THE NONPROFIT WAR ON WORKERS

PART I

WEAPONS OF LABOR VIOLENCE:

AN ANALYSIS OF THE CHINESE-AMERICAN PLANNING COUNCIL'S LEGAL TACTICS TO EXPLOIT WORKERS

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GLOSSARY OF ACRONYMS AND SHORTHAND

- 2d Cir.: United States Court of Appeals, Second Circuit
- "*Chan* et al.," or "*Chan*" : *Lai Chan et al. v. Chinese-American Planning Council Home Attendant Program, Inc.*
- "*Chu* et al." or "*Chu*": *Mei Kum Chu et al. v. Chinese-American Planning Council Home Attendant Program, Inc.*
- "Section 301": Section 301 of the Labor Management Relations Act
- "Taft-Hartley Act of 1947" or "Taft-Hartley Act": Alternate name for the Labor Management Relations Act, named after the Congressional members who introduced it, Senator Robert A. Taft and Fred A. Hartley Jr.
- "Wagner Act of 1935" or "Wagner Act": Alternate name for the National Labor Relations Act, named after United States Senator from New York Robert F. Wagner
- "1199 SEIU United Healthcare Workers East," "1199 SEIU," or "1199": 1199 Service Employees International Union United Healthcare Workers East
- ADR: Alternative Dispute Resolution
- CBA: Collective Bargaining Agreement
- CM/ECF: Case Management/Electronic Case Files, the federal judiciary's digital system for submission of case documents
- CPC: Chinese-American Planning Council, Inc. Shorthand for CPCHAP.
- CPCHAP: Chinese-American Planning Council Home Attendant Program, Inc.
- FAA: Federal Arbitration Act
- FLSA: Fair Labor Standards Act
- LMRA: Labor Management Relations Act of 1947; also known as the Taft-Hartley Act
- LHCSA: Licensed Home Care Service Agency
- MOA: Memorandum of Agreement
- MOL: Memorandum of Law
- NLRA: National Labor Relations Act of 1935; also known as the Wagner Act
- NLRB: National Labor Relations Board
- NYCRR: New York Codes, Rules and Regulations
- NYLL: New York Labor Law
- NYPHL: New York Public Health Law
- NYSC: New York Supreme Court
- NYSDOH: New York State Department of Health
- NYSDOL: New York State Department of Labor
- NYSCEF: New York State Courts Electronic Filing System
- SDNY: United States District Court for the Southern District of New York
- TRO: Temporary Restraining Order
- USC: United States Code

CITATION GUIDE

The analysis put forth in this report heavily relies on the content matter of two cases, *Chan et al. v. Chinese-American Planning Council Home Attendant Program, Inc.* and *Chu et al. v. Chinese-American Planning Council Home Attendant Program, Inc.* Most documents from both cases that are cited in this report may be obtained for free through the County Clerk and Supreme Court of New York County Supreme Court Records Online Library (SCROLL). For documents in which each case was preempted to the United States District Court for the Southern District of New York – a federal court – readers can access through the Public Access to Court Electronic Records (PACER), the electronic database for federal court documents operated by the Administrative Office of the United States Courts on behalf of the federal judiciary.

Unfortunately, the federal courts are not known for their transparency, as PACER charges users $0.10 for each page in a document. These fees may be waived if the user spends less than $30.00 per quarter on the PACER system. The acronyms "NYSCEF" and "CM/ECF" refer to the New York State Courts Electronic Filing System and Case Management/Electronic Case Files, the digital case file uploading systems for the judiciaries of the State of New York and the United States of America, respectively.

Case index numbers for the *Chan* and *Chu* proceedings are given below, and may be used to expeditiously search for the cases in the state and federal databases:

- *Lai Chan et al. v. Chinese-American Planning Council Home Attendant Program, Inc.*
    - NYSCEF Index No.: 650737/2015
    - CM/ECF Index No.: 1:15-cv-09605-LGS
- *Mei Kum Chu et al. v. Chinese-American Planning Council Home Attendant Program, Inc.*
    - NYSCEF Index No.: 651947/2016
    - CM/ECF Index No. (2016): 1:16-cv-03569-KBF
    - CM/ECF Index No. (2021): 1:21-cv-02115-AT

Documents in the civil docket are numbered in order of filing. The format used in this report to cite specific documents is:

[*Chu* OR *Chan et al.*], [NYSC (New York Supreme Court) or SDNY (Southern District of New York)] [YEAR]. [MONTH] [DAY], [YEAR]. [NYSCEF OR CM/ECF] Doc. No. [XXX], pg. [XX].

For example, the citation:

Chu et al., NYSC 2016. February 19, 2020. NYSCEF Doc. No. 82, pg. 17

Refers to the document in the *Chu* case, in the civil docket for the New York County Supreme Court, filed on February 19, 2020 and numbered 82.

Foreword

In April 2021, organizers from the Flushing Workers Center (FWC) and the Ain't I A Woman (AIW)? campaign reached out to this office to brief us on a grave matter: the years-long abuse, exploitation, and labor violence of a large group of home care workers – predominantly immigrant Chinese home care workers – who were (and many still are) employed by the Chinese-American Planning Council Home Attendant Program (CPC-HAP, or CPC). We were told that for years, workers at CPC organized to bring their employer to justice for a multiplicity of extraordinarily serious alleged labor violations, ranging from unpaid minimum and overtime wages to outright abusive labor conditions in twenty-four hour work shift requirements. As CPC and its home care services agency affiliate have a pronounced presence in Assembly District 40 in Flushing, Queens, this was a case that warranted our utmost attention and care given the enormity of material impact this would have had – and has – on our constituents.

As we do with every claim that is brought to our office, we independently investigated to understand the circumstances surrounding this case. Our method is to listen intently to what our constituents have experienced, and to follow up through rigorous research of our own. After further examination and internal deliberation within our team, it was resolutely clear that the organizers and workers at the FWC and AIW were absolutely onto a case with far-reaching implications. We chose to pursue this case with the utmost urgency. And admittedly, the conclusions we draw in the pages to follow are far worse than we could have imagined earlier this year. In one respect, the moral conflict is straightforward and Manichean: CPC has stolen its workers' wages and subjugated them to the grueling twenty-four hour shift. In another sense, the implications of CPC's actions are forebodingly complex and far-reaching, and I fear may manifest in the future in ways we have yet to see.

Over the course of April to November 2021, I have spent hundreds of hours examining 327 unique documents in the Chan et al. v. Chinese-American Planning Council Home Attendant Program, Inc. and Chu et al. v. Chinese-American Planning Council Home Attendant Program, Inc, collectively spanning 2,891 pages. I have also studied scores of other documents spanning hundreds more pages pertaining to analysis of the statutory and regulatory regime around long-term home health care, and relevant case law that has been formative in public policy governing this type of labor. The report in the following pages is, within the scope of my abilities, the most rigorous product of my research over this year that I can present to this Office, and to the People of the State of New York.

There are two facets to this report. The first is the stunningly contempt for workers' rights CPC-HAP expresses in its over six-year-long litigation against its own workers, and the undertones this carries for labor relations in the general sense. The second is the sheer dehumanization by which immigrant and women of color laborers have been, and are still, forced to undergo in today's economic society. On this point, the misdeeds of CPC – a nonprofit ostensibly taken by many to possess progressive and racially just bona fides – render it the chief culprit of rampant and systemic labor violence, a point that may be unsettling and disquieting to some. To the reader, I ask that you set aside whatever sentiments, preconceptions, or loyalties you may currently maintain towards CPC, and allow the facts outlined here to speak for themselves.

The worldview on which this report rests is that the law functions as one of the most cunning weapons of capital. Many, even devoted adherents to politics, ignore its study, dismissing it as technocratic drivel or overly complicated so as to not warrant serious analysis. But this is a profound mistake, for the arena of law and the courts is a venue in which capital deals its greatest crimes unto the working class. To willfully dismiss and ignore capital's deceptive and powerfully strategic tactics by way of the law is to remain intentionally blind to the surplus of ways in which capital has incapacitated all of us.

No experience has ingrained this profound lesson in me more powerfully than my tenure with the New York State Assembly. In 2020, I authored a series of analyses of Governor Cuomo's and the Greater New York Hospital Association's (GNYHA) corporate immunity clause that brought about the unnecessary deaths of thousands of nursing home residents in our state. It is indisputable that these untimely and horrific deaths could not have happened without the law bestowing total immunity to nursing home providers looking to make an extra buck off of what they perceived to be disposable human life. This office has worked intimately with families whose lives were destroyed by the actions of a select group of private individuals weaponizing the law and the state to execute its perverse bidding. Thus, I make no distinction between the modus operandi of the GNYHA, predatory nursing homes, and the Chinese-American Planning Council in the latter's unrestrained exploitation of labor. In the struggles of aggrieved nursing home families and home care workers, I see a common fight against those powerful private entities whose patent disregard for human life in the pursuit of self-enrichment knows no bounds.

For as much as analysis of class conflict has grown in ubiquity in the political discourse, it is my belief that among the most useful insights of the class stratification in American society are found in analysis of the legal superstructure. One conclusion I have come to is it is not that there is a dearth of rule of law in the contemporary era. It is that the **law of capital** prevails, which follows a logic of its own to co-opt the law and the state for the purpose of its greater aggrandizement — with the diminishment of dignity and life for the underclasses as collateral. The law is anything but abstract — it is often **the** primary weapon by capitalists for determining the material condition of working peoples everywhere.

Indeed, the law does not simply outline a technocratic process. It is inherently bolstered by an ideological foundation, and study of the law gives one tremendous insight to the ideological forces charting society's course. But do not get hung up in the legal weeds — the analysis of law is merely a means to an end of greater import. I get technical where I need to get technical, but more important are the ideological implications I argue from the law. The more imperative question at the heart of this situation is a contest over the relation of the worker to their society, and of the organization of society and the labor process itself. Is this a society in which workers – of any races, gender or creed – are the masters of their own fates, rulers of their own time and wealth, deciders of their collective destiny? Or is this a society and a life we willingly surrender to the CPCs of the world, a society embroiled in deception and exploitation, all in the name of defending an ersatz and impostor progressivism?

As such, it is not my wish to simply describe CPC's legal tactics as a procedural analysis, for that would be of little use to non-lawyers — myself included. Rather, it is to demonstrate how the aforementioned ideological superstructure undergirding the legal stratagem damns us to the latter society. As I argue in the following chapters, the gross injuries inflicted on the CPC workers is only the beginning. The precedents CPC has established in defining the nature of labor relations will doom all workers, like a scourge left to propagate unchecked.

Undoubtedly, this an incomplete and imperfect work. There will be, without question, perspectives I have failed to consider, arguments I have neglected to make. I welcome any and all good-faith critiques that can only provide more light to the darkness and obfuscation of CPC's deeds.

Lastly, I want to underscore the urgency that this campaign demands for all who fight for a better future for workers. In May of this year, this Office, along with the Flushing Workers Center, held a town hall in District 40 featuring many of the home care workers. One home care worker in particular – Lai Yee Chan, one of the leaders of this venerable fight and the namesake for one of the major lawsuits we study in this report – spoke passionately to the permanent physical damages this work wreaks on the body. She spoke to how she and her work colleagues have lost time – time to be with children, family, friends and loved ones.

We must be forthright about an immutable truth: the law can redress monetary claims. There can never be a shortage of money too impossible to overcome, for money in its essence is never bound by biophysics and materiality. But there is a perpetual shortage of time from the moment we are brought into this world. It is ephemeral and may be seized from us at any moment, by unmitigated tragedy or cruel twist of fate. The magnitude by which time is superior in value to money is immeasurable. In one sense, the theft of the workers' time and money by CPC is nefarious in its own right.

But as I conclude in this report, it is not only home care workers at the Chinese-American Planning Council who suffer. This is a story that could easily be told with a different cast of characters. We could have easily written this report about oil rig workers off of the coast of California, who too are assigned to barbarous twenty-four hour shifts in abysmally dangerous conditions, frequently facing the risk of permanent injury if not death. Or we could have written about office workers working for the Big Four accounting firms in New York City, made to work grueling overtime hours and denied even the basic right to sue for lost wages. Irrespective of industry, the twenty-four hour shift is not an injustice idiosyncratic to our own time — it is a reality so grave that it truly is an injustice across the history of all human civilization. If not today, then one day, this could be you – the reader – and me.

It is my hope that this document will encourage those who have remained silent to do the right thing. In a moment to come, the workers will see their day of justice. It will not only be theirs, but ours too.

November 2021

INTRODUCTION: CPC'S WEAPONS OF LABOR VIOLENCE

> *"[The workers] also will not succeed on the merits of their primary claim in the underlying lawsuit which is that CPC was required to pay them for every hour in their 24-hour shifts regardless of how many hours they actually worked during those shifts."* [1]
>
> -Chinese-American Planning Council

Weapons of labor violence have wrought absolute catastrophe unto American labor relations and worker dignity. They constitute the legal arsenal that insidious employers across the state and nation deploy to routinely disenfranchise workers, frequently out of sight by legislators, the scrutinizing public, and worst of all, the workers themselves.

A weapon of labor violence functions in a manifold of ways: first, it is designed to garnish workers of their earnings ***en masse***, while barring any and all means of organization or litigation by the workers on a class-wide basis and on their own terms.

Moreover, it is prohibitively ***convoluted***, relying not only on the law of the legislature with constituencies to answer to, but of insular proceedings involving courts, private forums, and powerful employers whose nefariously anti-labor arguments are codified as the law of the judiciary. In other words, the realm of legal worker-management relations is not strictly exclusive to that of the state and legislatures; of worker autonomy, even less so. Individual firms such as CPC, in tandem with their white-shoe law firms in the courts, play a substantial, if not even *greater* role in decision- and rule-making in labor markets with often devastating material consequences for workers.

Disturbingly, it is ***deceptive***, as those who opt out of their own volition to harness such legal weapons – unions and employers alike – will spin their tactics to the public as tools of expedient justice, delivering for workers whose rights and material dignity they claim to champion. Some will even brand themselves as harbingers of social and economic justice, and appropriate language of the sort to win public appeal. It should go without saying that nothing could be further from the truth.

Above all, it is a ***coercive*** and ruthless game that exploitative employers and their ilk have established in the near-century following that of the New Deal, one willfully crafted to demoralize and dehumanize their workers into total capitulation by attrition from protracted court battles, arbitration proceedings, and years of untenable yet deliberate delay.

The Chinese-American Planning Council ("CPC") is one such employer. Home care workers from the CPC – predominantly elderly, immigrant, and Chinese women – have been embroiled in a years-long battle with their employer and its abettors[2], fighting to realize justice in the form of:

1. Ending the twenty-four hour work day immediately;
2. Full compensation of all stolen, garnished, and expropriated wages;
3. A public apology to all home care workers traumatized from their employment with CPC

[1] *Chu* et al., NYSC 2016. February 19, 2020. NYSCEF Doc. No. 82, pg. 17, see footnote.

[2] In this case, CPC's chief abettor is 1199 SEIU United Healthcare Workers East, the largest chapter of Service Employees International Union in the United States.

Beginning in 2015, however, a group of home care workers with the CPC brought formal lawsuits against the CPC for its "*systemic wage abuse against its home care aides in New York*." [3] Litigation in these suits has gone on for over six years at the time of this writing, and continue to the present day. The reasons for why this is so are precisely those of how weapons of labor violence unleash their might: by means of technocratic complexity, deception, delay, coercion and attrition, and irreparable injury unto an entire class of workers. Make no mistake: in analyzing CPC's weapons of labor violence and their vehemently anti-labor legal arguments in the courts over the last half-decade, **we categorically find that it is *entirely* CPC's decision to impede justice for the workers, and that liability for their wage theft rests with CPC *alone* – *not* the State of New York**.[4]

Indeed, one of the most pernicious myths to permeate New York State politics is that the CPC is a progressive, even anti-capitalist organization, in league with other (ostensibly) left-leaning entities mobilizing to realize a gamut of legislation encompassing the most ambitious heights of the left agenda: taxation of the wealthy, single-payer health care in New York, and transformative criminal justice reform.

But the deceptively "radical" aesthetics of CPC are part and parcel of employers' tactics in obfuscating the worldview they vindicate in the courts, one in which workers cannot ever be allowed to maintain autonomy as individuals or in collective organization. It is not even sufficient to claim CPC's *complicity* in the system, as if to convey a sense of passive but well-meaning acquiescence on CPC's part. More accurately, they have had a proactive role in *relying on* and *shaping* the system to their ends, while disingenuously masquerading to the legislature and the general public as a grassroots force committed to "community" and "liberation."

Henceforth, we find that the situation is in fact *worse* than CPC wronging *its* workers, and not merely a matter confined only to the internal strife of a firm's employees and management. Nor is this solely a matter of material expropriation of workers, untenable as that alone is. **We additionally argue that *CPC is the system*, as its actions in the judiciary have invoked among the *worst of anti-labor jurisprudence in American labor law*, and consequently, have contributed to the setting of precedent in the industry-wide arbitration that is injurious to not only the thousands of home care workers under CPC's employment, but to *the tens of thousands of home care workers across all agencies in New York City, extending even to workers of all industries*.**

To establish these two points – the exclusive liability and fault of CPC, and its culpability for its detrimental actions towards all home care workers in New York City – it behooves us to discuss in sufficient detail the mechanisms of these weapons of labor violence, their genesis in the post-New Deal legal landscape and the rise of the Reagan Right and neoliberalism, and particular for our purposes, the manner in which CPC has galvanized them against their own workers.

If public relations and legislative lobbying constitutes the exterior performance of CPC, the outwardly-facing, progressive impression society has of it – then its actions and ideological tendencies within the courts, delineated in docket documents essentially inaccessible to the public, make up its interior and thus ulterior agenda to cover for itself as their workers go each day without justice realized. Making sense of this agenda is the task before us.

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[3] *Chan* et al., NYSC 2015. March 11, 2015. NYSCEF Doc. No. 1, pg. 2.

[4] This liability also extends to CPC's failure to terminate the twenty-four hour shift within their organization. In short, CPC's claim that increases in Medicaid reimbursements to their organization are necessary to implement split-shifts are spurious.

I. THE CASES: LAI CHAN, MEI KUM CHU, AND ARBITRATION WITH NO END IN SIGHT

> *"Plaintiffs are seeking to recover more than entitled to recover and would be unjustly enriched if awarded judgment sought."* [5]
>
> -Chinese-American Planning Council, in claiming *the workers* will be the ones "unjustly enriched, not *itself*
>
> *"Plaintiffs are seeking pay for work not performed."* [6]
>
> -Chinese-American Planning Council, effectively denying that the workers worked grueling twenty-four hour shifts

Two class-action lawsuits have been brought against CPC. One is named *Lai Chan, Hui Chen, and Xue Xie et al. v. Chinese-American Planning Council Home Attendant Program, Inc.*[7] ("*Lai Chan"* or "*Chan"*), introduced in March 2015 and consisting of a putative class of CPC workers employed from January 1, 2015 to the present. Another, introduced in April 2016 on behalf of CPC workers employed from April 1, 2008 to November 30, 2015 (with the qualification that they terminated employment before December 1, 2015), is called *Mei Kum Chu, Sau King Chung, and Qun Xiang Ling, et al. v. Chinese-American Planning Council Home Attendant Program, Inc* [8] ("*Mei Kum Chu*" or "*Chu*").

In addition to the named plaintiffs in each case, the workers constituting each class allege systematic injustices during their employment under CPC; namely, working conditions that mandated them to be "on call" during twenty-four hour shifts while receiving only twelve to thirteen hours' worth of pay. These counts also encompass wage theft of unpaid minimum wages and overtime pay, calculated at one-and-a-half times that of the regular rate of pay. Injunctive relief, a court-ordered cease and desist of CPC's practices, is also sought by the workers. Plaintiffs state the following prayer for relief:

> "*Wherefore, Plaintiffs, individually and on behalf of all others similarly situated, pray for the following relief:*
>
> *a) That this action be permitted to proceed as a class action under CPLR Article 9 for all claims alleged, that Plaintiffs be designated as the representatives of the class, and that the undersigned counsel be designated as counsel for the class;*
>
> *b) Judgment be entered against Defendant and in favor of Plaintiffs and each Class Member in the amount of their individual unpaid wages, actual and compensatory damages, and pre-judgment and post-judgment interest as allowed by law;*
>
> *c) Plaintiffs be awarded their reasonable attorneys' fees and costs incurred in this litigation;*

[5] *Chan* et al., NYSC 2015. October 26, 2015. NYSCEF Doc. No. 41, pg. 9.

[6] *Ibid* at pg. 10.

[7] NYSCEF Index No. 650737/2015.

[8] NYSCEF Index No. 651947/2016.

d) Defendant be enjoined to cease the practices found illegal or in violation of Plaintiffs' rights, and;

e) Such further relief as this Court deems just and proper." [9]

The putative classes and timeframe of the claims are defined by the plaintiffs as such:

Table 1: Putative Class Definitions in the *Chan* and *Chu* Cases:

Case:	*Chan*	*Chu*
Class Definition:	"*All current and former home care aides, meaning home health aides, personal care aids, home attendants or other licensed or unlicensed persons whose primary responsibilities include the provision of in-home assistance with activities of daily living, instrumental activities of daily living or health-related tasks, employed by Defendant in New York to provide care services to Defendant's elderly and disabled clients in the clients' homes during the period from January 1, 2015 through the present (the 'Collective Action Period')*." [10]	"*All home care aides, meaning home health aides, personal care aids, home attendants or other licensed or unlicensed persons whose primary responsibilities include the provision of in-home assistance with activities of daily living, instrumental activities of daily living or health-related tasks, employed by Defendant in New York to provide care services to Defendant's elderly and disabled clients in the clients' homes during the period beginning from April 1, 2008 until November 30, 2015, and that such Class Members must have ceased their employment with Defendant before December 1, 2015 (the 'Class Period'), which is the date the Memorandum of Agreement ('MOA') between 1199 SEIU United Health Care Workers East (the 'Union') and Defendant came into effect. For the sake of clarity, the Class does not include any employees who worked for Defendant at any point on or after the MOA came into effect. Any employee who worked for Defendant on or after the MOA came into effect is not included in the class*." [11]

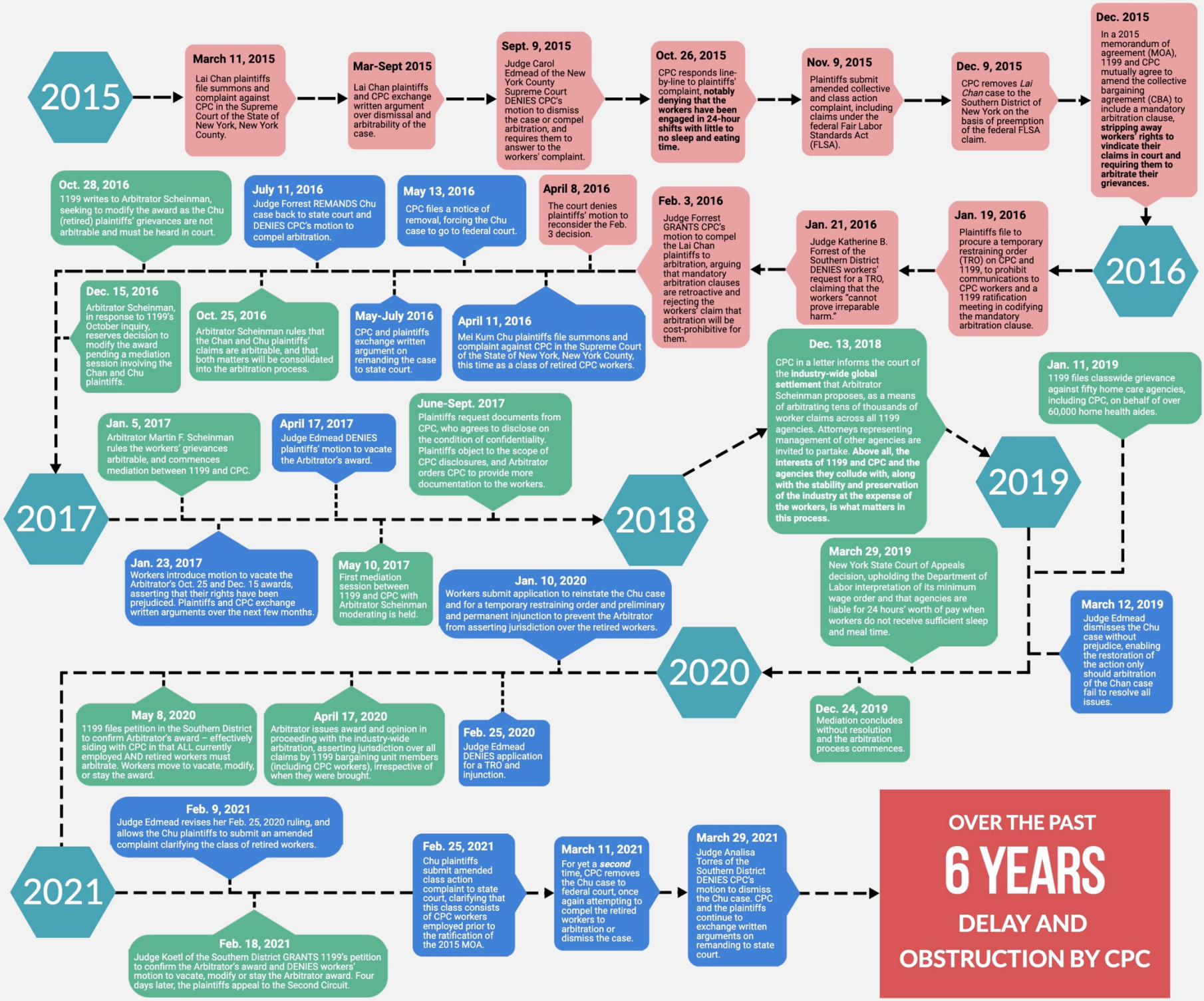
Both suits involve the workers bringing numerous wage and contract breach claims against CPC and have stalled in the courts for years. Below is a complete timeline of major events that have happened in the litigation.

[9] *Chan* et al., NYSC 2015. March 11, 2015. NYSCEF Doc. No. 1, pgs. 18-19.

[10] *Chan* et al., NYSC 2015. November 9, 2015. NYSCEF Doc. No. 43, pg. 5.

[11] *Chu* et al., NYSC 2016. February 15, 2021. NYSCEF Doc. No. 116, pg. 4.

TIMELINE OF CPC'S LITIGATION AND YEARS OF DELAY



Our purpose here will not be to exhaustively examine every single argument CPC has made to obstruct justice for the workers, for that would be needlessly tedious and time-consuming. Nor is our narrative here strictly limited to rehashing the litigation, even though an understanding of the legal landscape is important. The story to tell here is to communicate how a firm with awesome power, CPC, has orchestrated a full-scale assault on the rights and dignity of not only their own workers, but of all workers within its industry. Conveying this will require an establishment of the background of the litigation, at which point we will crescendo into examining the overarching themes of CPC's legal bases – its weapons of labor violence – look at plentiful examples in which these legalistic armaments are drawn, and conclude with this: that no friend of the Chinese-American Planning Council can be a friend to workers.

A. The Claims

We first must acquaint ourselves with the claims the workers have brought against CPC, which encompass violations of the New York Labor Law ("NYLL"), the Home Care Wage Parity Act in the Public Health Law ("NYPHL"), the New York City Fair Wages for New Yorkers Act, and its corresponding regulations promulgated by the Department of Labor ("NYSDOL") in the New York Codes, Rules and Regulations ("NYCRR"). Additionally, in the *Chan* case, two more claims have been brought under the federal Fair Labor Standards Act ("FLSA"). The claims are as follows:

Table 2: Claims for Relief by *Chan* Plaintiffs (CPC Workers from Jan. 1, 2015 to Present)[12]

Count	Claim for Relief	Statutory Violation(s)
I	Unpaid minimum wage	NYLL § 652, 12 NYCRR § 142-3.1
II	Unpaid overtime	NYLL § 650, *et seq.*, 12 NYCRR § 142-3.2
III	Unpaid spread of hours pay	NYLL § 190, *et seq.*, NYLL § 650, *et seq.*, 12 NYCRR § 142-3.4
IV	Failure to pay wages due	NYLL § 663(1)
V	Failure to comply with notification requirements (relating to paystubs)	NYLL § 195, 12 NYCRR § 142-3.8
VI	Breach of contract	NYPHL § 3614-c (NY Home Care Worker Wage Parity Act)
VII	Unjust Enrichment – defendant's failure to pay all wages due under the NY Home Care Worker Wage Parity Act and New York City's Fair Wages For Workers Act	NYPHL § 3614-c, NYC Admin. Code § 6-134 (NYC Fair Wages for Workers Act)
VIII	Unpaid minimum wage (Fair Labor Standards Act)[13]	29 USC § 206
IX	Unpaid overtime (Fair Labor Standards Act)	29 USC § 207

[12] *Chan* et al., NYSC 2015. November 9, 2015. NYSCEF Doc. No. 43, pg. 2.

[13] Counts VIII and IX were added in the November 9, 2015 amended collective and class complaint in the *Chan* case, after the coverage of the federal Fair Labor Standards Act was extended to home care workers in 2015.

Table 3: Claims for Relief by *Chu* Plaintiffs (CPC Workers from Apr. 1, 2008 to Nov. 30, 2015)

Count	Claim for Relief	Statutory Violation(s)
I	Unpaid minimum wage	NYLL § 652, 12 NYCRR § 142-3.1
II	Unpaid overtime	NYLL § 650, *et seq.*[14], 12 NYCRR § 142-3.2
III	Unpaid spread of hours pay	NYLL § 190, *et seq.*, NYLL § 650, *et seq.*, 12 NYCRR § 142-3.4
IV	Failure to pay wages due	NYLL § 191
V	Failure to comply with notification requirements (relating to paystubs)	NYLL § 195, 12 NYCRR § 142-3.8
VI	Breach of contract	NYPHL § 3614-c (NY Home Care Worker Wage Parity Act), NYC Admin. Code § 6-134 (NYC Fair Wages for Workers Act)
VII	Unjust Enrichment – defendant's failure to pay all wages due under the NY Home Care Worker Wage Parity Act and New York City's Fair Wages For Workers Act	NYPHL § 3614-c, NYC Admin. Code § 6-134

As mentioned, one maneuvering tactic CPC is engaged in is *deception*, and one notorious example of this we have found is a consistent and routine obfuscation by the defense in **discovery**, or the process in which parties produce evidence and witnesses for the court to consider in its judgment. In particular, the wage claims the plaintiffs have brought against CPC are notable not only for recuperating monetary damages that CPC has inflicted, but also for the **statutory requirements New York State mandates home care agencies[15] such as CPC to abide by**.

It would be utterly thoughtless and irresponsible to dismiss these requirements as mere technocratic details – for, as we will argue, if CPC has in any manner falsified or otherwise obstructed proper record-keeping and reporting, the matter at hand no longer remains a dispute solely between worker and employer but now evolves further into a **wrong against the State of New York intentioned to evade liability for the workers' grievances**. As New York State is CPC's greatest benefactor in the form of Medicaid reimbursements[16], it follows that any state-sanctioned funding of an organization found to be at fault for wage theft would truly be a serious matter and fully warranting of intervention and oversight by the legislature, amongst other state entities.

[14] *Et seq*., or "*and following,"* meaning the sections following § 650 of the NYLL.

[15] Specifically, the Chinese-American Planning Council Home Attendant Program is classified by New York State as a licensed home care services agency, or LHCSA. Part II of this report will contain an in-depth analysis into the reporting requirements the state promulgates for LHCSAs, and the insights this may provide to an agency's internal financial situation, fiduciary obligations to its workers, and legal obligations to the State of New York.

[16] To be discussed at great length in Part II.

B. Relevant Authorities

Below, we go into the authorities the workers have invoked in their lawsuits as part of the claims they levy on CPC. A disclaimer is necessary: we do not extol the protections of these laws as a gold standard to revere in labor relations. In reality, nothing could be further from the truth: these laws should be construed as the bottom-most floor, which employers like the CPC have attempted to twist and obscure the original intent of, along with evasion of enforcement, to escape unscathed with their deeds of wage theft. Hence, we are emphatic about what protections these laws afford (at least, according to their plain-text reading) if only to further underscore that CPC cannot even bring itself to abide by the absolute nadir of what the state promulgates to ostensibly protect workers.

1. Wage Theft Prevention Act (NYLL § 195)

Count V in both the *Chan* and *Chu* suits invoke New York State's Wage Theft Prevention Act, which enacts a series of record-keeping obligations employers (not specific to, but inclusive of nonprofit home care agencies) have to their workers and the state. Such obligations include providing the employee with information related to the rate of pay (in other words, a pay stub with sufficient information), and uniquely for home care workers, home care aide benefits supplementary to the minimum rate of compensation ordered by the Home Care Wage Parity Act[17]. The charge that the workers levy on CPC is:

> *"…failing to give Plaintiffs and the Class Members pay statements containing information on the dates of work covered by that payment of wages; rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; the regular hourly rate or rates of pay; the overtime rate or rates of pay; the number of regular hours worked; and the number of overtime hours worked."* [18]

The scope of the Wage Theft Prevention Act, however, goes further. Not only must the aforementioned record-keeping be furnished plainly and clearly to the worker; the law also orders employers to keep on hand detailed employment records that outline rates of pay and hours worked:

> *"Every employer shall:*
>
> *4. establish, maintain and preserve for not less than six years contemporaneous, true, and accurate payroll records showing for each week worked the hours worked; the rates or rates of pay and basis thereof…*
>
> *…Where such prevailing wage supplements are claimed, or such* ***home care aide benefits*** *are provided, the payroll records shall include copies of* ***all notices required*** *by subdivisions one and two of this section…*
>
> *…the payroll records shall include the regular hourly rate or rates of pay,* ***the overtime rate or rates of pay, the number of regular hours worked, and the number of overtime hours worked****.* (emphasis added)*"* [19]

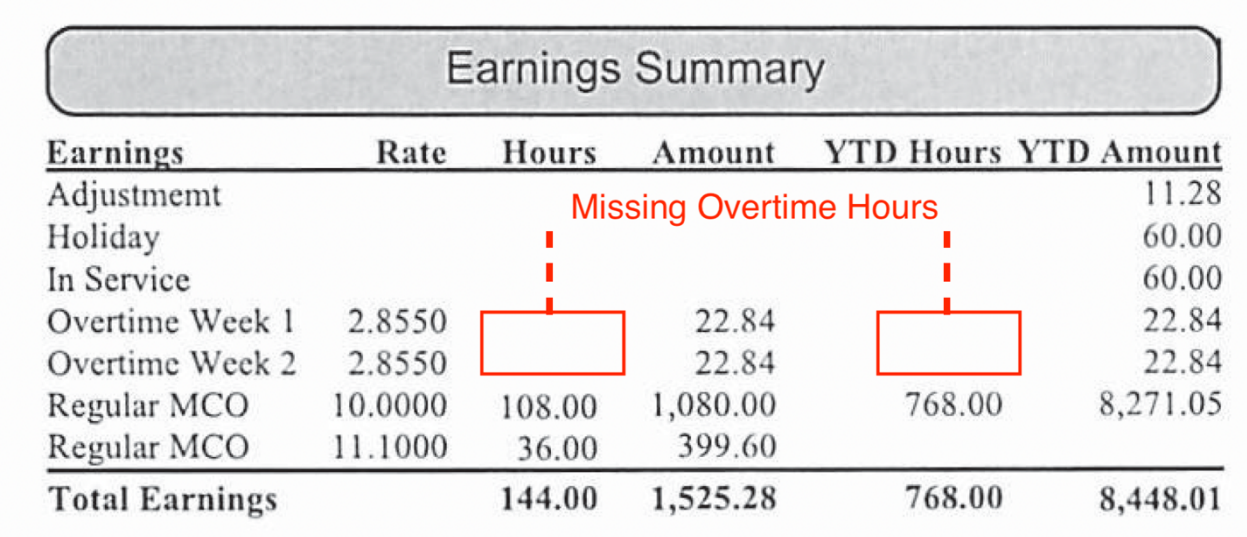
[17] *Consolidated Laws of New York*. Labor Law, § 195.

[18] *Chu* et al., NYSC 2016. February 15, 2021. NYSCEF Doc. No. 116, pg. 7.

[19] *Consolidated Laws of New York*. Labor Law, § 195.

Documentary evidence of the paystubs, as required by § 195(3) in particular, have been provided by both the plaintiffs and CPC in the litigation, each providing a sample paystub in different formats. On examination of both paystubs submitted by the parties, however, it is readily apparent that CPC has not included sufficient information on its paystubs that give a quantity of overtime hours that the employee has incurred:

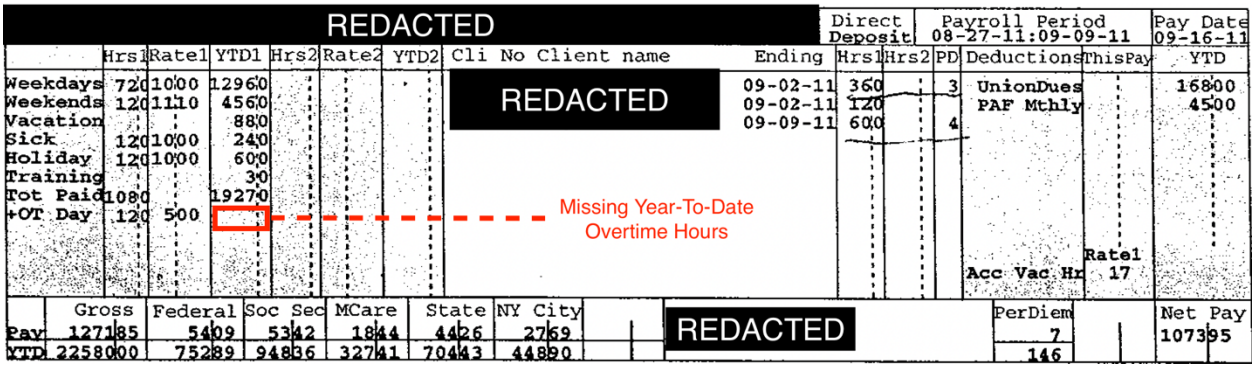
Exhibit 1: CPC Submission of Employee Paystub[20]



Earnings Summary

Earnings	Rate	Hours	Amount	YTD Hours	YTD Amount
Adjustmemt					11.28
Holiday					60.00
In Service					60.00
Overtime Week 1	2.8550		22.84		22.84
Overtime Week 2	2.8550		22.84		22.84
Regular MCO	10.0000	108.00	1,080.00	768.00	8,271.05
Regular MCO	11.1000	36.00	399.60		
Total Earnings		**144.00**	**1,525.28**	**768.00**	**8,448.01**

Exhibit 2: Plaintiff Submission of Employee Paystub[21]



REDACTED

Direct Deposit | Payroll Period 08-27-11:09-09-11 | Pay Date 09-16-11

	Hrs1	Rate1	YTD1	Hrs2	Rate2	YTD2	Cli No Client name	Ending	Hrs1	Hrs2	PD	Deductions	ThisPay	YTD
Weekdays	72	10.00	1296.0				REDACTED	09-02-11	36.0		3	UnionDues		168.00
Weekends	12	11.10	456.0					09-02-11	12.0			PAF Mthly		45.00
Vacation			88.0					09-09-11	60.0		4			
Sick	12	10.00	24.0											
Holiday	12	10.00	60.0											
Training			3.0											
Tot Paid	108		1927.0											
+OT Day	12	5.00												

Missing Year-To-Date Overtime Hours

Acc Vac Hr 17 | Rate1

	Gross	Federal	Soc Sec	MCare	State	NY City	REDACTED	PerDiem	Net Pay
Pay	1271.85	54.09	53.42	18.44	44.26	27.69		7	1073.95
YTD	22580.00	752.89	948.36	327.41	704.43	448.90		146	

By the workers' court declarations and in their campaign for justice on their forced overtime and twenty-four hour working conditions, and in their employer's refusal to compensate them for complete hours worked, it is evident that central to this investigation must be extensive scrutiny over CPC's own reporting of working hours and corresponding rates of pay. Compliance with the Wage Theft Prevention Act is one such safeguard in state law; further redundancies in the law in mandating reporting requirements to both the state and the employee are articulated in other central authorities to this case.

[20] *Chan* et al., NYSC 2015. June 5, 2015. NYSCEF Doc. No. 14. Annotations by author.

[21] *Chan* et al., NYSC 2015. July 7, 2015. NYSCEF Doc. No. 21. Redactions and annotations by author.

Notably, § 198-A of this article promulgates criminal penalties for employers who fail to pay its employees under the provisions of that article, ranging from a misdemeanor conviction for the first offense to a felony conviction for subsequent offenses:

> *"1. Every employer[22] who does not pay the wages of all of his employees in accordance with the provisions of this chapter, and the* ***officers and agents of any corporation, partnership, or limited liability company who knowingly permit the corporation, partnership, or limited liability company to violate this chapter by failing to pay the wages*** *of any of its employees in accordance with the provisions thereof, shall be guilty of a* ***misdemeanor for the first offense*** *and upon conviction therefor shall be fined not less than five hundred nor more than twenty thousand dollars or imprisoned for not more than one year, and, in the event that any second or subsequent offense occurs within six years of the date of conviction for a prior offense, shall be guilty of* ***a felony for the second or subsequent offense****, and upon conviction therefor, shall be fined not less than five hundred nor more than twenty thousand dollars or imprisoned for not more than one year plus one day, or punished by both such fine and imprisonment, for each such offense."* [23] (emphasis added)

Additionally, the law renders officers and agents of an employer criminally liable if they *knowingly* enable the violation of a worker's legally due wage payments.

2. Minimum Wage Act (NYLL Article 19, §§ 650-665) and Department of Labor Minimum Wage Orders (NYCRR Subpart 142-3)

Charges under the Minimum Wage Act, and its corresponding NYSDOL orders in the New York Codes, Rules and Regulations, are brought in Counts I-V in both lawsuits, which cover "unpaid minimum wage," "unpaid overtime," "unpaid spread of hours pay," "failure to pay wages due," and "failure to comply with notification requirements," respectively.

An unfamiliar term to some may be "spread of hours pay." In short, if an employee works a shift, and then works a second shift that same day, there exists what is called a "spread of hours" between the shifts. Under New York State law, if this spread of hours exceeds 10 hours, then the employer must pay an additional hour's worth of pay at the regular rate.[24] This constitutes Count III in the *Chan* and *Chu* cases.

Nonprofit-making institutions are subject to the provisions of the Minimum Wage Act.[25] Stringent record-keeping requirements are also laid out in § 661, which include the same requirements of the Wage Theft Prevention Act, and empower the department commissioner to request employer records of pay and hours worked.[26] To boot, the commissioner may also appoint a department representative to speak with a worker privately to ascertain that their employer is indeed paying them.

Akin to the Wage Prevention Act, the Minimum Wage Act also promulgates criminal sanctions for employers who fail to pay minimum and overtime wages to employees. It additionally criminalizes the

[22] Here, "employer" and "corporation" are inclusive of "non-profit making institutions."

[23] *Consolidated Laws of New York*. Labor Law, § 198-A(1).

[24] *New York Codes, Rules and Regulations*. Title 12 – Department of Labor, § 142-3.4.

[25] *Consolidated Laws of New York*. Labor Law, § 652(3)(a).

[26] *Consolidated Laws of New York*. Labor Law, § 661.

failure by employers to maintain adequate record-keeping, and any actions taken by the employer to delay or obstruct the government in its obligation to enforce the provisions of the Minimum Wage Act:

> "*1. Failure to pay minimum wage or overtime compensation. Any employer or his or her agent, or the officer or agent of any corporation, partnership, or limited liability company,* ***who pays or agrees to pay to any employee less than the wage applicable under this article*** *shall be guilty of a* ***misdemeanor*** *and upon conviction therefor shall be fined not less than five hundred nor more than twenty thousand dollars or imprisoned for not more than one year, and, in the event that any second or subsequent offense occurs within six years of the date of conviction for a prior offense, shall be guilty of a* ***felony for the second or subsequent offense****, and upon conviction therefor, shall be fined not less than five hundred nor more than twenty thousand dollars or imprisoned for not more than one year plus one day, or punished by both such fine and imprisonment, for each such offense.* ***Each payment to any employee in any week of less than the wage applicable under this article shall constitute a separate offense****.*
>
> *2. Failure to keep records. Any employer or his or her agent, or the officer or agent of any corporation, partnership, or limited liability company,* ***who fails to keep the records required*** *under this article or to* ***furnish such records or any information*** *required to be furnished under this article to the commissioner or his or her authorized representative upon request, or who* ***hinders or delays*** *the commissioner or his or her authorized representative in the performance of his or her duties in the enforcement of this article, or* ***refuses to*** *admit the commissioner or his or her authorized representative to any place of employment, or* ***falsifies any such records*** *or* ***refuses to make such records accessible*** *to the commissioner or his or her authorized representative, or refuses to furnish a sworn statement of such records or any other information required for the proper enforcement of this article to the commissioner or his or her authorized representative, shall be guilty of a* ***misdemeanor*** *and upon conviction therefor shall be fined not less than five hundred nor more than five thousand dollars or imprisoned for not more than one year, and, in the event that any second or subsequent offense occurs within six years of the date of conviction for a prior offense, shall be guilty of a* ***felony*** *for the second or subsequent offense, and upon conviction therefor, shall be fined not less than five hundred nor more than twenty thousand dollars or imprisoned for not more than one year plus one day, or punished by both such fine and imprisonment, for each such offense.* ***Each day's failure to keep the records requested under this article or to furnish such records or information to the commissioner or his or her authorized representative shall constitute a separate offense***." [27] (emphasis added)

In both instances, violations of the law are additive, with failure to render mandated weekly wage payments to workers or daily failure to furnish employment records to the Commissioner of Labor constituting an individual offense.

3. Fair Labor Standards Act (29 U.S.C. §§ 201-219)

A centerpiece of the New Deal, President Franklin D. Roosevelt signed the Fair Labor Standards Act ("FLSA") into United States law in 1938. For decades, home care workers went unprotected under the provisions of the FLSA until January 1, 2015, when the United States Department of Labor ("USDOL") implemented the Home Care Final Rule, extending many protections of the federal Fair Labor Standards

[27] *Consolidated Laws of New York*. Labor Law, § 662.

Act to home care workers[28]. Plaintiffs in the *Chan* suit have brought two counts of violations of the FLSA against CPC: one count for unpaid minimum wage, and a second on unpaid overtime.

CPC has not failed to obfuscate the claims workers have made under the FLSA. Adopting a myopic interpretation of the FLSA, CPC in a policy brief published in April 2019 claimed that:

> "*Current Fair Labor Standards Act (FLSA) provides that an employee who resides on their employer's premises on a permanent basis or for extended periods of time is not considered as working all the time they are on the premises…Because 24-hour home care workers as designated as residing onsite for 'extended periods' they are also exempt from 'on call' hours…Home care workers are caught in a regulatory gap: they are exempted from pay because of the amount of time spent on employer premises, but they are not afforded the same scheduling security or stability as other occupations that require significant time on employer's premises. This should be remedied by including home care workers under Fair Labor Standards Act protections.*" [29]

The agency's assertions are erroneous and do not convey the terms of the FLSA with specificity. USDOL, as the chief enforcer of federal labor law including the FLSA, has put out distinct guidelines[30] on how employers remain in compliance with the statutes of the FLSA.

1. CPC's first argument, which suggests an assumption that home care workers are employees who "reside on their employer's premises on a permanent basis or for extended periods of time," and thus are "not considered working all the time they are on the premises" is deeply misleading. The FLSA as it applies to home care workers offers very few exemptions from its minimum wage and overtime protections. The exemption that CPC attempts to cast broad application towards its workers is the **live-in domestic service employee exemption**[31], in which payment of minimum wage for hours worked is mandatory, but not overtime pay[32]. Here, employees subject to the exemption are said to be **live-in home care workers**, which USDOL narrowly defines as:

   > "*To be a 'live-in' home care worker, the employee must either live at the consumer's home full-time (that is, have no other home of their own), or spend at least 120 hours or five consecutive days or nights in the consumer's home per week.*"

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[28] United States Department of Labor, Wage and Hour Division. *Minimum Wage and Overtime Pay for Direct Care Workers*. https://www.dol.gov/agencies/whd/direct-care/workers

[29] Chinese-American Planning Council. *Investing in New York's Home Care Workforce: Fair Labor, Health, and Dignity for Women, Immigrants, Communities of Color, Seniors, and New Yorkers Living with Disabilities*. April 2019. https://www.cpc-nyc.org/sites/default/files/Policy%20Brief-%20Investing%20in%20New%20York_s%20Home%20Care%20Workforce%20%281%29.pdf

[30] United States Department of Labor, Wage and Hour Division. *Paying Minimum Wage and Overtime to Home Care Workers: A Guide for Consumers and their Families to the Fair Labor Standards Act*. https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/Homecare_Guide.pdf

[31] *Ibid* at pg. 24.

[32] No such exemption exists under New York State labor law, and payment for full 24-hour shifts in instances where requisite sleeping and eating times have not been provided to workers (of which all putative class members in the lawsuits allege) – irrespective of the hours worked in a week – is **mandatory**. In any case, the statutory minima should be construed as precisely that: a ***floor*** that fulfills the basic legal wage rights of workers. True remuneration awarded should considerably exceed this to an amount the workers collectively see appropriate.

In other words, under federal law, if a home care worker still works twenty-four hour shifts but still fewer than 120 hours or five consecutive days and nights per week, they **cannot** be defined as a live-in home care worker. Ergo, the live-in domestic service employee exemption cannot apply to their condition, and these workers must be entitled to their statutory right to minimum wage and overtime pay. CPC's analysis of the FLSA is at best injudicious, and at worst intentionally obfuscating and deceiving so as not to implicate itself in its violations of the FLSA and evade liability for wages owed under its statutes, which should serve as the ***absolute bare minimum*** in full compensation awarded to the workers. As we will see below, in any event, if a worker is required to be "on call" or otherwise rendering or available to render services, **payment is mandated**.

2. The second claim, asserting that "because 24-hour home care workers as designated as residing onsite for 'extended periods' they are also exempt from 'on call' hours," is simply fallacious. The first clause we have refuted above in USDOL's narrow definition of exempted workers. For CPC to claim that such workers are exempt from "on call" hours run counter to the guidelines promulgated by USDOL, which state on this matter:

> "*The FLSA requires payment for all time when the worker is providing services or is* ***required to be available to provide services****.* (emphasis added) *For example, if your home care worker is cooking for you or helping you get dressed, that time must be paid for, and is considered 'hours worked.' Or if you are napping and the worker must be available whenever you wake up, the worker's time is hours worked, even if she spends time watching TV*." [33]

Furthermore, the USDOL guidelines also state that "if any part of the time that is supposed to be for sleeping, meal breaks, or other periods of free time is interrupted by work, the worker must be paid for the time spent working." [34] In fact, New York State imposes a stronger condition: if, for a worker on a twenty-four hour shift, the requisite five hours of uninterrupted sleeping time and three hours of uninterrupted meal and break time are infringed upon (during which the worker is, for all intents and purposes, "on call"), the employer (meaning CPC) must be held liable to compensate for the entirety of the twenty-four hours.

3. Finally, CPC's belief in the broad exemption application and in a "regulatory gap" that precludes scheduling flexibility or stability for workers is as incorrect as its other claims. For reasons aforementioned and others that will be expounded upon more in Part II of this report, this is yet another deflection from CPC that seeks to extricate itself from its own culpability and use the excuse of imperfect statutory law to conceal its own fiscal preference to underpay workers for twenty-four hour work.

In all of the aforementioned minimum wage and overtime pay claims, USDOL FLSA terms are also unambiguous in areas where federal and state laws also conflict on what the standard for minimum pay is. Namely, the standard is to "follow the law that provides the higher wage to the employee." [35]

As is a recurring theme in this section, the Fair Labor Standards Act is yet another section of the labor law that directs employers to keep on hand complete and detailed payroll records, which must include "hours

[33] *Ibid* at pg. 35.

[34] *Ibid* at pg. 25.

[35] *Ibid* at pg. 34.

worked each day and total hours worked each workweek; total cash wages paid each week to the employee by employer, including any overtime pay; and any weekly amounts claimed by the employer as part of wages for housing or food provided to the employee." [36] Most notably in these record-keeping requirements, however, is that USDOL decrees that for live-in home care workers:

> "*An employer must also keep accurate records of time actually worked by the live-in home care worker,* ***to confirm that it matches the agreement or show how it was different from the agreement***." [37] (emphasis added)

Civil penalties for employers in transgression of the FLSA are outlined in 29 U.S.C. § 216, which states that for violations of §§ 206 and 207 – the statutes under which the *Chan* plaintiffs have brought claims against CPC – employers must be held liable to remunerate not only for unpaid wages, but additionally "in an additional equal amount as liquidated damages."[38] Workers under the FLSA may also be reimbursed appropriately for any attorneys' fees they may have incurred. Later, we will also examine how despite 29 U.S.C. § 216(b) allows for FLSA claims to be brought in "any Federal or State court of competent jurisdiction," [39] CPC has attempted to deploy the doctrine of preemption on the FLSA claims – a powerful weapon of mass wage theft frequently used by exploitative employers – to deny workers their rights to vindicate their injustices in court and instead coerce them into an egregiously delayed arbitration process.

4. Home Care Worker Wage Parity Act (NYPHL § 3614-c)

The most interesting authority we discuss here is the New York State Home Care Worker Wage Parity Act, and it is interesting for repudiating, in one fell swoop, CPC's perfidy in shirking culpability to the state. Plaintiffs in the *Chan* and *Chu* suits assert breach of contract and unjust enrichment claims under this statute, but the implications of the state law on CPC's dealings thus far go considerably further than that.

An idiosyncrasy of the New York State Department of Health is its tendency to create an excess of subclassifications for entities of minute differences, and home care is no exception. To be specific, CPC is classified as a **licensed home care services agency**[40], or "**LHCSA**." The most relevant characteristic of LHCSAs for our purposes is its *fiscal* relationship with other actors in the home care provider and insurance industries – namely, in contract with either another home care agency in which the LHCSA acts as a subcontractee to receive Medicaid reimbursements, or with a **managed care organization** ("**MCO**") or **managed long-term care** ("**MLTC**") program[41], an entity in the private health insurance industry that effectively serves as a garnishing middleman between the New York State government, which disburses public Medicaid dollars, and the home care agencies, which establish contracts with the MLTC that must

[36] *Ibid* at pg. 36.

[37] *Ibid* at pg. 37.

[38] *United States Code*. Title 29 – Labor, § 216.

[39] *Ibid* at subpart (b).

[40] New York State Department of Health. NYS Health Profiles, Chinese-American Planning Council Home Attendant Program, Inc. https://profiles.health.ny.gov/home_care/view/13055

[41] For more information on MLTCs, please see: http://www.wnylc.com/health/entry/114/. We will reserve a rigorous analysis of the relationship between MLTCs and home care agencies like CPC for the second part of this report.

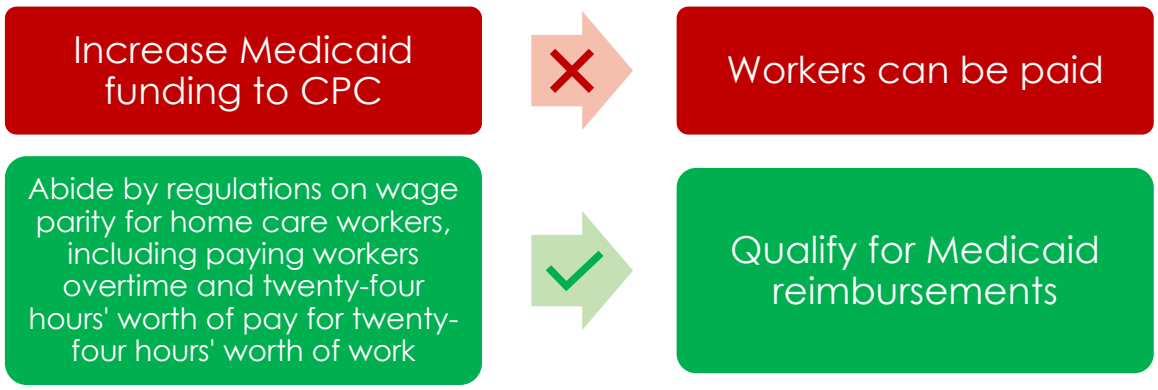
include terms on wage parity and other financial matters[42]. For the sake of brevity, we will stick to considering LHCSAs for now, and postpone more complex analysis to Part II.

Knowing the *legal* character of CPC allows us to target the statutory language that lays waste to the agency's fallacious reasoning that the state is responsible for compensating the workers:

> *"5.* ***No payments by government agencies shall be made*** *to certified home health agencies,* ***licensed home care services agencies****…for* ***any episode of care*** *without the certified home health agency,* ***licensed home care services agency****…having delivered prior written certification to the commissioner annually…on forms prepared by the department in consultation with the department of labor, that* ***all services provided under each episode of care during the period covered by the certification are in full compliance with the terms of this section and any regulations promulgated pursuant to this section*** *and that* ***no portion of the dollars spent or to be spent to satisfy the wage or benefit portion under this section shall be returned*** *to the certified home health agency,* ***licensed home care services agency****…****other than to a home care aide*** *as defined in this section to whom the wage or benefits are due, as a* ***refund, dividend, profit, or in any other manner****."* [43] (emphasis added)

Put simply: **receiving Medicaid reimbursements or any other form of public monies as subsidization for health services rendered is *conditioned on* compliance with the terms of the Home Care Worker Wage Parity Act.** It is in fact the ***converse*** to what CPC attests, which is that its compliance with the Act and complementary statutes must directly follow from more generous Medicaid reimbursements.

Figure 1: CPC's "Argument" on Medicaid Reimbursement



The subpart continues with:

> "*Such written certification shall also verify that the certified home health agency, long term home health care program, or managed care plan has received from the* ***licensed home care services agency****…an* ***annual statement of wage parity hours and expenses on a form provided by the department of labor accompanied by an independently-audited financial statement verifying such expenses****."* [44] (emphasis added)

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[42] See NYSDOH's documentation on MLTC contracting: https://www.health.ny.gov/health_care/medicaid/redesign/mrt90/hlth_plans_prov_prof.htm

[43] *Consolidated Laws of New York*. Public Health Law, § 3614-c(5).

[44] *Ibid*.

From this, it is clear that the state mandates not only the maintenance of legitimate record-keeping practices by the employer; it also requires that these hours and wage-related expenditures are reported to the Department of Health. **It is a crime** for a licensed home care services agency to knowingly submit false documents to the state government:

> "*Any licensed home care services agency…who shall upon oath verify any statement required to be transmitted under this section and any regulations promulgated pursuant to this section which is* ***known by such party to be false shall be guilty of perjury and punishable as provided by the penal law***." [45] (emphasis added)

Therefore, an indispensable piece of evidence that CPC must be forthright with producing is the annual records that they have submitted during the time period in which the workers' grievances occurred. As we will see in the following section, the workers have testified to the court – under penalty of perjury – that they have worked hours infringing on their obligatory sleeping and eating time and have not received wages due. As far as the court's records are concerned, CPC denies this. If documentation improprieties have taken place, these are damages that are no longer solely that of the workers, but additionally now damages incurred by the State of New York, and by extension, its millions of taxpayers who are responsible for bailing out noncompliant agencies such as CPC. Should the refusal to pay wages be willful in nature, this too is criminal under the Home Care Worker Wage Parity Act:

> "*7-a. Any certified home health agency,* ***licensed home care services agency****…that* ***willfully pays less than such stipulated minimums regarding wages and supplements****, as established in this section, shall be* ***guilty of a misdemeanor*** *and upon conviction shall be punished, for a first offense by a fine of five hundred dollars or by imprisonment for not more than thirty days, or by both fine and imprisonment; for a second offense by a fine of one thousand dollars, and in addition thereto the contract on which the violation has occurred shall be forfeited; and no such person or corporation shall be entitled to receive any sum nor shall any officer, agent or employee of the state pay the same or authorize its payment from the funds under his or her charge or control to any person or corporation for work done upon any contract, on which the certified home health agency, licensed home care services agency, long term home health care program, managed care plan, or fiscal intermediary, or other third party has been convicted of a second offense in violation of the provisions of this section.*" [46] (emphasis added)

We will refrain from haphazard speculation, and in the final verdict, these documents are imperative to scrutinize to ascertain whether reporting improprieties have transpired. But accession to the intent and plain language of the law is the least of our concerns. There is a more general point to be made here: if the state's response to CPC is to bail it out after a moral and legal failure of colossal proportions, then that can be construed as no different from the government rescue of the Wall Street banks in the aftermath of the Great Financial Crisis of 2008, all as homeowners were left to be crushed by fraudulently issued subprime mortgages and workers lost their livelihoods. In other words, **the state would valorize and even *reward* problematic agencies for their expropriation of workers' wealth**. New York would flagrantly deem its own legislative law as irrelevant and unenforceable, and worse yet, convey to its millions of workers that they have no faithful nor fierce advocate in their government.

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[45] *Consolidated Laws of New York*. Public Health Law, § 3614-c(6).

[46] *Consolidated Laws of New York*. Public Health Law, § 3614-c(7)(a).

5. The March 2019 Court of Appeals Decision

Pursuant to New York State Department of Labor regulations, home care workers assigned to twenty-four hour shifts at a patient's home ***must*** be guaranteed at least eight (five of which must be uninterrupted) hours of sleep and three hours of uninterrupted meal time. Additionally, should a home care worker be required to work at times intruding into the pre-requisite sleeping and eating times, the New York State Court of Appeals has ruled that the worker must be paid ***by their employer*** for the full twenty-four hours of their shift.

The twenty-four hour rule, as this policy is called, has been at the center of recent litigation in New York. Many home care workers across New York State have brought civil litigation against their employers with claims analogous to the ones above. Plaintiffs in two cases, *Andryeyeva et al. v. New York Health Care Inc, et al.* and *Moreno et al. v. Future Care Health Services Inc., et al.*, have suffered similar material injuries to the workers in the CPC lawsuits, and were suing New York Health Care and Future Care Health Services on unpaid minimum and overtime wage for working twenty-four hour shifts. In the facts of those cases, the workers:

> "*...allege they routinely did not receive five hours of uninterrupted sleep because their patients required assistance multiple times each night. Plaintiffs also allege that they were never allowed to take meal breaks; indeed,* [New York Health Care's] *orientation manual states expressly: 'Patients are never to be left alone!' According to Andryeyeva, the patient for whom she cared most frequently suffered from dementia, 'never' slept through the night, and 'usually got up two or three times each night to use the bathroom,' requiring assistance each time. Plaintiffs further allege they were never told that they should receive five hours of uninterrupted sleep during 24-hour shifts and that defendants failed to record when (or even whether) plaintiffs took sleep and meal breaks*."[47]

Initially, the *Andryeyeva* and *Moreno* plaintiffs won a stronger ruling from the Appellate Division of the Supreme Court, which rejected the Department of Labor's interpretation of its minimum wage order regulation that allowed for payment up to thirteen hours so long as the requisite eight hours of sleep time and three hours of meal time are met. In other words, the lower court affirmed that the home care workers were entitled to minimum wages for the entirety of the twenty-four hours.

Unfortunately, the Court of Appeals overturned the lower court's ruling and deferred to the Department of Labor's minimum wage order prescription. We must note that certain entities, such as the Home Care Association of New York State, Inc. and the Greater New York Hospital Association[48] each submitted amici curiae to the Court in support of the agencies. There is no doubt that these organizations, whose interests are exclusively in the name of the long-term health care providers they serve, have an agenda at odds with the material welfare and labor rights of home care workers.

We do not defend the Court of Appeals' March 2019 ruling, and in fact criticize it for deferring to the status quo of industrial stability above all else. However, *even* under the statutory, regulatory, and state common law as it stands today, and given that the CPC home care workers allege a profusion of routine abuse under the twenty-four rule and unpaid wages, **Chinese-American Planning Council is ultimately responsible**

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[47] *Andryeyeva et al.* and *Moreno et al.*, State of New York Court of Appeals 2019. March 26, 2019.

[48] Readers will recognize the Greater New York Hospital Association (GNYHA) as the organization behind the drafting of the corporate immunity clause – formerly known as Article 30-D of the Public Health Law – that former Governor Andrew M. Cuomo implemented to allow nursing homes to neglect care and be complicit in the mass death of thousands of nursing home residents with impunity.

for settling all unremunerated payment to its workers. For *even with* a decision in which provider interests consulted via amici curiae, the Court clarified:

> "*If, in fact, the aide does not receive the minimum break time because the patient needs assistance, the aide is paid for 24 hours of work time. As DOL confirms, failure to provide a home health care aide with the minimum sleep and meal times required under DOL's interpretation of the Wage Order is a 'hair trigger' that immediately makes the employer liable for paying every hour of the 24-hour shift, not just the actual hours worked.* ***Thus, even if a home health care aide sleeps without interruption for four hours and 59 minutes, but is not able to obtain five full hours of sleep, DOL mandates the employer pay for the entire eight hours allotted for sleep***." [49] (emphasis added)

Lastly, although the Court's ruling on the minimum wage order was unfavorable, it acknowledged the disturbing nature of the workers' claims and clarified that its decision on the minimum wage order was not a judgment on the merits of the allegations. The Court writes:

> "*While we ultimately conclude that the Appellate Division failed to afford adequate deference to DOL's interpretation of the Wage Order, we do not ignore plaintiffs' and amici's claims that a vulnerable population of workers is being mistreated.* ***Plaintiffs' allegations are disturbing and paint a picture of rampant and unchecked years-long exploitation****. Plaintiffs allege, among other things, that they* ***rarely received required sleep and meal time*** *during 24-hour shifts, were expected and required* ***to attend to patients numerous times each night****, and that* ***defendants failed to track actual hours worked or make a serious effort to ensure adequate sleep and meal times, as required by law***." [50] (emphasis added)

Consequently, it should be resolutely clear that CPC's attempted evasion of the Court of Appeals ruling and the culpability assigned to them cannot be tolerated.

C. Examination of Worker and CPC Claims

All six of the named plaintiffs in these two cases: Lai Chan, Hui Chen, Xue Xie, Mei Kum Chu, Sau King Chung, and Qun Xiang Lin, have submitted declarations to the courts as part of their individual testimony to their particular circumstances as CPC home care workers. Each have testified to the copious injuries they have sustained during the tenure of their employment, ranging from monetary damages to permanent disability of body.

In their own words, these are the workers' statements on CPC's malpractice:

> "*From as early as 2009 until approximately December 19, 2014, I was assigned to work between three and five, consecutive 24-hour shifts each week for a total of 72 to 120 hours of work per week. Even though I worked almost the entire 24-hours of my shift and got little to no sleep, I was only paid for the first twelve hours of my shift*."
>
> -Lai Chan[51]

[49] *Andryeyeva et al.* and *Moreno et al.*, State of New York Court of Appeals 2019. March 26, 2019, pg. 27.

[50] *Ibid*, pgs. 27-28.

[51] *Chan* et al., SDNY 2015. January 15, 2016. CM/ECF Doc. No. 15.

"*From even before 2009 to approximately December 21, 2014, I was generally assigned to work four, consecutive 24-hour shifts each week for a total of 96 hours of work per week. One year during that time period, I worked three, consecutive 24-hour shifts and an additional 7-hour shift for a total of 79 hours of work per week. From approximately December 21, 2014 to the present, I have been working three, consecutive 24-hour shifts for a total of 72 hours of work per week. Even though I work almost the entire 24-hours of my shift and get little to no sleep, I am only paid for the first twelve hours of my shift*."

-Hui Chen[52]

"*From the time I started working at CPC* [November 11, 2007] *until approximately 2012, I was assigned to work between four and five, consecutive 24-hour shifts each week for a total of 96 to 120 hours of work per week. Beginning in 2012, I was generally assigned to work three days per week. However, in October 2014 and October 2015, I was assigned to work four days per week for approximately 5 weeks each time. Even though I work almost the entire 24-hours of my shift and get little to no sleep, I am only paid for the first twelve hours of my shift.*"

-Xue Xie[53]

"*Since I stopped working for CPC, the injuries I developed while working for CPC have prevented me from taking another job*."

-Mei Kum Chu[54]

"*Since I stopped working for CPC, the injuries I developed while working for CPC have prevented me from taking another job*."

-Sau King Chung[55]

"*Sometime in January 2016, I learned that the Union was holding a meeting to talk about a new contract between the Union and CPC that might affect my former co-workers' rights to sue CPC. The meeting was being held at Union's headquarters. I tried to attend the meeting so I could learn more about the new contract, but the Union representatives would not let me enter the building. They told me that only current union members could attend and that I was not a current member because I hadn't received a notice about the meeting in the mail*."

-Qun Xiang Lin[56]

Correspondingly, the named *Chu* plaintiffs (the retired class) address their work hours in their complaint like their co-workers in the *Chan* suit – all three claim receiving less than the prescribed five hours of uninterrupted sleep per night, generally working two to four consecutive twenty-four hour shifts[57], thus ranging between 48 to 96 hours of work per week.[58] None received sufficient overtime or spread of hours pay.

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[52] *Chan* et al., SDNY 2015. January 13, 2016. CM/ECF Doc. No. 16.

[53] *Chan* et al., SDNY 2015. January 15, 2016. CM/ECF Doc. No. 19. Clarification in brackets added by author.

[54] *Chu* et al., SDNY 2016. June 15, 2016. CM/ECF Doc. No 20.

[55] *Chu* et al., SDNY 2016. June 15, 2016. CM/ECF Doc. No 21.

[56] *Chu* et al., SDNY 2016. June 15, 2016. CM/ECF Doc. No 22.

[57] Recall that exemption under the federal Fair Labor Standards Act only applies at five consecutive twenty-four hour shifts or 120 hours of work. Therefore, the plaintiffs are non-exempt workers and thus are entitled to FLSA protections.

[58] *Chu* et al., NYSC 2016. February 15, 2021. NYSCEF Doc. No 116, pgs. 11-14.

Table 4: Individual Claims by CPC Workers

Worker	Hours Worked per Week	Regular Rate of Pay	Wage Claims	Spread of Hours Pay
Lai Chan[59]	72-120 (across three to five consecutive twenty-four hour shifts)	• Weekday hourly rate: $10/hour • Weekend hourly rate: $11.10/hour • Per diem payment: $16.95 (twenty-four hour shift)	• No overtime pay until 2014 • Received overtime in 2014, but with no indication of overtime rate of pay on paystub • Beginning 2015, received overtime pay at $12.85/hour. Beginning November 2015, received overtime pay at $15/hour.	None
Hui Chen[60]	72-96 (across three to four consecutive twenty-four hour shifts)	• Weekday hourly rate: $10/hour • Weekend hourly rate: $11.10/hour • Per diem payment: $16.95 (twenty-four hour shift)	• No overtime pay until 2014 • Received overtime in 2014, but with no indication of overtime rate of pay on paystub • Cessation of overtime pay beginning December 21, 2014	None
Xue Xie[61]	96-120 (across four to five consecutive twenty-four hour shifts)	• Weekday hourly rate: $10/hour • Weekend hourly rate: $11.10/hour • Per diem payment: $16.95 (twenty-four hour shift)	• No overtime pay until October 2015 • Beginning October 2015, overtime pay received at $12.80/hour. Beginning November 2015, overtime pay received at $15/hour. In all instances, only 12 out of 24 hours of work per shift is counted towards the calculation of overtime pay.	None
Mei Kum Chu[62]	48-96 (across two to four consecutive twenty-four hour shifts)	• Weekday hourly rate: $10/hour • Weekend hourly rate: $11.10/hour • Per diem payment: $16.95 (twenty-four hour shift)	• No overtime pay ever	None

[59] See citation 51.

[60] See citation 52.

[61] See citation 53.

[62] See citations 54 and 58.

Sau King Chung[63]	48 (across two consecutive twenty-four hour shifts)	• Hourly rate: $10/hour • Per diem payment: $16.95 (twenty-four hour shift)	• No overtime pay ever	None
Qun Xiang Ling[64]	72-96 (across three to four consecutive twenty-four hour shifts)	• Weekday hourly rate: $10/hour • Weekend hourly rate: $11.10/hour • Per diem payment: $16.95 (twenty-four hour shift)	• No overtime pay ever	None

In only one instance in over six years of litigation – the early months of the *Chan* case in Fall 2015 – has a court ordered CPC to answer to the workers' initial complaint. And yet, CPC's answer to the complaint[65] is an extraordinarily revealing document, as its responses and the affirmative defenses it invokes lay the foundation for its maneuvers in court over the years that would follow: obfuscation, division, delay, evasion of discovery and fact, and categorical denial of its wrongdoing. Further exacerbating matters, CPC even goes as far as to deny rudimentary facts, **particularly those that can be easily verified with legitimate employer record-keeping**.

Below, we examine CPC's answers that offer precisely these insights into their courtroom tactics. All evidence cited below stems from NYSCEF Document Nos. 1 (initial complaint) and 41 (CPC's answer) of the *Chan* case, dated March 11, 2015 and October 26, 2015, respectively. CPC states that they fully deny in full the workers' allegations for each claim, unless otherwise noted.

1. Denial of Workers' Claims

Table 5: Claim Nos. 22, 23, and 25; Denial of Employment History and Duties[66]

Claim No.	Claim
22	"*Plaintiff Chan has been employed by Defendant as a home care aide from June 2000 to the present*."
23	"*Plaintiff Chen has been employed by Defendant as a home care aide from approximately November 1998 to the present*."
25	"*The job duties of Defendant's home care aides, including Plaintiffs, include, but are not limited to, the following: personal care services, such as assistance with walking, bathing, dressing, personal grooming, meal preparation, feeding and toileting; heavy and light cleaning, such as vacuuming, mopping, dusting, cleaning bathrooms, doing laundry, and taking out garbage; shopping; running errands; and escorting clients*."

[63] See citations 55 and 58.

[64] See citations 56 and 58.

[65] *Chan* et al., NYSC 2015. October 26, 2015. NYSCEF Doc. No. 41.

[66] *Chan* et al., NYSC 2015. March 11, 2015. NYSCEF Doc. No. 1, pgs. 8-9.

Disturbingly, CPC refutes even the most basic of claims by the workers: affirmations as simple as simply stating the duration of employment. Claims 22 and 23, for instance, only state the duration of employment for plaintiffs Lai Chan and Hui Chen. CPC bizarrely denies these statements, which ought to not ever rise as a debatable point of contention – it is an admission of fact ascertainable through employment records, and nothing more than that.

Perhaps even more peculiar is CPC's contesting of the plaintiffs' basic description of their job duties, in which CPC denies but "*admits that Defendant's home attendants perform some of the enumerated functions*." [67]

Claim Nos. 34, 35, 36, 37, 38, 39, 40, 41; Denial of Individual Worker Claims[68]

All claims listed here are exactly that of the individual workers' claims listed in Table 4. CPC denies all allegations, and adds a caveat for the statements of facts outlining the workers' regular rate of pay that it pays its workers "*in accordance with the collective bargaining agreement*."[69] We must reiterate once more that if CPC professes the workers' claims in their pay and overtime hours are erroneous, then establishing the veracity of such claims can be easily done with CPC producing its employment records. If deliberate illegitimacy has taken place with the intent to evade culpability for wage theft, then this too must be known for the sake of the workers and the general public.

Table 6: Claim Nos. 14, 16, 28, 29, 33;
Division of Workers and Denial of Class Application to Wage Claims[70]

Claim No.	Claim
14	"*The Class is so numerous that joinder of all members is impracticable. Although the precise number of such persons is unknown, and the facts are presently within the sole knowledge of Defendant, there are at least hundreds of home care aides employed by Defendant who would be members of the Class as of the date this Complaint was filed*."
16	"*Plaintiffs' claims are typical of the claims of the Class because they are all current, hourly-paid, non-exempt, and non-residential home care aides of Defendant who sustained damages, including underpayment of wage, as a result of Defendant's class-wide compensation policies and practices challenged herein. The defenses that are likely to be asserted by Defendant against Plaintiffs are typical of the defenses that Defendant will assert against the Class Members*."
28	"*Defendant regularly assigned Plaintiffs and other Class Members to work 24-hour shifts. Defendant required Plaintiffs and Class Members assigned to these shifts to remain in the client's home for the entire 24-hour period to provide services, to monitor the client's location, and to be 'on call' to immediately provide services to the client as needed*."
29	"*All 24 hours of Plaintiffs' and Class Members' 24-hour shift were compensable work hours*."
33	"*Throughout the relevant time period until approximately December 19, 2014, Defendant had a policy and practice of not paying spread of hours pay when Plaintiffs and other Class Members worked a spread of hours in excess of 10 hours in a day*."

[67] See citation 65 at pg. 3.

[68] *Chan* et al., NYSC 2015. March 11, 2015. NYSCEF Doc. No. 1, pgs. 10-12.

[69] See citation 65 at pg. 4.

[70] *Chan* et al., NYSC 2015. March 11, 2015. NYSCEF Doc. No. 1, pgs. 4, 7, 9-10.

These claims all invoke the class nature of the lawsuit. Put differently, these claims are characteristics that the workers assert in their condition – that they have all been injured in the form of wage theft and refusal of payment by CPC for overtime work, amongst other damages – and have chosen to litigate together as a class in court so as to avoid the costs and time of individually litigating their cases. Contemptibly, CPC's unequivocal denial of these class-based allegations is far from the only time in which the agency has attempted to treat the workers as a class *only when it can injure them as a class and evade individual worker's claims* ***en masse*** – one of the aforementioned weapons of labor violence – but aggressively work to divide and conquer the workers when they attempt to organize or litigate on a class-wide basis *on their own terms*.

2. Evasions of Definition – Statutory Liability Escape

Table 7: Claim Nos. 8, 12, 26, 44; Employee Definitions[71]

Claim No.	Claim
8	"*Plaintiffs are 'home care aides' within the meaning of the New York Home Care Worker Wage Parity Act*."
12	"*At all times relevant to this action, Plaintiffs and the Class Members were 'employees' covered by the NYLL and Defendant was an 'employer' of Plaintiffs and the Class of the home care aides they seek to represent, as those terms are defined by NYLL §§ 2(7), 190(3), 651(5) and 651(6) and applicable regulations, including 12 NYCRR § 142-3.12*."
26	"*Defendant's home care aides, including Plaintiffs, maintain homes where they and their families reside separate and apart from the homes of the clients where they work. Plaintiffs and the Class Members are not 'residential employees' as defined by 12 NYCRR §§ 142-3.1(b)*."
44	"*Plaintiffs and the Class are 'home care aides' within the meaning of N.Y. Public Health Law § 3614-c, also known as the 'NY Home Care Worker Wage Parity Act*.'"

The above are simple applications of the definitions of "employee" and "home care aide" to the plaintiffs to ensure that the protections afforded by the relevant statutes are extended to the workers. In Claim 26, the plaintiffs argue that they cannot be classified as "residential employees," which would otherwise preclude some of the wage claims by the workers. These definitions, while seemingly "common-sense" or elementary, are important to establish to delineate the class of workers to which these statutes apply. Fortunately for our purposes, however, we can definitively say through foolproof logic that the home care workers indeed fit these definitions:

"Employer" and "Employee," as defined by the Wage Theft Prevention Act:

> "*2. "Employee" means any person employed for hire by an employer in any employment.*
>
> *3. "Employer" includes any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service. The term "employer" shall not include a governmental agency*." [72]

[71] *Chan* et al., NYSC 2015. March 11, 2015. NYSCEF Doc. No. 1, pgs. 3, 9, 12.

[72] *Consolidated Laws of New York*. Labor Law, § 190(2) and §190(3).

"Home care aide," as defined by the Home Care Worker Wage Parity Act:

> *"(d) "Home care aide" means a home health aide, personal care aide, home attendant, personal assistant performing consumer directed personal assistance services pursuant to section three hundred sixty-five-f of the social services law, or other licensed or unlicensed person whose primary responsibility includes the provision of in-home assistance with activities of daily living, instrumental activities of daily living or health-related tasks; provided, however, that home care aide does not include any individual*
>
> > *(i) working on a casual basis, or*
> >
> > *(ii) (except for a person employed under the consumer directed personal assistance program under section three hundred sixty-five-f of the social services law) who is a relative through blood, marriage or adoption of:*
> >
> > > *(1) the employer; or*
> > >
> > > *(2) the person for whom the worker is delivering services, under a program funded or administered by federal, state or local government*." [73]

Clearly, the relationship between the workers and CPC is that of an employee-employer, as CPC – or its full name, CPCHAP, or "Chinese-American Planning Council Home Attendant Program, ***Inc***." (emphasis added) is a legal not-for-profit corporation that employs others to render home care services. The workers are also home care aides, as they provide "in-home assistance" as evidenced in their statements to the court, and do not count as one of the two exemptions in the definition (i.e. the employer is CPC and as such this exemption cannot apply; they are also not relatives of the client receiving services, which are assigned to them by CPC).

To each of the above claims, CPC responds that "*the Complaint asserts legal conclusions to which no answer is required*." [74] As simple as these conclusions are, CPC insists on offering no answer, as to do so would render them vulnerable to liability under the corresponding labor or public health statute.

Table 8: Claim No. 11; Employer Definition[75]

Claim No.	Claim
11	"*Defendant CPC Home Attendant Program is 'nonprofitmaking institution' within the meaning of 12 NYCRR § 142-3.13*."

CPC goes to the length of refusing to answer to its own legal status, responding in exactly the same manner as it did for the employee definition conclusions.[76] Not that this is any great mystery – acts of evasion sufficiently extensive to refuse to admit even the most straightforward of claims is part and parcel the CPC playbook to dodge, deceive, and delay in their vicious attempts to force the workers to concede through attrition.

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[73] *Consolidated Laws of New York*. Public Health Law, § 3614-c(1)(d).

[74] See citation 65 at pgs. 2-4.

[75] *Chan* et al., NYSC 2015. March 11, 2015. NYSCEF Doc. No. 1, pg. 3.

[76] See citation 65 at pg. 2.

3. CPC's Affirmative Defenses

Twenty-one affirmative defenses are provided by CPC; unusually but perhaps expectedly, it states that it **does not admit** "*that it bears the burden of persuasion or presentation of evidence on each or any of these matters*" [77] – a statement made all the more egregious when seen in concert with their hostility towards a transparent discovery process.

Several of these defenses chart the battle plan CPC would embark on to attack its workers in the courtroom, such as the doctrines of federal preemption and arbitration, the primary subjects of Chapters 2 and 3 in this first part. Some infringe on the workers' rights to litigate and represent one another as a class. Still others are outrageous in their insinuation that it is in fact the *workers*, not CPC, that have been the ones to stand to gain from their relationship with their employer.

Together, CPC's affirmative defenses paint a concise picture of the weapons of labor violence it intends to deploy: injury inflicted en masse in objecting to class certification, convolution and coercion through forced arbitration in private and inaccessible forums and federal preemption, and deception – none of this one could ever possibly gather from the public communications of neither CPC nor its surrogates.

Table 9: Sample of CPC's Affirmative Defenses[78]

Claim No.	Affirmative Defense
3	"*The Complaint is barred, in whole or in part, on the basis of an agreement to arbitrate claims*."
4	"*The Complaint is barred, in whole or in part, on the basis that Defendant made complete and timely payment of all wages due*."
7	"*Plaintiffs are seeking to recover more than entitled to recover and would be unjustly enriched if awarded judgment sought*."
8	"*The complaint is barred, in whole or in part, on the basis of federal preemption*."
12	"*Defendant asserts that Plaintiffs have not suffered any loss and Defendant has not been unjustly enriched. Plaintiffs are therefore not entitled to any disgorgement or restitution*."
15	"*Plaintiffs fail to allege sufficient grounds for a class action because the claims or defenses of the putative representatives are not typical of the claims or defenses of the class*."
16	"*Plaintiffs fail to allege sufficient grounds for a class action because Plaintiffs are not able to fairly and adequately protect the interests of all members of the putative class*."
19	"*Plaintiffs are seeking pay for work not performed*."

Claims 3 and 8 lay out the bases of arbitration and federal preemption, which warrant lengthy investigations in their own right. CPC in claims 15 and 16 target the class action status and even allege – as they themselves are the purveyors of wage expropriation – on behalf of the workers that they cannot be protected under this arrangement. For the remaining claims, we see a theme that rears its ugly head time and time again throughout the litigation: CPC reprehensibly maintaining that *it* is the injured party, that *it* has been maligned by workers opportunistically seeking undue enrichment, and not the converse.

[77] *Chan* et al., NYSC 2015. October 26, 2015. NYSCEF Doc. No. 41, pg. 7.

[78] *Chan* et al., NYSC 2015. October 26, 2015. NYSCEF Doc. No. 41, pgs. 7-10.

A final thought in this section is necessary: we look to CPC's memorandum of law ("MOL") to stay (pause) the proceedings as it appeals[79] the State Supreme Court's decision and order that mandated it to answer to the workers' claims, and (initially) rejected its arguments for arbitration or case dismissal. In this MOL, CPC decries:

> "*Given further that the parties may **proceed to arbitration of the matter**, a stay of the proceedings pending a determination of the appeal would avoid…**an unnecessary and burdensome expenditure of time and money by both parties**. Moreover, this case and the appeal…should be resolved by the Appellate Division before **Defendant is put to the expensive and time-consuming burden of providing discovery and fighting class certification**…the Court should stay the proceedings, since a ruling here has the potential to **disrupt the home care industry**, to more than double the cost of 24-hour home health care, and to reduce the ability of the elderly and disabled to obtain home care companion services…*
>
> *…a stay of proceedings would **promote judicial efficiency**, would **avoid potentially devastating consequences – to not only Defendant**, but to all other home care agencies in the State and to the elderly and disabled who rely on their affordable services…*" (emphasis added) [80]

Two threads emerge here: the first is in its feigned concern for its clients who are the recipients of home care. But as has already been made resolutely clear by the home care workers, the policies and practices promulgated by the home care agencies have been anything but compassionate to the patients.[81]

The second thread is the appeal to protecting the stability[82] of the home care industry above all, and especially, the financial strength of CPC even if it comes at the expense of the workers' rights to vindicate their claims in court. Even more condemnatory is CPC's concession that it will indeed expend considerable resources to challenge the workers' class certification – *an entirely conscientious decision CPC has chosen to make*. The defendant additionally avows that it would face the same burden in providing discovery, a claim inconsistent with, as we will see, the spending power it has at its disposal in its contracting with a white-shoe law firm and the tens of millions in cash and other easily liquidated or fungible assets to its name, and entirely in line with its refusal to accept the burdens of persuasion and proof for its defenses.

Admittedly, we can only speculate as to why CPC has been flagrantly evasive of discovery. But if we afford ourselves the indulgence to speculate: we can only assume that prohibition of cost is not the sole reason for CPC's resistance towards a fair and transparent discovery.

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[79] In December 2015 in the *Chan* case, CPC appealed to the First Department of the Appellate Division of the Supreme Court. The case eventually was preempted and ended up in the United States District Court for the Southern District of New York.

[80] *Chan* et al., NYSC 2015. October 13, 2015. NYSCEF Doc. No. 35, pg. 1.

[81] "Home Attendant Shao Huan Yu's story." *YouTube*, uploaded by AIW Campaign, 10 July 2018, https://www.youtube.com/watch?v=bVMwyilU4pU.

[82] As discussed, the notion of industrial stability is a prominent theme in the history of American labor relations.

D. The 2015 Memorandum of Agreement ("MOA"), Collective Bargaining Agreement ("CBA"), and A Primer on CPC's Arbitration Tactics

Collective bargaining need not inherently be construed as an anti-worker relation. However, in the case of the CPC and its workers, one of the most disempowering and paternalistic documents that attempts to govern legal relations between CPC, 1199SEIU, and the workers – in a manner asymmetrically biased towards the institutional power of CPC and 1199 – is the collective bargaining agreement ("CBA") and specifically, the 2015 memorandum of agreement ("MOA") amending it with an alternative dispute resolution ("ADR") clause mandating a mediation and arbitration process.

A comprehensive history of collective bargaining would be far too discursive and well beyond the intent and purpose of this report, as it is a subject that on its own merits could generate years' worth of scholarship and analysis.[83] We can simplify the dynamics of the distinct collective bargaining agreement into three prominent themes – indeed, weapons of labor violence – that emerge:

1. **Industry stability; power asymmetry.** The relation of the workers to the CBA are one in which the negotiating power, interests, and industrial stability of CPC and 1199, and more generally, the home care industry at-large, reign supreme.

2. **Coercion.** The CBA and its mandatory arbitration clause, along with courts' interpretations of CBAs generally vis-à-vis dispute resolution, strip workers of their rights to vindicate their claims in court. Worse yet, the CPC CBA is interpreted to apply to workers *who had absolutely no stake or representation in the codification of its terms*.

3. **Division, unless convenient for the employer.** A class of workers can come about in one of two ways: by the volition and will of the workers, or by class-wide treatment of the workers on the employer's terms. CPC's actions in the litigation have been to obstruct and prevent the first outcome at all costs. In the arena of arbitration, as we will soon see, it has been CPC's and 1199's *modus operandi* to demand not only class-wide arbitration of its own workers, but of tens of thousands of home care workers in the New York City area with the sole intent of preserving the stability of the industry.

1. Industry Stability; Power Asymmetry

All labor relations must be analyzed through power asymmetries between the employer, workers, and the union claiming to represent the workers. To examine this, we cannot ignore the facet of the legal contract, and the themes espoused in the CBA and 2015 MOA that stem from the disturbingly anti-worker practices that CPC has been more than enthusiastic to carry on.

One such practice is the acquiescence and total subservience to **industry stability** above all – meaning that the solvency, productive and profiteering capacity, and the ability of firms to engage in peaceful and uninterrupted commerce in an industry remain intact – even if the rights and material dignity of workers are secondary or categorically neglected. The legislative genealogy of industrial stability in the United

[83] Curious readers may refer to "*A Short History of the U.S. Working Class: From Colonial Times to the Twenty-First Century, Chapter 10: Hardship and Resurgence"* by Paul Le Blanc for an American history on collective bargaining, its context amidst the labor militancy and mass industrial disruption of the 19th and early 20th centuries, and the extraordinary implications the National Labor Relations Act had for institutional union power in the later 20th and 21st centuries.

States can be traced back to 1935, when Congress passed the Wagner Act, or more formally called the National Labor Relations Act ("NLRA") as, at the time, the most drastic intervention by the American state into labor relations. Congress wrote in its legislative findings:

> *"Section 1. The denial by employers of the right of the employees to organize and the refusal by employers to accept the procedure of collective bargaining* ***lead to strikes and other forms of industrial strife or unrest****…*
>
> *…The* ***inequality of bargaining power between employees*** *who do not possess full freedom of association or actual liberty of contract, and* ***employers*** *who are organized in the corporate or other forms of ownership association* ***substantially burdens and affects the flow of commerce****…*
>
> *…Experience has proved that protection by law of the right of employees to organize and bargain collectively* ***safeguards commerce from injury****, impairment, or interruption, and promotes the flow of commerce* ***by removing certain recognized sources of industrial strife and unrest, by…restoring equality of bargaining power between employers and employees****…"* [84] (emphasis added)

Implicit in the Congress's legislative intent are two claims: that "industrial strife or unrest" is untenable, but more relevantly, that the "[restoration of] equality of bargaining power between employers and employees" is a *means* of achieving the *end* of industrial stability.

While critique of the National Labor Relations Act is too expansive of a subject to engage with in this report, on a historical note, it is important to understand that there are those who criticize the policy it promulgates as deliberately defanging organized workers of many points of tactical leverage they have exerted throughout the labor movement. For instance, one argument is presented by Paul Le Blanc, author of "*A Short History of the U.S. Working Class*:"

> "*Some analysts have argued that unions' reliance on the government's labor-relations system played a major role in undermining labor's radicalism and independence. Union leadership were, more often than not, inclined to rely on the lengthy arbitration process rather than the often quicker and more decisive resort to local strike action…Once contracts were signed, union officials were generally expected to enforce the contract with their members – accepting the employer's authority at the workplace, preventing 'wildcat' and 'quickie' strikes, enforcing discipline*." [85]

Relevant to the CBA at hand, however, is one of a number of examples in which the power asymmetry and the deference to industry stability asserts itself: the waiver of the workers' right to strike. Specifically, "Article XXVII – No Strike and No Lockout" of the collective bargaining agreement, among other terms, orders:

> "*1. No Employee will engage in any strike, sit-down, sit-in, slow-down, cessation or stoppage or interruption of work, boycott, or other interference with the operations of the Employer.*
>
> *2. The Union, its officers, agents, representatives and members, shall not in any way, directly or indirectly, authorize, assist, encourage, participate in or sanction any strike, sit-down, sit-in, slow-*

[84] *United States Code*. Title 29 – Labor, § 151.

[85] Le Blanc, Paul. (1999). *A Short History of the U.S. Working Class: From Colonial Times to the Twenty-First Century.* Haymarket Books.

> *down, cessation or stoppage or interruption of work, boycott, or other interference with the operations of the Employer, or ratify, condone or lend support to any such conduct or action*." [86]

Unfortunately, the practical effect of the waiver to strike – irrespective of whether workers intend to strike or not – is the surrender of what historically has been an extraordinarily powerful leveraging tactic organized workers have been able to exert on their employer to force capitulation to worker demands.

Beyond the mandatory waiver of the right to strike, indeed, industrial stability and the preservation of the home care agencies, their market power, and good relations with the unions is the end game for CPC. Upon removing the *Chu* suit (for a second time!) in early 2021, CPC argued in the litigation:

> "*Plaintiffs' efforts to undermine the Arbitration also* ***threaten to disrupt the peace between the Union and industry employer*** *which the hard-bargained for dispute resolution process in the CBA is intended to preserve and protect*." [87] (emphasis added)

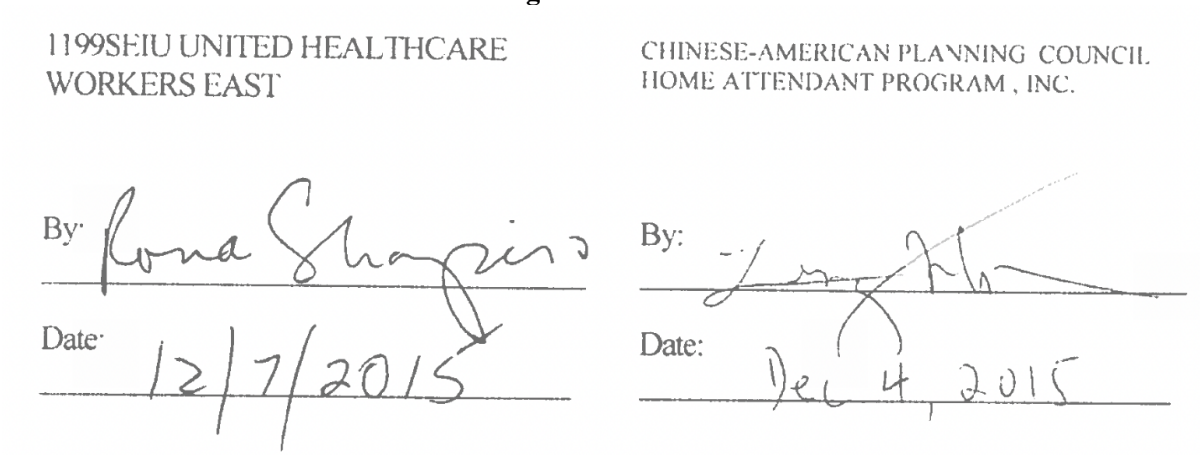
Remarkably and revealingly, CPC here insinuates that the interests of the plaintiffs – the workers – and the union (1199) are at diametric odds with one another. It is the "peace between the Union and industry employer" that is sacrosanct in these legal relations, a covenant that the workers dare to blaspheme by resisting the mandatory arbitration process.

This "peace" CPC speaks of, in which the union is *not* by virtue of being a bargaining representative for the workers an antagonist to CPC, but rather an amicable partner to CPC, is self-evident from the signatories to the 2015 MOA itself:

[86] *Chan* et al., NYSC 2015. Filed June 5, 2015. NYSCEF Doc. No. 7, pg. 27.

[87] *Chu* et al., SDNY 2021. April 15, 2021. CM/ECF Doc. No. 17.

Exhibit 3: Signatories to the 2015 MOA[88]



The only signatories to the MOA are Rona Shapiro, the Executive Vice President of 1199SEIU United Healthcare Workers East, and Ling Ma, the Director of Chinese-American Planning Council Home Attendant Program, Inc. – not a single worker or even a representative contingent of workers.[89] In effect, this is a contract governing workers' conditions and legal relations, but one **strictly between CPC and 1199, in which firstly, the interests of the union and the workers are not in harmony, and secondly, workers who dissent to its terms are nonetheless subject to the authority of their employer.**

On one hand, one could argue that 1199 claims *exclusive* rights as the bargaining representative for the class of home care workers they ostensibly represent, as the National Labor Relations Act promulgates.[90] But once again, we are behooved to question those who would defer to federal policy on labor relations to excuse the actions of CPC and 1199 in their defense of the power asymmetry. Ergo, our attention must be compelled to examine why 1199 would have agreed to the 2015 MOA – the contract which has, through arbitrator mandate, decreed that mandatory arbitration is now *retroactive* from its ratification and thus applies to home care workers' claims *from all time.*[91]

Unless they are publicly disclosed, we can only speculate as to the correspondences 1199 maintained with CPC and other agencies that employ the workers under 1199. But a letter dated January 9, 2020, from 1199 legal counsel Levy Ratner, P.C., addressed to Judge Kathryn E. Freed of the New York County Supreme Court, provides some insight into 1199's thinking.[92] In reference to a case quite similar to the two CPC suits, named *Ramirez Guzman et al. v. The First Chinese Presbyterian Community Affairs Home Attendant Corp.,*[93] 1199 defends its position on mandating workers to enter into industry-wide arbitration – a position that it came to in 2019, from originally accepting that workers may vindicate their claims in a court of law. Its reasons for amending its position are precisely the same motivation for CPC's defense of mandatory arbitration: industry stability once again.

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[88] *Chan* et al., SDNY 2015. Filed December 15, 2015. CM/ECF Doc. No. 7-4.

[89] 1199SEIU Funds, Home Care Industry Education. Board of Trustees. https://www.1199seiuhomecareed.org/board/.

[90] *United States Code*. Title 29 – Labor, § 159(a).

[91] More in Chapter 3.

[92] *Chu* et al., NYSC 2016. January 9, 2020. NYSCEF Doc. No. 78.

[93] NYSCEF Index No. 157401/2016.

> "*While, in 2016 when there was only a handful of wage and hour suits, the Union took the position that the Plaintiffs could pursue their claims in court…that position changed in 2019, when the proliferation of private suits* ***threatens the viability of this entire industry sector***." [94] (emphasis added)

To aggravate matters, 1199 even parrots CPC's talking point that the remuneration of unpaid wages and overtime is a state funding issue, in which a *de facto* bailout by the state despite catastrophic failures to fulfill fundamental workers' rights unquestionably amounts to a defense of the home care industry's stability on New York State's dime:

> "*Moreover, it became clear that without additional funding beyond the minimum wage funding* ***already provided by New York State****, employers would not be financially able to sustain many of these claims*." [95] (emphasis added)

Finally, 1199 attempts to tie the stability of the industry to the welfare of the workers and patients alike, despite that the system's standard practices that have been to deprive workers of their pay, and by extension, patients of the quality care they are entitled to:

> "*In this unique context, the Union…filed [an arbitration] grievance on an industry-wide basis: to protect its members' rights under applicable state and federal wage and hour law; to ensure the protection of its hard-fought for minimum wage and Wage Parity Law gains; and to ensure that the proliferation of wage and hour lawsuits involving 1199 bargaining unit members, most of which in any event had already been compelled to arbitration,* ***did not result in the fragmentation and destabilization of the unionized home care sector****. Such destabilization would not only impact the 75,000 current home care workers' jobs but would also seriously impact the ability of current and former employees to obtain any recovery at all on their wage and hour claims*." [96] (emphasis added)

It is disingenuous and utterly in bad faith for 1199 to attempt to preserve the stability of the agencies by asserting stability as a pre-condition for all debts settled to the workers. If an industry's stability, by definition, is one in which **agencies can pilfer workers of their wages for years, only to be bailed out by the New York State government as exploitative and asymmetrical labor relations defended by anti-worker contracts continue to persist**, then this is a worldview that must be resolutely condemned and vociferously challenged.

Furthermore, 1199 has openly conceded that it was ready to acquiesce to agreeing to a mandatory arbitration provision to begin with, albeit under certain conditions. Daniel J. Ratner, legal counsel for CPC, writes:

> "*Beginning in 2014,* ***attorneys representing a number of home care agencies*** *(CPC's counsel was not one of them)* ***approached 1199*** *and, on behalf of the industry, requested that there be a mandatory arbitration provision in the contract for state and federal wage claims.* ***To agree to such a provision*** *1199 demanded that the provision mirror the rights workers would have in prosecuting such claims in federal court, including: (i) the same statute of limitations, (ii) the same federal court discovery, (iii) the right to pursue class grievance/arbitration, (iv) that the*

[94] *Chu* et al., NYSC 2016. January 9, 2020. NYSCEF Doc. No. 78, pg. 3.

[95] *Ibid* at pg. 2.

[96] *Ibid* at pg. 2.

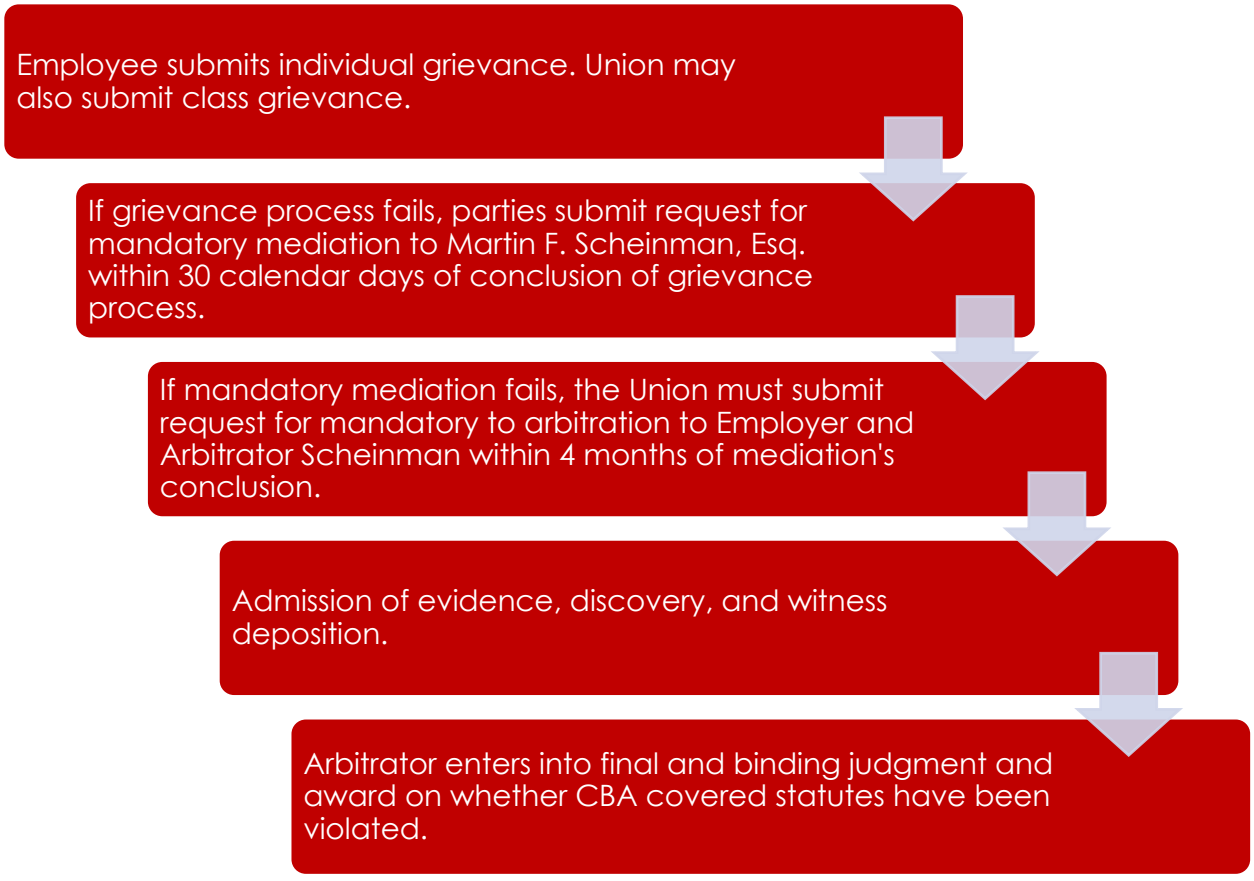
membership would be entitled to full federal statutory damages, and finally (v) that the arbitrator be required to apply federal statutory law." [97] (emphasis added)

Logically, the only manner in which to interpret 1199's statement is wholly as a concession to home care agencies attempting to establish an industry standard of mandatory arbitration to prolong its stability. If points (i)-(v) were all indeed rights that workers could realize and vindicate in state or federal court – all that has changed is that the workers can no longer do that, and additionally, are now required on terms they have had absolutely no stake in to pursue their claims in a forum that statistically and historically have asymmetrically favored employers. To add insult to injury, 1199 has the audacity to assert that the ADR is a "very good arbitration clause." [98]

If the NLRA at bare minimum put forth the right to *employee* collective bargaining as the means to industrial stability, then CPC and 1199 have failed to meet even this threshold – for, as we will see, a number of CPC *employees* have been deliberately shut out from the collective bargaining process, are entirely at the mercy of the agenda CPC and 1199 embarks to pursue, and effectively coerced into dispute resolution processes that they have not consented to or were never even made aware of to begin with.

2. Coercion

Figure 2: CPC-1199SEIU Mandatory Grievance, Mediation, and Arbitration Process



[97] *Chan* et al., SDNY 2015. January 20, 2016. CM/ECF Doc. No. 30, pg. 4.

[98] *Chan* et al., SDNY 2015. January 20, 2016. CM/ECF Doc. No. 30, pg. 6.

Excerpted verbatim terms of the alternative dispute resolution, or mandatory arbitration process, outlined in the 2015 memorandum of agreement, are as follows:

> "*1. …asserting violations of or arising under the Fair Labor Standards Act ('FLSA'), New York Home Care Worker Wage Parity Law, or New York Labor Law (collectively, the 'Covered Statutes'), in any manner**, shall be subject exclusively, to the grievance and arbitration procedures described in this article**…All such claims if not resolved in the grievance procedure**, including class grievances filed by the Union**, or mediation as described below shall **be submitted to final and binding arbitration before Martin F. Scheinman, Esq**."*
>
> *2. Whenever the parties are unable to resolve a grievance alleging a violation of any of the Covered Statutes, before the matter is submitted to arbitration, the dispute shall be submitted to **mandatory mediation**. The parties hereby designate **Martin F. Scheinman, Esq. as Mediator for such disputes**. Such mediation shall be requested no more than thirty (30) calendar days following exhaustion of the grievance procedure...Once the matter has been submitted to mediation, the Employer shall be obligated to produce relevant documents as requested by the Union and any objections to production shall be ruled on by the Mediator. The fees of the Mediator shall be shared equally by the Union and the Employer.*
>
> *3. No party may proceed to arbitration prior to completion of the mediation process as determined by the Mediator…**The Employer shall be obligated to produce relevant documents as requested by the Union** and any objections to production shall be ruled on by the Arbitrator…*
>
> *4. In the event an Employee has requested, in writing, that the Union process a grievance alleging a violation of the Covered Statutes and the **Union declines to process a grievance regarding alleged violations of the Covered Statutes**…an Employee **solely on behalf of herself**, may submit **her individual claim to mediation**, or following the conclusion of mediation, to arbitration…Such claims may be presented **by and on behalf of the individual Employee only, with or without counsel**. **The Mediator/Arbitrator shall have no authority to consider class or collective claims or issue any remedy on a class basis**. The fees and expenses of the Mediator/Arbitrator shall be **shared equally by the employee and the Employer**, unless the arbitrator finds a violation of any of the Covered Statutes, in which case the Employer shall pay the fees and expenses of the Arbitrator.*
>
> *5. The parties agree **not to contest court confirmation of an arbitration award** rendered under this Article…*
>
> *6. **All payroll and time records exchanged by the parties**…in mediation shall be deemed **admissible in arbitration**…*" [99] (emphasis added)

Figure 2 outlines the steps of the mandatory mediation and arbitration process. From the plain language alone, it is clear that several of the conditions of arbitration involve severe restrictions than in a court of law. For instance, item 1 prescribes that arbitration is "final and binding," meaning that **there is no appeals process for unfavorable arbitration awards**.

Although in theory, the comparative advantage of arbitration rests in its expediency when compared to court litigation, in practice, the mediation and arbitration process has taken **upwards of five years with no**

[99] Chan et al., SDNY 2015. Filed December 15, 2015. CM/ECF Doc. No. 7-4, pgs. 9-10.

end in sight. Nevertheless, years of delay are merely a fraction of the injustice. CPC and 1199 have additionally engaged in coercive and deceptive methods to force ratification of the 2015 MOA, invoking among the most outrageous arguments in the entire six years' worth of litigation to do so.

The ratification meeting of the 2015 MOA took place in late January 2016. In the time leading up to the ratification date, 1199 sent out postcards to its bargaining unit members informing them of a meeting, vaguely alluding to a "new contract ratification," but **no** mention that this new contract would contain a mandatory arbitration clause.

Exhibit 4: 1199 Postcard Number 1 [100]

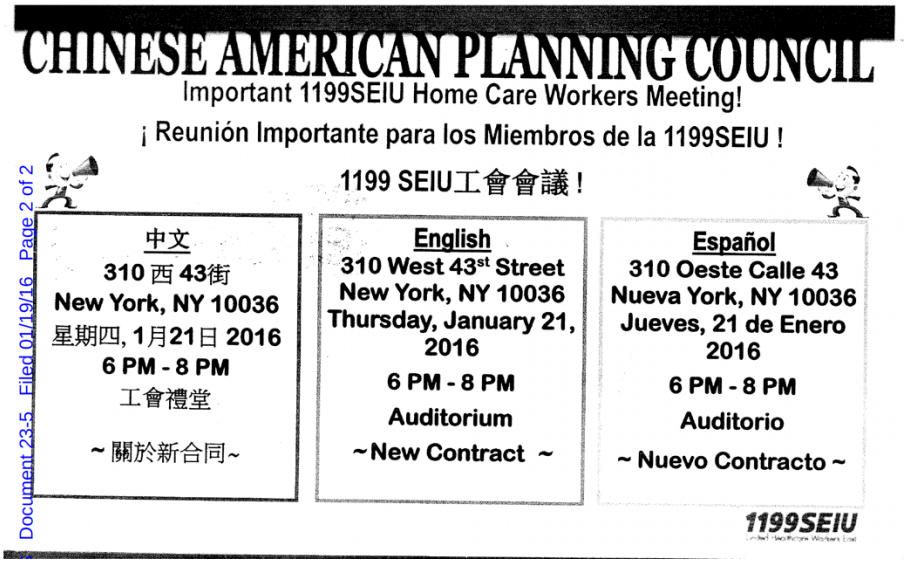


Exhibit 5: 1199 Postcard Number 2 [101]

[100] Chan et al., SDNY 2015. Filed January 19, 2016. CM/ECF Doc. No. 23-5.

[101] Chan et al., SDNY 2015. Filed January 19, 2016. CM/ECF Doc. No. 23-6.

Individual employee testimony also tells us that the workers were never consulted or even informed about the inclusion of the alternative dispute resolution process, further underscoring the fact that the collective bargaining process has not been faithful to the notion of *employee* collective bargaining, but rather, orchestrated without the knowledge and consent of the workers by the leadership of CPC and 1199SEIU. For instance, in the *Chan* case, all three of the named plaintiffs – Lai Chan, Hui Chen, and Xue Xie – testify to the fact that none of the three were aware about the mandatory arbitration clause ratification in the January 2016 meeting. Lai Chan testifies:

> "*15. I have been told by my lawyers that CPC wants* ***to force me into a mandatory arbitration process****…*
>
> *18. On or around January 8, 2016, I received a postcard from 1199SEIU, my union, telling me that there will be a very important meeting on January 21, 2016 about a '****new contract****.'*
>
> *19. I became a member of 1199SEIU (the 'Union') three months after I started working for CPC. In the entire time that I have been working for CPC****, this is the first time that I have been told about a new contract****.*
> *…*
> *21. The latest mandatory training that I attended was on December 4, 2015. At that training, a Union representative told me and the rest of the people in attendance that, in the near future, 24-hour workers would begin to receive extra pay for 3 hours of meals in the daytime and 5 hours for overnight work if we are required to take care of the patient (by helping the patient go to the bathroom and things like that) during the night.* ***However, the extra nighttime pay would not be automatic****. We would need to fill out a form and write down what we did during the night and have the patient sign in order to get that money.* ***When I asked the Union representative when this new policy will be enforced, he told me that he didn't know****.*
>
> *22.* ***The Union representative did not say anything about a mandatory arbitration process****.*" [102] (emphasis added)

The two other named plaintiffs testify to the same account. In the *Chu* case (retired workers), we see an even worse story, in which not only were the workers not informed of the amendments to the collective bargaining agreement with the mandatory arbitration clause; they were prohibited from attending the ratification meeting by virtue of being retired CPC employees – despite the concerns the plaintiffs have risen in court that retroactive application of the CBA would absolutely apply to *all* workers, past and present. Mei Kum Chu testifies:

> "*8. Sometime in January 2016, I learned that the Union was holding a meeting to talk about a* ***new contract between the Union and CPC that might affect my former co-workers' rights to sue CPC****. The meeting was being held at the Union's headquarters.*
>
> *9. I went to attend the meeting so I could learn more about the new contract. At the entrance to the building were several Union representatives were checking names off a list. A woman asked me for my name. I gave her my old CPC identification card. She told me that she could not find my name on the list. She said that it must be because I was no longer working for CPC and not a member of the Union anymore.* ***She told me that I could not enter the building and attend the meeting***." [103]

[102] *Chan* et al., SDNY 2015. January 15, 2016. CM/ECF Doc. No. 15.

[103] *Chu* et al., SDNY 2016. June 15, 2016. CM/ECF Doc. No 20.

The other two named plaintiffs of the *Chu* suit, Sau King Chung and Qun Xiang Lin, testify to the same. In fact, as far as the named plaintiffs claim, no one was aware of the inclusion of the mandatory arbitration clause and a considerable group of workers who are today bound by its terms were not even privy to the ratification vote. We can only presume this is also true for the other workers too.

In response to the rapid moves by CPC and 1199 to ratify the MOA, the workers moved to request from the court emergency relief in the form of a **temporary restraining order**, or "**TRO**" on CPC and 1199 to enjoin communications to the workers on the ratification meeting. The plaintiffs make compelling arguments for the need for a TRO:

> "*By negotiating an arbitration agreement during the **pendency of litigation** and deliberately attempting to insulate the agreement from judicial scrutiny by exploiting the collective bargaining process and the Union's power over the Plaintiffs' and other class members, Defendant has created a clear and obvious need for strong and swift judicial intervention*." [104]
>
> "*First, Plaintiffs and the putative class members might be **irreparably injured** by voting to ratify a contract without full understanding of the ADR clause or its effect on their right to participate in this lawsuit*." [105]
>
> "*...It may be impossible for this Court to obtain **a full record of all the communications that led up to a ratification vote to determine whether the class members were properly informed of the meaning of the ADR provision***." [106]
>
> "*Second, even if this Court subsequently rules that the ADR provision is unenforceable, putative class members may suffer irreparable injury because they may be told that the **ratification of the 2015 MOA prohibits them from participating in this action***." [107]

Several egregious issues arise here: that the mandatory arbitration clause was ratified during the litigation itself, that irreparable injury[108] may be suffered by the workers, as they would not be able to vindicate their claims in court, and potentially lose out on the full awards they must be statutorily given as final arbitration awards are peremptory, and that discovery entailing the procurement of correspondences by the union and CPC on the ratification of the ADR – namely, if deliberate attempts were made by either to obfuscate the contents of the amended CBA contract from their workers – would be cost- and time-prohibitive.

The first point is critical, and in Chapter 3 we will examine case law that CPC heavily cites to justify the retroactivity of a mandatory arbitration clause ratified *during* litigation, which is unusual. In reply to the others, CPC and 1199 submitted memoranda of law attempting to deny that the workers would be

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[104] *Chan* et al., SDNY 2015. January 19, 2016. CM/ECF Doc. No. 22, pg. 12.

[105] *Ibid* at pg. 13.

[106] *Ibid* at pg. 14.

[107] *Ibid* at pg. 14.

[108] "Irreparable injury" or "irreparable harm" is used here as a legal term that means the threshold for succeeding on a motion to procure a temporary restraining order, and in short, describes an injury to a party such that monetary compensation would be insufficient to fully redress the damages incurred. See: https://www.law.cornell.edu/wex/irreparable_harm

irreparably injured, and brazenly, argue that it is *their* rights who will be violated should the workers succeed in the TRO motion. To the argument on irreparable injury, 1199 responds:

> "*Here, Plaintiff cannot meet the high burden of showing immediate and irreparable harm. Plaintiffs identify three (3) 'harms' that they will suffer absent a TRO. These harms are: (1) the possibility that individuals will ratify the contract without understanding the potential impact on this lawsuit; (2) the possibility that individuals will be told that ratification of the contract will prohibit them from participating in this lawsuit; and (3) the possibility that the mandatory arbitration clause will be found enforceable retroactively and arbitration will be too costly for the individuals to pursue. All three of these 'harms' are speculative, remote, and either easily remediable or illusory*." [109]

The callousness in which 1199 dismisses the workers' concerns is deplorable in its own right. But if that were not enough, the prognostications of the workers came to fruition: both the *Chan* and *Chu*[110] cases either are or were stayed for years with the workers coerced into arbitration, and was declared by Arbitrator Scheinman to be retroactive – broadly applying to both currently-employed and retired CPC workers.

One could argue that 1199 exhibited extraordinarily poor legal foresight in this argument. Yet it would be a mistake to assume incompetence by 1199, as the correct analysis lies in the CPC's and 1199's jurisprudence and precedent-setting for the entirety of the court proceedings – and in particular, invoking federal labor jurisprudence that has been interpreted so expansively so as to almost deterministically state that the scope of a mandatory arbitration clause necessarily precludes and waives a worker's right to sue their employer in court for wage theft. To put it simply: barring absolute ignorance of the law, 1199 was indisputably conscientious of the contents and implications of their arguments, and their and the agency's strategy have writ large relied on employing the worst of federal labor jurisprudence.

If only this were all we had to say on coercive tactics! But if there is any common line of thought to extract, it is that CPC and 1199 spare nothing in aggressively mounting their legal attacks on their workers. And in point of fact, we present one final argument the two make on this matter, contending that not only must the workers go to arbitration – if they refuse to, and succeed in procuring the TRO on CPC and 1199 communications to the workers about the ratification meeting an enjoinment on the meeting itself, it will be ***CPC and 1199 unfairly injured in doing so***. The injury in question – **violation of free speech:**

1199's "free speech" argument:

> "*There is absolutely no basis for the Plaintiffs' suggestion that putative class members will be told by the Union that the CBA prohibits them from participating in this litigation.* ***Thus, there is no basis to stop the ratification or in any way restrict 1199's speech***." [111] (emphasis added)

CPC's "free speech" argument:

> "*Plaintiffs seek to enjoin 1199 from speaking to its members about a contract it negotiated. However, Plaintiffs did not cite a single case that prevents such communication or the holding of a ratification vote on matters that 1199 negotiated in good faith with all employers in the industry.* ***Allowing Plaintiffs to prevail would contravene federal labor policy and the First Amendment in***

[109] *Chan* et al., SDNY 2015. January 15, 2016. CM/ECF Doc. No. 31, pg. 9.

[110] Efforts to remand the *Chu* case back to state court and amend the class definition to enable retired workers to pursue their claims through litigation are underway.

[111] *Chan* et al., SDNY 2015. January 15, 2016. CM/ECF Doc. No. 31, pg. 8.

> ***a manner that would tip the balance of hardships decidedly against Plaintiffs' favor****. Indeed, such a restriction would not only weaken the strength of the Union's bargaining ability on behalf of Plaintiffs but the putative class in the future as well*." [112] [113] (emphasis added)
>
> "*The proposed order Plaintiffs are seeking is in essence a* ***gag order*** *and prior restraint* ***contrary to the First Amendment and fundamental principles of federal labor policy****. The ratification vote has been set and should proceed or it will be viewed by employees as the Court believes there is something unlawful with the 2015 MOA which was negotiated at arm's length with essentially all the home care agencies represented by 1199 in New York City*." [114] (emphasis added)

It's cruelly ironic that CPC and 1199 accuse the *workers* of infringing on First Amendment free speech rights, for not only is this a nonsensical claim on its own merits and in taking power asymmetry into consideration, but the First Amendment is not exclusive to the protection of freedom of speech alone. A lesser known but equally significant protection the First Amendment affords the people is the *right to petition* – in this case, to petition a court – to vindicate claims, and a fundamental right that CPC and 1199 have eviscerated in their ploys to force mandatory arbitration on the workers. Labor lawyers have argued that compulsory arbitration constitutes a flagrant violation of an individual's First Amendment Petition Clause rights;[115] that CPC and 1199 have even broached an argument of this sort should alarm all who view them as nominally progressive actors.

In spite of all this, the mandatory arbitration clause was ratified in January 2016. Shortly thereafter, in line with vehemently anti-worker federal jurisprudence that CPC and 1199 have insidiously taken advantage of to win success against their workers, Judge Katherine B. Forrest of the United States District Court of the Southern District of New York ruled to compel arbitration for the *Chan* plaintiffs.[116] Arbitration persists to the present day with nary a concluding stretch in sight.

3. Division

In the aforementioned *Guzman et al. v. The First Chinese Presbyterian* case, the workers at First Chinese Presbyterian, rather like the CPC workers, made a motion to obtain a TRO and preliminary and permanent injunction on arbitration. The union and the agency similarly argued vigorously against the motion. But this time, the outcome was not arbitration confined to the workers and their agency – the purview of arbitration now grew to encompass the entire New York City home care industry.

The most abominable elements of the collective bargaining agreement and its mandatory arbitration clause culminated in a settlement to merge the wage claims of all 1199 bargaining unit members and forty-two home care agencies into a global, industry-wide arbitration process, filed by 1199 in January 2019 on behalf

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[112] *Chan* et al., SDNY 2015. January 15, 2016. CM/ECF Doc. No. 32, pg. 17.

[113] "Balance of hardships" is a legal threshold used to determine, in the case of issuing a TRO or injunction, if failing to do so would result in irreparable harm to one of the parties. Here, CPC argues the balance of hardships would tip "decidedly against Plaintiffs' favor;" in other words, per CPC's assertion, it would be CPC and 1199 disproportionately burdened with hardship! See: https://www.law.cornell.edu/wex/injunction

[114] *Chan* et al., SDNY 2015. January 21, 2016. CM/ECF Doc. No. 33, pg. 13.

[115] Schmidt, A. (2017, November 16). Spirit of the Law: Can The Constitution Save Workers From Forced Arbitration?. *LaborPress.org*. https://www.laborpress.org/spirit-of-the-law-can-the-constitution-save-workers-from-forced-arbitration/

[116] *Chan* et al., SDNY 2015. February 3, 2016. CM/ECF Doc. No. 42.

of nearly 100,000 home care workers in New York City.[117] For this reason, and on the whole, the union's dereliction of its duty to advocate for and protect its workers, CPC home care attendants have taken action against their union in the form of protest[118] and in currently pending charges levied against 1199 through the National Labor Relations Board.[119]

Exhibit 6 is a list of all home care agencies covered by the global arbitration agreement.

Exhibit 6: 1199SEIU Agencies Subject to Industry-Wide Arbitration[120]

Exhibit A
List of 1199 Home Care Agencies

Alliance Home Services
All Season Home Attendant
Bronx Jewish Community Council Home Attendant Services
Bushwick Stuyvesant Heights Home Attendants
C.I.D.N.Y. Independent Living Services
Chinese-American Planning Council
Family Home Care Services of Brooklyn and Queens
FEGS Home Care
First Chinese Presbyterian CAHA
Home Care Services for Independent Living
Home Health Management
Home Attendant Services of Hyde Park
New York Foundation
P.S.C. Community Services, Inc.
RAIN Home Attendant Services, Inc.
Richmond Home Needs
Ridgewood Bushwick – RiseBoro Homecare, Inc.
Rockaway Home Attendant
School Settlement Home Attendant Corp.
Social Concern Community Development Corp.
Saint Nicholas Human Support Corp.
Stella Orton Home Care
United Jewish Council of the East Side Home Attendant Services
ABC Health Services Registry
AccentCare
All Metro Aids, Inc d/b/a All Metro Health Care
Alliance for Health
Azor Home Care
BestCare
Best Choice
Care at Home
Cooperative Home Care Associates
Fed Cap Home Care
Isabella Visiting Care
Neighbors Home Care
Partners in Care
People Care
Personal Touch
Premier Home Health Care
Prestige Care
Priority Home Care
Region Care
Special Touch
Sunnyside Home Care Project and Sunnyside Citywide Home Care
Wartburg – No Place Like Home Care
Riverspring LHCSA
Unlimited Care, Inc.
Bronxwood Home for the Aged, Inc.
MJHS Homecare Solutions d/b/a HomeFirst LHCSA, Inc.

[117] *Chu* et al., NYSC 2016. January 9, 2020. NYSCEF Doc. No. 78.

[118] Maisel, T. (2020, November 30). Home care attendants in Manhattan blast their union for supporting 24-hour work schedule. *AM New York Metro*. https://www.amny.com/news/home-care-attendants-blast-their-1199seiu-for-supporting-management-24-hour-work/

[119] See National Labor Relations Board case 29-CB-268494: https://www.nlrb.gov/case/29-CB-268494

[120] *Chu* et al., NYSC 2016. January 9, 2020. NYSCEF Doc. No. 87.

Disturbingly, the machinations of the agencies have been to **consolidate themselves** while **excluding the workers or their counsel from any form of representation in the arbitration – in other words, attempting to divide and deny the combined power of the workers.** In concert with the arbitrator's broad assertion of jurisdiction over current and retired employees, the peremptory nature of the arbitrator's final opinion and award, and the unequivocal assent by the union and the agencies, the rules of dispute resolution within the system have been established to expel all but a few of plaintiffs' respective counsels and far more damagingly, the workers themselves.

In a January 2020 letter from Arbitrator Scheinman to the legal counsels of the agencies, workers, and union alike, the Arbitrator writes:

> "*Virtually **all the Agencies**, through their attorneys and by virtue of making the required financial deposit to cover the fees involved in mediation to Scheinman Arbitration and Mediation Services for participation, expressed willingness to follow the* [dispute resolution] *template which evolved during the mediation process. This would cover approximately 135,000 employees. **1199 was also interested in the format**. However, **I was unable to obtain the buy-in of all the Plaintiff Counsel**. Those not willing to sign-on generally expressed the view – and cited certain court rulings – they **represented former employees that had left employment prior to the signing of the ADR protocol and were not bound to follow the ADR protocol**.*" [121] (emphasis added)

This is a maneuver that can only be seen in all-out bad faith, when CPC had previously pledged to challenge class certification of the workers in *their* suit against CPC individually. In a prior instance where the workers desired class certification on their own terms, CPC resolved to proscribe it. Notwithstanding that, when it is desirous for CPC and their unethical, wage-stealing kin in the home care industry to join as a class in arbitration, that same privilege is denied for the workers on the basis of the union – one that was perfectly willing to acquiesce to the agencies' requests for compulsory arbitration – maintaining exclusive representative rights for collective bargaining on behalf of the workers. To get down to brass tacks: the defense of federal labor policy and arbitration, from the 2015 MOA to resolve intra-CPC disputes up to its all-encompassing and profoundly corrupted industry-wide application, **was intentional without exception, for it is inherently a legal regime that aims to fetter the power of organized workers through the state-sanctioned system of dispute resolution while emboldening the combined strength of bosses and union leadership to dictate the binding fate of the workers**.

***

We present this section as a primer to the authorities governing the terms of arbitration in the CPC cases, and to introduce major themes – the weapons of labor violence – emerging from CPC's and 1199's blueprint to repudiate any act towards the realization of justice that the workers, of their own autonomy, engage in. In the third chapter, we will examine in comprehensive terms the arbitration proceedings that have been publicly disclosed as documentary evidence to the courts, and interrogate the federal labor policy CPC and 1199 frequently allude to in their argumentation; particularly, the federal labor policy put forth by the Supreme Court of the United States in some of its most anti-worker opinion-making in modern American history.

[121] *Chu* et al., NYSC 2016. December 24, 2019. NYSCEF Doc. No 77.

E. Hogan Lovells: CPC's Lieutenants in Court

Critical to the analysis we are attempting to establish here – **that individual firms along with their legal representatives are imperative actors in establishing the law of the judiciary** – is an analysis of the firm CPC has contracted for its defense in the litigation. CPC has been represented by **Hogan Lovells** for the entirety of the court proceedings and in arbitration. A newer creation, Hogan Lovells was previously known as Hogan & Hartson and Lovells before the merger of the two in 2010.[122] According to *Forbes*, Hogan Lovells enlists nearly 2,500 lawyers and brings in revenue on the order of over $2 billion per year.[123] Moreover, in 2019, *Forbes* ranked Hogan Lovells as one of "America's Top Trusted Corporate Law Firms."

Among its alumni and decorated ranks are the most powerful officials of the United States government, including the Chief Justice of the United States, John G. Roberts Jr., to a great many incumbent and former members of the federal bench, directors of executive branch agencies, cabinet secretaries, and members of the Congress.[124]

Beyond its contractual obligations to CPC, Hogan Lovells is also one of the most frequently sought out law firms in Washington, with over one hundred, largely corporate and profiteering clients retaining Hogan Lovells for lobbying purposes. Using 2013[125] data aggregated by OpenSecrets.org[126], we have conducted an analysis of the industries of clients who have contracted Hogan Lovells for lobbying services, and the corresponding revenues reported by Hogan Lovells for such services.

[122] As an aside, the former of the pair was known as what is dubbed in the legal, and more generally, corporate or professional services professions a "white-shoe firm," a phrase used to describe firms in the highest echelon of prestige and elitism in their respective industry. Typically, such firms would be dominated with White Anglo-Saxon Protestant (WASP) graduates of the Ivy League colleges. See: http://virtualcxo.net/bizforwardarticle.html

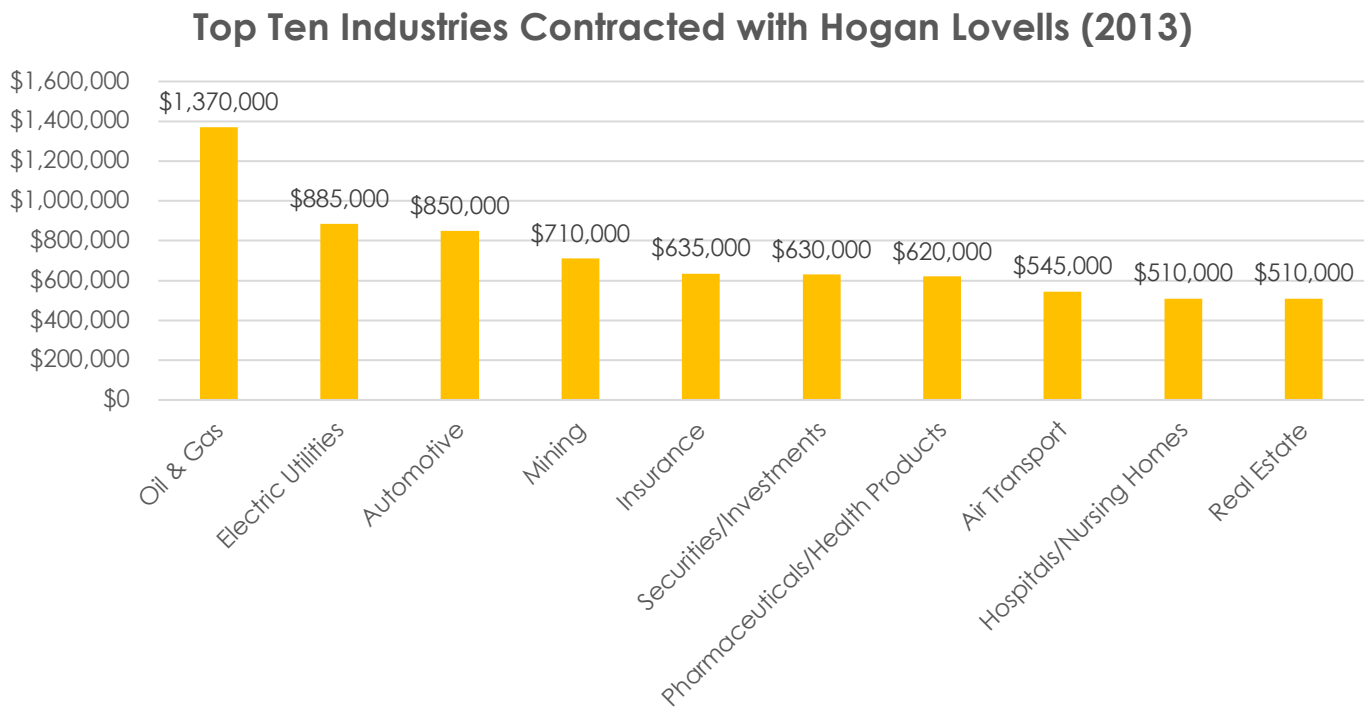
[123] *Forbes*. Hogan Lovells. https://www.forbes.com/companies/hogan-lovells/?sh=35b96a9c1060

[124] *Wikipedia*. Hogan Lovells. https://en.wikipedia.org/wiki/Hogan_Lovells

[125] The year 2013 allows us to scrutinize the lobbying work Hogan Lovells was involved in shortly before the 2015 litigation began.

[126] OpenSecrets.org. Lobbying Firm Profile: Hogan Lovells. http://www.opensecrets.org/federal-lobbying/firms/summary?cycle=2013&id=D000059877

Figure 3: Top Ten Industries Contracted with Hogan Lovells, 2013



From fossil fuel to pharmaceuticals to the financial, insurance, and real estate (FIRE) sectors, Hogan Lovells has been a faithful partner to the most dominant stakeholders at the center of American political power. None of these major interest groups are what one might consider "progressive" by any stretch of the definition, and yet CPC has enlisted their services while attempting to maintain a façade of professed progressivism in New York State politics.

Needless to say, through its alumni or litigation practices, the firm has indisputably been a prominent actor with influence in the creation of national policy around a multitude of issues. Moreover, given that CPC has sufficient spending power to contract with a firm as elite as Hogan Lovells, it should follow that they certainly have the means to do right by their workers.

F. Invoking the Victim Card: A Summary of CPC's Evasive Defenses

Coercion, convolution, deception, and delay – all are themes that characterize the legal posture of CPC and its accessories to mass wage theft. The orchestration of these legal tactics has led to the extraordinary delay, now exceeding six years, of the remuneration of the workers' backpay and the ceasing of twenty-four hour shifts by CPC. In spite of this, it is CPC who audaciously claims that they will be the most wronged if mandated to redress worker grievances, duplicitously arguing that their hands are tied by the state when in reality – it is they who enthusiastically embrace the law's hostility towards working people.

The takeaway should **not** be to wax lyrical about legal labor protections – grossly inadequate in their own right – but to understand the legal regime[127], in both the courts of the state and federal governments and in

[127] For the American capitalist system, or any capitalist system anywhere in the world, cannot function without a legal regime and the coercive powers of the state to enforce it. Thus, understanding the legal regime's core mechanics and functions is indispensable

the private, commercial pseudo-courts of arbitration, that exploitative employers and abetting unions will simultaneously forge and manipulate to serve their own ends. More emphatically, the sloganeering and aesthetics of social justice that the Chinese-American Planning Council, its senior staff, and its chief supporters attempt to purport as the core mission of the agency could not be further from its bona fide intentions: defending the status quo, and aligning itself with the formidable bulwark of American labor jurisprudence that constitutes one of the most zealously anti-worker legal regimes to be found anywhere in the modern world.

Make no mistake: an organization's true agenda is often found not in the public theater of appearances nor in the arena of political performances, but in deliberately constructed arguments to a court against their victims, who oppressors would prefer above all to remain unseen by society's scrutinizing eye.

to the understanding of capitalism and the relationship of workers and employers in a capitalist society. See G. Hodgson's *Conceptualizing Capitalism: Institutions, Evolution, Future.*

II. DOCTRINE OF PREEMPTION: "NO MINIMUM WAGE FOR YOU; NO MINIMUM WAGE FOR ANYONE!"

> *"The Supreme Court's labor law preemption cases are so broad that labor lawyers sometimes summarize them as standing for the proposition that states cannot regulate either any activity the* [National Labor Relations] *Act regulates, or that it doesn't regulate."*[128]
>
> -Charlotte Garden

A reader might ask why we have stuck to analogies of war and weaponry to describe CPC's tactics in the courtroom. We use these analogies in part because they have been used in the canon of legal scholarship to describe these precise tactics[129] by employers – so there is indeed precedent (of the academic sort) for this unyielding language. But the compelling and graver rationale for doing so is to convey to the reader the utter ruin they bring to workers' lives.

It should go without saying that the United States has among the worst labor relations in the world. A substantial proportion of this country's nearly innumerable human rights violations take place in the workplace, but many are led to the erroneous assumption that American labor laws to protect workers are robust, and such violations are consequently nonexistent. Of course, this could not be further from the truth – it is not that labor law is *meaningless* per se; rather, it is intentionally designed in the most deceptive and far-reaching of ways to unshackle the formidable might that bosses command to pilfer workers. It is a law formulated by bosses, for bosses.

These next two chapters, on the doctrine of **federal preemption** and **arbitration**, address the most prominent legal tactics by the Chinese-American Planning Council to disenfranchise the workers to the greatest possible extent.

The reasons for scrupulously discussing these tactics are threefold. Firstly, CPC's cynical exercise of these strategies is among the strongest of arguments to make to assert its *individual* complicity and agency in its worker exploitation – it is by *choice* that CPC has endeavored to execute these maneuvers in litigation, as much as it continues to remain a choice for CPC to do right by its workers.

Secondly, it ravages the carefully construed moral façade of CPC and professedly progressive nonprofits like it. While legislators, political activists, and the general public may superficially perceive CPC as an anti-status quo organization, CPC's defense of its wage-stealing practices could not stand in court without the foundation of a labor law jurisprudence designed to obliterate worker power.

Thirdly, it generalizes to explain how CPC's actions are not simply deleterious to its own workers, but in setting more jurisprudential precedent to preempt and arbitrate worker grievances, decidedly extends to a debasement of the rights of all workers in the home care industry and beyond. **It is in fact CPC's actions**

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[128] C. Garden. *Beyond the Race to the Bottom: Reforming Labor Law Preemption to Allow State Experimentation*, pgs. 46-55 in *The Cambridge Handbook of U.S. Labor Law for the Twenty-First Century*.

[129] One paper cited later on in this report describes arbitration as an "epidemic," while another quite unequivocally calls it "the corporation's new lethal weapon."

in the courtroom – among others – that contribute to elucidating its true ideological character as an anti-worker nonprofit.

Two arguments that will dominate the narrative in the next two chapters are as follows:

Argument 1: Rule-making in markets, or more broadly, rule-making governing the behavior and activities of firms and nonprofits, is not the sole deed of legislative law, or by what one may crudely express as "systems, not individuals."[130] Consequential rule-making – in this situation, rule-making governing relations between workers and firm management – is indeed pioneered by *individual* firms and nonprofits through private forums and the use of weapons of labor violence, while excluding workers to their substantial detriment.

Argument 2: The statutory or legislative law is but one of many manifestations of law in society. By exclusively insisting on reform by the legislature as the sole means of redressing the workers' grievances, CPC deceives the public into ignoring its weaponization of the *common law* and the "*privatized private law,*" [131] namely, its manipulation of the law of the judiciary and the law of private arbitrators to render untenable injury to the workers.

We are not lawyers, and we do not intend for the reader to have any legal knowledge or to come away from this report with any feelings of urgency to learn the law. Nor is our argument that the wrongdoings of CPC can be reduced to legal questions with answers that are legalistic or technocratic in nature. Our analysis is not to exhibit deference to and extol the virtues of the American labor law. To the contrary, our purpose here is grounded, simple, and quite unlike the convolution and confusion of CPC's legal tactics: we want to establish exactly *what* the tools and weapons of labor violence are and how they practically function in this situation and within the American economy and legal system. Moreover, we must *expose* CPC's character as a **wage-stealing organization**, **not the arbiter of economic and racial justice as it habitually purports to be**.

A. Federal Labor Law Preemption: The Basics; The *Garmon* Precedent

Preemption is not inherently a problematic tool. In the simplest terms, **preemption** is the doctrine in which whenever federal and state law contradict, the federal law supersedes, or *preempts* the law of the lower political subdivision. Put differently, the federal law is what is endowed governing authority over state law in such a scenario. Its origins lie in the Supremacy Clause of the United States Constitution:

> *"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." [132]*

[130] Put differently, we argue it is wildly incorrect to attribute all behavior by businesses and nonprofits as bound by and subject to the constraints of statutory law. They routinely skirt statutory law intended to protect workers and command plenteous power in setting their own rules to ensure bosses prevail at the game of wage exploitation each time.

[131] "Private law" is law and legal relations governing the conduct and interactions between two private individuals, institutions, or an individual and an institution. By "privatized private law," we mean rule-making by entities like CPC and 1199 that is unilaterally done by private employers and their abettors (e.g., unions and arbitrators) without the direct involvement of a legislature or democratic body, and nearly always culminating in the attempted (if not successful) erosion of worker rights and power.

[132] *Constitution of the United States of America*, Article VI.

In some instances, this is a welcome device. For instance, states that criminalize abortion or recreational marijuana could – and should – have their laws on those matters preempted by federal statute, should Congress endeavor to codify it as such. In the dominion of labor law, however, the outlook is very much more pessimistic.

The root of statutory American labor law, and thereby the federal government's most prominent laws surrounding the governance and mediation of worker-employer labor relations (collective bargaining), is the National Labor Relations Act ("NLRA"), which was drastically amended in 1947 by the Taft-Hartley Act, or the Labor Management Relations Act ("LMRA"). More important than the minutiae of what each Act prescribes, however, is the sweeping philosophy that the Supreme Court, through its interpretation of the NLRA and LMRA over a series of landmark cases in the decades since the New Deal and Cold War, has adopted, asserting that it is the exclusive burden of the Congress is to promulgate a *single* national labor relations policy.[133] Practically, as the opening quote to this chapter suggests, the effect of this has been to limit the power of state and local governments to enforce and protect the rights of laborers. For under these interpretations, the standard of a universal federal labor policy prevails over the ability for state and local legislators to craft policy to go *beyond* what federal policy protects – even though the National Labor Relations Act has no explicit language *mandating* that state labor laws or claims made under such must be preempted.

Make no mistake: **CPC is well aware of this dynamic**, and its insistence on the need to amend New York State policy as a pre-requisite to ending the 24-hour shift and remunerating its home care workers is a tactic of diversion to obscure the fact that many attempts by states to protect workers have come under assault, its policies preempted by abusive employers taking advantage of anti-worker precedent.

One such precedent, even if not *originally intended* to disenfranchise workers, has been construed so sweepingly so as to effectively bring about catastrophic outcomes for labor relations in this country: the precedent put forth in *San Diego Building Trades Council v. Garmon* (1959).[134] We need not concern ourselves with the technicalities of the case, other than its brief description and outcome: in the State of California, the San Diego Building Trades Council picketed their employer (Garmon), a lumber business, in an attempt to pressure them to ratify a collective bargaining agreement the union had drafted. Garmon claimed that the union did not have sufficient votes by the union membership to ratify the agreement, and procured an injunction from the Superior Court of the County of San Diego to prevent the union from picketing. However, the National Labor Relations Board, which nominally mediates labor disputes, refused to assert jurisdiction over the dispute, and when the case was wound up in the Supreme Court – multiple times, but the ruling we are examining here, in 1959 – the Court ruled that the California Superior Court's injunction was not acceptable for infringing on federal turf for NLRA-regulated activities. In the words of then-Associate Justice Felix Frankfurter, who authored the 5-4 majority opinion in favor of San Diego Building Trades:

> "*When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield.* ***To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.*** *Nor has it mattered whether the States have acted through laws of broad general application, rather than laws specifically directed towards the governance of industrial relations.*

[133] C. Garden. *Beyond the Race to the Bottom: Reforming Labor Law Preemption to Allow State Experimentation*, pgs. 46-55 in *The Cambridge Handbook of U.S. Labor Law for the Twenty-First Century*.

[134] *San Diego Unions v. Garmon*, 359 U.S. 236 (1959)**.** https://supreme.justia.com/cases/federal/us/359/236/

> *Regardless of the mode adopted**, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes***." [135] (emphasis added)

The final line of this excerpt is critical to understand. While in the *Garmon* case, the Court ruled in favor of the union, the principle of a unified national labor policy applies generally, including to states who wish to diverge from national labor policy with the intent of *fortifying* protections for workers. Seattle University School of Law Professor Charlotte Garden writes on *Garmon*:

> *"Garmon's breadth is significant: because it reaches activity that is even 'arguably' subject to regulation under the NLRA,* ***states are precluded both from augmenting the core of labor law, and from tinkering around the edges.*** *Further, Garmon means that states cannot increase the penalties that can be imposed on unions or employers that violate labor law – a departure from other areas of work law, including wage and hour or discrimination law. This aspect of Garmon preemption is significant because the NLRA's circumscribed set of available remedies, which largely fail to deter employer law breaking, is one of its most significant shortcomings.* ***Garmon means that states cannot pick up the slack****."* [136] (emphasis added)

Ascertaining why the standardization of a national labor policy was enshrined into precedent, however, is the question that will enable us to establish why CPC has been ruthless in ensuring that the *Chu* and *Chan* cases be preempted to federal court. The answer is what we have already discussed: **that national labor policy is preferential towards industry stability over workers' rights, and to preempt their claims to a forum designated to uphold this precedent – namely federal court – all but tips the balance of power in favor of the boss over the worker.**[137]

There are four primary means of preemption in labor jurisprudence,[138] which include:

1. National Labor Relations Act preemption, which may be by means of:
    a. The aforementioned *Garmon* precedent, called "*Garmon* preemption"
    b. Another precedent set by the 1976 *Machinists v. Wisconsin Employment Relations Commission* Supreme Court case, also dealing with preemption of state law under the NLRA, called "*Machinists* preemption"
2. Section 301, Labor Management Relations Act preemption
3. Employment Retirement Income Security Act, or "ERISA" preemption
4. Anti-discrimination or civil rights claim preemption

As it happens, CPC has either directly or implicitly made use of all four methods in its litigation against the workers. By far the most frequent invocation of the preemption tactic has been the second: Section 301 preemption under the Labor Management Relations Act. Therefore, it is this specific method of preemption we will closely examine in this chapter. Particularly, we will look at the political context of the passage of the LMRA as an anti-labor *reaction* to curtail whatever power of organized labor the NLRA was able to confer, and CPC's manipulation of the LMRA preemption tactic to evade liability.

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[135] *Ibid*.

[136] C. Garden. *Beyond the Race to the Bottom: Reforming Labor Law Preemption to Allow State Experimentation*, pgs. 46-55 in *The Cambridge Handbook of U.S. Labor Law for the Twenty-First Century*.

[137] And as we will discuss in Chapter 3, a federal policy that favors arbitration as a means of labor dispute resolution.

[138] Stephen F. Befort, *Demystifying Federal Labor and Employment Law Preemption*, 13 LAB. LAW. 429 (1998), *available at* https://scholarship.law.umn.edu/faculty_articles/85.

None of the above is to argue the claim that all labor rights violations originate with the Supreme Court, a statement so scandalously reductive and over-valorizing the agency of the Court while dangerously under-emphasizing the individual faculty of firms and nonprofits in rule-making. But it is imperative to understand the legal lay of the land in which boss nonprofits like CPC operate, and more crucially, realize that CPC's legal strategy is hedged on a foundation of anti-worker jurisprudence, from decades' worth of litigation and ruling by courts up and down the federal bench.

We now look to specific examples of CPC engaging in its preemption strategy.

B. Attacking the Minimum Wage: CPC's Attempted Preemption of the Home Care Worker Wage Parity Act

Before we begin to probe CPC's LMRA preemption tactics, we first look at one of CPC's earliest maneuvers: an (ultimately failed) attempt to preempt the Home Care Worker Wage Parity Act. At the outset of the litigation in Spring 2015, CPC's legal stratagem was to move for the workers' complaint to be dismissed (otherwise sent to arbitration) and in doing so, endeavored to argue that the workers' causes of actions were illegitimate or baseless.

As we saw in Chapter 1, one of the workers' complaints included claims under the New York State Home Care Worker Wage Parity Act. In addition to decreeing minimum wages for workers in the home care sector, the Act also promulgates wage and hour reporting requirements for home care agencies like CPC, and levies criminal penalties for intentional falsification of reporting to the Department of Labor on this information. Crucially, the Act specifies that agencies reimbursed by Medicaid, as is the case with CPC, must adhere to these regulations. CPC claims, however, that the Wage Parity Act must be preempted, and consequently, all claims the workers make under it dismissed.

The (faulty) mechanics behind CPC's argument are in its invocation of the 1976 *Machinists v. Wisconsin Employment Relations Commission* Supreme Court case, which establishes common law that governments cannot regulate any activity within the collective bargaining process that is "unregulated and to be controlled by the free play of economic forces." As Justice Brennan writes in the Court's opinion:

> "*The Court had earlier recognized in preemption cases that Congress meant to leave some activities unregulated and to be controlled by the free play of economic forces*." [139]

To put it another way, CPC is venturing to claim: **the ability to determine wages, hours, and conditions for workers should be left to the "free play of economic forces" – not for the state to intervene in and deliberately "disrupt" a bargaining process between workers and firm management**. In a capitalist economy such as the United States' in which employers like CPC dominate over workers in all respects, an implication like this can only be interpreted as a plea to let the working conditions of home care workers go completely unregulated, unprotected, and exclusively at the mercy of firms.

In its June 5, 2015 memorandum of law, CPC writes:

> "*Machinists preemption can exist comfortably with many state laws that set minimum labor standards…The Supreme Court has cautioned, however, that even a substantive state labor*

[139] *Machinists v. Wisconsin Employment Rel. Comm'n*, 427 U.S. 132 (1976). https://supreme.justia.com/cases/federal/us/427/132/

standard may be preempted if it is 'incompatible' with the NLRA's goals or of it 'discourage[s] the collective-bargaining processes that are the subject of the NLRA' (Metro. Life, 471 U.S. at 755).

The Wage Parity Law does just that. The most notable red flag is that…the Wage Parity Law is not a 'law[] of general application.' Instead, it ***narrowly targets a specific industry*** *(home health care workers) in a limited geographic region (New York City, Westchester, and Long Island). Some federal courts* ***have recognized that a law selectively defining benefits for a particular industry in a particular place encroaches more on the bargaining process than a generally applicable state law***." [140] (emphasis added)

Going further, CPC even asserts that the Wage Parity Act's preference for higher rates of compensation is problematic:

"…the Act requires that covered employees in New York City be paid the greater of the compensation required by New York City's Living Wage Law or the 'prevailing rate of total compensation.' Critically, 'prevailing rate of total compensation' is defined to mean the compensation paid to home care aides 'covered by whatever collectively bargained agreement covers the greatest number of home care aides' in New York City. In other words, ***the terms of the collective bargaining agreement entered into by the largest union will control for all other employers. That is a serious invasion of the bargaining rights of other unions, who must now negotiate around a wage term that one specific union prefers***." [141] (emphasis added)

In one conclusion, we could contend that CPC's ill-fated effort to void the Home Care Worker Wage Parity Act was a cynical and unscrupulous ploy for liability evasion. But this would be myopic, for there is an implication of greater consequence here – that **CPC ventured to usurp the very principle of a government establishing a base rate of pay for a disenfranchised class of workers.** The legislative intent of the Home Care Worker Wage Parity Act is unambiguously found in the Act's name: **wage parity**, a mandate by the state government to bring the minimum pay rate of home care workers up-to-par with that of workers across many industries in New York.

If CPC were to have their way and the Wage Parity Act were to be successfully preempted, it would be an invitation to employer challenges to any industry-specific legislation seeking to improve material conditions for workers in that sector – an assault to the very duty of a government providing the most basic of redress for material injustices in the most oppressive of industries. An ironic position for CPC to adopt, given its supposed conviction that it is only through legislative reform that justice for the workers will see the light of day.

In fact, the legal counsel for the plaintiffs respond:

"…the Wage Parity Act, which 'stabilizes minimum wages for the hundreds of thousands of home care aides in New York City and the surrounding Counties, is ***an unexceptional exercise of the state's police power'*** *(Concerned Home Care Providers, Inc., 783 F3d at 85). The Wage Parity Act does not favor union workers and all 'home care aides in New York City and the surrounding Counties benefit from the statute's minimum rate of compensation.' (Id.) The mere fact that the Wage Parity Act sets minimum wage standards is unremarkable. Indeed, 'parties traditionally*

[140] *Chan* et al., NYSC 2015. June 5, 2015. NYSCEF Doc. No. 4, pgs. 27-28.

[141] *Chan* et al., NYSC 2015. June 5, 2015. NYSCEF Doc. No. 4, pgs. 28-29.

come to the bargaining table with rights under state law that form a backdrop for their negotiations' (Id. at 86)." [142] (emphasis added)

What is the "unexceptional exercise of police power?" Simply the state's authority – a ubiquitous one – to establish a minimum wage.

And so, we have our first, but far from the last instance of the preemption doctrine. As we have stated at the outset of this chapter, we are not lawyers, and our ambition is not to provide any offering to the corpus of legal academic knowledge. The crux of our understanding must lie in the way in which CPC, and employers generally, orchestrate the legal regime of the American economy for aggrandized self-enrichment and empowerment as the lives of workers continue to deteriorate.

What can CPC's unsuccessful preemption of the Wage Parity Act tell us? It raises at least two points:

- The consolidation of corporate and nonprofit power – be it in markets, the political or legislative arena, or in the public discourse broadly – is not to serve the public commons but themselves; ergo, it must be checked and constrained. This can manifest through either the regulatory apparatus of the state, or through the direct organization of a firm's or nonprofit's workers. In seeking to preempt the Wage Parity Act, one of the keystone statutes to protect home care workers, CPC has attempted to negate both the abilities of the state and the home care workers to check its power.

- CPC's persistent grandstanding about redressing the workers' grievances through adequate budgeting, reform of the Medicaid reimbursement terms, and a ban on the 24-hour shift only by legislative fiat is fraudulent and in bad-faith.

Once again, it is through the litigation that CPC's true character and intentions may be exposed: if the Wage Parity Act was grounds for attempted preemption – an act designed to protect home care workers – there is little reason to believe that any newly codified statute to prohibit the 24-hour shift, or any other act to strengthen the state's regulatory regime to protect home care workers, would not face the same affront to its own viability. Irrespective of one's interpretation of the Wage Parity Act – there is a plethora of legitimate criticisms to make of its inadequacy – the critical point must be that CPC has no interest in any organized power, be it the state or the workers themselves, mounting any substantial challenge to its own economic and political power.

C. Red Scare Reaction: Preemption Under the Labor Management Relations Act

Where much of the labor law or precedent we have considered thus far may have been benign in intention but perverted in practice by CPC for its self-serving ends, among the nonprofit's most telling courtroom moves has been its bringing forth of a type of preemption known as **Section 301 Labor Management Relations Act (LMRA) preemption**, otherwise known as preemption under the **Taft-Hartley Act of 1947**.

In the most technical sense, Section 301 preemption deals with enforceability of collective bargaining agreements in federal court[143]; in actuality, it has been a weapon to purposefully void state and municipal

[142] *Chan* et al., NYSC 2015. July 7, 2015. NYSCEF Doc. No. 23, pg. 28.

[143] Curtis L. Mack et al., *The Fundamentals of Federal Labor Preemption*, presented to the American Bar Association Section of Labor and Employment Law, 14th Annual Labor and Employment Law Virtual Conference, *available at*

protections for workers and effectively enable the federal government to lend credence and deference toward collective bargaining agreements innately accommodating toward the employer, no matter its deficiencies in defending the worker's welfare. In the simplest statement: if a worker's terms of employment wages, working hours, and overtime are bound by a collective bargaining agreement, any *state* law claims by the worker related to such, or requiring the interpretation of the collective bargaining agreement, are thereby preempted. In instances such as that of the CPC workers in which it is not only the preference of federal labor law to arbitrate, but also explicitly mandated in the collective bargaining agreement itself, Section 301 preemption effectively amounts to the decimation of workers' rights to seek redress in state court, and by extension, the state's ability to exert a countervailing force towards firms who will devise any means to terminate any worker resistance.

Context is needed here: we must remember that the Taft-Hartley Act[144] was first and foremost a *reaction* to the legislative progress (however one chooses to define progress) of the New Deal and in particular, of the National Labor Relations Act. Among its most far-reaching intrusions has been the enabling of right-to-work laws across numerous American states, designed to curtail the power of organized labor. Legislated during the height of the fervor of the Cold War Red Scare, the infamous stipulation for union members to sign anti-communist affidavits prior to union registration also originates with this Act, as well as restrictions (if not an outright surrender) on unions' right to strike. Where the NLRA sought to establish some semblance of industry stability in providing legal and state-sanctioned means for workers to unionize, the spirit of the Taft-Hartley Act was to preserve the imbalance of power in the boss's hand by treating *workers* as culpable of labor injustices *against their employer*.[145] It is this contemptible legacy that CPC exhorts, and the laurels of the legislative champions of labor exploitation on which it rests.

A troubling application of Section 301 preemption exists in an uncannily similar case in the State of California. In *Curtis v. Irwin Industries, Inc.*,[146] Carl Curtis, an oil rig worker, sued his employer for unpaid overtime wages. But as is the case with the CPC home care workers, Curtis was required to labor for punishing twenty-four hour shifts on the oil rig, receiving little to no sleep or meal time throughout. And rather like home care work, the toil and degradation life and labor on an oil rig takes on the body and mind is irreparable and crippling, with injuries up to and inclusive of early death.

Curtis's case eventually wound up in the Ninth Circuit, the federal appeals court with jurisdiction encompassing the western states along with Alaska and Hawaii. Ordinarily, the California Labor Code promulgated requirements that employers must pay overtime for any amount of work done in excess of eight hours. However, a statutory restriction was prescribed to exempt coverage of the overtime requirement to workers covered under a collective bargaining agreement, so long as the CBA itself enacts its own wage, working hour, and overtime policy. Because of this critical point, although Curtis argued that his overtime claims were justified due to nonalignment between the CBA's overtime policy and the State of California's, it would amount to nil – the Ninth Circuit ruled against Curtis, invoking the threshold of Section 301

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https://www.americanbar.org/content/dam/aba/events/labor_law/2020/section-conference/materials/fundaments-of-federal-labor-preemption.pdf.

[144] Introduced by Republican House Representative Fred A. Hartley Jr. of New Jersey and Senator Robert A. Taft of Ohio, the Congress that passed it was so resolved to undo major tenets in the New Deal that its support overrode President Truman's veto of the Act. Organized labor, to this day, has never succeeded in achieving its full repeal.

[145] *Labor has opposed Taft-Hartley for decades. Here's why it's time to repeal it.* The Strike Wave. https://www.thestrikewave.com/original-content/2019/4/3/labor-has-opposed-taft-hartley-for-decades-heres-why-its-time-to-repeal-it

[146] Davis, Wright, Tremaine LLP. Jeffrey S. Bosley. *9th Circuit Holds CBA Preempts California Overtime Claims*. https://www.dwt.com/blogs/employment-labor-and-benefits/2019/02/ninth-circuit-holds-cba-preempts-california-overti

preemption that it is the collective bargaining agreement that must trump the state labor statute. It behooves one to pose the question of why the Chinese-American Planning Council is endowed with the virtues of progressivism when the contrasts of its legal strategy and that of Irwin Industries – an offshore crude oil drilling company no less willing to allow its workers to smolder than the climate – are scant.

Clearly, in the world of labor relations, the law of statutes do not tell the full story. Here too the courts have endowed the law with precedent to further enable the devastation of workers' recourses to material livelihood. From the very opening of the language of the first part of Section 301, no language declaratively orders preemption for cases involving collective bargaining agreements:

> *"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."* [147]

In the plain English reading, one can observe that the language of the section states that suits for violations of contracts may be brought in a United States District Court. It does not say one *must* bring a suit of this nature to federal court. Where, then, does preemption under the Labor Management Relations Act originate from?

Preempted cases under the LMRA are determined by a standard put forth in a 1988 Supreme Court precedent named *Lingle v. Norge Division of Magic Chef, Inc.* The facts of the case involve an Illinois employee (Lingle) who claimed workplace-related injuries, filed for workers' compensation, and was subsequently terminated by her employer (Norge Division of Magic Chef, Inc.), the latter claiming Lingle filed a false claim. Under Lingle's collective bargaining agreement, her union submitted a grievance to Magic Chef which then went to arbitration. During this time, Lingle submitted an additional suit, this time to Illinois state court stemming from her termination. Magic Chef then invoked Section 301 preemption under the Labor Management Relations Act, sending Lingle's case to the federal district court in that region. Ultimately, the district court sided with the employer, as did the federal appeals court afterward. However, upon reaching the Supreme Court, the decisions of the lower courts were overturned, and the Supreme Court unanimously ruled in favor of Lingle that her suit was not preempted under the LMRA.[148]

At first glance, this sounds like a win for workers – and in Lingle's case, it was. But the reasoning the Supreme Court exercised unfortunately left labor-management relations vulnerable to the outsized dominance of employers and unions friendly to them to codify all-encompassing collective bargaining agreements dictating the nature of worker-boss relations – often at the expense of the worker. It also synchronously eroded states' and municipalities' abilities to protect their constituencies and workers through statutory fiat, either through employers attempting to preempt worker protection laws (as we see in CPC's attempt to preempt the Wage Parity Act) or through grossly insufficient or outright absentee civil and criminal enforcement of such laws.

On one hand, the Supreme Court argued that because Lingle's complaint in Illinois state court was fundamentally a claim based on Illinois *state law*, and did *not* require interpretation of the collective bargaining agreement, the lower district and appellate courts erroneously came to the conclusion that state law claims were to be preempted as well under Section 301. Instead, the Supreme Court established into

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[147] *United States Code*. Title 29 – Labor, § 185. Alternatively, the statutes-at-large citation: June 23, 1947, ch. 120, title III, § 301, 61 Stat. 156.

[148] *Lingle v. Norge Div., Magic Chef, Inc*., 486 U.S. 399 (1988). https://supreme.justia.com/cases/federal/us/486/399/

precedent the exemption of state labor law claims *independent of* interpretation of a collective bargaining agreement from Section 301. In this sense the Supreme Court's ruling was superior to that of the lower courts – better some claims are immune to preemption than none. But conversely, and far more problematically, the Supreme Court's ruling allowed for Section 301 preemption, *period*. In our case, it left an opening for CPC to argue that the workers' state law claims are baseless (itself an argument devoid of proper reasoning), and to push the *Chan* and *Chu* cases to arbitration as the favored federal policy for labor dispute resolution. For as the late Justice John Paul Stevens writes in the unanimous opinion of the Court in *Lingle*:

> *"[The Court] held that § 301 not only provides federal court jurisdiction over controversies involving collective bargaining agreements, but also '**authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements'**...[The Court] rejected [the approach of applying state law rules of contract interpretation], and held that § 301 mandated resort to federal rules of law in order to ensure **uniform interpretation of collective bargaining agreements, and thus to promote the peaceable, consistent resolution of labor-management disputes**."* [149]

The logical mechanism of this understanding of the *Lingle* precedent is made most clear when we examine New York County Supreme Court Judge Carol R. Edmead's ruling on CPC's 2015 motion to dismiss or preempt the *Chan* case:

> "*Defendant's contention that plaintiffs' claims require interpretation of a collective bargaining agreement, and thus, must be submitted to the contractual grievance process, as required by section 301 of the Labor Management Relations Act (29 USC § 185) lacks merit. Contrary to defendant's contention, **plaintiffs' claims are not preempted by section 301**.*
> *...*
> *Plaintiffs allege that under the Wage Parity Act, Public Health Law, and Fair Wages Act, defendant, as a home health care service agency, is required, as a condition of its contract with government agencies, to certify that they are in compliance with both Acts. However, defendant failed to comply with such Acts.*
>
> *The "legal character" of plaintiffs' claims sound in violations of the Wage Parity Act, Public Health Law, and Fair Wages Act and the elements of such claims **indicate that they are truly independent of rights under the CBA**."* [150] (emphasis added)

Here, we have a ruling by a New York State Supreme Court judge that the claims under *state* labor statute are indeed independent of any analysis of the CPC-1199 SEIU collective bargaining agreement. As we have established in Chapter 1, the workers' grievances are congruent to the elements defined in the Wage Parity Act and all the aforementioned Acts under which the complaint was brought. In the particular case of the Wage Parity Act, Judge Edmead authors:

> "*Paragraph 22 [of the complaint] does not clearly indicate an agreement to arbitrate the claims raised in the complaint. Paragraph 22 requires binding arbitration of a claim that **a term** of the MOA fails to comply with the Wage Parity Act. Plaintiffs do not claim that any term of the MOA violates the Wage Parity Act, but that defendant's payments violate such law*." [151] (emphasis by Judge Edmead)

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[149] *Ibid.*

[150] *Chan* et al., NYSC 2015. September 9, 2015. NYSCEF Doc. No. 31.

[151] *Ibid.*

To contrast with the state judge's ruling, compare with the argumentation from United States District Judge for the Southern District of New York Katherine B. Forrest's ruling in February 2016[152], in response to CPC's motion to compel arbitration:

> "*The 2015 [memorandum of agreement] clearly specifies that all wage and hour-related claims brought by employees or the Union must be submitted exclusively to the alternative dispute resolution procedures provided for in the agreement…The CBA thus expressly evinces the parties' intention to arbitrate the precise claims brought here, including all claims brought under the FLSA,* ***New York Home Care Worker Wage Parity Law, and New York Labor Law***." [153] (emphasis added)

Indeed, a serious discrepancy emerges in the respective judges' interpretation of the breadth of the collective bargaining agreement, one that brings forth truly illuminating insight into CPC's legal grand strategy. One discussion we will temporarily delay until the third chapter will analyze the Federal Arbitration Act, the authority under which Judge Forrest argues for the expansive breadth of interpretation of a CBA's powers.

But from these critical points, we can see how our initial two arguments at the outset of this chapter are realized in CPC's legal grand strategy: to the first argument, the point that rule-making to establish how workers and management interact with one another is effectively marshaled by the boss and unions, or *private entities*. The second argument is valorized in CPC's *de facto* supplanting of New York State labor law, rubber-stamped by the federal court and concomitantly rendering the state's statutory protections helpless in their reach to shield workers from harm.

More critically, we can also begin to piece together a formula nonprofits like CPC follow to attempt to exercise total and absolute power over their workers, and through a judiciary deliberately built to service capital, contemptuously erode the state's power and will to enforce its laws around the protection of workers and their material sanctity.

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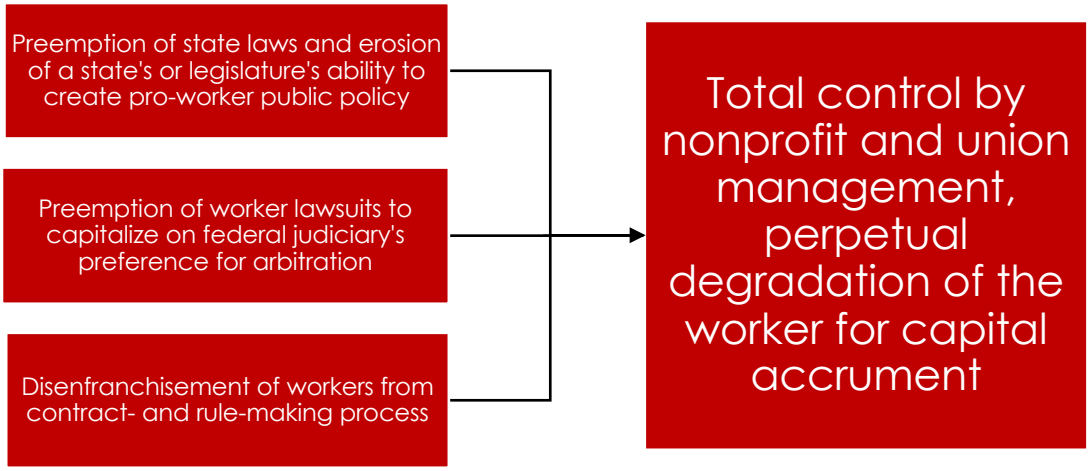
[152] Recall that the *Chan* case was removed to federal court subsequent to the amendment of the plaintiffs' initial complaint to include claims under the federal Fair Labor Standards Act.

[153] *Chan* et al., SDNY 2015. February 3, 2016. CM/ECF Doc. No. 42, pg. 4.

Figure 4: Outline of the Chinese-American Planning Council's Legal Grand Strategy



D. A Tool of Delay: CPC's (Twice) Attempted Preemption of the *Chu* Suit

When a nonprofit like CPC needs to dominate over its workers, it is not enough to simply preempt bases for a legal complaint. It must swat at and suppress existing legal actions against itself, as it has attempt to do not once, but *twice* with the *Chu* suit. The first instance took place on May 13, 2016 and the second on March 11, 2021.

1. May 13, 2016 Removal of the *Chu* Action to the Southern District

The *Chu* action was first brought before the New York County Supreme Court on April 11, 2016. In the very first action after the summons and civil complaint, the defendant, CPC, submitted a notice of removal pursuant to federal rules on judicial procedure to force the action to be heard in the United States District Court for the Southern District of New York ("SDNY"). Its briefly-written notice, under four pages, put forward the following arguments:

> "*4. Removal is appropriate under 28 U.S.C. §§ 1441(a) and (c)* ***because all of the Plaintiffs' claims are completely preempted by federal law, Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185****. Thus, this is a civil action in which the District Courts of the United States have been given original jurisdiction, in that it arises under the law of the United States within the meaning of 28 U.S.C. § 1331*." [154] (emphasis added)

Thereby establishing Section 301 preemption as the basis for removal, and furthermore:

> "*7. Plaintiffs and all putative class members are subject to the provisions of the CBA relating to wages and hours, which expressly set forth their compensation, including for 24-hour shifts…Therefore,* ***Plaintiffs' claims require the interpretation of the CBA***.

[154] *Chu* et al., SDNY 2016. May 13, 2016. CM/ECF Doc. No. 1, pg. 2.

> *8. Plaintiffs' wage and hour claims effectively amount to a legal challenge to the lawfulness of the CBA's terms,* ***which requires substantial interpretation of the CBA***." [155] (emphasis added)

Which is CPC's attempted application of the aforementioned *Lingle* test for Section 301 preemption of cases involving substantial interpretation of a collective bargaining agreement. But as we have already seen, Judge Edmead of the state Supreme Court previously ruled against CPC's motion to dismiss or compel the workers' to arbitrate in its entirety. And with respect to the *Chu* action specifically[156], Judge Forrest reinforces the decision of the state court:

> "*CPC contends that plaintiffs' claims are inextricably tied to and require interpretation of the CBA with respect to certain (1) wage provisions and (2) grievance and arbitration provisions set forth therein. At the outset, in order to determine whether any provision in the CBA will have to be interpreted to adjudicate plaintiffs' claims, the parties raise a threshold issue as to which agreement(s) actually applies. CPC contends that the 2015 MOA, made effective December 1, 2015, governs CPC's employment relationship with plaintiffs – who each ceased working at CPC prior to that date – on the ground that the 2015 MOA was made retroactive. This argument lacks merit. Regardless of the purported retroactivity of the 2015 MOA, and 1199's authority to bargain on behalf of then-current employees, plaintiffs may not be bound by subsequently adopted amendments to a collective bargaining agreement to which they were not parties…****Turning to the specific provisions of the 2014 MOA and the 2012 CBA, there is no basis at this stage to find that any of plaintiffs' claims are substantially dependent on interpretation of any CBA terms***." [157] (emphasis added)

The issue at hand is not CPC's flagrant disregard of either court's decision, although that is true in this instance. To reiterate, this is not a battle to be won in a courthouse, and a judge's decision cannot be construed as gospel truth for the constitution of workers' justice. **More compellingly, it is CPC's abject refusal to honor any demand to do right by its workers**, whether it is handed down by an official New York State court, or from the workers themselves, as has been the case for the totality of this time. Any entity with the agency to seemingly elevate itself above any form of accountability by means of judicial mandate or popular dissent must necessarily have the agency to rectify its own wrongs. *Even if* both the state Supreme Court and the Southern District ruled in unison with the most generous of outcomes: that the workers are to receive aggregate sum of their due amount, supplemental awards in damages, and an injunction of the nonprofit's exploitative twenty-four hour and wage theft practices, *who is to say CPC would honor the court's ruling in that scenario*?

Unsurprisingly, this will prove to be quite the pertinent question to pose, as six years later in far more recent times, CPC would attempt the exact maneuver once more.

2. March 11, 2021 Removal of the *Chu* Action to the Southern District

Since the first attempted motion to preempt in 2016, 1199 and home care agencies employing its workers, including CPC, corralled all outstanding wage claims into a single, industry-wide arbitration forum. We reserve the details of this until the next chapter. For now, we look toward the Arbitrator's award issued on

[155] *Ibid,* pgs. 2-3.

[156] The *Chan* plaintiffs were compelled to arbitration by Judge Forrest, and a key difference between the two actions is the *Chan* action includes a *federal* claim under the Fair Labor Standards Act. Unfortunately, Congress, courts, and capital have made federal wage and labor claims especially vulnerable to mandatory arbitration.

[157] *Chu* et al., SDNY 2016. July 11, 2016. CM/ECF Doc. No. 28.

April 17, 2020, in which the Arbitrator adopted an extraordinarily sweeping interpretation of the collective bargaining agreement governing the labor relations of 1199 workers and their employers. In practical terms, the award was effectively a declaration by the Arbitrator to self-anoint himself total jurisdiction over the adjudication and resolution of the workers' grievances; in the case of CPC's workers, the Arbitrator lay jurisdictional claim to *both* the group of currently employed (*Chan)* and the group of retired (*Chu)* workers. Shortly thereafter, 1199 submitted a petition[158] to the Southern District to confirm the award, subsequent to which the federal court confirmed in February 2021.

Almost immediately following the confirmation of the arbitration award, CPC made its second motion on March 11 to preempt the *Chu* action. Akin to the first attempt, CPC appeals to Section 301 preemption under the Labor Management Relations Act, once again contrary to the decisions handed down by the SDNY and state Supreme Court:

> "*20. Removal is appropriate under 28 U.S.C. §§ 1441 because all of Plaintiffs' claims are completely preempted by federal law,* ***Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, which grants federal question subject matter jurisdiction over matters that relate to rights created by the CBA or are substantially dependent on the interpretation of the CBA****. Thus, this is a civil matter in which the District Courts of the United States has been given original jurisdiction, in that it arises under the laws of the United States within the meaning of 28 U.S.C. § 1331*." [159] (emphasis added)

But CPC's contention does not end there. It invokes the federal court's argumentation in confirming the aforementioned arbitration award, and most egregiously, a line of argument that **cedes decisions of jurisdiction and arbitrability to the American Arbitration Association (AAA) and its arbitrators, effectively cementing the triumvirate of corporate, nonprofit, and union domination over the labor relations of their workers:**

> "*14. On February 18, 2021, this Court granted the Union's petition and confirmed the Award. In the accompanying opinion, the Court affirmed that the Arbitrator has jurisdiction over the wage and hour claims,* ***irrespective of Plaintiffs' allegations that the Arbitrator exceeded his authority by asserting jurisdiction over employees who were no longer employed at the time the 2015 MOA took effect*** *(the "Confirmation Order")."* [160] (emphasis added)

In this confirmation, CPC quotes the Court in determining that:

> *"… the CBA required that grievances be arbitrated … The subsequent 2015 MOA clarified that grievances relating to "Covered Statutes" must be arbitrated … Thus, under both agreements there is plainly an agreement to arbitrate. Second, under the CBA,* ***arbitrations occur pursuant to AAA Rules****, including AAA Rule 3(a), which delegates questions of jurisdiction and "arbitrability" to the Arbitrator.* ***Therefore, the Respondents and the Union (on behalf of its employees) agreed to arbitrate and to delegate questions of arbitrability and jurisdiction to the Arbitrator***." [161] (emphasis added)

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[158] In the legal sense, the term "petition" simply means a request to a court to issue an order of some sort. In this case, 1199 petitioned the Southern District to confirm the arbitration award for the purposes of rendering it enforceable and legally binding.

[159] *Chu* et al., NYSC 2016. March 11, 2021. NYSCEF Doc. No. 126, pg. 7.

[160] *Ibid*, pg. 5.

[161] *Ibid*, pg. 5.

By venturing to preempt the *Chu* workers yet *another* time, and in this instance appealing to the logic of arbitrator deference, CPC's strategy is to decisively crush the plaintiffs' shot at procuring redress through the state court, and with that, ensure that the only means of formal resolution are through arbitration, where workers are statistically face near-certain doom in receiving due justice. We can be sure that this is the case, for in *its* analysis of the plaintiffs' motions, CPC categorically admits its intentions:

> "*17. Plaintiffs filed an amended complaint on February 15, 2021 (the "Amended Complaint")…The Amended Complaint is an ineffective attempt to differentiate the Chu putative class from the Chan class* ***to evade arbitration****. However, in order to evaluate the futility of Plaintiffs' Amended Complaint on this action****, this Court must unavoidably evaluate the CBA to determine the arbitrator's jurisdiction over the narrowed putative class****, which it has already ruled are covered in the Union Matter*." [162] (emphasis added)

The amended complaint CPC refers to simply defines the constitution of the class of retired *Chu* workers in a more rigorous fashion than it had previously been. Irrespective of the manner in which the classes are composed, it is absolutely indisputable that CPC's methods have been to coercively strongarm its workers into arbitration, by way of preemption of the *Chu* suit to stomp out the state court action and reliance on the federal court's surrender of labor relations and defense of workers' rights to the employers and arbitrator in its entirety.

Shamelessly yet, in its defense of its motion to remove the *Chu* suit to federal court, CPC even purports to speak *on behalf of its workers' wishes*, while chastising them for having the audacity to disrupt the "industrial peace" between CPC and 1199:

> "*It is not clear why Plaintiffs keep challenging the Arbitration on behalf of individuals they do not represent and have presumably not even contacted,* ***who presumably would prefer to be among the 100,000 plus grievants represented by their Union in the Arbitration****…Plaintiffs' efforts to undermine the Arbitration also* ***threaten to disrupt the peace*** *between the Union and industry employer which the hard-bargained for dispute resolution process in the CBA is intended to preserve and protect*." [163] (emphasis added)

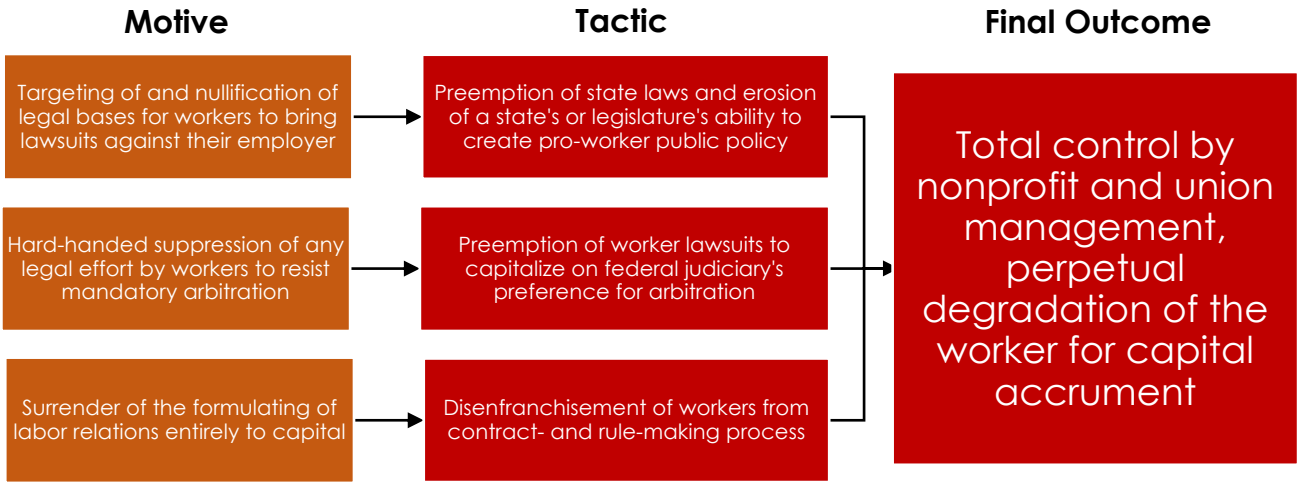
Through the twice-attempted preemptions of the *Chu* suit, we can now easily see the strategic *motives* behind these specific applications of CPC's weapons of labor violence. We previously established the attempted preemption of the New York State Home Care Worker Wage Parity Act as a direct targeting of the state's regulatory regime to protect workers (at least on paper). However, in the additional preemption attempts of the *lawsuits themselves*, and in the nonprofit's reliance on the federal judiciary's deference to arbitrators on substantive questions vis-à-vis the labor relations between worker and boss, we also find that to sharpen its coercive mandate to arbitrate, CPC has engaged in a years-long effort to permanently extinguish the *Chu* plaintiffs' efforts to seek a fairer forum for grievance redress than arbitration.

Therefore, in amending Figure 4, we can conclusively add motivations for the tactics comprising CPC's legal grand strategy:

[162] *Ibid*, pg. 6.

[163] *Chu* et al., SDNY 2016. April 15, 2021. CM/ECF Doc. No. 17, pgs. 18-19.

Figure 5: Outline of the Chinese-American Planning Council's Legal Grand Strategy, with Motives



E. Preemption, or a Path to Arbitration: The Federal Judiciary's Deference to Arbitration and Judge Koeltl's Confirmation of the Arbitration Award

We finish this chapter with a comprehensive analysis of federal Judge John G. Koetl of the Southern District's confirmation of 1199's petition to confirm the Arbitrator's April 17, 2020 award. In particular, we examine the Southern District's confirmation of the 2020 arbitration award – in orchestrated concert with CPC's preemption ploy – as the culmination of the nonprofit's stratagem to completely render the state feeble in its ability to enforce labor law, and to segue into the discussion of the third and final chapter of this first part, which will be to generalize CPC's actions as establishing **precedent that will have enduring repercussions for not only hundreds of thousands of home care workers in New York State, but for workers in industries beyond**.

Following the issuance of Arbitrator Martin F. Scheinman's award in April 2020 to claim jurisdiction and arbitrability on *all* currently employed and retired employees of 1199 home care agencies, the union filed a petition with the Southern District to confirm the award on May 8, 2020[164]. The respondents to the petition are comprised of forty-two home care agencies, collectively employing between 75,000 to 100,000 home care workers under 1199SEIU, including Chinese-American Planning Council Home Attendant Program. In deliberate fashion, 1199 upholds CPC's invocation of Section 301 LMRA preemption, for the union writes as its statement of facts:

> "*23. Section 301 of the LMRA, 29 U.S.C. § 185, provides that suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.*

[164] *1199SEIU United Healthcare Workers East v. PSC Community Services,* et al., SDNY 2020. May 8, 2020. CM/ECF Doc. No. 1.

24. The Award, in relevant part the Arbitrator's findings (1) and (2) with respect to arbitrability and jurisdiction, ***should be confirmed and entered as a judgment of this Court pursuant to LMRA Section 301, 29 U.S.C. § 185***." [165] (emphasis added)

With the petition pending the confirmation by Judge Koeltl, District Court Judge for the Southern District of New York, retired home care workers – including the named *Chu* plaintiffs – along those formerly employed by the United Jewish Council of the East Side Human Attendant Service ("UJC"), submitted respective motions to have the Court intervene, stay, or dismiss the 1199 petition. Unfortunately, the workers' motion was denied by the Court in February 2021.

Among the reasons for the Judge's denial of the intervenors' motion, one was to turn to an erroneous line of argument that 1199 previously employed to deny their workers to procure a temporary injunction on the ratification of the mandatory arbitration clause. Recall that in January 2016, the union argued that the workers' concerns that their grievances would not be fully remedied through arbitration was "speculative" at best, and thus insubstantial grounds for the Court to issue a temporary restraining order on the ratification of the collective bargaining agreement. Regrettably, Judge Koeltl engages in analogous anti-worker reasoning:

"***Moreover, the Proposed Intervenors' alleged impairment is speculative****. The Proposed Intervenors do not represent that they have attempted to pursue the Union's internal grievance procedures and been rebuffed, or that the Union's representation of their claims is inadequate…****The Union has acted with diligence****, and the Proposed Intervenors have provided no evidence to suggest that the Union would not adequately represent the Proposed Intervenors' claims against the Respondents*." [166] (emphasis added)

But as we have already said, and will argue more rigorously shortly, to assert that the workers' unease over mandatory arbitration is "speculative" at best is to patently disregard any material analysis of the outcome of arbitration proceedings in the United States, which tend to be statistically far worse for workers and consumers than if the same claims were made in federal or state court.

Nevertheless, the union and agencies know that preemption under the Labor Management Relations Act is itself a *pathway* to having a court-sanctioned arbitration that is monopolizes the grievance redress process, and precludes all other legal forums for deliberation. For Judge Koeltl openly opines:

"*The LMRA 'establishes a federal policy of* ***promoting industrial stabilization through collective bargaining agreements****, with a particular emphasis on* ***private arbitration of grievances****,' and a '****clear preference for the private resolution of labor disputes***.'" [167] (emphasis added)

Moreover, Judge Koeltl further cites an opinion from a 2016 case ruled on by the Second Circuit that appeals to a principle of "self-government" that bosses and unions espouse in the formation of a collective bargaining agreement:

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[165] *Ibid*, pg. 11.

[166] *1199SEIU United Healthcare Workers East v. PSC Community Services,* et al., SDNY 2020. February 18, 2021. CM/ECF Doc. No. 159, pg. 16.

[167] *Ibid*, pg. 26.

> "***Under [the LMRA's] framework of self-government**, the collective bargaining agreement is not just a contract, but '**a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate**,'" that "are negotiated and refined over time by the parties themselves so as to best reflect their priorities, expectations and experience*." [168] (emphasis added)

The case for "self-government" in the current context of American labor relations must raise red flags, for it is a euphemism for the state to surrender all enforcement authority to the bosses, union management, and the arbitrator to determine the fate of the workers' years-long struggle. As far as the forces of capital are concerned, it is without reservation that the workers have no agency to exercise in the act of self-governing their own labor relations, nor their right to self-determine and realize their material dignity. It is toward the end of Judge Koeltl's thirty-five-page opinion and order that we see an overt argument of coercion – that the rights of any worker to "opt-out" of a mandatory arbitration agreement are without merit:

> "*The Proposed Intervenors argue that the Union cannot represent its former employees, either in assenting to the 2015 MOA or in initiating the grievance, and thus – at least – former employees did not "consent" to arbitration. **But this misconceives the relationship between a Union and its bargaining unit members and oversimplifies the CBA at issue**. As the "exclusive bargaining" agent for home care employees of the Respondents, the **Union had authority to enter into CBAs and subsequent agreements, on behalf of its bargaining unit members**. The Proposed Intervenors' arguments that former employees cannot be bound by a CBA or cannot be represented by their Union in arbitration are without merit. To accept that conclusory argument would "**essentially allow Union members to opt-out of their obligations under a collective bargaining agreement by simply withdrawing from their Union prior to bringing suit**..."*
>
> *Indeed, courts in this Circuit have **compelled former employees to arbitrate** claims under CBA alternative dispute provisions, **including in instances where supplemental agreements were executed after the plaintiff ceased employment***." [169] (emphasis added)

And so, a judge of the Southern District lays out the reality of American labor relations. It is not the obligation of the union to recognize the autonomy and agency of the workers it ostensibly represents. The directionality is reversed: it is the obligation of the workers to submit to the coercive terms of a collective bargaining agreement, and to have their claims in either the state or federal court preempted all in the name of the reverence of industrial peace – a peace of capital, its power uncontested, its workers disciplined to surrender to its rule.

***

To be clear, as much as one may find disappointment with the Court's ruling – we certainly do – we cannot forget that it is fundamentally and materially CPC's and 1199's doing to orchestrate the legal conditions culminating in this situation. Judge Koeltl, along with all of the judges and justices who sit on this country's federal bench, are constitutionally bound to rubber-stamp rulings under the law as it exists in that specific moment of time; indeed, a body of law ideologically endowed to empower capital and punish the working underclasses. There is an unequivocally strong case to make against a labor law regime, in statute and in precedent, virulently predisposed to fail workers. Nor is the judiciary exempt from criticism in their acquiescence towards exercising an anti-worker jurisprudence.

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[168] *National Football League Management Council v. National Football League Players Association,* 820 F.3d 527, 536 (2d Cir. 2016).

[169] *1199SEIU United Healthcare Workers East v. PSC Community Services,* et al., SDNY 2020. February 18, 2021. CM/ECF Doc. No. 159, pg. 32-33.

Notwithstanding the American state's failure to protect its workers, we would walk directly into CPC's trap if our blame was targeted exclusively at insufficient law, for it was not the United States or New York State government that ordered CPC and 1199 to force its workers to arbitration – it was CPC and 1199 themselves. Nor did either the federal or state government demand that the union and agency intentionally delay remuneration of backwages and termination of the twenty-four-hour shift for the workers for many a year and counting.[170]

It is CPC and 1199, whose deployment of the legal weapons of labor violence is undeniably thorough, who *knew* that this was the strategy to circumvent any means of lawyering and courtroom resistance by its workers. We and our community should see this as nothing other than betrayal – in one case, by a union of its obligation in spirit if not by law to defend its workers against any assault on their rights and dignity. In the other, by an Asian American services agency that had, in outward appearance, cultivated trust amongst its constituency, only to categorically betray that trust and deceive the public in obscuring its true treatment of workers.

[170] At the time of this report's publishing, the *Chu* case remains in the Southern District pending the Court's decision to remand the case back to state court or not. Appeals to the Second Circuit of Judge Koeltl's decision are pending.

III. ARBITRATION BY COERCION

Now is the time to generalize our discussion of the Chinese-American Planning Council's exploitation of workers to advancing a simple but devastating argument: that CPC's jurisprudence and the ideological foundation that undergirds it is ruinous not only for its workers consigned to the twenty-four hour shift and deprived of due wages, **but for tens of millions of workers hegemonized by firms employing legal weapons of labor violence**.

Put differently, appeals to "solidarity" or "sympathy" for the workers are insufficient, for it eludes the most disturbing and consequential point of the Chinese-American Planning Council's legal stratagem: **that there is no worker immune to the long arm of capital or the state apparatus engineered to enforce the will of the boss.** We have already had plenty to say on arbitration in the two major lawsuits CPC workers have been involved in. It behooves us to expand our analysis beyond the idiosyncrasies of this case. Hence our final act will proceed in two arguments:

Argument 1: In building off of the conclusions of the preceding chapter, we can now demonstrate how the privatized rule-making process of arbitration directly leads to our first claim: **that through the arbitrator's establishment of procedural and jurisdictional rules in the arbitration forum, CPC has established precedent for tens of thousands of New York City home care workers to suffer material injury, not only its own.** Moreover, by its coercive use of arbitration, CPC contributes to the growing ubiquity of anti-labor employer practices that all but guarantee certain defeat of workers who strive remedy their grievances through legal channels.

Argument 2: Closely analyzing the arbitration structure, we find that the home care agencies and 1199 have taken their cues from numerous precedents previous established by federal courts. These precedents consist of comparable circumstances of worker exploitation in the real estate industry. That precedent established in a different industry has material bearing in this case is alarming. This phenomenon we will call **cross-industry precedent**, and it is the mechanism by which mass injury to workers in the home care industry extends to workers in others.

A. Arbitrator Scheinman's Rulings

1. The October 25, 2016 Arbitrator Award: Setting Broad Jurisdictional Claim Over Workers' Grievances

After SDNY Judge Forrest's order to force the *Chan* suit to arbitration, deliberations commenced between 1199SEIU and CPC on how to proceed with the mediation and arbitration process. As we previously mentioned, due to the Union's status as the "exclusive bargaining representative" on behalf of CPC's workers, only the Union and CPC were permitted to be parties to the alternative dispute resolution. No worker, or even their legal counsel, was officially recognized as a party. Moreover, in at least three prior conferences and hearings held between the Union, CPC, and Arbitrator Scheinman on December 18, 2015, January 7, 2016, and May 23, 2016, the former two parties consented to designate the question of arbitrability for Arbitrator Scheinman to decide. [171]

Specifically, two questions were posed, deliberated and decided in the October 25, 2016 award:

[171] *Chu* et al., NYSC 2016. October 28, 2016. NYSCEF Doc. No. 27, pg. 6.

"*1. Is the grievance arbitrable?*

2. If so, what shall be the remedy?" [172]

To the first question, Arbitrator Scheinman ruled in the affirmative. But notably, this is the moment in which Arbitrator Scheinman *consolidates* the *Chan* and *Chu* claims and lays claim on jurisdiction to the grievances of the entire collective of workers that constitute both lawsuits (currently employed and retired). Recall our discussion on the retroactivity the 2015 collective bargaining agreement, including the mandatory arbitration clause – this is the ruling in which that retroactivity was effectively established.[173]

Arbitrator Scheinman's line of reasoning is consistent with all we have discussed thus far. In his opinion, he writes:

> "*As an arbitrator, my role is a limited one. It is to interpret the parties' agreement as written. If the agreement is clear on its face and from* ***the parties' chosen words their intentions are manifest, then I am without power or authority to deviate from those intentions****. Rather, if the contract language is clear and consistent, I must enforce the contract according to the plain meaning of the parties' language*." [174] (emphasis added)

The Arbitrator suggests that his role is that of a humble adjudicator, bound by the provisions of the collective bargaining agreement. In truth, the broadness of the CBA has enabled a far-reaching interpretation of its contents to assert such an extensive jurisdiction, including over workers who had since long retired prior to the ratification of the mandatory arbitration clause. But "broadness" is not simply a question of vagueness or carelessness. It facilitates the ceding of all power to an industry-friendly arbitrator by way of the **presumption of arbitrability**, or the question of deciding what is arbitrable:

> "*Where the Agreement contains a* ***broad arbitration clause a presumption of arbitrability attaches****. This is a fundamental principle of arbitrable jurisprudence. Also fundamental is the principle in the absence of a specific provision excluding a particular grievance from arbitration,* ***the burden on the party to overcome the presumption is high***." [175] (emphasis added)

Combining this fact with the Arbitrator's assertion of jurisdiction over the *Chan* and *Chu* suits:

> "*Upon my careful consideration of the evidence and arguments presented****, I find the federal, state and local wage claims filed in the Chan lawsuit are properly before me****. Therefore, the claims will be subject to the mediation and arbitration procedures set forth in the ADA Provision. I also find the wage claims filed in the Chu lawsuit are properly before and shall be consolidated with the Chan matter*." [176]

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[172] *Ibid,* pg. 7.

[173] Judge Forrest, in her February 2016 decision compelling the *Chan* plaintiffs to arbitration, argues using Second Circuit precedent in favor of the retroactive interpretation of the CBA. But as the federal court itself inherently ceded questions of arbitrability to the private arbitrator, we claim that it is in the October 25 arbitrator's award in which the retroactivity interpretation is formally recognized and implemented. Pedanticism aside, the fundamental point, however, still stands: the broadness of the mandatory arbitration clause was **intentional** on the part of CPC and 1199 to ensure that **all** claims would fall under the arbitrator's jurisdiction, and this should make the agency's and union's actions all the more contemptible.

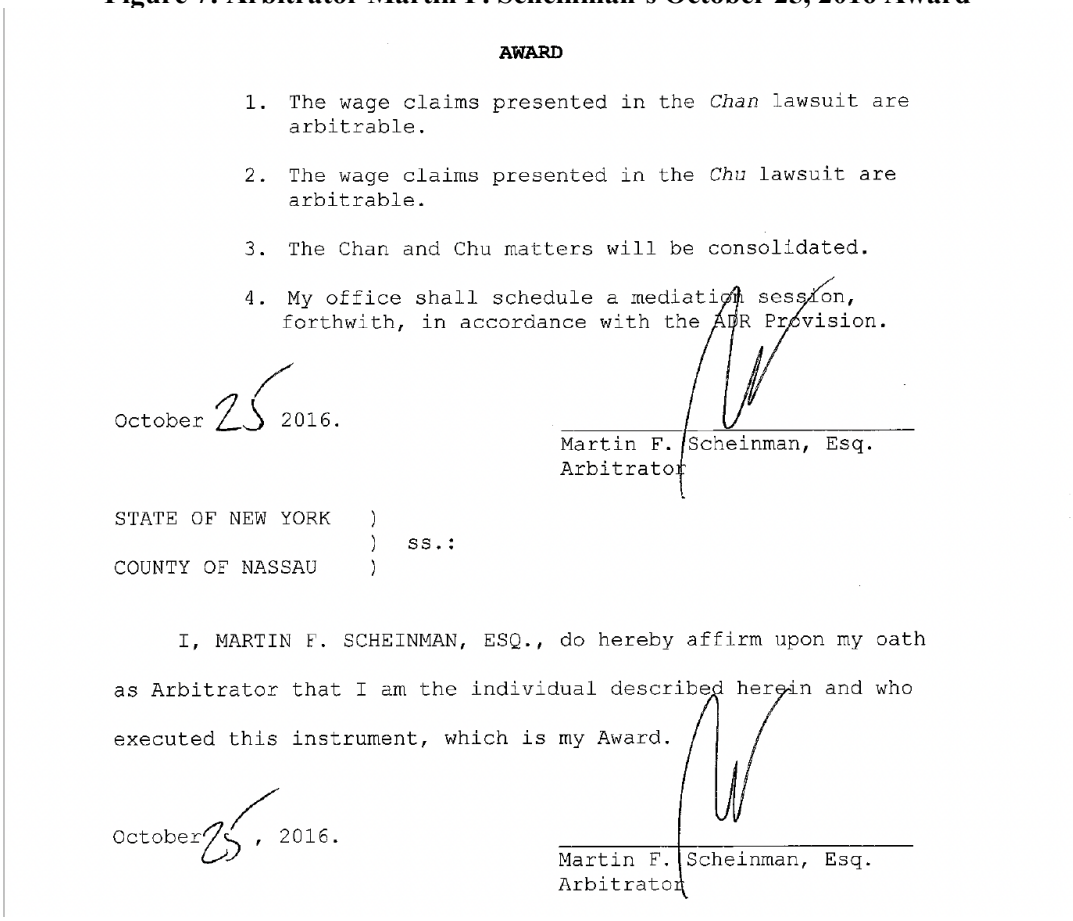
[174] *Ibid*, pg. 14.

[175] *Ibid*.

[176] *Ibid*.

We can see that the broad language surrounding arbitration and the presumption of arbitrability have extended to all "federal, state and local wage claims" the workers have made in their respective lawsuits against CPC. In this instance, one can see not simply a privatization of critical home care services, but even a surrender of the entire dispute resolution process to industry-friendly arbitration. **It begs the question of why a legislature might even concern itself with legislating policies to protect workers and direct the state to support and defend worker power**, if claims brought under the state's laws are merely diverted to private arbitration.

Figure 7: Arbitrator Martin F. Scheinman's October 25, 2016 Award[177]



AWARD

1. The wage claims presented in the *Chan* lawsuit are arbitrable.

2. The wage claims presented in the *Chu* lawsuit are arbitrable.

3. The Chan and Chu matters will be consolidated.

4. My office shall schedule a mediation session, forthwith, in accordance with the ADR Provision.

October 25 2016.

Martin F. Scheinman, Esq.
Arbitrator

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

I, MARTIN F. SCHEINMAN, ESQ., do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

October 25, 2016.

Martin F. Scheinman, Esq.
Arbitrator

Unfortunately, the October 25 Arbitrator's Award would not only persist in the cases of the CPC workers, but itself serve as a *standard* for the arbitration of *all* claims involving 1199 bargaining unit members.

2. The April 17, 2020 Arbitrator Award: Global Industry-wide Settlement

Four years later, on April 17, 2020 during the apex of the COVID-19 crisis in New York City, a critical ruling was made on the arbitrability of all wage claims made by 1199 bargaining unit members at over forty nonprofit home care agencies.

[177] *Ibid*, pg. 18.

Akin to the 2016 award, the Arbitrator posed a few questions related to the presumption of arbitrability, but this time with a third question[178] in relation to the involvement of plaintiff counsel in the arbitration:

> "*1. Are the claims encompassed by the wage and hour related grievances involving current and former 1199 bargaining unit members, including those arising under federal, state and local law, arbitrable?*
>
> *2. Does the Arbitrator have jurisdiction to adjudicate the claims asserted in the wage and hour grievances, arising under federal, state and local law, filed by the parties to the Collective Bargaining Agreement ("Agreement") which encompass all claims arising under the federal, state and local laws named in the Agreement, as well as any pending litigation or administrative actions on the identical claims, irrespective of whether employees' employment terminated prior to the effective date of the Memorandum of Agreement providing Alternative Dispute Resolution language for exclusive mediation/arbitration procedures for wage and hour disputes pursuant to the Agreement between the parties?*
>
> *3. What is the role, if any, of counsel for the individual Plaintiffs, collective or putative class in this proceeding*?" [179]

In answering the first question, Arbitrator Scheinman once again appeals to the broadness of arbitrability clauses and the attachment of the presumption of arbitrability. He argues:

> "*By their chosen language, the parties agreed to arbitrate all claims brought by either the Union or employees for redress of violations of any of the covered statutes. By providing for arbitration of all such claims,* ***I conclude they intended arbitration be the exclusive forum for resolution of these claims, and clearly and unmistakably waived access to the judicial forum***." [180] (emphasis added)

We can see further evidence of this intention by the Union and the nonprofit agencies, for Arbitrator Scheinman additionally writes that not a single party, either the Union or any agency, voiced dissent to the arbitrability question:

> "*Significantly, during the entire course of this proceeding,* ***no party to the Agreement argues the claims encompassed by the grievance are not arbitrable****. In their written brief, and statements during the hearing, both the Union, and those Employers addressing the issue, have conceded my authority to determine arbitrability of the Union's grievance. They agree the claims encompassed by the grievance are arbitrable*." [181] (emphasis added)

To the second question, Arbitrator Scheinman yet again ruled in the affirmative. But his reasoning for extending arbitrability *temporally*, no matter if a home care worker was employed at the time of the mandatory arbitration clause ratification, directly implicates CPC and 1199 culpability. Chinese-American

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[178] Most important are the first two questions. To the third question, Arbitrator Scheinman's opinion and award provides for the creation of a "Plaintiffs' Coordinating Counsel," which at most serves as a consultation body for the Union and has extremely limited (if any) powers to influence anything in the arbitration.

[179] *Chu* et al., SDNY 2021. March 18, 2021. CM/ECF Doc. No 12-4, pgs. 7-8.

[180] *Ibid*, pg. 33.

[181] *Ibid*, pg. 36.

Planning Council is far from the only nonprofit home care agency that has been under litigation for alleged wage theft. Nonetheless, it is precisely the October 25, 2016 ruling, along with SDNY Judge Forrest's February 23, 2016 ruling to compel arbitration of the *Chan* claims, that Arbitrator Scheinman invokes as precedential justification for his award in 2020:

> "*In my October 25, 2016, Opinion and Award in Chinese-American Planning Council Home Attendant Program, Inc. and 1199 SEIU United Healthcare Workers East,* ***I ruled the same ADR Provision applies retroactively to claims accruing before its effective date****. I did so based upon the parties' express language arbitration was to be the exclusive remedy for "all claims" arising under the covered statutes, and after taking into account the absence in the contract language of any temporal limitation upon covered claims. I found persuasive Judge Forrest's decision in Chan et al v. Chinese-American Planning Council Home Attendant Program, Inc., (S.D.N.Y. (Feb. 23, 2016) on the issue of retroactivity, where she compelled arbitration of wage claims under the same ADR Provision and stated:*
>
> > ***Plaintiffs seek to avoid this mandatory arbitration clause by arguing that the agreement to arbitrate embodied in the 2015 MOA cannot apply retroactively to claims that may have accrued prior to the execution of the 2015 MOA. This argument is meritless****. The Second Circuit has indicated that, in the absence of a provision placing a temporal limitation on arbitrability, an arbitration provision may cover claims that accrued prior to the execution of the agreement to arbitrate. Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc. 198 F.3d 88, 98-99 (2d Cir. 1999); see also Arrigo v. Blue Fish Commodities, Inc., 408 F. App'x 480, 481-82 (2d Cir. 2011) (summary order); Duraku v. Tishman Speyer Properties, Inc., 714 F. Supp. 2d 470, 474 (S.D.N.Y. 2010)*." [182] (emphasis added)

The Arbitrator concludes his argument with:

> "*My determination jurisdiction extends to all claims encompassed by the Union's grievance, irrespective of whether employment ended before the effective date of the ADR Provision, is* ***consistent with my prior Award*** *and equally apt in the context of the Union's class grievance. More fundamentally, my determination honors the intent of the contracting parties. They provided arbitration as their exclusive forum for resolving all claims arising under the covered statutes, and did so without limitation as to whether the claims accrued before or after adoption of their ADR Provision*." [183] (emphasis added)

It is at this point the culmination of CPC's efforts to compel its workers' claims to arbitration has borne fruit, and the consensus of the bosses is made most clear. For CPC's exploitation and theft from its workers is no longer a private controversy between it and the workers – **through Arbitrator Scheinman's opinion, CPC's forcing of all worker claims, irrespective of employment date, to arbitration is now *enshrined* in the binding rulings of the Arbitrator, with the full assent by the Union and nonprofit agencies**. **It is now an industry-wide standard for home care workers in New York City**. Among the strongest arguments for why the workers, and hence this author, have chosen to scrutinize CPC's dealings is exactly this reason. To claim that CPC is "one of" the offending agencies is scandalously insufficient. Significant elements of its employment practices, and the anti-worker jurisprudence it has opted to exercise through this ordeal, have been adopted as a model for all other 1199 agencies to follow in resolution of their workers' grievances.

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[182] *Ibid*, pgs. 38-39.

[183] *Ibid*, pg. 39.

When taking into consideration the fact that 1199 represents tens of thousands of home care workers across New York City, it is uncomplicated to observe how the decisions of a select group of managers at the nonprofit agencies manifest into protracted material suffering for the workers they employ. It should be exceptionally alarming for anyone to recognize the debilitating effects these decisions have on not only tens of thousands of home care workers who are victims of wage theft, but in the ensuing collateral and irreparable damage done onto the destitute economic conditions of their families and households. For this, culpability must lie squarely and especially with CPC and 1199 SEIU.

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We have now justified the first argument put forth at the outset of this chapter. In our closing cadence, we will argue the second and go even further than anti-labor practices in the home care industry – that abuse of workers in **any** sector, by way of the legal superstructure governing labor relations in our society, has material repercussions **across** seemingly unrelated industries. Thus the true danger in CPC's practices lie not only in the material damages to its workers, but in the accelerated deterioration of labor relations and the condition of the working class in all of society.

B. Arbitration in General; The Supreme Court's Frankenstein: The Federal Arbitration Act of 1925

The next step is to move beyond arbitration in the particular case of CPC and 1199 workers and analyze its impact on labor relations in general.

Every theme we have discussed thus far vis-à-vis CPC's mandatory arbitration – coercion, deception, and the priority of industrial peace above all else – generalizes to arbitration in any industry, to workers *and* consumers alike. By no means is this by accident. Decades' worth of anti-labor litigation by employers, and acquiescence by courts who were more than willing to shift the balance of power in American labor relations to the employer, have been integral to the erosion of labor rights post-New Deal. The logic applied to CPC in our discussion of the doctrine of preemption readily applies here: for all of the agency's grandstanding on needing to "change the system" to remedy the wrongs of the home care industry, its jurisprudence soundly rests on the American capitalists' storied tradition on the eviscerating of workers' rights for material enrichment.

One idea we have intentionally emphasized is the waiving of the workers' rights to litigate their claims in court. It is true that the *right* to vindicate one's rights in a competent court of law ought to be – and in theory, is – an inalienable right of people in the United States. But we do not speak of rights in the abstract alone. The reality is that the mandatory surrender of statutory rights workers suffer leads to tangible losses, and *significantly* reduces the probability in which they see a day of justice.

A 2011 study revealed that at trial, employees who must submit to mandatory arbitration are statistically less likely to win than if they had been in federal court (~15% less likely) or in state court (~35% less likely). We reproduce the study's table comparing these outcomes below:

Table 10: Comparison of Outcomes of Employment Arbitration and Litigation[184] [185]

	Mandatory employment arbitration (Colvin)	Federal court employment discrimination (Eisenberg and Hill)	State court non-civil rights (Eisenberg and Hill)
Mean time to trial (days)	361.5	709	723
Employee trial win rate	21.40% (n=1,213)	36.40% (n=1430)	57% (n=145)
Median damages[186]	$36,500	$176,426	$85,560
Mean damages	$109,858	$394,223	$575,453
Mean including zeros	$23,548	$143,497	$328,008

To be clear, the best of all worlds is for employers to settle with their workers on all unpaid backwages and the immediate discontinuation of exploitative labor practices – or better still, to not exploit its workers to begin with. Nevertheless, after injuries against workers have been committed, it is critical to scrutinize means of redress workers have and determine which judicial forums are the most hostile for workers to see their day of justice. Clearly, on both fronts of power asymmetry and empirical outcomes of employment arbitration cases, the evidence that mandatory arbitration serves to disenfranchise and materially dispossess workers, all in the name of liability evasion for the employer, is overwhelming.

But where did it all begin? The origins of arbitration as means of dispute resolution dates well before the founding of the United States, and has been a component of the English common law tradition for many centuries.[187] Arbitration specific to United States law, and in particular, its perverse construction as an anti-worker legal weapon, dates to its genesis in the New York Arbitration Act of 1920.[188] Aggressively pushed for by business interests such as the New York Chamber of Commerce and the American Bar Association's Committee on Commerce, Trade, and Commercial Law, the New York Arbitration Act was a response to add enforceable teeth to contractual relations between parties – in other words, statutorily prohibiting parties from escaping contractual obligations to arbitrate disputes.[189] Another way to think about it is the intent to create a body of rules – procedures – that dictate how private business disputes are to be resolved. This will be an important point for later.

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[184] Alexander J.S. Colvin, "An Empirical Study of Employment Arbitration: Case Outcomes and Processes." *Journal of Empirical Legal Studies* 8(1): 1-23 at 5 (2011) and Eisenberg, Theodore, and Elizabeth Hill "Arbitration and Litigation of Employment Claims: An Empirical Comparison." *Dispute Resolution Journal* 58(4): 44-55 (2003).

[185] Table reproduced from Stone, Katherine V.W., Colvin, Alexander J.S., *The arbitration epidemic: Mandatory arbitration deprives workers and consumers of their rights.* Economic Policy Institute. https://www.epi.org/publication/the-arbitration-epidemic/

[186] In 2005 dollar amounts.

[187] Outside of England and the Anglo-world, compulsory arbitration was implemented by the Italian fascist regime at the same time the FAA came into force in the United States. In particular, the Rocco laws (named after Alfredo Rocco, one of the intellectual heavyweights of the corporatist ideology in Mussolini's Partito Nazionale Fascista) criminalized worker strikes, monopolized legal representation of workers' interests only in industrial syndicates loyal to the fascist regime, and established labor courts with the intent to mandate arbitration of labor disputes that arose. See *Italian Fascism, 1919-1945* by Philip Morgan.

[188] Stone, Katherine V.W., Colvin, Alexander J.S., *The arbitration epidemic: Mandatory arbitration deprives workers and consumers of their rights.* Economic Policy Institute. https://www.epi.org/publication/the-arbitration-epidemic/

[189] *Ibid*.

Eventually, these New York business interests set larger sights on the law of the nation itself, and began lobbying the Congress for a federal act mirroring that of the New York legislation. Professor Imre Stephen Szalai of Loyola University New Orleans College of Law, in his research on the history of the genesis of this act – what would become the Federal Arbitration Act ("FAA") – writes:

> *"The individuals who were involved had passionate, sincere beliefs about the use of arbitration to resolve commercial disputes. The campaign for the FAA involved celebratory parties fitting for the Great Gatsby, invitations to an exclusive Hollywood hangout, and stump speeches at movie theaters, synagogues, and churches."* [190]

Among the strongest supporters in the federal government for an arbitration act was then-Secretary of Commerce (and future president) Herbert Hoover, whose ideological position on peaceful industrial relations found no fault with the exemplar of private dispute resolution between private parties.[191] Indeed, the class composition of individuals and organizations advocating for the passage of the FAA, from the New York City gilded elite, to senior figures in the United States government, to individuals likely to have been invited to social functions befitting that of the luxury of the West Egg estate of Jay Gatsby[192], cannot be ignored.

By the mid-1920's, capital had won its legislative victory. The Federal Arbitration Act was signed into United States law by President Calvin Coolidge in February 1925. But as in the case of the Labor Management Relations Act, and in all foundational pieces of legislation, the Act itself only tells part of the story. The FAA of the Roaring Twenties is most certainly not the FAA of the contemporary era, and its interpretation by the federal judiciary in the century since its passage has been a critical (if sorely underdiscussed) component of the perilous erosion of labor power our society has witnessed.

One of the substantive differences between the FAA of a century ago and the Act of today is the sweeping scope in which the FAA today is interpreted to have claim over. Originally, for all of the ethos surrounding the FAA's passage embracing a libertarian approach to the governance of industrial relations, the FAA was intended and composed with the intent to arbitrate *trade* disputes. In no manner was the FAA of the 1920's even remotely near the breadth of meaning and power it has been endowed with today. Writing for the Economic Policy Institute, Katherine V.W. Stone and Alexander J.S. Colvin argue:

> "*The drafters, legislators, and advocates of the FAA assumed that the statute applied only to business disputes. It was drafted with an eye toward* ***trade association arbitration, not employment or consumer disputes. Indeed, the statute contains a specific exemption for 'contracts of employment***.'" [193] (emphasis added)

As a matter of fact, the Federal Arbitration Act consists of the entirety of Title 9 in the United States Code, in which its first section imparts clear insight to Congress's intent in 1925:

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[190] Imre Stephen Szalai, *Exploring the Federal Arbitration Act through the Lens of History Symposium,* 2016 J. Disp. Resol. (2016). Available at: https://scholarship.law.missouri.edu/jdr/vol2016/iss1/9, pg. 117.

[191] Stone, Katherine V.W., Colvin, Alexander J.S., *The arbitration epidemic: Mandatory arbitration deprives workers and consumers of their rights.* Economic Policy Institute. https://www.epi.org/publication/the-arbitration-epidemic/.

[192] Fitzgerald's *The Great Gatsby* was coincidentally – perhaps uncannily – published in the same year as the passage of the Federal Arbitration Act.

[193] Stone, Katherine V.W., Colvin, Alexander J.S., *The arbitration epidemic: Mandatory arbitration deprives workers and consumers of their rights.* Economic Policy Institute. https://www.epi.org/publication/the-arbitration-epidemic/.

> " ***"Maritime transactions" and "commerce" defined; exceptions to operation of title***. *"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation****, but nothing herein contained shall apply to contracts of employment*** *of seamen, railroad employees, or any other* ***class of workers engaged in foreign or interstate commerce***." [194]

In seemingly unambiguous language, Congress promulgates the FAA to apply to matters of maritime, interstate, and foreign commerce, but explicitly *exempts* "contracts of employment of…class[es] of workers engaged in foreign or interstate commerce." Simply put, "contracts of employment" do not apply here, or so the originators of the FAA believed.

Recall our mentioning that the FAA was originally intended to be an act of *procedural* law-making – dictating rules that private parties who agreed to arbitrate would follow and be held accountable to under federal law. But beginning in the 1980's, the federal judiciary began to drastically enlarge the FAA's jurisdiction to encompass, in no exaggerated terms, "virtually all types of non-criminal disputes" [195] – namely, encroaching on the territory of *substantive* rights. Most particularly for our circumstances, the substantive rights of *workers*. Short of committing a crime and facing prosecution by the state, where private disputes arise – and *especially* in disputes with an asymmetry of power as stark as boss and worker – arbitration serves as a means for powerful and exploitative actors to exert their will by force of the law on the legally disenfranchised:

> "*However, through flawed judicial interpretations, the Supreme Court has dramatically expanded the FAA to support an extensive system of dispute resolution covering virtually every type of non-criminal claim, and the FAA today is displacing broad swaths of state power*." [196]

The corruption of the FAA into becoming a woefully unknown, and yet formidably powerful force in the refereeing of American labor relations, has spiraled so out of control so as to warrant dismay from Justices of the Supreme Court. The late Justice Sandra Day O'Connor called it "an edifice of [the SCOTUS's] own creation." One might even call it a "legal Frankenstein":

> "*As lamented by some Justices, the Supreme Court has "play[ed] ostrich" and ignored the history of the FAA, and "the [Supreme] Court has abandoned all pretense of ascertaining congressional intent with respect to the [FAA], building instead, case by case an edifice of its own creation*." [197]

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[194] *United States Code*. Title 9 – Arbitration, § 1.

[195] Imre Stephen Szalai, *Exploring the Federal Arbitration Act through the Lens of History Symposium,* 2016 J. Disp. Resol. (2016). Available at: https://scholarship.law.missouri.edu/jdr/vol2016/iss1/9, pg. 117.

[196] Imre Stephen Szalai, *Exploring the Federal Arbitration Act through the Lens of History Symposium,* 2016 J. Disp. Resol. (2016). Available at: https://scholarship.law.missouri.edu/jdr/vol2016/iss1/9, pg. 122.

[197] Imre Stephen Szalai, *Exploring the Federal Arbitration Act through the Lens of History Symposium,* 2016 J. Disp. Resol. (2016). Available at: https://scholarship.law.missouri.edu/jdr/vol2016/iss1/9, pg. 122.

Of greater import than the lamenting of federal jurists, the FAA's intrusion into the literal prescription of who has rights, and who does not – the *substantive* law – lies at the heart of the legal "operating system" by which capitalists like Chinese-American Planning Council are able to exert their leverage against their own workers. In tandem with the preemption strategy explained in the preceding chapter, the Federal Arbitration Act, when taken to its extreme conclusion, has the ability to render state law's regulatory powers to protect and bolster workers **absolutely powerless**. Two formative Supreme Court case establishing this profound change in jurisprudence extending to employment and many other forms of contract are *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* in 1983 and *Southland Corp. v. Keating* in 1984. To the latter case, Professors of Law Kathryn A. Sabbeth of the University of North Carolina and David C. Vladeck of Georgetown University Law Center argue:

> "*The first wave of decisions, especially Southland Corp. v. Keating, held that the Federal Arbitration Act ("FAA") was not, as had been previously thought, merely a procedural statute applicable only in federal court, but was instead* ***a substantive statute that preempted state law and applied with equal force to actions filed in state court***." [198] (emphasis added)

The authors leave us with an even more disconcerting conclusion:

> "*Without exception, the Court held that statutory rights – even core civil rights – could be relegated to arbitration by contract*." [199]

It might seem pedantic to speak in terms of optimal judicial forums for dispute resolution, be it through private arbitration or a court. But the venue in which disputes are adjudicated is hardly the central point. As we have seen this entire time with the Chinese-American Planning Council's litigation, forcing waiver of statutory rights is a means to deprive the workers what they are materially entitled to. And disturbingly, the evolution of the doctrinal interpretation of the FAA was not done through legislative law, but through the *courts*, and litigants arguing for near-universal application of arbitration in these instances.

In *Moses Cone* and *Southland's* aftermath, mandatory arbitration clauses proliferated on both the worker and consumer sides. Both interpretations of the FAA effectively surrendered the adjudication and judgment of private economic disputes to the most powerful and gilded of classes, and promulgated that the federal government adopted the "preference" for arbitration as a cornerstone of its labor relations policy.

CPC's mandatory arbitration practices indisputably manifest the legacies of these foundational cases. It is the same legacy that birthed the coercion that mandatory arbitration entails for millions of workers and consumers. And it is precisely insights like this, derived from examining the jurisprudential lineage of CPC's arguments, that enable us to generalize beyond the home care industry. The magnitude of decisions like *Southland* extends beyond any one set of workers and injures many. But make no mistake – the power of a judicial decision rests not in abstract decree. Its power is realized by firms like CPC who, under no obligation, *choose* to take advantage of ill-protected workers and consumers. Understanding the legal programming behind the FAA, the asymmetrical advantages employers always have in arbitration, and the strategy for evading New York State's legal mandates for home care worker compensation, it is now clear why CPC so aggressively moved to preempt the *Chan* case in 2015 and early 2016, leading to a favorable ruling for the employer from Judge Forrest:

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[198] Kathryn A. Sabbeth and David C. Vladeck, *Contracting (Out) Rights,* 36 Fordham Urb. L.J. 803 (2009). Available at: https://ir.lawnet.fordham.edu/ulj/vol36/iss4/8, pg. 814.

[199] Kathryn A. Sabbeth and David C. Vladeck, *Contracting (Out) Rights,* 36 Fordham Urb. L.J. 803 (2009). Available at: https://ir.lawnet.fordham.edu/ulj/vol36/iss4/8, pg. 815.

> "*On December 15, 2015, CPC moved to compel arbitration and stay the instant action pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 3-4, based on the arbitration provisions of a collective bargaining agreement executed between plaintiffs' bargaining representative, 1199 SEIU United Healthcare Workers East (the "Union") and CPC. For the reasons set forth below, defendant's motion is GRANTED.*
>
> *There is **a strong federal policy favoring arbitration under the FAA**, which requires federal courts to enforce valid arbitration agreements and stay underlying litigation. See 9 U.S.C. §§ 2-3; **Moses H. Cone Mem'l Hosp. v. Mercury Contr. Corp.**, 460 U.S. 1, 24-25 (1983) ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.") …*
>
> *Plaintiffs further argue that this court should not compel them to arbitrate their claims because arbitration will be cost prohibitive, **preventing them from vindicating their rights in that forum**…**Plaintiffs have failed to support this argument with any evidence** – as opposed to mere speculation – that they are likely to incur prohibitive costs by pursuing their claims through arbitration*." [200] (bold emphasis added, underlined emphasis by SDNY)

In the Court's and CPC's outright dismissing the workers' rightfully placed concerns over having their statutory rights waived and the extraordinarily tangible fear of spending years in arbitration with only a mere fraction in awards to show for it, the "edifice of the [Supreme Court's] own creation" Justice O'Connor spoke of reveals the "Frankenstein" of American arbitration law at its heart.

C. The American Arbitration Association ("AAA"): Masters of Workers' Fate

As ubiquitous mandatory arbitration has become in the governance of industrial relations, an often-ignored organization responsible for presiding over many labor disputes is the **American Arbitration Association**. A 501(c)3 nonprofit organization, the AAA is an example of what we call a *private* creator of *private law*, or the law governing contractual relations between two private parties. Its purview is not only the resolution of disputes in labor: additionally, the AAA arbitrates construction industry, commercial (business-to-business), and consumer disputes.[201] American governments from municipalities to the federal government even order the AAA to render services for disputes arising from government regulations.[202]

The AAA's history is intertwined with the Federal Arbitration Act. The organization's founding in 1926 took place only one year after the passage of the FAA. Although the organization self-extols its virtue of "neutrality" in the arbitration of private disputes, and claims its purpose is to "reduce the burden" [203] of the courts in hearing civil dispute cases, in truth, the AAA has effectively been a privatization *en masse* of dispute resolution procedure.

However, even the prioritization of "judicial efficiency" over justice for the injured party would be an idealistic analysis of the AAA's role. In practice, the AAA has been actively weaponized by corporations and employers as a tool to deprive workers and consumers of their rights, and the material redress to which

[200] *Chan* et al., SDNY 2015. February 3, 2016. CM/ECF Doc. No. 42.

[201] American Arbitration Association. https://www.adr.org/

[202] American Arbitration Association, Practice Areas, Government. https://www.adr.org/government

[203] American Arbitration Association, Our Mission. https://www.adr.org/mission

their rights entitle them. Worse yet, the AAA has been shown to have egregious conflicts of interest with the parties it renders services for. It possesses millions of dollars in financial investments in its corporate clients, and actively solicits business clients for its services.[204] In one case in 2001, a California individual named Darcy Ting received a notice from her phone carrier, AT&T, for a claim exceeding $5,000 if she made a long-distance call from her home. Unbeknownst to her, the AAA had purchased $100,000 in AT&T bonds the year prior.[205] It should go without saying that any semblance of impartiality erodes instantaneously with financial relationships of this nature.

In one of the most consequential actions by the AAA in recent decades, the Association filed a legal brief in 2001 in *Circuit City Stores, Inc. v. Adams*, a seminal Supreme Court case that grossly corrupted Congress's intent in the Federal Arbitration Act.[206] The FAA, as we already mentioned, had exempted a number of groups of workers in the transportation sectors, and generally in "foreign or interstate commerce." This exemption was written by the Congress in the 1920's to ensure that arbitration would be constrained to trade disputes amongst firms, and not be extended to labor disputes in the abstract.

Circuit City, in keeping to the logic of the *Moses Cone* and *Southland* decisions of augmenting the power of arbitrators, took contention over the meaning of "foreign and interstate commerce" and argued that employment contracts *generally* were not subject to the FAA's exemption. In other words, under *Circuit City,* any employment contract could be arbitrated and enforced under the Federal Arbitration Act. Professors Sabbeth and Vladeck analyze:

> "*Focusing on whether Section 1's exclusion of 'contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce,' put employment contracts out of the Act's reach, the majority held that the exclusion applied only to employment contracts with transportation workers, like seamen and railroad employees, but not more generally employees engaged in interstate commerce.*
> …
> *In the aftermath of Circuit City, courts have routinely enforced boilerplate, mandatory arbitration provisions in employment contracts, even where there is clear evidence that, due to the disparity in bargaining power, the employee had no meaningful right to reject binding arbitration*." [207]

The most striking element to this ruling was the American Arbitration Association's intervention through the filing of its legal brief to the Supreme Court. Contrary to the AAA's reputation as a "neutral" organization, it is patently clear that the AAA's intervention in a significant Supreme Court deliberation with pervasive effects on labor relations is anything but a "neutral" act. There is a staunch anti-worker politics inherent in influencing the Court's decision to establish an even broader purview for FAA-related actions.

But the AAA's influence on public policy stops not at the domain of the judiciary. It too is a promulgator of public policy. In arbitrating labor disputes, the AAA determines its *own* set of rules for determining

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[204] *PRIVATE JUSTICE / Can public count on fair arbitration? / Financial ties to corporations are conflict of interest, critics say*. SFGate. https://www.sfgate.com/news/article/PRIVATE-JUSTICE-Can-public-count-on-fair-2870731.php

[205] *Ibid*.

[206] *Ibid*.

[207] Kathryn A. Sabbeth and David C. Vladeck, *Contracting (Out) Rights,* 36 Fordham Urb. L.J. 803 (2009). Available at: https://ir.lawnet.fordham.edu/ulj/vol36/iss4/8, pgs. 818-819.

jurisdictional and procedural questions in an employment arbitration.[208] It is one matter if an organization establishes rules that its constituency *voluntarily* subjects itself to through membership in the organization. However, these are rules that Chinese-American Planning Council, 1199, and the scores of nonprofit agencies under the collective bargaining agreement acquiesced to – and most importantly, rules that the agencies' workers are contractually coerced to arbitrate under.

Specifically, Rule 3(a) of the AAA's *Labor Arbitration Rules* has been invoked by the Southern District, CPC and 1199 as an authority in ceding jurisdiction questions to the arbitrator. The rule states:

> "*The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement*." [209]

And in his February 18, 2021 ruling to confirm 1199's petition to the Southern District to arbitrate, Judge Koeltl defers to Rule 3(a), surrendering the arbitrability question to the arbitrator:

> "*In this case, the CBA required that grievances be arbitrated. The subsequent 2015 MOA clarified that grievances relating to "Covered Statutes" must be arbitrated. Thus, under both agreements there is plainly an agreement to arbitrate.* ***Second, under the CBA, arbitrations occur pursuant to AAA Rules, including AAA Rule 3(a), which delegates questions of jurisdiction and "arbitrability" to the Arbitrator****. Therefore, the Respondents and the Union (on behalf of its employees) agreed to arbitrate and to delegate questions of arbitrability and jurisdiction to the Arbitrator.*
> *…*
> *…the Proposed Intervenors' arguments confuse the question of consent to arbitration (namely, did parties consent to arbitrate) with the question of arbitrability (namely, whether the dispute at issue is within the scope of the arbitration agreement). The searching review that the Proposed Intervenor encourages this Court to undertake is not appropriate, because the parties to the CBA – namely the Union and the Respondents – plainly agreed to arbitrate grievances and to* ***delegate such questions of arbitrability to the Arbitrator***." [210] (emphasis added)

Rules issued by nonprofit, self-regulatory organizations like the AAA are only endowed with power if they are granted such by arbitration parties and the governments that outsource dispute resolution to the AAA. Thus, we can see the full implications of the state of affairs in arbitration today: the AAA, an organization with deeply problematic financial relationships and systemic biases towards bosses and firms in employment disputes, has been supremely empowered to decide the fates of millions of workers in the United States who are forced to arbitrate their grievances.

But the AAA's power is not an abstract concept. Organizations like CPC and 1199 who, out of their own volition, employ arbitrators and the procedural rules of the AAA are chiefly responsible for accelerating the surrender and erosion of workers' rights. In light of this, we can be certain that arbitration is not simply a "neutral" forum to resolve labor disputes – it is an aggressively political decision to disenfranchise workers under the façade of a technocratic "impartiality."

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[208] American Arbitration Association. *Labor Arbitration Rules*. https://www.adr.org/sites/default/files/Labor_Arbitration_Rules_3.pdf

[209] American Arbitration Association. *Labor Arbitration Rules*, Section 3 – Jurisdiction. https://www.adr.org/sites/default/files/Labor_Arbitration_Rules_3.pdf

[210] *1199SEIU United Healthcare Workers East v. PSC Community Services,* et al., SDNY 2020. February 18, 2021. CM/ECF Doc. No. 159, pgs. 28-29.

D. Cross-Industry Precedent: Arbitration's Model in Real Estate

We now come to the most contemporary episode in labor arbitration, in which Chinese-American Planning Council's actions articulate for us a vision of what the future of labor holds for American workers: a world in which the rights and material dignity of *all* workers, irrespective of industry, are surrendered away.

In our review of hundreds of documents in the CPC litigation, we identified over 450 individual state and federal cases are cited by the parties collectively in both lawsuits. One motivation for this was to ascertain which case law Chinese-American Planning Council was invoking most frequently as its precedential justification for its arguments. Although a number are relevant to the issue of arbitration, two were featured most prominently in CPC's motions to arbitrate: *14 Penn Plaza v. Pyett*, a landmark 2009 Supreme Court case dealing with arbitration of civil rights disputes, and *Duraku v. Tishman Speyer Properties, Inc.*, a case heard by the Southern District of New York with similar ramifications for workers facing coerced arbitration.

Table 11: Most Cited Case Law in the CPC Litigation

Case	Plaintiff Citations	CPC Citations	Total
14 Penn Plaza LLC v. Pyett	3	6	9
Vera v. Saks & Co.	4	4	8
Severin v. Project OHR, Inc.	3	4	7
Arrigo v. Blue Fish Commodities, Inc.	1	5	6
Duraku v. Tishman Speyer Properties, Inc.	1	5	6
Jones-Bartley v. McCabe, Weisberg & Conway, P.C.	2	4	6
McLean v. Garage Mgt. Corp.	4	2	6
Moreno v. Future Care Health Servs., Inc.	2	4	6
Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.	1	5	6
Allis-Chalmers Corp. v. Lueck	1	4	5
Holick v. Cellular Sales of New York, LLC	3	2	5
Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.	1	4	5

Significantly, both *14 Penn Plaza* and *Duraku* involve arbitration of janitorial workers in the real estate industry. The cases are clear examples of what we call **cross-industry precedent**, or the emulation of anti-worker legal practices in an industry by firms in another. In this instance, we will see that the anti-labor practices by 14 Penn Plaza and Tishman Speyer Properties did not only injure the plaintiffs in each respective case – they have served as a guide in-and-of-themselves for CPC and aligned home care agencies in an attempt to evade culpability for their actions. Furthermore, these cases are notable for introducing yet another anti-labor precedent: **that unions, on top of bosses, may bargain away workers' rights to vindicate all of their statutory rights in court**.

1. Unions Surrendering Labor Rights: *14 Penn Plaza LLC v. Pyett*

The story of *14 Penn Plaza* begins with three plaintiffs: Steven Pyett, Thomas O'Connell, and Michael Phillips, all of whom were employees at Temco Services Industries, Inc. The employer is a contractor that renders building maintenance and cleaning services to commercial properties in New York City – in this

case, contracting with 14 Penn Plaza, LLC.[211] Additionally, the plaintiffs were union members under Local 32BJ of the Service Employees International Union, in which the union maintained a collective bargaining agreement with the Realty Advisor Board on Labor Relations, Inc. (RAB), which bargains on behalf of employers in the New York City real estate industry.[212]

Each of the plaintiffs was over 50 years old, and in August 2003, Temco chose to reassign the plaintiffs to positions on the janitorial staff that typically new recruits were assigned to. These positions had worse working conditions than the role the plaintiffs were initially assigned to, and also paid less. Subsequently, Pyett and the others came to the conclusion that they were discriminated by their employer for their age in the deliberate reassignment to substandard positions on the staff.[213]

The collective bargaining agreement that Local 32BJ was contractually bound to contained an anti-discrimination clause, under which workers ostensibly had a right to petition their union to pursue grievance claims:

> "*There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the American with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, New Jersey Law Against Discrimination, New Jersey Conscientious Employee Protection Act, Connecticut Fair Employer Practices Act, or any other similar laws, rules or regulations. All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI [of the Collective Bargaining Agreement] as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination*." [214]

Initially, Local 32BJ submitted grievance claims to Pyett's employer, which included the workers' age discrimination claim. These grievances went on to arbitration. However, after the arbitration process commenced, the union decided to drop the age discrimination claims. Consequently, the workers took the initiative to file civil rights claims with the Equal Employment Opportunity Commission (EEOC), which was unfortunately dismissed. The plaintiffs then took their employer to federal court in the Southern District of New York, alleging civil rights violations of the Age Discrimination in Employment Act (ADEA). In response, the employer and 14 Penn Plaza countered with a motion to compel the plaintiffs' claims to arbitration. The Southern District in this case ruled in favor of the workers, as did the Second Circuit when the defendants appealed the case. Under the Second Circuit's opinion in particular, the unenforceability of any collective bargaining agreement that purported to waive a worker's rights to vindicate statutory claims in court was affirmed.

Devastatingly for labor rights in the United States, the Supreme Court undid the justice the workers won and reversed the decisions of the lower courts in its 2009 ruling of *14 Penn Plaza, LLC v. Pyett*. The majority opinion, authored by Justice Clarence Thomas and joined by Chief Justice John G. Roberts Jr. and Justices Antonin Scalia, Anthony Kennedy, and Samuel Alito, was the nail in the coffin for the previous

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[211] *Wikipedia*. 14 Penn Plaza LLC v. Pyett. https://en.wikipedia.org/wiki/14_Penn_Plaza_LLC_v._Pyett

[212] Lavin, Howard S; DiMichele, Elizabeth. *Can Unions Waive Members' Rights to a Judicial Forum?* Employee Relations Law Journal; New York Vol. 34, Iss. 2, (Autumn 2008): 123-130. pg. 124.

[213] *Wikipedia*. 14 Penn Plaza LLC v. Pyett. https://en.wikipedia.org/wiki/14_Penn_Plaza_LLC_v._Pyett

[214] Lavin, Howard S; DiMichele, Elizabeth. *Can Unions Waive Members' Rights to a Judicial Forum?* Employee Relations Law Journal; New York Vol. 34, Iss. 2, (Autumn 2008): 123-130. pg. 125.

unenforceability of the waiver of statutory claims. Remarkably, the Court's reasoning overtly concedes the union's interests necessarily supersede the anti-discrimination rights of the worker – a line of logic that has been used to suppress the rights of the CPC workers. Justice Clarence Thomas writes for the Court:

> "*The CBA's arbitration provision is also fully enforceable under the Gardner-Denver line of cases. Respondents* [the workers] *interpret Gardner-Denver and its progeny to hold that '**a union cannot waive an employee's right to a judicial forum under the federal antidiscrimination statutes' because 'allowing the union to waive this right would substitute the union's interests for the employee's antidiscrimination rights**.' The 'combination of union control over the process and inherent conflict of interest with respect to discrimination claims,' they argue, 'provided the foundation for the Court's holding [in Gardner-Denver] that arbitration under a collective-bargaining agreement could not preclude an individual employee's right to bring a lawsuit in court to vindicate a statutory discrimination claim.' We disagree.*" [215] (emphasis added)

Justice Thomas's and the Court's disagreement with prior precedent on a union's ability to waive its members' rights to pursue statutory claims in court is significant for two reasons. Firstly, it is a recognition by the Supreme Court that there exist tensions between a union's and workers' interests – a tension that has played out repeatedly in the CPC workers' interactions with 1199. Therefore, the assumption that the interests of workers are inherently aligned with their union must be challenged. Secondly, in keeping this framing of a worker-union tension, the Court expressly disagrees with existing precedent, and in its 5-4 decision to enable a union and employer to waive workers' rights to litigate in court, delivers a debilitating blow to labor rights.

Strikingly, this was not an opinion that the Supreme Court always held. In the aforementioned *Gardner-Denver* decision. Brendan D. Cummins and Nicole M. Blissenbach write for the American Bar Association:

> "*Additionally, the Court noted the individual employee's lack of control over the labor arbitration process:*
>
> > *A further concern is the union's exclusive control over the manner and extent to which an individual grievance is presented. In arbitration…the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit**…[H]armony of interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made**.*
>
> *Thus, the Court explained that in some circumstances tensions could exist between the interests of the individual employee and the collective interests of the group, which would make court a better option for the individual employee. Based on the foregoing analysis, the Court concluded that arbitration was not an adequate substitute for a judicial forum for Title VII claims. This was the status of the law for decades*." [216] (emphasis added)

However, the implications of *14 Penn Plaza* do not stop at mandatory arbitration of age or racial discrimination claims alone. The precedent set here has been applied to *all* statutory claims, be they discrimination or employment wage claims, state or federal. In a paper titled *The Corporation's New Lethal Weapon: Mandatory Binding Arbitration Clauses*, Ashley M. Sergeant of the University of South Dakota School of Law writes:

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[215] *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009). https://supreme.justia.com/cases/federal/us/556/247/

[216] Cummins, Brendan D; Blissenbach, Nicole M. *The Law of the Land in Labor Arbitration: The Impact of 14 Penn Plaza LLC v. Pyett*. ABA Journal of Labor & Employment Law. Vol. 25, No. 2 (Winter 2010), pp. 159-172. Published by: American Bar Association.

> "*[The 14 Penn Plaza L.L.C. v. Pyett] holding became relevant authority in three types of cases: (1)* ***when statutory claims are brought in grievance arbitration****; (2) when discrimination claims should be dealt with; and (3) when employment contracts have specific protocols for handling disability cases and clauses barring employers from 'unlawfully discriminating' against their employees*." [217] (emphasis added)

With this extraordinarily broad surrender of the right to vindicate statutory claims of all sorts, it is irrefutable that the potential for rampant abuse by nefarious employers and unions more than willing to accommodate them is dire. To boot, the injustices done unto workers in the real estate industry have become exemplars for bad actors in the home care industry to mimic. Chinese-American Planning Council cites *14 Penn Plaza* early on in its litigation, rendering it foundational to the agency's efforts to compel arbitration for its workers. As early as December 2015, CPC writes in defense of its motion to stay proceedings pending compulsion of arbitration:

> "*…The express language of the CBA requires arbitration of the entire matter and a stay of the proceedings pending arbitration because all the claims in the Amended Complaint relate to the CBA provisions that direct the parties to mediation and arbitration, not litigation. Therefore, in accordance with the mandate in 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009) and its progeny, as well as the Federal Arbitration Act ("FAA"), this Court must compel arbitration and stay these proceedings pending arbitration of these claims*." [218]

CPC then invokes *14 Penn Plaza*'s chief ideological notion – that the union's agenda must supplant that of its members:

> "*CPC and 1199 bargained to arbitrate Plaintiffs' claims, and '[c]ourts generally may not interfere in this bargained-for exchange.' 14 Penn Plaza, 556 U.S. at 257****. In 14 Penn Plaza, for example, the union agreed that individual employment discrimination claims, including claims brought under the federal Age Discrimination in Employment Act, must be submitted to arbitration****. The U.S. Supreme Court held that the union had acted within its statutory authority to freely negotiate for that term on behalf of its members. It also indicated that an agreement to arbitrate other statutory claims – including minimum-wage claims under the FLSA – would require arbitration even where the standard contract-based grievance procedure in a collective bargaining agreement would not. The 2015 MOA includes a provision specifically requiring Plaintiffs to arbitrate such statutory claims. Under both 14 Penn Plaza and the FAA, then, it is clear that this Court must enforce the arbitration clause and stay these proceedings*." [219]

But once again, we must be emphatic about CPC's intentions here. Even under *14 Penn Plaza* and the Federal Arbitration Act, ***it was CPC's and 1199's choice to include the mandatory arbitration clause to begin with***. Judicial precedent does not realize itself in society's economic and social relations by mere decree; this is too abstract and a misunderstanding of how judicial power operates. Rather, public policy inaugurated by precedent in cases like *14 Penn Plaza* can only armed with teeth through individual actors, like CPC and 1199, giving force to the policy in their coercive imposition of exploitative labor relations on their workers.

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[217] Ashley M. Sergeant, *The Corporation's New Lethal Weapon: Mandatory Binding Arbitration Clauses*, 57 S.D. L. Rev. 149, 149 (2012), pg. 156.

[218] *Chan* et al., SDNY 2015. December 15, 2015. CM/ECF Doc. No. 6, pgs. 1-2.

[219] *Ibid* at pgs. 8-9.

Perhaps the most appalling implication of *14 Penn Plaza*, and more broadly, the abuse and labor violence that mandatory arbitration breeds, is the utter helplessness and deprivation of autonomy it renders a worker of any industry. One grievous yet painfully accurate description of mandatory arbitration in labor relations is that it is **nonconsensual**. As we have seen with the home care workers – all of whom initially had no idea that CPC and 1199 were negotiating the mandatory arbitration provision years ago – the perversion of labor relations in this manner necessitates the willful obfuscation of the union's dealings with the employer. On the fates of tens of millions of workers in the United States who are bound by nonconsensual and abusive mandatory arbitration clauses, Professors Sabbeth and Vladeck powerfully argue:

> "***But it is another step altogether to find consent on the part of an employee when someone else bargained away his access to court****. This is especially troubling because workers who join unions do so to enlist the unions' aid in matters of collective bargaining and resolution of contract-based disputes, not to cede control over their statutory rights. The potential impact of Penn Plaza is great not only because of the* ***more than sixteen million workers*** *in the United States who are members of labor unions authorized to negotiate collectively on their behalf, but also because of other situations in which an agency relationship may be inferred and rights waived*." [220] (emphasis added)

With the entire historical scope of mandatory arbitration and its trajectory in mind, if, indeed, mandatory arbitration is the path that "progressive" employers like Chinese-American Planning Council, and "progressive" unions like 1199 SEIU have chosen to embark on, then there truly is no meaning to political progressivism. The embrace of mandatory arbitration is an ideological position with repercussions that eclipse even the surrender of litigation rights in court. It is a statement that the worker is a servant, undeserving of both material dignity and self-expression as an individual with rights and justice they are entitled to. The ability to live in material sufficiency, even plentitude, and the exercise and realization of rights and autonomy in a greater society are prerequisites to a dignified human life. But arbitration as it is today coerced on home care workers, as it is on tens of millions of workers in the United States, denies the worker all of that. It is anti-progressive to the core. In fact, it is regression in social relations so severe so as to evoke the fascist economics of the 1920's and 1930's, as Ewan McGaughey of the King's College School of Law argues:

> *"First, it emphasizes the absolute autonomy of 'the leadership' whenever there is a conflict. Second, it negates all rights for other members of an association: everyone is equal in their subordination to the leader. Third, it excludes the ability of the law to protect the vulnerable in supposedly market or private affairs…****It pursues a social ideal that almost conforms with the fascist theories of the 1930s****." [221]* (emphasis added)

2. An Abusive Model for Arbitration: *Duraku v. Tishman Speyer Properties, Inc.*

The *Duraku* case, heard in the Southern District of New York in 2010, offers us a closer examination of the cross-industry precedent as it pertains to the emulation of exploitative employment contracts.

Analogous to the plaintiffs in *14 Penn Plaza*, the plaintiffs of this case – Sonya Duraku, Nieves Sanchez, and Julia Inirio were janitorial staff in a building operated by Tishman Speyer Properties. The workers were

[220] Kathryn A. Sabbeth and David C. Vladeck, *Contracting (Out) Rights,* 36 Fordham Urb. L.J. 803 (2009). Available at: https://ir.lawnet.fordham.edu/ulj/vol36/iss4/8, pg. 820.

[221] E. McGaughey. *Fascism-lite in America (or the social ideal of Donald Trump*), pgs 18-19.

also members of Local 32BJ, which had a collective bargaining agreement with the Realty Advisory Board on Labor Relations.

Contemptibly, the three plaintiffs endured severe and routine workplace violence, ranging from gender and racial discrimination to physical and sexual harassment and assault.[222] Exacerbating matters, the workers' employer made numerous retaliatory threats to the plaintiffs, deliberately refusing to investigate the harassment and assault allegations, and attempting to intimidate the plaintiffs by threatening their employment and even their physical security.

In response to the deplorably nightmarish conditions at their workplace, the plaintiffs brought their grievances to Local 32BJ to pursuit, as well as the Equal Employment Opportunity Commission. The union refused to pursuit the claims, and the EEOC offered a "notice to sue," at which point the Duraku plaintiffs filed a civil complaint in the Southern District against Tishman Speyer.[223] As has been the situation in every one of these cases we have examined, Tishman Speyer counter-motioned to dismiss the complaint and compel arbitration of the plaintiffs' claims.

The next steps in the litigation would be directly carbon-copied by CPC and 1199 in their own litigation against the home care workers. *During* the litigation of the *Duraku* case – which began in October 2009 – the Local 32BJ collective bargaining agreement with RAB was *amended*, in February 2010. What was the amendment? The purpose of the amendment was precisely to **codify a mandatory arbitration clause**, depriving the workers to sue their employer in court. **This is the exact move CPC and 1199 used to amend their CBA during the time the *Chan* suit was pending the New York County Supreme Court.** Adding insult to injury, the Southern District sided with Tishman Speyer, and ordered the case stayed pending arbitration.

Principally, the precedent that *Duraku* established would not have been possible without the one set by *14 Penn Plaza* in the year prior. Local 32BJ enabled the amendment of the CBA so as to allow the *Duraku* plaintiffs to be coerced into mandatory arbitration. But *Duraku* established a precedent of its own, one that was instrumental for Chinese-American Planning Council in *its* litigation: **that amendments to a collective bargaining agreement, even during ongoing litigation, are retroactive**. This is a critical mechanism that has allowed for the currently employed and retired employees to suffer the same material injury in their fight to seek justice.

In an April 2016 letter from CPC's legal counsel to Arbitrator Scheinman, the nonprofit straightforwardly concedes that the *Duraku* contract was indeed a basis for the language 2015 memorandum of agreement and collective bargaining agreement:

> "*Notably, the agreement in Duraku, which provided for the mediation and arbitration of discrimination claims, was **used as a model for the provision at issue here**, which provides for **mediation and arbitration of wage and hour claims**…Indeed, the same language of 'Whenever' and 'shall,' and the provision for the Union to decline to take a claim, are all provided for in the 2015 MOA, as in the Duraku agreement. 'A collective bargaining agreement that clearly and unmistakably requires union members to arbitrate statutory employment…claims is enforceable as*

[222] *Chu* et al., SDNY 2016. June 17, 2016. CM/ECF Doc. No 19-1. This is the civil complaint filed in 2009 in the Southern District of New York by Duraku and her co-plaintiffs. As a forewarning, the facts of the case that outline the workplace violence in this complaint are graphic in detail and deeply troubling to read.

[223] J. Nicholas Haynes, *On Precarious Ground: Binding Arbitration Clauses, Collective Bargaining Agreements, and Waiver of Statutory Workplace Discrimination Claims Post-Pyett – Duraku v. Tishman Speyer properties, Inc.,* 2011 J. Disp. Resol. (2011). Available at: https://scholarship.law.missouri.edu/jdr/vol2011/iss1/13

a matter of federal law unless Congress precluded waiver of judicial remedies for the statutory rights at issue.' Duraku, 714 F. Supp. 2d at 473 (citing 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 258-59 (2009))" [224] (emphasis added)

Where courts reward cruel bosses who refuse to rectify workplace violence, other bosses follow. Where employers allow discrimination and physical harassment and violence to transpire with immunity, the Chinese-American Planning Councils of the world embrace the shields that federal labor jurisprudence provides to steal wages and force twenty-four hour shifts, committing labor violence in their own right. Nevertheless, for the plethora of deficiencies that federal case law features, the reader should never forget: the choice to codify a collective bargaining agreement with a mandatory arbitration clause – a willful decision to defend the boss over the humanity of the worker – was always CPC's and 1199's to make. It remains theirs' to rescind if that is what it takes to do right by their workers.

E. The Twilight of Workers' Rights – A Warning to Workers of All Trades

It is impossible to say for certain where staying our course on the aforementioned labor relations will take us. But it is not inconceivable that unsavory bosses in industries far and wide will look towards the global industry arbitration in New York City's home care industry as an instructive paragon for exploiting its workers with impunity.

One mistaken belief observers of labor disputes frequently fall into is the assumption that crimes (of the moral and legal variety) against workers only injure so-called "blue-collar workers." Those who would argue this claim do so ignorant of recent case law around wage claims made by "white-collar" office workers. For even in the present day, the federal judiciary has established case law depriving higher-income workers of their legally entitled rights to vindicate statutory claims in court. An example of this is in the 2018 *Ernst & Young LLP v. Morris* Supreme Court case, in which Justice Neil Gorsuch, writing for a 5-4 majority of the court, affirmed the enforceability of individual employee-employer arbitration contracts, superseding any authority that the National Labor Relations Board may exert in a situation like this.[225] The lesson should be incontrovertibly clear to the reader: no worker is immune to the types of devious anti-labor practices that many allege the Chinese-American Planning Council Home Attendant Program to be culpable for.

Although we discuss case law at length in this report, our collective dilemma as workers should not be reduced to the realm of legal relations alone. We discuss the law at length because it is integral to understanding CPC's weapons of labor violence, and more fundamentally, the ideological structure undergirding its stratagem. Even more elementary than the law is precisely this: the structure that governs our inherent worth and value as workers, producers, and human beings in society, and the disturbing ways in which CPC and other bosses are quietly molding that structure to injure all workers. There can be no doubt that unscrupulous employers in all sorts of industries will look to CPC's labor exploitation and violence as a model to emulate. It is precisely this we should fear.

[224] *Chu* et al., NYSC 2016. April 19, 2016. NYSCEF Doc. No. 7-6, pg. 4.

[225] *Supreme Court Rules in Favor of Employers by Enforcing Arbitration Agreements*. American Bar Association. https://www.americanbar.org/groups/litigation/committees/woman-advocate/practice/2018/enforcing-arbitration-agreements/

"I CAN SUE YOU AND SEND YOU TO JAIL": TESTIMONIES OF THE CPC HOME ATTENDANTS

We come to the conclusion of this report with the most compelling and important pieces of evidence of all – the oral testimonies of the workers themselves, recalling their experiences in working twenty-four hour shifts as home attendants at Chinese-American Planning Council. Interviews were conducted, via Chinese-language translator, by the Office of Assemblymember Ron Kim ("OARK") with CPC workers who willingly volunteered their time to speak about the labor violations they allege. The questions posed by OARK to the workers spanned the nature of working the twenty-four hour shift, and the experiences the workers had in dealing with their management at CPC-HAP and union representatives at 1199SEIU. In the interest of clarity and brevity, the interviews have been edited and excerpted with the workers' express consent.

The statements below by four workers this Office interviewed comprise serious allegations, ranging from blatant complacency and disregard for extremely sub-standard working conditions by CPC-HAP, retaliatory threats made by CPC-HAP to the workers, including threats of termination of employment and even "jail," and knowing and willful involvement by at least one manager at CPC-HAP in timesheet and record-keeping improprieties. Accountability must include a comprehensive and exhaustive investigation into the wrongdoing these and other workers have been subjected to, with those responsible for the perpetuation of such improprieties brought to justice.

Where requested, the workers' personally identifiable information has been redacted. Bold-print indicates emphasis on the workers' testimonies that indicate the precarity of the home attendants' situations, and the abusive practices from CPC-HAP they have had to endure.

1. Interview Excerpt No. 1 with "Ms. Chen," or "CHEN"

Worked as a home attendant at CPC: May 1998 to July 2017
24-hour shifts for CPC: 1999–2017 (18 years)

OARK: Please describe to me the effects the twenty-four hour shift has had on your personal – meaning physical, mental, or spiritual health.

CHEN: From working 24-hour shifts, I'm mentally fatigued and hurt all over, my hands, my fingers, my shoulders and back hurt. Years of 24-hour shifts, pushing wheelchairs, running their errands really takes a toll on you. My joints hurt all the time and I frequently need headache relief medication. Sleep is so difficult. I wake up frequently in the middle of the night.

OARK: Please explain to me, in as much detail as possible, the hour-by-hour experience of working a twenty-four hour shift for CPC-HAP in a client's home.

CHEN: I cared for a bedridden patient who had to be flipped every 2 hours throughout the night to prevent bedsores, so I did not get to sleep. I slept on an old pull-out sofa bed. It was in very bad condition because the patient's grandchildren often jumped on it. There were only

three small springs supporting the cushion, and it was so uneven I had to stack magazines in the spots that were sinking down. **I told CPC and asked them to tell the family to replace the bed, but CPC ignored me. This sofa bed was in the same room where the patient's family watched TV and used the computer until midnight, so I really could not rest.**

OARK: Has the managerial staff at CPC-HAP ever threatened to retaliate against you for speaking out against your working conditions, time record-keeping, or any other aspect of your employment?

CHEN: My partner and I were very detailed with our timesheets, recording whenever we got up to help the patient overnight, following CPC's policy. However, in response, **CPC called the patient's son and portrayed our detailed record-keeping to the patient's family as if I was complaining that the patient was getting up so many times. CPC even told the family that if the patient continued to need care at night, the patient would have to be sent to a nursing home.**

The family in turn yelled at us and treated us coldly from then on. I explained that it was CPC's policy to record everything we did overnight in our timesheets. CPC told us the patient's son claimed we were overreporting and stealing from the government. I explained to CPC that according to the patient's care plan from a nurse, I had to flip her over every 2 hours at night. And we need to help the patient use the toilet at night.

This work was so difficult and hard. I put my sweat and blood into this work. I was mentally fatigued the whole time I was working 24-hour shifts, the whole time my head was hurting.

***

Interview Nos. 2 and 3 with Zhao E. Jiang and Gui Zhu Chen were conducted together. We present their responses here separately for clarity.

2. Interview Excerpt No. 2 with "Zhao E. Jiang," or "JIANG"

Worked as a home attendant at CPC: 2013 – February 2019
24-hour shifts for CPC: 2013 – February 2019 (6 years)

OARK: Could you explain to me the overview of the shared experiences you and your colleagues have had working the twenty-four hour shift? Please describe to me the effects that the twenty-four hour shift has had on your personal – meaning physical, mental, or spiritual health.

JIANG: I cared for a patient who got up 6, 7, 8 times per night. We didn't even have a bed to sleep on at night. We slept on a narrow, uncomfortable board next to the bathroom door. I didn't get much sleep anyways since we had to get up so many times at night to help the patient.

I still have headaches and back problems from working those shifts even though I retired years ago.

OARK: In general terms, can you summarize the quality of your interactions with your managerial staff (e.g. have they been kind, rude, abusive)?

JIANG: When we told CPC that the patient didn't provide a bed for us, CPC ignored us and said "This is the way it is, if you don't like it, don't work." We even sent photos of the situation to CPC, and they said "Tough luck, if you don't want to do it, we can hire someone else instead."

When my partner Gui Zhu Chen and I submitted timesheets which included the work we did at night for our patient, **CPC's Head Nurse Lee told us, "You are lying, you are defrauding the government. I can sue you and send you to jail."** From then on, we stopped recording our overnight hours on timesheets. We were never paid for any of the work we did at night on our 24-hour shifts. It didn't matter if we recorded those hours or night, we were never paid for any of the work we did at night.

3. Interview Excerpt No. 3 with "GUI ZHU CHEN"

Worked as a home attendant for CPC: March 2013 – October 2020
24-hour shifts for CPC: March 2013 – February 2019 (6 years)

OARK: Could you explain to me the overview of the shared experiences you and your colleagues have had working the twenty-four hour shift? Please describe to me the effects that the twenty-four hour shift has had on your personal – meaning physical, mental, or spiritual health.

GUI ZHU CHEN: When we work 24-hour shifts, we never get to sleep, I have headaches, back problems, my whole body hurts. When we work 24-hour shifts, at someone else's home, how could you be with family? How can you see and take care of your grandchildren? There's just no way.

OARK: Have you personally requested to your managerial staff to work a "split-shift," which may consist of either a twelve- or an eight-hour long shift?

GUI ZHU CHEN: When I requested split shifts, **CPC told me "Tough luck, someone else will do it if you don't want to." I worked 24-hour shifts in order to make a living and pay the rent. If you refuse to do 24-hour shifts, they'll immediately cut you off from any work at all.**

OARK: In general terms, can you summarize the quality of your interactions with your managerial staff (e.g. have they been kind, rude, abusive)?

GUI ZHU CHEN: In 2017 per CPC's own policies, Zhao E Jiang and I submitted timesheets that included all of our overnight hours. Our timesheets showed that we were getting up 6-8 times every night. **Head Nurse Lee told us, "You're lying, you are defrauding the government. I can sue you and send you to jail."**

Head Nurse Lee told me and Zhao E Jiang not to fill out the timesheets anymore. She said, "From now on, you should not fill out the timesheets. And even if you fill them out, it's of no use. You will not get any money." From then on, we stopped filling out the timesheets and we were never paid for any of the work we did at night.

In addition to their oral testimony to OARK, Gui Zhu Chen provided a sample of their work log outlining the frequency they are compelled to work throughout the night on a twenty-four hour shift, including services rendered to assist the patient with bathroom breaks, clean-up after bathroom use, and the administration of medication – all of which precludes the home care worker from their necessary uninterrupted sleep time. The sample has been translated from Chinese and affixed to this document below as **Table 12**:

Table 12: Sample from Gui Zhu Chen's Work Log

Date	Time	Help patient use bathroom	Wash the patient's body	Administer medication to the patient
1/2/2016	7:35 PM	✓	✓	
	8:15 PM	✓	✓	Digestion aid
	10:15 PM	✓	✓	Herbal anxiety medicine
	11:45 PM	✓	✓	
	10:05 PM	✓	✓	
	2:15 AM	✓	✓	
	3:30 AM	✓	✓	
	4:48 AM	✓	✓	
	6:06 AM	✓	✓	
	7:30 AM	✓	✓	Stomach medicine
1/3/2016	7:45 PM	✓	✓	
	8:35 PM	✓	✓	Digestion aid
	9:15 PM	✓	✓	
	10:35 PM	✓	✓	Herbal pain medicine, Herbal anxiety medicine
	11:15 PM	✓	✓	
	1:05 AM	✓	✓	
	2:38 AM	✓	✓	

	4:08 AM	✓	✓	
	5:18 AM	✓	✓	
	6:50 AM	✓	✓	
	7:30 AM	✓	✓	Stomach medicine
1/4/2016	7:49 PM	✓	✓	
	8:35 PM	✓	✓	Digestion aid
	9:50 PM	✓	✓	
	10:35 PM	✓	✓	Herbal pain medicine, Herbal anxiety medicine
	12:03 AM	✓	✓	
	1:15 AM	✓	✓	
	4:05 AM	✓	✓	
	6:11 AM	✓	✓	
	7:30 AM	✓	✓	Stomach medicine
1/5/2016	7:35 PM	✓	✓	
	8:50 PM	✓	✓	Digestion aid
	10:00 PM	✓	✓	Herbal pain medicine, Herbal anxiety medicine
	11:53 PM	✓	✓	
	12:38 AM	✓	✓	
	2:15 AM	✓	✓	
	3:45 AM	✓	✓	
	5:05 AM	✓	✓	
	7:38 AM	✓	✓	Stomach medicine
1/6/2016	7:35 PM	✓	✓	
	8:50 PM	✓	✓	Digestion aid
	10:03 PM	✓	✓	
	12:15 AM	✓	✓	
	1:40 AM	✓	✓	
	2:57 AM	✓	✓	
	7:15 AM	✓	✓	Stomach medicine
1/9/2016	7:25 PM	✓	✓	
	8:59 PM	✓	✓	Digestion aid
	10:09 PM	✓	✓	
	11:45 PM	✓	✓	Herbal pain medicine, Herbal anxiety medicine
	2:15 AM	✓	✓	

	3:50 AM	✓	✓	
	5:07 AM	✓	✓	
	6:50 AM	✓	✓	
	7:40 AM	✓	✓	Stomach medicine

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4. Interview Excerpt No. 4 with "Lai Chan," [226] or "CHAN"

Working as a home attendant at CPC: 2001 to present
24-hour shifts for CPC: 2007 – 2014, and briefly in 2017

OARK: Approximately how many hours of uninterrupted sleep time do you receive per night while working twenty-four hour shift(s)?

CHAN: When working 24-hour shifts, you don't get any continuous sleep. My patient had respiratory issues and we needed to monitor his breathing. My bed was in the same room as the patient's, right next to his bed. My patient had a care plan prepared by a nurse which specified that the patient needed to be flipped over once every 2 hours, including at night, to prevent bedsores. And it was our responsibility to get him to the hospital if any issues arose, even in the middle of the night.

OARK: If you feel that you have received insufficient sleeping and eating times while working the twenty-four hour shift(s), can you describe to me the experience of laboring under such conditions?

CHAN: In order to get health insurance from 1199, we have to work at least 100 hours each month. Oftentimes, the only shifts available were 24-hour shifts. I developed tennis elbow in my right arm after years of 24-hour shifts. I went to the doctor and was told I needed to take a three-month break from work in order to recover. But after one-and-a-half months, I didn't dare to take more time off because I was afraid of losing insurance.

OARK: Did CPC split your shifts for you?

CHAN: The ex-wife of my patient saw how hard it was for us to care for the patient. In 2014, she called Healthfirst, the patient's insurance company, to split the shift. The insurance company sent a nurse to stay overnight from 9 pm to 7 am to observe the patient's condition. The nurse came and stayed the night for three nights in November. By December 19, they split the shifts into two 12-hour shifts.

[226] The first named plaintiff and eponym of the *Chan v. Chinese-American Planning Council Home Attendant Program, Inc.* suit.

OARK: In general terms, can you summarize the quality of your interactions with your managerial staff (e.g. have they been kind, rude, abusive)?

CHAN: After this patient passed away at the end of 2017, CPC assigned me to 24-hour shifts for another patient near South Street Seaport. Per company policy, I recorded my nighttime work on my timesheets and asked CPC to pay me for the night hours. **Although Head Nurse Lee at first said they would pay me, within two weeks they instead fired me and told me it was the patient who fired me.** I initiated a four-way call with CPC, 1199 and the patient, and the patient said she didn't fire me and even wanted me to come back to care for her. But CPC still didn't re-assign me to care for her. I told CPC this was retaliation and I could sue them, and afterward, they assigned me to split shifts for a different patient.

OARK: [Follow-up] They fired you, and then they re-hired you after?

CHAN: Although I was no longer caring for this patient near South Street Seaport, the patient recorded a video testimonial[227] about her home attendant ignoring her at night when she needed help. CPC had told home attendants to ignore patients at night and just call 911 if something happens. **CPC forces home attendants to choose between hurting patients, or doing unpaid work at night and hurting their own health.**

OARK: Have you personally requested to your managerial staff to work a "split-shift," which may consist of either a twelve- or an eight-hour long shift?

CHAN: CPC could help workers by asking the insurance companies for split shifts, but they won't do it. If my patient's family was able to talk to the insurance company to get split shifts, why can't a powerful agency like CPC do it? Not only has CPC not done that, but CPC has threatened patients, telling patients that if they continue to ask for help at night, they will be separated from their loved ones and forced into a nursing home. This endangers the patients, pits patients and their families against the workers who care for them and discourages workers from fighting for back pay and split shifts.

Though it's been years since I've worked 24-hour shifts, I still have insomnia. My doctor has prescribed me sleep aid medication, but even with it I still can't fall asleep. Twenty-four hour shifts are violence against us women of color!

[227] Ning, Z. (2018, August 7). *Chan (patient)* [Video]. Vimeo. https://vimeo.com/283634268

CLOSING WORDS ON THE NONPROFIT INDUSTRIAL COMPLEX: THE THEATRICS OF RACIAL JUSTICE ACTIVISM AND THE LAW OF CAPITAL

When one studies the institutions and mechanical workings of the American capitalist economy and state intensely enough, themes that describe exploitative tactics across multiple industries emerge. One such theme that we have been more than emphatic about is deception. For all policy experts and elected officials pontificate about the need for stronger regulatory regimes, in more than several instances, the initiative despairingly crumbles to a well-intentioned but near-futile endeavor.

Deception is but the logical conclusion of how the American system is designed to function. Legislatures and law enforcement can crack down on obviously deceptive activities, such as wire or securities fraud. But then there are sweeping industries whose existence is premised on the very tactic of deception to avoid either legal or public scrutiny: shadow banks assume the functions of depository institutions without being subject to an intense regulatory regime, but with all the benefits of high-risk gambling and gain with other people's money to boot. Once upon a time, pyramid schemes were branded as criminal enterprises to be prosecuted, and rightfully so; today, society calls such schemes "multi-level marketing," a far tamer term that has allowed unscrupulous and predatory practices to evade detection and prosecution except for the most heinous cases.

And so, we come to the nonprofit, not as the charitable or social justice-pioneering entity the Chinese-American Planning Council and countless others assert nonprofits to be, but as a **legal and cultural instrument intentionally designed to accrue wealth while evading scrutiny by policy-makers, enforcement, and the general public.**

It behooves us to ask: why would CPC use the federal and state judiciaries as well as an arbitration forum to wage its war on workers? Firstly, even for the most ardent observers of government and its proceedings, the judiciary routinely proves to be notoriously opaque and incomprehensible to the general public, save for the most inciteful and controversial of cases. Secondly, in establishing the overt façade of racial and social justice, CPC knowingly captivates its audience with a repertoire of passionate slogans to pander to its progressive political base. It is a simple narrative to embrace without question, and certainly far simpler to grasp than the convolution of its legal weapons of labor violence on workers.

To the first point, CPC's legal status as a 501(c)3 nonprofit is not immaterial to its machinations. The obvious conclusion is that as a nonprofit, it is not subject to taxation under the Internal Revenue Code or the New York State tax code. Less evident is CPC's reliance on hundreds of millions of dollars in Medicaid funding, all of which is premised on proper compliance with New York State Labor Law, as we discussed in Chapter 1. Even more scandalously, as CPC's home care workers languish under brutal twenty-four hour shifts and are dispossessed of their wages, the nonprofit's managerial and executive staff enjoys six-figure salaries and the luxury of significantly fewer working hours than their home care workers. We must cease to tolerate the imposture of a charitable nonprofit that purports to be an anchoring pillar for its community, as its own community members endure the worst working conditions of contemporary society, and as its executive leadership enjoys the salaries and livelihoods that are fantastical dreams for most.

Perhaps most disturbingly of all, if the reader reaches only one conclusion at the end of this report, let it be that CPC's deeds put all of us in grave peril for dignity in our own work and life. Preemption doctrine and mandatory arbitration are not trifling concepts to be dismissed as technocratic drivel; this is precisely what the powerful desire – the heedlessness of the public in the abundance of exploitation methods by bad actors. These are drastic maneuvers by CPC and others like them to fundamentally shape labor relations and the

ideological underpinnings of societal governance, to the benefit of the class of capital and to the expense of the life of the worker.

To this end, CPC's weaponization of the law against its own workers goes beyond questions of procedure and dispute resolution. CPC lays claim to representation of the Chinatown community's interests and presumably, the greater Chinese-American community in New York City. But it cannot be ignored that CPC's immediate victims are by-and-large immigrant and Chinese women of color. The agency's actions are mercilessly racist and sexist to its core, and the quashing of labor rights and the theft of material earnings speaks to darker realities than transgressions of the law. No amount of social justice rhetorical posturing can exonerate CPC from its malfeasance. They are fundamentally statements and actions that resolutely assert that immigrant and women of color workers are inherently *less than human*, made to be subject to habitual labor violence. Society, and its labor governance structure the Chinese-American Planning Council uncompromisingly upholds, has deemed them as sacrificial lambs in the name of defending the nonprofit's progressive and righteous image – a pretense that we now know to be unequivocally fraudulent.

Therefore, the Office of Assemblymember Ron Kim recommends the following actions:

- Reiterating the demands of the home care workers themselves, we demand:
    - Immediate cease-and-desist of the twenty-four hour shift
    - Remuneration of unpaid wages to the workers
    - A public apology from CPC to the injured workers
    - And, for those who are in concurrence with the above demands, that they sign onto the pledge issuing these demands[228]

- The public disclosure of any and all documents outlining the contractual relationship between Chinese-American Planning Council Home Attendant Program, Inc. (CPC-HAP) and managed long-term care (MLTC) and managed care organization (MCO) insurance companies, detailing the nature of Medicaid disbursements

- The public disclosure of granular and complete accounting records of the over $200 million in Medicaid reimbursements CPC-HAP collects on an annual basis

- If, in the alternative that CPC-HAP fails to turn over the aforementioned documents, the following entities and agencies be empowered, by means of subpoena or other investigative tools, to open an inquiry into CPC-HAP for improprieties, civil and criminal, pertaining to transgressions New York State Public Health, Labor, Social Services, or Insurance Law:
    - The Office of the New York State Attorney General (OAG)
    - The Office of the New York State Comptroller and the Department of Audit and Control
    - The Office of the Medicaid Inspector General
    - The Legislative Standing Committees on Health, Labor, Social Services, and Insurance, to exercise the breadth of their statutory authority and issue legislative subpoenas to CPC-HAP and relevant parties for the purposes of investigating Medicaid and labor improprieties outlined and alluded to in this report

- The passage of Assembly Bill No. A.3145a, which will promulgate as New York State law the abolition of the twenty-four hour home care shift statewide, and require the splitting of existing twenty-four hour shifts into non-consecutive twelve-hour shifts. We must add the qualification that **neither the volitional capacity for CPC to terminate its twenty-four hour shifts, nor the**

[228] See: https://docs.google.com/forms/d/e/1FAIpQLSf0eHEKuT7w3-rkoIUPgWSQ2FLMstzipZjT4JqDbZ63HnSYTw/viewform

remuneration of all outstanding backwages to the workers, is conditional on the passage of this bill.

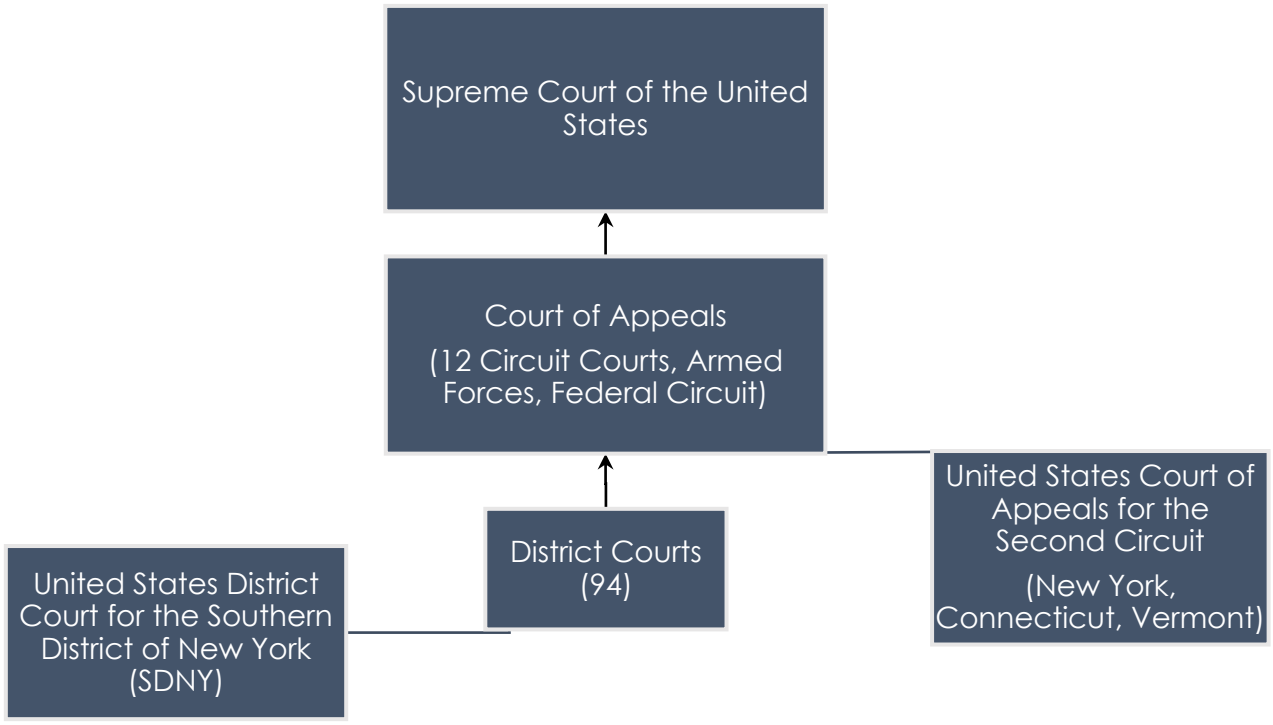
- A moratorium by the legislature on discretionary funding of Chinese-American Planning Council, Inc. and its affiliated nonprofit entities,[229] until CPC-HAP has fully resolved the aforementioned demands by the workers

[229] As outlined in its latest Consolidated Financial Statements: https://www.cpc-nyc.org/sites/default/files/Chinese-American%20Planning%20Consolidated%20Financial%20Statement%20%206-30-20%20-%20FINAL.pdf

APPENDIX:
DIAGRAM OF THE NEW YORK STATE AND FEDERAL COURTS

The below is an abbreviated diagram outlining the hierarchy of the courts in the United States justice system, at both the state and federal levels. Cases in the lower tiers appeal directly to the one above it.

The Judiciary of the United States of America



The Judiciary of the State of New York