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## Alternative Remedies for Undocumented Workers Left Behind in a Post-*Hoffman Plastic* Era

### Cover Page Footnote

J.D. The Catholic University of America, Columbus School of Law, 2019; B.A. The University of North Carolina at Chapel Hill, 2010. The author would like to thank her family and friends for their support, Matt Ginsburg for his expert guidance and feedback, and The Catholic University Law Review staff and editors for helping edit this Comment.

# ALTERNATIVE REMEDIES FOR UNDOCUMENTED WORKERS LEFT BEHIND IN A POST-*HOFFMAN PLASTIC* ERA

*Rachel S. Steber*<sup>+</sup>

In 2002, when the Supreme Court ruled that undocumented immigrant workers were not entitled to back pay or reinstatement under the National Labor Relations Act (NLRA)<sup>1</sup> in *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*,<sup>2</sup> employers were essentially emboldened to violate workers' rights with minimal consequences.<sup>3</sup> The Court found that extending back pay and reinstatement to undocumented workers when employers violated the NLRA completely bypassed the goals of the Immigration Reform and Control Act (IRCA),<sup>4</sup> exceeding the authority delegated to the National Labor Relations Board (Board).<sup>5</sup> It stated, the Court has “never deferred to the Board’s remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA.”<sup>6</sup>

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<sup>+</sup> J.D. The Catholic University of America, Columbus School of Law, 2019; B.A. The University of North Carolina at Chapel Hill, 2010. The author would like to thank her family and friends for their support, Matt Ginsburg for his expert guidance and feedback, and *The Catholic University Law Review* staff and editors for helping edit this Comment.

1. National Labor Relations Act, 29 U.S.C. §§ 151–169 (2012).

2. *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137 (2002). The majority opinion was authored by Justice Rehnquist, and was narrowly decided in a 5–4 decision. *Id.* at 151–52.

3. *See id.* at 155–56 (Breyer, J., dissenting). Justice Breyer acknowledges the possibility that immigration enforcement might instead be weakened by preventing the Board from awarding backpay. *Id.* He states “[t]o deny the Board the power to award backpay, however, might very well increase the strength of th[e] magnetic force [of immigrant labor].” *Id.* at 155. *See also* *Mezonos Maven Bakery, Inc.*, 357 N.L.R.B. 376, 380 (2011), supp. by *Mezonos Maven Bakery, Inc.*, 362 N.L.R.B. No. 41 (2015). Former Chairwoman Liebman and then-Member Pearce state in their concurring opinion that *Hoffman Plastic*’s holding undermines the NLRA’s enforcement and “employees are chilled in the exercise of their Section 7 rights, the work force is fragmented, and a vital check on workplace abuses is removed. *Id.* at 380. Further, they state “the backpay remedy also serves a deterrent function by discouraging employers from violating the [NLRA] . . . [t]he foreseeable result will be widespread retaliation against undocumented workers brave . . . enough to assert their rights under the [NLRA].” *Id.*

4. Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1101 (2012).

5. *Hoffman Plastic Compounds*, 535 U.S. at 144; *see also* *Southern S.S. Co. v. N.L.R.B.*, 316 U.S. 31, 47 (1942) (holding that while the Board possesses broad discretion to effectuate the policies of the Act, its authority is not unlimited and the Board may not “wholly ignore other and equally important Congressional objectives”).

6. *Hoffman Plastic Compounds*, 535 U.S. at 144.

*Hoffman Plastic* arose out of a challenge to the administrative authority of the Board in its application of NLRA remedies to undocumented workers.<sup>7</sup> Section 160(c) of the NLRA allows the Board to direct offending employers to remedy their unfair labor practices in any manner necessary to advance the goals of the NLRA.<sup>8</sup> On this authority, prior to *Hoffman Plastic*, the Board routinely awarded back pay to workers aggrieved by an employer's unfair labor practices, regardless of the worker's immigration status.<sup>9</sup> In its decision in *A.P.R.A. Fuel Oil Buyers Group, Inc.*, on which the Board rested one of its primary arguments in *Hoffman Plastic*, "the Board determined that 'the most effective way to accommodate and further the immigration policies embodied in [IRCA] is to provide the protections and remedies of the [NLRA] to undocumented workers in the same manner as to other employees.'"<sup>10</sup> *Hoffman Plastic*, however, nullified this practice and prevented the Board from effectuating the NLRA in ways that facially clash with the IRCA.<sup>11</sup>

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7. See Katherine Seitz, *Enter at Your Own Risk: The Impact of Hoffman Plastic Compounds v. National Labor Relations Board on the Undocumented Worker*, 82 N.C. L. REV. 366, 387 (2003). Seitz summarizes the procedural history leading to the Supreme Court's consideration of *Hoffman Plastic*, stating that after the D.C. Circuit Court of Appeals rejected petitions for the case based on clear compliance with Supreme Court precedent, "[t]he Supreme Court granted certiorari to review the NLRB's grant of the limited back pay remedy" and "[i]n a split decision, the [ ] Court concluded that the NLRB had no authority to order a backpay award." *Id.*

8. 29 U.S.C. § 160(a), (c) (2012); *Southern S.S. Co.*, 316 U.S. at 46. The Supreme Court also likely granted certiorari in *Hoffman Plastic* to resolve the growing tension between circuits on undocumented workers' eligibility to backpay awards. See *Del Rey Tortilleria, Inc. v. N.L.R.B.*, 976 F.2d 1115, 1122 (7th Cir. 1992) (holding that "Section 274A of IRCA, 8 U.S.C. § 1324a(a), makes it unlawful for an employer to hire an undocumented alien; and thus, clearly bars the Board from awarding backpay to undocumented aliens wrongfully discharged after IRCA's enactment."); *Local 512, Warehouse & Office Workers' Union v. N.L.R.B.*, 795 F.2d 705, 717-18 (9th Cir. 1986) (holding that the Supreme Court previously "gave no indication that it was overruling a significant line of precedent . . . in determining . . . eligibility for backpay" and therefore declines to consider an employee's immigration status as relevant in determining the availability of remedies).

9. See *A.P.R.A. Fuel Oil Buyers Grp., Inc.*, 320 N.L.R.B. 408 (1995). In this guiding decision, the Board stated:

Congress has enacted both the NLRA and the statutes regarding immigration, specifically IRCA, to further virtually identical policy objectives with respect to the American workplace . . . [t]hus . . . we believe that we can best achieve this mutuality of purpose and effect by vigorously enforcing the NLRA, including providing traditional Board remedies, [for] all employees.

*Id.* at 411; *Regal Recycling, Inc.*, 329 N.L.R.B. 355, 357 (1999) (ordering the employer "to offer the seven discriminatees immediate reinstatement with backpay" provided that they are able to produce relevant documentation of their employment eligibility); *Cty. Window Cleaning Co.*, 328 N.L.R.B. 190, 199-200 (1999) (finding that, based on the Board's careful consideration of balancing the interests of both the NLRA and IRCA in *A.P.R.A. Fuel Oil Buyers Grp.*, the order of reinstatement and backpay to the undocumented workers unlawfully coerced out of supporting the union campaign was warranted).

10. *Hoffman Plastic Compounds*, 535 U.S. at 141 (citing *A.P.R.A. Fuel Oil Buyers Grp.*, 320 N.L.R.B. at 1060).

11. See James Meehan, *Undocumented Workers, the National Labor Relations Act, and the Immigration Reform and Control Act: Irreconcilable Differences or a Match Made in Legal*

Since *Hoffman Plastic*, the Board's ability to effectively carry out the purpose of the NLRA has been curtailed. Without the ability to award back pay and reinstatement to undocumented workers, the bargaining power between employers and both documented and undocumented workers is tipped in favor of employers. Although the NLRA is remedial, rather than punitive,<sup>12</sup> the holding in *Hoffman Plastic* erases the most effective means of remedying the wrongs of noncomplying employers and instead signals that violating the NLRA comes with little to no consequences.<sup>13</sup> Further, by dividing the workforce between those workers worthy of remedies and those not, *Hoffman Plastic* condones a sub-class of workers in high demand and with little to no rights.<sup>14</sup> As the undocumented workforce has grown dramatically in the past 20 years, this not only devalues the NLRA, but also disadvantages authorized American workers, essentially eroding the goals of IRCA that the Court originally sought to uphold.<sup>15</sup>

Nine years after the Court decided *Hoffman Plastic*, former Board Chair Wilma Leibman and then-Member Mark Pearce authored a concurring opinion after the Board held that, based on the *Hoffman*, it was unauthorized to award back pay and reinstatement to an employee fired for union activity, even if the employer had knowingly hired an undocumented worker.<sup>16</sup> Leibman and Pearce believe "the Act's enforcement is undermined, employees are chilled in the exercise of their Section 7 rights, the work force is fragmented, and a vital check on workplace abuses is removed."<sup>17</sup> In response, they leave the door open to

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*Heaven?*, 43 HOFSTRA L. REV. 601, 615–16 (2014). It could be argued, too, that future potential immigration reform might be an effective means to remedy the employers' incentive to hire undocumented workers and prolong the clash with labor law, however such an argument is outside the scope of this Comment.

12. See generally National Labor Relations Act, 29 U.S.C. §§ 151–69 (2012).

13. See Peter F. Shapiro, *Union Shops, not Border Stops: Updating NLRB Sanctions to Help Organize Immigrant Workers After Hoffman*, 78 GEO. WASH. L. REV. 1069, 1074 (2010).

14. Seitz, *supra* note 7, at 387–88.

15. See Shapiro *supra* note 13, at 1074.

16. *Mezonos Maven Bakery, Inc.*, 357 N.L.R.B. 376, 380 (2011). Former Chairperson Leibman and then-Member Pearce, agreeing with dissenting Justice Breyer, believe that the Court's holding achieves the opposite of the intended purpose of curtailing the illegal employment of undocumented workers, and rather, that "imposing backpay liability on the Respondent is necessary . . . to 'make[] clear that violating the labor laws will not pay.'" *Id.* (quoting *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 154 (2002)). In other words, the concurrence believes the only way to achieve the intended purpose the Court in *Hoffman* is to allow the Board to require violating employers to award backpay to all workers.

17. *Mezonos Maven Bakery*, 357 N.L.R.B. at 380. In refuting the Supreme Court's finding that other remedies, such as cease-and-desist orders and mandatory violations postings are sufficient enough to promote the Act, the concurrence states:

Provided it is severe enough, one labor-law violation is all it really takes. The coercive message—assert your rights, and you will be discharged (and, perhaps, detained and deported)—will have been sent, and it will not be forgotten. Thus, it makes little difference that the offending employer will be ordered to cease and desist, and that a cease-and-desist order will set the stage for contempt penalties should the employer

consider the possibility of other monetary remedies not inconsistent with the holding in *Hoffman Plastic*, such as “a fund to make whole discriminatees whose backpay the Board had been unable to collect.”<sup>18</sup> As it is unlikely that the Court will entertain additional challenges to the Board’s ability to award back pay to undocumented workers (even when the employer knowingly hired undocumented workers in contravention of IRCA), this Comment will expand on the idea of a common “fund” mentioned in the *Mezonos* concurrence.

Part I of this Comment provides a brief overview of the Board’s application of the NLRA to undocumented workers prior to *Hoffman Plastic*, and a discussion of how that application changed dramatically after the Court’s holding in that case. Part II analyzes the effect of the *Hoffman Plastic* decision on the ability of the Board to effectuate the policies of the NLRA, as well as the effectiveness of the goals of IRCA in light of the Court’s holding. Part III presents the possibility of implementing a common fund as an alternative solution for money owed to ineligible undocumented workers, and speculates on the Board’s ability to create such a fund within the confines of its remedial authority. In support of a common fund, this Comment draws an analogy from the doctrine of *cy pres*, where “[a] *cy pres* distribution puts settlement funds to their next-best use by providing an indirect benefit to the class.”<sup>19</sup> Finally, this Comment offers concrete statutory language suggestions and amendments that could be considered by a future Congress interested in achieving the objectives the NLRA seeks to implement.

## I. INTRODUCTION TO THE NLRA, THE NATIONAL LABOR RELATIONS BOARD (BOARD), INA, AND IRCA

### A. NLRA

The NLRA was passed in 1935 in part as a response to “a wave of labor strikes and employee uprisings in the early 1930s.”<sup>20</sup> In its findings and declaration of policy, the NLRA states that it seeks to level the bargaining power of employees and employers in order to prevent burdening the flow of commerce and depressing workers’ wages.<sup>21</sup> Through the right to collectively bargain,

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reoffend. For the employer to do so, employees would have to reassert their Section 7 rights. That is highly unlikely. Employees will recall, or will have learned from the lore of the shop, what happened the last time someone dared do so.

*Id.*

18. *Id.* at 384.

19. *Klier v. Elf Atochem N. Am. Inc.*, 658 F.3d 468, 475 (5th Cir. 2011).

20. *Seitz*, *supra* note 7, at 373.

21. 29 U.S.C. § 151 (2012). The statute further enumerates that the free-flow of commerce is protected “by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.” *Id.* The roots of the policy findings are found in the First Amendment, “by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the

workers' rights to "freedom of association, self-organization, and designation of representatives of their own choosing" are protected and in turn "eliminate the causes of certain substantial obstructions to the free flow of commerce."<sup>22</sup> In its definition of an "employee" as covered under the NLRA, the statute does not specify a workers' immigration status, however this ambiguity has been interpreted inclusively towards undocumented workers.<sup>23</sup>

*1. The Application of the NLRA to Undocumented Workers has Long Been a Point of Confusion and Conflict*

In *Sure-Tan, Inc. v. N.L.R.B.*,<sup>24</sup> five employees were deported when their employer asked the Immigration and Naturalization Service (INS) to inquire into their immigration status "solely because the employees supported the Union."<sup>25</sup> After the Board determined the company had violated the NLRA, it offered the workers the traditional remedies of reinstatement and backpay.<sup>26</sup> The Court of Appeals conditioned these remedies, however, on the premise that the workers demonstrate availability for employment.<sup>27</sup> In evaluating the employer's appeal, the Supreme Court examined the Board's interpretation of who is an "employee" under the NLRA, and affirmed the Board's practice of extending broad discretion to include undocumented workers in its construction of the term.<sup>28</sup> The Court held that "the task of defining the term 'employee' is one that 'has been assigned primarily to the agency created by Congress to administer the Act.'"<sup>29</sup> The Court's determination in this case upheld the Board's decision to award remedies of reinstatement and backpay to five undocumented workers who were unlawfully fired for engaging in collective bargaining under the

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purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." *Id.*

22. *Id.* As the statutorily designated administrative agency to facilitate the Act, the Board has a degree of enforcement power. As stated by one scholar:

The NLRB's enforcement power derives from the remedies it may impose against employers found to have engaged in unfair labor practices. Such remedies include reinstatement, backpay, cease and desist orders, and post notice orders. The NLRB, however, does not have the authority to bring complaints of its own volition, rather, it investigates only official complaints of unfair labor practices filed with its local offices.

Seitz, *supra* note 7, at 373–74.

23. See 29 U.S.C. § 152 (2012). The statute states "[t]he term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise . . ." *Id.* See also Logan & Paxton, 55 N.L.R.B. 310, 314, n.12 (1944) (concluding that the "[NLRA] does not differentiate between citizens and non-citizens.").

24. *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883 (1984).

25. *Id.* at 888.

26. *Id.* at 889.

27. *Id.*

28. *Id.* at 891.

29. *Id.* The Court declined to question the Board's discretion as long as the construction of the NLRB's definition of employee "is reasonably defensible." *Id.*

NLRA, on the condition that the workers could prove they were lawfully able to re-enter the country.<sup>30</sup>

*B. The National Labor Relations Board (Board)*

The NLRA vests the administration of promulgating the goals of the NLRA in the Board.<sup>31</sup> One of the primary provisions of the NLRA provides that employees have the right to collectively bargain and organize “through representatives of their own choosing, and to engage in other concerted activities . . . .”<sup>32</sup> If an employer violates any of the rights guaranteed in Section 157 of the NLRA by engaging in a number of illegal practices described in Section 158 of the NLRA, an employee has the right to file an unfair labor practice charge against the employer.<sup>33</sup> Once an unfair labor practice charge has been brought before the Board, it is “empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce” and “shall have power to issue and cause to be served upon such person a complaint stating the charges . . . .”<sup>34</sup>

*1. The NLRA Vests the Board with Broad Discretion to Determine Appropriate Remedies for Workers Harmed by Employers who Violate the Statute*

In determining the appropriate remedies for an employee whose employer violated their rights under the NLRA, the Board has broad discretion.<sup>35</sup> Section 10(c) of the NLRA “directs the Board ‘to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act].’”<sup>36</sup> In 1941 in *Phelps Dodge Corp. v. N.L.R.B.*, the Supreme Court analyzed the Board’s remedial authority to order the reinstatement of two employees who were denied employment due to their union membership and their participation in a strike at the company plant.<sup>37</sup> Although the Court remanded the case to the Board to set forth facts supporting their contention that the two workers’ new employment was not equivalent to that at Phelps Dodge, the Court held generally that an order of reinstatement is justified if the Board deems it necessary to promote industrial peace as sought under the NLRA.<sup>38</sup> The Court emphatically affirmed the discretion of the Board in

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30. Seitz, *supra* note 7, at 377.

31. 29 U.S.C. § 153 (2012).

32. 29 U.S.C. § 157 (2012).

33. 29 U.S.C. §§ 158–160 (2012).

34. 29 U.S.C. § 160 (2012).

35. *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 197 (1941); *see also* *N.L.R.B. v. Lee Hotel Corp.*, 13 F.3d 1347, 1351 (9th Cir. 1994) (holding that if the Board’s remedies can effectively account for the goals of another statute such that the Board has “reconciled the two statutes in a reasonable way” then a reviewing court will affirm).

36. *Phelps Dodge Corp.*, 313 U.S. at 188 (quoting 29 U.S.C. § 160(c) (2012)).

37. *Id.* at 181–82.

38. *Id.* at 187–88. In regard to the practice of reinstatement, the Court stated that:

determining appropriate remedies by stating that “[w]e have no warrant for speculating on matters of fact the determination of which Congress has entrusted to the Board. All we are entitled to ask is that the statute speak through the Board where the statute does not speak for itself.”<sup>39</sup> The Court further stated that “[m]aking the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces.”<sup>40</sup>

Two years later, in *Virginia Electric & Power Co. v. N.L.R.B.*, an electric company challenged the Board’s authority to order backpay and reinstatement for two workers it discharged in response to their efforts to form a union, in violation of the NLRA.<sup>41</sup> In upholding the Board’s order, the Court emphasized that it will not disturb the Board’s remedial order unless it clearly does not effectuate the goals of the NLRA, which are primarily to “encourag[e] and protect[] collective bargaining and full freedom of association for workers, [and] the costly dislocation and interruption of the flow of commerce caused by unnecessary industrial strife and unrest.”<sup>42</sup> Here, the Court held that because there was no such finding that the Board’s order was for any purpose other than to effectuate the goals of the NLRA, the order requiring back pay and reinstatement must stand in light of the Board’s informed discretion.<sup>43</sup> The remedies of back pay and reinstatement are not automatically triggered under the NLRA, but are deployed at the discretion of the Board.<sup>44</sup>

When the Board exercises its authority, “courts must not enter the allowable area of the Board’s discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.”<sup>45</sup> Such limited judicial review is imperative if the Board is to meet the goals of the NLRA. The Board “draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by

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Reinstatement is the conventional correction for discriminatory discharges. Experience having demonstrated that discrimination in hiring is twin to discrimination in firing, it would indeed be surprising if Congress gave a remedy for the one which it denied for the other. The powers of the Board as well as the restrictions upon it must be drawn from § 10(c), which directs the Board “to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.”

*Id.*

39. *Id.* at 195–96.

40. *Id.* at 197.

41. *Va. Elec. & Power Co. v. N.L.R.B.*, 319 U.S. 533, 534 (1943).

42. *Id.* at 539.

43. *Id.* at 540.

44. *Phelps Dodge Corp.*, 313 U.S. at 198. The Court again stresses that “[a]ttainment of a great national policy through expert administration in collaboration with limited judicial review must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies.” *Id.* at 188.

45. *Id.* at 194.

reviewing courts.”<sup>46</sup> This Supreme Court precedent has been unwaveringly upheld for the past several decades and in numerous binding decisions.<sup>47</sup> For example, twelve years after the decision in *Phelps Dodge*, the Court upheld the Board’s order of reinstatement and backpay for eleven discriminatorily discharged employees in *N.L.R.B. v. Seven-Up Bottling Company of Miami*.<sup>48</sup> The Court held that “the power, which is a broad discretionary one, is for the Board to wield, not for the courts.”<sup>49</sup> The Court went on to discuss the Board’s unique position to fashion remedies based on its experience and consideration of “every socially desirable factor” in the “mitigation of damages” stating that “the Board must draw on enlightenment gained from experience.”<sup>50</sup> Although courts must defer to the discretion of the Board, the affirmative authority may not amount to punitive action against a violating employer, but only remedial awards aimed at making workers whole.<sup>51</sup>

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46. *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 153 (2002) (Breyer, J., dissenting).

47. *See Nat’l Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 362–63 (1940) (finding that the Board’s authorization under the NLRA is not for the adjudication of private rights, but for the promulgation of the public policy of the Act, and the statute itself provides the Board with authority to take affirmative remedial actions to meet this end); *Phelps Dodge Corp.*, 313 U.S. at 194–96 (finding that the Act “entrusts to an expert agency the maintenance and promotion of industrial peace” and that the Court has “no warrant for speculating on matters of fact the determination of which Congress has entrusted to the Board.”); *Fibreboard Paper Prods. Corp. v. N.L.R.B.*, 379 U.S. 203, 216 (1964) (applying Supreme Court precedent to find that “[t]he relation of remedy to policy is peculiarly a matter for administrative competence.”); *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 612–14 (1969) (holding that the Board’s bargaining order was not an “unnecessarily harsh remedy” in deterring an employer’s Section 7 violations based on their remedial authority to effectuate the NLRA); *N.L.R.B. v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969) (holding that backpay awards serve critically important remedial purposes); *N.L.R.B. v. S.E. Nichols, Inc.*, 862 F.2d 952, 960 (2d Cir. 1988) (holding that the Board’s remedial authority is “subject to limited judicial review”); *but see N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 257 (1939) (finding that the broad discretion attributed to the Board to fashion remedies under the NLRA “is not unlimited”). In a concise summary of what the Board must take into consideration, practitioners have stated that:

It is for the NLRB and not the courts to make the determination of what remedy is appropriate for a violation of the NLRA sections prohibiting an interference with employees’ organizing rights and refusing to bargain collectively based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity. In fashioning the remedy for such a violation, the NLRB should take into account the extensiveness of the employer’s unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future; if the Board determines that the possibility of erasing the past practices and of ensuring a fair election by the use of traditional remedies is slight, then a bargaining order should issue.

51A C.J.S. Labor Relations § 826.

48. *N.L.R.B. v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344 (1953).

49. *Id.* at 346.

50. *Id.*

51. *Consol. Edison Co. of N.Y. v. N.L.R.B.*, 305 U.S. 197, 235–36 (1938).

### C. Immigration Nationality Act

The Immigration Nationality Act (INA) was passed in 1952 in order to enumerate cohesively the nation's various immigration laws governing the entrance of migrants to the United States.<sup>52</sup> For whatever reason, Congress failed to include any section making it unlawful to employ an undocumented immigrant.<sup>53</sup> For many years, the rights and remedies of undocumented workers in the work force went unaddressed in legislation.<sup>54</sup>

### D. Immigration Reform and Control Act

In 1986, shortly after the decision in *Sure-Tan*, Congress passed IRCA as an official amendment to the INA.<sup>55</sup> While IRCA did not directly address the contention between undocumented workers and the NLRA, it did fill the gap left by the INA regarding the employment of undocumented workers.<sup>56</sup> The statute added the language that made it “unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien.”<sup>57</sup> The goal in adding this language was to slow illegal immigration by deterring employers from seeking low-cost, immigrant labor.<sup>58</sup> Therefore, despite the additions to IRCA, courts remained divided over the applicability of the NLRA to undocumented workers and the best way to harmonize these two statutes.

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52. Seitz, *supra* note 7, at 372–73.

53. *Id.* at 373.

54. Until the implementation of IRCA 34 years later, the Supreme Court's holding in *Sure-Tan* remained governing law, providing “considerable deference” to the Board's consideration of the term “employee” under the NLRA. *Sure-Tan, Inc. v. N.L.R.B.*, 497 U.S. 883, 891 (1984). So long as the Board's interpretation of an employee under the NLRA was “reasonably defensible,” it was not to be disturbed. *Id.*

55. Seitz, *supra* note 7, at 380.

56. *Id.*

57. 8 U.S.C. § 1324a(a)(1)(A) (2012). In addition, the statute “established a verification system that requires employers to validate the work eligibility of every potential employee before hiring.” Seitz, *supra* note 7, at 380.

58. Seitz, *supra* note 7, at 380.

Despite restrictive immigration statutes such as the IRCA in 1986 and the PRWORA in 1996, the INS has recently estimated that some 350,000 persons immigrate illegally to the United States annually. See Immigration and Naturalization Service, Executive Summary: Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000, Jan. 31, 2003, available at <http://www.immigration.gov/graphics/shared/aboutus/statistics/2000ExecSumm.pdf> [hereinafter Estimates of the Unauthorized Immigrant Population] (on file with the North Carolina Law Review); Marcus Stern, *Number Put at 8 million; Growth Rate Is Increased*, SAN DIEGO UNION-TRIB., Jan. 31, 2003, at A1.

*Id.* at n.91.

*E. From Policy to Conflict to Harmony*

*1. Prior to Hoffman Plastic, the Board Routinely Extended Traditional Remedies of Backpay and Reinstatement to Undocumented Workers*

Prior to the Supreme Court's holding in *Hoffman Plastic*, the Board consistently held that undocumented workers were eligible for reinstatement and back pay awards under the NLRA.<sup>59</sup> This precedent followed the Supreme Court's decision in *Sure-Tan* that "the Act's policies 'fully support' the view that undocumented aliens are employees under Section 2(3) of the [NLRA]. . . ."<sup>60</sup> In its analysis, the Court stressed that by not allowing undocumented workers to participate in protected union activities, "there would be created a subclass of workers without a comparable stake in the collective goals of their legally resident co-workers, thereby eroding the unity of all the employees and impeding collective bargaining."<sup>61</sup> Therefore, considering that "Congress has vested the Board with broad authority to remedy unfair labor practices," the Board was vindicated in its practice of awarding remedies of reinstatement and back pay to all workers in light of employer violations.<sup>62</sup>

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59. See *Cty. Window Cleaning Co.*, 328 N.L.R.B. 190, 200 (1999) (ordering that the undocumented worker should be reinstated as his employer possessed knowledge of his undocumented status and should therefore not preclude the worker from being made whole); *Belle Knitting Mills, Inc.*, 331 N.L.R.B. 80, 101 (2000) (asserting that "[t]he law is clear that undocumented aliens fall within the statutory definition of 'employee' under the Act."). In affirming the Board's finding that undocumented workers are considered "employees" within the meaning of the Act, the Court stated that:

The terms and policies of the [NLRA] fully support the Board's interpretation in this case. The breadth of § 2(3)'s definition is striking: the Act squarely applies to "any employee." The only limitations are specific exemptions for agricultural laborers, domestic workers, individuals employed by their spouses or parents, individuals employed as independent contractors or supervisors, and individuals employed by a person who is not an employer under the NLRA. Since undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly come within the broad statutory definition of "employee."

*Sure-Tan*, 467 U.S. at 891–92.

60. A.P.R.A. *Fuel Oil Buyers Grp., Inc.*, 320 N.L.R.B. 408, 411 (1995).

61. *Sure-Tan*, 467 U.S. at 892.

62. A.P.R.A. *Fuel*, 320 N.L.R.B. at 410. The Board discusses the specific language of the NLRA, saying that:

Section 10(c) of the [NLRA] directs the Board, upon finding that an unfair labor practice has been committed, to issue "an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the] [NLRA]."

*Id.* See also *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194 (1941) (finding that "[t]he exercise of the process was committed to the Board . . . [b]ecause the relation of remedy to policy is peculiarly a matter for administrative competence.").

2. *The NLRA and IRCA can be Enacted in Unison and Advance Congress' Policy Objectives*

In response to arguments that the practice of awarding backpay and reinstatement to undocumented workers undermines IRCA, the Board contended that its practices allow both the NLRA and IRCA to be enacted in harmony. In *A.P.R.A Fuel*, the Board argued that the NLRA and IRCA have “virtually identical policy objectives with respect to the American workplace.”<sup>63</sup> The Board further stated that “Congress has expressly indicated that the policies underlying these statutes reinforce each other.”<sup>64</sup> Thus, the Board determined that in the case at hand, the undocumented workers who were unlawfully terminated for engaging in union activity, should receive the traditional Board remedies of reinstatement and back pay as long as “such enforcement does not require or encourage unlawful conduct by either employers or individuals.”<sup>65</sup> This, the Board stated, would allow them to “best achieve th[e] mutuality of purpose and effect [between the NLRA and IRCA] by vigorously enforcing the NLRA.”<sup>66</sup> As discussed in Section I.B.1., while the Board maintains deference to interpret the NLRA, “it has been said that the Board’s interpretation of the INA is entitled to no deference at all.”<sup>67</sup>

On appeal to the Second Circuit, the Court affirmed the Board’s application of awarding back pay and reinstatement to the aggrieved workers.<sup>68</sup> After examining the legislative intent of the employment provisions in IRCA, the Court concluded that it was clear Congress’ “intent [was] to focus on employers, not employees, in deterring unlawful employment relationships.”<sup>69</sup> Focusing on the Judiciary Committee report, the Court also noted “that IRCA was not intended to limit” in any way the scope of the term ‘employee’ under the Act.<sup>70</sup> Applying these findings in conjunction with the Board’s inherently discretionary

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63. *A.P.R.A Fuel*, 320 N.L.R.B. at 411.

64. *Id.*

65. *Id.* The Board further based its discretionary authority on Congressional reports indicating Congress’ intent, stating that:

The legislative history of IRCA provides the Board with explicit guidance in our endeavor to fulfill our own mandate under the NLRA without impeding congressional intent as expressed in other statutes. Congress clearly directed the Board to persist in applying the protections and remedies of the Act to employees, including those hired despite their lack of authorization to enter the United States or to work here. As the House Report emphasized, “as long as job opportunities are available to undocumented aliens, the intense pressure to surreptitiously enter this country or violate status once admitted as a nonimmigrant in order to obtain employment will continue.”

*Id.* at 414.

66. *Id.* at 411.

67. N.L.R.B. v. *A.P.R.A. Fuel Oil Buyers Grp., Inc.*, 134 F.3d 50, 54 (2d Cir. 1997).

68. *Id.* at 56.

69. *Id.*

70. *Id.*

powers, the Court held “that the Board’s remedies do not conflict with the requirements of IRCA.”<sup>71</sup>

*3. The Board’s Reversal of an Administrative Law Judge’s Decision to Deny an Undocumented Worker Backpay Sparked Push-Back Leading to Hoffman Plastic*

On this precedent, the Board reversed an Administrative Law Judge’s (ALJ) decision denying a back pay award to a former employee of Hoffman Plastic Compounds, Inc.<sup>72</sup> Jose Castro was laid off by the company in retaliation for his involvement in a union organizing campaign at the company’s production plant.<sup>73</sup> At the compliance hearing to determine the amount of back pay Castro should receive from the company, Castro admitted that he fraudulently obtained employment with Hoffman by producing a fabricated driver’s license and social security card.<sup>74</sup> The ALJ found that awarding Castro back pay or reinstatement would be “contrary to *Sure-Tan, Inc. v. NLRB*, and in conflict with IRCA, which makes it unlawful for . . . employees to use fraudulent documents to establish employment eligibility.”<sup>75</sup> On review following its decision in *A.P.R.A Fuel*, the Board determined that the “protections and remedies of the [NLRA]” should be extended to Castro as an undocumented worker “in the same manner as to other employees.”<sup>76</sup>

*4. Hoffman Plastic Reversed Board Precedent and Effectively Undermined the Goals of the NLRA in Favor of a Strict Statutory Interpretation of the IRCA*

In response to this decision, Hoffman Plastics appealed to the District of Columbia Circuit Court of Appeals, who affirmed the Board’s decision.<sup>77</sup> The company then petitioned for, and was granted, review by the Supreme Court of

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71. *Id.* The Second Circuit reinforced the Board’s reasoning in its decision to award the two employees conditional reinstatement and backpay. The Board stated that:

To do otherwise would increase the incentives for some unscrupulous employers to play the provisions of the NLRA and IRCA against each other to defeat the fundamental objectives of each, while profiting from their own wrongdoing with relative impunity. Thus, these employers would be free to flout their obligations under the Act, secure in the knowledge that the Board would be powerless fully to remedy their violations.

*Id.* at 57.

72. *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 141 (2002).

73. *Id.* at 140.

74. *Id.* at 141.

75. *Id.*

76. *Id.* The Court stated that “[s]ince the Board’s inception, we have consistently set aside awards of reinstatement or backpay to employees found guilty of serious illegal conduct in connection with their employment.” *Id.* at 143. Therefore, the Court seemed to make its finding primarily on the basis that Castro had broken the law.

77. *Id.* at 142.

the United States.<sup>78</sup> While the Court acknowledged the Board's generally broad discretion in determining appropriate remedies for violations of the NLRA, it also noted that this discretion is not unlimited.<sup>79</sup> The Court relied on its dicta in *Sure-Tan* that the Board's practice of awarding back pay to undocumented workers "runs counter to policies underlying IRCA, policies the Board has no authority to enforce or administer."<sup>80</sup> In reaching this conclusion, the Court discussed prior holdings rejecting remedial awards to employees committing illegal acts and others where the Board's "remedial preferences . . . potentially trench upon federal statutes and policies unrelated to the NLRA."<sup>81</sup>

Conversely, the dissent authored by Justice Breyer strongly disagreed with the majority and came to the opposite conclusion on the effect of the Board's practice of awarding backpay.<sup>82</sup> It determined that such a remedy was instead "necessary; it helps make labor law enforcement credible; it makes clear that violating the labor laws will not pay."<sup>83</sup> Further, the dissent argued that by not requiring employers who *knowingly* violate immigration and labor laws to award backpay, the "magnetic force" of illegal immigration will instead be strengthened.<sup>84</sup> When an employer's incentives to adhere to the employment laws of IRCA and the labor laws of the NLRA are diminished by an absence of effective deterrents, the goals of both IRCA and the NLRA are undermined and American workers jeopardized.<sup>85</sup> Therefore, this holding abrogated the Board's

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78. *Id.*

79. *Id.* at 142–43.

80. *Id.* at 149; *see also* *Southern S.S. Co. v. N.L.R.B.*, 316 U.S. 31, 48 (1942). The Court expressed its reservation with upholding an administrative agency's authority when its award essentially endorses unlawful activity and stated that:

We cannot ignore the fact that the strike was unlawful from its very inception. It directly contravened the policy of Congress as expressed in §§ 292 and 293, and it was more than a "technical" violation of those provisions. Consequently, and despite the initial unfair labor practice which caused the strike, we hold that the reinstatement provisions of the order exceeded the Board's authority to make such requirements "as will effectuate the policies of the Act."

*Id.*

81. *Hoffman Plastic Compounds*, 535 U.S. at 144.

82. *Id.* at 153 (Breyer, J., dissenting). Justice Breyer emphatically states:

I cannot agree that the backpay award before use "runs counter to," or "trenches upon," national immigration policy . . . . As *all* the relevant agencies . . . have told us, the National Labor Relations Board's limited backpay order will *not* interfere with the implementation of immigration policy. Rather, it reasonably helps to deter unlawful activity that *both* labor laws *and* immigration laws seek to prevent.

*Id.* Justice Breyer is joined in his dissent by Justices Stevens, Souter, and Ginsburg. *Id.*

83. *Id.* at 154.

84. *Id.* at 155.

85. *See id.*, 153–54. Justice Breyer stressed that:

[w]ithout the possibility of the deterrence that backpay provides, the Board can impose only future-oriented obligations upon law-violating employers—for it has no other weapons in its remedial arsenal. And in the absence of the backpay weapon, employers could conclude that they can violate the labor laws at least once with impunity.

long-term precedent of exercising its remedial discretion to extend reinstatement and back pay to undocumented workers and, further, changed the ability of the NLRA to protect a rapidly growing group of workers in America.

*5. The Wake of the Holding in Hoffman Plastic and the Board's Reluctant Adherence to New Guidelines Led to the Idea of Alternative Remedies*

Several years later, in an effort to test Justice Breyer's dissent in the *Hoffman Plastic* decision that the rule barring undocumented workers from backpay and reinstatement would not apply to a scenario where an employer knowingly hired an undocumented worker, employees and advocates brought a case before the Board where the employer initially hired the workers knowing they were undocumented.<sup>86</sup> The effort failed, and in *Mezonos Maven Bakery*, the Board held that *Hoffman Plastic* barred backpay, even in the case of an employer who knowingly violates immigration laws.<sup>87</sup>

This holding, however, led to the concurring opinion by former Board Chairwoman Wilma Liebman and then-Member Mark Pearce, in which they expanded on the dissent in *Hoffman Plastic* by delineating four specific harms inevitable to workers regardless of immigration status:

"Precluding backpay undermines enforcement of the Act;"<sup>88</sup>

"Precluding backpay chills the exercise of Section 7 rights;"<sup>89</sup>

"Precluding backpay fragments the work force and upsets the balance of power between employers and employees;"<sup>90</sup> and

"Precluding backpay removes a vital check on workplace abuses."<sup>91</sup>

Further, Liebman and Pearce agree with Justice Breyer's dissent, stating that "wrong doing employers liable for backpay to undocumented discriminatees not only does not conflict with IRCA's purposes, it supports them."<sup>92</sup>

Although Liebman and Pearce acknowledge the Board's confined authority under the Supreme Court's holding in *Hoffman Plastic*, they introduce the issue raised by this Comment, stating that "we would be willing to consider in a future case any remedy within our statutory powers that would prevent an employer that discriminates against undocumented workers because of their protected activity from being unjustly enriched by its unlawful conduct."<sup>93</sup> Whether or

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*Id.* at 154.

86. See *Mezonos Maven Bakery, Inc.*, 357 N.L.R.B. 376, 376 (2011).

87. *Id.* at 377-78.

88. *Id.* at 380.

89. *Id.*

90. *Id.* at 381.

91. *Id.* at 382.

92. *Id.*

93. *Id.* at 384. In a Supplemental Decision to the initial holding in *Mezonos*, the Board addressed the question of conditional reinstatement for undocumented workers and concluded that "*Hoffman* 'did not cast doubt on the use of conditional reinstatement in cases involving

not a remedy falls within the Board's remedial, statutory powers, will hinge on analyzing precedent, relevant statutes, and interpreting legislative intent.

## II. ANALYZING THE EFFECTS OF *HOFFMAN PLASTIC* ON THE NLRA AND IRCA

### A. *When Employers Knowingly Violate the Employment Provisions in IRCA, Both the NLRA and IRCA are Undermined*

The general policy goal of the NLRA, to protect workers by leveling the playing field between employer and employee, and the aim to deter illegal immigration through the employment provision added to the INA by IRCA,<sup>94</sup> are both undermined when employers knowingly hire undocumented workers. Prior to the holding in *Hoffman Plastic*, the Board discussed a Congressional report that demonstrated findings of the consequences when undocumented workers' labor rights are violated. The Board summarized that:

the willingness of many illegal immigrants to accept low wages and substandard conditions makes them attractive to some employers who are ready to "exploit [them as a] source of labor" often to the detriment of United States workers whose wages are depressed or whose jobs are lost.<sup>95</sup>

This report shows that not only are undocumented workers treated as a sub-class when employers intentionally seek to take advantage of their status, or lack thereof, but also that documented workers' conditions are simultaneously undermined.<sup>96</sup>

Post-*Hoffman Plastic*, undocumented workers are still entitled to bring a claim under the NLRA, but the only remedy available in such cases is injunctive, and undocumented workers are not eligible to be made whole from their alleged harm.<sup>97</sup> In fact, the effects of *Hoffman Plastic* essentially "remov[e] any real consequences for an NLRA violation" against the employer.<sup>98</sup> By simply

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undocumented discriminatees,' and held that 'conditional reinstatement is important in the immigration context in order to provide a meaningful remedy for the Respondent's unfair labor practices.'" Steven M. Swirsky, *NLRB Reiterates its Position that Undocumented Workers are Entitled to "Conditional Reinstatement" in Unfair Labor Practice Cases*, EPSTEIN BECKER GREEN (May 20, 2015), <https://www.managementmemo.com/2015/05/20/nlr-reiterates-its-position-that-undocumented-workers-are-entitled-to-conditional-reinstatement-in-unfair-labor-practice-cases/>.

94. See Eduardo Rivero, *American Workers Must Settle for Less When Undocumented Workers are Protected Less: The Uphill Battle Facing Undocumented Workers and How Immigration Law is Reigning in Workers' Rights*, 5 AM. U. LAB. & EMP. L.F. 53, 58–59 (2015).

95. *N.L.R.B. v. A.P.R.A. Fuel Oil Buyers Grp.*, 134 F.3d 50, 55–56 (2d Cir. 1997) (quoting 1986 U.S.C.C.A.N. at 5651, 5656, 5662).

96. See 1986 U.S.C.C.A.N. at 5653.

97. Seitz, *supra* note 7, at 387–88. Employers are only required to post "cease and desist" orders, which only require a posting of the violation. *Id.* at 387. This meager directive is hardly remedial and likely fails to deter employers from hiring undocumented workers, making their employment "a cost-effective business practice." *Id.* at 387–88.

98. *Id.* at 388.

viewing the firing of undocumented workers for engaging in protected activity under the NLRA as an immigration issue, the *Hoffman Plastic* Court essentially ignored the workers' rights issues.<sup>99</sup>

The Court failed to consider that such a holding instead results in the opposite effect intended by IRCA, as it encourages the pull of illegal immigration and emboldens employers by assuring them that labor laws will not be enforced against all types of workers.<sup>100</sup> This has created the presence of a sub-class of workers not entitled to labor protections, thereby contributing to the downward trend of overall wages and working conditions.<sup>101</sup>

*B. Hoffman Plastic Unfairly Focuses on Punishing Employees for Working Without Documentation Without Seeking to Deter and Hold Violating Employers Accountable*

In holding that undocumented workers are not entitled to the same remedies as all other workers when their labor rights are violated, the Court has "essentially declared the enforcement of immigration regulations more important than the right of a worker to organize and work collectively for improved working conditions . . . ."<sup>102</sup> The Court seemingly made this determination outside any indication of legislative intent from IRCA as "the statute's language itself does not explicitly state how a violation is to effect the enforcement of other laws, such as labor laws."<sup>103</sup> In fact, when IRCA was initially enacted, it did not make it unlawful for an undocumented worker to accept employment, but focused instead on sanctioning employers for violations of the statute.<sup>104</sup> By its facial language, as well as its requirements that employers verify the legal employment of their workers, it can be interpreted that "the primary purpose of the IRCA is to make it more difficult to employ undocumented workers by providing severe penalties to employers who offer

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99. *Id.*

100. *Id.*

101. See *DeCanas v. Bica*, 424 U.S. 351, 356–57 (1976). The Court stated that "acceptance 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." *Id.*

102. *Seitz*, *supra* note 7, at 390. In light of these findings, "[t]he Court's ruling established that if a remedy issued by the NLRB seriously conflicts with federal policies unrelated to the NLRB's objections, the remedy must be adjusted to conform to the federal policies." *Id.* See also *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 157 (2002) (Breyer, J., dissenting) (arguing that, in reading excerpts of legislative hearings, it is clear that Congress did not intend for the immigration statute to take away from any power vested to the Board to effectuate remedies under the Act); *N.L.R.B. v. Apollo Tire Co.*, 604 F.2d 1180, 1184 (9th Cir. 1979) (Kennedy, J., concurring) (opining that in order for the Board to uphold the policies of the NLRA, they must be able to actually enforce the labor laws, and denying them this ability "would leave helpless the very persons who most need protection from exploitative employer practices").

103. *Seitz*, *supra* note 7, at 391.

104. *Rivero*, *supra* note 94, at 59.

the undocumented jobs.”<sup>105</sup> With this interpretation, the Court haphazardly endorsed penalizing the employment of undocumented workers at the expense of upholding and protecting labor rights for documented and undocumented workers alike.

*C. Previously Proposed Alternative Remedies Fail to Adequately Assess Their Legality within the Board’s Discretionary Authority*

In response to the Supreme Court’s decision in *Hoffman Plastic*, scholars began proposing alternative solutions to protect the legitimacy of the NLRA and the Board’s established remedies for undocumented workers.<sup>106</sup> Although the Court in *Hoffman Plastic* found that undocumented workers were not eligible recipients for back pay under the NLRA,<sup>107</sup> it was silent on the possibility of awarding this money to alternative recipients.<sup>108</sup> When it comes to the relationship between the NLRA and the IRCA, it is clear that the solution does not have to be so narrow as for one to preclude the other.

In his article, *Union Shops, Not Border Stops: Updating NLRB Sanctions to Help Organize Immigrant Workers After Hoffman*, Peter Shapiro suggests using the money owed to discriminated undocumented workers to fund immigrant worker groups.<sup>109</sup> Groups can then “use[] the money to promote the workers’ collective voice—thereby promoting the well-being of the entire community.”<sup>110</sup> Shapiro argues that requiring the money to instead benefit community activism groups or unions specifically organizing immigrant workers will “ensure fairness and foster worker participation.”<sup>111</sup> He argues that awarding backpay to immigrant worker groups avoids disrupting the holding in *Hoffman Plastic* as the award would not go directly to an undocumented worker.<sup>112</sup> Therefore, such

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105. *Id.* at 58.

106. *See* Shapiro, *supra* note 13, at 1070; Seitz, *supra* note 7, at 371; Rivero, *supra* note 94, at 56–57. Note that none of these articles analyze the possibility of a common fund proposed by former Chairperson Liebman and then-Member Pearce. Rivero poignantly points out that “[t]here are approximately eleven million undocumented people in the United States. Around eight million of these undocumented people are part of the nation’s workforce . . . [and] still represent[] three times the population in 1990.” Rivero, *supra* note 94, at 56.

107. *Hoffman Plastic Compounds*, 535 U.S. at 151–52.

108. *See id.*

109. Shapiro, *supra* note 13, at 1081.

110. *Id.* Shapiro points out that:

Enjoyment of these diffuse benefits and recognition that the award could benefit those close to the wronged employee would help to minimize the unfairness of an alternative-recipient scheme. Concededly, unfairness is created by the preclusion of backpay from the *Hoffman* decision and it cannot be entirely ameliorated by a proposal consistent with the case.

*Id.*

111. *Id.* at 1081.

112. *Id.*

an alternative will remind all workers that they have collective rights under the NLRA and encourage the reporting of employer wrongdoings.<sup>113</sup>

As the NLRA does not specifically allow for punitive damages, the Supreme Court has interpreted this omission as affirmative of the preclusion of the Board's authority to assess punitive damages and fines.<sup>114</sup> One of the main goals of requiring violating employers to award backpay to an alternative recipient is to "preserve backpay's disincentive for employers to fire unauthorized workers for protected union activities, and so protect labor law goals."<sup>115</sup> As this goal is "aimed primarily at deterring employer conduct, [and] not at making employees whole,"<sup>116</sup> alternative remedial solutions must walk the fine line of upholding the goals of the NLRA within the Board's authority without crossing into the sphere of punitive sanctions.

Though Shapiro addresses these concerns, he does not fully analyze his proposed alternatives and how they might arguably maintain the NLRA's remedial nature of making victims of discrimination whole. While his suggestions ensure compliance with *Hoffman Plastic*, if alternative solutions are to pass muster as legitimate and legal proposals, they must also arguably fall within the Board's broad authority to prescribe remedies. Without this nuanced analysis, proposed remedies might otherwise be read through a punitive lens and found outside the scope of the Board's authority and the purposes of the NLRA. Alternatively, if proposed solutions are not deemed punitive, they might still run the risk of failing to adequately provide a direct remedy for the individual

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113. Shapiro, *supra* note 13, at 1082. Shapiro also suggests as alternative recipients, government institutions and, in particular, government efforts at immigration enforcement. *Id.* at 1082–83. Congress summarized the purpose of the Act by stating that:

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151 (2012). With this purpose in mind, by not extending the Board's remedial power to cover undocumented workers, the Supreme Court is taking a short-sighted approach to the goals of the NLRA and undermining the Board's authority to protect workers under the Act.

114. Shapiro, *supra* note 13, at 1075. These proposals fail, however, to adequately address the harm suffered by the immigrant worker community caused by *Hoffman Plastic*. Additionally, the proposal to award backpay to enforce immigration laws would not only directly hurt undocumented workers, but would disincentivize reporting of unfair labor practices and hamper workers' efforts to organize collectively. *Id.* Shapiro acknowledges that "[a]n award of backpay to an alternative recipient would likely require congressional action to change the NLRA because, like punitive damages and fines, it is aimed primarily at deterring employer conduct, not at making employees whole." *Id.*

115. *Id.* at 1074. Shapiro discusses the possibility of alternative remedies in an attempt to honor the goals of both labor and immigration laws, rather than to view these respective federal laws in conflict, as the Supreme Court appears to do in *Hoffman Plastic*. *Id.* at 1074–75.

116. *Id.* at 1075.

harmed. The following section seeks to raise possible alternative remedies, and analyzes the likelihood these solutions will be found within the Board's remedial statutory authority.

### III. FIXING THE PROBLEM: HARMONIZING THE GOALS OF THE NLRA AND IRCA WHILE SIMULTANEOUSLY STRENGTHENING THE UNITED STATES WORKFORCE

As the demographics in the United States workforce continues to grow in percentage of minorities and immigrants,<sup>117</sup> the potential for workplace abuses will continue to rise. Therefore, it is important that the Board is able to promulgate the goals of the NLRA lest its purpose be forgotten entirely. With a growing workforce, especially one involving such vulnerable groups of people, the NLRA's principal policy purpose of "fostering collective bargaining through unionization"<sup>118</sup> is in jeopardy when the Board is unable to ameliorate violations of the NLRA in a uniform fashion for all employees. New alternative remedies for workers harmed in violation of laws are therefore imperative to the strength of labor laws under the NLRA and the Board must be creative in applying its enforcement discretion. In justifying the Board's broad authority, the Supreme Court has held:

We prefer to deal with these realities and to avoid entering into the bog of logomachy, as we are invited to, by debate about what is "remedial" and what is "punitive." It seems more profitable to stick closely to the direction of the [NLRA] by considering what order does, as this does, and what order does not, bear appropriate relation to the policies of the Act.<sup>119</sup>

Further, the Court has stressed that "in devising a remedy the Board is not confined to the record of a particular proceeding" and "[t]he relation of remedy to policy is peculiarly a matter for administrative competence."<sup>120</sup> Therefore, in its sole purpose to enforce the NLRA, the Board is permitted to fashion broad remedies, not necessarily those applicable to individual cases, that will uphold and advance the purposes of the NLRA.<sup>121</sup> The ability of the Board to shift the

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117. See *Labor Force Projections to 2022: The Labor Force Participation Rate Continues to Fall*, U.S. BUREAU OF LAB. STAT.: MONTHLY LAB. REV. (Dec. 2013), <https://www.bls.gov/opub/mlr/2013/article/labor-force-projections-to-2022-the-labor-force-participation-rate-continues-to-fall.htm>.

118. Shapiro, *supra* note 13, at 1082.

119. *N.L.R.B. v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 348 (1953).

120. *Id.* at 349; see also *Chi., B. & Q. Ry. Co. v. Babcock*, 204 U.S. 585, 598 (1907) (holding that "[t]he Board was created for the purpose of using its judgment and its knowledge . . . [w]ithin its jurisdiction, except . . . in the case of fraud or a clearly shown adoption of wrong principals, it is the ultimate guardian of certain rights").

121. See *Seven-Up Bottling Co. of Miami*, 344 U.S. at 349. The Court states that: in devising a remedy, the Board is not confined to the record of a particular proceeding. "Cumulative experience" begets understanding and insight by which judgments not objectively demonstrable are validated or qualified or invalidated. The constant process

recipient of damages owed to an aggrieved undocumented worker to a qualifying recipient with an insolvent employer is within the Board's discretion to effectuate the broader policies of the NLRA.<sup>122</sup>

*A. The Creation of a Common Fund for Workers Unpaid by Insolvent Employers is Within the Board's Discretionary Remedial Authority*

The first solution to remedying undocumented workers whose labor rights have been violated is through the concept of a common fund. As former Chairwoman Liebman briefly mentioned in the concurring opinion in *Mezonos*, the Board:

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.<sup>123</sup>

The Board, therefore, has opened the door to litigation proposing the concept of a common fund, so long as such solution is within the confines of the Board's statutory power.<sup>124</sup>

In a common fund, violating employers would pay back pay awards into a general pool rather than directly to victims of discrimination. This payment would trigger at the compliance stage of a Board proceeding and only after it has been determined that the actual victim of discrimination is ineligible for backpay or reinstatement. The money in the pool would then be distributed to workers eligible for backpay awards, but who had not been paid for whatever reason—most likely due to the insolvency of the offending employer. While not directly benefitting the ineligible, undocumented worker, the remedial purposes of the NLRA could still be effectuated by making whole other aggrieved workers who had not yet received backpay. As previously referenced, one remedy clearly within the Board's discretionary power is the ability to require employers

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of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process . . . peculiarly a matter for administrative competence.

*Id.* (citing *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194 (1941)).

122. *Seven-Up Bottling Co. of Miami*, 344 U.S. at 349–52.

123. *Mezonos Maven Bakery, Inc.*, 357 N.L.R.B. 376, 384 (2011).

124. *Id.* The Board stated that “we would be willing to consider in a future case any remedy within our statutory powers that would prevent an employer that discriminates against undocumented workers because of their protected activity from being unjustly enriched by its unlawful conduct.” *Id.*

to pay backpay awards,<sup>125</sup> and the idea of a common fund is arguably only a step away from traditional direct backpay awards. This solution does not contravene the holding of *Hoffman Plastic*, and it ensures that undocumented workers do not directly receive backpay. Moreover, it does not punitively fine an employer for its labor law violations, but instead makes use of funds that an employer would ordinarily be required to pay if the employee was eligible for the backpay award.

*1. Current Board Precedents Provide Legal Rationales from Which a Common Fund can Logically Flow*

While a common fund that consists of monetary awards not directed to a particular employee might be considered punitive, there is current Board precedent from which this proposal could logically flow. For example, in joint-employer cases, the Board has held that employees under the control of more than one employer maintain rights against each, who are in turn jointly and severally liable for any damages caused for violating the NLRA.<sup>126</sup> In *Adams & Associates*, where one employer claimed to not know its counterpart committed unfair labor practices, the Board reiterated its standard that liability is appropriate even if one employer was unaware of the unlawful acts committed by the other.<sup>127</sup> On this standard, there would be no dispute that, because of two employers' joint responsibility to an employee, that one employer would be fully responsible for the others unlawful acts. This liability would also extend to a situation in which the "aggrieved" employer becomes insolvent, thereby requiring the "innocent" employer to pay the entirety of an award to employee, solely based on their joint and several liability.

Similar to a common fund, and arguably only a step beyond the Board's authority to hold employers jointly and severally liable, is the possibility for employees contracted under a multi-employer bargaining unit to create a common fund for backpay within the unit.<sup>128</sup> The Supreme Court has long

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125. *F.W. Woolworth Co.*, 90 N.L.R.B. 289 (1950). In this case, the Board found that the company illegally discriminated against the employee "because of her union affiliation and activities" in violation of Section 8(a)(3) of the NLRA. *Id.* at 291. The Board determined that the appropriate remedy for the harmed employee is "immediate reinstatement to her former or substantially equivalent position without prejudice to her seniority and other rights and privileges, and to make her whole for any loss of pay she may have suffered as a result of the Respondent's discrimination against her." *Id.* In discussing the best way to calculate an appropriate back pay award, the Board emphasized the policy behind its ability to award remedies, finding "[t]he public interest in discouraging obstacles to industrial peace requires that we seek to bring about, in unfair labor practice cases, 'a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination.'" *Id.* at 292.

126. *See generally* *Browning-Ferris Indus., Inc.*, 362 N.L.R.B. No. 186 (2015).

127. *See generally* *Adams & Assocs.*, 363 N.L.R.B. No. 193 (2016).

128. Logically, a step further from this authority is the possibility for the Board to award damages to victims of discrimination for consequential damages suffered as a result of the loss of their employment. In a Board decision and order from 2016, the General Counsel sought "a make whole remedy that includes reasonable consequential damages incurred as a result of the

acknowledged the Board's authority to certify multi-employer bargaining units, determining that "Congress intended 'that the Board should continue its established administrative practice of certifying multi-employer units, and intended to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future.'"<sup>129</sup> The Court recognized Congress' findings that multi-employer bargaining units could serve as "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining,"<sup>130</sup> which is one of the tasks the Board is charged to uphold under the NLRA.

Multi-employer units are generally common in the construction industry, with employers from a particular trade sharing mutual employment contracts with other employers of the same trade.<sup>131</sup> Because of the frequency in which workers oscillate from one employer within the unit to another, it seems sensible to require that participating employers create a common fund for the industry. In the event that one member of the unit commits an unfair labor practice, and is unable to pay the aggrieved worker, the employee could still be made whole from the multi-employer unit common fund. If the Board could justifiably authorize a common fund, it is not far off to require single employers, who have violated the NLRA, to pay into a common fund to benefit workers awaiting backpay awards.

From a policy perspective, the use of a common fund in cases where awards cannot directly benefit an undocumented worker logically flows from the Board's established authority to dictate the parameters of joint-employer and multi-employer bargaining unit cases. Moreover, a common fund promotes a similar spirit to joint and multi-employer cases: at times, the NLRA's goal of maintaining industrial peace and equalizing the bargaining power between employers and employees means more than upholding responsibility to an employer's own employees.

A common fund is distinguishable from Shapiro's suggestion of awarding backpay money to community organizing groups. In his proposal, money intended for undocumented workers would go towards some type of organization with a nexus to immigrant communities, rather than to actual victims of discrimination under the NLRA.<sup>132</sup> Because a common fund would directly help remedy the wrongs a worker suffered due to an employer's labor law violations, it is more likely to pass legal muster as an alternative to the

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Respondents' unfair labor practices." Goodman Logistics, LLC, 363 N.L.R.B. No. 177, at n.2 (2016). In response, the Board declined to directly address this proposed remedy as this type of "relief sought would involve a change in Board law." *Id.* The Board, however, did not decide against this possibility, but instead stated that "the appropriateness of th[is] proposed remed[y] should be resolved after a full briefing by the affected parties." *Id.*

129. N.L.R.B. v. Truck Drivers Local Union No. 499, 353 U.S. 87, 96 (1957).

130. *Id.* at 95.

131. *Id.* at 94–95.

132. Shapiro, *supra* note 13, at 1081–82.

problems *Hoffman Plastic* raises. And, importantly, such a fund remains in the permissible sphere of requiring a remedial award, rather than a punitive fine.

## 2. *The Equitable Doctrine of Cy Pres Provides Further Legal Justification for a Common Fund*

The common fund suggested here is analogous to the doctrine of *cy pres* as applied to trust law. Although *cy pres* is not ordinarily present in traditional labor law jurisprudence, its underlying equitable concepts can rationally extend to backpay awards paid into a common fund. In other areas of law, where the doctrine has been deemed applicable, courts often point to the general rule of charitable intent.<sup>133</sup> *Cy pres* is recognized if “the instrument indicates a general intention or dominant purpose on the part of the donor that the property to be devoted to charitable purposes regardless of the peculiar method of execution.”<sup>134</sup> In awarding back pay, the Board promulgates the purposes of the NLRA, which is the underlying intent behind such a monetary award.

In recent years, the use of *cy pres* has expanded to the world of employment litigation as a “last resort” for the distribution of unclaimed funds in class action settlements.<sup>135</sup> Although there is debate surrounding the use of *cy pres* awards

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133. See generally J.T. Buxton, Jr., *General Charitable Intent as Essential to Application of Cy Pres Doctrine*, 74 A.L.R. 671 (originally published in 1931). To understand the origins of the *cy pres* doctrine, the Eighth Circuit states:

The *cy pres* doctrine takes its name from the Norman French expression, *cy pres comme possible*, which means “as near as possible.” The doctrine originated to save testamentary charitable gifts that would otherwise fail. Under *cy pres*, if the testator had a general charitable intent, the court will look for an alternate recipient that will best serve the gift’s original purpose. In the class action context, it may be appropriate for a court to use *cy pres* principles to distribute unclaimed funds. In such a case, the unclaimed funds should be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated.

Airline Ticket Comm’n Antitrust Litig. *Travel Network v. United Air Lines*, 307 F.3d 679, 682 (8th Cir. 2002) (internal citations omitted).

134. Buxton, *supra* note 133, at 671. Although this doctrine is typically applied to the bequeathing of trusts, the overarching concepts can be transferred to a scenario where the Board is like the manager of a trust with a particular intent. *Id.* The rule states that:

Where a main charitable purpose is disclosed with reasonable clearness, directions of the donor relating to management of the trust, not intended as limitations, will be regarded as directory only, and not mandatory, if necessary to preserve the trust and carry out its leading purpose. In such cases, it will be presumed that specified details of management were meant to be governed by circumstances; and this whether they be either impracticable or illegal. Administrative duties may be varied, details changed, and the main purpose carried out *cy pres*, or as nearly as possible according to the plan prescribed in the trust instrument.

*Id.*

135. Letter from John H. Beisner, U.S. Chamber Inst. for Legal Reform, to Rebecca A. Womeldorf, Sec’y of the Comm. on Rules of Practice & Procedure of the Admin. Office of the U.S. Courts, U.S. COURTS (Oct. 15, 2015), [http://www.uscourts.gov/sites/default/files/15-cv-ii-suggestion\\_u.s.chamber\\_0.pdf](http://www.uscourts.gov/sites/default/files/15-cv-ii-suggestion_u.s.chamber_0.pdf).

as a primary settlement option, many courts have upheld settlement agreements with *cy pres* fall-back clauses for unclaimed funds.<sup>136</sup> In *Ontiveros v. Zamora*, the United States District Court of the Eastern District of California upheld the parties' settlement agreement, which stated that any leftover funds "are to be redistributed to designated *cy pres* beneficiaries" after unclaimed settlement funds are "redistributed to class members on a pro rata basis."<sup>137</sup> This holding is in line with the Fifth Circuit in *Klier v. Elf Atochem North America, Inc.*, where the court stated, "a *cy pres* distribution puts settlement funds to their next-best use by providing an indirect benefit to the class."<sup>138</sup>

Because the agreement in *Klier* sought to distribute unclaimed funds through the *cy pres* doctrine first before distributing residual funds within the class, the court held the trial court "abused its discretion by ordering a *cy pres* distribution in the teeth of the bargained-for-terms of the settlement agreement."<sup>139</sup> While *cy pres* was not appropriately applied in this case, the Fifth Circuit went on to indicate that the doctrine is properly applied when it "comes on stage to... rescue the objectives of the settlement when the agreement fails to do so."<sup>140</sup>

*i. Cy Pres Awards Are Generally Accepted by Courts When There is a Close Nexus Between the Intended Recipient and the Charity Organization*

Another necessary element for a *cy pres* award to be valid in a settlement agreement is "that there be 'a driving nexus between the plaintiff class and the *cy pres* beneficiaries.'"<sup>141</sup> Further, "[a] *cy pres* award must be 'guided by (1) the objectives of the underlying statute(s) and (2) the interests of the silent class

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The letter states that "[i]n the vast majority of reported cases in 2014 and 2009, the *cy pres* provision was essentially a fallback term designed solely to administer unclaimed funds after multiple attempts were made to distribute the money to class members." *Id.* at 6. As applied in wage and hour class action settlements, the doctrine has "usually provided that any checks uncashed by class members would be donated to third-party charities, rarely a significant sum of money." *Id.*

136. *Id.* The U.S. Chamber Institute for Legal Reform notes their concern with the risk of overly expanding the *cy pres* doctrine in federal class action practice and with using *cy pres* as a first option rather than a last resort strictly for residual funds. *Id.* at 12–13.

137. *Ontiveros v. Zamora*, 303 F.R.D. 356, 362 (E.D. Cal. 2014). In the section entitled "Settlement Distribution," the settlement agreement states that "[i]n the event that any class members fail to cash checks issued in the second round, those funds will be distributed to designated *cy pres* beneficiaries." *Id.* at 369. In the event that settlement awards are offered to all classes and their members, any left-over money will revert to *cy pres* beneficiaries. *Id.*

138. *Klier v. Elf Atochem N. Am. Inc.*, 658 F.3d 468, 475 (5th Cir. 2011). Similar to the court's discussion in *Ontiveros*, the Fifth Circuit places the use of *cy pres* in settlement agreements to "large-scale class actions . . . [where] money often remains in the settlement fund even after initial distributions to class members have been made because some class members either cannot be located or decline to file a claim." *Id.* at 473.

139. *Id.* at 471.

140. *Id.* at 476.

141. *Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012) (quoting *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011)).

members,' and must not benefit a group 'too remote from the plaintiff class.'"<sup>142</sup> In *Dennis v. Kellogg Co.*, the Ninth Circuit held that the *cy pres* distribution proposed in the settlement to donate food to local charities feeding the indigent was "divorced from the concerns embodied in consumer protection laws."<sup>143</sup> In *Dennis*, the plaintiff class complained of the company's misrepresentation of its cereal as improving consumer attentiveness.<sup>144</sup> The Court, therefore, held that meeting the requisite nexus between the plaintiff class and a *cy pres* recipient would require the company to donate instead to "organizations dedicated to protecting consumers from . . . false advertising."<sup>145</sup>

In cases where undocumented workers are ineligible for remedies ordinarily awarded by the Board under *Hoffman Plastic*, the money should instead go into a common fund to benefit victims of discrimination at insolvent companies. Although the money paid to these workers would derive from another employer, it would provide a close nexus to the objectives of the NLRA, i.e., to remedy an employer's wrong by making aggrieved workers whole. This would serve a similar function as those settlement agreements with a *cy pres* provision acting as a last resort when there is money left over after adequate attempts to reach class members. In this case, because undocumented workers are not eligible recipients of back pay awards when employers violate the NLRA, the doctrine of *cy pres* could rationally be viewed as a "last resort," saving the money intended for the aggrieved workers and distributing it instead to a common fund with a "close nexus" to the undocumented worker's class.

*B. Congress Should Amend the Language of the NLRA to Include Provisions Allowing for a Common Fund in Order to Protect the Goals of the NLRA and IRCA*

Another solution to the loophole created under *Hoffman Plastic*, would be for Congress to take legislative action. Although the interpretation and construction of the NLRA is in the hands of the Board and courts, the legislature has the ability to amend the statute. Congress should take note of the problems resulting from the holding in *Hoffman Plastic*, as well as the clash between the NLRA and IRCA. As undocumented immigrants continue to represent a notable portion of the American workforce, Congress should address the inevitable possibility of a growth in labor violations and recognize the strength of the NLRA when all workers are extended the same remedies. Therefore, the simplest solution would

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142. *Dennis*, 697 F.3d at 865.

143. *Id.* at 866.

144. *Id.* at 862.

145. *Id.* at 867. The Ninth Circuit based its holding on a prior decision, where the court "held that the *cy pres* distribution was an abuse of discretion because there was 'no reasonable certainty' that any class member would benefit from it, even though the money would go 'to areas where the class members may live.'" *Id.* at 865. A common fund, however, would benefit the greater class of workers whose labor rights have been violated, sending the money directly to workers who have already won cases on the merits, but await a make whole remedy.

be for Congress to resolve the confusion created by the conflicting provisions of the NLRA and IRCA and effectively overrule *Hoffman Plastic*.

One possible amendment would be to add a sentence to the end of section 160(e) of the NLRA allowing for a common fund as within the Board's remedial discretion.<sup>146</sup> Congress should note that such remedies are not punitive but rather equitable solutions available to the Board to alleviate the harms of employers violating the NLRA. Adding such language would remind employers that violating the NLRA is subject to consequences no matter the status of the victim of discrimination. Although the word "consequences" might trigger perceptions of punitive actions, the necessity of holding employers accountable in order to maintain the integrity of the NLRA is convincing and should instead be argued as an equitable solution. Moreover, it is important to note that, although the current construction of the NLRA bars punitive remedies and consequential damages,<sup>147</sup> Congress has the power to amend the NLRA to allow for punitive remedies and fines. Therefore, even if Congress deems this type of amendment too far outside the confines of the NLRA's original objectives, the option to amend the statute to require payment to a common fund for eligible workers is at least an equitable solution within the current confines of the NLRA.

In addition to, or as an alternative to, amending the language of the statute, Congress should propose new legislation to address the gaps to enforcing the NLRA. The Workplace Action for a Growing Economy (WAGE) Act, for example, was proposed in 2015 as a broad amendment to the NLRA to strengthen protections for workers.<sup>148</sup> As the NLRA was passed in 1935 under

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146. 29 U.S.C. § 160 (2012). The title of this section is "[p]revention of unfair labor practices" and the subtitle of section 'e' reads: "[p]etition to court for enforcement of order; proceedings; review of judgment." *Id.* Although this section discusses the modification of a Board order, it would make sense to include here a sentence allowing for funds owed to undocumented workers to revert to a community fund in the event that a worker is ineligible to receive such funds.

147. *Id.*

148. Ross Eisenbrey, *The WAGE Act will Help Strengthen Worker Protections, Raise Wages, and Improve Working Conditions*, ECON. POL'Y INST. (Sept. 16, 2015) <http://www.epi.org/publication/the-wage-act-will-help-strengthen-worker-protections-raise-wages-and-improve-working-conditions/>. Proponents of the WAGE Act view the current situation in the following light:

Rebuilding our collective bargaining system is an extremely important task for regenerating robust wage growth and restoring our democracy. The erosion of collective bargaining has been the major cause of wage stagnation for middle-class workers (wages have been stagnant for both blue-collar and white-collar workers for the last dozen years) and has been an important force in driving up overall inequality. It has affected union and non-union workers alike, because collective bargaining sets wage standards in industries and occupations. Union representation also provides the main vehicle for working Americans to have a voice in legislative and political matters, helping to offset the power of money in politics.

*Id.* Because it seems less likely that Congress would amend the language of a long-established statute, it is more likely that proposing new legislation would gain greater traction, especially if written in consideration of the current labor environment and the makeup of the American workforce.

completely different workplace settings,<sup>149</sup> it is imperative that Congress re-visit the goals of the NLRA under today's setting and determine if the Board is able to continue effectively enforcing said goals under precedent such as *Hoffman Plastic*.

#### IV. CONCLUSION

Undocumented immigrants have made up a notable percentage of the workforce in the United States for decades.<sup>150</sup> When the NLRA was passed in 1935, the demographics of the workforce were dramatically different than today;<sup>151</sup> however, there are significant reports suggesting that Congress intended the NLRA to apply to all members of the workforce in order to achieve its purposes. With its main provisions to protect the rights of employees to bargain *collectively* in order to combat the disproportionate power of employers,<sup>152</sup> the NLRA's effectiveness depends on the ability of all workers to come together as a unit. In turn, this implies that victims of discrimination under the NLRA should have access to the same array of remedies when the Board finds their rights violated. Facially, offering a sliding scale of remedies creates subdivisions among workers and undermines the entire collective purpose of the NLRA.

After the Supreme Court's holding in *Hoffman Plastic*, the ability of the Board to effectuate the policies of the NLRA was curtailed, arguably at an integral period in workers' rights advocacy. Without the ability to extend the traditional Board remedies of backpay and reinstatement awards to undocumented workers, both the goals of the NLRA and the IRCA are undermined. Without incentives to treat undocumented workers as an equal class of employees as documented workers, the goals of minimizing the "pull" factors of illegal immigration under the IRCA,<sup>153</sup> and the goals of protecting collective organizing rights under the NLRA are stunted.<sup>154</sup> If the purposes of both these federal statutes are to be furthered, the Board must have the ability to fashion alternative remedies when undocumented workers are the intended recipients. The possibility of employers paying into a common fund or an immigrant community advocacy fund are both solutions within the remedial power of the Board in its charge to carry out the goals of the NLRA. Enacting these changes will help curtail the incentive to hire undocumented workers, taking advantage of their legal vulnerability by simultaneously strengthening American workers.

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149. National Labor Relations Act, 29 U.S.C. §§ 151–169 (2012).

150. Jens Manuel Krogstad, *5 Facts about Illegal Immigration in the U.S.*, PEW RES. CTR. (Nov. 28, 2018), <http://www.pewresearch.org/fact-tank/2018/11/28/5-facts-about-illegal-immigration-in-the-u-s/>.

151. Donald M. Fisk, *American Labor in the 20th Century*, U.S. BUREAU OF LAB. STAT. (Jan. 30, 2003), <https://www.bls.gov/opub/mlr/cwc/american-labor-in-the-20th-century.pdf>.

152. 29 U.S.C. § 151 (2012).

153. Immigration Reform and Control Act of 1986, 8 USC § 1101 (2012).

154. 29 U.S.C. § 151.

