

# FISSURES IN THE VALLEY: SEARCHING FOR A REMEDY FOR U.S. TECH WORKERS INDIRECTLY DISPLACED BY H-1B VISA OUTSOURCING FIRMS

## INTRODUCTION

“If I could just change one law,” lamented Bill Gates, “it would be this.”<sup>1</sup> What law provokes the ire of the Silicon Valley titan and co-chairman of the world’s largest philanthropic organization?<sup>2</sup> Hint: it was at the center of a publicity maelstrom that struck the happiest place on earth—Walt Disney World<sup>3</sup>—as well as one of California’s largest power utilities, Southern California Edison (SCE).<sup>4</sup> In 2015, reporters revealed that Disney and SCE laid off<sup>5</sup> hundreds of their U.S. technology workers<sup>6</sup> and replaced them with foreign visa workers supplied by outsourcing firms in an effort to cut IT

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1. ZaZona, *Bill Gates Dupes Students at Waterloo University*, YOUTUBE (Feb. 28, 2008), <https://www.youtube.com/watch?v=GB2OhaGLp8>.

2. See generally Karl Mathiesen, *What is the Bill and Melinda Gates Foundation?*, THE GUARDIAN (Mar. 16, 2015), <https://www.theguardian.com/environment/2015/mar/16/what-is-the-bill-and-melinda-gates-foundation>. Vivek Wadhwa, a former software entrepreneur turned-academic and H-1B visa supporter, candidly explained that “Bill Gates’ interest as chairman of Microsoft are different than Bill Gates’ interest as a philanthropist.” Martin Kaste, *Engineer Shortage? Duke Study Says No*, NPR (Apr. 30, 2007), <http://www.npr.org/templates/story/story.php?storyId=9910492>.

3. In 2014, Disney laid off approximately 250 of its U.S. tech employees and required many of them to train their foreign replacements. See Patrick Thibodeau, *Fury Rises at Disney Over Use of Foreign Workers*, COMPUTERWORLD (Apr. 29, 2015), <https://perma.cc/M4F9-YY83>; Julie Preston, *Pink Slips at Disney. But First, Training Foreign Replacements.*, N.Y. TIMES (June 3, 2015), <https://www.nytimes.com/2015/06/04/us/last-task-after-layoff-at-disney-train-foreign-replacements.html>.

4. See Editorial, *End H-1B Visa Program’s Abuse*, L.A. TIMES (Feb. 16, 2015), <http://www.latimes.com/opinion/editorials/la-ed-visas-tech-workers-h1b-20150217-story.html>; Patrick Thibodeau, *Southern California Edison IT Workers ‘Beyond Furious’ Over H-1B Replacements*, COMPUTERWORLD (Feb. 4, 2015), <https://perma.cc/47CQ-6SSD> (reporting SCE laid off 400 of its U.S. tech workers and required some to train their foreign replacements).

5. This Note uses the terms “lay off” and “displace” interchangeably to mean “to cause the worker’s loss of employment, other than through a discharge for inadequate performance, violation of workplace rules, cause, voluntary departure, voluntary retirement, or the expiration of a grant or contract.” 8 U.S.C. §§ 1182(n)(4)(B), (D)(i)(I) (2012).

6. This Note uses the term “U.S. worker” according to its statutory definition: an employee who is either a U.S. citizen, U.S. national, permanent resident, alien lawfully admitted for temporary residence, refugee, or an alien granted asylum. 8 U.S.C. § 1182(n)(4)(E) (2012).

(information technology) labor costs.<sup>7</sup> Rather than denying the allegations,<sup>8</sup> Disney and SCE argued that they had followed the letter of the law.<sup>9</sup> Unfortunately, the law is on their side. At issue was section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (INA),<sup>10</sup> a law that facilitates the country's most commonly utilized<sup>11</sup> and most contentious, highly-skilled foreign worker program<sup>12</sup>—the H-1B visa.<sup>13</sup> The majority of H-1B workers are young males born in India working in computer-related occupations—the industry that depends the most on foreign labor.<sup>14</sup>

Layoffs such as those at Disney and SCE “had occurred numerous times over previous years, with little public comment.”<sup>15</sup> Outsourcing firms, both in the U.S. and India, have a history of discriminating against American job applicants,<sup>16</sup> exploiting H-1B visa holders,<sup>17</sup> and commandeering

7. “Outsourcing” refers to a client organization enlisting a third-party to perform a function that the client would otherwise perform itself. See Karen E. Klein, *Insource, Offshore, Outsource—Help!*, BLOOMBERG BUSINESSWEEK (May 26, 2005), <https://perma.cc/D5EE-KF6X>; see also Tejas Shah & Michael A. Warner, Jr., *Are Outsourcing Arrangements a New Vehicle for Alleging Employment Discrimination?*, FRANZCEK RADELET P.C. (Jan. 13, 2016), <https://perma.cc/D2MY-VYLX>.

8. Disney characterized the layoffs as “restructuring [its] global technology organization to support future innovation and new capabilities.” Sandra Pedicini, *Disney’s Technology Group Undergoing Restructuring*, ORLANDO SENTINEL (Oct. 28, 2014), <http://www.orlandosentinel.com/business/os-disney-technology-restructuring-20141028-story.html>. SCE explained that it had adopted “a proven business strategy commonly . . . used by other top U.S. companies” in order to improve “capabilities while lowering costs.” Brian Watt, *Southern California Edison Plans Layoffs and Outsourcing of Some Work*, 89.3 KPCC (Apr. 16, 2014), <https://perma.cc/34FD-4PB5>.

9. See Julia Preston, *Judge Says Disney Didn’t Violate Visa Laws in Layoffs*, N.Y. TIMES (Oct. 13, 2016), <https://www.nytimes.com/2016/10/14/us/judge-says-disney-didnt-violate-visa-laws-in-layoffs.html>; Lisa Mascaro & Jim Puzanghera, *Senators Seek Federal Investigation of Alleged H-1B Visa Abuse at Edison*, L.A. TIMES (Apr. 9, 2015), <http://www.latimes.com/nation/politics/politicsnow/la-na-immigration-investigation-20150409-story.html>.

10. INA § 101(a)(15)(H)(ii)(b) (codified at 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2012)).

11. Julia Funke, *Supply and Demand: Immigration of the Highly-Skilled and Educated in the Post-9/11 Market*, 48 J. MARSHALL L. REV. 419, 427 (2015).

12. See Giovanni Peri et al., *Foreign Scientists and Engineers and Economic Growth*, 3 CATO PAPERS PUB. POL’Y 107, 114 (2014).

13. The H-1B nonimmigrant is defined as “an alien . . . who is coming temporarily to the United States to perform services . . . in a specialty occupation . . . or as a fashion model.” 8 U.S.C. § 1101(a)(15)(H)(i)(b). Visa categories derive their name from the letter and numeral of their applicable subsection under the INA. See RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL33977, IMMIGRATION OF FOREIGN WORKERS: LABOR MARKET TESTS AND PROTECTIONS 8 (Apr. 24, 2007).

14. See *infra* notes 298–301 and accompanying text.

15. See Matloff, *supra* note 9, at 88; see also RON HIRA, ECON. POL’Y INST., THE OFFSHORING OF INNOVATION 3 (Dec. 1, 2008), <https://perma.cc/89XJ-8MBJ> (“As recently as 1992 IBM never laid off an employee, but since 2002” it has forced “U.S. workers to train foreign replacements as a condition of severance and unemployment insurance.”).

16. See Stan Malos, *Discrimination Cases Involving H-1B Immigration Status: An Updated Review and Analysis*, 15 BENDER’S LAB. & EMP. BULL. 295, 299 (Sept. 2015) [hereinafter Malos, *Updated*] (noting Indian outsourcing firms Wipro, Infosys, and Tata have allegedly discriminated against U.S. job applicants in favor of Indian applicants).

17. See, e.g., *India’s TCS pays \$29.75 Million to Settle Class Action Suit*, REUTERS (Mar. 1, 2013), <https://perma.cc/H5VN-XZBU> (reporting Tata paid \$29.75 million settlement after it was accused of forcing H-1B workers to sign over their tax refunds); U.S. DEP’T OF LABOR, Teaneck, N.J.,

immigration law to maximize profits.<sup>18</sup> Outsourcing firms sponsor visas for foreign workers, who are then contracted out to U.S. client companies. The clients in turn hand their U.S. tech employees the pink slip<sup>19</sup> and oftentimes a Hobson's choice: severance pay conditioned upon “‘knowledge transfer,’” an ugly euphemism for being forced to train their foreign replacements,<sup>20</sup> or nothing.

Political discourse and legal scholarship tends to view immigration in terms of undocumented aliens<sup>21</sup> or those who are allowed entry via low-skilled nonimmigrant worker visas (e.g., H-2A or H-2B visas).<sup>22</sup> Virtually all previous scholarship on the H-1B program has been devoted to proposing reforms to its legislative labyrinth.<sup>23</sup> But a lack of data has only

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Information Technology Company Agrees to Pay More than \$509,000 in Back Wages Following U.S. Labor Department Investigation (Mar. 30, 2009), <http://www.aila.org/infonet/dol-back-wages-h-1b-violations-nj-it-company> (announcing U.S. outsourcing firm Cognizant paid \$509,607 to sixty-seven of its H-1B employees after DOL found the company had underpaid them).

18. In 2013, the Indian firm Infosys agreed to a record \$34 million settlement amid accusations of “systemic visa fraud and abuse.” Tom Schoenberg et al., *Infosys Settles with U.S. in Visa Fraud Probe*, BLOOMBERG (Oct. 31, 2014), <https://www.bloomberg.com/news/articles/2013-10-30/infosys-settles-with-u-s-in-visa-fraud-probe>.

19. Julia Preston, *Disney Has No Comment on the Recent Reversal of Layoffs*, N.Y. TIMES (Jun. 23, 2015), <https://www.nytimes.com/times-insider/2015/06/23/disney-has-no-comment-on-the-recent-reversal-of-layoffs/> (reporting that Disney also told many Orlando businesses to not hire the laid off U.S. workers).

20. See Thibodeau, *supra* note 4; see also Stephanie Armour, *Workers Asked to Train Foreign Replacements*, USA TODAY (Apr. 6, 2004), [http://usatoday30.usatoday.com/money/workplace/2004-04-06-replace\\_x.htm](http://usatoday30.usatoday.com/money/workplace/2004-04-06-replace_x.htm).

21. See Peter Choi, *Immigration as Business Strategy: Simplifying American Immigration Law in a Global Economy*, 10 U. MASS. L. REV. 164, 167 (2015) (noting the immigration debate “has often focused on substantive proposals—most commonly regarding legalization and border enforcement”).

22. This Note focuses on discrimination against highly-skilled U.S. workers, unlike most scholarship, which has generally been more concerned with the lower skilled H-2A (agricultural) or H-2B (non-agricultural) visa workers. See, e.g., Rachel Bloomekatz, *Rethinking Immigration Status Discrimination and Exploitation in the Low-Wage Workplace*, 54 UCLA L. REV. 1963, 1965 (2007) (first article to analyze remedies for U.S. workers claiming their employer unfairly favored undocumented or low-skilled H-2A and H-2B workers); Bryce W. Ashby, *Indentured Guests—How the H-2A and H-2B Temporary Guest Worker Programs Create the Conditions for Indentured Servitude and Why Upfront Reimbursement for Guest Workers’ Transportation, Visa, and Recruitment Costs is the Solution*, 38 U. MEM. L. REV. 893, 895 (2008) (arguing “de-facto indentured servitude” is common among H-2A and H-2B workers); Jennifer J. Lee, *Private Civil Remedies: A Viable Tool for Guest Worker Empowerment*, 46 LOY. L. A. L. REV. 31, 63, 67 (2012) (arguing low-skilled H-2A and H-2B workers should consider seeking relief under civil RICO, § 1981, and Title VII); Eleanor G. Carr, *Search for a Round Peg: Seeking a Remedy for Recruitment Abuses in the U.S. Guest Worker Program*, 43 COLUM. J.L. & SOC. PROBS. 399, 445 (2010) (discussing H-2 visa workers seeking relief via RICO, domestic tort claims, and the Trafficking Victims Protection Act).

23. See, e.g., Jung S. Hahm, *American Competitiveness and Workforce Improvement Act of 1998: Balancing Economic and Labor Interests under the New H-1B Visa Program*, 85 CORNELL L. REV. 1673, 1699 (2000); Sabrina Underwood, *Achieving the American Daydream: The Social, Economic, and Political Inequalities Experienced by Temporary Workers under the H-1B Visa Program*,

fueled heated debates that have shed little light on the dollars-and-cents of the H-1B visa.<sup>24</sup> This Note instead takes the distinct approach of analyzing potential remedies<sup>25</sup> for U.S. tech workers who allege their U.S. employer replaced them in favor of H-1B workers supplied by outsourcing firms. Part I explains how the H-1B program's protections—specifically, the labor condition application process (LCA) and its administrative remedies—have failed to hold employers accountable for discriminating against their U.S. tech employees.<sup>26</sup> Part I concludes that the failures of the visa's statutory regime necessitate a discussion of alternative remedies.

Part II analyzes the viability of claims brought under federal statutes: namely, the civil provisions of the Racketeer and Influenced Corrupt Organization Act (civil RICO),<sup>27</sup> the Immigration Reform and Control Act of 1986 (IRCA),<sup>28</sup> Title VII of the Civil Rights Act of 1964 (Title VII),<sup>29</sup> and section 1981 of the Civil Rights Act of 1866 (§ 1981).<sup>30</sup> Part II concludes that among these alternatives, Title VII and § 1981 offer the most promise for displaced U.S. tech workers.

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15 GEO. IMMIGR. L.J. 727, 746–47 (2001) (proposing reforms to end the exploitation of H-1B workers); Norman Matloff, *On the Need for Reform of the H-1B Non-Immigrant Work Visa in Computer-Related Occupations*, 36 U. MICH. J.L. REFORM 815, 901–12 (2003); Todd H. Goodsell, *On the Continued Need for H-1B Reform: A Partial, Statutory Suggestion to Protect Foreign and U.S. Workers*, 21 BYU J. PUB. L. 153, 156 (2007); Courtney L. Cromwell, *Friend or Foe of the U.S. Labor Market: Why Congress Should Raise or Eliminate the H-1B Visa Cap*, 3 BROOK. J. CORP. FIN. & COM. L. 455, 458 (2009) (advocating for increasing the annual visa cap); Jessica F. Rosenbaum, *Exploiting Dreams: H-1B Visa Fraud, its Effects, and Potential Solutions*, 13 U. PA. J. BUS. L. 797, 813 (2011) (proposing a supplemental tax on H-1B employers in order to expand DOL oversight).

24. “It is no surprise that debate over whether domestic workers are sufficiently safeguarded from adverse effects of the H-1B visa program is as volatile as the statistics that justify the need for such a program.” Vincent C. Avagliano, *The Second Wave: IT Outsourcing, Globalization, and Worker Rights*, 23 PA. ST. INT’L L. REV. 663, 669 (2005).

25. See Christopher Fulmer, *A Critical Look at the H-1B Visa Program and Its Effects on U.S. and Foreign Workers—A Controversial Program Unhinged From Its Original Intent*, 13 LEWIS & CLARK L. REV. 823, 841–43, 856–60 (2009) (proposing legislative reforms to the H-1B program, but also highlighting the administrative remedies for visa violations); Maria L. Ontiveros, *H-1B Visas, Outsourcing and Body Shops: A Continuum of Exploitation for High Tech Workers*, 38 BERKELEY J. EMP. & LAB. L. 1, 41–42 (2016) (briefly discussing civil RICO and Title VII lawsuits brought by U.S. and H-1B workers); Malos, *Updated, supra* note 16 (analyzing ten H-1B discrimination cases); Stan Malos, *Employment Discrimination Based on Immigration Status: Recent Cases Involving H-1B Visas*, 24 EMP. RESPS. & RTS. J. 23, 26 (2011) [hereinafter Malos, *Employment Discrimination*] (noting that “little if any scholarly research has addressed” H-1B discrimination case law).

26. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-11-26, H-1B VISA PROGRAM: REFORMS ARE NEEDED TO MINIMIZE THE RISKS AND COSTS OF CURRENT PROGRAM 52 (2011) [hereinafter U.S. GOV’T ACCOUNTABILITY OFF., REFORMS ARE NEEDED] (explaining no “explicit provisions” cover U.S. client companies that acquire H-1Bs sponsored by outsourcing firms).

27. 18 U.S.C. §§ 1961–68 (2012).

28. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

29. Pub. L. No. 88-352, 78 Stat. 252 (codified as amended at 42 U.S.C. §§ 2000–2000e-17 (2012)).

30. 42 U.S.C. § 1981 (2012).

However, it is still unclear whether these federal anti-discrimination statutes can effectively address H-1B discrimination. Part III concludes that tech workers will ultimately achieve the greatest job security through reforming the H-1B statutory scheme. But rather than recommend the content of those reforms, Part III proposes the catalyst—a sustained campaign of litigation, unionization, and education—all with the aim of exposing the corporate exploitation of American and foreign tech workers.

#### I. THE H-1B VISA STATUTORY SCHEME AND ITS FAILURE TO ADDRESS THE FISSURED TECH WORKPLACE

The tech industry's demand for H-1B workers greatly exceeds the available supply,<sup>31</sup> which is capped at 65,000 per year, albeit with plenty of exceptions.<sup>32</sup> The visa cap—which Bill Gates has criticized as the “worst disaster”<sup>33</sup>—has been a lightning rod in the debate over the economic soundness of the H-1B program. Despite the visa's important consequences on the science, technology, engineering, and mathematics (STEM) labor market,<sup>34</sup> especially computer-related jobs,<sup>35</sup> surprisingly few studies have examined its effect on the employment opportunities of U.S. tech workers.<sup>36</sup>

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31. See, e.g., Sari Pekkala Kerr, William R. Kerr, & William F. Lincoln, *Firms and the Economics of Skilled Immigration*, 15 INNOVATION POL'Y AND THE ECON. 115, 121 (2015) (noting that in 2014 and 2015 “demand exceeded the annual supply in the first week that the visas were available”); Danielle M. Drago, *Losing the Best and the Brightest: The Disappearing Wage Premium for H-1B Visa Recipients*, 17 VAND. J. ENT. & TECH. L. 1051, 1054 (2015) (“In the first six days of the 2015 application period, applicants filed almost three times as many applications as the number of available visas.”).

32. 20,000 cap-exempt visas are allocated to nonimmigrants with master's degrees or higher, as well as visas for employees of universities and certain research organizations. 8 U.S.C. § 1184(g)(5)(A)–(C) (2012).

33. *Supra* note 1.

34. Almost two-thirds of H-1B petitions are for STEM occupations. See NEIL G. RUIZ ET AL., THE SEARCH FOR SKILLS: DEMAND FOR H-1B IMMIGRANT WORKERS IN U.S. METROPOLITAN AREAS 1 (Brookings Institution 2012), <https://perma.cc/A99U-FSCV>.

35. See Payal Banerjee, *Indian Information Technology Workers in the United States: The H-1B Visa, Flexible Production, and the Racialization of Labor*, 32 CRITICAL SOC. 425, 431 (2006) (estimating H-1B workers “comprise about one-sixth . . . of the total IT workforce in the [United States]”).

36. See *supra* note 31, at 130–42, for a discussion of current H-1B research. See also MADELINE ZAVODNY, IMMIGRATION AND AMERICAN JOBS, AMERICAN ENTERPRISE INST. & PARTNERSHIP FOR A NEW AMERICAN ECON. 3 (2011), <https://perma.cc/B6BU-CLSP> (noting that while numerous studies have analyzed the effect of immigration on U.S. worker wages, there has been “relatively little research on” its effect on employment opportunities).

Thus, a vacuum of data<sup>37</sup> and conflicting research methods<sup>38</sup> have led to a cacophonous debate.<sup>39</sup> Supporters argue the H-1B program attracts the “best and the brightest,”<sup>40</sup> who fill a shortage in skilled domestic labor.<sup>41</sup> Critics counter H-1Bs are “people of just ordinary talent, doing ordinary work”<sup>42</sup> for corporations that replace their older American IT staff with a younger, immobile,<sup>43</sup> and thus cheaper, workforce.<sup>44</sup>

Plenty of ink has been spilled on these issues. Part I will instead discuss the current H-1B statutory scheme and its administrative remedies ostensibly designed to protect U.S. workers. Part I argues that the program instead facilitates the legal displacement of U.S. tech workers, which is primarily due to the statutory scheme’s failure to address the realities of today’s fissured tech workplace.

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37. See, e.g., U.S. GOV’T ACCOUNTABILITY OFF., REFORMS ARE NEEDED, *supra* note 26, at 30 (explaining the “total number of H-1B workers” in the country is unknown “because of limitations in agency data”); William R. Kerr & William F. Lincoln, *The Supply Side of Innovation: H-1B Visa Reforms and U.S. Ethnic Invention*, 28 J. LAB. ECON. 473, 484 (2010) (noting the problem posed by “data limitations”).

38. See Sari Pekkala Kerr & William R. Kerr, *Immigration and Employer Transitions for STEM Workers*, 103 AMERICAN ECON. REV. 193, 193 (May 2013).

39. See NEIL G. RUIZ ET AL., *supra* note 34, at 31–32 n.15 (arguments in support of the program); *id.* at 32–33 n.18 (criticisms of the program). See also Ron Hira, *Brookings H-1B Report’s Flawed Analysis & Flawed Process*, ECON. POL’Y INST. WORKING ECON. BLOG (May 13, 2013), <https://perma.cc/F49H-L38B>.

40. See, e.g., Drago, *supra* note 31; Jennifer Hunt & Marjolaine Gauthier-Loiselle, *How Much Does Immigration Boost Innovation?*, 2 AM. ECON. J. MACROECON. 31, 33 (2010) (estimating “immigrants account for 24 percent of patents, twice their share in the population”).

41. Compare *Strengthening American Competitiveness for the 21st Century: Hearing Before the S. Comm. on Health, Educ., Labor, and Pensions*, 110th Cong. 9 (2007) (statement of Bill Gates, Chairman, Microsoft Corp.) (“[W]e face a critical shortage of scientific talent, and there’s only one way to solve that crisis today. Open our doors to highly talented scientists and engineers . . .”), with WILLIAM P. BUTZ, ET AL., RAND, IS THERE A SHORTAGE OF SCIENTISTS AND ENGINEERS? HOW WOULD WE KNOW? 4 (2003), <https://perma.cc/8YGU-EN2E> (“[N]either earnings patterns nor unemployment patterns indicate [a] . . . shortage in the data we are able to find.”).

42. See, e.g., NORMAN MATLOFF, H-1BS: STILL NOT THE BEST AND THE BRIGHTEST, CENT. FOR IMMIGR. STUD. 1, 4 (MAY 2008), <https://perma.cc/3CJE-39N4> (calculating seventy percent of H-1Bs are concentrated at DOL skill Levels I and II, which are for “apprentice-like positions with only ‘limited exercise of judgment’”); see also U.S. GOV’T ACCOUNTABILITY OFF., REFORMS ARE NEEDED, *supra* note 26, at 58 (estimating fifty-four percent of H-1B workers were Level I “and were paid at the lowest pay grades allowed under the prevailing wage levels”); Ron Hira, *New Data Show How Firms Like Infosys and Tata Abuse the H-1B Program*, ECON. POL’Y INST. BLOG (Feb. 19, 2015, 10:47 AM), <https://perma.cc/7FS6-D55K> (arguing that if U.S. workers are training their foreign replacements, then it is obvious that the U.S. workers are better qualified).

43. See Adam B. Cox & Eric A. Posner, *Delegation in Immigration Law*, 79 U. CHI. L. REV. 1285, 1298 (2012) (arguing H-1Bs face “serious restrictions on job mobility” because the visa’s validity is largely contingent on the worker remaining with the same employer).

44. See Norman Matloff, *Immigration and the Tech Industry: As a Labour Shortage Remedy, for Innovation, or for Cost Savings?*, 10 MIGRATION LETTERS No. 2, 210, at 219–24 (2013), <https://perma.cc/J8AV-PALF>.

*A. Immigration and Nationality Act of 1952 (INA): A Decentralized Approach to Skilled Foreign Labor*

Congress has the explicit authority to regulate immigration.<sup>45</sup> But contrary to popular opinion, the “federal government rarely makes decisions on its own about which immigrants should be admitted.”<sup>46</sup> Instead, under the Immigration and Nationality Act of 1952 (INA)<sup>47</sup>—the foundation of all U.S. immigration law<sup>48</sup>—Congress delegates substantial immigration authority to non-governmental agents (i.e., private employers).<sup>49</sup> Employers are granted the greatest control over foreign workers who qualify as nonimmigrants (i.e., temporary), as opposed to immigrants (i.e., permanent).<sup>50</sup> Compared to global standards,<sup>51</sup> the American approach to skilled nonimmigrant visa workers is atypical because the H-1B program “is built around written requests from [employers] for access to specific workers.”<sup>52</sup> The petitioning employer initiates the visa process and maintains considerable control over the foreign worker.<sup>53</sup>

The INA first “opened the door for the entry of high-skill, temporary workers”<sup>54</sup> with its creation of the H-1 visa category for nonimmigrant workers<sup>55</sup>—the precursor to the H-1B.<sup>56</sup> The original H-1 nonimmigrants were required to maintain “a residence in a foreign country which [they had]

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45. U.S. CONST. art. 1, § 8, cl. 4 (granting Congress the power “[t]o establish an uniform Rule of Naturalization”).

46. Cox & Posner, *supra* note 43, at 1287.

47. Pub. L. No. 82-414, 66 Stat. 1638 (codified as amended in scattered sections of 8 U.S.C.).

48. See Richard A. Posthuma et al., *Hiring Foreign Workers: Developments in Immigration and Discrimination Laws*, 3 J. EMP. DISCRIMINATION L. 49, 52 (Winter 2001).

49. Cox & Posner, *supra* note 43, at 1287.

50. *Id.* at 1287.

51. “Canadian-style centralized systems of migrant screening are popular outside the United States.” Cox & Posner, *supra* note 43, at 1349.

52. Kirk Doran, Alexander Gelber, & Adam Isen, *The Effects of High-Skilled Immigration Policy on Firms: Evidence from Visa Lotteries* 1 (Rev. Version of Nat’l Bureau of Econ. Research, Working Paper No. 20668, 2016), <https://perma.cc/29RR-PP78>.

53. See Rosenbaum, *supra* note 23, at 814 (criticizing employers’ wide discretion over their H-1B employees).

54. Margaret L. Usdansky & Thomas J. Espenshade, *The H-1B Visa Debate in Historical Perspective: The Evolution of U.S. Policy Toward Foreign-Born Workers* 6 (U.C. San Diego Ctr. for Comp. Immigr. Stud., Working Paper No. 11, 2000), <https://perma.cc/92LU-JNPH>.

55. The H-nonimmigrant category is the INA’s main category of temporary workers. See DEMETRIOS G. PAPADEMETRIOU & STEPHEN YALE-LOEHR, *BALANCING INTERESTS: RETHINKING U.S. SELECTION OF SKILLED WORKERS* 81 (1996).

56. See SAMUEL ESTREICHER, *CROSS-BORDER HUMAN RESOURCES, LABOR AND EMPLOYMENT ISSUES: PROCEEDINGS OF THE NEW YORK UNIVERSITY 54TH ANNUAL CONFERENCE ON LABOR* 139 (Andrew P. Morriss & Samuel Estreicher eds., 2005).

no intention of abandoning,” be “of distinguished merit and ability,” and intend to come to the country temporarily to perform services “of an exceptional nature requiring such merit and ability.”<sup>57</sup> In short, the H-1 visa reflected many of the federal policies of the 1950s and 1960s that sought to grow the economy while also protecting U.S. labor interests.<sup>58</sup>

### *B. Immigration Act of 1990: A Contradictory Approach to Skilled Foreign Labor*

However, by 1990, labor organizations criticized that the H-1 visa “no longer reflected its original intent.”<sup>59</sup> Concerned that employers were misusing the H-1 program to fill entry-level positions,<sup>60</sup> labor organizers recommended that Congress separate foreign business professionals from nurses, entertainers, and athletes.<sup>61</sup> However, the business community and immigration bar sought to prevent the imposition of any onerous labor certification process.<sup>62</sup>

Congress sought to placate these competing concerns in the Immigration Act of 1990,<sup>63</sup> which added new categories of nonimmigrant visas. Among these was the H-1B visa,<sup>64</sup> which eliminated the original H-1 “distinguished

57. Pub. L. No. 82-414, § 101(15)(H), 66 Stat. 163, 168.

58. See PAPADEMETRIOU & YALE-LOEHR, *supra* note 55, at 18–19.

59. H. Rosemary Jeronimides, *The H-1B Visa Category: A Tug of War*, 7 GEO. IMMIGR. L.J. 367, 371 (1993) (noting that prior to the 1990 Act, it was possible to qualify for an H-1 visa “with no college degree and just a few years of work experience.”). Part of the problem was INS’s interpretation of “distinguished” to mean any individual deemed a “professional”—which in turn required a bachelor’s degree as a prerequisite to work in the occupation. See *Matter of Essex Cryogenics Indus., Inc.*, 14 I. & N. Dec. 196, 197 (BIA 1972) (accepting INS’s interpretation); Constantine S. Potamianos, *The Temporary Admission of Skilled Workers to the United States under the H-1B Program: Economic Boon or Domestic Work Force Scourge?*, 11 GEO. IMMIGR. L.J. 789, 796 (1997).

60. See B. Lindsay Lowell, *H-1B Temporary Workers: Estimating the Population*, at 4–5 (U.C. San Diego: Ctr. for Comparative Immigr. Stud., Working Paper No. 12, 2000).

61. See Jeronimides, *supra* note 59, at 371 (noting that in 1987, forty-eight percent of all H-1 visas were issued to entertainers). In addition, organized labor was concerned with the lack of a visa cap and any requirement that employers first exhaust the domestic labor market before hiring foreign workers. See U.S. GEN. ACCT. OFF., GAO/PEMD-92-17, IMMIGRATION AND THE LABOR MARKET: NONIMMIGRANT ALIEN WORKERS IN THE UNITED STATES 17 (1992).

62. See Jeronimides, *supra* note 59, at 372 (noting U.S. employers wanted to abolish the requirement that H-1 visa workers maintain an overseas domicile in order to overcome the presumption of their intent to permanently settle in the U.S.); see also 8 U.S.C. § 1184(b) (2012) (presuming “every alien,” except for certain nonimmigrants such as H-1Bs, to be an “immigrant”).

63. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.).

64. While the H-1B visa was technically created prior to the 1990 Act with the passage of the Immigration Nursing Relief Act of 1989, Pub. L. No. 101-238, 103 Stat. 2099 (1989) (amending scattered sections of 8 U.S.C.), it was under the 1990 Act that the H-1B visa took its current form. See, e.g., Jeronimides, *supra* note 59, at 369 n.9.



merit and ability” standard.<sup>65</sup> Instead, H-1B nonimmigrants were required to work in a “specialty occupation,” defined as a job that requires “(A) theoretical and practical application of a body of highly specialized knowledge, and (B) attainment of a bachelor’s or higher degree in the specific specialty . . . .”<sup>66</sup>

The H-1B visa reflected Congress’s schizophrenic approach to immigration. On the one hand, Congress satisfied business interests by rejecting “any recruitment obligations, positive tests of the labor market, and other obligations for employers to demonstrate U.S. worker unavailability”<sup>67</sup>—unlike other H-category nonimmigrants<sup>68</sup> and contrary to popular opinion.<sup>69</sup> In addition, Congress allowed H-1B *nonimmigrants* to have dual intent, meaning they could intend to stay in the country temporarily or plan to *permanently* settle in the future.<sup>70</sup> On the other hand, Congress ostensibly sought to protect U.S. workers by imposing an annual cap of 65,000 visas and requiring prospective H-1B employers undergo a labor condition application (LCA) process.<sup>71</sup>

*C. The LCA Requirements and the H-1B Visa Program’s Administrative Remedies: An Inadequate Protection for U.S. Tech Workers*

An employer seeking to employ H-1B nonimmigrants must first file an LCA, which requires the employer make four attestations subject to

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65. Inexplicably, H-1B visas also cover fashion models of “distinguished merit and ability.” 8 U.S.C. § 1101(a)(15)(H)(i)(b). Nevertheless, the majority of H-1B visas are issued to specialty workers in high-tech industries. See Malos, *Employment Discrimination*, *supra* note 25, at 25.

66. 8 U.S.C. § 1184(i)(1) (defining “specialty occupation”).

67. Angelo A. Paparelli & Mona D. Patel, *The Immigration Act of 1990: Death Knell for the H-1B?*, 25 INT’L LAW 995, 997 (Winter 1991).

68. For example, employers that petition the government to sponsor H-2A (agricultural) or H-2B (non-agricultural) visa workers must attest (1) “there are not sufficient workers who are able, willing, . . . qualified,” and available, and (2) hiring the foreign worker “will not adversely affect the wages and working conditions of *workers in the United States similarly employed*.” 8 U.S.C. § 1188(a)(1) (2012) (H-2A) (emphasis added); 8 C.F.R. § 214.2(h)(6)(i)(A) (2016) (H-2B).

69. See, e.g., Fulmer, *supra* note 25, at 828 n.28 (noting a *Wall Street Journal* article erroneously stating that all employers must “attest that [they] can’t find a U.S. worker” before hiring an H-1B).

70. See U.S. GEN. ACCT. OFF., GAO/HEHS-00-157, H-1B FOREIGN WORKERS: BETTER CONTROLS NEEDED TO HELP EMPLOYERS AND PROTECT WORKERS 6 (2000).

71. See, e.g., *Implementation of the Immigration Act of 1990: Hearing before the Subcomm. on Int’l Law, Immigr., and Refugees of the H. Comm. on the Judiciary*, 102nd Cong. 96 (May 15, 1991) (statement of David O. Williams, Deputy Assistant Secretary for Employment and Training, Department of Labor) (“[A]ttestations are required to assure the wages and working conditions of U.S. workers are not adversely affected.”); Potamianos, *supra* note 59, at 797–98 (explaining the dual concerns that shaped the H-1B visa).

perjury.<sup>72</sup> First, the employer must verify that it will pay the H-1B employee the required wage rate.<sup>73</sup> Second, and most importantly, the employer must agree that it “will provide working conditions for [the H-1B worker] that will not adversely affect the working conditions of *workers similarly employed*.”<sup>74</sup> Third, the employer confirms that there is no “strike, lockout, or work stoppage . . . in the occupational classification in the area of intended employment.”<sup>75</sup> Lastly, the employer attests that it “provided notice of the filing of the [LCA] to the bargaining representative of the employer’s employees in the occupational classification in which the H-1B nonimmigrants will be employed . . . or, if there is no such bargaining representative, has posted notice . . . in conspicuous locations . . . .”<sup>76</sup> Under 8 U.S.C. § 1182(n)(2)(A), Congress tasked the Department of Labor (DOL) with investigating worker complaints of LCA violations and enforcing administrative remedies against noncompliant employers.<sup>77</sup>

On its face, the LCA reaffirms the “overriding principle . . . that foreign workers should not be able to compete with U.S. workers on the basis of the price for their labor.”<sup>78</sup> Yet DOL’s Office of Inspector General (OIG) has consistently criticized the LCA as doing “little to protect the jobs or wage levels of U.S. workers.”<sup>79</sup> As discussed below, the statutory scheme’s failure to prevent the displacement of U.S. workers is primarily for three reasons: first, the LCA is administered by a complex bureaucracy that has limited oversight and enforcement authority; second, Congress crafted a prolix statutory scheme riddled with LCA exceptions that benefit outsourcing firms and their U.S. clients; and third, these companies exploit

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72. See 20 C.F.R. § 655.700(b) (2016); see also U.S. DEP’T OF LABOR, ETA FORM 9035 & 9035E, LABOR CONDITION APPLICATION FOR NONIMMIGRANT WORKERS, [https://www.foreignlaborcert.doleta.gov/pdf/ETA\\_Form\\_9035.pdf](https://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9035.pdf) [hereinafter LCA].

73. See 20 C.F.R. § 655.730(d)(1) (2016). An employer must attest that it will pay H-1B employees “at least the local prevailing wage or the employer’s actual wage, whichever is higher, and pay for nonproductive time.” LCA, *supra* note 72, at 4.

74. 8 U.S.C. § 1182(n) (2012) (emphasis added). Cf. 20 C.F.R. § 655.732(a) (2016) (explaining the second LCA requirement is met when the employer affords the same “working conditions to its H-1B . . . employees . . . as it affords to *its U.S. worker employees who are similarly employed*, and without adverse effect upon the working conditions of *such U.S. worker employees*.”) (emphasis added).

75. 20 C.F.R. § 655.733(a) (2016).

76. 20 C.F.R. § 655.734 (2016). Following ETA’s approval of the LCA, the employer submits a Form I-129 (H-1B petition) to the Department of Homeland Security’s (DHS) U.S. Citizenship and Immigration Services (USCIS). See 20 C.F.R. § 655.700(b)(2) (2016).

77. See 8 U.S.C. § 1182(n)(2)(A) (2016) (directing the Secretary of Labor to “establish a process for the receipt, investigation, and disposition of complaints respecting a petitioner’s failure to meet a condition specified in an application . . . or a petitioner’s misrepresentation of material facts in such an application.”).

78. PAPADEMETRIOU & YALE-LOEHR, *supra* note 55, at 72 (emphasis omitted).

79. U.S. DEP’T OF LABOR, THE DEPARTMENT OF LABOR’S FOREIGN LABOR CERTIFICATION PROGRAMS: THE SYSTEM IS BROKEN AND NEEDS TO BE FIXED 3 (1996) [hereinafter U.S. DEP’T OF LABOR, THE SYSTEM IS BROKEN]. See 76 U.S. DEP’T OF LAB. SEMIANN. REP. TO CONGRESS (Apr. 1–Sept. 30, 2016) [hereinafter U.S. DEP’T OF LABOR, SEMI-ANNUAL REPORT] (reiterating DOL’s oversight authority has “been an ongoing concern . . . since the mid-1990s”).

a gap in statutory and regulatory authority in order to evade the requirement that H-1B petitioners maintain an employer-employee relationship with their H-1B employees.

*1. The Department of Labor's Inadequate Oversight and Enforcement Authority*

A hodgepodge of four federal departments and their respective divisions are tasked with overseeing the H-1B program.<sup>80</sup> This division of responsibilities impedes the sharing of information that would otherwise allow meaningful investigation of employer abuses.<sup>81</sup> More problematic is DOL's limited oversight and enforcement authority. According to the U.S. Government Accountability Office (GAO), DOL's review of the LCA "is not intended to identify . . . lack of [employer] compliance with the attestations made on the LCA."<sup>82</sup> Instead, the law explicitly provides that "[l]abor shall review [the LCA] only for completeness and obvious inaccuracies."<sup>83</sup> In other words, DOL's certification of the LCA is little more than a rubber stamp.<sup>84</sup>

DOL's Wage and Hour Division (WHD) is responsible for investigating complaints of LCA violations,<sup>85</sup> imposing civil money penalties,<sup>86</sup> and on

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80. U.S. GOV'T ACCOUNTABILITY OFF., REFORMS ARE NEEDED, *supra* note 26, at 44–45 (listing the agencies, their roles, and limitations). DOL's Employment and Training Administration (ETA) reviews the LCA, and its Wage and Hour Division (WHD) investigates complaints concerning the LCA requirements concerning wage and working conditions. *Id.* The Department of Homeland Security's United States Citizenship and Immigration Services (USCIS) is tasked with reviewing H-1B petitions, and its Directorate of Fraud Detection and National Security (FDNS) conducts site visits to verify the accuracy of the LCA and H-1B petitions. *Id.* Finally, the State Department interviews the foreign worker and issues the visa. *See Id.*; *see also* 20 C.F.R. § 655.705 (2016) (detailing the agencies' responsibilities).

81. *See* U.S. GOV'T ACCOUNTABILITY OFF., REFORMS ARE NEEDED, *supra* note 26, at 44–46.

82. *Id.* at 46. DOL is unable to verify whether a nonimmigrant is qualified for the position because when employers file the LCA, they are requesting DOL's "approval for one or more *positions*, not specific aliens." U.S. DEP'T OF LABOR, OVERVIEW AND ASSESSMENT OF VULNERABILITIES IN THE DEPARTMENT OF LABOR'S ALIEN CERTIFICATION PROGRAMS 10 (2003) (emphasis added).

83. 8 U.S.C. § 1182(n)(1)(G) (2012).

84. *See, e.g.*, U.S. DEP'T OF LABOR, *supra* note 82, at 1 ("The H-1B is a 'rubber stamp' program . . ."); U.S. DEP'T OF LABOR, SEMI-ANNUAL REPORT, *supra* note 79, at 5 ("Given this fact, it is not surprising that . . . the H-1B program [is] susceptible to significant fraud and abuse, particularly by dishonest immigration attorneys, labor brokers, employers, and organized criminal enterprises.").

85. 8 U.S.C. § 1182(n)(2)(A) (2012).

86. Civil monetary fines range from \$1811, \$7370, or \$51,588 per violation. *See* 20 C.F.R. § 655.810 (2017) (explaining the various remedies and the applicable factors in assessing the penalty). In addition, WHD may impose other remedies, including the reinstatement of workers who suffered retaliation for participating in an investigation, reinstatement of displaced U.S. workers, and back wages. *Id.*

rare occasions, referring employers to the Department of Homeland Security (DHS) for “debarment” (disqualification from the H-1B program).<sup>87</sup> But this complaint-driven enforcement scheme<sup>88</sup> is underutilized by workers, especially H-1B workers, who are often reluctant to complain out of fear of retaliation and deportation.<sup>89</sup>

Furthermore, DOL can only initiate investigations in four situations.<sup>90</sup> Even in these limited circumstances, employer cooperation is unlikely because the fine “for not cooperating is far less than the potential penalty” for violating the LCA.<sup>91</sup> DOL officials are essentially caught in a catch-22. On the one hand, DOL has been criticized in the past for lax enforcement.<sup>92</sup> On the other hand, DOL has little authority to conduct thorough investigations.

For example, in *Greater Missouri Medical Pro-Care Providers, Inc. v. Perez*, the Eighth Circuit held that DOL officials erred in expanding the scope of an employer investigation based on an “aggrieved party” complaint under 8 U.S.C. § 1182(n)(2)(A).<sup>93</sup> In *Perez*, an H-1B worker alleged her employer committed the following abuses: forced her to pay all of the visa filing fees, including attorney’s fees; required her and other H-1B workers to stay in a company-paid apartment during the time she studied for a licensing exam; during this non-productive time the employer only paid the workers \$50 per week for food; and her contract included an illegal early

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87. See Wage & Hour Div., U.S. Dep’t of Labor v. Camo Techs., Inc., Arb. No. 11-026, ALJ No. 2010-LCA-23, at 3 (DOL Adm. Rev. Bd. Aug. 31, 2012).

88. Under the H-1B statutory scheme, “any aggrieved party” may file complaints to redress violations of the LCA attestations. See 20 C.F.R. § 655.715 (2016) (defining “aggrieved party”); see also 20 C.F.R. § 655.806 (2016) (detailing the complaint filing process).

89. See U.S. GOV’T ACCOUNTABILITY OFF., REFORMS ARE NEEDED, *supra* note 26, at 45, 59. The majority of complaints are filed by H-1B workers, but the overall number remains small. *Id.* at 47.

90. DOL’s WHD can only initiate H-1B-related investigations as a result of one of four factors: (1) an “aggrieved party” files a complaint, 8 U.S.C. § 1182(n)(2)(A); (2) DOL receives “credible information from a knowledgeable source (other than an aggrieved party) that an employer willfully” violated the LCA, 8 U.S.C. § 1182(n)(2)(G)(ii); (3) DOL randomly investigates “employers who (within the last five years) were found . . . to be willful violators,” 8 U.S.C. § 1182(n)(2)(F); or (4) “the Secretary of Labor personally certifies that there is reasonable cause to believe” there was a violation, 8 U.S.C. § 1182(n)(2)(G)(i). See U.S. GOV’T ACCOUNTABILITY OFF., REFORMS ARE NEEDED, *supra* note 26, at 47 n.74; see also 8 U.S.C. § 1182(n)(2) (2012). An “aggrieved party” includes a U.S. or H-1B worker “whose job, wages, or working conditions are adversely affected by the employer’s alleged non-compliance with the [LCA].” 20 C.F.R. § 655.715 (2016).

91. U.S. GOV’T ACCOUNTABILITY OFF., REFORMS ARE NEEDED, *supra* note 26, at 49.

92. U.S. GOV’T ACCOUNTABILITY OFF., GAO-06-720, H-1B VISA PROGRAM: LABOR COULD IMPROVE ITS OVERSIGHT AND INCREASE INFORMATION SHARING WITH HOMELAND SECURITY 3 (2006) (noting DOL’s review of LCAs is “timely, but lacks quality assurance controls and may overlook some inaccuracies.”).

93. See *Greater Mo. Med. Pro-Care Providers, Inc. v. Perez*, 812 F.3d 1132, 1139 (8th Cir. 2015) (holding that while DOL has the authority to investigate a single allegation in an aggrieved party complaint, DOL cannot “authorize the comprehensive initial investigation of the employer and its general compliance”).

termination fee.<sup>94</sup> DOL treated the complaint as an “aggrieved party complaint” and determined it had “reasonable cause” to conduct a thorough investigation in order to determine whether there were “violations to *any* employee.”<sup>95</sup> As a result of the comprehensive investigation, DOL ordered the employer pay \$382,889.87 to forty-five H-1B workers.<sup>96</sup> On appeal, the Eighth Circuit vacated the award and rejected DOL’s argument that “reasonable cause to investigate any single violation alleged by an aggrieved party” establishes a reasonable cause to investigate the employer’s general H-1B compliance with respect to all of its employees.<sup>97</sup>

But DOL’s limited oversight authority is not the only problem for workers seeking relief for LCA violations. There is also a procedural issue.<sup>98</sup> Workers lack the right to bring a private cause of action in court for LCA violations.<sup>99</sup> Instead, they must traverse a complicated administrative process that can drag on for many years.<sup>100</sup> Of course, this assumes that the worker filed the complaint with the correct agency. Depending on the particular LCA violation alleged, this could either be DOL’s WHD<sup>101</sup> or the

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94. *Id.* at 1134.

95. *Id.* at 1138 (emphasis added).

96. *Id.* at 1135.

97. *Id.* at 1137–39. However, DHS began proactively inspecting worksites after a 2008 audit of visa petitions revealed twenty-one percent were either fraudulently filed or contained technical violations. *See generally* U.S. CITIZENSHIP & IMMIGR. SERVS., H-1B BENEFIT FRAUD AND COMPLIANCE ASSESSMENT (Sept. 2008) (finding thirteen percent of petitions audited were fraudulent and seven percent had technical violations); Foley & Lardner LLP, *H-1B Compliance: The FDNS Site Visit*, LEXOLOGY (Aug. 30, 2010), <https://perma.cc/FNG5-KQ9G> (noting that from October 2009 to August 2010, DHS conducted over 14,000 H-1B worksite visits).

98. Ontiveros, *supra* note 25, at 28.

99. *See Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 422 (4th Cir. 2005) (holding implied cause of action did not exist for a violation of 8 U.S.C. § 1182(n) where an American software engineer of East Indian origin alleged his employer hired H-1B nonimmigrants by falsely representing that there was shortage of qualified U.S. software engineers); *Biran v. JP Morgan Chase & Co.*, 2002 WL 31040345, at \*1 (S.D.N.Y. 2002) (dismissing a U.S. tech worker’s complaint for failure to exhaust his administrative remedies under 8 U.S.C. § 1182(n) and 8 U.S.C. § 1324(b) “because no private right of action exists to enforce those statutory provisions”); *Watson v. United States*, 2007 WL 5171595, at \*1 (Fed. Cl. 2007).

100. *See* Brian Green et al., *Immigration Action: The Civil Litigation Side of Employing Foreign Nationals*, 30 ABA J. LAB. & EMP. L. 205, 215–17 (2015) (helpful overview of the process for filing complaints with DOL). *See also* *Shah v. Wilco Sys., Inc.*, 126 F. Supp. 2d 641, 648 (S.D.N.Y. 2000).

101. DOL’s WHD is responsible for investigating almost all complaints regarding LCA violations. *See* 20 C.F.R. § 655.805 (2016) (listing the violations WHD may investigate). The following process applies to such complaints. First, an aggrieved worker must file the complaint with DOL’s WHD, who will determine whether there exists reasonable cause to believe that the violation occurred. 20 C.F.R. § 655.806(a)(2) (2016). If WHD determines such reasonable cause exists, it will investigate and issue its findings in a determination letter. 20 C.F.R. § 655.806(a)(3). If the worker or employer disagrees with WHD’s findings, either party may appeal by requesting a hearing before an Administrative Law Judge (ALJ), who is required to issue a decision. 20 C.F.R. § 655.820. The ALJ’s

Department of Justice's (DOJ's) Immigrant and Employee Rights Section (IER),<sup>102</sup> which until recently was the Office of Special Counsel for Immigration-Related Unfair Employment Practices.<sup>103</sup> Oftentimes, workers seek relief without legal representation.<sup>104</sup> Given the visa regime's administrative technicalities, it comes as no surprise that pro se litigants have had little success.<sup>105</sup>

## 2. *How LCA Exemptions and Fissured Work Facilitate the Indirect Displacement of U.S. Tech Workers*

In 2008, DHS concluded that the H-1B program was rife with "significant" fraud.<sup>106</sup> Nevertheless, fraudulent LCAs do not explain the H-1B statutory scheme's failure to prevent the displacement of U.S. tech workers. Instead, the visa statutory scheme facilitates the legal displacement of U.S. tech workers because of exemptions that favor the outsourcing model.

The H-1B program defines two types of displacement: (1) direct (or primary) and (2) indirect (or secondary).<sup>107</sup> Direct displacement occurs when a petitioning H-1B employer lays off one of its own U.S. employees within a certain time period and fills that position with an H-1B nonimmigrant sponsored by the employer.<sup>108</sup> Indirect displacement occurs when a petitioner, such as an outsourcing firm, contracts its H-1B

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decision may then be reviewed by DOL's Administrative Review Board (ARB). 20 C.F.R. § 655.845(a). Only at the end of this process may parties file an appeal in the appropriate U.S. District Court. 20 C.F.R. § 655.850.

102. DOJ's IER handles complaints filed under 8 U.S.C. § 1182(n)(5) regarding an "H-1B dependent" employer's or "willful violator" employer's failure to offer the job to a U.S. applicant who is equally or better qualified than the H-1B nonimmigrant sought for the job. 20 C.F.R. § 655.705(a) (2016). *See infra* note 119. Filing complaints with DOJ involve a different process than those filed with DOL. *See* 8 U.S.C. §§ 1182(n)(5)(B)–(F) (requiring arbitration proceedings).

103. Press Release, Dep't of Justice, Justice Department Cautions Employers Seeking H-1B Visas Not to Discriminate Against U.S. Workers (Apr. 3, 2017), <https://perma.cc/62H8-ULBL>. USCIS recently made the complaint process easier by establishing an email address that allows workers who suspect fraud or abuse to submit tips and alleged violations. Press Release, U.S. Citizenship & Immigr. Servs., Putting American Workers First: USCIS Announces Further Measures to Detect H-1B Visa Fraud and Abuse (Apr. 3, 2017), <https://perma.cc/H3M8-F4DR>.

104. *See* Malos, *Updated, supra* note 16, at 296 ("[E]mployer successes in defending these claims . . . should be interpreted with caution in that many were filed by pro se plaintiffs who . . . failed to exhaust administrative remedies, failed to file with the proper tribunal, or failed to do so in a timely manner.").

105. *See* Takamiya v. DNP Am., LLC, 2016 WL 4030861, at \*1 (S.D.N.Y. 2016) (dismissing pro se H-1B worker's complaint as untimely where she filed more than twelve months after the alleged LCA violation).

106. U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 97, at 15.

107. Fulmer, *supra* note 25, at 853.

108. *See* 20 C.F.R. § 655.738(c) (2016) (defining direct displacement). The direct displacement prohibition applies within a period beginning ninety days before and ending ninety days after the filing date of an H-1B petition supported by the LCA. *Id.*

employees to a secondary employer, usually a U.S. client company, thereby enabling the U.S. client to replace its U.S. employees with the outsourcing firm's H-1B workers.<sup>109</sup>

The H-1B statutory scheme did not explicitly address displacement until 1997, the first year that the visa cap was met<sup>110</sup> and the start of the tech industry's lobbying efforts.<sup>111</sup> An influx of high-tech money and unreliable studies<sup>112</sup> ultimately led to the passage of the American Competitiveness and Workforce Improvement Act of 1998 (the "1998 Act").<sup>113</sup> Like the 1990 Act, the 1998 Act introduced half-hearted measures that were ostensibly designed to protect U.S. labor.<sup>114</sup> Specifically, the 1998 Act imposed additional LCA attestations on petitioners that either qualify as "willful violators"<sup>115</sup> or "H-1B dependent."<sup>116</sup> All major outsourcing firms are H-1B dependent.<sup>117</sup>

In addition to the four LCA attestations that apply to all petitioners, the 1998 Act required that H-1B dependent employers sign two additional attestations, most important of which is the non-displacement requirement.<sup>118</sup> It has two components. First, an H-1B dependent employer

109. See 20 C.F.R. § 655.738(d) (2016) (defining secondary displacement).

110. Usdansky & Espenshade, *supra* note 54, at 10.

111. See Matloff, *supra* note 23, at 816.

112. See Matloff, *supra* note 23, at 822–23 (noting GAO criticized one report as suffering from "serious analytical and methodological weaknesses").

113. See, e.g., Susan Martin, B. Lindsay Lowell, & Philip Martin, *U.S. Immigration Policy: Admission of High Skilled Workers*, 16 GEO. IMMIGR. L.J. 619, 629 (2002) (noting Congress temporarily raised the visa cap in 1998 and 2000 "[p]rimarily as the result of lobbying by the information technology industry").

114. See Matloff, *supra* note 23, at 825; see also RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL 33977, IMMIGRATION OF FOREIGN WORKERS: LABOR MARKET TESTS AND PROTECTIONS 20 (Apr. 24, 2007).

115. See 20 C.F.R. § 655.736(f) (2017) (defining "willful violator" employer).

116. An employer is H-1B dependent if it: (1) has twenty-five or fewer full-time equivalent (FTE) employees in the United States, of which eight or more are H-1Bs; (2) has twenty-six to fifty FTE employees in the United States, of which thirteen or more are H-1Bs; or (3) has fifty-one or more FTE employees, of which more than fifteen percent are H-1Bs. See 8 U.S.C. § 1182(n)(3)(A) (2012); see also 20 C.F.R. § 655.736(a) (2016). The fifteen percent threshold applies to all employees regardless of occupation; so even if fifty percent of an employer's IT staff are H-1Bs, it would still be unlikely that the employer would qualify as H-1B dependent because "most employers would have enough non-technical workers" (e.g., management, administrative staff, and janitors). Matloff, *supra* note 23, at 825.

117. See, e.g., Letter from M. Patricia Smith, Solicitor of Labor, U.S. Dep't of Labor, to Richard J. Durbin, U.S. Senator (Apr. 21, 2015), <https://perma.cc/AX5W-MVRU> ("Typically, consulting companies that contract with U.S. firms to supply H-1B IT workers are dependent employers."); Patrick Thibodeau, *H-1B Loophole May Help California Utility Offshore IT Jobs*, COMPUTERWORLD (Apr. 17, 2004), <https://perma.cc/3ZW6-S4KM> ("All the major offshore firms, . . . are H-1B dependent.").

118. In addition to the non-displacement requirement, and outside the scope of this Note, is the requirement that H-1B dependent employers recruit U.S. workers in good-faith before hiring H-1B workers. Moreover, an H-1B dependent employer must attest on the LCA that it offered the job to any

must agree that it has not directly displaced and will not directly displace its U.S. employees within a 180-day period.<sup>119</sup> Second, an H-1B dependent employer must attest that it will not indirectly displace a client's U.S. employees. Specifically, the controlling statute provides that the H-1B dependent employer—

will not place the nonimmigrant with another employer (regardless of whether or not such other employer is an H-1B-dependent employer) where—

- (i) the nonimmigrant performs duties in whole or in part at one or more worksites owned, operated, or controlled by such other employer; and
- (ii) there are indicia of an employment relationship between the nonimmigrant and such other employer.<sup>120</sup>

However, this non-displacement provision does not apply if the H-1B dependent employer—

has inquired of the other employer as to whether, and has no knowledge that, within the period beginning 90 days before and ending 90 days after the date of the placement of the nonimmigrant with the other employer, the other employer has displaced or intends to displace a United States worker employed by the other employer.<sup>121</sup>

In other words, an outsourcing firm can indirectly displace a client's U.S. employees if (1) there are no "indicia of an employment relationship" between the H-1B nonimmigrant and client,<sup>122</sup> or (2) the outsourcing firm

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U.S. worker who applied and was equally or better qualified for the job than the non-exempt H-1B nonimmigrant sought for the job. *See* 8 U.S.C. § 1182(n)(1)(G)(i)(II). DOJ enforces this requirement. *See* 8 U.S.C. § 1182(n)(5); *see also* 20 C.F.R. § 655.705 (2016).

119. Specifically, an H-1B dependent employer must attest that it "did not displace and will not displace a United States worker . . . employed by the employer within the period beginning 90 days before and ending 90 days after the date of filing of any visa petition." 8 U.S.C. § 1182(n)(1)(E)(i) (2012).

120. 8 U.S.C. §§ 1182(n)(1)(F)(i)–(ii).

121. 8 U.S.C. § 1182(n)(1)(F)(ii). *See* *Cyberworld Enter. Techs., Inc. v. Napolitano*, 602 F.3d 189, 202 (3d Cir. 2010) (holding DOL was *required* under § 1182(n)(2)(C)(i) to impose a 1 year debarment on an H-1B dependent firm because the firm failed to inquire whether the secondary employer intended to lay off its U.S. employees).

122. "The relationship between the H-1B-nonimmigrant and the other/secondary [employer] need not constitute an 'employment' relationship (as defined in § 655.715) . . . ." 20 C.F.R. § 655.738(d)(2)(ii) (2016). Relevant indicia of an employment relationship include the following:

(A) The other/secondary employer has the right to control when, where, and how the nonimmigrant performs the job (the presence of this indicia would suggest that the relationship between the



asked the U.S. client and has no knowledge that the U.S. client displaced or intends to displace its U.S. employees within the covered time period.<sup>123</sup>

Apparently Congress considered this mealy-mouthed language still too restrictive because the 1998 Act provided exceptions to the non-displacement requirements. Specifically, H-1B dependent employers are not required to make the non-displacement attestation if they submit the LCA for “exempt” H-1B workers—defined as specialty workers who are paid at least \$60,000 annually or hold at least a master’s degree in a specialty related to the intended position.<sup>124</sup>

The combined result of these cryptic statutory provisions is that petitioners are only prohibited from directly or indirectly displacing U.S. workers where all four of the following conditions apply: (1) the petitioner’s total workforce is made up of over fifteen percent of non-exempt H-1B workers, or the petitioner has been found to have committed a willful violation within the past 5 years, (2) the H-1B worker lacks a master’s degree, (3) the H-1B worker earns less than \$60,000, *and* (4) the U.S. worker is displaced within the period beginning ninety days before and ending ninety days after the employer files the petition.<sup>125</sup>

Officials had warned Congress as early as 1995 that the 1990 Act was failing to prevent the unfair displacement of U.S. workers.<sup>126</sup> The 1998 Act

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nonimmigrant and the other/secondary employer approaches the relationship which triggers the secondary displacement provision);

(B) The other/secondary employer furnishes the tools, materials, and equipment;

(C) The work is performed on the premises of the other/secondary employer (this indicia alone would not trigger the secondary displacement provision);

(D) There is a continuing relationship between the nonimmigrant and the other/secondary employer;

(E) The other/secondary employer has the right to assign additional projects to the nonimmigrant;

(F) The other/secondary employer sets the hours of work and the duration of the job;

(G) The work performed by the nonimmigrant is part of the regular business (including governmental, educational, and non-profit operations) of the other/secondary employer;

(H) The other/secondary employer is itself in business; and

(I) The other/secondary employer can discharge the nonimmigrant from providing services. *Id.*

123. See 8 U.S.C. § 1182(n)(1)(F)(ii).

124. See 8 U.S.C. § 1182(n)(3)(B); see also 20 C.F.R. § 655.737(a) (2016); U.S. DEP’T OF LABOR, *Fact Sheet #62Q: What are “Exempt” H-1B Nonimmigrants?* (July 2008), <https://perma.cc/V2LU-UB3Y>.

125. See U.S. DEPT. OF LABOR, STRATEGIC PLAN: FISCAL YEARS 2006–2011 35, <https://perma.cc/PW6S-P7FV> (explaining non-H-1B dependent employers may hire an H-1B “even when a qualified U.S. worker wants the job, and a U.S. worker can be displaced from the job in favor of the foreign worker.”); see also *Immigrations Reforms Needed to Protect Skilled American Workers: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. 6 (Mar. 17, 2015) (testimony of John M. Miano, Washington Alliance of Technology Workers).

126. In 1995, then Secretary of Labor Robert Reich warned Congress of the program’s flaws:

“[W]hat was conceived as a means to meet temporary business needs for unique, highly skilled professionals from abroad is, in fact, being used by some employers to bring in relatively large numbers

only exacerbated the problem. The futility of the non-displacement provisions became apparent during the early 2000s as the tech industry shifted towards a “fissured work” model.<sup>127</sup> This concept refers to work arrangements that resemble the traditional employer-employee relationship, but entail the insecurity of temporary work.<sup>128</sup> The typical fissured work model involves a U.S. client that contracts with a third-party (e.g., an outsourcing firm<sup>129</sup>) to perform functions that the U.S. client previously performed itself (e.g., IT), thereby allowing the client to focus on its “core competencies”<sup>130</sup> (e.g., being “The Most Magical Place On Earth”<sup>131</sup>), cutting labor costs,<sup>132</sup> or avoiding legal responsibility for workers the client controls (e.g., H-1B nonimmigrants).<sup>133</sup>

Today’s tech workplace is the paradigm of fissured work. By relying on outsourcing firms to provide an immobile labor force, tech<sup>134</sup> and non-tech<sup>135</sup> companies alike can avoid LCA obligations and maximize profits.<sup>136</sup> This trend began in the early 2000s<sup>137</sup> and by 2014, the top ten companies

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of foreign workers who may well be displacing U.S. workers and eroding employers’ commitment to the domestic workforce.” Fulmer, *supra* note 25, at 824–25. See, e.g., U.S. DEP’T OF LABOR, THE SYSTEM IS BROKEN, *supra* note 79, at 25 (noting in a 1996 report that the “H-1B program was not intended for an employer to establish a business of H-1B aliens to contract out to U.S. employers”).

127. See *infra* note 133.

128. Professor David Weil, also the Administrator of the WHD, first coined the term “fissured work.” David Weil, *Afterword: Learning from A Fissured World—Reflections on International Essays Regarding the Fissured Workplace*, 37 COMP. LAB. L. & POL’Y J. 209, 211 (2015). See U.S. Dep’t of Labor, Wage & Hour Div., Admin.’s Interpretation, No. 2016-1 (Jan. 20, 2016) (noting the “traditional employment relationship” is “less prevalent”).

129. “Fissuring is accomplished through a variety of business structures,” such as subcontracting and temporary agencies. Weil, *supra* note 128, at 211. See, e.g., *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997) (finding Microsoft misclassified employees as independent contractors and contracted with staffing firms to avoid paying benefits to such employees).

130. “[T]hat is, what provides greatest value to their consumers and investors.” Weil, *supra* note 128, at 211.

131. WALT DISNEY WORLD, <https://disneyworld.disney.go.com/destinations/magic-kingdom/>.

132. See Weil, *supra* note 128, at 211.

133. Essentially, fissuring allows clients to “maintain a sufficient degree of control over subordinate organizations such that important . . . standards are achieved, in order to preserve the core ‘brand’,” while at the same time allowing the client to avoid “direct responsibility, and liability, with respect to labor supply.” Timothy J. Bartkiw, 36 COMP. LAB. L. & POL’Y J. 323, 324–25 (2015) (reviewing DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014)).

134. Microsoft, Google, Intel, Amazon, and Apple are not even among the top ten H-1B petitioners. See Martin Kaste, *Who’s Hiring H-1B Visa Workers? It’s Not Who You Might Think*, NPR (Apr. 3, 2013).

135. For example, “Disney directly employs fewer than ten H-1B workers . . . and has not been prominent in visa lobbying.” Preston, *supra* note 3.

136. As WHD has explained, only the “staffing company” that files the LCA is “technically accountable.” U.S. GOV’T ACCOUNTABILITY OFF., REFORMS ARE NEEDED, *supra* note 26, at 52 (explaining the “contractual relationship” between a U.S. client and the outsourcing firm “does not transfer” the firm’s LCA obligations to the client).

137. See, e.g., U.S. DEP’T OF LABOR, THE SYSTEM IS BROKEN, *supra* note 79, at 3, 25 (a 1996 report finding six percent of H-1B workers were contracted out by their LCA employer); Anand Giridharadas, *Outsourcers Corner Market for U.S. Skilled Worker Visas*, N.Y. TIMES (Apr. 12, 2007),

receiving H-1B visas—nearly thirty percent of the annual quota—were all outsourcing firms.<sup>138</sup>

The SCE layoffs exemplify the statutory scheme's shortcomings in the fissured tech workplace. News of the layoffs prompted a group of bipartisan U.S. senators, including Senators Bernie Sanders (I-Vt.) and Jeff Sessions (R-Ala.), to request a DOL investigation into whether U.S. tech workers were being unfairly displaced.<sup>139</sup> DOL initially declined to investigate, citing its limited authority.<sup>140</sup> DOL only looked into the matter after the laid off U.S. employees complained that as a result of SCE's contract with Indian firms Infosys and Tata, they were forced to train their H-1B replacements and ultimately terminated.<sup>141</sup>

The U.S. tech workers alleged two LCA violations. First, they claimed that being forced to train their H-1B replacements amounted them suffering adverse work conditions in violation of the second LCA requirement, which according to the relevant statute specifies that a petitioner “will provide working conditions for [the H-1B nonimmigrant] that will not adversely affect the working conditions of *workers similarly employed*.”<sup>142</sup> Second, the U.S. workers also suggested that the firms had committed indirect displacement in violation of the non-displacement provisions.<sup>143</sup>

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<http://www.nytimes.com/2007/04/12/business/worldbusiness/12iht-visa.4.5257621.html> (reporting Infosys increased its total number of H-1B employees from 231 in 1998 to 6800 in 2007).

138. See, e.g., Ron Hira, *Top 10 H-1B Employers Are All IT Offshore Outsourcing Firms, Costing U.S. Workers Tens of Thousands of Jobs*, ECON. POL'Y INST.: BLOG (Aug. 22, 2016), <https://perma.cc/259M-FESB> (five firms were based in India; four in the United States; and one in Ireland); Julia Preston, *Large Companies Game H-1B Visa Program, Costing the U.S. Jobs*, N.Y. TIMES (Nov. 10, 2015), <https://www.nytimes.com/2015/11/11/us/large-companies-game-h-1b-visa-program-leaving-smaller-ones-in-the-cold.html>.

139. See Letter from Sen. Jeff Sessions et al., to Thomas E. Perez et al., Sec'y of Labor (Apr. 9, 2015), <https://perma.cc/XBX2-54X6>; see also Laura D. Francis, *Senators Seek Probe into Companies Using H-1B Visas to Replace U.S. Workers*, Daily Lab. Rep. (BNA) No. 69, at A-6 (Apr. 10, 2015).

140. See Letter from M. Patricia Smith, Solicitor of Labor, U.S. Dep't of Labor, to Richard J. Durbin, U.S. Senate (Apr. 21, 2015), <https://perma.cc/NF5R-HTQ2> (explaining DOL had not received “a complaint from an aggrieved party or a credible source”).

141. Patrick Thibodeau, *Labor Department Says It Can't Investigate So Cal Edison's H-1B Use*, COMPUTERWORLD (Apr. 24, 2015), <https://perma.cc/K298-4G77> [hereinafter Thibodeau, *Labor Department Says It Can't Investigate*]; Patrick Thibodeau, *Labor Dept. Plans H-1B Probe—One That Could Have an Impact*, COMPUTERWORLD (Jun. 12, 2015), <https://perma.cc/RTH9-M2Q5> [hereinafter Thibodeau, *Labor Dept. Plans H-1B Probe*].

142. 8 U.S.C. § 1182(n)(1)(A)(ii) (2012) (emphasis added); 20 C.F.R. § 655.732(a) (2016) (defining “working conditions [to] include matters such as hours, shifts, vacation periods, and benefits such as seniority-based preferences for training programs and work schedules”). Ontiveros, *supra* note 25, at 29.

143. See Thibodeau, *Labor Department Says It Can't Investigate*, *supra* note 141.

The former SCE workers sought a broad interpretation of the second LCA requirement and hoped for a precedential finding that an outsourcing firm that displaced a client's U.S. workers violated this provision.<sup>144</sup> DOL only responded to the second allegation, however, focusing on whether the outsourcing firms were H-1B dependent.<sup>145</sup> DOL explained that only the petitioning H-1B dependent employers (outsourcing firms),<sup>146</sup> not the client (SCE), were bound by the non-displacement requirements.<sup>147</sup> DOL concluded that even though Infosys and Tata were H-1B dependent, they had filed the LCAs for exempt H-1B workers and thus, the non-displacement provisions did not apply.<sup>148</sup> This formulaic approach conveniently avoided the issue of whether the second LCA requirement—which prohibits adverse working conditions and for which there is no exemption—only protects the petitioner's U.S. employees or whether it also applies to the client's.<sup>149</sup>

### 3. *Why Outsourcing Firms and their U.S. Clients Do Not Satisfy the Employer-Employee Relationship Requirement*

DOL likely avoided discussing the scope of the second LCA requirement because such an analysis would implicate a serious flaw in the outsourcing model—the requirement that visa petitioners maintain a valid employer-employee relationship with the H-1B nonimmigrant.<sup>150</sup> Prior to 2010, there was little “guidance clearly defining what constitutes a valid employer-

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144. See Ontiveros, *supra* note 25, at 29.

145. *Id.*

146. See 20 C.F.R. § 655.715 (2016) (explaining the party “that files a petition . . . is deemed to be the employer” of the H-1B worker).

147. Letter from M. Patricia Smith, Solicitor of Labor, U.S. Dep't of Labor, to Richard J. Durbin, U.S. Senate (Apr. 21, 2015), <https://perma.cc/89GB-URRL>.

148. *Id.*

149. Compare 8 U.S.C. § 1182(n) (referring to “workers similarly employed”), and LCA, *supra* note 72, with 20 C.F.R. § 655.732(a) (2016) (requiring the petitioning employer to provide the same “working conditions to its H-1B . . . employees . . . as it affords to its U.S. worker employees who are similarly employed, and without adverse effect upon the working conditions of such U.S. worker employees.”) (emphasis added). One commentator correctly observed that DOL “took a narrow, textualist approach to the statutory requirements” that focused on whether Infosys was an H-1B dependent employer “instead of whether the requirement to not have a ‘negative effect on the work conditions of existing employees’ included displacing American workers through outsourcing.”). See Ontiveros, *supra* note 25, at 30.

150. An H-1B nonimmigrant is defined as an alien “who is coming temporarily to the United States to perform services . . . in a specialty occupation . . . and with respect to whom the Secretary of Labor determines . . . that the intending employer has filed” an LCA. 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2012) (emphasis added). The C.F.R. provides that a “United States employer” shall file the petition. See 8 C.F.R. § 214.2(h)(2)(i)(A) (2016). This term is defined in part as an entity that “has an employer-employee relationship” with the nonimmigrant. See 20 C.F.R. § 214.2(h)(4)(ii) (2016).

employee relationship” for purposes of the H-1B program.<sup>151</sup> USCIS Associate Director Donald Neufeld clarified matters in a 2010 memorandum (“Neufeld Memo”), which took aim at outsourcing arrangements.<sup>152</sup>

The Neufeld Memo explained that USCIS agents would apply the traditional common law test in determining whether a petitioner and H-1B nonimmigrant maintained a valid employer-employee relationship, focusing on whether the petitioner has the right to control, as opposed to actual control, over the manner and means of the nonimmigrant’s work.<sup>153</sup> Several factors guide this determination, with no single factor being dispositive.<sup>154</sup>

Importantly, the Neufeld Memo provided an example of an invalid arrangement, in which a petitioning IT outsourcing firm “has contracts with numerous outside companies . . . to fulfill specific staffing needs.”<sup>155</sup> In the scenario, these positions are not detailed in the contract and the petitioner’s H-1B worker has been assigned to maintain the client’s payroll. The H-1B worker reports to one of the client’s managers and the client determined all of the work assignments. “The petitioner does not control how the [H-1B worker] will complete daily tasks, and no proprietary information of the petitioner is used by the [H-1B] to complete any work assignments.”<sup>156</sup> The Neufeld Memo reasoned there was a lack of a valid employer-employee relationship in such a situation because the IT firm neither had the “right to control” nor “actual control” over the nonimmigrant’s work.<sup>157</sup>

In the wake of the Neufeld Memo, outsourcing firms haven’t taken “great pains” to ensure their own supervisors oversee H-1B workers at client

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151. USCIS Memorandum, Donald Neufeld, Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements 2 (Jan. 8, 2010) [hereinafter, Neufeld Memo].

152. Immigration attorneys and IT staffing firms unsuccessfully challenged the Neufeld Memo, arguing it violated the Administrative Procedure Act’s notice and comment procedures for agency rulemaking. *See Broadgate Inc. v. U.S. Citizenship & Immigration Servs.*, 730 F. Supp. 2d 240, 247 (D.D.C. 2010) (holding that the Neufeld Memo did not constitute “final agency action” and thus, was not subject to judicial review and the notice and comment requirements under the APA because the Neufeld Memo only provided guidance).

153. *See Neufeld Memo, supra* note 151, at 3.

154. *See Neufeld Memo, supra* note 151, at 2 (citing *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992) and *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003)).

155. *See Neufeld Memo, supra* note 151, at 6.

156. *See Neufeld Memo, supra* note 151, at 7.

157. *See Neufeld Memo, supra* note 151, at 7.

sites.<sup>158</sup> In addition, attorneys advise that “contracts should demonstrate that contractual performance requires the use of the petitioner’s proprietary product and/or knowledge.”<sup>159</sup> Many of the top outsourcing firms derive the bulk of their revenue from servicing software owned by the client or a third-party,<sup>160</sup> and thus, may struggle to satisfy the property product requirement.<sup>161</sup> Nevertheless, the knowledge factor is clearly lacking in layoffs such as those at Disney and SCE, where the U.S. workers had to train the firm’s H-1B workers.<sup>162</sup>

## II. SEARCHING FOR A REMEDY OUTSIDE THE H-1B STATUTORY SCHEME: CIVIL RICO, IRCA’S ANTI-DISCRIMINATION PROVISION, TITLE VII, AND § 1981

The lack of a sufficient remedy under the H-1B statutory scheme necessitates an exploration of alternative solutions. Up until recently, the majority of “enforcement actions against employers [for immigration-related offenses] rested squarely with the government.”<sup>163</sup> However, recent private litigation suggests that tech workers should consider seeking relief outside the H-1B visa’s administrative process.

### A. *Civil RICO: A Powerful Theory of Liability, Except in the Fissured Workplace*

Unlike SCE, the Department of Labor did not rescue Disney from its public relations nightmare. So, when two former Disney tech workers filed civil RICO claims<sup>164</sup> against Disney and the two outsourcing firms HCL and

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158. Laura D. Francis, *Disney Workers Replaced by Foreign Workers Lose Claims*, Daily Lab. Rep. (BNA), DLR No. 199, at A-4.

159. Larry L. Drumm et al., *H-1Bs and Third-Party Worksites: I’ve a Feeling We’re Not in Kansas Anymore*, AILA IMMIGRATION PRACTICE POINTERS 154, 163 (2010–11), <https://perma.cc/RG9D-XYH4>.

160. See Infosys Ltd., Annual Report (Form 20-F) (May 18, 2016) (“Our revenues are generated principally from services . . .”).

161. See MICHAEL A. HITT ET. AL., STRATEGIC MANAGEMENT: CONCEPTS AND CASES: COMPETITIVENESS AND GLOBALIZATION 97 (2016) (noting “firms such as Wipro and Infosys are challenged to develop competencies in terms of their own software niches and to learn how to competitively price their new products . . .”). Even if an outsourcing firm uses its own expertise to develop software for a client, the firm will usually lack ownership rights in the product. See Infosys Ltd., Annual Report (Form 20-F) (May 18, 2016) (“[O]ur clients usually own the intellectual property in the software we develop for them.”).

162. Preston, *supra* note 3 (“Former employees said many immigrants who arrived were younger technicians with limited data skills who did not speak English fluently and had to be instructed in the basics of the work.”).

163. Green et al., *supra* note 100, at 206.

164. See 18 U.S.C. § 1962(c) (2012).

Cognizant,<sup>165</sup> it marked the first time that American workers sued both their U.S. employer and the outsourcing firm.<sup>166</sup>

The RICO Act imposes criminal and civil liability for “racketeering activity” connected to interstate commerce.<sup>167</sup> Section 1964(c) of the RICO Act provides a private cause of action for “[a]ny person injured in his business or property by reason of a violation of section 1962.”<sup>168</sup> In order to state a prima facie civil RICO claim, a plaintiff must establish three elements: (1) that the defendant committed “a pattern of racketeering activity” (defined as at least two predicate acts)<sup>169</sup> (2) that actually and proximately caused<sup>170</sup> (3) the plaintiff to suffer an injury to his or her business or property.<sup>171</sup>

There are three important considerations to keep in mind. First, RICO predicate acts include violations of 18 U.S.C. § 1546, which prohibits the “fraud and misuse of visas, permits, and other documents.”<sup>172</sup> Thus, a petitioning employer who knowingly makes false LCA attestations would violate § 1546 and this violation could potentially constitute a RICO predicate act.<sup>173</sup> Second, civil RICO plaintiffs can only recover damages for an injury to their business or property. Therefore, U.S. workers could not recover emotional damages for being forced to train their H-1B replacements.<sup>174</sup> Significantly, civil RICO plaintiffs can recover treble damages and the cost of suit, and thus, civil RICO can provide workers with serious negotiating leverage.<sup>175</sup> Third, a plaintiff can file a civil RICO claim

165. See, e.g., Julia Preston, *Lawsuits Claim Disney Colluded to Replace U.S. Workers with Immigrants*, N.Y. TIMES (Jan. 25, 2016), [https://www.nytimes.com/2016/01/26/us/lawsuit-claims-disney-colluded-to-replace-us-workers-with-immigrants.html?\\_r=0](https://www.nytimes.com/2016/01/26/us/lawsuit-claims-disney-colluded-to-replace-us-workers-with-immigrants.html?_r=0).

166. See *id.*

167. 18 U.S.C. §§ 1961–68,

168. 18 U.S.C. § 1964(c) (2012).

169. A “‘pattern of racketeering activity’ requires at least two acts of racketeering activity” committed within ten years of each other. 18 U.S.C. § 1961(5) (2012). See, e.g., *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2096–97 (2016) (“A predicate offense implicates RICO when it is part of a ‘pattern of racketeering activity’—a series of related predicates that together demonstrate the existence or threat of continued criminal activity.”).

170. See *Beck v. Prupis*, 529 U.S. 494, 508 n.2 (2000).

171. *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 380 (2d Cir. 2001).

172. 18 U.S.C. § 1961 (defining “racketeering activity”).

173. See 18 U.S.C. § 1546 (2012) (“Whoever knowingly makes . . . any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws . . .”).

174. See Carr, *supra* note 22, at 418 (“Because plaintiffs cannot recover for emotional and physical injuries, victims in minimum wage jobs may not obtain substantial damages.”).

175. See 18 U.S.C. § 1964(c) (2012). The threat of treble damages led one federal circuit to describe civil RICO as “an unusually potent weapon—the litigation equivalent of a thermonuclear

even if the government has not prosecuted a criminal RICO case against the defendants.<sup>176</sup>

In *Perrero v. HCL*<sup>177</sup> and *Moore v. Cognizant*,<sup>178</sup> former Disney workers alleged that the outsourcing firms committed a pattern of racketeering activity in violation of 18 U.S.C. § 1546<sup>179</sup> when they “falsely . . . attested that there would be no adverse effect to workers similarly situated” (thus violating the second LCA requirement) and when the firms falsely attested that U.S. workers would not be displaced (thus violating the non-displacement requirements).<sup>180</sup> As a result of these alleged LCA misrepresentations, the plaintiffs were terminated and thus suffered compensable injuries.<sup>181</sup>

In support of the first alleged predicate offense (violation of the second LCA requirement), plaintiffs argued that the firms committed visa fraud because they “knew,” as a result of their contract to provide Disney with hundreds of H-1B workers, Disney “would be adversely affecting the working conditions of similarly situated employees by discharging [its] U.S. workers” and replacing them with the H-1Bs.<sup>182</sup> Defendants countered that the second LCA requirement only applied “to workers employed by the same employer.”<sup>183</sup> The district court agreed, citing 20 C.F.R. § 655.732(a), which narrowly construes the statute’s reference to “workers similarly employed.”<sup>184</sup>

The court then rejected the allegation that the firms committed a second predicate offense by falsely attesting to the non-displacement requirements. The court determined that the non-displacement provisions did not apply because the outsourcing firms had indirectly displaced the plaintiffs with exempt H-1B workers.<sup>185</sup> Accordingly, the court found that the plaintiffs

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device.” *Miranda v. Ponce* Fed. Bank, 948 F.2d 41, 44 (1st Cir. 1991). Thus, “promising cases—those that survive motions to dismiss—tend to settle before courts reach the merits.” Carr, *supra* note 22, at 417.

176. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 493 (1985).

177. *Perrero v. HCL Am., Inc.*, No. 6:16-cv-00112, 2016 WL 5943600 (M.D. Fla. 2016).

178. *Moore v. Cognizant Tech. Sols.*, No. 6:16-cv-00113, 2016 WL 5943593 (M.D. Fla. 2016).

179. “Whoever knowingly makes . . . any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws . . .” 18 U.S.C. § 1546 (2012).

180. Compl. at 14, *Perrero v. HCL Am., Inc.*, 6:16-cv-00112-GAP-TBS (M.D. Fla. Jan. 25, 2016).

181. *Id.* at 19.

182. *Id.* at 16.

183. See *Perrero v. HCL Am., Inc.*, 2016 WL 5943600, at \*3 (M.D. Fla. Oct. 13, 2016).

184. Compare 8 U.S.C. § 1182(n) (2012) (requiring petitioners attest that they would “provide working conditions for the nonimmigrants that would not adversely affect the working conditions of workers similarly employed”), with 20 C.F.R. § 655.732(a) (2016) (employer attests it will afford “working conditions to its H-1B nonimmigrant employees on the same basis . . . as it affords to *its U.S. worker employees* who are similarly employed, and without adverse effect upon the working conditions of such U.S. worker employees.”) (emphasis added).

185. See *Perrero*, 2016 WL 5943600, at \*4.



failed to establish the necessary predicate acts and thus, dismissed their civil RICO claims.<sup>186</sup>

The Disney civil RICO cases and DOL's investigation of SCE both demonstrate that indirectly displaced U.S. workers will face serious hurdles if they are required to prove as part of their prima facie case a violation of the second LCA requirement.<sup>187</sup> In addition to the problems related to fissured work, civil RICO plaintiffs may also face procedural obstacles. For example, one federal court held that the INA preempted an H-1B fashion model's civil RICO claim because she did not fully exhaust her administrative remedies under the H-1B statutory scheme.<sup>188</sup>

### *B. IRCA Anti-Discrimination Provision: An Administrative Remedy for Citizenship Discrimination*

In 1986, concern that undocumented aliens were depriving U.S. workers of employment opportunities led Congress to pass the Immigration Reform and Control Act of 1986 (IRCA).<sup>189</sup> IRCA's purpose of deterring undocumented immigration by prohibiting their employment was to be achieved through new employer sanctions.<sup>190</sup> However, Congress believed

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186. Moore v. Cognizant Tech. Sols., No. 6:16-cv-00113, 2016 WL 5943593, at \*4 (M.D. Fla. 2016). Like DOL's analysis of the SCE layoffs, the district court failed to explain why the statutory terms "similarly situated," for purposes of the second LCA requirement, only applied to the petitioner's U.S. employees, and not also the client's. See *supra* note 149.

187. However, H-1B workers have successfully brought RICO claims against abusive employers. See Tanedo v. Placide, 632 F. App'x 896 (9th Cir. 2015) (affirming a \$4.5 million award to 350 Filipino teachers who claimed H-1B recruiters committed TVPA and RICO violations). But see Panwar v. Access Therapies, Inc., 975 F. Supp. 2d 948, 957 (S.D. Ind. 2013); Palmer v. Trump Model Mgmt., LLC, 175 F. Supp. 3d 103, 109 (S.D.N.Y. 2016).

188. See Palmer, 175 F. Supp. 3d at 109 (holding plaintiff's civil RICO claim was preempted because she did not seek an administrative remedy for allegations that defendants conspired to deprive her and other foreign models of a promised salary of \$75,000 per year) (quoting Biran v. JPMorgan Chase & Co., No. 02 Civ. 5506, 2002 WL 31040345 (S.D.N.Y. 2002)). But see Panwar v. Access Therapies, Inc., 975 F. Supp. 2d 948, 957-58 (S.D. Ind. 2003) (addressing on the merits plaintiff H-1B worker's RICO claims); Access Therapies, Inc. v. Mendoza, 2014 WL 4670888, at \*6 (S.D. Ind. 2014) (rejecting defendants' argument that plaintiff H-1B worker was required "to exhaust remedies under the INA as a condition to bringing" civil RICO claims).

189. Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.). See Natalie Prescott, *Immigration Reform Fuels Employment Discrimination*, 55 DRAKE L. REV. 1, 4 (2006).

190. See, e.g., Andrew Strojny, *Developments Concerning IRCA's Antidiscrimination Provision—What Is It, What Does It Do, and Does It Have Any Applicability To Work-Related Nonimmigrant Visa Programs?*, 10 GEO. IMMIGR. L.J. 371, 371 (1996); Prescott, *supra* note 189, at 4. Prior to IRCA, employers were exempt from liability if they knowingly hired an undocumented worker. Steven M. Kaplan, *The Employer Sanctions Provision of IRCA: Deterrence or Discrimination?*, 6 GEO. IMMIGR. L.J. 545, 546-47 (1992). In response, IRCA made it unlawful "to hire, or to recruit or refer for

the threat of liability would cause employers to discriminate against workers who “looked or sounded foreign.”<sup>191</sup> Congress thus included an anti-discrimination provision, 8 U.S.C. § 1324b, which prohibits employers from discriminating—

against any individual (other than an unauthorized alien, . . . ) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment—

(A) because of such individual’s national origin, or

(B) in the case of a protected individual . . . , because of such individual’s citizenship status.<sup>192</sup>

Confusingly, both the IRCA anti-discrimination provision and Title VII ban national origin discrimination. But the IRCA is not applicable for most U.S. tech workers who are displaced by large outsourcing firms because IRCA national origin claims are limited to employers with four to fourteen employees.<sup>193</sup> As discussed below, U.S. workers should file national origin claims under Title VII, which covers employers with fifteen or more employees.<sup>194</sup> IRCA is unique because it bans citizenship discrimination.

### 1. *Citizenship Discrimination*

“Citizenship or immigration status discrimination occurs when an employer treats individuals differently based on their real or perceived citizenship or immigration status with respect to hiring, firing, recruitment, or referral for a fee.”<sup>195</sup> A *prima facie* IRCA citizenship discrimination claim requires a showing that the plaintiff is (1) a protected individual; (2) who suffered an adverse employment action; (3) was qualified for a position; and (4) a similarly qualified applicant who was outside the protected class filled that position.<sup>196</sup>

IRCA’s anti-discrimination provision has several advantages over other potential remedies. First, it explicitly bans citizenship discrimination

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a fee, for employment in the United States an alien knowing the alien is an unauthorized alien.” 8 U.S.C. § 1324a(a)(1) (2012). IRCA also imposed liability on employers for continuing “to employ [an] alien . . . knowing the alien is (or has become)” unauthorized. 8 U.S.C. § 1324a(a)(2).

191. See, e.g., *In Re Martinez*, 1 OCAHO 143 (Mar. 22, 1990); Prescott, *supra* note 189, at 5.

192. 8 U.S.C. § 1324b(a)(1) (2012); see *Martinez*, 1 OCAHO 143 (Mar. 22, 1990).

193. 8 U.S.C. § 1324b(a)(2).

194. See *infra* Section II.C.1.

195. USCIS, HANDBOOK FOR EMPLOYERS GUIDANCE FOR COMPLETING FORM I-9 35 (2017), <https://www.uscis.gov/sites/default/files/files/form/m-274.pdf>.

196. See Letter from Seema Nanda to Liane Hicks Cooney, *supra* note 189.

against U.S. citizens, unlike Title VII and § 1981.<sup>197</sup> Although the anti-discrimination provision was intended to protect “non-citizens, ethnic minorities, or anyone perceived by an employer as looking or sounding ‘foreign,’”<sup>198</sup> U.S. citizens are nevertheless eligible for protection because they explicitly qualify as a “protected individual.”<sup>199</sup>

Second, unlike the H-1B program’s administrative remedies and civil RICO, it is unlikely that U.S. employers can avoid liability under § 1324b by relying on outsourcing arrangements.<sup>200</sup> In 2015, Bruce Morrison, one of the 1990 Act drafters and now a lawyer for The Institute of Electrical and Electronics Engineers (IEEE), requested guidance from the DOJ on “whether a violation of the anti-discrimination provision . . . can be established where an employer replaces a protected employee with a non-protected contract employee provided by a third party company, rather than directly hiring a replacement worker from outside of the protected class.”<sup>201</sup> In response, DOJ explained that, barring rare situations, “an employer violates the anti-discrimination provision if it terminates workers or hires their replacements because of citizenship or immigration status.”<sup>202</sup>

However, DOJ went on to explain that “[w]hether an employer has, in fact, violated the anti-discrimination provision through its use of contract workers will depend upon the facts of each case, including . . . the extent to which the original employer could be considered a joint employer of the

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197. Bloomekatz, *supra* note 22, at 1993.

198. See Bloomekatz, *supra* note 22, at 1987 (quoting Lucas Guttentag, *Immigration-Related Employment Discrimination: IRCA’s Prohibitions, Procedures, and Remedies*, 37 FED. B. NEWS & J. 29, 29 (1990)); see also Shawn Zeller, *Technology Workers Target Abuse of H-1B Visas*, CQ ROLL CALL, 2015 WL 7730439 (reporting that the Institute of Electrical and Electronics Engineers suspect DOJ has not enforced § 1324b for the benefit of U.S. tech workers because the provision was intended to protect “legal Hispanic workers”).

199. 8 U.S.C. § 1324b(a)(3) (2012) (defining “protected individual” as a U.S. citizen, U.S. national, refugee, asylee, or lawful permanent resident). See *McDonnell Douglas Corp.*, 2 OCAHO 351, at 370 (1991) (“Although I agree that native born American citizens were not the primary target of protection in the enactment of IRCA, I disagree with the implication that they are not protected.”). In addition, the IRCA anti-discrimination provision provides, perhaps counterintuitively, that “it is not an unfair immigration-related employment practice to prefer to hire, recruit, or refer an individual who is a citizen or national of the United States over . . . an alien if the two individuals are equally qualified.” 8 U.S.C. § 1324b(a)(4).

200. See discussion *supra* Sections I.C.2–3, II.A.

201. Letter from Alberto Ruisanchez, Deputy Special Counsel, Office of Special Counsel for Immigration-Related Unfair Emp’t Practices, to Bruce A. Morrison, Chairman, Morrison Public Affairs Group (Dec. 22, 2015).

202. *Id.* Thus, IRCA applies “regardless of whether the employer takes the discriminatory employment actions itself through direct hiring, or contracts, as a joint employer, with an outside agency to implement its discriminatory staffing plan.” *Id.*

contract workers.”<sup>203</sup> But DOJ explained that the existence of a joint employer relationship is only one relevant factor.<sup>204</sup>

On the flip side, there are limitations to the IRCA’s anti-discrimination provision. First, it does not offer a private cause of action.<sup>205</sup> Similar to filing complaints alleging LCA violations, workers who file IRCA citizenship discrimination claims must navigate an administrative maze.<sup>206</sup> But workers have even less time to file an IRCA claim than they do for filing complaints alleging LCA violations.<sup>207</sup> Workers must also be careful to file their citizenship discrimination claims with DOJ’s Immigrant and Employee Rights Section (IER), which has administrative jurisdiction over citizenship discrimination claims against employers with four or more employees.<sup>208</sup> However, unlike the Department of Labor’s enforcement authority under the H-1B statutory scheme, DOJ has the ability to subpoena employers and as a result, employers are more likely to cooperate.<sup>209</sup>

Second, workers may be disinclined to navigate the administrative process because IRCA’s civil monetary penalties are relatively small: for first time violations, an employer will be subject to a penalty between \$445 and \$3563 for each individual discriminated against; for the second violation, \$3563 to \$8908; and for the third, \$5345 to \$17,816.<sup>210</sup> Thus, attorneys will likely only consider cases involving numerous claimants.

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203. *Id.*

204. DOJ explained that in addition, it will consider “whether there is evidence of intentional discrimination in the selection of employees for discharge or rehire,” and “the circumstances surrounding the selection of the third party staffing contractor.” *Id.* Whether a U.S. client company is a joint employer under IRCA is determined according to the traditional common law test. This analysis also applies to Title VII defendants. *See Faush v. Tuesday Morning, Inc.*, 808 F.3d 208, 213 (3d Cir. 2015).

205. *See, e.g., Biran v. JP Morgan Chase & Co.*, No. 02 CIV. 5506 (SHS), 2002 WL 31040345, at \*3 (S.D.N.Y. Sept. 12, 2002) (dismissing U.S. tech worker’s § 1182 and § 1324b complaints and reasoning that Congress did not intend “to create a private right of action in” either statute); *Shah v. Wilco Sys., Inc.*, 126 F. Supp. 2d 641, 648 (S.D.N.Y. 2000).

206. Workers claiming a § 1324b violation must file a charge with DOJ. After an initial investigation, DOJ or the worker may file a complaint with an ALJ. 8 U.S.C. §§ 1324b(b)–(d) (2012). The ALJ will conduct a hearing and either dismiss the complaint or order remedies. 8 U.S.C. §§ 1324b(e)–(h). The ALJ’s order is appealable to the applicable U.S. Court of Appeals. *See generally Shah*, 126 F. Supp. at 648.

207. IRCA discrimination claims must be filed with DOJ within 180 days of the alleged discriminatory conduct. 28 C.F.R. § 44.300(b) (2017). In comparison, a complaint alleging a LCA violation “must be filed not later than 12 months after the latest date on which the alleged violation(s) were committed.” 20 C.F.R. § 655.806 (2017).

208. *See Malos, Updated, supra* note 25, at 296.

209. U.S. GOV’T ACCOUNTABILITY OFF., REFORMS ARE NEEDED, *supra* note 26, at 49.

210. U.S. CITIZENSHIP & IMMIGR. SERVS., CIVIL FINES AND CRIMINAL PENALTIES FOR FORM I-9 AND IMMIGRATION-RELATED EMPLOYMENT DISCRIMINATION VIOLATIONS, <https://perma.cc/P25N-4RGQ>.

Lastly, unlike Title VII, which allows for disparate impact claims,<sup>211</sup> IRCA's anti-discrimination provision only applies to disparate treatment claims (that is, intentional discrimination).<sup>212</sup> "This means that to engage in unlawful citizenship status discrimination, an employer must have acted 'because of' citizenship or immigration status."<sup>213</sup> However, this does not require the plaintiff prove that the employer acted out of hostility or animus.<sup>214</sup> As a result, U.S. workers have had mixed results in bringing IRCA claims.<sup>215</sup> The IRCA anti-discrimination provision seems ideal in limited situations, such as where employers post job announcements that express a clear preference for H-1B workers over U.S. workers<sup>216</sup> In addition, the IRCA would be ideal in cases such as *Shah v. Wilco Systems, Inc.*<sup>217</sup> In *Shah*, the plaintiffs, an H-1B worker from Britain and a naturalized U.S. citizen who was born in India, claimed their former employer stated that "Indian workers were needed because 'Americans don't make quality workers—they're stupid, they're too expensive and difficult to control.'"<sup>218</sup> But most cases will lack such clear evidence of intentional discrimination and employers may be able to avoid liability by showing that "the outsourcing was motivated by legitimate business considerations, such as cost cutting, and was not motivated by the citizenship of the displaced workers."<sup>219</sup>

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211. Unlike disparate treatment practices, disparate impact "practices . . . are not intended to discriminate but in fact have a disproportionately adverse effect" on protected individuals. See *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009); see also *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

212. *Bloomekatz*, *supra* note 22, at 1991.

213. Letter from Alberto Ruisanchez to Bruce A. Morrison, *supra* note 201 (quoting 8 U.S.C. § 1324b(a)(1)(B)).

214. Letter from Alberto Ruisanchez to Bruce A. Morrison, *supra* note 201.

215. See *McDonnell Douglas*, 2 OCAHO 351, at 361 (1991) (finding employer unlawfully rejected qualified U.S. applicants, instead hiring H-2B workers). But see *General Dynamics*, 3 OCAHO 517, at 1170 (1993) (ruling in the employer's favor, but noting that temporary workers were "basically indentured to the company").

216. See, e.g., U.S. DEP'T OF JUSTICE, *Justice Department Settles Citizenship Status Discrimination Claim Against IBM* (Sept. 27, 2013), <https://perma.cc/F73J-ACYE>.

(announcing a settlement with IBM over allegations that IBM "placed online job postings for application and software developers that contained citizenship status preferences for . . . H-1B" workers); U.S. DEP'T OF JUSTICE, *Justice Department Reaches Settlement with Avant Healthcare Professionals LLC to Resolve Immigration-Related Unfair Employment Practices*, (Feb. 8, 2013), <https://perma.cc/TGY4-3MWH> (announcing a settlement involving hundreds of internet-based job postings).

217. 126 F. Supp. 2d 641 (S.D.N.Y. 2000).

218. *Id.* at 644.

219. Tejas Shah & Michael A. Warner, Jr., *How Outsourced Workers Could Increase Discrimination Risks*, LAW360 (Jan. 20, 2016), <https://perma.cc/B7L2-RN9D>. But see Esther Lander & Andrew Turnbull, *Defending and Avoiding Citizenship Discrimination Claims When Using Staffing Firms with H-1B Visa Holders*, DAILY LAB. REP. (BNA), at 3 (Mar. 1, 2016) ("Although it may be

In short, workers who decide to file IRCA claims without the aid of legal representation must be aware of the risks of filing with the wrong agency (e.g., EEOC), claiming the wrong protected class (e.g., national origin claims against large employers), or basing their discrimination claim on the wrong legal theory (e.g., disparate impact). Indeed, employers have generally been successful in “defending discrimination and related claims involving H-1B visas” for these very reasons.<sup>220</sup>

*C. Title VII: A Private Cause of Action for Racial and National Origin Discrimination*

As discussed above, displaced tech workers will face various difficulties if they seek relief under the H-1B statutory regime,<sup>221</sup> civil RICO,<sup>222</sup> or the IRCA’s anti-discrimination provision.<sup>223</sup> Among the remaining remedies, workers should especially consider Title VII, which forbids an employer with fifteen or more employees from failing or refusing “to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”<sup>224</sup>

Title VII provides distinct advantages over the aforementioned administrative claims and private causes of action. First, Title VII litigants can recover more extensive damages compared to the administrative remedies for LCA violations and IRCA’s anti-discrimination provision.<sup>225</sup> Second, Title VII arguably “provides more comprehensive protection from employment discrimination than [IRCA]” and § 1981, because Title VII recognizes disparate impact claims.<sup>226</sup> On the other hand, plaintiffs who proceed under a disparate impact theory, as opposed to disparate treatment, can only seek equitable relief.<sup>227</sup> More fundamentally, there is no consensus

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politically unpopular, there is nothing illegal about companies wishing to outsource jobs to a staffing firm to lower overhead costs, as long as they do not purposefully seek to use firms that are staffed with H-1B visa holders.”)

220. Malos, *Updated*, *supra* note 16, at 300.

221. *See* discussion in Section I.C.

222. *See* discussion in Section II.A.

223. *See* discussion in Section II.B.

224. 42 U.S.C. § 2000e-2(a)(1) (2012).

225. Before commencing a private civil action, workers must file a charge with the EEOC and receive a right to sue letter. *See* 42 U.S.C. § 2000e-5(e)(1).

226. Bloomekatz, *supra* note 22, at 1994.

227. Unlike disparate treatment claims, compensatory and punitive damages are not available under the disparate impact theory, only equitable relief may be granted. 42 U.S.C. § 1981a(a)(1); *In re Employment Discrimination Litig.*, 198 F.3d 1305, 1315 (11th Cir. 1999).

on the effectiveness of the disparate impact theory in combatting discrimination.<sup>228</sup>

### 1. Title VII National Origin Discrimination

Title VII explicitly prohibits employment discrimination on the basis of national origin and race—but not citizenship.<sup>229</sup> The Supreme Court emphasized this distinction in *Espinoza v. Farah Manufacturing Co.*, where a legal permanent resident from Mexico claimed a company’s policy of not hiring aliens violated Title VII.<sup>230</sup> The Supreme Court in *Espinoza* explained that national origin specifically “refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came.”<sup>231</sup> The *Espinoza* court looked to the plain language of the statute and held that Title VII does not apply to citizenship discrimination.<sup>232</sup>

Nevertheless, *Espinoza* may not be a total bar for U.S. workers seeking relief under Title VII. The majority in *Espinoza* acknowledged that “there may be many situations where discrimination on the basis of citizenship would have the effect of discriminating on the basis of national origin. . . . Certainly Tit[le] VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin.”<sup>233</sup> Thus, the disparate impact theory may help U.S. tech workers in cases.

Furthermore, the Court in *Espinoza* “primarily contemplated an immigrant seeking protection based on alien status . . . .”<sup>234</sup> Thus, some have argued that for “native-born U.S. citizens, citizenship status is inseparable from national origin.”<sup>235</sup> Justice Douglas reasoned as much in his dissent in *Espinoza*: “Alienage results from one condition only: being born outside the

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228. Compare Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701 (2006), with Charles Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911 (2005).

229. See 42 U.S.C. § 2000e-2(a)(1).

230. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973).

231. *Id.* at 88.

232. *Id.* at 95 (“[N]othing in [Title VII] makes it illegal to discriminate on the basis of citizenship or alienage.”). The federal circuits continue to rely on *Espinoza*. See *Cortezano v. Salin Bank & Trust Co.*, 680 F.3d 936, 940 (7th Cir. 2012) (Title VII does not apply to “[d]iscrimination based on one’s status as an immigrant”). In *Cortezano*, the Seventh Circuit acknowledged “that Congress took steps to limit *Espinoza*’s holding when it enacted” IRCA’s antidiscrimination provision. *Id.*

233. *Espinoza*, 414 U.S. at 92 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

234. Bloomekatz, *supra* note 22, at 1995.

235. Bloomekatz, *supra* note 22, at 1995.

United States. Those born within the country are citizens from birth.”<sup>236</sup> Justice Douglas concluded that discrimination against U.S. citizens necessarily involves discrimination against all persons born in the United States.<sup>237</sup> However, this proposition only holds true for citizens at birth, not naturalized citizens. Thus, in situations where the employer also employs and retains “naturalized citizens, then discrimination against citizenship would not overlap with national origin.”<sup>238</sup>

This distinction was explored in *Shah v. Wilco Systems Inc.*, in which the putative class plaintiffs—a naturalized American citizen (originally born in India) and an H-1B coworker who held British citizenship—alleged their former employer violated Title VII’s prohibition on national origin discrimination.<sup>239</sup> Specifically, the plaintiffs alleged their former employer engaged in a scheme of importing “foreign workers in order to displace American workers, trained foreign workers and paid them a salary that was ‘far below the prevailing wages for their skills in the local United States market’ based on their nationality and/or citizenship, and failed to adequately train American workers or provide them with needed work experience to enhance their skills.”<sup>240</sup> In addition, the American plaintiff claimed she suffered retaliation for informing H-1B workers of their legal protections.<sup>241</sup> But because the American plaintiff was of Indian origin, the Second Circuit affirmed the lower court’s holding that she could only base her Title VII “national origin discrimination [claim] as an Indian, rather than as an American.”<sup>242</sup>

It follows from *Espinoza* and *Shah*, that native-born U.S. tech workers will only be able to state a Title VII national origin discrimination claim in limited situations: that is, where the client “company has not hired any naturalized citizens, or does not treat those naturalized citizens the same as native-born citizens.”<sup>243</sup>

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236. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 96 (1973) (Douglas, J., dissenting).

237. *Id.*

238. Bloomekatz, *supra* note 22, at 1995.

239. *Shah v. Wilco Sys., Inc.*, 2001 WL 1006722, at \*2 (S.D.N.Y. Aug. 31, 2001), *aff’d*, 76 F. App’x 383 (2d Cir. 2003).

240. *Shah v. Wilco Sys., Inc.*, 126 F. Supp. 2d 641, 645 (S.D.N.Y. 2000).

241. *Shah*, a naturalized U.S. tech worker, claimed her employer terminated her “because she was an American worker, as an example to the Indian workers . . . and in retaliation for her discussions and statements [to the other workers] regarding Wilco’s employment practices.” *Id.* *Shah* also alleged she was terminated “in reprisal for her efforts to secure her legal rights and as an attempt to intimidate and prevent foreign workers from looking into theirs . . .” *Id.*

242. *Shah v. Wilco Sys., Inc.*, 76 F. App’x 383, 385 (2d Cir. 2003).

243. Bloomekatz, *supra* note 22, at 1995.



## 2. Title VII Racial Discrimination

However, *Espinoza* would not pose a hurdle to U.S. workers filing Title VII racial discrimination claims. Both Title VII and § 1981 encompass discrimination against Caucasian employees (sometimes referred to as “reverse discrimination”).<sup>244</sup> Following dismissal of their civil RICO suit, the Disney workers filed a racial discrimination claim under Title VII and § 1981.<sup>245</sup>

In addition, in two other federal cases, U.S. tech workers are litigating Title VII national origin and racial discrimination claims, as well as § 1981 claims, against two major outsourcing firms (Infosys and Tata).<sup>246</sup> In *Koehler v. Infosys*, four Caucasian employees of American national origin filed a class action suit against Infosys alleging it made adverse employment decisions on the bases of race and national origin.<sup>247</sup> The federal district court in *Koehler* allowed the plaintiffs to go forward in their claims, which relied on the disparate treatment<sup>248</sup> and disparate impact theories.<sup>249</sup>

### D. 42 U.S.C. § 1981: A Potentially Effective, yet Untested, Remedy

Title VII plaintiffs may also pursue relief under section 1981 of the Civil Rights Act of 1866 (42 U.S.C. § 1981),<sup>250</sup> which provides that “[a]ll persons

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244. *Koehler v. Infosys Techs. Ltd. Inc.*, 107 F. Supp. 3d 940, 945 (E.D. Wis. 2015) (citing *Everett v. Cook County*, 655 F.3d 723, 729 (7th Cir.2011) (Title VII) and *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 287 (1976) (§ 1981)).

245. Amended Complaint at 10, *Perrero et al. v. Walt Disney Parks and Resorts U.S., Inc.*, No. 6:16-cv-02144-CEM-TBS (M.D. Fla. Jan. 25, 2017). Plaintiffs also sought relief under the Older Worker Benefit Protection Act (OWBPA) and alleged a hostile work environment based on Disney forcing the U.S. workers to train their replacements. *Id.* at 7, 10.

246. *Koehler v. Infosys Techs. Ltd. Inc.*, 107 F. Supp. 3d 940 (E.D. Wis. 2015); *Heldt v. Tata Consultancy Servs., Ltd.*, 132 F. Supp. 3d 1185 (N.D. Cal. 2015).

247. *Koehler v. Infosys*, 107 F. Supp. 3d at 942.

248. Plaintiffs alleged Infosys intended to purge Caucasian “employees in favor of South Asian employees”—who made up ninety-six percent of Infosys’s workforce. *Id.* at 943. Plaintiffs also alleged that a hiring manager stated: “There does exist an element of discrimination. We are advised to hire Indians because they will work off the clock without murmur and they can always be transferred . . . .” *Id.* at 944.

249. In support of their disparate impact claims, plaintiffs alleged that Infosys’s hiring of H-1B workers “resulted in a significant disparity in the ratio of South Asian employees to Caucasian employees . . . .” *Id.* at 947. Plaintiffs argued that for fifty-three of the fifty-nine U.S. offices, “at least 94.5% of the employees are ‘Asian.’” *Id.* at 948. *See also* *Heldt v. Tata Consultancy Servs., Ltd.*, 132 F. Supp. 3d 1185, 1187–88 (N.D. Cal. 2015) (arguing Tata’s discriminatory hiring resulted in a workforce “of approximately 95% persons of South Asian descent, race, and/or national origin,” while only individuals of South Asian descent only represent “1–2% of the United States population.”).

250. *See* *Lee, supra* note 22, at 63.

within the jurisdiction of the United States . . . have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens.”<sup>251</sup> Section 1981 offers several key advantages over all the options thus discussed. First, § 1981 lacks any administrative barriers, unlike IRCA and Title VII.<sup>252</sup> Second, § 1981 “protects against discrimination broadly in the right to ‘make and enforce contracts,’” unlike IRCA’s anti-discrimination provision, which only applies to hiring, discharge, recruitment, and referral for a fee.<sup>253</sup> Third, there are no statutory caps on the amount of compensatory and punitive damages that may be recovered under § 1981, unlike Title VII.<sup>254</sup>

The biggest drawback to seeking relief under § 1981 is that the case law is mixed on whether § 1981 is limited to racial discrimination or whether it also covers citizenship discrimination.<sup>255</sup> Even if § 1981 applies to citizenship discrimination, it is not entirely clear whether § 1981 only prohibits state-sponsored citizenship discrimination or whether it also applied to private employers.<sup>256</sup> If plaintiffs are successful in convincing a court that § 1981 applies to private employers that engage in reverse citizenship discrimination, then § 1981 would be the best option among all the remedies discussed thus far.<sup>257</sup>

### III. UNIONIZATION, EDUCATION, AND COOPERATION: SEEKING A SOLUTION IN THE COURT OF PUBLIC OPINION

While IRCA, Title VII, and § 1981 offer potential avenues of relief for indirectly displaced U.S. tech workers, there is little precedent to guide their efforts. Furthermore, litigation is not a long-term solution to the problem of H-1B visa discrimination. Part III therefore concludes that U.S. tech workers should ultimately aim for legislative reform. Workers should seek to achieve this goal via three strategies: unionization, education, and cooperation with H-1B workers. By relying on these strategies, in

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251. 42 U.S.C. § 1981(a) (2012); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 286-87 (1976) (“[O]ur examination of the language and history of § 1981 convinces us that § 1981 is applicable to racial discrimination in private employment against white persons.”).

252. Bloomekatz, *supra* note 22, at 2001.

253. Bloomekatz, *supra* note 22, at 2002.

254. *Compare* 42 U.S.C. § 1981a(b)(4), *with* 42 U.S.C. § 1981a(b)(3) (Title VII statutory caps).

255. *See, e.g., Anderson v. Conboy*, 156 F.3d 167 (2d Cir. 1998) (holding that § 1981 prohibits discrimination against aliens); *Chacko v. Texas A & M Univ.*, 960 F. Supp. 1180 (S.D. Tex. 1997), *aff’d*, 149 F.3d 1175 (5th Cir. 1998). *But see Camara v. Schwan’s Food Mfg., Inc.*, No. CIV.A. 04-121-JGW, 2005 WL 1950142, at \*6 (E.D. Ky. Aug. 15, 2005) (holding that § 1981 does not prohibit discrimination on the basis of plaintiff’s asylee status and noting the Sixth Circuit has not yet addressed the issue).

256. *See, e.g., Duane v. GEICO*, 37 F.3d 1036 (4th Cir. 1994) (holding that § 1981 prohibits private discrimination against aliens). *But see Bhandari v. First Nat. Bank of Commerce*, 829 F.2d 1343 (5th Cir. 1987) (holding that § 1981 does not reach private discrimination based on alienage).

257. *See* Bloomekatz, *supra* note 22, at 2001.

conjunction with litigation, U.S. workers can shape public opinion and in turn, pressure Congress into reforming the H-1B program.

*A. Unionization: The Role of Virtual Unions in Advocating for Reform*

The LCA's third attestation contemplates a role for unions. Under 8 U.S.C. § 1182(n)(1)(B), a petitioning employer must attest that "there is not a strike or lockout in the course of a labor dispute in the occupational classification *at the place of employment*."<sup>258</sup> Again, DOL regulations interpret the state narrowly, failing to address the realities of the fissured tech workplace. The regulations clearly state that "labor disputes for the purpose of this section relate only to those *disputes involving employees of the employer* working at the place of employment in the occupational classification named in the labor condition application."<sup>259</sup>

Accordingly, a tech union could strike in order to force an employer into filing an LCA in good faith or risk being penalized for misrepresentation. But this strategy would be ineffective in outsourcing arrangements.

More problematic is the fact that "unions are hardly present at all" in the tech industry.<sup>260</sup> Indeed, the former SCE workers were not represented by a union.<sup>261</sup> Unionization is unlikely in industries marked by "short job tenures, heavy use of temporary labor, and heavy use of immigrant labor"<sup>262</sup>—practices associated with Silicon Valley,<sup>263</sup> which features a "high velocity labor market" in which workers regularly job-hop between employers.<sup>264</sup> Furthermore, in industries where business lobbies are

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258. 8 U.S.C. § 1182(n)(1)(B) (2012) (emphasis added); 20 C.F.R. § 655.733 (2016). ("A strike or lockout which occurs after the labor condition application is filed by the employer with DOL is covered by DHS regulations at 8 CFR 214.2(h)(17).")

259. 20 C.F.R. § 655.733(a) (2016) (emphasis added).

260. Alan Hyde, *Employee Organization in Silicon Valley: Networks, Ethnic Organization, and New Unions*, 4 U. PA. J. LAB. & EMP. L. 493, 496 (2002) ("At a high-technology company, the only employee who is typically represented by a union is the janitor . . ."). See Avagliano, *supra* note 24, at 676 (observing that the IT sector has traditionally lacked "significant numbers of union members").

261. The laid-off SCE workers were not represented by a union. Thibodeau, *Labor Dept. Plans H-1B Probe*, *supra* note 141. Following the SCE layoffs, former employees formed the organization Save Jobs USA with the purpose of addressing the issue of indirect displacement and has sought to curtail expansion of the H-1B program in the courts. See Complaint at 3, *Save Jobs USA v. U.S. Dep't of Homeland Security*, No. 1:15-cv-615, 2015 WL 2242540 (D.D.C. Apr. 23, 2015) (challenging DHS's rule which grants work authorization to H-1B dependent spouse aliens who possess H-4 visas).

262. Hyde, *supra* note 260, at 498.

263. Hyde, *supra* note 260, at 498.

264. See Johanna Shih, *Circumventing Discrimination: Gender and Ethnic Strategies in Silicon Valley*, 20 GENDER & SOC'Y 177, 179 (2006) (noting that Caucasian and Asian females and Asian males

influential, like the high-tech sector, there are fewer barriers to migration and unions have little influence.<sup>265</sup>

Traditional unions have thus had little experience with employers who rely on H-1B workers.<sup>266</sup> Among the few unions for computer-related workers is Washington Alliance of Technology Workers (WashTech), which has been described as a “virtual union” because it “advance[s] workers’ interests without acting as their legal bargaining representative.”<sup>267</sup> Virtual unions like WashTech face an uphill battle in “trying to persuade professionals in what has traditionally been a highly individualistic work culture to consider bargaining collectively with employers.”<sup>268</sup> However, virtual unions and traditional unions do play a crucial role in educating the public and Congress on the problems of the H-1B program.<sup>269</sup> Without unions and professional organizations, the tech industry’s narrative of a worker shortage would go unchecked.

### *B. Education and Cooperation: Exposing the Corporate Exploitation of Tech Workers and Joining with H-1B Workers in Securing Their Workplace Rights*

While the 2016 presidential election has shifted the calculus for immigration reform,<sup>270</sup> the tech industry’s bevy of lobbyists are determined to protect the status quo.<sup>271</sup> Congress has been all too eager to cater to

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view job-hopping as a “useful strategy [to] circumvent employers and firms that they viewed as discriminatory.”)

265. See Giovanni Facchini et al., *Do Interest Groups Affect US Immigration Policy?*, 85 J. INT’L ECON. 114, 120 (2011).

266. The one exception seems to be The Society of Professional Engineering Employees in Aerospace (SPEEA), IFPTE Local 2001, which represents Boeing engineers. See Dominic Gates, *Russian Engineers, Once Turned Back, Now Flowing to Boeing Again*, SEATTLE TIMES (Apr. 15, 2012), <http://www.seattletimes.com/business/russian-engineers-once-turned-back-now-flowing-to-boeing-again/> (reporting SPEEA criticized Boeing’s use of Russian contractors brought into the country on B-1 visas in lieu of H-1B visas).

267. Hyde, *supra* note 260, at 523.

268. Andrew Bibby, *IT Outsourcing Goes Global*, WORLD OF WORK MAG., Mar. 2003, at 15, <https://perma.cc/B3KR-6VVF>. “The problem is tech workers do not like to organize . . . Unions have some branding issues that hold them back from recruiting tech workers.” E-mail from John Miano, J.D., representing WashTech, to author (Jan. 21, 2017, 1:18 EST) (on file with author).

269. See, e.g., DEP’T FOR PROF’L EMPS., AFL-CIO, DPE PRESIDENT’S REPORT 8 (June 1, 2015–May 31, 2016), <https://perma.cc/TS6W-2UFW> (“DPE continues . . . to educate members of Congress and the public about needed high-skilled immigration reforms.”); INT’L FED’N OF PROF’L & TECH. ENG’RS, AFL-CIO, *Congress Should Reform the H-1B Program, Not Expand It*, <https://perma.cc/GXB9-PFZ6>.

270. See Roy Maurer, *Trump Immigration Policy Likely to Be Enforcement-Heavy*, SOC’Y FOR HUM. RES. MGMT. (Nov. 14, 2016) (foreseeing stricter worksite enforcement, but arguing that foreign workers “should not expect their immigration statuses to be affected anytime soon”); see also Laura D. Francis, *Will We Really See Immigration Legislation in 2017?*, Daily Lab. Rep. (BNA) No. 28, at S-28 (Jan. 9, 2017).

271. See discussion *infra* Section III.B.

Silicon Valley executives, such as Bill Gates, who has even admitted that he is no immigration “expert.”<sup>272</sup> Much of the H-1B program’s legislation bears the imprimatur of the engineering and computer services industries—the top spenders on immigration lobbying<sup>273</sup> and the top recipients of H-1B visas.<sup>274</sup> Despite the industry’s lobbying efforts, Congress has not increased the visa cap since 2004, perhaps due to the fact that the visa’s “flaws have finally been exposed.”<sup>275</sup>

H-1B proponents characterize the Disney and SCE layoffs as one-offs, arguing “lawmakers shouldn’t overhaul the entire system just because ‘one bad apple’ decided to break the law.”<sup>276</sup> But the corporate commandeering of the H-1B program is not a new practice.<sup>277</sup> SCE and Disney were simply using the same tactics as other top U.S. companies, such as AT&T,<sup>278</sup>

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272. During his 2008 congressional testimony, Bill Gates, then-chairman of Microsoft, pleaded Congress to raise the visa cap. When asked whether there “should there be any limits on H-1B visas and . . . limits on [overall] immigration,” Gates answered in part, “I don’t know what it would be like if you didn’t have limits, you know. There may need to be limits. I’m not an expert on that.” *Competitiveness and Innovation on the Committee’s 50th Anniversary with Bill Gates, Chairman of Microsoft: Hearing Before the H. Comm. on Science and Technology* 42–43, 110th Cong. (Mar. 12, 2008) (testimony of Bill Gates). Indeed, Gates and other famous tech entrepreneurs, such as Larry Ellison, Steve Jobs, Steve Wozniak, and Mark Zuckerberg, never even attained the level of achievement that apparently qualifies H-1B visa holders as the “best and the brightest” (generally, a bachelor’s degree in STEM). See, e.g., Norman Matloff, *Loss of Another American Dream*, (1996), <https://perma.cc/SVA4-UD4Z>; Daniel Costa, *STEM Labor Shortages? Microsoft Report Distorts Reality About Computing Occupations*, 3 (ECON. POL’Y INST., Pol’y Mem. #195, Nov. 19, 2012), <http://www.epi.org/files/2012/pm195-stem-labor-shortages-microsoft-report-distorts.pdf>.

273. See Facchini et al., *supra* note 265, at 126 (“Barriers to migration are higher in sectors where labor unions are more important and lower in those sectors in which business lobbies are more active.”); see also Cox & Posner, *supra* note 43, at 1301.

274. John Miano, *H-1B Visa Numbers: No Relationship to Economic Need*, Center for Immigration Studies, 1 (June 2008), <https://perma.cc/HRM7-MABU>. In 2000, for example, when Congress overwhelmingly voted in favor of raising the H-1B visa cap, Senator Bob Bennet (R-Ut.) admitted Congress was motivated out of fear of “being accused of being against [the] high tech” industry, whom politicians were “tapping . . . for campaign contributions.” Carolyn Lochhead, *Bill to Boost Tech Visas Sails Through Congress/Clinton Expected to Sign Popular Measure*, SFGATE (Oct. 4, 2000), <https://perma.cc/Y29Y-TJNK>. Similarly, Rep. Tom Davis remarked that although it was “not a popular bill with the public,” it was “popular with the CEOs.” David Enrich, *High-Tech Cheap Labor*, THE NATION (Sept. 28, 2000), <https://www.thenation.com/article/high-tech-cheap-labor/>.

275. Fulmer, *supra* note 25, at 859.

276. Francis, *supra* note 158.

277. Watt, *supra* note 8.

278. *Immigrations Reforms Needed to Protect Skilled American Workers: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. 7 (Mar. 17, 2015) (testimony of John M. Miano, J.D., representing WashTech), <https://perma.cc/PAB7-X8X7>.

AIG,<sup>279</sup> Bank of America,<sup>280</sup> Best Buy,<sup>281</sup> IBM,<sup>282</sup> Sun Microsystems,<sup>283</sup> Pfizer,<sup>284</sup> Abbott Laboratories,<sup>285</sup> Wal-Mart,<sup>286</sup> Harley-Davidson,<sup>287</sup> and Toys “R” Us.<sup>288</sup>

Informing the public of H-1B discrimination is thus crucial to reform efforts. The Disney and SCE layoffs illustrate the power of negative publicity.<sup>289</sup> Just days after the *New York Times* published an article that lambasted Disney, the company reversed an earlier decision to replace thirty-five of its U.S. tech workers at their California office.<sup>290</sup> In turn, *60 Minutes* investigated the issue of tech worker displacement.<sup>291</sup> This was not the first time that the iconic news program had shed light on the issue. In 1993, a *60 Minutes* piece lambasted Hewlett-Packard’s use of body shops that contracted out H-1B computer programmers for \$10 per hour.<sup>292</sup> Hewlett-Packard subsequently “announced that it would take action to

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279. *Id.*

280. *Id.*

281. *Id.*

282. William M. Bulkeley, *New IBM Jobs Can Mean Fewer Jobs Elsewhere*, WALL ST. J. (Mar. 8, 2004), <http://www.wsj.com/articles/SB107870140865148660>.

283. *Ex-Sun Worker Files Discrimination Suit*, CNET (Mar. 19, 2003), <http://www.cnet.com/news/ex-sun-worker-files-discrimination-suit/>.

284. See Kevin Fogarty, *Did Pfizer Force Its Staff to Train Their H-1B Replacements?*, EWEEK.COM (Nov. 7, 2008), <https://perma.cc/2CDA-3848>.

285. Ameet Sachdev, *Abbott’s IT Layoffs Draw Fire from Sen. Durbin*, CHI. TRIB. (Mar. 2, 2016), <http://www.chicagotribune.com/business/ct-abbott-layoffs-durbin-0302-biz-20160301-story.html>.

286. AFL-CIO, *After Decimating U.S. Manufacturing, Wal-Mart Takes Aim at the Information Technology Sector* (Apr. 1, 2015), <https://perma.cc/S5BE-J44G> (“Walmart is the only brick and mortar retailer that uses H-1B visas to hire a substantial amount of IT workers”); Dave Jamieson, *Walmart Seeking Foreign Guest Workers to Fill U.S. Tech Jobs, AFL-CIO Finds*, HUFFINGTON POST (Apr. 1, 2015), [http://www.huffingtonpost.com/2015/04/01/walmart-h-1b\\_n\\_6987200.html](http://www.huffingtonpost.com/2015/04/01/walmart-h-1b_n_6987200.html).

287. Laura Wides-Munoz & Paul Wiseman, *Backlash Stirs Against Foreign Worker Visa*, USA TODAY (July 6, 2014), <http://www.usatoday.com/story/money/business/2014/07/06/backlash-stirs-in-us-against-foreign-worker-visas/12266783/>.

288. Julia Preston, *Toys ‘R’ Us Brings Temporary Foreign Workers to U.S. to Move Jobs Overseas*, N.Y. TIMES (Sept. 29, 2015), <https://www.nytimes.com/2015/09/30/us/toys-r-us-brings-temporary-foreign-workers-to-us-to-move-jobs-overseas.html>.

289. Malos, *Updated*, *supra* note 16, at 300 (noting the “risk of negative publicity . . . warrants caution” for companies that contemplate replacing their staff with H-1B workers). One reason why the Disney layoffs were able to garner national attention was Disney’s failure to adhere to the industry practice of using severance agreements that include non-disparagement provisions and waivers. Patrick Thibodeau, *Laid-off IT Workers Muzzled as H-1B Debate Heats Up*, COMPUTERWORLD (Jan. 28, 2016), <https://perma.cc/2UNA-GVVV>.

290. See, e.g., Malos, *Updated*, *supra* note 16, at 300; Preston, *supra* note 19.

291. *60 Minutes: You’re Fired* (CBS television broadcast Mar. 19, 2017), <http://www.cbsnews.com/videos/youre-fired/>.

292. *60 Minutes: North of the Border* (CBS television broadcast Oct. 3, 1993), <http://www.cbsnews.com/news/how-h-1b-visas-have-been-abused-since-the-beginning/>; Ron Hira, *Bridge to Immigration of Cheap Temporary Labor? The H-1B and L-1 Visa Programs Are a Source of Both*, 2 (Econ. Pol’y Inst., D.C., EPI BRIEFING PAPER #257, Feb. 17, 2010), <https://perma.cc/9K86-WLB4> (explaining that this wage was “nowhere near what the company would have to pay permanent residents”).

prevent abuse of the H-1B program.”<sup>293</sup> Significantly, the SCE and Disney layoffs also prompted a Senate hearing that was highly critical of the outsourcing model.<sup>294</sup>

These examples demonstrate the value in leveraging the media against outsourcing firms and U.S. employers—especially those like Disney who are particularly vulnerable in the court of public opinion.<sup>295</sup> Such efforts may secure reinstatement in some cases, but more importantly, honest news coverage is necessary in order to counter the industry’s narrative of a domestic shortage in high-tech labor. But U.S. workers should be mindful that they will likely be derided as nativists.<sup>296</sup> U.S. workers can dispel such notions by focusing their efforts not only on American workers, but also their foreign counterparts.

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293. Matloff, *supra* note 23, at 821.

294. See Beryl Lieff Benderly, *Displaced American STEM Workers Spur Senate Hearing*, SCI. (Mar. 3, 2016), <https://perma.cc/4C8N-9NUD>; see also *The Impact of High-Skilled Immigration on U.S. Workers: Hearing Before the Subcomm. on Immigration & the Nat’l Interest of the S. Comm. on the Judiciary*, 114th Cong. (Feb. 25, 2016) (testimony of John M. Miano, J.D., representing WashTech).

295. For example, Infosys admitted in its SEC filings that it was concerned with the effect of media reporting its record \$34 million fraud settlement with DOJ:

[O]ur entry into the Settlement Agreement resulted in significant media attention, particularly in the United States. Negative publicity about our company could adversely affect our reputation as well as our existing and potential business relationships, which could have a material and adverse effect on our results of operations and financial condition.

Infosys Ltd., Annual Report (Form 20-F) (Mar. 21, 2015) (also mentioning that in 2007, Infosys entered into a \$26 million settlement with the California Division of Labor Standards Enforcement over claims of misclassification of employees).

296. See, e.g., Justin Estep, *Immigration Hypocrisy and Its Destructive Effect on the Economic and Families*, 17 THE SCHOLAR 541, 550 (2015) (arguing that lobbying efforts by executives such as Bill Gates and Mark Zuckerberg have been “stymied by unfounded xenophobic fear that citizens are losing their jobs to immigrants”); Underwood, *supra* note 23, at 735 (“The H-1B workers are a prime target for anti-immigrant sentiment because they are recruited into a competitive market, employed on a temporary basis, and perceived as foreigners.”).

Since the late 1990s, when tech lobbying began in earnest,<sup>297</sup> the majority of H-1Bs have been young<sup>298</sup> males<sup>299</sup> born in India<sup>300</sup> working in computer-related occupations.<sup>301</sup> According to a report conducted by DOL's Glass Ceiling Commission, corporate America tends to stereotype Asian workers as industrious, intelligent, polite, non-confrontational, politically passive,<sup>302</sup> and well-suited to "programmed or routine repetitive decisions that are learned in advance."<sup>303</sup> Such perceptions have allowed Indians to gain entry into the U.S. tech workplace.<sup>304</sup> But these stereotypes have also caused detrimental working conditions.<sup>305</sup> For example, former tech entrepreneur and H-1B supporter Vivek Wadhwa explained that the H-1B visa is a "flawed visa" because the foreign worker is essentially "held hostage" by the sponsoring employer.<sup>306</sup> Reports of abusive employer practices surfaced as early as 1996, when an OIG audit found nineteen percent of H-1B workers "were paid below the wage specified on the LCA."<sup>307</sup>

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297. See Ron Hira, *U.S. Immigration Regulations and India's Information Technology Industry*, 71 *TECH. FORECASTING & SOC. CHANGE* 837, 841 (2004).

298. U.S. CITIZENSHIP & IMMIGR. SERVS., DEP'T OF HOMELAND SECURITY, CHARACTERISTICS OF H-1B SPECIALTY OCCUPATION WORKERS FOR FISCAL YEAR 2014-9 (Feb. 26, 2015) (noting seventy-two percent of new visas went to nonimmigrants aged between twenty-five and thirty-four years old).

299. While the government refuses to track gender data on H-1B applicants, the Anita Borg Institute estimates roughly eighty-five percent of H-1B visa holders are male. See Sharon Machlis et al., *How Many H-1B Workers Are Female? U.S. Won't Say*, *COMPUTERWORLD* (Apr. 1, 2016) <https://perma.cc/JX99-NB5R>; see also Payal Banerjee, *Indian Information Technology Workers in the United States: The H-1B Visa, Flexible Production, and the Racialization of Labor*, 32 *CRITICAL SOC.* 425, 426 (Mar. 1, 2006) (noting the "vast majority" of H-1B workers "in IT has been and continues to be Indian men").

300. See, e.g., U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 298, at 6 (Noting that among all the H-1B petitions approved in fiscal year 2014, seventy percent were for workers born in India. Eight percent were born in China.); Patrick Thibodeau et al., *With H-1B Visa, Diversity Doesn't Apply*, *COMPUTERWORLD* (Aug. 10, 2015), <https://perma.cc/32VM-RVT2> (calculating eighty-six percent of H-1B computer workers were born in India).

301. In fiscal year 2014, sixty-five percent of the approved petitions were for computer-related occupations. See U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 298, at 11.

302. See FED. GLASS CEILING COMMISSION, *GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL* 104 (Mar. 1995); see also Roli Varma, *India-Born in the U.S. Science and Engineering Workforce*, 53 *AM. BEHAV. SCI.* 1064, 1071 (Feb. 9, 2010) ("There is a feeling that [H-1B] workers . . . are spared layoffs because they . . . are easier to be bossed around.").

303. Roli Varma & Everett M. Rogers, *Indian Cyber Workers in U.S.*, 39 *ECON. & POLIT. WEEKLY* No. 52, 5645, 5649 (Dec. 25, 2004).

304. However, these same stereotypes negatively affect Indian workers' chances at being selected for managerial roles. See *Id.* at 5649. One manager explained why he preferred hiring H-1Bs: "The H-1B guy is ready to put in a lot of hours, up to 14 hours a day, and they don't charge for the extra hours." Marianne Kolbasuk McGee, *Where Does H-1B Fit?*, *INFO. WEEK* (Feb. 1, 2002), <https://perma.cc/5SUD-S2KV>.

305. See discussion *supra* Section I.A (noting that H-1B workers are much more immobile compared to their American counterparts).

306. Bernice Yeung, *Goodbye H-1B; Hello, Green Card Reform*, *FIRSTPOST* (Dec. 20, 2014), <https://perma.cc/UF7M-EJCB>. "But what I realised was that my writing was being used as a way to close the doors on immigration. People that oppose H-1Bs aren't concerned about the people on the visas; they see it as a gateway to legal immigration." *Id.*

307. U.S. DEP'T OF LABOR, *THE SYSTEM IS BROKEN*, *supra* note 79, at 3.



To counter corporate perceptions of H-1B workers as a docile workforce, reformers should seek to inform them of their workplace rights<sup>308</sup> and join H-1Bs as plaintiffs in litigation against abusive employers.<sup>309</sup> Through unionization, education, and cooperation, reformers can begin to curb abusive employment practices without fomenting divisiveness between foreign and native workers.

### CONCLUSION

Much of the scholarship on the H-1B program has focused on how to best fix the H-1B statutory scheme. However, recent high profile layoffs and lawsuits have highlighted the need for a discussion on whether existing federal statutes offer adequate remedies for displaced U.S. tech workers. This Note has argued that the fissured work model has not only limited the effectiveness of the H-1B program's administrative remedies, but it has also had a spill-over effect into other statutory remedies, such as civil RICO. Among the remedies discussed, Title VII and § 1981 seem to hold the most promise. But because the case law is still sparse, workers should continue to seek legislative reform.<sup>310</sup>

Fixing the visa statutory scheme will be no easy task. Immigration is one of the most divisive issues in today's political climate.<sup>311</sup> But reform can be achieved. Despite partisan divisions, H-1B reform is one of the few issues

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308. See generally OFFICE OF SPECIAL COUNSEL FOR IMMIGRATION-RELATED UNFAIR EMPLOYMENT PRACTICES, <https://perma.cc/X5YA-8NMY> (providing a list of publications outlining foreign worker's rights such as charts comparing the jurisdictions of DOJ and EEOC); U.S. DEP'T OF LABOR, LEGAL PROTECTIONS FOR H-1B WORKERS, <https://www.dol.gov/whd/FLSAEmployeeCard/H1BEnglish.pdf>; INT'L LAB. RECRUITMENT WORKING GROUP, THE AMERICAN DREAM UP FOR SALE: A BLUEPRINT FOR ENDING INTERNATIONAL LABOR RECRUITMENT ABUSE (2013), <https://fairlaborrecruitment.files.wordpress.com/2013/01/final-e-version-ilrwg-report.pdf>.

309. *Shah v. Wilco Sys., Inc.*, 126 F. Supp. 2d 641, 644 (S.D.N.Y. 2000) provides an example of such cooperation between American and H-1B tech workers. "The irony in this case is that the two workers that initiated the lawsuit belong to groups that have typically been on opposing sides of the H-1-B visa debate." Avagliano, *supra* note 24, at 671. "It's quite possible the workers most affected by the program will play a pivotal role in removing its inherent divisiveness." *Id.*

310. In addition to the remedies discussed in Section II, U.S. workers may consider seeking relief under state law, as well as other federal statutes, such as the Age Discrimination in Employment Act of 1967 (ADEA) and the Older Workers Benefit Protection Act (OWBPA).

311. See, e.g., Kenneth T. Walsh, *Poll Shows Partisan Divide on Immigration Ban*, U.S. NEWS (Feb. 1, 2017), <http://www.usnews.com/news/ken-walshs-washington/articles/2017-02-01/poll-shows-partisan-divide-on-immigration-ban>.

that unites President Donald Trump,<sup>312</sup> Attorney General Jeff Sessions,<sup>313</sup> Senator Richard Durbin (D-Ill.),<sup>314</sup> and Senator Bernie Sanders (I-Vt.).<sup>315</sup> Congress should centralize visa oversight in DOL, expand DOL's enforcement authority, and amend the statutory framework in order to increase H-1B worker mobility, eliminate the concept of the "exempt" H-1B worker, and most importantly, extend the LCA requirements to client companies that contract with H-1B employers.

No wall will solve this problem.<sup>316</sup> The culprits are already on this side of the border.

*Kenneth M. Geisler II*<sup>317</sup>

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312. President Donald Trump recently issued an executive order that directed the Attorney General and the Secretaries of State, Labor, and Homeland Security to "suggest reforms to help insure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries." Exec. Order No. 13788, 82 Fed. Reg. 76 (Apr. 21, 2017).

313. "At a hearing in the wake of the Disney layoffs, Senator Sessions questioned the tech industry's claim of a worker shortage, noting that in 2016 IT companies planned to "cut as many as 330,000 jobs." Genevieve Douglas, *Senators Urged to Help Curb H-1B Visa Abuses*, 10 Workplace Immigr. Rep. (BNA) No. 5 (Feb. 29, 2016).

314. See Letter from Richard J. Durbin, to President Donald Trump (Mar. 3, 2017), <https://www.durbin.senate.gov/imo/media/doc/POTUS%20H-1B%203.3.2017.pdf> ("While I disagree with you on most issues, protecting American workers is one area where I hoped we might be able to find common ground.").

315. Dylan Matthews, *'This is a Massive Effort to Attract Cheap Labor.' Why Sen. Bernie Sanders is Skeptical of Guest Workers*, WASH. POST (May 25, 2013), [https://www.washingtonpost.com/news/work/wp/2013/05/25/this-is-a-massive-effort-to-attract-cheap-labor-why-sen-bernie-sanders-is-skeptical-of-guest-workers/?utm\\_term=.e535cabe0014](https://www.washingtonpost.com/news/work/wp/2013/05/25/this-is-a-massive-effort-to-attract-cheap-labor-why-sen-bernie-sanders-is-skeptical-of-guest-workers/?utm_term=.e535cabe0014) (quoting Senator Sanders: "The bottom line is that . . . a lot of the initiative behind these guest workers programs . . . is coming from large corporations who want cheap labor from abroad."); Ian Smith, *'You're Fired' — Now Train Your Replacement*, NAT'L REV. (Apr. 28, 2015), <http://www.nationalreview.com/article/417572/youre-fired-now-train-your-replacement-ian-smith>.

316. Compare Aubrey Allegretti, *Donald Trump's US-Mexico Border Wall Blasted by Mark Zuckerberg In Message Of Hope*, HUFFINGTON POST (Dec. 4, 2016), [http://www.huffingtonpost.co.uk/entry/donald-trump-us-mexico-border-wall-blasted-by-mark-zuckerberg-in-message-of-hope\\_uk\\_570d42d4e4b0ae22c1e07c10](http://www.huffingtonpost.co.uk/entry/donald-trump-us-mexico-border-wall-blasted-by-mark-zuckerberg-in-message-of-hope_uk_570d42d4e4b0ae22c1e07c10) (reporting Facebook tycoon Mark Zuckerberg lambasted plans to build a southern border wall), with Alex Heath, *'People are Furious Down Here': Hundreds of Protesters Will Amass at Mark Zuckerberg's Hawaiian Wall*, BUSINESS INSIDER (Jan. 26, 2017), <http://www.businessinsider.com/hawaiians-to-march-in-protest-against-mark-zuckerbergs-land-grab-lawsuits-2017-1> (reporting that Zuckerberg a 6-foot wall around his 700-acre Hawaiian property and suing his neighbors—Hawaiian natives who have ownership rights to parcels of his property).

317 J.D. (2018), Washington University in St. Louis School of Law; B.A. (2014), History, University of Louisville. I would like to thank the editors of the *Washington University Law Review* for their tireless work and dedication to the editing process. Thank you also to my friends and family for their constant support. Special thanks to Dr. Stephen Legomsky and Professor Brishen Rogers for their valuable intellectual contributions. Please note that the views expressed in this Note—as well as all errors—are attributable solely to the author, and not to any other person, agency, or organization.