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Inter-American Court of Human Rights Amicus Curiae Brief: The United States Violates International Law When Labor Law Remedies are Restricted Based on Worker's Migrant Status

Sarah H. Cleveland

Beth Lyon

Rebecca Smith

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INTER-AMERICAN COURT OF HUMAN RIGHTS

IN THE MATTER OF

REQUEST FOR ADVISORY OPINION

SUBMITTED BY

THE GOVERNMENT OF THE UNITED MEXICAN STATES

OC-18

Brief of *Amicus Curiae:* Labor, Civil Rights and Immigrants' Rights Organizations in the United States

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February 2003

Honorable Court:

Attorneys Rebecca Smith of the National Employment Law Project, Professor Sarah Cleveland, Amanda Levinson and Emily Rickers of the University of Texas School of Law, Professor Beth Lyon of Villanova University School of Law,[1] Ana Avendaño of the National Immigration Law Center and D. Michael Dale of the Northwest Worker Justice Center present this brief *amicus curiae* on behalf of fifty labor, civil rights and immigrants' rights organizations in the United States, listed in Appendix A, in the matter of the Request for Advisory Opinion submitted by the Government of the United Mexican States to the Inter-American Court of Human Rights regarding the human rights of migrant workers, OC-18.

INTRODUCTION

Immigrant workers in the United States of America are among the most poorly paid and poorly treated in the workforce. *Amici's* attempts to protect the rights of immigrants, including unauthorized[2] workers, have been severely hampered by domestic U.S. laws that discriminate on the basis of alienage and immigration status, and especially by a recent decision of the United States Supreme Court in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137 (2002).

Immigrant workers in particular employment-related visa categories are explicitly excluded from the protections of certain U.S. labor and employment laws. So, too, immigrant workers who lack employment authorization required by federal law ("unauthorized immigrants") are denied the protection of some state and federal laws. As a result of the *Hoffman* decision, many employers have defended pending cases by claiming that unauthorized immigrant workers have no labor and employment rights in the United States. Undoubtedly, some lower courts will find that unauthorized immigrants are excluded from the protections of additional labor laws.

In the U.S., employer threats to retaliate against complaining workers by calling in the U.S. Immigration and Naturalization Service to arrest them are common. These threats are on the rise in the last several months, and have had several pernicious effects: First, they have a severe chilling effect on workers' ability to enforce their remaining rights. Second, employers who would first hire, then abuse, and finally retaliate against unauthorized employees gain a competitive advantage over those who follow the law. Since these employers suffer no penalty for violating the law, they are encouraged to hire the undocumented, and the goals of U.S. immigration laws are thus thwarted.

Amici are concerned that continued employer threats of retaliation and actual retaliation mean that, regardless of the outcome of pending legal cases, many immigrant workers will be too intimidated to bring their legitimate complaints to the authorities. Because of this chilling effect, and because of legal restrictions on access to federal legal services for undocumented immigrants, the result will be more severe exploitation of a highly vulnerable workforce, all to the detriment of workers, law-abiding employers, and domestic immigration policy.

The OAS Charter proclaims that "work gives dignity to the one who performs it."[3] Discriminatory U.S. laws deprive millions of migrant workers of that dignity simply because they have been forced to cross international borders in order to survive. In the name of immigration control, U.S. federal and state employment laws violate international human rights law binding on this country.

Amici recognize that states retain the authority under international law to decide whether to admit aliens. For the purposes of this case, *amici* do not dispute that a state may have the right to deny employment to aliens altogether under certain circumstances, in order to further its border control policy. However, once an alien is present in a state's territory and actually working, international law, including the instruments of the OAS system, prohibits discrimination on the basis of alienage or immigration status in

workplace benefits and protects the right to freedom of association for all workers. U.S. employment laws that discriminate against migrant workers on the basis of alienage or immigration classification accordingly violate these norms.

This *amicus* submission considers only those human rights sources that are binding in some form on the United States. *Amici curiae* understand that this Court has no jurisdiction over the United States and do not make the following argument in order to seek any binding legal pronouncements on our government's actions. We feel it is important, however, to demonstrate that the United States' practice subjects the massive migrant worker population in this country to human rights deprivations of the most serious kind. We hope thus to demonstrate to this Honorable Court the urgent necessity for strong regional standards regarding the protection of migrant workers.

The importance of this question for millions of OAS nationals who migrate for employment, and the lack of jurisprudence from other international bodies regarding the employment rights of migrant workers, create an important opportunity for this Court to clarify the obligations of the Inter-American system and to provide fundamental human rights protection to this uniquely vulnerable group.

ARGUMENT

I. U.S. Laws Deny Basic Employment Protections to Foreign Workers on the Basis of Alienage or Immigration Status.

A. The Unauthorized Population Performs a Large Part of the Low-Wage, High Risk Employment in the United States.

North America absorbs the highest number of international migrants in the world.[4] The United States is the top migrant-receiving nation, and has the largest international migrant population worldwide.[5] A subgroup of the migrant population is undocumented. The number of undocumented

immigrants in the United States is estimated at roughly double the entire undocumented population of Europe.[6] In some industries, these numbers are extremely high. For example, eighty-one percent of U.S. farm workers are foreign-born, mainly from Mexico.[7] At least half of the agricultural workforce is not authorized to work in the United States.[8]

Various sources provide estimates of the undocumented population in the U.S. The U.S. Immigration and Naturalization Service (INS) keeps a periodically updated estimate of undocumented residents. The latest INS statistic estimates five million undocumented immigrants as of 1996.[9] More recent private estimates profit from the 2000 Census process, which invested resources in encouraging greater participation by undocumented immigrants.[10] The Pew Hispanic Center, a non-partisan research organization,[11] estimates the total illegal-resident population in the United States at 7.8 million.[12] The Migration Policy Institute tentatively places the 2000 undocumented population at 8.5 million.[13]

The Pew Hispanic Center estimates the numbers of undocumented immigrants in the workforce, placing the unauthorized urban labor force at 5.3 million[14] and the unauthorized agricultural labor force at 1.2 million.[15] The Center notes that there is significant overlap between the urban and agricultural work force and because of the uncertainty about how to calculate the overlap, the authors decline to provide an estimate of the total unauthorized workforce.[16] For the purposes of this brief, using the urban labor force figure of 5.3 million as a rough estimate of the total number of undocumented workers in the United States is sufficient to establish the population as a serious economic factor and compelling focus of political and human concern.

About 4.7 million of the U.S. undocumented population, or 55%, come from Mexico. About 1.9 million come from other nations in Latin America, and 1.1 million come from Asia. A few hundred thousand undocumented immigrants come from Europe, Canada, and Africa.[17]

Undocumented workers in the United States work in a variety of low wage, high-risk occupations. The manufacturing sector employs 1.2 million undocumented workers. The services sector employs 1.3 million undocumented workers. One million to 1.4 million unauthorized workers labor in the fields. Six hundred thousand more work in construction and 700,000 work in restaurants.[18]

In 1996 and 1997, INS inspections found that 23% of workers at Nebraska and Iowa meatpacking plants had questionable documents. An INS inspection of eighty-nine construction businesses in Las Vegas found that 39% of workers appeared to be unauthorized to work. Inspections of seventy-four Los Angeles-area garment contractors found 41% of the employees were unauthorized to work.[19] In recent years, the number of unauthorized immigrant workers in the poultry industry has increased, prompting the INS to deem the employment of unauthorized workers a major problem.[20]

Many of these same industries are known for low wages, dangerous conditions, and frequent violations of labor laws. A U.S. Department of Labor (DOL) survey found that in 2000, 100% of all poultry processing plants were non-compliant with federal wage and hour laws.[21] A separate DOL survey found that in 1996, half of all garment-manufacturing businesses in New York City could be characterized as sweatshops, and a DOL survey in agriculture focused on cucumbers, lettuce, and onions revealed that compliance in these commodities was unacceptably low.[22]

Injuries and deaths of Latino workers engaged in hazardous employment are extremely high and increasing. In the year 2000, construction fatalities involving Latino workers increased by 24%, while Latino employment was up only six percent.[23] New York has the nation's highest rate of immigrants killed in the workplace, with foreign-born workers accounting for three out of every 10 deaths.[24]

In 2001, farm workers employed in the production of crops accounted for only one percent of the workforce, but represented six percent of the

occupational deaths.[25] In that year, there were forty-nine farm fatalities in the state of California alone.[26]

Thus, it is no secret that many U.S. employers are hiring unauthorized workers and profiting from their labor. Both because of overt exclusions from the protection of domestic labor laws, and because of the practical and legal effects of the United States Supreme Court's recent decision in *Hoffman*, the task of enforcing workers' rights has become increasingly more difficult. The *Hoffman* decision has contributed to a general climate of fear among immigrant workers in the United States and a general reluctance, and often, inability, to enforce existing rights. The following sections will examine that climate, employers' willingness to hire the unauthorized, and the limitations of U.S. labor law that exacerbate the victimization of these workers.

B. Case Examples: Unscrupulous Employers Use Extra-Judicial Threats to Suppress Exercise of Labor Rights.

The practice of threatening to expose, and exposing, workers to the U.S. Immigration and Naturalization Service in order to suppress immigrant workers' exercise of their labor rights has been a common one in the United States for many years. For example:

Victor Benavides began working as a boiler mechanic in 1990. Before he was hired, the president of the corporation personally interviewed Mr. Benavides. Mr. Benavides told the president that he was working unlawfully in the United States. The president responded that he only needed a "legal" name so that Benavides could be listed on the company's books. Several months later, when Benavides and another undocumented worker, Alberto Guzman, became active in a union organizing drive, and in an atmosphere of "flagrant and pervasive unfair labor practices," the workers were fired. One day after the union won the election, the employer asked the INS to investigate the legal status of its employees.[27]

In 1999, workers at a Holiday Inn Express hotel in Minneapolis voted to join the Hotel Employees and Restaurant Employees union. A call to the INS by the employer resulted in the arrest of eight members of the union's negotiating committee.[28]

In 1996, the Teamsters' and United Farm Workers' unions began a joint organizing drive in Washington State's lucrative apple industry, beginning with a packing company in Wenatchee, Washington. One employee, Mary Mendez, quotes the employer's anti-union consultant as having told the workers: "there hasn't been a union here yet, and the INS hasn't done any raids. But with a union, the INS is going to be around." The union lost the subsequent election.[29]

Silvia Contreras worked as a secretary for a company that sells commercial insurance to truck drivers. In 1997, after Ms. Contreras filed a claim for unpaid wages and overtime under the Fair Labor Standards Act, her employer turned her in to the INS.[30]

In *U.S. v. Alzanki,*[31] an employer confined her immigrant employee to the apartment, forced her to work fifteen hour days, exposed her to noxious cleaning chemicals, and refused to provide medical treatment when the chemicals caused her illness. The employer threatened her with deportation almost daily. He was later convicted of holding her in involuntary servitude.

In Gilbert, Arizona, female employees at Quality Art LLC, a picture frame manufacturing company, accused their employer of offensive and intrusive searches, as well as other harassment on the basis of sex, such as being assigned to sex-segregated positions. The employer retaliated by terminating some employees, forcing some workers to quit their jobs based on the hostile work environment, and reported the women to the INS. Although INS officials said that they sympathized with the women—calling them "courageous" for coming forward—INS indicated that the women likely would be returned to their countries.[32]

Since the United States Supreme Court decision in *Hoffman*, unscrupulous employers' threats of retaliation have continued unabated. Immediately after the Court's ruling, an employer's attorney in New York cited *Hoffman* when he issued a written threat of litigation against a community group that had announced the intention to protest unpaid wages. The attorney stated, falsely, that *Hoffman* had outlawed a demonstration by the group.[33]

Four Peruvian farm workers filed a claim against their former employers for minimum wage and overtime violations, discrimination, and for housing them in substandard housing over a four-year period from 1997 through 2001. After their lawsuit was filed, the defendant's father contacted the INS, and repeatedly pressured the agency to take enforcement action against the plaintiffs, claiming that the unpaid workers are both undocumented and "terrorists." When *Hoffman* was decided, the employer used it to argue—incorrectly—that the workers were not protected by U.S. labor and employment law.[34]

Alejandro Vazquez and David Sanchez both worked for a Michigan company as laborers. Both were seriously injured in separate accidents at the workplace, suffering, respectively, a joint separation and a hand injury requiring several surgeries. After the injuries, the employer received a letter indicating that the two did not have social security numbers, and questioned them about this fact in the workers' compensation proceedings. The employer fired both injured workers, and opposed the workers' compensation claim on the basis that they were undocumented workers from Mexico. Their claims are pending in the Michigan Court of Appeals. The court has just determined that wage loss benefits are unavailable to undocumented injured workers in Michigan because they have committed a "crime" under state law by working illegally.[35]

Twenty-two Mexican workers were recruited from California to work as carpenters on a power project in Texas. This past summer, a local newspaper reported that after two weeks of work, the workers were told that

they would not be paid, and that they must leave or the contractor would call the U.S. Immigration and Naturalization Service. The workers were owed for two weeks of work at $12 to $16 per hour.[36] Other examples are noted in the report, *Used and Abused*, compiled by the Mexican American Legal Defense and Education Fund and the National Employment Law Project, attached as Appendix B.

C. The Employer Sanctions Scheme in the U.S. Poses No Deterrent to Employer Threats.

1. Basics of the employer sanctions law.

The Immigration Reform and Control Act of 1986 (IRCA) contains an "employer sanctions" scheme that prohibits the employment of unauthorized aliens in the United States.[37] IRCA established an "employment verification system" designed to deny employment to aliens who are not lawfully present in the United States, or who are not lawfully authorized to work in the United States. IRCA mandates that employers verify the identity and eligibility of all new hires by examining specified documents before they begin work.

Under the IRCA, if an immigrant job applicant is unable to present the required documentation, she cannot legally be hired.[38] If an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed, the employer is compelled to discharge the worker upon discovery of the worker's unauthorized status. Employers who violate the law may be liable for civil fines and may be subject to criminal prosecution.

IRCA also makes it a crime for an unauthorized alien to present fraudulent documents to his or her employer.[39] Unauthorized immigrants who use or attempt to use fraudulent documents to subvert the employer verification system established by IRCA are subject to fines and criminal prosecution.[40]

2. Employer sanctions are not an effective deterrent to hiring unauthorized workers.

As noted above, employer hiring of unauthorized immigrants continues unabated after IRCA. Employers have little reason to fear that INS will sanction them for hiring unauthorized immigrants, and can easily come to see hiring of the unauthorized as a legitimate cost-saving decision. This is because the employer sanction system is full of holes and left largely ignored by federal agencies.

The language of the verification requirements provides employers with a "gaping loophole" that they exploit by hiring immigrants whom they know have presented fraudulent documents.[41] Under IRCA, employers are only required to accept documents that appear on their face to be genuine and to relate to the individual named.[42] This has meant that an employer can ignore documents it suspects are invalid, allow the worker to use documents that belong to another person, or even take part in procuring documents for the worker. "In effect, employers who are willing to comply just enough to avoid appearing to disregard the law totally, but who in fact continue to rely on unauthorized labor, are insulated from the law's sanctions provisions."[43]

Even where employers fail utterly to comply with the law, average employer sanctions fines are low and rarely assessed. In fiscal year 1999, the INS apprehended 1,714,035 aliens. Of this number, the Border Patrol made 1,579,010 apprehensions, of which 97% were made along the southwest border.[44] By contrast, the number of warnings to employers nationwide was 383, down 40% from 1998. The INS issued only 417 notices of intent to fine employers nationwide in 1999, a decrease of 59%.[45] In the year 2000, warnings to employers decreased another 26%, and notices of intent to fine decreased yet again, by 57%.[46]

According to the Immigration and Naturalization Service itself, "Neither Republicans nor Democrats nor a broad range of interest groups is prepared to support an employer sanction program that actually would work."[47] Thus, under the current legal scheme in the United States, employers may

readily hire unauthorized workers, take advantage of them, and then threaten to turn them in to the INS, all without fear of governmental action.

3. Employers continue to hire unauthorized workers after IRCA because it is profitable.

Unauthorized immigrants commonly will decline to report private or official abuse and are frequently unwilling to pursue civil claims in court.[48] The lack of access to safety-net programs such as unemployment insurance, food stamps, and welfare, supply further reasons for unauthorized workers to suffer workplace illegality without risking job separation.[49]

In Dallas, Texas, the Regional Administrator of the Wage and Hour Division of the U.S. Department of Labor indicates that illegal immigrant workers endure sexual harassment, denial of overtime pay, and wages below the minimum federal standard because they are worried they will be deported.[50]

When unauthorized workers are not protected by labor laws, unscrupulous employers are encouraged to hire them. This, in turn, undermines the effectiveness of a country's immigration laws. When it considered the IRCA for passage, the United States Congress understood this dynamic. In their consideration of IRCA, both houses of Congress agreed that employers easily abuse undocumented workers. Each house concluded that undocumented immigrants, "out of desperation, will work in substandard conditions and for starvation wages."[51] For that reason, Congress stated that, after IRCA, labor laws should continue to protect the undocumented.[52] Unfortunately, enforcement has not occurred. As discussed in the next section, unauthorized workers and other immigrant workers remain unprotected by many U.S. employment laws, both by the *Hoffman* and other court decisions, and by express exclusions in state and federal law.

D. Court Decisions Deprive Certain Immigrants of Meaningful Remedies for Violation of their Rights.

Immigrant workers in particular immigration categories, especially unauthorized immigrants, are expressly excluded from the remedies available to their U.S. citizen counterparts. Here we outline the *Hoffman* decision and its effect on remedies available to unauthorized workers under U.S. law.

1. Collective bargaining laws – Unauthorized workers not entitled to meaningful remedies for violation of their rights.

The primary law under which workers are guaranteed the right to organize trade unions and bargain collectively in the United States is the National Labor Relations Act (NLRA).[53] Although unauthorized workers are considered "employees" under the NLRA,[54] under current law, workers in irregular migratory status are not afforded the same remedies for violation of this right as are other workers. In its March 2002 decision in *Hoffman,*[55] the Supreme Court held that an unauthorized worker cannot recover the remedy of back pay for an unlawful termination under the National Labor Relations Act.

The limitation on remedies afforded to unauthorized workers means that many workers will not exercise their rights to organize. The limitation on remedies has also spilled over into other areas of law. As noted in Section B, above, and the attached Report in Appendix B, some employers in the U.S. are attempting to use the *Hoffman* decision to limit undocumented workers' rights in many areas.

The *Hoffman* case involved a worker named José Castro. Mr. Castro was working in a factory in California and was fired, along with other co-workers, for his organizing activities. The National Labor Relations Board, the agency that administers the NLRA, ordered the employer to cease and desist, to post a notice that it had violated the law and to reinstate Mr.

Castro, and to provide him with back pay for the time he was not working because he had been illegally fired.

During a hearing on his case, Mr. Castro admitted he had used false documents to establish work authorization and that he was an unauthorized worker. The U.S. Supreme Court ultimately held that unauthorized workers cannot receive back pay under the National Labor Relations Act. Under the Act, back pay is paid to a victim of an illegal anti-union firing in order to compensate him for wages he would have earned had he not been wrongfully fired.

In reaching this decision, the Supreme Court focused on the fact that the "legal landscape [had] now significantly changed"[56] since Congress had enacted the Immigration Reform and Control Act of 1986, and its employer sanctions provisions. According to the Court, IRCA's prohibition on employer hiring of unauthorized workers, and on workers' acceptance of employment without work authorization requires the National Labor Relations Board to deny back pay to these workers, because back pay would compensate these workers for work they cannot lawfully perform.

Neither the U.S. Constitution, nor any provision of IRCA or the NLRA prohibits back pay awards to unauthorized workers. However, the Court refused to defer to the NLRA's enforcement scheme because it reasoned that to do so would "trump" Congressional immigration policy. It is important to note that the U.S. government pursued Castro's case and defended the position that he was entitled to back pay before the U.S. Supreme Court.

The Supreme Court did not have before it any arguments based on international law; nor were international legal precepts taken into consideration in its decision. Nor did the Court, which decided the case by the slimmest of margins—five justices supporting the decision and four opposing—take into account the practical impact of its decision on the labor rights of international migrant workers.

Since the *Hoffman* decision, the National Labor Relations Board has stated that unauthorized workers will not be entitled to back pay, or to reinstatement when they are illegally fired, unless they can show that they now have lawful employment status.[57] The Board's policy does not distinguish between employers who knowingly hire workers who are unauthorized, in violation of U.S. law, and those who do not know of the worker's illegal status at the time of hire.

Back pay is the only meaningful remedy available to workers under the NLRA. After *Hoffman*, the only remedies available to unauthorized immigrants in the U.S. are these: an employer who illegally fires an unauthorized worker might be ordered to post a notice about the violations of the law, and might be told to "cease and desist" violating the law. In certain cases, an employer who violates the law again might be subject to penalties for contempt of court. Back pay is the only monetary compensation afforded under the National Labor Relations Act to victims of employer wrongdoing. After the Court's decision, this remedy is unavailable to unauthorized workers, with the result that workers will be much less likely to exercise their remaining rights, unscrupulous employers will have no reason to respect those rights, and law-abiding employers will be tempted to violate the law or face a competitive disadvantage.

2. Discrimination laws—Unauthorized workers not entitled to equal remedies with authorized workers.

The *Hoffman* decision also has important implications for the remedies available to unauthorized workers under the U.S. anti-discrimination laws. In the United States, Title VII of the federal Civil Rights Act protects workers' rights to be free from discrimination based on several factors: sex, color, race, religion, and national origin.[58] The Age Discrimination in Employment Act protects workers' rights to be free from discrimination based on age.[59] The Americans with Disabilities Act protects workers' rights to be free from discrimination based on disabilities.[60]

Unauthorized workers may not be entitled to back pay for wrongful termination under laws enforced by the EEOC.

The U.S. Equal Employment Opportunity Commission (EEOC) is the government agency that enforces most federal employment discrimination laws. After the *Hoffman* decision, the EEOC rescinded its *Enforcement Guidance on Remedies Available to Undocumented Workers*.[61] It noted that since its former practice of awarding back pay to undocumented workers was based on the NLRA, it was reviewing that practice in light of *Hoffman.* The EEOC's statement leaves in doubt whether undocumented workers will be entitled to back pay under Title VII.

Recently, a federal court in New York issued a troubling decision in a case involving violations of the Americans with Disabilities Act, suggesting that *Hoffman* has made the issue of immigration status relevant to a worker's standing to sue for relief under the anti-discrimination laws, and which may well serve as an indicator of things to come. In denying a defendant's motion to dismiss in *Lopez v. Superflex, Ltd.,*[62] the judge noted:

> If *Hoffman Plastic* does deny undocumented workers the relief sought by plaintiff, then he would lack standing. As that issue is not ripe for decision, we decline to rule on it at this time. However, if plaintiff were to admit to being in the United States illegally, or were to refuse to answer questions regarding his status on the grounds that it is not relevant, then the issue of his standing would properly be before us, and we would address the issue of whether *Hoffman Plastic* applies to ADA claims for compensatory and punitive damages brought by undocumented aliens.[63]

Like denial of the back pay remedy under the National Labor Relations Act, denial of back pay to unauthorized immigrant victims of discrimination means that one of the most effective deterrents to further violations is no longer available. It remains to be seen whether certain courts may limit unauthorized immigrant workers' rights to receive other forms of monetary compensation for discrimination.

Unauthorized workers not protected at all against age discrimination in five states.

Prior to the U.S. Supreme Court's decision in *Hoffman*, most courts in the country agreed that unauthorized immigrants were entitled to the protection of age discrimination laws. In one case, however, prior to *Hoffman*, the Fourth Circuit Court of Appeals, covering the states of Maryland, North Carolina, South Carolina, Virginia, and West Virginia, had held that an individual without work authorization was not "qualified" for the job, and therefore not protected by the federal law against age discrimination in employment.[64]

Foreign nationals under H-2A visa program excluded from protection of law in five states.

The same court has also held that the Age Discrimination in Employment Act did not protect a foreign nationals applying for a job from outside the United States under the H-2A visa program because he was not authorized to work at the time of his job application, and therefore not qualified for the job.[65]

3. Minimum wage and overtime violations—workers' rights to back pay for retaliatory firings not clear.

In the United States, the federal Fair Labor Standards Act guarantees a minimum wage, currently $5.15 per hour, and a right to overtime pay for hours worked over forty in a week for covered workers.[66] The law is explicitly intended to protect the wages of low-income workers, and to protect law-abiding employers from the unfair competition that results from unscrupulous employers' payment of unfairly low wages.[67]

Prior to *Hoffman,* the Eleventh Circuit had held that an unauthorized worker was eligible for unpaid wages under the Fair Labor Standards Act in *Patel v. Quality Inn South*.[68] The court concluded that, "the Fair Labor Standards Act's coverage of unauthorized aliens is fully consistent with the

IRCA and the policies behind it."[69] Moreover, the court concluded that the plaintiff was eligible for back pay on the basis that the plaintiff was "not attempting to recover back pay for being unlawfully deprived of a job. Rather, he simply seeks to recover unpaid minimum wages and overtime for work *already performed*."[70]

Hoffman leaves intact the right to minimum wage and overtime pay under the FLSA since *Hoffman* deals only with back pay for work not performed. The U.S. Department of Labor, the federal agency charged with enforcing the Fair Labor Standards Act, has stated that the Department "will fully and vigorously enforce the Fair Labor Standards Act without regard to whether an employee is documented or undocumented."[71] However, the Department has not made clear its view on unauthorized immigrants' entitlement to back pay for retaliatory discharges, saying that it is "still considering" *Hoffman's* effect on this remedy.[72]

E. U.S. Laws Explicitly Exempt Certain Immigrants from Workplace Protections.

As noted above, the *Hoffman* decision has resulted in a diminution of the remedies available to unauthorized workers under U.S. laws protecting the right to organize and protecting workers from discrimination in employment. In addition, even prior to *Hoffman,* some U.S. laws have expressly discriminated against workers in certain immigration categories, including both unauthorized workers and other workers in particular visa categories. This section outlines those laws.

1. Workers' rights to be compensated for on the job injuries limited in some states.

Workers' compensation is a state system that provides remuneration for employees who have been injured while working on the job. In general, it covers the medical costs of an injured employee, and allows a worker to continue to be partially paid during the period he or she is unable to work.

Workers' compensation laws also provide compensation for disabilities and for the family of an employee who dies on the job. In the United States, workers give up their right to sue an employer for unhealthy conditions on the job that cause them injuries. In return, workers receive certain benefits for any on the job injury through the workers' compensation system, whether or not the employer causes the injury. Though workers' compensation is generally an issue of state law, and the state laws vary, generally workers receive medical payments, partial replacement of wages, pensions, death benefits, and sometimes retraining for new jobs.

In most states, unauthorized workers are covered under the law.

The majority of the States' workers' compensation laws include "aliens" in the definition of covered employees.[73] Entitlement to lost wages under state workers' compensation laws turns on state statutes and their definition of "worker" or "employee." State courts in California, Colorado, Connecticut, Florida, Georgia, Iowa, Louisiana, Nevada, New Jersey, New York, Pennsylvania, and Texas have specifically held that unauthorized workers are covered under their state workers' compensation laws.[74] However, at least one state, Wyoming, explicitly denies workers' compensation benefits to unauthorized immigrants.[75]

At least two states deny certain rehabilitation benefits to unauthorized workers.

Vocational rehabilitation benefits are normally provided for workers who have been injured on the job as part of the overall workers' compensation benefits package. Vocational rehabilitation is granted so that an injured employee may be retrained to perform the same job, or to perform a different job at the same company. Courts in the states of Nevada and California have concluded that unauthorized workers are not entitled to vocational rehabilitation benefits under certain circumstances.[76]

Death benefits for non-residents limited in some states.

Workers' compensation laws in many states bar the non-resident family members of workers killed on the job from receiving full benefits. In those states, whenever the family member is living outside the United States and is not a United States citizen, the family members do not receive the full death benefits award. There are several ways in which states limit compensation to nonresident alien beneficiaries. Some states limit compensation compared to the benefits a lawful resident would have received, generally 50% (Arkansas, Delaware, Florida, Georgia, Iowa, Kentucky, Pennsylvania, and South Carolina).[77] Some states restrict the types of non-resident dependents who are eligible to receive benefits as beneficiaries (Arkansas, Delaware, Florida, Kentucky, Pennsylvania). Other states limit coverage based on: the length of time a migrant has been a citizen (Wisconsin), the laws of the alien resident beneficiary's home country (Washington), or the cost of living in the alien resident beneficiary's home country (Oregon).[78] Alabama denies benefits to all foreign beneficiaries.[79] Although these laws do not explicity discriminate on the basis of alienage alone, they disproportionately deny equal benefits to non-nationals, who are most likely to have beneficiaries who are non-resident aliens.

New rulings may endanger unauthorized workers' entitlement to wage loss compensation.

Since the U.S. Supreme Court ruling in *Hoffman,* employers in two states have challenged unauthorized workers' entitlement to workers' compensation coverage, or to elements of that coverage. The Supreme Court of Pennsylvania has held that, while an injured unauthorized worker is entitled to medical benefits, illegal immigration status would justify terminating benefits for temporary total disability (wage loss) benefits.[80] Very recently, the Michigan Court of Appeals decided that wage loss benefits may be cut off to undocumented workers as of the date that the

employer "discovers" that the worker is unauthorized. Cases like these encourage unscrupulous employers to suddenly "discover" a workers' unauthorized status as soon as he or she suffers an on the job injury, thereby lowering the employer's workers' compensation premiums.[81]

2. H-2A workers denied many employment protections.

Approximately 40,000 workers who are admitted to the United States annually as temporary non-immigrant workers to perform agricultural work under the H-2A program, most of whom are from Mexico, are denied many basic federal employment protections.[82] H-2A workers are excluded from the protections of the Migrant and Seasonal Agricultural Worker Protection Act (MSAWPA), which is the principal federal employment law for agricultural workers.[83] This exclusion has many serious effects. H-2A migrant workers, unlike other farm workers, are not entitled to disclosures about the job terms at the time they are recruited.[84] Indeed, the recruiter need not even tell the worker for whom he will be working for in the United States. The labor contractors used to recruit and hire H-2A workers need not be registered and monitored by the U.S. Department of Labor. The MSAWPA's transportation safety standards and vehicle insurance requirements for migrant workers are inapplicable to H-2A workers,[85] and H-2A workers are denied the full monetary remedies provided by the MSAWPA as well as the ability to sue in federal court.[86]

H-2A workers' permission to remain lawfully in the United States is tied to only one employer. These workers therefore lack the freedom to leave abusive employers and seek other employment in the United States.[87] In addition to the general exclusion of agricultural workers from the collective bargaining protections of the NLRA, H-2A workers are denied rights to freedom of association to demand higher wage rates or better working conditions as a practical matter, because employers are legally permitted to reject such demands and to fire and deport H-2A workers who make them.

3. Citizenship discrimination law excludes unauthorized immigrants.

Immigrants without work authorization are excluded from the protection of the Unfair Immigration-Related Employment Practices Act, which protects against discrimination based on citizenship and national origin in employment.[88] This Act was passed at the same time as the IRCA, and was intended to protect immigrants from discrimination that might result from the imposition of IRCA's employer sanctions provisions.

4. Immigrant workers' rights of access to legal representation restricted.

In 1974, the U.S. Congress passed the Legal Services Corporation Act (LSCA), which was designed to provide equal access to the civil justice system for people who cannot afford lawyers.[89] To this end, the LSCA created the Legal Services Corporation, an independent corporation that makes grants to legal aid programs.[90] One of the key reasons that working people need access to the civil justice system is to enforce their labor rights. As a practical matter, without the means to bring suit in court, workers' rights cannot be adequately enforced.[91]

<u>Certain immigrants, including the unauthorized and H-2B workers, have no right to legal assistance.</u>

Legal Services Corporation programs are prohibited from providing legal assistance "for or on behalf of" most immigrant workers who are not lawful permanent residents.[92] This ban on representation prohibits representing unauthorized workers, as well as many categories of workers who are legally admitted to work in the United States, such as workers admitted to perform unskilled non-agricultural labor under the H-2B program. Legal aid programs can be fined or have their funding taken away if they are found to have provided services to unauthorized workers. Without the help of legal services, low-wage immigrant workers cannot afford to hire an

attorney to press their legal cases. Therefore, they are effectively prevented from enforcing their remaining rights.

II. U.S. Employment Laws Concerning Migrant Workers Violate Fundamental International Norms of Nondiscrimination and Freedom of Association.

States historically have asserted the right to restrict the rights and activities of foreign nationals based on either their non-citizen or immigration status for a variety of reasons. International law recognizes the right of states to control movement across their borders as a matter both of sovereignty and of national security.[93] States have exercised this right through direct measures such as physical border controls, visa and entry permits, and quotas that limit the number and nationality of people who may enter the country. States also have sought to control immigration through indirect measures, such as limits on access to employment or denial of access to public benefits. States furthermore have denied aliens rights that arguably are owed only to individuals who are citizens or official members of the political community, such as the rights to vote, to hold public office, to engage in certain political activities, and to hold certain civil service jobs.[94] States also have discriminated against non-nationals for purely xenophobic reasons through restrictions on social and cultural life, such as bans on inter-ethnic marriage or the teaching of foreign languages.

Although international law recognizes the right of states to control their borders, international law prohibits many forms of discrimination against non-nationals, whether or not the individuals are legally present in the state. No state, for example, can claim the right to commit genocide or torture against non-nationals. As discussed below, non-nationals also are protected by fundamental human rights in the workplace such as the prohibition against discrimination and the protection of freedom of association.

U.S. employment laws discriminate against migrant workers based on a number of criteria, such as the worker's possession of a valid work authorization or a particular visa status, the presence of the worker's alien relatives outside the country, or the worker's unlawful immigration status. The denial of meaningful remedies for violations of freedom of association under *Hoffman*, and the denial of workers' compensation and vocational rehabilitation benefits in some states, turn on whether an immigrant (whether lawfully present in the country or not) possesses a legal work authorization. The restrictions on the rights of H-2A workers are tied to the particular visa status of such workers as lawful temporary non-immigrants. Restrictions on death benefits to non-resident alien beneficiaries disparately impact immigrant workers and their alien dependents. Further, migrants who are not lawfully present in the United States are denied access to federally-funded legal services representation in employment and other claims.

Amici do not contest that states have a right under international law to control their borders. Nor do they contend, for purposes of this brief, that states cannot deny the right to employment to certain immigrants as part of an immigration control policy. *Amici* contend instead that once an alien is physically present in a country's territory and secures employment, denial of fundamental workplace protections to that immigrant worker violates fundamental international human rights norms regarding nondiscrimination and freedom of association. As discussed herein, international treaties that are binding in some form on the United States make clear that fundamental human rights protections, including nondiscrimination and freedom of association, protect individuals in the workplace, regardless of the worker's nationality or immigration status.

A. U.S. Employment Laws Violate the Prohibition Against Discrimination

Numerous international instruments binding on the United States likewise establish a universal norm of nondiscrimination that protects all persons within a state's jurisdiction. The U.N. Human Rights Committee has established that most of the provisions of the International Covenant on Civil and Political Rights (ICCPR) apply equally to aliens, including the Article 2 and Article 26 prohibitions on discrimination, and that differences in treatment based on alienage or nationality constitute discrimination when they are not based on objective and reasonable criteria. The Committee's interpretation of this standard supports a finding that the differential employment laws outlined above violate Articles 2 and 26 of the ICCPR. A similar norm of nondiscrimination is recognized by the instruments of the Inter-American system and supports the conclusion that U.S. laws denying workplace protections on the basis of nationality or immigration status violate Article II of the American Declaration. The International Labour Organization (ILO) has concluded that the principle of nondiscrimination is a fundamental human right which protects all individuals in the workplace, regardless of their nationality or immigration status. And although some of the substantive employment benefits addressed in this brief, such as workers' compensation, may not themselves be fundamental rights under international law, *discrimination* in such benefits based on criteria that are not objective and reasonable violates fundamental international human rights law.

1. Binding treaty provisions

The right to nondiscrimination is one of the most fundamental human rights recognized by international law. Articles 55 and 56 of the U.N. Charter pledge all member states to respect "human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion,"[95] and recognize that such protection is "necessary for peaceful and friendly

relations among nations."[96] The principle of nondiscrimination has been further elaborated to prohibit discrimination based on nationality or other status in the following treaty provisions that are applicable to the United States:

American Declaration of the Rights and Duties of Man (ADHR or American Declaration)[97]

Article II:

All persons are equal before the law and have the rights and duties established in this Declaration without distinction as to race, sex, language, creed *or any other factor*.

American Convention on Human Rights (ACHR or American Convention)[98]

Article 1:

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to *all persons subject to their jurisdiction* the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, *national or social origin*, economic status, birth *or any other social condition*.
2. *For the purposes of this Convention, "person" means every human being*.

Article 24:

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

International Covenant on Civil and Political Rights (ICCPR)[99]

Article 26:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and

effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, *national or social origin*, property, birth *or other status*.

International Covenant on Economic, Social and Cultural Rights (ICESCR)[100]

Article 2(2):

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, *national or social origin*, property, birth *or other status*.[101]

Universal Declaration of Human Rights (UDHR)[102]

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, *national or social origin*, property, birth *or other status*.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. *All* are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

ILO Convention (No. 111) Concerning Discrimination in Employment[103]

Article 1(1):

For the purpose of this Convention the term discrimination includes—(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, *national extraction or social origin,* which

has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

Article 2:

Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

The ILO has identified the prohibition against discrimination in employment as one of four "core" worker rights that are internationally recognized as fundamental human rights (the other core rights are freedom of association, and the prohibition against forced and child labor),[104] and thus are binding on all ILO members.[105]

The plain language of the specific nondiscrimination provisions discussed above suggests that these international instruments prohibit employment discrimination on the basis of alienage. As discussed more fully below, the language of the nondiscrimination provisions is unambiguously universal. The equality provisions declare that "all persons" or individuals are equal, not merely "all citizens" or even "all persons lawfully present in a country." The instruments also explicitly prohibit discrimination based on national or social origin and other status.

Furthermore, the overall language and structure of the instruments listed above supports the interpretation that aliens are entitled to the treaty's substantive work-related protections. Like the specific nondiscrimination provisions, the instruments' other substantive provisions are generally applicable to all persons. Unlike the European Convention on Human Rights and the Convention to Eliminate all Forms of Racial Discrimination, the Inter-American instruments, the ICCPR, ICESCR, Universal Declaration, and ILO Conventions do not provide for general exceptions based on citizenship or immigration status.[106] Moreover, the jurisprudence of the U.N. Human Rights Committee, the Inter-American human rights

bodies and the ILO support a finding that international law prohibits denying workplace rights to aliens who are actually employed, regardless of their immigration status, at least with respect to fundamental rights such as nondiscrimination and freedom of association. The language and interpretation of the ICCPR, Inter-American instruments, ICESCR, and ILO Convention No. 111 are each addressed in turn, below.

2. Aliens are protected by the ICCPR, and cannot be discriminated against in either Covenant or non-Covenant rights absent reasonable and objective criteria.

The plain language and negotiating history of the ICCPR and interpretations of the U.N. Human Rights Committee establish that aliens are entitled to the protections of the ICCPR, with a few limited exceptions, and that the principle of non-discrimination under the ICCPR applies fully to aliens. In other words, states cannot discriminate on the basis of nationality or other status under the ICCPR unless the distinction is based on reasonable and objective criteria.

Only three provisions of the ICCPR expressly distinguish between citizens and aliens. Article 25, regarding "Political Rights," recognizes rights only for citizens to participate in government, to vote, and to public service, while Article 13 prohibits the arbitrary expulsion of aliens. Articles 12 and 13 further permit States parties to deny a very narrow range of rights to *undocumented* non-citizens, such as the freedom of movement and the right to choose one's residence (Art. 12), and the right to certain procedural protections in expulsion proceedings (Art. 13), each of which applies only to aliens "lawfully within the territory" of a State party.[107] According to the CCPR Commentary,[108] the focus on lawful aliens in Article 12 reflects the view that "*aliens* located on the territory of a State party have the same claim as citizens to respect for and protection of the rights guaranteed by the ICCPR…; [although] the decision on whether they are permitted to be in

the territory of a State Party remains the sole matter of the State concerned."[109]

Other than these specific provisions that distinguish between citizens and aliens or between legal and illegal aliens, the ICCPR expressly allows for discrimination against non-citizens only "[i]n time of public emergency which threatens the life of the nation" and then only "to the extent strictly required by the exigencies of the situation,"[110] circumstances which certainly are not presented here. Under the principle of *expressio unius est exclusio alterius*, therefore, aliens are entitled to the other protections of the ICCPR.

Moreover, although Articles 2 and 26 expressly secure ICCPR rights and prohibit discrimination only on the basis of national origin and other status, rather than expressly on nationality, the negotiating history indicates that one of the primary purposes of Article 2 was to prohibit discrimination against aliens in ICCPR rights.[111] Negotiating states repeatedly noted that Articles 2 and 26 should not prohibit *all* unequal treatment of aliens,[112] but the absence of any express provision in the ICCPR for distinctions based on alienage (other than in Articles 12, 13, and 25), led several states to enter reservations that would allow differential treatment of aliens in certain circumstances.[113]

Consistent with the plain language of the ICCPR and its negotiating history, the United Nations Human Rights Committee (HRC) has ruled that most state obligations under the treaty apply equally to non-nationals.[114] In its General Comment on the Position of Aliens, the Committee rejects the suggestion that states are entitled to deny or limit aliens' protections under the Covenant. As stated by the Committee:

> [E]ach State party must ensure the rights in the Covenant to 'all individuals within its territory and subject to its jurisdiction'. . . . In general, the rights set forth in the Covenant apply to everyone, irrespective of his nationality or statelessness. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.

> Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof.[115]

The Committee's General Comment notes that of the rights set forth in the Covenant, only political rights such as the vote in Article 25 are limited to citizens.[116] The Committee specifically observed that aliens are entitled to the Covenant's protections regarding nondiscrimination and freedom of association, among others.[117]

The General Comment recognizes that states have the right, in principle, to decide whom to admit into their territory, and that states may condition permission to enter by imposing some restrictions on movement, residence, and employment.[118] The Committee noted, however, that "in certain circumstances an alien may enjoy the protection of the Covenant *even in relation to entry or residence*, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise."[119] The Comment further notes that once an alien is lawfully present in a country, his or her freedom of movement can be restricted only under the conditions set forth in Article 12(3) of the ICCPR[120] and in a manner with the other rights recognized by the ICCPR.[121]

Moreover, the Committee confirmed that entitlement to most of the ICCPR's protections is not limited to aliens who are legally present. The General Comment noted that Article 13's restriction to legal aliens was an exception to the general principle that the ICCPR's protections apply to all persons in a State's territory.[122] And even here, the Committee observed that "[d]iscrimination may not be made between different categories of aliens in the application of article 13."[123]

a. U.S. employment restrictions violate ICCPR Articles 2 and 26

The prohibitions of discrimination under ICCPR Articles 2 and 26 are both relevant to the question before this Court. Article 2 bars discrimination in the rights that are protected by the ICCPR (such as

discrimination in freedom of association), while Article 26 prohibits discrimination in substantive rights and benefits that are not, themselves, mandated by the ICCPR.[124]

Under both Articles 2 and 26, whether a distinction based on alienage or other criteria is prohibited turns on whether the distinction is *based on reasonable and objective criteria*, and whether the distinction is *proportional* in a given case.[125] The prohibited bases for discrimination listed in Articles 2 and 26 (distinctions on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status) are not comprehensive, but represent particularly reprehensible distinctions that are especially likely to be found to be violations.[126]

In elaborating on these principles in the *Broeks* and *Zwaan-de Vries* cases, involving gender discrimination under the Dutch Unemployment Benefits Act, the Human Rights Committee reasoned that equal protection of the law "prohibits discrimination in law or in practice in any field regulated and protected by public authorities," but that not all differences in treatment are discriminatory, since "[a] differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of Art. 26."[127] The Committee nevertheless found that Article 26 had been violated, since the unemployment law discriminated on the basis of sex—an unreasonable criterion.

Likewise, in *Gueye v. France,*[128] the Committee applied this test to find that a French employment law disadvantaging non-nationals violated Article 26. The case was brought by a group of Senegalese nationals who had served in the French military during the colonial era, and who were provided lower pensions for their military service than French nationals.[129] The Committee noted that Article 26 expressly prohibits discrimination only on the basis of "national origin," not on nationality *per se*, but nevertheless concluded that the French law's differentiation based on citizenship constituted a distinction based on "other status" under Article

26. The Committee also found that Article 26 had been violated, despite the fact that the ICCPR does not expressly protect the right to a pension.[130]

The Committee concluded that France's justifications for the discrimination against non-nationals were not based on "reasonable and objective criteria," and thus were not permissible.[131] The Committee reasoned that the pension program's purpose was to reward veterans for their service to the government, and that the nationality of the recipient was therefore irrelevant.[132] The Committee stated that "[a] subsequent change in nationality cannot by itself be considered as a sufficient justification for different treatment, *since the basis for the grant of the pension was the same service which both they and the soldiers who remained French had provided.*"[133]

The *Gueye* analysis is directly relevant to U.S. employment laws limiting protections for legal migrant workers, and it seems clear that many, if not all, of these provisions violate Articles 2 and 26 under the Committee's reasoning. The *Gueye* case illustrates a number of points relevant to the question before this Court. First, it reaffirms the Human Rights Committee's position that provisions of the ICCPR (and, *amici* argue, of human rights treaties generally), are applicable to non-nationals absent express language to the contrary. Even though the ICCPR does not expressly address discrimination based on nationality, the *Gueye* case confirms that the treaty bars distinctions based on nationality or alienage, like other distinctions, unless they are reasonable and objective.

Second, the *Gueye* case demonstrates that distinctions based on alienage violate Article 26 even if the ICCPR does not expressly protect the substantive benefit at issue (in this case, a right to pensions). In addition to discrimination in freedom of association, an ICCPR right which cannot be denied in a discriminatory manner under Article 2, the other employment benefits at issue in this case are protected by many substantive treaty provisions binding on this country, including the rights to fair remuneration, proper working conditions, and effective recourse through legal aid. (For

the relevant treaty provisions, see Appendix C, Tables 1-5). The *Gueye* case stands for the proposition that discrimination in these benefits is improper, absent a reasonable and objective basis, even if the substantive rights themselves are not fundamental, or even recognized by the ICCPR.

In fact, the pension plan at issue in *Gueye* is closely analogous to the various U.S. states' death benefit schemes which discriminate against decedents (the vast majority of whom are aliens) whose beneficiaries are aliens not residing in the U.S. Although these death benefit schemes do not facially discriminate on the basis of nationality, in contrast to the French pension scheme in *Gueye*, like the French pension plan, their clear purpose is to deny equal benefits to non-resident aliens in a manner which is not tied to the actual cost of living in the particular locale where the beneficiary resides. Under the *Gueye* analysis, discrimination in such benefits may be impermissible even if the benefits themselves are not mandated by the ICCPR.

Finally, the *Gueye* decision makes clear that in determining whether discrimination in an employment benefit is reasonable and objective, and therefore permissible, a court should examine the underlying purpose of the employment law at issue to determine whether the distinction employed is relevant to achieving that purpose. The U.S. laws workplace protections that discriminate on the basis of alienage or immigration status fail under this test. Employment benefits such as protection of freedom of association, workers' compensation, and access to legal services fundamentally serve the purpose of protecting employees at work, and most effectively achieve their purpose when applied and enforced equally with respect to all workers. Once an alien is employed, that employee's nationality, or even his or her legal status, is irrelevant to the employment law's goal of protecting individuals in the workplace and preventing exploitation. Indeed, allowing such laws to be applied differentially to non-citizen or unauthorized workers will only undermine the rights of other workers,

promote labor exploitation, and adversely affect the laws' underlying protective goal.

The *Gueye* case did not directly address the issue of immigration control, which is likely to be the primary governmental motive offered to justify limiting worker protections for unauthorized workers. But immigration control cannot be viewed as the primary purpose of employment protection laws, and the United States' restrictions on the employment protections of aliens do not objectively and reasonably serve this purpose. Given the fact that even employer sanctions laws have not curbed the entry of undocumented persons into the United States, it seems fantastic to argue that denying aliens fundamental rights to freedom of association, workers' compensation, vocational training, death benefits or legal representation could accomplish U.S. immigration goals. Furthermore, the justification of immigration control does not plausibly apply to restrictions on the rights of lawfully present and *authorized* workers in the United States, such as the denial of freedom of association to H-2A workers.

In sum, *amici* recognize that states retain the authority under the ICCPR to decide whether to admit aliens. For the purposes of this case, *amici* do not dispute that a state may have the right to deny employment to aliens altogether under certain circumstances, in order to further its border control policy. However, once an alien is present in a state's territory and actually working, that alien is fully entitled to the ICCPR's workplace protections, and distinctions based on alienage are permissible only when based on reasonable and objective criteria. Distinctions in employment protections are legitimate only if nationality or immigration status is somehow objectively and reasonably relevant to achieving the employment protection's goal. Applying this standard to the question before the Court should lead this Court to conclude that differential application of employment protections to aliens who are present and working in a state's territory cannot be justified. Every worker in America is contributing to our society, and has need of protection *in his or her role as a worker.* Any

employment situation is fraught with unique vulnerabilities. These vulnerabilities, compounded in the case of a foreign worker, are an inappropriate—and, as demonstrated above, ineffective—vehicle for migration policy. Far from being a reasonable and objective path toward migration control, differential labor protections for migrant workers merely represent the receiving country's ability to take advantage of workers whose bargaining power is wiped out by unemployment and deprivations in their homelands.

b. U.S. employment restrictions violate the American Declaration

The plain language and *expressio unius* arguments set forth above regarding the ICCPR are equally applicable to the American Declaration and Convention. The language of the Inter-American instruments is universal, and does not expressly provide for distinctions on the basis of alienage or immigration status. Like the ICCPR, the American Convention limits rights of freedom of movement and residence and procedural protections in expulsion proceedings to aliens "lawfully in the territory of a State Party" (Article 22), and permits limitations on rights of political participation on the basis of citizenship, nationality, and residence (Article 23). The treaty, however, otherwise does not distinguish on these grounds. Moreover, Article 29 of the Convention provides that no restrictions may be imposed on Convention rights other than those provided for in the treaty,[134] while Article 30 provides that even the restrictions authorized under the Convention "may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established."[135]

The nondiscrimination jurisprudence of the Inter-American system substantially comports with that under the ICCPR and supports the conclusion that U.S. employment laws improperly discriminate against immigrant workers. This Court's 1984 Advisory Opinion on the Proposed Amendments to the Naturalization Provision of the Constitution of Costa

Rica laid down the fundamental principle that state sovereignty over immigration does not trump human rights:

> [D]espite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each state to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the states in that area, and that the manners in which states regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; those powers of the state are also circumscribed by their obligations to ensure the full protection of human rights.[136]

The Court went on to discuss Costa Rica's proposed naturalization rule in light of the American Convention's nondiscrimination provisions. It stated that:

> [E]quality springs from the oneness of the human family and is linked to the essential dignity of the individual…[i]t is…irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character.[137]

The Court continued to establish a reasonable proportionality test for nondiscrimination under the Convention. The Court held that discrimination exists "when the classifications selected are based on substantial factual differences and there exists *a reasonable relationship of proportionality* between these differences and the aims of the legal rule under review."[138] The Court then went on to examine the proposed naturalization restrictions on the basis of whether the restrictions were "inconsistent with the nature and purpose of the grant of nationality."[139]

In a recent contentious case decision applying the standards laid down by this Court, the Inter-American Commission on Human Rights found that the United States had violated the right to equality of a group of migrants being

held in indefinite detention.[140] In so doing, the Commission required that distinctions be based on reasonable and objective criteria, and be reasonably proportional to the objective being pursued. Thus, "[t]he right to equality includes the prerequisite of an *objective and reasonable justification* as a distinction basis."[141] The Commission found that "even though differences in the treatment of nationals and foreigners are admitted with respect to the entrance and permanence in the territory of any given country, the State has to demonstrate that distinctions of this nature are *reasonable and proportionate with the objective they pursue*."[142] In other words, even sovereign state decisions regarding entrance and duration of stay must be objective, reasonable, and proportional. As argued above, conditioning workplace protections on citizenship or immigration status is not reasonably related or proportional to an immigration-related objective.

Special note should also be made of the centrality of the rights at issue for immigrant workers in the United States. Worker rights in the Americas begin with the OAS Charter, which refers to the specific importance of worker rights three times and makes numerous other provisions for protecting work-related benefits. The Inter-American Charter of Social Guarantees[143] was adopted by the same conference that produced the OAS Charter and the American Declaration. The Charter includes thirty-eight substantive articles detailing labor rights written "in the belief…that it is to the public interest…to give workers guarantees and rights on a scale not lower than that fixed in the Conventions and Recommendations of the [ILO]."[144] As a detailed statement of rights contemporaneous with the American Declaration, the Charter is an additional indicator of the centrality of worker rights in the Americas.

c. Other international instruments also protect the fundamental right to nondiscrimination in the workplace for immigrant workers.

Other international treaties and declarations applicable to the United States also confirm that basic principles of nondiscrimination apply to

workplace protections without distinction based on nationality or immigrant status.

Like the ICCPR and the instruments of the Inter-American system, Article 2(2) of the ICESCR forbids discrimination on the basis, *inter alia,* of national or social origin, birth, or other status, and expressly establishes rights that apply to all. Thus, Article 6 grants everyone the right to work; Article 7 grants everyone just and favorable working conditions; Article 8 ensures everyone the right to establish trade unions; Article 9 guarantees the right to social security for everyone, and Article 11 ensures the right of everyone to an adequate standard of living including adequate food, clothing, housing, and the continuous improvement of living conditions. The only exception to the principle of nondiscrimination recognized by the ICESCR is the Article 2(3) exception for developing countries, which is not applicable to discriminatory laws adopted by the United States.[145]

The United Nations Committee on Economic, Social, and Cultural Rights has addressed the situation of migrant workers in several contexts, making clear its determination to extend the protections of the ICESCR to this vulnerable group. In Concluding Observations reviewing state performance under the ICESCR, the Committee has expressed concern over foreign workers' "appalling…working conditions,"[146] discrimination against immigrants and refugees in the workplace,[147] and acts of discrimination and racism against "illegal workers."[148] Also in its supervisory capacity, the Committee has requested that States Party ensure that foreign workers enjoy specific rights, including: the right to hold trade union office;[149] to be "adequately compensated" after working legally, contributing to the social security system, and subsequently being expelled;[150] and the right to the same vocational guidance and training courses as those offered to nationals.[151] The Committee has pressed specific states to "effectively" implement job security laws, "especially as regards the most vulnerable groups, including foreigners"[152] and to allow foreign domestic helpers to "freely seek employment" upon expiration of their contracts.[153] The

Committee has also monitored states' efforts to further the integration of foreign workers.[154]

The ILO Committee of Experts similarly has concluded that the fundamental principle of nondiscrimination in employment protected by Convention No. 111 applies to both nationals and non-nationals, and does not distinguish on the basis of an immigrant worker's lawful or unlawful status.[155] In one case, for example, the Committee of Experts found that poor working conditions, violence, and abuse against unlawful agricultural migrant workers constituted "acts of discrimination on the basis of race, colour, religion and national extraction."[156] As discussed further with respect to freedom of association, below, the ILO reiterated this view in its recent opinion on migrant workers.[157]

Finally in 1985, the U.N. General Assembly adopted, by consensus, Resolution 40/144 containing the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, which covers all non-nationals, including migrant workers, refugees, documented and undocumented aliens, and individuals who have lost their nationality.[158] The Declaration provides for respect for fundamental human rights of all aliens, including equality before the courts and tribunals (Article 5), trade union rights, the right to safe and healthy working conditions and the right to medical care, social security, and education (Article 8).[159]

Indeed, a comprehensive examination of the principle of equal protection for non-citizens under international law has led the United Nations to conclude as follows:

> In general, international human rights law requires equal treatment of citizens and non-citizens. The exceptions to that non-discrimination principle are narrow and must be strictly construed. In general, differential treatment of non-citizens may be acceptable only if based on reasonable and objective criteria and designed to achieve a legitimate purpose. With respect to civil and political rights, in times of domestic stability States may distinguish among

> citizens and non-citizens only as to political participation rights and certain rights of entry and residence. Developing countries may, to the extent necessary, differentiate among citizens and non-citizens in the area of economic rights. . . .
>
> The extent of permissible differential treatment among non-citizens is somewhat broader. Instances of differentiation of this type arise primarily in the regulation of entry, residence, and naturalization of aliens—areas in which States have traditionally exercised substantial discretion. Permissible distinctions among non-citizens would appear to be limited to preferences extended to the nationals of certain countries, such as other members of a supranational political or economic entity, rather than the imposition of more onerous conditions on citizens of selected countries.[160]

B. U.S. Laws Discriminating Against Migrants Violate Freedom of Association Under International Law

In addition to violating the principle of nondiscrimination under international law, U.S. employment laws that fail to protect freedom of association for unauthorized and other immigrant workers also violate the fundamental international norm of freedom of association. As discussed below, the ILO has explicitly recognized freedom of association as one of four fundamental human rights that protect all workers, including unauthorized and undocumented workers. Other international instruments applicable to the United States likewise allow for exceptions to the principle of freedom of association only in a narrow range of circumstances that do not justify denying this right to aliens or unauthorized immigrants.

1. Freedom of association to protect labor union interests is a fundamental human right.

Like nondiscrimination, the right to freedom of association, including the right to organize a labor union, bargain collectively, and strike, is a fundamental human right which is protected in a wide range of international

human rights instruments, including many that are applicable to the United States, as follows:

American Declaration

Article XXII. Right of association:

Every person has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature.

American Convention

Article 16. Freedom of Association:

1. *Everyone* has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.
2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.
3. The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police.

OAS Charter

Article 45(c) & (g):

The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms:…

c) *Employers and workers*, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, including the right to collective bargaining and the workers' right to strike, and recognition of the juridical personality of associations and the

protection of their freedom and independence, all in accordance with applicable laws; . . .

g) Recognition of the importance of the contribution of organizations such as labor unions, cooperatives, and cultural, professional, business, neighborhood, and community associations to the life of the society and to the development process;….

ICCPR

Article 22:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in the exercise of this right.

ILO Convention (No. 87) on the Freedom of Association and Protection of the Right to Organize[161]

Article 2:

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

Article 9:

The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

Article 11:

Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.

ILO Convention (No. 98) regarding the Right to Organize and Collective Bargaining[162]

Article 1:

1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.
2. Such protection shall apply more particularly in respect of acts calculated to:

(a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;

(b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

Other international instruments applicable in some form to the United States which recognize the right to freedom of association include the ICESCR (Article 8), the Universal Declaration (Articles 20.1 and 23.4), and the North American Agreement on Labor Cooperation Between the Government of the United States of America, the Government of Canada, and the Government of the United Mexican States (NAALC) (Articles 2, 4).[163] These specific treaty clauses regarding freedom of association are set forth in Appendix C, Table 1, attached to this brief.

As discussed below, none of these instruments authorizes denial of the right to freedom of association based on alienage, unauthorized worker, or other immigration status, as discussed below. Because the ILO is the international body that has most specifically addressed this question, jurisprudence under the ILO conventions will be considered first, followed by the ICCPR and the American Convention.

2. The right to freedom of association protected by the ILO applies equally to all workers, regardless of status.

The principle of freedom of association in the labor context is set forth in greatest detail in ILO Conventions No. 87 and 98. The ILO has long considered freedom of association to be a core human rights provision relating to worker rights. The Preamble to the ILO Constitution recognizes freedom of association as a means of establishing peace,[164] while the Declaration of Philadelphia reaffirms that freedom of expression and association are essential to sustained progress.[165] Indeed, the principle is so important that for over fifty years, the ILO has maintained that the obligation to protect the right to freedom of association is binding on all ILO members as a matter of membership, regardless of whether states have ratified the relevant ILO conventions.[166] Furthermore, in its 1998 Declaration on Fundamental Rights and Principles of Work, the ILO recognized freedom of association, like nondiscrimination, as one of the four core labor rights that constitute fundamental human rights, and which are binding on all ILO members, regardless of their ratification records. Thus, like the ILO principle of nondiscrimination, the principle of freedom of association is obligatory on the United States as a result of its ILO membership, despite its failure to ratify the two relevant ILO conventions.[167] As the international body with the greatest expertise in the labor rights area, the ILO's interpretation of the principle of freedom of association is also relevant to the construction of freedom of association under other international instruments to which the United States is a party.

The ILO Conventions regarding freedom of association do not allow for any exception based on a worker's immigration status or employment authorization. Conventions No. 87 and 98 expressly recognize exceptions only for members of the national police and armed forces, an exception that is not implicated in this case.

Moreover, the ILO has interpreted the right to freedom of association as a fundamental right that cannot be denied even to migrant workers who are not lawfully present in a country. In the *Spain* case, for example, the ILO Committee on Freedom of Association (CFA) concluded that a Spanish law which provided that foreigners could exercise trade union rights only "when they obtain authorization of their stay or residence in the country" violated the fundamental right to freedom of association.[168] The CFA confirmed that Article 2 of Convention No. 87 "recognize[s] the rights of all workers, *without distinction whatsoever*, to establish and join organizations of their own choosing," with the only permissible exception relating to the armed forces and police.[169]

In an opinion issued in 2002, the ILO likewise interpreted the Migrant Workers Convention (No. 143)[170] and Recommendation (No. 151)[171] as providing that "illegally employed migrant workers are not deprived, by the sole reference to their undocumented status, of their rights in respect of the work actually performed."[172] In particular, the ILO reasoned that despite the authority of states to treat documented and undocumented migrant workers differently with respect to non-fundamental workplace rights, *all* migrant workers are entitled to equal treatment with respect to "basic human rights."[173] These rights include the fundamental human rights contained in U.N. instruments, as well as the four core ILO worker rights and their eight accompanying conventions.[174] Although the Migrant Convention itself has not been widely ratified by ILO members, the ILO concluded that the decisions regarding application of the eight fundamental ILO conventions (including freedom of association and nondiscrimination),

"apply to all workers, whether nationals or non-nationals, without distinction."[175]

3. The Inter-American instruments and the ICCPR do not recognize exceptions based on a worker's unauthorized status.

a. The American Declaration and Convention

The principle of freedom of association under the American Declaration is potentially even broader than that recognized by the ILO, since Article XXII of the Declaration applies to "every person" and includes no express exceptions. On the other hand, the American Convention, the ICCPR, and the ICESCR all recognize that states may make exceptions to this right under certain circumstances. The American Convention applies to "everyone", but recognizes exceptions for the armed forces and police as well as exceptions that are established by law and are "necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedoms of others."[176] The ICCPR (Art. 22(2)) and ICESCR (Art. 8(1)(c) and (2)) contain similar language. And although these exceptions might be construed as allowing broad suspensions of trade union rights, international bodies have construed them very narrowly.

In the *Baena Ricardo* case, the Inter-American Court elaborated on the requirement that an exception be "necessary in a democratic society." The Court interpreted the principle of freedom of association in the labor union context as protecting "the basic right to constitute a group for the pursuit of a lawful goal, without pressure or interference that may alter or denature its objective."[177] The Court noted that "in trade union matters, freedom of association is of the utmost importance for the defence of the legitimate interests of the workers, and falls under the *corpus juris* of human rights."[178]

The Court further concluded that the measures taken to deny the exercise of trade union rights in that case could not be justified under the Article 16 exceptions. In particular, the Court found that there was no evidence that

the measures "were necessary to safeguard the public order in the context of the events, nor that they maintained a relationship to the principle of proportionality; in sum . . . such measures did not meet the requirement of being 'necessary in a democratic society,'" as required by Article 16(2) of the Convention.

b. The ICCPR

The text of Article 16 of the American Convention was based on the ICCPR,[179] which also imposes rigorous requirements on the exceptions to freedom of association. Freedom of association with respect to trade union rights was expressly included in the ICCPR, despite its protection in the ICESCR and ILO conventions, in order to underscore its importance as a civil, as well as economic, right.[180] Like other ICCPR provisions, Article 22 applies to "[e]veryone," and thus applies equally to aliens and nationals alike under the Human Rights Committee's General Comment on the Position of Aliens.[181]

None of the allowable restrictions on trade union activities under Article 22 of the ICCPR suggest that a state may deny the right to freedom of association based on alienage or other immigration status. Like the American Convention, restrictions on freedom of association under Article 22 must be "prescribed by law" (e.g., set down in sufficient definiteness by legislative act or the common law), and must be "necessary to a democratic society" for achieving one of the purposes set down in Article 22(2). According to the CCPR Commentary, necessity under the ICCPR imposes a strict requirement of proportionality; in other words, both the type and intensity of a restriction must be absolutely necessary to attain a legitimate purpose.[182] The requirement that restrictions must comport with democratic principles further requires that restrictions serve basic democratic values of pluralism, tolerance, and broadmindedness.[183]

Finally, any restriction must be "in the interests of national security or public safety, public order (*ordre public*) the protection of public health or

morals or the protection of the rights and freedoms of others," and must also be proportional – or precisely balanced to the reason for the measure.[184] More sweeping restrictions may be imposed only on members of the police and armed forces.[185]

According to Human Rights Committee jurisprudence and the CCPR Commentary, the exception for national security refers narrowly to grave cases of political or military threat to the entire nation, where action is necessary to secure the smooth functioning of the military and other forces,[186] while public safety contemplates a specific threat to the safety of persons or things.[187] Public order (or the French concept of "ordre public"), refers to those "universally accepted fundamental principles, consistent with respect for human rights, on which a democratic society is based.[188] This exception allows states to impose time, place, and manner restrictions on trade union activities, including registration requirements and restrictions on general strikes that cripple the economic or public life of the state.[189] Finally, protection of the rights and freedoms of others refers to protection of fundamental individual rights, as well as issues of personal safety and physical integrity. It allows restrictions on freedom of association to protect private property rights and to prohibit advocacy of national, racial, or religious hatred.[190]

c. The denial of meaningful remedies to unauthorized workers cannot be justified under the exceptions recognized by international law.

There can be little question that the United States Supreme Court's decision in *Hoffman* that unauthorized workers may not recover back pay when they are improperly fired for union-related activities substantially eviscerates the right of freedom of association for unauthorized workers in the United States. Because unauthorized workers are not entitled to reinstatement when they are wrongfully terminated, back pay for lost wages is the *only* effective remedy available for violations of the NLRA for this group. Eliminating this remedy thus grants a *carte blanche* to employers to

violate unauthorized migrant workers' basic human rights with impunity, and eliminates any meaningful recourse for such workers. The *Hoffman* decision thus contravenes the United States' obligation under international law to provide "adequate protection" against anti-union discrimination,[191] and de facto eliminates the right to organize and bargain collectively for unauthorized migrant workers, regardless of whether they are lawfully present in the United States.[192]

Nor can the restriction on remedies for violations of freedom of association be justified under any exception in international law due to the migrants' status as unauthorized workers. The ILO conventions recognize no such exception, and even under the exceptions allowed by the American Convention, ICCPR, and ICESCR, the U.S. rules limiting the freedom of association rights of unauthorized workers cannot be sustained. National security, public safety, health or morals, or the rights of others are all narrow exceptions which are not implicated by the *Hoffman* rule. Only the public order exception could arguably be invoked to justify denial of effective remedies to unauthorized workers in order to deter unauthorized immigration. Even that exception, however, does not comfortably accommodate an immigration justification. Moreover, an immigration control justification clearly would not satisfy international law's requirements that the remedy be proportional and necessary to a democratic society recognized both by this Court and the ICCPR. Denial of freedom of association benefits to immigrant workers is contrary to the principles of pluralism, tolerance, and broadmindedness.

As discussed with respect to nondiscrimination, above, denial of effective remedies for trade union violations is in no sense necessary or proportional to the goal of immigration control. There is no indication that respecting the fundamental right to freedom of association for such workers will in any way thwart the effectiveness of U.S. immigration policy. Indeed, far from deterring unlawful immigration, denial of freedom of association rights to immigrants has precisely the opposite effect, creating an incentive for

unscrupulous employers to recruit unauthorized workers, whom the employer knows effectively cannot organize or otherwise seek the protection of U.S. laws. The denial of the back pay remedy simply harms unauthorized workers, other workers who seek to assert their collective bargaining rights in the workplace, and scrupulous employers who are disadvantaged by the economic advantage gained by employers who are willing to exploit the reduced rights of unauthorized immigrants.

CONCLUSION

As noted in the introduction to this brief, the United States is the largest employer of migrant workers in the world. U.S. laws that discriminate against migrant workers in employment affect a tremendous number of OAS nationals, and subject them to significant forms of mistreatment and discrimination. Non-nationals in certain immigration categories and certain geographical locations are expressly excluded from the protections of vital labor and employment laws, including workers' compensation protections, the right of legal assistance to redress employment law violations, the protections of the Migrant and Seasonal Agricultural Worker Protection Act and the Unfair Immigration-Related Employment Practices Act. Moreover, unauthorized immigrant workers' rights to certain remedies for violation of their fundamental right to organize and to be free from discrimination are hampered by the *Hoffman* decision. Unscrupulous employers use these pronouncements by courts to take unfair advantage of immigrant workers.

U.S. laws and court decisions depriving migrant workers of labor rights and other employee protections violate international nondiscrimination and freedom of association norms. International human rights law does not generally allow distinctions on the basis of alienage, or distinctions based on immigration status where fundamental rights such as nondiscrimination and freedom of association are implicated. Nor can these laws be justified by the government's border-control prerogative, because migration control is demonstrably not served by limiting worker protections for immigrants,

and because the general protective purpose of employment laws is not served by distinctions drawn on the basis of nationality or immigrant classification.

The effect of exclusionary laws and court decisions is to both undermine workers' rights and enforcement of immigration law. Employers are encouraged to take unfair advantage of unauthorized workers, all to the detriment of the workers themselves and to the employers who abide by U.S. employment laws. The sheer number of OAS natio[193]nals who are implicated, the vulnerability of these workers, and the paucity of decisions regarding the employment rights of non-nationals in the OAS or elsewhere in the international system underscores the need for this Court to lend clarity to the provisions of the Inter-American system and to establish fundamental worker protections for all workers in the region.

Respectfully submitted by Rebecca Smith, National Employment Law Project, 407 Adams St. SE, Suite 203, Olympia, WA 98501, (360) 534-9160, fax (360) 534-9166, e-mail rsmith@nelp.org, Sarah Cleveland, 727 East Dean Keeton Street, Austin, TX 78705-3299, (512) 232-1720, fax (512) 471-6988, e-mail scleveland@mail.law.utexas.edu, and Beth Lyon, Villanova University School of Law, 299 N. Spring Mill Rd., Villanova, PA 19085-1682, (610) 519-6417, fax (610) 519-5173, lyon@law.villanova.edu.

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[1] Nothing in this brief purports to represent the official views of the University of Texas nor of Villanova University.

[2] This brief uses the term "unauthorized" worker to describe immigrant workers who do not possess authorization to be employed pursuant to U.S. law. This group includes workers who are in the United States legally for various reasons (on student visas, asylum applicants, etc.) but who nevertheless lack authorization to work. The term "undocumented" immigrant is used to describe immigrants whose presence in the U.S. is illegal. These workers form a subset of the immigrant population that is unauthorized to work. Most relevant court decisions are based on the presence or absence of work authorization.

[3] Charter of the Org. of Am. States, Apr. 30, 1948, art. 45(b), 2 U.S.T 2394, 2422, 119 U.N.T.S. 3.

[4] UNITED NATIONS, POPULATION DIV. DEP'T OF ECON. & SOC. AFFAIRS, INT'L MIGRATION 2002, *available at* http://www.un.org/esa/population/publications/ittmig2002/Migration%202002.pdf.

[5] *Id.*
[6] Peter Stalker, *Types of Migrant, in* STALKERS GUIDE TO INTERNATIONAL MIGRATION, *at* http://www.pstalker.com/migration/mg_types.htm#. The few available estimates of the undocumented immigrant population in Canada are extremely unreliable, because of the Canadian government's refusal to fund such research, but one 1995 report estimated "at least about 200,000." J. Samuel, *Temporary and Permanent Labour Immigration into Canada: Selected Aspects, The jobs and effects of migrant workers in northern America—Three essays* (International Labour Organization Migration for Employment Programme International Migration papers 10) 1, 22 (1995) (on file with *amici*).
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[10] Jeffrey Passel, *New Estimates of the Undocumented Population in the United States*, MIGRATION INFO. SOURCE (May 22, 2002), *at* http://www.migrationinformation.org/feature/display.cfm?ID=19.
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[12] *Id.* at 5. This figure represents a "midrange total… between a low estimate of 5.9 and a high estimate of 9.9 million."
[13] Passel, *supra* note 10, at 1.
[14] PEW HISPANIC CENTER STUDY, *supra* note 11, at 7.
[15] *Id.* at 8.
[16] *Id.*
[17] Michael Fix & Jeffrey S. Passel, *Immigration and Immigrants: Setting the Record Straight,* URBAN INSTITUTE (May 1994), *at* http://www.urban.org/url.cfm?ID=305184 .
[18] PEW HISPANIC CENTER STUDY, *supra* note 11, at 7.
[19] GEN. ACCOUNTING OFFICE, GAO/GGD-99-33, ILLEGAL ALIENS: SIGNIFICANT OBSTACLES TO REDUCING UNAUTHORIZED ALIEN EMPLOYMENT EXIST 6 (Apr. 1999) (on file with *amici)*.
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[22] *Labor Department: Close to Half of Garment Contractors Violating Fair Labor Standards Act*, DAILY LAB. REP, BUREAU OF NAT. AFFAIRS 87 (May 6, 1996); U.S. DEP'T OF LABOR, COMPLIANCE HIGHLIGHTS 1, 3 (Nov. 1999).
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[29] David Bacon, *Immigration Law—Bringing Back Sweatshop Conditions,* STORIES AND PHOTOS BY DAVID BACON, Nov. 10, 1998, *at* <http://www.igc.org/dbacon/Imgrants /11sanctn.html> (documenting similar employer abuses in a maintenance company in the Silicon Valley of California, a knitting company on Long Island, and a video company in San Leandro, California).
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[33] Nancy Cleeland, *Employers Test Ruling on Immigrants*, L.A. TIMES, Apr. 22, 2001, at C1.
[34] Centeno-Bernuy v. Becker Farms, No. 01-CV-839(A) (W.D.N.Y filed Nov. 28, 2001).
[35] Sanchez v. Eagle Alloy, 658 N.W.2d 510 (Mich. Ct. App. 2003).
[36] *See Undocumented Immigrants Leave Job without Paychecks*, BEAUMONT ENTERPRISE, Aug. 15, 2002.
[37] Immigration and Nationality Act, 8 U.S.C.A. § 1324a (2003).
[38] *Id.*
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[72] U.S. DEP'T OF LABOR, FACT SHEET #48: APPLICATION OF U.S. LABOR LAWS TO IMMIGRANT WORKERS: EFFECT OF HOFFMAN PLASTIC DECISION ON LAWS ENFORCED BY THE WAGE AND HOUR DIVISION*, at* http://www.dol.gov/esa/regs/compliance/whd/whdfs48.htm.
[73] *See* ARIZ. REV. STAT. § 23-901(5)(b) (2003); CAL. LAB. CODE § 3351(a) (2003); FLA. STAT. ch. 440.02(14)(a) (2002); ILL. COMP. STAT. 820/305(1)(b) (West 2002); KY. REV. STAT. ANN. § 342-0011(21) (2003); MICH. STAT. ANN. § 17.237(161)(1)(I); MINN. STAT. § 176.011 subd.9(1) (2002); MISS. CODE ANN. § 71-3-27 (2002); MONT. CODE ANN. § 39-71-118(1)(a) (2002); NEB. REV. STAT. §§ 48-115(2), 48-144 (2002); NEV. REV. STAT. ANN. 616A.105 (2002); N.M. STAT. ANN. § 52-3-3 (2002); N.C. GEN. STAT.

§ 97-2(2) (2003); N.D. CENT. CODE § 65-01-02(17)(a)(2) (2001); OHIO REV. CODE ANN. § 4123.01(A)(1)(b) (2003); S.C. CODE ANN. § 42-1-130 (2002); TEX. LAB. CODE §§ 401.011, 406.092 (2001); UTAH CODE ANN. § 34A-2-104(1)(b) (2002); VA. CODE ANN. § 65.2-101 (2002).

[74] *See* Champion Auto Body v. Gallegos, 950 P.2d 671 (Colo. Ct. App. 1997); Gene's Harvesting v. Rodriguez, 421 So. 2d 701, 701 (Fla. Dist. Ct. App. 1982); Artiga v. M.A. Patout and Son, 671 So.2d 1138, 1139 (La. Ct. App. 1996); Lang v. Landeros, 918 P.2d 404 (Okla. Ct. App. 1996); Gayton v. Gage Carolina Metals Inc., 560 S.E.2d 870 (N.C. Ct. App. 2002); Ruiz v. Belk Masonry Co., 559 S.E.2d. 249 (N.C. Ct. App. 2002); Rivera v. Trapp, 519 S.E.2d 777 (N.C. Ct. App 1999); Mendoza v. Monmoth Recycling Corp., 672 A.2d 221 (N.J. Super. Ct. 1996); Reinforced Earth Co. v. Workers' Comp. Appeal Bd., 810 A. 2d 99 (Pa. 2002); Dowling v. Slotnik, 712 A.2d 396, 403 (Conn. 1998); Dynasty Sample Co. v. Beltrain, 479 S.E.2d 773 (Ga. 1996); Commercial Standard Fire & Marine Co. v. Galindo, 484 S.W.2d 635, 637 (Tex. Civ. App. 1972); Fernandez-Lopez v. Jose Cervino, Inc., 671 A.D.2d 1051, 1054 (N.J. Super. Ct. App. Div. 1996). *See also* Iowa Erosion Control v. Sanchez, 599 N.W.2d 711, 715 (Iowa 1999) ("The employer has furnished no authority to support its view that, on grounds of policy or morality, [decedent worker's surviving mother's] immigration status has any bearing on her entitlement to benefits."); Del Taco v. Workers' Comp. Appeals Bd., 79 Cal. App. 4th 1437, 1439-1442 (Cal. Ct. App. 2000) (holding that the California workers' compensation laws apply to aliens but do not "expressly authorize vocational rehabilitation benefits for an 'illegal worker'" who is not otherwise "medically eligible.").

[75] WYO. STAT. ANN. § 27-14-102 (a)(vii) (2002).

[76] Tarango v. State Indus. Ins. Sys., 25 P.3d 175 (Nev. 2001); Foodmaker v. Workers' Comp. Appeals Bd., 78 Cal. Rptr. 2d 767 (Cal. Ct. Apps., Div. 2 1999).

[77] ALA. CODE § 25-5-82 (2002); ARK. CODE ANN. § 11-9-111 (2002); DEL. CODE ANN. § 19-2333 (2001); FLA. STAT. ch. 440.16 (2002); GA. CODE ANN. § 34-9-265 (2002); IOWA CODE § 85.31 (2002); KY. REV. STAT. ANN. § 342.130 (2001); PA. STAT. ANN. TIT. 77, § 563 (2002); S.C. CODE ANN. § 42-9-290 (2001).

[78] WIS. STAT. § 102.51 (2001); WASH. REV. CODE § 51.32.140 (2002); OR. REV. STAT. § 656.232 (2001).

[79] ARK. CODE ANN. § 11-9-111 (2002).

[80] Reinforced Earth Co. v. Workers' Comp. Appeal Bd., 810 A.2d 99 (Pa. 2002).

[81] Sanchez v. Eagle Alloy, 658 N.W.2d 510 (Mich. Ct. App. 2003).

[82] U.S. DEP'T OF LABOR, *Employment and Training Administration, Office of Workforce Security, 2001 H-2A Activity Report,* Apr. 5, 2002 (on file with *amici)* states that 44,825 workers were approved for visas in 2001. Some number fewer than that represents the number of workers who actually entered the country.

[83] 29 U.S.C. A. § 1802(8)(B)(2) and (10)(B)(iii) (1999).

[84] *See* 29 U.S.C.A. § 1821 (1999).

[85] *Id.* § 1841.

[86] *Id.* § 1854.

[87] Under some circumstances, businesses that constitute "joint employers" may transfer workers among different businesses, however the workers themselves lack the right to

change employers. *See* 8 U.S.C.A. § 1184(c)(1) (1999); 8 C.F.R. § 214.2(h)(5) (2003); 20 C.F.R.§§ 655.106(a)-(b), 655.106(c)(2) (2003).

[88] 8 U.S.C.A. § 1324b(a)(3) (2003).

[89] Legal Services Corporation Act of 1974, Pub.L. 93-355, § 2, 88 Stat. 378 (codified as amended at 42 U.S.C.A. § 2996 (1995)).

[90] *Id*.

[91] For example, in adopting the Migrant and Seasonal Agricultural Workers Protection Act, Congress identified the lack of a private right to sue as a primary reason for failure of its predecessor statute. S. REP. NO. 1206, 93d Cong., 2d Sess. 3 (1974); H.R. REP. NO. 1493, 93d Cong., 2d Sess. 1 (1974). Accordingly, one of the "major purpose[s]" of the 1974 Amendments was to "creat[e] a civil remedy for persons aggrieved by violations of the act." *Id*. Congress deemed "an unfettered federal civil remedy" to be "crucial to the effective enforcement of existing law." *Id.*

[92] 45 C.F.R. §§ 1626.1 (2003).

[93] WARWICK MCKEAN, EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW 194 (1983). *See also* RYSZARD CHOLEWINSKI, MIGRANT WORKERS IN INTERNATIONAL HUMAN RIGHTS LAW: THEIR PROTECTION IN COUNTRIES OF EMPLOYMENT 73 (1997).

[94] MCKEAN, *supra* note 93, at 194.

[95] U.N. CHARTER arts. 55(c), 56.

[96] *Id.* at art. 55.

[97] AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN (ADHR), OAS RES. XXX, INTERNATIONAL CONFERENCE OF AMERICAN STATES, 9TH CONF., OAS DOC. OEA/SER. L/V/I. 4 REV. XX (1948) (emphasis added). The American Declaration was adopted in 1948 as a resolution of the General Assembly of the OAS, and is directly binding on the United States by virtue of the United States' ratification of the OAS Charter in 1951. *See* ORG. OF AM. STATES, A-41—CHARTER OF THE ORGANIZATION OF AMERICAN STATES, *available at* www.oas.org/juridico/english/sigs/a-41.html (including signatures and ratifications of the OAS Charter). The Declaration's original status as a non-binding document has evolved by virtue of the Commission's and the Court's jurisprudence, so that the Declaration is now considered to be indirectly binding. David Harris, *Regional Protection of Human Rights: The Inter-American Achievement*, *in* INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 5 (1998). In Advisory Opinion No. 10, the Inter-American Court held that the Declaration had been incorporated into the American system as an authoritative document. *See* I/A COURT H.R., *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 65 of the American Convention on Human Rights*, *Advisory Opinion OC-10/89*, July 14, 1989, Series A, No. 10, ¶ 36. The Court also held that the American Declaration defines human rights and individual rights as referred to in the OAS Charter. *Id*. ¶ 45. The Inter-American Commission on Human Rights has further elaborated a complementarty principle that allows Petitioners to supplement the American Convention on Human Rights (ACHR) with the ADHR when the latter document provides more fulsome protection. The Commission notes that American Convention norms will be relied on "insofar as [petitioners allege] violations of *substantially identical rights* set forth in both instruments." *Paul Lallion,* Case No. 11.765, Report No. 124/99, ¶ 26 (Sept. 27, 1999). Moreover, the U.S. government regularly appears before the Inter-American

Commission on Human Rights to defend cases brought against it under the American Declaration.

[98] American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978) (emphasis added). The United States has signed, but not ratified, the American Convention. *See* ORG. OF AM. STATES, B-32: AMERICAN CONVENTION ON HUMAN RIGHTS "PACT OF SAN JOSE, COSTA RICA," *available at* http://www.oas.org/juridico/english/Sigs/b-32.html (including signatures and Ratifications of the American Convention on Human Rights, Pact of San Jose, Costa Rica). The standards laid out in the ACHR should nonetheless be applied to this country's treatment of migrant workers for two reasons. First, as explained above, the ADHR is binding on the United States, and the American Convention is regarded as an interpretation of the norms contained in the ADHR. *See* ADHR *supra* note 97. Second, according to the Vienna Convention on the Law of Treaties, a state which has signed, but not ratified, a treaty is obliged to refrain from acts that would contravene the object and purpose of the treaty. Vienna Convention on the Law of Treaties, *concluded* May 23, 1969, 1155 U.N.T.S. 331, 25 I.L.M. 543, art. 18 ("A State is obligated to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty…until it shall have made its intention clear not to become a party to the treaty"). The United States has signed but not ratified the Vienna Convention, but has accepted that treaty's provisions as binding customary international law. *See, e.g.,* TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, S. REP. NO. 106-71, 106th Cong., 2d Sess. 2001 ("During this interim period [prior to ratification] the treaty is not yet in effect, but under international law nations have an obligation not to do anything that would defeat the purpose of the treaty."). There is no set definition for what level of violation contravenes a treaty's object and purpose, but retrogressive measures such as those described above would seem to fall exactly into this category.

[99] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (emphasis added). The ICCPR was adopted to implement principles set forth in the Universal Declaration of Human Rights into binding treaty law. The United States ratified the ICCPR in 1992, and although the United States Senate appended a declaration that the treaty was not self-executing, *see* UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, UNITED NATIONS TREATY COLLECTION, DECLARATIONS AND RESERVATIONS, *available at* http://193.194.138.190/html/menu3/b/treaty5_asp.htm, that declaration does not alter the force of the treaty as binding international law.

[100] International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) (emphasis added). Like the ICCPR, the ICESCR was adopted to codify into binding treaty law the principles set forth in the Universal Declaration. The United States has signed, but not ratified, the ICESCR. *See* OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL HUMAN RIGHTS TREATIES, *available at* http//:193.194.138.190/pdf/ report.pdf. The United States' signature nevertheless obligates the United States not to violate the object and purpose of the treaty, as discussed *supra* note 98.

[101] Although the ICESCR nondiscrimination clause is limited to "the rights enunciated in the present Covenant," the employment rights discussed in this brief are protected by the ICESCR. Thus, ICESCR Article 2(2) is fully relevant to this general discussion of nondiscrimination.

[102] Universal Declaration of Human Rights, G.A. Res. 217 (AIII), U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948). As an early statement of human rights that was unanimously adopted by the U.N. General Assembly, the Declaration is evidence of early and ongoing support for the international norms examined herein. Moreover, the principles of the UDHR are widely considered to have reached the status of customary international law. *See* Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT'L & COMP. L. 1 (1995/1996).

[103] ILO Convention C111 Concerning Discrimination (Employment and Occupation), June 15, 1958, 362 U.N.T.S. 31 (entered into force June 15, 1960) *available at* http://www.ilo.org/ilolex/english/convdisp2.htm.

[104] These four fundamental rights are supported by eight ILO conventions. *See* INT'L LABOUR ORG., *Fundamental ILO Conventions*, *available at* http://www.ilo.org/public/ english/standards/ norm/whatare/fundam/index.htm. For purposes of this discussion, the relevant conventions are those relating to nondiscrimination in employment; *see, e.g.,* ILO Convention C111 *supra* note 103, and those relating to freedom of association, *e.g.,* ILO Convention C87 Concerning Freedom of Association and Protection of the Right to Organise , July 9, 1948 (entered into force July 4, 1950), *available at* http://www.ilo.org/ilolex/english/convdisp2.htm; ILO Convention C98 Concerning Right to Organise and Collective Bargaining , July 1, 1949, 96 U.N.T.S. 257 (entered into force July 18, 1951).

[105] Although the United States has not ratified the ILO's fundamental conventions relating to nondiscrimination and freedom of association, under the ILO's 1998 Declaration on Fundamental Principles and Rights at Work, all ILO member states, including the United States, are obligated to respect these core principles, regardless whether they have ratified the relevant ILO conventions. *See* ILO Declaration on Fundamental Principles and Rights at Work, art. 2, June 18, 1998, 37 I.L.M. 1233 (1998) (declaring that "all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions").

[106] The European Convention on Human Rights includes a general clause authorizing the denial of all political rights to non-nationals. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, art. 16. Article 1(2) of the Convention on the Elimination of Racial Discrimination also excludes from the Convention's scope distinctions "between citizens and non-citizens." International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969). Other than the narrow distinctions for aliens set forth in Articles 13 and 25 of the ICCPR, discussed herein, none of the instruments addressed in this brief similarly provide for distinctions based on alienage.

[107] *E.g.,* ICCPR, *supra* note 99, art. 12(1) ("everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence"). *See also* David Weissbrodt, *Progress Report On The Rights Of Non-Citizens*, U.N. Doc. E/CN.4/Sub.2/ 2002/25 (2002), ¶ 38 [hereinafter Weissbrodt].
[108] MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY (1993) [hereinafter CCPR COMMENTARY].
[109] *Id*. § 12-3, at 199.
[110] ICCPR, *supra* note 99, art. 4(1) ("In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."). Unlike the ICCPR's Article 2(1) and Article 26 nondiscrimination clauses, the Article 4 derogation clause does not include "national origin" among the impermissible grounds for discrimination. According to the travaux prèparatoires, this omission reflects the drafters' recognition that States often find it necessary to discriminate against non-citizens in time of national emergency. *See* Weissbrodt, *supra* note 107, ¶ 20; CCPR COMMENTARY, *supra* note 108, § 4-28, at 86.
[111] CCPR COMMENTARY, *supra* note 108, § 2-31, at 43. Early drafts of Article 2 by the United States, the United Kingdom, and the drafting committee expressly provided that the rights of the Covenant applied equally to citizens, nationals, aliens and stateless persons, though a broader application was ultimately adopted. *Id.* § 2-43, at 51, n. 119. Moreover, the ICCPR's protection under Article 2 was expressly extended to all "individuals" within a state's territory rather than to all "persons," to prevent states from excluding some persons from the treaty's protections by denying them legal personality. *Id*. § 2-23, at 39-40.
[112] *Id.* § 2-43, at 51.
[113] Austria, whose domestic bill of rights only protects equality for nationals, entered a reservation that Article 26 would not preclude differential treatment of Austrian nationals and aliens. CCPR/X/2/Rev.3, *reprinted in* CCPR COMMENTARY, *supra* note 108, Appendix, at 751. Trinidad and Tobago likewise reserved the right to restrict property acquisition by aliens. *Id.* at 768.
[114] The Human Rights Committee is the treaty body established by Article 40 of the ICCPR to monitor and interpret state compliance with that treaty. States Parties are required to submit to the Human Rights Committee periodic reports on their progress in implementing ICCPR rights.
[115] OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, THE POSITION OF ALIENS UNDER THE COVENANT, 11/04/86, CCPR GENERAL COMMENT 15, ¶ ¶ 1, 2, *available at* http://www1.umn.edu/humanrts/gencomm/hrcom15.htm [hereinafter "GENERAL COMMENT"]. The Human Rights Committee is authorized to issue "such general comments as it may consider appropriate." ICCPR, art. 40(4). The Committee's general comments are addressed to all States parties and are intended, among other things, "to draw the attention of the States parties to matters relating to the improvement of . . . the implementation of the Covenant" and to "stimulate activities of States parties . .

. in the promotion and protection of human rights." *Statement on the duties of the Human Rights Committee under article 40 of the Covenant*, Decision of the Committee of 30 October 1980, CCPR/C/18, A/36/40, *reproduced in* CCPR COMMENTARY, *supra* note 108, at appendix, 845. Such comments, therefore, are an important interpretive guide to the ICCPR.

[116] GENERAL COMMENT, *supra* note 115, ¶ 2.

[117] *Id.* ¶ 7.

[118] *Id.* ¶ 6.

[119] *Id.* ¶ 5.

[120] ICCPR, supra note 99, at art. 12(3) (requiring any restrictions on Article 12 rights to be, among other things, "necessary to protect national security, public order [order public], public health or morals, or the rights and freedoms of others.")

[121] GENERAL COMMENT, *supra* note 115, ¶ 12.

[122] *Id.*, ¶ 9 ("the particular rights of article 13 only protect those aliens who are lawfully in the territory of a State party. This means that national law concerning the requirements for entry and stay must be taken into account in determining the scope of that protection, and that illegal entrants and aliens who have stayed longer than the law or their permits allow, in particular, are not covered by its provisions.").

[123] *Id.* ¶ 10.

[124] *See, e.g.,* Decision of the Human Rights Committee under art. 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights, Thirty-Fifth Session, concerning Communication No. 196/1985; CCPR/C/35/D/196/1985 (April 6, 1989) [hereinafter *Gueye v. France*]. *See also* S.W.M. Broeks v. Netherlands, H.R. Comm. No. 172/1984 U.N. Doc. Supp. No. 40 (Apr. 9, 1987); F.H. Zwaan-de Vries v. Netherlands, H.R. Comm. No. 182/1984 U.N. Doc. CCPR/C/OP/2 (Apr. 9, 1987); GENERAL COMMENT, *supra* note 115, § 12 ("the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant").

[125] CCPR COMMENTARY, *supra* note 108, § 2-33, 44.

[126] *Id.* § 26-25, 474.

[127] Zwaan-de Vries, supra note 124, §§ 12–15.

[128] *Gueye v. France*, *supra* note 124.

[129] Initially, the French pension program had awarded equal benefits to all veterans regardless of nationality, but a subsequent law reduced benefits for non-French citizens. *Id.* ¶ 8.2.

[130] *Id.* ¶ 9.4.

[131] France contended that the policy was justified because (1) the Senegalese officers were no longer French nationals; (2) it was too difficult for France to establish the identity and family situation of former soldiers in African countries; and (3) the cost of living in France was significantly higher than in the former colonies. *Id.* ¶ 1.5. France further argued that Senegalese soldiers who wished to receive full pensions could restore their French nationality. *Id.* ¶ 7.1.

[132] *Id.* ¶ 9.5 (emphasis added). The Committee further found that "mere administrative inconveniences" in administering the pension scheme could not justify unequal treatment, and that the justification based on living standards was pretextual, since a French national

living in Senegal would have received a larger pension than a Senegalese national who also resided there. *Id.* ¶ 9.5.

[133] *Id.*

[134] American Convention, *supra* note 98, at art. 29(a).

[135] *Id*. at art. 30. According to the Inter-American Court's interpretation of Article 30, a law enacted in the "general interest" must be "an integral element of public order." INTER-AMERICAN COURT OF HUMAN RIGHTS, ADVISORY OPINION OC-1/82, THE WORD "LAWS" IN ARTICLE 30 OF THE AMERICAN CONVENTION ON HUMAN RIGHTS, ¶ 29 (Sept. 24, 1982). In Advisory Opinion No. 5, the Court held that the terms "general welfare" and "public order…must be subjected to an interpretation that is strictly limited to the 'just demands' of 'a democratic society' which takes account of the need to balance the competing interests involved and the need to preserve the object and purpose of the Convention." INTER-AMERICAN COURT OF HUMAN RIGHTS, ADVISORY OPINION OC-5/85, COMPULSORY MEMBERSHIP IN AN ASSOCIATION PRESCRIBED BY LAW FOR THE PRACTICE OF JOURNALISM (ARTS. 13 AND 29 OF THE AMERICAN CONVENTION ON HUMAN RIGHTS), ¶ 67 (Nov. 13, 1985). The purpose of public order, in turn, is "the protection of the essential rights of man and the creation of circumstances that will permit him to achieve spiritual an material progress and attain happiness." ADVISORY OPINION OC-1/82, *supra* ¶ 29 (quoting the American Declaration, first introductory clause). Davidson has concluded from this language that a legitimate purpose is designed in "the interests of national security, public safety or public order, or to protect public health or morals or the rights or freedoms of others," in effect reading into the Court's opinion the requirements imposed by ICCPR Art. 22, discussed *infra*. *See* J. SCOTT DAVIDSON, THE INTER-AMERICAN HUMAN RIGHTS SYSTEM 50 (1997).

[136] INTER-AMERICAN COURT OF HUMAN RIGHTS, ADVISORY OPINION OC-4/84, PROPOSED AMENDMENTS TO THE NATURALIZATION PROVISION OF THE CONSTITUTION OF COSTA RICA, ¶ 32 (Jan. 19, 1984).

[137] *Id.* ¶ 55.

[138] *Id.* ¶ 57.

[139] *Id.* ¶ 60.

[140] INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT NO. 51/01, CASE 9903, (Apr. 4, 2001).

[141] *Id.* ¶ 68 (emphasis added).

[142] *Id.* ¶ 69 (emphasis added).

[143] INTER-AMERICAN CHARTER OF SOCIAL GUARANTEES, THE INTERNATIONAL CONFERENCES OF AMERICAN STATES, SECOND SUPPLEMENT, 1942–1954, 254 (1958).

[144] *Id.*, at 255.

[145] ICESCR, *supra* note 100, at art. 2(3) ("Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals"). *See* Weissbrodt, *supra* note 107, ¶¶ 22-24.

[146] UN Doc. E/C.12/1/Add.15, ¶ 16 (1997) (Libya).

[147] UN Doc. E/C.12/1/Add.25, ¶ 13 (1998) (Netherlands); OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, CONCLUDING OBSERVATIONS OF THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: SWEDEN, ¶¶ 18, E/C.12/1/Add.70

(2001); OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, CONCLUDING OBSERVATIONS OF THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (HONG KONG): CHINA, UN Doc. E/C.12/1/Add.58, ¶ 15(f) (2001).

[148] UN Doc. E/C.12/1/Add.2, ¶ 10 (1996) (Spain).

[149] OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, CONCLUDING OBSERVATIONS OF THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: SENEGAL, UN Doc. E/C.12/1/Add.62, ¶ 44 (24 September 2001).

[150] UN Doc. E/C.12/1/Add.23, ¶ 11 (1998) (Nigeria).

[151] UN Doc. E/C.12/1/Add.53, ¶ 19 (2000) (Portugal).

[152] UN Doc. E/C.12/1/Add.52, ¶ 28 (2000) (Finland).

[153] OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, HONG KONG, *supra* note 147

[154] UN Doc. E/C.12/1/Add.34, ¶ 10 (1999) (Denmark) (praising State Party's integration support); UN Doc. E/C.12/1/Add.25, ¶ 23 (1998) (Netherlands) (urging reduction of discrimination to improve integration).

[155] *See*, *e.g.*,: CEACR, Individual Direct request concerning Convention No. 111, Poland, 1992; CEACR, Individual Observation concerning Convention No. 111, Denmark, 1991; CEACR, Individual Direct Request concerning Convention No. 111, Antigua and Barbuda, 2000; CEACR, Individual Direct Request concerning Convention No. 111, Germany, 2000.

[156] CEACR, Individual Observation concerning Convention No. 111, Spain, 2000; see also CEACR, Individual Observation concerning Convention No. 97, Spain, 2000.

[157] Int'l Labour Office Governing Body, *Migrant Workers (Supplementary Provisions) Convention, 2975 (No. 143) (Article 9, paragraph 1 and Part I (Migration in abusive conditions))*, GB.285/18/1 **(**Report of the Director-General: First Suplementary Report: Opinions relative to the decisions of the International Labour Conference) (November 2002), ¶ 12, attached as Appendix D [hereinafter ILO Opinion on the Rights of Migrant Workers].

[158] G.A. Res. 40/144, U.N. GAOR, 40th Session, U.N. Doc. A/40/114 (1985). Article 1 defines the term "alien" as "any individual who is not a national of the State in which he or she is present" (emphasis added). Article 5, ¶ 1 grants "aliens" specific rights, without specifying any particular subgroup of aliens. Articles 9 and 10 refer to "no alien" and "any alien," respectively.

[159] *See* David Weissbrodt, *Preliminary Study on the Rights of Non-Citizens*, U.N. Doc. E/CN.4/Sub.2/2001/20 (2001), ¶¶ 102-106.

[160] Weissbrodt, *supra* note 107, ¶¶ 50-51.

[161] ILO Convention C87 Concerning Freedom of Association and Protection of the Right to Organize, *supra* note 104. The United States has not ratified C87, but it is binding on the United States as an obligation of membership in the ILO, as discussed below.

[162] ILO Convention C98 Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively, s*upra* note 104. The United States has not ratified C98, but it is binding on the United States as an obligation of membership in the ILO, as discussed below.

[163] Canada-Mexico-United States: North American Agreement on Labor Cooperation, Pub. L. No. 103-182, 107 Stat. 2057, 32 Int'l Legal Materials 1499 (1993).

[164] INT'L LABOUR ORG. CONSTITUTION, pmbl., *available at* http://www.ilo.org/public/english/about/iloconst.htm#pre.
[165] INT'L LABOUR ORG., DECLARATION CONCERNING THE AIMS AND PURPOSES OF THE INTERNATIONAL LABOUR ORGANIZATION, May 10, 1944, I(b), *available at* http://www.ilo.org/public/english/about/iloconst.htm#annex.
[166] The ILO Committee on Freedom of Association reviews state practice regarding the freedom of association obligations that arise from the ILO Constitution as obligations of membership. *See* discussion in Francis Maupain, *The Settlement of Disputes Within the International Labour Office,* JIEL 273, 177 (1999).
[167] *See* INT'L LABOUR ORG. *supra* note 104.
[168] COMMITTEE OF FREEDOM OF ASSOCIATION, REPORT NO. 327 (Vol. LXXXV, 2002, Series B, No. 1), Spain, ¶ 561 (Case No. 2121 of 23 March 2001).
[169] *Id*.
[170] ILO Convention C143 Concerning Migrant Workers (Supplementary Provisions) Convention, June 24, 1975, *available at* http://www.ilo.org/ilolex/english/convdisp2.htm. The ILO noted that the ILO Constitution confers no special competence on the ILO to interpret conventions, although the organization may provide guidance to governments regarding the appropriate scope of convention provisions. *Id.* ¶ 2.
[171] ILO Recommendation R151 Concerning Migrant Workers Recommendation, June 24, 1975, *available at* http://www.ilo.org/ilolex/english/recdisp2.htm.
[172] ILO Opinion on the Rights of Migrant Workers, *supra* note 157 ¶ 6, attached as Appendix D. Recommendation 151 regarding the rights of Migrant Workers provides that irregular migrant workers are entitled to equality of treatment "in respect of rights arising out of present and past employment as regards trade union membership and exercise of trade union rights." ILO Recommendation R151, *supra* note 171, ¶ 8(2). The Recommendation further recognizes the entitlement of irregular workers to remuneration for work performed, severance payments ordinarily due, and employment injury benefits. *Id.* ¶ 34.
[173] ILO Opinion on the Rights of Migrant Workers, *supra* note 157, ¶ 8, quoting Migrant Workers Convention (No. 143), art. 1.
[174] *Id.* ¶ 11. *See generally* INT'L LABOUR ORG.: "MIGRANT WORKERS", REPORT OF THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, REPORT III (PART IB), INTERNATIONAL LABOUR CONFERENCE, 87TH SESSION, GENEVA 1999; INT'L LABOUR ORG.: "MIGRANT WORKERS", REPORT OF THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, REPORT III (PART 4B), INTERNATIONAL LABOUR CONFERENCE, 66TH SESSION, GENEVA, 1980.
[175] ILO Opinion on the Rights of Migrant Workers, *supra* note 157, ¶ 12.
[176] American Convention, *supra* note 98, at art 16(3).
[177] *Baena Ricardo, et al. (270 Workers v. Panama)*, Inter-Am. C.H.R., (Feb. 2, 2001), ¶ 156, *available at* http://www.corteidh.or.cr/seriecing/index_serie_c_ing.html (visited Dec. 16, 2002).
[178] *Id.* ¶ 158.
[179] CCPR COMMENTARY, *supra* note 108 ¶ 29, 397.
[180] *Id.*, § 22-11, 389.

[181] *Id.* § 22-19, 393-94. Indeed, several European states entered reservations under the article allowing them to restrict the political associational activities of aliens, consistent with Article 16 of the European Convention.
[182] *Id.* § 21-20, 379.
[183] *Id.* § 22-21, 394; § 21-21, 379; *see also Handyside Case*, Euro. Ct. H.R. (1976), Series A No. 24, ¶ 49.
[184] CCPR COMMENTARY, *supra* note 108, § 22-21, 394.
[185] ICCPR, *supra* note 99, at art. 22(2); CCPR COMMENTARY, *supra* note 108, §22-30-33, 397-98.
[186] *Id.* §12-34, 212.
[187] *Id.* § 21-23, 380.
[188] *Id.* §§ 21-24, 25, p. 381.
[189] *Id.* ¶ 23, 395.
[190] *Id*. § 22-26-27, 396; *id*. at § 21-28-29, 382-83. The restriction for public health or morals is not applicable here.
[191] ILO Convention C98 , *supra* note 104, at art. 1(1).
[192] For further discussion of the implications of the *Hoffman* decision on the freedom of association rights of migrant workers, *see* Complaint presented by the American Federation of Labor and Congress of Industrial Organizations to the ILO Committee on Freedom of Association against the Government of the United States of America for violation of fundamental rights of freedom of association and protection of the right to organize and bargain collectively concerning migrant workers in the United States, attached as Appendix D.