TWENTY-SECOND ANNUAL INTERNATIONAL ADVOCATE FOR PEACE AWARD, HONORING GLORIA STEINEM

On March 29, 2023, the *Cardozo Journal of Conflict Resolution* presented the twenty-second annual International Advocate for Peace Award to Gloria Steinem. The following is a transcript of the event's speeches.

Dean Melanie Leslie, Opening Remarks: Welcome everybody. Isn't this a great night? It's a fantastic night. So glad to have so many of you here, our wonderful students, our fantastic alumni, it's just fantastic.

So, as you can see, I'm a little star struck. It is really special for me to be able to welcome our distinguished guest, Ms. Gloria Steinem. As someone who grew up in the 1960s and 1970s in Las Vegas with a very conservative Catholic family, I received a lot of conflicting messages about what it was to be a woman. Because of the work of Gloria Steinem, and others, I was given yet another set of messages that ended up becoming the things over time that led me to where I am today. So, I think you can take credit for so many women leaders who may not have taken the path that they have but for the work that you've done. This is a really special evening for not just me, but so many of us here. I just want to extend my personal gratitude for your fearlessness and the legacy of your work. Thank you.

Every year since 2000, the student editors—the intrepid student editors—of the *Cardozo Journal of Conflict Resolution* have awarded the International Advocate For Peace Award to an individual organization or group that the students believe have done something truly significant to advance the cause of peace and conflict resolution. The list of past recipients includes two former presidents of the United States who each negotiated international peace treaties, a former senator who was instrumental in negotiating peace in Ireland, and a Beatle. The award has also been given to a South African bishop who led the fight against apartheid, a documentary filmmaker, and the subject of her documentary, a woman whose life's work was championing reconciliation and restitution in civil war-torn Liberia. Other recipients include a prosecutor of the Nuremberg trials, for whom Cardozo's clinic in atrocity prevention is named, and a leading economist focused on developing economies in poverty-ridden countries. We are incredibly proud of the journal and the students who run it, and the program that nurtured it.

The *Cardozo Journal of Conflict Resolution* is the country's preeminent legal journal of arbitration, negotiation, mediation, settlement, and restorative justice. It is one of the most frequently cited legal publications in the field of conflict resolution. We thank all of the students today who are here who are current editors and staff of that journal for the incredible and important work that you are doing. This award—and the Journal itself—stems from the work of one incredibly trailblazing woman. Professor Lela Love is here with us tonight. Professor Love started the Kukin Program for Conflict Resolution at Cardozo Law School. When attention to alternatives to litigation and war was not really a big topic, she saw it; she was a pioneer and a trailblazer, and she was here at Cardozo. Because of her, we are all here. Her legacy has grown and what we're doing here tonight is a direct result of your work, Lela. In 1985, Professor Love launched Cardozo's Mediation Clinic and that continues here at Cardozo. The Clinic fosters the development of the role of the lawyer as problem solver, counselor, and peacemaker in addition to the traditional lawyer role of client advocate. While in law school, Cardozo students have the opportunity to become experts in mediation and other forms of dispute resolution and while still students, they mediate live disputes between neighbors, business partners, and divorcing spouses. We are proud to instill in our students the values that are promoted by this program.

Now this year we, speaking of forces of nature, we've welcomed two more incredible women to lead our efforts in this in this regard. First, Robyn Weinstein is here. She now leads our Mediation Clinic. Before Robyn joined us, she was the Alternative Dispute Resolution Administrator for the United States District Court for the Eastern District of New York. Second, Professor Andrea Schneider, a nationally known scholar and teacher. She is the newly appointed professor of law and director of the Kukin Center. Let's have a round of applause for her. All these powerful women have created something that is transforming the world, and I couldn't be prouder to be able to support it, even in some small way. I'm going to turn it over to Professor Schneider, who is the director of the Kukin Center and who will now take it from here. Please welcome Professor Schneider.

Andrea Schneider, Introductory Remarks: It's wonderful to be here, as Dean Leslie has said to be taking over from one powerful woman, being led by another, our Provost is here who's also female. It really is just an incredible event that we are here at tonight.

Welcome to Cardozo, it's great to see everybody here. As the Dean has outlined, our mission here at the Kukin program is to develop modern day problem solvers who can skillfully use dispute resolution processes for the benefits of their clients and for society

at large. Through our classes, our clinics, our competition teams, and the amazing *Cardozo Journal of Conflict Resolution*, we provide opportunities every day for our students to build these skills. We are so very happy to see all of you here for the twenty-second annual International Advocate for Peace Award.

This was started by my fabulous predecessor about whom you have heard, Lela Love, and the award honors those who have been exemplary in the field of conflict resolution. The Journal's past recipients have included presidents, ambassadors, activists, and artists. We are very excited to add Gloria Steinem to this incredible list. As Bell Hooks once noted about Ms. Steinem, "everywhere she goes she carries with her the vitality of democracy, a freedom for women and men, and her profound love of justice." I know that our Journal and our Journal students were thrilled when she agreed to come and accept this award and in her birthday week no less. Ms. Steinem just turned to eighty-nine, and I did clear that I was allowed to say that inadvance. We are very grateful you are here for your birthday week and with no further ado, I'm going to turn this over to Nick Beudert, our amazing, fabulous, Symposium Editor to formally introduce Ms. Steinem.

Nicholas Beudert, Introductory Remarks: Good evening, everyone. Thank you, Professor Schneider and Dean Leslie, for the wonderful introductions and thank you all for attending tonight's ceremony. My name is Nicholas Beudert, and I am the Symposium Editor for the *Cardozo Journal of Conflict Resolution*.

Selecting the recipient of the International Advocate for Peace Award is a wonderful and refreshing process to be a part of. Instead of wading into the despair of current conflicts, you get to celebrate achievements that have been made in resolving those conflicts. You get to look at the bodies of work of amazing individuals, and marvel at the ways that they have advocated for peace. Now this is not to say that all the hard work is finished, but sometimes it is nice to consider some of the good that has been done in the face of all the bad that's out there.

Tonight's recipient has no shortage of such achievements and needs no introduction, but we're not going to let that stop us. Ms. Steinem is a journalist and author. She co-founded *Ms. Magazine* and has written ten books and countless hard-hitting exposés. She is also an activist; she campaigned for the Equal Rights Amendment to the U.S Constitution, protested the South African apartheid system, led a women's march across the demilitarized zone between North and South Korea, and helped found the International Foundation's Equality Now Donor Direct Action and Direct Impact Africa. She's also worked alongside Cardozo students at the Lenape Center to address the missing and murdered Indigenous persons crisis.

Please everyone join me in giving a warm welcome to the woman considered by many, including *National Geographic*, to be the world's most famous feminist: Ms. Gloria Steinem.

GLORIA STEINEM: Now I have to live up to that introduction, excellent.

ANDREA SCHNEIDER: Well, let's start at the very beginning, you have been known your whole life as a feminist, the world's most famous feminist. How would you link that to the commitment that you have also shown—and what we are all celebrating tonight—to non-violent conflict resolution?

GLORIA STEINEM: I think, in general, the values of women have often been more peaceful, if only because they did not have armies. They had to use the family as a model for conflict resolution. That is quite different as a model. And it is not that it is always right, but it is helpful. Because if it is a family model, it has to be a model in which no one loses and in which there is a continuing possibility of working together. That is pretty good to add to armies.

ANDREA SCHNEIDER: Terrific. Our format tonight is that I am going to ask some questions and we are going to alternate with some of our pre-selected students. Our first student question is from Penina Gershbaum.

PENINA GERSHBAUM: You are a role model and inspire many women. I wanted to know who your role model is and who inspired you?

GLORIA STEINEM: There are so many. Wilma Mankiller, who was the chief of the Cherokee Nation. In a just country, she would have been president of this country. Bella Abzug, who was a great lawyer. There are so many, and many men, too. I could certainly make a list with Cesar Chavez, Gandhi, so many.

ANDREA SCHNEIDER: Much of your work has been around storytelling. In *Ms. Magazine*, you quote Margaret Mead, saying, "[T]ell me a fact and I'll forget it. Tell me a story and I'll always remember." Your quote, which I love particularly for academics and for the lawyers in the audience, is to remember "people before paper; stories before statistics." How have you used stories to promote change and to be persuasive?

GLORIA STEINEM: I really think that our brains are organized on narrative. If we hear a fact, we want to know why and then what happened next. We learn by narrative. The more ancient the culture, the more likely it has been to teach in the story mode, as Gandhi did and as the Cherokee culture here in our country did. But that is not necessarily the way academia is organized. So sometimes we have to do it ourselves. Stories are the best memory aid. Anything to help our memories. But most important is that we listen to each other's stories. Even the person who seems to us the least likely, the most

difficult, the most irrational, has a story. Once we hear the story, we may not agree, but we understand that person. We have a bridge to that person.

Andrea Schneider: Thank you. Terrific. Our next question is from student Olivia Huey.

Olivia Huey: Good evening. Thank you so much for being here tonight. If you could go back in time and improve any of your approaches or actions in your activist journey, which one would you choose and why?

Gloria Steinem: In my age group, I felt that I had to get married. I did not have a choice, and that raising children would be my contribution to the future. I did not question that, but I fled and went to live in India for two years. I thought, "I'll do that, but not right now." "Not right now" is a form of rebellion; you are going to do it, but not right now. "Not right now" just got longer and longer, and not in a negative way because obviously there are great partnerships and marriages, but just in a way of discovering that the way I had been raised in Toledo, Ohio, did not necessarily mean that I should not live in India. That I lived in a majority white culture did not mean that I did not learn from being the only white person in summer jobs. I have learned much more than I learned at college from living in India. We were teaching swimming and I was the only white person in this group of college students who worked in the summer. Not only did I learn how to play bid whist and lots of dances I would not have known otherwise, but I learned what it is like to be the only, and how precious it is to be accepted when you are the only.

Andrea Schneider: A lot of your famous quotes have to do with taking action: "Feel the fear and do it anyway." Also, your own story about being afraid of public speaking.

Gloria Steinem: No, I became a writer so I didn't have to talk; that was the whole idea.

Andrea Schneider: How did you overcome your fears? For so many students, it conveys the message: "It is okay to be scared. Do it."

Gloria Steinem: In my understanding, it does not happen all at once. It happens in steps and stages. Because I, as a writer, was writing a column for *New York Magazine*, I began to get invitations to speak. That was terrifying. I asked a friend of mine [to come to speaking engagements with me], Dorothy Pitman-Hughes—she ran a pioneer childcare center, the West 80th Street Childcare Center—an African-American woman. We did not do it because we were contrasting, we did it because we were friends. And I was thinking, "she is married and has children. I am not. Together, more people will be able to relate to us." In that way, I discovered that together we attracted audiences that we never would have had on our own. We both began to see how relieved the audiences were. I hope it is

better now, but it was just to see that the two of us had arrived together, that we were friends. It was an achievement in itself.

ANDREA SCHNEIDER: The next question is from student Jessica Lalehzar.

JESSICA LALEHZAR: Could you speak on how you have approached intersectional feminism in your work over the course of your career as racial, gender, and socioeconomic divides among us have become more and more prevalent?

GLORIA STEINEM: The word "intersectional" is new; it did not exist. I am not sure it is the best word because you have to explain it. I find it easier just to say, "feminism means all women or nothing," because it does. And in my case, individuals we would now refer to as "women of color" happened to have been my teachers. Also, I had the experience of being the only white person in situations when I was living in India. That was helpful since it was another learning situation. I remember writing a paper for my fellowship about Gandhi. He had more female followers than male followers and his methods were, you might say, "culturally female" methods. I was writing this paper, and I went to interview someone who was clearly part of that movement, Kamaladevi Chattopadhyay, a great woman. She rocked on her veranda and listened to me and said, "well, my dear, we taught him everything he knows." It turns out that the Salt March to the sea and rebellion against paying tax on salt, and all of it, was mostly women driven. That was the basis of Gandhi's philosophy.

ANDREA SCHNEIDER: We are going to turn more to current events. One of my other favorite quotes and the title of one of your books is "The truth will set you free, but first it will piss you off." So, I am wondering, what is pissing you off today?

GLORIA STEINEM: How long do we have?

ANDREA SCHNEIDER: We're happy to listen as long as you'll stay!

GLORIA STEINEM: Well, at least Trump is out of the White House. Also, the news and the way it focuses on—as it should—conflict whether here or abroad and murders. There's also news of new coalitions new things going forward; new books, narratives, everything that you all are doing. You should be on the news. So, I just think we need to redefine the news. It doesn't have to be violent, or bad, or difficult, or restricted to one group in the country.

ANDREA SCHNEIDER: Okay our next question is from student Remy Leelike.

REMY LEELIKE: You've mentioned several times that society's acceptance of violence in the home is a predictor of violence outside the home. Yet, it seems like women's issues are often siloed and treated as separate from issues about violence. Can you speak

a little bit more about this and the work that you've done to raise awareness about the link?

Gloria Steinem: There is an excellent book called *Sex and World Peace* which demonstrates in a much more copious, factual way than we could do today. Why it is that violence in the home normalizes violence as a way of dealing with conflict or difference. In a deep sense that is more predictive of national violence than conflict over borders or water or all kinds of national conflicts.

So, because the home is seen as a female sphere—which of course, it shouldn't be—it's not taken seriously in terms of its importance in an origin of normalizing behavior. But I do think it helps to take it to heart in in our own households and with our own friends and see a resolution of a particular conflict as something that is not only limited to that conflict but is teaching us how to proceed in a humane, peaceful way.

Andrea Schneider: You told a story in your book *My Life on the Road* about a class trip. As any professor who has led class trips, I love the vision of all of us on a class trip with Gloria Steinem! This class trip you saw a giant turtle on the side of the road and, for fear it would be run over, you moved it back to the side of the river at which point the professor told you that the turtle had probably spent the entire morning crawling from the river to the side of the road. You noted in the book that it took you many more years to realize that this parable had taught [you] the first rule of organizing: always ask the turtle. For all of us who are out here trying to resolve conflict and mediate disputes, how do you ask the turtle? How have you used this lesson to really think about your organizing, mediating, and facilitating work?

Gloria Steinem: It may be different in each case, but it means asking the people who are most involved and have the most at stake. Our rules of mediation are very important, but they may not apply completely to the situation we're in if the difficulty doesn't—in its origin—come from the two particular combatants, for instance, but it comes from family or employer or ethnicity or whatever it is. So, it's just always "ask the turtle makes sense to you" as a motto.

Andrea Schneider: I think that if we asked everybody for a takeaway, "ask the turtle" is a good takeaway. Our next question is from student Se Won Park.

Se Won Park: You crossed the Korean Demilitarized Zone ("DMZ") in a symbolic effort to draw attention to the family separation issues caused by the Korean conflict. What role do you believe symbolic efforts like that play in conflict resolution?

Gloria Steinem: Crossing the DMZ was led by women whose families had been divided by the Korean War. Lots of us were invited to come along just to make it a big enough event so that it

might get covered by the press. It's sort of putting your body where your belief is. If we want the North and South Korean families who have been so tragically divided to be able to come together, then just walking across the demilitarized zone and going to North Korea and coming back is a visual example that it is possible. Obviously, it has not brought families back together, but there are a lot of instances in which people are coming together, despite the DMZ.

ANDREA SCHNEIDER: So, you've taken on the role of facilitator, and some might even say mediator. I'm thinking of the example you've talked about at the Women's Conference in Houston in 1977. You noted at the time that you were as proud of your facilitating role as anything you had ever done in your life. We are, as you've heard, training our conflict resolvers and our facilitators right here at Cardozo. Can you tell us a little bit more about that role and what made you so proud of it?

GLORIA STEINEM: Well, I hope you read about the National Conference in Houston because it was and still is the most representative national group this country has ever seen. Bella Abzug, Shirley Chisholm, and Patsy Mink made a set of rules that meant that there was a national conference in each state and the state created a delegation that reflected that state. And then, we got to Houston. I was very proud of it, and I'm sorry that it's not as much of a part of history these days. Does anybody read about the National Conference?

ANDREA SCHNEIDER: All the students in the room, consider it your next assignment! We can make that happen.

GLORIA STEINEM: It's just interesting in terms of what is possible. What I incidentally learned from that experience was that the only groups that were already doing it were Native American groups. The different tribes and nations, and the women had been meeting anyway and were and a model for what we were trying to do nationally. I still have the gifts of the shawl; when I think I'm in deep, I go and look at the shawl and I think "well, if they could do it, maybe I could do it."

ANDREA SCHNEIDER: So, what I hear you saying is that we need to learn a little bit more from native cultures?

GLORIA STEINEM: It's because our history and my experience starts with Columbus, usually. We are here, on Manhattan Island, and to look at history or to study history vertically has a kind of intimacy. Here we are, and who was here before us.

ANDREA SCHNEIDER: We appreciate the work that you've been doing with our Cardozo students, the Lenape Center, and obviously grounding some of these Native American practices and restorative justice as well. On the flip side, I think sometimes in law we get stuck in this adversarial system.

You've also written about how adversaries can become co-conspirators. I'd love for you to talk a little bit more about how these labels—adversaries and co-conspirators—can change over time and how we as conflict resolvers can help shift that a little bit.

GLORIA STEINEM: Well, it's so different in each situation, isn't it? It's hard to find generalities except obvious ones like, "everybody needs to be heard." The first step is that everybody who's involved in this conflict needs to be able to tell their story because—as we've already said—our brains work on narrative not, on isolated facts. We begin to understand each other with those stories and to try to put one person in the opposite story and see if that changes consciousness and allows us to see from the other point of view. I don't know how if much of this is used in legal situations, is it?

ANDREA SCHNEIDER: We would call it role reversal and training how you would sit in their shoes, to switch seats, and to try to understand it from their perspective. So, there is a theory.

GLORIA STEINEM: Okay, I'm calling you up. When there's the next conflict, I'm definitely calling you up and asking for help!

ANDREA SCHNEIDER: We're just down the block, that would be great! I'd love to turn to advice for our students in the audience. You've written about the whole idea of "you work because you have to" that it's a good rationalization but the goal is really to find productive, honorable work, things that you really value, and that this is one of life's basic pleasures, to have work that you value. We have a lot of graduating third-year students in the audience as well, so, I'd love to hear some advice that you have for them as they look for productive work that matters.

GLORIA STEINEM: I just hope that, or think that, in my experience that I kind of know what I should be doing because I love it so much, I forget what time it is when I'm doing it. I don't get up in the morning thinking "oh God, you know . . ." or, "I think maybe if we tried this or tried that a little bit." It's infinitely interesting to let your interest, your enthusiasm, and your eagerness be your guide.

Yes, we end up having to do certain things. But, I think we suppress the joy of our work if we don't honor it, look for it, and get up in the morning and just try. I remember getting up in my house and deciding that because I had to go out, I would just try to talk to the first person I met whether standing on the curb or in my neighborhood or whatever. The first person I met was the postman. I talked to him, and he turned out to be the political organizer of Queens. I learned a lot from him. We were friends for years.

Just try it, even in an elevator. I know it's risky, but it's kind of fun. I got that from my father who was quite a character. Whenever we got into an elevator together—of course I was a child—he would

turn to me with everybody listening and say, "so I told the man to keep his $50,000."

ANDREA SCHNEIDER: So tomorrow when you are waiting for the elevator, just continue a conversation. That's pretty funny. We also had students who wrote and wanted to talk about how you decide when there are so many crises. You've written how the future depends on what each of us do every day. But, on any given day we look at the news, which has not yet adopted your advice, and it looks pretty awful sometimes. How do you decide which crisis to focus your energy on?

GLORIA STEINEM: We have the most power where we have the most access or the most credibility with a particular group of people. I think it's helpful to remember that revolution is like a tree; it does not grow from the top down, it grows from the bottom up. So, choosing to do what otherwise might seem hopeless because the problem is in Washington may turn out to be quite hopeful. You form a group in your neighborhood, you put signs in your windows, you call your political representatives, and you have power now because you're a whole group. It helps to think of revolution or change as a tree.

ANDREA SCHNEIDER: And on the flip side, you have an entire chapter in one of your books called *Fantasies For Temporary Relief of Injustice* where you talk about the idea of, "okay I can't fix it tomorrow. I'm going to think about something that will make me potentially a little happier." I'm wondering what your current fantasy might be these days to help us through.

GLORIA STEINEM: Oh gosh I don't know. When you say that it makes me think of Florence Kennedy, a great lawyer because her fantasy was that she was going to name herself "Florence of Arabia," put together an army of women, take over all the oil producing territories, turn to the world and say, "okay now deal. You want oil? Here's what you do for it." It's kind of satisfying, isn't it?

ANDREA SCHNEIDER: But I like that. So, as you're waiting for the elevator again tomorrow, now you can enter the elevator with your fantasy of injustice. A couple popcorn questions just as we are closing here. What book are you reading right now?

GLORIA STEINEM: Well, the honest truth is I'm reading my email.

ANDREA SCHNEIDER: It sounds like many of us are just managing to keep up on the email! Okay, so what brings you joy?

GLORIA STEINEM: Being here with you. No, really. Because I think there's a feeling of understanding, energy, hope, laughter, and all the good stuff is here. Other than that, I like to tap dance.

ANDREA SCHNEIDER: We had heard at one point that one of your favorite songs is "Isn't She Lovely" because you like to dance to that.

GLORIA STEINEM: Well, they're all the old tap dances, such as "Me and My Shadow" and all these tap dance songs because, living in

Toledo, I thought the only way that as a female human being that I was going to get out into a different life was through show business. So, I did try to tap dance my way out of Toledo into the hearts of Americans.

Andrea Schneider: And if you occasionally take vacation, what is your favorite thing to do on vacation?

Gloria Steinem: My favorite thing to do is to go to any ocean and just sit on the shore and look at the ocean. The ocean is mysterious and wonderful, and it connects us to all the other countries and continents in the world. It makes you forget about borders, which really are made up anyway.

Andrea Schneider: Wonderful. We actually have a few minutes so I'm going to let the audience if there are any other questions. We could take one or two.

Gloria Steinem: Or answers, give me answers!

Andrea Schneider: Or answers, also answers.

Ilona Ehrlich: As a U.S history scholar, in classes when learning about second wave feminism, we hear a lot about the Equal Rights Amendment, and that there were some groups who were opposed to it. I'm curious about how you responded to the backlash, how you reacted to it, and how you deal with criticism.

Gloria Steinem: Well, I don't know. I really want to raise enough money to put big, huge roadside billboards in every airport where people arrive from other countries that say, "welcome to the only democracy in the world that excludes women from the Constitution." I mean, it is ridiculous, you know.

Andrea Schneider: I think we're done; I don't have anything to top that. There's one question in the back.

Gloria Steinem: Or answer?

Andrea Schneider: Okay, also answer, yes.

Andrea Schneider, Repeating Student Question: Are you seeing any young women today who you've interacted with, or met, who you look at as change makers and are particularly impressed with?

Gloria Steinem: Oh, yes absolutely. I mean they say to me things like, "you know, I'm becoming in many ways a woman who takes no shit." How great is that? It's happening in the deli in my neighborhood, on campuses, and of course in this room. I'm probably going to live an extra ten years just because of the energy.

Andrea Schneider: And then you'll come back for your ninety-ninth birthday!

Gloria Steinem: Okay that would be good.

Andrea Schneider: All right, please join me in thanking Ms. Steinem. I am going to turn this over to our Editor-in-Chief, John Dellamore, to officially present you with the award.

JOHN DELLAMORE: On behalf of the *Cardozo Journal of Conflict Resolution*, I am deeply honored to present Ms. Gloria Steinem with the International Advocate for Peace Award.

GLORIA STEINEM: Thank you.

THE FUTURE OF ARBITRATION IN THE UNITED STATES: TEXTUALISM, A TECTONIC SHIFT, AND A RESHAPING OF THE CIVIL JUSTICE SYSTEM

*Imre S. Szalai**

I. Introduction

Everyone reading this sentence is likely bound by an arbitration agreement. There are hundreds of millions of arbitration agreements in the United States used in connection with all types of employment relationships and consumer transactions.[1] An explosion in the broad use of arbitration agreements has been occurring since the 1980s, when the United States Supreme Court began issuing broad, expansive interpretations of arbitration law.[2] As a result of this expansion, the role of courts diminished in society. Due to arbitration agreements, parties are generally blocked from having their disputes heard through public proceedings in courts with broader procedural protections. Instead, parties bound by such agreements must submit claims to a private arbitrator where due process does not exist.[3]

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1 Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration,* Econ. Pol'y Inst. (Apr. 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/ [https://perma.cc/BN68-T3F2] (noting that more than 60 million American workers are bound by arbitration agreements); Imre S. Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. Davis L. Rev. 233, 234 (2019) (noting that more than 826 million consumer arbitration agreements were in force in the United States in 2018).

2 *See infra* Section II.

3 Davis v. Prudential Sec., 59 F.3d 1186, 1191 (11th Cir. 1995) (holding that "the state action element of a due process claim is absent in private arbitration cases."); *see also* Fed. Deposit Ins. Corp. v. Air Florida Sys., Inc., 822 F.2d 833, 842 n.9 (9th Cir. 1987) ("The FDIC argues also that it had a due process right to an oral hearing. The arbitration involved here was private, not state, action; it was conducted pursuant to contract by a private arbitrator. Although Congress, in the exercise of its commerce power, has provided for some governmental regulation of private arbitration agreements, we do not find in private arbitration proceedings the state action requisite for a constitutional due process claim."); Elmore v. Chi. & I.M.R. Co., 782 F.2d 94, 96 (7th Cir. 1986) ("Private arbitration, however, really is private; and since constitutional rights are in general rights

The inability to access courts and the corresponding shrinking role of courts in society, due to the growth of arbitration, can be problematic on many fronts.

As one example of the potential harm of arbitration, some parties have abused arbitration in a manner to help cover up wrongdoing. The widespread use of arbitration agreements in the employment context likely played a role in concealing widespread sexual assault and harassment cases in the workplace.[4] Claims involving anticompetitive or unfair business practices by Amazon, as well as claims that Amazon sold counterfeit, dangerous infant car seats and other harmful products, have been sent to arbitration instead of public courts.[5] As a result, their wrongdoing can be more easily concealed from the public. As another example, an arbitration agreement is at the center of one of Donald J. Trump's many legal battles. Trump used an arbitration agreement in connection with the hush payment made to adult film actress Stormy Daniels.[6] Although arbitration can be appropriately used for many legitimate reasons and with many potential benefits, such as efficiency, speed, lower costs, and the use of an expert decisionmaker to resolve a dispute,[7] parties can sometimes abuse arbitration with the hope of concealing questionable or illegal conduct, which could otherwise be more easily revealed during the course of public court proceedings.

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against government officials and agencies rather than against private individuals and organizations, the fact that a private arbitrator denies the procedural safeguards that are encompassed by the term 'due process of law' cannot give rise to a constitutional complaint.").

[4] Employees at Sterling Jewelers endured severe sexual harassment and discrimination at their workplace. However, the confidential nature of arbitration hindered the workers from fully discovering the scope of the wrongdoing. An attorney representing these workers noted that "[m]ost of [these workers] had no way of knowing that the others had similar disputes, because that was all kept confidential." *See* Rachel Martin, *No Class Action: Supreme Court Weighs Whether Workers Must Face Arbitrations Alone*, NPR (Oct. 6, 2017, 4:22 AM), https://www.npr.org/transcripts/555862822 [https://perma.cc/R8Q6-H95G].

[5] Greenberg v. Amazon.com, Inc., No. 20-cv-02782-JSW, 2021 WL 7448530 at *20 (N.D. Cal. 2021) (ordering consumer to arbitrate his unfair competition claims against Amazon.com); Blake Ellis & Melanie Hicken, *Dozens of Amazon's Own Products Have Been Reported as Dangerous—Melting, Exploding or Even Bursting into Flames. Many are Still on the Market*, CNN (Sept. 10, 2020), https://www.cnn.com/2020/09/10/business/amazonbasics-electronics-fire-safety-invs/index.html [https://perma.cc/3ED7-G8VH]; Anderson v. Amazon.com, Inc., 478 F. Supp. 3d 683, 699 (M.D. Tenn. 2020) (compelling arbitration of claims involving sale of allegedly defective seatbelt extenders for children).

[6] Clifford v. Trump, No. CV1802217SJOFFMX, 2019 WL 3249597, at *2 (C.D. Cal. 2019); Michael R. Sisak et al., *Trump Charged with 34 Felony Counts in Hush Money Scheme*, Associated Press (Apr. 4, 2023), https://apnews.com/article/donald-trump-arraignment-hush-money-81225510ef7638494852816878f612f0 [https://perma.cc/N2HD-S975].

[7] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010) ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.") (citation omitted).

Today, after decades of expansion, arbitration and arbitration law are undergoing a tectonic shift, and a new phase of contraction in arbitration law is currently unfolding.[8] Since 2019, the United States Supreme Court has started to use a more textual approach when interpreting the Federal Arbitration Act ("FAA"), the main federal law governing the enforceability of arbitration agreements.[9] This profound shift and more literal approach in interpreting the law can have a far-reaching impact and limit the broad enforceability of arbitration agreements. In addition to this judicial shift, there have been similar legislative and private initiatives reflecting a more cautious, restrained use of arbitration in recent years.[10] Before this shift, and still to this day, the United States has stood apart from the rest of the world in its expansive embrace and broad uses of arbitration agreements for virtually all types of disputes.[11] However, it appears that the United States may have now reached a maximum saturation point with arbitration agreements. A recalibration is currently underway in which there will be a contraction and rethinking of the broad uses of arbitration in the United States.

This Article explores the transformation in arbitration and arbitration law that is currently in progress. To help contextualize how arbitration law is evolving, the first part of the Article examines the initial enactment of the FAA in 1925. It also discusses a forty-year period of the FAA's expansion, when the Supreme Court generally used an atextual, policy-driven approach when interpreting the FAA from the 1980s to about 2019.[12] The second part of the Article then analyzes this new, ongoing phase with the FAA whereby the Court, since 2019, has been using a more restrained, textual approach in interpreting and applying the FAA.[13] Finally, the third part of the Article discusses the current and potential future impact of this new textual approach by the judiciary, which is coinciding with similar legislative and private initiatives to cut back on the uses of arbitration, and how the new textual approach can help reconceptualize arbitration.[14] Furthermore, future cases decided under the new approach will be in tension with the older, expansionist FAA

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[8] *See infra* Section III.

[9] *See* 9 U.S.C. § 1–16.

[10] *See infra* Section IV.B.

[11] Deborah R. Hensler & Damira Khatam, *Re-Inventing Arbitration: How Expanding the Scope of Arbitration Is Re-Shaping Its Form and Blurring the Line Between Private and Public Adjudication*, 18 Nev. L. J. 381, 391 n.51 (2018) ("Mandatory pre-dispute arbitration in consumer and employment contexts is a uniquely American phenomenon, distinguishing U.S. arbitration from domestic arbitration in other countries.") (citation omitted).

[12] *See infra* Section II.A.

[13] *See infra* Section III.

[14] *See infra* Section IV.

precedent, and this tension can cause arbitration law to unravel in certain situations.[15]

The explosive growth of arbitration for several decades and the recent beginning of a period of contraction have shaped and will continue to shape our civil justice system. Arbitration should not be viewed in isolation as a stand-alone legal institution, but instead, should be understood as part of a broader legal system and as having a close relationship with the courts. Whenever there is a binding arbitration agreement in place, a weaker party has likely lost an opportunity and broader procedural protections available in publicly petitioning the government, through the courts, for assistance in resolving disputes. Some of these disputes sent to private arbitration may involve critical disputes of public interest, such as civil rights disputes or wage disputes or claims of consumer harm. One can view the period of expansion of arbitration law as reflecting successful attempts by conservative interests and corporate interests to weaken or limit access to the public courts by vulnerable consumers and workers.[16] At a time when other pillars of democracy are under attack, this current period of contraction is a significant, needed shift to help reestablish or recalibrate the courts to a more proper, stronger role in maintaining democracy in the United States.

II. The Supreme Court's Transformation and Expansion of the FAA

Today, arbitration agreements, including agreements to arbitrate future disputes, are generally binding and fully enforceable,[17] but this broad enforceability has not always been the case in United States history. Prior to the 1920s, although an arbitration award could generally be entered in court as a binding judgment, pre-dispute arbitration agreements were not enforceable.[18] To put this another way, a promise or agreement to arbitrate a future dispute was not

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15 *Id.*

16 *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1646 (2018) (Ginsburg, J., dissenting) ("The inevitable result of today's [majority, pro-arbitration] decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers."); *See generally* Stephen B. Burbank & Sean Farhang, Rights and Retrenchment: The Counterrevolution against Federal Litigation (2017) (exploring how conservative interests have transformed federal law to make private enforcement of substantive rights more difficult).

17 9 U.S.C. § 2.

18 Ian R. Macneil, American Arbitration Law: Reformation, Nationalization, Internationalization 19–20 (1992) (although pre-1920 laws were supportive of arbitration once an arbitrator issued an award, there was a "relative lack of enforceability of such agreements before an award was made . . .").

legally binding before the 1920s; a person could back out of such a promise, if desired, prior to an award being issued.[19] However, a mix of different events, beliefs, and transformations in society during the early 1900s—including innovations in transportation and communications, a growing, interconnected national and international economy, the First World War, progressive beliefs, and a broader movement of procedural reform in the courts—prompted Congress and several states to enact modern arbitration laws during the 1920s, such as the FAA, which declared that agreements to arbitrate future disputes are "valid, irrevocable, and enforceable."[20]

With the passage of the FAA in 1925, arbitration agreements between two business interests across the country became valid, irrevocable, and enforceable, and the statute helped facilitate an efficient, convenient mechanism for resolving disputes.[21] As explained below, the FAA, as originally enacted, was limited in scope. However, for a period of about forty years beginning in the 1980s and lasting until 2019, the Supreme Court ignored the FAA's text and expanded the meaning of the statute far beyond its original scope.

A. *The Supreme Court Expanded the FAA From Contractual Disputes to Virtually All Types of Disputes*

The FAA was originally designed to resolve contractual, commercial disputes that arose out of interstate shipping. During Congressional hearings about the bills that would become the FAA, a Senator described the FAA by observing "[w]hat you have in mind is that this proposed legislation relates to contracts arising in interstate commerce."[22] The main proponent and supporter of the FAA confirmed the Senator's observation and gave an example of what the FAA was designed for by responding, "Yes; entirely. The farmer who will sell his carload of potatoes, from Wyoming, to a dealer in

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[19] *Id.*; *see also* Arb. Agreements at Common L., 21 Williston on Contracts § 57:2 (4th ed.) (2023) (discussing the revocability of arbitration agreements under common law prior to the issuance of an award).

[20] 9 U.S.C. § 2. For deeper exploration of the many factors that brought about modern arbitration laws during the 1920s, *see* Imre S. Szalai, Outsourcing Justice: The Rise of Modern Arbitration Laws in America (2013).

[21] 9 U.S.C. § 2.

[22] *Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 7 (1924) [hereinafter *1924 Hearings*].

the State of New Jersey, for instance."[23] During these hearings, the FAA was described as designed to cover "ordinary[,] everyday trade disputes," and drafters stated, "it is for them that this legislation is proposed."[24]

The FAA's text confirms this understanding of the FAA as limited in scope to contractual disputes. Section 2 of the FAA, which is the heart of the statute, contains a substantial limit that has been largely ignored for the last several decades:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration *a controversy thereafter arising out of such contract or transaction* . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[25]

To paraphrase this key provision of the statute, the FAA governs written arbitration provisions either in a maritime transaction or in a contract involving interstate commerce, and the statute further defines "maritime transaction" as certain types of maritime contracts. Additionally, under section 2, such arbitration provisions are binding with respect to certain designated controversies. More specifically, there are two types of controversies covered by this language of the FAA: (i) controversies arising out of a contract involving interstate commerce; and (ii) controversies arising out of a maritime transaction, which is defined to be maritime contracts.[26] Thus, the FAA's text establishes a critical limit to the FAA's coverage. The FAA only applies to contractual disputes or disputes that arise out of a contract. The FAA's coverage is expressly limited to written provisions in a contract "to settle by arbitration a controversy thereafter arising out of such contract . . ."[27]

It must be emphasized that claims that can be asserted without reference to a contract are not covered by the FAA's text. For example, if one party commits an assault or battery on another party, the right to sue in this instance generally does not arise out of a contract. One's right to be free from unconsented, harmful or offensive contact does not depend on a contract.[28] Likewise, certain statutory claims are beyond the scope of the FAA's coverage. For example, if an employer engages in gender or racial discrimination against an

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[23] *Id.*

[24] *Id.*

[25] 9 U.S.C. § 2 (emphasis added).

[26] *Id.*

[27] *Id.*

[28] *See, e.g.*, Brown v. Brotman Med. Ctr., Inc., 571 F. App'x 572, 574 (9th Cir. 2014) ("prohibitions against assault and battery exist independent of any contract.") (citation and internal quotations omitted).

employee, the employee's right to sue may arise out of a federal civil rights statute, not out of a contract.[29]

Unfortunately, since the 1980s, the U.S. Supreme Court has expanded the FAA to cover virtually every type of claim of substantive law, including statutory and tort claims. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court ignored the text of the FAA and expanded the FAA to cover statutory claims.[30] In *Mitsubishi*, the Court selectively quotes section 2 as follows and, through selective omissions, the Court opens the door for the arbitration of statutory antitrust claims:

> We do not agree, for we find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims. The Act's centerpiece provision makes a written agreement to arbitrate "in any maritime transaction or a contract evidencing a transaction involving commerce . . . valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[31]

Notice that the Court's quotation of section 2 in *Mitsubishi* leaves out the critical contractual limitation found in section 2 that disputes must "aris[e] out of such contract" in order to be covered by the FAA.[32] The Court in *Mitsubishi* uses a cleverly placed, disingenuous ellipsis to ignore the clear contractual limitation and in effect rewrite and expand the statute beyond contractual claims.

Immediately after engaging in this atextual analysis and claiming the FAA is not limited to contractual disputes, the Court in *Mitsubishi* then cites and relies on a purported federal policy favoring arbitration to justify its holding:

> The "liberal federal policy favoring arbitration agreements," manifested by this [section 2] and the Act as a whole, is at bottom a policy guaranteeing the enforcement of private contractual arrangements: the Act simply "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate." As this Court recently observed, "the preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered," a concern which requires that we rigorously enforce agreements to arbitrate. Accordingly,

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[29] *See, e.*g, Jamison v. Dow Chem. Co, No. 03-10226-BC, 2005 WL 1252204, at *5 (E.D. Mich. May 23, 2005) ("The right to be free of discrimination under both state and federal law is independent of contract rights.") (citation omitted); Leahman v. Shell Oil Co., No. CIV.A. 88-1469, 1989 WL 30280, at *1 (E.D. La. Mar. 23, 1989) ("the right to be free from racial discrimination in employment is independent of any contractual right an employee may have.").

[30] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 615 (1985).

[31] *Id.* at 625.

[32] 9 U.S.C. § 2 (written provisions in a contract "to settle by arbitration a controversy thereafter arising out of such contract" are fully binding).

> the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute.[33]

In *Mitsubishi*, the Court ignores the FAA's text and relies instead on a "liberal federal policy favoring arbitration" to hold that virtually any substantive dispute the parties agreed to arbitrate could be covered by the FAA.[34] The *Mitsubishi* Court, instead of applying the limitation from the FAA's text, shifts the inquiry to whether the substantive law of the underlying dispute prohibits arbitration of such a dispute.[35] In other words, if parties agree to arbitrate a statutory civil rights claim pursuant to the FAA, such a dispute is arbitrable as long the civil rights law does not forbid arbitration.[36] Most substantive laws do not address, or much less forbid, arbitration, and so based on *Mitsubishi*, virtually every substantive claim is by default subject to the FAA unless the substantive law forbids arbitration.[37]

Mitsubishi approved of the arbitration of statutory claims, beyond the text of the FAA, and more specifically upheld the arbitration of complex antitrust claims.[38] In the wake of *Mitsubishi*, the Court addressed and approved of the arbitration of other statutory disputes under the FAA, such as securities, RICO, and ADEA claims.[39] And in more recent years, the Court has applied the FAA to wrongful death or battery claims in the nursing home context.[40] As a result of the Court's permissive attitude towards arbitrability under the FAA, virtually every type of claim can now be arbitrated.[41]

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[33] 473 U.S. at 625–26 (citations and internal quotations omitted).

[34] *Id.* at 627.

[35] *Id.* ("[I]t is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable.") (citations omitted).

[36] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (to determine whether an Age Discrimination in Employment Act ("ADEA") claim can be arbitrated under the FAA, court must examine the text, legislative history, and purpose of the ADEA).

[37] *Id.*

[38] *Mitsubishi*, 473 U.S. at 636–37.

[39] Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477 (1989) (securities claims); Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220 (1987) (securities and RICO claims); *Gilmer*, 500 U.S. 20 (ADEA claim).

[40] Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 581 U.S. 246 (2017) (applying the FAA to wrongful death tort claims).

[41] *See, e.g.*, Woodell v. Vivint, Inc., No. 22-CV-00733-JCH-GBW, 2023 WL 3956631 (D.N.M. June 12, 2023) (compelling arbitration of personal injury claims); Duval v. Costco Wholesale Corp., No. 22-CV-02338-TSH, 2023 WL 3852694 (N.D. Cal. June 5, 2023) (Costco successfully asked court to compel arbitration of a slip-and-fall claim); Karim v. Best Buy Co., No. 22-CV-04909-JST, 2023 WL 3801909 (N.D. Cal. June 2, 2023) (Best Buy successfully asked the court to compel arbitration of customer's unfair business practices claim); Southwest Convenience Stores, LLC v. Iglesias, 656 S.W.3d 784 (Tex. App. 2022) (enforcing arbitration clause in connection with wrongful death action filed by family of a murdered convenience store worker); Winninger v. Scott, No.

However, disputes that do not arise out of a contract should not be covered under the text and original purpose of the FAA.

Through a democratic process with elected representatives, it would be appropriate for legislators to decide that certain disputes involving a public interest should or should not be entitled to greater protections in court. However, the shift that occurred through *Mitsubishi* involved judicial activism and judicial rewriting of the law. With the Court's atextual and policy-driven approach from *Mitsubishi*, the contractual limitation in the FAA no longer exists as a matter of law and stare decisis. During the 1980s, the Court transformed and expanded the statute by ignoring its text in cases like *Mitsubishi* and others.

B. *The Supreme Court Expanded the FAA From Federal Court to State Court*

The FAA was not originally designed to apply in state court. This federal nature of the FAA was emphasized during Congressional hearings when the bills that would become the FAA were being debated:

> Nor can it be said that the Congress of the United States, directing its own courts . . . would infringe upon the provinces or prerogatives of the States . . . [T]he question of the enforcement [of arbitration agreements] relates to the law of remedies and not to substantive law. The rule must be changed for the jurisdiction in which the agreement is sought to be enforced . . . *There is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement. The statute can not have that effect.*[42]

If a party involved in an interstate shipping dispute is bound by an arbitration clause but nevertheless files a lawsuit in federal court, the text of the FAA would allow the federal court to stay the litigation until the arbitration occurred.[43] Section 3 of the FAA states that "[i]f any suit or proceeding be brought in any of the *courts of the United States* upon any issue referable to arbitration under an agreement in writing for such arbitration," then that court may issue a stay.[44] Notice that the statute here discusses "courts of the

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21-CV-04689-HSG, 2022 WL 3205035 (N.D. Cal. 2022) (compelling arbitration of patient's claims that doctor sexually assaulted her during a medical exam).

[42] 1924 Hearings, at 39–40 (emphasis added).

[43] 9 U.S.C. § 3 (1947).

[44] *Id.* (emphasis added).

United States," or federal courts, not state courts. Likewise, if one party involved in an interstate shipping dispute refused to honor an arbitration agreement, the other party could ask a federal court to compel arbitration.[45] Section 4 of the FAA allows such a petition to be filed in the "United States district court" which would have subject matter jurisdiction over the dispute between the parties.[46] As demonstrated by the FAA's text, the FAA, as a procedural statute, was not intended to govern in state courts.[47]

However, in 1984 in the landmark case of *Southland Corp. v. Keating*, the Supreme Court interpreted the FAA as applicable in state courts.[48] Before analyzing the text of the FAA, the Court in *Southland* described the core section of the FAA as embodying a strong national policy: "[i]n enacting section 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[49] After highlighting this federal policy favoring arbitration, the Court then selectively analyzed the text of one provision of the FAA.[50] The Court quoted section 2 of the FAA, which broadly declares arbitration agreements to be binding, and the Court found two limitations in this provision.[51] First, the arbitration provision must be part of a written maritime contract or a contract involving interstate commerce.[52] Second, the arbitration agreement may be revoked upon any grounds that exist at law or in equity for the revocation of any contract.[53] After recognizing these two limitations found in section 2 of the FAA, the Court explained that the FAA's broad principle of enforceability contains no other limitation under state law.[54] Looking at this provision in isolation and finding no

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45 9 U.S.C. § 4 (1947).

46 *Id.*

47 *See also* H.R. Rep. No. 68–96, at 1 (1924) ("The matter is properly the subject of Federal action. Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought and not one of substantive law to be determined by the law of the forum in which the contract is made."); *id.* ("Before [arbitration] contracts could be enforced in the Federal courts . . . this law is essential. The bill declares that such agreements shall be recognized and enforced by the courts of the United States."); *See* Ian R. Macneil, American Arbitration Law: Reformation, Nationalization, Internationalization (1st ed. 1992), for a thorough exploration of why the FAA is applicable solely in the federal courts.

48 Southland Corp. v. Keating, 465 U.S. 1 (1984).

49 *Id.* at 10.

50 *Id.* at 10–11.

51 *Id.*

52 *Id.* at 11.

53 *Id.*

54 *Southland*, 465 U.S. 1, 11.

other limitations, the Court was now free to declare that the FAA is not limited to federal courts and could be applied in state courts.[55] The Court also characterized the FAA as a substantive rule enacted pursuant to Congress's Commerce Clause powers.[56]

In *Southland*, the Court relied on a federal policy favoring arbitration to reach its conclusion and expand the FAA beyond its original intent as applicable solely in federal court.[57] As pointed out by Justice O'Connor in her dissenting opinion in *Southland*, the majority focused its textual analysis on section 2 of the FAA, which contains no mention of which judicial forums are bound by section 2.[58] Justice O'Connor explained that the other provisions of the FAA implementing section 2 are limited to federal courts, and Justice O'Connor also relied on legislative history to show the original understanding of the FAA as applicable solely in federal courts.[59] Justice O'Connor pointed out that her colleagues' decision to change and expand the FAA "is impelled by an understandable desire to encourage the use of arbitration."[60]

C. *The Supreme Court Expanded the FAA to Cover Employment Disputes*

The FAA was originally understood as covering contractual, commercial disputes, not employment disputes. During legislative hearings regarding the FAA, one of the main drafters explained that "[i]t was not the intention of this bill to make an industrial arbitration in any sense . . . It is not intended that this shall be an act referring to labor disputes, at all."[61] The FAA is limited in its coverage to contracts involving interstate commerce.[62] Before the New Deal and at the time of the FAA's enactment, the Court treated the Commerce Clause in a narrow manner so that most

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55 *Id.* at 16 (in passing the FAA, Congress created "a substantive rule applicable in state as well as federal courts.").

56 *Id.* at 11–16.

57 *Id.* at 10.

58 *Id.* at 22.

59 *Id.* at 22–23, 25–29.

60 *Southland*, 465 U.S. 1, 22.

61 *A Bill Relating to Sales and Contracts to Sell in Interstate and Foreign Commerce; and a Bill to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or With Foreign Nations: Hearing on S. 4213 and S. 4214 Before the Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 9 (1923).

62 9 U.S.C. §§ 1, 2 (1947).

employment relationships would be analyzed as local and not involving interstate commerce.[63] However, transportation workers who crossed state lines, such as railroad workers, were viewed as involved with interstate commerce and could be subject to federal regulation.[64] To confirm that the FAA was limited to commercial disputes and not employment disputes, the FAA's drafters added language to the original draft to clarify that the FAA does not apply to "contracts of employment" of any "class of workers engaged in interstate commerce."[65] Furthermore, the drafters stressed that "all industrial questions have been eliminated" from the FAA's coverage through the addition of this language excluding workers involved in interstate commerce.[66]

For several decades, the FAA was understood to be inapplicable to employment disputes, but in 1991, the Supreme Court upheld the enforcement of an arbitration clause in connection with an employment relationship in *Gilmer v. Interstate/Johnson Lane Corp*.[67] The *Gilmer* Court focused on a narrow issue: whether a statutory claim under the Age Discrimination in Employment Act ("ADEA") can be covered by the FAA.[68] Based on precedent such as the *Mitsubishi* case described above, the Court recognized that statutory claims can be arbitrated pursuant to the FAA, and nothing in the ADEA prohibits private resolution through arbitration.[69] In reaching its conclusion, the Court recognized there must be a "healthy regard" for the "liberal federal policy favoring arbitration."[70] However, in *Gilmer*, the Court ignored a controlling, threshold legal issue: whether the FAA applies to employment relationships. The majority opinion in *Gilmer* did not address the section 1 exclusion regarding workers or the legislative history demonstrating the FAA was not intended for employment disputes.[71] Instead, by focusing on the narrow issue of whether statutory claims can be arbitrated and by upholding the enforcement of the arbitration agreement at issue, the Court in

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63 *Employers' Liability Cases*, 207 U.S. 463 (1908).

64 *Id.* at 496, 498 (regulation of the employment of railroad employees engaged in the operation of interstate commerce is permissible under the Commerce Clause, but regulation of a railroad company's clerical workers is not).

65 9 U.S.C. § 1 (1947); SZALAI, *supra* note 20, at 135, 153.

66 SZALAI, *supra* note 20, at 135, 153.

67 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

68 *Id.* at 23.

69 *Id.* at 35.

70 *Id.* at 26, 35.

71 *Id.* at 25 n.2 (noting that this threshold issue was not raised in the courts below or presented as a question in the petition for certiorari, and instead this issue is "left for another day").

Gilmer indirectly opened the door for the arbitration of employment disputes under the FAA.

Ten years after *Gilmer*, the Court finally addressed the worker exclusion in section 1 in *Circuit City Stores, Inc. v. Adams*.[72] Instead of viewing the exclusion as originally intended as a provision to ensure that the FAA would not cover any employment relationships, the Court explained that section 2's broad enforceability provision implements Congress' intent to exercise commerce power to the full.[73] Under this view of the commerce power, employment contracts would generally be covered by the FAA.[74]

In a strong dissent in *Circuit City*, Justice Stevens explained the FAA was originally designed for commercial disputes, not employment disputes.[75] He explained that section 1's exclusion was added to the FAA to confirm that section 2 would not apply to any employment relationships.[76] Justice Souter also wrote a separate dissent where he emphasized that at the time of the FAA's enactment, when there was a narrow view of the commerce power, most employment relationships would not be covered by the FAA.[77] The majority in *Circuit City* improperly transformed and expanded the statute to cover employment relationships.[78]

Justice Stevens criticized his colleagues for this transformation. He explained the FAA was originally designed to reverse an old judicial hostility against arbitration so that arbitration agreements would be treated neutrally and enforceable like other contracts.[79] However, Justice Stevens explained that the Court was now expanding the FAA and treating arbitration agreements more favorably than other contracts.[80] Citing cases like *Gilmer*, *Mitsubishi*, *Southland*, and others, Justice Stevens explained "a number of this Court's cases decided in the last several decades have pushed the pendulum far beyond a neutral attitude and endorsed a policy that strongly favors private arbitration."[81] As a result of the Court's decision to

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72 Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

73 *Id.* at 112.

74 *Id.* at 113–14 (section 2 of the FAA broadly covers all employment contracts, subject to the narrow exception in Section 1 for transportation workers).

75 *Id.* at 125–27.

76 *Id.* at 128.

77 *Id.* at 136.

78 *Circuit City*, 532 U.S. at 119 ("only contracts of employment of transportation workers" are exempt from the FAA's scope).

79 *Id.* at 131–32.

80 *Id.*

81 *Id.*

change and expand the FAA to employment disputes, millions of workers are now covered by binding arbitration agreements.[82]

To summarize this section about the judicial transformation of the FAA, the FAA was originally enacted and designed to play a more limited role in society. The statute was originally understood to be a procedural statute, applicable only in federal courts,[83] for commercial, contractual claims.[84] However, beginning around the 1980s, the Court used an atextual, policy-driven approach to change and expand the FAA. Cases like *Mitsubishi*,[85] *Southland*,[86] *Gilmer*,[87] and *Circuit City*[88] are contrary to the text, history, and purpose of the FAA. As recognized by dissenting Justices, the Court's expansion of the FAA was likely motivated by a desire to promote the use of arbitration.[89] This judicial activism probably arose, at least in part, in response to a perception of a litigation crisis during the 1980s,[90] with the hope that increased use of arbitration agreements would help clear judicial dockets.

III. The Court's New Textual Approach When Analyzing the FAA

After four decades of judicial expansion of the FAA, which was addressed in the prior section of the Article, arbitration law is currently undergoing a tectonic shift. This section of the Article explores a new phase in the historical evolution of arbitration law. In this new phase, which is a significant change from the past several decades, the Supreme Court has been using a more textual approach when interpreting the FAA as opposed to a more policy-driven approach. This textual approach tends to limit the broad enforceability of arbitration agreements.

This section of the Article first explores the landmark 2019 case of *New Prime, Inc. v. Oliveira*,[91] which ushered in this new phase of arbitration law. Then, this section explores the Supreme Court's

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82 Colvin, *supra* note 1; Szalai, *supra* note 1.

83 *See supra* section II.B.

84 *See supra* section II.A.

85 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

86 *Southland*, 465 U.S. 1.

87 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

88 *Circuit City*, 532 U.S. 105.

89 *Southland*, 465 U.S. 1, at 22 (O'Connor, J., dissenting).

90 Frank J. Vandall, *A Critique of the Restatement (Third), Apportionment as it Affects Joint and Several Liability*, 49 Emory L. J. 565, 620 (2000) (explaining that during the 1980s, "the myth of a litigation crisis was created and widely disseminated.").

91 New Prime, Inc, v. Oliveira, 139 S. Ct. 532 (2019).

2021 term, during which the Court's new textual approach is on full display.

A. *New Prime, Inc. v. Oliveira*

The *New Prime* case involved a minimum wage employment dispute and class action filed by a truck driver, and the truck driver was purportedly bound by an arbitration agreement with the defendant trucking company.[92] The truck driver and trucking company disagreed whether the driver was an employee or an independent contractor.[93] Under *Circuit City*'s interpretation of the FAA, section 1 of the FAA contains the transportation worker exception, which is supposed to be narrowly construed.[94] However, there was some confusion whether the phrase "contracts of employment" narrowly referred to employee-employer relationships or more broadly covered all types of workers, including independent contractors.[95] Under a narrow interpretation of the exemption, if the truck driver at issue was an independent contractor, the exemption would not apply, and the FAA would require enforcement of the arbitration agreement. However, under a broad reading of the exemption, the truck driver would not be covered by the FAA, regardless of whether the truck driver was an employee or independent contractor.

In resolving this issue, the Supreme Court in *New Prime* focused on the text of the FAA and what the terms would have meant at the time of the FAA's enactment. Citing several dictionaries as well as cases and statutes from the relevant time period,[96] the Court in *New Prime* held that the term "contract of employment" meant a contract to perform work, without distinguishing between kinds of workers.[97] As a result, the truck driver would be exempt from the FAA's coverage pursuant to the transportation worker exemption in section 1.[98]

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92 *Id.* at 536.

93 *Id.*

94 *Adams*, 532 U.S. 105, 118–19.

95 *New Prime*, 139 S. Ct. at 536 ("[D]oes the term 'contracts of employment' refer only to contracts between employers and employees, or does it also reach contracts with independent contractors? Because courts across the country have disagreed on the answers to these questions, we took this case to resolve them.").

96 *Id.* at 539–43.

97 *Id.* at 543–44.

98 *Id.*

Since the 1980s, the Court's decisions were often driven or influenced by the Court's perception of a strong federal policy favoring arbitration.[99] For decades since the 1980s, it was a safe bet that the Court would likely rule in favor of ordering arbitration in connection with FAA cases. There was a long line of Supreme Court cases where a consumer or worker would be pitted against a corporate defendant who was trying to enforce an arbitration agreement, and for the last few decades, the Court has generally ruled in favor of the company and of enforcing the arbitration agreement.[100] If the *New Prime* case had been decided several years ago during the expansionist phase of the FAA's evolution, a different Court following a policy-driven approach could have interpreted the transportation worker exemption more narrowly such that only employees who served as transportation workers would be exempt. Under a policy-driven interpretation of the FAA from the past, the Court may have held that the truck driver in *New Prime* was covered by the FAA and forced to arbitrate.

The Court's *New Prime* case is a landmark decision because the Court broke from its prior, atextual, policy-driven approach. The Court in *New Prime* was more textual and analyzed what the statute's language would have meant at the time of the FAA's enactment. If this approach had been followed consistently since the FAA's enactment, arbitration law would be more limited in scope today, and as explained below, the Court has continued with this more textual approach, especially during the Court's 2021 term.

B. *The Supreme Court's 2021 Term*

This subsection examines the textualist approach used by the Supreme Court in four arbitration cases from the 2021 term. As explained below, it is likely that these cases would have been decided differently under the prior era's atextual, policy-driven, expansionist approach.

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99 *See supra* Section II.

100 *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018); Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 581 U.S. 246 (2017); DIRECTV, Inc. v. Imburgia, 577 U.S. 47 (2015); Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530 (2012); CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63 (2010); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006); Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002); Cir. City Stores, Inc. v. Adams, 532 U.S. 105 (2001); Dr.'s Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996); Allied-Bruce Terminix Cos. V. Dobson, 513 U.S. 265 (1995).

i. Badgerow v. Walters

The *Badgerow* case addressed a federal court's power or subject matter jurisdiction in connection with FAA proceedings.[101] More specifically, the case addressed how a federal court analyzes subject matter jurisdiction in connection with a petition to vacate or confirm an arbitrator's award.[102] In the Court's *Badgerow* decision, one sees the Court's textual approach on display.

To better understand the jurisdictional issues with the FAA and in the *Badgerow* case, it helps to understand that the FAA regulates or governs different types of court proceedings used to facilitate arbitration. For example, from the front end of a dispute, before an arbitration takes place, a court can rely on section 4 of the FAA to enforce an arbitration agreement or compel a party to arbitrate.[103] When one party refuses to honor an arbitration agreement, the other party to the agreement can commence an action in court pursuant to section 4, which provides for a court order directing the parties to arbitrate according to the terms of the agreement.[104] At the back end of a dispute, or after an arbitration proceeding has run its course and produced an award resolving the dispute, a party may seek confirmation of the award in court pursuant to section 9 of the FAA.[105] Additionally, at the back end, a party may seek vacatur of the award in court pursuant to section 10 of the FAA, which sets forth narrow grounds for vacatur such as evident partiality of the arbitrator or procurement of the award by fraud.[106]

When does a federal court have power or subject matter jurisdiction to compel arbitration or enforce an arbitration agreement from the front end? The text of section 4 provides a clear answer. Section 4 directs the federal court to analyze jurisdiction by examining whether the federal court has subject matter jurisdiction over the dispute to be arbitrated.[107] In other words, if the federal court has the power to hear the merits of the underlying dispute, the federal court has the power to order the parties to honor an agreement to arbitrate this underlying dispute.[108] This approach of examining the underlying dispute to be arbitrated is sometimes referred to as the "look-through" approach, whereby a federal court looks through

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101 Badgerow v. Walters, 142 S. Ct. 1310, 1314 (2022).

102 *Id.*

103 9 U.S.C. § 4.

104 *Id.*

105 *Id.* § 9.

106 *See id.* § 10.

107 *Id.* § 4.

108 *See generally* Vaden v. Discover Bank, 556 U.S. 49 (2009).

the arbitration agreement to examine subject matter jurisdiction over the main merits dispute to be arbitrated.[109] Pursuant to the text of section 4, the underlying merits dispute, the core substantive dispute at the heart of any attempts to arbitrate under the FAA, serves as the jurisdictional anchor in federal court for FAA proceedings to compel arbitration.[110]

Badgerow addressed subject matter jurisdiction of federal courts from the back end, after an arbitration proceeding has produced an arbitrator's award.[111] *Badgerow* involved an employment dispute where a worker alleged unlawful termination under both state and federal laws, and an arbitrator dismissed the worker's claims.[112] Does a federal court have power or subject matter jurisdiction to confirm or vacate this award? The look-through approach used to analyze subject matter jurisdiction for "front-end" petitions to compel arbitration[113] would support a finding of jurisdiction here in the *Badgerow* "back-end" situation. Under this look-through approach, if applied to the back-end, a federal court would have subject matter jurisdiction over the employment dispute at issue in *Badgerow* because the employment dispute involved a federal civil rights claim, and thus, a federal court would have jurisdiction to confirm or vacate the arbitral award resolving this dispute. However, the Supreme Court in *Badgerow* rejected this look-through approach,[114] and as explained below, the Court reached this result through a textual analysis.

In a majority opinion authored by Justice Elena Kagan, the Court recognized that the FAA does not, by itself, provide for federal jurisdiction, and instead, there must be an "independent jurisdictional basis."[115] The Court also recognized that the text of Section 4 instructs courts to examine jurisdiction over the parties' underlying dispute.[116] However, in contrast to section 4, "[s]ections 9 and 10 do not mention the court's subject-matter jurisdiction at all. So under ordinary principles of statutory construction, the look-through method for assessing jurisdiction should not apply."[117] The Court reasoned that if certain text only appears in one section of a statute but not others, Congress intended such an omission to be

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109 *Id.* at 52, 66.

110 9 U.S.C. § 4; *Discover Bank*, 556 U.S. at 66.

111 *Badgerow*, 142 S. Ct. at 1314.

112 *Id.* Badgerow's claims included a Title VII federal civil rights claim. *Badgerow v. Walters*, 975 F.3d 469, 473 n.3 (5th Cir. 2020).

113 *Discover Bank*, 556 U.S. at 66.

114 *Badgerow*, 142 S. Ct. at 1314.

115 *Id.* at 1316 (citations omitted).

116 *See id.* at 1317 (citation omitted).

117 *Id.* at 1317–18.

deliberate.[118] Emphasizing a textual approach, the Court also cautioned it could not "redline" the FAA or import "[s]ection 4's consequential language into provisions containing nothing like it."[119]

The textual approach used by the Court in *Badgerow* is less supportive of arbitration than the past policy-driven cases interpreting the FAA. As a practical matter, if the underlying dispute involves a federal question claim, such as a civil rights claim for racial discrimination in an employment dispute, a federal court would not have power to confirm or vacate an arbitral award resolving this federal claim.[120] The federal nature of the underlying dispute is no longer a proper basis for a federal court's subject matter jurisdiction under *Badgerow*.[121] Although a federal court would have jurisdiction to compel arbitration of this same dispute from the front end,[122] a federal court would not have automatic jurisdiction to vacate or confirm an award arising from this same federal question dispute.[123] Post-*Badgerow*, federal judicial power is now lopsided with respect to the FAA; *Badgerow* undermined, to a certain degree, the powers of federal courts to facilitate arbitration from the back end. In order for a federal court to have power to confirm or vacate an arbitral award, the petition to vacate or confirm would generally need to involve diverse parties and more than $75,000 in controversy.[124] Without satisfying diversity jurisdiction, parties would have to seek confirmation or vacatur of an arbitral award in state courts. As recognized by the Court, state judiciaries will play a significant role with respect to the FAA: "The result [of the holding in *Badgerow*] is to give state courts a significant role in implementing the FAA. But we have long recognized that feature of the statute. Enforcement of the Act, we have understood, 'is left in large part to the state courts.'"[125]

To emphasize the shift that is currently underway in arbitration law, it is helpful to understand the impact of *Badgerow* and realize that the Court could have easily reached the opposite result in *Badgerow* by using the policy-driven, atextual approach of the past.

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118 *Id.* at 1318 (quoting Collins v. Yellen, 141 S.Ct. 1761, 1782 (2021)).

119 *Id.*

120 *Id.* at 1317–18.

121 *See id.* at 1321 ("As Walters notes, those claims may have originated in the arbitration of a federal-law dispute. But the underlying dispute is not now at issue. Rather, the application concerns the contractual rights provided in the arbitration agreement, generally governed by state law.").

122 *Discover Bank*, 556 U.S. at 66.

123 *See Badgerow*, 142 S. Ct. at 1317–18.

124 *Id.* at 1316 ("If [a petition to confirm or vacate an arbitral award] shows that the contending parties are citizens of different States (with over $75,000 in dispute), then § 1332(a) gives the court diversity jurisdiction.").

125 *Id.* at 1322 (citations and internal quotations omitted).

The textual approach used in *Badgerow* resulted in a more restrained reading of the FAA and less judicial support of arbitration proceedings. Under *Badgerow*, the federal courts are not as supportive of the system of arbitration from the back end, after an arbitration award has been issued. Also, if the Court had decided *Badgerow* twenty years ago during the policy-driven, expansive era of the Court's FAA interpretations, the Court could have reached the opposite result it reached in *Badgerow*. For example, the Court could have reached the opposite result by extending the look-through jurisdictional analysis to all FAA proceedings, whether front-end or back-end, and such a jurisdictional approach would have been more supportive of arbitration. An expansionist, atextualist Court from the past may have reasoned that based on the strong federal policy favoring arbitration, the entire statute should be viewed as embodying a comprehensive legal framework regarding arbitration, and the jurisdictional look-through approach found in section 4 of the FAA applies to every FAA proceeding under this unitary, comprehensive statute, including back-end proceedings for vacatur or confirmation. With a uniform jurisdictional approach, federal courts would be best positioned to support and facilitate the federal policy favoring arbitration. In other words, relying on a broad federal policy supporting arbitration, the Court in the past may have been tempted to be less textual and may have said that the approach recognized under Section 4 was intended to apply comprehensively to every type of FAA proceeding. Thus, under this expansive approach, as long as a federal court has power to hear the merits of the underlying dispute, such as a federal civil rights claim in the employment context, a federal court would have power to hear any type of FAA proceeding related to that dispute, such as a proceeding to compel arbitration, to appoint an arbitrator, to enforce an arbitral subpoena, or to confirm or vacate an arbitral award.

As an alternative way to reach the opposite result in *Badgerow*, the Court could have addressed this *Badgerow* fact pattern by relying on its earlier policy-driven, expansionist holding from *Southland*, that the FAA embodies a substantive right to arbitrate.[126] Treating the FAA as involving a substantive right should mean that the FAA automatically gives rise to federal question jurisdiction.[127] Therefore, had the Court decided *Badgerow* during its expansive, atextualist stage, the Court could have justified and reached a different result.

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[126] Southland Corp. v. Keating, 465 U.S. 1, 16 (1984) (through the FAA, Congress "creat[ed] a substantive rule applicable in state as well as federal courts.").

[127] A.I. Trade Fin., Inc. v. Petra Int'l Banking Corp., 62 F.3d 1454, 1459 (D.C. Cir. 1995) ("In a federal question case within the scope of § 1331, there is by definition some substantive federal law to govern the case from the outset.") (citation and internal quotations omitted).

In sum, *Badgerow* helps illustrate the evolution that is occurring in arbitration law with the more textual approach.

ii. Morgan v. Sundance, Inc.

On a narrow plane, the *Sundance* case addressed the issue of waiver; more specifically, when or under what circumstances has a party waived its contractual right to arbitrate?[128] To help understand the impact of *Sundance* and the particular fact pattern involved, consider the following hypothetical. A consumer or worker files a lawsuit against a company in court, and the plaintiff is either unaware of the arbitration agreement or believes that any purported arbitration agreement related to the transaction is likely invalid. In many situations like this, the defendant will immediately raise the issue of the arbitration agreement and ask the court to stay the action and issue an order compelling the plaintiff to submit the plaintiff's claims to arbitration pursuant to the arbitration agreement.[129]

However, there may be situations where the defendant does not immediately raise the issue of the arbitration agreement and the defendant does not immediately ask the court to compel arbitration. For example, the defendant may engage in some motion practice before raising the issue of arbitration. Or perhaps the defendant may file an answer and start engaging in discovery, as if there is no arbitration agreement. Why does a defendant not immediately ask the court to enforce an arbitration agreement? It could be that the defense counsel is neglectfully unaware of the existence of the arbitration agreement, or perhaps the defense counsel is hoping to game the system and see if a litigation route may be more beneficial to the defendant's interests.

In these situations where a defendant delays in asking the court to compel arbitration, courts examine whether a defendant has waived the right to arbitrate.[130] Although the federal appellate courts articulated a waiver standard in slightly different ways, the majority of federal appellate courts before *Sundance* required a showing of prejudice in order to demonstrate that a waiver of the right to arbitrate had occurred.[131] In other words, this standard of waiver

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128 Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1710–11 (2022).

129 *See, e.g.*, Racioppi v. Airbnb, Inc., No. A-0455-22, 2023 WL 4552596 (N.J. Super. Ct. App. Div. July 17, 2023); Hopkins v. Dell Techs., Inc., No. 22-CV-2464-DWD, 2023 WL 3791722 (S.D. Ill. June 2, 2023).

130 *See, e.g.*, Bridgeporte Wealth Plan. Partners Co. v. Vallabhaneni, No. 1-20-CV-390-RP, 2020 WL 13180462, at *3 (W.D. Tex. Dec. 30, 2020) ("The right to arbitrate a dispute, like all contract rights, is subject to waiver.") (citation omitted).

131 *See, e.g.*, McCoy v. Walmart, Inc., 13 F.4th 702, 704 (8th Cir. 2021) ("[W]hen a party (1) kn[ows] of an existing right to arbitration; (2) act[s] inconsistently with that right; and (3) prejudice[s] the

helped preserve the right to arbitrate, and this pre-*Sundance* standard was forgiving and generous in allowing defendants to compel arbitration belatedly.[132] Put another way, demonstrating a defendant's waiver before *Sundance* required the plaintiff to demonstrate prejudice arising from the defendant's delay.[133] This pre-*Sundance* requirement of prejudice helped support, or was justified, in light of the strong federal policy favoring arbitration.[134]

For example, the Second Circuit in *Rush v. Oppenheimer & Co.* explained that "[g]iven this dominant federal policy favoring arbitration, waiver of the right to compel arbitration due to participation in litigation may be found only when prejudice to the other party is demonstrated."[135] In *Rush*, the Second Circuit found there was no waiver, even where the defendant had delayed about eight months in asking the court to compel arbitration and instead engaged in pretrial proceedings, including filing a motion to dismiss, participation in some discovery, and filing an answer containing several affirmative defenses but with no mention of arbitration.[136] The Second Circuit found that the plaintiff had not demonstrated any prejudice.[137]

Prior to *Sundance*, courts recognized that a waiver of the right to arbitrate should not be inferred lightly, and the prejudice requirement helped maintain this standard.[138] For example, one district court in connection with a Title VII civil rights employment dispute found that the defendant employer had not waived the right to arbitrate, despite the defendant's year long delay in moving to compel arbitration.[139] The employer had filed an answer containing several affirmative defenses, none of which involved arbitration, and the

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other party [with its] inconsistent acts, waiver occurs.") (citation and internal quotations omitted); O.J. Distrib., Inc. v. Hornell Brewing Co., 340 F.3d 345, 356 (6th Cir. 2003) ("Although a waiver of the right to arbitration is not to be lightly inferred, a party may waive the right by delaying its assertion to such an extent that the opposing party incurs actual prejudice.") (citations and internal quotations omitted).

132 Borror Prop. Mgmt., LLC v. Oro Karric N., LLC, 979 F.3d 491, 494 (6th Cir. 2020) ("Federal law looks favorably upon arbitration. In view of that federal prerogative, the waiver of the right to arbitration is not to be lightly inferred.") (citations and internal quotations omitted).

133 Gala v. Tesla Motors TN, Inc., No. 2:20-CV-2265-SHM-TMP, 2020 WL 7061764, at *17 (W.D. Tenn. 2020) ("The party asserting waiver must demonstrate both that there was inconsistency and that there was actual prejudice.") (citation omitted).

134 Sabatelli v. Baylor Scott & White Health, 832 Fed. Appx. 843, 848 (5th Cir. 2020) (recognizing presumption against waiver because of the liberal federal policy in favor of arbitration).

135 Rush v. Oppenheimer & Co., 779 F.2d 885, 887 (2d Cir. 1985).

136 *Id.* at 889.

137 *Id.* at 885–86.

138 Trout v. Organizacion Mundial de Boxeo, Inc., 965 F.3d 71, 76–77 (1st Cir. 2020) (in light of federal policy favoring arbitration, waiver should not be lightly inferred and doubts about waiver should be resolved in favor of arbitration).

139 Pierre v. Rochdale Vill. Inc., No. 18-CV-6383, 2020 WL 6799635, at *9 (E.D.N.Y. Nov. 19, 2020).

employer also engaged in some discovery, including a minimal exchange of documents and responding to interrogatories.[140] The court found this delay and litigation conduct did not amount to waiver because the plaintiff did not demonstrate any prejudice from this delay or conduct.[141] In another case, a defendant delayed twenty-two months in asking the court to compel arbitration, and the defendant also removed the case from state court and engaged in some discovery, such as requesting the production of documents and propounding interrogatories.[142] Because the plaintiff did not demonstrate any prejudice, the court found that the defendant had not waived the right to arbitrate.[143]

In *Morgan v. Sundance, Inc.*, the Supreme Court addressed this particular problem of waiver of the right to arbitrate.[144] The plaintiff in *Sundance* was a Taco Bell worker who filed a collective action lawsuit in federal court for overtime violations of the Fair Labor Standards Act.[145] Sundance, the owner of the franchise, engaged in eight months of litigation without asking the court to compel arbitration.[146] Sundance first moved to dismiss the lawsuit since there were similar lawsuits previously filed, and the district court denied Sundance's motion.[147] Sundance then answered the plaintiff's complaint.[148] The answer contained numerous affirmative defenses, but none mentioned arbitration.[149] The parties also engaged in a mediation before Sundance moved to compel arbitration.[150] The district court found that the worker had been prejudiced,[151] but the Eighth Circuit found no prejudice and compelled arbitration, reasoning that no formal discovery had occurred and that the parties had not contested matters on the merits.[152]

The Supreme Court granted certiorari in *Sundance* to resolve a split among the federal circuits. Most circuits had adopted an arbitration-specific waiver rule whereby the party seeking to demonstrate

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140 *Id.* at *7.

141 *Id.* at *8 ("[T]he key to a waiver analysis is prejudice; without prejudice, there can be no waiver of the right to arbitrate a dispute.") (citations and internal quotations omitted); *id.* at *9.

142 Gateguard, Inc. v. Goldenberg, 585 F. Supp. 3d 391, 397 (S.D.N.Y. 2022).

143 *Id.* at 401.

144 *Sundance, Inc.*, 142 S. Ct. 1708, 1710–11 (2022).

145 *Id.* at 1711.

146 *Id.*

147 *Id.*

148 *Id.*

149 *Id.*

150 *Sundance*, *Inc.*, 142 S. Ct. at 1711.

151 *Id.* at 1712.

152 *Id.*

waiver had to show prejudice, but two circuits had rejected this rule.[153]

When discussing the special waiver rule for arbitration requiring prejudice, the Supreme Court explained the origins of this rule: the "special rule . . . derives from the FAA's 'policy favoring arbitration.'"[154] The Court recognized that outside of the arbitration context, federal courts generally do not require a showing of prejudice in connection with a waiver analysis,[155] and federal courts developed the prejudice requirement to foster this policy favoring arbitration.[156] However, the Court strongly cautioned that "the FAA's 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules."[157] Instead, this policy should be understood as overruling the pre-1920s judicial hostility and refusal to enforce arbitration agreements, and under this narrower view of policy, arbitration agreements are to be enforceable like any other contract.[158] Put another way, waiver concepts applicable to all other contracts would also govern arbitration contracts; "a court may not devise novel rules to favor arbitration over litigation."[159]

A prejudice requirement does not exist in the FAA's text,[160] and the idea of treating arbitration agreements the same as other contracts can be found in section 2 of the FAA, whereby agreements to arbitrate are fully binding "save upon such grounds as exist at law or in equity for the revocation of any contract."[161] The Court in *Sundance* did not mention the text of section 2 or the fact that the FAA does not explicitly discuss a prejudice requirement. However, the Court did attempt a textual analysis. Citing section 6 of the FAA, the Court mentions "the text of the FAA makes clear that courts are not to create arbitration-specific procedural rules like the one we address here."[162] According to section 6, any

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153 *Id.*

154 *Id.* at 1711.

155 *Id.* at 1713.

156 *Sundance*, *Inc.*, 142 S. Ct. at 1712–13.

157 *Id.* at 1713.

158 *See id.* at 1713–14.

159 *Id.* at 1713. After *Sundance*, it is possible that a court may still require a showing of prejudice in order to find waiver if the applicable contract law would have a prejudice requirement for waiver analysis for contracts generally. VIPshop Int'l Holdings, Ltd. v. Transpacific Trade Ctr. LLC, No. 20 C 2557, 2022 WL 4119787, at *2 (N.D. Ill. 2022) ("Although the Supreme Court recently held [in *Sundance*] federal courts could not fashion an arbitration-specific rule requiring prejudice as a condition of waiver, it did not cast doubt on the proposition that prejudice can be a factor in deciding whether a party impliedly waived arbitration.").

160 9 U.S.C. § 1–16.

161 9 U.S.C. § 2.

162 *Sundance*, *Inc.*, 142 S. Ct. at 1714.

application under the FAA must be "made and heard in the manner provided by law for the making and hearing of motions,"[163] and the Court construed this provision as requiring usual procedural rules, not "custom-made rules, to tilt the playing field in favor of (or against) arbitration."[164]

To help illustrate the shift that is currently underway in arbitration law, recall that prior to *Sundance*, courts would bend over backwards to enforce an arbitration agreement, even where one party had engaged in litigation conduct incompatible with arbitration.[165] Prior to *Sundance*, courts would not easily find a waiver of the right to arbitrate.[166] However, in the aftermath of *Sundance*, courts have been finding waiver more easily. Courts which used to require a showing of prejudice have been rejecting that requirement after *Sundance*.[167] As a result, waiver of the right to arbitrate can be more easily established after *Sundance*.

If the Court had decided *Sundance* decades ago during the policy-driven, expansive phase of the FAA instead of during the more textual phase, the Court could have reached the opposite conclusion and required a showing of prejudice. Relying on the federal policy favoring arbitration cited by the Court in the past,[168] the Court in *Sundance* could have simply concluded that waiver is not to be easily established unless there is a strong showing of prejudice in light of such policy.

iii. Southwest Airlines Co. v. Saxon

The *Southwest* case involves section 1 of the FAA, which exempts from the coverage of the statute "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[169] This exemption in Section 1 has been construed since *Circuit City* as referring to "transportation workers."[170] The plaintiff in *Southwest* was employed by the airline

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163 9 U.S.C. § 6.

164 *Sundance*, *Inc.*, 142 S. Ct. at 1714.

165 *See supra* notes 137–42 and accompanying text.

166 *Id.*

167 Armstrong v. Michaels Stores, Inc., 59 F.4th 1011, 1014 (9th Cir. 2023) (recognizing that after *Sundance*, "it is error to require parties arguing waiver of the right to arbitration to demonstrate prejudice"); Alvarez v. Experian Info. Sols., Inc., No. 19-CV-03343, 2023 WL 2519249, at *8 (E.D.N.Y. Mar. 15, 2023) (same).

168 *See, e.g.*, Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) (claiming that Congress had declared a national policy favoring arbitration when enacting the FAA).

169 9 U.S.C. § 1 (2023).

170 Southwest Airlines Co. v. Saxon, 142 S. Ct. 1783, 1789 (2022) "§ 1 exempted only contracts with transportation workers, rather than all employees, from the FAA." (citing Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001)).

company as a ramp supervisor who trained and supervised ramp agents who physically handled cargo, and the supervisors frequently handled cargo as well.[171] The plaintiff, who had agreed to arbitrate pursuant to her employment contract, filed suit against Southwest for overtime wages, and a threshold issue was whether the FAA governed the plaintiff's arbitration agreement.[172] The Court had to decide whether the plaintiff would fall within the transportation worker exemption found in section 1 of the FAA.[173]

The Court's textual approach in *Southwest* was evident throughout the opinion. The Court began its analysis by emphasizing it had to interpret the transportation worker exemption's "language according to its ordinary, contemporary, common meaning," and "[t]o discern that ordinary meaning, those words must be read and interpreted in their context, not in isolation."[174] Then, to engage in this textual analysis, the Court broke down the transportation worker exemption into different phrases: "class of workers" and "engaged in foreign or interstate commerce."[175] First, the Court relied on three different dictionaries from the early 1900s to describe how one defines the relevant "class of workers."[176] The Court explained that this phrase "class of workers" focuses on the "actual work that the members of the class, as a whole, typically carry out," as opposed to the broader industry an employer may be involved in.[177] The Court then applied this definition or principle and found that the plaintiff belonged to a class of workers who frequently handled or loaded cargo on airplanes.[178] Next, having defined the relevant class of workers, the Court examined the rest of the transportation worker exemption by analyzing whether this particular class of airplane cargo loaders is "engaged in foreign or interstate commerce."[179] To analyze this phrase, the Court again emphasized its textual approach: "As always, we begin with the text."[180] Relying again on dictionaries from the time period of the FAA's enactment, the Court found that to be "engaged" means to be "occupied, employed, or involved," and the

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171 *Id.* at 1787.

172 *Id.* If the FAA did not govern, then perhaps state arbitration law would govern. Saxon v. Southwest Airlines Co., 993 F.3d 492, 502 (7th Cir. 2021) ("But [if the FAA does not govern,] Saxon could still face arbitration under state law . . .").

173 *Southwest*, 142 S. Ct. at 1788.

174 *Id.* (citations and internal quotation marks omitted).

175 *Id.*

176 *Id.*

177 *Id.*

178 *Id.*

179 *Southwest*, 142 S. Ct. at 1789–90.

180 *Id.* at 1789.

word "commerce" includes the transportation of goods.[181] The Court concluded that "any class of workers directly involved in transporting goods across state or international borders" is not covered by the FAA, and airplane cargo loaders such as the plaintiff were within such a class.[182]

During the expansionist, atextual phase of the Court's FAA jurisprudence, the Court may have reached a different conclusion in *Southwest*. For example, relying on the liberal federal policy favoring arbitration, the Court may have interpreted the transportation worker exemption very narrowly. Under a narrow view of the exemption, only workers who transport goods and people across state lines, like seamen and railroad employees, would fall under the exemption. But other workers in the same industries would fall outside the scope of the exemption and thus be covered by the FAA.[183]

iv. ZF Automotive US, Inc. v. Luxshare, Ltd.

Luxshare did not directly involve the domestic FAA, and instead, at issue in this case was a different statute that could potentially impact international arbitration.[184] Even though the domestic FAA was not at issue, one also sees the Court's strong textual approach in this arbitration-related case. A federal statute from the 1960s, 28 U.S.C. § 1782(a), permits litigants to ask United States federal courts to provide assistance in gathering evidence for use in "a foreign or international tribunal,"[185] and there was uncertainty whether a foreign or international tribunal included a private arbitration proceeding.[186] In *Luxshare*, the Court granted certiorari to clarify whether the statute could be used in connection with international arbitration proceedings.[187]

Engaging in a textual analysis and citing dictionaries from the 1960s, the Court held that the terms "foreign tribunal" and "international tribunal" mean tribunals with governmental authority, not private arbitration proceedings.[188] After engaging in a textual analysis, the

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181 *Id.* (internal quotations marks and citations omitted).

182 *Id.*

183 *Cf.* Eastus v. ISS Facility Servs., Inc., 960 F.3d 207, 212 (5th Cir. 2020) (narrowly construing the transportation worker exemption before the *Southwest* case and finding that a ticketing agent supervisor, who sometimes handled baggage at the gate and supervised others who did so, did not fall under the exemption because the worker was not "engaged in an aircraft's actual movement in interstate commerce.").

184 ZF Auto. US, Inc. v. Luxshare, Ltd., 142 S. Ct. 2078, 2083 (2022).

185 28 U.S.C. § 1782 (2022).

186 *ZF Auto. US, Inc.*, 142 S. Ct. at 2083.

187 *Id.*

188 *Id.* at 2086–87.

Court found support for such an analysis in the history of the statute.[189] The Court explained the statute was designed for United States courts to provide assistance to governmental bodies abroad, in the hope of encouraging reciprocal assistance from other foreign courts, and this purpose would be in tension with providing assistance to purely private arbitration proceedings.[190] The Court also supported its textual analysis by explaining that a contrary ruling would be in tension with the FAA, which generally does not allow for broad discovery.[191]

As demonstrated by the Court's decision in *New Prime*, which ushered in the textual era of the Court's FAA jurisprudence, and the Court's decisions from its 2021 term, the Court is now using a more literal, textual, restrained approach when interpreting arbitration law, as opposed to the more policy-driven, expansionist approach used for several decades since the 1980s.

IV. The Future of Arbitration and Arbitration Law in the United States

This final section of the Article makes some observations and predictions about the future.[192] The Court will likely continue using a more textual approach in future FAA cases, and this approach will tend to limit the scope of arbitration and conceptualize arbitration differently from the past. Also, this new textual approach is subject to a few caveats, which will be explored below. Furthermore, recent legislative and private initiatives are consistent with this more restrained, textual approach being displayed in the judiciary. Finally, cases decided under the textual approach will not always coexist in harmony with the policy-driven cases from the past. Tension is likely to grow within arbitration law, and in some instances, the legal framework supporting arbitration may breakdown as a result.

A. *The Court Will Likely Use a More Textual Approach in Future FAA Cases, and This Approach Can Help Reconceptualize Arbitration*

At least with the current makeup of the Court, the Court as a general trend will likely continue to use some form of a textualist

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189 *Id.* at 2088.

190 *Id.*

191 *Id.* at 2088–89.

192 However, as the wise Yoda once recognized, "Difficult to see. Always in motion is the future." Star Wars: Episode V – The Empire Strikes Back (20th Century Fox 1980).

approach for the foreseeable future. The text of the statute will be the primary focus for the Court when analyzing the FAA in future cases, subject to few caveats or qualifications. This new trend is significant and will likely lead to more restrained or limited interpretations of the FAA, and this new approach may be less supportive of arbitration. Such a textual approach is a tectonic shift compared to the past, when a more policy-driven analysis was used,[193] and as explained below, this textual approach may lead to a different conceptualization of arbitration.

To illustrate this tectonic shift, consider how some past FAA decisions would have turned out differently under a textualist approach. In *Sundance*, the Court warned that "the FAA's 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules."[194] Instead, under the FAA, arbitration agreements are to be enforceable like any other contract, and "a court may not devise novel rules to favor arbitration over litigation."[195] These principles from *Sundance* are in direct conflict with a landmark ruling from the Court's expansionist, earlier period regarding the FAA, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*.[196]

If the Court in *Moses H. Cone* had applied these principles from *Sundance*, arbitration law would be different today. Normally, the general rule in contract law is that ambiguous terms in a contract are construed against the drafter.[197] But in the landmark *Moses H. Cone* case, the Court created a policy-driven rule favoring arbitration, whereby ambiguities about the scope of an arbitration clause are to be interpreted in favor of arbitration.[198] Thus, imagine a customer and merchant enter into an arbitration clause, drafted by the merchant, whereby all disputes regarding "deliveries" are to be arbitrated. Suppose a shipment is delivered late, and the parties dispute who is responsible for the delay of the delivery. This dispute concerning a late delivery is likely covered by the clause. What if the dispute involves a purchased product that is defectively designed? The dispute has nothing to do with a late delivery or an allegation that a delivery damaged the product. Is this dispute regarding a design

193 *See supra* Section II.

194 *Sundance*, 142 S. Ct. at 1713.

195 *Id.*

196 Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983). Westlaw demonstrates that *Moses H. Cone* has been cited in thousands of cases and briefs over the years; it is a foundational case in FAA jurisprudence.

197 Restatement (Second) of Contracts § 206 (1981).

198 *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25 (1983) ("The [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ").

defect a dispute about a "delivery"? Under normal contract law, ambiguities about the arbitration contract would be construed against the drafter,[199] and the dispute about a design defect would therefore not be arbitrable. However, under the special pro-arbitration rule crafted by the Court in *Moses H. Cone*, ambiguities in the scope of an arbitration clause are resolved in favor of arbitration.[200] Why? Because the Supreme Court (not the text of the FAA) said so in *Moses H. Cone* based on the purported federal policy in favor of arbitration.[201]

If the Court were to revisit the *Moses H. Cone* ruling using the principle from *Sundance,* that courts are not supposed to invent arbitration-preferring procedural rules,[202] then the Court would have reached a different result in *Moses H. Cone*. Treating arbitration agreements like any other contract, instead of developing a special rule favoring arbitration, would result in application of the traditional contract rule that ambiguities are construed against the drafter.[203] In today's modern economy, where millions of arbitration clauses are presented on a take-it-or-leave-it, non-negotiable basis, by a corporate entity to a consumer or worker,[204] the general contract rule would typically result in holding that arbitration is not required if the arbitration clause is ambiguous, because the drafter would tend to be the corporate party. The pro-arbitration, expansionist *Moses H. Cone* presumption, whereby ambiguities are resolved in favor of arbitration—which has no basis in the text of the FAA—would likely not exist if the Court had applied today's more textual approach.

This example involving *Moses H. Cone* and *Sundance* also helps demonstrate how the new textual approach can lead to a different conceptualization of arbitration. Although *Sundance* involves the doctrine of waiver,[205] the Court's reasoning in *Sundance* goes beyond the narrow context of waiver. The Court's core statement in *Sundance*, that "the FAA's 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules,"[206] is a strong, clear rejection of the atextual, policy-driven approach from the past. In rejecting the policy-driven approach, the

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199 Restatement (Second) of Contracts § 206 (1981).

200 *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25.

201 *Id.* at 24 ("[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.").

202 *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022).

203 Restatement (Second) of Contracts § 206 (1981).

204 Colvin, *supra* note 1.

205 *Sundance*, 142 S. Ct. at 1713.

206 *Id.*

Court in *Sundance* attempts to restore arbitration agreements as being on an equal footing like any other contract. In other words, *Sundance* reconceptualizes or repositions arbitration agreements by relegating arbitration agreements to be equal with other contracts.[207] Arbitration contracts are no longer at the top of a hierarchy of contracts to be supported by the Court's preference for arbitration, as illustrated by the preferential rule from *Moses H. Cone*. Instead, in this post-*New Prime* world of the FAA, arbitration agreements should be treated like any other contract.

This more textualist approach on display since *New Prime* has the potential to recalibrate and change arbitration law, subject to some caveats and qualifications. It is important to recognize that a textualist approach to the FAA does not necessarily mean that there will be clear answers to every FAA issue. There are different degrees or types of textualist approaches, with some versions being more flexible and others more formal.[208] Also, some view the text of the FAA as ambiguous, indeterminate, and sparse.[209] Additionally, the FAA may be silent on certain issues, especially because it was originally designed for a more limited use of arbitration compared to today.[210] Thus, even if the text of the FAA is the main focus of analysis, there may still be uncertainty or disagreement on how a particular issue may be resolved because of uncertainties or gaps in the text, or different textualist approaches. To put this another way, a textualist approach will be the dominant approach going forward but may not eliminate all confusion or uncertainty regarding the FAA.

Furthermore, the policy preferences of the Justices may also creep in and influence a textualist approach. Hanging in the balance of FAA cases may be whether class proceedings can occur, and certain Justices appear to strongly dislike class proceedings.[211] For

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[207] *Id.* ("The federal policy is about treating arbitration contracts like all others, not about fostering arbitration.") (citations omitted).

[208] Tara Leigh Grove, *The Misunderstood History of Textualism*, 117 Nw. U. L. Rev. 1033, 1084–85 (2023) (discussing different versions of textualism); Tara Leigh Grove, *Which Textualism?*, 134 Harv. L. Rev. 265, 279 (2020); Kevin Tobia et al., *Progressive Textualism*, 110 Geo. L. J. 1437, 1448–55 (2022) (describing different principles of textualism and how these principles sometimes conflict).

[209] Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. Rev. 1189, 1194 n.29 (2011) (noting the text of the FAA is indeterminate); Amalia D. Kessler, *Arbitration and Americanization: The Paternalism of Progressive Procedural Reform*, 124 Yale L. J. 2940, 2946 (2015) (recognizing the text of the FAA is "too terse" and "indeterminate") (citations omitted).

[210] *See supra* Part II.

[211] In an FAA case, Justice Kagan made the following observation in dissent: "To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled." Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 252 (2013) (Kagan, J., joined by Ginsburg and Breyer, JJ., dissenting).

certain Justices, their policy preferences and desire to limit the use of class proceedings may shape how they utilize a textualist approach in connection with FAA cases.[212]

Also, the Court has built up several decades of atextual and flawed holdings. For example, as explained above, the Court has held that section 2 of the FAA governs in state courts,[213] and statutory claims are covered by the FAA.[214] Justice O'Connor once wrote of the Court's judicial law-making with respect to the FAA that the "Court has abandoned all pretense of ascertaining congressional intent with respect to the [FAA], building instead, case by case, an edifice of its own creation."[215] This judicially created edifice, or prior Court holdings, is subject to the principle of stare decisis. Although some Justices have expressed a willingness to overrule past FAA cases, such as *Southland*,[216] overruling of prior FAA cases has not occurred. The Court seems likely to adhere to stare decisis and its past FAA precedents.[217] Thus, the Court's textual approach is more likely to be used when confronting new FAA issues for which there is no prior precedent.

In sum, the Court has ushered in a new era of FAA jurisprudence where the primary focus will be on the FAA's text, and this approach, although subject to a few caveats, is a significant shift from

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212 Justice Alito, joined by Justice Thomas, wrote in dissent the following comments about the textualist approach: "[t]he Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated; the theory that courts should "update" old statutes so that they better reflect the current values of society." Bostock v. Clayton City, 140 S. Ct. 1731, 1755–56 (2020) (Alito, J., joined by Thomas, J., dissenting); *cf.* W. Va. v. Env't Prot. Agency, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., joined by Breyer and Sotomayor, JJ., dissenting) ("[s]ome years ago, I remarked that '[w]e're all textualists now.' It seems I was wrong. The current Court is textualist only when being so suits it.") (citation omitted).

213 Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

214 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 636–37 (1985).

215 Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

216 *Id.* at 287 (Thomas, J., dissenting, joined by Scalia, J.) (*Southland* is fundamentally flawed because the FAA was intended to apply solely in federal court); *Id.* at 285 (Scalia, J., dissenting) ("I will, however, stand ready to join four other Justices in overruling [*Southland*].").

217 In another landmark FAA case from the expansionist period, the Court developed a "clear and unmistakable" standard for delegating arbitrability issues to an arbitrator. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995). Textually, however, the FAA does not allow for delegation of arbitrability matters to an arbitrator; instead, section 4 requires a court to make arbitrability determinations. 9 U.S.C. § 4. However, when the Court was confronted with this textual argument recently, that the FAA's text does not allow for delegation, the Court succinctly observed "that ship has sailed." Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 530 (2019). Thus, with respect to past FAA precedent, the Court is also likely to dismiss new, textual arguments against such precedent as involving a "ship [that] has sailed" instead of overruling the past precedent).

the past. This new approach can lead to more constrained or limiting interpretations of the FAA, along with a reconceptualization of arbitration as involving a contract that does not deserve special treatment.

B. *The Court's New Approach is Consistent with Recent Legislative and Private Initiatives*

Arbitration law can be described through the metaphor of a slow-moving pendulum, with shifts or changes that have occurred over long periods of time.[218] When one looks at the treatment of arbitration across United States history, there have been periods where government and judicial systems gave little support for arbitration and other periods where government and judicial systems more strongly supported arbitration. For example, prior to the 1920s in the United States, there was a judicial mistrust of arbitration,[219] and courts would generally not enforce predispute arbitration agreements.[220] Arbitration was sometimes viewed as an inferior form of dispute resolution.[221] Then, the pendulum shifted during the 1920s with the enactment of the FAA and similar state arbitration statutes whereby predispute arbitration agreements became valid, irrevocable, and enforceable.[222] During the 1980s, the pendulum started shifting increasingly in favor of arbitration, with the Supreme Court's expansionist interpretations transforming the FAA.[223] With such pro-arbitration law, arbitration clauses exploded in the United States so that now, arbitration clauses appear in connection with virtually all types of transactions.[224]

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218 Stephen C. Yeazell & Joanna C. Schwartz, Civil Procedure 555 (9th ed. 2016).

219 AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 342 (2011) (recognizing a pre-FAA "judicial hostility" towards arbitration).

220 Macneil, *supra* note 18, at 19–20.

221 Tobey v. Cty. of Bristol, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845) ("[Arbitrators] are not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually, in complicated cases; and hence it has often been said, that the judgment of arbitrators is but rusticum judicium. Ought then a court of equity to compel a resort to such a tribunal, by which, however honest and intelligent, it can in no case be clear that the real legal or equitable rights of the parties can be fully ascertained or perfectly protected?"); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 34 (1991) (recognizing that judicial attitudes have shifted and no longer treat arbitration as inferior to litigation).

222 *See generally* Szalai, *supra* note 20.

223 *See supra* Part I.

224 *See, e.g.*, Woodell v. Vivint, Inc., No. 22-CV-00733-JCH-GBW, 2023 WL 3956631 (D.N.M. June 12, 2023) (enforcing arbitration clause in connection with personal injury claims); Duval v. Costco Wholesale Corp., No. 22-CV-02338-TSH, 2023 WL 3852694 (N.D. Cal. June 5, 2023) (enforcing

Now, during this new, more textualist phase of the Court's jurisprudence regarding the FAA, it appears that arbitration may have reached a saturation point in society. The pendulum may have reached its highest point or limit already, and more parties seem to be questioning whether the broad uses of arbitration in society are appropriate. With this more textualist phase, the pendulum appears to be swinging back in the opposite direction, with less judicial support of arbitration. If the pendulum is pushed too far in one direction, the pendulum seems to correct itself and move in the opposite direction.

The judicial shift captured in this Article also corresponds well with recent legislative and private initiatives to cut back on the expansive uses of arbitration. For several years, there have been attempts in Congress to amend the FAA, such as by banning predispute arbitration agreements in the consumer or employment contexts.[225] Such bills have usually died in committee.[226] However, in March 2022, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act ("EFAA") went into effect.[227] The EFAA is the most significant change in the last several decades to the FAA and a landmark statute arising from the #MeToo movement.[228] The EFAA generally invalidates predispute arbitration agreements in cases involving sexual harassment or sexual assault.[229] In effect, the people of the United States, through their representatives, made a recent decision that these types of disputes should not be subject to predispute arbitration agreements under the FAA. Instead, survivors of these horrible acts can choose to proceed with their claims in public court with more robust procedural protections.

There have also been some private initiatives in recent years cutting back on the broad use of arbitration. For example, Google voluntarily dropped the use of arbitration agreements for all

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arbitration clause in connection with a slip-and-fall claim); Karim v. Best Buy Co., No. 22-CV-04909-JST, 2023 WL 3801909 (N.D. Cal. June 2, 2023) (enforcing arbitration clause in connection with an unfair business practices claim); Southwest Convenience Stores, LLC v. Iglesias, 656 S.W.3d 784 (Tex. App. 2022) (enforcing arbitration clause in connection with a wrongful death claim); Winninger v. Scott, No. 21-CV-04689-HSG, 2022 WL 3205035 (N.D. Cal. 2022) (enforcing arbitration clause in connection with a sexual assault claim).

225 *See, e.g.*, Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong. (2017) (declaring as invalid predispute arbitration agreements with respect to employment, consumer, antitrust, or civil rights disputes).

226 *Id.*

227 Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117–90, 136 Stat. 26 (codified at 9 U.S.C. §§ 401, 402).

228 Imre S. Szalai, *#MeToo's Landmark, Yet Flawed, Impact on Dispute Resolution: The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021*, 18 NW. J. L. SOC. POL'Y 1 (2023).

229 9 U.S.C. § 402.

employment disputes in 2019,[230] shortly after the *New Prime* ruling. In 2021, Amazon also voluntarily dropped arbitration for its customers.[231] These legislative and private initiatives suggest that the shift in attitude regarding arbitration is not just limited to the judiciary, and this shift is happening across broader segments of society.

C. *The Court's New Approach Will Create Tension with Older Precedent from the Expansionist Phase of the Court's FAA Jurisprudence*

As explained above, the Court's future interpretations of the FAA are likely to be more rooted in the text of the FAA. However, such new decisions will be in tension with the older expansionist FAA precedent from the last several decades.[232] Arbitration law will lack coherence, and in some situations, the uneasy tension between the expansionist phase and textual phase could lead to a breakdown in the legal system's treatment of arbitration.

As an example of this uneasy tension, consider the Court's *Southland* ruling[233] in light of the more recent watershed *New Prime* case.[234] The Court in *New Prime* recognized the unitary nature of the FAA, [235] an analysis in tension with *Southland*. The Court in *New Prime* observed that sections one, two, three and four of the FAA involve a significant "sequencing" and are "integral parts of a whole."[236] Sections three and four refer exclusively to federal courts,[237] and by recognizing that sections one, two, three and four must be read together,[238] it becomes clear under the rationale from *New Prime* that the FAA's broad principle of enforceability is a procedural rule applicable solely in federal courts. In other words, the broad enforceability principle from section two is inextricably intertwined with the provisions of sections three and four, which are

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230 Daisuke Wakabayashi, *Google Ends Forced Arbitration for All Employee Disputes*, N.Y. Times (Feb. 21, 2019), https://www.nytimes.com/2019/02/21/technology/google-forced-arbitration.html [http://perma.cc/PG7L-R6EB].

231 Michael Corkery, *Amazon Ends Use of Arbitration for Customer Disputes*, N.Y. Times (July 22, 2021), https://www.nytimes.com/2021/07/22/business/amazon-arbitration-customer-disputes.html [http://perma.cc/E9MF-29C9].

232 *See, e.g.*, *supra* Part II.

233 Southland Corp. v. Keating, 465 U.S. 1 (1984).

234 New Prime Inc. v. Oliveira, 139 S. Ct. 532 (2019).

235 *Id.* at 538.

236 *Id.*

237 9 U.S.C. §§ 3 ("[C]ourts of the United States . . ."), 4 ("United States district court . . .").

238 *New Prime Inc.*, 139 S. Ct. at 534, 538.

limited to federal courts. However, the *Southland* Court from the 1980s ignored the integrated, unitary nature of the FAA and the FAA's clear references to federal courts, and instead the *Southland* court reached its expansionist holding by looking narrowly at section two in isolation.[239] If the Court would have always used this more textual approach found in *New Prime* when analyzing the FAA in the past, the Court's expansionist, atextual cases like *Southland*,[240] *Mitsubishi*,[241] and *Circuit City*[242] may have turned out differently. As the Court warned in the landmark *New Prime* case, courts should not "pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal,"[243] an ironic statement in light of the forty years of the Court's expansionist, policy-driven FAA interpretations immediately prior to *New Prime*. Had the Court adhered to this more restrained principle during the 1980s, the FAA would be more limited in scope today, and the United States may not have experienced an explosion of arbitration agreements.

Like pouring new wine into old wineskins, the new textualist decisions may lead to problems trying to coexist with the older, atextual FAA precedent, and in some situations, the legal system's support of arbitration may break down. For example, consider the Court's textual approach in *Badgerow* in light of the expansive, atextual interpretations of the FAA in *Southland*. If the underlying dispute involves a federal statutory claim, like a federal civil rights claim, the federal nature of this claim would no longer give rise to a federal court's jurisdictional power to vacate or confirm an arbitral award.[244] The solution according to the *Badgerow* Court is for such petitions to vacate or confirm to be heard in state courts.[245] The *Badgerow* Court believed that "Congress chose to respect the capacity of state courts to properly enforce arbitral awards," and the Court concluded it "must respect that congressional choice."[246] However, this conclusion is problematic because if one examines the FAA's text, it is not clear that the FAA applies in state court. For example, consider the vacatur provisions of section ten, which state that the "United States court in and for the district wherein the award was made" may vacate an award upon four stated grounds.[247] If one applies a textual analysis, one will conclude that the FAA's vacatur

239 *Southland*, 465 U.S. at 10–11.

240 *Id.* at 1.

241 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

242 Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

243 *New Prime Inc.*, 139 S. Ct. at 543.

244 Badgerow v. Walters, 142 S. Ct. 1310, 1317–18 (2022).

245 *Id.* at 1322.

246 *Id.*

247 9 U.S.C. § 10.

provisions do not apply in state court. The text of the FAA has always been in tension with the Court's expansive readings of the past, such as the Court's *Southland* decision where the Court found the FAA embodies a substantive right applicable in both state and federal courts.[248]

The Court has painted itself into a corner with the textual approach of *Badgerow* and the expansive FAA precedent. According to *Badgerow*, an arbitral award resolving a federal claim could be subject to a petition to vacate or confirm in state court.[249] However, looking at the text of the FAA's vacatur provision, the four grounds for vacatur found in the FAA do not apply in state courts.[250] If one turns to state arbitration laws, many states' arbitration laws are patterned after the FAA and have the same grounds for vacatur as the FAA.[251] However, what if a state arbitration law provides more expansive grounds for vacatur, such as a *de novo* judicial review of statutory claims, which would seem to unravel the finality of arbitration embodied in the FAA's limited vacatur provision? *Badgerow*'s decision to send more vacatur petitions to state court could create a situation where the legal framework supporting arbitration collapses. Arbitration is supposed to be binding under the FAA, with very limited grounds for vacatur, but arbitration could lose its benefit of finality if a state opens up the grounds for vacatur to *de novo* review.[252] The textual approach of the Court on display in *Badgerow* is on a collision course with the Court's prior expansionist interpretations and could lead to a breakdown in the legal system's treatment and support of arbitration.

Badgerow's holding also gives rise to another conceptual tension regarding the FAA. When compelling arbitration from the front-end where courts are permitted to base jurisdiction on the underlying dispute to be arbitrated,[253] the court is treating the FAA as procedural in nature and as a tool to resolve the underlying dispute. Arbitration is treated as a process to resolve the underlying dispute when the Court treats the underlying substantive dispute as the jurisdictional anchor.[254] But in *Southland*, the right to arbitrate

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248 Southland Corp. v. Keating, 465 U.S. 1, 16 (1984) (in passing the FAA, Congress "creat[ed] a substantive rule applicable in state as well as federal courts.").

249 *Badgerow*, 142 S. Ct. at 1322.

250 9 U.S.C. § 10 (providing for vacatur under four grounds in the "United States court in and for the district wherein the award was made.").

251 *See, e.g.*, Conn. Gen. Stat. Ann. § 52-418 (2012); Miss. Code. Ann. § 11-15-23 (2019); N.J. Stat. Ann. § 2A:24-8 (2013); Ohio Rev. Code Ann. § 2711.10 (2006).

252 9 U.S.C. §§ 2, 10.

253 Vaden v. Discover Bank, 556 U.S. 49, 62 (2009).

254 *Id.* at 63–64.

is viewed as substantive in nature.[255] Also, at the back-end after *Badgerow*, when vacating an award, the Court appears to treat arbitration as involving a bundle of contractual rights. For example, if one seeks to vacate an arbitral award involving a federal statutory claim because perjury was used to obtain the result, the Court seems to view this vacatur process as involving contractual rights, not a federal right.[256] But isn't an issue of perjury an ancillary dispute to the main substantive underlying dispute involving the federal right? The goal of the vacatur proceeding is not simply to resolve the issue of perjury, but instead, to reopen the merits process to resolve the underlying dispute. Thus, in *Vaden*, with respect to front-end proceedings, arbitration is viewed as procedural in nature, but in *Southland* and in *Badgerow*, the Court appears to treat arbitration as involving a substantive right. Interpreting the FAA as originally intended, as a procedural statute designed to facilitate the arbitral resolution of contractual disputes,[257] would avoid this conceptual tension.

With the Court likely continuing its more textual approach in the future, there is greater potential for more examples of tension and inconsistencies to arise between the expansionist FAA decisions and more recent textual decisions. Tension in arbitration law is problematic because arbitration can lose its potential value of speed and efficiency if the legal framework supporting arbitration is uncertain and filled with conflicting principles.

V. Conclusion

The explosive growth of arbitration for several decades and the recent beginning of a period of contraction have shaped and will continue to shape our civil justice system. Arbitration should not be

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255 Southland Corp. v. Keating, 465 U.S. 1, 26 (1984).

256 Badgerow v. Walters, 142 S. Ct. 1310, 1321 (2022) ("As Walters notes, those claims may have originated in the arbitration of a federal-law dispute. But the underlying dispute is not now at issue. Rather, the application concerns the contractual rights provided in the arbitration agreement, generally governed by state law.").

257 The issues in *Badgerow* never would have arisen if the FAA had been interpreted as originally intended. The Court's expansionist *Mitsubishi* decision, where the Court conveniently uses an ellipsis to avoid the text of the FAA and hold that the FAA applies beyond contractual disputes to cover statutory claims, is deeply flawed. *See supra* Part II.A. If the FAA were limited to contractual disputes as originally intended, then the jurisdictional issue in *Badgerow* (whether a federal court has jurisdiction to vacate an arbitral award on the basis of the federal nature of the underlying claim) never would have arisen. The FAA was never supposed to cover federal claims such as the federal claim at issue in *Badgerow*. Also, *Badgerow* involves the employment setting, and if the Court had properly limited the FAA to non-employment cases, the *Badgerow* case would have never arisen. The problems arising from the clash between the atextual holdings, and the more textual approach are all of the Court's making.

viewed in isolation as a stand-alone legal institution, and instead, arbitration should be understood as part of a broader legal system and as having a close relationship to the courts. Courts help facilitate this arbitration process. Also, whenever there is a binding arbitration agreement in place, a weaker party likely loses an opportunity and broader procedural protections available in publicly petitioning the government, through the courts, for assistance in resolving disputes, some of which may involve critical disputes of public interest, such as civil rights disputes, wage disputes, or claims of consumer harm. One can view the period of expansion of arbitration law as reflecting successful attempts by corporate, conservative interests to weaken or limit access to the courts by vulnerable consumers and workers. This current period of contraction is a significant, welcome, and needed shift, which can help reestablish or recalibrate the courts to a more proper, stronger role in maintaining democracy.

This shift in arbitration law is also coinciding with a milestone in the FAA's history. The FAA is approaching its centennial anniversary in 2025, and with the upcoming centennial, it will be an opportune time to examine the FAA and uses of arbitration in the United States and consider possible reforms. With the decades of the Supreme Court's policy-driven, expansionist decisions beginning in the 1980s, there is a disconnect between the FAA's text and how the FAA is applied today. As explained above, the principles from atextualist decisions from the past tend to be in tension with more textualist interpretations of the FAA, and the FAA's text does not support the broad uses of arbitration that currently exist. Recent judicial, legislative, and private initiatives reflect a greater awareness, debate, caution, and questioning about the appropriate role of arbitration in the United States. These questions about arbitration more broadly help define the scope of the civil justice system. With the tectonic shift described in this Article and with the upcoming centennial anniversary of the FAA's enactment, it is hoped that more reforms can occur.

NOTES

DON'T FORECLOSE ON ME: ADR'S ROLE IN REGULATING THE FORECLOSURE POWER OF HOMEOWNERS ASSOCIATIONS IN THE AFTERMATH OF COVID-19

*Jessica Lalehzar**

I. Introduction

One December day, Miesha Ross received a knock on the door of her home in an Aurora, Colorado Homeowners Association. Behind the door was a foreclosure notice, but, to her great surprise, it wasn't from her bank. It was from her Homeowners Association.[1] Homeowners Associations ("HOAs") serve a regulatory and governmental function in condominium and cooperative buildings.[2] The responsibilities of HOAs range from imposing regulations on unit owners, such as aesthetics regarding the property, to procedures that help to maintain the overall function of the community.[3] Of these procedures, the collection of association dues is arguably the most important function, as it enables HOAs to maintain common areas and provide amenities to residents.[4] When dues are left unpaid,

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1 Brittany Freeman, *They Faced Foreclosure Not From Their Mortgage Lender, but From Their HOA*, Rocky Mountain PBS (June 23, 2022), https://www.rmpbs.org/blogs/news/colorado-hoa-foreclosure-investigation/ [https://perma.cc/L4CP-UFSA].

2 Stewart E. Sterk, *Maintaining Condominiums and Homeowner Associations: How Much of a Priority?*, 93 Ind. L. J. 807, 811–19 (2018).

3 *Id.*; Michael C. Pollack, *Judicial Deference and Institutional Character: Homeowners Associations and the Puzzle of Private Governance*, 81 U. Cin. L. Rev. 839, 840–52 (2013).

4 Rachel Furman, *Collecting Unpaid Assessments: The Homeowner Association's Dilemma When Foreclosure Is No Longer a Viable Option*, 19 J. L. & Pol'y 751, 754–60 (2011).

delinquent owners are faced with foreclosure proceedings and left to figure out how to legally remain in their homes.[5]

The COVID-19 pandemic undoubtedly revealed the conflicts that arise between HOAs and homeowners where foreclosure is on the horizon. Homeowners affected by loss of work or income brought on by the pandemic struggled to afford housing costs.[6] Buildings governed by HOAs likewise struggled to function where common charges and maintenance fees were left unpaid, as non-payments lead to reduced amenities and the possible demise of the community.[7] Where common charge fees are left unpaid, HOAs must take action in order to preserve the integrity of the community, often leading to the commencement of foreclosure proceedings against the delinquent homeowner.[8] The legitimate needs of both sides of this scheme were uncovered by the pandemic, revealing the need for an alternative source of dispute resolution. With millions affected by unemployment because of the pandemic, the New York City ("NYC") housing market suffered due to the financial hardships faced by many.[9] While NYC homeowners were granted temporary relief by way of foreclosure moratoriums, these attempts served as a band-aid on the larger issues surrounding city housing.[10] The end of the moratorium brought high numbers of foreclosures, particularly within condominiums and cooperatives governed by HOAs.[11]

The disputes that arise in cases involving HOAs have a heightened degree of tension due to the lack of checks and balances that would otherwise serve to regulate the system.[12] Requirements for HOAs to foreclose are often minimal, requiring only that a homeowner falls behind on payments, so long as a foreclosure suit is filed within six years of the filing date of the notice of the lien with dues still outstanding.[13] State statutes typically grant HOAs the

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5 Pollack, *supra* note 3.

6 *Brooklyn Co-op and Condo Foreclosures Are on the Rise*, Habitat Mag. (July 22, 2022), https://www.habitatmag.com/Publication-Content/COVID-19/2022/2022-July/Brooklyn-Co-op-and-Condo-Foreclosures-Are-on-the-Rise [https://perma.cc/RYH3-6KJZ].

7 *Id.*; Furman, *supra* note 4.

8 Furman, *supra* note 4.

9 Margaret Cascino, *The End of New York's Foreclosure Moratorium*, JD Supra (Jan. 20, 2022), https://www.jdsupra.com/legalnews/the-end-of-new-york-s-foreclosure-3497658/#:~:text=The%20hardship%20stays%20provided%20under,ended%20on%20January%2015%2C%202022 [https://perma.cc/B52S-Y2X4].

10 Habitat Mag., *supra* note 6.

11 *Id.*

12 Justin R. Cooley, *Arizona's Planned Community Act: A Good Start, But Far From the Finish Line*, 4 Phx. L. Rev. 853, 854 (2011).

13 *Condominium Association Liens and Foreclosures in New York*, Griffin Alexander (July 7, 2017), https://www.lawgapc.com/blog/condominium-association-liens-and-foreclosures-in-new-york/ [https://perma.cc/G42H-FERB].

right to foreclose for delinquencies on payments.[14] The HOA only needs to file a lien to commence foreclosure proceedings pursuant to New York law, relying greatly on the association's governing documents for this power.[15] Associations have been critiqued in their role as quasi-governmental entities, as they are granted broad lien and foreclosure powers by their governing documents.[16] Despite the fact that HOAs are comprised of elected community members[17], homeowners typically have little to no recourse in the event of judicial foreclosure.[18] Since the rules and obligations of each homeowner to pay assessments are clearly explained in the governing documents, it is of general consensus that owners are put "on notice" of these duties.[19] Foreclosure proceedings may begin before homeowners have time to work out an alternative solution given the circumstances of their default.[20] As a result, a power imbalance between the board and homeowners arises, with the former often using their powerful resources to the latter's disadvantage by turning to judicial intervention.[21]

Foreclosure is a costly and undesirable end for both the board and homeowners in most cases. HOAs have a valid need to maintain the integrity of their communities while homeowners have a desire to maintain their livelihoods given the unique circumstances of each owner's life. Where these two valid desires seem to come to a stalemate in such situations, a solution in the form of alternate dispute resolution will aid in serving these goals. It is clear from the current state of NYC housing and the effects of the COVID-19 pandemic that judicial intervention in foreclosure proceedings is not a viable form of conflict resolution. Formal judicial proceedings have proven to be slow and cumbersome, causing both parties to inevitably suffer.[22] Communities face negative impacts where

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[14] Davis S. Vaughn, *Lien Back: Why Homeowner Association Super-Priority Lien Statutes Should Be Replaced*, 71 Consumer Fin. L. Q. Rep. 68, 69–70 (2017).

[15] Griffin Alexander, *supra* note 13; Amy Loftsgordon, *New York HOA and COA Foreclosures*, NOLO, https://www.nolo.com/legal-encyclopedia/new-york-hoa-coa-foreclosures.html [https://perma.cc/M7UT-S9TT] (last visited Feb. 3, 2023).

[16] Paul Boudreaux, *Home, Rights, and Private Communities*, 20 U. Fla. J. L. & Pub. Pol'y 479, 480–91 (2009).

[17] Paula A. Franzese, *Common Interest Communities: Standards of Review and Review of Standards*, 3 Wash. U. J. L. & Pol'y 663, 671–73 (2000).

[18] Gemma Giantomasi, *A Balancing Act: The Foreclosure Power of Homeowners' Associations*, 72 Fordham L. Rev. 2503, 2506–17 (2004).

[19] *Id.*

[20] Griffin Alexander, *supra* note 13 (explaining that HOAs are able to initiate foreclosure proceedings as long as six years have not passed since the filing of a lien on the unit).

[21] Cooley, *supra* note 12.

[22] Bryan E. Meek, *Mortgage Foreclosure Proceedings: Where We Have Been and Where We Need to Go*, 48 Akron L. Rev. 129, 151 (2015).

foreclosure is backlogged, and the process has proven to be economically insufficient.[23] The implementation of mediation in this situation can help protect the interests of both sides and allow homeowners to stay within their units while HOAs can continue to effectively maintain the community.

This Note proposes the statutory implementation of mediation in lieu of traditional judicial foreclosure processes where HOAs are faced with homeowners who are delinquent on their assessments. First, the Background section of this Note will discuss the structure and operations of HOAs. Then, this Note will outline the broad powers granted to HOAs, as well as the great deference afforded to them by the judicial system. Next, this Note will discuss the costs and benefits associated with HOA foreclosure, as well as the judicial processes that HOAs undertake when choosing to foreclose on homes. This Note focuses specifically on NYC homeowners in HOA communities in a post-pandemic world, due to the volume of foreclosures that the area is seeing as legislative protections begin to lift. The Discussion section will outline the deficiencies of traditional litigation, as well as forward mediation as a powerful alternative for dispute resolution. This Note will elaborate on the different methods of mediation and the benefits associated with them. Finally, the Proposal section of this Note will discuss the form of mediation that would be the most efficient method for solving HOA-led foreclosures. This Note will argue that the implementation of mediation in the form of potential legislation is a viable alternative to costly judicial intervention.

II. Background

A. *The Structure of HOAs*

The role of HOAs is often regarded as acting as a "residential private government" and it is constructed to maintain the community it is situated in.[24] Membership in a community governed by an HOA is an incident of purchasing a property in buildings such as cooperatives and condominiums; one cannot choose to opt out of HOA governance.[25] The board consists of elected homeowners who reside in the community.[26] Elections are guided by the association's governing documents and

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[23] *Id.*

[24] Franzese, *supra* note 17.

[25] *Id.* at 672.

[26] *A Complete Guide to HOA Elections*, Associa, https://hub.associaonline.com/blog/a-complete-guide-to-hoa-elections [https://perma.cc/TU5L-6EKJ] (last visited Oct. 15, 2022).

state and local law.[27] Regarded as a "quasi-constitution," the governing documents include articles of incorporation, bylaws, and covenants, conditions, and restrictions.[28] These documents effectively serve as the "law of the land," and put potential buyers on notice of the powers of the board and costs of membership, as well as the obligation to obey these terms.[29] While some states such as Florida have enacted term limits for HOAs and other mechanisms for regulating these entities, New York does not have a specific statute governing HOAs, allowing the documents to control.[30]

Governing boards are usually elected by and from members of the building by way of a democratic voting process set out by these documents.[31] As a result, neighbors end up governing over their own neighbors, wielding a great amount of decision-making power.[32] The formation of HOAs is often criticized, as residents often regard them as "inflexible" or "self-selecting" entities.[33] All members of the association are typically free to run for board positions, but these positions usually do not reflect the popular will of the community as a whole.[34] A typical election can result in the appointment of individuals who wish to act in their own self-interest and use the authoritarian power of the board over their neighbors, posing problems in cases of neighborly disputes.[35] It is important to note, however, that HOA boards are not all-powerful. Board members can often be removed in cases where duties are neglected and can be voted out at the expiration of their term.[36] Although homeowners are afforded the ability to control who serves on their community's board to some effect, foreclosure action can be exacerbated by cases where "authoritarian" boards enjoy exercising power over their neighbors.[37] In cases where residents are threatened with foreclosure, the very integrity of the HOA is called into question. The great powers afforded to members of the board display the power imbalance that

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[27] *Id.*

[28] Monique C.M. Leahy, *Proof of Homeowner Association Acting as Quasi Governmental Entity Whose Conduct Constitutes State Action Requiring Declaration of Rights Under Homeowner Association Restriction Prohibiting Political Signs*, 76 Am. Juris. Proof Facts 3d 89 (2004).

[29] Pollack, *supra* note 3, at 847.

[30] *New York HOA Laws and Resources*, HOPB, https://www.hopb.co/new-york [https://perma.cc/MJB8-UZDW] (last visited Oct. 15, 2022).

[31] Franzese, *supra* note 17; Associa, *supra* note 26.

[32] Franzese, *supra* note 17.

[33] Brian J. Fleming, *Regulation of Political Signs in Private Homeowner Associations: A New Approach*, 59 Vand. L. Rev. 571, 579–80 (2006).

[34] *Id.* at 579.

[35] *Id.* at 580.

[36] Associa, *supra* note 26.

[37] Fleming, *supra* note 33.

exists in this structure.[38] This imbalance is further exacerbated in cases of payment delinquencies and foreclosure, where the board is given great deference by the judicial system.

B. *Defining the Powers and Judicial Deference Afforded to HOAs*

The governing documents of HOAs empower the board to collect fees to maintain and manage the building.[39] These duties are arguably the most important responsibilities given to the HOA, as the collection of fees ensures that the building runs efficiently.[40] The bylaws, which are regarded as the "guiding force" of HOAs, contain the rules and regulations that grant the board their decision-making powers.[41] The Court of Appeals of New York established in *Neponsit Property Owners' Association v. Emigrant Savings Bank* that HOAs have the power to collect fees in order to maintain community spaces within the building, as such matters "touch and concern the land."[42] When a unit owner defaults and the board is unable to collect, HOAs have the unilateral power to file liens against unit owners for failing to comply with the requirements set by the board.[43]

The assessments that the board collects are regarded as the "lifeblood" of the building, which "could crumble without that financial support."[44] The fact that the assessments serve as the main revenue stream of any condominium or cooperative building further emphasizes the issue at hand.[45] There is no disputing the fact that the foreclosure power of HOAs serves to maintain the integrity of the community; however, this reveals the vast power imbalance that exists between HOAs and homeowners.[46] HOAs may take any measure to collect assessments, as long as they are "enforced 'uniformly, promptly and firmly'" by the board.[47] If the employment of preliminary warnings and attempts to collect fail, HOAs look to

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[38] *Id.*

[39] Giantomasi, *supra* note 18, at 2507–09.

[40] *Id.* at 2512–13, 2521.

[41] *Id.* at 2507.

[42] *See* Neponsit Prop. Owners' Ass'n. v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793, 797 (N.Y. 1938).

[43] Sterk, *supra* note 2, at 810–11.

[44] *Condominium and HOA Collections During the COVID-19 Pandemic*, NOWACK HOWARD, https://nowackhoward.com/condominium-and-hoa-collections-during-the-covid-19-pandemic/ [https://perma.cc/FN94-7BWF] (last visited Nov. 20, 2022).

[45] *Id.*

[46] Giantomasi, *supra* note 18.

[47] *Id.* at 2513.

judicial interference to aid in foreclosing on an individual, and often do so.[48] Sale by judicial foreclosure is typically used as a last resort by associations, but become necessary where unpaid assessments begin accruing on a unit.[49] Courts apply the business judgment rule when weighing in on such matters, giving great deference to the HOA's decisions unless it acted in bad faith.[50] The board is essentially free to make unilateral decisions for the good of the community, as long as the decision fits squarely into the business judgment rule. The business judgment rule states that "each director [on the board] must perform his or her duties in good faith as would a reasonable prudent person given the circumstances, and in a manner reasonably in the best interests of the corporation."[51] This rule, borrowed by courts from the law of corporations, solidifies the HOA as a quasi-governmental and business entity.[52] Courts generally refuse to substitute their own judgment in place of the board's, giving great deference to the HOA's internal practices for collecting assessments and dealing with delinquencies.[53]

C. *Foreclosure Proceedings in HOAs: Costs and Benefits*

Given the fact that the collection of assessments is important to the overall function of HOAs, it is important to understand what boards do when faced with delinquent homeowners. The threat of foreclosure enables HOAs to either force the payment of dues or replace the homeowner with an individual who can afford the costs.[54] When homeowners start falling behind on payments, HOAs are able to attach a lien to each individually owned unit.[55] The governing documents of each HOA building enable the board to do so and serve to put homeowners on notice, resulting in the broad authority to serve as "judge, jury, and executioner" in the face of delinquency.[56] The power to attach a lien to a unit is the first step of a foreclosure proceeding, opening the door for the HOA to foreclose on the

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48 *Id.* at 2517.

49 Sterk, *supra* note 2, at 816.

50 Pollack, *supra* note 3, at 844.

51 Grant J. Levine, *This is My Castle: On Balance, the Freedom of Contract Outweighs Classifying the Acts of Homeowners' Associations as State Action*, 36 Nova L. Rev. 555, 556 (2012).

52 *See* Pollack, *supra* note 3, at 844, 850.

53 Giantomasi, *supra* note 18, at 2513–14; *see* Pollack, *supra* note 3, at 851.

54 Furman, *supra* note 4, at 756–57.

55 *Id.* at 755.

56 *Id.*; Paula A. Franzese, *Privatization and its Discontents: Common Interest Communities and the Rise of Government for "the Nice"*, 37 Urb. Law. 335, 342–43 (2005).

home in the event the lien is not timely settled.[57] Given a situation where an insolvent homeowner is in arrears on common charge and maintenance fees, HOAs can choose to foreclose on the lien in order to collect the unpaid dues and force the homeowner out of the unit, often with the help of judicial intervention.[58] Homeowners struggling to afford the costs of housing will come to face this as reality, as evidenced by the hardships brought on by the COVID-19 pandemic.

The onslaught of the COVID-19 pandemic brought significant hardship, with tens of millions of people who lost their jobs struggling to pay for basic expenses.[59] As a result, homeowners fell behind on mortgage and common charge payments with the threat of foreclosure looming.[60] Co-op shareholders and condo unit-owners struggled to pay monthly dues to HOAs, accentuated by the loss of employment or reductions in hours as a result of the virus.[61] In July of 2022, NYC saw an unemployment rate of 6.1%,[62] a strong indication that the pandemic left many unable to tend to the costs associated with living, including the payment of HOA fees. These hardships were seen throughout NYC's boroughs with the highest risk of displacement. In some areas of Brooklyn, homeowners reported a median income at $41,564, falling below the citywide median household income.[63] In 2019, the pre-pandemic median income in Brooklyn was $67,567, showing the trend of economic hardship that the virus brought to the area.[64] States quickly adapted to alleviate these hardships through government intervention in

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57 Giantomasi, *supra* note 18 at 2517.

58 Furman, *supra* note 4, at 760–61.

59 *Tracking the COVID-19 Economy's Effect on Food, Housing, and Employment Hardships*, Ctr. Budget & Pol'y Priorities (Feb. 10, 2022), https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-economys-effects-on-food-housing-and [https://perma.cc/QQ8Y-R7VV].

60 *See id.*

61 *Co-op and Condo Owners Get a Lifeline Against Foreclosure*, Habitat Mag. (Dec. 7, 2021), https://www.habitatmag.com/Publication-Content/COVID-19/2021/2021-December/Co-op-and-Condo-Owners-Get-a-Lifeline-Against-Foreclosure [https://perma.cc/C8TH-86DB]; Habitat Mag., *supra* note 6.

62 Nicole Hong & Matthew Haag, *In New York City, Pandemic Job Losses Linger*, N.Y. Times (Sept. 14, 2022), https://www.nytimes.com/2022/09/14/nyregion/nyc-covid-job-losses.html [https://perma.cc/2HRL-C23Y]; *See* Daniel Finnegan, *Looking for a Silver Lining: How the COVID-19 Pandemic Forced New York to Reckon with its Affordable Housing Crisis*, 15 Brook. J. Corp. Fin. & Com. L. 467, 479 (2021).

63 Anna Bradley-Smith, *As COVID Protections End, Foreclosures and Homelessness in Brooklyn Could be Poised to Increase*, Brook. Paper (July 14, 2022), https://www.brooklynpaper.com/protections-brooklyn-foreclosures-increase/ [https://perma.cc/ABB6-YMRT].

64 *Brooklyn, New York (NY) Income Map, Earnings Map, and Wages Data*, City-Data, https://www.city-data.com/income/income-Brooklyn-New-York.html [https://perma.cc/8M8G-W683] (last visited Feb. 3, 2023).

order to prevent defaults on payments.[65] New York State, in an effort to protect struggling homeowners, implemented the COVID-19 Emergency Eviction and Foreclosure Prevention Act ("EEFPA") in December of 2020.[66] The EEFPA served many purposes, one of which included the prevention of residential mortgage and tax lien foreclosures.[67] The Act's protection also extended to "any foreclosure or eviction proceeding in which a borrower or homeowner filed a hardship declaration," allowing those affected by the pandemic to explain how they were unable to afford living costs.[68] The legislation protected delinquent owners in residential cooperatives from foreclosure, where ownership of real property is conditioned on the ownership of shares of a unit.[69] However, the Act failed to prevent foreclosure by HOAs where delinquent common charges were at issue.[70] This flaw is evidenced by the fact that most of the foreclosures that took place during the period the Act was in place were a result of common charge liens.[71]

As a result of the New York State legislation, as well as many other states following suit, foreclosures in the U.S. hit record lows.[72] In 2020, the number of residential lis pendens in NYC amounted to 2,661 notices.[73] This shows a significant decrease from pre-pandemic levels in 2019, which saw over 9,000 lis pendens filed against delinquent homeowners.[74] However, the end of the EEFPA in early 2022 brought forth the filing of more than 1,000 pre-foreclosure notices against NYC homeowners, a huge surge from the low figures seen earlier in the pandemic.[75] These figures indicate a

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65 *U.S. Foreclosure Starts Reach Pre-Pandemic Levels Nationwide*, ATTOM Data (Sept. 8, 2022), https://www.attomdata.com/news/market-trends/foreclosures/attom-august-2022-u-s-foreclosure-market-report/ [https://perma.cc/3X3S-7ZG6].

66 *New York's COVID-19 Eviction and Foreclosure Prevention and Small Businesses Acts Extended to August 31, 2021—What You Need to Know*, BlankRome (May 13, 2021), https://www.blankrome.com/publications/new-yorks-covid-19-eviction-and-foreclosure-prevention-and-small-businesses-acts [https://perma.cc/JJW3-RSEJ].

67 *Id.*

68 Cascino, *supra* note 9.

69 S. 9114, 2020 Leg. (N.Y. 2020).

70 *Id.*

71 Habitat Mag., *supra* note 6.

72 Leesa Davis, *Foreclosures are Rising with the End of COVID-era Moratoriums. Here's Where They're Happening the Most*, SCNOW (Aug. 29, 2022), https://scnow.com/business/investment/personal-finance/foreclosures-are-rising-with-the-end-of-covid-era-moratoriums-heres-where-theyre-happening-the/collection_4850a0af-9995-5b80-9153-7679a7e81cec.html#1 [https://perma.cc/9P8C-VGMS].

73 Eliza Theiss, *2022 Q1 Foreclosure Report: NYC Records 87 Foreclosures Since End of Moratorium*, Prop. Shark (Apr. 14, 2022), https://www.propertyshark.com/Real-Estate-Reports/2022/04/14/nyc-foreclosure-report-q1-2022/ [https://perma.cc/CZN5-JR9M].

74 *Id.*

75 Habitat Mag., *supra* note 6.

growing pressure on homeowners to repay arrears in order to avoid foreclosure. However, with the pandemic still ongoing and many struggling to get back on their feet, the financial situations of many remain unchanged.[76] Where liens accumulate and remain unsettled as a result of non-payment, it becomes clear that foreclosure may be imminent.

A significant portion of these pre-foreclosure notices were generated from common charge liens on condominiums and cooperative buildings, constituting 501 notices within the first three months of 2022 alone.[77] While this figure is not as high as the 808 foreclosures that affected homeowners in HOA-led buildings in 2019, it is predicted that common charge liens will be foreclosed on at increasing rates now that the moratorium has been lifted.[78] Common charge liens are attached to the unit of a delinquent homeowner in a condominium or cooperative building by the building's HOA.[79] Where assessments are left unpaid and homeowners lack statutory protection against foreclosure, HOAs are enabled to attach a lien to the homeowner's unit and begin foreclosure processes. Where HOAs initiate a foreclosure proceeding against a delinquent unit, the property will typically be sold at auction to satisfy the homeowner's debts.[80] These liens take priority over unpaid mortgage liens that the owner may have and play a significant role in the foreclosure power of the HOA.[81] The collection of assessments are an important part of the duties afforded to HOAs, as these assessments effectively work to maintain the community functions of the building.[82] Without the collection of these assessments, the building may cease to provide any of the essential services that work to maintain the community.

With nearly 73.9 million Americans living in community associations governed by an HOA, it is clear that the threat of foreclosure in a post-pandemic world jeopardizes the well-being of homeowners across the country.[83] NYC currently leads as the metropolitan area with the greatest number of foreclosure starts in

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[76] Hong & Haag, *supra* note 62.

[77] Habitat Mag., *supra* note 6.

[78] Bradley-Smith, *supra* note 63.

[79] *Condominium Liens: Which Comes First?*, Graff L. Offs., https://www.grafflawoffices.net/condominium-liens-which-comes-first/ [https://perma.cc/ST4V-3MQL] (last visited Nov. 20, 2022).

[80] Amy Loftsgordon, *HOA Liens and Foreclosures: An Overview*, NOLO, https://www.nolo.com/legal-encyclopedia/hoa-liens-foreclosures-an-overview.html [https://perma.cc/MK89-6Z9S] (last visited Nov. 20, 2022).

[81] Graff L. Offs., *supra* note 79.

[82] Sterk, *supra* note 2.

[83] *HOA Statistics*, iPropertyManagement (Apr. 23, 2022), https://ipropertymanagement.com/research/hoa-statistics#:~:text=73.9%20million%20Americans%20live%20in,HOA%20housing%20units%20are%20occupied [https://perma.cc/YTP2-R874].

the country.[84] Where a large number of New York residents reside in buildings governed by HOAs,[85] it is clear that the harmful effects of the COVID-19 pandemic will inevitably end in conflict between the homeowner and the board.[86] HOAs, acting as a "private government" with an abundance of resources at their disposal, can represent themselves in the face of the judicial foreclosure while struggling homeowners are not likely to secure representation.[87] Where these processes have proven to impose costs on both parties, it is clear that a different approach to traditional common charge lien foreclosure must be adopted.

When HOAs typically follow through with the proceedings for judicial foreclosure, they are faced with an undesirable result. After a unit is foreclosed on and is emptied of its delinquent owners, HOAs must absorb the tax costs of the property while trying to find a new buyer.[88] While the HOA has successfully removed the non-paying homeowner, they are left to search for a new owner who will hopefully pay the costs associated with living in a condominium or cooperative building. This result likewise has undesirable effects on other homeowners in the building as well. Incentives to pursue foreclosure litigation are often built into the very guidelines that authorize HOAs to take action and further allow them to tax other building residents in order to finance costly lawsuits.[89] This proves to be a costly end for both the HOA—who must cover taxes on an empty unit and effectively injure other residents—and for the struggling owner.[90] Through understanding the undeniable impact that the COVID-19 pandemic continues to have on homeowners across NYC, it is clear that judicial foreclosure is an undesirable result that can leave both parties worse off.[91]

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[84] *U.S. Foreclosure Activity Continues to Increase Quarterly Nearing Pre-Pandemic Levels*, ATTOM (Oct. 13, 2022), https://www.attomdata.com/news/market-trends/foreclosures/attom-september-and-q3-2022-u-s-foreclosure-market-report/#:~:text=13%2C%202022%20%E2%80%94%20ATTOM%2C%20a,up%203%20percent%20from%20the [https://perma.cc/TEP2-A9YJ].

[85] Tony Mariotti, *HOA Stats: Average HOA Fees & Number of HOAs by State (2023)*, RubyHome (July 18, 2022), https://www.rubyhome.com/blog/hoa-stats/#hoa-popularity [https://perma.cc/T8NE-TH6F] (explaining that 18.8% of New York State's population resides in a HOA).

[86] *2019–2020 U.S. National and State Statistical Review for Community Association Data*, Cmty. Ass'ns Inst., https://foundation.caionline.org/wp-content/uploads/2020/08/2020StatsReview_Web.pdf [https://perma.cc/7HTP-ERPX] (last visited Nov. 20, 2022).

[87] Boudreaux, *supra* note 16.

[88] Furman, *supra* note 4, at 761.

[89] Franzese, *supra* note 56.

[90] Furman, *supra* note 4.

[91] Habitat Mag., *supra* note 6.

III. Discussion

As title holders to the common property in the community, HOAs have a strong interest in maintaining the operations and activities of each building.[92] This interest is particularly strong because the members of the board reside in the very building they oversee, enhancing the desire to keep building operations running smoothly.[93] The purpose of monthly assessments is to enable unit owners to pay their proportionate share of expenses in order to fund the overall function of the community vis-à-vis the HOA.[94] Without the participation of unit owners in paying these assessments, the board is unable to carry out its delegated functions.[95] The non-payment of these dues can either result in other unit owners bearing the costs of delinquent owners or the cessation of amenities due to a lack of funding.[96] Neither of these options are desirable, so the collection of these dues are one of the most important duties of the board.[97] As a self-governing mechanism, HOAs have a strong interest in funding the maintenance and repairs of amenities and are governed by strict regulations as such. [98] It is clear that the interests of the HOA are significant, as HOAs cannot afford to absorb a high number of delinquencies.[99]

Homeowners have a strong interest in participating in communities and staying within their homes. The problem that arises is the potential for mistreatment where HOAs are afforded the broad array of powers that they are to keep the community in order.[100] The threat of foreclosure can be detrimental to struggling homeowners when they are taken to court for unpaid assessments, as the legal fees they incur can be greater than the actual amount they owe to the HOA.[101] This issue is further exacerbated where homeowners are already facing financial hardship. In addition, homeowners brought to judicial foreclosure must incur the costs of funding their own case while paying a share of the HOA's legal expenses, a duty

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92 Giantomasi, *supra* note 18.

93 Associa, *supra* note 26.

94 Giantomasi, *supra* note 18.

95 Sterk, *supra* note 2.

96 *Id.*

97 *Id.*

98 Furman, *supra* note 4.

99 Laci Ehlers, *Limiting the Foreclosure Power of Texas HOAs with a Percentage Threshold*, 43 St. Mary's L. J. 187, 200 (2011).

100 *Id.*

101 *Id.*

that is typically stated in the bylaws.[102] The unique situation of NYC homeowners as a result of the COVID-19 pandemic furthers the issues posed by HOA power. As foreclosure moratoriums lift and the COVID-19 pandemic dwindles on, it is clear that there is a conflict of interest where judicial foreclosure is not the solution.

A. *The Deficiencies of Traditional Litigation*

Given that most HOAs move to foreclose on unsettled liens and resort to judicial foreclosure in order to expel a delinquent owner from the community, it is important to note the deficiencies of this traditional process. Litigation and delays associated with it have been referred to as a "ceaseless and unremitting problem of modern civil justice."[103] In major urban areas, court dockets are congested and slow-moving as a result of the influx of housing disputes that are filed.[104] As a result, parties are typically left in limbo while waiting for their case to reach the courts. Critics of litigation-based solutions argue that the escalating court costs and legal fees surrounding judicial intervention are excessive.[105] Delays are viewed as problematic where time-sensitive issues are at hand, as delays can often last years before a decision is reached.[106]

Other criticisms regarding litigation concern the inherent limitations to the process. When litigation is chosen as a means of dispute resolution, it typically focuses on narrow issues that are handled within the scope of existing legal doctrine.[107] Given the court's tendency to defer to the business judgment rule, rulings are often given in favor of the HOA, who have acted within their scope of duties by foreclosing on a delinquent homeowner.[108] With an objective of arriving at a decision about "who is right and who is wrong", litigation fails to capture the various factors that underlie the dispute.[109] The adversarial nature of the process fails to encapsulate the "human" qualities of each dispute, such as the factors that

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102 Evan McKenzie, *Private Covenants, Public Laws, and the Financial Future of Condominiums*, 52 Univ. Ill. Chi. J. Marshall L. Rev. 715, 721 (2019).

103 George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. Rev. 527 (1989).

104 Scott E. Mollen, *Alternate Dispute Resolution of Condominium and Cooperative Conflicts*, 73 St. John's L. Rev. 75, 80–93 (1999).

105 Kathleen A. Devine, *Alternative Dispute Resolution: Policies, Participation, and Proposals*, 11 Rev. Litig. 83, 84 (1991).

106 Mollen, *supra* note 104.

107 Devine, *supra* note 105, at 88.

108 Giantomasi, *supra* note 18; Pollack, *supra* note 3.

109 Devine, *supra* note 105, at 88–89.

led to the delinquencies or other changing circumstances in the homeowner's life. The process fails to consider the nature of the relationship between parties and instead places the judiciary in the position of evaluating the intricacies of the dispute.[110] The process antagonizes parties and gives them little control over the process, contributing to the animosity that surrounds litigation.[111]

Despite the undeniable defects of this system, litigation has increased in most areas of conflict.[112] The model assumes the self-interest of the parties and delivers a favorable outcome to those with the resources to advocate for their cause.[113] The tendency to stick to the status quo is driven by the perception that the judicial process will present a clear winner and loser in any situation and will tend to favor those who have prior decisions on their side.[114] A shift to an alternative source of dispute resolution is a clear alternative to the pitfalls of litigation and should be explored in this context.

B. *Mediation as a Viable Form of Conflict Resolution*

Mediation serves as an alternative form of dispute resolution compared to typical judicial processes. The informal process of mediation employs the use of a neutral third party in order to help conflicting parties reach a voluntary and negotiated resolution.[115] The mediator does not decide what the fair outcome of the situation is but instead provides the means for parties to communicate and provides guidance to a mutually beneficial solution.[116] Mediators act through setting a realistic agenda for the conflict at hand and maintaining order where parties are unable to sort through issues themselves.[117] Parties are also able to meet one-on-one in a separate caucus with the mediator to ask questions and express their position in a more private setting.[118] In cases where homeowners are faced with difficulties as the result of an unprecedented pandemic,

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110 Kenneth R. Feinberg, *Mediation—A Preferred Method of Dispute Resolution*, 16 Pepp. L. Rev. S5, S6-S7 (1989).

111 *Id* at S7.

112 *Id.*

113 Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 Ohio St. J. Disp. Resol. 241, 277–80 (1996).

114 Feinberg, *supra* note 110, at S6.

115 *Mediation Questions and Answers*, N.Y.C. Hum. Rts., https://www1.nyc.gov/site/cchr/enforcement/mediation.page [https://perma.cc/P7KX-D76B] (last visited Oct. 15, 2022).

116 *Mediation Defined: What is Mediation?*, JAMS, https://www.jamsadr.com/mediation-defined/ [https://perma.cc/XZ4N-VLPM] (last visited Oct. 15, 2022).

117 *Id.*

118 *Id.*

mediation allows for these individuals to explain the unique nature of their situation. Mediation is a form of dispute resolution that emphasizes an outcome based on harmony rather than determining who is right or wrong in the given situation.[119] This process stands in stark contrast to the adversarial nature of litigation and is a viable alternative to the judicial foreclosure process.

The mediation process typically begins with a joint session, which serves to educate the mediator, state the differing views of the facts, and uncover what each side regards as a satisfactory resolution.[120] The mediator is able to understand the basis of the issue at hand and where the parties currently stand in the dispute.[121] It is within this portion of the mediation that the ground rules of the session are stated and the realistic expectations of the parties are established.[122] Joint sessions are utilized by mediators to assess the emotional state of the parties from the beginning and to evaluate possible strategic choices for continuing the mediation.[123] If the situation is one of great sensitivity and the mediator senses that emotions are running high, the mediator may opt to bypass the joint session and move directly to the next stage of mediation in order to avoid any further conflict.[124] This is an important benefit of the process, as the session can continually be adapted to the needs of the parties.

The next step of the process, the caucus stage, is regarded as being one of the most attractive features of mediation.[125] The caucus stage allows parties to discuss the matter separately with the mediator and invites private conversation.[126] These caucuses are confidential and allow each side to discuss their underlying needs and concerns in the dispute, as well as how important each factor is in reaching a resolution.[127] It is within these caucuses that parties can reveal private facts and requests that they may not otherwise be able to express to the other side.[128] The transfer of this information enables the mediator to engage in shuttle diplomacy, a process in which the mediator moves back and forth between parties with proposals and

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119 Leonard L. Riskin, *Mediation and Lawyers*, 43 Ohio St. L. J. 29, 33–4 (1982).

120 James Kerwin, *How Mediation Works When Both Parties Agree They Need Help Resolving the Dispute*, Harv. L. Sch. (Dec. 22, 2022), https://www.pon.harvard.edu/daily/mediation/navigating-the-mediation-process/ [https://perma.cc/HJD5-XEGX].

121 *Id.*

122 Mollen, *supra* note 104.

123 Kerwin, *supra* note 120.

124 *Id.*

125 Mollen, *supra* note 104, at 95.

126 *Id.*

127 Kerwin, *supra* note 120.

128 *Id.*

suggestions to resolve the issue at hand.[129] With the mediator acting as a proxy, emotional situations can be de-escalated. This process may take some time, but more often than not, it ends in a resolution that is mutually acceptable to the parties.[130]

There are three common models of mediation that are typically used by mediators when engaging in these processes. These models include facilitative, transformative and evaluative mediation.[131] Mediation is unique in that these different methods can be adopted based on what kind of conflict is at hand. The facilitative model employs a mediator to help the parties recognize their problems and seek a mutually agreeable resolution.[132] The mediator in this instance abstains from making recommendations or imposing a decision on the parties, but rather works to encourage the parties to reach their own solution through a thorough analysis of the other's deeper interests.[133] The philosophy of this approach is that the parties will come to their best-case solution with as little help from the mediator as possible.[134] Facilitative mediation places an emphasis on creating an environment free of hostilities, as well as a place where parties can discuss all the relevant information of the issues at hand.[135] This is particularly useful in emotionally charged situations.[136]

In the transformative mediation model, mediators encourage disputants to recognize each other's needs and interests.[137] This method is more holistic in nature, as the parties' values and points of view are considered.[138] Empowerment and mutual recognition are the fundamentals of this method.[139] Transformative mediation places an emphasis on parties structuring the process and outcome of the mediation session, and the mediator follows the lead of the parties.[140] Parties are enabled to define their issues and seek solutions on

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129 *Id.*

130 *Id.*

131 Tanya M. Marcum, et al., *Reframing the Mediation Lens: The Call for a Situational Style of Mediation*, 36 S. Ill. Univ. L. J. 317, 318 (2012).

132 *Id.* at 319.

133 Katie Shonk, *Types of Mediation: Choose the Type Best Suited to Your Conflict*, Harv. L. Sch. (Aug. 8, 2022), https://www.pon.harvard.edu/daily/mediation/types-mediation-choose-type-best-suited-conflict/#:~:text=In%20facilitative%20mediation%20or%20traditional,exploring%20each%20other's%20deeper%20interests.%2036%20SILULJ [https://perma.cc/5NMD-8VUR].

134 Dave Wakely, *Spectrum of Mediation: Facilitative Mediation*, Wakely Mediation (Sept. 5, 2017), https://wakelymediation.com/2017/09/facilitative-mediation/ [https://perma.cc/4VBF-Y9AD].

135 Marcum et al., *supra* note 131, at 319.

136 Wakely, *supra* note 134.

137 Marcum et al., *supra* note 131, at 320.

138 *Id.*

139 Brad Spangler, *Transformative Mediation*, Beyond Intractability (2013), https://www.beyondintractability.org/essay/transformative_mediation [https://perma.cc/JDD2-VF3C].

140 Marcum et al., *supra* note 131.

their own, as well as understand the perspective of the other side.[141] Like the facilitative model, the mediator's role is to help guide the conversation rather than impose an outcome on the issue at hand.[142] This method is particularly useful where parties have difficulty interacting with each other and have a hard time understanding where the other side is coming from.[143] This method is intended to effect a deeper change in people and their interpersonal relationships beyond that of remedying a short-term problem.[144] Mediators often opt to use this model where they feel a deeper conflict is at issue between the parties.[145]

The evaluative mediation model—regarded as the "court-mandated" model—allows the mediator to take on a more active role in the dispute resolution process.[146] In this scenario, mediators are more likely to make recommendations and suggestions towards a solution that they believe would be best for the parties.[147] Mediators take into account the legal rights of the parties rather than their needs and interests, and help to determine what is fair under the circumstances.[148] Mediators will typically point out the weaknesses in each party's case and predict what a judge or jury would be likely to do.[149] This method is particularly helpful in assessing the costs and benefits of resorting to litigation rather than a settlement rooted in mediation.[150] Attorneys with legal expertise in the area of dispute usually head evaluative mediation conferences, allowing for impartial yet informed leadership.[151]

C. *The Benefits Associated with Mediation*

Regardless of the method chosen, the mediation process holds a wide range of benefits to conflicting parties. This flexible form of conflict resolution does not require the use of attorneys or formal

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141 Spangler, *supra* note 139.

142 Jim Hanley, *Transformative Mediation*, SHRM (Apr. 1, 2010), https://www.shrm.org/hr-today/news/hr-magazine/pages/0410tools.aspx [https://perma.cc/BP8V-4U92].

143 *Id.*

144 Spangler, *supra* note 139.

145 *See id.*

146 Marcum et al., *supra* note 131, at 319.

147 *Id.*

148 *Id.*

149 Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation*, MEDIATE (Feb. 27, 2018), https://mediate.com/styles-of-mediation-facilitative-evaluative-and-transformative-mediation/ [https://perma.cc/XG6C-LHNL].

150 Marcum et al., *supra* note 131.

151 Shonk, *supra* note 133.

rules of evidence in order to provide a solution.[152] Legal fees tend to increase as litigation drags on, yet mediation processes generally take less time to complete and allow for an earlier solution compared to traditional litigation.[153] Attorneys are not necessary during the mediation process, whereas litigation typically has attorneys controlling the process and charging exponential fees.[154] As a result, mediation processes tend to save time and money compared to traditional litigation.[155] Pro-bono services are also an option for those who require assistance with the fees associated with mediation.[156] Parties are generally working together on their own terms and in accordance with the terms that they drafted themselves.[157] Parties to mediation sessions typically reach settlement quickly due to the high rate of compliance in such a collaborative setting.[158]

Another key benefit of mediation is that it aids in preserving relationships.[159] The litigation process is often regarded as creating a hostile environment.[160] The adversarial nature of the process tends to result in parties being further divided rather than solving the actual issues at hand.[161] Mediation is better suited for conflicts between parties where there is a need for cooperation in an ongoing relationship.[162] Where future disputes may arise due to the nature of the parties' relationship, mediation looks towards ending the problem and creating a resolution that can mitigate any future issues.[163] Preservation of relationships is an important goal of mediation, and the process aids in achieving this through the use of customized and ongoing agreements.[164] Parties play a greater role in setting the terms and goals of the session.[165] Procedural and interpersonal

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152 *Advantages of Mediation*, U.S. Off. Special Couns., https://osc.gov/Services/Pages/ADR-Advantages.aspx [https://perma.cc/2FBB-HZTX] (last visited Oct. 15, 2022).

153 *Id.*

154 *Id.*

155 NYC Hum. Rts., *supra* note 115.

156 *Recommendation § 300*, A.B.A. (Aug. 3–4, 2009), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2009/2009_am_300.pdf [https://perma.cc/3FJP-7439] (ABA resolution supporting access to pro bono or low-cost counsel or other advocates for parties who would otherwise be unrepresented in the mediation process).

157 Fabiola De Armas, *Is Mediation the Future for Settling Disputes*, 23 Pub. Int. L. Rep. 106 (2018).

158 *Id.*

159 U.S. Off. Special Couns., *supra* note 152.

160 *How Courts Work*, A.B.A. (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/mediation_advantages/ [https://perma.cc/F34H-8NXN].

161 *Id.*

162 *Id.*

163 *Id.*

164 U.S. Off. Special Couns., *supra* note 152.

165 *Id.*

issues that are not suited for legal intervention typically fare better in mediation, as settlements are tailored by parties to suit the fine details of the issue.[166]

Although litigation is typically turned to because of the benefits of judicial enforcement, mediation can also result in a legally binding outcome.[167] One of the attractive features of mediation includes the parties' ability to tailor the session to their individual needs. Parties can agree to a contract on their own terms that provides that a decided outcome is legally binding on the parties.[168] This contract gets sent to a court and is approved by a judge, thus holding both parties to the mutual agreement.[169] In the event that this contract is not honored by a party, individuals are able to pursue legal recourse.[170] The mediation process is unique in its ability to conform to parties' needs and provide legally binding outcomes without the need for litigation.

III. Proposal

The structure of HOAs must be reconfigured in a way that allows for alternate dispute resolution to rectify the issues exposed by hardships of the pandemic. A system that helps to avoid judicial foreclosure in HOA-governed buildings must be implemented to effectively solve these disputes. The structure of HOA boards breeds opportunities for conflicts of interest between residents and boards in the context of foreclosure.[171] Litigation typically falls in favor of HOAs, who use their power and resources to foreclose on a homeowner.[172] The use of judicial foreclosure neglects the unique circumstances posed by the COVID-19 pandemic. Where homeowners facing hardship are struggling to pay and lack the resources to explain their situation or pay their arrears, the HOA will nearly always prevail in litigation.[173] A solution where the needs of both parties are dealt with exists and can be found through alternate dispute resolution.

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166 *Id.*

167 *Is Mediation Legally Binding?*, Anderson Hunter (July 31, 2021), https://andersonhunterlaw.com/blog/is-mediation-legally-binding [https://perma.cc/R85N-EKFU].

168 *Id.*

169 *Id.*

170 *Id.*

171 *See* Mollen, *supra* note 104 at 88–89 (describing the hostilities that occur in the between the HOA and resident facing foreclosure).

172 Mollen, *supra* note 104 at 86.

173 Devine, *supra* note 105; Mollen, *supra* note 104 at 86.

The use of alternate dispute resolution methods helps to save homes from auctions, as well as to provide an outlet for the homeowner and HOA to work through a plan together.[174] Mediation can offer a solution to these problems and allow for a forum for homeowners to vouch for themselves regarding their situation. The introduction of a mediator to help work out the issues related to payment delinquencies in a non-judicial setting may help aid parties in reaching a mutually desirable end. Parties are empowered to work together and with the mediator to figure out a solution, rather than leave the outcome in the hands of a judge.[175] As mentioned above, mediation is time-efficient and inexpensive compared to traditional judicial foreclosure methods.[176] The use of this method allows for parties to work together towards a common-interest goal.[177]

A. *Methods of Mediation Suitable for HOA Foreclosure*

Of the facilitative, transformative, and evaluative models of mediation, the issues posed by foreclosure in buildings governed by HOAs require a blend of these methods. Mediators view these models as existing on a continuum, often blending these techniques in order to adapt to the unique circumstances of every dispute.[178] Aspects of each of these models are often applied to areas where communication between HOAs and homeowners is necessary, such as in a time of financial hardship. The facilitative model's emphasis on de-escalating hostile situations may play a significant role in communities where neighborly disputes exist between board members and unit owners.[179] Homeowners and the HOA work together in this model rather than as adversaries. The transformative model allows for each party to express their points of view and interests.[180] In cases where financial hardships hinder individuals from being able to pay their common charges, a transformative setting may give struggling homeowners the space to express their financial situation and how the COVID-19 pandemic has affected their ability to keep up with assessments. Homeowners could use the forum to explain how they expect their financial situation to change over time and how they

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174 Meek, *supra* note 22.

175 JAMS, *supra* note 116.

176 Ehlers, *supra* note 99, at 218.

177 *Id.*

178 Zumeta, *supra* note 149.

179 Associa, *supra* note 27; Marcum et al., *supra* note 131, at 319.

180 Marcum et al., *supra* note 131, at 320.

can expect to afford the association's dues in the coming months. Likewise, board members will be able to express their concerns about how to maintain the common areas and provide other services in the face of resident delinquency. The evaluative model would be helpful in these disputes in that the mediator would be empowered to suggest a possible resolution.[181] This model would also be helpful in communicating the advantages of reaching a mutual agreement rather than resorting to traditional litigation, in that parties can work out a plan with the help of an informed leader.[182]

Where parties reach a stalemate, the mediator may be helpful in working toward a solution that benefits both parties. Examples of possible solutions could be like that of a payment plan for the delinquent resident based on a showing of financial hardship and inability to pay common charges. If individuals are getting back on their feet due to a new job or changed circumstances, they would be able to make a showing of this to the board and work out an agreement that allows them to remain in their homes while they catch up on unpaid dues. HOAs would likewise be able to tailor their own needs to this plan in order to ensure a fair resolution. Regardless of the proposed method and solution, a neutral mediator will be able to recognize the needs of both parties and work towards a mutually beneficial solution.[183]

A situation where foreclosure is on the table is aided by mediation's benefits of low costs and speedy resolution, as homeowners under financial pressure can often not afford the high costs of legal representation. Litigation costs can rack up as HOAs are able to add their legal fees to the homeowner's common charge arrears.[184] If the homeowner wishes to contest the foreclosure and loses, the owner may face legal fees reaching upwards of tens of thousands of dollars.[185] HOAs likewise face pressures related to the maintenance of the building they govern, as litigation is costly and time consuming, and fees remain unpaid.[186] Mediators can seek agreement from litigators to forbear from litigation during the mediation process,[187] preventing any judicial foreclosure proceedings from taking place. Mediation also preserves confidentiality, as the

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181 Marcum et al., *supra* note 131, at 319.

182 Shonk, *supra* note 133.

183 Marcum et al., *supra* note 131, at 320.

184 Wade Goodwyn, *Not So Neighborly Associations Foreclosing on Homes*, NPR (June 29, 2010), https://www.npr.org/2010/06/29/128078864/not-so-neighborly-associations-foreclosing-on-homes [https://perma.cc/G6YS-56U2].

185 *Id.*

186 Furman, *supra* note 4; Riskin, *supra* note 119, at 33 (explaining that mediation is beneficial where the parties have a complex and interdependent relationship).

187 JAMS, *supra* note 116.

parties and mediator must sign an agreement to treat any information shared as private.[188] In a situation where neighbors who serve on HOAs are given the power to foreclose on their own neighbors, it is significant that the unfortunate details of one's financial hardships cannot be used against them at a future time.

The co-dependent relationship between the HOA and the homeowner makes foreclosure cases ripe for mediation, as they focus on repairing and facilitating an ongoing relationship rather than solving a "one-time situation."[189] The HOA's existence is dependent on the homeowner's ability to pay, and homeowners rely on the board to maintain and provide services to the benefit of the community as a whole.[190] Mediation settlements consider all parties' interests in ways that judicial processes do not consider, as the latter typically result in a "win/lose" outcome.[191] Mediation is forward-looking in that parties are more likely to use it as a form of dispute resolution for future issues rather than resorting to an adversarial approach, like litigation.[192] In the context of an ongoing pandemic, where one's financial state and overall well-being continues to be uncertain, this system can aid in resolving future disputes or coming up with a sustainable plan that benefits both parties.

B. *Implementing Mediation into HOA Policy*

There are methods that allow for the implementation and enforcement of mediation processes between homeowners and the HOA in the face of foreclosure. One of these methods includes action taken directly by the state legislature.[193] Other states have implemented ADR provisions in their statutes that govern HOAs across the country, such as in Florida and Maryland.[194] In Florida, the legislature mandated nonbinding arbitration in disputes where judicial foreclosure was at stake for delinquent homeowners living in HOA-led communities.[195] The Florida legislature justified this statute by finding that unit owners faced disadvantages when litigating against HOAs that were more equipped to bear the costs

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188 NYC Hum. Rts., *supra* note 115.

189 Andreas Nelle, *Making Mediation Mandatory: A Proposed Framework*, 7 Ohio St. J. Disp. Resol. 287, 297 (1992).

190 Giantomasi, *supra* note 18.

191 U.S. Off. Special Couns., *supra* note 152.

192 *Id.*

193 Giantomasi, *supra* note 18, at 2521–24.

194 *Id.* at 2518.

195 *Id.*

of litigation.[196] Although the Florida legislature was reacting to a congested docket and other deficiencies in the judicial foreclosure system, NYC would benefit from a similar statute.[197] The California legislature also took similar steps to limit judicial foreclosure in HOAs through the Davis-Stirling Common Interest Development Act.[198] The Act requires HOAs to offer a homeowner the chance to participate in ADR methods before initiating foreclosure proceedings for delinquent assessments.[199] The effects of COVID-19 only further exacerbate the issues that were recognized in Florida and California, and further expose the pressing need for action on the part of the legislature. The New York state legislature, in recognizing the pressing issue that foreclosure poses in the post-pandemic world, could adopt similar provisions in their laws that currently govern HOAs. The benefit of having a state mandate to turn to an alternate dispute method, such as mediation, would promote efficiency in the process and ensure that all parties could turn to a default rule when faced with conflict.[200] Statutory regulations on the foreclosure process could ensure that each board is held to the same standard, and that all homeowners get the same chance to adequately explain their situation.

Rather than the implementation of mediation through legislative action, condominium and cooperative buildings could also implement alternate dispute resolution in their bylaws and governing documents in their own capacity. For example, the major difficulties that the board and its residents incurred at Two Fifth Avenue in NYC resulted in the board acting in a way to mitigate and work with their residents in times of crisis. The cooperative building in that case experienced catastrophic damages to its façade because of poor architectural planning.[201] The incumbent board was faced with the fact that the building required $30.7 million worth of repairs to rectify the hazardous state of the façade.[202] Where assessments for improvements are borne by the residents of the building, the board recognized that they needed to consider flexible methods for imposing these costs on homeowners.[203]

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196 Fla. Stat. Ann. § 718.1255 (West 2021)

197 *Id.*

198 Ehlers, *supra* note 99, at 212.

199 *Id.* at 212–13.

200 *See id.* at 209–10.

201 Robin Finn, *The Killer Assessment*, N.Y. Times (June 13, 2014), https://www.nytimes.com/2014/06/15/realestate/village-co-op-gets-hit-with-30-million-assessment.html [https://perma.cc/3UZK-2N79].

202 *Id.*

203 *Id.*

The board took it upon themselves to implement a three-pronged plan to finance the assessment.[204] In recognizing that individual homeowners were all under different financial circumstances, the plan allowed residents to either pay the $30.7 million assessment up front, pay in multiple de-escalating payments over the term of the project, or pay on a ten-year plan with no penalty.[205] The ten-year payment plan option proffered by the board specifically took into account the needs of those who could prove financial hardship and provided an alternative payment method.[206] The system worked out seamlessly, and the board noted that no resident defaulted under this scheme.[207] Those who opted to pay the entire assessment up front effectively subsidized their neighbors, and did so for moral and ethical reasons connected to wanting their neighbors to continue to live in the building.[208] The HOA, faced with uncertainty and the realization that all residents were impacted negatively by the large assessment, took action that displays how boards can work with residents rather than against them.

Although unrelated to the matter of foreclosure, the tale of Two Fifth Avenue reveals the self-recognition capabilities of HOAs. The board, rather than acting in a way to penalize its residents, acted in a way that recognized that each owner's situation placed them in different financial spheres. As both HOAs and homeowners face costs associated with judicial foreclosure, it can be said that there is a desire on both sides to work towards remedying issues caused by delinquency. The recognition that both sides involved in the case of Two Fifth Avenue were inevitably going to suffer because of the repairs that had to be made enabled the board to adopt the plan that it did. This desire to work through issues can even be heightened by moral and ethical considerations due to the effects of the COVID-19 pandemic. Where neighbors are willing to realize the hardships that they endure as a community, solutions that can be reached through internally situated mechanisms—like payment plans—may prove to be viable solutions where foreclosure is on the table.

Although a system where HOAs took it upon themselves to include such provisions for ADR in their governing documents and processes would be a best-case scenario, it is unclear whether it would be the most viable option under the present circumstances.

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204 *Id.*

205 *Id.*

206 *Id.*

207 Robin Finn, *The Killer Assessment*, N.Y. Times (June 13, 2014), https://www.nytimes.com/2014/06/15/realestate/village-co-op-gets-hit-with-30-million-assessment.html [https://perma.cc/3UZK-2N79].

208 *Id.*

HOAs can be inflexible forms of governance, and in the face of a nationwide emergency, state-mandated legislation may comprise a necessary solution.[209] California's Davis-Stirling Act brought stability to those governed by community associations through the creation of financial safeguards for homeowners.[210] HOAs are required by law to provide a "fair, reasonable and expeditious" procedure for resolving disputes before resorting to judicial foreclosure.[211] The California Court of Appeals has ruled that HOAs must strictly comply with the requirements of the Act in recording liens and pursuing foreclosure.[212] Such legislation creates a strict requirement that HOAs explore ADR options before considering foreclosure and keeps boards in check. It is the main goal that the Act will allow for the parties to work out an option on their own before involving the courts.[213]

In adopting a similar plan, the New York State legislature could create significant change in the realm of foreclosures across the state, especially in the urban areas disproportionately affected by COVID-19. Homeowners and HOA boards would benefit from having such regulations set in place and could further serve to prevent future conflicts. Such legislation could be turned to in the event of other major economic or physical events that may cause similar hardship, creating a framework for how to approach the issue of HOA-led foreclosures.

IV. Conclusion

Implementing mediation in the HOA foreclosure process is a low-cost and time-efficient solution. There is an urgent need for this method, specifically in NYC, where homeowners are struggling as a result of the COVID-19 pandemic. Alternate dispute resolution in a time where uncertainty is high can prove to be a viable source of solutions for HOA boards and homeowners alike. Instances of

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209 Fleming, *supra* note 33; Associa, *supra* note 26.

210 *History of Davis-Stirling Act*, Adams Stirling, https://www.davis-stirling.com/HOME/Statutes/History-of-Davis-Stirling-Act#:~:text=Stability%20and%20Disclosures.,Californians%20served%20by%20community%20associations [https://perma.cc/98F2-JF7L] (last visited Feb. 3, 2023).

211 *Internal Dispute Resolution (IDR)*, Adams Stirling, https://www.davis-stirling.com/HOME/I/Internal-Dispute-Resolution [https://perma.cc/WNS3-YQZC] (last visited Feb. 3, 2023) (describing the "meet and confer" procedure of the Act, which enables the parties to confer in good faith in an effort to resolve the dispute without judicial interference).

212 Brian Hanley, *HOA Boards Beware: California Courts Require Strict Statutory Compliance to Lien and Foreclose*, Porter Simon (Feb. 1, 2015), https://portersimon.com/hoa-boards-beware-california-courts-require-strict-statutory-compliance-to-lien-and-foreclose/ [https://perma.cc/QMM8-N78M].

213 Adams Stirling, *supra* note 211.

future conflict can be mitigated by the implementation of mediation in any interaction where the board and delinquent residents are in disagreement with one another. The adoption of mediation, whether through legislative action or through the processes that the HOA adopts, can work to alleviate tension caused by uncertainty.

IMPROVING NEW YORK CITY'S COVID-19 VACCINE MANDATE FOR PUBLIC SECTOR WORKERS: A COLLABORATIVE FRAMEWORK FOR LABOR-MANAGEMENT RELATIONS IN HIGH IMPACT CIRCUMSTANCES

*Chelsea Hill**

I. Introduction

Since being declared a global pandemic on March 11, 2020,[1] the novel coronavirus, SARS-CoV-2 ("COVID-19") has had a substantial impact on people's lives across the globe. With more than 6.9 million dead and more than 770 million reportedly infected,[2] the human toll has been devastating. In addition to the loss of life, the efforts to contain COVID-19 brought profound and unprecedented changes to just about every aspect of daily life including work, travel, and basic social interaction. But just as the COVID-19 virus was unprecedented, so too was the global response. Using groundbreaking mRNA technology, researchers rapidly developed multiple successful vaccines to immunize the public and slow the spread of the virus.[3]

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[1] Jamey Keaten, Maria Cheng, and John Leicester, *WHO Declares Coronavirus a Pandemic, Urges Aggressive Action*, Associated Press (Mar. 12, 2020), https://apnews.com/article/united-nations-michael-pence-religion-travel-virus-outbreak-52e12ca90c55b6e0c398d134a2cc286e [https://perma.cc/P8YF-6FV6].

[2] *Coronavirus Dashboard*, World Health Organization [WHO], https://covid19.who.int/ [https://perma.cc/2SNJ-FK7E] (last visited Nov. 10, 2023).

[3] Jennifer Abbasi, *COVID-19 and mRNA Vaccines—First Large Test for a New Approach*, [J] AMA Med. News & Pers. (Sept. 3, 2020), https://jamanetwork.com/journals/jama/fullarticle/2770485 [https://perma.cc/9HLH-GHJS].

In record time, vaccines were available for a large part of the global population.[4]

In the United States, government efforts to encourage and even compel vaccination have focused on those facets of life most heavily impacted by the COVID-19 virus. One common approach mandated proof of vaccination for indoor dining or event attendance.[5] Another approach tethered compliance with COVID-19 vaccine mandates to one's employment.[6] The power of state and local governments to enact protective public health measures is well-established,[7] and it is similarly uncontroversial for non-unionized private employers to unilaterally impose new requirements on workers.[8] Imposing employment-based vaccine mandates to unionized workplaces, however, raised important questions involving collective bargaining obligations.[9]

Broadly speaking, unions and employers are obligated to negotiate the setting of "wages, hours, and other terms and conditions

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[4] Amanda Glassman, Charles Kenny, and George Yang, *The COVID-19 Vaccine Rollout Was the Fastest in Global History, but Low-Income Countries Were Left Behind*, Ctr. Glob. Dev. (Feb. 9, 2022), https://www.cgdev.org/blog/covid-19-vaccine-rollout-was-fastest-global-history-low-income-countries-were-left-behind [https://perma.cc/7SBS-JZNJ] (discussing how, while COVID-19 vaccines were developed and distributed faster than any other such development in history, vaccines were not distributed equitably to low-income countries).

[5] *See* Emma G. Fitzsimmons, Sharon Otterman, and Joseph Goldstein, *N.Y.C. Will Require Workers and Customers Show Proof of at Least One Dose for Indoor Dining and Other Activities*, N.Y. Times (Sept. 7, 2021), https://www.nytimes.com/2021/08/03/nyregion/nyc-vaccine-mandate.html [https://perma.cc/S22K-77P7]; *see also* Christine Bestor Townsend & Zachary A. Pestine, *Chicago Issues Proof of COVID-19 Vaccination Requirement for Restaurants, Gyms, and Indoor Concerts*, Ogletree Deakins (Dec. 23, 2021), https://ogletree.com/insights/chicago-issues-proof-of-covid-19-vaccination-requirement-for-restaurants-gyms-and-indoor-concerts/ [https://perma.cc/D7DK-9ZD9].

[6] *See generally* Haley Messenger, *From McDonald's to Goldman Sachs, Here Are the Companies Mandating Vaccines for All or Some Employees*, NBC News (Aug. 3, 2021, 12:40 P.M.), https://www.nbcnews.com/business/business-news/here-are-companies-mandating-vaccines-all-or-some-employees-n1275808 [https://perma.cc/6NVF-XLAX]; *see also* Danielle Ivory et al., *Who's Requiring Workers to Be Vaccinated?*, N.Y. Times (Feb. 23, 2022), https://www.nytimes.com/interactive/2022/02/23/business/office-vaccine-mandate.html [https://perma.cc/T7FG-GN8R].

[7] *See infra*, Section II.B.

[8] *See generally* Roland E. Jolles, *A Survey of Employment Contract Law in Florida: An Analysis of the Applications of Employment Contracts to the Interests of Employers and Employees*, 21 Fla. St. Univ. L. Rev. 167, 167 (1993) ("In the absence of a contract, however, an employee is subject to the common law doctrine of at-will employment. This latter doctrine gives the employer unfettered control over the terms and conditions of employment and termination.").

[9] Jon Anderson & Rufino Gaytán III, *Vaccine Mandates May Require Collective Bargaining*, Lab. Rel. L. Insider (Nov. 16, 2021), https://www.laborrelationslawinsider.com/2021/11/vaccine-mandates-may-require-collective-bargaining/ [https://perma.cc/P8RM-65W5] ("[T]he ETS affects terms and conditions of employment—including the potential to affect the continued employment of employees who become subject to it—and to the extent the ETS gives covered employers some measure of discretion . . . bargaining obligations may arise.").

of employment" in good faith through collective bargaining.[10] These rights and obligations apply to both the public and private sectors but derive from different authority. For public sector unions, federal, state, and local law determine what rights, if any, public sector unions have in that jurisdiction.[11] However, statutory mandates can sometimes affect the terms and conditions of employment of public or private sector workers. In the private sector, decisions of the National Labor Relations Board ("NLRB") have long supported the principle that "an employer is relieved of its duty to bargain"[12] where a statute changes specific terms and conditions of employment; however, "the employer may not act unilaterally so long as it has some discretion in implementing those requirements."[13] Essentially, where the employer can make choices as to how the law will be implemented in the workplace, such changes may be subject to bargaining.[14] Discretionary aspects of vaccine mandate implementation—for example, how workers would submit proof of vaccination or request a reasonable accommodation—prompted debate as to whether such terms would need to be bargained over.[15] For private sector unions, the NLRB's Office of the General Counsel took a clear stance that

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10 29 U.S.C. § 158(d).

11 *See infra,* Section II.C. The rights and obligations of private sector employers and employees are enshrined in the National Labor Relations Act. *See generally*, 29 U.S.C. §§ 151-169.

12 Off. Gen. Couns., Nat'l Lab. Rel. Bd., OM 22-03, Responding to Inquiries Regarding Bargaining Obligations Under the Department of Labor's Emergency Temporary Standard to Protect Workers From Coronavirus, (Nov. 10, 2021), https://smart-union.org/wp-content/uploads/2021/11/2021.11.12_NLRB_Responding-to-Inquiries-Regarding-Bargaining-Obligations-COVID-19.pdf [https://perma.cc/UFV3-YZFN].

13 *Id.*; *see also*, Alex G. Desrosiers, *NLRB's General Counsel Tells Unionized Employers They Must Bargain Over Mandate-or-Test Vaccine ETS Rule*, Fisher Phillips (Nov. 16, 2021), https://www.fisherphillips.com/news-insights/nlrbs-general-counsel-unionized-employers-bargain-vaccine-ets-rule.html [https://perma.cc/P2ZL-88SM]; *see also* Anderson and Gaytán, *supra* note 9.

14 Such changes may not be subject to bargaining where a union has waived bargaining rights over the decision in question, or the decision falls under management rights provisions of the existing collective bargaining agreement. But even if waived by the union, an employer may still have to bargain over the *effects* of such statutory requirements. Anderson and Gaytán, *supra* note 9; *see also* Desrosiers, *supra* note 13 (describing the difference between decisional and effects bargaining in the context of vaccine mandates).

15 Steven M. Bernstein & Patrick W. Dennison, *The Realities of Mandating COVID-19 Vaccination for Unionized Employees*, Fisher Phillips (Jan. 26, 2021), https://www.fisherphillips.com/news-insights/the-realities-of-mandating-covid-19-vaccination-for-unionized-employees.html [https://perma.cc/LLY7-3CTZ]; *See also Management and Union's Rights and Obligations in Collective Bargaining*, A.B.A., https://www.americanbar.org/content/dam/aba/events/labor_law/basics_papers/nlra/obligations.pdf [https://perma.cc/PN9S-ACCV] (last visited Jan. 12, 2023) (explaining the difference between mandatory, permissive, and illegal bargaining terms).

workers have a right to bargain over how employers implement these and other discretionary aspects of such mandates.[16]

Public sector unions, meanwhile, may be more limited by state and local law.[17] As outlined by relevant law,[18] public sector unions and employers across the country engaged in bargaining, negotiation, or other forms of dispute resolution over COVID-19 vaccine mandate implementation.[19] In New York City ("NYC"), for example, the city government imposed some of the "most aggressive steps in the nation to increase vaccination rates",[20] primarily impacting the city's public sector workforce.[21] In implementing these mandates, the city and its unions utilized various forms of dispute resolution commonly deployed in labor relations, namely, negotiation and arbitration.[22] Negotiation and arbitration served to settle disputes between the unions and city government over mandate implementation,[23] and arbitration played a significant role in the implementation of the mandate on rank-and-file workers through the accommodation request and appeal process.[24] Negotiation and arbitration, while non-adversarial in that they provide alternatives to litigation, can still be antagonistic. This is especially true in, but not unique to, the context of labor relations, where labor and management often come to the table with, at least a perception of, directly opposing goals. While critical to labor relations during normal circumstances, as seen

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16 *See* Off. Gen. Couns., Nat'l Lab. Rel. Bd., *supra* note 12. Although this memo was issued in light of the Biden administration's since-invalidated OSHA mandate (*see infra*, section II.B.1), it represents a broader policy statement regarding bargaining obligations relating to vaccine mandates, answering a question many in labor law had been asking since the COVID vaccine was in development; *See* Desrosiers, *supra* note 13.

17 *Infra*, Section II.C.

18 *See, e.g.,* N.Y. Civ. Serv. L. §§ 200–215.

19 *See, e.g.,* Seamus J. Ronan, Note, *Standardized (COVID) Testing? Vaccines Mandates and Teachers' Unions Collective Bargaining Agreements in Urban School Districts*, 49 Fordham Urb. L.J. 861, 895–908 (2022) (discussing negotiations and arbitration between the city school districts of Los Angeles and New York City with their respective teachers' unions over, *inter alia*, vaccine mandates); *see also Breaking: State Workers Ratify Vaccine Agreement*, Wash. Fed'n St. Emps. (Sept. 10, 2021), https://www.wfse.org/news/breaking-state-workers-ratify-vaccine-agreement [https://perma.cc/GVA3-4TZ2]; *State Reaches First Union Agreement on Vaccine Mandate in Illinois' Congregate Facilities*, St. Ill. (Sept. 20, 2021), https://www.illinois.gov/news/press-release.23913.html [https://perma.cc/AMZ6-2NJT].

20 Emma G. Fitzsimmons & Sharon Otterman, *New York City Ends Vaccine Mandate for City Workers*, N.Y. Times (Feb. 6, 2023), https://www.nytimes.com/2023/02/06/nyregion/vaccine-mandate-nyc-adams.html [https://perma.cc/92TJ-9HDB].

21 *Id.*, *see also infra*, Section II.B.ii.2.

22 *See infra,* Section III.A.

23 *Id.*

24 *Id.*

with COVID-19, such processes are generally ill-suited to problem-solving in times of crisis.[25]

In many ways, NYC's vaccine mandates highlighted longstanding issues particular to, and inherent in, public sector unions and bargaining.[26] In the context of a major societal upheaval like a pandemic, this question becomes more urgent: How can governments balance their powers and obligations to the public along with their obligations to unionized workers as an employer? Using NYC as a case study, this Note argues that in "high impact events" such as pandemics, financial crises, and natural disasters, the traditional methods of public sector labor-management dispute resolution are insufficient to properly balance these competing obligations. Instead, public sector employers and employees should engage in collaborative governance.

Collaboration is "a process through which parties who see different aspects of a problem constructively explore their differences and search for solutions that go beyond their own limited view of what is possible."[27] Collaborative governance describes the application of the process of collaboration to policy decision-making and public administration.[28] By bringing together multiple stakeholders, collaborative governance processes are intended to facilitate more thoughtful, responsive, and efficient responses to complex societal problems.[29] Pandemics, such as COVID-19 and other disruptors including financial crises and natural disasters, cause uniquely complex and interrelated issues for governments within the realm of labor relations involving public employees. Governments must balance the need to take swift, decisive action, uphold collective bargaining obligations as an employer, and ensure the continued provision of public services. With an updated and expanded role for collaboration—particularly using collaborative governance with government, management, union, and rank-and-file participation and input—public sector employers and employees could achieve better balance in times of crisis between protecting collective rights of employees and the public good while also ensuring respect for the individual rights of workers.

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[25] *Infra*, Section III.C.

[26] *Infra*, Section II.C.

[27] Jill M. Purdy, *A Framework for Assessing Power in Collaborative Governance Processes*, 72 Pub. Admin. Rev. 409, 409 (2012) (quoting Barbara Gray and Pat Lauderdale, *The Great Circle of Justice: North American Indigenous Justice and Contemporary Restoration Programs*, 10 Contemp. Just. Rev. 215 (2007)).

[28] *See* Kirk Emerson, Tina Nabatchi, and Stephen Balogh, *An Integrative Framework for Collaborative Governance*, 22 J. Pub. Admin. Rsch. & Theory 1, 2–3 (2011).

[29] *Id.*; *see also* Purdy, *supra* note 27.

The Background section of this Note will briefly discuss the impacts of the COVID-19 pandemic on the workplace and provide an overview of the legal landscape relating to vaccine mandates at the federal, state, and local level. The Background section will also discuss important ways public sector labor unions differ from private sector unions, in particular, the unique relationship between union and management when management is also the government. The Discussion section will evaluate the way NYC's COVID-19 vaccine mandate for city employees was imposed largely unilaterally by city government. Additionally, this section will look at the outcomes of agreements reached through bargaining and arbitration and analyze whether, and to what extent, they achieved objectives such as protecting worker and public health, respecting workers' needs for accommodation, and maintaining trust in institutions.

Finally, this Note will propose that unique and extreme circumstances such as the COVID-19 pandemic necessitate a more collaborative framework that seeks to balance the needs and input of government, management, labor, and union rank-and-file to ensure the highest possible buy-in at every level. Decisions of the government as an employer carry the implication of policy.[30] Decisions concerning public sector employment, often determined through collective bargaining, can indirectly impact workers beyond those employed in the public sector. This makes it even more imperative for the government to enact thoughtful, responsive policy for public sector workers in times of crisis. And the best way to ensure this is the case is through collaborative governance.[31]

II. Background

A. *COVID-19 and the Workplace*

After COVID-19 was declared a pandemic, many states and localities issued stay-at-home orders to slow the spread of the virus. Entire sectors of the economy essentially shut down, disrupting employment for millions.[32] Unemployment in April 2020 measured at 14.8%, the highest levels ever recorded in the United States.[33] Both the public and private sector felt these losses. While public sector job

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[30] *See infra*, Section II.C.iii.

[31] *See infra*, Section IV.

[32] Gene Falk, Isaac A. Nicchitta, Paul D. Romero, and Emma C. Nyhof, Cong. Rsch. Serv., R46554, Unemployment Rates During the COVID-19 Pandemic (2021).

[33] Data on national unemployment rates did not start being collected until 1948. *Id.*

losses due to the pandemic were not as drastic and immediate as private sector losses, by September 2020, state and local governments lost more than 1.2 million jobs.[34]

The immediate and drastic impact of the COVID-19 virus on work and the economy led to predictions of fundamental changes to work and workplace.[35] But rather than expanding accessibility and addressing racial[36] and gender[37] inequities[38] laid bare by the pandemic, many policymakers focused recovery narratives on the economy broadly and a "return to normalcy."[39] Pandemic-era job loss and unemployment disproportionately affected workers in fields less amenable to remote work;[40] Hispanic workers, Black workers, and those with lower levels of education—particularly those with a high school diploma or less—were also disproportionately impacted.[41] Notably, for many employers, including public sector employers

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[34] The 1.2 million lost state and local government jobs equates to a loss of 6.1% of all state and local government jobs nationwide. Total private sector losses by September 2020 reached 9.8 million jobs, or a 7.6% decrease. Federal government numbers are here excluded due to increases stemming from census-related hiring. Sara Hinkley, *Public Sector Impacts of the Great Recession and COVID-19*, U.C. Berkeley Lab. Ctr. (Oct. 21, 2020), https://laborcenter.berkeley.edu/public-sector-impacts-great-recession-and-covid-19/ [https://perma.cc/EBK9-9NT6].

[35] Some of these predictions included: sustained increases in remote work and reliance on telecommunication technologies; increased use of automation and artificial intelligence; and lowered demand for low-wage customer service and retail workers due to said automation. *E.g.*, Susan Lund, Anu Madgavkar, James Manyika, Sven Smit, Kweilin Ellingrud and Olivia Robinson, *The Future of Work After COVID-19*, McKinsey Glob. Inst. (Feb. 18, 2021), https://www.mckinsey.com/featured-insights/future-of-work/the-future-of-work-after-covid-19 [https://perma.cc/4Y6J-BGEH].

[36] *E.g.,* Jamillah Bowman Williams, *COVID-19 Widens Disparities for Workers of Color*, 35 A.B.A. J. Lab. & Emp. L. 1, 33, 33–35 (2020), https://www.americanbar.org/content/dam/aba/publications/aba_journal_of_labor_employment_law/v35/number-1/covid-19-widens.pdf [https://perma.cc/CN3W-6M9N].

[37] Richard Fry, *Some Gender Disparities Widened in the U.S. Workforce During the Pandemic*, Pew Rsch. Ctr. (Jan. 14, 2022), https://www.pewresearch.org/fact-tank/2022/01/14/some-gender-disparities-widened-in-the-u-s-workforce-during-the-pandemic/ [https://perma.cc/W5F7-TRNH].

[38] Gender and racial disparities have further impact on those at the intersection of multiple social identities, such as black women, who saw "disproportionately negative social effects" as a result of COVID-19. Jacquelyn V. Coats et al., *Employment Loss and Food Insecurity—Race and Sex Disparities in the Context of COVID-19*, Ctrs. Disease Control & Prevention (Aug. 18, 2022), https://www.cdc.gov/pcd/issues/2022/22_0024.htm [https://perma.cc/K2BL-MEKF].

[39] *E.g.,* Michelle L. Price, *Big Cities Drop More COVID-19 Measures in Push for Normalcy*, AP News (Mar. 4, 2022), https://apnews.com/article/kathy-hochul-brooklyn-nets-nba-coronavirus-pandemic-sports-5377490ad6db096d52c355d3d7c15757 [https://perma.cc/7LAY-2MYF] ("New York City and Los Angeles are lifting some of their strictest COVID-19 prevention measures as officials in big cities around the U.S. push for a return to normalcy after two grueling years of the pandemic.").

[40] *See* Falk, Nicchitta, Romero, and Nyhof, *supra* note 32, at 5, 20 (stating that sectors offering "in-person services" saw the highest job losses, with the leisure and hospitality industry suffered significantly higher job loss than any other employment sector).

[41] *Id.* at 12–13.

such as the NYC government, "return to normalcy" policies often aligned with the issuance of COVID-19 vaccine mandates.[42]

B. *Legal Authority for Vaccine Mandates*

Vaccine mandates have been considered a legitimate exercise of state police power almost as long as vaccines have existed. In 1905, the Supreme Court upheld a smallpox vaccine mandate for all Cambridge residents in the foundational case *Jacobson v. Massachusetts*.[43] Since the development of COVID-19 vaccines, mandates have been issued at the federal, state, and local levels, often by executive authority.[44] Throughout the pandemic, the courts largely upheld state and local mandates for COVID vaccines[45] as public health protections are generally considered a power reserved to the states through the Tenth Amendment to the United States Constitution.[46] Meanwhile, federal mandates were largely subject to judicial interpretation of administrative and constitutional law due to their enactment by federal agencies or the executive branch[47] rather than Congress.[48]

i. Federal COVID-19 Vaccine Mandates

As will be discussed below, federal COVID-19 vaccine mandates encountered mixed results in the courts. Two executive federal agencies issued mandates in 2021 that went before the Supreme Court: The Occupational Safety and Health Administration

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[42] Annie McDonough, *City Employees Are Eyeing the Exits as Adams Insists on In-Person Work*, City & St. N.Y. (Mar. 17, 2022), https://www.cityandstateny.com/policy/2022/03/city-employees-are-eyeing-exits-adams-insists-person-work/363317/ [https://perma.cc/ZTQ8-6FZQ] (noting that city office workers were ordered to return to offices full-time in September, 2021; roughly coinciding with the issuance of the City's vaccine-only mandate for all city employees that same month, *see infra* Section II.B.ii.2).

[43] Jacobson v. Massachusetts, 197 U.S. 11 (1905). This is not to say, however, that every state and local vaccine mandate is legal: courts have invalidated vaccine requirements found to be discriminatory or otherwise arbitrary. *See* Wong Wai v. Williamson, 103 F.1 (C.C.N.D. Cal. 1900) (finding a vaccine requirement exclusively targeting San Francisco's Chinese and Chinese-American residents discriminatory and thus invalid).

[44] Wen W. Shen, Cong. Rsch. Serv., R46745, State and Federal Authority to Mandate COVID-19 Vaccination, (2022)

[45] *Id.* at 8-12; *see also infra,* Section II.B.ii.

[46] Stephanie Cooper Blum, *Federalism: Fault or Feature—An Analysis of Whether the United States Should Implement a Federal Pandemic Statute*, 60 Washburn L. J. 1, 3 (2020).

[47] *Infra,* Section II.B.i.

[48] While Congress has some concurrent powers in the public health sphere, limitations under the Tenth Amendment restrict Congressional action to the provision of "guidance, research, expertise, and financial assistance." Blum, *supra* note 46, at 44.

("OSHA")[49] and the Centers for Medicare and Medicaid Services ("CMS").[50] In both cases, the Court focused on interpretating the issuing agency's statutory authority.[51] The Court's decisions on these mandates established that executive agencies are capable, if limited, in issuing vaccine mandates by the powers enumerated in their authorizing statutes. Presidential authority to issue vaccine mandates for the federal workforce, however, was largely not upheld.[52]

In November 2021, OSHA issued a broad vaccine-or-test mandate[53] that applied to all private employers with one hundred employees or more.[54] OSHA issued this mandate as an Emergency Temporary Standard ("ETS") under the Occupational Safety and Health Act, 29 U.S.C.S. § 655(c)(1).[55] Experts estimated this

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[49] OSHA is an executive agency housed within the Department of Labor. OSHA, 86 C.F.R. § 61402 (2021).

[50] CMS is an executive agency housed with the Department of Health. Dept. of Health, Ctrs. For Medicare and Medicare Servs., 86 C.F.R. § 61555 (2021).

[51] *See* Nat'l Fed'n Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 665 (2022) (invalidating the OSHA mandate as exceeding the scope of the agency's authority); *see also* Biden v. Missouri, 142 S. Ct. 647, 651 (2022) (upholding the validity of the CMS mandate for healthcare workers in facilities receiving Medicaid funds).

[52] President Biden issued two vaccine mandates in 2021 aimed at the Federal workforce through Executive Order: Executive Order No. 14043 applying to federal employees ("employee mandate") and Executive Order No. 14042 extending the federal employee mandate to federal contractors ("contractor mandate"). Exec. Order No. 14043, 86 Fed. Reg. 50989 (Sept. 9, 2021); Exec. Order No. 14042, 86 Fed. Reg. 50985 (Sept. 9, 2021). Both mandates were enjoined by the federal courts and those injunctions were upheld on appeal. Louisiana v. Biden, 55 F.4th 1017 (5th Cir. 2022) (upholding injunction against the contractor mandate); Kentucky v. Biden, 57 F.4th 545 (6th Cir. 2023) (upholding injunction against the contractor mandate); Feds for Medical Freedom v. Biden, 63 F.4th 366 (5th Cir. 2023) (upholding injunction against the employee mandate). The Biden Administration announced on May 1, 2023, that the enjoined federal employee and contractor mandates would end. *The Biden-Harris Administration Will End COVID-19 Vaccination Requirements for Federal Employees, Contractors, International Travelers, Head Start Educators, and CMS-Certified Facilities*, White House (May 1, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/01/the-biden-administration-will-end-covid-19-vaccination-requirements-for-federal-employees-contractors-international-travelers-head-start-educators-and-cms-certified-facilities/ [https://perma.cc/GML4-2K5Y].

[53] "Vaccine-or-test" means that workers who chose not to, or could not, receive the COVID-19 vaccine could instead choose to get tested for COVID-19 weekly and produce their negative test to their employer. *See* Archives & Recs. Admin., Off. Fed. Reg., DCPD202100725 (2021).

[54] OSHA, *supra* note 49.

[55] 29 U.S.C. § 655(c)(1)(1970) outlines the criteria for issuance of an ETS as "(A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger." As an ETS, the rule would be put into place for six months during which OSHA would accept comments as required by the Administrative Procedures Act to determine whether the rule should be made permanent. 29 U.S.C. § 655(b) (1970); *see also* James Sullivan, *Lawsuits Fighting OSHA COVID-19 Vaccine Standard May Not Matter*, Bloomberg L. (Sept. 24, 2021), https://news.bloomberglaw.com/daily-labor-report/lawsuits-fighting-osha-covid-19-vaccine-standard-may-not-matter [https://perma.cc/FL3A-26PD] (the COVID-19 vaccine mandate marked the first time OSHA had issued an ETS in nearly forty years).

private employer mandate could have affected up to 100 million Americans, with up to 50% of whom otherwise were not previously vaccinated.[56] Those challenging the ETS argued that the COVID-19 vaccine mandate exceeded the authority designated to OSHA by the Occupational Safety and Health Act.[57] The Supreme Court agreed, holding that COVID-19 did not constitute a workplace hazard qualifying for the implementation of an ETS, according to § 655(c)(1).[58]

The CMS mandate, meanwhile, was a vaccination-only mandate applicable to healthcare workers at facilities accepting Medicare and/or Medicaid funding.[59] CMS issued the mandate without going through formal notice-and-comment requirements, arguing there was "good cause" to do so due to the danger to patient health from delayed implementation.[60] Facilities that failed to adhere to the mandate could suffer monetary penalties or even termination from participation in Medicare or Medicaid programs.[61] The Supreme Court found this to be within the scope of the agency's authority to "impose conditions on the receipt of Medicaid and Medicare funds"[62] to further the "health and safety"[63] of Medicare and Medicaid patients, including conditions relating to the "qualifications and duties" of healthcare workers.[64]

ii. State and Local COVID-19 Vaccine Mandates

State and local governments are primarily responsible for regulations pertaining to public health as a police power reserved to

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56 Farhan I. Mohiuddin & Hina I. Mohiuddin, Comment, *To Force or Not to Force: Analyzing the Implications of the Executive Employer Vaccine Mandate*, 12 HOUS. L. REV. 25, 31 (2021) (citing Julia Ries, *How Many People Will Be Impacted by Biden's Vaccine Rules?*, HEALTHLINE (Sept. 17, 2021), https://www.healthline.com/health-news/how-many-people-will-be-impacted-by-bidens-vaccine-rules [https://perma.cc/9CNA-MNH5]).

57 Nat'l Fed'n Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 665 (2022).

58 *Id.* (stating "[a]lthough COVID-19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most . . . Permitting OSHA to regulate the hazards of daily life . . . would significantly expand OSHA's regulatory authority without clear congressional authorization"); *cf.* OSHA, *supra* note 49, at 61407 (arguing "there is nothing in the [OSH] Act to suggest that its protections do not extend to hazards which might occur outside of the workplace as well as within," citing as an example existing OSHA regulation relating to HIV/AIDS and Hepatitis B exposure).

59 The CMS mandate, issued as an interim final rule with comment period (IFC), allowed exemptions for remote workers and those requiring medical or religious accommodations. Biden v. Missouri, 142 S. Ct. 647, 651 (2022).

60 *Id.*

61 *Id.*

62 *Id.* at 652.

63 *Id.*

64 *Id.* at 653.

them through the Tenth Amendment.[65] Accordingly, both New York State ("NYS") and NYC issued vaccine mandates for COVID-19. NYS focused on vaccine mandates for healthcare workers.[66] NYC, meanwhile, initiated multiple mandates initially aimed at employees of different government agencies, eventually culminating in a sweeping mandate applicable to all private employers with worksites in the city.[67] While the power of the state and city to enact such mandates remains largely intact as discussed below, some challenges succeeded with as-applied claims of arbitrariness, separation of powers violations, and violation of collective bargaining rights.[68]

1. NYS Mandate for Healthcare Workers

Challenges to the NYS mandate primarily focused on the mandate's lack of a religious exemption.[69] However, federal courts have long held that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[70] As such, the Second Circuit Court of Appeals held that NYS had a "legitimate government interest"[71] in preventing both the spread of COVID-19 in medical facilities and staffing shortages that could negatively impact patient care.[72] The Second Circuit also cited the lack of religious accommodation in longstanding vaccine requirements for New York healthcare workers, such as those for measles and rubella.[73]

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65 Blum, *supra* note 46; *see also* Shen, *supra* note 44.

66 10 N.Y.C.R.R. § 2.61.

67 *Infra*, Section II.B.ii.2.

68 *See id.*

69 Mary Beth Morrissey, Thomas G. Merrill, and Christopher C. Palermo, *Challenges to State and Local Vaccine Mandates in New York*, NYSBA (Dec. 10, 2021), https://nysba.org/challenges-to-state-and-local-vaccine-mandates-in-new-york/ [https://perma.cc/F7MD-DK6M].

70 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993).

71 We the Patriots U.S., Inc. v. Hochul, 17 F.4th 266 (2d Cir. 2021). The U.S. Supreme Court declined to hear this case on appeal; Andrew Chung, *U.S. Supreme Court Nixes Religious Challenge to New York Vaccine Mandate*, Reuters (June 30, 2022, 11:47AM), https://www.reuters.com/legal/government/us-supreme-court-nixes-religious-challenge-new-york-vaccine-mandate-2022-06-30/ [https://perma.cc/W6VE-8Y8J].

72 *Id.*

73 Chung, *supra* note 71.

A later challenge to the mandate in state court held that the mandate violated state law[74] and was arbitrary and capricious.[75] However, the Appellate Division of the Supreme Court of New York, Fourth Judicial Department, issued a stay on this order until the case could be heard on appeal.[76] NYS lifted the mandate in May 2023 before the appeal could be heard.[77]

2. NYC Mandates: Expansion and Exemption

NYC's COVID-19 vaccine mandate consisted of multiple orders issued under Mayor Bill de Blasio's administration, starting in July 2021 and continuing into 2022 under Mayor Eric Adams, as will be detailed below. A chronological view of these orders shows the de Blasio administration's attempt to expand the mandate to as many people as possible. The Adams administration took a less unified approach, navigating political pressures and pushing for a "return to normalcy."[78]

The first vaccine orders issued by Mayor de Blasio in the summer of 2021 implemented vaccination-or-test mandates for

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[74] Med. Pro. for Informed Consent v. Bassett, 185 N.Y.S.3d 578, 585 (N.Y. Sup. Ct. 2023) (citing that NYS Public Health Law prohibits the State Health Commissioner from implementing mandatory immunization programs for children or adults unless added to the Public Health Law legislatively).

[75] J. Neri declared the mandate "absurd" and "Orwellian" based on evidence that COVID-19 vaccines do not fully prevent transmission of the disease. It is unclear, however, why a 100% transmission prevention rate is the only measure of vaccine efficacy considered. *Id.* at 586. *See also* Petition, Ex. F at 25, Med. Pro. for Informed Consent v. Bassett, 185 N.Y.S.3d 578, 586 (Sup. Ct. 2023).

[76] S. Alexander Berlucchi, et al., *Healthcare Law Alert: New York State Supreme Court Judge Invalidates COVID-19 Vaccine Mandate*, Hancock Estabrook (Mar. 1, 2023), https://www.hancocklaw.com/publications/healthcare-law-alert-new-york-state-supreme-court-judge-invalidates-covid-19-vaccine-mandate/ [https://perma.cc/TE9B-6LUK].

[77] The appeal was to be added to the court's term beginning May 15, 2023. *Id.*; The NYS Department of Health announced the repeal of the mandate on May 24, 2023. *New York State Department of Health Statement on Repealing the COVID-19 Healthcare Worker Vaccine Requirement*, N.Y. Dep't. Health (May 24, 2023), https://www.health.ny.gov/press/releases/2023/2023-05-24_statement.htm#:~:text=(May%2024%2C%202023)%20%2D,at%20regulated%20health%20care%20facilities [https://perma.cc/BYD8-YFJF].

[78] *See* Michael Gartland, *Political Tone in NYC Takes a Marked Turn Two Years Into the COVID-19 Pandemic*, N.Y. Daily News (Mar. 13, 2022, 12:00 PM), https://www.nydailynews.com/news/ny-covid-pandemic-eric-adams-de-blasio-masks-vaccines-hochul-cuomo-20220313-3fs3gdhcu5chdjg2wcyergu6ae-story.html [https://perma.cc/Q2N3-GNJZ] (pointing out that de Blasio, when enacting NYC's aggressive vaccination mandates, was term-limited and thus less constrained by political considerations).

city employees,[79] starting with those employed in higher-risk environments such as hospitals, and phasing in all city agencies over time.[80] The de Blasio administration also implemented the "Key to NYC" program in summer 2021.[81] Key to NYC required both workers and visitors at indoor establishments such as restaurants, gyms, and theaters, to show proof that they had received at least one dose of the vaccine to enter.[82] Notably, the program required vaccines for some private sector workers.[83]

By August 2021, the de Blasio administration switched to a vaccination-only approach for city workers beginning with the Department of Education ("DOE"),[84] no longer allowing weekly testing as a vaccination alternative.[85] In October 2021, the de Blasio administration issued a vaccination-only mandate for all city employees ("the public sector mandate").[86] In its most ambitious effort, the de Blasio administration then issued a mandate for all employers with worksites in NYC in December 2021 ("the private

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79 Mirna Alsharif et al., *New York City to Require its Health Workers to get Vaccinated or Submit to Weekly Tests*, CNN (July 21, 2021, 1:38 PM), https://www.cnn.com/2021/07/21/us/new-york-city-vaccine-healthcare-requirement/index.html [https://perma.cc/9H2X-3NS7]; *see, e.g.,* City of N.Y., Comm'r Health & Mental Hygiene, Order of the Commissioner of Health and Mental Hygiene to Require COVID-19 Vaccination or Testing for Staff in Public Healthcare Settings (Aug. 24, 2021), https://www.nyc.gov/assets/doh/downloads/pdf/covid/covid-19-vaccination-or-testing-staff-public-settings-072121.pdf [https://perma.cc/ZA9J-DKHV]; City of N.Y., Comm'r Health & Mental Hygiene, Order of the Commissioner of Health and Mental Hygiene to Require COVID-19 Vaccination or Testing for Staff in Residential and Congregate Settings, (Aug. 10, 2021) https://www.nyc.gov/assets/doh/downloads/pdf/covid/covid-19-vaccination-or-testing-staff-residential-congregational-081021.pdf [https://perma.cc/ZGK9-G4AM].

80 *See* Alsharif et al., *supra* note 79.

81 Fitzsimmons et al., *supra* note 5. City of N.Y., Off. Mayor, Emergency Exec. Ord. No. 225 (2021), https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2021/eeo-225.pdf [https://perma.cc/S7C7-4JBV].

82 City of N.Y., Off. Mayor, Emergency Exec. Ord., *supra* note 81.

83 *See id.*

84 City of N.Y., Comm'r Health & Human Hygiene, Order of the Commissioner of Health and Mental Hygiene to Require COVID-19 Vaccination for Department of Education Employees, Contractors, Visitors, and Others (Sept. 15, 2021), https://www.nyc.gov/assets/doh/downloads/pdf/covid/covid-19-vaccination-requirement-doe-2.pdf [https://perma.cc/PQ3L-2Y6X] (covering in-person teachers, staff, contractors, and even visitors to NYC public schools, charter schools, and DOE buildings).

85 Morrissey et al., *supra* note 69.

86 City of N.Y., Comm'r Health & Human Hygiene, Order of the Commissioner of Health and Mental Hygiene to Require COVID-19 Vaccination for City Employees and Certain City Contractors (Oct. 20, 2021), https://www1.nyc.gov/assets/doh/downloads/pdf/covid/covid-19-vaccination-requirement-city-employees.pdf [https://perma.cc/A5AZ-YR3R].

employer mandate").[87] The private employer mandate required employers to receive proof of vaccination from any employee who worked in-person with either members of the public or other employees.[88] The private employer mandate prompted questions regarding the scope of local public health powers.[89]

When Mayor Adams took office the following month in January 2022, his administration declined to enforce the private employer mandate.[90] Then, in March 2022, Mayor Adams made crucial changes to the existing web of vaccine mandates through the issuance of two executive orders. First, citing high rates of vaccination and lower rates of COVID-19 infection, he ended the Key to NYC Program through Executive Order 50 issued March 4, 2022.[91] Establishments no longer needed proof of vaccination from customers.[92] Executive Order 50, however, still required businesses to collect proof of vaccination from workers pursuant to the private employer mandate, despite that mandate not being enforced.[93]

Then, on March 24, 2022, Mayor Adams modified Executive Order 50 and, by extension, the private employer mandate.[94] Specifically, he changed the definition of "covered worker," exempting certain categories of employees from the obligation to

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87 This mandate created complementary obligations for both private employers and their employees: employees were obligated to provide proof of vaccination to their employer, who had to collect this information and keep records of employee vaccination status. City of N.Y., Comm'r Health & Human Hygiene, Order of the Commissioner of Health and Mental Hygiene to Require COVID-19 Vaccination in the Workplace (Dec. 13, 2021), https://www.nyc.gov/assets/doh/downloads/pdf/covid/covid-19-vaccination-workplace-requirement.pdf [https://perma.cc/PE34-UWAH].

88 This requirement extended to non-employees as well, such as contractors, interns, and volunteers. *Id.*

89 *E.g.,* Susan Gross Sholinsky, et. al., *Is New York City's Vaccine Mandate for Private Employers Legal?*, Bloomberg L. (Dec. 9, 2021, 9:00 AM), https://news.bloomberglaw.com/daily-labor-report/is-new-york-citys-vaccine-mandate-for-private-employers-legal [https://perma.cc/P5RF-UVVL]; *see also* Morrissey et al., *supra* note 69.

90 Adams claims his administration focused on promoting vaccination through education instead, distributing informational pamphlets on COVID-19 vaccines. Lola Fadulu, *Eric Adams Stopped Enforcing Vaccine Mandate for New York City Businesses*, N.Y. Times (June 23, 2022), https://www.nytimes.com/2022/06/23/nyregion/nyc-vaccine-mandate-adams.html [https://perma.cc/9SZR-3FW7]; *see also* David Lazar, *Adams Administration Is Not Inspecting Companies for Vaccine Mandate Compliance*, NY1 (June 22, 2022, 10:00 PM), https://www.ny1.com/nyc/all-boroughs/coronavirus/2022/06/23/mayor-eric-adams-not-inspecting-private-companies-for-city-s-covid-19-mandate [https://perma.cc/YB4M-8FT5].

91 City of N.Y., Off. Mayor, Emergency Exec. Ord. No. 50 (2022), https://www.nyc.gov/office-of-the-mayor/news/050-003/emergency-executive-order-50 [https://perma.cc/2RWC-XJXU].

92 *Id.*

93 *Id.*; *see also* Fadulu, *supra* note 90.

94 City of N.Y., Off. Mayor, Emergency Exec. Ord. No. 62 (2022), https://www.nyc.gov/assets/home/downloads/pdf/executive-orders/2022/eeo-62.pdf [https://perma.cc/UWD6-FDNR].

provide proof of vaccination to their employer.[95] These exemptions applied to remote workers, professional athletes, performing artists, and individuals "accompanying" either a performing artist, athlete, or the athlete's sports team.[96] These exemptions became known as the "Kyrie Carveout," referring to the vocally unvaccinated member of the Brooklyn Nets professional basketball team, Kyrie Irving, who had been benched by the Nets due to the city's vaccination policies.[97]

Mayor Adams contended the Kyrie Carveout was necessary for NYC's economic recovery, as the city's economy relies heavily on tourism and entertainment.[98] But the exemptions for artists and athletes immediately angered public sector labor leaders.[99] While never enforced, the Adams administration formally ended the private employer mandate on November 1, 2022.[100] The public sector mandate not only remained in effect at that time, further angering public sector labor leaders,[101] but had long been enforced by the city. In February 2022 alone, NYC terminated more than 1,400 city workers for non-compliance with the vaccine

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[95] *Id.*; *see also* City of N.Y., Comm'r Health & Human Hygiene, *supra* note 87.

[96] City of N.Y., Off. Mayor, Emergency Exec. Ord. No. 62, *supra* note 94 at § 3(d)(3).

[97] Initially in compliance with the Key to NYC program and then the (unenforced) private employer mandate, the Brooklyn Nets benched the unvaccinated Irving for home games at Barclay's Center in Brooklyn. Unvaccinated visiting players were not so restricted. Ohm Youngmisuk, *Kyrie Irving Says Decision to Remain Unvaccinated is 'About Being True to What Feels Good for Me'*, ESPN (Oct. 14, 2021, 1:10 AM), https://www.espn.com/nba/story/_/id/32397602/kyrie-irving-says-decision-remain-unvaccinated-being-true-feels-good-me [https://perma.cc/87F5-B872]; *see also* Emma G. Fitzsimmons & Sopan Deb, *'Kyrie Carve Out' in Vaccine Mandate Frees Irving to Play in New York*, N.Y. Times (Mar. 23, 2022), https://www.nytimes.com/2022/03/23/sports/kyrie-irving-nyc-vaccine-mandate.html [https://perma.cc/F8P8-WQFM].

[98] Mayor Eric Adams, *Transcript: Mayor Eric Adams Makes an Economic and Health-Related Announcement*, NYC Gov't (Mar. 24, 2022), https://www.nyc.gov/office-of-the-mayor/news/153-22/transcript-mayor-eric-adams-makes-economic-health-related-announcement [https://perma.cc/2JUP-HTJR] ("A multibillion-dollar industry is tied to tourism . . . [W]e're going to keep our nightlife industry thriving, a $35.1 billion industry.").

[99] Katie Honan, *Eric Adams' 'Kyrie Carve Out' Has Unions and Workers Fuming*, The City (Mar. 24, 2022, 8:00 PM), https://www.thecity.nyc/2022/3/24/22995486/adams-kyrie-irving-carve-out-nyc-unions-workers-angry [https://perma.cc/8Z8P-8SM2].

[100] Daniel I. Small & Robert S. Whitman, *COVID-19 Update: New York City Announces November 1 End for Vaccine Mandate*, Seyfarth (Sept. 20, 2022), https://www.seyfarth.com/news-insights/covid-19-update-new-york-city-announces-november-1-end-for-vaccine-mandate.html [https://perma.cc/RED6-98NW].

[101] Joe Anuta, *Supreme Court to Consider Taking up Challenge to New York's Vaccine Mandate*, Politico (Sept. 20, 2022, 9:01 PM), https://www.politico.com/news/2022/09/20/supreme-court-new-york-vaccine-mandate-00057894 [https://perma.cc/54ED-J37C].

mandate.[102] The public sector mandate remained in effect until February 2023.[103]

Various lawsuits, largely from public employees, challenged the different iterations of NYC's COVID-19 vaccine mandate in both state and federal court. While the United States Supreme Court declined to hear a challenge to the public sector mandate,[104] the New York State Supreme Court for Richmond County found the public and private sector mandates arbitrary and capricious due to the Kyrie Carveout.[105] Judge Ralph Porzio held in *Garvey v. City of New York* that "there is no rational reason for vaccination mandates to distinguish City workers, athletes, performers, and other private sector employees . . . . Either there is a mandate for all, or a mandate for none."[106] Crucially, Judge Porzio focused on the implementation of the mandates, not their scope, writing that "[i]t is clear that the Health Commissioner has the authority to issue public health mandates,"[107] however, "the Board of Health does not have the authority to unilaterally and indefinitely change the terms of employment for any agency."[108] This sentiment, that the conditioning of continued employment on vaccination creates a new term of employment, was echoed in a holding from the New York Supreme Court of New York County; a judge held that, while "it is undisputed that the DOH has the authority to issue vaccine

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102 As of February 2022, another 9,000 workers were awaiting decisions on exemption requests. Emma G. Fitzsimmons, *N.Y.C. Fires 1,430 Workers, Less Than 1 Percent of City Employees, Over a Vaccine Mandate*, N.Y. Times (Feb. 14, 2022), https://www.nytimes.com/2022/02/14/nyregion/nyc-vaccine-mandate.html [https://perma.cc/FVN7-LLHW]. By September 2022, the number of terminated city workers rose to around 1,700. Sahalie Donaldson, *What's the Latest on New York City's COVID-19 Vaccine Mandate for City Workers?*, City & St. (Sept. 28, 2022), https://www.cityandstateny.com/policy/2022/09/whats-latest-new-york-citys-covid-19-vaccine-mandate-city-workers/377671/ [https://perma.cc/CBN9-Z8J2].

103 Fitzsimmons & Otterman, *supra* note 20 (noting the change affected current and future employees; the lifting of the mandate did not restore jobs for those who had been terminated under the mandate, though they could reapply for employment).

104 This particular challenge to the public employer mandate predated Executive Orders 50 and 62. Andrew Chung, *U.S. Supreme Court's Sotomayor Keeps New York City's COVID Vaccine Mandate*, Reuters (Aug. 29, 2022, 6:56 PM), https://www.reuters.com/world/us/us-supreme-courts-sotomayor-keeps-new-york-city-covid-vaccine-mandate-2022-08-29/ [https://perma.cc/P5YK-AULF].

105 Garvey v. City of New York, 77 Misc. 3d 585 (N.Y. Sup. Ct. 2022).

106 *Id.* at 599.

107 *Id.*

108 Unlike with the state vaccine mandate for healthcare workers, Judge Porzio noted that there have never been any citywide vaccine requirements for public sector employees. *Id.* at 595.

mandates," NYC had an obligation to engage in bargaining with the unions over implementation.[109]

C. *Public Sector Union Bargaining*

i. Codification of Public Sector Collective Bargaining Rights

Public sector unions, as the name suggests, represent public sector workers employed by government entities, rather than workers engaged by private employers. As will be explored below, public employment differs from private employment, both generally and regarding collective bargaining rights, in some fundamental ways. Further, the American federal system of government means that public sector unions can be broken down according to the respective level of government—federal, state, and local—each with their own parameters and permissions when it comes to collective bargaining.[110] As the vaccine mandates impacting federal employees never went into effect,[111] this Note will not discuss federal collective bargaining practices.

Public sector bargaining rights for state and local workers are determined by state and local statute rather than the National Labor Relations Act, which governs private sector bargaining. As a result, public sector employee bargaining rights exist "on a continuum,"[112] varying both between and within states. At least thirty-one states allow public sector collective bargaining to some extent, but some states have banned the practice outright.[113] While some states and localities grant collective bargaining rights to certain categories of employees, most states instead legislate what terms of employment can or cannot be bargained for.[114] For example, some states allow bargaining over wages and hours but not retirement benefits.[115]

Public sector union statutes go beyond prescribing who can bargain and what they can bargain over. These laws also touch on various other factors affecting the scope of public sector

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109 Police Benevolent Ass'n. v. City of N.Y., 2022 N.Y. Misc. LEXIS 5420 (Sept. 23, 2022) ("The issues before this Court are narrow and are whether the DOH can impose adverse employments actions to enforce those mandates and even taking it a step further, whether it is lawful for the DOH to implement conditions of employment to members of the PBA.").

110 Jon O. Shimabukuro, Cong. Rsch. Serv., R41732, Collective Bargaining and Employees in the Public Sector (2011).

111 *See supra* Section II.B.i.

112 Shimabukuro, *supra* note 110, at 3.

113 *Id.*

114 *Id.*

115 *Id.*

union bargaining power such as whether terms are permissive or mandatory, what dispute resolution procedures will be used to resolve grievances, and what rights, if any, workers have to strike.[116] As mentioned previously,[117] changes to conditions of employment imposed by statute are generally not subject to negotiation except sometimes where the employer has discretion in determining how the statutory change will be implemented.[118] For public sector unions, this also depends on whether they have a statutory right to collectively bargain over the condition of employment in question.[119]

As in the private sector, public sector unions must often rely on various forms of bargaining, negotiation, and dispute resolution to resolve grievances or address issues that arise outside of contract negotiations. For example, Memoranda of Understanding ("MOUs") or Memoranda of Agreement ("MOAs") are collectively bargained-for agreements that can serve to resolve disputes or address needs that arise under an existing collective bargaining agreement ("CBA").[120] In some limited emergency circumstances, employers may take unilateral action that is otherwise not expressly permitted under a CBA.[121] Even before the prospect of mandated vaccination, the COVID-19 pandemic prompted many questions, in both the public and private sectors, over whether employers could unilaterally impose health and safety measures on unionized workers or whether such measures were subject to collective bargaining.[122] For the public sector, these questions centered on the intersection of the government's public health powers and the obligation to bargain with public employee unions.

ii. NYS and NYC Public Sector Union Rights

New York State public sector unions' bargaining rights are governed by the Taylor Law.[123] The Taylor Law includes basic rights and permissions for public sector unionization at the state and local levels,[124] including granting public employees the right to organize

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116 Monique Morrissey, *Unions Can Reduce the Public-Sector Pay Gap*, EPI (July 9, 2021), https://www.epi.org/publication/unions-public-sector-pay-gap/ [https://perma.cc/86PD-CZQU].

117 *See supra* Section I.

118 Desrosiers, *supra* note 13.

119 Shimabukuro, *supra* note 110.

120 Ronan, *supra* note 19, at 870.

121 Brian R. Garrison, *COVID-19 Issues for Unionized Employers*, Faegre Drinker (Apr. 1, 2020), https://www.faegredrinker.com/en/insights/publications/2020/4/covid-19-issues-for-unionized-employers [https://perma.cc/QN8B-E6JQ].

122 *Id.*

123 Taylor Law (Public Employees' Fair Employment Act), N.Y. Civ. Serv. Law § 200-215 (McKinney 1969).

124 N.Y. Civ. Serv. Law § 201(6) (McKinney 1969).

and choose their union; requiring governments and "other political subdivisions"[125] to negotiate and enter into CBAs with employee unions; establishing procedures where bargaining does not result in agreement; and creating the Public Employment Relations Board ("PERB"), a neutral, state-level administrative agency that enforces the Taylor Law.[126] The Taylor Law defines the terms and conditions of employment as "salaries, wages, hours and other terms and conditions" and excludes all retirement benefits and payments from public retirement systems.[127] The Taylor Law also defines which public employees are excepted from bargaining rights[128] and prohibits public employees from conducting strikes or other work stoppages.[129]

iii. Concerns and Controversy Over Public Sector Bargaining Rights

With the government as an employer, terms of employment are also policy decisions.[130] For example, public sector unions bargaining for higher wages impacts budget levels and resource allocation, typically policy decisions made by the elected legislature.[131] As a result, many questions regarding political participation, where the terms and conditions of public sector employment intersect with public policy, have persisted since the first attempts to gain recognition for public sector unions.[132] Specifically, what terms and conditions are to be negotiated privately by union representatives and what issues are of such public interest that they must be openly

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125 *Id.*

126 *See id.*; The PERB serves a similar function for New York's public sector unions similarly that the NLRB serves for private sector unions. *See* N.Y. Civ. Serv. Law § 205 (McKinney 1969); *see also* N.Y. Dept. Lab., Off. Emp. Rel., *New York State Public Employees' Fair Employment Act – the Taylor Law*, N.Y. St., https://oer.ny.gov/new-york-state-public-employees-fair-employment-act-taylor-law [https://perma.cc/CBT7-VGVV] (last visited Oct. 15, 2023).

127 N.Y. Civ. Serv. Law § 201(4) (McKinney 1969).

128 N.Y. Civ. Serv. Law § 201(7) (McKinney 1969) (excepting "judges and justices of the unified court system," managerial and confidential employees and political appointees from collective bargaining rights).

129 N.Y. Civ. Serv. Law § 210 (1) (McKinney 1969).

130 *See* Clyde Summers, *Public Sector Bargaining: A Different Animal*, 5 U. Pa. J. Bus. L. 441, 441 (2003); *see also* Jeffrey H. Keefe, *Laws Enabling Public-Sector Collective Bargaining Have Not Led to Excessive Public-Sector Pay*, Econ. Pol'y Inst. (Oct. 16, 2015), https://www.epi.org/publication/laws-enabling-public-sector-collective-bargaining-have-not-led-to-excessive-public-sector-pay/ [https://perma.cc/7B6L-VZZ4].

131 Summers, *supra* note 130, at 446.

132 The history of public sector unions, while fascinating, is outside the scope of this note. *See* Joshua B. Freeman & Steve Fraser, *IN THE REARVIEW MIRROR: A Brief History of Opposition to Public Sector Unionism*, CUNY Sch. Lab. & Urb. Stud.: New Lab. F. (Oct. 2011), https://newlaborforum.cuny.edu/2011/10/12/in-the-rearview-mirror-a-brief-history-of-opposition-to-public-sector-unionism/ [https://perma.cc/X48E-T7VN].

debated according to fundamental democratic principles?[133] The collective rights of workers to fair negotiation are, in some ways, seen as opposed to the individual rights of citizens to political participation.[134] But workers themselves are also members of the public with a right to civic participation in addition to their collective rights as a unit.[135] This means that, on one hand, union negotiations conducted through elected union representatives can be interpreted as preventing workers from participating in the political process as individual citizens.[136] On the other hand, however, this can also render civic participation by public unions and their members as a form of collective action to impact working conditions, as expressed by Victor Gotbaum, former head of the American Federation of State, County, and Municipal Employees, District Council 37 who stated that "[w]e have the power, in a sense, to elect our own boss."[137]

Government employers do not solely represent their interests as employers in negotiations with public sector unions. President Franklin D. Roosevelt wrote, on the question of public sector unionization, that "[t]he employer is the whole people, who speak by means of laws enacted by their representatives."[138] Essentially, government employers are entrusted to represent the will of the public. Early concerns with public sector unions focused on whether, in negotiating with the representatives of the citizenry, public sector unions would serve as an "organized minority"[139] negotiating against the majority will of the public.[140] To some, this could be seen as a challenge to state sovereignty itself.[141] Limitations on public sector bargaining, including restrictions on strikes, are thus at least partly in response to concerns of "politically advantaged"[142] public employee unions having outsized influence on both politics and government.[143]

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133 Summers, *supra* note 130, at 448–50.

134 Keefe, *supra* note 130 ("The greatest concern about extending the private-sector model was whether public-sector collective bargaining would result in distortions of democracy . . .").

135 *See* Summers, *supra* note 130, at 447–48.

136 *Id.* at 448 (using decisions regarding student discipline as an example: ". . . when disciplinary rules are bargained for, the teachers may have different and conflicting views, yet the union as exclusive bargaining representative purports to speak with a single voice for all teachers. With [collective bargaining] behind closed doors, the teachers who disagree will have no opportunity to be heard.").

137 Emmet Teran, *Private vs. Public Unions*, UNIT (Feb. 5, 2021), https://guide.unitworkers.com/private-vs-public-unions/ [https://perma.cc/33N3-AUQT].

138 Freeman & Fraser, *supra* note 132.

139 Keefe, *supra* note 130.

140 Freeman & Fraser, *supra* note 132.

141 *Id.*

142 Keefe, *supra* note 130.

143 *Id.*; *see also* Summers, *supra* note 130.

Many states and localities either do not permit any public sector unions the right to strike or strictly limit the practice.[144] Such limitations are most common for public safety professions such as police and corrections officers.[145] Strike bans also relate to concerns over the political ramifications of public sector bargaining, in particular public sector unionization as a political act because "[u]nlike a strike in the private sector, a strike in the public sector is not an economic instrument operating through the market . . .[i]t is primarily a political instrument working through the political process."[146] A labor strike is a sort of ultimatum, and a government employer deciding whether to comply with an ultimatum is unable to make a democratic choice, especially when that choice carries any of the aforementioned policy ramifications such as budget and resource allocation.

III. Discussion

A. *NYC Public Sector Union Implementation of the COVID-19 Vaccine Mandate*

By their nature, government-imposed vaccine mandates tied to workplace and employment are necessarily going to be implemented by employers,[147] which for unionized workers, both public and private-sector, implicates impact bargaining.[148] New and evolving circumstances such as the COVID-19 pandemic are poor subjects for CBAs, which are intended for long term implementation and often do not change substantially when renegotiated.[149] As is typical

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144 Summers, *supra* note 130, at 450; *see also* Kirsten Bass, *Overview: How Different States Respond to Public Sector Labor Unrest*, OnLabor (Mar. 11, 2014), https://onlabor.org/overview-how-different-states-respond-to-public-sector-labor-unrest/ [https://perma.cc/7LKK-XLZ3] (detailing policies for those states that do permit public sector labor strikes in some form).

145 Summers, *supra* note 130, at 450; Bass, *supra* note 144.

146 Summers, *supra* note 130, at 452.

147 *See, e.g.,* City of N.Y., Comm'r Health & Human Hygiene, *supra* note 86 (public sector mandate); *see* City of N.Y., Comm'r Health & Human Hygiene, *supra* note 87 (private employer mandate issuing the vaccine requirement for workers with a deadline for compliance but not specifying anything about the logistics of how employers would collect employer vaccine status or what the disciplinary process for workers found non-compliant would be, requiring the employers individually to determine these aspects of implementation).

148 *See*, Anderson & Gaytán, *supra* note 9 (discussing impact bargaining in private sector labor law); *see also* West Irondequoit Teachers Ass'n v. Helsby, 35 N.Y.2d 46 (N.Y. 1974) (upholding public sector impact bargaining in NY: "PERB has held only that determination of class size is not negotiable. It has not been held that the *impact* of class size on the teachers is not negotiable . . . 'Nevertheless, impact is a matter for negotiations.'") (emphasis added).

149 Ronan, *supra* note 19, at 879 ("Significant research shows that CBAs are resistant to change without a large precipitating event causing a reason to reconfigure the terms of the contract. CBAs are rarely substantively modified, and the contract language remains constant.").

in such situations, NYC's public sector unions turned to bargaining tools such as MOAs instead.[150]

When such negotiations reach an impasse, public employers and unions turn to dispute tools such as mediation, fact-finding, or interest arbitration, with specific dispute resolution tools and timelines defined by statute.[151] When bargaining with the city over the vaccination-only mandate for DOE employees reached an impasse,[152] the United Federation of Teachers ("UFT") and the city entered into arbitration.[153] *Board of Ed. of the City School District of the City of N.Y. and United Fed. Of Teachers* ("UFT Arbitration") served as a framework for many subsequent agreements between NYC and other public unions,[154] as is typical where an employer must deal with multiple bargaining units.[155]

In addition to use as an impasse procedure in bargaining, the appeals process for individual workers' accommodation requests utilized a different arbitration process.[156] The arbitration processes for individual workers differed minimally between the MOAs reached with various bargaining units.[157] Standards for accommodation requests largely derived from the UFT Arbitration[158] and

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150 *Id.*; *e.g.*, Summary of Agreement between District Council 37, AFSCME and The City of New York (Nov. 4, 2021), https://www.dc37.net/wp-content/uploads/news/headlines/pdfs/Summary_of_Agreement_DC37_NYC_11_04_2021_COVID_vaccine.pdf [https://perma.cc/38HK-PG33] [hereinafter DC 37 Agreement]; Memorandum of Agreement Local 300, Service Employees International Union (SEIU), City of New York, and the Board of Education of the City School District for the City of New York (Oct. 4, 2021), https://www.seiulocal300.org/assets/files/L300-DOEVaccinemandateMOA10-4-21executed10-4-21.pdf [https://perma.cc/VPH6-UCRK] [hereinafter SEIU Local 300 MOA]; Memorandum of Agreement Between Local 237, International Brotherhood of Teamsters and the City of New York (Nov. 3, 2021), https://www.local237.org/docman/latest-from-local-237/1103-ibt-237-citywide-vaccine-mandate-moa/file [https://perma.cc/X6GX-PC5L] [hereinafter Teamsters Local 237 MOA].

151 *See, e.g.*, N.Y. Civ. Serv. Law § 209 (McKinney) (specifying dispute resolution procedures to be used at impasse).

152 According to the UFT at least, bargaining reached an impasse due to the City's refusal to budge on offering any medical or religious accommodations. *See Arbitrator Rules City Must Offer Non-Classroom Work to Teachers with Covid Vaccination Medical/Religious Exemptions*, UFT (Sept. 10, 2021), https://www.uft.org/news/press-releases/arbitrator-rules-city-must-offer-non-classroom-work-teachers-covid-vaccination-medicalreligious [https://perma.cc/AD8U-38AT].

153 *Id.*; United Fed'n of Tchrs., Loc. 2 v. City of New York (Sept. 10, 2021) (Scheinman, Arb.).

154 *See* DC 37 Agreement, *supra* note 150; *SEIU Local 300 MOA*, *supra* note 150; *Teamsters Local 237 MOA*, *supra* note 150; *see also* Sharon Otterman, *N.Y.C. Reaches an Agreement with Nine Labor Unions on COVID Vaccine Mandates*, N.Y. Times (Nov. 8, 2021), https://www.nytimes.com/2021/11/04/nyregion/nyc-vaccine-mandate-union.html [https://perma.cc/SAU3-CU2M]. The concessions outlined in the UFT Arbitration will be described below. *See infra* Section III.C.i.

155 *See* Summers, *supra* note 130, at 444.

156 *See* Otterman, *supra* note 154; DC 37 Agreement, *supra* note 150; SEIU Local 300 MOA, *supra* note 150; Teamsters Local 237 MOA, *supra* note 150.

157 *See* DC 37 Agreement, *supra* note 150; SEIU Local 300 MOA, *supra* note 150; Teamsters Local 237 MOA, *supra* note 150.

158 *United Fed'n of Tchrs*. (Scheinman, Arb.).

followed established anti-discrimination standards.[159] For medical accommodations, workers could request permanent or temporary exemptions.[160] Both required documentation from a doctor showing that the individual could not receive any COVID-19 vaccine, either due to a condition or prior allergic reaction to any vaccine, or to certain medical conditions allowing for a temporary accommodation.[161] For religious accommodation, workers had to provide a letter from a clergy member.[162] A religious accommodation could still be denied, however, where the head of the religion in question had spoken in favor of vaccination.[163]

Workers who applied for but were denied an exemption could usually choose to appeal one of two ways:[164] submission to a city panel[165] or an appeal through an independent arbitrator from Scheinman Arbitration & Mediation Services ("SAMS"),[166] a frequent neutral for NYC public sector union disputes.[167] The city panel option did not afford the opportunities for live hearings and decisions were based on submitted materials alone.[168] The SAMS process as described in these same MOAs allowed for expedited virtual hearings only at the arbitrator's discretion.[169]

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159 *See, e.g.*, *What You Should Know about COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, EEOC (July 12, 2022), https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#K [https://perma.cc/R6PH-VX8V] (discussing ADA and medical accommodations in Section K, and religious accommodation under Title VII in Section L).

160 *Applying for a Reasonable Accommodation from the COVID-19 Vaccine Mandate*, Dep't. of Citywide Admin. Servs. (Oct. 28, 2021), https://www.nyc.gov/assets/dcas/downloads/pdf/guidelines/vaccine-reasonable-accommodation-process.pdf [https://perma.cc/54PH-4J95] [hereinafter *Applying for a Reasonable Accommodation*].

161 *See United Fed'n of Tchrs.* (Scheinman, Arb.) (specifying conditions such as myocarditis as eligible for temporary medical accommodation).

162 *Id.*

163 This question arose in several cases with NYC employees claiming exemption based on their Catholic faith, while Pope Francis had spoken publicly in favor of the COVID-19 vaccines. *E.g.*, State. N.Y. Unemployment Ins. Appeal Bd., Appeal Board No. 625404 (N.Y. 2022) (referencing the Pope's statements in favor of vaccination in upholding the denial of unemployment benefits for a teacher fired under the DOE mandate citing his Catholic faith as the basis for religious objection to vaccination).

164 Not all workers had access to both processes. *See Applying for a Reasonable Accommodation*, *supra* note 160.

165 *Id.*

166 *United Fed'n of Tchrs*. (Scheinman, Arb.).

167 *Resume of Neutral: Martin Scheinman*; N.Y.C. Off. Collective Bargaining, https://www.ocb-nyc.org/view-resume.php?uid=555ca62fb30a5 [https://perma.cc/V6YC-39BJ] (last visited Feb. 6, 2023).

168 DC 37 Agreement, *supra* note 150; SEIU Local 300 MOA, *supra* note 150; Teamsters Local 237 MOA, *supra* note 150.

169 DC 37 Agreement, *supra* note 150; SEIU Local 300 MOA, *supra* note 150; Teamsters Local 237 MOA, *supra* note 150.

Even after going through arbitration and negotiating MOAs with the city government, NYC's public sector unions remained unhappy with the termination of city workers who failed to comply with the mandate.[170] NYC issued termination notices to unvaccinated and unexempted workers in January 2022.[171] In response, a collective organization of NYC public sector bargaining units called the Municipal Labor Committee[172] brought suit for violations of procedural due process, claiming that the government failed to follow disciplinary procedures from CBAs and city and state law.[173] The New York State Supreme Court for New York County held that the cited statutes and relevant CBAs did not apply to the COVID-19 vaccine mandate, as the created condition of employment did not implicate job performance and the specific cited statutes delineate disciplinary procedures relating to issues with job performance, competency, and misconduct.[174] Despite some successful as-applied challenges to NYC's vaccine mandate in lower courts,[175] these accommodation procedures remained in place until the mandate ended in 2023.[176]

B. *Public Sector Union Stances on Vaccine Mandates*

Many public sector unions raised concerns with COVID-19 vaccine mandates while supporting vaccines for their members. This was not limited to NYC unions, with national public sector labor organizations similarly encouraging voluntary vaccination among members while withholding official support for mandates.[177] This was often not out of opposition to vaccination itself, but based on a desire to preserve the ability to negotiate concessions for members

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170 *See* N.Y.C. Mun. Lab. Comm. v. City of New York, 75 Misc.3d 411 (N.Y. Sup. Ct. 2022).

171 The court's opinion states that approximately 4,000 workers received termination notices, but more than 1,300 were ultimately terminated. *Id.* at 413. It is unclear whether or how many of those 4,000 workers either received their requested exemption or voluntarily separated from employment rather than be terminated. *Id.*

172 N.Y.C. Admin. Code § 12-313.

173 N.Y.C. Mun. Lab. Comm., 75 Misc.3d at 415.

174 *Id.* at 415–16.

175 As referenced prior, appeals in these cases were not heard before the end of the mandate. *See infra* Section II.B.ii.2.

176 N.Y. Dept. Health, *supra* note 77.

177 Nathaniel Weixel & Alex Gangitano, *Vaccine Mandates Test Biden Ties with Labor*, Hill (Sept. 11, 2021, 5:00 PM), https://thehill.com/homenews/administration/571773-vaccine-mandates-test-biden-ties-with-labor/ [https://perma.cc/T892-XRHA].

and ensure adequate representation for workers.[178] For example, in the UFT Arbitration, the arbitrator wrote that "[t]he UFT made clear it supports vaccination efforts and has encouraged its members to be vaccinated. Nonetheless, as a Union, it owes a duty to its members to ensure their rights are protected."[179]

Not all public sector unions, however, shared these views on mandates and vaccines, with some unions not even supporting vaccination as an individual choice. For example, some police unions across the country actively encouraged members to not get vaccinated.[180] The majority of NYC bargaining units and their members, meanwhile, complied with the mandate: by February 2022, only three city agencies had vaccination rates below 90%.[181] One of those three agencies was the New York Police Department ("NYPD").[182] Yet despite the prevalence of anti-vaccine messaging aimed at law enforcement, at least 89% of the NYPD had been vaccinated at that time.[183] By the time Mayor Adams lifted the mandate in February 2023, more than 95% of all NYC employees received at least one dose of the vaccine.[184]

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178 Jeffrey Hirsch, *Why So Many Unions Oppose Vaccine Mandates – Even When They Actually Support Them*, Conversation (Nov. 9, 2021, 8:41 AM), https://theconversation.com/why-so-many-unions-oppose-vaccine-mandates-even-when-they-actually-support-them-170067 [https://perma.cc/ZWM5-BEPU].

179 *United Fed'n of Tchrs.* (Scheinman, Arb.).

180 Sharon Otterman & Joseph Goldstein, *New York City's Biggest Police Union Sues Over the City's Vaccine Mandate*, N.Y. Times (Nov. 4, 2021), https://www.nytimes.com/2021/10/25/nyregion/nypd-police-covid-vaccine-mandate-deblasio.html [https://perma.cc/686L-U8K5] ("Police unions across the country, from Chicago to Washington State, are urging members to resist COVID vaccine requirements — despite COVID being by far the most common cause of officer duty-related deaths this year and last, according to the Officer Down Memorial Page.").

181 David Lazar, *95% of City Workers Have at Least One Dose Ahead of Vax Deadline, Mayor's Office Says*, N.Y. 1 (Feb. 9, 2022, 6:03 PM), https://www.ny1.com/nyc/all-boroughs/coronavirus/2022/02/09/city-municipal-worker-vaccination-rates-feb--9 [https://perma.cc/93PK-JVH5].

182 *Id.*

183 *Id.* NYC's police unions and leaders, while leading multiple court challenges to the vaccine mandates, were not publicly opposed to vaccination and argued for police officers to have access as soon as possible. Instead, NYC's police unions and leadership primarily advocated vaccination as a personal choice or argued the vaccine mandate exceeded the city government's authority. Patrick J. Lynch, *PBA On Covid-19 Vaccinations*, NYCPBA (July 22, 2021), https://www.nycpba.org/press-releases/2021/pba-on-covid-19-vaccinations/ [https://perma.cc/AS66-TFWP] (advocating vaccination as personal choice); Janelle Griffith, *'Hell No': Some Police Officers and Their Unions Oppose Vaccination Mandates*, NBC NEWS (Aug. 27, 2021, 4:30 AM), https://www.nbcnews.com/news/us-news/hell-no-some-police-officers-their-unions-oppose-vaccination-mandates-n1277608 [https://perma.cc/JUT7-AADY] (quoting then-NYPD Commissioner Dermot Shea as supporting vaccine mandates "100 percent" but believing the mandate should have come from the state or federal government).

184 Fitzsimmons & Otterman, *supra* note 20.

C. *Outcomes and Effects from COVID-19 Vaccine Mandate Implementation*

NYC's public sector unions undoubtedly won some valuable concessions from the city, whose hardline vaccine-only stance was one of the most aggressive vaccination measures in the country[185] But in many ways, the mandates as implemented were still insufficient to properly protect workers against COVID-19 nor to adequately address those who had legitimate need of accommodation.[186] Additionally, by focusing solely on vaccination, the city missed a vital opportunity to institute a more comprehensive public health strategy to better address COVID-19, such as supporting vaccination efforts with masking, regular testing, and improved ventilation.[187] By relying on the oppositional approach to bargaining, as often seen in labor relations, and taking a hard, vaccine-only stance, the city missed an opportunity to build trust and buy-in from both union leadership and the rank-and-file during a time when conspiracy theories and lack of trust in institutions were rampant.[188]

i. Positive Outcomes from Vaccine Mandate Implementation

First and foremost, the high rate of vaccination among NYC employees was an undoubtedly positive result of the COVID-19 vaccine mandate. The COVID-19 vaccine is estimated to have prevented 8,508 deaths, 48,076 hospitalizations, and 290,467 cases in NYC between December 2020 and July 2021 alone.[189] The vast majority of the city workforce ultimately complied with the mandate;[190] surely many workers who otherwise would not have been vaccinated did so because their continued employment depended on it. Through bargaining and arbitration, the unions also won significant concessions from the city government despite the city's commitment to a vaccination-only mandate.[191] Some of the concessions included: providing non-public facing roles for work-granted medical accommodation, rather than these workers "being removed from payroll,"[192] and expanding the options for those out

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185 *Id.*

186 *See infra* Section III.C.iii.

187 *See infra* Section III.C.ii.

188 *See infra* Section III.C.iv.

189 Affan Shoukat, et al., *Lives Saved and Hospitalizations Averted by COVID-19 Vaccination in New York City: A Modeling Study*, 5 Lancet Reg'l. Health – Americas 100085 (2021), https://www.sciencedirect.com/science/article/pii/S2667193X21000818 [https://perma.cc/9RFQ-G8YP].

190 *See* Fitzsimmons & Otterman, *supra* note 20.

191 Ronan, *supra* note 19, at 900–02.

192 UFT, *supra* note 152.

of compliance by the mandated deadline, including offering unpaid leave while maintaining health insurance coverage or the ability to separate from employment with severance pay and no disciplinary record.[193]

ii. Inadequate Long Term Public Health Measures and Workers' Rights Protections

Vaccines, while extremely effective and crucial in stopping the spread of deadly viruses like COVID-19,[194] are even more effective when used in conjunction with other public health measures.[195] By focusing solely on vaccination, the city failed to take advantage of additional public health benefits associated with regular testing,[196] masking,[197] improved ventilation,[198] and continued allowances for remote work for relevant staff.[199] Failure to embrace and promote these additional public health precautions likely contributed in some degree to continued spread of the virus, for example by not providing additional protections against "breakthrough" cases of

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193 *Id.*; *see also United Fed'n of Tchrs.* (Scheinman, Arb.) As is often the case, later MOAs between N.Y.C. and its unions were modeled on the UFT Arbitration, which first outlined these concessions to workers; *see also e.g.*, DC 37 Agreement, *supra* note 150.

194 Tom Randall et al., *More Than 12.7 Billion Shots Given: COVID-19 Tracker*, Bloomberg (Oct. 6, 2022, 1:16 PM), https://www.bloomberg.com/graphics/covid-vaccine-tracker-global-distribution/ [https://perma.cc/DU9X-JPLF].

195 Liz Szabo, *Better Ventilation Can Prevent Covid Spread. But Are Companies Paying Attention?*, Kaiser Health News (Apr. 19, 2022), https://kffhealthnews.org/news/article/ventilation-covid-prevention-indoor-air-quality-businesses-invest/ [https://perma.cc/2JSS-7JYS] ("Scientists stress that ventilation should be viewed as one strategy in a three-pronged assault on covid, along with vaccination . . . and high-quality, well-fitted masks.").

196 *See* Tim R. Mercer & Marc Salit, *Testing at Scale During the COVID-19 Pandemic*, 22 Nature Revs. Genetics 415, 415 (2021), https://www.nature.com/articles/s41576-021-00360-w# [https://perma.cc/8PZG-55BS] (discussing that some studies have shown largescale testing can lower infection rates).

197 *See* Sam Moore, PhD et al., *Vaccination and Non-Pharmaceutical Interventions for COVID-19: A Mathematical Modelling Study*, 21 Lancet 793 (2021), https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(21)00143-2/fulltext [https://perma.ccF68X-KDCL]; *see also* Mehul D. Patel, PhD et al., *Association of Simulated COVID-19 Vaccination and Nonpharmaceutical Interventions with Infections, Hospitalizations, and Mortality*, JAMA Network (June 1, 2021), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2780539 [https://perma.cc/DM9S-CWQ5].

198 Gail M. Thornton et al., *The Impact of Heating, Ventilation, and Air Conditioning Design Features on the Transmission of Viruses, Including the 2019 Novel Coronavirus: A Systemic Review of Ventilation and Coronavirus*, PLOS Glob. Pub. Health (July 5, 2022), https://journals.plos.org/globalpublichealth/article?id=10.1371/journal.pgph.0000552 [https://perma.cc/RHD6-ZV8F]; *see also* Szabo, *supra* note 195.

199 Jean-Victor Alipour, Harald Fadinger, & Jan Schymik, *My Home Is My Castle—The Benefits of Working from Home During a Pandemic Crisis*, 196 J. Pub. Econ. 329 (2021), https://www.sciencedirect.com/science/article/pii/S0047272721000098 [https://perma.cc/E53S-CHMQ].

COVID-19.[200] NYC employs more than 325,000 individuals,[201] and it is reasonable to think the benefits to workers from additional, non-vaccine precautions would ripple outward from workers to their households, families, and communities. By adopting a more holistic public health approach, the city also could have inspired private employers to enact similar changes.[202]

The vaccine-only mandate also imposed inherently higher barriers for those seeking medical or religious accommodation than a vaccine-or-test mandate would.[203] With a testing option, employees additionally benefit from not having to share potentially sensitive and personal information about their health or religious beliefs with their employer. While a small minority of workers requested accommodation and an even smaller percentage had legitimate claims for exemptions,[204] this renders these issues no less important under American law. And, as detailed below, with opaque standards both for initial accommodation requests and appeals, protections of the rights of workers.

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200 "Breakthrough cases" are instances of COVID-19 infection in vaccinated individuals. As of February 2023, more than 18.5% of fully vaccinated New Yorkers, accounting for 2,725,213 people statewide, had laboratory-confirmed breakthrough cases of COVID-19. Additional unconfirmed breakthrough infections likely occurred through this period. Hospitalization rates, however, remained extremely low for breakthrough cases, amounting to less than 1% by February 2023. *COVID-19 Breakthrough Data*, N.Y. Dept. Health, https://coronavirus.health.ny.gov/covid-19-breakthrough-data [https://perma.cc/4V7G-MRJC] (last visited Nov. 20, 2022).

201 Ana Champany & Patrick Ronk, *NYC Employee Headcount*, Citizens Budget Comm'n (Oct. 18, 2021), https://cbcny.org/research/nyc-employee-headcount [https://perma.cc/55FV-K63H].

202 *See, e.g.*, Fitzsimmons & Otterman, *supra* note 20 (quoting a health adviser under the de Blasio administration on the effect public sector vaccine mandates have on the private sector: "Dr. Jay Varma . . . was particularly concerned, he said, that the city dropping its mandate would lead private employers to follow suit, just as the city's institution of the mandate encouraged private employers to do the same. 'It's a cascading effect.'").

203 The NYC Commission on Human Rights issued guidance on the "Equitable Implementation of COVID-19 Requirements" that suggested regular COVID testing as a possible reasonable accommodation for employees requesting disability or religious-based reasonable accommodations to vaccine mandates. *Guidance for Employers on Equitable Implementation of COVID-19 Vaccine Requirements*, N.Y.C. Comm'n Hum. Rts. (Dec. 15, 2021), https://www.nyc.gov/assets/cchr/downloads/pdf/publications/Vax-Employment-Guidance.pdf [https://perma.cc/KTX4-BVJK].

204 While unclear what these exact numbers may be, some sources have reported that approximately 13,000 city workers submitted exemption requests. Compared to a workforce of around 325,000, this would be less than 4% of the city workforce. This makes sense considering the more than 95% compliance with the mandate. *See* Reuven Blau, *With Vaccine Exemptions Under Review, Thousands of City Workers Could Still Lose Jobs*, The City (Feb. 21, 2022, 7:04 PM), https://www.thecity.nyc/2022/2/21/22944908/with-vaccine-exemptions-under-review-thousands-of-city-workers-could-still-lose-jobs [https://perma.cc/9NNR-CQA4]; *see also* Citizens Budget Comm'n, *supra* note 201; Fitzsimmons & Otterman, *supra* note 20.

iii. Opaque Accommodation Request and Appeal Procedures

While required by federal non-discrimination law to provide reasonable accommodation for workers with sincere religious belief or disability,[205] NYC's vaccine mandate implementation provided insufficient procedures for adequate handling of accommodation requests and appeals.[206] There is of course a need to identify and reject false claims or the suspicious adoption of sudden religious devotion at the exact time vaccine mandates were implemented,[207] and many individuals applied for accommodation who clearly did not meet the standards.[208] But the opaque procedures for accommodation request appeals in particular raised concerns that some individuals with sincere religious beliefs or legitimate need for medical exemption were similarly rejected with little to no explanation.

The UFT Arbitration and MOAs between NYC and unions established processes for requesting accommodation, including an appeal process for those denied accommodations. Many workers had a choice between the city's appeal panel and SAMS process.[209] Workers, however, often received little to no explanation for why an accommodation request was rejected or found insufficient, either as an initial determination or through either appeal process.[210] For example, in *Matter of Deletto*, a New York Supreme Court judge for New York County determined that the denial of an NYPD officer's religious exemption request due to his Catholic faith was unlawful.[211] The officer's religious accommodation request was denied for "not meet[ing] criteria," with no elaboration as to what those criteria are, rendering the denial of accommodation arbitrary and capricious.[212] The judge in *Garvey* similarly expressed concerns about the "generalized and vague denials" petitioners received in response to

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205 *See generally* EEOC Technical Assistance, *supra* note 159.

206 *See DC 37 Agreement*, *supra* note 150; *SEIU Local 300 MOA*, *supra* note 150; *Teamsters Local 237 MOA*, *supra* note 150.

207 Mark E. Wojcik, *Sincerely Held or Suddenly Held Religious Exemptions to Vaccination?*, 47 A.B.A. Hum. Rts. Mag. (2022), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/sincerely-held-or-suddenly-held/ [https://perma.cc/P8ZZ-36ZH] (detailing some of the difficulties employers have in determining genuine religious belief and the factors through which to evaluate such claims).

208 According to The City, N.Y.C. granted approximately 2,118 exemption requests from October 2021 to February 2022. Of 13,044 total exemptions requested, about 4,800 still awaited an initial determination of as February 2022, meaning at least half had been rejected. Blau, *supra* note 204.

209 *Supra* Section III.A.

210 *See* Matter of Deletto v. Adams, 2022 N.Y. Slip Op. 33129 (N.Y.S. 2022); *see also* Garvey v. City of New York, 77 Misc. 3d 585 (N.Y. Sup. Ct. 2022).

211 *Matter of Deletto*, Slip Op. at 13.

212 *Id.* at 5.

their requests for exemptions.[213] The vast majority of petitioners in the *Garvey* case either received no reason for the denial of their exemption appeals, or received the same determination as *Deletto*: "Does not meet criteria."[214]

iv. Dissipation of Trust in Leadership and Institutions

Many public sector unions and workers took issue with Mayor Adams's decision in March 2022 to create exemptions from the vaccine mandate for athletes and performers while city workers were losing their jobs due to non-compliance with the mandate.[215] This unilateral decision from the mayor's office was perceived as benefitting multimillionaire athletes and the even-wealthier owners of NYC's sports teams,[216] creating a perception of hostility towards the city's workforce. However, that was neither the first nor last decision the city government made during the pandemic that angered workers and unions. Compounding the distrust and dissatisfaction caused by the Kyrie Carveout, Mayor Adams later reinforced this seeming hostility to his own workforce by refusing to extend the availability of remote work opportunities;[217] eliminating nearly 5,000 vacant city jobs in order to reduce the size of the workforce;[218] and keeping pay as low as possible for new hires and transfers.[219] Many have cited these policies as causing an "exodus" of city workers.[220] Such policies raised questions about NYC's ability

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213 Garvey, 77 Misc.3d at 592; Matter of Deletto, Slip Op. at 13.

214 The denial notices for two petitioners, however, cite that those individuals were denied for "failure to engage in cooperative dialogue." Garvey, 77 Misc.3d. at 41 (Petitioners Affidavits and corresponding exhibits).

215 Honan, *supra* note 99.

216 *Id.* (highlighting that the owner of the Mets had donated $1.5 million to Adams' mayoral campaign and former City Council speaker Corey Johnson directly lobbied Mayor Adams on behalf of the Nets).

217 Joe Torres, *Mayor Adams Sends Stern Letter to NYC Employees: "You Are Required to Report to Work in Person"*, WABC (June 1, 2022), https://abc7ny.com/work-from-home-nyc-municipal-employees-return-to-office/11915890/ [https://perma.cc/AFK8-LA8B]. City Hall indicated a reversal of course in February 2023, however, during contract negotiations with city unions. Elizabeth Kim, *In a Shift, City Hall Will Consider Hybrid Work, Union Says*, Gothamist (Feb. 2, 2023), https://gothamist.com/news/in-a-shift-city-hall-will-consider-hybrid-work-union-says [https://perma.cc/KUU4-RYX2].

218 Annie McDonough, *New York City Will Cut Some of its 21,000 Vacant Government Positions*, City & St. (Nov. 22, 2022), https://www.cityandstateny.com/policy/2022/11/new-york-city-will-cut-some-its-21000-vacant-government-positions/380107/ [https://perma.cc/E3AG-K8GW].

219 Ross Barkan, *Working for the City When Everyone Else Is Leaving*, Curbed (Jan. 23, 2023), https://www.curbed.com/2023/01/vacancy-crisis-new-york-city-agencies-eric-adams.html [https://perma.cc/N56H-SB2E].

220 Dana Rubinstein & Emma G. Fitzsimmons, *Why City Workers in New York Are Quitting in Droves*, N.Y. Times (July 13, 2022), https://www.nytimes.com/2022/07/13/nyregion/labor-shortage-nyc-jobs.html [https://perma.cc/PK4R-4B65].

to deliver necessary services in the short term.[221] But they further risked fostering deeper distrust in government at a time when distrust in public institutions was already negatively impacting COVID-19 mitigation measures across the globe.[222] Such distrust will have implications not only for future pandemics, but also for good governance in the long term; "lack of trust in government can be a circular, self-reinforcing phenomenon: poor performance leads to deeper distrust, in turn leaving government in the hands of those with the least respect for it."[223]

IV. Proposal

This section will lay out the necessity of supplementing traditional labor bargaining practices with a more collaborative model of governance in times of crisis. First, it will discuss potential benefits to collaboration in times of crisis. Then, it will detail theoretical components and elements of collaborative governance. Lastly, this section will outline what a collaborative framework could look like and detail some of the expected challenges.

A. *The Case for Collaboration in Public Sector Labor Relations*

There is no question that the adversarial relationship between labor and employer is vital to many aspects of labor and the fight for workers' rights. However, the COVID-19 pandemic has shown that traditionally oppositional bargaining and related dispute resolution processes, such as negotiation and arbitration, are inadequate under such complex and ever-evolving circumstances to sufficiently meet the needs of public sector employers, unions, workers, and the

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221 Barkan, *supra* note 219 ("The city comptroller's office released a report . . . that found the overall vacancy rate at municipal agencies is 8 percent, quadruple the 2 percent rate before COVID. Certain pivotal agencies are struggling much more.").

222 Olga Khazan, *What's Really Behind Global Vaccine Hesitancy*, Atl. (Dec. 6, 2021), https://www.theatlantic.com/politics/archive/2021/12/which-countries-have-most-anti-vaxxers/620901/ [https://perma.cc/D9XA-AX39] ("Something as complex as vaccine hesitancy is bound to have many causes, but research suggests that one fundamental instinct drives it: A lack of trust . . .The crisis of vaccine hesitancy and the crisis of cratering trust in institutions are one and the same.").

223 Dr. Orkun Saka, *The Political Scar of Epidemics: Why COVID-19 is Eroding Young People's Trust in Their Leaders*, London Sch. Econ. (Sept. 7, 2021), https://www.lse.ac.uk/research/research-for-the-world/politics/the-political-scar-of-epidemics-why-covid-19-is-eroding-young-peoples-trust-in-their-leaders-and-political-institutions [https://perma.cc/6HFB-DRFC] (quoting Mark Schmitt).

public.[224] Rather, in such exceptional circumstances, supplementing the collective bargaining relationship with a collaborative, multi-party framework for governance would allow for increased reactivity, flexibility, and cooperation. Collaborative governance in such situations could produce policies that lead to better health outcomes, create clearer enforcement procedures, and increase trust in leadership between both employers and unions, and unions and their membership. This framework intends in no way to serve as a replacement for collective bargaining for those issues that impact workers' day-to-day conditions. Admittedly, however, this can be a difficult line to draw with challenges such as COVID-19 that, at its height, altered the most basic facets of daily life and work. Instead, this framework aims to address the ways events like the COVID-19 pandemic require thoughtful, wide-ranging adaptation and collective action to address the daily realities of working people, and in particular those working to deliver government services in a time of crisis.

Models for labor-management collaboration do already exist. Labor-management committees ("LMC"s), for example, are a form of cooperative body between management and labor[225] "intended to provide a non-adversarial forum for discussion of problems that might develop into disputes."[226] LMCs take on many forms: some focus on particular areas of concern, such as workplace safety[227] while others address more general matters. Some exist between one bargaining unit and their employer,[228] while others are a sort of regional body addressing community-wide issues.[229] In the private sector, LMCs have also served to increase collaboration between

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224 *See supra* Section III.C.

225 LMCs can raise issues under § 8(a)(2) (prohibition on employee-dominated labor organizations) and § 8(a)(5) (duty to bargain in good faith) of the NLRA and public sector bargaining statutes modeled thereon. A full detailing is beyond the scope of this Note, but caution must be taken primarily in assigning the role and authority of management, as well as the extent to which employee proposals made by the body can be approved or denied unilaterally by management. *E.I. DuPont de Nemours & Co.*, 311 NLRB No. 88 (1993).

226 *Labor-Management Committees,* PUB. EMP. REL. BD., https://perb.ny.gov/labor-management-committees/ [https://perma.cc/AV5X-7VBQ] (last visited Jan. 16, 2023).

227 George R. Gray, Donald W. Myers, & Phyllis S. Myers, *Joint Local Labor-Management Safety and Health Committee Provisions in Private Sector Collective Bargaining Agreements*, COMP. & WORKING CONDITIONS (2000), https://www.bls.gov/opub/mlr/cwc/joint-local-labor-management-safety-and-health-committee-provisions-in-private-sector-collective-bargaining-agreements.pdf [https://perma.cc/EU39-5RT3].

228 *See, e.g., NYS/UUP Joint Labor-Management Committees*, NYS OFF. EMP. REL., https://oer.ny.gov/nysuupjlmc [https://perma.cc/S6KG-EJGL] (last visited Nov. 5, 2023).

229 Richard D. Leone & Michael F. Eleey, *The Origins and Operations of Area Labor-Management Committees*, U.S. BUREAU LAB. STATS.: MONTHLY LAB. REV. (May 1, 1983), https://www.bls.gov/opub/mlr/1983/05/rpt3full.pdf [https://perma.cc/XAY8-SX3E].

labor and management in times of crisis such as during wartime.[230] The use of LMCs to increase collaborative, joint decision making in times of crisis in the private sector help underscore the need and potential for a collaborative framework or sort of modified LMC to serve a similar purpose in the public sector.[231]

i. Why Collaboration: Incentives and Modern Motivations

With rising concern over society's increasing vulnerability to zoonotic infectious diseases,[232] many experts predict COVID-19 will not be the last global pandemic in our lifetimes.[233] The twenty-first century has seen the emergence of three separate deadly coronavirus infections: COVID-19 being the third and most devastating, following the emergence of SARS and MERS in 2002 and 2012, respectively.[234] This same time period has seen zoonotic forms of influenza cause numerous global outbreaks.[235] Ebola,[236] West Nile Virus,[237] and Zika[238] are further examples of zoonotic diseases that have caused significant outbreaks in recent years. As a global economic and cultural center

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230 *Id.*

231 *Id.*

232 *Zoonotic Disease: Emerging Public Health Threats in the Region*, WHO https://www.emro.who.int/about-who/rc61/zoonotic-diseases.html#:~:text=The%20emerging%20zoonoses%20are%20a,other%20WHO%20region%20%5B2%5D. [https://perma.cc/R88N-X8SL] (last visited Jan. 16, 2023) ("It is estimated that, globally, about one billion cases of illness and millions of death[s] occur every year from zoonoses. Some 60% of emerging infectious diseases that are reported globally are zoonoses.").

233 *See, e.g.,* Karen Weintraub, *As COVID Turns 3, Experts Worry Where the Next Pandemic Will Come From – And If We'll Be Ready*, USA Today (Jan. 4, 2023, 12:28 PM), https://www.usatoday.com/story/news/health/2023/01/01/covid-anniversary-next-pandemic-expert-concern/10847848002/ [https://perma.cc/T8DF-6BNQ].

234 Manas Pustake et al., *SARS, MERS, and COVID-19: An Overview and Comparison of Clinical, Laboratory, and Radiological Features*, 11 J. Fam. Med. & Primary Care 10, 10 (2022).

235 *E.g., 2009 H1N1 Pandemic,* Ctrs. Disease Control, https://archive.cdc.gov/#/details?url=https://www.cdc.gov/flu/pandemic-resources/2009-h1n1-pandemic.html [https://perma.cc/D724-R5ZS] (last visited Feb. 12, 2023) (discussing swine flu); Kai Kupferschmidt, *'Incredibly Concerning': Bird Flu Outbreak at Spanish Mink Farm Triggers Pandemic Fears*, Sci. (Jan. 24, 2023, 5:00 PM), https://www.science.org/content/article/incredibly-concerning-bird-flu-outbreak-spanish-mink-farm-triggers-pandemic-fears [https://perma.cc/73S3-8JR6] (discussing fears in early 2023 over avian flu potentially jumping to humans).

236 *2014–2016 Ebola Outbreak in West Africa*, Ctrs. Disease Control (VHFs), https://www.cdc.gov/vhf/ebola/history/2014-2016-outbreak/index.html [https://perma.cc/P7GX-5DDC] (last visited Feb. 12, 2023).

237 *8 Zoonotic Diseases Shared Between Animals and People of Most Concern in the U.S.*, Ctrs. for Disease Control (May 6, 2019), https://www.cdc.gov/media/releases/2019/s0506-zoonotic-diseases-shared.html [https://perma.cc/YM7N-WB24].

238 *Zika Virus*, WHO (Dec. 8, 2022), https://www.who.int/news-room/fact-sheets/detail/zika-virus [https://perma.cc/S33B-A8WP].

and tourist destination, NYC has been directly impacted by many of these outbreaks.[239]

Other critical circumstances, such as following natural disasters[240] or global economic crises similar to the Great Recession in 2009[241] provide impetus to apply this framework. Such a framework for collaborative governance in crisis is necessitated by the nature of public sector work itself: crises increase the need for public services while putting further strain on already-limited government resources.[242] By fostering a collaborative relationship in times of societal crisis, management and labor—and the government and workers they represent—can work together to ameliorate, contain, and, where possible, minimize the difficult fallout and aftermath.

B. *Collaboration Theory*

It is important to place collaboration in the context of labor relations and, particularly, collective bargaining. As stated previously, collaboration is not a substitute for collective bargaining, but a supplement to it; an alternative when collective bargaining alone is insufficient.[243] Barry Rubin and Richard Rubin broadly outlined the context under which collaboration can better meet the needs of labor and management, explaining that collective bargaining best serves the basic, foundational needs of workers, such as wages, hours, and conditions, while collaboration can better address "higher-order" needs such a personal autonomy in the workplace, job satisfaction, and feelings of competence.[244] Furthermore, they argue "the success of collaborative management will be dependent

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239 *E.g.*, Justin Lessler et al., *Outbreak of 2009 Pandemic Influenza A (H1N1) at a New York City School*, 361 New Eng. J. Med. 2628 (2009) (detailing the discovery of one of the first U.S. outbreaks of swine flu during the 2009 pandemic at a high school in Queens).

240 *E.g., Impact of Hurricane Sandy*, N.Y.C. Comm. Block Grant, https://www.nyc.gov/site/cdbgdr/about/About%20Hurricane%20Sandy.page#, [https://perma.cc/Q9JD-SYXU] (last visited Feb. 12, 2023).

241 Hinkley, *supra* note 34.

242 *E.g., id.* (identifying trends from post-Great Recession data showing that government budget cuts following recession cause public sector employment to recover more slowly than private sector employment).

243 Leone & Eleey, *supra* note 229.

244 Many researchers break down issues according to "low" or "high" needs, but the terms "low" and "high" do not reflect the relative importance of these needs compared to each other. Rather, high and low reference their station in a hierarchy of needs: "low" needs such as wages provide for basic life necessities, while "high" needs are needs that arise once the "low" needs are satisfactorily met. Barry Rubin & Richard Rubin, *Labor-Management Relations: Conditions for Collaboration*, 35 Pub. Pers. Mgmt. 283, 284–85 (2006).

on the effectiveness of the collective bargaining relationship."[245] Collaborative relationships are necessarily determined by the context in which they operates, the "multilayered context of political, legal, socioeconomic, environmental and other influences."[246] Existing collective bargaining relationships are thus crucial to understand to establish the "system context"[247] in which collaboration is to happen.

i. Initiating the Collaborative Relationship

Barry Rubin and Richard Rubin also describe the conditions under which collaboration is appropriate and even necessary. The first pre-collaboration stage, that they call "impetus," is described as the point at which collective bargaining has proved inadequate to address the "increasing internal and external pressures on both parties."[248] Notably, they write, those internal and external pressures serve to differentiate the otherwise largely-shared goals of the parties, fulfilling another necessary element for the use of collaboration; there must simultaneously be both goal congruence, or shared objectives, and goal differentiation, ensuring the parties each adequately represent their own respective constituencies.[249] Kirk Emerson, Tina Nabatchi, and Stephen Balogh meanwhile identify a number of "drivers" necessary to initiate the collaborative relationship.[250] The four identified drivers are leadership; "consequential incentives," or what it is the collaborative relationship must address; the inability to address the issue independently; and uncertainty.[251] Crucial for collaboration, the parties must "recognize their mutual problems and be willing to make the necessary commitment to resolve them."[252] This element was unfortunately missing in NYC's handling of the COVID-19 vaccine mandates, with the city government instead unilaterally issuing mandates.

Much collaboration scholarship emphasizes the importance in collaboration of "the iterative process"[253] or the institutionalization of collaboration.[254] Emerson, Nabatchi, and Balogh define four "process elements" through which the iterative process takes shape in the form of "principled engagement": discovery, definition, deliberation,

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245 *Id.* at 285.

246 Emerson, Nabatchi, & Balogh, *supra* note 28, at 8.

247 *See generally id.*

248 Rubin & Rubin, *supra* note 244, at 285.

249 *Id.* at 286.

250 Emerson, Nabatchi, & Balogh, *supra* note 28.

251 *Id.*at 5.

252 *Planning for Progress: Labor Management Committees*, FMCS, https://www.fmcs.gov/wp-content/uploads/2016/10/FMCS_LMC_Planning_for_Progess.pdf [https://perma.cc/H2MF-RZB5] (last visited Oct. 15, 2023).

253 Emerson, Nabatchi, & Balogh, *supra* note 28, at 11.

254 Rubin & Rubin, *supra* note 244, at 287.

and determination.[255] Principled engagement then combines with the shared motivation of the parties and their capacity for joint action to initiate external actions; and these actions force the adaptation of the collaborative dynamic as the process continues.[256] Thus, the iteration of the process is crucial element of the framework's ability to adapt, act, and ultimately create any impact.[257]

Synthesizing these pieces of scholarship, then, the requirements for use of the collaborative framework outlined in this Note are (1) an existing collective bargaining relationship, (2) issues and/or circumstances that impact employer, management, the union, and workers in ways not liable to solution neither through collective bargaining nor traditional impasse solutions, such as mediation or arbitration, (3) an alignment of overall objectives while maintaining differentiated interests, and (4) a mutual commitment both to collaborating in order to resolve said issues and to the iterative process of collaboration itself.[258] Unlike traditional LMCs, the collaborative framework as outlined in this Note considers it necessary to differentiate roles for the government separate from, but in addition to, management; and for the rank-and-file as separate, but in addition to, union leadership. These features are particular to the context of public sector bargaining.

ii. The Organizing Body Generally

Due to the complexity of contexts, the framework presented in this Note is only presented in the broadest sense. Details such as how many actual members are on the organizing body or meeting structures are omitted, as these and other questions of implementation would be heavily dependent on available resources and many other factors. What follows are merely general suggestions for organization and participation could look like and why.

The body will consist of representatives of four interested categories: government, employers, unions, and the rank-and-file. "Government" here largely refers to the political government: elected officials or those representing officials such as the mayor, who are empowered to legally issue policy. Employers will also technically be government but are representative of those government agencies that act as employer to unionized public sector employees. With a large, bureaucratic government like NYC's, not every department will be able to be represented due to sheer volume. Instead, employer agencies shall be rotated in four staggered terms in order to represent

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255 Emerson, *supra* note 28, at 11.

256 *Id.* at 6.

257 *See id.*

258 *Id.*; Rubin & Rubin, *supra* note 244, at 285.

the varied interests and needs of different agencies. Similarly, not all eighty-five of NYC's public sector bargaining units will be able to be represented at once. Union and rank-and-file representatives should also follow a staggered, rotating appointment schedule.

Selection of rank-and-file representatives is arguably the most challenging and most crucial, as it is important to have a range of workers and views represented. Involvement cannot be compulsory. But those most likely to volunteer for such a position would likely be those already deeply involved with the union, potentially preventing more skeptical workers from becoming involved. This will likely require creative solutions in the form of incentives as well as creating interest through various opportunities for involvement, such as townhall-style meetings and surveys to increase participation among the rank-and-file broadly.[259]

Such a framework also requires the involvement of neutral agents to ensure that discussion is conducive and does not become dominated by certain personalities or mired in minutiae. For NYC, the Office of Conciliation of the PERB may be well-suited to serve in this capacity, considering that the Office of Conciliation houses a state-level LMC program.[260] The Office of Collective Bargaining ("OCB"), a similar body chartered at the city-level, could also potentially serve in this role, as most bargaining units in NYC fall under the purview of the OCB rather than PERB.[261] The neutral party could be charged with ensuring proper rotation and selection of new representatives from each of the representative categories. A neutral facilitator would be especially helpful at guiding the body through its own creation.[262] Additionally, while the hope is that working collaboratively will result in productive dialogue, there may be times where the parties simply cannot move forward on a topic. In such instances, a neutral facilitator could step in to mediate and help the parties arrive back to a mutual understanding in order to proceed.

iii. The Four Parties

1. Government, Employer, and Union

The inclusion of government as public administrator, government as employer, union, and rank-and-file input seeks to

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259 *Infra* Section IV.B.iii.2.

260 Pub. Emp. Rel. Bd., *supra* note 226.

261 *Public Employers Under OCB's Jurisdiction*, Off. Collective Bargaining, https://www.ocb-nyc.org/introduction/public-employers-under-ocbs-jurisdiction/ [https://perma.cc/D8NR-H8GC] (last visited Aug. 15, 2023).

262 *See, e.g.,* FMCS, *supra* note 252.

ensure the broadest range of views and ideas be represented. Each comes with challenges, as discussed below,[263] but each also contribute to potential solutions in times of crisis in important ways.

While the government is technically the employer in terms of public sector unions, the direct management of public sector unions is most often handled at the department or agency level (Department of Education, Department of Corrections, etc.).[264] In the context of a macro-societal issue such as COVID-19, some department heads may be responsible in conjunction with executive and legislative policymakers for key policy decisions.[265] But largely, such policies will be coming from elected officials. In the context of NYC and the scale of city government, it would be appropriate to have representation from both the Mayor's Office[266] as well as a member of the City Council. As necessary, this can also include agency heads who would otherwise not be seated on the body at that time, where certain expertise would be beneficial: the Department of Health and Mental Hygiene in times of pandemic, or finance and budget leaders in a recession, for example.

As stated earlier, unions should be rotated in on staggered intervals. By seating multiple public sector unions on the collaborative body, unions would be further required to also collaborate with each other. While certain issues, such as COVID-19 vaccine mandates, may be viewed very differently by different unions,[267] the underlying goals—protecting workers and the public they serve—certainly are shared. Requiring the public sector unions to work as a collective will likely bring about better outcomes for all public sector workers regardless of workplace, with the benefits of those improved outcomes emanating out to the general citizenry.

2. The Importance of the Rank-and-File

It is also crucial to involve rank-and-file members of unions rather than reserve participation in discussions for labor leadership.

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263 *See infra* Section IV.B.iii.2.

264 *See generally DC 37 Agreement*, *supra* note 150; *SEIU Local 300 MOA*, *supra* note 150; *Teamsters Local 237 MOA*, *supra* note 150.

265 For example, both the head of the Department of Health and Mental Hygiene as well as the mayor issued orders establishing NYC's COVID-19 vaccine mandates. *See supra*, Section II.B.ii.2.

266 It may be most appropriate to have the representative of the Mayor's Office be a member of the Office of Labor Relations, which already handles collective bargaining with public unions. *About OLR*, Off. Lab. Rel., https://www.nyc.gov/site/olr/about/about-olr.page [https://perma.cc/5EJE-PQHZ] (last visited Aug. 15, 2023).

267 *See, e.g.*, Weixel & Gangitano, *supra* note 177 (pointing out that law enforcement unions and, in New York, the state teacher's union NYSUT both openly opposed vaccine mandates, while other public sector unions such as the International Association of Fire Chiefs came out in support of mandates).

Pragmatically, unions are politically active, and union leadership may have preexisting relationships with elected or government officials. These relationships are carefully maintained, and union leaders may be hesitant to take stronger stances in discussions that could alienate political allies. Including rank-and-file members in the collaborative framework not only ensures a more diverse range of voices and opinions are discussed, but that union leadership can represent the interests of the union itself. While the unions' interests are based on benefitting members, the interests of the union may differ from the interests of the rank-and-file due to the political aspect of unions, especially in the public sector.[268] Public sector unions may also benefit internally from a more collaborative relationship with their own rank-and-file, building trust and fostering greater and buy-in to leadership decisions.[269]

Finally, the participation of public sector rank-and-file provides not only the viewpoints of workers but is also in a sense direct citizen participation in setting policy. This does create some difficult questions around representation, however, with the inherent tensions of public sector collective bargaining as discussed in Section II.C. However, issues also arise due to the fact that not all NYC workers actually live in the city.[270] Allowing non-citizens a voice in determining possible policy outcomes is, in a sense, anti-democratic; however, preventing rank-and-file members from participating in discussions involving their own union would render the unions anti-democratic. There are a few possible workarounds for this: positions within the collaborative body could require a portion of, but not all, rank-and-file representatives be residents of the city. Additionally, a collaborative body would ideally be creating opportunities for rank-and-file participation through tools such as listening sessions, open meetings, and surveys; allowing both resident and non-resident members to participate in the collaborative process and decision making. This also raises potential problems due to the variety of viewpoints the rank-and-file would represent. As seen in numerous lawsuits, many city workers are staunchly opposed to vaccine mandates;[271] it is not unreasonable to assume that at least some

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268 *See supra,* Section II.C.iii.

269 Rubin & Rubin, *supra* note 244, at 285.

270 City employees are subject to residency requirements that may be different depending on the position, but most City workers are permitted to live in one of six counties outside of the five boroughs after two years of employment. N.Y.C. Admin. Code §§ 12-119-121.

271 *See supra* Section II.B.ii.2.

city workers opposed the vaccines themselves.[272] But one benefit to collaboration is the opportunity to "provid[e] an open door for skeptics,"[273] building credibility and potentially combating distrust and misinformation.

3. Expected Challenges

One inherent difficulty in conceptualizing a collaborative governance framework to be used in such exceptional circumstances as the COVID-19 pandemic is this question of institutionalization and iteration.[274] How does the collaborative relationship continue to exist when there is no extraordinary challenge to be met? Such a framework requires the parties involved, especially city as government and unions, to cede some of their authority. Such a collaborative body would also raise some of the inherent tensions underlying public sector collective bargaining, namely, creating a separate process by which a select few workers can access policymakers and impact public policy decisions.[275] As such, allowing such a framework outside of times of unusual need would likely be untenable for several parties involved.

The prospect of such a framework also raises potential issues under labor law. As discussed prior, existing collaborative efforts between management and labor have run into issues and limitations under the NLRA sections 8(a)(2) and 8(a)(5),[276] and public sector bargaining statutes often contain the same or similar language to these sections.[277] But the continued popularity of LMCs indicates that the limitations on labor-management collaboration under the NLRA can be worked around with careful structuring and planning. This points to the importance of involving a neutral labor body such as PERB or the OCB who will be able to help develop guidelines to keep the body and its potential output in line with legal requirements.

Additionally, when forming LMCs, the proper topics for discussion through collaboration are established through collective

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272 *See* Li Ping Wong, Yulan Lin, Haridah Alias, Sazaly Abu Bakar, Qinjian Zhao, and Zhijian Hu, *COVID-19 Anti-Vaccine Sentiments: Analyses of Comments from Social Media*, 9 HEALTHCARE 1530 (2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8622531/ [https://perma.cc/GK2R-84JD] (pointing out that the U.S. has had relatively low COVID-19 vaccine acceptance rates compared to other nations: in May 2020, only 67% of Americans expressed vaccine acceptance, and, by October 2020, only 51% of Americans said they intended to receive the vaccine).

273 FMCS, *supra* note 252.

274 *See supra* Section IV.B.i.

275 *See supra* Section II.C.iii.

276 *See supra* Section IV.A; *see also E.I. DuPont de Nemours & Co.*, 311 N.L.R.B No. 88 (1993).

277 *See e.g.,* N.Y. Civ. Serv. Law §§ 200-215 (McKinney).

bargaining.[278] While certainly not impossible, CBAs will have to be very carefully drafted in order to give the collaborative framework sufficient authority to address the unforeseen problems that inevitably arise in times of crisis, while also not requiring labor or management to cede too much power to the other or to the framework itself. Careful drafting could also help address the above questions of institutionalization and iteration by limiting topics of discussion outside of exigent circumstances and allowing greater flexibility in response to actual crisis. This raises numerous and significant questions though, such as what triggering language could adequately encompass every potential catastrophe, or whether the decision to allow for greater decision-making powers should be determined by a vote of the parties, that would be specific to the circumstances of implementation.

Finally, the simple logistics of getting four self-interested parties attempting to reach decisions that will impact potentially millions of people while advocating for their own varied and distinct interests are, to put it *very* mildly, difficult. But the benefits to all parties involved as well as the general citizenry through improved provision of services in times of crisis are arguably worth the immense effort it would take to start such an initiative.

V. Conclusion

In engaging in collaborative governance with public sector unions, NYC and its public sector unions could have created a COVID-19 response that focused less on vaccination as the sole path to overcoming the pandemic, and merely as one tool in a holistic, multifactor approach developed through joint consideration of political and bureaucratic government, unions, and the rank-and-file. Not only would public health and worker safety outcomes improve, but union members and the city would benefit from increased buy-in and trust from the rank-and-file. While adversarial union bargaining practices have undoubtedly led to invaluable gains for workers, supplementing those practices in light of exigent circumstances to include models focused on collaborative decision making will help continue those important successes for workers.

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[278] *See* FMCS, *supra* note 252.

EASING EVICTIONS: THE NEED FOR MEDIATION AND FORMAL EVICTION GUIDELINES BETWEEN NEW YORK CITY LANDLORDS AND RENT-STABILIZED TENANTS

*Halle Jaffe**

I. Introduction

Rental prices across Manhattan, Brooklyn, and Queens reached a new all-time high in 2022, and prices do not appear to be dissipating any time in the near future.[1] The recent surge of the outrageous rental market stems from several factors: lack of inventory, rising mortgage rates, peak season, and the Housing Stability and Tenant Protection Act, creating new protections against tenant evictions.[2] In the post-pandemic era especially, New York apartment rents increased substantially, as those who "received a 'COVID discount' are now paying the price for those deals" and landlords are demanding huge sums for their units.[3] New York City even topped the list as the most expensive market for one-bedroom apartments, with prices rising a whopping 41% from last year and 5% in July 2022 alone.[4]

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1 Mary K. Jacob, *NYC's Real Estate Rental Market Has Reached a Shocking Point*, N.Y. Post (Aug. 3, 2022), https://nypost.com/article/where-nyc-real-estate-rental-market-stands-right-now-housing-prices/ [https://perma.cc/WH6B-ER29].

2 *Id.* The Housing Stability and Tenant Protection Act of 2019 established the strongest protections for New York tenants in years. This act extends and makes rent regulation laws permanent, in addition to dozens of other provisions.

3 Ronda Kaysen, *New York Renters Are Now Paying the Price for the 'Covid Discount'*, N.Y. Times (July 26, 2022), https://www.nytimes.com/2022/07/26/realestate/nyc-apartments-covid-discount.html [https://perma.cc/FMN2-CJAA].

4 Martine Paris, *These Are the Most Expensive US Cities for Renters, With Some Prices Up 41%*, Bloomberg (July 26, 2022), https://www.bloomberg.com/news/articles/2022-07-26/these-are-the-most-expensive-cities-for-renters-led-by-nyc-and-sf [https://perma.cc/6GH3-XZSW].

Although there has been an abrupt increase in rental prices in recent months, the existence of rent-stabilized and rent-controlled apartments resulting from New York City's rent-regulation system act as critical components of the city's dwindling affordable housing stock.[5] To bring matters into perspective, out of roughly 3,644,000 homes in New York City, the approximately 1,006,000 rent-stabilized homes make up around 28% of the overall housing stock and 44% of all rentals.[6] In addition, about 16,400 homes are rent-controlled.[7]

New York's rent-regulation system has been in place for decades. However, landlords often suffer from the low prices that rent-regulated tenants pay, make little to no profit from their properties, are no longer able or willing to make repairs, ultimately leaving them yearning to evict these tenants.[8] For rent-regulated units, landlords cannot charge rent at its market value and cannot improve properties unless they are satisfied with contributing a significant amount of money towards renovating a unit that will not bring in the income that it otherwise would.[9] Even if a landlord renovates and updates a unit with, for example, new appliances, it must remain rent-regulated by law.[10]

As a general trend in the New York City real estate industry, landlords often try to evict rent-stabilized tenants from their rental units with the goal of either renovating their building to implement structural changes, update appliances, etc., or demolishing their existing building to construct a high rise with more units at higher price points.[11] While landlords are often incentivized to create rent-stabilized units due to 421-a tax exemptions, they are consequently enticed by the thoughts of: (i) refraining from listing their rent-stabilized units, as rents have been driven to an astronomical level and landlords cannot list these units at market price even if they invest in significant upgrades; and (ii) demolishing their small, rent-stabilized

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[5] Ilaria Parogni & Mihir Zaveri, *Understanding Rent Regulation in N.Y.C.*, N.Y. Times (June 22, 2023), https://www.nytimes.com/2022/06/22/nyregion/rent-regulation-new-york.html [https://perma.cc/6TZC-NRYB].

[6] *Id.*

[7] *Id.*

[8] Caleb Malik, *Rent Control Is Bad for Both Landlords And Tenants*, Mkt. Urbanism (Apr. 2, 2016), https://marketurbanism.com/2016/04/02/rent-control-bad-landlords-tenants/ [https://perma.cc/GHC6-WSXM].

[9] *Id.*

[10] Melvin Monachan, *What Are the Pros & Cons of New York's Rent Control Laws?*, Melvin Monachan (Mar. 20, 2020), https://www.monachanlaw.com/what-are-the-pros--cons-of-new-yorks-rent-control-laws [https://perma.cc/YTP9-RYAY].

[11] Alcynna Lloyd, *Why Some NYC Landlords Keep the Apartments You Can Actually Afford Off the Market*, Bus. Insider (July 10, 2022), https://www.businessinsider.com/why-cant-find-affordable-nyc-rent-controlled-regulated-vacant-apartments-2022-7 [https://perma.cc/C2EU-8ZYY].

tenements in hopes of constructing a taller, more money-generating high-rise development which would allow for a surplus of housing.[12]

New York City already has guidelines and laws regarding the issue of landlords planning to demolish certain buildings consisting of rent-stabilized units. For instance, landlords who intend to demolish their buildings can attempt to negotiate with tenants, offering to pay off the tenants or award them a stipend.[13] Tenants may choose to fight the proposed demolition plan at the Division of Housing and Community Renewal ("DHCR"), often incentivizing landlords to offer bigger payments.[14] Additionally, the legal system provides a means for landlords to evict tenants for nonpayment of rent or other lease violations.[15] However, the process is often slow, adversarial, and expensive, with little opportunity for the parties to come to a mutually acceptable resolution. Neither receiving a stipend nor fighting the demolition plan at the DHCR or in court typically results in merited and suitable settlement for the parties.[16]

Offering tenants a stipend or bringing the case to the DHCR is typically confusing, time-intensive, and inadequate ways of resolving these housing disputes. First, as Sam Himmelstein, a lawyer with the firm Himmelstein, McConnell, Gribben Donoghue & Joseph stated, "[s]tipends are often completely inadequate."[17] For cases heard at the DHCR, the proceedings often take five to six years to resolve and cost both the landlord and the tenant a significant amount of money.[18] While cases may be settled via housing court or negotiation, the outcome of these cases often leaves both parties at a disadvantage. The landlord and tenant likely end up spending a notable amount of time and money in efforts of reaching a solution. Likewise, one side is typically left at even more of a disadvantage than the other, as the landlord either cannot knock down his existing building due

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12 *Id. See also 421-a & Rent Stabilization Tenant Fact Sheet*, N.Y.C. Dep't Hous. Pres. & Dev., https://www1.nyc.gov/assets/hpd/downloads/pdfs/services/421-a-tenant-fact-sheet.pdf [https://perma.cc/9E9J-Y7KL] (last visited Nov. 14, 2022) ("421-a refers to a section of the New York State Real Property Tax Law that exempts certain new multiple dwellings form local property taxation. These laws are, or have been, adopted by the New York State and City Legislatures and are designed to incentivize developers to build multiple dwellings, in exchange for partial tax benefits over a certain period of time. In particular, because of the tax benefit, rental apartments are often subject to rent-stabilization, usually also only for a certain period of time.").

13 Himmelstein McConnell Gribben & Joseph LLP, *Ask Sam: Do Landlords Have to Relocate Tenants When They're Demolishing the Building?*, Brick Underground (May 12, 2021), https://www.brickunderground.com/rent/demolition-rent-stabilized-buyout-relocation-landlord-nyc [https://perma.cc/5TDL-2FXE].

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

to the circumstances of the tenant's rent-stabilized unit or the rent-stabilized tenant must move out of their lifelong home.

Although there are several methods for landlords to evict rent-stabilized tenants, there are no formal guidelines for this process, and mutually beneficial agreements are rarely reached. This Note will begin with an in-depth discussion of the background of rent-stabilization in New York City and how tenants who refuse to leave their rent-stabilized units can destroy a landlord's vision of demolishing the building to construct a high-rise, maximize profits from their property, and expand New York City's housing supply. After the Introduction and Background sections, the Discussion section will detail why current eviction regulations are unsatisfactory, and will delve into illegal eviction practices, the need for formal guidelines regulating the eviction of rent-stabilized tenants, and the benefits of landlords constructing new buildings to all parties involved, including New York City residents in general. Lastly, the Proposal section will suggest a unique solution to resolve the rent-regulated eviction debacle: the use of mediation as a tool to help landlords evict rent-stabilized tenants in a mutually beneficial manner to construct high-rises, improve their buildings, and increase the housing supply. This Proposal section will explore why landlords and tenants especially warrant mediation, the benefits of mediation generally and in housing disputes, potential obstacles for an eviction-based mediation program, and ultimately, the details of my proposed mediation system.

II. Background

A. *The History of Rent-Controlled Units in New York*

The terms "rent-control" and "rent-stabilized" are often used interchangeably, but there are several notable differences between the two.[19] The term "rent-control" limits the rent that a landlord may charge a tenant for an apartment unit and presents the owner with limits regarding their rights to evict tenants.[20] Rent control programs apply to residential buildings constructed prior to February 1947 in municipalities that have not yet declared an end to the post-war rental housing emergency.[21] Rent

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[19] Nathan Miller, *Rent Control Versus Rent Stabilization: What It All Means for Landlords*, Forbes (May 28, 2021), https://www.forbes.com/sites/forbesrealestatecouncil/2021/05/28/rent-control-versus-rent-stabilization-what-it-all-means-for-landlords/?sh=2cbfa84316fc [https://perma.cc/69D7-GHHM].

[20] Eric T. Schneiderman, *Tenants' Rights Guide*, St. N.Y. Att'y Gen., https://www1.nyc.gov/assets/buildings/pdf/tenants_rights.pdf [https://perma.cc/KKH9-6YDM] (last visited Oct. 15, 2023).

[21] *Id.*

control remains prevalent in New York City as well as parts of Albany, Erie, Nassau, Rensselaer, Schenectady, and Westchester counties.[22]

In order for an apartment to be considered rent-controlled, the tenant or the tenant's lawful successor must have been living in the unit continuously since before July 1, 1971.[23] When a rent-controlled apartment is vacated in New York City or other localities, it becomes rent-stabilized or removed from regulation entirely.[24] Rent-controlled apartments in New York City have a maximum base rent which adapts every two years to reflect changes in operating costs.[25] If tenants choose to dispute rent increases by filing a complaint with the Office of Rent Administration, they may do so if the price instilled by the landlord exceeds the legal regulated rent, the building violates the housing code, the owner's expenses do not warrant an increase, or the owner is not maintaining essential services.[26] Lastly, rent-control typically locks in rental rates at a specific amount.[27]

B. *The History of Rent-Stabilized Units in New York*

Rent-stabilization, on the other hand, is more common than rent control and allows for the state or local government to increase one's rent by a fixed amount.[28] As long as one is able to find a rent-stabilized unit, anyone in New York has the ability to rent a rent-stabilized apartment, even if they qualify for market-rate rents.[29] Rent stabilized tenants are entitled to required essential services—repairs, heat, hot and cold water, maintenance, etc.—and lease renewals, but they can only be evicted on legal grounds.[30] The legal grounds for evicting rent-stabilized tenants are more limited than the typical grounds a landlord must go about to evict a typical

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[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] Eric T. Schneiderman, Tenants' Rights Guide, St. N.Y. Att'y Gen., https://www1.nyc.gov/assets/buildings/pdf/tenants_rights.pdf [https://perma.cc/KKH9-6YDM] (last visited Oct. 15, 2023). *See also Rent Increases and Rent Overcharge*, N.Y. St. https://hcr.ny.gov/rent-increases-and-rent-overcharge [https://perma.cc/4C69-H2XQ] (last visited Nov. 14, 2022).

[27] Miller, *supra* note 19.

[28] *Id.*

[29] Ruth Shin, *What Is A Rent-Stabilized Apartment in New York?*, Propertynest (Feb. 21, 2023), https://www.propertynest.com/blog/rent/what-rent-stabilized-apartment-new-york/ [https://perma.cc/BK48-764C].

[30] Schneiderman, *supra* note 20; *See also Living Conditions and Essential Services*, N.Y. St., https://hcr.ny.gov/living-conditions-and-essential-services [https://perma.cc/GR3S-6RKL] (last visited Nov. 5, 2023).

tenant, as these tenants may only be evicted for non-payment of rent, violations of the lease, causing a substantial disturbance to neighbors, or if the landlord intends to use the apartment for his or her family.[31]

In the past, owners were able to deregulate any rent-stabilized unit with a monthly rent of $2,500 per month once it became vacant.[32] More specifically, occupied apartments became deregulated when the legal regulated rent reached $2,500 or more and the tenant's total annual income exceeded $200,000 per year the two years prior to the deregulation.[33] Once a tenant's unit became deregulated through these means, landlords could be offered a rent at the prevailing market rate.[34] Additionally, owners of rent-stabilized apartments were also awarded up to a twenty percent bonus to the legal rent in between tenancies.[35] However, as of June 14, 2019, owners can no longer remove a unit from rent stabilization after vacancy, even if the rent has reached a certain dollar threshold, and the bonus has been eliminated.[36] Instead, new tenant protection laws make evictions and rent increases more challenging.[37] For instance, rent increases must be based on the preferential rent with a few very narrow exceptions, as current guidelines set by the Rent Guidelines Board ensure that rent may increase 1.5% for a one-year lease and 2.5% for a two-year lease.[38]

Several guidelines determine whether apartments are rent-stabilized. Thus, apartments in New York City are generally under rent stabilization if they are: (i) in buildings of six or more units built between February 1, 1947 and December 31, 1973; (ii) in buildings constructed before February 1, 1947 with tenants who moved in after June 30, 1971; or (iii) in buildings with three or more apartments constructed or extensively renovated on or after January 1, 1974 with special tax benefits.[39]

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31 Steven R. Sutton, *Rent-Stabilized Tenant Attorney*, L. Off. Steven R. Sutton, https://www.ssuttonlaw.com/landlord-tenant-litigation/rent-stabilized-tenants/ [https://perma.cc/NA2A-2UN8] (last visited Oct. 15, 2023).

32 Schneiderman, *supra* note 20.

33 *Id.*

34 *Id.*

35 *New Protections for Rent-Regulated Tenants,* N.Y.C. Mayor's Off. Protect Tenants, https://www.nyc.gov/content/tenantprotection/pages/new-protections-for-rent-regulated-tenants [https://perma.cc/EJW5-9SJD] (last visited Oct. 15, 2023).

36 Gerald Lebovits, John S. Lansden, & Damon P. Howard, *New York's Housing Stability and Tenant Protection Act of 2019: What Lawyers Must Know*, 91 N.Y. St. Bar J. 35 (2019).

37 *Id.*

38 N.Y.C. Mayor's Off. Protect Tenants, *supra* note 35.

39 *Rent Stabilization and Emergency Tenant Protection Act,* N.Y. St. Homes Cmty. Renewal, https://hcr.ny.gov/rent-stabilization-and-emergency-tenant-protection-act#:~:text=In%20

C. *Evicting Tenants in Rent-Stabilized Units*

Evicting tenants from rent-controlled or rent-stabilized units greatly differs from the typical eviction process, as the grounds for eviction are limited under rent stabilization.[40] Hence, evicting stabilized tenants can only occur under the following circumstances: (i) you are using your apartment as a non-primary residence; (ii) you have committed a "breach of tenancy"; (iii) you are being a nuisance; (iv) you are not paying rent; (v) the landlord wants your apartment for herself or her family; or (vi) the landlord plans to demolish the building.[41]

i. When a Landlord Plans to Demolish a Rent-Regulated Building

Many landlords believe that rent-regulation stifles new construction, halting their ability to demolish buildings that house rent-controlled and rent-stabilized units.[42] In the case that a landlord plans to demolish his or her building, the landlord may have the end goal of demolishing the building in order to build a new one, or to gut-renovate and reconstruct the interior. In these instances, the landlord must prove that they have the financial ability to do the work and that their plans have been approved by the city.[43] These proceedings are heard at the DHCR, and very few cases actually proceed to a hearing.[44] If the landlord prevails, the tenants can file an appeal within the DHCR, known as a Petition for Administrative Review ("PAR").[45] This alone can take an additional two years to decide, and tenants can continue to pursue the issue with court challenges if the PAR is not decided in their favor.[46]

Real-life examples of landlords intending to demolish rent-regulated buildings creates a better understanding of the problems landlords face with eviction of these tenants. For instance, there was a recent case with a landlord who wanted to gut a townhouse, and

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general%2C%20rent%20stabilization%20in,also%20covered%20by%20rent%20stabilization [https://perma.cc/E3FZ-DQGM] (last visited Nov. 14, 2023).

40 Himmelstein McConnell Gribben & Joseph LLP, *Ask Sam: What are the Rules for Evicting Rent-Stabilized Tenants in NYC?*, Brick Underground (Dec. 8, 2021, 1:30 PM), https://www.brickunderground.com/rent/rules-for-evicting-rent-stabilized-tenant-nyc [https://perma.cc/4GD6-CM3Y].

41 *Id.*

42 John W. Willis, *Short History of Rent Control Laws*, 36 Cornell L. Q. 54 (1950).

43 Himmelstein McConnell Gribben & Joseph LLP, *supra* note 40.

44 *Id.*

45 Himmelstein McConnell Gribben & Joseph LLP, *supra* note 13.

46 *Id.*

he never offered more than $300,000 to his tenants in exchange for them leaving the property.[47] According to Mr. Himmelstein, "our clients found that unacceptable, and the day before their hearing the landlord dropped his demolition plans. It took over two years for the DHCR to schedule a hearing. Those tenants remain in their stabilized apartments."[48] Hence, as seen in this incident, rent stabilized eviction cases take years to resolve. They may also be costly and lack formal guidelines to guide landlords and tenants through the process. Likewise, tenants are entitled to certain stipends from the city if the landlord wins, which can vary based on the amount of rent they pay and how long they have been living in their apartment.

Besides DHCR hearings, tenants are sometimes able to negotiate buyouts deals in major cases. Take the experience of Raquel Cruz, a fifty-one-year-old Brooklyn resident, for instance:[49]

> Cruz says she was offered $10,000 and three months paid rent at a two-bedroom apartment "with a little skinny kitchen" on Quincy Street in Bedford-Stuyvesant, with a rent of $1,300 a month, $400 more than she was paying on Franklin Avenue. MySpace [a Brooklyn-based real-estate agency] also offered to pay for her moving costs and provide her with a permanent cleaning job . . . She knew that she would struggle to afford the $1,300 a month rent, but she says she felt compelled to sign, pressured by the money and the fact that her neighbors were vacating.[50]

While Ms. Cruz's case was cordial and mutually beneficial to both the landlord and the tenant,

> [m]ore commonly . . . landlords will try to 'lowball' tenants, especially when they are not represented by an attorney in negotiations.[51] In fact, according to Legal Aid attorneys and housing advocates, some tenants complain that buyout offers amount to a mere 'pittance,' ranging from as low as $2,000 to $10,000.[52]

Correspondingly, tenants and their attorneys often think that the buyout offers are insufficient, causing the landlord's ultimate demolition and new construction plans to fall through.[53]

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47 *Id.*

48 *Id.*

49 Louis W. Fisher, *Paying for Pushout: Regulating Landlord Buyout Offers in New York City's Rent-Stabilized Apartments*, 50 Harv. Civ. Rts. Civ. Liberties Rev. 491, 497 (2015).

50 *Id.* at 497; *See also* Vinnie Rotondaro & Maura Ewing, *The Ins and The Outs*, Narratively (Jan. 15, 2015), https://www.narratively.com/p/the-ins-and-the-outs [https://perma.cc/CH38-AD9V].

51 Fisher, *supra* note 49.

52 *Id.* at 497.

53 *Id.*

A. *Cost of Living in New York*

As rents are rising faster than ever, New Yorkers' average incomes are making it difficult for residents to afford adequate housing.[54] According to Senator Jessica Ramos, chair of the Senate Labor Committee, "[n]ow, more than two years into a pandemic-related economic crisis, rent, inflation, the cost of gas and groceries, and billionaires' wealth have all gone up. The only thing that hasn't kept pace is our wages."[55] The cost of living in New York City is 26% higher than the state average and 95% percent higher than the national average.[56] Likewise, housing in New York City is 258% more expensive than the United States average, as utilities are 2% higher and both clothing and groceries cost 25% more than New York's United States counterparts.[57] In May 2020, rents reached a new milestone as the median rent soared to $4,000.[58] For New Yorkers earning the city's median income of $52,409 each year, New York's average rent comes amounts to around 92% of their pre-tax paycheck, which is far above what financial experts recommend budgeting for housing.[59]

B. *The Demand for Rental Apartments in New York City Exceeds Supply*

Post-pandemic, America is facing a significant housing shortage with home ownership becoming diminishingly affordable.[60] While rental prices have increased across the nation, New York City specifically is one of the most expensive places in the United States and has deep-rooted issues.[61] Rents are hitting a new record every month,

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54 Alcynna Lloyd, *Welcome to the Typical NYC Apartment: It Costs $4,000 a Month and is Too Expensive for the Average New Yorker*, Bus. Insider (June 10, 2022, 7:45 AM), https://www.businessinsider.com/nyc-average-apartment-rent-price-monthly-compared-median-income-2022-3 [https://perma.cc/BQ9D-MWR4].

55 *Id.*

56 *Cost of Living in New York City (November 2022)*, *NY*, RentCafé, https://www.rentcafe.com/cost-of-living-calculator/us/ny/new-york-city/ [https://perma.cc/Q5DZ-4DC2] (last visited Oct. 15, 2023).

57 *Id.*

58 Lloyd, *supra* note 54.

59 *Id.*

60 Sharon Tang, *Post-Covid Housing Market*, Harv. Model Cong. (2022), https://static1.squarespace.com/static/5cb7e5637d0c9145fa68863e/t/61d7656d60bc3654d4eec995/1641506157494/SPPresCab10.pdf [https://perma.cc/J9JY-CE4E].

61 Janaki Chadha, *New York Tried to Make Apartments Affordable. The Opposite Happened*, Politico (July 16, 2022), https://www.politico.com/news/2022/07/16/new-york-housing-crunch-00045575 [https://perma.cc/WJM3-5Q6C].

with Manhattan's median apartment rental price reaching $5,000 for the first time ever.[62] In addition to prices soaring, New York City is suffering from an acute housing shortage, as there is a desperate need for 560,000 new units by 2030.[63] While the city's necessity for new units within the next eight years is acute, inflation is pushing costs higher and higher, meaning that the soon-to-be new units will ultimately be difficult for the majority of New Yorkers to afford.[64]

III. Discussion

A. *Why Current Eviction Regulations Are Not Satisfactory*

Rent-stabilized apartments represent almost half of all rental housing in New York City and are among the most affordable places in the area to live, however, landlords only receive a minimal percentage of the rent they would otherwise be able to receive if they renovated the apartment, demolished the building to construct a high rise, etc. Tight restrictions on evicting rent-stabilized tenants infuriate landlords, and tenants living in rent-regulated units are often susceptible to mistreatment by landlords, since they are paying significantly below the market rate.[65] As a result, landlords are taking extraordinary measures to evict their rent-stabilized tenants, as current eviction regulations are confusing and unsatisfactory.

At the moment, landlords may evict their rent-stabilized tenants or refuse to renew the tenant's lease only if: (i) the tenant engages in wrongful conduct (other than nonpayment); (ii) the landlord intends to use the housing accommodation for the landlord's own primary residence or the landlord's immediate family members because of immediate and compelling necessity; (iii) the tenant is not occupying the housing accommodation as the tenant's primary residence; and (iv) the DHCR has issued an order permitting the landlord to commence the summary proceeding.[66] As a result of the limited subset of cases al-

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[62] *Id.*

[63] Shimon Shkury, *New York City Real Estate: Top Trends that Are Moving the Needle*, Forbes (Oct. 7, 2022), https://www.forbes.com/sites/shimonshkury/2022/10/07/new-york-city-real-estate-top-trends-that-are-moving-the-needle/?sh=e4bed654aa63 [https://perma.cc/T4Q3-NEHY].

[64] Conor Dougherty, *The Rent Revolution is Coming*, N.Y. Times (Oct. 15, 2022), https://www.nytimes.com/2022/10/15/business/economy/rent-tenant-activism.html [https://perma.cc/WV98-NPD4].

[65] Stephanie Gorin, *Collective Bargaining in Rent Stabilized Buildings: How New York City's Rent Regulated Market Can Benefit From the Fundamentals of Labor Law*, 17 Cardozo J. Conflict Resol. 1045, 1048 (2016).

[66] *Eviction Procedure for Rent-Stabilized Units (NY)*, Thomson Reuters, https://1.next.westlaw.com/Document/Ie13c36e2bc4211e398db8b09b4f043e0/View/FullText.html?transitionTyp

lowing landlords to evict rent-regulated tenants, illegal and immoral actions are often taken to remove these tenants from their units.

i. Illegal Evictions

There is a clear imbalance of power between landlords and tenants of rent-stabilized units, which is often made worse by the time, money, and fear that comes with attending Housing Court.[67] Many tenants housed in rent-regulated apartments are intimidated by their landlords and fall subject to harassment, since the landlords either seek to replace the rent-regulated tenants with those who would pay full market value or hope to evict the tenants to knock down the old building and construct a high rise instead.[68] Consequently, the power balance inherent in the landlord-tenant relationship results in landlords taking extreme measures—such as cutting off a unit's hot water supply or purposefully creating hazardous living conditions—to attempt to evict tenants, whether legal or not.

Rent-regulated tenants have certain eviction protections in place covered by the Tenant Protection Act of 2008, which "serve[s] as a life jacket for the most vulnerable New York City tenants," providing adequate protection for tenants experiencing systematic harassment.[69] More specifically, this law creates a "new layer of protection for renters in New York City" by labeling certain actions as harassment under this legislation, including: (i) using force or making threats against a lawful occupant; (ii) repeated or prolonged interruptions of essential services; (iii) using frivolous court proceedings to disrupt a tenant's life or force an eviction; (iv) removing the possessions of a lawful tenant; (v) removing doors or damaging locks to a unit; or (vi) any other acts designed to disturb a lawful occupant's residence.[70]

However, while the preceding eviction guidelines may appear concise and *should* be engrained in landlords' minds, landlords still often evict tenants illegally; however, they are almost never arrested for these illegal do-it-yourself ("DIY") evictions.[71] Evicting tenants

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e=Default&contextData=(sc.Default)&firstPage=true&oWSessionId=cf214f0df4ac435db4d1a300e53b486a&isplcus=true&fromAnonymous=true&bhcp=1 [https://perma.cc/ANG5-Q9CT] (last visited Sept. 17, 2023).

67 *Mayor de Blasio Signs Three New Laws Protecting Tenants From Harassment*, N.Y.C., https://www.nyc.gov/office-of-the-mayor/news/590-15/mayor-de-blasio-signs-three-new-laws-protecting-tenants-harassment [https://perma.cc/7N26-782B] (last visited Nov. 14, 2023).

68 *Id.*

69 *Groundbreaking Tenant Protection Act Becomes Law*, N.Y. City Council (Mar. 13, 2008), https://council.nyc.gov/press/2008/03/13/1323/ [https://perma.cc/F7JA-M5S5].

70 *Id.*

71 Ishan Thakore, *NYC Landlords Almost Never Get Arrested for Illegal DIY Evictions*, The City (Feb. 17, 2022), https://www.thecity.nyc/housing/2022/2/17/22937540/nyc-landlords-illegal-evictions-arrests [https://perma.cc/MY9K-EJCR].

without first receiving a judge's order in Housing Court is a common crime in New York.[72] It is quite common for landlords to try to find loopholes around the legal approval process of evicting rent-regulated tenants and altering the units. For instance, between 1993 and 2019, vacancy deregulation, "a loophole written into the system that allow[ed] landlords to escape regulations once rent reache[d] a certain threshold," ultimately "encourag[ing] real estate speculation by driving up rents in empty apartments."[73] As a result of this loophole, the Housing Stability and Tenant Protection Act of 2019 ("HSPTA") was enacted and ameliorated the issue of widespread unaffordability and evictions to a certain degree.[74] However, landlords still use deceptive tactics to try to evict landlords and de-regulate rent-stabilized apartments, such as cutting out the middleman—the DHCR—in eviction disputes and going directly through the Department of Buildings ("DOB") instead.[75]

The DHCR and DOB both know that these illegal eviction attempts occur; however, they remain silent and have not addressed them.[76] Additionally, when landlords abide by the laws and submit plans to the DHCR, tenants have the ability to write responses.[77] In the illegal case of landlords going straight to the DOB, however, tenants are stripped of this right.[78] Just as this illegal loophole does not typically result in landlords getting into trouble, landlords who attempt to evict tenants via harassment, intentionally cutting utilities, changing the locks, etc. can similarly face legal consequences and go to jail for up to one year.[79] During the pandemic especially, which was a time of extraordinary hardship for both landlords and tenants, thousands of tenants filed Housing Court cases against their landlords for similar reasons.[80] However, the police rarely followed through with the complaints.[81]

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[72] *Id.*

[73] Celia Weaver, *From Universal Rent Control to Cancel Rent: Tenant Organizing in New York State*, 30 New Lab. F. 93, 93–98 (2021).

[74] *Id.*

[75] Emily Eaton and Eva Henley, *Opinion: Close the Loophole Letting Landlords Displace Rent-Stabilized Tenants*, City Limits (Nov. 15, 2022), https://citylimits.org/2022/11/15/opinion-close-the-loophole-letting-landlords-displace-rent-stabilized-tenants/ [https://perma.cc/2A4F-VV9C].

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*; Ishan Thakore, *NYC Landlords Almost Never Get Arrested for Illegal DIY Evictions*, The City (Feb. 17, 2022), https://www.thecity.nyc/housing/2022/2/17/22937540/nyc-landlords-illegal-evictions-arrests [https://perma.cc/MY9K-EJCR].

[80] The City, *supra* note 79.

[81] *Id.*

1. Repercussions of the Lack of Formal Rent-Stabilized Eviction Guidelines: Empty and Unavailable Housing Stock

While it is inauspicious that landlords are pushing their tenants out of rent-stabilized units via illegal measures and landlord-tenant disputes are at an all-time high, the root of the problem seems to stem from New York's unsatisfactory eviction laws. Now, a significant amount—around 61,000 units—of New York's prime affordable housing stock is empty and unavailable.[82] However, these apartments are not vacant for typical reasons such as not being able to find tenants or the rent being too high. Instead, landlords are "warehousing" these units; they are purposefully keeping apartments vacant during the current housing crisis, which those units could significantly alleviate.[83] There are no laws in place that prevent landlords from purposefully "warehousing" their properties, and landlords across the city are utilizing this cunning tactic for several reasons: (i) they may be waiting in hopes that rent-regulation laws eventually shift in their favor; (ii) since landlords can no longer increase a rent-stabilized unit's rent and take apartments out of rent-stabilization once a tenant moves out, they are making little to no profit off of these units; or (iii) landlords may be waiting on the result of lawsuits challenging the constitutionality of rent-regulation laws to reach federal court in hopes that rent-regulation is struck down completely.[84]

In addition to landlords warehousing units, the city also discovered that the number of apartments registered as rent-stabilized decreased more between 2019 and 2020 than it has in the past fifteen years, as these rent-stabilized units have "disappeared" from the market.[85] Tenant advocacy groups blame landlords for the decrease in rent-stabilized units, accusing them of holding these apartments "ransom" in order to move political policy in their favor.[86]

Thus, while "affordable rental units with strong tenant protections are exactly the type of housing most in need right now . . . withholding them has undoubtedly exacerbated the affordability crisis."[87] As landlords suffer from rent laws which make it impossible to build

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[82] Hannah Frishberg, *NYC Landlords Holding 60K + Rent-Stabilized Units for 'Ransom': Memo*, N.Y. Post (Oct. 20, 2022), https://nypost.com/2022/10/20/nyc-landlords-holding-60k-rent-stabilized-units-for-ransom/ [https://perma.cc/9MU9-XCCT].

[83] *Id.*

[84] Alanna Schubach, *Why Is My Landlord Warehousing Rent-Stabilized Apartments? Is He Looking to Combine Units?*, Brick Underground (Aug. 8, 2022), https://www.brickunderground.com/rent/landlord-warehousing-rent-stabilized-apartments-combination-market-rate-nyc [https://perma.cc/6EHA-6Q4W].

[85] *Id.*; Frishberg, *supra* note 82.

[86] Frishberg, *supra* note 82.

[87] *Id.*

a high rise or renovate vacant units without losing money, tenants are suffering right back, since the lack of these sought after units on the market is exacerbating the housing crisis, resulting in less housing and higher rents overall.[88]

2. Constant Protests

As a result of the city's housing crisis becoming increasingly dire, tenant advocates and lawmakers have been yearning for solutions. However, since landlords are pushing tenants out of their apartments through illegal measures and warehousing their units, landlord-tenant disputes are at an all-time level of severity, resulting in unpromising protests.[89] As of November 2022, tenants are conducting near-daily protests to demand landlords to cease rent-stabilized apartment vacancies.[90] In Crown Heights, Brooklyn, tenants who have been on rent strike for a full year at a building embedded with violations. The residents of 1392 Sterling Place claim that their landlord has kept twenty percent of the units vacant, some for a decade, and prevented any tenants from moving into the empty apartments.[91] Tenants refer to these vacancies as "zombie units," hoping for warehousing to come to a halt.[92]

The Coalition to End Apartment Warehousing took to City Hall's steps in early November 2022 in hopes of ending landlord warehousing and opening vacant apartments.[93] Since landlords often claim that they make no money off of rent-stabilized units, one rally-goer asserted that "[y]ou can make money on rent-stabilized units, don't tell me otherwise."[94] One study reporting on rent guidelines in New York City revealed that a typical apartment in a rent-stabilized building produced a net income of $6,500 per year.[95]

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[88] *Id.*

[89] Sam Rabiyah & Rachel Holliday Smith, *In Near-Daily Protests, Tenants Demand a Stop to Rent-Stabilized Apartment Vacancies*, The City (Nov. 3, 2022), https://www.thecity.nyc/housing/2022/11/3/23439366/tenants-protest-rent-stabilized-apartment-vacancies [https://perma.cc/Z3A9-JSBE].

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] Sam Rabiyah & Rachel Holliday Smith, *In Near-Daily Protests, Tenants Demand a Stop to Rent-Stabilized Apartment Vacancies*, The City (Nov. 3, 2022), https://www.thecity.nyc/housing/2022/11/3/23439366/tenants-protest-rent-stabilized-apartment-vacancies [https://perma.cc/Z3A9-JSBE].

[95] *Id.*; *see 2022 Income and Expense Study*, N.Y. City Rent Guidelines Bd. (Mar. 31, 2022), https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2022/03/2022-IE-Study.pdf [https://perma.cc/3BAY-LP8K].

Advocates offer solutions to the issue at hand. For instance, public advocate Jumaane Williams stated that "the city needs legislation to register and document vacancies, contends landlords should be penalized for holding empty apartments, and says the city should explore options to acquire these units before more zombie units further terrorize our streets."[96] Advocates also want DHCR to come out and make public the data revealing which apartments are vacant, as well as the rents per apartment unit.[97]

Lastly, as eviction case filings reached their highest levels since 2020, less than 10% of tenants facing an eviction received the free legal representation to which they are entitled.[98] Without proper appointed representation, tenants will be kicked out of their rent-stabilized units and forced to either live somewhere more expensive or revert to homelessness.[99] Thus, a solution is needed to ensure that landlords and tenants alike can reach eviction agreements via more cordial, inviting means that benefit each of the parties involved.

3. Why New York City Needs Formal Guidelines Regarding the Eviction of Rent-Stabilized Tenants

Current eviction regulations for rent-stabilized units are confusing, inconsistent, and unobliging, often resulting in downsides for landlords and tenants alike. As previously discussed, tenants in rent-regulated units are susceptible to mistreatment by their landlords since they are paying below market rate, while landlords are subject to receive a significantly lower income than market rate would allow and are unable to evict tenants to improve the building or build a high rise. Without formal guidelines detailing the proper and recommended procedure for landlords to evict their rent-stabilized tenants, landlords and tenants are wasting their time, energy, and resources hiring lawyers, going to court, and constantly negotiating deals in an informal setting among other things.

4. The Benefits of New Construction to New York City Residents

Although New York City is the largest city in America, its housing shortage deeply affects this city's citizens. Recently, the supply of housing in New York City has not been able to keep pace with

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[96] Rabiyah & Smith, *supra* note 89.

[97] *Id.*

[98] *Id.*

[99] *Id.*

growing demand.[100] As a result of New York City's housing crisis, rents are higher, apartments are more valuable, and it is harder for middle and low-income people to reside in the city.[101] In efforts to remedy the housing crisis, large-scale developments are now being considered.[102] While there is no perfect solution to the daunting housing crisis at hand, city council members intend to contribute to the creation of more housing within the five boroughs.[103] For instance, Councilmember Tiffany Cabán announced that the city will build the Halletts North project:—a development along waterfront property in Astoria, Queens with 1,340 affordable apartment units.[104] Likewise, another recently approved development was the Bruckner Boulevard rezoning in the Throggs Neck section of the Bronx, with 349 units.[105] There is one more massive proposal in the works that the Council has yet to vote on, which would create 2,845 units in Astoria.[106]

In addition to the creation of more affordable housing kickstarted by city councilmembers, new developments from private landlords are also needed to alleviate the lack of housing and soaring rents from New York City's housing crisis. According to New York City Mayor Eric Adams, "[the city] also need[s] to speed up the process to allow people who want to make private investments today to create housing."[107] Landlords, however, are in the business of creating new developments with the goal of making a significant profit. Often, landlords and property owners alike aim to profit on the fact that there are citizens willing to pay more in gentrifying neighborhoods.[108] As a result, New York City councilmembers also hope to pass the Good Cause bill, stating that one must have a

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100 Sean Campion, *Strategies to Boost Housing Production in the New York City Metropolitan Area*, Citizens Budget Comm'n (Aug. 26, 2020), https://cbcny.org/research/strategies-boost-housing-production-new-york-city-metropolitan-area [https://perma.cc/H3KB-T47P].

101 James Barron, *Why the Rent is So High*, N.Y. Times (Aug. 8, 2022), https://www.nytimes.com/2022/08/08/nyregion/why-the-rent-is-so-high.html [https://perma.cc/4D6M-HBX9].

102 Emily Ngo, *To Solve NYC's Housing Crisis, Large-Scale Developments Are Being Considered*, Spectrum News (Oct. 14, 2022, 5:15 PM), https://www.ny1.com/nyc/all-boroughs/housing/2022/10/14/to-solve-nyc-s-housing-crisis--large-scale-developments-are-being-considered [https://perma.cc/FL9F-RSPY].

103 *Id.*

104 *Id.*

105 *Id.*

106 *Id.*

107 Emily Ngo, *To Solve NYC's Housing Crisis, Large-Scale Developments Are Being Considered*, Spectrum News (Oct. 14, 2022, 5:15 PM), https://www.ny1.com/nyc/all-boroughs/housing/2022/10/14/to-solve-nyc-s-housing-crisis--large-scale-developments-are-being-considered [https://perma.cc/FL9F-RSPY].

108 *Id.*

specific reason to evict somebody.[109] This bill would be beneficial in that it would not allow landlords to evict tenants in order to replace them with a more high-paying tenant; however, landlords of rent-stabilized units will still find loopholes and ways to try to evict their tenants, resulting in unwanted disputes and potential litigation.[110]

5. Local Land Use Regimes and Issues in High-Rise Development

Although developers seek to build high-rises to generate more revenue and increase housing stock and their portfolios, local land use regimes often limit these aspirations.[111] Limitations include air rights and floor area ratios. Air rights, or "excess development rights," are "floor area that is allowed by zoning but has not been constructed or used."[112] For example, in a zoning district that allows a Floor Area Ratio of 5.0, a 10,000 square foot property may be developed with up to 50,000 square feet of floor area.[113] If the property contains a building that has only 40,000 square feet of floor area, the property has 10,000 square feet of air rights.[114] Floor Area Ratio, on the other hand, is a "mathematical formula that determines how many square feet can be developed on a property in proportion to the lot area."[115] The property area is "multiplied by the FAR factor with the result being the maximum floor area allowed for a building on the lot."[116] Limitations vary depending on several factors, including the size and shape of the property, its location, and the zoning district in which it is located.[117] Thus, these limitations can get in the way of landlords' hopes of demolishing rent-stabilized apartment buildings in order to construct a more updated building or a high-rise.

Besides restrictions from land use regimes, redevelopment in New York City typically tends towards luxury.[118] When a landlord builds a tall building, there is hardly a difference in

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109 *Id.*

110 *Id.*

111 *New York City Air Rights*, Rosenberg & Estis, P.C., https://www.rosenbergestis.com/in-the-news/new-york-city-air-rights/ [https://perma.cc/MEK5-6QKX] (last visited Nov. 19, 2022).

112 *Id.*

113 *Id.*

114 *Id.*

115 Jorge Fontan, *Floor Area Ratio FAR Zoning Calculations*, Fontan Architecture (Apr. 12, 2022), https://fontanarchitecture.com/floor-area-ratio-zoning-far/ [https://perma.cc/5JNZ-RX56].

116 *Id*.

117 Rosenberg & Estis, P.C., *supra* note 111.

118 Kim Velsey, *When a New High-Rise Means Less Housing*, Curbed (July 21, 2022), https://www.curbed.com/2022/07/bigger-building-fewer-apartments-nyc.html [https://perma.cc/D8ZN-J9VG].

construction cost between a luxury apartment and a simpler one.[119] Landlords, however, are incentivized by the difference in selling price.[120] Likewise, landlords often do not care whether or not they build more apartment units; instead, they seek to build less luxurious units for a higher cost. For instance, a five-story tenement on 75th Street and Third Avenue was recently demolished and replaced with an eighteen-story apartment building.[121] In the spring of 2021, the site sold to luxury condo developer EJS, intending to build thirty-eight apartments with no retail space.[122] The low-rise tenement that the high-rise is replacing initially had a total of forty-three units, in addition to retail space.[123] Thus, the building was bought by a luxury developer and instead of adding more units and housing to the New York City housing market, a bigger building with fewer units was constructed which is relatively common as of recently.[124]

While limitations to new construction in New York City exist and landlords often construct new buildings which benefit the wealthy rather than the common New Yorker, knocking down small tenements with rent-stabilized units and building a high-rise would still create more housing.[125] As a result, with the creation of more and more housing, rents in general will go down, and the New York housing stock will slowly become more affordable.[126]

IV. Proposal

A. *Why Landlords and Tenants Especially Warrant Mediation*

Mediation has not typically been used to help resolve landlord-tenant disputes regarding issues of rent-regulation.[127] However, the problem of abusive tenant displacement in New York City is now particularly inauspicious.[128] The feelings of frustration and marginalization amongst longtime residents who are displaced by evictions grow as landlords often turn to aggressive and abusive tactics to

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119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.*

123 Kim Velsey, *When a New High-Rise Means Less Housing*, Curbed (July 21, 2022), https://www.curbed.com/2022/07/bigger-building-fewer-apartments-nyc.html [https://perma.cc/D8ZN-J9VG].

124 *Id.*

125 Rosenberg & Estis, P.C., *supra* note 111.

126 Barron, *supra* note 101 .

127 Rotondaro & Ewing, *supra* note 50.

128 Willis, *supra* note 42.

compel these residents to leave.[129] As discussed previously, without formal eviction guidelines for rent-stabilized tenants, eviction attempts by landlords often result in aggressive buyout tactics, mistreatment and harassment of tenants, engaging in illegal construction on the building, and failing to provide the tenants with utilities, repairs, and other necessary services.[130] Laws such as the Tenant Protection Act of 2008[131] and the Housing Stability and Tenant Protection Act of 2019 provide a bit of relief from harassment and these cunning landlord practices; however, these laws fail to address coercive buyout tactics.[132] The Tenant Protection Act does provide certain safeguards for tenants, such as the illegality of the interruption of essential services, yet aggressive buyout tactics on behalf of landlords is neither mentioned nor covered by this law.[133] Landlords' buyout offers, "which are often coupled with other means of 'intimidat[ing] or pressur[ing]' longtime residents to leave, epitomize the 'injustice of community upheaval and working-class displacement [and] also . . . the erosion of affordable housing' in rapidly gentrifying communities."[134]

Landlords and tenants would both benefit from the implementation of mediation as a means to address and resolve disputes over rent-regulated units. Data shows that resolving a single dispute outside of court, rather than going to trial, "is the most rational business choice from an economic viewpoint."[135] Eviction court is unpredictable, costs a significant amount of money and time, and is typically inefficient.[136] Likewise, the average cost of an eviction is $3,500 to $10,000 without even factoring in consultations with an attorney, going to court, among other expenses.[137] Mediation, on the other hand, is significantly more affordable—and oftentimes free—and has a higher success rate, deeming it a solution for these types of disputes.[138]

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129 *Id.*

130 *Notorious Landlord, Raphael Toledano, To Pay $3 Million, Other Penalties for Harassing NY Tenants*, Off. N.Y. St. Att'y Gen. (June 20, 2019), https://ag.ny.gov/press-release/2019/notorious-landlord-raphael-toledano-pay-3-million-other-penalties-harassing-ny [https://perma.cc/MSD2-ENTK].

131 N.Y.C. Loc. L. No. 7 (2008).

132 Fisher, *supra* note 49, at 494.

133 *Id.*

134 *Id. See also* Tom Slater, *The Eviction of Critical Perspectives from Gentrification Research*, 30 Int'l J. Urb. & Reg'l Rsch. 737, 737 (2006).

135 *Landlord Tenant Mediation: A Modern Approach to Tenant Issues*, Avail (Feb. 7, 2022), https://www.avail.co/education/articles/landlord-tenant-mediation-a-modern-approach-to-tenant-issues [https://perma.cc/3BCC-869F].

136 *Id.*

137 *Id.*

138 *Id.*

B. *Benefits of Mediation Generally and in Housing Disputes*

Mediation is an affordable, convenient, voluntary, and confidential service that helps parties in dispute reach their own settlement.[139] Instead of spending time and money going through litigation and standing in front of a judge to make a decision, the parties meet with a trained mediator who helps the party make their own decision on how to settle the dispute.[140] If a settlement is reached, it is put into writing, signed by each party, and becomes a legally binding contract that is enforceable in court.[141] In order for parties to engage in mediation, there are no filing fees, both day and evening sessions are available, settlements can often be reached in one to two hours, you lose no rights by trying to resolve your dispute through mediation, and all conversations during sessions are confidential.[142] Mediation allows each party to speak their truth and be heard, which both informs the trained mediator on the situation at hand and allows the people in dispute to better understand each other.[143] Lastly, mediation works. Parties who reach their own settlement through mediation sessions are more likely to comply with the settlement reached.[144]

C. *Benefits of Mediation Specifically in Rent-Stabilized Landlord-Tenant Eviction Disputes*

Mediation is a better alternative to going to DHCR, hiring attorneys to negotiate buyouts, or forcing landlords to relocate tenants and pay the difference in the tenant's old and new rent. First, mediation is inherently a more just and effective dispute resolution approach than court evictions. Court systems are overburdened, inefficient, and public trust and confidence is often undermined. Landlords and tenants alike may not feel as though the court system protects their rights and interests. Mediation, in contrast, helps landlords and tenants talk through their differences in a more calm and

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139 *Resolving Your Case Through Mediation in Civil Court of the City of New York*, N.Y. Ct. Sys. (Jan. 6, 2014), https://www.nycourts.gov/courts/nyc/civil/pdfs/mediation.pdf [https://perma.cc/9RWS-N4P9].

140 *Id.*

141 *Id.*

142 *Id.*

143 *Id.*

144 *Resolving Your Case Through Mediation in Civil Court of the City of New York*, N.Y. Ct. Sys. (Jan. 6, 2014), https://www.nycourts.gov/courts/nyc/civil/pdfs/mediation.pdf [https://perma.cc/9RWS-N4P9].

increasingly inviting environment without incurring the time and expenses of a proper courthouse.

While mediation has been used in the past to attempt to prevent landlords from evicting tenants, mediation can also be used to make both parties benefit equally from the deal at hand.[145] Landlords who aspire to knock down their buildings in order to build a high-rise or renovate the entire building can kindly talk tenants out of leaving their rent-stabilized units while offering them an alternative to their original set-up, such as a lump sum, the difference in their new and old rent, or helping find them a new, reasonable apartment in a controlled and moderated setting rather than having landlords simply "buying them out" and leaving them to struggle on their own. Rather than being nasty and forceful and taking drastic measures to force tenants to leave, such as failing to provide tenants with utilities, engaging in mediation would result in a more just and fair settlement. Landlords and tenants can work through their differences in a calmer and more collected environment under the guidance of a trained mediator.

In 2016, the Baltimore City District Court piloted a Rent Court Mediation program for five months, and its results give hope for a mediation program in New York City between landlords and tenants of rent-regulated units.[146] The District Court of Maryland's Alternative Dispute Resolution Office ("ADR Office") developed a program to introduce volunteer mediators to Pilot procedures.[147] The pilot ran during the course of a twenty-three week program, and over the course of this pilot, on average, one mediation occurred for each volunteer day. The average length per mediation session was 1.07 hours.[148] The program received seventy-three requests for ADR services and forty-three referrals to the ADR practitioner.[149] Of the forty-three referrals to ADR, thirty-seven resulted in mediation.[150] Thus, ADR practitioners conducted thirty-seven mediations, and the mediations proved utterly successful, as thirty agreements resulted.[151] Put simply, eighty-one percent of the cases that were sent to mediation reached an agreement.[152]

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145 *Id.*

146 *Report on the 2016 Rent Court ADR Pilot for the District Court of Maryland in Baltimore City*, Ctr. Disp. Resol. Univ. Md. Francis King Carey Sch. L. (May 2017), https://mdcourts.gov/sites/default/files/import/district/adr/pdfs/rentcourtreport.pdf [https://perma.cc/6T4M-NFPB].

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.*

151 *Report on the 2016 Rent Court ADR Pilot for the District Court of Maryland in Baltimore City*, Ctr. Disp. Resol. Univ. Md. Francis King Carey Sch. L. (May 2017), https://mdcourts.gov/sites/default/files/import/district/adr/pdfs/rentcourtreport.pdf [https://perma.cc/6T4M-NFPB].

152 *Id.*

As a result of the Baltimore Rent Court Mediation's Pilot, ADR—mediation, in particular—clearly and successfully provided a positive experience for practitioners and participants alike.[153] Data from participant surveys consistently point to participant satisfaction with the ADR process, particularly the ability to talk and be heard.[154] The Baltimore City Rent Court's ADR program provides a framework with potential for other jurisdictions and can be a model for implementation in New York City, a place where landlord-tenant disputes are extremely common.[155]

D. *Potential Obstacles for an Eviction-Based Mediation Program*

Some may argue that since this program results in tenants being evicted, this is a negative outcome since evictions contribute significantly to the growing epidemic of homelessness, housing insecurity, and financial insecurity in this country. Likewise, others may argue that landlords benefit disproportionately to the tenants in these situations. However, the proposed system below is designed to be mutually beneficial for both landlords and tenants.

E. *The Need for Mediation Between Rent-Stabilized Tenants and Their Landlords*

Rent-stabilization laws in New York City prevent new buildings from being built as landlords are unable to evict tenants from rent-regulated units in order to demolish an older building and construct a high rise building instead, affecting both landlords and tenants alike. While landlords are unable to increase their income from owning a five-unit building rather than a multi-hundred-unit high-rise in its place, tenants are also stuck living in unrenovated, old apartments and often time living in those conditions solely due to the unit's low cost. Similarly, landlords' inability to construct bigger buildings that house significantly more people is contributing to the housing crisis. This issue prevents new buildings from being built, which, arguably, would reduce the price of apartment units in New York City. As these issues are worse than ever in 2023, landlords and tenants would greatly benefit from a mediation program implemented for both sides of the disputes to benefit.

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153 *Id.*

154 *Id.*

155 *Id.*

F. *Details of the Proposed Mediation System*

New York City should establish a formal guideline where landlords can remove tenants in rent-stabilized units, place them in temporary housing—such as another one of the landlord's properties—or pay the difference in their rent until the landlord's desired demolition and high-rise construction is complete. Then, landlords will move the tenants back into the improved building once construction is complete. When initially moving a tenant into another property, the tenant must be given proper notice and consent before making the move. The new unit must be in a condition that is safe and fit for habitation, and the apartment layout, square footage, and details regarding the temporary unit and building itself will be discussed via mediation. Once the landlords move their tenants back into the new and updated units after demolition and construction is concluded, they will be required to give these tenants a similar price to the one they were initially paying in their rent-regulated unit, as well as a similarly sized apartment. This way, landlords will be making an increasingly larger income than they were from their small building with rent-stabilized units, and tenants will live in new and improved buildings that may have units with new appliances and state-of-the-art building amenities with little to no difference in price.

In order for this proposal to be put to life, it is important that landlords communicate closely and kindly with the tenants to inform them of proposed construction plans and to discuss any potential relocation options. As a means of achieving this goal that benefits both the landlords and the tenants, both parties must engage in mediation with open minds to clarify, talk through, and decide upon the terms of their specific agreement. Rather than one side benefitting from the results of devious tactics or a buyout, rent-regulated landlord-tenant eviction mediation would result in resolutions crafted and agreed to by both sides.[156] Mediation will incentivize the parties to work together to reach a mutually beneficial solution that trumps the hardships of court.

The creation of formal eviction guidelines mandated through mediation can provide clear and consistent rules for both landlords and tenants to follow, reducing the likelihood of misunderstandings and conflicts. Such guidelines may entail the following:

1. As soon as a landlord decides that he or she intends to: (i) make significant improvements to rent-stabilized units;

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[156] AVAIL, *supra* note 135.

or (ii) demolish a building with rent-stabilized units in order to construct a high rise, he or she must notify the tenant as soon as possible, providing notice of the upcoming change.

2. When providing notice to the tenant—and rather than sending an eviction notice to the tenant, simply contacting the tenant to engage in a buyout offer, or creating hazardous conditions in the apartment to drive the tenant out themselves—the landlord must ask the tenant if they are willing to engage in mediation and attach a notice explaining what mediation is, its benefits, etc.
3. If both parties agree to a mediation session, the mediation will be led by a trained landlord-tenant mediator who undergoes a background check to ensure he or she is not biased or acquainted with the landlord or tenant and can help shape the discussion by providing the following alternatives for tenants:
    i. Being relocated to a different building by the landlord until the renovation or demolition is complete. Once the renovation/demolition is complete, tenant will be moved back into a similarly sized apartment unit. The landlord will subsidize the move, pay all moving expenses, and pay the difference in rent between the tenant's current rent-stabilized apartment and their temporary new unit. The Landlord can either move the tenant into another one of their buildings or a building of the tenant's choosing as long as the price point is within a reasonable amount. This way, landlords will have the ability to make their desired improvements to their property while tenants will be living in new, updated units at the same or a similar price point to what they were already paying.
    ii. Talking through and negotiating a deal where the landlord pays the tenant a sum of money to move out of the rent-stabilized unit for good.
    iii. The landlord permanently moving the tenant to another building and paying the difference in the tenant's new rent for a specified number of years, depending on the circumstances.

The eviction guidelines stated above and established via mediation can provide an efficient and orderly process for resolving disputes and evicting tenants when necessary. In addition to providing an effective means of resolving disputes, the use of mediation and

formal eviction guidelines can also help to promote a sense of fairness and justice in the housing market. Rent-stabilized tenants, who are often low-income, vulnerable, and in need of affordable housing, may feel that the legal system is stacked against them.[157] By providing an alternative means of resolving disputes that is more equitable and less adversarial, the proposed mediation system with formal eviction guidelines can help to promote a sense of fairness and justice in the housing market, leaving all parties at an advantage in the end.

While mediation can greatly benefit landlords and tenants in eviction disputes, it is important that landlords work closely with tenants to find suitable relocation options that meet their needs. This can include providing financial assistance for moving expenses and ensuring that the new rental units are of comparable size, quality, and in a similar location to the original rental units. It is also important for the landlord to be transparent in all the steps of the process, clear in his or her communication, and in all the details of the eviction and relocation process. Furthermore, the landlord should comply with laws and not break any laws currently in place, avoiding any legal issues that may arise.

Mediators for rent-regulated landlord-tenant eviction cases should be selected based off their qualifications, training, and experience in the field. While mediators typically do not have specific knowledge on the types of cases that they are mediating, the mediators in my proposed system should be well-versed in local laws and regulations that govern landlord-tenant eviction cases. The mediators must be unbiased, meaning they must undergo a background check to ensure they have not worked with the parties whom they will mediate for and have no prior ties to them. Landlords and tenants will work together to choose the mediator to ensure that they are both happy with whom they are working with, that they can trust the mediator, and that there will be no bias present. The cost of the mediator must be paid by the landlord, as the landlords in these scenarios are ultimately the parties bringing the cases and trying to evict the tenants. In addition, while mediators may already work at a reputable organization or agency specializing in landlord-tenant mediation, mediators may also be volunteers who are well-versed in the dispute area, as the volunteer mediators in the Baltimore Rent Court Mediation's Pilot proved to be extremely successful in their work.[158]

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157 *Rent Control in NYC: Everything You Need to Know*, Bungalow (Feb. 1, 2022), https://bungalow.com/articles/rent-control-in-nyc-everything-you-need-to-know [https://perma.cc/95UV-M28A].

158 Ctr. For Disp. Resol. Univ. of Md. Francis King Carey Sch. L., *supra* note 151.

IV. Conclusion

Creating a mediation system and formal eviction guidelines for landlords and their rent-stabilized tenants can provide a win-win situation for both parties by providing a fair and efficient means of resolving disputes, promoting a sense of fairness and justice in the housing market, and protecting the rights of both parties. While evicting rent-stabilized tenants in order to build a high-rise can be a complex process, effective communication, following proper legal procedures, and mediation can help make the process as auspicious as possible.

More specifically, by utilizing the proposed mediation system to allow landlords to construct high rises or improve their buildings by removing rent-stabilized tenants and either placing them in different buildings of their choice or relocating tenants until construction is complete, New York City will: (i) develop an increased housing supply; (ii) likely see a decrease in rents across the city as housing becomes more widely available; and (iii) both parties involved in the mediation will likely end up with a beneficial, agreeable, advantageous solution. The implementation of these mechanisms should be a top priority for policymakers, landlords, and tenants alike.

VICTIM-OFFENDER MEDIATION: A MISSING COMPONENT OF A MULTI-PRONGED APPROACH TO REDUCE NEW YORK CITY SUBWAY CRIME

*Elizabeth Neuburger**

I. Introduction

The subway is a vital lifeline of New York City ("NYC"), as many rely on the quick, inexpensive transportation. However, NYC subway trains and stations have recently seen a massive surge in criminal activity. In 2022 alone, in January, a woman on her way home was pushed onto the train tracks by a man with a history of violence and mental health issues.[1] In April, multiple riders were injured and ten were shot when a man, with multiple prior arrests, set off smoke grenades and opened fire in a crowded subway car during rush hour.[2] In May, a man, on his way to brunch, was shot in the chest and killed on a train by another man with years of criminal history.[3]

Clearly, many incidents have occurred in 2022 alone,[4] but these three examples do not begin to encompass the problem. From 2021

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1 Anne Branigin, *For Many, Michelle Go's NYC Subway Death Highlights Failures in Public Safety for Women*, Wash. Post (Jan. 19, 2022, 4:00 PM), https://www.washingtonpost.com/lifestyle/2022/01/19/michelle-go-public-safety-women/ [https://perma.cc/5B4X-WJHQ].

2 Jonah E. Bromwich et al., *Police Search for Gunman in Attack on Brooklyn Subway*, N.Y. Times (Apr. 15, 2022), https://www.nytimes.com/live/2022/04/12/nyregion/brooklyn-subway-shooting [https://perma.cc/92RC-93XP]; *see also* Chad Pradelli & Cheryl Mettendorf, *Who is Frank James? Digging into Brooklyn Subway Shooter's Lengthy Criminal History*, 6ABC Action News (Apr. 14, 2022), https://6abc.com/frank-james-brooklyn-shooter-criminal-background-subway-shooting-gunman/11745301/ [https://perma.cc/U9QP-UZML].

3 Nicole Gelinas, *NYC Subway Crime is Soaring Because We No Longer Bother to Prevent it*, N.Y. Post (May 28, 2022, 1:58 PM), https://nypost.com/2022/05/28/nyc-subway-crime-is-soaring-because-we-no-longer-prevent-it/ [https://perma.cc/5NS7-7MAZ].

4 Sarah Vasile, *Brooklyn Subway Attack just the Latest in String of 2022 Transit Crimes*, PIX11 (Apr. 12, 2022, 9:45 PM), https://pix11.com/news/local-news/brooklyn-subway-attack-just-the-latest-in-string-of-2022-transit-crimes/ [https://perma.cc/GD6T-E3EX].

to 2022, subway crime has increased by nearly sixty-five percent.[5] By April 2022, the New York City Police Department ("NYPD") reported 617 transit crimes for the year.[6] Moreover, in 2022, less than half of New York voters felt safe using the subway system in comparison to the seventy-six percent that felt comfortable in 2015.[7]

Violence results in arrests and prosecutions that are handled in a traditional adversarial criminal legal system, focusing solely on the party who broke the law.[8] However, this approach can actually create additional harm because it is exclusionary, punitive and shameful in nature.[9] Instead, restorative justice, a practice that relies on conflict resolution through dialogue and mediation to provide justice and healing to the harmed victims, perpetrators and the community, should be used.[10] The clearest operationalization of restorative justice is expressed through victim-offender mediation programs.[11]

Victim-offender mediation involves a perpetrator and a victim voluntarily meeting to discuss the impact of the harm with the help of a mediator, and, ultimately, coming to a mutually agreed upon amount and type of restitution.[12] The process gives victims and offenders the chance to "make things right" and enables some victims to recover from the effects of the crime while obtaining an element of emotional closure.[13] While this process is typically utilized for "minor or non-violent cases" such as property offenses and theft, it has been used, and even recommended, to address the effects of more serious crimes such as aggravated assault and

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[5] Emmanuel Felton & Joanna Slater, *In New York, Subway Attack Adds to Fears that City has Grown Dangerous*, Wash. Post (Apr. 12, 2022, 8:03 PM), https://www.washingtonpost.com/nation/2022/04/12/new-york-subway-shooter-crime/ [https://perma.cc/DVW6-ZRFR].

[6] Noah Pransky, *Is Crime in NYC Actually Soaring? 2022 Crime Rates in Perspective*, LX News (Apr. 14, 2022, 11:45 AM), https://www.lx.com/community/nyc-crime-rates-how-dangerous-is-new-york-city/51473/ [https://perma.cc/8AGD-ZZS2].

[7] *More Than 6 Out Of 10 NYC Voters Optimistic About Mayor Adams, Quinnipiac University New York City Poll Finds; Record Number Say Crime is a Very Serious Problem in NYC*, Quinnipiac U./Poll (Feb. 9, 2022), https://poll.qu.edu/poll-release?releaseid=3834 [https://perma.cc/Y6K5-G4V2].

[8] Jen K. Molloy et al., *An Exploratory Integrative Review of Restorative Justice and Social Work: Untapped Potential for Pursuing Social Justice*, 59 J. Soc. Work Educ. 133, 133 (2021).

[9] *Id.* at 133–34.

[10] Mike Niemeyer & David Shichor, *A Preliminary Study of a Large Victim/Offender Reconciliation Program*, 60-SEP Fed. Prob. 30, 30 (1996); Molloy et al., *supra* note 8, at 1.

[11] Niemeyer & Shichor, *supra* note 10 at 30.

[12] *Id.*

[13] *Id.*; Stephen Hooper & Ruth Busch, *Domestic Violence and the Restorative Justice Initiatives: The Risks of a New Panacea*, 4 Waikato L. Rev. 101, 103 (1996).

murder.[14] Family members or other support persons who may be involved in the mediation can also express their concerns and get answers to questions.[15]

While a multi-pronged approach is necessary to reduce the increased violence in the NYC subway system, victim-offender mediation is one component that has yet to be explored in this context. Thus, this Note will focus on the potential benefit of victim-offender mediation between subway crime victims and perpetrators. Using victim-offender mediation in this context as one element to reduce NYC subway crime will benefit the community of NYC subway riders by decreasing the likelihood of recidivism, while instilling a feeling of justice for subway crime victims. This Note does not propose that victim-offender mediation will solve all crime and mental health issues pertaining to the NYC subway system, but merely that victim-offender mediation is one ingredient that has been missing from the various proposals to ultimately reduce subway crime.

II. Background

While the recent increases in violent crime have certainly alarmed residents and commuters,[16] fear of the subway is far from new.[17] During the 1970-80s, trains were the playground of NYC's criminals.[18] Since the subway was filthy, noisy, dangerous, and filled with graffiti, subway riders often feared being victims of

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[14] *See* Tim Prenzler & Hennessy Hayes, *Victim-Offender Mediation and the Gatekeeping Role of Police*, 2 Int'l. J. Police Sci. & Mgmt. 17, 28 (1999); Hooper & Busch, *supra* note 13, at 103–04; Niemeyer & Shichor, *supra* note 10 (The American Bar Association has recommended that local, state and federal agencies take steps to incorporate these programs into their criminal justice process for violent and nonviolent crimes).

[15] Mark S. Umbreit, The Handbook Of Victim Offender Mediation 134 (Jossey-Bass 2001).

[16] Ali Watkins, *Along a Subway Line's 31 Miles, Nagging Crime Fears Test Riders' Resolve*, N.Y. Times (Aug. 8, 2022), https://www.nytimes.com/2022/08/08/nyregion/subway-crime-ridership-nyc.html [https://perma.cc/JP8T-GCRG].

[17] David A. Graham, *The Subway-Crime Death Spiral*, Atlantic (Apr. 14, 2022), https://www.theatlantic.com/ideas/archive/2022/04/new-york-subway-shooting-transit-crime-death-spiral/629554/ [https://perma.cc/PVE6-AMTW].

[18] *Learn About the Most Notorious NYC Subway Crimes and Incidents*, Timeout (Oct. 14, 2013), https://www.timeout.com/newyork/travel/learn-about-the-most-notorious-nyc-subway-crimes-and-incidents [https://perma.cc/HW2L-EUR7].

crime.[19] Graffiti artists took over in the 1970s,[20] and small crimes like graffiti led to bigger crimes.[21] By September 1979, there were 250 felonies reported per week within the subway system.[22] During the 1980s, subways were widely viewed as dangerous,[23] as 2.6 percent of all NYC felonies reported during 1984 occurred on the subways.[24] With crime rates skyrocketing, the NYC subway proved to be the most dangerous transit system in the world.[25] Moreover, while there has been a recent trend of increased crime in the subway system, it is a far cry from the crime of the 1980s and 1990s.[26] In a study of violent offenders who pushed or attempted to push victims on to the subway tracks in NYC from 1975 to 1991, it was found that ninety-five percent of offenders were psychotic and sixty-five percent were homeless.[27] Moreover, most of these offenders had extensive mental health and criminal histories, including psychiatric hospitalization and several prior arrests and convictions, often for violent crimes.[28]

A series of initiatives was introduced to bring subway crime to a halt. Mayor Abraham Beame decided to close the rear cars of subway trains, attempting to keep riders closer to the conductor's car and presumably safer.[29] Thus, in July 1974, the Metropolitan Transit Authority ("MTA") shut down the rearmost cars of trains at night to combat the surge of violence,[30] but this proved ineffective.[31]

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19 Damaris Pichardo, *The Subway System in the 1970s-1980s*, TLTC Blogs, https://blogs.shu.edu/nyc-history/subway-system-1970-1980s/ [https://perma.cc/57WK-CEXB] (last visited Oct. 12, 2022).

20 Steven Thomas, *History of the New York City Subway*, TopView, https://www.topviewnyc.com/packages/history-of-the-new-york-city-subway [https://perma.cc/9VLP-XFKY] (last visited Oct. 12, 2022).

21 Pichardo, *supra* note 19.

22 Nikola Budanovic, *With Over 250 Felonies in a Week, NYC Subway in the 1970s was the Most Dangerous Place on Earth*, Vintage News (July 11, 2018), https://www.thevintagenews.com/2018/07/11/nyc-subway-1970s/?safari=1 [https://perma.cc/B7EE-JAFD].

23 *See* Watkins, *supra* note 16.

24 Pichardo, *supra* note 19.

25 Budanovic, *supra* note 22.

26 Katie Corrado, *Is NYC Transit More Dangerous Now Than in the 1980s & 1990s?*, PIX11 (Oct. 10, 2022, 11:05 PM), https://pix11.com/news/local-news/is-nyc-transit-more-dangerous-now-than-in-the-1980s-and-1990s/ [https://perma.cc/FZ49-6C3U].

27 Daniel A. Martell & Park E. Dietz, *Mentally Disordered Offenders Who Push or Attempt to Push Victims onto Subway Tracks in New York City*, 49 Archives Gen. Psychiatry 472, 473 (1992) ("An offender was classified as *psychotic* at the time of the offense if the records described the presence of hallucinations, delusions, or formal thought disorder.").

28 *Id.* at 472.

29 Nicole Gelinas, *How Bratton's NYPD Saved the Subway System*, Manhattan Inst. (Aug. 6, 2016), https://www.manhattan-institute.org/html/how-brattons-nypd-saved-subway-system-9132.html [https://perma.cc/HJ54-GJ87].

30 Budanovic, *supra* note 22.

31 Gelinas, *supra* note 29.

In response to the fear of victimization and fear of the subway in general, Mayor Ed Koch introduced a new program in 1979 to decrease subway crime by placing transit police officers and city officers on all subway trains and in most stations during evening hours.[32] Patrolling subway stations was a required part of city police officers' jobs.[33] The plan also called for the use of shorter trains to cut down on the number of empty cars and isolated passengers, because secluded passengers were deemed to be a reason why some people were victimized over others.[34] Nevertheless, this program was terminated because of the city's budget deficits, causing hundreds of transit police officers to lose their jobs.[35] Also in 1979, a civilian-crime watch group called the Guardian Angels, led by Curtis Sliwa, began unarmed patrol of the subway in an effort to discourage crime to make up for the lack of police patrol.[36] Members rode the subway between the toughest stops looking to detain criminals for police to arrest.[37] Some New Yorkers viewed the group as a solace, but others saw the group as "vigilantes who undermined police efforts and targeted young men of color."[38] Moreover, many questioned Sliwa's motives, specifically whether he was genuinely a Good Samaritan or merely seeking publicity.[39] In 1992, Sliwa admitted to lying about six incidents, including fake attacks on himself and the group's members.[40] He defended his actions on the ground that lying was the best way to gain media attention and recruit new group members.[41] While the group has received widespread support from former New York mayors, government investigations from the 1980s demonstrated that the group "had a limited effect on crime rates, although they reported a positive effect on citizens' perception

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32 Pichardo, *supra* note 19.

33 *Id.*

34 *Id.*

35 *Id.*

36 Mark S. Feinman, *The New York Transit Authority in the 1970s*, NYCSubway (Nov. 19, 2002), https://www.nycsubway.org/wiki/The_New_York_Transit_Authority_in_the_1970s [https://perma.cc/S99T-F579]; *How We Got Our Start,* Guardian Angels, http://guardianangels.org/about/history [https://perma.cc/SY6P-UP42] (last visited Oct. 12, 2022).

37 Feinman*, supra* note 36.

38 Gwynne Hogan, *Curtis Sliwa's Long, Strange, Sometimes Fabricated Road to Becoming a 2021 Mayoral Candidate*, Gothamist (Aug. 2, 2021), https://gothamist.com/news/curtis-sliwas-long-strange-sometimes-fabricated-road-to-becoming-a-2021-mayoral-candidate [https://perma.cc/HGP8-QD5U].

39 Susan Pennell et al., Guardian Angels: An Assessment of Citizen Response to Crime 1 (National Institute of Justice 1986).

40 Hogan, *supra* note 38.

41 *Id.*

of safety."[42] The group still patrols the subway today seven days a week.[43]

In 1990, NYC witnessed a record crime wave and action was crucial.[44] Mayor David Dinkins' "Safe Streets, Safe City" plan proposed additional police officers to patrol the transit system daily.[45] The plan promised that by 1994 there would be an officer on every train in the city between the hours of 8 P.M. and 4 A.M.; however, it neglected to do so.[46] Transit police never even attempted to carry out the mandate.[47] Nevertheless, throughout the duration of Dinkins' term, major crime dropped fourteen percent, with murders dropping twelve percent.[48] Thus, little argument was made over the broken promise, as it is hard to fight the proven success.[49]

In the 1990s, when the NYPD joined a citywide effort to combat crime, subway crime dropped dramatically.[50] Bill Bratton was hired by Mayor Rudy Giuliani to lead the city's police force.[51] Subway safety started to improve, and crime declined when Bratton and other leaders focused on cleaning up the system.[52] "Broken windows" policing, which focuses on reducing illegal behavior and going after illegal disorderly acts, reduced crime in the city.[53] "Many attribute New York's crime reduction to specific 'get-tough' policies carried out by former Mayor Giuliani's administration."[54] However, Mayor Giuliani also severely criminalized homelessness, noting that the

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42 Ksenia Baatz, *What We Can Learn from New York City's Guardian Angels*, Yale Daily News (Aug. 25, 2022, 4:21 AM), https://yaledailynews.com/sjp/2022/08/25/what-we-can-learn-from-new-york-citys-guardian-angels/ [https://perma.cc/U7V2-FHZ8].

43 *Id;* Bruce Handy, *Back to the Eighties: Crime, Yucky Subways, and the Guardian Angels!*, New Yorker (Oct. 11, 2021), https://www.newyorker.com/magazine/2021/10/18/back-to-the-eighties-crime-yucky-subways-and-the-guardian-angels [https://perma.cc/4QJQ-A8QC].

44 Richard Perez-Pena, *An Officer on Every Subway Train: a Popular Promise That Disappeared*, N.Y. Times (Mar. 24, 1996), https://www.nytimes.com/1996/03/24/nyregion/an-officer-on-every-subway-train-a-popular-promise-that-disappeared.html [https://perma.cc/MB6D-TM9P].

45 Liz Crotty, *Opinion: NYC Subways Urgently Need More Cops*, Citylimits (Jan. 26, 2021), https://citylimits.org/2021/01/26/opinion-nyc-subways-urgently-need-more-cops/ [https://perma.cc/4QU3-WCB5].

46 Perez-Pena, *supra* note 44.

47 *Id.*

48 Crotty, *supra* note 45.

49 Perez-Pena, *supra* note 44.

50 Thomas, *supra* note 20.

51 Al Baker &. J. David Goodman, *Bratton, Who Shaped an Era in Policing, Tries to Navigate a Racial Divide*, N.Y. Times (July 25, 2016), https://www.nytimes.com/2016/07/26/nyregion/william-bratton-new-york-city-police-commissioner.html [https://perma.cc/HME6-F7W2].

52 Graham, *supra* note 17.

53 Gelinas, *supra* note 29.

54 David R. Francis, *What Reduced Crime in New York City*, NBER (Jan. 1, 2003), https://www.nber.org/digest/jan03/what-reduced-crime-new-york-city [https://perma.cc/L7AN-XQSU].

"[s]treets do not exist in civilized societies for the purpose of people sleeping there," and "[t]he founding fathers never put that in the Constitution."[55]

Currently, it seems like the NYC subway system is heading back in the same direction that was seen in the 1980s. In 2021, when Mayor Bill De Blasio was prompted with the question of how to address the surge in subway violence, he offered no plan, downplayed the surge of subway violence, and merely stated, "if we need to shift NYPD personnel more to the subways, we absolutely will."[56] Moreover, De Blasio insisted the 500-plus officers that the NYPD deployed into the subways towards the beginning of 2021 were sufficient to make riders feel safe.[57]

In February 2022, in response to the escalation of violence, Mayor Eric Adams released a Subway Safety Plan to address public safety concerns.[58] The plan, implemented to reduce subway crime, states that New York must address the interconnected issues of homelessness, unmet mental health needs, substance misuse and violence on the subway platforms and stations.[59] Mayor Adams notes that New York faces two concurrent challenges: the problem of homelessness and of feeling safe within the subway system.[60] The plan outlines a tripartite system created to seamlessly transition New Yorkers in need of care from: (1) outreach, to (2) initial housing and mental health care, to (3) permanent housing and community.[61] Mayor Adams insists this system will be employed by adding response teams throughout New York to connect with the unhoused individuals on the subways, ensuring that those individuals have short and long-term sources of care, support, and housing, and are working with all levels of government to begin

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55 Elisabeth Bumiller, *In Wake of Attack, Giuliani Cracks Down on Homeless*, N.Y. Times (Nov. 20, 1999), https://www.nytimes.com/1999/11/20/nyregion/in-wake-of-attack-giuliani-cracks-down-on-homeless.html [https://perma.cc/M2C4-T7EG].

56 Nolan Hicks, *De Blasio Offers Non-Answer on NYC Subway Mayhem as Kids Go Back to School*, N.Y. Post (Feb. 9, 2021, 4:44 PM), https://nypost.com/2021/02/09/de-blasio-offers-non-answer-on-increased-nyc-subway-violence/ [https://perma.cc/W98B-6SN2].

57 Clayton Guse, *De Blasio Says MTA is Discouraging New Yorkers from Returning to Subways*, N.Y. Daily News (Apr. 13, 2021, 7:09 PM), https://www.nydailynews.com/new-york/nyc-crime/ny-20210413-i6cfhcl4fndzbcw5ca6ouhiwn4-story.html [https://perma.cc/5VBJ-AT8W].

58 *Mayor Adams Releases Subway Safety Plan, Says Safe Subway is Prerequisite for New York City's Recovery*, NYC.Gov (Feb. 18, 2022), https://www1.nyc.gov/office-of-the-mayor/news/087-22/mayor-adams-releases-subway-safety-plan-says-safe-subway-prerequisite-new-york-city-s#/0 [https://perma.cc/3HLR-ZMRZ].

59 *The Subway Safety Plan,* NYC.GOV, https://www.nyc.gov/assets/home/downloads/pdf/press-releases/2022/the-subway-safety-plan.pdf [https://perma.cc/7W2C-852R] (last visited Nov. 6, 2023).

60 *Id.*

61 *Id.*

reforming our broken mental health and housing systems.[62] The plan also calls for an increased police presence in subway cars and on platforms, especially at "high-priority stations,"[63] to assist with enforcing subway rules such as the prohibition on sleeping across subway train seats, decrease aggressive behavior, and enforce a sanitary environment.[64] The plan promises to send thirty specialized teams of police officers, homeless outreach workers, and behavioral clinicians into high-priority subway stations, as well as to create a transitional housing program.[65] Mayor Adams reasons that this approach aims to address "decades of failure" that have led to numerous individuals living and sleeping in the city's subway system.[66] In reference to homelessness in the subway system, Mayor Adams noted that "[y]ou can't put a Band-Aid on a cancerous sore" and "you must remove the cancer and start the healing process."[67]

Flooding the subway system with more police officers, a favorite response of mayors, might provide a short-term feeling of safety for subway riders, but crime cannot be entirely prevented since it is not feasible to have police officers on every train and every platform.[68] This would be a poor investment of resources, and an individual motivated to do massive harm may well still succeed.[69] It is a vicious cycle; subway crime increases when the subway system is more sparingly used, but when violent crime occurs, riders are discouraged from using the subway, which then only makes crime more likely.[70] New York mayors' solutions all lack a common element: using victim-offender mediation as a piece of the puzzle.

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62 *Id.*

63 *Id.* (Noting more than 1,000 additional officers have already been deployed across the system).

64 *Id.*

65 Steven Vago et al., *Mayor Eric Adams' Subway Safety Plan Off to a Slow Start After Violent Weekend*, N.Y. Post (Feb. 21, 2022, 7:46 PM), https://nypost.com/2022/02/21/mayor-eric-adams-nyc-subway-safety-plan-off-to-a-slow-start-after-violent-weekend/ [https://perma.cc/9MTH-89Y6]; WSN Editorial Board, *Editorial: Eric Adams Needs to House the Homeless, Not Attack Them,* Wash. Square News (Feb. 28, 2022), https://nyunews.com/opinion/2022/02/28/adams-subway-safety-is-bad-for-homeless-people/ [https://perma.cc/5NXT-FG47].

66 Ryan W. Miller, *New York Wants to Stop People From Living in the Subways. But Where Will They Go?*, USA Today (Feb. 21, 2022, 3:24 PM), https://www.usatoday.com/story/news/nation/2022/02/21/eric-adams-new-york-city-subway-violence-safety-plan-homelessness/6877425001/ [https://perma.cc/XT9A-MG7Q].

67 *Id.*

68 Graham, *supra* note 17.

69 *Id.*

70 *Id.*

III. Discussion

A. *Defects in Mayor Adams' Subway Safety Plan*

While Mayor Adams' plan suggests promising results, it arguably criminalizes homelessness and poverty, which targets homeless and poor individuals, as opposed to providing long-term, sustainable solutions.[71] While Mayor Adams' plan for the development of permanent housing is arguably a sustainable solution, his plan does not allow this to happen quickly, nor will this happen without the commitment of significant resources. The plan attempts to provide services and shelters to homeless New Yorkers, but "several nonprofit outreach organizations are skeptical of treatment effectiveness."[72] Moreover, instead of creating permanent housing and stabilization beds, homeless rights workers fear that Mayor Adams is coercing the homeless from the subway, giving those individuals no alternatives aside from the shelter system or being left exposed on the city streets.[73] Many homeless individuals find these types of group shelters dangerous or the curfews too restrictive, and are thus more likely to accept safe havens, which are low-barrier shelters with fewer rules and residents.[74] Mayor Adams' plan does not call for sending individuals to safe havens, nor does it provide funds to increase these limited beds.

Without support for organizations that aid homeless New Yorkers, Mayor Adams' plan to fix homelessness places an undue weight on detaining and punishing the unhoused, as opposed to helping them.[75] Instead of fixing the problem successfully, this plan will just push unhoused individuals from one subway line to the next, or from the subway to the city's streets.[76] Moreover, critics argue that pairing police officers with mental health outreach teams can be detrimental in that instead of homeless individuals seeking out outreach teams who want to help them, the homeless will view them as a branch of the police.[77]

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71 Dean Moses, *Accepting Services or Bowing to Ultimatums? Advocates Question Adams' Subway Safety Plan Stats*, AMNY (May 26, 2022), https://www.amny.com/new-york/accepting-services-or-bowing-to-ultimatums-advocates-question-adams-subway-safety-plan-stats/ [https://perma.cc/2DWG-LVB8]; WSN Editorial Board, *supra* note 65.

72 Moses, *supra* note 71.

73 *Id.*

74 Chau Lam, *City's Subway Safety Policy Collides with Realty as Enforcement Begins*, Gothamist (Mar. 4, 2022), https://gothamist.com/news/citys-subway-safety-policy-collides-with-reality-as-enforcement-begins [https://perma.cc/V7A6-K6JL].

75 WSN Editorial Board, *supra* note 65.

76 Lam, *supra* note 74.

77 *Id.*

Therefore, Mayor Adams' plan is unlikely to reduce subway safety problems that many New Yorkers fear, but instead "perpetuates the unending cycle of homelessness," and will be just another ill-fated attempt to address the problem that merely expands NYPD's power over the City's most vulnerable individuals.[78]

B. *Current Policing on NYC's Subway System*

The subway attacks throughout 2022 have put police efforts to control subway crime in the spotlight,[79] as there is a disconnect between police presence and feelings of public safety.[80] While in January 2022, Mayor Adams said he would double the number of police officers patrolling New York's subway system,[81] this has not made the subway system any safer for riders.[82] Rather, violence continued to persist.[83] There were two officers stationed on the platform where Michelle Go was pushed on January 15, 2022.[84] Even with officers stationed at the Sunset Park station in Brooklyn, the April 12, 2022 mass shooting on the northbound N train still occurred and officers failed to stop or detain the attacker.[85] Moreover, an officer at that station asked people who were fleeing the scene to call 911 on their cell phones because his radio was malfunctioning.[86] In October 2022, Governor Kathy Hochul and Mayor Adams announced a plan to increase the presence of police officers in the transit system.[87] Specifically, the "state would help the city pay for an

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78 WSN Editorial Board, *supra* note 65.

79 Ari E. Feldman, *Subway Attack Places Scrutiny on Police Transit Safety Efforts*, Spectrum News N.Y.1 (Apr. 13, 2022, 4:30 PM), https://www.ny1.com/nyc/all-boroughs/news/2022/04/13/subway-attack-places-scrutiny-on-police-transit-safety-efforts [https://perma.cc/LLP8-894P].

80 *Id.*

81 Matthew Guariglia, *The One Thing NYC Shouldn't Rush to Do After the Subway Attack? Increase Police Presence*, NBC News (Apr. 17, 2022, 4:30 AM), https://www.nbcnews.com/think/opinion/nyc-subway-attack-police-isnt-answer-rcna24605 [https://perma.cc/AS9Q-HKSV].

82 Sam McCann & Aaron Stagoff-Belfort, *More Police Won't Make Public Transit Safer. Housing and Social Services Will*, Vera Inst. Just. (June 17, 2022), https://www.vera.org/news/more-police-wont-make-public-transit-safer-housing-and-social-services-will [https://perma.cc/TB3B-S4VB]; Feldman, *supra* note 79 ("Reported transit crimes are up nearly 70% year-to-date compared with 2021, although the heightened statistics have come amid a massive influx of police into the system, as well as a higher arrest rate.").

83 Emma G. Fitzsimmons, *New York City Will Increase Police Presence in Subways to Combat Crime*, N.Y. Times (Oct. 22, 2022), https://www.nytimes.com/2022/10/22/nyregion/nyc-subway-police-combat-crime.html [https://perma.cc/VLF4-SRKX].

84 Feldman, *supra* note 79; Branigin, *supra* note 1.

85 Feldman, *supra* note 79.

86 *Id.*

87 Fitzsimmons, *supra* note 83.

additional 1,200 overtime shifts per day for police officers to patrol the subway."[88] Since the plan was announced, arrests have doubled, but most of these arrests are for fare evasion, along with a "surge in 'quality of life' summonses."[89]

The number of arrests for minor offenses like fare evasion, smoking, and obstruction of seats has dramatically increased.[90] The justification behind this is to aid in deterring crime, because those who commit serious crimes are more likely to evade fares.[91] Enforcement of these minor crimes, known as "broken windows policing," has been said to "target poor and minority New Yorkers," lead to constitutional violations, and crowd jail facilities with too many individuals incarcerated for petty offenses.[92] Moreover, "broken-windows policing merely creates a revolving door in which homeless people are arrested," placed in jail, sent through the court system, and then "released back into the community in the same condition they left it."[93] Therefore, it does not result in an individual's stabilization in permanent housing, substance abuse services, or even with regard to long-term mental health.[94]

This type of subway policing criminalizes poverty and focuses on the most vulnerable people, who need the most support, not policing.[95] This is evident in the fact that Mayor Adams has defended multiple police decisions to arrest innocent vendors within the city's subway stations.[96] For instance, Mayor Adams defended a decision by NYPD officers to handcuff a woman for selling mangoes in a subway station without a license, in front of her daughter, by noting

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88 *Id.*

89 Candace Pedraza, *Eric Adams and Kathy Hochul's Plan to Put More Cops in the Subway will Only do More Harm*, CopWatch Media (Nov. 24, 2022), https://copwatch.media/2022/11/eric-adams-and-kathy-hochuls-plan-to-put-more-cops-in-the-subway-will-only-do-more-harm/ [https://perma.cc/5L3J-J248]; *see also* Gwynne Hogan, *MTA Says Arrests, Summonses are Surging With More Police on NYC Subways*, Gothamist (Nov. 1, 2022), https://gothamist.com/news/mta-says-arrests-and-stops-are-surging-with-more-police-on-nyc-subways [https://perma.cc/4LAX-SHZ4].

90 Matt Katz, *Police in New York are Making More Arrests, Particularly on the Subways*, Gothamist (Apr. 7, 2022), https://gothamist.com/news/police-in-new-york-are-making-more-arrests-particularly-on-the-subways [https://perma.cc/FDG4-TAWP].

91 *See* Feldman, *supra* note 79.

92 Katz, *supra* note 90.

93 Alex S. Vitale, The End of Policing 93 (Verso, 2017).

94 *Id.*

95 Wilfred Chan, '*Egregious Acts of Violence': Why is Eric Adams Cracking Down on Subway Buskers and Mango Sellers?*, Guardian (July 1, 2022, 6:00 PM), https://www.theguardian.com/us-news/2022/jul/01/new-york-street-vendors-arrests-mayor-eric-adams-nypd [https://perma.cc/QAH7-ZA69].

96 *Id.*

that the police were just enforcing the law.[97] In June 2022, police arrested a saxophonist who had played at the Herald Square subway station for more than five years.[98] The justification behind the arrest, which was defended by Mayor Adams, was that the saxophonist's cats were impeding pedestrian paths.[99] The result of using the City's resources on instances like these is "a huge bureaucracy that is spending a ton of time and resources policing and prosecuting the poorest New Yorkers for low-level offenses with no public safety benefit."[100] Criminalizing street vendors is a poor and ineffective use of the City's resources.[101] Instead of focusing on these petty crimes, these resources should be expended on reducing more serious crimes.

C. *Mental Health and Homelessness Crisis*

Though currently prevalent, mental health issues have unfortunately also previously impacted the subway system. In 1999, Andrew Goldstein, a mentally ill man, shoved Kendra Webdale to her death in front of an oncoming subway train.[102] In response, the State Legislature passed Kendra's Law (§ 9.60 of the Mental Hygiene Law), which allows "judges to order closely supervised outpatient treatment for mentally ill patients who had a history of refusing to take their medications and who had been put in jail or hospitalized repeatedly," or had become violent.[103]

Proponents of Kendra's Law argue that the "law helps a subset of people with mental illness receive expedited care and avoid

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97 *Id.;* Chelsia R. Marcius, *Adams Defends Police for Handcuffing Vendor Who Sold Mangoes in Subway*, N.Y Times (May 9, 2022), https://www.nytimes.com/2022/05/09/nyregion/subway-safety-food-vendor-brooklyn.html [https://perma.cc/Z2UL-WM7X].

98 Chan, *supra* note 95.

99 *Id.*

100 *Id.*

101 *Id.*

102 Ali Watkins, *A Horrific Crime on the Subway Led to Kendra's Law. Years Later, Has it Helped?*, N.Y. Times (Sept. 11, 2018), https://www.nytimes.com/2018/09/11/nyregion/kendras-law-andrew-goldstein-subway-murder.html [https://perma.cc/X7NW-YJX5].

103 N.Y. Mental Hygiene Law § 9.60 (McKinney 1999); Marc Santora & Anemona Hartocollis, *Troubled Past for Suspect in Fatal Subway Push*, N.Y. Times (Dec. 30, 2012), https://www.nytimes.com/2012/12/31/nyregion/erika-menendez-suspect-in-fatal-subway-push-had-troubled-past.html?_r=0 [https://perma.cc/B9DB-L4XS]; In re K.L., 1 N.Y.3d 362, 367 (N.Y. 2004) ("Kendra's Law was thus adopted in an effort to 'restore patients' dignity, and . . . enable mentally ill persons to lead more productive and satisfying lives,' while at the same time reducing the risk of violence posed by mentally ill patients who refuse to comply with necessary treatment.").

unnecessary hospitalization" and criminal charges.[104] Meanwhile, critics argue the system is coercive in that it uses broad language that often is used to violate constitutional rights.[105] However, both advocates and critics agree that the Kendra's Law program is underutilized and underfunded.[106] The law is rarely used by law enforcement, but is more often utilized by family members to address a relative's mental health crisis.[107] Despite the law's enactment, mental health crises in the subway system have persisted. For instance, in December 2012, Erika Mendez, who previously had years of contact with NYC's mental health and law enforcement establishments, pushed a stranger to his death under an oncoming subway train.[108]

In response to the January 2022 death of Michelle Go, pushed to her death by a man with a history of mental illness, Governor Kathy Hochul proposed a significant expansion of Kendra's Law,[109] which could create a means of "removing the mentally ill from the subway or from homeless encampments if they are unable to feed, clothe or shelter themselves, and if they pose a 'substantial risk of physical harm.'"[110] This proposal makes for involuntary inpatient care an overly broad standard.[111] Under the proposed expansion, an individual can be considered a danger if their mental illness makes them unable to meet basic needs like food, shelter, clothing or healthcare.[112] This proposal would also remove the standard that requires a determination that the individual being committed would

104 Ethan Geringer-Sameth, *What's Behind the Increased Use of Kendra's Law in New York City?*, Gotham Gazette (Sept. 27, 2022), https://www.gothamgazette.com/city/11599-increase-kendras-law-new-york-city [https://perma.cc/U92T-6DV7].

105 *Id.*

106 Santora & Hartocollis, *supra* note 103.

107 Joshua Solomon, *Changes to Kendra's Law Could Expand State's Power to Commit the Mentally Ill. Advocates are Concerned*, Times Union (Mar. 30, 2022, 12:31 PM), https://www.timesunion.com/state/article/Expansion-of-Kendra-s-Law-has-fallen-outside-the-17037168.php [https://perma.cc/Z2X2-KK3Q].

108 Santora & Hartocollis, *supra* note 103.

109 Samar Khurshid, *After Subway Shoving, Officials Look to Expand State Laws on Mandatory Treatment for Mental Illness*, Gotham Gazette (Feb. 14, 2022), https://www.gothamgazette.com/state/11077-expand-kendras-law-mandatory-treatment-mental-illness [https://perma.cc/SP3T-JWNQ].

110 Solomon, *supra* note 107.

111 *Id.*

112 Khurshid, *supra* note 109.

likely benefit from treatment.[113] This is the standard prior court cases rested constitutionality on.[114]

As of September 22, 2022, the number of people on assisted outpatient treatment in NYC rose to 1,655, a nineteen percent increase from the same day the previous year.[115] Leaders in the civil rights community across New York wrote a letter to senators and assembly members urging them to protect the rights of mentally disabled New Yorkers and to reject the proposal to expand forced psychiatric commitment laws.[116] The letter urges rejection on the ground that it is unnecessary and unconstitutional to broaden the standard for forced inpatient and outpatient commitments based on prediction of future harm to an individual who appears to be unable to meet basic needs.[117] Moreover, the New York Court of Appeals relied on certain criteria to uphold Kendra's Law against a constitutional challenge: (i) the patient has a history of lack of compliance with treatment for mental illness; and (ii) the patient is likely to benefit from treatment.[118] The proposed amendments go against these two factors and illegally permit those unable to obtain food, shelter, clothing, or medical services to be subjected to forced outpatient commitment without requiring a mandatory showing that the individual refused mental illness treatment and without even requiring that the individual is likely to benefit from an outpatient commitment Kendra's Law order.[119]

Despite Mayor Adams' plan to provide individuals with the necessary mental health treatment in order to alleviate the subway mental health crisis, very few mentally ill people encountered by subway safety teams are being brought in for psychiatric evaluations, let alone treatment.[120] Perhaps the most chilling wakeup call into the subway mental health crisis is April 2022 subway shooter, Frank

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113 Solomon, *supra* note 107.

114 *Id.*; *see* Meyers v. Sullivan, 2017 WL 5125767, 5 (E.D.N.Y. 2017) ("[i]n In re K.L., the New York Court of Appeals held that Kendra's Law does not violate an individual's constitutional right to due process because the standards that must be met to commit an individual under the statute 'themselves satisfy due process.'"); *see also* Coleman v. State Supreme Ct., 697 F. Supp. 2d 493, 511 (S.D.N.Y. 2010) ("[t]he procedures set forth in Section 9.60 therefore are adequate to withstand a facial due process challenge under the Fourteenth Amendment.").

115 Geringer-Sameth, *supra* note 104.

116 *Letter to State Legislators Regarding Kendra's Law*, NYLPI (Mar. 25, 2022), https://www.nylpi.org/resource/letter-to-state-legislators-regarding-kendras-law/ [https://perma.cc/QE6P-PZ6A].

117 *Id.*

118 *In re K.L.*, 1 N.Y.3d at 368.

119 *See In re K.L.*, 1 N.Y.3d at 366; NYLPI, *supra* note 116.

120 Melissa Russo, *Are Adams' Subway Safety Teams Getting Individuals the Mental Health Help They Need?*, NBC N.Y. (Mar. 11, 2018, 12:08 PM), https://www.nbcnewyork.com/news/local/are-adams-subway-safety-teams-getting-individuals-the-necessary-mental-health-help/3594282/ [https://perma.cc/8BVS-XYBT].

James, stating in a YouTube video: "Mr. Mayor, I'm a victim of your mental-health program . . . I'm 62 now, full of hate, full of anger and full of bitterness."[121]

D. *Victim Remedial Efforts*

Subway crime victims deserve justice, but where should they seek it from? Filing suit directly against a perpetrator may be hopeless since a perpetrator likely will not have the resources to pay damages.[122] Even if a perpetrator's sentence includes the legal obligation to pay damages in small amounts overtime, that is simply too long for an innocent victim to wait for justice.[123] Take the case of Bernard Goetz, who shot four young men on a NYC subway train after they allegedly tried to rob him in 1984.[124] Despite his straightforward confession, Mr. Goetz was cleared of attempted murder and ended up serving less than one year in prison.[125] Darrell Cabey, left paralyzed after the shooting, filed a civil suit against Goetz and was awarded $43,000,000 by a jury for his gunshot injuries in 1996.[126] After the trial, Goetz declared bankruptcy and U.S. Bankruptcy Judge Cornelius Blackshear ruled that the award could not be dismissed by declaration of bankruptcy,[127] yet the Cabey family has never received any money from Goetz.[128]

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121 Post Editorial Board, *NYC's Subway Shooting May Finally be a Turning Point for Mental Health*, N.Y. Post (Apr. 13, 2022, 5:28 PM), https://nypost.com/2022/04/13/nycs-subway-shooting-may-be-a-mental-health-turning-point/ [https://perma.cc/9YA9-EEAS].

122 *See* Charles R., Gueli, Esq., *When Can You Sue for Assault, Battery, or Physical Abuse?*, Inj. Claim Coach (May 30, 2022), https://www.injuryclaimcoach.com/assault-abuse.html [https://perma.cc/VXV6-Q356].

123 *Id.*

124 Tina Kelley, *Following Up; Still Seeking Payment from Bernard Goetz*, N.Y. Times (Sept. 10, 2000), https://www.nytimes.com/2000/09/10/nyregion/following-up-still-seeking-payment-from-bernard-goetz.html [https://perma.cc/D2HU-7NFQ].

125 Pippa Raga, *The "Subway Vigilante" Shot Four Unarmed Black Men in 1984—Where is He Now?*, Distractify (June 2, 2020, 1:10 PM), https://www.distractify.com/p/bernhard-goetz-now [https://perma.cc/GHJ6-MEET].

126 Kelley, *supra* note 124.

127 *Judge Rules Bankrupt Goetz Liable for $43 Million Judgment*, AP News (Aug. 2, 1996), https://apnews.com/article/1b9a60d48716c43e1d4a2dad33abcd15 [https://perma.cc/HR3C-6WNZ].

128 Rebekah Kuschmider, *Netflix's 'Trial By Media': Where is Bernhard Goetz Today in 2020?*, Your Tango (May 12, 2020), https://www.yourtango.com/2020333925/where-bernhard-goezt-today-trial-by-media-netflix [https://perma.cc/6GUW-2NRE].

The MTA has a legal duty to keep the premises reasonably safe, but it is hardly ever held liable for third-party criminal attacks.[129] The New York Court of Appeals decision in *Crosland v. New York City Transit Authority* addresses the issue of the MTA's liability for third-party criminal acts.[130] In a case involving a victim who was beaten to death at a subway station, the Court held that the NYC Transit Authority "owed [decedent] no special duty, for lack of the element of 'some direct contact between agents of the [defendant] and the injured party.'"[131] Attorney Bob Genis notes he is unaware of any "Appellate Division case that sustains liability or allows liability from criminal acts by someone in the subway system."[132] The liability of the MTA is solely its duty as a property owner.[133] Therefore, the MTA only has a duty to keep riders safe by taking reasonable precautions to avoid hazards and can only be found liable if its negligence leads to an accident and damages.[134] The MTA has no special duty to assure safety from the criminal acts of third parties and in the absence of such a duty, a plaintiff cannot recover on a negligence theory.[135] Moreover, New York courts have held that a third-party criminal act constitutes an intervening and superseding cause of a victim's harm and thus, cuts off any liability on the part of the MTA as a matter of law.[136]

Victims of these horrendous crimes typically do not see desired results via litigation. For instance, a victim of Frank James' shooting, Ilene Steur, filed a federal lawsuit against Glock Inc., the manufacturer of James' weapon, arguing that Glock should be held liable for James' crime because Glock improperly marketed its firearm with an emphasis on their easy concealment as well as other features that "appeal to purchasers with criminal intent."[137]

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129 *See* Andrew Denney, *A Victim of the April 12 NYC Subway Shooting Seeks to Hold the MTA Liable. Here's Why it Might be a Longshot*, N.Y. L. J. (May 2, 2022, 4:26 PM), https://www.law.com/newyorklawjournal/2022/05/02/a-victim-of-the-april-12-nyc-subway-shooting-might-seek-to-hold-the-mta-liable-heres-why-it-might-be-a-longshot/?slreturn=20220722101453 [https://perma.cc/JQ2Z-AMEV].

130 *Id.*

131 Crosland v. New York City Transit Auth., 68 N.Y.2d 165, 168 (N.Y. 1986) (internal citation omitted).

132 *See* Denney, *supra* note 129.

133 *Id.*

134 Jonathan Damashek, *NYC Subway Injuries: Can You Sue the MTA?*, Lawyer1 (June 13, 2022), https://lawyer1.com/blog/nyc-subway-injuries-can-you-sue-the-mta/ [https://perma.cc/Z54F-N4RA].

135 *See* Maynard v. New York City Transit Auth, 267 A.D.2d 37 (N.Y. App. Div. 1999).

136 *See, e.g.*, *id.* at 38 (Holding the transit authority assumed no special duty to assure safety of passengers from criminal acts of third parties and unforeseen criminal acts constituted intervening and superseding cause of passenger's harm); Falcone v. Manhattan & Bronx Surface Transit Operating Auth., 166 A.D.2d 271 (N.Y. App. Div. 1990) (Holding unexpected criminal act of third party was superseding and intervening cause, relieving transit authority from liability).

137 Troy Closson, *Subway Victim Sues Gun Maker Over Attack That 'Changed My Life Forever'*, N.Y. Times (May 31, 2022), https://www.nytimes.com/2022/05/31/nyregion/subway-shooting-victim-sues-gun-maker-glock.html [https://perma.cc/G847-HABC].

However, because there are tight federal protections for companies like Glock, and due to the burden of proof that Steur's lawyers would be required to meet to hold Glock liable, it is unclear if this suit will prevail in court.[138] While the state has a fund designed to financially support victims of violent crimes when victims have no other resources or have exhausted all other options, the fund has distributed money only to a small fraction of those eligible.[139]

IV. Proposal

A. *Victim-Offender Mediation*

The adversarial system is the traditional method of redressing violent crime.[140] However, besides the issues involved in litigating against perpetrators or the MTA, this approach can actually create additional harm because it's exclusionary, punitive and shameful in nature.[141] Further, there is a growing recognition that the predominant approach of criminal justice, which centers on the offender's behavior and subsequent punishment, is not only ineffective and archaic, but also strips victims of the opportunity to participate actively in the justice process.[142] Instead, restorative justice should be used as an alternative. Restorative justice, a practice in the field of criminal justice that dates back to the 1970s,[143] and unlike the traditional system, emphasizes the voices and experiences of harmed crime victims through dialogue, perspective-taking, and storytelling.[144] The clearest operationalization of restorative justice is expressed through Victim-offender Mediation Programs ("VOM").[145]

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138 Samantha Max, *Can Subway Shooting Victim's Suit Against Glock Stand Up in Court? If it Does, it Will Change History*, Gothamist (June 14, 2022), https://gothamist.com/news/subway-shooting-victim-leans-on-new-ny-law-to-take-glock-to-court [https://perma.cc/UH65-U733].

139 Jessica Washington, *Violent Crime Victims in New York Struggle to Access Funds Due to Them*, The City (June 1, 2022, 6:00 AM), https://www.thecity.nyc/2022/6/1/23149316/victim-compensation-fund-new-york-violent-crime [https://perma.cc/627Q-JUBD].

140 Howard Zehr, Changing Lenses: A New Focus For Crime And Justice (Herald Press, 3rd ed. 2005).

141 Molloy et al., *supra* note 8, at 133–34.

142 Niemeyer & Shichor, *supra* note 10.

143 Christian B. N. Gade, *Is Restorative Justice Punishment?*, 38 Conflict Resol. Q. 127, 128 (2020).

144 Molloy et al., *supra* note 8, at 133.

145 Niemeyer & Shichor, *supra* note 10.

Mediation has been implemented in two ways in relation to the criminal justice system: as an alternative to court proceedings or as complementary to court proceedings.[146] However, in the context of serious offenses, mediation is hardly possible as an alternative procedure where the offense threatened the victim's life and health because in those cases, there is a need to emphasize the general prevention effect of the penalty.[147] In the context of violent crime, VOM would necessarily be applied post-sentence, as opposed to a departure from prosecution.[148]

VOM is comprised of a four-step process.[149] Step one is the intake and referral process, where a mediator contacts the victim and offender prior to a mediated session to ensure that they are well suited to the mediation process and have voluntarily chosen to participate.[150] Step two involves the mediator getting to know the victim and offender separately, gaining their trust and explaining the process to them in order to ensure their expectations are realistic.[151] Step three is the mediated session where the mediator supports the victim and offender in voicing their thoughts and questions to one another, and ultimately, the parties may choose to construct an agreement.[152] Step four concludes with wrapping up the process, where the mediator follows up by contacting the victim and offender to check in with them in order to ensure they are adhering to their commitments.[153] In the case of a restitution plan, which does frequently occur, the mediator will write up the details in a contract for the participants.[154] Overall, the VOM process humanizes the criminal justice experience for victims and offenders, holds offenders directly accountable to the people they harmed, and allows for more active involvement of crime victims,

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146 Juhani Iivario, *Victim-Offender Mediation—An Alternative, Addition or Nothing but a Rubbish Bin in Relation to Legal Proceedings?*, Nat'l Res. & Dev. Centre Welfare & Health, https://biblioteca.cejamericas.org/bitstream/handle/2015/912/iivari-victim-offender.pdf?sequence=1&isAllowed=y [https://perma.cc/3JKL-W52M] (last visited Oct. 10, 2022).

147 *Id.* at 13.

148 Rachel Alexandra Rossi, *Meet Me on Death Row: Post-Sentence Victim-Offender Mediation in Capital Cases*, 9 Pepp. Disp. Resol. L. J. 185, 193 (2008).

149 Toran Hansen & Mark Umbreit, *State of Knowledge: Four Decades of Victim-Offender Mediation Research and Practice: The Evidence*, 36 Conflict Resol. Q. 99, 101 (2018).

150 *Id.*

151 *Id.*

152 *Id.* at 101–02 (In the context of crime victims, this means receiving a restitution agreement and/or an apology).

153 *Id.* at 101–02.

154 Mark S. Umbreit et al., *The Impact of Victim-Offender Mediation: A Cross-National Perspective*, 17 Mediation Q. 215, 217 (2000).

family members of victims and offenders, as well as community members, in the justice process.[155]

VOM is a process whereby victims and offenders come together to discuss wrongdoing, its impacts, and ways to "make things right" in a safe setting.[156] Where most other applications of mediation are among individuals with some type of prior relationship, most, but not all, participants in VOM are strangers.[157] During the meeting, facilitated by a trained mediator, victims and offenders assume active problem-solving roles aimed at restoring material and psychological losses that not only the victim suffered, but also that the community suffered.[158] It is a humanistic and dialogue-driven process rather than settlement-driven, with participants directly sharing their narratives and listening to each other in a face-to-face format.[159] Victims can ask questions and tell the offender how the crime affected them,[160] receive answers to questions, and directly participate in developing a restitution plan for the offender to be accountable for the loss or damage caused.[161] Offenders can take responsibility and/or are actively involved in the restitution plan.[162] Offenders have been able to gain a far better understanding of the real human impact of their actions, "own up" to their behavior and make amends directly to the person they harmed.[163] Moreover, the offender's attitude in reacting to a victim's feelings conveys valuable information to officials tasked with assessing personal rehabilitation potential.[164] An offender who displays signs of empathy toward the victim's feelings requires a different rehabilitation program from an offender who is apathetic and alienated.[165] If an offender fails to complete the restitution, court-imposed consequences can be imposed.[166] VOM increases satisfaction of both parties, saves time

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155 Umbreit, *supra* note 15, at XLVI.

156 Hansen & Umbreit, *supra* note 149, at 100.

157 Mark S. Umbreit, *Mediation of Victim Offender Conflict*, 1988 J. Disp. Resol. 85, 103 (1988).

158 Niemeyer & Shichor, *supra* note 10.

159 Hansen & Umbreit, *supra* note 149, at 101.

160 Melvin Aulkemeyer, *Predicting and Improving the Public's Attitudes and Beliefs About Victim-Offender Mediation in Response to a Serious Crime* (June 23, 2019) (B.A. Thesis, University of Twente) (on file with the Department of Psychology of Conflict, Risk & Safety, University of Twente).

161 Umbreit, *supra* note 15, at XXXVIII.

162 Aulkemeyer, *supra* note 160.

163 Umbreit, *supra* note 15, at XXXVIII–XXXIX.

164 Gabriel Hallevy, *Therapeutic Victim-Offender Mediation Within the Criminal Justice Process—Sharpening the Evaluation of Personal Potential for Rehabilitation While Righting Wrongs Under the ADR Philosophy*, 16 Harv. Negot. L. Rev. 65, 77 (2011).

165 *Id.*

166 Umbreit, *supra* note 15, at XXXVIII.

and costs, and has a tendency of ensuring restitution to victims of crime.[167]

VOM in the context of serious crimes requires mediators to have far more extensive training, particularly a need for special knowledge and skills related to severely violent crimes, in addition to standard mediation skills.[168] There must be a focus on the process of facilitating a direct dialogue between parties related to the violence that occurred, the journey of grief experienced by the victim, and the potential for closure and healing.[169] From a victim's perspective, a mediator must understand the victimization experience, dealing with grief and loss, understanding post-traumatic stress, and the ability to collaborate with psychotherapists.[170] From an offender perspective, a mediator must understand criminal justice and corrections systems, understand the offender and prisoner experience, have the ability to non-judgmentally relate to offenders convicted of heinous crimes, and have the ability to negotiate with high level correctional officials to gain access to the offender.[171]

B. *Using VOM as a Tool to Reduce Violent Crime on NYC's Subway System*

i. Benefits of VOM

The VOM process provides a multitude of different possible benefits.[172] Research shows three broad goals of VOM: to benefit the victim, to benefit the offender and the offender's family, and to benefit the community.[173] Parties generally report that VOM programs are beneficial, and victims appreciate the chance to directly participate in the criminal justice process.[174]

Victims are especially interested in VOM because victims are left with unanswered questions and frequently want to hold the offender accountable, to share pain with their offender, and help

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167 Enoch Amoah, *Justification for Implementing Victim-Offender Mediation in the Criminal Justice System of Ghana*, 1 E-J. Hum. Arts & Soc. Sci. 118, 121 (Sept. 2020).

168 Mark S. Umbreit et al., *Victims of Severe Violence Meet the Offender: Restorative Justice Through Dialogue*, 6 Int'l Rev. Victimology 321, 324 (1999).

169 *Id.*

170 *Id.*

171 *Id.*

172 Mark S. Umbreit, *Victim Offender Mediation: Conflict Resolution and Restitution*, U.S. Dep't Just. 8 (Sept. 15, 1985), https://www.ojp.gov/pdffiles1/Digitization/101322NCJRS.pdf [https://perma.cc/H2L9-4KHQ].

173 Rossi, *supra* note 148, at 195.

174 Katherine L. Joseph, *Victim-Offender Mediation: What Social & Political Factors Affect its Development*, 11 Ohio St. J. Disp. Resol. 207, 212 (1996).

their offender change behaviors.[175] Co-victims, family members and friends of homicide victims experience similar distress.[176] Victims can participate in fashioning a resolution for the offense and thereby gain control, which they are unable to do through the traditional justice system.[177] Victims also have reported satisfaction with meeting their offender and being able to better understand the crime and the offender's situation, and to be present while the offender expressed remorse.[178]

Offenders get the opportunity to make amends and have the chance to regain control through active participation in the process.[179] Offenders may gain more respect for the criminal justice system, come to understand the personal costs that result from their criminal acts, and gain appreciation for other people's rights.[180] As discussed more in depth in Section (iii) below,[181] VOM also has a positive correlation with preventing offenders from recommitting crimes or being rearrested.[182] Reduced reoffending rates leads to fewer victims, fosters stronger communities, and promotes public safety.[183]

VOM is for the benefit of the community as much as it is for the benefit of the victim and the offender.[184] The community can be represented in the VOM process by third parties, including active observers, social workers, or ordinary community members without a connection to the crime or the criminal justice process.[185] The community representative must emphasize the impact the specific crime had upon the community, beyond just the interaction between the victim and the offender.[186] VOM programs that include volunteers increase participation of the community in the criminal justice process and, to the extent that VOM programs enhance the possibility of offender rehabilitation and reduce recidivism, the community is spared future criminal conflict and victimization.[187] The immediate benefit to the community is the prevention of recidivism

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175 Rossi, *supra* note 148, at 197.

176 *Id.*

177 Joseph, *supra* note 174, at 212.

178 *Id.*

179 *Id.* at 212–13.

180 *Id.*

181 *See infra* Section iii.

182 Amoah, *supra* note 167, at 121.

183 Lynn Stewart et al., *The Impact of Participation in Victim-Offender Mediation Sessions on Recidivism of Serious Offenders*, 62 Int'l J. Offender Therapy & Comp. Criminology 3910, 3921 (2018).

184 Hallevy, *supra* note 164, at 80.

185 *Id.*

186 *Id.* at 81.

187 Joseph, *supra* note 174, at 213.

by the offender, and the release of the victim's fears, angers and frustration.[188]

A police officer may also act as a representative of the community.[189] Using VOM to improve the NYC subway system should require NYPD to play an active role in the scheme to further the community benefit. Restorative practices rely on police, courts and criminal law to set the restorative process into motion.[190] Police are often referred to as "the gatekeepers of the criminal justice system" because almost all cases proceeding through the criminal courts and corrections are a result of police action.[191] Police decision-making is therefore an essential element of justice, and police officers have discretion regarding decisions to charge suspects or engage in other forms of intervention into problems of crime and disorder.[192]

While restorative justice enjoys increasing popularity, it is not yet a structural part of police work.[193] Police officers believe restorative interventions are more suited for young accomplices on the periphery of the criminal organization as opposed to those who commit more violent offenses.[194] Even in the case of these 'suitable' offenses, according to police officers, only a small minority of cases handled by police are deemed eligible for restorative justice by the police.[195] However, Australian evaluations show that police rapidly become supporters of VOM after experiencing a conference firsthand, but the general approach appears to be one of suspicion of the process as a "soft option" or simply forgetting to consider the option.[196] Police saw VOM as a "soft option" when they felt a more punitive response was required.[197]

Accordingly, NYPD should be required, as part of their training, to attend VOM conferences in order to increase the level of understanding of and support for the process.[198] NYPD should also use community policing, which places an emphasis on greater police

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188 Hallevy, *supra* note 164, at 81.

189 Prenzler & Hayes, *supra* note 14, at 30.

190 Patrick M. Gerkin, *Participation in Victim-Offender Mediation: Lessons Learned from Observations*, 34 Grand Valley St. U. Crim. Just. Rev. 226, 229 (June 2009).

191 Prenzler & Hayes, *supra* note 14, at 17.

192 *Id.* at 17–18.

193 M.S. Hoekstra, *Messy Victims & Sympathetic Offenders: The Role of Moral Judgments in Police Referrals to Restorative Justice*, 25 Contemp. Just. Rev. 179, 179 (2022).

194 *Id.* at 181.

195 *Id.*

196 Prenzler & Hayes, *supra* note 14, at 21.

197 *Id.* at 22.

198 *Id.* at 23.

cooperation with communities in solving crime-related problems.[199] VOM can involve community policing in police referral of victims, in police participation in conferences, and in intervention in cases of non-compliance.[200] If a system where police attend all VOMs is implemented, NYPD will see the positive effects that VOM has on violent offenders as well as troubled victims. In turn, NYPD will be more likely to use their discretion in referring the victims and offenders they encounter daily on the NYC subway to VOM.

Critics may be concerned about how the public will cope with the distrust that many community members feel toward police officers, especially because, since the high-profile use-of-force incidents of 2020, there has been a widened gap between police agencies and their communities.[201] This arrangement leaves potential for the public to view police officers negatively given their discretion and authority to refer participants to VOM. However, this conceivable distrust will not affect VOM's potential benefits given that the process is entirely voluntary for participants.

ii. Using VOM for Violent Crimes

In the context of violent NYC subway crime, the VOM program to be used is one where cases are referred primarily after a formal admission of guilt has been accepted by the court, with the mediation being a condition of probation, granted the victim so desires.[202] While the VOM process has typically been utilized for "minor or non-violent cases," such as property offenses and theft, it has been used, and even recommended, to address the effects of more serious crimes such as aggravated assault and murder.[203]

Important differences exist between VOM after serious and less serious crimes.[204] For instance, after a serious crime, offenders are typically in prison and already found guilty when they

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199 *See id.* at 20; *see Community Policing Defined*, U.S. DEP'T JUST. (2014), https://cops.usdoj.gov/RIC/Publications/cops-p157-pub.pdf [https://perma.cc/38VT-YSZD] (Community policing entails using "problem-solving techniques to proactively address the immediate conditions that give rise to public safety issues such as crime, social disorder, and fear of crime.").

200 Prenzler & Hayes, *supra* note 14, at 20.

201 Terrence M. Cunningham, *How Police and Communities Can Move Forward Together*, A.B.A. (Jan. 11, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/how-police-and-communities-can-move-forward-together/ [https://perma.cc/2UB4-R4F5].

202 UMBREIT, *supra* note 15, at XXXIX.

203 Prenzler & Hayes, *supra* note 14, at 28; *see* Hooper & Busch, *supra* note 13, at 103–04; Niemeyer & Shichor, *supra* note 10 (The American Bar Association has recommended that local, state and federal agencies take steps to incorporate these programs into their criminal justice process for violent and nonviolent crimes).

204 Aulkemeyer, *supra* note 160, at 4.

participate in VOM. VOM, in the context of serious crimes, requires much more extensive preparation than after less serious crimes on the part of the mediators, victims and offenders.[205] The use of VOM and dialogue in severely violent crimes has various defining characteristics, such as: emotional intensity; extreme need for non-judgmental attitude; longer case preparation by the mediator; multiple separate meetings prior to joint session; multiple phone conversations; negotiation with correctional officers to secure access to the incarcerated person and to conduct mediation in prison; coaching of participants in the communication of intense feelings; and boundary clarification.[206]

While victims of serious crimes, experiencing high levels of suffering, are often anticipated to be unwilling to engage in mediated contact with offenders, especially when the crime happened recently, it has been found that many crime victims expressed the need for broader programs that include severely violent crimes.[207] An increasing number of victims of sexual assault and attempted homicide and survivors of murder victims have requested the opportunity to meet the offender to express the full impact of the crime on their lives, to get answers to their questions, and to gain a greater sense of closure.[208] However, due to the extremely violent nature of the crimes at hand, it may take longer for victims or offenders to be sufficiently prepared for dialogue.[209] In most cases, VOM occurs many years after the crime occurred and the actual mediation or dialogue session is generally held in a secure institution where the offender is located.[210]

Using VOM in crimes of severe violence is about engaging those most affected by violent crimes while holding the offender accountable, helping victims achieve a greater sense of meaning or closure concerning the severe harm resulting from the crime and assisting all parties in having a greater capacity to move on with their lives positively.[211]

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205 *Id.*

206 Umbreit, *supra* note 168, at 323–24.

207 Katharina Kahl, *The Dynamics of Crime Seriousness & Victims' Preference to Participate in Online & Offline Victim-Offender Mediation* (June 28, 2022), (Study on file with the University of Twente, Faculty of Behaviour, Management & Social Sciences), http://essay.utwente.nl/90937/1/Kahl_BA_BMS.pdf [https://perma.cc/RG38-8UL6].

208 Umbreit, *supra* note 168, at 323.

209 Rossi, *supra* note 148, at 194.

210 Umbreit, *supra* note 168, at 323.

211 *Id.* at 340–41.

iii. VOM & NYC Subway Crime Recidivism

In 2019, the MTA passed a resolution supporting the ban of criminal recidivists from the NYC transit system, emphasizing that it is unacceptable that serial criminal recidivists are able to continually enter the public transit system to prey upon MTA workers and subway riders.[212] However, the resolution did not include language as to what would constitute a ban or how it would be enforced.[213] It merely stated that "there can and should be some mechanism in place to ban certain perpetrators from the transit system for some amount of time in order to protect the public."[214] While this a good attempt to decrease recidivist crime on the subway, the MTA has no power to actually ban repeat offenders.[215] Additionally, banning individuals from public transit could actually increase recidivism rates, as it would make it almost certain that these people would have to return to a life of crime, because they will not have transportation options.[216] Therefore, more efforts must be made to remedy the recidivism problem.

Scholars have concluded that offenders who participate in restorative justice programs have a lower incidence of reoffending compared with offenders who do not participate in such programs and undergo the traditional justice procedure and sanction.[217] This is potentially because restorative justice practices can address offenders' antisocial attitudes, their lack of problem-solving strategies, empathy and self-control, all of which should be considered.[218] Further, talking about the offense and an offender's background or addictions can be charged with emotion for the offenders.[219]

Studies show that when the mediation was focused on the offense and its consequences, victims and offenders were able to think about how to confront the offenders' criminogenic needs.[220] Direct contact with victims is associated with emotions of guilt,

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212 *MTA Passes Resolution to Ban Repeat Offenders in NYC in New York City*, ABC7NY (June 26, 2019), https://abc7ny.com/subway-new-york-city-repeat-offenders-nyc/5366027/ [https://perma.cc/U5UL-P62R].

213 Erik Bascome, *MTA, Cuomo Looking to Ban Repeat Criminals from NYC Transit System*, SILive (June 25, 2019, 2:33 PM), https://www.silive.com/news/2019/06/mta-cuomo-looking-to-ban-repeat-criminals-from-nyc-transit-system.html [https://perma.cc/9CLS-Y2UN].

214 *Id.*

215 ABC7NY, *supra* note 212.

216 Bascome, *supra* note 213.

217 Jiska Jonas-van Dijk et al., *Victim-Offender Mediation & Reduced Reoffending: Gauging the Self-Selection Bias*, 66 Crime & Delinq. 949, 950 (2019).

218 Anna Meléndez, *The Role of Criminogenic Needs & Emotions in Restorative Justice: Offenders' Experiences in Victim-Offender Mediation*, 13 Eur. J. Probation 21, 22 (2021).

219 *Id.*

220 *Id.*

remorse and shame, sparking in offenders the desire to apologize and make amends.[221] Empathy is an important goal for offenders so that they can understand the harm caused by their crime, which is important for genuine remorse and ultimately, a willingness to repair the harm.[222]

One Canadian study compared 122 offenders who participated in facilitated face-to-face meetings to a matched sample of 122 non-participating offenders.[223] Offenders were matched on several variables including offense, type of crime, admission date, and release date.[224] In general, the offenses were serious in nature, including homicide, manslaughter, and sexual assault.[225] Due to matching, there were few differences between the demographic profiles of participants and non-participating matches, and no statistically significant differences were noted between participants and non-participants on key variables including age.[226] "Given the low number of reoffending events, it was only possible to examine the statistical outcome for revocations of conditional release for any reason."[227] Overall, the offenders who participated in the meeting had significantly fewer revocations of release during the study period than the matched sample, and fewer of them returned to custody.[228] Non-participant offenders matched to participants with a face-to-face meeting were six times more likely to experience a revocation than those who participated in a face-to-face-meeting.[229]

Participation in VOM can lower the risk of reoffending.[230] Critics will argue that it is unclear whether this is due to the mediation process itself or due to a self-selection bias among those who choose to participate, given that it is a voluntary process.[231] Nevertheless, research suggests that restorative justice is more effective at reducing crime in cases that involve more serious offenses and crimes that involve personal injury victims, and that it is more likely to reduce recidivism as a supplement to the conventional criminal justice process.[232]

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221 *Id.*

222 *Id.*

223 Stewart et al., *supra* note 183, at 3910.

224 *Id.* at 3915–16.

225 *Id.* at 3913.

226 *Id.* at 3916.

227 *Id.* at 3919–20.

228 *Id.* at 3919.

229 Stewart et al., *supra* note 183, at 3920.

230 Jonas-van Dijk et al., *supra* note 217.

231 *Id.* at 963.

232 Stewart et al., *supra* note 183, at 3912; Lawrence W. Sherman & Heather Strang, *Restorative Justice: The Evidence*, Smith Inst. (2007), https://www.ajc.state.ak.us/acjc/docs/resources/restorative/restorjus.pdf [https://perma.cc/5Z4A-K7GN] ("The success of RJ in reducing, or at least not increasing, repeat offending is most consistent in tests on violent crime.").

iv. VOM with Mentally Ill Offenders

A possible limitation to using the VOM model for reducing NYC subway crime is the fact that many of these offenders likely have mental illness and generally have no connection with the people that they attack.[233] While opponents may argue that random episodes of violence are used to scapegoat individuals with mental illness,[234] data proves otherwise. In at least one-quarter of subway murders since 2020, and in nearly one-half of NYC's subway murders in which a suspect has been publicly identified, the suspect appears to have suffered from a well-documented mental illness before allegedly committing the homicide.[235] Moreover, in at least three of these cases where the suspect suffered from a well-documented illness, the suspect was free on charges pertaining to an earlier alleged violent crime before committing the subway crime, indicating a failure of prosecutorial and criminal-justice supervision.[236] In the last year, various individuals facing charges for unprovoked attacks were previously released without mandated treatment.[237] For instance, in October 2021, a woman, diagnosed with schizophrenia, pushed an innocent rider into a moving subway train in Times Square when just months earlier, she allegedly beat another woman on the train, which was one of seven incidents for which she had been arrested since 2018.[238]

Nevertheless, offenders who have committed serious offenses and suffer from severe mental disorders are generally capable of having contact with their victim, depending on the aim and the type of contact.[239] Specifically, it has been found that during mandatory treatment, it is possible for offenders and victims to engage in contact with each other if both parties agree.[240] According to social workers,

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233 Mackenzie T. Jones & Philip D. Harvey, *Neurocognition and Social Cognition Training as Treatments for Violence and Aggression in People with Severe Mental Illness*, 25 CNS Spectrums 145 (June 28, 2019), https://www-cambridge-org.ezproxy.yu.edu/core/services/aop-cambridge-core/content/view/S1092852919001214 [https://perma.cc/GTL2-3SLB].

234 Arun Venugopal, *Nearly Half of Those Arrested in Hate Crime Attacks had Mental Health Issues: NYPD*, Gothamist (May 4, 2022), https://gothamist.com/news/most-subway-crime-attributed-to- [https://perma.cc/8XNX-XEQT].

235 Nicole Gelinas, *Public Safety on NYC Subways: No Safety in Small Numbers*, Manhattan Inst. (Mar. 30, 2022), https://www.manhattan-institute.org/public-safety-nyc-subways-no-safety-small-numbers [https://perma.cc/M3RN-7ZDN].

236 *Id.*

237 *CBS2 Investigates: Why are so Many Repeat Offenders in Need of Mental Health Services Back on NYC Streets?*, CBS News N.Y. (Dec. 29, 2021, 10:25 PM), https://www.cbsnews.com/newyork/news/mental-health-services-crime-nyc/ [https://perma.cc/A2GS-TY55].

238 *Id.*

239 Mariëtte van Denderen et al., *Contact Between Victims & Offenders in Forensic Mental Health Settings: An Exploratory Study*, 73 Int'l J. L. & Psychiatry 1, 5 (2020).

240 *Id.* at 1.

no type of offense or psychopathology is a clear exclusionary criterion for victim-offender contact,[241] and ultimately, it depends on the skills of the social worker and treatment team, how the psychopathology is managed, and finding a form in which contact can proceed safely.[242] Moreover, offenders who cannot be held fully responsible for their offenses, because of severe psychopathology or who suffer from diagnoses such as a personality disorder, schizophrenia and other psychotic disorders, developmental disorders or anxiety and mood disorders, have been judged to be at a high risk for reoffending.[243]

Studies report positive effects, such as decreased anger, need for revenge, and PTSD symptoms among victims after contact with their offenders.[244] However, there are also studies that report that some victims felt more fearful or worse after meeting their offender.[245] Managing the parties' expectations is essential because even if a mentally ill offender acts unengaged, offenders without regret for their offense might still be able to answer questions from victims.[246] Another way to handle VOM in the context of a mentally ill offender is to postpone contact until an offender is better adjusted to anti-psychotic medication, or to have contact by letter instead of face-to-face contact.[247] Since some crimes committed by mentally ill offenders can be explained by lack of proper treatment, the remorse that these offenders may experience during the restorative justice process may prompt them to control their illness by cooperating with medication and treatment plans.[248]

Offenders also generally respond more positively to processes they perceive as fair, and they generally perceive VOM meetings as fair, especially when compared to court proceedings.[249] Procedural fairness by authorities strongly increases trust in authorities, and trust in authorities in turn has considerable effects in increasing participation in a community.[250] Thus, to the extent a subway crime offender is mentally ill, the offender could very well view the VOM as a fair experience which could encourage them to respond well to treatment and ultimately, decrease their chances of reoffending.

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241 *Id.*

242 *Id.* at 6.

243 *Id.* at 1.

244 *Id.*

245 van Denderen et al., *supra* note 239, at 1.

246 *Id.* at 6.

247 *Id.*

248 Jessica Burns, *A Restorative Justice Model for Mental Health Courts*, 23 S. CAL. REV. L. & SOC. JUST. 427, 450 (2014).

249 *Id.* at 451.

250 *Id.*

V. Conclusion

While a multi-faceted approach is necessary to reduce the increase in violence in the NYC subway system, VOM is one component that has yet to be explored in this context. VOM between subway crime victims and offenders certainly will not solve all crime and mental health issues pertaining to the NYC subway. However, the potential benefits of the process could, with other factors, help to reduce crime. VOM dialogues with subway crime victims and offenders, referred by NYPD, benefit the victim, the offender, and the NYC community of subway riders. The process allows victims to get answers to their questions, while also allowing offenders, even those that are mentally ill, to gain insight on how their actions made their victims feel. This can ultimately reduce the likelihood that those same offenders will reoffend in the subway system.