NATIONAL ORIGIN, IMMIGRANTS, AND THE WORKPLACE: THE EMPLOYMENT CASES IN *LATINOS AND THE LAW* AND THE ADVOCATES' PERSPECTIVE

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I. INTRODUCTION

In defining national origin in workplace cases, courts have created distinctions between Latino workers who have immigration status or citizenship and those who do not.[1] This doctrinal distinction does not reflect any actual social status differences based on immigration status among Latinos who live in the United States.[2] Yet it has served to create legally distinct identities among Latinos at the same time that it has set Latinos, in general, apart as foreigners.[3] Delgado, Perea, and Stefancic's new casebook, *Latinos and the Law*, identifies this problem in its overview of the major issues affecting Latinos in the workplace.[4] In the framework laid out in the introduction of their employment discrimination chapter,[5] the authors identify the very issues that keep advocacy organizations engaged in the very long-term judicial, political, and public debates over the scope of rights and responsibilities of Latinos in the workplace.

The characterization of immigrants—especially undocumented immigrants—as different from other Latinos in the workplace has created a two-tiered rights regime. The reasons that Delgado, Perea, and Stefancic set forth for why Latinos may not fare well in employment discrimination cases—that categorization by immigration status is appropriate in the workplace, or that language rights are not necessarily protected, or that the har-

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[1] *See, e.g.*, Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002); Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984); Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973).

[2] Mixed-status families are somewhat normative among Latinos in the United States, after all. One in ten children living in the United States today lives in a mixed-status household. David B. Thronson, *Creating Crisis: Immigration Raids and the Destabilization of Immigrant Families*, 43 WAKE FOREST L. REV. 391, 396 (2008).

[3] *See* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 95 (2004) ("The agricultural labor market and immigration laws worked in tandem to create a kind of imported colonialism, which constructed Mexicans working in the United States as a foreign race and justified their exclusion from the polity.").

[4] RICHARD DELGADO, JUAN F. PEREA & JEAN STEFANCIC, LATINOS AND THE LAW: CASES AND MATERIALS 631-96 (2008).

[5] *Id.* at 634.

assment described by Latino plaintiffs is not severe or pervasive enough, among others—have their roots in a general set of assumptions that ultimately conflates the identities of Latinos and immigrants. Workplace rights for Latinos, especially in low-wage workplaces, tend to be coextensive with immigrants' rights. In these cases, native-born Latino workers working alongside immigrant workers will experience more workplace restrictions than their non-Latino counterparts working outside immigrant workplaces.[6] And they face different sets of discriminatory practices than their native-born Latino counterparts working in predominately Anglo workplaces. The legal regimes surrounding both immigration and employment laws have continued to reshape Latino identities. Immigration law itself has created varying sets of rights for Latinos. Lawful permanent residents, for example, have different sets of rights and responsibilities than citizens, non-immigrants, or undocumented immigrants.[7] These sets of rights based on legal status have isolated groups of workers from each other. At the same time, in employment law, Latinos as a national origin category continue to be treated by courts as outside the norm of the American worker.[8] The cases chosen for the workplace chapter of *Latinos and the Law* expose us to courts' assumptions about how differently native- and foreign-born Latinos should be treated. The cases also demonstrate how courts consign all Latinos to the "other" category when they conflate immigrants with all Latinos. So, for example, Latinos as a group differ from the normative U.S. "worker," especially when they are immigrants;[9] or, Latinos, especially immigrants, are stereotypically circumscribed by the type of work they can, will, or are allowed to do;[10] or, Latinos should be accustomed to certain levels of harass-

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[6] That is the case, arguably, in immigrant workplaces after *Hoffman*, 535 U.S. 137, because all workers will find it more difficult to organize in workplaces that employ undocumented workers. *See infra* Part III.A; *see also* NGAI, *supra* note 3, at 2.

[7] For example, lawful permanent residents are subject to different grounds of removability than those seeking admission to the United States. *Compare* Immigration and Nationality Act § 237, 8 U.S.C. § 1227 (2006) *with id.* § 212. Lawful permanent residents are removable for committing violations of domestic violence laws, while those seeking admission are not held to the same standard. *See id.* § 237(a)(2)(E). Lawful permanent residents are deportable for voting in violation of state, local, or federal laws, while citizens generally enjoy voting rights. *See id.* § 237(a)(6).

[8] *See* NGAI, *supra* note 3, at 129.

[9] *See, e.g.*, *Hoffman*, 535 U.S. 137; *see also* Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984).

[10] *See, e.g.*, *Hoffman*, 535 U.S. 137; Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973); *see also* EEOC v. Consol. Serv. Sys., 989 F.2d 233, 237-38 (7th Cir. 1993) (noting that immigrants, in this case from Korea, feel more at ease working with their ethnic cohorts); Christopher David Ruiz Cameron, *The Rakes of Wrath: Urban Agricultural Workers and the Struggle Against Los Angeles's Ban on Gas-Powered Leaf Blowers*, 33 U.C. DAVIS L. REV. 1087, 1089-99 (2000) (describing ordinances banning leaf blowers as targeting Latino landscapers in Los Angeles); Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961 (2006) (describing the targeting by employers of Latino immigrant workers because of their subservient attitudes in the workplace).

ment, violence or humiliation because of their own cultural backgrounds.[11] Each of these assumptions is, of course, influenced by assumptions about what the ideal worker looks like. In employment antidiscrimination law, courts have interpreted the national origin category narrowly, providing protection based on ethnicity without recognizing the extent to which alienage is a part of one's ethnic traits.[12]

The assumptions embedded in these judicial opinions are, and have been, challenged by parties within the legal arena for decades. The Mexican American Legal Defense and Educational Fund (MALDEF) has made it their mission to reveal the negative effects of those assumptions on equal opportunities for Latinos in the workplace. The background story in each of the employment cases included in *Latinos and the Law* is provided by advocacy organizations such as MALDEF. MALDEF and like institutions have been at the forefront of protecting Latino workers' rights in just about every case that the authors chose to include in the workplace section of the casebook. The casebook authors identify the very issues that most concern organizations like MALDEF without explicitly identifying the roles and positions of the organizations. Rather than characterize the advocates as simply partisans to the disputes, the authors elegantly focus on issues involved in the cases, leaving students to decide for themselves how competing policy issues can or should be decided.

In reviewing the workplace section of *Latinos and the Law* and examining the indeterminacy of Latino identity in the workplace, this Article aims to make more explicit the role of advocates in the contested terrain of workplace rights for Latinos. My argument proceeds in two parts. First, what the courts deem normative—especially in defining workers—affects Latinos differently than other minorities, in part because of the intertwined relationship between immigration status and national origin. Second, lurking in the background of these decisions are vigorous and active debates pushed forth by litigation, advocacy, and support groups like MALDEF. The MALDEF experience and its advocacy role in the cases included in *Latinos and the Law* help us see how indeterminate and contested the issues before courts continue to be. This discussion offers an analysis of issues from an advocate's—specifically, MALDEF's—perspective. This background story is a small reminder to students of *Latinos and the Law*-type courses of the role of advocacy organizations in formulating Latino legal discourse. I hope to interrupt the myth that the outcomes in cases involving Latinos in the workplace are inevitable, unchanging, or even correct. I do not mean this

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[11] *See, e.g.*, Machado v. Goodman Mfg. Co., 10 F. Supp. 2d 709, 720 (S.D. Tex. 1997) (finding plaintiff's claims of harassment not severe or pervasive enough to warrant constructive discharge).

[12] *See Espinoza*, 414 U.S. at 97-98 (Douglas, J., dissenting); *see also* Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 824-25 (1994) (noting the Court's overly narrow reading of the term "national origin" in *Espinoza*).

discussion as an exhaustive overview of the role of Latino advocacy organizations. Instead, it is a call for more such investigation, discussion, and analysis.

II. The Assumptions Operating in the Employment Discrimination Cases

This Part addresses some of the major norms running through the cases in the workplace section of *Latinos and the Law*. First, there is the norm of the U.S. worker, for whom employment and labor laws exist, and to whom protection is owed. This view of the U.S. worker as a member of a group that has rights invites questions about who can be a member of society and of the workplace, and under what circumstances.[13] Cases such as *Hoffman Plastic Compounds, Inc. v. NLRB*[14] and *Espinoza v. Farah Manufacturing Co.*[15] deal with just those sets of questions. In *Hoffman*, the parties disputed whether undocumented workers had the same workplace rights as those with legal status. In *Espinoza*, the Court decided whether an employer could distinguish between citizens and non-citizens in its hiring decisions. A simple answer to the question of who is entitled to workplace rights would be that anyone who works has the full rights and benefits of labor and employment laws. And, theoretically, all workers are treated as having the same workplace rights, regardless of status. Our socio-legal landscape is not that simple, however. Race, sex, and ethnicity have long played a role in fashioning workplace rights. Several categories of workers, for example, were denied the protections of the Fair Labor Standards Act (FLSA) and the National Labor Relations Act (NLRA) when Congress enacted those laws.[16] From their inception, these laws were intended to protect only certain employees. Exempted from protections were farm labor and domestic work,[17] occupations held disproportionately by Blacks and Latinos, and particularly women. So, the occupations historically and initially protected by labor and

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[13] Legal scholars, including Linda Bosniak and Jennifer Gordon, and historians like Mae Ngai have written extensively about the idea of citizenship encompassing concepts such as legal status, political participation, rights-bearing concepts, and notions of collective identity. *See* Linda Bosniak, The Citizen and the Alien: Dilemmas of Contemporary Membership 17-36 (2006); Ngai, *supra* note 3; Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 Wis. L. Rev. 955, 966 (describing the legal duality of undocumented workers on the membership/exclusion continuum); Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. Cal. L. Rev. 503, 514 (2007). Bosniak notes that "[i]n certain formal and practical spheres, the undocumented alien functions as an acknowledged member of the national community." Bosniak, *supra*, at 978.

[14] 535 U.S. 137 (2002).

[15] 414 U.S. 86 (1973).

[16] Ira Katznelson, When Affirmative Action Was White 58-61 (2005); Ngai, *supra* note 3, at 136.

[17] *See, e.g.*, National Labor Relations Act § 2(3), 29 U.S.C. § 152(3) (2006) ("The term 'employee' . . . shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home . . . .").

employment laws favored Anglo, male workers. This has occurred despite the promise of statutes such as the FLSA and the NLRA to level the workplace playing field for all workers. It has also occurred despite organizing efforts by Latinos aimed at inclusion of occupations predominantly held by Latinos.[18] Cases such as *Hoffman* and *Espinoza* reaffirm that the non-citizen worker is not the paradigmatic ideal worker.[19] It is this narrow view of the ideal U.S. worker that MALDEF has challenged and continues to attempt to broaden.

There is also a norm of acceptable work for Latinos, especially Latino immigrants. The norm is embodied in the notion of work that no one else will do.[20] Employers who seek out workers for their subservience, their hard work, their compliance, and their willingness to tolerate tough conditions, say they prefer immigrants, and particularly Latinos, precisely because they do not complain over conditions the way that native-born workers are perceived to.[21] The assumption embedded in this construction of Latino workers is that they choose to take the jobs no one else will take because those jobs are better than whatever work they would be able to find in their home countries. This assumption allows the corollary perception that when these workers are hired, they are the beneficiaries of a privilege and the workplace rights that accrue to other workers are not necessarily part of that privilege. While the perception may be held for undocumented immigrants alone, its effects are felt by all Latinos working in immigrant-dominated industries. All Latinos—immigrant or not—become the "other" in this conceptualization. The "work as privilege" conceptualization differs from that afforded to the normative worker, who is presumed to have a set of rights and to belong to the group protected by general employment laws.[22] Because immigration status and Latino identity are so intertwined, the normative ideal of the U.S. worker and its attendant rights do not inure to Latino workers. More important, the norm of the ideal worker affects how the courts, employers, and the public perceive Latinos and their workplace rights. Groups like MALDEF continue to find it necessary to challenge a workplace rights regime that further divides Latinos according to immigration status and, in

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[18] *See* ZARAGOSA VARGAS, LABOR RIGHTS ARE CIVIL RIGHTS: MEXICAN AMERICAN WORKERS IN TWENTIETH-CENTURY AMERICA 7-9 (2005).

[19] Ironically, while opinions and statutes disfavor full rights for those holding immigrant jobs, employers increasingly favor immigrant workers as ideal for the least favored jobs in our society. *See* ROGER WALDINGER & MICHAEL I. LICHTER, HOW THE OTHER HALF WORKS 40, 179-80 (2003).

[20] This notion that Latinos will perform undesirable work has existed at least since the early days of conquest and colonization of Mexicans. *See* DAVID G. GUTIÉRREZ, WALLS AND MIRRORS: MEXICAN AMERICANS, MEXICAN IMMIGRANTS, AND THE POLITICS OF ETHNICITY 24-26 (1995).

[21] WALDINGER & LICHTER, *supra* note 19, at 144, 147-48, 156-63.

[22] *Cf.* Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 133-46 (1997) (reporting empirical findings demonstrating that a majority of U.S. workers interviewed perceived they had greater rights than employment laws actually afforded them).

the process, diminishes workplace rights for all Latinos in immigrant workplaces.

III. MALDEF Litigation and the Employment Discrimination Cases: The Advocates' Perspective

In this Part, I explore the advocacy background story of the cases dealing with the immigration/national origin intersection in *Latinos and the Law*. Although such advocacy has always been present—and, in fact, existed in the background of each of the cases chosen for the employment discrimination section—it remains in the background, and likely not much discussed in law school classrooms. But it is an important, if overlooked, element in legal discourse because advocacy institutions like MALDEF challenge how underlying judicial opinions affect workplace dynamics. MALDEF brings forth the stories of Latinos who are negatively affected by narrow readings of Supreme Court decisions.

I will discuss MALDEF's advocacy position in two of the cases in the employment discrimination chapter of the casebook: *Hoffman Plastic Compounds, Inc. v. NLRB*[23] and *Espinoza v. Farah Manufacturing Co.*[24] I choose these two cases because, while MALDEF itself did not directly litigate the cases, the institution has made the issues in those cases a major priority, reflecting the needs of Latino communities throughout the country. MALDEF's unique position as a Latino civil rights organization continues to give courts a perspective on how the assumptions behind who belongs in the workplace affect Latinos, undocumented or not.

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

In *Hoffman*, the Supreme Court held that the National Labor Relations Board (NLRB) overstepped its remedial authority when it required backpay for an undocumented worker who had been illegally fired for participating in union organizing activities.[25] The *Hoffman* case has a long, rich precedential history. It is the latest in a series of cases, starting with *Sure-Tan, Inc. v. NLRB*,[26] which have featured important debates about whether undocumented workers are, in fact, employees protected by labor and employment laws. In particular, the case revisited the question of whether alienage is or should be distinguishable from national origin. Before addressing these questions, a review of *Hoffman*'s case history and predecessor cases is in order. *Hoffman* ended several decades of legal debate over both the rights of Latinos in the workplace and how to define valid members of the workforce.

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[23] 535 U.S. 137 (2002).
[24] 414 U.S. 86 (1973).
[25] *Hoffman*, 535 U.S. at 151-52.
[26] 467 U.S. 883 (1984).

The question of "who belongs" and who is deserving of workplace rights, of course, affects undocumented immigrants to the extent that their status affects their ability to work.

Historically, workplace law did not concern itself with immigration status in determining who was a "worker." It was not until 1986, with the passage of the Immigration Reform and Control Act (IRCA),[27] that Congress succeeded in explicitly inserting immigration regulation into the workplace. IRCA implemented employer sanctions provisions, including civil fines and the possibility of criminal punishment, for hiring a noncitizen "knowing the alien is an unauthorized alien . . . with respect to such employment,"[28] or to hire a worker without complying with documentation requirements.[29] MALDEF has long understood the interconnectedness between immigration and workplace issues, and the underlying civil rights implications of defining "worker" narrowly. It was this country's history with the bracero program that actually began to conflate workplace and immigration issues. Braceros, who were Mexican nationals brought to the United States on a temporary basis for agricultural employment, were an early version of today's "guest workers."[30] The mid-century program was created in response to labor shortages created by war[31] and by the targeting in the United States of other racialized groups—namely Filipino and Japanese—for exclusion from the labor force.[32] Under that program, any labor and employment rights of the Mexican braceros were the subject of contractual agreements between the U.S. and Mexican governments.[33] The workers did not have either private rights of action or individual enforceable rights against employers themselves.[34] Instead, workers complained to government agencies responsible for monitoring contractual violations. As a result, the program left open the possibility of massive exploitation.[35]

The bracero program experience, and the problems with its enforcement regime,[36] led MALDEF to the forefront of legislative advocacy in the 1980s opposing the proposed employer sanctions provisions in IRCA.[37] MALDEF

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[27] Pub. L. No. 99-603, §§ 101-103, 100 Stat. 3359, 3360-80 (1986) (codified as amended at 8 U.S.C. §§ 1324a-1324b (2006) and 18 U.S.C. § 1546 (2006)).

[28] Immigration and Nationality Act § 274A(a)(1)(A), 8 U.S.C. § 1324a(a)(1)(A) (2006).

[29] *Id.* § 274A(a)(1)(B).

[30] The contemporary guest worker program allows for temporary H-2 visas for skilled and unskilled workers to enter the United States for a specified period of time, typically for work that is temporary in nature. In order to protect U.S. workers from job losses, employers are required to obtain labor certifications or attestations that employers have unsuccessfully sought U.S. workers for the jobs at the prevailing wages. *See id.* §§ 101(a)(15)(H)(i)-(ii), 214(c)(1).

[31] *See* NGAI, *supra* note 3, at 138-47.

[32] *Id.* at 93-95, 175-77.

[33] *Id.* at 143-44.

[34] *Id.* at 144-46.

[35] *Id.*

[36] *Id.*

[37] MALDEF lobbied legislators, testified before congressional committees, and produced reports before and after the passage of the legislation documenting the effects of the legislation on Latinos. *See, e.g.*, MEXICAN AM. LEGAL DEF. & EDUC. FUND & AM. CIVIL LIBERTIES UNION, THE HUMAN COSTS OF EMPLOYER SANCTIONS: RECOMMENDATIONS FOR GAO'S THIRD

was concerned that creating a sanction for employers who hired undocumented immigrants would create an underclass of workers vulnerable to workplace exploitation.[38] This underclass would inevitably include large numbers of Latinos, whether documented or not. The organization also worried about an unnecessary division in law between documented and undocumented Latino workers. Further, MALDEF was concerned that the employer sanctions provisions would create the conditions for discrimination against foreign-looking or foreign-sounding workers, a fear that the organization documented as realized in a 1989 report on the effects of employer sanctions in the workplace.[39]

In the midst of policy wrangling over the contours of IRCA, including the employer sanctions and legalization[40] provisions in the legislation, the Supreme Court addressed the issue of whether an undocumented worker could be considered an employee under employment and labor laws, and what kinds of remedies undocumented employees were entitled to. In *Sure-Tan, Inc. v. NLRB*,[41] the Court held that the NLRB had exceeded its limited remedial power by requiring the employer to pay a minimum backpay award

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REPORT TO CONGRESS UNDER THE IMMIGRATION REFORM AND CONTROL ACT OF 1986 (1989); *see also* NICHOLAS LAHAM, RONALD REAGAN AND THE POLITICS OF IMMIGRATION REFORM 121-23 (2000); Christine Marie Sierra, *In Search of National Power: Chicanos Working the System on Immigration Reform, 1976-1986*, *in* CHICANO POLITICS AND SOCIETY IN THE LATE TWENTIETH CENTURY 131, 135-48 (David Montejano ed., 1999).

[38] One way that IRCA rendered immigrants vulnerable was by forcing them to resort to false documentation to show their eligibility to work. *See Hearing on Employment Eligibility Verification Systems and the Potential Impacts on SSA's Ability to Serve Retirees, People with Disabilities, and Workers Before the Subcomm. on Social Security of the H. Comm. on Ways & Means*, 110th Cong. (2008), *available at* http://waysandmeans.house.gov/hearings.asp?formmode=view&id=6897 (Statement of John Trasviña, President and General Counsel, MALDEF) ("In 1986, when Congress adopted employer sanctions as a means to keep unauthorized workers from being hired, MALDEF predicted that document fraud would render sanctions ineffective. We were correct."); S. COMM. ON BUSINESS AND PROFESSIONS, 1993-1994 REG. SESS., BILL ANALYSIS OF S.B. 1535, at 4-5 (Cal. 1994), *available at* http://info.sen.ca.gov/pub/93-94/bill/sen/sb_1501-1550/sb_1535_cfa_940412_142455_sen_comm ("[MALDEF] opposes this bill because it would only exacerbate the problems of employment discrimination on the basis of national origin and citizenship caused by the Immigration Reform and Control Act of 1986. MALDEF states that the threat of license revocation or suspension to existing employer sanctions simply adds to employer incentives to discriminate unfairly against persons merely suspected of possibly being undocumented. MALDEF alleges that eight years of experience under IRCA show that employer sanctions do not reduce undocumented immigration and there is no reason to believe that further sanctions directed at licensees will be any more successful.").

[39] MEXICAN AM. LEGAL DEF. & EDUC. FUND & AM. CIVIL LIBERTIES UNION, *supra* note 37; *see* MICHAEL C. LEMAY, ANATOMY OF A PUBLIC POLICY 122 (1994); *see also* MICHAEL LEMAY, U.S. IMMIGRATION 18 (2004), U.S. GEN. ACCOUNTING OFFICE, GDD-90-62, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION (1990), *available at* http://archive.gao.gov/d24t8/140974.pdf.

[40] The final provisions provided a path to lawful permanent residency for those who could demonstrate entry into the United States before January 1, 1982, and continuous presence since November 6, 1986. *See* Immigration and Nationality Act § 245A(a)(2)-(3), 8 U.S.C. § 1255a(a)(2)-(3) (2006). A parallel provision provided a path for lawful permanent residency for those who demonstrated that they had worked in agriculture for at least ninety days between May 1985 and May 1986. *Id.* § 210(a)(1).

[41] 467 U.S. 883 (1984).

to a group of workers for the period of time after the workers were unlawfully fired but during which period they were not legally available for work because they had left the country. In that case, workers at a leather goods factory in Chicago, the majority of whom were undocumented Mexican immigrants, voted to elect a union in an NLRB election.[42] The employer filed objections to the election with the NLRB based on a number of the employees being undocumented, but the NLRB overruled the employer's objections and certified the union. In retaliation, the employer then reported a number of workers, whom it knew were undocumented, to the Immigration and Naturalization Service (INS) for deportation. The INS raided the worksite. Several workers chose voluntary departure instead of going forward with a deportation proceeding, and left immediately.[43] They continued their involvement in the labor proceedings from outside the United States. The NLRB ultimately found that the employer engaged in unfair labor practices when it retaliated against employees for their organizing activity by reporting workers to the INS as undocumented and ordered that the employees be reinstated and awarded backpay for the period of time after they were forced out of their jobs.[44] The Seventh Circuit upheld the NLRB's reinstatement order and award of backpay and went even further, ruling that the reinstatement order be held open for four years to allow the deported workers time to figure out how to return and be reinstated legally.[45] The court recognized that the workers technically would not be entitled to backpay for the time that they were not legally entitled to be present and employed in the United States, and instead suggested that the NLRB impose a minimum backpay award of six months' pay as an alternative in order to effectuate the policy goals of the NLRA.[46]

In an opinion by Justice O'Connor, the Supreme Court affirmed the Seventh Circuit's decision in part, but reversed as to the remedy. The Court held that the undocumented workers were covered by the definition of employee in the NLRA.[47] The Court did not find any conflict between the goals of the Immigration and Nationality Act (INA) and the NLRA because the INA was more concerned with entry of immigrants than with the employment of undocumented workers. The Court held that extending rights to undocumented workers supported the broader goals of the NLRA to maintain wage scales and working conditions of citizens and legally admitted workers.[48] With respect to the remedy, however, the Court held that because there was no basis for upholding a six-month minimum backpay award, the

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[42] *Id.* at 886.
[43] *Id.* at 887.
[44] *Id.* at 887-88.
[45] NLRB v. Sure-Tan, Inc., 672 F.2d 592, 606 (7th Cir. 1982), *aff'd in part and rev'd in part*, 467 U.S. 883 (1984).
[46] *Id.*
[47] Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891-92 (1984) (citing 29 U.S.C. § 152(3) (1982)).
[48] *Id.* at 892-94.

Seventh Circuit had overstepped its remedial authority.[49] For the periods of time when the workers were not legally in the country and thus not "available for work," they could not have been eligible for a backpay award.

The *Sure-Tan* opinion prompted several lower court cases in which the status and rights of an undocumented worker as an employee were challenged. MALDEF filed amici briefs in several labor cases involving immigrant workers, including a case brought by, among others, the International Ladies' Garment Workers' Union.[50] In *Local 512, Warehouse and Office Workers' Union v. NLRB (Felbro)*, the plaintiffs sued their employer under the unfair labor practices provision of the NLRA,[51] after the union won an election. The employer refused to agree to a collective bargaining agreement and laid off several workers in violation of the NLRA notice and bargaining provisions.[52] The union's members were mostly immigrant workers. The NLRB sided with the union but decided that backpay remedies should be available to workers only upon proof that they were legally entitled to work in the United States.[53]

Unlike the workers in *Sure-Tan* who were deported and were in Mexico throughout the presumptive six-month backpay period, the Felbro workers had been reinstated and worked for Felbro throughout the period of time that the employer was found to have discriminated against them under the NLRA.[54] MALDEF and other advocacy organizations argued for a limited reading of the *Sure-Tan* decision, noting that *Sure-Tan* barred remedies only for those who were unavailable because they were outside the United States with no chance of legal reentry.[55] The circuit court agreed, noting that "[t]he Supreme Court in *Sure-Tan* gave no indication that it was overruling a significant line of precedent that disregards a discriminatee's *legal status*, as opposed to *availability to work*, in determining his or her eligibility for backpay."[56] The circuit court noted that the Supreme Court was concerned about illegal entry rather than work authorization because immigration law at the time (before IRCA was implemented) was not concerned with the employment of undocumented workers.[57]

MALDEF's advocacy position, supported by its reading of the *Sure-Tan* opinion, was that NLRA backpay remedies were unavailable only to those immigrants who had left the country and who faced immigration conse-

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[49] *Id.* at 898-905.

[50] *See* Brief Amici Curiae of the Mexican American Legal Defense and Educational Fund and the National Center for Immigrants' Rights, Inc., Local 512, Warehouse and Office Workers' Union v. NLRB (*Felbro*), 795 F.2d 705 (9th Cir. 1986) (Nos. 85-7281, 85-7355).

[51] *See* 29 U.S.C. § 158 (2006).

[52] *Felbro*, 795 F.2d at 709.

[53] *Id.* at 710.

[54] *Id.* at 709-10.

[55] *Id.* at 716; Brief Amici Curiae of the Mexican American Legal Defense and Educational Fund and the National Center for Immigrants' Rights, Inc., *supra* note 50, at 4-10.

[56] *Felbro*, 795 F.2d at 717.

[57] *Id.* at 719-20.

quences should they return to the United States for reinstatement.[58] The position was in keeping with both the doctrine after *Sure-Tan* and MALDEF's position that Latinos in the United States should not be treated differently based on immigration status.[59] Employers, on the other hand, attempted to apply the remedial restrictions in the *Sure-Tan* holding in other workplace contexts.[60] MALDEF's position comports with its general view that Latino workers should be part of the normative employee framework, despite the particulars of their immigration status. MALDEF's continued advocacy surrounding the issue has taken the form of both legislative and litigation efforts. MALDEF's work around the passage of IRCA was directly related to its litigation efforts, as the institution understood the possible consequences of immigration law entering the field of documentation issues in the workplace.

The main issue in post-*Sure-Tan* immigrant worker cases, as a result of *Sure-Tan* and cases like *Felbro*, was whether backpay remedies were available if the worker could show that he was available in the United States, rather than whether the worker had authority to work in the United States. The *Sure-Tan* opinion made clear that undocumented workers were still employees within the definition of the NLRA.[61] It left to lower courts the questions surrounding the scope of remedies available to undocumented workers who were unavailable for work, as well as the definition of "unavailable for work." MALDEF and other advocacy organizations continued to advocate for a limited meaning of "unavailable for work" in the undocumented worker context, litigating in the courts for a definition that included only those workers who had been deported and could not legally return to the United States to work.[62] The issue was clouded by the passage of IRCA, through which Congress created the possibility of immigration enforcement efforts in the workplace. IRCA, which made it illegal to knowingly hire

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[58] *See* Brief Amici Curiae of the Mexican American Legal Defense and Educational Fund and the National Center for Immigrants' Rights, Inc., *supra* note 50, at 9-10.

[59] *Cf. id.* at 19-23.

[60] By the time that *Hoffman* was decided in 2002, MALDEF litigators and policymakers had been dealing with the fallout from IRCA and its effect on workers for almost two decades. Employment issues for low-wage and immigrant workers were as much a part of the organization's priorities as were issues such as workplace gender discrimination, language issues, and promotion issues. Advocacy organizations and labor unions continued to fight to limit the bad effects of *Sure-Tan* in subsequent lower court cases involving the National Labor Relations Act, the Fair Labor Standards Act, and Title VII. For example, in *EEOC v. Tortilleria La Mejor*, 758 F. Supp. 585 (E.D. Cal. 1991), Equal Rights Advocates attorney Maria Blanco, who became senior litigation counsel for MALDEF, represented the plaintiff employee. In that case, the court held that Title VII applied to all workers employed within the United States, regardless of their immigration status. *Id.* at 587-90. *But see* Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184 (4th Cir. 1998) (holding that Title VII remedies were not available to undocumented workers). See also *Hoffman*, 535 U.S. 137, 142 n.2 (2002), for a discussion of the circuit split around remedies for undocumented workers.

[61] Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891-92 (1984).

[62] See *Hoffman*, 535 U.S. at 142 n.2, for examples of cases involving the meaning of unavailability for work.

undocumented workers,[63] and which imposed immigration-related consequences for unauthorized employment, opened the debate about whether undocumented workers had any workplace rights or remedies as a practical matter.

The issues that the *Sure-Tan* opinion left unsettled came before the Court again in *Hoffman*. In that case, the employer unlawfully laid off Jose Castro and others who participated in a union organizing drive.[64] The NLRB ordered Hoffman to cease and desist from further violations of the NLRA, to post a detailed notice to employees regarding the remedial order, and to offer reinstatement and backpay to Castro.[65] At the hearing to determine backpay, Castro admitted he was not authorized to work legally in the United States and that he had used a friend's birth certificate to obtain employment.[66] The administrative law judge found that Castro could not be reinstated or receive backpay as a result of his admission.[67] The NLRB reversed on the backpay issue, noting that the best way to enforce immigration policy goals was to provide the same benefits under the NLRA to documented and undocumented workers alike.[68] The appellate court affirmed the backpay award and the Supreme Court granted certiorari.[69]

MALDEF was part of a coalition that filed an amici curiae brief describing the potential effects of further eroding the remedies available to undocumented workers.[70] MALDEF's greatest concern continued to be the effect of limiting the rights of the most vulnerable workers and on the organizing prospects for all workers in increasingly immigrant workplaces. MALDEF as an institution understood how much more difficult union organizing efforts would become if undocumented workers' remedies were limited further than they had been limited in *Sure-Tan*. The coalition brief reflected this understanding:

> The impact of employers' unlawful conduct is felt not only by undocumented workers themselves, but by their co-workers as well. Documented workers and U.S. citizens may be reluctant to organize their workplaces because threats to turn workers over to the INS, properly timed, can undermine the election process. Deportation of their undocumented co-workers will dilute the power of their bargaining unit, if it survives a union election.[71]

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[63] Immigration and Nationality Act § 274A(a)(1)(A), 8 U.S.C. § 1324a(a)(1)(A) (2006).
[64] Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 140 (2002).
[65] *Id.* at 140-41.
[66] *Id.* at 141.
[67] *Id.*
[68] *Id.*
[69] *Id.* at 142.
[70] Brief of Amici Curiae National Employment Law Project, Mexican American Legal Defense and Educational Fund, Asian American Legal Defense and Education Fund, Coalition for Humane Immigrant Rights of Los Angeles, et al. in Support of Respondent, Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002) (No. 00-1595), 2000 U.S. Briefs 1595. I was a MALDEF staff attorney at the time and part of the legal team that submitted the brief.
[71] *Id.* at *25-*26.

The brief also notes that chilling the activities of undocumented workers is detrimental to all workers whose environment is marked by a fear of immigration-based retaliation: "The inability of undocumented workers to make complaints and secure effective remedies takes on added significance in a system that relies on complaints. . . . [W]hen workers, fearing retaliation, fail to make complaints, unscrupulous employers profit. Both documented and undocumented workers suffer."[72]

In its opinion, the Supreme Court identified the issue as one of a conflict between federal labor law and federal immigration policy. While the issues were similar to the ones addressed in *Sure-Tan*—whether an undocumented worker was eligible for remedies under the NLRA—the factual differences brought into focus the arguments that parties engaged in for the several years since *Sure-Tan*. Were NLRA remedies as limited for those undocumented workers currently in the country illegally? Or were the limited remedies confined to those who were outside the country and who could not return legally? The Supreme Court held that backpay relief for an undocumented worker was "foreclosed by federal immigration policy" regardless of whether the worker was in the United States.[73] The key factor in determining whether backbay remedies were available, according to the Court, was the immigration status of the worker. As the Court noted,

> allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations. However broad the Board's discretion to fashion remedies when dealing only with the NLRA, it is not so unbounded as to authorize this sort of award.[74]

The Supreme Court's opinion was itself limited, however. It addressed the restricted powers of the NLRB in fashioning remedies for undocumented workers for unfair labor practices.[75] But the Court upheld several other sanctions that the NLRB had imposed on the employer for unfair labor practices.[76] The effect was to preserve the power of the NLRB to sanction employers for unfair labor practices, whether or not the affected workers were undocumented.

In the aftermath of *Hoffman*, employers have responded precisely as MALDEF and its coalition partners predicted. Emboldened employers have

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[72] *Id.* at *26.

[73] *Hoffman*, 535 U.S. at 140.

[74] *Id.* at 151-52.

[75] *Id.* at 149 ("[A]warding backpay to illegal aliens runs counter to policies underlying IRCA, policies the Board has no authority to enforce or administer. Therefore, as we have consistently held in like circumstances, the award lies beyond the bounds of the Board's remedial discretion.").

[76] *Id.* at 152.

tried to chill immigrant workers' efforts to seek workplace protections typically afforded under the Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, and various state laws. The lower courts were left to interpret the contours of the Court's holding and to determine whether the *Hoffman* holding applies outside of the collective bargaining context of the NLRA. Thus far, the opinion's holding has been limited to remedies allowed by the National Labor Relations Board, and has not been extended to remedies available to workers under either the Fair Labor Standards Act[77] or Title VII.[78]

As was the case after *Sure-Tan*, MALDEF's advocacy did not end with its amicus brief in the *Hoffman* case. It has entered the post-*Hoffman* debate surrounding the rights of undocumented workers with the intent to lessen the seemingly disastrous effects of the Supreme Court's holding for immigrant workers. MALDEF and similar organizations, such as the American Civil Liberties Union, the National Immigration Law Center, and the National Employment Law Project, have been at the forefront of the debate in litigation at the lower court levels post-*Hoffman*. The issue in related employment and labor cases arises during discovery, when plaintiffs who seek to enforce their rights under the FLSA or Title VII are asked about their immigration status.

Because the *Hoffman* opinion reiterated the *Sure-Tan* holding that undocumented workers continued to be employees, immigration status does not define—and therefore is irrelevant to—a worker's set of workplace rights.[79] In response to motions for protective orders, or in response to plaintiffs' refusals to respond to questions about immigration status, employers brought the issue of immigration status to lower courts almost immediately after the *Hoffman* case was decided. In *Flores v. Albertsons, Inc.*, for example, MALDEF and other attorneys representing a group of janitors working for the grocery store chain defended the position that *Hoffman* did not affect undocumented workers' rights to seek backpay in an FLSA lawsuit for work already performed.[80] In that case, the workers filed a class action lawsuit against the grocery store chain for failing to pay overtime and for misclassifying employees as independent contractors in its stores.[81] *Hoffman* was decided during the discovery phase of the case, and the employer's attorneys began to seek information regarding the plaintiffs' immigration status.[82] Albertsons sought a court order to compel discovery regarding the plaintiffs' immigration status after the *Hoffman* opinion was issued. MALDEF argued

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[77] *See, e.g.*, Montoya v. S.C.C.P. Painting Contractors, Inc., 589 F. Supp. 2d 569, 577 n.3 (D. Md. 2008); Flores v. Amigon, 233 F. Supp. 2d 462, 463-64 & n.1 (E.D.N.Y. 2002).

[78] *See, e.g.*, Rivera v. NIBCO, Inc., 364 F.3d 1057, 1067-69 (9th Cir. 2004); Avila-Blum v. Casa de Cambio Delgado, Inc., 236 F.R.D. 190, 192 (S.D.N.Y. 2006).

[79] *Hoffman* does affect the remedies available to undocumented workers when their workplace rights are violated.

[80] Flores v. Albertsons, Inc., No. CV 01-00515 AHM (SHx), 2002 WL 1163623 (C.D. Cal. Apr. 9, 2002).

[81] *Id.* at *1.

[82] *Id.* at *2.

that the *Hoffman* holding was irrelevant to federal or state wage claims. MALDEF also argued that, unlike the backpay and reinstatement at issue in *Hoffman*, the janitors were still working for Albertsons and were simply seeking backpay in the form of the difference between what they received and what they should have received if the FLSA were properly enforced.[83] The organization distinguished between backpay for work not performed and backpay for work performed, an argument that at once distinguished and limited the holding of the *Hoffman* case.[84] The court agreed, denying Albertsons's motion to compel discovery of immigration status in the case.[85]

A similar case involving immigrant workers' rights under Title VII was litigated in northern California. In *Rivera v. NIBCO, Inc.*, a group of female immigrant workers sued a manufacturing company for violations of Title VII and the California Fair Employment and Housing Act after they were discharged because they performed poorly on work skills tests offered only in English, when their jobs did not require English proficiency.[86] They alleged disparate impact discrimination. During discovery, the employer sought information about their immigration status and the district court issued a protective order barring the employer from seeking such information through the discovery process.[87] The employer appealed the decision.

MALDEF joined with a coalition of advocacy groups represented by the National Employment Law Project to file an amicus brief in the case. The coalition argued that *Hoffman*'s restrictions on the remedial powers of the NLRB did not apply to Title VII or to state law anti-discrimination statutes. They also argued that seeking irrelevant information about immigration status would chill efforts by undocumented workers to vindicate their labor rights because they face harsher consequences than other workers, such as detention and deportation.[88]

The Ninth Circuit Court of Appeals agreed with the position of the plaintiffs, MALDEF, and the other groups, holding that a protective order was appropriate where questions about immigration status would have a chilling effect on workers.[89] The court also strongly suggested that *Hoffman* did not apply to Title VII cases.[90]

MALDEF's role in this case demonstrates the premises of this article. First, advocacy lawyers are critical players in revealing the practical effects of precedent. Here, MALDEF's advocacy served to limit the *Hoffman* holding in the face of attempts to further undermine workers' rights outside of the NLRA context. Second, the case, and MALDEF's role, demonstrate the

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[83] *See id.* at *5-*6.

[84] Earlier cases had anticipated the difference between backpay for work performed and backpay for work that would have been performed had the employee not been terminated. *See* Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115 (7th Cir. 1992).

[85] *Flores*, 2002 WL 1163623, at *5-*6.

[86] 364 F.3d 1057, 1061 (9th Cir. 2004).

[87] *Id.* at 1061-62.

[88] *See id.* at 1064-65.

[89] *Id.* at 1074-75.

[90] *Id.* at 1074-75 & n.19.

power of the underlying assumptions regarding normative workers. Chief Justice Rehnquist's statement that we are operating in a "legal landscape now significantly changed"[91] illustrates how deeply the law has embedded the notion of different rights for different categories of workers. While MALDEF has accepted an uphill battle to defend the rights of all workers, Supreme Court precedent allowed employers to assert that different treatment was warranted because of immigration status. This is not too different an outcome from that reached by the Supreme Court in *Espinoza v. Farah Manufacturing Co.*,[92] three decades earlier. The difference between the two cases is how the context of the era influences the arguments. In *Hoffman*, MALDEF and its allies argued that, for the sake of the integrity of labor and employment laws, all workers had to be treated equally, regardless of immigration status. It made the same general argument in *Espinoza*, although it emphasized the desire of the noncitizen in that case to become a citizen, in time. MALDEF advocated for similar outcomes—equal treatment for immigrants in the workplace—in each case. It is critical that MALDEF's voice continue to exist when these workplace issues arise in the courts.

B. Espinoza v. Farah Manufacturing Co.

Espinoza again reveals the tensions arising from the norm of the worker as Anglo, male, and native-born. The issue in the case revolved around whether an employer's refusal to hire a legal permanent resident violated Title VII of the Civil Rights Act of 1964. Cecilia Espinoza was a lawful permanent resident married to a U.S. citizen and residing in Texas.[93] She had a U.S. citizen child and was planning to become a citizen as soon as she could meet the citizenship requirements.[94] She was, for all intents and purposes, someone who intended to continue to reside and remain in the United States. In the context of a growing Mexican American population with continued ties to extended families in Mexico,[95] this case was an important test of how strong the Title VII protections against national origin discrimination would be. If employment and labor laws, including hiring laws, protected only citizens, then those left unprotected would be, by and large, immigrants with Latino national origin roots. The Court, in fact, held that an employer could discriminate based on alienage or immigration status (despite statutory

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[91] Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002).

[92] 414 U.S. 86 (1973).

[93] *Id.* at 87.

[94] Brief of Mexican American Legal Defense and Educational Fund, Amicus Curiae at 3-4, Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973) (No. 72-671), 1973 WL 172048, at *3-*4 [hereinafter MALDEF *Espinoza* Brief].

[95] *See* Frank D. Bean, Susan Gonzalez-Baker & Randy Capps, *Immigration and Labor Markets in the United States*, *in* SOURCEBOOK OF LABOR MARKETS: EVOLVING STRUCTURES AND PROCESSES 669, 689 (Ivar Berg & Arne L. Kalleberg eds., 2001) (noting that the Latino immigration stream has lasted longer than predecessor European immigration cycles).

prohibitions against discrimination based on race and national origin),[96] thus rendering the anti-discrimination law much less useful for Latinos, or for mixed-status families such as the Espinozas.

MALDEF filed an amicus curiae brief in *Espinoza* in part because it recognized that so many of its constituents were Mexican Americans who were disenfranchised by their lack of citizenship. As MALDEF noted in its brief, "MALDEF . . . sees as one of its roles the effective use of the courts to safeguard and secure the legal rights of persons of Mexican origin who are permanent resident aliens."[97] Because of its understanding of the extent to which Mexican Americans lived in mixed-status families, MALDEF argued that alienage discrimination had the effect of discrimination based on national origin.[98] Just as with the *Sure-Tan/Hoffman* lines of cases, the organization's position sought to avoid the division created by the Court's focus on immigration status rather than the effect on the Latino community that rules based on immigration status might have. MALDEF argued that an immigrant's rights coincided with rights emanating from national origin status if the immigrant resided in the United States.[99] Residency allowed for a measure of reliability and stability that an employer could rely upon, according to the MALDEF argument. The organization pointed out how the effects of national origin discrimination were experienced differently between newly-arrived and earlier-arrived immigrants, and advocated for flexibility in the national origin doctrine that would consider these differences when faced with the possibility of workplace discrimination:

> [N]ational origin discrimination has never been a phenomenon distributed evenly over an entire ethnic group. The "national origin" discrimination one suffers naturally decreases the further in years and generations one is removed from foreign origins. . . . It is unrealistic to expect a third generation American citizen and a newly arrived immigrant to be subject to similar discrimination because their last names are both Rivera.[100]

MALDEF's argument also noted how an employer can easily mask national origin discrimination with citizenship requirements:

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[96] *Espinoza*, 414 U.S. at 95 ("Aliens are protected from illegal discrimination under the Act, but nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage.").

[97] MALDEF *Espinoza* Brief, *supra* note 94, at 3.

[98] This argument was echoed in Justice Douglas's dissenting opinion. *Espinoza*, 414 U.S. at 96 (Douglas, J., dissenting) ("Alienage results from one condition only: being born outside the United States. Those born within the country are citizens from birth. It could not be more clear that Farah's policy of excluding aliens is *de facto* a policy of preferring those who were born in this country.").

[99] MALDEF argued that the "[r]efusal to hire permanent resident aliens actually residing in the United States (persons in Cecilia Espinoza's position) constitutes national origin discrimination." MALDEF *Espinoza* Brief, *supra* note 94, at 4.

[100] *Id.* at 5-6.

> By basing the discrimination on citizenship, Farah has merely substituted another element in the classification. This additional element further disadvantages that class of persons most victimized by "national origin" discrimination, i.e., recent immigrants, and those least assimilated into mainstream American life. It is hard to see how this additional discriminatory element operates to nullify the "national origin" discrimination which is the net effect of Farah's policy.
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> . . . .
>
> Withdrawing Title VII's protection from aliens would do much to cripple the national origin discrimination prohibition.[101]

MALDEF envisioned its role in this case as demonstrating to the Court the consequences of allowing employers to mask discriminatory practices with the veil of immigration status. This context-based argument is the same type of argument that MALDEF made throughout its advocacy efforts in the *Sure-Tan/Hoffman* line of cases. While rejecting the Espinozas' claims, the Court, in fact, accepted the argument, leaving open the possibility that parties could claim national origin discrimination disguised as discrimination based on immigration status. Had MALDEF not advanced the argument, the underlying assumption today might be that immigration status discrimination is never the basis for a national origin claim.

In this case, MALDEF sought to challenge both of the assumptions running through national origin cases. First, MALDEF challenged the notion of the normative worker even as the employer tried to redefine the normative worker as including Mexican Americans.[102] Second, MALDEF challenged the notion that there were types of work that Latinos, especially immigrants, could or could not do. The outcome of MALDEF's challenge was that the Court left an opening for future plaintiffs to challenge the notion that Latino immigrants are naturally endowed to perform certain types of work. The Court allowed for claims of national origin discrimination in the guise of immigration status discrimination. In this era of increasing segregation in immigrant-dominated workplaces, this type of challenge—with the opening that MALDEF's advocacy created—is ripe for mounting.

IV. Conclusion

MALDEF's concern throughout these cases involving the intersection of labor and employment rights with immigration law has been the effects of judicial opinions that afford some workers in our society fewer rights than others. MALDEF has also been and continues to be concerned with ensuring that differences are not exacerbated between Latinos with immigration status and those without. Since MALDEF's inception in 1968, the class of

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[101] *Id.* at 6-9.
[102] *See Espinoza*, 414 U.S. at 92-93.

immigrants with fewer workplace rights has become increasingly Latino. MALDEF has consistently envisioned its role as demonstrating—to courts, to legislators, and to the public—the effects of laws that assume some workers belong and others do not.

Ultimately, the cases arising out of *Sure-Tan*, IRCA, *Hoffman*, and *Espinoza* are all part of the same set of debates surrounding which workers deserve membership rights in the workplace. MALDEF and similar advocacy organizations recognize that disfavored groups in this country deserve protection from discriminatory and anti-labor practices, and to the extent that immigrants face the same types of exploitation that past minority groups have faced, they deserve advocates. For MALDEF, the relationship between immigrants and Latinos is still too intertwined to isolate in ways that courts and policymakers historically have done. Delgado, Perea, and Stefancic chose cases carefully in order to highlight the complexities in the doctrinal immigration status/national origin distinction. This Article has attempted to highlight the important role of advocacy organizations in the development of the doctrine. Such stories deserve a place in classroom discussion, if nothing else, because they illustrate the transitory and continuously contested evolution of law. Lawmakers, judges, and students who are exposed to the effects of law on its subjects will have better information at decision time. It will continue to be the advocate's responsibility to show the effects of laws that distinguish between national origin and immigration status, and to show that such distinctions have a far more deleterious effect when courts and policymakers fail to recognize that the distinctions are not quite as clean as they may seem. As seen in this series of cases, MALDEF and like institutions find it imperative to blur the distinctions, for the sake of all Latinos and other minorities.