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CASE 12.834

REPORT ON MERITS (PUBLICATION)

UNDOCUMENTED WORKERS
UNITED STATES OF AMERICA

Approved by the Commission on November 30, 2016
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Organization of American States

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* Commissioner James Cavallaro, a U.S. national, did not participate in discussing or deciding this case, in accordance with Article 17.2(a) of the IACHR's Rules of Procedure. Commissioner José de Jesús Orozco Henríquez, a Mexican national, considered that he should abstain from participating in the study and decision of this case, in accordance with Article 17.3 of the IACHR's Rules of Procedure, noting that the alleged victims in this case are also nationals of Mexico. The Inter-American Commission accepted his decision to excuse himself, with the result that Commissioner Orozco Henríquez did not participate in the deliberation or vote on this case.

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I. SUMMARY

1. On November 1, 2006, the Inter-American Commission on Human Rights (the "Inter-American Commission" or the "IACHR") received a petition from the University of Pennsylvania School of Law, the American Civil Liberties Union Foundation, and the National Employment Law Project (the "petitioners") against the United States of America (the "State" or "United States"), on behalf of, among others, Leopoldo Zumaya and Francisco Berumen Lizalde, foreign undocumented workers who had resided in the United States.[1]

2. The petitioners claim that the presumed victims were excluded from employment rights and remedies available to their documented counterparts. The presumed victims have allegedly been directly affected by the United States' denial of equal rights based on immigration status in their efforts to seek enforcement of their employment and labor rights. The petitioners contend that a decision of the United States Supreme Court, *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137 (2002) ("*Hoffman*"), made the issue of immigration status relevant to workplace rights and encouraged employers to claim that undocumented immigrant workers lack legal rights in contexts beyond that discussed in *Hoffman*, which related to the freedom of association of undocumented workers. These other contexts, petitioners claim, include: access to compensation for workplace injuries, freedom from workplace discrimination, and entitlement to hold an employer responsible for a workplace injury. Within these contexts, they claim that the presumed victims were denied full protection for their labor rights and denied due process.

3. The State contends that the petitioners have not exhausted domestic remedies, noting that remedies are available in state courts, and therefore the case should be dismissed. In the alternative, the State argues that it has a sovereign right to deny permission to work to those "illegally present" in the country or to those who have not obtained authorization to work. Consequently, the State maintains that federal and state law recognizes the difficulty in providing backpay for work that was not done when it could not have lawfully been done. Further, the State claims that the petitioners have "overstated" the impact of *Hoffman* and that undocumented workers are still entitled to protection under the National Labor Relations Act ("NLRA"),[2] including wage compensation and medical benefits. The State affirms its commitment to protecting all workers against employment and labor violations, regardless of whether they possess authorization to work.

4. In Report No. 134/11, adopted by the IACHR on March 20, 2011 during its 141 Period of Sessions, the Commission declared petition 1190-06 admissible, without prejudging the merits of the matter,

[1] The petition was also presented on behalf of three other presumed victims. As indicated in paragraph 5 of the Admissibility Report, No. 134/11, the IACHR has decided to divide the petition and process separately the situation of these presumed victims.

[2] The NLRA was enacted in 1935 to "protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses, and the U.S. economy." The Act created the National Labor Relations Board (NLRB), an independent federal agency, which "safeguard[s] employees' rights to organize and to determine whether to have unions as their bargaining representative. The agency also acts to prevent and remedy unfair labor practices committed by private sector employers and unions." When a violation is found by the NLRB, it encourages the parties to resolve cases through settlements rather than litigation; however, if this is not possible, then a hearing is held before an NLRB Administrative Law Judge. The hearing is conducted as a court proceeding, with arguments, evidence, witnesses, and experts; after the hearing, the judges issue initial decisions. These decisions are reviewable by the Board (a five-member panel appointed by the U.S. President for 5 year terms); and the decisions of the Board may be appealed to a U.S. Court of Appeals and, following that, to the U.S. Supreme Court. *See* NLRB, "National Labor Relations Act" and "What We Do," http://www.nlrb.gov/what-we-do (last accessed May 6, 2015).

with respect to Articles II (Right to equality before law), XVI (Right to social security), XVII (Right to recognition of juridical personality and civil rights), and XVIII (Right to fair trial) of the American Declaration of the Rights and Duties of Man ("American Declaration") with regard to Leopoldo Zumaya and Francisco Berumen Lizalde.[3] It published this report and included it in its Annual Report to the General Assembly of the Organization of American States. The petition was then registered as Case No. 12.834.

5. In the instant report, after analyzing the position of the petitioners and the State, and the available information, the Inter-American Commission concludes that the United States is responsible for violating Articles II and XVI of the American Declaration with respect to Leopoldo Zumaya and Francisco Berumen Lizalde and for additionally violating Mr. Lizalde's rights under Articles XVII and XVIII. As such, it recommends that the State: provide Messrs. Zumaya and Lizalde with adequate monetary compensation to remedy the violations sustained in the present report; ensure all federal and state laws and policies, on their face and in practice, prohibit any and all distinctions in employment and labor rights based on immigration status and work authorization, once a person commences work as an employee; prohibit employer inquiries into the immigration status of a worker asserting his or her employment and labor rights in litigation or in administrative complaints; ensure that undocumented workers are granted the same rights and remedies for violations of their rights in the workplace as documented workers; establish a procedure whereby undocumented workers involved in workers' compensation proceedings, or their representatives, may request the suspension of their deportations until the resolution of the proceedings and the workers have received the appropriate medical treatment ordered by the presiding courts; and improve and enhance the detection of employers who violate labor rights and exploit undocumented workers and impose adequate sanctions against them.

II. PROCEEDINGS BEFORE THE IACHR SUBSEQUENT TO ADMISSIBILITY REPORT

6. By communications of December 21, 2011, the Inter-American Commission transmitted the admissibility report to the parties and in accordance with the Rules of Procedure in force at the time, the Commission set a deadline of three months for the petitioners to present additional observations on the merits and, at the same time, placed itself at the disposition of the parties with a view to reaching a friendly settlement of the matter.

7. On July 31, 2013, the petitioners submitted additional information on the merits, the pertinent parts of which were duly forwarded to the State by note dated September 6, 2013. The Inter-American Commission set a deadline of four months for the State to submit its observations. On April 24, 2014, the IACHR transmitted a note to the State, in which it reiterated the request for information on the merits.

8. On June 27, 2014, the IACHR received the United States' response on the merits, the pertinent parts of which were duly forwarded to the petitioners on September 5, 2014.

9. Meanwhile, the petitioners requested a hearing on the merits during the 147 Period of Sessions, March 7–22, 2013, and again during the 153 Period of Sessions, October 23-November 7, 2014; these requests were not granted due to the large number of requests received. The Commission granted the petitioners' request for the 154 Period of Sessions and held a hearing on the merits of the case on March 16, 2015.[4]

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[3] On October 20, 2011, the IACHR, pursuant to Article 29.1(c) of its Rules of Procedure in force at the time, decided to divide the petition and process separately the claims presented on behalf of three presumed victims whose complete names had not been provided to the IACHR. *See* IACHR, Report No. 134/11, Case 12.834, Admissibility, *Undocumented Workers*, United States, October 20, 2011, paras. 5,12.

[4] To see video of the hearing, visit the Multimedia Section of the IACHR's website, http://www.oas.org/es/cidh/multimedia/sesiones/154/default.asp; *see also* https://www.youtube.com/watch?v=GtZumYHuqAU.

III. POSITIONS OF THE PARTIES

A. The petitioners

10. The petitioners indicate that the present complaint challenges government-sanctioned discrimination against undocumented immigrant workers[5] in the United States. Petitioners represent two undocumented workers who sustained injuries while on the job in Pennsylvania and Kansas, respectively, and were allegedly excluded from employment rights and remedies available to their documented counterparts. They claim that this discrimination stems from the U.S. Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*[6]. In that case, petitioners assert that undocumented workers' right to an effective remedy for violation of their freedom of association was limited: from *Hoffman* and onward, undocumented workers illegally fired in retaliation for exercising this right are no longer able to access the remedy of backpay under the NLRA.

11. Petitioners contend that the impact of *Hoffman* has extended beyond the denial of freedom of association for undocumented workers and that employers have been encouraged to claim that undocumented immigrant workers lack legal rights in other contexts, including those in dispute in the present case. Although U.S. federal law protects a worker's right to be free from discrimination based on sex, color, race, religion, and national origin,[7] the petitioners argue that, following *Hoffman*, a number of state courts have either eliminated or severely limited state-law based workplace protections for undocumented workers. Petitioners indicate that these rights and remedies are often exclusively provided by state law and include access to compensation for workplace injuries[8], freedom from workplace discrimination, and entitlement to hold an employer responsible for a workplace injury. Further, petitioners claim that in some states where an individual may sue in tort for injury or wrongful death, these benefits have also been limited – including in Pennsylvania and Kansas.

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[5] For the purposes of this report, the Commission will use the term and definition put forth by the petitioners of "undocumented" or "unauthorized workers" to refer to "immigrant workers, otherwise known as irregular migrants, who do not possess authorization to be employed pursuant to U.S. law and are unlawfully present in the United States." As the petitioners correctly describe, "this group also 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." Petition P-1190-06 (Nov. 1, 2006) (hereinafter "Petition" or "Petitioners' document dated Nov. 1, 2006"), FN 1.

[6] 535 U.S. 137 (2002).

[7] U.S. Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964), Title VII.

[8] The Commission notes that workers' compensation programs are generally designed to provide employees who are injured at work or acquire an occupational disease with various benefits, depending on their need, such as wage replacement benefits, medical treatment, rehabilitation, and others. As mentioned above, workers' compensation programs are most often exclusively provided by state law. In Pennsylvania, the Commission observes that workers' compensation is understood as the employer's liability "for compensation for personal injury to, or for the death of each employe [sic], by an injury in the course of his employment, and such compensation shall be paid in all cases by the employer, without regard to negligence" in accordance with a schedule provided in Articles 306 and 307 of the Pennsylvania Workers' Compensation Act of 1915, P.L. 736, No. 338, Art. III, § 301(a) (77 Pa. Cons. Stat. §431). Under the Pennsylvania workers' compensation scheme, benefits provided consist of payments for lost wages ("wage-loss" or "time-loss" benefits), death, specific loss (generally the permanent loss of the use of a limb or sense or a serious and permanent disfigurement to the head, face, or neck), medical care, total and partial disability, as well as alternative dispute resolution services. *See* Pennsylvania Department of Labor & Industry, "Workers' Compensation & the Injured Worker," Rev 09-13, http://www.portal.state.pa.us/portal/server.pt/community/workers%27_compensation/10386/about_workers%27_compensation/552721#whatcovered (last accessed December 8, 2015).

In Kansas, the Workers' Compensation Act provides, "If, in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act." Kan. Stat. Ann. § 44-501(b) (2014). Included under the Kansas workers' compensation scheme are benefits for: disability, survivors (when a job-related death occurs), medical treatment, income (lost wages), as well as ombudsman, mediation, and vocational rehabilitation services.

The Commission will use the term "workers' compensation" to refer to all of the these benefits, generally and in collective, unless otherwise specified, with the acknowledgement that the type and amount of benefits received in any particular case is the result of a case by case analysis and determination.

12. The petitioners also allege that, in addition to limiting or eliminating the workplace rights of undocumented workers, a further consequence of *Hoffman* has been the intimidation of undocumented workers to discourage them from asserting their rights through the judicial system. More specifically, the petitioners contend that because *Hoffman* had the effect of making immigration status relevant to workplace rights, employer-defendants often seek discovery of immigrant worker-plaintiffs' immigration status, an action which chills immigrants' willingness to pursue their workplace rights. According to the petitioners, allowing this discovery results in the State's tacit condoning of this intimidation and exploitation of immigrant workers' rights.

1. Presumed Victims

a. Leopoldo Zumaya

13. Petitioners indicate that Leopoldo Zumaya, a Mexican national, worked on a farm in Pennsylvania picking apples for 14 months, from September 2003 to November 2004. In his Declaration, Mr. Zumaya stated that, "It was common knowledge that my employer knowingly accepted false documents and employed approximately fifteen undocumented workers when I worked there. My employer accepted my documents [at hiring] and knew that I was undocumented."

14. In November 2004, Mr. Zumaya fell from a tree and severely fractured his left leg. He had to undergo three separate surgeries so that doctors could insert a metal plate and six screws in his ankle and leg and to try to repair torn ligaments. Mr. Zumaya's employer initially paid his medical benefits, but when it became clear he would not return to work soon, his employer indicated that his benefits would be suspended. He was deemed physically able to return to sedentary work; however, due to his physical limitations, he was unable to find work.

15. Mr. Zumaya therefore retained an attorney to represent him in a workers' compensation claim against his former employer. He was advised to settle with his employer, and ultimately did so for the amount of $35,000. According to the petitioners, had Mr. Zumaya been a U.S. citizen, he would have been eligible to receive a settlement value of between US $85,000 – 100,000 in workers' compensation benefits.[9]

16. Prior to the issuance of the admissibility report, Mr. Zumaya returned to Mexico. The petitioners report that he suffers from chronic regional pain disorder and sustained permanent nerve damage, which continues to affect him.

b. Francisco Berumen Lizalde

17. Petitioners affirm that Francisco Berumen Lizalde, also a national of Mexico, worked as a painter in Kansas for eight months, from March through November 2005. In November 2005, he fell from scaffolding and fractured his hand, which rendered him unable to work. Mr. Lizalde received medical care for his injury, consisting of surgery and the placement of a cast on his hand. He also received four checks from his employer's insurance company to cover medical expenses.

18. Shortly after Mr. Lizalde filed for workers' compensation benefits and before he was able to be seen by a doctor to determine the extent of his disability, he was arrested and charged with "document fraud," on the basis that he used a false social security number to obtain employment. He was subsequently jailed for one month, convicted of this crime (a felony under U.S. law), and deported to Mexico in February 2006. During the time he was in jail, Mr. Lizalde was unable to see a doctor and therefore unable to have the cast removed until he returned to Mexico.

[9] Petitioners' Supplemental Information (Mar. 5, 2010), p. 2 (citing Decl. of Andrew Touchstone, attorney who represented Mr. Zumaya in his workers' compensation claim at para. 9., Exhibit A (2) (i) to Petitioners' document dated Nov. 1, 2006.).

19. After returning to Mexico, Mr. Lizalde reports that he still does not have full movement or strength of his hand. He has undergone physical therapy in Mexico for his hand and is paying the full costs of such treatment.

2. Legal Argument: Rights to equality before the law, recognition of juridical personality and civil rights, and right to a fair trial (Articles II, XVII, and XVIII of the American Declaration)

20. The petitioners submit that the United States' failure to ensure equal redress and access to justice for violations of its labor and employment laws and protection of undocumented workers from discrimination by non-state actors violates its obligations under Articles II, XVII, and XVIII of the American Declaration to the detriment of the two presumed victims, Mr. Zumaya and Mr. Lizalde. Petitioners acknowledge that compensation for workplace injury is governed by state, not federal, law; however, they assert that the American Declaration imposes an obligation on the federal government to guarantee fundamental human rights at both the national and local levels. Furthermore, they assert that the state laws implicated in the present case are being interpreted in a discriminatory manner because of the analysis and precedent established by the U.S. Supreme Court in *Hoffman* and that current practices inhibit access to justice for undocumented workers.

21. According to the petitioners, Mr. Zumaya had his entitlement to wage-loss benefits, provided under the workers' compensation scheme, prematurely limited because he had not been authorized to work at that time, despite the fact that he had been fully engaged in the employment relationship when he sustained the injury. The petitioners claim that Mr. Zumaya was forced to accept a settlement for a fraction of his claim, due to a decision of the Pennsylvania Supreme Court finding that an unauthorized worker is not entitled to wage loss benefits once it was determined that the person could return to work, even though there was no work available to him with the physical restrictions imposed by his workplace injury.[10] The petitioners assert that had Mr. Zumaya been authorized to work in the United States, his settlement would have been far greater, allowing him to continue physical therapy and support himself pending employment that did not require him to exceed his physical capabilities.

22. Petitioners argue that, with regard to Mr. Lizalde, he was unable to pursue his claim for disability or to secure payments for medical care after his workplace injury given that he was prosecuted and deported shortly after filing a workers' compensation claim. Additionally, petitioners call into question the circumstances and timing of Mr. Lizalde's arrest, advancing a "strong suspicion" that he was turned in to immigration authorities as a result of filing a workers' compensation claim.

23. In both cases, the petitioners claim that, as illustrated through the experiences and declarations of the alleged victims in this case as well as their lawyers, employers are often aware of the undocumented status of immigrant workers and are "more than willing" to use that information to defeat claims, deny work, and otherwise harm workers who file claims against them. Petitioners maintain that, even in states where undocumented workers are legally entitled to workers' compensation benefits with no limitations, local and federal law enforcement cooperate with employers and insurance companies to deny them those benefits. Additionally, petitioners submit that undocumented workers also rationally fear deportation as a result of disclosing their full identities and immigration status during legal proceedings against their employer.

24. The climate of fear surrounding undocumented workers in the United States regarding the consequences of taking action against employers who have violated workers' human rights is what petitioners label the "*in terrorem*" effect. Akin to a chilling effect, they affirm that it discourages undocumented workers from asserting workplace rights out of fear of adverse immigration enforcement actions.

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[10] Petitioners cite *Reinforced Earth Co. v. Workers' Compensation Appeal Bd.*, 570 Pa. 464 (Pa. 2002).

25. To combat or overcome this fear, the petitioners report that the United States, through its relevant agencies, has developed two policies designed to keep immigration authorities from interfering with workers' exercise of their labor rights. The first policy is a field manual for U.S. Immigration and Customs Enforcement (ICE) agents on how to question persons during labor disputes to avoid the chilling effect described above;[11] the second is a Memorandum of Understanding (MOU) with the U.S. Department of Labor (DOL), the purpose of which is to preclude the involvement of immigration enforcement in labor disputes. However, the petitioners claim that ICE "often fails to follow its own policy of non-involvement in labor disputes," conducting workplace raids in the middle of or immediately following a DOL investigation against the employer.[12]

26. Petitioners additionally emphasize the irrelevance of immigration status and related matters to the issues in labor disputes and workplace rights, in addition to the chilling effect of such disclosures. Petitioners cite a number of cases in which they allege that courts "contemplating the *in terrorem* effect of discovery related to plaintiffs' immigration status" have come to the same conclusions, upon considering "the overwhelmingly detrimental impact of potential harassment, intimidation, and threats against plaintiffs such discovery causes."[13] To support this argument, petitioners cite cases in which courts found that granting discovery requests for information related to immigration status would allow illegal and condemnable actions by employers to go unreported and unsanctioned.[14]

27. Lastly, the petitioners claim that in the years following *Hoffman*, remedies available to undocumented workers under federal law are no longer guaranteed. This lack of remedies, they maintain, translates into a denial of undocumented workers' rights under these statutes. Even though the petitioners recognize that "most litigation ultimately results in undocumented workers being found eligible for remedies under federal statutes," they argue that *Hoffman* and cases following it have emboldened employers to disclose their workers' immigration status and argue against their eligibility for workers' compensation on the basis of their immigration status.[15] Importantly, petitioners assert that "the uncertainty of the outcome has forced undocumented workers to litigate and re-litigate supposedly guaranteed remedies on a case-by-case basis and in various contexts, with varying rates of success."[16] According to the petitioners, this litigation

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[11]Petitioners cite ICE, Operating Instruction (OI) 287.3a, Questioning Persons During Labor Disputes", now known as ICE Special Agents Field Manual 33.14(h).

[12] Petitioners' Supplemental Information (Mar. 5, 2010), p. 6 (citing a report by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), American Rights at Work, and National Employment Law Project (NELP) entitled *Iced Out: How Immigration Enforcement Has Interfered with Workers' Rights* (Oct. 2009)). In one example, petitioners mention that an immigration judge found that immigration agents failed to follow their own policy when raiding a New York factory and initiating removal proceedings against two workers engaged in union activities. Petitioners allege that the immigration authority's attorney in the case argued that the ICE policy embodied in the MOU and the manual were merely instructions and did not command the same force of law as an officially promulgated rule or regulation. *See id.* (citing *In the matter of Herrera-Priego*, USDOJ EOIR (July 10, 2003)).

[13] Petitioners' Supplemental Information (Mar. 5, 2010), p. 7-8 (citing *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 513-14 (M.D. Pa. 2007) (reasoning that "federal courts have recognized that inquiries into immigration status can have an *in terrorem* effect limiting the willingness of plaintiffs to pursue their rights out of fear of the consequences of an exposure of their position"); *Topo v. Dhir*, 210 F.R.D. 76, 78-79 (S.D.N.Y. 2002) (quoting "Plaintiff's fears of her immigration status deterring further prosecution of her claims are well founded. Courts have generally recognized the *in terrorem* effect of inquiring into a party's immigration status when irrelevant to any material claim"); *Flores v. Albertsons, Inc.*, No. CV 01-00515 AHM(SHx), 2002 WL 1163623, at *5-6 (C.D. Cal. 2002) (denying the defendant's request for documents relating to plaintiffs' immigration status, finding "it is entirely likely that any undocumented [litigant] forced to produce documents related to his or her immigration status will withdraw from the suit rather than produce such documents and face deportation").

[14] Petitioners' Supplemental Information (Mar. 5, 2010), p. 8-9 (citing *Rivera v. NIBCO, Inc.* 364 F.3d 1057, 1064 (9th Cir. 2004)(affirming a protective order in an employment discrimination case because it was necessary to avoid "the chilling effect that disclosure of plaintiffs' immigration status could have upon their ability to effectuate their rights...[W]ere we to grant discovery requests for information related to immigration status in every case involving national origin discrimination...countless acts of illegal and reprehensible conduct would go unreported"); *see also In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987); *Trejos v. Editas Bar and Restaurant*, 2009 WL 749891 (E.D.N.Y. 2009); *Galaviz-Zamora v. Brady Farms Inc.*, 230 F.R.D. 499, 501 (W.D. Mich. 2005).

[15] Petitioners' documented dated Jan. 6, 2015, at p. 17.

[16] Petitioners' documented dated Jan. 6, 2015, at p. 17.

and mixed outcomes threaten undocumented workers' rights and simultaneously serve to discourage them from claiming their rights.

28. The petitioners conclude that, as a result of the above, the United States has failed in its affirmative obligation to ensure that Messrs. Zumaya and Lizalde were not discriminated against in the realization of their labor rights and that they had effective access to justice. Thus, according to the petitioners, the State has violated their rights to equality before law, recognition of juridical personality and civil rights, and to a fair trial, as set forth in Articles II, XVII, and XVIII of the American Declaration.

B. The State

29. The State does not dispute the factual circumstances of either Mr. Zumaya's or Mr. Lizalde's case. It does, however, dispute the petitioners' claims concerning the availability of remedies and maintains that the petition sets forth no human rights violations, as explained in more detail below.

30. The United States submits that it is fully committed to the protection of all workers, including undocumented persons. The State details the efforts it makes through its various agencies, outlined below, to pursue enforcement of labor and employment laws against employers who violate these laws, regardless of whether the victims of those violations are lawfully present and entitled to work in the United States.

1. Labor Protection Efforts

31. The State cites as examples of its enforcement efforts those undertaken by the Department of Labor (DOL), National Labor Relations Board (NLRB), and the Equal Employment Opportunity Commission (EEOC). According to the State, the DOL administers and enforces more than 180 federal laws for the protection and advancement of workers in the United States. Of these 180, two major statutes it enforces are the Fair Labor Standards Act (FLSA), administered by its Wage and Hour Division, and the Occupational Safety and Health Act (OSH Act), administered by the Occupational Safety and Health Administration (OSHA). The FLSA prescribes standards for wages and overtime pay, and the OSH Act prescribes a set of regulations and safety and health standards that public sector employers must meet. With regard to the health and safety conditions in private industries, the State asserts that OSHA or OSHA-approved state programs regulate those workplace conditions.

32. In addition to the work performed by the DOL internally, the State maintains that the Department engages bilaterally with nations of origin for undocumented workers. The State alleges that these consultations have resulted in DOL initiatives to inform migrant workers about applicable labor protections under United States laws. Further, the State cites a number of joint declarations it has with other States, including Mexico, Costa Rica, El Salvador, Guatemala, Nicaragua, and Belize, on mutual commitments to inform workers about their labor rights in the United States and to foster environments in which these rights are respected.

33. The State also refers to the work of the NLRB in enforcing the National Labor Relations Act (NLRA). The State affirms that the NLRA guarantees covered employees the right to form, join, decertify, or assist a labor organization and to bargain collectively through representatives of their own choosing or to refrain from such activities. According to the State, employers must not interfere with rights under the NLRA, and employees, labor organizations, and employers themselves may file charges alleging unfair labor practices with the NLRB. The NLRB, in turn, investigates the claims and makes findings on the merits and recommendations, which include "make-whole remedies, such as reinstatement and backpay for discharged workers." As examples of the types of sanctions that the NLRB may impose, the State mentions that an employer may be ordered to recognize and bargain with a labor organization or to comply with informational remedies, such as the posting of a notice by the employer promising not to violate the law.

34. Regarding the EEOC, the State explains that it is the entity responsible for enforcing federal, anti-discrimination laws that make it illegal to discriminate against a job applicant or an employee on account of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability, or genetic information.[17] According to the State, it is also illegal to discriminate against a person for having: complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. The State asserts that federal anti-discrimination laws apply to all types of work situations, including hiring, firing, promotions, harassment, training, wages, and benefits.[18]

35. On the topic of ICE's enforcement actions and general agency guidelines, the State informs that on April 30, 2009, ICE announced a revised Worksite Enforcement Strategy, which promotes, among other things, "integrity in the immigration system and an equitable enforcement program," prioritizing the "most egregious violators, including employers who abuse and exploit their workers, traffic in persons, or create false identity documents." The State assures that "ICE is actively committed to effective labor law enforcement promoting proper wages and working conditions for all covered workers regardless of their immigration status." Further, the State claims that ICE refrains from engaging in civil worksite enforcement activities at worksites that are the subject of an existing DOL investigation of labor disputes "during the pendency of the investigation and any related proceeding."

2. Legal Argument: Rights to equality before the law, recognition of juridical personality and civil rights, and a fair trial (Articles II, XVII, and XVIII of the American Declaration)

36. The State maintains that there has been no violation of the presumed victims' rights under the American Declaration because *Hoffman* does not impact the rights of workers who suffer on-the-job injuries in Pennsylvania and Kansas. The State submits that it has a sovereign right to deny permission to work to those illegally present in the country or to those who have not obtained authorization to work. Thus, the State submits that, consistent with this principle, federal and state laws recognize the difficulty in providing backpay for work that was not done when it could not lawfully have been done.

37. According to the State, the Supreme Court's decision in *Hoffman* leaves its decision in *Sure-Tan, Inc. v. National Labor Relations Board*[19] undisturbed, namely the finding that the NLRA applies to undocumented workers. The State asserts that this ruling had no impact on the NLRB's ability to order companies to cease unlawful activities under the NLRA.

38. To support this position, the State cites a July 2002 memorandum issued by the General Counsel of the NLRB to NLRB regional offices. In this memo, the State indicates that it was made clear that *Hoffman* did not affect other actions the NLRB could take against employers acting unlawfully.[20] In the memo,

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[17] The EEOC enforces federal law at all federal agencies. With regard to state and local government agencies, the EEOC may generally enforce these laws if the agency has 15 or more employees who worked for the agency for at least twenty calendar weeks. If the complaint involves age discrimination, the state or local government agency is covered, regardless of the number of employees, in addition to the obligation to comply with the Equal Pay Act (EPA), which makes it illegal to pay different wages to men and women if they are performing substantially equal work in the same workplace. Regarding private employers, the EEOC may generally cover the employer if it has 15 or more employees who worked for it for at least 20 calendar weeks. If the complaint involves age discrimination, the EEOC may cover the employer if it has 20 or more employees who worked for the company for at least 20 calendar weeks, and "virtually all" employers are covered by the EPA, mentioned above. Where a state and local government agency or private employer does not meet the qualifications for EEOC coverage, then state and local anti-discrimination laws may apply and cover that employer. EEOC, "Coverage," (last accessed May 15, 2015), http://www.eeoc.gov/employers/coverage.cfm.

[18] State's Response, p. 7 (citing, *inter alia*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.; Equal Pay Act of 1963, 29 U.S.C. § 206(d); Age Discrimination in Employment Act of 1987, 29 U.S.C. § 621 et seq.; Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq.; Genetic Information Nondiscrimination Act of 2008 (GINA), 42 U.S.C. § 2000ff et seq.).

[19] 467 U.S. 883 (1984).

[20] State's Response, p. 14. *See* NLRB General Counsel Memorandum GC 02-06 (July 19, 2002) ("GC 02-06"), p. 1 ("The Court in *Hoffman* dealt only with a remedial question, and thus, as set forth above, does not overturn otherwise settled Board and Court law. Thus, Regions should continue to object to a charged party's attempt to elicit evidence concerning an employee's asserted undocumented status in order to escape unfair labor practice liability.")

the General Counsel advised that the NLRB could still seek to award backpay for work that was actually performed[21] and to enforce cease and desist orders, subject to contempt proceedings for non-compliance.[22] The State insists that the General Counsel both in this memorandum and in subsequent instructions emphasized the point that regional offices should presume that employees are lawfully authorized to work and should not set out on *sua sponte* investigations to determine the charging party's immigration status in the US.[23] The State also maintains that *Hoffman* did not impact the laws enforced by DOL or the work of the EEOC.

39. Further, the State argues that federal and administrative court decisions subsequent to *Hoffman* have confirmed the principle that employers in the United States may not illegally discriminate against employees, even when those employees are undocumented workers.[24]

40. Additionally, the State contends that *Hoffman* concerned the unavailability of only one particular remedy under one particular statute – backpay for the period between termination of employment for union activities and when the NLRB found that the employer acted unlawfully. However, the State asserts that *Hoffman* does not even implicate the claims of Petitioners, who seek compensation through state workers' compensation systems for injuries they suffered while working; thus, there is a basic factual distinction that separates the cases.

41. Notwithstanding this factual distinction, the State maintains that the two jurisdictions implicated in this case, Pennsylvania and Kansas, are not hostile or adverse towards undocumented workers and, based on precedent, would likely have upheld the presumed victims' rights. With regard to Pennsylvania, the State refutes Petitioners' claims regarding *Reinforced Earth Co. V. Workers' Compensation Appeal Board*, stating that the decision does not cite *Hoffman* and "implicitly rejects" extending *Hoffman* to the Pennsylvania workers' compensation scheme. Moreover, the State highlights that the decision expressed the principle that undocumented workers are eligible for workers' compensation, including medical expenses and wage-loss compensation, even where a worker obtained employment using fraudulent documentation.[25]

42. With regard to Kansas, the State likewise refutes the Petitioners' arguments that Kansas has erected procedural barriers to undocumented workers' access to workers' compensation. The State maintains that the case cited as support by the Petitioners, *Doe v. Kansas Dept. of Human Resources*, involves a claim by an undocumented worker for workers' compensation that was upheld. Further, the State affirms that this case does not mention *Hoffman* in its decision.

43. Based on the above, the State requests that the Commission dismiss the case, as it submits that no violation of the American Declaration has occurred. The Commission notes that the State included arguments concerning the admissibility of the case in its response, but given that the admissibility decision was made by the Commission in 2011, these are untimely and it is not pertinent to consider them.

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[21] Where the "worker has already left the US" and unpaid wages for work performed are owed to this person, the State submits that DOL works with U.S. consulates to locate the worker so that he/she may receive the wages collected on his/her behalf. State's Response, p. 15-16.

[22] State's Response, p. 14. A cease and desist order is one of the orders the NLRB may order when it finds that, upon a preponderance of the testimony taken, the person named in the complaint has engaged in unfair labor practice(s). The person must therefore stop such unfair practice(s) and take affirmative remedial action(s) as ordered by the NLRB. *See* NLRA, 29 U.S.C. §§ 151 – 169, 160(c).

[23] State's Response, p. 14-15 (citing NLRB General Counsel Memorandum OM 11-62 (June 7, 2011) ("OM 11-62"), p. 3; GC 02-06, p. 5).

[24] State's Response, p. 17-18 (citing, *inter alia*, Concrete Form Walls, Inc., 346 NLRB 831 (2006); *Chellen v. John Pickle Co.*, 344 F.Supp.2d 1278 (N.D. Okla. 2004) (holding that a worker not authorized to work was still covered by FLSA); *Flores v. Amigon*, 233 F.Supp.2d 462, 463 (E.D.N.Y. 2002) (holding that the FLSA applies to employees regardless of immigration status)).

[25] State's Response, p. 20 (citing *Reinforced Earth Co. v. Workers' Compensation Appeal Bd.*, 570 Pa. 464, 467 (Pa. 2002).

IV. ESTABLISHED FACTS

44. In application of Article 43(1) of its Rules of Procedure, the IACHR will examine the arguments and evidence provided by the petitioners and the State. In addition, it will take into consideration publicly available information.[26]

A. Presumed Victims

45. In November 2004, Mr. Zumaya was injured on the job, at a farm in Pennsylvania, while picking apples. He fell from a tree and severely fractured his left leg. Mr. Zumaya had worked on this farm for 14 months and did not have authorization to work in the United States.[27]

46. As a result of this injury, Mr. Zumaya had to have three operations. In the first operation, a metal plate and six screws were inserted in his leg; in the second, the screws were removed; and the third was to fix a torn ligament in the front of his leg. Mr. Zumaya suffers chronic pain in his leg and sustained permanent nerve damage from the fall.[28]

47. Mr. Zumaya's employer initially paid for his medical expenses, but when it became apparent he could no longer go back to work, his employer ceased these payments.[29] The employer's insurance company also refused payment of workers' compensation benefits due to his undocumented status.[30] Mr. Zumaya retained counsel to bring a workers' compensation claim against his employer and was advised by his attorney to accept a settlement for $35,000.[31]

48. In November 2005, Mr. Lizalde was injured on the job when he fell from scaffolding and fractured his hand. Mr. Lizalde had been working as a painter in Kansas for eight months.[32] Mr. Lizalde received medical care for the injury he sustained, through the insurance of his employer. Such care consisted of surgery on his hand which was then placed in a cast. He also received four checks from his employer's insurance company in the amount of $470 each, for a total of $1,880, to cover medical expenses.[33]

49. Shortly after filing a workers' compensation claim in December 2005 and prior to a doctor's appointment to determine the full extent of the disability, Mr. Lizalde was arrested and charged with document fraud. He was detained for more than a month in jail, convicted of the felony and deported to Mexico in February 2006.[34] While in jail, Mr. Lizalde did not have access to medical care and was unable to get his cast removed until after he was in Mexico, at his own cost.[35]

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[26] Article 43(1) of the Rules of Procedure of the Inter-American Commission on Human Rights provides that: "The Commission shall deliberate on the merits of the case, to which end it shall prepare a report in which it will examine the arguments, the evidence presented by the parties, and the information obtained during hearings and on-site observations. In addition, the Commission may take into account other information that is a matter of public knowledge."

[27] State's Response, p. 4.

[28] Exhibit A (2) to Petitioners' document dated Nov. 1, 2006, Decl. of Leopoldo Zumaya, paras. 2, 4-5.

[29] Petitioners' document dated Nov. 1, 2006 at p. 24.

[30] Exhibit A (2) to Petitioners' document dated Nov. 1, 2006, Decl. of Leopoldo Zumaya, para. 8.

[31] *Cf.* Petitioners' Supplemental Information (Mar. 5, 2010), p. 2 (citing the declaration of Mr. Zumaya's attorney, Andrew Touchstone, who, at the time of the declaration had 18 years of experience in the area of workers' compensation and alleged that Mr. Zumaya could have received between $85,000-100,000 in the settlement had he been a U.S. citizen). The State did not directly refute this contention, although it did refute the context of the argument.

[32] State's Response, p. 4.

[33] Exhibit A (4) to Petitioners' document dated Nov. 1, 2006, Decl. of Francisco Berumen Lizalde, paras. 5-6.

[34] Petitioners' document dated Nov. 1, 2006 at p. 25.

[35] Exhibit A (4) to Petitioners' document dated Nov. 1, 2006, Decl. of Francisco Berumen Lizalde, para. 9.

50. Prior to being deported, Mr. Lizalde retained counsel to preserve his right to workers' compensation benefits. Nonetheless, within days of filing Mr. Lizalde's claim, his lawyer was contacted and informed that Mr. Lizalde had been prosecuted and deported. His lawyer was further informed that, given that Mr. Lizalde's presence is required to pursue his claim, Mr. Lizalde had to choose between possible prosecution and conviction for illegal reentry or to forego his legal rights to workers' compensation, including disability compensation and medical treatment.[36]

B. *Hoffman Plastic Compounds, Inc. v. NLRB*

51. Given that the parties center many of their arguments around the impact of the U.S. Supreme Court case *Hoffman Plastic Compounds, Inc. v. NLRB* ("*Hoffman*"), the Commission considers it pertinent to include a brief description of this case.

52. In *Hoffman*, the U.S. Supreme Court considered whether an undocumented worker, Mr. Jose Castro, who presented fraudulent documents to prove his authorization to work and was later fired along with other workers in retaliation for union-organizing activities, could be eligible to receive backpay[37] and other relief to remedy the labor violation. In the first instance, the NLRB had found that the layoff of these employees by employer Hoffman Plastic Compounds violated the NLRA and ordered backpay and other relief.[38] At a later compliance hearing, Mr. Castro testified that he had never been legally admitted nor authorized to work in the United States, and on this basis, the Administrative Law Judge (ALJ) presiding over the case determined that the Board was precluded from ordering backpay as a remedy for Mr. Castro.[39]

53. In September 1998, the NLRB reversed the ALJ's decision with respect to backpay.[40] The Board held that "the most effective way to accommodate and further the immigration policies embodied in the Immigration Reform and Control Act of 1986[41] is to provide the protections and remedies of the NLRA to undocumented workers in the same manner as to other employees."[42] The NLRB determined that Mr. Castro was entitled to backpay in the amount of $66,951, plus interest, calculated from the date of Mr. Castro's termination of employment to the date that Hoffman first learned of Castro's undocumented status.[43]

54. Hoffman next appealed to the U.S. Court of Appeals for the District of Columbia ("Court of Appeals"). A panel of the Court of Appeals denied the petition for review initially[44]; after a re-hearing *en banc*, the court again denied the petition for review and upheld the NLRB's order.[45]

55. Hoffman then appealed to the U.S. Supreme Court, which granted *certiorari* and ultimately held (in a 5-4 vote) that "Federal immigration policy, as expressed by Congress in IRCA, foreclosed the Board

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[36] Exhibit A (4)(i) to Petitioners' document dated Nov. 1, 2006. Decl. of Michael Snider, paras. 5-8.

[37] Generally speaking, the Commission understands "backpay" to mean past wages to which an employee is entitled due to unlawful employment practices that resulted in his or her inability to earn wages or to collect the full amount of wages earned, whereas "wage loss" compensation is designed to pay employees part of their normal wages when a work-related disability or injury prevents them from working.

[38] 306 NLRB 100 (1992).

[39] 314 NLRB 683, 685-86 (1994).

[40] 326 NLRB 1060 (1998).

[41] See *infra* at para. 57 for more information on the Immigration Reform and Control Act.

[42] 326 NLRB at 1060 (citing *A.P.R.A. Fuel Oil Buyers Group*, 320 NLRB 408 (1995), aff'd 134 F.3d 50 (2d Cir. 1997).

[43] 326 NLRB at 1061-062.

[44] 208 F.3d 229 (D.C. Cir. 2000).

[45] 237 F.3d 639 (D.C. Cir. 2001).

[NLRB] from awarding backpay to an undocumented alien who has never been legally authorized to work in the United States."[46]

56. In so ruling, the Supreme Court relied heavily on its previous ruling in *Sure-Tan, Inc. v. NLRB* ("*Sure-Tan*").[47] In the *Sure-Tan* case, six of seven workers were undocumented and all six voted for a certain union as the collective bargaining representative with their employer, Sure-Tan, Inc. The employer filed objections to the election with the NLRB, which overruled them. After receiving notification of the overruling, the president of Sure-Tan, Inc. sent a letter to the Immigration and Naturalization Service (INS) and requested that it check into the immigration status of a number of its employees, claimants included. Based on the subsequent investigation realized by the INS, five of the workers involved voluntarily exited from the US to avoid deportation.

57. The Supreme Court in *Sure-Tan* determined, *inter alia*, that:

a. "The NLRA's terms – defining 'employee' to include 'any employee,' and not listing undocumented aliens among the few groups of specifically exempted workers – fully support [the interpretation of the NLRB]. Similarly extending the NLRA's coverage to undocumented aliens is consistent with its purpose of encouraging and protecting the collective bargaining process;"

b. "The Board's interpretation of the NLRA as applying to unfair labor practices committed against undocumented aliens is reasonable, and thus will be upheld;"

c. "Enforcement of the NLRA with respect to undocumented alien employees is compatible with the INA's purpose in restricting immigration so as to preserve jobs for American workers, since, if there is no advantage as to wages and employment conditions in preferring illegal alien workers, any incentive for employers to hire illegal aliens is lessened. In turn, if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws;"

d. "[P]etitioners committed an unfair labor practice under § 8(a)(3) of the NLRA by constructively discharging their undocumented alien employees through reporting the employees to the INS in retaliation for participating in union activities;" and

e. With regard to the NLRB's remedial order, including the figure of backpay, "the [Seventh Circuit] Court of Appeals erred in its modification of [this] order . . . [b]y directing the Board to impose a minimum backpay award without regard to the employees' actual economic losses or legal availability for work, the court exceeded its limited authority of review under the NLRA. A backpay remedy must be tailored to expunge only actual, not speculative, consequences of an unfair labor practice."[48]

58. With regard to (e), the Supreme Court in *Sure-Tan* found that the "main deficiency" in the Seventh Circuit Court of Appeals' decision for review was the amount of backpay ordered, not that backpay was ordered.[49] Specifically, the Supreme Court's objection to the Court of Appeals' decision in *Sure-Tan* was that the latter failed to take into consideration "the period of time these particular employees might have continued working before apprehension by the INS and without affording the petitioners any opportunity to

[46] 535 US 137 (2001), Syllabus.

[47] 467 US 883 (1984).

[48] 467 US 883, Syllabus.

[49] 467 US at 899-900, no. 9; *see also* 237 F.3d 639, 644 (DDC 2001).

provide mitigating evidence" in calculating an estimate amount of backpay.[50] As the Supreme Court explained:

> [T]he Court of Appeals recognized . . . in computing backpay, the employees must be deemed "unavailable for work" (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States. The Court of Appeals assumed that, under these circumstances, the employees would receive no backpay, and so awarded a minimum amount of backpay that would effectuate the underlying purposes of the Act by providing some relief to the employees as well as a financial disincentive against the repetition of similar discriminatory acts in the future.[51]

59. Notwithstanding this reasoning and its own determination of the "probable unavailability of the Act's more effective remedies" in that case, the Supreme Court in *Sure-Tan* found that the Seventh Circuit Court of Appeals "plainly exceeded its limited authority under the Act" by directing the Board to impose a minimum backpay award without regard to the employees' actual economic losses or legal availability for work."[52]

60. The Supreme Court in *Hoffman* departed from the *Sure-Tan* ruling on the point of backpay, determining that "There is no reason to think that Congress [ ] intended to permit backpay where but for an employer's unfair labor practices, an alien-employee would have remained in the United States illegally, and continued to work illegally, all the while successfully evading apprehension by immigration authorities."[53] The Court concluded in *Hoffman* that "allowing the [NLRB] to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations."[54] As a result, Jose Castro, the undocumented worker illegally fired by Hoffman in retaliation for union-organizing, was denied backpay.

C. Situation of Undocumented Workers in the United States

61. Prior to continuing to its analysis on the merits of this case, the Commission deems it relevant to provide an updated snapshot on the situation of undocumented workers in the United States.[55] Reports suggest that the population of "unauthorized immigrants"[56] in the United States is approximately 11,022,000 as of 2013.[57] The top country of origin is Mexico, with 6,194,000, or 56% of this population,

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[50] 467 US at 901 n. 11.

[51] 467 US at 903-04. However, as Justice Brennan's dissenting opinion in *Sure-Tan* contends, "it is clear that the Board's decision to support the backpay award ordered by the Court of Appeals rests squarely upon its own judgement that this award estimates with a fair degree of precision the period that these employees would have continued working for petitions had petitioners not reported them to the INS. Indeed, as the Board points out, such an award is no more speculative or conjectural than those developed in other situations commonly confronted by the Board in which it is not clear how long an employment relationship would have continued in the absence of an unfair labor practice," (citing *Buncher v. NLRB*, 405 F.2d 789-90 (3d Cir. 1968) (in establishing that an estimate must be made of the income these employees would have earned but for the petitioners' unfair labor practices).

[52] 467 US at 904-05.

[53] 535 US 137, 149.

[54] 535 US 137, 151.

[55] In Petitioners' document dated Nov. 1, 2006, p. 8, the Petitioners cite the Pew Hispanic Center, which estimated that in March 2005, there were approximately 11.5 – 12 million undocumented immigrants living in the United States. Of those, an estimated 7.2 million unauthorized immigrants were employed in March 2005, constituting 4.9% of the U.S. civilian labor force. The United States did not dispute these estimates in its Response dated June 26, 2014.

[56] To be used herein interchangeably with the term "undocumented [immigrant] workers."

[57] Migration Policy Institute (MPI), Data Hub, "Unauthorized Immigrant Population: United States," http://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US (last accessed May 28, 2015) (data is MPI's analysis of U.S. Census Bureau data from the 2013 American Community Survey (ACS), 2009-2013, and the 2008 Survey of Income and Program Participation (SIPP) by James Bachmeier of Temple University and Jennifer Van Hook of The Pennsylvania State University, Population Research Institute).

accounting for 71% when combined with the countries of Central America.[58] A Pew study reports that, as of 2012, unauthorized immigrants accounted for 3.5% of the U.S. population, 26% of all immigrants, and 5.1% of the U.S. labor force consisting of 8.1 million who were working or looking for work. [59]

62. According to this same study, in terms of the top industries in which unauthorized immigrants work, as of 2012, 62% held service, construction, and production jobs, which is twice the share of U.S. born workers in those same industries.[60] To break this figure down, nearly 33% held service jobs as a janitor, child care worker or cook, almost double the share of U.S. born workers in those types of occupations (17%); 15% held construction or extraction jobs, triple the share of U.S. workers (5%); and 14% were employed in production, installation, and repair, more than half of the share of U.S. born workers (9%).[61] Unauthorized immigrants only constitute 2% of the workers in management, professional, and office support occupations.[62]

63. According to the U.S. Bureau of Labor Statistics, there were 4,585 workers who died from work-related injuries in 2013.[63] Of those, 879 or 19% involved foreign-born workers, of whom Mexican workers accounted for 41% (360 persons) and Central American workers for 14% (123 persons), for a joint total of 55% (483) or 10.5% of all work-related fatalities.[64] Further, in 2013, of the non-fatal occupational injuries in private industry recorded by the race or ethnic origin of the worker (immigration situation is not recorded), approximately 21-22% were workers classified as "Hispanic" or "Hispanic and another race."[65]

64. For its part, OSHA has acknowledged that immigrant and "hard to reach" workers are employed in some of the most inherently dangerous jobs: in its Fiscal Year 2014-2018 Strategic Plan, it explained, "OSHA has made outreach to Latino and other limited English proficiency workers – a population that typically experiences a higher rate of injuries, illnesses, and fatalities in the workplace – a priority by working with community- and faith- based groups, employers, unions, consulates, the medical community, health and safety professionals, and government representatives."[66]

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[58] *Id.*

[59] Jeffrey Passel and D'Vera Cohn, "Immigrant Workers in Production, Construction Jobs Falls Since 2007: In States, Hospitality, Manufacturing and Construction are Top Industries," Pew Research Center (March 2015), p. 5-6.

[60] *Id.* at p. 5. Note: This figure varies among the states: in the west and northeast (and Florida), leisure and hospitality is the largest industry among unauthorized immigrant workers; in most southern states, the principal industry is construction; and in the Midwest, manufacturing is the dominant employer. *Id.* at p. 6.

[61] *Id.* at p. 4.

[62] *Id.* at p. 9.

[63] U.S. Department of Labor, Bureau of Labor Statistics, "Table A-7. Fatal occupational injuries by worker characteristics and event or exposure, all United States, 2013," http://www.bls.gov/iif/oshwc/cfoi/cftb0283.pdf (last accessed June 1, 2015); Bureau of Labor Statistics, "Census of Fatal Occupational Injuries: All Charts" (2015), p. 12, http://www.bls.gov/iif/oshwc/cfoi/cfch0012.pdf.

[64] Fatal injuries involving undocumented workers are included in these figures provided they meet the other work-relationship criteria. The U.S. Bureau of Labor does not, however, break down its figures according to the work authorization status of the workers involved, so the number of foreign-born workers is an approximation. *See* U.S. Bureau of Labor Statistics, Injuries, Illnesses, and Fatalities, "Census of Fatal Occupational Injuries (CFOI): Definitions" (last modified date Apr. 22, 2015), http://www.bls.gov/iif/oshcfdef.htm.

[65] U.S. Department of Labor, Bureau of Labor Statistics, Survey of Occupational Injuries and Illnesses in cooperation with participating State agencies, "Table R72. Number and percent distribution of nonfatal occupational injuries and illnesses involving days away from work by selected worker characteristics and number of days away from work, and median number of days away from work, private industry, 2013" http://www.bls.gov/iif/oshwc/osh/case/ostb4052.pdf. In total, there were 917,130 total nonfatal injuries recorded in private industry in 2013. Of that total, race or ethnic origin was not recorded in 336,830 of those cases, and incidents on farms with fewer than 11 employees were not recorded, either. Thus, the total number of incidents with race recorded was 580,300; of that number, 124,330 (21.4%) were "Hispanic or Latino only" and another 940 were "Hispanic or Latino and other race" (for a combined total of 21.6%). Due to the gaps in this data, including the lack of information on the immigration situation of the injured workers, the number of nonfatal incidents is used herein for illustrative purposes only.

[66] U.S. Department of Labor, Strategic Plan Fiscal Years 2014-2018, p. 33-34, http://www.dol.gov/_sec/stratplan/FY2014-2018StrategicPlan.pdf; OSHA, Strategic Management Plan 2003-2008, https://www.osha.gov/StratPlanPublic/strategicmanagementplan-final.html.

65. Undocumented workers also contributed an estimated $11.84 billion in state and local taxes in 2012.[67] This includes sales and excise taxes from the purchase of goods, such as gasoline and clothing, and services, which account for more than $7 billion of the $11.84.[68] Undocumented immigrants also pay property taxes, directly as property owners or indirectly as renters, accounting for approximately $3.6 billion (of the $11.84).[69] Regarding contributions to the social security fund, in 2010 the U.S. Social Security Administration (SSA) estimated that there was a $12 billion surplus of tax revenue paid into the system, attributable to the earnings of unauthorized workers.[70]

66. In the United States, the Commission observes that the Immigration Reform and Control Act of 1986 (IRCA) was enacted to "control and deter illegal immigration to the United States" and explicitly prohibited employers from knowingly hiring undocumented workers. Also, for the first time in U.S. history, IRCA established sanctions for U.S. employers who knowingly hire undocumented workers.[71] Under IRCA, employers are required to verify the work authorization of prospective employees. This review process, effective November 6, 1986 and onward, consists of requiring all employers to complete a form (known as the "I-9") each time they seek to hire a person to perform work in the United States.[72] In order to complete the I-9, prospective employees need to provide two forms of identification to the employer.

67. The standard of review that employers must apply when examining documentation presented by a prospective employee is whether the document "reasonably appears on its face to be genuine."[73] As mentioned above, failure to comply with these requirements may lead to fines and other sanctions. It is the State's responsibility to ensure that employers in all U.S. states comply with the requirements established under IRCA and to sanction those employers who fail to comply. This system was in place at the time of hiring for both Mr. Zumaya and Mr. Lizalde.

V. LEGAL ANALYSIS

68. In addressing the allegations raised by the petitioners in this case, the Inter-American Commission emphasizes that it is necessary to consider the provisions of the American Declaration in the broader context of both the inter–American and international human rights systems. The Inter-American Commission considers this necessary in light of developments in the field of international human rights law since the Declaration was adopted and having regard to other relevant rules of international law applicable to

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[67] Matthew Gardner, Sebastian Johnson and Meg Wiehe, *Undocumented Immigrants' State & Local Tax Contributions*, The Institute on Taxation & Economic Policy (ITEP) (Apr. 2015), p. 1 ("ITEP Report").

[68] ITEP Report at p.2

[69] *Id.*

[70] SSA, Office of the Chief Actuary, "Effects of Unauthorized Immigration on the Actuarial Status of the Social Security Trust Funds," Actuarial Note No. 151 (Apr. 2013), p. 3, http://www.socialsecurity.gov/OACT/NOTES/pdf_notes/note151.pdf (estimating that undocumented workers contributed as much as $13 billion in payroll taxes to the social security system and only about $1 billion in benefit payments are attributable to unauthorized work, thus arriving at the $12 billion surplus). In fact, the Social Security Administration (SSA) has recognized that, without the monetary contributions of undocumented workers, it would have "entered into a persistent shortfall of tax revenue to cover payouts starting in 2009. *See* Maria Santana, "5 Immigration Myths Debunked," CNN Money (Nov. 20, 2011), http://money.cnn.com/2014/11/20/news/economy/immigration-myths/ (citing Stephen Gross, chief actuary of the SSA).

[71] Other major provisions included: legalization of undocumented aliens who had been continuously unlawfully present since 1982, legalization of certain agricultural workers, and increased enforcement at U.S. borders. *See* USCIS, "IRCA", http://www.uscis.gov/tools/glossary/immigration-reform-and-control-act-1986-irca (last accessed May 26, 2015).

[72] U.S. Citizenship and Immigration Services (USCIS), I-9 Employment Eligibility Verification (version May 2013), http://www.uscis.gov/i-9; USCIS, Handbook for Employers: Guidance for Completing I-9, M-274, Rev 04/30/13, http://www.uscis.gov/sites/default/files/files/form/m-274.pdf.

[73] 8 U.S.C. § 1324a(b)(1)(A)(ii).

member states against which complaints of violations of the Declaration are properly lodged.[74] In the case of the United States, relevant applicable international instruments include the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of all Forms of Racial Discrimination (ICEAFRD), to which it is a Party. Pursuant to the principles of treaty interpretation, the Inter-American Court of Human Rights has likewise endorsed an interpretation of international human rights instruments that takes into account developments in the *corpus juris* of international human rights law over time and in present-day conditions.

69. Developments in the corpus of international human rights law relevant to interpreting and applying the American Declaration may in turn be drawn from the provisions of other prevailing international and regional human rights instruments. In particular, this includes the American Convention on Human Rights, which, in many instances, may be considered to represent an authoritative expression of the fundamental principles set forth in the American Declaration. While the Commission clearly does not apply the American Convention in relation to Member States that have yet to ratify that treaty, its provisions may well be relevant in informing an interpretation of the Declaration.[75]

70. The petitioners claim that the State has violated the rights of Messrs. Zumaya and Lizalde under various Articles of the American Declaration. As concluded in the admissibility report in this matter, the IACHR is competent to examine and pronounce upon these allegations against the State of the United States. The Declaration is a source of legal obligation for application by the Inter-American Commission to the United States on the basis of its commitment to uphold respect for human rights as provided in the Charter of the Organization of American States (OAS). The United States deposited its instrument of ratification of the OAS Charter on June 19, 1951. Article 20 of the Inter-American Commission's Statute, as well as the Rules of Procedure of the Inter-American Commission, authorize the IACHR to examine the alleged violations of the Declaration raised by the petitioners against the State, which relate to acts or omissions that transpired after the State joined the OAS.

A. Right to equality before law (Article II of the American Declaration)

71. Article II of the American Declaration provides as follows:

> 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.

72. The Commission has repeatedly established that the right to equality and non-discrimination contained in Article II is a fundamental principle of the inter-American human rights system ("IAHRS").[76] The principle of non-discrimination is the backbone of the universal and regional systems for the

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[74] *See* I/A Court H.R., *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights.* Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10, para. 37 (pointing out that in determining the legal status of the American Declaration, it is appropriate to look to the Inter-American system of today in the light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948). *See also* ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16 ad 31 stating that "an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation").

[75] *See* IACHR, *Report of the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, Doc. OEA/Ser.L/V/II.106, Doc. 40 rev. (February 28, 2000), para. 38; IACHR, *Garza v. United States*, Case No. 12.275, Annual Report of the IACHR 2000, paras. 88-89.

[76] *See*, IACHR, Report Nº 80/11, Case 12.626, *Jessica Lenahan (Gonzales) et al.* (United States), July 21, 2011, para. 107; IACHR Report 40/04, Case 12.053, *Maya Indigenous Community* (Belize), October 12, 2004, para. 163; IACHR Report 67/06, Case 12.476, *Oscar Elías Bicet et al.* (Cuba), October 21, 2006, para. 228; IACHR, *Report on Terrorism and Human Rights*, Doc. OEA/Ser.L./V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, para. 335.

protection of human rights.[77] As with all fundamental rights and freedoms, the Commission has observed that States are not only obligated to provide for equal protection of the law[78], but they must also adopt the legislative, policy, and other measures necessary to guarantee the effective enjoyment of the rights protected under Article II of the American Declaration.[79]

73. The notion of equality set forth in the American Declaration relates to the application of substantive rights and to the protection to be given to them in the case of acts by the State or others.[80] The Commission has clarified that the right to equality before the law does not necessarily mean that the substantive provisions of the law have to be the same for everyone, but that the application of the law should be equal for all without discrimination.[81] In practice this means that States have the obligation to adopt the measures necessary to recognize and guarantee the effective equality of all persons before the law; to abstain from introducing in their legal framework regulations that are discriminatory towards certain groups either on their face or in practice; and to combat discriminatory practices.[82]

74. The Commission has previously recognized that while Article II does not prohibit all distinctions in treatment in the enjoyment of protected rights and freedoms, it does require that any permissible distinctions be based upon objective and reasonable justification, that they further a legitimate objective, "regard being had to the principles which normally prevail in democratic societies, and that the means are reasonable and proportionate to the end sought."[83] Regard should also be given to the fact that "[O]ne of the American Declaration's objectives . . . was to assure in principle 'the equal protection of the law to nationals and aliens alike in respect to the rights set forth.'"[84] In this regard, the Commission takes note of similar conclusions reached by UN treaty bodies, which have interpreted the prohibition of discrimination to include non-nationals, regardless of their legal status and authorization to work.[85]

75. The Commission also takes into account evolving standards in the area of discrimination, and considers that what has been expressed by the Human Rights Committee under the ICCPR is equally applicable in the inter-American system:

> The Committee believes that the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction, or preference which is based on

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[77] *See, e.g.*, International Covenant on Civil and Political Rights (Articles 2 and 26); International Covenant on Economic, Social and Cultural Rights (Articles 2.2 and 3); European Convention on Human Rights (Article 14); African Charter on Human and People's Rights (Article 2).

[78] IACHR, Report Nº 40/04, Case 12.053, *Maya Indigenous Community* (Belize), October 12, 2004, para. 162.

[79] IACHR, Report Nº 80/11, Case 12.626, *Jessica Lenahan (Gonzales) et al.* (United States), July 21, 2011, para. 108; IACHR, Report Nº40/04, Case 12.053, *Maya Indigenous Community* (Belize), October 12, 2004, para. 162.

[80] IACHR, Report No. 51/01, Case 9903, *Rafael Ferrer-Mazorra et al.*, United States, Apr. 4, 2001, para. 23; IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, 28 February 2000, OEA/Ser.L/V/II.106 Doc. 40 rev., para. 96 (citing the Inter-American Juridical Committee, "Draft Declaration of the International Rights and Duties of Man and Accompanying Report" (1946)); IACHR, Report Nº 51/96, Annual Report of the IACHR 1996, p. 550, paras. 177-178.

[81] IACHR, Report Nº 57/96, Case 11.139, *William Andrews* (United States), December 6, 1996, para. 173.

[82] IACHR, Report Nº 67/06, Case 12.476, *Oscar Elías Bicet et al.* (Cuba), October 21, 2006, paras. 228-231; IACHR Report Nº 40/04, Case 12.053, *Maya Indigenous Community* (Belize), October 12, 2004, paras. 162, 166.

[83] IACHR, Report No. 51/01, Case 9903, *Rafael Ferrer-Mazorra et al.*, United States, Apr. 4, 2001, para. 238 (citing as support of its position Eur. Ct. H.R., *Belgian Linguistics Case*, July 23, 1968, Series A Nº 6, 1 E.H.R.R. 252, p. 35, para. 10).

[84] IACHR, Report No. 113/14, Case 11.661, Merits, *Manickavasagam Suresh*, Canada, November 7, 2014, para. 86; IACHR, Report No. 51/01, Case 9903, *Rafael Ferrer-Mazorra et al.*, United States, Apr. 4, 2001, para. 239. *See also* IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, OEA/Ser.L/V/II.106 Doc 40.rev (February 28, 2000), para. 96.

[85] *See, e.g.*, U.N. Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, General comment no. 2 on the rights of migrant workers in an irregular situation and members of their families, CMW/C/GC/2 (Aug. 2013), para. 18 (citing U.N. Committee on Economic, Social and Cultural Rights, General comment no. 20 on non-discrimination in economic, social and cultural rights, E/C.12/GC/20 (July 2009), para. 30).

any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[86]

76. Regarding employment of undocumented workers, the Commission deems it pertinent to state at the outset that neither the State nor individuals in a State are obligated to offer employment to undocumented workers. In other words, the State and individuals, such as employers, can abstain from establishing an employment relationship with migrants in an irregular situation[87]. However, upon assuming an employment relationship, the Commission considers that the protections accorded by law to workers, with the range of rights and obligations covered, must apply to all workers without discrimination, including on the basis of documented or undocumented status.[88]

77. In the present case, the Commission finds that Mr. Zumaya and Mr. Lizalde, who assumed an employment relationship and were later injured on the job, experienced treatment different than that given to documented workers when they sought to obtain workers' compensation for their injuries and to access justice.

78. This difference in treatment is not attributable to a facial distinction in the laws but rather to a "distinction, exclusion, or preference" in their implementation, which has the practical effect of impairing the rights of undocumented workers. As the State has put forth and petitioners acknowledge, there are several laws that protect workers and mechanisms in place to enforce these laws, and on the face of these laws it does not matter whether the worker involved has work authorization. However, the Commission observes that, despite the terms of these laws and mechanisms, neither Mr. Zumaya nor Mr. Lizalde were able to obtain full benefits under workers' compensation programs, including medical benefits.

79. The "distinction, exclusion, or preference" is notable in the precedents established in both jurisdictions, Pennsylvania and Kansas, as well as in the actions and practices of both State and non-State actors. There are two seminal cases that were repeatedly cited by both the Petitioners and the State in their submissions. These cases demonstrate the reach of *Hoffman*, and thus are important to mention here.

80. In the first case, *Reinforced Earth Co. v. Workers' Compensation Appeals Board* ("*Reinforced Earth*"), an undocumented worker (the "claimant") employed as a maintenance helper sustained a head, neck, and back injury.[89] As part of the job, the claimant routinely cut and welded iron, repaired motors, and lifted heavy steel beams. As a result of his injuries, the claimant was unable to return to work, and following termination from employment, his employer was ordered to pay claimant's total disability payments, medical expenses, to remain responsible for claimant's medical expenses, and pay claimant's litigation costs. The employer appealed this order several times, eventually reaching the Pennsylvania Supreme Court, seeking a suspension in the claimant's benefits and the extension of a blanket "public policy exception" that would exempt undocumented workers from coverage under the IRCA, which had been denied on appeals below.

81. The Pennsylvania Supreme Court, in ruling on the case, held that it would not consider announcing a public policy exception with respect to the receipt of workers' compensation benefits by undocumented workers, as the legislature has already spoken on the issue and to do so would be to exceed its

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[86] U.N. Human Rights Committee, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev.1 (1994), General Comment 18, Non-discrimination, p. 26.

[87] Referred to as "[foreign] undocumented workers" in this merits brief.

[88] *See* I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, paras. 131-36. *See also*, Committee on the Elimination of Racial Discrimination (CERD), General Recommendation 30, Discrimination against Non-citizens, CERD/C/64/Misc.11/rev.3 (2004), para. 35.

[89] 570 Pa. 464 (2002).

powers, engaging in an "exercise of judicial legislation."[90] However, the Court reversed in one key area; under Pennsylvania law, when an employer or insurer seeks to terminate or modify disability benefits, the employer or insurer must show medical evidence of a change in condition and evidence of a referral (or referrals) to an open job or jobs, "which fits in the occupational category for which the claimant has been given medical clearance," such as light work or sedentary work.[91] In *Reinforced Earth*, the Court eliminated the second requirement for employers and insurers specifically when the claimant is an undocumented worker, finding that "when an employer seeks to suspend the workers' compensation benefits that have been granted to an employee who is an unauthorized alien, a showing of job availability by the employer is not required."[92] Clarifying its position, the Court affirmed that while the employer may seek suspension of the total disability compensation claimant was granted, the employer may not seek a suspension of medical benefits awarded, "as the provisions of [the section providing for payment of reasonable surgical and medical services] apply to injuries whether or not loss of earning power occurs."[93]

82. In the second case, *Doe v. Kansas Department of Human Resources*, an undocumented worker from Mexico, Delia Butanda, sustained injuries on the job at a meatpacking plant.[94] She filed a claim for workers' compensation using the false name (Victoria Acosta) and social security number she originally used to obtain employment at the plant. Ms. Butanda was awarded over $57,000 in compensation for her injuries.[95] Later, as the result of a "referral from the Kansas Insurance Department," the Workers' Compensation Division's Fraud and Abuse Unit discovered Ms. Butanda's real identity.[96] Subsequently, in an administrative decision later affirmed by the Kansas Supreme Court, Ms. Butanda was found to have committed a "fraudulent or abusive act" in obtaining workers' compensation benefits through the use of this assumed identity, an action which also amounted to concealment of a material fact.[97] As a result of this discovery, her compensatory benefits were suspended.[98]

83. Notably, in its decision, the Kansas Supreme Court acknowledged that Ms. Butanda's employer, NBP, "knew or should have known" that she was an undocumented worker and "yet was willing to look the other way when it hired her;" nonetheless, the Court reasoned that NBP's complicity was irrelevant in the determination of the culpability of Ms. Butanda for her fraudulent actions.[99]

84. The Commission observes that the practical effect of the Kansas Supreme Court's ruling in *Doe* has been to require undocumented workers, if injured and terminated from the job all the while under a false identity, to disclose their real identity in workers' compensation proceedings, such that the appropriate

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[90] 570 Pa. at 475.

[91] *Kachinski v. Workmen's Compensation Appeal Board* (Vepco Construction Co.), 516 Pa. 240, 251-252 (1987) (these are the first two elements of a test established in this case, referred to as the "Kachinski four pronged test").

[92] 570 Pa. at 479-80 (clarifying in n. 11 that it "does not address" whether the lower court's modification of the "job availability prong" for the modification of benefits, as originally established in *Kachinski v. Workmen's Compensation Appeal Bd.*, 532 A.2d 374 (Pa. 1987), to allow for availability to be established through expert testimony or advertisements in the employment area would be correct").

[93] 570 Pa. at n. 12.

[94] 277 Kan. 795 (2004).

[95] *Acosta v. National Beef Packing Co., L.P.*, 273 Kan. 385 (2002). In this earlier decision, the Kansas Supreme Court found that Ms. Butanda (a/k/a Victoria Acosta) was owed $57,936.72 out of the total $78,608.38 awarded to her, an amount that her employer had not paid and refused to pay even prior to the amount being set aside based on the discovery of her fraud.

[96] 277 Kan. at 797.

[97] 277 Kan. at 799-804.

[98] See *supra* n. 86. However, at the outset of the case, the court affirms that Ms. Butanda was "legally entitled to the benefits she [already] received." 277 Kan. 795; see also, supra 273 Kan. 385 (2002) (upholding Ms. Butanda's claim to $57,936.72).

[99] 277 Kan. at 807 (upon applying for employment at the plant, Ms. Butanda "disclosed that she was prevented from lawfully working in the country because of visa or immigration status...").

agency may properly calculate the amount of benefits owed, or face prosecution for fraud if caught.[100] However, such disclosure automatically triggers violations of IRCA.[101] Further, as a result of *Doe*, any awards made in Kansas prior to the discovery of the use of a false identity may be set aside or suspended, meaning that the final award may be modified not on the basis of the injury or employer wrongdoing or knowledge – actual or implied – of workers' immigration status, but rather an action made at the outset of the employment relationship.

85. Experts have warned that, as the result of *Doe* and similar cases, undocumented immigrants will be "deterred" from making workers' compensation claims because the process "risks intervention by federal immigration officials."[102] They also caution that "despite any complicity and causation on their behalf, unscrupulous employers will benefit with lower labor costs," and "unauthorized workers [have] more reason to cling to their assumed identities [thereby] promot[ing] identity fraud."[103]

86. The Commission takes note of two cases in other jurisdictions within the United States that restrict access to equal remedies for undocumented workers. In *Balbuena v. IDR Realty, LLC*, the highest state court in New York found that, based on *Hoffman*, an injured undocumented worker was precluded from claiming lost wages derived from income earned in the United States but could seek wages based on income that could be earned in the worker's home country.[104] In *Sanchez v. Eagle Alloy*, the Michigan Supreme Court denied review of an appellate court decision finding that, based on *Hoffman*, due to the workers' commission of a crime (use of false identities), the weekly wage-loss benefits of the two undocumented workers involved, who were fired after being injured on the job, should be suspended.[105]

87. Finally, in a more recent decision of the NLRB and in light of the significant jurisprudence on these issues at both state and federal levels in the United States, the Commission deems important to mention the case of *Mezonos Maven Bakery, Inc. and Puerto Rican Legal Defense and Education Fund* ("*Mezonos*").[106] In *Mezonos*, the NLRB found that even where it is undisputed that the employer, not the employees, violated IRCA, the undocumented employees who are wrongfully fired are still foreclosed from being awarded backpay on the basis of this violation.[107] The NLRB made clear that its hands were tied, "regardless of the merits of [claimants'] arguments," as the Supreme Court in *Hoffman* used "IRCA violator-neutral" language - i.e., regardless of which party, employer or employee, committed the violation – and noted that it would be unable to even order such a remedy, as the Court in *Hoffman* found that a backpay award "lies beyond the bounds of the Board's remedial discretion." Lastly, the NLRB in *Mezonos* summarized *Hoffman*'s ruling as, where undocumented workers are involved and "[without regard to] which party violates the law, the result

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[100] 277 Kan. 800 (citing the District Court's finding on the evolving way records are being made and maintained [i.e. via digitalization and rapid indexing of persons based on their social security numbers] that "without a person's name and social security number, an agency [ ] would be unable to properly investigate and gather information on that individual, or at the very least, it would be severely handicapped in its efforts to uncover information").

[101] 8 U.S.C. § 1324c(a).

[102] Fritz Ebinger, *Exposed to the Elements: Workers' Compensation and Unauthorized Farm Workers in the Midwest*, 13 Drake J. Agric. L. 263, 281 (2008). *See also* Petitioners' document dated Nov. 1, 2006 at p. 21-22 (citing Brent I. Anderson, *The Perils of U.S. Employment for Falsely Documented Workers (and Whatever You Do, Don't File a Work Comp Claim)*, paper submitted to American Bar Association, Labor and Employment Law Workers' Compensation Committee Midwinter Meeting (March 2006) (providing that an Assistant U.S. Attorney in Wichita, Kansas made public the practice of verifying a worker's immigration status after he or she files a worker's compensation claim, with employers and insurance companies referring those cases that raise flags to the U.S Attorney's office. This office proceeds to these employees for fraud, which ultimately may lead to their deportation)).

[103] Fritz Ebinger, *Exposed to the Elements: Workers' Compensation and Unauthorized Farm Workers in the Midwest*, 13 Drake J. Agric. L. 263, 281 (2008).

[104] 6 N.Y. 3d 338, 350, 370 (2006) (affirming the judgment of the Appellate Division, First Department).

[105] 658 N.W.2d 510, 519-21 (Mich. Ct. App. 2003), cert. denied *Sanchez v. Eagle Alloy, Inc.*, 471 Mich. 851 (Mich. 2004).

[106] 357 NLRB No. 47 (2011).

[107] 357 NLRB at p. 1, 4. The employer in this case never asked for work authorization documents when it hired the workers who were later unlawfully fired. These employees worked for the employer for periods ranging from 5 months to 8 years, and were discharged after concertedly complaining about unfair labor practices.

is an unlawful employment relationship [between an employer and an undocumented worker]."[108] As such, the NLRB may not encroach upon federal law by "legitimizing" that illegal relationship through awards designed to remedy labor violations.[109]

88. As mentioned above, the difference in treatment is not only attributable to legal precedent but also to the practice of local and federal officials. In this regard, in the cases of both Mr. Zumaya and Mr. Lizalde, local and federal officials collaborated with private individuals (employers and insurance agencies) to enforce the infraction of immigration laws; however, these actions took place only following the initiation of workers' compensation claims by both workers and to the detriment of the processing of these claims. The Commission considers that the actions of the State in this context had the effect of extinguishing the two workers' compensation claims, a scenario that would have not taken place but for their irregular migratory situation: Mr. Lizalde was deported prior to the conclusion of the claim and it was in this context that the insurance agency of Mr. Zumaya's employer refused to pay him workers' compensation benefits.

89. In the present case, the Commission observes that, despite the State's argument that benefits other than lost wages are still available to undocumented workers post-*Hoffman*, neither Mr. Zumaya nor Mr. Lizalde received full medical benefits for the injuries they sustained. Further, the foregoing analysis makes plain that the State subjected the two victims, Messrs. Zumaya and Lizalde, as non-nationals lacking authorization to work, to a legal regime in relation to their workers' compensation proceedings that is fundamentally distinct from that applicable to other national and/or authorized workers.

90. The Commission therefore considers that the State has failed to ensure that the protections in the law for workers, including remedies for labor rights violations, are recognized and applied without discrimination to every worker. The Commission acknowledges that the State has the prerogative to prosecute persons who commit social security fraud, but it emphasizes that such prosecution is irrelevant to and in no way should affect the right of an undocumented injured worker to receive and enjoy labor rights, such as to workers' compensation, once the person has assumed an employment relationship in the US.

91. In the Commission's view and based on the record in this case, the State has not shown that this difference in treatment is based upon an objective and reasonable justification, that it furthers a legitimate objective, or that the means are reasonable and proportionate to the end sought.[110] The State has described in broad strokes a number of programs and mechanisms to protect workers and enforce violations of labor laws against employers. However, the State does not provide any concrete link between the general and the specific; it has failed to show any measures taken to ensure the effective equality of Messrs. Zumaya and Lizalde in obtaining workers' compensation benefits equal to those received by similarly-situated, documented peers or in combatting the identified discriminatory practices.

92. Based on the above, in denying the two victims access to remedies equal to that of other injured workers, the Commission considers that the State has denied them the protection of equality before the law, in violation of Article II of the American Declaration.

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[108] 357 NLRB at p. 2-3 (citing *Hoffman* at p. 148).

[109] 357 NLRB at p. 3.

[110] The IACHR would be remiss if it failed to reject here the argument that discrimination against undocumented workers discourages them from seeking employment in contravention of U.S. law. Rather, the Commission considers that by requiring employers to provide equal redress to employees, undocumented or otherwise, would do more to achieve this goal. If undocumented workers must be paid the same, treated the same, and remedied the same under the law, the incentives for hiring undocumented workers are reduced. Additionally, the Commission observes that measures, such as the denial of workers' compensation or a denial of certain workers' compensation benefits, in the wake of *Hoffman* have failed to discourage employment of undocumented workers: in 2000, there were an estimated 5.5 million unauthorized immigrant workers in the US, representing 3.8% of the total work force. This number has, with some small variations, steadily continued to grow through 2012, when the estimated number of unauthorized immigrant workers was 8.1 million or 5.1% of the labor force. *See* Jeffrey Passel and D'Vera Cohn, *Immigrant Workers in Production, Construction Jobs Falls Since 2007: In States, Hospitality, Manufacturing and Construction are Top Industries*, Pew Research Center (Mar. 2015), p. 5. Jeffrey Passel and D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010* (Feb. 1, 2011), p. 17.

B. Rights to juridical personality and to enjoy basic civil rights and to a fair trial (Articles XVII and XVIII of the American Declaration)

93. Articles XVII and XVIII of the American Declaration provide as follows:

Article XVII. Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights.

Article XVIII. Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

94. With regard to the right to juridical personality and to enjoy basic civil rights, enshrined in Article XVII of the American Declaration, the Commission highlights that this right implies the recognition of every person as entitled to rights and obligations based on the sole condition of being human. As such, this right is an essential requirement or condition for the enjoyment of all rights, and it likewise imposes important limits to State action.[111] The Commission observes that the failure to recognize juridical personality harms human dignity because it renders a person vulnerable to non-observance of his or her rights by the State or other individuals.[112]

95. The Commission highlights that the American Declaration, unlike other international instruments, specifically includes within Article XVII the right to "enjoy the basic civil rights," one of which is the right to work. The Charter of the Organization of American States (hereinafter "OAS Charter" or the "Charter") first established this right in its Article 45 (b), providing that "[w]ork is a right and a social duty." The Charter further establishes that this right must be observed under "proper conditions," defined as those that "ensure life, health and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working."[113]

96. In the present, the Commission finds that workers' compensation programs and the benefits provided through them fall squarely within the concept of "proper conditions" as prescribed in the OAS Charter. Payments for medical care due to injuries suffered on the job and disability payments, among others, are precisely those types of conditions that ensure life, health, and a decent standard of living when a circumstance, such as an accident, deprives a worker of the possibility of working. In addition, the failure to remedy the wrong with the correct or proportionate redress in the situation of these undocumented workers constitutes an impermissible failure to recognize their juridical personality. In effect, this failure creates a legal limbo in which the violations committed against them are not recognized under the law.

97. Based on a review of this Commission's decisions and principles of international law, the IACHR considers that undocumented workers should not be denied protection of their human rights by the State on the basis of infractions of immigration regulations. In other words, it does not follow that an infraction of (civil) domestic legislation in one area should be used to deprive that person of the protection of his or her rights in another. The IACHR emphasizes that an infraction of a State's immigration laws does not exempt the State from complying with its obligations imposed by both domestic and international law to remedy the violation of labor rights. To find otherwise would be to provide for an indirect, yet highly

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[111] Independent of the two undocumented workers' existential or juridical condition, the Commission considers that they have full legal capacity in the circumstances presented. Messrs. Zumaya and Lizalde sought the recognition of their economic and social rights as workers under the workers' compensation schemes into which they both contributed, as opposed to the recognition of certain political rights, such as the right to vote in the US, which are not normally granted to non-nationals.

[112] I/A Court H.R., *Case of the Yean and Bosico Children v. The Dominican Republic*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 8, 2005. Series C No. 130, para. 180.

[113] Articles 34 (g) and 45 (b) of the OAS Charter; Article XIV of the American Declaration.

effective, way of discriminating against undocumented migrant workers by denying them juridical personality and creating legal inequality between persons.

98. As this Commission has recognized previously, both Articles XVII and XVIII are predicated upon the recognition and protection by a State of an individual's fundamental civil and constitutional rights. Article XVIII further prescribes a fundamental role for the courts of a State in ensuring and protecting these basic rights.[114] For its part, Article XVIII of the American Declaration establishes that all persons are entitled to access judicial remedies when they have suffered human rights violations.[115] This right is similar in scope to the right to judicial protection and guarantees contained in Article 25 of the American Convention on Human Rights, which is understood to encompass: the right of every individual to go to a tribunal when any of his or her rights have been violated; to obtain a judicial investigation conducted by a competent, impartial and independent tribunal that establishes whether or not a violation has taken place; and the corresponding right to obtain reparations for the harm suffered.[116]

99. The Commission has affirmed for many years that it is not the formal existence of judicial remedies that demonstrates due diligence, but rather that they are adequate and effective.[117] The "effectiveness" of a judicial remedy has two aspects: one is normative and the other is empirical.[118] The normative aspect deals with the remedy's suitability, or its ability to determine whether a violation of human rights occurred, and its capacity to yield positive results or responses, principally measured in terms of whether it offers the possibility to provide adequate redress, for human rights violations.[119]

100. The second aspect, the empirical nature of the remedy, refers to the political or institutional conditions that enable a legally recognized remedy to "fulfill its purpose" or "produce the result for which [it] was designed."[120] In this regard and as the Commission has previously stated, a remedy is not effective when it is "illusory," excessively onerous for the victim, or when the State has not ensured its proper enforcement by the judicial authorities.[121]

101. Thus, when the State apparatus leaves human rights violations unpunished and the victim's full enjoyment of human rights is not promptly restored, the State fails to comply with its positive duties under international human rights law.[122] The same principle applies when a State allows private persons to

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[114] IACHR, Report No. 51/01, Case 9903, *Rafael Ferrer-Mazorra et al.*, United States, Apr. 4, 2001, para. 243.

[115] IACHR, Report Nº 80/11, Case 12.626, *Jessica Lenahan (Gonzales) et al.* (United States), July 21, 2011, para. 172; IACHR, Report Nº 54/01, Case 12.051, *Maria Da Penha Maia Fernandes* (Brazil), April 16, 2001, para. 37.

[116] IACHR, Report Nº 80/11, Case 12.626, *Jessica Lenahan (Gonzales) et al.* (United States), July 21, 2011, para. 172; IACHR, Report Nº 40/4, Case 12.053, *Maya Indigenous Community* (Belize), para. 174; IACHR, Report Nº 54/01, Case 12.051, *Maria Da Penha Fernandes* (Brazil), April 16, 2001, para. 37.

[117] *See* IACHR, Report Nº 80/11, Case 12.626, *Jessica Lenahan (Gonzales) et al.* (United States), July 21, 2011, para. 173; IACHR, Report Nº 81/10, Case 12.562, *Wayne Smith, Hugo Armendatriz, et al.*, United States, July 12, 2010, para. 62; IACHR, ACHR, Report on Admissibility Nº 52/07, Petition 1490-05, *Jessica Gonzales and Others (United States)*, July 24, 2007, para. 42; IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser.L/V/II, Doc. 68 (January 20, 2007), para. 26. *See also* I/A Court H.R., The "Street Children" Case (Villagrán Morales et al.). Judgment of November 19, 1999. Series C No. 63, para. 235; IACHR, Report No. 105/09, Petition P-592-07, Admissibility, *Hul'Qumi'Num Treaty Group*, Canada, October 30, 2009, para. 31.

[118] IACHR, *Access to Justice as a Guarantee of Economic, Social, and Cultural Rights*, OEA/Ser.L/V/II.129 Doc.4 (Sept. 2007) (hereinafter "IACHR Access to Justice Report"), para. 245 (citing Courtis C., *El derecho a un recurso rápido, sencillo y efectivo frente a afectaciones colectivas de derechos humanos*, in Víctor Abramovich, Alberto Bovino and Christian Courtis (comp.) "La aplicación de los tratados de derechos humanos en el ámbito local. La experiencia de una década (1994-2005)", Buenos Aires, CELS and Editores del puerto).

[119] *Id.* at paras. 246-47.

[120] *Id.* at para. 251.

[121] *Id.*

[122] IACHR, Report Nº 80/11, Case 12.626, *Jessica Lenahan (Gonzales) et al.* (United States), July 21, 2011, para. 173; IACHR, *The Situation of the Rights of Women in Ciudad Juarez*, OEA/Ser. L/V/II.117. Doc. 44 (March 7, 2003), para. 51.

act freely and with impunity to the detriment of the rights recognized in the governing instruments of the IAHRS.

102. The Commission further maintains that there is a direct connection between the suitability of available judicial remedies, as mentioned above, and the real possibility of observance of economic, social, and cultural rights. The IACHR has identified the principle of equality of arms as an integral part of the right to a fair trial, given that the types of relationships governed by social rights usually give rise to and presuppose conditions of inequality between the parties in a dispute – such as between workers and employers or the beneficiary of a social service and the State that provides the service. That inequality often translates into disadvantages in the framework of judicial proceedings.[123]

103. The IACHR considers that real inequality between the parties in a proceeding engages the duty of the State to adopt all the necessary measures to lessen any deficiencies that thwart the effective protection of the rights at stake. The Inter-American Commission has also noted that the particular circumstances of a case may determine that guarantees additional to those explicitly prescribed in the pertinent human rights instruments are necessary to ensure a fair trial. For the IACHR this includes recognizing and correcting any real disadvantages that the parties in a proceeding might have, thereby observing the principle of equality before the law and the prohibition of discrimination.[124]

104. In the context of the specific case, Messrs. Lizalde and Zumaya filed their workers' compensation claims pursuant to serious work-related injuries that affected their physical integrity with lasting consequences. The interests at stake therefore dealt not only with their social and economic rights generally, but also very concretely with their personal integrity and involved their need for ongoing medical treatment.

105. In the present case, the Commission observes that Mr. Lizalde did not have access to a full and fair hearing by the courts. He initially had access to a workers' compensation mechanism[125]; however, his deportation prior to the conclusion of the workers' compensation proceeding he initiated was a principal factor in rendering the second element – the empirical nature – of the judicial remedy null. Upon being deported, the workers' compensation proceeding could not produce the result for which it was designed, as Kansas law requires the worker to be physically present in order to continue his/her case. For his part, Mr. Zumaya was advised by his lawyer to accept a settlement with his employer for less than what experts estimate he would have received were he a U.S. citizen.[126]

106. Regarding the situation of Mr. Lizalde, the State argues that, while it may be more difficult, it is not impossible to continue a worker's compensation claim after being deported, and, regardless, Mr. Lizalde and his lawyers did not try to pursue the proceedings once he was deported by way of requesting humanitarian parole to allow his entry into the U.S.

107. On this point, the IACHR notes that it is possible for a deported person to apply for a non-immigrant visa or for humanitarian parole, which would allow for entry into the country thus satisfying the requirement of presence to continue a workers' compensation claim. However, the IACHR also notes that undocumented workers would likely be subject to certain bars on their readmission under a non-immigrant visa.[127] In order to overcome these bars, they would, at the time of requesting a non-immigrant visa, also

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[123]IACHR Access to Justice Report, *supra*, paras. 19-20.

[124]IACHR Access to Justice Report, *supra*, para. 20.

[125] In both Pennsylvania and Kansas, the adjudicating body is administrative in nature.

[126] This was based on his lawyer's assessment of Pennsylvania jurisprudence at the time. The Commission notes that some experts have interpreted *Reinforced Earth Co.*, 570 Pa. 464 (2002) as prohibiting undocumented workers from receiving any workers' compensation benefits on the basis of public policy.

[127] U.S. Department of State, "Visa Ineligibilities," (last accessed Dec. 11, 2015), http://travel.state.gov/content/visas/en/general/ineligibilities.html#visa (among them, refer to section 212(a)).

have to submit requests for waivers of their inadmissibility.[128] By way of example, the steps required to apply for the latter, humanitarian parole, include the following: (1) an application for a travel document (Form 131), which includes a filing fee of $360 per parole applicant; (2) since parolees may not work, locating a sponsor in the US, and having him or her complete and file Form I-134, Affidavit of Support; and (3) mailing these documents, fees, and a supporting explanation of why the person should be granted humanitarian parole to one of two locations in the state of Texas.[129] While the U.S. government does not specify the time frame to analyze and decide upon requests for humanitarian parole, it does state that if no response is received within 120 days, then only on or after the 121st day may the applicant, by mail only, contact the Parole Branch, the unit that adjudicates these requests.[130]

108. In short, both processes to return to the United States are complex, costly[131], and potentially time-consuming, making them - for many deported or voluntarily-departed workers, and certainly the two workers in this case - unduly burdensome. Furthermore, there are no guarantees that such applications will be granted.[132]

109. The Commission also finds that these hurdles allow for undocumented workers to be exploited and discriminated against with little to no guarantees of judicial protection. In this regard, the Commission takes note of the views espoused by U.S. Supreme Court Justice Breyer in his dissenting opinion in *Hoffman*, where he recognized the high possibility of exploitation of undocumented workers "if no real penalties existed for labor law violations [committed against undocumented workers] beyond a posting [of cease and desist orders] and the possibility of a contempt charge for repeat offenders."[133]

110. Based on its review of international law and precedents within the inter-American system[134], the IACHR finds that once a person, regardless of migratory situation or authorization to work, enters into an employment relationship, he or she has the same rights as all other workers, and States are obligated to respect, protect, and guarantee these rights.

111. The Commission's analysis of the merits of this case indicates that the judicial branch of the State has not fully recognized the victims' right to non-discrimination and Mr. Lizalde's right to juridical personality, nor has it afforded the victims adequate or effective protection of their rights as workers, as

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[128] It is worth noting that the filing fee for the waiver of inadmissibility is $585. Additional information on the waiver application may be found at USCIS, "I-601, Application for Waiver on Grounds of Inadmissibility," (edition date May 22, 2015), http://www.uscis.gov/i-601.

[129] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS), "Humanitarian Parole," http://www.uscis.gov/humanitarian/humanitarian-parole (last accessed June 10, 2015).

[130] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS), "Humanitarian Parole," http://www.uscis.gov/humanitarian/humanitarian-parole (last accessed June 10, 2015).

[131] The filing costs alone are high, but the Commission also considers the potentially high associated costs, as well, such as those to mail the paperwork through an international courier mail service, obtain a passport (if necessary), and international travel (transportation, lodging, meals, etc.).

[132] A study conducted by the U.S. Government Accountability Office (GAO) that analyzed the adjudication of requests for humanitarian parole during a period spanning October 1, 2001 to June 30, 2007 found that one of the top 10 reasons for denial of a request, accounting for 13% of denials, was "The applicant had committed a prior immigration violation or other criminal violation." Additionally, the same study found that although Mexican nationals constituted the largest number of humanitarian parole applicants, 82% of all Mexican applicants were denied. *See* U.S. GAO, "Immigration Benefits: Internal Controls for Adjudicating Humanitarian Parole Cases are Generally Effective, but Some Can Be Strengthened," GAO-08-282 (Feb. 2008), p. 15-17 (noting that the adjudication process is discretionary and that the adjudicating officials noted that "none of the reasons are in and of themselves automatically disqualifying"), 13, 21.

[133] *Hoffman* at 154. *See also* Fritz Ebinger, *Exposed to the Elements: Workers' Compensation and Unauthorized Farm Workers in the Midwest*, 13 Drake J. Agric. L. 263, 280 (2008) (concluding that "If employers know that they will not be liable for expenses of unauthorized worker injuries, then they naturally have a financial incentive to find and hire unauthorized workers. In the least, some employers will look the other way and accept documents that are known to be false under the pretext that they are 'reasonably genuine'").

[134] *See, e.g.*, OC-18/03 at paras. 133-34.

provided for under the American Declaration. While the victims were able to file claims for workers' compensation and to file suits against their employers for failure to comply with the terms of the workers' compensation, any relief available from the courts is conditioned, reduced, or denied based on the migratory situation of the workers, a condition which may not be legitimately used to deprive workers harmed on the job from the right to a remedy for a serious injury.

112. In reaching this conclusion, the Commission takes into consideration the situation of both workers. In the case of Mr. Lizalde, who was unable to obtain full medical benefits and unlike Mr. Zumaya did not reach a settlement with his employer, the State has demonstrated that the existence of a worker's compensation suit is not enough to suspend a deportation, thus heightening the risk that undocumented workers' rights will not be adequately processed via the judicial system. In the case of Mr. Zumaya, the Commission takes into account the allegations of the petitioners and the State, but it considers that it lacks sufficient elements to find a violation of Mr. Zumaya's rights under Articles XVII and XVIII of the American Declaration. Specifically, it lacks information on the terms of and reasons for the settlement he reached with his employer as well as the consequences of this settlement on the claims presented before the IACHR. Despite the lack of information with respect to Mr. Zumaya's settlement, sufficient evidence was presented by the parties regarding the uncertainty faced by undocumented workers over the outcome of their claims. In this regard, the Commission recognizes that undocumented workers have had varying rates of success on their claims, given that the workers' compensation system in the United States is a patchwork of fifty different systems, with varying interpretations of the effect of the *Hoffman* decision.

113. In this regard, the Commission points to the Concluding Observations of the U.N. Committee on the Elimination of Racial Discrimination (CERD) on the United States, which support its conclusion in the present case: in pertinent part, the CERD stresses that decisions such as that of *Hoffman* from the U.S. Supreme Court "have further eroded the ability of workers belonging to racial, ethnic and national minorities to obtain legal protection and redress in cases of discriminatory treatment at the workplace, unpaid or withheld wages, or work-related injury or illnesses."[135]

114. Based on the foregoing, the Commission finds that the State is responsible for violations of Mr. Lizalde's rights under Articles XVII and XVIII of the American Declaration.

C. Right to social security (Article XVI of the American Declaration)

115. Article XVI of the American Declaration establishes that "Every person has the right to social security which will protect him from the consequences of unemployment, old age, and any disabilities arising from causes beyond his control that make it physically or mentally impossible for him to earn a living."

116. As explained in the preceding section, the OAS Charter provides in Article 45 (b) that "proper [working] conditions" are those that "ensure life, health and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working."[136] The Commission also deems pertinent to note here that Article 45 (h) of the Charter explicitly calls for the "development of an efficient social security policy," and Article 46, on the subject of regional integration, deems it necessary for Member States to "harmonize social legislation . . . especially in the labor and social security fields, so that workers shall be equally protected."

117. The Commission considers that the right of all workers to receive benefits arising from the employment relationship, such as those included within workers' compensation schemes, is one of a group of economic and social rights that must accompany civil and political liberties for the full protection of human

[135] U.N. CERD, "Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the CERD," CERD/C/USA/CO/6 (Feb. 2008), at para. 28.

[136] Articles 34 (g) and 45 (b) of the OAS Charter; Article XIV of the American Declaration.

rights, such as the rights to property or to juridical personality.[137] Benefits such as access to medical treatments and services paid by the employer to cover the cost of healing injuries sustained on the job, as well as disability payments to provide a source of income for the injured worker to support himself or herself during the time in which the disability prevents him or her from working, are critical and necessary to meet the social security standards established in the OAS Charter and Article XVI of the American Declaration. Access to medical treatment and services also relates to the right to personal integrity. These benefits are earned by workers and form part of workers' compensation. The Commission therefore considers that workers' compensation programs, generally, as they exist in the states of the United States, seek to provide protections to workers during vulnerable times, and as such clearly fall within the scope of "social security."

118. The Inter-American Court has endorsed a similar position. In its *Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants*, it cited social security as a right which all workers irrespective of migratory status possess and one that assumes a "fundamental importance...yet [is] frequently violated."[138] The Commission finds illustrative the view put forth by Judge Sergio García Ramírez in his concurring opinion, citing social security as a "particularly important" right, as one that contributes to determining the "general framework for the provision of services and for the protection and welfare of those that provide them."[139]

119. Labor rights are also human rights.[140] The Commission notes that the right to social security, along with others, is similar to the provisions of other international instruments in this regard. For example, the United States is a Member Country of the International Labour Organization (ILO), which is a specialized agency within the United Nations.[141]

120. In its *Note on the Dignity and Rights of Migrant Workers in an Irregular Situation*, the ILO has clarified that "unless otherwise stated, all international labour standards cover all workers irrespective of their nationality or immigration status. Lack of labor protection for migrant workers in an irregular situation undermines protection generally for lawfully resident migrant workers as well as national workers."[142] Further, the United States, as a member of the ILO, is obliged "to respect, to promote and to realize" the principles contained in the ILO Declaration on Fundamental Principles and Rights at Work, which was adopted in 1998 ("1998 ILO Declaration").[143] One of these fundamental principles centers on eliminating

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[137] *See also* Brief for the Academy of Human Rights and International Humanitarian Law of the American University Washington College of Law and the Human Rights Program of the Universidad Iberoamericana de Mexico as Amicus Curiae, p. 53-59, I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18.

[138] *See* I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 157.

[139] Judge Sergio García Ramírez's non-exhaustive list of "particularly important" rights: prohibition of obligatory or forced labor, elimination of discriminations in the provisions of labor, abolition of child labor, protection of women workers and the rights corresponding to remuneration, the working day, rest and holidays, health and security in the workplace, association to form trade unions and collective negotiation. OC-18/03 (concurring opinion), para. 33.

[140] *See* I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18; *see also* the Universal Declaration on Human Rights (UDHR), ICCPR, and ICESCR.

[141] *See* ILO, Official Relations Branch, Alphabetical List of ILO Member Countries, http://www.ilo.org/public/english/standards/relm/country.htm.

[142] ILO, Note on the Dignity and Rights of Migrant Workers in an Irregular Situation, Submitted to ILO-Brussels (Nov. 30, 2011).

[143] ILO Member States are required to do so regardless of whether they have ratified the relevant Conventions. ILO, "About the Declaration," http://www.ilo.org/declaration/thedeclaration/lang--en/index.htm. Of the eight core Conventions, the US has ratified two: #105 on forced labor and #182 on the worst forms of child labor.

discrimination in hiring, assignment of tasks, working conditions, pay, benefits, promotions, lay-offs and termination of employment.[144]

121. Additionally, the Commission notes that the United States is a signatory to the North American Agreement on Labor Cooperation (NAALC), the supplemental labor accord to the North American Free Trade Agreement (NAFTA).[145] The three signatories – Canada, Mexico, and the United States – agreed in the NAALC to commit themselves to promote 11 labor principles that apply to "workers" (including non-citizens). These principles include: prevention of occupational injuries and illnesses; compensation in cases of occupational injuries and illnesses, and protection of migrant workers.[146] Thus, not only under inter-American standards but also through other international treaties and conventions does the US have the obligation to ensure that all workers have effective access to social security programs that protect and provide remedies for workers injured on the job.

122. Lastly, the Commission observes that there are two programs run by the U.S. Social Security Administration (SSA) that benefit workers whose injuries have rendered them unable to work for at least 12 months, in addition to other individuals. However, the Commission observes that these programs were not available to the two victims and would not be available to the many undocumented workers who reside in the US temporarily. The first program, Social Security Disability Insurance (SSDI), which pays benefits to injured workers and members of their families, only becomes available if the person worked a required number of quarters (three-month periods) preceding the claim.[147] The number of quarters required depends on the person's age at the time of the event causing the disability, and in the cases of both Mr. Zumaya and Mr. Lizalde, the required amount would have been 20 quarters or five years.[148] The second program, Supplemental Security Income (SSI), makes monthly payments to persons who have low income and few resources and who are age 65 or older, blind, or disabled; as a non-citizen, a person must prove that he or she is a "qualified alien" and that he or she also meets a condition that allows qualified aliens to receive SSI benefits.[149]

123. Therefore, in light of the fact that neither Mr. Zumaya nor Mr. Lizalde was able to recover their full benefits under the workers' compensation programs applicable in Pennsylvania and Kansas, respectively, and due to the contrary decisions reached by federal and state courts on the issue, the IACHR finds that the United States has failed to ensure the right to social security of these two workers. Thus, the Commission finds that the State has violated Article XVI of the American Declaration to the detriment of Messrs. Zumaya and Lizalde.

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[144] ILO, Declaration on Fundamental Principles and Rights at Work: Elimination of Discrimination in Respect of Employment and Occupation, http://www.ilo.org/declaration/principles/eliminationofdiscrimination/lang--en/index.htm (last visited June 10, 2015).

[145] The United States, Mexico and Canada signed the NAALC on September 14, 1993 and it entered into force on January 1, 1994. The NAALC is one of the supplementary accords to the North America Free Trade Agreement (NAFTA). According to the Commission for Labor Cooperation, the international organization created under the NAALC, the three signatories sought to improve working conditions and living standards and to "protect, enhance and enforce basic workers' rights." *See* Secretariat of the Commission for Labor Cooperation, "The NAALC," http://new.naalc.org/naalc/thenaalc.htm.

[146] Principles 9-11. Secretariat of the Commission for Labor Cooperation, "Annex 1: Labor Principles," http://new.naalc.org/index.cfm?page=219.

[147] SSA, Disability Benefits (May 2015), p. 5, https://www.ssa.gov/pubs/EN-05-10029.pdf.

[148] SSA, Disability Benefits (May 2015), p. 5, https://www.ssa.gov/pubs/EN-05-10029.pdf. According to their respective declarations, at the time of their workplace injuries, Mr. Zumaya was 34 years old and Mr. Lizalde was 37 years old. Mr. Zumaya declared having worked in total for a year and two months; for his part, Mr. Lizalde declared that he worked for eight months.

[149] SSA, Supplemental Security Income (SSI) (Jan. 2015), p. 4, https://www.ssa.gov/pubs/EN-05-11000.pdf; SSA, SSI Eligibility Requirements – 2015 edition, https://www.ssa.gov/ssi/text-eligibility-ussi.htm (last accessed Dec. 16, 2015). The categories of "qualified aliens" are as follows: lawfully admitted for permanent residence in the United States; granted conditional entry under Section 203(a)(7) of the Immigration and Nationality Act (INA) as in effect before April 1, 1980; paroled into the U.S. under Section 212(d)(5) of the INA for a period of at least one year; refugee admitted to the U.S. under Section 207 of the INA; granted asylum under Section 208 of the INA; deportation is being withheld under Section 243(h) of the INA as in effect before April 1, 1997, or removal is being withheld under Section 241(b)(3) of the INA; or a "Cuban or Haitian entrant" under Section 501(e)of the Refugee Education Assistance Act of 1980 or in a status that is to be treated as a "Cuban/Haitian entrant" for SSI purposes.

VI. ACTIONS SUBSEQUENT TO REPORT No. 83/15

124. On December 29, 2015, the Inter-American Commission electronically approved Report No. 83/15 on the merits of this matter, which comprises paragraphs 1 to 123 supra, with the following recommendations to the State:

1. Provide Messrs. Zumaya and Lizalde with adequate monetary compensation to remedy the violations sustained in the present report;

2. Once a person commences work as an employee, ensure all federal and state laws and policies, on their face and in practice, prohibit any and all distinctions in employment and labor rights based on immigration status and work authorization;

3. Prohibit employer inquiries into immigration status of a worker asserting his or her employment and labor rights in litigation or in administrative complaints;

4. Ensure that undocumented workers are granted the same rights and remedies for violations of their rights in the workplace as documented workers;

5. Establish a procedure whereby undocumented workers involved in workers' compensation proceedings, or their representatives, may request the suspension of their deportations until the resolution of the proceedings and the workers have received the appropriate medical treatment ordered by the presiding courts; and

6. Improve and enhance the detection of employers who violate labor rights and exploit undocumented workers and adequately sanction them.

125. On January 21, 2016 the report was transmitted to the State with a time period of two months to inform the Inter-American Commission on the measures taken to comply with its recommendations. On that same date, the petitioners were notified of the adoption of the report.

126. By letter dated March 18, 2016 the United States provided its response. Firstly, the State contended that several of the recommendations of the Commission "already reflect U.S. law, policy, and action in this area" as was stated in its submissions during the merits stage. In general, the State pointed out that

> ...these include aggressive enforcement of a robust system of laws that protect workers' rights and prohibit many forms of discrimination and retaliation against workers based on their undocumented status; ongoing efforts to combat employer efforts to discover the immigration status of workers during litigation, investigation of claims, and administrative proceedings; and conducting investigations at worksites and enforcing labor laws, without regard to the worker's immigration status. Our immigration law and policies include safeguards for the protection of various classes of victims and vulnerable individuals. Further, our immigration authorities work collaboratively with labor and employment agencies to ensure consistent enforcement of the law.

127. On the other hand, the State indicated that "other recommendations" of Report 83/15 "do not seem feasible for federal implementation, in that they implicate questions of U.S. state law or otherwise fall within the purview of state authorities for their implementation; or require a change in federal or state jurisprudence."

128. The State further affirmed that the recommendations of the Commission are "not requirements under international law." Lastly, the State reiterated its disagreement with the Commission's assertion that there has been a violation of its legal international obligations in this case. The State did not provide information with respect to measures taken in response to the specific recommendations.

129. On June 10, 2016 the Inter-American Commission approved Report No. 29/16 containing the final conclusions and recommendations indicated *infra*. As set forth in Article 47.1 of its Rules of Procedure, on July 5, 2016, the IACHR transmitted the report to the State with a time period of one month to present information on compliance with the final recommendations. On the same date the IACHR transmitted the report to the petitioners and also requested their observations on compliance with the final recommendations.

130. The State did not provide information with respect to compliance with the final recommendations. Also, no response was received within the stipulated period from the petitioners.

VII. FINAL CONCLUSIONS AND RECOMMENDATIONS

131. On the basis of the foregoing analysis, the Inter-American Commission finds that the State is responsible for violating the human rights of Messrs. Zumaya and Lizalde under Articles II and XVI of the American Declaration by not fully recognizing the victims' rights to non-discrimination and social security. The Commission further finds that, as Mr. Lizalde was unable to pursue his workers' compensation claim in the judicial system, the State has also violated his right to juridical personality and a fair trial, enshrined in Articles XVII and XVIII of the American Declaration.

132. Based upon these conclusions,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES THAT THE UNITED STATES:

1. Provide Messrs. Zumaya and Lizalde with adequate monetary compensation to remedy the violations sustained in the present report;

2. Once a person commences work as an employee, ensure all federal and state laws and policies, on their face and in practice, prohibit any and all distinctions in employment and labor rights based on immigration status and work authorization;

3. Prohibit employer inquiries into immigration status of a worker asserting his or her employment and labor rights in litigation or in administrative complaints;

4. Ensure that undocumented workers are granted the same rights and remedies for violations of their rights in the workplace as documented workers;

5. Establish a procedure whereby undocumented workers involved in workers' compensation proceedings, or their representatives, may request the suspension of their deportations until the resolution of the proceedings and the workers have received the appropriate medical treatment ordered by the presiding courts; and

6. Improve and enhance the detection of employers who violate labor rights and exploit undocumented workers and adequately sanction them.

VIII. PUBLICATION

133. In light of the above and in accordance with Article 47.3 of its Rules of Procedure, the IACHR decides to make this report public, and to include it in its Annual Report to the General Assembly of the Organization of American States. The Inter-American Commission, according to the instruments which govern its mandate, will continue evaluating the measures adopted by the United States with respect to the above recommendations until it determines there has been full compliance.

Done and signed in Panama City, Panama on the 30th day of the month of November, 2016. (Signed): Francisco José Eguiguren, First Vice President; Margarette May Macaulay, Second Vice President; José de Jesús Orozco Henríquez, Paulo Vannuchi, Esmeralda E. Arosema Bernal de Troitiño, and Enrique Gil Botero, Commissioners.

The undersigned, Paulo Abrão, Executive Secretary of the Inter-American Commission on Human Rights, in keeping with Article 49 of the Commission's Rules of Procedure, certifies that this is an accurate copy of the original deposited in the archives of the IACHR Secretariat.

Paulo Abrão
Executive Secretary