



REMEDY WITHOUT RECOURSE: *HOFFMAN PLASTIC COMPOUNDS, INC. v*

***NLRB* AND THE EROSION OF LABOR PROTECTIONS FOR UNDOCUMENTED**

WORKERS

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ABSTRACT

The Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board* (NLRB) represents a fundamental contraction of federal labor protections, establishing that the NLRB lacks the remedial discretion to award back pay to undocumented workers under the Immigration Reform and Control Act (IRCA). By stripping the most vulnerable members of the labor force of make-whole remedies, the Court effectively transformed immigration law into a shield for exploitative employers, thereby facilitating systemic discrimination against both documented and undocumented workers. This ruling incentivized a "low-cost road" of illegality where employers may prefer an unauthorized workforce that lacks the financial recourse to challenge unfair labor practices, while simultaneously eroding the collective bargaining power of authorized workers who witness this impunity. Consequently, the *Hoffman* precedent grants corporations the leverage to suppress unionization efforts through the credible threat of retaliatory discharge, relegating undocumented workers to a permanent remedial underclass with limited agency to report workplace abuses. This environment represents a human rights crisis; unionization remains essential to maintaining safe work environments and ensuring that all employees receive necessary protections. As undocumented immigrants face heightened discrimination from both governmental and societal structures, analyzing the ossification of labor law and the resulting lack of bargaining power is increasingly critical. This paper examines the historical intersection between immigration and labor law, the pervasive chilling effect of the *Hoffman* decision on collective action, and proposes a multi-tiered legal framework—including administrative reforms, statutory litigation under state labor codes or federal tort claims, and the creation of a new class of visas—designed to restore meaningful deterrence and dismantle the exploitative labor dynamics currently sanctioned by the Court.

TABLE OF CONTENTS

- I. INTRODUCTION**
- II. THE INTERSECTION BETWEEN LABOR LAW AND IMMIGRATION**
 - A. The Intersection Pre-Hoffman*
 - B. The Hoffman Decision*
- III. THE IMPACT OF *HOFFMAN***
 - A. How Hoffman Shaped the NLRB*
 - B. The Chilling Effect of Hoffman on Labor Organizing*
 - C. A Sub-Class of Workers and the Bracero Program*
- IV. THE FAILURES AND POSSIBILITIES OF NLRB-BASED SOLUTIONS**
- V. THE PATH FORWARD**
- VI. CONCLUSION**

I. INTRODUCTION

There has been a long and tense relationship between immigration and labor law. Labor law has continually attempted to minimize immigration to the United States. *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board* serves as the primary mechanism in the twenty-first century by which undocumented immigrants are denied a remedy for unfair and exploitative working conditions. There remains a need to understand the tension that has existed between labor law and immigrants to identify potential paths forward that can establish meaningful protections for workers.

The *Hoffman* decision effectively transformed immigration law into a shield for law-breaking employers, allowing them to discharge union activists with financial impunity. By stripping undocumented workers of make-whole remedies, the Court did more than resolve a statutory conflict: it created a permanent underclass by sending a message of intimidation to the entire workforce. This environment not only chills the exercise of labor rights for the undocumented but also erodes the collective bargaining power of authorized workers who stand beside them. This dynamic creates a perverse financial incentive structure through which employers can externalize the costs of labor violations, effectively treating undocumented workers as a disposable workforce, while avoiding the monetary consequences that would otherwise deter unlawful conduct. Consequently, the ruling represents a human rights crisis that necessitates a fundamental legal reevaluation of how federal agencies reconcile labor protections with immigration control.

To remedy these systemic harms, this paper will propose a multi-tiered legal and administrative path forward that moves beyond the National Labor Relations Board's (NLRB)

limited remedial arsenal. First, the NLRB must implement “Expanded Appropriate Remedies,” such as mandatory use of an “Explanation of Rights” document and a public notice reading to restore confidence in the workforce. Second, because the Board’s authority is often restricted to non-punitive measures, labor advocates should shift the venue of enforcement toward statutory litigation in U.S. courts under state labor codes or federal tort claims to ensure financial accountability for employers. Finally, this paper will argue for targeted legislative reforms, including the codification of pre-*Hoffman* back pay practices and the creation of “special visas” for workers involved in labor enforcement proceedings to eliminate the threat of retaliatory deportation. By integrating labor and immigration policy through “Joint Enforcement Actions” and “DHS Forbearance,” the legal system can begin to dismantle the exploitative informal Bracero Program sanctioned by the *Hoffman* majority.

II. THE INTERSECTION BETWEEN LABOR LAW AND IMMIGRATION

A. *The Intersection of Labor Law and Immigration Law Pre-Hoffman*

According to Vernon Briggs, there is a long history of worker solidarity in the United States; however, it was not until the 1850s that formal unions became strong enough to survive the anti-worker sentiment that pervaded politics. Immigrants and unions have often been at odds with each other, as immigrants were used as tools by employers to break strikes through increasing the threat of replacement in response to organizing behavior.¹ Major labor organizations, such as the American Federation of Labor (AFL) in the 1880s-1890s, actively opposed migrants and waged full-scale attacks on the scope of legal immigration.² This culminated in a series of anti-immigration policies, including the Chinese Exclusion Act of 1882

¹ Vernon M. Briggs Jr., *American Unionism and U.S. Immigration Policy*, CENTER FOR IMMIGRATION STUDIES (Aug. 1, 2001), <https://cis.org/Report/American-Unionism-and-US-Immigration-Policy>.

²*Id.*

and the Alien Contract Act of 1885.³ These acts made it illegal for American companies to hire Chinese workers, banned the foreign recruitment of workers, and ended contract work in the United States, requiring contract workers to return to their country of origin.

In 1892, the Supreme Court ruled in *Nishimura Ekiu v. United States* that the federal government is the sole authority over immigration policy in the United States.⁴ This narrowed the scope of where anti-immigration lobbyists' attention had to be placed. The Immigration Commission released a report in 1911 that securitized against immigrants, stating they were depressing wages, causing unemployment, and spreading poverty.⁵ The report created the justification for the commission to recommend an annual immigration restriction that would be significantly more selective.⁶ During and following the Second World War, there was the implementation of the 1942 Mexican labor program (called the “Bracero” program), which permitted Mexican farmworkers to work in the United States for busy seasons and subsequently return to Mexico. Unions at the time vehemently opposed the program, which then ensued immigration reforms until the Immigration Act of 1965 was passed. The program ended in 1964; however, farm owners had grown dependent on the cheap labor that came from migrants.⁷ The implications were staggering for immigration law; the United States had one of the most important domestic markets, dependent on what was now illegal immigration.

The Immigration Act of 1965 followed as policymakers faced increased pressure to create reform to deal with the influx of immigrants.⁸ These pressures on the government paved the way for the passage of the 1986 Immigration Reform and Control Act (IRCA), which has

³*Id.*

⁴ *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892), <https://supreme.justia.com/cases/federal/us/142/651/>

⁵ WILLIAM P. DILLINGHAM, *REPORTS OF THE IMMIGRATION COMMISSION 1-922* (1911), <http://archive.org/details/reportsofimmigra01unitrich>.

⁶ Vernon M. Briggs Jr., *American Unionism and U.S. Immigration Policy*, *CENTER FOR IMMIGRATION STUDIES* (Aug. 1, 2001), <https://cis.org/Report/American-Unionism-and-US-Immigration-Policy>

⁷ *Id.*

⁸ *Id.*

since dominated the national landscape of immigration policy and labor law. The American Federation of Labor supported immigration restrictions via legislative actions, including taking the stance that there should be no immigration at all, which culminated in the IRCA.⁹

The IRCA was signed into law by President Reagan in November 1986, becoming the backbone of legislation that controls undocumented immigration to the United States. Through introducing civil and criminal penalties for employers who knowingly hire people without work authorization in the United States, the IRCA consequently shifted the burden of vetting immigration status onto the employer.¹⁰ Proponents of the IRCA at its passing suggested that the Act created one of the largest pathways to legal immigration. Migrants who had been working in the United States for 90 days were permitted to begin the naturalization process, allowing them to obtain and retain citizenship. This created a legal pathway to citizenship for more than 3 million immigrants, mostly of Hispanic descent.¹¹ However, this clause of the IRCA was revoked after a year.

While attempting to control undocumented immigration, the IRCA instead increased the incentives for unethical employers to hire undocumented workers, thereby allowing them to gain an advantage over law-abiding employers. Shifting the burden onto employers to ensure that workers are documented creates an incentive for some employers to hire undocumented individuals to avoid that responsibility, as employers have a significant economic incentive to hire undocumented workers.¹² Employers recognize savings in the ability to pay lower wages and reduce their enforcement of labor law protections. Additionally, the government's inconsistent

⁹ *Id.*

¹⁰ *Immigration Reform and Control Act of 1986*, Libr. of Cong.: A Latinx Res. Guide: Civil Rights Cases and Events in the U.S., (last visited Apr. 19), <https://guides.loc.gov/latinx-civil-rights/irca>.

¹¹ *Id.*

¹² Joseph D. Layne, *Fighting a Losing Battle: IRCA's Negative Impact on Law-Abiding Employers*, 44 Loy. L.A. L. Rev. 1431 (2011).

application of the IRCA leads employers to believe they will not face penalties for violations. This creates a legal loophole by which employers are incentivized to illegally hire undocumented workers who they can force to work in dangerous conditions and pay pennies on the dime compared to authorized workers.¹³

B. The Hoffman Decision

Hoffman addresses the question: Does the National Labor Relations Board have the discretion to award back pay to immigrants who are not authorized to work in the United States? The case came to the Supreme Court after Jose Castro, a factory worker in California, was fired for union organizing. The NLRB rendered a decision that Jose Castro, along with his fellow organizers, was fired in violation of the National Labor Relations Act (NLRA) and should therefore be reinstated with back pay.¹⁴ The case then proceeded to an administrative law judge to determine the scope of the back pay owed, during which Castro admitted that he was never authorized to work in the United States. The administrative law judge then found that, per the IRCA, Castro was precluded from accessing back pay relief as a result of his immigration status.¹⁵

The case was appealed to the Supreme Court, where the decision found that the NLRB having this discretion ran counter to federal immigration policy, specifically the IRCA.¹⁶ The effect of this decision was staggering; it gave employers an economic incentive to hire

¹³ *Id.*

¹⁴ AMY SUGIMORI ET AL., Nat'l Emp. L. Proj., *Assessing the Impact of the Supreme Court's Decision in Hoffman Plastic Compounds v. NLRB on Immigrant Workers and Recent Developments* 1–7 (2013), https://media.nilec.org/wp-content/uploads/2016/04/Hoffman_NELP_NILC_FINAL.pdf.

¹⁵ *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137, 140 (2002) (Rehnquist, J., majority), <https://supreme.justia.com/cases/federal/us/535/137/>.

¹⁶ Oyez. n.d. "Hoffman Plastic Compounds, Inc. v. National Labor Relations Board." Accessed March 21, 2026. <https://www.oyez.org/cases/2001/00-1595>.

undocumented immigrants without recourse and, by extension, allowed employers to circumvent the labor laws that are the cornerstone of worker protections.

III. THE IMPACT OF *HOFFMAN*

A. How Hoffman Shaped the NLRB

The Supreme Court's decision in *Hoffman Plastic Compounds, Inc v. National Labor Relations Board* represents a significant shift in the remedial authority of the NLRB and, more broadly, in the hierarchy of federal labor policy. By denying back pay to undocumented workers who suffer retaliatory discharges for union activity, the Court did more than simply resolve a statutory conflict: it effectively reconfigured the power dynamic between the executive agency charged with protecting labor rights and the judiciary itself. A vital distinction must be made regarding these financial impacts: while *Hoffman* denies back pay for work not performed, or the wages a worker would have received if they were not unjustly fired, it does not disturb the right of workers to recover wages for work already performed. This distinction is critical to understanding the precise contours of the Court's holding and the limits of its impact on employer liability. Under the Fair Labor Standards Act (FLSA), undocumented workers remain entitled to minimum wage and overtime for actual hours worked, a distinction that prevents total immunity for employers regarding wage theft. Ultimately, this critical reevaluation remains essential, because if the *Hoffman* precedent—which prioritizes immigration control over the fundamental human right to organize—continues to expand, the remaining protections of the Fair Labor Standards Act for work already performed are also vulnerable to being sacrificed to the same exclusionary logic.

This ruling is symptomatic of a deeper structural failure in American law, where, because immigration and labor policies have usually been decoupled, the Court was able to pit immigration control against the right to organize, ultimately requiring labor protections to yield. This failure is rooted in the fragmented nature of federal statutory interpretation, where courts are often required to reconcile competing congressional objectives without clear guidance on hierarchy. Because the NLRA and the IRCA were enacted at different times, with distinct policy goals and enforcement schemes, courts are left to resolve tensions through implied preemption and purposive interpretation rather than explicit statutory instruction. In *Hoffman*, the Court effectively elevated immigration enforcement priorities over labor protections by treating the IRCA as a limit on the scope of the NLRB's remedial authority and not merely a complementary statute. This interpretive approach allows the judiciary to reshape the balance between statutory regimes, even in the absence of direct congressional intent to subordinate one to the other.

This judicial takeover was facilitated by what Cynthia L. Estlund describes as the “ossification” of American labor law—a state where federal labor law has remained practically unamendable for over sixty years, creating a legislative void that the Supreme Court has filled with its own policy preferences. Estlund posits that the ineffectuality of American labor law and the shrinking power of collective bargaining rights are “traceable to the law's ‘ossification’ and its longstanding insulation from democratic renewal and local innovation.”¹⁷ Because the National Labor Relations Act has been “essentially sealed off... from democratic revision” due to a longstanding political impasse at the national level, the Supreme Court has gained unprecedented power to define labor policy through its own interpretations.¹⁸ Since the NLRA contains no private right of action, the Board is the designated institutional vehicle for adapting

¹⁷ Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 *COLUM. L. REV.* 1527-1612 (Oct. 2002), <https://www.jstor.org/stable/1123792>.

¹⁸ *Id.*

labor law to modern conditions, yet it is increasingly “hemmed in by Congress and particularly by the federal judiciary” through the cumulative impact of *stare decisis*.¹⁹

Christopher David Ruiz Cameron argues that Hoffman is “the most recent manifestation of a decades-long process by which the Court has been elevated from an interpreter to a maker of federal labor policy.”²⁰ This transformation reflects a broader trend where the judiciary has stepped in to fill a void left by legislative inaction. Since 1959, Congress has enacted practically no substantive reforms of the NLRA, yet the Supreme Court has fundamentally reshaped the landscape through its rulings. By setting up a “false conflict” at the margins between the NLRA and the IRCA, the majority was able to resolve the tension by effectively abrogating the NLRA in favor of “other” federal policies.²¹ In doing so, the Court dismissed the NLRB’s expertise, treating its efforts to reconcile the two statutes as the ravings of an incompetent bureaucracy and declaring the chosen remedies to be “outside the Board’s competence to administer.”²²

This categorical shift in power was solidified in the decade following the ruling, specifically through two key cases that tested the boundaries of the Board’s remaining authority. The first, *Mezonos Maven Bakery, Inc* (2011), addressed whether the *Hoffman* bar on back pay applied even when the employer, rather than the employee, was the party that violated immigration law.²³ In this case, the NLRB held that *Hoffman* was “categorical in its exclusion of back pay from undocumented workers under the NLRA,” regardless of whether the employer

¹⁹ *Id.*

²⁰ Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, The New Bracero Program, and the Supreme Court’s Role in Making Federal Labor Policy*, 51 *UCLA L. REV.* 1-34 (2003), https://www.uclalawreview.org/wp-content/uploads/2019/09/10_51UCLALRev12003-2004.pdf.

²¹ *Id.*

²² Rehnquist, *supra* note 15.

²³ David J. Liebman, Michael J. Hayes & Peter J. Pearce, *Mezonos Maven Bakery, Inc. and Puerto Rican Legal Defense and Education Fund*, HINSHAW & CULBERTSON LLP (Sept. 1, 2011), https://www.hinshawlaw.com/a/web/vKdEyNr2rTEdZXyyUuF7fb/a15wec/employmentpractices_mezonos_090111.pdf.

knowingly hired the worker in violation of IRCA.²⁴ The Board concluded that awarding back pay would “trench upon ‘policies underlying IRCA’ by replacing wages that ‘could not lawfully have been earned’ in the first place.”²⁵ This decision effectively transformed the IRCA into a “shield” for law-breaking employers, allowing them to escape financial liability for labor violations by invoking the immigration status of their victims.

The second post-*Hoffman* development appeared in *Agri Processors, Co. v. National Labor Relations Board* in 2008, which illustrated how employers attempted to expand the Court’s logic to challenge the very definition of a worker. While *Hoffman* did not disturb the 1984 *Sure-Tan* holding that undocumented workers remain “employees” protected by the Act, Ruben J. Garcia points out that the “seeds for revisiting” these basic protections had been planted during oral arguments when Justice Kennedy questioned whether such workers should be allowed in bargaining units at all.²⁶ In *Agri Processors*, the employers leveraged this uncertainty to challenge the validity of a bargaining unit, arguing that undocumented and documented workers could not share a “community of interest.”²⁷ Although the D.C. Circuit eventually rejected this challenge, the case highlights an emboldened employer class using the *Hoffman* precedent to try to strip undocumented workers of their status as employees entirely. The *Hoffman* outcome creates a practical fragmentation that erodes the legal unity within the shared communities of interest of undocumented workers. Authorized workers are less likely to join their peers in collective action when they see that a violation against an undocumented coworker results in no meaningful financial penalty for the employer.²⁸ This “lore of the shop,” or the

²⁴ Ruben J. Garcia, *Ten Years after Hoffman Plastic Compounds, Inc. V. NLRB: The Power of a Labor Law Symbol*, WILLIAM S. BOYD SCHOOL OF LAW (2012), <https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1800&context=facpub>.

²⁵ Liebman, *supra* note 23.

²⁶ Garcia, *supra* note 24.

²⁷ *Id.*

²⁸ Liebman, *supra* note 23.

shared history and anecdotes that define the unique culture and atmosphere of a business, sends a message that the group's collective power is only as strong as its most vulnerable members' lack of a remedy.²⁹

Ultimately, the reshaping of the NLRB has resulted in a feeble and toothless agency that can no longer restore the status quo *ex ante* after a violation.³⁰ As Rachel Steber concludes, by dividing the workforce into those worthy of remedies and those who are not, the Court has condoned a “sub-class of workers in high demand and with little to no rights.”³¹ The Board's remedial arsenal is now limited to future-oriented obligations, such as cease and desist orders and notice postings, which Justice Breyer warned would allow employers to “conclude that they can violate the labor laws at least once with impunity.”³²

B. The Chilling Effect of Hoffman on Labor Organizing

Beyond its direct impact on the NLRB's remedial powers, the *Hoffman* decision has had a profound and pervasive “chilling effect” on the willingness of undocumented workers to exercise their statutory rights or report workplace abuses. As Cameron observes, the Court's ruling creates a reality where workers are “promised workplace rights in theory, but not in practice.”³³ This silence is not merely a byproduct of a legal ruling but is often a calculated outcome leveraged by employers who use the specter of the decision more effectively than its actual legal application.

²⁹ *Id.*

³⁰ Rita Trivedi, *Restoring a Willingness to Act: Identifying and Remediating the Harm to Authorized Employees Ignored Under Hoffman Plastics*, Univ. of Mich. J.L. Reform (2018).

³¹ Rachel Steber, *Alternative Remedies for Undocumented Workers Left Behind in a Post-Hoffman Plastic Era*, 68 CATH. U. L. REV. 757, include page cited here (2019), <https://scholarship.law.umich.edu/cgi/viewcontent.cgi?article=3524&context=lawreview>.

³² *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137, 140 (2002) (Breyer, J., minority), <https://supreme.justia.com/cases/federal/us/535/137/>.

³³ Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, The New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1-34 (2003), https://www.uclalawreview.org/wp-content/uploads/2019/09/10_51UCLALRev12003-2004.pdf.

The most immediate manifestation of this chill is the misuse of the discovery process in litigation. Ruben Garcia notes that “employers have tried to use *Hoffman* to seek discovery of immigration status in depositions and to deny workers' compensation in some cases,” effectively transforming a labor dispute into a deportation threat.³⁴ This strategy was explicitly addressed in *Rivera v. NIBCO, Inc* (2004), where the Ninth Circuit justified a protective order because “the substantial and particularized harm of the discovery—the chilling effect that the disclosure of plaintiffs' immigration status could have upon their ability to effectuate their rights—outweighed [the employer’s] interests” in obtaining that information.³⁵ The court recognized that if such discovery were permitted, “countless acts of illegal and reprehensible conduct would go unreported” because workers would withdraw meritorious claims rather than risk exposure.³⁶

This environment creates what Lance Compa describes as a “vicious cycle of abuse.”³⁷ Compa argues that immigrant workers’ defenselessness ensures that they fear exercising their collective bargaining rights or seeking legal redress when their workplace rights are violated for fear of retaliation or deportation.³⁸ Employers, fully aware of this fear, are then emboldened to intensify abuses and violations of their rights with the certainty that the workers will not complain to authorities. As Justice Breyer warned in his *Hoffman* dissent, without the deterrence of back pay, “employers could conclude that they can violate the labor laws... with impunity,” essentially receiving “one free bite of the apple” before facing any real consequence.³⁹

The behavioral impact extends into the broader context of occupational safety and health. Jayesh Rathod argues that, while immigration status is a primary factor, the *Hoffman* decision

³⁴Garcia, *supra* note 24.

³⁵ *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004).

³⁶ *Id.*

³⁷ Human Rights Watch, *Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards* (Aug. 1, 2000), <https://www.hrw.org/reports/2000/uslabor/>.

³⁸ *Id.*

³⁹ *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137, 140 (2002) (Breyer, J., minority), <https://supreme.justia.com/cases/federal/us/535/137/>.

“tacitly invited employers to test the significance of immigration status in other areas of employment and labor law,” leading to a tsunami of litigation across statutes like the Fair Labor Standards Act and Title VII.⁴⁰ This constant threat of disclosure “position[s] immigrant workers largely as objects, swayed by structural forces that override individual agency.”⁴¹ This chill is especially dangerous in hazardous industries, including agriculture, construction, and factory work, where workers may trade safety for the speed of work or fail to report injuries to avoid drawing government attention to their unauthorized status.

Ultimately, the most lasting damage of *Hoffman* is the coercive message sent to the entire workforce. As the concurring opinion in *Mezonos Maven Bakery* (2011) points out, “provided it is severe enough, one labor-law violation is all it really takes” to immobilize an organizing effort.⁴² This structural intimidation borders on a threat: assert your rights and you will be discharged, detained, and deported. This lore of the shop creates an enduring culture of intimidation that prevents even authorized coworkers from joining their undocumented peers in collective action, as they witness violations pass with only slaps on the wrists, such as notice posting, rather than meaningful financial remedies.⁴³

C. A Sub-Class of Workers and the New Bracero Program

The ultimate socio-economic consequence of the *Hoffman* decision is the formalization of what Rachel Steber describes as a “sub-class of workers in high demand and with little to no rights.”⁴⁴ While the Court maintained the technicality that undocumented workers are employees under the NLRA, it effectively stripped that status of its primary protective value. By dividing

⁴⁰ Jayesh Rathod, *Beyond the ‘Chilling Effect’: Immigrant Worker Behavior and the Regulation of Occupational Safety & Health*, https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2063&context=facsch_lawrev.

⁴¹ *Id.*

⁴² Liebman, *supra* note 23.

⁴³ Jayesh, *supra* note 40.

⁴⁴ Steber, *supra* note 31.

the American workforce between those worthy of make-whole remedies and those who are not, the Court has not only devalued the NLRA but has also “disadvantage[d] authorized American workers, essentially eroding the goals of IRCA that the Court originally sought to uphold.”⁴⁵

This development represents the revival of a discredited historical era—*Hoffman* enacts, in effect, a “new” Bracero Program. The original Bracero Program was a series of laws and treaties that imported Mexican nationals as “indentured servants” to bolster the agricultural labor pool.⁴⁶ Cameron notes that what “Jim Crow laws were to African Americans... the Bracero Program had become to Mexican Americans.”⁴⁷ Like its predecessor, the new program created by *Hoffman* places an underclass of low-wage Latino immigrants outside the protection of the law, where they are never truly guaranteed workplace rights or safety.

The historical parallel is most visible in the “captivity” of the labor force. In the original program, braceros were confined by law to a given crop and employer and lacked the freedom to travel across the country as they pleased or pursue better working conditions. Under the *Hoffman* regime, undocumented workers face a modern iteration of this captivity—while not legally tied to one employer, the categorical exclusion of back pay means they cannot safely exercise the right to “shop” for better conditions through collective bargaining without risking a “cost-free” discharge.⁴⁸ As Cameron argues, this creates a perverse “protectionism” for law-breaking employers, providing a subsidy in the form of lower labor costs for those who choose the “low-cost road of breaking the law.”⁴⁹

⁴⁵ *Id.*

⁴⁶ Cameron, Christopher. 2003. “Borderline Decisions: Hoffman Plastic Compounds, The New Bracero Program and the Supreme Court’s Role in Making Federal Labor Policy.” Pt. 1-34. *UCLA LAW REVIEW* 51 (1). https://www.uclalawreview.org/wp-content/uploads/2019/09/10_51UCLALRev12003-2004.pdf.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

This legal environment intentionally erodes the workforce unity that the Supreme Court once deemed essential. In the 1984 *Sure-Tan* decision, the Court warned that if undocumented workers were excluded from participation in union activities, “there would be created a subclass of workers without a comparable stake in the collective goals of their legally resident coworkers,” thereby impeding effective collective bargaining for everyone.⁵⁰ *Hoffman* effectively ignored this warning, creating the very fragmented workforce the *Sure-Tan* court sought to avoid.

Ultimately, this subsection of the labor force is relegated to the shadows, serving as the “low-wage muscle” for industries ranging from Southern poultry factories to New York sweatshops, while being denied the tools to reach the middle class. This structural positioning arranges “immigrant workers largely as objects” whose individual agency is overridden by the constant threat of status-based exclusion.⁵¹ By ensuring the merits of this new Bracero Program will not be debated at all in a democratic forum, the *Hoffman* majority has successfully established permanent, remedial exclusion within the American economy.

IV. THE FAILURES AND POSSIBILITIES OF NLRB-BASED SOLUTIONS

A central, albeit restrictive, tenet of the *Hoffman* ruling is the categorical bar on backpay for hours not worked; however, the Court’s holding did not explicitly address whether such financial awards could be redirected to an alternative recipient. Legal scholars like Peter E. Shapiro at The George Washington University Law School argue that the financial liability normally owed to undocumented workers could instead be funneled to organizations dedicated to collective worker representation.⁵² By redirecting these funds, the legal system could effectively

⁵⁰ *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).

⁵¹ Rathod, Jayesh. 2010. “Beyond the ‘Chilling Effect’ and the ‘Chilling Effect’: Immigrant Worker Behavior and the Violation and the Regulation of Occupational Safety & Health.” *EMPLOYEE RIGHTS AND EMPLOYMENT POLICY JOURNAL*.

⁵² Peter E. Shapiro, Union Shops, Not Border Stops: Updating NLRB Sanctions to Help Organize Immigrant Workers After *Hoffman*, 78 *GEORGE WASH. LAW REV.* 1069, 1069-1085 (2010) (NLRB sanction fines should fund immigrant worker organizations) 78-5-Shapiro.pdf.

circumvent the *Hoffman* bar—since the award is not granted to the worker themselves—while ensuring that employers do not realize a windfall from their unlawful conduct.⁵³ This approach seeks to maintain a level of financial deterrence that preserves the integrity of the collective bargaining process for the entire workforce.

The viability of this approach, however, hinges on the precise scope of the NLRB’s authority. Because the Board’s mandate is traditionally viewed as remedial rather than punitive, the Supreme Court has historically interpreted any lack of explicit statutory permission to award damages as an “affirmative of the preclusion of the Board’s authority.”⁵⁴ This creates a significant hurdle: if a redirected backpay award is construed as a punitive damage rather than a make-whole remedy, it is unlikely to survive judicial scrutiny. Conversely, if the damages assessed are too low to be deemed punitive, they may fail to provide the meaningful deterrence necessary to address systemic unfair labor practices.

Nonetheless, the possibility for administrative innovation remains. In the *Mezonos Maven Bakery* opinion, Chairwoman Liebman noted that the *Hoffman* precedent:

“do[es] not definitely shut the door on other monetary remedies, which have not been tested here. It is arguable, for example, that a remedy that requires payment by the employer of backpay equivalent to what it would have owed to an undocumented discriminatee would not only be consistent with *Hoffman*, but would advance Federal labor and immigration policy objectives. Such backpay could be paid, for example, into a fund to make whole discriminatees whose backpay the Board had been unable to collect.”

⁵³ *Id.*

⁵⁴ Rachel Steber, *Alternative Remedies for Undocumented Workers Left Behind in a Post-Hoffman Plastic Era*, 68 CATH. U. L. REV. 757, include page cited here (2019), <https://scholarship.law.edu/cgi/viewcontent.cgi?article=3524&context=lawreview>.

This allows the door to remain open for litigation proposing a common fund, provided it stays within the Board's legitimate power.⁵⁵ Ultimately, the Board faces a delicate balancing act: it must craft penalties stringent enough to create meaningful deterrence while ensuring it does not exceed its authority by awarding remedies that the judiciary will strike down as punitive.

V. THE PATH FORWARD

The legal community has long wrestled with determining the best course of action to address the immediate and long-term harms of the *Hoffman* decision. While the most direct resolution would be for the United States Supreme Court to overturn the ruling and reestablish the availability of back pay for all employees, the current judicial climate makes such a reversal deeply unlikely. Consequently, legal scholars and labor advocates have proposed a series of alternative legal and administrative actions designed to restore the integrity of the National Labor Relations Act and protect the most vulnerable members of the workforce. These solutions range from internal administrative adjustments by the National Labor Relations Board to broader legislative reforms and the creation of alternative remedial funds.

A critical, yet often ignored, component of the path forward involves addressing the harm done to authorized employees who work alongside undocumented workers. As Rita Trivedi observes, the current remedial structure fails to restore the psychological status quo *ex ante* for the remaining workforce after an employer commits an unfair labor practice.⁵⁶ When authorized workers witness their employer retaliate against an undocumented colleague with relative impunity—facing only a slap on the wrist rather than financial consequences—their own willingness to exercise collective bargaining rights is chilled.

⁵⁵ *Id.*

⁵⁶ Rita, *supra* note 30.

To remedy this, we suggest that the NLRB should routinely implement “Expanded Appropriate Remedies” in cases involving undocumented workers to counteract the lore of the shop, which reinforces employer power. One such action is the use of an “Explanation of Rights” document, which sets out core statutory rights with clear examples relevant to the specific violations found in a case. By mailing this document to all current and former employees, the Board can educate the workforce and provide the information and reassurance critical to restoring collective confidence.⁵⁷ Furthermore, the Board could exercise its authority to order extended notice posting periods and notice readings where high-ranking management must acknowledge their legal obligations in front of the assembled workforce. To ensure these orders are not ignored, the Board should utilize visitation rights, both announced and unannounced, allowing agents to enter facilities to monitor compliance, which is especially vital in immigrant-heavy industries where workers are unlikely to report non-compliance for fear of retaliation.⁵⁸

Because alternative-recipient funds for back pay are often struck down as “punitive” and thus beyond the Board’s authority, a more viable path involves shifting the venue of enforcement from administrative actions to statutory and common law litigation. We suggest the initiation of employment claims in U.S. courts under the federal Alien Tort Claims Act or state labor codes.⁵⁹ As the Ninth Circuit noted in *Rivera v. NIBCO, Inc* (2004), federal courts possess superior expertise and the authority to balance Title VII and the NLRA against immigration policy in ways the NLRB cannot.⁶⁰ Unlike the Board, which is limited to “remedial” actions, the judiciary can decide whether a statutory violation warrants back pay by weighing the overriding national

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Ruben J. Garcia, *Ten Years after Hoffman Plastic Compounds, Inc. V. NLRB: The Power of a Labor Law Symbol*, WILLIAM S. BOYD SCHOOL OF LAW (2012), <https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1800&context=facpub>.

⁶⁰ *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004).

policy against discrimination against the goals of the IRCA. This bypasses the punitive label that plagues the NLRB-directed funds while ensuring that law-breaking employers are still held financially accountable for their misconduct.

Legislative action remains a primary, albeit admittedly difficult, avenue for reform. Congress could achieve partial restoration of labor protections by codifying the NLRB's pre-*Hoffman* practice. This would involve amending the NLRA to clarify that back pay remains a valid remedy up until the specific date the employer discovered the worker's undocumented status. Such a move would prevent employers from knowingly hiring undocumented workers, then holding that information as a defensive shield to be deployed only when the worker begins to organize.⁶¹ Additionally, Congress could model the proposed Workplace Action for a Growing Economy (WAGE) Act from 2016 and adapt it to contemporary conditions. The Act could be utilized to strengthen the NLRA's overall deterrent effect by introducing civil penalties and triple back pay, though specific language would be needed to ensure these protections reach the undocumented workforce.

To address the specific fear of deportation that silences workers, we propose modeling Sarah Zelcer's recommendation of the creation of a "Z-Visa," a new cooperative visa category modeled after the existing "U" and "T" visas.⁶² While the current U-Visa requires proof of "criminal activity," the Z-Visa would extend to civil violations, specifically focusing on serious workplace abuse, exploitation, and violations of environmental standards like pesticide misapplication. Under Zelcer's findings, the Z-Visa process would allow the Secretary of Homeland Security to grant temporary legal status to an undocumented person who has

⁶¹ Ruben J. Garcia, *Ten Years after Hoffman Plastic Compounds, Inc. V. NLRB: The Power of a Labor Law Symbol*, WILLIAM S. BOYD SCHOOL OF LAW (2012), <https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1800&context=facpub>.

⁶² Sarah Zelcer, *Engaging Farmworkers in Enforcement of Environmental Policy: The Case for a New Cooperative Visa*, 16 VT. J. ENVTL. L. 542, 542-571 (2015)

witnessed or been exposed to a “covered violation” and has been or is likely to be helpful to law enforcement or federal agencies.⁶³ This proposal is unique in its technical implementation: it expands the list of “certifying agencies” beyond the police and judiciary to include the Environmental Protection Agency (EPA), the Department of Labor (DOL), and even medical professionals.⁶⁴ A medical professional’s certification would verify that the worker’s physical symptoms match the health criteria associated with workplace hazards, such as chemical exposure.⁶⁵ The Z-Visa would not require the high standard of causation found in tort litigation but, rather, a *prima facie* showing that links workplace conditions to physical or mental harm.⁶⁶ This mechanism ensures that immigration enforcement is delayed or stayed while a *bona fide* workplace claim is investigated, preventing employers from using the threat of a raid to silence witnesses or undermine a pending NLRB election. Providing victims and witnesses with “work authorization” cards for the duration of legal proceedings would allow them to seek reinstatement and testify without the immediate threat of being deported, transforming workers from passive “ghosts” into active partners in the enforcement of federal labor and environmental standards.⁶⁷

Finally, the path forward must include “Joint Enforcement Actions” and greater inter-agency cooperation. Rather than treating labor and immigration law as a hierarchy where immigration control always trumps worker rights, agencies like the NLRB, EEOC, and ICE should work in unison to ensure that immigration enforcement is not used as a pretext for

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Human Rights Watch, *Unfair Advantage: Workers’ Freedom of Association in the United States Under International Human Rights Standards* (Aug. 1, 2000), <https://www.hrw.org/reports/2000/uslabor/>. AND Sarah Zelcer, *Engaging Farmworkers in Enforcement of Environmental Policy: The Case for a New Cooperative Visa*, 16 VT. J. ENVTL. L. 542, 542-571 (2015)

strike-breaking or union-busting.⁶⁸ For example, a mandatory policy of “DHS Forbearance” could be established, prohibiting raids or internal enforcement measures at any worksite where an NLRB election is pending or an active labor dispute is being adjudicated.⁶⁹

By combining these administrative remedies, equitable financial pools, and targeted legislative changes, the legal system can begin to mitigate the “sub-class” status *Hoffman* imposed on the immigrant workforce. These actions would not only protect the most vulnerable workers in America but would also shore up the desperately needed collective bargaining power and mental confidence of the authorized workers who stand beside them.

However, while the foregoing proposals collectively gesture toward a restoration of the pre-*Hoffman* remedial landscape, it would be analytically imprecise—and politically naïve—to assume their simultaneous adoption. The contemporary administrative and legislative environment is defined by fragmentation: a periodically under-quorum NLRB,⁷⁰ an increasingly skeptical federal judiciary,⁷¹ aggressive immigration enforcement priorities,⁷² and a Congress largely immobilized by partisan gridlock.⁷³ In such a climate, the question is not which reforms are normatively desirable in the aggregate, but which interventions are both politically plausible and independently capable of reintroducing meaningful deterrence against employer misconduct. Accordingly, reform efforts should be strategically concentrated on those mechanisms that can

⁶⁸ Garcia, Ruben. 2012. *Ten Years after Hoffman Plastic Compounds, Inc. V. NLRB: The Power of a Labor Law Symbol*. <https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1800&context=facpub>.

⁶⁹ Human Rights Watch, *Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards* (Aug. 1, 2000), <https://www.hrw.org/reports/2000/uslabor/>.

⁷⁰ Robert C. Nagle, *The Lost Year at the NLRB: How a Lack of Quorum Stalled Change in 2025*, FOX ROTHSCHILD LLP (Dec. 5, 2025), <https://www.foxrothschild.com/publications/the-lost-year-at-the-nlr-how-a-lack-of-quorum-stalled-change-in-2025>.

⁷¹ Lauren McFerran, *How to Save Labor Law from Slaughter*, THE CENTURY FOUND. (Dec. 11, 2025), <https://tcf.org/content/commentary/how-to-save-labor-law-from-slaughter/>.

⁷² Kaleah Haddock, *ICE and Deportations: How Trump Is Reshaping Immigration Enforcement*, COUNCIL ON FOREIGN RELATIONS (Jan. 30, 2026), <https://www.cfr.org/articles/ice-and-deportations-how-trump-reshaping-immigration-enforcement/>.

⁷³ Jia Xin Luo, *Gridlock From Polarization: The Current State of the United States Government*, DEMOCRATIC EROSION CONSORTIUM (Nov. 22, 2023), <https://www.democratic-erosion.com/2023/11/22/gridlock-from-polarization-the-current-state-of-the-united-states-government/>.

operate within existing statutory frameworks while still altering the incentive structure created by *Hoffman*.

One such intervention lies in the expansion and formalization of immigration-based protections for workers engaged in labor disputes—most notably, the creation (or aggressive administrative analog) of “Z-Visas” for individuals participating in labor enforcement proceedings. Unlike comprehensive legislative overrides of *Hoffman*, which would require congressional action unlikely to materialize in the near term, a visa-based approach can be partially operationalized through executive discretion and inter-agency coordination between the NLRB and the Department of Homeland Security. By temporarily stabilizing a worker’s immigration status during the pendency of a labor claim, such a policy would directly target the coercive leverage that *Hoffman* affords employers: the credible threat of deportation. This reform, thus, is not just a supplement to existing remedies but an overhaul of the underlying enforcement dynamic. By enabling undocumented workers to participate in the proceedings without fear of removal, the likelihood of detection and prosecution of unfair labor practices is significantly easier. In implementing Z-Visas, labor organizers can reintroduce a form of accountability that, while not identical to back pay, nonetheless disrupts the cost-benefit calculus that *Hoffman* recalibrated in favor of employer impunity.

At the same time, if political or administrative constraints render even visa-based reforms only partially realizable, a secondary—and perhaps more immediately implementable—strategy would be the systematic expansion of state-level and federal court litigation pathways outside the NLRA’s remedial scheme. By channeling claims into jurisdictions that recognize broader damages frameworks (including tort and wage-and-hour statutes), advocates can circumvent the narrow remedial ceiling imposed by *Hoffman* without directly confronting it. This approach is

particularly attractive in the current legal landscape because it leverages existing causes of action and does not depend on doctrinal shifts at the Supreme Court level. Moreover, it is independently sufficient to reintroduce financial consequences for unlawful employer behavior, thereby restoring—at least in part—the deterrent function that *Hoffman* eliminated. While this strategy lacks the structural elegance of a unified federal solution and may not have the same guarantee to issue protection to undocumented workers, its decentralization may, in fact, be its greatest strength in the era of federal inaction.

Ultimately, if neither of these pathways proves viable in the present political moment, the more candid conclusion is that meaningful reform may need to await a shift in the composition of the political branches and the judiciary. However, even under such constraints, prioritizing immigration-linked labor protections and alternative litigation strategies offers a pragmatic means of mitigating the most pernicious effects of *Hoffman* without requiring its formal repudiation.

VI. CONCLUSION

The *Hoffman* decision serves as a definitive case study in the ossification of American labor law, where a decades-long legislative impasse has allowed the Supreme Court to displace Congress as the primary architect of federal labor policy. By effectively reviving the structural vulnerabilities of the Bracero Program, the Court has established a remedial underclass of undocumented workers who are promised statutory protections in theory but denied the financial means to enforce them in practice. This remedial void triggers a pervasive chilling effect, ensuring that reprehensible workplace conduct remains unreported as workers withdraw meritorious claims rather than risk exposure and deportation. Ultimately, this environment

silences the most vulnerable and effectively weaponizes immigration status to deter the exercise of fundamental labor rights. Furthermore, this legal framework operates to send a coercive message of impunity to employers that fragments the entire workforce and erodes the collective bargaining power and mental confidence of authorized American workers who stand alongside their undocumented counterparts.

The path toward restoring the integrity of the National Labor Relations Act requires a multifaceted approach that moves beyond the judiciary's currently limited remedial arsenal. As argued throughout this paper, the implementation of "Expanded Appropriate Remedies" by the NLRB, such as mandatory notice readings and an Explanation of Rights, can counteract encroaching employer power. Simultaneously, shifting the venue of enforcement toward statutory litigation and common law claims can provide the necessary financial deterrence to prevent employers from using immigration status as a shield against labor accountability. Further, legislative innovations like the Z-Visa and formalized Department of Homeland Security forbearance represent critical steps toward an integrated legal regime that recognizes labor rights as fundamental human rights rather than mere economic variables.

Ultimately, until the law is reformed to reflect the interconnected realities of a global economy, the American legal system will continue to fail its most vulnerable workers and, by extension, the democratic foundations of the workforce itself.