PROPOSING A UNIFORM REMEDIAL APPROACH FOR UNDOCUMENTED WORKERS UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAW

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Given the recent influxes of undocumented workers who have entered the United States in order to obtain employment, the issue of their remedial rights under federal employment discrimination law has become highly significant. Under Title VII of the Civil Rights Act, the Americans with Disabilities Act (ADA), and/or the Age Discrimination in Employment Act (ADEA), these remedies could include back pay, front pay (in lieu of reinstatement), compensatory damages, punitive damages, liquidated damages, and/or reasonable attorneys' fees, as applicable.

At present, there is no uniform judicial approach for determining the monetary remedial rights of the millions of undocumented workers under these laws. Instead, courts have developed remedial approaches that span the spectrum in terms of scope. At one end is an approach that forecloses none of these remedies. In the middle is an approach that forecloses only some of these remedies. At the other end is an approach that forecloses all of these remedies.

This Article proposes a “Conditional Foreclosure Approach” as the uniform approach for ascertaining the remedial rights of undocumented workers who pursue federal discrimination and/or retaliation claims. This new approach has two distinct features: (1) a “disqualifying condition,” which provides that an undocumented worker must have violated the employee-specific provisions (prohibiting fraudulent conduct in the employment and hiring processes) of the Immigration Reform and Control Act (IRCA) as a condition to any potential remedy foreclosure; and (2) “limited remedy foreclosure,” which forecloses an undocumented worker from, at most, the monetary remedies of back pay and front pay, while preserving all other remedies (such as compensatory damages, punitive damages, liquidated damages, and reasonable attorneys’ fees).

This new approach represents a balanced “middle ground” that draws from the many relevant sources on this issue, including: the IRCA and its congressional philosophy and legislative history; U.S. Supreme Court

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precedent under the National Labor Relations Act (NLRA); federal employment discrimination policy and purpose; and federal immigration policy and purpose. This new approach properly promotes both federal employment discrimination policy and federal immigration policy (without sacrificing either) and adequately holds accountable both employers and undocumented workers for unlawful conduct under the IRCA and/or federal employment discrimination law.

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INTRODUCTION

Every remedy extended to undocumented workers under the federal labor laws provides a marginal incentive for those workers to come to the United States. It is just as true, however, that every remedy denied to undocumented workers provides a marginal incentive for employers to hire those workers. . . . Given this tension, the courts must attempt to sensibly balance competing considerations.1

You are a federal judge. On the docket is the case of an undocumented worker2—previously employed by a company in the United States—who has brought a federal employment discrimination or retaliation claim under Title VII of the Civil Rights Act of 1964 (Title VII),3 the Americans with Disabilities Act of 1990 (ADA),4 and/or the Age Discrimination in Employment Act of 1967 (ADEA).5 As part of her lawsuit, the undocumented worker has sought the buffet of monetary remedies that are typically available under the applicable statute(s). Depending upon the claim(s), these monetary remedies may include: (i) recovery of back pay to compensate her for past lost wages (from the date of discrimination until the date of judgment); (ii) recovery of front pay to compensate her for future lost wages (from the date of judgment until the date of any reinstatement); (iii) recovery of compensatory damages for any humiliation, pain and suffering, medical expenses, and other incurred out-of-pocket costs; (iv) recovery of punitive damages or liquidated damages against her former employer for any alleged malicious, recklessly indifferent, or

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2. This Article uses the term “undocumented worker(s)” in lieu of other comparable terms, such as “unauthorized migrant(s),” see infra note 12, “unauthorized alien(s),” see infra Part I.A, or “unauthorized alien(s)” or “illegal alien(s),” see infra notes 116–48 and accompanying text. While each of these terms reflect a person’s immigration-related status, the “undocumented worker” term is the only one that also reflects employment-related status—the focus of this Article.
3. 42 U.S.C. §§ 2000e to 2000e-17 (2000). Title VII is the primary piece of federal employment legislation. It prohibits employment-based discrimination against any person because of his or her race, color, religion, sex (gender), or national origin. See id. § 2000e-2(a)(1). Title VII also prohibits retaliatory discrimination against a person for having “opposed any practice made an unlawful employment practice” or having “made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing” under Title VII. Id. § 2000e-3(a).
4. Id. §§ 12101–12213. The Americans with Disabilities Act of 1990 (ADA) prohibits employment-based discrimination against a “qualified individual with a disability” because of that “disability.” See id. § 12112(a)–(b); see also id. §§ 12102(2) (defining “disability”), 12111(8) (defining “qualified individual with a disability”). The ADA also contains an antiretaliation provision similar to that of Title VII. See id. § 12203(a); supra note 3 (describing Title VII’s antiretaliation provision).
5. 29 U.S.C. §§ 621–634 (2000). The Age Discrimination in Employment Act of 1967 (ADEA) prohibits employment-based discrimination against a person because of his or her age (i.e., forty years old or older). See id. §§ 623(a), 631(a) (limiting the ADEA’s applicability to persons “at least [forty] years of age”). The ADEA also contains an antiretaliation provision similar to those of Title VII and the ADA. See id. § 623(d); supra notes 3–4 (describing Title VII’s and the ADA’s antiretaliation provisions, respectively).
willfully unlawful conduct; and/or (v) recovery of reasonable attorneys’ fees and costs in litigating the claim(s).6

You must decide whether the undocumented worker is entitled to all, some, or none of the available monetary remedies for her claim(s). This issue lies at the crossroads of two avenues. The first avenue is federal employment discrimination law and policy—embodied in Title VII, the ADA, and the ADEA, all of which seek to hold employers accountable for unlawful discriminatory and/or retaliatory conduct and to deter such conduct in the future.7 The second avenue is federal immigration law and policy—embodied in the Immigration Reform and Control Act of 1986 (IRCA),8 which seeks to deter illegal immigration by imposing sanctions against both employers and undocumented workers for specified unlawful conduct in the employment and hiring processes.9

What is your decision? Does federal employment discrimination law and policy require that the undocumented worker be entitled to recover all of the available monetary remedies, notwithstanding federal immigration law and policy? Or, does federal immigration law and policy mandate that the worker be entitled to recover none of the available monetary remedies, notwithstanding federal employment discrimination law and policy? Or, do federal employment and immigration laws and policies together dictate that the undocumented worker be entitled to recover some, but not all, of the available monetary remedies, and, if so, which remedies are recoverable and which are not?

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The issue of the remedial rights of undocumented workers under the federal employment discrimination laws has become particularly significant in the United States. As one commentator has noted, the American workplace represents “the most important place where civil rights have met with immigration law in the United States today,”10 given the recent influxes of undocumented workers who have entered this country for the purpose of obtaining employment.11 For example, in June 1989, there were

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6. See infra Part II.A. While some relevant authorities use the one-worded terms of “backpay” and “frontpay,” others use the two-worded terms of “back pay” and “front pay.” For consistency and uniformity purposes, this Article uses the two-worded terms.

7. See infra Part II.A.


9. See infra Part I.A.


11. See id.
approximately 2.5 million undocumented workers in the United States;\(^\text{12}\) however, that figure has virtually quintupled in less than twenty years, to at least twelve million undocumented workers as recently as 2006.\(^\text{13}\) In addition, the average annual increase in the undocumented worker population in the United States has dramatically expanded from 180,000 per year during the 1980s, to 400,000 per year during 1990–1994, to 575,000 per year during 1995–1999, and to 850,000 per year during 2000–2004.\(^\text{14}\)

Struggling with how best to balance the federal employment discrimination laws and federal immigration law, courts have developed remedial approaches that are inconsistent. Depending upon the jurisdiction, circuit, or district, an undocumented worker’s remedial rights under federal employment discrimination law range from recovery of all of the available monetary remedies, to only some of those remedies, to none of those remedies.\(^\text{15}\) In short, at present, there is no uniform remedial approach for undocumented workers under federal employment discrimination law.

Part I of this Article discusses both congressional and U.S. Supreme Court guidance regarding undocumented workers and their remedial rights in the employment context. This part first describes the IRCA, which was passed by Congress in 1986 and regulated—for the first time under federal immigration law—the employment of undocumented workers in the United States.\(^\text{16}\) This part then discusses the 1984 and 2002 Supreme Court decisions\(^\text{17}\) that addressed whether undocumented workers were barred from certain remedies under an employment-related federal statute known as the National Labor Relations Act (NLRA).\(^\text{18}\)

\(^{12}\) JEFFREY S. PASSEL, PEW HISPANIC CENTER, THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY 3 (2006), available at http://pewhispanic.org/files/reports/61.pdf [hereinafter PEW UNAUTHORIZED MIGRANT POPULATION REPORT] (using data from Figure 2). This report defines “unauthorized migrant” as “a person who resides in the United States, but who is not a U.S. citizen, has not been admitted for permanent residence, and is not in a set of specific authorized temporary statuses permitting longer-term residence and work.” Id. at 1.

\(^{13}\) Id. at 2 (“Data from the monthly Current Population Surveys conducted since March 2005, as well as other evidence such as the number of apprehensions by the Border Patrol, indicate that the unauthorized flow is continuing. Assuming that the rate of growth evident between Census 2000 and the March 2005 [Current Population Survey] held steady, the best estimate for March 2006 is between 11.5 million and 12 million for the current number of unauthorized migrants.”).

\(^{14}\) Id. at 2–3 (using data from Figure 1). In light of this data, the Pew Unauthorized Migrant Population Report noted that “about two-thirds of unauthorized migrants have been in the country less than 10 years.” Id. at 2.

\(^{15}\) See infra Part II.B–D.

\(^{16}\) See infra Part I.A (providing a detailed discussion of the IRCA).


\(^{18}\) 29 U.S.C. §§ 151–169 (2000). The National Labor Relations Act (NLRA) creates certain employee rights regarding labor union organizing, collective bargaining, and engaging in “concerted activities.” Id. § 157 (establishing so-called “section 7” rights to self-organize, form or join a labor union, bargain collectively, or engage in “other concerted
Part II then identifies three distinct remedial approaches that the courts have applied to undocumented worker claims under the federal employment discrimination laws. Each of these approaches has a different remedial impact upon undocumented workers: the first remedial approach does not foreclose any monetary remedies under these laws; the second approach forecloses only certain monetary remedies; and the third remedial approach forecloses all monetary remedies.

Part III then proposes, discusses, and defends a uniform approach—the “Conditional Foreclosure Approach”—for determining the monetary remedial rights of undocumented workers under the federal employment discrimination laws. This unique remedial approach contains two concrete features:

(1) “Disqualifying Condition.” As a condition to the limited remedy foreclosure described in (2)(a), the undocumented worker must have violated the IRCA’s employee-specific provisions that prohibit fraudulent conduct in the employment and hiring processes, with the employer thus having satisfied the IRCA’s employer-specific requirements as to these processes; and

(2) “Limited Remedy Foreclosure.” Under the federal employment discrimination laws, an undocumented worker:

(a) is foreclosed from (and does not retain) the monetary remedial rights to back pay and front pay; but

(b) is not foreclosed from (and does retain) all other monetary remedial rights, including, but not limited to, rights to compensatory damages, punitive damages, liquidated damages, and reasonable attorneys’ fees.

Unlike the three remedial approaches currently embraced by the courts, the Conditional Foreclosure Approach represents an effective fusion of (i) the IRCA and its underlying congressional philosophy, (ii) the Supreme Court’s NLRA precedent, and (iii) the policies and purposes of both federal employment discrimination law and federal immigration law.
I. CONGRESSIONAL AND SUPREME COURT GUIDANCE REGARDING UNDOCUMENTED WORKERS AND THEIR REMEDIAL RIGHTS

At present, neither Congress nor the Supreme Court has addressed the precise issue of the monetary remedial rights of undocumented workers under the federal employment discrimination laws. Nonetheless, both the IRCA and a pair of Supreme Court decisions under the NLRA reflect important principles and policies that are relevant to determining the remedial rights of undocumented workers under Title VII, the ADA, and the ADEA.

A. The Immigration and Reform Control Act of 1986

For over thirty years prior to 1986, federal immigration law—embodied in the Immigration and Nationality Act of 1952 (INA)\(^{19}\)—essentially addressed only “the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.”\(^{20}\) In addition to specifying the admission qualifications for “aliens” (including necessary entry documents and visas in addition to registration requirements),\(^{21}\) the INA made it unlawful for any person to “bring to the United States,” “transport or move,” “conceal[, harbor[, or shield[ from detection” any such individual.\(^{22}\)

While criminalizing these activities, Congress had “not adopted provisions in the INA making it unlawful for an employer to hire an alien who is present or working in the United States without appropriate authorization.”\(^{23}\) In fact, the INA had originally stated that “employment” of such a person “shall not be deemed to constitute harboring.”\(^{24}\) Consequently, the INA had originally “evince[d] ‘at best . . . a peripheral concern with employment of illegal entrants.”\(^{25}\)

\(^{20}\) De Canas v. Bica, 424 U.S. 351, 359 (1976); see also Christopher Ho & Jennifer C. Chang, Drawing the Line After Hoffman Plastic Compounds, Inc. v. NLRB: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond, 22 HOFSTRA LAB. & EMP. L.J. 473, 478 (2005) (stating that pre-1986 immigration law “generally concerned only the terms and conditions under which foreign nationals would be classified and admitted to this country and, perhaps, become its naturalized citizens”); Linda S. Bosniak, Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law, 1988 WIS. L. REV. 955, 979 (stating that pre-1986 “immigration law directly regulated border and entry only”).

\(^{21}\) See generally 8 U.S.C. §§ 1151–1306. The INA defines “alien” as “any person not a citizen or national of the United States.” Id. § 1101(a)(3).

\(^{22}\) Id. § 1324(a)(1)(A)(i)–(iii).


\(^{25}\) Sure-Tan, 467 U.S. at 892 (citing De Canas, 424 U.S. at 360) (emphasis added).
In 1986, however, Congress filled this void with the IRCA,\textsuperscript{26} which amended the INA. The primary purpose of the IRCA was to “control illegal immigration into the United States.”\textsuperscript{27} Importantly, Congress considered employment in the United States to be the “back door on illegal immigration” and “the magnet that attracts aliens here illegally.”\textsuperscript{28} In an effort to “close [this] back door”\textsuperscript{29} and to “diminish the attractive force” of this magnet,\textsuperscript{30} Congress—for the first time ever—created a “comprehensive scheme prohibiting the employment of illegal aliens in the United States” and “forcefully” made combating the employment of illegal aliens central to “[t]he policy of immigration law.”\textsuperscript{31}

The IRCA’s “comprehensive scheme” consists of two key parts: (i) an “employment verification system” that creates employer-specific responsibilities when hiring any employee in the United States;\textsuperscript{32} and (ii) the imposition of civil and/or criminal sanctions against both employers and “unauthorized aliens”\textsuperscript{33} for certain unlawful conduct in these employment and hiring processes.\textsuperscript{34}

Under the IRCA’s employment verification system, an employer is required, first, to review certain documents that confirm both the identity and employment authorization (work eligibility) of any person seeking employment and, second, to attest (under penalty of perjury) that it has “verified” the person is “not an unauthorized alien.”\textsuperscript{35} If the employer

\begin{itemize}
  \item \textsuperscript{26} Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).
  \item \textsuperscript{28} Id. at 46; see also id. at 52 (stating that “the most reasonable approach to this problem is to make unlawful the ‘knowing’ employment of illegal aliens, thereby removing the economic incentive which draws such aliens to the United States”); \emph{id.} at 56 (stating that “as long as job opportunities are available to undocumented aliens, the intense pressure to surreptitiously enter this country or to violate status once admitted as a nonimmigrant in order to obtain employment will continue”).
  \item \textsuperscript{29} Id. at 46.
  \item \textsuperscript{31} \emph{Id.} at 147 (quoting INS v. Nat’l Ctr. for Immigrants’ Rights, Inc., 502 U.S. 183, 194 n.8 (1991)) (alteration in original).
  \item \textsuperscript{32} See \textit{infra} notes 35–37 and accompanying text (discussing this employment verification system).
  \item \textsuperscript{33} The IRCA defines “unauthorized alien” as an “alien,” see \textit{supra} note 20 (providing the INA’s definition of “alien”), who is neither “lawfully admitted for permanent residence” nor “authorized to be . . . employed” in the United States per the IRCA. 8 U.S.C. § 1324a(h)(3).
  \item \textsuperscript{34} See \textit{infra} notes 38–47 and accompanying text (discussing these IRCA prohibitions for employers and undocumented workers, in addition to applicable civil and/or criminal sanctions).
  \item \textsuperscript{35} 8 U.S.C. § 1324a(b)(1). Under the IRCA, the following documents establish both identity and employment authorization: (1) a U.S. passport; or (2) a resident alien card or registration card (subject to certain requirements). Id. § 1324a(b)(1)(B). Otherwise, the employer must ensure that an individual presents one document establishing identity (for example, a driver’s license) and another establishing employment authorization (for example, a social security card). \emph{id.} § 1324a(b)(1)(C)–(D).
\end{itemize}
makes a “good faith attempt” to meet these employment verification system responsibilities, it is deemed to have complied with the IRCA, notwithstanding any “technical or procedural failure.”\textsuperscript{36} In addition, the person seeking employment must also attest (under penalty of perjury) that he or she is eligible and authorized to work in the United States.\textsuperscript{37}

Beyond creating this employment verification system, the IRCA targets both employers and undocumented workers with sanctions for certain prohibited conduct in the employment and hiring processes. First, the IRCA prohibits employers from (i) hiring any person without complying with the paperwork obligations of the employment verification system\textsuperscript{38} and (ii) hiring, or continuing to employ, any person whom the employer knows “is (or has become) an unauthorized alien with respect to such employment.”\textsuperscript{39}

The IRCA provides the following penalties for these noncompliant employers: (i) if an employer violates the employment verification system’s paperwork obligations as to any person, it is subject to civil fines;\textsuperscript{40} (ii) if an employer hires or continues to employ a person whom it knows to be an “alien,” it is subject to even steeper civil fines;\textsuperscript{41} and (iii) if an employer engages in a “pattern or practice” of hiring or employing individuals whom it knows to be “aliens,” it is subject to additional criminal fines and/or criminal prosecution and imprisonment for up to six months.\textsuperscript{42} Congress considered these “employer sanctions” to be “the principal means of closing the back door, or curtailing future immigration” based on a “trickle-down” rationale: “Employers will be deterred by the penalties in [the IRCA] from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment.”\textsuperscript{43}

In addition, the IRCA takes a hard-line stance against undocumented workers who engage in fraudulent conduct in the employment and hiring process. When reviewing and determining the authenticity of these documents, an employer is subject only to a “reasonable man” standard. H.R. Rep. No. 99-682, pt. 1, at 62 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5666. Thus, an employer is deemed to have complied with its document examination duties if an applicable document “reasonably appears on its face to be genuine.” 8 U.S.C. § 1324a(b)(1)(A).

\begin{itemize}
\item \textsuperscript{36} 8 U.S.C. § 1324a(b)(6)(A).
\item \textsuperscript{37} Id. § 1324a(b)(2).
\item \textsuperscript{38} Id. § 1324a(a)(1).
\item \textsuperscript{39} Id. § 1324a(a)(2).
\item \textsuperscript{40} Id. § 1324a(e)(5) (specifying fines ranging from $100 to $1000 for each such person).
\item \textsuperscript{41} Id. § 1324a(e)(4)(A) (specifying fines ranging from $250 to $10,000 for each such “alien”).
\item \textsuperscript{42} Id. § 1324a(f)(1) (specifying fines up to $3000 for each such individual).
\item \textsuperscript{43} H.R. Rep. No. 99-682, pt. 1, at 46 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5660 (noting that “the Committee remains convinced that legislation containing employer sanctions is the most . . . effective way to respond to the large-scale influx of undocumented aliens”); see also id. at 47 (stating that “since most undocumented aliens enter this country to find jobs, the Committee believes it is essential to require employers to share the responsibility to address this serious problem”).
\end{itemize}
processes.44 Specifically, the IRCA makes it a federal crime for any person (i) to use an identification document (as part of the employment verification system) that he or she knows, or has reason to know, was “not issued lawfully” to him or her or was otherwise “false” or (ii) to falsely attest (as part of this system) that he or she is eligible and authorized to work in the United States.45 The IRCA subjects any person who engages in this unlawful conduct to a criminal fine and/or criminal prosecution and imprisonment for a period up to five years.46 Similarly, a person is prohibited from, and is subject to civil fines for, using or attempting to use (as part of the IRCA’s employment verification system) (i) any “forge[d], counterfeit, alter[ed], or falsely . . . [made] document” or (ii) any document “lawfully issued to” another person.47

Importantly, however, neither the IRCA nor INA prohibits the undocumented worker from (or otherwise imposes any civil or criminal sanctions upon that worker for) the mere act of obtaining employment in the United States.48 In other words, an undocumented worker does not violate the IRCA’s employment provisions just because he or she becomes (or is) employed in this country; instead, that worker is only subject to civil and/or criminal sanctions if he or she uses the specified fraudulent means in the employment and hiring processes.

Finally, when enacting the IRCA, Congress briefly commented on undocumented workers and their status as “employees” under federal labor law—namely, the NLRA. Two years before the IRCA was enacted, the Supreme Court decided Sure-Tan, Inc. v. NLRB, in which it concluded, in part, that undocumented workers were covered “employees” to whom NLRA rights and protections applied.49 Discussing whether the IRCA had any impact on this decision and undocumented workers’ protections under the NLRA, Congress stated that it did not intend the IRCA

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44. See id. at 62 (stating that the IRCA provides “serious . . . penalties” if and when “fraudulent documents are utilized”).
46. Id.
47. 8 U.S.C. § 1324c(a) (listing prohibited actions); id. § 1324c(d)(3) (specifying fines ranging from $250 to $5000 for each improper document).
48. See generally id. §§ 1101–1537; Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.); see also Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 893 (1984) (stating that, under the INA, “Congress has not made it a separate criminal offense for an alien to accept employment after entering this country illegally”); Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1124 (7th Cir. 1992) (Cudahy, J., dissenting) (“Once an alien has crossed the border, however, employment is not an additional offense (in fact, it is no crime at all). . . . This distinction between having to break the law to reach the workplace and lacking a formal legal entitlement to work is the only reading of Sure-Tan that makes sense.”); Ho & Chang, supra note 20, at 479 (stating that, under the INA, “although it was unlawful for an immigrant to enter the United States without inspection, it was not per se unlawful for her to seek and obtain employment here”).
49. Sure-Tan, 467 U.S. at 894; see also infra Part I.B.1 (generally discussing the Sure-Tan decision); infra note 75 (discussing Sure-Tan’s conclusion that undocumented workers were covered “employees” under the NLRA).
to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law. In particular, the employer sanctions provisions are not intended to limit in any way the scope of the term “employee” in Section 2(3) of the [NLRA] . . . or of the rights and protections stated in Sections 7 and 8 of that Act.50

Implicitly recognizing that some employers may be encouraged to employ more undocumented workers if those workers received no protection as “employees” under the NLRA, Congress reasoned that such a result “would be counter-productive of our intent [in the IRCA] to limit the hiring of undocumented employees.”51

B. The Supreme Court’s NLRA Precedent

Almost thirty years after the passage of the INA and just two years before the enactment of the IRCA, the Supreme Court—for the first time—tackled the issue of the remedial rights of undocumented workers under federal labor and employment law.52 In its 1984 decision in Sure-Tan, the Court, relying on the INA, restricted back pay (and reinstatement) remedies for undocumented workers under the NLRA.53 Then, in 2002, the Court addressed virtually the same issue in Hoffman Plastic Compounds, Inc. v. NLRB.54 Relying this time on the IRCA, the Court left no doubt that undocumented workers can be foreclosed from back pay remedies under the NLRA.55

1. Pre-IRCA—The Sure-Tan Decision

Sure-Tan was a leather-processing company in Chicago, and most of its eleven employees were “Mexican nationals present illegally in the United States without visas or immigration papers authorizing them to work.”56 In 1976, a group of seven Sure-Tan employees elected a union to serve as their collective-bargaining representative.57

Within two hours after the election, Sure-Tan’s president asked the employees “whether they had valid immigration papers.”58 Then, after learning that the National Labor Relations Board (NLRB) had rejected un...
Sure-Tan’s challenges to the election results, its president wrote a letter to the Immigration and Naturalization Service (INS) and asked it to “check the [immigration status of several [of its] employees, who [were] Mexican nationals.”

About a month later, the INS visited Sure-Tan to “investigate the immigration status of all Spanish-speaking employees”; it found that five of them were “living and working illegally in the United States.” These employees, who then admitted their “illegal presence in the country,” departed on a bus to Mexico by the end of day.

The NLRB subsequently concluded that Sure-Tan had engaged in unfair labor practices under the NLRA by, inter alia, requesting the INS investigation “solely because the employees supported the Union.”

The NLRB then awarded the NLRA’s “conventional remedy of reinstatement with backpay” for the undocumented workers who had already returned to Mexico.

On appeal, the U.S. Court of Appeals for the Seventh Circuit struggled with what it called “the most difficult problem presented on this appeal”—namely, the “appropriateness of the relief ordered by the Board” for the undocumented workers. As a general matter, the Seventh Circuit agreed that the NLRA’s “conventional remedy” of “reinstatement and backpay [was] justified” for these workers.

But, in an effort to “reconcil[e]” these remedies with “the policies underlying the national immigration laws,” the court placed “limitations” on them. As to reinstatement, the Seventh Circuit noted that such relief was proper “only if the discriminatees are legally present and legally free to be employed in this country when they offer themselves for reinstatement.”

As to back pay, the Seventh Circuit concluded that the

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60. Sure-Tan, 467 U.S. at 887.
61. Id.
63. Id. Section 10(c) of the NLRA authorizes the National Labor Relations Board (NLRB) to order an employer that has committed an unfair labor practice to “take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies” of the Act. 29 U.S.C. §160(c) (2000) (also authorizing the NLRB to issue cease and desist orders against employers). Unlike the federal employment discrimination laws, the NLRA does not provide for compensatory, punitive, or liquidated damages. See id.; infra Part II.A (discussing Title VII, ADA, and ADEA monetary remedies).
65. NLRB v. Sure-Tan, Inc., 672 F.2d 592, 602 (7th Cir. 1982), aff’d in part, rev’d in part, 467 U.S. 883 (1984); see also id. at 595 (noting “the further knotty problem of rectifying the injustice done” to Sure-Tan’s undocumented workers).
66. Id. at 604 (reasoning that the purpose of these remedies was to make “employees whole for their losses caused by the employer’s unfair labor practices” and that these remedies were needed to “vindicate the policy of the [NLRA] and to deter similar conduct by other employers in the future”).
67. Id. at 605.
68. Id. at 604.
69. Id. at 606 (emphasis added). Interestingly, the court minimized the impact of this limitation by stating that reinstatement offers for undocumented workers who are no longer
undocumented workers would be “deemed unavailable for work”—and thus not entitled to any back pay relief—for “any period when not lawfully entitled to be present and employed in the United States.”

Significantly, however, the court recognized that this “legal (or lawful) presence” limitation on back pay would likely preclude these undocumented workers from receiving any monetary relief. Consequently, the Seventh Circuit opted to reduce this limitation’s adverse impact by endorsing a “minimum” six-month back pay remedy that “the employer must pay [to each undocumented worker] in any event.” The court reasoned that this back pay “minimum” (as opposed to no back pay at all) would “better effectuate the policies of the [NLRA]” and better recognize the employer’s “discriminatory act which caused these employees to lose their jobs.”

The Supreme Court, assessing the “validity” of the NLRB’s (and, as modified, the Seventh Circuit’s) “remedial order,” reversed and remanded for “formulation of an appropriate remedial order.” The U.S. Supreme Court decided this remedial issue in Sure-Tan, Inc. v. NLRB by a five to four margin. The five member majority on this issue was comprised of Chief Justice Warren E. Burger and Justices Sandra Day O’Connor, Byron White, Lewis F. Powell, and William H. Rehnquist; the four member minority was comprised of Justices William J. Brennan, Thurgood Marshall, Harry A. Blackmun, and John Paul Stevens. See id. at 886, 906, 913.

In addition to addressing this remedial issue, the Court tackled the “predicate question” of “whether the NLRA should apply to unfair labor practices committed against undocumented aliens.” Id. at 891. In other words, are “undocumented aliens” covered “employees” to whom NLRA rights and protections apply?

Deferring to the NLRB’s administrative position on this question, the Court—by a seven to two majority—held that “the provisions of the NLRA are applicable to undocumented alien employees.” Id. at 894. The Court offered several bases for its decision. First, the Court noted that the NLRA had a “broad statutory definition of ‘employee’” and that Congress did not include “undocumented aliens” among the NLRA’s exempted employee categories. Id. at 891–92; see also 29 U.S.C. § 152(3) (2000) (containing the NLRA’s definition of “employee”).

Second, the Court stated that (i) not applying the NLRA to these workers would create a “subclass” of workers that had no real stake in the collective representation and bargaining process, whereas (ii) applying it to these workers would further the NLRA’s purpose of “encouraging and protecting the collective bargaining process.” Sure-Tan, 467 U.S. at 892.

Finally, the Court explained that applying the NLRA to undocumented workers did not “conflict” with any express provision of the INA and was, in fact, “compatible with the policies of the INA.” Id. at 892–93. As to the former, the Court stated that, because the INA contained no language that “[m]ade it unlawful for an employer to hire an alien,” the NLRA’s application to these workers failed to “conflict with the terms of the INA.” Id. As
embraced the Seventh Circuit’s application of a “legal (or lawful) presence” limitation upon back pay and reinstatement remedies for undocumented workers under the NLRA, it rebuffed any “minimum” back pay remedy for these workers.

As to the former, the Court concretely agreed with the Seventh Circuit that “the implementation of the [NLRB’s] traditional remedies [i.e., reinstatement and back pay] . . . must be conditioned upon the employees’ legal readmittance to the United States.” Specifically, the Court noted that (i) any reinstatement remedy for Sure-Tan’s undocumented workers under the NLRA hinged on their “legal reentry” and (ii) any back pay remedy for them under the NLRA was to be tolled, and unavailable, “during any period when they were not lawfully entitled to be present and employed in the United States.” Significantly, the Court reasoned that the NLRB, in crafting remedies for NLRA violations, must “take into account” the “equally important Congressional objectives” . . . of deterring unauthorized immigration that is embodied in the INA. These “legal reentry” and “lawful . . . presence” conditions, said the Court, “avoided” a “potential conflict” between the NLRA’s remedial relief and the INA.

As to the latter, however, the Court flatly rejected the Seventh Circuit’s “irreducible minimum of six months’ backpay” for undocumented workers under the NLRA. In support of this decision, the Court offered two points regarding federal immigration law and policy. First, the Court to the latter, the Court noted that the INA was designed to “preserve jobs for American workers” and protect the “wages and working conditions” of U.S. workers. The Court reasoned that not applying the NLRA to undocumented workers would frustrate these purposes, because it could lead to employer preference for these workers (vis-à-vis legal workers), which, in turn, would adversely affect the “wages and employment conditions of lawful residents.”

Only Justice Powell, joined by Justice Rehnquist, dissented on the “predicate question.” Id. at 913 (Powell, J., dissenting) (“It is unlikely that Congress intended the term ‘employee’ to include—for purposes of being accorded the benefits of [the NLRA]—persons wanted by the United States for the violation of our criminal laws.”).

76. Id. at 902–03.
77. Id. at 903–05.
78. Id. at 902–03 (emphasis added).
79. Id. at 903 (further explaining that an undocumented worker’s unlawful presence in the U.S. rendered that worker “unavailable” for work for back pay accrual and tolling purposes).
80. Id. (quoting Southern S.S. Co. v. NLRB, 316 U.S. 31, 47 (1942)).
81. Id. at 903.
82. Id. at 898.
83. Id. at 905–06.
84. Id. at 902–05. The Supreme Court offered at least two other reasons for rejecting any minimum back pay remedy for undocumented workers under the NLRA. First, the Court stated that the Seventh Circuit had “overstepped the limits of its own reviewing authority” (and “exceeded its narrow scope of review”) because it had expanded the NLRB’s original remedial order and thus “usurped” the NLRB’s “delegated function” to “determine a just backpay remedy.” Id. at 898–900, 900 n.10.

Second, the Court noted that the minimum back pay remedy exceeded the NLRB’s own remedial authority under the NLRA. Id. at 900 (stating that the NLRA requires remedial orders to “effectuate the policies of the Act” (internal quotation marks omitted)).
noted that this minimum back pay award was “without regard to the [undocumented] employees’ . . . legal availability for work.” As mentioned above, the Court viewed this “legal availability” limitation as necessary to “avoid[]” any “potential conflict with the INA.”

Second, the Court was unmoved by the Seventh Circuit’s rationale for a minimum back pay award—namely, to ensure at least “some relief to the employees as well as a financial disincentive [to the employer] against the repetition of similar discriminatory acts in the future.” The Court fully appreciated the Seventh Circuit’s concerns—in fact, it sympathetically recognized the “probable unavailability” of reinstatement and back pay remedies for Sure-Tan’s undocumented workers, given the “uncertainty” that they could establish that they were “lawfully available for employment during the backpay period” or had “enter[ed] the country lawfully to accept the reinstatement offers.” Nonetheless, the Court stated that this “probable unavailability of the [NLRA’s] more effective remedies in light of the practical workings of the immigration laws . . . simply cannot justify the judicial arrogation of remedial authority not fairly encompassed within the Act.”

As a final but related point, the Court addressed the important argument (in Justice William J. Brennan’s opinion) that there was a “disturbing anomaly” in finding that undocumented workers were “employees” with NLRA rights, yet “effectively depriv[ing them] of any remedy” under the NLRA. The Court was not persuaded by, and rejected, that argument for explained that any NLRB remedial order must be “tailored to the unfair labor practice it is intended to redress” and seek to “expunge only the actual, and not merely speculative, consequences of the unfair labor practices.” Id. The Court concluded that any minimum back pay award under the NLRA constituted “pure speculation” and was inconsistent with the “general reparative policies of the NLRA.” Id. at 901.

85. Id. at 904.
86. Id. at 903.
87. Id. at 903–04 (citing NLRB v. Sure-Tan, Inc., 672 F.2d 592, 606 (7th Cir. 1982)).
88. Id. at 904.
89. Id. (emphasis added). The Court also addressed the Seventh Circuit’s modifications to the NLRB’s reinstatement remedy, which included, inter alia, requiring that reinstatement offers remain open for a period of four years. Id. at 905–06; see also supra note 69 and accompanying text (discussing the Seventh Circuit changes to the NLRB’s reinstatement remedy). The Court struck down those modifications on the grounds that the Seventh Circuit had “exceeded its limited authority of judicial review.” Sure-Tan, 467 U.S. at 905–06.
90. Id. at 904 n.13 (internal quotation marks omitted); see also id. at 911–12 (Brennan, J., concurring in part and dissenting in part) (discussing the “disturbing anomaly” created when undocumented workers are deemed “employees” under the NLRA and thus “entitled to all of the protections that come with that status” but then “striped of the normal remedial protections of the Act”).

A second argument in Justice Brennan’s opinion was that the Court’s decision to restrict drastically the remedies available to undocumented alien employees” under the NLRA would undermine, not promote, federal immigration law and policy. Id. at 912. Specifically, he argued that employers would be encouraged to hire undocumented alien employees once they realize “they may violate the NLRA with respect to [those employees] without fear of having to recompense those workers for lost backpay.” Id.
two reasons. First, the Court noted that other “traditional remedies” under the NLRA—such as cease and desist orders and any subsequent contempt proceedings—still existed and provided “a significant deterrent against future violations” of the NLRA.91

Second, the Court—while candidly recognizing that the availability of reinstatement and back pay remedies would provide “more . . . deterrence” against NLRA violations and “more meaningful relief” for undocumented workers92—refused to be guided solely by those negative policy consequences.93 Instead, the Court concluded that it “remain[ed] bound to respect the directives of the INA as well as the NLRA and to guard against judicial distortion of the statutory limits placed by Congress on the [NLRB’s] remedial authority.”94

2. Post-IRCA—The Hoffman Plastic Decision

In the almost twenty years after Sure-Tan, the federal circuits disagreed as to whether the “legal (or lawful) presence” condition for NLRA back pay applied to all, or only certain, undocumented workers. Three federal circuits (the U.S. Courts of Appeals for the Second, Ninth, and D.C. Circuits) had concluded that this condition should be applied narrowly—namely, only to undocumented workers who (like those in Sure-Tan) were already physically absent from the United States.95 In contrast, one federal circuit (the Seventh Circuit) had decided that this condition should be applied universally—namely, to all such workers, regardless of presence in, or absence from, the country.96

91. Id. at 904 n.13; see also supra note 62 (discussing the NLRA’s remedial scheme).
92. Sure-Tan, 467 U.S. at 904 n.13.
93. See id.
94. Id. (also noting that “[a]ny other solution must be sought in Congress and not the courts”).
95. See Hoffman Plastic Compounds, Inc. v. NLRB, 237 F.3d 639, 642–46 (D.C. Cir. 2001) (interpreting Sure-Tan to preclude back pay remedies “only to undocumented discriminatees who were unavailable for work because they were outside the country and unable to lawfully reenter” and rejecting the argument that Sure-Tan created an “absolute bar to any award of backpay for undocumented discriminatees”); NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc., 134 F.3d 50, 54–55, 58 (2d Cir. 1997) (reaffirming its interpretation that Sure-Tan addressed “only awards of backpay to undocumented employees who have left the country” and thus allowing back pay when those employees “remain in the United States after their illegal termination”); Local 512, Warehouse & Office Workers’ Union v. NLRB, 795 F.2d 705, 715–17, 722 (9th Cir. 1986) (stating that Sure-Tan did “not address the question whether an undocumented worker who remains in the United States, and who has not been the subject of any INS deportation proceedings, is barred from receiving backpay to remedy an NLRA violation”).
96. See Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1119–21 (7th Cir. 1992) (rejecting the “narrower interpretation” that Sure-Tan “applies only to undocumented aliens who are no longer within the United States” and stating that “the text of the opinion is quite clear—undocumented aliens may not receive backpay unless they can show that they were ‘lawfully entitled to be present and employed in the United States’” (quoting Sure-Tan, 467 U.S. at 903)).
In its March 2002 decision in *Hoffman Plastic*, the Supreme Court substantially cleared these muddied waters.97 Hoffman Plastic was a chemical compound formulation business that had hired Jose Castro as a machine operator in May 1988.98 At the time of his hire, “Castro presented documents that appeared to verify his authorization to work in the United States.”99 In fact, however, he had “gain[ed] employment with Hoffman only after [fraudulently] tendering a birth certificate belonging to a friend who was born in Texas.”100 About six months after Castro was hired, several employees (including Castro) supported a local union that was attempting to become the collective bargaining agent for the business’s employees.101 Hoffman Plastic then proceeded to lay off Castro and others who had participated in these support and organizing activities.102

The NLRB concluded that Hoffman Plastic had engaged in unfair labor practices under the NLRA by discriminatorily laying off Castro and others “in order to rid itself of known union supporters.”103 The NLRB then ordered Hoffman Plastic to provide appropriate “make whole” back pay to these employees to compensate for “any loss of earnings and other benefits they may have suffered.”104 After a hearing to determine the amount of this due back pay, the NLRB awarded Castro—who still remained in the country after his layoff—four and a half years of back pay, totaling almost $67,000.105

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98. Id. at 140.
99. Id.
100. Id. at 141. There is no indication in the Supreme Court and U.S. Court of Appeals for the D.C. Circuit opinions that Hoffman Plastic was aware, or became aware during Jose Castro’s employment, that he had fraudulently used another person’s birth certificate to obtain his employment. See id. at 140–43; Hoffman Plastic, 237 F.3d at 640–42.
102. Id. at 140.
104. Id. at 107.

In support of its back pay decision, the NLRB “adhere[d]” to its narrow interpretation of *Sure-Tan* as applying only to undocumented workers who were not physically present in the country. *Hoffman Plastic II*, 326 N.L.R.B. at 1060–62 (discussing *A.P.R.A. Fuel Oil Buyers Group*, 320 N.L.R.B. at 416, which states that *Sure-Tan*—which involved employees “who had left the country”—“did not foreclose the possibility of backpay for . . . undocumented aliens,” and approving an “award of backpay in this case, in which the employees may remain in the United States”). According to the NLRB, “the most effective way to accommodate and further the immigration policies embodied in [the IRCA]” was to extend all traditional “protections and remedies of the [NLRA]” to
On appeal, the D.C. Circuit upheld the NLRB’s remedial order that provided this back pay to Castro, notwithstanding his undocumented worker status. The court employed a two-step rationale to support its decision. First, addressing Sure-Tan, the D.C. Circuit narrowly interpreted its “legal (or lawful) presence” condition for NLRA back pay to “deal with the precise problem [the Seventh Circuit] faced—undocumented discriminatees returning to the country illegally to claim backpay.” Consequently, the court viewed Sure-Tan as “not bar[ring] back pay to undocumented discriminatees” on a universal basis, but rather dealing only with “unique circumstances . . . not present in this case.”

Having overcome Sure-Tan, the D.C. Circuit then opted merely to defer to the NLRB’s administrative authority and discretion to fashion appropriate remedial relief in Castro’s circumstances. The court initially noted that an administrative agency’s decisions must both “‘fully enforce the requirements of its own statute’” and accommodate, rather than ignore, “‘other . . . equally important Congressional objectives.’” The D.C. Circuit then concluded that the NLRB had “fully satisfied” these administrative obligations by considering both the NLRA and IRCA when crafting Castro’s back pay remedy. More specifically, the NLRB had argued that back pay relief for undocumented workers served the purposes and policies of both statutes, by (i) “reduce[ing] employer incentives to prefer undocumented workers ([the] IRCA’s goal)”; (ii) “reinforc[ing] collective bargaining rights for all workers (the NLRA’s goal)”; and (iii) “protect[ing] wages and working conditions for authorized workers (the goal of both Acts).” Consequently, the court concluded that the NLRB had “fully enforce[d]” the NLRA, while “carefully consider[ing]” (and not ignoring) “other . . . equally important Congressional objectives.”

The Supreme Court reversed. In a broadly worded holding, the Court stated that the NLRB’s “award of backpay to an undocumented alien who has never been legally authorized to work in the United States . . . is
foreclosed by federal immigration policy, as expressed by Congress in the Immigration Reform and Control Act of 1986 (IRCA).”

As a preliminary matter, the Court addressed Sure-Tan. While recognizing the current circuit split regarding whether Sure-Tan’s “legal (or lawful) presence” condition on NLRA back pay “applies only to aliens who left the United States,” the Supreme Court looked beyond Sure-Tan to “resolve this controversy.” Specifically, the Court stated that it thought “the question presented here better analyzed through a wider lens, focused as it must be on a legal landscape now significantly changed” via the IRCA.

The Court next addressed whether it should merely defer—as the D.C. Circuit had—to the NLRB’s administrative authority and discretion in fashioning Castro’s back pay remedy. While noting the NLRB’s “generally broad” discretion to select and craft remedies for NLRA violations, the Court stated that it had “never deferred to the [NLRB’s] remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA.” Consequently, the Court concluded that an NLRB-fashioned remedy “may be required to yield” when it “trenches upon” another federal statute or policy.

Asking whether Castro’s back pay remedy “trenches upon” another federal statute or policy, the Court bluntly answered: “[I]t is precisely the situation today.” In reaching this conclusion, the Court examined exactly how the NLRB’s back pay remedy for Castro “trench[ed] upon” both the express terms and policies embodied in the IRCA.

116. Id. Just like in its Sure-Tan decision, the Court decided Hoffman Plastic Compounds, Inc. v. NLRB by a five to four margin. The five member majority was comprised of Chief Justice Rehnquist and Justice O’Connor (just as in Sure-Tan), in addition to Justices Anthony Kennedy, Antonin Scalia, and Clarence Thomas (in effect, replacing Chief Justice Burger and Justices White and Powell from the Sure-Tan majority). The four member minority was comprised of Justice Stevens (just as in Sure-Tan), in addition to Justices Stephen G. Breyer, David Souter, and Ruth Bader Ginsburg (in effect, replacing Justices Brennan, Marshall, and Blackmun from the Sure-Tan minority). See id. at 140; id. at 153 (Breyer, J., dissenting); supra note 75 (discussing the five to four margin in Sure-Tan).

118. Id. at 146–47.
119. Id. at 147.
120. Id. (emphasis added).
121. Id. at 142–44, 147.
122. Id. at 142.
123. Id. at 144 (emphasis added).
124. Id. at 147.
125. Id.
126. Id. at 147–52.
As to the IRCA’s express terms, the Court recognized that the IRCA “combat[ed] the employment of illegal aliens” by explicitly targeting both employers and undocumented workers with sanctions for engaging in prohibited conduct in the employment and hiring processes.\textsuperscript{127} Specifically, the Court correctly observed that it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of [the] IRCA’s enforcement mechanism [i.e., the employment verification system], or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations.\textsuperscript{128}

Evaluating the impact of Castro’s back pay remedy upon these IRCA’s express terms, the Court concluded 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 [the] IRCA.”\textsuperscript{129} Importantly, the Court highlighted that “Castro’s use of false documents to obtain employment . . . violated the[] provisions”\textsuperscript{130} that “made it criminally punishable for an alien to obtain employment with false documents.”\textsuperscript{131} Repeatedly emphasizing this unlawful conduct, the Court viewed Castro’s actions as “misconduct that render[ed] an underlying employment relationship illegal under explicit provisions of federal law.”\textsuperscript{132} As a result, the Court concluded that the NLRB’s back pay remedy for Castro “discount[ed] the misconduct of illegal alien employees” under the IRCA and thereby “subvert[ed]” and “trivialize[d]” the express terms of “the immigration laws.”\textsuperscript{133}

As to the IRCA’s policies, the Court stressed that the “central” focus of “[t]he policy of immigration law” was “combating the employment of illegal aliens.”\textsuperscript{134} Assessing the effect of the NLRB’s back pay remedy upon IRCA policy, the Court similarly concluded that “awarding backpay

\begin{itemize}
\item \textsuperscript{127} Id. at 147; see supra Part I.A (discussing the IRCA and the applicable prohibited conduct and sanctions (civil and/or criminal) for employers and undocumented workers).
\item \textsuperscript{128} Hoffman Plastic, 535 U.S at 148 (emphasis added) (also noting that the IRCA “makes it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents”).
\item \textsuperscript{129} Id. at 151 (emphasis added).
\item \textsuperscript{130} Id. at 148.
\item \textsuperscript{131} Id. at 149.
\item \textsuperscript{132} Id. at 146 (emphasis added); see also id. at 143 (discussing NLRA precedent where the Court had set aside back pay or reinstatement remedies to employees who were “found guilty of serious illegal conduct in connection with their employment” or who “themselves had committed serious criminal acts”); id. at 149 (stating that Castro’s job had been “obtained in the first instance by a criminal fraud”); id. at 151 n.5 (noting that the IRCA “expressly criminalizes the . . . employment relationship at issue in this case”).
\item \textsuperscript{133} Id. at 150.
\item \textsuperscript{134} Id. at 147 (alteration in original) (quoting INS v. Nat’l Ctr. for Immigrants’ Rights, Inc., 502 U.S. 183, 194 & n.8 (1991)).
\end{itemize}
to illegal aliens runs counter to policies underlying [the] IRCA."\textsuperscript{135} The Court then highlighted two key ways in which Castro’s back pay remedy “trench[ed] upon” the IRCA’s policy of combating the employment of undocumented workers.\textsuperscript{136}

First, the Court stated that the NLRB’s back pay remedy would “condone prior violations of the immigration laws” by undocumented workers such as Castro, who had tendered false documents to obtain employment.\textsuperscript{137} The Court reasoned that permitting back pay to those like Castro simply overlooked and “discount[ed] the misconduct of illegal alien employees,”\textsuperscript{138} who may then still “remain[] in the United States illegally, and continue[] to work illegally.”\textsuperscript{139} According to the Court, there was “no reason to think that Congress” intended such a result.\textsuperscript{140}

Second, the Court noted that the NLRB’s back pay award to an undocumented worker such as Castro would also “encourage[] future violations” of the IRCA, whether by the worker or employers in general.\textsuperscript{141} The Court reasoned that a system of awarding back pay to undocumented workers—particularly those who had not yet departed from the country—served as an inducement for them to “remain[] inside the United States illegally.”\textsuperscript{142} According to the Court, those undocumented workers who remain would “trigger[ future,] new IRCA violations, either by tendering false documents to employers or by finding employers willing to ignore [the] IRCA and hire illegal workers.”\textsuperscript{143}

As a concluding point, the Court addressed the primary argument in Justice Stephen G. Breyer’s dissent—namely, that foreclosing the NLRA’s back pay remedy to undocumented workers frustrates the policies behind \textit{both (i) the federal labor laws} (i.e., by removing the remedy that acts as an effective deterrent to unlawful employer conduct under the NLRA) and \textit{(ii) the federal immigration laws} (i.e., by creating a “perverse economic incentive” for employers “to find and to hire illegal-alien-employees”).\textsuperscript{144}

\textsuperscript{135} Id. at 149 (emphasis added).
\textsuperscript{136} See id. at 149–52.
\textsuperscript{137} Id. at 151.
\textsuperscript{138} Id. at 150.
\textsuperscript{139} Id. at 149.
\textsuperscript{140} Id.
\textsuperscript{141} Id. at 150, 151.
\textsuperscript{142} Id. at 150.
\textsuperscript{143} Id. at 151 (similarly stating that NLRB back pay awards to undocumented workers like Castro would “encourage the successful evasion of apprehension [of these workers] by immigration authorities”).
\textsuperscript{144} See id. at 152; id. at 153–56, 160 (Breyer, J., dissenting). As to frustration of the federal labor laws, Justice Breyer argued that the NLRA’s back pay remedy “serve[d] critically important remedial purposes” of “victim compensation” and “deterrence, i.e., discouraging employers from violating the Nation’s labor laws.” Id. at 153–54 (similarly stating that back pay “reasonably helps to deter unlawful activity”); see also id. at 154 (viewing the NLRA’s back pay remedy as “necessary” to “help[ ] make labor law enforcement credible” and to “make[ ] clear that violating the labor laws will not pay”); id. at 160 (stating that “the same backpay award that compensates an employee . . . also requires an employer who has violated the labor laws to make a meaningful monetary payment”
The Court rejected this argument for two reasons. First, the Court noted that the NLRB’s “[l]ack of authority to award backpay does not mean that the employer gets off scot-free.”\textsuperscript{145} Akin to the Sure-Tan Court, the Court stated that employers (like Hoffman Plastic) were still subject to “other significant sanctions” under the NLRA, including cease-and-desist orders, the obligation to post work notices that detail unlawful conduct, and “contempt proceedings should it fail to comply with these orders.”\textsuperscript{146} These other sanctions, said the Court, are “sufficient to effectuate national labor policy regardless of whether the ‘spur and catalyst’ of back pay accompanies them.”\textsuperscript{147}

Second, the Court reiterated Sure-Tan’s point that it was not the role of the courts (which must be guided by the “practical workings of the immigration laws”) to address any “perceived deficien[cy] in the NLRA’s existing remedial arsenal” stemming from back pay foreclosure to undocumented workers.\textsuperscript{148}

II. THE VARYING REMEDIAL APPROACHES FOR UNDOCUMENTED WORKERS UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAW

The Supreme Court’s Sure-Tan and Hoffman Plastic decisions addressed the remedial rights of undocumented workers under the NLRA. Because the Court has never addressed this issue in the context of the federal

\textsuperscript{145} Hoffman Plastic, 535 U.S. at 152.

\textsuperscript{146} Id; see also supra note 63 (discussing the NLRA’s remedial scheme); supra note 91 and accompanying text (discussing the Sure-Tan Court’s view that the board’s “traditional remedies” provided a “significant deterrent” against future NLRA violations).

\textsuperscript{147} Hoffman Plastic, 535 U.S. at 152 (emphasis added). The “spur and catalyst” language had previously appeared in the Supreme Court’s decision in Albemarle Paper Co. v. Moody, 422 U.S. 405, 417–18 (1975) (citing United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973)), which used the language “spur or catalyst.”

\textsuperscript{148} Hoffman Plastic, 535 U.S. at 152 (citing Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 904 (1984)).
employment discrimination laws, the federal courts have attempted to fill this void. The results of these judicial efforts have been three distinct, yet inconsistent, approaches regarding these workers’ remedial rights under the federal employment discrimination laws.\textsuperscript{149}

In crafting their respective approaches, courts answer—whether explicitly or implicitly—two key questions:

(1) Whether, as a general matter, the Supreme Court’s NLRA precedent—\textit{Sure-Tan} and \textit{Hoffman Plastic}—extends beyond the NLRA context and applies to the federal employment discrimination law contexts?

(2) If so, what monetary remedies under these federal employment discrimination laws are foreclosed to undocumented workers?\textsuperscript{149}

The three remedial approaches provide different sets of answers to these questions. The first remedial approach never gets beyond the first question—it finds the Supreme Court’s NLRA precedent inapplicable to the federal employment discrimination laws and thus forecloses no monetary remedies to undocumented workers under those laws.\textsuperscript{150} In contrast, both the second and third remedial approaches find that this NLRA precedent crosses over to the contexts of the federal employment discrimination laws.\textsuperscript{151} However, these two approaches diverge on the extent of the remedial foreclosure for undocumented workers: (i) the second approach forecloses only some monetary remedies;\textsuperscript{152} and (ii) the third approach forecloses all monetary remedies.\textsuperscript{153} Thus, at present, there is no consistent judicial philosophy regarding the monetary remedial rights of undocumented workers under the federal employment discrimination laws. The chart below summarizes these three remedial approaches.

\begin{center}
\begin{tabular}{|c|c|c|}
\hline
Remedial Approach & Apply Supreme Court's NLRA Precedent to Federal Employment Discrimination Law Contexts? & Monetary Remedies Foreclosed to Undocumented Workers: \\
\hline
First & No & None \\
\hline
Second & Yes & Some: back pay and front pay (in lieu of reinstatement) \\
\hline
Third & Yes & All \\
\hline
\end{tabular}
\end{center}

\textsuperscript{149} See infra Parts II.B–II.D.
\textsuperscript{150} See infra Part II.B.
\textsuperscript{151} See infra Parts II.C–II.D.
\textsuperscript{152} See infra Part II.C.
\textsuperscript{153} See infra Part II.D.
Before providing judicial examples of these three remedial approaches, this part first describes the monetary remedies that are available under Title VII, the ADA, and the ADEA. An understanding of the nature and purpose(s) of these remedies—which include damages in addition to those available under the NLRA—can be helpful in assessing the viability and impact of the current remedial approaches.

A. Available Monetary Remedies Under Title VII, the ADA, and the ADEA

Until 1991, Title VII “afforded only ‘equitable’ remedies” to prevailing plaintiffs. In particular, it expressly empowered the courts (i) to “order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate” and (ii) to award “a reasonable attorney’s fee (including expert fees) as part of the costs . . . .” While enumerating these equitable remedies, Title VII did not explicitly reference any front pay remedy. However, as recognized by the Supreme Court, front pay fell within, and was authorized by, Title VII’s “any other equitable relief” catchall language.

The purpose behind Title VII’s equitable remedies was—and still is—to “make persons whole for injuries suffered on account of unlawful employment discrimination.” Thus, the remedies of back pay and

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154. Landgraf v. USI Film Prods., 511 U.S. 244, 252 (1994); see also Kolstad v. Am. Dental Ass’n, 527 U.S. 526, 533–34 (1999) (stating that, prior to 1991, “only equitable relief . . . was available to prevailing Title VII plaintiffs” and “no authority [existed under Title VII] for an award of punitive or compensatory damages”).
156. These Title VII remedial provisions were modeled after, and are almost identical to, those of the NLRA. See id. at 848–49 (stating that Title VII’s remedial provisions “closely tracked the language of § 10(c)” of the NLRA); Landgraf, 511 U.S. at 252–53 (stating that “Title VII’s backpay remedy[ was modeled on that of the [NLRA]’(footnote omitted)); see also supra note 63 (discussing the NLRA’s remedial scheme).
158. See Pollard, 532 U.S. at 853–54 (stating that the front pay remedy—whether “in lieu of reinstatement” or “for the period between the date of judgment and the date of [any] reinstatement”—was “authorized under” Title VII’s equitable remedy provisions); see also id. at 850–51 (stating that “[b]y 1991, virtually all of the courts of appeals had recognized that ‘front pay’ was a remedy authorized under” Title VII’s equitable remedy provisions and that “no court of appeals appears to have ever held to the contrary”); id. at 853 n.3 (stating that the federal circuits have “consistently . . . construed [Title VII’s ‘other equitable relief language] as authorizing front pay awards in lieu of reinstatement”); United States v. Burke, 504 U.S. 229, 239 n.9 (1992) (noting that “courts have allowed Title VII plaintiffs who were wrongfully discharged and for whom reinstatement was not feasible to recover ‘front pay’ or future lost earnings”).
159. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418–19 (1975) (stating that “[t]he ‘make whole’ purpose of Title VII is made evident by the legislative history”); see also
reinstatement (or front pay in lieu thereof) seek to “restor[e] victims . . . to the wage and employment positions they would have occupied [at their employer] absent the unlawful discrimination.”

Mathematically, the back pay remedy represents “the difference between the amount the claimant would have earned [in his or her position at the employer] absent the discrimination and the amount of wages actually earned during the relevant period” prior to judgment. The front pay remedy, on the other hand, corresponds to

\[
\text{lost compensation \text{[from a plaintiff’s position at his or her employer] during the period between judgment and reinstatement or in lieu of reinstatement}.}
\]

For instance, when an appropriate position for the plaintiff is not immediately available without displacing an incumbent employee, courts have ordered reinstatement upon the opening of such a position and have ordered front pay to be paid until reinstatement occurs. In cases in which reinstatement is not viable because of continuing hostility between the plaintiff and the employer or its workers, or because of psychological injuries suffered by the plaintiff as a result of the discrimination, courts have ordered front pay as a substitute for reinstatement.

In 1991, however, the landscape of available Title VII remedies changed. In passing the Civil Rights Act of 1991 (the 1991 Act), Congress amended Title VII and “expanded the remedies available to . . . plaintiffs by permitting, for the first time, the recovery of compensatory and punitive damages.” Compensatory damages may be awarded for a Title VII

Landgraf, 511 U.S. at 252–53 (stating that “Title VII’s back pay remedy . . . is a ‘make-whole’ remedy”); EEOC v. Dial Corp., 469 F.3d 735, 743 (8th Cir. 2006) (stating that, under Title VII, “[t]he trial court ‘has broad equitable discretion to fashion back pay awards in order to make the Title VII victim whole’” (quoting EEOC v. Delight Wholesale Co., 973 F.2d 664, 669–70 (8th Cir. 1992))).

Burke, 504 U.S. at 239 (citing Albermarle Paper Co., 422 U.S. at 418) (similarly stating that Title VII’s equitable remedies address “the unlawful deprivation of full wages earned or due for services performed” and thus permit an employee to “recover only an amount equal to the wages the employee would have earned [at his employer] from the date of discharge to the date of reinstatement”).

Dial Corp., 469 F.3d at 744 (emphasis added); see also Akouri v. State of Fla. Dep’t of Transp., 408 F.3d 1338, 1343 (11th Cir. 2005) (stating that “[b]ack pay is ‘the difference between the actual wages earned and the wages the individual would have earned in the position’” without the discrimination (quoting Gunby v. Pa. Elec. Co., 840 F.2d 1108, 1119–20 (3d Cir. 1988))).

Pollard, 532 U.S. at 846 (emphasis added) (citations omitted); see also id. at 850 (stating that “[c]ourts [have traditionally] recognized that reinstatement was not always a viable option, and that an award of front pay as a substitute for reinstatement in such cases was a necessary part of the ‘make whole’ relief mandated by Congress” in Title VII); McInnis v. Fairfield Cmty., Inc., 458 F.3d 1129, 1145 (10th Cir. 2006) (discussing front pay and noting that “reinstatement . . . may not be appropriate . . . when the employer has exhibited such extreme hostility that, as a practical matter, a productive and amicable working relationship would be impossible” (quoting EEOC v. Prudential Fed. Sav. & Loan Ass’n, 763 F.2d 1166, 1172 (10th Cir. 1985))).


Pollard, 532 U.S. at 848 (emphasis added); see also 42 U.S.C. § 1981a(a) (2000) (providing compensatory and punitive damage remedies under Title VII); Landgraf, 511
plaintiff’s “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.”

While the 1991 Act allowed these supplemental Title VII remedies, Congress limited them to certain types of discrimination cases and to monetary caps. Specifically, a prevailing Title VII plaintiff can recover compensatory and punitive damages only in cases where the employer engaged in “unlawful intentional discrimination” (i.e., cases that rely on a “disparate treatment” theory, rather than a “disparate impact” theory). In addition, punitive damages are available only in a further subset of these “intentional discrimination” cases—namely, those in which the employer “engaged in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights of [the] aggrieved individual.” Finally, the aggregate amount of a prevailing Title VII plaintiff’s compensatory and punitive damages is subject to statutory caps.

165. 42 U.S.C. § 1981a(b)(3); see also H.R. REP. NO. 102-40, pt. 1, at 74 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 612 (stating that “[c]ompensatory damages include, but are not limited to, monetary relief for humiliation, pain and suffering, other psychological and physical harm, and loss of civil rights; medical expenses incurred as a result of psychological or physical harm; and other economic losses and out-of-pocket costs”); Akouri, 408 F.3d at 1345 (stating that Title VII’s compensatory damages may “compensate[] for intangible, psychological injuries as well as financial, property, or physical harms”).

The “future pecuniary losses” aspect of Title VII’s compensatory damages does not include the front pay remedy. See Pollard, 532 U.S. at 852 (recognizing that “future pecuniary losses” could, “out of context” and “in the abstract,” be viewed as including front pay, but holding that front pay is not to be included within Title VII’s compensatory damages and the statutory caps).


167. 42 U.S.C. § 1981a(b)(1); see also Kolstad, 527 U.S. at 534 (“The very structure of [section] 1981a suggests a congressional intent to authorize punitive awards in only a subset of cases involving intentional discrimination. . . . Congress plainly sought to impose two standards of liability—one for establishing a right to compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for a punitive award.”). Generally, an employer acts with the requisite “malice or reckless indifference” when it “at least discriminate[s] in the face of a perceived risk that its actions will violate federal law.” Id. at 535–36 (stating that the proper inquiry “pertain[s] to the employer’s knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination” (emphasis added)).
that range from $50,000 to $300,000, depending upon the number of employees.\footnote{168}

In adding compensatory and punitive damages to Title VII’s remedies, Congress aimed to serve three important purposes. First, Congress intended to provide more “appropriate remedies for intentional discrimination and unlawful harassment,”\footnote{169} thus affording more “adequate compensation for victims of discrimination.”\footnote{170} Specifically, Congress reasoned that “[t]he limitation of relief under Title VII to equitable remedies often means that victims of intentional discrimination may not recover for the very real effects of the discrimination.”\footnote{171} Stressing this inadequacy in Title VII’s equitable relief, Congress noted that

> victims of intentional sexual or religious discrimination in employment terms and conditions often endure terrible humiliation, pain and suffering. This distress often manifests itself in emotional disorders and medical problems. Victims of discrimination often suffer substantial out-of-pocket expenses as a result of the discrimination, none of which is compensable with equitable remedies.\footnote{172}

Second, Congress aimed “to encourage citizens to act as private attorneys general to enforce” their Title VII rights via these potentially lucrative compensatory and punitive damages.\footnote{173} Congress sensed and suspected that, due to the limited equitable relief then available under Title VII, “victims of intentional discrimination [have been] discouraged from seeking to vindicate their civil rights.”\footnote{174}

\footnote{168. 42 U.S.C. § 1981a(b)(3) (specifying a $50,000 cap for employers with between 15 and 100 employees, a $100,000 cap for employers with between 101 and 200 employees, a $200,000 cap for employers with between 201 and 500 employees, and a $300,000 cap for employers with 501 or more employees).


\footnote{170. H.R. REP. NO. 102-40, pt. 2, at 1, reprinted in 1991 U.S.C.C.A.N. at 694 (also noting that the 1991 Act was intended to “strength[en] existing protections and remedies available under federal civil rights laws to provide . . . adequate compensation for victims of discrimination”); see also id., pt. 1, at 14–15 (noting that one of the purposes of the 1991 Act was to “provide monetary remedies for victims of intentional employment discrimination to compensate them for resulting injuries” (emphasis added)).

\footnote{171. Id., pt. 2, at 25; see also id., pt. 1, at 64–65 (stating that additional “[m]onetary [sic] damages also are necessary to make discrimination victims whole for the terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity”); id. at 68 (stating that Title VII’s equitable relief “[a]ll too frequently . . . leaves prevailing plaintiffs without remedies for their injuries”).

\footnote{172. Id., pt. 2, at 25 (emphasis added); see also id., pt. 1, at 66 (similarly stating that “[v]ictims of intentional discrimination often endure terrible humiliation, pain and suffering, psychological harm and related medical problems, which in turn cause [them] to suffer substantial out-of-pocket medical expenses and other economic losses as a result of the discrimination”).

\footnote{173. Id., pt. 1, at 64–65; see also id. at 70 (finding that “permitting the recovery of such damages would enhance the effectiveness of Title VII by . . . encouraging private enforcement”).

\footnote{174. Id., pt. 2, at 25; see also id., pt. 1, at 70 (stating that Title VII’s limited back pay relief “serves as a powerful disincentive for victims to seek to vindicate their rights”).}
Finally, Congress intended “to deter unlawful harassment and intentional discrimination in the workplace” by exposing employers to these additional and more costly remedies.\footnote{175. Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071, 1071 (1991); see also H.R. Rep. No. 102-40, pt. 1, at 14, reprinted in 1991 U.S.C.C.A.N. at 552 (noting that one of the purposes of the 1991 Act was to “provide monetary remedies for victims of intentional employment discrimination . . . to provide more effective deterrence”); id. at 70 (finding that “permitting the recovery of such damages would enhance the effectiveness of Title VII by . . . deterring future acts of discrimination”); id., pt. 2, at 1 (noting that the 1991 Act was intended to “strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence”).} According to Congress, Title VII’s limited equitable relief had “not served as an effective deterrent” for employment-related discrimination\footnote{176. Id. at 69.} and had “allow[ed] employers who discriminate to avoid any meaningful liability.”\footnote{177. Id. at 68.} Consequently, Congress authorized compensatory and punitive damages under Title VII to “raise the cost of an employer’s engaging in intentional discrimination, thereby providing employers with additional incentives to prevent intentional discrimination in the workplace before it happens.”\footnote{178. Id. at 65; see also id. at 69 (stating that “[m]aking employers liable for all losses—economic and otherwise—which are incurred as a consequence of prohibited discrimination . . . will serve as a necessary deterrent to future acts of discrimination, both for those held liable for damages as well as the employer community as a whole”).}

As to available monetary remedies under the ADA, that act merely incorporates by reference Title VII’s remedial provisions,\footnote{179. 42 U.S.C. § 12117(a) (2000) (stating that the “remedies . . . set forth in [Title VII’s remedial section of 42 U.S.C. § 2000e-5] shall be the . . . remedies . . . provide[d] to . . . any person alleging discrimination on the basis of disability in violation” of the ADA’s employment-related provisions).} and Congress—through the 1991 Act—similarly expanded the ADA’s remedies to include compensatory and punitive damages.\footnote{180. See id. § 1981a(a)(2) (stating that compensatory and punitive damages are equally recoverable by prevailing plaintiffs under the ADA).} Consequently, the remedies available to an ADA plaintiff are identical to those available under Title VII.

Finally, the ADEA provides remedial relief that is similar—but not identical—to that available under Title VII and the ADA. Interestingly, the ADEA incorporates by reference certain remedial provisions of the Fair Labor Standards Act (FLSA)\footnote{181. 29 U.S.C. § 626(b) (2000) (stating that the ADEA “shall be enforced in accordance with the . . . remedies . . . provided” in section 216 of the Fair Labor Standards Act (FLSA) (except for the penalties of fines and imprisonment articulated in section 216(a)). Generally, the FLSA requires that employers (i) pay at least the federally established minimum wage rate and (ii) pay overtime compensation (at one and a half times the applicable “regular rate” of pay) to nonexempt employees who work in excess of forty hours per week. Id. §§ 206(a)(1), 207(a)(1). In addition, it contains an antiretaliation provision similar to those of Title VII, the ADA, and the ADEA. Id. § 215(a)(3); see supra notes 3–5 (describing Title VII’s, the ADA’s, and the ADEA’s antiretaliation provisions, respectively).} and classifies age-based employment discrimination as a “prohibited act under” the FLSA’s antiretaliation
provision.182 Under the FLSA, this type of violation exposes the employer to (i) “legal or equitable relief as may be appropriate to effectuate the purposes of [the FLSA], including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages”183 and (ii) payment of a “reasonable attorney’s fee . . . and costs of the action.”184

Thus, the ADEA affords the same equitable remedies to prevailing plaintiffs as Title VII and the ADA afford—namely, back pay (as “wages lost”), reinstatement (or front pay in lieu thereof, as “wages lost”), and attorneys’ fees.185 Yet, instead of providing “compensatory damages” or “punitive damages,” the ADEA allows recovery of “liquidated damages” in an amount “equal” to any “wages lost,” thus providing, in effect, “double damages.”186 In addition, Congress limited liquidated damages to “cases of willful violations” of the ADEA.187

The nature and purpose of the ADEA’s liquidated damages is clear: “Congress intended for liquidated damages to be punitive in nature.”188 Furthermore, and similar to one of the stated purposes behind Title VII’s

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182. 29 U.S.C. § 626(b); see supra note 181 (discussing the FLSA’s antiretaliation provision).
183. 29 U.S.C. § 216(b) (emphasis added). The “wages lost” component includes both back pay and front pay in lieu of reinstatement, if warranted. See Hansard v. Pepsi-Cola Metro. Bottling Co., 865 F.2d 1461, 1469 (5th Cir. 1989) (recognizing that “[c]ourts have permitted ADEA plaintiffs to recover ‘front pay’ in addition to the usual award of back pay” (citation omitted)).
184. 29 U.S.C. § 216(b) (emphasis added); see also id. § 626(b) (similarly providing that, in any ADEA action, “the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate . . ., including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section” and stating that any “[a]mounts owing to a person as a result of a violation of [the ADEA] shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of [the FLSA’s remedial scheme]”) (emphasis added).
185. See supra notes 154–58, 179–80 and accompanying text (discussing the equitable remedies available under Title VII and the ADA).
187. 29 U.S.C. § 626(b). In order for an employer to commit the requisite “willful violation[]” of the ADEA, it must “kn[o]w or show[ ] reckless disregard for the matter of whether its conduct was prohibited by the [ADEA].” Hazen Paper Co. v. Biggins, 507 U.S. 604, 615–17 (1993).
188. Trans World Airlines, 469 U.S. at 125; see, e.g., Cross v. N.Y. City Transit Auth., 417 F.3d 241, 255 (2d Cir. 2005) (stating that “‘liquidated damages may fairly be characterized as ‘punitive in nature’ [because] they do after all provide an ADEA victim with more than his or her out-of-pocket damages or any other strictly compensatory amounts’” (quoting McGinty v. New York, 193 F.3d 64, 70–71 (2d Cir. 1999))); Potence v. Hazleton Area Sch. Dist., 357 F.3d 366, 373 (3d Cir. 2004) (citing Trans World Airlines, 469 U.S. at 126, and stating that “[b]oth the Supreme Court and this court have held that the liquidated damages provision of the ADEA was intended to be punitive in nature”); Carberry v. Monarch Mktg. Sys., Inc., 30 F. App’x. 389, 394 (6th Cir. 2002) (noting that the ADEA’s liquidated damages “are ‘punitive in nature’”).
compensatory and punitive damages, Congress viewed “liquidated damages awards as ‘an effective deterrent to willful violations of the ADEA.’”

B. The First Remedial Approach:
Foreclosure of No Monetary Remedies

Under the first remedial approach, undocumented workers are not foreclosed from any of the above-referenced monetary remedies under the federal employment discrimination laws. This approach provides the following answers to the above-referenced key questions on this issue:

(1) No—the Supreme Court’s *Hoffman Plastic* and *Sure-Tan* decisions do not extend beyond the NLRA context and apply to the federal employment discrimination law contexts; and

(2) Consequently, no monetary remedies are foreclosed to undocumented workers under those laws.

This first remedial approach is nicely reflected in the Ninth Circuit’s opinion in *Rivera v. NIBCO, Inc.* In *Rivera*, the Ninth Circuit confronted a Title VII national origin discrimination lawsuit by Martha Rivera and almost two dozen other Latin and Asian employees, all of whom had been terminated after poor performance on a job skills test given in English. These employees requested the full panoply of Title VII monetary remedies—namely, “reinstatement (and front pay for those not electing reinstatement), back pay, compensatory and punitive damages, and attorneys fees.”

During a deposition, Rivera was asked questions about her “immigration status,” but she refused to answer per her counsel’s instruction. Subsequently, the magistrate judge issued a protective order that “barred all discovery” on this issue because it “would unnecessarily chill legitimate

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189. Graefenhain v. Pabst Brewing Co., 870 F.2d 1198, 1205 (7th Cir. 1989) (quoting *Trans World Airlines*, 469 U.S. at 125); see also McGinty, 193 F.3d at 70 (noting that “liquidated damages are designed to deter willful violations of ADEA” (citation omitted)); Lindsey v. Atl. Cast Iron Pipe Co., 810 F.2d 1094, 1102 (11th Cir. 1987) (stating that “ADEA liquidated damages awards . . . deter violators”); Kelly v. Am. Standard, Inc., 640 F.2d 974, 979 (9th Cir. 1981) (stating that “the award of liquidated damages . . . is intended to deter intentional violations of the ADEA” (citation omitted)).

Interestingly, the original bill for the ADEA had incorporated the FLSA’s criminal liability sanctions in cases of “willful violations” of the ADEA. *Trans World Airlines*, 469 U.S. at 125 (discussing the ADEA’s legislative history). However, Congress opted to substitute “liquidated damages” for these criminal liability sanctions, based on “the view that liquidated damages could effectively supply the deterrent and punitive [functions] which both criminal penalties and punitive damages normally serve.” Dean v. Am. Sec. Ins. Co., 559 F.2d 1036, 1039-40 (5th Cir. 1977); see also *Trans World Airlines*, 469 U.S. at 125 (also discussing this legislative substitution).

190. 364 F.3d 1057 (9th Cir. 2004), cert. denied, 544 U.S. 905 (2005).

191. Id. at 1061.

192. Id.

193. Id.
claims of undocumented workers under Title VII.” On appeal, NIBCO argued that a Title VII plaintiff’s “immigration status” was relevant, discoverable, and “essential to its defense,” because Hoffman Plastic “foreclose[d] any award of back pay to an undocumented plaintiff.”

Because it affirmed the protective order on other grounds, the Ninth Circuit initially noted that it “need not decide the Hoffman question in this [Title VII] case.” Nonetheless, the court seized upon the opportunity to

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194. Id. at 1061–62.
195. Id. at 1066 (similarly referencing NIBCO’s contention that “each plaintiff’s immigration status governs her entitlement to reinstatement, front pay, and back pay on [her] Title VII claim” and that “Hoffman precludes any award of back pay to an illegal immigrant, no matter what federal statute the employer may have violated”).
196. Id. at 1069; see also id. at 1074 n.19 (stating that “we have left open the question whether Hoffman applies in a Title VII action”).

The Rivera v. NIBCO, Inc. court bypassed the “Hoffman question” by viewing separately the liability and remedy phases of Martha Rivera’s Title VII lawsuit. See id. at 1069–70, 1074–75. Specifically, the U.S. Court of Appeals for the Ninth Circuit stated that Hoffman Plastic was relevant, if at all, only at the latter remedy phase, not at the former liability phase. See id. at 1069–70 (stating that “[t]he information that NIBCO seeks is not relevant to determining whether it has violated Title VII”); id. at 1070 (stating that “[i]t makes no difference to the resolution of [the liability] question whether some of the plaintiffs are ineligible for certain forms of statutory relief”); id. at 1074–75 (noting that “Hoffman does not make immigration status relevant to the determination whether a defendant has committed national origin discrimination under Title VII... [T]he availability of backpay remedies for certain plaintiffs will be determined, if at all, only after the liability phase.”).

Because the Rivera litigation was still in the initial liability phase, the court was free to find the “Hoffman question” unnecessary. Id. at 1069.

Freed from the “Hoffman question,” the court affirmed the protective order because “the substantial and particularized harm of the discovery—the chilling effect that the disclosure of plaintiffs’ immigration status could have upon their ability to effectuate their rights—outweighed NIBCO’s interests in obtaining the information at this early stage in the litigation.” Id. at 1064 (footnote omitted). For other cases in which courts have relied upon this rationale to preclude discovery into a plaintiff’s “immigration status” (especially during a lawsuit’s liability phase), see Perez-Farias v. Global Horizons, Inc., No. CV-05-3061, 2007 WL 1412796, at *3 (E.D. Wash. May 10, 2007) (a federal and state employment discrimination case citing Rivera and concluding that “[c]onsistent with Rivera, Defendants are prohibited from questioning Plaintiffs regarding their immigration status”); EEOC v. First Wireless Group, Inc., No. 03-CV-4990, 2007 WL 586720, at *3 (E.D.N.Y. Feb. 20, 2007) (a Title VII discrimination and retaliation case citing Rivera and finding that the magistrate judge’s protective order barring discovery into “immigration status” was proper, because it was “a potential weapon for harassing and intimidating individuals” and had an “in terrorem effect”); EEOC v. Rest. Co., 448 F. Supp. 2d 1085, 1087–88 (D. Minn. 2006) (a Title VII discrimination and retaliation case citing Rivera and barring discovery regarding immigration status because it would “have an unacceptable chilling effect on the bringing of civil rights actions”); Avila-Blum v. Casa De Cambio Delgado, Inc., 236 F.R.D. 190, 191–92 (S.D.N.Y. 2006) (a federal employment discrimination case highlighting the “chilling effect of inquiry into immigration status in connection with evidence sought in discrimination and employment-related cases” and “concurs[ing] with the analysis of other courts that have . . . concluded that such discovery should be barred” (citation omitted)); EEOC v. Bice of Chicago, 229 F.R.D. 581, 582–83 (N.D. Ill. 2005) (a federal employment discrimination case citing Rivera and barring discovery as to “immigration status” because such questions “are oppressive... constitute a substantial burden on the parties and on the public interest and . . . would have a chilling effect on victims of employment discrimination from coming forward to assert discrimination claims”); EEOC v. First Wireless Group, Inc., 225 F.R.D. 404, 405–06 (E.D.N.Y. 2004) (a federal employment discrimination and
discuss, in general terms, whether Hoffman Plastic extended beyond the NLRA context and applied to the Title VII context. Succinctly answering that question, the Ninth Circuit stated: “We . . . specifically believe it unlikely that [Hoffman Plastic] applies in Title VII cases.” The Ninth Circuit stressed several primary points in support of this position.

For example, and akin to Justice Breyer’s contention in his Hoffman Plastic dissent, the court suggested that barring back pay (and other) remedies under Title VII would frustrate their deterrent purpose and thus compromise national antidiscrimination policy. Specifically, the Ninth Circuit observed that Congress “armed” Title VII plaintiffs with a “full complement of remedies”—“not only traditional remedies for employment law violations, such as backpay, frontpay, and reinstatement, but also full compensatory and punitive damages.” These “full” Title VII remedies, noted the court, were designed “to punish employers who engage in unlawful discriminatory acts,” “to deter future discrimination both by the defendant and by all other employers[,]” and to “vindicate national policy of the highest priority.” Intimating that employers would be less deterred from violating Title VII if they were not subject to its “severe remedies, including backpay,” the court was “strongly” disinclined to find any

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197. Rivera, 364 F.3d at 1066–69.
198. Id. at 1067; see also id. at 1068 (stating that it was “persuad[ed] . . . that Hoffman does not resolve the question whether federal courts may award backpay to undocumented workers who have been discharged in violation of Title VII”); id. at 1074 n.19 (emphasizing that “we have serious reservations about [Hoffman Plastic’s] applicability” in Title VII actions).
199. Id. at 1067–69.
200. See supra note 144 and accompanying text (discussing Justice Breyer’s arguments in his Hoffman Plastic dissent).
201. Rivera, 364 F.3d at 1067–69.
202. Id. at 1067; see supra Part II.A (discussing the available remedies under Title VII).
203. Id. at 1067–68 (stating similarly that Congress added the compensatory and punitive damage remedies “to facilitate the deterrence of discrimination” and that Title VII’s remedies address “instances of discrimination by sending strong messages to would-be-discriminators”); see supra Part II.A (discussing the nature and purposes of the available remedies under Title VII).
204. Rivera, 364 F.3d at 1068; see also id. at 1068–69 (discussing how “the reasonably certain prospect of a back pay award . . . provide[s] the spur or catalyst which causes employers . . . to endeavor to eliminate . . . the last vestiges of an unfortunate and ignominious page in this country’s history” (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 417–18 (1975))).
congressional “inten[t] to bar the use of one of the most critical of those remedies [i.e., back pay] in the case of undocumented workers who are victims of invidious discrimination.”²⁰⁵

Moreover, the Rivera court viewed Hoffman Plastic as “not . . . relevant to a Title VII action” because it “says nothing regarding a federal court’s power to balance [the] IRCA against Title VII” when fashioning remedies.²⁰⁶ Specifically, the Ninth Circuit compared the NLRA, which utilizes a federal administrative agency (the NLRB) to award back pay and remedial relief, with Title VII, which uses “a federal court [to] decide[] whether a statutory violation warrants a backpay award.”²⁰⁷ Stating that Hoffman Plastic only addressed the NLRB’s “remedial discretion to interpret statutes other than the NLRA,”²⁰⁸ the court emphasized that a federal court still retains “the very authority to interpret both Title VII and [the] IRCA that the NLRB [now] lacks” after Hoffman Plastic.²⁰⁹

Having deemed Hoffman Plastic as likely inapplicable to the Title VII context, the Rivera court did not bar any monetary remedies (including that of back pay) for undocumented workers under that statute.²¹⁰ To the contrary, the Ninth Circuit “seriously doubt[ed]” that undocumented workers were even barred from “the payment of back wages . . . in Title VII cases.”²¹¹

The Ninth Circuit is not the only federal court to have embraced this first approach of not foreclosing any monetary remedies to undocumented workers under federal employment discrimination law. Indeed, certain federal district courts in Illinois²¹² and New York²¹³ have also supported this approach.

backpay, in order to deter future discrimination and vindicate national policy of the highest priority”). In light of Title VII’s “private” enforcement scheme, the court’s presumed point is that barring certain Title VII remedies for undocumented workers would make these “private attorneys general” less inclined and less motivated to bring Title VII lawsuits, thereby frustrating the “deterrent purpose[]” behind Title VII. Id. at 1067; see also id. at 1068–69 (referencing “the importance of private actions to the enforcement scheme and of backpay to the bringing of private actions”).

²⁰⁵. Id. at 1068–69; see also id. at 1069 (suggesting that “the overriding national policy against discrimination would seem likely to outweigh any bar against the payment of back wages to unlawful immigrants in Title VII cases”).

²⁰⁶. Id. at 1068.

²⁰⁷. Id.

²⁰⁸. Id.

²⁰⁹. Id.

²¹⁰. See id. at 1066–70, 1074–75.

²¹¹. Id. at 1069; see also id. at 1066–67 (stating that it “seriously doubt[ed] that Hoffman is as broadly applicable” so as to preclude “any award of backpay to an illegal immigrant” under other federal statutes); id. at 1074 (stating that “[w]e seriously doubt that Hoffman’s prohibition of NLRB-authorized back pay awards under the NLRA serves to prohibit a district court from awarding backpay to a Title VII plaintiff”).

²¹². See De La Rosa v. N. Harvest Furniture, 210 F.R.D. 237, 238–39 (C.D. Ill. 2002) (a Title VII employment discrimination case viewing Hoffman Plastic as “focused on” the NLRB’s remedial authority and stating that, based on the broader “authority of a federal court as opposed to the NLRB,” it “cannot conclude at this time that Hoffman is dispositive” as to the remedial rights of undocumented workers to back pay under Title VII).
C. The Second Remedial Approach: Foreclosure of Some Monetary Remedies

Under the second remedial approach, undocumented workers are foreclosed from some of the monetary remedies under the federal employment discrimination laws. This approach answers the above-referenced key questions as follows:

(1) Yes—the Supreme Court’s *Sure-Tan* and *Hoffman Plastic* decisions do extend beyond the NLRA context and apply to the federal employment discrimination law contexts; and

(2) Only certain monetary remedies (namely, back pay and front pay) are foreclosed to undocumented workers under those laws.

As a result, the first and second remedial approaches differ in two significant ways: (i) the latter views the Supreme Court’s NLRA precedent as applicable beyond that NLRA context, while the former does not; and (ii) the latter bars undocumented workers from recovering certain monetary remedies under the federal employment discrimination laws, while the former does not.

While the Ninth Circuit’s *Rivera* decision provides an example of the first remedial approach, a four-member dissent in that case paints an effective picture of the second approach.214 In this dissent, Judge Carlos Bea criticized the *Rivera* court’s unwillingness to extend the Supreme Court’s *Hoffman Plastic* decision to the federal employment discrimination law contexts.215 In support of the opposite view, the dissent offered two primary points.216

First, Judge Bea rejected the *Rivera* court’s position that *Hoffman Plastic* merely involved the NLRB’s administrative remedial authority under the NLRA and was not relevant to a federal court’s remedial authority under Title VII.217 Specifically, the *Rivera* dissent argued that *Hoffman Plastic*’s remedial limitations for undocumented workers “[d]id not rest upon such a slender reed” as administrative authority under the NLRA.218 Instead, Judge Bea more broadly viewed *Hoffman Plastic* as addressing “the question [of] . . . not who can vindicate the rights [of undocumented

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213. See Avila-Blum v. Casa De Cambio Delgado, Inc., 236 F.R.D. 190, 192 (S.D.N.Y. 2006) (a federal employment discrimination action concluding that the magistrate judge “did not err in following the reasoning of *Rivera* and other courts in concluding that *Hoffman Plastic* was limited to actions brought by the NLRB to enforce the [NLRA]”).


215. Id. at 830–31.

216. See id. at 830–35.

217. Id. at 832–33 (noting also the *Rivera* court’s view that *Hoffman Plastic* merely “stands for the proposition that backpay, frontpay and reinstatement are not available to plaintiffs suing under the NLRA alone” (emphasis added)).

218. Id. at 834.
workers], but what damages can be recovered" by them.219 Focusing on these remedies rather than who awards them, the Rivera dissent stated that Hoffman Plastic’s “same rationale applies here [in a Title VII case]: allowing federal courts to award backpay to illegal aliens would also ‘unduly trench upon’ federal immigration policy as codified in the IRCA.”220

Second, Judge Bea disputed the Rivera court’s contention that limiting Title VII’s “broader remedies” could act as a disincentive for undocumented workers to “vindicate their workplace rights[,]” thereby compromising the “national policy against discrimination.”221 Akin to the Supreme Court’s response to a similar argument in Sure-Tan and Hoffman Plastic,222 the Rivera dissent focused on the still-available remedies under Title VII and stated that “admirable civil rights policy” would still be furthered “were the plaintiffs forthrightly to waive only one of their money claims [i.e., wage loss claims, such as back pay or front pay],” the one based on a possibly illegal contract, while retaining other money, equitable and counsel fees’ claims.”223

Having deemed Hoffman Plastic applicable to the Title VII context, Judge Bea then clarified which monetary remedies were foreclosed to undocumented workers. Noting that the Rivera court would “grant to unauthorized aliens suing under Title VII the [monetary] remedies of backpay [and] frontpay,”224 the dissent reached the opposite conclusion: “[U]nder the Supreme Court’s decision in Hoffman, unauthorized aliens are not entitled to backpay and frontpay damages under Title VII . . . .”225

Symbolic of the second remedial approach, however, the Rivera dissent did not foreclose all monetary remedies to undocumented workers. Instead, it stated,

219. Id. at 833.
220. Id. at 835 (quoting Hoffman Plastic, 535 U.S. at 151–52) (“More fundamentally, why should a district court have any greater discretion to fashion remedies for civil rights violations which ‘trench upon federal statutes and policies’ unrelated to Title VII (such as prohibitions on unauthorized aliens working in the U.S.) than does the NLRB?”).
221. Id. at 828, 831, 834.
222. See supra notes 90–94 and accompanying text (discussing the Sure-Tan Court’s response on this issue); supra notes 144–47 and accompanying text (discussing the Hoffman Plastic Court’s response on this issue).
223. Rivera, 384 F.3d at 823 (emphasis added); see also id. at 828 (stating that “[u]nchilled” but unauthorized aliens are not only entitled to, but have sought emotional distress damages, punitive damages, and attorneys’ fees under Title VII . . . and have, in fact, sought to vindicate their workplace rights”); id. at 835 (stating that courts can “still award remedies to vindicate Title VII rights such as (1) emotional distress [compensatory] damages, (2) punitive damages, and (3) attorneys’ fees”).
224. Id. at 830–31.
225. Id. at 826; see also id. at 823 (referencing Hoffman Plastic and stating that the plaintiffs—who “do not have authorized immigration status”—are “not entitled [under Title VII] to be awarded back wages or wages they might have earned in the future”); id. at 835 (proposing that courts should “not allow[ ] unauthorized aliens to work or to recover wage loss damages for work time loss”).
court[s] can still award remedies to vindicate Title VII rights, such as (1) emotional distress [compensatory] damages, (2) punitive damages, and (3) attorneys’ fees, all without ‘trenching upon’ the IRCA policy of not allowing unauthorized aliens to work or to recover wage loss damages for work time loss in jobs to which they had no legal right[s].226

Thus, the Rivera dissent differentiated between foreclosed remedies and preserved remedies based on a particular remedy’s implicit connection to such “wage loss damages for work time loss in jobs to which [these workers] had no legal right[s]”—or, stated differently, to “back wages or wages they might have earned in the future from … job[s] which they were incapable of holding, under our Immigration laws.”228

Another example of the second approach is an Illinois federal district court’s decision in Renteria v. Italia Foods, Inc.229 In Renteria, the district court confronted a FLSA retaliation claim by employees who had been terminated after joining an overtime compensation lawsuit.230 These employees requested the complete gamut of FLSA monetary remedies for retaliation claims—namely, back pay, front pay (in lieu of reinstatement), and liquidated damages.231 At summary judgment, the employer contended that, in light of Hoffman Plastic, the employees were “not entitled to back pay, front pay, or [liquidated] damages because they were not legally authorized to work in the United States.”232

The court granted summary judgment as to some, but not all, of these FLSA monetary remedies.233 The court did not even question whether Hoffman Plastic extended beyond the NLRA context and applied to the employees’ FLSA retaliation claim.234 Instead, it simply discussed, and thus presumed, Hoffman Plastic’s applicability to monetary remedies in this FLSA retaliation context.235

Next, the court addressed which of these monetary remedies were foreclosed to undocumented workers under the FLSA’s retaliation

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226. Id. at 835 (emphasis added).
227. Id.
228. Id. at 823; see also id. at 833 (stating that “explicit congressional policy prohibit[s] payment of wage loss damages to anyone who lacks the immigration status or nationality to have a legal right to earn the wages claimed to have been lost”).
230. Id. at *1; see supra note 181 (discussing the FLSA’s retaliation provision).
231. Renteria, 2003 WL 21995190, at *4, 6. In discussing the requested and available remedies for the FLSA retaliation claim, the Renteria court appeared to use interchangeably the terms “liquidated damages” and “compensatory damages.” See id. Because the FLSA expressly provides for the former and not the latter, see supra notes 183–84 and accompanying text (discussing the available remedies under the FLSA’s retaliation provision), the term “liquidated damages” will be substituted and used in discussing the Renteria decision.
233. Id. at *6, 10.
234. See id. at *6.
235. See id.
provision. Specifically, the court decided that “claims for back pay and front pay are stricken.” But, like the Rivera dissent, the court did not bar all monetary remedies to undocumented workers for these claims; instead, it “agree[d] with . . . the point—that [liquidated] damages for retaliatory termination under the FLSA remain available to undocumented workers.”

Similar to the Rivera dissent, the Renteria court distinguished between back pay and front pay (as foreclosed monetary remedies) and liquidated damages (as a preserved monetary remedy) based on whether a particular remedy implicitly “assume[d]” work that was “against the law”:

[T]he Supreme Court has made it clear that awarding back pay to undocumented aliens contravenes the policies embodied in [the IRCA]. An award of front pay would be inappropriate for the same reason: front pay essentially assumes that the worker will continue to work for the employer in the future, which is against the law for an undocumented alien. We reach a different conclusion, however, regarding [liquidated] damages. . . . The remedy of [liquidated] damages, unlike those of back pay and front pay, does not assume the undocumented worker’s continued (and illegal) employment by the employer.

Beyond the Rivera dissent and Renteria court, other federal district courts in Illinois, Minnesota, New York, Oklahoma, and Texas—
plus the Equal Employment Opportunity Commission (as the federal administrative agency that enforces Title VII, the ADA, and the ADEA)—have embraced this second remedial approach.

Superflex, Ltd., the plaintiff had, in light of the Hoffman Plastic decision, withdrawn claims for back pay and reinstatement remedies, thereby leaving claims for compensatory damages and punitive damages. Id. at *1–2.

243. See Chellen v. John Pickle Co., 446 F. Supp. 2d 1247, 1277–78, 1280, 1286–88 (N.D. Okla. 2006) (a Title VII discrimination and FLSA case expressly embracing the second remedial approach by (i) stating that Hoffman Plastic “may preclude an award of back pay” and (ii) allowing, rather than foreclosing, the plaintiffs to recover the monetary remedies of compensatory and punitive damages (under Title VII) and liquidated damages (under the FLSA)).

244. See Escobar v. Spartan Sec. Serv., 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003) (a Title VII discrimination and retaliation case expressly embracing the second remedial approach through the Hoffman Plastic “compels the conclusion that Hoffman Plastic is not entitled to back pay on his claims under Title VII . . . [because] such a remedy . . . [is] foreclosed by the fact that he was an undocumented worker at the time he was employed by Spartan”). Enrique Escobar had “concede[d] that he [was] not, given the Supreme Court’s decision in [Hoffman Plastic], entitled to back pay.” Id. at 896. The Escobar court, however, did question Hoffman Plastic’s applicability to a reinstatement (and front pay) remedy when the undocumented worker has subsequently obtained “legal work status in the United States.” Id. at 897.


245. Before Hoffman Plastic, the Equal Employment Opportunity Commission (EEOC)’s official position reflected the first remedial approach—specifically, that “unauthorized workers who are subjected to unlawful employment discrimination are entitled to the same relief as other victims of discrimination” under the applicable law(s). EQUAL EMPLOYMENT OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE ON REMEDIES AVAILABLE TO UNDOCUMENTED WORKERS UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAWS: EEOC NOTICE NO. 915.002 Intro. (Oct. 26, 1999), available at http://www.eeoc.gov/policy/docs/undoc.html (rescinded June 27, 2002).

Three months after Hoffman Plastic, the EEOC rescinded its 1999 Enforcement Guidance. See EQUAL EMPLOYMENT OPPORTUNITY COMM’N, RESCISSION OF ENFORCEMENT GUIDANCE ON REMEDIES AVAILABLE TO UNDOCUMENTED WORKERS UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAWS: EEOC DIRECTIVES TRANSMITTAL NO. 915.002 (June 27, 2002), available at http://www.eeoc.gov/policy/docs/undoc-rescind.html. The EEOC subsequently embraced the second remedial approach, by viewing some, but not all, monetary remedies to be foreclosed to undocumented workers under the federal employment discrimination laws. See Press Release, Equal Employment Opportunity Comm’n, EEOC Reaffirms Commitment to Protecting Undocumented Workers from Discrimination—Commission Rescinds Prior Guidance, Issues Charge Processing Instructions (June 28,
D. The Third Remedial Approach: 
Foreclosure of All Monetary Remedies

Under the third and final remedial approach, undocumented workers are foreclosed from all monetary remedies under the federal employment discrimination laws. This approach provides the following answers to the above-referenced key questions on this issue:

(1) Yes—the Supreme Court’s Sure-Tan and Hoffman Plastic decisions extend beyond the NLRA context and apply to the federal employment discrimination law contexts; and

(2) All monetary remedies (including, but not limited to, back pay and front pay) are foreclosed to undocumented workers under those laws.

Thus, like the second remedial approach, this third approach views the Supreme Court’s NLRA precedent as applicable beyond the NLRA context. But, distinct from the first two remedial approaches, the third approach bars undocumented workers from recovering any and all monetary remedies under the federal employment discrimination laws.

Judicial examples of the third remedial approach are, at best, sparse. However, the New Jersey Superior Court’s decision in Crespo v. Evergo Corp.246 nicely reflects this third approach, albeit in a state employment discrimination law context. In Crespo, the appellate court confronted a state employment discrimination claim (under New Jersey’s Law Against Discrimination (LAD))247 by an undocumented worker who had been
terminated after taking maternity leave.\textsuperscript{248} In her claim, Rosa Crespo had requested full monetary remedies under the LAD—namely, “economic damages (back pay, front pay, and lost benefits)” in addition to “non-economic damages (emotional distress damages, punitive damages and counsel fees).”\textsuperscript{249} The trial court—embracing the second remedial approach of foreclosing only some monetary remedies—had granted summary judgment to Evergo Corp. as to Crespo’s “economic damages” but not as to her “non-economic damages.”\textsuperscript{250}

On appeal, the New Jersey Superior Court reversed and remanded for “dismissal of the entire complaint[,]”\textsuperscript{251} because it viewed Crespo as being barred from all monetary damages under the LAD.\textsuperscript{252} Like the Renteria court, the court did not even question whether Hoffman Plastic extended beyond the NLRA context and applied to Crespo’s LAD claim.\textsuperscript{253} Rather, the court merely discussed Hoffman Plastic, noted that decision’s “strong enforcement of the policies served by [the] ICRA [sic],”\textsuperscript{254} and thus presumed its applicability to monetary remedies in the LAD context.\textsuperscript{255}

The court then tackled which monetary remedies were foreclosed to undocumented workers under the LAD.\textsuperscript{256} Specifically, the court concluded that Crespo was “preclude[d from] both economic and non-economic damages she claims [to have] resulted from the termination of [her] employment.”\textsuperscript{257}

The court’s rationale for foreclosing all monetary remedies under the LAD was that “legal employment” constituted a “prerequisite” to such remedies under the LAD.\textsuperscript{258} Highlighting Crespo’s “disqualification from legal employment” and “the illegality of [that] employment,”\textsuperscript{259} the court

\textsuperscript{248}. Crespo, 841 A.2d at 472–73. In order to obtain her employment with Evergo Corp., Rosa Crespo had presented a fraudulent social security card and represented that she was “legally entitled to work in the United States.” \textit{Id.} at 473.

\textsuperscript{249}. \textit{Id.} at 472. Under the LAD, a prevailing plaintiff is entitled to recover “[a]ll remedies available in common law tort actions,” N.J. STAT. ANN. § 10:5-13, in addition to a “reasonable attorney’s fee,” \textit{id.} § 10:5-27.1.

\textsuperscript{250}. Crespo, 841 A.2d at 472.

\textsuperscript{251}. \textit{Id.}

\textsuperscript{252}. \textit{See id.} at 473.

\textsuperscript{253}. \textit{See id.} at 474–77.

\textsuperscript{254}. \textit{Id.} at 477.

\textsuperscript{255}. \textit{See id.} at 474–77.

\textsuperscript{256}. \textit{See id.}

\textsuperscript{257}. \textit{Id.} at 477; \textit{see also id.} at 476 (concluding that Crespo’s “termination damages, both economic and non-economic damages,” under the LAD were precluded).

\textsuperscript{258}. \textit{Id.}

\textsuperscript{259}. \textit{Id.} at 476–77 (also referencing Crespo’s “statutory bar” and “[c]ongressionally mandated disqualification”). Interestingly, the court referenced a possible exception to foreclosing all monetary remedies to undocumented workers under the LAD. \textit{See id.} Specifically, it suggested that “egregious circumstances” (such as “‘aggravated sexual harassment’”) could trigger sufficient need “‘to vindicate the policies of the LAD . . . and to compensate . . . tangible physical or emotional harm’” and thus warrant preserving remedial relief for undocumented workers under the LAD. \textit{Id.} (citing and discussing Cedeno v. Montclair State Univ., 750 A.2d 73 (N.J. 2000)). The court found no such “egregious circumstances” in \textit{Crespo}. \textit{Id.} at 477.
saw “no basis for distinguishing . . . non-economic damages” (such as emotional distress damages and punitive damages) from “economic damages” (such as back pay and front pay) for purposes of remedy foreclosure under the LAD.\(^{260}\)

Finally, it is worth noting that some jurisdictions appear to use a “partial version” of the third remedial approach: they reach the same end (i.e., foreclosing all monetary remedies to undocumented workers under the federal employment discrimination laws), but via different means. Specifically, these jurisdictions conclude that an undocumented worker does not even meet the “qualified for the position” element of a prima facie case for federal employment discrimination claims.\(^{261}\) Because the undocumented worker’s prima facie case is found lacking in the first place, these courts have no need to rely upon, or extend the applicability of, the Supreme Court’s NLRA precedent in order to reach the same result of comprehensive remedial foreclosure.

This version of the third approach is illustrated by the U.S. Court of Appeals for the Fourth Circuit’s decision in *Egbuna v. Time-Life Libraries, Inc.*\(^{262}\) In *Egbuna*, the Fourth Circuit faced a Title VII retaliation claim by Obiora E. Egbuna, an undocumented worker who had not been rehired after he had corroborated certain claims in another employee’s discrimination lawsuit against Time-Life.\(^{263}\) Granting summary judgment to Time-Life, the district court reasoned that Egbuna’s undocumented status rendered him “unqualified for the position . . . sought” and thus precluded him from establishing even a prima facie case of discrimination.\(^{264}\)

The Fourth Circuit affirmed.\(^{265}\) The court concluded that Egbuna was entirely “ineligible . . . for the remedies he [sought]” under Title VII.\(^{266}\) Its rationale for foreclosing all Title VII monetary remedies rested on two bases. First, the Fourth Circuit focused upon a Title VII plaintiff’s need to prove his or her “qualification” for the position as part of the requisite prima facie case:

\([^260\text{Id. at 473.}\]
\[^{261}\text{See infra notes 262–79 and accompanying text (discussing illustrative U.S. Court of Appeals for the Fourth Circuit precedent). In order to establish a prima facie case of employment discrimination, a plaintiff must establish that: (i) he or she “belongs” to a protected group or class; (ii) he or she “applied and was qualified for a job for which the employer was seeking applicants”; (iii) he or she was “rejected” or otherwise subject to adverse employment action; and (iv) “the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.” McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).}\]
\[^{262}\text{153 F.3d 184 (4th Cir. 1998) (per curiam).}\]
\[^{263}\text{Id. at 185–86. At the time of his initial hire in June 1989, Obiora E. Egbuna possessed a valid student work visa and was thus not an undocumented worker. Id. at 185. However, that visa expired six months into his employment with Time-Life, and he never renewed it. Id. at 185–86. Consequently, Egbuna was an undocumented worker for the balance of his employment with Time-Life (which ended with his resignation in April 1993) and at the time Time-Life refused to rehire him in June 1993. Id. at 185–86, 186 n.4.}\]
\[^{264}\text{Id. at 186.}\]
\[^{265}\text{Id. at 188.}\]
\[^{266}\text{Id. at 186.}\]
A plaintiff is entitled to [Title VII’s] remedies only upon a successful showing that the applicant was qualified for employment. When the applicant is an alien, being “qualified” for the position is not determined by the applicant’s capacity to perform the job—rather, it is determined by whether the applicant was an alien authorized for employment in the United States at the time in question. Congress so declared in the . . . [IRCA].

. . .

. . . [The] IRCA thus statutorily disqualifies any undocumented alien from being employed as a matter of law.267 Consequently, the court viewed Egbuna—whose undocumented status was undisputed—as “statutorily disqualified from employment in the United States”268 and as thus having “no cause of action” or available remedies under Title VII.269

Second, and from more of a policy perspective, the Fourth Circuit viewed a contrary decision that would allow Egbuna to proceed with, and recover monetary remedies under, his Title VII claim as: (i) “sanction[ing] the formation of a statutorily declared illegal relationship”; (ii) “illogically creat[ing] an entitlement simply because Egbuna applied for a job despite his . . . having been statutorily disqualified from employment in the United States”; and (iii) “nullify[ing] the IRCA, which declares it illegal to hire or to continue to employ unauthorized aliens.”270

In dissent, Judge Samuel James Ervin—foreshadowing the arguments that Justice Breyer would make four years later in his Hoffman Plastic dissent271—contended that the Egbuna court’s approach significantly compromised the purposes and policies of both federal employment discrimination law and federal immigration law.272 As to the former, the

267. Id. at 187.
268. Id. at 188.
269. Id. at 186.
270. Id. at 188. The Fourth Circuit decided Egbuna v. Time-Life Libraries, Inc. almost four years before the Supreme Court’s 2002 Hoffman Plastic decision. In the past six years since Hoffman Plastic, the Fourth Circuit does not appear to have substantively discussed either Egbuna or Hoffman Plastic in the context of an undocumented worker’s rights—remedial or otherwise—under the federal employment discrimination laws.

There are other pre–Hoffman Plastic cases from the Fourth Circuit that evidence the partial version of the third remedial approach. See Chaudhry v. Mobil Oil Corp., 186 F.3d 502, 504–05 (4th Cir. 1999) (citing Egbuna in a Title VII and ADEA claim for an alleged discriminatory and retaliatory failure to transfer and concluding that the plaintiff’s undocumented worker status rendered him “not qualified for employment” and “ineligible for Title VII protection” and “ADEA protection”); Reyes-Gaona v. N. C. Growers Ass’n, 250 F.3d 861, 863 (4th Cir. 2001) (citing Egbuna in an ADEA claim for an alleged discriminatory refusal to hire and stating that, for “a foreign national to be ‘qualified’ for a position, he must be authorized for employment in the United States at the time in question”).
271. See supra note 144 and accompanying text (discussing Justice Breyer’s arguments in his Hoffman Plastic dissent).
272. Egbuna, 153 F.3d at 188–90 (Ervin, J., dissenting).
dissent stated that the majority’s decision precluded undocumented workers from “ever prov[ing] a \textit{prima facie} case of employment discrimination”\textsuperscript{273} and thus insulated employers from “be[ing] held accountable under Title VII for adverse employment actions taken against undocumented aliens.”\textsuperscript{274} This result, said Judge Ervin, “defeat[ed] Congress’s desire to eradicate employment discrimination”\textsuperscript{275} and “fail[ed] to effectuate the anti-discrimination provisions of Title VII.”\textsuperscript{276}

As to the latter, the dissent argued that, under the majority’s approach, employers would also have “an economic incentive to hire undocumented workers” because those workers could not bring viable claims under the federal employment discrimination laws, such as Title VII.\textsuperscript{277} By creating this incentive, said Judge Ervin, the \textit{Egbuna} decision actually “work[ed] against [the] IRCA’s goal of curtailing illegal immigration”\textsuperscript{278} and was “contrary” to “the immigration policy Congress sought to advance through [the] IRCA.”\textsuperscript{279}

\section*{III. Proposing a Uniform Remedi al Approach for Undocumented Workers Under Federal Employment Discrimination Law}

As evidenced by the three different remedial approaches, there is no uniform judicial philosophy regarding the monetary remedial rights of undocumented workers under the federal employment discrimination laws. As a result, an undocumented worker’s remedial rights (and an employer’s accompanying remedial liabilities) under Title VII, the ADA, and/or the ADEA are jurisdiction-dependent.

For example, assume that Shirley, Earl, and Sandee are all undocumented workers who work for Lemon Corp. but in different federal jurisdictions: (i) Shirley works in a jurisdiction following the first remedial approach; (ii) Earl works in one following the second approach; and (iii) Sandee works in a jurisdiction following the third approach. If Lemon Corp. discriminatorily discharges each of these workers because of the same protected trait under federal employment discrimination law, then: (i) Shirley is able to recover (and Lemon Corp. must pay) \textit{all} available monetary damages; (ii) Earl is able to recover (and Lemon Corp. must pay) \textit{only some} of those damages; and (iii) Sandee is able to recover (and Lemon Corp. must pay) \textit{none} of those damages.

\begin{itemize}
\item \textsuperscript{273} Id. at 188.
\item \textsuperscript{274} Id.; see also id. at 189 (stating that “[t]he majority’s decision, in effect, relieves employers of their obligation to comply with federal employment laws, other than penalties under [the] IRCA, with regard to any undocumented workers they might employ”).
\item \textsuperscript{275} Id. at 188.
\item \textsuperscript{276} Id. at 189; see also id. at 190 (stating that the majority’s decision is “contrary” to “the anti-discrimination aims of Title VII”).
\item \textsuperscript{277} Id. at 189.
\item \textsuperscript{278} Id.
\item \textsuperscript{279} Id. at 190.
\end{itemize}
The new approach proposed in this Article—the Conditional Foreclosure Approach—will bring federal uniformity to the monetary remedial rights of undocumented workers under the federal employment discrimination laws. This approach represents a balanced “middle ground” that is consistent with: (i) the IRCA and its underlying congressional philosophy; (ii) the Supreme Court’s NLRA precedent; and (iii) the important purposes and policies of both federal employment discrimination law and federal immigration law.

A. The Conditional Foreclosure Approach and Its Two Features

The Conditional Foreclosure Approach contains two distinct features for determining the extent, if any, of monetary remedial foreclosure for undocumented workers under Title VII, the ADA, and/or the ADEA. These two features are:

1. “Disqualifying Condition.” As a condition to the limited remedy foreclosure described in 2(a), the undocumented worker must have violated the IRCA’s employee-specific provisions that prohibit fraudulent conduct in the employment and hiring processes, with the employer thus having satisfied the IRCA’s employer-specific requirements as to these processes; and

2. “Limited Remedy Foreclosure.” Under the federal employment discrimination laws, an undocumented worker:

   a. is foreclosed from (and does not retain) the monetary remedial rights to back pay and front pay; but

   b. is not foreclosed from (and does retain) all other monetary remedial rights, including, but not limited to, rights to compensatory damages, punitive damages, liquidated damages, and reasonable attorneys’ fees.

This new approach represents several significant departures from the current remedial approaches. First, unlike any of the three approaches, the Conditional Foreclosure Approach—via its disqualifying condition feature—expressly forecloses limited forms of monetary relief if and only if the undocumented worker engaged in IRCA-prohibited fraudulent conduct in obtaining employment in the United States (with the employer having fulfilled its IRCA employment and hiring-related obligations).

Second, this new approach—unlike the second and third approaches—would afford certain undocumented workers (i.e., those who do not engage in prohibited fraudulent conduct to obtain employment and thus fall outside the disqualifying condition) full and complete monetary remedies, including back pay and front pay, under the federal employment discrimination laws.280

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280. For example, suppose Ann is an undocumented worker. During its interviewing and hiring process, Collins Corp. fails to abide by its employer-specific IRCA responsibilities—
Finally, and unlike the third approach, the Conditional Foreclosure Approach—via its limited remedy foreclosure feature—preserves, and does not bar under any circumstances whatsoever, an undocumented worker’s rights to any and all monetary remedies other than back pay and front pay. As a result, an undocumented worker who prevails in a Title VII, ADA, and/or ADEA lawsuit could recover, as applicable and at a minimum, the significant remedies of compensatory damages, punitive damages, liquidated damages, and/or attorneys’ fees.

B. Defending the “Disqualifying Condition” Feature

The first feature of the Conditional Foreclosure Approach is its unique disqualifying condition as to back pay and front pay remedies. This feature is consistent with the IRCA and its underlying congressional philosophy, rests on the implicit, if not explicit, foundation of the Supreme Court’s Hoffman Plastic decision, and promotes employer IRCA compliance and federal immigration policy.

1. The IRCA and Its Underlying Congressional Philosophy

The disqualifying condition feature is wholly consistent with the IRCA’s express terms and the two-part congressional philosophy reflected therein. This two-part philosophy includes: (i) the view that undocumented workers who obtain employment via certain prohibited, fraudulent means are to be subject to negative consequence or sanction; and (ii) the view that all other undocumented workers, who merely obtain employment in the United States but not via such prohibited means, are not to be subject to that consequence or sanction.

As to the first view, when enacting the IRCA’s “comprehensive scheme” to “combat[]” the employment of undocumented workers, Congress created prohibitions and penalties applicable to both employers and undocumented workers. While the IRCA’s “principal means of . . . curtailing future illegal immigration” was, indeed, to subject noncompliant

namely, obtaining the requisite I-9 supporting documents to establish Ann’s identity and authorization to work in the United States. See supra notes 31–35 and accompanying text (discussing the IRCA’s “employment verification system” responsibilities for employers). Ann can thus become employed by Collins Corp. without having tendered any fraudulent materials in violation of the employee-specific prohibitions of the IRCA. See supra notes 44–47 and accompanying text (discussing the IRCA’s employee-specific prohibitions and civil and criminal sanctions).

If Collins Corp. subsequently discriminates against Ann in violation of Title VII, the ADA, and/or the ADEA and she prevails in her lawsuit, the Conditional Foreclosure Approach would afford her the full panoply of monetary remedies under the applicable law(s), because the disqualifying condition would not have been satisfied.

employers to stiff civil and/or criminal penalties. Congress also opted to take a strong stance against undocumented workers. Specifically, the IRCA purposefully subjects undocumented workers to criminal fines, criminal prosecution and imprisonment, and/or additional civil fines (as applicable), provided that they either (i) use a “false” or non-“lawfully issued” identification document (in conjunction with an employer’s IRCA employment verification system) or (ii) falsely attest to eligibility and work authorization. Importantly, the IRCA thus reflects a congressionally created condition to negative consequences for undocumented workers—namely, engaging in IRCA-prohibited, fraudulent misconduct as part of the employment and hiring processes.

As to the second view, Congress went no further than this subset of undocumented workers for purposes of IRCA prohibition and sanction. More specifically, and despite an undocumented worker’s illegal entry into the country, the IRCA’s employment provisions do not prohibit that worker from (or impose criminal and/or civil sanctions for) the mere act of becoming, or being, employed in the United States. Consequently, when an undocumented worker is simply able to obtain employment without having used IRCA-prohibited, fraudulent means (i.e., because the employer failed to request any identity and work authorization documents in the first place), that worker is viewed as “off-limits” by Congress for purposes of IRCA penalty and sanction.

Thus, the IRCA’s express terms and framework reflect a purposeful intent by Congress to differentiate, and to place into two separate groups, undocumented workers for purposes of sanction—those who engage in IRCA-prohibited, fraudulent conduct, and those who do not. The IRCA’s negative consequences for undocumented workers do not spring automatically from the simple fact of employment, but conditionally from these more culpable facts of “employment process” misconduct.

This disqualifying condition feature reflects the first part of Congress’s two-part IRCA philosophy—namely, the view that negative consequences or sanctions are to apply to undocumented workers who obtain employment via prohibited, fraudulent means. Under the IRCA, the negative consequences are in the form of criminal and/or civil sanctions. Under the Conditional Foreclosure Approach, of course, the negative consequences

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283. See supra notes 44–47 and accompanying text (discussing the IRCA provisions applicable to undocumented workers).
285. See supra note 48 and accompanying text (discussing the absence of IRCA prohibition and sanction against undocumented workers for merely being employed).
are in the form of foreclosure of back pay and front pay remedies under the federal employment discrimination laws.

More importantly, however, is the applicable scope of the disqualifying condition feature—it expressly applies only to the subset of undocumented workers who “have violated the IRCA’s employee-specific provisions that prohibit fraudulent conduct in the employment and hiring processes.” As a result, the subset that Congress carved out for IRCA sanction is the exact same subset that is carved out for limited remedial foreclosure per the disqualifying condition feature. Put differently, the congressionally created condition that leads to negative IRCA consequence (i.e., fraudulent conduct in the employment and hiring processes) is the same as the disqualifying condition that leads to negative remedial consequence under the Conditional Foreclosure Approach.

Next, the disqualifying condition feature also embraces the second part of Congress’s IRCA philosophy—namely, the view that negative consequence or sanction should not extend to all other undocumented workers who merely obtain employment, but not via prohibited, fraudulent means. By its very terms, the disqualifying condition does not trigger if the undocumented worker has simply become employed or is employed in the United States, without engaging in any IRCA-prohibited “employment process” misconduct. Thus, again, the subset of undocumented workers that Congress labeled as “off-limits” for purposes of IRCA sanction is the precise subset that is “off-limits” for purposes of remedial foreclosure under the Conditional Foreclosure Approach.

2. The Supreme Court’s Hoffman Plastic Decision

In addition, the disqualifying condition feature of the Conditional Foreclosure Approach is also supported by the Supreme Court’s Hoffman Plastic decision.

At superficial glance, the Hoffman Plastic holding—namely, that an NLRA back pay award “to an undocumented alien who has never been legally authorized to work in the United States” is “foreclosed by federal immigration policy [and the IRCA]” may appear at odds with the disqualifying condition. After all, this holding could be viewed as foreclosing back pay relief on a much broader scale—namely, to almost all undocumented workers (i.e., those who have “never been legally authorized to work” in this country), rather than the smaller subset who would be barred from such relief via the disqualifying condition.

However, a close and measured review of the Hoffman Plastic decision shows that it was the undocumented worker’s (Castro’s) undisputed

286. See supra Part III.A (outlining the disqualifying condition feature); supra notes 44–47 and accompanying text (discussing the IRCA provisions and prohibitions applicable to employees).

fraudulent conduct—not his mere employment in this country or sheer undocumented worker status—that served as the implicit, if not explicit, foundation of the Court’s decision. In Hoffman Plastic, the Court analyzed precisely how Castro’s NLRA back pay remedy “trench[ed] upon” both the express terms and policies embodied in the IRCA. In analyzing this “how” question, the Court visibly relied upon one overwhelming factor—Castro’s IRCA-prohibited, fraudulent conduct.

For example, in explaining how a back pay remedy for Castro would “trench upon” the express terms of the IRCA, the Court stressed that “Castro’s use of false documents to obtain employment . . . violated [the] provisions” that “made it criminally punishable for an alien to obtain employment with false documents.” Repeatedly underscoring Castro’s unlawful conduct, the Court viewed his actions as “misconduct that render[ed] an underlying employment relationship illegal under explicit provisions of federal law.” As a result, the Court concluded that the NLRB’s back pay remedy for Castro “discount[ed] the misconduct of illegal alien employees” under the IRCA and thereby “subvert[ed]” and “trivialize[d]” the express terms of “the immigration laws.”

Similarly, in explaining how a back pay remedy for Castro would “trench upon” the policies of the IRCA, the Court again made repeated references to Castro’s prohibited, fraudulent conduct. For instance, the Court commented that permitting NLRA back pay awards to undocumented workers such as Castro would serve as an inducement to “remain[] inside the United States illegally” and would thus “encourage” future, “new IRCA violations . . . by [those workers] tendering false documents to employers.” In similar reference to undocumented workers such as Castro, who had tendered fraudulent documents in his hiring process, the Court stated that the NLRB’s back pay remedy would: (i) “condone prior violations of the immigration laws” by these workers; (ii) “discount[] the

288. See supra note 100 and accompanying text (discussing Castro’s fraudulent use of “a birth certificate belonging to a friend who was born in Texas” in order to gain employment with Hoffman Plastic).
290. Id. at 148.
291. Id. at 149.
292. Id. at 146 (emphasis added); see also id. at 143 (discussing NLRA precedent where the Court had set aside back pay or reinstatement remedies to employees who were “found guilty of serious illegal conduct in connection with their employment” or who “themselves had committed serious criminal acts”); id. at 149 (stating that Castro’s job had been “obtained in the first instance by a criminal fraud”); id. at 151 n.5 (noting that the IRCA “expressly criminalizes the . . . employment relationship at issue in this case”).
293. Id. at 150.
294. Id.
295. Id. at 151.
296. Id.
misconduct of illegal alien employees;” and (iii) encourage them to “remain[] in the United States illegally, and continue[] to work illegally.”

Consequently, not only did the Hoffman Plastic Court’s foreclosure of the back pay remedy for undocumented workers involve the factual context of a worker who had engaged in IRCA-prohibited conduct, but that misconduct also formed the legal foundation of that foreclosure. The Court’s reliance on this foundation was necessary, in light of the IRCA’s express terms. Those terms, as discussed above, do not prohibit or sanction an undocumented worker’s mere employment in the United States. As a result, an undocumented worker can “trench upon” the IRCA’s express terms only if he or she uses prohibited, fraudulent means in obtaining employment in the United States. To view the Hoffman Plastic holding as applicable to all undocumented workers (rather than this narrower subset) is to overlook both the IRCA’s express terms and the Court’s “trench upon” analysis.

Akin to its consistency with the IRCA’s framework and philosophy, the disqualifying condition feature nicely reflects this foundation of the Hoffman Plastic decision. Just as Castro’s IRCA-prohibited, fraudulent conduct was the basis used by the Supreme Court to trigger back pay foreclosure, this same misconduct by undocumented workers is the express basis used by the disqualifying condition feature to trigger the limited remedy foreclosure of the Conditional Foreclosure Approach. Thus, by similarly viewing an undocumented worker’s “employment process” misconduct as the key to monetary remedy foreclosure, both the Hoffman Plastic decision and the disqualifying condition feature apply to the same, narrow subset of undocumented workers.

3. Promoting IRCA Compliance and Federal Immigration Policy

Finally, the disqualifying condition feature of the Conditional Foreclosure Approach creates a significant financial incentive for employers to comply fully with IRCA obligations, thereby advancing federal immigration policy.

When it passed the IRCA in 1986, Congress viewed employment in the United States to be both the “back door on illegal immigration” and “the magnet that attracts aliens here illegally.” As a result, Congress made “combating [such] employment of illegal aliens central to [t]he policy of immigration law.” Importantly, and as mentioned above, Congress created the IRCA’s employer-based requirements, prohibitions, and

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297. Id. at 150.
298. Id. at 149.
sanctions as “the principal means of closing the back door” and “diminish[ing] the attractive force” of this magnet.

In evaluating how the Conditional Foreclosure Approach furthers these policies, it is important initially to understand that the concepts of a worker’s IRCA fraudulent conduct and an employer’s IRCA compliance are manifestly connected. In other words: (i) if an employer complies with its IRCA “employment verification system” obligations (i.e., by obtaining, and verifying, the requisite identity and work authorization documents), then an undocumented worker who becomes employed must have done so via use of false or fraudulent documents; and (ii) if an employer does not comply with these IRCA obligations, then an undocumented worker who becomes employed was able to do so without any use of false or fraudulent documents.

By referencing (i) the undocumented worker’s violation of the IRCA’s “employee-specific provisions” regarding fraudulent conduct in the employment and hiring processes and (ii) the employer’s satisfaction of the IRCA’s “employer-specific requirements” as to these processes, the disqualifying condition feature recognizes this connected relationship. Indeed, the Conditional Foreclosure Approach, in effect, issues the following notice to employers:

**EMPLOYERS BEWARE:** If you are sued by an undocumented worker under federal employment discrimination law, then:

(A) that worker can recover back pay and front pay remedies if he or she obtained employment free of fraudulent conduct because you did not comply with your IRCA obligations; and

(B) that worker cannot recover back pay and front pay remedies if he or she resorted to obtaining employment via fraudulent conduct because you did comply with your IRCA obligations.

Thus, the employer’s financial incentive via the disqualifying condition feature is conceptually clear: compliance with IRCA responsibilities equals

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301. H.R. Rep. No. 99-682, pt. 1, at 46, *reprinted in* 1986 U.S.C.C.A.N. at 5650 (also noting that “the Committee remains convinced that legislation containing employer sanctions is the most . . . effective way to respond to the large-scale influx of undocumented aliens”).


303. Chief Justice Rehnquist recognized this relationship between undocumented worker (mis)conduct and employer (non)compliance in *Hoffman Plastic*:

[It] is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of [the] IRCA’s enforcement mechanism [i.e., the employment verification system], or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations.

*Id.* at 148 (emphasis added).
avoidance of back pay and front pay liability under federal employment discrimination law.

In addition to being clear in concept, that incentive is also significant in substance. For example, suppose an employer is hiring for a $50,000 per year position. That employer will likely choose to comply with its IRCA employment verification system obligations, if it knows that: (i) compliance will translate to a $50,000 savings (one year combined back pay plus front pay) or $100,000 savings (two years combined back pay plus front pay) in any federal discrimination lawsuit brought by an undocumented worker; and (ii) noncompliance will translate to $50,000 or $100,000 in extra liability in any such lawsuit. As a result, the disqualifying condition feature encourages an employer’s IRCA compliance with a “carrot-and-stick” approach. The “carrot” is the substantial monetary savings in the form of foreclosed back pay and front pay liability. Conversely, the “stick” is the significant additional monetary liability for such damages. Regardless, both this “carrot” and “stick” act, respectively, as the incentive for IRCA compliance and the deterrent against IRCA noncompliance by employers.

As a final point, the disqualifying condition feature directly resolves a primary criticism against foreclosure of any monetary remedies to undocumented workers. For example, in his dissent in Hoffman Plastic, Justice Breyer argued that denial of the NLRA’s back pay remedy for undocumented workers would compromise federal immigration policy by creating a “perverse economic incentive” for employers to violate the IRCA. 304 Explaining his view, Justice Breyer noted that such remedy foreclosure (i) serves to “lower[] the cost to the employer” of an NLRA violation, and (ii) thus creates, in that very employer, an “incentive to find and to hire” these workers rather than legal workers. 305

The Conditional Foreclosure Approach—via its disqualifying condition—eliminates any such “perverse economic incentive.” As Justice Breyer recognized, unconditional or automatic remedy foreclosure may, in fact, create this “incentive” for employers to skirt the IRCA. 306 However,
the limited remedial foreclosure under this new approach is *neither unconditional nor automatic*—instead, by its very terms, it is “conditional” upon the undocumented worker’s fraudulent “employment process” conduct, along with the employer’s preceding compliance with its IRCA obligations. Because the “carrot”—namely, limited monetary foreclosure—springs from such employer-based IRCA compliance, the Conditional Foreclosure Approach removes the very “incentive to find and hire” undocumented workers that Justice Breyer legitimately highlighted.

Thus, the disqualifying condition feature furthers the IRCA’s purpose of curtailing illegal immigration. This feature simultaneously creates not only financial “reward” for employer IRCA compliance but also financial “penalty” for noncompliance. Consequently, the Conditional Foreclosure Approach furthers Congress’s desired ends of reducing the “attractive force” of the magnet of employment in the United States and of closing this “back door on illegal immigration.”

C. Defending the “Limited Remedy Foreclosure” Feature

The second feature of the Conditional Foreclosure Approach is its limited foreclosure of monetary remedies—namely, barring only back pay and front pay (if the disqualifying condition is satisfied) yet preserving all other monetary remedies, such as compensatory damages, punitive damages, liquidated damages, and/or attorneys’ fees.

This second feature is consistent with the “black letter” law and implicit principles of the Supreme Court’s NLRA precedent and also promotes, in a sensible, balanced manner, the important policies of federal employment discrimination law and federal immigration law.

1. The Supreme Court’s NLRA Precedent—Explicit “Black Letter” Law and Implicit Principles

The limited remedy foreclosure feature finds initial support in the explicit “black letter” law of the Supreme Court’s NLRA cases. In addition, however, a close review of these cases (and other judicial authority) also reveals the implicit principle that only back pay and front pay remedies—exhibiting an “inherently work-based remedial characteristic”—are to be foreclosed to undocumented workers under the federal employment discrimination laws.

The definitive “black letter” law of the *Sure-Tan* and *Hoffman Plastic* decisions provides that undocumented workers are foreclosed from the remedies of back pay and reinstatement (for which front pay is the

penalties and sanctions for violation of the Act. However, because employers often view the odds of being subject to an IRCA compliance audit as slim, the “specter” of such penalties or sanctions may alone be inadequate incentive for such IRCA compliance.


monetary, equitable substitute). For example, the *Sure-Tan* Court was explicit as to the remedies that could be barred to undocumented workers. Specifically, the Court stated that: (i) any reinstatement for such workers would be unavailable absent their “legal reentry” and (ii) any back pay was tolled, and unavailable, “during any period when they were not lawfully entitled to be present and employed in the United States.” Consequently, the *Sure-Tan* Court considered back pay and reinstatement (for which front pay is the monetary equivalent and substitute) as generally unrecoverable by undocumented workers.

The *Hoffman Plastic* Court was equally clear as to the remedial relief that could be barred to undocumented workers. The Court stated in plain terms that an “award[ of] backpay to an undocumented alien who has never been legally authorized to work in the United States” is “foreclosed by federal immigration policy [and the IRCA].” Thus, like in *Sure-Tan*, the Court in *Hoffman Plastic* generally placed the back pay remedy into the “foreclosed” category for undocumented workers.

Consistent with this explicit “black letter” law of the Supreme Court’s NLRA cases, the limited remedy foreclosure feature serves to bar the monetary remedies of back pay and front pay (as the equivalent and substitute for the reinstatement remedy foreclosed by *Sure-Tan*). Consequently, the specific subset of foreclosed remedies under these decisions is the same subset of barred relief via this limited remedy foreclosure feature.

Yet, this definitive “black letter” law from *Sure-Tan* and *Hoffman Plastic* does not, and cannot, provide the complete and exclusive justification for the limited remedy foreclosure feature. The reason is simple: these NLRA decisions had no need to address, and thus did not address, possible foreclosure of other monetary remedies (such as compensatory damages, punitive damages, liquidated damages, and attorneys’ fees) for undocumented workers because they are unavailable under the NLRA. Given that the Supreme Court was merely addressing the limited remedies that were available under the NLRA, one cannot automatically assume that (i) the remedies that it foreclosed are the only barred relief or (ii) the remedies that it did not address remain available and recoverable as relief.

However, that very bifurcation—which represents the heart of the limited remedy foreclosure feature—is supported by a subtle, but important, principle embodied in Supreme Court (and other judicial) authority. This principle is that monetary remedy foreclosure for undocumented workers is

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309. See supra notes 158–60, 162 and accompanying text (discussing front pay and its role as the monetary substitute for reinstatement).
310. *Sure-Tan*, 467 U.S. at 903; see also id. at 902–03 (similarly stating that “the implementation of the [NLRB’s] traditional remedies [i.e., reinstatement and back pay] . . . must be conditioned upon the employees’ legal readmittance to the United States” (emphasis added)).
312. See supra note 63 (discussing the remedies available under the NLRA).
(i) appropriate as to relief that has an “inherently work-based remedial characteristic” (i.e., it is naturally and inescapably linked or tied to wage loss amounts that the worker could not have earned lawfully, due to his or her “illegal” employment and work), but (ii) inappropriate as to relief that does not have an “inherently work-based remedial characteristic.”

The Supreme Court, in Hoffman Plastic, implicitly recognized this principle. Specifically, the Court observed that Castro’s fraudulent, employment-process conduct had “render[ed] an underlying employment relationship illegal under explicit provisions of [the IRCA]” and that the IRCA “expressly criminalize[d] the only employment relationship at issue in this case.” Pointing to that “illegal” work by Castro, the Court flatly rejected the NLRB’s argument that would “allow it to award backpay to an illegal alien for . . . wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud.” Thus, Hoffman Plastic stands for more than its explicit “black letter” law of foreclosing the monetary remedy of back pay. It represents the broader, implicit principle that monetary remedies tied to “wages that could not lawfully have been earned” (i.e., having an “inherently work-based remedial characteristic”) are properly foreclosed.

Similarly, other judicial authority supports this principle. For example, the four-judge dissent in Rivera, on the one hand, explained that undocumented workers may not recover “back wages or wages they might have earned in the future from . . . job[s] which they were incapable of holding, under our Immigration laws.” Such “wage loss damages,” said the dissent, may not be awarded to “anyone who lacks the immigration status or nationality to have a legal right to earn the wages claimed to have been lost.”

On the other hand, the Rivera dissent reached the opposite conclusion as to other Title VII monetary remedies for undocumented workers. Specifically, it stated that courts may “still award remedies to vindicate Title VII rights such as (1) emotional distress [compensatory] damages, (2) punitive damages, and (3) attorneys’ fees, all without “trenching upon” the

314. Id. at 151 n.5 (emphasis added).
315. Id. at 149 (emphasis added).
316. Id.
317. In his dissent in the D.C. Circuit’s opinion in Hoffman Plastic, Judge David B. Sentelle also implicitly recognized this principle. See Hoffman Plastic Compounds, Inc. v. NLRB, 237 F.3d 639, 651 (D.C. Cir. 2001) (Sentelle, J., dissenting) (stating that “it defies the logic of the [IRCA] that the employer could be compelled by law to pay to the illegal [worker] unearned wages which he could not lawfully earn and to which he would have no claim but for his prior successful fraud”).
318. Rivera v. NIBCO, Inc., 384 F.3d 822, 823 (9th Cir. 2004) (Bea, J., dissenting) (emphasis added).
319. Id. at 833 (emphasis added).
IRCA policy of not allowing unauthorized aliens to . . . recover wage loss damages for work time loss in jobs to which they had no legal right[s].”

Like the Rivera dissent, the court in Renteria followed this same principle of foreclosing only that monetary relief which exhibits this “inherently work-based characteristic.” While striking down the plaintiff’s “claims for back pay and front pay,” the court nonetheless concluded that “[liquidated] damages for retaliatory termination under the FLSA remain available to undocumented workers.” The court justified this remedial differentiation by focusing upon whether the requested relief “assumed” an undocumented worker’s “illegal” work:

[T]he Supreme Court has made it clear that awarding back pay to undocumented aliens contravenes the policies embodied in [the IRCA]. An award of front pay would be inappropriate for the same reason: front pay essentially assumes that the worker will continue to work for the employer in the future, which is against the law for an undocumented alien. We reach a different conclusion, however, regarding compensatory damages . . . . The remedy of compensatory damages, unlike those of back pay and front pay, does not assume the undocumented worker’s continued (and illegal) employment by the employer.

The limited remedy foreclosure feature of the Conditional Foreclosure Approach is wholly consistent with this implicit principle to foreclose an undocumented worker’s particular monetary remedy if it has an “inherently work-based remedial characteristic.” Specifically, this feature acts to bar those monetary remedies that exhibit this characteristic (i.e., back pay and front pay), while preserving those remedies that lack it (i.e., compensatory damages, punitive damages, liquidated damages, and attorneys’ fees).

As to back pay and front pay, both remedies are “inherently work-based” in that each—in nature and computation—is inevitably linked to “work-based” sums that would have been earned by the undocumented worker via “illegal” or “unlawful” employment. More specifically, these forms of equitable, “make-whole” relief aim to “restor[e] victims . . . to the wage and employment positions they would have occupied [at their place of employment] absent the unlawful discrimination.” Further, back pay merely computes “the difference between the amount the claimant would have earned [in his or her position at the employer] absent the discrimination and the amount of wages actually earned” prior to judgment. Similarly, the front pay remedy—acting as a “substitute for reinstatement”—simply represents “lost compensation [from a plaintiff’s

320. Id. at 835 (emphasis added).
322. Id.
323. Id. (emphasis added).
324. United States v. Burke, 504 U.S. 229, 239 (1992) (emphasis added); see supra Part II.A (discussing the nature and purpose of back pay and front pay).
325. EEOC v. Dial Corp., 469 F.3d 735, 744 (8th Cir. 2006) (emphasis added).
position at his or her employer] during the period between judgment and reinstatement or in lieu of reinstatement."

Thus, back pay and front pay relief exhibits this “inherently work-based remedial characteristic.” These remedies—whether in nature, purpose, or computation—are inescapably wedded to undocumented workers’ wage losses: they must “assume” that worker’s continued employment (in the past and/or the future) and rely upon “work-based” compensation that would have been earned (again, in the past or the future) by that worker. For these reasons, the limited remedy foreclosure feature serves to properly bar this relief to undocumented workers under the federal employment discrimination laws.

As to the other monetary remedies, however, none of them—in nature or purpose—exhibit this same “inherently work-based characteristic” that inescapably links it to an undocumented worker’s wage losses due to “illegal” work. For example, compensatory damages (available under Title VII and the ADA) represent significant—but non-“work-based”—monetary losses caused by unlawful discrimination. Specifically, these damages reflect “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.” So, compensatory damages are not connected to any “wage losses” of the undocumented worker; instead, they are tied and linked only to other “losses” (all non-wage-based or work-based) sustained by that worker.

Punitive damages (also available under Title VII and the ADA) are, in fact, not even tied to monetary loss (work-based or otherwise) of the victim of discrimination. Instead, such damages, which are penal and corrective in nature, are linked only to the severity or degree of employer misconduct—specifically, whether the employer “engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of [the] aggrieved individual.” Consequentially, such damages are wholly independent of the undocumented worker and his or her wage loss or work-based amounts.

Similarly, liquidated damages (available under the ADEA) are “punitive in nature” for an employer’s “willful violation[]” of the ADEA. As a result, like pure punitive damages under Title VII and the ADA, these liquidated damages also are linked only to the severity or degree of employer misconduct and are not intended to compensate for an


327. 42 U.S.C. § 1981a(b)(3) (2000); see supra Part II.A (discussing the nature and purpose of compensatory damages).

328. 42 U.S.C. § 1981a(b)(1); see supra Part II.A (discussing the nature and purpose of punitive damages).


330. 29 U.S.C. § 626(b) (2000); see supra Part II.A (discussing the nature and purpose of liquidated damages).
undocumented worker’s wage loss amounts as to prior or future employment or work. Uniquely, the ADEA’s liquidated damages are mathematically calculated by using an individual’s lost pay or wages—specifically, a prevailing ADEA plaintiff may recover liquidated damages in an amount “equal” to “wages lost.” However, this use of “wages lost” as the formula for calculating liquidated damages does not convert the latter into back-pay-type or front-pay-type relief. Instead, the substantive nature and purpose of this relief does not change—it is punitive in nature and tied solely to an employer’s “willful” misconduct.

Finally, recovery of reasonable attorneys’ fees (and related costs and expenses) is merely designed to (i) reimburse a prevailing plaintiff for actual, out-of-pocket litigation and court costs and (ii) reimburse that plaintiff, or otherwise compensate his or her attorney, for paid and/or otherwise reasonably accrued legal services rendered in the litigation. Consequently, such fees and costs have no relationship or link to an undocumented worker’s past or future wage loss sums.

Thus, neither compensatory damages, punitive damages, liquidated damages, nor attorneys’ fees exhibit any “inherently work-based remedial characteristic.” None of these remedies—in nature or purpose—is inescapably tied to wage-based losses arising from assumed prior or future “illegal work” of the undocumented worker. Indeed, each of these remedies is inherently linked to something entirely distinct from “work-based” losses: (i) non-wage-related, personal losses of an undocumented worker (compensatory damages); (ii) severity or degree of unlawful discrimination by the employer (punitive damages and liquidated damages); and (iii) non-wage-related legal expenses and fees of the worker and/or his or her legal counsel (attorneys’ fees). Consequently, the limited remedy foreclosure feature properly acts to preserve such relief to undocumented workers under the federal employment discrimination laws.

Notwithstanding the “black letter” law and implicit principles from the Hoffman Plastic and Sure-Tan decisions, one could argue that such Supreme Court precedent does not extend beyond NLRA-fashioned

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331. See 29 U.S.C. § 626(b) (stating that the ADEA “shall be enforced in accordance with the . . . remedies . . . provided” in section 216 of the FLSA); id. § 216(b) (listing applicable FLSA remedies, including “the payment of wages lost and an additional equal amount as liquidated damages”).

332. See generally Jordan v. City of Cleveland, 464 F.3d 584, 602 (6th Cir. 2006) (stating that its “methodology” for determining “a reasonable attorney’s fee award” includes (i) a “starting point” calculation of “the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate” (called the “lodestar” amount), (ii) a subtraction for “excessive, redundant or otherwise unnecessary hours,” and (iii) a final adjustment to “reflect the ‘result obtained’” (which, in part, considers whether the plaintiff’s success “makes the hours reasonably expended a satisfactory basis” for the fee) (quoting Wayne v. Vill. of Sebring, 36 F.3d 517, 531–32 (6th Cir. 1994)); Caudle v. Bristow Optical Co., 224 F.3d 1014, 1028 (9th Cir. 2000) (similarly stating that an award of attorneys’ fees includes (i) a calculation of “the ‘lodestar’ amount by “multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate” and (ii) subsequent adjustment for certain “additional considerations”).
remedies under the NLRA to judicially fashioned remedies under the federal employment discrimination laws. For example, in Rivera, the Ninth Circuit embraced this “NLRB-centric” view of Hoffman Plastic. Stating that it “believe[d] it unlikely that [Hoffman Plastic] applies in Title VII cases,” the court reasoned that Hoffman Plastic (i) merely addressed, and limited, the NLRB’s “remedial discretion to interpret statutes other than the NLRA” and (ii) “said nothing regarding a federal court’s power to balance [the] IRCA against Title VII when fashioning remedies. Consequently, the Rivera court deemed a federal court to still retain “the very authority to interpret both Title VII and [the] IRCA that the NLRB lack[ed]” after Hoffman Plastic. Other commentators have similarly argued for this NLRB-centric (and NLRA-specific) interpretation and application of Hoffman Plastic.

While it may be convenient to limit these NLRA cases to their NLRA context, the NLRB-centric view rests upon a clear, but flawed, assumption. This assumption is that Hoffman Plastic and Sure-Tan would have been decided differently if a federal court (rather than a federal administrative agency like the NLRB) had fashioned the at-issue remedial relief for undocumented workers.

However, the Supreme Court’s Sure-Tan decision flatly undercuts that assumption. In that case, after the NLRB had originally awarded the NLRA’s “conventional remedy of reinstatement with backpay” for the undocumented workers who had already returned to Mexico, it was the Seventh Circuit that proceeded to modify that remedial order by enumerating a “minimum” six-month back pay remedy that the “employer...
must pay [to each undocumented worker] in any event.” 339 Thus, when deciding Sure-Tan, the Supreme Court was not only dealing with remedial relief fashioned by the NLRB (a federal administrative agency) but also such relief—via a modified remedial order—fashioned by an actual federal circuit court.

In its decision, the Court expressly recognized that the source of the challenged remedial relief went beyond the NLRB to the Seventh Circuit. For example, the Court initially noted that it was addressing legal “challenges” to “the Court of Appeals’ order which modified the Board’s original order by providing for an irreducible minimum of six months’ backpay for each employee.” 340 Similarly, the Sure-Tan Court stated that “the Court of Appeals impermissibly expanded the Board’s original order” and that the “remedy ordered by the Court of Appeals exceeds the limits imposed by the NLRA.” 341 Moreover, the Court noted that the “probable unavailability of the [NLRA’s] more effective remedies in light of the practical workings of the immigration laws . . . simply cannot justify the judicial arrogation of remedial authority not fairly encompassed within the Act.” 342

Thus, while the NLRB-centric view assumes that a federal court could have properly fashioned the remedial relief at issue in the Supreme Court’s NLRA cases, the distinctive procedural posture and “black letter” law of Sure-Tan show just the opposite. That procedural posture unquestionably involved a federal court (namely, a federal circuit court) that had ordered certain backpay relief for undocumented workers; and, that “black letter” law clearly labeled a federal court’s remedial order as improper under federal immigration law and the NLRA.

As a result, the NLRB-centric view—and its underlying assumption—look at the Supreme Court’s NLRA cases through too narrow a prism. As nicely recognized by the Rivera dissent and as illustrated by the Sure-Tan decision, these cases address “the question [of] . . . not who can vindicate the rights [of undocumented workers], but what damages can be recovered” by them. 343 The NLRB-centric view, by focusing only on the “who orders the remedial relief” issue, neglects the broader issue in those cases—

340. Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 898 (1984) (emphasis added); see also id. at 886 (addressing “the validity of the Board’s remedial order as modified by the Court of Appeals” (emphasis added)).
341. Id. at 899 (emphasis added).
342. Id. at 904 (emphasis added); see also id. at 904 n.13 (stating that “we remain bound to respect the directives of the INA . . . and to guard against judicial distortion of the statutory limits placed by Congress on the Board’s remedial authority” (emphasis added)).
343. Rivera v. NIBCO, Inc., 384 F.3d 822, 833 (9th Cir. 2004) (Bea, J., dissenting); see also id. at 835 (“More fundamentally, why should a district court have any greater discretion to fashion remedies for civil rights violations which ‘trench upon federal statutes and policies’ unrelated to Title VII (such as prohibitions on unauthorized aliens working in the U.S.) than does the NLRB?”).
namely, that of “what remedial relief is (in)appropriate for undocumented workers.” The Supreme Court did not decide its NLRA cases because of the “who” issue—it decided them because of the “what” issue. When viewed through the proper prism of “what remedial relief is (in)appropriate for undocumented workers,” the Supreme Court’s NLRA precedent provides firm support for the limited remedy foreclosure feature of the Conditional Foreclosure Approach.


In addition, the limited remedy foreclosure feature of the Conditional Foreclosure Approach properly balances and promotes the policies of both federal employment discrimination law and federal immigration law. While other remedial approaches “elevate” problematically one policy or the other to a “superior” or “untouchable” status, this new approach opts for policy equality over policy superiority.

First, the limited remedy foreclosure feature maintains and promotes federal employment discrimination policy by preserving substantial monetary remedies (e.g., compensatory damages, punitive damages, liquidated damages, and attorneys’ fees) and the critical deterrent and punitive purposes they serve. For example, when Congress added compensatory and punitive damages to Title VII and ADA remedies in 1991, the expressly stated purposes of these additional, potentially lucrative remedies included: (i) further “encourag[ing] citizens to act as private attorneys general to enforce” their Title VII rights;344 and (ii) further “deter[ring] unlawful harassment and intentional discrimination in the workplace.”345 According to Congress, these compensatory and punitive damages achieve this deterrent purpose by “rais[ing] the cost of an employer’s engaging in intentional discrimination, thereby providing employers with additional incentives to prevent intentional discrimination in the workplace before it happens.”346 Similarly, when fashioning the monetary remedies under the ADEA, Congress intended liquidated

344. H.R. Rep. No. 102-40, pt. 1, at 65 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 603; see also id. at 70 (finding that “permitting the recovery of such damages would enhance the effectiveness of Title VII by . . . encouraging private enforcement”).

345. Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071, 1071 (1991); see also H.R. Rep. No. 102-40, pt.1, at 14, reprinted in 1991 U.S.C.C.A.N. at 552 (noting that one of the purposes of the 1991 Act was to “provide monetary remedies for victims of intentional/employment discrimination . . . to provide more effective deterrence” (emphasis added)); id. at 70 (finding that “permitting the recovery of such damages would enhance the effectiveness of Title VII by . . . deterring future acts of discrimination”); id., pt. 2, at 1 (noting that the 1991 Act was intended to “strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence”).

346. Id. pt. 1, at 65; see also id. at 69 (stating that “[m]aking employers liable for all losses—economic and otherwise—which are incurred as a consequence of prohibited discrimination . . . will serve as a necessary deterrent to future acts of discrimination, both for those held liable for damages as well as the employer community as a whole”).
damages—which are “punitive in nature”—to serve “as an effective deterrent to willful violations of the ADEA.”

The limited remedy foreclosure feature simultaneously protects and promotes each important purpose served by those remedies. Ultimately, Congress viewed compensatory damages, punitive damages, and liquidated damages as the “carrot-and-stick” means by which employment discrimination could be reduced and prevented on a national level. By preserving all of these significant monetary remedies as the “carrot” for undocumented workers, the Conditional Foreclosure Approach will provide these workers—as Congress had generally envisioned—with substantial monetary incentive “to act as private attorneys general” and thus pursue applicable claims against discriminatory employers. Similarly, by leaving untouched such substantial monetary liabilities as the “stick” for employers, the limited remedy foreclosure feature also gives employers—as Congress had also envisioned—“additional incentives to prevent intentional discrimination in the workplace before it happens.”

In fact, this new approach’s significant promotion and protection of federal employment discrimination policy becomes especially apparent when comparing its preserved monetary remedies to the NLRA relief still available to undocumented workers after Hoffman Plastic. Despite foreclosing the back remedy to these workers under the NLRA, the Hoffman Plastic Court viewed the Act’s “other significant sanctions”—which included the nonmonetary relief of cease-and-desist orders, the obligation to post work notices regarding unlawful conduct, and possible “contempt proceedings”—as “sufficient to effectuate national labor policy.” Thus, by preserving actual monetary remedies under the federal employment discrimination laws that are far more substantial than these “other significant sanctions” under the NLRA, the limited remedy foreclosure feature extends far beyond being merely “sufficient to effectuate” federal employment discrimination policy.

Next, the limited remedy foreclosure feature also maintains and promotes federal immigration policy by creating at least some negative, remedial consequences for undocumented workers who engage in IRCA-prohibited

347. Graefenhain v. Pabst Brewing Co., 870 F.2d 1198, 1205 (7th Cir. 1989) (quoting Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 125 (1985)).
348. See infra notes 169–78 and accompanying text (discussing the purposes served by compensatory and punitive damages under Title VII and the ADA), 188–89 and accompanying text (discussing the purpose served by liquidated damages under the ADEA).
350. Id. (emphasis added).
351. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 152 (2002); see also Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 904 n.13 (1984) (similarly noting that, even absent back pay relief, other “traditional remedies” under the NLRA—such as cease and desist orders and any applicable, subsequent contempt proceedings—still applied and provided “a significant deterrent against future violations” of the NLRA).
fraudulent conduct in the employment and hiring processes.\footnote{352} As discussed above, when passing the IRCA, Congress made “combating the employment of illegal aliens central to “[t]he policy of immigration law.”\footnote{353} Viewing “employment” as the “back door on illegal immigration” and “the magnet that attracts aliens here illegally,”\footnote{354} Congress intended the IRCA to serve as “[t]he principal means of closing the back door”\footnote{355} and “diminishing the attractive force” of that magnet.\footnote{356}

By barring the monetary remedies of back pay and front pay to undocumented workers, the limited remedy foreclosure feature provides a tangible, monetary disincentive against those workers entering the United States in the first place for employment purposes.\footnote{357} Admittedly, the prospect of not recovering back pay and front pay remedies in the event of a potential federal employment discrimination claim against an employer in the United States could, depending on the undocumented worker, (i) be too remote or slight to alter that worker’s financial-driven decision to enter the United States for employment, or (ii) be a concrete factor in that worker’s decision-making calculus. The real point, though, is that the limited foreclosure feature does not ignore the IRCA and federal immigration policy. Instead, it does its part—whether small, medium, or large—to help “diminish the attractive force” of the employment magnet, “close[s]e the back door” of illegal immigration, and “combat[] employment” of undocumented workers.

Thus, the limited remedy foreclosure feature of the Conditional Foreclosure Approach views both federal employment discrimination policy and federal immigration policy as important “equals.” Taking this “policy equality” view, this feature promotes and balances both sets of important federal policy and refuses to elevate one set into a “superior” or “untouchable” position at the expense of the other set.

Advocates for the first or third remedial approaches could argue that the limited remedy foreclosure feature—by relying upon “policy equality” to achieve a compromising “middle ground”—fails to fully embrace and

\footnote{352} As discussed in Part III.B.3, supra, the first feature of the Conditional Foreclosure Approach—its disqualifying condition—promotes the important policies of the IRCA from the employer’s perspective: it provides a monetary “carrot” for IRCA compliance and a monetary “stick” for IRCA violation. In contrast, the limited foreclosure feature promotes federal immigration policy from the undocumented worker’s perspective: it provides a monetary disincentive for initial, unlawful entry into the United States.\footnote{353} \textit{Hoffman Plastic}, 535 U.S. at 147 (quoting INS v. Nat’l Ctr. for Immigrants’ Rights, Inc., 502 U.S. 183, 194 & n.8 (1991)).\footnote{354} H.R. Rep. No. 99-682, pt. 1, at 46 (1986), \textit{reprinted in} 1986 U.S.C.C.A.N. 5649, 5650.\footnote{355} \textit{Id.} (also noting that “the Committee remains convinced that legislation containing employer sanctions is the most . . . effective way to respond to the large-scale influx of undocumented aliens”).\footnote{356} \textit{Hoffman Plastic}, 535 U.S. at 155 (Breyer, J., dissenting).\footnote{357} \textit{See}, e.g., Singh v. Jutla & C.D. & R.’s Oil, Inc., 214 F. Supp. 2d 1056, 1062 (N.D. Cal. 2002) (stating that “every remedy extended to undocumented workers under the federal labor laws provides a marginal incentive for those workers to come to the United States”).
promote federal employment discrimination policy or federal immigration policy, respectively. In other words, as the argument would go, this new remedial approach: (i) does not fully promote, and at least partially compromises, federal employment discrimination policy because it bars at least some monetary remedies for undocumented workers; and (ii) does not fully promote, and at least partially compromises, federal immigration policy because it allows at least some monetary remedies for those workers.

While the first remedial approach may “fully promote” federal employment discrimination policy (by preserving all monetary remedies) and the third remedial approach may “fully promote” federal immigration policy (by barring all such remedies), each approach is able to achieve its respective result only by employing the flawed philosophy of “policy superiority.” This philosophy elevates one competing federal policy to a “superior” position and thus relegates the other competing federal policy to an “inferior” status.

Embracing a “policy superiority” philosophy, the first remedial approach automatically elevates federal employment discrimination policy over, and to the exclusion of, federal immigration policy. In Rivera, the Ninth Circuit did not seek a true balance of the deterrent and punitive policies of federal employment discrimination law and federal immigration law. Instead, the Rivera court considered Title VII to embody a “national policy of the highest priority” and then observed that “the overriding national policy against discrimination” would “outweigh” any IRCA-supported bar to back pay remedies for undocumented workers. Consequently, the Ninth Circuit placed federal employment discrimination policy in a superior and “untouchable” position, whereby any action that may negatively impact that policy (i.e., judicial foreclosure of any monetary remedies to undocumented workers) is automatically rendered invalid.

Also reflecting a “policy superiority” philosophy, the third remedial approach automatically elevates federal immigration policy over, and to the exclusion of, federal employment discrimination policy. In Egbuna, the Fourth Circuit similarly did no true balancing of federal immigration policy and federal employment discrimination policy. Instead, the Egbuna court exclusively focused on the IRCA and its underlying policy and then concluded that any remedial relief for undocumented workers under the federal employment discrimination laws would (i) “sanction the formation of a statutorily declared illegal relationship” and (ii) “nullify [the] IRCA, which declares it illegal to hire or to continue to employ unauthorized aliens.” Thus, the Fourth Circuit placed federal immigration policy in a superior and “untouchable” position, whereby any action that may negatively impact that policy (i.e., judicial preservation of any monetary

358. Rivera v. NIBCO, Inc., 364 F.3d 1057, 1068 (9th Cir. 2004) (emphasis added).
359. Id. at 1069 (emphasis added).
remedies for undocumented workers) is automatically rendered unacceptable.

Either approach’s philosophy of “policy superiority”—whether elevating federal employment discrimination policy or federal immigration policy— not only lacks supporting precedent but also leads to substantial compromise of the “trumped” federal policy. As to the former approach, the Rivera dissent observantly recognized that “[t]here is nothing in either the Hoffman opinion or caselaw to suggest that the policy concerns underlying Title VII trump the policy considerations of the IRCA.”361 The converse would presumably be true as well—namely, no such basis exists to suggest that the IRCA’s “policy concerns” would “trump” the policies of federal employment discrimination law.

In addition, the “policy superiority” philosophy also serves to ignore completely the “inferior” or “trumped” federal policy. For example, the first remedial approach—in preserving all monetary remedies for undocumented workers in an effort to “fully promote” federal employment discrimination policy—substantially frustrates the key federal policy of curtailing illegal immigration. Specifically, because this approach refuses to bestow any tangible or negative remedial consequence upon such workers, it quite simply fails to do its part (or to play any positive role) in helping to “diminish the attractive force” of the employment magnet, “clos[e] the back door” of illegal immigration, and/or “combat[] employment” of undocumented workers. In fact, under the first remedial approach, federal immigration policy might as well not even exist—it gives that policy no weight or importance, and it makes no effort to discourage the illegal immigration that Congress has expressly aimed to curtail.

Similarly, the third remedial approach—in foreclosing all monetary remedies for undocumented workers in an effort to “fully promote” federal immigration policy—significantly compromises important deterrent and punitive purposes that are served by those remedies under federal employment discrimination law. Specifically, this approach, (i) fails to provide any monetary “carrot” for undocumented workers “to act as private attorneys general” under those laws, and (ii) eliminates all possible monetary “sticks” that serve as “additional incentives [for employers] to prevent intentional discrimination in the workplace before it happens.” Thus, under the third remedial approach, federal employment discrimination policy might as well not even exist—it encourages undocumented workers to remain silent in the face of employment discrimination, and it opens the door for employers to discriminate without financial consequence.362

361. Rivera v. NIBCO, Inc., 384 F.3d 822, 835 (9th Cir. 2004) (Bea, J., dissenting) (similarly noting that the Rivera court “cite[d] no authority whatsoever for the proposition that the national policy against discrimination outweighs immigration policy”).

362. The third remedial approach is also problematic because it relegates an undocumented worker to a position that is no better or different than that of a person who is not even classified as an “employee” under the federal employment discrimination laws.
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In sum, the “means” of the first and third remedial approaches simply do not justify their “ends” of “fully promoting” their respective federal policies. In order to achieve this end, each approach embraces a “policy superiority” view that acts to sacrifice completely the other, competing federal policy. The limited remedy foreclosure feature does not place any federal policy in “superior” or “inferior” (or “untouchable” or “touchable”) categories. Instead, it embodies a “policy equality” philosophy that views the monetary remedial rights of undocumented workers through two equal lenses. As a result, the Conditional Foreclosure Approach achieves an

This approach affords such workers “rights” under such laws, but extends no “remedies” for violation of those rights. See Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 911–12 (1984) (Brennan, J., concurring in part and dissenting in part) (discussing the “disturbing anomaly” created when undocumented workers are deemed “employees” under the NLRA and “entitled to all of the protections that come with that status” but then “stripped of the normal remedial protections of the Act”). Thus, the practical consequence of the third remedial approach is to equate undocumented workers with noncovered “employees”—there is zero remedial recovery for both groups, zero liability for employers who discriminate against both groups, and no practical protection from unlawful workplace discrimination for both groups.

Relegating undocumented workers to this practical status of non-“employees” runs counter to the Supreme Court’s Sure-Tan decision and the legislative history of the IRCA, both of which indicate that undocumented workers are, in fact, covered “employees” for purposes of the NLRA. First, in its Sure-Tan decision in 1984, the Court tackled the “predicate question [of] whether the NLRA should apply to unfair labor practices committed against undocumented aliens.” Id. at 891. The Court expressly held that “the provisions of the NLRA are applicable to undocumented alien employees.” Id. at 894.

Similarly, when enacting the IRCA two years later in 1986, Congress approved this position of the Sure-Tan Court. Specifically, it stated that the IRCA was not intended to “undertake or diminish in any way labor protections in existing law” as to undocumented workers or to “limit in any way the scope of the term ‘employee’” under the NLRA. H.R. REP. NO. 99-682, pt. 1, at 58 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5662; see also Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1121 (7th Cir. 1992) (noting that the House’s committee report “endorse[d] the first holding of Sure-Tan, that undocumented aliens are employees within the meaning of the NLRA”).

While the Sure-Tan Court and Congress addressed this issue in the context of the NLRA, courts have similarly concluded that undocumented workers are covered “employees” for purposes of the federal employment discrimination laws. See, e.g., Rivera, 384 F.3d at 832 n.14 (Bea, J., dissenting) (recognizing that “unauthorized aliens are entitled to the protections of Title VII”); Rivera, 364 F.3d at 1064 n.4 (stating that “we have long assumed to be the law of this circuit” that “Title VII applies to discrimination against undocumented aliens on one of the protected grounds”); Egbuna, 153 F.3d at 189–90 (Ervin, J., dissenting) (stating that any classification of undocumented workers as noncovered “employees” would be “at-odds” with “every court that has considered [the] IRCA’s effect on federal labor laws”); EEOC v. Hacienda Hotel, 881 F.2d 1504, 1517 n.10 (9th Cir. 1989) (stating that the court will assume without deciding that the undocumented workers in this case were entitled to the protections of Title VII and noting that persuasive argument “by analogy to case law interpreting the NLRA that undocumented aliens fall within the broad category of ‘individual[s]’ protected by Title VII”, abrogated on other grounds by Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998), and Faragher v. City of Boca Raton, 524 U.S. 775 (1998); EEOC v. Rest. Co., 490 F. Supp. 2d 1039, 1047 (D. Minn. 2007) (stating that “[e]very court that has considered the impact of Hoffman Plastic on Title VII either assumed or concluded that undocumented workers have standing in their own right to obtain relief,” and concluding that the plaintiff “has standing to pursue her federal civil rights claims” under Title VII).
effective “middle ground” and balance between the policies of federal employment discrimination law and federal immigration law.363

363. While this Article has proposed and discussed the Conditional Foreclosure Approach in the context of employment discrimination and/or retaliation claims brought by undocumented workers under Title VII, the ADA, and the ADEA, this new approach would presumably be equally applicable to other federal employment-related laws that offer comparable claims and monetary remedies.

The Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601–2654 (2000), would be one such example. The FMLA, which creates certain work-leave-related rights for an “eligible employee,” id. § 2612(a)(1)–(2), prohibits any employer interference with, restraint, or denial of these leave rights, id. § 2615(a)(1). It also contains an antiretaliation provision similar to those of Title VII, the ADA, and the ADEA. See id. § 2615(a)(2); supra notes 3–5 (describing Title VII’s, the ADA’s, and the ADEA’s antiretaliation provisions, respectively). If an employer violates any of these FMLA provisions, the prevailing plaintiff may recover the following monetary remedies: (i) “any wages, salary, employment benefits, or other compensation denied or lost . . . by reason of the violation” (i.e., back pay and/or front pay); (ii) if no actual lost pay under (i), a substitute amount for “actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary for the employee”; (iii) additional “liquidated damages” in the same amount as the lost pay or substitute amount; and (iv) reasonable attorneys’ fees and costs. Id. § 2617(a)(1), (a)(3).

These claims under the FMLA are quite comparable—if not identical, in the case of retaliation—to those under the federal employment discrimination laws. The same is also true for its remedial scheme, which is very similar to that of the ADEA in light of its use of “liquidated damages.” If the Conditional Foreclosure Approach were applied to such claims by an undocumented worker under the FMLA, it would have the following remedial effect: (i) if the disqualifying condition were satisfied due to the undocumented worker’s use of IRCA-prohibited fraudulent means to obtain employment, that worker would be foreclosed from back pay and front pay but not from any of the other FMLA remedies; and (ii) if the disqualifying condition were not satisfied, he or she would not be foreclosed from any of these FMLA monetary remedies whatsoever.

In addition, the FLSA, 29 U.S.C. §§ 201–219 (2000), provides a comparable retaliation claim and comparable monetary remedies for that claim. See supra notes 181–84 and accompanying text (discussing the FLSA’s antiretaliation provision and the available monetary remedies for an FLSA retaliation claim—namely, “payment of wages lost,” “an additional equal amount as liquidated damages,” and a “reasonable attorney’s fee” and costs); supra notes 229–39 and accompanying text (discussing the Renteria court’s decision regarding the undocumented worker-plaintiff’s FLSA retaliation claim and the available remedies for that claim). If the Conditional Foreclosure Approach were applied to a retaliation claim by an undocumented worker under the FLSA, it would have the following remedial effect: (i) if the disqualifying condition were satisfied, that worker would be foreclosed from “payment of wages lost” (i.e., back pay and front pay) but not from any of the other FLSA remedies; and (ii) if the disqualifying condition were not satisfied, he or she would not be foreclosed from any of these FLSA monetary remedies whatsoever.

While this new approach would be applicable to FLSA retaliation claims, it would not be applicable to FLSA claims for unpaid overtime amounts or minimum wage sums that are tied to work that has already been performed. Because these claims involve monetary remedies for work already completed, they are not comparable to discrimination or retaliation-type claims, which do not involve such remedies. Courts have resoundingly agreed that undocumented workers are not foreclosed from overtime or minimum wage compensation for work actually and already performed. See, e.g., Chellen v. John Pickle Co., 446 F. Supp. 2d 1247, 1277–78 (N.D. Okla. 2006) (concluding that “Hoffman does not preclude an [FLSA] award for work actually performed” by undocumented workers and also noting that “[c]ourts in several jurisdictions have found that Hoffman does not limit [FLSA] backpay for work already performed” (citations omitted)); Zavala v. Wal-Mart Stores, Inc.,
CONCLUSION

Today, there is no uniform judicial approach for determining the monetary remedial rights of the millions of undocumented workers under the federal employment discrimination laws. The three existing remedial approaches span the spectrum in terms of remedial impact. At one end of the spectrum is an approach that preserves all monetary remedies and forecloses none. In the middle is an approach that preserves some, and forecloses some, of these remedies. At the other end of the spectrum is an approach that preserves none of these remedies and forecloses all.

Consequently, this Article proposes the Conditional Foreclosure Approach as the uniform remedial approach for ascertaining the remedial rights of undocumented workers who pursue discrimination and/or retaliation claims under Title VII, the ADA, and/or the ADEA. This new approach—with its two distinct features of a disqualifying condition and limited remedy foreclosure—represents a balanced, “middle ground” approach that draws from the many relevant sources on this issue: (i) the IRCA and its congressional philosophy and legislative history; (ii) the Supreme Court’s *Hoffman Plastic* and *Sure-Tan* decisions under the NLRA; (iii) federal employment discrimination policy and purpose; and (iv) federal immigration policy and purpose. This approach properly promotes both federal employment discrimination policy and federal immigration policy (without sacrificing either) and adequately holds accountable both employers and undocumented workers for unlawful conduct under the IRCA and/or federal employment discrimination law.

The time has come to bring reason and order to this chaotic area. By best achieving the dual policy goals behind immigration law and employment discrimination law in the United States, the Conditional Foreclosure Approach provides the most effective blueprint for dealing with federal employment discrimination claims by undocumented workers.