Comments

ALL EMPLOYEES ARE EQUAL, BUT SOME EMPLOYEES ARE MORE EQUAL THAN OTHERS

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I. INTRODUCTION

In *Hoffman Plastic Compounds, Inc. v. NLRB*, the Supreme Court denied an undocumented immigrant employee an award of limited back pay against an employer who had fired him unlawfully. Even as the Court maintained in the decision itself that undocumented immigrants are recognized as full employees under the National Labor Relations Act (NLRA), it found that they nevertheless do not benefit from the full protections of the NLRA. Holding that undocumented immigrants are different in kind from other employees, the Court set the precedent that employers who commit labor violations against undocumented immigrants will not be penalized to the full extent authorized by the NLRA. The significance of this decision reaches far beyond undocumented immigrants: by distinguishing one group of employees to receive different treatment under the NLRA, the *Hoffman* decision threatens to delegitimize the National Labor Relations Board’s (NLRB) authority to enforce the legal expectations and relationships among all employers and their employees, which Congress created through the NLRA.

In deciding *Hoffman*, the Court reversed a legally reasonable decision enforcing the NLRA by the NLRB, affirmed by the D.C. Circuit Court, to

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2. *Id.* at 144-45.
3. *Id.* at 149-50.
4. Hoffman Plastic Compounds, Inc., 326 N.L.R.B. 1060 (1998); see *Hoffman*, 535 U.S. at 161 (Breyer, J., dissenting) ("[T]he Board’s position is, at the least, a reasonable
award limited back pay to an undocumented immigrant, without reinstatement, for the period extending from the unlawful discharge to the point at which the employer became aware of the employee's undocumented status. In reaching its decision, the Board had carefully considered both the relevant Supreme Court precedent and the congressional mandates of federal immigration policy. The Board determined that its remedy appropriately enforced the penalties of the NLRA against the employer while still serving the goals of federal immigration policy by discouraging employment of illegal immigrants.

The relevant immigration policy, the Immigration Reform and Control Act of 1986 (IRCA), criminalizes both the hiring of undocumented immigrants and the use of false documents to obtain work, in an effort to disrupt illegal immigration to the United States. The policy goals of IRCA harmonize well with those of the NLRA in that they seek to require employers to maintain lawful and appropriate standards in the workplace. Employers have had a history of avoiding—and continue to avoid—these standards by hiring undocumented workers. Undocumented workers have feared seeking enforcement of their rights as employees because of the significant chance their immigration status would be revealed in the process. Employers thus have taken advantage of their status and have forced them to accept substandard wages and workplace conditions. Inevitably, this has resulted in lowered standards for all individuals in affected portions of the labor market: where United States citizens and documented immigrants seek jobs, they encounter a market defined by this "race to the bottom" among employers. Federal immigration policy in fact explicitly seeks to

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11. E.g., Katherine V.W. Stone, Employee Representation in the Boundaryless Workplace, 77 Chi.-Kent L. Rev. 773, 813 (2002) (describing "the well-known danger of the race to the bottom . . . "). As will be discussed more fully below, the AFL-CIO has taken an increasingly significant stand in bringing this "race to the bottom" to the attention of the American public and our elected officials:

U.S. employers have a long history of exploiting fear and differences to drive wedges between workers. Today, they use the threat of exposing undocumented workers and sending them back to their home country to force them to work long hours, often in poor conditions and for poor wages.

But as history has shown, whenever one group of workers is denied access to workplace protections, all workers' rights are in jeopardy. "Any action to deny
enforce exemplary conditions in the workplace for all workers, as a consequential goal of discouraging employment-based illegal immigration. The Supreme Court's rationale for reversing the Board's "Hoffman" ruling, that the NLRB lacked the authority to interpret federal immigration law, misconstrued the Board's reasonable articulation of the mandates of the NLRA in light of federal immigration policies. This reversal was both a usurpation of the Board's authority and an act of reinterpretation of immigration and labor laws amounting to judicial legislation. Whereas the Board based its ruling largely on protection of those public interests embodied in the NLRA and IRCA, the Supreme Court majority ignored these fundamental principles and decided "Hoffman" as if the case strictly implicated the private rights of an individual employee.

In Part II of this comment, I will contrast the Supreme Court's holding in "Hoffman" with the Board's decision in light of: (1) congressional intent in the construction of immigration and labor policy; (2) prior Supreme Court precedent; and (3) the application of that policy and precedent, both by the benefits to any workers, whether they're immigrants, women, minorities or white men, is a threat to all workers," says AFL-CIO Vice President and UNITE International Vice President Clayola Brown. "Working people don't have the luxury to be divided."

... The plight of immigrants has a direct impact on all U.S. workers. Because undocumented workers often are afraid to speak up for fear of being found out, employers use them as a wedge to force down standards and pay throughout an industry. If employers believe they can get away with treating immigrants poorly, they will find ways to pit these workers against higher-paid, often union workers, and try to force down the pay scale.


12. See H.R. REP. No. 99-682, pt. 1, at 46-49 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5650-53 (explaining that the need for reform of immigration law has grown significantly, both because of increasing numbers of undocumented workers seeking employment in the United States and because of the practice of employers choosing to hire them in order to avoid maintaining workplace conditions acceptable under federal employment laws).

13. The Court held:

However broad the Board's discretion to fashion remedies when dealing only with the NLRA, it is not so unbounded as to authorize this sort of an award.

... As we concluded in Sure-Tan, "in light of the practical workings of the immigration laws," any "perceived deficiencies[y] in the NLRA's existing remedial arsenal" must be "addressed by congressional action," not the courts. In light of IRCA, this statement is even truer today.

Board and the lower courts, prior to Hoffman. The priorities of both federal immigration law and federal labor law, as expressly articulated in the statutory provisions, require that the laws be interpreted so as to reinforce one another. If either is interpreted otherwise, neither law succeeds as intended: to protect the rights of individuals and the general public interest. Undocumented immigration and labor abuses are joined so intimately that to enforce one set of laws at the expense of the other compromises the goals of both. The implications of Hoffman illustrate this point with alarming clarity: while the Supreme Court's decision ostensibly denies a private remedy to only one individual, the decision directly jeopardizes the success of the public goals of both the NLRA and IRCA.

In Part III, I will articulate more comprehensively the potential negative consequences of the Supreme Court's holding. The Supreme Court's determination that undocumented immigrant employees are ineligible for the full protections of the NLRA trivializes the definition of "employee" because it establishes a precedent whereby groups may be singled out for disparate treatment without technically disturbing this definition in the NLRA and other employment laws. The NLRA draws its strength from the universality of the definition of employee that legally obligates all employers to maintain certain minimal standards (e.g., workplace conditions and fair wages). The Court's decision in Hoffman gives employers room to evade the obligations of labor laws by preying on undocumented immigrant workers' inability to demand enforcement of their individual rights because of their status. Most alarmingly, the decision effectively extinguishes the employment rights of undocumented immigrant workers, perpetuating and creating new incentives for employers to continue to break federal immigration law by hiring undocumented immigrants and maintaining them as employees for as long as they can. The maintenance of such practices forces down the typical wage for all workers and generally lowers standards for workplace conditions. Moreover, an employer may increase its economic competitiveness by employing undocumented workers, as compared to other employers who do not take advantage of these workers. The Supreme Court's decision in

16. See Hoffman, 535 U.S. at 155 (Breyer, J., dissenting) ("May the employer ignore the labor laws? More to the point, may the employer violate those laws with impunity, at least once—secure in the knowledge that the Board cannot assess a monetary penalty?").
17. See, e.g., Kitty Calavita, Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime, 24 LAW & SOC'Y REV. 1041, 1053 (1990) ("A garment shop owner, noting the competitive pressure to violate the employer sanction law, complained, 'When you have someone who's bidding against you and using illegals and paying them...")
Hoffman thus invites the continued breaching of both federal immigration and labor laws, yet the Court insists that its interpretation is correct and the one intended by Congress.

In Part IV, I will consider how narrowly the lower courts have applied, and continue to apply, the limitations suggested by Hoffman on employment remedies for undocumented immigrant employees. Even courts that have adopted the strictest interpretations of the precedent in this area, up to and following Hoffman, have been reluctant to extend the reasoning to cases involving other federal employment statutes, such as the Fair Labor Standards Act (FLSA), Title VII of the Civil Rights Act of 1964, as administered by Equal Employment Opportunities Commission (EEOC), the Americans with Disabilities Act (ADA), and various state laws that extend similar protections to employees.

Finally, in Part V, I will consider the need for Congress to define the relationship between federal immigration and labor laws. I will argue that in order to serve public and private interest goals appropriately, any policy adopted must account for the significant contributions undocumented immigrants already employed in the United States constantly make, in addition to encouraging legal immigration and appropriate, legal employer conduct.

II. DISTINGUISHING HOFFMAN BY THE BOARD FROM HOFFMAN BY THE SUPREME COURT

In 1989, Hoffman Plastic Compounds, Inc. illegally fired Jose Castro and several other employees for participating in union activities. When, during the compliance phase of the adjudication in 1993 Mr. Castro revealed that he was an undocumented immigrant, the Administrative Law

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19. See EEOC v. Tortilleria “La Mejor,” 758 F. Supp. 585, 590 (E.D. Cal. 1991) (holding “as a matter of law, that the protections of Title VII were intended by Congress to run to aliens, whether documented or not, who are employed within the United States.”).
20. Cf. Lopez v. Superflex, Ltd., No. 01 CIV. 10010(NRB), 2002 WL 1941484, at *2 (S.D.N.Y. Aug. 21, 2002) (“As the record does not reflect plaintiff’s immigration status, we cannot yet consider whether Hoffman Plastics applies to his [ADA] claim.”).
Judge denied him the standard remedy of reinstatement with back pay. The General Counsel of the NLRB filed an exception to the decision with the Board. The Board granted Mr. Castro an award of limited back pay without reinstatement. The Board adopted a balance in Hoffman similar to those it had achieved in prior decisions: serving the public policy goals of both labor and immigration laws while responding to the tensions presented by cases involving undocumented-immigrant employees. In its balancing, the Board acknowledged the importance of reconciling immigration policies with the private rights guaranteed to all employees under federal employment laws. It adopted the presumption embraced by a majority of the lower courts: that Congress intentionally crafted immigration and labor laws to reinforce, in a mutual way, the protections of public rights.

A. IRCA and NLRA Mutually Reinforce Concordant Policy Goals

Congress introduced IRCA, the immigration law central to Hoffman, in 1986. This legislation for the first time criminalized the knowing employment of undocumented immigrants and established guidelines for employers regarding document verification for all employees upon hiring. As discussed in a House Committee Report issued at the time of the passage of IRCA, Congress' intent was to discourage illegal immigration to the United States, but not to discourage employment-based immigration to the United States in general:

This legislation seeks to close the back door on illegal immigration so that the front door on legal immigration may remain open. The principal means of closing the back door, or curtailing future illegal immigration, is through employer sanctions. The bill would prohibit the employment of aliens who are unauthorized to work in the United States because they either entered the country illegally, or are in an immigration status which does not permit employment. U.S. employers who violate this prohibition would be subject to civil and criminal penalties.

Employment is the magnet that attracts aliens here illegally or, in the case of nonimmigrants, leads them to accept employment in violation of their status. Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and

this, in turn, will deter aliens from entering illegally or violating their status in search of employment.  

Congress has acknowledged that, due to unfavorable conditions in their countries of origin, many aliens desperately seek employment without going through the process of becoming documented. As such, Congress placed significant responsibility on the employers to prevent jobs from being held by undocumented workers. Moreover, the report recognized the challenges faced by undocumented immigrants, once they are employed here, in seeking redress where their employment rights have been transgressed, due to their fear of being deported. This inability to demand the protection of employment rights has negative repercussions for all workers because it encourages employers to hire undocumented immigrants so as not to be held accountable for offering legitimate wages and acceptable workplace conditions. The report articulates this principle tellingly:

In particular, the employer sanctions provisions are not intended to limit in any way the scope of the term “employee” in Section 2(3) of the National Labor Relations Act (NLRA), as amended, or of the rights and protections stated in Sections 7 and 8 of that Act. As the Supreme Court observed . . . application of the NLRA “helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment.”

Congress emphasized employer sanctions in IRCA because it recognized that undocumented immigration creates significant problems for all employees and, therefore, for the public in general. The existence of a large pool of undocumented workers allows employers to hire individuals who are unable to challenge dangerous workplace conditions and subminimum wages. Furthermore, Congress addressed individual examples of these practices at the time of the passage of IRCA, indicating its contextualized awareness of the importance of protecting the rights of

29. The House Committee on the Judiciary noted:

Now, as in the past, the Committee remains convinced that legislation containing employer sanctions is the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens. While there is no doubt that many who enter illegally do so for the best of motives—to seek a better life for themselves and their families—immigration must proceed in a legal, orderly and regulated fashion.

undocumented workers as employees because of their interdependence with all other workers in the United States.\textsuperscript{31}

Along with its focus on controlling illegal immigration in order to benefit all employees, Congress also acknowledged the contributions that undocumented immigrant workers have made, and continue to make, to the United States and its workforce. To address both concerns most effectively, Congress added temporary amnesty provisions to IRCA\textsuperscript{32} offering permanent residence to those undocumented immigrants who could demonstrate their continuous residency in the United States since 1982 and a continuing ability to support themselves here:

The Committee believes that the solution lies in legalizing the status of aliens who have been present in the United States for several years, recognizing that past failures to enforces [sic] the immigration laws have allowed them to enter and to settle here.

This step would enable INS to target its enforcement efforts on new flows of undocumented aliens and, in conjunction with the proposed employer sanctions programs, help stem the flow of undocumented people to the United States. It would allow qualified aliens to contribute openly to society and it would help to prevent the exploitation of this vulnerable population in the work place.\textsuperscript{33}

Congress thus created a system for reducing illegal immigration to the United States while keeping our country open to embrace new immigrant workers. In passing IRCA, Congress adopted the principle that the best interests of the country as a whole would be served by encouraging the influx of motivated workers into our economy where the economy can support them, while requiring employers to maintain the high level of workplace standards demanded by federal labor laws.

The House Committee Report cited above had influenced the lower courts and the Board in those decisions prior to Hoffman that involved both

\textsuperscript{31} This interdependence was addressed in testimony before the House Immigration Subcommittee:

The NAACP strongly supports employer sanctions. Our branches across the country, particularly in large cities, report that the undocumented worker impacts the employment of blacks. Many blacks are forced from employment rolls by the undocumented worker who is hired at a subminimum wage and is at the mercy of the employer. The worker is consciously aware that he/she has no protection because of illegal status and will accept “starvation” wages to be employed in the United States.


the NLRA and IRCA. Although commentators continue to debate the validity of relying on legislative history as an indication of congressional intent, the amnesty provisions in IRCA, the statutory language actually adopted, and the lower courts’ interpretations of the statute suggest that, in this case, the report adequately reflected Congress’ understanding of the significance of the legislation. Indeed, the dissenting justices in Hoffman based their objections largely on this House Committee Report. The dissent argued that, in this report, Congress had articulated its intent that federal labor and immigration law should be read as mutually reinforcing so that the goals and policies of the one always accord with those of the other. In fact, Congress could not have stated these intentions more clearly:

It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law.

However, the Supreme Court’s decision ultimately ignored these public interest goals and refused to apply immigration and labor laws in a mutually supportive way.

B. The Board’s Remedy in Hoffman Reinforced Both Congressional Immigration and Labor Policy Goals

In fashioning its remedy for Jose Castro in Hoffman, the Board reasoned that Congress’ motives in its criminalization of employment of undocumented immigrants were jointly to discourage continued undocumented immigration and to promote appropriate standards in the workplace among all employers. The Board explicitly articulated in its decision that its remedy of limited back pay to Mr. Castro served these dual goals and was therefore entirely in accordance with immigration policy.


The Board relied significantly on the fact that IRCA does not expressly forbid remedies of back pay\(^{38}\) and also on a reading of the Supreme Court's holding in *Sure-Tan, Inc. v. NLRB*,\(^{39}\) the precedent-setting decision prior to *Hoffman.*

In *Sure-Tan,* the Court was asked to decide whether undocumented immigrants, who had fled the country in response to their employer's unlawfully reporting their status to the Immigration and Naturalization Service (INS) because of their union activities, should be eligible to collect back pay. Congress had not yet passed IRCA so it was not yet illegal for an employer to hire undocumented workers. The Court held that the undocumented workers could not collect back pay for any periods of time when they would have been deemed "unavailable" to work because they were unable to be legally present in the United States.\(^{40}\)

In applying the *Sure-Tan* decision to Mr. Castro's situation, the Board adopted an interpretation that it and several of the circuit courts\(^{41}\) had embraced since the passage of IRCA in 1986: immigrants who had fled the country could not *collect* their back pay because they were unable to reenter as eligible workers, not having gone through the processes most effective way to accommodate and further the immigration policies embedded in the Immigration and Reform Act of 1986 is to provide the protections of the National Labor Relation Act (NLRA) to undocumented workers in the same manner as to other employees . . . ."

38. *Id.* at 1061-62 (following Board precedent in rejecting argument by employer that IRCA precludes back pay remedy); A.P.R.A. Fuel Oil Buyers Group, Inc., 320 N.L.R.B. 408, 414 (1995) ("[T]he House Report explicitly disclaims any limitation on the power to remedy employers' avoidance of workplace protections.").


40. The Court reasoned:

By conditioning the offers of reinstatement on the employees' legal reentry, a potential conflict with the INA is thus avoided. Similarly, in computing backpay, the employees must be deemed "unavailable" for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States.

*Sure-Tan,* 467 U.S. at 903 (citation omitted).

41. See *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 54 (2d Cir. 1997) (interpreting *Sure-Tan* "as addressing only awards of backpay to undocumented employees who have left the country, and held that, when undocumented employees remain in the United States after their illegal termination, backpay may appropriately be awarded . . . ."); *see also Del Rey Tortilleria, Inc. v. NLRB,* 976 F.2d 1115, 1123-24 (7th Cir. 1992) (Cudahy, J., dissenting) (arguing that the *Sure-Tan* decision only applies to undocumented employees who are not in the country); Local 512, Warehouse and Office Workers' Union v. NLRB, 795 F.2d 705, 722 (9th Cir. 1986) ("*Sure-Tan* barred from backpay only those undocumented workers who were . . . outside the United States without entry papers."); EEOC v. Tortilleria "La Mejor," 758 F. Supp. 585, 591 (E.D. Ca. 1991) (quoting with favor the Ninth Circuit's holding in *Local 512*). But see *Del Rey Tortilleria,* 976 F.2d. at 1120 (adopting broad interpretation of *Sure-Tan*).
necessary for legal immigration.\footnote{Hoffman, 326 N.L.R.B. at 1062.} The Board limited Castro’s award to back pay only up to the point at which his employer learned of his illegal status, without reinstatement.\footnote{Id.} Finding no evidence that Hoffman Plastic Compounds had hired Castro knowing he was an illegal immigrant, the Board appropriately tailored its decision to punish the employer for its violations of the NLRA.

The Board’s reasoning in Hoffman represents the policy it had adopted in the years between Sure-Tan and the passage of IRCA. In fact, the Board adapted for Hoffman the remedy it had provided in A.P.R.A. Fuel Oil Buyers Group, Inc.,\footnote{320 N.L.R.B. 408 (1995).} in which the employer had knowingly hired two undocumented immigrants whom it then fired unlawfully for union activities, after committing several other flagrant abuses of the NLRA.\footnote{Id. at 408-09.} Finding that the employer would have continued to employ the two undocumented immigrants had it not been for their union activities,\footnote{Id.} the Board articulated a remedy consistent with its policy of balancing the mandates of the NLRA, to enforce public rights through the protection of individualized assertions of these rights,\footnote{Id.} with the mandates of IRCA. The Board demonstrated its full understanding of Congress’ intent as to how these bodies of law should be read together:

After carefully considering the briefs and reviewing the record, we find that IRCA and the NLRA can and must be read in

\footnote{As the Court has described the Board’s function:}

The Board acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining and by protecting the “exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment . . . .” § 1. The immediate object of the proceeding is to prevent unfair labor practices which, as defined by §§ 7, 8, are practices tending to thwart the declared policy of the Act. . . .

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Here the right asserted by the Board is not one arising upon or derived from the contracts between petitioner and its employees. The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices. The public right and the duty extend not only to the prevention of unfair labor practices by the employer in the future, but to the prevention of his enjoyment of any advantage which he has gained by violation of the Act, whether it be a company union or an unlawful contract with employees, as the means of defeating the statutory policy and purpose.

\footnote{Nat’l Licorice Co. v. NLRB. 309 U.S. 350, 362-64 (1940).}
harmony as complementary elements of a legislative scheme explicitly intended, in both cases, to protect the rights of employees in the American workplace. We reject the Respondent’s reading of IRCA as requiring the Board to deny its traditional make-whole remedies to unlawfully discharged employees because they have not provided documents necessary for legal employment in the United States. . . . We shall order the Respondent to offer reinstatement to Benavides and Guzman; however, we condition the Respondent’s obligation to reinstate these individuals on the individuals’ production, within a reasonable time, of documents enabling the Respondent to meet its obligation under IRCA to verify their eligibility for employment in the United States. Backpay shall be tolled as of the date the discriminatees are reinstated or when, after a reasonable period of time, they are unable to produce the documents enabling the Respondent to meet its obligations under IRCA to verify their eligibility for employment in the United States.48

As the Board states explicitly, the remedy punishes the employer and discourages future labor violations, thus serving the goals of the NLRA, while requiring the employees to obtain documented status in order to collect their awards. This serves IRCA’s goal of discouraging immigrants from seeking employment outside legal channels, while accepting that immigrant workers make constant positive contributions to our workforce and supporting them in these efforts. In other words, the award protects the public interests, as intended by Congress in fashioning both immigration and labor laws, while providing an appropriate remedy for the individual in question.49

In fashioning its award in Hoffman, the Board took into account that Castro had obtained employment through the use of fraudulent documents and, at the time of the hearing, still had undocumented status and therefore was technically unavailable for reinstatement.50 Nevertheless, Hoffman Plastic Compounds had not been aware of this when it hired Castro and then proceeded to commit labor abuses against him and his fellow employees. The Board, therefore, determined that the appropriate remedy was back pay up until the point at which Castro’s employer learned of his undocumented status because only after that point could it present a

49. See NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc., 134 F.3d 50, 53 (2d Cir. 1997) (upholding the Board’s decision to grant the illegal immigrant employees back pay with reinstatement on the condition that the back pay would be tolled either when the employer re-hired them legally or after they failed to acquire the documentation required by IRCA within a reasonable time).
defense that it did not create, and knowingly maintain, an employment relationship with an undocumented immigrant.

At the individual level, the Board’s economic sanctions on the employer serve to discourage future labor violations against particular employees. Acknowledging that Mr. Castro, the employee in this case, was not in compliance with federal immigration policies, the Board recognized the employer’s defense that it should not be liable for providing compensation to Castro from the point at which it realized he was unavailable for employment. The rationale behind the defense is that, from this point forward, the employer had a legitimate reason for dismissing Mr. Castro. An employer can offer a comparable defense against the back pay claims of any employee in light of circumstances that give the employer an acceptable reason for dismissing an employee; therefore, the defense does not have the effect of distinguishing undocumented immigrant employees from other employees. Such a remedy recognizes that while employed, Mr. Castro was an employee like any other, as IRCA does not criminalize the actual work completed by an undocumented worker.

The award serves the public interest by discouraging future labor violations while simultaneously reducing an employer’s incentive to hire undocumented immigrants. If the rights of undocumented workers are enforceable, then there is no advantage to hiring them that would compensate for the disadvantage of having to break federal immigration law in the process. This thereby reduces the number of jobs available to undocumented immigrants and, in the long run, may discourage them from coming to the United States. At both levels, the award brings the mandates of federal labor law into accordance with those of federal immigration law.

C. The Supreme Court Rejected a Reconciliation of IRCA and the NLRA

In its affirmance of the Board’s ruling in Hoffman, the Court of Appeals for the D.C. Circuit fully embraced the Board’s rationale for its award to Mr. Castro. Just as importantly, in terms of setting judicial
precedent, the D.C. Circuit specifically confirmed the Board’s reading of *Sure-Tan* and identified the decisions of other circuits that had embraced the same reading. In particular, the D.C. Circuit acknowledged the public interests served by reconciling the tensions between immigration and labor laws and articulated how the Board achieved this with its individualized award in *Hoffman*:

The Board crafted the limited backpay remedy to avoid conflict with IRCA and to implement its understanding of the purposes of both IRCA and the NLRA. According to the Board, the limited backpay award reduces employer incentives to prefer undocumented workers (IRCA’s goal), reinforces collective bargaining rights for all workers (the NLRA’s goal), and protects wages and working conditions for authorized workers (the goal of both Acts). Far from “ignor[ing] other and equally important Congressional objectives,” the Board, fully enforcing its own statute, carefully considered IRCA and modified its traditional backpay remedy accordingly.

As viewed by the D.C. Circuit, the Board had successfully crafted a remedy that facilitated the protection of public interests by the labor and immigration statutes while fully accounting for the details of the dispute between Mr. Castro and Hoffman Plastic Compounds.

The Supreme Court majority, however, directly refused to construe congressional intent in the way adopted by the Board and the D.C. Circuit that largely provided the rationale for the Board’s award in *Hoffman*. In fact, the Court majority took an entirely different view, reading congressional intent as prioritizing the prevention of illegal immigration over the enforcement of federal labor laws. The Court further stated that the Board had overstepped its authority as an agency by even attempting to resolve tensions between labor and immigration policies in its decision. Ultimately, the Supreme Court held that any remedy that offered individual relief to Mr. Castro was precluded, if not under *Sure-Tan*, then certainly under IRCA. The Court emphasized that Congress had prioritized the promulgation of IRCA over the Board’s awarding an individual remedy for labor violations:

[All]owing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to

IRCA prevented any award of backpay. To account for IRCA’s prohibition on the fraudulent use of documents, however, the Board applied its well-established after-acquired evidence rule and ended backpay liability the moment Hoffman became aware of Castro’s undocumented status.

*Id.* at 641 (citations omitted).

54. *Id.* at 645 (citing cases from the Second and Ninth Circuits).

55. *Id.* at 650 (internal citation omitted).
federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations. However broad the Board's discretion to fashion remedies when dealing only with the NLRA, it is not so unbounded as to authorize this sort of an award.\(^\text{56}\)

The Court argued that *Sure-Tan* and related precedents in many ways provided only an historical backdrop for the decision in this case, given that *Sure-Tan* was issued prior to IRCA.\(^\text{57}\) Although the majority acknowledged that undocumented immigrants are employees fully protected by federal labor laws,\(^\text{58}\) it held that they are not entitled to the same remedies as other employees because they had not experienced the same legal losses for which reinstatement and back pay serve to compensate, since they never had the right to employment in the first place.\(^\text{59}\) The Supreme Court further reasoned that the fact that undocumented immigrants are never eligible for employment in the United States has two legally significant implications: (1) in order to create the employment relationship, either the immigrant or the employer or both must have committed a fraudulent act;\(^\text{60}\) (2) following the unlawful dismissal, the undocumented immigrant would not be able to seek any other employment opportunities without committing further fraudulent acts, and this failure to mitigate damages would preclude the employee from being eligible to receive the remedies prescribed by the Act.\(^\text{61}\)

In holding that Mr. Castro's fraudulent actions in obtaining employment should preclude him from receiving any back pay, the majority rejected the determinations of the Board and the D.C. Circuit that the case law, based on efforts to enforce both the NLRA and IRCA, supports the opposite presumption.\(^\text{62}\) Among its other roles, an award of

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57. *Id.* at 147.
58. *Id.* at 144-45.
59. *Id.* at 146.
60. *Id.* at 148.
61. *Id.* at 150-51.
62. In finding that the case law did not preclude Mr. Castro from receiving back pay, the D.C. Circuit stated:

Even where, as here, the discriminatee violates the law, the Supreme Court has refused to require the Board to deny all backpay. In *ABF Freight System, Inc. v. NLRB*, 510 U.S. 317 (1994), the discriminatee perjured himself during the compliance proceeding—an act which, like Castro's fraudulent conduct, violated federal criminal law. Although declaring that "[f]alse testimony in a formal proceeding is intolerable," and that "perjury should be severely sanctioned," the Court rejected the company's argument that such behavior should preclude the employee from receiving backpay: "[The company's]
back pay attests to the legitimacy of the employment relationship that had existed. In holding that all undocumented immigrants should be precluded from receiving awards of back pay, the majority contradicted its own statement that undocumented immigrant workers are \textit{fully employees} under federal labor laws.\textsuperscript{63} Equally strikingly, the Court stated that the Board should have limited its resolution of the case to assigning prospective remedies against the employer, for example, requiring the employer to post signs attesting that it had committed labor violations. The majority held that federal immigration policy prevented the Board from offering any of the traditional remedies to undocumented immigrant employees as a class, regardless of the labor violations committed by the employer as against a particular employee. The majority justified this holding by asserting that Congress intended to prioritize the enforcement of immigration laws and asserted that, "[a]s we concluded in \textit{Sure-Tan}, 'in light of the practical workings of the immigration laws,' any 'perceived deficiency in the NLRA's existing remedial arsenal,' must be 'addressed by congressional action,' not the courts. In light of IRCA, this statement is even truer today."\textsuperscript{64} The majority effectively made undocumented immigrants a discrete class of employees, and acquiesced to their disparate treatment by employers.

\textbf{D. Pitfalls that Hoffman Has Created for the Enforcement of Labor and Immigration Policies}

Opening his dissent with the following statement, Justice Breyer challenged the entire basis of the majority’s decision:

I cannot agree that the backpay award before us "runs counter to," or "trenches upon," national immigration policy. As \textit{all} the relevant agencies (including the Department of Justice) have told us, the National Labor Relations Board’s limited backpay order will \textit{not} interfere with the implementation of immigration policy.

\hspace{1cm}\textsuperscript{contention, though not inconsistent with our appraisal of [the employee’s] misconduct, raises countervailing concerns. \textit{Most important is Congress’ decision to delegate to the Board the primary responsibility for making remedial decisions that best effectuate the policies of the Act when it has substantiated an unfair labor practice.}}"

Hoffman Plastic Compounds, Inc. v. NLRB, 237 F.3d 639, 649 (D.C. Cir. 2001) (en banc) (citations omitted) (emphasis added); Hoffman Plastic Compounds, Inc. v. NLRB, 208 F.3d 229, 233 (D.C. Cir. 2000) (reasoning that, because Mr. Castro was hired in 1988, prior to the 1990 amendments to IRCA, "Castro’s use of another’s birth certificate to obtain employment did not violate IRCA at that time."). \textit{aff’d en banc}, 237 F.3d 639 (D.C. Cir. 2001).

\textsuperscript{63. Hoffman, 535 U.S. at 144-45.}

\textsuperscript{64. \textit{Id.} at 151-52 (citations omitted).}
Rather, it reasonably helps to deter unlawful activity that both labor laws and immigration laws seek to prevent. Consequently, the order is lawful.\(^\text{65}\)

He plainly asserted that the majority had misinterpreted the statutory language of IRCA and the intent of Congress in crafting IRCA,\(^\text{66}\) ignored the federal mandates of the NLRA and entirely stripped the Board of its statutory authority to enforce the NLRA effectively,\(^\text{67}\) and issued a decision that ultimately will undermine both federal immigration and employment laws:

To deny the Board the power to award backpay, however, might very well increase the strength of this magnetic force. That denial lowers the cost to the employer of an initial labor law violation (provided, of course, that the only victims are illegal aliens). It thereby increases the employer’s incentive to find and to hire illegal-alien employees.\(^\text{68}\)

The Supreme Court’s majority refused to look beyond Mr. Castro’s individual identity, as a member of the class of undocumented immigrants, to address the public rights that the Board’s decision sought to protect through granting Mr. Castro a private remedy. The majority’s decision rests entirely on its rejection of the view adopted overwhelmingly by the lower courts: that Congress’ intent in passing IRCA was expressed in the House Committee Report. This rejection runs contrary to the position adopted extensively throughout the related case law and articulated so

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65. Id. at 153 (Breyer, J., dissenting) (citations omitted).
66. Id. at 154-55 (Breyer, J., dissenting).
67. In considering the Board’s limited authority, Justice Breyer stated:

Without the possibility of the deterrence that backpay provides, the Board can impose only future-oriented obligations upon law-violating employers—for it has no other weapons in its remedial arsenal. And in the absence of the backpay weapon, employers could conclude that they can violate the labor laws at least once with impunity.

Id. at 154 (Breyer, J., dissenting) (citations omitted); see also A.P.R.A. Fuel Oil Buyers Group, Inc., 320 N.L.R.B. 408, 415, n.38 (1995) (without potential back pay order employer might simply discharge employees who show interest in a union “secure in the knowledge” that the only penalties were requirements “to cease and desist and post a notice”); cf. EEOC v. Waffle House, Inc., 534 U.S. 279, 296 n.11 (2002) (back pay award provides important incentive to report illegal employer conduct); Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975) (“It is the reasonably certain prospect of a backpay award” that leads employers to “shun practices of dubious legality”); Golden State Bottling Co. v. NLRB, 414 U.S. 168, 186-87 (1973) (“[I]t cannot be in the public interest to permit the violator of the Act to shed all responsibility for remedying his own unfair labor practices by simply disposing of the business.”). Hence the back pay remedy is necessary; it helps make labor law enforcement credible and also makes clear that violating the labor laws will not pay. See Hoffman, 535 U.S. at 153-54 (Breyer, J., dissenting).
richly in Justice Breyer's dissent. As demonstrated above, Breyer explained that only the mutual enforcement of labor and immigration laws can protect the public interests implicated by either.

By focusing entirely on preventing undocumented immigration by imposing sanctions at the individual level, the majority's decision flies in the face of Congress' articulated intent that immigration and employment laws be read as seamlessly as possible. The majority erroneously viewed federal immigration policy as completely preemptive of federal labor policy for individual cases and interpreted the law with this focus:

There is no reason to think that Congress nonetheless intended to permit backpay where but for an employer's unfair labor practices, an alien-employee would have remained in the United States illegally, and continued to work illegally, all the while successfully evading apprehension by immigration authorities. Far from "accommodating" IRCA, the Board's position, recognizing employer misconduct but discounting the misconduct of illegal alien employees, subverts it. 69

Where the majority identified any public interest implicated by this particular case at all, it limited it to preventing further illegal immigration. 70 The majority only vaguely acknowledged the public interests generally protected by the NLRA and federal labor laws when it asserted that the prospective remedies forced upon Hoffman Plastic Compounds—of declaring officially their labor violations 71—would discourage this behavior in the future sufficiently. 72 However, as Justice Breyer clearly articulated, the prospective remedies will not discourage future labor violations, particularly not as against undocumented immigrant employees. In fact they will encourage employers to hire more undocumented immigrant workers because these individuals will not benefit from the full protections of federal labor laws, at least not the NLRA. Employers will be cushioned

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69. Id. at 149-50.
70. Id. at 150.
72. In support of its view that employers will be discouraged from hiring undocumented workers, the Court states:

Lack of authority to award backpay does not mean that the employer gets off scot-free. The Board here has already imposed other significant sanctions against Hoffman—sanctions Hoffman does not challenge... These include orders that Hoffman cease and desist its violations of the NLRA, and that it conspicuously post a notice to employees setting forth their rights under the NLRA and detailing its prior unfair practices. Hoffman will be subject to contempt proceedings should it fail to comply with these orders. We have deemed such "traditional remedies" sufficient to effectuate national labor policy regardless of whether the "spur and catalyst" of backpay accompanies them.

Hoffman, 535 U.S. at 152 (citations omitted).
The Court implied in *Hoffman* that the ideal resolution to any conflict between federal labor and immigration laws simply should be to exclude all undocumented immigrants from protections reserved only for those individuals who have obtained their employment in the United States legitimately. Such a sweeping policy seems grossly unfair and raises constitutional concerns.73 Yet even putting aside all such arguments, the Court’s approach, were it applied generally, would have potentially devastating repercussions for our overall system of labor relations.

### III. Threats Presented by the Decision

As the NLRA refuses to distinguish among employees on the basis of citizenship status, the Court’s *Hoffman* decision creates difficulty from both constitutional and pragmatic standpoints. It seems to require that the Board discriminatorily enforce federal law against individuals who are protected comparably to citizens under the Fifth and Fourteenth Amendments.74 Moreover, if we acknowledge that Congress intended to advance the public interests through the reconciled enforcement of immigration and labor laws, the Court unnecessarily and improperly transgressed the Board’s discretion when it overruled *Hoffman*. The Board crafted a remedy that most effectively balanced the priorities of the NLRA with the overall body of relevant federal law. The Court should have afforded the Board’s reasonable interpretation and application of the NLRA significant, if not complete, deference based on its own precedent regarding

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73. Over a century ago the Supreme Court, in construing the scope of constitutional protections for non-citizens, established that:

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: “Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.

*Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). More recently, the Supreme Court acknowledged that:

There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.


74. *See Mathews*, 426 U.S. at 77-78.
agency decisions. Instead, the majority attempted to avoid all questions of deference to the Board as an agency by characterizing the Board’s decision as an interpretation of federal immigration law, entirely beyond the scope of its authority.

The Court’s majority decision, in contrast to the Board’s reasoned balancing, threatens to jeopardize the effective promulgation of both labor and immigration laws. The decision prevents the enforcement of the most effective penalties of the NLRA against employers who commit labor violations against their undocumented immigrant employees, whereas IRCA itself nowhere precludes the full enforcement of the NLRA. Justice Breyer identified how the majority’s decision fails to satisfy, and indeed compromises, the priorities embodied in both strands of federal law.

75. See Chevron U.S.A. Inc. v. Nat’l Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (establishing a presumption of near-complete deference to agency interpretations of ambiguous statutory meaning). Since then, the Court has qualified this presumption of near-complete deference to extend to agency decisions where: (1) Congress has given an agency the power to act with the force of law; and (2) the interpretation in question was made pursuant to that authority. United States v. Mead Corp., 533 U.S. 218, 227 (2001). Commentators suggest that the Court intended the discretion to extend only to decisions that result in binding and self-executing orders. They continue to debate whether Chevron deference extends to NLRB decisions, given that parties must seek enforcement of their orders and injunctions from appellate courts. E.g., Thomas W. Merrill & Kristin E. Hickman, Chevron’s Domain, 89 GEO. L.J. 833, 883 (2001). Even if the Court could have adopted the position that NLRB decisions did not warrant Chevron deference, the case law prior to Chevron suggests that courts should grant NLRB decisions significant deference. See Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 216 (1964) (holding that “[t]he Board’s power is a broad discretionary one, subject to limited judicial review . . . . The Board’s order will not be disturbed ‘unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.’”); see also Consolo v. Fed. Mar. Comm’n, 383 U.S. 607, 621 (1966) (expressing the view that, “[b]y giving the agency discretionary power to fashion remedies, Congress places a premium upon agency expertise, and, for the sake of uniformity, it is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency.”). Finally, the rationale the Court adopted in Mead counsels that the Court should have deferred to the Board’s decision in this case. Mead asserted that where agency decisions might not rise to the level of Chevron deference, courts should still grant their decisions significant deference: “Chevron did nothing to eliminate Skidmore’s holding that an agency’s interpretation may merit some deference . . . given the ‘specialized experience and broader investigations and information’ available to the agency . . . and given the value of uniformity in its administrative and judicial understandings of what a national law requires.” Mead, 533 U.S. at 234 (citing Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944)).

76. See Hoffman, 535 U.S. at 144-45 (referring to past cases that exclude the NLRB from ruling on federal bankruptcy and antitrust law). But see id. at 157 (Breyer, J., dissenting) (discussing the Court’s prior deference to Board decisions, even in cases where the decisions had implications for the enforcement of criminal law).

77. Justice Breyer aptly points out that:

[T]he statutes’ language itself does not explicitly state how a violation is to effect the enforcement of other laws, such as the labor laws. What is to happen,
stands, the majority’s decision likely gives employers greater incentives to break federal immigration laws and employ more undocumented immigrants than they would have, were they liable for at least limited back pay. This creates harmful competition among employers—who will be willing to disregard federal law in order to employ workers whose rights under the NLRA are unenforceable. It also widens the job market within the United States for illegal immigrants. Finally, the decision increases undocumented immigrants’ lack of security in their rights and ensures that they will not seek to have courts redress violations of those rights. The decision thus directly impedes the express goals of both Congress’ immigration and labor policies.

Shortly after Hoffman, the General Counsel of the NLRB issued a memorandum, suggesting how the Board should approach future cases involving undocumented immigrants. Reaffirming that undocumented immigrants are employees, fully protected under the NLRA, the General Counsel emphasized that the immigration status of employees is irrelevant for determining whether particular employers have committed labor

for example, when an employer hires, or an alien works, in violation of these provisions? Must the alien forfeit all pay earned? May the employer ignore the labor laws? More to the point, may the employer violate those laws with impunity, at least once—secure in the knowledge that the Board cannot assess a monetary penalty? The immigration statutes’ language simply does not say.

Id. at 154-55 (Breyer, J., dissenting).

78. See Calavita, supra note 17, at 1053.

79. Discussion in the legal community has extended to seeking protected class status for undocumented workers:

Although undocumented workers are afforded the same substantive rights as documented employees, the ability of undocumented workers to enforce those rights is limited by the fear of deportation and the fact that remedies are either limited or nonexistent. Undocumented workers face a “Catch-22” when deciding whether to remain silent and subject themselves to exploitation or assert their rights and subject themselves to deportation. Society’s “perception of immigrants as a labor source rather than as future members of . . . society creates a marginalized subclass of the general population.” This view creates a class vulnerable to exploitation by employers looking solely at the bottom line. The result warrants the grant of “protected class” status to undocumented workers.


82. Id. at *1 (§ B1).
violations against them.83 Therefore, questions of immigration status must only be considered in the compliance phase of any adjudication.84 The memo asserts that Hoffman does not foreclose awards in non-discharge situations for work already performed or in cases where benefits or wages have been changed illegally.85 It further states that the Board should continue to order reinstatement and back pay, conditioned upon the employee's obtaining legal status.86 Additionally, the General Counsel advised that the Board should only entertain discovery regarding an employee's status where the employer specifically seeks to have the matter addressed.87

The General Counsel did limit the availability of reinstatement to cases in which the employer could not demonstrate (as the employer in this case, Hoffman Plastic Compounds Inc., did succeed in demonstrating) that it would not have knowingly have hired an undocumented immigrant.88 In the same vein, the General Counsel advised that, based on the holding in Hoffman, "[r]egions should not seek a backpay remedy once evidence establishes that a discriminatee was not authorized to work during the backpay period."89 Based on this, some commentators have focused on the unavailability of back pay and suggested that the Board has adopted the broadest interpretation of Hoffman, threatening to institutionalize this reading to the detriment of undocumented workers and the system of law under the NLRA.90 Nevertheless, the emphasis the General Counsel placed on sustaining the maximum availability of remedies and protecting undocumented workers rights as employees belies the suggestion that the Board has adopted the Supreme Court's interpretation of the relationship between IRCA and the NLRA.91 Instead the General Counsel seems to have intended that the memorandum caution the Regional Board members that courts may attempt to construe Hoffman broadly, and to suggest policies the Board may adopt to avoid having decisions overturned on

83. Id. (§ B2).
84. Id.
85. Id. at *3 (§ C2).
86. Id. at *2 (§§ B4, C1).
87. Id. at *4 (§ E).
88. Id. at *2 (§ B4).
89. Id. (§ C1).
91. See GC Memorandum, supra note 81, at *1 (§ B1) ("[I]t is unassailable that all statutory employees, including undocumented workers, enjoy protections from unfair labor practices and the right to vote in NLRB elections without regard to their immigration status."); id. (§ B2) ("The Court in Hoffman dealt only with a remedial question, and thus, as set forth above, does not overturn otherwise settled Board and Court law.").
appeal based on an employer's use of *Hoffman*.*92* Other commentators have suggested a reading of the memorandum compatible with this analysis.*93*

Similarly, the AFL-CIO, which already had taken a highly active role in advocating for the rights of immigrant workers, has stepped up its efforts to call public attention to the interconnections between the welfare of these individuals and the general public. The organization has asserted that, in an effort to enforce public policies that provide for the rights of all workers, it "supports a broad legalization program that makes no distinction based on country of origin and that allows undocumented workers and their families who have been working hard, paying taxes[,] and contributing to their communities the opportunity to adjust to permanent legal resident status."*94*

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*92.* The General Counsel explicitly identified how the Board may act within the scope of its authority to minimize *Hoffman's* destruction of remedies for undocumented employees, noting that the burden remains on the employer to prove the relevance of an employee’s immigration status and not before the compliance and settlement stages:

The *Hoffman* decision clearly established that an employee’s immigration status may become a relevant factor during the compliance and settlement phases. Proof of a discriminatee’s undocumented status, as with any other defense to reinstatement or backpay, must be established through evidence proffered by the party making the allegation, and not through a sua sponte regional investigation. The *Hoffman* decision does not shift the burden onto the Board to conduct an immigration investigation in the first instance. In fact, this issue arose in *Hoffman* not pursuant to an investigation, but because the discriminatee admitted on the witness stand during a compliance hearing that he was undocumented throughout the backpay period.

Regions have no obligation to investigate an employee’s immigration status unless a respondent affirmatively establishes the existence of a substantial immigration issue. Regions should begin their analysis with the presumption that employees and employers alike have conformed to the law. The law—IRCA—protects employees against harassment by an employer which seeks to reverify their immigration status without cause. A substantial immigration issue is lodged when an employer establishes that it knows or has reason to know that a discriminatee is undocumented. Once an employer makes this showing, Regions should investigate the claim by asking the Union, the charging party and/or the discriminatee to respond to the employer's evidence. Again, a mere assertion is not a sufficient basis to trigger such an investigation.

*Id.* at *4* (§ E).

*93.* See, e.g., Michael A. Curley, *Recent Developments in National Labor Relations Board Law*, 680 PLI/Lit 573, 584-85 (2002) (emphasizing how the memorandum details the actions that the Board may continue to take against employers who violate the NLRA); Eric Schnapper, *Righting Wrongs Against Immigrant Workers*, TRIAL, Mar. 2003, at 46, 47-49 (highlighting the extent to which the memorandum asserts the Board may continue to award remedies, despite *Hoffman*).

Additionally, other members of the national legal community continue to point out the limited applicability of *Hoffman*; specifically, that it does not proscribe remedies under statutes other than the NLRA, for work already performed.  

The General Counsel’s memorandum and the views presented by the AFL-CIO reflect the extreme concern for the future enforcement of federal labor law raised by *Hoffman*. Nevertheless, they demonstrate as strongly that *Hoffman* has by no means ended the discussion as to the proper manner of enforcing public rights under federal labor law in accordance with immigration law.

### IV. Limited Application of *Hoffman* by the Lower Courts

There has been sweeping recognition of the interdependency of labor and immigration policies and the need to enforce them concurrently in order to prevent this kind of "race to the bottom" for employers since *Sure-Tan* and particularly since Congress passed IRCA. Courts have uniformly held that *Sure-Tan* was intended to be applied jointly with IRCA to cases involving remedies of back pay for work not yet performed, but declined to extend the decision beyond this limited area. The federal appeals courts that had addressed the particular issue of back pay were split as to whether *Sure-Tan* and IRCA should be read to prohibit awards to undocumented immigrants altogether, or simply to limit their ability to collect back pay, but still enabling courts to grant conditional awards. Yet even the Seventh Circuit, which had adopted the strictest interpretation of *Sure-Tan*, distinguished cases where awards might arise for work already performed under employment statutes other than the NLRA.  

Lower courts have consistently acknowledged the circuit split and frequently

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11, 2003). The organization further elaborates:

> History has proven that mistreatment of one group in a workplace ultimately will lead to the mistreatment of all workers. We must be mindful of and learn from the history of oppression that many U.S. workers have faced, in particular the long struggle of African American workers. All workers must understand the difference that unions make for workers, whether it is a living wage, better benefits or a safer work environment.

_**Id.** at 2._


96. _E.g.,_ Stone, _supra_ note 11, at 813.

97. Del Rey Tortilleria v. NLRB, 976 F.2d 1115, 1122 n.7 (7th Cir. 1992) (citing cases from Second and Eleventh Circuits).

98. The Superior Court of Massachusetts acknowledged the split when it wrote:

> The circuit courts that have addressed the issue of backpay and undocumented workers have...
SOME EMPLOYEES ARE MORE EQUAL THAN OTHERS

referred to it in determining whether or not the immigrant status of an employee might be relevant to the case. Some courts have even found support under Sure-Tan, in its recognition of the employee status of undocumented immigrants, for issuing awards to undocumented immigrants under employment statutes other than the NLRA.

The case law since Hoffman suggests that the lower federal courts are applying Hoffman as narrowly as they applied Sure-Tan in the past. Hoffman stands only for the principle that undocumented immigrants are ineligible for awards of back pay under the NLRA and does not determine whether or not undocumented immigrants may be eligible for benefits and remedies under other statutory schemes intended to protect employees. Courts have continued to determine that awards comparable to back pay under the NLRA would be required where the compensation would be granted for work already performed as under the FLSA; where they arose in a context of employer discrimination under Title VII or the ADA, or for compensation for on-the-job injuries, for example in situations where it is clear that the claim of inability to continue working stems from circumstances entirely other than the undocumented status. The courts then fashioned remedies largely on the basis of the federal rights at issue, disregarding any tensions with immigration law suggested by Hoffman.

In the cases brought since Hoffman, employers inevitably seek to use

aliens in actions arising under Title VII and the National Labor Relations Act since the IRCA's enactment have split in their application and interpretation of Sure-Tan. The Fourth and Seventh circuits have strictly interpreted Sure Tan and the IRCA to prohibit awarding any back pay to an undocumented worker. The Second, Ninth, and District of Columbia circuits, on the other hand, have allowed some recovery. Thus, the law is unsettled regarding an undocumented alien's ability to collect front or back pay under federal labor laws.


99. Urrea, 2000 Mass. Super. LEXIS 690, at *8 (holding that since the employer had a duty to demonstrate that the employee had not mitigated damages, it was entitled to know whether or not the employee had been undocumented but only for the period during which the employer could have been liable for back pay).

100. See, e.g., Patel v. Quality Inn S., 846 F.2d 700, 703 (11th Cir. 1988) (holding that "the Supreme Court's decision in Sure-Tan weighs heavily in favor of Patel's contention that Congress did not intend to exclude undocumented aliens from the FLSA's coverage" given that it held that undocumented immigrants were employees under the NLRA because not excluded, and the same reasoning applies to the FLSA). The decision is significant because the Court held that once it had been established that the undocumented immigrant in question was covered by the FLSA, he would receive the benefits of its full protections, without regard to his undocumented status.


the decision to argue that they are not liable for damages to their employees if the employees are undocumented immigrants. In response to this, many of the lower courts' most recent rulings on motions—prior to reaching the merits—have even refused to allow employer-defendants to inquire as to the employee's immigration status during discovery, as such information is irrelevant for determining whether the employees' rights have transgressed. In other words, an employee's immigration status does not alter his or her rights as an employee. In Cortez v. Medina's Landscaping, a federal district court articulated the principle informing many of these decisions. The court held that the employer could not compel discovery of an employee's immigrant status under Hoffman because,

[critical to the Court's holding [in Hoffman] was the fact that the work had not been performed and that it would have been illegal for the plaintiffs to mitigate damages, which is required for a back-pay award. Hoffman does not hold that an undocumented alien is barred from recovering unpaid wages for work actually performed.

This practice of explicitly distinguishing, whenever possible, where an employee's immigration status is relevant and where it is not, suggests that the courts implicitly acknowledge the difficulties that Hoffman—by treating the two as mutually independent—presents for labor and immigration policies. Discussing a Pennsylvania worker's compensation statute, comparable to federal protections, the Supreme Court of Pennsylvania affirmed the ruling of the Workers' Compensation Appeal Board, upholding the ruling of an administrative judge that "even 'accepting that Claimant as an alien did not have proper [INS] documentation to work for [Reinforced Earth], such illegal alien status at the time of injury does not bar relief to the Claimant under the [Act].'" The Court rationalized the ruling largely on a public policy basis:

With respect to Reinforced Earth's argument that Claimant's status as an unauthorized alien barred him from the Act's coverage, the Board determined that Reinforced Earth failed to prove that Claimant's alleged violation of the law—the use of invalid documents to secure employment—was causally related to his injury. In addition, the Board stated that any determination that Claimant's immigration status alone would vitiate his entitlement to compensation benefits would violate the

103. De la Rosa, 210 F.R.D. at 239.
105. Id. (citations omitted).
humanitarian purposes of the Act.\textsuperscript{108}

The Pennsylvania Supreme Court held in \textit{Reinforced Earth} that where public policy dictated that a particular individual should be granted compensation, in order to promote the interests and concerns protected by that policy, the award could not be extinguished by a determination that, under federal immigration law, an individual was not lawfully present or employed in the United States. The status of one individual should be of lesser concern than the interests of the community at large. This is exactly the argument that the Supreme Court majority declined to consider in \textit{Hoffman}. Yet neither this decision, nor those of the lower courts, can change the reality that \textit{Hoffman} directs that federal immigration policy should be enforced over all other laws that apply to undocumented immigrants, regardless of public policy concerns.\textsuperscript{109}

Therefore, under each lower court opinion that effectively refuses to address the relationship between immigration and employment laws lurks the reality that courts will eventually be faced with cases \textit{requiring} their simultaneous enforcement.\textsuperscript{110} The flow of undocumented workers has only continued to increase in the time since the passage of IRCA. The INS estimates that throughout the 1990s, over 350,000 undocumented immigrants established residence in the United States annually.\textsuperscript{111} As the AFL-CIO stresses, moreover, "the current system of immigration enforcement, while failing to stop the flow of undocumented people into the United States, is causing workplace discrimination against immigrants and minorities, particularly undocumented workers."\textsuperscript{112}

\textit{Mendoza v. Zirkle Fruit Co.}\textsuperscript{113} illustrates the difficulties caused by \textit{Hoffman}. In \textit{Mendoza}, the Ninth Circuit held that documented immigrant

\textsuperscript{108} Id. at 102.

\textsuperscript{109} Although \textit{Hoffman} does not reach state labor regulation schemes, the \textit{Reinforced Earth} decision highlights the public policy concerns the Supreme Court majority ignored: the purpose behind reconciling federal labor and immigration laws.

\textsuperscript{110} "The question of whether \textit{Hoffman Plastics} applies only to awards of backpay and reinstatement or whether it similarly precludes illegal immigrants from bringing suits for punitive and compensatory damages is not before us at this time." Lopez v. Superflex, Ltd., No. 01 CIV. 10010(NRB), 2002 WL 1941484, at *2 n.3 (S.D.N.Y. Aug. 21, 2002).

\textsuperscript{111} Press Release, Immigration and Naturalization Service, INS Releases Updated Estimates of Undocumented Resident Population (Jan. 31, 2003), at http://www.immigration.gov/graphics/publicaffairs/summaries/undocres.htm (last visited Nov. 10, 2003) ("The new report... shows that the average undocumented resident population growth in the 1990s was 350,000 annually, roughly 75,000 per year higher than previous estimates. The new INS estimates indicate the number of undocumented residents in the United States in October 1996 was 5.8 million ... ").

\textsuperscript{112} See AFL-CIO Policy, \textit{supra} note 94, at 1.

\textsuperscript{113} 301 F.3d 1163 (9th Cir. 2002); \textit{see also} Commercial Cleaning Servs. v. Colin Serv. Sys., Inc., 271 F.3d 374, 383 (2d Cir. 2001) (holding that a company's practice of hiring undocumented workers gave it an unfair competitive advantage by enabling it to pay its workers substantially lower wages).
employees could bring an action under the Racketeer Influenced and Corrupt Organizations Act (RICO)\(^\text{114}\) against their employer based on allegations that the employer "depressed their salaries by conspiring to hire undocumented workers at below market wages."\(^\text{115}\) The Ninth Circuit's opinion provides a comprehensive picture of the clear advantages to employers in hiring undocumented workers because of their inability to seek enforcement of their rights as workers and how dramatically this affects entire sectors of the economy.\(^\text{116}\) The decision stands as an acknowledgment of the tangible relationship between abuses of labor and immigration law. Although it ultimately offers a possible remedy for this particular group of workers, the Ninth Circuit, quoting the Supreme Court's \textit{Hoffman} opinion, pointedly articulates the difficulties that decision creates in terms of dealing with such abuses through enforcement of the labor laws themselves: "[w]e also note that the undocumented workers cannot 'be counted on to bring suit for the law's vindication.'"\(^\text{117}\)

The current policy among the lower courts of avoiding the potential implications of \textit{Hoffman} inevitably will lead to one of two resolutions: either the Supreme Court will explain the extent of the applicability of its holding in \textit{Hoffman} in a future case, or Congress will take affirmative steps to clarify the relationship it intended to craft between labor and immigration policies. Ultimately either path should lead to congressional action to clarify this relationship, either by dramatically revising the NLRA or by creating a statutorily specific bridge between immigration and labor law, to resolve exactly this kind of situation. I will argue that the best resolution is one that provides for the extension of full protections of the NLRA to \textit{all} employees, without altering the definition of that term, because such a policy gives employers incentives to compete legally and responsibly while simultaneously serving the goals of federal immigration law.

\footnote{115. \textit{Mendoza}, 301 F.3d at 1166.}
\footnote{116. The \textit{Mendoza} opinion states:}
\footnote{[T]he employees allege that the growers singularly have the ability to define wages in this labor market, akin to monopsony or oligopsony power. They further allege that it is the illegal scheme [of hiring undocumented workers] that has caused their injury. The proposed amended complaint lays to rest any remaining doubt about attributing the alleged harm to the scheme, by spelling out a broad conspiracy causing direct harm to the workers. For example, it makes clear that the scheme involves fruit growers that "comprise a large percentage of the fruit orchards and packing houses in the area, and therefore affect wages throughout the labor market."}

\footnote{117. \textit{Id.} at 1170 (citations omitted).}
V. WHITHER CONGRESSIONAL POLICY?

Congress decidedly did not intend that IRCA or other immigration laws should have the negative impact on national labor relations that they will have, should the courts be forced to extend Hoffman more broadly. Yet we have seen that even a narrow application of the Supreme Court's decision in Hoffman will create harmful incentives for employers and disrupt the overall legitimacy of labor relations in the United States. Congress should therefore clarify the relationship between federal labor and immigration policies.

Some of the more recent debate in Congress has involved how IRCA has affected employers. There is a general acknowledgement that IRCA's restrictions have not succeeded in reducing illegal immigration or the hiring of undocumented immigrants. Moreover, in light of the post-9/11 strictures levied upon immigrants, there is a pressing need for Congress to speak definitively on how immigration and labor policies should be read together. Indeed, the Bush administration in effect has thrown down the gauntlet in the form of the President's recent proposal to grant undocumented immigrants temporary guest-worker status. Though the Administration has not drafted the specific details of the proposed plan, President Bush provided an extended outline in a speech on January 7, 2004, in which he identified the four principles informing his administration's approach to dealing with undocumented immigrants and their role in the U.S. economy:

Our reforms should be guided by a few basic principles. First, America must control its borders . . . Second, new immigration laws should serve the economic needs of our country. If an American employer is offering a job that American citizens are not willing to take, we ought to welcome into our country a person who will fill that job . . . Third, we should not give unfair rewards to illegal immigrants in the citizenship process or disadvantage those who came here lawfully, or hope to do so . . . Fourth, new laws should provide incentives for temporary,


foreign workers to return permanently to their home countries after their period of work in the United States has expired.¹²¹

The actual proposal the Bush administration articulates on the basis of these principles, however, fails to provide a satisfactory and effective solution to the absence of undocumented workers' rights and the resulting effects on the workplace generally throughout the United States. In order to understand why the Bush administration's plan does not respond appropriately or adequately to the situation, it must first be determined what characteristics a policy fundamentally must present, in order to be effective.

Commentators have offered a variety of resolutions. Some would adopt the rationale implied by the Supreme Court to preclude undocumented immigrants' receipt of any benefits of federal labor laws that stem from their having held employment illegally.¹²² Others take the opposite stance and suggest we should grant all undocumented immigrants full amnesty because they are already a part of our country—a part that we depend on extensively for their contributions to our economy and society.¹²³ Reflecting this understanding of our reliance on undocumented workers, another commentator, in asserting the need for direct congressional action, has suggested that "any solution designed to regularize large numbers of immigrants must include a clear Congressional

¹²¹. Id.
¹²². An example of commentary that would restrict access of undocumented immigrants to benefits states that:

Although notions of fairness and human decency might suggest that back pay is an available remedy to undocumented workers, this Note concludes otherwise. Courts should reserve back pay awards only to those employees who have a right to be employed in the first place. There are three supporting reasons for this conclusion. First, existing labor statutes provide alternative remedies to rectify employer abuses. Second, back pay remedies require the employee to mitigate damages; however, an undocumented worker cannot mitigate damages. Finally, it is inconsistent to award conditional reinstatement simultaneously with unconditional back pay.


¹²³. An advocate of amnesty believes that:

The limited amnesty program proposed by this note offers a permanent solution to the exploitation of illegal aliens in the workplace by granting amnesty, which is limited to undocumented workers who file good faith claims based on labor and employment law violations. The program rewards the reporting of employer violations with citizenship, and, as a result, avoids conflict with immigration law. In order for federal labor and employment agencies to enforce their respective policies, they must be able to penalize employers by compensating employees whose rights have been violated.

Hudson & Schenck, supra note 79, at 387.
statement that U.S. labor and employment laws will be invoked to protect the remaining undocumented population.\(^{124}\)

In developing an effective policy, Congress first should identify and reassert the historic principles informing labor law: the right of employees to full protection of clearly defined laws; the right of employers to compete in an open market that is not controlled by a willingness to act outside of the boundaries of established law; and the right of the American people to a stable employment system governed by reasonable laws rather than harmful incentives. In other words, Congress must begin by reaffirming that the predominant purpose of federal labor laws is to protect public rights. In pursuit of this goal, Congress should continue to afford individuals in the workplace opportunities to act as private attorneys general, enforcing the mandates of employment laws against particular employers and thereby advancing the protection of rights for all workers.

Congress should then reaffirm that the goals of immigration law are to protect the rights of those individuals who legally immigrate to the United States while, at the same time, preventing and discouraging illegal immigration. Additionally, Congress must acknowledge—as it did when it passed IRCA—that once undocumented individuals are present in this country, entwined on a daily basis in our economic fabric, they become interdependent with legal immigrants, permanent residents, and U.S. citizens. Therefore, policies and laws that determine—or limit—the rights of undocumented immigrants directly affect the rights and lives of all U.S. residents. Even if one can make arguments against extending full legal protections to undocumented immigrants, one cannot ignore the repercussions of such policy decisions on the United States as a whole.

Of these goals, the Bush administration’s proposal only grants undocumented workers a limited tenure of legitimate status and does not provide the solution Congress should be seeking. The proposal would allow undocumented workers to pay a one-time registration fee to continue working in the United States for three years, with the potential for renewal of status, provided that they were holding jobs American workers refused to fill and that they remained in good standing with their employers at all times.\(^{125}\) Individuals not currently in the United States also could obtain temporary worker status, without paying any fee and come here to work for the three year, renewable period, by getting a job offer from an employer who could prove that there were no Americans willing to take the job. Nevertheless, the administration’s plan in no way would alter or reduce the penalties imposed upon those who enter the United States illegally; nor would the guest worker program create any new avenues toward acquiring

\(^{124}\) Correales, \textit{supra} note 90, at 159.

\(^{125}\) See Bush’s Remarks, \textit{supra} note 120.
permanent residence. All guest workers would be required to leave the country at the end of their terms of employment and the Administration’s plan would tie their future financial stability to this, for example, by negotiating with those countries who wish to have their workers participate in the program that any type of Social Security benefits for the time worked would vest only in the home country—not the United States.

While some businesses have greeted the proposal with cautious enthusiasm, those concerned with workers’ and immigrants’ rights have raised numerous and significant objections to the plan. Among the most prominent are that the plan still would tie workers to their employers in ways that would discourage their bringing labor violations claims against their employers, and moreover encourage employers to create job conditions that no American workers would accept in order to hire cheap labor from abroad. Ultimately, critics fear that the plan “would create a permanent, exploitable second-tier of workers who would never have the opportunity for permanent residency and full citizenship.” The plan does not acknowledge in any meaningful way the contribution the undocumented workers make daily to the formation of our American society. It recognizes these individuals only as contributors to the Gross Domestic Product.

The Bush administration’s plan therefore avoids resolving all of the most important issues: it does not secure undocumented workers’ rights to enforce labor laws; it does not prevent the continuing diminution of working conditions and wages for all workers; it does not acknowledge the significant incorporation of undocumented immigrant workers into our overall society. Fortunately, the response from Congress suggests that both

126. Id.
127. Id.
129. See Richard Stevenson & Steven Greenhouse, Plan for Illegal Immigrant Workers Draws Fire From Two Sides, N.Y. TIMES, Jan. 8, 2004, at A28 (quoting statements by John T. Sweeney, President of the A.F.L.-C.I.O. that the plan deepened “the potential for abuse and exploitation of these workers while undermining wages and labor protections for all workers”; and David Gray, spokesman for the Federation for Immigration Reform, stating that “[i]t’s going to have a huge downward pressure on wages and working conditions. It will basically allow employers unfettered access to cheap exploitable workers. If they claim they can’t fill a job with an American, they can fill it with a foreign worker”).
130. Greenhouse, supra note 128. See also Stevenson & Greenhouse, supra note 129 (quoting Howard Dean’s statement that the plan “does nothing to place hard-working immigrants on a path to citizenship and would create a permanent underclass of service workers with second-class status”).
131. See David Abraham, American Jobs but Not the American Dream, N.Y. TIMES, Jan. 9, 2004, at A19 (concluding that “this plan is an abandonment of America’s ideals, not an expression of them. It values immigrants’ talents over their dreams. Instead of hope, it offers them simply a job”).
the liberal and conservative members object to the proposal on numerous—and contrasting—grounds. The Administration's proposal thus may have the net positive effect of forcing Congress to step up and address these issues proactively.

We can identify and consider the consequences of a number of solutions, some admittedly much more desirable than others, that nonetheless do not skirt the most significant factors of the problem the way the Bush administration's proposal does. Hoffman most immediately suggests that Congress should redefine "employee" to exclude all undocumented immigrants under all federal labor and employment statutes, on the grounds that their obtaining employment requires some breach of federal law and cannot, therefore, be considered legitimate. Alternatively, as a recent Harvard Law Review case note suggested, Congress could codify specific procedures whereby employers could be held financially accountable for violating the rights of their undocumented immigrant employees, just as they are for violations of the rights of documented-immigrant and U.S.—citizen employees, but without extending any financial reparations to the undocumented employees themselves. In choosing either of these solutions, however, by qualifying either the definition of employee or its use in practice—even putting aside all notions of fairness to the undocumented workers themselves—Congress would undercut the foundation of all labor and employment law and fundamentally disrupt the relative stability of labor relations in the United States. Once undocumented immigrants have obtained employment, regardless of whether they have breached federal law in doing so, their treatment by employers directly implicates the treatment received by all other employees and necessarily impacts the entire labor market.

On the other hand, Congress could articulate a clear policy that allows the Board to impose the same penalties on employers for violations of the NLRA against any employee, while preventing undocumented immigrants from collecting those benefits until they have legalized their status, as was


133. The case note author expressed the view that:

In cases such as Hoffman, in which both employer and employee are wrongdoers, the Board's remedial inflexibility creates a tension between the goal of employer deterrence and the equitable desire not to bestow a windfall upon the employee. If the Board were permitted greater remedial flexibility, the award of backpay to a third party, such as the government, would be the Board's most sensible choice. This award would neither improperly enrich the undocumented worker nor create a remedial structure in which the cost of unlawfully firing an illegal alien differs vis-à-vis that of firing a legal worker.

upheld in a number of decisions prior to Hoffman.\textsuperscript{134} Congress could then create a system for acquiring status, for example, whereby undocumented immigrants could apply for a new category of worker visa that acknowledged the ways they already have become incorporated into American society. Rather than instituting a blanket amnesty provision, as Congress did when it passed IRCA in 1986, the creation of a new category of discretionary, employment-based visas would require undocumented immigrants to demonstrate that they were already contributing and committed to continuing their contributions to the United States. Issued in conjunction with stepped-up measures to enforce the restrictions of IRCA, Congress could create a system that discourages employment of undocumented immigrants by removing employers' incentives to seek out undocumented workers and further, gives those undocumented immigrants who already have obtained jobs positive incentives and a reasonable means to legalize their status and take the initial steps toward acquiring legal permanent residence.

There has been at least one recent proposal for limited amnesty for undocumented workers who have suffered violations of their employment rights, aimed at encouraging them to report those abuses and indirectly giving them an opportunity to demonstrate their attachment to our society.\textsuperscript{135} By contrast a discretionary, employment-based visa program that offers a path to permanent residence presents a distinct advantage over an amnesty program because the visa program would provide undocumented immigrants with an opportunity to proactively assert their rights as persons within American society; rather than simply accepting offers of empathy and regret—however deeply they may be owed these—once they have been subjected to violations of those rights. Indeed, Senate Democrats, in their response to the Bush Administration's proposal, have gone so far as to assert they will offer an alternative visa plan that does include a path to permanent residence.\textsuperscript{136}

VI. CONCLUSION

Until either Congress or the Supreme Court takes further action, the Board, along with federal and state courts, will have immense authority to shape the relationship between federal labor and immigration law. The interests of the nation are best served by a policy that recognizes both that undocumented immigrant employees play an active and fundamental role in our economy and society, and that the interests and rights of all

\textsuperscript{134} See, e.g., Felbro, Inc., 274 N.L.R.B. 1268 (1985) (holding a similar solution to be in accordance with federal immigration policy and standing precedent).

\textsuperscript{135} See AFL-CIO Policy, supra note 94, at 1.

\textsuperscript{136} Dewar, supra note 132.
individuals in the United States will only be protected when undocumented immigrants receive full recognition as employees. Although, at this point, the lower federal courts seem to be shaping the law to reflect this understanding, it is not at all clear that the Supreme Court or the 108th Congress will accept this trend. National security concerns could easily encourage the crafting of policies that target undocumented workers while ignoring the implications such policies would have for all employees and, in the long run, for the public at large. The federal courts, up to this point, have walked a tightrope. They have emphasized that they are deciding cases on the facts before them and not seeking to issue broad declarations regarding the appropriate balance between federal immigration and labor laws. Meanwhile, they have constantly called attention to the undue impact that harshly restrictive decisions could have for all workers. When Congress finally does articulate a clear relationship between our federal labor and immigration laws, it will be of paramount importance that it address how this balance implicates—in one way or another—the rights and security of every individual in our society.