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## Twenty Yards From the End Zone: ADR, and the Potential for Greater Levels of Gender Equality in Professional Sports Employment

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# TWENTY YARDS FROM THE END ZONE: ADR, AND THE POTENTIAL FOR GREATER LEVELS OF GENDER EQUALITY IN PROFESSIONAL SPORTS EMPLOYMENT

*Elan Kirshenbaum\**

## I. INTRODUCTION

“Achieving gender equality requires the engagement of women and men, girls and boys. It is everyone’s responsibility.”<sup>1</sup>

—*Ban Ki-moon, Former Secretary-General of the United Nations*

For far too long, men have dominated professional sports leagues. Men greatly outnumber their female counterparts as team owners, executives, coaches, umpires and referees, journalists, announcers, and television and radio personalities.<sup>2</sup> However, this is

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\* Executive Editor, *Cardozo Journal of Conflict Resolution* (Vol. 23); J.D. Candidate 2022, Benjamin N. Cardozo School of Law; B.S. Yeshiva University, Sy Syms School of Business 2012. I would like to express my deepest gratitude to my family and friends for their constant support throughout this arduous process. I dedicate this Note to each of you. Special thanks to my parents, brothers, sisters-in-law, nephews, nieces, and cousins, both in the U.S. and abroad; Tziporah and Daniel Sauffer; Yocheved and Yitzi Diskind; Tsippora Cohen; and Lizzy Blass; and all the people who have had an extremely positive impact on my time at Cardozo, including: Professor Donna Erez-Navot, Professor Brian Farkas, Professor Lela Love, Samantha Chase, Anna Chen, Adela Cojab, Samuel Ditchek, Miles Dixon-Darling, Iona Ehrlich, Levi Gourarie, Morgan Helfman, Avery Horovitz, Michael Jacobson, Rachel Kaminetzky, Reuben Kirshenbaum, Zachary Kriesberg, Lindsay Maglich, Julia Martyn, Hannah Petitti, Nigel Pura-Bryant, Christine Rosenblatt, Daniel Rosenn, Tanya Schulman, Andrew J. Windsor II, Debbie Yang, and Annie Zagha. Finally, I would also like to thank Professor Alexander A. Reinert for his insightful comments and feedback in helping to improve the overall quality of this Note, as well as the Staff Editors and Board members of Volumes 22 and 23 of the *Cardozo Journal of Conflict Resolution*.

<sup>1</sup> *Secretary-General’s Remarks to Closing Session of High-Level Event of the General Assembly “The Contributions of Women, the Young and Civil Society to the Post-2015 Development Agenda”*, UNITED NATIONS (Mar. 7, 2014), <https://www.un.org/sg/en/content/sg/statement/2014-03-07/secretary-generals-remarks-closing-session-high-level-event-general> [<https://perma.cc/V7MW-7379>].

<sup>2</sup> *Athletic Administration: No Longer a Boy’s Club*, OHIO UNIV. (Jan. 24, 2020), <https://onlinemasters.ohio.edu/blog/athletic-administration-no-longer-a-boys-club/> [<https://perma.cc/5YCC-LV48>]; see also *The Women’s Sports Foundation Report Brief: Her Life Depends on It III & Women, Sport, and Executive Leadership*, WOMEN’S SPORT FOUND. (Sept. 22, 2016), <https://www.womenssportsfoundation.org/wp-content/uploads/2016/11/her-life-depends-on-it-leadership-brief-full-references-final.pdf> [<https://perma.cc/8SUK-F4SS>].

certainly not for a lack of interest in sports from women—women make up almost half of the fanbases of traditional American and international sports leagues.<sup>3</sup> During the COVID-19 pandemic, Major League Baseball (“MLB” or “League”) television ratings actually rose, fueled by a 41% increase in female viewership among 18–24 year-olds (from 40,000 to 56,000 viewers) and a 15% increase in female viewership among 25–54 year-olds (from 341,000 to 393,000 viewers).<sup>4</sup> Since 1972, when President Richard Nixon signed Title IX into law—“protect[ing] people from discrimination based on sex in education programs or activities that receive federal financial assistance”<sup>5</sup>—women’s participation in high school and college athletics has skyrocketed, but the job gains for women in professional sports leagues have been much more stagnant.<sup>6</sup>

This Note will highlight the specific instances of gender-based employment discrimination in professional sports and then consider how alternative dispute resolution (“ADR”) provides the best avenue to address and correct these imbalances. In particular, this Note will analyze the benefits and drawbacks of ADR and litigation, while simultaneously applying this analysis to the discussion of the gender gap in professional sports employment. Part II will outline several examples of this discrimination, while also briefly detailing the general hiring and wage gaps that exist between men and women. In doing so, this section will examine the hiring practices of three of the major professional sports leagues: MLB, the National Football League (“NFL”), and the National Basketball Association (“NBA”). Part III will focus on the legal options available in cases of gender-based employment discrimination and will also provide the aforementioned comparative review of ADR and litigation as it relates to professional sports employment. Part IV will offer a proposal that is grounded in an ADR-centric approach to help remedy this lack of gender diversity in professional sports work. Finally, Part V will reiterate why ADR provides a better avenue than litigation to solve this issue, while summarizing the specific details of this Note’s proposal and main arguments.

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<sup>3</sup> Athletic Administration: No Longer a Boy’s Club, *supra* note 2; see also *Closing the Sports Fan Gender Gap*, GEMBA GRP. (Mar. 6, 2020), <http://thegembagroup.com/news/closing-the-sports-fan-gender-gap/> [<https://perma.cc/3SYK-VLWS>].

<sup>4</sup> Daniel Kaplan, *MLB TV Ratings Increase Over Last Season, Led by Women and Youth*, ATHLETIC (Aug. 21, 2020), <https://theathletic.com/2012197/2020/08/21/mlb-tv-ratings-increase-led-by-women-and-youth/> [<https://perma.cc/3T9Y-FT3E>].

<sup>5</sup> *Title IX and Sex Discrimination*, U.S. DEPT. EDUC. (Aug. 2021), [https://www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html) [<https://perma.cc/6R4T-N7MP>].

<sup>6</sup> Athletic Administration: No Longer a Boy’s Club, *supra* note 2.

## II. BACKGROUND

In theory, it should be the norm that men and women be treated equally in the workplace, and that women be provided the same professional opportunities as men. In reality, though, this is far from the norm. Women are often *not* provided the same professional opportunities as men,<sup>7</sup> and when women do break into certain fields, they are usually paid less than the men employed in similar positions.<sup>8</sup> For almost sixty years, federal laws such as the Equal Pay Act of 1963<sup>9</sup> and Title VII of the Civil Rights Act of 1964<sup>10</sup> have made it unlawful for men and women to be treated differently in the workplace based on sex.<sup>11</sup> And yet, these issues still persist today. The following sections will explore this phenomenon in greater detail and then focus on its applicability to the professional sports employment field.

### A. *The General Hiring and Wage Gaps That Exist Between Men and Women*

In 2020, women made up 47% of the overall workforce.<sup>12</sup> While a 6% gap between men and women in the labor force might not seem to be so staggering, progress in this area has been remarkably slow. Women actually reached the 46% workforce participation level in 1994 and have merely hovered between 46% and 47% ever since.<sup>13</sup> Additionally, it is possible that the numbers, post-pandemic, could show a decrease, setting women back in this area. As a result of the COVID-19 pandemic, women have been experiencing higher rates of burnout than men, and “[o]ne in three

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<sup>7</sup> Jackson Gruver, *Equal Opportunity in the Workplace: Their Problem, Not Ours*, Payscale (Jan. 16, 2020), <https://www.payscale.com/data/equal-opportunity-perceptions> [<https://perma.cc/S79W-G756>].

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

<sup>9</sup> 29 U.S.C. § 206.

<sup>10</sup> 42 U.S.C. § 2000e.

<sup>11</sup> *Equal Pay/Compensation Discrimination*, EEOC, <https://www.eeoc.gov/equal-paycompensation-discrimination> [<https://perma.cc/8TXU-RAB6>] (last visited Mar. 18, 2022).

<sup>12</sup> *Civilian Labor Force, by Age, Sex, Race, and Ethnicity*, U.S. BUREAU LAB. STAT. (Sept. 8, 2021), <https://www.bls.gov/emp/tables/civilian-labor-force-summary.htm> [<https://perma.cc/A85K-24T6>].

<sup>13</sup> *Civilian Labor Force By Sex*, U.S. DEP'T LAB., <https://www.dol.gov/agencies/wb/data/lfp/civilianlfbyses> [<https://perma.cc/PRQ3-ZNML>] (last visited Mar. 17, 2022).

women . . . have considered downshifting their career or leaving the workforce.”<sup>14</sup>

However, while women have narrowed the overall gap in the labor participation rate, the gap between men and women who serve in leadership roles remains quite large. For example, 48.5% of associates in law firms are women, but this figure drops to 23.3% when gauging the number of female equity partners.<sup>15</sup> Further, 40% of all physicians and surgeons are women, but only 16% of permanent medical school deans are women.<sup>16</sup> Overall, women capture a paltry share of the top corporate leadership positions in the United States. Women lead just 167 of the country’s top 3,000 companies (5.56%),<sup>17</sup> and women serve as CEOs in only forty-one of the Fortune 500 companies (8.2%).<sup>18</sup> While this Fortune 500 data actually represented an increase from prior years—with twenty-four female Fortune 500 CEOs in 2018 and thirty-three female Fortune 500 CEOs in 2019—it still indicates an extremely slow level of progress for women.<sup>19</sup>

There is also a significant pay gap between men and women. Like the workforce participation numbers, the gender pay gap is gradually shrinking, but there is still a considerable disparity. In 2022, a study analyzing the uncontrolled gender pay gap—which measures median salaries for all men and women—found that the average woman earns eighty-two cents for every dollar that the average man earns.<sup>20</sup> This is an increase from seventy-three cents on

<sup>14</sup> Tiffany Burns et al., *Women in the Workplace 2021*, MCKINSEY & Co. (Sept. 27, 2021), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace> [<https://perma.cc/GY4Y-4J43>].

<sup>15</sup> Jacqueline Bell, *Law360’s Glass Ceiling Report: What You Need To Know*, LAW360 (Sept. 13, 2021, 3:03 PM), <https://www.law360.com/legalethics/articles/1418221/law360-s-glass-ceiling-report-what-you-need-to-know> [<https://perma.cc/GQ6N-XYTH>].

<sup>16</sup> Judith Warner, Nora Ellmann, & Diana Boesch, *The Women’s Leadership Gap*, CTR. AM. PROGRESS (Nov. 20, 2018), <https://www.americanprogress.org/issues/women/reports/2018/11/20/461273/womens-leadership-gap-2/> [<https://perma.cc/PNY5-EM43>].

<sup>17</sup> Vanessa Fuhrmans, *Where Are All the Women CEOs?*, WALL ST. J. (Feb. 6, 2020, 10:34 AM), <https://www.wsj.com/articles/why-so-few-ceos-are-women-you-can-have-a-seat-at-the-table-and-not-be-a-player-11581003276> [<https://perma.cc/P9LX-TG96>].

<sup>18</sup> WOMEN BUSINESS COLLABORATIVE (WBC) ET AL., *WOMEN CEOs IN AMERICA: CHANGING THE FACE OF BUSINESS LEADERSHIP 4* (Women Bus. Collaborative ed., 2021), [https://www.wbcollaborative.org/wp-content/uploads/2021/10/Women-CEOS-in-America\\_2021\\_1013-2.pdf](https://www.wbcollaborative.org/wp-content/uploads/2021/10/Women-CEOS-in-America_2021_1013-2.pdf) [<https://perma.cc/5X5B-MHVZ>].

<sup>19</sup> Alisha Ebrahimji, *Female Fortune 500 CEOs Reach an All-Time High, But it’s Still a Small Percentage*, CNN (May 20, 2020, 10:46 AM), <https://www.cnn.com/2020/05/20/us/fortune-500-women-ceos-trnd/index.html> [<https://perma.cc/CVE7-CX6S>].

<sup>20</sup> *2022 State of the Gender Pay Gap Report*, PAYSACLE, <https://www.payscale.com/research-and-insights/gender-pay-gap/> [<https://perma.cc/K54V-FBUY>] (last visited Mar. 17, 2022).

the dollar in 2014, but until the number reaches a hundred cents on the dollar, true equality has not been achieved.<sup>21</sup>

Additionally, while an average of eighty-two cents on the dollar might not seem like such a substantial number, these losses add up over time:

For Asian women, the gender pay gap to White men amounts to \$3,000 a year and \$120,000 over a 40-year career. For White women, it's nearly \$14,000 less in earnings a year, and more than \$555,000 over a 40-year career. For Black women, it's more than \$24,000 annually and more than \$976,000 over a 40-year career. For Native American women, it's \$27,000 less a year and more than \$1 million over 40 years. And for Latina women, it amounts to making nearly \$29,000 less a year, and more than \$1.1 million less over 40 years.<sup>22</sup>

With this view of the gender pay gap, the issue reveals itself to be more significant. If more people, especially the men leading the top companies in the country, took these statistics seriously, the gender pay gap could be completely eliminated. At this time, though, the term “equal pay for equal work” has no basis in reality.

### B. *The Lack of Women Working in High-Profile Professional Sports Jobs*

Compared to men, there have been relatively few women who have been granted the opportunity to work in high-profile jobs across the professional sports industry. The following subsections will provide specific examples of this phenomenon and will also examine the hiring practices of three of the major sports leagues: MLB, the NFL, and the NBA. Because of space and word constraints, this Note will not focus on other professional sports leagues, such as the National Hockey League (“NHL”) or Major League Soccer (“MLS”). Additionally, because the Women’s National Basketball Association (“WNBA”) is entirely comprised of female players—and is, naturally, a women-dominated environment—this league will only be discussed briefly.<sup>23</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> Sarah Ewall-Wice, *Women are Losing Thousands of Dollars a Month Due to the Gender Pay Gap. The Pandemic May Have Made it Worse.*, CBS NEWS (Mar. 15, 2022, 7:00 AM), <https://www.cbsnews.com/news/equal-pay-day-gender-gap-pandemic/> [<https://perma.cc/PP4A-Y9DS>].

<sup>23</sup> See *infra* Section II(B)(iii).

The paragraphs ahead will effectively demonstrate how women are often either fully excluded from these employment opportunities or are instead hired for less-prominent roles than their male counterparts. Conversely, these subsections will also profile some of the women who have found success across the professional sports leagues, showing that women are just as capable of excelling in this industry as men—if only given the opportunity.

### i. Major League Baseball

Throughout professional sports, it can be argued that nowhere is the gender disparity between men and women more blatant than in Major League Baseball. Out of the thirty total teams in the League, not one currently has a majority owner that is a woman.<sup>24</sup> In fact, according to the popular Baseball Reference online database, there have only been thirteen total female owners in MLB history,<sup>25</sup> a time period that spans almost 150 years.<sup>26</sup> However, some of these women were part of larger male-dominated ownership groups, and some of the women gained ownership of their respective teams via an inheritance from the teams' previous male owners.<sup>27</sup>

The Institute for Diversity and Ethics in Sport (“TIDES”) annually produces a Racial and Gender Report Card for each of the major sports leagues, among others.<sup>28</sup> In its 2021 assessment of Major League Baseball,<sup>29</sup> the league received an overall letter grade of C for its gender hiring practices.<sup>30</sup> This score was made up

<sup>24</sup> Mike Digiovanna, *Here are the Billionaire Team Owners Who Rule Baseball Amid the MLB Lockout*, L.A. TIMES (Feb. 28, 2022, 3:47 PM), <https://www.latimes.com/sports/dodgers/story/2020-06-26/roster-mlb-billionaire-team-owners-who-rule-baseball> [<https://perma.cc/2ZE3-J8WM>].

<sup>25</sup> *Category: Female Owners*, BASEBALL REFERENCE, [https://www.baseball-reference.com/bullpen/Category:Female\\_owners](https://www.baseball-reference.com/bullpen/Category:Female_owners) [<https://perma.cc/WDF8-TDD4>] (last visited Mar. 18, 2022).

<sup>26</sup> *National League of Baseball is Founded*, HISTORY (Jan. 30, 2020), <https://www.history.com/this-day-in-history/national-league-of-baseball-is-founded> [<https://perma.cc/P4VD-VZHT>]; see also Adam Augustyn, *Major League Baseball*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/topic/Major-League-Baseball> [<https://perma.cc/LM43-34CY>] (last visited Mar. 18, 2022).

<sup>27</sup> See generally *Category: Female Owners*, *supra* note 25.

<sup>28</sup> See generally *The Racial and Gender Report Card*, THE INST. DIVERSITY ETHICS SPORT (TIDES), <https://www.tidesport.org/racial-gender-report-card> [<https://perma.cc/HS2A-LYNX>] (last visited Mar. 18, 2022).

<sup>29</sup> RICHARD E. LAPCHICK, THE 2021 RACIAL AND GENDER REPORT CARD: MAJOR LEAGUE BASEBALL 1 (The Inst. for Diversity and Ethics in Sport [TIDES] ed., 2021), [https://www.tidesport.org/\\_files/ugd/138a69\\_0fc7d964273c45938ad7a26f7e638636.pdf](https://www.tidesport.org/_files/ugd/138a69_0fc7d964273c45938ad7a26f7e638636.pdf) [<https://perma.cc/CH2P-3DVN>].

<sup>30</sup> *Id.*

of individual grades of a C- for the MLB Central Office (29.1% women);<sup>31</sup> a C- for Senior Administration (28.5% women);<sup>32</sup> a D+ for Professional Administration (25.5% women);<sup>33</sup> an F for CEO/ Presidents (0% women);<sup>34</sup> an F for C-Suite Personnel (22.6% women);<sup>35</sup> and an F for Vice Presidents (22% women).<sup>36</sup> The League did receive an A+ grade for its overall diversity initiatives,<sup>37</sup> which, as they relate to women, include MLB's *Take the Field* program<sup>38</sup> and its *Katy Feeney Leadership Symposium*.<sup>39</sup> It is clear, though, that the goals of these initiatives have yet to fully materialize.

Thankfully, the Miami Marlins took the first step toward gender equality in baseball management positions when, on November 13, 2020, the team hired Kim Ng to serve as its general manager (“GM”).<sup>40</sup> Ng had worked in various baseball positions for over thirty years and had interviewed for seven other teams’ GM openings since 2005,<sup>41</sup> but it took over fifteen years of dedicated perseverance for Ng to finally become the “first female GM [for] a major North American men’s professional sports league.”<sup>42</sup> While Ng was not given her chance to serve as a GM until days before her fifty-second birthday, male GMs—such as Brian Cashman of the New York Yankees (hired at age thirty in 1998),<sup>43</sup> former Red Sox general manager Theo Epstein (hired at age twenty-eight in 2002),<sup>44</sup> and Jon Daniels of the Texas Rangers (hired at age twenty-

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<sup>31</sup> *Id.* at 2.

<sup>32</sup> *Id.* at 3.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 18.

<sup>35</sup> LAPCHICK, *supra* note 29, at 19.

<sup>36</sup> *Id.* at 20.

<sup>37</sup> *Id.* at 22.

<sup>38</sup> *Take the Field*, MLB, <https://www.mlb.com/diversity-and-inclusion/events/take-the-field> [<https://perma.cc/867P-W6ET>] (last visited Mar. 17, 2022).

<sup>39</sup> *Katy Feeney Leadership Symposium*, MLB, <https://www.mlb.com/diversity-and-inclusion/events/katy-feeney> [<https://perma.cc/U4HT-BAR7>] (last visited Mar. 17, 2022).

<sup>40</sup> Jared Diamond & Rachel Bachman, *Marlins Hire Kim Ng as Baseball's First Female General Manager*, WALL ST. J. (Nov. 13, 2020, 12:41 PM), <https://www.wsj.com/articles/marlins-hire-kim-ng-as-baseballs-first-female-general-manager-11605289276> [<https://perma.cc/W7FU-F28E>].

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

<sup>42</sup> Sarah Spain, *Kim Ng Finally — Finally! — Lands General Manager Job in Major League Baseball*, ESPN (Nov. 13, 2020), [https://www.espn.com/mlb/story/\\_/id/30310556/kim-ng-lands-general-manager-job-major-league-baseball](https://www.espn.com/mlb/story/_/id/30310556/kim-ng-lands-general-manager-job-major-league-baseball) [<https://perma.cc/3KTP-U97J>].

<sup>43</sup> Peter Botte, *Cashman's on the Fast Track*, N.Y. DAILY NEWS (Feb. 3, 1998, 12:00 AM), <https://www.nydailynews.com/archives/sports/cashman-fast-track-article-1.802166> [<https://perma.cc/T6QT-PTTG>].

<sup>44</sup> Norman Chad, *The Baseball GM's Office, Where the Young Ivy Leaguers Roam*, WASH. POST (Apr. 16, 2017), <https://www.washingtonpost.com/sports/the-baseball-gms-office-where>



eight in 2005)<sup>45</sup>—faced no such impediments. That the Rangers have retained Daniels for so many years is, in it of itself, a bit puzzling, as Daniels has presided over a failing team.<sup>46</sup> One might wonder if, as a woman, Ng will eventually be given this same leeway, if a comparable situation were to arise in the future. It also remains to be seen whether male fans will accept Ng into the fold; social media comments by men regarding women in sports tend to be quite disparaging, which could become even more negative if Ng is not successful in her efforts to better the team.<sup>47</sup>

The trends in this area seem to be improving, with more women being hired for management-level positions. On February 27, 2022, the New York Mets hired Elizabeth Benn as their director of major-league operations.<sup>48</sup> “Benn was named one of The Athletic’s ‘35 under 35’ in 2019 when she worked as a labor relations coordinator for MLB and was the first woman to play in the New York Metro Baseball League.”<sup>49</sup>

However, the League has an even worse track record when it comes to the people involved in on-field play—particularly, managers, coaches, and umpires. In the history of Major League Baseball, there has never been a woman hired as an MLB manager; Baseball Reference notes that 828 men have managed games across that timespan.<sup>50</sup> On the Minor League level, though, the Yankees made a historic hire when they selected Rachel Balkovec to manage the Low-A Tampa Tarpons, making Balkovec the first female manager in affiliated professional baseball.<sup>51</sup> Balkovec is

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the-young-ivy-leaguers-roam/2017/04/16/84f462e4-215d-11e7-be2a-3a1fb24d4671\_story.html [https://perma.cc/R476-725J].

<sup>45</sup> Jeff Wilson, *Here’s Why Texas Rangers Owner Ray Davis is Still Keeping the Faith in Jon Daniels*, FORT WORTH STAR TELEGRAM (Sept. 30, 2020, 4:29 PM), <https://www.star-telegram.com/sports/mlb/texas-rangers/article246128240.html> [https://perma.cc/R8XJ-VEJN].

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

<sup>47</sup> Katie Mettler, *The Disgustingly Obscene ‘Everyday’ Harassment of Sports Media Women: A Lesson for Men*, WASH. POST (Apr. 28, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/04/28/morethanmean-a-graphic-lesson-for-men-in-the-everyday-harassment-of-women-in-sports-media/> [https://perma.cc/75V6-RDS5].

<sup>48</sup> Tim Britton & The Athletic Staff, *Mets Hire Elizabeth Benn from MLB Office to Direct Major-League Operations: Sources*, ATHLETIC (Feb. 27, 2022, 6:48 PM), <https://theathletic.com/news/mets-hire-elizabeth-benn-from-mlb-office-to-direct-major-league-operations-sources/HimixIJKQw3/> [https://perma.cc/AUZ6-NLWR].

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

<sup>50</sup> *Major League Managers*, BASEBALL REFERENCE, <https://www.baseball-reference.com/managers/index.shtml> [https://perma.cc/3JRN-PBNX] (last visited Mar. 18, 2022).

<sup>51</sup> Bryan Hoch, *Rachel Balkovec Tabbed Low-A Skipper*, N.Y. YANKEES (Jan. 12, 2022), <https://www.mlb.com/yankees/news/rachel-balkovec-to-manage-yankees-low-a-team> [https://perma.cc/HVN6-2GP4].

embracing the chance to be a role model, stating, “I want to be a visible idea for young women. I want to be a visible idea for dads that have daughters. I want to be out there.”<sup>52</sup>

MLB’s official website also lists 368 umpires, all-time, that have worked Major League games.<sup>53</sup> There has never been a woman to serve as an umpire for a professional Major League Baseball game,<sup>54</sup> although one woman, Bernice Gera, served as an umpire for a single Minor League Baseball game.<sup>55</sup> Responding to increasing fan criticism<sup>56</sup> that umpires make too many incorrect ball-strike calls behind the plate—and seeing that notion confirmed in a massive study of the 2018 season, which revealed that umpires were incorrect on 34,294 ball-strike calls that year<sup>57</sup>—MLB began testing “robot umps” in the Minor Leagues, which use “optical tracking data to determine and communicate ball and strike calls to plate umpires.”<sup>58</sup> Perhaps, though, it is time to give women a chance behind the plate.

Until recently, the same diversity issues might have also been found with coaches in the Major Leagues. However, on January 16, 2020, the San Francisco Giants hired Alyssa Nakken to be the first full-time on-field female coach in MLB history.<sup>59</sup> This positive trend is now continuing. On January 4, 2021, the Boston Red Sox “hired Bianca Smith as a Minor League coach, making her the first Black woman to serve as a coach in the history of professional baseball.”<sup>60</sup> Not even a month later, the Milwaukee Brewers hired Sara Goodrum to serve as the first female hitting coordinator in

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<sup>52</sup> *New York Yankees (@Yankees)*, TWITTER (Jan. 12, 2022, 7:18 PM), <https://twitter.com/Yankees/status/1481420298394214406> [<https://perma.cc/5YWU-EECW>].

<sup>53</sup> *All-Time Roster*, MLB, [https://img.mlbstatic.com/mlb-images/image/upload/fl\\_attachment/mlb/vnimvdku58s8hpihgux.pdf](https://img.mlbstatic.com/mlb-images/image/upload/fl_attachment/mlb/vnimvdku58s8hpihgux.pdf) [<https://perma.cc/LP46-MCCD>] (last visited Mar. 17, 2022).

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

<sup>55</sup> *Bernice Gera, Umpire, 61*, N.Y. TIMES (Sept. 25, 1992), <https://www.nytimes.com/1992/09/25/obituaries/bernice-gera-umpire-61.html> [<https://perma.cc/GUT4-ATNS>].

<sup>56</sup> Douglas Charles, *MLB Fans React to News That Triple-A Baseball Will Be Using Robot Umpires During the 2022 Season*, BROBIBLE (Jan. 21, 2022), <https://brobible.com/sports/article/mlb-fans-triple-a-robot-umpires> [<https://perma.cc/6WQX-432Q>].

<sup>57</sup> Mark T. Williams, *MLB Umpires Missed 34,294 Ball-Strike Calls in 2018. Bring on Robo-Umps?*, BU TODAY (Apr. 8, 2019), <https://www.bu.edu/articles/2019/mlb-umpires-strike-zone-accuracy> [<https://perma.cc/YLG3-C9VJ>].

<sup>58</sup> Charles, *supra* note 56.

<sup>59</sup> Des Bieler, *MLB Team Hires First Female Full-Time Coach in League History*, WASH. POST (Jan. 17, 2020), <https://www.washingtonpost.com/sports/2020/01/17/giants-hire-first-female-full-time-coach-mlb-history/> [<https://perma.cc/84Q4-X27R>].

<sup>60</sup> Ian Browne, *Red Sox Hire Smith, First Black Female Coach*, MLB (Jan. 4, 2021), <https://www.mlb.com/news/red-sox-hire-bianca-smith-first-black-female-baseball-coach> [<https://perma.cc/9QS9-48UH>].

Minor League history.<sup>61</sup> As of January 1, 2021, there were twenty-two women with on-field coaching or player development roles across the League.<sup>62</sup> It should be noted, though, that several of these women were not uniformed coaches, and many served in behind-the-scenes roles (such as mental skills coaches, strength and conditioning coaches, and various lower-level Minor League positions).<sup>63</sup>

It is difficult to know the exact number of coaches that work in various capacities across Major League Baseball, as each team can hire as many coaches and staff members as it wishes and not all club positions and hires are made known to the general public. However, by looking at two big-market teams, the New York Yankees and the Los Angeles Dodgers, it can be seen how gender diversity is a major problem in this area. The Yankees' "Coaches" page on its official website lists twenty-eight coaches and staff members that serve at the MLB level.<sup>64</sup> All twenty-eight of these individuals are men.<sup>65</sup> Similarly, the Dodgers' "Coaches" page on its official website lists thirty-seven coaches and staff members that work at the MLB level.<sup>66</sup> Only one person employed by the Dodgers in this capacity, Ellen Harrigan, is a woman.<sup>67</sup>

MLB has made some minor progress in the area of female announcers and TV and radio personalities. As of this writing, though, only a handful of women have ever served as the main play-by-play announcer<sup>68</sup> for an MLB television or radio broadcast,<sup>69</sup> but there have been slightly more women to work as color

<sup>61</sup> Katherine Acquavella, *Brewers' Sara Goodrum Becomes First Woman to Serve as Minor-League Hitting Coordinator*, CBS SPORTS (Jan. 28, 2021, 5:18 PM), <https://www.cbssports.com/mlb/news/brewers-sara-goodrum-becomes-first-woman-to-serve-as-minor-league-hitting-coordinator/> [<https://perma.cc/P9G7-CQ8N>].

<sup>62</sup> LAPCHICK, *supra* note 29, at 13.

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

<sup>64</sup> *Yankees Roster & Staff: Coaches*, N.Y. YANKEES, <https://www.mlb.com/yankees/roster/coaches> [<https://perma.cc/3TPQ-6Q89>] (last visited Mar. 18, 2022).

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

<sup>66</sup> *Dodgers Roster & Staff: Coaches*, L.A. DODGERS, <https://www.mlb.com/dodgers/roster/coaches> [<https://perma.cc/R285-DTL6>] (last visited Mar. 18, 2022).

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

<sup>68</sup> A *play-by-play announcer* provides real-time commentary on the game. Their main job is to engage the viewer or listener and describe the action at-hand. Many play-by-play announcers, for example, will react emphatically when something exciting happens in the game.

<sup>69</sup> Britni de la Cretaz, *Where Are All the Women in Play-by-Play Broadcasting?*, RINGER (Oct. 11, 2018, 10:27 AM), <https://www.theringer.com/2018/10/11/17963320/women-play-by-play-broadcasting-andrea-kremer-hannah-storm-amazon-nfl> [<https://perma.cc/H2PN-9LUM>].

commentators.<sup>70</sup> Two of baseball's most prominent female color commentators have been Suzyn Waldman and Jessica Mendoza.<sup>71</sup> In August 2020, the Baltimore Orioles made Melanie Newman the first woman in its team's history to call play-by-play on the radio. Newman is now the fourth woman to serve as a play-by-play announcer in the League's history.<sup>72</sup>

A simple glance at the MLB Network Television Personalities page will provide greater context as to the gender disparity displayed throughout the League as a whole.<sup>73</sup> The page lists a total of forty individuals that serve in various positions for the network: Hosts, Analysts, Announcers, "Insiders," and Reporters.<sup>74</sup> Out of these forty people, thirty-six are men and only four are women.<sup>75</sup>

The same can be said for individual teams' broadcasting personnel. For example, the Yankees Entertainment and Sports Network ("YES Network"), which is majority-owned by the New York Yankees and is the team's main broadcasting network, officially employs eighteen announcers and in-studio personnel for game broadcasts, pre-game and post-game shows, and other general programming.<sup>76</sup> However, of these eighteen people, fifteen are men and only three are women.<sup>77</sup> Sarah Kustok, who is profiled *infra*,<sup>78</sup> is employed in a primary analyst role for Brooklyn Nets game telecasts;<sup>79</sup> Meredith Marakovits serves as the Yankees clubhouse reporter and also provides on-air reports during Yankees game telecasts, pre-game and post-game shows, and other program-

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<sup>70</sup> A *color commentator* is the secondary game announcer and provides background information about the players and teams. Color commentators will engage with the play-by-play announcer to provide for a more interesting broadcast for the fans.

<sup>71</sup> Bob Raissman, *Jessica Mendoza's Story Should Shine Cooperstown Light on Pioneers Such as Suzyn Waldman*, N.Y. DAILY NEWS (Oct. 10, 2015, 5:35 PM), <https://www.nydailynews.com/sports/baseball/raissman-shining-light-pioneers-suzyn-waldman-article-1.2392743> [<https://perma.cc/A2JZ-Q83U>].

<sup>72</sup> Jon Meoli, *Melanie Newman Becomes Orioles' First Female Broadcaster to Call Play-By-Play in Regular Season*, BALT. SUN (Aug. 4, 2020, 8:58 PM), <https://www.baltimoresun.com/sports/orioles/bs-sp-melanie-newman-orioles-20200805-jok15b2bj5frln3sc4pcw3rh34-story.html> [<https://perma.cc/5DGW-S9KD>].

<sup>73</sup> *MLB Network Personalities*, MLB NETWORK, <https://www.mlb.com/network/personalities> [<https://perma.cc/JQU3-LZH9>] (last visited Mar. 18, 2022).

<sup>74</sup> *Id.*

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

<sup>76</sup> *Personalities*, YES NETWORK, <https://www.yesnetwork.com/personalities> [<https://perma.cc/B53Q-5A34>] (last visited Mar. 18, 2022).

<sup>77</sup> *Id.*

<sup>78</sup> See *infra* Section II(B)(iii).

<sup>79</sup> *Sarah Kustok: Brooklyn Nets Game Analyst*, YES NETWORK, <https://www.yesnetwork.com/personalities/sarah-kustok> [<https://perma.cc/AN36-FJSS>] (last visited Mar. 18, 2022).

ming;<sup>80</sup> and Nancy Newman serves as a studio anchor for Yankees and Nets pre-game and post-game shows and is the host of the *Yankees Batting Practice Today* show.<sup>81</sup>

Another example of this phenomenon can be found with the New England Sports Network (“NESN”), which is a regional sports network owned by the Boston Red Sox and the Boston Bruins.<sup>82</sup> According to the “NESN Team” page on its website, the network employs thirty-three personalities, all of whom work in various capacities.<sup>83</sup> Of these thirty-three individuals, twenty-eight are men and only five are women.<sup>84</sup> However, the NESN Team page has not been updated since 2019, and two of those five women have actually left the network since that time: Guerin Austin<sup>85</sup> and Cealey Godwin.<sup>86</sup> Ironically, the “About NESN” page on the NESN website emphasizes a commitment to diversity: “Embracing diversity . . . enables us to identify new opportunities and succeed in an ever-changing business environment. . . . Bringing people together with unique backgrounds, talents, and experiences diversifies our thinking, heightens our creativity, and provides us with the skills and perspectives to be innovative and competitive.”<sup>87</sup> Under the “NESN’s Values” section on that same page, the “Diversity” bullet point states, “We believe that diverse cultures and ideas are integral to our success. Embracing a diverse workforce enables us to discover and understand the perspectives of our fans and customers.”<sup>88</sup>

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<sup>80</sup> Meredith Marakovits, *New York Yankees Clubhouse Reporter*, YES NETWORK, <https://www.yesnetwork.com/personalities/meredith-marakovits> [<https://perma.cc/7YWM-TLNF>] (last visited Mar. 18, 2022).

<sup>81</sup> Nancy Newman, *Yankees Batting Practice Today Host, Yankees and Nets Pre- and Post-Game Studio Anchor*, YES NETWORK, <https://www.yesnetwork.com/personalities/nancy-newman> [<https://perma.cc/ZUZ3-2H2N>] (last visited Mar. 18, 2022).

<sup>82</sup> *About NESN*, NESN, <https://nesn.com/about/> [<https://perma.cc/J4FV-S3MY>] (last visited Mar. 18, 2022).

<sup>83</sup> *NESN Team*, NESN, <https://nesn.com/nesn-team/> [<https://perma.cc/BJL5-3B82>] (last visited Mar. 18, 2022).

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

<sup>85</sup> Andrew Bucholtz, *Red Sox Reporter Guerin Austin Has Left NESN After Six Years, With the Network Not Renewing Her Contract*, AWFUL ANNOUNCING (Jan. 27, 2021), <https://awfulannouncing.com/mlb/guerin-austin-has-left-nesn-after-six-years.html> [<https://perma.cc/N52P-MDPR>].

<sup>86</sup> Tereza Shkurtaj, *GOODBYE CEALEY: Is Cealey Godwin Leaving NESN?*, U.S. SUN (Nov. 27, 2021, 1:10 PM), <https://www.the-sun.com/news/4156618/is-cealey-godwin-leaving-nesn/> [<https://perma.cc/A672-42KP>].

<sup>87</sup> About NESN, *supra* note 82.

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

On the other hand, MLB and YouTube made history when they announced that an all-woman broadcasting crew would work a game between the Tampa Bay Rays and the Baltimore Orioles on July 20, 2021.<sup>89</sup> “The YouTube broadcast featured Melanie Newman on play-by-play with Sarah Langs as the analyst. Alanna Rizzo was the on-field reporter, and Heidi Watney and Lauren Gardner hosted the pregame and postgame coverage.”<sup>90</sup> Said Rizzo, “It can’t help but feel different. . . . I’ve always had a male play-by-play voice in my ear during every game I’ve ever done. So, to do a game where those voices are Melanie and Sarah, that will be a unique feeling and a unique perspective of the game.”<sup>91</sup>

For her part, Miami Marlins GM Kim Ng has a positive outlook for the future, as she seeks to inspire the next generation of women and girls who are thinking about a career in sports. Said Ng, “There’s an adage, ‘You can’t be it if you can’t see it.’ I suggest to them, ‘Now you can see it.’”<sup>92</sup> Added Ng after Rachel Balkovec’s historic hire by the Yankees, “If you had told me five years ago that this was going to be what would happen in 2022, I would have said there’s no chance. But really seeing it with my own two eyes, where the game is going or has gone—it’s just incredibly heartening.”<sup>93</sup>

## ii. The National Football League

The NFL has made strides in achieving gender equality in sports employment, but there is still plenty of room for improvement. At the time of this writing, there are currently eight women who hold primary ownership stakes in NFL teams.<sup>94</sup> According to

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<sup>89</sup> Rachel DeSantis, *All-Women Broadcast Crew Makes History as They Call MLB Game: ‘Representation Is Important’*, PEOPLE (July 21, 2021, 2:56 PM), <https://people.com/sports/all-women-broadcast-crew-makes-history-as-they-call-mlb-game/> [https://perma.cc/2SNV-F55N].

<sup>90</sup> Associated Press, *First All-Female Broadcast Crew in MLB History Calls Game*, CBS NEWS (July 21, 2021, 3:45 AM), <https://www.cbsnews.com/news/first-all-female-broadcast-crew-in-mlb-history-calls-game/> [https://perma.cc/URG2-9LSX].

<sup>91</sup> David Waldstein, *In a First, an M.L.B. Game Will be Called Entirely by Women*, N.Y. TIMES (July 15, 2021), <https://www.nytimes.com/2021/07/15/sports/baseball/mlb-all-woman-broadcast.html> [https://perma.cc/5EXU-STQ6].

<sup>92</sup> Tyler Kepner & James Wagner, *Kim Ng Has Been Ready for Years*, N.Y. TIMES (Nov. 18, 2020), <https://www.nytimes.com/2020/11/18/sports/baseball/kim-ng-miami-marlins.html> [https://perma.cc/QY34-DRNE].

<sup>93</sup> Betelhem Ashame, *Balkovec Latest in Line of Women Shattering Baseball’s Barriers*, MLB (Jan. 24, 2022), <https://www.mlb.com/news/featured/rachel-balkovec-joins-group-of-women-who-broke-barriers> [https://perma.cc/527H-ACXK].

<sup>94</sup> Jenny Vrentas, *NFL’s Female Owners Are Changing the Narrative as They Continue to Gain Power, Influence*, SPORTS ILLUSTRATED (July 19, 2018), <https://www.si.com/nfl/2018/07/19/nfl-female-owners-influence-martha-firestone-ford-kim-pegula> [https://perma.cc/A8VM-H79Z].

Sports Illustrated, though, “if you were to rank the owners wielding the most power around the NFL, you would [go] pretty far down the list before getting to any of the women.”<sup>95</sup> Nevertheless, women have been able to assert themselves in the game of football in ways that are still mostly out of reach for their counterparts in baseball.

Similarly, while the NFL currently has no female general managers, Susan Spencer served as the Philadelphia Eagles’ acting general manager in 1984.<sup>96</sup> She remains the only woman to ever serve as a general manager in NFL history.<sup>97</sup> The following anecdote, though, will demonstrate how Spencer certainly had to endure more abuse than the average male general manager would have had to endure.<sup>98</sup>

With a more sexist environment in sports in the 1980s, Spencer was faced with the chauvinistic antics of players but found ways to “turn the tables” on them.<sup>99</sup> After visiting the team’s locker room to examine some new rehabilitation equipment, Spencer encountered five naked players, all of whom immediately grabbed towels.<sup>100</sup> The players, though, decided to drop their towels and expose themselves to her.<sup>101</sup> While Spencer was initially embarrassed, she walked up to the organizer of this stunt, looked at his privates, and said, “Big deal.”<sup>102</sup> The other players ended up laughing at the player and nicknamed him “Big Deal.”<sup>103</sup> “Spencer had successfully turned the table” on these players and had earned their respect.<sup>104</sup>

There are also several other women who have reached the executive level among the NFL’s thirty-two teams. In its 2021 Racial

<sup>95</sup> *Id.*

<sup>96</sup> Bill Shea, *A Chat with NFL’s First—and Only—Female General Manager*, *CRAIN’S DETROIT BUS.* (Mar. 27, 2017, 8:00 AM), <https://www.crainsdetroit.com/article/20170327/BLOG003/170329831/a-chat-with-nfls-first-and-only-female-general-manager> [https://perma.cc/84ZS-AXNV].

<sup>97</sup> Jeff Kerr, *Susan Tose Spencer Broke Glass Ceiling for Women in NFL Front Offices While Saving Eagles from Disaster*, *CBS SPORTS* (June 11, 2021, 2:27 PM), <https://www.cbssports.com/nfl/news/susan-tose-spencer-broke-glass-ceiling-for-women-in-nfl-front-offices-while-saving-eagles-from-disaster/> [https://perma.cc/RQ45-3GAB].

<sup>98</sup> Mike Freeman, *The Past, Present and Future of Women and the NFL’s ‘Boys Club’*, *BLEACHER REP.* (Mar. 21, 2016), <https://bleacherreport.com/articles/2618710-the-past-present-and-future-of-women-and-the-nfls-boys-club> [https://perma.cc/BB4N-9K7G].

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

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

<sup>104</sup> Freeman, *supra* note 98.

and Gender Report Card for the NFL, TIDES noted that there were 110 women in the “Vice Presidents” category.<sup>105</sup> Further, certain NFL teams have taken proactive steps to involve women in important decision-making roles. Although the Philadelphia Eagles are owned by a man—Jeffrey Lurie—they employ women in over half of the top advisor roles for the team.<sup>106</sup> While Lurie did not hire these women with the specific purpose of making a point, he was interested in finding executives that could bring “diversity of thought” to the team.<sup>107</sup> “The Eagles realized that if they wanted to hire the most well-rounded candidates, it was foolish to look within the same industry that has been dominated by backward hiring practices for its century of existence.”<sup>108</sup>

The NFL can also count some women among its coaching ranks. Jennifer Welter became the first female coach in NFL history, albeit on a temporary level, when she served as an assistant linebackers coach for six weeks over the summer of 2015.<sup>109</sup> In 2016, Kathryn Smith became the first-ever full-time female coach in NFL history, after she was promoted to Special Teams Quality Control coach for the Buffalo Bills.<sup>110</sup> Her position did not come without challenges, though: Smith was “[o]ften the only woman in the room during coach or player meetings,”<sup>111</sup> and opposing team fans would direct sexist remarks her way.<sup>112</sup>

NFL teams have hired more women as coaches in the five years since Smith’s hiring. Katie Sowers became the first openly gay coach—and second full-time female coach—in 2017, after be-

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<sup>105</sup> RICHARD E. LAPCHICK, *THE 2021 RACIAL AND GENDER REPORT CARD: NATIONAL FOOTBALL LEAGUE 51* (The Inst. for Diversity and Ethics in Sport [TIDES] ed., 2021), [https://www.tidesport.org/\\_files/ugd/326b62\\_5afc0093dedf4b53bdba964fa0c1eb0c.pdf](https://www.tidesport.org/_files/ugd/326b62_5afc0093dedf4b53bdba964fa0c1eb0c.pdf) [https://perma.cc/KGG2-AF2J].

<sup>106</sup> Andrew Beaton, *The NFL Team Run by Women*, WALL ST. J. (Sept. 25, 2019, 7:54 AM), <https://www.wsj.com/articles/the-nfl-team-run-by-women-11569412442> [https://perma.cc/CDB6-ZWWE].

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

<sup>108</sup> *Id.*

<sup>109</sup> Courtney Connley, *Meet Four Women Changing the Face of NFL Coaching*, CNBC (Jan. 30, 2019, 12:33 PM), <https://www.cnbc.com/2018/09/28/meet-four-women-changing-the-face-of-nfl-coaching.html> [https://perma.cc/7K65-SMXW].

<sup>110</sup> Poppy Harlow & Haley Draznin, *NFL’s First Full-Time Female Coach: I Didn’t Set Out to Be a ‘Trailblazer’*, CNN BUS. (Jan. 8, 2018, 8:13 AM), <https://money.cnn.com/2018/01/08/news/boss-files-kathryn-smith/index.html> [https://perma.cc/7ZAB-X3MS].

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

<sup>112</sup> “Last season, a fan who was rooting for the opposing team yelled down at Smith while she was coaching on the sidelines, ‘Hey waitress! Can I have a Pepsi, please?’” *See id.*



ing hired by the San Francisco 49ers.<sup>113</sup> In 2018, Kelsey Martinez was hired by the Oakland Raiders (now the Las Vegas Raiders) as a strength and conditioning coach.<sup>114</sup> The Raiders' running backs coach at the time, Jemal Singleton, noted how hires like Martinez had the potential to leave lasting impacts on young girls like his daughter.

My daughter is five, so right now she's at such an impressionable age that the sights and sounds she's around will impact her really for the rest of her life. . . . And to be in a situation here—I don't know if it's the first, or the only—but to get to have a female strength coach in Kelsey is unbelievable. Because now my daughter can see there's so many different roles when you come here. You hear [play-by-play announcer] Beth Mowins on the call [during games], you see Kelsey out there working the players, and it's one of those things as a father you want your daughter to have those aspirations to be whatever she wants to be.<sup>115</sup>

More recently, on January 26, 2021, Jennifer King became the first Black woman to be hired as a full-time coach, when the Washington Football Team (now the Washington Commanders) chose her for its Assistant Running Backs coach position for the 2021–2022 NFL season.<sup>116</sup>

The NFL surpassed MLB's level of zero female umpires with its hiring of a single female referee, Sarah Thomas, in 2015.<sup>117</sup> While Shannon Eastin was, technically, the first woman to serve as

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<sup>113</sup> Nick Wagoner, *49ers' Katie Sowers Becomes NFL's First Openly Gay Coach, Second Woman to Hold Full-Time Post*, ESPN (Aug. 23, 2017), [https://www.espn.com/nfl/story/\\_/id/20433721/san-francisco-49ers-hire-first-female-assistant-coach-first-openly-gay-nfl-assistant](https://www.espn.com/nfl/story/_/id/20433721/san-francisco-49ers-hire-first-female-assistant-coach-first-openly-gay-nfl-assistant) [https://perma.cc/D2V6-7L77].

<sup>114</sup> Kyle Martin, *Strength and Conditioning Coach Kelsey Martinez Breaking Barriers in Silver and Black*, LAS VEGAS RAIDERS (Aug. 14, 2018, 3:56 PM), <https://www.raiders.com/news/strength-and-conditioning-coach-kelsey-martinez-is-accomplishing-things-only-a-h> [https://perma.cc/GK5P-6H5R].

<sup>115</sup> *Id.*

<sup>116</sup> Zach Selby, *Jennifer King Makes History as NFL's First African American Female Assistant Position Coach*, WASH. COMMANDERS (Jan. 26, 2021, 9:00 AM), <https://www.commanders.com/news/jennifer-king-first-female-african-american-female-assistant-position-coach-nfl> [https://perma.cc/4EBE-5BS5]; see also Terry Shropshire, *Jennifer King Becomes the 1st Black Female Coach in NFL History*, ROLLING OUT (Jan. 28, 2021), <https://rollingout.com/2021/01/28/jennifer-king-becomes-the-1st-black-female-coach-in-nfl-history/> [https://perma.cc/MX7B-7DXF].

<sup>117</sup> Tadd Haislop, *Who is the NFL's Female Referee? Meet Sarah Thomas, The Only Woman Official in the NFL in 2020*, SPORTING NEWS (Oct. 4, 2020), <https://www.sportingnews.com/ca/nfl/news/nfl-female-referee-sarah-thomas/1gqgz7ungjig1kgrk68un15rx> [https://perma.cc/HH4C-659L].

an NFL referee—serving as a Line Judge during the 2012 NFL Referees Association lockout—Thomas was the first woman to be hired in a full-time officiating role.<sup>118</sup> Thomas also made history when she served as the Down Judge during Super Bowl LV, making her the first female referee to ever officiate the NFL’s most prominent and important game.<sup>119</sup> The NFL then hired a second female referee, Maia Chaka, before the 2021–2022 season.<sup>120</sup> Chaka made history as the first Black woman to officiate an NFL game.<sup>121</sup> Clearly, the NFL has a long way to go when it comes to gender equality with its officiating crews, but these hires were definitely a step in the right direction.

The NFL has also seen a small number of women serve as play-by-play and color commentary announcers for game broadcasts, but, like MLB, the overall number is much too low. “In 1987, Gayle Sierens became the first woman to call an NFL game.”<sup>122</sup> However, it would be another thirty years before a woman would again serve as the play-by-play announcer for an NFL game.<sup>123</sup> On September 11, 2017, Beth Mowins called the Monday Night Football game between the San Diego Chargers and the Denver Broncos.<sup>124</sup> In 2018, Amazon made history when the company announced that two women, Hannah Storm and Andrea Kremer, would serve as the first all-female broadcast team for its Thursday Night Football telecasts.<sup>125</sup> Additionally, several female journalists serve as NFL sideline and clubhouse reporters, but this

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

<sup>119</sup> Steve Gardner, *NFL Referee Sarah Thomas Gets History-Making Super Bowl Assignment*, USA TODAY (Jan. 19, 2021, 2:59 PM), <https://www.usatoday.com/story/sports/nfl/2021/01/19/sarah-thomas-become-first-female-official-super-bowl-history/4216348001/> [<https://perma.cc/R74K-XC9N>].

<sup>120</sup> Patrik Walker, *NFL Officiating History: Maia Chaka Becomes First Black Woman to Officiate League Game in Week 1*, CBS SPORTS (Sept. 12, 2021, 11:30 AM), <https://www.cbssports.com/nfl/news/nfl-officiating-history-maia-chaka-becomes-first-black-woman-to-officiate-league-game-in-week-1/> [<https://perma.cc/TTWV-A2TP>].

<sup>121</sup> *Id.*

<sup>122</sup> De la Cretaz, *supra* note 69.

<sup>123</sup> Sam Farmer, *Beth Mowins Will Take Her Place in History Behind the Mike on ‘Monday Night Football’*, L.A. TIMES (Sept. 9, 2017, 4:05 PM), <https://www.latimes.com/sports/nfl/la-sp-nfl-preview-beth-mowins-20170909-story.html> [<https://perma.cc/UWF9-9PYT>].

<sup>124</sup> *Id.*

<sup>125</sup> Courtney Connley, *Meet the First All-Female Broadcast Team for NFL Games*, CNBC (Sept. 26, 2018, 12:09 PM), <https://www.cnn.com/2018/09/26/meet-the-first-all-female-broadcast-team-for-nfl-games.html> [<https://perma.cc/BK9D-KZ9Z>]; see also *Iconic Sports Journalists Hannah Storm and Andrea Kremer to Provide Commentary and Analysis for Thursday Night Football on Prime Video in More Than 200 Countries and Territories*, BUS. WIRE (Sept. 25, 2018, 9:30 AM), <https://www.businesswire.com/news/home/20180925005706/en/Iconic-Sports-Journalists-Hannah-Storm-Andrea-Kremer> [<https://perma.cc/9QU7-DB2P>].

only supports one of the main arguments of this Note—that when women are hired by professional sports leagues, they often serve in less-prominent roles than their male counterparts.<sup>126</sup>

For 2021, TIDES awarded the NFL an overall grade of a C+ for its gender hiring practices.<sup>127</sup> This score included individual grades of a B for the NFL League Office (38.8% women);<sup>128</sup> a D+ for Team Senior Administration (25.3% women);<sup>129</sup> a C+ for Team Professional Staff (33% women);<sup>130</sup> an F for Team Owners (21.9% women);<sup>131</sup> an F for Team CEOs/Presidents (3.1% women);<sup>132</sup> a C- for C-Suite Executives (28.6% women);<sup>133</sup> and a D+ for Team Vice Presidents (25.1% women).<sup>134</sup> Like MLB, though, the NFL received an A+ grade for its diversity initiatives, but there is plenty of opportunity for further progress.<sup>135</sup>

### iii. The National Basketball Association

Without question, the NBA has served as a model for gender diversity throughout all the professional sports leagues, outperforming MLB and the NFL in many areas. NBA commissioner Adam Silver “has been vocal about wanting to see more women hired for various NBA jobs, including coaching, administration and officiating.”<sup>136</sup> Even so, there is further potential to improve and strengthen this diversity over the coming years. Starting this analy-

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<sup>126</sup> See generally *FOX Sports Unveils 2020 NFL Game Broadcaster Lineup*, FOX SPORTS (Aug. 31, 2020), <https://www.foxsports.com/presspass/latest-news/2020/08/31/fox-sports-unveils-2020-nfl-game-broadcaster-lineup-headlined-elite-veterans-talented-new-voices> [https://perma.cc/9BBF-UQRB]; see also *Jim Nantz, Tony Romo and Tracy Wolfson Lead 2020 “NFL on CBS” Broadcast Team in CBS Sports’ Super Bowl LV Season*, VIACOMCBS (Sept. 2, 2020), <https://www.viacomcbspressexpress.com/cbs-sports/releases/view?id=55844> [https://perma.cc/CL85-88P4]; see also *2020 NFL Season Kicks Off This Thursday Night on NBC as Patrick Mahomes & Defending Champion Kansas City Chiefs Host Deshaun Watson and Houston Texans*, NBC SPORTS (Sept. 8, 2020), <https://nbcspportsgrouppressbox.com/2020/09/08/2020-nfl-season-kicks-off-this-thursday-night-on-nbc-as-patrick-mahomes-defending-champion-kansas-city-chiefs-host-deshaun-watson-and-houston-texans/> [https://perma.cc/6CGS-LBZ5].

<sup>127</sup> LAPCHICK, *supra* note 105, at 1.

<sup>128</sup> *Id.* at 3.

<sup>129</sup> *Id.* at 4.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 15.

<sup>132</sup> *Id.* at 16.

<sup>133</sup> LAPCHICK, *supra* note 105, at 18.

<sup>134</sup> *Id.* at 19.

<sup>135</sup> *Id.* at 26.

<sup>136</sup> Mechelle Voepel, *What Lindsay Gottlieb Hire Means for Women Coaches, The NBA and Cal*, ESPN (June 13, 2019), [https://www.espn.com/womens-college-basketball/story/\\_/id/26969340/what-lindsay-gottlieb-hire-means-women-coaches-nba-cal](https://www.espn.com/womens-college-basketball/story/_/id/26969340/what-lindsay-gottlieb-hire-means-women-coaches-nba-cal) [https://perma.cc/VQG5-U3FQ].

sis from the very top of the NBA, there are currently three women who own NBA teams: Jeanie Buss (Los Angeles Lakers), Ann Kroenke (Denver Nuggets), and Gail Miller (Utah Jazz).<sup>137</sup> A fourth woman, Julianna Holt, had succeeded her husband, Peter, as owner of the San Antonio Spurs, but she has since ceded control of the team to her son.<sup>138</sup>

Arguably the most prominent woman of this group is Jeanie Buss. Buss became the first female owner of a championship team in NBA history when the Lakers won the 2020 NBA Finals.<sup>139</sup> “[Buss] flexed when she needed to in order to end years of family drama, and quickly righted the Lakers’ ship, after years of bumbling and futility.”<sup>140</sup> Prior to Buss assuming control of the team, the Lakers had not won a championship since 2010.<sup>141</sup>

The NBA and its teams have also regularly elevated women to CEO positions and other important executive roles. Cynthia Marshall—who became the NBA’s first Black, female team CEO<sup>142</sup> when she was hired by Mark Cuban of the Dallas Mavericks—was brought in to clean up the toxic, “corrosive environment”<sup>143</sup> that had been in place under the team’s former male CEO, Terdema Ussery.<sup>144</sup> Marshall was tired of the way people had told her to conform throughout her lifetime. “[T]asked with transforming the culture [of the Dallas Mavericks], she’s making sure nobody else experiences that.”<sup>145</sup> Marshall added, “If nothing else, I am proud

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<sup>137</sup> Ed Reeves, *How the NBA’s Female Team Owners Made Their Fortunes*, SPORTSCASTING (Mar. 6, 2020), <https://www.sportscasting.com/how-the-nbas-female-team-owners-made-their-fortunes/> [https://perma.cc/94GU-KE4Q]; see also Kyle Ringo & Shari Biediger, *Holt Siblings Take Control of Spurs Sports & Entertainment*, SAN ANTONIO REP. (Mar. 29, 2019), <https://sanantonioreport.org/holt-siblings-take-control-of-spurs-sports-entertainment/> [https://perma.cc/T5DV-RFJ4].

<sup>138</sup> Reeves, *supra* note 137.

<sup>139</sup> Brittany Martin, *Jeanie Buss Is the First Female Owner of a Championship Team in NBA History*, L.A. MAG. (Oct. 12, 2020), <https://www.lamag.com/culturefiles/jeanie-buss-lakers-owner/> [https://perma.cc/747T-NGAQ].

<sup>140</sup> Dan Szczepanek, *Ranking the 9 Best (And Only) Female Owners in Sports.*, MEDIUM (Sept. 9, 2017), <https://medium.com/grandstandcentral/best-women-owners-pro-sports-37a32b603f18> [https://perma.cc/8B7L-YN4].

<sup>141</sup> Reeves, *supra* note 137.

<sup>142</sup> Jenny Anchondo, *NBA’s First Black Female CEO Helped Transform Culture of NBA Franchise*, KHON2 NEWS (Jan. 11, 2021, 9:44 AM), <https://www.khon2.com/hidden-history/black-history-month/nbas-first-black-female-ceo-helped-transform-culture-of-nba-franchise/> [https://perma.cc/TYG6-D9FQ].

<sup>143</sup> Mary Pilon, *The Dallas Mavericks’ New CEO Is Cleaning Up a #MeToo Mess*, BLOOMBERG (Dec. 20, 2018, 5:00 AM), <https://www.bloomberg.com/news/features/2018-12-20/the-dallas-mavericks-new-ceo-is-cleaning-up-a-metoo-mess> [https://perma.cc/X5G8-N3PR].

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

<sup>145</sup> Anchondo, *supra* note 142.

of the speak-up culture we have. Our people have a voice. The level doesn't matter. I had a one-on-one with every single person in the organization when I got there."<sup>146</sup>

Another example of a prominent female executive in basketball is Kelly Krauskopf, who became the NBA's first female Assistant General Manager when she was hired by the Indiana Pacers in December 2018.<sup>147</sup> Krauskopf has had a long career in basketball—both at the collegiate and professional levels—playing college basketball at Texas A&M, serving as the WNBA's Director of Basketball Operations from 1996–1999, and joining Pacers Sports & Entertainment in 1999.<sup>148</sup> In that last position, she led the WNBA's Indiana Fever to thirteen playoff appearances, three WNBA Finals appearances, and one WNBA championship.<sup>149</sup> As the WNBA was originally formed by the NBA and its teams, this further shows the great level of emphasis that the NBA has placed on female leadership positions over the years.<sup>150</sup>

Other prominent women who hold high-level positions within the NBA are Kathy Behrens—who is the President of Social Responsibility & Player Programs—and Amy Brooks—who is Chief Innovation Officer.<sup>151</sup> “Behrens oversees all NBA programs that coordinate league, team and player social responsibility and impact efforts, foster youth basketball development, support player growth and education, further important health and safety information, promote greater civic engagement, and enhance marketing opportunities for current and former players.”<sup>152</sup> Similarly, “[Amy Brooks] leads a Global Strategy & Innovation group that develops and executes new ideas and initiatives, collaborates with NBA se-

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

<sup>147</sup> Abby Gardner, *Kelly Krauskopf, The First Female Assistant GM in the NBA, Opens Up About Her Career and the Pacers Season*, *INDY MAVEN* (Feb. 25, 2020), <https://indymaven.com/articles/kelly-krauskopf-indiana-pacers-nba/> [<https://perma.cc/LT4N-2P2Q>].

<sup>148</sup> *Pacers Name Kelly Krauskopf Assistant General Manager*, *IND. PACERS* (Dec. 17, 2018), <https://www.nba.com/pacers/news/pacers-name-kelly-krauskopf-assistant-general-manager> [<https://perma.cc/NY4F-6QBB>].

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

<sup>150</sup> *History*, *WNBA*, <https://www.wnba.com/history/> [<https://perma.cc/GA8U-M4V4>] (last visited Mar. 19, 2022).

<sup>151</sup> Eddie Moran, *Women in Sports Roundtable: Female Executives Share Their Experiences Working at Leagues*, *FRONT OFF. SPORTS* (Sept. 17, 2019), <https://frontofficesports.com/female-exec-bigs-4-sports/> [<https://perma.cc/ML2G-NDM9>].

<sup>152</sup> *Kathy Behrens*, *NBA CAREERS* (Apr. 2021), <https://careers.nba.com/executive/kathleen-behrens/> [<https://perma.cc/YC5Y-B58E>].

nior leadership on setting global strategic priorities and delivers data insights to enable fan and business growth.”<sup>153</sup>

Beyond the executive level, the NBA and its teams have also made a concerted effort to employ a large number of female coaches throughout the NBA. At the time that this Note was originally written, “[eleven] women [held] assistant coaching positions in the NBA,” representing “[a]bout a third of NBA teams.”<sup>154</sup> One of the most well-known was Becky Hammon—a former WNBA star—who, until the end of 2021, served as one of the assistant coaches of the San Antonio Spurs.

In 2014, the Spurs made Hammon the first female full-time coach in NBA history.<sup>155</sup> Spurs’ head coach, Gregg Popovich—who has had a legendary career at the helm of the team—was most concerned about Hammon’s qualifications, rather than her gender. Hammon liked the approach, stating that it was “the best way to go about it.”<sup>156</sup> Hammon also noted that “[i]t could be very catastrophic if I wasn’t qualified. Then it sets the whole thing back.”<sup>157</sup> Said Hammon, “I don’t want to be hired because I’m a woman. . . . I’m getting hired because I’m capable.”<sup>158</sup> Mirroring that mindset, Popovich’s public statement regarding the hire did not even mention that Hammon was a woman.<sup>159</sup> Hammon worked her way up to eventually become Popovich’s senior assistant for the 2019–2020 season.<sup>160</sup> When Popovich was ejected from a game during the 2020–2021 season, Hammon became the first woman to ever serve as a head coach during an NBA game.<sup>161</sup> Hammon’s years of NBA coaching experience paid dividends when, on December 31, 2021, she was officially hired as the head coach of the WNBA’s Las

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<sup>153</sup> Amy Brooks, NBA CAREERS (Dec. 2021), <https://careers.nba.com/executive/amy-brooks/> [https://perma.cc/CWD4-B8LK].

<sup>154</sup> Charlotte Gibson, *Trailblazing NBA Women Coaches*, ESPNW (Mar. 6, 2020), [https://www.espn.com/espn/feature/story/\\_/id/28744241/trailblazing-nba-women-coaches](https://www.espn.com/espn/feature/story/_/id/28744241/trailblazing-nba-women-coaches) [https://perma.cc/5P7F-2Q3D].

<sup>155</sup> Jeré Longman, *Pioneer of a Crossover Move*, N.Y. TIMES (Aug. 11, 2014), <https://www.nytimes.com/2014/08/12/sports/basketball/becky-hammon-takes-big-steps-from-russia-to-san-antonio.html> [https://perma.cc/8S3R-KT7R].

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Victor Mather & Marc Stein, *Becky Hammon Becomes First Woman to Serve as Head Coach in N.B.A. Game*, N.Y. TIMES (Dec. 31, 2020), <https://www.nytimes.com/2020/12/31/sports/basketball/becky-hammon-nba-head-coach.html> [https://perma.cc/42CG-Z3Y9].

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

Vegas Aces.<sup>162</sup> Hammon dismissed the outside criticism, which posited that she was taking a step down by leaving the NBA for the WNBA: “I think it’s an ignorant statement. To think I’ve outgrown the WNBA in a coaching capacity is ridiculous. I’d rather be a [head] coach in the WNBA and have my own organization and be running a team.”<sup>163</sup>

The NBA has also been an industry trailblazer in employing female referees, first hiring Violet Palmer as a referee back in 1997.<sup>164</sup> Palmer would go on to officiate 919 total games across eighteen seasons, including nine postseason games in six different seasons.<sup>165</sup> Her success opened up more opportunities for women to serve as referees for NBA games. For the 2021–2022 season, six of the NBA’s seventy-five officiating staffers were women.<sup>166</sup> On January 25, 2021, Natalie Sago and Jenna Schroeder made history when they both served as referees in the same NBA game, the first time that two women had ever officiated a game together.<sup>167</sup>

There are also some prominent women who work as announcers and provide studio coverage for NBA game telecasts. Doris Burke, who has covered professional and college basketball for ESPN for over three decades, was promoted to full-time NBA game analyst in 2017, making her the first-ever woman to serve in this role.<sup>168</sup> Burke also became the first woman to serve as an announcer for playoff and championship games, after she called the

<sup>162</sup> Mechelle Voepel, *Becky Hammon Officially Named Coach of Las Vegas Aces*; Gregg Popovich Says She Has All Tools to Succeed, ESPN (Dec. 31, 2021), [https://www.espn.com/wnba/story/\\_/id/32970074/becky-hammon-thrilled-back-wnba-las-vegas-aces](https://www.espn.com/wnba/story/_/id/32970074/becky-hammon-thrilled-back-wnba-las-vegas-aces) [<https://perma.cc/FV5F-SYST>].

<sup>163</sup> Doug Feinberg, *Becky Hammon: It Was Easy Decision to Leave NBA, Return to WNBA*, NBA (Jan. 18, 2022, 4:46 PM), <https://www.nba.com/news/becky-hammon-it-was-easy-decision-to-leave-nba-return-to-wnba> [<https://perma.cc/DUN5-G99W>].

<sup>164</sup> Longman, *supra* note 155; see also Joe Pantorno, *NBA’s First Female Referee, Violet Palmer, Retires from On-Court Work*, BLEACHER REP. (Sept. 22, 2016), <https://bleacherreport.com/articles/2665293-nbas-first-female-referee-violet-palmer-retires-from-on-court-work> [<https://perma.cc/2AUD-2KYP>].

<sup>165</sup> Pantorno, *supra* note 164.

<sup>166</sup> Steve Aschburner & Michaela Gilmer, *6 NBA Officials Proving Refereeing is Not a Gendered Job*, NBA (Mar. 8, 2022, 8:59 AM), <https://www.nba.com/news/6-nba-officials-proving-refereeing-is-not-a-gendered-job> [<https://perma.cc/6RDG-RZS8>].

<sup>167</sup> Associated Press, *Natalie Sago, Jenna Schroeder Part of NBA’s First Two-Woman Ref Crew*, ESPN (Jan. 25, 2021), [https://www.espn.com/nba/story/\\_/id/30777933/natalie-sago-jenna-schroeder-part-nba-first-two-woman-ref-crew](https://www.espn.com/nba/story/_/id/30777933/natalie-sago-jenna-schroeder-part-nba-first-two-woman-ref-crew) [<https://perma.cc/PP6J-EN33>].

<sup>168</sup> Frank Pallotta, *Doris Burke Will Be the First Female Full-Time National NBA Game Analyst*, CNN BUS. (Sept. 25, 2017, 6:31 PM), <https://money.cnn.com/2017/09/25/media/doris-burke-espn-nba-analyst/index.html> [<https://perma.cc/6NFJ-NFDE>]; see also *Doris Burke*, ESPN PRESS ROOM, [https://espnpressroom.com/us/bios/burke\\_doris/](https://espnpressroom.com/us/bios/burke_doris/) [<https://perma.cc/DF6P-RZ6D>] (last visited Mar. 19, 2022).

2020 NBA Conference Finals and the 2020 NBA Finals on the radio.<sup>169</sup>

Sarah Kustok, discussed *supra*,<sup>170</sup> was the first woman to earn a full-time solo analyst role for an NBA team's broadcasts.<sup>171</sup> After serving for five years as the YES Network's Brooklyn Nets courtside reporter, Kustok became a primary game analyst for the network in 2017.<sup>172</sup> In April 2020, Kustok became the first woman to win a New York Emmy Award in the category of "Sports Analyst."<sup>173</sup> As her on-air partner, Ian Eagle, also won his fifth straight New York Emmy Award in the "Sports Play-By-Play" category, the pair became the first sports broadcasting team to sweep these categories at the New York Emmy Awards.<sup>174</sup> Said Kustok,

The NBA is so progressive in how they think about things. The amount of females in front offices, the amount of females on coaching staffs, females in different broadcast positions that you didn't necessarily see before. It's seeped into so many different areas, like support and performance staffs, not just with the Nets, but across the league. There's still a ways to go, but I love the idea that you are trying to put the most competent people in a role regardless of gender.<sup>175</sup>

The NBA also made history when, on February 9, 2022, an ESPN telecast of a game between the Golden State Warriors and Utah Jazz was announced, produced, and directed by a crew made up entirely of women.<sup>176</sup> Beth Mowins—who was the first woman to call an NFL game in thirty years back in 2017<sup>177</sup>—served as the play-by-play announcer, Doris Burke performed color commen-

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<sup>169</sup> Associated Press, *ESPN's Doris Burke to Add to Milestones with Radio Call of NBA Playoffs*, ESPN (Sept. 9, 2020), [https://www.espn.com/nba/story/\\_id/29845900/espn-doris-burke-add-milestones-radio-call-nba-playoffs](https://www.espn.com/nba/story/_id/29845900/espn-doris-burke-add-milestones-radio-call-nba-playoffs) [<https://perma.cc/9ATV-XZ5G>].

<sup>170</sup> See *supra* Section II(B)(i).

<sup>171</sup> Yaron Weitzman, *Let's Normalize This: Meet Sarah Kustok, The NBA's First Solo Female Analyst*, BLEACHER REP. (Dec. 22, 2017), <https://bleacherreport.com/articles/2749476-meet-sarah-kustok-the-nbas-1st-full-time-female-color-commentator> [<https://perma.cc/JU24-JBWB>].

<sup>172</sup> Sarah Kustok: Brooklyn Nets Game Analyst, *supra* note 79.

<sup>173</sup> Tom Dowd, *YES Network's Sarah Kustok Breaks New Ground with Emmy Win for Brooklyn Nets Coverage*, NBA (May 5, 2020), <https://www.nba.com/nets/news/feature/2020/05/05/yes-networks-sarah-kustok-breaks-new-ground-with-emmy-win-for-brooklyn-nets-coverage> [<https://perma.cc/VY4N-JAH9>].

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> Madison Williams, *ESPN's Jazz-Warriors Broadcast to Make History as NBA's First All-Women Crew*, SPORTS ILLUSTRATED (Feb. 9, 2022), <https://www.si.com/nba/2022/02/10/espn-jazz-warriors-broadcast-all-women> [<https://perma.cc/2GT4-Y2YS>].

<sup>177</sup> See *supra* Section II(B)(ii).



tating duties, and Lisa Salters reported from the sideline.<sup>178</sup> Additionally, thirty-three other woman served on the production and directorial teams for the telecast.<sup>179</sup>

Reflecting this greater commitment to diversity, TIDES, in its 2021 Racial and Gender Report Card for the National Basketball Association, awarded the NBA an overall grade of B for its gender hiring practices.<sup>180</sup> This included individual grades of an A- for the NBA League Office (42% women);<sup>181</sup> a C- for Team Vice Presidents (27.8% women);<sup>182</sup> a B for Team Senior Management (37.9% women);<sup>183</sup> a D+ for Team C-Suite Personnel (26.4% women);<sup>184</sup> an F for Team Presidents/CEOs (8.7% women);<sup>185</sup> and a C+ for Professional Staff (32.7% women).<sup>186</sup> Like MLB and the NFL, the NBA received an A+ grade for its diversity initiatives.<sup>187</sup>

### III. DISCUSSION

The next issue that must be addressed is whether women involved with the major sports leagues have a viable cause of action as a result of the lack of professional opportunities in prominent positions across the field. As noted *supra*,<sup>188</sup> Title VII of the Civil Rights Act of 1964<sup>189</sup> prohibits discrimination based on several factors, including sex.<sup>190</sup> Further, the Equal Pay Act of 1963<sup>191</sup> “makes it illegal to pay different wages to men and women if they perform equal work in the same workplace.”<sup>192</sup> If a woman work-

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<sup>178</sup> Williams, *supra* note 176.

<sup>179</sup> *Id.*

<sup>180</sup> RICHARD E. LAPCHICK, *THE 2021 RACIAL AND GENDER REPORT CARD: NATIONAL BASKETBALL ASSOCIATION 1* (The Inst. for Diversity and Ethics in Sport [TIDES] ed., 2021), [https://www.tidesport.org/\\_files/ugd/138a69\\_4b2910360b754662b5f3cb52675d0faf.pdf](https://www.tidesport.org/_files/ugd/138a69_4b2910360b754662b5f3cb52675d0faf.pdf) [<https://perma.cc/AD8F-QM26>].

<sup>181</sup> *Id.* at 3.

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

<sup>183</sup> *Id.* at 4.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 19.

<sup>186</sup> LAPCHICK, *supra* note 180, at 22.

<sup>187</sup> *Id.* at 23.

<sup>188</sup> See *supra* Section II.

<sup>189</sup> 42 U.S.C. § 2000e.

<sup>190</sup> See generally *What Laws Does EEOC Enforce?*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/youth/what-laws-does-eeoc-enforce> [<https://perma.cc/343V-XDY6>] (last visited Mar. 19, 2022).

<sup>191</sup> 29 U.S.C. § 206.

<sup>192</sup> *What Laws Does EEOC Enforce?*, *supra* note 190.

ing in the professional sports industry is able to prove the elements of either of these laws, it is possible that a viable cause of action exists. However, litigation may not necessarily be the best option for that particular individual. The following sections will explore the available legal options for these potential plaintiffs, and the sections will also provide a comparative analysis of litigation and alternative dispute resolution.

### A. *Litigation v. ADR*

When it comes to the best course of action for a potential plaintiff who has suffered a cognizable injury, the individual will often be presented with two broad choices: litigation or ADR. ADR refers to “any method of resolving disputes without litigation,” and includes arbitration, mediation, and negotiation, among other methods.<sup>193</sup> But which is the best option? Further, which method is most ideal when the individual in question has been subjected to gender-based employment discrimination? While both litigation and ADR each have several benefits, both methods also have their own drawbacks. It is likely that the individual’s particularized situation will be a major determining factor as to whether litigation or ADR is preferable, but in a general sense, there are positives and negatives to each method. The following subsections will explore these factors in greater detail.

#### i. The Benefits and Drawbacks of Litigation

One of the main benefits of litigation is its ordered, structured procedures. In federal cases, the Federal Rules of Civil Procedure (“FRCP”) provide precise guidelines as to how a lawsuit can and may proceed.<sup>194</sup> Individual states also have their own sets of civil practice and procedure laws, which apply to state court proceedings.<sup>195</sup> The parties to a lawsuit can use these sets of guidelines in their planning, devising strategies throughout the process to gain advantages over their adversaries. Predictability is a key feature of litigation, and how the parties adapt to this general predictability—

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<sup>193</sup> Wex Definitions Team, *Alternative Dispute Resolution*, CORNELL L. SCH. LEGAL INFO. INST. (Nov. 2021), [https://www.law.cornell.edu/wex/alternative\\_dispute\\_resolution](https://www.law.cornell.edu/wex/alternative_dispute_resolution) [<https://perma.cc/EGH8-R72R>].

<sup>194</sup> See generally FED. R. CIV. P.

<sup>195</sup> For an example, see generally *Legislation*, N.Y. STATE SENATE (Jan. 7, 2022), <https://www.nysenate.gov/legislation/laws/CVP> [<https://perma.cc/W6EH-83DL>].

as well as how the parties respond to any surprises that may arise along the way—will usually be a good indicator of the party that will prevail in its case.<sup>196</sup>

Two further benefits of litigation, along the lines of striving for predictability, are *stare decisis* and the pre-trial discovery system. Under the doctrine of *stare decisis*, courts are usually bound by precedent that has been set by prior legal opinions.<sup>197</sup> On the other side of this, important legal issues that are adjudicated through litigation will also set lasting precedent for years to come. This is something that may be important to the client—depending on the issues being litigated—especially if the client wishes to expose an issue or injury through the public record.<sup>198</sup> Similarly, with the pretrial discovery system,<sup>199</sup> the parties will gather and exchange information about their respective cases, in order to have a more efficient, cooperative, and open process when it comes to the overall preparations for trial.<sup>200</sup>

A key advantage of litigation that must also be mentioned is that litigation allows for the losing party to appeal the result.<sup>201</sup> Where a party is of the opinion that a case was inappropriately adjudicated through summary judgment, or the party believes that the judge made a reversible error of law or discretion, the opportunity for review by a higher court will usually be available.<sup>202</sup> In a

<sup>196</sup> See generally Stefanie A. Lindquist & Frank C. Cross, *Stability, Predictability and the Rule of Law: Stare Decisis as Reciprocity Norm* (Univ. Tex. Sch. L. Working Paper), <https://law.utexas.edu/conferences/measuring/The%20Papers/Rule%20of%20Law%20Conference.crosslindquist.pdf> [<https://perma.cc/G9G8-DRZH>].

<sup>197</sup> The precise parameters of the *stare decisis* doctrine, including when the doctrine does or does not apply, are outside the scope of this Note. See generally Wex Definitions Team, *Stare Decisis*, CORNELL L. SCH. LEGAL INFO. INST. (Dec. 2021), [https://www.law.cornell.edu/wex/stare\\_decisis](https://www.law.cornell.edu/wex/stare_decisis) [<https://perma.cc/LL8Y-DCAZ>].

<sup>198</sup> *If I File a Personal Injury Lawsuit, Is It Public?*, ENJURIS, <https://www.enjuris.com/blog/questions/lawsuit-public/> [<https://perma.cc/6J4C-6Z73>] (last visited Mar. 19, 2022).

<sup>199</sup> The rules and procedures of the pre-trial discovery system are outside of the scope of this Note. See generally *Discovery*, CORNELL L. SCH. LEGAL INFO. INST., <https://www.law.cornell.edu/wex/discovery> [<https://perma.cc/LR68-B6GW>] (last visited Mar. 19, 2022); see also Legislation, *supra* note 195.

<sup>200</sup> There are several important pre-trial discovery and e-discovery cases that have helped shape the overall process. See generally *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003); *In re Seroquel Prods. Liab. Litig.*, 244 F.R.D. 650 (M.D. Fla. 2007); *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D. Md. 2008); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251 (D. Md. 2008); *Moore v. Publicis Groupe*, 287 F.R.D. 182 (S.D.N.Y. 2012).

<sup>201</sup> *How Courts Work*, AM. BAR ASS'N (Nov. 28, 2021), [https://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/appeals/](https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/appeals/) [<https://perma.cc/8H3E-4M8K>].

<sup>202</sup> *Id.*

civil case, either party can appeal the result.<sup>203</sup> As a result of the appellate process, litigants can feel confident that their cases will be appropriately decided. An unfavorable ruling at a lower court will not necessarily mean that the party has lost its case.<sup>204</sup>

However, there are also several drawbacks to litigation, and these must be analyzed if a potential litigant is to make an informed decision as to the best method of pursuing relief for their injury. One of the main drawbacks of litigation is that it can be extremely costly. This is especially true when the case is of a complex nature and when one—or both—of the parties have deep pockets and vast resources. Overly complex cases can result in a tremendous number of billable hours for an attorney.<sup>205</sup>

For this reason, pre-trial discovery also has the potential of being a major drawback to litigation, as difficult cases can result in parties spending an inordinate amount of time and money on these obligations. Additionally, due to the astronomical increase in the amount of electronically stored information (“ESI”), parties are now spending more time and money than ever on pre-trial discovery. In 2015, the majority of Fortune 1000 companies spent between \$5 million and \$10 million annually on e-discovery costs, with some of these companies spending as much as \$30 million annually.<sup>206</sup> As the world becomes more dependent on electronic devices and communications, these costs will only continue to rise.

Another drawback of litigation is that the process tends to favor the wealthier party.<sup>207</sup> “[C]lasses of litigants with the greatest resources and the lowest relative risk in litigation have the highest rates of success in courts.”<sup>208</sup> The wealthier party will generally have access to better attorneys and larger legal departments and can likely more easily withstand the costs and burdens of a long,

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<sup>203</sup> *Id.*

<sup>204</sup> See generally *On the Merits*, CORNELL L. SCH. LEGAL INFO. INST., [https://www.law.cornell.edu/wex/on\\_the\\_merits](https://www.law.cornell.edu/wex/on_the_merits) [<https://perma.cc/8JP7-MQLK>] (last visited Mar. 19, 2022).

<sup>205</sup> David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1271 (2009).

<sup>206</sup> Jennifer Booton, *Don't Send Another Email Until You Read This*, MARKETWATCH (Mar. 9, 2015, 10:10 AM), <https://www.marketwatch.com/story/your-work-emails-are-now-worth-millions-of-dollars-to-lawyers-2015-03-06> [<https://perma.cc/T8P9-PY4H>].

<sup>207</sup> Bahaar Hamzehzadeh, *Repeat Player vs. One-Shotter: Is Victory All That Obvious?*, 6 HASTINGS BUS. L. J. 239, 241 (2010); see also Albert Yoon, *The Importance of Litigant Wealth*, 59 DEPAUL L. REV. 649 (2010).

<sup>208</sup> Hamzehzadeh, *supra* note 207.

complex case.<sup>209</sup> According to Marc Galanter,<sup>210</sup> the wealthier parties also tend to be “repeat players” in the courts, as opposed to individual litigants, who can be classified as “one-shotters.”<sup>211</sup> These repeat players will often have advance intelligence of the system, will have developed a high level of expertise with litigation proceedings, and will have had opportunities to develop relationships with institutional incumbents.<sup>212</sup>

Finally, a major disadvantage of litigation is the possibility of a resulting damaged relationship between the parties. Due to the adversarial nature of litigation, the parties will tend to do everything in their power to win, and this has the potential to create tremendous levels of animosity. Additionally, even if a plaintiff is successful in litigating their case, messy and bitterly fought disputes—as a result of the public record—can often be damaging to an individual’s reputation. For example, after Laura Zubulake prevailed in her gender-based employment discrimination suit against her employer, UBS Warburg,<sup>213</sup> she was awarded over \$29 million in total damages but chose to settle before the ruling could be appealed.<sup>214</sup> However, after serving as a high-level executive in the banking industry while at UBS Warburg, she was never able to find another job in the field. Zubulake has since authored a book; she now does consulting work and is a professional lecturer.<sup>215</sup>

## ii. The Benefits and Drawbacks of ADR

### 1. Mandatory Arbitration

Before even commencing an analysis of the benefits and drawbacks of ADR, it is important to consider that there are many indi-

<sup>209</sup> See generally Hedieh Nasheri & David L. Rudolph, *Equal Protection Under the Law: Improving Access to Civil Justice*, 20 AM. J. TRIAL ADVOC. 331, 335 (1997).

<sup>210</sup> Marc Galanter is a Professor Emeritus at the University of Wisconsin Law School and is the author of a seminal paper entitled “Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change.”

<sup>211</sup> Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 97–98 (1974).

<sup>212</sup> *Id.* at 98–99. For a chart on the taxonomy of litigation by the strategic configuration of the parties, see *id.* at 107.

<sup>213</sup> See generally *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004).

<sup>214</sup> Eduardo Porter, *UBS Ordered to Pay \$29 Million in Sex Bias Lawsuit*, N.Y. TIMES (Apr. 7, 2005), <https://www.nytimes.com/2005/04/07/business/ubs-ordered-to-pay-29-million-in-sex-bias-lawsuit.html> [<https://perma.cc/ZH9Q-WEXU>]; see also Victor Li, *Looking Back on Zubulake, 10 Years Later*, ABA J. (Sept. 1, 2014, 10:30 AM), [https://www.abajournal.com/magazine/article/looking\\_back\\_on\\_zubulake\\_10\\_years\\_later](https://www.abajournal.com/magazine/article/looking_back_on_zubulake_10_years_later) [<https://perma.cc/62F4-Z8XJ>].

<sup>215</sup> Li, *supra* note 214; see also *Laura Zubulake*, LINKEDIN, <https://www.linkedin.com/in/laurazubulake/> [<https://perma.cc/2M4P-FQS2>] (last visited Mar. 19, 2022).

viduals who will not even have a choice in the matter because of the presence of mandatory arbitration agreements in their employment contracts. The use of mandatory arbitration clauses has consistently been upheld as valid by U.S. courts.<sup>216</sup> “Under the FAA [Federal Arbitration Act], such arbitration is ‘mandatory’ in that courts will rigorously enforce the arbitration clause and compel the parties to arbitrate, even if one of the parties would prefer to litigate once the dispute actually arises.”<sup>217</sup> Section 2 of the Act, later codified into Title 9 of the United States Code in 1947, provides that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>218</sup> This provision affords a great amount of legal weight to arbitration agreements, and only allows for revocation of these agreements in cases where a contract would be voidable—such as fraud, duress, and unconscionability, to name a few examples. Additionally, under sections 9 and 10 of the Act, the “[Federal Arbitration Act] provides that the arbitration award is final and binding, having the same effect as a court judgment, with exceedingly limited grounds for judicial review.”<sup>219</sup> These sections of the Act have proven to be critical, as they transformed a mere award by an arbitrator—which, at one point, had little-to-no force of law—into a binding, legal obligation for the losing party.

Mandatory arbitration clauses have also had a major impact on employees’ rights. “Under [mandatory arbitration] agreements, workers whose rights are violated—for example, through employment discrimination or sexual harassment—can’t pursue their claims in court but must submit to arbitration procedures that research shows overwhelmingly favor employers.”<sup>220</sup> Because mandatory arbitration clauses are often found in adhesion contracts, the larger party presenting the contract essentially has full control over the terms of the agreement.<sup>221</sup> An individual presented with an employment contract, for example, is placed in a

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<sup>216</sup> Schwartz, *supra* note 205, at 1249.

<sup>217</sup> *Id.* at 1253.

<sup>218</sup> 9 U.S.C. § 2; *see also* Martha Nimmer, *The High Cost of Mandatory Arbitration*, 12 CARDOZO J. CONFLICT RESOL. 183, 189–90 (2010).

<sup>219</sup> Schwartz, *supra* note 205, at 1253–54.

<sup>220</sup> Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL’Y INST. (Apr. 6, 2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/> [<https://perma.cc/K4VV-PXT8>].

<sup>221</sup> Law Journal Editorial Board, *Mandatory Arbitration Clauses Are Contracts of Adhesion*, N.J. L. J. (Nov. 2, 2018, 5:12 PM), <https://www.law.com/njlawjournal/2018/11/02/mandatory-arbitration-clauses-are-contracts-of-adhesion/> [<https://perma.cc/GQ2N-SDQY>].

situation where they can either accept the terms of the contract and be hired by the employer or decline the terms of the contract and seek employment elsewhere.

With employment contracts, mandatory arbitration clauses have become extremely commonplace. The percentage of non-union employees who have been subjected to mandatory arbitration clauses has risen from 2% in 1992 to 56% in 2020.<sup>222</sup> The percentage of workers in 2020 who faced mandatory arbitration was even higher when considering employers with over 1,000 employees: 65.1% of these workers were subjected to mandatory arbitration.<sup>223</sup> “[O]ver 60 million workers in non-union private sector jobs have been denied access to the courts, where research has shown their claims would fare better than in arbitration.”<sup>224</sup> In 2018, the Supreme Court handed employers a huge victory, upholding the validity of mandatory arbitration clauses and also allowing employers to prohibit class action lawsuits through these clauses.<sup>225</sup> However, some states have enacted bans on mandatory arbitration.<sup>226</sup>

Further, on February 7, 2022, the U.S. House of Representatives passed a bill to amend the FAA, the “Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021,”<sup>227</sup> and the “Senate passed the bill three days later without amendment.”<sup>228</sup> The bill aimed to end employers’ ability to force sexual assault and sexual harassment victims to arbitrate their claims as a result of mandatory arbitration clauses in their employment contracts.<sup>229</sup>

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<sup>222</sup> John Bickerman, *Increase in Workers Subject to Arbitration Coincides with Supreme Court Rulings*, AM. BAR ASS’N (Jan. 16, 2020), <https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2020/increase-in-workers-subject-to-arbitration-coincides-with-supreme-court-rulings/> [<https://perma.cc/GK3Z-PTT6>].

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

<sup>226</sup> Colleen Quinn & Kate Miceli, *Mandatory Arbitration Clauses in Employment Contracts: Are They Legal? Do They Make Sense?*, RICH. TIMES-DISPATCH (June 20, 2019), [https://richmond.com/sponsored/locke-quinn/mandatory-arbitration-clauses-in-employment-contracts-are-they-legal-do-they-make-sense/article\\_dc85a466-9378-11e9-b3cd-8f41db56574f.html](https://richmond.com/sponsored/locke-quinn/mandatory-arbitration-clauses-in-employment-contracts-are-they-legal-do-they-make-sense/article_dc85a466-9378-11e9-b3cd-8f41db56574f.html) [<https://perma.cc/AX8Q-6RXA>].

<sup>227</sup> Pub. L. No. 117-90; see also Emily Burkhardt Vicente, Timothy Kim, & Karen Jennings Evans, *Congress Votes to End Mandatory Arbitration of Sexual Assault and Sexual Harassment Claims*, NAT’L L. REV. (Mar. 1, 2022), <https://www.natlawreview.com/article/congress-votes-to-end-mandatory-arbitration-sexual-assault-and-sexual-harassment> [<https://perma.cc/2BNM-6L5X>].

<sup>228</sup> Burkhardt Vicente, Kim, & Jennings Evans, *supra* note 227.

<sup>229</sup> *Id.*

[T]he bill would allow employees asserting claims of sexual assault or sexual harassment to bring such claims in court on an individual or class action basis regardless of whether the employee had signed a pre-dispute arbitration agreement that requires such claims to be only in arbitration on an individual basis. The new bill, however, does allow arbitration of sexual assault and sexual harassment claims if the employee voluntarily opts to proceed with arbitration.<sup>230</sup>

On March 3, 2022, President Biden signed the bill into law.<sup>231</sup>

## 2. Further ADR Benefits and Drawbacks Analysis

As opposed to litigation, one of the main benefits of ADR is that the parties are free to conduct the proceedings according to their own preferences. As noted in the prior subsection, this might not apply with mandatory arbitration clauses—where the larger party can control the terms of the agreement by placing the mandatory arbitration clause in an adhesion contract—but it would apply with other forms of ADR. While the litigation process is controlled by the FRCP, state laws, and court directives, ADR allows for a more flexible approach. This immediately creates a collaborative and friendlier environment, with the potential to produce favorable results for both sides.<sup>232</sup> Contrary to the adversarial nature of litigation, ADR can be effective at preserving existing relationships, something that can be quite important when the parties must still interact with each other outside of the proceedings (e.g., a continuing employer-employee relationship between the parties, once a mediation proceeding has concluded).<sup>233</sup>

A further benefit of ADR is that, on average, ADR costs much less than litigation. This is due to the fact that private ADR proceedings are often conducted much more quickly than litigation

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<sup>230</sup> *Id.*

<sup>231</sup> Emily T. Patajo, *President Biden Signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021*, NAT'L L. REV. (Mar. 8, 2022), <https://www.natlawreview.com/article/president-biden-signed-ending-forced-arbitration-sexual-assault-and-sexual> [<https://perma.cc/JZ53-RG4S>]; see also Melanie Baker & Leonard Dietzen, III, *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021*, JD SUPRA (Mar. 17, 2022), <https://www.jdsupra.com/legalnews/ending-forced-arbitration-of-sexual-7542210/> [<https://perma.cc/5R99-XUP6>].

<sup>232</sup> *7 Benefits of Alternative Dispute Resolution (ADR)*, CONSUMER PROT. ASS'N (July 27, 2018), <https://www.the CPA.co.uk/news/benefits-of-alternative-dispute-resolution/> [<https://perma.cc/5NDH-FYN2>].

<sup>233</sup> *Id.*



proceedings, saving the parties valuable money and resources.<sup>234</sup> For example, “[t]he average contract-based lawsuit takes approximately two years to resolve in court. The average duration of similar cases in arbitration can be as short as five or six months.”<sup>235</sup> As anyone with litigation experience will know, an extra year and a half of attorney’s fees can be quite costly for a litigant.

Yet another potential benefit of ADR is that the proceedings are confidential. When the issues at-stake involve sensitive legal topics or facts, it is possible that the parties might not wish for the contents of their dispute to be made known to the general public. While the results of a litigation proceeding are entered into the public record, the decisions and rulings that come out of ADR proceedings are, most often, kept private.<sup>236</sup> This ensures that the parties’ respective reputations are kept intact.

However, ADR also has certain disadvantages. One drawback pertains to the limited scope and authority of ADR proceedings. Regarding arbitration, specifically—which would be considered the most binding form of ADR—while the parties will enter into an arbitration agreement before the proceeding begins, a court still technically retains the power to “overturn an arbitrator’s decision if [the arbitrator] decided issues that were not within the scope of the . . . agreement.”<sup>237</sup> However, the opportunities for judicial review of an arbitrator’s decision are limited.<sup>238</sup> Additionally, arbitrators will not always have the authority to order a party to act, nor will they have the authority to issue injunctions in these cases.<sup>239</sup> There is certainly little-to-no authority present in cases of negotiation or mediation, as these proceedings are often entered into on a completely voluntary basis.<sup>240</sup> Without a binding judg-

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<sup>234</sup> Schwartz, *supra* note 205, at 1251; see also Kevin R. Casey et al., *Experts Compare the Advantages and Disadvantages of Litigation and ADR*, CORP. COUNS. BUS. J. (Aug. 1, 2006), <https://ccbjournal.com/articles/experts-compare-advantages-and-disadvantages-litigation-and-adr/> [<https://perma.cc/6QXP-A49W>].

<sup>235</sup> Casey et al., *supra* note 234.

<sup>236</sup> *What are the Benefits to Alternative Dispute Resolution?*, FINDLAW (Jan. 5, 2017), <https://corporate.findlaw.com/litigation-disputes/what-are-the-benefits-to-alternative-dispute-resolution.html> [<https://perma.cc/4ZVD-88X3>].

<sup>237</sup> Lorman Education, *Advantages and Disadvantages of Alternative Dispute Resolution*, LORMAN EDUC. SERVS. (Apr. 16, 2018), <https://www.lorman.com/resources/advantages-and-disadvantages-of-alternative-dispute-resolution-16190> [<https://perma.cc/D45P-XJWR>].

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> However, many states’ court systems have adopted “Presumptive ADR” programs, where potential litigants will first be sent to an ADR proceeding before they have the opportunity to pursue litigation. For a further discussion of these programs, see *infra* Section III(B).

ment, a party seeking damages for an employment discrimination claim, for example, would have no means of redress if the offending party did not abide by the terms of the agreement.

Further, with cases of employment discrimination, specifically, a key drawback of ADR as compared to litigation is that there is far less discovery conducted in ADR proceedings.<sup>241</sup> While this could be beneficial to a party that is looking to save time and money, it is a negative in employment discrimination cases because the plaintiff (e.g., the employee) is at an informational disadvantage when compared with the defendant (e.g., the employer).<sup>242</sup> This can occur when the files the employee needs to prove an employment discrimination claim are housed on the employer's computers and servers. A classic example of this issue, discussed *supra*,<sup>243</sup> was Laura Zubulake's case against UBS Warburg.<sup>244</sup> Without Zubulake having had the ability to access several backup tapes of supervisor and coworker emails—which she obtained through discovery after a lengthy court battle with UBS Warburg—Zubulake would have had no means of proving her gender discrimination claims against the company.<sup>245</sup>

Another drawback of ADR is that, generally, there is no appeals process. While this can be a positive in that it helps reduce time and costs, it can also be a negative—the parties are stuck with whatever outcome or ruling that is reached.<sup>246</sup> As noted above, there are some limited scenarios where a judge can review an arbitrator's decision, but these situations are quite uncommon.<sup>247</sup>

Further, the party might have already been locked into an ADR proceeding, even before the dispute has arisen, because ADR is often “initiated by pre-dispute . . . agreements rather than under post-dispute submissions. Post-dispute ADR agreements are rare because after the dispute has arisen, the parties are polarized. At least one of the parties almost always sees some kind of strategic advantage in declining an offer to mediate or arbitrate.”<sup>248</sup> As examined *supra*,<sup>249</sup> these pre-dispute agreements often take the form of mandatory arbitration clauses that are inserted into em-

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<sup>241</sup> Casey et al., *supra* note 234.

<sup>242</sup> See generally Zubulake v. UBS Warburg LLC, 229 F.R.D. 422 (S.D.N.Y. 2004).

<sup>243</sup> See *supra* Section III(A)(i).

<sup>244</sup> See generally Zubulake v. UBS Warburg LLC, 229 F.R.D. 422 (S.D.N.Y. 2004).

<sup>245</sup> *Id.*

<sup>246</sup> Casey et al., *supra* note 234.

<sup>247</sup> Lorman Education, *supra* note 237.

<sup>248</sup> Casey et al., *supra* note 234.

<sup>249</sup> See *supra* Section III(A)(ii)(1).

ployment contracts, thereby weakening employees' bargaining power and limiting the ability of the employees to pursue legal action after suffering an injury.<sup>250</sup> Additionally, these arbitration proceedings tend to favor the employer.<sup>251</sup>

Finally, a key disadvantage of ADR is the exact opposite of one of the main benefits of litigation: a party seeking to expose a particular issue or to create lasting legal precedent cannot do so with an ADR proceeding. ADR proceedings do not set legal precedent, for the simple reason that no form of ADR involves a judicial opinion. Similarly, the confidential nature of ADR ensures that the key issues at stake in the proceeding will not be made public. As noted above, this can serve as a benefit when the parties are seeking confidentiality with the proceedings.<sup>252</sup> However, if, for example, an individual has suffered a particularly egregious injury—one that the individual wants the general public to be made aware of so that the other party is put under additional pressure or is subjected to criticism—the individual will not be able to expose this injury through an ADR proceeding.

### B. *Presumptive ADR and its Potential Effects on Professional Sports Leagues*

In May 2019, the New York Unified Court System took a major step in transforming the “delivery and quality of civil justice” in New York State.<sup>253</sup> Under the leadership of Chief Judge Janet DiFiore—Chief Judge of the Court of Appeals and the State of New York<sup>254</sup>—New York courts adopted the “Presumptive ADR Program [“the Program”], a statewide initiative in which the majority of civil cases would be referred to ADR processes for the opportunity to resolve matters early and efficiently.”<sup>255</sup> In the New York Unified Court System’s “Interim Report and Recommenda-

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<sup>250</sup> Colvin, *supra* note 220.

<sup>251</sup> *Id.*

<sup>252</sup> What are the Benefits to Alternative Dispute Resolution?, *supra* note 236.

<sup>253</sup> Press Release from the Hon. Lawrence K. Marks, Chief Admin. J., N.Y.S. Unified Ct. Sys., Court System to Implement Presumptive, Early Alternative Dispute Resolution for Civil Cases (May 14, 2019) (on file with New York State Uniform Court System), [https://ww2.nycourts.gov/sites/default/files/document/files/2019-05/PR19\\_09\\_0.pdf](https://ww2.nycourts.gov/sites/default/files/document/files/2019-05/PR19_09_0.pdf) [<https://perma.cc/C8W8-NH5D>].

<sup>254</sup> Chief Judge Janet DiFiore, N.Y.S. UNIFIED CT. SYS., [http://ww2.nycourts.gov/Admin/directory/janet\\_difiore.shtml](http://ww2.nycourts.gov/Admin/directory/janet_difiore.shtml) [<https://perma.cc/W44Z-DFL3>] (last visited Mar. 19, 2022).

<sup>255</sup> *Alternative Dispute Resolution in the Courts*, N.Y.S. UNIFIED CT. SYS., <http://ww2.nycourts.gov/ip/adr/index.shtml> [<https://perma.cc/2JNX-ZLA8>] (last visited Mar. 19, 2022).

tions of the Statewide ADR Advisory Committee,” released in February 2019, Chief Judge DiFiore’s ADR Advisory Committee outlined five main recommendations for this program:

- (1) Significantly expand statewide infrastructures for developing and supporting court-sponsored ADR (and particularly court-sponsored mediation);
- (2) Promulgate statewide uniform court rules;
- (3) Increase court connections with and expand funding for Community Dispute Resolution Centers (CDRCs), as a significant component of scaling up existing court-connected programs;
- (4) Take steps to support, encourage, and educate about court-sponsored mediation; and
- (5) Develop mechanisms for effective monitoring and evaluation of individual programs.<sup>256</sup>

In launching the Program, the state courts wanted to decrease case backlogs, build on the successes of the existing ADR mechanisms that had already been in place, and expand access to these systems.<sup>257</sup> Chief Judge DiFiore felt that ADR had “proven a meaningful, efficient and cost-effective way to resolve disputes in appropriate cases,”<sup>258</sup> but that it “continue[d] to be underutilized.”<sup>259</sup> The Program would thus make it possible for individuals—regardless of finances—to have more access to justice than ever before.<sup>260</sup> However, the New York courts were quite late to the game; New Jersey courts have had a presumptive mediation program in-place since July 1995.<sup>261</sup>

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<sup>256</sup> ADR ADVISORY COMMITTEE, INTERIM REPORT AND RECOMMENDATIONS OF THE STATEWIDE ADR ADVISORY COMMITTEE 1 (N.Y.S. Unified Ct. Sys. ed., Feb. 2019), <https://ww2.nycourts.gov/sites/default/files/document/files/2019-05/InterimReportRecommFeb-2019.pdf> [<https://perma.cc/N54V-7ASQ>].

<sup>257</sup> Claudia Lanzetta, *Be Prepared: ‘Presumptive ADR’ Is Coming*, N.Y. L. J. (Aug. 2, 2019, 2:35 PM), <https://www.law.com/newyorklawjournal/2019/08/02/be-prepared-presumptive-adr-iss-coming/> [<https://perma.cc/7N9T-YSRW>].

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Courts Increasingly Using Presumptive ADR to Settle Civil Cases*, CONCORD L. SCH. (Sept. 25, 2019), <https://www.concordlawschool.edu/blog/news/courts-use-presumptive-alternative-dispute-resolution-mediation/> [<https://perma.cc/HXB3-4NPA>].

<sup>261</sup> Rafal Morek, *Presumptive Mediation*, KLUWER MEDIATION BLOG (Sept. 18, 2019), <http://mediationblog.kluwerarbitration.com/2019/09/18/presumptive-mediation/> [<https://perma.cc/2ET2-DMWM>]; see generally CIVIL MEDIATION PROGRAM RESOURCE MATERIALS 1 (N.J. Cts. ed., Sept. 1, 2015), <https://www.njcourts.gov/courts/assets/civil/civilmedprogramresman.pdf?c=JQu> [<https://perma.cc/663W-M3JB>].

The adoption of the Program in New York has been especially important, considering a 2008 study on “decision error.”<sup>262</sup> In the study, it was revealed that in 61.2% of cases, plaintiffs made the wrong decision by deciding to proceed to trial instead of taking a settlement offer, losing an average of \$43,100 per case.<sup>263</sup> While defendants only committed decision error in 24.3% of cases, their average resulting losses were astronomically higher, with defendants losing an average of \$1,140,000 per case.<sup>264</sup> ADR, on the other hand, encourages settlement and strives to help parties avoid these costly mistakes.

The Program has proven to be successful in its initial rollout and has clearly met its stated goals, with more courts across New York State expanding the Program’s use and availability.<sup>265</sup> The New York County Supreme Court (Civil) has established a committee to screen tort cases and has also introduced ADR into tax and matrimonial cases.<sup>266</sup> Similarly, the New York City Civil Court has partnered with mediators from the Community Dispute Resolution Centers.<sup>267</sup> Further, Nassau County courts have referred personal injury and medical malpractice cases to ADR, Suffolk County courts have been using lawyers from its ADR Part to make alternative dispute resolution recommendations at all of its preliminary conferences, and Westchester courts have been referring more cases to mediation.<sup>268</sup>

That New York State courts have adopted the Presumptive ADR Program is significant for another reason: MLB, the NFL, and the NBA all maintain their league offices in New York City.<sup>269</sup> As a result, for any civil case involving these leagues filed in New York State court, specifically, it is possible that the parties would

<sup>262</sup> Randall L. Kiser, Martin A. Asher, & Blakeley B. McShane, *Let’s Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, 5 J. EMPIRICAL LEGAL STUD. 551, 566 (2008).

<sup>263</sup> *Id.*; see also Jonathan D. Glater, *Study Finds Settling Is Better Than Going to Trial*, N.Y. TIMES (Aug. 7, 2008), <https://www.nytimes.com/2008/08/08/business/08law.html> [<https://perma.cc/H9JP-PS3H>].

<sup>264</sup> Kiser, Asher, & McShane, *supra* note 262.

<sup>265</sup> Syed (Zim) Rizvi, *Presumptive ADR Poised to Expand Across New York State After Promising Start in New York City*, JD SUPRA (Feb. 7, 2020), <https://www.jdsupra.com/legalnews/presumptive-adr-poised-to-expand-across-15179/> [<https://perma.cc/G4VT-WDGM>].

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> The MLB League Office is located at 1271 Avenue of the Americas, New York, NY 10020; the NFL League Office is located at 345 Park Avenue, New York, NY 10154; and the NBA League Office is located at 645 5th Avenue, New York, NY 10022.

immediately be referred to ADR to resolve their dispute. Because professional sports leagues will usually want to keep their internal matters private, and because of the disparity in finances between these leagues and their employees, the Program has immense potential to resolve disputes in ways that would be highly beneficial to both parties.

### C. *Further Litigation v. ADR Considerations in a Post-Pandemic World*

In March 2020, the COVID-19 pandemic hit in full-force,<sup>270</sup> and the resulting country-wide lockdowns and stay-at-home orders made it impossible to conduct in-person proceedings.<sup>271</sup> Courts adapted to the challenge, though, mostly pivoting to virtual and online-based offerings.<sup>272</sup> Many judges and lawyers embraced the change and predicted that virtual options would continue post-pandemic.<sup>273</sup> The courts that had pre-existing virtual and automated programs in-place were the ones that were able to shift their operations most seamlessly.<sup>274</sup> New York courts, in particular, built off of the existing Presumptive ADR Program and launched presumptive virtual ADR initiatives.<sup>275</sup>

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<sup>270</sup> WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 - 11 March 2020, WORLD HEALTH ORG. (Mar. 11, 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> [<https://perma.cc/F7CJ-EK7L>]; see also Laurel Wamsley, *March 11, 2020: The Day Everything Changed*, NPR (Mar. 11, 2021, 5:00 AM), <https://www.npr.org/2021/03/11/975663437/march-11-2020-the-day-everything-changed> [<https://perma.cc/DND4-MTQB>].

<sup>271</sup> *State Court Closures in Response to the Coronavirus (COVID-19) Pandemic Between March and November, 2020*, BALLOTPEDIA (Nov. 4, 2020), [https://ballotpedia.org/State\\_court\\_closures\\_in\\_response\\_to\\_the\\_coronavirus\\_\(COVID-19\)\\_pandemic\\_between\\_March\\_and\\_November,\\_2020](https://ballotpedia.org/State_court_closures_in_response_to_the_coronavirus_(COVID-19)_pandemic_between_March_and_November,_2020) [<https://perma.cc/E34N-U8D2>].

<sup>272</sup> Bruce M Wexler & Yar Chaikovsky, *U.S. Court Closings, Restrictions, and Re-Openings Due to COVID-19*, PAUL HASTINGS (Feb. 2, 2022), <https://www.paulhastings.com/insights/practice-area-articles/u-s-court-closings-restrictions-and-re-openings-due-to-covid-19> [<https://perma.cc/2EWF-E7J4>].

<sup>273</sup> Alan Zimmet, *A Primer on Virtual Court Proceedings in This Brave New World*, 39 NO. 3 TRIAL ADVOC. (FDLA) 38, 38 (2020).

<sup>274</sup> Donna Erez-Navot, *Reimagining Access to Justice: Should We Shift to Virtual Mediation Programs Beyond the COVID-19 Pandemic, Especially for Small Claims?*, N.Y.S. BAR ASS'N (Feb. 16, 2022), <https://nysba.org/reimagining-access-to-justice-should-we-shift-to-virtual-mediation-programs-beyond-the-covid-19-pandemic-especially-for-small-claims/> [<https://perma.cc/P8JA-PMD7>].

<sup>275</sup> For example, the Civil Court of the City of New York began scheduling virtual mediation proceedings for small claims cases. See Admin. Ord., Hon. Anthony Cannataro, Management of Small Claims Cases During the Coronavirus Pandemic, CIV. CT. CITY N.Y. (Aug. 4, 2020), <https://>

Now two-plus years into the pandemic, there are arguments abound that virtual offerings should remain an option for litigants who are seeking an appropriate resolution to their dispute—even though in-person proceedings have generally returned.<sup>276</sup> While courts are now conducting litigation proceedings in-person,<sup>277</sup> there is some indication that many ADR providers intend to stick with virtual settings for future ADR proceedings.<sup>278</sup> This consideration, along with the following arguments, can come into play when a party is making the decision between using litigation or ADR to resolve their dispute.

One argument concerns convenience—namely, it is just much more convenient to participate in a virtual proceeding than one that is conducted in an in-person setting. Said a lawyer being surveyed, “Mediation days are a little less stressful because I don’t have to commute up to three hours a day. If a mediation ends at 8 p.m., I’m ‘home’ at 8:01 and not trying to figure out if I can make the next train.”<sup>279</sup> Virtual proceedings have also allowed parties from around the world to instantaneously meet without the need for travel, saving the parties time and money that would have needed to be expended with an in-person arrangement. Additionally, the introduction of the virtual proceeding has expanded access to justice, allowing countless parties who once may not have been willing or able to seek out remedies<sup>280</sup> to now have the ability to do so.<sup>281</sup> Because it is arguably easier to conduct an ADR proceeding

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[/nycourts.gov/courts/nyc/SSI/directives/DRP/DRP212.pdf](https://nycourts.gov/courts/nyc/SSI/directives/DRP/DRP212.pdf) [https://perma.cc/J5JT-XDYJ]; see also Erez-Navot, *supra* note 274.

<sup>276</sup> See, e.g., John Fritze, *Supreme Court (Mostly) Returns to the Courtroom for First Time Since COVID-19 Pandemic Began*, USA TODAY (Oct. 4, 2021, 12:35 PM), <https://www.usatoday.com/story/news/politics/2021/10/04/supreme-court-returns-person-argument-first-time-months/5985946001/> [https://perma.cc/3VYP-VVSF]; see also Ann O’Connell, *How Every State’s Legal System Is Responding to COVID-19*, NOLO (Mar. 18, 2022), <https://www.nolo.com/legal-encyclopedia/how-every-states-legal-system-is-responding-to-covid-19.html> [https://perma.cc/9CD8-LC28].

<sup>277</sup> O’Connell, *supra* note 276.

<sup>278</sup> Erez-Navot, *supra* note 274.

<sup>279</sup> Brandon Vogel, *How Coronavirus Has Changed the Practice of Law: Perspectives from Four Lawyers*, 92-DEC N.Y.S. B.J. 30, 32 (2020), <https://nysba.org/how-coronavirus-has-changed-the-practice-of-law-perspectives-from-four-lawyers/> [https://perma.cc/9HY8-CM29].

<sup>280</sup> “[A]pproximately 100 million people per year have unmet civil legal needs, yet less than 14% of them get any legal help or come to court. This leaves more than 80 million people each year with legal needs that need to be addressed outside the court system.” See ROADMAP TO JUSTICE CAMPAIGN 2020–2021 8 (Nat’l Ctr. for State Ct. ed., 2021), [https://www.ncsc.org/\\_data/assets/pdf\\_file/0023/42908/NCSC-Roadmap-to-Justice-2020-21.pdf](https://www.ncsc.org/_data/assets/pdf_file/0023/42908/NCSC-Roadmap-to-Justice-2020-21.pdf) [https://perma.cc/W6G5-NS9G] (last visited Mar. 18, 2022).

<sup>281</sup> Erez-Navot, *supra* note 274.

in a virtual setting than it is to conduct, for example, a full courtroom trial online, this could be a factor weighing in ADR's favor.

A second argument focuses on vulnerable parties. One of the key features of several ADR processes, particularly mediation, is party self-determination.<sup>282</sup> In an in-person environment, a vulnerable party may be subjected to power imbalances, intimidation, and a loss of true self-determination when sitting in a room with another individual who brings about these issues.<sup>283</sup> This would, of course, apply to in-person litigation proceedings *and* in-person ADR proceedings. In this scenario, the vulnerable party would greatly benefit from having access to a virtual platform, as it allows the party to stay in a comfortable, familiar environment on their own and regain control. Additionally, while it may be terrifying for the vulnerable party to summon the courage to walk out of the room or terminate the session in an in-person setting, a virtual proceeding allows the individual to feel empowered by having access to an "End Meeting" button. If tensions were to, theoretically, get out of hand during the virtual session, the vulnerable party could immediately exit the meeting and cut off any further abuse. Now that ADR is more readily available online than litigation, this is another factor that might sway a party when making their decision.

Finally, in a similar vein as it relates to parties having greater control over the process, data from the National Center for State Courts ("NCSC") have revealed that certain populations have a highly negative view of the court system. "Less than a third of African-Americans believe courts provide equal justice."<sup>284</sup> Additionally, "the cost and time of resolving cases in the courts have long been recognized as barriers to justice in the United States . . . because of the inaccessibility of the courts to disadvantaged groups and the cost and delay associated with litigation."<sup>285</sup> Virtual ADR proceedings—as a substitute for in-person court appearances—can play a key role in counteracting those impediments to justice by

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<sup>282</sup> MODEL STANDARDS OF CONDUCT FOR MEDIATORS 3 ["Standard I. Self-Determination"] (Am. Arb. Ass'n/Am. Bar Ass'n/Ass'n for Conflict Resol. eds., 2005), [https://www.americanbar.org/content/dam/aba/administrative/dispute\\_resolution/dispute\\_resolution/model\\_standards\\_conduct\\_april2007.pdf](https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/model_standards_conduct_april2007.pdf) [<https://perma.cc/7JMR-RRH9>].

<sup>283</sup> Haley Benson, *Abuse Just Out of Frame: The Impact of Online Dispute Resolution on Domestic Violence*, 2022 J. DISP. RESOL. 83, 91 (2022).

<sup>284</sup> THE ACCESS AND FAIRNESS CAMPAIGN 2017–2019 1 (Nat'l Ctr. for State Ct. ed., 2019), [https://www.ncsc.org/\\_data/assets/pdf\\_file/0021/15159/access-and-fairness-campaign-2017-2019.pdf](https://www.ncsc.org/_data/assets/pdf_file/0021/15159/access-and-fairness-campaign-2017-2019.pdf) [<https://perma.cc/S5B5-U5BP>] (last visited Mar. 18, 2022); *see also id.* at 5 ("NCSC surveys indicate that on nearly every measure of trust, fairness, or customer service, African-Americans score courts dramatically lower than the population overall.").

<sup>285</sup> *Id.* at 4.



placing greater control of the process in the hands of the parties, decreasing costs, and producing resolutions more efficiently.

#### D. *Litigation v. ADR Wrap-Up*

The above overarching analysis should help a party deciding between litigation and ADR make a well-informed decision. Each party's particularized situation will play a key role in this choice. But in the situations where relationships need to be preserved—such as between sports league executives and female employees—and where a party is looking for a more cost- and time-efficient option, it is likely that ADR will come out as the clear winner. ADR allows the party to take the dispute into their own hands, rather than having to rely on the unpredictability of a judge. With this true self-determination, the party will feel confident in knowing that they will arrive at a resolution that is best suited to their individual needs. Most importantly, if the party is not comfortable with the proposed resolution, they have the power to reject it—something that cannot happen in a litigation setting. Moreover, because the pandemic brought about the introduction of numerous virtual ADR options, ADR now provides parties with more flexibility than ever before. Virtual ADR has (1) made the process more convenient for parties, (2) empowered vulnerable parties by ensuring that they are subjected to fewer power imbalances, and (3) worked to curb the various impediments to true access to justice.

#### IV. PROPOSAL

This Note proposes the creation and implementation of an ordered, structured ADR program across the major professional sports leagues to help facilitate better communication between the leagues and their respective female employees. As noted *supra*,<sup>286</sup> one of the biggest advantages of utilizing ADR over litigation to resolve disputes is that, when there is a need for continued employer-employee dealings, ADR allows for positive relationships to be maintained and nurtured, using a system that is designed to benefit all parties.<sup>287</sup> This concept is critical when it comes to profes-

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<sup>286</sup> See *supra* Section III(A)(ii)(2).

<sup>287</sup> 7 Benefits of Alternative Dispute Resolution (ADR), *supra* note 232.

sional sports, where even the slightest amount of drama—or a conflict within a particular team’s operations—has the potential to result in widespread negative publicity, harming the league, the team, and the team’s employees.<sup>288</sup>

To help facilitate this ADR program, a joint commission of women from all the major sports leagues should be formed. This commission would be comprised of women who serve as owners, executives, coaches, referees, journalists and announcers, and TV and radio personalities. The commission would meet with the leaders of these leagues on a regular basis—either in-person or virtually, or both, depending on the preferences of the parties and the particularized situations at-hand. This group of women would provide the leagues with much-needed diversity of thought.<sup>289</sup> These women would have the ability to offer perspectives from across the sports employment spectrum, helping the leagues shift away from the formerly accepted male-dominated approaches. The formation of this commission would generate significant publicity in the press and across social media, making it difficult for the leagues to ignore this initiative. Further, as each of the three leagues has already taken steps to gradually improve their respective diversity practices, it is considerably likely that the formation of a commission of this sort would not be met with any sort of resistance.<sup>290</sup> Rather, the leagues would likely want to embrace any new resource or approach that could help increase overall diversity levels across their respective sports—especially when people across the country are becoming progressively more cognizant of social issues and are looking to organizations and businesses for leadership.<sup>291</sup>

This ADR-centric approach has a high potential for success because the major sports leagues already use various ADR methods in prominent ways, most often to resolve or avoid disputes between ownership and players. One of the most well-known examples of ADR that is utilized across professional sports is the

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<sup>288</sup> For general background information on one of the most famous examples of the in-fighting of a professional sports team making major news headlines, see JONATHAN MAHLER, *LADIES AND GENTLEMEN, THE BRONX IS BURNING: 1977, BASEBALL, POLITICS, AND THE BATTLE FOR THE SOUL OF A CITY* (1st ed. 2006).

<sup>289</sup> Beaton, *supra* note 106.

<sup>290</sup> See generally LAPCHICK, *supra* note 29; see also LAPCHICK, *supra* note 105; LAPCHICK, *supra* note 180.

<sup>291</sup> Rachel Sandler, *68% of Americans Want CEOs to Take a Stand on Social Issues, Poll Finds*, FORBES (Oct. 2, 2020, 7:06 AM), <https://www.forbes.com/sites/isabeltogoh/2020/10/02/68-of-americans-want-ceos-to-take-a-stand-on-social-issues-poll-finds/> [https://perma.cc/W8WL-UL4A].

collective bargaining agreement (“CBA”), which is a written agreement that the parties will draft after conducting voluntary ADR methods like negotiation and mediation.<sup>292</sup> Collective bargaining occurs between labor unions and employers, where a union will conduct negotiations and reach agreements on behalf of the entire class of employees.<sup>293</sup> The players that are employed by MLB, the NFL, and the NBA are all part of player unions: the MLBPA, the NFLPA, and the NBPA, respectively.<sup>294</sup> These unions work together with each of their league’s ownership groups on a regular basis, in order to craft the best overall playing and working environments for their represented players. Collective bargaining was most recently utilized with negotiations that took place between MLB and the MLBPA, in order to end an MLB-imposed lockout of the 2022 season and craft a new CBA for the sport.<sup>295</sup>

Another prominent example of ADR that is employed throughout professional sports is salary arbitration. For example, with MLB salary arbitration, players with three or more years of service time—but less than six years—can negotiate their salaries for the coming season when they do not already have a signed contract.<sup>296</sup> If, by a certain date, a salary cannot be agreed-upon between the player and their respective team, the two parties will submit proposed salaries to a panel of arbitrators, who will then listen to each side’s arguments and make a final ruling by selecting one of the proposals.<sup>297</sup> The process clearly encourages compromise. Generally, the vast majority of teams reach settlements with

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<sup>292</sup> *What is Collective Bargaining?*, PITTAL LLP (Apr. 21, 2017), <https://www.pittalaw.com/blog/2017/04/what-is-collective-bargaining/> [https://perma.cc/E8LC-5Y65].

<sup>293</sup> *Id.*

<sup>294</sup> *See generally Labor Relations and the Sports Industry: Sports Unions + Leagues*, RUTGERS UNIV. LIBRS., <https://libguides.rutgers.edu/c.php?g=336678&p=2267003> [https://perma.cc/E9CS-GA4N] (last visited Mar. 19, 2022).

<sup>295</sup> R.J. Anderson, *MLB Lockout Ends as MLBPA, Owners Reach CBA Agreement: Five Takeaways with Baseball Set to Return*, CBS SPORTS (Mar. 12, 2022, 11:49 AM), <https://www.cbssports.com/mlb/news/mlb-lockout-ends-as-mlbpa-owners-reach-cba-agreement-five-takeaways-with-baseball-set-to-return/live/> [https://perma.cc/M3QE-3YP4]; *see also* Evan Drellich, *MLB’s Collective Bargaining Agreement: Guide to the Changes in the 2022-26 Labor Deal*, ATHLETIC (Mar. 16, 2022), <https://theathletic.com/3187914/2022/03/16/mlbs-collective-bargaining-agreement-guide-to-the-changes-in-the-2022-26-labor-deal/> [https://perma.cc/NL55-EBFB].

<sup>296</sup> *Salary Arbitration*, MLB, <https://www.mlb.com/glossary/transactions/salary-arbitration> [https://perma.cc/F2GG-3ADR] (last visited Mar. 19, 2022).

<sup>297</sup> *Id.*

their players and agree to new contracts, completely avoiding the need to even pursue arbitration.<sup>298</sup>

Capitalizing on the professional sports leagues' existing knowledge and level of comfort with ADR practices, women who are employed across all levels of the industry have a prime opportunity to band together and improve the career prospects for countless other women. As noted, not only would the professional sports leagues not resist this approach, but it is likely they would even be highly supportive and jump at the opportunity to both increase the levels of diversity within their respective organizations and create significant positive press coverage. Using ADR, existing relationships between professional sports leagues and their female employees can be nurtured and preserved, beneficial outcomes can be reached for all parties, and true progress can be achieved for all of the women and young girls who dream of one day breaking into the industry and soaring to the top.

## V. CONCLUSION

Thankfully, there have been several women over the preceding decades who have broken down barriers and have been employed by professional sports leagues and teams. As highlighted throughout this Note, women have taken on prominent roles as team owners, executives, coaches, umpires and referees, journalists, announcers, and television and radio personalities. But there is undoubtedly much more that can and should be done to further this progress. When compared with the number of men who have been employed in these same roles over time, it is clear that women are employed in high-profile sports positions at a much lower rate. Because of the complexities, costs, and power structures of litigation, it would be extremely difficult for women to correct this diversity gap through standard lawsuits.

Rather, ADR—long recognized and appreciated for its flexibility, low cost, efficiency, and friendlier setting—has the potential to provide women seeking entry into, and promotion within, professional sports with a higher chance of success. By forming a coa-

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<sup>298</sup> Steve Adams & Connor Byrne, *Players Avoiding Arbitration: 1/15/21*, MLB TRADE RUMORS (Jan. 15, 2021, 10:51 AM), <https://www.mlbtraderumors.com/2021/01/mlb-arbitration-agreements-exchange-day.html> [<https://perma.cc/Z7ZB-UCUG>]; see also *RosterResource - Offseason Tracker*, FANGRAPHS, [https://www.fangraphs.com/roster-resource/offseason-tracker?transaction\\_type=arbitration](https://www.fangraphs.com/roster-resource/offseason-tracker?transaction_type=arbitration) [<https://perma.cc/S4XS-ANWH>] (last visited Mar. 19, 2022).

lition of these women—a coalition that would help amplify the voices and perspectives of women throughout all levels of professional sports—it might be possible to push each of the respective major leagues toward policies and approaches that could bring about greater levels of gender diversity. The leagues, which have already been trying to increase their diversity levels across-the-board, would embrace an initiative of this sort and could benefit from having a direct line of communication with these women. Additionally, this approach would help avoid any potential future disputes regarding diversity practices across the major leagues. But if disputes were to arise in state courts, states like New York—among others—have made it clear that the parties' first responsibility would be to attempt to resolve these disputes through alternative dispute resolution.

If professional sports leagues continue to keep an open mind, and further embrace ADR practices to both resolve and avoid disputes, there could come a time when this Note is no longer relevant, and women will have achieved the equality that they have long deserved.

**Appendix A**

*2021 MLB Gender Diversity Grades (The Institute for Diversity and Ethics in Sport [TIDES])*<sup>299</sup>

<b><u>Category</u></b>	<b><u>Grade</u></b>
MLB Central Office	C- (29.1% Women) <sup>300</sup>
Senior Administration	C- (28.5% Women) <sup>301</sup>
Professional Administration	D+ (25.5% Women) <sup>302</sup>
CEO/Presidents	F (0% Women) <sup>303</sup>
C-Suite Personnel	F (22.6% Women) <sup>304</sup>
Vice Presidents	F (22% Women) <sup>305</sup>
Diversity Initiatives	A+ <sup>306</sup>
<b>Overall Grade</b>	<b>C</b> <sup>307</sup>

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<sup>299</sup> LAPCHICK, *supra* note 29.

<sup>300</sup> *Id.* at 2.

<sup>301</sup> *Id.* at 3.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at 18.

<sup>304</sup> *Id.* at 19.

<sup>305</sup> LAPCHICK, *supra* note 29, at 20.

<sup>306</sup> *Id.* at 22.

<sup>307</sup> *Id.* at 1.

**Appendix B**

*2021 NFL Gender Diversity Grades (The Institute for Diversity and Ethics in Sport [TIDES])*<sup>308</sup>

<b><u>Category</u></b>	<b><u>Grade</u></b>
NFL League Office	B (38.8% Women) <sup>309</sup>
Team Senior Administration	D+ (25.3% Women) <sup>310</sup>
Team Professional Staff	C+ (33% Women) <sup>311</sup>
Team Owners	F (21.9% Women) <sup>312</sup>
Team CEO/Presidents	F (3.1% Women) <sup>313</sup>
C-Suite Executives	C- (28.6% Women) <sup>314</sup>
Team Vice Presidents	D+ (25.1% Women) <sup>315</sup>
Diversity Initiatives	A+ <sup>316</sup>
<b>Overall Grade</b>	<b>C+</b> <sup>317</sup>

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<sup>308</sup> LAPCHICK, *supra* note 105.

<sup>309</sup> *Id.* at 3.

<sup>310</sup> *Id.* at 4.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* at 15.

<sup>313</sup> *Id.* at 16.

<sup>314</sup> LAPCHICK, *supra* note 105, at 18.

<sup>315</sup> *Id.* at 19.

<sup>316</sup> *Id.* at 26.

<sup>317</sup> *Id.* at 1.

**Appendix C**

2021 NBA Gender Diversity Grades (The Institute for Diversity and Ethics in Sport [TIDES])<sup>318</sup>

<b><u>Category</u></b>	<b><u>Grade</u></b>
NBA League Office	A- (42% Women) <sup>319</sup>
Team Vice Presidents	C- (27.8% Women) <sup>320</sup>
Team Senior Management	B (37.9% Women) <sup>321</sup>
Team C-Suite Personnel	D+ (26.4% Women) <sup>322</sup>
Team Presidents/CEOs	F (8.7% Women) <sup>323</sup>
Professional Staff	C+ (32.7% Women) <sup>324</sup>
Diversity Initiatives	A+ <sup>325</sup>
<b>Overall Grade</b>	<b>B</b> <sup>326</sup>

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<sup>318</sup> LAPCHICK, *supra* note 180.

<sup>319</sup> *Id.* at 3.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.* at 4.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.* at 19.

<sup>324</sup> LAPCHICK, *supra* note 180, at 22.

<sup>325</sup> *Id.* at 23.

<sup>326</sup> *Id.* at 1.



