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AMERICAN WORKERS MUST SETTLE FOR LESS WHEN
UNDOCUMENTED WORKERS ARE PROTECTED LESS:
THE UPHILL BATTLE FACING UNDOCUMENTED WORKERS AND
HOW IMMIGRATION LAW IS REIGNING IN WORKERS' RIGHTS

EDUARDO RIVERO

PART I: INTRODUCTION

Undocumented workers have been the victims of relentless litigation attempting to preclude them from receiving back-pay awards arising out of Title VII cases,¹ remuneration for employer violations of the Fair Labor Standards Act (FLSA),² workers' compensation, damages arising out of state tort claims,³ and

¹ See generally *Escobar v. Spartan Sec. Serv.*, 281 F. Supp. 2d 895 (S.D. Tex. 2003) (dismissing undocumented employee's Title VII claim for back-pay). But see *Rios v. Enter. Ass'n Steamfitters Local Union*, 638 F.2d 1168, 1173 (2d Cir. 1988) (holding that undocumented workers were entitled to receive back-pay under Title VII). See also Matthew Panach, *Two Wrongs Don't Make a Right . . . to Receive Backpay?: The Post Hoffman Polarity of Escobar and Rivera*, 60 ARK L. REV. 907 (2008) (explaining how *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), can be used to challenge an undocumented worker's claims under Title VII).

² See *Lucas v. Jerusalem Café L.L.C.*, 721 F.3d 927 (8th Cir. 2013) (holding that *Hoffman Plastic* does not apply to the Fair Labor Standards Act (FLSA) and undocumented workers are still protected by the FLSA) (citing *Patel v. Quality Inn S.*, 846 F.2d 700 (11th Cir. 1988) (holding that undocumented workers are employees within the meaning of the FLSA and such workers can bring an action under the act for unpaid wages and liquidated damages)).

³ Compare *Fernandez v. Tamko Bldg. Prods.*, 2013 U.S. Dist. LEXIS 98517, at *4 (M.D. La. July 15, 2013) (holding that *Hoffman Plastic* does not preclude an undocumented person from recovering tort damages under Louisiana law since Louisiana does not require citizenship or alien work permit as a prerequisite for recovering damages), and *Asylum Co. v. D.C. Dep't of Empl. Servs.*, 10 A.3d 619, 633 (D.C. 2010) (deeming it unlikely that the availability of workers' compensation benefits resulting from a work injury in the United States would affect an undocumented worker's decision about whether to enter the United

even under Farm Labor Contractors Acts (FLCAs).⁴ While largely unsuccessful, these claims were raised throughout the lower courts due to the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*,⁵ which not only denied back-pay remedies to an individual who had presented false documents, in violation of the Immigration Reform and Control Act (IRCA)⁶, but has been interpreted by courts to deny the National Labor Relations Board (NLRB)⁷ the ability to award back-pay damages to all undocumented workers.⁸ The Supreme Court attempted to reconcile the competing demands of the NLRA's retaliation provision and the IRCA's prohibition of the employment of undocumented workers.⁹

States), *with* *Wielgus v. Ryobi Techs., Inc.*, 875 F. Supp. 2d 854, 862 (N.D. Ill. 2012) (denying an undocumented alien recovery of damages based on the loss of future earnings in the United States but not precluding the recovery of damages for lost future earnings or earning capacity based on what he could have earned in his country of lawful residence).

⁴ *See* *Saucedo v. NW Mgmt. & Realty Servs. Inc.*, 2013 U.S. Dist. LEXIS 126320 (E.D. Wash. 2013) (using *Hoffman Plastic* to permit an inquiry into worker's immigration status to determine eligibility for awards due to violations of the Farm Labor Contractors Acts (FLCA)).

⁵ *See generally* *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 US 137 (2002) (considering a challenge brought under the National Labor Relations Act (NLRA) by an undocumented worker who was not lawfully entitled to be present in the United States and who had used false documentation to obtain employment in violation of Immigration Reform and Control Act (IRCA) provisions).

⁶ *See* *Unlawful Employment of Aliens*, 8 U.S.C. § 1324a(a) (2014) (prohibiting employers from hiring or continuing employment of known undocumented workers).

⁷ *National Labor Relations Board*, <http://www.nlr.gov> (last visited Nov. 11, 2013).

⁸ *See* *Mezonos Maven Bakery Inc.*, No. 29-CA-25476, 2011 N.L.R.B. Lexis 422 (Aug. 9, 2011) (NLRB decision stating that *Hoffman Plastic* prevents the NLRB from awarding back-pay to undocumented workers); *see also* *Palma v. NLRB*, 723 F.3d 176 (2d Cir. 2013) (denying a back-pay award to an employee who was unable to prove legal residency in the United States).

⁹ *See* *National Labor Relations Act*, 29 U.S.C. §§ 151-169 (2006) (preventing discrimination among employees and retaliation against employees who engage in

The true impact of *Hoffman Plastic* may be difficult to determine.¹⁰ At this time most courts have refused to extend the holding of *Hoffman Plastic* past the issue of back-pay under the NLRA, but the breadth of the Court's holding could still be applied to remedies other than back-pay.¹¹ NLRB Chairman Liebman and Member Pearce's concurrence in *Mezonos Maven Bakery* best addressed the issues created by the *Hoffman Plastic* decision:

“By reducing illegal immigration, Congress sought through IRCA to protect the interests of U.S. Citizens and authorized-alien workers . . . undocumented immigrants, fearing detection and deportation, will work long hours, accept low wages, and tolerate substandard conditions. Thus, they possess a competitive edge in the labor market[,] particularly in the market for unskilled labor[,] over U.S. citizens and other authorized workers unwilling to submit to such exploitation. Also, undocumented immigrants' availability in a labor market tends to depress wages and working conditions for others in the same market. By deterring employers from hiring undocumented immigrants, IRCA seeks to counteract these forces. To the extent that precluding backpay awards encourages employers to hire undocumented immigrants, it is at cross-purposes with IRCA and injures the welfare of citizen and authorized-alien workers.”¹²

collective bargaining and other protected concerted activities); *see also* 8 U.S.C. § 1324a (depriving undocumented workers of employment).

¹⁰ *See Immigrant Workers' Rights and Remedies*, NATIONAL EMPLOYMENT LAW PROJECT, http://www.nelp.org/site/issues/category/immigrant_workers_rights_and_remedies (last visited Sept. 15, 2013) (detailing how *Hoffman Plastic* has led to a “storm of litigation” around the United States that has left labor protections vulnerable).

¹¹ *See* Ruben J. Garcia, *Ten Years After Hoffman Plastic Compounds, Inc. v. NLRB: The Power of a Labor Law Symbol*, 21 CORNELL J.L. & PUB. POL'Y 659, 669 (2012) (showcasing the difficulties in assessing the true impact of *Hoffman Plastic* and presenting the decision as a symbol of what is wrong with the American labor movement).

¹² *Mezonos Maven Bakery Inc.*, No. 29-CA-25476, 2011 N.L.R.B. Lexis 422 at *5-

There are approximately eleven million undocumented people in the United States.¹³ Around eight million of these undocumented people are part of the nation's workforce.¹⁴ Despite a recent stabilization of the growth of undocumented people in the United States, it still represents three times the population in 1990.¹⁵ Despite this assault on undocumented worker rights, their population has increased substantially, most likely due to the magnetic pull of employers, which attracts undocumented workers to the United States.¹⁶ It stands to reason that any policy or court decision favoring that "magnetic pull," making undocumented workers more attractive to employers, goes against the purpose of immigration laws.¹⁷

This Comment will address how *Hoffman Plastic* and its progeny, *Mezonos Maven Bakery, Inc.* and *Palma v. NLRB*, have the effect of chilling participation by undocumented workers in protected concerted activities while encouraging employers to hire undocumented workers knowing full well that they are not wholly protected by the NLRA.¹⁸ Furthermore, the Second Circuit's recent *Palma*

11 (Liebman, Ch., concurring).

¹³ See generally D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010*, PEW RESEARCH CENTER (Feb. 1, 2011), available at <http://www.pewhispanic.org/files/reports/133.pdf> (counting the number of undocumented workers in the workforce at about eight million in March 2010).

¹⁴ See *id.* at 1. But see Dean E. Murphy, *A New Order: Imagining Life Without Illegal Immigrants*, N.Y. TIMES (Jan. 11, 2004) (noting that there were around 5.3 million in 2001 workers in the "unauthorized labor" force).

¹⁵ See generally Cohn, *supra* note 13, at 2.

¹⁶ H.R. REP. NO. 99-682(I), at 45 (1986).

¹⁷ See *Montero v. I.N.S.*, 124 F.3d 381, 384 (2d Cir. 1997) (citing H.R. REP. NO. 99-682(I), at 45-46, 56, reprinted in 1986 U.S.C.C.A.N. 5649, 5649-50, 5660 (1986)) (reducing "the flow of illegal immigration into the United States by removing the employment 'magnet' that draws undocumented workers into the country").

¹⁸ See Garcia, *supra* note 11, at 660 (explaining how *Hoffman Plastic* allows employers and others to take advantage of immigrant undocumented workers and how *Hoffman Plastic* has done little to deter employers from exploiting undocumented workers); see also Fausto Zapata, *Come Monday, It'll Be Alright, Come Monday, We'll Be Payin' You Right: Routine Remedy or Radical Departure? Is Backpay for Unlawful Immigrants Beyond the Scope of the Board's*

ruling unnecessarily expands on *Hoffman Plastic* in interpreting the Immigration Reform and Control Act of 1986 (IRCA) to contravene undocumented workers' rights to recover back-pay for wrongful termination under the NLRA, despite a ruling from the administrative law judge of the NLRB recommending that the undocumented workers be awarded back-pay and a highly unusual concurring opinion by the NLRB Board criticizing the decision in *Hoffman Plastic*.¹⁹

Part II of this Comment will examine the law as it stands now with regards to the NLRB and its ability to award back-pay to undocumented workers who have been unlawfully terminated under the NLRA. Part III will analyze the complexities brought upon by the Supreme Court's interpretation of *Hoffman Plastic* and how it could be used to challenge undocumented workers' rights to remedies under other statutes such as the FLSA and Title VII. Part IV recommends alternatives for courts other than completely stripping away undocumented workers' rights to back-pay.

II. INTERPRETING THE IRCA AND NLRA IN THE LEAD UP TO PALMA

What follows is a brief description of federal immigration laws and relevant labor standards and how they have been interpreted by some courts to restrict the rights of undocumented workers.

Remedial Processes?, AMERICAN BAR ASSOCIATION (2012), available at http://www.americanbar.org/content/dam/aba/events/labor_law/2012/02/committee_on_development_of_the_law_under_the_nlra_midwinter_meeting/dll2012_zapata.authcheckdam.pdf.

¹⁹ See Edwin S. Hopson, *NLRB Rules for Employer Finding No Obligation to Reinstate or Pay Backpay to Illegal Aliens*, WYATT EMPLOYMENT LAW REPORT (Aug. 10, 2011), <http://wyattemployment.wordpress.com/2011/08/10/nlrb-rules-for-employer-finding-no-obligation-to-reinstate-or-pay-backpay-to-illegal-aliens/> (pointing out chairman Liebman's criticism of *Hoffman Plastic* for failing to make abused employees whole under the NLRA which chills the exercise of their Section 7 rights and removes a vital check on workplace abuses); see also *Mezonos Maven Bakery, Inc.*, NLRB INSIGHT (Aug. 29, 2011), <http://www.nlrbinsight.com/2011/08/mezonos-maven-bakery-inc/> (noting that *Hoffman Plastic* may be settled law but it was included on the NLRB site because of the NLRB's unusual critique of the Supreme Court precedent).

a. Federal Immigration Statutes

The Immigration Reform and Control Act (IRCA) was enacted in 1986 as a supplement to the Immigration and Nationality Act (INA).²⁰ The INA is the basic body of immigration law, despite being amended many times over the years.²¹ The INA imposes a preference system that focuses on immigrants' skills and family relationships with citizens or U.S. residents.²² Notably absent from the INA is a prohibition on the employment of undocumented workers, which gave rise to the IRCA in the 1980s.

Given its focus on employers, the primary purpose of the IRCA is to make it more difficult to employ undocumented workers by providing severe penalties to employers who offer the undocumented jobs.²³ The IRCA made the employment of undocumented workers illegal for the first time.²⁴ The statute made combating the employment "of illegal aliens central to the policy of immigration law."²⁵ The language of the IRCA is employer focused, with penalties being mainly enforced against employers.²⁶ The IRCA established a system of employment verification designed to deny employment to undocumented workers who are either not lawfully present in the United States or are not lawfully authorized to work in the United States.²⁷ Under the verification system, employers are required to

²⁰ See Immigration Reform and Control Act (IRCA), USCIS, <http://www.uscis.gov/tools/glossary/immigration-reform-and-control-act-1986-irca> (last visited Apr. 28, 2015).

²¹ See Immigration and Nationality Act, USCIS, <http://www.uscis.gov/iframe/ilink/docView/SLB/HTML/SLB/act.html> (last visited Oct. 13, 2013).

²² See *The 1965 Immigration Act*, ASIAN NATION, <http://www.asian-nation.org/1965-immigration-act.shtml> (last visited Oct. 13, 2013) (noting that high skilled workers and individuals with family already in the United States are given preference over low skilled workers).

²³ See *NLRB v. A.P.R.A. Fuel Oil Buyers Grp.*, 134 F.3d 50, 55 (2d Cir. 1997), *abrogated by Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (explaining that since the IRCA is employer focused, awarding back-pay to undocumented workers is not inconsistent with the IRCA's purpose).

²⁴ Unlawful Employment of Aliens, 8 U.S.C. § 1324a (2012).

²⁵ *Hoffman Plastic*, 535 U.S. at 149 (2002).

²⁶ See 8 U.S.C. § 1324a.

²⁷ See *id.* § 1324a(h)(3).

authenticate the identity and eligibility of all new hires by examining specified documents before the employee commences employment.²⁸

The more significant mention of undocumented workers in the IRCA came with the Immigration Act of 1990 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.²⁹ Together, these laws amended the INA to impose penalties on undocumented workers who use false documents to obtain employment in the United States.³⁰

When it was initially enacted, the IRCA did not make it unlawful for undocumented workers to accept employment in the United States.³¹ In fact, IRCA's purpose was to combine sanctions on employers who purposefully hired undocumented workers and improve border enforcement to curb illegal entry, which was seen as the most practical and cost-effective way to address illegal immigration.³² Not until the IRCA was amended in 1990 did Congress provide for penalties imposed directly on undocumented workers who sought employment in the United States.³³ Even then, the new sanctions were only made applicable to those undocumented workers who "knowingly or recklessly used false documents to obtain employment."³⁴ Therefore the act does not specifically punish undocumented workers whose employer actively sought their employment or ignored their lack of documentation altogether.³⁵

²⁸ *See id.* § 1324a(b).

²⁹ Bringing In and Harboring Certain Aliens, 8 U.S.C. § 1324 (2014); *see also* Pub. L. No. 104-208, 110 Stat. 3009-570.

³⁰ Penalties for Document Fraud, 8 U.S.C. § 1324c (2014).

³¹ *See Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 231 (2d Cir. 2006) (noting the niche left by the IRCA which penalized employers for hiring undocumented workers but did not penalize undocumented workers for accepting employment).

³² H.R. REP. NO. 99-682(I), at 49, *reprinted* in 1986 U.S.C.C.A.N. at 5653.

³³ 8 U.S.C. § 1324c.

³⁴ 8 U.S.C. § 1324c(a), (f) (noting that the IRCA does not prohibit undocumented workers from seeking or maintaining employment, it just prohibits employers from employing undocumented workers); *see also* 8 U.S.C. § 1324a(a).

³⁵ *See* 8 U.S.C. § 1324c (noting the absence of specific language penalizing undocumented workers who do not present fraudulent documents to obtain employment and are either actively recruited by employers or have employers that

b. The National Labor Relations Act – Protected Concerted Activity and Back-pay

The National Labor Relations Act was enacted with the purpose of making it easier for employers to negotiate with employees as a whole.³⁶ Certain labor standards were put in place to illegalize unfair labor practices and abuses.³⁷ The Act protects employees' rights to join unions and organize for the purpose of collective bargaining with employers.³⁸ Under Section 10(c) of the Act, the NLRB is empowered to issue an order requiring the violator to “cease and desist from such unfair labor practices, and to take such affirmative action including reinstatement of employees with or without back-pay, as will effectuate the policies” of the NLRA.³⁹ The reinstatement and back-pay remedies are used to restore the employee to the economic standing in which he or she would have been but for the employer's NLRA violation.⁴⁰ The cease and desist order is one of the most common orders in the NLRB's arsenal, where the Board order directs the party in violation to refrain from violating any rights guaranteed in the Act.⁴¹

are willfully blind to their immigration status).

³⁶ Unfair Labor Practices, 29 U.S.C. § 158 (2014).

³⁷ Prevention of Unfair Labor Practices, 29 U.S.C § 160 (2014).

³⁸ *See* 29 U.S.C § 157 (2014).

³⁹ Republic Steel Corp. v. N.L.R.B., 311 U.S. 7, 11 (1940) (pointing out section 10(c) of the NLRA requiring reinstatement when an employer is found to have discharged an employee for the purpose of interfering with the employee's NLRA rights. The NLRB may also require that either an employer or a union award back-pay to an employee for lost wages arising out of a discharge that violates the NLRA).

⁴⁰ DOUGLAS S. MCDOWELL & KENNETH C. HUHNS, NLRB REMEDIES FOR UNFAIR LABOR PRACTICES 81 (University of Pennsylvania ed., 1976) (explaining how reinstatement and back-pay are remedies used to make the employee whole after the employer's violation of the NLRA).

⁴¹ *See id.* at 73 (explaining how in almost all cases where an NLRA violation is found, the NLRB will order the employer to post notices of the Board's findings and order).

c. The Fair Labor Standards Act

The Fair Labor Standards Act establishes a minimum wage, overtime pay, and youth employment standards affecting the private and public sectors.⁴² “Employer” is defined by the FLSA as “any person acting directly or indirectly in the interest of an employer in relation to an employee.”⁴³ The term “employee” is equally broadly defined.⁴⁴ Like the NLRA, the FLSA’s definition of employee undisputedly includes undocumented workers.⁴⁵ Section 15(a)(3) of the FLSA prohibits any person from discharging or discriminating against any employee because such employee filed any complaint related to the FLSA.⁴⁶

d. *Sure-Tan* and the Circuit Split that led to *Hoffman Plastic*

The conflict between immigration law and labor law with regards to undocumented workers’ rights stems from the Supreme Court’s contentious decision in *Sure-Tan, Inc. v. NLRB*.⁴⁷ A leather-processing firm hired

⁴² See *Compliance Assistance – Wages and the Fair Labor Standards Act*, DEPARTMENT OF LABOR, <http://www.dol.gov/whd/flsa/> (last visited Nov. 10, 2013) (describing the minimum wage and overtime provisions of the FLSA).

⁴³ See 29 U.S.C. § 203(d)(2012).

⁴⁴ See *id.* § 203(e)(1)-(5) (defining employees as all who are engaged in interstate commerce or in the production of goods for commerce, or who are employed by an enterprise engaged in commerce or in the production of goods for commerce).

⁴⁵ See *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987) (establishing that the FLSA is applicable to citizens and undocumented alike); see also *Contreras v. Corinthian Vigor Ins. Brokerage*, 25 F. Supp. 2d 1053, 1056 (N.D. Cal. 1998) (noting that Congress has expressly manifested its intent that all employees, regardless of immigration status, are protected by the FLSA’s anti-retaliation provisions); *Patel v. Quality Inn S.*, 846 F.2d 700 (11th Cir. 1988) (applying the FLSA’s minimum wage and overtime violations provisions to undocumented workers).

⁴⁶ See *Fact Sheet #77A: Prohibiting Retaliation Under the Fair Labor Standards Act (FLSA)*, DEPARTMENT OF LABOR: WAGE AND LABOR DIVISION (Dec. 2011), <http://www.dol.gov/whd/regs/compliance/whdfs77a.htm> (detailing the retaliation provision of the FLSA).

⁴⁷ See generally *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) (finding that the petitioners committed an unfair labor practice by reporting their undocumented

undocumented workers and eventually informed the INS when the workers attempted to unionize.⁴⁸ The undocumented workers had returned to Mexico by the time Sure-Tan offered to reinstate them.⁴⁹ The majority opinion authored by Justice O'Connor held that the Court of Appeals could not order the NLRB to impose a minimum back-pay award without regard to the employees' actual economic losses or legal availability for work.⁵⁰ The majority noted that if back-pay is awarded, it must be "sufficiently tailored to expunge only the actual, and not merely speculative, consequences of unfair labor practices."⁵¹ Justice Brennan's concurrence agreed that petitioners had committed an unfair labor practice by reporting their undocumented employees to the INS but also affirmed the Court of Appeals' enforcement order because it "effectuates the purposes of the NLRA."⁵²

Sure-Tan created many uncertainties which led to a circuit split.⁵³ Certain courts held that the NLRB lacked discretion to award back-pay to undocumented workers in all cases, while others determined that the Board lacked discretion to award back-pay to undocumented workers who were removed from the United States and could not reenter the country without breaking immigration law.⁵⁴ In

employees to immigration services in retaliation for participating in union activities; however, the undocumented workers were not entitled to back-pay since they had self-deported to Mexico and were currently residing outside the United States).

⁴⁸ *See id.* at 886-87.

⁴⁹ *See id.* at 887 (recounting how after complaints were issued alleging that Sure-Tan had committed various unfair labor practices, Sure-Tan sent letters to the five employees who had been reported to the INS offering to reinstate them, provided that it would not be a violation of immigration laws).

⁵⁰ *See id.* at 884 (finding undocumented workers to be within the meaning of "employee" under the NLRA).

⁵¹ *See id.* at 900 (noting that at the core of a back-pay award is the goal of making the worker whole, not punitive measures against the employer).

⁵² *Id.* at 906 (Brennan, J., concurring).

⁵³ *Cf. id.* at 911 (Brennan, J., concurring) (discussing how the Court addresses the disturbing anomaly it creates by holding that undocumented workers are "employees" within the meaning of the NLRA but these workers are effectively deprived of any remedy under the NLRA).

⁵⁴ *See Zapata, supra* note 18, at 5 (noting how the split stemmed from the Supreme Court's contentious decision in *Sure-Tan* but also how *Hoffman Plastic* failed to

NLRB v. A.P.R.A. Fuel Oil Buyers Group, the employer knowingly hired undocumented workers, a violation of the IRCA, and then fired them for engaging in union activities, which violated the NLRA.⁵⁵ In *A.P.R.A. Fuel Oil Buyers Group*, the Second Circuit held that the failure to enforce back-pay would encourage employers to take advantage of undocumented workers in violating labor laws since the remaining penalties would not be that severe.⁵⁶ Even the dissent agreed that the NLRB could award back-pay to compensate an undocumented alien for labor violations committed by the employer.⁵⁷

The Second Circuit's decision reiterated the Ninth Circuit's holding in *Local 512, Warehouse & Office Workers' Union v. NLRB*, where undocumented workers terminated in violation of the NLRA were awarded back-pay.⁵⁸ The Ninth Circuit noted that the Supreme Court's decision in *Sure-Tan* gave no indication that it was not following precedent disregarding a worker's "legal status, as opposed to availability to work" in determining back-pay.⁵⁹ Furthermore, the Ninth Circuit considered that cease and desist orders without back-pay were insufficient

directly address that split).

⁵⁵ See generally *NLRB v. A.P.R.A. Fuel Oil Buyers Grp.*, 134 F.3d 50 (2d Cir. 1997) (discussing how the employer violated both immigration and labor laws).

⁵⁶ See *id.* at 57 (upholding a back-pay award to undocumented workers from the date of their unlawful discharge until either they obtain new employment or time expires for them to comply with the IRCA).

⁵⁷ But see *id.* at 59 (Jacobs, J., dissenting) (stating that under current immigration law, back-pay could not be awarded for a period in which the undocumented worker's employment was unlawful).

⁵⁸ Compare *Local 512, Warehouse & Office Workers' Union v. NLRB*, 795 F.2d 705 (9th Cir. 1986) (explaining how discriminating back-pay awards to undocumented workers could encourage employers to continue violating the NLRA), with *Kolkka v. NLRB*, 170 F.3d 937 (9th Cir. 1999) (finding that the employer could not refuse to bargain with duly elected union representatives on the basis that some of the voting employees were undocumented workers).

⁵⁹ See *Local 512*, 795 F.2d at 717 (citing *NLRB v. Apollo Tire Co.*, 604 F.2d 1180 (9th Cir. 1979) (finding that six undocumented workers who were laid off in retaliation for complaining about not receiving overtime pay were entitled to reinstatement with back-pay)).

penalties and encouraged unscrupulous employers to hire undocumented workers for a competitive advantage.⁶⁰

Conversely, the Seventh Circuit reached the opposite conclusion in *Del Rey Tortilleria, Inc. v. NLRB*, holding that undocumented workers suffered no harm in not being awarded back-pay because they had no right to be present in the United States and therefore had no right to employment.⁶¹ The Seventh Circuit disagreed with the *Local 512* majority's holding that *Sure-Tan* applies only to undocumented workers who have departed the United States.⁶² Therefore, the court required an employee to present evidence that he is lawfully present and eligible for employment in back-pay cases, which would protect both immigration and labor laws.⁶³ In this case, the dissent echoed *Local 512* in arguing that prohibiting back-pay as a remedy to undocumented workers did not serve either the NLRA or immigration laws.⁶⁴

e. *Hoffman Plastic*: The Shift 20 Years After *Sure-Tan*

Nearly twenty years after *Sure-Tan*, the Supreme Court reached a sharply divided decision in *Hoffman Plastic Compounds, Inc. v. NLRB*.⁶⁵ The Court was

⁶⁰ *See id.* at 719 (explaining how a contempt proceeding would require a further complaint from an undocumented employee who knows that filing another charge would place his immigration status in jeopardy).

⁶¹ *See generally* *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1121 (7th Cir. 1992) (ruling that under *Sure-Tan*, undocumented workers could not be awarded back-pay for any period during which they were not lawfully entitled to be present and employed in the United States).

⁶² *See id.* at 1120 (noting that the *Sure-Tan* majority intended to preclude back-pay from all undocumented workers).

⁶³ *See id.* at 1123-24 (Cudahy, J., dissenting) (distinguishing the current case from *Sure-Tan* by stating that the undocumented workers in *Sure-Tan* were unavailable for work because they had self-deported to Mexico and could not lawfully re-enter the United States without clearly violating the INA).

⁶⁴ *See id.* at 1125 (Cudahy, J., dissenting) (noting that the majority's interpretation of *Sure-Tan* undermines the purpose of immigration laws).

⁶⁵ *See generally* *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (holding, five to four, that an undocumented worker who presented false documentation in order to obtain employment was not entitled to back-pay

confronted with the issue of whether an undocumented worker who presented a fraudulent birth certificate to obtain employment could recover back-pay under the NLRA since his employment was terminated for engaging in protected concerted activities.⁶⁶ The false documents were discovered at an administrative law judge (ALJ) hearing after the NLRB found Hoffman Plastic engaged in unfair labor practices.⁶⁷ Chief Justice Rehnquist held that federal immigration policy, as expressed in the IRCA,⁶⁸ precluded the NLRB from awarding back-pay to an undocumented worker, despite the employer's violation of labor laws.⁶⁹

The Chief Justice reversed the NLRB's order because while the order recognized employer misconduct, it also discounted the misconduct of illegal alien employees who tender fraudulent documents.⁷⁰ The Court reasoned that the IRCA, which penalizes the acts of undocumented workers and provides significant penalties to companies that knowingly employ illegal immigrants, effectively disallows the use of back-pay because it would benefit any undocumented worker who knowingly broke immigration law.⁷¹ Knowingly committing fraud by using false identification to gain employment is a crime as much as it is a crime to hire "illegal" undocumented workers.⁷² Even the dissent echoed that sentiment but reached a different conclusion than the majority by arguing that immigration

remedies under the NLRA).

⁶⁶ *See id.* at 140 (noting that Hoffman Plastic had committed an unfair labor practice by terminating the employment of workers who chose to unionize).

⁶⁷ *See id.* at 141 (recounting how Castro, the undocumented worker in question, testified that he was born in Mexico and had never been legally admitted to the United States but had obtained employment after tendering a birth certificate belonging to a friend who was born in Texas).

⁶⁸ 8 USC § 1324a (2012).

⁶⁹ *See Hoffman Plastic*, 535 U.S. at 140 (presenting false documents to gain employment is explicitly illegal under the IRCA).

⁷⁰ *See id.* at 150 (discounting the misconduct of the undocumented worker employee clearly subverts the plain language of the IRCA).

⁷¹ *See generally id.* (noting how Congress did not intend to award undocumented workers back-pay for work that could not have been legally acquired).

⁷² *See id.* (signaling a shift away from purely employer based sanctions in the IRCA).

statutes penalize employers who knowingly hire undocumented workers and workers who tender fraudulent documents.⁷³

f. A Decade of Litigation: *Mezonos Maven* and *Palma*

The Puerto Rican Legal Defense and Education Fund filed a complaint against Mezonos Maven Bakery, Inc. in 2003, gearing up for a decade long litigation that most recently reached the Second Circuit.⁷⁴ Approximately twenty workers were employed by Mezonos Bakery.⁷⁵ The seven workers involved in the litigation were employed the longest, worked sixty-five to seventy-five hours in a six-day work week, and did not receive overtime pay.⁷⁶ The record reflects that the bakery's president knew that he was required to verify that the workers were lawfully entitled to be in the United States but still employed the workers sans verifiable documentation.⁷⁷ The workers engaged in protected concerted activities and were subsequently fired.⁷⁸

Before the NLRB rendered a decision, the ALJ quoted extensively from the dissent in *Hoffman Plastic* and concluded that the back-pay remedy was necessary to make labor law enforcement credible.⁷⁹ Furthermore the employees must be reinstated since they were wrongfully terminated.⁸⁰ The ALJ read the issue rather narrowly, begging the question whether an undocumented worker who has not engaged in fraud or criminal activity to secure employment is entitled to back-pay

⁷³ See *id.* at 153 (Breyer, J., dissenting) (questioning the majority's argument that the IRCA precludes back-pay awards under the NLRA to undocumented workers).

⁷⁴ See generally *Mezonos Maven Bakery Inc.*, No. 29-CA-25476, 2011 N.L.R.B. Lexis 422 (Aug. 9, 2011).

⁷⁵ See *id.* at *46.

⁷⁶ See *id.*

⁷⁷ See *id.* at *46-47 (ALJ decision) (further noting that none of the undocumented workers presented fraudulent documents).

⁷⁸ See *id.* at *41 (ALJ decision) (referring to the undocumented workers' efforts to unionize as protected concerted activity).

⁷⁹ See *id.* (noting the relative weakness of the other remedies available to the NLRB).

⁸⁰ See *id.* (reinstating the unlawfully terminated employee is the proper remedy under the NLRA for labor violations).

when their employer terminates the employer-employee relationship in violation of the NLRA.⁸¹ Ultimately, the ALJ's narrow reading of *Hoffman Plastic* led him to award back-pay.⁸²

However, the NLRB overruled the ALJ and held that under the NLRA, even undocumented workers who do not turn in false documents and are hired by an employer who knows of the employee's status are still not eligible for back-pay awards.⁸³ The NLRB stated that *Hoffman Plastic* was written broadly and made distinction as to which party violated immigration laws.⁸⁴ The Board interpreted *Hoffman Plastic* and the IRCA to categorically preclude back-pay awards to undocumented workers as a remedy for NLRA violations because the employee-employer relationship itself is illegal under immigration law.⁸⁵

An unusual supplemental decision to *Mezonos Maven Bakery, Inc.* was issued by Chairman Wilma B. Liebman and Member Mark Gaston Pearce wherein they criticized the implications of *Hoffman Plastic* on the NLRB's ability to grant back-pay to undocumented workers.⁸⁶ The supplemental decision sharply criticized the employer in *Mezonos Maven Bakery, Inc.* stating that the bakery was plainly indifferent to either the IRCA or the NLRA and it was unfortunate that immigration law was invoked as a shield to escape penalties for violating labor laws.⁸⁷ Liebman outlined arguments in favor of back-pay, stating that back-pay acts as a deterrent by discouraging employers from violating the Act, the lack of a remedy chills the exercise of Section 7 rights, precluding the remedy interferes with the NLRA's ability to promote and protect collective bargaining, and others.⁸⁸

⁸¹ *See id.* at *40 (awarding back-pay in excess of \$100,000 to the seven workers).

⁸² *See id.* at *90 (ALJ decision) (noting that denying an award of "backpay would punish the employees, benefit the wrongdoer, condone the employment of undocumented workers and place the risk associated with such employment on the employees . . .").

⁸³ *See id.* at *1.

⁸⁴ *Id.* at *7.

⁸⁵ *Id.*

⁸⁶ *See id.* at *39 (Liebman, Ch., concurring) (noting that open criticism of Supreme Court precedent in concurring opinions is an unusual practice within the NLRB).

⁸⁷ *Id.*

⁸⁸ *See id.* (Liebman, Ch., concurring) (awarding back-pay would actually be in line with immigration policies; *see also Zapata, supra* note 5, at 10).

Ultimately, the supplemental decision rejected the argument that back-pay would conflict with the IRCA.⁸⁹

Palma was appealed to the Second Circuit from the NLRB decision in *Mezonos Maven Bakery, Inc.*⁹⁰ The Second Circuit held that undocumented workers were not entitled to back-pay because the IRCA precluded back-pay remedies to undocumented workers but remanded a part of the decision to allow the Board to consider whether the undocumented workers in question were offered proper reinstatement.⁹¹ The Second Circuit observed that the IRCA does not provide that an undocumented worker who is unauthorized to work commits a crime merely by obtaining employment without presenting fraudulent documents.⁹² However, there is no indication that Congress meant to allow the NLRB to encourage undocumented workers to work by awarding them back-pay.⁹³ While the court foreclosed back-pay as a remedy, the issue of whether conditional reinstatement would be appropriate despite the holding in *Hoffman Plastic* was remanded to the Board.⁹⁴ *Palma* seems to make it clear in the Second Circuit that all undocumented workers are not entitled to back-pay.⁹⁵

⁸⁹ *Mezonos Maven Bakery Inc.*, 2011 N.L.R.B. Lexis 422.

⁹⁰ *See generally* *Palma v. NLRB*, 723 F.3d 176 (2d Cir. 2013).

⁹¹ *Id.*

⁹² *Id.* at 183.

⁹³ *Id.*

⁹⁴ *See id.* at 180 (noting the anomaly that the court creates by stating that *Hoffman Plastic* precludes back-pay remedies to undocumented workers because the employer-employee relationship in question is inherently illegal but then defers to the Board's judgment as to whether the employees can be conditionally reinstated).

⁹⁵ *Id.* (emphasizing *Hoffman Plastic* is unequivocal in its denial of back-pay to undocumented workers).

III. HARMONIZING THE NLRA AND THE IRCA

American jurisprudence has traditionally preserved the rights of undocumented people in the United States.⁹⁶ Most recently, in *Plyler v. Doe*, the Supreme Court struck down a Texas law prohibiting enrollment of undocumented children in public school, stating that the children are protected by the Equal Protection Clause of the Constitution.⁹⁷ Conversely, under *Hoffman Plastic* and *Palma*, courts have restricted the rights of undocumented workers, even though they are considered employees under the NLRA.⁹⁸

As discussed in *Sure-Tan*, when the NLRB's chosen remedy "trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy *may* be required to yield."⁹⁹ *Hoffman Plastic* seems to require that the NLRB's decision to award back-pay be tempered by the fact that the supposed awardee could not obtain "lawful wages" during his period of employment and the employment was obtained in the first instance by fraud.¹⁰⁰ The *Hoffman Plastic* decision, which is guiding on *Palma* and could subsequently affect other remedies

⁹⁶ See generally *Yick Wo v. Hopkins*, 118 U.S. 356 (holding that an alien, although alleged to be in the United States illegally, is protected by the Fourteenth Amendment). See also *Wong Wing v. United States*, 163 U.S. 228 (1986) (applying the citizenship-blind nature of the Constitution to the Fifth and Sixth Amendments).

⁹⁷ See generally *Plyler v. Doe*, 457 U.S. 202 (1981) (stating undocumented children are entitled to the same access to primary education as their documented counterparts).

⁹⁸ See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 (2002) (upholding the Supreme Court's decision in *Sure-Tan* declaring that undocumented workers are still considered employees under the NLRA).

⁹⁹ See *id.* (emphasis added) (providing while the NLRB is given wide latitude in applying the NLRA, once it entrenches into other bodies of law, its discretion is hampered).

¹⁰⁰ See *id.* (explaining the undocumented worker at issue in *Hoffman Plastic* obtained employment using fraudulent documents, a clear violation of the IRCA, therefore he could not obtain lawful wages during his period of employment); see also 8 U.S.C. § 1324 (2014) (stating undocumented workers cannot present false documents).

to which undocumented workers have previously been entitled,¹⁰¹ determined the NLRB had exceeded its discretion by awarding back-pay to an undocumented worker for years of work not performed, for wages that could not lawfully have been earned, *and* for a job obtained in the first instance by a criminal fraud, thereby vacating the NLRB's grant of back-pay.¹⁰²

However, this holding ignores the reality of immigration, such as the magnetic pull by employers and that undocumented workers do not chose to emigrate with the goal of obtaining back-pay or being victorious in a FLSA claim.¹⁰³ Instead, as the NLRB found, the "IRCA and the NLRA can and must be read in harmony as complementary elements of a legislative scheme explicitly intended, in both cases, to protect the rights of employees in the American workplace."¹⁰⁴ Should an employer be able to disregard the NLRA when the employee in question is undocumented?

The sweeping definition of "employee" under the NLRA includes undocumented workers while the IRCA does not explicitly exclude undocumented workers from the protection of the NLRA.¹⁰⁵ The IRCA prohibits employers from hiring undocumented workers while the NLRA requires that any undocumented worker who is hired in violation of federal immigration law be afforded the right to

¹⁰¹ Cf. Katerine E. Seitz, Comment, *Enter at Your Own Risk: The Impact of Hoffman Plastic Compounds v. National Labor Relations Board on the Undocumented Worker*, 82 N.C.L. REV. 366, 373 (2003) (acknowledging a conflict remains between current immigration and labor relations, which the court attempted to resolve in *Hoffman Plastic*, but which also reflects America's struggle to redefine itself in the wake of its newest wave of immigrants).

¹⁰² *Hoffman Plastic*, 535 U.S. at 152 (emphasis added) (noting how back-pay cannot be awarded to an undocumented worker who obtained his employment through fraudulent means).

¹⁰³ See *id.* at 153 (Breyer, J., dissenting) (emphasizing back-pay does not interfere with immigration policies because employers are the main force pulling undocumented workers into the workforce).

¹⁰⁴ See *A.P.R.A. Fuel Oil Buyers Grp., Inc.*, 320 N.L.R.B. 408 (1995); see also *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 904 n.13 (1984) (recognizing that "reinstatement and back-pay awards afford both more certain deterrence against unfair labor practices and more meaningful relief for the illegally discharged employees").

¹⁰⁵ See 29 U.S.C. § 160 (2006); see also 8 U.S.C. § 1324a.

collective action under Section 8 of the NLRA, subject to back-pay.¹⁰⁶ Therefore undocumented workers should be awarded back-pay and an employer should not be able to skirt national labor policies based on the immigration status of the employee in question.¹⁰⁷

a. Undocumented Workers are Employees Under the NLRA but Lack Full Protection

Undocumented workers are “employees” for the purposes of the NLRA. Since the term “employee” was written broadly and undocumented workers are not named under the exceptions, they are covered by that term.¹⁰⁸ Over the years, courts have created an untenable anomaly by holding that undocumented workers are within the meaning of “employee” in the NLRA but are still not entitled to the same amount of protection as other protected employees.¹⁰⁹

¹⁰⁶ See 8 U.S.C. § 1324a; see also 29 U.S.C. § 160; Basic Guide to National Labor Relations Act, NATIONAL LABOR RELATIONS BOARD (Apr. 29, 2015), available at <http://www.nlr.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf> (highlighting that the traditional remedy for an employee discharged in violation of § 8(a)(3) or 8(a)(4) of the Act is reinstatement and back-pay).

¹⁰⁷ See *Local 512, Warehouse & Office Workers’ Union v. NLRB*, 795 F.2d 705, 705 (9th Cir. 1986) (discouraging back-pay awards to undocumented workers could encourage employers to violate the undocumented workers’ NLRA rights).

¹⁰⁸ See 29 U.S.C. § 160(c); see also *Sure-Tan*, 467 U.S. at 883 (noting undocumented workers are employees under the NLRA since they are not mentioned in any of the exceptions to the definition).

¹⁰⁹ See *Sure-Tan*, 467 U.S. at 911 (Brennan, J., concurring) (stating the Court creates a disturbing anomaly by holding that undocumented workers are “employees” within the meaning of the NLRA but then finding that undocumented workers are effectively deprived of any remedy); see also 29 C.F.R. § 104.201 (covering any employee whose work has ceased because of an unfair labor practice except public sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers, and supervisors); *In re Paxton*, 55 N.L.R.B. 310, 313-14 (1944) (recognizing, officially, undocumented workers as “employees” under the NLRA definition).

Before the IRCA, undocumented workers were reinstated and awarded back-pay in *NLRB v. Apollo Tire Co.*¹¹⁰ The NLRB found that six allegedly undocumented workers had been laid off in retaliation for complaining about non-payment of overtime.¹¹¹ The Ninth Circuit affirmed the Board's order that the employees be reinstated with back-pay since the NLRA defines "employee" broadly and provides specific exceptions to coverage of the Act, of which, undocumented workers are not among.¹¹²

The majority in *Sure-Tan* also found that undocumented workers are employees within the meaning of that term in the NLRA.¹¹³ The passage of the IRCA raised some doubt as to whether undocumented workers were still considered employees under the NLRA. The Second Circuit in *A.P.R.A. Fuel Oil Buyers Group* answered that question by holding that the legislative history of the IRCA was "not intended to limit in any way the scope of the term employee under the Act or the scope of the rights and protections stated in Sections 7 and 8 of that Act."¹¹⁴ The IRCA does not explicitly state that undocumented workers are no longer considered employees under the NLRA, it merely prohibits employers from hiring undocumented workers.¹¹⁵ *A.P.R.A. Fuel Oil Buyers Group* also held that the IRCA was "not intended to limit the powers of the Board to remedy unfair practices committed against undocumented employees."¹¹⁶

¹¹⁰ See generally *NLRB v. Apollo Tire Co.*, 604 F.2d 1180, 1180 (9th Cir. 1979).

¹¹¹ *Id.* at 1182.

¹¹² *Id.* at 1183 (agreeing with the *Sure-Tan* majority that the NLRB's interpretation that undocumented workers are employees best furthers the policies of immigration laws).

¹¹³ See *Sure-Tan*, 467 U.S. at 883 ("the Board has consistently held that undocumented [workers] are 'employees' within the meaning of section 2(3) of the NLRA and since the Board is granted the role of defining the term, it should be afforded 'considerable deference.'").

¹¹⁴ See *NLRB v. A.P.R.A. Fuel Oil Buyers Grp.*, 134 F.3d 50, 56 (2d. Cir. 1997) (noting that the IRCA was passed to reduce the incentives for employers to hire undocumented workers).

¹¹⁵ See *Agri. Processor Co. v. NLRB*, 514 F.3d 1, 4 (D.C. Cir. 2008) (holding that the NLRB could place undocumented workers and legal workers in the same bargaining unit since undocumented workers are employees under the meaning in the NLRA).

¹¹⁶ See *A.P.R.A. Fuel Oil Buyers Grp.*, 134 F.3d at 56 (stating Congress's intent to

Finally, *Hoffman Plastic* does not alter the definition of “employee” as applied by the Court in *Sure-Tan*; therefore undocumented workers still qualify as employees under the meaning of the NLRA.¹¹⁷ *Hoffman Plastic* did not alter the definition, only providing that federal immigration policy prevented the NLRB from awarding back-pay to an undocumented worker who had falsified documents in order to obtain employment.¹¹⁸ The *Hoffman Plastic* decision has not left undocumented workers altogether unprotected by the NLRA and the NLRA’s plain language continues to include undocumented workers as employees.¹¹⁹

Given the history, the undocumented worker in *Palma* still falls within the definition of “employee” for the purposes of the NLRA.¹²⁰ It would be inconsistent with the policies of the NLRA to hold that undocumented workers are not entitled to back-pay while maintaining that they are considered employees under the terms of the Act.¹²¹

b. Since the Definition has not Changed - Undocumented Workers Should be Afforded Full Protection

Since undocumented workers are “employees” under the NLRA and there is no express provision in the IRCA that changes that definition, undocumented workers should be awarded back-pay. An undocumented worker, while considered an employee, may be found unavailable for work and therefore back-pay remedies

focus on employers, not employees, in deterring unlawful employee relationships is dispositive of not restricting the labor rights of undocumented workers).

¹¹⁷ See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149 n.4 (2002) (noting that the Court’s decision in *Sure-Tan* is not at issue in the present case).

¹¹⁸ See *id.* at 144 (affirming the NLRB’s determination that the NLRA was applicable to undocumented workers).

¹¹⁹ See *Agri Processor Co.*, 514 F.3d at 7 (providing IRCA did not expressly state that undocumented workers are no longer employees under the NLRA).

¹²⁰ Cf. *Palma v. NLRB*, 723 F.3d 176 (2d Cir. 2013) (noting *Hoffman Plastic* addressed that undocumented workers were still employees under the NLRA definition).

¹²¹ See *Mezonos Maven Bakery Inc.*, No. 29-CA-25476, 2011 N.L.R.B. Lexis 422, at *15 (Aug. 9, 2011) (noting the contradiction of holding that undocumented workers are employees and yet not entitled to the full level of protection other recognized employees have).

will not toll.¹²² Once the undocumented worker is already in the United States, it is not a crime per se for the “removable alien” to remain in the United States.¹²³ The *Sure-Tan* majority reasoned that the undocumented workers in the case could not be legally awarded back-pay since they were not in the United States and had elected to self-deport to Mexico after their employment was terminated.¹²⁴ In order to obtain back-pay, they would have had to return to the United States, which if done illegally, would have been a clear violation of the INA,¹²⁵ since the INA prevents any foreigner from seeking entry into the United States until such foreigner has been properly registered and has secured a visa.¹²⁶

However, the NLRB explained in *Sure-Tan* that the employees would not necessarily have been found unavailable because their immediate departure from the country was “plainly and directly attributable to petitioners’ illegal conduct.”¹²⁷ The Board had consistently held that “where *unavailability* is due to an illness, injury, or *other event* that would not have occurred *but for the unlawful discharge*, back-pay liability will not be tolled for that period” in an effort to provide the undocumented workers in *Sure-Tan* with some level of back-pay.¹²⁸

The IRCA enforces penalties mainly against employers and the language of the statute is employer-focused; therefore, the Supreme Court’s focus on

¹²² See generally *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 883 (1984).

¹²³ *Ariz. v. United States*, 132 S. Ct. 2492, 2505 (2012) (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984)); see also *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 726 F.3d 524 (5th Cir. 2013) (striking down an ordinance that criminalized conduct of undocumented people because it interfered with the balance struck by Congress with respect to the harboring of non-citizens).

¹²⁴ *But see Sure-Tan*, 467 U.S. at 910 (1984) (Brennan, J., concurring) (noting that employees would not “necessarily have been found unavailable, because their immediate departure from the country was plainly and directly attributable to petitioners’ illegal conduct).

¹²⁵ See generally *id.*

¹²⁶ 8 U.S.C. § 1301 (1952) (requiring aliens obtain visas before entry); *Id.* § 1201(b) (detailing the visa process to some extent).

¹²⁷ See *Sure-Tan*, 467 U.S. at 910 (showing how the undocumented workers self-deported because they had been reported by their employer).

¹²⁸ See *id.* at 910 n.2 (arguing why a minimum back-pay award is consistent with the NLRB’s longstanding policies).

undocumented worker employees represents an inconsistent shift.¹²⁹ While the IRCA was amended to impose penalties and sanctions on undocumented workers who sought employment, it did so only if they “knowingly or recklessly used false documents to obtain employment” but it did not “otherwise prohibit undocumented aliens from seeking or maintaining employment” without fraud.¹³⁰ In fact, state courts have frequently made the distinction between who violated federal immigration law when taking awards to undocumented workers into consideration.¹³¹

The ALJ in *Mezonos Maven Bakery, Inc.* stated that the IRCA does not make it unlawful for an undocumented worker to work in the United States.¹³² In fact, there are several programs that regularly employ undocumented workers in the United States, again noting that the only conduct of an undocumented employee which was made unlawful by the IRCA is the tendering of fraudulent documents, “including those which are forged or counterfeit or documents of other persons.”¹³³ These seven employees were hired by an employer who knew that they were undocumented.¹³⁴ Their employment was not obtained at first instance

¹²⁹ See 8 U.S.C. § 1324a (2012) (noting that it is illegal to knowingly employ an undocumented worker in the United States and it is illegal for an undocumented foreigner to enter the United States without proper documentation).

¹³⁰ See *Affordable Hous. Found. Inc. v. Silva*, 469 F.3d 219, 223 (2d. Cir. 2006) (holding that the IRCA does not preempt New York State law, which allows undocumented workers to recover lost United States earnings where it was the employer, rather than the worker, who knowingly violated the IRCA in arranging for employment).

¹³¹ See *Balbuena v. IDR Realty L.L.C.*, 6 N.Y.3d 338 (Ct. App. 2006) (distinguishing this case from *Hoffman Plastic* since the undocumented workers had not themselves violated federal immigration law in procuring employment).

¹³² *Mezonos Maven Bakery Inc.*, No. 29-CA-25476, 2011 N.L.R.B. Lexis 422, at *4 (Aug. 9, 2011) (noting that the seven employees did not violate the IRCA by working in the United States even if they were undocumented).

¹³³ See *id.*; see also *Lozano v. City of Hazleton*, 724 F.3d 297, 306 (3d Cir. 2012) (noting that the IRCA reaches only hiring or recruiting or referring for undocumented people for employment and Congress deliberately excluded independent contractors and other non-employees from the scope of restrictions).

¹³⁴ See *Mezonos Maven Bakery, Inc.*, 2011 N.L.R.B. Lexis 422 at *75 (maintaining that the IRCA places the burden on employers to verify that their employees

due to fraud of their own, but because the employer actively sought out undocumented workers knowing they were less likely to complain about working conditions.¹³⁵ Undocumented workers, although present in the United States without proper documentation, will find employers willing, if not eager, to employ them.¹³⁶ However, by applying the same level of protection to undocumented and documented workers, employers will have no incentive to hire undocumented workers over those who are legally present in the United States.¹³⁷

c. Narrowing the Scope of the Question in *Hoffman Plastic*: Lessons from the ALJ in the *Mezonos* Litigation

The ALJ in *Mezonos Maven Bakery, Inc.* interpreted *Hoffman Plastic* to preclude back-pay remedies to an undocumented worker who had presented false documents to gain employment. The Third Circuit, in *Rodriguez v. Integrity*

possess documents qualifying them to be legally employed in the United States).

¹³⁵ See *id.* at *8; see also Shannon Firth, *Special Report: Employers Turn Their Backs on Undocumented Workers injured on the Job*, VOICES OF NY (April 1, 2013, 3:08 PM), <http://www.voicesofny.org/2013/04/employers-turn-their-backs-on-injured-undocumented-workers-2/> (noting that undocumented workers are fearful of “retaliation, job loss, and deportation” and as a result tend to keep quiet about injuries on the job); *Food Empowerment Project, FACTORY FARM WORKERS*, <http://www.foodispower.org/factory-farm-workers/> (last visited Oct. 13, 2013) (noting how employers find undocumented factory farm workers to be “ideal recruits because they are less likely to complain about low wages and hazardous working conditions).

¹³⁶ See *Mezonos Maven Bakery Inc.*, 2011 N.L.R.B. Lexis 422 at *18 (showing that the seven undocumented workers in this case all obtained employment following their illegal discharges); see also Eunice Hyunhye Cho, *Exploiting Immigrants: Labor Laws Need to Protect Undocumented Workers, Too*, MERCURY NEWS (April 24, 2013, 10:00 AM), http://www.mercurynews.com/ci_23091307/exploiting-immigrants-labor-laws-need-protect-undocumented-workers (explaining how immigration policies which are intended to stop employers from hiring undocumented workers have instead allowed employers to skirt immigration and labor laws, thereby abusing undocumented workers).

¹³⁷ See *Mezonos Maven Bakery Inc.*, 2011 N.L.R.B. Lexis 422 at *7 (awarding back-pay reduces the incentive to hire undocumented workers).

Contracting, tried to determine whether an undocumented worker was entitled to workers' compensation benefits.¹³⁸ That court interpreted the central question in *Hoffman Plastic* as being "whether an undocumented worker was entitled to back-pay following a termination of employment after an employer found him or her to be unauthorized to work."¹³⁹ The way the question is phrased indicates that an undocumented worker who is found to be undocumented by the employer can be terminated without back-pay, as per the IRCA.¹⁴⁰ However, what about an employer who knowingly hires undocumented workers based on the fact that they are undocumented?

The IRCA does not mention restricting the power of the NLRB to grant back-pay remedies under the NLRA to undocumented workers.¹⁴¹ In fact, removing the ability of the NLRB to grant undocumented workers back-pay remedies runs counter to the IRCA's main purpose, which is to penalize employers for drawing in undocumented workers.¹⁴² Without the ability to grant remedial awards to undocumented workers, employers could knowingly hire undocumented workers knowing they can violate labor laws at least once with impunity.¹⁴³

Furthermore, throughout the *Hoffman Plastic* litigation, the NLRB Board ruled in favor of back-pay citing their earlier decision in *A.P.R.A. Fuel Oil Buyers*

¹³⁸ See generally *Rodriguez v. Integrity Contracting*, 38 So. 3d 511 (3d Cir. 2010) (awarding workers' compensation to an injured, undocumented worker).

¹³⁹ See *id.* at 520 (holding that *Hoffman Plastic* does not preempt Louisiana workers' compensation benefits).

¹⁴⁰ See *id.* (preferring that the legislature address the multitude of issues created by undocumented workers).

¹⁴¹ See generally 8 U.S.C. § 1324 (2012).

¹⁴² See H.R. REP. NO. 99-682 (I), at 49, reprinted in 1986 U.S.C.C.A.N. at 5649, 5650 (noting that employment is the magnet that attracts aliens here illegally and employers will be deterred by penalties in this legislation from hiring unauthorized aliens, which deter undocumented workers from entering illegally or violating their status in search of employment).

¹⁴³ See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 154 (2002); see also *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 912 (1984) (stating that once employers realize that they are not required to compensate undocumented workers for lost back-pay due to an NLRA violation, their incentive to hire undocumented workers will increase).

Group, Inc. where the NLRB determined that “the most effective way to accommodate and further the immigration policies embodied in IRCA is to provide the protections and remedies of the NLRA to undocumented workers in the same manner as to other employees.”¹⁴⁴ If employers are granted impunity from violations of the NLRA with regards to undocumented workers, then undocumented workers are seen as more attractive to employers, which runs contrary to national immigration policy and the IRCA.¹⁴⁵

Most instructive is the NLRB’s supplemental decision in *Mezonos Maven Bakery, Inc.*, where the Chairman sharply criticized the employer for ignoring both the IRCA and the NLRA and using immigration law as a shield to escape penalties for violating labor laws.¹⁴⁶ The opinion also outlined arguments in favor of back-pay because it is a deterrent to violating the NLRA and precluding the remedy interferes with the NLRA’s ability to promote and protect collective bargaining.¹⁴⁷ While Chairman Liebman and Member Pearce of the NLRB joined the majority opinion, rejecting back-pay awards to undocumented workers, their supplemental decision sharply criticizing Supreme Court precedent is very unusual.¹⁴⁸ After proposing several policy arguments in favor of allowing back-pay for undocumented workers, Chairman Liebman and Member Pearce noted that they “remain convinced that . . . an order relieving the employer of economic responsibility for its unlawful conduct can serve only to frustrate the policies of the Act and our nation’s immigration laws.”¹⁴⁹ Immigration laws are frustrated when employers have an incentive to hire undocumented workers.¹⁵⁰

¹⁴⁴ A.P.R.A. Fuel Oil Buyers Grp., Inc. 320 N.L.R.B. 408, 415 (1995).

¹⁴⁵ *See id.* (determining that immigration policies are better served when undocumented workers are offered the protections and remedies of the NLRA).

¹⁴⁶ *See Mezonos Maven Bakery Inc.*, No. 29-CA-25476, 2011 N.L.R.B. Lexis 422, at *19 (Aug. 9, 2011).

¹⁴⁷ *Id.*; Zapata, *supra* note 5, at 10.

¹⁴⁸ *Mezonos Maven Bakery, Inc.*, 2011 N.L.R.B. Lexis 422 at *4 n.26 (noting how the concurring opinion is “highly unusual”); Michael Eastman, *Mezonos Maven Bakery, Inc.*, NLRB INSIGHT (Aug. 29, 2011), <http://www.nlrbinsight.com/2011/08/mezonos-maven-bakery-inc/> (noting how the Chairman’s concurring opinion is “interesting”).

¹⁴⁹ *Mezonos Maven Bakery, Inc.*, 2011 N.L.R.B. Lexis 422 at *9.

¹⁵⁰ *See id.* (noting the incentive that is created by allowing employers to violate the

The Second Circuit in *Palma* holds to the contrary, noting that the IRCA and awards of back-pay are in direct conflict even though an undocumented worker may not have obtained employment through fraud, because they are naturally ineligible by virtue of being present in the United States unlawfully.¹⁵¹ Yet denying an award of back-pay punishes the employees, benefits the employer-wrongdoer, and condones predatory employers to seek out undocumented workers.¹⁵²

When both cases are read narrowly, there is no reason why the undocumented worker in *Palma* should not be awarded back-pay.¹⁵³ Granting back-pay to undocumented workers who are wrongfully terminated and are recruited by employers who are aware of their undocumented status fulfills labor and immigration policies.¹⁵⁴ While the *Palma* opinion explicitly states that even though the employer had committed serious violations of the NLRA, according to *Hoffman Plastic* the NLRB had no discretion to award reinstatement with back-pay because it frustrates immigration laws.¹⁵⁵ First, the federal courts traditionally have afforded the NLRB deference, given the Board's expertise in this area of law.¹⁵⁶ Second, the decisions in *Hoffman Plastic* and *Sure-Tan* did not deal with undocumented workers who were present in the United States, had obtained

labor rights of undocumented workers).

¹⁵¹ *Palma v. NLRB*, 723 F.3d 176, 183 (2d Cir. 2013). *But see Mezonos Maven Bakery, Inc.*, 2011 N.L.R.B. Lexis 422 at *8 (explaining how awarding back-pay to undocumented workers is necessary to support immigration policies).

¹⁵² *Mezonos Maven Bakery, Inc.*, 2011 N.L.R.B. Lexis 422 at *9 (ALJ supplemental decision).

¹⁵³ *Compare Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (holding that an undocumented worker who obtained employment using fraudulent documents is not eligible to receive back-pay), *with Palma*, 723 F.3d 176 (exemplifying where the undocumented workers had not obtained employment using fraudulent documents).

¹⁵⁴ *Mezonos Maven Bakery, Inc.*, 2011 N.L.R.B. Lexis 422 at *9 (ALJ supplemental decision) (holding that the proposition is fully consistent with immigration policies).

¹⁵⁵ *See generally Hoffman Plastic*, 545 U.S. 137.

¹⁵⁶ *See id.* at 153 (explaining how the NLRB has “especially broad discretion in choosing an appropriate remedy” to address violations of labor laws).

subsequent employment, and did not obtain their original employment through fraudulent means.¹⁵⁷ The undocumented workers in *Palma* should be given back-pay because they obtained subsequent employment and faced no immediate threat of deportation, therefore awarding them back-pay would not frustrate immigration laws.¹⁵⁸

d. *Hoffman Plastic's* Influence on the FLSA: How Arguments Supporting FLSA Coverage of Undocumented Workers Also Support Awarding Back-pay under the NLRA

There is a risk that other federal statutes and local regulations that do not account for the immigration status of individuals might face federal preemption under the IRCA because it provides discretionary awards to undocumented immigrants. *Hoffman Plastic* and its progeny have become a symbol to employers that they can take advantage of undocumented workers, not just in the context of back-pay under the NLRA¹⁵⁹ but also from receiving back-pay awards arising out of Title VII cases,¹⁶⁰ remuneration for employer violations of the FLSA,¹⁶¹

¹⁵⁷ *Id.* See generally *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).

¹⁵⁸ See *Mezonos Maven Bakery, Inc.*, 2011 N.L.R.B. Lexis 422 at *9 (ALJ supplemental decision) (enforcing the NLRA enhances the mission of the IRCA).

¹⁵⁹ See Donna M. Ruscitti, Comment, *Employment Rights of Undocumented Aliens: Will Congress Clarify or Confuse an Already Troublesome Issue?*, 14 CAP. U.L. REV. 431, 457 (1985) (stating that without the protection of labor laws, the rights of undocumented workers are dangerously undefined, and any change in the law could upset the balance and tip the scale in favor of the position that one who enters the country illegally is present at his or her own risk and therefore outside the protection of the labor law).

¹⁶⁰ See generally *Escobar v. Spartan Sec. Serv.*, 281 F. Supp. 2d 895 (S.D. Tex. 2003) (dismissing employee's Title VII claim for back-pay). *But see* *Rios v. Enter. Ass'n Steamfitters Local 638*, 860 F.2d 1168, 1173 (2d Cir. 1988) (holding that undocumented workers were entitled to receive back-pay under Title VII). See also *Panach*, *supra* note 1 (explaining how *Hoffman Plastic* can be used to challenge an undocumented worker's claims under Title VII).

¹⁶¹ See *Lucas v. Jerusalem Café, L.L.C.*, 721 F.3d 927 (8th Cir. 2013) (holding that *Hoffman Plastic* does not apply to the FLSA and therefore undocumented workers are still protected by the FLSA) (citing *Patel v. Quality Inn S.*, 846 F.2d 700 (11th Cir. 1988) (holding that undocumented workers are employees within the meaning

workers' compensation, damages arising out of state tort claims,¹⁶² and even under Farm Labor Contractors Acts (FLCAs).¹⁶³

Courts have attempted to distinguish the FLSA from the NLRA in an attempt to allow undocumented workers to recover under the FLSA.¹⁶⁴ *Cindy's Total Care, Inc.* allowed a motion *in limine* to exclude evidence as to the immigration status of the employees who brought suit under the FLSA.¹⁶⁵ The opinion notes that the FLSA is a statute that extends its protection and remedies to "any individual" employed by the employer,¹⁶⁶ which seems to be of very little difference to the NLRA, where undocumented workers have repeatedly been included under the definition of employee.¹⁶⁷

of the FLSA and "such workers can bring an action under the act for unpaid wages and liquidated damages"))).

¹⁶² See *Fernandez v. Tamko Bldg. Prods.*, 2013 U.S. Dist. LEXIS 98517, at *4 (M.D. La. July 15, 2013) (holding that *Hoffman Plastic* does not preclude an undocumented person from recovering tort damages under Louisiana law since Louisiana does not require citizenship or an alien work permit as a prerequisite for recovering damages). *But see* *Wielgus v. Ryobi Techs., Inc.*, 875 F. Supp. 2d 854, 862 (N.D. Ill. 2012) (denying an undocumented alien recovery of damages based on the loss of future earnings in the United States but not precluding the recovery of damages for lost future earnings or earning capacity based on what he could have earned in his country of lawful residence).

¹⁶³ *Saucedo v. NW Mgmt. & Realty Servs. Inc.*, 2013 U.S. Dist. LEXIS 126320 (Sept. 4, 2013) (using *Hoffman Plastic* to permit an inquiry into a worker's immigration status to determine eligibility for awards due to violations of the FLCA).

¹⁶⁴ *Solis v. Cindy's Total Care Inc.*, No. 10 Civ. 7242(PAE), 2011 WL 6013844, at *3 (S.D.N.Y. Dec. 2, 2011); *see also* *Marquez v. Erenler Inc.*, No. 12 Civ. 8580(ALC)(MHD), 2013 WL 5348457, at *1 (S.D.N.Y. Sept. 20, 2013) (noting that the Second Circuit and the Labor Department have held that FLSA claims for payments of work already performed are not affected by immigration status).

¹⁶⁵ *Solis*, 2011 WL 6013844 at *3 (declining to visit the immigration status of the employees).

¹⁶⁶ See *id.* at *10 (noting how the definition of employee under the FLSA is expansive).

¹⁶⁷ See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) (holding that undocumented workers are employees for the purposes of the NLRA).

For the most part, courts have used the same arguments that can be used in defense of back-pay under the NLRA to provide undocumented workers with protection under these other statutes.¹⁶⁸ Just like back-pay under the NLRA, compensation under the FLSA seeks to make a worker whole by compensating them for time they would have worked were it not for an unlawful termination.¹⁶⁹ Furthermore, granting employers the right to inquire into workers' immigration statuses would allow them to raise the threat of deportation and criminal prosecution, chilling the exercise of labor protections.¹⁷⁰ For an employer who knowingly hires undocumented workers, he would be able to chill his undocumented workers' labor rights under the threat of deportation.¹⁷¹ These undocumented workers would also not be able to recover back-pay for wrongful termination despite being considered employees under the NLRA.¹⁷² Therefore, holding employers who violate federal labor and immigration laws liable for both

¹⁶⁸ See *Patel v. Quality Inn S.*, 846 F.2d 700, 706 (11th Cir. 1988) (holding that undocumented workers are employees within the meaning of the FLSA and “such workers can bring an action under the act for unpaid wages and liquidated damages”); see also *Lucas v. Jerusalem Café L.L.C.*, 721 F.3d 927, 935 (8th Cir. 2013) (holding that Hoffman does not apply to the FLSA and therefore undocumented workers are still protected by the FLSA).

¹⁶⁹ See *Alcoser v. A Spice Route Inc.*, No. 12 Civ. 2106(HB), 2013 WL 5309496, at *1 (S.D.N.Y. Sept. 19, 2013) (distinguishing awards of FLSA compensation from back-pay remedies under the NLRA in granting suspected undocumented workers their FLSA claims).

¹⁷⁰ See *Rivera v. NIBCO Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004) (noting how undocumented workers are reluctant to report abusive or discriminatory practices by their employers for fear of deportation); see also *Sure-Tan*, 467 U.S. at 894-97 (determining that an employer violates labor rights where he reports undocumented workers to INS after they vote in favor of union representation); *Singh v. Jutla & C.D. & R's Oil Inc.*, 214 F. Supp. 2d 1056, 1057, 1060 (N.D. Cal. 2002) (noting that an employer who recruited an undocumented worker and then reported him to the INS after he filed a FLSA claim for unpaid wages may have committed a labor violation).

¹⁷¹ Cf. *Mezonos Maven Bakery Inc.*, No. 29-CA-25476, 2011 N.L.R.B. Lexis 422 (Aug. 9, 2011) (explaining how denying the back-pay remedy means that the seven employees would be held responsible for the employer's violation of the IRCA and the NLRA).

¹⁷² *Id.*

violations advances the purpose of federal immigration policy by offsetting the attractiveness of workers who are not covered by the NLRA.¹⁷³

The IRCA does not express Congress's clear and manifest intent to exclude undocumented workers from protection of the NLRA.¹⁷⁴ Neither the IRCA nor subsequent case law changes the definition of "employee" under the NLRA to exclude undocumented workers.¹⁷⁵

IV. HOW TO FIX THE PROBLEM: READING *HOFFMAN PLASTIC*, THE NATIONAL LABOR RELATIONS ACT, AND THE IMMIGRATION REFORM AND CONTROL ACT TO PENALIZE EMPLOYERS AND PROTECT INNOCENT UNDOCUMENTED WORKERS

There are several courses of action that can preserve the rights of undocumented workers while also maintaining the integrity of labor laws under the NLRA and applying stiff penalties to discourage illegal immigration, in compliance with immigration laws in the United States.¹⁷⁶ Since undocumented workers are recognized as employees under the NLRA, they are entitled to protections afforded to them by the NLRA, including back-pay for wrongful termination.¹⁷⁷ Adopting the Second Circuit's decision in *A.P.R.A. Fuel Oil Buyers Group*, which stated that the IRCA did not diminish the NLRB's power to craft remedies for violations of the NLRA¹⁷⁸ as well as the Ninth Circuit's decision

¹⁷³ *Cf. Patel*, 846 F.2d at 706 (using the same analysis in allowing undocumented workers to make FLSA claims).

¹⁷⁴ *Cf. Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1307 (11th Cir. 2013) (rejecting arguments that *Hoffman Plastic* and the IRCA precluded undocumented workers from FLSA protection).

¹⁷⁵ *See Agri Processor Co. v. NLRB*, 514 F.3d 1, 4 (D.C. Cir. 2008) (noting that the definition of "employee" under the NLRA remains unchanged).

¹⁷⁶ *Cf. Wielgus v. Ryobi Techs., Inc.*, 875 F. Supp. 2d 854, 862 (N.D. Ill. 2012) (concluding that plaintiff undocumented worker could not recover damages for lost future earnings or lost future earning capacity in the United States but was entitled to seek lost future earnings at his residence country).

¹⁷⁷ 29 U.S.C. § 160 (2012); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891, 900 (1984).

¹⁷⁸ *NLRB v. A.P.R.A. Fuel Oil Buyers Grp.*, 134 F.3d 50, 56 (2d Cir. 1997) *abrogated by Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

in *Local 512, Warehouse and Office Workers' Union*, which awarded back-pay.¹⁷⁹ While the former two decisions were expressly abrogated by the Supreme Court's decision in *Hoffman Plastic*, those decisions can be read in line with *Hoffman Plastic* to preserve labor rights and curb illegal immigration.

When in litigation, the initial part of the hearing should be devoted to determining the actual offender of immigration law. This reflects the fact that the IRCA is not itself violator neutral.¹⁸⁰ The IRCA requires that employers verify the status of their workers to deny employment to those who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States.¹⁸¹ Therefore, an employer who knowingly hires undocumented workers violates the IRCA.¹⁸² If that employer also violate the NLRA by terminating an employee for exercising his or her Section 7 rights, then the employer should face the full extent of punishment for violating both statutes, including having to pay back-pay.¹⁸³ Should the undocumented worker present fraudulent documentation in order to obtain employment, unbeknownst to the employer, then the worker has violated the IRCA and *Hoffman Plastic* would preclude him or her from being awarded back-pay.¹⁸⁴

¹⁷⁹ *Local 512 Warehouse & Office Workers' Union v. NLRB*, 795 F.2d 705, 722 (9th Cir. 1986) *abrogated by Hoffman Plastic*, 535 U.S. 137).

¹⁸⁰ *See Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 228 (2d Cir. 2006) (holding where employer, not undocumented worker, violated the IRCA by arranging employment and where jury was instructed to consider worker's removability in assessing damages, New York law did not conflict with IRCA policy in allowing recovery "for some measure of lost earnings at United States pay rates"). *But see Hoffman Plastic*, 535 U.S. at 150-52 (noting that the holding is IRCA-violator neutral).

¹⁸¹ 8 U.S.C.S. § 1324 (2012).

¹⁸² *Id.*

¹⁸³ *Mezonos Maven Bakery Inc.*, No. 29-CA-25476, 2011 N.L.R.B. Lexis 422, at *9 (Aug. 9, 2011) (noting that while the more direct way to counteract the magnetic pull that employers have on undocumented workers is to vigorously enforce the IRCA, it is obvious that the double risk of IRCA penalties *and* NLRA back-pay awards would reinforce deterrence); *Hoffman Plastics*, 535 U.S. at 154 (recognizing that sign posting is not enough of a deterrence to employers).

¹⁸⁴ 8 U.S.C.S. § 1324.

Enforcing back-pay based on who violated the IRCA and the NLRA sends a clear message to employers and undocumented workers to follow our nation's laws,¹⁸⁵ while not ignoring the realities that employers are the main magnet attracting undocumented workers to the United States.¹⁸⁶ The undocumented workers in *Palma* did not present fraudulent documents to secure employment, are not under immediate threat of being deported, and were even able to secure employment after being wrongfully terminated.¹⁸⁷ The workers securing employment after *Mezonos Maven Bakery, Inc.* is ironic considering they were not awarded back-pay.

Restricting the rights of undocumented workers is not the most effective way of combatting their presence in the United States; severely penalizing employers is substantially more effective. States can craft laws that apply more pressure on employers than that applied by the IRCA. Arizona adopted the Legal Arizona Workers Act of 2007, which applied more pressure on those who employ undocumented workers by authorizing the suspension of business licenses of employers who knowingly or intentionally employ an undocumented worker and requiring employers in Arizona to use the E-Verify system created by the IRCA.¹⁸⁸

Another avenue to be explored by states is that adopted by California in response to *Hoffman Plastic*.¹⁸⁹ The State of California enacted legislation

¹⁸⁵ *Mezonos Maven Bakery, Inc.*, 2011 N.L.R.B. Lexis 422 at *9 (showing how imposing a back-pay award on an employer which violates the NLRA serves the same purpose as fining an employer for employing an undocumented worker).

¹⁸⁶ *Hoffman Plastic*, 535 U.S. at 155 (citing H.R. REP. NO. 99-682, pt. 1, p. 45 (1986)).

¹⁸⁷ *But see* *Palma v. NLRB*, 723 F.3d 176, 184-85 (2d Cir. 2013) (holding that undocumented workers are categorically precluded from back-pay awards regardless of who violated the IRCA and if they were able to obtain subsequent employment).

¹⁸⁸ *See* ARIZ. REV. STAT. ANN. §§ 23-211 (2008) (West); *see also* *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1987 (2011) (affirming *Chocanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 861 (9th Cir. 2009) (affirming the constitutionality of ARIZ. REV. STAT. ANN. §§ 23-211)).

¹⁸⁹ *See* William J. Emanuel et al., *Labor & Employment: 2003 California Employment Law Amendments*, MONDAQ BUS. BRIEFING, p. 30 (June 4, 2003); Kevin Fung, *California Introduces Bills to Protect Immigrant Workers' Rights*, IMMIGRATION REFORM (June 16, 2013),

granting all individuals employed in the state, regardless of immigration status, the full protection of state laws.¹⁹⁰ Furthermore, it also codified into state law that investigation of an individual's immigration status will not be allowed in the judicial proceedings to enforce labor laws.¹⁹¹ The federal government should look into either adopting what California has done or make it clear that the IRCA is not intended to abrogate labor protections afforded to individuals by the NLRA.¹⁹²

Another remedy would be that adopted by the district court in *Wielgus*.¹⁹³ The *Wielgus* remedy would involve rather difficult and extensive calculations, taking into account what the worker would have earned in his or her country of origin as a remedy for being unlawfully terminated.¹⁹⁴ Since the employer-employee relationship between an employer and an undocumented worker is "illegal" under the IRCA,¹⁹⁵ but the undocumented employee needs to be made whole under the NLRA, the calculations in *Wielgus* makes some sense. The individual's status as an undocumented worker may preclude the recovery of back-pay of earnings made while still on the job in the United States, but may not preclude the recovery of back-pay for lost earnings based on what he could legitimately earn in his country of lawful residence.¹⁹⁶

http://www.longislandwins.com/policy/detail/california_introduces_bills_to_protect_immigrant_workers_rights (explaining an immigration bill that would protect undocumented workers from employer intimidation has been introduced by California lawmakers).

¹⁹⁰ See Emanuel, *supra* note 189.

¹⁹¹ See *id.*

¹⁹² Cf. *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1067 (9th Cir. 2004) (explaining how Congress wrote Title VII).

¹⁹³ See generally *Wielgus v. Ryobi Techs., Inc.*, 875 F. Supp. 2d 854 (N.D. Ill. 2012).

¹⁹⁴ See *id.* at 862 (denying an undocumented alien recovery of damages based on the loss of future earnings in the United States but not precluding the recovery of damages for lost future earnings or earning capacity based on what he could have earned in his country of lawful residence).

¹⁹⁵ *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137, 141 (2002).

¹⁹⁶ *Wielgus*, 875 F. Supp. 2d at 862 (reconciling federal government's immigration policies as interpreted by *Hoffman Plastic* with state tort action in formulating this new remedy).

V. CONCLUSION

Hoffman Plastic and its progeny have used immigration laws to warp the labor protections of undocumented workers in attempts to reconcile the two. However, *Hoffman Plastic* has not slowed the tide of undocumented immigrants; it has had the effect of allowing unscrupulous employers to abuse workers and skirt both immigration and labor laws.¹⁹⁷ For the first time in years, there is a strong hope that our immigration system will be reformed. In addition to creating a broad path to citizenship for those undocumented individuals already in the United States, a new policy must protect the labor rights of immigrant workers. Regardless of new changes to the immigration policies of the United States, *Hoffman Plastic* should be read narrowly, unlike the Second Circuit's reading in *Palma*.

Undocumented workers are employees under the NLRA. As employees under the NLRA, undocumented workers are afforded Section 7 rights, such as the right to organize.¹⁹⁸ The IRCA does not change the definition of employees under the NLRA and it does not expressly state that undocumented workers cannot be awarded back-pay under the NLRA if an employer violates their Section 7 rights.¹⁹⁹ They should be entitled to the same level of protection as other employees within the statute.

The Second Circuit in *Palma* should have followed the Administrative Law Judge's opinion in *Mezonos Maven Bakery, Inc.*,²⁰⁰ reading the holding of *Hoffman Plastic* narrowly. When an undocumented worker violates the IRCA by tendering fraudulent documents, as in the *Hoffman Plastic* case, then he or she should not be entitled to back-pay.²⁰¹ However when an employer actively recruits undocumented workers and then terminates their employment when they exercise their rights under the NLRA, then back-pay should be awarded.²⁰² Immigration

¹⁹⁷ See Cho, *supra* note 136.

¹⁹⁸ 29 U.S.C. § 160 (2012).

¹⁹⁹ 8 U.S.C. § 1324a (2012); 29 U.S.C. § 160.

²⁰⁰ See *Mezonos Maven Bakery Inc.*, No. 29-CA-25476, 2011 N.L.R.B. Lexis 422, at *24-29 (Aug. 9, 2011) (limiting the *Hoffman Plastic* decision to undocumented workers who present fraudulent documents to obtain employment).

²⁰¹ See *id.*

²⁰² See *id.*

policies should not be used by NLRA-violating employers as a shield to avoid paying back-pay. Similar remedies for undocumented workers are available under the FLSA, workers' compensation, and state tort laws but *Hoffman Plastic* and *Palma* show that courts will not recognize undocumented workers as a class worthy of equal protection by allowing them to exercise their Section 7 rights and organize without fear of employer retribution.²⁰³ The courts have created this untenable anomaly that should be fixed, either by courts narrowing the question in *Hoffman* or Congress acting to clarify the issue.²⁰⁴

²⁰³ See Seitz, *supra* note 101.

²⁰⁴ See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 143-45 (2002) (explaining how only Congress can address the issue of whether undocumented workers are entitled are precluded from back-pay under the IRCA).