The Immigrant Workers Union:
Challenges Facing Low-Wage Immigrant Workers in Los Angeles

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I. INTRODUCTION

Assi workers using teamwork
Fighting for the union
Not treated right
Not paid right
Hang on Assi workers
Keep fighting for your rights

The campaign to establish a labor union at Assi Super, Inc. ("Assi Super"), one of Los Angeles Koreatown's largest supermarkets, began in July 2001, when eight Latino workers staged a brief walk-out action to protest cuts to their shifts that followed a pattern of unlawful employment practices. The eight employees walked down the street one block into the office of Korean Immigrant Workers Advocates (KIWA), where the Immigrant Workers Union (IWU) was born. The IWU was conceived as a new type of union—worker-led, community-based, and independent of the AFL-CIO. The IWU hoped to utilize collective bargaining after an election certified by the National Labor Relations Board (NLRB) to improve working conditions at Assi Super, where violations of employment law were commonplace. Assi Super management swiftly reacted with an anti-union campaign employing common union-busting tactics, despite prohibition of such an approach under the National Labor Relations Act

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1. This poem was written by Carlos Martinez, a third-grade student at Wilton Place Elementary School, a school located near Assi Super, Inc. where teachers have taught students about social justice issues in their community. Jenni Emiko Kuida, Third Graders Say, Boycott Assi Supermarket, RAFU SHIMPO, Sept. 12, 2002.
(NLRA). When the contentious election resulted in a tie, while Assi Super continued discouraging union support and denying recognition of the union, the IWU filed appeals and challenges with the NLRB.

Assi workers also filed charges with the Equal Employment Opportunity Commission (EEOC) alleging that Latino workers were subject to working conditions that were significantly different than those imposed on Korean workers. In addition, Latino and Korean workers filed administrative claims with the California State Labor Commissioner's office for wage and hour violations regarding overtime pay and mandatory rest period requirements. These claims evolved into a class action lawsuit in which plaintiffs alleged unlawful harassment, discrimination, and retaliation, violations of wage and hour laws, and employer negligence. At press time, plaintiffs were still awaiting news of a potential settlement.

Although the Assi workers have ardently pursued state and federal remedies, nearly four years after the beginning of their struggle, many of them are now unemployed, vulnerable, and unprotected. While monthly pickets and calls for a community boycott of Assi Super continue, the IWU leaders and community organizers have begun shifting their strategy, all but abandoning the campaign to establish the IWU as the employees' bargaining agent. While some workers were empowered through the union campaign and are now committed to the continuing fight for workers' rights, others have grown bitter, regretting their experience and concluding their losses outweigh any gains from the campaign.

A closer examination of the IWU campaign reveals the complex legal, social, and political challenges facing low-wage immigrant workers who seek to enforce their rights and to demand dignity and respect from their employers. Scholarship regarding the weaknesses in employment and labor law protections abound, illustrating the precarious legal situation of immigrant workers. Anti-immigrant sentiment following September 11 has led to further abridgement of the protections afforded to undocumented immigrant workers. In major metropolitan areas such as Los Angeles, tenuous legal remedies move farther out of reach as race and class stratification precludes broad-based community support for low-wage immigrant workers. As urban and rural areas in the United States experience increased racial diversity and continuing changes in the labor market, social and economic disparity will continue to grow. Advocates for low-wage workers will need to find innovative approaches to work towards justice and to combat the profound despair that accompanies such inequity.

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2. Interview with Steve Arredondo, Staff Attorney, Traber & Voorhees, in Pasadena, Cal. (Mar. 25, 2004).
3. Interview with Steve Arredondo, Staff Attorney, Traber & Voorhees, in Pasadena, Cal. (Oct. 14, 2004).
4. Interview with Vy Nguyen, Lead Organizer, Korean Immigrant Workers Advocates, in Los Angeles, Cal. (Jan. 5, 2005).
5. Interview with Steve Arredondo, supra note 2; see infra Part III.C.
The story of the IWU campaign illustrates the limitations of the law and reminds us of the overwhelming power of race and class to hold off positive social change. Indeed, at the end of the campaign at Assi Super, the aggregated legal, social, economic, and political challenges proved insurmountable. While the workers and organizers depended on the law to regulate their employers and to protect themselves, the law proved inadequate.

The IWU campaign at Assi Super is a case study for the larger struggle for justice and equity in low-income communities throughout Los Angeles, a city where changing demographics and an increasing economic gap further complicate race relations and the social justice movement. This Comment discusses the legal challenges workers faced by contextualizing the campaign within the social and cultural fabric of Koreatown, where Korean American business owners employ a majority Latino workforce. I take an interdisciplinary, intersectional approach that examines the roles of race, class, immigrant status, immigration history, and the law.

Part II begins with a few workers' perspectives of the working conditions at Assi Super and then takes a step back to provide a history of the growth of the Korean American community in Los Angeles, including its experience during the L.A. Riots and the development of KIWA. Part III provides a brief summary of the IWU campaign, documenting the workers' pursuit of their right to organize among other workplace rights. Part IV provides a broad overview of the various legal challenges confronting low-wage immigrant workers, including weaknesses in existing employment and labor law protections. Part V examines the campaign's victories and failures—what went wrong and what important lessons may be drawn from the experience? The conclusion looks ahead at new possibilities, expressing hope that the fight for economic justice in Koreatown will continue beyond the IWU campaign at Assi Super with the increased support of the Korean American community.

I offer no panacea for the dire state of the law. Rather, this Comment is diagnostic, intended to provide community leaders, student activists, organizers, and legal practitioners with a comprehensive context in which to place their work. I hope to provide a few tools with which workers' advocates may effectively continue their work in the movement for justice and equity.

6. I refer to the event that occurred in the period April 29, 1992 to May 1, 1992 in Los Angeles following the acquittal of police officers charged with the beating of Rodney King. Throughout this Comment, I refer to these events as "riots" or "civil unrest." I am aware that particular political perspectives may be associated with each use (e.g., some Korean Americans who sustained damage during the events feel that it was a riot, whereas some African Americans emphasize the political aspects of the events and use the terms rebellion or unrest). I espouse neither perspective. See EDWARD T. CHANG & JEANETTE DIAZ-VEIZADES, ETHNIC PEACE IN THE AMERICAN CITY: BUILDING COMMUNITY IN LOS ANGELES AND BEYOND 9 n.1 (1999).
II. KOREATOWN

In Koreatown, the struggle of low-wage immigrant workers is complicated by the race and class division that augments the legal barriers facing all immigrant workers in the United States. Throughout the campaign, a debilitating lack of support from the Korean American community forestalled the broad community pressure that may have been the key to a union victory. Familiarity with the history of Koreatown and the Korean American community is essential to understanding the perspectives of the Assi Super workers, the management, KIWA staff, and other community members.

A. Working Conditions at Assi Super

In July 2001, eight Latino workers walked off of their jobs at Assi Super in protest of a management action cutting the workers' shifts from eight to six hours, a change that would require them to find additional part-time jobs. But this change was the proverbial straw that broke the camel's back. For three years, the management had mistreated workers by committing racial discrimination, failing to pay wages, engaging in verbal abuse, and unlawfully terminating employees. The experience of Assi workers is all too common; low-wage immigrant workers are arguably the most vulnerable and exploited workers in the United States. It is well-documented that low-skilled immigrants are more willing to work for low wages and under poor working conditions. Latino immigrants are the most likely to live in poverty and be employed in low-wage occupations. For undocumented immigrant workers, the fear of deportation serves as a compelling deterrent against making demands on the employers or participating in unionization efforts.

The individual stories of Assi workers illustrate these multifaceted challenges. Tomás Solis and his wife Betty are Mexican immigrants who started working at Assi Super in 2000. Tomás worked in the produce and deli sections while Betty worked in the market's kitchen. They worked eight to twelve hour shifts without adequate breaks and overtime pay. They were subject to constant harassment and racial discrimination. As a result, Tomás and Betty both became members of a class action lawsuit against

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8. Interview with Steve Arredondo, supra note 2.
10. Id.
11. Id.; see infra Part III.B.1.
13. Id.
14. Id.
Assi Super alleging employment discrimination and violations of wage and hour laws. Tomás and his family are still waiting, hoping for a favorable settlement vitally needed to fund a kidney transplant that will save Tomás’s life.

In March 2003, “Kevin,” a recent immigrant from South Korea, was injured while working alone in an area of the market that once utilized three employees during a shift that typically lasted from 7 a.m. to 10 p.m. on light days. Daniel Rhee, the owner, refused to fill the open positions, explaining that business was slow. When Kevin complained about the workload, Rhee told him that he could simply quit if he did not like the job. Protesting the working conditions and supporting the union were risky actions for Kevin, due to his well-justified fear of retaliation and being blacklisted among Korean American business owners. Yet Kevin is one of the Korean plaintiffs who joined the Latino workers in the class action claims for wage and hour violations where back pay is sought. Since Kevin took leave due to his injuries, he has volunteered several hours of support to the IWU.

Max Mariscal is a recent immigrant and former employee of Assi Super. After working for two years at California Market, one of Assi Super’s competitors, Max began to work at Assi Super in early 2001. He soon noticed that the working conditions were much worse at Assi Super, although his previous job did not offer any benefits beyond minimum wage. Max started taking English classes in order to overcome language barriers and began serving as an unofficial mediator between his co-workers and supervisors. He had been working as a bagger for six to seven months when the IWU campaign was launched. Max started attending worker committee meetings that led to his election as the provisional President of the IWU, a position that he currently holds. Max is currently a full-time organizer for the IWU.

15. Id. at 51.
16. Id.
17. Kevin’s real name was not used in order to maintain his privacy; id. at 53-54.
18. Id.
19. Id.
20. Id.; see Austin Bunn, Market Forces, LA WKLY., May 3, 2002 (discussing Korean workers’ fear of being blacklisted among Koreatown businesses).
22. Id.
23. Interview with Maximiliano Mariscal, Interim President, Immigrant Workers Union, in Los Angeles, Cal. (Oct. 14, 2004).
24. Id.
25. Id.
26. Id.
27. Id.
28. Id.
29. Id.
B. Korean Americans in Los Angeles

According to the 2000 U.S. Census, over a quarter-million Korean Americans reside in Southern California, comprising nearly one-fourth of the Korean population in the United States. Koreatown is the social, cultural, and economic heart of the Korean American community in Los Angeles. Located three miles west of Downtown Los Angeles, Koreatown is one of the most racially diverse, densely populated and poorest areas of the city. To the surprise of many who are unfamiliar with the demographics of Koreatown, Koreans constitute about a third of the residents in Koreatown, while the majority of residents are Latino. Koreatown is one of the major locations for initial settlement of both Korean and Latino immigrants, who quickly move out of the area if and when it becomes economically feasible. This leaves the area disproportionately poor, while commercial development continues to boom. Although Koreatown serves as the central business district of the Korean American community in Southern California, Korean Americans are dispersed among six distinct areas throughout Los Angeles County. Unlike other ethnic enclaves such as Chinatown, Koreatown owes its name to the predominance of Korean business in Koreatown, but it does not reflect residential patterns of Korean Americans in Los Angeles County.

Korean Americans were one of the fastest growing immigrant groups in Los Angeles beginning in the 1970s and following the liberalization of immigration laws and quotas in 1965. In the 1980s, the population of Korean Americans increased by 142%, reaching 145,000 in Los Angeles County in 1990. Most Korean immigrants arrived in the United States with relatively high education levels, but were prevented from pursuing their prior occupations because of language barriers, resulting in high levels of entrepreneurship in the form of small retail and personal service businesses. Surveys conducted in five major American cities showed that

32. Id.
33. Id.
35. ONG & HEE, supra note 31, at 8; Yu & Choe, supra note 30, at 14.
36. ONG & HEE, supra note 31, at 8.
37. CHANG & DIAZ-VEIZADES, supra note 6, at 18 (providing a brief history of Korean immigration to the United States).
38. ONG & HEE, supra note 31, at 7.
39. The early years following 1965 immigration law reform was marked by immigration of Koreans with higher educations and professional or middle class backgrounds. The period was followed by a slight decline. In 1975, 65 percent of Korean immigrants had professional or managerial backgrounds. See CHANG & DIAZ-VEIZADES, supra note 6, at 18; ONG & HEE, supra note 31, at 7-8.
one-third of Korean Americans engaged in self-owned business. The ratio
between the ownership of unincorporated business firms and the size of the
Korean American population, compared to that of the general U.S.
population, is the highest among all ethnic and minority groups. In other
words, the rate of business ownership among Korean Americans is 71% higher than their share of the general U.S. population. This astonishingly
high rate of business ownership can be attributed to a combination of the
limited professional opportunities for recent immigrants, liberalization of
foreign exchange laws in Korea, profitability (contingent on intensive
individual or family labor), and satisfaction from the ability to control
one's own work environment (particularly for immigrants with college
degrees and professional backgrounds).

In Los Angeles, the establishment of Korean businesses with limited
start-up capital has been concentrated in low-income Latino and African
American communities. While filling a vacuum of economic
development in low-income communities avoided by mainstream investors,
cultural and economic conflicts between Korean and other minority
communities have grown in urban areas throughout major American cities.
Intergroup conflict is manifested in boycotts, stereotypical media
portrayals, and violence that often results in murder. Tensions in South
Central Los Angeles peaked when Korean store owner Soon Ja Du shot and
crushed Latasha Harlins, an African American teenager, and was
subsequently sentenced only to probation. This incident is one of many
factors that led to the 1992 Los Angeles riots, or civil unrest.

Among the various characterizations of the events of April 29, 1992
offered by scholars, activists, and the participants, there is a consensus that
the complex history and modern dynamics of race and class must
counterfactualize any interpretation of the riots. The civil unrest has been
described as a "hybrid social revolt" with dimensions ranging from a
"revolutionary democratic protest" in the spirit of the Civil Rights
Movement, as a "postmodern bread riot" of the urban poor, and as an
"interethic conflict" in which Korean-owned stores in the inner city were
targeted. The substantial damage incurred by Korean American
businesses during the riots is often observed as an affirmation that the

41. Id. at 15.
42. Id.
43. Id. at 18-19.
44. ONG & HEE, supra note 31, at 8.
45. CHANG & DIAZ-VEIZADES, supra note 6, at 63-69.
46. ONG & HEE, supra note 31, at 8; Elaine J. Kim, Home is Where the Han Is: A Korean
American Perspective on the Los Angeles Upheavals, in READING RODNEY KING, READING URBAN
47. See sources cited supra note 46.
racial conflict between African Americans and Korean Americans fueled the flames of the riots, as was commonly depicted on television news media. Critique of the mainstream media’s role in perpetuating stereotypes, the model minority myth, and sensationalizing the racial nature of the conflict has been well articulated by Asian American scholars and community leaders. Understanding the disproportionate damage sustained by this community, while correcting popular views that were perpetuated by the media, is critical to understanding the Korean American community in Los Angeles today.

Korean Americans were the single largest group that sustained damage from the looting and fire bombing during the riots. Damage to Korean businesses was concentrated in Koreatown and South Central Los Angeles, where most of the looting and burning took place. The riots affected various types of Korean businesses, with "swapmeets" and clothing stores ranking first, followed by markets ranking second. The total number of Korean businesses affected by the looting and burning is estimated at 2,000, with damage value estimated at $359 million.

Several reasons explain why Korean Americans sustained the most damage from the riots. Koreatown's proximity to South Central Los Angeles makes it difficult to measure the extent to which Korean-owned businesses were targeted in the looting and fire bombing of the riots. While it is true that some rioters were motivated by racial animosity and intentionally targeted Korean businesses, a larger historical and structural analysis illuminates another explanation. The economic role of Korean merchants in South Central Los Angeles exposed this group to violence that cannot be attributed to the mere ethnicity or racial identity of this group. Korean merchants are only "the latest immigrant group to operate in South Central, replacing the Jews who left in large numbers after the 1965 Watts Riots." Korean immigrants started businesses where suburban flight and deindustrialization left areas impoverished with little capital investment. One can view the events of 1992 and the damage sustained by Korean victims as an inevitable outcome of conservative economic policy.

49. Chang & Diaz-Veizades, supra note 6, at 59-63.
52. Id. at 11.
53. Id.
54. Id. at 12.
55. Id. at 8 (citing Betty Pleasant, A Tale of Two Riots, L.A. Sentinel, May 7-13, 1992, A1, A16).
that failed to revitalize inner city areas after 50,000 industrial jobs were lost in the 1970s. Over a decade following the violence and upheaval of the Los Angeles civil unrest, it is difficult to measure whether there has been significant progress in community economic development, race relations, and broader social and economic justice concerns. While many Korean business owners chose to leave the city of Los Angeles for suburban areas, and some immigrants returned to their native South Korea, economic disparity in Koreatown has grown as Korean businesses and commercial development in Koreatown have boomed, even in national economic downturns. Riots could easily happen again if the city of Los Angeles fails to address this enduring social and economic disparity. Indeed, in Dai Sil Kim-Gibson’s documentary, Wet Sand: Voices from L.A. Ten Years Later, Los Angeles residents question whether conditions have improved, many commenting that the riots could easily happen again.

Assi Super is an example of the successful major commercial developments that have taken hold in Koreatown following the riots. Assi Super was established in Los Angeles in 1998 as a corporate affiliate of Rhee Bros., Inc. (“Rhee Bros.”). Rhee Bros. was founded in 1976 in Maryland by Syngman Rhee, who currently serves as its chairman. With international affiliates in China, Japan, and Korea, Rhee Bros. imports over 10,000 items from Asia and distributes to over 1,500 retailers and wholesalers around the world. The imported goods are sold under the corporation’s five private brand names, each representing the foods of a different Asian country. Rhee Bros. has reported $30 million in sales annually from 1999–2002 and claims that it is the largest Asian food wholesaler and retailer in North America, employing over 1,000 employees. According to the Rhee Bros. website, Syngman Rhee projects gross revenues of over $500 million by 2005. Assi Super was established as one of seven national independent retail companies under Rhee Bros., with Chairman Syngman Rhee’s brother, Daniel Rhee, as its president. The workforce employed at Assi Super is about 50% Latino and 50% Korean.

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56. CHANG & DIAZ-VEIZADES, supra note 6, at 17, 27.
57. Id. at 37; see Mandell, supra note 34.
62. Id.
64. Id.
65. Interview with An Le, Legal Fellow, Korean Immigrants Workers Advocates, in Los Angeles, Cal. (Mar. 23, 2004).
While some studies show that Korean-Latino relations are not as strained as those between Koreans and African Americans, the experiences of the workers and organizers at Assi Super demonstrate that there is an uneasy peace in Koreatown. While casual, common interactions may be amiable on the street, relations can become highly racialized when loaded with disparate interests between employers, employees, and community consumers as third-parties. The IWU campaign presented a unique opportunity for the Korean American community to move Los Angeles forward, furthering the movement for social and economic justice while improving race relations among communities of color. Weak support for the union among Korean immigrants and business owners revealed the reality of the challenges facing workers exploited by the confluence of laissez faire capitalism and racial division in a growing low-wage labor market. The Korean American community failed to embrace values of economic justice over notions of ethnic solidarity and business interests.

Assi Super used notions of ethnic solidarity or loyalty with Korean workers to discourage support for the union, although this may have indirectly fueled Latino support for the union. Korean workers were given marginal privileges since they did not experience the verbal abuse and race-based discrimination faced by Latino workers. When asked if relations have improved since the 1992 civil unrest, Danny Park, Executive Director of KIWA, responded:

Since the Korean community went through the devastating wake up call in '92, Koreans are realizing that it is now the Latino community that we live closer to. The majority of residents in Koreatown are Latino, workers in the low wage industry in Koreatown are Latinos, and very recently, a lot of Korean businesses have begun selling products to Latino customers. . . . Korean and Latino interaction is much more conscious and careful about the relations, but I don't know how much genuine change has happened; we still see a lot of racial slurs used in Korean.

Nevertheless, KIWA’s role as a Korean American community-based organization has helped to de-racialize the labor disputes in Koreatown. KIWA’s role in advocating for Latino workers has allowed the issue to remain a labor dispute on its face, suppressing the inclination to label the dispute as a racial conflict between Latinos and Koreans and to side with

66. The “immigrant hypothesis” is one theory explaining the relatively positive relations between Koreans and Latinos as compared to relations between Koreans and African Americans. The theory identifies the common immigrant ideology as an explanation for the ability of Korean and Latinos to sympathize with each other more than African Americans, who have been systematically oppressed and may feel hostility towards some immigrant groups. CHANG & DIAZ-VEIZADES, supra note 6, at 83 (citing Lucie Cheng & Yen Le Espiritu, Korean Business in Black and Hispanic Neighborhoods: A Study of Intergroup Relations, 32 SOCIOLOGICAL PERSPS. 521-34 (1989)).


68. Interview with Danny Park, Executive Director, Korean Immigrant Workers Advocates, in Los Angeles, Cal. (Mar. 24, 2004).

69. Id.
either group accordingly. KIWA’s Korean American background has enabled it to make significant headway in addressing social justice issues in Koreatown, serving as a “buffer zone where a conscious voice of the community addresses the racial issues within the community before they get out of hand.” The Korean American leadership and history of KIWA impliedly asserts that protecting workers’ rights, including the rights of Latino workers, is in the best interest of Korean Americans, as members of the diverse Koreatown community.

C. KIWA’s Role

There are over half a million Korean Americans living in Southern California locked into an ethnic economy that is doing very well. This population is the size of a typical mid-size U.S. city. Unless you have a deep insight into the political, social, and economic dynamics, it would be very difficult for an outside union to establish and sustain a community-based union. We understand the dynamics within this community.

KIWA was founded in March 1992 with the mission “to empower low wage immigrant workers to develop a progressive constituency and leadership amongst low wage immigrant workers in Los Angeles that can join the struggle in solidarity with other underrepresented communities for social change and justice.” Founded by Korean American labor activists, KIWA fulfilled a unique role that was lacking in the Koreatown community. At the time, it was “the only Asian American group devoted to helping low-income immigrant workers in Southern California.” Since its founding, KIWA has worked to develop a progressive constituency in the Korean American community by advocating for the rights of Korean and Latino workers. All of KIWA’s staff organizers are bilingual or trilingual, many of them speaking English, Korean, and Spanish.

KIWA is one among many workers’ centers throughout Los Angeles and the nation that incorporate multiple advocacy strategies. These range from worker and community organizing to worker leadership development and education. Empowerment is central to KIWA’s approach; KIWA believes that, in order to become empowered, a community of workers must increase its internal decision-making capacity and serve as its own advocates by developing skills that are typically left to community

70. Id.
71. Interview with Paul Lee, Community Organizer, Korean Immigrant Workers Advocates, in Los Angeles, Cal. (Mar. 25, 2004).
organizers. While the Workers’ Empowerment Clinic at KIWA provides legal assistance to workers for work-related problems such as wage and hour violations and workplace injuries, KIWA simultaneously facilitates leadership development for the workers. This has led to the formation of organizations such as the Restaurant Workers Association of Koreatown, a worker-led independent organization that “fights to improve the working conditions of workers for human dignity and to unite all workers to help themselves and their co-workers.” In addition, KIWA has maintained a strong base of community support by fostering community education, student activism, and coalition-building with other progressive community-based organizations.

KIWA’s first major opportunity to further its mission was during the aftermath of the 1992 Los Angeles civil unrest, popularly referred to as the “Sa-I-Gu” by the Korean American community. When the Korean American Relief Fund denied workers relief, KIWA organized forty-five Korean and Latino workers to demand the aid that was denied them by the conservative businessmen who disbursed the funds. The workers eventually received $109,000 in relief funds. Before initiating the recent Market Workers Justice Campaign, KIWA also organized and advocated for workers in both the Los Angeles garment and restaurant industries.

KIWA’s success can be substantially attributed to its willingness to work in collaboration with other progressive organizations on social justice issues beyond labor. While focusing on issues critical to low-wage immigrant workers, KIWA actively engages in public policy advocacy and raising voter awareness on issues of local politics and statewide legislation. In 1997, KIWA, the Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA), and the Pilipino Workers Center (PWC) started a coalition to support each others’ organizing efforts among low-wage immigrant workers in Los Angeles. From restaurant workers to day laborers, these organizations organized communities in order to pressure small business owners to pay back wages, correct health and safety violations, and end verbal and physical abuse. While mainstream labor organizers

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78. “Sa-I-Gu” is the Korean translation of 4-29, which refers to the beginning date of the civil unrest. This terminology follows a Korean tradition of referring to events of political significance by their date. Kim, supra note 46, at 216.


80. See Ha, supra note 75.

81. Interview with An Le, supra note 65.

82. Ochs & Payes, supra note 75.

83. Id.
unions typically ignored workers in these low-wage industries, these culturally fluent community organizations modeled after workers' centers throughout the country proved to be one of the few sources of support and advocacy for these workers.\textsuperscript{84}

The improved working conditions in the Koreatown restaurant industry demonstrate the success of KIWA's strategy that combines worker empowerment, community organizing, and coalition-building.\textsuperscript{85} Observing the extremely high rate of noncompliance with employment law among Koreatown restaurants, KIWA launched the Restaurant Workers Justice Campaign to improve conditions in the nearly 300 Koreatown restaurants employing approximately 2,000 workers.\textsuperscript{86} Despite the involvement of the U.S. Department of Labor in 1998 (when it cited forty-three Koreatown restaurants for wage and overtime pay violations), KIWA found that it was uniquely situated to effect community change when it began to advocate for Latino and Korean workers against Korean-owned restaurants.\textsuperscript{87} Utilizing boycotts to apply community pressure, KIWA won several high-profile settlements with well-known Koreatown restaurants, resulting in increased employer willingness to settle workers' subsequent claims.\textsuperscript{88}

KIWA's decision to initiate a campaign to establish a labor union in Koreatown was made possible by the growth of KIWA's capacity as well as the development of the Koreatown local economy. While previous campaigns had been directed at small businesses in Koreatown, KIWA believed that immigrant businesses such as Koreatown supermarkets were profitable and established enough to sustain labor contracts with workers:

We felt, and still do, that the Korean community and Koreatown is ripe for this because while it is recently immigrated, it is established enough and developed [sic] a social, political and economic business infrastructure. . . . Meanwhile, the workers of these businesses remain stuck at minimum wages, with no voice or protection from the prosperous businesses and their owners. We believe that the community is developed enough to sustain a community-based labor union made up of workers who play a role in setting terms of employment. These markets can afford a collective bargaining agreement.\textsuperscript{89}

The vision to establish the IWU marked a significant departure from previous campaigns that established non-union associations of workers.\textsuperscript{90}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.}
\item See generally Ha, supra note 75.
\item Dina Berta, Study: Koreatown Workers Underpaid, NATION'S RESTAURANT NEWS, Jan. 15, 2001, at 14; CHANG & DIAZ-VEIZADES, supra note 6, at 89.
\item Interview with Paul Lee, supra note 71.
\item Interview with Danny Park, supra note 68.
\end{enumerate}
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The economic development of Koreatown and the size and profitability of Koreatown supermarkets enabled KIWA to engage in labor organizing as a community-based organization. KIWA targeted the markets for union organizing because they typically employ 80 to 100 employees in each store. Unlike small restaurants that are often family-run, KIWA believed that the six major Koreatown supermarkets could sustain a labor contract with its workers. The campaign's goal was to establish a union in which workers would be able to bargain collectively and negotiate contracts with the employer. As a community-based organization, KIWA's role was to assist, educate, and support the workers who would elect their own officers and function as an independent local union. Without models to follow, KIWA and the workers developed an innovative vision for IWU that would focus on improving working conditions for low-wage immigrant workers with future goals of representing workers at multiple businesses and low-wage industries throughout Koreatown.

As an independent union targeting a local economy, the IWU differs from mainstream trade unions that are usually based in specific industries in various geographic areas. Danny Park explained, "The IWU has drawn its support through the Market Workers Justice Campaign in Koreatown, so why leave it behind and try to organize somewhere else, leaving that power behind?" KIWA utilized its unique resources and experience as a progressive community-based organization to support a union drive that was the first of its kind in Koreatown.

The IWU hoped to eventually organize workers in various low-wage industries in Koreatown, such as those working in car washes or local manufacturing industries. KIWA and IWU organizers knew that once the campaign gained momentum and as more businesses were organized, it would become less likely that these businesses would be held back by competition with their unorganized counterparts. The IWU would not only draw its strength from having Koreatown supermarkets organized, it would maximize its impact by organizing multiple low-wage industries in Koreatown, thus improving the quality of life for Koreatown's working poor. As a community-based union steered by the workers themselves, the IWU aspired to address issues beyond the workplace, such as housing, school, and immigration issues—effecting broad community change by way of worker empowerment.

91. Id.
92. Id.
93. Id.
94. Id.
95. Id.
96. Id.
97. Id.
98. Id.
99. Id.
While KIWA recognized the challenges inherent to traversing such unexplored territory in union organizing, KIWA utilized its unique experience and insight into social and economic dynamics in Koreatown to guide this work. Paul Lee, a former KIWA Community Organizer, described the IWU as "very ambitious—an attempt to establish a community-based union as a permanent institution—to represent the voice of workers within the confines of an ethnic enclave." As a Korean American organization that has struggled with workers in Koreatown for over ten years, KIWA's record demonstrates its ability to overcome the challenging disparities of power in Koreatown.

III. THE IWU CAMPAIGN

As support among workers grew in the first few months of organizing, the IWU filed a petition for an election with the NLRB on November 15, 2001. On the same day, Communities in Solidarity with Immigrant Workers, a community coalition, held a press conference with the IWU to announce its support for the workers' demands. A delegation composed of workers and community members presented the Assi Super management with a demand for recognition of the IWU.

Assi Super immediately responded with a strategic campaign to weaken support for the union before the election, utilizing common union-busting tactics in consultation with a law firm with expertise in employer defense and labor management. As is commonly found in anti-union campaigns, the employer formally expressed interest in the employees' working conditions while discrediting the interests of union organizers by casting them as outsiders. Informally, Assi Super engaged in strategic actions that are prohibited practices under the NLRA. Assi Super communicated its formal campaign message through information sessions in which the management promised increased wages and vacation time if the workers voted against the union. Informally, the Assi Super management aggressively engaged in such prohibited practices as discharging workers who supported the union and pressuring workers to vote against the union on the day of the election (lobbying for votes twenty-four hours prior to the election is prohibited under the NLRA). As a part of its anti-union strategy, the management effectively divided workers by race, building on racial divisions that already existed.
between the Korean American and Latino communities in Koreatown. Assi Super invoked notions of ethnic solidarity to discourage Korean workers and community members from supporting the union. The management characterized the union campaign as a Latino cause, making comments such as:

- It is a Latino union, it’s the Latinos who want to organize a union, why would you want to be in a union that is run by Latino workers?
- Look at the IWU President, he is only a Latino box boy, we have to help each other as Koreans.

According to Park, the management’s strategy to racialize the labor conflict was effective: “if you join the union, since it is a Latino union, you will just be paying fees and the union will work for interests of Latinos.”

On March 9, 2002, the election at Assi Super resulted in a tie, with the NLRB officially declaring “no result.” The IWU promptly filed 22 ULP charges and objections to the election result with the NLRB. The IWU alleged that the employer violated section 8(a)(1) of the NLRA by offering workers more flexible working hours in exchange for ceasing to wear union t-shirts, by terminating, suspending, or disparately changing the terms of employment of those who support the union, and by interrogating employees about their intention to vote for or against the union.

In addition, the IWU filed 15 challenges and objections under section 9 of the NLRA. These claims alleged that during the election, the managers cast votes, blocked entrances to the voting area, and instructed workers to go home during the election.

Following the filing of ULP charges, the NLRB may choose to investigate, depending on the evidence and nature of the claims. The Board may choose to proceed and represent the workers in front of an Administrative Law Judge (ALJ). However, while this process was underway, the IWU chose to withdraw the charges because pending claims would preclude another election until they were fully resolved. After four ULP claims were dropped, the union settled seventeen out of the eighteen remaining claims with Assi Super.

Despite the union’s confidence that it could succeed with the ULP charges, it opted to settle, agreeing to settlement terms that were essentially the same as the remedies available through the NLRB complaint process.

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107. Interview with Danny Park, supra note 68.
109. Interview with Danny Park, supra note 68.
110. Id.
111. Interview with Steve Arredondo, supra note 2.
112. Id.
113. Id.
114. Id.
115. Id.
116. Id.
The employer was required to post notices stating that it would no longer engage in the prohibited practices that were charged in the claims. This illustrates one of the inherent weaknesses of labor law: the available remedy is so deficient that its benefits are outweighed by the expense and delay of pursuing a claim. The simple requirement that the employer post a message is hardly restitution for the potential damage effected by the employer's unfair and prohibited practices. Due to this limited remedy, it is ultimately more strategic and profitable for an employer to engage in prohibited practices in order to thwart a successful union campaign than to acquiesce and recognize the union.

After a week of hearings, the IWU withdrew the remaining challenges and objections to the employer's conduct during the election. Pursuing the adjudication of the challenges and objections would have fatally stalled the campaign. If the workers were to fight for three or four years and win the final judgment, the result would be the right to another election; the workers would be right back where they started, but would have lost significant time and momentum in the organizing campaign. After settling and withdrawing their ULP and challenge claims, the IWU ultimately decided against filing for another election due to the inherent flaws of the election process. Assi Super could easily engage in prohibited practices again, leaving the IWU to bring claims for limited remedies in front of the NLRB, creating a frustrating Catch-22.

Based on this experience, Steve Arredondo, who represented the workers at NLRB hearings, observes, "If you have to go to the NLRB, you've already lost because it is so weak. This is why most unions don't use elections." Due to the administrative delay and weak remedies afforded by the NLRA, big companies like Assi Super have much to gain by violating the NLRA through unfair labor practices, diminishing legal pressure to recognize the union. Even when the NLRB finds the employer violated the Act, it does not provide remedies that effectively deter the employer from further engaging in unlawful action.

Following the settlement and withdrawal of its claims against Assi Super, the IWU shifted its strategy, hoping to gain union recognition through a "card check" neutrality agreement. Through the card check process, an employer agrees to recognize a union if the majority of employees sign pledge cards over an extended period of time in place of casting ballots on a designated election day. While the union gathers

117. Id.
118. Interview with An Le, supra note 65.
119. Interview with Steve Arredondo, supra note 2.
120. Id.
121. Id.
122. Interview with An Le, supra note 65.
signatures, the employer promises to remain neutral throughout the recognition campaign. By avoiding the NLRB election process, unions are able to evade the often successful efforts of employers to manipulate and coerce employees to vote against the union.

While union membership has steadily declined in the United States, unions utilizing the card check neutrality agreements have won significant victories. In Los Angeles, the Service Employees International Union (SEIU) successfully used card check recognition in their well-publicized "Justice for Janitors" campaign in 2000. However, the legitimacy of card check recognition has been challenged and is part of a consolidated case awaiting review by the NLRB. The NLRB will examine whether card check certifications should be subject to an immediate decertification election, whereas the current "recognition bar doctrine" bars a decertification election for one year where the employer voluntarily recognized the union under card check recognition. Although the lawfulness of card check recognition is not directly at issue, labor leaders are concerned about the potential ramifications of a decision that could make way for increased employer challenges that would render the card check approach unworkable.

While labor leaders nervously wait for a decision by the Board—currently dominated by Bush appointees—Democrats and Republicans in Congress have proposed competing bills regarding card check recognition. The Democrats' proposal would sanctify card check as the NLRB's preferred method for gauging union support, while the Republican bill would outlaw the card check approach altogether, forcing unions to conduct representative elections to win recognition. The card check recognition is one of union organizers' few remaining tools for gaining union recognition in a legal system wrought with barriers. The continuing feasibility of this approach will likely be determined by the politics of the prevailing party in Congress.

After the "no result" outcome of the March 2002 election, Assi Super's management more aggressively resisted IWU organizing while ignoring community protest of its anti-union action during the campaign and election. The following month, the Assi Super fired Chin Yol Yi, one of the few publicly pro-union Korean workers. While Yi claimed that he was terminated because he was the only Korean worker who was pictured

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124. Id.
125. Id.
127. Id.
129. Cleeland, supra note 126.
130. Id.
131. Bunn, supra note 20.
in a flier urging support of the union, the management claimed that “Yi had given away several dollars’ worth of sashimi to a customer.” In response, the IWU and community supporters began to hold regular pickets at the supermarket, protesting this termination and Assi Super’s extensive record of unfair labor and employment practices.

One of the most detrimental episodes during the campaign occurred in July 2002 when Assi Super used Social Security Administration (SSA) No-Match letters to suspend 56 workers. Assi Super used the No-Match letters, issued under a new SSA policy, to undercut union support. Upon receipt of the letters, Assi management placed fifty Latino and six Korean workers on “non-disciplinary, indefinite suspension,” effective August 1, telling workers that their names and social security numbers did not match SSA records. Despite the No-Match letter’s instruction to employers to not take adverse action against the workers, Assi management gave workers seven days to bring back valid Social Security documents or face termination. When workers attempted to report to work as usual on August 1, the management called the police department; police then removed the suspended workers from the premises under threat of arrest.

KIWA and the IWU responded by calling for a community boycott of Assi Super, but the threat to the livelihood of pro-union workers had already critically damaged union support.

Assi Super’s use of the SSA No-Match letters and the impact of the Supreme Court decision in Hoffman dealt a significant blow to the campaign. While suspended workers listed in the No-Match letters perceived their suspension as retaliation for pro-union activity, undocumented workers were further discouraged from supporting the campaign due to the inability of attorneys and organizers to guarantee their right to reinstatement or back pay under Hoffman. These two developments, coupled with the broader social and political challenges facing low-wage immigrant workers, crippled the IWU campaign. According to Lee, “Agencies that are not bound by Hoffman, are still interpreting the decision. Coupled with the SSA No-Match letter, this gave employers a bullet-proof way to fire immigrant workers without any legal consequences.”

These legal developments are especially debilitating in immigrant communities such as Koreatown, where the law has often wielded more
influence than community pressure.\textsuperscript{139} This dynamic influenced the IWU’s initial decision to seek recognition through an election, despite the advice of unions who typically use card check recognition. KIWA organizers believed that a clear legal mandate from the NLRB would carry more weight in the Korean community than card check recognition.\textsuperscript{140} In past campaigns, KIWA organizers utilized the law as one of the most powerful tools in changing behavior among immigrant employers.\textsuperscript{141} Lee explains, “For immigrants who have different cultural and historical perspectives on social and economic justice values, legal requirements can be more effective than community or public pressure.”\textsuperscript{142}

Existing weaknesses in employment and labor law combined with the impact of Hoffman and SSA No-Match letters erected seemingly insurmountable barriers for the IWU.\textsuperscript{143} “This is the ground floor that has dropped and we have little control over it. Times are tough and the trade and labor laws are stacked up against us.”\textsuperscript{144}

IV. LEGAL CHALLENGES FACING LOW-WAGE IMMIGRANT WORKERS

Despite Assi Super’s clear violations of labor, employment and civil rights laws, the confluence of legal, social, and political challenges relegated Assi workers to a contentious struggle in their pursuit of union recognition and restitutionary remedies. Preliminarily, the IWU campaign at Assi Super should be understood in the larger historical context of the American labor movement’s decline in the late twentieth century. Legal scholarship examining causal theories for this decline range from the labor movement’s failure to accommodate changing demographics to administrative and judicial hostility towards union protection.\textsuperscript{145} Next, recent developments in American politics following the terrorist attacks of September 11th have negatively impacted civil rights and liberties, resulting in a surge of anti-immigrant policies that have significantly affected immigrant workers’ rights.

A. Weaknesses in Labor Law

There is a general consensus that the labor movement has experienced significant decline in the late twentieth century.\textsuperscript{146} The decline of union membership has been accompanied by the steady loss of working class

\textsuperscript{139} Interview with Danny Park, \textit{supra} note 68.

\textsuperscript{140} Interview with Vy Nguyen, \textit{supra} note 4.

\textsuperscript{141} \textit{Id.}

\textsuperscript{142} \textit{Id.}

\textsuperscript{143} \textit{Id.}

\textsuperscript{144} \textit{Id.}

\textsuperscript{145} See infra Part III.A.1.

power to advocate for fair wages and protection from unjust or discriminatory treatment by employers.\textsuperscript{147} Many scholars attribute the labor movement's decline to the law's failure to adapt to the changing workforce and economy in a postindustrial era.\textsuperscript{148} While legal scholars, labor leaders and union organizers have formulated proposals for reform, such proposals face political hostility as well as the challenge of increasing globalization and deregulation of the American economy.\textsuperscript{149}

Among the causal theories explaining the decline of the labor movement, there seems to be agreement that labor law itself, embodied in the National Labor Relations Act (NLRA), is one of the most debilitating forces in the labor movement. Based on a field study of two "heartbreaking" failed union organizing elections, Julius Getman explains the weakened state of the labor movement using two factors: a bias in labor law favoring employers and internal problems of unions.\textsuperscript{150} Getman provides a structural analysis supporting his argument that the law is biased in favor of employers.\textsuperscript{151} This problem is exacerbated by internal weaknesses of unions that include internal politics, stereotyped thinking, and the need for broader solidarity.\textsuperscript{152} Marion Crain adds a critique of labor law's historical "preoccupation" with serving the interests of blue-collar white males.\textsuperscript{153} More recently, successful union organizing initiatives have been directed towards the increasingly diverse labor force with an awareness of the intersecting identities of class and race.\textsuperscript{154} The pro-employer bias of labor law and the internal bias of dominant unions begin to explain the disparate lack of protection afforded to low-wage immigrant workers through union organizing. While the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) recently adopted policy in support of the full protection of immigrant workers,\textsuperscript{155} these efforts are tainted by the organization's racist and anti-immigrant history.\textsuperscript{156}
1. Pro-Employer Bias in Labor Law

The landmark passage of the NLRA in 1935 afforded most workers the right to organize unions and bargain collectively. Section 7 of the NLRA grants workers the right to publicly support unionization and submit grievances without fear of reprisal. Section 8 prohibits employers from engaging in unfair labor practices (ULP) such as punishing or discriminating against employees who exercise their section 7 rights. Despite these protections, workers’ rights under the NLRA are routinely violated through both legal and illegal means. It is common for employers to fire workers who support unionization, threaten to shutdown plants upon unionization, force workers to attend anti-union presentations, and hire outside consultants to conduct anti-union campaigns. While these anti-union practices continue unabated, the Board and the courts have continued to limit the scope of collective bargaining, reduce the protection available through collective agreements, and broaden the regulation of union campaign tactics and speech.

The NLRB is the administrative agency charged with enforcing the NLRA. The NLRA has jurisdiction over labor disputes where the employer’s business activity falls within the meaning of commerce, or “affecting commerce,” under the Act. The Board has two primary functions: (1) to determine employee representatives within industries under the jurisdiction of the NLRA; and (2) to decide whether a particular challenged activity constitutes an unfair labor practice. The NLRB is composed of a General Counsel and a five-member Board. The President appoints NLRB Board Members, endowing the position with overt political character. There is an expansive staff in regional offices led by Regional Directors who have delegated authority to determine representation cases and issue complaints based on ULP charges; these decisions are subject to limited review by the Board or General Counsel.

Under NLRB procedures, a union seeking to represent employees must file an election petition that is supported by a “showing of interest” of

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162. The standard for “affecting commerce is the broad Commerce Clause test under Constitutional law. See NLRA § 2(6)-(7); COX, supra note 157 (discussing jurisdiction of the NLRB).
163. COX, supra note 157, at 104-14.
164. Id. at 104.
165. See id.
166. Id. at 104-14.
at least 30 percent of the employees in the proposed bargaining unit. By either consent or hearing, an election date will be scheduled and conducted by the Regional office. The election typically takes place at the workplace during working hours in order to maximize turnout. The Regional Director can either set aside or issue rulings regarding any challenged votes. Decisions made by the Regional Director are subject to review by the Board.

Both unions and employers can file charges of unfair labor practices with the NLRB when one party claims that the other has engaged in activity prohibited under section 8 of the NLRA. Section 8(a)(1) makes it unlawful for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7,” including the right to join a union. Where a union successfully brings an 8(a)(1) charge against an employer, the ALJ typically orders the employer to post a notice of fault, enjoining them from any future unlawful action. When the NLRB finds that the employer has engaged in substantial ULPs, it may issue an order to bargain with the union if the union had a majority card count and the severity of the unfair labor practices committed by the employer make a fair election infeasible. However, bargaining orders have proven to be less effective than might be expected and often do not lead to a contract. Congruently, employers may file complaints with the NLRB alleging that the union has engaged in ULPs under section 8(a)(3). Unions and employers may also challenge the conduct of an election under section 9, a charge that might result in an NLRB order setting aside results of the election and ordering a new one to take place.

During the initial stages of organizing activity, the NLRB’s intervention upon ULP charges has been ineffective for unions and advantageous to the employer. The restricted remedies available through the NLRB do not effectively discourage employers from engaging in ULPs. Employers may knowingly violate workers’ rights under section 7 using various unfair labor practices because benefits of the violations, such as diminishing union support, are not significantly offset by imposed penalties such as posting a notice of fault in the workplace or avoiding further

167. Id. at 111.
168. Id.
169. Id.
170. Id.
171. Id.
172. Id. at 112.
175. See Getman, supra note 102, at 67-68.
176. THE DEVELOPING LABOR LAW, supra note 174, at 375.
violations in the future. Meanwhile, the time and expense of filing ULP charges take a significant toll on both union and campaign. In addition to the narrow remedies available for ULP charges, the NLRB has limited authority to remedy employer violations in the election process. In such cases, the Board simply sets aside the election and permits another to take place. Here, again, if an employer prevents a successful union election through unlawful means, an NLRB finding in the union’s favor will have limited consequence. The impotent nature of these remedies favors employers who bear marginal risk by violating workers’ rights under the NLRA.

In addition to the weak remedies and enforcement power of the NLRB, both the Board and the courts continue to harbor an anti-labor bias that has systematically undercut the workers’ right to organize. The Board and the courts, the administrative and judicial bodies charged with interpreting the NLRA, have exercised their power to narrow the NLRA’s scope and protection in collective bargaining and to limit the enforcement of collective bargaining agreements. While the obligations of unions have increased (e.g., obligation to nonmembers, increased liability to members for action taken in good faith), employers’ rights have been expanded in areas such as First Amendment rights and the right to terminate jobs in response to union activity. While employers have increased their use of consulting firms and sophisticated union-busting techniques, the NLRB and the courts have failed to adequately exercise their power to protect workers’ rights that were embodied in the original spirit of the NLRA.

The combined weaknesses in coverage and biased enforcement of labor law result in an anti-union effect that can be attributed to the decline of the American labor movement. The ineffective nature of remedies provided under the NLRA combined with the pro-employer interpretation of the law further exacerbates the imbalance of power and resources between employers and workers. Unfortunately, any possibilities of substantial legislative or policy reform remain bleak. This “broken” nature of labor law has frustrated workers and worker advocates, rendering provisions of the NLRA useless in effecting their intent.

177. Getman, supra note 102, at 67.
178. Getman, supra note 102, at 69 n.65 (citing Congressional hearings affirming the trend towards anti-union bias of the NLRB and the courts).
180. Getman, supra note 102, at 68-69.
181. Id. at 45.
182. The last significant labor law reform effort failed after a filibuster in the Senate, despite the Democratic dominance of the White House and both houses of Congress. Harper warns that any reform proposal must reverse union decline without provoking a political backlash that would again negate union gains. Harper, supra note 147, at 103 n.3, 104.
183. The attorney and Law Fellow representing Assi Super workers both expressed this view.
2. "Colorblindness": Race-Neutral or White-Privileged?

In recent years, organized labor has made efforts to be more inclusive by serving the needs of immigrants and communities of color, departing from its negative history of excluding these groups. While some unions have become more inclusive in order to adapt to the increasingly diverse workforce, more progressive unions have forged stronger progressive pathways by aligning themselves with civil rights groups and coalition-building across social justice issues in order to build a common vision that integrates racial and economic justice issues. Although organizing around immigrant and ethnic issues has led to successful campaigns, unions that utilize race-conscious strategies risk being charged with unfair labor practices and having union elections overturned based on the law’s requirement of “colorblind” organizing.

The “colorblind” or “race-neutral” doctrine was adopted by the NLRB in the absence of an anti-discrimination clause in the NLRA. An anti-discrimination clause that would have prohibited union discrimination of African Americans was included in a draft of the proposed legislation but eliminated due to the AFL’s protest. In addition, the NLRA did not extend coverage to workers in agriculture and domestic services, industries dominated by African Americans at the time of enactment. Inevitably, employers used inflammatory racial appeals to discourage union support by provoking fear of integration and job loss among white workers. Years after the enactment of the NLRA, the lack of an anti-discrimination clause left unions with no further options but to file typical ULP and section 9 charges when seeking to enjoin employers from appealing to racial sentiments in organizing campaigns. Unions began to argue that the NLRB should prohibit employers from using racial prejudice to discourage union support by treating it as a special violation.

In 1962, the NLRB responded with its decision in Sewell Manufacturing Company, where it announced that it would not tolerate “appeals or arguments which can have no purpose except to inflame the racial feelings of voters in the election.” Cases following Sewell used this doctrine to set aside elections where employers used racial speech to divide workers, and to uphold election results when unions used racial solidarity.

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184. See Crain, supra note 144.
185. Crain refers to this type of union organizing as “civil rights unionism.” Id. at 213-14, 223-28.
186. Id. at 229.
187. Id.
188. Id.
189. Id.
190. Id. at 230.
191. Id.
192. Id. at 231.
and racial justice issues to unite workers during the Civil Rights Movement.\textsuperscript{194}

Although the \textit{Sewell} decision was intended to prevent employers from using inflammatory racial speech, employers began using this doctrine against unions that utilized racial justice values to unite workers during the civil rights movement of the 1960s.\textsuperscript{195} While the Board initially distinguished employer efforts to divide workers through racial bigotry and union appeals to racial pride, some federal courts have applied a "racially neutral" standard to examine racial inflammatory appeals, substantially limiting the ability of unions to equate racial justice with workers' rights.\textsuperscript{196} The inconsistent application of the inflammatory appeals doctrine has created substantial unpredictability for unions, where progressive unions run the risk of having elections overturned when appeals to racial solidarity or insubordination are invoked in organizing campaigns.\textsuperscript{197} In sum, employers who appeal to racial sentiments have less at risk than unions that utilize race in organizing strategies; a typical remedy issued against an employer is an election re-run, where delay works to the employer's advantage.\textsuperscript{198}

In a broader perspective, the "race-neutral" standard applied by courts in adjudicating inflammatory appeals issues represents labor law's presumption that labor is race-neutral, or white by default.\textsuperscript{199} Requiring race-neutral organizing ignores the reality of the daily intersectional experience of low-wage workers based on their race, ethnicity, gender, and immigrant status.\textsuperscript{200} Presuming that labor law can and should be "colorblind" in its application benefits white workers and employers who benefit from white privilege, while constricting the ability of union organizers to appeal to the stark reality of nonwhite workers. This formalistic approach proves to be an abstract theory when applied to real case studies such as the IWU campaign at Assi Super, where race, immigrant status, and class significantly impact the workers' access to legal protections and ultimately determine the outcome of a union organizing campaign. Although Assi Super did not bring an inflammatory appeals charge against the IWU for invoking racial solidarity in organizing efforts,

\textsuperscript{194} Crain, \textit{supra} note 144, at 234-35 (citing \textit{Archer Laundry Co.}, 150 N.L.R.B. 1427 (1965)).
\textsuperscript{195} Id.
\textsuperscript{196} Id. at 237-39 (citing \textit{Carrington South Health Care Center v. NLRB}, 76 F.3d 802 (6th Cir. 1996)).
\textsuperscript{197} Id. at 241-42.
\textsuperscript{198} Id. at 243.
\textsuperscript{199} See id. at 251.
it is clear that Assi Super used such racist speech to discourage union support without fear of reprimand by the NLRB.

B. Anti-Immigrant Developments Post-September 11

In early 2001, workers' rights and immigrants' rights groups throughout the country were part of a campaign calling for the "legalization" or amnesty of undocumented immigrants. In Los Angeles, KIWA was part of Multi-ethnic Immigrant Worker Organizing Network (MIWON), an alliance of organizations that actively advocated for legalization of undocumented immigrants. The total undocumented population in the United States was estimated at 7.8 million in 2001, with eighty percent of this group working in urban areas. In March 2001, talks between Presidents George W. Bush and Vicente Fox of Mexico sought to "legalize" undocumented workers in the United States and authorize the flow of future migrants across the U.S.-Mexico border. In Los Angeles, MIWON organized a 4,000 person march calling for broad legalization. Momentum increased as coalition-building continued through shared stories and learning of common histories, resulting in the development of a multiethnic "Immigrant Workers' Rights" platform.

When the terrorist attacks occurred on September 11, 2001, the legalization campaign lost all momentum. Increased scrutiny of immigration policies and hostility towards immigrants grew with concerns regarding "homeland security." A KIWA organizer noted the dramatic change brought about by the nation's response to September 11: "Now it's 2004, almost three years later, and it is conceivable that we might have had a legalization amnesty in place right now if it weren't for September 11."

Among major legislation and policy changes following September 11, two developments have significantly changed the rights of undocumented immigrants in the workplace. In 2002, the Supreme Court held in *Hoffman Plastic Compounds, Inc. v. NLRB* that an undocumented worker is not entitled to a backpay award if the worker is unlawfully terminated in retaliation for union activities. Also in 2002, the Social Security Administration (SSA) increased its issuance of No-Match letters, issuing

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201. Ochs & Payes, supra note 75.
203. Ochs & Payes, supra note 75.
205. Interview with Paul Lee, supra note 71.
206. Back pay is comprised of wages he or she would have earned had the employer not fired him or her.
almost seven times as many letters to employers than in previous years.\textsuperscript{208} These letters led to job loss and insecurity for both documented and undocumented workers who remain vulnerable to the actions of misinformed or opportunistic employers. These recent developments demonstrate how the precarious position of immigrant workers can quickly grow worse in a politically hostile climate where immigrants are viewed as a threat to "homeland security."

\textbf{1. Hoffman Plastic Compounds, Inc. v. NLRB}

In \textit{Hoffman}, the Supreme Court overruled the NLRB's award of backpay to Jose Castro, an undocumented worker who was unlawfully fired after he supported a union-organizing campaign.\textsuperscript{209} The NLRB had awarded Castro backpay, applying NLRA protections to undocumented workers and other workers equally, concluding that this was the most effective way to "accommodate and further the immigration policies."\textsuperscript{210} The Court held that the NLRB had overstepped its power by awarding Castro a reward of backpay because it violated the Immigration Reform and Control Act of 1986 (IRCA), federal law prohibiting employers from hiring undocumented workers.\textsuperscript{211}

This decision has prompted a flurry of critical responses from the labor and immigrants' rights communities.\textsuperscript{212} Although \textit{Hoffman} narrowly held that an undocumented immigrant cannot receive backpay for employer violations of the NLRA, employers have launched a multifaceted attack on other workers' rights under the Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, and parallel state laws, using \textit{Hoffman} as precedential authority.\textsuperscript{213} \textit{Hoffman} has encouraged employers to retaliate against employees who assert their rights under labor law, resulting in a "chilling effect" that discourages workers from seeking enforcement of remaining workplace rights.\textsuperscript{214} After the \textit{Hoffman} decision, the

\textsuperscript{208} Paul R. Penny, III, Comment, Fire First and Ask Questions Later: What is the Effect of the Social Security Administration's "Mismatch Letter?", 5 SCHOLAR 355, 365 (2003); Under Homeland Security, supra note 204

\textsuperscript{209} The employer laid off four employees who supported the union in violation of §8(a)(3) of the NLRA. 535 U.S. at 140.

\textsuperscript{210} \textit{Id.} at 141-42.

\textsuperscript{211} \textit{Id.} at 151.


\textsuperscript{214} NAT'L EMPLOYMENT LAW PROJECT & MEXICAN AMERICAN LEGAL DEFENSE AND EDUC. FUND, USED AND ABUSED: THE TREATMENT OF UNDOCUMENTED VICTIMS OF LABOR LAW VIOLATIONS SINCE HOFFMAN PLASTIC COMPOUNDS V. NLRB (2003), available at
Interamerican Court of Human Rights, the international human rights court for the Americas, held that a country violates international human rights law when it fails to include undocumented workers in its internal laws.\textsuperscript{215}

2. Social Security Administration No-Match Letters

The SSA first began notifying employers of discrepancies in Social Security filings through "Mismatch" or "No-Match" letters in 1993.\textsuperscript{216} The purpose of the letter is to inform the employer that there is a discrepancy between the social security number listed on the employer's W-2 form and the SSA's records for the employees listed in the letter.\textsuperscript{217} In 1993, the SSA only sent mismatch letters to employers who reported annual wage reports of which at least 10% were "mismatched."\textsuperscript{218} In 2003, the SSA began to send No-Match letters to employers who had one or more reported employees with a mismatch, resulting in a significant surge in the issuance of No-Match letters.\textsuperscript{219}

The failure of SSA No-Match letters to provide clear instructions has led to a lack of awareness among employers, often leading to the adverse treatment of immigrant workers.\textsuperscript{220} While warning of potential fines for knowingly employing unauthorized workers, the letters warn that employers should not take adverse action against listed employees solely based on the receipt of the No-Match letter.\textsuperscript{221} After receipt of a No-Match letter, employers are essentially left with two choices: terminate listed employees or inquire about the employees' Social Security identification records.\textsuperscript{222} Both of these choices can cause problems in employers' relationships with their employees.

While employers can be fined for knowingly employing unauthorized workers under IRCA, they can also be charged with wrongful termination or discrimination claims by employees listed on a No-Match letter.\textsuperscript{223} In spite of the potential threat of workers' claims, an employer may elect to terminate suspected unauthorized workers without fear of legal ramifications based on a presumption that immigrant workers lack adequate access to the law.\textsuperscript{224} In the context of low-wage workers, the manual or low-skill work that may be involved enables employers to terminate employees without a significant loss of investment in training or benefits.

\textsuperscript{215} Id.
\textsuperscript{216} Penny, supra note 208, at 363.
\textsuperscript{217} Id. at 362.
\textsuperscript{218} Id. at 364-65.
\textsuperscript{219} Id.
\textsuperscript{220} Id. at 364.
\textsuperscript{221} Id.
\textsuperscript{222} Id.
\textsuperscript{223} Id. at 365-66.
\textsuperscript{224} See id. at 367.
The increased use of SSA No-Match letters has added yet another vulnerability to the legal challenges facing low-wage immigrant workers in the United States. The potential impact of these letters was illustrated when Assi Super used SSA No-Match letters to suspend pro-union workers in the middle of the IWU organizing campaign, when the suspensions struck a severe blow to IWU campaign, nearly halting its momentum.

C. Divergent Strategies: Balancing Litigation and Organizing

While the IWU campaign at Assi Super continued to garner support for the union and demand recognition from the employer, the workers' lawyers filed a federal class action lawsuit seeking damages and injunctive relief, alleging employment discrimination, employer negligence, wage and hour violations, and individual claims of assault and battery. Following investigation of the workers' complaints, the EEOC issued a “right to sue” letter in January 2002, concluding that Latino workers were subject to discrimination prohibited under Title VII of the Civil Rights Act of 1964.

Specifically, the EEOC found that Latino workers as a class were subject to harassment, a hostile work environment, and denied employment based on their national origin. The lawsuit included discrimination charges on behalf of Latino plaintiffs and wage and hour claims on behalf of both Latino and Korean workers. The wage and hour claims alleged violations of state and federal minimum standards regarding overtime pay and mandatory rest periods. Although the wage and hour claims provided race-neutral motivation to support the IWU campaign because of the impact on a cross-section of the entire workforce, tensions grew between the litigation and organizing strategies when the plaintiffs' interests diverged from those of other Assi workers, dividing support for the union.

Steve Arredondo, an attorney representing the workers, identified two vital considerations in determining the role of litigation in a community organizing campaign: (1) community organizing, and not litigation, should be the focus of the campaign; and (2) interests of the community organizing strategy and the litigation strategy might well conflict. Lessons learned from the IWU campaign challenge traditional notions regarding the power of civil litigation to further social and economic justice. Although Arredondo made efforts to involve workers in the

225. Second Am. Compl. for Damages and Injunctive Relief at 3, Lara v. Assi Super, Inc., Central District of California (No.: CV 03-5131 SVW (VBKx)) [hereinafter "Second Am. Compl. for Damages and Injunctive Relief"].
227. See generally Second Am. Compl. for Damages and Injunctive Relief.
228. Second Am. Compl. for Damages and Injunctive Relief at 9-17, Lara v. Assi Super, Inc., Central District of California (No.: CV 03-5131 SVW (VBKx)).
229. Id.
230. Interview Steve Arredondo, supra note 2.
231. Id.
litigation, the most effective and meaningful role for workers was in direct campaign organizing, where workers could be visible in the forefront of the campaign.\textsuperscript{232} An over-reliance on litigation would circumscribe the campaign's success.

Increasing community support for Assi workers through organizing was critical to the IWU's ability to pressure the employer to change its practices through litigation.\textsuperscript{233} KIWA and IWU organizers hoped that demanding local community support for the workers would influence the employer to avoid delay, enabling the workers to pursue their legal claims expeditiously.\textsuperscript{234} As a result, community organizing was one of the most important and challenging aspects of the campaign. According to Arredondo, the community needed to "shut the market down" and exert public pressure on the corporation to push the case through the courts.\textsuperscript{235} Without community pressure through boycotts and other actions, the employer would continue to prolong legal proceedings as much as possible. One of the main challenges facing the IWU campaign was the difficulty of mobilizing the Korean American community to support the Assi workers; this lack of support from Assi Super's consumer base significantly debilitated the implementation of both the organizing and litigation strategies.

Meanwhile, the community organizers were frustrated by the slow and unpredictable timeline of the litigation trajectory. Unexpected developments in litigation caused delays as events such as press conferences and rallies were cancelled or rescheduled on short notice, causing frustration and tension to develop among attorneys and staff organizers alike.\textsuperscript{236} Litigation steps did not easily fit within the timeline of the community campaign, revealing another difficulty in balancing the organizing campaign and litigation strategy.

Disagreements between workers and organizers also often placed attorneys in a difficult position. As legal representatives of the workers, attorneys are required to serve their clients' interests—but this obligation becomes complicated when workers and organizers disagree about campaign strategy. Attorneys must step back and consider the indirect impact of a particular legal strategy on the community organizing strategy. In a community organizing campaign, attorneys may become ad hoc negotiators who are expected to reconcile the various perspectives of the workers and their advocates.

One of the most troubling tensions between litigation and organizing developed between the IWU supporters and the class members who were current and former employees at Assi Super. While IWU leaders aimed at

\begin{itemize}
  \item \textsuperscript{232} Interview with Steve Arredondo, \textit{supra} note 3.
  \item \textsuperscript{233} Interview with Steve Arredondo, \textit{supra} note 2.
  \item \textsuperscript{234} \textit{Id.}
  \item \textsuperscript{235} \textit{Id.}
  \item \textsuperscript{236} Interview with Steve Arredondo, \textit{supra} note 3.
\end{itemize}
the broader, long-term fight for workers’ rights in Koreatown, many class members were concerned about the immediate need to support their families and became disenchanted with the campaign. As the settlement talks ensued, the members of the class action lawsuit found other low-wage jobs in Koreatown and discontinued their active support of the IWU. Many now regret their involvement with union activity because they feel that they have lost more than they have gained in the ongoing struggle. The division between the plaintiffs in the class action and the current IWU members speaks to the difficulty in combining litigation with a union drive, where frustration with the weak protection of employment and labor law can divide workers who share a common struggle.

V. LESSONS LEARNED

In the four years following the initial Assi Super walk out, workers and their supporters have experienced a dramatic campaign: workers awaiting the ballot count on election day looked on with hopeful tears that soon turned to anger and frustration caused by their subsequent mistreatment, suspension, and firing, absent adequate recourse or legal protection. Although KIWA and the IWU continue to call for community pickets and the boycott of Assi Super, worker leaders and community organizers have abandoned their starting strategy of establishing the IWU at Assi Super. KIWA and IWU will take the lessons learned from the failed IWU campaign at Assi Super and shape new strategies and paths for furthering economic justice in Koreatown.

Vy Nguyen, KIWA Lead Organizer, explained, “We tried the card check and the support was no longer there. We conducted an assessment of the industry, and everyone was so burned with SSA No-Match firings that no one wanted to support a union drive.” After a survey of fifty workers, KIWA found that a living wage was overwhelmingly the most important issue to workers. In the spring of 2005, KIWA plans to launch a new campaign to support the “living wage code of conduct” in the Koreatown community.

After the election resulted in a tie, Assi Super took advantage of loopholes in labor law and became more sophisticated in their anti-union strategies. The IWU lost the most support when fifty-six workers were suspended after receipt of SSA No-Match letters and management hired temporary workers as replacements. After the temporary workers were

237. Interview with Steve Arredondo, supra note 2.
238. Id.
239. Interview with Vy Nguyen, supra note 4.
240. Id.
241. Id.
242. Id.
243. Id.
hired, support for the union dropped drastically.\textsuperscript{244} Above all, workers feared getting fired, expressing this at meetings and house visits as their foremost concern.\textsuperscript{245} The difficulties that arose in the IWU campaign affirm that immigrant workers are concerned about retaliation and termination due to their vulnerability and lack of equal protection under the NLRA. Without the full protection of workplace rights equal to those of U.S. permanent residents and citizens, immigrant workers will remain disproportionately subject to unfair employment practices and less likely to actively support unionization.

When an officer of the corporation was willing to sign an agreement setting some terms and conditions of employment, but swore that he would rather close Assi Super than sign a union contract, the idea of a non-union contract with a living wage requirement took flight.\textsuperscript{246} Negotiating a non-union contract may be a feasible alternative to a union drive, where workers would still benefit from wage terms that are typical of a collective bargaining agreement.

KIWA plans to unveil this new living wage campaign on the 13th anniversary of the Los Angeles civil unrest in 2005. At that point, organizers hope to have one Koreatown supermarket signed on as an exemplary leader. This campaign will return KIWA to its expertise in community organizing. While the IWU campaign's failure can be attributed to innumerable weaknesses in the law and the disparate social and economic conditions in Koreatown, KIWA has learned an internal lesson about the difficulty in conducting a union campaign as a community-based organization.\textsuperscript{247} While KIWA's unique experience and perspective as a workers' center placed the organizers in a strong position to advocate for economic justice in Koreatown, the lack of experience with labor law and union organizing proved to be the flip side of the same coin.

VI. CONCLUSION

The continuing struggle of workers at Assi Super is a testament to the complex challenges facing workers and their advocates throughout the United States. The workers' pursuit of their due wages, equal treatment, and right to organize were thwarted by the "broken" state of labor law and its failure to protect all immigrant workers equally. KIWA and IWU organizers' attempts to increase community support and pressure the employer also met limited success when the Korean American business community and consumers failed to declare support for the workers as a critical mass. These legal, social, and political challenges debilitated the IWU campaign, despite KIWA's innovative strategy and valuable

\begin{itemize}
\item \textsuperscript{244} Id.
\item \textsuperscript{245} Id.
\item \textsuperscript{246} Id.
\item \textsuperscript{247} Id.
\end{itemize}
experience working in this community. These challenges are likely to threaten the viability of social and economic justice in other fights, where race, class, and immigrant status inevitably play a role in creating and perpetuating inequities of power and privilege.

Assi workers and their advocates learned many difficult lessons about labor law's pro-employer bias, the growing political hostility towards immigrants, and the debilitating effect of racial division. KIWA staff, IWU organizers, and attorneys have learned their own internal lessons regarding effective strategy, and the conflicts that can arise when coordinating community organizing and litigation.

The IWU campaign served as a community call to demand economic justice for workers who faced discriminatory treatment based on their race, class and immigrant status. It remains to be seen if the Korean American community will bolster its support for workers when KIWA launches a living wage campaign in Koreatown. Although community members may not have the power to quickly repair employment and labor law, communities do have the power to pressure local employers to recognize a union or pay a living wage.

Despite the enduring racial tension and discrimination that surround the Korean American community, the traditional Korean immigrant community has failed to make more than nominal strides towards embracing economic justice values over notions of ethnic solidarity and capitalistic entrepreneurship fueled by the American Dream. While Korean American progressive organizations, student activists and community leaders declared their support for Assi workers early on in the campaign and engaged in coalition-building with other communities of color, Korean business owners and consumers have failed to take on an equally responsible role.

While Sa-I-Gu fades in the collective memory of the Los Angeles Korean American community, that community must critically reflect on the cause and experience of Sa-I-Gu, and extract lessons from the painful memories of massive chaos and violence that hurt Korean Americans and their businesses. Current relations between Korean employers and Latino workers must be examined in light of tensions between Korean store owners and African American customers in South Central Los Angeles preceding the Los Angeles civil unrest. The IWU campaign and upcoming living wage campaign present an opportunity for the Korean American community to mitigate race and class division by supporting immigrant workers' rights in their own community. The IWU vision provided a glimpse of what is possible, while the campaign's failure demonstrated what is at stake, if the Korean American community fails to take a meaningful path towards furthering social and economic justice in Koreatown.

While workers and their advocates strategize to improve legal protection for low-wage immigrant workers through community
organizing, impact litigation, policy advocacy, and worker empowerment, community members must also corroborate the effort by demanding justice—as neighbors, consumers, workers, and as business owners. The Korean American community has the power to determine the final outcome of campaigns for economic justice throughout its community. The next step towards realizing a vision of social and economic justice in Koreatown is theirs to take.