

## *Hoffman v. NLRB:* Leaving Undocumented Workers Unprotected Under United States Labor Laws?

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Immigration law can prove particularly difficult to navigate and understand in light of the conflicting personhood, membership, and plenary power doctrines. For over a century, courts have experienced a form of schizophrenia when attempting to reconcile immigration law with other federal or state laws. At times, aliens who have entered the United States are viewed as “persons” as used in the federal and state constitutions, as well as federal laws. In other circumstances, aliens are afforded protection under U.S. laws according to their status, with legal permanent resident aliens being afforded the most protection and undocumented aliens being afforded the least. Then there are times when the power of Congress to regulate the flow of immigration is held to be absolute. When immigration law governing undocumented aliens interacts with federal laws protecting persons within this country, the plenary power or membership doctrine often dictates that federal protection should yield to immigration law.

Currently, we see this struggle occurring with regard to the protections afforded undocumented workers under U.S. labor laws. The following Parts explore the negative impact that the Immigration Reform and Control Act of 1986 (IRCA)<sup>1</sup> has on the rights of undocumented workers under U.S. labor and employment laws by focusing on the recent decision of the United States Supreme Court in *Hoffman Plastic Compounds, Inc. v. NLRB (Hoffman II)*.<sup>2</sup> Part I provides an introduction to the IRCA. It focuses on the actions made unlawful by this Act and its impact on U.S. immigration law and policy. Part II discusses the treatment of undocumented aliens as employees both pre- and post-IRCA. This Part explores how the IRCA affects the protections and remedies available to undocumented workers under the National Labor Relations Act (NLRA).<sup>3</sup> Part III focuses on how the *Hoffman* cases reconcile the tensions between the NLRA and the IRCA. Finally, Part IV discerns the extent to which the Supreme Court’s decision in *Hoffman II* has further undercut the protection available to undocumented workers under U.S. labor laws.

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<sup>1</sup> Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

<sup>2</sup> 535 U.S. 137 (2002), *rev’g Hoffman Plastic Compounds, Inc. v. NLRB (Hoffman I)*, 237 F.3d 639 (D.C. Cir. 2001).

<sup>3</sup> National Labor Relations Act, 29 U.S.C. §§ 151–169 (1994).

## I. BACKGROUND

A. *The Immigration Reform and Control Act of 1986*

Prior to the passage of the IRCA, the Immigration and Nationality Act (INA) worked to stem the flow of illegal aliens by focusing on the admission, entry, harboring, and transportation of illegal aliens.<sup>4</sup> The INA was silent as to the employment of undocumented aliens. In 1986, Congress enacted the IRCA based on its belief that employment opportunities in the United States were a major attraction to aliens entering illegally.<sup>5</sup> The employer sanctions imposed by the IRCA were meant to discourage them from hiring aliens in order to decrease the job opportunities available to undocumented aliens. Congress believed that by making it more difficult for undocumented workers to find employment, it could curb the flow of illegal immigrants entering the United States and protect the working conditions and availability of jobs for U.S. citizens and authorized aliens.<sup>6</sup>

Section 101 of the IRCA, *inter alia*, makes it unlawful for an employer knowingly to hire or continue employing unauthorized aliens or to fail to verify the identity and work authorization of an individual hired for employment.<sup>7</sup> An employer who violates the IRCA is subject to a civil penalty of between \$250 and \$2,000 per unauthorized alien.<sup>8</sup> A pattern of hiring, recruiting, or knowingly continuing to employ unauthorized workers subjects an employer to a fine of between \$2,000 and \$5,000 per unauthorized alien, depending on the number of times the employer has violated the Act. Repeated violations of section 101 may also subject employers to criminal penalties of up to six months imprisonment.

The provisions of the IRCA as found in section 101(a)(1) and (2) focus on the acts of the employer. They define the actions that amount to unlawful activity for which an employer can be sanctioned. The IRCA does not, however, require that an employer track the expiration of work authorizations or recheck work authorizations after any length of time. The IRCA also does not expressly make an undocumented alien's act of working unlawful, nor does it bar an unauthorized worker from accepting employment.<sup>9</sup> Section 274C of the INA, which imposes sanctions upon

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<sup>4</sup> Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952).

<sup>5</sup> It is Congress' belief that "[e]mployment is the magnet that attracts aliens here illegally." See H.R. REP. NO. 99-682, pt. 1, at 46-47 (1986). "[T]he [Judiciary] Committee is convinced that as long as job opportunities are available to undocumented aliens, the intense pressure to surreptitiously enter this country or to violate status once admitted as a nonimmigrant in order to obtain employment will continue." *Id.* at 56.

<sup>6</sup> See *id.* at 46.

<sup>7</sup> 8 U.S.C. § 1324a(a)(2), (b)(1).

<sup>8</sup> 8 U.S.C. § 1324a(e)(4).

<sup>9</sup> *Hoffman I*, 237 F.3d 639, 651 (D.C. Cir. 2001) (dissenting opinion), *rev'd*, *Hoffman II*, 535 U.S. 137 (2002). The majority focused on the legal implications of the IRCA on the act of an undocumented alien working. The court stated, "IRCA does not explicitly make it

undocumented aliens who use fraudulent documents to secure employment, is the only INA section concerned with the actions of undocumented aliens.<sup>10</sup>

Prior to the passage of the IRCA, the U.S. government was familiar with the idea of directly barring an undocumented alien from accepting employment, yet it chose to place the bar on the employer and not upon the undocumented alien. Regulation 8 CFR § 103.6(a)(2)(ii) of the INA, since reserved, imposed a “no-work condition” upon excludable and deportable aliens being released from custody.<sup>11</sup> The regulation required that, absent special circumstances, bonds for the release of excludable or deportable aliens include a condition barring unauthorized employment. In *INS v. National Center for Immigrants’ Rights, Inc.*, the Supreme Court, finding that imposing a “no-work condition” on an undocumented alien was within the Attorney General’s statutory authority under section 242(a) of the INA, upheld 8 CFR § 103.6.<sup>12</sup> Nonetheless, Congress did not impose such a condition on undocumented aliens under the IRCA.

#### *B. Congress’ Intent in Passing the IRCA*

Proposals advocating employer sanctions similar to those enacted by the IRCA have been before Congress since 1972. A report submitted by the House Judiciary Committee of the Ninety-second Congress, advocating the passage of employer sanctions, highlighted the adverse impact of illegal aliens on U.S. labor markets.<sup>13</sup> The report noted that illegal aliens “[t]ake jobs which would normally be filled by American workers[, d]epress the wages and impair the working conditions of American citizens[, and c]onstitute for employers a group highly susceptible for exploitation.”<sup>14</sup> The House Judiciary Committee concluded that employer sanctions for knowingly employing undocumented workers were necessary not only to remove an “illegal source of competition . . . and thereby protect the job security of United States citizens and aliens lawfully present in this country,” *but also* “to remove the incentive for employers to exploit this source of labor.”<sup>15</sup>

Likewise, in 1986, the House Judiciary Committee acknowledged the problematic exploitation of undocumented aliens, stating that “because of their undocumented status, these people live in fear, afraid to seek help when their rights are violated, when they are victimized by criminals,

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unlawful for undocumented aliens to work.” *Id.* at 649. *See* discussion of *Hoffman I infra* Part III.

<sup>10</sup> *See* 8 U.S.C. § 1324c.

<sup>11</sup> Immigration and Nationality Act, 8 C.F.R. § 103.6(a)(2)(11) (1982).

<sup>12</sup> 502 U.S. 183 (1991).

<sup>13</sup> *See* H.R. REP. NO. 92-1366 (1972).

<sup>14</sup> *Id.* at 3–4.

<sup>15</sup> *Id.* at 4.

*employers* or landlords . . . . Continuing to ignore this situation is harmful to both the United States and the aliens themselves.”<sup>16</sup> The House Judiciary Committee further acknowledged that continuing to apply labor laws, such as the NLRA, to undocumented workers “helps to assure that wages and employment conditions of lawful residents are not adversely affected.”<sup>17</sup> These statements evince congressional concern with an application of the newly enacted IRCA that would leave a group of workers susceptible to exploitation.

Concerned about leaving undocumented workers susceptible to exploitation by unscrupulous employers, the House Judiciary Committee and the Committee on Education and Labor made it clear that the intent of Congress in passing the IRCA was not to leave undocumented workers unprotected. In its report amending the INA to include employer sanctions, the House Judiciary Committee clearly states:

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.<sup>18</sup>

The House Committee on Education and Labor also made a point to declare that employer sanctions were not meant to interfere with the protections and remedies provided to undocumented workers. The House Committee on Education and Labor recognized that limiting the powers of labor agencies “to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by these agencies . . . would be *counter-productive* of [Congress’] intent to limit the hiring of undocumented employees.”<sup>19</sup> As such, the legislative history of the IRCA indicates that Congress was aware that changing the INA might leave undocumented workers unprotected. With this knowledge, several House committees of the Ninety-ninth Congress stipulated that applying the IRCA so as to leave workers unprotected was antithetical to the purposes of the Act.

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<sup>16</sup> H.R. REP. NO. 99-682, pt. 1, at 49 (1986) (emphasis added).

<sup>17</sup> *Id.* at 58 (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984)).

<sup>18</sup> *Id.* (emphasis added).

<sup>19</sup> H.R. REP. NO. 99-682, pt. 2, at 9 (emphasis added).

## II. THE DEBATE SURROUNDING UNDOCUMENTED WORKERS' RIGHTS

There is a debate in the U.S. legal system currently over how to harmonize the policies and provisions of the INA with U.S. labor laws. Prior to the passage of the IRCA, the employment of undocumented aliens was only a “peripheral concern” of immigration laws.<sup>20</sup> In *INS v. National Center for Immigrants' Rights, Inc.*, however, the Supreme Court recognized that the passage of the IRCA made the employment of illegal aliens part of the focus of immigration laws.<sup>21</sup> The question is, what effect do these changes in immigration law have on the applicability of U.S. labor law to undocumented workers?

Courts, both before and after the passage of the IRCA, have recognized that undocumented workers are employees as defined in the NLRA and the Fair Labor Standards Act (FLSA).<sup>22</sup> Section 2 of the NLRA defines “employee” broadly, stating that “[t]he term ‘employee’ shall include any employee,” and then explicitly lists those individuals who do not fall within the meaning of the term.<sup>23</sup> Section 3(e) of the FLSA defines “employee” in a similar manner to include “any individual employed by an employer,” and then sets forth specific exceptions to the

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<sup>20</sup> *DeCanas v. Bica*, 424 U.S. 351, 361 (1976) (holding that section 2805(a) of the California State Labor Code—which prohibited an employer from knowingly hiring and employing an alien not lawfully admitted to the United States if such employment adversely affected lawful resident workers—was not unconstitutional as an interference with federal immigration regulations and was not preempted by the INA). Although at the time *DeCanas* was decided the INA did not speak directly and generally on the employment of illegal aliens, the federal government was familiar with the strategy of using employment restrictions to regulate immigration. The Farm Labor Contractor Registration Act of 1963, 7 U.S.C. § 2045(f) (Supp. IV), prohibited farm labor contractors from knowingly employing aliens not lawfully admitted to the United States. *DeCanas*, 424 U.S. at 362 n.10. Moreover H.R. 8713, which amended the INA “to provide a penalty for knowingly employing an alien not lawfully admitted to the United States,” was pending in Congress. *Id.* at 354 n.4.

<sup>21</sup> 502 U.S. 183 (1991).

<sup>22</sup> Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (1994).

For examples of pre-IRCA cases, see, for example, *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) (discussed in greater detail *infra* Part II); *NLRB v. Apollo Tire Co.*, 604 F.2d 1180, 1182–83 (9th Cir. 1979) (finding undocumented aliens within the definition of “employee” as defined in the NLRA and enforcing in its entirety the Board’s order that the violator reinstate and pay undocumented discriminatees backpay). See also *NLRB v. Actors’ Equity Ass’n*, 644 F.2d 939 (2d Cir. 1981).

For examples of post-IRCA cases, see, example, *NLRB v. Kolkka*, 170 F.3d 937, 940 (9th Cir. 1999) (including undocumented workers in the NLRA’s expansive definition of “employee” and finding them eligible to vote in elections for union representative); *Patel v. Quality Inn S.*, 846 F.2d 700, 703 (11th Cir. 1988), *rev’g* *Patel v. Sumani Corp.*, 660 F. Supp. 1528 (N.D. Ala. 1987) (refusing to exclude undocumented workers from the protections of the FLSA).

<sup>23</sup> Section 152(3) of the NLRA specifically excludes the following individuals from its definition of “employee”: agricultural laborers, domestic servants, independent contractors, supervisors, individuals employed by a parent or spouse, those subject to the Railway Labor Act, and individuals employed by persons who are not employers as defined in the NLRA.

definition.<sup>24</sup> Neither the NLRA nor the FLSA lists undocumented aliens as exceptions to the meaning of “employee.” Instead, both pre- and post-IRCA, courts have found that the definition of “employee” in the NLRA and the FLSA is an expansive definition that includes undocumented workers.

*A. The Sure-Tan Decision: Undocumented Aliens  
Are Employees (Pre-IRCA)*

In *Sure-Tan, Inc. v. NLRB*, the Supreme Court held that undocumented aliens are “employees” protected by the NLRA; however, it left open the question of whether they were entitled to any of the remedies provided for by the Act.<sup>25</sup> In *Sure-Tan*, the Court found that an employer who reported undocumented aliens to the INS in retaliation for participating in union activities had committed an unfair labor practice in violation of the NLRA. The Court further found that to be eligible for backpay, discriminatees must be available for work. It declared discriminatees “unavailable” for work “during any period when they were not lawfully entitled to be present and employed in the United States.”<sup>26</sup> Since the undocumented workers in *Sure-Tan* departed for Mexico immediately after being reported to the INS, the Court considered them unavailable for work and overturned their backpay awards because the awards were based on a conjectural six-month period that was beyond the statutory authority granted to the NLRB. The Court further found that any other award without the lawfully present requirement would provide workers with an incentive to reenter the country illegally in violation of the INA.<sup>27</sup> The

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<sup>24</sup> Section 203(e)(1)–(5) of the FLSA specifically excludes the following individuals from its definition of “employee”: certain individuals employed by public agencies, individuals engaged in agriculture who are employed by immediate family, and certain individuals who volunteer to perform services for public agencies or humanitarian purposes.

<sup>25</sup> *Sure-Tan*, 467 U.S. at 890.

<sup>26</sup> *Id.* The Court in *Sure-Tan* noted that without the stipulation of being “lawfully entitled to be present and employed” the Seventh Circuit in *Sure-Tan* feared it would provide an incentive for deported or departed undocumented aliens to reenter the United States illegally. *See id.* at 903 n.12 (referring to *Sure-Tan*, 672 F.2d at 606).

<sup>27</sup> *See Sure-Tan*, 467 U.S. at 904–05. The Court found that a minimum backpay award could not be imposed because the NLRA requires backpay to be awarded on the basis of actual economic losses or legal availability to work. Since the undocumented discriminatees had been deported to Mexico immediately after being removed from their employment at *Sure-Tan*, employees were not available for work and therefore backpay was tolled. The ruling in this case suggests that a legislative change in section 10(c) of the NLRA, 29 U.S.C. § 160(c), that allowed for minimum backpay, would enable undocumented workers such as those in *Sure-Tan* to receive a backpay award. Such a change would further the goals of NLRA which are to protect the rights of employees to collective bargaining. In light of IRCA, however, if such a change were to occur, it would be challenged in the courts in order to determine whether it could be applied to undocumented aliens without conflicting with the IRCA.

National Labor Relations Act § 10(c), 29 U.S.C. § 160(c), authorizes the NLRB to remedy the effects of unfair labor practices by ordering employers “to take such affirmative action including . . . backpay, as will effectuate the policies of this [Act].”

Court, however, did not decide whether or not an undocumented worker who is not deported and remains in the United States after being terminated in violation of the NLRA is considered available for work and, therefore, entitled to backpay.

The holding of *Sure-Tan*, with respect to whether undocumented workers are entitled to receive backpay under the NLRA and the meaning of the phrase “lawfully entitled to be present and employed,” has been a source of debate in U.S. courts. Pre-IRCA, in *Local 512, Warehouse & Office Workers’ Union v. NLRB*, the Ninth Circuit interpreted *Sure-Tan* narrowly to mean that an undocumented alien “outside the United States with no prospect of legal reentry” cannot be awarded backpay.<sup>28</sup> In post-IRCA cases, however, the courts offer conflicting views as to whether aliens can be awarded backpay under federal labor laws without violating the IRCA.<sup>29</sup>

In *Local 512*, the Ninth Circuit, citing *Sure-Tan*, held that undocumented discriminatees who are not deported and who remain in the United States during the backpay period are available for work. As such, they are entitled to backpay under the NLRA.<sup>30</sup> The court in *Local 512* observed that the majority opinion in *Sure-Tan* “implied that backpay would have been available to the *Sure-Tan* discriminatees had they not left the United States at the INS’ behest, notwithstanding their status as undocumented workers.”<sup>31</sup>

According to the Ninth Circuit, the Supreme Court barred a backpay award to undocumented aliens in *Sure-Tan* because of the speculative nature of the backpay remedy, since the discriminatees in *Sure-Tan* had returned to Mexico after being fired in retaliation for participating in activities protected by the NLRA. The Ninth Circuit first distinguished *Local 512* by noting that the discriminatees had found employment after being laid off in violation of the NLRA. Thus, the backpay remedy could be calculated precisely based on an “actual” backpay period and was not beyond the scope of the NLRB’s authority.<sup>32</sup> Secondly, the *Local 512* court noted that the fear of providing an incentive to reenter the country illegally was

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<sup>28</sup> See *Local 512, Warehouse & Office Workers’ Union v. NLRB*, 795 F.2d 705, 716, 722 (9th Cir. 1986) (concluding that “*Sure-Tan* barred . . . only those undocumented workers who were unavailable for work in the backpay period because they were outside the United States without entry papers.”). See, e.g., *Rios v. Enter. Ass’n Steamfitters Local Union 638*, 860 F.2d 1168, 1173 (2d Cir. 1988); *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 54 (2d Cir. 1997).

<sup>29</sup> Compare *A.P.R.A. Fuel*, 134 F.3d 50, with *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115 (7th Cir. 1992). Compare *Hoffman I*, 237 F.3d 639 (D.C. Cir. 2001), with *Hoffman II*, 535 U.S. 137 (2002) (discussed *infra* Part III).

<sup>30</sup> *Local 512*, 795 F.2d at 718–19.

<sup>31</sup> *Id.* at 717. The *Local 512* court found Justice O’Connor’s reason for denying a backpay award in *Sure-Tan* to be the absence of relevant factual information showing an opportunity to mitigate by the employees who were out of the country.

<sup>32</sup> See *id.*

absent, since the discriminatees had not been subjected to deportation proceedings and remained in the United States.<sup>33</sup>

*B. Post-IRCA: Undocumented Aliens Continue To Be Considered Employees*

In *Local 512*, however, the court was not operating in a post-IRCA environment where employers are prohibited from knowingly hiring undocumented aliens. In limiting the findings of the *Sure-Tan* decision, the court in *Local 512* noted that “[t]he employment of undocumented workers is ‘peripheral’ to the INA.”<sup>34</sup> This has changed with the passage of the IRCA, which focuses directly on the employment of undocumented aliens. Equally important, however, is the fact that in *Local 512*, the court acknowledged that the protection of American workers’ jobs was a major goal of the INA. The *Local 512* court believed that depriving backpay to undocumented workers could undermine this goal.<sup>35</sup> In light of amendments to the INA affecting the employment of aliens and the policy considerations and goals behind these changes, courts are struggling to interpret how these changes affect the definition of the term “employee” and the awarding of remedies and backpay under U.S. labor laws.

After the passage of the IRCA, courts have had to decide whether or not the Supreme Court’s analysis of the interaction between U.S. labor laws and the INA in *Sure-Tan* is still valid. Courts are currently finding that, whatever the changes to the INA, undocumented workers are employees under U.S. labor laws.<sup>36</sup> The courts, however, remain split on the

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<sup>33</sup> See *id.* at 719–20.

<sup>34</sup> *Id.* at 719.

<sup>35</sup> See *id.* at 720.

<sup>36</sup> The Ninth and Eleventh Circuits have held that the IRCA does not alter the definition of “employee” under the NLRA and the FLSA. In *NLRB v. Kolkka*, 170 F.3d 937 (9th Cir. 1999), the Ninth Circuit held that undocumented workers are employees with a right to vote in union organizing elections under the NLRA and enforced an order of the NLRB requiring an employer to recognize and bargain with a union elected in part by the votes of undocumented workers. The court found that despite the fact that the IRCA makes it unlawful for an employer to form a relationship with an undocumented worker, the worker, once hired by the employer, is still an employee within the definition of the NLRA. The question presented in *Kolkka*, however, is much easier than the question of whether undocumented workers discharged in retaliation for participating in protected activities are entitled to backpay under the NLRA. The latter issue, discussed *infra* Part III, faced the Supreme Court in *Hoffman II*.

In *Patel v. Quality Inn South*, 846 F.2d 700, 703 (11th Cir. 1988), the Eleventh Circuit also held that the IRCA did not alter the meaning of the term “employee” as used in the FLSA. The court found that the language in the IRCA and the legislative history of the Act show that the IRCA did not expressly amend or repeal the provisions of the FLSA, nor was it intended to. The Eleventh Circuit also held that *Sure-Tan* does not serve as a bar to backpay remedies under any federal labor law based on the undocumented status of an alien.

Several post-*Hoffman II* cases have likewise held that neither the IRCA nor the Supreme Court in *Hoffman II* requires a change in the position that undocumented aliens are employees under the NLRA and FLSA. *Flores v. Amigon*, 233 F. Supp. 2d 462 (E.D.N.Y. 2002); *Singh v. Jutla & C.D. & R’s Oil, Inc.*, 214 F. Supp. 2d 1056 (N.D. Cal. 2002); Flo-

proper interpretation of the remedial implications of *Sure-Tan* in light of the IRCA. Circuit courts have handed down conflicting opinions on whether undocumented discriminatees who remain in the United States can be considered available for work and thereby entitled to remedial awards under U.S. labor laws.

The Supreme Court stepped into this debate in *Hoffman II*. However, as with *Sure-Tan*, the full implications of its decision, as to the validity of the NLRB awarding backpay to undocumented discriminatees, remain unclear. If courts resolve the debate by finding that undocumented workers are per se unable to receive remedial awards, they will deny undocumented aliens the protection of U.S. labor laws despite finding that undocumented aliens are employees intended to be protected by these laws.

In *Del Rey Tortilleria, Inc. v. NLRB*, the Seventh Circuit, citing *Sure-Tan*, held that under current immigration laws undocumented workers, although still considered employees under the NLRA, were not eligible for backpay.<sup>37</sup> The court, finding that the NLRB's order was "inconsistent with *Sure-Tan*," denied enforcement of the order requiring backpay to undocumented aliens.<sup>38</sup> This finding was based on a plain language interpretation of the *Sure-Tan* requirement that employees receiving backpay be "lawfully entitled to be present and employed in the United States." The *Del Rey Tortilleria* court interpreted the requirement as a complete bar to awarding backpay to undocumented aliens whether or not they remain in the United States after being dismissed from employment.<sup>39</sup> The court's holding, therefore, rests upon its conclusion that *Sure-Tan* continues to be in line with immigration laws even after the changes adopted by the IRCA.<sup>40</sup>

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res v. Albertsons, Inc., No. CV 01-00515 AHM (SHX), 2002 WL 1163623 (C.D. Cal. Apr. 9, 2002).

<sup>37</sup> 976 F.2d 1115, 1118–22 (7th Cir. 1992).

<sup>38</sup> *Id.* at 1117.

<sup>39</sup> In finding undocumented aliens ineligible to receive a backpay award, the court in *Del Rey Tortilleria* also reasoned that relief under the NLRA was remedial, not punitive, in nature and that an undocumented alien terminated from employment could not be harmed in a legal sense since they "had no right to be present in this country at all, and consequently no right to employment." *Id.* at 1119 (quoting *Local 512*, 795 F.2d at 725 (Breezer, J., dissenting in part)). I disagree with this reasoning considering that the "right to employment" has not been found to be a right guaranteed by the U.S. Constitution and, therefore, citizens, legal aliens, and undocumented workers alike do not have a "right to employment." Instead, the NLRA grants the right to collective bargaining protected from employer discrimination/retaliation. The Supreme Court held in *Sure-Tan* that documented and undocumented aliens alike are protected employees under the NLRA. See *Sure-Tan*, 467 U.S. at 891–92.

<sup>40</sup> In *A.P.R.A. Fuel*, the Ninth Circuit observed that in *Del Rey Tortilleria*, the Seventh Circuit discussed the IRCA with the assumption that Congress understood *Sure-Tan* as barring backpay to undocumented workers—including those who remain in the United States after being discharged in violation of the NLRA—and endorsed that understanding at the time it passed the IRCA. *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 58 (2d Cir. 1997). The *A.P.R.A. Fuel* court noted, however, that nothing in the House Reports discussing the effect of the IRCA on existing laws warrants this conclusion. See

In *NLRB v. A.P.R.A. Fuel*, the Second Circuit addressed the implications of the IRCA on the *Sure-Tan* holding and the rights of undocumented workers under the NLRA.<sup>41</sup> The court held “without hesitation that IRCA did not diminish the Board’s power to craft remedies for violations of the NLRA.”<sup>42</sup> The Second Circuit then narrowly interpreted *Sure-Tan* as barring undocumented aliens who had been deported or who had departed at the behest of the INS from being awarded backpay. As such, the court in *A.P.R.A. Fuel* found that the precedent established by *Sure-Tan* stands: undocumented discriminatees who remain in the United States after being discharged by an employer in violation of the NLRA, and who are not subject to INS proceedings, are entitled to backpay.

In support of their conflicting interpretations of *Sure-Tan* and an undocumented worker’s right to remedies under the NLRA, courts have cited the same report by a House Committee in the Ninety-ninth Congress. The report states that it was not the intention of Congress to limit the protection afforded undocumented aliens under existing law.<sup>43</sup> At the time the IRCA was passed, however, the state of the law was unclear. As seen in *Local 512, Del Rey Tortilleria*, and *A.P.R.A. Fuel*, courts in varying circuits set forth conflicting interpretations of the scope of *Sure-Tan* and of the remedies afforded undocumented aliens under U.S. labor laws. The Supreme Court has not stepped in to resolve the issue. Since the congressional reports do not expressly state which interpretation of the remedial holdings of *Sure-Tan* Congress intended to endorse, courts today continue to struggle with the *Sure-Tan* mystery, made even more complicated by the provisions of the IRCA.

Presently, the NLRB and the Courts of Appeals for the Second and Ninth Circuits have held that *Sure-Tan* allows an award of backpay to undocumented aliens that remain in the United States.<sup>44</sup> Furthermore, the Second Circuit has held that it was not the intent of Congress to undercut the holding in *Sure-Tan* by passing the IRCA. On the other hand, the Seventh Circuit has held that *Sure-Tan* imposes a blanket bar on awarding backpay to undocumented aliens under the NLRA and that the decision

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*id.* The same argument used in *Del Rey Tortilleria* to support the position that the *Sure-Tan* holding is a blanket bar on awarding backpay to undocumented aliens under the NLRA can, therefore, also be used to argue that the alternative limited interpretation of *Sure-Tan*—as only barring backpay to aliens that are outside the United States or subject to INS deportation proceedings—is the correct post-IRCA interpretation.

<sup>41</sup> See 134 F.3d 50 at 54–56.

<sup>42</sup> *Id.* at 56.

<sup>43</sup> See H.R. REP. NO. 99-682, pt. 1, at 58 (1986); H.R. REP. NO. 99-682, pt. 2, at 8–9 (1986). See discussion of legislative history *supra* Part I.

<sup>44</sup> Although in *Local 512* the NLRB took a position similar to the one taken by the Seventh Circuit in *Del Rey Tortilleria*, the NLRB’s current position is that undocumented aliens are entitled to backpay and may be entitled to conditional reinstatement. However, they acknowledge that an order for reinstatement not conditioned on becoming authorized would violate the IRCA. See also Hoffman I, 237 F.3d 639, 641 (D.C. Cir. 2001); *A.P.R.A. Fuel*, 134 F.3d at 54.

in *Sure-Tan* survives the IRCA. As such, it remains unclear which remedial interpretation of *Sure-Tan*, if any, can continue to operate in a post-IRCA environment. The Supreme Court's decision in *Hoffman II*, however, has shaken the strength of the Second Circuit's findings in *A.P.R.A. Fuel* while bolstering the interpretation of the Seventh Circuit in *Del Rey Tortilleria*.<sup>45</sup>

### III. HOW DOES *HOFFMAN II* RECONCILE THE NLRA AND THE IRCA?

In *Hoffman II*, the Supreme Court faced the question of whether the NLRA entitles undocumented employees, discharged in retaliation for participating in protected activities, to receive backpay.<sup>46</sup> In 1988, several employees at Hoffman Plastic Compounds, Inc. assisted the United Rubber, Cork, Linoleum, and Plastic Workers of America in a union organizing drive. The employees participating in those activities were laid off within a year of the union organizing activities. The NLRB determined that Hoffman Plastic Compounds had unlawfully discriminated and retaliated against the workers for engaging in activities protected under sections 8(a)(1) and (3) of the NLRA.<sup>47</sup> The NLRB ordered Hoffman Plastic Compounds to cease and desist its unfair labor practices, post notices at the work plant informing employees of their right to organize, and make all of the unlawfully discharged employees whole through reinstatement and payment of backpay.<sup>48</sup>

At a later hearing concerning the computation of backpay, the attorney for Hoffman Plastic Compounds questioned one of the employees, Jose Castro, about his citizenship status. Castro revealed that he was a Mexican citizen who had used a friend's U.S. birth certificate to obtain em-

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<sup>45</sup> The D.C. Circuit in *Hoffman I* interpreted *Sure-Tan* narrowly, similar to the Second Circuit in *A.P.R.A. Fuel*. The Supreme Court subsequently reversed the D.C. Circuit's interpretation in *Hoffman II*.

<sup>46</sup> *Hoffman II*, 535 U.S. 137 (2002).

<sup>47</sup> 29 U.S.C. § 158(a)(1)–(3) makes it an unfair labor practice for any employer to interfere with organizing activities and to discriminate on the basis of membership or non-membership in a labor organization. The IRCA makes it a crime for a person to subvert the employer document verification system by using false documents. Section 1324c(a)(3) states that it is unlawful for any person or entity knowingly

to use or attempt to use or to provide or attempt to provide any document lawfully issued to or with respect to a person other than the possessor (including a deceased individual) for the purpose of satisfying a requirement of this chapter or obtaining a benefit under this chapter.

Additionally, 18 U.S.C. § 1546(b)(1) stipulates that whoever uses “an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor” for the purpose of satisfying a requirement of section 274A(b) of the Immigration and Nationality Act, shall be fined under this title, imprisoned not more than five years, or both.

<sup>48</sup> See *Hoffman I*, 237 F.3d at 641.

ployment.<sup>49</sup> The NLRB then modified the award given to Castro by denying reinstatement and using the after-acquired evidence rule to require Hoffman Plastic Compounds to pay a limited backpay award beginning the date of Castro's unlawful discharge and ending the date on which Hoffman Plastic Compounds learned of Castro's unauthorized status.<sup>50</sup> Hoffman Plastic Compounds filed a petition with the Court of Appeals for the D.C. Circuit. The court enforced the NLRB's order.<sup>51</sup> Hoffman Plastic Compounds then petitioned for and was granted a rehearing, *en banc*. In *Hoffman I*, the D.C. Circuit Court, relying heavily on its interpretation of *Sure-Tan*, again upheld the NLRB's order awarding backpay to Castro.<sup>52</sup> Ultimately, however, in a 5-4 decision the Supreme Court in *Hoffman II* reversed the D.C. Circuit. The Supreme Court held that the NLRB was foreclosed from awarding backpay to Castro, an undocumented alien who had used fraudulent documents to obtain employment and had never been entitled to work in the United States.<sup>53</sup>

#### A. Hoffman I: *Undocumented Does Not Mean Unprotected*

In *Hoffman I*, the D.C. Circuit Court, sitting *en banc*, upheld the NLRB's award of limited backpay to Castro, an undocumented worker. The award was crafted to take into account the discriminatee's actual losses and to avoid conflicting with the IRCA by limiting its accrual to the period between discharge and the employer's knowledge of Castro's undocumented status, which is when the employer would have been required to discharge Castro under the IRCA.<sup>54</sup> The *Hoffman I* court held that *Sure-Tan* supports awarding backpay to undocumented workers and that nothing in the IRCA bars an award of limited backpay.

Hoffman Plastic Compounds argued that the Supreme Court's decision in *Sure-Tan* barred an award of backpay to undocumented discriminatees. In the alternative, they argued that even if *Sure-Tan* did allow such an award under certain circumstances, changes to the legal landscape in the form of the IRCA meant that such an award was now barred. In support of this argument, and as an additional equal protection argument,

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<sup>49</sup> See *id.* Castro also used his friend's birth certificate to secure a driver's license, Social Security card, and employment after being unlawfully discharged from Hoffman Plastic Compounds. See *Hoffman II*, 535 U.S. at 141.

<sup>50</sup> See *Hoffman II*, 535 U.S. at 141–42. The NLRB denied reinstatement acknowledging that in the case of undocumented discriminatees it would violate the IRCA. *Id.* at 141.

<sup>51</sup> *Hoffman Plastic Compounds, Inc. v. NLRB*, 208 F.3d 229 (D.C. Cir. 2000), *vacated*, *Hoffman I*, 237 F.3d 639.

<sup>52</sup> See *Hoffman I*, 237 F.3d 639.

<sup>53</sup> See *Hoffman II*, 535 U.S. 137.

<sup>54</sup> See *Hoffman I*, 237 F.3d at 648–49. Section 101(a) of the IRCA, 8 U.S.C.A. § 1324a(a)(2), states, "It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment."

Hoffman Plastic Compounds noted that the IRCA prevented an undocumented worker from mitigating lost wages by finding new employment as required “in fashioning an equitable backpay award.”<sup>55</sup> If undocumented discriminatees were allowed to receive backpay without having to mitigate, they would be treated more favorably under the NLRA than discriminatees authorized to work in the United States.<sup>56</sup>

In addressing the employer’s argument that *Sure-Tan* barred a backpay award to all undocumented discriminatees, the D.C. Circuit Court took a view similar to those in *Local 512* and *A.P.R.A. Fuel*: that the decision in *Sure-Tan* to withhold backpay from an undocumented worker was a contextual one limited to the facts of the case.<sup>57</sup> The D.C. Circuit concluded that the holding in *Sure-Tan* prevented a minimum six-month backpay period as being beyond the statutory authority granted by the NLRA. Further, backpay was tolled because the discriminatees had departed to Mexico immediately after being discharged and could not legally reenter the United States.<sup>58</sup>

Looking at the legislative history of the IRCA, the court of appeals in *Hoffman I* found that the NLRB’s application of the provisions of the NLRA were in harmony with the IRCA’s goals. Citing reports by the House Judiciary Committee, the court observed that Congress did not intend the IRCA to undermine the protections afforded undocumented workers under existing labor laws.<sup>59</sup> As such, the court determined that although sanctions for knowingly hiring undocumented aliens or using false documents to obtain employment may attach legal implications to the employment relationship, they did not change the protections afforded to undocumented workers.<sup>60</sup> The *Hoffman I* court found Castro’s use of

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<sup>55</sup> See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 901 (1984). In *Sure-Tan*, the Court noted that in awarding backpay, it has required the Board to “give due consideration to the employee’s responsibility to mitigate damages.” See *id.* See, e.g., *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

<sup>56</sup> See *Hoffman I*, 237 F.3d at 650. The D.C. Circuit did not address this equal protection argument. Instead, it quickly disposed of the argument by finding that an employer lacked standing to assert an equal protection claim on behalf of third parties and that Hoffman Plastic Compounds did not provide any evidence that the NLRB was applying different mitigation standards to undocumented discriminatees.

<sup>57</sup> See *id.* at 642. As in *A.P.R.A. Fuel*, the D.C. Circuit in *Hoffman I* refused to give literal treatment to the sentence in *Sure-Tan* requiring that an individual must be entitled to be “lawfully present and employed” in the United States in order to receive backpay. *Hoffman I*, 237 F.3d at 645 (citing *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 54–55 (2d Cir. 1997)). The D.C. Circuit found that a literal interpretation of this sentence meant that the language was divorced from the facts of the case. It also found that the purpose of this sentence was not to bar undocumented discriminatees from receiving backpay awards, but to ensure that the NLRA and the INA were not in conflict by ensuring “that illegal reentry would not restart the accumulation of backpay.” See *Hoffman I*, 237 F.3d at 642–43.

<sup>58</sup> See *Hoffman I*, 237 F.3d at 642–44.

<sup>59</sup> See *id.* at 646 (quoting H.R. REP. No. 99-682, pt. 1, at 58 (1986)). See discussion of this House Judiciary Committee report *supra* Part I.

<sup>60</sup> See *Hoffman I*, 237 F.3d at 646.

fraudulent documents to obtain employment a separate offense for which he could be fined under the IRCA. This, however, did not bar a remedy under the NLRA because “the IRCA does not explicitly make it unlawful for undocumented aliens to work.”<sup>61</sup> Since Castro was an employee under the NLRA and his act of working was not illicit, he was still afforded the protections of the NLRA. According to the *Hoffman I* court, these protections were violated when he was unlawfully discharged by Hoffman Plastic Compounds.

The *Hoffman I* court concluded that the purpose of federal immigration laws, which now emphasized curbing immigration by making it more difficult for undocumented aliens to find jobs, could be harmonized with the NLRA’s goal of protecting workers. Protecting undocumented workers under the NLRA was in line with the policies of the IRCA because they both operate to protect the jobs available to American citizens and authorized aliens. Requiring employers who discharge undocumented workers for participating in activities protected under the NLRA to comply with backpay awards removes the economic advantage that accrues to employers who hire an undocumented work force.<sup>62</sup> Removing this economic advantage means that employers will be less likely to take the risk of hiring undocumented workers in violation of the IRCA. This will reduce the number of U.S. jobs available to undocumented aliens and make the United States less attractive to illegal immigrants. The court in *Hoffman I* thereby concluded that effectively protecting undocumented workers under the NLRA by allowing them to receive backpay awards furthers, rather than hinders, the goals of the employer sanction provisions of the IRCA.

*B. Hoffman II: The Supreme Court Overturns a Backpay Award to an Undocumented Worker*

Reversing the D.C. Circuit Court’s ruling in *Hoffman I*, the Supreme Court held in a 5-4 decision that the IRCA forecloses an award of backpay to Castro, “an undocumented alien who has never been legally authorized to work in the United States.”<sup>63</sup> The Court in *Hoffman II* was

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<sup>61</sup> *Id.* at 649.

<sup>62</sup> *See id.* at 647 (arguing that in light of the sanctions imposed on employers under the IRCA for hiring undocumented workers, the savings in not having to pay remedies for unfair labor practices did not override the disincentive imposed by the IRCA). This argument fails to consider the power of both acts working in tandem and avoids the questions of why the IRCA and the NLRA should not both operate as a disincentive to unscrupulous employers.

<sup>63</sup> *See Hoffman II*, 535 U.S. at 140. Taken literally, this seems to bar any undocumented alien who has never had working papers from receiving backpay under the NLRA. The opinion, however, does suggest that those aliens that began working with legal authorization that subsequently expired may not be barred from receiving backpay. This contradicts the Court’s mitigation argument as being a main reason for deeming Castro ineligible to receive backpay. After all, an alien with expired work authorization is in the same position as an alien who never had authorization to begin with when it comes to

of the opinion that the provisions of the two acts could not be harmonized. Chief Justice Rehnquist concluded that “allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy” and that, consequently, the NLRA must yield.<sup>64</sup>

The Court’s opinion in *Hoffman II* concentrates on the details of the case and takes an overly legalistic approach to the interaction of the IRCA and the NLRA that emphasizes the clashes between the two acts and underplays their common goals.<sup>65</sup> In *Hoffman II*, the Court was particularly troubled by the fact that Castro violated express provisions of the IRCA by using fraudulent documentation to obtain employment with Hoffman Plastic Compounds.<sup>66</sup> For the Court, this seemed to taint the entire employment relationship, even though, as opined by the court of appeals in *Hoffman I*, the IRCA does not expressly make the act of working while undocumented unlawful.<sup>67</sup>

The Court further emphasized the incompatibility of the IRCA and the NLRA by focusing on the conflict between the IRCA’s verification requirements and the NLRA’s mitigation requirements in the case of a backpay award.<sup>68</sup> The Court stressed the fact that the duties to mitigate

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fulfilling the mitigation requirement under the NLRA.

<sup>64</sup> *Id.* at 151–52.

<sup>65</sup> Several courts, including the Supreme Court in *Sure-Tan*, have found that the IRCA goals of reducing the incentive of illegal entry into the United States converge with the goals of the NLRA to protect the American work force. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 884 (1984). This allows the two acts to be reconciled without either having to yield. This view is more in line with the legislative intent of Congress in enacting IRCA, as discussed *supra* Part I.

<sup>66</sup> *Hoffman II*, 535 U.S. at 149 (“What matters here, and what sinks both of the Board’s claims, is that Congress has expressly made it criminally punishable for an alien to obtain employment with false documents.”). The IRCA, 8 U.S.C. § 1324c(a)(1)–(4), makes it a crime for a person to use any “forged, counterfeit, altered, or falsely made document” or “any document lawfully issued to or with respect to a person other than the possessor” to secure employment in the United States. Under 18 U.S.C. § 1546(b), persons who use such documents are subject to fines and criminal prosecution.

<sup>67</sup> See *Hoffman I*, 237 F.3d at 649. The view of the entire employment relationship being tainted is reminiscent of Justice Powell’s dissent in *Sure-Tan* which seems to become part of the majority opinion in *Hoffman II*. Concurring in part and dissenting in part in the *Sure-Tan* decision, Powell, joined only by Justice Rehnquist, took issue with finding that illegal aliens “are ‘employees’ within the meaning of that term in the National Labor Relations Act.” *Sure-Tan*, 467 U.S. at 913. Powell reasoned that “[i]t is unlikely that Congress intended the term ‘employee’ to include—for purposes of being accorded the benefits of that protective statute—persons wanted by the United States for the violation of our criminal laws.” *Id.* We see Rehnquist employ the same “clean hands” reasoning in the majority opinion in *Hoffman II*. Writing for the majority in *Hoffman II*, Rehnquist clearly based his decision on his belief that a Congress that enacted a statute creating a crime would not reward an offender of that statute. See *Hoffman II*, 535 U.S. at 148–49.

<sup>68</sup> *Hoffman II*, 535 U.S. at 150–51. Generally speaking, the majority in *Hoffman II* found that awarding backpay to illegal aliens “would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations.” *Id.* at 151. On the other hand, the Court may simply be reacting to the rigid tension between the IRCA and the NLRA presented by the facts of this case in which an undocumented discriminatee obtained employment by overtly vio-

under the NLRA cannot be fulfilled “without triggering new IRCA violations, either by tendering false documents to employers or by finding employers willing to ignore IRCA and hire illegal workers.”<sup>69</sup> The Court thus transitioned from a focus on Castro’s specific violation of the IRCA to a more general finding that “[u]nder the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies.”<sup>70</sup> This led the Court to conclude that “awarding backpay to illegal aliens runs counter to policies underlying IRCA . . . . Therefore . . . the award lies beyond the bounds of the Board’s remedial discretion.”<sup>71</sup>

The *Hoffman II* decision sparked a very strong dissent by Justice Breyer. His opinion echoed that of the D.C. Circuit Court in *Hoffman I* and stressed the importance of allowing the NLRB to award backpay, even in cases where the employer is unaware of the unauthorized status of the employee. To hold otherwise would encourage employers to “wink” and “nod” at verification documents, leading them directly to contravene the goals of the IRCA.<sup>72</sup>

Justice Breyer’s dissent, rather than highlighting the conflict between the IRCA and backpay awards under the NLRA, concentrated on how these awards fortify the purpose of federal immigration laws by reducing an employer’s incentive to hire undocumented aliens. Breyer noted that the purpose of the amendment to the INA was to “diminish the attractive force of employment, which like a ‘magnet’ pulls illegal immigrants toward the United States.”<sup>73</sup> Enforcing the full remedial powers of the NLRB under the NLRA helps the IRCA meet this goal by showing employers that even undocumented aliens will be afforded the potentially costly protections of the NLRA. Breyer also noted that the possibility of bringing a suit under the NLRA to recover backpay is not enough to attract undocumented workers to the United States because bringing such a suit is speculative and likely to subject undocumented discriminatees to INS proceedings and deportation.<sup>74</sup> As noted in *Patel v. Quality Inn South*, immigrants, documented and otherwise, enter the country in “the

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lating the IRCA.

<sup>69</sup> *Id.* at 151.

<sup>70</sup> *Id.* at 148. From this finding it does not logically follow that all violations of the IRCA should foreclose an award of backpay under the NLRA. For example, when an employer has violated the IRCA by not verifying documents or by intentionally hiring an undocumented labor force, and he then commits a violation under the NLRA, the fact that the IRCA and the NLRA were violated does not mean that the NLRA should automatically yield or that any of the remedies under the NLRA should be foreclosed. Instead, to prevent any such future violations of the IRCA, it might be best to sanction the employer to the maximum under both acts. In his dissent, Justice Breyer notes that this was not the scenario before the Court. *Id.* at 155.

<sup>71</sup> *Id.* at 149.

<sup>72</sup> *See id.* at 156.

<sup>73</sup> *Id.* (Breyer, J., dissenting) (quoting H.R. REP. NO. 99-682, pt. 1, at 45 (1986)).

<sup>74</sup> *See id.* at 155.

hope of getting a job” and not for the purpose of being afforded “the protection of our labor laws.”<sup>75</sup>

The close 5-4 margin between the majority and dissenting opinions in *Hoffman II* may indicate that a new majority, composed of the minority and at least one more justice, could distinguish and sustain the NLRB’s award if the NLRA case involved a backpay award to an undocumented worker who did not use false documents to obtain employment.<sup>76</sup> As such, the narrow majority and Justice Breyer’s dissent may prompt lower courts to test the boundaries of *Hoffman II* to determine how important the context of the decision is to the holding. In several cases upholding wage awards to undocumented workers under the FLSA, lower courts in New York and California have already declined to extend or have distinguished the Court’s ruling in *Hoffman II*.<sup>77</sup>

At this point, *Hoffman II* appears to leave lower courts with the same puzzle presented by *Sure-Tan*.<sup>78</sup> Is the language of the decision meant to provide plain language guidance to lower courts or is it a contextual decision based largely on the facts of the case? There is language in *Hoffman II* which supports both interpretations. Accordingly, it remains unclear whether the opinion of the Court is meant to be a general view of the clash between the IRCA and the NLRA or whether it is driven by the Court’s refusal to punish employer misconduct under the NLRA while discounting the misconduct of an undocumented worker under the IRCA. Narrowly read, the holding may allow an award of backpay to an undocumented alien when the employer has violated both the IRCA and the NLRA while the alien has done nothing to subvert the verification system of the IRCA. The danger is that if *Hoffman II* is interpreted too broadly, as a per se bar that fails to take into account cases involving employer

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<sup>75</sup> 846 F.2d 700, 704 (11th Cir. 1988).

<sup>76</sup> As Justice Breyer notes, the issue of whether “to assess backpay against a *knowing* employer” under the NLRA was not before the Court. *Hoffman II*, 535 U.S. at 155 (Breyer, J., dissenting).

<sup>77</sup> The following post-*Hoffman II* cases have declined to extend the *Hoffman II* analysis to compensatory wage and punitive damage awards under the FLSA: *Flores v. Amigon*, 233 F. Supp. 2d 462 (E.D.N.Y. 2002); *Singh v. Jutla & C.D. & R’s Oil, Inc.*, 214 F. Supp. 2d 1056 (N.D. Cal. 2002); *Zeng Liu v. Donna Karan Int’l, Inc.*, 207 F. Supp. 2d 191 (S.D.N.Y. 2002); *Flores v. Albertsons, Inc.*, No. CV 01-00515 AHM (SHX), 2002 WL 1163623 (C.D. Cal. Apr. 9, 2002).

<sup>78</sup> Although the Court in *Hoffman II* notes the competing interpretations of *Sure-Tan*, it does not decide whether it should receive a plain language or contextual interpretation. Instead, the Court avoids clarifying *Sure-Tan* by stating, “we think the question presented here [is] better analyzed through a wider lens, focused as it must be on a legal landscape now significantly changed.” *Hoffman II*, 535 U.S. at 147. Nonetheless, from the tone of the opinion as a whole, it may be inferred that the Court is advocating a plain language interpretation of the “lawfully entitled to be present and employed” language used in *Sure-Tan*.

In my opinion, clarifying the scope of *Sure-Tan*, a pre-IRCA Supreme Court decision, remains an important and live issue because of the references to existing labor laws made in the Congressional reports debating and discussing the passage of the IRCA. References to existing law are important to determine the IRCA’s effect on remedies available under the NLRA.

misconduct alone, this overly technical approach to reconciling the IRCA and the NLRA will undermine the purposes and functioning of the IRCA.

#### IV. DECIPHERING UNDOCUMENTED WORKERS' RIGHTS AFTER *HOFFMAN II*

##### A. *The NLRB's Position Post-Hoffman II*

On July 19, 2002, in light of the Supreme Court's decision in *Hoffman II*, the NLRB's Office of the General Counsel issued Memorandum 02-06.<sup>79</sup> The memorandum provides guidelines for the NLRB to decide which remedies are appropriate in cases involving undocumented discriminatees. In the document, the General Counsel accepts a broad interpretation of *Hoffman II*. The basic position of the NLRB is that undocumented discriminatees who have been unlawfully discharged are precluded from being awarded backpay under the NLRA, "regardless of the circumstance of their hire."<sup>80</sup> This means that all undocumented aliens are per se precluded from obtaining backpay under the NLRA, regardless of whether their hands are "clean" or not, whether their employers hired them knowing their legal status or not, or whether they were hired with work authorization that subsequently expired.<sup>81</sup>

The memorandum does not clearly state why the General Counsel supports such a broad interpretation of the *Hoffman II* decision.<sup>82</sup> On the contrary, the memorandum acknowledges that in *Hoffman II* "the Court's considerations focused on the employee's wrongdoing."<sup>83</sup> Additionally, in a footnote to the memorandum, the NLRB recognizes that, as stated by Justice Breyer's dissent in *Hoffman II*, the issue of a backpay award to a knowingly hired undocumented discriminatee was not before the Court.<sup>84</sup> What appears to be driving the NLRB in its opinion is the Court's finding in *Hoffman II* that an undocumented discriminatee is unable to mitigate damages as required by the NLRA without violating the IRCA.<sup>85</sup>

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<sup>79</sup> Gen. Couns. Mem. 02-06 (NLRB July 19, 2002), available at 2002 WL 1730518 (modifying Gen. Couns. Mem. 98-15 (NLRB Dec. 4, 1998)).

<sup>80</sup> *Id.* at \*3. There are no NLRB cases on record after *Hoffman II* awarding, disputing, or discussing backpay awards under the NLRA to undocumented discriminatees.

<sup>81</sup> The IRCA does not expressly prohibit an award of backpay to unlawfully discharged discriminatees whose work authorization expired during the course of employment. Moreover, absent an admission by the employer that he knew that an alien's work authorization had expired, the continued employment of this alien does not violate IRCA. The provisions of the IRCA do not expressly require that an employer recheck or monitor the expiration of a work authorization once an alien is hired.

<sup>82</sup> The NLRB notes that "[t]he Hoffman decision arguably does not affect the Board's remedy in A.P.R.A. because the employer in Hoffman was unaware that the discriminatee was undocumented when it hired him." Gen. Couns. Mem. 02-06, 2002 WL 1730518 at \*3.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at \*5 n.5.

<sup>85</sup> See *Hoffman II*, 535 U.S. at 150-51; Gen. Couns. Mem. 02-06, 2002 WL 1730518 at \*1, \*3.

Despite acknowledging that its remedial authority in cases involving undocumented aliens has been severely constrained, the NLRB memorandum notes that *Hoffman II* does not overturn the ruling in *Sure-Tan* that undocumented workers are employees under the NLRA.<sup>86</sup> The NLRB also continues to stand by its policy of awarding conditional reinstatement in cases where an employer fails to verify work authorization or knowingly hires, then unlawfully discharges, undocumented workers.<sup>87</sup> In summary, it is the NLRB's position that an employer is still liable under the NLRA for unlawfully discharging an undocumented alien. Nonetheless, the NLRB acknowledges that the severe constraint of a per se bar on awarding backpay to undocumented workers greatly limits not only the effectiveness of the remedies afforded undocumented discriminatees, but also the NLRB's ability to provide the remaining workers, documented and undocumented alike, with the full protections afforded by the NLRA.<sup>88</sup>

The NLRB distinguishes between awarding undocumented aliens "backpay" under the NLRA in unlawful discharge situations and other situations where the undocumented alien actually performed the work but was either not paid the appropriate wages or not paid at all, in violation of the FLSA. The NLRB concludes that since the latter scenario was not at issue in *Hoffman II*, "the Court did not preclude compensation for undocumented workers for work previously performed under unlawfully imposed terms and conditions."<sup>89</sup>

### B. Labor Law Cases Decided Post–*Hoffman II*

In line with the NLRB's position as announced in General Counsel Memorandum 02-06, various federal district courts have declined to apply *Hoffman II* in cases involving claims for unpaid wages under the FLSA.<sup>90</sup> In *Flores v. Albertsons, Inc.*, the U.S. District Court for the Central

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<sup>86</sup> Gen. Couns. Mem. 02-06, 2002 WL 1730518 at \*1.

<sup>87</sup> *See id.* at \*2. Since in *Hoffman II* the NLRB did not seek conditional reinstatement, this issue was not addressed by the Court and remains an open question. The other remedies that remain within the discretion of the NLRB in cases involving the unlawful discharge of undocumented workers include: formal settlements and the threat of contempt sanctions (especially where an employer knowingly hires undocumented workers); the reading of notices to employees; and other remedies tailored to the specific situation, such as requiring an employer to continue assisting an undocumented worker to obtain authorization. *Id.* at \*4.

<sup>88</sup> *See id.* at \*3–\*4.

<sup>89</sup> *Id.* at \*3. The NLRB observes that it is an open question whether the Court will uphold a backpay award to an undocumented discriminatee for the wages the worker would have earned but for having been unlawfully demoted into a lower paying job. In this setting, the mitigation requirement does not come into play because the worker remains employed. The NLRB notes, however, that the Court's concern with paying an undocumented discriminatee for work not performed is still present.

<sup>90</sup> The application of *Hoffman II* is limited to cases where claims of backpay are made for work *not performed*. *See, e.g., Cortez v. Medina's Landscaping, Inc.*, No. 00 C 6320, 2002 WL 31175471 (N.D. Ill. Sept. 30, 2002); *Flores v. Amigon*, 233 F. Supp. 2d 462

District of California, holding that immigration status is irrelevant to actions under the FLSA for unpaid wages, refused to compel the production of documents concerning a claimant's immigration status. The court based its decision on its conclusion that "*Hoffman [II]* does not establish that an award of unpaid wages to undocumented workers for work actually performed runs counter to IRCA."<sup>91</sup> Likewise, in *Zeng Liu v. Donna Karan International, Inc.*, the U.S. District Court for the Southern District of New York held that *Hoffman II*, which addresses cases involving awards of post-termination backpay for work not actually performed, does not apply to cases where undocumented discriminatees seek an award of unpaid wages for work performed pursuant to the FLSA.<sup>92</sup>

Several of the decisions following this line of reasoning also cite the *Hoffman II* court's concern with the inability of undocumented discriminatees to mitigate damages under the NLRA as an additional basis for distinguishing between remedies awarded under the FLSA and NLRA.<sup>93</sup> This distinction is important. The inability of undocumented aliens to fulfill the mitigation requirement under the NLRA without directly contravening the IRCA is a difficult hurdle to overcome. In *Flores v. Amigon*, Flores brought a claim under the FLSA and state wage laws for overtime wages that she was not paid during her three years of employment. Amigon, requesting documents regarding Flores' immigration status, raised a *Hoffman*-based defense. Amigon argued that *Hoffman II* precluded an award of backpay to undocumented workers. The court rejected Amigon's argument, reasoning that "unlike the problem posed in *Hoffman [II]*," where the NLRA requires an undocumented discriminatee who has been unlawfully discharged and is seeking backpay to mitigate, under the FLSA "no such impediment exists to repayment of any amounts proved to be owed . . . for work . . . already performed."<sup>94</sup>

Additionally, the *Amigon* court noted that "enforcing the FLSA's provisions requiring employers to pay proper wages to undocumented aliens when the work has been performed actually furthers the goals of IRCA."<sup>95</sup> The court reasoned that if employers know they will have to pay illegal workers at the same rate as legal workers, "there are virtually no incentives left for an employer to hire an undocumented alien."<sup>96</sup> This argument is reminiscent of the Supreme Court's finding in *Sure-Tan*:

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(E.D.N.Y. 2002); *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F. Supp. 2d 1056 (N.D. Cal. 2002); *Zeng Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191 (S.D.N.Y. 2002); *Flores v. Albertsons, Inc.*, No. CV 01-00515 AHM (SHX), 2002 WL 1163623 (C.D. Cal. Apr. 9, 2002).

<sup>91</sup> *Flores v. Albertsons, Inc.*, 2002 WL 1163623 at \*5 (emphasis added).

<sup>92</sup> 207 F. Supp. 2d at 192.

<sup>93</sup> See *Flores v. Albertsons*, 2002 WL 1163623 at \*5; *Flores v. Amigon*, 233 F. Supp. 2d at 463-64.

<sup>94</sup> *Flores v. Amigon*, 233 F. Supp. 2d at 464.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* Although I agree with the premise of the argument that providing undocumented aliens with the protection of U.S. labor laws is in line with the IRCA, the *Amigon* court's

If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened. In turn . . . there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws.<sup>97</sup>

It is also reminiscent of the argument the NLRB used and the Court rejected in *Hoffman II* with regard to the importance of providing remedies to undocumented workers under the NLRA in a post-IRCA environment.<sup>98</sup>

*Singh v. Jutla C.D. & R's Oil, Inc.* is another recent post-*Hoffman II* case that revisits and reaffirms the finding in *Sure-Tan*: that the goals of the INA in restricting illegal immigration converge with U.S. labor law objectives to protect the American work force.<sup>99</sup> *Singh*, however, is a very different case from the previously discussed post-*Hoffman II* cases, which denied motions to compel document production pertaining to a claimant's immigration status. In *Singh*, the court deemed an employer's act of calling the INS to report an illegal immigrant a violation of FLSA section 215(a)(3), thus, potentially pitting the IRCA and the FLSA directly against one another.<sup>100</sup>

The court in *Singh* "decline[d] to extend *Hoffman*" by focusing on the differences between the factual circumstances of the two cases.<sup>101</sup> The court distinguished *Hoffman II* by interpreting the holding contextually, rather than interpreting it broadly or following the "thrust" of the case.<sup>102</sup> The *Singh* court noted that the case before the Court in *Hoffman II* was one in which the employer unknowingly hired an undocumented alien and a backpay remedy was awarded for work not performed. In *Singh*, on the other hand, an undocumented alien brought a retaliation claim under

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argument that simply protecting them under the FLSA is enough to reduce virtually all employer incentives to hire illegal aliens is faulty. For example, the argument fails to realize the many benefits that can accrue to an employer who does not have to provide medical benefits, paid vacation, or allow union organizing activities.

<sup>97</sup> *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893–94 (1984). This excerpt reflects the very purposes of the IRCA, despite the fact that *Sure-Tan* was decided prior to its passage.

<sup>98</sup> Basing its decision on the NLRB's position in *A.P.R.A. Fuel*, the NLRB in *Hoffman* "determined that 'the most effective way to accommodate and further the immigration policies embodied in [the IRCA] is to provide the protections and remedies of the [NLRA] to undocumented workers in the same manner as to other employees.'" *Hoffman II*, 535 U.S. 137, 141 (2002) (quoting *Hoffman Plastic Compounds, Inc.*, 326 N.L.R.B. 1060, 1060 (1998)).

<sup>99</sup> *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F. Supp. 2d 1056, 1061–62 (N.D. Cal. 2002).

<sup>100</sup> *Id.* at 1059 ("[R]eporting an illegal alien to the INS is generally encouraged conduct because it is consistent with the labor and immigration policies established by the IRCA . . .").

<sup>101</sup> *See id.* at 1061.

<sup>102</sup> If the court in *Singh* chose to follow the "thrust" of the Supreme Court's decision, as the NLRB did in General Counsel Memorandum 02-06, it could have found that allowing an undocumented worker to bring an anti-retaliation claim under section 215(a)(3) of the FLSA was in violation of the IRCA. *See Gen. Couns. Mem. 02-06* (NLRB July 19, 2002), available at 2002 WL 1730518.

section 215(a)(3) of the FLSA after his employer, who hired Singh knowing that he was an illegal alien, turned him in to the INS after Singh sought unpaid wages for work performed.<sup>103</sup> Accordingly, the court held that the employer's behavior constituted an adverse employment action under the FLSA and that Singh, an undocumented alien, was entitled to bring such a claim.<sup>104</sup> Additionally, the court noted that the "FLSA's coverage of undocumented aliens helps to discourage illegal immigration and is thus fully consistent with the objectives of the IRCA."<sup>105</sup>

The post-*Hoffman II* cases' refusal to extend the *Hoffman II* holding to cases arising under the FLSA may lead to the conclusion that the distinction between wages for work that has been performed, as opposed to wages for work not performed, is driving the courts to treat wage remedies under the NLRA and the FLSA differently. However, as Justice Breyer notes in his dissent in *Hoffman II*, the very meaning of backpay under the NLRA is pay for work not performed.<sup>106</sup> Congress and the courts accepted this many years ago when the propriety of backpay remedies under the NLRA was heavily debated. Distinguishing between allowing undocumented aliens and authorized workers or U.S. citizens to receive backpay introduces the membership model into the discussion of the propriety of awarding unearned wages. However, the change from the personhood model that has allowed undocumented aliens to be classified as "employees" under the FLSA and the NLRA to a membership model has never been discussed or implicitly included in the reasoning of the courts. Nonetheless, distinguishing the FLSA from the NLRA based on the differences between earned and unearned wages is a worthwhile distinction to make in limiting the application of *Hoffman II* to the NLRA.

In awarding unearned wages under the FLSA, courts distinguish it from the NLRA and from the ruling in *Hoffman II* in two additional ways. First, the post-*Hoffman II* decisions have held that the FLSA, unlike the NLRA, does not have a mitigation requirement. Second, in *Singh*, the court also noted the difference between an employer who knowingly hires an undocumented alien and an employer who is unaware of a worker's undocumented status. These distinctions allow the courts the leeway necessary to decline to apply the *Hoffman II* decision without ignoring Supreme Court precedent. The issue that remains is whether these distinctions are necessary to avoid applying the precedent set in *Hoffman II*.

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<sup>103</sup> See *Singh*, 214 F. Supp. 2d at 1061. Section 215(a)(3) of the FLSA prohibits "any person" from "discharg[ing] or in any other manner discriminat[ing] against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter." 29 U.S.C. § 215(a)(3).

<sup>104</sup> See *Singh*, 214 F. Supp. 2d at 1061-62.

<sup>105</sup> *Id.* at 1058 (quoting *Patel v. Quality Inn S.*, 846 F.2d 700, 704 (11th Cir. 1988)). The court in *Singh* acknowledged that this argument was used unsuccessfully in *Hoffman II*. See *id.* at 1062.

<sup>106</sup> *Hoffman II*, 535 U.S. 137, 160 (2002) (Breyer, J., dissenting).

Moreover, can any of these distinctions be used in future NLRA cases involving backpay to an undocumented alien?

*C. Does the IRCA Require That Undocumented Aliens Be Denied Comprehensive Protection Under Federal Labor Laws?*

As discussed herein, the danger of interpreting *Hoffman II* broadly—that is, finding that undocumented workers are unable to receive an award of backpay under the NLRA regardless of the circumstances—is that this overly technical approach to reconciling the IRCA and the NLRA undermines the purposes of both U.S. labor and immigration laws. Unfortunately, this is the interpretation that the NLRB has given to *Hoffman II*. Thus, the danger to the U.S. workforce, to undocumented and therefore exploitable aliens, and to the effective functioning of both U.S. labor and immigration laws is imminent. Nonetheless, there is still hope for reconciling the two acts so as to provide undocumented aliens with comprehensive coverage under federal labor laws while ensuring the effective functioning of U.S. immigration laws and policy.

The NLRB has reconsidered and changed its position in the past, as seen in the progression of cases from *Local 512* to *A.P.R.A. Fuel* and *Hoffman II*. In *Local 512*, the NLRB accepted a plain language interpretation of *Sure-Tan* and took the position that it foreclosed an award of backpay to undocumented aliens.<sup>107</sup> In *A.P.R.A. Fuel* and *Hoffman II*, however, the NLRB found that the *Sure-Tan* decision had to be read in context. It took the position that a limited backpay award to undocumented aliens who remained in the United States after being unlawfully discharged is not foreclosed by *Sure-Tan* or by the IRCA.<sup>108</sup>

Currently, as evidenced by General Counsel Memorandum 02-06, the NLRB is once again accepting a plain language interpretation of a Supreme Court ruling. As time goes on, however, the NLRB may realize the possibility and value in testing a contextual interpretation of the Supreme Court's ruling in *Hoffman II*. As highlighted by Breyer's dissent in *Hoffman II*, there is room for lower courts to interpret *Hoffman II* contextually without contradicting the Supreme Court.<sup>109</sup> The major obstacle to contextually interpreting the *Hoffman II* decision is the conflict between the mitigation requirement under the NLRA and the provisions of the IRCA.

In *Hoffman II*, Rehnquist found that it was “impossible” for an undocumented alien to satisfy the mitigation requirement without violating

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<sup>107</sup> See *Local 512, Warehouse & Office Workers' Union v. NLRB*, 795 F.2d 705, 708 (9th Cir. 1986).

<sup>108</sup> See *Hoffman II*, 535 U.S. at 142 n.2; *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 53 (2d Cir. 1997).

<sup>109</sup> See *Hoffman II*, 535 U.S. at 155–56 (Breyer, J., dissenting) (commenting that awarding backpay to an undocumented worker when an employer knowingly hired him or her was not before the Court in *Hoffman II*).

the IRCA.<sup>110</sup> Post-*Hoffman II*, the NLRB has found the difference between the mitigation requirements of the NLRA and the lack thereof in the FLSA to be an important reason for distinguishing wage awards under the two acts and allowing such awards under the FLSA. In so finding, the Court and the NLRB have neglected to realize that there are ways of awarding backpay to undocumented workers and meeting the mitigation requirement without violating the IRCA. In situations where an alien seeks and finds employment after an unlawful discharge and would be hired but for his or her undocumented status, the mitigation requirement of the NLRA can be deemed satisfied and a backpay award limited up to that point without a future violation of the IRCA ever occurring.

More importantly, in focusing on the mitigation barrier, the Court and the NLRB have failed to give due consideration to the possibility of the NLRA and the IRCA working in tandem, particularly in NLRA cases where the undocumented alien has clean hands with regard to his or her initial employment relationship. It is not necessary to conclude that punishing a violation under the IRCA is foreclosed by protecting undocumented workers under the NLRA or vice versa. In cases where an alien uses fraudulent documents in contravention of the IRCA to mitigate as required under the NLRA, the alien can be punished under the IRCA for his or her transgression, while still allowing the NLRA to punish the unscrupulous employer who originally hired and exploited the undocumented alien. The NLRA and the IRCA can thereby operate jointly to reduce an employer's incentive to hire a category of workers who, in the past, have been easy to exploit. In the alternative, the NLRB can condition backpay awards on a clean hands policy by stipulating that using fraudulent documents to meet the mitigation requirement invalidates the award. If, on the other hand, it is the employer that hires the unauthorized alien in violation of the IRCA, either by not verifying work documents or knowingly hiring an unauthorized worker, the employer can be punished under the IRCA. As such, future violations of the IRCA will not go unpunished, and the purposes of the NLRA and immigration laws will also be upheld.

Despite the NLRB's current position regarding the interaction of the NLRA and the IRCA, undocumented aliens are not completely unprotected under U.S. labor laws. As previously mentioned, both the NLRB and post-*Hoffman II* cases have declined to apply the *Hoffman II* decision in FLSA cases, which suggests that courts, the NLRB, and perhaps other federal and state labor and employment agencies will strongly scrutinize the application of a *Hoffman II* analysis to other U.S. labor law cases. Additionally, the post-IRCA findings that undocumented aliens are still "employees" under the NLRA and the FLSA represents courts' acceptance of a membership model when deciding labor law cases involving

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<sup>110</sup> See *id.* at 148.

illegal aliens, rather than a less favorable shift toward the plenary power model which would likely result in undocumented workers being left with no protection at all. Accordingly, undocumented does not necessarily mean unprotected under U.S. labor laws. It does mean, however, that under certain U.S. labor and employment laws, undocumented aliens will be left without comprehensive and effective protection, to the detriment of all workers within U.S. borders and to the detriment of U.S. immigration laws and policies.