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:

Sarah Paoletti
Transnational Legal Clinic
University of Pennsylvania School of Law

Rebecca Smith
National Employment Law Project

Claudia Flores
Lenora Lapidus, Director
American Civil Liberties Union Foundation
Women's Rights Project

Chandra Bhatnagar
Steven Watt
Ann Beeson, Associate Legal Director
American Civil Liberties Union Foundation
Human Rights Program

Jennifer C. Chang
Lucas Guttentag, Director
American Civil Liberties Union Foundation
Immigrants' Rights Project

Submitted: November 1, 2006

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

TABLE OF CONTENTS

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

---

[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)

---

[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

---

[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

---

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

---

[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

---

[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

---

[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-

---

[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

---

[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

---

[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

---

[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

---

[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

---

[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.

---

[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.

---

[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

---

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

---

[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

---

[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

---

[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

---

[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

---

[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

---

[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,

---

[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]

---

[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]

---

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:

---

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

---

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:

---

[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

---

[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]

---

[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,

Petitioners
AFL-CIO
United Mine Workers Union
Inter-faith Worker Justice
Chinese Staff & Workers Association
Francisco Berumen Lizalde
Melissa L
Yolanda LR
Leopoldo Z
Jesus L

Counsel
Transnational Legal Clinic
University of Pennsylvania
Sarah Paoletti

National Employment Law Project
Rebecca Smith

American Civil Liberties Union
Claudia Flores

Yolanda LR

Chandra Bhatnagar
Steven Watt
Ann Beeson
Lenora Lapidus
Jennifer Chang
Lucas Guttentag