

DRAWING THE LINE AFTER
HOFFMAN PLASTIC COMPOUNDS, INC. V. NLRB:
STRATEGIES FOR PROTECTING
UNDOCUMENTED WORKERS IN THE
TITLE VII CONTEXT AND BEYOND

*Christopher Ho** and *Jennifer C. Chang***

I. INTRODUCTION

This is a time of rapid change and uncertainty in the laws affecting immigrant workers and, in particular, those who are undocumented. Although the jurisprudence in this area has never been static, the Supreme Court's 2002 opinion in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*¹ constituted an abrupt departure from prior law, threatening to undo an established framework several decades in the making that had successfully reconciled seeming tensions between federal immigration and employment law policy. *Hoffman* discerned, for the first time, a Congressional policy to bar important remedies for undocumented workers under the National Labor Relations Act ("NLRA")² if such remedies could be construed to somehow "encourage . . . evasion of . . . immigration authorities, condone prior violations of the immigration laws, and encourage future violations."³

* Senior Staff Attorney, The Legal Aid Society - Employment Law Center, San Francisco, California.

** Skadden Fellow, American Civil Liberties Union Immigrants' Rights Project, Oakland, California.

The authors wish to express their gratitude to Michele Landis Dauber, William N. Nguyen, Anita Sinha, and Rebecca Smith for reviewing and commenting on earlier drafts of this article; to Kathryn Dittrick for her invaluable research assistance; to Maelle Fonteneau for her excellent editing; and to Maggie Irgens-Moller for her continued support and camaraderie.

1. 535 U.S. 137 (2002).

2. 29 U.S.C. § 151-169 (2005).

3. *Hoffman*, 535 U.S. at 151-52. Yet, as one judge has aptly observed, "Illegal aliens do not come to this country in order 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." Del

Since *Hoffman*, immigrants have witnessed developments both encouraging and discouraging. Workers' rights advocates have won important victories at the state level, securing protective policies to help fill potential gaps in federal law.⁴ More recently, the Bush administration has indicated that it will resume efforts to explore possibilities for legalizing undocumented immigrants already living in the United States.⁵ Yet anti-immigrant animus persists, fueling the passage of restrictive, Draconian initiatives at both the federal and state levels,⁶ and even leading

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

4. See, e.g., CAL. GOV'T CODE § 7285 (2005) (declaring that "[a]ll protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state" and that "in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person's immigration status except where the person seeking to make the inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law."); 2003 N.Y. Op. Att'y Gen., Formal Opinion No. 2003-F3 (2003) (*Hoffman* does not preclude the New York State Department of Labor from enforcing state wage payment laws on behalf of undocumented immigrants); Statement by Gary Moore, Director, Washington of the Dept. of Labor & Industries, Washington Dep't of Labor & Industries (May 21, 2002) (affirming that state agency in charge of enforcing worker safety, minimum wage, and worker compensation laws will continue to fulfill its mission "without regard to the worker's immigration status") (on file with authors); Op. Ltr. of Director of Washington State Human Rights Comm'n (Oct. 7, 2002) (asserting that state human rights commission "does not view the *Hoffman* case as restricting its authority to seek back pay as a remedy for acts of discrimination in violation of state law") (on file with authors); see also Rebecca Smith, Amy Sugimori & Luna Yasui, *Low Pay, High Risk: State Models for Advancing Immigrant Workers' Rights*, 28 N.Y.U. REV. L. & SOC. CHANGE 597, 607-09 (2004); Bob Egelko, *Immigration: The Legal Whorl; State Seeks to Protect Back Pay for Undocumented Workers*, S.F. CHRON., May 26, 2002, at A7 (describing state labor commissioner's position that workers are entitled to protection under state wage, hour, health and safety laws regardless of immigration status). But see Reinforced Earth Co. v. Workers' Compensation Appeal Bd., 810 A.2d 99, 109-10 (Pa. Commw. Ct. 2002) (Newman, J., dissenting) (arguing that where state law conflicts with federal policy, state law policies must give way).

5. See, e.g., Peter Wallsten & Chris Kraul, *Neighborly Tensions Nag Bush*, L.A. TIMES, Mar. 24, 2005, at A4 (describing Bush pledge to President Vicente Fox of Mexico "that I will continue to push our Congress to come up with rational, common-sense immigration policy."); Darryl Fears, *Immigration Measure Introduced*, WASH. POST., May 13, 2005, at A08 (reporting Congressional introduction of bipartisan bill to allow undocumented workers currently in the United States to apply for guest worker status, and to permit persons from other countries to do the same, contingent upon proof of job availability).

6. See, e.g., REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (Slip Copy May 11, 2005) (inter alia, preventing states from issuing standard federally recognized drivers' licenses to undocumented immigrants; making political asylum claims more difficult to prove; eliminating 28 U.S.C. § 2241 habeas corpus review of final orders of removal; and expanding the grounds of inadmissibility); Javier Erik Olvera, *Tancredo Floats Plan to Slash Foreign Aid*, ROCKY MTN. NEWS, June 16, 2004, at 24A (describing proposal to eliminate U.S. assistance to countries receiving more than half a billion dollars in remittances sent home by immigrant workers); Amanda J. Crawford et al., *Prop 200: Migrant Issue Wins, May Head to Court*, ARIZ. REPUBLIC, Nov. 3, 2004, at 10A (describing passage of Arizona initiative requiring state residents to prove American citizenship when

to violent crime against immigrant workers in some parts of the country.⁷

At the same time, the actual impact of *Hoffman* on immigrant workers' rights remains to be fully tested. How judicial interpretations of the primary federal labor and civil rights statutes that have historically protected undocumented workers will evolve from this point forward is yet to be wholly understood. Should courts uncritically adopt *Hoffman*'s internally inconsistent and needlessly punitive rationale in different statutory contexts and for more expansive purposes, there will be severe consequences for the effective enforcement of employment and labor laws in the United States and, in turn, for all who are employed in the American workplace, whether documented or not.

Another more practical and immediate ramification of *Hoffman* in the litigation context warrants special concern: its now nearly routine invocation by employer defendants as a ground for invasive discovery into a plaintiff's immigration status. For a universe of reasons only too well known, undocumented workers are already highly reluctant to come forward to defend their legal rights. For one, a common consequence of doing so is the employer's retaliatory reporting of the worker to federal immigration authorities, with the distinct prospect of prosecution and deportation. An uncritical expansion of *Hoffman* – which made an employee's immigration status germane to her entitlement to backpay under the NLRA – to justify intimidating inquiries wholly irrespective of the statute involved or relief sought would eviscerate the ability of undocumented workers, and possibly that of many others, to seek justice against unprincipled employers.

Because of *Hoffman*'s potentially significant impact on the rights of undocumented workers, it is crucial to ensure that its holding is narrowly and judiciously circumscribed. This article will examine two ways in which *Hoffman*'s reach is properly so limited. First, *Hoffman*'s analysis

seeking public services or registering to vote, and requiring state employees to report suspected undocumented immigrants to federal immigration authorities); Susan Greene, *Unbowed, Tancredo keeps pushing immigration issue*, DENVER POST, Aug. 31, 2004, at A11 (quoting Congressional opponent of Bush administration "guest worker" legalization proposal as saying that "[i]f we have another event like 9/11 and it happens by someone here illegally, then the blood of the people killed in that event will be on our hands. . . .").

7. Campbell Robertson, *Immigrant Policies Take a More Aggressive Turn*, N.Y. TIMES, Nov. 14, 2004, at L11 (discussing violence and hostility directed at Mexican and Central American day laborers in Suffolk County, New York); see also Susan Carroll, *Supremacists a border worry: FBI, civilian group are concerned about racists joining border sweeps next month*, TUCSON CITIZEN, Mar. 5, 2005, at 4A (discussing widespread concerns about hate violence against migrants during the Minuteman Project, a month-long civilian border patrol effort in southeastern Arizona).

– grounded in the specific purposes of the NLRA and the limited competence of the National Labor Relations Board (“NLRB”) to referee apparent conflicts with other laws – cannot be fungibly imported into other statutory schemes. Second, *Hoffman* does not give license to defense counsel to utilize intrusive and threatening discovery tactics as a means of coercing withdrawals of claims or dismissals of plaintiffs, inasmuch as it does not address how, or even whether, discovery into status can legitimately be obtained in the first place. To the contrary, well-worn provisions of the Federal Rules of Civil Procedure militate strongly against such a result, and the public interest would be disserved by the chilling effect that the specter of such discovery would invariably have upon immigrant plaintiffs.

Part II.A of this article briefly surveys the state of the law prior to *Hoffman*, and in particular the longstanding Congressional and judicial recognition of the imperative to protect undocumented immigrants from workplace abuses to the same extent as authorized workers. Part II.B discusses the circumstances that gave rise to the *Hoffman* decision, with a critical analysis of the Court’s reasoning therein and its misguided repudiation of well-established jurisprudence and public policy. Part II.C examines the potential impact of the *Hoffman* rationale upon the ability of immigrant workers, documented and undocumented alike, to pursue redress for the unlawful actions of their employers. Next, using actions brought under Title VII of the Civil Rights Act of 1964⁸ as an example, Part III of this article demonstrates that the flawed *Hoffman* analysis cannot, in any event, be generically extended to other statutes. Finally, Part IV explains that for a variety of reasons, *Hoffman* does not confer *carte blanche* upon employer defendants to launch invasive and intimidating inquiries into the immigration status of employees who assert their legal rights.

II. BACKGROUND

A. *The Legal Landscape Before Hoffman*

Recent estimates have placed the number of undocumented workers in the United States at 5.3 million,⁹ out of a total undocumented popula-

8. 42 U.S.C. §§2000e–2000e-17 (2000).

9. See Dean E. Murphy, *A New Order: Imagining Life Without Illegal Immigrants*, N.Y. TIMES, Jan. 11, 2004, at 4-1.

tion of between 7 to nearly 11 million.¹⁰ One recent study has gone so far as to more than double these numbers.¹¹ As has been amply described elsewhere, the conditions under which these persons work are –owing to their precarious circumstances – typically substandard, rife with exploitation by avaricious employers and, sometimes, astoundingly appalling in the extent and depth of their cruelty.¹² Less well known are the contri-

10. See U.S. IMMIGRATION AND NATURALIZATION SERVICE, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 1990-2000 (2003), at 1 (7 million); Jeffrey S. Passel, *Estimates of the Size and Characteristics of the Undocumented Population*, Pew Hispanic Center, Mar. 21, 2005, at 1-2, available at <http://pewhispanic.org/files/reports/44.pdf> (nearly 11 million); B. Lindsay Lowell & Roberto Suro, *How many undocumented: The numbers behind the U.S. - Mexico Migration Talks*, Pew Hispanic Center, March 21, 2002, available at <http://www.pewhispanic.org/site/docs/pdf/howmanyundocumented.pdf> (7.8 million).

11. See Robert Justich & Betty Ng, *The Underground Labor Force Is Rising To The Surface*, Bear Stearns Asset Mgmt., Inc., Jan. 3, 2005, at face page, 5-13 (stating that “[t]he number of illegal immigrants in the United States may be as high as 20 million people” and that undocumented workers hold approximately 12 to 15 million jobs, citing inter alia to unreliability of Census data collection procedures and based on analyses of remittances sent abroad, housing permits in immigration “gateway communities,” school enrollment data, and cross-border flows), available at <http://www.bearstearns.com/bscportal/pdfs/underground.pdf>; see also Press Release, Inter-Am. Dev. Bank, Remittances to Latin American and Caribbean Countries Topped \$45 Billion in 2004 (Mar. 22, 2005), available at http://www.iadb.org/NEWS/Display/PRView.cfm?PR_Num=41_05&Language=English (reporting that about three-quarters of such remittances were sent from the United States).

12. Soberingly, stories of such exploitation are commonplace: In August 1995, law enforcement officials conducting a workplace raid in El Monte, California, discovered over seventy undocumented workers who had been made to work in slave-like conditions in a home garment manufacturing operation. The compound in which they had been imprisoned was encircled by razor wire. These and dozens of other workers, most of them Thai nationals and Latinas, worked as many as twenty-two hours a day, seven days a week, and were often paid less than \$2.00 an hour. Some of the workers chose not to attend a public ceremony at which they were presented with the wages owed them for fear of possible employer reprisals against family members. Cal. Dept. of Indus. Relations, *DIR Delivers Partial Wages to Garment Slave Workers*, available at http://www.dir.ca.gov/Bulletin/Mar_Apr_96/thaiworkers.html.

In July 1997, New York City police arrested members of a human smuggling ring that had trafficked sixty-two Mexican deaf-mutes, including twelve children, into the United States. The workers, who had been housed in squalid, overcrowded apartments, had been forced to sell key chains and other trinkets in the streets and subways, and were threatened with being beaten or turned over to the INS if they complained or did not comply. At the end of each day, the workers turned over all of their earnings to their “bosses.” Typically, they were forced to work twelve to eighteen hours daily, and were allowed only two days off every other month. Deborah Sontag, *Poor, Deaf and Mexican, Betrayed in Their Hope*, N.Y. TIMES, July 25, 1997, at A1.

Macan Singh, an undocumented Indian, was trafficked into the United States in 1995 by his uncle, who had promised him a good job, tuition for education, and an eventual share in his Northern California gas station business. Instead, upon his arrival, Singh was made to work every day, typically for twelve hours at a time, for nearly three years, all without pay. After Singh signed a settlement in which his uncle agreed to pay a portion of his unpaid wages, the uncle immediately called the INS to report his whereabouts. Singh spent the next fifteen months in INS detention. Bob Egelko, *Jury Awards \$200,000 to Illegal Immigrant*, S.F. CHRON., Dec. 20, 2003, at A-3; see also

butions that undocumented workers make to the American economy and way of life, contributions that are as difficult to overstate as these workers are invisible.¹³ The principled delineation of their legal rights as employees in the United States is therefore of great consequence, and demands careful consideration notwithstanding the emotionally charged and highly politicized national debate over illegal immigration.

For the greater part of their history, the federal immigration laws, up until and including the passage in 1952 of the Immigration and Nationality Act (“INA”),¹⁴ generally concerned only the terms and conditions under which foreign nationals would be classified and admitted to this country and, perhaps, become its naturalized citizens.¹⁵ None of

Smith, *supra* note 4, at 597-600.

13. For example, Congress recognized in the course of enacting the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified at 8 U.S.C. § 1324a-1350 (2000)), that

[m]any of these people have been here for a number of years and have become a part of their communities. Many have strong family ties here which include U.S. citizens and lawful residents. They have built social networks in this country. They have contributed to the United States in myriad ways, including providing their talents, labor and tax dollars. However, 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, employers or landlords or when they become ill.

Jud. Comm., H.R. REP. NO. 99-682(I), at 58 (1986), *reprinted in* 1986 U.S.S.C.A.N. 5649, 5653. *See also e.g.*, DANIEL ROTHENBERG, WITH THESE HANDS: THE HIDDEN WORLD OF MIGRANT FARMWORKERS TODAY 144 (1998) (“In many regions of the country, there is a growing fear that immigrants are abusing public services, flooding public schools with children who don’t speak English, and costing society far more than they contribute. In fact, immigrants, both legal and illegal, contribute to American society in much the same way as citizens. They earn wages, pay income tax, Social Security, property tax (often as rent), and sales tax Undocumented immigrants, on the other hand, have long been denied virtually all nonemergency social service benefits.”). These observations find considerable empirical support. *See, e.g.*, Eduardo Porter, *Illegal Immigrants are Bolstering Social Security with Billions*, N.Y. TIMES, Apr. 5, 2005, at A-1 (estimating that undocumented workers in the U.S. provide subsidy of as much as \$7 billion a year to Social Security system and \$1.5 billion to Medicare); Salomón R. Baldenegro, *Immigrants Boost, Don’t Drain, the U.S. Economy*, TUCSON CITIZEN, June 13, 2002, at 5B (“There are great misperceptions that immigrants are a drain on our economy, but many studies have confirmed that the opposite is true. Even undocumented workers—commonly referred to as ‘illegal’ contribute more than their fair share to our great country,” quoting Congressional testimony of Federal Reserve Board chairman Alan Greenspan, July 2001; also citing studies indicating that undocumented workers pay \$90 billion in federal and state income taxes, and \$2.7 billion in Social Security taxes annually); *A safety net for immigrants*, CHI. TRIB., Aug. 14, 2001, at N14 (illegal immigrants in Illinois pay \$547 million in taxes yearly, compared to \$238 million in services used); Jeffrey S. Passel & Rebecca L. Clark, *Immigrants in New York: Their Legal Status, Incomes, and Taxes*, Urban Institute, Apr. 1, 1998 (undocumented immigrants in New York state contribute over \$1 billion in total taxes annually), at <http://www.urban.org/url.cfm?ID=407432>.

14. 8 U.S.C.A. §§ 1101-1105 (2005).

15. *See, e.g.*, Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 979 (1988) (“[U]ntil the

these enactments, however, had ever been understood as vehicles for the regulation of undocumented labor.¹⁶ Thus, although it was unlawful for an immigrant to enter the United States without inspection, it was not *per se* unlawful for her to seek and obtain employment here.¹⁷

As a result, the judicial decisions treating claims by undocumented workers under such mainstay protective statutes as Title VII,¹⁸ the NLRA,¹⁹ the Fair Labor Standards Act (“FLSA”),²⁰ the Farm Labor Contractor Registration Act²¹ and its successor, the Migrant and Seasonal Agricultural Worker Protection Act (“MSAWPA”),²² were in near-unanimous agreement that those workers, notwithstanding the illegality of their presence in the United States, were still entitled to all of the rights and remedies afforded by those laws.²³

implementation of employer sanctions, immigration law directly regulated border and entry only.”).

16. *See, e.g., De Canas v. Bica*, 424 U.S. 351, 360 (1976) (observing that INA had only “a peripheral concern with employment of illegal entrants”); *NLRB v. Apollo Tire Co., Inc.*, 604 F.2d 1180, 1183 (9th Cir. 1979) (“The INA, which makes it a felony to harbor an illegal alien, provides that employment shall not constitute harboring.” This is known as the so-called “Texas Proviso.” Other immigration laws, of course, did have their origins in the desire to regulate the labor market. *See, e.g., Chinese Exclusion Act* (“Act of May 6, 1882”), 22 Stat. 58 (1882), which was enacted with the goal of protecting domestic workers from having to compete with Chinese labor but also heavily laden with racist overtones (*see* H.R. REP. NO. 46-572, at 11 (1880); H.R. REP. NO. 240, at 2-3 (1878)); the more comprehensive Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153 (1924) (establishing preferences within immigration quota system for those having job-related skills in certain economic sectors); and the 1965 amendments to the INA requiring that aliens seeking to obtain work certification from Department of Labor that there are insufficient domestic workers available to perform the work in question, and that employment of aliens therein will not adversely affect working conditions of Americans similarly employed (codified at 8 U.S.C. § 1182(a)(5)(A) (2000)).

17. “Once an alien has crossed the border, however, employment is not an additional offense (in fact, it is no crime at all).” *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1124 (7th Cir. 1992) (Cudahy, J., dissenting).

18. *See Bevles Co. v. Teamsters Local 986*, 791 F.2d 1391, 1392-93 (9th Cir. 1986) (applying pre-IRCA law); *Rios v. Enterprise Ass’n Steamfitters Local Union 638*, 860 F.2d 1168, 1172 (2d Cir. 1988) (applying pre-IRCA law); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1517 (9th Cir. 1989) (applying pre-IRCA law).

19. *See Local 512, Warehouse and Office Workers’ Union v. NLRB*, 795 F.2d 705, 716 (9th Cir. 1986) (following *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984)); *Apollo Tire Co.*, 604 F.2d at 1183; *but see Del Rey Tortilleria, Inc.*, 976 F.2d at 1121 (applying pre-IRCA law, disagreeing with *Local 512* and interpreting *Sure-Tan* as disallowing backpay awards).

20. 29 U.S.C.A. §§ 201-262 (2000); *see, e.g., In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987) (applying pre-IRCA law); *Donovan v. Burgett Greenhouses, Inc.*, 759 F.2d 1483, 1485 (10th Cir. 1985) (applying pre-IRCA law); *Castillo v. Givens*, 704 F.2d 181, 183 (5th Cir. 1983); *Lopez v. Rodriguez*, 668 F.2d 1376, 1377-78 (D.C. Cir. 1981).

21. 7 U.S.C. §§ 2041-2055 (repealed 1983); *see Montelongo v. Meese*, 803 F.2d 1341, 1352 n.17 (5th Cir. 1986).

22. 29 U.S.C. §§ 1801-1803 (2000); *see, e.g., In re Reyes*, 814 F.2d at 170.

23. Indeed, the Supreme Court has long recognized that undocumented immigrants are fully entitled to the protections of the Constitution in many different contexts. *See, e.g., Wong Wing v.*

In the Supreme Court's first decision expressly addressing the legal status of undocumented workers under federal law, *Sure-Tan, Inc. v. NLRB*,²⁴ the Court affirmed the longstanding position of the National Labor Relations Board that such workers were "employees" protected by the NLRA. In *Sure-Tan*, five undocumented workers had been reported to the INS by their employer in retaliation for having voted in favor of a union, and "voluntarily" left the country as a result. Affirming the Seventh Circuit's conclusion that *Sure-Tan's* actions were "unlawful labor practices" violating the NLRA, the Court observed: "[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." If undocumented alien employees were excluded from participation in union activities and from protections against employer intimidation, a subclass of workers would be created without a comparable stake in the collective goals of their legally resident co-workers, thereby eroding the unity of all the employees and impeding effective collective bargaining.²⁵

Although the Court found that the workers in question could not claim the backpay otherwise owed to them "during any period when they were not lawfully entitled to be present and employed in the United States,"²⁶ it did so in the context of the NLRB's standard practice of tolling backpay when discriminatees are physically unavailable to work,²⁷ inasmuch as they were no longer physically present in the United States.²⁸ Most circuits, accordingly, interpreted *Sure-Tan* as barring

United States, 163 U.S. 228, 237-38 (1896) (holding that Chinese unlawfully in the United States are nonetheless covered by Fifth and Sixth Amendment rights to due process and speedy trial, relying on *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)); *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (holding undocumented individuals to be "persons" within Texas jurisdiction and therefore protected by Equal Protection Clause).

24. 467 U.S. 883 (1984).

25. *Id.* at 892 (quoting *De Canas v. Bica*, 424 U.S. 351, 356-57 (1976)) (internal citation omitted).

26. *Id.* at 903.

27. See, e.g., *Local 512*, 795 F.2d at 715 n.9; see *NLRB v. Hickory's Best, Inc.*, 267 N.L.R.B. 1274, 1277 (1983) (including when out of the country).

28. *Sure-Tan*, 467 U.S. at 902-03 (holding that a backpay award in the case "must be conditioned upon the employees' legal readmittance to the United States"). The *Sure-Tan* Court "generally approve[d]" of the NLRB's initial order of backpay and reinstatement to the affected workers. *Id.* at 902. The Court took issue, however, with the Seventh Circuit's use of an admittedly "conjectural," *NLRB v. Sure-Tan, Inc.*, 672 F.2d 592, 606 (7th Cir. 1982), six-month backpay period as a means of balancing the fact of the workers' immediate, employer-instigated deportation (and consequent unavailability for work) against the likelihood that they might have remained and worked in the United States for an additional period of time but for *Sure-Tan's* unlawful labor practices. *Sure-*

backpay only to undocumented plaintiffs currently outside the United States who could not lawfully re-enter the country.²⁹

Congress's enactment in 1986 of the Immigration Reform and Control Act ("the IRCA")³⁰ was the next major development to address the legal status of undocumented workers. The IRCA was enacted in response to widespread concerns that, by coming to the United States to seek employment, undocumented immigrants were depriving authorized workers of jobs that the latter would otherwise have taken.³¹ In order to counteract this "jobs magnet" effect, and with the ultimate aim of curtailing illegal immigration,³² the IRCA amended the INA in two significant ways. First, the IRCA made it illegal for employers knowingly to hire undocumented workers,³³ and established a system through which employers were required to verify the employment authorization of their employees upon hire by reference to specifically designated docu-

Tan, 467 U.S. at 902-05.

29. See *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 54 (2d Cir. 1997); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1517 (9th Cir. 1989); *Rios v. Enterprise Ass'n. Steamfitters Local Union 638*, 860 F.2d 1168, 1173 (2d Cir. 1988); *NLRB v. Ashkenazy Property Mgmt. Corp.*, 817 F.2d 74, 75 (9th Cir. 1987); *Bevles Co. v. Teamsters Local 986*, 791 F.2d 1391, 1393 (9th Cir. 1986); *Local 512*, 795 F.2d at 719; but see *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1121 (7th Cir. 1992) (interpreting *Sure-Tan* as disallowing backpay awards irrespective of employees' presence in the United States).

30. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.).

31. Such concerns are empirically disputed. See, e.g., President George W. Bush, Presidential Radio Address (Jan. 10, 2004), (*available at* <http://www.whitehouse.gov/news/releases/2004/01/print/20040110.html/>) ("Some of the jobs being generated in America's growing economy are jobs American citizens are not filling If an American employer is offering a job that American citizens are not willing to take, we ought to welcome into our country a person who will fill that job [We should] recognize[] the contributions that many undocumented workers are now making to our economy."); Julian L. Simon, *Immigration: The Demographic & Economic Facts*, Cato Inst. & Nat'l Immigration Forum § 1 (Dec. 11, 1995) ("Immigrants do not cause native unemployment, even among low-paid or minority groups. A spate of respected recent studies, using a variety of methods, agrees that 'there is no empirical evidence documenting that the displacement effect [of natives from jobs] is numerically important' [citation omitted] The jobs [immigrants] create with their purchasing power, and with the new businesses they start, are at least as numerous as the jobs which immigrants fill."), *at* http://www.cato.org/pubs/policy_report/pr-immig.html.

32. For instance, the House Judiciary Committee's report on the IRCA legislation stated that "the primary reason for the illegal alien problem is the economic imbalance between the United States and the countries from which aliens come, coupled with the chance of employment in the United States The committee, therefore, is of the opinion that the most reasonable approach to this problem is to make unlawful the 'knowing' employment of illegal aliens, thereby removing the economic incentive which draws such aliens to the United States as well as the incentive for employers to exploit this source of labor." H.R. REP. NO. 99-682(1), at 58 (1986), *reprinted in* 1986 U.S.C.A.N. 5649, 5656.

33. 8 U.S.C. § 1324a(a)(1)(A) (2000).

ments.³⁴ Thus – for the first time – hiring undocumented workers became unlawful in itself, and employers who did so were subject to sanctions.³⁵ Second, because of Congress’s concern that employers’ fear of incurring those sanctions could lead them to ‘play it safe’ by refusing to hire anyone whom they suspected might be unauthorized, despite her presentation of the required documents, the IRCA contained new provisions barring employers from discriminating against applicants or employees because of their national origin or citizenship status.³⁶

Importantly, although it prohibited the knowing employment of undocumented individuals, the IRCA did nothing to diminish their legal entitlement to existing labor and employment law protections.³⁷ To the

34. See 8 U.S.C. § 1324a(b) (2000) (establishing what is commonly known as the “I-9 process”). In addition, in 1990, Congress amended the IRCA by adding penalties for employers who insist upon more or different documents than those deemed sufficient under the statute. 8 U.S.C. § 1324b(a)(6) (2000) (amended in 1996 to add intentional discrimination requirement, Pub. L. No. 104-208 § 421(a)). Employers need only examine each document proffered by an applicant to see whether it “reasonably appears on its face to be genuine.” 8 U.S.C. § 1324a(b)(1)(A) (2000).

35. 8 U.S.C. § 1324a(e)(4)–(5) (2000). There is evidence to indicate that these employer sanctions are only infrequently imposed. See, e.g., *2003 Yearbook of Immigration Statistics*, Office of Immigration Statistics, U.S. Dept. of Homeland Security, Sept. 2004, at 147, 157 (between fiscal years 1997 through 2003, issuances to employers of notices of intent to impose employer sanctions fell from 865 to 162, and arrests of employers violating the IRCA dropped from 17,554 to 445), available at <http://uscis.gov/graphics/shared/aboutus/statistics/2003Yearbook.pdf>; Jenny Schulz, *Grappling with a Meaty Issue: IIRIRA’s Effect on Immigrants in the Meatpacking Industry*, 2 J. GENDER RACE & JUST. 137, 145-46 (1998) (describing instances where employers have “escaped sanctions” despite large-scale immigration raids at their workplaces). Moreover, although the IRCA provides for monetary penalties of up to \$10,000 for violations of its hiring provisions (and up to \$1,000 for paperwork compliance violations), data indicate that the fines actually imposed upon IRCA-violating employers are in fact far more modest in their actual amount. Based on computations utilizing INS data collected from the IRCA’s effective date through May 2000, the average sanction imposed during that period for “knowing hire” violations was \$720.91; for “continued knowing hire” violations, \$695.20; for having no I-9 records, \$193.99; and for improperly filled out I-9 forms, \$177.15. During the same period, there were only 6,331 instances of sanctions for “knowing hires” and 736 instances of sanctions for “continuing hires” nationwide. (Computations on file with the authors.)

The data utilized in these calculations were obtained from the INS by the Center for Immigration Studies through a Freedom of Information Act request, and are publicly available at <http://www.cis.org/sanctions/db.zip>. CIS notes that this database “contains all closed cases through May 2000, though the information on cases before 1997 is often incomplete (for instance, many cases will list no specific violations and no fine amounts, the data not having been reported to headquarters or not having been entered into the computer system.) Center for Immigration Studies, *Introduction to the Sanctions Database*, at <http://www.cis.org/sanctions/help/intro.html>.

36. 8 U.S.C. (a)(1) (2000). In doing so, the IRCA’s national origin antidiscrimination provisions complement those under Title VII inasmuch as they cover employers with 4–14 employees, below the Title VII threshold of fifteen employees.

37. The right of unlawfully fired undocumented employees to reinstatement continues to be an open question. See, e.g., *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 56-57 (2d Cir. 1997) (ordering reinstatement of unlawfully discharged undocumented employees, where they

contrary, the report of the House Judiciary Committee on the IRCA legislation clearly expressed the intent that undocumented workers continue to be fully covered by those workplace statutes, and that the IRCA's employer sanctions provisions should therefore not

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.³⁸

Such continued coverage for undocumented workers, the Committee observed, "helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment."³⁹ Likewise, the House Labor and Education Committee took pains to note the same concerns:

[T]he committee does not intend that any provision of this Act would limit the powers of State or Federal labor standards agencies such as the Occupational Safety and Health Administration, the Wage and Hour Division of the Department of Labor, the Equal Employment Opportunity Commission, the National Labor Relations Board, or Labor arbitrators, in conformity with existing law, to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by those agencies. To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.⁴⁰

Significantly, the IRCA also provided funding for the increased enforcement of certain federal labor standards agencies "in order to deter

had been "knowingly" hired as undocumented by the employer, conditioned upon their presentation of IRCA-required employment authorization documents within "a reasonable time."). Based on *A.P.R.A.*, the NLRB General Counsel continues to apply the conditional reinstatement remedy in cases of "knowing" employers. See Nat'l Labor Relations Bd. *Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens after Hoffman Plastic Compounds, Inc.*, Memorandum GC 02-06 (July 19, 2002). The NLRB's interpretations of the NLRA are entitled to great deference and are subject only to "limited judicial review." *NLRB v. Weingarten*, 420 U.S. 251, 267 (1975).

38. H.R. REP. NO. 99-682(I), at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5662.

39. *Id.* (relying on *Sure-Tan*).

40. H.R. REP. NO. 99-682(II), at 8-9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5758.

the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens.”⁴¹

Accordingly, and in keeping with the Supreme Court’s analysis in *Sure-Tan*, the IRCA’s passage did nothing to disturb the prevailing judicial consensus that undocumented workers were generally entitled to the same employment rights and remedies that were available to all workers.⁴² This was expressly reflected in the post-IRCA decisions under the NLRA,⁴³ Title VII,⁴⁴ the FLSA,⁴⁵ and the MSAWPA,⁴⁶ as well as state

41. Immigration Reform and Control Act, Pub.L. No. 99-603, § 111(d), 100 Stat. 3359, 3381 (1986), codified as amended at 8 U.S.C § 1101 (2000); *see also* Brief of Respondent the National Labor Relations Board at 36, *Hoffman*, 535 U.S. 137, (2002) (No. 00-1595), available at 2001 WL 1597748 (discussing § 111(d) of the IRCA); *EEOC v. Tortilleria “La Mejor”*, 758 F. Supp. 585, 590 (E.D. Cal. 1991) (citing with approval, analysis of § 111(d) contained in *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988)).

42. The most notable exceptions with respect to such coverage are state laws providing that undocumented workers are not entitled to receive unemployment compensation benefits. *See, e.g.*, CAL. UN. INS. C. § 1264 (2005) (limiting unemployment benefits to lawfully present aliens); *Gutierrez v. Employment Dev. Dept.*, 18 Cal. Rptr. 2d 705, 709 (Cal. Ct. App. 1993) (indicating that undocumented workers are not considered “available for work” within meaning of CAL. UN. INS. C. § 1253(c) due to lack of employment authorization).

43. *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 56 (2d Cir. 1997) (holding “without hesitation that the IRCA did not diminish the Board’s power to craft remedies for violations of the NLRA”); *NLRB v. Kolkka*, 170 F.3d 937, 940-41 (9th Cir. 1999) (relying on IRCA legislative history to affirm NLRB conclusion that the IRCA did not call *Sure-Tan* into question, and noting that finding otherwise would mean that “an employer would be able to avoid its obligations under both statutes. An employer would be rewarded for violating the IRCA through the hiring and continued employment of unauthorized aliens because their participation in any union election would defeat that election, even if it was otherwise valid under the NLRA.”). *See also* *Hernandez v. M/V Rajaan*, 848 F.2d 498, 500 (5th Cir. 1988) (en banc) (interpreting *Sure-Tan*, in action under Longshore and Harbor Workers’ Comp. Act, as not barring payment of future lost wages to injured undocumented longshore worker absent showing that he was about to be deported at time of injury).

44. *EEOC v. Switching Sys. Div. of Rockwell Intl. Corp.*, 783 F. Supp. 369, 374 (N.D. Ill. 1992) (“Plaintiff plainly is correct that Title VII’s protections extend to aliens who may be in this country either legally or illegally.”); *Tortilleria “La Mejor”*, 758 F. Supp. at 590-91 (relying inter alia on IRCA legislative history, *Local 512, Warehouse and Office Workers’ Union v. NLRB*, 795 F.2d 705, 716 (9th Cir. 1986), and *Patel v. Quality Inn S.*, 846 F.2d 700 (11th Cir. 1988)). *But see* *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184, 186-87 (4th Cir. 1998) (summarily rejecting relevance of *Sure-Tan* due to passage of the IRCA, court reasoned that plaintiff was ineligible for reinstatement due to his expired work authorization and, thus, “has no cause of action.”).

45. *Patel*, 846 F.2d at 703 (relying on *Sure-Tan* and the IRCA legislative history to hold that argument that Congress did not intend to cover undocumented workers “is contrary to the overwhelming weight of authority”); *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 25 F. Supp. 2d 1053, 1058 (N.D. Cal. 1998) (finding undocumented worker could maintain FLSA retaliation action against former employer, and noting that permitting state law to pre-empt FLSA coverage of undocumented workers would “not only weaken[] the anti-retaliation provision of the FLSA, it virtually guts it.”); *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 103 F. Supp. 2d 1180, 1185 (N.D. Cal. 2000) (granting summary judgment for undocumented plaintiff, finding retaliating employer undertook “adverse employment action” against her inasmuch as “a report to the INS or the SSA of a former employee’s undocumented status clearly affects the former employee’s ability to maintain

and other federal workplace statutes.⁴⁷ As then-Circuit Judge Anthony M. Kennedy observed in 1979, “[i]f the NLRA were inapplicable to workers who are illegal aliens, we would leave helpless the very persons who most need protection from exploitative employer practices”⁴⁸

B. *The Hoffman Decision*

In *Hoffman*, the Supreme Court considered the question whether, in light of the IRCA, the NLRB had authority to award backpay to an undocumented worker harmed by his employer’s unfair labor practice.⁴⁹ In a 5-4 decision authored by Chief Justice Rehnquist, the Court held that backpay for undocumented workers, under the NLRA, is foreclosed by the federal immigration policies reflected in the IRCA.⁵⁰

The case arose out of an unfair labor practice charge alleging that the employer, Hoffman Plastic Compounds, Inc., had fired several workers in retaliation for their participation in a union organizing campaign.⁵¹ Upon finding against Hoffman, the NLRB ordered several remedies, including a requirement that Hoffman offer reinstatement and backpay to the employees who had been terminated.⁵² At a subsequent administrative hearing held to determine the amount of backpay owed to each worker, one employee, José Castro, testified that he was born in Mexico and had never been legally admitted to the United States or legally authorized to work here.⁵³ He further testified that he had gained

employment”); *Contreras v. Corinthian Vigor Insurance Brokerage, Inc.*, 142 Lab.Cas. P34165, 6 Wage & Hour Cas. 2d (BNA) 845 (N.D. Cal. 2000) (awarding compensatory and punitive damages for unlawful retaliation resulting in INS apprehension and detention).

46. *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990); *Escobar v. Baker*, 814 F. Supp. 1491, 1498 (W.D. Wash. 1993).

47. See, e.g., Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 503 (2004) (“State courts have generally interpreted their laws as applying to all covered employees regardless of immigration status.”). For example, virtually all state workers’ compensation statutes made (and continue to make) no distinction between documented and undocumented workers, and in many cases have expressly been determined by their respective state courts to extend to the latter. See Sarah Cleveland, Beth Lyon & Rebecca Smith, *Inter-American Court of Human Rights Amicus Curiae Brief: The United States Violates International Law When Labor Law Remedies are Restricted Based on Workers’ Migrant Status*, 1 SEATTLE J. FOR SOC. JUST. 795, 818 n.73-75 (2003).

48. *NLRB v. Apollo Tire Co., Inc.*, 604 F.2d 1180, 1184 (9th Cir. 1979) (Kennedy, J., concurring).

49. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (2002).

50. *Id.*

51. *Id.* at 140.

52. *Id.* at 140-41.

53. *Id.* at 141.

employment at Hoffman by using the birth certificate of a friend who was born in the U.S.⁵⁴

The administrative law judge (“ALJ”) concluded that the NLRB could not award backpay or reinstatement to Castro, reasoning that such relief would conflict with the IRCA and with *Sure-Tan*, which held, as discussed above, that undocumented workers are not entitled to backpay for periods during which they are “unavailable” for work.⁵⁵ The NLRB subsequently reversed the ALJ’s decision with respect to backpay, finding that awarding the same remedies to undocumented workers as to other employees would further the policies embodied in the IRCA.⁵⁶ A three-judge panel of the D.C. Circuit denied Hoffman’s petition for review,⁵⁷ as did an en banc panel upon rehearing, thereby allowing to stand the NLRB’s order awarding backpay to Castro.⁵⁸

The Supreme Court reversed, vacating the backpay award. The opinion by Chief Justice Rehnquist reflected three overall themes: the limited discretion of the NLRB; the dictates of national immigration policy embodied in the IRCA; and concerns over the practical consequences of awarding backpay to undocumented workers.

The Court emphasized that the NLRB’s generally broad discretion to fashion remedies for NLRA violations is not unlimited, particularly where the agency’s decision necessitates the interpretation of a statute other than the NLRA: “[W]here the Board’s chosen remedy trenches upon a federal statute or policy outside the Board’s competence to administer, the Board’s remedy may be required to yield.”⁵⁹ The Court discussed precedent, noting that the NLRB may not ignore other Congressional objectives.⁶⁰ In particular, where other policies or statutes are implicated, the expertise rationale for deferring to the NLRB’s judgment is inapplicable and the NLRB is “entitled [to] no deference from this Court.”⁶¹

54. *Id.*

55. 467 U.S. 883, 903 (1984); *see also supra* notes 24-28 and accompanying text.

56. *Hoffman*, 535 U.S. at 141.

57. 208 F.3d 229, 231 (D.C. Cir. 2000).

58. 237 F.3d 639, 640 (D.C. Cir. 2001).

59. 535 U.S. at 147; *see also id.* at 142-43 (“This case exemplifies the principle that the Board’s discretion to select and fashion remedies for violations of the NLRA, though generally broad, is not unlimited.”) (internal citations omitted).

60. *Id.* at 143-44; *see also id.* at 144 (“[W]e have . . . never deferred to the Board’s remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA.”).

61. *Id.* at 143-44.

The Court found that the enactment of the IRCA in 1986 resulted in “a legal landscape now significantly changed”⁶² and that, accordingly, the pre-IRCA *Sure-Tan* line of cases was not controlling.⁶³ The Court outlined what it viewed as key changes in national immigration policy embodied in the IRCA, which ‘forcefully’ made combating the employment of illegal aliens central” to federal immigration policy.⁶⁴ As the Court elaborated, these changes included the establishment of an employment verification system designed to deny employment to undocumented persons through the operation of the I-9 process; the imposition of civil and criminal penalties for knowingly hiring undocumented workers; and a prohibition on the use of false or fraudulent documents to obtain employment.⁶⁵ The Court reasoned:

Under 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. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA’s enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations.⁶⁶

The Court rejected the NLRB’s argument that a backpay award to Castro reasonably accommodated and was not inconsistent with the IRCA, where the award was limited to the period during which Hoffman was not violating any provision of the IRCA (i.e., through its unawareness of Castro’s lack of status).⁶⁷ The Court disapproved of the NLRB’s exclusive focus on the employer’s wrongdoing and dismissed the NLRB’s reliance on the fact that Congress had nowhere explicitly barred backpay awards to undocumented workers:

What matters here . . . is that Congress has expressly made it criminally punishable for an alien to obtain employment with false documents. There is no reason to think that Congress nonetheless intended to permit backpay where but for an employer’s unfair labor practices, an alien-employee would have remained in the United States illegally, and continued to work illegally, all the while successfully evading ap-

62. *Id.* at 147.

63. *See id.*

64. *Id.* (citations omitted).

65. *Id.* at 147-48.

66. *Hoffman*, 535 U.S. at 148.

67. *Id.* at 149.

prehension by immigration authorities. Far from “accommodating” IRCA, the Board’s position, recognizing employer misconduct but discounting the misconduct of illegal alien employees, subverts it.⁶⁸

Thus, the Court concluded that the new immigration policies it discerned in the IRCA barred backpay awards to undocumented workers under the NLRA as inconsistent with the IRCA’s scheme.

Further, the Court expressed concern about the practical consequences of awarding backpay to undocumented workers, asserting that such awards would condone and encourage future violations of the immigration laws.⁶⁹ The Court stated that because an undocumented worker who is detained by the Immigration and Naturalization Service (“INS”)⁷⁰ or who departs the U.S. is considered to be unavailable for work, she would be able to qualify for backpay only by continuing her illegal stay within the U.S. and avoiding apprehension by immigration authorities.⁷¹ Moreover, according to the Court, an undocumented worker cannot fulfill her obligation of mitigating damages without obtaining new employment and thereby engaging in a further violation of the IRCA.⁷²

The Court concluded:

[A]llowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations. However broad the Board’s discretion to fashion remedies when dealing only with the NLRA, it is not so unbounded as to authorize this sort of an award.⁷³

The Court closed by concluding that a prohibition on backpay would not undermine the remedial scheme of the NLRA given the other remedial options available to the Board. The NLRB’s power to issue

68. *Id.* at 149-50 (citations omitted).

69. *Id.* at 150.

70. Effective March 1, 2003, the INS was abolished and its functions were transferred to the newly formed Department of Homeland Security (“DHS”) pursuant to the Department of Homeland Security Reorganization Plan. *See* 6 U.S.C. § 542 (2000).

71. *See Hoffman*, 535 U.S. at 150.

72. *See id.* at 150-51; *see also* Oral Argument Transcript at *31-33, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (No. 00-15952002), *available at* 2002 WL 77224 (2002) (reflecting on Justice Scalia’s comment that rather than mitigate losses, undocumented workers “can just sit home and eat chocolates and get [their] back pay [sic]”).

73. *Id.* at 151-52.

prospective cease and desist orders and require the posting of a notice of employee rights and of the employer's unfair labor practices, the Court concluded, were remedies sufficient to give effect to national labor policy.⁷⁴

As highlighted by Justice Breyer's dissent,⁷⁵ the *Hoffman* majority's reasoning is flawed in a number of respects.

First, the majority opinion fundamentally misunderstands both the economic incentives involved in enforcing the labor laws and the realities faced by undocumented workers. As a result, the majority erroneously concluded that permitting a backpay remedy in this context would undermine the purposes of the immigration laws and "encourage future violations" of the immigration laws.⁷⁶ Yet neither an immigrant's initial decision to come to the United States nor her decision to remain here are affected by the uncertain promise of backpay, for, as Breyer persuasively argued, "so speculative a future possibility could not realistically influence an individual's decision to migrate illegally."⁷⁷ Such workers come here in search of employment – not in hopes of becoming a victim of an unfair labor practice or of discrimination.⁷⁸ Moreover, as immigrants' advocates can attest, many immigrant workers are unfortunately unaware of their rights under U.S. employment laws; they could hardly be motivated by legal protections with which they are unfamiliar.⁷⁹

Contrary to the *Hoffman* majority's view, its holding may actually encourage employers to violate the IRCA by creating an economic incentive for employers to favor undocumented workers over others. As Justice Breyer explained, denying the backpay remedy to undocumented workers may "very well increase the strength of [the] magnetic force" of employment which draws immigrants to the U.S.⁸⁰ He elaborated, "[t]hat

74. *See id.* at 152.

75. Justice Breyer was joined in his dissent by Justices Stevens, Souter, and Ginsberg. *See Hoffman*, 535 U.S. at 153-61 (Breyer, J., dissenting).

76. *Id.* at 150-51.

77. *Id.* at 155 (Breyer, J., dissenting) (citing A.P.R.A. Fuel Oil Buyers Group, Inc., 320 N.L.R.B. 408, 410-15 (1995)).

78. *See supra* note 3. Indeed, President Bush noted during the 2004 presidential debates that as long as undocumented immigrants can "make \$5 here in America, \$5.15, [they're] going to come here if [they're] worth [their] salt." *See* Transcript: Third Presidential Debate (Oct. 13, 2004), *available at* http://www.washingtonpost.com/wp-srv/politics/debatereferree/debate_1013.html (last visited Apr. 22, 2005).

79. In contrast, unscrupulous employers are likely to be more sophisticated about their legal rights and responsibilities, and to use their comparatively greater knowledge to take advantage of workers who are unfamiliar with their rights. Given this unequal playing field, the *Hoffman* majority's decision to tip the balance still further in favor of employers is particularly troublesome.

80. *Hoffman*, 535 U.S. at 155 (Breyer, J., dissenting).

denial lowers the cost to the employer of an initial labor law violation (provided, of course, that the only victims are illegal aliens). It thereby increases the employer's incentive to find and hire illegal-alien employees."⁸¹ Further, as the Supreme Court has previously recognized, lowering protections for undocumented workers acts to depress conditions for all employees, jeopardizing all workers' rights.⁸² Prohibiting backpay awards to undocumented workers therefore both contravenes the purpose of the IRCA by encouraging their hiring, and undermines the enforcement of the labor laws for all those in the American workplace.

Second, the majority's holding is not borne out by the statutory text. As Justice Breyer emphasized in dissent, "the statutes' language itself does not explicitly state how a violation is to effect the enforcement of other laws, such as the labor laws."⁸³ He continued:

What is to happen, for example, when an employer hires, or an alien works, in violation of these provisions? Must the alien forfeit all pay earned? May the employer ignore the labor laws? More to the point, may the employer violate those laws with impunity, at least once—secure in the knowledge that the Board cannot assess a monetary penalty? The immigration statutes' language simply does not say.⁸⁴

The relevant statutory language thus does *not* compel the conclusion that backpay may not be awarded to undocumented workers. Indeed, as we explained in Part II.A above, the IRCA itself provided for increased funding for workplace law enforcement,⁸⁵ and the reports of the House Judiciary Committee and House Labor and Education Committee made abundantly clear that the IRCA was not intended to alter existing labor protections or diminish the enforcement powers of agencies such as the NLRB or the U.S. Equal Employment Opportunity Commission ("EEOC").⁸⁶

81. *Id.*

82. *See, e.g.,* *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984) (reasoning that applying the NLRA to undocumented workers "helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment").

83. *Hoffman*, 535 U.S. at 155 (Breyer, J., dissenting).

84. *Id.*

85. *See* Immigration Reform and Control Act, Pub.L. No. 99-603, § 111(d), 100 Stat. 3359, 3381 (1986), codified as amended at 8 U.S.C. § 1101 (2000). The IRCA authorized appropriation of funds to the Department of Labor for wage and hour enforcement, in order to "deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens." *Id.*

86. *See supra* notes 37-41 and accompanying text. For example, the House Judiciary Committee report stated that the IRCA does not "undermine or diminish in any way labor protections in

The *Hoffman* majority erred in yet another respect. Because of the longstanding principle that implicit repeal of a Congressional mandate is disfavored, a court faced with the competing directives of two federal statutes must endeavor to give effect to both wherever possible.⁸⁷ As the Supreme Court has explained, “[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.”⁸⁸ Accordingly, “when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”⁸⁹ Here, as Justice Breyer observed, the IRCA’s text is silent on what should happen when an employer violates the rights of an unauthorized worker: nowhere does it explicitly repeal any remedies available under the NLRA. In addition, because undocumented persons do not base their immigration decisions on the availability of backpay, allowing backpay pursuant to the NLRA can hardly be said to undermine the policy objectives of the immigration laws. Because the two statutory schemes are not mutually irreconcilable, the Court erred in holding that the NLRB lacked the authority to award backpay to an undocumented worker.

In the following section, we discuss the potential impact on immigrant workers of the *Hoffman* Court’s flawed decision.⁹⁰

existing law, or . . . limit the powers of federal or state labor relations boards . . . to remedy unfair practices committed against undocumented employees.” H.R. REP. NO. 99-682, at 58, *reprinted in* U.S.C.C.A.N. 1986, at 5649, 5662. The majority referred to this report as “a rather slender reed.” *Hoffman*, 535 U.S. at 149-50 n.4.

87. *See infra* notes 194-199 and accompanying text.

88. *Morton v. Mancari*, 417 U.S. 535, 550 (1974); *see also* *Posadas v. Nat’l City Bank*, 296 U.S. 497, 503 (1936) (“[T]he cardinal rule is that repeals by implication are disfavored.”).

89. *Morton*, 417 U.S. at 551; *see also* *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (explaining that the courts must “give effect to each [statute] if we can do so while preserving their sense and purpose”).

90. *Hoffman* has also been criticized by transnational legal bodies having jurisdiction over labor issues. After *Hoffman* was decided, the Mexican government sought an advisory opinion from the Inter-American Court of Human Rights on the question of the

deprivation of the enjoyment and exercise of certain labor rights [of migrant workers,] and its compatibility with the obligation of the American States to ensure the principles of legal equality, non-discrimination and the equal and effective protection of the law embodied in international instruments for the protection of human rights.

The Inter-American Court was established pursuant to the Organization of American States’ American Convention on Human Rights, *available at* <http://www.oas.org/juridico/english/Treaties/b-32.htm>, a treaty to which the United States is not a signatory. In a lengthy analysis, the Inter-American Court found *inter alia* that “if undocumented migrants are engaged [in employment], they immediately become possessors of the labor rights corresponding to workers and may not be discriminated against because of their irregular situation.” Inter-American Court of Human Rights, Advisory Opinion OC-18/03, *Juridical Condition and Rights of the Undocumented Migrants*, ¶¶ 1,

C. Consequences for Immigrant Workers

More so than authorized workers, undocumented workers are reluctant to enforce their rights to begin with, given the risks not only of retaliatory discharge but also of retaliatory reporting to the Department of Homeland Security and concomitant criminal prosecution.⁹¹ After *Hoffman*, however, employers' far-ranging and invasive discovery inquiries have exerted an additional chilling effect on the enforcement of immigrant workers' rights, resulting in a climate of fear and intimidation. As the Ninth Circuit has cautioned, "Granting employers the right to inquire into workers' immigration status . . . would allow them to raise implicitly the threat of deportation and criminal prosecution every time a worker, documented or undocumented, reports illegal practices or files a Title VII action."⁹² Rather than risk deportation, detention, and criminal prosecution, undocumented workers are more likely to abandon suit during the discovery stage or elect not to sue in the first place.⁹³

136 (Sept. 17, 2003) available at http://www.corteidh.or.cr/serieapdf_ing/seriea_18_ing.pdf. Similarly, an arm of the International Labour Organization, the United Nations agency charged with formulating minimum standards of basic labor rights, has determined that *Hoffman* is inconsistent with the international human right to organize. Governing Body, International Labour Office, 288th Session, 332nd Report of the Committee on Freedom of Association, at 142 (2003), available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb288/pdf/gb-7.pdf>.

The domestic impact of these developments is unclear. Ironically, however, in recent years the Supreme Court has looked increasingly to international legal authorities as reference points for its interpretations of United States law. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 576-77 (2003) (relying in part on decisions of the European Court of Human Rights protecting right of homosexual adults to engage in intimate, consensual conduct); *Roper v. Simmons*, — U.S. —, 125 S.Ct. 1183, 1199 (2005) (pointing to international covenants against imposition of death penalty upon juveniles).

91. *See, e.g.*, 8 U.S.C. § 1324c(a) (2000) (penalizing use of fraudulent documents to satisfy the IRCA's verification requirements); 18 U.S.C. § 1015 (2000) (prohibiting making a false claim of U.S. citizenship in order to engage in employment); 18 U.S.C. § 1546 (2000) (prohibiting false statement on employment verification form); 42 U.S.C. § 408(a)(7)(B) (2000) (prohibiting false use of social security number).

92. *Rivera v. NIBCO*, 364 F.3d 1057, 1065 (9th Cir. 2004).

93. *See Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1170 (9th Cir. 2002) ("undocumented workers cannot 'be counted on to bring suit for the law's vindication.'") (citations omitted); *Flores v. Amigon*, 233 F. Supp. 2d 462, 465 n.2 (E.D.N.Y. 2002) ("If forced to disclose their immigration status, most undocumented aliens would withdraw their claims or refrain from bringing an action such as this in the first instance. This would effectively eliminate the FLSA as a means for protecting undocumented workers from exploitation and retaliation.") (citations omitted); *Flores v. Albertsons, Inc.*, No. CV01-00515, 2002 WL 1163623, at *6 (C.D. Cal. Apr. 9, 2002) ("It is entirely likely that any undocumented class member forced to produce documents related to his or her immigration status will withdraw from the suit rather than produce such documents and face termination and/or potential deportation.").

If backpay were *per se* unavailable to undocumented workers in Title VII proceedings, the uncertain possibility of securing injunctive relief and compensatory and punitive damages would likely be outweighed by the substantial risks to which those workers would be exposed.⁹⁴ Furthermore, the number of disparate impact claims brought by undocumented workers, for which compensatory and punitive damages are unavailable under federal law,⁹⁵ would almost certainly drop. As a result, as the Ninth Circuit has recognized, “countless acts of illegal and reprehensible conduct would go unreported.”⁹⁶

The chilling effects outlined above, moreover, are likely to extend beyond just undocumented workers, such that even legal immigrants may be dissuaded from enforcing their rights. First, employers’ demands for immigration-related information may be expected to surface in any and all cases involving plaintiffs whom they perceive to be immigrants. Because of common misperceptions, defendants are especially likely to seek discovery of such information where the plaintiff has a ‘foreign-sounding’ name, speaks non-standard English, or belongs to a particular ethnic minority group.⁹⁷ A rule against backpay for undocumented

94. The important role of backpay in encouraging workers to bring Title VII claims is discussed further *infra* at Part III.B.3.

95. See 42 U.S.C. § 1981a (2000) (providing for recovery of compensatory and punitive damages in cases of intentional discrimination only).

96. *Rivera*, 364 F.3d at 1065; see also *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987) (denying discovery of plaintiffs’ immigration status, noting that such discovery could inhibit their pursuit of their legal rights “because of possible collateral wholly unrelated consequences, [and] because of embarrassment and inquiry into their private lives”); *Liu v. Donna Karan Intl., Inc.*, 207 F. Supp. 2d 191, 192-93 (S.D.N.Y. 2002) (explaining that discovery of immigration status would create a “‘danger of intimidation, [and] danger of destroying the cause of action,’ [which] would inhibit plaintiffs in pursuing their rights”) (citation omitted); *Topo v. Dhir*, 210 F.R.D. 76, 78 (S.D.N.Y. 2002) (“Plaintiff’s fears of her immigration status deterring further prosecution of her claims are well-founded. Courts have generally recognized the *in terrorem* effect of inquiring into a party’s immigration status when irrelevant to any material claim. In particular, courts have noted that allowing parties to inquire about the immigration status of other parties, when not relevant, would present a ‘danger of intimidation [that] would inhibit plaintiffs in pursuing their rights.’”) (citations omitted); *EEOC v. Tortilleria “La Mejor”*, 758 F. Supp. 585, 593 (E.D. Cal. 1991) (discussing “fear of deportation” as explanation for apparent lack of case law on topic of protecting undocumented workers from intimidating discovery requests); Christopher Ho, *Illegal Immigrants Deserve Protection of American Labor Law*, CHI. TRIB., Apr. 7, 2002, at C9 (“By taking away the most powerful tool workers have to assert their right—the possibility of backpay . . . —the Supreme Court made it much less likely that other poorly-treated employees like Castro will ever come forward to assert their rights.”).

97. See Minty Sue Chung, *Proposition 187: A Beginner’s Tour Through a Recurring Nightmare*, 1 U.C. DAVIS J. INT’L L. & POL’Y 267, 279 (1995) (discussing stereotypes that illegal immigrants hail from particular ethnic groups or have particular ethnic characteristics); see also *infra* note 227 and accompanying text.

workers would thus increase invasive discovery practices against many workers who are legal immigrants or even citizens.⁹⁸

Second, of this expanded pool of workers affected by employers' discovery practices, even those who are *not* undocumented may be confused or have imperfect information with respect to their rights under the notoriously complex, hypertechnical immigration laws.⁹⁹ They may fear – often, with good reason – the negative immigration consequences to themselves or loved ones that could result from participating in any enforcement activities that may draw attention to their citizenship status.¹⁰⁰ Such fear may be compounded further still by the risk of error in immigration enforcement by the Department of Homeland Security.¹⁰¹ In addition, legal immigrants are typically acutely aware that inquiries into

98. Disturbingly, a rule against backpay creates an incentive for employer defendants to act upon irrational stereotypes about members of ethnic or language minorities, thus strengthening and entrenching such stereotypes in the conduct of litigation itself.

99. See *Baltazar-Alcazar v. INS*, 386 F.3d 940, 948 (9th Cir. 2004) (“[w]ith only a small degree of hyperbole, the immigration laws have been termed second only to the Internal Revenue Code in complexity.”) (citation omitted) (alteration in original).

100. See, e.g., *Rivera*, 364 F.3d at 1065 (“[N]ew legal residents or citizens may feel intimidated by the prospect of having their immigration history examined in a public proceeding.”); Mexican Am. Legal Def. & Educ. Fund & Nat’l Employment Law Project, *Used and Abused: The Treatment of Undocumented Victims of Labor Law Violations Since Hoffman Plastic Compounds v. NLRB*, Jan. 2003, at 2 (“Uncounted other immigrant workers have been chilled in the exercise of their remaining labor rights by news reports of employer retaliation, threats of retaliation, and confusion created by the *Hoffman* decision. They are unwilling to complain about even the most egregious violations of their labor rights and their right to unionize.”); 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, 417 n.38 (1995) (“[B]ecause of their fear of deportation, immigrants are terrified to request the government for help with employment problems and thus rarely complain about exploitation at work.”).

101. See, e.g., *Rivera v. Ashcroft*, 394 F.3d 1129, 1135, 1139 (9th Cir. 2005) (finding that the INS “overreach[ed]” and “abuse[d] [its] executive power” in failing to adequately investigate and adjudicate petitioner’s claim of U.S. citizenship prior to ordering him deported from the U.S.); *McKnight Comes Home / INS Officials Apologize for Blunder*, Associated Press, June 19, 2000 (discussing the case of Sharon McKnight, a mentally disabled woman who was deported to Jamaica because the INS claimed she was falsely posing as a U.S. citizen despite evidence that she was a naturalized U.S. citizen); Suzanne Espinoza, *Snafu Underscores Civil Rights Issue – Born in the U.S.A – But Deported*, S.F. CHRON., October 22, 1993, at A1 (explaining that Ralph Lepe, a native-born resident of Santa Barbara, California, was arrested by U.S. Border Patrol while working on his house and deported); Ian James, *Experts: INS violated man’s rights*, Associated Press, May 12, 1999 (discussing case of Thomas Sylvain, a Bronx-born U.S. citizen who was mistakenly deported to Haiti by the INS); see also Minty Sue Chung, *Proposition 187: A Beginner’s Tour Through a Recurring Nightmare*, 1 U.C. DAVIS J. INT’L L. & POL’Y 267, 280 (1995) (“[O]n occasion, the Border Patrol has been known to remove United States citizens to Mexico based solely on their ethnic characteristics”).

their own citizenship status may lead to adverse immigration consequences for undocumented family members.¹⁰²

All of these circumstances suggest that a rule against backpay would eviscerate private enforcement of Title VII's prohibition against national origin discrimination, because immigrant workers, a primary and growing constituency for national origin claims, would be considerably deterred in the exercise of their rights. Such an outcome would substantially thwart Congress's intent that Title VII apply to aliens.¹⁰³ Furthermore, for reasons already noted, plaintiffs bringing national origin disparate impact claims—in particular, those alleging language discrimination¹⁰⁴—could quickly diminish in number.

Finally, cutting back on antidiscrimination protections for undocumented workers would lead to backsliding in protections for all workers by making undocumented workers less expensive to employ and thus more attractive to employers. If employers are motivated to employ a subclass of undocumented workers (or workers whose authorization papers are of dubious legality), whose rights they may trample at will, authorized employees would have less leverage in areas such as hiring and working conditions – to the detriment of all workers.¹⁰⁵

102. For example, 85% of immigrant families with children are mixed status families, in which at least one parent is a noncitizen and one child is a citizen. See MICHAEL FIX ET AL., *THE INTEGRATION OF IMMIGRANT FAMILIES IN THE UNITED STATES* 15 (Urban Institute 2001) (stating that contact with immigration authorities raises the risk that a family member may be detained for an immigration violation); *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004) (“Documented workers may fear that their immigration status would be changed, or that their status would reveal the immigration problems of their families or friends.”).

103. See *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973) (“Title VII was clearly intended to apply with respect to the employment of aliens inside any State.”). Very little in the way of legislative history exists to illuminate congressional thinking on the significance of the inclusion of national origin as a protected characteristic. See *id.* at 88-89 (“The statute’s legislative history [is] quite meager in this respect.”); Juan F. Perea, *Ethnicity & Prejudice: Reevaluating “National Origin” Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 807 (1994) (“At the time, Congress gave no serious thought to the content of the national origin term nor to its proper scope.”).

104. Language discrimination claims commonly allege, for example, that an employer’s “English-only” policy has a disparate impact on workers of certain language minorities. See, e.g., *EEOC v. Premier Operator Servs. Inc.*, 113 F. Supp. 2d 1066, 1073 (N.D. Tex. 2000) (finding that employer’s English-only policy had a disparate impact on employees of Hispanic national origin in violation of Title VII). Individuals most disadvantaged by such policies would logically tend to be more recent immigrants, but these may be the same people most uncertain about their legal rights; they may avoid the justice system as a result. See *supra* note 100 and accompanying text.

105. See *supra* note 82 and accompanying text; see also *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 155-56 (2002) (Breyer, J., dissenting) (discussing perverse incentives created by denial of backpay, such that employers will be advantaged by finding and hiring undocumented aliens); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (creating subclass of undocumented workers with fewer rights would “erod[e] the unity of all the employees and imped[e] effective collective

In sum, a rule against backpay in the Title VII context would increase the costs – personal, legal, and otherwise – of bringing suit, while simultaneously decreasing the incentives for immigrant workers to bring such suits. Most notably, such a rule would severely burden the enforcement of Title VII’s prohibition against bias based on national origin, and encourage discriminatory behavior on the part of emboldened employers during the employment relationship as well as in the conduct of the litigation process itself. In the following Parts, we consider how employers’ attempts to undercut Title VII protections through intimidating discovery practices after *Hoffman* can best be overcome.

III. HOFFMAN’S SUBSTANTIVE LIMITS

Courts have struggled to define the limits of *Hoffman* in contexts ranging from the Fair Labor Standards Act (“FLSA”),¹⁰⁶ to state workers’ compensation schemes,¹⁰⁷ tort liability,¹⁰⁸ and the antidiscrimination

bargaining. . . .”); *Singh v. Jutla*, 214 F. Supp. 2d 1056, 1062 (N.D. Cal. 2002) (“[E]very remedy denied to undocumented workers provides a marginal incentive for employers to hire those workers.”).

106. For FLSA cases limiting *Hoffman*, see *Chellen v. John Pickle Co., Inc.*, 344 F. Supp. 2d 1278, 1293-94 (N.D. Okla. 2004); *Renteria v. Italia Foods, Inc.*, 149 Lab.Cas. P34771, 8 Wage & Hour Cas.2d (BNA) 16651 (N.D. Ill. 2003); *Cortez v. Medina’s Landscaping*, 148 Lab.Cas. (CCH) P34743 (N.D. Ill. 2002); *Flores v. Amigon*, 233 F. Supp. 2d 462, 463 (E.D.N.Y. 2002); *Rodriguez v. The Texan, Inc.*, 147 Lab.Cas. (CCH) P34633 (N.D. Ill. 2002); *De La Rosa v. N. Harvest Furniture*, 210 F.R.D. 237, 238-39 (C.D. Ill. 2002); *Singh v. Jutla*, 214 F. Supp. 2d 1056, 1060 (N.D. Cal. 2002); *Liu v. Donna Karan Int’l, Inc.*, 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002); *Flores v. Albertsons, Inc.*, No. CV0100515AHM (SHX), 2002 WL 1163623, at *5 (C.D. Cal. Apr. 9, 2002); *Ulloa v. Al’s All Tree Serv., Inc.*, 768 N.Y.S.2d 556, 557-58 (2003) (allowing claim for wages for work already performed, but not in excess of minimum wage). See also *Martinez v. Mecca Farms, Inc.*, 213 F.R.D. 601, 604-05 (S.D. Fla. 2002) and *Centeno-Bernuy v. Perry*, 219 F.R.D. 59, 61-62 (W.D.N.Y. 2003) (Migrant and Seasonal Agricultural Worker Protection Act).

107. For workers’ compensation cases limiting *Hoffman*, see *Ortiz v. Cement Products Inc.*, No. 2525, 2004 NE Wrk. Comp. LEXIS 1018 (Neb. Workers’ Comp. Ct. Sept. 29, 2004); *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324, 328-30 (Minn. 2003); *Tiger Transmissions v. Indus. Comm. of Ariz.*, No. 1 CA-IC 02-0100 (Ariz. Ct. App. May 29, 2003); *Safeharbor Employer Servs. I, Inc. v. Cinto*, 860 So.2d 984, 985-86 (Fla. Dist. Ct. App. 2003); cf. *Nancy Cleeland, Employers Test Ruling on Immigrants*, L.A. TIMES, Apr. 22, 2002 (reporting that a meatpacker who filed a workers’ compensation claim in Nebraska was asked for immigration documents). For workers’ compensation decisions applying *Hoffman*, see, e.g., *Sanchez v. Eagle Alloy Inc.*, 658 N.W. 510, 521 (Mich. Ct. App. 2003) (undocumented worker ineligible for wage loss benefits after employer learned of his lack of status).

108. For tort cases limiting *Hoffman*, see *Echeverria v. Estate of Lindner*, No. 018666/2002, 2005 WL 1083704, 2005 N.Y. Slip Op. 50675(U), at *11 (N.Y. Sup. Ct. Mar. 2, 2005) (finding injured undocumented worker entitled to future lost earnings of \$750,000 notwithstanding *Hoffman*); *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994, 997 (N.H. Mar. 4, 2005) (“We see no reason to separate an illegal alien’s claim for lost earning capacity from the umbrella of other claims that he may make under tort law, for [s]urely the effect on the worker of his injury has nothing to do with

statutes.¹⁰⁹ The majority of the courts interpreting *Hoffman* have distinguished it or otherwise confined its application to claims of lost earnings, particularly in the tort setting. Only a few cases, however, have considered whether *Hoffman* applies to limit undocumented workers' eligibility for backpay under Title VII.¹¹⁰ And although members of the Supreme Court were clearly aware that any decision in *Hoffman* might have implications for Title VII,¹¹¹ the majority and dissenting opinions

his citizenship or immigration status.” [citation omitted] . . . “Allowing recovery of lost wages under limited circumstances will not, in our opinion, bar enforcement of our Immigration laws.”); *Ma-deira v. Affordable Housing Found., Inc.*, 315 F. Supp. 2d 504, 507-08 (S.D.N.Y. 2004); *Pontes v. New England Power Co.*, No. 03-00160A, 2004 Mass. Super. LEXIS 340, at *5-7 (Mass. Sup. Aug. 19, 2004); *Asgar-Ali v. Hilton Hotels Corp.*, 4 Misc. 3d 1026(A) (N.Y. Sup. Ct. 2004) (*Hoffman* does not make plaintiff's immigration status relevant to claim for lost future wages stemming from workplace accident, and denying discovery thereon); *Balbuena v. IDR Realty*, 787 N.Y.S.2d 35 (N.Y. App. Div. 2004) (plaintiff's lost earnings recovery limited to wages he would have been able to earn in his home country, not in United States); *Tyson Foods, Inc. v. Guzman*, 116 S.W.3d 233, 244 (Tex. App. 2003); *Cano v. Mallory Mgmt.*, 760 N.Y.S.2d 816, 818 (N.Y. Sup. Ct. 2003); *Hernandez v. Paicius*, 109 Cal. App. 4th 452, 459-60 (Cal. Ct. App. 2003); *Celi v. 42nd Street Dev. Project, Inc.*, 5 Misc. 3d 1023(A) (N.Y. Sup. Ct. 2004) (*Hoffman* does not mandate dismissal of plaintiff's claims for future lost earnings and back wages). *See also Topo v. Dhir*, 210 F.R.D. 76, 78 (S.D.N.Y. 2002) (federal Alien Tort Claims Act).

For tort cases following *Hoffman*, see *Veliz v. Rental Serv. Corp. USA*, 313 F. Supp. 2d 1317, 1335 (M.D. Fla. 2003) (barring award of lost future wages in a negligence suit, and stating, “In addition to trenching upon the immigration policy of the United States and condoning prior violations of immigration laws, awarding lost wages would be tantamount to violating the IRCA”); *Hernandez-Cortez v. Hernandez*, No. Civ.A. 01-1241-JTM, 2003 WL 22519678, at *7 (D. Kan. Nov. 4, 2003) (in personal injury action, plaintiff's status as an illegal alien precludes his recovery for lost income based on projected earnings in the United States); *Majlinger v. Cassino Contracting Corp.* 766 N.Y.S.2d 332, 333 (N.Y. Sup. Ct. 2003) (the IRCA barred undocumented alien's claims in negligence and under labor law for wages lost due to injuries sustained in fall from scaffold, since he had no lawful right to be employed and reinstated in his job); *Sanango v. 200 East 16th Street Housing Corp.*, 788 N.Y.S.2d 314, 318-19, 323 (N.Y. App. Div. Dec. 28, 2004) (denying claim for future lost wages).

109. For discrimination cases limiting *Hoffman*, see *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1066-70 (9th Cir. 2004) (Title VII); *De La Rosa v. N. Harvest Furniture*, 210 F.R.D. 237, 238 (C.D. Ill. 2002) (Title VII); *EEOC v. First Wireless Group, Inc.*, 225 F.R.D. 404, 406-07 (E.D.N.Y. 2004) (Title VII) (following *Rivera* and denying discovery of charging parties' immigration status). For a discrimination case applying *Hoffman*, see *Escobar v. Spartan Sec. Serv.*, 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003) (Title VII). *See also Lopez v. Superflex, Ltd.*, No. 01 CIV. 10010(NRB), 2002 WL 1941484, at *1 (S.D.N.Y. Aug. 21, 2002) (indicating in an Americans with Disabilities Act case that, should evidence that plaintiff is undocumented be admitted, the question whether plaintiff had standing to sue would be properly before the court). *See also Cleeland, supra* note 107 (reporting that a sexual harassment complainant at a Kentucky poultry plant was asked for immigration documents); L.M. Sixel, *Damage Awards for Illegal Immigrants at Issue*, HOUSTON CHRON., June 28, 2002, at B1 (discussing employer who raised *Hoffman* as a defense to an EEOC discrimination charge).

110. *See Rivera*, 364 F.3d at 1066-70; *Escobar*, 281 F. Supp. 2d at 897; *De La Rosa*, 210 F.R.D. at 238.

111. At oral argument, *Hoffman*'s attorney was questioned about how a prohibition on backpay

were both silent on the matter. Further, shortly after the issuance of the *Hoffman* decision, the EEOC contributed to the vacuum of authority by

under the NLRA might affect Title VII cases:

QUESTION:What about title VII?

MR. McCORTNEY:Under title VII, if it's backpay exactly like backpay under the National Labor Relations Act, where it's unearned wages for work not performed during the backpay period, then that would be a problem.

QUESTION:Suppose the allegation is, they kept me in this entry-level job, although I was qualified for the next step, because I was a woman and they never promote women. That's the charge, and she wants backpay, she wants to be paid at the rate she should have earned absent sex discrimination.

...

MR. McCORTNEY:Then there are other remedies available under title VII to effectuate the policies of the act and to enforce compliance.

QUESTION:I'm asking about backpay for title VII. You said you would treat FLSA differently, and there would be backpay. Here, title VII, . . . would that . . . be bracketed with FLSA, or would it be bracketed with the NLRA?

MR. McCORTNEY:. . . [I]n your situation, you would get backpay, and let me explain the difference in this case. The problem with the [NLRB's] remedy is that the very nature of the remedy creates a duty to mitigate, which in turn requires and encourages the illegal alien to seek interim employment, thereby committing further and new violations of the immigrations law.

QUESTION:So in title VII, if she were laid off, say, because they laid off all the women before they laid off any men, so she would have a duty to mitigate in those circumstances, would the result be different?

MR. McCORTNEY:No. When there's a duty to mitigate which requires them to seek interim employment, that is where the rub is, but under title VII, under like, the National Labor Relations Act, there's a whole array of other remedies available to enforce compliance. Punitive damages, . . . compensatory damages, emotional distress, that is not dependent on the victim[']s authorization to work in this country.

QUESTION:Of course, her complaint, if it were [a] complaint, should read something like, you know, I shouldn't have been working at all, and it was illegal for me to be working at all, and I'm complaining because I only got \$12,000 in illegal wages. I should have gotten \$14,000 in illegal wages. I don't find that a very appealing case anyway. Do you find that an appealing case?

MR. McCORTNEY:No, Your Honor, I don't. . . .

QUESTION:But you just told me that you would bracket title VII with the FLSA.

MR. McCORTNEY:Yes, because I – notwithstanding Justice Scalia's very good example that I don't find appealing, . . . there is a way that this Court can distinguish between the National Labor Relations Act, which is remedial in nature, and all these other State and Federal discrimination laws that have punitive features to it [sic] that are not dependent on the undocumented alien's ability to work in this country.

Oral Argument Tr. at *18-20, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (No. 00-15952002), available at WL 77224 (2002); see also Brief of Amici Curiae Equal Employment Advisory Council and LPA, Inc. at *18, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (No. 00-1595), available at 2001 WL 1480578 (urging that “[t]he Court should clarify that under IRCA, undocumented aliens are not entitled to backpay under the NLRA—or any of the other federal antidiscrimination laws, such as Title VII, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADA)”) (citations omitted).

rescinding its previous policy guidance on the availability of remedies to undocumented workers.¹¹²

Given employers' overreaching and intrusive discovery practices post-*Hoffman*, it is ever more important for advocates of immigrant workers to craft thoughtful legal arguments to fill this vacuum. In this Part we discuss some possibilities for protecting immigrant workers from *Hoffman*'s prohibition on backpay, focusing on Title VII. We first briefly examine the three federal court cases that have considered the applicability of *Hoffman* to Title VII. We then set forth an affirmative argument that *Hoffman*'s holding is not automatically transferable to other statutory contexts but, rather, that its applicability must be determined in light of the specific text, history, and purposes of the statutory scheme in question. We suggest that *Hoffman*'s prohibition on backpay does not apply in Title VII cases because of significant differences between its enforcement scheme and that of the NLRA. In particular, we emphasize that the backpay remedy must be preserved because of its central role in furthering Title VII's primary objectives of deterring and punishing unlawful employment discrimination.

A. Title VII Case Law After Hoffman

Thus far, two of the three courts that have considered whether *Hoffman* affects Title VII remedies have suggested that it does not. In *De La Rosa v. Northern Harvest Furniture*,¹¹³ the district court consid-

112. See Equal Employment Opportunity Comm'n, *Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws*, EEOC DIRECTIVES TRANSMITTAL NO. 915.002, June 27, 2002, available at <http://www.eeoc.gov/docs/undoc-rescind.html> [hereinafter "EEOC Rescission"]. Under the EEOC's former policy guidance, an undocumented worker was presumptively entitled to backpay as long as the worker remained present and available for work. See Equal Employment Opportunity Comm'n, *Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws*, EEOC NOTICE NO. 915.002, Oct. 26, 1999, (rescinded June 27, 2002), available at <http://www.eeoc.gov/docs/undoc.html> [hereinafter "EEOC Enforcement Guidance"]. In the EEOC Rescission, the EEOC stated that it was "reexamining" its policy in light of *Hoffman*:

The Court's holding [in *Hoffman*] bars an award of backpay under the NLRA to an undocumented worker for any period following the termination of his or her employment. Because the Commission's 1999 Enforcement Guidance relied on NLRA cases to conclude that undocumented workers are entitled to all forms of monetary relief – including post-discharge back-pay – under the federal employment discrimination statutes, the Commission has decided to rescind that Guidance. The Commission will evaluate the effect *Hoffman* may have on the availability of monetary remedies to undocumented workers under the federal employment discrimination statutes.

Id.

113. 210 F.R.D. 237 (C.D. Ill. 2002)

ered the employer's argument that, after *Hoffman*, information regarding work authorization was relevant to the plaintiffs' claims for post-termination backpay for purposes of Title VII, the FLSA, and state minimum wage law.¹¹⁴ Plaintiffs responded that *Hoffman* applies only to NLRA cases, not to those arising under Title VII or the wage and hour laws. Plaintiffs also argued that even if immigration status was relevant, any such relevance is outweighed for discovery purposes by the chilling effect of requiring plaintiffs to reveal that sensitive information.¹¹⁵

The *De La Rosa* court reasoned that the outcome in *Hoffman* turned upon the limited, statute-specific authority of the NLRB - a constraint not applicable to the federal courts, which are charged with addressing the interplay of different statutory schemes. It explained, "[T]he Supreme Court focused on whether the NLRB had authority to award post-termination backpay when that remedy interfered with the policies of another statute—the IRCA—which the NLRB had no authority to enforce or administer."¹¹⁶ Because of this difference between the authority of a federal court and that of the NLRB, as well as the Title VII precedent unambiguously favoring backpay, the court concluded that *Hoffman* was not dispositive of the issues raised by defendants.¹¹⁷ *De La Rosa* thus pointed to an extremely important distinction, discussed further below, that may prove fruitful in protecting the full range of Title VII remedies for undocumented workers.

However, the court's conclusions on the applicability of *Hoffman* were only dicta, as the court ultimately found that the information sought by defendants—plaintiffs' immigration status *during* their employment by defendants—was clearly not germane to determining their entitlement to *post-termination* backpay.¹¹⁸ Nonetheless, the court's view of the matter clearly signaled to the parties that any attempt by the defendants to amend the discovery request would be futile.

In contrast, in *Escobar v. Spartan Security Service*,¹¹⁹ the district court suggested that *Hoffman* precludes undocumented workers from receiving backpay under Title VII.¹²⁰ The defendant in that case moved for

114. *See id.* at 237-38.

115. *See id.* Plaintiffs also argued that *Hoffman* does not apply where the employer has failed to verify work authorization as required by the IRCA, and that even if immigration status is relevant, it is only relevant (and thus only discoverable) during the limited period of post-discharge backpay. *See id.*

116. *Id.* at 238.

117. *See id.* at 239.

118. *See id.*

119. 281 F. Supp. 2d 895 (S.D. Tex. 2003).

120. *See id.* at 897.

summary judgment on the plaintiff's sexual harassment and retaliation claims, arguing that because he was undocumented he was not entitled to Title VII protections at all.¹²¹ The court disagreed, explaining that *Hoffman* did not "specifically foreclose all remedies for undocumented workers under either the National Labor Relations Act or other comparable federal labor statutes."¹²² Nonetheless, the court determined that "as conceded by *Escobar*, *Hoffman* only compels the conclusion that *Escobar* is not entitled to back pay [sic] on his claims under Title VII, such a remedy being foreclosed by the fact that he was an undocumented worker at the time he was employed by *Spartan*."¹²³ The court failed, however, to discuss its reasons for that conclusion. In any event, because the plaintiff had never contested the issue of his entitlement to backpay under Title VII, the district court's conclusion is arguably dicta.

Finally, in the most thorough consideration yet by any federal court of this question, the Ninth Circuit recently suggested in *Rivera v. NIBCO, Inc.*,¹²⁴ a Title VII national origin discrimination action, that *Hoffman* does not apply in the Title VII context because of significant differences between Title VII and the NLRA.¹²⁵

In *Rivera*, twenty-three Latina and Southeast Asian employees, who performed repetitive and largely unskilled manufacturing jobs that required only minimal communication skills, challenged their terminations on the basis of an invalid, non-job-related English proficiency test given by the company that had acquired the irrigation manufacturing facility where they worked.¹²⁶ Because the plaintiffs' English proficiency was limited, they failed this test – even though they had long performed their work successfully – and were fired as a result.¹²⁷ After defense counsel sought to discover plaintiffs' immigration status, the plaintiffs obtained a protective order pursuant to Federal Rule of Civil Procedure 26(c).¹²⁸ The employer then sought interlocutory review of the protective order before the Ninth Circuit, arguing not only that *Hoffman* extended

121. *Id.* at 896.

122. *Id.* at 897. The district court also noted that where the plaintiff has subsequently obtained U.S. work authorization, *Hoffman* does not appear to foreclose certain remedies such as reinstatement. *See id.* ("The fact that *Escobar* is now a documented worker certainly means that he is not ineligible for re-employment.")

123. *Id.* (emphasis added).

124. 364 F.3d 1057 (9th Cir.), 384 F.3d 822 (2004), *cert. denied*, 125 S.Ct. 1603 (2005).

125. *Id.* at 1066-70.

126. *Id.* at 1061.

127. *Id.*

128. *Rivera v. NIBCO, Inc.*, 204 F.R.D. 647, 651 (E.D. Cal. 2001).

to Title VII, but also that it *required* the district court to order the discovery at issue.¹²⁹

Upholding the protective order, the Ninth Circuit stated, “We seriously doubt that *Hoffman* is as broadly applicable as NIBCO contends, and specifically believe it unlikely that it applies in Title VII cases.”¹³⁰ The court, however, ultimately found it unnecessary to reach that question given that the discovery NIBCO sought was irrelevant to its liability under Title VII and, at most, would bear upon the availability and extent of remedies once liability was determined.¹³¹

The *Rivera* court provided three primary reasons for its view that *Hoffman* does not apply to Title VII cases. First, it reasoned that while the NLRA provides only for limited private causes of action, Title VII depends heavily upon private parties for its enforcement. The court determined that Congress could not have intended to preclude backpay in Title VII cases, owing to the importance of that remedy in encouraging victims of discrimination to come forward and litigate their claims.¹³² Second, the *Rivera* court found it significant that Congress intended Title VII to serve both punitive and deterrent goals, in contrast to the NLRA’s more modest, “make-whole” purposes.¹³³ In this respect, the court emphasized the importance of maintaining a comprehensive remedial arsenal in Title VII actions, because its goal of eradicating employment discrimination was a “national policy of the highest priority.”¹³⁴ Finally, as did the *De La Rosa* court, the Ninth Circuit emphasized that under Title VII it is a federal court – not an administrative agency such as the NLRB – that decides whether an employer’s violation of the statute warrants an award of backpay.¹³⁵ The court explained, “[*Hoffman*’s] limitation on the Board’s authority says nothing regarding a *federal court’s power* to balance IRCA against *Title VII* if the two statutes conflict. A district court has the very authority to interpret both Title VII and IRCA that the NLRB lacks.”¹³⁶ In light of these significant differences, the *Rivera* court concluded that, at a minimum, “[r]esolving the conflicting statutory policies” of IRCA and Title VII “necessitates a different analysis than the Court undertook in *Hoffman*.”¹³⁷

129. *Rivera*, 364 F.3d at 1062-63, 1066.

130. *Id.* at 1067.

131. *Id.* at 1070.

132. *Id.* at 1067, 1068-69.

133. *See id.* at 1067.

134. *Id.* at 1067-69.

135. *See id.* at 1068.

136. *Id.* (emphasis in original).

137. *Id.* at 1068.

Building on similar considerations, we construct below an argument that *Hoffman* does not bar backpay awards to undocumented workers in Title VII actions.

B. Distinguishing Title VII

1. Outgrowing the NLRA: The Evolution and Expansion of Title VII Remedies Before and After the Passage of the IRCA

Numerous authorities have observed that Congress, in drafting Title VII, drew inspiration from the remedial scheme of the NLRA, and cases interpreting the NLRA's remedial provisions have routinely been given persuasive force in the Title VII context.¹³⁸ Therefore, in insulating Title VII plaintiffs from *Hoffman*, it is crucial to point out the many distinctions that have arisen between the two remedial schemes since Title VII was first enacted – distinctions that make clear that *Hoffman's* bar on backpay cannot be imported to the Title VII context.

When first enacted, Title VII's remedial provisions borrowed heavily from those of the NLRA. Section 706(g) of the Civil Rights Act of 1964 granted to the courts authority to “enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay.”¹³⁹ Similarly, the NLRA provided that the NLRB shall issue an order “requiring such person to cease and desist from such unfair labor practice,

138. See, e.g., *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 848-49 (2001) (noting that the Title VII remedial provision “closely tracked the language of [the NLRA]”); *Lorance v. AT&T Tech., Inc.*, 490 U.S. 900, 909 (1989) (“[W]e have often observed that the NLRA was the model for Title VII’s remedial provisions, and have found cases interpreting the former persuasive in construing the latter.”); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975) (noting that the backpay provision of Title VII was expressly modeled on the backpay provision of the NLRA); *De La Rosa v. N. Harvest Furniture*, 210 F.R.D. 237, 238 (C.D. Ill. 2002) (“The remedial language of the [NLRA] is very similar to Title VII’s language.”); see also EEOC Enforcement Guidance, *supra* note 112, at 3 (noting that the rationale from NLRA cases applies equally to the federal employment discrimination statutes); EEOC Rescission, *supra* note 112, at 1 (“Because the Commission’s 1999 Enforcement Guidance relied on NLRA cases to conclude that undocumented workers are entitled to all forms of monetary relief—including post-discharge backpay—under the federal employment discrimination statutes, the Commission has decided to rescind that Guidance.”); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1516-17 (9th Cir. 1989) (relying upon NLRA cases in determining that undocumented workers could be awarded backpay under Title VII).

139. Civil Rights Act of 1964, § 706(g), 88 Pub. L. No. 352, 78 Stat. 259 (1964) (codified as amended at 42 U.S.C. § 2000e-5(g)(1) (2000)).

and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this subchapter.”¹⁴⁰ Members of Congress involved in drafting Title VII expressly noted the similarity between the two provisions.¹⁴¹

In the decades since then, however, Congress has instituted several significant changes in Title VII’s remedial scheme—changes that mark a substantial departure from the original NLRA model.

First, in 1972, Congress amended the remedial provisions of Title VII by granting courts the authority to order “any other equitable relief as the court deems appropriate.”¹⁴² As the Supreme Court later described this change, “Congress expanded § 706(g) to specify that a court could, in addition to awarding those remedies previously listed in the provision, award ‘any other equitable relief as the court deems appropriate.’”¹⁴³ In doing so, Congress granted the courts the power to order far more expansive relief under Title VII, indicating its belief that the original Title VII remedial scheme that was modeled on the NLRA was in fact inadequate to accomplish its statutory goals.¹⁴⁴

Subsequently, nearly two decades later, Congress expanded the remedies available under Title VII still further when it enacted the Civil Rights Act of 1991 – notably, five years *after* the IRCA was passed. Section 1981a provides for awards of compensatory and punitive damages in cases of intentional discrimination, subject to statutory caps based on the size of the employer.¹⁴⁵ In making available these new forms of relief, Congress was motivated by its finding that “additional remedies under Federal law are needed to deter unlawful harassment and

140. National Labor Relations Act, § 10(c), 49 Stat. 454 (codified at 29 U.S.C. § 160(c)).

141. See 110 CONG. REC. 6549 (1964) (remarks of Sen. Humphrey); *id.* at 7214 (interpretative memorandum of Sens. Clark and Case) (“This relief is similar to that available under the [NLRA] in connection with unfair labor practices”); see also *Albemarle Paper Co.*, 422 U.S. at 419 n.11 (discussing legislative history of this provision).

142. 42 U.S.C. § 2000e-5(g)(1) (2000); see also *Pollard*, 532 U.S. at 848-50 (discussing the development of the Title VII remedial provision).

143. *Pollard*, 532 U.S. at 849-50.

144. See generally H.R. REP. NO. 92-238, at 3 (1971) (discussing need to expand powers of the EEOC and noting generally that “[d]espite the commitment of Congress to the goal of equal employment opportunity for all our citizens, the machinery created by the Civil Rights Act of 1964 is not adequate”).

145. See 42 U.S.C. § 1981a(a)(1), (b) (2000). The practical impact of the new damages remedy was to permit victims of religious and gender-based employment discrimination to recover compensatory and punitive damages, as damages for intentional race and national origin discrimination were already available via § 1981. See 42 U.S.C. § 1981; *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 460 (1975) (explaining that remedies available under § 1981 include compensatory and punitive damages); see also *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (stating that § 1981 prohibits discrimination based on “ancestry or ethnic characteristics”).

intentional discrimination in the workplace.”¹⁴⁶ Reflecting a continuing Congressional concern that pre-existing Title VII remedies, while important, were still inadequate by themselves to ensure equal opportunity in employment throughout the nation,¹⁴⁷ the 1991 amendments constitute a further significant departure from the original, limited NLRA-based remedies available in 1964.

For these reasons, Title VII’s remedial scheme is now structurally and substantively distinct, having long outgrown its origins in the NLRA. Congress’s evident desire to augment – not cut back on – pre-existing remedies plainly demonstrates its intent to keep Title VII’s enforcement a “national policy of the highest priority.” In light of these vigorous expansions of remedial power, *Hoffman*’s holding that the NLRB was not authorized to award backpay to an undocumented worker plainly cannot and does not decide whether backpay is available under Title VII. Rather, the effect of the IRCA, if any, must be evaluated specifically in light of Title VII’s vital policy goals and its now-enhanced remedial scheme.

2. Congressional Silence: Legislative Developments Demonstrating Absence of Congressional Intent to Abrogate Title VII Remedies

As seen above, Congress has consistently acted to strengthen – not diminish or narrow – the remedies available under Title VII. And as we explain below, in the course of enacting the IRCA, Congress also broadened the scope of Title VII’s liability provisions. It is thus particularly striking that despite Congress’s sharp and persistent focus upon questions of antidiscrimination remedies, it has never cut back on the remedies – backpay or otherwise – that undocumented employees may receive under existing Title VII protections. Congress’s silence in this respect makes virtually inescapable the conclusion that it never meant to prevent undocumented workers from receiving backpay under Title VII.

146. Civil Rights Act of 1991, 105 Stat. 1071, § 2 (1991); see also *Pollard*, 532 U.S. at 852 (discussing the rationale for addition of damages remedies); EEOC Enforcement Guidance, *supra* note 112 (noting that Congress added compensatory and punitive damage remedies “because it had concluded that existing remedies were ineffective”).

147. See, e.g., H.R. REP. NO. 102-40(I), at 69 (1991) (“Back pay as the exclusive monetary remedy under Title VII has not served as an effective deterrent”).

a. Silence in Passing the IRCA's Antidiscrimination Protections

While it was enacting the various portions of the IRCA that the Supreme Court found significant in *Hoffman*, Congress was – in the very same legislation – expanding Title VII's coverage. It did so in two ways: 1) by including in the IRCA a prohibition against employment discrimination based on “citizenship status,” which protects legal aliens authorized to work in the U.S.;¹⁴⁸ and 2) by extending Title VII's prohibition on national origin discrimination to reach employers previously exempted from Title VII because they had fewer than fifteen employees.¹⁴⁹ In making these changes, however, Congress explicitly preserved the existing reach of Title VII by stating that neither amendment in any manner affected persons already covered by the statute.¹⁵⁰ Similarly, Congress made clear that these expanded protections in no way diminished the authority of the EEOC to enforce previously available Title VII protections:

NO EFFECT ON EEOC AUTHORITY . . . —Except as may be specifically provided in this section, nothing in this section shall be construed to restrict the authority of the Equal Employment Opportunity Commission to investigate allegations, in writing and under oath or affirmation, of unlawful employment practices, as provided in section 706 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) or any other authority provided therein.¹⁵¹

Had Congress meant for the IRCA to limit the existing backpay remedy for undocumented workers under Title VII, it would have expressly so stated when it examined the interconnection between immigration law and antidiscrimination protections. Yet it chose not to do so. After it exempted undocumented workers from the *new* national origin protections for employees of businesses with less than fifteen employees,¹⁵² Congress expressly chose to maintain the scope of Title VII's ex-

148. 8 U.S.C. § 1324b(a)(1)(B) (2000).

149. *See id.* § 1324b(a)(1)(A). Note that employers with three or fewer employees are exempt. *See id.* § 1324b(a)(2)(A).

150. *Id.* § 1324b(a)(2)(B).

151. 8 U.S.C. § 1324b (2000) (quoting Pub. L. 99-603, § 102(b) in note entitled “No Effect on EEOC Authority”).

152. Title 8 U.S.C. § 1324b(a)(1)(A) provides:

[I]t is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien . . .) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment— (a) because of such individual's na-

tant coverage.¹⁵³ Especially since it was presumptively aware that the EEOC had since 1982 interpreted Title VII to cover undocumented workers,¹⁵⁴ Congress's inaction in this regard shows that it did not intend for the IRCA to affect the eligibility of undocumented workers for back-pay under Title VII's existing protections.

Further, the decision to include language exempting "unauthorized aliens"¹⁵⁵ from the new, narrow, antidiscrimination provision affirmatively indicates that the IRCA, in and of itself, does not exclude undocumented workers from the protection of statutory antidiscrimination mandates. Under well-established canons of statutory interpretation, statutes must be construed so as not to render any part superfluous.¹⁵⁶ Congress's inclusion of an express exemption for "unauthorized aliens" demonstrates its understanding that without the limitation, the new provision would have applied to undocumented workers. In other words, in Congress's view the IRCA's provisions criminalizing the employment of undocumented workers were insufficient, without more, to exclude undocumented workers from antidiscrimination protections. Taken together with Congress's express statements in the IRCA that existing rights under Title VII not be affected, these amendments indicate that

tional origin. . . .

This exemption provision expressly has no effect on anyone already covered by Title VII. *See* 8 U.S.C.A. § 1324b(a)(2)(B) (West 2005), and *supra* note 150 and accompanying text.

153. Nor did the reports of either the House Judiciary Committee or House Education and Labor Committee indicate any intent to roll back existing Title VII protections. *See, e.g.*, Jud. Comm., H.R. REP. NO. 99-682(I), at 108-11, 215-17 (1986); Educ. & Labor Comm., H.R. REP. NO. 99-682(II), at 12-14, 46-47 (1986).

"Congress[s] silence in this regard can be likened to the dog that did not bark." *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991) (citing *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting) ("In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.")).

154. *See* EEOC COMPLIANCE MANUAL, §622 at 3810-11 (2004). As the Supreme Court has held,

Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change. . . . So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.

Lorillard v. Pons, 434 U.S. 575, 580-81 (1978).

155. 8 U.S.C. § 1324b(a)(1) (2000).

156. "It is an 'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.'" *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 n.22 (1986) (citation omitted); *see also* *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994) (cautioning that judges should refrain from construing statutory terms "as surplusage—as words of no consequence").

Congress did not prevent undocumented workers from receiving the backpay awards previously authorized under Title VII.

b. Silence in Passing the 1991 Civil Rights Act

In addition, when Congress comprehensively re-examined Title VII's remedial scheme in 1991, new Section 1981a expressly authorized, for the first time, "compensatory and punitive damages . . . *in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964.*"¹⁵⁷ Accordingly, the Supreme Court has noted that Congress added those remedies "without giving any indication that it wished to curtail previously available remedies."¹⁵⁸ Indeed, in 1991 Congress was presumptively aware that at least one federal court had held that the IRCA did not alter the scope of Title VII protections for undocumented workers.¹⁵⁹ Similarly, it was presumptively aware of the EEOC's established policy, reaffirmed after the IRCA, that Title VII covered undocumented workers.¹⁶⁰ In the 1991 legislation, moreover, Congress addressed several developments in the federal courts, and specifically discussed the need to overturn several Title VII decisions it deemed problematic.¹⁶¹ Yet, despite all of these circumstances, it did not address the status of undocumented workers under that statute. The absence of

157. 42 U.S.C. § 1981a(a)(1) (2000) (emphasis added).

158. *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 852 (2001).

159. *See EEOC v. Tortilleria "La Mejor,"* 758 F. Supp. 585, 593-94 (E.D. Cal. 1991) (concluding that Congress did not intend that the IRCA amend or repeal any of the protections under Title VII for undocumented workers); *see also EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1517 (9th Cir. 1989) (affirming district court's award of backpay to undocumented workers under pre-IRCA law); *Rios v. Enter. Ass'n. Steamfitters Local Union* 638, 860 F.2d 1168, 1173 (2d Cir. 1988) (applying pre-IRCA law and concluding that undocumented workers are eligible for backpay under Title VII); *EEOC v. Switching Sys. Div. of Rockwell Intl.*, 783 F. Supp. 369, 374 (N.D. Ill. 1992) ("Plaintiff plainly is correct that Title VII's protections extend to aliens who may be in this country either legally or illegally."); *cf. Lorillard*, 434 U.S. at 580-81 (discussing Congress's presumptive awareness of judicial interpretations).

160. *See EEOC COMPLIANCE MANUAL*, §623 at 3810-11 (2004); *see also Lorillard*, 434 U.S. at 580-81 (discussing Congress's presumptive awareness of administrative interpretations).

161. *See, e.g., H.R. REP. NO. 102-40(I)* (1991), at 23, 26-28 (discussing the need to overturn *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)); *id.* at 45-48 (discussing the need to overturn *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)); *id.* at 49-50 (discussing the need to overturn *Martin v. Wilks*, 490 U.S. 755 (1989)); *id.* at 60-61 (discussing the need to overturn *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900 (1989)); *id.* at 77-78 (discussing the need to address *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987)); *see also, e.g., id.* at 27-30 (discussing *Allen v. Seidman*, 898 F.2d 375 (7th Cir. 1989), and *Hill v. Seaboard Coast Line R.R. Co.*, 885 F.2d 804 (11th Cir. 1989)); *id.* at 78 (discussing the problem arising in *Denny v. Westfield State Coll.*, 669 F. Supp. 1146 (D. Mass. 1987)).

any such legislative history indicates that Congress had no intention of limiting the eligibility of undocumented workers for backpay.¹⁶²

Congress's consistent course of action over the years has made plain its desire that existing discrimination remedies, including backpay for undocumented workers, continue unabated post-IRCA. Rather than elevating immigration policy over important antidiscrimination mandates, Congress harmonized the two concerns, reaffirming all previously available remedies without limitation.

3. The Critical Role of Backpay in Title VII Enforcement

The important role of backpay in securing Title VII's goals, markedly broader than those of the NLRA, serves as another reason that *Hoffman* does not limit remedies in the antidiscrimination context.

In *Hoffman*, the Supreme Court found it significant that backpay was not necessary to fulfill the goals of national labor policy. In the NLRA context, traditional remedies such as cease and desist orders and notice-posting were deemed "sufficient to effectuate national labor policy regardless of whether the 'spur and catalyst' of backpay accompanies them."¹⁶³ To understand why the situation is different with Title VII backpay, it is necessary to examine the differing goals and enforcement mechanisms of the two statutes.

A primary aim of the NLRA is "the establishment and maintenance of industrial peace to preserve the flow of interstate commerce."¹⁶⁴ Congress sought to achieve this goal by protecting the essentially procedural right of employees to self-organize and bargain collectively through chosen representatives.¹⁶⁵ The NLRA was thus designed to protect the integrity of the bargaining process between employers and their employees, but it set no limits on the substantive outcomes of that process. Rather, the working conditions determined through collective bargaining "may be as bad as the employees will tolerate or be . . . as bad as they can bargain for."¹⁶⁶

To achieve its purposes, the NLRA employs "essentially remedial" measures and does not seek the "vindication of public rights or provide

162. See *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991).

163. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 (2002).

164. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 674 (1981) (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)); see also *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-11 (1940).

165. *First Nat'l Maint. Corp.*, 452 U.S. at 674 & n.11.

166. *NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395, 402 n.8 (1952).

indemnity against community losses as distinguished from the protection and compensation of employees.”¹⁶⁷ As *Hoffman* noted, “the ‘award provisions of the NLRA are remedial, not punitive, in nature, and thus should be awarded only to those individuals who have suffered harm.’”¹⁶⁸ Accordingly, it found awards that are punitive in nature to be beyond the authority of the NLRB.¹⁶⁹

In contrast, Title VII utilizes compensatory, preventive, and punitive awards to “achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.”¹⁷⁰ Invidious discrimination, the ill Title VII seeks to eradicate, has been recognized, without hyperbole, as a “historic evil of national proportions.”¹⁷¹ Indeed, Congress augmented the remedies available under Title VII after initially following the NLRA model precisely because discrimination had proven itself an intractable, deeply-rooted phenomenon requiring an expanded arsenal.¹⁷²

While Title VII aims in part to make victims of discrimination whole,¹⁷³ the important goals of deterrence and punishment are also included among its objectives. As the Supreme Court has asserted, “The statute’s ‘primary objective’ is ‘a prophylactic one’: it aims, chiefly, ‘not to provide redress but to avoid harm.’”¹⁷⁴ In addition, in contrast to that

167. *Republic Steel Corp.*, 311 U.S. at 10; see also *Sure-Tan, Inc., v. NLRB*, 467 U.S. 883, 905 n.14 (1984) (citing *Republic Steel*, 311 U.S. at 9-12).

168. *Hoffman*, 535 U.S. at 152 n.6 (quoting *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1119 (7th Cir. 1992) (quotation marks omitted)). During oral argument, counsel for Hoffman had remarked that “there is a way that this Court can distinguish between the National Labor Relations Act, which is remedial in nature, and all these other State and Federal discrimination laws that have punitive features to it [sic] that are not dependent on the undocumented alien’s ability to work in this country.” Oral Argument Transcript at *20, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (No. 00-15952002), available at 2002 WL 77224 (2002) (Argument of Ryan D. McCortney for Petitioner); see also *supra* note 111.

169. *Hoffman*, 535 U.S. at 152 n.6 (citing *Sure-Tan*, 467 U.S. at 905 n.14).

170. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

171. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975).

172. See, e.g., H.R. REP. NO. 92-238, at 3 (1971) (citing “[t]he persistence of discrimination, and its detrimental effects” as reasons for expanding Title VII remedial scheme).

173. See, e.g., *Albemarle*, 422 U.S. at 418 (“It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination.”); H.R. REP. NO. 102-40(I), at 64-65 (1991) (“Monetary damages . . . are necessary to make discrimination victims whole for the terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity.”)

174. *Kolstad v. Am. Dental Ass’n.*, 527 U.S. 526, 545 (1999) (citations omitted); see also *Albemarle*, 422 U.S. at 417 (“[T]he primary objective was a prophylactic one.”); see also *supra* note 146 and accompanying text (“[A]dditional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace.”).

of the NLRA, Title VII's remedial scheme is also meant to penalize employers for violating its antidiscrimination mandates.¹⁷⁵ Backpay helps fulfill the goals of both deterrence and punishment.

In *Albemarle Paper Co. v. Moody*,¹⁷⁶ the Supreme Court discussed the functions of the backpay remedy in detail. The Court explained that “[t]he power to award backpay was bestowed by Congress as part of a complex legislative design directed at a historic evil of national proportions.”¹⁷⁷ Backpay, the Court recognized, not only compensates victims of employment discrimination but helps deter future discrimination. In particular, the backpay remedy has an “obvious connection” to Title VII’s deterrent purpose:

If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that ‘provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country’s history.’¹⁷⁸

Albemarle established a presumption in favor of backpay that can only “seldom be overcome.”¹⁷⁹ Given the important function served by backpay, the Court concluded, “backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.”¹⁸⁰

In *McKennon v. Nashville Banner Publishing Co.*,¹⁸¹ the Supreme Court recognized that backpay may also fulfill a punitive role in enforcing federal antidiscrimination policies. The Court considered whether a per se rule against backpay would be appropriate in cases in which dis-

175. See 42 U.S.C. § 1981a(1) (2000) (providing for recovery of punitive damages).

176. 422 U.S. 405 (1975).

177. *Id.* at 416.

178. *Id.* at 417-18; see also *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 296 n.11 (2002) (“If injunctive relief were the only remedy available, an employee who signed an arbitration agreement would have little incentive to file a charge with the EEOC.”); H.R. REP. NO. 102-40(I), at 69 (1991) (“[W]hen backpay is not available . . . there is simply no deterrent.”).

179. *City of Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 719 (1978); see also *Albemarle*, 422 U.S. at 417 (“[T]he statutory purposes [leave] little room for the exercise of discretion not to order reimbursement.”) (citation omitted).

180. *Albemarle*, 422 U.S. at 421.

181. 513 U.S. 352 (1995).

criminatorily terminated employees are subsequently found to have committed some wrongdoing that, had the employer known of it, would have justified the termination.¹⁸² Although *McKennon* was decided under the Age Discrimination in Employment Act (“ADEA”) and not Title VII, the case is instructive because of the common substantive features and purposes of the two statutes.¹⁸³ After considering the objectives of both, the Court emphasized the public policy interest in promoting the private enforcement of such claims. The Court noted:

The objectives of the ADEA are furthered when even a single employee establishes that an employer has discriminated against him or her. The disclosure through litigation of incidents or practices that violate national policies respecting nondiscrimination in the work force is itself important, for the occurrence of violations 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.¹⁸⁴

The Court observed that “[a]n absolute rule barring any recovery of backpay, however, would undermine the ADEA’s objective of forcing employers to consider and examine their motivations, and of *penalizing* them for employment decisions that spring from age discrimination.”¹⁸⁵ It concluded that eliminating backpay would undermine the purposes of deterring and penalizing employers for discriminatory behavior, despite the availability of other remedies such as injunctive relief, declaratory judgments, liquidated damages in special cases, or other forms of legal or equitable relief.¹⁸⁶

McKennon’s reasoning suggests that in the Title VII context, a *per se* rule against backpay awards for undocumented workers would similarly “undermine” Title VII’s objectives of deterrence and punishment. Although the employee’s wrongdoing may not be ignored,¹⁸⁷ the em-

182. Such “after-acquired evidence” cases and the doctrine underpinning them are further discussed *infra* Part IV.B.1.

183. *McKennon* expressly noted that “[t]he ADEA and Title VII share common substantive features and also a common purpose.” *McKennon*, 513 U.S. at 358.

184. *Id.* at 358-59.

185. *Id.* at 362 (emphasis added).

186. *See id.* at 357-58 (describing remedies available under the ADEA). The Court also determined that front pay and reinstatement would not be appropriate in “after-acquired evidence” cases. *Id.* at 361-62.

187. The Court recommended that a starting point for the calculation of backpay in “after-acquired evidence” cases would be from the date of the discriminatory termination to the date the

ployer's discriminatory actions must nonetheless be identified and penalized through a backpay award in order to protect the important public interest in nondiscrimination. Denying backpay to all undocumented workers would, in the words of the *Albemarle* Court, "frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."¹⁸⁸

In addition to deterring and punishing discrimination, backpay in the Title VII setting also plays a crucial role in encouraging private individuals to come forward and enforce the public interest in freedom from discrimination, over and above any private interests of the complainants. As the Supreme Court has recognized, "the private litigant [in a Title VII case] not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices."¹⁸⁹ Whereas the NLRA is enforced primarily through the actions of the NLRB rather than of private individuals, "Title VII depends principally upon private causes of action for enforcement."¹⁹⁰

In sum, backpay importantly advances the statutory goals of deterrence and punishment, and encourages private litigants to enforce the public interest embodied in Title VII's antidiscrimination norms. In

evidence of wrongdoing was discovered. However, courts should also consider the equitable circumstances of the particular case in determining the appropriate amount of backpay. *Id.* at 362.

188. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975); *see also supra* notes 176-180, and accompanying text.

189. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). *See also* *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 296 (2002) ("[W]henver the EEOC chooses from among the many charges filed each year to bring an enforcement action in a particular case, the agency may be seeking to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific relief"); *N.Y. Gaslight Club v. Carey*, 447 U.S. 54, 63 (1980) (explaining that a Title VII plaintiff is "a private attorney general, vindicating a policy of the highest priority") (citation and internal quotation marks omitted).

190. *See* *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1067 (9th Cir. 2004). It is important to underscore that compensatory and punitive damages would be insufficient by themselves to fulfill the important goals of deterrence, punishment, and encouragement of private enforcement activities. First, had Congress believed these remedies to be sufficient, without more, it would have in 1991 withdrawn the backpay remedy rather than reaffirming all "previously available remedies." *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 852 (2001). Instead, the 1991 amendments manifested Congress's belief that each of these remedies plays an important role in securing Title VII's objectives. Second, compensatory and punitive damages are not available in disparate impact cases. *See supra* note 95 and accompanying text. In addition, whereas backpay is "reasonably certain," *Albemarle*, 422 U.S. at 417-18, compensatory and punitive damages are notoriously intangible and difficult to calculate. Because, in contrast to backpay, it is nearly impossible to predict *ex ante* the likelihood and extent of a potential plaintiff's recovery based on compensatory and punitive damages, the prospects of these remedies are less likely to influence the behavior of employers considering the potential costs of discrimination and potential plaintiffs considering the potential gains of going to court.

comparison to its role under the NLRA, backpay plays such an indispensable role in the Title VII remedial scheme that a per se rule against it, even where the employee has committed some wrongdoing, would strip it of its efficacy. For this reason as well, *Hoffman*'s denial of backpay to undocumented workers under the NLRA does not fungibly extend to the Title VII context. Rather, in weighing immigration policy against the paramount importance of the nation's civil rights goals, the courts must locate a balance that effectuates the concerns underlying both public policies.

4. The Authority of Federal Courts to Balance Competing Statutory Objectives

In *Hoffman*, the Supreme Court emphasized that the NLRB's authority to order backpay to undocumented workers was limited because the decision was one that required the balancing of "policies the Board has no authority to enforce or administer."¹⁹¹ In contrast, in the context of private enforcement of Title VII in the federal courts, the careful balancing of competing policy interests is conducted by a court, whose very place in our federal constitutional scheme is based upon its duty to say what the law is.¹⁹² While *Hoffman* certainly circumscribes the power of one federal agency to make difficult choices when faced with a conflict between its own organic statute and a statute enforced by an entirely separate agency, the decision says little about the authority of the federal courts to reach compromise solutions. The courts in both *De La Rosa* and *Rivera v. NIBCO, Inc.* cited this important distinction as justification for declining to extend *Hoffman* to the Title VII setting.¹⁹³

191. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149 (2002). Indeed, the Court's opinion is replete with statements emphasizing the limited authority of the NLRB. *See, e.g., id.* at 142-43 ("This case exemplifies the principle that the Board's discretion to select and fashion remedies for violations of the NLRA, though generally broad, is not unlimited.") (internal citations omitted); *id.* at 144. ("[W]e have . . . never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA."); *Id.* at 147 ("[W]here the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield."); *Id.* at 149 ("[T]he award lies beyond the bounds of the Board's remedial discretion."); *Id.* at 149 ("However broad the Board's discretion to fashion remedies when dealing only with the NLRA, it is not so unbounded as to authorize this sort of an award."); *id.* at 152 (referring to the Board's "lack of authority to award backpay").

192. *See, e.g., Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. . . . If two laws conflict with each other, the courts must decide on the operation of each.")

193. *See Rivera*, 364 F.3d at 1068; *De La Rosa v. N. Harvest Furniture*, 210 F.R.D. 237, 239

The *Hoffman* court was understandably reluctant to entrust to an administrative agency – charged with enforcement of a particular national policy – the delicate business of balancing two federal statutory schemes. The situation is entirely different, however, when the balancing is done by a federal court, whose institutional competence and expertise is well established. The federal courts have traditionally been accorded broad discretion to determine in particular cases which remedies will best achieve the competing interests at play given, as relevant, the seriousness of the discrimination or immigration violations at issue.

Indeed, Supreme Court precedent explicitly requires federal courts facing potential conflicts between federal statutes to balance the interests reflected in each and give effect to both statutes whenever possible. In *Morton v. Mancari*,¹⁹⁴ for example, the Supreme Court considered a facial conflict between the Equal Employment Opportunity Act of 1972 (“EEOA”), which amended Title VII to include federal government employees within its protections, and an earlier statute establishing a preference for Native Americans in employment decisions made by the Bureau of Indian Affairs.¹⁹⁵ The plaintiff-appellees contended that the EEOA implicitly repealed the Native American preference.¹⁹⁶ Rejecting this argument, the Court reasoned that “[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for repeal by implication is when the earlier and later statutes are irreconcilable.”¹⁹⁷ The Court cautioned: “The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”¹⁹⁸ Finding no such legislative intention in that case, the Court con-

(C.D. Ill. 2002). During oral argument in *Hoffman*, one member of the Court made a remark that highlighted the difference between the power of the courts to determine the proper remedy and the power of a federal agency to instruct the courts on a remedy: “We don’t give a deference to administrative agencies as to what damage[s] are available in court. That’s not part of their administration of the laws, is it? I don’t know any case where we’ve said, well, what damages – you know, the agency can tell us what damages we can award. That seems quite extraordinary.” Oral Argument of Ryan D. McCortney at *21, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (No. 00-1595), available at 2002 WL 77224 (Jan. 15, 2002).

194. 417 U.S. 535 (1974).

195. *Id.* at 537-41; see also 42 U.S.C. § 2000e-16 (2000).

196. See *Mancari*, 417 U.S. at 547.

197. *Id.* at 550 (citing *Georgia v. Penn. R.R. Co.*, 324 U.S. 439, 456-57 (1945)); see also *Posadas v. Nat’l City Bank*, 296 U.S. 497, 503 (1936) (“repeals by implication are not favored”).

198. *Mancari*, 417 U.S. at 551; see also *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (asserting that the courts should read federal statutes “to give effect to each if we can do so while preserving their sense and purpose”).

cluded that the Native American preference, which was intended to further Native American self-government, was not inconsistent with the Equal Employment Opportunity Act's purpose of eliminating race-based employment discrimination. Accordingly, the Court determined that the Native American preference was not repealed by the later Act.¹⁹⁹ Under the Court's approach, even a facial conflict in the text of two federal statutes by itself is insufficient to invalidate the earlier of the two laws.

Applying these principles to the instant question indicates that effectuating the immigration policies embodied in the IRCA does not bar the Title VII backpay remedy for undocumented workers. Rather, the objectives of both statutes can be accommodated by permitting such awards in appropriate cases. Nothing in the IRCA withdraws Title VII protections for undocumented workers or dictates what should happen when, despite the prohibitions on employment of undocumented workers, such an employment relationship is created and the worker is subjected to discrimination. Indeed, as discussed in Part III.B.2 above, legislative developments demonstrate that Congress neither intended nor understood the IRCA to limit existing rights and remedies under Title VII in any way.

Aside from this significant difference in Title VII's legislative history, the importance of the backpay remedy to Title VII enforcement further distinguishes the case of Title VII from that of the NLRA. While *Hoffman* expressed concern that enforcing a backpay remedy may create some tension with the IRCA,²⁰⁰ this concern is outweighed in the Title VII context because the important national objective of eradicating employment discrimination – one that cannot effectively be achieved without a backpay remedy – would be defeated. As the preceding sections make clear, the backpay remedy is so essential to achieving Title VII's policy goals that it must be preserved in any accommodation of the IRCA. In weighing the competing objectives of the IRCA and the NLRA in *Hoffman*, in contrast, a different balance was struck because of the far lesser role played by backpay in the NLRA remedial scheme. There, the *Hoffman* Court found that backpay was not so essential to the enforcement of the labor laws that its preclusion would threaten the entire statutory scheme.

Here, by comparison, where Congress has not clearly stated an intent to limit the remedies available to undocumented workers under Title VII (and indeed, has stated an intent to preserve Title VII protections

199. *Mancari*, 417 U.S. at 551.

200. *Hoffman*, 535 U.S. at 151.

without limitation), the backpay remedy must be retained to give effect to the important national policy of a discrimination-free workplace. The public interest in freedom from discrimination in employment is damaged when *anyone* is discriminated against, regardless of immigration status. In turn, this public interest is vindicated whenever an individual, regardless of immigration status, acts as a private attorney general to bring such reprehensible conduct to public light. And while a federal agency's power to resolve seeming conflicts between two unrelated statutes may be limited, the courts have not only the power but the duty to do so, and without compromising the objectives of either statute.²⁰¹

IV. LIMITING DISCOVERY OF IMMIGRATION STATUS

Irrespective of whether *Hoffman*'s rationale for denying backpay to unauthorized employees in NLRA cases will be appropriately limited to the labor relations setting, or instead broadly extended to questions of relief under other protective statutes, there is no doubt that defendants will attempt to invoke *Hoffman* as aggressively as possible for tactical advantage in litigation. Employers now routinely defend all manner of employment actions in purported reliance on *Hoffman*, either to argue that the decision *sub silentio* deprives undocumented workers of standing to sue, prevents them from recovering some or all forms of relief,²⁰² or – perhaps most immediately – that all plaintiffs must submit to discovery aimed at ascertaining their immigration status.²⁰³

The last of these is typically a demand that immigrant plaintiffs and their counsel will confront at or near the outset of litigation. It will too frequently have the effect of causing undocumented plaintiffs (and even others, *see* Part II.C, *supra*) to abandon their claims in order to avoid the risk that their immigration status will be disclosed or otherwise compromised or, indeed, not to file claims at all. Such demands find no support in *Hoffman*, however, because: 1) *Hoffman* did not legitimate such discovery, 2) the Federal Rules of Civil Procedure strongly counsel that such discovery be barred or significantly limited because of its chilling effect upon plaintiffs, and 3) the public interest would be severely preju-

201. *See supra* notes 191-193 and accompanying text.

202. *See, e.g.*, Nat'l Employment Law Project, *Used and Abused: The Treatment of Undocumented Victims of Labor Law Violations Since Hoffman Plastic Compounds v. NLRB*, at 8 (Oct. 2003), available at <http://www.nelp.org/docUploads/Used%20and%20Abused%20101003%2Epdf>.

203. *See, e.g.*, Nat'l Employment Law Project & Nat'l Immigration Law Ctr., *Undocumented Workers: Preserving Rights and Remedies After Hoffman Plastic Compounds v. NLRB* § IV (Apr. 2003) available at <http://www.nelp.org/iwp/rights/organize/nlghoff040303.cfm>.

diced by the consequent weakening of the critical private enforcement of Title VII. We elaborate on each of these considerations below.

A. Hoffman's Silence on Issues of Discoverability

Employers may argue that *Hoffman's* elimination of backpay remedies to undocumented workers under the NLRA rendered the immigration status of all plaintiffs relevant and *a fortiori* discoverable, wholly irrespective of Rule 26(b)(2) of the Federal Rules of Civil Procedure. Such an assertion, however, fails for the simple reason that *Hoffman* did not address how a plaintiff's immigration status may permissibly be learned in the first place, since the manner of its discovery was never litigated or raised on appeal in that case.

Appropriately, the immigration status of the employees in question in *Hoffman* was not considered at trial before the NLRB. It was only in the post-trial compliance hearing – held to determine the relief the NLRB would order once Hoffman's liability for unlawful retaliation had been determined – that one of the employees, José Castro, inadvertently testified as to his immigration status before an objection could timely be made.²⁰⁴ As the NLRB stated in its underlying decision, “there is no issue before us as to whether the judge should have barred the Respondent from questioning Castro about his eligibility for employment.”²⁰⁵

Hoffman therefore had no occasion to address *how* an undocumented employee's immigration status might properly come to light to begin with. It is, of course, well-established that information is not made discoverable simply because it is asserted to be relevant.²⁰⁶ For instance,

204. “When Hoffman's attorney began questioning Castro about his citizenship, the Board's General Counsel objected. The ALJ sustained the objection, but not before Castro had stated that he was a Mexican national and that the birth certificate he had used to gain employment from Hoffman was borrowed from a friend.” *Hoffman Plastic Compounds, Inc. v. NLRB*, 237 F.3d 639, 641 (D.C. Cir. 2001) (en banc), *rev'd*, 535 U.S. 137 (2002).

205. *Hoffman Plastic Compounds, Inc.*, 326 N.L.R.B. 1060, 1061 n.9 (1998) (noting irregularity of the means by which that information made its way into the administrative law judge's decision, but observing that the NLRB had subsequently raised no exception to the receipt of that evidence into the record). The NLRB noted that “[a]t the end of the questioning, the judge stated he was sustaining the objection. Nonetheless, in his written decision, he made factual findings based on Castro's admission.” For reasons unknown, the Board failed to file an exception to the ALJ's findings based on that irregularity. *Id.*

206. *See, e.g.*, FED. R. CIV. P. 26(b) (setting forth categorical limitations on discovery); *Hickman v. Taylor*, 329 U.S. 495, 507-08 (1947) (“[D]iscovery, like all matters of procedure, has ultimate and necessary boundaries”); *In re Surety Ass'n of Am.*, 388 F.2d 412, 414 (2d Cir. 1967) (“[P]ractical considerations dictate that the parties should not be permitted to roam in shadow zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so.”) (citation omitted).

in *McKennon v. Nashville Banner Publishing Co.*²⁰⁷ – a case sometimes cited by employers in attempts to justify immigration-related discovery – the Supreme Court noted that there are boundaries on the ability of defendants to search for evidence of employee wrongdoing when defending an employment discrimination claim, even if such evidence might limit an employer’s backpay exposure:

The concern that employers might as a routine matter undertake extensive discovery into an employee’s background or performance on the job to resist claims under the Act is not an insubstantial one, but we think the authority of the courts to award attorney’s fees, mandated under the statute, 29 U.S.C. §§ 216(b), 626(b), and to invoke the appropriate provisions of the Federal Rules of Civil Procedure will deter most abuses.²⁰⁸

Thus, even if *Hoffman* made a worker’s status potentially relevant to the measure of backpay, it does not thereby confer license upon any and all efforts to discover that status. Indeed, as we will next discuss, Rule 26 of the Federal Rules of Civil Procedure provides a powerful basis for protections against intimidating discovery tactics in circumstances where employers have attempted to place plaintiffs’ immigration status at issue.

B. Utilizing Rule 26 to Protect Immigrant Plaintiffs

A protective order under Rule 26 of the Federal Rules of Civil Procedure can provide plaintiffs’ attorneys with an important tool to resist invasive discovery demands. Rule 26(b)(2) provides that a district court may place limits on the scope of discovery to be taken in situations where, *inter alia*, “the burden or expense of the proposed discovery outweighs its likely benefit.” Rule 26(c) accordingly provides that the court “may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense” In considering the need for a protective order, therefore, the courts balance the need, if any, for the information sought against the prejudice or burden that the discovery would impose upon the responding party.²⁰⁹

207. 513 U.S. 352 (1995).

208. *Id.* at 363.

209. See *Nicholas v. Wyndham Inter., Ltd.*, 373 F.3d 537, 543 (4th Cir. 2004) (applying Rule 26 balancing analysis and denying discovery of plaintiffs’ immigration status where such requests were at “the outer limits of conceivable relevance.”); *Farnsworth v. Procter & Gamble Co.*, 758

Below, we discuss two important factors in this balancing that plaintiffs' attorneys may rely on in moving for a protective order pursuant to Rule 26.

1. Factoring the Chilling Effect of Immigration-Related Discovery into Rule 26 Balancing

As discussed in Part II.C, permitting defendant employers freely to discover sensitive matters relating to plaintiffs' immigration status could have a deeply chilling effect that would severely undercut their ability to enforce their rights under Title VII. The courts have long recognized these troubling effects.²¹⁰ Similarly, the Ninth Circuit, in the closely analogous context of a request that plaintiff workers be allowed to proceed pseudonymously, has noted the importance of insulating particularly vulnerable plaintiffs from the adverse consequences of disclosing their identities. Affirming that there are "special circumstances when the party's need for anonymity outweighs prejudice to the opposing party and the public's interest in knowing the party's identity," the court found that the district court abused its discretion by failing to consider the po-

F.2d 1545, 1547 (11th Cir. 1985) (stating that the district court's duty was to balance defendant's interest in the information, against plaintiff's interest in keeping that information confidential); *see also* Calderon v. Witvoet, 999 F.2d 1101, 1106-07 (7th Cir. 1993) (rejecting, without expressly invoking Rule 26, "a roving inquiry into [plaintiff employees'] immigration status" where defendant was unable to articulate any credible basis for its relevance).

210. *See, e.g., In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987) (denying discovery concerning plaintiffs' immigration status, noting that such discovery could inhibit their pursuit of their legal rights "because of possible collateral wholly unrelated consequences, [and] because of embarrassment and inquiry into their private lives"); *Montelongo v. Meese*, 803 F.2d 1341, 1352 n.17 (5th Cir. 1986) (noting that district court barred inquiry into class members' immigration status); *John Dory Boat Works, Inc.*, 229 N.L.R.B. 844 (1977) (NLRB enjoined employer from calling employees' immigration status into question, noting that the impact upon witnesses of immigration-related questions at Board proceedings "ranged from unsettling to devastating and certainly affected their ability to testify.").

As discussed earlier, *see supra* note 91, this chilling effect is particularly strong because apart from the specter of deportation, a number of criminal statutes could be implicated by such discovery. *See* 18 U.S.C.A. § 1015 (West 2005) (prohibiting making a false claim of U.S. citizenship in order to engage in employment); 18 U.S.C. § 1546 (2000) (prohibiting false attestation on an employment verification form); 42 U.S.C. § 408(a)(7)(B) (2000) (prohibiting false use of a social security number). Employer knowledge of adverse plaintiff testimony in these areas, or other information indicating that an employee lacks current work authorization, could require an employer to terminate the worker. *See* 8 U.S.C. § 1324a(a)(2) (2000). Information that an employee at some time in the past lacked work authorization or misrepresented his or her immigration status to the employer could also be grounds for termination. Plainly, even an attenuated possibility that an adverse disclosure might result in such severe job consequences would inhibit many, if not most, reasonable plaintiffs from continuing to press their claims.

tential harms to the plaintiffs of disclosure and their vulnerability to retaliation:

While threats of termination and blacklisting are perhaps typical methods by which employers retaliate against employees who assert their legal rights, the consequences of this ordinary retaliation to plaintiffs are extraordinary. As guest workers in Saipan, plaintiffs may be deported if they lose their jobs.²¹¹

Accordingly, after *Hoffman*, several district courts have rejected employers' attempts to discover immigration status information, citing similar concerns about the impact on employees' willingness to enforce their rights. Recognizing the obligation to balance the need for the discovery sought against its potential to harm plaintiffs, one such court, in denying an employers' motion to compel plaintiffs to produce immigration-related documents, observed:

[A]s the Magistrate Judge found, there is an *in terrorem* effect to the production of such documents. It is entirely likely that any undocumented class member forced to produce documents related to his or her immigration status will withdraw from the suit rather than produce such documents and face termination and/or potential deportation.²¹²

Likewise, in a similar case, the district court rejected the employers' bid to discover plaintiffs' immigration status notwithstanding its possible relevance, pointing to the serious intimidating effect such discovery would have. As the court explained, "*even if such discovery were relevant . . . the risk of injury to the plaintiffs if such information were disclosed outweighs the need for its disclosure.*"²¹³ The court elaborated, "Even if the parties were to enter into a confidentiality agreement restricting the disclosure of such discovery, as [the defendant] suggests, there would still remain 'the danger of intimidation, the danger of destroying the cause of action' and [sic] would inhibit plaintiffs in pursuing their rights."²¹⁴

211. *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1071 (9th Cir. 2000) (noting that "complaining employees are more effectively protected from retaliation by concealing their identities than by relying on the deterrent effect of *post hoc* remedies").

212. *Flores v. Albertson's, Inc.*, No. CV01-00515, 2002 WL 1163623, at *6 (C.D. Cal. Apr. 9, 2002) (affirming denial of employer's motion to compel production of immigration documents).

213. *Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191, 192-93 (S.D.N.Y. 2002) (denying defendant's request for immigration status information) (citations omitted) (emphasis added).

214. *Id.* See also *Flores v. Amigon*, 233 F. Supp. 2d 462, 464-65 (E.D.N.Y. 2002) (granting protective order against discovery of immigration status information, and noting that "*even if it were*

Although these district court cases reaffirmed the post-*Hoffman* vitality of FLSA wage claims for work already performed, as opposed to backpay, their assessment of the coercive effect of immigration-related discovery applies with full force to Title VII backpay questions. Other post-*Hoffman* cases have likewise rejected immigration-related inquiries for the same reasons,²¹⁵ again notwithstanding *arguendo* their possible relevance.²¹⁶ Subjecting immigrant plaintiffs to discovery about their

[relevant], the potential for prejudice far outweighs whatever minimal probative value such information would have.”) (emphasis added); *Topo v. Dhir*, 210 F.R.D. 76, 78 (S.D.N.Y. 2002) (issuing Rule 26(c) protective order barring immigration-related questioning, and stating that “[w]hen the potential for abuse of procedure is high, the Court can and should act within its discretion to limit the discovery process, even if relevancy is determined”) (emphasis added); *Diaz v. V & V Farms*, No. C01-20423, 2002 WL 32816452, at *2 (N.D. Cal. Sept. 18, 2002) (following *Rivera v. NIBCO, Inc.*, 204 F.R.D. 647 (E.D. Cal. 2001), denying discovery of Social Security numbers used by plaintiffs and concluding that “the proposed questions in this suit are not relevant and could chill the pursuit of workplace rights.”).

One post-*Hoffman* decision has taken an equitable approach in denying employer-requested immigration discovery. See *Rodriguez v. Texan, Inc.*, No. 01 C 1478, 2002 WL 31061237, at *3 (N.D. Ill. Sept. 16, 2002) (granting plaintiffs’ motion *in limine* to exclude evidence of their undocumented status for purposes of challenging their entitlement to damages, court noted that “it surely comes with ill grace for an employer to hire alien workers and then, if the employer itself proceeds to violate the [FLSA] . . . , for it to try to squirm out of its own liability on such grounds. For more than one reason, this is a classic case for the application of the principle of waiver . . .”).

215. *EEOC v. First Wireless Group, Inc.*, 225 F.R.D. 404, 406-07 (E.D.N.Y. 2004) (following *Rivera v. NIBCO, Inc.* and denying discovery of charging parties’ immigration status in Title VII case); *Cortez v. Medina’s Landscaping, Inc.*, No. 00C 6320, 2002 WL 31175471, at *1 (N.D. Ill. Sept. 30, 2002) (denying defendant’s motion to discover plaintiff’s immigration status); *Diaz*, 2002 WL 32816452, at *1-2 (denying motion to compel deposition answers related to immigration status); *Cabrera v. Ekema*, 695 N.W.2d 78 (Mich. App. 2005) (holding trial court abused its discretion in compelling production of plaintiffs’ Social Security numbers even for assertedly “limited purpose,” concluding that such information was not relevant and “was improper as it sought to intimidate plaintiffs from exercising their rights.”); *Cagnoli v. Tandem Staffing*, 888 So. 2d 79, 80 (Fla. Dist. Ct. App. 2004) (striking down requirement that applicants for workers’ compensation benefits must provide Social Security number); *Asgar-Ali v. Hilton Hotels Corp.*, 4 Misc. 3d 1026(A) (N.Y. Sup. Ct. 2004) (finding that *Hoffman* does not make immigration status relevant to claim for lost future wages stemming from workplace accident, and observing that “Hilton’s interest in plaintiff’s alien status can only be construed as an attempt to deny plaintiff access to the courts through intimidation; this is intolerable to this Court.”); *Llerena v. 302 W. 12th Street Cond.*, 5 Misc. 3d 1022(A) (N.Y. Sup. 2004) (denying, in tort action for lost wages, defendants’ motion to compel plaintiff to produce information relating to his immigration status); *Pontes v. New England Power Co.*, No. 03-00160A, 2004 WL 2075458, at *3 (Mass. Super. Aug. 19, 2004) (same). See also *Centeno-Bernuy v. Perry*, 302 F. Supp. 2d 128, 132, 135, 139 (W.D.N.Y. 2003) (enjoining defendant employer from communicating with “any local, state or federal governmental official or agency” concerning plaintiffs’ immigration status, and further noting that “retaliatory actions undermine the important purposes of the . . . FLSA and MSAWPA, and could potentially chill other migrant workers who might seek to enforce their rights.”).

216. *Centeno-Bernuy v. Becker Farms*, 219 F.R.D. 59, 61 (W.D.N.Y. 2003) (granting protective order against employer attempts to discover FLSA and MSAWPA plaintiffs’ current residences

immigration status would have the same *in terrorem* effect these decisions decry. Even the possibility of having to answer such questions would likely deter many such plaintiffs from taking any legal steps at all. The risk of retaliatory or other severe, far-reaching consequences is, much too often, quite real.²¹⁷ It is a heavy burden that such plaintiffs – who typically have come to this country only to find opportunities to support themselves and their families that do not exist in their home countries²¹⁸ – should not be forced to bear in order to vindicate the Title VII rights that are undisputedly theirs. Accordingly, no published decision to date has understood *Hoffman* to permit, let alone mandate, the unmitigated immigration-related discovery defendants will commonly seek. Courts have also turned aside arguments that the mere postulated existence of evidence that a plaintiff may lack immigration status automatically justifies far-ranging attempts to discover such status under the “after-acquired evidence” doctrine set out by the Supreme Court in *McKennon*.²¹⁹ Consistent with these cases, neither the EEOC nor the

and places of employment, even assuming *arguendo* the relevance of that information, in view of intimidating effect of such discovery). See also *In re Herrera-Priego*, U.S. Dept. of Justice Exec. Office for Immigration Review (Lamb, I.J., July 10, 2003) available at <http://www.lexisnexis.com/practiceareas/immigration/pdfs/web428.pdf> (granting a motion to terminate proceedings inasmuch as the prosecution was based on evidence obtained by the INS in violation of an internal guideline, Operations Instruction 287.3a (“Questioning Persons During Labor Disputes,” published in 74 Int. Releases 199 (Jan. 27, 1997))). This guideline, which was redesignated as § 33.14(h) of the Special Agent’s Field Manual effective April 28, 2000, counsels that when information about employees’ immigration status is provided under circumstances indicative of an ongoing labor dispute, INS offices should proceed carefully so as to avoid inadvertently involving the agency in efforts to retaliate against or otherwise interfere with the rights of the employees in question. Although *Herrera-Priego* is not a civil discovery case, it nonetheless acknowledges and disapproves the illicit dynamic in which status information may be leveraged in order to intimidate and coerce employee plaintiffs or, indeed, to dispose of them and their claims entirely.

217. Evidence suggests a close and troubling correlation between the presence of labor and employment disputes in a workplace and the occurrence of a federal immigration raid. See Michael J. Wishnie, *Introduction: The Border Crossed Us: Current Issues in Immigrant Labor*, 28 N.Y.U. REV. L. & SOC. CHANGE 389, 390-92 (2004) (discussing data indicating that in the New York district of INS, during a thirty-month period from 1997 to 1999, 102 of 184 INS-raided businesses were subject to a labor agency investigation or proceeding at the time of the raid).

218. Congress recognized this when it found, during its deliberations on the IRCA, that “there is no doubt that many who enter illegally do so for the best of motives – to seek a better life for themselves and their families.” 1986 U.S.C.A.N. at 5650.

219. In *Rivera*, for example, the employer argued that the after-acquired evidence doctrine outlined in *McKennon*, taken together with *Hoffman*, should be understood to permit unrestricted discovery into immigration status inasmuch as evidence of wrongdoing, if indeed any exists, might serve to terminate the employer’s backpay exposure at the point at which it discovered such evidence. The Ninth Circuit, citing to *McKennon* as authorizing district courts to limit “wholesale searches for evidence that might serve to limit its damages for its wrongful conduct”, rejected this argument. *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1072 (9th Cir. 2004). The EEOC, moreover, has cast serious doubt upon this extreme reading of *McKennon*. See Equal Employment Opportunity

NLRB have interpreted *Hoffman* as requiring them to initiate inquiries as to complaining workers' immigration status.²²⁰

It is critical to note, as we explained in Part II.C, that such discovery could have a negative impact not only on those who may not be documented but, indeed, on plaintiffs who are fully authorized to work. Because of the great complexity of the immigration laws, the close relationships documented persons often have with undocumented individuals, and the ineptitude of some immigration officers, even legal immigrants may have fears, both founded and unfounded, that they or their

Comm'n, *EEOC Enforcement Guidance on After Acquired Evidence and McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 65 E.P.D. Par. 43, 368 (1995), No. 915.002, Dec. 14, 1995, available at <http://www.eeoc.gov/policy/docs/mckennon.html> ("Launching a retaliatory investigation of a [charging party's] background in response to a charge or complaint of discrimination is one such equitable circumstance [of the type noted by *McKennon*, 513 U.S. at 362, as warranting flexible application of the doctrine.]. Numerous federal courts are in accord, expressly rejecting an interpretation of *McKennon* as providing a "blank check" for discovery in the stated name of pursuing after-acquired evidence. See, e.g., *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221, 1236 (3d Cir. 1994) (The prospect of a defendant's thorough inquiry into the details of a plaintiff's pre- and post-hiring conduct . . . may chill the enthusiasm and frequency with which employment discrimination claims are pursued, even in cases where the victim of discrimination has nothing to hide, let alone cases where the potential plaintiff is not entirely blameless. . . . [T]he likely consequence of the widespread exploitation of after-acquired evidence will be underenforcement of Title VII and ADEA, and consequently underdeterrence of discriminatory employment practices); *Washington v. Lake County*, 969 F.2d 250, 256 (7th Cir. 1992) (approving of application of doctrine so as to "weaken[] the incentive for an employer to engage in a fishing expedition"); *Miller v. AT&T*, 83 F. Supp. 2d 700, 706 (S.D. W.Va. 2000) ("Even if the after-acquired evidence doctrine applies, it is not intended to be used as a fishing expedition by employers to find wrongful conduct on the part of their terminated employees for the purpose of limiting their damages."); *Perry v. Best Lock Corp.*, No. IP98-C-0936, 1999 WL 33494858, at *3 (S.D. Ind. Jan. 21, 1999) ("[The employer] has not provided any information suggesting it has a *specific* basis for believing that an after-acquired defense might be developed here. . . . On this record, therefore, the subpoenas look like nothing more than a fishing expedition, or, more accurately, an exercise in swamp-dredging and muck-raking.") (emphasis in original); *Dodge v. Hunt Petroleum Corp.*, No. 3:97-CV-810-R, 1998 WL 355495, at *1 (N.D. Tex. June 26, 1998) (broad scope of defendant's efforts to discover after-acquired evidence may support inference of retaliatory purpose).

220. See *EEOC Rescission*, *supra* note 112 ("When enforcing [the federal employment discrimination statutes], EEOC will not, on its own initiative, inquire into a worker's immigration status. Nor will EEOC consider an individual's immigration status when examining the underlying merits of a charge."). The EEOC's administrative interpretations of Title VII are "entitled to great deference." *Albamarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975). In the same respect, see Nat'l Labor Relations Bd., *Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens After Hoffman Plastic Compounds, Inc.*, Memorandum from the General Counsel, to the Regional Directors, Officers in Charge and Resident Officers (July 19, 2002) ("Regions have no obligation to investigate an employee's immigration status unless a respondent affirmatively establishes the existence of a substantial immigration issue. . . . The law – IRCA – protects employees against harassment by an employer which seeks to verify their immigration status without cause.") available at http://www.nlr.gov/nlr/shared_files/gcmemo/gcmemo/gc0206.asp?useShared=/nlrb/legal/gcmemo/gcmemo/default.asp.

loved ones will be placed at risk if their own immigration status becomes the subject of scrutiny.²²¹ This is particularly true in the aftermath of the radical immigration law changes in 1996 that subjected even lawful permanent residents to deportation for previously non-existent reasons.²²²

Because a lawsuit will likely be the first encounter that immigrant plaintiffs will have had with the American judicial system, the entire discovery process is certain to be filled with anxiety and apprehension. Being required to submit to questions that, in effect, demand that a plaintiff re-justify her presence in this country would be an upsetting and humiliating experience that would pointlessly demoralize many if not most plaintiffs, and undeniably weaken their resolve to see their cases through to their end. This, in turn, would seriously threaten the vitality of Title VII's protections themselves. Rule 26's balancing analysis, therefore, weighs heavily against permitting unfettered discovery of immigration status information.

2. Factoring in the Impact of Unfettered Immigration-Related Discovery on Vigorous Private Enforcement of Employment Rights

Because of the potentially drastic consequences of immigration-related discovery upon plaintiffs' willingness to come forward, its unrestrained use would also undercut the national public policy in favor of the strong private enforcement of Title VII and similar employment statutes. This is a factor that merits considerable weight in the Rule 26 analysis.²²³

221. See *supra* notes 99-102 and accompanying text.

222. In particular, the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009, rendered the status of even longtime lawful permanent residents unexpectedly precarious. See, e.g., IIRIRA § 321 (codified at 8 U.S.C. § 1101) (redefining "aggravated felony" as a ground for removal); see also *Aragon-Ayon v. INS*, 206 F.3d 847, 852-53 (9th Cir. 2000) (finding that redefinition of "aggravated felony" applied retroactively). In conjunction with the enactment the same year of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, IIRIRA threw into sudden and grave doubt the ability of any lawful permanent resident who ever had committed a crime to remain in the United States. This wreaked havoc with the settled expectations of millions of immigrants that they could live out their lives in the United States, and might eventually become naturalized. See, e.g., U.S. Committee For Refugees, *Supreme Court Victories For Immigrants* ("This meant that immigrants who were convicted years or even decades ago, spent no time in jail for their crime, and who had already applied for relief and were awaiting a final decision when the law was passed were no longer allowed to have their cases heard by an immigration judge. Essentially, these immigrants became subject to mandatory deportation.") available at http://www.refugees.org/world/articles/suprmcourt_rr01_6.htm (last visited Jan. 25, 2005).

223. *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000) (grant-

There is no public purpose served by identifying whether the plaintiff in a particular case is undocumented.²²⁴ In fact, the opposite is true: as we developed in Part III.B.3, the courts have long recognized that the vigorous enforcement of antidiscrimination laws depends almost exclusively on the willingness and ability of private plaintiffs to come forward in defense of their civil rights.²²⁵ That willingness and ability to do so, in turn, depends upon whatever protection they may have against the possibility of employer retaliation or other adverse consequences of proceeding.²²⁶

Were plaintiffs in employment cases – particularly national origin and race discrimination cases, or cases of particular relevance to low-wage worker communities – to be routinely subject to traditional formal discovery regarding their immigration status, this would powerfully deter their willingness to defend their rights in the first place. As noted above, this could discourage even fully documented immigrant workers from coming forward – or, indeed, even employees who may have reason to fear being singled out for immigration-related questioning solely on account of their physical appearance, primary language or manner of speech, or other personal characteristics.²²⁷

Moreover, freely allowing inquiries into immigration status would actually provide unprincipled employers with a perverse, yet powerful incentive to hire undocumented workers, since those workers' fear of retaliation for reporting unlawful working conditions would be far greater than that of their documented counterparts. This, in turn, would push the

ing request for anonymity, court noted that it “must decide whether the public’s interest in the case would be best served by requiring that the litigants reveal their identities.”)

224. See, e.g., *Doe v. Steagall*, 653 F.2d 180, 185 (5th Cir. 1981) (“[P]arty anonymity does not obstruct the public’s view of the issues joined or the court’s performance in resolving them.”); see also *Does I thru XXIII*, 214 F.3d at 1069 (“The public’s interest in this case can be satisfied without revealing the plaintiffs’ identities.”).

225. See, e.g., *McKennon v. Nashville Banner Publ’g Co.*, 513 U.S. 352, 358 (1995) (citing *Alexander* with approval); *Does I thru XXIII*, 214 F.3d at 1073 (“Employee suits to enforce their rights benefit the general public.”); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974) (observing that a private Title VII plaintiff “not only redresses his own injury but also vindicate[s] the important congressional policy against discriminatory employment practices”).

226. See, e.g., *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (“[E]ffective enforcement [of the FLSA] could thus only be expected if employees felt free to approach officials with their grievances. . . . [I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions.”).

227. See, e.g., Stephen M. Cutler, *A Trait-Based Approach to National Origin Claims Under Title VII*, 94 YALE L.J. 1164 (1985) (“Differences in dress, language, accent, and custom associated with a non-American origin are more likely to elicit prejudicial attitudes than the fact of the origin itself.”).

undocumented workforce further underground and depress working standards for all employees; such employers would have little incentive to retain complaining workers, as opposed to hiring more vulnerable workers who lacked work authorization. Ethical employers would suffer anti-competitive harms as a result.²²⁸ The corresponding damage to the national policy goal of vigorous workplace law enforcement is self-evident.²²⁹

C. Ninth Circuit Approval of Protective Orders Barring Immigration-Related Discovery

The arguments set forth above against immigration status discovery were recently adopted by the first federal appellate decision to address *Hoffman*. In *Rivera v. NIBCO, Inc.*,²³⁰ discussed in Part III.A above, the Court of Appeals for the Ninth Circuit recently upheld a district court's protective order that barred or otherwise sharply limited discovery into the work authorization status of the plaintiffs, all immigrants.

Rivera involved a protective order obtained by the plaintiffs pursuant to Rule 26(c) when, in deposition, defense counsel persisted in seeking responses to facially irrelevant queries bearing upon the plaintiffs' immigration status for the stated purpose of investigating their entitlement to backpay. The order: 1) barred questioning on matters directly relating to plaintiffs' immigration status, and 2) restricted the disclosure of plaintiffs' testimony on other such questions less directly related to, but still possibly circumstantially probative of, their immigration status.²³¹ In granting the protective order, the magistrate judge determined that the "chilling effect upon potential discrimination claims," as well as the possibility that the search for after-acquired evidence might

228. See, e.g., *Commercial Cleaning Serv., LLC v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 378 (2d Cir. 2002) (finding that plaintiff small business stated a RICO claim when it alleged that defendant secured anticompetitive advantage by hiring undocumented employees).

229. Numerous district courts have relied on broad public policy considerations such as this in deciding the propriety of protective orders. See, e.g., *In re Eli Lilly & Co.*, 142 F.R.D. 454, 458 (S.D. Ind. 1992) (holding disclosure of identities of persons reporting adverse drug reactions ran counter to public policy of encouraging physicians to report their patients' experiences with the drugs); *Doe v. Am. Red Cross Blood Serv., Inc.*, 125 F.R.D. 646, 653 (D.S.C. 1989) (holding identity of blood donor should not be disclosed in light of public policy in favor of encouraging anonymous testing for sexually transmitted diseases); *Krause v. Rhodes*, 535 F. Supp. 338, 348 (N.D. Ohio 1979) (ordering nondisclosure of grand jury testimony due to strong public policy in favor of secrecy of those proceedings).

230. 364 F.3d 1057 (9th Cir. 2004).

231. *Rivera v. NIBCO, Inc.*, 204 F.R.D. 647 (E.D. Cal. 2001).

“have the stain of retaliation,” both clearly outweighed the benefits of such discovery, if any.²³²

The Ninth Circuit, which heard defendant’s interlocutory appeal from the order after the Supreme Court had decided *Hoffman*, agreed and affirmed the protective order. It recognized that the harms to the plaintiffs of the discovery sought were considerable, and that “[a]s a result, most undocumented workers are reluctant to report abusive or discriminatory employment practices.”²³³ Allowing such discovery would provide employers with a powerful tool with which to frustrate workplace law enforcement:

Granting employers the right to inquire into workers’ immigration status in cases like this would allow them to raise implicitly the threat of deportation and criminal prosecution every time a worker, documented or undocumented reports illegal practices or files a Title VII action. Indeed, were we to direct district courts to grant discovery requests for information related to immigration status in every case involving national origin discrimination under Title VII, countless acts of illegal and reprehensible conduct would go unreported.²³⁴

The court also noted that, in situations where immigration status information was *arguendo* ultimately deemed necessary, district courts could potentially bifurcate the remedies issues such that the production of immigration status could occur in a separate post-trial proceeding where potential harms from disclosure could be significantly mitigated:

The district court has not yet ruled on the plaintiffs’ proposed bifurcated proceedings. Although we do not order such proceedings here, it is clear that a separation between liability and damages would be consistent with our prior case law and would satisfy the concern that causes of action under Title VII not be dismissed, or lost through intimidation, on account of the existence of particular remedies. The principal question to be decided in the action before us is whether NIBCO violated Title VII. It makes no difference to the resolution of that question whether some of the plaintiffs are ineligible for certain forms of statutory relief. NIBCO’s contention that discovery regarding

232. *Id.* at 650.

233. *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004), *reh’g and reh’g en banc denied*, 384 F.3d 822 (9th Cir. 2004), *cert. denied*, 125 S.Ct. 1603 (2005).

234. *Id.*

the plaintiffs' immigration status is essential to its defense is therefore without merit.²³⁵

Indeed, a bifurcation approach – which would help to ensure that any disclosure of status arguably needed to determine entitlement to backpay could be undertaken under meaningful guarantees against improper disclosure – finds support in the position taken by the EEOC subsequent to *Hoffman*. In a June 2002 enforcement guidance, the EEOC stated that “[w]hen enforcing [federal employment discrimination statutes], EEOC will not, on its own initiative, inquire into a worker’s immigration status. Nor will EEOC consider an individual’s immigration status when examining the underlying merits of a charge.”²³⁶ The NLRB’s General Counsel has taken a similar position with respect to investigations under the NLRA.²³⁷ Many courts have likewise approved of bifurcating the liability and damages phases of a trial where sensitive and potentially prejudicial after-acquired evidence has been involved.²³⁸ Similarly, in *Rivera*, the plaintiffs had proposed a post-trial procedure for use in such a contingency, wherein the district court would take au-

235. *Id.* at 1070. See also *Chellen v. John Pickle Co., Inc.*, 344 F. Supp. 2d 1278, 1293-94 (N.D. Okla. 2004) (rejecting defendant’s assertion that plaintiffs’ immigration status was relevant to their coverage under the FLSA, and noting that “such an argument goes to the remedies available to the plaintiffs”).

236. EEOC Rescission, *supra* note 112.

237. The NLRB’s post-*Hoffman* interpretive memorandum states, among other things, that “an individual’s work authorization status is irrelevant to a respondent’s liability under the Act.” Nat’l Labor Relations Bd., *Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens after Hoffman Plastic Compounds, Inc.*, Memorandum GC 02-06 (July 19, 2002), available at http://www.nlr.gov/nlr/shared_files/gcmemo/gcmemo/gc02-06.asp?useShared=/nlrb/legal/gcmemo/gcmemo/default.asp. See also *Tuv Taam Corp.*, 340 N.L.R.B. No 86, 2003 WL 22295361, at *6 (2003). The memorandum further explains that although “an employee’s immigration status may become a relevant factor in the compliance and settlement phases” – *i.e.*, only after a determination of employer liability – that issue may be investigated only after the employer “affirmatively establishes the existence of a substantial immigration issue.” *Id.*

238. See, *e.g.*, *Mardell v. Harleysville Life Ins. Co.*, 65 F.3d 1072, 1073 n.2 (3d Cir. 1995) (“bifurcation may sometimes be advisable as a vehicle to ensure that after-acquired evidence not be improperly used during the liability phase”); *EEOC v. Fargo Assembly Co.*, 142 F. Supp. 2d 1160, 1165 (D. N.D. 2000) (“Bifurcation is appropriate in a true *McKennon* situation because, while subsequently-obtained evidence or wrongdoing may not be used to prove or disprove liability, it may be relevant to determination of damages.”); *Garrett v. Langley Fed. Credit Union*, 121 F. Supp. 2d 887, 906 (E.D. Va. 2000) (bifurcating due to existence of after-acquired evidence that could mitigate backpay award); *Nyazie v. Kennedy*, No. Civ. A. 97-0120, 1998 WL 472504, at *3 (E.D. Pa. July 27, 1998) (ordering bifurcation and noting that doing so “could substantially shorten the period of trial as a whole” if defendant prevailed on liability, and where testimony of liability witnesses would be irrelevant in damages phase); *Finch v. Hercules Inc.*, No. Civ. A. 92-251 MMS, 1995 WL 785100, at *3 (D. Del. Dec. 22, 1995) (court proposed bifurcating liability from damages so that after-acquired evidence relevant to damages alone would not create “confusion and prejudice” at liability stage).

thoritative evidence *in camera* pertaining to plaintiffs' status, enabling it to ascertain the correctness of an overall, lump-sum backpay award to plaintiffs as a group without necessitating the production of status information to defense counsel.²³⁹

V. CONCLUSION

Undocumented and other immigrant workers take on some of the most undesirable jobs in the American economy. They often endure long hours, low pay, and substandard working conditions for fear of being reported to the INS, losing their jobs, or suffering other forms of mistreatment and retaliation. In the wake of the *Hoffman* decision, employers have attempted to capitalize by adopting intimidating litigation strategies in an array of statutory contexts. Against this backdrop of uncertainty and fear, the rights of immigrant workers have become even more precarious, undermining, in turn, the vitality of workplace protections for all workers.

These after-effects of *Hoffman* are not inevitable, despite employers' strenuous efforts to portray the decision's universal applicability as a foregone conclusion. Instead, armed with both substantive and procedural strategies for protecting immigrant workers, civil rights advocates can begin the work of restoring a modicum of fairness and justice to the judicial process for even this most vulnerable of communities.

Title VII represents one of several statutory contexts in which the substantive impact of *Hoffman* on undocumented workers' remedies remains to be fully explored and, for that reason, in which advocates can make a positive impact. It provides an important illustration of how *Hoffman*'s holding may be limited to the NLRA, based upon differences in the legislative history, contemporaneous and subsequent Congressional enactments, remedial schemes, and enforcement mechanisms of the two statutes. By doing so and also by providing robust procedural protections against coercive litigation tactics, it may be possible to ensure, pending Congressional and other legislative solutions to address *Hoffman*'s infirmities, that immigrant workers are genuinely able to enforce their workplace rights. This, in turn, would reinforce the rights of

239. *Rivera*, 364 F.3d at 1062, 1070-71. Regardless of whether the plaintiff or plaintiffs in a given action are undocumented or not (a fact question that has not been established in the *Rivera* litigation), such an *in camera* procedure may be helpful in a settlement context, or in the event that a court should determine, as a matter of substantive law, that undocumented plaintiffs are not entitled to receive backpay.

2005]

DRAWING THE LINE

531

all workers and help to ensure the continuing vitality of our nation's deepest commitments to justice, equality, and fundamental human rights.