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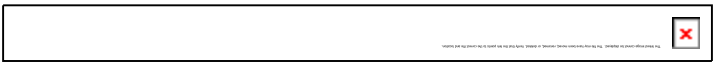

HOFFMAN PLASTIC COMPOUND, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

On Writ of Certiorari to the
United States Court of Appeals
For the District of Columbia Circuit

BRIEF AMICUS CURIAE OF IMMIGRANT WORKER GROUPS

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I. Statement of Interest of Amici Curiae

This *amicus curiae* brief is prompted by deep concern about the difficulties encountered by immigrant workers, often among the most poorly paid and poorly treated workers in our country, when they attempt to exercise their legal rights to form a union and engage in collective bargaining.1 Through their experiences as lawyers for immigrant workers and immigrant organizing groups, *amici* have gained extensive knowledge of the ways in which unscrupulous employers can unfairly profit from the hiring of undocumented immigrants; first, by employing a group of workers that will work under conditions that their US citizen counterparts would not tolerate, and second, by using threats to call the US Immigration and Naturalization Service as a tool to make certain that conditions do not change.

Amici do not submit this brief to reargue the points already submitted to this Court and the courts below. Rather, they seek to demonstrate the devastating real-world effects, on workers**,** on employers who comply with the law, and on the policies set forth in our nation's labor and immigration laws, of a decision that undocumented immigrants are not entitled to back pay for their employers' violations of the National Labor Relations Act **(**NLRA**)**.

The National Employment Law Project (NELP) has worked, for over 25 years, to advance the workplace rights of low-wage workers, including many immigrant workers. Both directly and through its network with local community groups, labor unions and legal services organizations, NELP has represented thousands of immigrant workers attempting to enforce their labor rights. NELP attorneys have written, lectured, litigated, and

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1 This brief amici curiae is filed with the written consent of all parties, which is on file with the Clerk of the Court. The parties' counsel did not author the brief in whole or in part, and no person or entity outside the organizations and attorneys listed on the brief has made a monetary contribution to its preparation or submission. See Supreme Court Rule 37.

engaged in policy advocacy on behalf of low-wage immigrant workers throughout the United States.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights legal organization founded in 1968 to promote and protect the rights of Latinos in the United States through litigation, advocacy, and education. MALDEF has a long history of advancing the civil rights of Latino immigrants, primarily in the areas of employment, education and Constitutional rights.

The National Immigration Law Center (NILC) is a national legal support center dedicated to protecting the rights of low-income immigrants in the areas of law that especially affect them. NILC conducts training, produces publications, and provides technical assistance to nonprofit legal assistance organizations across the country concerning employment discrimination and immigrants' rights. NILC also conducts litigation to promote the rights of low-income immigrants in employment, immigration and access to public benefits.

The Farmworker Justice Fund (FJF) is a Washington, D.C.-based litigation and advocacy organization for migrant and seasonal farmworkers. During its seventeen-year existence, FJF has sought to enforce and enhance farmworkers' rights in the areas of immigration, labor and employment law, occupational safety and health, women's' issues and access to legal services.

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a non-profit organization based in New York City. AALDEF defends the civil rights of Asian Americans nationwide through the prosecution of lawsuits and the dissemination of public information. AALDEF has represented numerous clients in claims against their employers for various violations of the federal labor laws. Permitting employers to avoid the consequences of labor law violations based on the citizenship status of the employee undermines the rights of all workers.

Pineros y Campesinos Unidos del Noroeste (PCUN) is a union of agricultural and reforestation workers based in Woodburn, Oregon. PCUN represents over 4800 workers, most of whom are immigrants. Although much of its organizing is with agricultural workers who are excluded from the protection of the NLRA, many of its members work at least part of the year in activities, such as reforestation or food processing, subject to the protection of the Act. PCUN is concerned with its members' well-being in non-agricultural work places. Further, PCUN is concerned that an adverse ruling by this court under the NLRA could affect the available remedies under other anti-retaliation statutes that apply directly to agricultural workers, such as the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) or the Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. § 1855(a).

The Public Justice Center, ("PJC") is a non-profit civil rights and anti-poverty legal services organization based in Baltimore, Maryland. Since 1985, the PJC has used impact litigation, legislative advocacy and public education to accomplish systemic change for the underrepresented. The PJC has represented low-wage immigrant workers in wage and hour actions, and has a Latino Legal Assistance Project that seeks to protect and expand the rights of Latinos in the State of Maryland.

Together, *amici* have many decades of experience advising and representing documented and undocumented immigrant workers attempting to enforce their labor rights. We urge the Court to affirm the decision of the District of Columbia Court of Appeals in this case.

II. Statement of the Case

In the present case, Jose Castro signed an employment authorization document at the time of hire, indicating that he was not legally entitled to work in the United States. Mr. Castro was illegally laid off during a campaign to organize a union at Hoffman Plastic. He was awarded back pay from the time of the unlawful discharge until the time that his employer elicited from him, in the course of National Labor Relations Board proceedings, his status as an undocumented alien. *Hoffman Plastic Compounds, Inc.*, 320 N.L.R.B. 1060 (1998). The employer now contends that it is not liable to Mr. Castro for back pay for any period of time, despite its concession that it acted illegally in Mr. Castro's layoff.

III. Summary of Argument

In many workplaces in our country, undocumented immigrant workers toil alongside documented and United States Citizen workers. Some employers hire undocumented workers with a general knowledge that some in their workforce lack authorization to be employed in the U.S. Others have more specific knowledge that many in their workforce are undocumented. In the worst cases, employers seek out undocumented workers for the purpose of taking advantage of them.

If employers are unconcerned about their employees' immigration status at the time of hire, their interest in the immigration status of their workers rises sharply when workers begin to assert their labor and employment rights. Employers wishing to defeat a labor organizing campaign use whatever tools are at hand to defeat the union, including sudden "discovery" that the workers are unlawfully in the United States. Unscrupulous employers threaten to bring in immigration authorities as a way of quelling organizing efforts.

A legal system that denies undocumented victims of discrimination back bay creates a perverse incentive, where it a "reasonable" business decision for an employer

to retaliate against a union organizing campaign by turning all suspected undocumented immigrants in to the immigration authorities. When undocumented victims of discrimination are denied back pay as a remedy for retaliation, this unlawful strategy carries no cost. Employers pay no penalty for their unlawful conduct and are encouraged to continue the practice with the next group of immigrant workers.

The Immigration and Nationality Act (INA) and the National Labor Relations Act (NLRA) share the goal of reducing employer incentive to take advantage of a vulnerable workforce. An award of back pay to undocumented workers deprives employers of the competitive advantage they gain by first hiring, and then mistreating, undocumented employees. It diminishes the attractiveness of hiring undocumented immigrants, meeting the goals of IRCA. It also diminishes employer incentives to discharge or otherwise retaliate against workers who wish to form a union, meeting the goals of the NLRA. Only if this Court affirms the NLRB's policy of providing back pay to undocumented immigrants can the goals of both statutes be met.

VI. Argument

A. Unscrupulous Employers Use Threats of INS Raids to Chill Immigrants' Exercise of Their Workplace Rights.

1. Retaliatory Threats of INS Raids are Common when Workers Seek to Enforce Rights under the NLRA.

The NLRA expresses our national policy that all workers be free to exercise their right to organize and bargain collectively through representatives they choose, without interference or retaliation by their employers. 29

U.S.C. § 151 (1994). The law further provides that employers may not retaliate against workers who exercise these protected rights. Employers may not directly retaliate, by threatening to fire or firing workers. Nor may they use the Immigration and Naturalization Service (INS), to indirectly retaliate. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984). The protections of the law extend to all employees, regardless of their immigration status at the time the work was performed. *Id.*, 467 U.S. 883, 895.

In spite of the protections in labor and immigration laws, undocumented workers are extremely vulnerable to anti-union pressure from the employer. An employer who is adamantly opposed to recognizing a union may discharge immigrant union supporters or threaten to turn workers over to the INS if they seek to organize themselves into a union. Unfortunately, threats and actual retaliation against undocumented immigrants are a common occurrence for immigrant workers and their US citizen co-workers.

Sure-Tan itself is the best-known example of this retaliation. There five of seven eligible voters in a successful union election were undocumented. The employer knew of the workers' undocumented status at least several months prior to the union election. Two hours after the workers voted in favor of union representation, and cursing the workers for having voted for the union, the employer questioned them about their immigration status. He then turned the workers over to the INS. *Sure-Tan*, 467 U.S. at 886-87.

While *Sure-Tan* may be the most well-known example of employer retaliation, it is not a unique one. The scene of employer retaliation and misuse of the immigration laws presented in *Sure-Tan* has been repeated across the country, in many industries.

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

could be listed on its books. Several months later, when Benavides and another undocumented worker, Alberto Guzman, became active in a union organizing drive, and in an atmosphere of "flagrant and pervasive unfair labor practices," the workers were fired. One day after the union won the election, the employer asked the INS to investigate the legal status of its employees. *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 NLRB 408, 409, 415 *(1995) aff'd,* 134 F.3d 50 (2nd Cir. 1997)

In 1996, the Teamsters and United Farm Workers' unions began a joint organizing drive in Washington State's lucrative apple industry, beginning with a packing company in Wenatchee, Washington. One employee, Mary Mendez, quotes the employer's anti-union consultant as having told the workers, "there hasn't been a union here yet, and the INS hasn't done any raids. But with a union, the INS is going to be around." The union lost the subsequent election, but the NLRB issued a bargaining order because of the company's many illegal actions. David Bacon, *Immigration Law – Bringing Back Sweatshop Conditions,* *www.igc.org/dbacon/Imgrants/11sanctn.html (11/10/98)* (documenting such cases in a maintenance company in the Silicon valley of California, knitting company on Long Island, and a video company in San Leandro).

In 1994, workers in a Chicago Italian restaurant sought to join a union. At an employee meeting, the general manager told the workers that the Immigration and Naturalization Service could visit the restaurant. *6 West Ltd. Corp v. NLRB,* 237 F.3d 767, 772 and n. 7 (7th Cir. 2001).

Aida Naranjo was hired in 1985 to work for a Brooklyn textile manufacturer. In 1991, after voting for union representation from the International Ladies Garment Workers' Union, Aida was laid off. The Board found that Ms. Naranjo and other workers' rights were violated when the employer made implicit threats, shortly after the union election, to report all of them to the INS in retaliation for their support of the union. *Impressive Textiles,* 317 N.L.R.B. 8 (1995).

In *Impact Industries, Inc.*, 285 N.L.R.B. 5 (1987), *remanded* 293 N.L.R.B. 794 (1989), an Illinois aluminum and zinc die casting manufacturer contacted the INS after being informed that 99% of the Mexican immigrants in his employ supported the **u**nion. He secured interviews of each employee by the INS**,** spreading fear among the workers. The Board found that the employer "viewed the INS program as a handy convenient way to rid itself of a bloc of union-supporting employees." *Id.*, at 37.

Claudio Quijada worked as a janitor for a building maintenance company in White Plains, New York. He contacted the Service Employees International Union, in October of 1989, to organize the workforce. About a week later, when he went to pick up his check, a company manager told him that if he did not withdraw his support for the union, he would be reported to the Immigration Service. *Accent Maintenance Corp.,* 303 N.L.R.B. 294, 296 (1991)

Emme Loy was involved in an organizing drive at a bakery in Brooklyn in 1988. His employer threatened to close the bakery and tear up any union cards given him. Further, he informed the workers that the Union was "not for illegals." *Breakfast Productions, Inc.,* 293 N.L.R.B. 607, 609 (1989).

Similar examples abound, both before and after the passage of the Immigration Reform and Control Act of 1986 (IRCA). In 1977, Hilda Niz worked at a California tire company. She complained to the company general manager that her son, who also worked there, had not received overtime pay due him. In response, the manager said that if Ms. Niz complained to the Department of Labor, he would have her killed. When Ms. Niz complained, along with six other employees, six workers were laid off. Later, the employer claimed that since some of the workers were undocumented, it was not liable for back pay. *NLRB v. Apollo Tire Co.,* 604 F.2d 1180, 1181-82 (9th Cir. 1979).

In Chicago in 1982, immigrant workers at a tortilla factory began an organizing drive. Among many other retaliatory acts, the employer instituted a policy that

workers would not be allowed to collect their paychecks unless two forms of identification, such as a birth certificate, social security card or immigration document, was shown. In the course of interrogating an employer about her union sympathies, a manager showed the employee a newspaper article about INS arrests of workers during a union organizing drive, and stated that she, too, could call INS. *Del Rey Tortilleria, Inc.,* 272 NLRB 1106, 1112 (1984), *order enforced by N.L.R.B. v. Del Rey Tortilleria,* 823 F.2d 1125 (7th Cir. 1987).

In 1975, employees at a shipbuilding plant on Long Island decided to join a union. The shipbuilder threatened to have one of the workers, Juan Figueroa, a native of Guatemala, deported if he testified against the employer at the NLRB hearing on alleged unfair labor practices committed in the course of the organizing campaign. *NLRB v. John Dory Boat Works, Inc.,* 229 N.L.R.B. 844, 852 (1977). S*ee also, Corrugated Partitions West, Inc.,* 275 N.L.R.B. 894, 897 (1985) (California manufacturer repeatedly threatened to call INS on workers who supported the union); *Sun Country Citrus, Inc.,* 268 N.L.R.B. 700, 708 (Arizona employer violated Section 8 (a)(1) of the NLRA by telling workers that immigration papers would be required to vote in union election); *Caffe Giovanni, Inc.,* 259 N.L.R.B. 233, 235 and 237 (1981)(restaurant made at least two specific threats to induce action by the INS against workers engaged in union activities); *Futuramik Industries, Inc.,* 279 N.L.R.B. 185, 185 and n.3 (1986)(employer threatened at least 10-20 workers either on election day or shortly before with INS enforcement if they voted for union representation); *Hasa Chemical, Inc.,* 235 N.L.R.B. 903, 905 (1978)(Employer's president said that if he lost the election hearing he was going to call Immigration and have all the "illegal aliens" hauled off); *Viracon, Inc.,* 256 N.L.R.B. 245, 246 (1981)(Illinois employer threatened to report undocumented workers to INS if union won election. "Like the fears of job loss discussed above, fears of possible trouble with the Immigration Service or even of deportation must remain indelibly etched in the minds of

any who would be affected by such actions on Respondent's part.")

Just in the last several months, the NLRB has ruled in two cases involving employer misuse of knowledge of workers' unlawful status. In October 2001, California waste company was found to have committed an unfair labor practice by contacting INS a few days after a union representation election and telling eleven union supporters they could not work until they straightened out their immigration paperwork. The Board held that the immigration status inquiry was a "smokescreen" for unlawful discharges. *Nortech Waste,* 336 N.L.R.B. No. 79 (October 24, 2001).

In August 2001, the Board overruled a Chicago employer's objections to a union election. The employer told the Board that some of the workers who voted in the election were undocumented. It offered as proof letters from the Social Security Administration indicating that some of the workers had invalid social security numbers. However, the Board pointed out, the employer had received letters from the Social Security Administration in May 1999, and had not raised any questions about immigration status until after the union election in February 2001. *Superior Truss & Panel, Inc. and Chicago & Northeast Illinois Dist. Council of Carpenters, AFL-CIO,* 334 N.L.R.B. No. 115 (August 2, 2001).

The above examples all concern written decisions by courts and by the National Labor Relations Board. Many more complaints are made yearly that do not result in Board findings. Officials of the NLRB estimate that as many as 45 complaints are filed yearly involving threats of deportation, in the city of New York alone. Thomas Maier, *Workers Often Subject to Scare Tactics*, Newsday (July 26, 2001) www.newsday.com/news/ny-work-belle726.story Unofficial reports by immigrants and immigrant groups tell a story of widespread retaliation and threats of retaliation by employers around the country.

Rodrigo Romero is a native of Belize. He worked in the warehouse of a Los Angeles department store for seven years. His employer knew of his undocumented

status, and had, in fact, referred him to an immigration lawyer to gain legal residency. During an organizing campaign, he was pressured to vote against the union and reminded of his tenuous status. Romero voted in favor of union representation at the plant. The next day, he was fired, ostensibly because of his undocumented status. *Los Angeles Times, (January 16, 2000)* *cite check*

In 1999, workers at a Holiday Inn Express hotel in Minneapolis voted to join the Hotel Employees and Restaurant Employees union. A call to the INS by the employer resulted in the arrest of eight members of the union's negotiating committee. T. Alexander Aleinikoff, *Illegal Employers,* The American Prospect (December 4, 2000), www.steinreport.com/amprospect1204.htm The secretary-treasurer of the Hotel Employees and Restaurant Employees' union says that immigration status "has come up in every single organizing campaign we've had in the last three years. In a number of our hotels, we have lost entire departments. And it really has a chilling effect on an organizing drive. People understand very clearly that if you are involved in trying to bring in a union, you put your job in jeopardy." Los Angeles Times, (January 16, 2000) check cite.

2. Employer Retaliation is Also Common when Workers Seek to Enforce Wage and Hour, Health and Safety, and Other Employment Rights.

As noted above, employers use threats of INS raids as tools to maintain a non-unionized labor force. Workers who seek to be paid minimum wage, have healthful work environments or overtime pay are also vulnerable to this form of abuse. The Court's back pay decision in the present case may affect employer retaliation under a host of other labor and employment laws where retaliation is also common.

Silvia Contreras worked as a secretary for a company that sells commercial insurance to truck drivers. In 1997, after Ms. Contreras filed a claim for unpaid wages and overtime under the Fair Labor Standards Act, her employer turned her in to the INS. *Contreras v. Corinthian Vigor Ins. Brokerage Inc.*, 25 F.Supp. 2d 1053 (N.D. Cal. 1998).

In *U.S. v. Alzanki*, 54 F.3d 994, 999 (1st Cir. 1995), *cert. denied*, 516 U.S. 1111 (1996), an employer confined her immigrant employee to the apartment, forced her to work fifteen hour days, exposed her to noxious cleaning chemicals, and refused medical treatment when the chemicals caused her illness. The employer threatened her with deportation almost daily.

In *Urrea v. New England Tea & Coffee Co.*, 2000 WL 1483215 (Mass.Super.) an employer knew of a female employee's undocumented status and did nothing to contest it until she filed a complaint alleging sex harassment. The employer then engaged in a campaign of intimidation and fear, attempting to uncover her immigration status during discovery in order to stop the prosecution of her case.

In Phoenix, women workers at Quality Art company accused their employer of sexual harassment. The workers correctly predicted that their employer would call the INS. Although INS officials said that they sympathized with the women – calling them "courageous" for coming forward, INS indicated that the women would likely be returned to their countries. The Wall Street Journal, August 22, 2000. cite and a little more detail.

Foreign garment workers from China sued their employers in Saipan under the FLSA using fictitious names because the recruiters and employers had threatened them with physical assault and other extreme forms of retaliation. The workers were required to surrender their passports upon hire, and were told by their employers that their families in China would be arrested, physically assaulted, and/or fined if the workers complained of unfair working conditions in the garment plants in Saipan. *Does*

I through XXIII v. Advanced Textile, 214 F.3d 1058, 1065 (9th Cir. 2000).

Seven employees at a Staten Island laundry plant filed a complaint with the New York State Labor Department, charging that their employer owed them $159,000 in back wages. Five days later, the INS raided the workplace, under circumstances indicating that the employer had reported the workers. India Abroad, October 23, 1998 check cite

Rajni Patel worked as a janitor and maintenance person for a Quality Inn in Birmingham, Alabama. When he brought suit against his employer for unpaid minimum wages and overtime, the employer claimed that it was not obligated to pay unpaid minimum wages or liquidated damages to undocumented workers. *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988). The employer had known of Patel's undocumented status all along: in the lower court, the employer claimed that it brought Patel to the motel in order to "hide" him from the INS. *See, Patel v. Quality Inn South*, 660 F. Supp 1528 (N.D. Ala. 1987)

An undocumented farmworker on a California ranch worked for three years for less than the minimum wage. He joined with thirteen other workers in a lawsuit to recover wages owed them. The employer reported all of the plaintiffs to the INS. *Fuentes v. INS*, 765 F.2d 886, 887 (9th Cir. 1985) *vacated as moot*, 844 F.2d 699, 700 (9th Cir. 1988).

De Coster Eggs, a repeat violator of immigration and labor laws in Maine was fined in 1986 for knowingly recruiting and hiring undocumented immigrant workers and for multiple housing and wage and hour violations. An independent report found the farm's housing to be akin to a concentration camp. The recruitment of undocumented workers and concomitant labor law violations continued, and in 1992, a landmark court decision found that undocumented workers have the same rights to protection under the state civil rights laws as Maine citizens. [get court cite] http://www.culturediversity.org/mig.htm]

Most recently in New York City, retail grocery and pharmacy chains hired labor contractors who recruited and hired delivery workers from among an almost exclusively undocumented West African community. The labor contractors knew the workers were undocumented and did not demand proof of work authorization while at the same time gathering copies of worker passports and visas in order to intimidate and harass complaining workers. After working 80 hour weeks for as little as $2 an hour, the workers filed a claim under the Fair Labor Standards Act. A federal district court judge recently granted the delivery workers a protective order and a TRO prohibiting the employers from retaliating against them by turning them in to the INS. [cite to NELP website]

B. Without Back Pay As a Deterrent, Employer Incentive to Hire and Abuse Undocumented Workers is High.

1. Employers in Many Industries Hire Undocumented Workers Despite IRCA.

Employer retaliation against undocumented workers continues, virtually unabated, in spite of the passage of IRCA. In fact, employer retaliation against workers has reached a degree such that even INS recently admitted that the only workers at risk of deportation for unauthorized employment are those reported by the employer in retaliation for protected organizing activities or "that kind of stuff." Lori A. Nessel, *Undocumented Immigrants in the Workplace: the Fallacy of Labor Protection and the Need for Reform*, 36 Harv. C.R.-C.L. L. Rev. 345, 359-362 (2001)

At least two factors influence an employer's decision to hire and then retaliate against undocumented workers. First, these workers are known for their willingness to suffer low wages and poor working

conditions without complaint. Second, the threat of employer sanctions being levied against the employer is a remote one.

Because of their vulnerability and willingness to work hard in difficult jobs at low wages without complaint, undocumented immigrant workers offer work hard under harsh conditions, undocumented workers offer significant advantages to employers, despite IRCA's employer sanctions. Indeed, many low-wage industries rely on immigrant workers, both documented and undocumented. In the large immigrant states, three out of every four tailors, cooks, and textile workers are immigrants. A majority of taxicab drivers and service workers in homes are immigrants. Panel, *The New Americans: Economic, Demographic, and Fiscal Effects of Immigration, at 215.* (National Academy Press (1997).

In 1996 and 1997, INS inspections found that 23 percent of workers at Nebraska and Iowa meatpacking plants had questionable documents. INS' inspection of 89 construction businesses in Las Vegas found that 39% of workers appeared to be unauthorized to work. Inspections of 74 Los Angels area garment contractors found 41% of the employees were unauthorized to work. General Accounting Office, *Illegal Aliens: Significant Obstacles to Reducing Unauthorized Alien Employment Exist, 6 (1999).* Eighty-one percent of the agricultural workforce in the United States is foreign-born, and at least half of the workforce is not authorized to work in the US. *Findings from the National Agricultural Workers Survey 1997-98*, Research Rep. No. 8, U.S. D.O.L. (2000)2

Industries that employ large numbers of undocumented workers are also among the biggest labor

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2 Analysis of preliminary data from Census 2000 indicates that there are approximately 8 ½ million undocumented immigrants in the United States. Jeffrey S. Passel and Michael Fix, *Testimony Prepared for the Subcommittee on Immigration and Claims, Hearing on "The U.S. Population and Immigration,"* Committee on the Judiciary, U.S. House of Representatives (August 2, 2001) at http://www.house.gov/judiciary/passel_080201.html

and employment law violators. In suburban New York, where large numbers of workers toil in landscape and small construction, restaurants, domestic service and building cleaning and maintenance, "[u]ndocumented workers are the employees of choice in [these] sector[s] and abuses run high." Jennifer Gordon, *We Make the Road By Walking: Immigrant Workers, The Workplace Project, and The Struggle For Social Change*, 30 Harv.Civ.Rts.-Civ.Lib.L.Rev. 407, 413 (Summer 1995).

The US Department of Labor considers that two-thirds of all garment-manufacturing businesses in New York City can be characterized as "sweatshops." The competition between legal garment shops and illegal sweatshops has an industry-wide effect of driving down wages of all garment workers. *See*, *Labor Department: Close to Half of Garment Contractors Violating FLSA, Daily Labor Report,* 1996 DLR 87 d11 (May 6, 1996).

In their consideration of IRCA, both houses of Congress concluded that undocumented immigrants, "out of desperation, will work in substandard conditions and for starvation wages." H.R. Rep. No. 99-682(I) at 47 (1986), reprinted in 1986 U.S.C.C.A.N. 5662. ("Rep. No. 99-682(I)"); S. Rep. No. 99-132 at 5 (1986) (S. Rep.), *cited in A.P.R.A. Fuel Oil Buyers Group, Inc.,* 320 N.L.R.B. at 414.

Undocumented immigrants commonly will decline to report private or official abuse and are frequently unwilling to pursue civil claims in court. Linda Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law,* 1988 Wis.L.Rev. 955, 986 (1998). The lack of availability of safety-net programs such as unemployment insurance, food stamps and welfare supply further reasons for undocumented workers to suffer workplace illegality without risking job separation. *Id.*, at 993-94.

In Dallas, the Regional Administrator of the Wage and Hour division of the U.S. Department of Labor indicates that illegal immigrant workers endure sexual harassment, denial of overtime pay and wages below the

minimum federal standard because they are worried they'll be deported. Houston Chronicle, June 23, 1999. cite

Thus, employers who hire undocumented workers gain a significant initial advantage of a workforce that is willing to work hard, under poor conditions and for poor wages. The workforce will, as well, suffer illegal conditions that lawfully-present workers would contest.

2. Employer Sanctions Provide no Deterrent to Employers who would Retaliate.

Some employers hire workers without specific knowledge that they are undocumented. Others hire workers with full knowledge that they are unauthorized to work. In the worst cases, employers focus their recruitment efforts on undocumented workers for the express purpose of taking advantage of a vulnerable workforce.3 In all cases, employer sanctions provide no deterrent to retaliation.

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3 In a rare occurrence, a federal grand jury as indicted a Nebraska company as defendants in a conspiracy to smuggle undocumented workers for jobs in a beef packing plant, the result of a 14-month investigation that culminated in a raid in 2000. The Omaha World-Herald, November 17, 2001. cite and add detail about labor violations.
In ___(place), executives of a contract labor firm were recently sentenced on charges that they recruited workers who were known to be in the U.S. illegally, and used classes in asbestos abatement for this purpose. According to the Justice Department, instructors told immigrant workers to evade INS by throwing asbestos at officers before running away. Daily Labor Report, September 23, 2001.

Employers who would abuse the law can use the employer sanction system to their advantage. The language of the verification requirements provides employers with a "gaping loophole" that they exploit by hiring aliens whom they know have presented fraudulent documents. William J. Murphy, Note, *Immigration Reform without Control: The Need for an Integrated Immigration-Labor Policy,* 17 Suffolk Transnat'l L.Rev. 165, 177-78 (1994). Under IRCA, employers are only required to accept documents that appear on their face to be genuine and to relate to the individual named. 8 U.S.C. Sec. 1324a(b)(1)(A) (1994). This has meant that an employer can ignore documents it knows are invalid, allow the worker to use documents that belong to another person, or even take part in procuring documents for the worker. For example, as in the case of Victor Benavides, the employer can simply request that the worker supply him with "legal" documents, *N.L.R.B. v. A.P.R.A., supra,* ___.

In the present case, there is at least some indication that the employer knew that Mr. Castro was illegally in the country at the time of hire: on his initial employment application, Castro answered "yes" to the question, "Are you prevented from lawfully becoming employed in this country because of Visa or Immigration Status?" *See, Hoffman Plastic Compounds, Inc.,* 326 N.L.R.B. 1060 and n. 10.

In such a case, the employer rarely risks employer sanctions, but acquires a powerful club to use against workers who attempt to assert their rights. "In effect, employers who are willing to comply just enough to avoid appearing to disregard the law totally, but who in fact continue to rely on undocumented labor, are insulated from the law's sanctions provisions." Bosniak, *supra,* at 1017.

In early studies of employer compliance with IRCA, many admitted to researchers that they accept counterfeit documents "with a wink." Cecelia M. Espenoza, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986,* 8 Geo.Immigr.L.J. 343, 375 and n. 273.

Even where employers fail utterly to comply with the law, average employer sanctions fines are low and rarely assessed. Between 1989 and 1993, the average employer fine under the employer sanctions provisions was only $292. Louis Freedberg, *INS to Crack Down on Employers*, S.F.Chron., Feb. 18, 1994, at 2. In 1999, the number of warnings to employers nationwide was 383, down 40 percent from 1998. The INS issued only 417 notices of intent to fine employers, nationwide, in 1999, a decrease of 59%. Immigration and Naturalization Service, *1999 Statistical Yearbook of the Immigration and Naturalization Service*, http://www.ins.gov/graphics/aboutins/statistics/enf99text.pdf

The risk of sanction being levied is, in fact, so low that sanctions amount to a cost of doing business, a "reasonable expense, more than offset by savings of employing undocumented immigrants in the first place or by the perceived benefits of union avoidance." *A.P.R.A. Fuel Oil Buyers Group*, 320 N.L.R.B. at 415.

3. In a Scheme without Back Pay, Employer Retaliation Incurs No Cost.

Employers gain significant economic advantages by hiring undocumented workers. They have little to fear in the way of employer sanctions, even for knowingly hiring undocumented workers. Employers who choose to retaliate against workers who exercise their labor rights also find, in the absence of a back pay remedy, that this is a "no-cost" strategy.

Back pay performs two functions in the NLRB administrative scheme: it is intended to remedy the consequences of an unfair labor practice, and to deter further violations. *Consolidated Edison v. NLRB*, 305 U.S. 197 (1938).

Back pay compensates victims of unfair practices by making them whole for the losses suffered on account

of the unfair labor practice. *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 197 (1940). Moreoever, it deprives employers of the competitive advantage they secure by acting unlawfully.

Absent back pay awards to undocumented victims of discrimination, an employer who would rather not have a union at its workplace has a perverse incentive to retaliate. Employers know that they are in little danger of sanction for lack of compliance with the law. On the other hand, a "tip" to INS or threat to a workforce will rid the employer of the union. Finally, in jurisdictions where no back pay is awarded to undocumented immigrants, there is no cost to an employer who would violate the law. In such a case, threats to turn immigrant workers in to the INS perversely become a "reasonable" business decision.

4. If left Unremedied, Employer Retaliation against Undocumented Workers Chills all Workers' Rights.

As this Court has previously recognized: "[A]cceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions." *DeCanas v. Bica,* 424 U.S. 351, 356-57 (1976).

The impact of employer's unlawful conduct is felt not only by undocumented workers themselves, but by their co-workers as well. Documented workers and U.S. citizens may be reluctant to organize their workplaces because threats to turn workers over to the INS, properly timed, can undermine the election process. Deportation of their undocumented co-workers will dilute the power of their bargaining unit, if it survives a union election.

Further, employers' violations of the NLRA, and other laws, may never come to light because of

undocumented workers' fears of exposure. Such a result does damage to the retaliation protections in the laws and the entire remedial scheme. As this Court has said in another context, employee complaints "may disclose patterns of noncompliance resulting from a misappreciation of the Act's operation or entrenched resistance to its commands, either of which can be of industry-wide significance. The efficacy of its enforcement mechanisms becomes one measure of the success of the Act." *McKennon v. Nashville Banner Publishing Co.,* 513 U.S. 352, 115 S.Ct. 879, 885 (1995) Complete freedom to make complaints without fear of retaliation is necessary "to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses." *John Hancock Mut. Life Ins. Co. v. NLRB,* 191 F,2d 483, 485 (D.C.Cir. 1951).

The inability of undocumented workers to make complaints and secure effective remedies takes on added significance in a system that relies on complaints. The NLRB has no authority to conduct investigations on its own. "The Board does not initiate its own proceedings; implementation is dependent 'upon the initiative of individual persons.'" *Nash v. Florida Industrial Comm'n,* 389 U.S. 235, 238 (1967) Thus, when workers, fearing retaliation, fail to make complaints, unscrupulous employers profit. Both documented and undocumented workers suffer. In addition, the efficacy of the NLRA is undermined.

When undocumented immigrant victims of discrimination are not awarded back pay, neither goal is realized. Undocumented workers are put in a position worse than that they would have held had they never made a complaint about illegal conduct or exercised their rights to unionize. That is, they are without a job, and without compensation for a job illegally taken from them. To the converse, an award of back pay operates to assure immigrants that US labor laws protect them, not only on paper, but also in reality. It operates to assure employers

that there are real consequences to their failure to follow the law.

IV. Conclusion

Congress passed the employer sanctions provisions of the Immigration Reform and Control Act as part of its strategy to "remove the economic incentive which draws [undocumented] aliens to the United States as well as the incentive for employers to exploit this source of labor." H.R. Rep. 99-682(I), *reprinted* in 1986 U.S.C.C.A.N. 5649 at 5656. Thus, Congress intended that enforcement of NLRA provisions would support the IRCA's purpose of reducing illegal immigration by focusing on the employer's unlawful actions. Back pay remedies, to the extent they "depriv[e] employers of any competitive advantage they may have secured by acting unlawfully" complement the purpose of the IRCA to protect U.S. labor markets from the effects of illegal immigration. *NLRB v. A.P.R.A. Buyers Group, Inc.*, 134 F.3d at 55.

One observer has posed the question before the Court as one of incentives: Which of the two is more likely to take advantage of the system: Employers, in a system where undocumented workers who suffer illegal discrimination can receive no remedy? Or employees, in a system where undocumented workers may collect back pay for a reasonable time following anti-union discrimination? John L. McIntyre, *What Does "Lawfully Entitled to be Present and Employed" Mean to You?: Undocumented Workers & Make-Whole Remedies under the NLRA*, 22 U.Haw.L.Rev. 737, 762 (2000)

That question is answered by the dissent of Judge Cudahy in *Del Rey Tortilleria v. N.L.R.B.*, the only circuit court decision denying compensatory damages to undocumented employees suffering violations of their labor rights by their employees:

> "Illegal aliens do not come to this country to gain the protection of our labor laws. They come here for jobs. They can find jobs because they are

> often willing to work hard in rotten conditions for little money…When we deny back pay to illegal aliens, we tell employers to hire more of them; for aliens who cannot claim monetary damages for unfair labor practices are less expensive to hire and less trouble than their native counterparts."

Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1125 (7th Cir. 1992) (Cudahy, J., dissenting)

The incentive and economic advantage outlined in this brief can be reversed by the Court's endorsement of the Board's remedy of back pay to undocumented victims of discrimination. Once employers across the country discover that the practice of threatening their undocumented workers with deportation has monetary consequences, they will be deterred from this form of abuse.

Amici respectfully urge the Court to affirm the decision of the District of Columbia Circuit in this case.

Respectfully submitted,

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