June 4, 2021

SUPPLEMENT TO PETITION ON LABOR LAW MATTERS ARISING IN THE UNITED STATES

Submitted to the

LABOR POLICY AND INSTITUTIONAL RELATIONS UNIT THROUGH THE GENERAL DIRECTORATE OF INSTITUTIONAL RELATIONS IN THE SECRETARIAT OF LABOR AND SOCIAL WELFARE (STPS)

UNITED STATES–MEXICO–CANADA AGREEMENT

REGARDING THE FAILURE OF THE U.S. GOVERNMENT TO EFFECTIVELY ENFORCE ITS DOMESTIC LABOR LAWS AND PROMOTE THE ELIMINATION OF EMPLOYMENT DISCRIMINATION IN THE H-2 PROGRAM IN VIOLATION OF CHAPTER 23 OF THE UNITED STATES–MEXICO–CANADA AGREEMENT (USMCA)

NON-CONFIDENTIAL COMMUNICATION

We submit this Supplement in support of the March 23, 2021 *Amended Petition Regarding the Failure of the U.S. Government to Effectively Enforce its Domestic Labor Laws and Promote the Elimination of Employment Discrimination in the H-2 Program in Violation of Chapter 23 of the United States-Mexico-Canada Agreement (USMCA)*, brought by Maritza Perez and Adareli Ponce, and the binational coalition of organizations led by Centro de los Derechos del Migrante, Inc. (CDM) (the "Amended Petition"). The below signatories – international human rights scholars, professors, and advocates – join in support of Petitioners and provide the following supplemental information about the ways in which the United States, through administering the H2 temporary work visa programs, fails to meet its shared commitments to labor rights under Art. 23 of the USMCA. Specifically, this Supplement first sets forth the United States' obligations to ensure the right to equality and non-discrimination for all workers regardless of gender or migration status under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998) and other governing international and regional international human rights norms. It then urges that these norms require the United States to reform the H2 temporary work visa programs and their administration to eradicate sex discrimination.

As detailed in the *Amended Petition* of March 23, 2021, women face discrimination in all stages of the H2 labor migration process: initially, during the recruitment process, labor recruiters and employers systematically exclude women from equal opportunities to employment; at the outset of their employment relationship, employers track migrant women into positions with inferior pay and working conditions; and within their employment, employers subject women to sexual harassment, abuse, and further discrimination. Compounding the discrimination endemic to

recruitment and employment systems under the H2 programs are the discriminatory exclusions women confront when seeking to access justice for the rights violations they have experienced. International human rights law, and the very terms of the USMCA, obligate the United States to ensure women seeking access to and participating in the H2 programs are able to do so free from discrimination.

The signatories herein welcome Mexico's May 12, 2021 Communication to the United States requesting cooperation under the USCMA and recognizing the range of rights concerns and violations migrant workers employed in agriculture and protein food confront, including: lack of adequate health and safety protections; exclusions and limitations on wage and hour protections; denial of equal protection under the law for undocumented workers brought about by the U.S. Supreme Court decision in *Hoffman Plastics v. NLRB*, which has had a particularly discriminatory impact on the right to access workers' compensation and freedom of association; statutory exclusions to the right to freedom of association and collective bargaining; as well as sexual harassment and assault in the workplace. As Mexico pursues a cooperative dialogue with the United States under the USMCA, we urge both governments to employ a gender-perspective, and to recognize the multiplicities of discrimination experienced by women migrant workers, as exemplified by the experiences Petitioners Ponce and Perez, and other similarly situated women seeking access to and finding employment through the H2 programs. Recognizing gender discrimination in labor migration aligns with the view of the UN Committee on the Elimination of Discrimination Against Women:

> Migration is not a gender-neutral phenomenon. The position of female migrants is different from that of male migrants in terms of legal migration channels, the sectors into which they migrate, the forms of abuse they suffer and the consequences thereof. To understand the specific ways in which women are impacted, female migration should be studied from the perspective of gender inequality, traditional female roles, a gendered labour market, the universal prevalence of gender-based violence and the worldwide feminization of poverty and labour migration. The integration of a gender perspective is, therefore, essential to the analysis of the position of female migrants and the development of policies to counter discrimination, exploitation and abuse.
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> CEDAW Gen. Rec. No. 26 on women migrant workers, ¶ 5.[1]

We call on Mexico to reaffirm the principle of equality and non-discrimination as a binding principle of international human rights law that all Parties to the USMCA must adhere to, and one that applies to all workers regardless of gender, sex, national origin, or migration status. And we urge Mexico to call on the United States to take all measures necessary to ensure the fulfillment of the right to equality and non-discrimination for Mexican women seeking access to employment and employed through the H2 temporary visa programs, consistent with its obligations under Art. 23 of the USMCA and international human rights law.

[1] UN Doc. CEDAW/C/2009/WP.1/R (Dec. 5, 2008).

I. DEFINING U.S. OBLIGATIONS UNDER THE USMCA TO ELIMINATE DISCRIMINATION WITHIN THE H2 TEMPORARY WORK VISA PROGRAMS

As a signatory to the USMCA, the United States has affirmed its commitment to ensure the "elimination of discrimination in respect of employment and occupation," consistent with its obligations under the ILO's Declaration on Fundamental Principles and Rights at Work, Arts. 23.2.1. and 23.3.1.(d). ILO Convention C111 Discrimination (Employment and Occupation) Convention (1958) defines discrimination as:

> any distinction, exclusion or preference made on the basis of race, colour, *sex*, … national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation."
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> ILO C111, Art. 1.1.(a) (emphasis added).

While the United States is one of just twelve (12) ILO Member States to have not ratified ILO C111,[2] the ILO Declaration on Fundamental Principles and Rights at Work establishes:

> [A]ll Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote, and to realize, in good faith and in accordance with the Constitution [of the ILO], the principles concerning the fundamental rights which are the subject of those Conventions.
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> ILO Declaration on Fundamental Principles and Rights at Work (1998), ¶ 2.

It is therefore appropriate to look to the rights set out in the ILO's core convention on discrimination, ILO Convention C111 Discrimination.

Art. 23.9 of the USMCA calls on each State Party to implement measures it "considers appropriate to protect workers against employment discrimination on the basis of sex (including with regard to sexual harassment), pregnancy, sexual orientation, gender identity, and caregiving

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[2] *See* ILO NORMLEX Ratifications of C111 - Discrimination (Employment and Occupation) Convention, 1958 (No. 111) (last visited May 17, 2021), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312256:NO. The other non-ratifying members of the ILO are Brunei Darussalam, Cook Islands, Japan, Malaysia, Marshall Islands, Myanmar, Oman, Palau, Singapore, Tonga, and Tuvalu. *Id*. Of note, the United States has ratified just two (2) of the eight (8) Conventions identified as Fundamental Conventions by the ILO. *See* ILO NORMLEX, Ratifications by Country: Ratifications for United States of America (last visited May 17, 2021), https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102871. The two fundamental conventions ratified include C105 Abolition of Forced Labour Convention, 1957 (No. 105) and C182 Worst Forms of Child Labor Convention, 1999 (No. 182). Those that it has not ratified, in addition to the C111 Discrimination, include – of particular relevance to the discussion herein – C100 Equal Remuneration Convention, 1951 (No. 100), as well as: C029 Forced Labour Convention, 1930 (No. 29); C087 Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); and, C138 Minimum Age Convention, 1973 (No. 138).

responsibilities; provide job-protected leave for birth or adoption or a child and care of family members; and protect against wage protections."

Art. 23.8 of the USMCA further affirms: "each Party *shall* ensure that migrant workers are protected under its labor law, whether they are nationals or non-nationals" (emphasis added). Migration status has long been considered as part of the analysis of race, ethnic and national origin-based discrimination.[3]

Furthermore, the USMCA recognizes full and equal access to justice, a right in and of itself under international human rights law, as a critical driver in ensuring accountability and redress in remedying discrimination and the host of other ensuing workplace rights violations, and in discouraging future discrimination. USMCA, Art. 23.10.2. states: each Party shall "ensure … appropriate access to tribunals for the enforcement of its labor laws," and "shall ensure that proceedings … (a) are fair, equitable and transparent; [and] (b) comply with due process of law." It further states that States Parties shall provide workers with "access to remedies under its law for the effective enforcement of their rights." *Id.* at 23.10.7.

As set forth in the *Amended Petition* (filed March 23, 2021),[4] Mexican women are persistently sidelined when seeking employment through the H2 program. Recruiters and employers hiring women often relegate them to the H2B program, which affords fewer rights, benefits and protections. And recruiters and employers further track women hired through the H2 programs into segregated positions that provide inferior terms and conditions of employment to that of their male counterparts. Women on H2 visas also confront rampant discrimination, wage and hour violations, sexual harassment, and sexual assault. Compounding these violations is the subsequent denial of access to justice: women who experience violations throughout the labor migration process – from the time of recruitment, in the employment placement, and at the termination of employment, whether forced or voluntary – often find themselves without access to legal recourse. Legal and logistical barriers, including but not limited the explicit statutory exclusion of women in the H2B program from receipt of assistance from federally funded legal services organizations, effectively deny women on temporary labor programs equal access to the courts.

Section II of this Supplement elaborates upon the scope of the right non-discrimination in respect of employment and occupation under international and regional human rights law. In doing so, it calls for the recognition of the multiplicity of discrimination and the intersectionality of rights. Petitioners Ponce and Perez, and other Mexican women seeking participation in the H2 program have experienced and continue to confront discrimination on the bases of sex and gender, national origin, race and ethnicity, language, and migration status. That multi-layered

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[3] The Preamble to the ILO Declaration on Fundamental Principles and Rights at Work recognizes the need for "special attention to the problems of persons with special social needs, particularly the unemployed and migrant workers." *See also* ILO Committee of Experts on the Application of Conventions and Recommendations, Discrimination (Employment and Occupation) Convention, 1958 (No. 111), General observation 2019, at 3, *available at* https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_717510.pdf.

[4] The signatories to this Supplement fully endorse and support the Amended Petition and incorporate by reference its arguments, factual findings regarding gender-discrimination in H2 temporary labor programs, and discussion as to the resulting violations of U.S. domestic law.

discrimination has direct and negative impacts on their full and fair enjoyment of all rights recognized within the ILO Declaration on Rights at Work, as incorporated into the USMCA, including: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labor; the effective abolition of child labor; the elimination of discrimination itself in respect of employment and occupation, and acceptable conditions of work with respect to minimum wages, hours of work, and occupational health and safety. USMCA, Arts. 23.1, 23.3.

II. THE UNITED STATES MUST TAKE AFFIRMATIVE MEASURES TO FULFILL ITS OBLIGATIONS TO ELIMINATE DISCRIMINATION IN THE H2 TEMPORARY WORK VISA PROGRAMS

A. U.S. OBLIGATIONS OF NON-DISCRIMINATION UNDER INTERNATIONAL HUMAN RIGHTS LAW

The United States is bound by its commitment under the USCMA to eliminate discrimination in employment opportunity, and in the terms and conditions of work, which as detailed above, includes any distinction, exclusion, or preference on the basis or sex, national origin, among other identities, which – in the context of work – "has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation." ILO C111 Discrimination, Art. 1.1.(a). This commitment to eliminating discrimination, reaffirmed in the ILO's Declaration on the Rights at Work, is consistent with the United States' obligations under the International Covenant on Civil and Political Rights (ICCPR)[5] and under the OAS Charter and the American Declaration on the Rights and Duties of Man.

The ICCPR obligates each State Party to "respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." ICCPR, Art. 2.1.[6] Included among those rights is the recognition that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination on any ground such as *race*, colour, *sex*, *language*, religion, political or other opinion, *national or social origin*, property, birth or *other status*." ICCPR, Art. 26 (emphasis added).

The American Declaration of the Rights of and Duties of Man (AmDecl)[7] provides: "All persons are equal before the law and have the rights and duties established in this declaration, without distinction as to race, *sex*, language, creed or any other factor." AmDecl., Art. II. Among the

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[5] International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976, adopted by the United States Sept. 8, 1992).

[6] The ICCPR permits limited derogation from the rights obligations set out within the treaty in times of public emergency, but such derogation must be "strictly required by the exigencies of the situation," and cannot involve discrimination solely on the ground of "race, colour, sex, language, religion or social status." *Id.*, Art. 4.1.

[7] The rights and protections are contained in both the American Declaration of the Rights and Duties of Man, American Declaration of Rights and Duties of Man, May 2, 1948, O.A.S. Off. Rec. OEA/Ser. L./V/II.23/doc. 21/rev. 6 (1948), which is part of the 1948 OAS Charter, and the American Convention on Human Rights, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

rights included therein are: the right to work; a rate of remuneration and terms and conditions of work that meet minimum requirements and basic needs; and access to the courts. AmDecl. at Arts. XIV and XVIII. The Inter-American Commission on Human Rights has affirmed and "repeatedly established that the right to equality and non-discrimination contained in Article II is a fundamental principle of the inter-American human rights system."[8]

When looking to the right to non-discrimination as applied specifically to women, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) provides a definition of discrimination similar to that provided under ILO Convention No. 111:

> [A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.
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> CEDAW, Art. 1.[9]

Art. 11.1 of CEDAW explicitly extends the right to non-discrimination to work, recognizing work as an inalienable right, and obligating States Parties to ensure: equal access to employment opportunities; "equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work"; the right to social security; and the right to the protection of health and safety in the workplace.

Despite the United States' status as an outlier among just six States to have not yet ratified the CEDAW,[10] its norms and guidance are consistent with the United States' obligations under the ICCPR and the American Declaration, and by virtue of their widespread acceptance across the globe, are arguably binding norms of customary international law.

When considering discrimination in the H2 temporary work visa programs, employing an intersectional analysis recognizes the overlapping discriminations women in the H2 programs face, which include not just gender-based discrimination, but also discrimination based on national origin, race, ethnicity, language, and citizenship status. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)[11] employs a definition of

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[8] Undocumented Workers v. United States of America, IACHR, Report No. 50/16, OEA/Ser.L/V/II.159, doc. 59 (Nov. 30, 2016), at ¶ 72 (citations omitted).

[9] While the ICCPR does not include a definition of prohibited discrimination in the text of the treaty itself, the UN Human Rights Committee has adopted the definition quoted above from CEDAW, which is similar to that set out in ICERD and in ILO Convention No. 111 Discrimination. *See*. U.N. Human Rights Comm., CCPR General Comment No. 18: Nondiscrimination, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I), ¶¶ 6-7, (Nov. 10, 1989).

[10] Palau and the United States are the only two countries to have signed, but not ratified or acceded to the CEDAW, while Iran, Somalia, Sudan and Tonga have taken no action with regard to the treaty. *See* United Nations Treaty Collection, Chapt. 4.8, Convention on the Elimination of All Forms of Discrimination Against Women (as of May 15, 2021), available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en. Canada and Mexico both fully submit to CEDAW's treaty obligations without any reservations or declarations restricting the recognition of the rights therein. *Id.*

[11] 660 U.N.T.S. 195, 5 I.L.M. 352 (1966) (adopted by the U.S. on June 24, 1994).

discrimination similar to that of ILO Convention C111 and CEDAW, and defines as prohibited racial discrimination, "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." ICERD, Art. 1.1. ICERD, Art. 5(e)(i) specifically recognizes among those "the rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration," and Art. 5(e)(ii) "the right to form and join trade unions."

The right to non-discrimination, and to the full and equal enjoyment of fundamental rights at work applies to all workers, regardless of migration status. The UN Committee on the Elimination of All Forms of Racial Discrimination (CERD) has affirmed that "human rights are, in principle, to be enjoyed by all persons," and therefore, "States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law."[12] With respect to non-discrimination in the context of work, the CERD calls on States Parties to:

> Remove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health;… Take measures to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects; [and,] Take effective measures to prevent and redress the serious problems commonly faced by non-citizen workers, in particular by non-citizen domestic workers, including debt bondage, passport retention, illegal confinement, rape and physical assault.
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> CERD Gen. Rec. 30, ¶¶ 29, 33 – 34.

When taken together, international human rights law requires the United States to take affirmative steps to guarantee the right to non-discrimination to all workers, regardless of gender, sex, national origin, or migration status, an obligation extending to all stages of the H2 temporary work visa programs, discussed below.

B. THE UNITED STATES' OBLIGATIONS TO ERADICATE DISCRIMINATION IN THE H2 PROGRAM APPLIES TO ALL STAGES OF THE MIGRATION PROCESS

The United States is obligated to root out discrimination in the H2 temporary work visa programs which it administers and oversees. As the Inter-American Commission has held: "As with all fundamental rights and freedoms, … States are not only obligated to provide for equal protection of the law, but they must also adopt the legislative, policy, and other measures necessary to guarantee the effective enjoyment of the rights protected under Article II of the

[12] Comm. on Elimination Racial Discrimination, General Recommendation No. 30: Discrimination Against Non-Citizens, U.N. Doc. HRI/GEN/1/Rev.7/Add.1 (May 4, 2005)

American Declaration."[13] In its Report on the Merits in *Undocumented Workers v. the United States* in 2016, the Commission goes on to affirm:

> States have the obligation to adopt the measures necessary to recognize and guarantee the effective equality of all persons before the law; to abstain from introducing in their legal framework regulations that are discriminatory towards certain groups either on their face or in practice; and to combat discriminatory practices.

This obligation applies to both opportunities to employment, as well as the terms and conditions of work, and throughout all stages of the labor migration process. As recognized by CEDAW, countries of origin and countries of destination, in this case Mexico and the United States respectively, have a shared obligation to:

> formulate a gender-sensitive, rights-based policy on the basis of equality and non-discrimination to regulate and administer all aspects and stages of migration, to facilitate access of woman migrant workers to work opportunities abroad, promoting safe migration and ensuring the protection of the rights of women migrant workers.
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> CEDAW Gen. Rec. No. 26, ¶ 23(a)

The sections below examine those rights in the context of recruitment into and placement within the United States' H2 temporary work visa programs, and then examines the rights violations migrant women experience within the workplace.

1. The United States is obligated to ensure non-discrimination in access to employment opportunities provided through the H2 visa program

The United States is responsible for discrimination that happens in recruitment, although the recruitment itself is conducted by private actors operating in Mexico. The USMCA and ILO Convention C111 Discrimination make clear that the obligation to eliminate discrimination arises not only in the context of employment itself, but also in the context of employment opportunity. Nonetheless, as detailed in the *Amended Petition*, recruiters *and* employers routinely and systematically deny women access to the H2 temporary work visa programs. Furthermore, employers granting women opportunities through the H2 program often deny them opportunities under the H2A program and instead provide them with opportunities exclusively under the H2B program, which provides fewer rights and protections. Employers then routinely track women into jobs where they fare worse in terms of pay, as well as other terms and conditions of employment, including health and safety.

While the United States does not itself actively recruit and hire H2 workers, the US Department of Labor approves H2 visa applications and the underlying job orders, and the US Departments

[13] Undocumented Workers v. U.S., *supra* note 8, at ¶ 72 (citations omitted).

of Homeland Security and of State ultimately oversee, administer, and issue visas to the workers. Throughout each stage of the H2 application and approval process, and in overseeing recruitment and ultimate job placement, the United States is obligated to assess whether the manner in which the H2 program is being administered and implemented has the effect – not just the purpose – of nullifying or diminishing the rights of women to full and equal participation. This obligations accords with the Inter-American Court on Human Rights' holding in its Advisory Opinion the Juridical Condition and Rights of Undocumented Migrants, OC-18-03:

> That the State has the obligation to respect and guarantee the labor human rights of all workers, irrespective of their status as nationals or aliens, and not to tolerate situations of discrimination that are harmful to the latter in the employment relationships established between private individuals (employer-worker). The State must not allow private employers to violate the rights of workers, or the contractual relationship to violate minimum international standards.[14]

Where, as is the case here, clear evidence shows that women are disproportionately excluded from those opportunities, the United States must act with due diligence and take affirmative measures to ensure greater equality of opportunity.[15]

2. The United States is obligated to ensure non-discrimination in the workplace

The United States must further ensure that women who ultimately come to the United States on H2 visas are guaranteed their rights to equality and non-discrimination in all aspects of their employment and stay in the United States. This applies to all rights in employment – including, but not limited to, the right to freedom of association and collective bargaining, the right to be free from forced or compulsory labor, and the right to be free from discrimination in respect to the terms and conditions of work, such as minimum wages, hours of work, health and safety, and the right to be free from sexual harassment and assault.

As the Inter-American Court on Human Rights has recognized:

> 157. In the case of migrant workers, there are certain rights that assume a fundamental importance and yet are frequently violated, such as: the prohibition of obligatory or forced labor; the prohibition and abolition of child labor; special care for women workers, and the rights corresponding to: freedom of association and to organize and join a trade union, collective negotiation, fair wages for work performed, social security, judicial and administrative guarantees, a working day of reasonable length with adequate working conditions (safety and health), rest and compensation. The safeguard of these rights for migrants has great importance based on the principle of the inalienable nature of such rights, which all workers possess, irrespective of their migratory status, and also the

[14] Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, Opinion, ¶9 (Sept. 17, 2003).
[15] *See, e.g.* Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶¶88, 139-151 (Sept. 17, 2003).

> fundamental principle of human dignity embodied in Article 1 of the Universal Declaration, according to which "[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."
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> 158. This Court considers that the exercise of these fundamental labor rights guarantees the enjoyment of a dignified life to the worker and to the members of his family. Workers have the right to engage in a work activity under decent, fair conditions and to receive a remuneration that allows them and the members of their family to enjoy a decent standard of living in return for their labor. Likewise, work should be a means of realization and an opportunity for the worker to develop his aptitudes, capacities and potential, and to realize his ambitions, in order to develop fully as a human being. [16]

We incorporate by reference the discussion in the *Amended Petition* illustrating the ways in which women migrant workers in the H2 programs are routinely denied these rights. While the Inter-American Court's Advisory Opinion specifically considers undocumented workers' rights, it equally applies to all workers, including migrant workers recruited and hired into employment in the United States through the H2 programs. As noted above, we welcome Mexico's recognition that these rights protect migrant workers in the agriculture and protein-processing industries, and that the United States, through its laws, regulations and practices, falls short of its commitment and obligations to guarantee these rights.

C. THE UNITED STATES MUST ENSURE FULL AND EQUAL ACCESS TO JUSTICE FOR WOMEN WHOSE RIGHTS ARE VIOLATED UNDER THE H2 VISA PROGRAMS

The USMCA binds each State Party to ensuring "that a person with a recognized interest under its law in a particular matter has appropriate access to tribunals for the enforcement of its labor laws." Furthermore, "Each Party shall ensure that the parties to these proceedings have access to remedies under its law for the effective enforcement of their rights under its labor laws and that these remedies are executed in a timely manner," and are "effectively enforce[d]."

This right must be understood together with the obligation set out in Art. 14 of the ICCPR that "All persons shall be equal before the courts and tribunals." The American Declaration goes further, providing: "Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights." AmDecl., Art. XVII.

The Inter-American Commission on Human Rights has recognized that this right "is an essential requirement or condition for the enjoyment of all rights, and it likewise imposes important limits to State action. The Commission observed that the failure to recognize juridical personality harms human dignity because it renders a person vulnerable to non-observance of his or her rights by the State or other individuals," including the right to work and rights in work.[17] The

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[16] *Id.* at ¶¶ 157-158.
[17] Undocumented Workers v. U.S., *supra* note 8, at ¶¶94-95.

Commission's analysis of the right to access the courts in its Report on the Merits in Undocumented Workers v. United States (2016) bears repeating here in full:

> 98. As this Commission has recognized previously, both Articles XVII and XVIII are predicated upon the recognition and protection by a State of an individual's fundamental civil and constitutional rights. Article XVIII further prescribes a fundamental role for the courts of a State in ensuring and protecting these basic rights. For its part, Article XVIII of the American Declaration establishes that all persons are entitled to access judicial remedies when they have suffered human rights violations. This right is similar in scope to the right to judicial protection and guarantees contained in Article 25 of the American Convention on Human Rights, which is understood to encompass: the right of every individual to go to a tribunal when any of his or her rights have been violated; to obtain a judicial investigation conducted by a competent, impartial and independent tribunal that establishes whether or not a violation has taken place; and the corresponding right to obtain reparations for the harm suffered.
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> 99. The Commission has affirmed for many years that it is not the formal existence of judicial remedies that demonstrates due diligence, but rather that they are adequate and effective. The "effectiveness" of a judicial remedy has two aspects: one is normative and the other is empirical. The normative aspect deals with the remedy's suitability, or its ability to determine whether a violation of human rights occurred, and its capacity to yield positive results or responses, principally measured in terms of whether it offers the possibility to provide adequate redress, for human rights violations.
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> 100. The second aspect, the empirical nature of the remedy, refers to the political or institutional conditions that enable a legally recognized remedy to "fulfill its purpose" or "produce the result for which [it] was designed." In this regard and as the Commission has previously stated, a remedy is not effective when it is "illusory," excessively onerous for the victim, or when the State has not ensured its proper enforcement by the judicial authorities.
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> 101. Thus, when the State apparatus leaves human rights violations unpunished and the victim's full enjoyment of human rights is not promptly restored, the State fails to comply with its positive duties under international human rights law. The same principle applies when a State allows private persons to act freely and with impunity to the detriment of the rights recognized in the governing instruments of the IAHRS.
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> 102. The Commission further maintains that there is a direct connection between the suitability of available judicial remedies, as mentioned above, and the real possibility of observance of economic, social, and cultural rights. The IACHR has identified the principle of equality of arms as an integral part of the right to a fair trial, given that the types of relationships governed by social rights usually give rise to and presuppose conditions of inequality between the parties in a dispute –

> such as between workers and employers or the beneficiary of a social service and the State that provides the service. That inequality often translates into disadvantages in the framework of judicial proceedings.
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> 103. The IACHR considers that real inequality between the parties in a proceeding engages the duty of the State to adopt all the necessary measures to lessen any deficiencies that thwart the effective protection of the rights at stake. The Inter-American Commission has also noted that the particular circumstances of a case may determine that guarantees additional to those explicitly prescribed in the pertinent human rights instruments are necessary to ensure a fair trial. For the IACHR this includes recognizing and correcting any real disadvantages that the parties in a proceeding might have, thereby observing the principle of equality before the law and the prohibition of discrimination.[18]

The United States must therefore take affirmative measures to ensure the rights to juridical personality and to equality and non-discrimination under the law are guaranteed. The United States fails to ensure access to the courts and judicial remedies for women routinely and systematically denied access to the H2 program or tracked into employment and positions within that employment that provide inferior terms and conditions of work, and subjects women to higher rates of injury, sexual harassment and assault. These failures directly violate this obligation. Furthermore, the denial of access to free legal services to women – and all workers – brought into the United States on the H2B visa program, while other workers in the United States *do* have access to these services, is a distinction that cannot be justified under international law and prevents many of those workers from accessing justice. The same is true for the failure of the United States to provide adequate protection from retaliation for those who do pursue complaints against their employer, and who may then lose their job and therefore their legal status in the United States, risking deportation.

As reinforced by CEDAW in its General Recommendation No. 26 on women migrant workers, the United States should ensure that women migrant workers have "the same rights and protection that are extended to all workers in the country," and should ensure "adequate legal remedies and complaints mechanisms, and put in place easily accessible dispute resolution mechanism, protecting both documented and undocumented women migrant workers from discrimination or sex-based exploitation and abuse." In doing so, States should:

> Repeal or amend laws that prevent women migrant workers from using the courses and other systems of redress. These include laws on loss of work permit, which results in loss of earnings and possible deportation by immigration authorities when a worker files a complaint of exploitation or abuse and while pending investigation. States parties should introduce flexibility into the process of changing employers or sponsors without deportation in cases where workers complain of abuse.

Finally, CEDAW calls for ensuring "that women migrant workers have access to legal assistance and to the courts and regulatory systems charged with enforcing labour and employment laws,

[18] *Id*., at ¶¶ 98-103 (citations omitted).

including through free legal aid."[19] While the United States has not ratified CEDAW, as noted above, and is therefore not specifically bound by the CEDAW General recommendations, the recommendation cited can be viewed as persuasive authority when examining the obligations of the United States to ensure the rights to equality under the law and equal access to the courts, as it relies on the same definition of discrimination incorporated into ICERD and then applies that in the context of prohibited sex or gender-based discrimination set forth under the ICCPR and the American Declaration, all international human rights instruments which the United States is bound to follow.

III. CONCLUSION

The United States has committed to eliminating discrimination under the USMCA and the ILO Fundamental Principles at Work, as well as through ratifying the ICCPR and ICERD and as a member of the Organization of American States bound to the principles set forth in the American Declaration. International law defines discrimination as any distinction, exclusion, restriction of preference that has the purpose *or* effect of unequal opportunity and treatment.

The Inter-American Court on Human Rights has recognized:

> There is an inseparable connection between the obligation to respect and guarantee human rights and the principle of equality and non-discrimination. States are obliged to respect and guarantee the full and free exercise of rights and freedoms without any discrimination. Non-compliance by the State with the general obligation to respect and guarantee human rights, owing to any discriminatory treatment, gives rise to its international responsibility.[20]

The *Amended Petition* clearly establishes the multitude of ways in which the United States, through its H2 programs – and the administration therein – are contributing to, rather than working towards eliminating, both direct and disparate impact discrimination against women workers. The failure of the United States to take the measures necessary to eliminate that discrimination against Petitioners Ponce and Perez and others similarly situated stands in contrast to its commitments set out in Art. 23 of the USMCA.

The signatories herein respectfully request the Mexican government recognize in its response to the *Amended Petition* the foundational right to equality and non-discrimination as applied to the women at the center of said petition, and the centrality of that right to ensuring the full set of fundamental human rights for all workers. In doing so, we ask for recognition of the intersecting identities of women seeking access to and employment in the H2 temporary employment visa programs and the multiplicity of discrimination they confront – discrimination on the basis of sex, immigration status, language, race, ethnicity, and national origin. Such recognition serves as an important first step in developing solutions that will ultimately meet the commitment to non-discrimination set out in the USMCA.

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[19] Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 26 on Women Migrant Workers, UN Doc. CEDAW/C/2009/WP.1/R, at ¶¶ ¶ 26(c)(i - iii) (Dec. 5, 2008).
[20] Inter-American Court on Human Rights, *supra* note 14, at ¶ 85.

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