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**AN “UNMANAGEABLE” TASK:  
BREACH OF WARRANTY CLAIMS IN MULTI-STATE CLASS ACTION LITIGATION**

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❖ Article ❖

*William G. Beatty\**

I. INTRODUCTION

The crossroads of warranty law and class action litigation pose substantial hurdles for claimants asserting a multi-state class action for breach of express or implied warranty. Not only do they have to satisfy the rigorous Federal Rules of Civil Procedure Rule 23(a)<sup>1</sup> requirements of numerosity, commonality, typicality and adequacy of representation,<sup>2</sup> but also have to fit the cases into one of the three categories outlined in Rule 23(b). Plaintiffs must also deal with widely varying state rules regarding such issues as reliance, pre-suit notice and privity of contract which might destroy the required elements of commonality or typicality.<sup>3</sup> These variables have resulted in several courts deeming multi-state warranty class actions to be “unmanageable,” rendering them unsuitable for class-wide resolution.<sup>4</sup>

This paper will examine some of the state-to-state variables that result in many multi-state class actions for breach of warranty being deemed “unmanageable” for the district courts in which such actions are brought. The paper begins with a review of the requirements of Rules 23(a) and (b) for class certification to more fully understand the circumstances under which class action treatment of a controversy have been considered “unmanageable.”

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\* William G. Beatty recently retired from a major Chicago litigation firm where he practiced for 45 years, predominantly in the fields of product liability defense, employment law litigation at the trial and administrative levels, and ERISA law.

<sup>1</sup> Hereinafter Rule 23.

<sup>2</sup> See Fed. R. Civ. P. 23(a) and (b).

<sup>3</sup> See *Forsher v. J.M. Smucker Co.*, 612 F. Supp. 3d 714, 727 (N.D. Ohio 2020).

<sup>4</sup> See, e.g., *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002); *In re Caterpillar, Inc.*, 2015 U.S. Dist. LEXIS 98784, 2015 WL 4591236 at \*25 (D.N.J. July 29, 2015); *Pilgrim v. Universal Health Card, LLC*, 2010 U.S. Dist. LEXIS 28298, 2010 WL 1254849 at \*4 (N.D. Ohio Mar. 25 2010); *Forsher*, 612 F. Supp. 3d at 726–27.

Following a review of the requirements imposed by Rules 23(a) and (b), this paper will discuss a number of cases that have examined some of the obstacles to class-wide treatment of multi-state breach of warranty claims arising from variances in state law, as well as some of the ways that courts have handled such issues. These include reconfiguring or decertifying proposed classes in order to minimize the difficulties arising from differing state laws on such issues as pre-suit notice under the Uniform Commercial Code,<sup>5</sup> or varying rules relating to reliance or privity of contract between the parties.

## II. BACKGROUND

### *A. Federal Class Action Prerequisites*

Addressing class certification standards, the Supreme Court of the United States has said that a district court must undertake a “rigorous analysis” to satisfy itself that the prerequisites of Rule 23 are met.<sup>6</sup> As the Court has enumerated:

- “Because class action litigation remains ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only,’ the requirements of Rule 23 are heavily scrutinized and strictly enforced.”<sup>7</sup>
- “The Court’s decision to certify a class action under Fed. R. Civ. P. ‘is not free-form, but rather has been carefully scripted by the Federal Rules of Civil Procedure.’”<sup>8</sup>
- “[A]ctual, not presumed, conformance with [Rule 23] remains . . . indispensable.”<sup>9</sup>

#### 1. Rule 23(a) Prerequisites

Under Rule 23(a) the following four factors are listed as necessary prerequisites for class action treatment: (1) numerosity;<sup>10</sup> (2) commonality;<sup>11</sup> (3) typicality;<sup>12</sup> and (4)

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<sup>5</sup> *See, e.g.,* Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 541 (6th Cir. 2012).

<sup>6</sup> Comcast Corp. v. Behrend, 569 U.S. 27 (2013).

<sup>7</sup> CGC Holding Company, L.L.C. v. Broad and Cassel, 773 F.3d 1076, 1086 (10th Cir. 2014).

<sup>8</sup> *McGlenn v. Driveline Retail Merchandising, Inc.*, No. 18-CV-2097, 2021 WL 165121 (C.D. Ill. Jan. 19, 2021).

<sup>9</sup> *Id.* at 1086 (quoting Gen. Tel. Co. v. Falcon, 457 U.S. 147, 160 (1982)).

<sup>10</sup> Numerosity means that “the class is so numerous that joinder of all members is impracticable[.]” Fed. R. Civ. P. 23(a)(1).

<sup>11</sup> Commonality means that “there are questions of law or fact common to the class[.]” Fed. R. Civ. P. 23(a)(2).

<sup>12</sup> Typicality means that “the claims or defenses of representative parties are typical of the claims or defenses of the class[.]” Fed. R. Civ. P. 23(a)(3).

adequacy of representation.<sup>13</sup> Regarding numerosity, “[t]here is no strict numerical test for determining impracticability of joinder.”<sup>14</sup> Rather, the numerosity requirement will be met “so long as general knowledge and common sense indicate that joinder would be impracticable.”<sup>15</sup> “Where the number of class members exceeds forty, Rule 23(a)(1) is generally deemed satisfied.”<sup>16</sup>

As to commonality, “the claims of the class “must depend on a common contention . . . of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”<sup>17</sup> “Plaintiff ‘must show that there is a common question that will yield a common answer for the class . . . and that the common answer relates to the actual theory of liability in the case.’”<sup>18</sup> Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, “there is a common question.”<sup>19</sup>

“Typicality looks to ‘whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct.’”<sup>20</sup> Thus, “a claim is typical if ‘it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.’”<sup>21</sup> The premise of the typicality requirement is simply stated: “as goes the claim of the named plaintiff, so go the claims of the class.”<sup>22</sup> The Supreme Court of the United States has recognized that “[t]he commonality and typicality requirements of Rule 23(a) tend to merge”<sup>23</sup> and therefore have common element of proof.

With respect to adequacy of representation, “the named plaintiff must be prepared to ‘fairly and adequately protect’ the class’s interests.”<sup>24</sup> This requirement is essential

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<sup>13</sup> Adequacy of representation means that the represented parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4).

<sup>14</sup> *In re Amer. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1995).

<sup>15</sup> *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 541 (6th Cir. 2012).

<sup>16</sup> *Ham v. Swift Transp. Co., Inc.*, 275 F.R.D. 475, 483 (W.D. Tenn. 2011); *see also* *Daffin v. Ford Motor Co.*, 458 F.3d 549, 552 (6th Cir. 2006) (noting “substantial numbers usually satisfy the numerosity requirement”).

<sup>17</sup> *Savidge v. Pharm-Save, Inc.*, 727 F. Supp. 3d 661, 697 (W.D. Ky. 2024) (quoting *Young*, 693 F.3d at 542).

<sup>18</sup> *Id.* (quoting *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 505 (6th Cir. 2015)).

<sup>19</sup> *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756 (7th Cir. 2014).

<sup>20</sup> *Id.* at 699 (quoting *Sprague v. General Motors Corp.*, 133 F. 3d 388, 399 (6th Cir. 1998)).

<sup>21</sup> *Beattie v. CenturyTel, Inc.*, 511 F. 3d 554, 561 (6th Cir. 2007) (quoting *In re Amer. Med. Sys., Inc.*, 75 F.3d 1069, 1082 (6th Cir. 1995)). *See also* *Retired Chicago Police Ass’n v. City of Chicago*, 7 F.3d 584, 597 (7th Cir. 1993).

<sup>22</sup> *Beattie*, 511 F. 3d at 561 (quoting *Senter v. General Motors Corp.*, 532 F.2d 511, 525 n.31 (6th Cir. 1976)).

<sup>23</sup> *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 n.5 (2011).

<sup>24</sup> *In re Ford Motor Co.*, 86 F.4th 723, 727 (6th Cir. 2023) (quoting Fed. R. Civ. P. 23(a)(4)).

to due process “because a final judgment in a class action is binding on all members.”<sup>25</sup> The adequacy of representation inquiry “consists of two parts: (1) the adequacy of the named plaintiffs as representatives of the proposed class’s myriad of members, with their differing and separate interests, and (2) the adequacy of the proposed class counsel.”<sup>26</sup> A class is not fairly and adequately represented if class members “have antagonistic or conflicting claims.”<sup>27</sup>

## 2. Rule 23(b) Prerequisites

In addition to the requirements of Rule 23(a), the proposed class action must fit within one of the three categories of Rule 23(b). “Even where all four requirement of [Rule] 23(a) are met, class certification is not appropriate unless one of the three categories of Rule 23(b) also applies.”<sup>28</sup> The first alternative, Rule 23(b)(1)(A)-(B), is intended to avoid inconsistent or varying results from individual adjudications that may create the risk of incompatible standards of conduct for the opposing party, or substantially impair or impede the interests of non-parties. The second alternative, Rule 23(b)(2), is directed to the possibility of injunctive or corresponding declaratory relief in cases in which such a remedy would be appropriate in addressing the grievances of the class in its entirety.

The third alternative, and the one featured most prominently in the cases cited herein, Rule 23(b)(3), imposes the additional requirements for proposed class actions: (1) predominance;<sup>29</sup> and (2) superiority,<sup>30</sup> as determined, in part, by factors listed in Rule 23(b)(3)(A)-(D). One such factor, as discussed in the cases cited herein, is manageability. Rule 23(b)(3) permits class certification only if the questions of law or fact common to the class members “predominate” over questions that are individual to the class. “There is no mathematical or mechanical test for evaluating

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<sup>25</sup> *Cnty. Refugee & Immigr. Servs. V. Registrar, Ohio Bureau of Motor Vehicles*, 334 F.R.D. 493, 505 (S.D. Ohio 2020). *See also In re Amer. Med. Sys.*, 75 F.3d at 1083.

<sup>26</sup> *Gomez v. St. Vincent Health, Inc.*, 649 F.3d 583, 592 (7th Cir. 2011).

<sup>27</sup> *Riffey v. Rauner*, 873 F.3d 558, 563–64 (7th Cir. 2017).

<sup>28</sup> *Savidge, v. Pharm-Save, Inc.*, 727 F. Supp. 3d 661, 702 (W.D. Ky. 2024) (citing *Senter*, 532 F.2d at 533); *Lyngaas v. Ag*, 992 F.3d 412, 428 (6th Cir. 2021).

<sup>29</sup> Predominance means that common questions of law or fact predominate over any questions affecting any individual members of the class “when the substance and quality of evidence necessary to prove the class claims won’t vary significantly from one plaintiff to another.” *Tershakovic v. Ford Motor Co.*, 79 F.4th 1299, 1306 (11th Cir. 2023). *See also Brown v. Electrolux Home Prods.*, 817 F.3d 1225, 1234 (11th Cir. 2006); *Cole v. General Motors Corp.*, 484 F.3d 717, 724 (5th Cir. 2007) (quoting *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996) (“In multi-state actions, variations in state law may swamp any common issues and defeat predominance.”)).

<sup>30</sup> Superiority means that a class action must be “superior to other available methods for fully and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(3). The superiority requirement also includes “the likely difficulty in managing a class action.” *See Tershakovic*, 79 F.4th at 1316, in which the defendant objected to class certification because the result would be “unmanageable.”

predominance.”<sup>31</sup> “Individual questions need not be absent. The text of Rule 23(b)(3) itself contemplates that such individual questions will be present. The rule requires only that those questions not predominate over the common questions affecting the class as a whole.”<sup>32</sup>

The test for predominance under Rule 23(b)(3), however, has been described as rigorous. While similar to Rule 23(a)’s requirements for typicality and commonality, the Supreme Court has said that “the predominance criterion is far more demanding.”<sup>33</sup> Still, Rule 23(b)(3)’s predominance requirement is satisfied when “common questions represent a significant aspect of [a] case and . . . can be resolved for all members of [a] class in a single adjudication.”<sup>34</sup> “Or to put it another way, common questions can predominate if a ‘common nucleus of operative facts and issues’ underlies the claims brought by the proposed class.”<sup>35</sup>

The second prong of the Rule 23(b)(3) test requires a showing that “a class action is superior to other available methods for the fairly and efficiently adjudicating the controversy.”<sup>36</sup> In applying this test, courts have said that “our focus is not on the convenience or burden of a class action *per se*, but on the relative advantages of a class action suit over whatever other forms of litigation might be realistically available to the plaintiffs.”<sup>37</sup>

Comparing two prongs of the Rule 23(b)(3) test, one court has said; “In many respects, the predominance analysis . . . has a tremendous impact on the superiority analysis . . . for the simple reason that the more [that] common issues predominate over individual issues, the more desirable a class action lawsuit will be as a vehicle for adjudicating the plaintiffs’ claims.”<sup>38</sup> Additional rules exist regarding the timing of certification of the class(es),<sup>39</sup> defining the class(es),<sup>40</sup> appointment of class counsel,<sup>41</sup> forms of notice for the various types of classes,<sup>42</sup> and the creation of subclasses where appropriate.<sup>43</sup>

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<sup>31</sup> *Messner v. Northshore Univ. Health Sys.*, 669 F.3d 802, 814 (7th Cir. 2012), (citing 7AA Wright & Miller, *Federal Practice & Procedure*, § 1778 (3d ed. 2011)).

<sup>32</sup> *Id.* at 815.

<sup>33</sup> *Id.* at 814 (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997)).

<sup>34</sup> Wright & Miller, *supra* note 31 § 1778.

<sup>35</sup> *Messner*, 669 F.3d at 815 (quoting *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 299 (1st Cir. 2000)).

<sup>36</sup> Fed. R. Civ. P. 23(b)(3).

<sup>37</sup> *Klay v. Humana, Inc.*, 382 F.3d 1241, 1269 (11th Cir. 2004) (citing *In re Managed Care Litig.*, 209 F.R.D. 678, 692 (S.D. Fla. 2002) (noting that the superiority factor “requires the Court to determine whether there is a better method of handling the controversy other than through the class action mechanism”)).

<sup>38</sup> *Klay*, 382 F.3d at 1269.

<sup>39</sup> Fed. R. Civ. P. 23(c)(1)(A).

<sup>40</sup> Fed. R. Civ. P. 23(c)(1)(B).

<sup>41</sup> *Id.*

<sup>42</sup> Fed. R. Civ. P. 23(c)(2)(A) and (B).

<sup>43</sup> Fed. R. Civ. P. 23(c)(5).

Within this array of rules, the often-overriding question of “manageability” is frequently discussed in conjunction with commonality (i.e. whether there are questions of law or fact common to the class); or with predominance (i.e. whether such common questions of law or fact predominate individual claims or defenses); or with superiority (i.e. whether class treatment poses advantages over individual claims, litigated separately). This paper suggests that manageability, although referenced last among the Rule 12 factors for determining the appropriateness of a class action, pervades all other factors and should be regarded as a threshold matter when determining the appropriateness of class-wide treatment in multi-state breach of warranty claims. This is especially so when state law variables such as pre-suit notice to the defendant, privity of contract (especially vis a vis consumer plaintiffs and remote manufacturer defendants) and reliance in express warranty claims, dominate any commonality in law or fact that may otherwise exist.

*B. Manageability Issues in Multi-State Breach of Warranty Actions*

A starting point for a discussion about the unmanageability of multi-state breach of warranty cases may be gleaned from the opinion of the Supreme Court of the United States in *BMW of North America v. Gore*,<sup>44</sup> a case involving a challenge to a punitive damages award in which the Court made it clear that consumer protection laws vary widely from state to state, and that courts must respect those differences rather than apply one state’s law to transactions in other states with different rules.<sup>45</sup>

A frequently cited case on the practical aspects of class action warranty litigation is the Seventh Circuit decision in the *Bridgestone/Firestone* case,<sup>46</sup> which vividly illustrates the unmanageable nature of the one-size-fits-all approach to multi-state class actions. *Bridgestone* involved the abnormally high rate of failure of Firestone tires on Ford Explorer SUVs during the late 1990’s. Some of the resulting lawsuits sought recovery for physical injuries or deaths from vehicle rollovers related to tire failures, while the bulk of the claimants whose tires had thus far performed properly, sought compensation “for the *risk* of failure [as] reflected in diminished resale value of the vehicles . . . .”<sup>47</sup> The district court, obliging the request of counsel for many of the plaintiffs in a consolidated suit, certified two nationwide classes, the first of which consisted of all persons who owned or leased a Ford Explorer (model years 1991 through 2001) (the “vehicle class”), and the second consisting of owners or lessees of certain tires used on the subject vehicles as well as others (the “tire class”). All in all, “[m]ore than 60 million tires and 3 million vehicles fit these definitions.”<sup>48</sup>

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<sup>44</sup> 517 U.S. 559 (1996).

<sup>45</sup> *Id.* at 568–73; *See also* *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002).

<sup>46</sup> *In re Bridgestone/Firestone*, 288 F.3d at 1012.

<sup>47</sup> *Id.* at 1015.

<sup>48</sup> *Id.*

The court examined the “unmanageability” issue in the context of the commonality and superiority requirements of Rule 23.<sup>49</sup> In so doing, the Seventh Circuit described the district court’s conclusion that one state’s laws should apply to claims by consumers throughout the country and beyond as a “novelty,” considering that the principle of *lex loci delicti* was applicable under the appropriate choice of law rules for the venue of the action, and that the economic injuries for which recovery was sought “occurred in all 50 states, the District of Columbia, Puerto Rico and U.S. territories such as Guam.”<sup>50</sup> Since the question of recovery for breach of warranty is determined by the law of the state where the consumer is located, and not the location of the corporate headquarters of the sellers of either vehicles or the tires involved, the Seventh Circuit determined that “a single nationwide class [for either the vehicle class or the tire class] is not manageable.”<sup>51</sup>

So many variables existed as to the use of the tires and the vehicles involved that “it would not be possible to make a once-and-for-all decision about whether [the products] were defective, even if the law[s] were uniform.”<sup>52</sup> The court concluded by saying that “[d]ifferences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court.”<sup>53</sup> The district court’s order certifying the two nationwide classes was thereby reversed.

A year earlier, the same circuit judge who wrote the decision in the *Bridgestone/Firestone* case authored the opinion in *Szabo v. Bridgeport Machines, Inc.*,<sup>54</sup> a case combining breach of warranty allegations with claims of fraud and negligent misrepresentation involving control units used to direct machine tools in performing complex metal milling tasks. The plaintiffs claimed that all the control units manufactured in the past five years were defective and sought certification of a nationwide class containing hundreds of customers seeking damages of more than \$100,000 each. While the warranty claims were governed by the law of the control manufacturer’s home state (per contract), the tort claims were not, depending instead on “who made the representations, where, and on whose behalf.”<sup>55</sup>

Noting that “the applicable law likely would be supplied by the state in which the statements were made,”<sup>56</sup> the court said that “[d]ifferences of this kind cut strongly against nationwide classes” and that “[t]hese and other potential sources of variation account for the fact that few warranty cases have ever been certified as class actions – let alone as nationwide classes, with the additional choice-of-law problems that

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<sup>49</sup> Fed. R. Civ. P. 23(a),(b)(3).

<sup>50</sup> *In re Bridgestone/Firestone*, 288 F.3d at 1016.

<sup>51</sup> *Id.* at 1018.

<sup>52</sup> *Id.* at 1019.

<sup>53</sup> *Id.* at 1020.

<sup>54</sup> 249 F.3d 672 (7th Cir. 2001).

<sup>55</sup> *Id.* at 673.

<sup>56</sup> *Id.*

complicate such a venture.”<sup>57</sup> Holding that factual determinations regarding the alleged misrepresentations were necessary before deciding whether to allow the case to proceed as a class action, and that “[n]agging issues of choice of law, commonality and manageability beset this case,”<sup>58</sup> the Seventh Circuit vacated the class certification granted by the district court and remanded the case for further proceedings consistent with its opinion.<sup>59</sup>

Four years after *Bridgestone/Firestone* a court in the Northern District of Illinois decided the case of *Muehlbauer v. General Motors Corp.*,<sup>60</sup> in which the defendant was accused of having breached the implied warranty of merchantability as well as having been unjustly enriched by the sale of defective braking components in vehicles purchased or leased by the plaintiffs. The defendant moved to strike the class allegations of the plaintiffs’ initial complaint on the grounds that the number of states (forty-six) whose laws were implicated made the maintenance of the number of sub-classes proposed by plaintiffs unmanageable. Quoting the *Bridgestone/Firestone* decision extensively, the district court granted the defendant’s motion for a determination that the class(es) proposed could not be maintained, but denied the defendant’s motion to dismiss the case, choosing instead to allow the plaintiffs to amend their classification of claimants in such a way as to group the plaintiffs in a more narrow number of categories, or sub-classes, having common legal theories and the same elements of proof, thereby avoiding the need for a “product-by-product analysis”<sup>61</sup> that plagued the proposed class in *Bridgestone/Firestone*.

In the case of *In re American Medical Systems, Inc.*,<sup>62</sup> the district court certified a rather ill-defined nationwide class (plaintiffs’ estimates were between 15,000 and 120,000 persons)<sup>63</sup> who had used a certain medical device manufactured by the defendant. In reviewing the requirements of Rule 23 relative to the facts of the case, as well as the decision of the district court to certify the proposed nationwide class, the federal appellate court was very critical of the district court for its analysis leading to class certification. In fact, the Sixth Circuit said that “the district judge’s disregard of the class action procedures was of such severity and frequency”<sup>64</sup> as to warrant mandamus being issued, directing the district judge to decertify plaintiffs’ class.<sup>65</sup> Noting that “a number of other courts have denied class certification in drug or medical product liability actions”<sup>66</sup> for lack of the commonality and superiority requirements, the Sixth Circuit, regarding the manageability aspect, added that “[i]f more than a few of the

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<sup>57</sup> *Szabo*, 249 F.3d at 674.

<sup>58</sup> *Id.* at 677.

<sup>59</sup> *Id.* at 678.

<sup>60</sup> 431 F. Supp. 2d 847 (N.D. Ill. 2006).

<sup>61</sup> *Id.* at 871.

<sup>62</sup> 75 F.3d 1069 (6th Cir. 1995).

<sup>63</sup> *Id.* at 1076.

<sup>64</sup> *Id.* at 1074.

<sup>65</sup> *Id.* at 1090.

<sup>66</sup> *In re American Medical Systems, Inc.*, 75 F.3d at 1085.

laws of the fifty states differ, the district judge would face an impossible task of instructing the jury on the relevant law . . . .”<sup>67</sup>

A manageability challenge to a proposed multi-state class action involving alleged breach of implied warranty was rejected by the district court in *Lessin v. Ford Motor Co.*,<sup>68</sup> which involved claims of latent effects in the suspensions and steering linkage systems in certain models of Ford trucks. In response to plaintiffs’ motion seeking class certification of ten sub-classes under the laws of eight states, Ford argued that “due to the material differences in state law . . . and the numerous claims at issue, this case would be unmanageable for class certification.”<sup>69</sup> The district court responded to this objection by stating that “the differences in laws can be handled at trial through different jury instructions based on each of the separate subclasses, and multiple courts have certified similar classes.”<sup>70</sup> (citing cases that had certified thirty-two, twenty-seven and twenty-four classes, respectively, that found the superiority requirement to be satisfied).

Variations in proximate causation have caused federal reviewing courts to either refuse certification or to vacate certifications granted by district courts. In *Marcus v. BMW of N. Am., LLC*,<sup>71</sup> a case involving alleged defects in run-flat tires with which the subject vehicles were equipped, plaintiffs asserted claims of breach of implied warranty, breach of express warranty and breach of warranty under the Magnuson-Moss Act. In addressing the issue of proximate cause in the context of a multi-state product liability claim, the court cited the fact that “[o]ther federal courts have also recognized that suits alleging defects ‘involving motor vehicle often involve complicated issues of individual causation that predominate over common questions regarding the existence of a defect.’”<sup>72</sup>

Some courts have treated breach of express warranty claims differently from those alleging breach of implied warranty due to the need to show reliance in the former type of claims, an element which may require individual, rather than class-wide consideration.<sup>73</sup> In *Hampton v. Gen. Motors*,<sup>74</sup> the element of reliance was discussed in the context of a breach of express warranty claim which the defendant said was incompatible with class-wide treatment due to the different degrees of reliance on the part of individual class members. Defendant argued that “the required element of reliance . . . can only be established through individual proof and therefore defeats predominance.”<sup>75</sup> Indeed, the Tenth Circuit has recognized that “reliance is often a

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<sup>67</sup> *Id.*

<sup>68</sup> 19-cv-01082 (S.D. Cal. Nov. 7, 2024).

<sup>69</sup> *Id.* at \*83.

<sup>70</sup> *Id.* at \*84.

<sup>71</sup> 687 F.3d 583 (3d Cir. 2011).

<sup>72</sup> *Id.* at 604 (quoting *Oscar v. BMW of N. Am, LLC*, 274 F.R.D. 498, 511 (S.D.N.Y. 2011)); *See also* *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 455 (D.N.J. 1998).

<sup>73</sup> *See* *Roberts v. C.R. England, Inc.*, 318 F.R.D. 457, 513 (D. Utah 2017).

<sup>74</sup> 21-CV-250 (E.D. Okla. May 13, 2024).

<sup>75</sup> *Id.* at \*23.

highly idiosyncratic issue that might require unique evidence from individual plaintiffs” and “presents an impediment to the economies of time and scale that encourage class actions as an alternative to traditional litigation.”<sup>76</sup> In *Hampton*, however, the district court held that:

Sometimes issues of reliance can be disposed of on a classwide basis without individualized attention at trial. For example, where circumstantial evidence of reliance can be found through generalized, classwide proof, then common questions will predominate and class treatment is valuable in order to take advantage of the efficiencies essential to class actions.<sup>77</sup>

*Pilgrim v. Universal Health Card, LLC*,<sup>78</sup> involved a healthcare discount program intended to provide members with access to a network of healthcare providers that had allegedly agreed to lower their prices for members. The problem was that many of the healthcare providers had never heard of the program. Based upon this and other misrepresentations, two “disenchanted consumers” sued in federal court, seeking to represent a nationwide class of all the people who had joined the program. The two defendants moved separately to strike the class allegations and to dismiss the complaint, both of which motions were granted by the district court, which reasoned that under the forum state’s choice-of-law rules it would have to analyze each class member’s claim under the law of his or her home state. “Such a task,” the district court concluded, “would make this case unmanageable as a class action[.]”<sup>79</sup> and the Sixth Circuit agreed, citing *In re Am. Med. Sys., Inc.*,<sup>80</sup> also from the Sixth Circuit, which said that “[i]f more than a few of the laws of the fifty states differ, the district judge would face an impossible task in instructing a jury on the relevant law.”<sup>81</sup> The Sixth Circuit also cited *In re Bridgestone/Firestone, Inc.*<sup>82</sup> from the Seventh Circuit, which held that “[b]ecause these [consumer fraud claims involving allegedly defective tires] must be adjudicated under the law of so many jurisdictions, a single nationwide claim is not manageable.”<sup>83</sup>

Most recently, a district court in New York discussed the manageability of potentially divergent state laws in the context of a nationwide class action alleging

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<sup>76</sup> *Huddleston v. John Christner Trucking, LLC*, 2020 WL 489181 at \*17 (N.D. Okla. Jan. 30, 2020), *amended on reconsideration in part*, 2020 WL 6375163 (N.D. Okla. Oct. 26, 2020) (quoting *CGC Holding Co., LLC v. Broad and Cassel*, 773 F.3d 1076, 1089 (10th Cir. 2014)).

<sup>77</sup> 21-CV-250 at \*23.

<sup>78</sup> 660 F.3d 943 (6th Cir. 2011).

<sup>79</sup> *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 945 (6th Cir. 2011) (quoting the district court).

<sup>80</sup> 75 F.3d 1069 (6th Cir. 1996).

<sup>81</sup> *Id.* at 1085.

<sup>82</sup> 288 F.3d 1012 (7th Cir. 2002).

<sup>83</sup> *Id.* at 1018.

breach of an express warranty. In *Goetz v. Ainsworth Pet Nutrition, LLC*,<sup>84</sup> plaintiffs complained of defendants' allegedly false claim that their pet food products were "natural," when in fact the U.S.F.D.A. had identified a number of synthetic ingredients in the defendants' products. The defendants moved to strike the plaintiffs' class allegations in advance of any motion on the part of the plaintiffs to certify the class, thereby taking on the higher burden of having to prove "from the face of the complaint that it would be impossible to certify the alleged class regardless of the facts that the plaintiffs may be able to obtain during discovery."<sup>85</sup> "But prior to discovery," the district court said, "it is impossible for the Court to determine how many states' laws are implicated in this action, how many of those laws vary, and how many variations are material."<sup>86</sup>

Even given state law variations on the issues of notice, reliance, and privity (which will be discussed in detail in the section that follows), the court said that it was not clear that "the standards of liability in [the] relevant states are sufficiently different that they would raise insurmountable case management issues,"<sup>87</sup> adding that "courts in this Circuit have cautioned that 'the specter of having to apply different substantive law does not warrant refusing to certify a class on common-law claims.'"<sup>88</sup> "Even where state laws differ," the district court said, "concerns are lessened where the states' laws do not vary materially."<sup>89</sup> The district court thereupon denied the defendants' motion to strike the plaintiffs' class allegations.

Despite this willingness to downplay the impact of variations in state law, there remains throughout the cases' discussions of such factors as statutes of limitations, pre-suit notice of a breach of warranty, privity of contract and reliance (as discussed below) that militate against a nationwide (or multi-state) class actions for breach of warranty claims.

An interesting means of dealing with the above-referenced objections to multi-state class actions for breach of warranty was demonstrated by the district court in the case of *Bietsch v. Sergeant's Pet Care Prods., Inc.*,<sup>90</sup> a multi-state class action involving dog food which was described on the package labelling as "nutritious," but which sickened the named plaintiff's dog and killed others. In a motion to dismiss filed by the defendant, along with a motion to strike the class allegations of plaintiffs' complaint, the defendant raised several of the issues that cause manageability problems in multi-state class action litigation, i.e. failure of the plaintiffs to adequately plead reliance on the express warranty, lack of privity of contract between plaintiffs and defendant, and lack of pre-suit notice as required by the Uniform Commercial Code.

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<sup>84</sup> 24-CV-04799 (S.D.N.Y. Mar. 3, 2025).

<sup>85</sup> *Id.* at \*20 (quoting *Reynolds v. Lifewatch, Inc.*, 136 F. Supp. 3d 503, 511 (S.D.N.Y. 2015)).

<sup>86</sup> *Id.* (quoting *Greene v. Gerber Products Co.*, 262 F. Supp. 3d 38, 80 (E.D.N.Y. 2017)).

<sup>87</sup> *Id.* (quoting *Greene*, 262 F. Supp. 3d at 80).

<sup>88</sup> 24-CV-04799 at \*21 (quoting *Reynolds*, 136 F. Supp. 3d at 518).

<sup>89</sup> *Id.* (quoting *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 127 (2d Cir. 2013)).

<sup>90</sup> No. 15 C 5432 (N.D. Ill. Mar. 15, 2016).

The named plaintiff in the *Bietsch* case was a citizen of Illinois who purchased the defendant’s dog food at a pet store. According to the applicable choice of law rules, the law of the plaintiffs’ home state governed the action.<sup>91</sup> Regarding the alleged failure of the plaintiffs to adequately plead reliance on the express warranty set forth on the defendant’s packaging, the court said that “[a]lthough some states require a plaintiff to ‘show reliance on a statement or representation for it to be considered part of the basis of the bargain[.]’”<sup>92</sup> “in Illinois the seller’s representation creates a rebuttable presumption of reliance on the buyer,”<sup>93</sup> thereby excusing the need to plead reliance.

As to the absence of privity between plaintiffs and defendant (because plaintiffs purchased the dog food from intermediate sellers), the court, after stating the general rule that privity is required between the parties in order to maintain claims for breach of express or implied warranties,<sup>94</sup> cited the following exceptions to the privity requirement under the applicable choice of law rules. Regarding the express warranty claim, Illinois law creates an express warranty from representations or promises made directly to the consumer by the remote manufacturer on its product packaging thereby eliminating the need for direct privity. Regarding the implied warranty, another exception to the privity requirement exists under Illinois law for “articles of food sold in sealed containers.”<sup>95</sup>

Finally, regarding the absence of pre-suit notice from the buyer to the seller as required by the Uniform Commercial Code,<sup>96</sup> the named plaintiff admitted that the complaint did not contain an allegation of pre-suit notice to the defendant, but argued that there had been a telephone call to the defendant’s customer service department regarding the dog’s injury prior to suit being filed, and that this was demonstrated in a separate declaration or affidavit provided to the court in response to the defendant’s motion to dismiss, which the court accepted as evidencing notice, since its averments were deemed “consistent with those in the complaint.”<sup>97</sup>

The defendant’s contentions having been addressed by a denial of its motion to dismiss, the court next turned its attention to the defendant’s motion to strike the class allegations from the plaintiffs’ complaint. The defendant cited the Seventh Circuit’s decisions in the *Bridgestone/Firestone*<sup>98</sup> and *Szabo v. Bridgeport Machines*<sup>99</sup> cases, the latter

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<sup>91</sup> *In re Rust-Oleum Prod. Liab. Litig.*, 155 F. Supp. 3d 772,786 (N.D. Ill. 2016).

<sup>92</sup> *Bietsch*, No. 15 C 5432 at \*10 (quoting *In re Rust-Oleum*, 155 F. Supp. 3d at 808).

<sup>93</sup> *Id.* (citing *Felley v. Singleton*, 302 Ill. App. 3d 248, 708 N.E. 2d 930 (2d Dist. 1999)).

<sup>94</sup> See *Voelker v. Porsche Cars of N. Amer., Inc.*, 353 F. 3d 516, 525 (7<sup>th</sup> Cir. 2013); *Mednick v. Precor, Inc.*, No. 14 C 3624, 2014 WL 6474915 at \*5 (N.D. Ill. Nov.14, 2014).

<sup>95</sup> *Bietsch*, No. 15 C 5432 at \*\*12–13 (citing *Adkins v. Nestle Purina Pet Care Co.*, 973 F. Supp. 2d 905 (N.D. Ill. 2013).

<sup>96</sup> U.C.C. § 2-607(3)(a) (2002).

<sup>97</sup> *Bietsch*, No. 15 C 5432 at \*18 (citing *Help at Home, Inc. v. Med. Capital, L.L.C.*, 260 F. 3d 748, 752–53 (7<sup>th</sup> Cir. 2001) (holding that plaintiff may add facts “by affidavit or brief in order to defeat a motion to dismiss if the facts are consistent with the allegation of the complaint”)).

<sup>98</sup> 288 F. 3d 1012, 1015 (7<sup>th</sup> Cir. 2002).

<sup>99</sup> 249 F. 3d 673 (7<sup>th</sup> Cir. 2001).

of which held that nationwide class actions for breach of warranty “pose serious problems about choice of law, the manageability of suit, and the propriety of class certification.”<sup>100</sup> The district court responded by saying that it was deferring an inquiry into the impact of state law variations (on such issues as reliance, pre-suit notice and privity of contract), finding such considerations to be “premature” at the motion to dismiss stage, and that a recitation of state law variations under which the plaintiffs sought to proceed was “not sufficient to demonstrate that a multistate class is ‘per se unworkable.’”<sup>101</sup>

Although courts may defer the difficult decisions concerning the impact of state law variants at the motion to dismiss stage, it is at the class certification stage (if not earlier) that the problems presented by the need to apply the divergent laws of the various class members’ home states must be resolved. Some of those problems are presented in the following section.

*C. Certain Aspects of Breach of Warranty Claims That Make Them Particularly “Unmanageable” for Class Action Treatment.*

In all class action litigation, plaintiffs’ claims must depend upon “a common contention . . . that is capable of class-wide resolution[.]”<sup>102</sup> “What matters most to class certification. . . is not the raising of common ‘questions’ – even in droves – but rather the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.”<sup>103</sup>

One major source of “dissimilarities within the proposed class” are the variations found in the state laws that govern the claims asserted in class actions, particularly in multi-state class actions alleging breaches of express or implied warranties.<sup>104</sup> In such cases “a district court must consider how variations in state law affect the elements of

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<sup>100</sup> Szabo v. Bridgeport Machines, Inc., 249 F.3d 672, 674 (7th Cir. 2001).

<sup>101</sup> *Id.* at 24–25 (citing Rysewyk v. Sears Holding Corp., No. 15 CV 4519, 2015 WL 9259886 at \*8 (N.D. Ill. Dec. 18, 2015) (refusing to strike class allegations where defendants did not show “specific Impediments” to a multi-state class, noting that “Plaintiffs might not carry their burdens at class certification, but nothing in the complaint or defendants’ explanation of the law persuades me that it is practicable to resolve the certification question at this stage”). *See also* Mednick v. Precore, Inc., No 14 C 3624, 2014 WL 6474915 at \*\*6–7 (N.D. Ill. Nov. 13, 2014) (deferring consideration of impact of state law variants until class certification stage, finding that “the mere possibility that the presence of class members in other states may require the application of different state laws does not satisfy the facially and inherently deficient standard”).

<sup>102</sup> Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011).

<sup>103</sup> Nagareda, *Class Certification in the Age of Aggregate Proof*, N.Y.U. L. REV. 97, 131–32 (2009).

<sup>104</sup> “In a multi-state class action, variations in state law may swamp any common issues and defeat predominance.” Castano v. American Tobacco Co., 84 F.3d 734, 741 (5th Cir. 1996) (citing *Georgine v. Amchem Prods.*, 83 F.3d 610, 618 (3d Cir. 1996) (decertifying a class because legal and factual differences in the plaintiffs’ claims, “when exponentially magnified by choice of law considerations, eclipse any common issues in this case.”)). *See also* *In re American Medical Sys.*, 75 F.3d 1069, 1085 (6th Cir. 1996).

predominance and superiority.”<sup>105</sup> A 2020 case from the Northern District of Ohio<sup>106</sup> succinctly illustrates the manageability problems arising from state law variations:

The elements for breach of express warranty differ from state to state, including whether reliance, pre-suit notice, or privity are required. In Ohio, reliance is not required but pre-suit notice is. In Indiana, neither is required. Texas class members would have to show both. Ten states require both reliance and pre-suit notice, three states require reliance but have not decided on pre-suit notice, seven states require reliance but not pre-suit notice, ten states require pre-suit notice but not reliance, eight states do not require reliance and have not decided on pre-suit notice, and five states do not require either. Furthermore, different class members have different privity requirements. Under Ohio law, for example, privity is not required . . . [b]ut in Illinois, “privity of contract is required to enforce an express warranty where economic loss is alleged[.]”<sup>107</sup>

This section will review a number of such variances in state law that make multi-state class actions for breach of warranty “unmanageable,” and particularly unsuited for class-wide resolution.

#### 1. Statutes of Limitations

Under the provisions of the Uniform Commercial Code (“U.C.C.”), adopted with minor variants by every state, an action for breach of warranty must be commenced within four years after the cause of action had accrued.<sup>108</sup> The cause of action accrues when the breach occurs, regardless of the aggrieved party’s lack of knowledge of the breach.<sup>109</sup> With regard to implied warranties, the breach generally occurs when tender of delivery is made.<sup>110</sup> With regard to express warranties, where the warranty explicitly extends to future performance of the goods, as is often the case, and discovery of the breach must await the time for such performance, the cause of action accrues when the breach is discovered, or should have been discovered, by the buyer.<sup>111</sup>

Section 2-725(4) explicitly states that this section of the U.C.C. “does not alter the law on tolling of the statute of limitations,”<sup>112</sup> which introduces one of the state law variants that implicates individual inquires and therefore can confound the concept of commonality. This concept was the subject of considerable discussion in the case of *Haley v. Kolbe & Kolbe Millwork Co.*,<sup>113</sup> a multi-state class action involving allegedly defective window installations in residential homes. Claims of breach of express and

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<sup>105</sup> *Walsh v. Ford Motor Co.*, 807 F.2d 1000 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 915 (1987).

<sup>106</sup> *Forsher v. J.M. Smucker Co.*, 612 F. Supp. 3d 714, 727 (N.D. Ohio 2020).

<sup>107</sup> *Id.* at 727.

<sup>108</sup> U.C.C. § 2-725(1) (2002).

<sup>109</sup> U.C.C. § 2-725(2) (2002).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> U.C.C. § 2-725(4) (2002).

<sup>113</sup> 2015 WL 9255571 (W.D. Wis. Dec. 18, 2015), *aff’d*, 863 F.3d 600 (7th Cir. 2017).

implied warranty were asserted, and the court, as a threshold matter, elaborated on case management problems caused by a number of issues.

As to the express warranty claims, the court stated that because of the nature of the contracts involved, the express warranty claims accrued when the plaintiffs discovered, or should have discovered, that the windows were defective. Therefore, the timeliness of the express warranty claims “require[d] inquiries into the state of mind and knowledge of individual class members and the specific circumstances surrounding the failure of their windows.”<sup>114</sup>

Regarding the implied warranty claims, which accrued on the delivery dates of the windows (as opposed to the date of their installation), the court determined that the plaintiffs’ proposed subclass was “not manageable . . . because up to 50 states could govern those claims.”<sup>115</sup> Both the express and implied warranty claims, being subject to the state laws of the individual members of the class, were also subject to state law variations with respect to tolling and equitable estoppel, both of which “involve multi-factor tests that require fact-intensive and individual inquiries that will vary from class member to class member.”<sup>116</sup>

The district court in *Haley* noted that “courts facing similar individual inquiries regarding accrual, tolling and equitable estoppel have refused to certify a class, at least with respect to the statute of limitations issue.”<sup>117</sup> The district court concluded its discussion of the statute of limitations issue by saying that “the large number of individual questions of law and fact necessary to determine the accrual and tolling of the limitations period for each class member precludes certification of any class with respect to those issues.”<sup>118</sup>

## 2. Pre-Suit Notice

Section 2-607(3)(a) of the Uniform Commercial Code requires that once a tender of goods from the seller has been accepted by the buyer, “the buyer must within a reasonable time after he discovers or should have discovered any breach [of any express or implied warranty] notify the seller of the breach or be barred from any remedy.”<sup>119</sup> The purposes behind the timely pre-suit notice requirement have been described by the courts as giving the seller a meaningful opportunity to investigate and

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<sup>114</sup> *Id.* at \*\*28–29.

<sup>115</sup> *Id.* at \*27.

<sup>116</sup> *Id.* at \*29; *See also* *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990) (explaining types of inquiries required under both tolling and equitable estoppel).

<sup>117</sup> 2015 WL 9255571 at \*29 (citing *Pella Corp. v. Saltzman*, 606 F.3d 392, 393 (7th Cir. 2010)); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 342 (4th Cir. 1998) (tolling depended on individualized showings of misrepresentations and obfuscations unique to each class member).

<sup>118</sup> 2015 WL 9255571 at \*29.

<sup>119</sup> U.C.C. § 2-607(3)(a) (2002),

resolve the breach,<sup>120</sup> to encourage parties to settle their disputes,<sup>121</sup> and to avoid litigation.<sup>122</sup>

Despite the name of the aforementioned Code, state law interpretations of section 2-607(3)(a) have been anything but “uniform.”<sup>123</sup> For instance, in some states the mere filing of a complaint is sufficient to provide notice to the seller, whereas in other states it is not.<sup>124</sup> In most states, timely pre-suit notice to the seller of a breach is an essential element of a buyer’s breach of warranty claim,<sup>125</sup> while in other states the notice element is excused entirely.<sup>126</sup> When buyers deal only with a middleman, as opposed to a remote manufacturer, some states say that notice to the immediate seller suffices as pre-suit notice to the manufacturer<sup>127</sup> (note that U.C.C. § 2-607(3)(a) provides that the buyer need only “notify the seller” of the alleged breach), while other states require direct notification to the remote manufacturer in order to sustain a buyer’s action for breach of warranty against that party.<sup>128</sup>

This divergence in state law regarding the notice requirement has led a number of courts to deny class certification of breach of warranty claims on the grounds of unmanageability.<sup>129</sup>

### 3. Privity of Contract

Privity is, basically, one of the central aspects of the commercial relationship between buyer and seller in the marketplace. Simply stated, it is “that connection . . . which exists between two or more contracting parties.”<sup>130</sup> “Courts are sharply split regarding whether privity is required in implied and express warranty actions when a buyer seeks only recovery for economic loss. While many jurisdictions retain the privity requirement in an implied warranty action for economic loss, other jurisdictions

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<sup>120</sup> *See, e.g.*, *Oettle v. Walmart, Inc.*, 685 F. Supp. 3d 706 (S.D. Ill. 2023).

<sup>121</sup> *See, e.g.*, *Ibarrola v. Kind, LLC*, 83 F. Supp. 3d 751 (N.D. Ill. 2015).

<sup>122</sup> *See, e.g.*, *Reyes v. McDonald’s Corp.*, 06-c-1604,2813, 2006 WL 3253579 at \*3 (N.D. Ill. Nov. 8, 2006).

<sup>123</sup> *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1016–17 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 915 (1987) (holding that: “The Uniform Commercial Code is not uniform”).

<sup>124</sup> *See In re Caterpillar, Inc.*, 1:14-cv-3722 (D.N.J. July 29, 2015) (comparing cases).

<sup>125</sup> *See, e.g.*, *Hedges v. Earth, Inc.*, 14-c-9858, 2015 WL 1843039 at \*1 (N.D. Ill. Apr. 21, 2015) (quoting *Whitwell v. Wal-Mart Stores, Inc.*, 09-513, 2009 WL 4894575 at \*\*4–6 (S.D. Ill. Dec.11, 2009)).

<sup>126</sup> *See Forsher v. J.M. Smucker Co.*, 612 F. Supp. 3d 714, 727 (N.D. Ohio 2020). (collecting cases).

<sup>127</sup> *See, e.g.*, *Halprin v. Ford Motor Co.*, 686, 689 (N.C. App. Ct. 1992) (collecting cases holding that notice to the immediate seller is sufficient to allow a warranty case against a remote manufacturer). *See also Blommer Chocolate Co. v. Bongards Creameries, Inc.*, 635 F. Supp. 911 (N.D. Ill. 1985); *Owens v. Glendale Optical Co.*, 590 F. Supp. 32 (S.D. Ill. 1984).

<sup>128</sup> *See, e.g.*, *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 672–75 (Tex. 2004) (collecting cases holding that pre-suit notice to a remote manufacturer is necessary).

<sup>129</sup> *See In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002); *Forsher*, 612 F. Supp. 3d. at 727; *Melnick v. Tamko Bldg. Prods.*, 19-CV-2630 (D. Kan. July 25, 2024).

<sup>130</sup> *Privity*, BLACK’S LAW DICTIONARY 1079 (5th ed. 1979).

have abandoned the privity requirement and now allow buyers to assert an implied warranty claim for economic loss against remote manufacturers.”<sup>131</sup>

Several states that retain the privity requirement in implied warranty cases no longer require it in express warranty claims.<sup>132</sup> For example, under New York law, a plaintiff must allege privity with the defendant in a claim for breach of an implied warranty, although “New York has long since dispensed with the privity requirement for express warranty claims . . .”<sup>133</sup> Similarly, the Ohio courts take the position that privity between the parties is not necessary to impose liability for breach of an *express* warranty.<sup>134</sup> “Thus, a [remote] manufacturer can be held liable by a purchaser for breach of an express warranty even though there is no privity between the two parties.”<sup>135</sup>

On the other hand, in order to sustain a contract-based breach of *implied* warranty claim, the parties must be in privity.<sup>136</sup>

Among states there is a sharp split of authority as to whether a purchaser may recover economic loss from a remote manufacturer when there is no privity of contract between the parties.<sup>137</sup> For example, “a significant number of jurisdictions require vertical privity in implied warranty actions for direct economic loss [while] [o]ther jurisdictions, however, have eliminated the privity of contract requirement and allow recovery of economic loss from remote manufacturers.”<sup>138</sup>

Noting the “significant variations in state law and the multiple individualized legal and factual questions they present,” the Fifth Circuit concluded in *Cole v. General Motors Corp.*<sup>139</sup> “that plaintiffs have failed to carry their burden in establishing predominance and that the district court abused its discretion in certifying the class.”<sup>140</sup>

<sup>131</sup> *Simonet v. SmithKline Beecham Corp.*, 506 F. Supp. 2d 77, 84–85 (D. P.R. 2007) (citing *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 728 (5th Cir. 2007) (discussing state law variations of implied warranty claims for economic loss when no privity exists between the buyer and the manufacturer)).

<sup>132</sup> Such jurisdictions include Arizona, California, Illinois, Indiana, North Carolina and Washington. *See Collins Co., Ltd. v. Carboline Co.*, 532 N.E. 2d 834, 838–39 (1988) (holding that the difference between express and implied warranties justify the distinction in privity rules).

<sup>133</sup> *See Colpitts v. Blue Diamond Growers*, 527 F. Supp. 3d 562, 591 (S.D.N.Y. 2021); *Weisblum v. Prophase Labs, Inc.*, 88 F. Supp. 3d 283, 296 (S.D.N.Y. 2015).

<sup>134</sup> *Bobb Forest Prods., Inc. v. Morbark Industries, Inc.*, 151 Ohio App. 3d 63, 783 N.E. 2d 560 (7th Dist. 2002); *Chik Promotions, Inc. v. Middletown Sec. Sys., Inc.*, 688 N.E.2d 278 (12th Dist. 1996).

<sup>135</sup> *Caterpillar Fin. Servs. Corp. v. Harold Tatman & Son’s Enters., Inc.*, 50 N.E. 2d 955, 961 (2015); *Johnson v. Monsanto Co.*, 2002 Ohio 4316, 2002 WL 2030889 at \*14 (2002).

<sup>136</sup> *Caterpillar*, 50 N.E.2d at 961; *Curl v. Volkswagen of Am., Inc.*, 871 N.E. 2d 1141 (2007) (holding that the U.C.C.’s implied warranty of merchantability and implied warranty of fitness are not enforceable against remote manufacturers with whom the consumer is not in privity).

<sup>137</sup> *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 727 (5th Cir. 2007).

<sup>138</sup> *Id.* at 728 (collecting cases).

<sup>139</sup> 484 F.3d 717, 730 (5th Cir. 2007).

<sup>140</sup> *Id.* at 730. The Fifth Circuit also noted that “[o]ther courts have declined class certification, at least in part because of variations in state law regarding privity of contract” *Id.* (citing *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 460 (D.N.J. 1998) (noting that plaintiffs failed to show that state law differences regarding vertical privity did not pose manageability problems); *see also Walsh v. Ford Motor Co.*, *supra* at

#### 4. Reliance

Reliance, a concept usually associated with fraud-based claims, also impacts actions for breach of express warranties. Section 2-313 of the U.C.C. provides that an express warranty is made by the seller in one of three ways: “(1) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods . . . creates an express warranty that the goods shall conform to the affirmation or promise . . . (2) Any description of the goods . . . creates an express warranty that the goods shall conform to the description , , , [and] (3) any sample or model [of the goods] creates an express warranty that the whole of the goods shall conform to the sample or model.”<sup>141</sup> In all three cases the affirmation, description or sample must be part of the “basis of the bargain,”<sup>142</sup> but the U.C.C provides no specific definition of this requirement.

“There is a clear split in authority among the jurisdictions as to whether a buyer must show reliance on a statement or representation for it to be considered part of the ‘basis of the bargain.’”<sup>143</sup> For example, “[s]ome jurisdictions require a strict showing of reliance [while] [o]ther jurisdictions have no reliance requirement . . . [a]nd still other jurisdictions have applied a rebuttable presumption of reliance.”<sup>144</sup> Such a divergence “greatly impacts the predominance inquiry: ‘the economy ordinarily associated with the class action device’ is defeated where plaintiffs are required to bring forth individual proof of reliance.”<sup>145</sup>

In the *Cole* case, which proposed a class of more than 200,000 members, class certification was deemed unmanageable, as it “would require the court to undertake an inquiry that would turn on facts particular to each of those class members and raised the potential that the trial would break down into multiple individual hearings.”<sup>146</sup> In a context other than warranty law, the Tenth Circuit has said that “[s]ince reliance is often a highly idiosyncratic issue that might require unique evidence from individual plaintiffs, it may present an impediment to the economies of time and scale that encourage class actions as an alternative to traditional litigation. In terms of Rule 23 doctrine, individualized issues of reliance often preclude predominance.”<sup>147</sup> Thus reliance, like statutes of limitations, pre-suit notice and privity of contract, is another

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272 (“Along the various implied warranty standards and other subsidiary issues . . . the numerous vertical privity rules convince this Court that a predominance of common issues are not present in this case”).

<sup>141</sup> U.C.C. § 2-313(A)(1)–(3) (2002).

<sup>142</sup> Gabriel, *The ABC’s of the UCC, Article 2: Sales*, (2d ed. 2013) AMERICAN BAR ASSOCIATION, p.52.

<sup>143</sup> *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 726 (5th Cir. 2007). *See also*, Clark & Smith, *The Law of Product Warranties*, § 4:16 (2d ed. 2002).

<sup>144</sup> *Cole*, 484 F.3d at 726.

<sup>145</sup> *Id.* at 727 (quoting *Patterson v. Mobile Oil Co.*, 241 F.3d 417, 419 (5th Cir. 2001) (“Claims . . . where individual reliance is an element are poor candidates for class treatment, at best”).

<sup>146</sup> *Id.* at 727.

<sup>147</sup> *CGC Holding Company, L.L.C. v. Broad and Cassel*, 773 F.3d 1076, 1089 (10th Cir. 2014).

state law variable that can render multi-state class actions for breach of warranty unmanageable for the federal trial courts.

### III. ATTEMPTS TO AVOID VARYING STATE LAWS REGARDING PRIVACY AND PRE-SUIT NOTICE

Some plaintiffs who have contemplated class action treatment for breach of warranty claims may attempt to circumvent varying state law requirements regarding pre-suit notice and privity, which may hinder or restrict class action certification of state law breach of warranty actions by suing under federal law, i.e. the Magnuson-Moss Warranty Act.<sup>148</sup> In reality, however, it has been held that implied warranty claims brought under the Magnuson-Moss Act are subject to the same state law privity rules as warranty claims brought under state common law.<sup>149</sup> Additionally, the Magnuson-Moss Act imposes its own requirements as to pre-suit notice.<sup>150</sup>

The Act reads as follows: “No action. . . may be brought. . . for failure to comply with any obligation under any written or implied warranty, . . . and a class of consumers may not proceed in a class action. . . unless the [defendant] is afforded a reasonable opportunity to cure such failure to comply. In the case of such a class action, . . . such reasonable opportunity will be afforded by the named plaintiffs, and they shall at that time notify the defendant that they are acting on behalf of the class.”<sup>151</sup> Therefore, suing under the Magnuson-Moss Act does not circumvent state law rules regarding privity of contract. In addition, as stated above, the Act includes its own provisions concerning notice and the need to provide the seller with an opportunity to cure.<sup>152</sup>

#### A. Subclasses

One of the other means proposed by plaintiffs to deal with the variations in state laws which often characterize multi-state class action litigation, and hence to make such cases more “manageable,” is the creation of subclasses that organize class members by state or by issue, for example those of whom privity is required as opposed to those for whom privity is excused.<sup>153</sup> Regarding the creation of subclasses as a manageability tool, the court in *Hart v. BHH, LLC*<sup>154</sup> said that “[i]n the event that there are material variations in the law of the fifty states, the Court may employ

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<sup>148</sup> 15 U.S.C. § 2301 et seq.

<sup>149</sup> *See, e.g., Abraham v. Volkswagen of America*, 795 F.2d 238 (2d Cir. 1986) (holding that implied warranty claims brought under the Magnuson-Moss Act are subject to state law privity rules, including those applicable to consumers’ breach of warranty actions against remote manufacturers).

<sup>150</sup> *See Bearden v. Honeywell Int’l Inc.*, 720 F. Supp. 2d 932 (M.D. Tenn. 2010).

<sup>151</sup> 15 U.S.C. § 2310(e).

<sup>152</sup> *Id.*

<sup>153</sup> *See Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532 (6th Cir. 2012).

<sup>154</sup> 2017 WL 2912519 (S.D.N.Y. July 7, 2017).

subclasses or decertify those state law subclasses whose adjudication becomes unmanageable.”<sup>155</sup>

In the case of *In Re Telectronics Pacing Sys., Inc.*,<sup>156</sup> the court commented favorably on the possibility of using subclasses to deal with the variations in state laws. Likewise in the case of *Matrinelli v. Johnson & Johnson*<sup>157</sup> the court allowed the use of subclasses where ten such categories were created as a means of managing the variations in state law. Such means of dealing with state law variations is disfavored by other courts, however, who have said that “subclasses are not [a] substitute for compliance with Rule 23”<sup>158</sup> requirements regarding commonality and typicality, two essential elements for class certification.

A variation of the creation of subclasses to handle the manageability of multi-state class actions involving implied warranty claims is seen in the case of *Stuve v. The Kraft Heinz Co.*<sup>159</sup> in which plaintiffs filed a class action involving claimants from eleven states who alleged that the defendant had falsely labelled its macaroni and cheese product because it failed to disclose that the product contained, or risked containing, a synthetic chemical known as phthalates, which scientific studies had linked to a variety of ailments, including damage to the fetus in pregnancy. At the pleading stage, only economic damages were claimed by the plaintiffs (i.e. it was alleged that they would not have purchased the product had it warned consumers about the potential presence of phthalates).

Among the claims asserted was one for breach of implied warranty. The district court noted that, generally, “[b]reach of implied warranty is a contract claim, one element of which is privity between the parties.”<sup>160</sup> The court cited cases from several jurisdictions requiring privity, including Florida, Illinois and New York,<sup>161</sup> in which several of the class members resided, but also noted that one of the plaintiffs in the proposed class lived in Massachusetts, which does not impose the privity requirement.<sup>162</sup> The district court singled out the Massachusetts plaintiff, and permitted her implied warranty claim to continue while dismissing the remainder of the implied warranty claims for lack of privity. Thus, the court demonstrated one way in which the issue of conflicting state laws on the issue of privity may be successfully “managed” i.e. by segregating those plaintiffs for whom the privity requirement is

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<sup>155</sup> *Id.* at \*8.

<sup>156</sup> 172 F.R.D. 271,292 (S.D. Ohio 1997).

<sup>157</sup> 2019 WL 1429653 at \*10 (E.D. Cal. Mar. 29, 2019).

<sup>158</sup> *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 n.9 (6th Cir. 1998). *See also* *Forsher v. J.M. Smucker Co.*, 612 F. Supp. 3d 714, 728 (N.D. Ohio 2020).

<sup>159</sup> Case 21-CV-1845 (N.D. Ill. Jan. 12, 2023) (Opinion of Judge Pallmeyer).

<sup>160</sup> *Id.* at \*23.

<sup>161</sup> *Weiss v. Gen. Motors LLC*, 418 F. Supp. 3d 1173, 1183 (S.D. Fla. 2019); *Manley v. Hain Celestial Grp., Inc.*, 417 F. Supp. 3d 1114, 1121 (N.D. Ill. 2019); *Catalano v. BMW of N. Am., LLC*, 167 F. Supp. 3d 540, 556 (S.D.N.Y. 2016).

<sup>162</sup> *Jacobs v. Yamaha Motors Corp., U.S.A.*, 649 N.E. 2d 758, 763 (Mass. 1995); *Schneider v. BMW of N. Am. LLC*, No. 18-cv-12239, 2019 WL 4771567 at \*6 (D. Mass. Sept. 27, 2019).

excused, allowing those claims to proceed while dismissing the claims of those plaintiffs as to whom the privity requirement applies.

#### IV. CONCLUSION

Although listed last among Rule 23's criteria for class action treatment,<sup>163</sup> manageability is a factor that pervades the other listed prerequisites for a class action. State law variances on such issues as pre-suit notice, privity, reliance and others in multi-state breach of warranty actions erode the concepts of commonality, typicality, predominance and superiority that give class actions their reasons for being, often making the maintenance of such actions "unmanageable" for the federal trial courts, tasked (among other things) with fashioning a workable set of jury instructions for such cases.

While categorization of claims (be it by plaintiff or by jurisdiction), or the creation of subclasses, may pose a partial solution to the manageability of multi-state breach of warranty claims, the specter of an "unmanageable task" will still loom large in multi-state class actions for breach of warranty.

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<sup>163</sup> Fed. R. Civ. P. 23(b)(3)(D) ("the likely difficulties in managing a class action").

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**SCARCITY DOES NOT CREATE VALUE:  
H-1B VISA REFORM THAT PROTECTS AMERICAN WORKERS WITHOUT  
REDUCING IMMIGRATION**

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❖ Note ❖

*Justin Fernando\**

I. INTRODUCTION

Amidst rising tensions surrounding immigration, the H-1B visa program has found itself under fire from all sides of the political spectrum.<sup>1</sup> Elon Musk and Vivek Ramaswamy, two businessmen who were tapped to lead the proposed Department of Governmental Efficiency, made headlines towards the end of last year for arguing in favor of the H-1B visa system as a way to bring talented workers to the United States.<sup>2</sup> Senator Bernie Sanders directly opposed these comments, criticizing companies for replacing American workers with lower-paid immigrant workers, going as far as to call these workers “indentured servants.”<sup>3</sup>

This debate, while not new, presents a false dichotomy.<sup>4</sup> One side argues that in order to protect American workers, we must add greater restrictions to the H-1B visa

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\* J.D. Candidate, Class of 2027, University of Illinois College of Law.

<sup>1</sup> See Aimee Picchi, *Musk and Ramaswamy Are Sparking a Debate Over the H-1B Visa. Here’s What to Know About the Visa.*, CBS NEWS (Dec. 30, 2024, 11:39 AM), <https://www.cbsnews.com/news/musk-vivek-ramaswamy-h1b-visa-maga-immigration-what-to-know/>; see also Bernie Sanders, *Sen. Bernie Sanders: H-1B Visas Hurt One Type of Worker and Exploit Another. This Mess Must Be Fixed*, FOX NEWS (Jan. 8, 2025, 6:00 AM), <https://www.foxnews.com/opinion/sen-bernie-sanders-h1-b-visas-hurt-one-type-worker-exploits-another-mess-must-fixed>.

<sup>2</sup> Aimee Picchi, *Musk and Ramaswamy Are Sparking a Debate Over the H-1B Visa. Here’s What to Know About the Visa.*, CBS NEWS (Dec. 30, 2024, 11:39 AM), <https://www.cbsnews.com/news/musk-vivek-ramaswamy-h1b-visa-maga-immigration-what-to-know/>.

<sup>3</sup> Bernie Sanders, *Sen. Bernie Sanders: H-1B Visas Hurt One Type of Worker and Exploit Another. This Mess Must Be Fixed*, FOX NEWS (Jan. 8, 2025, 6:00 AM), <https://www.foxnews.com/opinion/sen-bernie-sanders-h1-b-visas-hurt-one-type-worker-exploits-another-mess-must-fixed>.

<sup>4</sup> See generally Daniel Costa and Heidi Shierholz, *Immigrants Are Not Hurting U.S.-Born Workers*, ECON. POL’Y INST. (Feb. 20, 2024, 12:02 PM), <https://www.epi.org/blog/immigrants-are-not-hurting-u-s-born-workers-six-facts-to-set-the-record-straight/>.

program.<sup>5</sup> On the other hand, some who support H-1B visa immigration argue that this program is necessary in an American culture that “has venerated mediocrity over excellence.”<sup>6</sup> It’s a zero-sum game, where one group can only win at the expense of another.<sup>7</sup>

These are not the only solutions. The H-1B visa system needs reform – that much is certain – but we don’t have to operate on a scarcity mindset.<sup>8</sup> Instead, this Note proposes that the H-1B visa program should be modified to strengthen protections for immigrant workers without reducing the visa quota or adding restrictions to the program.<sup>9</sup> In particular, extending the grace period for laid-off H-1B visa workers and creating more robust enforcement mechanisms to shield H-1B visa workers from retaliation by their employers will provide them with more job mobility and security.<sup>10</sup> As a result, companies will be disincentivized from disproportionately hiring H-1B workers, reducing displacement of American workers.<sup>11</sup> At the same time, current and future H-1B workers will be protected, and potential exploitation of this visa class will be reduced.<sup>12</sup>

Part II of this Note will discuss the background of the H-1B visa program, with subsection A providing a brief history of the program, subsection B discussing how the program operates, and subsection C exploring current H-1B visa trends.<sup>13</sup> Part III will discuss the issues in the current H-1B visa program, with subsection A discussing income disparities, subsection B covering a lack of job mobility, subsection C discussing the displacement of U.S. workers, and subsection D looking at current reform proposals.<sup>14</sup> Part IV will discuss recommendations for the federal government to pursue in order to prioritize the needs of both H-1B workers and American workers, such as extending the grace period for laid-off H-1B workers, increasing federal protections for H-1B workers, and diversifying the industries that accept H-1B workers.<sup>15</sup>

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<sup>5</sup> See PRESS RELEASE, U.S. SENATE COMMITTEE ON THE JUDICIARY, DURBIN, GRASSLEY INTRODUCE BIPARTISAN H-1B, L-1 VISA REFORM LEGISLATION TO PROTECT WORKERS AND STOP OUTSOURCING OF AMERICAN JOBS (Mar. 27, 2023), <https://www.judiciary.senate.gov/press/dem/releases/durbin-grassley-introduce-bipartisan-h-1b-l-1-visa-reform-legislation-to-protect-workers-and-stop-outsourcing-of-american-jobs> [hereinafter Visa Reform Legislation].

<sup>6</sup> See Picchi, *supra* note 2.

<sup>7</sup> See generally Costa and Shierholz, *supra* note 4.

<sup>8</sup> *Id.*

<sup>9</sup> See *infra* Section IV.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See *infra* Section II.

<sup>14</sup> See *infra* Section III.

<sup>15</sup> See *infra* Section IV.

## II. BACKGROUND

### *A. Brief History of the H-1B Visa Program*

The H-1B visa category was first established by the passage of the Immigration Act of 1990.<sup>16</sup> This legislation set preference for immigrant workers with extraordinary ability or highly specialized knowledge, creating the initial cap of 65,000 H-1B visas per fiscal year.<sup>17</sup> Employers were required to submit Labor Condition Applications, attesting that H-1B visa workers were being given the required wages and benefits comparative to U.S. workers in the same position.<sup>18</sup> This Act also showed the legislators' sensitivities towards the American workforce, as it directed the Secretary of Labor to issue labor certifications for occupations with labor shortages.<sup>19</sup> In addition, this Act contained a small provision allocating educational funding and assistance for U.S. workers.<sup>20</sup>

The 65,000 H-1B visa cap remained stagnant until the passage of the American Competitiveness and Workforce Improvement Act of 1998, which increased the cap to 115,000 visas for fiscal years 1999 and 2000.<sup>21</sup> Subsequently, the American Competitiveness in the 21st Century Act of 2000 increased the cap to 195,000 visas for fiscal years 2001-2003.<sup>22</sup> These increases were largely fueled by the high demand for skilled foreign workers in United States tech and computer industries.<sup>23</sup> However, these cap increases were only temporary, so in fiscal year 2004, the H-1B visa cap fell back to 65,000 per year.<sup>24</sup> But since fiscal year 2005, an additional 20,000 H-1B visas per year have been allocated to immigrants with U.S.-earned master's or advanced degrees, bringing the current H-1B cap to 85,000 visas.<sup>25</sup>

### *B. How the H-1B Visa Program Operates*

The H-1B visa is designed for immigrants who wish to work in specialized occupations in the United States.<sup>26</sup> In order to be eligible, a bachelor's degree is

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<sup>16</sup> S. 358, 101st Cong. (1990).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> H.R. 4328, 105th Cong. (1998).

<sup>22</sup> American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000).

<sup>23</sup> Jung S. Hahm, *American Competitiveness and Workforce Improvement Act of 1998: Balancing Economic and Labor Interests Under the New H-1B Visa Program*, 85 CORNELL L. REV. 1673, 1676 (2000).

<sup>24</sup> American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000).

<sup>25</sup> Pub. L. No. 108-447, 118 Stat. 2809 (2004).

<sup>26</sup> *H-1B Specialty Occupations*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/working-in-the-united-states/h-1b-specialty-occupations> (last visited May 31, 2025).

generally required; however, applicants with less education can make up for this through demonstrated relevant work experience.<sup>27</sup> The United States Citizen and Immigration Services (USCIS) specifically employs a “Three to One” rule, which states that three years of specialized training and/or work experience can make up for one year of higher education.<sup>28</sup> That means an applicant with no college degree would need to show twelve years of relevant training and/or work experience to be eligible for an H-1B visa.<sup>29</sup> It appears that many applicants may be pursuing this alternative pathway – in fiscal year 2011, an estimated one-in-four H-1B visa requests were for positions requiring only a two-year associate’s degree.<sup>30</sup>

In recent years, the amount of H-1B visa applicants has greatly exceeded the number of visas available, resulting in the USCIS conducting a lottery to narrow the applicant pool.<sup>31</sup> If selected through the lottery, an H-1B visa applicant and their prospective employer must prepare several documents to support their H-1B petition.<sup>32</sup> The employer is required to fill out a Labor Condition Application (“LCA”) with the Department of Labor (“DOL”), attesting that the H-1B applicant will be paid at least the actual wage on par with other employees with the same experience and qualifications, or will be paid the prevailing wage for the occupation in the area of employment, whichever is higher.<sup>33</sup> In addition, the employer must submit Form I-129, which is a petition for an H-1B visa, to the USCIS.<sup>34</sup> If the petition is approved, then the applicant will be able to officially apply for the visa and admission to the United States.<sup>35</sup> This process includes an interview with a consular officer, who will inquire about the applicant’s educational background, their professional experience, their U.S. job offer, and other related information.<sup>36</sup> If a candidate successfully makes it through the application process, they will be granted an H-1B visa.<sup>37</sup> For a typical applicant, the entire process can take approximately six to nine months from the initial lottery registration to the final visa decision.<sup>38</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> *H-1B Visa Without a Degree: The ‘Three to One’ Rule*, RICHARDS AND JURUSIK IMMIGR. L. (Aug. 1, 2024), <https://rjimmigrationlaw.com/resources/h-1b-visa-without-a-degree-the-three-to-one-rule/>; 8 C.F.R. §214.2(h)(4)(iii)(D)(5).

<sup>29</sup> *Id.*

<sup>30</sup> Neil G. Ruiz, *Key Facts About the U.S. H-1B Visa Program*, PEW RSCH. CTR. (Apr. 27, 2017), <https://www.pewresearch.org/short-reads/2017/04/27/key-facts-about-the-u-s-h-1b-visa-program/>.

<sup>31</sup> *H-1B Specialty Occupations*, *supra* note 26.

<sup>32</sup> *Id.*

<sup>33</sup> *H-1B Labor Condition Application*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/whd/laws-and-regulations/laws/ina/h1b> (last visited Apr. 27, 2025).

<sup>34</sup> *H-1B Specialty Occupations*, *supra* note 26.

<sup>35</sup> *Id.*

<sup>36</sup> *H-1B Visa Interview Questions*, BOUNDLESS IMMIGR. INC., <https://www.boundless.com/immigration-resources/h-1b-visa-interview-questions/> (last visited May 31, 2025).

<sup>37</sup> Alison Moodie, *The H-1B Visa, Explained*, BOUNDLESS IMMIGR. INC. (Mar. 26, 2025), <https://www.boundless.com/immigration-resources/the-h-1b-visa-explained/>.

<sup>38</sup> *Id.*

There are several types of employers who are held exempt from the H-1B visa cap, meaning their applicants are not subject to the H-1B visa lottery.<sup>39</sup> This includes higher-education institutions, non-profit research organizations, government research organization, and non-profit organizations affiliated with higher-education institutions.<sup>40</sup>

### *C. Current H-1B Visa Program Trends*

The demand for H-1B visas greatly outpaces the current supply.<sup>41</sup> For fiscal year 2024, the USCIS received 758,994 eligible H-1B applications.<sup>42</sup> While the number of eligible applications decreased to 470,342 for fiscal year 2025, that number still exceeds the current cap of 85,000 visas per year.<sup>43</sup>

It is not uncommon for applicants to be denied – and denial rates have greatly fluctuated in the past several years.<sup>44</sup> For example, denial rates for initial employment applications were much higher under the first Trump administration, reaching as high as twenty-four percent in fiscal year 2018.<sup>45</sup> The denial rates sharply declined under the Biden administration, with fiscal year 2024 having only a 2.5 percent denial rate for new applications.<sup>46</sup> While some worry that denial rates might increase again with Trump back in office,<sup>47</sup> it is too soon to see whether that will actually be the case.

As of 2019, there are approximately 583,420 workers on an H-1B visa in the United States.<sup>48</sup> The vast majority of H-1B applications are for positions requiring high-level STEM and computer knowledge.<sup>49</sup> As a result, many of the largest employers of H-1B visa workers are in the tech industry.<sup>50</sup> In particular, Amazon had the largest number of approved H-1B petitions for fiscal year 2024, with companies

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<sup>39</sup> Dimo Machailov, *Guide to H-1B Cap Exempt Employers*, CAPITOL IMMIGR. LAW GROUP PLLC (Sept. 30, 2024), <https://cilawgroup.com/news/2024/09/30/guide-to-h-1b-cap-exempt-employers/>.

<sup>40</sup> *Id.*

<sup>41</sup> *A Sneak Peek Into H-1B Applications Filed for 2025*, IMAGILITY (Jul. 8, 2024), <https://imagility.co/blog/h-1b-applications-filed-for-2025/>.

<sup>42</sup> *Id.*

<sup>43</sup> *H-1B Electronic Registration Process*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations/h-1b-electronic-registration-process> (last visited Apr. 27, 2025).

<sup>44</sup> *H-1B Petitions and Denial Rates in FY 2024*, NAT'L FOUND. FOR AM. POL'Y, <https://nfap.com/studies/h-1b-petitions-and-denial-rates-in-fy-2024/> (last visited May 31, 2025).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> See generally Ananya Bhattacharya, *A Trump H-1B Crackdown Could Hit Big Tech Hard, with Amazon Suffering Most*, REST OF WORLD (Mar. 24, 2025), <https://restofworld.org/2025/trump-h1b-policy-big-tech-workers-amazon/>.

<sup>48</sup> *H-1B Authorized-to-Work Population Estimate*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/sites/default/files/document/reports/USCIS%20H-1B%20Authorized%20to%20Work%20Report.pdf> (last visited May 31, 2025).

<sup>49</sup> Ruiz, *supra* note 30.

<sup>50</sup> *H-1B Petitions and Denial Rates in FY 2024*, *supra* note 44.

such as Microsoft, Google, Meta, Apple, and Tesla also landing among the top twenty-five.<sup>51</sup>

### III. ANALYSIS

#### A. *Income Disparities*

Despite employers being required to submit an LCA, there is evidence indicating that many H-1B workers are paid below the market level.<sup>52</sup> When completing an LCA for an H-1B applicant, employers can choose from four prevailing wage levels.<sup>53</sup> Level 1, meant for entry-level workers, is equivalent to the seventeenth percentile of wages for similar occupations in the local area.<sup>54</sup> This means that if an H-1B worker is paid at Level 1, eighty-three percent of workers in that occupation and area would be paid more than the H-1B worker.<sup>55</sup> Each level assigns a higher prevailing wage proportional to experience, with Level 2 being equivalent to the thirty-fourth percentile, Level 3 being equivalent to the fiftieth percentile, and Level 4, meant for “fully competent” workers, is set at the sixty-seventh percentile.<sup>56</sup> In fiscal year 2019, approximately sixty percent of all H-1B positions were set at either Level 1 or 2.<sup>57</sup> In fact, only nineteen percent of positions were set at the median percentile of Level 3.<sup>58</sup> Some have interpreted this to show that the majority of H-1B positions are underpaid compared to the median prevailing wage, and that these companies are exploiting these immigrant workers that are intrinsically tied to their employers to lawfully maintain their immigration status.<sup>59</sup> Thus, it could be argued that some employers might prioritize hiring H-1B workers over United States’ workers to save money and avoid paying higher salaries.<sup>60</sup>

However, this doesn’t necessarily mean that H-1B visa holders are in low-paying roles. The USCIS reported that H-1B workers in computer-related occupations, making up over half of all H-1B petitions approved in fiscal year 2022, had a median annual compensation of \$123,000.<sup>61</sup> According to the Bureau of Labor Statistics, the

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<sup>51</sup> *Id.*

<sup>52</sup> Daniel Costa & Ron Hira, *H-1B visas and prevailing wage levels*, ECON. POL’Y INST. (May 4, 2020), <https://www.epi.org/publication/h-1b-visas-and-prevailing-wage-levels/>.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Characteristics of H-1B Specialty Occupation Workers*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Mar. 13, 2013), [https://www.uscis.gov/sites/default/files/document/data/OLA\\_Signed\\_H-1B\\_Characteristics\\_Congressional\\_Report\\_FY2022.pdf](https://www.uscis.gov/sites/default/files/document/data/OLA_Signed_H-1B_Characteristics_Congressional_Report_FY2022.pdf).

median annual salary for all computer and information technology occupations was \$105,990 in May 2024.<sup>62</sup>

Further, any money saved by employing H-1B workers may be overstated, especially when considering the high costs associated with processing H-1B visas.<sup>63</sup> Employers are responsible for paying hundreds of dollars in registration and form fees during the application process.<sup>64</sup> Including legal fees, employer could expect to pay around \$33,000 for an initial H-1B application and extension.<sup>65</sup> And if an employer sponsors an employee's application for permanent residency, the estimated total legal fees could increase to \$50,000.<sup>66</sup> Thus, any potential wage gaps between immigrant and American workers, while troubling and worthy of addressing, may not be the primary reason why employers seem to be prioritizing the hiring of H-1B workers over American workers.

### B. *Lack of Mobility*

Another major issue facing H-1B workers is a lack of job mobility. Due to the nature of work-based visas, H-1B visa holders are intrinsically tied to their employers.<sup>67</sup> As mentioned previously, H-1B applicants need their employers to sponsor their petition in order to be approved for a visa.<sup>68</sup> As a result, this can often create situations where the employer have undue leverage over H-1B workers, making these workers more susceptible to abuses by their employers.<sup>69</sup> In particular, research has shown that this system makes H-1B workers feel less willing to report their employers for wrongdoings or misconduct due to fear of retaliation or loss of employment.<sup>70</sup> As a

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<sup>62</sup> *Computer and Information Technology Occupations*, U.S. BUREAU OF LAB. STAT. (Apr. 18, 2025), <https://www.bls.gov/ooh/computer-and-information-technology/>.

<sup>63</sup> Stuart Anderson, *A Look At The High Fees Making Hiring H-1B Visa Holders Challenging*, FORBES (Feb. 22, 2024, 8:59 AM), <https://www.forbes.com/sites/stuartanderson/2024/02/22/a-look-at-the-high-fees-making-hiring-h-1b-visa-holders-challenging/>.

<sup>64</sup> Nita Nicole Upadhye, *H-1B Visa Cost & Fees 2025*, NNU IMMIGR. (Jan. 7, 2025), <https://www.nnuimmigration.com/h1b-visa-cost/>.

<sup>65</sup> Anderson, *supra* note 63.

<sup>66</sup> *Id.*

<sup>67</sup> *H-1B Specialty Occupations*, *supra* note 26.

<sup>68</sup> *Id.*

<sup>69</sup> See Patrick Thibodeau, *Employer Power Over H-1B Workers Could Create Financial Risk*, TECHTARGET (Feb. 15, 2024), <https://www.techtargget.com/searchhrsoftware/news/366570083/Employer-power-over-H-1B-workers-could-create-financial-risk>; see also Ron Hira and Daniel Costa, *New Evidence of Widespread Wage Theft in the H-1B Visa Program*, ECON. POL'Y INST. (Dec. 9, 2021), <https://www.epi.org/publication/new-evidence-widespread-wage-theft-in-the-h-1b-program/>.

<sup>70</sup> Ruiting Dai, Xuanjun Dong, Nemit Shroff, & Qin Tan, *Does U.S. Immigration Policy Facilitate Financial Misconduct?* (May 23, 2025), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=5266279](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5266279).

result, companies may prefer to hire H-1B workers over American workers due to the lack of mobility created from their visa status.<sup>71</sup>

There are even instances of H-1B workers facing retaliation from their employers after reporting misconduct.<sup>72</sup> Last year, an Indian H-1B visa holder sued JPMorgan, his former employer, after they allegedly fired him following his complaints about racial and national origin discrimination at the company.<sup>73</sup> H-1B workers being fired can put their visa status at risk, since they must retain sponsorship from an employer in order for their H-1B to remain valid.<sup>74</sup>

Further, H-1B visa holders are not helped by the fact that if they lose their employment, they only have sixty days to find a new job or change their visa status.<sup>75</sup> As of February 2023, it took an average of 8.3 weeks to find a new job after a layoff.<sup>76</sup> This is particularly relevant given the significant layoffs occurring in the tech industry.<sup>77</sup> Thus, H-1B workers are situated in a vulnerable position, which could further explain the problematic relationship between these workers and their employers.

### C. Displacement of U.S. Workers

It is clear that the H-1B visa program has continued to displace more and more American workers.<sup>78</sup> Analysis from the Economic Policy Institute shows that the top thirty H-1B employers hired around 34,000 H-1B workers in fiscal year 2022, while laying off 85,000 workers during roughly the same period.<sup>79</sup> There are even several reports of American workers who were terminated from their positions and

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<sup>71</sup> See generally Patrick Thibodeau, *Employer Power Over H-1B Workers Could Create Financial Risk*, TECHTARGET (Feb. 15, 2024), <https://www.techtarget.com/searchhrsoftware/news/366570083/Employer-power-over-H-1B-workers-could-create-financial-risk>.

<sup>72</sup> Andrew Kreighbaum, *JPMorgan Retaliated Against Indian H-1B Worker, Lawsuit Says (1)*, BL (Jun. 4, 2024), <https://news.bloomberglaw.com/daily-labor-report/jpmorgan-retaliated-against-indian-h-1b-worker-lawsuit-says>.

<sup>73</sup> *Id.*

<sup>74</sup> *H-1B Specialty Occupations*, *supra* note 26.

<sup>75</sup> *Options for Nonimmigrant Workers Following Termination of Employment*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/working-in-the-united-states/information-for-employers-and-employees/options-for-nonimmigrant-workers-following-termination-of-employment> (last visited May 31, 2025).

<sup>76</sup> Aleksandra Yosifova, *The Aftermath of the Big Tech Layoffs: Who Found a Job and Where?*, 365 DATA SCI. (Oct. 7, 2024), <https://365datascience.com/trending/the-aftermath-of-the-big-tech-layoffs/>.

<sup>77</sup> Cody Corral, *A Comprehensive Archive of 2024 Tech Layoffs*, TECHCRUNCH (Dec. 31, 2024, 11:09 AM), <https://techcrunch.com/2024/12/31/a-comprehensive-archive-of-2024-tech-layoffs/>.

<sup>78</sup> Daniel Costa & Ron Hira, *Tech and Outsourcing Companies Continue To Exploit the H-1B Visa Program at a Time of Mass Layoffs*, ECON. POL'Y INST. (Apr. 11, 2023, 3:41 PM), <https://www.epi.org/blog/tech-and-outsourcing-companies-continue-to-exploit-the-h-1b-visa-program-at-a-time-of-mass-layoffs-the-top-30-h-1b-employers-hired-34000-new-h-1b-workers-in-2022-and-laid-off-at-least-85000-workers/>.

<sup>79</sup> *Id.*

subsequently forced to train immigrant workers who would be assuming their jobs.<sup>80</sup> For example, 250 data systems employees at Disney were informed that they would be laid off in late 2014, and many of these workers reported that they were required to train the immigrant workers who would be replacing them over their last few months of employment.<sup>81</sup> A similar story unfolded at AT&T in 2019.<sup>82</sup> As long as the weaknesses in the H-1B visa system can be exploited, American workers will continue to receive less priority in the job market.

#### *D. Current Reform Proposals*

These issues are not new, and many elected officials have sought to try and address the flaws of the H-1B visa program. For example, since 2007, Democratic Senator Dick Durbin and Republican Senator Chuck Grassley have been advocating for Congress to adopt the H-1B and L-1 Visa Reform Act.<sup>83</sup> This Act, if adopted, would institute higher wage requirements, greater transparency measures, and other provisions aimed at closing loopholes in the H-1B visa program.<sup>84</sup> In particular, it would prioritize H-1B applicants who will be paid at the prevailing wage Level 3 or 4.<sup>85</sup> It would also require employers seeking H-1B employees to post these jobs on a Department of Labor (DOL) website, increase fines for wage violations, and allow the DOL to hire 200 additional employees for the administration of this program.<sup>86</sup>

However, there are many provisions in this bill that fall flat. Specifically, the Act implements restrictions that would make it more difficult for applicants to obtain their H-1B visa status.<sup>87</sup> Currently, H-1B visa applications filed by higher education institutions are not subject to the visa cap.<sup>88</sup> However, this Act would remove this exception, decreasing the amount of H-1B visas that are awarded each year.<sup>89</sup> It would also set a bachelor's degree as a minimum requirement for an H-1B visa, eliminating the USCIS "Three to One" rule that allows applicants to substitute work experience

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<sup>80</sup> See Stef W. Kight, *U.S. Companies Are Forcing Workers to Train Their Own Foreign Replacements*, AXIOS (Dec. 29, 2019), <https://www.axios.com/2019/12/29/trump-att-outsourcing-h1b-visa-foreign-workers>.

<sup>81</sup> Julia Preston, *Pink Slips at Disney. But First, Training Foreign Replacements.*, NEW YORK TIMES (Jun. 3, 2015), <https://www.nytimes.com/2015/06/04/us/last-task-after-layoff-at-disney-train-foreign-replacements.html>.

<sup>82</sup> Kight, *supra* note 80.

<sup>83</sup> Visa Reform Legislation, *supra* note 3.

<sup>84</sup> *Id.*

<sup>85</sup> S. 979, 118th Cong. (2023).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Machailov, *supra* note 39.

<sup>89</sup> *H-1B Cap Season*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations/h-1b-cap-season> (last visited May 31, 2025); S. 979, 118th Cong. (2023).

for their lack of education.<sup>90</sup> These changes, while aimed at protecting American workers, would harm prospective H-1B workers.<sup>91</sup> There are other methods to protect American workers without harming H-1B workers.

#### IV. RECOMMENDATIONS

To protect both American and H-1B workers, the H-1B visa program must be strengthened to reduce exploitation by employers. As previously stated, it is unclear how pronounced the income disparities are between H-1B workers and American workers.<sup>92</sup> Thus, the following solutions will be more tailored to promoting job mobility and security for H-1B workers, and ensuring American workers are not displaced in the process.

First, it is clear that the grace period for laid-off H-1B workers must be extended. Currently, when H-1B visa holders are laid off or terminated from their jobs, they must change their visa status or find a new employer willing to sponsor their visa within sixty days.<sup>93</sup> I propose that this should be increased to at least 180 days. Not only would this provide a greater safety net for H-1B workers who are unexpectedly laid off from their jobs, but it would also provide increased mobility for any H-1B worker that is searching for a new job.<sup>94</sup>

Second, the USCIS should institute more protections for H-1B visa workers unlawfully terminated by their employer. Currently, if an H-1B employee believes they were retaliated against for reporting their employer for an LCA violation, they are potentially able to extend or change their status even after losing their H-1B status.<sup>95</sup> However, this process is often costly, as H-1B workers would need to consult an attorney, and even after doing so, there is no guarantee that the USCIS will grant an exception.<sup>96</sup> I propose that the USCIS should grant an indefinite grace period to any H-1B worker who reports being terminated from their position for reporting an LCA violation during the time that the USCIS is investigating their claim. Further, if a worker is found to have been retaliated against by their employer, they should be given additional time to search for a new job, and the USCIS should ensure that their H-1B visa remains portable even if it was cancelled by their previous employer. These protections would greatly benefit H-1B workers who have to fight an uphill battle

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<sup>90</sup> S. 979, 118th Cong. (2023).

<sup>91</sup> *Id.*

<sup>92</sup> See Anderson, *supra* note 63.

<sup>93</sup> *Options for Nonimmigrant Workers Following Termination of Employment*, *supra* note 75.

<sup>94</sup> See generally Alison Moodie, *Presidential Panel Calls for H-1B Grace Period Extension Amid Layoffs*, BOUNDLESS IMMIGR. INC. (Mar. 7, 2025), <https://www.boundless.com/blog/grace-period-h1b-lay-offs/>.

<sup>95</sup> *Combating Fraud and Abuse in the H-1B Visa Program*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/scams-fraud-and-misconduct/report-fraud/combating-fraud-and-abuse-in-the-h-1b-visa-program> (last visited May 31, 2025).

<sup>96</sup> *Id.*

against their employers, and may discourage employers from taking advantage of their H-1B employees.

Third, the USCIS should give priority to employers that are submitting petitions for workers in occupations and industries that are experiencing worker shortages. When employers are filling out LCAs for the H-1B applicant they are sponsoring, they should also be given the option to provide information on potential shortages that are affecting the occupation or industry they are hiring within. If the DOL confirms this shortage exists, then the applicant should receive greater deference during the application process. This would help diversify the industries that receive H-1B workers, lessening the burden on industries that already employ many H-1B workers, such as tech companies, and could reduce future layoffs of American workers.

These policies would give H-1B workers greater mobility and security, as well as providing them with more freedom and equalizing their status with American workers. As a result, both American and H-1B workers would be placed on an even playing field, reducing further exploitation of this visa class and displacement of American workers.

## V. CONCLUSION

The H-1B visa program is not perfect. But we don't have to restrict this immigration path in order to protect the American workforce. Strengthening protections for H-1B workers is beneficial, not just to protect this class of workers, but to ensure that all workers are being treated fairly and equally by employers.

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**RACING TOWARD REFORM:  
LIMITING NASCAR'S MONOPSONY POWER THROUGH STRUCTURAL CHANGE**

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❖ Note ❖

*Lauren Hadley\**

I. INTRODUCTION

Since its inception in 1948, the France family has ruled NASCAR with an iron fist.<sup>1</sup> As other American professional sports leagues became increasingly democratic through athlete unionization and joint venture structures, NASCAR remained a dictatorship.<sup>2</sup> In 2016, NASCAR granted teams non-permanent charters, similar to franchises, to build equity and encourage investment.<sup>3</sup> Theoretically, the charter agreement gave teams formal power in NASCAR governance by negotiating and bargaining for better terms every few years.<sup>4</sup>

However, during last fall's charter renewal negotiations, it became clear this was not true in practice.<sup>5</sup> On September 6, 2024, NASCAR sent its teams a 105-page take-it-or-leave-it offer with a six-hour deadline.<sup>6</sup> Teams could sign before midnight or risk losing their charters.<sup>7</sup> Thirteen of fifteen teams signed.<sup>8</sup>

In October 2024, the two holdouts, 23XI Racing and Front Row Motorsports,

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\* J.D. Candidate, Class of 2026, University of Illinois College of Law.

<sup>1</sup> S. Joseph Modric, *The Good Ole' Boys: Antitrust Issues in America's Largest Spectator Sport*, 1 DEPAUL J. SPORTS L. CONTEMP. PROBS. 159, 161 (2003).

<sup>2</sup> *See id.*

<sup>3</sup> Tyler M. Helsel, *Not Everyone Qualifies: A Comparative Look at Antitrust Law and Nascar's Charter System*, 28 MARQ. SPORTS L. REV. 235, 235 (2017).

<sup>4</sup> Dustin Long, *NASCAR Announces Charter System for Sprint Cup Team Owners*, NBC SPORTS (Feb. 9, 2016), <https://www.nbcsports.com/nascar/news/nascar-announces-charter-system-for-sprint-cup-team-owners>

<sup>5</sup> *See* Matt Weaver, *NASCAR Makes Bold Move To End Charter Negotiations But Two Teams Didn't Budge*, SPORTSNAUT (Sept. 10, 2024), <https://sportsnaut.com/nascar-charter-update-michael-jordan-denny-hamlin-no-deal/>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

sued NASCAR and its CEO, Jim France, in federal court for antitrust violations.<sup>9</sup> The teams alleged that the France family used NASCAR to acquire and maintain monopsony power over the market for premier stock car racing teams.<sup>10</sup>

This Note argues that NASCAR's unique structure allowed it to monopsonize the market for stock car racing teams' services. Part II discusses NASCAR's past and present economic models and monopsony power under Section 2 of the Sherman Act. Part III analyzes NASCAR's economic model under Section 2 of the Sherman Act and argues its monopsony power is structurally derived. Part IV argues that structural remedies are the best solution to NASCAR's monopsony power.

## II. BACKGROUND

### *A. NASCAR as a Sanctioning Body*

NASCAR was founded in 1948 in Daytona Beach, Florida, by Bill France Sr., a veteran stock car driver, mechanic, and race promoter.<sup>11</sup> With no unifying sanctioning body, stock car racing had descended into chaos and corruption, and was viewed as illegitimate.<sup>12</sup> France started NASCAR to create uniform rules, guaranteed prize money, and a legitimate stock car racing national championship.<sup>13</sup>

France wanted NASCAR to be the dominant sanctioning body in American motorsports. To do so, NASCAR needed to expand beyond traditional dirt tracks. Thus, France created International Speedway Corporation ("ISC") and took it public in 1953 to fund the construction of the asphalt superspeedway Daytona International Speedway and, later, Talladega Superspeedway.<sup>14</sup>

Today, NASCAR is the sole sanctioning body for stock car racing in the United States.<sup>15</sup> NASCAR owns and sanctions four professional stock-car racing series: The Cup Series, the Xfinity Series, the Truck Series, and the ARCA Menards Series.<sup>16</sup> The

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<sup>9</sup> 23XI Racing is owned by NBA legend Michael Jordan; current NASCAR Cup Series driver and three-time Daytona 500 winner Denny Hamlin; and Jordan's longtime business partner, Curtis Polk. Complaint, 2311 Racing LLC v. NASCAR, LLC, No. 3:24-CV-00886-KDB-SCR, (W.D.N.C. filed Oct. 2, 2024).

<sup>10</sup> *Id.*

<sup>11</sup> MARK D. HOWELL, FROM MOONSHINE TO MADISON AVENUE: A CULTURAL HISTORY OF THE NASCAR WINSTON CUP SERIES, 16–17 (Popular Press 1997).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> See International Speedway Corp., 2018 Annual Report 5 (Form 10-K) (Mar. 11, 2019), [https://www.annualreports.com/HostedData/AnnualReports/PDF/NASDAQ\\_ISCA\\_2018.pdf](https://www.annualreports.com/HostedData/AnnualReports/PDF/NASDAQ_ISCA_2018.pdf) [hereinafter 2018 Annual Report].

<sup>15</sup> See HOWELL, *supra* note 11.

<sup>16</sup> *NASCAR Cup Series Schedule 2025*, NASCAR, <https://www.nascar.com/nascar-cup-series/2025/schedule/> (last visited May 31, 2025).

NASCAR Cup Series is its premier series and is considered to be the top level of stock car racing.<sup>17</sup>

### B. NASCAR's Unique Structure

Structurally, NASCAR is unique among American sports leagues.<sup>18</sup> Traditional leagues like the NFL, NBA, NHL, and MLB are unincorporated joint ventures with strong players' unions.<sup>19</sup> Teams govern and split league revenue evenly amongst themselves while the league itself plays an extremely limited role.<sup>20</sup> But in NASCAR, the series has power over everything.<sup>21</sup> NASCAR is a private, for-profit corporation, while NASCAR teams and drivers are independent contractors.<sup>22</sup> As such, unlike traditional joint venture leagues, NASCAR has no obligation to collectively bargain, share revenue, or include teams in governance decisions.<sup>23</sup>

### C. NASCAR's Pre-Charter Economic Model

Before 2016, NASCAR's economic model had been relatively the same since its inception.<sup>24</sup> Teams funded their operations through sponsorships and race prize purses, with no guaranteed revenue from NASCAR.<sup>25</sup> As NASCAR grew, broadcast rights fees constituted a large part of the prize purses.<sup>26</sup> Until 2000, each racetrack negotiated their own broadcast rights deals.<sup>27</sup> For each race, twenty-five percent of the broadcast rights fees went to the teams via the prize purse, sixty-five percent was retained by the track and NASCAR got the remaining ten percent.<sup>28</sup>

At first, networks hesitated to air lengthy NASCAR races flag-to-flag, so broadcast rights fees and prize purses were low.<sup>29</sup> Purses grew when NASCAR pooled its race broadcast rights and quadrupled its rights fee for the 2001 season.<sup>30</sup> However, the

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<sup>17</sup> See HOWELL, *supra* note 11, at 13.

<sup>18</sup> Stephen F. Ross & Stefan Szymanski, *Antitrust and Inefficient Joint Ventures: Why Sports Leagues Should Look More Like McDonald's and Less Like the United Nations*, 16 MARQ. SPORTS L. REV. 213, 216 (2006).

<sup>19</sup> See *id.*

<sup>20</sup> *Id.*

<sup>21</sup> HOWELL, *supra* note 11, at 18.

<sup>22</sup> Ross & Szymanski, *supra* note 18.

<sup>23</sup> See *id.*

<sup>24</sup> Helsel, *supra* note 3, at 240.

<sup>25</sup> *Id.*

<sup>26</sup> See MARK YOST, *THE 200-MPH BILLBOARD: THE INSIDE STORY OF HOW BIG MONEY CHANGED NASCAR* 309 (2007).

<sup>27</sup> *Id.* at 88.

<sup>28</sup> 2018 Annual Report, *supra* note 14, at 61.

<sup>29</sup> SCOTT BEEKMAN, *NASCAR NATION: A HISTORY OF STOCK CAR RACING IN THE UNITED STATES* 99 (2010)

<sup>30</sup> YOST, *supra* note 26, at 309.

distribution percentages per race remained the same.<sup>31</sup> At the time, team costs skyrocketed thanks to technological advances, improved safety standards, and a geographically expanding schedule.<sup>32</sup> Thus, even at the sport's peak, NASCAR teams heavily depended on sponsorship to keep racing.<sup>33</sup> Consequently, teams' finances rose and fell with television ratings and the broader economy.<sup>34</sup> When ratings and consumer spending were high, corporate marketing dollars flooded NASCAR and teams thrived.<sup>35</sup> But when ratings and consumer spending fell, corporations left and teams suffered.<sup>36</sup> Without guaranteed revenue or franchise rights, teams that failed to find sponsors folded, forcing owners to either merge with another team or sell their assets for pennies on the dollar.<sup>37</sup>

#### D. NASCAR's Economic Model Under the Charter System

By 2008, NASCAR's economic model was already faltering as television ratings declined, but the global financial crisis delivered the final blow.<sup>38</sup> With consumer spending, ratings and marketing budgets declining, corporate sponsors fled NASCAR.<sup>39</sup> Making matters worse, the recession devastated NASCAR's backbone: the auto industry.<sup>40</sup> With costs higher than ever and less sponsor and manufacturer support than ever, teams collapsed.<sup>41</sup> Eighteen of the twenty-three full-time 2006 Cup Series teams either cut cars, merged, sold assets, or closed by 2012.<sup>42</sup>

The financial crisis made team owners push NASCAR for a franchise model.<sup>43</sup> In 2014, eighteen NASCAR Cup teams formed the Race Team Alliance (RTA) to discuss

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<sup>31</sup> 2018 Annual Report, *supra* note 14, at 61.

<sup>32</sup> See BEEKMAN, *supra* note 29, at 134–35, 145.

<sup>33</sup> *Id.* at 145–46 (2010).

<sup>34</sup> *Id.*

<sup>35</sup> Jack Gage, *Nascar's Business Wreck*, FORBES (Feb. 20, 2009), [https://www.forbes.com/global/2009/0302/050\\_pileup/](https://www.forbes.com/global/2009/0302/050_pileup/).

<sup>36</sup> *Id.*

<sup>37</sup> Terry Blount, *A Farewell to the King?* ESPN (Dec. 4, 2008), [https://www.espn.com/racing/nascar/cup/columns/story?columnist=blount\\_terry&id=3745914](https://www.espn.com/racing/nascar/cup/columns/story?columnist=blount_terry&id=3745914).

<sup>38</sup> Jerry Bonkowski, *Financial Crisis Hits NASCAR*, STATE J. REG. (Feb. 9, 2009), <https://www.sj-r.com/story/news/2009/02/10/financial-crisis-hits-nascar/42935633007/>.

<sup>39</sup> *Id.*

<sup>40</sup> In 2008, NASCAR had four manufacturers. By 2012 two manufacturers, General Motors and Dodge, a Chrysler subsidiary, had filed for bankruptcy. Dodge left the sport at the end of 2012, leaving General Motors, Ford, and Toyota. *Id.*

<sup>41</sup> BEEKMAN, *supra* note 29, at 145–46.

<sup>42</sup> See Ken Belson, *NASCAR and Its Race Teams Fight Over the Sport's Future*, N.Y. TIMES (May 1, 2024), <https://www.nytimes.com/2024/05/01/business/nascar-racing-teams-charters.html>.

<sup>43</sup> Gage, *supra* note 35.

cost-cutting initiatives and new ways to market the sport.<sup>44</sup> In February 2016, NASCAR announced the Charter system, a compromise between the series and the RTA to give teams more financial stability and make the sport more appealing to sponsors and investors.<sup>45</sup> A charter is the NASCAR equivalent of a franchise.<sup>46</sup> The thirty six chartered cars are guaranteed entry and a share of the prize purse for every NASCAR Cup race.<sup>47</sup> Each team is limited to four chartered cars.<sup>48</sup> Unchartered cars compete for four “open team” spots in every race.<sup>49</sup> If an owner wants to leave the sport or downsize, they can sell or lease their charters, if approved by NASCAR.<sup>50</sup> However, unlike franchises, charters are not permanent.<sup>51</sup> Teams must renegotiate the terms of their charter agreement with NASCAR every few years.<sup>52</sup> If no agreement is reached, NASCAR can seize teams’ charters, discontinue the system, and return to its old economic model.<sup>53</sup>

While the charter system improved the old economic model in some respects, it remained unchanged in others.<sup>54</sup> Even though the teams’ share of broadcast rights fees grew to between thirty and thirty-nine percent, rising costs wreaked havoc on budgets.<sup>55</sup> As a result, sponsors still funded sixty-five to eighty percent of teams’ annual budgets.<sup>56</sup> However, since the charter and its guaranteed entries were not permanent, teams could not promise exposure for their sponsors long-term.<sup>57</sup> Consequently, sponsors were often only willing to sign short-term contracts or provide support for part of the season, forcing many teams to secure multiple new sponsors each year.<sup>58</sup> While charters provided team owners with new marketable equity, it incentivized high

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<sup>44</sup> David Scott, *Alliance Now at 18 Cup Teams*, CHARLOTTE OBSERVER (Aug. 14, 2014), <https://www.charlotteobserver.com/sports/nascar-auto-racing/thatsracin/article9150506.html>.

<sup>45</sup> Long, *supra* note 4.

<sup>46</sup> However, NASCAR insists charters are not functionally equivalent to franchises in so-called stick and ball sports, despite their similarities. Matt Weaver, *NASCAR Steve Phelps Joined Kevin Harvick for Wide Ranging State of the Sport Conversation*, SPORTSNAUT (Aug. 22, 2024), <https://sportsnaut.com/nascar-steve-phelps-joined-kevin-harvick-for-wide-ranging-state-of-the-sport-conversation/>.

<sup>47</sup> Long, *supra* note 4.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Adam Stern, *NASCAR Teams Let Charter Negotiation Window Expire, As Talks Set to Run Into Season*, SPORTS BUS. J. (Feb. 1, 2024), <https://www.sportsbusinessjournal.com/Articles/2024/02/01/nascar-charter-negotiations/>.

<sup>53</sup> *Id.*

<sup>54</sup> See Helsel, *supra* note 3 at 241–43.

<sup>55</sup> Belson, *supra* note 42.

<sup>56</sup> *Id.*

<sup>57</sup> Adam Stern, *NASCAR Teams Dig Deep for Sponsors*, SPORTS BUS. J. (July 17, 2023), <https://www.sportsbusinessjournal.com/Journal/Issues/2023/07/17/Upfront/motorsports/>.

<sup>58</sup> *Id.*

team turnover as costs rose and sponsorship became scarce.<sup>59</sup> Since 2016, more than half the original charter-owning teams left NASCAR, overwhelmingly citing financial difficulties.<sup>60</sup> Despite its benefits, the 2016 charter in combination with rising costs left teams in the same economically volatile position as before.<sup>61</sup>

#### E. The 2025 Charter Negotiations

In November 2023, NASCAR announced its landmark new broadcast rights deal beginning in 2025 that would bring in 1.1 billion U.S. dollars in rights fees per year over seven years.<sup>62</sup> It represented a forty percent increase from NASCAR's previous deal.<sup>63</sup> With their ongoing financial strain, teams wanted a bigger share of the broadcast rights fees and other revenue streams under the 2025 charter agreement.<sup>64</sup> Seemingly, NASCAR and teams agreed on an increased rights fee share relatively early in negotiations.<sup>65</sup> However, the teams' acceptance was contingent on NASCAR making the charter system permanent.<sup>66</sup> NASCAR refused and negotiations stalled for almost two years.<sup>67</sup> NASCAR's subsequent offers included a cost cap, a provision that would allow the France family and private equity firms to purchase charters and a non-disparagement clause.<sup>68</sup> Throughout 2024, team owners expressed fears negotiations would end with a take it or leave it offer from NASCAR.<sup>69</sup> On September 6, 2024, that

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<sup>59</sup> Belson, *supra* note 42.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Jordan Bianchi, *NASCAR's New TV Deal, Explained: Why Amazon, Who Gets What Races and More*, N.Y. TIMES (Nov. 30, 2023), <https://www.nytimes.com/athletic/5100901/2023/11/30/nascar-tv-deal-fox-nbc-amazon-warner-bros-explained/>.

<sup>63</sup> *Id.*

<sup>64</sup> Belson, *supra* note 42.

<sup>65</sup> Jenna Fryer, *Race Teams Ask NASCAR for 'Meaningful' Talks As Their Business Model Dispute Skids Toward Summer*, ASSOCIATED PRESS (May 12, 2023, 10:12 AM), <https://apnews.com/article/nascar-charters-team-owners-letter-43d1892380ecc257d7d550eaaeecd5a5>.

<sup>66</sup> *Id.*

<sup>67</sup> Jenna Fryer, *NASCAR Has Finalized a New Charter Agreement. Team Co-Owner Michael Jordan Won't Sign It*, ASSOCIATED PRESS (Sept. 9, 2024, 4:39 PM), <https://apnews.com/article/nascar-charters-michael-jordan-423f18857461af57fc7da7bd7f2dd130>.

<sup>68</sup> A cost cap would require teams to disclose their finances to NASCAR while the series kept theirs secret from the teams; NASCAR claimed the France family owning a charter was equivalent to Roger Penske, who owns the IndyCar Series and fields an IndyCar team, but Penske was a highly successful team owner for 50 years before he purchased the series in 2019, which is fundamentally different from the France family here. See Jeff Misenti, *NASCAR's Latest Revenue Sharing Offer to Teams Was One of the Worst Yet*, SPORTSNAUT (Jun. 12, 2024), <https://sportsnaut.com/nascars-latest-revenue-sharing-offer-to-teams-was-one-of-the-worst-yet/>.

<sup>69</sup> Jenna Fryer, *Analysis: Race teams Unhappier Than Ever with NASCAR's Latest Offer on Charter Agreement*, ASSOCIATED PRESS (Jun. 10, 2024, 6:58 PM), <https://apnews.com/article/nascar-kyle-larson-20522ecfeedfafca9b68750e585bbce4>.

became a reality.<sup>70</sup> At 5:00 PM, NASCAR sent teams a final offer with a six-hour deadline.<sup>71</sup> Despite later expressing they felt coerced, most teams signed.<sup>72</sup>

The two holdouts were 23XI Racing and Front Row Motorsports (FRM).<sup>73</sup> In October 2024, they sued NASCAR and CEO Jim France alleging violations of Sections 1 and 2 of the Sherman Act.<sup>74</sup> In their Complaint, the teams allege they get thirteen percent of NASCAR's total revenue each year.<sup>75</sup> In March 2025, NASCAR countersued 23XI, FRM, and 23XI co-owner, Curtis Polk for allegedly violating Section 1 of the Sherman Act.<sup>76</sup>

#### *F. Monopsony Power Under the Sherman Act*

Section 2 of the Sherman Antitrust Act prohibits monopolizing, attempting to monopolize, or conspiring to monopolize a market.<sup>77</sup> Courts have interpreted the Sherman Act to also apply to monopsonies.<sup>78</sup> While a monopoly possesses market power on the selling side and traditionally harms consumers, a monopsony possesses market power on the buying side and traditionally harms sellers.<sup>79</sup> In a monopsony a single dominant firm uses its market power to purchase goods or services from sellers at below competitive market prices.<sup>80</sup> Because there are few or no alternative buyers, sellers must accept the monopsony price or leave the market entirely.<sup>81</sup> Market power is measured by a firm's ability to raise prices (monopolies) above or lower prices (monopsonies) below what they would be in a competitive market.<sup>82</sup> Section 2 does not outright ban all monopolies.<sup>83</sup> A section 2 claim requires that the defendant (1) "possessed monopsony power in the relevant markets," (2) "willfully acquired or maintained its monopsony power through exclusionary conduct," and (3) "caused antitrust injury" through such conduct.<sup>84</sup>

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<sup>70</sup> Weaver, *supra* note 5.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Complaint, 2311 Racing LLC v. NASCAR, LLC, No. 3:24-CV-00886-KDB-SCR, (W.D.N.C. filed Oct. 2, 2024).

<sup>75</sup> *Id.*

<sup>76</sup> Counterclaim, 2311 Racing LLC v. NASCAR, LLC, No. 3:24-CV-00886-KDB-SCR, (W.D.N.C. filed Mar. 25, 2025).

<sup>77</sup> 15 U.S.C. § 2.

<sup>78</sup> See *NCAA v. Alston*, 594 U.S. 69, 86 (2021).

<sup>79</sup> *Le v. Zuffa, LLC*, No. 215CV01045RFBBNW, 2023 WL 5085064, at \*39 (D. Nev. Aug. 9, 2023).

<sup>80</sup> PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION*, § 574 (2024).

<sup>81</sup> See *id.*

<sup>82</sup> See *Le*, 2023 WL 5085064, at \*40.

<sup>83</sup> *Id.* at \*\*39–40.

<sup>84</sup> *Id.* at \*40.

### G. Monopsony Power in Professional Sports

Professional sports labor markets are “unique and highly specialized” and, therefore, especially vulnerable to anticompetitive monopsonistic practices.<sup>85</sup> Athletes typically have specialized skill sets focused on a single sport.<sup>86</sup> They invest significant time and money and sacrifice alternative career opportunities to develop them.<sup>87</sup> Because of these sunk costs and with no equivalent substitute buyers, athletes are more likely to accept lower prices for their labor.<sup>88</sup> Thus, leagues can buy athlete labor at monopsony prices.<sup>89</sup>

## III. ANALYSIS

In their lawsuit, the teams allege NASCAR’s economic model is a price-suppression scheme in which NASCAR leverages its dominant market position to buy teams’ services at below competitive market prices so it can reap monopsony profits.<sup>90</sup> This section analyzes this claim under antitrust law and argues NASCAR’s structure is to blame.

### A. Defining the Relevant Market

NASCAR possesses monopsony power in the relevant input market for the of services top-level stock car racing teams in the United States.<sup>91</sup> Monopsony power is demonstrated by defining a relevant market and showing the alleged monopsonist’s percentage share of that market.<sup>92</sup> A relevant market under the Sherman Act encompasses both a product and a geographic market.<sup>93</sup> To define the relevant product market the inquiry is: whether there is a reasonably good substitute buyer to which teams could sell their services if NASCAR began buying them at a lower price.<sup>94</sup>

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<sup>85</sup> Grimes, Warren S., *Buyer Power and Retail Gatekeeper Power: Protecting Competition and the Atomistic Seller*, 72 ANTITRUST L.J. 563 (2005)

<sup>86</sup> *Brown v. Pro Football*, 50 F.3d 1041, 1061 (1995) (Wald, J., dissenting).

<sup>87</sup> *Id.*

<sup>88</sup> Grimes, *supra* note 85.

<sup>89</sup> *See Brown*, 50 F.3d at 1061.

<sup>90</sup> Complaint, 2311 Racing LLC v. NASCAR, LLC, No. 3:24-CV-00886-KDB-SCR, (W.D.N.C. filed Oct. 2, 2024).

<sup>91</sup> *See Le v. Zuffa, LLC*, No. 215CV01045RFBBNW, 2023 WL 5085064, at \*\*39–40 (D. Nev. Aug. 9, 2023).

<sup>92</sup> *Todd v. Exxon Corp.*, 275 F.3d 191, 199 (2d Cir. 2001).

<sup>93</sup> *Le*, 2023 WL 5085064 at \*\*41–42.

<sup>94</sup> *US Airways, Inc. v. Sabre Holdings Corp.*, 938 F.3d 43, 66 (2d Cir. 2019) (“[A] single brand of a product or service may ‘be a relevant market under the Sherman Act’ if no substitute exists for that brand’s products or services”) (citing *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451, 482 (1992)).

Here, there is no reasonably good substitute buyer to which NASCAR teams could sell their services.<sup>95</sup> While other motorsports such as Formula 1 and IndyCar exist, they are not reasonable substitutes because they are neither functionally nor economically interchangeable with NASCAR from the perspective of stock car teams.<sup>96</sup>

First, each series operates within its own distinct technological universe, making teams highly specialized to each series.<sup>97</sup> NASCAR uses closed-wheel stock cars following NASCAR's Gen-7 specifications.<sup>98</sup> In contrast, IndyCar and F1 both use open-wheel, open-cockpit cars, but follow completely different technical specifications.<sup>99</sup> Such stark differences mean teams cannot switch between series without investing significantly in new equipment, infrastructure and personnel retraining to meet the unique demands of the new series.<sup>100</sup> Thus, these steep switching costs and industry-specific skills possessed by teams in each series indicates these series are not substitutes but rather narrowly defined individual markets.<sup>101</sup>

In addition, there are significant structural barriers that make it nearly impossible for NASCAR teams to sell their services to IndyCar or Formula One ("F1").<sup>102</sup> First, IndyCar's charter system caps entries at twenty-seven cars, with only two slots for unchartered cars.<sup>103</sup> Any NASCAR team wanting to compete in IndyCar would have to buy an existing team's charter or compete for the two unchartered entry slots every race.<sup>104</sup> Additionally, a team would need to obtain a Honda or Chevrolet engine lease to even try to qualify as an unchartered entry.<sup>105</sup> However, each manufacturer issues a

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<sup>95</sup> See *Todd*, 275 F.3d at 202.

<sup>96</sup> See *id.*

<sup>97</sup> See Bob Pockrass, *'Wrestling A Bear': Differences Between INDYCAR, NASCAR, and Formula 1 Cars*, FOX SPORTS (Mar. 2, 2025), <https://www.foxsports.com/stories/motor/indycar-nascar-formula-1-different-cars>.

<sup>98</sup> See *id.*

<sup>99</sup> F1 teams individually design, build, and test almost every component of their cars in-house to meet the current FIA technical regulations. Meanwhile, IndyCar is a "spec" series where teams use the same base chassis, a Honda or Chevrolet engine, and technological creativity is limited to suspension dampers. See *id.*

<sup>100</sup> While there are some crossover teams that compete across multiple series (Team Penske, McLaren, Andretti Global), they are rare, typically maintain separate infrastructure and personnel for each series, and are directly funded by auto manufacturers (McLaren and Andretti Global) and or billionaire investors (Team Penske and Andretti Global). See Pockrass, *supra* note 97.

<sup>101</sup> See *Todd v. Exxon Corp.*, 275 F.3d 191, 202 (2d Cir. 2001).

<sup>102</sup> Marshall Pruett, *IndyCar Charter Program Launches After Final Team Owners Sign*, RACER (Sept. 24, 2024), <https://racer.com/2024/09/23/indycar-charter-program-launches-after-final-team-owners-sign/>.

<sup>103</sup> *Id.*

<sup>104</sup> See *id.*

<sup>105</sup> See *Curt and Kevin Talk About Jay Frye to RLL, Grade Teams, and Talk to Jim Michaelian on 50 Years of Long Beach!*, 107.5 THE FAN, at 28:40 (April 1, 2025), <https://open.spotify.com/episode/7ADyCNq5lO8M9FqCtdk8OM?si=adde968fe7d748c5>.

limited number of leases per year and chartered teams have priority.<sup>106</sup> Thus, entry barriers limit IndyCar's feasibility as a reasonable substitute buyer for NASCAR teams.<sup>107</sup>

F1 is even more unrealistic.<sup>108</sup> The grid is capped at twenty-four cars, but the sport has stayed at twenty cars for over a decade.<sup>109</sup> Prospective F1 teams face a lengthy dual-approval process and if approved and must pay a 450 million-dollar anti-dilution fee to join the grid.<sup>110</sup> F1's approval standards are notoriously subjective.<sup>111</sup> Andretti Cadillac's recent bid underscores this.<sup>112</sup> Despite decades of success in IndyCar and other motorsports, F1 initially denied Andretti Cadillac's bid because the team would not bring competitiveness and brand value to F1.<sup>113</sup> After three years and a U.S. Department of Justice Antitrust Division investigation into F1's initial denial of the team's bid, F1 approved Andretti Cadillac to join the grid as an eleventh team.<sup>114</sup> Thus, with these significant financial and structural barriers, IndyCar and F1 are not reasonable substitute buyers of stock car racing teams' services.<sup>115</sup>

### B. Structural Sources of NASCAR's Monopsony Power

With no reasonable substitutes, NASCAR effectively controls the entire market for team participation.<sup>116</sup> NASCAR's dominance allows it to suppress team compensation without fear because teams have no higher-paying rival series to defect to even if they are unhappy.<sup>117</sup> Moreover, this power is not temporary.<sup>118</sup> NASCAR has entrenched its monopsony power through high structural entry barriers so it can

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<sup>106</sup> *See id.*

<sup>107</sup> AREEDA & HOVENKAMP, *supra* note 80, at §§ 506(a), 539(b)(4).

<sup>108</sup> Steven Cole Smith, *Michael Andretti Says He Has Money, Reveals Backup Plan to Get into F1*, AUTOWEEK (Feb. 27, 2022), <https://www.autoweek.com/racing/formula-1/a39252785/micheal-andretti-money-reveals-backup-plan-f1/>.

<sup>109</sup> *Id.*

<sup>110</sup> Phillip Horton, *Cadillac Will Pay \$450 Million Anti-Dilution Fee to Join Formula 1*, AUTOWEEK (Mar. 18, 2025), <https://www.autoweek.com/racing/formula-1/a64218356/cadillac-will-pay-450-million-anti-dilution-fee-join-formula-1/>.

<sup>111</sup> *See* Mike Pryson, *Official Text of F1 Decision Against Michael Andretti's Bid for Entry into Formula 1*, AUTOWEEK (Jan. 31, 2024), <https://www.autoweek.com/racing/formula-1/a46596038/complete-text-of-f1-decision-against-andretti/>.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Nathan Brown, *FOM, FLA Give Cadillac F1 OK to Join Formula 1 Grid in 2026 as Series' 11th Team*, INDIANAPOLIS STAR (Mar. 7, 2025), <https://www.indystar.com/story/sports/motor/2025/03/07/cadillac-f1-gains-formal-approval-join-formula-1-grid-2026-twg-motorsports-general-motors/81945288007/>.

<sup>115</sup> *Todd v. Exxon Corp.*, 275 F.3d 191, 199 (2d Cir. 2001).

<sup>116</sup> *See* *NCAA v. Alston*, 594 U.S. 69, 90 (2021).

<sup>117</sup> *Id.*

<sup>118</sup> *See* *Le v. Zuffa, LLC*, No. 215CV01045RFBBNW, 2023 WL 5085064, at \*\*52–56 (D. Nev. Aug. 9, 2023).

continue suppressing team compensation while deterring any rival series from entering the market.<sup>119</sup> For example, NASCAR controls or restricts access to the key inputs like tracks,<sup>120</sup> teams,<sup>121</sup> drivers,<sup>122</sup> and cars,<sup>123</sup> which a prospective competitor would need to establish a series.<sup>124</sup> Through acquisitions, exclusive dealing clauses, and rules NASCAR imposes high fixed and sunk costs on prospective competitors which deters them from entering the market.<sup>125</sup>

First, NASCAR maintains significant cost advantages over potential rivals by owning racetracks which deters new entry and allows it to impose monopsony prices.<sup>126</sup> NASCAR owns eighteen racetracks through various subsidiaries, such as ISC.<sup>127</sup> Every time a NASCAR-owned series races at a NASCAR-owned track, NASCAR minimizes costs and maximizes revenue by retaining most of the broadcast rights fees for each race.<sup>128</sup> Consequently, compared to prospective rivals, NASCAR can stage races at much lower cost.<sup>129</sup> Even though this structure creates efficiencies

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<sup>119</sup> *See id.*

<sup>120</sup> NASCAR owns various tracks though ISC. For tracks it competes at but does not own, it imposes a covenant not to compete in the sanctioning agreement that for the duration of the contract that bars the track or any third-party promoter from promoting or hosting an event for any series that attempts to “duplicate, emulate, imitate, copy, simulate and/or mimic the NASCAR Cup Series; or uses the same or similar race vehicles, rules, competitors, trademarks, trade dress, and/or “look and feel” of the NASCAR Cup Series.” Sanction Agreement between Nashville Speedway, USA, Inc. and NASCAR Event Mgmt., Inc. for 2021 to 2024 National Association for Stock Car Auto Racing, Inc. NASCAR Cup Series Events, Ex. 10.2 (delivered Jun. 2, 2020), <https://contracts.justia.com/companies/dover-motorsports-inc-1598/contract/120075/>.

<sup>121</sup> The Charter agreement imposes a covenant not to compete and requires teams to compete in every race, which amounts to thirty-seven Cup Series races over thirty-seven weekends per year. *See* Complaint, 2311 Racing LLC v. NASCAR, LLC, No. 3:24-CV-00886-KDB-SCR, (W.D.N.C. filed Oct. 2, 2024).

<sup>122</sup> The 2025 playoff waiver rule penalizes NASCAR Cup Series drivers who miss Cup Series races for non-permissible reasons including, racing in other series. If NASCAR grants a playoff waiver to a driver who misses a race for non-permissible reasons, the driver forfeits all past and future playoff points for the regular season. *See 2025 Rule Changes*, NASCAR, <https://nascar101.nascar.com/2025/01/16/nascar-announces-competition-updates-for-2025-nascar-season/> (last visited May 31, 2025).

<sup>123</sup> Teams allege that all Gen-7 car parts are property of NASCAR and while teams are required to “purchase” the parts from NASCAR for approximately \$3 million NASCAR retains ownership and teams cannot use them in other series. Complaint, 2311 Racing LLC v. NASCAR, LLC, No. 3:24-CV-00886-KDB-SCR, (W.D.N.C. filed Oct. 2, 2024).

<sup>124</sup> *See* *Le v. Zuffa, LLC*, No. 215CV01045RFBBNW, 2023 WL 5085064, at \*\*52–56 (D. Nev. Aug. 9, 2023).

<sup>125</sup> AREEDA & HOVENKAMP, *supra* note 80, at § 768(e) (arguing raising rivals costs results in some level of market foreclosure and amounts to exclusionary conduct).

<sup>126</sup> *Id.*

<sup>127</sup> *See List of NASCAR Tracks*, NASCAR, <https://www.nascar.com/tracks/> (last visited May 31, 2025).

<sup>128</sup> *See* 2018 Annual Report, *supra* note 14, at 61.

<sup>129</sup> *See* AREEDA & HOVENKAMP, *supra* note 80, at § 420(c).

for NASCAR, it raises costs for prospective rivals.<sup>130</sup> Unlike NASCAR, a rival series would have to invest significant capital to buy their own tracks, split revenue with independent track promoters, or pay NASCAR to race at one of their tracks.<sup>131</sup> Thus, high fixed and sunk costs deter rival series from entering the market at all because it would be economically irrational.<sup>132</sup> Since it does not fear a new rival will enter the market and compensate teams competitively, NASCAR can impose monopsony prices.<sup>133</sup>

NASCAR's ability to impose monopsony prices, in turn, reinforces teams' economic dependency.<sup>134</sup> Because NASCAR's below-market revenue share does not cover team operating costs, teams rely on sponsors for most of their funding.<sup>135</sup> Sponsors want the national exposure guaranteed by a charter.<sup>136</sup> Thus, a team's survival is directly linked to charter ownership.<sup>137</sup> NASCAR retains unilateral power to revoke the charters and discontinue the system at will.<sup>138</sup> Without charters, teams have no guaranteed entry, no accrued equity value, and limited sponsorship opportunities.<sup>139</sup> NASCAR uses this as leverage to force teams to accept one-sided charter terms including covenants not to compete.<sup>140</sup> Over time, this structure traps teams in a cycle of dependency that entrenches NASCAR's monopsony power and keeps team compensation permanently suppressed.<sup>141</sup>

The 2025 charter negotiations exemplified NASCAR's leverage.<sup>142</sup> In September 2024, NASCAR sent teams a 105-page final offer and gave teams six hours to sign or risk losing their charters.<sup>143</sup> Ultimately, thirteen of fifteen teams signed.<sup>144</sup> In the agreement, NASCAR imposed several terms that reinforce its monopsony power, including a covenant not to compete, a reciprocal waiver of antitrust claims and a non-

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<sup>130</sup> *Id.* at § 768(e).

<sup>131</sup> *See id.*

<sup>132</sup> *Id.* at § 420(a) (“[E]ntry will not occur at all when the entrant’s short-run marginal costs exceed the incumbent’s short-run profit maximizing price.”).

<sup>133</sup> *See Le v. Zuffa, LLC*, No. 215CV01045RFBBNW, 2023 WL 5085064, at \*\*52–56 (D. Nev. Aug. 9, 2023).

<sup>134</sup> *See Belson, supra* note 42.

<sup>135</sup> *Id.*

<sup>136</sup> *See YOST, supra* note 26, at 134.

<sup>137</sup> *See Order Granting Motion for Preliminary Injunction*, 2311 Racing LLC v. NASCAR, LLC, No. 3:24-CV-00886-KDB-SCR, (W.D.N.C. filed Dec. 18, 2024).

<sup>138</sup> Stern, *supra* note 52.

<sup>139</sup> *See Le*, 2023 WL 5085064 at \*\*61–69 (discussing Zuffa’s use of comparable leveraging tactics to reinforce its monopsony power over MMA fighters).

<sup>140</sup> *See Complaint*, 2311 Racing LLC v. NASCAR, LLC, No. 3:24-CV-00886-KDB-SCR, (W.D.N.C. filed Oct. 2, 2024).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> Fryer, *supra* note 67.

<sup>144</sup> *Id.*

disparagement clause.<sup>145</sup> While these provisions may be typical and unproblematic in competitive markets, they have a fundamentally different effect in a nonopsonized market with a single dominant buyer.<sup>146</sup> In a competitive market, such terms serve legitimate business purposes such as protecting trade secrets and investments.<sup>147</sup> However, in NASCAR's single-buyer market, these provisions serve no legitimate business interest.<sup>148</sup> Instead, they operate solely to entrench NASCAR's monopsony power by foreclosing exit options, insulating the series from legal scrutiny, and suppressing public criticism.<sup>149</sup> Thus, NASCAR uses to charter provisions to preserve its structural dominance over the teams.<sup>150</sup>

#### IV. RECOMMENDATIONS

##### *A. A Remedy Should Go Beyond Enjoining the Anticompetitive Charter Terms*

While striking down the anticompetitive charter provisions would provide some relief to teams, it would have little effect on the structure of economic dependency that fuels NASCAR's monopsony power.<sup>151</sup> Unlike recent NCAA cases, where enjoining specific rules effectively eliminated monopsony pricing, NASCAR's monopsony power is more structural than contractual.<sup>152</sup> The backbone of the NCAA's monopsony were rules that horizontally restrained competition between schools for athletes' services.<sup>153</sup> Every enjoined restraint or rule change opened a new dimension of competition among schools for athletes' services, and athlete compensation rose quickly.<sup>154</sup> In contrast, NASCAR is a single dominant buyer with no competitors, and the restraints imposed by the charter are vertical.<sup>155</sup> Thus, unlike the NCAA cases, eliminating the anticompetitive charter provisions will not immediately unlock an existing highly competitive market and raise compensation

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<sup>145</sup> Complaint, 2311 Racing LLC v. NASCAR, LLC, No. 3:24-CV-00886-KDB-SCR, (W.D.N.C. filed Oct. 2, 2024).

<sup>146</sup> See *Le*, 2023 WL 5085064 at \*\*57–62.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> NCAA v. Alston, 594 U.S. 69, 86 (2021); Ohio v. NCAA, 706 F. Supp. 3d 583 (N.D.W. Va. 2023); Pavia v. NCAA, 760 F. Supp. 3d 527 (M.D. Tenn. 2024).

<sup>152</sup> *Alston*, 594 U.S. at 92–93.

<sup>153</sup> *Id.*

<sup>154</sup> Jake Fischer, 'It's the Wild, Wild West': NIL Turning College Hoops Business Upside Down, BLEACHER REPORT (July 26, 2022), <https://bleacherreport.com/articles/10030809-its-the-wild-wild-west-nil-turning-college-hoops-business-upside-down>.

<sup>155</sup> Complaint, 2311 Racing LLC v. NASCAR, LLC, No. 3:24-CV-00886-KDB-SCR, (W.D.N.C. filed Oct. 2, 2024).

quickly.<sup>156</sup> Even if it reduces some entry and exit barriers, NASCAR's scale, cost advantages and brand entrenchment disincentivize new entrants.<sup>157</sup> Investors have little incentive to spend significant capital to start a series that would almost certainly fail.<sup>158</sup>

Moreover, even the most passionate potential new entrants, NASCAR team owners, are deterred from competing against NASCAR by historical failure.<sup>159</sup> At one time, IndyCar rivaled F1 as the most popular motorsport in the world.<sup>160</sup> However, in 1996, disgruntled team owners and Tony George, then the sport's most powerful figure at the time, split IndyCar into two competing series.<sup>161</sup> Consequently, American open-wheel racing's mainstream popularity nosedived and has never recovered.<sup>162</sup> In light of this, NASCAR teams see splitting off not merely as a financial risk but as an existential threat to stock car racing.<sup>163</sup> Thus, even if teams were unhappy with NASCAR's monopsony prices and free to leave without the charter restraints, structural market realities trap teams in NASCAR.<sup>164</sup>

### B. Teams Should Be Considered Legitimate Franchisees

Given the structural nature of NASCAR's monopsony, traditional antitrust remedies targeting contractual restraints are insufficient.<sup>165</sup> While traditional remedies might temporarily reduce specific abuses of monopsony power, they cannot change the underlying economic structure that causes them.<sup>166</sup> Real reform should address the economic dependency built into NASCAR's economic model.<sup>167</sup> Accordingly, a structural remedy is necessary to reduce NASCAR's monopsony power.<sup>168</sup>

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<sup>156</sup> See Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 308 (1991).

<sup>157</sup> AREEDA & HOVENKAMP, *supra* note 80, at §§ 420(a), 420(b).

<sup>158</sup> See *id.*

<sup>159</sup> Jordan Bianchi & Jeff Gluck, *Inside NASCAR's Unsettled Charter Negotiations: We're All Not Aligned, and That's Not Good*, NY TIMES (Apr. 30, 2024), <https://www.nytimes.com/athletic/5444573/2024/04/30/nascar-charter-negotiations/>.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> AREEDA & HOVENKAMP, *supra* note 80, at § 653(b)(2) ("Where the prohibited conduct is discrete and well defined, a prohibitory injunction may be sufficient to remedy the problem, particularly where it is clear that the defendant is unlikely to exercise its market power in other ways.").

<sup>166</sup> See *id.*

<sup>167</sup> *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972) ("The relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition.'") (quoting *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961)).

<sup>168</sup> *Id.* (noting that district courts have broad discretion to impose remedies that fit the special needs of individual cases).

Here, the appropriate structural remedy is for a court to force NASCAR to treat the charters more like traditional franchises.<sup>169</sup> Structurally, NASCAR already functions like a franchised league.<sup>170</sup> Like franchises in the NFL and other leagues, NASCAR teams are economically locked into the series and heavily depend on collective revenue streams like broadcast rights fees.<sup>171</sup> NASCAR enforces similarly extensive competition rules, dictates the schedule, and limits market entry and team growth by imposing charter caps.<sup>172</sup> Despite their shared characteristics, NASCAR classifies teams as independent contractors rather than franchisees.<sup>173</sup> Thus, NASCAR teams lack the long-term stability, governance rights, and bargaining power enjoyed by franchisees even though they occupy structurally equivalent positions.<sup>174</sup> Consequently, NASCAR can maintain and expand its monopsony power over teams.<sup>175</sup>

An effective remedy for NASCAR has two components. First, Charters must be permanent, transferable, and only revocable in extreme circumstances. Permanent charters give teams long-term equity and prevent NASCAR from leveraging revocation to impose monopsony prices and other anticompetitive terms. Second, revenue share percentages must keep pace with rising operating costs and broadcast rights fees. Teams became dependent on sponsors because operating costs rose faster than revenue share. If revenue share kept pace with operating costs, teams would be less vulnerable during economic downturns when sponsorship is scarce. While teams would remain economically dependent on NASCAR, it would be more stable and predictable than sponsorship reliance. Overall, these reforms would enhance team financial stability, reduce turnover, and strengthen fan loyalty by preserving continuity and giving more teams resources to compete.

### C. *NASCAR Should Not Be Forced to Divest From ISC*

Treating teams more like franchisees aligns traditional structural antitrust remedies like divestiture but fits the specific needs of the series.<sup>176</sup> Here, an individualized structural remedy is necessary because divestiture is inappropriate.<sup>177</sup> Even if forcing NASCAR to divest from ISC would reduce NASCAR's market power, it is an

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<sup>169</sup> *Id.*

<sup>170</sup> Helsel, *supra* note 3, at 241–42.

<sup>171</sup> Belson, *supra* note 42.

<sup>172</sup> *See* Complaint, 2311 Racing LLC v. NASCAR, LLC, No. 3:24-CV-00886-KDB-SCR, (W.D.N.C. filed Oct. 2, 2024).

<sup>173</sup> *Id.*

<sup>174</sup> *See* Helsel, *supra* note 3, at 241–42.

<sup>175</sup> *See* Le v. Zuffa, LLC, No. 215CV01045RFBBNW, 2023 WL 5085064, at \*\*57–62 (D. Nev. Aug. 9, 2023).

<sup>176</sup> *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972).

<sup>177</sup> *Id.*

inappropriate remedy because it would harm the sport overall.<sup>178</sup> First, few investors outside of racing series are interested in owning large speedways as they sit empty most of the year since they financially depend on being scheduled by a series like NASCAR and IndyCar.<sup>179</sup> Without ISC's ownership and support, many tracks would likely close.<sup>180</sup> Thus, despite its risks, ISC ownership likely maximizes the number of available tracks.<sup>181</sup> Moreover, if NASCAR were forced to divest from ISC, it would lose its cost advantage and likely pass its increased costs onto the teams, exacerbating their economic dependency.<sup>182</sup> Thus, a structural remedy that preserves NASCAR's vertically integrated efficiencies but corrects its economic leverage over teams is a more appropriate and effective remedy than divestiture.<sup>183</sup>

## V. CONCLUSION

As NASCAR's case moves toward trial in December 2025, it is unclear what courts will decide. *NCAA v. Alston* and *Cung Le v. Zuffa* indicate that courts are concerned about excessive buyer power in sports labor markets, but neither provides definitive solutions.<sup>184</sup> However, the courts should rule in favor of the teams and impose unique structural remedies to ensure the long-term stability of the sport.

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<sup>178</sup> See *United States v. Microsoft Corp.*, 253 F.3d 34, 106 (2001).

<sup>179</sup> AREEDA & HOVENKAMP, *supra* note 80, at § 420(a).

<sup>180</sup> See *id.*

<sup>181</sup> See *id.* at § 420(c)

<sup>182</sup> *Id.*

<sup>183</sup> *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972).

<sup>184</sup> *NCAA v. Alston*, 594 U.S. 69, 86 (2021); *Le v. Zuffa, LLC*, No. 215CV01045RFBBNW, 2023 WL 5085064, at \*39 (D. Nev. Aug. 9, 2023).

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**WHICH SIDE ARE YOU ON:  
CEMEX, MANDATORY BARGAINING, AND THE FUTURE OF ORGANIZED LABOR**

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❖ Note ❖

*Jarrett Krous\**

I. INTRODUCTION

Under President Joe Biden, the frequency of union elections exploded—election petitions increased by roughly a quarter in 2024 compared to 2022 and 2023,<sup>1</sup> and were double those filed in 2021.<sup>2</sup> While many factors have likely contributed to the rise in union elections,<sup>3</sup> the August 2023 National Labor Relations Board (“NLRB”) decision in *Cemex Construction Materials Pacific, LLC* plays a major role.<sup>4</sup>

A three-to-one ruling of the NLRB Board, *Cemex* lowered requirements for the issuance of mandatory bargaining orders.<sup>5</sup> Departing from previous standards adopted fifty years ago, the Board held that any unfair labor practice could justify a bargaining order.<sup>6</sup> Regardless of whether the union achieved (or would have achieved) a majority vote in the election, once a bargaining order is issued, employers must open good-faith negotiations with a representative, usually culminating in the establishment of a union.<sup>7</sup>

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\* J.D. Candidate, Class of 2027, University of Illinois College of Law.

<sup>1</sup> *Number of Elections Held Per FY*, NAT’L LAB. REL. BD., <https://www.nlr.gov/reports/nlr-case-activity-reports/representation-cases/election/election-statistics> (last visited May 24, 2025).

<sup>2</sup> *Id.*

<sup>3</sup> *See, e.g., 16 Million Workers Were Unionized in 2024*, ECONOMIC POLICY INSTITUTE (Jan. 28, 2025), <https://www.epi.org/publication/millions-of-workers-millions-of-workers-want-to-join-unions-but-couldnt/>.

<sup>4</sup> Gabriel Thompson, *A Landmark Federal Ruling Against Union Busting Has Boosted Organizing*, THE AMERICAN PROSPECT (Aug. 28, 2024), <https://prospect.org/labor/2024-08-28-landmark-federal-ruling-union-busting-boosted-organizing/>.

<sup>5</sup> *Cemex Constr. Materials Pac., LLC and Int’l Bhd. Teamsters*, 372 N.L.R.B. No. 130, slip op. at 25 (2023).

<sup>6</sup> *Id.*

<sup>7</sup> *Bargaining in Good Faith with Employees/Union Representative*, NAT’L LAB. REL. BD., <https://www.nlr.gov/about-nlr/rights-we-protect/thelaw/bargaining-in-good-faith-with-employees-union-representative> (last visited May 24, 2025).

This new precedent has set a strict standard for employers to be on their best behavior during union elections.<sup>8</sup> Any unfair labor practice may be used as evidence of a fraudulent election, at which point the NLRB can step in and order the bargaining process to begin.<sup>9</sup> Yet this expansion of union power has not gone unquestioned, as the new decision has opened the NLRB to criticism for trampling employers' rights.<sup>10</sup> *Cemex* has been appealed and could potentially make its way to the Supreme Court.<sup>11</sup> All the while, the political future of the NLRB itself sits in doubt.<sup>12</sup> The continued existence of *Cemex* and the expansion of union power it represents may well become a climactic confrontation between the interests of labor and those of employers that will set the tone for workers' rights in the twenty-first century.<sup>13</sup>

This Note will analyze the changes to mandatory bargaining orders prompted by *Cemex*, and how the *Cemex* decision sheds light on pressing issues in labor law and with the NLRB. Part II of this Note will explore the history of mandatory bargaining orders in the National Labor Relations Act and the back-and-forth history of the NLRB's approach toward bargaining orders.<sup>14</sup> Part III analyzes the implications of *Cemex* for the labor movement, as well as the challenges currently facing the continued existence of the *Cemex* Doctrine, primarily in the form of a potential Supreme Court appeal.<sup>15</sup> Part IV argues why *Cemex* should survive a Supreme Court challenge, as well as how the labor movement can make the most of *Cemex* rules while they still exist.<sup>16</sup>

## II. BACKGROUND

### *A. Bargaining Orders in the National Labor Relations Act*

The National Labor Relations Act, passed on July 5, 1935, established the NLRB and the basis for union certification.<sup>17</sup> Most relevant to bargaining orders are sections

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<sup>8</sup> See *Cemex*, 372 N.L.R.B. 130 at 36.

<sup>9</sup> *Cemex*, 372 N.L.R.B. 130 at 26.

<sup>10</sup> See Daniel Pasternak & Scott Held, *The NLRB and Employers' Terrible, Horrible, No Good, Very Bad Week: A Deep-Dive Analysis of Recent Activist NLRB Decisions (US)*, SQUIRE PATTON BOGGS (Sept. 14, 2023), <https://www.employmentlawworldview.com/the-nlr-and-employers-terrible-horrible-no-good-very-bad-week-a-deep-dive-analysis-of-recent-activist-nlr-decisions-us/>.

<sup>11</sup> Petition for Review of Nat'l Lab. Rel. Bd. Decision and Order, *Cemex Constr. Materials Pac., LLC v. Nat'l Lab. Rel. Bd.*, No. 23-1232 (9th Cir. Sept. 30, 2023).

<sup>12</sup> See, e.g., Peter Rich, *The Pendulum Swings – Changes at the NLRB Under the Trump Administration*, JD SUPRA (Mar. 10, 2025), <https://www.jdsupra.com/legalnews/the-pendulum-swings-changes-at-the-nlr-3537341/>.

<sup>13</sup> See, e.g., Matt Breunig, *Acting General Counsel Rescinds Long List of Biden-Era Guidance*, NLRB EDGE (Feb. 17, 2025), <https://www.nlrbedge.com/p/acting-general-counsel-rescinds-long>.

<sup>14</sup> See *infra* Part II.

<sup>15</sup> See *infra* Part III.

<sup>16</sup> See *infra* Part IV.

<sup>17</sup> National Labor Relations Act, ch. 372, 49 Stat. 449 (1935); see also 29 U.S.C. §§ 151–169 (2023).

8(1) and 9I.<sup>18</sup> Section 8(1) states that unfair labor practices may take the form of a refusal to initiate collective bargaining or attempts to hinder workers from forming unions.<sup>19</sup> Originally, Section 9(c) mandated that the Board had the power to investigate petitions for unionization, and could “take a secret ballot of employees, or utilize any other suitable method” to verify whether a union enjoyed majority support.<sup>20</sup> Once such a result was found, the employer was obligated to initiate bargaining negotiations with the union.<sup>21</sup>

This Act empowered the NLRB to certify unionization through whatever means they desired.<sup>22</sup> Employers immediately criticized the NLRB’s perceived prioritization of unions.<sup>23</sup> In 1939, the Board willingly moved away from a more expansive reading of Section 9(c) in *Cudahy Packing Company* and *United Packing House Workers Local Industrial Union*.<sup>24</sup> With the still-nascent Board under immense political pressure, they signaled in *Cudahy* that only elections would be sufficient to confirm the existence of a union.<sup>25</sup> The 1947 Taft-Hartley amendments cemented this change, mandating that the Board must “direct an election by secret ballot and . . . certify the results thereof.”<sup>26</sup>

#### B. *The Joy Silk Decision and its Descendants*

The NLRB turned to the language of section 8 to justify stepping into the union formation process.<sup>27</sup> In 1949, the Board issued its decision *Joy Silk Mills, Inc.* and *United Textile Workers of America, A.F.L.*, barring employers from refusing to bargain when presented with proof of a union’s majority support, even without an election, unless the employer demonstrably refused in good faith.<sup>28</sup> As the Board noted, biding for time to garner more support was indicative of a bad faith justification for refusal.<sup>29</sup> If the Board found the employer to be acting in bad faith, they could step in and issue a

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<sup>18</sup> National Labor Relations Act, ch. 372, §§ 8(1), 9(c), 49 Stat. 449, 452–53 (1935). Codified at 29 U.S.C. §§ 158(a), 159(c) (2023).

<sup>19</sup> 29 U.S.C. §§ 158(a)(1), 158(a)(5).

<sup>20</sup> National Labor Relations Act, ch. 372, § 9(c), 49 Stat. 449, 453 (1935). *National Labor Relations Act: New Deal Legislation (July 5, 1935)*, PEPP. UNIV. SCH. OF PUB. POL’Y, <https://publicpolicy.pepperdine.edu/academics/research/faculty-research/newdeal/legislation/nlr070535.htm> (last visited May 24, 2025).

<sup>21</sup> Leslie Sanmarco, *Remedial Collective Bargaining Orders: Compelling Employer Recognition Where the Union Has Never Attained a Majority*, 15 J. MARSHALL L. REV. 649, 651–52 (1982).

<sup>22</sup> Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 505-07 (1993).

<sup>23</sup> *Id.* at 508-10.

<sup>24</sup> *Cudahy Packing Co.*, 13 N.L.R.B. 526 (1939); see Becker, *supra* note 22, at 506–10.

<sup>25</sup> Becker, *supra* note 22, at 508–11.

<sup>26</sup> 29 U.S.C. § 159(c)(1)(B).

<sup>27</sup> *Cemex Constr. Materials Pac., LLC and Int’l Bhd. Teamsters*, 372 N.L.R.B. 130, slip op. at 19 (2023); 29 U.S.C. §§ 158(a)(1), 158(a)(5).

<sup>28</sup> *Joy Silk Mills, Inc. and United Textile Workers Am., A.F.L.*, 85 N.L.R.B. 1263, 1264 (1949).

<sup>29</sup> *Id.* at 1265.

mandatory bargaining order.<sup>30</sup> This meant that many unionization campaigns could sidestep the election process through card checks, where employees sign cards certifying their interest in a union.<sup>31</sup> If an employer refused in bad faith to accept the card checks (or some similar method), the Board could issue a bargaining order in response, forcing the employer to begin negotiations with the union representatives.<sup>32</sup>

Because these bargaining orders were issued in response to an unfair labor practice, they were issued under Section 10(c) rather than Section 9(c).<sup>33</sup> This allowed the Board to avoid the Taft-Hartley requirement that elections are the sole way to form a union.<sup>34</sup> Section 10(c) grants the Board authority, upon a finding of any unfair labor practices, to “require[e] [any person named in the complaint] to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this Act.”<sup>35</sup> Besides bargaining orders, Board orders commonly require the reinstatement of former employees as the simplest remedy to many unfair labor practices.<sup>36</sup> Through the Section 10(c) loophole, the Board was empowered to issue bargaining orders, so long as some sort of unfair labor practice meeting the *Joy Silk* standard had occurred.

While this new standard was friendly to unions, the Board struggled to adequately implement it.<sup>37</sup> Complainants had particular difficulty proving employers’ subjective state of mind.<sup>38</sup> Twenty years after *Joy Silk*, in 1969, the Supreme Court addressed this concern—issuing a new standard for determining when an MBO is necessary.<sup>39</sup> In *N.L.R.B. v. Gissel Packing Co.*, the Court held that when the employer committed ULPs that were so egregious that no election or rerun would be fair, the Board “should issue” an MBO.<sup>40</sup> In other circumstances, i.e., those where the effects of ULPs were not quite as pervasive, the Court determined that a number of factors could be consulted: whether the union at one point had a majority, the extent of the unfair labor practices, impact of those practices on the election outcome, and the likelihood that the unfair

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<sup>30</sup> *Id.* at 1264–65.

<sup>31</sup> Grace DuBois, comment, *Jumping for Joy Silk: How the Revival of a Mid-Century Labor Union Organizing Doctrine Would Increase Cost Efficiency for the National Labor Relations Board*, 75 ADMIN L. REV. 159, 163 (2023).

<sup>32</sup> *Joy Silk Mills, Inc.*, 85 N.L.R.B. 1263, 1264, 1293 (1949).

<sup>33</sup> National Labor Relations Act, ch. 372, § 10(c), 49 Stat. 449, 454 (1935). Codified at 29 U.S.C. § 160(c) (2023).

<sup>34</sup> 29 U.S.C. § 159(c)(1)(B).

<sup>35</sup> National Labor Relations Act, ch. 372, § 10(c), 49 Stat. 449, 454 (1935). Codified at 29 U.S.C. § 160(c) (2023).

<sup>36</sup> *Id.*

<sup>37</sup> Brian J. Petruska, *Adding Joy Silk to Labor’s Reform Agenda*, 57 SANTA CLARA L. REV. 97, 104 (2017).

<sup>38</sup> *Cemex*, 372 N.L.R.B. 130 at 23.

<sup>39</sup> *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575 (1969).

<sup>40</sup> *Id.* at 614–15.

labor practices might be repeated.<sup>41</sup> Generally speaking, however, the Court held that MBOs were inappropriate outside some significant violation by the employer.<sup>42</sup>

*Gissel* severely curtailed *Joy Silk*.<sup>43</sup> Two years later, the Board issued a decision officially overturning the *Joy Silk* standard.<sup>44</sup> In *Linden Lumber Division, Summer & Co. and Truck Drivers Union Local No. 413*, the Board declared it would not “reenter the ‘good-faith’ thicket of *Joy Silk*,” instead stating that employers should not be punished for refusing any sort of proof beside an election to show that the union had achieved a majority.<sup>45</sup> The decision eventually made its way to the Supreme Court, where the Court reaffirmed the Board’s *Linden Lumber* standard as a reasonable interpretation of the NLRA.<sup>46</sup> The Board was no longer allowed to enforce card checks or similar methods outside of particularly extreme examples; the Court stated that if the employer’s violations were merely “limited,” a bargaining order would be rarely necessary.<sup>47</sup>

### C. *Cemex and the Reexamination of Bargaining Orders*

This standard remained unchanged for almost fifty years, until the Board’s 2023 decision, *Cemex Construction Materials Pacific, LLC and Truck Drivers Union Local No. 413*. *Cemex* concerned cement drivers in Ventura County, California who sought to unionize.<sup>48</sup> *Cemex* quickly organized a campaign to sway the drivers against the union.<sup>49</sup> The Administrative Judge recommended setting aside the election results on account of the numerous unfair labor practices committed by *Cemex*, but per *Gissel*, thought that these violations were insufficient to justify a bargaining order.<sup>50</sup> This was primarily due to the “lack of dissemination of knowledge of [*Cemex*]’s coercive conduct among unit employees.”<sup>51</sup> The Board disagreed, found that *Linden Lumber* was too constraining, and overturned *Linden Lumber* as a result.<sup>52</sup>

Instead, the Board adopted a broader standard.<sup>53</sup> When “the employer commits an unfair labor practice that requires setting aside the election, the petition . . . will be

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<sup>41</sup> *Id.* at 614.

<sup>42</sup> *Id.* at 615.

<sup>43</sup> See Petruska, *supra* note 37, at 112.

<sup>44</sup> *Linden Lumber Div., Summer & Co., and Truck Drivers Union Local No. 413*, 190 N.L.R.B. 718, 721 (1971).

<sup>45</sup> *Id.*

<sup>46</sup> *Linden Lumber Div., Summer & Co. v. N.L.R.B.*, 419 U.S. 301, 309-10 (1974).

<sup>47</sup> *Id.* at 305.

<sup>48</sup> *Cemex Constr. Materials Pac., LLC and Int’l Bhd. Teamsters*, 372 N.L.R.B. 130, slip op. at 2 (2023).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 1, 14.

<sup>51</sup> *Id.* at 14.

<sup>52</sup> *Id.* at 24.

<sup>53</sup> *Id.* at 25.

dismissed, and the employer will be subject to a remedial bargaining order.”<sup>54</sup> An employer may also violate the new *Cemex* standard by “refusing to recognize, upon request, a union that has been designated as Section 9(a) representative by the majority of employees in an appropriate unit unless the employer promptly files” an election petition.<sup>55</sup>

These two expansions of the already-existing *Gissel* standard radically increased the number of situations where bargaining orders could potentially be granted.<sup>56</sup> The new standard also goes well beyond *Joy Silk*; there is no need to show bad faith, nor does the union need to show it ever actually had majority support.<sup>57</sup> Because *Cemex* had committed a variety of unfair labor practices that justified setting aside an election, the Board found that a mandatory bargaining order was proper and issued one.<sup>58</sup> Following the decision, *Cemex* appealed to the Ninth Circuit, where the case was deferred to a later date awaiting the conclusion of a recent case dealing with the ability of the NLRB to administer financial remedies.<sup>59</sup>

While the *Cemex* appeal is pending, NLRB is experiencing a political crisis of its own. On January 27, 2025, President Donald Trump fired Gwynne Wilcox from her position on the NLRB Board,<sup>60</sup> claiming the “aims and purposes of the Administration with respect to the work on the Board can be carried out most effectively with personnel of my own selection.”<sup>61</sup> In March 2025, the U.S. District Court for the District of Columbia declared that Wilcox remains a member of the Board and found her dismissal unlawful.<sup>62</sup> Yet, on appeal, the Supreme Court declined to reinstate Wilcox to the Board in a 6-3 decision.<sup>63</sup> The move has caused chaos, denying the Board a quorum.<sup>64</sup> William Cowen, the acting General Counsel of the NLRB, has also issued new guidance to the agency, including rescinding a memo offering guidance on how

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 26.

<sup>57</sup> *Id.* at 24-25.

<sup>58</sup> *Id.* at 40-41.

<sup>59</sup> Daniel Wiessner, *NLRB, Macy’s Duel Over US Supreme Court Ruling’s Impact on Agency Powers*, REUTERS (Aug. 13, 2024, 11:29 AM), <https://www.reuters.com/legal/government/nlr-macys-duel-over-us-supreme-court-rulings-impact-agency-powers-2024-08-13/>; Int’l Union of Operating Eng’rs, *Stationary Eng’rs, Loc. 39 v. Nat’l Lab. Rels. Bd.*, 127 F.4th 58, 68 (9th Cir. 2025).

<sup>60</sup> *Court Finds That Trump’s Termination of NLRB Member Gwynne Wilcox Was Unlawful and Void*, OFF. ATTORNEY GEN. (Mar. 7, 2025), <https://oag.ca.gov/news/press-releases/court-finds-trump%E2%80%99s-termination-nlr-member-gwynne-wilcox-was-unlawful-and-void>.

<sup>61</sup> Matt Breunig, *Read the Trump Email Firing Member Wilcox and GC Abruzzo*, NLRB EDGE (Jan. 30, 2025), <https://www.nlrbedge.com/p/read-the-trump-email-firing-member>.

<sup>62</sup> Robert Iafolia, *Fired NLRB Member Reinstated in Decision Nixing Trump Move (4)*, BLOOMBERG LAW (Mar. 6, 2025, 5:39 PM), <https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberglaw-news/XD6FLDI0000000>.

<sup>63</sup> *See* *Trump v. Wilcox*, 145 S.Ct. 1415 (2025)

<sup>64</sup> Alejandro Agustin Ortiz, *Trump’s Attempt to Deride NLRB Won’t Stop Power of Collective Actions*, ACLU (Mar. 21, 2025), <https://www.aclu.org/news/racial-justice/trumps-attempt-to-deride-nlr-wont-stop-power-of-collective-actions>.

best to interpret *Cemex*.<sup>65</sup> With the aforementioned changes and uncertainty, the future of the *Cemex* decision may seem unsettled.

### III. ANALYSIS

The *Cemex* decision bodes well for the labor movement in the face of the Trump administration's anti-labor push.<sup>66</sup> The sharp uptick in employer-filed election petitions provides strong evidence thereof; in the nine years preceding *Cemex*, the NLRB oversaw an average of sixteen employer-filed petitions each year.<sup>67</sup> In the year after *Cemex*, however, this number skyrocketed to 197 representation management petitions, more than the previous decade combined.<sup>68</sup> This likely stems from employers' fear of being targeted by a mandatory bargaining order, and a hope that they may be able to sway the election results in their favor without resorting to any unfair labor practices.<sup>69</sup>

While the decision seems to have put employers on heightened notice to act, union representatives or labor advocates should also pay close attention. While previously under *Gissel* only a significant violation by employers could justify a mandatory bargaining order, now nearly any unfair labor practice could be grounds for the Board's intervention.<sup>70</sup> Where previously union advocates might be better off filing an election petition as soon as they had significant support, now there may be more merit not filing one at all. If the employer fails to do so, a bargaining order may be issued, sidestepping an election entirely.<sup>71</sup> Even a well-organized union campaign can fail, but once the bargaining order is issued the question of support is moot.<sup>72</sup> Even if the employer does file a petition, any sort of unfair labor practice would still be legally sufficient for a mandatory bargaining order, giving the union supporters several opportunities beyond the election itself to win recognition.<sup>73</sup>

The longevity of the *Cemex* decision remains unclear. As mentioned, it is currently pending on appeal in the Ninth Circuit, where observers believe it will likely be upheld by the court.<sup>74</sup> This would open the possibility of a further appeal to the Supreme

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<sup>65</sup> Robert Iafolla, *Top Labor Board Lawyer Withdraws Slew of Biden-Era Policy Memos*, BLOOMBERG LAW (Feb. 14, 2025), <https://news.bloomberglaw.com/daily-labor-report/top-labor-board-lawyer-withdraws-slew-of-biden-era-policy-memos>.

<sup>66</sup> Max Burns, Opinion, *What to Expect as Trump's Anti-Labor Agenda Takes Shape*, THE HILL (Feb. 19, 2025, 9:00 AM), <https://thehill.com/opinion/white-house/5151459-trump-anti-worker-nlr-union/>.

<sup>67</sup> *Number of Elections Held Per FY*, *supra* note 1.

<sup>68</sup> *Id.*

<sup>69</sup> *Cemex Constr. Materials Pac., LLC and Int'l Bhd. Teamsters*, 372 N.L.R.B. 130, slip op. at 26.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 25.

<sup>72</sup> *Id.* at 28.

<sup>73</sup> *Id.* at 25.

<sup>74</sup> Joshua Fox & Michael Kratochvil, *Ninth Circuit Panel Hears Oral Argument on the NLRB's Transformative Cemex Decision*, PROSKAUER (Oct. 23, 2024), <https://www.proskauer.com/blog/ninth->

Court.<sup>75</sup> Considering the Court’s willingness to address and curtail administrative agencies’ powers in recent years, it seems likely certiorari will be granted.<sup>76</sup>

Given the current makeup of the Supreme Court and its record of handling cases dealing with the NLRB and executive agencies,<sup>77</sup> it seems unlikely that the *Cemex* rule will survive review.<sup>78</sup> Yet in 2023, the Supreme Court held in *Glacier Northwest, Inc. v. International Brotherhood of Teamsters Local Union No. 174* that a longstanding NLRB rule protecting unions’ strike rights remained valid, dampening the hopes of some and fears of others that the Court would take an axe to it.<sup>79</sup> While this by no means shows the current Court is fanatically pro-labor, it does show that most justices are not interested in cutting away *all* union rights or NLRB powers even if they may support weakening them overall.<sup>80</sup>

Still, recent cases show the Court’s increasing skepticism of administrative agencies’ power. *Loper Bright*, likely the most high-profile recent case dealing with administrative law, demonstrated the Court’s move away from a broad deference toward agency decision making.<sup>81</sup> The decision, which overturned the “*Chevron* deference” doctrine, emphasized that ambiguous readings of statutes should be left to judges; “the court, after applying all relevant interpretive tools, concludes” what interpretation should be followed.<sup>82</sup>

The end of *Chevron* deference and the emphasis on judges having the final say suggests the Court may take issue with an important element of the Board’s argument

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circuit-panel-hears-oral-argument-on-the-nlrbs-transformative-cemex-decision; *Federal Appeals Court Hears Arguments Over NLRB Union Rule*, NEW ENGLAND BIZ L. UPDATE (Nov. 12, 2024), <https://newenglandbizlawupdate.com/2024/11/12/federal-appeals-court-hears-arguments-over-nlr-union-rule/>.

<sup>75</sup> *Buck v. Davis*, 580 U.S. 100, 127 (2017) (quoting *Schiro v. Farley*, 510 U.S. 222, 229 (1994)).

<sup>76</sup> See, e.g., Joseph S. Diedrich, *Landmark Supreme Court Decisions Restrain Federal Administrative Agency Power*, HUSCH BLACKWELL (June 28, 2024), <https://www.huschblackwell.com/newsandinsights/landmark-supreme-court-decisions-restrain-federal-administrative-agency-power>; Shay Dvoretzky, Parker Rider-Longmaid & Sylvia O. Tsakos, *Supreme Court Decisions Curtail Regulatory Agencies’ Powers, Making It Easier To Challenge Rules*, SKADDEN (Sept. 2024), <https://www.skadden.com/insights/publications/2024/09/insights-september-2024/supreme-court-decisions-curtail-regulatory-agencies-powers>.

<sup>77</sup> See, e.g., *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400 (2024); *Securities and Exchange Commission v. Jarkesy*, 603 U.S. 109, 136-40 (2024); *Corner Post, Inc. v. Bd. Of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 823-25 (2024).

<sup>78</sup> See Christopher J. Walker, *Congress and the Shifting Sands in Administrative Law*, 34 WIDENER COMMONWEALTH L. REV. 187, 192–93 (2024).

<sup>79</sup> *Glacier Nw., Inc. v. Int’l Bhd. of Teamsters Loc. Union No. 174*, 598 U.S. 771, 776-77 (2023); Alexander S. Whistler, *Labor Law’s Preemption Problem: Glacier Northwest and What the Fate of Garmon Means for American Workers*, 75 HASTINGS L.J. 853, 858 (2024).

<sup>80</sup> See *Glacier Nw., Inc. v. Int’l Bhd. of Teamsters Loc. Union No. 174*, 598 U.S. 771, 785-88 (2023) (Thomas, J., dissenting).

<sup>81</sup> *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400 (2024).

<sup>82</sup> *Id.*

in *Cemex*.<sup>83</sup> Crucial to the logic underlying overturning *Linden Lumber* is the fact the Supreme Court held *Linden Lumber* was merely one of many plausible interpretations.<sup>84</sup> Because the Court seemingly left open the possibility for other interpretations, the Board felt justified in concluding that the *Linden Lumber* standard was not mandated by the Supreme Court but merely acknowledged as a reasonable conclusion.<sup>85</sup> With the end of *Chevron* deference, the Court might not look as favorably on the latitude the Board felt comfortable taking.<sup>86</sup>

Kaplan's dissent in *Cemex* suggests the route the Supreme Court's analysis would take. First, it would presumably address whether the Supreme Court's prior agreement with the *Linden Lumber* standard implies that only the Court could overturn that standard, or if the Board was correct in concluding that they could do so as well.<sup>87</sup> This argument rests largely on the fact the Supreme Court reversed the Court of Appeals' decision, which could imply that the Court viewed its interpretation as the correct one rather than one of many.<sup>88</sup> This argument is disconnected from the actual text of *Linden Lumber*. The Court merely found that the Board's new interpretation was not "arbitrary and capricious or an abuse of discretion."<sup>89</sup> Further, the dissent (largely presaging the standard adopted in *Cemex*) disagreed with the majority that *Linden Lumber* "constitutes a permissible interpretation of sections 8(a)(5) and 9(a)" of the NLRA.<sup>90</sup> Instead, Justice Stewart argued that the text of the NLRA requires employers to either bargain with a union or call an election.<sup>91</sup> The text therefore makes it quite clear that the Supreme Court did not view *Linden Lumber* as the only interpretation of the NLRA.

Second, the Supreme Court would likely address whether the Board has the authority to expand the circumstances in *Gissel* where a bargaining order may be called for. *Gissel* set out two main possibilities: either (1) an employer commits unfair labor practices that "impede the election processes," justifying a bargaining order; or (2) an employer commits unfair labor practices that could be overcome by a rerun of the election, in which case a bargaining order is not called for.<sup>92</sup> The Court stated that the NLRA contains "no per se rule that the commission of any unfair labor practice will

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<sup>83</sup> *Id.*

<sup>84</sup> *Cemex Constr. Materials Pac., LLC and Int'l Bhd. Teamsters*, 372 N.L.R.B. 130, slip op. at 24 n.138 (2023).

<sup>85</sup> *Id.* at 24 n.138, 30.

<sup>86</sup> *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 401 (2024) (it "makes no sense to speak of a 'permissible' interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best").

<sup>87</sup> *Cemex Constr. Materials Pac., LLC and Int'l Bhd. Teamsters*, 372 N.L.R.B. 130, slip op. at 44 (Kaplan, M., dissenting).

<sup>88</sup> *Id.*

<sup>89</sup> *Linden Lumber Div., Summer & Co. v. N.L.R.B.*, 419 U.S. 301, 309 (1974).

<sup>90</sup> *Id.* at 310 (Stewart, J., dissenting).

<sup>91</sup> *Id.* at 317.

<sup>92</sup> *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969).

automatically result in a section 8(a)(5) violation and the issuance of an order to bargain.”<sup>93</sup>

This language suggests that *Gissel* represents the outer bounds of mandatory bargaining orders. Yet in a footnote, the *Gissel* Court states

We . . . need not decide whether, absent election interference by an employer’s unfair labor practices, he may obtain an election only if he petitions for one himself; whether, if he does not, he must bargain with a card majority if the Union chooses not to seek an election; and whether, in the latter situation, he is bound by the Board’s ultimate designation of the card results.<sup>94</sup>

This language shows the Court’s thinking; they simply intended to clarify a possible situation where mandatory bargaining orders could be proper, rather than draw a firm line on what situations could not be solved through bargaining orders.<sup>95</sup> Without the *Linden Lumber* standard, *Gissel* only serves to clarify the appropriateness of bargaining orders. Therefore, *Cemex* is merely an expansion to the number of situations justifying mandatory bargaining orders and does not contradict *Gissel* despite how it might first appear.<sup>96</sup>

In the aftermath of *Loper Bright*, the Supreme Court may well attempt to check the powers of the NLRB. Yet *Loper Bright* changed very little about how the Court would analyze the Board’s decision.<sup>97</sup> As discussed, the Supreme Court has considered the exact boundaries of the NLRB’s remedial authority on numerous occasions.<sup>98</sup> The Court found in *Linden Lumber* that the Board’s approach to bargaining orders was permissible; this decision was not based on *Chevron* deference, but rather an analysis that showed the Board’s decision to be clearly within statutory limits.<sup>99</sup>

Many of the concerns voiced in *Loper Bright* are inapplicable to the NLRB.<sup>100</sup> The Supreme Court has a long tradition of deferring to the NLRB that long predates *Chevron*.<sup>101</sup> This was a deliberate choice to deprive courts of oversight and ensure decision making power was firmly in the hands of experts.<sup>102</sup> This deference

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<sup>93</sup> *Id.* at 615.

<sup>94</sup> *Id.* at 601 n.18.

<sup>95</sup> *Id.* at 597-98.

<sup>96</sup> *Cemex Constr. Materials Pac., LLC and Int’l Bhd. Teamsters*, 372 N.L.R.B. 130, slip op. at 24-26.

<sup>97</sup> *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400-01 (2024).

<sup>98</sup> *See, e.g.*, *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575 (1969); *Linden Lumber Div., Summer & Co. v. N.L.R.B.*, 419 U.S. 301 (1974).

<sup>99</sup> *Linden Lumber Div., Summer & Co. v. N.L.R.B.*, 419 U.S. 301, 309 (1974).

<sup>100</sup> *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400-01 (2024).

<sup>101</sup> Fred B. Jacob, *The National Labor Relations Act, The Major Questions Doctrine, and Labor Peace in the Modern Workplace*, 65 B.C. L. REV. 1381, 1441-42 (2024).

<sup>102</sup> *Id.* at 1438-39.

is encompassed within the very text of the act.<sup>103</sup> The NLRB is also purely remedial—it has no real policy-making powers outside of crafting remedies and the circumstances they may apply, within the confines of the NLRA.<sup>104</sup> While *Loper Bright* may provide an excuse to reexamine the NLRB’s power, it does not provide an independent rationale to restrain that power.<sup>105</sup>

Even though there are legal arguments to defend *Cemex* as it remains under appeal,<sup>106</sup> it is clear that the NLRB itself will, as usual, radically shift course under the new administration.<sup>107</sup> In addition to the policy memo circulated by Acting General Counsel William Cowen, President Trump has announced his choice for General Counsel, garnering much ire from unions nationwide.<sup>108</sup> It is obvious that a general rollback of union capabilities and workers’ rights is underway.<sup>109</sup> This makes it quite likely that the NLRB may attempt to overturn *Cemex* of their own accord.<sup>110</sup> No matter the outcome of the appeal to the Ninth Circuit, the Board could find some case that presents a similar issue to *Cemex*, and use said case to return to something more in line with *Gissel* and *Linden Lumber*, or potentially even revert to a harsher standard on mandatory bargaining orders.<sup>111</sup> Indeed, it is possible the Board could simply state that they will no longer issue bargaining orders at all, since they are a completely discretionary tool.<sup>112</sup> Such a result would be a devastating blow to workers’ rights in the United States.<sup>113</sup>

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<sup>103</sup> *Id.* at 1439.

<sup>104</sup> *Id.* at 1437–39.

<sup>105</sup> *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400-01 (2024).

<sup>106</sup> Petition for Review of Nat’l Lab. Rel. Bd. Decision and Order, *Cemex Constr. Materials Pac., LLC v. Nat’l Lab. Rel. Bd.*, No. 23-1232 (9th Cir. Sept. 30, 2023).

<sup>107</sup> John W. Hargrove & Matthew C. Lonergan, *The NLRB’s 2025 U-Turn: Stay Buckled*, THE NAT’L L. REV. (Apr. 30, 2025), <https://natlawreview.com/article/nlrbs-2025-u-turn-stay-buckled>.

<sup>108</sup> See, e.g., David Dayen, *Trump to Pick Union-Busting Attorney for Key Labor Law Position*, AM. PROSPECT (Mar. 17, 2025), <https://prospect.org/labor/2025-03-17-trump-pick-union-busting-attorney-key-labor-law-position-nlrbs/>; *Teamsters Union Opposes Nomination of Crystal Carey as NLRB General Counsel*, INT’L BHD. OF TEAMSTERS (Mar. 25, 2025, 7:20 PM), <https://www.prnewswire.com/news-releases/teamsters-union-opposes-nomination-of-crystal-carey-as-nlrbs-general-counsel-302411356.html>.

<sup>109</sup> See, e.g., Steven Greenhouse, *Trump and Musk Are Setting the Example: How Companies Are Becoming Emboldened to Be More Anti-Union*, THE GUARDIAN (Apr. 7, 2025, 7:00 AM), <https://www.theguardian.com/us-news/2025/apr/07/trump-union-workers-rights>.

<sup>110</sup> Breunig, *supra* note 13.

<sup>111</sup> See Matt Breunig, *Another Trump NLRB*, NLRB EDGE (Nov. 6, 2024), <https://www.nlrbedge.com/p/another-trump-nlrbs/>.

<sup>112</sup> See, e.g., *Joy Silk Mills, Inc.*, 85 N.L.R.B. 1263, 1292–94 (1949); 29 U.S.C. § 160(c).

<sup>113</sup> See, e.g., Walter M. Meginnis, Jr., *Comments on the PRO Act’s Bargaining Order and Secondary Boycott Provisions*, ABA J. LAB. & EMP. L. 367, 371–73 (2023).

## IV. RECOMMENDATIONS

*Cemex* might only last a few more years. Even if the appellate courts upheld the *Cemex* standard in its entirety, the decision will still be faced with a hostile NLRB that has already signaled its willingness to overturn it.<sup>114</sup> Union rates remain at some of the lowest ever since the passage of the NLRA, and even the relatively pro-union policies of the Biden administration could not buck that trend completely.<sup>115</sup> On the whole, the future of organized labor seems bleak.<sup>116</sup> Still, as long as *Cemex* remains viable it presents labor leaders with potent tools to advance their agendas in the short term. If nothing else, the decision may create hesitation for employers to engage in any sort of election misconduct for fear of receiving a bargaining order as a result.<sup>117</sup>

Right now, union advocates can make use of the *Cemex* standard. This means that they may be able to win union fights with less support than might otherwise be necessary should the employer commit an act that falls into either of the two types of employer behavior that can justify a bargaining order.<sup>118</sup> Yet this should be done with caution. As noted, the NLRB is looking for opportunities to overturn the *Cemex* decision, and if the case ended up before the Board, they might use it as a chance to do just that.<sup>119</sup>

Since *Cemex* will likely be overturned one way or another, it might be in labor's best interest to use it for political theater.<sup>120</sup> Labor leaders like Shawn Fain have been able to successfully use media access to eke out victories, and while it is unlikely a similar strategy would change the ultimate outcome of the case, it might help galvanize workers and labor against the Trump-controlled NLRB.<sup>121</sup> This might mean short-term losses, but the potential for major rewards in the long term, as more workers consider the possibility of unionization and collective action.<sup>122</sup>

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<sup>114</sup> See Breunig, *supra* note 13.

<sup>115</sup> U.S. Bureau of Labor Statistics, *Union Membership Rate Fell by 0.2 Percentage Point to 10.1 Percent in 2022*, ECON. DAILY (Jan. 24, 2023), <https://www.bls.gov/opub/ted/2023/union-membership-rate-fell-by-0-2-percentage-point-to-10-1-percent-in-2022.htm>.

<sup>116</sup> See Sydney Wertheim & Meghna Chakrabarti, *What the Future Holds for Labor Unions*, WBUR (Aug. 14, 2019), <https://www.wbur.org/onpoint/2019/08/14/labor-unions-beaten-down-worked-up-steven-greenhouse>.

<sup>117</sup> *Cemex Constr. Materials Pac., LLC and Int'l Bhd. Teamsters*, 372 N.L.R.B. 130, slip op. at 26.

<sup>118</sup> *Id.* at 25.

<sup>119</sup> Breunig, *supra* note 13.

<sup>120</sup> See, e.g., *Id.*; see also Greenhouse, *supra* note 109.

<sup>121</sup> See Shawn Fain, Opinion, *Shawn Fain: UAW Members Will Fight Hard to Protect Their Jobs*, DETROIT NEWS (Feb. 13, 2025, 8:01 PM), <https://www.detroitnews.com/story/opinion/2025/02/13/shawn-fain-uaw-members-will-fight-hard-to-protect-their-jobs/78525169007/>.

<sup>122</sup> See Heidi Shierholz, Celine McNicholas, Margaret Poydock & Jennifer Sherer, *Workers Want Unions, but the Latest Data Point to Obstacles in Their Path*, ECON. POL'Y INST. (Jan. 23, 2024), <https://www.epi.org/publication/union-membership-data/#epi-toc-4>.

The uncertainty surrounding *Cemex* is nothing new; nor is the oscillation between differing standards for mandatory bargaining orders.<sup>123</sup> The Board is infamous for its sudden policy shifts depending on the politics of new appointees, causing rapid fluctuations in labor law to which both employees and employers must respond.<sup>124</sup> Even if *Cemex* endures, its implementation will come down to the willingness of the new Trump-appointed Board to enforce the standard.<sup>125</sup> This situation aptly demonstrates the common critique that the NLRB is overly reliant on enforcement issues.<sup>126</sup>

To develop a more durable and consistent body of labor law would require significant changes to the NLRB itself, rather than the policies it chooses to adopt. One such proposal, the Protecting the Right to Organize Act, came close to passing during the Biden Administration, but is unlikely to be passed given the new administration.<sup>127</sup> Still, it represents a step into the right direction, and a *bona fide* attempt to reform labor law for the first time in at least a generation. Additional changes could include expanding the NLRB's arsenal of responses to include new options but giving Board members less choice in determining what responses are appropriate for a given situation.<sup>128</sup> This is just one way the influence of the Board could be decreased without harming the rights of unions or workers; with individual Board members wielding less power, the NLRB would be more insulated from sudden swings.

## V. CONCLUSION

The *Cemex* decision is only the latest in a series of back-and-forth rulings on labor law. Yet even if it only lasts a few years, it has already had a significant impact on the strength of unions and will continue to do so. By significantly lowering the threshold for a bargaining order, *Cemex* has created a strong incentive for employers to preemptively recognize unions, without risking the standard election process. The decision has also provided savvy labor advocates with a variety of options to pursue unionization in the workplace.

The emerging fight over *Cemex* also reveals the need for staunch support for workers' rights, and the institutional weaknesses of the NLRB in this regard. The reliance of the NLRB on the executive branch creates a pendulum effect, leading to

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<sup>123</sup> Leonard Bierman, Rafael Gely & William B. Gould IV, *Achieving the Achievable: Realistic Labor Law Reform*, 88 MO. L. REV. 311, 325 (2023).

<sup>124</sup> See, e.g., Charlotte Garden, *Enforcement-Proofing Work Law*, 44 BERKELEY J. EMP. & LAB. L. 191, 191–92 (2023).

<sup>125</sup> See Breunig, *supra* note 13.

<sup>126</sup> Charlotte Garden, *Enforcement-Proofing Work Law*, 44 BERKELEY J. EMP. & LAB. L. 191, 199 (2023).

<sup>127</sup> *Id.*

<sup>128</sup> Michael Weiner, *Can the NLRB Deter Unfair Labor Practices? Reassessing the Punitive-Remedial Distinction in Labor Law Enforcement*, 52 UCLA L. REV. 1579, 1624 (2005).

rapid changes in the status of labor law and workers' rights. While reform in the short term seems unlikely, renewed efforts should be taken to strengthen the NLRB's role as a bastion of workers' rights.

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**MOBLEY V. WORKDAY: AN EVOLVING AI COMPLIANCE LANDSCAPE**


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❖ Note ❖

*Asbley Morris\**

I. INTRODUCTION

*Mobley v. Workday* is a groundbreaking legal dispute that sits at the intersection of artificial intelligence (“AI”) and employment law.<sup>1</sup> The key issues in *Mobley* are whether the use of algorithmic screening tools in hiring decisions, as implemented by Workday, result in unlawful disparate impact discrimination under the Title VII of the Civil Rights Act of 1964, (“Title VII”), under the Age Discrimination in Employment Act (“ADEA”), or under the Americans with Disabilities Act (“ADA”).<sup>2</sup> Another key issue in *Mobley* centers around whether Workday can be held liable as employer’s agent for unlawful disparate impact discrimination under these three acts.<sup>3</sup> While this case is still pending, it is among the first major cases to challenge algorithmic hiring under anti-discriminatory statutes.<sup>4</sup> It could set precedent for how AI hiring systems are regulated in the U.S.<sup>5</sup> While *Mobley* was filed in California, this note will examine the issues of employment discrimination and AI under Illinois’ Human Rights Act (“IHRA”).

This Note proceeds as follows. Part II explores the mechanics of AI-driven discrimination, provides an in-depth analysis of the *Mobley v. Workday* case, and examines IHRA as it relates to AI. Part III analyzes why Workday would be liable under the IHRA and considers AI regulatory efforts in other states such as Colorado. Part IV addresses the critical implications for businesses deploying AI systems, emphasizes the importance of these developments, and provides practical guidance for businesses.

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\* J.D. Candidate, Class of 2026, University of Illinois College of Law.

<sup>1</sup> *Mobley v. Workday, Inc.*, 740 F. Supp. 3d 796, 801, (N.D. Cal. 2024).

<sup>2</sup> *Id.* at 803.

<sup>3</sup> *Id.* at 806.

<sup>4</sup> *Id.* at 805.

<sup>5</sup> *Id.* at 805.

## II. BACKGROUND

Most AI systems, especially those based on machine learning, learn from large datasets.<sup>6</sup> These datasets allow it to identify patterns, make predictions, and perform tasks with increasing accuracy.<sup>7</sup> If these datasets contain historical biases, stereotypes, or underrepresentation of certain groups, AI will learn to reproduce those biases.<sup>8</sup> For example, a hiring algorithm trained on past hiring data might favor male candidates if the company historically hired more men.<sup>9</sup> Biased outcomes like these do not necessarily occur because the software developers instruct it to discriminate; instead, by programming AI to prefer words that are typically used by men such as “executed” or “captured,” or activities like chess club, AI will automatically choose male candidates over others.<sup>10</sup> Even if biological attributes (like race or gender) are excluded, other variables can act as substitutes and reintroduce biases.<sup>11</sup> For example, an algorithm that does not explicitly use race but uses location, education, or income data may still reflect racial disparities.<sup>12</sup> In 2021, The Markup analyzed more than two million mortgage applications using data from the Home Mortgage Disclosure Act.<sup>13</sup> The study found that algorithmic systems used by lenders were more likely to deny home loans to African American and Latino applicants than to Caucasian applicants with similar financial backgrounds.<sup>14</sup> In fact, high-earning Black applicants with *less* debt were rejected more often than high-earning White applicants who have *more* debt.<sup>15</sup> While the lenders did not use race as an input, the models included variables like zip code, loan type, and lender—all of which can serve as substitutes for

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<sup>6</sup> Santosh Kumar Singh and H.K. Pallwal, *A state-of-the-art review on the utilization of machine learning in nanofluids, solar energy generation, and the prognosis of solar power*, SCIENCE DIRECT, 62, 68 (2023).

<sup>7</sup> *How Does AI Recognize Patterns and Make Predictions?*, STACK AI (Mar. 14, 2025), <https://www.stack-ai.com/blog/how-does-ai-recognize-patterns-and-make-predictions>.

<sup>8</sup> Matthew G. Hanna, et al., *Ethical and Bias Considerations in Artificial Intelligence/Machine Learning*, 38 MODERN PATHOLOGY (2025), <https://www.sciencedirect.com/science/article/pii/S0893395224002667>.

<sup>9</sup> Amanda B. Blair and Karen L. Odash, *New Study Shows AI Resume Screeners Prefer White Male Candidates: Your 5-Step Blueprint to Prevent AI Discrimination in Hiring*, FISHER PHILLIPS (Nov. 11, 2024), <https://www.fisherphillips.com/en/news-insights/ai-resume-screeners.html>.

<sup>10</sup> Jake Silberg & James Manyika, *Notes from the AI Frontier: Tackling bias in AI (and in humans)*, MCKINSEY GLOBAL INST. (June 2019), <https://www.mckinsey.com/~media/McKinsey/Featured%20Insights/Artificial%20Intelligence/Tackling%20bias%20in%20artificial%20intelligence%20and%20in%20humans/MGI-Tackling-bias-in-AI-June-2019.ashx>.

<sup>11</sup> Jon Kleinberg, Jens Ludwig, Sendhil Mullainathan, & Cass R Sunstein, *Discrimination in the Age of Algorithms*, 10 OXFORD ACADEMIC 113, 121, (Apr. 22, 2019).

<sup>12</sup> *Id.* at 121.

<sup>13</sup> Emmanuel Martinez & Lauren Kirchner, *The Secret Bias Hidden in Mortgage-Approval Algorithms*, THE MARKUP (Aug. 25, 2021, 6:50 AM), <https://themarkup.org/denied/2021/08/25/the-secret-bias-hidden-in-mortgage-approval-algorithms>.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

race, even when race is not explicitly used.<sup>16</sup> The algorithms were trained on past lending decisions, which embedded those same biases.<sup>17</sup> These defective data sets are deeply troubling and can result in penalizing marginalized groups.<sup>18</sup>

Problematic AI data sets also lead to employment discrimination in the workforce.<sup>19</sup> The IHRA, codified as 775 ILCS 5, governs employment discrimination.<sup>20</sup> Employment discrimination occurs when an employer treats an applicant or employee less favorably because of their race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, disability, age or genetic information.<sup>21</sup> Some examples of employment discrimination include refusing to hire a candidate because they are over the age of forty or based on their race or disability.<sup>22</sup>

In the case of *Mobley v. Workday Inc.*, Derek Mobley’s (“Mobley”) class action lawsuit was filed in federal court in the Northern District of California.<sup>23</sup> In his lawsuit, he alleges that Workday’s AI-powered hiring tool discriminated against him and other similarly situated job applicants based on race, age, and disability.<sup>24</sup> Mobley, the lead plaintiff and an African American man, claims that he was rejected for over 100 jobs due to his race, age (over 40), and mental health conditions, including anxiety and depression.<sup>25</sup> Mobley claims to have been qualified for these positions.<sup>26</sup> The companies he applied for all used Workday’s AI-based screening tools, which include personality and cognitive tests.<sup>27</sup> These screening tools then interpret a candidate’s qualifications through advanced algorithmic methods and can automatically reject candidates or advance them along in the hiring process.<sup>28</sup> Mobley argues that Workday’s AI screening tools perpetuate existing biases in the hiring process. In fact, Mobley applied for a job position at 12:55 a.m. only to be rejected less than an hour later.<sup>29</sup> He asserts a disparate impact claim, arguing that Workday’s AI system led to biased outcomes, violating federal antidiscrimination laws, including Title VII, the

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Silberg & Manyika, *supra* note 10.

<sup>20</sup> 775 III. COMP. STAT. 5/1-101 et seq. (2024).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Mobley v. Workday, Inc.*, 740 F. Supp. 3d 796, 802 (N.D. Cal. 2024).

<sup>24</sup> *Id.* at 802.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 803.

<sup>27</sup> *Id.* at 802.

<sup>28</sup> *Id.* at 803.

<sup>29</sup> *Id.*

ADEA, and the ADA.<sup>30</sup> Four other plaintiffs over the age of forty have since joined him with allegations of age discrimination claims under the ADEA.<sup>31</sup>

Illinois has taken a proactive stance in regulating the use of AI in employment decisions, particularly to prevent discrimination and ensure fairness.<sup>32</sup> On August 9, 2024, Governor Pritzker signed into law the Illinois House Bill 3773 (“HB-3773”) amending the Employment Article of the IHRA 775 ILCS 5/2-102.<sup>33</sup> The IHRA prohibits employment practices that “adversely affect” a group based on protected classes such as race, sex, age, disability, national origin, and other protected categories.<sup>34</sup> Specifically, the amendment to 775 ILCS 5/2-102, Section 2-102, establishes that the following are civil rights violations: “With respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure, or the terms, privileges, or conditions of employment, for an employer to use artificial intelligence that has the effect of subjecting employees to discrimination on the basis of protected classes identified under this Article or to use zip codes as a proxy for protected classes identified under this Article; and for an employer to fail to provide notice to an employee that the employer is using artificial intelligence.”<sup>35</sup> Intent is not mentioned in the law as a factor.<sup>36</sup> Therefore, even if an employer does not intend to discriminate, if the system does discriminate, they will be held liable.<sup>37</sup> The law will hold AI models to the same standards that it holds humans who are manually making employment hiring decisions.<sup>38</sup>

This bill was enacted to address concerns about the potential for AI systems to inadvertently bolster discrimination in employment and credit decisions, and to guarantee that employees are given notice about the use of AI.<sup>39</sup> The bill aims to ensure that AI technologies are used responsibly, promoting fairness and transparency through mandatory disclosures about the use of AI in the workplace.<sup>40</sup> By amending the IHRA 775 ILCS 5/2-102, the law reinforces existing civil rights protections, assuring that AI applications do not undermine efforts to combat discrimination in

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<sup>30</sup> *Id.*

<sup>31</sup> Clare Duffy, *Lawsuit Claims Discrimination by Workday’s Hiring Tech Prevented People Over 40 From Getting Hired*, CNN (May 22, 2025, 9:09AM), <https://www.cnn.com/2025/05/22/tech/workday-ai-hiring-discrimination-lawsuit>.

<sup>32</sup> Adam S. Forman, Nathaniel M. Glasser, & Naomi C. Friedman, *Illinois Prohibits Discriminatory AI in Employment Decisions*, EPSTEIN BECKER GREEN (Aug. 14, 2024), <https://www.workforcebulletin.com/illinois-prohibits-discriminatory-artificial-intelligence-in-employment-decisions>.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> 775 ILL. COMP. STAT. 5/2-102 (2023).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Press Release, Ill. House Dems., *Andrade, Rashid Pass Bill Cracking Down on AI-Based Discrimination* (May 24, 2024), <https://ilhousedems.com/2024/05/24/andrade-rashid-pass-bill-cracking-down-on-ai-based-discrimination/>.

<sup>40</sup> *Id.*

the workplace.<sup>41</sup> The law goes into effect January 1, 2026, providing employers time to comply with its provisions.<sup>42</sup>

Illinois is one of the first states to adopt comprehensive AI employment regulations.<sup>43</sup> This bill could serve as a model for other states or even federal policy, showing leadership in adapting to emerging technologies.<sup>44</sup> On the flip side, the bill could serve as a compliance burden for small and mid-sized businesses. These businesses may lack the resources to audit AI systems for biases or to implement new compliance processes. This could increase operational costs for them, and it may be more effective for them to not utilize AI at all, making AI only accessible to larger businesses. This can deepen inequality in the labor market, and lead to larger businesses having a major advantage in speed and quality candidate, while smaller businesses without access to AI will fall behind.

### III. ANALYSIS

After Mobley filed his discrimination complaint, the judge dismissed Mobley’s allegations that Workday intentionally discriminated against him based on age, race, and mental health.<sup>45</sup> However, the judge allowed his *disparate impact* discrimination claims to proceed.<sup>46</sup> The court found these claims plausible, particularly on the basis that Workday could be considered an “agent” of the employers to which the applicant applied.<sup>47</sup> This decision implies that AI vendors, not just employers, can be held liable for discriminatory impacts in hiring.<sup>48</sup> Likewise, taking Mobley’s allegations as true, the Court held that he plausibly alleged the necessary elements for disparate impact discrimination under Title VII, the ADA, and the ADEA by (1) showing a significant disparate impact on a protected class or group; (2) identifying the specific employment practices or selection criteria at issue; and (3) showing a causal relationship between the challenged practices or criteria and the disparate impact.<sup>49</sup>

On the first element (disparate impact), the Court found that Mobley had pled a specific employment practice by alleging that Workday’s use of algorithmic decision-making tools to screen applicants had relied on biased training data and personality tests, on which applicants with mental health and cognitive disorders performed more

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<sup>41</sup> 775 ILL. COMP. STAT. 5/2-102 (2023).

<sup>42</sup> Simon R.D. Francis, Benjamin W. Perry, Lauren N. Watson, *Illinois Steps Up AI Regulation in Employment: Key Takeaways for Employers*, NAT’L L. REV. (Aug. 29, 2024), <https://natlawreview.com/article/illinois-steps-ai-regulation-employment-key-takeaways-employers>.

<sup>43</sup> Forman, Glasser & Friedman, *supra* note 32.

<sup>44</sup> *Id.*

<sup>45</sup> Mobley v. Workday, Inc., 740 F. Supp. 3d 796 (N.D. Cal. 2024).

<sup>46</sup> *Id.* at 809.

<sup>47</sup> *Id.* at 808.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* 809–10.

poorly.<sup>50</sup> The Court also held that the tools which were designed to screen applicants unfairly penalize older candidates (40+).<sup>51</sup> While these screening tools did vary based on customer hiring preference, the Court held that this fact was not sufficient to dismiss Mobley's claims because he showed a common component that discriminated against applicants based on protected characteristics.<sup>52</sup>

On the second element (disparity), the Court found a reasonable inference of disparity based on Mobley's allegations that he had applied for over 100 job positions and had been rejected from every single one due to Workday's allegedly biased screening tool. One of the jobs that he was rejected from was a job that he was already working at as a contractor.<sup>53</sup> The court also looked at the rapid rejection that Mobley received, even receiving rejections in the middle of the night.<sup>54</sup> For the last element (causation), the Court held that Mobley plausibly alleged that the disparity was caused by Workday's algorithmic screening tools based on the "sheer number of rejections" he received combined with allegations that Workday's AI tool relied on biased training data.<sup>55</sup>

Mobley's attorney alleged that "because there are no guardrails to regulate Workday's conduct, the algorithmic decision-making tools it utilizes to screen out applicants provide a ready mechanism for discrimination."<sup>56</sup>

Illinois is likely to find the reasoning in Mobley persuasive, particularly his arguments about Workday being held liable as an employer's agent, and disparate impact liability in AI-driven hiring. Illinois has robust anti-discrimination laws and has taken an active role in regulating AI and employment practices.<sup>57</sup> Both federal and Illinois state laws recognize disparate impact claims. While federal protections like Title VII, the ADA, and the ADEA apply only to employers with more than fifteen employees, IHRA extends coverage to employers with just one employee, offering broader protection.<sup>58</sup> Under the IHRA, a practice that appears neutral—such as the use of Workday's AI tools—can still be unlawful if it disproportionately harms a protected group.<sup>59</sup> Courts examine whether a neutral policy exists, whether it causes statistical disparities among protected groups, whether the employer can justify the

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<sup>50</sup> *Id.* at 809.

<sup>51</sup> *Id.* at 810.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 810.

<sup>54</sup> *Id.* at 811.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> 775 ILL. COMP. STAT. 5/2-102 (2023).

<sup>58</sup> Family and Medical Leave Act, 29 U.S.C. §§ 2601–2654; Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17; 775 Ill. Comp. Stat. 5/et seq. (Illinois Human Rights Act).

<sup>59</sup> *See* *Griggs v. Duke Power Co.*, 401 U.S. 424, 430–31 (1971); *City of Rome v. United States*, 446 U.S. 156, 176–77 (1980); *Gaston Cty. v. United States*, 395 U.S. 285, 297 (1969).

practice as job-related and consistent with business necessity, and whether the plaintiff can suggest a less discriminatory alternative that still meets the employer's goals.<sup>60</sup>

Disparate impact discrimination occurs when a facially neutral policy or practice, such as Workday's AI-based screening tool, disproportionately harms members of a protected class, even if there is no intent to discriminate.<sup>61</sup> The IHRA prohibits employment practices that "adversely affect" a group based on race, sex, age, disability, national origin, and other protected categories.<sup>62</sup> Illinois courts have held that plaintiffs can bring disparate impact claims under the IHRA, similar to Title VII claims.<sup>63</sup> Under the IHRA, courts analyze whether a neutral employment policy exists and if the plaintiff can show that the policy causes a statistical disparity under a protected group, if the employer can then show that the policy is job-related and consistent with business necessity, and if the plaintiff can then show an alternative practice that would have less impact and still meet the employer's goals.<sup>64</sup>

Common examples of disparate impact in the workplace include hiring exams that disproportionately exclude minority candidates, height or strength requirements which may exclude women, or requiring a four-year college degree where a high school diploma would suffice could disproportionately affect minority applicants or those from lower-income backgrounds, who may have fewer opportunities to pursue higher education.<sup>65</sup> All of these policies are unlawful under Title VII if they are not job related and consistent with business necessity.<sup>66</sup>

When analyzing *Workday v. Mobley*, under the IHRA, the neutral employment policy is Workday's AI-based screening tool. Workday's policy caused a statistical hiring disparity with Mobley and other class-action members protected under Title VII, the ADA, and the ADEA. This led to them being rejected for every single position they applied for.<sup>67</sup> While as a defense, Workday can show that the policy was job related, as it was for hiring people for employment, Mobley can rebut this claim by showing that instead of employers' using Workday's AI-based screening tool, they could have used human review of resumes which would have achieved similar business objectives. Or they could have monitored Workday's AI-based screening tool, to ensure that it was free of biases.

It may appear that cases involving disparate impact claims are currently under attack, and to an extent, that is true. President Trump's Executive Order 14281, issued in April 2025 and titled "*Restoring Equality of Opportunity and Meritocracy*," seeks to

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<sup>60</sup> See *Griggs*, 401 U.S. at 430–31.

<sup>61</sup> *Lau v. Nichols*, 414 U.S. 563, 568 (1974).

<sup>62</sup> 775 Ill. COMP. STAT. 5/1-101 et seq. (2024).

<sup>63</sup> *Id.*

<sup>64</sup> *N.Y. Urban League v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995).

<sup>65</sup> *Disparate Impact vs Disparate Treatment: Complete Guide*, CASE IQ, <https://www.caseiq.com/resources/disparate-impact-treatment> (last visited June 21, 2025).

<sup>66</sup> *Id.*

<sup>67</sup> *Mobley v. Workday, Inc.*, 740 F. Supp. 3d 796, 810 (N.D. Cal. 2024).

eliminate the use of disparate impact theory in federal civil rights enforcement.<sup>68</sup> Agencies like the U.S. Equal Employment Opportunity Commission (EEOC), who filed an amicus brief on April 9, 2024, in support of Mobley, have been directed to stop using disparate impact in investigations, rulemaking, or enforcement actions.<sup>69</sup> However, private individuals, such as Mobley, may still bring disparate impact claims in federal court.<sup>70</sup> Moreover, many states such as Illinois still recognize liability under disparate impact discrimination.<sup>71</sup> Employers could still face lawsuits or penalties under state anti-discrimination laws such as the IHRA 775 ILCS 5/2-102.<sup>72</sup>

Illinois is not the only state that has enacted laws to protect its citizens from AI based employment discrimination.<sup>73</sup> Colorado was the first state to enact laws regulating AI in the workplace.<sup>74</sup> The Colorado AI Act requires developers and deployers of “high-risk” AI systems to use “reasonable care to avoid algorithmic discrimination.”<sup>75</sup> This duty extends to any foreseeable risk of algorithmic discrimination from the intended and contracted uses of their AI products.<sup>76</sup> The law also mandates transparency and requires businesses to inform individuals when AI is used for making consequential decisions.<sup>77</sup> Moreover, Colorado job applicants will be able to challenge a company’s decision not to hire them.<sup>78</sup>

#### IV. RECOMMENDATIONS

As employers’ use of AI faces increasing legal scrutiny, businesses should pay close attention to *Mobley v. Workday Inc.*, a revolutionary legal case that could significantly impact how businesses implement AI in hiring and employment decisions, particularly under civil rights and anti-discrimination laws.<sup>79</sup> Understanding the implications of this case can help businesses proactively manage AI-related risks, ensure compliance with evolving regulations, and avoid costly legal challenges.<sup>80</sup>

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<sup>68</sup> Exec. Order No. 14281, 90 Fed. Reg. 17537 (Apr. 23, 2025).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> 775 ILL. COMP. STAT. 5/2-102 (2025).

<sup>73</sup> Forman, Glasser & Friedman, *supra* note 32.

<sup>74</sup> *Colorado Governor Signs Broad AI Bill Regulating Employment Decisions*, SEYFARTH (May 18, 2024), <https://www.seyfarth.com/news-insights/colorado-governor-signs-broad-ai-bill-regulating-employment-decisions.html>.

<sup>75</sup> COLO. S.B. 24-205, 2024 Gen. Assemb., Reg. Sess. (Colo. 2024) (enacted).

<sup>76</sup> *Colorado Governor Signs Broad AI Bill Regulating Employment Decisions*, *supra* note 82.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Diamiana Saad, *Where Are We Now with the Use of AI in the Workplace?*, NAT’L L. REV. (June 17, 2025), <https://natlawreview.com/article/where-are-we-now-use-ai-workplace>.

<sup>80</sup> *Id.*

In *Mobley v. Workday*, the court allowed the lawsuit to proceed under the theory that Workday, as an AI vendor, could be considered an “agent” of employers.<sup>81</sup> Businesses using AI tools will be accountable for discriminatory outcomes, even if the bias originates from the software provider.<sup>82</sup> As a result, businesses can face public backlash, media scrutiny, and loss of consumer and employee trust.<sup>83</sup> Since AI obfuscates bias with layers of ostensibly objective mathematical authority, the presence of these biases cannot fully be eliminated until AI is harnessed correctly.<sup>84</sup> AI is unlikely to be harnessed correctly unless a diverse set of software engineers assist with the creation of AI algorithms. For example, a science, technology, engineering, and mathematics (“STEM”) pipeline would allow more women and minorities to pursue careers in the STEM field.<sup>85</sup> Leveling the playing field and creating diversity initiatives for those from diverse backgrounds will help them to climb the ladder in the STEM world and allow their influence to be felt as well when programming these products.<sup>86</sup> However, a STEM pipeline undoubtedly requires significant time, effort, and resources. So, due to the biases that AI currently perpetuates, governments and regulatory bodies should establish clear guidelines and standards for the use of AI in hiring ensuring fairness, transparency, and accountability.<sup>87</sup>

For those businesses that still choose to use AI as it is in the workplace, it is essential to thoroughly vet AI tools.<sup>88</sup> This involves identifying which decisions are being made by AI, assessing how protected characteristics (race, gender, age) might be impacted, evaluating the potential for disparate impact, and regularly testing for such impact.<sup>89</sup> Additionally, businesses should carefully select AI vendors by requesting documentation on how the AI models were trained and validated, ensuring the vendor provides tools for auditing fairness and explainability and including contractual provisions that require non-discriminatory outcomes.<sup>90</sup> Finally, businesses must continuously monitor AI performance after deployment, watching for “drifts”—

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<sup>81</sup> *Mobley v. Workday, Inc.*, 740 F. Supp. 3d 796, 808 (N.D. Cal. 2024).

<sup>82</sup> *Id.*

<sup>83</sup> *AI Hiring Lawsuits: Risks and How Employers Can Stay Compliant*, MONDO, <https://mondo.com/insights/ai-hiring-lawsuits-risks-and-how-employers-can-stay-compliant/> (last visited June 21, 2025).

<sup>84</sup> *Id.*

<sup>85</sup> Abhishek Bahl, *Why We Need More Women In STEM*, SHE CAN CODE, <https://shecancode.io/why-we-need-more-women-in-stem/> (last visited June 21, 2025).

<sup>86</sup> *Id.*

<sup>87</sup> Stylianos Kampakis, *Bias and Discrimination in AI: Legal Remedies and Ethical Obligations*, IBM (June 11, 2025), <https://community.ibm.com/community/user/blogs/stylian-kampakis/2025/06/10/bias-and-discrimination-in-ai>.

<sup>88</sup> Saad, *supra* note 79.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

where models may develop bias over time due to changing data—and updating models and processes as needed.<sup>91</sup>

## V. CONCLUSION

As seen in *Mobley v. Workday*, employers face considerable risks when they use AI. AI systems can unintentionally reinforce biases, leading to discriminatory hiring or employment decisions that may result in costly legal challenges, reputational harm, and regulatory penalties.<sup>92</sup> Ongoing monitoring of AI in the workplace is crucial to identify and mitigate any biases that may develop, helping to maintain fairness and compliance with anti-discrimination laws.<sup>93</sup>

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<sup>91</sup> Veronica Drake, *Best Practices for Monitoring AI Systems Post-Deployment*, STACK MOXIE (July 29, 2024), <https://www.stackmoxie.com/blog/best-practices-for-monitoring-ai-systems/>.

<sup>92</sup> Lena Kempe, *Navigating the AI Employment Bias Maze: Legal Compliance Guidelines and Strategies*, ABA (Apr. 10, 2024), [https://www.americanbar.org/groups/business\\_law/resources/business-law-today/2024-april/navigating-ai-employment-bias-maze/](https://www.americanbar.org/groups/business_law/resources/business-law-today/2024-april/navigating-ai-employment-bias-maze/).

<sup>93</sup> *Continuous Monitoring, Data Governance, and Compliance: A Guide to Optimizing AI Performance*, NANOMATRIX, <https://www.nanomatrixsecure.com/continuous-monitoring-data-governance-and-compliance-a-guide-to-optimizing-ai-performance/> (last visited June 21, 2025).

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**WEIGHTY CONSEQUENCES:  
HOW GLP-1 AGONIST LITIGATION HIGHLIGHTS THE NEED FOR GREATER FDA  
OFF-LABEL PRESCRIPTION OVERSIGHT**

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❖ Note ❖

*Carson Poupore\**

I. INTRODUCTION

With 42.4 percent of United States adults suffering from clinical obesity and 9.2 percent of adults suffering from it severely,<sup>1</sup> the following archetypical story is far too familiar in recent years. Seeking dietary control and weight loss, a patient consults their physician. The physician, comporting with their standard of care, prescribes *Ozempic*, which is popularly understood to resolve the patient's issue. Based on information communicated by Novo Nordisk, *Ozempic*'s manufacturer,<sup>2</sup> the physician fully informs their patient of *Ozempic*'s side effect risks. The patient starts the prescription and feels a newfound sense of hopeful control. But this feeling is short-lived. Soon after, the patient constantly feels nauseous, vomits after eating, and suffers from abdominal pain.<sup>3</sup> The patient never expected this. After correlating these unforeseen symptoms with *Ozempic* prescription, the patient concludes that they would never have taken the drug had they known these newfound issues might arise.

Millions of patients have taken drugs from the GLP-1 agonist ("GLP-1") family, which mimics GLP-1 hormones that regulate digestion.<sup>4</sup> GLP-1s are prescribed under names like *Ozempic*, *Wegovy*, *Mounjaro*, and *Zepbound*; about one in eight American adults

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\* J.D. Candidate, Class of 2027, University of Illinois College of Law.

<sup>1</sup> *Obesity in America*, AM. SOCIETY FOR METABOLIC & BARIATRIC SURGERY, <https://asmbs.org/resources/obesity-in-america/> (last visited Apr. 19, 2025).

<sup>2</sup> Ronald V. Miller, Jr., *Ozempic Lawsuit*, LAW INFO. CTR. (Jan. 5, 2025), <https://www.lawsuit-information-center.com/ozempic-gastroparesis-lawsuit.html>.

<sup>3</sup> *Id.*

<sup>4</sup> Jamie Ducharme, *Patients Are Suing Over Alleged Side Effects of Weight-Loss Drugs*, TIME (Nov. 4, 2024, 2:15 PM), <https://time.com/7130456/ozempic-side-effects-wegovy-mounjaro-gastroparesis-weight-loss/>.

have taken a GLP-1.<sup>5</sup> GLP-1s control blood sugar and appetite and boast U.S. Food and Drug Administration (“FDA”) approval for treating diabetes and obesity.<sup>6</sup> Furthermore, recent FDA approvals suggest that GLP-1s may decrease risks of heart attack and stroke.<sup>7</sup>

While most patients taking these “miracle drugs” experience negligible side effects, 1,443 cases are pending against Novo Nordisk, Eli Lilly & Co., and other pharmaceutical manufacturers alleging that GLP-1 usage has led to unexpected side effects such as stomach paralysis, pulmonary aspiration, and even thyroid cancer.<sup>8</sup> On-label information for GLP-1s has allegedly failed to warn about these outcomes, potentially violating state consumer protection laws.<sup>9</sup> Since media coverage of mass tort litigation has contributed to the past declines of beneficial FDA-approved pharmaceuticals,<sup>10</sup> the forefront issue posed by GLP-1 litigation is the FDA’s ability to monitor approved drugs post-approval to ensure their safe supply and prevent their decline in marketability.

Ultimately, Congress should enable the FDA to promulgate regulations that provide greater post-market oversight of off-label uses of approved pharmaceuticals to incrementally reduce unexpected side effect incidents, even if such oversight is *de minimis* and does not represent a regulatory overhaul. Part II of this Note discusses existing FDA regulatory capabilities in monitoring off-label prescriptions. Part III examines the case law surrounding off-label prescription and, in light of the case law, executes a cost-benefit analysis over greater post-market FDA regulatory capabilities.<sup>11</sup> Part IV takes the aforementioned cost-benefit analysis and recommends that Congress should enable the FDA to better collect post-market data to examine, monitor, and respond to off-label prescription in practice, even if such a move would merely reduce patient adverse side effect incidence marginally.

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<sup>5</sup> Alex Montero et al., *KFF Health Tracking Poll May 2024: The Public’s Use and Views of GLP-1 Drugs*, KFF (May 10, 2024), <https://www.kff.org/health-costs/poll-finding/kff-health-tracking-poll-may-2024-the-publics-use-and-views-of-glp-1-drugs/>.

<sup>6</sup> Ducharme, *supra* note 4.

<sup>7</sup> Press Release, U.S. Food & Drug Admin., FDA Approves First Treatment to Reduce Risk of Serious Heart Problems Specifically in Adults with Obesity or Overweight (Mar. 8, 2024), <https://www.fda.gov/news-events/press-announcements/fda-approves-first-treatment-reduce-risk-serious-heart-problems-specifically-adults-obesity-or>.

<sup>8</sup> Miller, *supra* note 2.

<sup>9</sup> See, e.g., Complaint & Demand for Jury Trial at ¶ 124, *Jones v. Eli Lilly & Co.*, No. 2:25-cv-00686 (E.D. Pa. Feb. 7, 2025).

<sup>10</sup> See L.E. Nigrovic & K.M. Thompson, *The Lyme Vaccine: A Cautionary Tale*, 135 EPIDEMIOLOGY & INFECTION 1, 5 (2007).

<sup>11</sup> Amy Todd, Note and Comment, *No Need for More Regulation: Payors and Their Role in Balancing the Cost and Safety Considerations of Off-Label Prescriptions*, 37 AM. J. L. & MED. 422, 430 (2011).

## II. BACKGROUND

### A. FDA Regulation of On-Label Prescription

In 1906, President Theodore Roosevelt signed the Food and Drugs Act into law, the first federal law enforcing the proper and accurate labeling of ingredients in food and drug products.<sup>12</sup> The agency charged with enforcement of this law was the FDA, which grew from a single U.S. Department of Agriculture chemist in 1862 into the agency it is today – one boasting a \$4 billion budget, twenty district offices, and oversight over approximately twenty-five percent of consumer purchase value.<sup>13</sup> The decades immediately following the enactment of the Food and Drugs Act brought consumer protection pressures to strengthen the authority of the FDA, particularly in medical, pharmaceutical and cosmetic spaces un contemplated by the initial statute.<sup>14</sup> Congress ultimately granted the FDA comprehensive authority over the on-label details, descriptions, and cautions of medical, pharmaceutical, and cosmetic products<sup>15</sup> – an authority that persists in the contemporary pharmaceutical market with drugs like GLP-1s.<sup>16</sup>

The congressional statute enabling FDA prescription regulation is the Federal Food, Drug, and Cosmetic Act (“FDCA”), which was enacted in 1938.<sup>17</sup> The FDCA authorizes the FDA to approve, monitor, recall, and regulate the marketing of pharmaceutical products to protect consumers and enforce quality standards.<sup>18</sup> In addition, Congress empowers the FDA through 21 U.S.C. §§ 393(b)(2)(B) and (b)(2)(D) to ensure that “human . . . drugs are safe and effective”<sup>19</sup> and “cosmetics are safe and properly labeled.”<sup>20</sup>

Federal regulations additionally govern the labeling, advertising, and marketing of prescription drugs exists under 21 C.F.R. § 201.100(d) and 21 C.F.R. § 201.56.<sup>21</sup> Title 21 C.F.R. § 201.100(d) requires that all prescriptions contain “adequate information for such use” on labels, including “any relevant warnings, hazards, contraindications, side effects, and precautions” for “all conditions for which [the drug] is advertised or

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<sup>12</sup> Stephen Daily, *A Brief History of the FDA*, CATARACT & REFRACTIVE SURGERY TODAY (Oct. 2011), <https://crstoday.com/articles/2011-oct/a-brief-history-of-the-fda>.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> HASSAN SHEIKH, CONG. RSCH. SERV., R45792, OFF-LABEL USE OF PRESCRIPTION DRUGS 8 (2021).

<sup>16</sup> *See id.*

<sup>17</sup> 21 U.S.C. § 393.

<sup>18</sup> Clinton Lam & Preeti Patel, *Food, Drug, and Cosmetic Act*, NIH NAT’L LIBR. OF MED.: NAT’L CTR. FOR BIOTECHNOLOGY INFO. (July 31, 2023), <https://www.ncbi.nlm.nih.gov/books/NBK585046/>.

<sup>19</sup> 21 U.S.C. § 393(b)(2)(B).

<sup>20</sup> 21 U.S.C. § 393(b)(2)(D).

<sup>21</sup> 21 C.F.R. § 201.56 (2025); 21 C.F.R. § 201.100 (2025).

represented.”<sup>22</sup> This information is ascertained through clinical trials, observational studies, and post-market spontaneous reports.<sup>23</sup> The FDA mandates post-market spontaneous reports from all companies with approved pharmaceuticals on the market,<sup>24</sup> and requires fifteen-day “[a]lert reports” after any firm becomes aware of a “serious and unexpected” adverse event.<sup>25</sup> Granted, it is unclear how efficacious these post-market spontaneous reports are in achieving the underlying purpose of 21 C.F.R. § 201.100(d) because most reports of side-effects come from pre-market trials and studies.<sup>26</sup>

21 C.F.R. § 201.56 expands upon the FDA’s general 21 C.F.R. § 201.100(d) reporting requirements and mandates that notices and warnings are “informative,” “accurate,” and “neither promotional in tone nor false or misleading” in any fashion.<sup>27</sup> Furthermore, 21 C.F.R. § 201.56 requires that prescription drug labeling “must be based whenever possible on data derived from human experience.”<sup>28</sup> With GLP-1s, for instance, the FDA deployed its on-label authority under 21 C.F.R. § 201.56 to add a warning to *Ozempic*’s label amid allegations that GLP-1s may cause bowel obstructions.<sup>29</sup>

These regulations play a critical role in the FDA process that drug manufacturers must comply with before marketing new pharmaceuticals.<sup>30</sup> Following three clinical trial phases and the submission and filing of a new drug application, an FDA review team examines the safety and efficacy of the proposed drug and its accompanying marketing.<sup>31</sup> This review scrutinizes the drug’s proposed label based on the preceding clinical trials’ empirical outcomes.<sup>32</sup> As all pharmaceuticals must gain on-label approval from the FDA, *Ozempic*, the GLP-1 “poster child,” went through this process in 2017, gaining FDA approval for the specific purpose of lowering blood sugar in diabetics.<sup>33</sup>

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<sup>22</sup> 21 C.F.R. § 201.100(d) (2025).

<sup>23</sup> Jeanne Herndon, *Adverse Reaction Information in the Prescribing Information*, U.S. FOOD & DRUG ADMIN. (Dec. 4, 2019), <https://www.fda.gov/media/133940/download>.

<sup>24</sup> *Postmarketing Adverse Event Reporting Compliance Program*, U.S. FOOD & DRUG ADMIN. (May 5, 2020), <https://www.fda.gov/drugs/surveillance/postmarketing-adverse-event-reporting-compliance-program>.

<sup>25</sup> 21 C.F.R. § 314.80(c)(1) (2025).

<sup>26</sup> Charlie Plain, *Drug Companies Failing to Properly Report Side Effects*, UNIV. MINN. SCH. PUB. HEALTH (July 30, 2015), <https://www.sph.umn.edu/news/drug-companies-failing-properly-report-side-effects/>.

<sup>27</sup> 21 C.F.R. § 201.56(a)(2) (2025).

<sup>28</sup> 21 C.F.R. § 201.56(a)(3) (2025).

<sup>29</sup> Interview by Todd Unger with Andrea Garcia, Vice President of Sci., Med., & Pub. Health, AMA, in Chi., Ill. (Oct. 4, 2023).

<sup>30</sup> *FDA’s Drug Review Process: Continued*, U.S. FOOD & DRUG ADMIN. (Aug. 24, 2015), <https://www.fda.gov/drugs/information-consumers-and-patients-drugs/fdas-drug-review-process-continued>.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Pierce Logan, *On the Increase in Use of GLP-1s*, IND. UNIV. SCH. OF MED. (June 27, 2024), <https://medicine.iu.edu/blogs/bioethics/on-the-increase-in-use-of-glp-1s>.

However, the FDA only approved *Ozempic*'s primary active ingredient, semaglutide, for weight loss after Novo Nordisk submitted a new drug application for *Wegovy* in 2021.<sup>34</sup>

### B. FDA Regulation of Off-Label Prescription

21 C.F.R. § 201's labeling requirements generally notify a prescription drug's "intended" on-label use as "advertised or represented" by pharmaceutical companies.<sup>35</sup> However, a large proportion of prescriptions are off-label and outside of the prescription's intended purpose.<sup>36</sup> While ubiquitous, off-label prescription uses can carry adverse effects not reflected in FDA-approved labeling.<sup>37</sup>

To alleviate concerns surrounding off-label drug prescription, its ubiquity, and associated adverse side effect incidence, Congress has bestowed the FDA with some regulatory power over "unintended" prescription uses.<sup>38</sup> The FDA prohibits mislabeling and requires labeling to reflect communicated post-market findings.<sup>39</sup> Furthermore, the FDA prohibits the dissemination, marketing, and advertising of prescription drugs for unapproved uses by manufacturers in interstate commerce.<sup>40</sup> The FDA may examine marketing "expressions, the design or composition of the [marketing] article, or . . . the circumstances surrounding the distribution of the [marketing] article" to extrapolate the "objective intent" of a manufacturer in prescription product launch.<sup>41</sup>

Even though the FDA has significant authority over off-label prescription sales, state medical boards, not the FDA, regulate the practice of medicine.<sup>42</sup> Accordingly, the FDA concedes regulation over the practice of off-label prescription and explicitly does not sanction pharmaceutical manufacturers for their "knowledge that . . . [a] drug was being prescribed or used by health care providers for . . . [unintended] use."<sup>43</sup>

Because the FDA lacks the requisite authority to regulate off-label prescription, it has proliferated and often defines the physician's standard of care for guideline-

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<sup>34</sup> *Id.*

<sup>35</sup> 21 C.F.R. § 201.100(d) (2025).

<sup>36</sup> Christopher Wittich, et al., *Ten Common Questions (and Their Answers) About Off-label Drug Use*, 2012 MAYO CLINIC PROC. 982, 988 (2012).

<sup>37</sup> *Understanding Unapproved Use of Approved Drugs "Off Label"*, U.S. FOOD & DRUG ADMIN. (Feb. 5, 2018), <https://www.fda.gov/patients/learn-about-expanded-access-and-other-treatment-options/understanding-unapproved-use-approved-drugs-label>.

<sup>38</sup> Wittich, et al., *supra* note 36.

<sup>39</sup> 21 C.F.R. §§ 201.56(a)(2)–(3) (2025).

<sup>40</sup> 21 C.F.R. § 201.128 (2025).

<sup>41</sup> *Id.*

<sup>42</sup> *Understanding Medical Regulation in the United States*, FED'N OF STATE MED. BDS., <https://www.fsmb.org/education/understanding-medical-regulation-in-the-united-states/> (last visited Feb. 17, 2025).

<sup>43</sup> 21 C.F.R. § 201.128 (2025).

recommended practice, last-resort therapy, and first-line therapy.<sup>44</sup> While off-label prescription facilitates treatment innovation and expedites treatment access, it is often criticized as undercutting safety standards and increasing health care costs.<sup>45</sup> Recognizing the interests at stake, the FDA has adopted the middle ground of issuing guidelines allowing manufacturers to distribute peer-reviewed studies on new off-label risk information to health care providers.<sup>46</sup>

### *C. Off-Label Prescription of GLP-1 Agonists*

Recent studies reveal that current GLP-1 patient utilization rates are not correlated with the local population incidence of diabetes and other GLP-1-treatable conditions in patients – empirically an odd result given that pharmaceutical market analysis would anticipate more GLP-1 usage where more of the conditions GLP-1s are designed to treat arise.<sup>47</sup> These findings signal greater off-label prescription, presumably to combat obesity given GLP-1 media coverage.<sup>48</sup> While the proportion of GLP-1s prescribed off-label is unclear, some studies suggest that it is about thirty-three percent, up from sixteen percent in 2021.<sup>49</sup> Medical professionals harbor concern about the rise in GLP-1 off-label prescription chiefly because the long term effects of GLP-1 usage are unknown.<sup>50</sup> Medical professionals also recognize the possibility of short-term adverse effects in patients prescribed GLP-1s off-label.<sup>51</sup> These short-term side effects include gastrointestinal issues correlated with dosage – mirroring the same concerns litigants assert against GLP-1 manufacturers.<sup>52</sup>

Increased off-label GLP-1 prescription also has limited access to on-label prescriptions for diabetics and other intended beneficiaries.<sup>53</sup> From 2022 through 2024, the FDA listed GLP-1s on its Drug Shortages Database, recognizing

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<sup>44</sup> Randall Stafford, *Regulating Off-Label Drug Use – Rethinking the Role of the FDA*, 358 NEW ENG. J. MED. 1427, 1427 (2008).

<sup>45</sup> *Id.*

<sup>46</sup> *Guidance for Industry: Distributing Scientific and Medical Publication on Risk Information for Approved Prescription Drugs and Biological Products – Recommended Practices*, U.S. FOOD & DRUG ADMIN. (June 2014), <https://www.fda.gov/media/88674/download>.

<sup>47</sup> Sanjula Jain, *GLP-1 Utilization in New York City Is Not Correlated with Clinical Indication*, TRILLIANT HEALTH (Sept. 10, 2023), <https://www.trillianthealth.com/market-research/studies/glp-1-utilization-in-new-york-city-is-not-correlated-with-clinical-indication>.

<sup>48</sup> *Id.*

<sup>49</sup> Logan, *supra* note 33.

<sup>50</sup> Grace Niewijk, *Research Shows GLP-1 Receptor Agonist Drugs Are Effective but Come with Complex Concerns*, UNIV. CHI. MED. (May 30, 2024), <https://www.uchicagomedicine.org/forefront/research-and-discoveries-articles/research-on-glp-1-drugs>.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> David Lipanovic, *GLP-1 Receptor Agonist Shortage Expected to Continue for All of 2024*, THE PHARM. J. (Jan. 4, 2024), <https://pharmaceutical-journal.com/article/news/glp-1-receptor-agonist-shortage-expected-to-continue-for-all-of-2024>.

pharmaceutical manufacturers could not meet aggregate demand for the drugs.<sup>54</sup> The FDA removed GLP-1s from this listing in February 2025,<sup>55</sup> but Eli Lilly & Co. and Novo Nordisk have since sued the FDA on allegations that it prematurely removed their GLP-1s from the database before shortage resolution.<sup>56</sup> Before the FDA’s alleged improper action, the pharmaceutical manufacturers’ February 2025 Form-F SEC filings claimed that expected supply constraints and drug shortage notifications were to “continue into the foreseeable future.”<sup>57</sup> Relatedly, medical professionals expect long-term GLP-1 supply chain disruptions to continue so long as cosmetic off-label demand remains high, hurting the FDA-intended consumers who rely on GLP-1s the most.<sup>58</sup>

The medical community is concerned with the FDA’s handling of off-label GLP-1 prescription for three reasons: the short-term side effects featured in tort litigation, the long-term side effects unknown without post-market data, and the inability of intended users to receive on-label treatment.<sup>59</sup> Given that FDA off-label oversight is limited to pharmaceutical marketing, some commentators have raised concerns about the safety and efficacy of GLP-1 off-label prescription without FDA analysis of the drug family’s off-label applications.<sup>60</sup> These commentators imply that the medical community must either maintain the status quo while placing the burden of safe, efficacious treatment on the market or that the FDA should be better equipped to oversee off-label prescription of pharmaceuticals like GLP-1s.<sup>61</sup>

### III. ANALYSIS

#### *A. Case Law on FDA Regulation of Off-Label Prescription*

FDA off-label prescription regulation is already limited to pharmaceutical marketing, but courts have further limited attempted FDA regulation within that

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<sup>54</sup> *Drug Shortages*, U.S. FOOD & DRUG ADMIN. (Mar. 13, 2025), <https://www.fda.gov/drugs/drug-safety-and-availability/drug-shortages>.

<sup>55</sup> *FDA Clarifies Policies for Compounders as National GLP-1 Supply Begins to Stabilize*, U.S. FOOD & DRUG ADMIN. (Mar. 10, 2025), <https://www.fda.gov/drugs/drug-safety-and-availability/fda-clarifies-policies-compounders-national-glp-1-supply-begins-stabilize>.

<sup>56</sup> See Complaint at ¶ 3, *Outsourcing Facilities Ass’n v. U.S. Food & Drug Admin.*, No. 4:25-cv-00174 (N.D. Tex. Feb. 24, 2025).

<sup>57</sup> See *id.* at ¶ 2.

<sup>58</sup> Heather Whitley et al., *Special Report: Potential Strategies for Addressing GLP-1 and Dual GLP-1/GIP Receptor Agonist Shortages*, NIH NAT’L LIBR. OF MED.: NAT’L CTR. FOR BIOTECHNOLOGY INFO. (Apr. 7, 2023), <https://pmc.ncbi.nlm.nih.gov/articles/PMC10338283/>.

<sup>59</sup> Logan, *supra* note 33.

<sup>60</sup> Magda Wojtara et al., *Glucagon-Like Peptide-1 Receptor Agonists for Chronic Weight Management*, NIH NAT’L LIBR. OF MED.: NAT’L CTR. FOR BIOTECHNOLOGY INFO. (Sept. 20, 2023), <https://pmc.ncbi.nlm.nih.gov/articles/PMC10533252/>.

<sup>61</sup> *Id.*

space.<sup>62</sup> What results is a laissez-faire approach—the FDA cannot criminally penalize truthful, non-misleading speech about off-label usages in pharmaceutical marketing.<sup>63</sup> This judicial limitation empowers physicians and consumers—not FDA experts charged with initial drug approval reviews—to evaluate the safety and efficacy of off-label prescription in light of adverse drug events.

In *United States v. Caronia*, the Second Circuit held that the FDA cannot criminalize the truthful and non-misleading promotion of off-label prescription.<sup>64</sup> The *Caronia* court relied on the Supreme Court’s holding that “[s]peech in aid of pharmaceutical marketing . . . is a form of expression protected by the Free Speech Clause of the First Amendment”<sup>65</sup> and further classified regulations on off-label prescription promotion by pharmaceutical manufacturers as “content- and speaker-based restrictions on speech subject to heightened scrutiny.”<sup>66</sup> The *Caronia* court held that criminalizing lawful off-label prescription promotion did not establish a “reasonable fit” to drug safety and public health as required by heightened scrutiny for content- and speaker-based speech restrictions.<sup>67</sup> Instead, criminal prosecution prohibited the free dissemination of information facilitating safe off-label use on the physician-to-consumer market.<sup>68</sup> Accordingly, the *Caronia* court standardized FDA non-regulation in off-label prescription, further narrowing the agency’s limited authority in preventing off-label harms.<sup>69</sup>

*Caronia*’s holding was extended by the U.S. District Court for the Southern District of New York in *Amarin Pharma, Inc. v. U.S. Food and Drug Admin.* to the dissemination of peer-reviewed publications, textual statements, and disclosures concerning off-label prescription.<sup>70</sup> In *Amarin Pharma*, the FDA urged the court to narrow *Caronia* to statements made directly to a health care provider or entity by a firm.<sup>71</sup> However, the court instead focused on the *actus reus* requirement of the FDCA’s misbranding provisions, agreeing with *Caronia* that the provisions did not reach “all truthful and non-misleading promotional speech” related to prescriptions.<sup>72</sup> While the *Amarin Pharma* court affirmed *Caronia*’s holding on off-label prescription non-regulation, the court did highlight where the FDA maintains proper authority.<sup>73</sup> The FDA can regulate

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<sup>62</sup> Frederick R. Ball & Erin M. Duffy, *United States v. Caronia: A Brief Look at the Broader Implications for the Food Industry*, DUANE MORRIS (Apr. 2013), [https://www.duanemorris.com/articles/static/ball\\_fldi\\_0313.pdf](https://www.duanemorris.com/articles/static/ball_fldi_0313.pdf).

<sup>63</sup> *Id.*

<sup>64</sup> *United States v. Caronia*, 703 F.3d 149, 169 (2d Cir. 2012).

<sup>65</sup> *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 557 (2011).

<sup>66</sup> *Caronia*, 703 F.3d at 162.

<sup>67</sup> *Id.* at 167-68 (quoting *Bd. of Tr. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)).

<sup>68</sup> *Caronia*, 703 F.3d at 168-69.

<sup>69</sup> See Ball & Duffy, *supra* note 62.

<sup>70</sup> *Amarin Pharma, Inc. v. U.S. Food & Drug Admin.*, 119 F. Supp. 3d 196, 237 (S.D.N.Y. 2015).

<sup>71</sup> *Id.* at 208.

<sup>72</sup> *Id.* at 227.

<sup>73</sup> *Id.* at 228.

and criminalize “false or misleading commercial speech” and “non-communicative activities to promote off-label use” unprotected by the First Amendment and within the FDCA’s misbranding provisions.<sup>74</sup>

As insinuated by the specified boundaries set in *Caronia* and *Amarin Pharma*, courts tend to defer to pharmaceutical companies, the medical profession, and state medical boards on off-label prescription, “recogniz[ing] the propriety and potential public value of unapproved” applications.<sup>75</sup> The Supreme Court articulated this general principle in *Buckman Co. v. Plaintiffs’ Legal Comm.*, stating that off-label usage is “an accepted and necessary corollary of the FDA’s mission to regulate . . . without directly interfering with the practice of medicine.”<sup>76</sup> Furthermore, the Eighth Circuit in *Weaver v. Reagen* stood by the general assertion that FDA approval processes are not designed to “preclude physicians from using their best judgment in the interest of the patient.”<sup>77</sup> In light of these general principles favoring off-label drug prescription and no circuit courts distinguishing the holdings in *Caronia* and *Amarin Pharma*, the consensus is that these Second Circuit precedents represent the status quo of FDA authority over off-label promotion.<sup>78</sup> In sum, the judiciary has limited the FDA’s regulatory authority over off-label prescription, empowering companies and medical professionals—not FDA experts controlling FDA pharmaceutical approval—with pharmaceutical market safety and quality.

#### B. Benefits of More FDA Regulation on Off-Label Prescription

Off-label prescription deregulation and its associated empowerment of professionals and firms carry opportunity costs.<sup>79</sup> First, incremental off-label prescription can positively correlate with adverse events, even under the good faith standard set in *Caronia* and *Amarin Pharma*.<sup>80</sup> For example, with off-label GLP-1 prescription for weight loss, the FDA issued a consumer notice following “more than 392 reports of adverse events with compounded semaglutide” and “more than 215 reports of adverse events with compounded tirzepatide.”<sup>81</sup> The FDA also mentioned in this notice that “federal law does not require state-licensed pharmacies that are not outsourcing facilities to submit adverse events to [the] FDA,” so the agency’s reported

<sup>74</sup> *Id.*

<sup>75</sup> *Caronia*, 703 F.3d at 153.

<sup>76</sup> *Buckman Co. v. Plaintiffs’ Legal Comm.* 531 U.S. 341, 350 (2001).

<sup>77</sup> *Weaver v. Reagen*, 886 F.2d 194, 198 (8th Cir. 1989).

<sup>78</sup> See George Horvath, *Off-Label Drug Risks: Toward a New FDA Regulatory Approach*, 29 ANNALS HEALTH L. & LIFE SCIS. 101, 118 (2020) (discussing *Caronia*, mentioning *Amarin Pharma, Inc.*, and stating that “trend over the past decade has been for courts to invalidate the FDA’s ban on some off-label promotional activities.”).

<sup>79</sup> *Id.* at 102.

<sup>80</sup> *FDA’s Concerns with Unapproved GLP-1 Drugs Used for Weight Loss*, U.S. FOOD & DRUG ADMIN. (Dec. 18, 2024), <https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/fdas-concerns-unapproved-glp-1-drugs-used-weight-loss>.

<sup>81</sup> *Id.*

metrics may be “underreported.”<sup>82</sup> Since minimal FDA oversight into off-label prescription may cause underreporting,<sup>83</sup> the FDA may be unable to issue adequate warnings and notices. While the FDA cannot enforce recalls and only retains authority to oversee company recall strategy and classify recalls,<sup>84</sup> greater oversight may facilitate informational exchanges, allowing for more efficient warnings, notices, and recalls that marginally prevent adverse drug events.<sup>85</sup>

Additionally, off-label prescription is prevalent because, under current FDA regulatory oversight, it is cost-prohibitive, time-consuming, and evidence-intensive to attain FDA approval for an additional on-label use.<sup>86</sup> The FDA approval process for a new indication on a previously approved drug is facilitated under 21 C.F.R. § 314, which requires thorough research through the “list of all published studies or publicly available reports of clinical investigations” to show that the FDA needs to conduct a “new clinical investigation . . . essential to approval.”<sup>87</sup> While this rigorous standard ensures methodically sound accreditation, commentators have suggested that pharmaceutical companies have subverted the FDA approval process for off-label indications due to compliance costs.<sup>88</sup> Greater FDA off-label prescription oversight may partially erode the informational barriers behind FDA on-label conversion of off-label uses, as efficacious off-label usages can be easily communicated, monitored, and approved via off-label data collection.<sup>89</sup>

### *C. Costs of More FDA Regulation on Off-Label Prescription*

Nonetheless, off-label prescription carries considerable benefits warranting at least a somewhat deregulated landscape, one furthered by *Caronia* and *Amarin Pharma*.<sup>90</sup> Outside the judicial rationale, insurance effectively curbs off-label prescription by denying reimbursement for off-label care without evidence of pharmaceutical quality and efficacy.<sup>91</sup> While data are not available on the percentage of off-label prescription claims submitted to and denied by payors, off-label prescription typically requires prior authorization given its unapproved nature.<sup>92</sup> With around 3.2 million prior

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<sup>82</sup> *Id.*

<sup>83</sup> *See, e.g., id.*

<sup>84</sup> *FDA’s Role in Drug Recalls*, U.S. FOOD & DRUG ADMIN. (Aug. 22, 2024), <https://www.fda.gov/drugs/drug-recalls/fdas-role-drug-recalls>.

<sup>85</sup> *See* Horvath, *supra* note 78, at 133 (proposing policy solution allowing FDA to collect more post-market data from manufacturers when off-label use exceeds certain threshold to minimize off-label risk).

<sup>86</sup> Stafford, *supra* note 44.

<sup>87</sup> 21 C.F.R. § 314.50(j)(4) (2025).

<sup>88</sup> Stafford, *supra* note 44.

<sup>89</sup> *Id.*

<sup>90</sup> *See* Christian Tomaszewski, *Off-Label: Just What the Doctor Ordered*, 2 J. MED. TOXICOLOGY 87, 87 (2006).

<sup>91</sup> Joshua Cohen et al., *Off-Label Use Reimbursement*, 64 Food Drug L. J. 391, 394 (2009).

<sup>92</sup> SHEIKH, *supra* note 15.

authorization requests fully or partially denied by payors in 2023,<sup>93</sup> commentators suggest that insurance plays a gatekeeping role in limiting unnecessary off-label prescription. With off-label GLP-1 prescription, prescriptions to treat obesity hold “minimal to no coverage on most ACA Marketplace formularies,” whereas GLP-1s prescribed on-label for diabetes are “included in 82% of Marketplace plan formularies.”<sup>94</sup> The limited data reveal that insurance guards from off-label overprescription, arguably making further FDA off-label regulation red tape that would not significantly mitigate adverse drug events.

Furthermore, FDA off-label prescription non-regulation has created practitioner norms that may make further oversight disruptive without careful implementation. Despite a lack of FDA approval, efficacious off-label prescriptions mold a physician’s standard of care;<sup>95</sup> increased complexity of the simplified regulatory environment, if hastily implemented to curtail off-label prescription, might hinder physicians’ abilities to provide effective treatments pursuant to their standard of care.<sup>96</sup> An example of this includes tricyclic antidepressants, which have proven effective through clinical trial and physician practice as a first-line treatment option for neuropathic pain.<sup>97</sup> The FDA has not approved use of tricyclic antidepressants for this application although their prescription falls within the physician’s standard of care.<sup>98</sup> A stringent framework enabling the FDA to monitor, limit, or barricade off-label usage might unreasonably disrupt physician and patient reliance interests, especially given the fact that almost eighty percent of certain patient subpopulations are taking at least one off-label medication.<sup>99</sup> Any reform must be cautiously applied.

#### D. *A Distinct Need for “Soft Power” Off-Label Prescription Regulation*

The current regulatory framework and the mantras of *Caronia* and *Amarin Pharma* are insufficient for maintaining a safe, yet effective pharmaceutical market adequately policed by the FDA. Some scholars have suggested the proper focus of FDA off-label prescription regulation should not be “off-label promotion” but rather “off-label

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<sup>93</sup> Jeannie Biniek et al., *Medicare Advantage Insurers Made Nearly 50 Million Prior Authorization Determinations in 2023*, KFF (Jan. 28, 2025), <https://www.kff.org/medicare/issue-brief/nearly-50-million-prior-authorization-requests-were-sent-to-medicare-advantage-insurers-in-2023/>.

<sup>94</sup> Justin Lo & Cynthia Cox, *Insurer Strategies to Control Costs Associated with Weight Loss Drugs*, PETERSON-KFF HEALTH SYSTEM TRACKER (June 12, 2024), <https://www.healthsystemtracker.org/brief/insurer-strategies-to-control-costs-associated-with-weight-loss-drugs/>.

<sup>95</sup> Wittich, et al., *supra* note 36.

<sup>96</sup> *Id.*

<sup>97</sup> Robert H. Dworkin, et al., *Recommendations for the Pharmacological Management of Neuropathic Pain: An Overview and Literature Update*, 85 MAYO CLINIC PROC. S3, S3 (2010).

<sup>98</sup> Wittich et al., *supra* note 36.

<sup>99</sup> Samir S. Shah, et al., *Off-label Drug Use in Hospitalized Children*, NIH NAT’L LIBR. OF MED.: NAT’L CTR. FOR BIOTECHNOLOGY INFO. (Mar. 2007), <https://pubmed.ncbi.nlm.nih.gov/17339510/>.

prescribing.”<sup>100</sup> These scholars assert the FDA should be able to exert a “soft power” to better gather available post-market data to make informed decisions.<sup>101</sup> In light of the variegated harms posed by increased GLP-1 off-label prescription, “soft power” policy recommendations, including the imposition of a duty on manufacturers to disclose off-label prescription data,<sup>102</sup> gain appeal.

That said, the cost-benefit analysis of FDA off-label prescription demands a nuanced solution sensitive to the ubiquity of off-label practice, even if such a solution is *de minimis* and only marginally mitigates harm within the pharmaceutical market. The same commentators advocating for the “soft power” approach to FDA off-label prescription regulation highlight a requisite consideration of the “sensitivity of the burdens that would be imposed on the FDA and drug manufacturers.”<sup>103</sup> Significant burdens may arise from navigating incremental displacements of the empowerment accorded to pharmaceutical manufacturers, physicians, and consumers under the current FDA regulatory regime – after all, according even incremental FDA oversight may chill the current practice of prescribing off-label so long as supported by peer-reviewed publications.<sup>104</sup> Intersecting market, health, and professional interests necessitate a compromise to make off-label prescription safer without eliminating its benefits. However, given off-label prescription’s risks absent FDA monitoring power, Congress must authorize FDA regulations that improve – or at least marginally improve – the off-label communicative framework between the FDA, manufacturers, physicians, and consumers in the physician-to-consumer market.<sup>105</sup>

#### IV. RECOMMENDATION

The best way to implement *de minimis* FDA off-label prescription oversight is neither overhauling its laissez-faire approach nor maintaining the status quo. Rather, the appropriate market-player compromise would be Congress’ authorization of FDA regulations for greater off-label prescription data collection and monitoring of its associated adverse drug events. Such an authorization would adequately respond to communicative needs between pharmaceutical manufacturers, physicians, consumers, and the FDA in the off-label prescription space while respecting the practice’s inseparable presence within the medical profession.

In seeking to incrementally enhance off-label prescription safety, part of the FDA’s regulatory role *must* remain the same. It is not the FDA’s role, but rather that of state medical boards, to directly regulate the prescription of off-label drugs by physicians.

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<sup>100</sup> Horvath, *supra* note 78, at 127.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 127–28.

<sup>103</sup> *Id.* at 127.

<sup>104</sup> Melanie Chansky et al., *Influence of Data Disclosures on Physician Decisions About Off-Label Uses: Findings From a Qualitative Study*, BMC PRIMARY CARE (Apr. 19, 2022), <https://doi.org/10.1186/s12875-022-01666-2>.

<sup>105</sup> Horvath, *supra* note 78, at 133.

Some studies have found that upwards of seventy-eight percent of certain patient subpopulations are taking at least one off-label medication.<sup>106</sup> As a result, the proper solution to mitigate litigation, like that associated with GLP-1 off-label usage, is not motivating the FDA to disrupt medical practice through an extreme regulatory overhaul. Instead, Congress should authorize the FDA to promulgate necessary regulations for greater data collection, monitoring, and oversight of off-label prescription and its associated adverse events.

While the FDA requires companies with approved pharmaceuticals on the market to “submit postmarketing safety information,”<sup>107</sup> including fifteen-day “Alert reports” after any “serious and unexpected” adverse event that comes to a firm’s knowledge,<sup>108</sup> physician reporting of adverse events to the FDA is currently voluntary.<sup>109</sup> If Congress were to incrementally authorize the FDA to mandate physician reporting of adverse events derived from off-label prescription, the FDA may be able to better issue notices and recalls without overstepping into the medical profession’s domain.

Regulations under 21 C.F.R. § 314.80 take *de jure* measures in ensuring adverse events are reported,<sup>110</sup> but some studies posit that pharmaceutical companies, *de facto*, fail to comply with these self-reporting regulations.<sup>111</sup> While it is unclear how many adverse events would be mitigated by mandatory physician reporting of merely off-label adverse events, the state of FDA regulation reveals a practical pain that requires a regulatory solution. Accordingly, Congress should incrementally resolve the issue by enabling the FDA to collect physician data to monitor off-label prescriptions significantly associated with adverse drug reactions due to off-label prescription’s unapproved nature.<sup>112</sup> What Congress should authorize the FDA to do is supplement the off-label adverse event reporting burden placed on pharmaceutical manufacturers by 21 C.F.R. § 314.80 with new reporting requirements for physicians,<sup>113</sup> enabling more reliable post-market data pooling on off-label prescription.

One possible roadblock to the effective implementation of off-label adverse event reporting requirements for physicians might be the short-term administrative burdens placed on them.<sup>114</sup> Physicians are ethically obligated to report all adverse events to

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<sup>106</sup> Shah, et al., *supra* note 99.

<sup>107</sup> *Postmarketing Adverse Event Reporting Compliance Program*, *supra* note 23.

<sup>108</sup> 21 C.F.R. § 314.80(c)(1) (2025).

<sup>109</sup> *Reporting By Health Professionals*, U.S. FOOD & DRUG ADMIN. (Mar. 25, 2016), <https://www.fda.gov/safety/reporting-serious-problems-fda/reporting-health-professionals>.

<sup>110</sup> 21 C.F.R. § 314.80 (2025).

<sup>111</sup> Plain, *supra* note 26.

<sup>112</sup> Benjamin Horen, et al., *Adverse Drug Reactions and Off-Label Drug Use in Paediatric Outpatients*, NIH NAT’L LIBR. MED.: NAT’L CTR. FOR BIOTECHNOLOGY INFO. (Dec. 2002), <https://pmc.ncbi.nlm.nih.gov/articles/PMC1874497/>.

<sup>113</sup> 21 C.F.R. § 314.80 (2025).

<sup>114</sup> See Eran Klein & Dennis Bourdette, *Postmarketing Adverse Drug Reactions*, NIH NAT’L LIBR. MED.: NAT’L CTR. FOR BIOTECHNOLOGY INFO. (Aug. 2013), <https://pmc.ncbi.nlm.nih.gov/articles/PMC3787113/> (discussing need for physician reporting that is “more timely, standardized, and useful for the practicing clinician” than status quo, encompassing administrative concerns).

appropriate regulatory agencies,<sup>115</sup> but the FDA currently boasts no mandatory reporting system procedurally binding physicians to report adverse events.<sup>116</sup> This additional cost to practitioners must be fairly weighed against the putative benefits of Congress' authorization of mandatory off-label adverse event physician reporting, but it does not tip the scales against authorization.<sup>117</sup> While implementation costs may disrupt practitioners in the short-term, the data mining capabilities granted to the FDA through robust reporting would catalyze long-term benefits in accurate drug labeling and communicative speed of contraindications to the physician-to-consumer market.<sup>118</sup> Prudently looking ahead at the downstream effects of its policy decisions, Congress should not let short-term practitioner burdens bar it from authorizing the FDA to better enhance long-term public welfare with greater off-label prescription data collection capabilities.<sup>119</sup>

## V. CONCLUSION

Multidistrict litigation is ongoing over unexpected adverse effects from the prevalent usage of GLP-1s.<sup>120</sup> While any regulatory fallout is yet to be determined, the litigation's nationwide scope and alleged consumer-level harms necessitate a re-examination of whether the FDA's post-market oversight is adequate. While the FDA significantly controls approved, on-label prescription, its authority over unapproved, off-label usage is limited by current regulations and further curtailed by the prevailing case law.<sup>121</sup> Some commentators have suggested a need for an increased FDA "soft power" over off-label prescription,<sup>122</sup> and ongoing GLP-1 litigation, at least partially characterized by off-label prescription, makes this recommendation appealing. In balancing the costs and benefits of greater FDA off-label prescription oversight, the appropriate "soft power" compromise is Congress' authorization of new FDA regulations mandating physician reporting of adverse drug events from off-label prescription. Given medical community concerns about off-label prescription of GLP-1s for unapproved – namely cosmetic – applications,<sup>123</sup> congressional authorization of such regulatory power might make the physician-to-consumer market safer, protect

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<sup>115</sup> 8.8. *Required Reporting of Adverse Events*, AMA PRINCIPLES MED. ETHICS, <https://code-medical-ethics.ama-assn.org/sites/default/files/2022-09/8.8%20Required%20reporting%20of%20adverse%20events%20-%20background%20reports.pdf> (last visited Mar. 13, 2025).

<sup>116</sup> Klein & Bourdette, *supra* note 114.

<sup>117</sup> *Id.*

<sup>118</sup> Jasmine C. Gatti, *The Importance of Physicians Identifying and Reporting Adverse Drug Events*, AM. FAM. PHYSICIAN (Feb. 15, 2012), <https://www.aafp.org/pubs/afp/issues/2012/0215/p318.html>.

<sup>119</sup> Klein & Bourdette, *supra* note 114.

<sup>120</sup> Miller, *supra* note 2.

<sup>121</sup> Mikaela Wells et al., *Regulating Off-Label Prescribing*, REGUL. REV. (June 22, 2024), <https://www.theregreview.org/2024/06/22/regulating-off-label-prescribing/>.

<sup>122</sup> Horvath, *supra* note 78, at 127.

<sup>123</sup> Logan, *supra* note 33.

pharmaceutical companies from avoidable liability, and allow GLP-1s to be beneficially prescribed without negative publicity or safety question marks.

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**DECEPTION BY DELIVERY FEES:  
DEMANDING CONSUMER PROTECTIONS AND TRANSPARENCY IN THE FACE OF  
DECEPTIVE FEE PRACTICES**

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❖ Note ❖

*Deanna Nila\**

## I. INTRODUCTION

The use of online food delivery platforms has seen a rampant increase in recent years, with the global food delivery market being valued at a whopping \$242.09 billion in 2023.<sup>1</sup> With the rise and fall of the COVID-19 pandemic, bustling consumer lifestyles, and the increased digitalization of everyday interactions, the ability to order food delivery from over thousands of different restaurant options has never been more convenient.<sup>2</sup> Every day, thousands of busy consumers utilize apps like DoorDash, Uber Eats, or GrubHub to have food or groceries delivered right to their door step.<sup>3</sup> Many have even become reliant on these services, such as those with mobility issues or those who do not own vehicles.<sup>4</sup> While the necessity and convenience of having food delivery at our fingertips has made it a booming business, consumers have found that this convenience can sometimes come at a heavy price. While many food delivery

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\* J.D. Candidate, Class of 2026, University of Illinois College of Law.

<sup>1</sup> *Online Food Delivery Market to Hit Enormous Growth of 11.92% by 2033*, GLOBENEWSWIRE (Sept. 2, 2024), <https://www.globenewswire.com/news-release/2024/09/03/2939262/0/en/Online-Food-Delivery-Market-to-Hit-Enormous-Growth-of-11-92-By-2033.html>.

<sup>2</sup> Kabir Ahuja, *Ordering in: The Rapid Evolution of Food Delivery*, MCKINSEY & CO. (Sept. 22, 2021), <https://www.mckinsey.com/industries/technology-media-and-telecommunications/our-insights/ordering-in-the-rapid-evolution-of-food-delivery>; *Robust Platforms and Tech Tools Help Independents Boost Online Ordering Business*, REST. HOSPITALITY (July 22, 2022), <https://www.restaurant-hospitality.com/supplier-news/robust-platforms-and-tech-tools-help-independents-boost-online-ordering-business>; Jim Tab, *The US Food Delivery Scene: What the Numbers Say*, CLOUDKITCHENS (Apr. 3, 2025), <https://cloudkitchens.com/blog/food-delivery-statistics-and-opportunities/>.

<sup>3</sup> *Id.*

<sup>4</sup> *What If More People Bought Groceries Online Instead of Driving to a Store?*, U.S. ENV'T PROT. AGENCY (Apr. 18, 2025), <https://www.epa.gov/greenvehicles/what-if-more-people-bought-groceries-online-instead-driving-store>.

services reel in customers by advertising zero-dollar delivery fees, steep discounts, or offering monthly subscriptions meant to cover delivery fees, customers are often surprised with additional fees that are tacked on at checkout under the guise of “small order fees” or “service fees.”<sup>5</sup> These kinds of fees fall under what many now refer to as “junk fees,” and have become the center of emerging litigation against food delivery giants like GrubHub and DoorDash.<sup>6</sup>

With junk fees and other deceptive fee practices causing disproportionate harm to consumers, employees, and businesses across industries like event ticket sales, banking, lodging, or food delivery, some government agencies have stepped in.<sup>7</sup> For instance, the Federal Trade Commission (“FTC”) and the Consumer Financial Protection Bureau (“CFPB”) are two of the primary agencies that have implemented initiatives or brought suit against some of the largest corporate culprits.<sup>8</sup> In a recent suit brought by the FTC and the Illinois Attorney General, for instance, GrubHub paid \$25 million to settle claims that they engaged in deceptive business practices, including the use of junk fees.<sup>9</sup> A similar suit was filed by the city of Chicago against DoorDash, alleging that the company engaged in deceptive practices surrounding fees, pricing, and tips for drivers.<sup>10</sup>

While recent agency initiatives have provided consumer protections against junk fees in cable, transportation, and banking institutions and litigation has cracked down on some food delivery companies, these measures serve merely as a “cautionary tale” for emerging food and grocery delivery platforms.<sup>11</sup> With companies choosing to settle rather than going to trial, millions they pay pale in comparison to the billions they make in junk fees annually.<sup>12</sup> Additionally, regulations against junk fees have been

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<sup>5</sup> Greg Johnson, *Grubhub to Pay \$25M to Settle FTC’s Unlawful Practices Charge*, BLUE BOOK (Dec. 19, 2024), <https://www.bluebookservices.com/grubhub-to-pay-25mm-to-settle-ftcs-unlawful-practices-charge/>.

<sup>6</sup> Joanna Fantozzi, *Chicago Accuses Grubhub, DoorDash of Deceptive Business Practices*, REST. DIVE (Aug. 30, 2021), <https://www.restaurantdive.com/news/chicago-accuses-grubhub-doordash-of-deceptive-business-practices/605739/>.

<sup>7</sup> Council of Economic Advisers, *The Price Isn’t Right: How Junk Fees Cost Consumers and Undermine Competition*, THE WHITE HOUSE (Mar. 5, 2024), <https://bidenwhitehouse.archives.gov/cea/written-materials/2024/03/05/the-price-isnt-right-how-junk-fees-cost-consumers-and-undermine-competition/>.

<sup>8</sup> *Id.*

<sup>9</sup> Leonard L. Gordon & Ellis McKennie, *FTC and Illinois Attorney General Settle with Grubhub for Deceptive Practices*, VENABLE LLP (Dec. 19, 2024), <https://www.allaboutadvertisinglaw.com/2024/12/ftc-and-illinois-attorney-general-settle-with-grubhub-for-deceptive-practices.html>.

<sup>10</sup> Mike Vilensky, *Chicago’s Suit Over DoorDash Fees Gets Trimmed by Federal Court*, BLOOMBERG L. (Sept. 20, 2023), <https://news.bloomberglaw.com/litigation/chicagos-suit-over-doordash-fees-gets-trimmed-by-federal-court>.

<sup>11</sup> James Palmer & Greg Andrews, *\$25M Grubhub Settlement Sheds Light on How Other Gig Economy Firms Can Avoid Regulatory Trouble*, LAW.COM: CORP. COUNS. (Dec. 18, 2024), <https://www.law.com/corpcounsel/2024/12/18/25m-grubhub-settlement-sheds-light-on-how-other-gig-economy-firms-can-avoid-regulatory-trouble/>.

<sup>12</sup> Council of Economic Advisers, *supra* note 7.

implemented in some industries, leaving others, such as the food delivery industry, without protection.<sup>13</sup> Even the FTC’s “Rule on Unfair or Deceptive Fees,” which was meant to provide widespread reform, was ultimately limited to the event-ticketing and short-term lodging industries.<sup>14</sup>

Although most states lack rigid protections for consumers facing deceptive business practices that can cost them hundreds in additional fees per year on food delivery, some states are leading the way in proposing legislation to combat these schemes.<sup>15</sup> California, for example, recently proposed two bills that would ban “drip pricing” and require food delivery apps to provide customers with an itemized list of fees at checkout, including all fees, commissions, and costs paid by the restaurant.<sup>16</sup> Some opponents argue that disclosure of these fee schedules can harm business competition by making information on commission schemes publicly available, prohibiting them from negotiating exclusive partnerships and pricing with delivery services.<sup>17</sup> However, with risks like consumer harm and distrust weighing in the opposite direction, the benefits to consumer protection and the increased ability to make informed purchasing decisions far outweigh the drawbacks.<sup>18</sup>

As consumers continue to require convenience in the age of advancement and as the food delivery industry is projected to grow, states must implement requirements for clear and conspicuous fee structures. Part II of this Note will discuss the past and present trends of deceptive fee practices in food and delivery service platforms, current measures implemented by the FTC, CFPB, and other government entities, and recent litigation against food delivery apps.<sup>19</sup> Part III of this note will analyze how excessive or deceptive delivery fees harm consumers, businesses, and those who partake in the gig economy, why the current FTC measures fall short, and how an implementation of more specific measures at the state or national level can ensure consumer protection.<sup>20</sup> Part IV recommends that state and national legislatures require “clear

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<sup>13</sup> *Id.*

<sup>14</sup> Monique N. Bhargava, et al., “Junk” Fees No More: The FTC Releases Final Rule on Unfair or Deceptive Fees, REED SMITH LLP (Jan. 7, 2025), <https://www.reedsmith.com/en/perspectives/2025/01/junk-fees-no-more-the-ftc-releases-final-rule-on-unfair-or-deceptive-fees>.

<sup>15</sup> Joanna Fantozi, *Surge in Food-Delivery-Related Legislation and Lawsuits Could Lead to Industry Reckoning*, NATION’S REST. NEWS (Apr. 22, 2024), <https://www.nrn.com/delivery-takeout-solutions/surge-food-delivery-related-legislation-and-lawsuits-could-lead-industry>.

<sup>16</sup> Joe Guzkowski, *California Bill Would Force Delivery Apps to Disclose What Restaurants Pay*, REST. BUS. ONLINE (Apr. 8, 2023), <https://www.restaurantbusinessonline.com/technology/california-bill-would-force-delivery-apps-disclose-what-restaurants-pay>.

<sup>17</sup> *Id.*

<sup>18</sup> Guzkowski, *supra* note 16; *Widespread Consequences of Junk Fees Uncovered, With Financial Transactions Showing Most Impact on Americans*, WISE NEWSROOM, (Jan. 23, 2024), <https://newsroom.wise.com/en-NAM/233952-widespread-consequences-of-junk-fees-uncovered-with-financial-transactions-showing-most-impact-on-americans>.

<sup>19</sup> *See infra* Part II.

<sup>20</sup> *See infra* Part III.

and conspicuous” disclosure of all transaction fees, minus government fees and fees for optional, ancillary goods or services.<sup>21</sup>

## II. BACKGROUND

### *A. How Deceptive Fee Practices Have Taken Shape Within the Food Delivery Industry*

Food delivery apps and services have seen explosive growth in the United States market within the past decade.<sup>22</sup> Prior to the 2010’s, most food delivery options were limited to delivery services offered by restaurants themselves, lacked any standardized or commonplace delivery service platforms, and were largely reliant on individual business practices and delivery personnel.<sup>23</sup> With the emergence of some of today’s food delivery giants, UberEats, DoorDash, and Postmates between 2011 and 2014, the restaurant industry got its first taste of food delivery apps.<sup>24</sup> These applications streamlined and standardized the process of placing an online order with a restaurant, having a gig-economy delivery driver pick up the order, and getting food delivered directly to one’s doorstep.<sup>25</sup>

However, it wasn’t until nearly a decade later, when the COVID-19 pandemic shocked the world, that this industry saw its biggest boom.<sup>26</sup> With lockdowns taking place across the country and precautionary social-distancing practices becoming the norm, millions of Americans were forced to stay home and make use of contactless delivery services to receive food and other essentials. This critical need for food delivery not only boosted business for existing food delivery platforms, but brought new contenders into the market, further launching this industry into prominence. With shifting cultural norms and recognition of the inherent convenience or necessity of these services, the industry has continued to see growth even after the pandemic.<sup>27</sup> It is estimated that the online food delivery market will continue to see a compounded annual growth rate of about 10.3 percent until 2030.<sup>28</sup>

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<sup>21</sup> See *infra* Part IV.

<sup>22</sup> Ahuja, *supra* note 2.

<sup>23</sup> *The Rise of Food Delivery Services: A Revolution in Convenience*, INTERSTATE COURIER SERV., INC. (Aug. 26, 2024), <https://interstatecourier.net/the-rise-of-food-delivery-services-a-revolution-in-convenience/>.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Online Food Delivery Market to Hit Enormous Growth of 11.92% by 2033*, GLOBENEWSWIRE (Sept. 2, 2024), <https://www.globenewswire.com/news-release/2024/09/03/2939262/0/en/Online-Food-Delivery-Market-to-Hit-Enormous-Growth-of-11-92-By-2033.html>.

<sup>28</sup> *ONLINE FOOD DELIVERY MARKET SIZE, SHARE & TRENDS ANALYSIS REPORT BY TYPE (PLATFORM TO CONSUMER, RESTAURANT TO CONSUMER), BY REGION (NORTH AMERICA, EUROPE), AND SEGMENT FORECASTS, 2023 – 2030*, GRAND VIEW RSCH.

However, consumers of these services are realizing that the convenience comes at a hefty cost.<sup>29</sup> Contrary to the prior expectation that the increasing prominence of food delivery apps would lower food delivery costs by providing a larger, easily-accessible network of delivery drivers, the price tag on these services has only gotten higher.<sup>30</sup> In 2024, over forty-one percent of consumers who reported that they ordered less delivery attributed the decrease to “high delivery fees.”<sup>31</sup> In other words, many customers are finding themselves unable or unwilling to afford food delivery after services tack on an array of delivery fees, service fees, and even suggested driver tips.<sup>32</sup> In 2022, data revealed that those using food delivery apps see an average of \$12.80 in hidden fees per order.<sup>33</sup> These kinds of fees, commonly referred to as ‘junk fees,’ often go undisclosed in advertisements and initial food prices and are misleadingly added on at the end of the transaction before a customer can check out.<sup>34</sup> With additional pressures like search cost coming into play, in which consumers decide to purchase a good or service they have already selected instead of spending additional time and resources in locating a lower-priced alternative, the issue of junk fees has greatly impacted consumers but gone largely unchecked.<sup>35</sup> With recent economic tensions and Americans spending an estimated \$5 billion in delivery fees per year, the role that deceptive fee practices play in consumer spending cannot be ignored.<sup>36</sup>

#### *B. Current Measures in Place Against Exorbitant or Deceptive Fees Across Industries*

Junk fees have impacted consumers in more than just the food delivery service industry – they have also taken hold in markets such as the lodging, banking, auto dealership, airline, and even ticketing sales industries.<sup>37</sup> While there are still insufficient measures in place to combat junk fees in the food delivery industry, entities like the FTC, CFPB, and U.S. Department of Transportation (“USDOT”) have implemented measures to combat deceptive fee practices in the cable, transportation, and banking industries. For instance, in 2022, the CFPB implemented an initiative that would save American families billions of dollars in exploitative junk fees like non-sufficient fund fees and credit card late fees.<sup>38</sup> Accordingly, the CFPB has slashed average credit card

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<sup>29</sup> Justine Fisher, *Food Delivery Fees are Rising, and Everyone’s Feeling the Pinch*, CNBC (July 27, 2024), <https://www.cnbc.com/2024/07/27/food-delivery-fees-are-rising.html>.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Lynn Beyrouthy, *Average Food Delivery Hidden Cost per Order in the U.S.*, STATISTA (Apr. 17, 2025), <https://www.statista.com/statistics/1358860/average-food-delivery-hidden-cost-per-order-us/>.

<sup>34</sup> Council of Economic Advisers, *supra* note 7.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Junk Fees*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/rules-policy/junk-fees/> (last visited Feb. 23, 2025).

late fees,<sup>39</sup> closed a loophole that allowed banks to charge high overdraft fees,<sup>40</sup> refunded consumers \$140 million in predatory bank fees, and more.<sup>41</sup> Furthermore, in March 2023, the FCC proposed an “all-in” pricing requirement for cable and satellite television providers, which would require providers to clearly and accurately disclose pricing for video programming service in their promotional materials.<sup>42</sup> Additionally, in 2023, the USDOT put forth initiatives urging U.S. airlines to provide fee-free family seating.<sup>43</sup> Previously, parents who wished to sit near underage children were forced to pay exorbitant fees to do so.<sup>44</sup> In 2024, the FTC also rolled out a final Junk Fees Rule prohibiting ‘bait-and-switch’ pricing practices in the event ticketing and hotel industries and requiring fees to be disclosed up-front.<sup>45</sup>

In addition to agency initiatives, states like Minnesota, New York, and California are paving the way in implementing legislation against junk fees.<sup>46</sup> In 2024, a California law went into effect, prohibiting businesses who engage with California consumers from using drip pricing and similar deceptive fee practices.<sup>47</sup> Drip pricing is a pricing scheme in which a business or service provider discloses only part of the price for a service or product, and then discloses or adds on additional, and often mandatory, charges later in the transaction.<sup>48</sup> Similarly, a 2025 Minnesota law now mandates businesses to include all mandatory fees in advertised prices. New York has also enacted legislation requiring businesses to be transparent about fees and surcharges

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<sup>39</sup> *CFPB Bans Excessive Credit Card Late Fees, Lowers Typical Fee from \$32 to \$8*, CONSUMER FIN. PROT. BUREAU (Mar. 5, 2024), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-bans-excessive-credit-card-late-fees-lowers-typical-fee-from-32-to-8/>.

<sup>40</sup> *Proposes Rule to Close Bank Overdraft Loophole that Costs Americans Billions Each Year in Junk Fees*, CONSUMER FIN. PROT. BUREAU (Jan. 17, 2024), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-rule-to-close-bank-overdraft-loophole-that-costs-americans-billions-each-year-in-junk-fees/>.

<sup>41</sup> *CFPB Exams Return \$140 Million to Consumers Hit by Illegal Junk Fees in Banking, Auto Loans, and Remittances*, CONSUMER FIN. PROT. BUREAU (Oct. 11, 2023), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-exams-return-140-million-to-consumers-hit-by-illegal-junk-fees-in-banking-auto-loans-and-remittances/>.

<sup>42</sup> *FCC Proposes Pricing Transparency Requirement for Cable and Satellite*, FED. COMM’NS COMM’N, <https://www.fcc.gov/document/fcc-proposes-pricing-transparency-requirement-cable-and-satellite> (last visited Feb. 23, 2025).

<sup>43</sup> *Biden-Harris Administration Proposes Ban on Family Seating Junk Fees Charged by Airlines*, U.S. DEPT OF TRANSP. (Aug. 1, 2024), <https://www.transportation.gov/briefing-room/biden-harris-administration-proposes-ban-family-seating-junk-fees-charged-airlines>.

<sup>44</sup> *Id.*

<sup>45</sup> *Federal Trade Commission Announces Bipartisan Rule Banning Junk Ticket and Hotel Fees*, FED. TRADE COMM’N (Dec. 17, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/12/federal-trade-commission-announces-bipartisan-rule-banning-junk-ticket-hotel-fees>.

<sup>46</sup> Council of Economic Advisers, *supra* note 7.

<sup>47</sup> Vejay Lalla, et al., *California’s Hidden Fee Ban: FAQs and Guidance*, FENWICK (July 18, 2024), <https://www.fenwick.com/insights/publications/californias-hidden-fee-ban-faqs-and-guidance>.

<sup>48</sup> *The Economics of Drip Pricing*, FED. TRADE COMM’N (May 21, 2021), <https://www.ftc.gov/news-events/events/2012/05/economics-drip-pricing>.

whenever customers pay with a credit card. Additionally, legislation has been adopted in states like New York and Massachusetts to help manage extortionate apartment fees, with New York implementing legislation that would prevent landlords from passing broker fees onto tenants and Massachusetts banning rental application fees since 2014.<sup>49</sup>

### *C. Recent Litigation Against Food Delivery Giants*

Government entities have also attempted to address the junk fee problem by bringing lawsuits on consumer protections grounds against some of the leaders in the food delivery service industry that engaged in these kinds of practices.<sup>50</sup> In 2021, the City of Chicago filed lawsuits against both DoorDash and GrubHub, alleging that the companies had engaged in deceptive practices such as advertising delivery from unaffiliated restaurants without their consent, using bait-and-switch fee schemes, and being deceptive about in-app menu prices being higher than restaurant prices.<sup>51</sup> Additionally, the complaint alleged that GrubHub employed tactics like providing customers with phone numbers and fake websites that appeared to belong to restaurants, using deceptive promotional materials, and exceeding Chicago's fifteen percent cap on restaurant commissions.<sup>52</sup> Moreover, it alleged that DoorDash misled customers into thinking that tips went directly to drivers and imposed a misleading "Chicago fee," which was not mandated by the city.<sup>53</sup> The U.S. District Court for the Northern District of Illinois later barred some of these claims, stating that any claim that occurred prior to August 27, 2019, was past the statute of limitations period.<sup>54</sup> DoorDash later settled the suit with the Illinois Attorney General Kwame Raoul, agreeing to pay a total of \$11.25 million to settle the claims.<sup>55</sup> Similarly, GrubHub agreed to pay \$25 million to settle their claims.<sup>56</sup>

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<sup>49</sup> Simón Rios, *For Many Renters, Apartment Application Fees Add Up. Some are Illegal*, WBUR (Nov. 27, 2023), <https://www.wbur.org/news/2023/11/27/renters-application-fees-illegal-landlords>.

<sup>49</sup> *FARE Act Becomes Law, Reforming Broker Fees to Help Working-Class New Yorkers Afford Housing*, N.Y. CITY COUNCIL (Dec. 14, 2024), <https://council.nyc.gov/press/2024/12/14/2770/>.

<sup>50</sup> Fantozzi, *supra* note 6.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Vilensky, *supra* note 10.

<sup>55</sup> Timothy Bado, et al., *DoorDash Settles Illinois' Investigation into Misleading Tip Policy*, JDSUPRA (Nov. 19, 2024), <https://www.jdsupra.com/legalnews/doordash-settles-illinois-investigation-2349741>.

<sup>56</sup> Gordon & McKennie, *supra* note 9.

## III. ANALYSIS

*A. How Deceptive Fee Practices Harm Consumers, Delivery Drivers, and Businesses*

The prevalence of junk fees and other deceptive fee practices within the food delivery sector has numerous negative implications, causing disproportionate harm to restaurants, consumers, and delivery drivers who participate in the gig economy.<sup>57</sup> As a press release by the Biden Administration points out, junk fees “undermine competition by making it impractical for consumers to compare prices, a linchpin of our economic system.”<sup>58</sup> Junk fees, which are added on at the end of a transaction but prior to checkout, harm consumers by exerting search cost pressures and making consumers spend more money than they had originally planned to.<sup>59</sup> In addition to tricking consumers into spending up to twenty-one percent more than if they were shown all-in pricing, hidden fees also make it difficult for consumers to compare prices and encourage healthy competition among others in the market.<sup>60</sup> Furthermore, these practices can frustrate and erode consumer trust, as consumers get reeled in by lower advertised prices and then end up paying much more in exorbitant fees that add little to no value.<sup>61</sup>

By causing distrust and impairing consumer purchasing decisions, deceptive fee practices can also significantly harm restaurants and other businesses that use food delivery platforms.<sup>62</sup> While businesses engaging in bait-and-switch pricing reap the advantages of locking in customers at a deceptively ‘lower’ price, businesses who do not engage in these practices are disadvantaged and out-competed.<sup>63</sup> This is attributable to the fact that businesses who hide their fees can attract customers by advertising a price that initially seems lower, even if their final price ends up being higher than that of their competitors.<sup>64</sup> Therefore, businesses are pressured, and even incentivized, into advertising a lower price and then adding on additional fees.<sup>65</sup>

Lastly, the practice harms gig economy workers and delivery drivers by potentially reducing delivery driver earnings, since forty to sixty percent of their pay is derived from tips.<sup>66</sup> With unanticipated costs being tacked on in the form of delivery and service fees, the unforeseen increase in delivery price can have the direct effect of

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<sup>57</sup> Council of Economic Advisers, *supra* note 7.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Trade Regulation Rule on Unfair or Deceptive Fees, 90 Fed. Reg. 1234 (Jan. 10, 2025).

<sup>63</sup> *Id.*

<sup>64</sup> *Biden-Harris Administration Proposes Ban on Family Seating Junk Fees Charged by Airlines*, *supra* note 43.

<sup>65</sup> *Id.*

<sup>66</sup> Caitlyn Rosen, *GrubHub Ordered to Pay \$25 million, End ‘Junk Fees’ in FTC Settlement*, COURTHOUSE NEWS. SERV. (Dec. 17, 2024), <https://www.courthousenews.com/grubhub-ordered-to-pay-25-million-end-junk-fees-in-ftc-settlement/>.

leading the customer to tip less.<sup>67</sup> With an average hidden cost of about \$12.80 per food delivery transaction, some customers may see a final total that is nearly double the amount they expected to pay, and detract from any tip money that would have gone to the delivery driver.<sup>68</sup>

*B. Why the Limited Nature and Scope of Current Regulations Fall Short*

Though the lawsuits against DoorDash and GrubHub were monumental in being the first suits filed against food delivery companies for deceptive fee practices, the settlement of these cases has merely served as a warning for other companies wishing to engage in similar practices.<sup>69</sup> Because these cases have settled, food delivery businesses like DoorDash and GrubHub have not had to face trial, and no binding legal precedent has been made on the issue.<sup>70</sup> While the sizeable settlement costs might dissuade some businesses from engaging in deceptive fee practices, some businesses might not heed the warning, given the small price to pay for large incentives.<sup>71</sup> Additionally, even if the FTC can bring lawsuits and other enforcement actions against companies who harm consumers through deceptive fees, this relief only comes after consumers have been harmed, and is more reminiscent of a remedy than a prevention measure.<sup>72</sup> Furthermore, enforcement actions and lawsuits, while effective at providing relief, can take significant time and resources to do so, which some might not have.<sup>73</sup> As a result, consumers can wait years before getting any substantive relief, or might not get any at all.<sup>74</sup>

Some initiatives have been implemented in hopes of targeting junk fees, such as the FTC's rule against junk fees in the event ticketing and lodging industries, federal agency actions against junk fees in cable, transportation, and lodging, and the few state laws presently in place.<sup>75</sup> However, these initiatives narrowly address junk fees in certain settings or industries, leaving gaps across different jurisdictions and business

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<sup>67</sup> Fisher, *supra* note 29.

<sup>68</sup> Beyrouthy, *supra* note 33.

<sup>69</sup> Bado, et al., *supra* note 55.

<sup>69</sup> Gordon & McKennie, *supra* note 9.

<sup>70</sup> *Id.*

<sup>71</sup> Biden-Harris Administration Proposes Ban on Family Seating Junk Fees Charged by Airlines, *supra* note 43.

<sup>72</sup> James McNulty, *Consumer Protection Settlements: Theory and Policy* (July 30, 2021), <https://ssrn.com/abstract=3896139>.

<sup>73</sup> Nora Freeman Engstrom and David Freeman Engstrom, *Justice for All? Why We Have an Access to Justice Gap in America – and What Can We Do About It?*, STAN. L. SCH. (June 13, 2024), <https://law.stanford.edu/2024/06/13/justice-for-all-why-we-have-an-access-to-justice-gap-in-america-and-what-can-we-do-about-it>.

<sup>74</sup> Leonard Willis, *Access to Justice: Mitigating the Justice Gap*, A.B.A. (Dec. 3, 2017), <https://www.americanbar.org/groups/litigation/resources/newsletters/minority-trial/access-justice-mitigating-justice-gap/>.

<sup>75</sup> Trade Regulation Rule on Unfair or Deceptive Fees, *supra* note 62.

sectors.<sup>76</sup> Due to the limited reach of these regulations, many consumers continue to experience harm in the form of impaired purchasing decisions and additional spending.<sup>77</sup> Instead, an issue as widespread and harmful as deceptive fee practices necessitates a well-established and widely-enforced law to result in any substantial deterrence and provide greater consumer protection.<sup>78</sup>

#### IV. RECOMMENDATION

Given the limited reach of current federal and state laws or regulations, implementation of comprehensive legislation on junk fees is critical for protecting U.S. consumers. To bridge these gaps and further executive and legislative efforts to crack down on deceptive fee practices, a law requiring businesses to clearly and conspicuously disclose fees must be implemented at both the state and federal level.<sup>79</sup> To provide for substantial, effective, and uniform consumer protections, a law including these provisions should be implemented at the federal level or in a similar format in all fifty states.<sup>80</sup>

The law or regulation should impose these requirements on businesses wishing to engage in online transactions with United States consumers.<sup>81</sup> Though broadly defined, this requirement would ensure that junk fees are addressed across widely varying industries, including the food delivery sector.<sup>82</sup> Specifically, such law should provide for the “clear and conspicuous” disclosure of all mandatory fees that a consumer cannot reasonably avoid, exclusive of any state-level or federal taxes.<sup>83</sup> The law should require these fees to be disclosed at some time before checkout, and for industries that make heavy or disproportionate use of advertisement and promotional materials, these prices should be included in the advertised price.<sup>84</sup>

Additionally, the law should require that all language related to fees be subjected to a “plain language requirement,” using clear language and avoiding jargon so that

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<sup>76</sup> *Id.*

<sup>77</sup> Council of Economic Advisers, *supra* note 7.

<sup>78</sup> *Id.*

<sup>79</sup> U.S. FTC *Narrows Junk Fee Rule: How New Guidelines Will Affect Event Ticketing and Short-Term Lodging*, SIDLEY AUSTIN LLP (Dec. 20, 2024), <https://www.sidley.com/en/insights/newsupdates/2024/12/ftc-announces-final-junk-fees-rule-that-is-significantly-narrower-than-proposed-rule>.

<sup>80</sup> Seth Frotman and Brian Shearer, *Strengthening State-Level Consumer Protections*, CONSUMER FIN. PROT. BUREAU (Jan. 14, 2025), <https://www.consumerfinance.gov/about-us/blog/strengthening-state-level-consumer-protections/>.

<sup>81</sup> *Deceptive Practices of Online Sellers*, PSECU, <https://www.psecu.com/learn/financial-tips-for-every-stage-in-life/2020/08/12/deceptive-practices-of-online-sellers> (last visited Feb. 23, 2025).

<sup>82</sup> *39 Food Delivery Statistics Restaurateurs Can Learn From in 2025*, OWNER, (Apr. 25, 2024), <https://www.owner.com/blog/food-delivery-statistics>.

<sup>83</sup> Trade Regulation Rule on Unfair or Deceptive Fees, *supra* note 62.

<sup>84</sup> Council of Economic Advisers, *supra* note 7.

consumers may easily understand these terms and any fees they are expected to pay.<sup>85</sup> Moreover, in businesses or industries where fees are subject to frequent fluctuations, businesses should have a statement disclosing the nature of and explaining the variability of these fees.<sup>86</sup> Lastly, the law should provide a maximum fee percentage cap that limits the amount of add-on fees that a service may charge, including delivery fees, small order fees, service fees, and more.<sup>87</sup> To ensure deterrence, these laws should also provide for fines and a right of action for consumers who are harmed by violations.<sup>88</sup>

## V. CONCLUSION

As American consumers make increasing use of the online marketplace to procure everyday goods and services, the need to combat junk fees and other deceptive fee practices has never been greater. These practices have taken root in the food delivery, online ticketing, lodging, and banking industries, and can result in significant harm to consumers, employees, and businesses alike.<sup>89</sup> While present legislation and litigation against these practices have been a step in the right direction, the gaps in the law are apparent, and state and federal legislatures must step in to protect consumers.<sup>90</sup> To combat misleading fees across these industries, state and federal legislatures must implement legislation that requires clear and conspicuous disclosure of fees prior to checkout or in advertising materials, plain language requirements for all language related to fees, maximum fee percentage caps, and more.<sup>91</sup>

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<sup>85</sup> Michael A. Blasie, *Plain Language: Lawmakers' Preferred Solution*, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL (Apr. 21, 2023), <https://www.naag.org/attorney-general-journal/plain-language-lawmakers-preferred-solution/>.

<sup>86</sup> Marco Bertini and Oded Keonigsberg, *Dynamic Pricing Doesn't Have to Alienate Your Customers*, HARVARD BUSINESS REV. (May 9, 2024), <https://hbr.org/2024/05/dynamic-pricing-doesnt-have-to-alienate-your-customers>.

<sup>87</sup> *City Council Approves 15% Cap on Service Fees Charged by Food Delivery Apps*, CBS NEWS (Nov. 23, 2020), <https://www.cbsnews.com/chicago/news/city-council-approves-15-cap-on-service-fees-charged-by-food-delivery-apps/>.

<sup>88</sup> Anne Fleming, *Consumer Rights are Worthless Without Enforcement*, GOV'T EXEC. (Mar. 15, 2019), <https://www.govexec.com/management/2019/03/consumer-rights-are-worthless-without-enforcement/155585/>.

<sup>89</sup> Council of Economic Advisers, *supra* note 7.

<sup>90</sup> Trade Regulation Rule on Unfair or Deceptive Fees, *supra* note 62.

<sup>91</sup> *City Council Approves 15% Cap on Service Fees Charged by Food Delivery Apps*, CBS NEWS (Nov. 23, 2020), <https://www.cbsnews.com/chicago/news/city-council-approves-15-cap-on-service-fees-charged-by-food-delivery-apps/>; Michael A. Blasie, *Plain Language: Lawmakers' Preferred Solution*, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL (Apr. 21, 2023), <https://www.naag.org/attorney-general-journal/plain-language-lawmakers-preferred-solution/>; Trade Regulation Rule on Unfair or Deceptive Fees, *supra* note 62.

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**COMITY, CHAPTER 15'S PUBLIC POLICY EXCEPTION,  
AND THE ABSOLUTE PRIORITY RULE**

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❖ Note ❖

*Christopher Stella\**

I. INTRODUCTION

Since chapter 15 of the Bankruptcy Code was enacted in 2006, there have been debates about when the public policy exception found in 11 U.S.C. § 1506 should apply to deny recognition of a foreign proceeding, law, or court order.<sup>1</sup> Although some critics have made strong arguments in favor of a broad application of section 1506,<sup>2</sup> the general rule among courts is to sparingly apply section 1506 and presume that recognition is proper.<sup>3</sup> Despite the general rule in favor of recognition, courts have found some situations where section 1506 does apply.<sup>4</sup> For instance, courts have applied section 1506's public policy exception when core bankruptcy principles have been violated, or where statutory rights have been impinged.<sup>5</sup> But courts have not fully addressed whether it would be proper to apply the public policy exception in a case where a foreign debtor's reorganization plan violates bankruptcy's absolute priority rule.<sup>6</sup>

The closest any court has come to resolving that issue was in *In re Vitro*, where the Bankruptcy Court for the Northern District of Texas hinted that a

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\* J.D. Candidate, Class of 2026, University of Illinois College of Law.

<sup>1</sup> See John J. Chung, *In re Qimonda Ag: The Conflict Between Comity and the Public Policy Exception in Chapter 15 of the Bankruptcy Code*, 32 B.U. Int'l L.J. 89 (2014); Frederick Tung, *Is International Bankruptcy Possible?*, 23 Mich. J. Int'l L. 31, 41 (2001).

<sup>2</sup> See Chung *supra* note 1.

<sup>3</sup> *In re Toft*, 453 B.R. 186, 195 (Bankr. S.D.N.Y. 2011).

<sup>4</sup> See *In re Gold & Honey, Ltd.*, 410 B.R. 357, 372 (Bankr. E.D.N.Y. 2009); *In re Qimonda AG*, 462 B.R. 165, 165 (Bankr. E.D. Va. 2011).

<sup>5</sup> See *In re Gold & Honey*, 410 B.R. at 372; *In re Qimonda*, 462 B.R. at 165.

<sup>6</sup> See *In re Rede Energia S.A.*, 515 B.R. 69, 103 (Bankr. S.D.N.Y. 2014); *In re Vitro*, S.A.B. de C.V., 473 B.R. 117, 119 (Bankr. N.D. Tex. 2012).

violation of the absolute priority rule likely would be manifestly contrary to U.S. public policy.<sup>7</sup> However, the court resolved the case on different grounds and therefore did not actually rule on the issue.<sup>8</sup> A similar situation also occurred in *In re Rede Energia*, where objectors to a foreign plan claimed it breached the absolute priority rule and thus breached U.S. public policy.<sup>9</sup> However, the Bankruptcy Court for the Southern District of New York in *In re Rede Energia* held the plan in question did not violate the absolute priority rule in the first place, and thus did not need to answer whether violating the rule would be considered contrary to public policy under section 1506.<sup>10</sup> Therefore, no court has answered the question as to whether violating the absolute priority rule would be considered manifestly contrary to U.S. public policy under section 1506.

This note will address whether a foreign insolvency plan's violation of the absolute priority rule should be treated as manifestly contrary to U.S. public policy under section 1506 and, therefore, denied recognition. In Part II of this note, I will provide some necessary background information on chapter 15 and its underlying policies, chapter 15's public policy exception in section 1506, and the absolute priority rule.<sup>11</sup> In Part III, I will analyze different arguments in favor of a narrow interpretation of the public policy exception and arguments in favor of a broad interpretation.<sup>12</sup> Then I will analyze the *In re Rede Energia* and *In re Vitro* cases, as well as how courts have spoken about the absolute priority rule.<sup>13</sup> Finally, I will also analyze how courts have viewed section 1506's public policy exception.<sup>14</sup> In Part IV, I will then recommend how courts should rule on a foreign plan that violates the absolute priority rule.<sup>15</sup>

## II. BACKGROUND

To understand whether a violation of the absolute priority rule should be considered manifestly contrary to U.S. public policy, a basic understanding of chapter 15, the public policy exception, and the absolute priority rule are necessary. This background information will show that chapter 15 was enacted to enable efficient and fair administration of international bankruptcy cases

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<sup>7</sup> *In re Vitro*, 473 B.R. at 119.

<sup>8</sup> *In re Vitro* S.A.B. de C.V., 701 F.3d 1031, 1043 (5th Cir. 2012); *see generally* *In re Vitro*, 473 B.R. at 119.

<sup>9</sup> *See* *In re Rede Energia*, 515 B.R. at 69.

<sup>10</sup> *Id.* at 103.

<sup>11</sup> *See* discussion *infra* Part II.

<sup>12</sup> *See* discussion *infra* Section III.A.

<sup>13</sup> *See* discussion *infra* Sections III.B–C.

<sup>14</sup> *See* discussion *infra* Section III.D.

<sup>15</sup> *See* discussion *infra* Part IV.

through granting recognition to foreign proceedings.<sup>16</sup> Further, it will show that section 1506's public policy exception was meant to be narrow yet overriding.<sup>17</sup> Finally, it will show that the absolute priority rule was created to support the critical bankruptcy policy of fairness to creditors.<sup>18</sup>

*A. Creation of Chapter 15 and the Policy Behind It*

The globalization of trade and investments toward the end of the 20<sup>th</sup> Century increased the number of occurrences of cross-border insolvencies.<sup>19</sup> In response, the Model Law on Cross Border Insolvency was created in 1997 by the United Nations Commission on International Trade Law ("UNCITRAL").<sup>20</sup> UNCITRAL wanted to address the challenges which multinational bankruptcies faced due to the lack of coordination between the insolvency regimes from different countries.<sup>21</sup> Because of the lack of coordination, it was difficult to adequately protect a debtor's assets as creditors would simply jump around and attack assets in foreign jurisdictions outside of the country where the debtor filed for bankruptcy.<sup>22</sup> Thus, the Model Law was designed to solve

[I]nadequate and inharmonious legal approaches, which hamper the rescue of financially troubled businesses, are not conducive to a fair and efficient administration of cross-border insolvencies, impede the protection of the assets of the insolvent debtor against dissipation and hinder maximization of the value of those assets.<sup>23</sup>

Seeing the value in a cross-border insolvency regime, the United States enacted chapter 15 of the Bankruptcy Code in 2005, which is a near copy of the Model Law.<sup>24</sup>

Central to chapter 15 is the idea of comity.<sup>25</sup> Comity is the recognition that U.S. courts give to the laws, orders, and decisions of a foreign country.<sup>26</sup> To illustrate this, imagine a situation where a foreign debtor files bankruptcy in a

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<sup>16</sup> See discussion *infra* Section II.A.

<sup>17</sup> See discussion *infra* Section II.B.

<sup>18</sup> See discussion *infra* Section II.C.

<sup>19</sup> 8 Collier on Bankruptcy P 1501.01 (16th 2025).

<sup>20</sup> *Id.*

<sup>21</sup> *In re ABC Learning Ctrs. Ltd.*, 728 F.3d 301, 305 (3rd Cir. 2013).

<sup>22</sup> *Id.*

<sup>23</sup> U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW, at 310 (2005).

<sup>24</sup> *In re ABC Learning*, 728 F.3d at 305.

<sup>25</sup> *In re Vitro S.A.B. de C.V.*, 701 F.3d 1031, 1043 (5th Cir. 2012).

<sup>26</sup> Chung, *supra* note 1, at 101.

foreign country. During the hypothetical bankruptcy case, the foreign court orders under a provision of the foreign country's insolvency law a U.S. creditor of the debtor to provide the court with a list of payments the debtor made to the creditor within the past year. If a U.S. court were to recognize the order and enforce it here in the U.S., despite the order being by a foreign court and under a foreign law, then that would be an example of comity.<sup>27</sup> Comity is what allows chapter 15 to further the goal of "cooperation between domestic and foreign courts in cross-border insolvency cases."<sup>28</sup>

*B. Section 1506 Public Policy Exception*

Despite the principal of comity being central to international insolvency cases, chapter 15 does offer an overriding exception to a U.S. courts recognition of a foreign bankruptcy proceeding or laws for public policy reasons.<sup>29</sup> Section 1506 of the Bankruptcy Code states that "nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States."<sup>30</sup> While this exception exists, it is supposed to be narrowly construed, with the term "manifestly" being used to restrict the public policy exception only to fundamental policies of the U.S.<sup>31</sup> Thus, courts have sparingly applied section 1506 to stop recognition.<sup>32</sup>

Courts have read the public policy exception in section 1506 so narrowly out of concern that if section 1506 was read too broadly, it would undermine the cooperative international goals of chapter 15.<sup>33</sup> Therefore, prevailing wisdom among courts is that the public policy exception applies only when there is concern over the procedural fairness of the foreign proceeding or where recognition would impinge severely a U.S. statutory or constitutional right.<sup>34</sup>

Courts have construed section 1506 so narrowly that they have even denied applying it in cases where creditors were denied jury trials, or where

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<sup>27</sup> Comity seen in many instances across chapter 15 cases. *See generally* Armada (Singapore) Pte Ltd. v. Shah (*In re* Ashapura Minechem Ltd.), 480 B.R. 129 (S.D.N.Y. 2012) (recognizing a foreign proceeding); *see also* *In re* Rede Energia S.A., 515 B.R. 69 (Bankr. S.D.N.Y. 2014) (recognizing a foreign plan).

<sup>28</sup> *In re Vitro*, 701 F.3d at 1043.

<sup>29</sup> *See* 11 U.S.C. § 1506. *In re Vitro*, 701 F.3d. at 1031; *In re ABC Learning*, 728 F.3d at 301.

<sup>30</sup> 11 U.S.C. § 1506.

<sup>31</sup> *In re ABC Learning*, 728 F.3d at 305.

<sup>32</sup> *In re* Toft, 453 B.R. 186, 195 (Bankr. S.D.N.Y. 2011).

<sup>33</sup> 8 Collier on Bankruptcy P 1506.01 (16th 2025).

<sup>34</sup> *In re ABC Learning*, 728 F.3d at 309; *see also* *In re* Qimonda AG Bankr. Litig., 433 B.R. 547, 570 (E.D. Va. 2010).

debtors acted in bad faith.<sup>35</sup> For instance, in *In re Ephedra*, the Bankruptcy Court for the Southern District of New York recognized a Canadian court's order in a Canadian insolvency case, even though the order would arguably deprive the group of objectors of their U.S. constitutional right to a jury trial had the case been in the U.S.<sup>36</sup> The court emphasized that section 1506 is narrowly construed such that U.S. courts should accord a foreign judgment comity if "its proceedings are according to the course of a civilized jurisprudence."<sup>37</sup> Because the Canadian proceedings were deemed fair and impartial, despite the lack of a jury, the court held they did not violate public policy under section 1506.<sup>38</sup> Further, in *In re Black Gold*, the Ninth Circuit even refused to use section 1506 to deny recognition when the debtor's principles had been accused of stealing trade secrets and limiting discovery requests.<sup>39</sup> The court held that "a party's misconduct or bad faith, standing alone, is not a proper basis for invoking the public policy exception in section 1506 to deny recognition."<sup>40</sup>

### C. *The Absolute Priority Rule*

The absolute priority rule is found in section 1129(b) of the Bankruptcy Code for corporate reorganizations; it governs the order which creditors get paid in a reorganization plan.<sup>41</sup> The absolute priority rule is a principle of bankruptcy where creditors are compensated in full, ahead of equity holders in the distribution of corporate assets.<sup>42</sup> Basically, "[i]f a business is insolvent, then its owners take nothing[, but if] the business can pay its creditors in full, then its owners take what remains."<sup>43</sup> Only if creditors voluntarily give up their priority rights by a vote, can equity holders retain their equity before creditors are paid in full.<sup>44</sup>

The absolute priority rule was created to combat the inherent danger in any reorganization plan that the plan will be too good of a deal for the debtor's

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<sup>35</sup> See generally *In re RSM Richter Inc. v. Aguilar* (*In re Ephedra Prods. Liab. Litig.*), 348 B.R. 333, 334–35 (S.D.N.Y. 2006); *Samba v. Int'l Petro. Prods. & Addictives Co.* (*In re Black Gold S.A.R.L.*), 635 B.R. 517 (B.A.P. 9th Cir. 2022).

<sup>36</sup> *In re Ephedra*, 348 B.R. at 334–35.

<sup>37</sup> *Id.* at 336.

<sup>38</sup> *Id.* at 337.

<sup>39</sup> See generally *In re Black Gold*, 635 B.R. 517.

<sup>40</sup> *Id.*

<sup>41</sup> 11 U.S.C. § 1129(b).

<sup>42</sup> *Alder v. Lehman Bros. Holdings* (*In re Lehman Bros. Holdings*), 855 F.3d 459, 470 (2d. Cir. 2017).

<sup>43</sup> Bruce A. Markell, *Owners Auctions, and Absolute Priority in Bankruptcy Reorganizations*, 44 STAN. L. REV. 69, 70 (1991).

<sup>44</sup> See 11 U.S.C. § 1129(b); see also Markell, *supra* note 43, at 72.

owners and ignore many of the claims of unsecured creditors.<sup>45</sup> This fear stemmed from the fact that a company's management had a position of dominance which meant that creditors were not able to bargain effectively without a clear standard of fairness.<sup>46</sup> Thus, the absolute priority rule was created because "fairness and equity required that the creditors be paid before the stockholders could retain equity interests for any purpose whatever."<sup>47</sup>

### III. ANALYSIS

An analysis shows that despite section 1506's narrow interpretation, a violation of the absolute priority rule by a foreign plan should be considered manifestly contrary to public policy. First, this would further U.S. policy objectives and better protect value for creditors.<sup>48</sup> Second, current case law supports the conclusion that a violation of the absolute priority rule would be manifestly contrary to U.S. public policy under section 1506.<sup>49</sup>

#### *A. Section 1506 Should Be Applied Broadly*

Currently, there are two main competing viewpoints on how courts should weigh granting comity against denying recognition for public policy purposes.<sup>50</sup> The first is the universalist approach, which argues that the insolvency law of the debtor's home country should apply worldwide, even if matters between the debtor and their creditors have no connection to the debtor's home country and it would undermine the laws and policies of the other country.<sup>51</sup> This approach argues that it enables the maximization of "value preserved for creditors by facilitating a coordinated disposition of the debtor's assets."<sup>52</sup>

Alternatively, some argue for a broader interpretation of section 1506 to prevent substantive harm to the public policy of a country the debtor is not from.<sup>53</sup> Supporters of this viewpoint argue that chapter 15 was simply meant to promote administrative convenience, not bind countries to the policies of their foreign counter parts.<sup>54</sup> Further, this side argues that considerations of

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<sup>45</sup> Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 444 (1999).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> See discussion *infra* Section III.A.

<sup>49</sup> See discussion *infra* Sections III.B–D.

<sup>50</sup> See Chung, *supra* note 1, at 101.

<sup>51</sup> Tung, *supra* note 1, at 40.

<sup>52</sup> *Id.* at 41.

<sup>53</sup> See Chung, *supra* note 1, at 101.

<sup>54</sup> See *id.*

comity were always meant to be subordinate to public policy in a chapter 15 case.<sup>55</sup>

Broader interpretation of section 1506 does seem to be the better solution. To start, section 1506 is blatantly titled the “Public Policy Exception” and stands alone to emphasize the need to protect public policy over other objectives of chapter 15.<sup>56</sup> Therefore, Congress was clearly concerned about how the application of foreign law may impact U.S. parties to a foreign bankruptcy proceeding.<sup>57</sup> Further, the universalist argument that universalism would preserve value for creditors does not necessarily hold true. Under U.S. law, rules such as the absolute priority rule help to preserve value for creditors.<sup>58</sup> However not all countries have similar rules, and therefore debtors can use less sophisticated bankruptcy systems to actually take value away from creditors, therefore making the universalist approach actually worse for creditor value.<sup>59</sup> Thus, a broader interpretation of section 1506 would arguably be better to combat Congress’s concerns of how a foreign law would impact domestic interests in a bankruptcy, and to protect creditor value.

#### B. *Rede and Vitro*

No court has formally ruled on whether violating the absolute priority rule is manifestly contrary to U.S. public policy, but multiple courts have come close to the issue.<sup>60</sup> First, in *In re Rede Energia S.A.*, an ad hoc group of creditors opposed a motion for the court to recognize a Brazilian reorganization plan because they believed it violated the absolute priority rule and thus was contrary to U.S. public policy under section 1506.<sup>61</sup> Ultimately the court did not have to consider whether a violation of the absolute priority rule would be contrary to U.S. public policy, however.<sup>62</sup> After analyzing the plan, the court held the plan was not in violation of the absolute priority rule in the first place because “significant dilution of outstanding equity under the Brazilian Plan [was] consistent with the purpose of the absolute priority rule in the U.S., which is designed to prevent shareholders from retaining equity in reorganized

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<sup>55</sup> *See id.*

<sup>56</sup> *Id.* at 115.

<sup>57</sup> *Id.* at 117.

<sup>58</sup> *Bank of Am. Nat’l Trust & Sav. Ass’n v. 203 N. LaSalle St. P’ship*, 526 U.S. 434, 444 (1999).

<sup>59</sup> *See In re Vitro*, S.A.B. de C.V., 473 B.R. at 117 (Bankr. N.D. Tex. 2012) (Mexican reorganization laws allowed for a plan which paid equity holders first).

<sup>60</sup> *See generally In re Vitro*, S.A.B. de C.V., 473 B.R. 117 (Bankr. N.D. Tex. 2012); *In re Rede Energia S.A.*, 515 B.R. 69 (Bankr. S.D.N.Y. 2014).

<sup>61</sup> *In re Rede Energia*, 515 B.R. at 103.

<sup>62</sup> *Id.*

companies without contributing new value.”<sup>63</sup> Therefore, the “foreign representative [] successfully demonstrated that the distribution scheme in the Brazilian Reorganization Plan [was] not manifestly contrary to the public policy of the United States.”<sup>64</sup>

The one other court which has flirted with this issue was the Bankruptcy Court for the Northern District of Texas in *In re Vitro*.<sup>65</sup> In *In re Vitro*, an ad hoc group of noteholders opposed a motion for the U.S. court to recognize a Mexican reorganization plan.<sup>66</sup> They argued, in part, that the plan violated the absolute priority rule because the equity holders of the debtor retained their interest while the other creditors did not get paid in full, and therefore it was manifestly contrary to U.S. public policy under section 1506.<sup>67</sup> The court agreed the plan would violate the absolute priority rule but the court did not ultimately hold whether the violation of the absolute priority rule would be contrary to public policy.<sup>68</sup> However, the court noted that the absolute priority rule objection was “strong” and “possibly meritorious.”<sup>69</sup> The court emphasized that by violating the absolute priority rule the plan runs afoul of the Bankruptcy Code, “because the result is demonstrably different than would occur in Chapter 11.”<sup>70</sup>

Although the *In re Rede Energia* and *In re Vitro* courts did not explicitly rule on whether a violation of the absolute priority rule would be manifestly contrary to public policy under section 1506, a holding that it would be aligns with those cases. The court in *In re Rede Energia* emphasized how because the Brazilian plan, although different than U.S. plans, still promoted the purposes behind the absolute priority rule, it could not have been manifestly contrary to U.S. public policy.<sup>71</sup> That leaves the door open, however, for a reorganization plan that is not only different from a U.S. plan under the absolute priority rule, but also when it does not promote the policy purposes behind it. That would be similar to the plan in *In re Vitro*, where the court persuasively mentioned in dicta how a plan which violates the absolute priority rule would run afoul of the Bankruptcy Code, and likely be manifestly contrary to U.S. public policy.<sup>72</sup> Therefore, holding that a violation of the absolute priority rule is manifestly contrary to U.S. public policy would arguably be supported by *Vitro* and *Rede*.

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *See In re Vitro*, 473 B.R. at 117.

<sup>66</sup> *Id.* at 119.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 132.

<sup>70</sup> *Id.*

<sup>71</sup> *In re Rede Energia S.A.*, 515 B.R. 69, 103 (Bankr. S.D.N.Y. 2014).

<sup>72</sup> *In re Vitro*, 473 B.R. at 132.

C. *The Absolute Priority Rule is a Statutory Right and is Fundamental Bankruptcy Policy*

The absolute priority rule has been recognized as one of bankruptcy's most important principles by multiple courts.<sup>73</sup> For instance in *In re Lehman Bros. Holdings*, in a brief discussion about the absolute priority rule, the Second Circuit characterized the rule as a "bedrock principle of bankruptcy."<sup>74</sup> It emphasized how the rule embodied the "axiomatic principle [] that because equity owners stand to gain the most when a business succeeds, they should absorb the cost of the business's collapse."<sup>75</sup>

Then, in the Supreme Court case of *Czyzewski v. Jevic Holding Corp.*, the Court echoed many of those same thoughts toward the absolute priority rule.<sup>76</sup> In *Czyzewski*, the Court had to decide whether a bankruptcy court had the ability to order a distribution which violated basic bankruptcy priority rules in connection with a chapter 11 dismissal.<sup>77</sup> The Court held it does not.<sup>78</sup> In doing so, the Court highlighted how the absolute priority rule "constitutes a basic underpinning of business bankruptcy law... [and] has long been considered fundamental to the Bankruptcy Code's operation."<sup>79</sup> Further, the Court noted that the absolute priority rule, as a fixed priority scheme, "is recognized as the cornerstone of reorganization practice and theory," and "priority is bankruptcy's most important and famous rule."<sup>80</sup> Therefore, due to its crucial importance in protecting creditors' claims, the absolute priority rule is a fundamental statutory right within the Bankruptcy Code.

D. *Violation of the Absolute Priority Rule Would Severely Impinge on a Statutory Right and Be Contrary to Fundamental Bankruptcy Policy*

Despite the courts' hesitancy to use section 1506 to deny recognition of a foreign order or proceeding, courts have denied recognition in cases where a foreign action is contrary to fundamental bankruptcy policy, or has impinged on a statutory right.<sup>81</sup> For example, in *In re Gold & Honey*, an Israeli insolvency

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<sup>73</sup> See *Alder v. Lehman Bros. Holdings (In re Lehman Bros. Holdings)*, 855 F.3d 459, 470 (2d. Cir. 2017); *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 444 (1999); *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451 (2017).

<sup>74</sup> *In re Lehman Bros.*, 855 F.3d at 470.

<sup>75</sup> *Id.* at 471 (citing Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 793 (1987)).

<sup>76</sup> *Czyzewski*, 580 U.S. at 464–65.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 465.

<sup>81</sup> See generally *In re Gold & Honey, Ltd.*, 410 B.R. 357 (Bankr. E.D.N.Y. 2009); *In re Qimonda AG*, 462 B.R. 165 (Bankr. E.D. Va. 2011).

proceeding seeking recognition was found to be manifestly contrary to public policy under section 1506 because the Israeli receiver violated a U.S. court's automatic stay orders. The court said recognizing the Israeli proceeding after the stay violation would ultimately hinder U.S. bankruptcy courts' abilities to promote two fundamental policies of the bankruptcy code: (1) preventing creditors from taking advantage over each other and (2) providing for the efficient distribution of assets in accordance with their priority.<sup>82</sup> Thus, the court decided not to recognize the Israeli proceeding under section 1506 because doing so would be manifestly contrary to U.S. public policy as it violated fundamental bankruptcy policies.<sup>83</sup>

Then, in *In re Qimonda*, the court denied recognition of a German bankruptcy court's order which it allowed a U.S. patent license to be cancelled.<sup>84</sup> The court emphasized that, by recognizing the German courts order, it would discourage investment in research and development, and in construction and manufacturing facilities.<sup>85</sup> Thus, it would "severely impinge an important statutory protection accorded licensees of U.S. patents and thereby undermine a fundamental U.S. public policy promoting technological innovation."<sup>86</sup> Therefore, impinging upon a statutory right in this case, which promoted a crucial U.S. public policy, was enough for the court to deny recognition using section 1506.<sup>87</sup>

Looking at the persuasive precedents set in *In re Qimonda* and *In re Gold & Honey*, a violation of the absolute priority rule would be manifestly contrary to U.S. public policy. As mentioned, in *In re Qimonda*, the court refused to recognize a German courts order to cancel a U.S. patent license.<sup>88</sup> The court said that recognition would violate a statutory right that afforded licensees of U.S. patents protections and violate the important policy goal of greater technological innovation.<sup>89</sup> Similar to how cancelling patent licenses violated a statutory right in *In re Qimonda*, violating bankruptcy's absolute priority rule in turn violates statutory rights given to creditors to protect their claims in bankruptcy. As emphasized by the *Czyzewski* court, the absolute priority rule "constitutes a basic underpinning of business bankruptcy law... [and] has long been considered fundamental to the Bankruptcy Code's operation."<sup>90</sup> Further, the absolute priority rule requires that "creditors are entitled to be paid ahead

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<sup>82</sup> See *In re Gold & Honey*, 410 B.R. at 372.

<sup>83</sup> See *id.*

<sup>84</sup> See *In re Qimonda AG*, 462 B.R. at 165.

<sup>85</sup> *Id.* at 185.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 464–65 (2017).

of [equity holders] in the distribution of corporate assets.”<sup>91</sup> This was to promote the policy goals of fairness and equity in the distribution process.<sup>92</sup> Therefore, violating the absolute priority rule would clearly be a violation of an important statutory right given to creditors by the Bankruptcy Code to promote the important policy of fairness and equity in the distribution process. So, in line with the *In re Qimonda* court, a violation of the absolute priority rule would be manifestly contrary to U.S. public policy under section 1506.

Then, in *In re Gold & Honey*, the court denied recognition of an Israeli insolvency proceeding because recognition would severely hinder the courts ability to promote the two crucial bankruptcy policies of preventing creditors from taking advantage over other creditors and the distribution of assets in accordance with priority.<sup>93</sup> By violating the absolute priority rule, these same principles of bankruptcy would also be violated. Again, the absolute priority rule is meant to ensure that creditors receive compensation before any equity holders within the debtor’s business.<sup>94</sup> Thus, a violation of the rule would allow for equity holders to take advantage over creditors and would not allow for the distribution of assets according to priority. Therefore, using the *In re Gold & Honey* case, violating the absolute priority rule should call for a denial of recognition under section 1506.<sup>95</sup>

#### IV. RECOMMENDATION

A violation of the absolute priority rule by a foreign reorganization plan should be considered manifestly contrary to U.S. public policy for three reasons: (1) a reading of section 1506 to encompass a violation of the absolute priority rule would better protect U.S. domestic interests, (2) this interpretation would better support the policies behind chapter 15, and (3) this interpretation of section 1506 is already supported by current case law.

Section 1506 was included in chapter 15 for a reason.<sup>96</sup> Congress saw the inherent problems with applying foreign law in the U.S. that was against domestic interests and, therefore, needed an exception that would allow courts to promote U.S. policy.<sup>97</sup> Here, the absolute priority rule promotes multiple fundamental U.S. bankruptcy policies.<sup>98</sup> Thus, by holding a violation of the

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<sup>91</sup> Alder v. Lehman Bros. Holdings (*In re Lehman Bros. Holdings*), 855 F.3d 459, 470 (2d. Cir. 2017).

<sup>92</sup> Bank of Am. Nat’l Trust & Sav. Ass’n v. 203 N. Lasalle St. P’ship, 526 U.S. 434, 444 (1999).

<sup>93</sup> *In re Gold & Honey, Ltd.*, 410 B.R. 357, 372 (Bankr. E.D.N.Y. 2009).

<sup>94</sup> See *In re Lehman Bros.*, 855 F.3d at 470.

<sup>95</sup> *In re Gold & Honey*, 410 B.R. at 372.

<sup>96</sup> Chung, *supra* note 1, at 117.

<sup>97</sup> *Id.*

<sup>98</sup> See *In re Lehman Bros.*, 855 F.3d at 470.

rule to be manifestly contrary to U.S. public policy, courts would be protecting U.S. domestic interests. For instance, the absolute priority rule mainly protects a creditor's rights to be paid for their claim against the bankruptcy estate.<sup>99</sup> This is extremely important, especially in the chapter 15 context, because the creditors will likely be U.S. based, compared to a foreign debtor.<sup>100</sup> This begs the question: which better promotes U.S. domestic interests, a hypothetical holding supporting U.S. creditors who are attempting to get their money back, or one supporting a foreign debtor, who is seeking recognition of a foreign reorganization plan which violates a fundamental principle of U.S. bankruptcy law (the absolute priority rule)? The answer should be the former, as the court would be protecting the interests of the U.S. creditors. So, by considering a violation of the absolute priority rule to be manifestly contrary to U.S. public policy, courts would be protecting U.S. domestic interests by protecting U.S. domestic creditors.

Although the drafters of section 1506 were concerned that a broad reading would undermine the goals of chapter 15,<sup>101</sup> in this instance, broader application of section 1506 would likely better promote the goals and policies behind chapter 15. As discussed, one of the main policy reasons behind chapter 15 was to combat “inadequate and inharmonious legal approaches, which... are not conducive to a fair and efficient administration of cross-border insolvencies.”<sup>102</sup> However, by enforcing a foreign plan which does not follow the absolute priority rule, a court would be enforcing an inadequate plan that is not conducive to a fair and efficient administration of cross-border insolvencies. Again, the absolute priority rule is considered to be a “cornerstone” of successful reorganization regimes,<sup>103</sup> as it promotes fair distribution among creditors. Therefore, adequate reorganization regimes should have a rule which promotes similar “fair” policy objectives to the absolute priority rule. So, by denying recognition to foreign plans which violate the absolute priority rule, U.S. courts would be supporting the chapter 15 policy objectives of promoting adequate and fair legal approaches to bankruptcy.

Finally, the current case law on the subject seems to support the recommendation that a violation of the absolute priority rule should be

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<sup>99</sup> *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 444 (1999).

<sup>100</sup> See generally *In re Vitro*, S.A.B. de C.V., 473 B.R. 117 (Bankr. N.D. Tex. 2012); *In re Rede Energia S.A.*, 515 B.R. 69, 103 (Bankr. S.D.N.Y. 2014).

<sup>101</sup> 8 Collier on Bankruptcy P 1506.01 (16th 2025).

<sup>102</sup> U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW, at 310, U.N. Sales No. E.05.V10 (2005).

<sup>103</sup> *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 465 (2017).

considered manifestly contrary to U.S. public policy.<sup>104</sup> As mentioned, the absolute priority rule provides creditors with certain fundamental statutory rights.<sup>105</sup> Under the *In re Qimonda* test, by violating the rule, a foreign plan would severely impinge on a statutory right and therefore be manifestly contrary to U.S. public policy.<sup>106</sup> Further, under the *In re Gold & Honey* test, a violation of the absolute priority rule would be contrary to fundamental bankruptcy policies and therefore manifestly contrary to U.S. public policy.<sup>107</sup> And finally, the court discussions in *In re Vitro* and *In re Rede Energia*, also seem to support the notion that a violation of the absolute priority rule would be manifestly contrary to U.S. public policy.<sup>108</sup> With the support of the case law, a violation of the absolute priority rule should be considered manifestly contrary to U.S. public policy.

## V. CONCLUSION

Overall, the absolute priority rule is a fundamental part of the bankruptcy code. It protects the rights of creditors so that equity holders do not take advantage of the bankruptcy process by paying themselves before the creditors in a corporate reorganization. Thus, it should be recognized as manifestly contrary to U.S. public policy under chapter 15 if a foreign debtor's plan violates the rule, and the foreign plan should not be recognized.

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<sup>104</sup> See generally *In re Vitro*, 473 B.R. 117; *In re Rede Energia*, 515 B.R. 69; *In re Gold & Honey, Ltd.*, 410 B.R. 357 (Bankr. E.D.N.Y. 2009); *In re Qimonda AG*, 462 B.R. 165 (Bankr. E.D. Va. 2011).

<sup>105</sup> See discussion *supra* Section III.C.

<sup>106</sup> *In re Qimonda*, 462 B.R. at 185.

<sup>107</sup> *In re Gold & Honey*, 410 B.R. at 372.

<sup>108</sup> See generally *In re Vitro*, 473 B.R. 117; *In re Rede Energia*, 515 B.R. 69.

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**UNSECURE HEALTH:  
WHAT THE BIOSECURE ACT COULD MEAN  
FOR THE BIOPHARMACEUTICAL INDUSTRY**

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❖ Note ❖

*Megna Ragburaman\**

I. INTRODUCTION

On January 19, 2025, TikTok, a social media platform owned by Chinese company ByteDance which provides short form video content to over 170 million users, shut down in the United States.<sup>1</sup> The bill to block TikTok was passed in April 2024 with an overwhelming majority in both the House and the Senate due to growing bipartisan fears of national security risks.<sup>2</sup> The Supreme Court upheld the TikTok ban, sharing Congress's national security concerns of TikTok's collection of data privacy.<sup>3</sup> However, the ban lasted a mere eighteen hours.<sup>4</sup> The first day of President Trump's term, his administration effectively stalled the ban and brought TikTok back to the U.S. via executive order.<sup>5</sup> However, while the Trump administration appears supportive of TikTok in the U.S., the executive order only delays the ban: TikTok must eventually sever its ByteDance—and essentially Chinese—connection to maintain its presence in the United States.<sup>6</sup>

The TikTok ban illustrates a growing trend in American politics to sever private companies' relationships with foreign adversaries—a trend which extends to

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\* J.D. Candidate, Class of 2027, University of Illinois College of Law.

<sup>1</sup> Bobby Allyn, *Trump Signs Executive Order to Pause TikTok Ban, Provide Immunity to Tech Firms*, NPR (Jan. 20, 2025, 8:22 PM), <https://www.npr.org/2025/01/20/nx-s1-5268701/trump-executive-order-tiktok-ban>.

<sup>2</sup> Antonio Pequeño IV & Mary Whitfill Roeloffs, *TikTok Ban Timeline: TikTok Returns to U.S. App Stores—For Now*, FORBES (Feb. 14, 2025, 2:39 PM), <https://www.forbes.com/sites/antoniopequenoi/2025/02/14/tiktok-ban-timeline-tiktok-returns-to-us-app-stores-for-now/>.

<sup>3</sup> Allyn, *supra* note 1.

<sup>4</sup> *Id.*

<sup>5</sup> Exec. Order No. 14166, 90 Fed. Reg. 8611 (Jan. 20, 2025).

<sup>6</sup> Allyn, *supra* note 1.

biotechnology industries.<sup>7</sup> On September 9, 2024, the House of Representatives passed the bipartisan bill H.R. 8333, also known as the BIOSECURE Act.<sup>8</sup> The BIOSECURE Act first prohibits executive agencies from both procuring any technology or services from a biotechnology company of concern.<sup>9</sup> A “biotechnology company of concern” is any company subject to a foreign adversary, i.e., any Chinese, North Korean, Iranian, or Russian company.<sup>10</sup> The BIOSECURE Act specifically names five major Chinese biotechnology companies as companies of concern: BGI, MGI, Complete Genomics, WuXi AppTec, and WuXi Biologics.<sup>11</sup> The BIOSECURE Act further prohibits executive agencies from entering into, or extending, any contract with an entity that “uses any equipment or services produced or provided by a biotechnology company of concern” for an executive agency contract, if the equipment or services are procured after the effective date of the bill.<sup>12</sup>

Like the TikTok ban, the BIOSECURE Act stems from increasing Congressional concerns that foreign-run biotechnology companies are accessing and exploiting American data, posing a risk to national security.<sup>13</sup> However, many U.S. based biopharmaceutical companies have contracts with companies that could be classified as biotechnology companies of concern.<sup>14</sup> This means that if the BIOSECURE Act is passed it will cause a major restructuring of the global biopharmaceutical industry, as American companies will have to navigate new contracts and programs without the support of international biotechnology companies.<sup>15</sup>

While there are legitimate concerns about foreign adversaries accessing U.S. health technology and data through international partnerships in biotechnology, the BIOSECURE Act will cause a major delay in the biopharmaceutical industry that may take years to recover from.<sup>16</sup> This Note argues that the BIOSECURE Act should not be passed in Congress until revisions are made that will either grant companies more time to contract away from biotechnology companies of concern and invest in American biotechnology.

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<sup>7</sup> David M. McIntosh, Arthur C. Mok & Geoffrey Lin, *BIOSECURE Act Passed in the House of Representatives with a 306-81 Vote*, ROPES & GRAY (Sept. 17, 2024), <https://www.ropesgray.com/en/insights/alerts/2024/09/biosecure-act-passed-in-the-house-of-representatives-with-a-306-81-vote>.

<sup>8</sup> *Id.*

<sup>9</sup> BIOSECURE Act, H.R. 8333, 118th Cong. (2023–2024).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> John Strom & Katie Kros, *BIOSECURE Act: Anticipated Movement, Key Provisions, and Likely Impact*, FOLEY & LARDNER LLP (Sept. 10, 2024), <https://www.foley.com/insights/publications/2024/09/biosecure-act-anticipated-movement-key-provisions-impact/>.

<sup>14</sup> Jaxon Tan & Ivy Yang, *Opinion: BIOSECURE Act Threatens Already Strained U.S. Supply Chain*, BIOSPACE (Sept. 9, 2024), <https://www.biospace.com/business/opinion-biosecure-act-threatens-already-strained-u-s-supply-chain/>.

<sup>15</sup> *Id.*

<sup>16</sup> See *infra* Part II.

Part II of this Note will discuss the current status of the American biotechnology industry, focusing on potential and current biotechnology companies of concern,<sup>17</sup> the history of the BIOSECURE Act and current potential planned reforms,<sup>18</sup> as well as the U.S.'s potential investment into domestic biotechnology and biomanufacturing resources.<sup>19</sup> Part III will analyze the impact of losing relationships with Chinese biotechnology companies, and potential problems with the prohibition of loans, grant funds, and the classification clauses of the proposed bill.<sup>20</sup> Part IV provides recommendations for how the U.S. biopharmaceutical industry should prepare for the BIOSECURE Act, emphasizing reinvestment in domestic production of biotechnology.<sup>21</sup> Part IV further recommends changes in the BIOSECURE Act, such as incorporating the Senate's grandfather clause into the House's proposed BIOSECURE Act<sup>22</sup> and limiting the scope of the BIOSECURE Act to prohibit federal funding only if the company affiliates itself with a biotechnology company of concern in performance of an executive contract.<sup>23</sup>

## II. BACKGROUND

### *A. The Current Status of the U.S. Biopharmaceutical Industry*

When discussing “biotechnology” and “biopharmaceuticals,” it is important to first understand the meaning of these terms and how they relate to each other. Biotechnology refers to the industry concerned with using biology to make new products, as well as making use of organisms and living processes for research purposes.<sup>24</sup> Biopharmaceuticals refers to the industry concerned with making medicines and drugs, typically through using living organisms produced by biotechnology industries.<sup>25</sup> Thus, the biopharmaceutical industry is closely intertwined with biotechnology industry.<sup>26</sup> This Note is specifically concerned with the impact of the BIOSECURE Act on the biopharmaceutical industry regarding drug production and distribution. While the BIOSECURE Act specifically mentions biotechnology companies of concern, many of the BIOSECURE Act's named biotechnology companies are close partners with biopharmaceutical companies and have helped

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *See infra* Part III.

<sup>21</sup> *See infra* Part IV.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Brinson Brothers, *Biotechnology vs Biopharma: What's The Difference?* BIOTECH HEALTH (Aug. 1, 2020), <https://biotechhealth.com/biotech-vs-pharma/>.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

develop several drugs in the United States.<sup>27</sup> Thus, the BIOSECURE Act is also pertinent to the biopharmaceutical industry.

Currently, the U.S. is the leading contributor to the biopharmaceutical industry, holding forty-four percent of the pharmaceutical market share worldwide in 2023.<sup>28</sup> Though the U.S. is currently the leading force in the biopharmaceutical market, Asia's presence in the biopharmaceutical industry is expected to grow quickly in the next ten years, especially China.<sup>29</sup> This sharp growth in the Chinese biopharmaceutical industry is due to its increasing participation in the global market, investment into Research & Development ("R&D") and strong government support.<sup>30</sup> Additionally, many of the top biopharmaceutical companies<sup>31</sup> invest in health services in emerging companies in countries considered foreign adversaries.<sup>32</sup> The U.S. biopharmaceutical industry has a tradition of international collaboration and relies heavily on Chinese biotechnology companies.<sup>33</sup>

#### B. U.S. Executive Investment into Domestic Biotechnology and Biomanufacturing

While there is a growing interdependence of U.S. biopharmaceutical industries on international collaboration and resources, there have also been efforts made by the executive branch to increase domestic reliance on biotechnology and biomanufacturing processes.<sup>34</sup> One major effort to increase domestic biotechnology and biomanufacturing resources was a Biden 2022 Executive Order that launched the National Biotechnology and Biomanufacturing Initiative.<sup>35</sup> This order was intended to advance government investment significantly in biotechnology and biomanufacturing areas such as health, climate change, agriculture, supply chain resilience, etc.<sup>36</sup> The Office of Science and Technology ("OTSP") has also been working with other executive agencies, and co-authored a report with the U.S. Department of Agriculture

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<sup>27</sup> Tan & Yang, *supra* note 15.

<sup>28</sup> Matej Mikulic, *Market Share of Leading 10 National Pharmaceutical Markets Worldwide in 2023*, STATISTA (Sept. 17, 2024), <https://www.statista.com/statistics/245473/market-share-of-the-leading-10-global-pharmaceutical-markets/>.

<sup>29</sup> *Biopharmaceuticals Market Size, Growth & Business Strategies*, TOWARDS HEALTHCARE (Jan. 29, 2025), <https://www.towardshealthcare.com/insights/biopharmaceuticals-market-is-rising-rapidly>; Jules Adam, *The Top-Performing Countries in Biotechnology (According to the OECD)*, LABIOTECHNOLOGY (Feb. 12, 2024), <https://www.labiotech.eu/best-biotech/top-biotech-countries/>.

<sup>30</sup> *Biopharmaceuticals Market Size, Growth & Business Strategies*, *supra* note 30; Adam, *supra* note 30.

<sup>31</sup> The majority of which are American. See Evelien Moorken, Nicolas Meuwissen, Isabelle Huys, Paul Declerck, Arnold G. Vulto & Steven Simoens, *The Market of Biopharmaceutical Medicines: A Snapshot of a Diverse Industrial Landscape*, 8 FRONTIERS IN PHARMACOLOGY 1, 3-8 (2017).

<sup>32</sup> *Id.*

<sup>33</sup> *See id.*

<sup>34</sup> *Bioeconomy*, USDA, <https://www.usda.gov/farming-and-ranching/plants-and-crops/biotechnology/bioeconomy> (last visited June 9, 2025).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

(“USDA”) that outlines a vision for biotechnology and biomanufacturing in the United States.<sup>37</sup>

The Trump administration may initiate substantial growth in domestic biotechnology and biomanufacturing.<sup>38</sup> President Trump’s first administration revolved heavily around an “America First” mindset.<sup>39</sup> In his first term, President Trump oversaw significant efforts to shorten the Federal Drug Administration’s (“FDA”) approval process, which led to a massive increase in novel drug approvals.<sup>40</sup> Currently, however, there seems to be no new investments in domestic biotechnology or biomanufacturing efforts planned for the immediate future.<sup>41</sup>

### C. *The History of the BIOSECURE Act and Potential Reforms*

The growing interdependence of U.S. biopharmaceutical industries on international collaboration and resources has created concerns regarding national security and ethics.<sup>42</sup> These concerns center around the fear that Chinese biotechnology companies, and other companies based in territories deemed “foreign adversaries,” could be compelled by their government to give up private American health data which could be weaponized against the United States.<sup>43</sup> Concerns over Chinese control of its companies are not new in Congress.<sup>44</sup> In early 2024, the Select Committee on the Chinese Communist Party released a report titled “How American Venture Capital Fuels the PRC Military and Human Rights Abuses.”<sup>45</sup> Though this

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<sup>37</sup> See *Fact Sheet: President Biden to Launch a National Biotechnology and Biomanufacturing Initiative*, THE WHITE HOUSE (Sept. 12, 2022), <https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2022/09/12/fact-sheet-president-biden-to-launch-a-national-biotechnology-and-biomanufacturing-initiative>.

However, these initiatives may no longer exist under the current Trump administration. See *id.* Biden’s Executive Order has been archived on the White House’s website, and the link to the OTSP and USDA’s article is no longer valid. *Bioeconomy*, *supra* note 35.

<sup>38</sup> See *Trump Administration’s Impact on FDA Regulations: 5 Key Changes for Pharma & Biotechnology in 2025*, DLRC (Jan. 28, 2025), <https://www.dlrcgroup.com/trump-administrations-impacts-on-fda-regulations-5-key-changes-for-pharma-biotech-in-2025/>.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See Maggie Fick & Bhanvi Satija, *Trump Health Policy Uncertainty Sends Biotechnology Sector into Deeper Slump*, REUTERS (Apr. 14, 2025, 10:53 AM), <https://www.reuters.com/business/healthcare-pharmaceuticals/trump-health-policy-uncertainty-sends-biotech-sector-into-deeper-slump-2025-04-14/>.

<sup>42</sup> David M. McIntosh, Arthur C. Mok, & Geoffrey Lin, *Senate Committee Votes to Send the BIOSECURE Act to the Senate Floor*, ROPES & GRAY (Mar. 7, 2024), <https://www.ropesgray.com/en/insights/alerts/2024/03/senate-committee-votes-to-send-the-biosecure-act-to-the-senate-floor>.

<sup>43</sup> *Id.*

<sup>44</sup> See H.R. SELECT COMMITTEE ON THE STRAT. COMP. BETWEEN THE U.S. AND THE CCP., Y 4.2:C 44/C 17, CCP’S INVESTORS: HOW AMERICAN VENTURE CAPITAL FUELS THE PRC MILITARY AND HUMAN RIGHTS ABUSES (2024).

<sup>45</sup> *Id.*

report is not focused on the biopharmaceutical industry specifically, the problems it highlights are very similar to the reasons motivating the BIOSECURE Act.<sup>46</sup> This report reflects that many politicians are concerned about the potentially unethical nature of China’s clinical trials and the possibility of China stealing American data for militaristic uses.<sup>47</sup>

The BIOSECURE Act was introduced by the House of Representatives to remedy these national security concerns by severing ties with biotechnology companies of concern.<sup>48</sup> While the five named companies are automatically classified as biotechnology companies of concern, the BIOSECURE Act also allows for the expansion of the classification list on the discretion of the Office of Management and Budget (“OMB”).<sup>49</sup>

The BIOSECURE Act proposed by the House of Representatives mostly aligns with the original 2023 bill proposed by the Senate.<sup>50</sup> However, some of the most notable differences between the Senate bill and the House bill are the House’s inclusion of the safe harbor clause and a time limit on a proposed grandfathering clause.<sup>51</sup> While the Senate bill includes a general grandfathering clause that would allow any previous contracts and services with biotechnology companies of concern before the BIOSECURE Act to continue, the House’s proposed BIOSECURE Act only allows for the continued contracts to be grandfathered for an eight-year period.<sup>52</sup> Under the House’s proposed bill, companies will have to completely disassociate from biotechnology companies of concern by 2032.<sup>53</sup> The House’s version of the bill also includes a Safe Harbor Clause, which allows the U.S. government to work with biotechnology equipment or services that were affiliated with biotechnology companies of concern, as long as they are no longer owned by biotechnology companies of concern.<sup>54</sup>

### III. ANALYSIS

#### *A. The Impact of Losing Chinese Biotechnology Companies*

One of the most concerning impacts of the BIOSECURE Act for the biopharmaceutical industry is the naming of WuXi AppTec and WuXi Biologics as

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<sup>46</sup> *Id.*

<sup>47</sup> McIntosh, Mok, & Lin, *supra* note 45.

<sup>48</sup> *Id.*

<sup>49</sup> BIOSECURE Act, H.R. 8333, 118th Cong. (2023–2024).

<sup>50</sup> See *BIOSECURE Act: Industry Closely Following in the Lame Duck*, FOLEY HOAG (Nov. 20, 2024), <https://foleyhoag.com/news-and-insights/publications/alerts-and-updates/2024/november/biosecure-act-industry-closely-following-in-the-lame-duck/>.

<sup>51</sup> McIntosh, Mok, & Lin, *supra* note 45.

<sup>52</sup> BIOSECURE Act, H.R. 8333, 118th Cong. (2023–2024).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

automatic biotechnology companies of concern.<sup>55</sup> Eli Lilly collaborated with WuXi AppTec, one of the named biotechnology companies of concern to produce some of its ingredients in its GLP-1 obesity medications, and GSK entered in a licensing deal with WuXi Biologics in 2023 for bi-and-multi-specific T-cell engager antibodies WuXi developed to help fight cancer.<sup>56</sup> Without Wuxi, these medications may not be able to be produced.<sup>57</sup> The biggest impact of losing WuXi is not the loss of WuXi’s specific biotechnology services, but the loss of its contracting services.<sup>58</sup> WuXi AppTec is one of the largest global providers of contract development and manufacturing (“CDMO”), and there is heavy international reliance on the bioproducts it can supply to biopharmaceutical companies.<sup>59</sup> WuXi has a major presence in the U.S. biopharmaceutical industry, contributing in the creation of several drugs in the United States.<sup>60</sup> WuXi is also deeply intertwined with the American markets.<sup>61</sup> WuXi AppTec and WuXi Biologics combined made around eight billion dollars of sales in 2023, in which more than half the profits came from the U.S. market.<sup>62</sup>

Some biopharmaceutical companies that would be impacted because of WuXi’s inclusion in the BIOSECURE Act include Amicus, Eli Lilly, Sypre Therapeutics, Vir Biotechnology, Fibrogen, AgeX Therapeutics, and Structure Therapeutics, just to name a few.<sup>63</sup> Additionally, a portion of these companies will be disproportionately impacted by the loss of WuXi.<sup>64</sup> Amicus depends on WuXi Biologics as its sole supplier for a lab-made protein in the company’s treatment of Pompe disease.<sup>65</sup> WuXi STA, a subsidiary of WuXi AppTec, “is the sole provider of ingredients in a pipeline of cardiovascular drugs being developed by Structure Therapeutics.”<sup>66</sup>

The loss of WuXi could have a severe negative impact on ongoing and developing clinical research.<sup>67</sup> Though there are other international suppliers companies can rely on, WuXi has earned its reputation as being the best and most diverse supplier

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<sup>55</sup> Strom & Kros, *supra* note 14.

<sup>56</sup> Amy Baxter, *Biopharma Prepares to Pivot from China as Biosecure Act Advances*, PHARMAVOICE (Sept. 16, 2024), <https://www.pharmavoices.com/news/biopharma-china-biosecure-act-wuxi/727018/>.

<sup>57</sup> See Jared Whitlock, *Wuxi Became a Critical Partner to Biopharma Biopharma Companies. They’re Not Ready If the U.S. Cracks Down*, ENDPOINT NEWS (Mar. 13, 2024, 8:13 AM), <https://endpts.com/wuxi-became-a-critical-partner-to-biopharma-companies-theyre-not-ready-if-the-us-cracks-down/>.

<sup>58</sup> *Id.*

<sup>59</sup> Strom & Kros, *supra* note 14.

<sup>60</sup> *The Biosecure Act and Its Impact on Pharma: What You Need to Know*, LANGHAM LOGISTICS (Aug. 26, 2024), <https://www.elangham.com/2024/08/26/the-biosecure-act-and-its-impact-on-pharma-what-you-need-to-know/>.

<sup>61</sup> Whitlock, *supra* note 61.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

internationally.<sup>68</sup> Additionally, many other suppliers may not be able to supply the specific proteins or other complex products.<sup>69</sup> Even if biopharmaceutical industries are able to find new suppliers, the switch would take time, disrupting the supply of many lifesaving medications and potentially ruining emerging clinical studies.<sup>70</sup>

*B. Concerns Over the Language of the Prohibition on Grant and Loan Funds Clause*

The BIOSECURE Act will also impact more than just federal government services and employees.<sup>71</sup> The BIOSECURE Act prohibits federal funding to companies that use biotechnology equipment or services from biotechnology companies of concern.<sup>72</sup> The distinction between the general clause and the prohibition on loan and grant funds is vital. The general clause only prohibits executive agencies from getting into contracts with companies who know or have reason to believe that they will use equipment or services from biotechnology companies of concern *in performance of the contract*.<sup>73</sup> The prohibition on loans and funding explicitly lacks that language and instead will prohibit federal loans and funding for companies that are contracting with biotechnology companies *in general*.<sup>74</sup>

Many of the top biopharmaceutical companies in the U.S. rely heavily on federal funding for the research and development of drugs that will eventually be released into U.S. markets.<sup>75</sup> However, many important drugs are made through reliance on Chinese biotechnology companies.<sup>76</sup> Companies are considering turning to Indian suppliers to fill the gap; however, these companies rely heavily on Chinese companies for their active pharmaceutical ingredients.<sup>77</sup> New partnerships might also cause an even bigger delay in the supply chain, as companies will have to negotiate new vital supply agreements and find a new supplier as reputable as WuXi.<sup>78</sup> Biopharmaceutical industry, to be compliant with the BIOSECURE Act, will be forced to try and find new suppliers after years-long partnerships and familiarity with these biotechnology companies of concern.<sup>79</sup>

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> See BIOSECURE Act, H.R. 8333, 118th Cong. (2023–2024).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Sujai Shivakumar, Tisyaketu Sirkar, & Jeffrey Depp, *Understanding the U.S. Biopharmaceutical Innovation Ecosystem*, CSIS (Aug. 15, 2024), <https://www.csis.org/analysis/understanding-us-biopharmaceutical-innovation-ecosystem>.

<sup>76</sup> Whitlock, *supra* note 61.

<sup>77</sup> HEALTH-ISAC, IMPACTS OF THE BIOSECURE ACT ON THE GLOBAL BIOTECH INDUSTRY, (Nov. 5, 2024), [https://health-isac.org/wp-content/uploads/11.4.24\\_WP\\_ImpactsoftheBIOSECUREActontheGlobalBioTechIndustry.pdf](https://health-isac.org/wp-content/uploads/11.4.24_WP_ImpactsoftheBIOSECUREActontheGlobalBioTechIndustry.pdf).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

*C. Potential Issues Regarding Classifying Biotechnology Company of Concern*

The way the BIOSECURE Act classifies biotechnology companies of concern means both U.S. biopharmaceutical and foreign biotechnology companies will get blindsided.<sup>80</sup> The BIOSECURE Act has only listed five major Chinese biotechnology companies as being classified as a biotechnology company of concern.<sup>81</sup> However, more entities will be released in a list that is decided by the OMB based on a list provided by the Secretary of Defense in coordination with other pertinent executive offices.<sup>82</sup>

The selection criteria and inclusion of new biotechnology companies of concern is concerning. First, the definition of foreign adversary is defined under 10 U.S.C. § 4872 (d)(2) as “the Democratic People’s Republic of North Korea, the People’s Republic of China, the Russian Federation, and the Islamic Republic of Iran.”<sup>83</sup> But this statute can be modified as political alliances shift, meaning that new countries can potentially be added to the BIOSECURE Act.<sup>84</sup> This uncertainty may cause unpredictable shifts in the biotechnology and biopharmaceutical industries.

Second, the OMB typically does not manage processes laid out in the BIOSECURE Act, such as the selection of biotechnology companies as potential national security threats.<sup>85</sup> The lack of OMB’s expertise in these areas may not be too damaging because the OMB chooses what is considered a biotechnology company of concern based on a list provided by other, better suited executive offices such as the Departments of Health and Human Services and Homeland Security.<sup>86</sup> However, this means that other departments, other the Department of Defense, may be able to influence OMB’s decision making, and it is unclear which ones may have the greatest influence.<sup>87</sup> This uncertainty could create a lack of accountability regarding which agency is actually classifying biotechnology companies of concern, and allows non-elected officials with unknown motives to assert a greater influence over the classification process.<sup>88</sup>

Further, another potential issue with the classification of biotechnology companies of concern is the lack of advance notice to both biotechnology companies and the biopharmaceutical industry itself.<sup>89</sup> If a company is notified that they are a biotechnology company of concern, they have within ninety days of the receipt of notice to submit any information or arguments that will help them oppose the

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<sup>80</sup> See Strom & Kros, *supra* note 14.

<sup>81</sup> BIOSECURE Act, H.R. 8333, 118th Cong. (2023–2024).

<sup>82</sup> *Id.*

<sup>83</sup> 10 U.S.C. § 4872 (d)(2).

<sup>84</sup> See *id.*

<sup>85</sup> Strom & Kros, *supra* note 14.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> See *id.*

<sup>89</sup> See BIOSECURE Act, H.R. 8333, 118th Cong. (2023–2024).

designation.<sup>90</sup> If the company opposes the designation, then any knowledge that they are a biotechnology company of concern only gets released after the OMB has reviewed all information and issues a final determination that the company shall remain a listed biotechnology company of concern.<sup>91</sup> However, the BIOSECURE Act gives no timeline to how long or rigorous the OMB's evaluation of these objections is, nor any specifications about the process or information biotechnology companies should submit.<sup>92</sup> The lack of specifications means that companies that are appealing their status as a biotechnology company of concern would have no knowledge on whether they can legally work with American companies for an undetermined period of time.<sup>93</sup> The BIOSECURE Act also does not contain language about notifying businesses about potential biotechnology companies of concern, meaning that biopharmaceutical companies must remain vigilant about *all* Chinese, Russian, North Korean, and Iranian biotechnology companies, even if they may never be listed as a biotechnology company of concern.<sup>94</sup>

The BIOSECURE Act essentially forces biopharmaceutical companies to try and cut off *all* ties with suppliers from these countries, or risk potentially being in collaboration with a biotechnology company of concern, which would cause unnecessary supply shortages, disrupted clinical trials, and drug price increases.<sup>95</sup>

#### IV. RECOMMENDATIONS

While the BIOSECURE Act stems from very real ethical and national security concerns regarding foreign adversaries such as China, the impact of the current version of the BIOSECURE Act appears to be more detrimental to the American people than beneficial.<sup>96</sup> Although there is currently not much expectation that the BIOSECURE Act will get passed into law, the biotechnology and biopharmaceutical industries must remain vigilant.<sup>97</sup> The current Trump administration is still supportive of distancing relations with China. The situation with the Tik Tok ban shows that the Trump administration is not willing to accept Chinese companies, as the ban's reversal still hinges on Tik Tok not being owned by the Chinese company ByteDance.<sup>98</sup> Additionally, BIOSECURE Act is a bipartisan issue, meaning that if it ever *is* called up, it will most likely be passed.<sup>99</sup>

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Tan & Yang, *supra* note 15.

<sup>96</sup> See generally *supra* Part III.

<sup>97</sup> See *Biosecure Stalls, Will Not Become Law In 2024*, HOGAN LOVELLS, (Dec. 23, 2024), <https://www.hoganlovells.com/en/publications/biosecure-stalls-will-not-become-law-in-2024>.

<sup>98</sup> Allyn, *supra* note 1

<sup>99</sup> *Id.*

However, if passed as it currently is, the BIOSECURE Act will be detrimental to the pharmaceutical industry.<sup>100</sup> The need for the biopharmaceutical industry to cut off all Chinese connections, especially with WuXi, and find new suppliers of their main drugs and therapies by 2032 would cause massive supply shortages and distribution issues.<sup>101</sup> Additionally, there is no guarantee that other biotechnology companies will exist that could replace the gap WuXi will leave in supplying specific complex proteins by 2032, when the grace period of the BIOSECURE Act is officially over.<sup>102</sup>

If Congress wants to be able to mitigate national security threats without the expense of the American population, there are a number of options they should implement. First, there needs to be active investment into domestic biotechnology and biomanufacturing resources for the health industry.<sup>103</sup> To fix American biopharma's dependence on international biotechnology companies, we need to be able to create a reliance on American biotechnology companies instead.<sup>104</sup>

However, creating a strong foundation of domestic biotechnology requires a lot of time. Thus, some of the BIOSECURE Act's provisions should be amended so they are more forgiving to current partnerships to allow the biopharmaceutical industry more time and stability.<sup>105</sup> One beneficial amendment would be to incorporate the Senate bill's grandfather clause.<sup>106</sup> Instead of only having an eight-year period for the biopharmaceutical companies to somehow find a way to resupply all their major drugs, all their previous contract deals will be grandfathered in, stabilizing the biopharmaceutical industry until domestic American biotechnology companies exist as a viable alternative solution.<sup>107</sup> Additionally, the language in the Prohibition of Loan and Grant Funding clause should be altered to mirror the scope of the General clause (2)(B).<sup>108</sup> This would mean that biopharmaceutical companies could still work with biotechnology companies of concern for their general patented drugs not meant for government contracts, without losing vital federal funding.<sup>109</sup>

## V. CONCLUSION

Overall, the BIOSECURE Act may be necessary for our nation's health industries to function without national security, privacy, and ethical concerns that arise from working with biotechnology companies potentially susceptible to working for foreign adversaries. However, before we can implement the BIOSECURE Act we need a

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<sup>100</sup> *The Biosecure Act and Its Impact on Pharma: What You Need to Know*, *supra* note 64.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> See discussion *supra* Section III.A.

<sup>104</sup> See *id.*

<sup>105</sup> *BIOSECURE Act: Industry Closely Following in the Lame Duck*, *supra* note 53.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> See BIOSECURE Act, H.R. 8333, 118th Cong. (2023-2024).

<sup>109</sup> See *id.*; Shivakumar, Sirkar, & Depp, *supra* note 79.

stronger domestic biotechnology foundation, which requires revision to the BIOSECURE Act to create more stability within the biotechnology and biopharmaceutical industry to hopefully reduce the impact on drug supplies and therapies in the U.S. while American biotechnology industries develop.