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ILLINOIS BUSINESS LAW JOURNAL

I THINK YOU ARE MUTED, YOUR HONOR: THE RISE OF REMOTE LEGAL PROCEEDINGS AND WHAT IS IN STORE

❖ Note ❖

*Austin Bull**

I. INTRODUCTION

On October 28, 2021, Mark Zuckerberg announced Facebook's new focus on the "metaverse."[1] Facebook and its counterparts now belong to Meta Platforms, Inc. and will emphasize and move toward a virtual reality future.[2] This novel endeavor came about a year and a half after the COVID-19 pandemic forced the world to adapt to new, remote mediums.[3] Digital landscapes became an immediate necessity rather than a distant, futuristic concept.[4] Many industries were affected; the legal sector was no exception.[5]

In an unprecedented fashion, law firms and courtrooms alike moved entirely remote.[6] For the first time, depositions, hearings, and even entire trials were

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[1] Kim Lyons, *Facebook Just Revealed Its New Name: Meta*, VERGE (Oct. 28, 2021, 2:19 PM), https://www.theverge.com/ 2021/10/28/22745234/facebook-new-name-meta-metaverse-zuckerberg-rebrand.

[2] *Id.*

[3] *See* Richard Eisenberg, *Is Working from Home the Future of Work?*, FORBES (Apr. 10, 2020, 2:44 PM), https://www.forbes.com/sites/nextavenue/2020/04/10/is-working-from-home-the-future-of-work/?sh=447c189346b1 (discussing the transition to remote work during the coronavirus pandemic).

[4] *See id.*

[5] *See, e.g.*, Sam Skolnik, *New York Bar Advises That Firms Be Cautious About Reopening*, BLOOMBERG LAW (May 13, 2020, 5:41 PM), https://news.bloomberglaw.com/us-law-week/new-york-state-bar-releases-law-firm-reopening-plan.

[6] *See, e.g.*, Robert Barnes, *Supreme Court Takes Modest but Historic Step with Teleconference Hearings*, WASH. POST (May 4, 2020), https://www.washingtonpost.com/politics/courts_law/supreme-court-teleconference-hearings-bookingcom/2020/05/03/f5902bd6-8d76-11ea-a9c0-73b93422d691_story.html.

conducted by video conference from participants' homes.[7] Attorneys and their clients no longer commuted to an office but instead conducted their business through programs such as Zoom or Microsoft Teams.[8]

With these sudden changes came questions about the legitimacy of the remote practices.[9] The legal field, which is rich in tradition and often slow to adapt, was now adopting modern technology with no time to verify its effectiveness or legality.[10] As the effects of the pandemic have waned, many firms and courts have maintained the new customs.[11]

What does this mean for the legal field moving forward? This note will argue that recent legal precedent has paved the way for the legal industry to enter the metaverse; businesses and firms should prepare for the changes, big and small, that will follow. Part II will examine the movement of legal proceedings and practices to remote settings in light of the COVID-19 pandemic and the history and current state of the metaverse. Part III will analyze the effects and legality of remote legal practice and how the metaverse may change the business and practice of law. Part IV will argue that legal precedent regarding remote legal proceedings will be applicable to practice in the metaverse, and the legal sector should prepare accordingly. Part V will conclude.

II. BACKGROUND

A. Going Remote

As the COVID-19 pandemic raged in the first half of 2020, entire industries were forced to comply with quarantine and stay-at-home orders.[12] These unexpected requirements meant conducting business from home for law firms and other office-based enterprises.[13] Meetings, depositions, and client relations moved entirely online, relying on phone and video conferencing.[14] Hopping on a plane to meet with a client face-to-face or collect a witness deposition was no longer an option.[15] Some firms

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[7] *See, e.g.*, Jake Bleiberg, *Texas Court Holds First US Jury Trial via Videoconferencing*, ABC NEWS (May 22, 2020, 12:31 AM), https://abcnews.go.com/Health/wireStory/texas-court-holds-us-jury-trial-videoconferencing-70825080.

[8] *See Which Video Conferencing Tool Is Best for Lawyers?*, LAW. MONTHLY (May 6, 2020), https://www.lawyer-monthly.com/2020/05/which-video-conferencing-tool-is-best-for-lawyers/.

[9] David Horrigan, *COVID Technology Law Update: The Law of Virtual Court Proceedings*, LEGALTECH NEWS (Feb. 8, 2022, 7:00 AM), https://www.law.com/legaltechnews/2022/02/08/covid-technology-law-update-the-law-of-virtual-court-proceedings/?slreturn=20220216181903.

[10] *See* Callie Evergreen, *Remote Legal Process Benefits 'Zees and 'Zors, Says Lawyer*, FRANCHISE TIMES (June 10, 2021), https://www.franchisetimes.com/franchise_news/remote-legal-process-benefits-zees-and-zors-says-lawyer/article_3348ebe0-c965-11eb-b428-83edcf2985d0.html.

[11] *See* Horrigan, *supra* note 9.

[12] *See* Eisenberg, *supra* note 3.

[13] *See* LAW. MONTHLY, *supra* note 8.

[14] *See* Evergreen, *supra* note 10.

[15] *See id.*

already used remote methods for client and colleague communications, but many legal businesses were uninitiated to the practice.[16]

Client confidentiality concerns arose after operations moved entirely remote.[17] These worries came amid several privacy lawsuits filed against popular platforms like Zoom in the early stages of the pandemic.[18] However, firms also noticed benefits to practicing remotely, such as flexibility and massive travel cost savings.[19]

Courts faced similar challenges. State courts, and even the Supreme Court, had to find ways to conduct their activities from home instead of in the courtroom.[20] In March 2020, courts around the country started conducting online hearings at record rates to resolve cases.[21] Some courts initially delayed proceedings like trials and motions, but delays could no longer suffice as the pandemic continued longer than expected.[22] For the first time, courts conducted entire jury trials through remote video conference software.[23]

Two years after the start of the COVID-19 pandemic, much of the practices that the legal industry initially thought to be temporary appear here to stay.[24] Many firms now offer their partners and associates a "hybrid" work environment where they can work part of the week from home.[25] These programs respond to many attorneys' preference for remote, at-home work and accordingly hope to improve retention.[26] Additionally, some courts are leaving pandemic practices in place.[27] Hearings, jury selections, and trials may stay remote in some jurisdictions.[28] For

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[16] *See id.*

[17] *See* LAW. MONTHLY, *supra* note 8.

[18] *See, e.g.*, Cullen v. Zoom Video Communs., Inc., No. 20-CV-02155-LHK, 2020 U.S. Dist. LEXIS 78745 (N.D. Cal. Apr. 24, 2020); Hurvitz v. Zoom Video Communs., No. CV 20-3400 PA (JPRx), 2020 U.S. Dist. LEXIS 138590 (C.D. Cal. May 12, 2020).

[19] *See* Evergreen, *supra* note 10.

[20] *See, e.g.*, Barnes, *supra* note 6.

[21] Erika Rickard, *How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations*, PEW CHARITABLE TRUSTS (Dec. 1, 2021), https://www.pewtrusts.org/en/research-and-analysis/reports/2021/12/how-courts-embraced-technology-met-the-pandemic-challenge-and-revolutionized-their-operations.

[22] *See* Jack Karp, *Trial Alternatives Getting Fresh Look with COVID-19 Backlog*, LAW360 (Feb. 4, 2021, 10:46 AM), https://www.law360.com/articles/1351450/trial-alternatives-getting-fresh-look-with-covid-19-backlog.

[23] *See* Bleiberg, *supra* note 7.

[24] *See* Horrigan, *supra* note 9.

[25] Ruiqi Chen, *Why Law Firms Take Differing Paths on Office Returns: Explained*, BLOOMBERG LAW (Nov. 10, 2021, 5:00 AM), https://news.bloomberglaw.com/business-and-practice/why-law-firms-take-differing-paths-on-office-returns-explained.

[26] *Id.*

[27] Rickard, *supra* note 21.

[28] Huo Jingnan, *To Try or Not to Try — Remotely. As Jury Trials Move Online, Courts See Pros and Cons*, NPR (Mar. 18, 2022, 5:45 AM), https://www.npr.org/2022/03/18/1086711379/as-jury-trials-move-online-courts-see-pros-and-cons.

example, a new California law allows courts to conduct all civil proceedings, including trials, remotely until July 2023.[29] Courts and litigants alike have found that virtual proceedings are beneficial for increased access, participation, and simplicity.[30]

B. Into the Metaverse

The "metaverse" can be defined as a "3D model of the internet."[31] Digital representations of people, known as avatars, can interact in a virtual reality parallel to the physical world.[32] The metaverse "represents a digital space accessed with [augmented reality] and [virtual reality] devices where many of our daily activities can be carried out" remotely.[33] In many contexts, the metaverse can be thought of more simply as "cyberspace."[34] The metaverse does not necessarily refer to any specific technology but is instead a broad shift in how society interacts in digital spaces.[35]

The metaverse concept has been around for many decades, but only recently has it been technologically possible to implement properly.[36] Although people can access virtual worlds through computers, game consoles, or phones, virtual and augmented reality devices allow for greatly enhanced immersion.[37] Virtual reality headsets have only existed for about ten years in their modern, popular form.[38] In 2014, Facebook acquired Oculus VR, one of the most prominent virtual reality headset companies.[39] In October 2021, Facebook rebranded itself as "Meta" to emphasize a new focus on metaverse projects.[40] Multiple tech giants have similar plans, including Microsoft, Disney, and Snap.[41]

Despite requiring advanced technology like a need for virtual reality headsets, many non-technology-centered businesses have considered metaverse

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[29] Cal. Civ. Proc. Code § 367.75 (Deering 2022).

[30] Rickard, *supra* note 21 (explaining that "[i]n recognition of technology's potential to make it easier for people to participate in court processes, more court officials plan to embrace virtual services").

[31] Shamani Joshi, *The Metaverse, Explained for People Who Still Don't Get It*, VICE (Mar. 15, 2022, 4:52 AM), https://www.vice.com/en/article/93bmyv/what-is-the-metaverse-internet-technology-vr.

[32] *Id.*

[33] Oleg Fonarov, *Tech Leaders Are Jumping into the Metaverse — Should Your Company Follow?*, FORBES (Feb. 3, 2022, 7:45 AM), https://www.forbes.com/sites/forbestechcouncil/2022/02/03/tech-leaders-are-jumping-into-the-metaverse---should-your-company-follow/?sh=3df7f35b6bae.

[34] Eric Ravenscraft, *What Is the Metaverse, Exactly?*, WIRED (Apr. 25, 2022, 7:00 AM), https://www.wired.com/story/what-is-the-metaverse/.

[35] *Id.*

[36] Joshi, *supra* note 31.

[37] *See* Ravenscraft, *supra* note 34.

[38] *See, e.g.*, *Oculus Rift Virtual Reality Headset Gets Kickstarter Cash*, BBC (Aug. 1, 2012), https://www.bbc.com/news/technology-19085967.

[39] Chris Welch, *Facebook Buying Oculus VR for $2 Billion*, VERGE (Mar. 25, 2014, 5:34 PM), https://www.theverge.com/2014/3/25/5547456/facebook-buying-oculus-for-2-billion/in/3631187.

[40] Lyons, *supra* note 1.

[41] Fonarov, *supra* note 33.

implementation.[42] According to the Accenture Technology Vision 2022 report, "98% of executives believe continuous technological advances are becoming more reliable than economic, political, or social trends in informing their organization's long-term strategy."[43] A metaverse platform could allow companies to unite existing digital tools to communicate, track work, and store and share files.[44] Current business uses for the metaverse include remote cooperation, training, and client interactions.[45] Although virtual offices for remote work are a potentially valuable way for companies to implement the metaverse internally, there are also opportunities to market and advertise.[46] To implement the metaverse into their practice, companies can hire an in-house development team or outsource this work to programmers and 3D artists.[47]

III. ANALYSIS

A. The Legality of Virtual Legal Proceedings

As soon as remote legal proceedings gained prevalence, there were questions about the practice's legal viability.[48] A criminal defendant's Sixth Amendment right to *confront* their accuser is one example of a worry raised in light of virtual proceedings.[49] Additionally, there were concerns about the practicality of transitioning from physical courtrooms to video conferencing software.[50] There were also questions of tradition, such as the Supreme Court's rule against cameras while in session.[51]

1. Case Law

Vazquez Diaz v. Commonwealth was one of the first cases concerning the constitutionality of remote court proceedings.[52] The question before the Massachusetts Supreme Court was whether the use of an internet-based video conferencing platform for an evidentiary hearing violated the defendant's constitutional rights to be present, to confrontation, and to a public trial under the Sixth Amendment.[53] The court concluded that "a virtual hearing is not a per se

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[42] *Id.*

[43] Vala Afshar, *Is Your Business Ready for the Metaverse?*, ZDNET (Mar. 16, 2022), https://www.zdnet.com/article/accenture-technology-vision-2022/.

[44] Fonarov, *supra* note 33.

[45] *Id.*

[46] *See* Joey Hodges, *How Brands Can Strategize for the Metaverse*, ENTREPRENEUR (Mar. 4, 2022), https://www.entrepreneur.com/article/416547.

[47] Fonarov, *supra* note 33.

[48] Horrigan, *supra* note 9.

[49] U.S. Const. amend. VI; *see* Horrigan, *supra* note 9.

[50] Horrigan, *supra* note 9.

[51] Barnes, *supra* note 6.

[52] *See generally* Vazquez Diaz v. Commonwealth, 167 N.E.3d 822 (Mass. 2021).

[53] *Id.* at 827-28; *see also* U.S. Const. amend. VI.

violation of the defendant's constitutional rights in the midst of the COVID-19 pandemic."[54] The court weighed the defendant's interests against the government's interests; it concluded that the state's "interest in protecting the public health during the COVID-19 pandemic is significant and, combined with its interest in the timely disposition of a case, would, in many instances, outweigh the defendant's interest in an in-person hearing."[55]

Although the court did not find virtual hearings during a pandemic a per se constitutional violation, they did hold that the trial court erred in denying the defendant's request for an in-person hearing.[56] The court stated that the trial "judge abused her discretion . . . in denying the defendant's motion to continue his hearing."[57] In making its decision, the court pointed to the defendant's waiver of his right to a speedy trial and that there were no civilian victims or witnesses.[58] Ultimately, *Vazquez Diaz* tells us that remote criminal proceedings are likely constitutional with the defendant's consent.[59]

In a concurring opinion to *Vazquez Diaz*, Justice Scott Kafker expressed some concerns with virtual proceedings, stating that "a virtual evidentiary hearing on Zoom . . . is not the same as an in-person evidentiary proceeding."[60] Justice Kafker was skeptical about the efficacy of virtual hearings because they "may alter [the] evaluation of demeanor evidence, diminish the solemnity of the legal process, and affect [the] ability to use emotional intelligence, thereby subtly influencing our assessment of other participants."[61]

Other states have reached similar outcomes.[62] For example, Illinois and Kansas appellate courts have likewise held that remote, video conferencing proceedings do not violate a defendant's due process rights.[63] In Illinois, the First District Court of Appeals noted that "[d]ue process is a flexible concept, and not all situations calling for procedural safeguards call for the same kind of procedure."[64] In Kansas, the Court of Appeals was asked to decide whether video conferencing hearings are a per se due process violation.[65] The court emphasized that there must be some particular deficiency, such as no access to documents or no ability to

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[54] *Vazquez Diaz*, 167 N.E.3d at 827-28.

[55] *Id.* at 832.

[56] *Id.* at 842.

[57] *Id.* at 833.

[58] *Id.* at 833-34.

[59] *See id.* at 833-34, 842.

[60] Vazquez Diaz v. Commonwealth, 167 N.E.3d 822, 843 (Mass. 2021) (Kafker, J., concurring).

[61] *Id.*

[62] *See, e.g.*, Clarington v. State, 314 So.3d 495, 509 (Fla. Dist. Ct. App. 2020) (holding that trial court's order directing remote probation violation hearing did not violate defendant's right to confrontation and due process).

[63] People v. W.L. (In re R.L.), 2021 IL App (1st) 210419, ¶15; In the Interest of C.T., 501 P.3d 899, 907 (Kan. Ct. App. 2021).

[64] People v. W.L. (In re R.L.), 2021 IL App (1st) 210419, ¶11.

[65] In the Interest of C.T., 501 P.3d 899, 907 (Kan. Ct. App. 2021).

consult with counsel, for remote hearings to violate due process rights.[66] In response to claims of technical issues, the court stated that their "review of the . . . hearing transcript . . . reveals that the district court and counsel were not hesitant to ask other hearing participants . . . to speak up and repeat themselves if the audio quality rendered spoken comments unclear."[67]

Remote and virtual court proceedings present novel issues that many jurisdictions have yet to address. However, initial decisions such as *Vasquez Diaz* indicate that virtual proceedings are not outright unconstitutional; they are viable alternatives to traditional courtroom proceedings as long as courts follow proper procedures.[68]

2. Legislative and Regulatory Landscape

In March 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security ("CARES") Act.[69] Under the CARES Act, courts may allow video conferencing for court proceedings in response to the COVID-19 pandemic.[70] Initially, Congress set the CARES Act provisions to expire thirty days after the end of the national emergency, but the President has extended the Act multiple times.[71] Some experts suggest the federal government will continue to extend the CARES Act into the near future.[72]

States are also beginning to take regulatory action in the form of statutes and procedural rules that authorize virtual proceedings and outline how courts should conduct them.[73] When the COVID-19 pandemic began, many states adopted emergency rules and authorizations for remote court proceedings.[74] California is the first state to codify more permanent legislation, with a new law allowing courts to

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[66] *Id.*

[67] *Id.*

[68] *See* Vazquez Diaz v. Commonwealth, 167 N.E.3d 822, 827-28 (Mass. 2021).

[69] Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020).

[70] Coronavirus Aid, Relief, and Economic Security Act § 15002.

[71] Horrigan, *supra* note 9.

[72] *Id.*; *see also* Adam S. Minsky, *Biden Officially Extends Student Loan Payment Pause, Promises 'Additional Flexibilities' for Borrowers*, FORBES (Apr. 6, 2022, 10:13 AM), https://www.forbes.com/sites/adamminsky/2022/04/06/biden-officially-extends-student-loan-payment-promises-additional-flexibilities-for-borrowers/?sh=55f662cf5b83 (discussing President Biden extending student loan payment forbearance, a part of the CARES Act, to August 2022).

[73] *See, e.g.*, Cal. Civ. Proc. Code § 367.75 (Deering 2022).

[74] *See, e.g.*, ILLINOIS SUPREME COURT, ILLINOIS SUPREME COURT POLICY ON REMOTE COURT APPEARANCES IN CIVIL PROCEEDINGS (2020); Stephen J. Henning, *California Leads Nation in Preserving Remote Appearances; Proposed Legislation Allows Virtual Appearances, Testimony and Trials*, WSHB LAW (Nov. 5, 2021), https://www.wshblaw.com/california-leads-nation-in-preserving-remote-appearances-proposed-legislation-allows-virtual-appearances-testimony-and-trials/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration..

conduct any civil proceeding remotely until July 2023.[75] The law gives courts the ability to deny remote proceedings only if the court does not have the necessary technology or if it determines that the in-person presence of a party or witness would "materially assist in the determination" of the proceeding.[76]

Additionally, the Ohio Supreme Court has proposed a new rule that would permanently allow civil trials to be held remotely.[77] The rule would allow parties to request a trial to be held remotely, but all parties must agree in the case of a jury trial.[78] This proposed rule has received some backlash from Ohio lawmakers, mainly due to individual parties having the ability to request remote court in the case of bench trials or other proceedings with no jury.[79]

Current case law and legislation, although arising from the COVID-19 pandemic, appear relatively straightforward; remote legal proceedings are not an outright constitutional violation when appropriately implemented.[80] There remain unanswered questions, but many will likely be answered as courts decide additional cases and more states consider the issue in the near future.

B. Law in the Metaverse

Current and proposed metaverse implementation in the private sector may suggest that legal work and proceedings could soon be found in a 3D virtual space.[81] Virtual and augmented reality metaverse experiences offer compelling reasons for law firms and courts to transition,[82] especially if they already use basic video conferencing platforms like Zoom. Business operations that are often done remotely, like client interactions and employee training, can now be enhanced and more realistic, allowing for a more connected remote work experience.[83]

The few years since the start of the COVID-19 pandemic have served as a proving ground for the legal sector's ability to adapt to remote, virtual landscapes.[84] Furthermore, some courts have found these new customs beneficial and even

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[75] § 367.75; *see* Henning, *supra* note 74.

[76] § 367.75; Henning, *supra* note 74.

[77] Csaba Sukosd, *Remote Technology Central in Proposed Court Rule Changes*, CT. NEWS OHIO (May 13, 2022), https://www.courtnewsohio.gov/happening/2022/Courtrulechanges_051322.asp#.YoVA9ujMIuU.

[78] *Id.*

[79] Nick Evans, *Ohio House Lawmaker Files Resolution to Block Remote Civil Trials in the State*, CITY BEAT (May 18, 2022, 9:45 AM), https://www.citybeat.com/news/ohio-house-lawmaker-files-resolution-to-block-remote-civil-trials-in-the-state-13174365.

[80] *See, e.g.*, Vazquez Diaz v. Commonwealth, 167 N.E.3d 822, 827-28 (Mass. 2021); § 367.75.

[81] *Cf.* Mary K. Pratt, *10 Examples of the Metaverse for Business and IT Leaders*, TECHTARGET (Apr. 5, 2022), https://www.techtarget.com/searchcio/feature/Examples-of-the-metaverse-for-business-and-IT-leaders (discussing various ways that companies can use and benefit from metaverse implementation including business operations, improved training, and work meetings).

[82] *See id.*

[83] *See id.*

[84] Horrigan, *supra* note 9.

preferable.[85] As more sectors transition from basic remote video conferencing to virtual and augmented reality metaverse platforms, the legal system may be next. As more states follow in the footsteps of California and Ohio in implementing remote court outside the pandemic context,[86] they may look for ways to create a more immersive and realistic virtual experience.

The metaverse could quell many of the concerns expressed by Justice Kafker in *Vazquez Diaz*.[87] Current video conferencing software is limited to two-dimensional depictions, whereas the metaverse allows for interactions in a virtual third dimension.[88] Digital avatars in a virtual reality courtroom may convey demeanor and emotional intelligence more clearly.[89] This enhanced virtual depiction could also benefit law firms and other legal organizations by allowing for more personal interactions with clients and colleagues while maintaining the remote conveniences.[90]

Constitutionally, courts may not view metaverse legal proceedings differently than current video conferencing implementations. Fundamentally, the metaverse is still a remote, virtual interface similar to Zoom or other video conferencing software.[91] Virtual reality technology could allow for more robust remote legal experiences that relieve many concerns with current options such as Zoom.[92] Ultimately, the metaverse may provide an alternative to standard video conferencing software that retains the benefits of remote legal work and proceedings but is also more viable for permanent use.[93]

IV. RECOMMENDATION

Legislatures, agencies, and courts should begin to compose a permanent regulatory landscape around virtual legal proceedings, particularly in the metaverse context. Although the concept and technology are in their infancy, the COVID-19 pandemic revealed that the legal industry must be prepared for rapid, unexpected change. Congress' CARES Act was a step in the right direction but only concerned

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[85] *See, e.g.*, Patrick Mcardle, *Some Changes to Vermont Courts Likely to Remain*, RUTLAND HERALD (Apr. 15, 2022), https://www.rutlandherald.com/news/some-changes-to-vermont-courts-likely-to-remain/article_88e1af89-670b-5e82-b07f-3e4f4e8f6119.html.

[86] *See* Cal. Civ. Proc. Code § 367.75 (Deering 2022); Sukosd, *supra* note 77.

[87] *See* Vazquez Diaz v. Commonwealth, 167 N.E.3d 822, 843 (Mass. 2021) (Kafker, J., concurring).

[88] Joshi, *supra* note 31.

[89] Shane L. Rogers et. al., *Realistic Motion Avatars Are the Future for Social Interaction in Virtual Reality*, 2 FRONTIERS IN VIRTUAL REALITY, Jan. 3, 2022, at 1, 7-9.

[90] *See id.*

[91] *See* Joshi, *supra* note 31.

[92] *See* Debra Cassens Weiss, *Another Lawsuit Is Filed Against Zoom Over Alleged Privacy Problems*, ABA J. (Apr. 14, 2020, 10:04 AM), https://www.abajournal.com/news/article/another-lawsuit-is-filed-against-zoom-over-alleged-privacy-problems.

[93] *See* Evergreen, *supra* note 10.

virtual proceedings in the context of a national emergency.[94] Even as the pandemic wanes, the proliferation of remote proceedings shows that more permanent legislation is needed.

States should consider promulgating rules like California's that plainly articulate remote court procedural authorization and expectations.[95] Legislators and courts should write these laws and rules to last indefinitely, even beyond public health needs, like what the Ohio Supreme Court is currently considering.[96] Cases like *Vazquez Diaz* suggest that although courts may not be able to compel parties to engage in virtual proceedings, it can be a viable and constitutional option when courts weigh interests.[97] The government's interest in public health was relied heavily upon during the COVID-19 pandemic.[98] However, many of the other benefits to virtual proceedings, like accessibility, could be compelling government interests that allow remote proceedings to continue beyond the pandemic context.[99]

Law practices of any size and type should begin preparing for future implementations of virtual, remote, metaverse technologies. To stay competitive, brands should begin developing strategies for how they will enter the metaverse.[100] This may mean adopting metaverse practices for internal activities such as meetings and training, or it may simply mean keeping up to date with current metaverse systems and platforms. Firms should also consider leveraging the metaverse for advertising, branding, and marketing opportunities to reach new and developing markets.[101] Firms that had already implemented remote video conferencing tools into their practice were at a distinct advantage when the COVID-19 pandemic began. There is no way to anticipate a similar situation.[102]

Law practices, public and private, should also be prepared to counsel their clients on possible implications of the metaverse. As the technology develops and more businesses and entities begin to adopt metaverse applications, attorneys will need to understand the new landscape and how to advise their clients appropriately. There may also be changes in the way attorneys interact with their clients,[103] and firms should ensure that attorneys and clients are comfortable with these new, virtual formats.

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[94] Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281, § 15002 (Mar. 27, 2020).

[95] *See* Cal. Civ. Proc. Code § 367.75 (Deering 2022).

[96] *See* Sukosd, *supra* note 77.

[97] *See* Vazquez Diaz v. Commonwealth, 167 N.E.3d 822, 832-34 (Mass. 2021).

[98] *See id.* at 832.

[99] Rickard, *supra* note 21.

[100] Hodges, *supra* note 46.

[101] *See* Pratt, *supra* note 81.

[102] *See* Evergreen, *supra* note 10.

[103] *See* Pratt, *supra* note 81.

V. CONCLUSION

When the COVID-19 pandemic forced the legal industry to quickly adapt to new, remote landscapes, most probably expected the changes to be temporary. However, despite some concerns and complications, many have noticed considerable benefits to remote, virtual legal and business work. Courts, law firms, corporations, and the like now continue to embrace virtual alternatives to the traditional courtroom or workplace. With the rise of innovative virtual technologies such as the metaverse, every aspect of the legal sector will be affected. One lesson to take away from recent history: departure from tradition may not always be a simple normative suggestion; prepare for change.

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ROBOTS DON'T TAKE BATHROOM BREAKS: ANALYZING THE APPLICABILITY OF CALIFORNIA'S A.B. 701 LEGISLATION IN ILLINOIS

❖ Note ❖

*Kevin Estes**

I. INTRODUCTION

On September 22, 2021, California Governor Gavin Newsom signed into law A.B. 701[1] intending to further protect the health and safety of warehouse workers in the state of California.[2] Authored by California Assemblywoman Lorena Gonzalez, A.B. 701"strengthen[s] warehouse workers' rights against arbitrary and abusive work quota systems by requiring companies to disclose work quotas to employees and state agencies, and establish statewide standards to minimize on-the-job injuries for employees working under strict quotas."[3] Although the bill places restrictions on all single warehouse distribution center with 100 or more employees or 1,000 or more employees at one or more warehouse distribution centers in the state,[4] the bill specifically targets Amazon Inc. and their "extreme high-churn model, continually replacing workers in order to sustain dangerous and grueling work pace demands."[5] To achieve its purpose, A.B. 701 is the first state legislation[6] that

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1 CA LEGIS 197 (2021), 2021 Cal. Legis. Serv. Ch. 197 (A.B. 701).

2 *New California Law Expands Protections for Warehouse Workers*, SAFETY AND HEALTH MAG. (Sept. 29, 2021), https://www.safetyandhealthmagazine.com/articles/21762-new-california-law-expands-protections-for-warehouse-workers.

3 Assem. Bill No. 701, (CA 2021-2022) Reg. Sess. Version Sep. 08, 2021, at 3 (2021).

4 Cal. Lab. Code § 2100(f).

5 Assem. Bill No. 701, CA 2021-2022) Reg. Sess. Version Sep. 08, 2021, at 2.

6 *Amazon's AI Managers Targeted in California Legislation Meant to Empower Warehouse Workers, Morning*, S. CHINA MORNING POST (Dec. 21, 2021), https://www.scmp.com/tech/big-tech/article/3161647/amazons-ai-managers-targeted-california-legislation-meant-empower?utm_source=rss_feed.

provides protections from AI monitoring systems that thwart basic worker rights such as rest periods, bathroom breaks, and safety.[7]

Placing a target on Amazon and the entire warehousing industry is a substantial move for the California legislature. California relies heavily on the warehousing market for a significant number of blue-collar jobs.[8] As of 2022, Amazon alone has created more than 170,000 jobs in California.[9] This is an increase of over 20,000 positions during the pandemic,[10] leading some experts to fear the bill will result in, "some of these warehouse distribution centers mov[ing] out of the state of California"[11], ultimately, causing a loss of much need blue-collar jobs.[12] However, California, as a port state, has seen massive investment from the warehousing market during the pandemic, all while A.B. 701 was being proposed and passed.[13] Major international companies have announced new distribution centers in 2021.[14] Likewise, as of 2021, California has 35 current or planned Amazon warehouses - the most of any state - with almost 32 million square feet of warehouse space.[15] As such, imposing protections on the warehouse industry has seemingly not slowed the growth.

Illinois, like California, relies heavily on warehousing industry and Amazon to provide jobs for blue-collar workers.[16] Amazon employs over 43,000 individuals in Illinois,[17] and Illinois contains the third most square footage of warehouse space with nearly 15 million square feet of space.[18] Although Illinois does not provide an AI monitoring protection currently for employees, the state Legislature has also

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[7] Cal. Lab. Code § 2103(a).
[8] Arkan Somo, *Opinion: Assembly Bill 701 Would Force E-Commerce Warehouse Jobs Out of California*, TIMES OF SAN DIEGO (June 9, 2021), https://timesofsandiego.com/opinion/2021/06/09/assembly-bill-701-would-force-e-commerce-warehouse-jobs-out-of-california/.
[9] Todd Bishop, *Amazon Tops 1M U.S. Employees*, GEEKWIRE (Feb. 9, 2022), https://www.geekwire.com/2022/amazon-tops-1m-u-s-employees/.
[10] Avi Asher-Schapiro, *Amazon Labor Conditions Under Scrutiny by California Lawmakers*, REUTERS (Sept. 8, 2021), https://www.reuters.com/article/us-usa-amazon-com-lawmaking/amazon-labor-conditions-under-scrutiny-by-california-lawmakers-idUSKBN2G41U1.
[11] *Id.*
[12] *Id.*
[13] *Why Is IT Impossible to Find California Warehouse Space?*, WEBER LOGISTICS (Mar. 17, 2022), https://www.weberlogistics.com/blog/california-logistics-blog/find-california-warehouse-space.
[14] Somo, *supra* note 8.
[15] *Mapping Amazon Warehouses: How Much Square Footage Does Amazon Own?*, BIG RENTZ (JAN. 7, 2022), https://www.bigrentz.com/blog/amazon-warehouses-locations#:~:text=Methodology-,States%20With%20the%20Most%20Amazon%20Warehouses,warehouses%2C%20also%20called%20fulfillment%20centers.
[16] Kari Lydersen, *Warehouse Workers Are on the Front Lines of the Covid Crisis. They're Worried They'll Be Passed Over for the Vaccine*, INTHESETIMES (Dec. 10, 2020), https://inthesetimes.com/article/warehouse-workers-for-justice-covid-vaccine-illinois-temporary-low-wage.
[17] Bishop, *supra* note 9.
[18] BIG RENTZ, *supra* note 15.

taken early steps to provide AI monitoring protections to jobseekers.[19] However, application of a warehousing protection bill in Illinois must come with some hesitation. Illinois is not a port state and nearby mid-western states provide similar strengths in the warehousing industry. [20] New legislation could push companies away from the state.

This note will argue the need for Illinois to further develop its warehouse worker protections by taking legislative action similar to that of California under A.B. 701. Part II discusses the warehouse industry, the growth of Amazon and the usage of AI technology, the status of federal worker AI Monitoring protections, and the current protections against AI monitoring provided under Illinois law. Part III will analyze the effectiveness of the working provisions under A.B. 701 and the potential effects A.B. 701 will have on the market in California. Part IV will argue that adopting similar legislation in Illinois should be done but with some hesitation.

II. BACKGROUND

A. Warehouse Industry's movement towards AI monitoring

A.B. 701 impacts all single warehouse distribution center with 100 or more employees or 1,000 or more employees at one or more warehouse distribution centers in the state.[21] The warehouse industry is particularly in need of protection because warehouses injuries often "involve musculoskeletal injuries: sprains, strains, and tears to the shoulder, back, knee, wrist, and foot."[22] These injuries are common in highly repetitive, forceful exertions—bending, twisting, and awkward postures—that are common to most warehouse roles. [23] "Further, the types of severe injuries that workers are suffering from are injuries that can stay with workers for the rest of their lives, leading to chronic pain and an elevated risk of reinjury and long-term disability." [24] "According to U.S. Census data, 27 percent of workers in the warehousing industry are younger than 25 years old, and 56 percent of warehouse

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[19] Lisa Burden, *Illinois Law Regulating Use of AI in Hiring Goes Into Effect*, ZENEFITS (Feb. 3, 2020), https://www.zenefits.com/workest/illinois-law-regulating-use-of-ai-in-hiring-goes-into-effect/; *See also* 820 Ill. Comp. Stat. Ann. 42/1.
[20] BIG RENTZ, *supra* note 15.
[21] Cal. Lab. Code § 2100(f).
[22] Deborah Berkowitz & Irene Tung, *Amazon's Disposable Workers: High Injury and Turnover Rates at Fulfillment Centers in California*, NAT'L EMP. LAW PROJECT (Mar. 6, 2020), https://www.nelp.org/publication/amazons-disposable-workers-high-injury-turnover-rates-fulfillment-centers-california/#_edn7.
[23] *Id.*
[24] *Id.*

workers are younger than 35 years old." [25] Severe injuries amongst this age group is particularly damaging to the states workforce.[26]

Although affecting a large portion of the warehouse industry, Amazon is an obvious target for legislative change as it plays a crucial part in the California warehouse market.[27] As of 2022, Amazon is the second-largest private employer in the US and its massive growth set a standard for the rest of the industry.[28] Amazon employs a total of 1.1 million people in the U.S, up 18% from 935,000 a year earlier.[29] That amounts to nearly one out of every 153 employed workers in the US.[30] However, this massive number of employees is not because of high retention rates. The turnover rate of hourly employees is 150%.[31] Before the pandemic, Amazon lost 3% of its warehouse staff each week. [32] This is nearly double the rate of similar businesses.[33] That works out to replacing the entire work force every eight months. [34] And this seems to be by design. David Niekerk, a former member of Amazon that helped design the company's warehouse-management system, told the New York Times that founder Jeff Bezos' "believed that people were inherently lazy" and "that our nature as humans is to expend as little energy as possible to get what we want or need."[35] " That conviction was embedded throughout the business, from the ease of instant ordering to the pervasive use of data to get the most out of employees." [36]

To achieve high turnover rates, Amazon warehouses created an environment that increased pressure to meet quotas.[37] Since then, Amazon has outsourced many of the roles traditionally played by human managers to machines.[38] Productivity

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[25] Transportation and Warehousing: Summary Statistics for the U.S., States, and Selected Geographies: 2017, U.S. CENSUS BUREAU (2017), https://www.census.gov/data/tables/2017/econ/economic-census/naics-sector-48-49.html.
[26] Berkowitz & Tung, *supra* note 22.
[27] Asher-Schapiro, *supra* note 10.
[28] David Brancaccio et al., *Is Amazon's High Turnover a Huge Red Flag or The Secret to Its Dominance?,* MARKETPLACE (June 18, 2021), https://www.marketplace.org/2021/06/18/amazon-workforce-turnover-dominance-investigation/.
[29] Bishop, *supra* note 9.
[30] Dominick Reuter, *1 Out of Every 153 American Workers is an Amazon Employee*, INSIDER (July 30, 2021), https://www.businessinsider.com/amazon-employees-number-1-of-153-us-workers-head-count-2021-7.
[31] Brancaccio et al., *supra* note 28.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] Jodi Kantor et al., *The Amazon That Customers Don't See*, N.Y. TIMES (June 15, 2021), https://www.nytimes.com/interactive/2021/06/15/us/amazon-workers.html.
[36] *Id.*
[37] Will Evans, *Amazon's Warehouse Quotas Have Been Injuring Workers for Years. Now, Officials Are Taking Action*, REVEAL NEWS (Jan. 19, 2022), https://revealnews.org/article/amazons-warehouse-quotas-have-been-injuring-workers-for-years-now-officials-are-taking-action/.
[38] Spencer Soper et al., *Amazon's Machine Bosses Are Targeted in California Legislation*, BLOOMBERG LAW (Dec. 30, 2021),

demands began to be tracked via automated tracking and termination processes as early as 2019.[39] Amazon's tracking system monitors the rates of each individual associate's productivity.[40] This system then "determines and automatically generates any warnings or terminations regarding quality or productivity without input from supervisor."[41]

Increasingly aggressive production demands ultimately are putting the bodies of employees at risk for the convenience of customers.[42] A 2020 report by the union-backed Strategic Organizing Center found that the serious injury rate for Amazon workers last year was more than double the rest of the warehouse sector.[43] The injury rates were found to be 80% higher than the rest of the industry.[44]

Amazon is not alone in its usage of AI technology to monitor employees' productivity. Rideshare apps like Uber utilize AI technology to rank drivers based on their star rankings.[45] Uber's systems will even go as far as too remove the driver for receiving to many low ratings.[46] Likewise, as Covid-19 shifted work into the home, many companies have begun to experiment with AI monitoring.[47] Companies can monitor employees' work productivity by tracking emails sent, collaboration tools, web browsing, video tracking, attention tracking, and key-logging. [48]

When major industry innovators begin moving towards AI monitoring, others are sure to follow. AI technology can be an effective tool to explore productivity in the workplace,[49] however, AI monitoring technology in the warehouse industry is being used to pursue aggressive quotas with the intention of fast turnover rates amongst young employees and is resulting in increased injuries to a particularly vital workforce. This abuse of innovation begs the question as to how

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https://www.bloomberglaw.com/bloomberglawnews/safety/X6GLOV40000000?bna_news_filter=safety.

[39] Colin Lecher, *How Amazon Automatically Tracks and Fires Warehouse Workers for 'Productivity'*, VERGE (Apr. 25, 2019), https://www.theverge.com/2019/4/25/18516004/amazon-warehouse-fulfillment-centers-productivity-firing-terminations.

[40] *Id.*

[41] *Id.*

[42] Evans, *supra* note 37.

[43] *Primed For Pain: Amazon's Epidemic of Workplace Injuries*, STRATEGIC ORG. CTR. (May 2020), https://thesoc.org/wp-content/uploads/2021/02/PrimedForPain.pdf.

[44] *Id.*

[45] Leonie Carter et al., *Your Boss is Watching: How AI-Powered Surveillance Rules the Workplace*, POLITICO (May 27, 2021), https://www.politico.eu/article/ai-workplace-surveillance-facial-recognition-software-gdpr-privacy/.

[46] *Id.*

[47] Mathew Finnegan, *Rise in Employee Monitoring Prompts Calls for New Rules to Protect Workers*, COMPUTERWORLD (Nov. 30, 2021), https://www.computerworld.com/article/3642712/rise-in-employee-monitoring-prompts-calls-for-new-rules-to-protect-workers.html.

[48] *Id.*

[49] *Id.*

Congress plans to address worker protections from over-aggressive AI technology productivity quotas.

B. Federal AI Monitoring protections

Congress has largely avoided addressing any protections in growing technological spaces. [50] The lack of comprehensive Federal legislation tackling a growing technology, like AI monitoring, is a race legislation often fails to win. [51] Moore's Law on the doubling of computing power every 18-24 months has driven the growth of technology to the extent that congressional action is often a band-aid that will be outdated in months. [52]

As a starting point of addressing AI technology, in 2016 the Equal Employment Opportunity Commission (EEOC) held a public meeting to hone in on employers using AI technology to discriminate in the employment process.[53] Unsurprisingly in 2020, the EEOC has failed to create any written guidance. [54] This resulted in ten U.S. Senators authoring a letter pleading for the agency to focus on employers' use of artificial intelligence, machine learning, and other hiring technologies that may result in discrimination. [55] The senators argued specifically for protections from "tools used in the employee selection process to manage and screen candidates after they apply for a job", "new modes of assessment, such as gamified assessments or video interviews that use machine-learning models to evaluate candidates," "general intelligence or personality tests," and "modern applicant tracking systems." [56] Nevertheless, despite what federal inquiry there has been, neither Congress nor an administrative agency has promulgated laws addressing the issue.

C. Illinois AI Monitoring Protections

Since no Federal regulations have been passed to protect employees, states have chosen to pass their own legislation. In August of 2019, Illinois Gov. J.B. Pritzker signed the "Illinois Artificial Intelligence Video Interview Act" ("Video Interview

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[50] Cameron F. Kerry, *Protecting Privacy in an AI-Driven World*, BROOKINGS (Feb. 10, 2020) https://www.brookings.edu/research/protecting-privacy-in-an-ai-driven-world/.
[51] *Id.*
[52] *Id.*
[53] *EEOC Launches Initiative on Artificial Intelligence and Algorithmic Fairness*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N (Oct. 28, 2021), https://www.eeoc.gov/newsroom/eeoc-launches-initiative-artificial-intelligence-and-algorithmic-fairness.
[54] Daniel J. Butler et al., *Employers Beware: The EEOC is Monitoring Use of Artificial Intelligence*, HUNTON ANDREWS KURTH (Sept. 21, 2021), https://www.huntonlaborblog.com/2021/09/articles/eeoc-developments/employers-beware-the-eeoc-is-monitoring-use-of-artificial-intelligence/.
[55] Letter from Michael Bennet, U.S. Senator, et al., to Janet Dhillon, Commissioner of the Equal Employment Opportunity Commission (Dec. 8, 2020) (on file with the U.S. Senate).
[56] *Id.*

Act") into law.[57] The "Video Interview Act" is a job applicant protection bill that "places requirements on employers who video record interviews with job applicants and then use an artificial intelligence system to analyze the responses, demeanor, and mannerisms of the prospective employees."[58] The bill requires "disclosure of the use of artificial intelligence analysis."[59] "An employer that asks applicants to record video interviews and uses an artificial intelligence analysis of the applicant-submitted videos" must "(1) [n]otify each applicant before the interview that artificial intelligence may be used"; "(2) [p]rovide each applicant with information before the interview explaining how the artificial intelligence works"; and (3) [o]btain, before the interview, consent from the applicant to be evaluated by the artificial intelligence."[60] The bill is the first Illinois legislation to place restrictions on employer AI systems. [61]

In terms of Warehouse protections, employees have few resources to rely upon. Under 820 Ill. Comp. Stat. Ann. 140/3, employees that work 7 1/2 continuous hours or more shall be provided a meal period of at least 20 minutes.[62] No legislation mentions the monitoring of quotas that thwart basic worker rights such as rest periods, bathroom breaks and safety.[63] Nevertheless, warehouse workers were singled out by the legislature during the Covid-19 pandemic for being essential workers.[64] Gov. J.B. Pritzker, specifically noted warehouse work is essential to the Illinois economy. [65] Since warehouse work is vital, protections for this group is key to Illinois' economy. The need to balance the rights of warehouse workers with the essentiality of the warehouse industry to the Illinois economy and to the way retail markets operate in today's world has led to difficult questions concerning a feasible legislative model to achieve that balance. The central question this paper seeks to resolve is whether application of a bill similar to A.B. 701 is the right fit to strike this balance in the state of Illinois.

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[57] 820 Ill. Comp. Stat. Ann. 42/1.
[58] Burden, *supra* note 19.
[59] 820 Ill. Comp. Stat. Ann. 42/5.
[60] *Id.*
[61] Burden, *supra* note 19.
[62] 820 Ill. Comp. Stat. Ann. 140/3.
[63] *Worker Rights*, ILLINOIS DEPARTMENT OF LABOR (2022), https://www2.illinois.gov/idol/Employees/Pages/default.aspx.
[64] Ill. Exec. Order 20-10 (March 9, 2020).
[65] Lydersen, *supra* note 16.

III. ANALYSIS

A. Warehouse Protections Under A.B. 701

A.B. 701 was specifically intended to have broad effects to all medium and large size warehouses.[66] The statue targets what are labeled "warehouse distribution centers."[67] "'Warehouse distribution center' means an establishment as defined by any of the following North American Industry Classification System (NAICS) Codes, however that establishment is denominated: (A) 493110 for General Warehousing and Storage"[68]; "(B) 423 for Merchant Wholesalers, Durable Goods"[69]; "(C) 424 for Merchant Wholesalers, Nondurable Goods";[70] and "(D) 454110 for Electronic Shopping and Mail-Order Houses."[71] In plain terms these are "establishments that are primarily engaged in operating merchandise warehousing and storage facilities, that sell durable and/or nondurable goods to other businesses, or that are primarily engaged in selling merchandise using non-store means, such as through the Internet or catalogs."[72] Likewise, the bill applies to "employers that employ or exercise control over the wages, hours, or working conditions of 100 or more employees at a single warehouse distribution center, or 1,000 or more employees at one or more distribution warehouse centers in California."[73]

Under the bill, quotas or "assigned standards of work" are limited in order to protect employees.[74] "Employers cannot require quotas that prevent compliance with meal or rest periods, use of bathroom facilities (including the time to travel to and from such facilities), or occupational health and safety laws."[75] Likewise, break periods are not considered to be productivity time unless they are actively on call.[76] Furthermore, employers must notify new hires of quota prior to starting the position and upon the request of current or former employees.[77]

In terms of protection from AI systems, the bill prevents usage of monitoring systems that thwart basic worker rights such as rest periods, bathroom breaks and safety.[78] Likewise, the bill protects from AI monitoring systems by preventing workers from being fired or retaliated against for failing to meet an

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[66] Steven Eheart, *Distribution Centers Face First-in-Nation Law Regulating Production Quotas*, FISHER PHILIPS (Sept. 23, 2021), https://www.fisherphillips.com/news-insights/california-employers-warehouse-distribution-centers.html; *See also* Cal. Lab. Code § 2103(a).
[67] *Id.*; *See also* Cal. Lab. Code § 2100(i)(1).
[68] Cal. Lab. Code § 2100(i)(1)(A).
[69] Cal. Lab. Code § 2100(i)(1)(B).
[70] Cal. Lab. Code § 2100(i)(1)(C).
[71] Cal. Lab. Code § 2100(i)(1)(D).
[72] Eheart, *supra* note 66.
[73] *Id.*; *See also* Cal. Lab. Code § 2103(a).
[74] *Id.*; *See also* Cal. Lab. Code § 2100(h).
[75] *Id.*; *See also* Cal. Lab. Code § 2100(h).
[76] *Id.*; *See also* Cal. Lab. Code § 2103(a).
[77] *Id.*; *See a*lso Cal. Lab. Code § 2101.
[78] S. CHINA MORNING POST, *supra* note 6; *see also* Cal. Lab. Code § 2103(a).

unsafe quota.[79] The authors intended the monitoring portion of the bill to be incredibly broad.[80] This was with the expectation that regulators are constantly playing catch-up with the tech industry.[81] By broadening the scope to any AI system, companies are forced to address any monitoring system that regulates the productivity of employees.[82]

Failure to meet the requirements under the bill allows employees to take legal action.[83] Employees may seek a court order to force employers to comply with the rule, individually or under California's Private Attorney General Act.[84] Failure to comply with the legislation effectively allows workers to file lawsuits that would impose costs on employers.[85]

Proponents of the bill focus on the creation of protective measures to aid the employees that are engaging in "back breaking conditions."[86] "Many workers see no other job options and feel they must accept unsafe conditions to keep a roof over their heads."[87] With increasing industry innovation "driving down workplace safety across the logistics industry" legislatures need to form some type of barrier of protection.[88] The expectation of the measures is "[i]f we raise standards at the biggest companies, we can create good jobs throughout the industry, particularly in the communities that need them most."[89]

Ultimately, the bill aims to target larger warehouse facilities with intentionally broad legislation.[90] Employers are forced to regulate out of fear of endless lawsuits. However, proponents argue his fear can be justified if employers are pushing the boundaries of an employee's health.[91] All in all, California's A.B. 701 is aimed primarily toward the benefit of employees. But concerns arise about the costs of California's new regulatory regime.

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[79] SAFETY AND HEALTH MAGAZINE, *supra* note 2; *see also* Assem. Bill No. 701, (CA 2021-2022) Reg. Sess. Version Sep. 08, 2021, at 3.
[80] Soper et al., *supra* note 38; *see also* Assem. Bill No. 701, *supra* note 3, at 3.
[81] *Id.*; *see also* Assem. Bill No. 701, (CA 2021-2022) Reg. Sess. Version Sep. 08, 2021, at 3.
[82] *Id.*; *see also* Assem. Bill No. 701, (CA 2021-2022) Reg. Sess. Version Sep. 08, 2021, at 3.
[83] Cal. Lab. Code §§ 2105-2107.
[84] Julie M. Capell et al., *California Enacts Law Aimed at Work "Quotas" Set by Employers with Warehouse Distribution Centers*, DAVIS WRIGHT TREMAINE LLP (Oct. 7, 2021), https://www.dwt.com/blogs/employment-labor-and-benefits/2021/10/california-warehouse-distribution-center-law; S*ee* Cal. Lab. Code §§ 2105-2107.
[85] Soper et al., *supra* note 38.
[86] Assem. Bill No. 701, (CA 2021-2022) Reg. Sess. Version Sep. 08, 2021, at 3.
[87] *Id.*
[88] *Id.*
[89] *Id.* at 3-4.
[90] Cal. Lab. Code § 2103(a).
[91] Assem. Bill No. 701, (CA 2021-2022) Reg. Sess. Version Sep. 08, 2021, at 3.

B. Fears of A.B. 701

Opponents of A.B. 701 argue the bill stifles innovation and the bill will move industry out of the state.[92] In terms of innovation, there "many reasons an employer might track worker activity, such as for safety reasons or to protect highly sensitive data."[93] By monitoring effective productivity, employees have a clear and quicker snapshot of job expectations in comparison to past usage of employee surveys. [94] Although AI monitoring can be used negatively, it can also provide insight into aspects of the role that are negatively impacting the well-being of employees, such as working too much or by becoming isolated. [95]

The market effects in California are another large point of contention for opponents of the bill. Having major ports on the coast, California has a large warehouse market.[96] Similar to Amazon, in 2020 Nike announced a new distribution center in California that will bring 250 jobs, and Burlington has opened a new distribution center that will create more than 100 new jobs.[97] "Regions such as the Inland Empire and San Joaquin County have grown to have among the highest concentration of transportation and warehousing employment in the entire United States."[98] Due to the growth resulting from e-commerce during the pandemic, warehouse demand exceeded supply in the fourth quarter of 2020 and 2021. [99] However, both innovation concerns and job loss are seemingly without merit. AI technology is not outright prohibited under A.B. 701 so long as it is not used to regulate unsafe working conditions.[100] Monitoring productivity to be used positively is still available under A.B. 701 if it does not thwart basic worker rights such as rest periods, bathroom breaks and safety.[101] Likewise, there are seemingly no signs of job loss or warehouse market decline.[102] Currently in California, there is a shortage of warehouse space.[103] California's warehouse market has continued to rise even after A.B. 701 as gone into effect. [104] Although business are moving out of California due

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[92] Soper et al., *supra* note 38.
[93] Finnegan, *supra* note 47.
[94] *Id.*
[95] *Id.*
[96] Somo, *supra* note 8.
[97] *Id.*
[98] Paul Granillo, *AB 701 Will Do More Harm Than Good*, ORANGE CNTY. REG. (Aug. 23, 2021), https://www.ocregister.com/2021/08/23/ab-701-will-do-more-harm-than-good/#:~:text=But%20AB%20701%20lumps%20the,keeping%20up%20with%20rising%20costs.
[99] Somo, *supra* note 8.
[100] Cal. Lab. Code § 2103(a).
[101] *Id.*
[102] Asher-Schapiro, *supra* note 10.
[103] WEBER LOGISTICS, *supra* note 13.
[104] Somo, *supra* note 8.

to the increasing prices of real estate[105], the warehouse market is seemingly unaffected. [106] Thus, the major concerns of the bill have had little effect.

IV. RECOMMENDATION

Applying A.B. 701 to California comes with benefits to employees as well as concerns about the warehouse market. Similar to California, Illinois relies heavily on warehouse jobs for blue-collar workers. [107] This has lead companies like Amazon to invest heavily into warehouse space in Illinois. [108] Amazon alone has over 43,000 individuals in Illinois, [109] and Illinois contains the third most square footage of Amazon warehouse space with nearly 15 million square feet of space.[110] Thus, concerns about the protections provided to workers should be taken seriously. Currently, employees are being subjected to increased injury due to aggressive quotas established by AI monitoring.[111] As stated above, the legislature has attempted to address initial concerns of AI technology on the job market with the passage of the "Video Interview Act." [112] Therefore, similar application of AI protections for warehouse workers is warranted.

While Illinois has the has the third-highest average wage in the Midwest, the state's low-income and blue-collar workers are the worst-paid in the region.[113] Blue collar workers are often subjected anti-worker laws thwarting the growth of blue-collar jobs and leaving blue-collar workers with lower wages and fewer opportunities.[114] And like California, many Illinois "workers see no other job options and feel they must accept unsafe conditions to keep a roof over their heads."[115] Warehouse workers in particular are essential to the Illinois economy and protection of these workers is vital. [116] With increasingly aggressive production demands as a result of harsh quotas, they are ultimately employees' physical well-being at risk for the convenience of customers.[117] Furthermore, the injuries sustained by warehouse workers can inflict chronic pain and elevate risk of reinjury and long-term

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105 Granillo, *supra* note 98.
106 Somo, *supra* note 8.
107 Lydersen, *supra* note 16.
108 BIG RENTZ, *supra* note 15.
109 Bishop, *supra* note 9.
110 BIG RENTZ, *supra* note 15.
111 Evans, *supra* note 37.
112 Burden, *supra* note 19.
113 *State Occupational Employment and Wage Estimates – Illinois*, U.S. BUREAU OF LABOR STATISTICS (May 2021), https://www.bls.gov/oes/current/oes_il.htm#otherlinks.
114 Michael Lucci, *Illinois' Low-Income and Blue-Collar Workers are the Worst-Paid in the Region*, ILLINOIS POLICY (Nov. 16, 2015), https://www.illinoispolicy.org/illinois-low-income-and-blue-collar-workers-are-the-worst-paid-in-the-region/.
115 Assem. Bill No. 701, (CA 2021-2022) Reg. Sess. Version Sep. 08, 2021, at 3.
116 Lydersen, *supra* note 16.
117 Evans, *supra* note 37.

disability.[118] Protective legislation modelled after A.B. 701 would address this problem.

However, adoption of similar legislation to A.B. 701 should be taken with some reluctance. California law makers have the added protection of being a port state. [119] Although businesses are actively leaving the state[120], the adoption of A.B. 701 has had little effect on the warehouse market. [121] However, Illinois does not have the same tight grip on the market. Midwest states of Michigan and Ohio, have similar sized Amazon warehouse spaces.[122] If adopting a warehouse worker protection bill, it is foreseeable that companies will move to nearby markets to protect themselves.

Ultimately, the application of A.B. 701 in Illinois is vital to the protection of warehouse employees. Given the current importance of warehouse employees in Illinois, providing them with protection from harmful quotas will create a meaningful standard for other states to match. However, the application monitoring protections must be adopted with an eye to the realities of the Illinois marketplace. The location of Illinois does not provide the same market shield as California. California's location on the coast has created an incredible demand warehouse space. [123] Although hesitation when addressing warehouses in Illinois due to a significant loss of blue-collar working position potentially causing an immediate strain on the economy, it should not stop legislature from protecting employees from unsafe environments. A narrowly well drafted law could provide adequate protections to workers, without driving blue-collar jobs out of the state, but the legislature needs to weigh the economic considerations against the need for employee protections.

V. CONCLUSION

Ultimately, the California legislature was able to fearlessly move forward with A.B. 701 by relying heavily on California's inescapable grip on the west coast market. Companies have continued to expand their warehouse facilities regardless of any restrictions A.B. 701 would place on their business model. However, Illinois's reliance on warehouse jobs to support blue-collar workers and the lack of need for companies to continuously expand in the state make similar legislature challenging to pass. Moving forward with protections such as A.B. 701 must be done with some hesitation.

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118 Berkowitz & Tung, *supra* note 22.
119 WEBER LOGISTICS, *supra* note 13.
120 Granillo, *supra* note 98.
121 *Id.*
122 BIG RENTZ, *supra* note 15.
123 WEBER LOGISTICS, *supra* note 13.

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ANOTHER GOLD RUSH: THE PROMISE OF CYRPTO AND THE WEALTH GAP

❖ Note ❖

*Amanda Holme**

I. INTRODUCTION

At the Aspen Security Forum, Gary Gensler, chair of the SEC, compared the state of cryptocurrency regulation to the "Wild West," noting its lack of investor protection.[1] Gensler has continued to repeat the "Wild West" metaphor when discussing the challenges and lack of cryptocurrency regulation, which leave individual investors and financial markets vulnerable to fraud.[2] Although the Internal Revenue Service ("IRS"), Financial Crimes Enforcement Network ("FinCEN"), Commodity Futures Trading Commission ("CFTC"), and U.S. Securities and Exchange Commission ("SEC") have used existing laws to regulate cryptocurrencies, Congress has not enacted legislation specifically targeting them.[3] Currently, no single U.S. regulatory authority governs private cryptocurrency exchanges.[4] Since the majority of cryptocurrency activity occurs beyond the boundaries of government regulation, Gensler worries about the continued potential for crime, financial instability, and threats to national security.[5]

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[1] Paul Kiernan, *Crypto 'Wild West' Needs Stronger Investor Protection, SEC Chief Says*, WALL ST. J. (Aug. 3, 2021, 6:21 PM), https://www.wsj.com/articles/sec-will-police-cryptocurrencies-to-maximum-possible-extent-chair-gary-gensler-says-11628007567.

[2] *SEC Chairman on New Regulations on Cryptocurrencies and Climate Risk*, WALL ST. J. (Dec. 12, 2021, 6:00 PM), https://www.wsj.com/articles/sec-chairman-on-regulations-on-cryptocurrency-and-climate-risk-11639165931.

[3] John Marinelli, *Meet New Boss, Same as Old Boss: How Federal Agencies Have Leveraged Existing Law to Regulate Cryptocurrency*, 57 AM. CRIM. L. REV. ONLINE 34, 34 (2020).

[4] Kiernan, supra note 1.

[5] *Id.*

Thus, it is not hard to imagine the world of cryptocurrency as a virtual Wild West with its lack of unified regulatory authority like the lawless environment of the American frontier. The scattered regulations issued in the face of fraud feel more like lone county sheriffs catching and apprehending outlaws in the Wild West than a unified police force responding to criminal activity. However, Gensler's Wild West metaphor extends beyond the lawless, and correspondingly dangerous American frontier. As the Wild West provided the promise of fortune through free land and untapped resources, cryptocurrency likewise shares the promise of fortune through "democratiz[ing] access to financial markets and giv[ing] individual investors control of their destiny."[6] Just as the American frontier offered the landless access to real property, cryptocurrency offers the promise of wealth to communities historically excluded from financial markets in an almost virtual gold rush.

Through its use of blockchain technology, cryptocurrencies are able to decentralize marketplaces.[7] While traditional currencies require users to trust governmental and banking institutions, cryptocurrencies use a blockchain, digital ledger that is neither owned by any particular entity nor affiliated with any political group, negating the user's need to trust traditional institutions.[8] Thus, the promise of cryptocurrency is especially appealing to communities historically excluded from financial markets because it does not require users to trust institutions that previously discriminated against them or their communities.[9] Consequently, cryptocurrencies provide an opportunity for individuals to finally enter the market and build generational wealth without relying on governmental or banking institutions.[10]

This note will argue that despite calls for greater government regulation, cryptocurrency exchanges should be left to self-regulate to preserve the promise and appeal of cryptocurrency. Part II will provide background information on the wealth gap in the United States, demographic information about cryptocurrency users, and the landscape of cryptocurrency regulation. Part III analyzes the current piecemeal approach to cryptocurrency regulation and considers the relationship between regulations and social equity. Part IV argues that while creating a new governmental agency to regulate cryptocurrency could address the wealth gap, allowing cryptocurrency exchanges to self-regulate best accomplishes the dual purpose of protecting investors and preserving the anti-institution appeal of cryptocurrency. Part V will conclude.

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[6] Tressie McMillan Cottom, *The Strange Allure of the Blockchain*, N.Y. TIMES (Jan. 24, 2022), https://www.nytimes.com/2022/01/24/opinion/crypto-blockchain-nfts.html?searchResultPosition=3.

[7] Makan Delrahim, *Regulation Will Be Good For Crypto*, WALL ST. J. (Jan. 20, 2022, 6:35 PM), https://www.wsj.com/articles/regulation-will-be-good-for-crypto-blockchain-currency-economy-stablecoins-sec-fdic-11642714529?page=1).

[8] McMillan Cottom, *supra* note 6.

[9] *Id.*

[10] *Id.*

II. BACKGROUND

A. The Wealth Gap

From 1989 to 2016, the wealth gap in the United States more than doubled.[11] A family's wealth, or net worth, is measured by totaling the assets they own minus outstanding debt, providing a more holistic understanding of financial well-being than merely considering income.[12] In 1989 the richest 5% of families owned more than 114 times as much wealth as lower-income families, with lower-income families belonging to the second wealth quintile (bottom 20-40%).[13] Seventeen years later, the ratio increased to 248.[14] Furthermore, upper-income families were the only group in the United States to increase their wealth from 2001 to 2016.[15] Middle and lower income families lost wealth during the same period.[16] Consequently, not only is there a wide gap between the wealth owned by the richest families in the United States, but the gap is also growing.

Additionally, race and ethnicity are unequally represented through the rungs of wealth distribution in the United States. In 2019, the median White family's wealth totaled $184,000 while the median Black family's was $23,000 and the median Hispanic family's was $38,000.[17] Furthermore, 82% of Black families and 76% of Hispanic families owned less wealth than the median White family.[18] Not only did the median Black and Hispanic family own less wealth than the median White family, but the entire curve of Black and Hispanic wealth distribution shifted toward less wealthy when compared to the White wealth distribution curve.[19] Thus, Black and Hispanic families are overrepresented among the country's less wealthy families, and correspondingly disproportionately affected by the widening wealth gap.

Historic and systemic barriers in the United States contribute to the current inequity in wealth accumulation. Excluding Black families from participating in governmental programs and policies, such as the Homestead Act, the Social Security Act of 1935 and the G.I. Bill of 1944, prevented families from building generational wealth.[20] However, White families were able to take advantage of these programs to

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[11] Juliana Menasce Horowitz, Ruth Igielnik & Rakesh Kochhar, *Trends in U.S. Income and Wealth Inequality*, PEW RSCH. CTR. (Jan. 9, 2020), https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] Ana Hernandez Kent & Lowell Ricketts, *Wealth Gaps Between White, Black and Hispanic Families in 2019*, FED RSRV. BANK ST LOUIS: ON THE ECONOMY (Jan. 5, 2021), https://www.stlouisfed.org/on-the-economy/2021/january/wealth-gaps-white-black-hispanic-families-2019#.
[18] *Id.*
[19] *Id.*
[20] *Id.*

build generational wealth through inheritance and education.[21] The inequities in wealth accumulation continue through ongoing systemic barriers with Black and Hispanic families facing discrimination in the labor market and in the criminal justice system.[22] When Black and Hispanic individuals are overrepresented in the incarcerated population and do not have the same ability to access the labor market as White individuals, they do not have the same opportunities to accumulate wealth, further exacerbating the wealth gap.

B. Cryptocurrency Users

While cryptocurrency is a relatively new technology, the vast majority of Americans are familiar with it.[23] Furthermore, in 2021 16% of U.S. adults reported using cryptocurrency in some capacity, including investing and trading.[24] The average cryptocurrency trader is thirty-eight years-old and 55% do not have a college degree.[25] Furthermore, 44% are not White, 41% are women, and 35% have household incomes under $60,000.[26]

While cryptocurrency traders trail behind Americans owning stock, with 56% of Americans owning stock in 2021, data suggests that a different demographic is investing in cryptocurrency.[27] Stock ownership is correlated with income, and while 24% of individuals making less than $24,000 per year own stock, 89% of individuals making over $100,000 own stock.[28] However, cryptocurrency use is not correlated to income level.[29] Furthermore, Asian, Black, and Hispanic individuals were more likely to use cryptocurrency in 2011 when compared to Whites.[30] In contrast, White individuals were more likely to own stock when compared with other racial or ethnic groups in 2011.[31] Thus, just as Black and Hispanic families are more likely to own less wealth than White families, they are also less likely to own stock. However, although Black and Hispanic individuals are underrepresented in traditional

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[21] *Id.*
[22] *Id.*
[23] Andrew Perrin, *Sixteen Percent of Americans Say They Have Invested in, Traded, or Used Cryptocurrency*, PEW RSCH. CTR. (Nov. 11, 2021), https://www.pewresearch.org/fact-tank/2021/11/11/16-of-americans-say-they-have-ever-invested-in-traded-or-used-cryptocurrency/.
[24] *Id.*
[25] *More Than One in Ten Americans Surveyed Invest in Cryptocurrencies*, NORC AT THE UNIV. CHI. (July 22, 2021), https://www.norc.org/NewsEventsPublications/PressReleases/Pages/more-than-one-in-ten-americans-surveyed-invest-in-cryptocurrencies.aspx.
[26] *Id.*
[27] Lydia Saad & Jeffrey M. Jones, *What Percentage of Americans Owns Stock*, GALLUP, https://news.gallup.com/poll/266807/percentage-americans-owns-stock.aspx (Aug. 13, 2021).
[28] *Id.*
[29] Perrin, *supra* note 23.
[30] *Id.*
[31] Saad & Jones, *supra* note 27.

investment methods, as seen through lower stock ownership levels, they are overrepresented, along with Asian individuals, in cryptocurrency use.[32]

Despite the allure of cryptocurrencies, few individuals have made significant money using them. Of all cryptocurrencies in circulation, Bitcoin is the most popular with the greatest value of "coins" in circulation.[33] While Bitcoin's value is volatile, only 0.07% of American Bitcoin users had Bitcoin assets worth over one million dollars in 2019.[34] In contrast, 75% of users had Bitcoin assets worth about one hundred dollars.[35] When compared with the U.S. population, only 0.05% of Americans have Bitcoin assets worth over $100,000.[36] With so few individuals owning or gaining any significant wealth from Bitcoin, it is too early to determine how cryptocurrency use will affect the wealth gap.

C. Cryptocurrency Regulation

While few cryptocurrency users have generated significant wealth, several government agencies have attempted to regulate cryptocurrency. However, Congress has not enacted any federal legislation to regulate it, nor does a single governing authority oversee it.[37] The Securities and Exchange Commission ("SEC"), the Internal Revenue Service ("IRS"), the Financial Crimes Enforcement Network ("FinCEN"), and the Commodity Futures Trading Commission ("CFTC") have all defined cryptocurrency to fall within their jurisdiction under existing law.

The SEC has become the major regulator of cryptocurrencies, defining many blockchain tokens as securities.[38] Thus, since cryptocurrencies use blockchain technology, the SEC is able to consider cryptocurrency a security. Outside of the SEC, the IRS, FinCEN, and CFTC have also regulated cryptocurrencies under their respective capacities. The IRS defined cryptocurrency as property, subjecting it to the IRS' collection authority whenever users purchase, sell, or trade cryptocurrencies.[39] FinCEN defined cryptocurrencies as funds.[40] It further indicated that cryptocurrency use, including using applications to purchase cryptocurrency with cash or debit cards or using cryptocurrency wallets, may be considered money services businesses

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[32] Perrin, *supra* note 23.
[33] Kat Tretina & John Schmidt, *Top Ten Cryptocurrencies in March 2022*, FORBES, https://www.forbes.com/advisor/investing/top-10-cryptocurrencies/ (Mar. 1, 2022, 9:17 AM).
[34] Aaron Hankin, *No, Everyone Is Not Getting Rich Off Bitcoin*, INVESTOPEDIA, https://www.investopedia.com/news/no-everyone-not-getting-rich-bitcoin/ (June 25, 2019).
[35] *Id.*
[36] *Id.*
[37] Marinelli, *supra* note 3.
[38] *Id.*
[39] I.R.S. Notice 2014-21, 2014-16 I.R.B., https://www.irs.gov/irb/2014-16_IRB#NOT-2014-21.
[40] FinCEN Guidance FIN-2019-G001 (May 9, 2019), https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%C20CVC%C20FINAL%20508.pdf.

(MSB).[41] Since FinCEN has the authority to require institutions to report on MSBs, FinCEN may exercise authority over some uses of cryptocurrencies. Finally, the CFTC has defined cryptocurrencies as "commodities" and regulated them as such.[42] Thus, governmental agencies have defined cryptocurrency as securities, property, funds, and commodities.

Additionally, case law has recognized the use of cryptocurrency. Both the Eastern District of New York[43] and the District Court of Massachusetts recognized cryptocurrencies as commodities.[44] Furthermore, the Eastern District of New York found that "simply labeling an investment opportunity as a 'virtual currency' or 'cryptocurrency' does not transform an investment contract--a security--into a currency," and concluded a jury could find that blockchain tokens constitute securities.[45]

III. ANALYSIS

A. Existing Regulation

In its 2018 Joint Economic Report, Congress noted the lack of unified regulation of cryptocurrencies, and it urged regulatory agencies to coordinate efforts to ensure effective and consistent regulations.[46] Four years later, the U.S. continues to regulate cryptocurrencies at the federal level using a piecemeal approach. The IRS, CFTC, FinCEN, and SEC all exercise regulatory authority, primarily in response to fraud or other criminal activity.[47] Thus, regulations tend to be reactive instead of proactive measures to protect investors and preserve the value of their assets.

Of the agencies regulating cryptocurrencies, the IRS takes a reactive approach to regulation. In 2014, the IRS defined cryptocurrency as property.[48] Since then, cryptocurrency use has been subject to the IRS' collection authority.[49] In 2001, the Cyber Crime Unit of the IRS seized 3.5 Billion dollars' worth of cryptocurrency.[50] Of that 3.5 Billion, the IRS seized one billion dollars' worth of cryptocurrency in connection with the conviction of Ross Ulbricht, the founder of Silk Road, an online

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[41] *Id.*
[42] In the Matter of: Coinflip, Inc., CFTC No. 15-29, 2015 WL 5535736, at *2 (C.F.T.C. Sept. 17, 2015).
[43] *Id.*
[44] Commodity Futures Trading Comm'n v. My Big Coin Pay, Inc., 334 F. Supp. 3d 492, 498 (D. Mass. 2018).
[45] United States v. Zaslavskiy, No. 17 CR 647 (RJD), 2018 WL 4346339, at *7 (E.D.N.Y. Sept. 11, 2018).
[46] H.R. REP. NO. 115-596, at 224 (2018).
[47] Marinelli, *supra* note 3.
[48] I.R.S. Notice 2014-21, *supra* note 39.
[49] *Id.*
[50] I.R.S., 2021 INTERNAL REVENUE SERV. CRIM. INVESTIGATION ANN. REP. 8 (2021), https://www.irs.gov/pub/irs-pdf/p3583.pdf.

black marketplace using the darknet.[51] Ulbricht was convicted of conspiracy to commit money laundering and conspiracy to distribute narcotics.[52] While the seizure enforced the principle that cryptocurrency should be used for legal financial transactions and purposes, it did not affect ordinary cryptocurrency users, who were unconnected to the seizure. Thus, while the seizure may have enforced the legitimacy of cryptocurrency, it did nothing to protect individual investor's ability to accumulate wealth. Instead, the IRS merely reacted to crime. However, given the purpose of the IRS, it is unlikely that its current structure would accommodate any proactive cryptocurrency regulation.

The CFTC has also taken a reactive approach in regulating cryptocurrency. In *Commodity Futures Trading Comm'n v. McDonnell*, the Eastern District of New York defined cryptocurrency as a commodity and held the CFTC had jurisdiction to exercise authority over it.[53] The defendants in the case offered cryptocurrency trading and investment services to individuals in exchange for a membership fee.[54] They promised members that they could generate profits of two to three hundred percent; however, once the defendants received the membership fee, they did not provide any significant trading advice and did not share any returns on investments.[55] The court held that cryptocurrency may be considered a commodity and the CFTC has the authority to "exercise its enforcement power over fraud related to virtual currencies sold in interstate commerce."[56] It then granted an injunction to prevent further action by the defendants.[57] Later that year, the District Court of Massachusetts also affirmed that cryptocurrencies could be considered commodities and subject to regulation by the CFTC in *Commodity Futures Trading Comm'n v. My Big Coin Pay, Inc.*[58] It further asserted the CFTC could assert a sufficient fraud claim against the defendant due to the defendant's misleading and fraudulent sale of cryptocurrency.[59] While the CFTC had the authority to respond to fraudulent activity, its response was reactive. Like the IRS, it merely responded to criminal activity involving cryptocurrency and did not issue proactive regulation to protect investors from initially becoming involved in the fraudulent activity and losing money.

Additionally, FinCEN has also exercised its authority over cryptocurrencies. It has defined them as funds and indicated that cryptocurrency use, including using applications to purchase cryptocurrency with cash or debit cards or using

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[51] *Id.*
[52] *Id.*
[53] Commodity Futures Trading Comm'n v. McDonnell, 287 N.E.3d 213, 230 (E.D.N.Y. 2018).
[54] *Id.* at 217.
[55] *Id.* at 217-18.
[56] *Id.* at 230.
[57] *Id.*
[58] Commodity Futures Trading Comm'n v. My Big Coin Pay, Inc., 334 F. Supp. 3d 492, 498 (D. Mass. 2018).
[59] *Id.* at 498-99.

cryptocurrency wallets, may be considered money services business ("MSB").[60] Since FinCEN has the authority to require institutions to report on MSBs, FinCEN may exercise authority over some uses of cryptocurrencies. However, while FinCEN may enforce sanctions for financial crimes involving cryptocurrency, it does not have the authority to regulate the market.[61] Thus, FinCEN does not have the ability to proactively regulate cryptocurrency because it can only respond to criminal activity. At best, FinCEN can only achieve similar reactionary regulations such as the ones issued by the IRS and CFTC.

Finally, the SEC has exercised authority over cryptocurrency by defining it as a security; however, unlike the reactive regulations of the IRS, CFTC, or FinCEN, the SEC has the ability to play a proactive role in cryptocurrency regulation. In *United States v. Zaslavskiy*, the court recognized that blockchain tokens may be considered securities and subject to regulation by the SEC.[62] Since cryptocurrencies use blockchain tokens, they may be subject to SEC regulations. Furthermore, the current and previous SEC chairs have suggested that cryptocurrency use, including Initial Coin Offerings, may be subject to the SEC's authority under existing law.[63] Additionally, the SEC has already brought dozens of successful actions alleging fraud or other harm to investors.[64] However, despite these successful actions, Gary Gensler, the current SEC chair, called for greater investor protection for cryptocurrency users.[65] Investor protection, along with maintaining fair, orderly, and efficient markets and facilitating capital formation, form the three components of the SEC's mission.[66] In defining its commitment to protecting investors the SEC states, "[w]e protect investors by vigorously enforcing the federal securities laws to hold wrongdoers accountable and deter future misconduct. We provide investor education and resources through our Office of Investor Education and Advocacy."[67] However, even if the SEC seeks greater protection for investors, their mission does not explicitly focus on bringing in individuals historically excluded from financial markets.

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[60] FinCEN Guidance FIN-2010-G001 (2019), https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%C20CVC%C20FINAL%20508.pdf.
[61] Casey Bessemer, *Cryptocurrency: Legality and Role Within U.S. Fin. Insts.,* 36 SYRACUSE J. SCI. & TECH. L. 3, 18 (2020).
[62] United States v. Zaslavskiy, No. 17 CR 647 (RJD), 2018 WL 4346339, at *7 (E.D.N.Y. Sept. 11, 2018).
[63] Gary Gensler, Chair, U.S. Secs. and Exch. Comm'n, Remarks Before the Aspen Security Forum (Aug. 3, 2021), *in* https://www.sec.gov/news/public-statement/gensler-aspen-security-forum-2021-08-03#_ftnref6 (last visited Mar. 18, 2022).
[64] *Id.*
[65] *Id.*
[66] U.S. SECS. AND EXCH. COMM'N, *What We Do*, SEC.GOV, https://www.sec.gov/about/what-we-do (Nov. 22, 2021).
[67] *Id.*

B. Equity Focused Regulation

Critics suggest authorities should regulate cryptocurrency with the focus on protecting investors from marginalized groups.[68] In the *New York Times*, Paul Krugman compared the risks of cryptocurrency with the subprime mortgage crisis.[69] While he acknowledged that cryptocurrency users and assets are not yet significant to affect the economy in the same way the subprime crisis threatened the financial system, he emphasized, "the risks of crypto are falling disproportionately on people who don't know what they are getting into and are poorly positioned to handle the downside."[70] Thus, just as financially vulnerable families were overrepresented in those affected in the subprime crisis, financially vulnerable individuals may also be disproportionately affected by the risk of cryptocurrency. Krugman explicitly mentioned the 44% of crypto investors that are not White and the 55% of individuals without a college degree as groups cryptocurrency regulators should specifically look to protect.[71]

However, better government regulation may not be sufficient to best protect investors historically excluded or underrepresented in financial markets. In *Commodity Futures Trading Comm'n v. McDonnell*, the Eastern District Court of New York expressed frustration at the lack of unified cryptocurrency regulation, and it suggested eight potential cryptocurrency regulators, in addition to offering the possibility of leaving cryptocurrency unregulated.[72] Cryptocurrency could be regulated by the Department of Justice ("DOJ"), CFTC, SEC, FinCEN, IRS, private cryptocurrency exchanges, individual states, or a combination of any of the previous.[73] Other than private exchanges or no regulation, all the suggested regulations require government involvement. However, a solution using an existing government agency or body may present additional challenges when considering the population of cryptocurrency users.

Cryptocurrency promises to democratize access and decentralize financial markets without relying on governmental institutions, so relying on these traditional institutions may undermine the purpose and appeal of cryptocurrency. Although traditional currencies require users to trust governmental and banking institutions, cryptocurrencies use a blockchain, digital ledger that is neither owned by any particular entity nor affiliated with any political group, negating the user's need to

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[68] *See* Paul Krugman, *How Crypto Became the New Subprime*, N.Y. TIMES (Jan. 27, 2022), https://www.nytimes.com/2022/01/27/opinion/cryptocurrency-subprime-vulnerable.html; Tressie McMillan Cottom, *Wealth Inequality Drives the Appeal of Crypto*, N.Y. TIMES (Jan. 31, 2022), https://www.nytimes.com/2022/01/31/opinion/crypto-nfts-inequality.html?searchResultPosition=2.

[69] Krugman, *supra* note 68.

[70] *Id.*

[71] *Id.*

[72] Commodity Futures Trading Comm'n v. McDonnell, 287 N.E.3d 213, 220-22 (E.D.N.Y. 2018).

[73] *Id.*

trust traditional institutions.[74] In this way, cryptocurrency's use of blockchain technology irrevocably guarantees ownership. Tressie McMillan Cottom discussed how this adds to the appeal of cryptocurrency among marginalized groups, "[i]f I live in a community where the police absolutely use eminent domain to claim my private property and I cannot do anything about it, that sense of everyday powerlessness would make the promise of blockchain sound pretty good."[75] McMillan Cottom's illustration of the police claiming eminent domain highlights one of the systemic barriers marginalized communities have faced, which has prevented wealth accumulation and led to wealth disparity. In other words, she emphasizes that cryptocurrency particularly appeals to those adversely affected by the wealth gap because it provides an opportunity to generate wealth without needing to rely on institutions that have perpetuated the wealth gap. Seeking government regulation from traditional agencies does little to resolve this tension.

IV. RECOMMENDATION

Given cryptocurrency's appeal among communities historically and systemically excluded from financial markets, cryptocurrency regulation provides an opportunity to reach these communities and offer support in wealth accumulation. If cryptocurrency use continues to grow, regulation could ultimately be used to address the wealth gap. In "Cryptocurrency: Legality and Role Within the US Financial Institutions," Casey Bessemer added to the *Commodity Futures Trading Comm'n v. McDonnell* regulatory body suggestions by offering that Congress could create a new agency to regulate cryptocurrencies.[76] Congress previously enacted legislation to create the current agencies regulating cryptocurrencies, such as the SEC and CFTC, so it would be possible for Congress to similarly create a new agency.[77] However, since this would require that Congress pass legislation, it would take a long time to enact, even if Congress were to approve such legislation.[78] Thus, Bessemer determined that it likely made most sense to regulate cryptocurrency through an existing agency.[79]

While the time delay required to create a new agency poses a challenge, creating a new agency provides some appealing benefits. Furthermore, because there are currently not enough cryptocurrency users and assets to affect financial markets,[80] the time required to enact legislation may not be detrimental. Not only

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[74] McMillan Cottom, *supra* note 6.
[75] *Id.*
[76] Bessemer, *supra* note 61, at 11.
[77] *Id.* at 23.
[78] *Id.*
[79] *Id.*
[80] Krugman, *supra* note 68.

would a new agency be able to take the burden of regulating cryptocurrency from existing agencies and offer a unified approach to regulation, but Congress could specifically create the new agency to focus on social equity. Just as the SEC's mission seeks to protect investors,[81] the new agency could explicitly seek to protect investors from backgrounds historically excluded from financial markets. Thus, given the significant involvement of cryptocurrency users from communities that are adversely affected by the wealth gap, Congress could create the new agency to explicitly support them in accumulating wealth. In doing so, Congress could eliminate the danger of using an agency that has historically limited wealth accumulation.

However, even if Congress were to create a new agency to regulate cryptocurrency, another regulatory body would still be needed during the time it took for Congress to enact the legislation. Furthermore, a new agency still requires cryptocurrency users to trust the government, albeit using a new agency. Thus, letting cryptocurrency exchanges self-regulate provides another appealing alternative. Cryptocurrency exchanges are websites that allow users to buy, sell, or trade cryptocurrencies.[82] While exchanges are not free from fraud, they have an incentive to ensure legitimate transactions to maintain their reputation.[83] Since there are numerous cryptocurrency exchanges, users can use the platform that they believe is most trustworthy.[84] Thus, allowing exchanges to self-regulate protects individual investors because the websites have an incentive to maintain investor confidence by preventing fraud. Not only does self-regulation protect an investor's ability to generate wealth, but it also preserves the anti-institution appeal of cryptocurrency since self-regulation involves no governmental agencies or involvement.

Thus, despite calls for a unified government response to regulating cryptocurrency, cryptocurrency exchanges should be left to self-regulate.[85] Not only would an exchange's reputation help guard against fraud, protecting individual investors, but it would also allow individuals to participate in financial markets without governmental interference. In doing so, cryptocurrency's promise to combat "that sense of everyday powerlessness," created by the government's practice of preventing certain communities from accumulating wealth, remains because the government is not involved in cryptocurrency exchanges.[86] Thus, if cryptocurrency's promise continues to attract individuals from groups historically excluded from financial markets, the investing landscape may change. While the corresponding

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[81] *See* U.S. Secs. and Exch. Comm'n, *supra* note 66 (stating the SEC's mission).
[82] Ameer Rosic, *The Best Cryptocurrency Exchanges: Most Comprehensive Guide List*, BLOCKGEEKS, https://blockgeeks.com/guides/best-cryptocurrency-exchanges/ (Oct. 26, 2021).
[83] Bessemer, *supra* note 61, at 20.
[84] *See* Rosic, *supra* note 82 (listing the numerous cryptocurrency exchanges).
[85] *See* H.R. REP. NO. 115-596, at 224 (2018) (urging regulatory agencies to coordinate efforts to ensure effective and consistent cryptocurrency regulations).
[86] *See* McMillan Cottom, *supra* note 6 ("If I live in a community where the police absolutely use eminent domain to claim my private property and I cannot do anything about it, that sense of everyday powerlessness would make the promise of blockchain sound pretty good.").

growth of cryptocurrency investment could encourage Congress to create a new agency to regulate it, Congress could then take advantage of the opportunity to create an agency with the explicit purpose to support communities systemically excluded from financial markets, instead of relying on an existing authority.

V. CONCLUSION

As historic and current governmental practices contribute to the widening wealth gap, cryptocurrency, with its promise to democratize and decentralize financial markets, provides an appealing method to generate wealth without relying on traditional institutions. Thus, despite calls for greater government intervention and standardization in regulating cryptocurrencies, cryptocurrency exchanges should be left to self-regulate, allowing the promise and appeal of cryptocurrency to endure.

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BUY NOW, BUT PAY FOR IT LATER: HOW BNPLS ALLOW UNSECURED CONSUMER DEBT TO ACCUMULATE WITHOUT REGULATION

❖ Note ❖

*Alec Klimowicz**

I. INTRODUCTION

Buy Now, Pay Later ("BNPL") has taken consumer shopping by storm. Businesses have emerged with the BNPL model as its primary operation, offering repayment plans, typically in four equal payments across six weeks, at no interest.[1] A financial movement that ostensibly began only a couple of years ago is now playing a role in over 200 billion dollars' worth of transactions.[2] Consumers have accelerated BNPL's use during the pandemic; BNPL's usage increased by 230% in 2020 and 400% during the same year's Black Friday holiday.[3] These businesses, however, have grown at such an exponential rate that regulators are now playing catch up.[4] The balancing act for regulators is to permit wide-usage of the service without taking away its redeeming qualities.

In some instances, this service allows financially precarious households to balance their expenditures by spacing out payments without interest.[5] This is particularly helpful for consumers that do not have access to bank-issued credit cards

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[1] Eversheds Sutherland, *Focus on Fintech: The CFPB is Scrutinizing Buy Now Pay Later Products – is Rulemaking Next?*, JD SUPRA (Jan. 25, 2022), https://www.jdsupra.com/legalnews/focus-on-fintech-the-cfpb-is-6337792/.

[2] Julia Gray, *The Evolution of Buy Now, Pay Later*, MORNING BREW (Dec. 27, 2021), https://www.morningbrew.com/retail/stories/2021/12/27/the-evolution-of-buy-now-pay-later.

[3] *Id.*

[4] *Consumer Financial Protection Bureau Opens Inquiry Into "Buy Now, Pay Later" Credit*, CONSUMER FIN. PROT. BUREAU (Dec. 16, 2021), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-opens-inquiry-into-buy-now-pay-later-credit.

[5] Jessica Dickler, *Now You Can Buy Now, Pay Later for Just About Everything*, CNBC (Oct. 22, 2021, 10:27 AM), https://www.cnbc.com/2021/10/22/now-you-can-buy-now-pay-later-for-just-about-everything.html.

or other providers that run credit checks prior to credit approval.[6] The ramifications for missing a BNPL payment can often carry a greater burden than credit cards. Typically, consumers overuse BNPLs resulting in missed payment penalties, immense debt accumulation, and unintended creditors; this is a peak source of income for BNPLs.[7]

Nonetheless, many believe BNPLs are a safer alternative to credit cards for consumers.[8] Additionally, BNPLs reported that consumers spend more when using a BNPL, boosting the seller's revenue.[9] Because it seems too good to be true, and mathematically impossible for consumers to be in less debt but also spend more, this note will explore how the Consumer Financial Protection Bureau ("CFPB") can effectively regulate this service.

BNPLs should not be regulated identically to credit cards. Part II provides necessary background of the regulators and parties involved. Part III then analyzes how BNPLs impact consumers and draws on credit card statutory regulations as a comparison. Even though the two operate almost identically, there is a tangible benefit by allowing consumers to make purchases without interest.[10] Instead, the CFPB's credit card regulations will act as a maximum guidepost for legislative scrutiny. From this, BNPLs need to be accountable for tracking consumer debt accumulation across platforms, increase transparency about the service's business practices or consumer literacy regarding BNPL, and limits on BNPL's monetary penalties for missing payments to discourage BNPL from preying on low-income families. Part IV uses the findings from Part III to form practical responses to ultimately bolster the benefits and minimize the negatives to protect consumers.

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[6] Lauren Aratani, *Buy Now, Pay Later Schemes Are Catching the Eye of Consumers, and of Federal Regulators*, GUARDIAN (Jan. 27, 2022, 3:00 PM), https://www.theguardian.com/money/2022/jan/27/buy-now-pay-later-schemes-entice-consumers-spend-more.

[7] *Id.*

[8] *Consumer Financial Protection Bureau Opens Inquiry Into "Buy Now, Pay Later" Credit*, *supra* note 4.

[9] *How rue21 Upped its AOV by 73% With Klarna*, KLARNA (May 6, 2021), https://www.klarna.com/us/blog/rue21-aov-coversion-increase-klarna/#.; *see also Deep Dive: How Buy Now Pay Later is Revitalizing Retail and the Economy*, PYMNTS (Nov. 10, 2021), https://www.pymnts.com/bnpl/2021/deep-dive-how-buy-now-pay-later-is-revitalizing-retail-and-the-economy.

[10] ACCENTURE, THE ECONOMIC IMPACT OF BUY NOW, PAY LATER IN THE US 6 (Sept. 2021), https://afterpay-corporate.yourcreative.com.au/wp-content/uploads/2021/10/Economic-Impact-of-BNPL-in-the-US-vF.pdf.

II. BACKGROUND

A. Regulators

The CFPB is an independent bureau, created by the Dodd-Frank Act, that enacts regulations to empower consumers to financially protect themselves and their families.[11] The CFPB is responsible for BNPL regulation.[12]

BNPL companies started operations as early as 2012 and continued to multiple in the following years.[13] The Covid pandemic seems to have accelerated BNPL's popularity as consumers sheltered at home and lived with financial uncertainty.[14] This increase in popularity caught the CFPB's attention, inciting an investigation into the top four BNPL providers: Affirm, Afterpay, Klarna, PayPal, and Zip.[15] The investigation orders the companies to submit information pertaining to various business practices to enlighten CFPB on, among other things, consumer risk.[16] The CFPB will also work with other countries performing similar investigations or that have already enacted regulations over BNPLs.[17]

As such, BNPL's popularity is not isolated in the United States. Afterpay and Zip are Australian BNPLs,[18] and Klarna is Swedish.[19] As a preliminary step towards regulation, Britain's Financial Conduct Authority urged BNPLs to change their contracts, and Britain's finance ministry intends to enact legislation in late 2022.[20] One report referred to as "The Woolard Review" identifies several areas of concern that sparked British government to pursue legislative regulations.[21] Other countries have been less forgiving and imposed stricter rules.[22]

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[11] *Consumer Financial Protection Bureau*, FED. REG. (Last visited April 15, 2022), https://www.federalregister.gov/agencies/consumer-financial-protection-bureau.

[12] *Consumer Financial Protection Bureau Opens Inquiry Into "Buy Now, Pay Later" Credit*, *supra* note 4.

[13] Gray, *supra* note 2.

[14] *How COVID Has Turned Buy Now, Pay Later Upside Down*, CONSUMER REPS. (Feb. 18, 2022), https://www.consumerreports.org/shopping-retail/how-covid-has-turned-buy-now-pay-later-upside-down-a4434659796/.

[15] *Consumer Financial Protection Bureau Opens Inquiry Into "Buy Now, Pay Later" Credit*, *supra* note 4.

[16] *Id.*

[17] *Id.*

[18] *Buy Now Pay Later Companies in Australia: Provider Comparisons, How to Sign Up and Tips to Manage a BNPL Account*, MOZO (Feb. 4, 2022), https://mozo.com.au/buy-now-pay-later.

[19] Nikita Divissenko, *Buy Now, Pay Later: The Role of EU Regulation in Shaping the 'New Normal*,' EUIDEAS (Dec. 17, 2020), https://euideas.eui.eu/2020/12/17/buy-now-pay-later-the-role-of-eu-regulation-in-shaping-the-new-normal/.

[20] Huw Jones, *Britain Crack Down on 'Buy Now Pay Later' Firms*, THOMSON REUTERS (Feb. 14, 2022, 9:36 AM), https://www.reuters.com/world/uk/britains-financial-watchdog-tells-buy-now-pay-later-firms-amend-contracts-2022-02-14/.

[21] FIN. CONDUCT AUTH., THE WOOLARD REVIEW – A REVIEW OF CHANGE AND INNOVATION IN THE UNSECURED CREDIT MARKET 3 (2021), https://www.fca.org.uk/publication/corporate/woolard-review-report.pdf.

[22] *See BNPL Under Global Regulatory Scrutiny, With UK as Likely Frontrunner*, PYMNTS (Dec. 9, 2021), https://www.pymnts.com/buy-now-pay-later/2021/bnpl-under-global-regulatory-scrutiny-

While British authorities, and others abroad, dive into how best to approach BNPL for their countries, the United States remains without much regulatory authority.[23] The CFPB has a difficult task ahead as BNPL has positives for both consumers and businesses. Left unregulated, however, BNPL has the potential to make consumers more indebted than ever before.

B. Consumers

BNPLs have tangible benefits to responsible users.[24] One of two revenue generating practices for credit cards is to charge interest on unpaid credit.[25] After going through the credit card screening process, submitting annual income and running a credit check, an interest rate is created based on one's default risk.[26] This is usually expressed as an annual percentage rate.[27] As the consumer uses their available credit, any unpaid balance following the billing cycle, typically monthly, the credit card provider charges that interest rate against the remaining balance and adds that fee as a charge.[28] BNPLs disregard that entire process by forgoing interest charges. Instead, BNPLs are generally applied to one transaction, with the first of four installments due at checkout.[29] Where credit cards pre-approve a consumer for a credit limit, BNPLs are unregulated and are not required to track an individual's debt accumulation.[30]

Additionally, BNPLs typically arrange a four-installment payment plan,[31] whereas credit cards typically invoke a monthly minimum.[32] That means that a consumer approaching an online checkout may opt for the BNPL option, and in lieu of paying the company directly, the consumer will be redirected to the BNPL's website, provide a debit or credit card, or link their bank account, and only pay one-fourth of their shopping cart.[33] When using credit cards for purchases, the seller

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with-uk-as-likely-frontrunner/ ("[T]he central bank [of Australia] adopted a decision in October [2021] ordering BNPL firms to remove their no-surcharge rules. This means that merchants are permitted to apply a surcharge to customers for using this method of payment if they wish to offset fees paid to the BNPL providers.").

[23] *Id.*

[24] ACCENTURE, *supra* note 10, at 6.

[25] *Understanding Credit Card Interest,* INVESTOPEDIA (Jan. 29, 2022), https://www.investopedia.com/articles/01/061301.asp.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] Jackie Veling, *What is Buy Now, Pay Later?*, NERD WALLET (Dec. 22, 2021), https://www.nerdwallet.com/article/loans/personal-loans/buy-now-pay-later.

[30] *CFPB Probes Big Five Buy Now, Pay Later Providers Over Data Use, Debt Accumulation*, PYMNTS (Dec. 17, 2021), https://www.pymnts.com/bnpl/2021/cfpb-probes-big-five-buy-now-pay-later-providers-over-data-use-debt-accumulation/.

[31] Veling, *supra* note 29.

[32] INVESTOPEDIA, *supra* note 25.

[33] *Id.*

seeks approval from the credit card provider for that transaction, essentially inquiring if the buyer has enough credit.[34] This action happens instantly after a swipe, insert, or tap.[35] That means BNPLs are not providing an individual limit based on each consumer giving full reign to the individual to purchase as much as they want.

Even if a consumer misses a payment with one BNPL company, that consumer can freely use another BNPL service.[36] Conversely, credit card lenders can rely on credit reports to justify whether a consumer can take on additional credit.[37] Generally, BNPLs neglect to run a credit score which increases convenience and accessibility to the consumer. Taken in isolation, this appears to be a great solution to individuals with low credit scores. But this entire structure relies on the consumer to track their spending with all BNPL services they use.

C. Businesses

Nearly forty-five million consumers are active BNPL users.[38] This magnitude of users amounts to more than twenty billion dollars in spending.[39] Of this multi-billion-dollar spending, BNPLs take a cut from each transaction.[40] Afterpay reported that businesses received over four billion dollars in net benefits from BNPLs in 2021.[41] This figure is the summation of BNPL's ability to cut costs, lower merchant fees, increase cost efficiencies.[42] Additionally, Afterpay found that consumers are spending seventeen percent more by using BNPL.[43]

From a business perspective, BNPL seems like a great way to increase profit. Klarna performed a case study to show a retail clothing brand, rue21, the impact of providing BNPL to their consumers.[44] The results showed that the average order

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[34] *How Do Credit Cards Work?*, INVESTOPEDIA (Dec. 28, 2021), https://www.investopedia.com/how-do-credit-cards-work-5025119.

[35] *Id.*

[36] Evan Weinberger, *Behind 'Buy Now, Pay Later' U.S. Boom, Federal Regulator Looms*, BLOOMBERG L. (Nov. 23, 2021, 5:00 AM), https://news.bloomberglaw.com/banking-law/behind-buy-now-pay-later-u-s-boom-federal-regulator-looms.

[37] *Credit Score*, INVESTOPEDIA (March 11, 2021), https://www.investopedia.com/terms/c/credit_score.asp.

[38] ACCENTURE, *supra* note 10, at 2.

[39] *Id.*

[40] Rahil Sheikh, *Buy Now Pay Later: How Does it Work?*, BBC NEWS (Dec. 13, 2021), https://www.bbc.com/news/explainers-59582188.

[41] ACCENTURE, *supra* note 10, at 2.

[42] *Id.*

[43] *Id.* at 15.

[44] KLARNA, *supra* note 9.

value increased by seventy-three percent.[45] Maybe its these results that make up for the one to two percent fee BNPL charges per transaction.[46]

Historically, businesses have not had the same welcoming arms for credit cards despite charging similar, and sometimes lower, rates.[47] Credit cards create unnecessary challenges with complex monthly statements and an ultra-competitive market, confusing businesses about their terminal and credit card rates.

Nonetheless, businesses have an opportunity to succeed with BNPL where credit cards faltered. BNPL makes the transaction streamlined for businesses and despite taking a portion of the transaction, the offset revenue increase from larger purchases makes this a win-win.

D. An Antedated Concept Innovated to be the Future of Unsecured Consumer Debt

Conceptually, BNPLs are not new.[48] Point-of-sale financing services have been available for decades[49] and often took shape in various forms.[50] As noted above, the pandemic is presumably a, if not *the*, catalyst for BNPL's success. But, as many people are eager for pre-pandemic life to return, will that spell the end of BNPL? The quick answer: probably not. That is because BNPLs are different from the previous point-of-sale financing services and are equipped to handle uncertainty surrounding future shopping.[51]

BNPLs can track a consumer's spending and sell that data to various marketing agencies.[52] This unregulated data jackpot can do many things. Assuming a consumer uses BNPL for all purchases, BNPL has untenable access to what the individual wants, likes, purchases, and how much money they spend over a six-week period.[53]

Quantitatively, consumers are trending towards wide acceptance.[54] Of the following—unsecured lending,[55] specifically point of sale financing (effectively,

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[45] *Id.*

[46] Gene Marks, *'Buy Now Pay Later' Services Could Be a Great Way for Small Retailers to Increase Sales*, PHILA. INQUIRER (Jan 10, 2022), https://www.inquirer.com/business/small-business/buy-now-pay-later-sales-retail-small-business-20220110.html.

[47] *Id.*

[48] *Buy Now, Pay Later: Five Business Models to Compete*, MCKINSEY & CO. (July 29, 2021), https://www.mckinsey.com/industries/financial-services/our-insights/buy-now-pay-later-five-business-models-to-compete.

[49] *Id.*

[50] Marks, *supra* note 46.

[51] Tomio Geron, *Invest Now, Win Later: Inside the 'Buy Now, Pay Later' Gold Rush*, PROTOCOL (Oct. 4, 2021), https://www.protocol.com/manuals/buy-now-pay-later/bnpl-affirm-klarna-afterpay#toggle-gdpr.

[52] *Id.*

[53] *Id.*

[54] *Buy Now, Pay Later: Five Business Models to Compete*, *supra* note 48.

[55] *See Unsecured Loan*, INVESTOPEDIA (Feb. 22, 2021), https://www.investopedia.com/terms/u/unsecuredloan.asp. ("An unsecured loan is a loan that

BNPL), personal loans, private-label credit cards, and general-purpose credit cards—all but one are projected to decrease in usage: BNPL.[56] Total unsecured lending is not positioned to decrease, however.[57] Reason being, BNPLs' popularity is catapulting growth and consumers seem to love it.[58]

III. ANALYSIS

There is much to analyze from BNPLs' many benefits, both for consumers and businesses, but also balance against the potential consumer ramifications of debt accumulation across platforms, increase transparency or consumer literacy regarding BNPL, limit BNPL's monetary penalties for missing payments to discourage BNPL from preying on low-income families, and adequately disclose exactly what privacy data is being sold to other parties.

A. Consumer Debt Accumulation

As BNPLs remain unregulated, a major concern is the ease of extraordinary consumer debt accumulation.[59] From unchecked and unsupervised usage of BNPL, to late fees increasing total amount due, consumers can quickly find themselves in greater debt than credit cards.[60] While BNPL providers may not welcome total removal of late fees, striking a balance between monitoring consumer debt accumulation and lowering late fees can solidify a legitimate alternative to credit cards.[61]

The CFPB defines creditors as:

> A person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of

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doesn't require any type of collateral. Instead of relying on a borrower's assets as security, lenders approve unsecured loans based on a borrower's creditworthiness"; however, BNPLs typically do not require credit checks prior to issuing a plan).

[56] *Buy Now, Pay Later: Five Business Models to Compete*, *supra* note 48.

[57] *Id.*

[58] *Id.*

[59] Testimony of Lauren Saunders, *Buy Now, Pay Later? Investigating Risks and Benefits of BNPL and Other Emerging Fintech Cash Flow Products*, NAT'L CONSUMER L. CTR. 6 (Nov. 2, 2021), https://www.nclc.org/images/pdf/banking_and_payment_systems/fintech/Fintech-task-force-liquidity-testimony-Lauren-Saunders-2021-11-2-FINAL.pdf.

[60] *Id.*

[61] *Id.*

> indebtedness or, if there is no such evidence of indebtedness, by agreement. Notwithstanding the preceding sentence, in the case of an open-end credit plan involving a credit card, the card issuer and any person who honors the credit card and offers a discount which is a finance charge are creditors.[62]

Meanwhile, a 'card issuer' is defined as "any person who issues a credit card, or the agent of such person with respect to such card."[63] Congress enacted the Consumer Credit Protection Act and specifically codified that a "card issuer" may not open any credit card account for any consumer under an open-end consumer credit plan, or increase any credit limit . . . unless the card issuer considers the ability of the consumer to make the required payments."[64] Even a cursory review will show that BNPLs structured their typical installments to avoid being defined as a creditor and card issuer.

BNPLs' typical installment plan is just outside the Consumer Credit Protection's Act's definition of creditor, thus entering an unregulated, unsecured credit field. Even though 'consumer' and various other definitions are applicable to BNPLs transactions, BNPL providers are not categorized, necessarily, under the current Consumer Credit Protection Act. Despite consumer risks running parallel between BNPL and credit cards, BNPL cannot operate under these regulations. Importantly, without being a card issuer, BNPL need not consider consumers ability to "make required payments."[65] Practically, BNPLs can let consumers increase their debt without hesitation.

Further, BNPLs do not track consumer usage across platforms. If a consumer uses Affirm for their one purchase, but Afterpay for another, the two companies are ignorant to the consumer's total debt accumulation. Thus, consumers can accumulate debt and not only do BNPLs need not inquire before providing consumers the service, but also do not communicate amongst other BNPLs how much debt an individual accumulated.

Credit card issuers remedied this issue by checking credit scores, which determines an individual's ability to pay back a debt.[66] Because a credit score is associated with an individual's social security number and can be widely accessed regardless of bank, provider, or lender, any creditor can assess an individual's ability to pay back debt by issuing a credit report.[67] Creditors are tasked with the legal

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[62] 15 U.S.C. §1602 (2020).

[63] 15 U.S.C. §1602(n) (2020).

[64] 15 U.S.C. §1665(e) (2020).

[65] *Id.*

[66] *When Did Credit Scores Start?*, CREDIT.COM (Nov. 29, 2018), https://www.credit.com/blog/when-did-credit-scores-start-152354/.

[67] *Id.*

responsibility to assess a consumer's ability to pay back the loan *and* credit reports make it easier[68] to accomplish this goal.[69]

Regulating how much debt an individual accumulates is central to the Consumer Credit Protection Act statutes and the same purpose is applicable to BNPL. While the credit vehicle may appear different, the risks are the same.

The CFPB must consider the debt accumulation BNPL poses to consumers by monitoring not only an individual within one company but across all platforms similar to the functionality of a credit score.[70]

B. Increase Transparency and Financial Literacy

BNPLs must increase transparency about their business practices to allow consumers to make well-informed to decisions before accepting the service. One in five BNPL users are unsure how the service works.[71] Without making an informed decision, users may find themselves incurring disproportionately high late fees[72] or inadvertently selling purchasing data to unintended businesses.[73]

Choosing BNPL to avoid credit card interest is one of its best features.[74] Arguably, however, late fees tacked onto missed payments within two weeks of purchase can replace interest charges and often times, summate to a larger fee.[75] A recent study found that twenty-six percent of respondents answered that their BNPL payments are less than fifty dollars a month.[76] While missed payment fees vary per

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[68] *See* Sarah Ludwig, *Credit Scores in America Perpetuate Racial Injustice. Here's How*, GUARDIAN (Oct. 13, 2015), https://www.theguardian.com/commentisfree/2015/oct/13/your-credit-score-is-racist-heres-why. (Explaining how credit scores have historical complications rendering it ineffective. The principle, however, of any creditor being able to assess an individual's ability to repay a loan is pertinent to discussion. Whether credit scores are calculated effectively is beyond this analysis).

[69] CREDIT.COM, *supra* note 66.

[70] Recently, private credit reporting companies have taken initiative to include BNPL purchases to their credit score calculations. *See* Robin Saks Frankel, *TransUnion Follows Equifax's Move to Include Buy Now, Pay Later Data in Credit Reports*, FORBES (March 7, 2022), https://www.forbes.com/advisor/personal-finance/transunion-equifax-buy-now-pay-later-credit-report/.

[71] Elizabeth Aldrich, *How Does Buy Now, Pay Later Work?*, ASCENT (March 8, 2022), https://www.fool.com/the-ascent/credit-cards/how-does-buy-now-pay-later-work.

[72] *Id.*

[73] CONG. RSCH. SERV., RAPIDLY GROWING "BUY NOW, PAY LATER" (BNPL) FINANCING: MARKET DEVELOPMENTS AND POLICY ISSUES 2—3 (Nov. 1, 2021), https://crsreports.congress.gov/product/pdf/IN/IN11784/3.

[74] AFTERPAY, THE ECONOMIC IMPACT OF BUY NOW, PAY LATER IN THE US 17 (2021), https://afterpay-corporate.yourcreative.com.au/wp-content/uploads/2021/10/Economic-Impact-of-BNPL-in-the-US-vF.pdf.

[75] *The Risks of Buy Now, Pay Later Programs* , CONSUMER REPS. (Nov. 30, 2021), https://www.consumerreports.org/shopping-retail/risks-of-buy-now-pay-later-programs-a1000664957/.

[76] *Buy Now, Pay Later Statistics and User Habits*, C + R RSCH. (last visited April 15, 2022), https://www.crresearch.com/blog/buy_now_pay_later_statistics.

service, generally, fees are greater than five dollars or ten percent.[77] If a consumer misses two payments, incurring an additional minimum fee of five dollars or ten percent, BNPLs begin to look a lot like credit card interest. What can be said about missed payments and BNPLs secret interest is that BNPLs reward those that can afford the payments, as opposed to those that might be using BNPL out of necessity.

BNPLs also lack transparency to consumers about how their credit scores will be impacted by the service.[78] When consumers first use the service for a purchase, their credit score typically remains unharmed.[79] Again, the problems begin to rise when users miss payments.[80] While some services simply ban consumers from using the service again,[81] others send default payments to collectors, which is reported to the credit bureaus.[82] BNPL users that miss payments could face major, negative impacts on their credit score as a result.[83]

In some instances, missing a BNPL payment is worse than missing a credit card payment.[84] Yet, consumers are accepting BNPL with open arms.[85] The CFPB must recognize that even though BNPL has redeeming qualities that should be maintained, its lack of transparency can make consumers financially worse off.

The perverse financial implications that arise from lack of transparency are not alone. Lack of transparency also reaches consumer data, leaving consumers woefully unaware.

Consumers provide important data when using BNPL such as shopping habits and bi-weekly expenses.[86] BNPLs also function as phone apps, allowing

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[77] Trina Paul, *Everything You Need to Know About the Most Popular Buy Now, Pay Later Apps*, CNBC (March 1, 2022), https://www.cnbc.com/select/best-buy-now-pay-later-apps/.

[78] Gaby Lapera, *72% of Americans Saw Their Credit Scores Drop After Missing a 'Buy Now, Pay Later' Payment, Survey Finds*, CREDIT KARMA (Feb. 8, 2021), https://www.creditkarma.com/insights/i/buy-now-pay-later-missed-payments.

[79] *Id.*

[80] Dawn Papandrea, *How Does 'Buy Now, Pay Later Affect Your Credit Score?*, BANKRATE (Jan. 3, 2022), https://www.bankrate.com/finance/credit-cards/buy-now-pay-later-credit-score/.

[81] Lapera, *supra* note 78.

[82] Papandrea, *supra* note 80.

[83] Clint Proctor, *What Should I Know if I Have Debts in Collections*, CREDIT KARMA (Jan. 20, 2022), https://www.creditkarma.com/advice/i/accounts-in-collections?

[84] *Compare Collections - How to Manage Them and What They Do to Your Credit*, MYFICO (last visited May 26, 2022), https://www.myfico.com/credit-education/faq/negative-reasons/should-i-pay-my-collections., (explaining how a debt sent to collections will impact a credit score), *with* Credit Karma Staff, *How Late Payments Can Affect Your Credit*, Credit Karma (Feb. 7, 2022), https://www.creditkarma.com/credit-cards/i/late-payments-affect-credit-score. (Explaining how a missed credit card payment will impact a credit score).

[85] *Study Confirms Love Match Between BNPL and 'Second-Chance Consumers'*, PYMNTS (Sept. 24, 2021), https://www.pymnts.com/buy-now-pay-later/2021/study-confirms-match-bnpl-second-chance-consumers/.

[86] *Consumer Financial Protection Bureau Opens Inquiry Into "Buy Now, Pay Later" Credit*, *supra* note 4.

consumers to purchase directly through the app.[87] In the CFPB's inquiry into BNPL practices, the organization highlights how BNPLs' profits will marginalize with competition, forcing alternative revenue streams to continue growing.[88] The easy inference is to monetize consumer data to create more targeted ads and tailored shopping experiences.[89] These companies keep this information tight to the chest, hence opening an investigation. This investigation, however, is not inconsistent with other financial institutions[90] and will open large spells of regulatory practices to prevent predatory business antics against consumers.

BNPLs' lack of transparency coupled with missed payments are thus working double time by increasing consumer spending, while advertising as interest-free. Meanwhile, BNPLs hide their fees to give consumers a false sense of security. In effect, these companies are taking advantage of consumers that may need to spread large payments to soften financial burdens across multiple paychecks by charging disproportionately high missed payments.

Additionally, the lack of transparency evolves into a second revenue stream. BNPLs captivate a larger audience now, but later, will be able to sell consumer data at a premium.

Both issues must be considered by the CFPB when formulating the regulatory basis for BNPL. With most of the concerns above, there is a silver lining. Efforts to keep those benefits intact are worthwhile, thus providing consumers and businesses a well-struck balance.

IV. RECOMMENDATION

The CFPB should implement a governing agency to track consumer debt accumulation without impacting credit scores. One of BNPLs' best characteristics is that it allows individuals with low income or bad credit to spread out large payments.[91] But, that incentive quickly dissipates as users miss payments. BNPL ostensibly prays on impulse purchases. Indeed, some BNPLs market their product's ability to capitalize on buyers' impulses and to induce larger purchases.[92]

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[87] Maurie Backman, *Study: Buy Now, Pay Later Services Continue Explosive Growth*, ASCENT (March 22, 2021), https://www.fool.com/the-ascent/research/buy-now-pay-later-statistics/.

[88] *Consumer Financial Protection Bureau Opens Inquiry Into "Buy Now, Pay Later" Credit*, *supra* note 4.

[89] *Id.*

[90] Michelle Price & Katanga Johnson, *U.S. Consumer Watchdog Orders Tech Giants to Turn Over Information on Payment Data*, THOMSON REUTERS (Oct. 21, 2021, 10:19 AM), https://www.reuters.com/article/ctech-us-usa-cfpb-bigtech-idCAKBN2HB1WG-OCATC.

[91] Aldrich, *supra* note 71.

[92] *See* ACCENTURE, *supra* note 10, at 6 marketing consumer checkout baskets are larger due to BNPL; *see also* KLARNA, *supra* note 9, finding from rue21 case study that consumers make larger purchases because of BNPL; *but see* C + R RSCH., *supra* note 76, finding that 59% of respondents said they purchased an unnecessary item because of BNPL.

For regulators, a keen eye should watch consumer debt accumulation. As seen above, if the CFPB incorrectly deems BNPL as a credit card and groups its lending within credit scores, then BNPL might as well disappear with layaway. The task is to find a way to regulate BNPL independent from other forms of unsecured lending.

The CFPB should put the impetus on the BNPL companies. Creating another government agency as a watch dog will only create more inefficiency. Because these are fintech companies, a fintech solution should be workable.

BNPLs should be regulated to assign a BNPL number to its customers. This number can be tied either to a consumer's phone number or credit card number to avoid duplicative accounts. That number is then registered with an agency that independently monitors consumer spending. From there, BNPL will notify an individual prior to purchase of their total BNPL payments, and how much those payments will cost in the credit's six-week period.

This approach will work in two ways: first, consumers will be less impulsive, seeing how much they will owe that day and in the coming weeks. Second, more discretion will be given to both the BNPL company and customer. With this information readily available, BNPL will have the option to review a customer's ability to pay the debt. This will remove the need to review eligibility imposed on the Consumer Credit Protection statutes but will give companies no excuse not to review.[93]

CFPB must require greater transparency with BNPLs impact on credit score and fess associated with missed payments. The requirement should go beyond a terms and condition sheet. Customers shopping online noted that BNPL are favored because of its ease of use and speed.[94] Likewise, when a consumer is shopping in-person, it is not conceivable for a shopper to step aside, read the fine print, and then proceed with their purchase.

The CFPB can approach online and traditional, in-person shopping identically. Online can require consumers to initial two sentences: one, briefly explaining what happens if a payment is missed and the second, that explains what happens with the consumer's data. In-person shoppers can initial the same two sentences but on the app from their phone. While this may seem over simplistic, the principle is sound: give consumers the true and correct information instead of using misleading sentences such as "there are no upfront fees charged or any interest incurred."[95]

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[93] *See* 15 U.S.C. §1665(e) (2020).

[94] C + R RSCH., *supra* note 76.

[95] *See Is There a Cost to Using Afterpay?*, AFTERPAY (last visited March 18, 2022), https://help.afterpay.com/hc/en-us/articles/218320423-Is-there-a-cost-to-using-Afterpay-. (Deciding regulation should consider this type of language. BNPLs, instead, should be required to be blunt and avoid deceptive practices).

Combining these two recommendations, the CFPB will effectively target and impede consumer debt accumulation and permit BNPL users to identify their financial bandwidth.

V. CONCLUSION

BNPL has the potential to assist many consumers by decreasing large payments and segmenting payments in smaller increments over a two-month period. Ahead of the CFPB's finding from their investigation of BNPL, factors such as consumer debt accumulation and lack of transparency must be balanced to allow BNPL's benefits to remain but protect consumers. By implementing a governing body to monitor individual debt across platforms and asking BNPLs to inform users how much debt they have accumulated is both reasonable and beneficial to both parties. Disseminating information about the realities of an individual's credit score and data will not prohibit BNPL from benefiting consumers, and in fact, will allow consumers to adequately determine if BNPL is right for them.

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DELINEATING DIGITAL MARKETS IN ANTITRUST CONTEXTS

❖ Note ❖

*Lindsey Robin**

I. INTRODUCTION

As digitization and technology increasingly affect all aspects of life, law makers and academics alike continue to consider how antitrust law can be applied to digital markets. Concerns over big data, data security, monopolization, privacy, and unfair competition practices have garnered much attention across the globe in the last decade.[1] How and whether antitrust law should effectively address these concerns remains a hotly debated topic in the antitrust community.

Many people have called for more aggressive antitrust action in order to decrease the size and influence of big digital companies like Amazon, Facebook, and Google.[2] Critics, however, have emphasized that a more economics-oriented approach suggests that mere "anti-bigness" goals may actually hinder economic growth, innovation, and, ultimately, consumer welfare.[3] Is there an economically sound way antitrust law can effectively be applied to digital markets while simultaneously keeping consumer welfare the central focus? To help answer this question, this Note

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[1] *See generally,* Benjamin M. Fischer, *The Rise of the Data-Opoly: Consumer Harm in the Digital Economy*, 99 WASH. U. L. REV. 729 (2021); Mason Marks, *Biosupremacy: Big Data, Antitrust, and Monopolistic Power over Human Behavior*, 55 U.C. DAVIS L. REV. 513 (2021); Joshua P. Zoffer, *Short-Termism and Antitrust's Innovation Paradox*, 71 STAN. L. REV. Online 308 (2019)

[2] *See, e.g.,* Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age*, HARV. L. REV. 1655, 1681-82 (2018); Lina M. Khan, *Amazon's Antitrust Paradox,* 126 YALE L. J. 710, 802-05 (2017); Elizabeth Warren, *Here's How We Can Break Up Big Tech,* MEDIUM (Mar. 8, 2019), https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c.

[3] *See, e.g.,* Robert W. Crandall, *The Dubious Antitrust Argument for Breaking up the Internet Giants*, 54 INDUS. ORG. REV. 627, 628–34 (2019); Matt Rosoff, *Op-ed: This Week Showed How the Big Tech Antitrust Campaign is Totally Misguided*, CSNBC (June 30, 2021, 5:55 PM), https://www.cnbc.com/2021/06/30/op-ed-antitrust-crusade-against-big-tech-is-misguided.html.

analyzes the current antitrust case against Facebook and the idea of market delineation within antitrust law.

From its inception, antitrust law has delineated markets and relied, to a significant extent, on market shares to determine monopolistic behavior.[4] Section 2 of the Sherman Act prohibits monopolization or attempted monopolization.[5] Section 7 of the Clayton Act bars acquisitions that substantially decrease competition.[6] Together these two acts form the substantive backbone of antitrust law. In order to determine whether a corporation holds monopoly power, the market to which they belong must first be defined.[7] Once the market is delineated, the corporation's market share percentage is determined.[8] Traditionally, corporations who hold a high market share percentage within a particular market have been broken up by antitrust law.

Applying traditional antitrust market delineation ideas to big tech markets has proven challenging for several reasons. First, many tech companies act as intermediary platforms bringing together two or more groups that provide value to each other.[9] For example, Facebook brings together advertisers and users, and the value one group gets is dependent on the participation and interaction of the other group.[10] Furthermore, many tech companies operate in "zero-price markets," meaning that they set prices at $0 for one group.[11] Value is then derived from harvesting data from these zero-price users and analyzing the data for advertising purposes.[12] Lastly, the rapidly evolving nature of digital markets present special challenges for antitrust law makers as proposed new frameworks can become outdated quickly.[13] These challenges are especially present in the recent antitrust case against Facebook, Inc.

In December 2020, the Federal Trade Commission ("FTC") and forty-six states sued Facebook, Inc. ("Facebook"), claiming it held monopoly power and engaged in anticompetitive behavior in violation of antitrust law.[14] The FTC and the states accused Facebook of maintaining a dominant share of the "Personal Social Networking Services" market ("PSN services market") in violation of Section 2 of

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[4] Gregory J. Werden, *The History of Antitrust Market Delineation*, 76 MARQ. L. REV. 123, 125-26 (1992).

[5] 15 U.S.C. § 2.

[6] *Id.* § 18.

[7] Werden, *supra* note 4, at 123-24.

[8] *Id.*

[9] Mark Jamison, *Applying Antitrust in Digital Markets: Foundations and Approaches*, B.C. INTELL. PROP. & TECH. F. 1, 14 (2020).

[10] John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 149, 151 (2015).

[11] *Id.*

[12] *Id.* at 156-57

[13] Jamison, *supra* note 9.

[14] New York v. Facebook, Inc., 549 F. Supp. 3d 6, 14-15 (D.D.C. 2021).

the Sherman Act.[15] Additionally, the FTC and the states accused Facebook of violating Section 7 of the Clayton Act when it acquired several companies that could have potentially competed with Facebook – most notably its acquisition of Instagram in 2012 and WhatsApp in 2014.[16]

In June 2021, the U.S. District Court of the District of Columbia, tossed both complaints; however, it allowed the FTC to file an amended complaint for the Section 2, monopolization claim.[17] The court held that the FTC's assertion that Facebook held over sixty percent of the PSN services market was unsupported, speculative, and conclusory as the FTC offered no indication of the metric(s) or method(s) used to calculate Facebook's market share percentage.[18] In spite of this, the Court dismissed only the complaint and not the entire case, theorizing that the defect could conceivably be overcome by repleading.[19] This effectively gave the FTC another chance to clarify the market to which Facebook belongs and how much of that market Facebook controls. A new approach in delineating Facebook's market may be advantageous for the FTC when it files its amended complaint; however, before addressing new approaches one must first understand the traditional approaches to market delineation in antitrust law. In Part II of this Note, I will discuss how antitrust law has developed the idea of market delineation and the traditional goals antitrust law has sought to achieve. In Part III, I will discuss the current, working framework for delineating markets and some of its shortcomings. Finally, Part IV of this Note will provide a recommendation for how a new approach to delineating Facebook's market is workable.

II. BACKGROUND

Antitrust law originated in the United States in the late nineteenth century in response to the rapid growth of private companies due to the technological advancements of the industrial revolution.[20] The Sherman Act of 1890 was the first federal antitrust statute.[21] It codified states' pro-competition common law doctrines and allowed the federal government to bring civil and criminal actions for antitrust violations.[22] The Sherman Act contained two main prohibitions: (1) concerted actions to restrict trade and (2) monopolization or attempted monopolization.[23] In

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[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Fed. Trade Comm'n v. Facebook, Inc., No. 20-3590 (JEB), 2021 WL 2643627, at *1 (D.D.C. June, 28 2021).

[19] *Id.*

[20] Laura Phillips Sawyer, *US Antitrust Law and Policy in Historical Perspective* 3-5 (Harv. Bus. Sch, Working Paper No. 19-110, 2019).

[21] *Id.*

[22] *Id.*

[23] 15 U.S.C. § 2.

1914, two amendments to the Sherman Act were passed – the Federal Trade Commission Act, which created the Federal Trade Commission, and the Clayton Antitrust Act.[24] The Clayton Antitrust Act clarified and expanded federal antitrust laws to cover anticompetitive acts, including price discrimination, exclusive dealing (i.e., tying arrangements), anticompetitive mergers and acquisitions, and interlocking corporate directorships.[25]

One of the most famous early antitrust cases involved the breakup of Standard Oil Company after it bought most of the oil refining companies in the United States.[26] Antitrust litigation continued to follow a pattern of breaking up big corporations in favor of smaller business during and after the Progressive Era.[27] The goal of early antitrust law was to ensure "free and fair competition" in the marketplace, and outcomes were often focused on protecting smaller, less powerful competitors.[28] Political motivations for early antitrust laws were fueled by populist sentiments.[29] But, as the Supreme Court increasingly enforced antitrust law in broader contexts, some economists became skeptical of the effects of antitrust law.[30]

In 1978, Professor Robert Bork, then a law professor at Yale Law School, wrote *The Antitrust Paradox,* in which he argued that consumers often benefited from corporate mergers and that many theories of antitrust law were economically irrational and hurt consumers.[31] He argued that antitrust law had gone too far and should focus on consumer welfare, not ensuring competition.[32] This prompted a dramatic decrease in antitrust litigation during the Reagan Administration; a shift that is largely still in effect today.[33] Today, antitrust law is still heavily influenced by Professor Bork's ideas that consumer welfare and innovation are best achieved by largely leaving the market to itself.[34] However, with the rapid rise of big tech and concerns over the commodification of data and human attention, some have questioned whether Professor Bork's idea and called for far-reaching antitrust reform.

Among those at the forefront of antitrust reform are Senators Elizabeth Warren and Amy Klobuchar. In Klobuchar's 2021 book *Antitrust: Taking on Monopoly Power from*

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[24] Sawyer, *supra* note 20.

[25] 15 U.S.C. § 18.

[26] *See generally* United States v. Standard Oil Co. of New Jersey, 221 U.S. 1 (1911).

[27] *See generally* Brown Shoe Co. v. United States, 370 U.S. 294 (1962); United States v. Von's Grocery Co., 384 U.S. 270, 86 (1966); Utah Pie Co. v. Cont'l Baking Co., 386 U.S. 685 (1967).

[28] *Antitrust 2: The Paradox*, NPR (Feb. 20, 2019, 4:29 PM), https://www.npr.org/transcripts/696337392.

[29] Jamison, *supra* note 9, at 7.

[30] *Antitrust 2: The Paradox*, *supra* note 28.

[31] *See generally* ROBERT BORK, THE ANTITRUST PARADOX (1978).

[32] *Id.*

[33] *Antitrust 2: The Paradox*, *supra* note 28.

[34] *Id.*

the Gilded Age to the Digital Age, Senator Klobuchar provides a narrative backdrop to her current legislative efforts to reform antitrust law in regard to how it deals with large technology companies.[35] Senator Warren suggests breaking up all "platform utilities," which she defines as "[c]ompanies with an annual global revenue of $25 billion or more and that offer to the public an online marketplace, an exchange, or a platform for connecting third parties."[36] Critics of Senator Warren and Klobuchar's attempts at legislative antitrust reformation argue that current antitrust law is equipped to deal with digital markets and that in many cases current antitrust law has led to the right conclusion.[37] While perhaps an entirely new framework for dealing with digital markets may be on the horizon, looking at market delineation in digital market contexts may be helpful to make the current structure work more effectively in the meantime.

III. ANALYSIS

In a famous early antitrust law case, Judge Learned Hand declared that while ninety percent "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough."[38] Despite Judge Hand's less-than-clear declaration on *how much* of a market share makes up a monopoly, he did not comment on how to determine what makes up a particular market in the first place. In fact, many early antitrust cases failed to address core market delineation concerns and often focused on exclusionary conduct instead of market structure.[39] By the mid-twentieth century, however, the substantive concerns of market delineation in antitrust contexts became unavoidable.

In the 1953 U.S. Supreme Court case *Times-Picayune Publishing Co. v. United States*, the court employed an idea in economics known as "cross-elasticity of demand" for the first time to help define markets.[40] In economics, cross elasticity of demand measures the quantity demanded of one good in response to the change in price of another.[41] If a change in price in one good causes an increase in demand in another,

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[35] *See generally* AMY KLOBUCHAR, ANTITRUST TAKING on MONOPOLY POWER from the GILDED AGES to the DIGITAL AGES (1st ed. 2021).

[36] Warren, *supra* note 2.

[37] John Ceccio, Christopher Mufarrige, *Digital Platform Competition, Merger Control, and the Incentive to Innovate: Don't Kill the Goose That Lays the Golden Egg*, 30 COMPETITION: J. ANTI., UCL & PRIVACY SEC. CAL. L. ASSOC. 52, 69 (2020).

[38] United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945).

[39] *See, e.g.,* United States v. United States Steel Corp., 251 U.S. 417, 451 (1920) ("[T]he law does not make mere size an offence or the existence of unexerted power an offence."); Standard Oil Co. v. United States, 221 U.S. 1, 62 (1911) (stating that there is no "direct prohibition against monopoly in the concrete").

[40] Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 612 n.31 (1953).

[41] F.T.C. v. Staples, Inc., 970 F. Supp. 1066, 1074 (D.D.C. 1997)

similar good, then those goods are considered substitutes of one another.[42] A market consists of substitutes identified on the basis of cross-elasticity of demand. The court in *Times-Picayune Publishing Co.* emphasized that markets should be narrowly delineated and limited substitutes that make up a market to "reasonable substitutes."[43]

The famous "cellophane case" soon followed the *Times-Picayune Publishing Co.* case highlighting both the advantages and disadvantages of the "reasonable substitutes" test. Du Pont, a cellophane producer, was sued by the U.S. Department of Justice under the Sherman Act for monopolization.[44] At the time, du Pont accounted for three-quarters of cellophane sales in the United States.[45] The case ultimately hinged on whether cellophane was its own market or part of a broader "flexible packaging materials" market.[46] Du Pont argued that other wrapping materials were reasonable substitutes of cellophane; therefore, cellophane should be part of this broader market.[47] The Supreme Court sided with du Pont using cross-elasticity of demand to determine it was part of the larger "flexible packaging market."[48] Since du Pont was considered part of the broader "flexible packaging market" it held a much smaller market share.[49] The decision was heavily criticized as the other flexible packaging materials had sprung up in the market chiefly because of du Pont's exercise of monopoly power in increasing prices substantially.[50] The Court's error was evaluating the cross-elasticity of demand at the monopoly price; a mistake that has come to be known as the "Cellophane fallacy."[51]

Although several cases since *Times-Picayune Publishing Co.* and the *Cellophane Case* have refined the use of cross-elasticity of demand in determining market delineation, the two cases laid the bedrock for market definition in antitrust law.[52] Today, the relevant product market is often defined as composed of "products that have reasonable interchangeability for the purposes for which they are produced – price, use and qualities considered."[53] The market is still defined with regard to demand

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[42] *Id.*

[43] *Id.*

[44] United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 377–79 (1956).

[45] *See id.*

[46] *See id.*

[47] *Id.* at 401.

[48] *Id.* at 403–04.

[49] *Id.*

[50] *See generally* George W. Stocking, Willard F. Mueller, *The Cellophane Case and the New Competition*, 45 AM. ECON. REV. 29 (1955).

[51] *See, e.g.*, Gene C. Schaerr, *The Cellophane Fallacy and the Justice Department's Guidelines for Horizontal Mergers*, 94 YALE L. J. 670, 671 (1985).

[52] *See generally* Brown Shoe Co. v. United States, 370 U.S. 294 (1962); United States v. Phila. Nat'l. Bank, 374 U.S. 321 (1963); Int'l Boxing Club of N. Y., Inc. v. United States, 358 U.S. 242 (1959); Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

[53] United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 404 (1956); *see also* United States v. Microsoft Corp., 253 F.3d 34, 51–52 (D.C. Cir. 2001).

substitution; however, courts are careful to take into account the "cellophane fallacy" for monopoly-maintenance cases.[54] In modern antitrust contexts, market definition also considers the relevant geographic area that consumers within a market might rationally turn to; however, geographic considerations are often irrelevant in digital markets as the internet transcends geographic boundaries.

Litigators continue to delineate markets by employing the idea of "reasonably interchangeable" products in modern cases.[55] However, in dealing with digital two-sided platforms like Facebook, one is left wondering which products should be analyzed. The Supreme Court dealt with the issue of two-sided, transactional platforms in *Ohio v. American Express Co.* which involved credit card companies who profit off both merchants and consumers.[56] Justice Thomas concluded that courts must treat what has traditionally been considered two separate markets as one for cases brough against "transaction platforms."[57] However, this has left some puzzling over what exactly are "transaction platforms,"[58] and whether Amex applies to platforms like Facebook, as Facebook only generates revenue from one "side," namely its advertisement market? In the Facebook case, the prosecution focused on only one side of the market – the "personal social networking" side.[59] Attempting to better define what a personal social networking service is, the FTC identified three key elements:

> "First, [personal social networking services] are built on a social graph that maps the connections between users and their friends, family, and other personal connections. Second, [they] include features that many users regularly employ to interact with personal connections and share their personal experiences in a shared [virtual] social space, including in a one-to-many 'broadcast' format. And [t]hird, [they] include features that allow users to find and connect with other users, to make it easier for each user to build and expand their set of personal connections. The social graph also supports this feature by informing [the user] which [new] connections might be available based on her existing network."[60]

Reasonably interchangeable services would be services that exhibit the three key elements listed above; but, serious ambiguities arise. Should LinkedIn be considered a personal social networking service as it is used to primarily share

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[54] *Id.*

[55] *See id.*

[56] Ohio v. Am. Express Co., 138 S. Ct. 2274, 2274 (2018).

[57] *Id.* at 2287.

[58] *See* Michael Katz & Jonathan Sallet, *Multisided Platforms and Antitrust Enforcement*, 127 YALE L.J. 2142, 2151 (2018).

[59] Fed. Trade Comm'n v. Facebook, Inc., No. 20-3590 (JEB), 2021 WL 2643627, at *10 (D.D.C. June 28 2021).

[60] *Id.*

professional content? Does TikTok exhibit these three elements? No precise metrics are available to clear these ambiguities under this model.

IV. RECOMMENDATION

When delineating markets, focusing on concrete data is important to get consistent results across cases. In tangible markets, antitrust law has historically analyzed products that produce revenue.[61] Perhaps one of the most consistent metrics in digital markets is advertisement revenue. Using ad revenue metrics to define the boundaries of the "digital advertisement market" eliminates the ambiguity of the personal social networking services market. Furthermore, using ad revenue metrics fits the reasonably interchangeable paradigm. Advertisers are likely to jump across platforms based on prices. For example, if Facebook raised its advertising prices, advertisers would likely jump to other platforms like Google or LinkedIn. Under the PSN market model, this analysis is entirely overlooked. While using advertisement revenue does broaden the market to which Facebook belongs, it still challenges Facebooks monopolistic behavior as Facebook will likely still hold a significant percentage of all-over internet ad revenue.

Many digital platforms primarily generate revenue through advertisement, while others generate revenue through various means. For example, Amazon generates revenue from advertisements, Amazon product sales, and commissions from third-party sales. Antitrust law can still address the role of these companies by analyzing the market share of each of the relevant markets to determine monopoly power. In this analysis, Facebook and Amazon would be part of the same market, but only with respect to Amazon's ad revenue, not its entire profits. This approach reduces ambiguity within antitrust litigation and allows digital companies to clearly know when they are and are not in violation of federal antitrust law.

V. CONCLUSION

As antitrust law adapts to rapidly changing digital markets, it is important that consistent metrics are used when delineating markets. When analyzing the reasonable interchangeability of products and services in digital markets, one should look to where revenue is generated. In digital markets, revenue is often generated from selling advertisement space. Calculating market share by looking at ad revenue metrics would reduce ambiguity and allow current antitrust law to function without undergoing sweeping transformation

[61] *See generally* United States v. U.S. Steel Corp., 251 U.S. 417 (1920); Brown Shoe Co. v. United States, 370 U.S. 294 (1962); United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956)

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PROTECTING THE EXERCISE BY WORKERS OF FULL FREEDOM OF ASSOCIATION: GIVING THE NLRB THE TOOLS IT NEEDS TO UPHOLD THE NLRA

❖ Note ❖

*Sam Smith**

I. INTRODUCTION

On April 9, 2021, Amazon defeated a unionization effort to unionize at their fulfillment center in Bessemer, Alabama after a hotly contested election featuring significant campaigning by both the company and the Union.[1] The Union immediately petitioned the National Labor Relations Board ("NLRB" or the "Board") alleging several violations of the National Labor Relations Act ("NLRA" or the "Act") by Amazon,[2] which resulted in the NLRB setting aside the original vote and ordering a new election. [3] The NLRB also reached a settlement with Amazon over its general anti-labor practices in December 2021, forcing the company to issue communications to its over 1.5 million employees informing them of their rights under the NLRA.[4]

Amazon is not the only company to face a significant unionization push since the start of 2020. Two Starbucks stores in Buffalo, New York, successfully

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[1] *See* Alina Selyukh, *Amazon Warehouse Workers get to Re-do Their Union Vote in Alabama, NAT'L PUB. RADIO (Nov.* 29, 2021), https://www.npr.org/2021/11/29/1022384731/amazon-warehouse-workers-get-to-re-do-their-union-vote-in-alabama.

[2] *See id.*

[3] *See id.*

[4] *See Amazon Unionization Efforts get a Boost Under a Settlement with U.S. Labor Board*, NAT'L PUB. RADIO (Dec. 23, 2021), https://www.npr.org/2021/12/23/1067698799/amazon-nlrb-union.

unionized in December 2021,[5] and over 175 additional locations have filed for union votes with NLRB in the wake of that success.[6] Like Amazon, Starbucks has been accused of numerous violations of the NLRA in its campaign against unionizers; and faces multiple NLRB investigations.[7] Despite the best efforts of the NLRB, anti-labor practices which violate the NLRA remain widespread.[8]

This note will argue that the remedies currently available to the NLRB are inadequate to deter private sector management from violating workers' rights under the NLRA in their fight against those workers efforts to unionize. Part II discusses the background of the NLRA and NLRB, the current extent of its power, and how it has been limited by judicial intervention. Part III will analyze how these remedies compare to sanctions available to agencies enforcing other workplace protection statutes, how private sector companies react in the face of the NLRB's decisions, and how the proposed Protecting the Right to Organize Act ("PRO Act") would affect both. Part IV proposes changes to the PRO Act to better empower the NLRB to succeed in its mission of upholding and enforcing the NLRA.

II. BACKGROUND

Congress passed the NLRA in 1935 in response to growing tensions between company management and labor, and unfair practices on both sides of the disputes.[9] In doing so, it declared as the policy of the United States "encouraging the practice and procedure of collective bargaining and [] protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing."[10] To this end, the act codified into law the right of workers to organize for the purpose of collective bargaining,[11] and created and empowered the NLRB to prevent any person from engaging in any unfair labor practice.[12] Accordingly, the board's role is to regulate and oversee union certification and

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[5] *See* Alina Selyukh, *Starbucks Union Push Spreads to 54 Stores in 19 States*, NAT'L PUB. RADIO (Jan. 31, 2022), https://www.npr.org/2022/01/31/1076978207/starbucks-union-push-spreads-to-54-stores-in-19-states.

[6] *See* Noam Scheiber, *Starbucks Union Campaign Pushes On, with at Least 16 Stores now Organized.*, N.Y. TIMES (Apr. 8, 2022) https://www.nytimes.com/2022/04/08/business/economy/starbucks-union-new-york-vote.html.

[7] *See, e.g.*, Starbucks Corp., No. 28-CA-289622 (NAT'L LAB. RELS. BD. Jan. 26, 2022) (alleging retaliation, threats, surveillance, and more in Phoenix, AZ); *see also* Starbucks Corp., No. 15-CA-290336 (NAT'L LAB. RELS. BD. Feb. 8, 2022) (alleging improper discharge in Memphis, TN).

[8] *See* Celine McNicholas et al., *Unlawful: U.S. Employers are Charged with Violating Federal Law in 41.5% of all Union Election Campaigns*, ECON. POL'Y INST. (Dec. 11, 2019), https://files.epi.org/pdf/179315.pdf.

[9] *See* 29 U.S.C. § 151.

[10] *Id.*

[11] *See id.* § 157

[12] *See id.* §§ 153, 160.

decertification elections, adjudicate any related disputes, and use the tools at its disposal to prevent employers and unions from souring the process.[13]

Gaining union representation under the NLRA is a lengthy process. Employees interested in unionizing must first identify a potential union and obtain a showing of interest from thirty percent of the proposed bargaining unit.[14] Next, the petition is served to the employer and provided to the NLRB to determine if the showing of interest is adequate and timely.[15] Then the employer can either agree to an election by negotiating the terms thereof with the union or consent to oversight from the NLRB's regional director.[16] Employers generally refuse consent,[17] prolonging the process as there must be a pre-election hearing with the regional director to resolve the parties' disagreements.[18] Once the terms have been set, the election occurs, the board tallies the results, and each party submits any objections they have, if any.[19] For the nearly 6,000 Amazon workers in Bessemer, Alabama, 150 days passed between the initial filing of their petition with the NLRB and the tallying of the votes in their first election.[20]

In its role as administrator and protector of this process, the NLRB strives to maintain "laboratory conditions" to allow employees to express their desires uninhibited.[21] Either side in the election can taint these conditions through their conduct leading up to and throughout the election.[22] Such conduct is not limited to unfair labor practices described in the act, but rather encompasses any actions which "create[] an atmosphere calculated to prevent a free and untrammeled choice by the employees."[23] Ways in which employers can create such an atmosphere include, but are not limited to: promising benefits,[24] threatening reprisal,[25] misrepresenting facts

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[13] *See generally id.* §§ 151-169.

[14] *See* 29 C.F.R. §§ 102.60-61 (2020); *see also Representation Law and Procedures*, AM. BAR ASS'N 1, https://www.americanbar.org/content/dam/aba/events/labor_law/basics_papers/nlra/representation_procedures.authcheckdam.pdf [hereinafter ABA].

[15] *See* 29 C.F.R. § 102.60 (2020); *see also The NLRB Process*, NAT'L LAB. RELS. Bd., https://www.nlrb.gov/resources/nlrb-process (last visited Mar. 22, 2022) (showing basic flowchart of unionization petition steps).

[16] *See* 29 C.F.R. § 102.62 (2020); *see also* ABA, *supra* note 14, at 4-5.

[17] *See* McNicholas et al., *supra* note 8.

[18] *See* 29 C.F.R. § 102.63 (2019); *See also* ABA, *supra* note 14, at 5-12.

[19] *See* 29 C.F.R. § 102.69 (2020); *See* ABA, *supra* note 14, at 17-24.

[20] *See Amazon.com Services LLC, No. 10-RC-269250*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/case/10-RC-269250 (last accessed Mar. 23, 2022).

[21] *See* Gen. Shoe Corp., 77 N.L.R.B. 124, 127 (1948).

[22] *See id.*

[23] *Id.*

[24] *See* Coca-Cola Bottling Co., 132 N.L.R.B. 481, 483-84 (1961) ("the giving of things of value to individual employees . . . in circumstances which reasonably would lead the donees to believe that it was given to influence their vote, is . . . a ground for setting aside the election.").

[25] *See* Wesselman's Enters., 248 N.L.R.B. 1017, 1022 (1980).

in campaign materials,[26] interrogation,[27] and disciplining or discharging employees based on union affiliation.[28]

When the NLRB finds that one side has engaged in conduct which taints the laboratory conditions it requires for union certification elections, its options for remedies are limited.[29] The text of the act provides that it may "serve[] on such person an order requiring such person to cease and desist from such unfair labor practice, and to take *such affirmative action . . . as will effectuate* the policies of this subchapter."[30] The Supreme Court has not read provision this broadly, holding that the board is limited to remedial, rather than punitive, measures.[31] This decision, made in the Board's infancy, leaves it with three options: first, order a new election;[32] second, force the violator to take an action which attempts to undo any damage they caused and no more;[33] or third, issue a *Gissel* order, declaring majority support for the union and bypassing the need for additional election.[34]

The first of these measures is straightforward – the laboratory conditions required for a fair election were tainted so a new election is necessary to reestablish them.[35] It is often coupled with the second, non-punitive remedial orders.[36] For example, if an employer is found to have improperly surveilled employees, they could be ordered to refrain from doing so again.[37] If an employee is improperly discharged, they can be reinstated, possibly with backpay (but no more),[38] and misrepresentations in campaign materials can result in orders to distribute

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[26] *See* Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127, 131 (1982) ("we will set an election aside . . . because of the deceptive manner in which it was made, a manner which renders employees unable to evaluate the forgery for what it is.").

[27] *See* V&S ProGalv, Inc. v. NLRB, 168 F.3d 270, 280 (6th Cir. 1999) ("It is well-settled that an employer violates the Act by interrogating its employees about their union activities.").

[28] *See* ABA, *supra* note 14, at 14-16.

[29] *See* Republic Steel Corp v. NLRB, 311 U.S. 7, 11 (1940) ("this authority to order affirmative action does not go so far as to confer a punitive jurisdiction . . . even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.").

[30] 29 U.S.C. § 160(c).

[31] *See Republic Steel Corp.*, 311 U.S. at 12.

[32] *See* Gen. Shoe Corp., 77 N.L.R.B. 124, 127 (1948).

[33] *See Republic Steel Corp.*, 311 U.S. at 12.

[34] *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 610-615 (1969).

[35] *See Republic Steel Corp.*, 311 U.S. at 12.

[36] *See, e.g.*, *id.*

[37] *See id.* ("he may be ordered to cease particular methods of interference, intimidation or coercion"); *See also* Amazon.com Services LLC, 13-CA-275270 (N.L.R.B. Dec. 22, 2021) (settlement agreement).

[38] *See* 29 U.S.C. S 160(c).

corrections and notices of employees' rights.[39] Neither imposes a burden that goes beyond the harm caused, and presumptively benefit gained, by the guilty employer.[40]

The final remedy – *Gissel* bargaining orders – arise when the steps taken by employers to subvert the union certification election process go so far as to make a return to "laboratory conditions" impossible.[41] When such conditions exist and the Union can prove majority support some other way, whether by showing majority support in the initial petition or subsequent increase in signatures, the Board will certify the union representative and order the company to move onto negotiations, essentially circumventing the election altogether.[42] The Supreme Court upheld this process in 1969, noting that "[i]f the Board could enter only a cease-and-desist order and direct an election or a rerun, it would in effect be rewarding the employer . . . ."[43] The requirements it laid out are: (1) a showing of majority support, (2) the possibility of return to a fair election is slight, and (3) that the employee is better protected by a bargaining order.[44] A combination of these strict requirements and shifting policy between administrations has made *Gissel* bargaining orders a rare and extraordinary remedy.[45]

Considering the current remedies available to the Board, how this compares to other regulatory bodies, and how corporations, the central issue this paper seeks to resolve is whether either current remedies or those proposed in the Protecting the Right to Organize Act are adequate to advance the United States' policy of encouraging the practice and procedure of collective bargaining.

III. ANALYSIS

Given the NLRB's charter to effectuate the United States' policy of "encouraging the practice and procedure of collective bargaining,"[46] the remedies available to it are woefully inadequate. Of the three options it possesses, only *Gissel* bargaining orders truly cause employers to suffer the consequences of violating the NLRA by directly enforcing the result they were hoping to avoid: union representation of their workforce. The actions of both Starbucks and Amazon taken in the face of burgeoning unionization movements show that the potential burdens

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[39] *See Republic Steel Corp.*, 311 U.S. at 12 ("to give appropriate notice of his compliance with the Board's order, and otherwise to take such action as will assure to his employees the rights which the statute undertakes to safeguard."); *See also* Amazon.com Services LLC, 13-CA-275270 (N.L.R.B. Dec. 22, 2021) (settlement agreement).

[40] *See* Republic Steel Corp, 311 U.S. at 12-13 (1940).

[41] *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 614 (1969).

[42] *See id.*

[43] *Id.* at 610.

[44] *See id.* at 614-15.

[45] *See* ABA, *supra* note 14, at 19.

[46] 29 U.S.C. § 151.

they face from NLRB remedies completely fail to outweigh the benefits they gain by illegally tainting the laboratory conditions required for a fair election. That other regulatory bodies are regularly given discretion to devise punitive schemes, as seen with both the Equal Employment Opportunity Commission[47] and the Department of Labor's Wage and Hour Division[48], shows that it is a necessary power for agencies to uphold the laws they are charged with enforcing.

Like the NLRA, the Fair Labor Standards Act ("FLSA")[49] and Family and Medical Leave Act ("FMLA")[50] both create specific workers' rights and establish protections against abuses by employers for those rights. Similarly, Title VII of the 1964 Civil Rights Act prohibits workplace discrimination for a variety of protected classes.[51] None of these three employment laws limits the agencies charged with enforcing them as much as the NLRA currently limits the NLRB.[52] Under all three, violations can be punished through punitive damages, with both companies and individuals within them potentially liable.[53]

Violations of the FMLA, FLSA, and Title VII are relatively rare.[54] By contrast, when facing an attempt by employees to establish collective bargaining—the primary right guaranteed under the NLRA—it is standard practice for companies to contravene worker's rights.[55] Employers are charged with violating the NLRA in 41.5% of union election campaigns.[56] Perhaps unsurprisingly, in the face of severe and often illegal management opposition, unionization has been on the decline in recent decades, with the proportion of workers who are members of unions falling from 20.1 percent in 1983 to just 10.8 percent in 2021.[57] That rate stands at just 6.1

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[47] *See* 42 U.S.C. § 2000e (barring employment discrimination on the basis of various protected classes, establishing the EEOC to aid in enforcement, and allowing for punitive damages against violators).

[48] *See* Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219.

[49] *See id.*

[50] *See* Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654.

[51] *See* 42 U.S.C. §§ 2000e-2(a)-(c) (barring discrimination by employers, employment agencies, and labor organizations "on the basis of his race, color, religion, sex, or national origin.").

[52] *Compare* 29 U.S.C. § 216 (providing financial and criminal penalties under the FLSA) and 29 U.S.C. § 2617(a) (providing for punitive financial damage awards under the FMLA) and 42 U.S.C. § 2000e-5 (providing financial and criminal penalties under Title VII) *with* Republic Steel Corp v. NLRB, 311 U.S. 7, 12 (1940) (barring any punitive remedies under the NLRA).

[53] *See* 29 U.S.C. § 216 (FLSA); *see also* 29 U.S.C. § 2617(a) (FMLA); *See also* 42 U.S.C. § 2000e-5 (Title VII).

[54] *See Charge Statistics (Charges Files with EEOC) FY 1997 Through FY 2020*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2020 (last visited Mar 23, 2022); *See also BLS Reports: Characteristics of Minimum Wage Workers, 2020*, U.S. BUREAU OF LAB. STAT. (Feb. 2021), https://www.bls.gov/opub/reports/minimum-wage/2020/home.htm.

[55] *See generally* McNicholas et al., *supra* note 8.

[56] *Id.*

[57] BUREAU OF LAB. STAT., USDL-22-0079, UNION MEMBERS – 2021 (2022), https://www.bls.gov/news.release/pdf/union2.pdf.

percent in the private sector.[58] Despite this, two major American corporations have been facing major, high-profile unionization efforts since the start of the new decade: Amazon[59] and Starbucks.[60] These examples demonstrate that the NLRB currently lacks the power to prevent them from merely treating violating the NLRA as part of the cost of doing business.

The most notable effort Amazon faces is at their fulfillment center in Bessemer, Alabama.[61] Workers there filed a petition seeking representation in November 2020[62] and had an election by mail ballot in March of 2021.[63] Following a contested campaign by both sides, Amazon prevailed, but not fairly.[64] The NLRB found that they engaged in several unfair practices which tainted the "laboratory conditions" required for union certification election.[65] These include inquiries into how employees would vote, installation of a tent and campaign materials by the ballot box, installation of a ballot box in the facility that employees believed Amazon could access, creating the impression that Amazon was surveilling how employees voted, and improper threats of retaliation and promises of benefits.[66] Given the severity and quantity of Amazon's transgressions, the board ordered a new election (which concluded on March 28, 2022 with disputed results)[67] and also ordered Amazon to cease the unfair practices listed above, and to provide the union equal access to the means of communication Amazon used for its own campaign.[68] Perhaps unsurprisingly, the company has been accused of further unfair interference in this new election by removing pro-union messaging and restricting employees' activities outside of working hours.[69] Following the second election, the union filed another twenty-three objections with the NLRB, alleging Amazon continued to

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[58] *Id.*

[59] *See generally* Alina Selyukh, *Amazon Labor Push Escalates as Workers at New York Warehouse Win a Union Vote*, NAT'L PUB. RADIO (Feb 17. 2022), https://www.npr.org/2022/02/17/1080689396/amazon-labor-push-escalates-as-workers-at-new-york-warehouse-win-a-union-vote.

[60] *See generally* Scheiber, *supra* note 6.

[61] *See* Selyukh, *supra* note 1.

[62] *See* Amazon.com Services LLC, 10-RC-269250 (N.L.R.B. Nov. 20, 2020) (RC Petition).

[63] *See* Amazon.com Services LLC, 10-RC-269250 (N.L.R.B. Jan. 19, 2021) (Notice of Election).

[64] *See* Amazon.com Services LLC, No. 10-RC-369250, 2021 N.L.R.B. Reg. Dir. Dec. LEXIS 182, at *29-*30 (N.L.R.B. Nov. 29, 2021).

[65] *See id.* at *38.

[66] *See id.*

[67] *See* Andrea Hsu, *Do-over Union Election at Amazon's Bessemer Warehouse is too Close to Call*, NAT'L PUB. RADIO (Mar. 31, 2022), https://www.npr.org/2022/03/31/1090123017/do-over-union-election-at-amazons-bessemer-warehouse-is-too-close-to-call.

[68] *See Amazon.com Services LLC*, 2021 N.L.R.B. Reg. Dir. Dec. LEXIS 182, at *38.

[69] *See* Daniel Wiessner, *Union Says Amazon Continues to Interfere with Election at Alabama Warehouse*, REUTERS (Feb. 22, 2022), https://www.reuters.com/business/retail-consumer/union-says-amazon-continues-interfere-with-election-alabama-warehouse-2022-02-22/.

engage in much of the same behavior that resulted in the Board setting aside the first election.[70]

Starbucks also faces a union push, though rather than the large, centralized efforts Amazon is combatting, efforts by employees for the café corporation are remarkable for their breadth.[71] It started in late 2021 with three individual stores in the Buffalo, New York area, each consisting of fewer than twenty employees.[72] Two of the three succeeded in December of that year, with the third following closely in early 2022 after disputes over the ballots.[73] These successes launched an avalanche of similar filings throughout the nation, with over 175 stores seeking votes in the first three months of 2022 alone.[74] Much like Amazon, Starbucks has engaged in numerous illegal acts to combat the unionization efforts of its employees.[75] The NLRB's findings against it include illegal surveillance and retaliation in multiple locations in the southwest.[76] Starbucks has also been accused of violating the law when it recently fired seven union organizers in Memphis, Tennessee.[77]

From a purely cost-benefit perspective, it is inevitable that companies like Amazon and Starbucks continue to violate the NLRA[78] given the complete lack of punitive remedies available to the NLRB when it finds employers violate the law. Excepting *Gissel* bargaining orders, the most the Board can currently order is a new election, the employer to cease and desist, or to undo the damage done by their actions.[79] In essence, the "cost" of being found guilty of an NLRA violation is merely to be put into the same position they would have occupied as if they had not perpetrated the violation in the first place. If they taint a union election, the punishment is a union election.[80] If an employee is improperly fired, the punishment is to reinstate with *potential* back pay.[81] If they make improper threats or promises or engage in any of the other various acts that constitute improper campaigning, they

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[70] *Compare* Amazon.com Services, LLC, 10-RC-269250 (N.L.R.B. Apr. 7, 2022) (petitioner's objections) *with* Amazon.com Services LLC, 2021 N.L.R.B. Reg. Dir. Dec. LEXIS 182, at *38.

[71] *See generally* Scheiber, *supra* note 6.

[72] *See* Selyukh, *supra* note 5.

[73] *See id.*

[74] *See* Scheiber, *supra* note 6.

[75] *See* Josh Eidelson, *Starbucks Retaliated Against Pro-Union Staff, NLRB Alleges*, BLOOMBERG (Mar. 15, 2022), https://www.bloomberg.com/news/articles/2022-03-15/starbucks-retaliated-against-pro-union-staff-nlrb-alleges.

[76] *See id.*

[77] *See* Allison Morrow, *Starbucks Fires 7 Employees Involved in Memphis Union Effort*, CNN BUSINESS (Feb. 8, 2022), https://www.cnn.com/2022/02/08/economy/starbucks-fires-workers-memphis-union/index.html.

[78] *See* McNicholas et al., *supra* note 8.

[79] *See supra* Part II.

[80] *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 615 (1969).

[81] *See* 29 U.S.C. S 160(c).

simply have to stop doing so and potentially issue a notice of employees' rights.[82] Even for *Gissel* orders, the union must already have a showing of majority support,[83] so the certification of the union absent another election is simply the most likely result absent abuses by the employer. In sum, even the highest "cost" of violating the NLRA is minimal, merely the incidental costs involved in perpetrating those violations in the first place.

On the other side of the equation, unions represent a potentially significant increase in costs through wages, benefits, and restrictions on employer freedom to and hire and fire employees at will.[84] Even for a bargaining unit of relatively few employees, these costs could easily run into the hundreds of thousands per year, let alone the tens of millions Amazon could face in major facilities like their fulfillment center in Bessemer.[85] Given corporations' fiduciary duty to their shareholders,[86] the only logical choice when facing a unionization movement is to take on the minimal costs of violating the NLRA to avoid hundreds of thousands, if not millions, in increased costs. It should not be surprising that companies like Starbucks and Amazon routinely and repeatedly flout the NLRA – given the current enforcement regime, it is simply the most logical choice.

This stands in stark contrast with the FLSA, where the potential punishments for violations are much more severe.[87] It includes similar compensatory remedies as the NLRA, financial penalties, and even criminal sentences for repeat offenders.[88] These measures prove effective. According to Bureau of Labor Statistics estimates, of the over seventy-three million hourly workers in the United States, 1.2 percent earn less than the federal minimum wage established by the FLSA.[89] In 2021, the Department of Labor found fewer than 8,000 cases with violations of the federal minimum wage and overtime laws each, involving a total of just over 180,000

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[82] *See* Amazon.com Services LLC, 13-CA-275270 (N.L.R.B. 22 Dec. 2021) (settlement agreement).

[83] *See Gissel Packing Co.*, 395 U.S. at 614.

[84] *See generally* Mathew Walters & Lawrence Mishel, *How Unions Help All Workers*, ECON. POL'Y INST. (Aug. 26, 2003), https://files.epi.org/page/-/old/briefingpapers/143/bp143.pdf.

[85] *See generally id.* (finding unions raise the wages of unionized workers by about 20%). Given Amazon's average wage of eighteen dollars per hour and assuming a working year of 2,000 hours, this would represent an annual increase of about thirty-six million in labor costs at the Bessemer facility in wages alone.

[86] *See* Mary Siegel, *Fiduciary Duty Myths in Close Corporate Law*, 29 DEL. J. CORP. L. 377, 377 (2004).

[87] *See* 29 U.S.C. § 216 (allowing for fines of up to $10,000 and prison terms of up to six months for individual violators, liability for up to double the damages caused, and an additional penalty for child labor violations that scales with the number of employees affected).

[88] *See* 29 U.S.C. § 216.

[89] U.S. BUREAU OF LAB. STAT., *supra* note 54. As the report notes, not all the 865,000 workers below the federal minimum wage are covered by the FLSA.

employees.[90] This represents less than a quarter of a percent of hourly workers in the United States.[91] The contrast with the 41.5% of union elections in which employees are charged with NLRA violations[92] could not be clearer.

To help remedy the NLRB's current lack of power to enforce the NLRA, the 117th Congress proposed the Protecting the Right to Organize Act ("PRO Act") which passed the House[93] but lingers in committee in the Senate.[94] It provides, among several other important provisions, the Board with the ability to impose limited financial sanctions of varying degrees for violations of the election "laboratory conditions" generally and unfair labor practices more specifically.[95] The limited nature of these sanctions means they are not severe enough to deter large companies from engaging in practices of the NLRA.

The financial penalties within the PRO Act are not severe enough to tip the cost-benefit analysis large corporations engage in when violating the NLRA to prevent union formation. There are four financial penalties in the proposed legislation: (1) up to a $10,000 fine for each violation, (2) up to $10,000 per day for continuing to violate the NLRA following a Board order to cease and desist, (3) up to $50,000 per unfair labor practice, which can be doubled for any employer with a similar violation in the prior three years, and (4) corporate and individual liability under a new private right of action up to double the compensatory amount (backpay).[96] The first of these covers the majority of actions taken by companies like Starbucks and Amazon to combat unionization efforts.[97] For example, none of the various violations Amazon perpetrated in Bessemer rose to the level of an unfair labor practice as defined by the Act, but rather together created an atmosphere which tainted the laboratory conditions required for a fair election.[98]

This first penalty does not go far enough to prevent companies from continuing their illegal strategies in combatting large union efforts. Amazon's fulfillment center in Bessemer is an example: the proposed bargaining unit there consists of just over 6,000 employees.[99] Under the currently proposed legislation, Amazon would be subject to $70,000 in fines for the conduct which resulted in the

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[90] *Fair Labor Standards Act*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/data/charts/fair-labor-standards-act (last visited Mar. 3, 2022) (showing table of annual FLSA violations).

[91] *See* U.S. BUREAU OF LAB. STAT., *supra* note 54; *See also id.*

[92] McNicholas et al., *supra* note 8.

[93] *See* Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. (as passed by House of Representatives, Mar. 9, 2021).

[94] *See id.*

[95] *See id.* §§ 106, 109.

[96] *See id.*

[97] *See generally* Amazon.com Services LLC, No. 10-RC-369250, 2021 N.L.R.B. Reg. Dir. Dec. LEXIS 182 (N.L.R.B. Nov. 29, 2021) (sustaining seven charges against Amazon, all of which fall in the first category of violations and not unfair labor practices).

[98] *See generally id.*

[99] *See* Selyukh, *supra* note 1.

second election,[100] and none of the supervisors responsible for those actions could be held individually liable.[101] While such fines would be inconvenient for the internet commerce giant, they pale in comparison to the additional costs it would face as a result of the earlier implementation of collective bargaining at the Bessemer facility.[102] From the company's perspective, violating the NLRA to scare employees out of unionizing is still the most logical business decision. Since the corporation bears the costs of such misconduct, the individuals making and carrying out the decisions are shielded from the repercussions of their bad behavior and will continue to act in the corporation's best interests, which continues to be to violate the law.

Changes are needed in the PRO Act to truly shift the incentives for large corporations away from violating the law and towards following it. Currently, while the proposed financial sanctions can dissuade employers from violating the rights of small bargaining units, they lack the ability to meaningfully shift the cost-benefit analysis of employers where large units are involved. Absent further changes, there is little reason to believe that large employers like Amazon will desist from their current practices of regularly violation the NLRA, and the Board will be unable to properly "protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing."[103]

IV. RECOMMENDATION

For the NLRB to fulfill its mission of furthering the United States' policy of encouraging the practice and procedure of collective bargaining, it needs tools far beyond the scope of what are currently available to it. Fundamentally, it must possess the ability to shift the cost-benefit analysis companies face such that adhering to the law is less costly than breaking it. The PRO Act is a good start but does not go far enough, particularly where large employers are concerned. To fully empower the NLRB, Congress should alter the financial penalties within the PRO Act to scale proportionally with the number of employees affected and extend individual liability to violations of the laboratory conditions.

The first solution to this problem is simple: scale the penalty for violating laboratory conditions with the number of employees affected by the violation. If the fine were a maximum of $10,000 per employee rather than per violation it would

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[100] *See generally Amazon.com Services LLC*, 2021 N.L.R.B. Reg. Dir. Dec. LEXIS 182; *See also* Protecting the Right to Organize Act of 2021, H.R. 842 § 109, 117th Cong. (as passed by House of Representatives, Mar. 9, 2021). Each of the seven violations by Amazon would result in a $10,000 fine, totaling $70,000.

[101] *See* H.R. 842 § 109. The individual liability proposed in the PRO Act only extends to unfair labor practices, of which none of Amazon's violations constitute.

[102] *See* Walters & Mitchell, *supra* note 84.

[103] 29 U.S.C. § 151.

serve to Similarly, the FLSA treats each individual employee as a separate violation for its child labor provisions.[104] Treating each employee affected deter not just small employers, but large ones too. The PRO Act already takes a similar approach for violations which continue after a cease and desist order by the board, treating each day as a new violation which incurs and additional fine.[105] Treating each employee affected as an additional violation would give the board the ability to adequately shift the cost-benefit analysis undertaken by employers opposing large bargaining units which could potentially increase costs by orders of magnitudes more than the current proposed financial penalties.[106]

The second solution brings changes to the cost-benefit calculation for individuals acting on behalf of these employers by imposing individual liability for violations which stain the laboratory conditions required for a fair election. The PRO Act already establishes this for unfair labor practices through the private right of action.[107] However, as discussed above employers can violate the laboratory conditions required for a fair election without engaging in unfair labor practices.[108] The logic behind making individuals liable for unfair labor practices they engage in on behalf of their employers is simple: make it in their best self-interest to adhere to the law even if it is not in their employer's best interest. The same logic should apply to violations of the laboratory conditions for union elections. These individual sanctions need not scale in the same fashion as they do for the corporation overall – even a relatively modest penalty can be enough to shift the finances, and thinking, of individual supervisors. A corporation cannot violate their employee's rights under the NLRA law without individuals doing so on its behalf. Holding those individuals liable helps dissuade them violating the law, even if it might benefit their employer.

These two changes – scaling the punitive damages along with the number of employees affected and allowing for individual liability when the laboratory conditions are violated – would alter incentives for both large corporations and the individuals acting on their behalf in dealings with unionization efforts by their employees. For the corporation, the potential costs of their illegal anti-union activities would appropriately scale with the costs of not doing so. For those individuals acting on behalf of the corporation, individual liability creates a personal incentive to adhere to the law as a counterbalance to pressure from their employer to violate it. Both are necessary to truly shift the cost-benefit calculation for employers and individuals away from subverting employee rights under the NLRA towards acknowledging and respecting the right to unionize.

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[104] *See* 29 U.S.C. § 216(e)(1)(A).

[105] *See* H.R. 842 § 106.

[106] For example, if the fine were up to $10,000 per employee, Amazon could be potentially liable for up to $60,000,000 for its actions in Bessemer, which may prove enough to outweigh the potential increases in expenditure from unionization discussed *supra* note 85.

[107] *See* H.R. 842 § 109.

[108] *See supra* Part II.

V. CONCLUSION

Time has shown that the National Labor Relations Board desperately lacks the power it needs to properly enforce the National Labor Relations Act and advance the United States' policy of promoting the practice and procedure of collective bargaining. The proposed Protecting the Right to Organize Act contains many important provisions, but the penalties contained within still fail to adequately empower the NLRB to disincentive employers from continuing to illegally meddle in union certification elections. Congress should adjust these penalties to scale with the number of number of employees affected by violations and extend individual liability to corporate officers who direct such actions and pass these changes, along with the remainder of the PRO Act, to enable the Board to fulfill its duty to enforce and uphold the NLRA.