Case 12.834: Leopoldo Zumaya and Francisco Berumen Lizalde

Requests for Relief and Recommendations to the
Inter-American Commission on Human Rights

Petitioners request that this Honorable Commission grant the following relief:

1. With respect to Petitioners Leopoldo Zumaya and Francisco Berumen Lizalde, recognize the rights violations they each suffered and take all appropriate steps to remedy those violations, including allowing reentry into the United States to pursue any claims for compensation that they may have.
2. Declare the United States of America and states of Kansas and Pennsylvania in violation of Articles II, XVII, and XVIII of the American Declaration for their failure to ensure full and equal access to workplace rights and remedies for workers based on immigration status;
3. Recommend such remedies as the Commission considers adequate and effective for the violation of Petitioners' fundamental human rights, including:
    a. Amendment of laws, policies and practice to comport with international obligations to apply all workplace protections in a nondiscriminatory manner;
    b. Ensure that states with laws or jurisprudence that limit the rights of undocumented workers bring their laws and policies in line with internationally recognized standards through amendment of laws and policies to ensure that undocumented workers are granted the same rights and remedies for violations of their rights in the work place as documented workers; any state with restrictions on the rights of undocumented workers be made to remove these restrictions that fail to comport with international standards;
    c. Enactment of comprehensive legislation that complies with international standards; specifically, the U.S. Congress should introduce and pass legislation that would address

the U.S. Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB* and ensure employment protections for non-citizens regardless of their immigration status.

d. In the interim, we respectfully request the Commission to urge the United States to promulgate regulations and guidance to ensure that all relevant federal and state agencies work affirmatively to guarantee non-citizens, regardless of their immigration status, non-discrimination in the protection and enjoyment of their rights in the workplace. In particular, the United States should:

    a. Take steps to ensure that all undocumented workers in the midst of a legitimate effort to protect their labor rights are aware of and afforded the right to remain and work in the United States;

    b. Strengthen existing policies that prevent employers from enlisting immigration officials to retaliate against workers who are exercising their labor rights;

    c. Undertake a program to proactively educate state and local officials on the limits and applicability of the *Hoffman* decision;

    d. Work with state and local officials to strengthen state anti-discrimination and other laws to ensure that all workers, regardless of their immigration status, are guaranteed their human rights to employment protections; and

    e. Instruct state and federal courts to prohibit employer inquiries into immigration status of a worker asserting his/her employment and labor rights to avoid chilling and discouraging attempts by undocumented workers to enforce their rights through litigation and complaints to administrative bodies.

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January 6, 2015

Emilio Álvarez-Icaza
Executive Secretary
Inter-American Commission on Human Rights
1889 F Street, NW
Washington, DC 20006

RE: Undocumented Workers, Case 12.834, United States
Request for Hearing on the Merits During 154th Period of Sessions
And Reply Brief to U.S. Government Response

Dear Secretary Álvarez-Icaza:

In accordance with Article 62 of the Rules of Procedure for the Inter-American Commission on Human Rights (hereinafter, "the Commission"), we respectfully submit this request on behalf of Petitioners, Leopoldo Zumaya and Francisco Berumen Lizalde, for a hearing on the merits at the upcoming 154th Session of the Commission. Petitioners seek the opportunity to present their claims to the Commission and to raise important issues pertaining to the United States' denial of their right to non-discrimination and equal protection of the law because of their undocumented or immigration status.

We also include in our request a reply to the United States government's response to our original Petition that illustrates the continuing impact of the denials of non-discrimination and equal protection on Petitioners, as well as on undocumented workers nationwide.

I. Introduction

"In November 2004, I was pruning a tree and fell, hurting my left leg… When it became apparent I could not go back to work [because of my injury], I was told to leave the camp. The insurance company refused to pay for my workers' compensation benefits when they found out from my employer that I was undocumented… As a result of being denied full workers' compensation and medical costs, I have not been able to see a doctor, receive medication or undergo physical therapy. Also, as a result of my immigration status, I had to settle for approximately less than half the amount I would have received if I had been a U.S. citizen."

– Petitioner Leopoldo Zumaya[1]

"In early November, 2005, I fell from some scaffolding while painting. I fractured my hand and could no longer work. In December, 2005, just before I was supposed to see a doctor for an impairment rating determination, immigration officials came to my house and arrested me. I do not know how they would have found out about my immigration status… except from my employer or his insurance company."

– Petitioner Francisco Berumen Lizalde[2]

The United States has denied Petitioners Leopoldo Zumaya and Francisco Berumen Lizalde their rightful workers' compensation for injuries sustained on the job solely because of their immigration status. Their cases are far from unique, and emblematic of the status quo for undocumented workers following the Supreme Court's decision in *Hoffman Plastics Compound v. NLRB*. 535 U.S. 137 (2002). *Hoffman* denied back pay to an undocumented worker fired for exercising his freedom of association and stood for the principle that immigration law trumps labor law in the United States. This principle, thereafter extended to workers' compensation and other state and national laws regulating the workplace and protecting workers' rights, has resulted in routine, nationwide discrimination of and unequal access to justice for undocumented workers, in violation of international law.

[1] Zumaya Decl., ¶¶ 4, 8, 12, submitted with Petition as Exhibit A(2) on November 1, 2006.
[2] Berumen Lizalde Decl., ¶¶ 4,7, submitted with Petition as Exhibit A(4) on November 1, 2006.
[3] American Declaration of the Rights and Duties of Man, art. 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"), art. XVII ("Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights"), and art. XVIII ("Every person may resort to the courts to ensure
[2] Berumen Lizalde Decl., ¶¶ 4,7, submitted with Petition as Exhibit A(4) on November 1, 2006.

Hoffman's progeny—the combination of state laws, employer cooperation with law enforcement, and other state and federal practices— has prevented workers like Petitioner Leopoldo Zumaya, who was severely injured on the job, from accessing their rightful workers' compensation benefits. It has enabled retaliation against workers like Petitioner Francisco Berumen Lizalde, who was prosecuted and deported after trying to obtain his rightful workers' compensation and before he was able to obtain that compensation. Retaliation by employers, sanctioned by both direct and indirect state and federal policy and practice, has created nearly insurmountable barriers to undocumented workers' exercise of legal rights beyond freedom of association. This has not only chilled workers from claiming benefits to which they are entitled, like workers' compensation, but it has also hindered workers from asserting their rights under the very statutes that aim to protect them from discrimination and abuse in the workplace.

Despite the United States' contention that *Hoffman*'s impact is limited, the current climate for undocumented workers in the United States is one that routinely violates their rights to unionize, to be compensated for an injury, and to be free from abuse and discrimination in the workplace. As such, the United States is violating undocumented workers' right to equality before the law "without distinction as to race, sex, language, creed or any other factor" (Article II), their right to "enjoy basic civil rights" (Article XVII), and their right to "resort to the courts to ensure respect for [their] legal rights" (Article XVIII) under the American Declaration[3], rights reiterated in the International Covenant on Civil and Political Rights (ICCPR)[4] and the

[3] American Declaration of the Rights and Duties of Man, art. 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"), art. XVII ("Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights"), and art. XVIII ("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."

[4] International Covenant on Civil and Political Rights, art. 16 ("Everyone shall have the right to recognition everywhere as a person before the law") and art. 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

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),[5] and which the United States has committed to upholding.

I. Procedural History

The present petitioners Leopoldo Zumaya and Francisco Berumen Lizalde, were joined by individual petitioners Melissa L., Jesus L., Yolanda L.R., as well as organizational petitioners United Mine Workers of America (UMWA), Interfaith Worker Justice (IWJ), Chinese Staff and Workers Association, and the American Federation of Labor, Congress of Industrial Organizations (AFL-CIO),[6] in their Petition addressing undocumented workers' discrimination and unequal access to justice submitted on November 1, 2006, only a few months after they suffered harm, and around the time that the *Hoffman* decision's detrimental impact became incontrovertible nationwide.[7] The Commission transmitted the petition to and requested a response from the United States twice, in 2010 and 2011. The United States failed to respond.

The Commission ultimately ruled the petition admissible on October 20, 2011. More than two and a half years later, on June 26, 2014, the United States responded, arguing in part that Petitioner's claims are inadmissible, but failed to state with specificity any grounds for disputing

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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.")

[5] International Convention on the Elimination of All Forms of Racial Discrimination, art. 5 ("States Parties undertake to… guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (a) The right to equal treatment before the tribunals and all other organs administering justice;…"), art. 6 ("States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms…as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.").

[6] Following the Commission's request that Petitioners provide their full names and other identifying information, three individual petitioners' claims were held in abeyance, in consideration of the individuals' fear of retaliation and deportation. Additionally, following the Commission's ruling on admissibility, organizational petitioners were removed from the list of victims, and Leopoldo Zumaya and Francisco Berumen Lizalde remain as the two named Petitioners. *See* Undocumented Workers, Case 12.834, Admissibility Report, Inter-Am. Comm'n H.R., Report No. 134/11, 1190-06, ¶ 12.

[7] Petition Alleging Violations of the Human Rights of Undocumented Workers by the United States of America, 1190-06, submitted Nov. 1, 2006.

the Commission's ruling. While the Government argues that Petitioners have not exhausted remedies, as to Petitioners Leopoldo Zumaya and Francisco Berumen Lizalde, the Commission deemed the petition timely filed, to have alleged a colorable claim, and without any duplicative proceedings, and found the petition admissible according to the IACHR Rules of Procedure. The Commission clearly held that further pursuit of remedies before domestic courts would be futile, finding that "any further proceedings brought by the presumed victims before domestic courts would appear to have no reasonable prospect of success, and therefore would not be effective in accordance with general principles of international law."[8] Petitioners therefore do not address the United States' admissibility arguments any further herein.

Petitioners have updated the Commission at various points since the Commission's finding of admissibility in 2011, while also communicating with the U.S. Government through both the Inter-American Commission process, as well as through various U.N. treaty and Universal Periodic Review processes. Following the Commission's determination on admissibility, Petitioners indicated their intent to move forward with the claims brought by Leopoldo Zumaya and Francisco Berumen Lizalde. Petitioners requested a hearing on the merits for the 147th Period of Sessions and updated the Commission on the status of the law concerning undocumented workers in the United States. In response, the Commission informed them it was awaiting their observations on the merits, which Petitioners then submitted on July 31, 2013. On August 13, 2014, as part of a request for a hearing on the merits for the 153rd period of sessions,

[8] Undocumented Workers, Case 12.834, Admissibility Report, Inter-Am. Comm'n H.R., Report No. 134/11, 1190-06. With respect to the United States' argument that Mr. Zumaya's settlement was proof that he did not exhaust domestic remedies (i.e., litigate his case), the Commission writes: "With regard to the settlement between Leopoldo Zumaya and his employer, the IACHR finds that it does not *prima facie* illustrate the existence of an effective remedy against the purported exclusion from employment rights, specifically when, according to the petitioners, the settlement was not reasonable or balanced; and it was allegedly signed in an unfavorable context." *Id.* at ¶ 28. With respect to the Government's argument that it was not impossible for Mr. Berumen Lizalde to litigate his case from abroad, the Commission agrees with Petitioners' contention that "it would have been futile to seek further benefits because of his undocumented status and the fact that U.S. courts have consistently rejected claims brought by undocumented immigrant workers in identical situations." *Id.* at ¶ 25.

Petitioners detailed the worsening of workplace conditions and human rights violations for undocumented workers nationwide.[9] Petitioners informed the Commission of a raid in Florida that led to the prosecution and deportation of over 100 fruit-packers for identity and workers' compensation fraud, following one worker's filing of a meritorious compensation claim.[10] Petitioners further illustrated how state and federal court decisions denying undocumented workers full compensation for workplace injury continue to deny undocumented workers' rights to equality before the law "without distinction as to race, sex, language, creed or any other factor," (art. II), to "enjoy basic civil rights" (art. XVII), and to "resort to the courts to ensure respect for [their] legal rights" (art. XVIII) under the American Declaration.[11]

Petitioners submit this response to the Government along with a new hearing request for the 154th period of sessions in March 2015. Petitioners respectfully request to allow Petitioners Leopoldo Zumaya and Francisco Berumen Lizalde to tell their stories, describe the human rights violations they experienced and the impact on their lives and the lives of their families, and request remedies and issue recommendations to the United States Government to redress and secure their rights to non-discrimination, equal protection under the law, and equal access to justice for undocumented workers in the United States.

II. State laws and federal policies and practices post-*Hoffman* have directly resulted in the discrimination and denial of justice to undocumented workers eligible for workers' compensation benefits.

A. Leopoldo Zumaya and Francisco Berumen Lizalde Were Denied Their Rightful Workers' Compensation and Suffered Violations of Non-Discrimination and Equality under Law.

[9] Request for Hearing on the Merits During 153rd Period of Sessions, submitted August 13, 2014.
[10] *Id.* at 2. *See also* "Raid Leads to Worker Fraud Bust in Naples," News-Press, July 16, 2014, *available at* http://www.news-press.com/story/news/crime/2014/07/16/fraud-probe-nets-16-arrests-naples/12741655/.
[11] Amer. Decl., *supra* note 3.

In its advisory opinion OC-18, the Inter-American Court interpreted the American Declaration and international law to clearly prohibit discrimination and prejudice based on immigration status.[12] It expressed concern for undocumented workers' rights to non-discrimination and equal protection in the wake of the Supreme Court's decision in *Hoffman*, and stated that "the migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment."[13] Unfortunately, the United States has done just that: by allowing state and federal courts to apply *Hoffman* and the *Hoffman* court's reasoning that immigration law trumps labor law, the United States denies undocumented workers such as Mr. Zumaya and Mr. Berumen Lizalde their rightful workers' compensation and discriminates against them solely based on their immigration status. While state law regulates workers' compensation, state courts in the United States are influenced by federal case law, including *Hoffman*. In both Pennsylvania and Kansas, courts and law enforcement agencies have applied the reasoning behind *Hoffman* to the detriment of undocumented workers.

In Pennsylvania, courts have denied time loss benefits in workers' compensation cases to undocumented workers, resulting in *de jure* status-based discrimination against workers, as was the case with Leopoldo Zumaya. In Kansas, state laws have deemed the procurement of false social security number for work to be "abusive." State and federal law enforcement's use of these laws enables, and even encourages, retaliation against workers for claiming entitled benefits, resulting in unequal access to justice for workers based on their status, as with Francisco Berumen Lizalde.

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[12] Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (Ser. A) No. 18, ¶¶ 111-127 (Sept. 17, 2003).
[13] *Id.* at ¶ 134.

1. The United States discriminated against Leopoldo Zumaya when it failed to guarantee him his rightful workers' compensation under Pennsylvania law based on the rationale applied in Hoffman.

The United States and the state of Pennsylvania violated Leopoldo Zumaya's rights to equal protection and non-discrimination under the American Declaration,[14] the ICCPR,[15] and CERD[16] when he was denied his rightful workers' compensation solely because of his immigration status following a debilitating workplace injury. While working as an apple picker, Mr. Zumaya fell from a tree, severely fracturing his ankle.[17] When his employers found out that he would no longer be able to pick apples, they fired him and threw him out of the living quarters.[18] His medical expense payments ceased, and he was unable to obtain the care he needed.[19] When he sought legal help, his lawyer informed Mr. Zumaya that he would not be able to successfully litigate his case because of *Reinforced Earth Co. v. WCAB*, 810 A.2d 99 (Pa. 2002), a Pennsylvania Supreme Court case decided a few months after *Hoffman* that opened the door for employers to deny workers' compensation benefits to undocumented workers who were permanently partially–disabled like Mr. Zumaya.[20] Mr. Zumaya was left with no choice but to settle for a much smaller amount than he would have been entitled to had he been a U.S. citizen.[21] Faced with no job or prospect for obtaining medical care, Mr. Zumaya had to go back to Mexico, where he continues to suffer from his injuries and struggles to support his family.[22]

[14] Amer. Decl., *supra* note 3.
[15] ICCPR articles 16 and 26, *supra* note 4.
[16] CERD articles 5 and 6, *supra* note 5.
[17] Zumaya Decl. ¶ 4**,** submitted with Petition as Exhibit A(2) on November 1, 2006.
[18] *Id.* at ¶ 8.
[19] Id.
[20] Declaration of Andrew K. Touchstone, submitted with Petition as Exhibit (A)(2)(i) on November 1, 2006.
[21] Zumaya Decl. ¶ 9.
[22] *Id.* at ¶ 11.

While the United States argues that the holding in *Reinforced Earth* was favorable to its undocumented plaintiffs,[23] the United States ignores the critical part of the holding in *Reinforced Earth*, as well as its impact on undocumented workers' access to justice. *Reinforced Earth* freed employers from the usual requirement of showing job availability to either 1) suspend workers with partial disabilities as a result of a workplace injury, or in the alternative 2) provide time-loss benefits—solely in the case of workers who are undocumented. 810 A.2d 99, 108 (Pa. 2002). This set a precedent for subsequent courts to suspend disability benefits to partially-disabled undocumented workers injured on the job on the account of their immigration status. *Morris Painting v. WCAB*, 814 A.2d 879, 883 (Pa. Commw. Ct. 2003).[24]

Pennsylvania workers' compensation jurisprudence at the time Mr. Zumaya filed his claim thus shows the futility of any litigation attempt on Mr. Zumaya's part. Post-*Reinforced Earth* jurisprudence allowed employers like Mr. Zumaya's to hide behind a worker's unauthorized status and shield themselves from full liability where the worker did not prove full, permanent injury. As Mr. Zumaya, an undocumented worker, was deemed partially disabled and available for sedentary work, his employers were entitled to fire him and deny him workers' compensation benefits without first proving that there was no other job available to Mr. Zumaya, or that he refused such an offer of employment —solely because Mr. Zumaya was undocumented. Mr. Zumaya was left with no choice but to accept a minimal settlement, his best possible outcome under the law.[25]

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[23] Response of the Government of the United States to Petition No. P-1190-06, 21, submitted June 26, 2014.
[24] "[W]ith respect to disability benefits, Employer established that Claimant was an unauthorized alien and Claimant's loss of earning power was caused by his immigration status not his work injury. Based upon the holding in *Reinforced Earth,* because unauthorized aliens may not legally work, an employer is not required to show job availability in order to suspend benefits." *Id.* at 883.
[25] *See* Admissibility Report, Inter-Am. Comm'n H.R. *supra* note 7, at ¶ 29 ("Any further proceedings brought by the presumed victims before domestic courts would appear to have no reasonable prospect of success, and therefore would not be effective in accordance with general principles of international law.").

Since then, undocumented workers who are injured in the workplace but who are not permanently disabled have been barred from two workers' compensation benefits in Pennsylvania —disability and weekly wage benefits—simply because of their status as non-citizens. In *Mora v. WCAB*, 845 A.2d 950 (Pa. Commw. Ct. 2004) and *Ortiz v. WCAB*, 60 A.3d 209 (Pa. Commw. Ct. 2013), courts ruled that once an injured undocumented worker's medical condition improved enough to allow him to work in some capacity, his lack of lawful status, not his injury, caused his loss in earning power.[26] This reasoning is not new. It is the same rationale that was set forth to deny back pay to a wrongfully fired worker in *Hoffman*.

Hoffman and *Reinforced Earth*'s legacies have led to the systematic denial of undocumented workers' rights to non-discrimination and equality under the law in the Commonwealth of Pennsylvania. They have also severely affected undocumented workers like Mr. Zumaya, who, after being denied proper treatment and medical benefits, was left permanently partially disabled and continues to suffer from his injuries today. Mr. Zumaya's case is but one example of the countless undocumented workers made much more vulnerable than their citizen counterparts under the law. In allowing courts to use immigration status as a basis for denying basic workplace protections to undocumented workers like Mr. Zumaya, the United States is discriminating against and failing to ensure undocumented workers' equal protection under the law, in violation of international principles it has committed to upholding.[27]

[26] The courts in both *Mora* and *Ortiz* held that when undocumented workers got injured on the job, their employers needed only show a change in their medical condition to suspend their weekly wage benefits. Both courts denied weekly wage loss benefits to partially disabled undocumented workers who had found alternative employment. Mora, 845 A.2d at 954; Ortiz, 60 A.3d at 212.

[27] Amer. Decl. articles II, XVII, and XVIII, *supra* note 3; ICCPR articles 16 and 26, *supra* note 4; CERD articles 5 and 6, *supra* note 5.

2. The United States discriminated against Francisco Berumen Lizalde when it failed to guarantee him his rightful workers' compensation and enabled retaliation against him through a combination of state laws and federal practices in Kansas.

The United States and the state of Kansas violated Francisco Berumen Lizalde's rights to non-discrimination and equal protection by allowing his employer's insurance company, the state labor agency, and federal law enforcement to deny Mr. Berumen Lizalde his rightful workers' compensation benefits. In November 2005, Mr. Berumen Lizalde was working as a painter when he fell from scaffolding and seriously fractured his hand.[28] His employer's workers' compensation insurance initially covered his medical expenses, but immediately before Mr. Berumen Lizalde's evaluation of the severity of his injury, scheduled to determine the full amount paid to him by his employer's workers' compensation, immigration officials came to his house and arrested him.[29] Following cooperation between his employer's insurance company, the state agency, and federal law enforcement to target cases like his, Mr. Berumen Lizalde was prosecuted for having used a false social security number to obtain work,[30] in accordance with a 2004 Kansas Supreme Court decision deeming the use of a false social security number for employment a punishable "fraudulent and abusive act," *Doe v. Kansas Dept. of Resources*, 90 P.3d 940 (Kan. 2004), He spent several months in detention and was subsequently deported back to Mexico, unable to access necessary medical benefits, and unable to litigate his workers' compensation claim from afar.[31]

The United States contends that since *Doe* did not deny workers' compensation benefits to the undocumented claimant but rather imposed a procedural requirement to verify claims, Mr.

[28] Berumen Lizalde Decl., ¶ 4, submitted with Petition as Exhibit A(4) on November 1, 2006.
[29] *Id.* at ¶ 7.
[30] *Id.* at ¶ 8.
[31] *Id.* at ¶¶ 10-11.

Berumen Lizalde cannot claim any discrimination on its basis.[32] In doing so, the United States ignores an important reality. The ruling in *Doe* allowed Mr. Berumen Lizalde's employer's insurance company to act in concert with state and federal authorities and prevent him from obtaining his rightful workers' compensation benefits. As an Assistant U.S. Attorney in Kansas stated at the time, his office made workers' compensation cases involving fraudulent documents an investigative and prosecutorial priority.[33] He made it known that employers, insurance companies, and others routinely verified workers' immigration status whenever they filed a compensation claim, and that his office prosecuted those who, like Mr. Berumen Lizalde, were found to have committed a "fraudulent and abusive act" under *Doe*[34]—regardless of whether these workers would have been entitled to benefits under the law.

Like most undocumented workers who are criminally prosecuted, Mr. Berumen Lizalde was then deported.[35] The federal government, working in conjunction with state agencies and private actors, thus deprived Mr. Berumen Lizalde of his right to access the courts and assert his employment rights because of his undocumented status. Despite the United States' contention that Mr. Berumen Lizalde could have attempted to litigate his claim from abroad, once in Mexico, it became impossible for him to access justice. While in the United States, Mr. Berumen Lizalde sought legal counsel, who advised him that there was almost no chance that his claim would move forward without his physical presence.[36] And despite the United States' suggestion that Mr. Berumen Lizalde could have applied for humanitarian parole to litigate his claim,[37] Mr.

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[32] Response of the Government, *supra* note 22, at 21-22.
[33] Brent I. Anderson, The Perils of U.S. Employment for Falsely Documented Workers (And Whatever You Do, Don't File a Work Comp Claim), paper submitted to the American Bar Association, Labor and Employment Law Workers' Compensation Midwinter Meeting (March, 2006).
[34] Id.
[35] Berumen Lizalde Decl., at ¶ 8
[36] Michael Snider Decl., ¶¶ 6-8, submitted with Petition as Exhibit A(4)(i).
[37] Response of the Government, *supra* note 22, at 21-22.

Berumen Lizalde's attorney learned that this was a rare occurrence and that his client would almost certainly have been unable to return to the United States to fight for his entitled benefits.[38]

The policies and actions of the state and federal governments in Kansas had a far-reaching impact, beyond Mr. Berumen Lizalde's case. The Assistant U.S. Attorney's policy post-*Doe* to investigate workers' compensation claims encouraged employers or insurance companies to avoid payment and retaliate—it encouraged them to punish undocumented workers for filing a meritorious claim by reporting their immigration status to state and federal authorities, who would deport them. Mr. Berumen Lizalde will never recover the compensation and medical care to which he was entitled after being severely injured on the job, and he continues to suffer from his injuries today. But many more undocumented workers will have been chilled from seeking that to which they were legally entitled in the first place, in fear of ending up like Mr. Berumen Lizalde. In allowing a climate in which workers were denied full compensation for a workplace injury based on their immigration status, the United States and the state of Kansas violated Mr. Berumen Lizalde and Kansas undocumented workers' rights to non-discrimination and equal protection under the American Declaration,[39] the ICCPR,[40] and CERD.[41]

As shown below, this set of circumstances has dire consequences for workers outside of the state of Kansas. Various states' workers' compensation jurisprudence, along with local, state, and federal law enforcement practices enable employers' threats and acts of retaliation toward undocumented workers. Throughout the United States, this works to severely stymie undocumented workers' access to justice and prevent them from claiming their legally entitled benefits.

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[38] Michael Snider Decl., *supra* note 36.
[39] Amer. Decl., *supra* note 3.
[40] ICCPR articles 16 and 26, *supra* note 4.
[41] CERD articles 5 and 6, *supra* note 5.

B. The United States, through its workers' compensation laws and practices nationwide, discriminates and enables retaliation against undocumented workers.

Courts throughout the United States have applied *Hoffman*'s reasoning that undocumented workers can be denied remedies solely based on their immigration status in rulings that curtail undocumented workers' workplace rights nationwide. In allowing such a climate, the United States violates undocumented workers' rights to non-discrimination and equal protection under the American Declaration, the ICCPR, and CERD, and has failed to heed the Inter-American Court's advisory statement that "migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights, including those of a labor-related nature".[42] In Michigan, for example, the court in *Sanchez v. Eagle Alloy, Inc.* used the *Hoffman* decision as persuasive authority to deny time loss benefits to undocumented workers who used false documents. 658 N.W.2d. 510 (Mich. Ct. App. 2003). Much like in *Hoffman*, the Michigan court chose to let enforcement of immigration laws trump enforcement of labor and employment laws, to the detriment of undocumented workers' workplace protections. In addition to time loss benefits, vocational rehabilitation benefits of undocumented workers have come under threat. Courts in Nevada, Nebraska, and California have prohibited undocumented immigrants from claiming vocational rehabilitation benefits.[43]

Even in states where undocumented workers are legally entitled to workers' compensation benefits with no limitations, local and federal law enforcement cooperate with employers and insurance companies to deny them those benefits, in violation of equal protection and non-discrimination principles. In Wisconsin, New York, and Florida, for example,

[42] Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, *supra* note 11, at ¶ 134.
[43] *See* Tarango v. State Indus. Ins. System, 25 P.3d 175 (Nev. 2001); Ortiz v. Cement Products, Inc., 708 N.W.2d 610 (Neb. 2005); Farmers Bros. Coffee v. Worker's Comp. Appeals Bd., 133 Cal. App. 4th 533 (Cal.App. 2 Dist. 2005).

employers and insurance companies retaliated with impunity against undocumented workers who filed meritorious workers' compensation claims. In Wisconsin, an employer's insurance company reported a worker to law enforcement after it discovered that the worker had used a false social security number to secure employment.[44] The worker was subsequently deported, never being able to recover for his severe back injury after having worked as a welder for eight years.[45] In New York, police arrested an undocumented worker who had filed a workers' compensation claim, after his employer filed criminal complaints against him in retaliation for filing the claim.[46] And, most recently in Florida, over 100 fruit-packers were subject to a raid by the local sheriff's office (in cooperation with Immigration Customs and Enforcement) after one of the workers filed for a meritorious workers' compensation claim.[47]

Mandatory checks on false social security numbers, and employer, insurance, and law enforcement cooperation are far more than necessary diligence, as the government argues in its response.[48] Functionally, these enable employers to report their workers' immigration status in retaliation for filing a claim with no consequence. They provide an avenue for the abuse of undocumented workers and prevent them from accessing their rights, which chills workers from claiming their legally entitled benefits. In California, for example, as mentioned in a report by the National Employment Law Project (NELP), entitled *Workers' Rights on ICE: How Immigration Reform Can Stop Retaliation and Advance Labor Rights*:

> "A study of immigrant hotel workers found that only 20 percent of those who had experienced work-related pain had filed workers' compensation claims for fear of getting "in trouble" or being fired. In another study of immigrant workers' perceptions of

[44] Rebecca Smith and Eunice Hyunhye Cho, National Employment Law Project, Workers' Rights on ICE: How Immigration Reform Can Stop Retaliation and Advance Labor Rights 10 (Feb. 2013), *available at* http://www.nelp.org/page/-/Justice/2013/Workers-Rights-on-ICE-Retaliation-Report.pdf?nocdn=1.
[45] *Id.*
[46] *Id.* at 5.
[47] "Raid Leads to Worker Fraud Bust in Naples," News□Press, July 16, 2014, *available at* http://www.news-press.com/story/news/crime/2014/07/16/fraud□probe-nets-16-arrests□naples/12741655/.
[48] Response of the Government, *supra* note 22, at 22.

> workplace health and safety, researchers … observed that '[w]orkers worried because they know the work they did was dangerous, and also because they knew that if they got injured they would have limited medical care options.'"[49]

This chilling effect's magnitude is enormous, but it also logical. Undocumented workers who hear of cases like that of Mr. Berumen Lizalde are understandably deterred from ever reporting an injury. And those who, like Mr. Berumen Lizalde, are deported after filing a claim are never able to recover their rightful benefits. The United States has committed itself to upholding principles of equal protection under the law, non-discrimination, and equal access to justice, but in the post-*Hoffman* climate, it is failing to do so, resulting in routine violations of the rights of undocumented workers nationwide.

III. The United States Discriminates Against Undocumented Workers in their Realization and Enjoyment of other Workplace Rights and Access to Justice.

While the United States asserts that it "provides comprehensive employment and labor protections for all workers, whether or not they possess authorization for work,"[50] United States courts' reliance on *Hoffman* and its rationale have severely limited the remedies available to undocumented workers under various national laws. This limit on remedies has limited undocumented workers' actual rights. In addition, the United States' aggressive immigration enforcement policies, particularly in the workplace, have created fear among workers and emboldened employers to threaten workers who have meritorious claims[51]. This overall climate

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[49] EUNICE HYUNHYE CHO AND REBECCA SMITH, NATIONAL EMPLOYMENT LAW PROJECT, WORKERS' RIGHTS ON ICE: HOW IMMIGRATION REFORM CAN STOP RETALIATION AND ADVANCE LABOR RIGHTS: CALIFORNIA REPORT 2 (Feb. 2013), *available at* http://www.nelp.org/page/-/justice/2013/workers-rights-on-ice-retaliation-report-california.pdf?nocdn=1.

[50] Response of the Government, *supra* note 22, at 14.

[51] For example, since the previous administration, the federal government has "quadrupled the number of audits of workplaces' I-9 'employment eligibility verification' forms, to about 2,000 a year." The audits are then used to arrest and deport workers who are found to be without legal employment authorization. Steven Wishnia, *Immigration Enforcement: A Tool to Silence Workers?*, DEFENDING DISSENT (December 11, 2014), http://www.defendingdissent.org/now/news/immigration-enforcement-a-tool-to-silence-workers/ (citing a 2013 report by the National Employment Law Project).

has thus encouraged retaliation by employers and chilled undocumented workers from exercising their rights under the federal statutes meant to protect them. In allowing and perpetuating this climate, the United States is failing to safeguard undocumented workers' right to non-discrimination and equal protection, in violation of international principles the United States has committed to upholding.

A. By Limiting or Denying Undocumented Worker's Equal Access to Remedies, the United States is Effectively Limiting their Access to Rights Under NLRA, FLSA, and Title VII.

The Supreme Court's decision in *Hoffman* and its reasoning that immigration laws trump labor laws has had an impact on undocumented workers beyond the simple denial of a remedy under the National Labor Relations Act (NLRA). In the years since the decision, remedies available to undocumented workers under other federal statutes meant to protect them from unfair labor practices or discrimination are no longer guaranteed. The lack of remedies available to undocumented workers translates into a denial of their rights under these statutes.[52]

Even though most litigation ultimately results in undocumented workers being found eligible for remedies under these federal statutes, *Hoffman* and its progeny have emboldened employers to disclose their workers' immigration status and argue against their eligibility on the basis of their immigration status. The uncertainty of the outcome has forced undocumented workers to litigate and re-litigate supposedly guaranteed remedies on a case-by-case basis and in various contexts, with varying rates of success. This has further threatened undocumented workers' rights under these statutes and chilled them from claiming their labor and employment rights.

[52] *See* Case No. 2227, Report in which the committee requests to be kept informed of development, ILO Report 332, ¶¶ 606-610 (Nov. 2003), *available at* http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2907332

Several courts have used *Hoffman* as precedent to significantly limit remedies to undocumented workers under the NLRA and Title VII—laws that the United States argues currently protect undocumented workers irrespective of their immigration status. The United States argues that *Hoffman*, which found that the undocumented worker himself had violated IRCA, did not impact the ability of the NLRA to protect employees. However, in 2011, the National Labor Relations Board (NLRB) foreclosed backpay to undocumented workers under the NLRA even though, in the case before it, employers, not workers, had violated IRCA. M*enzenos Maven Bakery, Inc.*, 357 NLRB No. 47, *2 (2011) (holding that *Hoffman* "broadly precludes back pay awards to undocumented workers regardless of whether it is they or their employer who has violated IRCA."). Similarly, despite the United States' contention that FLSA continues to protect workers from retaliation, relying on *Hoffman*, one court concluded that awarding an undocumented plaintiff back pay and front pay for a retaliatory discharge "would trench on the policies expressed in the IRCA." *Renteria v. Italia Foods*, No. 02 C 495, 2003 WL 21995190, at *6 (N.D. Ill. August 21, 2003). This foreclosure of back pay in both NLRA and FLSA cases limits one of the few remedies available to undocumented workers under both statutes and thus places them at a much higher risk of abuse by employers than their U.S. citizen counterparts.

While courts may in many cases ultimately recognize wrongdoing on the part of employers toward undocumented workers, the principle that immigration status is relevant to the award of remedies is routinely brought up by employers, and in some cases successfully argued, especially with cases under Title VII, the U.S. federal anti-discrimination statute. While the United States cited to *EEOC v. Evans Fruit Co.*, No. CV-10-3033, 2011 WL 2471749, *2 (E.D. Wash. June 21, 2011), to show that undocumented workers who suffered sexual and other

harassment at the hands of their employers had successfully brought suit under Title VII and recovered damages, the United States failed to take into account the more relevant part of the holding. The court in *Evans Fruit Co.* held that the plaintiffs' immigration status could be relevant to their determination of emotional distress damages. *Id.* This limitation of remedies further curtails undocumented workers' rights under Title VII.

As a result of such rulings, undocumented workers are placed in a much more vulnerable position than workers with legal authorization, despite the fact that the merit of their claims has nothing to do with their immigration status. In allowing such a climate for undocumented workers, the United States is curtailing their rights, leaving them susceptible to employer abuse and exploitations, and is violating their right to equal protection, non-discrimination, and access to justice under international law.

B. The post-*Hoffman* climate has enabled employer retaliation for undocumented workers' claims of violations under federal statutes meant to protect them and chilled them from exercising their rights.

The United States maintains that, certain unfavorable decisions notwithstanding, the combination of federal laws' current statutory provisions, favorable decisions and protective orders, as well as the various policies put in place by the federal government guarantee the respect of undocumented workers' rights to fair wages and nondiscrimination.[53] But the United States fails to account for the impact that both perceived and actual retaliation – taken on account of immigration status – has on undocumented workers and their ability to pursue and realize their rights.

[53] Response of the Government, *supra*. at 17-22.

Citing to the agency's guidance rescission, the United States asserts that the EEOC does not take immigration status into account "when examining the merits of a charge."[54] Yet most recently, in a reconsideration of a Title VII sexual and physical harassment case that originally protected discovery of plaintiffs' immigration status, a federal court ruled that the employer was "entitled to pursue discovery" into the plaintiff's visa applications, and that this consisted of a "legitimate defense." *Cazorla v. Koch Foods of Mississippi, LLC*, No. No. 3:10cv135–DPJ–FKB, 2014 WL 281979, *2 (S.D. Miss. January 24, 2014). The court ruled that the *in terrorem* effect was outweighed by the relevance of plaintiffs' immigration status. *Id.* Thus, workers who have the temerity to file a workplace discrimination complaint now have to be prepared for employers and courts to potentially use their immigration status or immigration application against them, significantly deterring them from filling a complaint in the first place.

There need not be a court ruling to notice the chilling, or *in terrorem*, effect of the post-*Hoffman* climate on undocumented workers' assertion of their rights. As stated in our original petition, employers routinely attempt to inquire into their employees' immigration status when they have filed a claim for a workplace violation.[55] Employers also routinely threaten to fire or deport undocumented works when they have filed a claim for a workplace violation. In 2009, a survey of low-wage workers in three cities in found that "43 percent of those who complained about workplace violations or tried to form unions were subjected to retaliation," and of those who experienced retaliation, 47.1 percent experienced getting threatened with dismissal or a call to immigration authorities.[56]

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[54] *Id.* at 17, citing EEOC, "Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Law," June 27, 2002, *available at* http://www.eeoc.gov/policy/docs/undoc-rescind.html.
[55] Petition, *supra* note 6.
[56] ANNETTE BERNHARDT, ET AL., NATIONAL EMPLOYMENT LAW PROJECT, BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 25 (2009), *available at* http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1.

The knowledge of these aggressive discovery tactics, the widespread retaliation and threat of retaliation,[57] and the actual or threatened limitation on remedies all contribute to intimidating undocumented workers from claiming rights to which they are legally entitled under NLRA, FLSA, and Title VII. Until the United States commits itself to the protection of undocumented workers, employers will be free to violate the rights of their employees, as with Leopoldo Zumaya, and retaliate against them, as in the case of Francisco Berumen Lizalde. Until then, countless undocumented workers remain vulnerable to discrimination and abuse. Until the United States remedies the impact of *Hoffman* and its application, it will remain in violation of international law principles guaranteeing the right to non-discrimination and equal access to justice, which the United States has committed to safeguarding.

IV. Recommendations

With respect to the human rights violations of Petitioners Leopoldo Zumaya and Francisco Berumen Lizalde, we ask that the Commission recognize the rights violations they endured and recommend the United States take all appropriate measures to remedy those violations.

We also reiterate our recommendations in our original petition and respectfully ask the Commission to:

- Request the amendment of laws, policies and jurisprudence to comport with international obligations to apply workplace protections in a nondiscriminatory manner and protect the freedom of association of all workers;

[57] For examples of actual employer retaliation, see Contreras v. Corinthian Vigor Insurance Brokerage, Inc., 103 F. Supp. 2d 1180 (N.D. Cal. 2000); Singh v.Jutla & C.D. & R's Oil, Inc., 214 F.Supp.2d 1056 (N.D. Cal. 2002); Centeno□Bernuy v. Perry, No. 03□CV□457, 2009 WL 2424380, at *9 (W.D.N.Y. Aug. 5, 2009); Montano□Perez v. Durrett Cheese Sales, Inc., 666 F. Supp. 2d 894 (M.D. Tenn. 2009). *See also* REBECCA SMITH, ET AL., ICED OUT, HOW IMMIGRATION ENFORCEMENT HAS INTERFERED WITH WORKERS' RIGHTS (Oct. 2009), *available at* http://nelp.3cdn.net/75a43e6ae48f67216a_w2m6bp1ak.pdf.

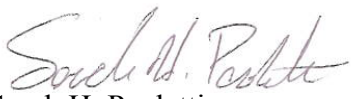
- Ensure that states with laws or jurisprudence that limit the rights of undocumented workers bring their laws and policies in line with internationally recognized standards through amendment of laws and policies to ensure that undocumented workers are granted the same rights and remedies for violations of their rights in the work place as documented workers; any state with restrictions on the rights of undocumented workers be made to remove these restrictions that fail to comport with international standards;
- Request the enactment of comprehensive legislation that complies with international standards; specifically, legislation that would prohibit a distinction in federal or state law between employment and labor rights based on immigration status.
- Instruct state and federal courts to prohibit employer inquiries into immigration status of a worker asserting his/her employment and labor rights to avoid chilling and discouraging attempts by undocumented workers to enforce their rights through litigation and complaints to administrative bodies.

VI. Conclusion

The United States has denied Petitioners Leopoldo Zumaya and Francisco Berumen Lizalde their rights to non-discrimination and equal protection under the law when it prohibited them from securing their rightful workers' compensation, in 2005 and 2006. Nearly a decade later, they continue to suffer from having been denied medical treatment, financial remedies, and an opportunity to litigate their claims. Their cases mirror an overall climate of fear enabled by the United States government since the Hoffman decision and negatively impacting undocumented workers.

We urge the Commission to take this opportunity to address this important matter at its 154th Period of Sessions in March 2015, and to issue recommendations to the United States aimed at ensuring the right to equality and nondiscrimination at a critical time when the nation is evaluating how to address profound problems endemic to the American immigrant-labor system.

Respectfully submitted,



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August 13, 2014

Emilio Álvarez-Icaza
Executive Secretary
Inter-American Commission on Human Rights
1889 F Street, NW
Washington, DC 20006

RE: Undocumented Workers, Case 12.834, United States
Request for Hearing on the Merits During 153rd Period of Sessions

Dear Secretary Álvarez-Icaza:

In accordance with Article 62 of the Rules of Procedure for the Inter-American Commission on Human Rights (hereinafter, "the Commission"), we respectfully submit this request on behalf of Petitioners, Leopoldo Zumaya and Francisco Berumen Lizalde, for a hearing on the merits at the upcoming 153rd Session of the Commission. Petitioners seek the opportunity to present their claims to the Commission and to raise important issues pertaining to the United States' denial of their right to non-discrimination and equal protection of the law because of their undocumented status.

This request is submitted more than six years after the original petition was submitted on November 1, 2006. Although the Commission transmitted the petition to the U.S. government in 2010, and subsequently found the petition admissible on October 20, 2011, the United States has never responded to the allegations contained therein. We ask the Commission to hear the claims of the two named individual Petitioners, Leopoldo Zumaya and Francisco Berumen Lizalde, who are representative of the undocumented workers whose human rights are denied every day in the United States because of their immigration status. Petitioners had requested a hearing on the merits for the 147th Period of Sessions, but were informed the Commission was awaiting our Observation on the Merits, though Petitioners had communicated to the Commission their desire to move forward on behalf of the named petitioners following the Commission's decision on admissibility, issued October 20, 2011.[1] Petitioners then submitted its observations on the merits

[1] Report on Admissibility Report on Admissibility Nº 134/11.
[2] See, "Raid Leads to Worker Fraud Bust in Naples," News-Press, July 16, available at <http://www.news-

to the Commission, as well as to the U.S. Department of State, on July 31, 2013. To date, the United States has not provided its observations on the merits of the petition (just as it failed to respond on the admissibility of the Petition). On February 21, 2014, Petitioners received notification that the United States was again asked for its comments on our submission.

We urge the Commission to take up this matter in a hearing on the merits at its upcoming 153rd Period of Sessions. While our individual Petitioners have been denied medical treatment and just compensation for injuries sustained on the job for nearly a decade, countless other migrants without work authorization continue to be denied access to remedies when their workplace rights are violated, as a direct result of the U.S. Supreme Court's decision in Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002). Most recently, over 100 fruit-packers in Florida were subjected to a raid and prosecution for identity theft and workers' compensation threat, following an investigation launched after one of the workers had sought medical attention for an injury sustained on the job,[2] in a move similar to the criminal prosecution brought against Petitioner Berumen Lizalde.

We urge the Commission will take this opportunity to address this important matter, and to issue recommendations to the United States aimed at ensuring the right to equality and non-discrimination at a critical time when the nation is evaluating how to address profound problems endemic to the American immigrant-labor system.

I. BACKGROUND

The United States currently denies undocumented workers equal rights and remedies under employment and labor laws, in violation of its commitments under international law, specifically the American Declaration of the Rights and Duties of Man (hereinafter, "the American Declaration"). This hearing will provide an important opportunity for Petitioners, Mr. Zumaya and Mr. Berumen Lizalde, to share the injustices they have endured and gain recognition of their right to equality and non-discrimination under international law, as set forth in the American Declaration and as elaborated upon in the Inter-American Court's Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants (OC-18).

Petitioners represent two of the original nine petitioners who submitted this petition in 2006.[3] Along with current Petitioners, these former petitioners and the workers' compensation attorneys for the two pending petitioners, provided affidavits addressing the sweeping impact of these state court extensions of the *Hoffman* decision by highlighting the impact of the denial of the fundamental right to association and of workplace discrimination based on immigration

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[2] See, "Raid Leads to Worker Fraud Bust in Naples," News-Press, July 16, available at <http://www.news-press.com/story/news/crime/2014/07/16/fraud-probe-nets-16-arrests-naples/12741655/>. See also, "105 people suspected of stealing Social Security numbers," WinkNews, July 17, 2014, available at <http://www.winknews.com/Local-Florida/2014-07-17/105-people-suspected-of-stealing-Social-Security-numbers>.

[3] This petition was originally submitted with four organizational petitioners, testifying to the U.S. government's denial of undocumented workers' right of association and to the chilling effect of *Hoffman* on undocumented workers' ability to pursue legal remedies to employment law violations. Additionally, three individual petitioners' claims, illustrating workplace discrimination and lack of equal remedies available to undocumented workers, were held in abeyance, in consideration of the individuals' fear of retaliation and deportation, following the Commission's request that Petitioners provide their full names and other identifying information.

status. Petitioners also illustrated how these laws have had a chilling effect on undocumented workers' ability to pursue meaningful legal remedies despite their recognition as employees under much of American labor and employment law. While violations of Articles II, XVII and XXII persist, and provide context for understanding the claims brought on behalf of Mr. Zumaya and Mr. Berumen Lizalde, the claims on which we seek this hearing arise under Articles II. XVII and XVIII and demonstrate the impact of state court decisions denying undocumented workers full compensation for workplace injury. Petitioners are due the opportunity to engage the United States government on the topic of discrimination and denial of equal protection under the law afforded to undocumented workers in the United States, and seek this hearing in an effort to ensure the United States meet its international law obligations and institute reforms that ensure immigration status is never used as the basis for denying workers equal protection of the law.

II. THE UNITED STATES CONTINUES TO FAIL TO MEET ITS INTERNATIONAL COMMITMENTS UNDER THE AMERICAN DECLARATION BY ALLOWING STATE AND FEDERAL COURTS TO BAR ACCESS TO EQUAL REMEDIES TO UNDOCUMENTED WORKERS BASED SOLELY ON THEIR IMMIGRATION STATUS. [4]

a. By Denying Equal Remedies in Employment and Tort Laws Based on Immigration Status, the United States is Failing to Meet its Obligations Under the American Declaration to Guarantee Equal Rights Under the Law.

The United States is continuing to deny undocumented workers basic rights guaranteed under Articles II and XVIII of the American Declaration. Article II provides that "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*" (emphasis added). Immigration status constitutes one such "other factor" upon which individuals may not be discriminated against.[5] Article XVIII states: "[E]very 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." However, the United States does not treat undocumented workers as equal before the law, nor does it provide them with equal access to pursue their legal claims, and thus fails to guarantee the equal protection mandated by the American Declaration. As set forth in the petition, the United States Supreme Court held 5-4 in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137 (2002) that undocumented workers are not entitled to back pay when their rights are violated under federal employment law.[6] Specifically, in this decision, the court held the prohibition on employment of workers without authorization in the Immigration Reform and Control Act of 1986 ("IRCA") to trump the rights and remedies contained under the National Labor Relations Act. This decision has been extended by state courts to deny undocumented workers compensation for workplace injuries and other legal

[4] Worker's compensation is generally governed by state law, but federal governments are responsible for guaranteeing fundamental human rights at both federal and local levels. *See Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, ¶ 149 (Inter-American Court of Human Rights advisory opinion finding the international principles of equal protection and non-discrimination in the American Declaration prohibit discrimination against undocumented migrants' labor rights.).

[5] *See* Advisory Opinion OC-18/03.

[6] Back pay is the pay an illegally fired employee would have received if not for his or unlawful termination. Back pay was and remains the only substantive and individualized remedy available to workers for violations of the National Labor Relations Act. State and federal anti-discrimination laws also apply back pay as a remedy.

remedies based on their immigration status. Because they were undocumented, Petitioners Mr. Zumaya received only partial compensation for his debilitating workplace injury, while Mr. Berumen Lizalde received a criminal charge and deportation in lieu of necessary medical attention and compensation.

Since the filing of the Petition in 2006, the situation for Petitioners and those in similar positions has worsened rather than improved.[7] The majority of court decisions post-*Hoffman* where the remedy is similarly fashioned to the remedy of back-pay provided for under the National Labor Relations Act and denied in *Hoffman*, find immigration status relevant to the adjudication of the workers' claims, regardless of whether the final decision turns solely on this factor. As one Colorado state court noted, "in light of the IRCA's prohibition against illegal aliens earning wages, the relevance of immigration status appears to have at least threshold relevance."[8] This finding has been made in state courts around the country.[9] As long as immigration status is relevant, the abuses of the system will persist. Undocumented workers fear bringing forward claims out of apprehension that they will not recover and face further repercussions, such as deportation and retaliation by employers. Further, employers will continue to be incentivized to hire undocumented workers and persist in maintaining unsafe, discriminatory, and abusive working conditions with the knowledge that they will not suffer the consequences, as their actions are sanctioned by courts denying full protections and remedies to workers.[10]

b. Petitioners' Right to Equal Protection Under the Law Irrespective of their Immigration Status Has Been Denied by these State Laws.

Mr. Zumaya's and Mr. Berumen Lizalde's rights to collect worker's compensation have been subjugated by judicial decisions and the actions of government agents denying their access

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[7] *See, e.g., Wielgus v. Ryobi Technologies, Inc.,* 08 CV 1597, 2012 WL 2367883, at *5 (N.D. Ill. June 21, 2012) (holding that an undocumented worker asserting a tort claim for an injury sustained at the workplace could only recover lost future wages at the rate they would make in their country of origin); *Ambrosi v. 1085 Park Avenue LLC* 06-CV-8163 (BSJ), 2008 WL 4386751, at *8 (S.D.N.Y. Sept. 25, 2008) (denying future lost wages altogether to an undocumented worker in a personal injury suit who violated IRCA by providing false documentation).

[8] *Silva v. Wilcox*, 223 P.3d 127, 133 (Colo. Ct. App. 2009). To be sure, IRCA regulates employers' duties in hiring, and not workers; IRCA does not prohibit undocumented workers from earning wages or full remedies. Thus, this statement of the Colorado court demonstrates a problematic, and legally inaccurate, interpretation of IRCA to deny undocumented workers their rights.

[9] *See, e.g., Republic Waste Services, Ltd. v. Martinez,* 335 S.W.3d 401, 406 (Tex. App. 2011) (finding that an employee's status as an illegal immigrant was relevant to his claim for lost future wages, as it made it less likely that he would continue to earn at the level he was earning for many years if he had not passed always); *Zuniga v. Morris Material Handling, Inc.,* 10-C-696, 2011 WL 663136, at *5 (N.D. Ill. Feb. 14, 2011) (holding that immigrant Zuniga's immigration status was discoverable for purposes of determining lost earnings capacity and loss of earnings damages); *Ayala v. Lee*, 215 Md. App. 457 (Md. App. 2013)(state court of appeals affirmed a trial court's denial of plaintiff's motion to limit discovery of immigration status, holding that to determine lost wages a jury has "a right to know of plaintiff's illegal status when calculating damages."). *See also*, *Novovic v. Greyhound Lines, Inc.*, No. 2:09 CV 00753, 2012 WL 252124 (S.D. Ohio Jan. 26, 2012) (while the court acknowledged that "federal case law is not entirely settled on this issue," and that immigration status could have a prejudicial effect on the jury, the Court determined immigration status is relevant and held that evidence of immigration status could be introduced for purposes of mitigating the damages claimed for loss of consortium, after defendant argued that decedent's immigration status made it less likely that his family would ever be able to reunite with him in the United States.).

[10] *Hoffman, supra* note 2, at 155-56 (Breyer, J., dissenting).

to justice and to the full remedy to which they are entitled. They are two out of approximately 8 million undocumented workers in the United States, more than 5 percent of the American workforce, who take some of the most dangerous, lowest-paying jobs available in the United States.[11] Because of the laws detailed above, workers like Mr. Zumaya and Mr. Berumen Lizalde are vulnerable to dangerous working conditions and exploitation by employers, who can use their immigration status to avoid paying their due worker's compensation when they are injured on the job.[12]

1. Leopoldo Zumaya

Mr. Zumaya suffered a debilitating injury on the job, and instead of receiving his rightful worker's compensation, his employer reported his immigration status to the insurance company which then refused to pay his benefits, leaving him unable to access medical care. As set forth in the Petition, Mr. Zumaya fell out of a tree while working on an apple farm in Pennsylvania, breaking his leg. His injuries required three operations, during which a metal plate and six screws were inserted in his leg and then removed. He has endured permanent nerve damage and chronic regional pain disorder. His doctor stated that Mr. Zumaya's injuries were among the worst he had ever seen, and that he would not be able to do physical work ever again. When it became clear that Mr. Zumaya would not be able to return to work, his employer ordered him to leave the camp and refused to pay him his benefits. The employer, who had hired Mr. Zumaya knowing he was not legally authorized to work, indicated to Mr. Zumaya's lawyer that it could not offer re-employment (the alternative to financial compensation) unless he could prove he was legally authorized to work. Because of a Pennsylvania Supreme Court decision questioning an undocumented worker's rights when permanently partially disabled, Mr. Zumaya was forced to accept a settlement of approximately one-third of what he would have been entitled to had he not been without legal authorization to work. He returned to Mexico because he could not find a sedentary job and was not able to receive medical care. Mr. Zumaya has suffered from chronic pain and has struggled to walk.

2. Francisco Berumen Lizalde

Mr. Berumen Lizalde was prevented from fully pursuing his workers' compensation when he was detained and subsequently deported immediately after filing his claim. Mr. Berumen Lizalde fell from a scaffold while working as a painter in Wichita, Kansas, and fractured his hand, making it impossible for him to work. He initially received medical care for his injury under this employer's compensation insurance, undergoing surgery and getting a cast on his hand. Just before he was to see a doctor for an impairment rating determination, an examination required for an insurance company to pay a lump sum to the injured worker,

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[11] JEFFERY S. PASSEL & D'VERA COHN, PEW HISPANIC RESEARCH CENTER, UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010 1 (2011) (stating that 8 million undocumented immigrants were employed in March, 2010, comprising 5.2% of the labor force) *available at* http://www.pewhispanic.org/2011/02/01/unauthorized-immigrant-population-brnational-and-state-trends-2010/; *See* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, OSHA 2003-2008 STRATEGIC MANAGEMENT PLAN, ("Immigrant and 'hard-to-reach' workers and employers are also becoming more prevalent. Many immigrants are less literate, unable to read English instructions, and work in some of the most inherently dangerous jobs.").

[12] Worker's compensation is generally governed by state law, but federal governments are responsible for guaranteeing fundamental human rights at both federal and local levels. *See* Advisory Opinion OC-18/03, ¶ 149.

immigration officials came to his home and arrested him in December 2005. He was detained for about three months during which time he was unable to see a doctor and thus unable to get his cast removed. He was criminally charged with using false documents to obtain employment, to which he pled guilty, and was subsequently deported to Mexico in February 2006. The insurance company stopped payments to Mr. Berumen Lizalde in December 2005, and he had to pay for his own medical care in Mexico. The district attorney who prosecuted Mr. Berumen Lizalde for document fraud, which led to his deportation, told Mr. Berumen Lizalde's attorney that he had been contacted by the employer's insurance company. Mr. Berumen Lizalde's deportation made it impossible for him to pursue his claim for the workers compensation benefits to which he was and remains entitled. He did not complete treatment for his hand before being detained, and he has not had full movement or strength in his hand.

III. CONCLUSION

Mr. Zumaya and Mr. Berumen Lizalde have been waiting for nearly eight years for the opportunity to have their claims heard, and for recognition of their right to non-discrimination and equal treatment under the law, as guaranteed by the American Declaration and multiple other international human rights treaties to which the United States is obligated. Given the serious cost of these abuses to undocumented workers like Mr. Zumaya and Mr. Berumen Lizalde, we respectfully submit this request the Commission grant Petitioners a hearing on the merits.

Both Petitioners, as stated above, are currently in Mexico, and face legal obstacles in returning to the United States. We appreciate any assistance the Commission and United States government can render in facilitating our Petitioners' physical presence at the hearing. In the alternative, should Petitioners be unable to overcome these legal barriers based on their immigration status, or be able to assume the costs associated with travel to Washington, D.C., we request assistance in facilitating their testimony via teleconferencing. Thank you for your attention to our request.

Respectfully submitted,

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cc: Rachel Owen, Alternate Representative, Permanent Mission of the OAS
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DECLARATION OF LEOPOLDO Z.

I, LEOPOLDO Z., declare under penalty of perjury under the laws of the United States that the following is true and correct:

1. My name is Leopoldo Zumaya; I am 44 years old, and I come from Veracruz, Mexico. I currently live in Posa Rica, Veracruz with my wife, son, my son's wife, and their daughter, who is 2 years old. I worked as an apple picker in the United States for approximately fourteen months until I was seriously injured on the job. My employers fired me because of my injury, and I was left without a home or a job in the United States. I found a lawyer to help me because I could not afford my medical care, but my lawyer could not get me the money I deserved because I was undocumented. I could not pay my medical bills, I could not afford the medical care I needed, and I was forced to return to Mexico. I am still in pain and my ankle has never gotten better. I can't work because of my injury, and this has been very hard for me and my family.

Arrival and Employment in the United States

2. I came to the United States (Pennsylvania) in 2003 in order to work to support my family back in Mexico. Two apple farmers, nicknamed "Jimmy" and "Shorty," recruited me and other workers for the harvest. Even though I didn't have work papers, I was one of many people without paperwork that Jimmy and Shorty commonly hired. I never gave them any documents—only a yellow pay stub that we used as a form of insurance.

3. Almost all of the other seasonal workers were undocumented. My employers knew that we were undocumented and only cared that we worked hard and fast. There were many of us working there from all parts of Latin America, and none of us had papers. It was obvious that we were all undocumented and they liked it that way because they could pay us less for the same work.

Unsafe Working Conditions at the Farm

4. A man named Francisco Ponce, originally from Guadalajara, Mexico, had been working at the farm for 32 years. He worked for Jimmy and Shorty as a supervisor. When we were working, Francisco would make rounds to make sure we did everything the way they wanted.

5. As an apple picker, I worked twelve hours a day—from 6 AM to 6 PM. We were each given a backpack and a ladder, and my job required me to climb trees and pick apples. I also had to prune and thin trees as part of my job. I lived on the farm labor camp all year long with the other workers, doing different work during the different seasons.

6. The work I was doing was very risky because the trees were very tall. If it rained and the trees were slippery, we had to be very cautious and we tried to look out for each other's safety because there were no protection measures for us. Francisco wanted us to work fast because the faster we worked, the more money the farm made. The employers made it clear that they only cared about our productivity.

Injury and Permanent Disability

7. One morning in November 2004, I had started work at 6 AM as usual, pruning trees. At around 11 AM, as I cut one of the branches off a tall tree, I fell to the ground, severely hurting my leg. I was in severe pain.

8. Another worker helped me go to Francisco to ask him to call an ambulance. Francisco refused to call the ambulance and decided to drive me to the hospital. I believe he didn't want other people to know that one of the undocumented workers had been hurt.

9. In the car, Francisco asked me repeatedly to drink a beer to "get over it" but I refused. I think Francisco wanted me to drink to get me in trouble because the first thing they did at the hospital was give me a Blood Alcohol Content test, but my test results were negative.

10. At the hospital, the doctor x-rayed my leg. He told me I had fractured my tibia and that my frontal tendon was ruptured. My tendons were so inflamed and torn that they immediately scheduled surgeries.

11. I had to have three operations. For the first set of operations, I had to stay in the hospital for three days. They inserted a metal plate into my leg with 8 screws during those first two operations. The third operation was to fix the ruptured tendon in the front of my leg. I was in incredible pain and very frightened throughout this time because I did not know if I would be able to walk again.

12. The first doctor I saw after my surgeries, Ivan Miller, was contracted by the insurance agency. He told me that I could go back to work. I tried to follow his advice, but I was in too much pain to be able to do anything at work, so I returned to see him after three days. He recommended that I continue trying to work, at least for four hours per day, in order to heal. I made a huge effort, and the work I had to do was the lightest they had on the farm, but the pain was unbearable. My ankle became so swollen that I had to call an ambulance to return to the hospital again. This time, the doctor sent me to physical therapy, which he said I would need for 9 months.

13. One doctor at physical therapy told me that my injuries were so severe that I might not recover. He said that my injuries were one of the worst cases he had ever seen, and that I would only be able to have sedentary jobs in the future.

14. As a result of the accident and the surgeries, I also suffered extreme gastritis. I had to have an endoscopy because of the gastritis, and my workers' compensation did not pay for that. I felt very alone and traumatized, and I became very depressed, but my employers did not offer anything for my mental health. I think that the stress of that time is the reason that I developed gastritis. I continue to have chronic symptoms from this condition that require medicine.

Workers' Compensation Claim and Subsequent Discrimination

15. Jimmy and Shorty paid for my initial medical expenses through some insurance, but as soon they found out I couldn't do hard labor, they fired me and threw me out of the labor camp where I had been living. I was kicked out with no place to go, and my wages and workers' compensation benefits were suddenly terminated. At this time, I felt really bad about my life. The only way that I can describe how I felt was something like intense anxiety. I felt very desperate and did not know what to do.

16. I think that the insurance company found out from my employer that I was undocumented, given the timing, because right when I was kicked out of the camp, the insurance agency also refused to pay for my medical care anymore, and as a result, my doctor's visits and physical therapy also ended abruptly, far too early. When my benefits were terminated, I also could no longer pay for the medicine I had been prescribed for my injuries and resulting illness.

17. A lawyer agreed to represent me in my workers' compensation claim on a contingency fee basis. My lawyer fought on my behalf for many months. He told me that he felt powerless because he could not get me as much as I deserved because I was undocumented. I was forced to settle for the amount of $35,000 but I only received approximately $28,000. My lawyer told me that if I had been a U.S. citizen, my case would have been worth at least twice as much as what I had to accept. This made me feel like my previous employers had taken advantage of me.

18. It was not okay that they denied my rights just because I was undocumented. I hope that other workers in the US do not have the same experience that I did because everyone deserves equal rights.

Impact of Injury and Denial of Workers' Compensation

19. After my employers threw me out, I still could not do manual labor because of my injuries, and I could not find a sedentary job. I went to live with my friend in Baltimore, Maryland, who said he could help me. I still had to pay for my living expenses, but I couldn't work. With a serious injury and no job prospects, I had to return to Mexico in 2006.

20. I am still in constant pain, I have trouble walking, and I can really do only sedentary work. The screws and plate in my leg still cause me pain when the weather is cold and sometimes requires pain medication. I have searched for jobs to support my family ever since I got back to Mexico, but it has been really hard. I have tried not to take any jobs that require me to lift more than 25 pounds because it puts me in severe pain, but sometimes my employers have required it, and so sometimes I have had no choice.

21. The economy is very bad here, and there are few jobs, so it has been very difficult to find anyone to hire me if they know that I cannot work at 100% physical capacity. I have trouble paying rent and utilities and feeding my family.

22. I have struggled immensely since returning to Mexico. To this day, it is very painful for me to walk, so I walk very slowly. I still have 8 screws that have not been removed, so I cannot move my ankle well, and it hurts tremendously with each step I take. I am in constant pain.

Discrimination

23. I was discriminated against because I was undocumented. I feel like I was disrespected and mistreated because I was undocumented, and now I am in pain and struggling financially because I was not able to get the money and treatment that I deserved for my injury. I worked very hard picking apples while I was in the United States, but because I am not an American citizen, I was treated terribly.

24. I am petitioning the Inter-American Commission on Human Rights because I want the Commissioners to hear my story and understand that my human rights were violated. Although I realize that the Commission may not be able to help directly with what happened to me, I want to bring this serious issue to the Commissioners' attention to help stop the abuse and discrimination that many of my fellow undocumented workers regularly face in the United States.

25. I authorize Tony Keffler to sign this declaration on my behalf.

TONY KEFFLER for LEOPOLDO ZUMAYA

DECLARATION OF TRANSLATION

I, Tony Keffler, declare under penalty of perjury under the laws of the United States that the following is true and correct:

1. I am over the age of eighteen and am competent to act as a translator of written documents in English into oral Spanish.

2. I read the foregoing Declaration of Leopoldo Zumaya in Spanish. I certify that my translation was true and accurate to the best of my ability, and that Mr. Zumaya understood it and believed it to be true.

Dated this 15th day of March, 2015 at Philadelphia, PA.

TONY KEFFLER

DECLARATION OF LEOPOLDO Z.

I, LEOPOLDO Z., declare under penalty of perjury under the laws of the United States that the following is true and correct:

1. My name is Leopoldo Z. I am 36 years old, and I come from Veracruz, Mexico. I have a wife and a son who are both living in Mexico.

2. I came to the United States in order to work to support my family. I worked on a farm in Pennsylvania picking apples for 14 months from approximately September 2003 until November 2004. I did not have work authorization and was not legally in the United States.

3. It was common knowledge that my employer knowingly accepted false documents and employed approximately fifteen undocumented workers when I worked there. My employer accepted my documents and knew that I was undocumented.

4. My job required me to climb trees and pick apples. I also had to prune and thin trees as part of my job. I lived on the farm camp during apple season with the other workers. In November 2004, I was pruning a tree and fell, hurting my left leg.

5. My employer took me to the hospital and the doctor told me I had fractured my left leg. The X-rays showed that I had torn ligaments I had to have three operations. I had to stay in the hospital for three days during the first set of operations. During the first operation, a metal plate was inserted into my leg with six screws, which were then removed during the second operation. The third operation was to fix a broken ligament in the front of my leg.

6. I have chronic pain in my leg and have permanent nerve damage. I was prescribed medication but my health insurance ran out approximately 8-9 months ago and I have not been able to afford any medication. The doctor initially said that I could work up to fifteen hours a week. However, when I tried to work, it was too painful and my leg swelled up.

7. I went to a second doctor and he gave me the same diagnosis. My doctor visits and medication were suspended because my workers' compensation benefits were terminated. I received physical therapy for a approximately a month until it was suspended. My doctor told me that my injuries were one of the worst cases he has seen and I could only return to sedentary duties.

8. My employer initially paid for my medical expenses, but when it became apparent that I could not go back to work, I was told to leave the camp. My employer refused to pay me my benefits and told me to obtain legal help. The insurance company refused to pay for my workers' compensation benefits when they found out from my employer that I was undocumented.

9. I retained a lawyer to represent me in my workers' compensation claim. I was forced to settle for the amount of $35,000. My lawyer told me that my case would have been worth approximately twice as much or more than I received.

10. I have not been able to work because of my injuries. I suffer from chronic pain and have trouble walking. I will not be able to do physical work ever again. I have not been able to find a sedentary job.

11. I am planning on returning to Mexico at the end of October because I cannot work. In Mexico, I do not know what kind of work I will be able to perform because of my injuries.

12. I believe that I was discriminated against because of my immigration status. As a result of being denied full workers' compensation and medical costs, I have not been able to see a doctor, receive medication or undergo physical therapy. Also, as a result of my immigration status, I had to settle for approximately less than half the amount I would have received if I had been a U.S. citizen.

13. I know of other undocumented workers working in Pennsylvania who have been injured on the job, denied workers' compensation benefits and have been forced into settlements much less than what their injuries are actually worth.

Dated this 1st day of Oct, 2006 at _____.

LEOPOLDO [redacted]

LEOPOLDO Z.

DECLARATION OF TRANSLATION

I, Alexandra Quiroz, declare under penalty of perjury under the laws of the United States that the following is true and correct:

1. I am over the age of eighteen and am competent to act as a translator of written documents in English into written and oral Spanish.

2. I translated the foregoing Declaration of Leopoldo Z. to Spanish. I certify that my translation was true and accurate to the best of my ability.

Dated this 29 day of October, 2006 at Philadelphia, PA

Alexandra Quiroz

DECLARATION OF ANDREW K. TOUCHSTONE

I, ANDREW TOUCHSTONE, declare under penalty of perjury under the laws of the United States that the following is true and correct:

1. I am an Attorney at Law, licensed to practice in Pennsylvania. I am a partner in the law office of Touchstone and Associates, P.C., located at Two Penn Center, Suite 1020, Philadelphia, Pennsylvania, 19102. My phone number is (215) 557-5181.

2. Since 1989 I have practiced almost exclusively in the area of Pennsylvania Workers Compensation law representing injured workers and families of workers. I have dealt with at least thirty compensation claims involving undocumented immigrant workers, some of which were referred to me by Friends of Farmworkers, Inc., Philadelphia.

3. In the past year alone, I have represented two immigrant workers, both of Mexican national origin, who have been forced to settled their claims for workers compensation wage loss benefits for less than half what they would have received had they been U.S. citizens.

Case of Mr. L.Z.

4. On August, 2005, L.Z. retained me to represent him in his claim for workers compensation following an injury he incurred on 30th November 2004, when he fell out of a tree picking apples in Adams County, Pennsylvania. He fractured his leg, tore his ligaments, and now suffers from reflex sympathetic dystrophy or chronic regional pain disorder.

5. Mr. Z. was at first entirely unable to work, but after 12/12/05, the employer secured a medical opinion that L.Z. could not perform sedentary or light duty work and the employer's medical expert determined that he could return to sedentary employment.

6. The employer, having known that Mr. Z. was not legally authorized to work from the first date of hire, indicated that he could not offer Mr. Z. re-employment unless he could demonstrate that he was legally authorized to work.

7. The case went to mediation, and because of the Pennsylvania Supreme Court's decision in *Reinforced Earth Company v. Workers Compensation Appeal Board (Astudillo)*, 570 Pa. 464, 810 A.2d 99, (PA 2002) and Mr. Z.'s inability to prove that he is legally authorized to work in the United States, on 8/28/06 Mr. Z. was forced to accept a settlement for $35,000. In my expert opinion, based on my eighteen years of practice in the area of workers compensation, had Mr. Z. been a U.S. citizen, he would have been eligible to receive a settlement value of between $85,000 and $100,000 in workers compensation benefits.

Case of Mr. A.C.

8. Mr. A.C., also a Mexican national, retained me in October, 2004. Mr. A.C. had been employed as a landscaper in Pennsylvania while living in Delaware.

9. When he did file a claim for workers compensation, he was compelled to accept a settlement of $50,000.00 which is, in my expert opinion, significantly lower than he could have secured had he been a documented citizen or legal alien. He could have received approximately $110,000.00 – $120,000.00 in a lump sum.

10. I believe the employer was aware of his undocumented status at the time of hire.

11. Because of the Pennsylvania Supreme Court's decision in *Reinforced Earth Company v. Workers Compensation Appeal Board*, subsequently reaffirmed by the Pennsylvania Supreme Court in *DDP Contracting, Inc. v. W.C.A.B. (Mora)*, 826 A.2d 830, 573 Pa. 424 (Pa. 2003), Mr. L.Z., Mr. A.C. and the tens of thousands of workers employed in Pennsylvania without legal authorization to work in the United States, are without legal recourse to pursue their rights to a full and effective remedy under the workers compensation law of Pennsylvania should they be injured on the job.

Dated this 18 day of October, 2006 at 11:23 A.M.

ANDREW K. TOUCHSTONE

DECLARACIÓN DE FRANCISCO BERUMEN LIZALDE

Yo, FRANCISCO BERUMEN LIZALDE, declaro bajo pena de perjurio bajo las leyes de los Estados Unidos que lo siguiente es verdadero y correcto:

1. Mi nombre es Francisco Berumen Lizalde. Vivo en Francisco I. Madero, Durango con mi familia. Tengo una esposa y una hija de 24 años de edad, quien es ciudadana estadounidense. Salí de México para ir a los Estados Unidos porque mi trabajo en la ganadería y agricultura no eran suficientes. En 1992 ingresé a los Estados Unidos sin documentos y viví así durante 14 años. En el 2005 trabajé como pintor por aproximadamente ocho meses en los Estados Unidos hasta que sufrí una lesión grave que inhibió mi capacidad de trabajar y requirió un tratamiento médico extenso. Mientras todavía estaba recibiendo atención médica debido a mi lesión, fui arrestado y detenido por inmigración. La agencia de seguros que me estaba pagando una compensación por mi lesión alertó a inmigración de mi situación irregular y de mi falta de documentación migratoria. Fui deportado a México, donde no pude encontrar trabajo suficiente y sigo luchando con los efectos permanentes de mi lesión.

Empleo en Estados Unidos:

2. Trabajaba como pintor para Forshee Painting Contractors, Inc. en Wichita, Kansas durante 8 meses aproximadamente desde marzo del 2005 hasta noviembre del 2005. Mi trabajo me obligó a estar de pie la mayor parte del día. Se me permitió tomar un descanso cada día por 10 a 15 minutos. A menudo tenía que pintar en lugares altos utilizando escaleras y andamios.

3. A principios de noviembre de 2005, me caí de un andamio de aproximadamente 16 pies de altura mientras pintaba. Se me fracturó la muñeca izquierda y no pude continuar trabajando. .

4. Recibí atención médica de mi lesión por alrededor de un mes y medio, ya que estaba cubierto por el seguro de mi empleador. Visité a un médico en Kansas, quien me operó en la mano y me puso un yeso. Yo no tuve conocimiento de en qué consistió la operación que me realizaron hasta que me removieron el yeso. Fue entonces cuando supe que me habían colocado 3 clavos en la muñeca izquierda.

Reclamo para compensación, el arresto y la detención:

5. Durante ese tiempo, no pude trabajar y recibí cuatro cheques de mi compañía de seguros por la cantidad de $470 dólares cada uno. Nunca tuve contacto con mi patrón durante este periodo.

6. En diciembre de 2005, la compañía de seguros me llamó para pedir mi número de seguridad social, también me preguntaron que si mi número de seguridad social era legítimo, a lo que yo contesté que no. Tres días después y justo antes de asistir a una cita con un médico para que diagnostique la severidad de mis lesiones y me dijera que tipo de

tratamiento debía tener, los funcionarios de inmigración llegaron a mi casa y me arrestaron.

7. Fui arrestado y encarcelado hasta el 9 de febrero de 2006. Estaba acusado criminalmente con falsificación de documentos para obtener un empleo y por entrar ilegalmente a los Estados Unidos. Mi abogado me recomendó que me declarara culpable ya que si no lo hacía mi estancia en la cárcel podía extenderse por mucho tiempo. Como yo no tenía conocimiento del proceso ni de mis derechos, me declaré culpable. Fui condenado a tiempo cumplido y posteriormente deportado a México el 9 de febrero de 2006

8. Mientras estaba en la cárcel yo les decía a los oficiales que era necesario que me quitaran el yeso porque ya tenía demasiado tiempo con él, pero ellos me decían que en las instalaciones no tenían los instrumentos adecuados para hacerlo. Cuando me quitaron el yeso vi que tenía tres clavos en mi muñeca. El doctor que me quitó el yeso no me dio indicaciones de cuidado ni tratamiento.

Impacto de la lesión y discriminación:

9. Al fecha mi mano no tiene la fuerza suficiente para realizar el trabajo de ganadería y agricultura que hacía en mi comunidad en México antes de ir a los Estados Unidos. Aprovechando lo que aprendí en Estados Unidos ahora hago trabajo de pintura pero mi mano sigue sin fuerza y torcida. Durante mis primeros dos meses en México fui a terapia de rehabilitación para mi mano pero no pude continuar porque no podía dejar de trabajar ya que soy el único sustento de mi familia.

10. Creo mis empleadores y la compañía de seguros me discriminaron debido a mi estado migratorio. Pienso que ellos prefirieron delatarme ante inmigración antes de continuar pagando mi compensación. Después de que la compañía de seguros me llamó para pedir mi número de seguridad social, fui arrestado y luego deportado. Nunca fui capaz de seguir mi reclamo de compensación debida a mi impedimento, porque fui deportado y la compensación debida a mi impedimento.

11. Sé que hay otros trabajadores indocumentados que trabajan en Kansas que han resultado heridos en el trabajo, han solicitado los beneficios de compensación y han sido arrestados y deportados antes de que fueran capaces de obtener beneficios justos. De hecho, fui deportado a México con dos compañeros en la misma situación que yo.

12. Estoy presentando una demanda ante la Comisión Interamericana de Derechos Humanos porque quiero que los comisionados escuchen a mi historia y entiendan que se violaron mis derechos humanos. Considero que lo que hizo la aseguradora al delatarme a inmigración y lo que hizo el gobierno de Estados Unidos al deportarme fue más ilegal que haber trabajado sin documentos en este país. Aunque me doy cuenta de que la Comisión no es capaz de ayudar directamente con lo que me pasó, quiero despertar conciencia sobre este grave problema a la atención de los Comisionados para ayudar a detener el abuso y la discriminación que muchos de mis compañeros trabajadores indocumentados enfrentan regularmente en los Estados Unidos.

Fechado en este día 09 de Marzo de 2015 en Durango, Dgo, México

Francisco Berumen Lizalde

Francisco Berumen Lizalde

DECLARATION OF FRANCISCO BERUMEN LIZALDE

I, FRANCISCO BERUMEN LIZALDE, declare under penalty of perjury under the laws of the United States that the following is true and correct:

1. My name is Francisco Berumen Lizalde. I am 38 years old, and I come from Durango, Mexico. I have a wife and an 8-year-old daughter who is a U.S. citizen.

2. I worked as a painter for Forshee Painting Contractors, Inc. in Wichita, Kansas for 8 months from approximately March 2005 until November, 2005. I did not have work authorization and was not legally in the United States. Because I needed to work in the United States, I used false documents to get a job to support my family.

3. My job required me to stand for most of the day. I was permitted to take one break each day for 10-15 minutes. I often had to paint in high places using ladders and scaffolding.

4. In early November, 2005, I fell from some scaffolding while painting. I fractured my hand and could no longer work.

5. I received medical care for my injury which was covered by my employer's workers' compensation insurance. I visited a doctor in Kansas, who did surgery on my hand and put my hand in a cast.

6. I retained an attorney to represent me in my workers' compensation claim. During the time I was out of work, I received four checks from my employer's insurance company in the amount of $470 each.

7. In December, 2005, just before I was suppose to see a doctor for an impairment rating determination,[1] immigration officials came to my house and arrested me. I do not know how they would have found out about my immigration status or the Social Security number that I was using except from my employer or his insurance company.

8. I was detained in jail until February 9, 2006. I was charged with using false documents to obtain employment. I plead guilty to the charge, was sentenced to time served, and was then deported to Mexico on February 9, 2006.

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[1] An impairment rating report is a determination made by a medical doctor after assessing the extent and permanency of a disability sustained by a person injured at work. Once this determination is made, the employer's workers' compensation insurance company pays a lump sum to the injured worker depending on the doctor's determination.

9. While I was in jail, I was unable to see a doctor. I was therefore unable to get my cast off and did not have it removed until I returned to Mexico.

10. Before leaving the United States, my treating physician wrote a letter on my behalf stating that I needed to continue my medical treatment in Mexico, including several months of physical therapy to strengthen my hand and regain a full range of motion.

11. I am now living with family members in Durango, Mexico. My hand still does not have full movement or strength. I have been undergoing physical therapy for my hand. I have had to pay all of the medical costs related to my workplace injury that I have incurred in Mexico.

12. I believe that I was discriminated against because of my immigration status. After I filed a workers' compensation claim and before the impairment rating report was made, I was arrested and later deported. I was denied full workers' compensation benefits including the medical costs I incurred after I was deported to Mexico and the sum owed to me reflecting the extent and permanency of my resultant disability.

13. I know of other undocumented workers working in Kansas who have been injured on the job, have filed for workers' compensation benefits, and have been arrested and deported before they were able to collect their full workers' compensation benefits.

14. I authorize Rebecca Smith to sign this declaration on my behalf.

Rebecca Smith / s#p

Rebecca Smith for Francisco Berumen Lizalde

DECLARATION OF TRANSLATION

I, , declare under penalty of perjury under the laws of the United States that the following is true and correct:

1. I am over the age of eighteen and am competent to act as a translator of written documents in English into oral Spanish.

2. I read the foregoing Declaration of Francisco Berumen Lizalde in Spanish. I certify that my translation was true and accurate to the best of my ability, and that Mr. Berumen Lizalde understood it and believed it to be true.

Dated this 23 day of Oct., 2006 at Olympia, WA.

Rebecca Smith, CHP

REBECCA SMITH

SUPPLEMENTARY DECLARATION OF MICHAEL SNIDER

I, MICHAEL SNIDER., declare under penalty of perjury under the laws of the United States that the following is true and correct:

1. I am an Attorney at Law, licensed to practice in Kansas. I was retained in March 2006 to represent Francisco Berumen Lizalde in his claim for workers compensation. I respectfully submit this Declaration as a supplement to my initial Declaration, signed and dated August 8, 2006, and submitted to the Inter-American Commission on Human Rights as part of the initial petition filed on November 1, 2006.

2. I continue to serve as a partner in the law office of Snider and Seiwert, LLC, 2628 S. Oliver, Suite 104, Wichita, Kansas, 67210, and maintain an extensive practice in the areas of Kansas Workers Compensation and Personal Injury law, representing injured workers and families of workers.

3. As I stated in my original Declaration, I was retained by Mr. Berumen Lizalde in March 2006 to represent him in his claim for workers compensation, following his workplace injury. I filed his claim following Mr. Lizalde's deportation from the United States, but because of his deportation, and his inability to return to the United States, I have not been able to pursue the claim on his behalf, for the reasons outlined in my initial Declaration.

4. In Kansas, the worker's compensation system uses Social Security numbers to determine the identity of recipients. It has come to my attention that there have been meetings between worker's compensation administrative law officials and the US Attorney's office where the workers compensation officials were instructed to notify the US Attorney's Office if there was a Social Security number that did not match a person's identity.

5. As noted in my original Declaration, shortly after filing Mr. Lizalde's claim for workers compensation, I was contacted by U.S. District Attorney Brent Anderson, asking me if Mr. Lizalde had illegally returned to the United States, and reported the insurance company responsible for medical and disability compensation in Mr. Lizalde's claim had contacted him.

6. I believe that the worker's compensation system in Kansas has worked with the United States Attorney's Office to prevent undocumented workers from accessing their legal remedies by criminally prosecuting them for using false documents. This system resulted in preventing my client from having his day in court.

7. The Kansas legislature in 2011 adopted a new law subsection that says in relevant part:

> "To establish post-injury wage loss, the employee must have the legal capacity to enter into a valid contract of employment. Wage loss caused by voluntary

resignation or termination for cause shall in no way construed to be caused by the injury." K.S.A. 44-510e(a)(2)(E)(i).

8. This statute is contradictory to the Kansas Supreme Court case Fernandez v. McDonald's, 296 Kan. 472 (2013), which interpreted prior law at K.S.A. 44-510e and determined that unauthorized aliens were entitled to the full measure of work disability awards.

9. The purpose of the new worker's compensation law section adopted in 2011 is to nullify the Fernandez case ruling, and it allows employers hiring undocumented workers to pay much lower work disability benefits when undocumented workers are injured on the job.

10. However, in my practice, I have to counsel my clients that it is possible they may be deported if they have used documents that do not match their identity when they file a worker's compensation claim. This has created great fear in workers, and has made many workers reluctant to process their workers compensation claims and pursue their full legal remedies in Kansas.

11. I believe that denying workers' rights for undocumented persons in Kansas has set up a disposable work force, a caste system of workers who are afraid to pursue their legal remedies and do not have the same access to rights as legal resident and citizen workers.

Dated on this 12th day of March, 2015 at Wichita, Kansas

Michael Snider, Esq.

DECLARATION OF MICHAEL L. SNIDER

I, MICHAEL L. SNIDER, declare under penalty of perjury under the laws of the United States that the following is true and correct:

1. I am an Attorney at Law, licensed to practice in Kansas. I am a partner in the law office of Snider and Seiwert, LLC, 2628 S. Oliver, Suite 104, Wichita, Kansas 67210, United States. My phone number is (316) 686-6113.

2. I have practiced extensively in the areas of Kansas Workers Compensation and Personal Injury law, representing injured workers and families of workers. Over the years, I have represented many Spanish-speaking immigrant workers.

3. On March 6, 2006, Francisco Berumen Lizalde retained me to represent him in his claim for workers compensation, following an injury he incurred on November 6, 2005, when he fell eight (8) feet from scaffolding on the job. He suffered fractured bones in his wrist and arm requiring surgery and he was temporarily disabled from working.

4. On December 22, 2005, Mr. Lizalde missed a scheduled appointment to see a doctor for continuing medical treatment in his workers compensation claim when he was arrested and detained by Immigration and Customs Enforcement of the Department of Homeland Security. He was charged with using fraudulent documents to obtain employment, to which he pled guilty, was sentenced to time served and deported in February 2006. Although Mr. Lizalde was not fully recovered from his work related injury when he was deported, the workers compensation insurance carrier stopped making temporary total disability payments in December 2005 to Mr. Lizalde. Prior to his deportation Mr. Lizalde had not completed medical treatment with his treating doctors in Kansas and at his last appointment a Kansas doctor advised Mr. Lizalde that

he would need to seek appropriate physical therapy and follow up medical treatment in Mexico for these work related injuries.

5. I filed Mr. Lizalde's Kansas workers compensation claim with his former employer on March 10, 2006. Within a few days of filing Mr. Lizalde's workers compensation claim, I was contacted by U.S. District Attorney Mr. Brent Anderson, who had prosecuted Mr. Lizalde for document fraud, resulting in his subsequent deportation. Mr. Anderson asked me whether Mr. Lizalde had illegally returned to the United States, reporting that the insurance company responsible for medical and disability compensation in Mr. Lizalde's claim had contacted him.

6. Mr. Lizalde's deportation to Mexico makes it very difficult to pursue his claim for workers compensation benefits, to which he is entitled under Kansas state law, for the following reasons:

a. Because of his deportation, Mr. Lizalde is barred under the federal immigration statutes from reentering the United States, and it is my understanding he faces a ten year prison sentence if he is convicted of doing so. While I have learned that the Mexican consulate has worked with lawyers in the United States in the past to arange for a humanitarian visa to allow for an individual to enter the United States to pursue his claim, it is my understanding that the chances of Mr. Lizalde being able to obtain such a visa are extremely slim.

b. Under the Kansas workers compensation statutes, the sworn deposition testimony of a medical doctor or health care provider licensed in the United States who has examined Mr. Lizalde is usually required to prove

the nature and extent of disability in Mr. Lizalde's case. Since Mr. Lizalde can not return legally to the United States for a medical examination by a doctor licensed in the United States, serious legal obstacles exist to obtaining a necessary medical examination to prove his claim. I have been advised by office staff of Texas doctors that since U.S. doctors do not have insurance coverage for medical treatment of patients in Mexico, U.S. doctors who routinely perform such evaluations in injury cases in the U.S. involving United States citizens will not travel across the border into Mexico to provide this service to Mr. Lizalde. Thus, it will be extremely difficult to obtain a necessary medical evaluation by a U.S. licensed doctor as evidence needed to prove Mr. Lizalde's workers compensation case.

c. Furthermore, it has been my experience that claimants such as Mr. Lizalde are usually required to present their testimony before the Kansas workers compensation court judge in person. Since Mr. Lizalde is not legally able to return to the United States to present his claim before the administrative law judge, the defense attorney has asked me how I am going to prove Mr. Lizalde's case and the defense attorney has asked if I am going to drop the case. If the judge decides to require Mr. Lizalde's presence in court, it will be impossible to present his testimony here in the United States without Mr. Lizalde risking additional incarceration and his case can be lost.

7. Mr. Lizalde is forced to choose between a possible ten year prison sentence if he is convicted of illegally returning to the United States to prove his claim, or forgoing his legal rights to permanent disability compensation and future medical treatment that are

due him under state law in his Kansas workers compensation claim.

8. As an attorney representing Mr. Lizalde's interests, I can not encourage him to illegally reenter the United States and risk violation of laws with additional convictions of federal crimes, and as an officer of the court, I can not counsel Mr. Lizalde to violate the laws of the United States by returning to Kansas to pursue his workers compensation claim.

9. Section 18 of the Constitution of the State of Kansas provides:

"All persons, for injuries suffered in person, reputation or property shall have remedy by due course of law, and

justice administered without delay."

10. It is my professional legal opinion this state constitutional provision applies to Mr. Lizalde's workers compensation claim in Kansas.

Dated this 8th day of August, 2006 at Wichita, Kansas, U.S.A.

MICHAEL L. SNIDER
ATTORNEY AT LAW
KANSAS SUPREME COURT LICENSE NUMBER 12377

Margaret Stranghoner

NOTARY PUBLIC - State of Kansas
MARGARET STRANGHONER
My Appt. Exp. 5-14-09

TO THE HONORABLE MEMBERS OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ORGANIZATION OF AMERICAN STATES

PETITION ALLEGING VIOLATIONS OF THE HUMAN RIGHTS OF UNDOCUMENTED WORKERS BY THE UNITED STATES OF AMERICA

By the undersigned, appearing as counsel for the individual and organization Petitioners under the provisions of Article 23 of the Commission's Rules of Procedure:

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Submitted: November 1, 2006

PETITION ALLEGING VIOLATIONS OF THE HUMAN RIGHTS OF UNDOCUMENTED WORKERS BY THE UNITED STATES OF AMERICA

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PETITION ALLEGING VIOLATIONS OF THE HUMAN RIGHTS OF UNDOCUMENTED WORKERS BY THE UNITED STATES OF AMERICA

I. INTRODUCTION

This Petition challenges government-sanctioned discrimination against immigrant workers in the United States. Petitioners are undocumented[1] immigrants who make up nearly 5% of the labor force of the United States, who work in the most poorly paid and undesirable jobs in the U.S. economy, yet are denied rights and remedies under employment and labor laws[2] because of their immigration status. The Petitioners include:

- A widow whose husband was killed on an unauthorized construction site in New York, and whose death was caused by his employer's criminal negligence;
- A woman who was forced to leave her job in New Jersey when workplace sexual harassment became intolerable;
- A Kansas worker who was prosecuted and deported, likely as a consequence of filing a workers' compensation claim;
- A Pennsylvania farm worker who suffers chronic pain as a result of a workplace accident;

[1] This Petition uses the generic terms "undocumented" or "unauthorized" worker to describe immigrant workers, otherwise known as irregular migrants, who do not possess authorization to be employed pursuant to U.S. law and are unlawfully present in the U.S. This group also 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. Most relevant court decisions are based on the presence or absence of work authorization.

[2] "Employment and labor laws" refer to the rights protected under the National Labor Relations Act ("NLRA") as well as federal and state statutes that set basic standards for working conditions and wages in the United States and regulate the relationship between employers and individual employees, such as anti-discrimination laws and workers' compensation laws. The NLRA protects an employees right to "self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . ". *See* National Labor Relations Act, 29 U.S.C. § 157 (2006). State laws referred to in this Petition include the state system of compensation for workplace accidents (workers' compensation), state protections against discrimination on the job, and state-based claims for negligence and violation of state statutes (tort claims).

- A Michigan poultry worker who suffered severe injuries when he fell from the top of a chicken house onto a concrete floor; and
- A union that was helping workers in Utah who labored in unsafe, poorly paid conditions and who were fired when they tried to organize.

These workers, and the organizations that are part of this Petition, are representative of the some six million undocumented workers who labor in the United States' factories, fields, restaurants and constructions sites, and who are denied remedies for violations of their labor rights solely on the basis of immigration status.

The government of the United States of America and many of the states[3] within the United States are responsible for denying these workers equal rights and remedies. In *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board,*[4] the United States Supreme Court denied the remedy of back pay to undocumented workers whose right to participate in lawful organized labor activities is violated. The removal of the back pay remedy has had the practical effect of eliminating the enforceability of this right and has limited undocumented workers' right to freedom of association.

Relying on *Hoffman*, various states in the United States have further reduced the rights and remedies available to undocumented workers under state law. New York, New Jersey, Kansas, Pennsylvania and Michigan have limited or eliminated such basic workplace protections as access to compensation for workplace injuries, freedom from workplace discrimination and entitlement to hold an employer responsible for a workplace injury. The result has been devastating, creating an environment in the United States where already vulnerable workers are

[3] This Petition uses the word "state" with an uncapitalized "s" to refer to states within the United States. It uses the term "State" with a capital "S" to refer to countries within the Organization of American States.
[4] 535 U.S. 137 (2002).

further denied the most basic legal protections both under federal law and state law because of their immigration status.

These laws and practices of the United States violate settled international law and express provisions of the American Declaration of Rights and Duties of Man ("American Declaration") including the provisions on non-discrimination (Article II) and freedom of association (Article XXII). The United States government is obligated to abide by the American Declaration and has failed to do so by condoning discrimination on the basis of alienage and immigration status.

The rights and remedies denied to Petitioners by the United States are within the category of rights that the Commission has clearly recognized cannot be discriminatorily denied. As the Commission has stated: "migratory status can never be grounds for excluding a person from the basic protections granted to him by international human rights law."[5] In 2003, the Commission called upon the Inter-American Court of Human Rights to enumerate those basic protections that "comprise the category of rights regarding which no discrimination is permissible, not even owing to migratory status."[6] In response, the Inter-American Court confirmed that the rights to freedom of association, adequate working conditions, and judicial and administrative guarantees are among the basic protections that governments could not exclude individuals from based on their immigration status:

> In the case of migrant workers, there are certain rights that assume a fundamental importance and yet are frequently violated, such as: ... the rights corresponding to: freedom of association and to organize and join a trade union, collective negotiation, fair wages for work performed, social security, judicial and administrative guarantees, a working day of reasonable length with adequate working conditions (safety and health), rest and compensation. The safeguard of these rights for migrants has great importance based on the principle of the inalienable nature of such rights, *which all workers possess, irrespective of their migratory status*, and also the fundamental principle of human dignity embodied in

[5] Inter-American Commission's brief to Inter-American Court, as quoted in *Juridical Condition and Rights of the Undocumented Migrants,* Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (Ser. A) No. 18 ¶ 47 (p. 26, English) (Sept. 27, 2003).
[6] *Id.*

> Article 1 of the Universal Declaration, according to which "[a]ll human beings are born free and equal in dignity and rights...."

Juridical Condition and Rights of the Undocumented Migrants, OC-18/03 ("OC-18/03").[7] (emphasis added)

As the Inter-American Court has explained, governments are "internationally responsible when they tolerate actions and practices of third parties that prejudice migrant workers, either because they do not recognize the same rights to them as to national workers or because they recognize the same rights to them but with some type of discrimination."[8]

Individual Petitioners attempted to assert their workplace rights and were limited in their ability to assert them, denied various remedies or denied their rights altogether because of their undocumented status. Having exhausted all available judicial remedies at the domestic level, Petitioners now bring their claims to this Honorable Commission.

Petitioners call upon the Commission to find the government of the United States in violation of its obligations under the American Declaration and specifically the principle of equality and non-discrimination to ensure that undocumented immigrant workers are afforded equal rights and remedies under all labor laws. Petitioners request, *inter alia*, that the United States amend its laws, policies and jurisprudence to comport with its international obligations to apply workplace protections in a non-discriminatory manner and protect the freedom of association of all workers; and that the United States ensure that individual states do the same. Petitioners request an oral hearing of this Petition at the next session of the Commission.

[7] *Id.* ¶ 157.
[8] *Id.* ¶ 153.

II. DOMESTIC LAW AND FACTS

A. Undocumented Immigrant Workers in the United States Labor Force

The United States is the largest receiving country of immigrants, hosting approximately one-fifth of the world's migrant population. Best estimates are that there are approximately 11.5 to 12.0 million undocumented immigrants living and working in the United States.[9] About 7.2 million unauthorized immigrants were employed in March 2005, accounting for about 4.9% of the civilian labor force. They make up a large share of all workers in many industries, including 24% of all workers employed in farming occupations, 17% in cleaning, 14% in construction and 12% in food preparation.[10]

Undocumented immigrants also perform some of the most dangerous, undesirable jobs in the United States economy.[11] The Department of Labor Bureau of Labor Statistics (BLS) found in 2004 that the highest work-related fatality rates were in the construction, transport and warehousing, agriculture and manufacturing sectors – all sectors in which a high number of undocumented workers are found.[12] In the United States, farm workers, many of whom are unauthorized immigrants, account for only one percent of the work force, but represent three

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[9] Jeffrey S. Passel, *Size and Characteristics of the Unauthorized Migrant Population in the U.S. Estimates Based on the March 2005 Current Population Survey*, Pew Hispanic Center (March 2006), *available at* http://pewhispanic.org/reports/report.php?ReportID=61.

[10] *Id.*

[11] *See* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, OSHA 2003-2008 STRATEGIC MANAGEMENT PLAN, "Immigrant and 'hard-to-reach' workers and employers are also becoming more prevalent. Many immigrants are less literate, unable to read English instructions, and work in some of the most inherently dangerous jobs."

[12] BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES IN 2005 (2006). *See* Chart, "Number and rate of fatal occupational injuries by industry sector, 2005," at 3. In 2000, the increase in fatal injuries to foreign-born Latino workers was concentrated in construction. In that year, at least 815 Latinos died at work. Latinos make up only 11% of the workforce, but hold 17.4% of construction jobs in the U.S. In 2001, fatal injuries rose again to 895, mostly in services and agriculture. After a short period of decline, fatal injuries to Latinos and to immigrants rose again in 2004. Scott Richardson, *Fatal Work Injuries Among Foreign-born Hispanic Workers,* MONTHLY LABOR REVIEW (Oct. 2005).

percent of the occupational deaths.[13] Foreign-born Latinos are more likely to die on the job than workers in any other demographic group, at a rate of nearly 6 per 100,000 workers, compared to 4.1 for all other workers.[14] In the years 1992-2004, two-thirds of fatal workplace injury occurred in the six high immigration states of California, Texas, Florida, New York Arizona and Illinois.[15]

In addition, foreign-born workers form a disproportionately large share of the working poor in the U.S. In 2002, 17.9 million out of a total of 125.3 million workers in the U.S. were foreign-born.[16] Yet, these workers made up 8.6 million out of a total of 43 million low-wage workers, defined as making less than 200% of the state prevailing minimum wage.[17] Undocumented immigrants in particular perform the lowest paid jobs in the economy. Two-thirds of the undocumented workforce, or four million workers, are low-wage workers making less than twice the minimum wage.[18] A recent report on the exploitation of immigrant workers details how nearly 25 percent of the workers rebuilding New Orleans after Hurricane Katrina are undocumented immigrants and employers are paying them significantly less than documented workers.[19]

B. The Exploitation of Undocumented Workers

Because of their economic desperation, undocumented workers are vulnerable to exploitative and unlawful work conditions. In fact, industries most populated by undocumented workers are not only dangerous and undesirable with extremely low wages, but are known for their frequent violation of labor and employment laws. A U.S. Department of Labor (DOL)

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[13] *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, 2005 CENSUS OF FATAL OCCUPATIONAL INJURIES (PRELIMINARY DATA), *available at* http://www.bls.gov/iif/oshcfoi1.htm#2005; BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, TABLE A-5. FATAL OCCUPATIONAL INJURIES BY OCCUPATION AND EVENT OR EXPOSURE, ALL UNITED STATES, 2005, *available at* http://www.bls.gov/iif/oshwc/cfoi/cftb0209.pdf.

[14] Richardson, *Fatal Work Injuries Among Foreign-born Hispanic Workers.*

[15] *Id. See also* Stephen Franklin et. al, *Throwaway Lives*, CHICAGO TRIBUNE, Sep 3-6, 2006.

[16] Jeffrey S. Passel, et. al, *Undocumented Workers, Facts and Figures,* Urban Institute (2004), *available at* http://www.urban.org/url.cfm?ID=1000587&renderforprint=1.

[17] *Id.*

[18] *Id.*

[19] James Parks, *Study Says Undocumented Immigrant Workers in New Orleans Exploited,* AFL-CIO WEBLOG, June 7, 2006, *available at* http://blog.aflcio.org/2006/06/07/study-says-undocumented-immigrant-workers-in-new-orleans-exploited.

survey found that in 2000, 100% of all poultry processing plants were non-compliant with federal wage and hour laws.[20] 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 2004 study found that 54% of garment contractors in the Los Angeles industry violated the minimum wage law.[21] A DOL survey in agriculture focused on cucumbers, lettuce and onions, revealed that compliance with employment and labor laws was unacceptably low.[22] The Department found in 2000 that 60% of United States nursing homes routinely violated overtime, minimum wage or child labor laws.[23] Last year, a private survey of hundreds of New York City restaurants found that more than half were violating overtime or minimum wage laws.[24] In recent months, media coverage has highlighted the exploitation, abuse and hazards unauthorized immigrants endure on the job, abuses and dangers the U.S. government has failed to prevent.[25]

When undocumented workers make efforts to oppose their unlawful working conditions, unscrupulous employers threaten to expose and often actually do expose workers to immigration authorities.[26] Employers hire immigrant workers that they know are undocumented or workers

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[20] U.S DEP'T OF LABOR, FY 2000 POULTRY PROCESSING COMPLIANCE REPORT (2000).
[21] BUREAU OF NATIONAL AFFAIRS, U.S. DEP'T OF LABOR, *Close to Half of Garment Contractors Violating Fair Labor Standards Act*, DAILY LABOR REPORT 87 (May 6 1996); David Weil, *Compliance With the Minimum Wage: Can Government Make a Difference?*, VERSION (May 2004).
[22] U.S. DEP'T OF LABOR, *Compliance Highlights*, 1, 3 (1999).
[23] EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEP'T OF LABOR, NURSING HOME 2000 COMPLIANCE FACT SHEET, *available at* http://www.dol.gov/esa/healthcare/surveys/nursing2000.htm.
[24] Restaurant Opportunities Center of New York and the New York City Restaurant Industry Coalition, *Behind the Kitchen Door: Pervasive Inequality in New York City's Thriving Restaurant Industry* (2005), *available at* http://www.rocny.org/documents/ROC-NYExecSummary.pdf.
[25] *See* illustrative media coverage in Exhibit C, particularly *Some Immigrant Workers Exploited but Home Builders say they Follow Rules*, THE POST AND COURIER, Charleston (SC), September 26, 2006; *Illegal Immigrants Frequently Denied Compensation*, CHARLOTTE OBSERVER (NC), September 15, 2006; *Shadow Workers: Exploitation Hidden Under the Table*, THE BOSTON HERALD (MA), June 22, 2006; and *Perils Darken a Shadow Economy*, CHICAGO TRIBUNE (IL), September 4, 2006.
[26] *See* illustrative media coverage in Exhibit C, particularly *Fear of Retaliation Trumps Pain*, CHICAGO TRIBUNE (IL), Sept. 3, 2006 and *Immigrants Face Retaliation for Asserting Workplace Rights*, THE NEW STANDARD (online at http://newstandardnews.net), June 1, 2006. *See A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 N.L.R.B. 408 (1995) (Victor Benavides, a boiler mechanic, told employer he was unlawful, employer told him he only needed his legal name to list him on the "books." When Benavides became active in a union organizing drive, he was fired and employer asked INS to investigate the legal status of his employees.); *Contreras v. Corinthian Vigor Ins. Brokerage*

they suspect lack lawful immigration status, but then act to investigate the workers' status only when the worker makes any attempt to demand fair and just work conditions. [27]

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.[28] The employer sanctions regime in the United States, on paper, sanctions employers who "knowingly" hire undocumented workers. IRCA mandates that employers review the identity and eligibility of all new hires by examining specified documents before they begin work.[29] In practice, the employer sanctions regime has become a club for employers to use against vulnerable workers.

Undocumented workers' inherent vulnerability is greatly exacerbated when the United States government excludes them from various labor and employment protections intended to ensure basic rights for all workers. These exclusions allow an unscrupulous employer to violate the law with impunity. As Petitioners' experiences demonstrate, even if workers are courageous enough to seek relief from the U.S. courts for various employment and labor violations, they may find they have no such rights or have been denied important remedies.

C. U.S. Federal and State Law And its Discriminatory Application to Undocumented Immigrant Workers

The United States highest court and various state courts have excluded undocumented workers from employment rights and remedies available to their documented counterparts. Discrimination against undocumented workers is rooted in a decision by the United States

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Inc., 25 F.Supp. 2d 1053 (N.D. Cal. 1998) (Silvia Contreras, a secretary for a company selling commercial insurance was turned into INS by employer when she filed a claim for unpaid wages and overtime); T. Alexander Aleinikoff, *Illegal Employers*, THE AMERICAN PROSPECT, Vol. II, Issue 25, (Dec. 4, 2000) (workers at Holiday Inn Express hotel voted to join Hotel Employees and Restaurant Employees Union. Call to INS by employer resulted in arrest of eight members of union negotiating committee.)

[27] *Id.*

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

[29] 8 U.S.C. § 1324a(b)(1)(A) (1994).

Supreme Court, *Hoffman Plastic Compounds, Inc. v. National Labor Relations Bd.*[30] in which the country's highest court limited undocumented workers' right to an effective remedy for violation of their freedom of association. Subsequent further limitations by lower federal courts and various state high courts on the rights of undocumented workers are based on the policy considerations set forth in *Hoffman.*

1. The *Hoffman* Decision and Freedom of Association

In *Hoffman,* the United States Supreme Court held that an undocumented worker fired in retaliation for participating in a union organizing campaign was not entitled to the remedy of back pay under the National Labor Relations Act ("NLRA") due to his undocumented immigration status.[31] The NLRA is the primary law under which workers are guaranteed the right to organize trade unions and bargain collectively in the United States.[32] Although undocumented workers are considered "employees" under the NLRA,[33] after *Hoffman*, they are no longer entitled to back pay when illegally fired in retaliation for having exercised their right to freedom of association unless they can show that they currently have lawful employment status.[34]

Back pay, the amount of money an employee would have earned but for the illegal firing, is one of just two substantive remedies available to individuals for violations of the NLRA and

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[30] 535 U.S. 137 (2002).
[31] *Hoffman*, 535 U.S. at 151; *See* National Labor Relations Act, 29 U.S.C. § 157 (2006).
[32] 29 U.S.C. § 151 et seq. The NLRA ensures employees rights to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and the right to refrain from any or all such activities." *See* 29 U.S.C. § 157.
[33] *See Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, (1984).
[34] NLRB General Counsel, *Procedures and Remedies for Discriminatees Who May Be Unauthorized Aliens after Hoffman Plastic Compounds, Inc.* (Jul. 19, 2002).

the only substantive remedy that remained available to undocumented workers at the time the Supreme Court ruled.[35]

In *Hoffman*, there was no question that the employer had violated the National Labor Relations Act: in fact, one justice referred to the employer's violation of the law as "crude and obvious."[36] However, five of the nine justices held that the immigration policy underlying IRCA required the Court to deny the remedy of back pay to undocumented workers. These Justices reasoned that back pay would compensate undocumented workers for work they could not lawfully perform because they lacked authorization to work in the United States.[37] Four dissenting justices argued that the Court's ruling undermined the protections offered both in immigration law and in labor law.[38] After *Hoffman*, the only remedies available when unauthorized workers are wrongfully terminated are as follows: the employer who illegally fires an unauthorized worker may be ordered to post a notice at the workplace, and may be told to "cease and desist" violating the law.[39] There are no remedies available to the undocumented individual who suffered the retaliatory termination.

Hoffman, the statutory scheme it construes and the case law on which it relies have had an enormous impact on undocumented workers' ability to organize to improve their work conditions. Membership in a union is a significant factor in protecting lawful, just, and dignified

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[35] The other substantive remedy available to an individual was reinstatement to the worker's former position, but that remedy was earlier foreclosed for undocumented workers by the Immigration Reform and Control Act of 1986 (IRCA), the law that prohibits the knowing employment of undocumented workers, and is not at issue here. See, *Sure-Tan, Inc.*, 467 U.S. at 903-904.

[36] *Hoffman,* 535 U.S. at 153.

[37] *Id.* at 159.

[38] *Id.* at 153.

[39] *Id.* at 152. In certain cases, an employer who violates the law again may be subject to penalties for contempt of court.

work conditions.[40] Typically, union membership brings with it higher wages and better working conditions for workers, both immigrant and non-immigrant. For Latino workers, union members wages are 59% higher than those for non-union members.[41] While 36.8 million non-union workers earn less than $20,000 per year, only 2.5 million union members are low wage workers earning less than $20,000 per year.[42]

Among other tools, employers continue to use immigration status and the employer sanctions requirements of IRCA, as a weapon to derail organizing campaigns. A recent report by Human Rights Watch, focused on the meatpacking industry, found that many employers threaten to call immigration authorities if workers seek to organize or make claims for labor law protection.[43] One study found that 52% of employers in workplaces that include undocumented immigrant workers threaten to call immigration authorities during organizing campaigns.[44] The impact of a denial of back pay as a remedy for immigrant workers has been to severely undermine labor protections, increase labor exploitation, and create a two tiered workforce in the United States.

2. Extension and Application of *Hoffman*

The impact of *Hoffman* and the IRCA statutory scheme it construes has extended far beyond the denial of the freedom of association for undocumented workers. The *Hoffman* decision has encouraged employers to claim that undocumented immigrant workers lack legal

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[40] Only about 12.5% of workers in the United States are union members. John Schmitt and Ben Zipperer, *Unions Hold Their Own in 2005,* CENTER FOR ECONOMIC AND POLICY RESEARCH UNION BYTE (2006), *available at* http://www.cepr.net/bytes/union_byte_2006_01.htm.

[41] Employee Benefit Research Institute, EBRI NOTES, Union Status and Employment-Based Health Benefits, Vol. 26, No. 5 (May 2005).

[42] *Id.*

[43] Lance Compa, *Blood, Sweat and Fear: Workers' Rights in U.S. Meat and Poultry Plants*, Human Rights Watch, (Jan. 2005).

[44] *How to Join a Union: Employer Interference by the Numbers*, American Federation of Labor - Congress of Industrial Organizations (2006), *available at* http://www.aflcio.org/joinaunion/how/employerinterference.cfm

rights in other contexts. As a consequence, some states have relied upon *Hoffman* to sanction unequal treatment under other core labor and employment laws.

Specifically, courts in these states have either eliminated or severely limited state-law based workplace protections for undocumented workers.[45] These rights and remedies often provided exclusively by state law, such as access to compensation for workplace injuries, freedom from workplace discrimination and entitlement to hold an employer responsible for a workplace injury, are among the most basic protections afforded to workers under United States law.[46] Because these rulings are interpretations of state law sanctioned or made by the states' highest court in the various states in which petitioners reside, the decisions represent the state's highest judicial bodies' interpretation of state law.

In addition to limiting or eliminating the workplace rights of undocumented workers, a further but no less problematic consequence of *Hoffman* and the cases following it has been the intimidation of undocumented workers asserting their rights through the courts. Because *Hoffman* purported to make immigration status relevant to workplace rights, employer-

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[45] *Crespo v. Evergo Corp.*, 366 N.J. Super. 391 (App. Div. 2004), *cert. denied, Crespo v. Evergo Corp.*, 180 N.J. 151 (2004) (holding that an undocumented worker suing for discriminatory termination could not recover either economic or non-economic damages absent egregious circumstances during the period of employment such as extreme sexual harassment); *Sanchez v. Eagle Alloy Inc.*, 254 Mich. App. 651 (Mich. Ct. App. 2003), *cert. denied, Sanchez v. Eagle Alloy, Inc.*, 471 Mich. 851 (Mich. 2004) (finding that undocumented workers are covered by Michigan workers' compensation law and are entitled to full medical benefits if injured on the job but that their right to wage-loss benefits ends at the time that the employer "discovers" they are unauthorized to work); *Reinforced Earth Co. v. Workers' Compensation Appeal Board (Astudillo),* 570 Pa. 464 (2002) (holding that although undocumented worker is entitled to medical benefits after experiencing a workplace injury, illegal immigration status might justify terminating workers' compensation benefits for temporary total disability); *Rosa v. Partners in Progress, Inc.,* 152 N.H. 6 (2005) (holding that undocumented worker asserting tort claim for workplace injury could only recover lost wages at the wage level of his country of origin unless he could prove his employer knew about his irregular immigration status at the time of hiring); *Balbuena v. IDR Realty LLC*, 6 N.Y. 3d 338 (N.Y. 2006)(holding that immigration status can be a factor to reduce benefits received by an undocumented worker's family in a wrongful workplace death claim).

[46] Some workplace rights in the United States are governed exclusively by state law. For example, federal anti-discrimination laws only protect employees working for employers who employee at least 15 employees. 42 U.S.C. § 2000e(b). State discrimination laws often protect employees working for employers with fewer employees. *See e.g.* the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et. seq.; New York State Human Rights Law, N.Y. Exec. Law § 296; Mass. Gen. Laws ch. 151B; Elliot-Larsen Civil Rights Act, Public Act 453 of 1976, as amended (Michigan); Pennsylvania Human Relations Act, Act of 1955, P.L. 744, No. 222, as amended June 25, 1997 BY ACT 34 OF 1997, 43 P.S. §§ 951-963.

defendants often seek discovery of immigrant-plaintiffs' immigration status,[47] an action that serves to chill immigrants' willingness to pursue their workplace rights.[48] The result is a tacit condoning of the exploitation of immigrant workers even in areas where these workers have retained enforceable workplace rights.

a) Unequal Application of Discrimination Protections Under Federal Law and New Jersey State Law

Hoffman has had important implications for remedies and rights available to undocumented workers under federal and state anti-discrimination laws. In the United States, the right to be free from discrimination in the workplace is protected through a combination of federal and state laws. Under federal law, Title VII of the federal Civil Rights Act of 1964 protects workers' right to be free from discrimination based on sex, color, race, religion and national origin.[49] However, this federal statute is of limited use to undocumented workers. Indeed, shortly after *Hoffman* was decided, the Equal Employment Opportunity Commission rescinded its previous guidance that established that back pay[50] was available to undocumented victims of discrimination.[51] This action, by the agency charged with enforcement of federal anti-discrimination law, has left victims of discrimination without any guarantees that they will be entitled to the full remedies to which they would otherwise be entitled were they documented. It

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[47] *See e.g. Morejon v. Terry Hinge and Hardware*, 2003 WL 22482036 (Cal. App. 2 Dist., 2003); *de Jesus Uribe v. Aviles*, 2004 WL 2385135 (Cal. App. 2 Dist. 2004); *Veliz v. Rental Service Corporation USA, Inc.*, 313 F.Supp.2d 1317 (2003); *Hernandez-Cortez v. Hernández*, 2003 WL 22519678 (D. Kan. 2003).

[48] *See, e.g., Rivera v. NIBCO, Inc.*, 364 F3d 1057 (9th Cir. 2004), *cert. denied, NIBCO, Inc. v. Rivera,* 544 U.S. 905, (2005) (noting chilling effect on rights enforcement resulting from discovery of immigration status).

[49] 42 U.S.C. § 2000e et. seq.

[50] Back pay is one of a handful of remedies available to an individual who suffers workplace discrimination. The other primary remedies available for a victim of discrimination under federal law are compensatory damages for emotional and physical harm, reinstatement and attorneys fees. Under most circumstances, undocumented workers are not entitled to reinstatement. *See* U.S. Equal Employment Opportunity Commission, *Federal Laws Prohibiting Job Discrimination, Questions and Answers, available at* http://www.eeoc.gov/facts/qanda.html.

[51] *See* U.S. Equal Employment Opportunity Commission, Directive Transmittal, 915-02 (June 27, 2002), *Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws.*

has also given employers seeking to avoid liability reason to believe that immigration status can be used to deter potential plaintiffs from bringing suit.

Moreover, workers employed by entities not covered by federal law rely on state law for protections against discrimination in the workplace. Most states have anti-discrimination laws, many of which are modeled on the federal law, but provide protection to workers employed by employers with fewer than 15 employees.[52]

In at least one state, New Jersey, undocumented workers relying on state law for protection are not only denied remedies for violation of their right to be free from workplace discrimination, but are precluded from asserting that right altogether. The New Jersey Law Against Discrimination (NJLAD) protects individuals working within the state against workplace discrimination.[53] However, the Appellate Division of the New Jersey Superior Court in *Crespo v. Evergo Corp.* [54] held that an undocumented worker who is discriminatorily discharged in violation of NJLAD may not be entitled to assert a claim or collect any damages caused by discriminatory termination, whether constructive or actual. Subsequently, New Jersey's highest court, the New Jersey Supreme Court, refused to review the Superior Court decision, thereby making the Appellate Division's decision the highest court interpretation of the law of the state of New Jersey.[55]

In *Crespo*, the New Jersey court held that an undocumented woman was without a damage remedy where her employer discriminated against her on the basis of her gender by refusing to allow her to return to work following her maternity leave. Analyzing federal

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[52] *See e.g.* the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et. seq.*; New York State Human Rights Law, N.Y. Exec. Law § 296; Mass. Gen. Laws ch. 151B; Elliot-Larsen Civil Rights Act, Public Act 453 of 1976, as amended (Michigan); Pennsylvania Human Relations Act, Act of 1955, P.L. 744, No. 222, as amended June 25, 1997 BY ACT 34 OF 1997, 43 P.S. §§ 951-963. *See also, e.g., supra* n.48.

[53] New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 (2006)

[54] *Crespo v. Evergo Corp.*, 366 N.J. Super. at 399.

[55] *See Crespo*, 180 N.J. 151.

immigration policy, the court stated that strong enforcement policies served by IRCA require such a result, and concluded that IRCA was a statutory bar that preempted the state labor protections.[56] Citing to *Hoffman*, the New Jersey court explained that where the "governing workplace statutory scheme makes legal employment a prerequisite to its remedial benefits, a worker's illegal alien status will bar relief"[57] in discriminatory discharge cases not involving aggravated sexual harassment and other discrimination in the course of employment. Furthermore, the New Jersey court stated that it saw "no basis for distinguishing [the plaintiff's] related non-economic damages [from her economic damages] and conclude[s] they, too, are barred."[58]

b) Provision of Workers Compensation Benefits and Other Relief Following Workplace Injuries

Hoffman has also been relied upon to limit remedies available to undocumented workers injured in the workplace. Workers' compensation is an exclusively state-based 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 most states in the United States, the workers' compensation system serves as a substitute for claims brought in tort. Some states, such as New York, also allow individuals who suffer harm in the workplace to sue their employer for injuries caused by the employer's negligence.

Since *Hoffman*, a number of state courts have held that undocumented immigrants' rights to certain workers' compensation benefits are limited by their immigration status, and in some

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[56] *Crespo*, 366 N.J. Super at 394.
[57] *Id.* at 399-400 (citing to a 1978 case, *Bastas v. Board of Review in Dept. of Labor & Industry*, 155 N.J. Super 312 (N.J. Super. A.D. 1978), decided before the IRCA made employment of undocumented workers illegal).
[58] *Id.* at 394.

states where an individual may sue in tort for injury or wrongful death, those benefits have also been limited. In addition, in some states, procedural and other barriers have blocked unauthorized workers' access to workers' compensation.

(1) Pennsylvania

In Pennsylvania, undocumented immigrant workers' equal access to compensation for disability payments have been limited by a decision of that state's highest court. In *Reinforced Earth Co. v. Workers' Compensation Appeal Bd. (Astudillo)*,[59] a worker employed as a maintenance helper suffered a concussion, head injury and back strain and sprain when he was injured on the job. He was initially awarded compensation for total disability, as well as medical expenses. On appeal, the employer argued that the worker's immigration status made him ineligible for workers' compensation, an argument the Court rejected. However, the Court agreed that the employer could apply for suspension of permanent partial disability payments based on the worker's status on the theory that an unauthorized worker's loss in earnings is due to his or her status rather than work-related injury. Under Pennsylvania law, when an employer or its insurer wants to terminate or otherwise modify disability benefits, the employer or insurer must show medical evidence of a change in condition, plus evidence of referrals to a job the worker can perform. In *Reinforced Earth*, the Court held an employer of an unauthorized immigrant need not show that there are jobs available to the worker.[60] This is so even if the employer does not show that it investigated immigration status at the time that it hired a worker.[61]

Reinforced Earth has left Pennsylvania's thousands of unauthorized immigrants without an effective safety net when they are injured on the job and left with a long-term or permanent

[59] 570 Pa. 464 (2002).
[60] *Id.* at 479.
[61] *Id.* at 472.

partial disability. In practice, individuals are often released for work with limitations prescribed by the treating doctor or the workers' compensation insurance carrier's physician on the kind of work they can perform, limiting that work to "light duty" or sedentary work. As described above, however, the jobs that undocumented immigrants fill in the United States mostly demand physical labor, and despite their release to work, these workers cannot find work available that does not exceed their physical capabilities. As a result, undocumented immigrants in Pennsylvania suffer from both the long-term work-induced disability, as well as the financial hardship that follows when their benefits are cut short. They are forced to settle their claims for far less than they would have been entitled, and they are unable to find a job that will allow them to continue to support themselves and their families.[62]

(2) Michigan

In Michigan, injured workers' access to workers' compensation benefits has been similarly limited in *Sanchez v. Eagle Alloy*.[63] In *Sanchez*, 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 workers sustained these injuries, the employer received a letter indicating that the two did not have social security numbers. Both men were fired and the employer defended the workers' compensation claims on the basis that they were undocumented workers from Mexico. Based on *Hoffman*, and under a state law that disallows time loss benefits to those workers who are unable to "obtain or perform work" because of commission of a crime, the court suspended wage loss benefits because the workers had used false documents in order to

[62] *See* Declarations of Leopoldo Z., Juan C.A., Andrew Touchstone and James Monaghan, Exhibit A(2).
[63] *Sanchez v. Eagle Alloy Inc.*, 254 Mich. App. 651 (Mich. Ct. App. 2003) *cert. denied Sanchez v. Eagle Alloy, Inc.*, 471 Mich. 851 (Mich. 2004). By refusing to review the decision of the Michigan Court of Appeals, the Michigan Supreme Court sanctioned that decision and made that decision the state law interpretation of the highest judicial body in the State of Michigan.

get a job.[64] Benefits were suspended from the time that the workers' status was discovered, which was after their workplace accidents.[65]

After *Sanchez*, undocumented workers in Michigan suffering job-related injuries can expect their employers to raise their immigration status and to successfully use it to deny them the same remedies as their documented counterparts. As a result, the approximately 150,000 undocumented immigrants working in agriculture, construction, and similarly dangerous jobs in Michigan are left without compensation for the time they are unable to work due to their injury.[66] While medical coverage remains available to individuals, employers are rewarded for suddenly "discovering" a worker's unauthorized status when an injury occurs. In this way, such employers avoid the impact on their workers' compensation premium caused by a workplace accident.

(3) Kansas

In Kansas, authorities have erected procedural barriers to undocumented workers' access to workers' compensation injuries. The highest state court, the Kansas Supreme Court, has held that a worker who submitted a false name and Social Security Number on her application for workers' compensation had committed a "fraudulent or abusive act" within the meaning of the Kansas workers' compensation law, and could be sanctioned for that act. This was so even though the worker had made no false claim for benefits and was entitled to them under Kansas law.[67] At the same time, an Assistant U.S. Attorney in Wichita, Kansas has made public a disturbing practice: employers, insurance companies and others take steps to verify a worker's

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[64] Time loss benefits are benefits that are paid to compensate an individual for time lost from work due to a work-related injury.
[65] *Sanchez,* 254 Mich. App. at 671-72.
[66] Ted Roelofs, *Undocumented Workers at Center of Growing Debate*, THE GRAND RAPIDS PRESS, Jan. 24, 2004, (citing a study by the Urban Institute).
[67] *Doe v. Kansas Dept. of Human Resources*, 277 Kan. 795 (Kan. 2004).

immigration status after a claim is made and refer those cases to his office, which then prosecutes injured workers for document fraud, resulting in their deportation and inability to pursue workers' compensation claims.[68] As a result, undocumented workers in Kansas who have the temerity to file a workers' compensation claim may find themselves prosecuted and deported.

Because of the apparent cooperation between the employers, workers' compensation insurance carriers and the U.S. Attorney's office, workers who are injured on the job are at risk of being denied benefits to which the Kansas Supreme Court has said they are entitled. The prosecution and subsequent deportation of workers who seek compensation for workplace injuries makes it a practical impossibility for them to pursue their claims for benefits. They are unable to follow through with medical examinations and they are not present for any adjudicative hearings, resulting in the high probability of their claims being denied.[69]

(4) New York

Since *Hoffman*, there have been a series of cases in the state of New York concerning whether, under state law, undocumented immigrant workers are precluded from collecting lost earnings in claims for wrongful workplace deaths. In February of 2006, in *Balbuena v. IDR Realty*, the highest court in New York – the New York Court of Appeals – indicated that after *Hoffman*, an immigrant worker's immigration status may be one factor in determining the amount of future lost wages that the worker's family may receive.[70]

In *Balbuena*, a worker was injured on a construction site, sustaining severe head trauma that left him incapacitated. The employer determined in the litigation that he did not have work authorization in the United States, and thus claimed that after *Hoffman*, he was not entitled to any

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[68] *See* BRENT I. ANDERSON, THE PERILS OF U.S. EMPLOYMENT FOR FALSELY DOCUMENTED WORKERS (AND WHATEVER YOU DO, DON'T FILE A WORK COMP CLAIM), paper submitted to American Bar Association, Labor and Employment Law Workers' Compensation Committee Midwinter Meeting (March, 2006).
[69] *See* Declaration of Michael Snider, Esq., attorney for Petitioner Francisco Berumen Lizalde, Exhibit A(4)(i).
[70] *Balbuena v. IDR Realty LLC*, 6 N.Y. 3d 338.

lost wages. The New York Court of Appeals held that a worker's mere illegal presence in the country does not per se preclude him or her from recovering lost wages. However, it also indicated that a plaintiff's lack of work authorization was one factor that a jury may consider in determining the amount of an award for lost future wages to be paid to an undocumented worker.[71] Thus workers in New York who file claims for injuries may be forced to disclose their immigration status in court. At best, they will suffer unequal remedies. At worst, they may be exposed and deported, or may be entirely dissuaded from coming forward to enforce their rights in the first place.[72]

III. PETITIONERS

Petitioners are individuals who have been affected directly by the United States' denial of equal rights based on immigration status in their efforts to enforce their employment and labor rights either under federal or state law. Petitioners also include national and local organizations who join individual Petitioners on behalf of their undocumented immigrant membership who are denied equal protection under the labor and employment laws of the United States solely because of their immigration status.

A. Individual Petitioners

All but one of the individual Petitioners request, in accordance with Rule 28 of the Commission's Rules of Procedure, to appear anonymously and request that their identity be withheld from the U.S. government.

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[71] The New York Court stated that a worker could show, for example, that he or she was in the process of receiving work authorization and that his or her future earnings would therefore not be affected by past undocumented status. However, if the defendant employer presents evidence that a worker continues to lack work authorization, the jury could also take that evidence into account in determining the amount of damages. *Id.* at 361.

[72] *See e.g.* Sanjay Bhatt, *Home-building boom relies on illegal workers*, SEATTLE TIMES, Sep. 19, 2006 (recounting story of injured construction worker whose status was divulged in workers' compensation proceeding, and then was deported).

Melissa L. is a Chinese national who was employed at a business in New Jersey and paid below minimum wage while required to work over sixty hours per week.[73] During the course of her employment, Ms. L. was a victim of sexual harassment by co-workers, who hit and touched her against her will, and made humiliating and menacing sexually explicit comments. After Petitioner complained to management about these actions, the treatment became worse and the managers (despite being aware of and even witnessing several of the egregious actions) refused to take any action. Eventually, Ms. L. resigned because of the intolerable working conditions. Melissa L. filed charges for discrimination with the EEOC under federal and state law. However before any determination was made as to her claim, she accepted a settlement offered by her employer rather than pursue the full amount of damages[74] she would have been entitled to had she been documented because of the *Crespo* and *Hoffman* decisions.[75]

Leopoldo Z is a Mexican national who fractured his leg when he fell out of a tree while picking apples in Pennsylvania. He had to endure three separate surgeries, to insert a metal plate and six screws in his ankle and leg, and to try to repair torn ligaments. He continues to suffer from nerve damage and chronic regional pain disorder. Mr. Z's employer initially paid his medical benefits, but when it became clear he would not be able to promptly return to work, his employer indicated his benefits would be suspended. Although the treating physician had told Mr. Z his case was among the worst he had seen, he was deemed physically able to return to sedentary work.[76] However, there was no work available for him with his physical limitations, so Mr. Z sought compensation for his workplace injury. Because of his immigration status, Mr.

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[73] With the exception of Francisco Berumen Lizalde, all individual Petitioners' names have been withheld because they wish to submit an anonymous Petition.
[74] The financial terms of Ms. L's settlement with her employer is confidential under the agreement between the parties.
[75] *See* Declaration of Melissa L., Exhibit A(1) and Affidavit of Chinese Staff and Workers Association, Exhibit A(8).
[76] *See* Declarations of Leopoldo Z and Andrew Touchstone, attorney for Mr. Z, Exhibits A(2) and A(2)(i).

Z was not entitled to wage loss benefits from the time he was released for sedentary work and was forced to accept a settlement of his claim for far less than he would have received if he had been documented.

Jesus L is a Mexican national who worked at a chicken farm in Michigan. He was severely injured in 2004 when he fell through an open trap door in a chicken house onto a cement floor, fracturing both his ankle and his spine. Mr. L spent over six months unable to work. He walked with difficulty and wore a back brace for several months, after undergoing spinal reconstruction surgery. After Mr. L's injury, he filed a workers' compensation claim. However, the employer's insurance company determined that the social security number Mr. L had used to get his job was not valid and consequently Mr. L's time loss benefits were suspended. He and his wife made ends meet by borrowing from a retirement plan and from friends. To date, they have not been able to repay the money they borrowed. Mr. L still suffers from pain and from an inability to fully perform all functions of his job as a janitor.[77]

Francisco Berumen Lizalde is a worker from Mexico who was employed as a painter in Wichita, Kansas. In November of 2005, he fell from scaffolding and fractured his hand. After filing for workers' compensation benefits, and just before a doctor's visit in December 2005 to determine the extent of his disability, he was arrested and charged with "document fraud," for having used false documents to get a job. He believes that he was turned in to immigration authorities because he filed a claim for workers' compensation. He was deported in February 2006. Mr. Lizalde subsequently retained a workers' compensation attorney who is seeking to preserve his right to workers' compensation benefits, knowing it will be almost impossible to do so without Mr. Lizalde's physical presence in Kansas. In sum, Mr. Lizalde has been unable to secure the care to which he is entitled under Kansas law, was jailed for more than a month, was

[77] *See* Declaration of Jesus L and his attorney Mike Gardiner, Exhibit A(3).

convicted of a felony, and deported, and has been effectively denied his right to the benefits to which he is legally entitled.[78]

Yolanda LR is a Mexican immigrant whose husband's immigration status will affect her recovery for his workplace death. Ms. LR's husband was killed on the job in New York in 2001. Ms. LR's husband's employer has been found criminally responsible for causing her husband's untimely death. While a wrongful death claim has been filed on her behalf, and the employer has been found liable for causing her husband's death, Ms. LR has been forced to disclose both her own immigration status and that of her deceased husband. Neither had work authorization, nor did they have any prospects of obtaining work authorization at the time of his death. Ms. LR remains in the United States, far from her family, awaiting a trial for the wrongful death claim. Ms. LR fears that she will be deported as a result of filing her claim.[79]

B. National Organizational Petitioners

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a voluntary federation of 53 national and international labor unions, representing nearly 9 million working women and men of every race and ethnicity and from every walk of life in the United States, both native-born, documented and undocumented immigrants. Members of AFL-CIO affiliated unions are construction workers, teachers and truck drivers, musicians and miners, firefighters and farm workers, bakers and bottlers, engineers and editors, pilots and public employees, doctors and nurses, painters and laborers-and more. The AFL-CIO's mission is to protect labor standards in the United States. Members of the AFL- CIO unions are affected by *Hoffman*'s denial of remedies to undocumented workers. *Hoffman* has had a demonstrable

[78] *See* Declaration of Mr. Lizalde and his attorney Mike Snider, Exhibit A(4).
[79] *See* Declaration of Yolanda L.R., Exhibit A(5).

chilling effect on workers' attempts to join and form unions, and in unionized workers' attempts to exercise their rights under collective bargaining agreements.

A recent case brought by a union in the United States illustrates the effect of *Hoffman* on freedom of association in the U.S. An arbitrator decided that a number of immigrant workers had been unlawfully fired. Just before a hearing, the employer's lawyer informed the union's lawyer that he had already called the Department of Homeland Security (DHS), and that he had informed DHS of the time and place of the hearing and that the hearing involved workers whom the employer believed to be unauthorized. The arbitrator ordered reinstatement of the workers in October of 2006. The employer's lawyer responded to the arbitrator's decision by saying that immigration authorities had conducted an audit, and had determined that the workers lacked authorization to work in the United States. The employer's lawyer then refused to comply with the arbitration award. Last week, the five workers were arrested at their homes on immigration charges.[80]

The United Mine Workers of America (United Mine Workers) is an international union representing coal miners, clean coal technicians, health care and public service workers, employees in manufacturing and other employees in the United States and Canada. Workers whom the United Mine Workers have tried to organize, including immigrant workers employed at a coal mine in Utah, have been adversely affected as described in this Petition.

For example, in November 2004, C.W. Mining Company doing business as Co-Op Mine, required 29 undocumented employees who supported the United Mine Workers Union to re-verify their immigration status, or be fired.[81] When they were unable to do so, Co-Op Mine fired

[80] *See* Affidavit of AFL-CIO, Exhibit A(9).

[81] Under the Immigration Reform and Control Act, to determine eligibility of employment at the time of hire, employers need only accept documents that appear on their face to be genuine and to relate to the individual named. 8 U.S.C. § 1324a(b)(1)(A). Once workers complain about working conditions or file injury claims, employers often

these workers in retaliation for their activities in support of the union and to discourage other undocumented employees from engaging in concerted activities. Even though the union had substantial evidence and was prepared to prove that the company had violated the workers' rights, the union was forced to settle their claims without back pay, because, as discussed above, undocumented workers are not entitled to back pay after *Hoffman.*[82]

The Inter-Faith Worker Justice was founded in 1996 to educate and mobilize the U.S. religious community on issues and campaigns to improve wages, benefits, and working conditions for workers, especially low-wage workers. Inter-Faith Worker Justice's 15 workers' centers provide safe havens where workers – who are often immigrants – can gather, learn about their rights, and plan ways to improve their working conditions.

Because of the vulnerability and common exploitation of undocumented immigrant workers in this country, many workers Inter-Faith Worker Justice works with face discrimination in the workplace. In the current political climate, Inter-Faith Worker Justice yearly finds thousands of cases where unscrupulous employers will not pay workers, file taxes, register health and safety violations, or even report a death on the job because of a worker's illegal status. Unfortunately, many workers who use Inter-Faith Worker Justice's centers are fearful of engaging in the legal process to assert their rights because they fear the consequences of doing so, and appreciate that their rights may be severely curtailed in any event. As recently as 30 days ago, one of Inter-Faith Worker Justice's affiliates was contacted by a woman worker who had been burned while on the job. Her employer would not provide workers' compensation and

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ask workers to prove again that they are authorized to work, in violation of 8 U.S.C. § 1324b(a)(6), and employers may make use of Social Security Administration and other databases to ascertain the workers' immigration status. This, in turn, provides an excuse for the employer to fire the worker, ostensibly because the employer may face penalties under the immigration law.

[82] *See* Affidavit of United Mine Workers of America, Exhibit A(6).

threatened to fire her. The worker is without income and without workers' compensation, but too afraid to file a complaint against her employer. [83]

The Chinese Staff & Workers Association (CSWA) is a non-governmental workers' center that represents workers in the restaurant, construction, garment, and other industries primarily in the New York and New Jersey area. CSWA has a membership of over 1,300 workers of various trades and ages, some of which have documented and others undocumented status. CSWA works to improve living and working conditions for its members, regardless of their immigrations status. Some CSWA members have successfully asserted their rights to be free from discrimination and exploitation in the workplace. However, because of the limitations on the rights and remedies available to undocumented workers, others have either been too afraid to pursue a claim or have settled their case for less than they would have been entitled had they been documented.

IV. ADMISSIBILITY

A. Petitioners Have Properly Exhausted Domestic Remedies

For this Petition to be found admissible, domestic remedies must have been pursued and exhausted.[84] Exhaustion is not required, however, where domestic legislation "does not afford due process of law for protection of the right or rights that have been alleged to have been violated."[85] The Commission has interpreted this provision to require that available domestic remedies "be both adequate, in the sense that they must be suitable to address an infringement of a legal right, and effective, in that they must be capable of producing the result for which they

[83] *See* Affidavit of Interfaith Worker Justice, Exhibit A(7).
[84] Inter-Am. C.H.R., Rules of Procedure of the Inter-American Commission on Human Rights, approved by the Commission at its 109° special session held from December 4 to 8, 2000, amended at its 116th regular period of sessions, held from October 7 to 25, 2002 and at its 118th regular period of sessions, held from October 7 to 24,2003.
[85] *Id.*, Art. 31(2)(a).

were designed."[86] In other words, the only legal remedies that need be exhausted are those which are "available, appropriate and effective for solving the presumed violation of human rights."[87] And, "when, for factual or [....] legal reasons, domestic remedies are unavailable, the Petitioners are exempted from the obligation of exhausting same."[88] The Commission has also held that "if the exercise of the domestic remedy is such that, on a practical basis, it is unavailable to the victim, there is certainly no obligation to exhaust it, regardless of how effective in theory the action may be for remedying the allegedly infringed legal situation."[89] Following this rationale, the Commission in *Salas and Others. v. United States,* for example, found that the Petitioners had "no appropriate possibility of redress" because any attempts to secure access to courts in the United States was unlikely to prevail due to sovereign immunity and Article VIII(2) of the Panama Canal Treaty, which granted U.S. officials immunity from suit in Panamanian courts.[90]

Art. 31(2) (b) of the Commission's Rules of Procedure also renders exhaustion of domestic remedies inapplicable where the Petitioner "has been denied access to the remedies under domestic law or has been prevented from exhausting them."[91] The Court has interpreted this exception to apply in situations where "there is proof of the existence of a practice or policy ordered or tolerated by the government, the effect of which is to impede certain persons from

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[86] *Tracy Lee Housel v. United States*, Case 129/02, Inter-Am. C.H.R., Report No. 16/04, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 ¶ 31 (2004); See also, *Gary T. Graham (Shaka Sankofa) v. United States*, Case 11.193, Inter-Am. C.H.R., Report No. 97/03, OEA/Ser./L/V/II.114 Doc. 70 rev. 1 ¶ 55 (2003); *Ramón Martinez Villareal v. United States*, Case 11.753, Inter-Am. C.H.R., Report No. 52/02, Doc. 5 rev. 1 ¶ 60 (2002); Velasquez Rodriguez Case, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988) ¶ 64-66.

[87] *Elias Gattass Sahih v. Ecuador*, Case 1/03, Inter-Am. C.H.R., Report No. 9/05, OEA/Ser.L/V/II.124 Doc. 5 (2005), ¶ 30.

[88] *Id.* (interpreting exhaustion requirements under Art. 46 of the American Convention on Human Rights).

[89] *Id.* (emphasis added). *See also, Akdivar and Others v. Turkey*, Eur. Ct. H.R., 21893/93, ¶ 66 (1996) (finding that "[t]he existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness").

[90] *Salas and others v. United States,* Case 10.573, Inter-Am.C.H.R., Report No. 31/93, OEA/Ser.L/V/II.85 Doc. 9 rev. at 312 (1994).

[91] Rules of Procedure of the IACHR, Art. 31(2)(b).

invoking internal remedies that would normally be available to others."[92] The Commission, in applying this rationale, found that where the petitioner demonstrated that she was denied access to evidence and to witnesses in a manner that prejudiced her in domestic proceedings, the requirement of exhaustion of domestic remedies did not apply.[93]

As discussed in Part II, U.S. courts, including the U.S. Supreme Court and courts in the states in which Petitioners reside, have consistently rejected claims brought by undocumented immigrant workers in situations identical to those in which the individual Petitioners here find themselves. Consequently, as set forth below, Petitioners were precluded from securing adequate and effective remedies for violation of rights protected by the American Declaration at the domestic level. In sum, all attempts by Petitioners to fully exhaust their domestic remedies would be futile, rendering the exhaustion requirement inapplicable.

Petitioner Melissa L was a victim of sexual harassment by co-workers, who hit and touched her against her will and made humiliating and menacing sexually explicit comments. Eventually, Ms. L resigned because of the intolerable working conditions and filed charges with a New Jersey area office of the Equal Employment Opportunity Commission, which investigates allegations under both federal and New Jersey state discrimination law. Ms. L sought damages for the sexual harassment she experienced which under federal and state law is considered a form of unlawful gender discrimination. However, in light of the *Hoffman* and *Crespo*[94] decisions, Ms. L, on the advice of her attorney, settled her claims rather than pursue the full range of damages she would have been entitled to had she possessed valid documentation. Ms. L settled

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[92] *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988) ¶ 68; *Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights*, Advisory Opinion OC-11/90, Inter-Am.Ct.H.R. (Ser. A) No. 11 ¶¶ 17, 34.
[93] *Myrna Mack v. Guatemala,* Case 10.636, Inter-Am.C.H.R., Report No. 10/96, OEA/Ser..L/V/II.91, Doc. 7 rev. (1996) ¶¶ 40-45.
[94] *Crespo*, 366 N.J. Super. at 399.

her claim on May 1, 2006. Because as set forth in *Crespo,* New Jersey law takes into account immigration status in denying rights and remedies to undocumented workers, it would have been futile for Petitioner Melissa L to pursue her case under state law any further.[95]

Petitioner Leopoldo Z was severely injured in the course of his employment at an apple orchard in Pennsylvania. Petitioner filed a workers' compensation claim under Pennsylvania state law. In view of *Reinforced Earth,*[96] Petitioner's attorney advised his client to settle his claim for significantly less than he would have been entitled under U.S laws had he been documented.[97] Following this advice, Mr. Z settled his claim in August 2006. Because the highest court in the state takes immigration status into account in denying full workers' compensation benefits to undocumented workers, it would have been futile for Petitioner Leopoldo Z to pursue his claims further and thereby exhausting domestic remedies potentially available to him

Petitioner Jesus L was severely injured in the course of his employment at a poultry farm in Michigan. Petitioner filed a workers' compensation claim under Michigan state law. As a consequence of *Sanchez,*[98] Petitioner's time loss benefits were cut off once his employer discovered he had used a false social security number on his job application. These benefits were restricted even though Petitioner was only able to perform light duty work, work which was not available to him. Because Jesus L continued to be restricted in his work activities, his attorney believes he would likely still be receiving time loss benefits, were it not for the *Sanchez* decision restricting time loss benefits for undocumented workers. Because the Michigan courts take

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[95] Though no determination was made as to whether Petitioners were protected by federal law, Petitioners and their attorney were of the reasonable belief that even if they did meet jurisdictional prerequisites under federal anti-discrimination law it would have been futile to seek back pay remedies in light of *Hoffman.*

[96] *Reinforced Earth,* 570 Pa. 464.

[97] This legal advice has similarly been issued by James Monaghan, an attorney specializing in Pennsylvania workers' compensation law. See Declaration of James Monaghan, Exhibit A(2)(ii).

[98] *Sanchez,* 254 Mich. App. 651.

immigration status into account in denying full workers' compensation benefits to undocumented workers, it would be futile for Petitioner Jesus L to exhaust domestic remedies potentially available to him.

Petitioner Francisco Berumen Lizalde was deported from the United States in February 2005 before he could file a workers' compensation claim and thereby exhaust his domestic remedies. His deportation effectively prevented him from exhausting remedies available to him and thus satisfying the requirements of Article 31(2)(b) of the Commission's Rules of Procedure.[99] By removing Petitioner from the United States, the government prevented him from pursuing his workers' compensation claim and exhausting available domestic remedies. Pursuing such claims from outside of the country would prove extremely burdensome, costly, and logistically difficult.

Petitioner Yolanda LR filed a wrongful death claim on behalf of her deceased husband following his workplace death in Brooklyn, New York in April 2001. As a result of *Balbuena,*[100] Petitioner was required to disclose her undocumented immigration status as well as that of her husband's at the time of his death. While Petitioner's claim is technically pending, after *Balbuena*, any recovery for her husband's death will undoubtedly be diminished as a consequence of his undocumented status. Because the highest state court takes immigration status into account in denying wrongful death benefits to undocumented workers, it would be futile for Petitioner Yolanda LR to fully exhaust domestic remedies potentially available to her.

Petitioner United Mine Workers of America was involved in efforts to organize employees of C.W. Mining Company at the Co-Op Mine, near Price, Utah, approximately 75 of whom were of Latino origin, some of whom were undocumented. The company's retaliatory

[99] Specifically, Art. 31(2)(b) provides that exhaustion is not required where: the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them."
[100] *Balbuena*, 6 N.Y. 3d 338.

actions throughout the campaign resulted in the filing of several unfair labor practice charges with the National Labor Relations Board, culminating in a Complaint issued by the NLRB's General Counsel in December 2005 in which he alleged the Company's investigation into its employees' immigration status, its requirement for new work authorization paperwork, and its termination of, and refusal to rehire, employees were unlawful activities intended to discourage employees from exercising their rights to freedom of association. The NLRB hearing was scheduled for May 2006, but in light of *Hoffman*, and its impact on back pay, the UMWA General Counsel concluded most of the fired workers would not be entitled to back pay and settled its charges against the company. Consequently, only two of the thirty-five employees who had lost up to seventeen months of work were awarded back pay.

Petitioner AFL-CIO brings this petition on behalf of its affiliates, including the United Mine Workers, and their members. The affiliates and members of the AFL-CIO have been and continue to be harmed by *Hoffman* and its progeny, either because members have been denied remedies when fired for engaging in lawful workplace organizing, or because undocumented workers are too afraid and reluctant to participate in union organizing. In a recent example, members of one of the AFL-CIO's affiliates were denied rights under their collective bargaining agreement. The employer then used the workers' undocumented status as the basis for refusing to comply with the resulting arbitration award. Five of the employees were subsequently arrested by immigration authorities.

Petitioners Inter-Faith Worker Justice and Chinese Staff and Workers Association appear on behalf of themselves, as well as their members. As with the AFL-CIO and the United Mine Workers, Petitioners encounter insurmountable fear as a barrier towards lawful workplace organizing, and can no longer provide assurances to undocumented members that they are

entitled to the same rights and remedies as documented workers post-*Hoffman*. In addition, because of *Hoffman* and its impact on labor law enforcement, individual members represented by Petitioners are either too afraid to pursue their remedies or have settled their cases for less than they would have been entitled to had they been documented.

B. Petitioners Have Presented This Petition Within Six Months of the Exhaustion of Domestic Remedies or Within A Reasonable Period Thereof

Article 32(2) of the Commission's Rules of Procedure requires that a Petition be brought within six months following the date the victim has been notified of the decision that exhausted domestic remedies. Alternatively, where an exception to the exhaustion requirement applies, a Petition must be "presented within a reasonable period of time."[101] Here, for the reasons set forth below, Petitioners satisfy these timeliness requirements.

Petitioners brought this Petition at the first opportunity after learning of the existence of their rights under the American Declaration, learning of the jurisdiction of this Commission, and obtaining the support of counsel to bring this Petition. Petitioners believe that the circumstances render their Petition timely. As detailed above, their filings in state and federal court also demonstrate Petitioners' *bona fide* efforts to challenge the alleged violation of their rights at the domestic level, despite the unavailability of an effective remedy.

1. Petitioners Who Have Filed Within Six Months of Having Exhausted Domestic Remedies

a) Petitioner Melissa L

Petitioner Melissa L has diligently and timely sought appropriate domestic remedies both at the federal and state levels seeking redress for violation of her rights to be free from employment and gender discrimination. She did not pursue her lawsuit further, settling for an amount significantly less than she would have secured had she been authorized to work. The

[101] Art. 32(2).

date of Petitioner's settlement was May 1, 2006. She submits this Petition within six months of this settlement date.

b) Leopoldo Z

Petitioner Leopoldo Z diligently and timely sought appropriate domestic remedies at the state level seeking compensation for workplace injury. In August 2006, Petitioner Leopoldo accepted a settlement for far less than he would have received had he been authorized to work. Petitioner submits this Petition within six months of this settlement date.

c) United Mine Workers of America

Petitioner United Mine Workers of America diligently and timely sought appropriate domestic remedies on behalf of its prospective members through the administrative agency charged with enforcing the rights contained under the National Labor Relations Act. Because of the futility in pursuing the claim in light of *Hoffman*, Petitioner settled the claim in May 2006, and submits this Petition within six months of this date.

2. Petitioners Who Have Filed Within a Reasonable Time of Having Exhausted Domestic Remedies

a) Petitioner Jesus L

Petitioner Jesus L diligently and timely sought appropriate domestic remedies at the state level seeking compensation for his workplace injury. Although his wage loss benefits were suspended when he was released to "light duty" in June 2005, and further benefits were not sought, Petitioner Jesus L has demonstrated that it would have been futile for him to have done so, and submits this Petition within a reasonable time.[102]

[102] *Ana, Beatriz, and Celia Gonzalez Perez v. Mexico*, Case 11.565, Inter-Am. C.H.R., Report No. 129/99, OEA/Ser.L/V/II.106 doc. 3 rev. at 232 (1999) ¶¶ 29-30 (where five years had lapsed, but where Petitioner's demonstrated pursuit of domestic remedies was futile, the Commission held "Due to the application of Article 46(2)(b) of the American Convention of this case, it is not necessary to analyze the requisite established in Article 46(1)(b) of that international instrument" and found Petition filed within a reasonable time).

b) Petitioner Francisco Berumen Lizalde

Petitioner Francisco Berumen Lizalde diligently and timely sought appropriate domestic remedies at the state level seeking compensation for his workplace injury. Although his claim for domestic remedies is still pending, Petitioner has demonstrated it will be futile for him to do so, and submits this Petition within a reasonable time.[103]

c) Petitioner Yolanda LR

Petitioner Yolanda LR diligently and timely sought appropriate domestic remedies at the state level seeking compensation for her husband's workplace death. During the course of the litigation, Petitioner was required to reveal both her immigration status, and that of her husband. Although her claim for compensation is still pending, Petitioner has demonstrated that because of state law she will undoubtedly receive less than that which she is entitled to because of her immigration status, and submits this Petition within a reasonable time.

C. There Are No Parallel Proceedings Pending

Article 33 of the Rules of Procedure renders a Petition inadmissible if its subject matter "is pending settlement pursuant to another procedure before an international governmental organization . . . or, . . . essentially duplicates a Petition pending or already examined and settled by the Commission or by another international governmental organization . . . ."[104] The subject of this Petition is not pending settlement and does not duplicate any other Petition in any other international proceeding.

D. The American Declaration Is Binding on the United States

As the United States is not a party to the Inter-American Convention on Human Rights ("American Convention"), it is the Charter of the Organization of American States ("OAS

[103] *Id.*
[104] Art. 33(1).

Charter") and the American Declaration that establish the human rights standards applicable in this case. Signatories to the OAS Charter are bound by its provisions,[105] and the General Assembly of the OAS has repeatedly recognized the American Declaration as a source of international legal obligation for OAS member States including specifically the United States.[106] This principle has been affirmed by the Inter-American Court, which has found that the "Declaration contains and defines the fundamental human rights referred to in the Charter,"[107] as well as the Commission, which recognizes the American Declaration as a "source of international obligations" for OAS member States.[108]

Moreover, the Commission's Rules of Procedure establish that the Commission is the body empowered to supervise OAS member States' compliance with the human rights norms contained in the OAS Charter and the American Declaration. Specifically, Article 23 of the Commission's Rules provides that "[a]ny person . . . legally recognized in one or more of the Member States of the OAS may submit Petitions to the Commission . . . concerning alleged violations of a human right recognized in . . . the American Declaration. . . ,"[109] and Articles 49 and 50 of the Commission's Rules confirm that such Petitions may contain denunciations of

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[105] Charter of the Organization of American States, 119 U.N.T.S. 3, *entered into force* December 13, 1951; amended by Protocol of Buenos Aires, 721 U.N.T.S. 324, O.A.S. Treaty Series, No. 1-A, *entered into force* Feb. 27, 1970; amended by Protocol of Cartagena, O.A.S. Treaty Series, No. 66, 25 I.L.M. 527, *entered into force* Nov. 16, 1988; amended by Protocol of Washington, 1-E Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add. 3 (SEPF), 33 I.L.M. 1005, *entered into force* September 25, 1997; amended by Protocol of Managua, 1-F Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add.4 (SEPF), 33 I.L.M. 1009, *entered into force* January 29, 1996. *See also James Terry Roach and Jay Pinkerton v. United States*, Case 9647, Inter-Am. C.H.R., Res. 3/87, 147 OES/Ser.L/VII/71, doc. 9, rev. 1 (1987), ¶ 46.

[106] *See, e.g.*, OAS General Assembly Resolution 314 (VII-0/77) (June 22, 1977) (charging the Inter-American Commission with the preparation of a study to "set forth their obligation to carry out the commitments assumed in the American Declaration of the Rights and Duties of Man).

[107] *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶¶ 43, 45 (July 14, 1989).

[108] *See e.g., Hector Geronimo Lopez Aurelli (Argentina),* Case 9850, Inter-Am. C.H.R., Report No. 74/90, OEA/Ser.L/V/II.79, doc. 12 rev.1 (1990), ¶ III.6 (quoting Inter-Am. Court H.R., Advisory Opinion OC-10/89, ¶ 45); *See also Mary and Carrie Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, Doc. 5 rev. 1 at 860 (2002), ¶ 163 (2002).

[109] *Rules of Procedure* , Art. 23 (2000).

alleged human rights violations by OAS member States that are not parties to the American Convention on Human Rights.[110] Likewise, Articles 18 and 20 of the Commission's Statute specifically direct the Commission to receive, examine, and make recommendations concerning alleged human rights violations committed by any OAS member State, and "to pay particular attention" to the observance of certain key provisions of the American Declaration by States that are not party to the American Convention, including, significantly, the right to equality before law, protected by Article II.

Finally, the Commission itself has consistently asserted its general authority to "supervis[e] member states' observance of human rights in the Hemisphere," including those rights prescribed under the American Declaration, and specifically as against the United States.[111]

In sum, all OAS member States, including the United States, are legally bound by the provisions contained in the American Declaration. Here, Petitioners have alleged violations of the American Declaration and the Commission has the necessary authority to adjudicate them.

V. THE COMMISSION'S INTERPRETIVE MANDATE

The Inter-American Commission, the Inter-American Court, as well as other international tribunals have consistently concluded that international human rights instruments should be construed in light of the developing standards of human rights law articulated in national, regional, and international frameworks. For instance, in 1971, the International Court of Justice

[110] *Id.*, Arts. 49, 50. (2000).

[111] Detainees in Guantánamo Bay, Cuba, Request for Precautionary Measures, Inter-Am. C.H.R. (March 13, 2002) at 2. *See also James Terry Roach and Jay Pinkerton v. United States*, Case 9647, ¶¶ 46-49 (affirming that, pursuant to the Commission's statute, the Commission "is the organ of the OAS entrusted with the competence to promote the observance of and respect for human rights").

declared that "an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation."[112]

More recently, the Inter-American Court, in taking into account the relationship between the American Convention and the American Declaration, cited this principle in its ruling that "to determine the legal status of the American Declaration it is appropriate to look to the inter-American system of today in light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948."[113] In 1999, the Court again articulated the significance of preserving an "evolutive interpretation" of international human rights instruments within the broad system of treaty interpretation brought into being in the Vienna Convention.[114] Adhering to this analysis, the Court concluded that the U.N. Convention on the Rights of the Child (CRC), an international instrument ratified by almost every OAS member State, signals expansive international consent (*opinio juris*) on the provisions within, and consequently can be utilized to construe not only the American Convention but also other international instruments pertinent to human rights within the Americas.[115]

The Commission too has consistently applied this interpretative principle and specifically in relation to its interpretation of the American Declaration. For example, in the *Villareal* case, the Commission concluded that "in interpreting and applying the American Declaration, it is necessary to consider its provisions in the context of developments in the field of international

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[112] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 21 June 1971.
[113] Advisory Opinion OC-10/89, *infra*, n. 4 ¶ 37.
[114] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶¶ 114-15 (October 1, 1999) (*citing, inter alia*, the decisions of the Eur. Ct. H.R. in *Tryer v. United Kingdom* (1978), *Marckx v. Belgium* (1979), and *Louizidou v. Turkey* (1995); *see also* Advisory Opinion OC-18/03, ¶ 120 (*citing* Advisory Opinion OC-16/99).
[115] *Juridical Status and Human Rights of the Child*, Advisory Opinion OC-17/2002, Inter-Am. Ct. H.R (ser. A) No. 17, ¶¶ 29-30 (August 28, 2002).

human rights law since the Declaration was first composed and with due regard to other relevant rules of international law applicable to member States against which complaints of violations of the Declaration are properly lodged. Developments in the corpus of international human rights law relevant in interpreting and applying the American Declaration may in turn be drawn from the provisions of other prevailing international and regional human rights instruments."[116] Under this methodology the Commission has relied upon various international and regional instruments in addition to judgments of international judicial entities to construe fundamental principles of human rights found in the American Declaration.[117]

VI. HUMAN RIGHTS VIOLATIONS AND LEGAL ANALYSIS

A. The United States' Failure to Ensure Equal Protection Under the Law to Undocumented Immigrant Workers Violates Article II & XVII of the American Declaration.

The Inter-American system for the protection of human rights has repeatedly articulated a norm of equality and non-discrimination in its various instruments and jurisprudence that not only prohibits discrimination in the application of rights and remedies on the basis of nationality or immigration, but one that also establishes an affirmative obligation on the State to ensure that

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[116] *Ramón Martinez Villareal v. United States*, Case 11.753, Inter-Am. C.H.R., Report No. 52/02, doc. 5 rev. 1 at 821 (2002) ¶ 60 (*citing Juan Raúl Garza v. United States,* Case 12.243, Report No. 52/01, OEA/Ser.L/V/II.111, doc. 20 rev. at 1255 ¶¶ 88-89 (2000); *see also Maya Indigenous Community of the Toledo District v. Belize*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 ¶727 (2004), ¶¶ 86-88; *Mary and Carrie Dann v. United States*, Case 11.140, ¶ 96-97.

[117] *See, e.g., Report On The Situation Of Human Rights Of Asylum Seekers Within The Canadian Refugee Determination System*, Inter-Am. C.H.R., Country Report, OEA/Ser.L/V/II.106, doc. 40 rev. (Feb. 28, 2000), ¶¶ 28, 159, 165 (referencing the U. N. Convention on the Rights of the Child to interpret Canada's responsibilities to asylum seekers under the American Declaration and the OAS Charter); *Maya Indigenous Community v. Belize,* Case 12.053, *supra* note 120, ¶¶ 112-120, 163, 174 (referencing the American Convention, jurisprudence of the Inter-American Court, and the United Nations Convention on the Elimination of Racial Discrimination (CERD) to interpret the rights to property, equality before the law, and judicial protection for indigenous peoples contained in the American Declaration); *Maria da Penha Maia Fernandes v. Brazil*, Case 12.051, Inter-Am. C.H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶ 704 (2001) (referring to the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Convention of Belém do Pará) in determining Brazil's obligations under the American Declaration to effectively prosecute domestic violence-related crimes).

such discrimination does not occur. By acquiescing in the discrimination against undocumented workers in the application of U.S. labor laws set forth in the legal precedents cited here, the United States violates Article II of the American Declaration, which provides that: "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*" (emphasis added).

The Inter-American Court of Human Rights has recently discussed this principle of non-discrimination specifically in relation to labor laws and policies that purportedly discriminate against undocumented workers. In its seminal Advisory Opinion 18 on the Legal Status and Rights of Undocumented Migrants ("OC-18/03"), rendered in September 2003, the Court found that international principles of equal protection and non-discrimination, including those contained in the American Declaration, the American Convention, the OAS Charter, and the International Covenant on Civil and Political Rights ("ICCPR") prohibit discrimination against undocumented immigrants with respect to their labor rights.[118] In OC- 18/03, the Inter-American Commission appeared before the Court and argued in favor of application of the principle of non-discrimination to discrimination based on migratory status.[119]

In its discussion regarding its competency to hear requests for Advisory Opinions, the Court reaffirmed its role in interpreting the terms, meaning and purpose of the OAS Charter, the American Convention and Declaration, as well as other regional and international human rights instruments.[120] The Court then looked to the regional and international instruments that incorporate the principle of non-discrimination, specifically:

> a) Articles 3(l) and 17 of the OAS Charter, which indicate that: The American States proclaim the fundamental rights of the individual without distinction as to race,

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[118] *Juridical Condition and Rights of the Undocumented Migrants,* Advisory Opinion OC-18/03.
[119] *Id.* ¶¶ 16, 32, with position summarized in ¶ 47.
[120] *Id.* ¶ 62.

nationality, creed, or sex. Each State has the right to develop its cultural, political, and economic life freely and naturally. In this free development, the State shall respect the rights of the individual and the principles of universal morality.
b) Article 24 of the American Convention, which determines that: All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.
c) Article II of the American Declaration, which states that: 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.
d) Article 26 of the International Covenant on Civil and Political Rights, which stipulates that: 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.
e) Article 2(1) of the Universal Declaration, which indicates that: 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.

The Court concluded that:

> The principle of equal and effective protection of the law and of non-discrimination is embodied in many international instruments. The fact that the principle of equality and nondiscrimination is regulated in so many international instruments is evidence that there is a universal obligation to respect and guarantee the human rights arising from that general basic principle.[121]

The Court explained that the principle of non-discrimination requires that "any exclusion, restriction or privilege"[122] granted to or withheld from any group by the State must be based on reasonable and objective criteria with due respect for human rights.[123] This principle extends to all individuals within the territory of a State, regardless of their immigration status.[124]

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[121] *Id.* ¶ 86. In its opinion the Court referenced the OAS Charter, the American Declaration, the Charter of the United Nations, the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Racial Discrimination, among several other international and regional human rights instruments. *Id.* at fn. 33.
[122] *Id.* ¶ 84.
[123] *Id.* ¶ 105, 119. The 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. Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4, ¶ 94 (January 19, 1984). The manner in which States regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction. The powers of the State are circumscribed by their obligations to ensure the full protection of human rights. The Court held that discrimination exists "when the classifications selected are based on substantial factual

The Court acknowledged that a State could make distinctions based on migratory status without violating the principle of non-discrimination, but only if the distinction is objective and reasonable and respects human rights. [125] As an example of a permissible distinction, the Court explained that a State could regulate the entry and exit of undocumented migrants more rigorously than documented migrants as long as the human rights of the undocumented migrants are respected.[126]

Turning towards the differential application of workplace protections, the Court concluded that the principle of non-discrimination prohibits a State from denying or limiting workplace protections based on migratory status. According to the Court, "migratory status can never be a justification for depriving [a worker] of the enjoyment and exercise of his human rights, including those related to employment."[127] The Court explained that "[o]n assuming an employment relationship, the migrant acquires rights as a worker, which much be recognized and guaranteed, irrespective of his regular or irregular status in the State of employment."[128] The Court outlined the specific labor rights which are fundamental and must be respected by member States, including, *inter alia*, the rights at issue in this Petition: freedom of association, discrimination against women workers, health and safety, and compensation.[129]

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differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review."

[124] Advisory Opinion OC-18/03 ¶ 118

[125] *Id.* ¶ 119.

[126] *Id.*

[127] *Id.* ¶ 134.

[128] *Id.* The Court, in its discussion leading up to this conclusion, cited to the U.N. Human Rights Committee's General Comment 15, Non-Discrimination, 10/11/89 October 11, 1989, CCPR/C/37, ¶ 8, in which the Committee stated: "Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under this Covenant." *Id.* ¶ 94.

[129] *Id.* ¶ 157, holding:

> In the case of migrant workers, there are certain rights that assume a fundamental importance and yet are frequently violated, such as: the prohibition of obligatory or forced labor; the prohibition and abolition of child labor; special care for women workers, and the rights corresponding to: freedom of association and to organize and join a trade union, collective negotiation, fair wages for work performed, social security,

Significant to this Petition is the Court's treatment of the principle of equality and non-discrimination as a *jus cogens* norm binding on all States,[130] and its holding that states have an affirmative "obligation to combat discriminatory practices and not to introduce discriminatory regulations into their laws."[131] Thus, the Inter-American Court's decision in OC-18/03 establishes compelling legal precedent for the proposition advanced by the Petitioners here - workers, no matter what their immigration status, must be afforded equal rights under a State's system of labor rights.[132]

Pursuant to this analysis, not only are states obligated to provide equal employment and labor rights to undocumented workers, states also have an affirmative obligation to protect undocumented workers from discrimination by non-state actors.[133] The Opinion clearly establishes precedent for the principle that, under certain circumstances, a State may be held responsible for the discriminatory actions of non-state actors towards immigrant workers.[134] Specifically, the Court noted that:

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judicial and administrative guarantees, a working day of reasonable length with adequate working conditions (safety and health), rest and compensation. The safeguard of these rights for migrants has great importance based on the principle of the inalienable nature of such rights, which all workers possess, irrespective of their migratory status, and also the fundamental principle of human dignity embodied in Article 1 of the Universal Declaration, according to which "[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

[130] *Id.* ¶ 110. "The effects of the fundamental principle of equality and non-discrimination encompass all States, precisely because this principle, which belongs to the realm of *jus cogens* and is of a peremptory character, entails obligations *erga omnes* of protection that bind all States and give rise to effects with regard to third parties, including individuals."

[131] *Id.* ¶ 88.

[132] OC-18/03 has been recognized in the observations and recommendations of the annual report from the Inter-American Court, approved by the OAS General Assembly on June 8, 2004. Organization of American States General Assembly, Observations and Recommendations on the Annual Report of the Inter-American Court of Human Rights, June 8, 2004, AG/RES. 2043 (XXXIV-O/04). These rights mirror those enumerated in the UN Convention on the Rights of All Migrant Workers and their Families. Recently, the Office of the High Commissioner for Human Rights at the United Nations recognized the decision in its resolution 2005/47. Human Rights of Migrants, Human Rights Res. 2005/47, Office of the High Commissioner for Human Rights, 57th meeting (Apr. 19, 2005).

[133] Advisory Opinion OC-18/03 ¶ 147-148.

[134] This principle of affirmative obligations on States for actions of non-state actors that violate fundamental human rights long has been recognized. *See e.g.*, *Velasquez Rodriguez case*, ¶ 172 (holding that the actions of a non-state

> States must ensure strict compliance with the labor legislation that provides the best protection for workers, irrespective of their nationality, social, ethnic or racial origin, and their migratory status; therefore, they have the obligation to take any administrative, legislative or judicial measures to correct *de jure* discriminatory situations and to eradicate discriminatory practices against migrant workers by a specific employer or group of employers at the local, regional, national or international level.[135]

In determining whether the State has satisfied its obligations to take measures to eradicate discriminatory practices, the Court has also stressed the importance of due process protections.[136] As set forth below, the United States' failure to ensure equal redress for violations of its labor and employment laws and protection of undocumented workers from discrimination by non-state actors, violates its obligations under Articles II and XVIII of the American Declaration.[137]

1. The United States and States of Pennsylvania, Michigan, Kansas and New York violate Article II by Failing to Provide Equal Remedies for Undocumented Workers under Workers Compensation and Tort Law.

Each of the injured workers whose Petition is presented here has received less than full compensation for a workplace injury because of his or her immigration status, and as such has been denied his or her rights under the American Declaration to equal protection of the laws and to be free from discrimination in the enforcement of fundamental labor protections. Although compensation for workplace injury is governed by state, not federal law, the American Declaration imposes an obligation on the federal government to guarantee fundamental human rights operating both at the national level and local levels.[138] Furthermore, the state laws

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actor that violates human rights "can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention"); and *cf. Godinez Cruz case*, Inter-Am. Ct. H.R. (ser. C) No. 5, ¶¶ 181, 182 and 187 (Jan. 20, 1989). Quoted in OC-18/03, ¶ 141.

[135] OC-18/03, ¶ 149.

[136] *Id.* ¶¶ 121-126; OC-16/99, ¶¶ 117, 119.

[137] Also implicated are due process provisions included in other international instruments including, Art. 45(i) of the OAS Charter, Art. 25 of the American Convention, and Arts. 2(3) and 26 of the ICCPR. *Id.*, ¶ 84 and fn 33.

[138] Advisory Opinion OC-18/03, ¶ 149

implicated here are being interpreted in a discriminatory manner because of the analysis and precedent established by the U.S. Supreme Court in *Hoffman*.

A review of individual Petitioners' claims demonstrates that the United States has failed in its affirmative obligation to ensure that individuals are not discriminated against in the realization of their labor rights.

Leopoldo Z and Jesus L both have had their entitlement to workers' compensation time loss benefits prematurely limited because they were not legally authorized to work, despite the fact that they had been fully engaged in the employment relationship at the time of the injury. Leopoldo Z was forced into a settlement for a fraction of his claim due to the Pennsylvania Supreme Court's determination that as an unauthorized worker he was not entitled to wage loss benefits once it was determined that he could return to work, even though there was no work available to him with the physical restrictions imposed by his workplace injury. Had he been authorized to work in the United States, his settlement would have been far greater, allowing him to continue physical therapy and support himself pending employment that did not require him to exceed his physical capabilities.

Jesus L was precluded prematurely from his entitlement to workers' compensation time loss benefits when it became known that he had used a false Social Security Number, leaving him and his wife without income while he was unable to work normally. This treatment was sanctioned by the Michigan courts. He is now saddled with debt and unable to work pain free. Like Leopoldo, Jesus L is without the safety net that documented workers in the United States possess when injured on the job – benefits designed to compensate workers for lost earnings due to the injuries incurred during the course of employment.

Yolanda LR, who lost her husband in a workplace accident, has had to disclose her own immigration status and that of her husband in litigation. In ruling that immigration status may be relevant to a determination of benefits, New York's highest court, also looking to *Hoffman*, has ensured that she will be compensated at a lower rate for the loss of her husband's life simply because of immigration status. Furthermore, she lives in fear that her claim for wrongful death will lead to her own deportation, a fate all workers in her situation must suffer as a result of the state court precedent establishing that immigration status is relevant to a determination of benefits.

Francisco Berumen Lizalde has been unable to pursue his claim for disability or secure payments for medical care after his workplace injury. The circumstances and timing of Mr. Berumen Lizalde's arrest raises a strong suspicion that he was turned in to immigration authorities as a result of his injury and filing a workers' compensation claim.[139] Mr. Lizalde's case is particularly compelling in that the federal government took direct action in violation of its obligation to "abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of *de jure* or *de facto* discrimination."[140]

The risk of deportation for asserting a claim is very real, and in further contravention of Petitioners' rights under international law, including significantly, the American Declaration. As the Court elaborated in OC-18/03:

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[139] As noted above, the Assistant U.S. Attorney in Wichita, Kansas has clearly indicated that it encourages employers to refer injured workers to its office, which will then prosecute such workers for document fraud, leading to their deportation and inability to pursue workers' compensation claims. *See*, BRENT I. ANDERSON, THE PERILS OF U.S. EMPLOYMENT FOR FALSELY DOCUMENTED WORKERS (AND WHATEVER YOU DO, DON'T FILE A WORK COMP CLAIM), paper submitted to American Bar Association, Labor and Employment Law Workers' Compensation Committee Midwinter Meeting (March, 2006).

[140] OC-18/03 ¶ 103 ("This translates, for example, into the prohibition to enact laws, in the broadest sense, formulate civil, administrative or any other measures, or encourage acts or practices of their officials, in implementation or interpretation of the law that discriminate against a specific group of persons because of their race, gender, color or other reasons.").

> The right to judicial protection and judicial guarantees is violated for several reasons: owing to the risk a person runs, when he resorts to the administrative or judicial instances, of being deported, expelled or deprived of his freedom, and by the negative to provide him with a free public legal aid service, which prevents him from asserting the rights in question. In this respect, the State must guarantee that access to justice is genuine and not merely formal. The rights derived from the employment relation subsist, despite the measures adopted.[141]

For Francisco Berumen Lizalde, the right to resort to the courts and due process has been contravened by the actions of the U.S.[142] Due process is also denied to all those similarly situated to Yolanda LP, Jesus L and Leopoldo Z who fear coming forward to raise a claim because their immigration status is now at issue in the determination of their legal rights.[143]

2. The United States and State of New Jersey Violated Article II by Limiting Undocumented Workers' Rights and Remedy to be Free from Workplace Discrimination

By limiting access to full remedies and protection against discrimination under the law for Petitioner Melissa L and other similarly situated Chinese Staff and Worker members, New Jersey state law violates Article II of the American Declaration, which affirms the equality of all human beings and the principle of non-discrimination on the grounds of sex.[144] The Inter-American Court gave specific recognition to this in its enumeration of fundamental worker rights in OC-18/03, highlighting the obligation to provide "special care for women workers."[145]

As with the precedential state court decisions pertaining to tort damages and workers' compensation benefits, the New Jersey Superior Court – Appellate Division's decision in *Crespo* followed *Hoffman*. The result is a legal system that fails to grant Petitioner the same protections from workplace discrimination as legally authorized workers. Moreover, by sanctioning unequal

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[141] *Id.* ¶ 126.
[142] Art. XVIII, American Declaration.
[143] OC-18/03 at ¶ 121, citing to OC-16/99 ¶¶ 117, 119.
[144] New Jersey law also violates Articles 3(1) and 45(a) of the OAS Charter and Articles 1 and 16 of the American Convention.
[145] *Id.* ¶ 157.

legal protections for undocumented women workers, the U.S. fails in its affirmative obligation to protect these women from discriminatory treatment by non-state actors. Thus, the U.S. discriminates against Petitioner because she is undocumented and further allows her to be discriminated against on the basis of her gender. Because of its decision in *Hoffman*, the United States is responsible for the State of New Jersey's subsequent failure to ensure equal treatment of citizens and non-citizens in denying Petitioner full judicial recourse when her employer violated her right to be free from sex-based discrimination.[146] As the Inter-American Court stated clearly, "States are obligated to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons."[147]

B. The United States' Failure to Protect Undocumented Immigrant Workers' Freedom of Association Violates Article XXII of the American Declaration

With respect to Petitioners AFL-CIO, the United Mine Workers Union and Inter-Faith Worker Justice, whose members were not provided full protection of the National Labor Relations Act, the United States is in breach not only of its obligations under the principle of equality and non-discrimination, but also of its obligations to guarantee freedom of association

[146] In looking to interpret the right to non-discrimination, as embodied in Article II of the American Declaration, the Commission may look to other international instruments and bodies, and in this case, the principles established by the International Labour Organization (ILO), are established. The ILO has concluded that the principle of non-discrimination is a fundamental human right which protects all individuals in the workplace, regardless of their nationality or immigration status. 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), and thus are binding on all ILO members. The US has not ratified the ILO's fundamental conventions relating to non-discrimination and freedom of association, but under the ILO's 1998 Declaration on Fundamental Principles and Rights at Work, all ILO member States, including the US, 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").

[147] OC-18/03 at ¶ 104.

under Article XXII of the American Declaration.[148] Specifically, in relation to its enumeration of fundamental rights, the Court in OC-18/03 stipulated that States must guarantee equally as to all workers without regard to migratory status the right to "freedom of association and to organize and join a trade union" and the right to collective bargaining.[149]

As discussed in Part II.C.1., those rights are provided in the United States under the National Labor Relations Act and were directly at issue in *Hoffman*. The experience of the United Mine Workers Union exemplifies the harm suffered by all workers as a result of the discrimination permitted and condoned vis-à-vis undocumented immigrants. Conditions at the Co-Op mine in the state of Utah were substandard in the industry, and lawful exercise of freedom of association would have protected these workers' safety and their wages. However, when workers at the mine attempted to exercise their rights to freedom of association to organize a union in order to gain more appropriate wages and working conditions, their employer retaliated against them by firing the workers. Because some of the workers were undocumented, the union was forced to settle their claims in an agreement that was substantially less favorable to the individual workers because many of them were not entitled to back pay after *Hoffman*.[150]

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[148] The Inter-American Court has recognized the importance of trade unions in ensuring freedom of association, equating the right to form and participate in a union with the right to freedom of association. *Baena Ricardo et al.*, Inter-Am.Ct.HR (Ser. C) No. 72 (February 2, 2001) (holding, "in trade union matters, freedom of association is of the utmost importance for the defense of the legitimate interests of the workers, and falls under the corpus juris of human rights.") ¶¶ 156, 158.

[149] OC-18/03 ¶ 157.

[150] While it is true that the Supreme Court held that undocumented workers are covered by the National Labor Relations Act, the denial of any substantive remedy for the individual retaliated against for having exercised his or her rights to freedom of association is tantamount to the denial of the right itself. The ILO Committee on Freedom of Association directly addressed this issue in a complaint brought by the AFL-CIO and the Confederation of Mexican Workers (CTM) and found undocumented migrants post-*Hoffman* were "likely to afford little protection to undocumented workers who can be indiscriminately dismissed for exercising freedom of association rights without any direct penalty aimed a dissuading such action," and therefore the remaining remedies were insufficient to guarantee the right purportedly protected. See *Report on Complaints against the Government of the United States presented by the AFL-CIO and the Confederation of Mexican Workers (CTM)*, Case No. 2227, ILO Committee on Freedom of Association, (November 2003).

Furthermore, as discussed with regard to Petitioners above, in denying undocumented immigrants the right to any meaningful remedy, the U.S. fails in its legal obligations under the American Declaration to ensure due process for undocumented immigrants seeking to enforce their legal rights without discrimination.

VII. CONCLUSION AND PETITION

For the foregoing reasons, Petitioners request that this Honorable Commission grant the following relief:

1. Declare this petition to be admissible;
2. Investigate, with hearings and witnesses as necessary, the facts alleged by Petitioners herein;
3. Declare the United States of America and states of New Jersey, Michigan, Kansas, New York and Pennsylvania in violation of Articles II, XVIII and XXII of the American Declaration;
4. Recommend such remedies as the Commission considers adequate and effective for the violation of Petitioners' fundamental human rights, including:
    a. Amendment of laws and policies to comport with international obligations to apply workplace protections in a nondiscriminatory manner and protect the freedom of association of all workers;
    b. Ensure that states with laws or jurisprudence that limit the rights of undocumented workers bring their laws and policies in line with internationally recognized standards through amendment of laws and policies to ensure that undocumented workers are granted the same rights and remedies for violations of their rights in the work place as documented workers; that any state with restrictions on the rights of undocumented

workers be made to remove these restrictions that fail to comport with international standards;

c. Enactment of comprehensive legislation that complies with international standards; specifically, legislation that would prohibit a distinction in federal or state law between employment and labor rights based on immigration status.

d. Enactment of laws, regulations, and rules of procedure prohibiting employer inquiries into immigration status of a worker asserting his/her employment and labor rights in courts and complaints to administrative bodies, to avoid chilling and discouraging attempts by undocumented workers to enforce their rights through litigation and complaints to administrative bodies.

e. Provide guidance to state and federal courts and legislatures regarding the United States obligations under international law and treaties.

5. Petitioners request an oral hearing.

Respectfully Submitted,

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Inter-faith Worker Justice
Chinese Staff & Workers Association
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Commentary

Immigrant Workers and Worker's Compensation: The Need for Reform

J.D. Rebecca Smith*

Foreign-born workers in the United States suffer high rates of workplace injuries and accidents. Both for workers who are unauthorized to work in the United States and for those who are present legally under guest worker programs, access to workers' compensation benefits presents nearly insurmountable barriers. Some of these are longstanding, such as employer retaliation and aggressive litigation of claims. Some are more recent and related to the increasingly transnational character of the workforce and to barriers put in place by administrators.

This is a legal overview of the cases, statutes, and policies that act as barriers to access for immigrant workers, conducted by reviewing case law and basic compensation statutes in all fifty states. Where these are known, policies that keep workers locked out of workers' compensation are also discussed. It concludes that reform of the system is needed in order to ensure its standing as an insurance program with universal application. As part of that reform, further state by state research and advocacy would discover specific administrative practices in each state that keep immigrant workers from receiving the benefits to which they are entitled. Am. J. Ind. Med. 55:537–544, 2012. © *2012 Wiley Periodicals, Inc.*

KEY WORDS: immigrant; immigration; workers' compensation; undocumented; unauthorized; injury; work; social security; retaliation

INTRODUCTION

Global migration is at an all-time high, and the United States is the largest receiving nation of migrant workers in the world [United Nations, 2008]. Our country's total immigrant population currently stands at nearly 40 million [Migration Policy Institute, 2010]. Among these, there are some eight million undocumented immigrants working in the United States economy [Passel and Cohn, 2011]. Most unauthorized workers are in the agricultural, construction, services, and manufacturing sectors, performing some of the most dangerous and low-paid jobs in our economy. Given the tragically high accident rates in these industries and the fatality rates for immigrant workers, protecting their access to workers' compensation must be a high priority for advocates, researchers, and policymakers.

It is not known exactly how many immigrant workers go without workers' compensation benefits following work-related injuries. Of course, immigrant workers face the same pressures to forego filing for workers' compensation faced by other workers, including lack of knowledge of their rights, lack of union representation to support filing, and employer pressures to refrain from filing. Immigrant workers are also frequently disadvantaged by inability to speak the fluent English often required to file government forms. Most importantly, immigrant workers face real possibilities of retaliation in the form of reports

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Ethics Committee/Institutional Review Board ("IRB"): Please include the following "IRB" information: This is not a Human Subjects Research, so no IRB was employed.

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to immigration authorities, with very severe consequences. Along with these legitimate fears of retaliation, both unauthorized workers and guest workers face legal and administrative barriers that can keep them from receiving badly needed benefits.

Immigrant workers are generally winning court battles over access to workers' compensation benefits. In the past 8 years, appellate courts and review boards in 20 states have found that immigration status does not affect general eligibility for benefits. At the same time, barriers imposed by state agencies and insurance companies, especially Social Security Number (SSN) requirements, have made it impossible for workers to claim benefits. In the typical case, employers aggressively investigate a claimant's immigration status in the hope of getting a free pass on claims. In the worst cases, employers and insurance companies have reported workers to immigration authorities in order to escape responsibility for workplace injuries and accidents.

Even where workers overcome fear of retaliation, file claims and are initially covered, transnational workers face nearly insurmountable obstacles to pursuing their claims from inside their home countries. State agencies are ill equipped to process time loss checks across borders. State requirements that workers be present to pursue their claims make it impossible for some workers to recover. Doctors in home countries are often unwilling or unable to bill U.S. insurance companies and agencies for their services.

Denying these workers their compensation undermines the integrity of an experienced-based workers' compensation system. Advocates, researchers, and policymakers must address these issues in order to protect workers, workplaces and the workers' compensation system itself.

ANALYSIS

Immigrant Workers and Workplace Injuries and Fatalities

There is strong evidence that immigrant workers and ethnic minorities face abnormally high rates of workplace injuries and fatalities. Fatalities on the job among foreign-born workers, particularly those from Mexico, have been increasing at a time in which the overall rate of workplace fatalities for all workers has been decreasing [Zuehlke, 2009]. The Department of Labor's Bureau of Labor Statistics found that from 1992 to 2006, Latino workers experienced a general increase in the number of fatal injuries in the workplace, peaking at 990 in 2006. The increase in fatalities among Latino workers during this time period was entirely accounted for by foreign-born workers [Schenker, 2010]. Although the number of work-related Latino fatalities fell to 668 in 2009, the drop was likely the result of high unemployment among Latino workers, as well as underreporting, rather than an increase in workplace safety [Bureau of Labor Statistics, 2009; Greenhouse, 2010].

Fatal injuries to immigrant workers have a regional focus, which correlates to the presence of unauthorized workers. Of the total number of unauthorized workers, many live in six states: California (23%), Texas (11%), Florida (9%), New York (8%), Illinois (6%), and New Jersey (5%) [Passel and Cohn, 2011]. This corresponds to the rates of fatal work injuries involving foreign-born workers, which are primarily concentrated in the same six states [Loh and Richardson, 2004]. The occupation fatality rate among immigrant workers is almost 1.6 deaths per 100,000 workers higher than the average rate among native workers. With respect to occupational injuries, the rate for immigrant workers is 31 injuries per 10,000 workers higher than the average [Orrenius and Zavodny, 2009].

Immigrant Workers and Workforce Segmentation

The highest work-related fatality rates are in the construction, transport and warehousing, and agricultural sectors, all industries in which immigrant workers are overrepresented [Bureau of Labor Statistics, 2011].

A number of researchers have documented the workforce segmentation that has historically been the lot of racial and ethnic minorities within the United States, and that now often relegates Latino workers both to the highest risk sectors, and to the hardest job assignments within a workplace [Anderson et al., 2000; Lipscomb et al., 2006; Friedman and Forst, 2008; Marin et al., 2009]. For unauthorized workers, immigration status can be a potent source of potential abuse and exploitation by supervisors that may, in fact, contribute to more accidents. (''Many workers live in a constant state of anxiety, fearing they will be deported and lose everything, perhaps even their children. Supervisors, both Latinos and Americans, can force workers to work beyond their normal duties'' [Marin et al., 2009].

In industry-specific studies of immigrant workers, researchers have documented high rates of workplace injuries and pain. For example, Latino construction workers are more than two times as likely to suffer traumatic injuries requiring trauma center treatment [Friedman and Forst, 2008]; Latino and limited English speaking hotel workers were more likely to complain about work-related pain, and, along with immigrant workers, miss work due to this pain [Premji and Krause, 2010]; immigrant sewing machine operators experience a high prevalence of upper body pain [Wang et al., 2007]; and 28% of largely immigrant Latino poultry workers had suffered a work-related illness or injury in the past twelve months [Quandt et al., 2006].

Apart from segmentation by industry and occupation into more dangerous jobs, the prevalence of injuries, accidents, and fatalities among Latino and/or immigrant workers can be partly explained by segmentation by firm size and sophistication. Hispanic workers in general are concentrated in small businesses and other work environments where job-related injuries tend to be underreported, making the full scope of the problem difficult to assess [Anderson et al., 2000; National Council of La Raza, 2009]. Some workers, due to language or their employers' lack of robust safety programs, are unaware of the risks they face on the job [Anderson et al., 2000].

Finally, other workers may feel that there is little choice but to accept those risks. In a study on immigrant workers' perceptions of workplace health and safety, researchers from UCLA observed that: ''[w]orkers worried because they know the work they did was dangerous, and also because they knew that if they got injured they would have limited medical care options. Some respondents said that they could not really 'afford to worry' because they needed the job and had little control over the working conditions'' [Brown et al., 2002]. UCLA researchers found that workers in the garment and restaurant industries ''said they could not speak up about workplace issues because they would get fired or 'blacklisted'''' [Brown et al., 2002].

Researchers in North Carolina observed that: ''[m]any immigrant workers believe that in a dangerous work situation, they have no choice but to perform the task, despite the risk.'' [Immigrant Workers at Risk, 2000]. One former employment supervisor in a poultry plant in Greenville, North Carolina, has reported that her boss did not like ''repeat complainers.'' She worked for 5 years hiring and translating for Spanish-speaking employees. She tried to urge plant managers to send injured workers to the doctor but was told ''if they keep coming to the office [to complain] they are going to have to be let go.'' One study of poultry workers in North Carolina found that supervisors who abuse their power by using immigration status as a threat may promote occupational illnesses and injuries, especially for women [Marin et al., 2009].

Barriers to Filing of Workers' Compensation Claims for Immigrant Workers

Underreporting of workplace injuries and illnesses is a problem across industries and populations [Hidden Tragedy, 2008]. For immigrant workers, it has become a particularly vexing issue. In one recent study where over 4,000 low-wage workers, one-third of them unauthorized immigrants, were interviewed, only 8% of injured workers had actually made claims for workers compensation [Bernhardt et al., 2009].

Many of the same factors that lead to increased injuries on the job also affect immigrant workers' ability to report workplace injuries. These include a lack of understanding of workers' compensation coverage, and lack of ability to communicate in English [Lashuay and Harrison, 2006]. Workers' lack of understanding of the legal system and lack of union membership, only exacerbate the willingness of some employers to fire vulnerable workers [Lipscomb et al., 2006]. A study of even unionized, largely immigrant hotel workers found that only 20 percent of those who had experienced work-related pain had filed workers' compensation claims, for fear of getting ''in trouble'' or being fired [Scherzer et al., 2005].

When injured immigrant workers do file workers' compensation claims, there is evidence that they are more likely than other workers to have their claims contested [Lashuay and Harrison, 2006; Premji and Krause, 2010]. The remainder of this paper focuses on the nature and outcome of those contested cases, both in cases involving unauthorized immigrant workers and temporary foreign workers.

Court Treatment of Immigration Status and Access to Workers' Compensation

Legal authority that immigrant workers, including guest workers and the unauthorized, is nearly unanimous that workers are entitled to workers' compensation benefits. However, a decade-old U.S. Supreme Court decision reopened the question of workers' entitlement to the full range of workers' compensation benefits available to other workers.

In *Hoffman Plastic Compounds, Inc. v. NLRB*, [2002] the Supreme Court held, by a slim 5–4 margin, that undocumented workers are not entitled to back pay—that is, pay for the time that an unlawfully-fired worker could not work after the unlawful discharge—under the National Labor Relations Act. In that case, the worker had used false documents in order to get the job, and, the Court said, could not legally comply with his duty to mitigate his damages (search for other work that would partially compensate him for lost pay). The Court reasoned that a worker who used false documents to get his job could not receive back pay ''for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by criminal fraud.''

Hoffman caused an onslaught of litigation in which employers and insurance companies argued that unauthorized workers were either not covered by workers' compensation schemes or not entitled to specific benefits. For the most part, courts rejected these claims. Post-*Hoffman*, state courts and administrative agencies in Arizona, California, the District of Columbia, Florida, Georgia, Illinois, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan,

Minnesota, Nebraska, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee and Texas have recently held that undocumented workers are covered under state compensation systems.[1]

While it is clear that unauthorized workers are entitled to basic coverage under workers' compensation laws, it is less clear that the unauthorized are entitled to the same remedies as other workers in every state. Businesses frequently argue that *Hoffman's* emphasis on the undocumented workers' inability to mitigate damages without violating federal law means that undocumented workers are not entitled to time loss compensation. Since *Hoffman*, only two state courts, in Michigan and Pennsylvania, have placed limitations on the availability of time loss recovery for injured workers based on immigration status [Pennsylvania: *The Reinforced Earth Company v. Workers' Compensation Appeal Board*, 2002; Michigan: *Sanchez v. Eagle Alloy*, 2003]. All others have held that basic entitlement to workers' compensation and basic elements of workers' compensation such as time loss benefits and medical benefits remain available to unauthorized workers after *Hoffman*.

Courts are more divided on the availability of vocational rehabilitation benefits to workers whose immigration status has been disclosed to the employer. In a North Carolina case, an employer argued that it could not perform required vocational rehabilitation for an undocumented worker without violating the employer sanctions provisions of the Immigration Reform and Control Act (IRCA) [*Gayton v. Gage Carolina Metals, Inc.*, 2002]. The North Carolina Court held, however, that there were a number of vocational rehabilitation functions that could be performed without violating federal law, including performing labor market surveys to find suitable jobs in the area, counseling, job analysis, analysis of transferable skills, job seeking skills training, or vocational exploration, and ordered that these be provided as necessary. Unfortunately, some courts have held that undocumented immigrants are not entitled to vocational rehabilitation benefits [See, for example, Nevada: *Tarango v. State Indus. Ins. System*, 2001; Nebraska: *Ortiz v. Cement Products, Inc.*, 2005].

State workers' compensation systems include provisions for death benefits to be paid to the dependents of a deceased worker. The question of whether ''dependents'' can include those that reside in another country has not been problematic for courts. Even in a case of a male immigrant who left his wife behind for 37 years, the court was able to find that the widow was not voluntarily living apart from her husband, and that the presumption of dependency applied [*Baburic v. Butler Bros.,* 1951, cited in LARSON'S WORKMEN'S COMPENSATION, 96.06(2)]. The concept of constructively ''living with'' the deceased employee is also applied to children. Even when a child lived in a foreign country but received support from the father, he was considered to be ''living with'' the father for purposes of entitlement to death benefits [*Milwaukee W. Fuel Co. v. Indus. Comm'n*, 1922, LARSON, 96.06(4)].

Some state laws contain particular restrictive provisions regarding death benefits payable to non-resident dependents. Most of these provide reduced benefits to dependents residing in another country [DEL CODE ANN. tit.19, § 2333, IOWA CODE § 85.31(5); KY.REV.STAT.ANN. § 342.130; OR.REV.STAT. § 656.232; S.C.CODE ANN. § 42-9-290). At least one state, Alabama, expressly excludes nonresident aliens from benefits, and a few specify that only certain classes of beneficiaries may receive benefits as nonresident alien dependents. (ALA. CODE § 25-5-82; WIS. STAT. § 102.51(2)(b); ARK. CODE ANN. § 11-9-111(a); N.C.GEN.STAT. § 97-38].

Other Barriers to Access to Workers' Compensation: Social Security Number Requirements

Even in states where state law clearly allows immigrants, regardless of immigration status, to receive compensation for job injuries, use (and misuse) of SSN requirements can bar access. Florida is one of many states with favorable court rulings that immigrants, no matter what their status, are entitled to workers' compensation.

[1] *Gamez v. Industrial Comm.,* 141 P.3d 794 (Ariz. Ct. App, 2006) reconsideration denied (Aug 28, 2006), review denied (Mar 13, 2007); *Farmers Bros. Coffee v. Worker's Comp. Appeals Bd.,* 133 Cal.App.4th 533 (Cal.App. 2 Dist. 2005);.*Cagnoli v. Tandem Staffing and Specialty Risk Services,* 914 So.2d 950 (Fla. 2005) reh. denied (Dec 14, 2004); *Safeharbor Employer Services I Inc., v. Velazquez*, 860 S.2d 984 (Fla. App. 2003) rev. denied by *Safeharbor Employer Services I Inc., v. Velazquez*, 873 So.2d 1224 (Fla. Apr. 22, 2004); *Earth First Grading et al. v. Gutierrez*, 606 S.E.2d 332 (Ga. Apps. 2004) cert. denied (Mar 28, 2005); *Wet Walls, Inc., v. Ledezma*, 598 S.E.2d 60 (Ga. App. 2004) cert. denied (Sep. 7, 2004); *Economy Packing Co. v. Illinois Workers' Compensation Com'n*, 387 Ill.App.3d 283, 289-290, 901 N.E.2d 915 (Ill. App. Ct. 2008); *Doe v. Kansas Dep't of Human Resources*, 90 P3d 940 (Kan. 2004); *Design Kitchen and Baths, et.al. v. Lagos,* 882 A.2d 817 (Md. 2005) opinion after grant of cert. *Design Kitchen and Baths v. Lagos,* 388 Md. 718, 882 A.2d 817 (Md. Sep 12, 2005); *Medellin,* No. 033242-00 (Mass. Dep't of Indus Accidents, Dec. 23, 2003); *Sanchez v. Eagle Alloy*, 658 N.W.2d 510 (Ct. Apps. Mich. 2003), order accepting review vacated by 684 NW2d 342 (2004); *Correa v. Waymouth Farms, Inc.,* 664 N.W.2d 324 (MN, 2003); *Ortiz v. Cement Products, Inc.,* 708 NW2d 610 (Neb., 2005); *XYZ Cleaning Contractors,* 2006 WL 1221568 (NY Worker's Compensation Board April 28, 2006); *Rajeh v. Steel City Corp et. al.,* 813 NE2d 697 (Oh. Apps. 2004); *Cherokee Industries, Inc., v. Alvarez,* 84 P3d 798 (Okla., 2003) cert. denied Jan. 20, 2004; *The Reinforced Earth Company v. Worker's Compensation Appeal Board* (Astudillo), 810 A.2d 99 (Pa. 2002); *Curiel v. Environmental Management Services,* 655 S.E.2d 482, (S.C., 2007); *Silva v. Martin Lumber Company,* 2003 WL 22496233 (Tenn. Worker's Comp.-Panel, 2003) *Appellant:* *** *v. Respondent:* ***, 2002 WL 31304032 (Tex.Work.Comp.Comm., 2002); *Asylum Co. v. D.C. Dep't of Empl. Servs*., 10 A. 3d 619 (D.C. 2010).

However, in 2004, the state began rejecting workers' compensation applications submitted without a SSN, pursuant to a state law. In only a few months, the state had rejected hundreds of applications [Chandler, 2006]. In November 2005, the Florida Supreme Court held that this practice was unlawful under the Federal Privacy Act [*Florida Div. Of Workers' Compensation v. Cagnoli*, 2005].

In some instances, employers have argued that if a worker provided an invalid SSN to the agency, she has committed ''fraud'' and is ineligible for benefits. The Kansas Supreme Court held that a worker who submitted a false name and SSN on her application for workers' compensation had committed a ''fraudulent or abusive act'' within the meaning of the Kansas workers' compensation law [*Doe v. Kansas Dept. of Human Resources*, Doe, 20042004]. In that case, the court held that the worker could be fined for committing a ''fraudulent act,'' but that she was still entitled to benefits, since undocumented workers are entitled to benefits under Kansas law. Courts in California, Tennessee, New York, and Florida have found that use of a false SSN does not constitute fraud [Tennessee: *Silva v. Martin Lumber Company,* 2003; California: *Farmers Bros. Coffee v. Worker's Comp. Appeals Bd*, 2005; New York: *XYZ Cleaning Contractors*, 2006; Florida: *Matrix Employee Leasing v. Leopoldo Hernandez*, 2008]. The California court refused to call the use of a false SSN fraud, since the use of the false number had no direct connection to the injury. The Court reasoned, ''It was employment, not the compensable injury, that Ruiz obtained as a direct result of the use of fraudulent documents.''

The SSN issue has become more complicated by new requirements with respect to Medicare Secondary Payer laws. Providers of workers' compensation are required as of January 1, 2011 to provide information to the Department of Health and Human Services about whether workers' compensation applicants are receiving Medicare, in order to determine whether a claim should be paid by Medicare or by the workers' compensation system. After a number of extensions on the effective date of the reporting requirements, the Centers for Medicare and Medicaid Services (CMS), the federal agency that administers Medicare, issued an alert regarding collecting of HCINs and SSNs, on April 10, 2010 [CMS, 2010].

CMS has provided some guidance that indicates that reporting entities are not required to ask injured workers for a SSN. States may fulfill their obligations simply by mailing a letter to claimants asking whether they are receiving Medicare. Claimants who are not receiving Medicare can simply answer ''no'' and sign the form. If claimants do not return the letter, states face no penalties, but will be required to send it annually for as long as a claim is open. CMS has a model form that may be used by states. However, CMS does not require states and insurance companies to take this approach. It is not yet clear how many states are currently using the suggested form instead of requesting a SSN.

Direct and Implied Retaliation

A review of reported workers' compensation cases reveals a disturbing trend. In many of the cases decided since *Hoffman,* an employer hires an undocumented immigrant without much regard to the worker's status, and then somehow discovers, once the worker is injured, that he or she is undocumented. The employer, often supported by workers' compensation insurance carriers, then argues that the worker is not entitled to workers' compensation benefits.

Especially brazen employers and insurance companies attempt to retaliate by alerting U.S. Immigration and Customs Enforcement (ICE) of the worker's undocumented status. In Kansas, for example, an injured worker was arrested and detained after ICE learned that he used fraudulent documents to obtain his job. Although he had not yet recovered from his work-related injury, he was deported and the workers' compensation insurance carrier stopped making temporary total disability payments [Smith and Avendaño, 2009]. Another injured worker in Kansas suffered retaliation when he and five co-workers were arrested and indicted after the company ''found a 'discrepancy' in employment records and turned the workers over to immigration authorities'' [Smith and Avendaño, 2009]. An Assistant US Attorney from Kansas announced to an American Bar Association meeting that his office's policy was to solicit and prosecute these claims.

In a grievous case from Wisconsin, an insurance company liable for workers' compensation payments retaliated against a worker by notifying authorities of his invalid SSN. The company issued a letter stating that its policy was to report such workers to government agencies and request prosecution of identity theft [Jones, 2009]. By filing charges of identity theft that lead to criminal prosecution and ultimate deportation, such insurance companies engage in a thinly veiled attempt to avoid paying valid claims.

Notably, immigration authorities are instructed, pursuant to an internal policy, to avoid involvement in labor disputes [U.S. Immigration and Naturalization Service, 1996]. While it appears that ICE is honoring its policy in cases where it discovers employers are reporting immigrant workers in order to retaliate, it has thus far resisted a policy that would require it to turn away from second-tier retaliation via an insurance company or a prosecutor.

New policies on the exercise of ''prosecutorial discretion'' in immigration cases may provide some immigration relief to victims of retaliation. A Department of Homeland Security memorandum published in June, 2011 set forth

agency policy regarding prosecutorial discretion in cases involving victims and witnesses of crimes, including ''individuals involved in non-frivolous efforts related to the protection of their civil rights and liberties'' [U.S. Department of Homeland Security, 2011]. The memorandum instructed ICE officers, special agents, and attorneys to ''exercise all appropriate prosecutorial discretion'' to minimize any effect that immigration enforcement may have on the willingness and ability of victims, witnesses, and plaintiffs to pursue justice. It is too early to tell whether this new policy will provide protection against retaliation to a substantial number of immigrant victims of workplace accidents who make workers' compensation claims.

Special Problems for Transnational Workers

Transnational workers, including both unauthorized workers who return home voluntarily or involuntarily and guest workers in the H2A agricultural and H2B non-agricultural temporary worker programs, face additional obstacles to receiving care and compensation. Because many immigrant workers are isolated at workplaces where they have little or no access to transportation or community support, it is even more difficult for them to make and keep a doctor's appointment. At the end of a guest workers' contract, he is required to return to his country of origin. Unauthorized workers may be removed from the country at any time, or may return home voluntarily after an injury. At that point, they face huge challenges in care and compensation. Although two states, Florida and Texas, have specific case law that allows claimants to receive care outside the country, many do not [Texas: *Barrigan v. MHMR Services for Concho Valley*, 2007; Florida: *AMS Staff Leasing, Inc. v. Arreola*, 2008]. Some states, such as Kansas, require the physical presence of the worker to pursue claims [Kansas Statute 44–528]. Even states that are willing to process claims transnationally face difficulties in money transfer and in locating doctors in other countries who are willing to provide care and bill the state. While some advocates have been able to procure temporary visas for workers' compensation claimants to return to the U.S. for hearing, and others have been able to identify doctors in Mexico and other countries who are willing to cooperate with U.S. based claims administrators, workers who cross borders face nearly insurmountable obstacles. To the extent that use of guest worker programs is growing in the United States and to the extent that eventual comprehensive immigration reform will include a guest worker program, this issue needs to be addressed in a way that assures compensation for injured workers.

RECOMMENDATIONS AND CONCLUSIONS

The extent of workplace injuries and fatalities among Latino and immigrant populations demands attention of researchers and policy-makers, at a time when anti-immigrant policies at a state and federal level are at perniciously high levels. Nevertheless, in order to protect individual workers and build safer workplaces, as well as to protect the insurance basis of the system, equality of access to workers' compensation benefits must be preserved.

Litigation in individual states has accomplished much, but, as has been shown here, it is not sufficient in itself to preserve access to workers' compensation. The tools of additional research into state policies, development of policy models, and litigation must each be employed. At the sub-statutory and case law level, we have only a poor understanding of which states have informal policies that keep immigrant workers from receiving workers' compensation, such as SSN requirements. A state survey could develop these. Nor do we know which states are best equipped to deal with transnational claims but this, too, could be developed by a state survey. Advocates and researchers should investigate which states have adopted best practices with respect to the Medicare Secondary Payer rules and support allies in other states to work to adopt these models.

Many of the state policies that bar access to workers' compensation are in unpublished policies and practices, but some are in formal law. Legal research could uncover states that have legal barriers to transnational claims, such as in person requirements or an unwillingness or inability to process claims transnationally. Legal research could also determine whether certain states have stronger retaliation statutes and whether Insurance Commissioners have the tools to punish insurance companies who retaliate. This kind of research is also urgently needed.

Additionally, further work with the Mexican Foreign Ministry and public health system could develop materials and relationships with doctors in Mexico who can cooperate with workers' compensation claims in the United States.

Finally, over the past several years, Comprehensive Immigration Reform proposals have often, though not always, included provisions that protect all immigrant workers' access to workers' compensation benefits, regardless of immigration status. These provisions have been increasingly more difficult to insert because most legislators would prefer to believe that a legalization program would eliminate unauthorized workers from the workforce. Ensuring these provisions are included in any CIR is one way to protect access to workers' compensation for immigrant workers as a formal matter.

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Workers' Rights on ICE

How Immigration Reform Can Stop Retaliation and Advance Labor Rights

NELP
National Employment Law Project

Rebecca Smith | Eunice Hyunhye Cho

The National Employment Law Project | February 2013

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About NELP

The National Employment Law Project (NELP) is a non-profit legal organization with over 40 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of labor standards laws, and that employers are not rewarded for skirting those basic rights.

Through its Immigrant Worker Justice Project, NELP works at the intersection of labor law and immigration law. We seek to expand and defend the labor rights of all workers, and to ensure that immigrant workers can assert their labor rights in a climate of equality and fairness, free from fear of reprisal. Our partners include workers centers and unions, immigrant rights groups, progressive lawyers, and community organizations. With them, we promote policies that expand the power of community organizing and protect immigrant workers' labor, civil, and human rights.

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Executive Summary

Often [immigrants work in] a shadow economy, a place where employers may offer them less than the minimum wage or make them work overtime without extra pay. And when that happens, it's not just bad for them, it's bad for the entire economy, because all the businesses that are trying to do the right thing that are hiring people legally, paying a decent wage, following the rules, they're the ones who suffer. They have got to compete against companies that are breaking the rules. And the wages and working conditions of American workers are threatened too.

— President Barack Obama, January 29, 2013.[1]

For the first time in many years in the United States, a broad consensus of policymakers and ordinary citizens agrees that the time has come for an overhaul of our immigration system. This overhaul will benefit immigrant workers, workers in low-wage sectors of our economy, and the economy as a whole.

The U.S. labor market remains weak, with three unemployed workers competing for every available job. This imbalance gives employers great power to set the terms and conditions of employment and to violate workers' rights without fear of consequences. This is especially the case in low-wage industries marked by rampant workplace abuse.

Employers and their agents have far too frequently shown that they will use immigration status as a tool against labor organizing campaigns and worker claims. From New York to California, Washington to Georgia, immigrant workers themselves bear the brunt of these illegal tactics. For example,

- A California employer falsely accuses a day laborer of robbery in order to avoid paying him for work performed. Local police officers arrest the worker. Although the police find no merit to the charges, he is turned over to Immigration and Customs Enforcement (ICE).
- A company in Ohio, on the eve of a National Labor Relations Board (NLRB) decision finding it guilty of several unfair labor practices, carries out its threats to "take out" union leadership by re-verifying union leaders' eligibility to work in the United States.
- A Seattle employer threatens workers seeking to recover their unpaid wages with deportation, and an ICE arrest follows.
- An injured worker in New York is arrested, at his employer's behest and on false criminal charges, just moments before a hearing on his labor claims.
- In the Deep South, a group of immigrant workers are facing deportation solely because they are defending labor and civil rights. The Southern 32 have exposed ICE's refusal to offer workers protections when enforcement actions block worker organizing on construction sites and day labor corners.

Silencing or intimidating a large percentage of workers in any industry means that workers are hobbled in their efforts to protect and improve their jobs. As long as unscrupulous employers can exploit some low-wage workers with impunity, all low-wage workers suffer compromised employment protections and economic security. Law-abiding employers are forced to compete with illegal practices, perpetuating low-wages in a whole host of industries.

The Obama administration has taken some steps to prevent immigration status-related retaliation by protecting immigrants who are victims of crime in the workplace, and by exercising prosecutorial discretion in limited cases to protect immigrant workers involved in labor disputes. But these efforts are not enough, particularly given the expansion of immigration enforcement at the federal and local levels. The U.S. government currently spends more on its immigration enforcement agencies—$18 billion in fiscal year 2012—than all other federal law enforcement agencies combined.[2] The build-up of immigration enforcement provides unscrupulous employers with additional tools to retaliate against immigrant workers who seek to exercise their rights.

We can create a real, effective, pro-immigrant worker reform agenda to ensure that workers can speak up about labor abuses, now and in the future. We must learn from worker experiences and the failed policies of the past.

First, we must ensure that the eleven million undocumented immigrants living in the U.S. have the ability to become citizens and exercise our most cherished freedoms. Immigration reform must include a broad and fair path to citizenship that brings low-wage immigrant workers – including "contingent" workers like caregivers and day laborers – out of the shadows. Immigration reform must allow these aspiring citizens to work collectively to upgrade jobs and contribute to a growth economy. As we know from the 1986 immigration reform, creating more U.S. citizens through a legalization program will improve wages and working conditions for all workers. In the process, it will strengthen our economy.

Second, to solidify the gains that will come from immigration reform, we must ensure that no employer can use immigration law to subvert labor laws and to retaliate against workers in the future. A new immigration policy must include:

- Equal remedies for all workers subjected to illegal actions at work;
- A firewall between immigration enforcement and labor law enforcement; and
- Immigration protections for workers actively engaged in defending labor rights
- Robust enforcement of core labor laws in low-wage industries.

The National Employment Law Project (NELP) has prepared this analysis and offers the stories of immigrant workers to underscore the importance of ensuring workplace protections for all who work in the United States, regardless of status, and to emphasize the critical need for a broad pathway to citizenship. Such protections will benefit all workers by raising workplace standards and removing rewards for employers who abuse workers for their own gain.

Overhaul of Immigration Law Must Protect All Workers' Rights

I. Labor abuses and retaliation against U.S. citizen and immigrant workers are all too common in expanding low-wage labor markets

A. Immigrants, including the undocumented, work mainly in low-wage sectors of our economy

Immigrants comprise a growing part of the United State labor force. In 2010, 23.1 million foreign-born persons participated in the civilian labor force.[3] Of these workers, some eight million undocumented workers form 5.2 percent of the U.S. labor force.[4]

Immigrant workers are present in every occupation in the United States. More than 25 percent of the foreign-born work in service occupations; 13 percent work in natural resources, construction, and maintenance occupations; 15.5 percent work in production, transportation, and material moving occupations; 17.8 percent in sales and office occupations; and 28.6 percent in management, business, science, and art occupations.[5]

Immigrant workers are over-represented in a majority of the largest and fastest-growing occupations in the United States. For example, between 2010 and 2020, we will need more home health aides, nursing aides, personal care aides, food preparation and serving workers, heavy tractor trailer truck drivers, freight stock and material movers, childcare workers, and cashiers—industries that employ a large number of immigrant workers.[6]

In an anemic and uneven economic recovery, 58 percent of the jobs gained in the last three years are in low-wage sectors—the sectors in which many immigrants work.[7] In particular, among undocumented immigrants in the labor force, 30 percent work in the service industry, 21 percent work in the construction industry, and 15 percent work in the production and installation industry. Undocumented immigrants labor as farm workers, building, grounds keeping and maintenance workers, construction workers, food preparation and serving workers, and transportation and warehouse workers. Undocumented immigrants represent 23 percent of workers in private household employment, and 20 percent of those in the dry cleaning and laundry industry.[8]

B. Labor abuses are common in low-wage, high-immigrant occupations

Labor abuses are endemic to most low-wage occupations and industries. Workers in industries most likely to employ low-wage immigrant workers, such as domestic work,[9] agriculture,[10] restaurants,[11] construction,[12] and nail salons,[13] report high incidences of wage and hour violations, health and safety violations, work-related injuries, and discrimination.

In a landmark survey of more than 4,000 low-wage workers in New York, Chicago, and Los Angeles, more than two in three experienced at least one type of pay-related workplace violation in their previous week of work, with violations

Employer Files False Police Report to Avoid Paying Day Laborer His Wages, Leading to Deportation Proceedings

Garden Grove, CA (2012)

On the morning of March 9, 2012, Jose Ucelo-Gonzalez was hired from a Home Depot parking lot by Michael Tebb, a private contractor, to pave the parking lot of a local hospital.

At the end of the day, Ucelo-Gonzalez asked Tebb to pay him for his ten hours of work. Tebb made motions as if he wanted to fight, cursed at him, and said that he would have Ucelo-Gonzalez arrested for stealing. Tebb got in his truck and drove away, abandoning Ucelo-Gonzalez without a ride and leaving him without his pay.

Ucelo-Gonzalez called the police, who asked him for the exact address of his location. As he left the parking lot to find out the address, eight police cars pulled up. Tebb was with them. The police arrested and handcuffed Ucelo-Gonzalez. At the police station, Ucelo-Gonzalez explained that Tebb had not paid him his wages and had made false accusations, and had a co-worker come and serve as a witness on his behalf. Although the police noted that Ucelo-Gonzalez was "very sincere in his statements," and although the false charges were ultimately dropped against him, Ucelo-Gonzalez was transferred to ICE custody.[24]

photo of Jose Ucelo-Gonzalez courtesy of NDLON

most prevalent in the high-growth areas of domestic employment, retail and personal care industries.[14] Undocumented workers, moreover, are far more likely to experience violations of wage and hour laws. According to the survey, over 76.3 percent of undocumented workers had worked off the clock without pay; 84.9 percent of undocumented workers had received less than the legally-required overtime rate; and 37.1 percent had received less than the minimum wage for their work. Undocumented workers experienced these violations at rates higher than their native-born counterparts.[15]

C. Retaliation and threats — although illegal — are common

Our nation's labor and employment laws protect undocumented workers—just like any other worker.[16] These laws include protections against employer retaliation. Labor and employment laws prohibit employers from reprisals when workers engage in protected workplace activity, regardless of the worker's immigration status.[17]

Nevertheless, retaliation is common against all workers who speak up about abuse on the job, ask questions about workplace protections, or exercise their rights to engage in collective action. In fiscal year 2012, the U.S. Equal Employment Opportunity Commission (EEOC) received more than 37,800 complaints that included retaliation claims.[18] Among the workers included in the three-city survey mentioned above, 43 percent of those who made complaints or attempted to organize a union experienced retaliation by their employer or supervisor.[19]

A study of immigrant hotel workers found that only 20 percent of those who had experienced work-related pain had filed workers' compensation claims for fear of getting "in trouble" or being fired.[20] In another study of immigrant workers' perceptions of workplace health and safety, researchers from the University of California at Los Angeles (UCLA) observed that "[w]orkers worried because they know the work they did was dangerous, and also because they knew that if they got injured they

would have limited medical care options. Some respondents said that they could not really 'afford to worry' because they needed the job and had little control over the working conditions."[21]

While threats of job loss have an especially serious consequence in this job market, an employer's threat to alert immigration or local law enforcement of an undocumented immigrant worker's status carries added force. Such action is at least as frequent as other forms of retaliation. An analysis of more than 1,000 NLRB certification elections between 1999 and 2003 found that "[i]n 7% of all campaigns – but 50% of campaigns with a majority of undocumented workers and 41% with a majority of recent immigrants — employers make threats of referral to Immigration Customs and Enforcement (ICE)."[22] Immigration worksite enforcement data for a 30-month period in the New York region between 1997 and 1999 show that more than half of raided worksites had been subject to at least one formal complaint to, or investigation by, a labor agency.[23]

Injured Immigrant Worker Arrested at NY Human Rights Hearing Due to Employer Retaliation, Sent to Immigration

Spring Valley, New York (2012)

In 2010, Jose Martinez,* a landscaper in New York, injured his hand at work. Instead of assisting Martinez after his injury, his employer, who had also failed to pay him proper wages, immediately fired him. On the advice of an attorney, Martinez filed a workers' compensation claim and complaints with the New York Department of Labor and NY Division of Human Rights, which began investigating his claims.

Minutes before Martinez's hearing before the NY Division of Human Rights, a police car from his employer's town arrested Martinez. The police informed Martinez that, as a result of complaints by his employer, there was a warrant for two criminal charges against him. He was detained, then transferred to ICE custody, where he spent six weeks in detention. He is still fighting his deportation. One of the criminal complaints brought by his employer has since been dismissed, and Martinez is currently trying to defend himself against the other. Martinez's employer later confirmed that he gave the local police department information about the hearing before the Division of Human Rights. While Martinez is still trying to recover his lost wages and help for his injuries, his employer has threatened his family in Guatemala. Martinez is afraid to come to court and afraid for his life.[25]

Employer Sexually Assaults Employee, Forces Her to Remain Silent Because of Immigration Status

Philadelphia Metro area (2010)

Josefina Guerrero,* an immigrant worker from Mexico, worked at a food processing facility outside Philadelphia, Pennsylvania. She enjoyed her work, until one of her supervisors began to make sexually explicit gestures and touch her as she worked on the line. While she tried to avoid him, one day he cornered her at the plant, and forced her to have sex. As he made his advances, he told her that if she did not comply, he would report her undocumented status and have her fired. Josefina was deeply traumatized, and was afraid to come forward, because her supervisor told her that she had no rights in this country as an undocumented worker. Although she was assaulted in 2010, it took her almost two years to come forward to share her story.[26]

II. Heightened immigration enforcement has given unscrupulous employers new tools for retaliation against immigrant workers

A. Expansion of immigration enforcement at local and federal levels brings new players to the retaliation game

Anecdotal reports show that in recent years, employers who seek to retaliate against immigrant workers have increasingly filed reports with local law enforcement agencies, in addition to direct reports to federal immigration officials. Enforcement targeting undocumented immigrants has reached record levels. The U.S. government currently spends more on its immigration enforcement agencies—$18 billion in FY 2012—than all other federal law enforcement agencies combined.[27] The U.S. Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) agencies now refer more cases for prosecution than all combined agencies within the U.S. Department of Justice (DOJ), including the Federal Bureau of Investigation (FBI), Drug Enforcement Administration (DEA), and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF).[28]

Immigrant communities feel keenly the effects of these heightened enforcement activities at the local level. In FY 2012 alone, the Obama administration deported a record 409,849 individuals from the United States. During the last four years, the Obama administration has deported more than 1.5 million people, at a rate faster than the previous Bush administration.[29]

The growth of immigration enforcement programs such as 287(g) agreements and Secure Communities, has expanded the reach of federal immigration enforcement agencies at the local level, radically transforming the immigration enforcement landscape. 287(g) agreements permit local law enforcement agencies to enforce federal immigration law. Secure Communities is a federal program that allows state and local law enforcement agencies to instantaneously share immigration information with the U.S. Department of Homeland Security (DHS) and check the immigration status of any individual taken into custody against a flawed and inaccurate database, even without the filing of a criminal charge. Under Secure Communities, ICE may place an immigration detainer—a pre-trial hold—on any individual who appears on the federal database, and transfer the individual into immigration custody. Secure Communities has had a disastrous effect on immigrant communities, including on victims of crime and employer abuse. In FY 2010, Secure Communities led to the issuance of 111,093 immigration detainers by ICE at the local level.[30] Underscoring the inaccuracies of the DHS database, Secure Communities has even led to the improper immigration-related arrest of approximately 3,600 U.S. citizens by ICE.[31]

In addition, deputization agreements formed under Section 287(g) of the Immigration and Nationality Act have enabled local law enforcement agencies to perform some of the functions of federal immigration agents, laying the groundwork for a greatly expanded immigration enforcement system. Although the Obama administration began to phase out local partnerships under the program in 2012 in favor of the use of Secure Communities, the impact of 287(g) agreements remains.[32] Critics argue that the 287(g) program lacked proper oversight, allowed local law enforcement agencies to pursue immigration enforcement in discriminatory ways, and diverted resources from the investigation of local crimes.[33]

As demonstrated by the following examples, the flawed integration of local law enforcement with federal immigration enforcement has provided employers with additional means to retaliate against immigrant workers who seek to exercise their workplace rights. Employers may capitalize on language barriers or local law enforcement biases against immigrants to achieve their ends. Due to the growing federal-local collaboration on immigration enforcement, immigrant workers who are falsely accused of crimes often have no recourse and instead, end up in deportation proceedings after blowing the whistle on labor violations.

In addition, agents of employers, including insurance agencies that provide workers' compensation coverage, have chosen to report immigrant workers to local law enforcement agencies for inconsistent Social Security numbers. Although it is well-settled that workers, regardless of immigration status, are entitled to workers' compensation coverage,[34] at least one large insurance company has persuaded local prosecutors to file identity theft charges or other document-related charges with local police departments, thereby avoiding payment to the injured worker.

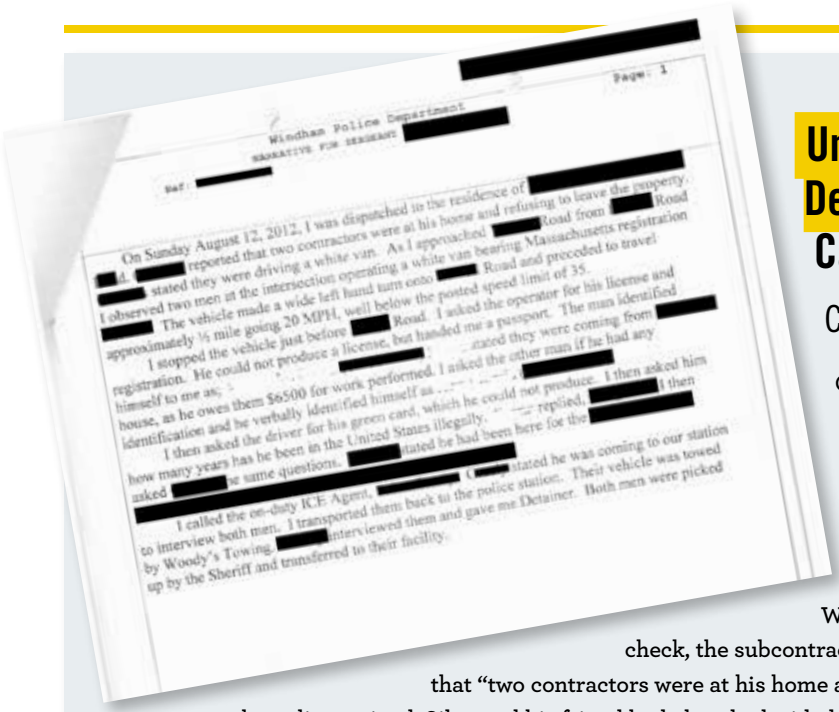
Day Laborer Lands in Jail and Faces Immigration Hold after Requesting Wages

Winnetka, California (2013)

Hector Nolasco, a day laborer in Winnetka, California, currently faces deportation because his employer falsely reported him to the police in order to avoid paying him his wages. On February 3, 2013, Hector and a friend were hired to pack and move boxes at a restaurant for five hours. Nolasco worked for six hours, and when he asked to be paid for the extra hour, his employer refused. Instead, the employer threatened to call the police.

Nolasco and his friend decided to leave, and began a three mile walk back to the corner from which they were hired. The employer followed them, hurling insults and gesturing threateningly. Suddenly, the police arrived, and placed Nolasco under arrest. Nolasco later learned that his employer had told the police that Nolasco had threatened him with a knife—the box cutter that Nolasco had used to pack boxes. Although Nolasco's friend, who was present all day, confirmed that Nolasco never threatened anyone, Nolasco remains in police custody on a misdemeanor charge of displaying a deadly weapon. He has also been issued an ICE hold.[35]

photo of Hector Nolasco courtesy of NDLON



Windham Police Department

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On Sunday August 12, 2012, I was dispatched to the residence of [redacted] reported that two contractors were at his home and refusing to leave the property. [redacted] stated they were driving a white van. As I approached [redacted] Road from [redacted] Road I observed two men at the intersection operating a white van bearing Massachusetts registration [redacted]. The vehicle made a wide left hand turn onto [redacted] Road and proceded to travel approximately ½ mile going 20 MPH, well below the posted speed limit of 35.

I stopped the vehicle just before [redacted] Road. I asked the operator for his license and registration. He could not produce a license, but handed me a passport. The man identified himself to me as [redacted] stated they were coming from [redacted] house, as he owes them $6500 for work performed. I asked the other man if he had any identification and he verbally identified himself as [redacted]. I then asked him how many years has he been in the United States illegally. [redacted] replied, [redacted] I then asked [redacted] the same questions. [redacted] stated he had been here for the [redacted]

I called the on-duty ICE Agent, [redacted] stated he was coming to our station to interview both men. I transported them back to the police station. Their vehicle was towed by Woody's Towing. [redacted] interviewed them and gave me Detainer. Both men were picked up by the Sheriff and transferred to their facility.

Unpaid Construction Worker Deported After Employer Retaliates, Calls Police

Charlestown, MA (2012)

Gabriel Silva,* a construction worker from Brazil, was hired during the summer of 2012 by a subcontractor to install plaster and sheetrock in Charleston, Massachusetts. The subcontractor failed to pay Silva the $6500 owed for his work, and on August 12, 2012, Silva returned to request his wages.

While Silva and a friend were waiting in their van for the check, the subcontractor called the local police department and reported that "two contractors were at his home and [were] refusing to leave the property." By the time the police arrived, Silva and his friend had already decided to give up and leave. As they drove off, the police stopped their van, and asked Silva for a copy of his driver's license. Silva handed the police officer a copy of his passport, and told the police officer that they had been trying to recover their unpaid wages. The police officer asked the pair for their green cards, which they could not provide. The police officer then called an ICE agent. Silva and his friend were transported back to the police station, and their vehicle was towed. The ICE agent interviewed Silva and his friend, and issued an immigration detainer. Silva and his friend were ultimately transferred into ICE custody and deported. The Brazilian Immigrant Center is still attempting to recover Silva's wages.[36]

Restaurant Worker Arrested and Deported After Trying to Collect Two Months of Unpaid Wages

Lanett, AL (2012)

Pablo Gutierrez* worked at a restaurant in Lanett, Alabama. While at the restaurant, he worked from 8:00 in the morning until 10:00 pm at night, seven days a week, for $1300 per month – an hourly wage of less than $3.50 per hour. After he had gone for two months without being paid, he asked his employer for a raise. His employer fired him on the spot. When he asked his employer for his unpaid wages, his boss told him to come back the next Saturday to collect his pay.

Gutierrez returned the following Saturday, October 6, 2012, right before the restaurant closed. As he waited in his car for his employer to come out of the restaurant, he saw his boss make a call on a cell phone. Suddenly, a police car pulled up, and the police officer asked Gutierrez why he was there. While Gutierrez explained that he was trying to collect his wages, three additional police cars pulled up. After the police officers talked to Gutierrez's employer, the police asked him for a drivers' license, and he was arrested at once. Gutierrez later understood that he had been charged with attempted robbery. Gutierrez was transferred to immigration custody, and after spending almost two months in jail and immigration detention, was deported to Mexico on November 26, 2012.[37]

Grandmother Imprisoned and Deported After Workers' Compensation Insurance Company Reported Her to Local Law Enforcement

York County, Pennsylvania (2012)

Juana Garcia,* a grandmother of eleven, nine of whom are U.S. citizens, and an immigrant from Mexico, worked for several years at a York County, Pennsylvania pizza restaurant. Garcia worked long hours at the restaurant—over 12 hours a day, 5 days a week—and also cleaned the restaurant owner's home on one of her two days off. She worked well over 40 hours a week, and was never properly paid overtime.

Garcia's legal problems began when a shelf fell on her at work, injuring her badly. Her employer reported her injury to the workers' compensation insurance company. The insurance company then contacted the local police department to initiate a criminal investigation because her Social Security number did not match records at the Social Security Administration. Garcia was charged and convicted for identity-related offenses, and was sentenced to several months in federal prison. Garcia was then transferred to the custody of immigration officials, and was deported to Mexico. Garcia never collected the wages she was due from her employer, and was deeply traumatized by incarceration and separation from her children and grandchildren in the United States.[38]

Immigrant Construction Workers Try to Recover Unpaid Wages, Reported to ICE

Seattle, WA (2012)

Casa Latina's Workers Defense Committee, an immigrant worker center in Seattle, Washington, worked with three construction workers whose employer owed them collectively a total of over $30,000. This employer was known to Casa as a repeat offender with a lengthy record of wage and hour violations.

In February 2012, the three workers approached their employer to request their pay, and gave the employer a list of wages owed and hours worked. During the meeting, the employer threatened to call immigration authorities if they continued to request their unpaid wages. The workers filed a wage complaint with the Washington State Department of Labor and Industries. A few days later, ICE arrived at the home of one of the workers and took him into custody. The other two workers remain in great fear, and have since dropped their claim against the employer.[39]

photo courtesy of Casa Latina

Farm Workers Detained by Immigration after Assault by Abusive Employer Who Filed False Police Report

Cordele, GA (2010)

When Ernesto Lopez,* and brothers Julio and Juan Diaz,* traveled with a watermelon-picking crew to Georgia, they realized that the bad rumors that they had heard about their employer were true. Their employer often yelled at workers, refused to pay them if the trucks were not loaded to his liking, and warned the workers about immigration. The workers did not receive all the pay that they were due, and were housed in a motel, assigned to them by their boss, who lived nearby with his family.

On June 5, 2010, Ernesto, Julio, and Juan decided that they wanted to find another place to work. Although they were scared, Ernesto and Julio called their boss to tell him that they wanted to leave and move to a different crew. Their boss would not allow them to leave. Soon after, their boss and eight of his friends and relatives came to their room, and began to beat Ernesto, Julio, and Juan. Ernesto was beaten over the head by a bottle; Julio was choked and he lost consciousness. Due to the commotion, two police officers, neither of whom spoke Spanish, soon arrived at the motel. They spoke to the boss in English, and arrested Ernesto, Julio, and Juan, who only speak Spanish.

When Ernesto, Julio, and Juan were brought to the police station, they were charged with disorderly conduct and told that they could leave if they paid bail. The three workers pooled their money so that Ernesto, who was most severely injured, could leave and get help. The day after Julio and Juan met with a legal aid lawyer, the disorderly conduct charges were dropped against them, and they were transferred to an immigration detention center. Julio and Juan's lawyer later found out that ICE had told the police department that it would be faster to get rid of the workers if the charges were dropped.[40]

Insurance Agency Reports Injured Worker after Workers' Compensation Claim, Leading to Deportation Proceedings

Milwaukee Metro Area, Wisconsin (2009)

Omar Damian Ortega worked as a welder for his employer for over eight years until March 2009, when he suffered a back injury. After he filed an appeal for his workers' compensation claim, his employer's insurance company called the local police department to investigate whether Mr. Damian Ortega had, years earlier, used a false Social Security number to get his job. The insurance company stated that "it is its policy to "notify the necessary law enforcement and government agencies when it believes an identity theft has occurred."

After the insurance company contacted the local police department, the police drove to Mr. Damian Ortega's house and questioned him. Mr. Damian Ortega was arrested a few days later. After approximately five months in jail, he pled guilty to two misdemeanors involving use of a false social security number. He was then transferred to the custody of Immigration and Customs Enforcement, where he faced deportation proceedings.

B. Increase in worksite immigration enforcement and I-9 audits encourages employers to "self-audit" during labor disputes

In 1986, Congress passed the Immigration Reform and Control Act (IRCA), a cornerstone of today's immigration policy. Central to IRCA was the creation of employment sanctions, which impose civil and criminal penalties on employers for knowingly hiring and employing workers without authorization.[41] IRCA requires employers to verify a worker's identity and eligibility to work, and complete and retain an "I-9" form for each new employee, or risk a fine.[42] Despite its intention to deter employers from knowingly hiring undocumented workers, workers themselves have borne the punitive

brunt of the employment sanctions regime.

In the past three years, the Obama administration has reduced the frequency of worksite raids and has instead increased administrative audits of employers to detect compliance with I-9 requirements. Since January 2009, ICE has conducted more than 8,079 audits of employers, compared with 503 audits in FY 2008.[43] Although this strategy of "silent raids" differs from the prior administration's primary focus on high-profile raids, the effect on workers is devastating. Where workers have conducted union organizing drives, employers may claim that they must re-verify employees' I-9 forms to comply with an ICE audit—even where none in fact is present. Such an announcement stokes fear in an already vulnerable workforce, and can unfairly interfere in an organizing campaign.

In limited circumstances, employers may re-verify, or ask workers to produce their I-9 work authorization documentation again, after the employer's initial verification at the time of hire, without running afoul of anti-discrimination or retaliation protections.[44] However, in some cases, employers have improperly conducted I-9 self-audits just after employees have filed workplace-based complaints, or in the midst of labor disputes or collective bargaining, creating a climate of fear. In other instances, employers have attempted to re-verify workers following a reinstatement order, an illegal practice under the National Labor Relations Act.[45] Employers often provide little or no notice to workers about the reason for the I-9 re-verification, and fail to provide a reasonable period of time for employees to respond to the self-audit, even when they are proper.

Employer Conducts Immigration Reverification After Workers File Complaint with Department of Labor for Safety and Wage Violations

Esmoke | Lakewood, NJ (2012)

Employees at the Esmoke company in Lakewood, New Jersey, make electric cigarettes—"fake cigarette" devices filled with nicotine and used to quit smoking. Workers who make these devices must mix dangerous chemicals and solder batteries to the electric cigarette. At Esmoke, workers had a number of serious health and safety complaints, and had not received wages, including overtime, from their employer.

After workers filed a complaint with the Department of Labor's Wage and Hour Division (WHD) and Occupational Health and Safety Administration (OSHA), OSHA inspectors conducted a surprise investigation of the plant on September 27, 2012.[46] Managers at the plant immediately told the workers not to answer the inspectors' questions, hid chemicals in their offices, and instructed the workers to falsely tell the inspectors that they used gloves.

One week after the OSHA investigation, the employer began to ask employees if they were legally authorized to work and told some workers that immigration agents would soon be coming to the plant. Word spread. Workers—except those close to the boss—were given I-9 and IRS W-4 forms to complete. Most workers had never been given these forms before, despite requirements that employers attain those forms from any new employees. Two of the workers who initiated the complaint were terminated from their jobs.

The WHD also investigated for labor law violations, and found that the employer had not paid over $33,000 worth of overtime wages to its workers. However, the employer required some workers to provide valid social security cards in order to receive their checks. Several workers remain unpaid.[47]

Palermo Pizza Attempts to Reverify Immigration Status of Workers Organizing to Form a Union

Palermo Pizza | Milwaukee, Wisconsin (2012)

For at least three years, workers at Palermo Villa, Inc., one of the country's largest producers of frozen pizza, had been working with a community group, Voces de la Frontera, to address workplace issues including health and safety, overtime pay, and discrimination. In May 2012, three-quarters of the production workers signed a petition in favor of a union, and on May 29, 2012, they requested that Palermo recognize their union and filed a formal petition with the NLRB. The next day, Palermo gave workers a letter indicating that ICE had conducted an I-9 audit and the workers were required to reverify their immigration status within 28 days.

Four days later, Palermo told its employees that they would have only 10 days to reverify their status. Scores of Palermo's workers went on strike to protest the immigration crackdown, as well as the poor wages and working conditions.[48] Palermo responded by telling workers that a union would cost the company thousands of dollars and that the company would not accept it.[49]

A few days later, after several labor leaders complained that the immigration audit at Palermo's was undermining a unionization effort, ICE wrote Palermo suspending its audit. At this point, Palermo had no information indicating that any of its employees were unauthorized to work, and was in no danger of penalties, because the ICE investigation had been stayed. Nonetheless, one day after receiving notice that ICE was not pursuing enforcement action against it, Palermo fired some 75 striking workers. Palermo claimed that the firings were not motivated by anti-union animus, but to comply with immigration law, a dubious claim in light of ICE's retraction of its investigation and in light of further actions by the company: It distributed a notice to workers that said, "unions want to take your job and give them to protesters." Palermo also posted a banner at the facility stating that, "a union will not change your immigration status."[50]

photios courtesy of Jenna Pope

Employers have improperly conducted I-9 self-audits just after employees have filed workplace-based complaints, or in the midst of labor disputes, or collective bargaining, creating a climate of fear.

In a national survey of 4,000 low-wage workers, 20 percent said that they did not make a complaint to their employer during the past 12 months, even if they had experienced a serious problem.

Pomona College Fires Dining Hall Workers through Immigration Reverification after Workers Organize for Union

Pomona College | Pomona, California (2011)

For two years, dining hall workers at Pomona College in Claremont, California organized to form a union. Discussions between workers and the College have been unsuccessful. In 2011, the administration began enforcing a rule barring dining hall employees from talking to students in the cafeteria.[51] The union filed unfair labor practice charges in August and September 2011 challenging the rule.[52] The College later changed the no-contact rule in the face of prosecution from the general counsel of the National Labor Relations Board.

In the middle of the campaign, the College received a letter from an undisclosed source accusing it of having a policy of not obtaining documentation of work authorization from its employees. The College administration investigated this complaint and found it to be false. Even though the College's review found that there was no such history of noncompliance, and although no federal agency had investigated the College for noncompliance, the College Board of Trustees decided to re-verify the immigration status of its staff. It turned the matter over to the law firm of Sidley Austin, a corporate law firm which offers services including "union avoidance" for "clients who desire to remain union-free."[53]

The college gave staff notice that they needed to bring in their documents within 3 weeks and by early December 2011, Pomona had fired 17 workers. Sixteen of them were dining hall workers. Some of the staff members had been employed by the College for decades.

It is impossible to know whether the college's actions were motivated by its desire to avoid unionization of its employees. What is clear is that the vagueness of the complaint that Pomona allegedly received and its harsh response —after two years of union organizing and amid pending charges of unfair labor practices[54]—resulted in job loss for some of Pomona's long-standing employees.

photos courtesy of UNITE HERE

Poultry Processor Targets Immigrant Worker Leaders, Investigates Immigration Status to Stop Union Organizing

Case Farms | Winesburg, Ohio (2011-2012)

Case Farms is a chicken slaughterhouse and processor located in Winesburg, Ohio. In the mid-1990s, the company began to recruit and hire Guatemalan workers from Florida and from its own processing plants in North Carolina. In 2000, approximately 350 Guatemalan workers worked at Case Farms. By 2007, Case Farm workers won union representation by the United Food and Commercial Workers (UFCW) Local 880 by a nearly 2 to 1 margin, but the company's campaign against the union had just begun.

For four years, in a climate of extreme hostility and illegal retaliation against workers by the employer, the union attempted, without success, to negotiate with the company to gain a contract. In June 2011, a federal district court issued an injunction against Case Farms' anti-union activities.[55] On September 16, 2011, the NLRB Division of Judges issued a cease and desist order against the company, after finding that its Human Resource manager had stated that he was intending to "take out" the Union supporters "one at a time."[56]

Just weeks before the NLRB released its decision, Case Farms on its own began an internal investigation into the immigration status of ten worker leaders who supported unionization, all of Guatemalan origin. The only stated basis for the company's actions was that some of the workers were originally from Guatemala or had traveled to Guatemala. The company had no basis for investigating the status of five of the ten workers. Although legally a person's ethnicity or national origin is not a legitimate basis upon which to determine citizenship status, Case Farms fired all ten workers.[57] The organizing campaign at the plant has since halted.

photo courtesy of Tim Mullins

C. Use of E-Verify exacerbates retaliation by employers

E-Verify is a federally-created internet-based program that allows employers to confirm the immigration status of newly hired workers. To use the E-Verify system, employers must enter an employee's identification information, including name, Social Security number, date of birth, citizenship, and alien number into an online database, which is matched against databases maintained by the Social Security Administration (SSA) and DHS. The E-Verify system is voluntary for most employers, although at least some employers in 19 states and those with federal contracts must enroll in E-Verify.[58] Although use of E-Verify has expanded rapidly over the last decade, only around 350,000 employers are currently enrolled.[59]

Policymakers have called for the implementation of mandatory E-Verify systems as part of immigration reform.[60] A mandatory E-Verify system would cause qualified workers to lose job opportunities, increase employment discrimination, decrease tax collection, and increase "off-the-books" employment, allowing more labor abuses to flourish.[61]

Proponents of E-Verify argue that the system will modernize the nation's employment immigration verification systems, but at least in its current form, E-Verify has led to widespread confusion and error. In 2009, a government-commissioned report estimated the error rate of the E-Verify system to be at 4.1 percent, with inaccuracies found to be 30 to 50 times higher for naturalized citizens and legal immigrants than for native-born citizens.[62] The Social Security Administration projects that under current conditions, a mandatory E-Verify program could result in the misidentification of 3.6 million workers as unauthorized for employment each year.[63]

Mandatory use of E-Verify will provide employers added incentive to erroneously call their workers independent contractors or simply pay them "off the books" in order to skirt their E-Verify obligations. The Congressional Budget Office estimates tax losses at over $17.3 billion.[64] In addition, as examples show, unscrupulous employers have misused E-Verify as an opportunity to intimidate and retaliate against workers for union organizing or for engaging in concerted efforts to address workplace violations.

The experience of state implementation of E-Verify proves instructive. In some states, E-Verify legislation requires state governments to verify immigration status for some employees, creating conflict with state and federal enforcement of labor standards for undocumented workers. Where this is the case, workers who wish to pursue labor claims face an especially high risk of immigration-related consequences.[65]

Latino Supermarket Chain Signs Up for E-Verify and Re-Verifies I-9 Forms in Midst of Unionizing Campaign

Mi Pueblo Supermarket Chain | San Francisco Bay Area (2012)

Workers at the Mi Pueblo supermarket chain, which caters to the Latino immigrant community in the San Francisco Bay Area, have been trying to join a union for years. In response to complaints about unfair hiring practices and violations of wage and hour laws, the United Food and Commercial Workers (UFCW) union Local 5 began a campaign to organize workers, gathering authorization cards from workers seeking collective bargaining. However, in August 2012, as the union organized both workers and local community to support the union, Mi Pueblo announced that it had decided to voluntarily join the E-Verify program to screen new hires for immigration status. Although Mi Pueblo explained that it was "forced" to use the E-Verify program by the government, ICE spokespeople confirmed that E-Verify is a voluntary program in California.[66]

Mi Pueblo's announcement that it would use E-Verify angered the local community, and UFCW scheduled a boycott of the supermarket chain the next month. However, days before the boycott was to begin, in October 2012, Mi Pueblo announced that federal immigration agents had launched an audit of the entire supermarket chain.[67] The effect of this announcement was disastrous: many workers quit working at Mi Pueblo out of fear. Despite the fear caused by Mi Pueblo and the I-9 audit, as well as union-busting tactics used by the employer, the union continues to organize.[68]

photos courtesy of David Bacon

Employer Decides Unilaterally to Enter E-Verify Program without Bargaining with Union

Pacific Steel Casting Company | Berkeley, California (2012)

Berkeley's Pacific Steel Casting Company (Pacific Steel) decided unilaterally to implement the use of E-Verify in its workplace. Even though Pacific Steel workers are represented by the Glass, Molders, Pottery, Plastics & Allied Workers International Union, Local No. 164B, AFL-CIO, CLC (Local 164B), the union was not notified. When Local 164B learned of Pacific Steel's enrollment and requested written confirmation, Pacific Steel untruthfully claimed that because it was a federal contractor, it was required to use E-Verify and refused to bargain with the union over this issue.[69]

To protect its members, the union filed unfair labor practice charges with the National Labor Relations Board (NLRB). In settlement of the charges, Pacific Steel agreed to reinstate employees and pay employees for any wages and benefits lost after many were terminated as a result of Pacific Steel's unlawful entry into the E-Verify Program. The agreement, signed on March 22, 2012, also requires that Pacific Steel terminate its enrollment in E-Verify.

photos courtesy of David Bacon

Mandatory use of E-Verify will provide employers added incentive to erroneously call their workers independent contractors or simply pay workers "off the books" in order to skirt their E-Verify obligations. The Congressional Budget Office estimates tax losses at over $17.3 billion.

Providing eight million workers with a pathway to citizenship will ease the climate of fear that prevents the exercise of workplace rights

Retaliation and threats of retaliation have created a culture of fear among low-wage and immigrant workers. In a national survey of 4,000 low-wage workers, 20 percent said that they did not make a complaint to their employer during the past 12 months, even if they had experienced a serious problem. Of these workers, most were afraid of having their wages and hours cut or of losing their job.[70]

Undocumented workers do not form a majority in any industry, but work alongside U.S. citizens and documented workers. When as many as 20 percent of low-wage workers are afraid to exercise their workplace rights, the remaining workers cannot effectively organize a union or voice collective complaints. It comes as no surprise that wages and unionization rates both remain low in industries with large numbers of undocumented workers.[71]

Providing a pathway to citizenship for the 11 million undocumented immigrants in the United States—8 million of whom participate in the labor force—will facilitate efforts to improve job quality and economic security for both U.S. and aspiring citizens. Immigration reform that puts all workers on a level playing field would create a virtuous cycle in which legal status and labor rights exert upward pressure on the wages of both native-born and immigrant workers.[72] Higher wages and better jobs translate into increased consumer purchasing power, which will benefit the U.S. economy as a whole.[73]

The historical experience of legalization under the Immigration Reform and Control Act of 1986 demonstrates that comprehensive immigration reform that includes a pathway to citizenship for the undocumented will improve our economy. In 1986, IRCA provided immediate direct benefits by successfully turning formerly clandestine workers into higher-paid employees. Wages increased because workers gained the right to live and work legally in the United States.[74] Today, providing a clear path for undocumented workers to become citizens will raise wages, increase consumption, create jobs, and generate additional tax revenue.[75] Experts estimate that providing a way for undocumented immigrants to realize their dreams of U.S. citizenship will add a cumulative $1.5 trillion to the U.S. gross domestic product—the largest measure of economic growth—over 10 years.[76]

A new immigration policy must ensure that employers can no longer use immigration status to retaliate against workers

Retaliation against immigrant workers has silenced fair pay, health and safety claims, and union organizing campaigns. While a broad legalization program will allow these workers to safely come forward, immigration policies must also guard against future employer manipulation of the immigration laws. In crafting those policies, we can learn from an evaluation of current efforts to protect immigrant workers from retaliation and ensure that labor agencies can enforce baseline laws.

I. Firewalls between immigration and labor enforcement must be reinforced

In the mid-1990s, the U.S. Department of Labor and the Immigration and Naturalization Service (INS) developed new policies to address the effect of strict enforcement of immigration laws on labor law enforcement. The first, an internal Operating Instruction at INS, and the second, a Memorandum of Understanding between the INS and the U.S. Department of Labor, intended to uphold dual national interests in protecting labor rights and enforcing immigration standards. Both of these interests are undercut when employers are allowed to use immigration status as an exit strategy in labor disputes.

A. Immigration and Naturalization Service Operating Instruction 287.3(a) must be updated and codified

Since 1996, INS and now ICE have been guided by an internal policy intended to ensure that immigration authorities do not become unwittingly involved in labor disputes as a result of employer retaliation.[77] The policy, Operating Instruction 287.3(a) (OI), requires immigration agents to receive approval from an ICE Director before continuing an investigation where it appears that the employer has attempted to use DHS to interfere with workers' exercise of their employment and labor rights.[78]

The OI includes a provision requiring ICE agents to determine whether information provided about an undocumented immigrant is given to interfere with a workplace dispute or to retaliate against any worker, and closely examine information from any source that may raise this concern, Where there is a suspicion that an employer may have brought in ICE during a labor dispute, ICE must make specific inquiries into the source and details of the information it receives. The OI also requires internal discussion with ICE District Counsel and

approval of the ICE Assistant District Director for Investigations or an Assistant Chief Patrol Agent before any immigration enforcement action takes place in such cases.

As cases in this report illustrate, the OI, while a good start, often falls short in protecting immigrant workers involved in workplace disputes, and requires substantial improvement in implementation. First, the OI remains an internal protocol, and lacks the force of codification. Local ICE offices are often unaware of its existence and therefore respond to employer calls for worker arrests without question. Second, the degree of discretion afforded ICE under the OI does not provide security for advocates or workers, who might fear disclosing to ICE the existence of a labor dispute, because of limited reports of ICE using such information to *trigger* an enforcement action. Finally, the OI applies only to retaliation by *employers*. Because agents of employers, including their friends, associates, and insurance companies, may make reports to ICE, and because local police referrals to ICE through programs such as Secure Communities have increased, the OI does not provide sufficient protection to immigrant workers who are victims of employer reprisals.

After Labor Commissioner Issues Judgment Against Employer Who Failed to Pay Worker, Employer Harasses Worker and Threatens to Report to Immigration with False Evidence

San Jose, CA (2013)

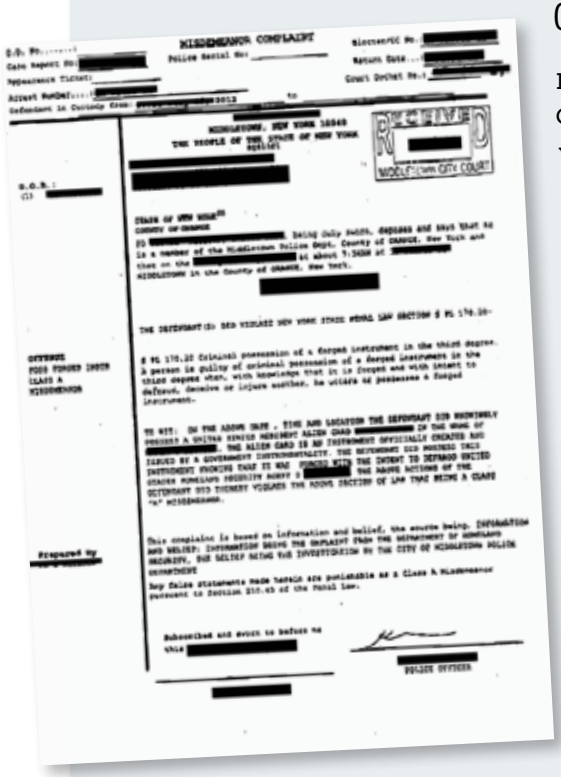
Mario Cruz,* a gardener from Mexico, trimmed trees in San Jose, California. After his employer failed to pay him, he filed a complaint with the California Labor Commissioner (CLC). The CLC entered a judgment requiring the employer to pay him over $50,000 for unpaid wages. Three months after the decision, Cruz still had not received any of his wages. With the help of a local advocacy group, Cruz sent a letter to his employer requesting his wages and indicating that he might file a lien on his employer's property if his employer did not pay.

Cruz did not receive any payment in response to his letter. Instead, on January 22, 2013, Cruz's employer paid a visit to his house. His employer threatened to have him deported. The employer visited Cruz twice more, but when Cruz refused to open the door, his employer repeated his threats to call immigration. When Cruz called the police to make a report, the police refused to help.

On January 25, 2013, immigration enforcement agents showed up at the house of one of the witnesses in Cruz's CLC case. Cruz worried that the visit was related to his case. Cruz heard that his employer had also threatened another worker who had tried to file claims for unpaid wages in the past. His employer had told his co-worker to take less money or that drugs would be planted in his car. Cruz is now afraid of leaving the house, and is afraid that his employer is going to harm him.[79]

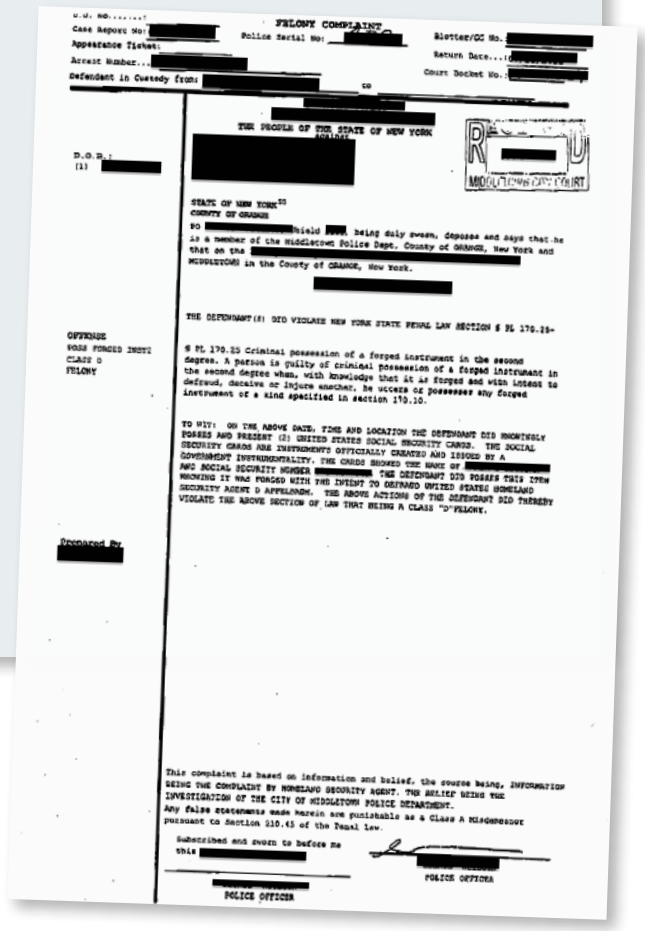
Employer Reports Worker Who Filed Wage and Hour Lawsuit to Friend at Department of Homeland Security; DHS Conducts In-Home Raid of Worker

Orange County, New York (2012)


MISDEMEANOR COMPLAINT

In March 2012, workers at a seafood processing and packing plant in Orange County, New York, filed a class action lawsuit against their employer for violations of the Fair Labor Standards Act and New York State Labor Law. Despite her apprehension, Maria Guadalupe Escobar Ibarra, a worker at the plant, agreed to be a named plaintiff in the case, believing it was important to stand up for her rights and those of her co-workers. Ten days after the case was filed in court, however, a supervisor at the plant contacted Escobar and the other named plaintiff in the case, informing them that her employer was willing to pay them a large sum of money if they dropped out of the case, and also said that the employer would consider contacting immigration authorities about her immigration status if she did not drop out of the case.

One morning in July, as Escobar and a friend drove to work, a special agent for the Department of Homeland Security stopped their vehicle, and instructed her to return to her home. When Escobar returned, the agent slammed open her door, and repeatedly yelled at her and demanded that she show him her papers, gesturing at the gun on his belt. Because Escobar was afraid, she handed him a set of papers. Soon after, a local police car pulled up to arrest Escobar. The police did not tell her anything, and instead handcuffed and loaded her in the car.

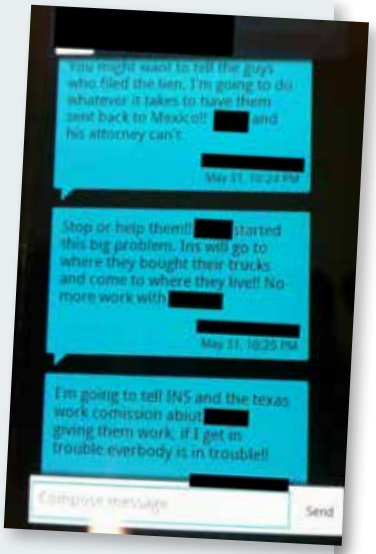

FELONY COMPLAINT

After Escobar was fingerprinted and booked in the station, she realized that she had seen the agent before. He was a friend of one of her employers. The police charged Escobar with a felony for possession of a forged instrument and she was transferred to immigration custody. Escobar has been deeply traumatized by the employer's retaliation against her, and doesn't know if it was worth it to file suit against her employer. She is still fighting her criminal and deportation cases.[80]

Employer Ordered to Pay Wages Threatens to Report Workers to Immigration

Austin, Texas (2012)

In March and April 2012, after a group of immigrant construction workers had worked for weeks painting, framing, and installing sheet rock, fixtures, and flooring in an Austin, Texas shopping mall, their employer failed to pay them for several weeks of work. The workers contacted the Equal Justice Center, which represented the workers in their efforts to recover their unpaid wages.



In order to collect the workers' unpaid wages, the Equal Justice Center placed a mechanic's lien on the property—a temporary hold on property for debts owed—which led the general contractor to pressure the workers' direct employer to pay their unpaid wages. Instead of paying the workers their wages, the subcontractor sent the workers text messages threatening to report them to immigration enforcement. "Play games with me!!" he texted. "You might want to tell the guys who filed the lien, [sic] I'm going to do whatever it takes to have them sent back to Mexico!! And [] attorney can't stop or help them . . . I'm going to tell INS and the Texas Work Commission about [their new employer] giving them work, if I get in trouble everybody is in trouble!!"[81]

photos courtesy of Equal Justice Center

Employer Contacts Immigration Officials to Deport Housekeeper Who Sued for Wages

New York, New York (2011)

Santosh Bhardwaj, a domestic worker from India, was brought to the United States by her employer, Prabhu Dayal, under false pretenses. Dayal, the head of the Indian consulate in New York, promised that he would pay her ten dollars an hour for her work, overtime pay, and good working conditions. Instead, Bhardwaj's employer confiscated her passport when she arrived, and subjected her to almost one year of forced labor in their home. On a typical day, Bhardwaj worked over twelve hours a day, seven days a week, cooking, doing laundry, making beds, sweeping, mopping, dusting, vacuuming, cleaning toilets, washing windows, polishing silver, serving food and tea, and polishing the shoes of the Dayal family. When the family had a party, she was required to cook and clean for the guests. The Dayals threatened to send Bhardwaj back to India if she did not do her job properly. Despite her backbreaking schedule, and despite their promise to pay her ten dollars an hour, Bhardwaj was paid only $300 a month.

When Bhardwaj, with the help of the Legal Aid Society and a law firm, Outten and Golden, sued Dayal for unpaid wages, he retaliated by threatening and intimidating her. Dayal released her photograph to the press, and publicly called for her deportation. He contacted law enforcement authorities encouraging her deportation. Although Bhardwaj was able to avoid deportation, this experience left her shaken.[82]

Immigrant Worker Joins Lawsuit against Employer, Arrested by ICE due to Employer Retaliation

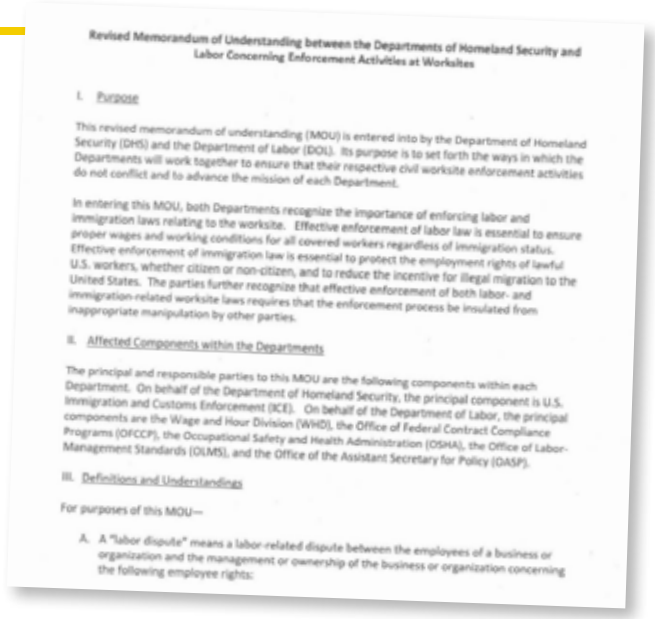
Anaheim, CA (2010)

Osfel Andrade, an immigrant from Mexico, worked in the shipping department of Terra Universal, a laboratory equipment manufacturer in Fullerton, California when immigration agents conducted a worksite raid on June 29, 2010. During the raid, ICE agents arrested 43 workers and placed them in deportation proceedings. Andrade was not arrested that day, but instead of remaining hidden from authorities, he agreed to serve as a named plaintiff in a class action case against his former employer. The case seeks back wages for years of unpaid wages, exploitation, and discrimination on behalf of hundreds of workers.

After Andrade joined the lawsuit, associates of his former employer attempted to pressure him to drop out of the case. Andrade refused. Shortly thereafter, ICE agents arrested Andrade at his home, and placed him in immigration detention, where he was held for three weeks until released on bond. Evidence indicates that Terra Universal informed ICE of Andrade's immigration status in retaliation for filing the lawsuit.

After Andrade's arrest by ICE, two of the other named plaintiffs in the lawsuit subsequently withdrew from the case. Andrade, however, has remained in the case, despite the fear and emotional distress caused by his employer's retaliation. His courage has earned him the respect of his co-workers and community members, and he was recently honored with the Freedom From Fear Award, in recognition of the significant risk he has taken to confront injustice on behalf of immigrants in the United States.[83]

photo of Osfel Andrade courtesy ACLU of Southern California



Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites

I. Purpose

This revised memorandum of understanding (MOU) is entered into by the Department of Homeland Security (DHS) and the Department of Labor (DOL). Its purpose is to set forth the ways in which the Departments will work together to ensure that their respective civil worksite enforcement activities do not conflict and to advance the mission of each Department.

In entering this MOU, both Departments recognize the importance of enforcing labor and immigration laws relating to the worksite. Effective enforcement of labor law is essential to ensure proper wages and working conditions for all covered workers regardless of immigration status. Effective enforcement of immigration law is essential to protect the employment rights of lawful U.S. workers, whether citizen or non-citizen, and to reduce the incentive for illegal migration to the United States. The parties further recognize that effective enforcement of both labor- and immigration-related worksite laws requires that the enforcement process be insulated from inappropriate manipulation by other parties.

II. Affected Components within the Departments

The principal and responsible parties to this MOU are the following components within each Department. On behalf of the Department of Homeland Security, the principal component is U.S. Immigration and Customs Enforcement (ICE). On behalf of the Department of Labor, the principal components are the Wage and Hour Division (WHD), the Office of Federal Contract Compliance Programs (OFCCP), the Occupational Safety and Health Administration (OSHA), the Office of Labor-Management Standards (OLMS), and the Office of the Assistant Secretary for Policy (OASP).

III. Definitions and Understandings

For purposes of this MOU—

A. A "labor dispute" means a labor-related dispute between the employees of a business or organization and the management or ownership of the business or organization concerning the following employee rights:

B. The Department of Labor (DOL) Memorandum of Understanding with the Department of Homeland Security must be expanded and codified

In 1998, then-INS and DOL signed a Memorandum of Understanding (MOU) to address their respective roles in the enforcement of immigration and labor law. In 2010, the Obama administration substantially overhauled this MOU.[84]

The revised DOL–DHS MOU aims to limit ICE enforcement activities from interfering with DOL investigations and audits, including enforcement of wage and hour and health and safety laws. Given the frequency of wage and hour abuses in industries in which many immigrants work, the MOU attempts to ensure that workers feel free to come forward to report serious labor abuse without fear of deportation, and that DOL can improve labor practices in these industries. The MOU applies to any DOL investigation, regardless of whether retaliation has occurred, in recognition that the sequence of a DOL investigation followed by any ICE enforcement action would chill worker complaints and thwart DOL's mission to enforce core labor standards.

To ensure that ICE does not interfere in DOL enforcement activities, the MOU has established

a process for both agencies to coordinate their workplace enforcement activities. The MOU requires DOL to communicate with ICE as to its worksite enforcement activities, and limits ICE from engaging in worksite enforcement during the pendency of a DOL investigation.

The MOU can be improved to establish a strong firewall between labor and immigration enforcement. Because it is only an agreement between DOL an ICE, no equivalent firewall exists for workplaces with pending state and federal discrimination claims, workers' compensation claims, state wage and hour investigations, or state health and safety investigations. The MOU explicitly allows ICE to resume or begin an audit after a DOL investigation concludes, sending the message to workers that if they complain, ICE may eventually come after them. To improve upon the MOU and create a stronger firewall, Congress should expand and codify the measure.

II. Remedies for labor abuses for undocumented workers must be restored

In addition to codification of best agency practices, Congress must restore equal remedies to undocumented workers subject to illegal working conditions. Undocumented workers are covered under all major labor and employment laws in the United States, including the Fair Labor Standards Act, Title VII of the Civil Rights Act, the National Labor Relations Act, the Occupational Safety and Health Act,[85] the state counterparts to these, and state workers' compensation laws, but a 2002 U.S. Supreme Court decision limits the remedies available such workers. In 2002, the U.S. Supreme Court ruled in *Hoffman Plastic Compounds v. NLRB,* 535 U.S. 137, 148-52 (2002) that undocumented workers who are fired for activities protected by the National Labor Relations Act (NLRA) are covered by the Act, but cannot recover back pay (the wages they would have earned had they not been illegally fired) or be reinstated.

The *Hoffman* decision sparked a mountain of litigation under virtually every federal and state employment statute, yielding a variety of inconsistent decisions. For example, in discrimination case law, the Ninth Circuit Court of Appeals has suggested that *Hoffman's* holding is limited to actions under the NLRA.[86] Another federal district court found immigration status relevant to entitlement to emotional distress damages as a result of gender discrimination.[87] In New Jersey, one court found that undocumented immigrants are not covered under state discrimination law.[88] And despite overwhelming authority to the contrary, at least one federal judge has expressed doubt that undocumented workers are entitled to wages for hours actually worked.[89]

Perhaps more importantly, the decision has given employers a free pass from having to pay for violations of the NLRA. As exemplified in many of the retaliation cases cited above, the decision provides an invitation for businesses to demand immigration documents from immigrant litigants, and to escape from paying compensation for violations of the law. Restoring equal remedies for all workers would reduce the incentive for employers to hire undocumented workers without regard to their status, and then aggressively pursue disclosure of immigration status in litigation. Instead of being afraid to pursue their legal claims, workers should be encouraged to come forward to report serious labor abuses.

III. Ensure that retaliation in the form of criminal activity does not interfere with worker rights

U Visas for immigrant victims of crimes must be made more broadly available and expanded to cover broader forms of employer retaliation

A "U visa" is a temporary status for immigrant victims of crime, including crimes committed in the workplace, intended to encourage immigrants to cooperate with law enforcement investigations. Congress created the U visa in 2000 as part of the Victims of Trafficking and Violence Protection Act (TVPA), in order to strengthen the ability of law enforcement agencies to investigate and prosecute crimes against immigrants and to offer protection to immigrant victims who fear reporting crimes due to their immigration status.[90] Holders of U visas receive lawful status for up to four years, are eligible to adjust their status to that of lawful permanent resident after three years, and are authorized to work. In addition, their qualifying family members may receive derivative visas.[91] This immigration relief protects workers against employer retaliation when workers are willing to call attention to workplace abuse. It strengthens the ability of labor and civil rights law enforcement agencies to gain workers' trust and cooperation in detecting and investigating crimes.

In order to qualify for a U visa, a petitioner must obtain certification from a law enforcement agency or judge confirming that the petitioner is a victim of a qualifying criminal activity and has been helpful in detecting, investigating, or prosecuting that crime. During the past three years, federal and state labor and civil rights law enforcement agencies, including the U.S. Equal Employment Opportunity Commission (EEOC), the U.S. Department of Labor, the National Labor Relations Board, the New York State Department of Labor, and the California Department of Fair Employment and Housing have released agency guidelines for certification of U visa petitions. A law enforcement agency's certification does not guarantee that the U visa will be granted. U.S. Citizenship and Immigration Services (USCIS) has jurisdiction to approve or deny the visa.[92] The agency may grant up to 10,000 U visas per year, not including qualifying dependents.[93] The 10,000 cap for U visas was reached for the first time in 2010.[94]

Learning from the agencies' experience, immigration policy can improve protection of victims of workplace crime and retaliation. Several agencies certify for criminal activities more narrowly than what is currently provided by statute. Currently, because of the novelty of workplace-based U visas, USCIS adjudicators unfamiliar with such cases need additional support and training on how to clearly assess issues such as eligible certifying agencies and the abuse suffered by workers in an exploitative employment environment. On a broader level, the statutorily provided number of U visas is inadequate to meet the needs of law enforcement agencies, and may suffer from an impending backlog without necessary adjustments to the annual cap. Finally, as a remedial measure, U visas do not provide broad coverage for victims of retaliation by employers. Congress should modify U visa provisions to expand explicit coverage of victims of employer retaliation. Specifically, the Protect our Workers from Exploitation and Retaliation (POWER) Act, introduced in both houses of Congress, should be included in a new immigration reform law.[95]

IV. Ensure no deportation results from a labor dispute

On June 17, 2011, in the midst of public outcry about the devastating impact of Secure Communities, ICE Director John Morton released two memoranda describing the agency's prosecutorial discretion strategy. The two memoranda outline the agency's enforcement priorities, as well as areas in which the agency would exercise its prosecutorial discretion to enforce immigration law. Specifically, the memoranda clarify that ICE could exercise its prosecutorial discretion in a number of ways, including declining to: initiate a removal proceeding; release an individual from detention; grant deferred action, parole, or stay a final order of removal; close a removal proceeding to prevent deportation; administrative closure (temporary removal of case from immigration court calendar); or grant of immigration relief, including parole.[96] ICE also specified that it is against department policy to initiate removal proceedings against victims or witnesses to a crime, and that "particular attention should be paid to . . . individuals engaging in a protected activity related to civil or other rights (for example, union organizing or complaining to authorities about employment discrimination or housing conditions) who may be in a non-frivolous dispute with an employer, landlord, or contractor."[97]

Despite the high hopes for ICE's prosecutorial discretion policy, it soon became clear that only a minimal number of workers would benefit from it. One year after ICE's policy went into effect, advocates declared the policy a failure, noting that of the 288,000 cases reviewed by ICE, only 1.5 percent of cases were granted discretion.[98] Moreover, it became clear that ICE has failed to properly screen for victims of crime and civil rights complainants in their custody. In particular, ICE has failed to identify or notify victims in custody of eligibility for prosecutorial discretion, particularly those who are *pro se*. Finally, prosecutorial discretion has proven difficult to obtain in cases where a victim of crime or employer retaliation was mistakenly arrested and charged with a crime. As an interim measure, the Obama administration should commit to full implementation of the "Prosecutorial Discretion: Certain Victims, Witnesses and Plaintiffs," memo for workers who are involved in labor or civil rights disputes, with employment authorization.

ICE payday raid at workplace with labor dispute results in deportation proceedings against workers

Kenner, Louisiana (2011)

Luis Zavala and two dozen construction workers in the home elevation industry and members of the Southern 32 and the New Orleans Workers' Center for Racial Justice were engaged in a labor dispute with their employer about unpaid wages and overtime. ICE conducted a violent payday raid coordinated with several law enforcement agencies but excluding the Department of Labor. After arresting and detaining the workers, ICE interrogated them about their unpaid wages and labor dispute, but still placed the workers in deportation proceedings. Several workers have already been deported and others continue to fight their deportation cases. Over a year later, their employer has been prosecuted, but the workers have not received their wages. Despite ongoing investigations by multiple federal labor and civil rights agencies, over 20 workers continue to fight their deportation cases based on the workplace raid. [99]

Recommendations for an overhaul of immigration laws to protect workers' labor rights, improve their wages and working conditions and boost our economy

Research and individual experiences show that rampant labor violations and widespread practices of retaliation have become key features of the low-wage labor market in the United States. In many of these occupations and industries, vulnerable immigrants cannot exercise their labor rights. Bad jobs will not become good jobs when a substantial portion of the workforce is so constrained.

The time has come for an overhaul of our immigration system for both humanitarian and economic reasons. Successful immigration reform has the potential to improve job quality in the low-wage jobs that fuel our economy, and to remove the ability of employers to use immigrant status for retaliation or other unlawful purposes. To achieve these goals, immigration reform must:

- Include a broad and fair path to citizenship that brings low-wage immigrant workers – including "contingent" workers like caregivers and day laborers — out of the shadows and allows them to work collectively to upgrade jobs and contribute to a growth economy.
- Ensure that employers cannot use immigration status as a means of escaping responsibility for workplace abuses.
- Restore workplace remedies in order to ensure fairness to workers and deter employers from hiring vulnerable immigrants for the purpose of exploitation.
- Ensure robust enforcement of baseline workplace laws.
- Provide immigration status, including work authorization protections, to workers engaged in defending labor rights.

Based on the data and analysis presented in this report, NELP recommends the following be included in immigration reform legislation:

Pathways to citizenship must be as broad-based as possible.

- Base pathways to citizenship on physical presence in the United States, not on past or future employment requirements.
- Provide flexible standards for documentary evidence in support of applications for citizenship. Legislation must include coverage of workers in "contingent" jobs such as day laborers, domestic workers, caregivers, and agricultural workers and those who might have difficulty proving their presence and work history in the United States.[100] Valid evidence should include records received from employers, including pay stubs or time sheets,

and records maintained by unions and from membership organizations such as worker centers and religious organizations.

- Any program that regularizes status must cover family members of applicants who would not themselves qualify for a pathway to citizenship.

Pathways to citizenship must include waivers of immigration offenses related to work.

- Undocumented persons may have worked without authorization, or may have worked with false documents, sometimes at the behest of their employers. In order to ensure that immigrant workers are not penalized for status-based offenses related to unauthorized employment in a pathway to citizenship, immigration reform must include a broad waiver for offenses associated with such work, including past use of false documents to obtain employment.

Immigration reform proposals must protect workers seeking to adjust their status.

- Provide that employment records supplied by an individual's employer in support of adjustment of status may not be used as grounds for prosecution or investigation for prior unauthorized employment.
- Prohibit as an unfair immigration-related employment practice any dismissal or retaliation by an employer because of a worker's application for legalization or citizenship, including dismissal for an employee's past use of false documents to obtain employment.
- Permit immigrant workers who have adjusted their status to correct their Social Security records without penalty and receive credit for past work.
- Provide that persons who apply but who do not ultimately qualify for legalization and citizenship will not be subjected to arrest or deportation.
- Ensure that individuals applying for immigration status relief are eligible for representation by federal Legal Services Corporation grantees, and encourage workers' organizations to aid in the process.
- Suspend ICE worksite enforcement activities during any application period authorized by statute.

Principles to protect workers' rights

Current tools that protect the ability of workers to claim wages, take collective action to enforce their rights, and upgrade working conditions must be modernized and codified.

- Codify into law and update ICE Operating Instruction 287.3a to ensure that DHS screens for and refrains from enforcement action in cases where employers or other individuals provide information concerning the employment of undocumented or unauthorized individuals to DHS in order to interfere with the labor and employment rights of workers.
- Codify and broaden the Memorandum of Understanding between the Department of Homeland Security and Department of Labor to ensure that DHS refrains from engaging in civil worksite enforcement activities at a worksite that is the subject of a pending litigation or complaints and claims to state and federal labor agencies.

Provide immigration status including work authorization protections to workers engaged in defending labor rights.

- Include the POWER Act in immigration reform legislation, to strengthen and streamline access to U visas for any individual who has filed a workplace claim or who is a material witness in any pending or anticipated proceeding involving a workplace rights claim, and expand grounds for U visas to include victims of employer retaliation.

All workers must be fully protected under all labor and employment laws regardless of immigrations status.

- Ensure payment of full backpay remedies or other monetary relief for unlawful labor and employment practices or work injuries to an employee regardless of immigration status.
- Prohibit as an unfair immigration-related employment practice any intimidation, threats, retaliation, or coercion, including the threat of removal and the use of I-9 employer self-audits, against any individual, regardless of legal status, with the purpose of interfering with any labor and employment rights or privileges.
- Clarify that immigration enforcement is the federal government's domain. State anti-immigrant bills that impose sanctions on workers or their employers for violation of immigration laws should be strictly preempted.
- Due to error rates and the likelihood that electronic verification systems would incentivize employers to push workers into abusive "off the books" work, NELP opposes the expansion of the E-Verify. To the extent that an E-Verify system is made mandatory, it should apply only to new hires, incorporate worker protections to guard against misuse by employers, protect workers' privacy and civil rights, and provide due process and remedies for workers who lose jobs due to database errors.

Strengthen enforcement of employment and labor laws.

- Increase the number of investigators enforcing minimum wage and overtime laws at the Department of Labor by 500 over four years, the number of OSHA inspectors by 500 over four years with similar increases in funding for state OSHA enforcement, and EEOC staffing should be increased by 650 investigators, mediators, attorneys, and support staff over four years.
- Ensure joint responsibility for workplace violations and compliance by worksite employers, and staffing, recruiting and transporting agencies. Clearly prevent businesses from using multi-tiered subcontracting arrangements to avoid labor and employment responsibilities for their workers. Ensure that these responsibilities cover both domestic and foreign labor recruiting.
- Clamp down on employer attempts to evade tax liabilities and workplace protections by misclassifying their employees as independent contractors or by paying them "off the books."

Endnotes

1 *President Obama Unveils His Proposals for Immigration Reform (Transcript)*, Washington Post, Jan. 29, 2013, *available at* http://www.washingtonpost.com/politics/president-obama-discusses-his-proposals-for-immigration-reform-transcript/2013/01/29/73074f9c-6a3c-11e2-af53-7b2b2a7510a8_print.html.

2 Doris Meissner et al., *Immigration Enforcement in the United States: The Rise of a Formidable Machinery* 9 (2013) (citing Department of Justice, Summary of Budget Authority by Appropriation (2012); Department of Homeland Security, FY 2012 Budget in Brief 9 (2012)), *available at* http://www.migrationpolicy.org/pubs/enforcementpillars.pdf.

3 Brookings Institute, *Immigrant Workers in the U.S. Labor Force* (2010), *available at* http://www.renewoureconomy.org/sites/all/themes/pnae/img/Immigrant_Workers_Brookings.pdf.

4 Jeffrey S. Passel & D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010* (2011), *available at* http://pewhispanic.org/files/reports/133.pdf. The Department of Homeland Security's Office of Immigration Statistics's new estimates, released in March 2012, indicated that as of January 2011, 11.5 million undocumented immigrants resided in the U.S., virtually unchanged from the Pew Hispanic Center's estimates as of March 2010. *See* Jeanne Batalova & Alicia Lee, *Frequently Requested Statistics on Immigrants and Immigration in the United States* (2012), *available at* http://www.migrationinformation.org/USfocus/display.cfm?ID=886#5. This report uses the terms "undocumented" and "unauthorized" synonymously to describe individuals present in the United States without legal status.

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Workers' Rights on ICE

How Immigration Reform Can Stop Retaliation and Advance Labor Rights | CALIFORNIA REPORT

NELP
National Employment Law Project

Authors: Eunice Hyunhye Cho and Rebecca Smith

The National Employment Law Project | February 2013

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About the National Employment Law Project

The National Employment Law Project (NELP) is a non-profit legal organization with nearly 40 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of labor standards laws, and that employers are not rewarded for skirting those basic rights.

Through its Immigrant Worker Justice Project, NELP works at the intersection of labor law and immigration law. We seek to expand and defend the labor rights of all workers, and to ensure that immigrant workers can assert their labor rights in a climate of equality and fairness, free from fear of reprisal. Our partners include worker centers and unions, immigrant rights groups, progressive lawyers, and community organizations. With them, we promote policies that expand the power of community organizing and protect immigrant workers' labor, civil, and human rights.

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EXECUTIVE SUMMARY

For the first time in many years in the United States, a broad consensus of policymakers and ordinary citizens agrees that the time has come for an overhaul of our immigration system. This overhaul will benefit immigrant workers, workers in low-wage sectors of our economy, and the economy as a whole.

The U.S. labor market remains weak, with three unemployed workers competing for every available job. This imbalance gives employers great power to set the terms and conditions of employment and to violate workers' rights without fear of consequences. This is especially the case in low-wage industries marked by rampant workplace abuse.

Employers and their agents have far too frequently shown that they will use immigration status as a tool against labor organizing campaigns and worker claims. For example,

- An employer in Garden Grove, California falsely accuses a day laborer of robbery in order to avoid paying him for work performed. Local police officers arrest the worker. Although the police find no merit to the charges, he is turned over to Immigration and Customs Enforcement (ICE).
- After the California Labor Commissioner found that a San Jose, California employer owed an immigrant worker $50,000 for unpaid wages, the employer harasses the worker in his home and threatens to report him to immigration.
- After workers at a Latino grocery store chain in the San Francisco Bay Area attempt to organize a union, the employer announces that it needs to re-verify workers' authorization and that it will enroll in the voluntary E-Verify program, leading to widespread fear.

Silencing or intimidating a large percentage of workers in any industry means that workers are hobbled in their efforts to protect and improve their jobs. As long as unscrupulous employers can exploit some low-wage workers with impunity, all low-wage workers suffer compromised employment protections and economic security. Law-abiding employers are forced to compete with illegal practices, perpetuating low-wages in a whole host of industries.

California can create a real, effective, pro-immigrant worker agenda to ensure that workers can speak up about labor abuses, now and in the future. We must learn from worker experiences and the failed policies of the past. A proactive policy to ensure protection of all workers, regardless of immigration status, must include:

- Stronger statutory protections to protect workers from employer retaliation;
- Enhanced ability of state labor law agencies, including the California Division of Labor Standards Enforcement (DLSE) and the California Department of Fair Employment and Housing (DFEH), to respond to charges of retaliation and to protect immigrant victims of workplace crime, from removal and deportation;
- Strengthened firewall between immigration enforcement, local law enforcement agencies, and state labor law enforcement; and
- Added resources for more robust enforcement of core labor laws in low-wage industries.

The National Employment Law Project (NELP) has prepared this analysis and offers the stories of immigrant workers to underscore the importance of ensuring workplace protections for all who work in California and the United States, regardless of status, and to emphasize the critical need for a broad pathway to citizenship. Such protections will benefit all workers by raising workplace standards and removing rewards for employers who abuse workers for their own gain.

Immigrant Workers in California Face Unfair Retaliation

A. Labor abuses and retaliation against California's immigrant workers are all too common in expanding low-wage labor markets

Immigrants comprise a growing part of the United State labor force. In 2010, 23.1 million foreign-born persons participated in the civilian labor force.[1] Of these workers, some eight million undocumented workers form 5.2 percent of the U.S. labor force.[2] Immigrant workers, both documented and undocumented, are a significant presence in California's workplace and economy.[3] An estimated 2.6 million undocumented immigrants reside in California—approximately seven percent of the State's total population and one-fourth of the population of undocumented immigrants nationwide. Almost one in every ten workers in California is undocumented.[4]

Most undocumented immigrants work in traditionally low-wage occupations such as agriculture, construction, manufacturing, and service industries, where workers face the greatest risk for exploitation.[5] Undocumented workers are far more likely to experience violations of wage and hour laws. A landmark study of low-wage workers in Los Angeles found that almost 76 percent of undocumented workers had worked off-the-clock without pay and over 85 percent had not received overtime pay. Undocumented workers experienced these violations at rates higher than their native-born counterparts.[6] Moreover, immigrant workers are disproportionately likely to be injured or killed on the job. Approximately 29 percent of workers killed in industrial accidents in California in recent years were immigrants.[7] Their rate of occupational injuries not resulting in death is also higher than average. Researchers suspect that the real numbers may be even greater, as immigrant workers often do not report work-related injury or illness for fear of retaliation.[8]

B. Retaliation and threats—although illegal—are common

Our national labor and employment laws protect undocumented workers—just like any other worker.[9] California law moreover, specifically provides that "[f]or purposes of enforcing state labor and employment laws, a person's immigration status is irrelevant to the issue of liability."[10]

Labor and employment laws prohibit employers from reprisals when workers engage in protected workplace activity, regardless of the worker's immigration status.[11] Nevertheless, retaliation is common against all workers who speak up about abuse on the job, ask questions about workplace protections, or exercise their rights to engage in collective action. In fiscal year 2012, the U.S. Equal Employment Opportunity Commission (EEOC) received more than 37,800 complaints that included retaliation claims.[12] A national survey of over 4,000 low-wage workers found that 43 percent of those who made complaints or attempted to organize a union experienced retaliation by their employer or supervisor.[13]

A study of immigrant hotel workers found that only 20 percent of those who had experienced work-related pain had filed workers' compensation claims for fear of getting "in trouble" or being fired.[14] In another study of immigrant workers' perceptions of workplace health and safety, researchers from the University of California at Los Angeles (UCLA) observed that "[w]orkers worried because they know the work they did was dangerous, and also

because they knew that if they got injured they would have limited medical care options. Some respondents said that they could not really 'afford to worry' because they needed the job and had little control over the working conditions."[15]

While threats of job loss have an especially serious consequence in this job market, an employer's threat to alert immigration or local law enforcement of an undocumented immigrant worker's status carries added force. Such action is at least as frequent as other forms of retaliation. An analysis of more than 1,000 NLRB certification elections between 1999 and 2003 found that "[i]n 7% of all campaigns – but 50% of campaigns with a majority of undocumented workers and 41% with a majority of recent immigrants – employers make threats of referral to Immigration Customs and Enforcement (ICE)."[16]

C. Expansion of Immigration Enforcement Brings New Players to the Retaliation Game

Anecdotal reports show that in recent years, employers who seek to retaliate against immigrant workers have increasingly filed reports with local law enforcement agencies, in addition to direct reports to federal immigration officials. Enforcement targeting undocumented immigrants has reached record levels. The U.S. government currently spends more on its immigration enforcement agencies—$18 billion in FY 2012—than all other federal law enforcement agencies combined.[17]

The growth of costly immigration enforcement programs such Secure Communities has expanded the reach of federal immigration enforcement agencies at the local level, radically transforming the immigration enforcement landscape. Secure Communities is a federal program that allows state and local law enforcement agencies to instantaneously share immigration information with the U.S. Department of Homeland Security (DHS) and check the immigration status of any individual taken into custody against a flawed and inaccurate database, even without the filing of a criminal charge. Under Secure Communities, ICE may place an immigration detainer—a pre-trial hold—on any individual who appears on the federal database, and transfer the individual into immigration custody. Secure Communities has had a disastrous effect on immigrant communities, including on victims of crime and employer abuse. In FY 2010, Secure Communities led to the issuance of 111,093 immigration detainers by ICE at the local level.[18] Between 2008 and 2012, ICE deported over 90,092 Californians under Secure Communities, 56 percent of whom had no criminal or minor record.[19] Underscoring the inaccuracies of the DHS database, Secure Communities has even led to the improper immigration-related arrest of approximately 3,600 U.S. citizens by ICE.[20] California taxpayers spend an estimated $65 million annually to detain immigrants for ICE; taxpayers spend $26 million per year in Los Angeles alone.[21]

This flawed integration of local law enforcement with federal immigration enforcement has provided employers with additional means to retaliate against immigrant workers who seek to exercise their workplace rights. Employers may capitalize on language barriers or local law enforcement biases against immigrants to achieve their ends. Due to the growing federal-local collaboration on immigration enforcement, immigrant workers who are falsely accused of crimes often have no recourse and instead, end up in deportation proceedings after blowing the whistle on labor violations.

D. Increase in worksite immigration enforcement and I-9 audits encourages employers to "self-audit" during labor disputes

In 1986, Congress passed the Immigration Reform and Control Act (IRCA), a cornerstone of today's immigration policy. Central to IRCA was the creation of employment sanctions, which impose civil and criminal penalties on employers for knowingly hiring and employing workers without authorization.[22] IRCA requires employers to verify a worker's identity and eligibility to work, and complete and retain an "I-9" form for each new employee, or risk a fine.[23] Despite its intention to deter employers from knowingly hiring undocumented workers, workers themselves have borne the punitive brunt of the employment sanctions regime.

In the past three years, the Obama administration has reduced the frequency of worksite raids and has instead increased administrative audits of employers to detect compliance with I-9 requirements. Since January 2009, ICE has conducted more than 8,079 audits of employers, compared with 503 audits in FY 2008.[24] Although this strategy of "silent raids" differs from the prior administration's primary focus on high-profile raids, the effect on workers is devastating. Where workers have conducted union organizing drives, employers may claim that they must re-verify employees' I-9 forms to comply with an ICE audit—even where none in fact is present. Such an announcement stokes fear in an already vulnerable workforce, and can unfairly interfere in an organizing campaign.

In limited circumstances, employers may re-verify, or ask workers to produce their I-9 work authorization documentation again, after the employer's initial verification at the time of hire, without running afoul of anti-discrimination or retaliation protections.[25] However, in many cases, employers have improperly conducted I-9 self-audits just after employees have filed workplace-based complaints, or in the midst of labor disputes or collective bargaining, creating a climate of fear. In other instances, employers have attempted to re-verify workers following a reinstatement order, an illegal practice under the National Labor Relations Act.[26] Employers often provide little or no notice to workers about the reason for the I-9 re-verification, and fail to provide a reasonable period of time for employees to respond to the self-audit, even when they are proper.

E. Use of E-Verify exacerbates retaliation by employers

E-Verify is a federally-created internet-based program that allows employers to confirm the immigration status of newly hired workers. To use the E-Verify system, employers must enter an employee's identification information, including name, Social Security number, date of birth, citizenship, and alien number into an online database, which is matched against databases maintained by the Social Security Administration (SSA) and DHS. The E-Verify system is voluntary for most employers, although at least some employers in 19 states and those with federal contracts must enroll in E-Verify.[27] Although use of E-Verify has expanded rapidly over the last decade, only around 350,000 employers are currently enrolled.[28]

In 2011, Governor Jerry Brown signed AB 1236, the Employment Acceleration Act, into law. The bill ensures that cities, counties, and the state government cannot mandate the use of E-Verify for private business owners, and reaffirmed that E-Verify is an optional program for private employers, with very few exceptions.[29] Although E-Verify is clearly optional, as examples show, unscrupulous employers have misused E-Verify as an opportunity to intimidate and retaliate against workers for union organizing or for engaging in concerted efforts to address workplace violations.

CASE STUDIES

Employer Retaliation: False Reports to Local Law Enforcement, Resulting in Immigration Hold

Day Laborer Who Requests Extra Pay Lands in Jail and Faces Immigration Hold after Requesting Wages

Winnetka, California (2013)

Hector Nolasco, a day laborer in Winnetka, California, currently faces deportation because his employer falsely reported him to the police in order to avoid paying him his wages. On February 3, 2013, Hector and a friend were hired to pack and move boxes at a restaurant for five hours. Nolasco worked for six hours, and when he asked to be paid for the extra hour, his employer refused. Instead, the employer threatened to call the police.

Nolasco and his friend decided to leave, and began a three mile walk back to the corner from which they were hired. The employer followed them, hurling insults and gesturing threateningly. Suddenly, the police arrived, and placed Nolasco under arrest. Nolasco later learned that his employer had told the police that Nolasco had threatened him with a knife—the box cutter that Nolasco had used to pack boxes. Although Nolasco's friend, who was present all day, confirmed that Nolasco never threatened anyone, Nolasco remains in police custody on a misdemeanor charge of displaying a deadly weapon. He has also been issued an ICE hold.[30]

photo of Hector Nolasco courtesy of NDLON

Employer Files False Police Report to Avoid Paying Day Laborer His Wages, Leading to Deportation Proceedings

Garden Grove, CA (2012)

On the morning of March 9, 2012, Jose Ucelo-Gonzalez was hired from a Home Depot parking lot by Michael Tebb, a private contractor, to pave the parking lot of a local hospital.

At the end of the day, Ucelo-Gonzalez asked Tebb to pay him for his ten hours of work. Tebb made motions as if he wanted to fight, cursed at him, and said that he would have Ucelo-Gonzalez arrested for stealing. Tebb got in his truck and drove away, abandoning Ucelo-Gonzalez without a ride and leaving him without his pay.

Ucelo-Gonzalez called the police, who asked him for the exact address of his location. As he left the parking lot to find out the address, eight police cars pulled up. Tebb was with them. The police arrested and handcuffed Ucelo-Gonzalez. At the police station, Ucelo-Gonzalez explained that Tebb had not paid him his wages and had made false accusations, and had a co-worker come and serve as a witness on his behalf. Although the police noted that Ucelo-Gonzalez was "very sincere in his statements," and although the false charges were ultimately dropped against him, Ucelo-Gonzalez was transferred to ICE custody.[31]

photo of Jose Ucelo-Gonzalez courtesy of NDLON

Employer Retaliation: Reports or Threats to Contact ICE

After Labor Commissioner Issues Judgment Against Employer Who Failed to Pay Worker, Employer Harasses Worker and Threatens to Report to Immigration with False Evidence

San Jose, CA (2013)

Mario Cruz,* a gardener from Mexico, trimmed trees in San Jose, California. After his employer failed to pay him, he filed a complaint with the California Division of Labor Standards Enforcement (DLSE). The DLSE entered a judgment requiring the employer to pay him over $50,000 for unpaid wages. Three months after the decision, Cruz still had not received any of his wages. With the help of the Wage Justice Center, a local advocacy group, Cruz sent a letter to his employer requesting his wages and indicating that he might file a lien on his employer's property if his employer did not pay.

Cruz did not receive any payment in response to his letter. Instead, on January 22, 2013, Cruz's employer paid a visit to his house. His employer threatened to have him deported. The employer visited Cruz twice more, but when Cruz refused to open the door, his employer repeated his threats to call immigration. When Cruz called the police to make a report, the police refused to help.

On January 25, 2013, immigration enforcement agents showed up at the house of one of the witnesses in Cruz's case. Cruz worried that the visit was related to his case. Cruz heard that his employer had also threatened another worker who had tried to file claims for unpaid wages in the past. His employer had told his co-worker to take less money or that drugs would be planted in his car. Cruz is now afraid of leaving the house, and is afraid that his employer is going to harm him.[32]

Immigrant Worker Joins Lawsuit against Employer, Arrested by ICE due to Employer Retaliation

Anaheim, CA (2010)

Osfel Andrade, an immigrant from Mexico, worked in the shipping department of Terra Universal, a laboratory equipment manufacturer in Fullerton, California when immigration agents conducted a worksite raid on June 29, 2010. During the raid, ICE agents arrested 43 workers and placed them in deportation proceedings. Andrade was not arrested that day, but instead of remaining hidden from authorities, he agreed to serve as a named plaintiff in a class action case against his former employer. The case seeks back wages for years of unpaid wages, exploitation, and discrimination on behalf of hundreds of workers.

After Andrade joined the lawsuit, associates of his former employer attempted to pressure him to drop out of the case. Andrade refused. Shortly thereafter, ICE agents arrested Andrade at his home, and placed him in immigration detention, where he was held for three weeks until released on bond. Evidence indicates that Terra Universal informed ICE of Andrade's immigration status in retaliation for filing the lawsuit.

After Andrade's arrest by ICE, two of the other named plaintiffs in the lawsuit subsequently withdrew from the case. Andrade, however, has remained in the case, despite the fear and emotional distress caused by his employer's retaliation. His courage has earned him the respect of his co-workers and community members, and he was recently honored with the Freedom From Fear Award, in recognition of the significant risk he has taken to confront injustice on behalf of immigrants in the United States.[33]

photo of Osfel Andrade courtesy ACLU of Southern California

Restaurant Worker Threatened with Deportation and Violence For Reporting Violations to U.S. Department of Labor Los Angeles, CA (2012)

Somkiat Jirapojananon, an immigrant from Thailand, worked as a delivery driver for a Thai restaurant in Los Angeles. His employer required him to work eleven-hour shifts five days a week, without meal or rest breaks or overtime pay. He was paid a flat-rate of $60 a day.

In October 2012, the U.S. Department of Labor (DOL) began investigating the restaurant for wage and hour violations. The restaurant owner ordered the employees to lie to the DOL investigators by telling them that they worked part-time and were paid $8 an hour. The employer threatened to report Jirapojananon to immigration officials and to send people to his home to hurt him if he did not lie to the DOL. Afraid that the employer would carry out her threats once she realized he did not lie to the DOL, Somkiat began looking for another place to live and work.

In December, the DOL ordered the employer to pay Jirapojananon over $23,000 in unpaid wages and mileage reimbursement. The employer told Jirapojananon that he had to pay that amount back to the restaurant, or that "he should think very carefully about what would happen to him or his family if he is deported or beaten up."[34]

Workers File Suit for Unpaid Wages; Employer Tries to Have Them Fired from New Job and Threatens Deportation Los Angeles, CA (2010)

Jose Lopez,* Norberto Lopez,* and Miguel Salazar* worked in a car wash in Los Angeles, California, where they were paid as little as $35 per day for 10-hour days. After finding better-paid work at a different car wash, they filed a lawsuit against their former employer seeking unpaid wages. The former employer came to their new workplace and tried to convince the owner to fire the men, then left messages on their cell phones threatening that he would "deport" them if they pursued their lawsuit. The men, who lived together, were afraid to leave their house alone for months. Soon after, ICE agents detained the three men, although is unclear whether they were picked up as part of a random sweep or due to a call from the employer.[35]

Workers Who Sue Employer for Unpaid Wages Arrested and Detained by ICE in Manager's Office Salinas, CA (2008)

In February 2008, after talking to members of the Teamsters union, workers at a cabinet manufacturing company in Gilroy, California, filed a class action lawsuit against their employer for unpaid wages and other violations of federal and state labor protections. Isais Aguilar, a worker at the factory, served as a named plaintiff in the case. A few months later, in April 2008, management called employees to the office, where ICE officials were present. ICE arrested and detained the workers. By the time the workers' attorney contacted ICE and members of Congress to inform them of the pending lawsuit and to stop deportation proceedings, many workers had already signed voluntary departure forms and had been removed from the United States. Aguilar's brother was one of the workers deported during the raid.

Aguilar, however, continued to participate in the lawsuit and stand up for his rights. Soon after, in April 2009, Aguilar handed out handbills to other workers at the plant. Managers, however, threatened to call immigration after Aguilar handed out handbills to other workers at the plant and called the local police department. Although Aguilar avoided deportation, the ICE raid, threats by supervisors, repeated lay-offs, reduced hours of work, and wage cuts severely intimidated the remaining workers, and defeated the union's organizing efforts.[36]

Employer Retaliation: Re-Verification of I-9 Forms

Manager Attempts to Require Workers to Re-File I-9 Forms, Threatens to Report to Police After Carwash Workers Organize

El Monte, California (2012)

Carwash workers at Star Carwash in El Monte, California, began to worry when their paychecks began to bounce. Their employer had filed for bankruptcy, and workers found that they had difficulty changing checks when they repeatedly came back with insufficient funds. In November 2012, eight workers of twelve at the company began to organize to work for better conditions with the support of the CLEAN Carwash Campaign, a partnership of unions, community groups, and religious groups.

Instead of ensuring that the workers received their pay, management at Star Carwash began to intimidate workers by threatening to cut their hours and fire them. The managers told the workers that they would need to refile their I-9 employment forms to re-verify their work authorization. When the workers refused, the manager brought Maria Flores,* one of the worker leaders, into his office. The manager told Maria that she had to fill out new employment papers so that he could show it to the local police department to check her identity, or she could choose to quit. When Maria refused, her employer cut her hours down to 2-3 hours per week.[37]

Pomona College Fires Dining Hall Workers through Immigration Reverification after Workers Organize for Union

Pomona College | Pomona, California (2011)

For two years, dining hall workers at Pomona College in Claremont, California organized to form a union. Discussions between workers and the College have been unsuccessful. In 2011, the administration began enforcing a rule barring dining hall employees from talking to students in the cafeteria.[38] The union filed unfair labor practice charges in August and September 2011 challenging the rule.[39] The College later changed the no-contact rule in the face of prosecution from the general counsel of the National Labor Relations Board.

In the middle of the campaign, the College received a letter from an undisclosed source accusing it of having a policy of not obtaining documentation of work authorization from its employees. The College administration investigated this complaint and found it to be false. Even though the College's review found that there was no such history of noncompliance, and although no federal agency had investigated the College for noncompliance, the College Board of Trustees decided to re-verify the immigration status of its staff. It turned the matter over to the law firm of Sidley Austin, a corporate law firm which offers services including "union avoidance" for "clients who desire to remain union-free."[40]

The college gave staff notice that they needed to bring in their documents within 3 weeks and by early December 2011, Pomona had fired 17 workers. Sixteen of them were dining hall workers. Some of the staff members had been employed by the College for decades.

It is impossible to know whether the college's actions were motivated by its desire to avoid unionization of its employees. What is clear is that the vagueness of the complaint that Pomona allegedly received and its harsh response —after two years of union organizing and amid pending charges of unfair labor practices[41]—resulted in job loss for some of Pomona's long-standing employees.

photo courtesy of UNITE HERE

Employer Who Paid No Wages Fires Workers, Requires New I-9 Forms After Car Wash Workers Organize

Los Angeles, CA (2010)

Half of the car wash workers at Robertson Carwash in Los Angeles, California, received no wages from their employer. Although the employer charged customers for each car wash, the employer did not pay the workers at all. Instead, these workers earned only the tips provided by customers after they cleaned the cars. One of the workers, Felipe Martinez,* earned so little that he often slept in the car wash bathroom at night to avoid living on the streets. In 2010, after workers reached out to the CLEAN Carwash Campaign, which organized a boycott of the carwash, the employer fired all of the workers who had worked only for tips. After the campaign filed unfair labor practice charges with the NLRB, the employer settled. When Felipe tried to return to work, his employer told him that he would have to reapply and fill out a new I-9 form. Felipe declined, and did not return to his job.[42]

Employer Retaliation: Retaliatory Use of E-Verify

Latino Supermarket Chain Signs Up for E-Verify and Verifies I-9 Forms in Midst of Unionizing Campaign

Mi Pueblo Supermarket Chain | San Francisco Bay Area (2012)

Workers at the Mi Pueblo supermarket chain, which caters to the Latino immigrant community in the San Francisco Bay Area, have been trying to join a union for years. In response to complaints about unfair hiring practices and violations of wage and hour laws, the United Food and Commercial Workers (UFCW) union Local 5 began a campaign to organize workers, gathering authorization cards from workers seeking collective bargaining. However, in August 2012, as the union organized both workers and local community to support the union, Mi Pueblo announced that it had decided to voluntarily join the E-Verify program to screen new hires for immigration status. Although Mi Pueblo explained that it was "forced" to use the E-Verify program by the government, ICE spokespeople confirmed that E-Verify is a voluntary program.[43]

Mi Pueblo's announcement that it would use E-Verify angered the local community, and UFCW scheduled a boycott of the supermarket chain the next month. However, days before the boycott was to begin, in October 2012, Mi Pueblo announced that federal immigration agents had launched an audit of the entire supermarket chain.[44] The effect of this announcement was disastrous: many workers quit working at Mi Pueblo out of fear. Despite the fear caused by Mi Pueblo and the I-9 audit, as well as union-busting tactics used by the employer, the union continues to organize.[45]

photos courtesy of David Bacon

Employer Decides Unilaterally to Enter E-Verify Program without Bargaining with Union

Pacific Steel Casting Company | Berkeley, California (2012)

Berkeley's Pacific Steel Casting Company (Pacific Steel) decided unilaterally to implement the use of E-Verify in its workplace. Even though Pacific Steel workers are represented by the Glass, Molders, Pottery, Plastics & Allied Workers International Union, Local No. 164B, AFL-CIO, CLC (Local 164B), the union was not notified. When Local 164B learned of Pacific Steel's enrollment and requested written confirmation, Pacific Steel untruthfully claimed that because it was a federal contractor, it was required to use E-Verify and refused to bargain with the union over this issue.[46]

To protect its members, the union filed unfair labor practice charges with the National Labor Relations Board (NLRB). In settlement of the charges, Pacific Steel agreed to reinstate employees and pay employees for any wages and benefits lost after many were terminated as a result of Pacific Steel's unlawful entry into the E-Verify Program. The agreement, signed on March 22, 2012, also requires that Pacific Steel terminate its enrollment in E-Verify.

photos courtesy of David Bacon

*indicates pseudonym to protect the identity of the worker

RECOMMENDATIONS: CALIFORNIA MUST PROTECT IMMIGRANT WORKERS FROM RETALIATION

Based on the data and analysis presented in this report, NELP recommends the following protections for immigrant workers in California.

Legislative Recommendations

Strengthen California's protections against employer retaliation.

California anti-retaliation law must be strengthened to provide workers with necessary protection from employer retaliation.

- Prohibit employer threats to expose immigration status in a retaliatory fashion; increase penalties for unfair immigration-based retaliation where it is proven to have occurred; prohibit retaliation for updating employment authorization records.
- Provide for a presumption of retaliation in California anti-retaliation statutes.
- Provide for non-discretionary penalties and quadruple punitive damage provisions for employers who retaliate against workers.
- Prohibit retaliation by any person against workers engaging in protected activity including retaliation by subcontractors, day and temporary labor service agencies, clients, or agents of third parties.
- Clarify that oral complaints to supervisors constitute protected activity sufficient to trigger anti-retaliation protections.
- Clarify that no administrative exhaustion is required to litigate employer retaliation under Cal. Lab. Code § 98.6.

Increase resources for anti-retaliation enforcement by state agencies.

The CA DLSE and DFEH enforce California's anti-retaliation statutes. Although the CA DLSE has implemented several changes to expedite retaliation cases, including streamlined conferences of parties, and informal decisions and settlements, the agencies must receive additional resources to timely adjudicate retaliation cases. Currently, more anti-retaliation cases are filed every year with the CA DLSE than can be processed: in 2011, the DLSE received 2,742 complaints of retaliation, 1,266 of which were within the DLSE's jurisdiction; the DLSE closed 1,018 cases.[47]

Pass the TRUST Act.

Employers who seek to retaliate increasingly file reports with local law enforcement agencies, taking advantage of language barriers or other biases against immigrants to achieve their ends. Due to the growing federal-local collaboration on immigration enforcement, immigrant workers who are falsely accused of crimes often have no recourse and instead, end up in deportation proceedings after blowing the whistle on labor violations.

The Transparency and Responsibility Using State Tools (TRUST) Act addresses the harmful impact of California's participation in the federal government's controversial "Secure Communities" program. The TRUST Act sets reasonable limits for local responses to immigration hold requests that detain immigrant workers as a result of employer retaliation.

Prohibit threats to report a worker's immigration status to law enforcement officials in order to extort money or property.

Employers who retaliate against immigrant workers may use the threat of reporting an employee's immigration status in order to avoid payment of wages. California should follow the lead of other states and amend its extortion statute, Cal. Penal Code § 518, to clarify that a threat to report to law enforcement officials an individual's immigration status in order to induce a person to give money, labor, or another item of value is prohibited under law,[48] or to prohibit to report an individual's immigration status to law enforcement officials.

Administrative Recommendations

Strengthen CA DFEH and promulgate CA DFEH U visa certification protocol for immigrant victims of workplace crime.

A "U visa" is a temporary status for immigrant victims of crime, including crimes committed in the workplace, intended to encourage immigrants to cooperate with law enforcement investigations.[49] The U.S. Citizenship and Immigration Service (USCIS) ultimately determines whether an immigrant crime victim can obtain a U visa. However, an immigrant victim of crime must obtain certification from a law enforcement agency or judge confirming that the petitioner is a victim of a qualifying criminal activity and has been helpful in detecting, investigating, or prosecuting that crime. The CA DFEH's internal protocol to certify U visas for victims of crime in the workplace should be broadened to the extent authorized under federal law. CA DLSE should likewise promulgate a U visa certification protocol, and specify grounds for certification eligibility to the extent authorized under federal law.

Establish a strike force to prevent retaliation.

The CA DLSE and DFEH should establish a strike force to immediately address instances of retaliation when they take place.

Reinforce the firewall between immigration and labor enforcement.

Support extension of the firewall between immigration and state labor law enforcement agencies, including CA DLSE and CA DFEH, as embodied in DHS's agreement with the U.S. Department of Labor (U.S. DOL).[50] Such an agreement would limit ICE enforcement activities from interfering with California labor law enforcement investigations and audits, including enforcement of California's wage and hour, anti-discrimination, and health and safety laws, and should extend to private litigation by employees. A firewall between immigration and labor law enforcement is critical to ensuring that workers feel free to come forward to report serious labor abuse without fear of deportation and that state agencies can improve labor practices in low-wage industries.

ENDNOTES

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2 Jeffrey S. Passel & D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010* (2011), *available at* http://pewhispanic.org/files/reports/133.pdf. The Department of Homeland Security's Office of Immigration Statistics's new estimates, released in March 2012, indicated that as of January 2011, 11.5 million undocumented immigrants resided in the U.S., virtually unchanged from the Pew Hispanic Center's estimates as of March 2010. *See* Jeanne Batalova & Alicia Lee, *Frequently Requested Statistics on Immigrants and Immigration in the United States* (2012), *available at* http://www.migrationinformation.org/USfocus/display.cfm?ID=886#5. This report uses the terms "undocumented" and "unauthorized" synonymously to describe individuals present in the United States without legal status.

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6 Ruth Milkman et al., *Wage Theft and Workplace Violations in Los Angeles: The Failure of Employment and Labor Law for Low-Wage Workers* 46-48 (2010).

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8 Immigrant workers suffer workplace injury at 31 injuries per 10,000, a rate higher than all workers. Pia Orrenius et al., *Do Immigrants Work in Riskier Jobs?*, 46 Demography 535 (2009).

9 *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900-903 (1984) (undocumented workers are "employees" under NLRA); *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989) (undocumented workers protected under the Fair Labor Standards Act (FLSA)); *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989) (undocumented workers protected under federal anti-discrimination laws); *Rios v. Enterprise Ass'n Steamfitters Local Union 638 of U.A.*, 860 F.2d 1168, 1173 (2d Cir. 1988) (same).

10 Cal. Lab. Code § 1171.5; Cal. Civ. Code § 3339; Cal. Gov. Code § 7285; Cal. Health & Safety Code § 24000.

11 29 U.S.C. § 215(a)(3); *Sure-Tan*, 467 U.S. 883 (an employer's use of a worker's immigration status to retaliate for labor union activities is an unfair labor practice in violation of the National Labor Relations Act); *Contreras v. Corinthian Vigor Insurance Brokerage*, 103 F. Supp. 2d 1180 (N.D. Cal. 2000) (concluding that an employer's report to then-INS and Social Security Administration of an undocumented worker's status violated anti-retaliation provisions of the FLSA); *EEOC v. City of Joliet*, 239 F.R.D. 490 (N.D. Ill. 2006) (finding inquiry into employee's immigration status after filing of discrimination claim to be unlawful retaliation).

12 Scott Flaherty, *Retaliation, Race Bias Top EEOC Complaints In 2012*, Law 360, Jan. 29, 2013, *available at* http://www.law360.com/articles/410694/retaliation-race-bias-top-eeoc-complaints-in-2012.

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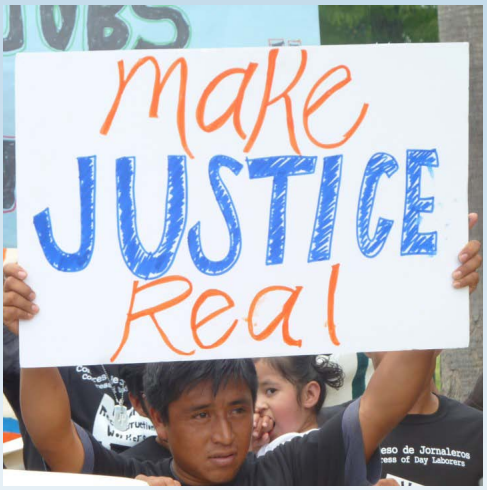
DEPORTING THE EVIDENCE:

Migrant Workers in the South Expose How U.S. Immigration Enforcement against Human Rights Defenders Violates the International Covenant on Civil and Political Rights



New Orleans Workers' Center for Racial Justice
Jacinta Gonzalez
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A Report to the United Nations Human Rights Committee on the Fourth Periodic Report of the United States of America

Submitted on behalf of the New Orleans Workers' Center for Racial Justice and the Congress of Day Laborers, New Orleans

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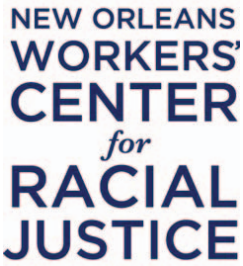

ABOUT THE AUTHORS

THE NEW ORLEANS WORKERS' CENTER FOR RACIAL JUSTICE is dedicated to expanding democracy through the power and participation of low-income communities and communities of color across the Southern United States. The Center was founded after Hurricane Katrina and since then has protected the bedrock civil, labor, and human rights of African American and immigrant communities. The Center represents workers on the frontlines of today's changing South in policy change efforts, in the media, and in strategic litigation and legal advocacy. For more information see ***www.nowcrj.org.***

THE CONGRESS OF DAY LABORERS is a grassroots membership organization of immigrant workers and their families, many of whom helped rebuild New Orleans and the Gulf Coast of the United States after Hurricane Katrina. Members of the Congress are human rights defenders who promote human rights including freedom of association, equal protection, freedom of movement, political participation, self-determination, access to justice, and an end to discrimination, racial profiling, and forced labor. For more information on the Congress see ***www.makejusticereal.org***.

LOYOLA UNIVERSITY NEW ORLEANS COLLEGE OF LAW was established in 1914. In the Jesuit tradition of academic rigor, pursuit of justice, and service to others, the College of Law has as its mission to educate future members of the Bar to be skilled advocates and sensitive counselors-at-law committed to ethical norms in pursuit of dignity for all.

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EXECUTIVE SUMMARY

THIS REPORT EXPOSES the ways in which the United States is "deporting the evidence," by arresting, detaining, and removing individuals engaged in defending themselves and their communities against serious violations of the International Covenant on Civil and Political Rights (ICCPR). In some cases, the state uses immigration enforcement to retaliate against persons who expose governmental abuses of civil and political rights. In other cases, the state cooperates with private actors who use immigration enforcement to hide their own unlawful behavior. Not only do these actions by the United States directly violate the ICCPR, they also prevent human rights abuses from being exposed or verified because victims and witnesses are intimidated, locked away, or removed from the country.

THIS REPORT DOCUMENTS the stories of "the Southern 32," a campaign of migrant workers in the southern region of the United States who are fighting government efforts to deport them in retaliation for the work they are doing to defend human rights. The southern region offers a microcosm of the broader challenges the United States faces in fully realizing its obligations to vulnerable immigrant communities under the International Covenant on Civil and Political Rights. In the last seven years, five major hurricanes have caused tens of billions of dollars of damage to the region. Immigrants, primarily Latino and Hispanic, have played a crucial role in the rebuilding effort, often performing the most essential and dangerous jobs. Today in New Orleans, many of the migrant workers who originally arrived to help with the post-Katrina recovery effort now live with their families in the city, intimately joined in the fabric of the community. Because they live and work either without formal governmental permission or with limited status as temporary contract workers, they are uniquely vulnerable to exploitation. Despite their essential contribution to the revitalization of the city and the region, these workers continue to face widespread human rights violations.

The southern region offers a microcosm of the broader challenges the United States faces in fully realizing its obligations to vulnerable immigrant communities under the International Covenant on Civil and Political Rights.

AS THE STORIES OF THE SOUTHERN 32 DEMONSTRATE, these workers are not quiescent victims. Rather, they are actively engaged in exposing violations of both domestic and international law. Unfortunately, instead of protecting migrant workers who speak out against unlawful arrests, racial profiling, forced labor, and other human rights abuses, the federal government's response has often been to use the immigration system for retaliation – or to look the other way when state and local actors engage in this activity. By "deporting the evidence," which is itself a violation of the ICCPR, the United States also minimizes its exposure to responsibility for the underlying human rights violations against migrant communities, including:

(a) the use of the threats of arrest, detention, and deportation by the Department of Homeland Security ("DHS") to limit the right to freedom of association, including the right to form and join trade unions;[1]
(b) the retaliatory arrest, detention, and deportation of migrants who exercise their civil and political rights;[2]
(c) the continued criminalization of immigrant communities;[3]
(d) the use of unlawful racial profiling by state and local law enforcement and by federal immigration enforcement officers;[4]
(e) the unlawful "over-detention" of immigrants, particularly as a result of state and local law enforcement collaboration with federal immigration enforcement;[5]
(f) the lack of due process, racial profiling, unlawful detention, and other civil rights violations arising from reliance on immigration detainers;[6]
(g) the unlawful conditions in prisons and jails where immigrants are detained;[7] and
(h) the contribution of U.S. immigration policy to conditions of forced labor and involuntary servitude for migrant workers,[8] and to violations of their right to life.[9]

THIS REPORT CONCLUDES with legislative and administrative recommendations that would help bring the United States immigration enforcement into compliance with its ICCPR obligations. The report also includes questions for the United States which would assist in clarifying critical areas for reform. We urge the Human Rights Committee to question the United States on its efforts to protect the civil and political rights of migrant workers and to issue strong recommendations to ensure immigration enforcement practices do not continue to undermine compliance with the ICCPR.

SUBSTANTIVE VIOLATIONS OF THE ICCPR

ART. 19, 21, 22
(ORGANIZING FOR JUSTICE: THE RIGHT TO FREE SPEECH, ASSOCIATION, AND ASSEMBLY)

1. THE ICCPR REQUIRES STATE PARTIES to protect the expressive and associative rights of the persons within their jurisdiction without regard to immigration status.[10] Together, Articles 19, 21, and 22 protect the rights to free expression, assembly, and association.[11] In a 2011 General Comment to Article 19, the Human Rights Committee (hereinafter "Committee") explained that this article is particularly significant because "[f]reedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights."[12] The Committee further emphasized the importance of the article in terms of an anchor of other rights guaranteed by the Covenant, stating that the "freedoms of opinion and expression form a basis for the full enjoyment of a wide range of other human rights. For instance, freedom of expression is integral to the enjoyment of the rights to freedom of assembly and association, and the exercise of the right to vote."[13] As such, the "obligation to respect freedoms of opinion and expression is binding on every State party as a whole."[14] States must take an affirmative role to protection against retaliation and silencing of speech, particularly in defense of human rights:

   > States parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression. Paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights. Nor, under any circumstance, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be compatible with article 19. . . .[15]

2. ALTHOUGH THE UNITED STATES RATIFIED these provisions of the ICCPR without reservation as to citizenship status,[16] it has failed to enforce these protections with respect to non-citizens. While the rights to freedom of opinion, expression, and association, are protected by the federal Constitution,[17] the United States Supreme Court indicated in United States v. Verdugo-Urquidez that these constitutional protections may not extend to undocumented persons.[18] Since that case, federal and state courts have indicated that the question of whether the First and Fourth Amendments apply to non-citizens is unsettled.[19] The Congress has responded to these signals from the Court, enacting "sweeping antiterrorism legislation in 1996 and 2001 targeting immigrants for deportation based on speech or political affiliation and even familial associations."[20]

3. AS A RESULT OF THE UNITED STATES' FAILURE to provide protection for the expressive and associative rights of non-citizens, the immigration system is regularly used as a mechanism of retaliation against workers who organize against private and government abuses. In Shelbyville, Tennessee, federal Immigration and Customs Enforcement (ICE) agents conducted home invasions only one day after a public hearing against racial profiling.[21] Similarly, in Montgomery, Alabama, ICE agents covertly surveilled immigrant workers as they visited a civil rights museum in Montgomery.[22] In Beaumont, Texas, local law enforcement and ICE officials colluded in the detention and attempted deportation of workers who organized a strike to challenge discrimination and wage theft by their employer.[23] Some workers were deported and others challenged their arrests for almost four years. Eventually some of the cases were administratively closed, but the immigration charges were never formally withdrawn and the previously deported workers received no relief.[24]

4.

DELMY PALENCIA'S

EXPERIENCE EPITOMIZES THE CHALLENGES that immigrants face when they try to exercise their civil and political rights.[25] Palencia was arrested by the New Orleans Police Department on May 21, 2011 for locking her husband out of the house following a domestic dispute. She spent 45 days in jail, separated from her infant son, before the district attorney reviewed the arrest and dropped all charges against her. After the charges were dropped, the New Orleans Parish Sheriff continued to incarcerate Palencia in Orleans Parish Prison based only on an investigatory immigration hold. From inside the jail, she filed a petition for a writ of habeas corpus through which she won release from her unlawful detention. Palencia then became a key witness into the ongoing investigation of the Sheriff's treatment of immigrant detainees and the problematic relationship between the Sheriff and ICE. Because of her activism, she was promptly re-arrested in a warrantless night raid by ICE. She was then transferred to a rural detention center over four hours away from her child. After community pressure and advocacy by several members of the United States Congress, she received a temporary delay in her deportation.

5. SAÚL MERLOS ALSO EXPERIENCED RETALIATION for speaking publicly about his experience in ICE detention. In late 2012, Saul was arrested in Kenner, Louisiana and relocated to the immigrant detention facility in Basile, Louisiana. Upon release, Saúl was granted a 60-day stay of removal in order to address his immigration status. Shortly after his release, Saúl was invited to speak at a symposium titled Dialogues on Detention: Applying Lessons from Criminal Justice Reform to the Immigration Detention System. The symposium was organized by Loyola University New Orleans College of Law and a national non-governmental organization, Human Rights First. Days after he spoke at the symposium, Saúl was ordered to report to the New Orleans ICE office for an unscheduled check-in. He went and was immediately re-arrested and placed in detention, despite the previously granted stay of removal. He spent several weeks in a rural immigration detention center. After community pressure and advocacy by several members of the United States Congress, he received a temporary delay in his deportation.

6. THE UNITED STATES' FAILURE TO PROMULGATE and enforce immigration policy that protects the expressive and associational rights of non-citizens violates the ICCPR. This failure is particularly egregious and damaging when it leads to the detention, arrest, and deportation of persons engaged in reporting and investigating human rights abuses. As these examples demonstrate, the United States' current approach to immigration law enforcement undermines federal efforts to understand, expose, and remedy violations of the ICCPR against immigrant communities and others who experience similar violations of their civil, labor, and constitutional rights.

ART. (2); (14)(1)
(ACCESS TO JUSTICE: RIGHT TO AN EFFECTIVE REMEDY AND EQUALITY THROUGH THE COURTS)

7. ARTICLE 2 PROVIDES that all persons whose rights under the Covenant are violated "shall have an effective remedy . . . ."[26] The Committee has clarified that in addition to "effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights."[27] These remedies "should be appropriately adapted so as to take account of the special vulnerability of certain categories of person . . . ."[28] Moreover, the Committee has explained that Article 2 also obligates the State to take measures to prevent recurring violations of the same rights.[29]

8. SEPARATELY, ARTICLE 14(1) PROVIDES that "[a]ll persons shall be equal before the courts and tribunals" of each State party. The Committee has interpreted article 14.1 as a guarantee of equal access to the courts, regardless of a party's citizenship or immigration standing, in both criminal and civil proceedings.[30]

9. THE RIGHT OF UNDOCUMENTED IMMIGRANTS to access the courts is also protected by the U.S. Constitution. The United States Supreme Court has held that the due process protections of the Fifth and Fourteenth Amendments apply to all persons within the borders of the United States, regardless of immigration status.[31] The Court has reasoned, consistent with the Covenant, that these constitutional protections apply to everyone within the United States territorial jurisdiction.[32]

10. DESPITE THESE FORMAL PROTECTIONS, however, immigrants face significant challenges in reporting remedies for violations of their ICCPR and national constitutional and statutory rights. The bureaucratic infrastructure that the United States has implemented in order to ensure that violations can be reported and corrected regularly fails to provide any meaningful remedy, and may itself be the source of retaliation.

11. THE UNITED STATES REPRESENTS that it corrects ICCPR violations through the Department of Homeland Security's Office of Civil Rights and Civil Liberties (CRCL).[33] CRCL "leads DHS efforts to develop relationships with communities whose civil rights may be affected by DHS activities" through "regular roundtable meetings that bring together DHS officials with diverse communities in cities across the country."[34]

12. IN SOME INSTANCES, HOWEVER, DHS policies render these meetings inaccessible. For example, in May 2012, members of the New Orleans Workers' Center for Racial Justice were invited to participate in a community meeting with the ICE Public Advocate and regional ICE leadership. The ICE Southern Field Region leadership required law enforcement background checks to participate in the meeting. Community members were informed that they would have to provide their date of birth if they did not have alien registration numbers. These types of policies have a chilling effect on the ability of the immigrant community to communicate their concerns to DHS.

13. EVEN WHEN VIOLATIONS ARE REPORTED, CRCL maintains that it lacks the authority to grant relief. Moreover, CRCL often does not respond to complaints and sometimes may even be the source of retaliation through the immigration system. The New Orleans Workers' Center has filed 13 complaints with CRCL over the last 4 years, including several on behalf of groups of affected individuals. CRCL has not found any rights violations or made any policy recommendations in any of those cases, even in those found meritorious by other state and federal agencies and courts.

14.

FOR EXAMPLE,

JOAQUIN NAVARRO HERNANDEZ

filed a complaint with CRCL in April 2012 following a botched raid of a day labor corner by U.S. Customs and Border Patrol (CBP). He also, while fighting his deportation proceedings, filed a Freedom of Information Act request seeking publicly available information related to his arrest. He ultimately prevailed in his FOIA claim in federal court.[35] Based on the evidence that was revealed of the CBP's cover-up and perjured testimony, a federal immigration judge closed his deportation case. Nonetheless, a year later, CRCL has not made any findings relating to his complaint, nor communicated with him in any way aside from sending a case receipt acknowledgment.

15. ADDITIONALLY, IN SOME CASES, FILING A COMPLAINT with CRCL can itself lead to retaliation through the immigration system. Mario Cacho is a Honduran national who was a reconstruction worker in New Orleans. On August 21, 2009 he completed a criminal sentence for disturbing the peace. Before finishing his criminal sentence, on August 3, 2009, ICE placed an immigration detainer on him. ICE's detainer expired in August, but ICE never took custody of Mr. Cacho and he remained in custody. Mr. Cacho filed a written grievance to the Orleans Parish Prison officials asking for his release, but the prison never responded. On February 5, 2010, Mr. Cacho's counsel filed a complaint with CRCL. At this point, he had been unlawfully over-detained for more than 160 days. After the complaint was filed, ICE sought custody of Mr. Cacho and deported him. In this rare instance the deportation did not block Mr. Cacho from continuing to expose violations of his civil and political rights. Mr. Cacho worked with advocates from the New Orleans Workers' Center for Racial Justice to pursue a civil rights lawsuit from his home in Honduras which resulted in a landmark civil rights settlement.[36] In recognition of the pattern and practice of civil rights violations, the settlement also resulted in a new policy limiting cooperation between local law enforcement and federal immigration agents.[37] U.S. immigration enforcement fought Mr. Cacho throughout the process even denying his application for temporary humanitarian status to testify at his federal civil rights trial.

16. THUS, WHILE THE UNITED STATES PRESENTS the CRCL as providing a mechanism for identifying and remedying ICCPR violations, in practice this office offers neither a meaningful investigation into reports of abuse, nor an effective remedy for violations. As currently constituted, access to the CRCL is insufficient to meet the United States' obligations under Article 2.

17. ANOTHER AREA WHERE SUBSTANTIVE VIOLATIONS of the ICCPR are widespread is in the treatment of immigrants in detention.[38] The number of persons held in immigration detention has grown exponentially over the last decade.[39] The large increase of detainees has overwhelmed the available government facilities. An increasingly large number of people are now detained in facilities run by private contractors.[40] Persons in immigration detention report lack of access to urgent medical care, shortages of basic necessities like soap, toothpaste, and toilet paper, a vacuum of information about their deportation cases, and minimal or no access to their families and lawyers.[41] These conditions constitute violations of the ICCPR, as well as of ICE detention standards.[42]

18. AS THE UNITED STATES EXPLAINED in its Fourth Periodic Report, "[t]he current ICE detention system consists of approximately 240 local and state facilities acquired through intergovernmental service agreements (IGSA), seven contract detention facilities, and seven ICE-owned facilities."[43] The largest majority (approximately 70% of detainees) are placed in IGSA facilities.[44] All detention facilities are required to meet the ICE National Detention Standards or the Performance Based National Detention Standards.[45] The United States represents that it monitors compliance with these standards through the Office of Detention Oversight (ODO), which is in the ICE Office of Professional Responsibility (OPR).[46] ODO was created in 2009 "to ensure independent internal management controls over ICE, the Detention Management Compliance Program, the safe and secure operation of detention facilities, and the humane treatment of ICE detainees."[47] OPR/ODO both conducts its own inspections of detention facilities and investigates incidents of non-compliance and mistreatment, and collaborates with other federal government offices, including CRCL in their oversight efforts.[48]

19. THE UNITED STATES RECOGNIZES THE IMPORTANT ROLE that the detainees themselves can play in reporting violations of detention standards in its facilities. The Fourth Periodic Report represents that all ICE detainees are provided with handbooks that explain ICE detention standards and policies and explain the grievance process.[49] Nonetheless, detainees who report poor conditions are regularly ignored or subjected to retaliation.

20.

GERSON DIAZ

WAS DETAINED AT THE SOUTH LOUISIANA CORRECTIONAL CENTER in Basile, Louisiana. He and other detainees filed grievances to challenge the poor conditions in the facility, but were ignored. He and sixty other detainees then began documenting the violations against them and conducting hunger strikes to expose the seriousness of ICE's failures.[50] In retaliation, several of the detainees were placed in solitary confinement.[51] Ultimately, the impasse was only resolved through the intervention of the DHS Secretary Janet Napolitano. When ICE finally conducted its own review of Basile, most of the violations reported by the detainees were validated[52] and conditions at Basile have begun to improve. Diaz continues to advocate for humane detention conditions and for the rights of detainees. Nonetheless, despite his courageous and meritorious advocacy efforts, ICE continues to pursue his deportation. Recently, his deportation defense based on civil rights violations occurring during his arrest was denied and he must now file an appeal or leave the country. ICE has continued to refuse to exercise discretion to close his case.

21. MR. DIAZ'S EXPERIENCE AT BASILE DEMONSTRATES that without the participation of the detainees themselves, the United States cannot effectively protect the Covenant rights of persons held in immigration detention. The current structure of detention oversight only involves review and recommendations made by other offices within ICE. To be truly comprehensive and critical in the review of its facilities ICE and ODO need to respect the voices of those within the detention system. Without protection from retaliation, however, immigrant detainees face extremely high costs for reporting ICE violations.

22. RECOGNIZING THE IMPORTANT ROLE that immigrant workers play in exposing civil, labor, and human rights violations, ICE formally adopted a policy of providing relief for defenders engaged in human rights actions. On June 17, 2011, ICE Director John Morton issued a memorandum entitled "Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs" ("Morton Memo").[53] The Morton Memo directs ICE officials to exercise "all appropriate

discretion" for individuals "pursuing legitimate civil rights complaints" including "individuals engaging in a protected activity related to civil or other rights."[54] It states that such discretion is necessary "to avoid deterring individuals from...pursuing actions to protect their civil rights."[55] While still discretionary, if broadly enforced, this memorandum would aid the U.S. in its obligations under the ICCPR.

23. IN ADDITION TO THE CONSTRAINTS that it is at best discretionary and subject to implementation by regional offices, the memorandum offers only limited protection for immigrant human rights defenders. It directs ICE officials to use their discretion not to pursue the deportation of any qualifying person. It does not, however, affirmatively direct immigration officials to grant immigrant human rights defenders any kind of authorization to stay or work in the United States and it does not prevent ICE from resuming a case for removal at another time.

24. MOREOVER, IN PRACTICE, THE SOUTHERN REGIONAL OFFICE of ICE has not exercised its prosecutorial discretion in accordance with the directives in the memorandum. The New Orleans Workers' Center for Racial Justice has requested prosecutorial discretion to protect human rights defenders who participate in national and local investigations into unlawful policing and detention practices. By and large, except for one group of four workers who ran a national advocacy campaign for four years, ICE has ignored or denied these requests for prosecutorial discretion and has continued to pursue deportation for these individuals. As a result, these human rights defenders are denied equal access to courts to seek redress for their civil rights claims.

25. IN SUM, THE REMEDIES THAT THE UNITED STATES HAS CREATED to ensure that the ICCPR rights of immigrant workers are protected are presently ineffective. Moreover, the systematic use of the immigration system to punish those who report violations separately contravenes the independent right to equal court access.

ARTICLE (2)(1); (26)
(NON-DISCRIMINATION)

26. ARTICLES 2(1)[56] AND 26[57] OF THE ICCPR FORM the non-discrimination standard that binds all state parties. According to the Committee, "the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness."[58] Specifically, the Committee has recognized that non-citizens "have the right to freedom of thought, conscience and religion, and the right to hold opinions and to express them"[59] as well as "the right to freedom of assembly and association."[60] Non-citizens also have the right to equal treatment in the courts.[61] As the Committee has explained, "the general rule is that each one of the treaty rights of the Covenant must be guaranteed without discrimination between citizens and aliens."[62]

27. AS RECOGNIZED BY THE UNITED STATES in its Fourth Periodic Report, non-citizens are also protected under U.S. constitutional and federal statutory law.[63] The United States acknowledges, however, that immigrants continue to be subjected to unlawful discrimination in all aspects of life.[64] State and federal actors are often active participants in and enablers of this discriminatory behavior,[65] creating a relationship of distrust and fear between these communities and the government."[66]

28. NONETHELESS, IMMIGRANT WORKERS IN THE GULF COAST have not been quiescent victims of discrimination, but rather have been actively engaged in reporting and challenging violations of their domestic and international legal rights by employers and by law enforcement. Members of the Southern 32 Campaign and the New Orleans Workers' Center for Racial Justice have been essential participants in state, local, and national efforts by government and non-governmental organizations to document and remedy workplace labor violations, law enforcement racial profiling, and abusive detention conditions, all of which violate the ICCPR,[67] as well as domestic constitutional and statutory law.

29. DESPITE THE IMPORTANT ROLE THAT THESE COMMUNITY LEADERS PLAY in defending civil, labor, and human rights, the federal government regularly uses the immigration system to retaliate against them for speaking out against unlawful discrimination. Thus, the violation of the ICCPR right against non-discrimination is compounded by subsequent violations of the separate and independent right to speak and organize against unlawful discrimination and to demand and receive a remedy for Covenant violations.

CONCLUSIONS & RECOMMENDATIONS

NON-CITIZENS ARE ENTITLED to full recognition of the protections guaranteed by the International Covenant on Civil and Political Rights. Unfortunately, as the United States acknowledges, unlawful discrimination against immigrant communities remains a problem for the nation.

IMMIGRANT HUMAN RIGHTS DEFENDERS play an essential and irreplaceable role in identifying and remedying these violations.

CONTINUED IMMIGRATION ENFORCEMENT including arrest, detention, and deportation of individuals engaged in defending human rights enumerated in the ICCPR violates the United States' obligation to provide an effective remedy under Article 2 of the Covenant, and severely limits the nation's ability to comply with its other Covenant obligations.

THE UNITED STATES' FAILURE TO PROTECT the expressive and associative rights of non-citizens violates its commitments under the ICCPR and undermines federal efforts to end unlawful discrimination by both state and federal actors.

TO BRING THE NATION INTO COMPLIANCE with its ICCPR obligations to immigrant human rights defenders and its obligation to detect, investigate, and remedy violations of all rights protected under the ICCPR, the United States should:

- **Legislate Immigration Protections for Individuals Defending Human Rights Enumerated within the International Covenant on Civil and Political Rights.** The POWER Act is proposed legislation that would ensure that worker protection laws are equally enforced in all workplaces and create special visa eligibility for workers suffering serious civil rights or labor violations.

- **Create and Enforce Administrative Protections for Individuals Defending Human Rights Enumerated within the International Covenant on Civil and Political Rights.** The Department of Homeland Security, the U.S. Cabinet agency responsible for immigration enforcement, should issue public guidance directing enforcement and legal personnel to properly limit enforcement in cases involving protected civil, labor, and human rights actions and should ensure consistent and broad implementation. This could include non-discretionary implementation and enforcement of the principles included in existing discretionary administrative documents.[68] Administrative protections must include: an end to all DHS custody conditions (including but not limited to detention, ankle shackles, travel limitations, and check-in requirements), indefinite future status for human rights defenders and their families (including termination of immigration cases with prejudice or indefinite stays of removal), and employment authorization.

- **Adopt Proactive Policies to Limit Harm to Ongoing Human Rights Activities.** The U.S. Department of Homeland Security should adopt procedures that limit the destructive impact of worksite, day labor corner, and community raids. Prior to such raids, ICE should conduct a community justice assessment on the raid's harm to ongoing protected activity relating to civil, labor, or human rights that shall constrain enforcement activity.

- **Terminate Federal Agreements with Local Law Enforcement Officials Who Undermine Human Rights.** The Department of Homeland Security should monitor and terminate collaboration with local and state law enforcement that is found to be undermining human rights. Terminating collaboration should include terminating detention contracts and information-sharing programs in which local law enforcement are found to have committed human rights violations including racial profiling, excessive use of force, over-detention based on expired immigration detainers, and/or unlawful detention conditions.

- **Investigate and Sanction Misconduct by Immigration Enforcement Officials and Protect Witnesses to the Investigation**. The Department of Homeland Security Office for Civil Rights and Civil Liberties should investigate and sanction agents who fail to comply with human rights, while protecting the confidentiality and safety of victims and witnesses who come forward and report misconduct. CRCL should develop a streamlined process to ensure that immigration enforcement protects and does not harm persons who participate in civil rights investigations. CRCL should also limit the ways in which information gathered through these investigations is shared and used against cooperating individuals in the future.

- **Ensure Community Transparency and Accountability.** The Department of Homeland Security should publicly disclose information relating to protection of human rights defenders across its field offices and divisions. This includes providing data, by region, relating to the number of cases reviewed and actions taken, community justice assessments performed, and funding allocations made towards civil, labor, and human rights. The Department of Homeland Security should also prioritize Freedom of Information Act requests relating to civil, labor, and human rights.

PROPOSED QUESTIONS TO THE UNITED STATES

(1) What provisions of U.S. immigration law and policy ensure protections for vulnerable migrant workers and other individuals acting to defend the rights enumerated in the ICCPR so that the U.S. does not deport the evidence of serious human rights violations?

(2) In June 2011, director of Immigration and Custom Enforcement (ICE), John Morton issued two memoranda to ICE personnel on the use of discretion in immigration enforcement.[69] They direct ICE attorneys and employees to refrain from pursuing individuals with strong ties to the United States, and those "involved in non-frivolous efforts related to the protection of their civil rights and liberties."[70] Instead ICE officials are to focus their efforts on persons who pose a serious threat to national security and public safety, and individuals with an "egregious record of immigration violations."[71]

- **a.** Please provide an update on the effect of these memoranda on U.S. immigration enforcement policy. How does the United States ensure uniform compliance with these directives by personnel in ICE's regional and local offices?
- **b.** What kinds of training and oversight mechanisms are in place to ensure that ICE personnel properly exercise discretion under the Morton memoranda? What channels of redress are available when they do not?

(3) The United States has created an Office of Civil Rights and Civil Liberties in the Department of Homeland Security, which is tasked with addressing complaints involving abuses of civil rights, civil liberties, and discrimination on the basis of race, ethnicity, and national origin, by employees or officials of the Department of Homeland Security, which includes the Bureau of Immigration and Customs Enforcement.[72]

- **a.** What role does the DHS Office for Civil Rights and Civil Liberties play in enforcement of the protections for victims of civil rights and labor violations?
- **b.** Please update the Committee as to the kind of complaints most commonly received by the CRCL and their resolution. What enforcement mechanisms does the CRCL have to end ongoing violations?
- **c.** How does the United States ensure that documented and undocumented immigrants can report civil, constitutional, and human rights violations, particularly against government officials, without experiencing retaliation? How does the United States ensure that immigrants receive due process of law on claims of civil, constitutional and human rights violations made to CRCL without fear of deportation? What redress is available for persons who experience retaliatory action by DHS or its sub-agencies as a result of reporting a rights violation? What steps does DHS take to ensure they are not detained and/or deported while their claims are being investigated?

d. How is information gathered through investigations shared within DHS and its sub-agencies? What protections exist to ensure confidentiality for participants in the process?

(4) The 287(g) Program authorizes local law enforcement to perform certain immigration functions traditionally done by the federal government. The Program also has been the source of numerous reported civil, constitutional, and human rights violations. The United States reports that it is engaged in a number of training efforts to ensure that this program operates in a way that is consistent with constitutional and human rights standards.[73]

a. Please update the Committee as to the impact of these training programs on the incidence of civil and human rights violations affecting immigrant communities.

(5) During the Universal Periodic Review of 2010, the United States addressed continuing concerns over its migrant detention practices. In its report for the Fourth Periodic Review, the United States reports the creation of the Office of Detention Oversight, which is charged with independently verifying the inspection of detention facilities, according to national detention standards.[74]

a. Please update the Committee as to the success of these oversight mechanisms in improving detention conditions, particularly in private facilities. Do these Offices also play a role in redressing individual reports of problematic detention conditions? How does the United States ensure that migrants in detention can receive individual redress for civil and human rights violations, beyond merely filing complaints with oversight entities? How does the United States ensure protections from retaliation for detainees who file complaints while in custody?

b. Civil society groups continue to report detention conditions that are dangerous to the health and safety of detainees; over-reliance on detention of individuals including women, children, and asylum seekers; and punitive actions against detainees including the use of solitary confinement. How is the United States responding to these continuing concerns from civil society?

(6) DHS and the Department of Labor have a Memorandum of Understanding designed to ensure that immigration and labor rights enforcement activities do not conflict.[75] Pursuant to this Memorandum, ICE agreed to refrain from engaging in civil worksite enforcement activities at a worksite that is under DOL investigation, and further committed to evaluating requests from employers to ensure that they are not "motivated by an improper desire to manipulate a pending labor dispute, retaliate against employees for exercising labor rights, or otherwise frustrate the enforcement of labor laws."[76]

a. Please update the Committee as to the progress in implementing the protections in this Memorandum. Specifically, please explain what training is in place at the national, regional, and local level to ensure that ICE employees and officials are aware of their obligations under the Memorandum and describe the standards by which DHS evaluates employer requests under the Memorandum. Please provide documentation as to the number of times DOL has asked for protections for workers and DHS's response.

ENDNOTES

[1] See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], art. 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] See ICCPR Human Rights Committee General Comment No. 15, The Position of Aliens Under the Covenant (27th Sess. 1986) [hereinafter Gen. Comment 15], at para. 7 (reiterating that "aliens" are entitled to equality before courts and tribunals and before the law, and they are guaranteed the right to hold and express opinions and to associate.").
[3] See id. at para. 7 ("Aliens have the full right to liberty and security of the person. . . . They may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence.").
[4] See ICCPR, art. 2, 26.
[5] See id. at art. 9(1) ("No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.").
[6] See id.
[7] See id. at art. 10(1) ("All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.").
[8] See id. at art. 8(3).
[9] See id. at art. 6(1).
[10] See Gen. Comment 15, supra note 2 at para. 7.
[11] See ICCPR, art. 19 ("Everyone shall have the right to hold opinions without interference" and "everyone shall have the right to freedom of expression . . . [which] shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."); art. 21 ("The right of peaceful assembly shall be recognized.); art. 22 ("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.").
[12] See ICCPR Human Rights Committee General Comment No. 34, Article 19: Freedoms of opinion and expression (102d Sess. 2011) [hereinafter General Comment 34] at para. 3.
[13] Id. at para. 4. General Comment 34 also highlights the broad reach of the article, which encompasses "the right to seek, receive and impart information and ideas of all kinds regardless of frontiers" and which includes "political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse." See id. at para. 11.
[14] See id., at para. 7.
[15] Id. at para. 23.
[16] For the text of the United States' reservations, understanding, and declarations, see SENATE COMM. ON FOREIGN RELATIONS, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. REP. NO. 23, 102d Cong. 2d Sess. 6-10 (1992).

[17] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." See U.S. Const. Amend. I.

[18] See United States v. Verdugo-Urquidez, 494 U.S. 259 (1990). Writing for the majority, Chief Justice Rehnquist explained that "'the people' protected by the Fourth Amendment, and by the First and Second Amendments . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." Id. at 265 (Rehnquist, C.J.).

[19] See Michael J. Wishnie, Immigrants and the Right to Petition, 78 N.Y.U. L. REV. 667, 681 (2003).

[20] Id. at 683.

[21] Chris Strunk and Helga Leitner, Redefining Secure Communities, THE NATION, Dec. 21, 2011, available at http://www.thenation.com/article/165295/redefining-secure-communities (last visited Aug. 23, 2013).

[22] See Statement of Saket Soni, Director, New Orleans Workers' Center for Racial Justice, Mar. 5, 2008, available at http://nolaworkerscenter.wordpress.com/2008/03/ (last visited Aug. 23, 2013).

[23] See Harold Myerson, Protecting undocumented Workers: Legislation would expand the protection of U visas to those who come forward to report workplace violations, L.A. Times, June 24, 2011, available at http://articles.latimes.com/2011/jun/24/opinion/la-oe-meyerson-undocumented-abuses-20110624 (last visited Aug. 23, 2013); Janelle Ross, Whistleblower workers face deportation despite Obama Administration Policy, Huffington Post (May 7, 2012, 6:24 PM), http://www.huffingtonpost.com/2012/05/07/obama-deportation-whistleblower-workers_n_1497888.html (last visited Aug. 23, 2103); Janelle Ross, Josue Dias: Workplace Whistleblower gets Temporary Deportation Reprieve, Huffington Post (May 10, 2012, 4:43 PM) http://www.huffingtonpost.com/2012/05/10/josue-diaz-workplace-whistleblower_n_1507078.html (last visited Aug. 23, 2013).

[24] Id.

[25] Maria Clark, Lives on hold: immigration policy comes under fire locally, NEW ORLEANS CITY BUSINESS (March 22, 2013, 7:26 AM) http://neworleanscitybusiness.com/blog/2012/03/22/immigration-policy-comes-under-fire-for-detaining-innocent/(last visited Aug. 23, 2013); see also Pramila Nadasen, Anything but "Secure": Federal Program Designed to Nap criminals is devastating immigrant families, MS. MAGAZINE, Winter 2012, available at http://www.msmagazine.com/winter2012/anything_but_secure.asp (last visited Aug. 23, 2013); Katy Reckdahl, Immigrant laborers in New Orleans testing Obama administration's new policy, TIMES PICAYUNE, June 25, 2012, available at http://www.nola.com/politics/index.ssf/2012/06/immigrant_laborers_in_new_orle.html (last visited Aug. 23, 2013).

[26] See ICCPR, art. 2(3) ("Each State Party to the present Covenant undertakes: (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. . . ").

[27] See ICCPR Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (80th Sess. 2004) [hereinafter General Comment 31] at para. 15.

[28] Id.

[29] Id. at para.17.

[30] See ICCPR Human Rights Committee General Comment No. 13, Equality before the courts and the right to a fair and public hearing by an independent court established by law (21st Sess. 1984) [hereinafter General Comment 13] (guaranteeing equal access to courts and tribunals). This interpretation has also been adopted by a least one federal court. See Dubai Petroleum Co. v. Kazi, 12 S.W. 3D 71, 82 (Tex. 2000) (holding that the ICCPR not only guarantees foreign citizens equal treatment in the signatories' courts, but also guarantees them equal access to these courts).

[31] In Yick Wo v. Hopkins, the Supreme Court held that all aliens are "persons"' within the meaning of the fourteenth amendment and are protected by that amendment's due process clause. See Yick Wo v. Hopkins 118 U.S. 356, 369 (1886) (holding that the Fourteenth Amendment "provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws"). See also Plyer v. Doe, 457 U.S. 202, 202 (1982) (stating that "[w] hatever his status under the immigration laws, an alien is a "person" in any ordinary sense of that term. This Court's prior cases [have recognized] that illegal aliens are 'persons' protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.").

[32] Additionally, the right to court access is protected under federal statutory law. For example, the civil rights statute 42 U.S.C. § 1981 provides that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." 42 U.S.C. § 1981. Undocumented immigrants are considered "persons" within the meaning of the statute. See also Martinez v. Fox Valley Bus Lines, 17 F.Supp. 576, 577 (N.D. Ill. 1936)(holding that the §1981 and the Fourteenth Amendment protects undocumented immigrants).

[33] See Fourth Periodic Report of the United States of America, CCPR/C/USA/4 (Dec. 30, 2011) [hereinafter Fourth Periodic Report], at para. 105.

[34] Id.

[35] See Navarro Hernandez v. U.S. Customs and Border Patrol, 2012 U.S. Dist. LEXIS 14290 (Feb. 6, 2012).

[36] Cacho et al. v. Gusman, No. 11-225 (E.D. La. filed Feb. 2, 2011) (42 U.S.C. § 1983 action for unlawful over-detention). See also Update to the Letter of Findings, United States Civil Rights Investigation of the Orleans Parish Prison System, United States Department of Justice, Civil Rights Division (Apr. 23, 2012) (finding that the conduct of officials at OPP evinces deliberate indifference to basic needs with particular risk to immigrants detained there) available at www.justice.gov/crt/about/spl/documents/parish_update_4-23-12.pdf (last visited Aug. 23, 2013).

[37] Campbell Roberson, New Orleans and U.S. in Standoff on Detentions, N.Y. TIMES, August 12, 2013, available at http://www.nytimes.com/2013/08/13/us/new-orleans-and-us-in-standoff-on-detentions.html (last visited Aug. 23, 2013); A Brighter Line on Immigration Policing, N.Y. TIMES, August 17, 2013, available at www.nytimes.com/2013/08/18/opinion/sunday/a-brighter-line-on-immigration-policing.html (last visited Aug. 23, 2013).

[38] See, e.g., Detention Watch Network, Conditions in Detention, http://www.detentionwatchnetwork.org/node/2383 (last visited Aug. 23, 2013); Amnesty International USA, Immigration Detention, http://www.amnestyusa.org/our-work/issues/refugee-and-migrant-rights/immigration-detention (last visited Aug. 23, 2013).

[39] An estimated 3 million people have been in immigration detention in the last decade. An average of 30,000 people are held in immigration detention facilities on any given day. See FRONTLINE, THE U.S. IMMIGRATION DETENTION BOOM, http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/map-the-u-s-immigration-detention-boom/ (last visited Aug. 23, 2013).

[40] See Fourth Periodic Report supra note 33 at para. 236.

[41] See generally DETENTION WATCH NETWORK, EXPOSE AND CLOSE, available at http://detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/ExposeClose/Expose-Executive11-15.pdf (last visited Aug. 23, 2013) (highlighting detainee reports of inadequate medical care and food, as well as lack of access to legal counsel and family); System of Neglect, WASH. POST., May 11, 2008, available at http://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc_d1p1.html (last visited Aug. 23, 2013) (documenting poor medical care and rising mortality rates of detainees).

[42] Article 10.1 of the ICCPR specifically provides for the preservation of human dignity for those who are held in detention. See ICCPR art. 10(1). The isolation of detainees from their counsel and their family, as well as the lack of adequate medical care, food, and other necessities, are an affront to the dignity of those held in immigration detention facilities.

[43] See Fourth Periodic Report, supra note 33 at para. 236.

[44] Id.

[45] Id. at para. 237-38.

[46] Id. at para. 241-242.

[47] Id., at para. 243. See also Susan Carrol, ICE paints bleak picture of detention system, HOUSTON CHRON., Oct. 20, 2011, available at http://www.chron.com/news/houston-texas/article/ICE-paints-bleak-picture-of-its-detention-system-2209428.php (last visited Aug. 23, 2013) (reporting that ODO inspection reports obtained through a FOIA request documented abusive practices, lack of medical care, and lack of clean underwear).

[48] Fourth Periodic Report, supra note 33 at para. 242.

[49] Id., at para. 239.

[50] John Moreno Gonzales, 60 Immigrant Detainees Hunger Strike in Louisiana: Authorities Deny Poor Conditions, Associated Press, July 30, 2009, available at http://www.startribune.com/templates/Print_This_Story?sid=52115137 (last visited Aug. 23, 2013). See also Detention Reform, N.Y. TIMES, Aug. 7, 2009, at A18, available at http://www.nytimes.com/2009/08/07/opinion/07fri2.html?scp=2&sq=basile%20 (last visited Aug. 23, 2013) (arguing that ICE should ensure that national policies on detention impact "continuing outrages, like those documented by immigrant advocates at a center in Basile, LA, where detainees have wages hunger strikes to get their grievances heard.").

[51] See Monitoring Reports on Retaliation Against Detainee Human Rights Monitors at the South Louisiana Correctional C enter, Basile, Louisiana, New Orleans Workers' Center for Racial Justice, available at http://www.nowcrj.org/wp-content/uploads/2009/08/retaliation-report.pdf (last visited Aug. 23, 2013).

[52] See ICE FOIA Request Number 1010FOIA 7265 (on file with New Orleans Workers' Center for Racial Justice).

[53] See JOHN MORTON, PROSECUTORIAL DISCRETION: CERTAIN VICTIMS, WITNESSES, AND PLAINTIFFS (Jun. 17, 2011) [hereinafter MORTON MEMO I], available at http://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf (last checked Aug. 23, 2013).

[54] Id. at 1. See also JOHN MORTON, EXERCISING PROSECUTORIAL DISCRETION CONSISTENT WITH THE CIVIL IMMIGRATION ENFORCEMENT PRIORITIES OF THE AGENCY FOR APPREHENSION, DETENTION, AND REMOVAL OF ALIENS 4 (Jun. 17, 2011) [hereinafter MORTON MEMO II], available at http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf (last visited Aug. 23, 2013)(listing cooperation with federal, state, or local law enforcement as a positive factor warranting prosecutorial discretion).

[55] MORTON MEMO I, supra note 55 at 1.

[56] See ICCPR art. 2(1): Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, 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.

[57] See ICCPR, art. 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.

[58] See Gen. Comment 15, supra note 2 at para. 1.

[59] Id. at para. 7

[60] Id.

[61] Id.

[62] Id., at para. 2.

[63] See Fourth Periodic Report supra note 33 at para. 101 ("As a matter of U.S. law, aliens within the territory of the United States, regardless of other immigration status, enjoy robust protections under the U.S. Constitution and other domestic laws. Many of these protections are shared on an equal basis with citizens, including a broad range of protections against racial and national origin discrimination."). See also id., at para. 102 (detailing federal statutory protections against discrimination).

[64] See id. at para. 105.

[65] In the Gulf Coast region, the Department of Homeland Security Bureau of Immigration and Customs Enforcement ["ICE"] have supported private employers in violating immigrant workers' rights. For example, in Mississippi, ICE "worked closely with a marine oil rig company . . .to discourage protests by temporary guest workers from India over their job conditions, including advising managers to send some workers back to India..." Julia Preston, Suit Points to Guest Worker Program Flaws, N.Y. TIMES, Feb. 2, 2010 at A12.

[66] See also State of Alabama v. Victor Marquez, No. CV2008-900560 (28th Judicial Cir. Ala. 2008) (alleging that while traveling from the United States to Mexico, a migrant farmworker had his life savings seized by the police during a traffic stop); Central Alabama Fair Housing Center, et al. v. Julie Magee, et al., 835 F.Supp.2d 1165 (M.D. Alabama 2011) (alleging that the Alabama Department of Revenue's requirement that people who owned or maintained mobile homes in the state must prove their lawful immigration status is a violation of the Fair Housing Act).

[67] The ICCPR protects against forced or compulsory labor, requires all persons to receive the equal protection of the law and proscribes arbitrary arrest or detention, and protects the dignity of persons who are deprived of their liberty. See ICCPR, arts. 8, 9, 10, 26.

[68] See March 31, 2011, Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites available at http://www.dol.gov/asp/media/reports/DHS-DOL-MOU.pdf. See also June 17, 2011, Memorandum from John Morton, Director of ICE, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs available at http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf.

[69] See supra n. 53-54 and accompanying text.

[70] See MORTON MEMO I, supra note 53 at 1.

[71] See MORTON MEMO II, supra note 54, at 5.

[72] See Fourth Periodic ICCPR Report, supra note 33, at para. 105 (describing CRCL's efforts to reach out to communities and other immigration enforcement agencies to discuss possible violations of civil rights and civil liberties and methods for improvement). See also id. at para. 106 (describing CRCL's investigative authority).

[73] See Fourth Periodic Report, supra note 33, at para. 291 (describing the 287(g) program, codified at 8 U.S.C. 1357(g), which allows domestic and local law enforcement to carry out functions of immigration officers). The United States has outlined many aspects of the program that are supposed to prevent and prohibit violations of civil rights by both ICE and local law enforcement. See id., at para. 292.

[74] See id., at para. 238, 242-245 (describing the oversight role of the CRCL and the ODO, and the creation of national detention standards).

[75] See Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites (Dec. 7, 2011), available at http://www.dol.gov/asp/media/reports/DHS-DOL-MOU.pdf (last visited Aug. 23, 2013).

[76] Id. § IV(A).

THE NEW ORLEANS WORKERS' CENTER FOR RACIAL JUSTICE is dedicated to expanding democracy through the power and participation of low-income communities and communities of color across the Southern United States. The Center was founded after Hurricane Katrina and since then has protected the bedrock civil, labor, and human rights of African American and immigrant communities. The Center represents workers on the frontlines of today's changing South in policy change efforts, in the media, and in strategic litigation and legal advocacy. For more information see ***www.nowcrj.org.***

THE CONGRESS OF DAY LABORERS is a grassroots membership organization of immigrant workers and their families, many of whom helped rebuild New Orleans and the Gulf Coast of the United States after Hurricane Katrina. Members of the Congress are human rights defenders who promote human rights including freedom of association, equal protection, freedom of movement, political participation, self-determination, access to justice, and an end to discrimination, racial profiling, and forced labor. For more information on the Congress see ***www.makejusticereal.org***.

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