No. 00-1595

IN THE

Supreme Court of the United States

HOFFMAN PLASTIC COMPOUND, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Brief of Amici Curiae National Employment Law Project, Mexican American Legal Defense and Educational Fund, Asian American Legal Defense and Education Fund, Coalition for Humane Immigrant Rights of Los Angeles, *et al.* in Support of Respondent

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STATEMENT OF INTEREST OF AMICI CURIAE

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

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

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

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

rights. NELP attorneys have written, lectured, litigated, and engaged in policy advocacy on behalf of low-wage immigrant workers throughout the United States.

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

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

The Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA) is a non-profit organization founded in 1986 to advance the human and civil rights of immigrants and refugees in Los Angeles. As a multiethnic coalition of community organizations and individuals, CHIRLA aims to foster greater understanding of issues that affect immigrant communities, provide a neutral forum for discussion, and unite immigrant groups to more effectively advocate for positive change. CHIRLA's Workers' Rights Project addresses workplace justice issues through advocacy, organizing, and policy reform.

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

Florida Immigrant Advocacy Center (FIAC) is a non-profit agency with the mission to protect and promote the human rights of immigrants of all nationalities. FIAC provides direct legal representation and impact advocacy in areas of concern to immigrants. FIAC also engages in public education and the strengthening of immigrant communities. FIAC has offices in Miami, Fort Pierce, Immokalee, and Krome Detention Center. Additionally, FIAC, with others, formed the Florida Immigrant Coalition in December 1998 and coordinates the Coalition. The Coalition is a network of more than 25 groups working together for fair policies for Florida's immigrants.

The Illinois Coalition for Immigrant and Refugee Rights (ICIRR) is a non-profit, non-partisan state-wide organization whose mission is to promote the right of immigrants and refugees to full participation in our society. Together with more than 100 member agencies, ICIRR is involved in advocacy, organizing, community education and training, and service provision related to immigrant rights. As an organization that was spawned by the passage of the Immigration Reform and Control Act and a leader in current immigrant rights campaigns, ICIRR and its members have fought for fairness to immigrant workers.

The Immigration Rights Project (IRP) of the American Friends Service Committee's Central Regional office works to help create an atmosphere in the State of Iowa in which Latino immigrants can participate in the decision making process in their workplace, host community, city, and/or state. The IRP carries out a multi-faceted approach, which includes community organizing, education and advocacy efforts. It has been instrumental in developing the Iowa Immigrant Rights Network, which advocates on policy and legislative levels for immigrant rights.

The Legal Aid Society - Employment Law Center (LAS-ELC) is a San Francisco-based public interest law firm that has

advocated for many years on behalf of the interests of low-wage immigrant workers. LAS-ELC has a strong interest in the legal protections available to workers who may have a precarious immigration status, and particularly those who face employer retaliation as a result of asserting their workplace rights. LAS-ELC's litigation in this area includes cases such as *Contreras v. Corinthian Vigor Insurance Brokerage, Inc.*, 25 F. Supp. 2d 1053 (N.D. Cal. 1998), the first reported federal case to hold that undocumented workers are covered by the wage and anti-retaliation protections of the Fair Labor Standards Act of 1938, and are entitled to recover punitive damages for such retaliation. As a result, LAS-ELC and the communities it represents have a strong interest in the issues implicated by this case.

The Massachusetts Immigrant and Refugee Advocacy Coalition (MIRA) is the only organization in Massachusetts that brings together groups serving immigrants and refugees from many parts of the world of various nationalities, races, and ethnicities. Combining capacity building, technical assistance, community education, and policy advocacy with community organizing and civic participation, MIRA is committed to fairness for immigrants and to sound public policies. With 130 organizational members, MIRA is a respected state and national leader on immigrant issues.

The National Asian Pacific American Legal Consortium (NAPALC) is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, NAPALC and its affiliates, the Asian American Legal Defense and Education Fund, the Asian Law Caucus and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education on discrimination issues. As a leading national voice on the rights of immigrants, NAPALC and its affiliates advocate for the fair and nondiscriminatory treatment of immigrant workers.

The National Council of La Raza (NCLR) is a leading national civil rights organization established in 1968 to reduce poverty and discrimination, and improve life opportunities for Hispanic Americans. NCLR has chosen to work toward this goal through two primary, complementary approaches: capacity-building assistance to support and strengthen Hispanic community-based organizations, and applied research, policy analysis, and advocacy on issues such as education, immigration, housing, health, employment and training, and civil rights enforcement affecting the Hispanic community. NCLR's Policy Analysis Center is the preeminent Hispanic "think tank" serving as a voice for Hispanic Americans in Washington, D.C.

The National Immigration Law Center (NILC) is a national legal support center dedicated to protecting and promoting the rights of low-income immigrants and their family members. Over the past 22 years, NILC has utilized its expertise on immigration, public benefits, and employment laws to conduct trainings, produce publications, and provide technical assistance to legal aid programs, community-based organizations, churches, clinics and social service agencies across the country. NILC also conducts litigation to promote the rights of low-income immigrants in employment, immigration and access to public benefits.

NOW Legal Defense and Education Fund (NOW Legal Defense) is a leading national non-profit civil rights organization that uses the power of the law to define and defend women's rights. A major goal of NOW Legal Defense is the elimination of barriers that deny women full participation in the workplace. NOW Legal Defense's Immigrant Women Program (IWP) strives to protect and expand the rights of immigrant women and their children. The overarching goal of the IWP is enhancing the legal rights and basic economic security of immigrant women.

The Nebraska Appleseed Center for Law in the Public Interest is a non-profit, non-partisan law project committed to

equal justice for all Nebraskans. Nebraska leads the nation in beef slaughter and production, which provides employment opportunities for thousands of low-skilled workers, now mostly Hispanic immigrants. Nebraska Appleseed works to protect the legal and civil rights of these workers, through education, negotiation, legislation, and litigation.

Pineros y Campesinos Unidos del Noroeste (PCUN) is a union of agricultural and reforestation workers based in Woodburn, Oregon. PCUN represents over 4800 workers, most of whom are immigrants. Although much of its organizing is with agricultural workers who are excluded from the protection of the NLRA, many of its members work at least part of the year in activities, such as reforestation or food processing, subject to the protection of the Act. PCUN is concerned with its members' well being in non-agricultural work places. Further, PCUN is concerned that an adverse ruling by this Court under the NLRA could affect the available remedies under other anti-retaliation statutes that apply directly to agricultural workers, such as the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (1985), or the Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. § 1855(a) (1983).

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

The Washington Alliance for Immigrant and Refugee Justice (WAIRJ) is an alliance of organizations and individuals working collaboratively to advance the civil and human rights of immigrants and refugees in Washington State. WAIRJ pursues this mission by organizing and cultivating leadership in immigrant and refugee communities throughout Washington State. WAIRJ has supported union organizing campaigns led predominantly by immigrant workers in a number of industries in the state. WAIRJ has also documented the chilling effects of INS raids and other enforcement activities on workers' exercise of their right to organize and assert their rights under employment laws.

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

STATEMENT OF THE CASE

In the present case, José Castro filled out an employment application and presented the required work authorization documents at the time of his hire with Hoffman Plastic Compound, Inc. In his responses on the application itself, he indicated that he was not legally entitled to work in the United States.

Mr. Castro was laid off during a campaign to organize a union at Hoffman Plastic. The National Labor Relations Board (NLRB) found that he was illegally laid off in retaliation for union activities and awarded him back pay, which ran from the time of the unlawful discharge until the time that his employer elicited from him, in the course of NLRB proceedings, that he was not legally authorized to work in the United States. *Hoffman Plastic Compounds, Inc.*, 320 N.L.R.B. 1060 (1998). The employer now contends that it is not liable to Mr. Castro for back pay for any period of time, despite its concession that it acted illegally in Mr. Castro's layoff.

SUMMARY OF ARGUMENT

In many workplaces in our country, undocumented immigrant workers toil alongside documented immigrant and United States citizen workers. Some employers hire immigrant workers with a general knowledge that some in their workforce

lack authorization to be employed in this country. Others have more specific knowledge that many in their workforce are undocumented. In the worst cases, employers seek out undocumented workers for the purpose of taking advantage of them.

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

A legal system that denies undocumented workers back pay creates a perverse incentive where it is a "reasonable" business decision for an employer to retaliate against a union organizing campaign or the filing of a sexual harassment claim by turning all suspected undocumented immigrants in to the immigration authorities. When undocumented victims of discrimination are denied back pay as a remedy for retaliation, this unlawful strategy carries no cost to employers. Employers pay no penalty for their unlawful conduct and are encouraged to continue the practice with the next group of immigrant workers.

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

ARGUMENT

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

1. Employers in many industries hire undocumented workers despite IRCA.

Because of their vulnerability and willingness to work hard in difficult jobs at low wages without complaint, undocumented workers offer significant advantages to employers, despite IRCA's employer sanctions provisions. Many low-wage industries rely on immigrant workers, both documented and undocumented.

In the large immigrant states, three out of every four tailors, cooks, and textile workers are immigrants. A majority of taxicab drivers and service workers in homes are immigrants. Panel, *The New Americans: Economic, Demographic, and Fiscal Effects of Immigration* 215 (National Academy Press 1997).

Many of the workers in low-wage, dangerous jobs are undocumented. In 1996 and 1997, INS inspections found that 23% of workers at Nebraska and Iowa meatpacking plants had questionable documents. An INS inspection of eighty-nine construction businesses in Las Vegas found that 39% of workers appeared to be unauthorized to work. Inspections of seventy-four Los Angeles-area garment contractors found 41% of the employees were unauthorized to work. General Accounting Office, GAO/GGD-99-33, *Illegal Aliens: Significant Obstacles to Reducing Unauthorized Alien Employment Exist* 6 (Apr. 1999). Eighty-one percent of the agricultural workforce in the United States is foreign-born, and at least half of the workforce is not authorized to work in the United States. U.S. Department

of Labor, Research Rep. No. 8, *Findings from the National Agricultural Workers Survey 1997-98,* 5, 22 (Mar. 2000).[2]

In recent years, the number of undocumented immigrant workers in the poultry industry has increased, prompting the INS to deem it a major problem. *See* Lena H. Sun & Peter S. Goodman, *Poultry Firm to Help INS Monitor Workers*, Wash. Post, Oct. 23, 1998, at A18; David Griffith, *Jone's Minimal: Low Wage Labor In the United States* 157 (1993) (suggesting that poultry employers had "developed a preference for those most likely to be illegal aliens").

Many of these same industries are known for frequent violations of labor laws. In the poultry industry, following a 2000 survey of compliance with federal wage and hour laws, the Department of Labor concluded that 100% of all poultry processing plants were non-compliant with federal wage and hour laws. U.S. Department of Labor, *FY 2000 Poultry Processing Compliance Report* (2000). The violations discovered by the Department included violations of the FLSA's hours of work, overtime, child labor, and record keeping provisions, as well as non-compliance with the Family and Medical Leave Act. *Id.*

The U.S. Department of Labor has also found that two-thirds of all garment-manufacturing businesses in New York City can be characterized as "sweatshops." The competition between legal garment shops and illegal sweatshops has an industry-wide effect of driving down wages of all garment workers. *See Labor Department: Close to Half of Garment Contractors Violating FLSA,* 1996 Daily Lab. Rep. (BNA) 87 (May 6, 1996). Industries that employ large numbers of undocumented workers are also among the worst violators of labor and employment laws. A Department of Labor investigation-based survey of compliance in agriculture, focused on cucumbers, lettuce and onions, revealed that compliance with FLSA and the Migrant and Seasonal Agricultural Worker Protection Act in these commodities was "unacceptably low." U.S. Department of Labor, *Compliance Highlights,* 1, 3 (Nov. 1999). In suburban New York, where large numbers of workers toil in landscape and small construction, restaurants, domestic service and building cleaning and maintenance, "[u]ndocumented workers are the employees of choice in [these] sector[s] and abuses run high." Jennifer Gordon, *We Make the Road By Walking: Immigrant Workers, The Workplace Project, and The Struggle For Social Change*, 30 Harv. C.R.-C.L. L. Rev. 407, 413 (1995).

In their consideration of IRCA, both houses of Congress agreed that employers easily abuse undocumented workers. Each house concluded that undocumented immigrants, "out of desperation, will work in substandard conditions and for starvation wages." H.R. Rep. No. 99-682(I) at 47, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 5662 ("Rep. No. 99-682(I)"), *cited in A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 N.L.R.B. 408, 414 n.32 (1995), *aff'd sub nom. NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50 (2d Cir. 1997).

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

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

In Dallas, the Regional Administrator of the Wage and Hour Division of the U.S. Department of Labor indicates that illegal immigrant workers endure sexual harassment, denial of overtime pay and wages below the minimum federal standard because they are worried they will be deported. L.M. Sixel, *Aggressive Stance Urged for EEOC/Witnesses Describe Abuse of Immigrants,* Houston Chron., June 23, 1999, *available at* 1999 WL 3997076.

Thus, employers who hire undocumented workers gain a significant initial advantage of a workforce that is willing to work hard, under poor conditions and for poor wages. The workforce will, as well, suffer illegal conditions that lawfully present workers would contest. Additionally, immigrant workers have good reason to fear retaliation by their employers.

2. Retaliatory threats of INS raids are common when workers seek to enforce rights under the NLRA.

Many employers hire immigrant workers with a generalized knowledge that some in the workforce may be undocumented. Others have very specific knowledge that particular workers are undocumented. Still others seek out undocumented workers for the very purpose of taking advantage of them.

Whatever the initial degree of an employer's interest in a worker's immigration status, that interest rises sharply when workers begin to organize a union. In such cases, instances of retaliatory threats or actual reports to the INS are common. As shown below, the temptation to engage in this form of retaliation is overwhelming, given that it has no cost to the employer.

The NLRA expresses our national policy that all workers be free to exercise their right to organize and bargain collectively through representatives they choose, without interference or retaliation by their employers. 29 U.S.C. § 151 (1994). The law further provides that employers may not retaliate against workers who exercise these protected rights. Employers may not directly retaliate by threatening to fire or firing workers. Nor may they use the INS to retaliate indirectly. *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883 (1984). The protections of the law extend to all employees, regardless of their immigration status at the time the work was performed. *Id.* at 895.

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

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

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

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

months later, when Benavides and another undocumented worker, Alberto Guzman, became active in a union organizing drive, and in an atmosphere of "flagrant and pervasive unfair labor practices," the workers were fired. One day after the union won the election, the employer asked the INS to investigate the legal status of its employees. The Board found in favor of the employees and made a limited back pay award to Benavides and Guzman. *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 N.L.R.B. 408, 409, 415 (1995), *aff'd sub nom. NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50 (2d Cir. 1997).

Rodrigo Romero is a native of Belize. He worked in the warehouse of a Los Angeles department store for seven years. His employer knew of his undocumented status, and had, in fact, referred him to an immigration lawyer to gain legal residency. During an organizing campaign, he was pressured to vote against the union and reminded of his tenuous status. Romero voted in favor of union representation at the plant. The next day, he was fired, ostensibly because of his undocumented status. Nancy Cleeland, *Unionizing is Catch 22 for Illegal Immigrants' Jobs: Undocumented Status Makes Them Vulnerable to Workplace Retaliation*, L.A. Times, Jan. 16, 2000, *available at* 2000 WL 2201447.

In 1999, workers at a Holiday Inn Express hotel in Minneapolis voted to join the Hotel Employees and Restaurant Employees union. A call to the INS by the employer resulted in the arrest of eight members of the union's negotiating committee. T. Alexander Aleinikoff, *Illegal Employers*, Am. Prospect, Dec. 4, 2000.

In 1996, the Teamsters' and United Farm Workers' unions began a joint organizing drive in Washington State's lucrative apple industry, beginning with a packing company in Wenatchee, Washington. One employee, Mary Mendez, quotes the employer's anti-union consultant as having told the workers: "there hasn't been a union here yet, and the INS hasn't done any raids. But with a union, the INS is going to be around." The union lost the subsequent election, but the NLRB issued a bargaining order because of the company's many illegal actions. David Bacon, *Immigration Law – Bringing Back Sweatshop Conditions*, Nov. 10, 1998, *available at <http://www.igc.org/dbacon/Imgrants/11sanctn.html>* (documenting similar employer abuses in a maintenance company in the Silicon Valley of California, a knitting company on Long Island, and a video company in San Leandro, California).

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

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

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

Claudio Quijada worked as a janitor for a building maintenance company in White Plains, New York. He contacted the Service Employees International Union in October 1989 to organize the workforce. About a week later, when he went to pick up his check, a company manager told him that if he did not withdraw his support for the union, he would be reported to

the Immigration Service. The employer threatened to report another employee to INS because her brother refused to give false testimony at the employer's behest. The Board found in favor of the employees. *Accent Maintenance Corp.*, 303 N.L.R.B. 294, 296 (1991).

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

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

In Chicago in 1982, immigrant workers at a tortilla factory began an organizing drive. Among many other retaliatory acts, the employer instituted a policy that workers would not be allowed to collect their paychecks unless two forms of identification, such as a birth certificate, social security card or immigration document, were shown. In the course of interrogating an employee about her union sympathies, a manager showed the employee a newspaper article about INS arrests of workers during a union organizing drive, and stated that the employer, too, could call INS. The Board found the employer threats to report workers to the INS to be unlawful retaliation and issued a bargaining order on the basis of the numerous acts of retaliation. *Del Rey Tortilleria, Inc.*, 272 N.L.R.B. 1106, 1112 (1984), *order enforced by N.L.R.B. v. Del Rey Tortilleria*, 823 F.2d 1125 (7th Cir. 1987).

In 1975, employees at a shipbuilding plant on Long Island decided to join a union. The shipbuilder threatened to have one of the workers, Juan Figueroa, a native of Guatemala, deported if he testified against the employer at an NLRB hearing. *NLRB v. John Dory Boat Works, Inc.*, 229 N.L.R.B. 844, 852 (1977). *See also Corrugated Partitions West, Inc.*, 275 N.L.R.B. 894, 897 (1985) (California manufacturer repeatedly threatened to call INS on workers who supported the union); *Sun Country Citrus, Inc.*, 268 N.L.R.B. 700, 708 (1984) (Arizona employer violated Section 8(a)(1) of the NLRA by telling workers that immigration papers would be required to vote in union election); *Caffe Giovanni, Inc.*, 259 N.L.R.B. 233, 235, 237 (1981) (restaurant made at least two specific threats to induce action by the INS against workers engaged in union activities); *Futuramik Industries, Inc.*, 279 N.L.R.B. 185, 185 n.3 (1986) (employer threatened at least 10-20 workers either on election day or shortly before with INS enforcement if they voted for union representation); *Hasa Chemical, Inc.*, 235 N.L.R.B. 903, 905 (1978) (employer's president said that if he lost the election hearing he was going to call the INS and have all the "illegal aliens" hauled off); *Viracon, Inc.*, 256 N.L.R.B. 245, 246 (1981) (where an Illinois employer threatened to report undocumented workers to INS if union won election, the Board said: "Like the fears of job loss discussed above, fears of possible trouble with the Immigration Service or even of deportation must remain indelibly etched in the minds of any who would be affected by such actions on Respondent's part.").

Just in the last several months, the NLRB has ruled in two cases involving employer misuse of its knowledge of workers' unlawful status. In October 2001, a California waste company was found to have committed an unfair labor practice by contacting the INS a few days after a union representation election and telling eleven union supporters they could not work until they straightened out their immigration paperwork. The Board held that the employer's immigration status inquiry

was a "smokescreen" for unlawful discharges. *Nortech Waste*, 336 N.L.R.B. 79 (2001).

In August 2001, the Board overruled a Chicago employer's objections to a union election. The employer told the Board that some of the workers who voted in the election were undocumented. It offered as proof letters from the Social Security Administration indicating that some of the workers had invalid social security numbers. However, the Board pointed out that the employer had received letters from the Social Security Administration as far back as May 1999, and had not raised any questions about immigration status until after the union election in February 2001. *Superior Truss & Panel, Inc.*, 334 N.L.R.B. 115 (2001).

The above examples mainly involve written decisions by courts and by the NLRB. Many more complaints are made yearly that do not result in Board findings. Officials of the NLRB estimate that as many as forty-five complaints are filed yearly involving threats of deportation in the city of New York alone. Thomas Maier, *Workers Often Subject to Scare Tactics*, Newsday, Jul. 26, 2001. The secretary-treasurer of the Hotel Employees and Restaurant Employees' union, involved in the Holiday Inn Express case outlined above, says that immigration status "has come up in every single organizing campaign we've had in the last three years. In a number of our hotels, we have lost entire departments. And it really has a chilling effect on an organizing drive. People understand very clearly that if you are involved in trying to bring in a union, you put your job in jeopardy." Cleeland, *supra*.

3. Employer retaliation is also common when workers seek to enforce wage and hour, discrimination, health and safety, and other employment rights.

As noted above, employers use threats of INS raids as tools to maintain a non-unionized labor force. In addition, workers who seek to be paid minimum wage or overtime pay, have healthful work environments, or to be protected against sex discrimination or sexual harassment at work are also vulnerable to this form of abuse. The Court's back pay decision in the present case may affect employer retaliation and worker remedies under a host of other labor and employment laws.

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

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

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

In Gilbert, Arizona, female employees at Quality Art LLC, a picture frame manufacturing company, accused their employer

of offensive and intrusive searches, as well as other harassment on the basis of sex, such as being assigned to sex-segregated positions. The employer retaliated by terminating some employees, forced some workers to quit their jobs based on the hostile work environment, and reported the women to the INS. Although INS officials said that they sympathized with the women — calling them "courageous" for coming forward — INS indicated that the women likely would be returned to their countries. Yochi J. Dreazen & Rudy Kleysteuber, *Allegations of Sexual Harassment in Arizona Put Immigration Service and EEOC at Odds,* Wall St. J., Aug. 22, 2000, *available at* 2000 WL-WSJ 3040954.

Foreign garment workers from China sued their employers in Saipan under the FLSA using fictitious names because the recruiters and employers had threatened them with physical assault and other extreme forms of retaliation. The workers were required to surrender their passports upon hire, and were told by their employers that their families in China would be arrested, physically assaulted, and/or fined if the workers complained of unfair working conditions in the garment plants in Saipan. *Does I through XXIII v. Advanced Textile*, 214 F.3d 1058, 1065 (9th Cir. 2000).

Seven employees at a Staten Island laundry plant filed a complaint with the New York State Labor Department, charging that their employer owed them $159,000 in back wages. Five days later, the INS raided the workplace, under circumstances indicating that the employer had reported the workers. Matthew Strozier, *Immigrant Groups Call for End to Workplace Raids,* India Abroad, Oct. 23, 1998, *available at* 1998 WL 11376904.

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

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

Most recently in New York City, retail grocery and pharmacy chains hired labor contractors who recruited and hired delivery workers from among an almost exclusively undocumented West African community. After working 80 hour weeks for as little as $2 an hour, the workers filed a claim under the FLSA. The labor contractors knew the workers were undocumented and had not demanded proof of work authorization at the time of hire. However, later they began gathering copies of worker passports and visas in order to intimidate and harass complaining workers. A federal district court judge granted the delivery workers a protective order and a temporary restraining order prohibiting the employers from retaliating against them by turning them in to the INS. *Ansoumana v. Gristede's,* No. 00-0253 (S.D.N.Y. filed Jan. 13, 2000) <http://*www.nelp.org/litig10.pdf*>,<http://*www.nelp. org/litig9.pdf*>.

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

1. Employer sanctions provide no deterrent to employers who would retaliate.

As noted above, employer hiring of undocumented immigrants and use of immigration status as a club to defeat labor and employment claims continue unabated after IRCA. Employers have little reason to fear that INS will sanction them

for hiring undocumented immigrants, and so are free to retaliate. In fact, employers who would abuse the law can use the employer sanction system to their advantage.

The language of the verification requirements provides employers with a "gaping loophole" that they exploit by hiring aliens whom they know have presented fraudulent documents. William J. Murphy, Note, *Immigration Reform Without Control: The Need for an Integrated Immigration-Labor Policy,* 17 Suffolk Transnat'l L. Rev. 165, 177-78 (1994). Under IRCA, employers are only required to accept documents that appear on their face to be genuine and to relate to the individual named. 8 U.S.C. § 1324a(b)(1)(A) (1994). This has meant that an employer can ignore documents it suspects are invalid, allow the worker to use documents that belong to another person, or even take part in procuring documents for the worker.[3] For example, as in the case of Victor Benavides, the employer can simply request that the worker supply him with "legal" documents. *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 N.L.R.B. at 409.

3. In a rare occurrence, a federal grand jury indicted a Nebraska company as defendants in a conspiracy to smuggle undocumented workers for jobs in a beef packing plant, the result of a 14-month investigation that culminated in a raid in 2000. Margery Beck, *INS Adds Nebraska Beef to Worker Smuggling case,* Lincoln Journal Star, Nov. 17, 2001, at 5B. The workers, who had been recruited from Mexico by management, were promised well-paying jobs at the meat packing plant. Instead, the workers found themselves toiling in terrible working conditions at the plant, and many were not paid any of their wages. Over 200 workers were detained and deported by the INS, in the midst of a several-months long organizing drive. Deborah Alexander, *Nebraska Beef Faces Federal Indictments,* Omaha World-Herald, Dec. 7, 2000, at 6B.

Executives of a contract labor firm were recently sentenced on charges that they recruited workers who were known to be in the U.S. illegally, and used classes in asbestos abatement for this purpose. According to the Justice Department, instructors told immigrant workers to evade INS by throwing asbestos at officers before running away. ***Safety and Health: Three Sentenced in Scheme to Hire Undocumented Workers to Remove Asbestos,*** 176 Daily Lab. Rep. (BNA) A-8 (2001).

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

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

In early studies of employer compliance with IRCA, many admitted to researchers that they accept counterfeit documents "with a wink." Cecelia M. Espenoza, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986,* 8 Geo. Immigr. L.J. 343, 375 n.273 (1994).

Even where employers fail utterly to comply with the law, average employer sanctions fines are low and rarely assessed. INS has shifted the focus of its enforcement efforts away from the workplace and towards border enforcement. In fiscal year 1999, the INS apprehended 1,714,035 aliens. Of this number, the Border Patrol made 1,579,010 apprehensions, of which 97% were made along the southwest border. I.N.S., *1999 Statistical Yearbook of the Immigration and Naturalization Service* 4, *available at <http://www.ins.gov/graphics/aboutins/statistics/enf99text.pdf>.*

By contrast, the number of warnings to employers nationwide was 383, down 40% from 1998. The INS issued only 417 notices of intent to fine employers, nationwide, in 1999, a decrease of 59%. *Id.* at 5. Between 1989 and 1993, the average employer fine under the employer sanctions provisions was only

$292. Louis Freedberg, *INS to Crack Down on Employers*, S.F. Chron., Feb. 18, 1994, at 2.

Because of the provisions of the law and the focus of INS enforcement efforts, employers have little to fear from sanctions. The risk of sanctions being levied is, in fact, so low that sanctions amount to a cost of doing business, a "reasonable expense, more than offset by savings of employing undocumented immigrants in the first place or by the perceived benefits of union avoidance." *A.P.R.A. Fuel Oil Buyers Group*, 320 N.L.R.B. at 415.

Workers, on the other hand, have much to fear from employers. Employer retaliation against workers has reached a degree such that even the INS recently admitted that the only workers at risk of deportation for unauthorized employment are those reported by the employer in retaliation for protected organizing activities or "that kind of stuff." Lori A. Nessel, *Undocumented Immigrants in the Workplace: the Fallacy of Labor Protection and the Need for Reform*, 36 Harv. C.R.-C.L. L. Rev. 345, 359-362 (2001).

2. In a scheme without back pay, retaliation imposes no cost on employers.

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

Back pay performs two functions in the NLRB administrative scheme: it is intended to remedy the consequences of an unfair labor practice, and to deter further violations. *Consolidated Edison v. NLRB*, 305 U.S. 197 (1938). Back pay compensates victims of unfair practices by making them whole for the losses suffered on account of the unfair labor practice. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1940). Moreover, it deprives employers of the competitive advantage they secure by acting unlawfully.

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

For workers, the absence of back pay means the undocumented worker is put in a position worse than he would have held had he never made a complaint. That is, he is without a job, and without compensation for a job illegally taken from him. It is little wonder, therefore, that workers do not complain about illegal acts.

3. If left unremedied, employer retaliation against undocumented workers chills all workers' rights.

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

The impact of employers' unlawful conduct is felt not only by undocumented workers themselves, but by their co-workers as well. Documented workers and U.S. citizens may be reluctant to organize their workplaces because threats to turn workers over to the INS, properly timed, can undermine the election

process. Deportation of their undocumented co-workers will dilute the power of their bargaining unit, if it survives a union election.

Further, employers' violations of the NLRA, and other laws, may never come to light because of undocumented workers' fears of exposure. Such a result does damage to the retaliation protections in the laws and the entire remedial scheme. As this Court has said in another context, employee complaints "may disclose patterns of noncompliance resulting from a misappreciation of the Act's operation or entrenched resistance to its commands, either of which can be of industry-wide significance. The efficacy of its enforcement mechanisms becomes one measure of the success of the Act." *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 359 (1995). Complete freedom to make complaints without fear of retaliation is necessary "to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses." *John Hancock Mut. Life Ins. Co. v. NLRB*, 191 F.2d 483, 485 (D.C. Cir. 1951).

The inability of undocumented workers to make complaints and secure effective remedies takes on added significance in a system that relies on complaints. The NLRB has no authority to conduct investigations on its own. "[I]mplementation is dependent 'upon the initiative of individual persons.' " *Nash v. Florida Indus. Comm'n*, 389 U.S. 235, 238 (1967). Thus, when workers, fearing retaliation, fail to make complaints, unscrupulous employers profit. Both documented and undocumented workers suffer. In addition, the efficacy of the NLRA is undermined.

CONCLUSION

Congress passed the employer sanctions provisions of the Immigration Reform and Control Act as part of its strategy to "remove the economic incentive which draws [undocumented] aliens to the United States as well as the incentive for employers to exploit this source of labor." H.R. Rep. No. 99-682(I), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5656. Thus, Congress intended that enforcement of NLRA provisions would support the IRCA's purpose of reducing illegal immigration by focusing on the employer's unlawful actions. Back pay remedies, to the extent they "depriv[e] employers of any competitive advantage they may have secured by acting unlawfully," complement the purpose of the IRCA to protect U.S. labor markets from the effects of illegal immigration. *NLRB v. A.P.R.A. Buyers Group, Inc.*, 134 F.3d at 55.

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

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

> Illegal aliens do not come to this country to gain the protection of our labor laws. They come here for jobs. They can find jobs because they are often willing to work hard in rotten conditions for little money . . . When we deny back pay to illegal aliens, we tell employers to hire more of them; for aliens

> who cannot claim monetary damages for unfair labor practices are less expensive to hire and less trouble than their native counterparts.

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

The Board's remedy of limited back pay to undocumented victims of discrimination is the only countervailing force weighing against the incentive and economic advantage outlined in this brief. If the complementary policies of the NLRA and IRCA are to be given effect, this Court must endorse this remedy so that employers will know that the practice of threatening their workers with deportation has monetary consequences. Limited back pay such as that afforded Mr. Castro in this case also inform undocumented workers that U.S. labor laws protect them, not only on paper, but in reality.

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

Respectfully submitted,

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