# ADMINISTRATIVE LAW

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## INTRODUCTION

This article reviews developments in administrative law and practice during 2020–2021 in the judicial and executive branches of New York State government. The discussion focuses on decisions announced by the New York Court of Appeals and executive action regarding COVID-19.

## I. NEW YORK COURT OF APPEALS

### *A. State Constitution*

New York State Department of Environmental Conservation (DEC) and the Adirondack Park Agency (APA) planned for the creation of more than twenty-seven miles of trails primarily for snowmobile use and began construction of the trails in 2012.[1] In 2013, Protect the Adirondacks! commenced an Article 78 proceeding in state

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1. Protect the Adirondacks! Inc. v. N. Y. State Dep't of Env't Conservation, 175 A.D.3d 24, 26–27, 106 N.Y.S.3d 178, 179 (3d Dep't 2019).

supreme court, arguing that construction of the trails violated the state constitution's "Forever Wild" clause.[2] After a nonjury trial, the supreme court held that the trails did not violate the state constitution.[3] On appeal, the Appellate Division, Third Department reversed, finding that, while the trails did not violate the "Forever Wild" directive, the destruction of trees to create the new trails was an unconstitutional destruction of timber.[4] The DEC appealed to the Court of Appeals.[5]

To determine if the trails violate the Forever Wild clause, the Court reviewed previous state referendums allowing projects within the Forest Preserve only after an approving referendum.[6] Further, the Court reviewed the only prior case considering the destruction of trees as a violation of the state constitution, *Association for Protection of Adirondacks v. MacDonald*.[7] In *MacDonald*, the Court declined to allow the construction of a bobsleigh run for the Lake Placid Olympics due to the destruction of trees necessary to construct the run.[8] After reviewing the rationale of the Court in *MacDonald*, the Court concluded that the snowmobile trails also violate the state constitution.[9]

First, as in *MacDonald*, creation of the trails would be a substantial change to the Forest Preserve, and although benefit to the public was a justification for the trails, it was not the primary purpose.[10] Additionally, because the primary purpose of the trails is snowmobile use, the trails would "[interfere] with the natural development of the Forest Preserve [more] than is necessary to

2. *Id.*

3. *Id.* at 27, 106 N.Y.S.3d at 179–80.

4. *Id.* at 28–29, 106 N.Y.S.3d at 180–81. The Court of Appeals did not follow the appellate division's bifurcation of the Constitutional protection between "Forever Wild" and "Destruction of Timber," instead finding that the two are both part of the "Forever Wild" directive, not to be considered separately. Protect the Adirondacks! Inc. v. N.Y. State Dep't of Env't Conservation, 37 N.Y.3d 73, 82, 170 N.E.3d 424, 429, 147 N.Y.S.3d 550, 554–55 (2021).

5. *Id.* at 79, 170 N.E.3d at 427, 147 N.Y.S.3d at 552.

6. *Id.* at 81, 170 N.E.3d at 428, 147 N.Y.S.3d at 554.

7. *Id.* at 82, 170 N.E.3d at 428–29, 147 N.Y.S.3d at 554 (citing Ass'n for Protection of Adirondacks v. MacDonald, 253 N.Y. 234, 242, 170 N.E. 902, 905 (1930)).

8. *MacDonald*, 253 N.Y. at 242, 170 N.E. at 905.

9. *Protect the Adirondacks!*, 37 N.Y.3d at 82, 170 N.E.3d at 429, 147 N.Y.S.3d at 554 (citing *MacDonald*, 253 N.Y. at 241–42, 170 N.E. at 905).

10. *Id.* at 83, 170 N.E.3d at 429, 147 N.Y.S.3d at 555. The DEC's primary rationale for the trails was to connect local communities. *Id.*

accommodate hikers."[11] Arguments from the DEC that the relative number of trees destroyed is small in comparison to the total Forest Preserve did not sway the Court, because constitutional protections apply no matter the size of the proposal.[12] Additionally, although the trails would provide additional opportunity for recreation, the New York Constitution is absolute that the Forest Preserve must be protected, even if the goal of a proposal is to provide additional recreation.[13] The Court affirmed the appellate division, holding that the proper way forward for the DEC's snowmobile trail construction plans is through constitutional amendment.[14]

Judge Stein dissented, joined by Chief Judge DiFiore, arguing that the majority's decision is contrary to precedent and the drafter's intentions.[15] First, she pointed out that over 800 miles of snowmobile trails have been constructed without a constitutional amendment prior to the case at hand.[16] Second, she reviewed the record regarding the destruction of timber and found that a large portion of the trees that would be cut down were seedlings or saplings that would not have survived even if they had not been cut down, calling into question whether trail construction was truly a "substantial change" as claimed by the majority.[17] Finally, Judge Stein contrasts *MacDonald* with the current situation, specifically that hiking and snowmobile trails are in line with the constitutional purpose of the Forest Preserve, unlike a bobsleigh run, and that the cutting of timber in this case is along narrow paths throughout the Forest Preserve instead of concentrated in a single area.[18]

### *B. Delegation of Authority*

*People v. Viviani* involved an examination of whether the creation of a Special Prosecutor under section 552 of the Executive Law was an improper delegation of authority by the Legislature.[19] The Special Prosecutor provision was part of the 2013 Protection of People with Special Needs Act (the Act) which created the New York State

11. *Id.* at 83, 170 N.E.3d at 430, 147 N.Y.S.3d at 555.
12. *Id.* at 84, 170 N.E.3d at 430, 147 N.Y.S.3d at 555–56.
13. *Id.* at 84, 170 N.E.3d at 430, 147 N.Y.S.3d at 556.
14. *Protect the Adirondacks!*, 37 N.Y.3d at 85, 170 N.E.3d at 431, 147 N.Y.S.3d at 556.
15. *Id.* at 91, 170 N.E.3d at 435, 147 N.Y.S.3d at 560–61, (Stein, J., dissenting).
16. *Id.* at 87, 170 N.E.3d at 432, 147 N.Y.S.3d at 558.
17. *Id.* at 88, 94–96, 170 N.E.3d at 433, 437–38, 147 N.Y.S.3d at 559, 562–64.
18. *Id.* at 96, 170 N.E.3d at 438–39, 147 N.Y.S.3d at 564.
19. 36 N.Y.3d 564, 572, 169 N.E.3d 224, 226, 145 N.Y.S.3d 512, 514 (2021).

Justice Center for the Protection of People with Special Needs (the Center).[20] The Act was an effort to standardize oversight of the care of vulnerable people[21] receiving services in hundreds of programs operated, licensed, or certified by six New York State agencies.[22] In addition to providing assistance to the public and government agencies,[23] the Center is authorized by statute to investigate allegations of abuse, neglect, and other significant incidents occurring in the programs;[24] and impose administrative sanctions on caregivers for such conduct.[25] The Center was also authorized to prosecute alleged criminal conduct through its Special Prosecutor.[26] The Special Prosecutor is a gubernatorial appointment.[27] The Special Prosecutor had specific authority to "(1) 'investigate and prosecute' offenses involving abuse or neglect against a vulnerable person by the person's professional caregiver; and (2) 'cooperate with and assist district attorneys and local law enforcement in their efforts against such abuse or neglect of vulnerable persons.'"[28] The legislation gave the Special Prosecutor "concurrent authority with the district attorney[]" but provided that the office was not to "interfere with the ability of district attorneys at any time to receive complaints, investigate and prosecute

20. *Id*. at 573, 169 N.E.3d at 227, 145 N.Y.S.3d at 515, (citing Protection of People with Special Needs Act (Special Needs Act) 2012 N.Y. LAWS 501 § 2, Part A, § 1).

21. Vulnerable children and adults are defined as persons "who, due to physical or cognitive disabilities, or the need for services or placement, [are] receiving services from a facility or provider agency." N.Y. EXEC. LAW § 550(5) (McKinney 2021).

22. Special Needs Act Part A § 1. The state agencies over which the Justice Center has jurisdiction are the office of mental health (OMH); the office for people with developmental disabilities (OPWDD); the office of alcohol and substance abuse services (OASAS); the office of children and family services (OCFS); the department of health (DOH); and the state education department (SED). N.Y. EXEC. LAW § 550(4).

23. *See* N.Y. EXEC. LAW §§ 553(11)–(17) (McKinney 2021).

24. N.Y. EXEC. LAW § 552(1) (McKinney 2021); N.Y. SOC. SERV. LAW § 488(1) (McKinney 2021); *see Who is Protected by the Justice Center*?, N.Y. STATE JUST. CTR., https://www.justicecenter.ny.gov/mission-vision-and-jurisdiction#who-is-protected-by-the-justice-center- (last visited May 2, 2022).

25. EXEC. § 552(1).

26. EXEC. § 552(2)(a). Prior to the creation of the Center, alleged criminal conduct in facilities was referred to the local district attorney.

27. EXEC. § 552(2)(a); People v. Davidson, 27 N.Y.3d 1083, 1088, 55 N.E.3d 1027, 1030, 36 N.Y.S.3d 54, 57 (2016) (Rivera, J., dissenting).

28. People v. Viviani, 36 N.Y.3d 564, 573, 169 N.E.3d 224, 227, 145 N.Y.S.3d 512, 515 (2021) (quoting EXEC. § 552(2)(a)).

any suspected abuse or neglect."[29] When appearing before a grand jury or court, the Special Prosecutor was authorized to exercise all the powers and duties that a district attorney would have under such circumstances.[30] The only statutory restriction on the Special Prosecutor's authority was a requirement that they consult with the district attorney of the pertinent county should the Special Prosecutor wish to appear in county court or supreme court, or before the grand jury.[31] The intent behind the creation of the Special Prosecutor was "[t]o 'bolster the ability of the state to respond more effectively to abuse and neglect of vulnerable persons, without creating additional burdens on local law enforcement.'"[32]

Defendants in each of the three appeals involved in *Viviani* were alleged to have sexually abused individuals for whom they were caring and were indicted by grand juries convened by the Special Prosecutor.[33] Each moved to have their indictment dismissed, arguing that the Special Prosecutor's office was an unconstitutional delegation of the prosecutorial authority of the elected district attorney to an unelected official.[34]

The trial courts dismissed the respective indictments.[35] Based on the dissent in *People v. Davidson* involving the authority of the Special Prosecutor to appear in Town Court,[36] the courts held that the Special Prosecutor provisions could be saved from a finding of unconstitutionality "only if the local District Attorney (1) consents to the special prosecutor conducting the prosecution, and (2) retains ultimate responsibility for the prosecution."[37] These requirements had

29. *Id.* at 573–74, 169 N.E.3d at 227–28, 145 N.Y.S.3d at 515–16 (quoting EXEC. § 552(2)(a)).

30. *Id.* at 574, 169 N.E.3d at 228, 145 N.Y.S.3d at 516 (quoting EXEC. § 552(2)(c)).

31. *See* EXEC. § 552(2)(c); *see also Davidson*, 27 N.Y.3d at 1086, 55 N.E.3d at 1029, 36 N.Y.S.3d at 56 (2016); *see also* People v. Hodgdon, 175 A.D.3d 65, 69, 106 N.Y.S.3d 198, 201 (3d Dep't 2019) (citing *Davidson*, 27 N.Y.3d at 1094–95, 1096, 55 N.E.3d at 1035–36, 36 N.Y.S.3d at 62–63 (Rivera, J., dissenting) (concluding that the special prosecutor's failure to obtain the formal consent of the district attorney required that the case be remanded).

32. *Viviani*, 36 N.Y.3d at 573, 169 N.E.3d at 227, 145 N.Y.S.3d at 515.

33. *Id.* at 574, 169 N.E.3d at 228, 145 N.Y.S.3d at 516.

34. *Id.*

35. *Id.* at 575, 169 N.E.3d at 228, 145 N.Y.S.3d at 516.

36. *See generally* People v. Davidson, 27 N.Y.3d 1083, 1096, 55 N.E.3d 1027, 1036, 36 N.Y.S.3d 54, 63 (2016) (Rivera, J., dissenting).

37. *Viviani*, 36 N.Y.3d at 575, 169 N.E.3d at 228, 145 N.Y.S.3d at 516.

not been met.[38] The appellate division affirmed the decision in each case.[39] Acknowledging that the Legislature lacked the authority to delegate the prosecutorial authority of the district attorney to an unelected Special Prosecutor, the court held that under the savings provision of statutory construction, the provision could nevertheless withstand challenge if the Special Prosecutor acted with the consent of the district attorney who retained responsibility for the criminal prosecution.[40] Finding that the record lacked evidence of such facts, the appellate court affirmed the trial courts' decisions.[41] Leave to appeal was granted in each case.[42]

The Court of Appeals affirmed the decision of the Fourth Department but declined to read a savings clause in section 522 and declared it facially unconstitutional.[43] The Court based its decision on the holding in *People ex rel. Wogan v. Rafferty*, "that '[w]here the Constitution establishes a specified office, or recognizes its existence, and prescribes the manner in which it shall be filled, the [L]egislature may not transfer any essential function of the office to a different officer chosen in a different manner.'" [44] The Constitution provides for the creation of the office of district attorney and the Legislature, through the county law, provides the office of district attorney in each county plenary and discretionary prosecutorial authority within its jurisdiction.[45] The Court concluded that Section 552 of the Executive Law deprived the district attorney's office of one if its essential functions, namely, the discretionary authority to prosecute.[46] The court rejected the Special Prosecutor's arguments of examples of

38. *Id.*

39. *Id.*

40. *Id.* at 575, 169 N.E.3d at 229, 145 N.Y.S.3d at 517 (quoting People v. Hodgdon, 175 A.D.3d 65, 68–69, 106 N.Y.S.3d 198, 201(3d Dep't 2019)).

41. *Id.* (citing *Hodgdon*, 175 A.D.3d at 69, 70, 106 N.Y.S.3d at 200, 202).

42. *Viviani*, 36 N.Y.3d at 576, 169 N.E.3d at 229, 145 N.Y.S.3d at 517.

43. *Id.*

44. *Id.* at 576, 169 N.E.3d at 230, 145 N.Y.S.3d at 518 (citing People *ex rel.* Wogan v. Rafferty, 208 N.Y. 451, 456, 102 N.E. 582, 582 (1913)).

45. *Id.* at 577, 169 N.E.3d at 230, 145 N.Y.S.3d at 518 (*see* People v. Gilmour, 98 N.Y.2d 126, 130, 773 N.E.2d 479, 481, 746 N.Y.S.2d 114, 116 (2002); Johnson v. Pataki, 91 N.Y.2d 214, 225, 691 N.E.2d 1002, 1006, 668 N.Y.S.2d 978, 982; N.Y. COUNTY LAW § 700(1) (Consol. 2021); People v. Romero, 91 N.Y.2d 750, 754, 698 N.E.2d 424, 426, 675 N.Y.S.2d 588, 590 (1998); *see also Wogan*, 208 N.Y. at 461, 102 N.E. at 584).

46. *Id.* at 578, 169 N.E.3d at 230, 145 N.Y.S.3d at 518 (citing Haggerty v. Himelein, 89 N.Y.2d 431, 436, 677 N.E.2d 276, 278, 654 N.Y.S.2d 705, 707 (1997).

delegation, finding them not to be analogous.[47] The Court also rejected the argument that the statute should be construed in a manner that would hold it to be constitutional.[48] The text of the statute provides no explicit requirement that the Special Prosecutor is subject to the direction of the District Attorney that could form the basis of a savings argument; rather both the legislative intent and statutory language express the view that the Special Prosecutor's authority is concurrent with that of the District Attorney.[49] The Court left intact the non-prosecutorial functions of the Special Prosecutor, including the authority to cooperate with the District Attorney in the prosecution of abuse cases.[50]

### *C. Statutory Interpretation*

A theme running through several of the Court of Appeals' decisions during this period is statutory interpretation. The first of the cases, *People Care Inc. v. City of New York Human Resources Administration*, involved the statutory authority of the Human Resources Administration to audit and recoup misused Medicaid funds.[51]

People Care Incorporated (People Care) is a home care services agency that provides personal care services to Medicaid recipients in New York City.[52] New York City's Human Resources Administration Department of Social Services (HRA) is the arm of New York City government that oversees Medicaid spending in New York City "under the supervision of [New York State's Department of Health (DOH)]."[53] In 2001, HRA entered into a contract with People Care.[54] Under the contract's terms, People Care would provide home care

47. *Viviani*, 36 N.Y.3d at 579, 169 N.E.3d at 232, 145 N.Y.S.3d at 520 (*see* N.Y. EXEC. LAW § 552, 2(a)).

48. *Id.*

49. *Id.* at 582, 169 N.E.3d at 234, 145 N.Y.S.3d at 522 (*see* EXEC. § 552, 2(a)).

50. *Id.* at 583, 169 N.E.3d at 235, 145 N.Y.S.3d at 523 (*see* EXEC. § 552, 2(a)).

51. People Care Inc. v. City of N.Y. Hum. Res. Admin., 36 N.Y.3d 1088, 1089–90, 167 N.E.3d 497, 498, 143 N.Y.S.3d 329, 330 (2021) (citing People Care, Inc. v. City of N.Y. Hum. Res. Admin., 175 A.D.3d 134, 147–53, 106 N.Y.S.3d 32, 43–47 (1st Dep't 2019) (Richter, J.P., dissenting), *rev'd*, 36 N.Y.3d 1088, 167 N.E.3d 497, 143 N.Y.S.3d 329 (2021); and then citing N.Y. PUB. HEALTH LAW § 2807-v(1)(bb)(i), (iii) (McKinney 2021)).

52. Br. Pet'r-Appellant at 1, *People Care Inc*., 36 N.Y.3d at 1088, 167 N.E.3d at 497, 143 N.Y.S.3d at 329 (No. 1-11-5204), 2010 WL 10878963 at 1.

53. *People Care*, 175 A.D.3d at 148, 106 N.Y.S.3d at 43.

54. *Id.*

services and be reimbursed with Medicaid funds.[55] This standard contract between HRA and a service provider was approved by DOH.[56] It provided that the Medicaid rate would be based on direct wages to home care workers and indirect wages to administrative staff.[57] As was customary, "[t]he contract also gave HRA the authority to conduct regular audits of People Care, and to recoup Medicaid funds that either exceeded People Care's actual costs or were used in violation of the contract's provisions."[58] The contract also provided that if the Medicaid reimbursement rate changed, HRA would notify People Care of the change and provide an explanation of the recalculation.[59] People Care had the right to an administrative appeal of any rate change.[60] In 2002, the legislature enacted certain amendments to the Health Care Reform Act which authorized a recalculation of the Medicaid reimbursement rate to provide additional funds to personal care service providers "'for the purpose of recruitment and retention of non-supervisory personal care services workers or any worker with direct patient care responsibility.'"[61] Recipient providers were not authorized to use the funds for other purposes.[62] The legislation authorized DOH to enter into memoranda of understanding with local social service agencies, such as HRA, regarding the amount of funds to be distributed.[63] DOH and HRA entered into a memorandum of understanding (MOU) in accordance with the legislation.[64] Both the legislation and the MOU were silent as to whether HRA would audit these particular funds.[65] HRA notified People Care of the new Medicaid rate in a timely fashion in accordance with their existing contract, and People Care accepted the rate without seeking an appeal.[66] HRA subsequently audited People Care and demanded return of $7 million that had been awarded to

55. *Id.*

56. *Id.* at 150, 106 N.Y.S.3d at 45.

57. *Id.* at 136, 106 N.Y.S.3d at 35.

58. *People Care*, 175 A.D.3d at 148, 106 N.Y.S.3d at 44.

59. *Id.* at 149, 106 N.Y.S.3d at 44.

60. *Id*.

61. *Id.* at 148, 106 N.Y.S.3d at 44 (quoting N.Y. PUB. HEALTH LAW § 2807–v(1)(bb)(iii) (McKinney 2021)).

62. *Id.* (citing PUB. HEALTH § 2807–v(1)(bb)(iii)).

63. *Id.* at 138, 106 N.Y.S.3d at 36 (citing PUB. HEALTH § 2807–v(1)(bb)(iii)).

64. *People Care*, 175 A.D.3d at 138, 106 N.Y.S.3d at 36 (citing PUB. HEALTH § 2807–v(1)(bb)(i)).

65. *Id.* at 149, 106 N.Y.S.3d at 44.

66. *Id*.

People Care pursuant to the worker retention legislation.[67] People Care filed an administrative appeal challenging this action with HRA, which was denied.[68] People Care then commenced this Article 78 proceeding.[69]

The gist of People Care's argument was that absent specific statutory authority in the 2002 legislation or a specific provision in the MOU between HRA and DOH, HRA had no authority to conduct the audit.[70] HRA argued that People Care's petition should fail because it had failed to use the alternative dispute resolution provided for in the contract between HRA and People Care, and that, substantively, HRA had the authority to conduct that audit of the funds used for retention because the funds were Medicaid dollars subject to its contract with People Care.[71] The parties litigated the matter through a prior appeal in which the First Department held that neither the MOU nor the 2002 legislation authorized HRA to audit People Care's use of the retention funds, and thus, the ADR provision was not relevant.[72] On remand to the trial court for further proceedings to determine whether there was any other statutory basis for the HRA audit, the trial court held that HRA had no authority to conduct the audit, rejecting HRA's argument that the retention funds were Medicaid funds and thus fell within its general authority of its contract with People Care.[73] The dissent adopted HRA's argument regarding the Medicaid funds, and gave deference to DOH's interpretation of its agreement with HRA to oversee disbursement of Medicaid funds in New York City to include auditing of the recipient providers of those funds.[74]

67. *Id.*

68. *Id.*

69. *People Care*, 175 A.D.3d at 149, 106 N.Y.S.3d at 44–45 (Richter, J.P., dissenting).

70. *Id.* at 149, 106 N.Y.S.3d at 45; *see also* Petr's Suppl. Mem. of Law in Further Support of Verified Pet., People Care Inc. v. City of N.Y. Hum. Res. Admin. (2017) (No. 109193-2009), 2017 WL 11559736, at *11, *17.

71. *People Care*, 175 A.D.3d at 149, 106 N.Y.S.3d at 45 (Richter, J.P., dissenting).

72. *Id.* at 150, 106 N.Y.S.3d at 45 (citing People Care Inc. v. City of N.Y. Hum. Res. Admin., 89 A.D.3d 515, 516–17, 933 N.Y.S.2d 218, 220 (1st Dep't 2011)).

73. *Id.*

74. *Id.* at 147, 106 N.Y.S.3d at 43 (Richter, J.P., dissenting).

HRA appealed the decision.[75] Relying on the dissenting opinion issued in the First Department, Appellate Division,[76] the Court of Appeals held in *People Care Inc. v. City of New York Human Resources Administration* that HRA did not exceed its authority, reversed the decision of the First Department, and remitted the case to the appellate court for consideration of the ADR issues and the amount sought by HRA in recoupment.[77] The First Department subsequently held that People Care was required to pursue ADR and dismissed the Article 78 challenge without passing on the substance of the recoupment.[78] The funds were disbursed in 2003 and 2004, the audit was conducted in 2007 and 2008, and a determination as to People Care's use of $6,998,432 in retention funds remained undecided as of 2021.[79]

*Herkimer County Industrial Development Agency v. Village of Herkimer* involves a long running dispute between the IDA, the village, and Herkimer County over whether the IDA had a statutory obligation to pay the village overdue water rent charges on property the IDA had leased to a tenant who subsequently went bankrupt.[80] The village sought to recover the unpaid water charges through several means.[81] First, it levied the charges as real property taxes against the property[82] and "turned the unpaid levies over to defendant County of

75. *See* People Care Inc. v. City of N.Y. Hum. Res. Admin., 36 N.Y.3d 1088, 167 N.E.3d 497, 143 N.Y.S.3d 329 (2021).

76. *See id.* at 1089–90, 167 N.E.3d at 498, 143 N.Y.S.3d at 330 (citing *People Care*, 175 A.D.3d at 147–53, 106 N.Y.S.3d at 43–47 (Richter, J.P., dissenting)).

77. *See id.*

78. People Care v. City of N.Y. Hum. Res. Admin., 194 A.D.3d 624, 624–25, 144 N.Y.S.3d 361, 361–62 (1st Dep't 2021) (citing Acme Supply Co. v. City of N.Y., 39 A.D.3d 331, 332, 834 N.Y.S.2d 142, 143 (1st Dep't 2007)).

79. People Care Inc. v. City of New York Hum. Res. Admin., 109193/2009, 2018 N.Y. Slip Op. 33839(U), at 2 (Sup. Ct. N.Y. Cnty. Feb. 5, 2018); *see also People Care*, 36 N.Y.3d at 1090, 167 N.E.3d at 498, 143 N.Y.S.3d at 330.

80. 36 N.Y.3d 1061, 1062, 166 N.E.3d 1043, 1044, 142 N.Y.S.3d 865, 866 (2021).

81. *See* Herkimer Cnty. Indus. Dev. Agency v. Vill. of Herkimer, 175 A.D.3d 857, 858, 108 N.Y.S.3d 564, 566 (4th Dep't 2019) (first citing Herkimer Cnty. Indus. Dev. Agency v. Vill. of Herkimer, 124 A.D.3d 1298, 1299, 1 N.Y.S.3d 644, 646 (4th Dep't 2015); and then citing Herkimer Cnty. Indus. Dev. Agency v. Vill. of Herkimer, 84 A.D.3d 1707, 1707, 922 N.Y.S.2d 701, 702 (4th Dep't 2011)); *see also Herkimer Cnty. Indus. Dev. Agency*, 84 A.D.3d at 1708, 922 N.Y.S.2d at 702.

82. *Herkimer Cnty. Indus. Dev. Agency*, 175 A.D.3d at 858, 108 N.Y.S.3d at 566 (first citing *Herkimer Cnty. Indus. Dev. Agency*, 124 A.D.3d at 1299, 1 N.Y.S.3d

Herkimer."[83] The county paid a portion of the unpaid amount pursuant to section 1442 of the Real Property Tax Law and declined to pay the rest, claiming that the IDA was exempt from real property tax.[84] The IDA then commenced an action against the village for a declaratory judgment that it was not obligated to pay the outstanding water rents.[85] The result of two rounds of appeal on the issue of the tax liens was that they could not be enforced against the IDA.[86]

The village then asserted a claim that the IDA as owner was personally liable for the outstanding amount.[87] It also brought a separate criminal complaint against the IDA for violations of the state's Uniform Fire Prevention and Building Code on the property.[88] The IDA moved for summary judgment dismissing the liability claim and sought a writ of prohibition against the village's enforcement of the building code.[89] The trial court denied IDA's motion as to liability but granted its application to prohibit the village from enforcing the building code.[90] The appellate division affirmed as to liability for the water payments and reversed as to the writ of prohibition.[91] Relying on Village Law which authorizes the village to adopt regulations for the collection of water rents and for enforcement of the unpaid amounts by cutting off the water supply, as well as local rules creating liability for the property owner where the water is used,[92] the appellate division held that the IDA assented to the tenant's water use and is liable for it.[93] As to enforcement of the building code, the court concluded that granting the writ was improper and that the IDA could

at 646; then citing *Herkimer Cnty. Indus. Dev. Agency*, 84 A.D.3d at 1707, 922 N.Y.S.2d at 702).

83. *Herkimer Cnty. Indus. Dev. Agency*, 84 A.D.3d at 1708, 922 N.Y.S.2d at 702.

84. *Id.* (citing N.Y. REAL PROP. TAX LAW § 1442(4) (McKinney 2021)).

85. *Id.* at 1708, 922 N.Y.S.2d at 702–03 (citing N.Y. GEN. MUN. LAW § 874 (Consol. 2021)).

86. *Herkimer Cnty. Indus. Dev. Agency*, 36 N.Y.3d at 1063, 166 N.E.3d at 1045, 142 N.Y.S.3d at 867.

87. *Herkimer Cnty. Indus. Dev. Agency*, 175 A.D.3d at 857. 108 N.Y.S.3d at 566.

88. *Id.* at 858, 108 N.Y.S.3d at 566 (first citing 19 N.Y.C.R.R. § 1219.1 (2021), then citing N.Y. EXEC. LAW § 377 (Consol. 2021)).

89. *Id.*

90. *Id.*

91. *Id.* at 861–62, 108 N.Y.S.3d at 568–69.

92. *Herkimer Cnty. Indus. Dev. Agency*, 175 A.D.3d at 860, 108 N.Y.S.3d at 567–68.

93. *Id.* at 860, 108 N.Y.S.3d at 568.

raise any challenges to enforcement in the criminal action.[94] The dissent opined that the IDA could not be held liable for its tenant's water use because the majority's interpretation of the village regulations wrongly conflates the in rem liability of the property for the water use with personal liability of a third party, namely the IDA.[95]

The IDA was granted leave to appeal.[96] The Court held that the IDA could not be held personally liable for the water usage[97] because the local rules only contemplate an in rem action against the property and not an enforcement action against the property owner.[98]

The issue in *In re Walsh v. New York State Comptroller* was the New York Retirement System's interpretation of the term "act of any inmate" in Section 607-c of the Retirement and Social Security Law which entitled a corrections officer to performance-of-duty disability benefits when injured by the "act of any inmate."[99] Petitioner suffered severe injuries when an inmate in handcuffs whom the officer was transporting from court to the jail accidently fell out of the transport van and landed on the officer.[100] The officer sought disability retirement benefits under Section 607-c of the Retirement and Social Security Law.[101]

Subdivision (a) of that section provides that a correction officer who "becomes physically or mentally incapacitated for the performance of duties as the natural and proximate result of an injury, sustained in the performance or discharge of his or her duties by, or as the natural and proximate result *of any act of any incarcerated individual*" is entitled to a disability retirement allowance.[102]

94. *Id.* at 862, 108 N.Y.S.3d at 569 (citing *In re* Henry v. Fandrich, 159 A.D.3d 1409, 1410, 70 N.Y.S.3d 139, 140 (4th Dep't 2018)).

95. *Id.* at 866, 108 N.Y.S.3d at 572. (Dejoseph, J. & Nemoyer, JJ., dissenting in part).

96. Herkimer Cnty. Indus. Dev. Agency v. Vill. of Herkimer, 177 A.D.3d 1345, 1345, 110 N.Y.S.3d 352, 352 (4th Dep't 2019).

97. Herkimer Cnty. Indus. Dev. Agency v. Vill. Of Herkimer, 36 N.Y.3d 1061, 1063, 166 N.E.3d 1043, 1044–45, 142 N.Y.S.3d 865, 866–67 (2021).

98. *Id.* at 1063, 166 N.E.3d at 1045, 142 N.Y.S.3d at 867.

99. 34 N.Y.3d 520, 522, 144 N.E.3d 953, 954, 122 N.Y.S.3d 209, 210 (2019) (citing N.Y. RETIRE. & SOC. SEC. LAW § 607-c (McKinney 2021)).

100. *Id.*

101. *Id.*

102. RETIRE. & SOC. SEC. § 607-c(a) (McKinney 2021) (emphasis added).

The retirement system denied the officer's application for the benefit, and the decision was affirmed after a rehearing.[103] The hearing officer interpreted the phrase "act of an inmate" under section 607-c to mean an act of violence.[104] Reading the statute's intent as an effort to provide compensation to officers for injuries caused by their "exposure to violence, assault, transmissible disease and other life threatening conditions," the hearing officer concluded that the event which caused the injuries was not covered by the statute because it was an accident.[105] Petitioner then commenced an Article 78 proceeding, challenging that determination.[106] The appellate division affirmed the agency decision and dismissed the petition.[107] It concluded that the "act of the inmate" had to be an affirmative disobedient act, which was not the case here.[108] Leave to appeal was granted.[109]

The Court noted at the outset that the standard of review in cases such as this one is a deferential one, namely, whether there is substantial evidence to support the agency determination.[110] In cases involving the agency's interpretation of laws it is charged with regulating, deference is also accorded to the agency determination.[111] However, if the law has a plain meaning that does not require a specialized expertise to interpret, the courts are not bound by an agency's interpretation.[112] Concluding that no special expertise was required to interpret this section, the Court then turned to the traditional principles of statutory construction which require that in the

103. *Walsh*, 34 N.Y.3d at 522, 144 N.E.3d at 955, 122 N.Y.S.3d at 211 (citing RETIRE. & SOC. SEC. § 607-c(a)).

104. *Id.* at 522–23, 144 N.E.3d at 955, 122 N.Y.S.3d at 211 (citing RETIRE. & SOC. SEC. § 607-c(a)).

105. *Id.* at 523, 144 N.E.3d at 955, 122 N.Y.S.3d at 211.

106. *Id.*

107. *Id.* (citing Walsh v. N.Y. State Comptroller, 161 A.D.3d 1495, 1497, 78 N.Y.S.3d 734, 736 (3d Dep't 2018).

108. *Walsh*, 34 N.Y.3d at 523, 144 N.E.3d at 955, 122 N.Y.S.3d at 211 (citing *Walsh*, 161 A.D.3d at 1497, 78 N.Y.S.3d at 736).

109. *Id.*

110. *See id.* (citing Wilson v. City of White Plains, 95 N.Y.2d 783, 784–85, 731 N.E.2d 1111, 1112, 710 N.Y.S.2d 303, 304 (2000)).

111. *See generally* PATRICK J. BORCHERS & DAVID L. MARKELL, N.Y. STATE ADMIN. PROC. & PRAC. § 8.3 (2d ed. 1998) (describing court's regular deference to agency determinations).

112. *See Walsh*, 34 N.Y.3d at 524, 144 N.E.3d at 955, 122 N.Y.S.3d at 211 (citing DeVera v. Elia, 32 N.Y.3d 423, 434, 117 N.E.3d 757, 763, 93 N.Y.S.3d 198, 204 (2018)).

absence of a statutory definition, words are given their ordinary meaning.[113]

Since the word "act" in *Walsh* was not defined in the statute, the Court spent several paragraphs discussing what is ordinarily meant by the word "act."[114] The Court held that in the absence of any limiting definition, the word "act" would include both voluntary and involuntary acts of an inmate, including the inmate's fall here, since "falling is commonly understood to be an act."[115]

The concurrence agreed with the majority but offered a second path to the same conclusion, namely that the section covers "acts of inmates where the inmates' acts are not the proximate cause of the injury, so long as the disability is the sort that would ordinarily flow from that type of injury" incurred by the officer.[116]

The dissent would have limited the interpretation of the term to volitional acts based on a reading of the legislative intent that aimed to protect offices from the inmates whom they oversee.[117]

The statutory interpretation before the Court in *Doe v. Bloomberg* involved the absence of a statutory definition of the relevant term: whether the individual owner or officer of a corporate employer was an "employer" for purposes of holding the individual vicariously liable for an employee's conduct under the New York City's Human Rights Law (Code).[118] The Code does not define the term "employer."[119] According to the Court of Appeals, the absence of a

113. *See id.* at 524, 144 N.E.3d at 955–56, 122 N.Y.S.3d at 211–12 (quoting Yaniveth R. v. LTD Realty Co., 27 N.Y.3d 186, 192, 51 N.E.3d 521, 524, 32 N.Y.S.3d 10, 13 (2016)).

114. *See id.* at 525–26, 144 N.E.3d at 956–57, 122 N.Y.S.3d at 212–13 (first citing Nadkos, Inc. v. Preferred Contractors Ins. Co. Risk Retention Grp. LLC, 34 N.Y.3d 1, 7, 132 N.E.3d 568, 571, 108 N.Y.S.3d 375, 378 (2019); then citing *Act*, BLACK'S LAW DICTIONARY (11th ed. 2019); then citing MODEL PENAL CODE § 1.13(2) (AM. LAW INST. 2007); then citing N.Y. PENAL LAW § 15.00(1)–(2) (McKinney 2021); then citing Mallory v. Travelers' Ins. Co., 47 N.Y. 52, 56 (1871); then citing Weed v. Mutual Benefit Life Ins. Co., 70 N.Y. 561, 563 (1877); and then citing Giryluk v. Giryluk, 30 A.D.2d 22, 24, 289 N.Y.S.2d 458, 460 (1st Dep't 1968)).

115. *Id.* at 526–27, 144 N.E.3d at 957–58, 122 N.Y.S.3d at 213–14.

116. *Id.* at 529, 144 N.E.3d at 959, 122 N.Y.S.3d at 215 (Wilson, J., concurring).

117. *See Walsh*, 34 N.Y.3d at 532, 541, 144 N.E.3d at 961, 968 122 N.Y.S.3d at 217, 224 (Rivera, J., dissenting).

118. *See* 36 N.Y.3d 450, 453, 167 N.E.3d 454, 456, 143 N.Y.S.3d 286, 288 (2021).

119. *See id.* at 455, 167 N.E.3d at 457, 143 N.Y.S.3d at 289 (citing N.Y.C. ADMIN. CODE § 8-107(13) (2021)).

definition in the city's Code as well as the existence of federal and state statutes governing an employer's potential vicarious liability for similar conduct has generated confusion.[120]

Plaintiff had alleged claims of sexual misconduct, discrimination, and sexual abuse, including rape, against her supervisor.[121] In addition to naming the supervisor as a defendant, plaintiff also named her corporate employer, Bloomberg L.P., and Michael Bloomberg, the "Co-Founder, Chief Executive Officer and President, of Bloomberg [L.P.]," as vicariously liable for the conduct of the supervisor.[122] There were no allegations that defendant Bloomberg engaged in the offending conduct.[123] However, plaintiff alleged that defendant Bloomberg created "a hostile work environment that led to the type of discrimination plaintiff experienced."[124] To bolster her claims, plaintiff cited allegations by other women against defendant Bloomberg in several other lawsuits and in media reports.[125]

The Human Rights Law of the City of New York "makes it unlawful for 'an employer or an employee or agent thereof' to discriminate on the basis of gender[126] [and] prohibits 'any person' from aiding and abetting discrimination[127] or from retaliating against another person for engaging in certain protected activities."[128] The Code also imposes vicarious liability on the employer for the discriminatory conduct of the employees with managerial or supervisory responsibilities,[129] if the employer knew about the conduct and acquiesced in it, or if the employer should have known about the conduct and failed to take reasonable actions to prevent it from happening.[130] Initially, the trial court granted defendant Bloomberg's motion to dismiss the complaint, but on re-argument, plaintiff successfully argued that a corporate officer could be subject

120. *See id.*

121. *See id.* at 453, 167 N.E.3d at 456, 143 N.Y.S.3d at 288.

122. *Id.*

123. *See Bloomberg*, 36 N.Y.3d at 453, 167 N.E.3d at 456, 143 N.Y.S.3d at 288.

124. Doe v. Bloomberg, L.P., 178 A.D.3d 44, 46, 109 N.Y.S.3d 254, 256 (1st Dep't 2019).

125. *See id.* at 46, 109 N.Y.S.3d at 256–57.

126. *Bloomberg*, 36 N.Y.3d at 454, 167 N.E.3d at 457, 143 N.Y.S.3d at 289 (citing N.Y.C. ADMIN. CODE § 8-107(1)(a)).

127. *Id.* (citing N.Y.C. ADMIN. CODE § 8-107(6)).

128. *Id.* (citing N.Y.C. ADMIN. CODE § 8-107(7)).

129. *Id.* (citing N.Y.C. ADMIN. CODE § 8-107(13)(b)(1)).

130. *Id.* at 454–55, 167 N.E.3d at 457, 143 N.Y.S.3d at 289 (citing N.Y.C. ADMIN. CODE §§ 8-107(13)(b)(2)–(3)).

to liability for discriminatory conduct under the state's Human Rights Law as well as federal law[131] if the individual is shown to have an "ownership interest or any power to do more than carry out personnel decisions made by others."[132] The trial court held that having "managerial or supervisory responsibility'" was sufficient to hold defendant Bloomberg liable and denied the motion as a matter of law.[133] The court's use of the language "'managerial or supervisory responsibility'" of an employer is confusing because in that instance it is the employee's authority that gives rise to the employer's liability under the city's Code.

The Appellate Division, First Department reversed and dismissed the claims against defendant Bloomberg.[134] It held that if there are both a corporate and an individual employer, the individual employer can be held vicariously liable, "in addition to the corporate employer, only if the plaintiff sufficiently alleges that the individual encouraged, condoned or approved the specific discriminatory conduct giving rise to the claim."[135] The appellate court recognized that the Court of Appeals had never addressed the issue of whether an individual owner also could be held vicariously liable where there is a corporate employer.[136] Relying on its own precedent,[137] the appellate court concluded that in order to be held liable under the city's Code, an owner or officer of a company, separate and apart from the corporate owner, would have to have "encouraged, condoned or approved the specific discriminatory conduct giving rise to the claim."[138] Given that plaintiff did not make such allegations, the court concluded that defendant Bloomberg's motion should have been granted.[139] The court

131. Margaret Doe v. Bloomberg L.P., No. 28254-2016E, 2018 N.Y. Slip Op. 33961(U), at 1–2 (Sup. Ct. N.Y. Cnty. 2018) (first citing generally N.Y.C. ADMIN. CODE § 8-107; then citing Zakrzewska v. New School, 14 N.Y.3d 469, 479, 928 N.E.2d 1035, 1039, 902 N.Y.S.2d 838, 842 (2010)).

132. *Id.* at 2.

133. *Id.* at 4–5.

134. Doe v. Bloomberg, L.P., 178 A.D.3d 44, 57, 109 N.Y.S.3d 254, 264 (1st Dep't 2019).

135. *Id.* at 45, 109 N.Y.S.3d at 256.

136. *Id.* at 48, 109 N.Y.S.3d at 257–258 (citing N.Y.C. ADMIN. CODE § 8-107(13)(b)(1)).

137. *Id.* at 48–49, 109 N.Y.S.3d at 258 (first citing Boyce v. Gumley-Haft, Inc., 82 A.D.3d 491, 492, 918 N.Y.S.2d 111, 112 (1st Dep't 2011); then citing McRedmond v. Sutton Place Rest. & Bar, Inc., 95 A.D.3d 671, 672, 945 N.Y.S.2d 35, 37 (1st Dep't 2012)).

138. *Id.* at 48, 109 N.Y.S.3d at 258.

139. *Bloomberg*, 178 A.D.3d at 50–52, 109 N.Y.S.3d at 260–261.

declined to interpret the Code so broadly that "it imposes strict liability on an individual for simply holding an ownership stake or a leadership position in a liable corporate employer."[140]

Arguing that the City's Human Rights Law was intended to be construed liberally, even where its federal and state counterparts would suggest a different result,[141] the dissent opined that defendant Bloomberg was indeed an employer under the City's Human Rights Law.[142] The dissent relied on the Court of Appeals' decision in *Patrowich v. Chemical Bank*,[143] interpreting the term "employer" under the state's Human Rights Law as an individual who has "an ownership interest in the relevant organization or the power to do more than carry out personnel decisions."[144]

Plaintiff's appeal to the Court of Appeals was as a matter of right.[145] The Court affirmed the dismissal of the complaint but for reasons different from those of the First Department.[146] First, the Court observed that applying the test under the state's Human Rights Law to determine liability of an employer has no place in deciding whether an individual is an employer under the city's Code.[147] The Court disagreed with the appellate court's analysis for that reason.[148] Moreover, the cases on which the appellate court relied involved whether the employer could be held liable based on respondeat superior, given that the state's Human Rights Law did not create vicarious liability for an employer.[149] The state Human Rights Law

140. *Id.* at 49, 109 N.YS.3d at 259.

141. *Id.* at 52, 109 N.Y.S.3d at 261(Manzanet-Daniels, J., dissenting) (citing N.Y.C. ADMIN. CODE § 8-130).

142. *Id.* at 56, 109 N.Y.S.3d at 263 (Manzanet-Daniels, J., dissenting).

143. *Id.* at 53, 109 N.Y.S.3d at 261 (Manzanet-Daniels, J., dissenting) (citing Patrowich v. Chemical Bank, 63 N.Y.2d 541, 542, 473 N.E.2d 11, 12, 483 N.Y.S.2d 659, 660 (1984)).

144. *Bloomberg*, 178 A.D.3d at 53, 109 N.Y.S.3d at 261 (Manzanet–Daniels, J., dissenting) (citing *Patrowich*, 63 N.Y.2d at 542, 473 N.E.2d at 12, 483 N.Y.S.2d at 660).

145. *Bloomberg*, 36 N.Y.3d at 454, 167 N.E.3d at 456, 143 N.Y.S.3d at 288 (citing N.Y. C.P.L.R. 5601(a) (McKinney 2021).

146. *Id.*

147. *Id.* at 456, 167 N.E.3d at 458, 143 N.Y.S.3d at 290 (citing generally Totem Taxi v. N.Y. State Hum. Rts. App. Bd., 65 N.Y.2d 300, 305, 480 N.E.2d 1075, 1077, 491 N.Y.S.2d 293, 295 (1985)).

148. *Id.* at 455, 167 N.E.3d at 457, 143 N.Y.S.3d at 289.

149. *Id.* at 456, 167 N.E.3d at 458, 143 N.Y.S.3d at 290 (first citing N.Y.C. ADMIN. CODE § 8-107(13)(b)(1) (2022); then citing Zakrzewska v. New School, 14 N.Y.3d 469, 481, 928 N.E.2d 1035, 1040, 902 N.Y.S.2d 838, 843 (2010)).

requirement of an employer's "minimum culpability" is not relevant to the city's Code.[150] The Court likewise dismissed the dissent's reliance on *Patrowich v. Chemical Bank*,[151] as it was interpreting state and federal law.[152] According to the majority, that reliance on *Patrowich* was misplaced because under state law an employee who is an officer and "the manager or supervisor of a corporate division," is not individually liable, and under federal law, an individual is not individually liable unless it can be shown that the individual an "ownership interest or [the] power to do more than carry out personnel decisions made by others."[153]

According to the Court, "where a plaintiff's employer is a business entity, the shareholders, agents, limited partners, and employees of that entity are not employers" under the Code,[154] an interpretation similar to that adopted under the Business Corporation Law, Partnership Law and Limited Liability Corporation Law.[155]

In reaching its decision, the Court reiterated the well-established principle that directors, officers, and shareholders are not subject to personal liability for the torts of corporate employees simply because the directors or officers hold corporate office.[156] To the Court, there was no indication that the City's Code intended to deviate from that principle.[157] The dissent viewed defendant Bloomberg's status as "co-founder, chief operating officer, president, and majority owner of the business" sufficient to make him an employer under the broad intention of the City's Code.[158] However, the majority concluded that the titles alone do not create liability.[159]

150. *Bloomberg*, 36 N.Y.3d at 456, 167 N.E.3d at 458, 143 N.Y.S.3d at 290 (citing *Zakrzewska*, 14 N.Y.3d at 481, 928 N.E.2d at 1040, 902 N.Y.S.2d at 843).

151. *Id.* (citing Patrowich v. Chemical Bank, 63 N.Y.2d 541, 542, 473 N.E.2d 11, 12, 483 N.Y.S.2d 659, 660 (1984)).

152. *Id.* at 457, 167 N.E.3d at 459, 143 N.Y.S.3d at 291 (citing *Patrowich*, 63 N.Y.2d at 542, 473 N.E.2d at 12, 483 N.Y.S.2d at 660).

153. *Id.*

154. *Id.* at 459, 167 N.E.3d at 460, 143 N.Y.S.3d at 292.

155. *Bloomberg*, 36 N.Y.3d at 459, 167 N.E.3d at 460, 143 N.Y.S.3d at 292. (first citing N.Y. P'SHIP LAW §§ 26, 121-303 (McKinney 2021); then citing N.Y. LTD. LIAB. CO. LAW § 609 (McKinney 2021); and then citing N.Y. BUS. CORP. LAW § 719 (McKinney 2021)).

156. *Id.* at 460–61, 167 N.E.3d at 461, 143 N.Y.S.3d at 293 (citing Connell v. Hayden, 83 A.D.2d 30, 57–58, 443 N.Y.S.2d 383, 402 (2d Dep't 1981)).

157. *Id.*

158. *Id.* at 462, 167 N.E.3d at 464, 143 N.Y.S.3d at 296.

159. *Id.*

*People v. Harris* addressed the statutory limits on scope of appellate review in criminal proceedings.[160] Before he pled guilty to "criminal possession of stolen property in the fourth degree,"[161] defendant Harris made a motion to suppress physical evidence recovered during a search of a closed suitcase he dropped during his arrest and a knife that was recovered from his pants pocket during the arrest.[162] Defendant argued that the warrantless search was improper because there were no exigent circumstances justifying the search, relying on the Court's decision in *People v. Gokey*.[163] *Gokey* held that "[a] duffel bag that is within the immediate control or "grabbable area" of a suspect at the time of his arrest may not be subjected to a warrantless search incident to the arrest, unless the circumstances leading to the arrest support a reasonable belief that the suspect may gain possession of a weapon or be able to destroy evidence located in the bag."[164] The trial court denied the motion to suppress, deciding that the holding of *Gokey* did not apply because the bag was not incidental to the arrest but the location of the stolen property.[165] The appellate court affirmed but on a different basis, concluding that *Gokey* did apply and that exigent circumstances existed to support a warrantless search.[166]

Under CPL 470.15(1), intermediate appellate review in a criminal case is limited to any question of law or issue of fact involving error or defect in the proceedings "which may have adversely affected the appellant."[167] The Court of Appeals in *Harris* held that the only reviewable issue for the appellate division was the correctness of trial court's decision that *Gokey* did not apply.[168] The appellate division's decision that *Gokey* did apply was within the scope of its review; its determination that exigent circumstances existed was beyond the

160. 35 N.Y.3d 1010, 1011, 149 N.E.3d 429, 430, 125 N.Y.S.3d 668, 669 (2020).

161. *Id.* (citing N.Y. PENAL LAW §165.45 (McKinney 2021)).

162. *Id.*

163. *Id.* (citing People v. Gokey, 60 N.Y.2d 309, 457 N.E.2d 723, 469 N.Y.S.2d 618 (1983)).

164. *Gokey*, 60 N.Y.2d at 311, 457 N.E.2d at 724, 469 N.Y.S.2d at 619.

165. *People v. Harris*, 35 N.Y.3d, 1010, 1011, 149 N.E.3d, 429, 430, 125 N.Y.S.3d, 668, 669 (2020).

166. *Id.*

167. *Id.* at 1011, 149 N.E.3d at 431, 125 N.Y.S.3d at 670 (citing N.Y. CRIM. PROC. Law § 470.15(1) (McKinney 2021)).

168. *Id.* at 1012, 149 N.E.3d at 431, 125 N.Y.S.3d at 670.

scope of its review because the trial court had not ruled on it.[169] The case was remanded to the trial court for further proceedings.[170]

In a final statutory interpretation case, the Court of Appeals was asked to clarify a New York City Statute barring issue preclusion as an affirmative defense if the action happened in small claims court before the Second Circuit could decide a Fair Labor Standards Act case.[171]

In *Simmons v. Trans Express Inc.*, Charlene Simmons was fired from her job at Trans Express Inc. in 2018.[172] She commenced an action in small claims court for payment of unpaid overtime, *pro se*.[173] She won the case, and was awarded a total of $1,020.00.[174] At a later time, Ms. Simmons commenced an action in Federal District Court against Trans Express under federal and state law for backpay and unpaid overtime according to the Federal Fair Labor Standards Act and state Labor Law.[175] The district court dismissed the action, holding that res judicata, or claim preclusion, barred Ms. Simmons from asserting the claim due to the prior small claims court action.[176] On appeal, the Second Circuit found that New York Law appears to allow re-litigation where the prior action was in small claims court, but this question has not been addressed by the New York Court of Appeals.[177] Therefore, the Court of Appeals was asked by the Second Circuit to answer the following question:

> Under New York City Civil Court Act §1808, what issue preclusion, claim preclusion, and/or res judicata effects, if any, does a small claims court's prior judgment have on subsequent actions brought in other courts involving the same facts, issues, and/or parties? In particular, where a small claims court has rendered a judgment on a claim, does [s]ection 1808 preclude

169. *Id.* (citing People v. Muhammad, 17 N.Y.3d 532, 547, 959 N.E.2d 463, 474, 935 N.Y.S.2d 526, 537 (2011)).

170. *Harris*, 35 N.Y.3d at 1011, 149 N.E.3d at 430, 125 N.Y.S.3d at 669.

171. Simmons v. Trans Express, 37 N.Y.3d 107, 109, 170 N.E.3d 733, 735, 148 N.Y.S.3d 178, 180 (2021).

172. *Id.* at 118, 170 N.E.3d at 741, 148 N.Y.S.3d at 186.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Simmons*, 37 N.Y.3d at 118–19, 170 N.E.3d at 741, 148 N.Y.S.3d at 186; Simmons v. Trans Express Inc., 355 F. Supp. 3d 165, 171–72 (E.D.N.Y. 2019).

177. Simmons v. Trans Express Inc., 955 F.3d 325, 328 (2d Cir. 2020).

> a subsequent action involving a claim arising from the same transaction, occurrence, or employment relationship?[178]
>
> The text of New York City Civil Court Act Section 1808 is:
>
> A judgment obtained under this article shall not be deemed an adjudication of any fact at issue or found therein in any other action or court; except that a subsequent judgment obtained in another action or court involving the same facts, issues and parties shall be reduced by the amount of a judgment awarded under this article.[179]

The Court of Appeals determined that the language of section 1808 allows re-litigation of actions that would be barred due to collateral estoppel (issue preclusion).[180] However, the second clause of the statute bars re-litigation if claim preclusion applies.[181] The Court reached this conclusion after examining the legislative history behind the exception and finding that the intent was not to allow re-litigation between the same parties on the same claim (claim preclusion), but to prevent the unforeseen consequences of treating an issue as settled against a party where the cause of action, and therefore the consequences of a successful claim, would be different.[182]

Additionally, the Court reviewed New York's treatment of both claim and issue preclusion law.[183] The Court found that other courts faced with this question may properly apply claim preclusion and should review whether claims "are related in time, space, origin, or motivation, whether they form a convenient trail unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage."[184] Finally, the Court noted that advocates in favor of interpretation of Section 1808 as limiting both claim and issue preclusion defenses should direct their efforts toward amendment of the statute.[185]

178. *Id.* at 331.

179. N.Y. CITY CIV. CT. ACT § 1808.

180. *Simmons*, 37 N.Y.3d at 113, 170 N.E.3d at 738, 148 N.Y.S.3d at 183 (citing Ryan v. N.Y. Tel. Co., 62 N.Y.2d 494, 500, 467 N.E.2d 487, 489, 478 N.Y.S.2d 823, 825 (1984)).

181. *Id.*

182. *Simmons*, 37 N.Y.3d at 113–14, 170 N.E.3d at 738, 148 N.Y.S.3d at 183.

183. *Id.* at 110, 170 N.E.3d at 735, 148 N.Y.S.3d at 180.

184. *Id.* at 111, 170 N.E.3d at 736, 148 N.Y.S.3d at 181 (quoting Xiao Yang Chen v. Fischer, 6 N.Y.3d 94, 100–01, 843 N.E.2d 723, 725, 810 N.Y.S.2d 96, 98 (2005)).

185. *Id.* at 115, 170 N.E.3d at 739, 148 N.Y.S.3d at 184.

Judge Rivera dissented, joined by Judge Wilson, arguing that this decision does a disservice to *pro se* small claims plaintiffs who are unaware they are giving up the right to larger awards by first proceeding in small claims court.[186] Under her interpretation of the statute's words, context, purpose, and legislative history, section 1808 prevents application of both claim and issue preclusion, and the second clause prevents a double recovery by the plaintiff in future actions of any award obtained in small claims court.[187] A second purpose of Section 1808 was to allow claim preclusion where the plaintiff's claim is unsuccessful in small claims court, but not when the plaintiff was successful.[188] Under this interpretation, a plaintiff who loses in small claims court cannot re-litigate the claim in another court, but if the plaintiff wins, they can bring the claim in another court with a reduction in any award based on the amount obtained in small claims court.[189]

### *D. Arbitrary and Capricious*

The issue in *West 58th Street Coalition, Inc. v. City of New York* was whether the City's finding that a building intended as a shelter met building code requirements was arbitrary and capricious.[190] The building, located at 158 West 58th Street in Manhattan,[191] had been built in 1910 and served many purposes over the years, including a hotel, and single room occupancy tenement (SRO),[192] and its current owner sought to transform it into a shelter for "employed and job-seeking men."[193] A public hearing on the City's plan was held and building permits were issued for renovations to the space.[194] The City

186. *Id.* at 116, 170 N.E.3d at 740, 148 N.Y.S.3d at 185.

187. *Simmons*, 37 N.Y.3d at 117, 170 N.E.3d at 741, 148 N.Y.S.3d at 186.

188. *Id.*

189. *Id.*

190. W. 58th St. Coal. v. City of New York, 37 N.Y.3d 949, 951, 170 N.E.3d 446, 447–48, 147 N.Y.S.3d 571, 573 (2021).

191. W. 58th St. Coal., Inc. v. City of New York, 188 A.D.3d 1, 2, 130 N.Y.S.3d 436, 439 (1st Dep't 2020) (For a picture of the building, see, https://www.google.com/maps/place/158+W+58th+St,+New+York,+NY+10019/@40.7658106,73.978603,3a,75y,206.65h,96.78t/data=!3m6!1e1!3m4!1sWOTVLYKfJuoU1NIuudWspQ!2e0!7i16384!8i8192!4m5!3m4!1s0x89c258f714ded151:0xa27b2d44197da2d4!8m2!3d40.7656728!4d-73.9788018).

192. *Id*.

193. *Id.* at 3, 130 N.Y.S.3d at 439.

194. *W. 58th St. Coal.*, 37 N.Y.3d at 951, 170 N.E.3d at 447, 147 N.Y.S.3d at 572.

subsequently issued a temporary certificate of occupancy for several floors of the building.[195]

Petitioners, a group of neighbors of the building and certain not-for-profit organizations,[196] opposed the opening of the shelter, claiming that its opening would jeopardize the value of their real estate and create public safety concerns.[197] They commenced an Article 78 proceeding challenging the City's approval of the project as "arbitrary, capricious, and irrational" and "the result of a fatally flawed process, reverse-engineered to fit a predetermined outcome, at an unjustifiable cost far in excess of such housing elsewhere."[198] They also sought a preliminary injunction.[199] Petitioners claimed that the City's decision to classified the building as a "Group R-2" building . . . a classification that permitted continued use of the historic building without modification of the residential spaces to comply with the current Building Code" was improper, and arbitrary and capricious.[200] Petitioners argued that certain structural deficiencies of the building made it inherently unsafe as a shelter despite the fact that the structure had been operated both as an SRO and hotel for many years.[201] Citing well established principles of administrative review of agency action,[202] the trial court dismissed the petition finding that the City's

195. *Id.* at 951, 170 N.E.3d at 447, 147 N.Y.S.3d at 572–73.

196. *Id.*

197. *W. 58th St. Coal., Inc.*, 188 A.D.3d at 4, 130 N.Y.S.3d at 439 ("They felt that the neighborhood had been singled out as 'a grand social experiment'; the planned project would violate the rights of people 'who work all day and pay their taxes' by reducing homeowners' property values; and that the City was putting them 'in danger because you're going to put 150 people in a small area, which will increase crime and the threat of crime and danger.'" *Id.*).

198. W. 58th St. Coal., Inc. v. City of New York, No. 156196/2018, 2019 N.Y. Slip Op. 31159(U), at 1 (Sup. Ct. N.Y. Cnty. Apr. 29, 2019). Mem. of Law in Support of Petrs' Am. Verified Pet. and Appl. by Order to Show Cause for Injunctive Relief and Other Related Relief, 2019 WL 1901379 (Sup. Ct. N.Y. Cnty. 2019).

199. *W. 58th St. Coal.*, 37 N.Y.3d at 949, 170 N.E.3d at 446, 147 N.Y.S.3d at 571.

200. *Id.* at 951, 170 N.E.3d at 447–48, 147 N.Y.S.3d at 573 ("Existing buildings are generally exempt from the provisions of the current Building Code as long as they are in compliance with prior code requirements unless there is substantial renovation or change in use." *W. 58th St. Coal., Inc.*, 188 A.D.3d at 4, 130 N.Y.S.3d 436 at 439.).

201. *See W. 58th St. Coal.*, 37 N.Y.3d at 951, 170 N.E.3d at 448, 147 N.Y.S.3d at 573.

202. *See W. 58th St. Coal.*, 2019 N.Y. Slip Op. 31159(U), at 1–2 ("An action is arbitrary and capricious when it is taken without sound basis in reason or regard to

decision was rational.[203] The trial court also determined that the building was safe to inhabit, concluding that the City was not required to submit any affirmative evidence that the building would not endanger "general safety and public welfare."[204] Petitioners appealed.[205] The First Department affirmed the trial court's holding that the City's determination was rational and supported by its interpretation that it was a "nontransient apartment hotel as its residents will have stays of more than 30 days, on average."[206] It remanded the case to the trial court for proceedings on the safety of the current configuration of the building.[207] The Court of Appeals affirmed the ruling that the City's determination was rational.[208] It reversed the appellate court's decision to remand the matter for a hearing on danger to public safety as improper.[209] Once it had been determined that the City's actions were not arbitrary and capricious, it could not remand the matter for further proceedings to consider additional evidence.[210]

### *E. Substantial Evidence*

Judicial review of an agency action after a hearing on the record is limited to whether it is supported in the whole record by substantial evidence.[211] Substantial evidence is "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact."[212] In *Matter of Zielinski v. Venettozzi*, the Court of

the facts . . . If the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency." (citations omitted)).

203. *See id.* at 2, 8.

204. *Id.* at 3–4.

205. *See* W. 58th St. Coal., Inc. v. City of New York, 188 A.D.3d 1, 3, 130 N.Y.S.3d 436, 438 (1st Dep't 2020).

206. *Id.* at 11–14, 130 N.Y.S.3d at 444–46.

207. *See id.* at 3, 130 N.Y.S.3d at 438.

208. *See* W. 58th St. Coal. v. City of New York, 37 N.Y.3d 949, 951–52, 170 N.E.3d 446, 447–48, 147 N.Y.S.3d 571, 572–73 (2021).

209. *See id.* at 952, 170 N.E.3d at 448, 147 N.Y.S.3d at 574.

210. *See id.* (citing Rizzo v. N.Y. Div. of Hous. & Cmty. Renewal, 6 N.Y.3d 104, 110, 843 N.E.2d 739, 742, 810 N.Y.S.2d 112, 115 (2005)).

211. *See* Pell v. Bd. of Educ., 34 N.Y.2d 222, 231, 313 N.E.2d 321, 325, 356 N.Y.S.2d 833, 839 (1974) (citing N.Y. C.P.L.R. 7803(4) (McKinney 2021)).

212. 300 Gramatan Ave. Assocs. v. State Div. of Hum. Rts., 45 N.Y.2d 176, 180, 379 N.E.2d 1183, 1185–87, 408 N.Y.S.2d 54, 56 (1978) (citing N.Y. State Lab. Rels. Bd. v. Frank G. Shattuck Co., 260 A.D. 315, 317, 20 N.Y.S.2d 949, 951 (1st Dep't 1940).

Appeals reviewed the evidence required to confirm disciplinary charges against a prison inmate who is not in possession of state issued items.[213]

The Petitioner (Zielinski), an inmate at Clinton County Correctional Facility, was found guilty of losing his state issued razor.[214] After an unsuccessful administrative appeal, Zielinski commenced an article 78 proceeding seeking judicial review of the hearing, determination, and penalties imposed.[215]

The appellate division reviewed the evidence and documentation the prison hearing officer used to find Zielinski guilty, concluding that substantial evidence supported the officer's determination.[216] Specifically, the Court found that the officer was allowed to rely on documentary evidence to prove that Zielinski was in possession of a razor and subsequently lost it, even though Zielinski stated that he had not been issued or in possession of a razor at the time.[217] Although Zielinski alleged that he was denied the right to submit documentary evidence or call witnesses, the appellate division determined that documentary evidence was provided for inspection and the requested witnesses were not relevant to the hearing.[218] Finally, the appellate division found that Zielinski's remaining arguments regarding unrecorded testimony and bias from the hearing officer were without merit, dismissing the petition.[219]

On appeal, the Court of Appeals affirmed the appellate division's holding, finding that substantial evidence supported the hearing officer's determination and that the record showed a rational basis for the hearing officer's decision.[220] The majority charged Judge Wilson,

213. *See* 35 N.Y.3d 1082, 1083, 156 N.E.3d 274, 274, 131 N.Y.S.3d 655, 655 (2020).

214. *See* Zielinski v. Venettozzi, 177 A.D.3d 1047, 1047, 112 N.Y.S.3d 338, 339 (3d Dep't 2019).

215. *See id.*

216. *See id.* (first citing Fernandez v. Venettozzi, 164 A.D.3d 1557, 1558, 81 N.Y.S.3d 772, 772 (3d Dep't 2018); then citing Thousand v. Prack, 139 A.D.3d 1212, 1212, 32 N.Y.S.3d 348, 350 (3d Dep't 2016); and then citing Ortega v. Annucci, 122 A.D.3d 1051, 1051, 994 N.Y.S.2d 742, 743 (3d Dep't 2014)).

217. *See id.* at 1047, 112 N.Y.S.3d at 339–40.

218. *See id.* at 1048, 112 N.Y.S.3d at 340 (first citing Reyes v. Keyser, 150 A.D.3d 1502, 1505, 55 N.Y.S.3d 495, 498 (3d Dep't 2017); then citing Medina v. Prack, 101 A.D.3d. 1295, 1297, 955 N.Y.S.2d 453, 455 (3d Dep't 2012)).

219. *See Zielinski*, 177 A.D.3d at 1048, 112 N.Y.S.3d at 340.

220. *See Zielinski*, 35 N.Y.3d at 1083, 156 N.E.3d at 274, 131 N.Y.S.3d at 655 (first quoting Marine Holdings, LLC v. N.Y.C. Comm'n on Hum. Rts., 31 N.Y.3d

who authors the dissent, of "crediting testimony rejected by the agency and re-weighing the record evidence in petitioner's favor."[221]

Joined by Judge Rivera, Judge Wilson dissented, arguing the documentary evidence was indirect evidence of Zielinski's infraction at best, and that the hearing officer failed to allow relevant requests for documentary evidence and witness testimony.[222] This shifted the burden of proof to Zielinski to prove he did not have a razor, instead of requiring the prison to prove that Zielinski was in possession of a razor and would not or could not produce it for inspection.[223]

First, Judge Wilson reviewed the evidence the hearing officer relied on in their finding, noting that none of the evidence used proved that Zielinski was actually in possession of a razor to lose, only that he failed to produce the razor.[224] Zielinski had previously reported that his razor was stolen, and there was no direct evidence proving that the stolen razor was replaced.[225] Instead, the hearing officer stated that (1) standard protocol was to reissue razors in this situation, (2) the prison records did not show that anyone noticed that Zielinski was not in possession of a razor, and (3) Zielinski had to have a razor in previous weeks, because if he didn't, he would have been charged with loss of the razor weeks earlier.[226]

Zielinski alleged that the records system was faulty, because in previous weeks nobody checked whether he had a razor and so no reports were generated stating that his razor was missing.[227] When Zielinski requested records and witnesses to plead his case, his requests were denied.[228] Judge Wilson asserts that the question of verifying whether Zielinski had a razor through prison records and witnesses is the fundamental issue in the case, because if the correctional facility cannot prove that Zielinski had a razor, there should be no punishment for failing to produce it.[229] Further, the

1045, 1047, 100 N.E.3d 849, 851, 76 N.Y.S.3d 510, 512 (2018)); (citing People *ex rel.* Vega v. Smith, 66 N.Y.2d 130, 139, 485 N.E.2d 997, 1002, 495 N.Y.S.2d 332, 337 (1985)).

221. *Id.* at 1083, 156 N.E.3d at 274–75, 131 N.Y.S.3d at 655.

222. *See id.* at 1084, 156 N.E.3d at 275, 131 N.Y.S.3d at 656 (Wilson, J., dissenting).

223. *See id.* at 1090, 156 N.E.3d at 280, 131 N.Y.S.3d at 660.

224. *See id.* at 1088, 156 N.E.3d at 278, 131 N.Y.S.3d at 659.

225. *See Zielinski*, 35 N.Y.3d at 1084, 156 N.E.3d at 275, 131 N.Y.S.3d at 656.

226. *See id.* at 1085–86, 156 N.E.3d at 276, 131 N.Y.S.3d at 657.

227. *See id.* at 1086, 156 N.E.3d at 276, 131 N.Y.S.3d at 657.

228. *See id.*

229. *See id.* at 1086, 156 N.E.3d at 276–77, 131 N.Y.S.3d at 657–58.

witnesses Zielinski wanted to call had information "highly material" to the question at hand, and preventing him from calling these witnesses violated due process and state law.[230]

> Prison officials could have provided affirmative proof [that Zielinski had a razor] if they had followed their own policies. Quite sensibly, Clinton Correctional Facility requires inmates to sign for razors when they are initially issued one. Had prison officials followed that policy when issuing Mr. Zielinski a second razor, there would be clear documentation to support the charge and notice given to Mr. Zielinski about what witnesses he would need to call to challenge that documentation.[231]

As prison officials did not provide Zielinski with sufficient due process, Judges Wilson and Rivera voted to reverse the appellate division.[232] However, this would amount to making credibility and weight determinations, and the Court of Appeal's job is limited to determining if substantial evidence existed to uphold the prison's decision.[233]

### *F. Ultra Vires*

A state agency has acted "Ultra Vires" when it takes actions that are beyond the powers granted to that agency by the legislature.[234] Stated otherwise, the ultimate determination hinges on whether agency actions exceed statutory authority.[235] The Court heard

230. *Zielinski*, 35 N.Y.3d at 1089, 156 N.E.3d at 278, 131 N.Y.S.3d at 659.

231. *Id.* at 1091, 156 N.E.3d at 280, 131 N.Y.S.3d at 661.

232. *See id.* at 1092, 156 N.E.3d at 280, 131 N.Y.S.3d at 661.

233. *See id.* at 1083, 156 N.E.3d at 274, 131 N.Y.S.3d at 655 (quoting Marine Holdings, LLC v. N.Y.C. Comm'n on Hum. Rts., 31 N.Y.3d 1045, 1047, 100 N.E.3d 849, 851, 76 N.Y.S.3d 510, 512 (2018)) (citing People *ex rel.* Vega v. Smith, 66 N.Y.2d 130, 139, 485 N.E.2d 997, 1002, 495 N.Y.S.2d 332, 337 (1985)); *see also* Pell v. Bd. of Educ., 34 N.Y.2d 222, 230, 313 N.E.2d 321, 325, 356 N.Y.S.2d 833, 839 (1974) (quoting HENRY COHEN & ARTHUR KARGER, THE POWERS OF THE NEW YORK COURT OF APPEALS 460 (rev. ed. 1952)) (first citing 1 N.Y. JURIS. ADMINISTRATIVE §§ 177, 185 (1958); and then citing Halloran v. Kirwan, 28 N.Y.2d 689, 692, 269 N.E.2d 403, 403, 320 N.Y.S.2d 742, 744 (1971) (Breitel, J., dissenting)).

234. *See* Boreali v. Axelrod, 71 N.Y.2d 1, 6, 517 N.E.2d 1350, 1351, 523 N.Y.S.2d 464, 466 (1987).

235. *See* Prometheus Realty Corp. v. N.Y.C. Water Bd., 30 N.Y.3d 639, 645, 92 N.E.3d 778, 781, 69 N.Y.S.3d 555, 558 (2017) (first citing Prometheus Realty Corp. v. N.Y.C. Water Bd., 54 Misc. 3d 745, 762, 37 N.Y.S.3d 362, 374 (Sup. Ct. N.Y. Cnty. 2016); and then citing N.Y. C.P.L.R. 7803 (McKinney 2021)).

numerous cases this year regarding agency action, including credit card account number theft, police benefits, attorney reimbursement when representing victims in front of the Office of Victim Services, the use of Residential Treatment Facilities as temporary residences for people under post supervisions release.[236]

In *People v. Badji*, the defendant used his supervisor's credit card account number to make unauthorized online purchases.[237] At trial, the defendant was convicted of three counts of grand larceny in the fourth degree, attempted grand larceny in the fourth degree, and criminal possession of stolen property in the fourth degree.[238] His conviction was affirmed by the appellate division, and he appealed to the Court of Appeals.[239]

The Court of Appeals granted leave to appeal and limited its inquiry into whether the defendant could be convicted of grand larceny for theft of a credit card account number if no physical credit card was stolen.[240] When interpreting statutes, "the Court's primary consideration is to ascertain and give effect to the intention of the [l]egislature."[241] The legislature's intentions are best discerned through statutory text, and if the statutory text is unambiguous, courts must follow the statute's plain meaning.[242]

The Court held that a person may be convicted of grand larceny in the fourth degree for stealing a credit card, which is defined under

236. *See* People v. Badji, 36 N.Y.3d 393, 395, 165 N.E.3d 1068, 1069, 142 N.Y.S.3d 128, 129 (2021); Lynch v. City of New York, 35 N.Y.3d 517, 520, 159 N.E.3d 213, 213, 134 N.Y.S.3d 297, 297 (2020); Juarez v. N.Y. State Off. of Victim Servs., 36 N.Y.3d 485, 487, 167 N.E.3d 478, 480, 143 N.Y.S.3d 310, 312 (2021); People v. Warden, Westchester Cnty. Corr. Facility, 36 N.Y.3d 251, 254, 163 N.E.3d 1087, 1089, 140 N.Y.S.3d 170, 172 (2020).

237. *See* 36 N.Y.3d at 395, 165 N.E.3d at 1069, 142 N.Y.S.3d at 129.

238. *See id.* at 397, 165 N.E.3d at 1070, 142 N.Y.S.3d at 130.

239. *See id.* at 397, 165 N.E.3d at 1070–71, 142 N.Y.S.3d at 130–31 (citing People v. Badji, 171 A.D.3d 499, 499, 95 N.Y.S.3d 808, 808 (1st Dep't 2019); then citing People v. Badji, 33 N.Y.3d 1066, 1066, 129 N.E.3d 338, 338, 105 N.Y.S.3d 18, 18 (2019) (decided without an opinion)).

240. *See id.* at 395, 165 N.E.3d at 1069, 42 N.Y.S.3d at 129.

241. *Id.* at 398, 165 N.E.3d at 1070, 42 N.Y.S.3d at 131 (quoting Mestecky v. City of New York, 30 N.Y.3d 239, 243, 88 N.E.3d 365, 367, 66 N.Y.S.3d 207, 209 (2017)).

242. *See Badji*, 36 N.Y.3d at 398, 165 N.E.3d at 1070, 42 N.Y.S.3d at 131 (quoting Mestecky v. City of New York, 30 N.Y.3d 239, 243, 88 N.E.3d 365, 367, 66 N.Y.S.3d 207, 209, (2017)).

General Business Law section 511.[243] In 2002 the legislature enacted General Business Law section 511-a, expanding the definition of a credit number to include credit card account numbers.[244] This expanded definition applied to section 511, which in turn meant that stealing a credit card account number was sufficient for conviction of grand larceny in the fourth degree.[245] The plain language of the statutes leads to the conclusion "that section 511-a supplements the definition of section 511" which then applies to the Penal Law.[246] Additionally, the Court looked at the legislative history of the 2002 amendment, finding that the purpose of the law was to punish identity theft.[247] Although the defendant advanced a number of positions arguing that section 511-a should not allow for conviction of grand larceny in the fourth degree, the Court declined to adopt any of his positions.[248] Therefore, the Court affirmed the Appellate Division's order.[249]

Judge Rivera dissented in part, joined by Judge Wilson, arguing that although the defendant is certainly guilty of a crime, grand larceny in the fourth degree was not the proper charge without theft of a physical credit card.[250] If the legislature had intended to expand the application of grand larceny in the fourth degree, the definitions within section 511-a would have been included in section 511 instead of a separate statute.[251] As section 511 was not amended, the legislature could not have meant to expand the definition of a credit card as applied to grand larceny in the fourth degree.[252] Further, the historical context of the 2002 amendment enacting section 511-a shows that a new punishment system for identity theft using section 511-a was

243. *See id.* at 397, 165 N.E.3d at 1071, 42 N.Y.S.3d at 131 (quoting N.Y. PENAL LAW § 155.30 (McKinney 2021)).

244. *See id.* at 398, 165 N.E.3d at 1071, 42 N.Y.S.3d at 131 (quoting N.Y. GEN. BUS. LAW § 511-a (McKinney 2021)).

245. *See id.* at 398–99, 165 N.E.3d at 1071–72, 42 N.Y.S.3d at 131–32 (citing People v. Barden, 117 A.D.3d 216, 234, 983 N.Y.S.2d 534, 546 (1st Dep't 2014), *rev'd on other grounds*, 27 N.Y.3d 550, 557, 55 N.E.3d 1053, 1058, 36 N.Y.S.3d 80, 85 (2016)).

246. *Id.* at 399, 165 N.E.3d at 1072, 42 N.Y.S.3d at 132.

247. *See Badji*, 36 N.Y.3d at 399, 165 N.E.3d at 1072, 42 N.Y.S.3d at 132 (citing N.Y. Assembly Bill No. 4939, 225th Sess. (2002)).

248. *See id.* at 399–405, 165 N.E.3d at 1072–76, 42 N.Y.S.3d at 132–36

249. *See id.* at 405, 165 N.E.3d at 1076, 42 N.Y.S.3d at 136.

250. *See id.* (Rivera, J., dissenting).

251. *See id.* at 408, 165 N.E.3d at 1079, 142 N.Y.S.3d at 139.

252. *See Badji*, 36 N.Y.3d at 410, 165 N.E.3d at 1080, 142 N.Y.S.3d at 140.

enacted and was not meant to expand application of larceny to credit card account numbers.[253] "By enacting the identity theft crimes, the legislature . . . created criminal liability for possession of intangible personal identification information. However, it left unchanged the Penal Law's definition of possession outside of the context of identity theft and fraud."[254]

Finally, Judge Rivera adopted some of the defendant's arguments regarding the element of asportation and the rule of lenity.[255] Under common law, an element of larceny is the taking of property, otherwise known as asportation.[256] The defendant never took a physical credit card, and so cannot be guilty of asportation.[257] Eliminating asportation as an element of larceny is "a reinvention of the crime to fit the majority's preferred outcome of the case."[258] Finally, under the rule of lenity, if a criminal statute is ambiguous, the interpretation more favorable to the defendant should be adopted.[259] The rule ensures that citizens are not punished for breaking laws if the law is not clear on its face.[260] The majority declined to invoke lenity because there was no ambiguity in the statute.[261] Judge Rivera disagreed, reviewing splits in the Appellate Division regarding application of section 511-a to the Penal Law.[262] In her view, if justices of the Appellate Division could come to differing conclusions about

253. *See id.* at 411, 165 N.E.3d at 1080–81, 142 N.Y.S.3d at 140–41 (quoting People v. Roberts, 31 N.Y.3d 406, 416, 104 N.E.3d 701, 708, 79 N.Y.S.3d 597, 604 (2018)).

254. *Id.* at 412, 165 N.E.3d at 1082, 142 N.Y.S.3d at 142 (citing N.Y. PENAL LAW §§ 190.77–84 (McKinney 2021)).

255. *See id.* at 413, 165 N.E.3d at 1082, 142 N.Y.S.3d at 142 (citing N.Y. GEN. BUS. LAW §§ 511, 511-a (McKinney 2021); *id.* at 414–15, 165 N.E.3d at 1083, 142 N.Y.S.3d at 143; *id.* 417, 165 N.E.3d at 1085, 142 N.Y.S.3d at 145.

256. *See id.* at 413, 165 N.E.3d at 1082, 142 N.Y.S.3d at 142 (first citing People v. Olivo, 52 N.Y.2d 309, 318, 420 N.E.2d 40, 44, 438 N.Y.S.2d 242, 246 n.6 (1981); then citing People v. Alamo, 34 N.Y.2d 453, 457, 315 N.E.2d 446, 448, 358 N.Y.S.2d 375, 378 (1974); and then citing Harrison v. People, 50 N.Y. 518, 523 (1872)).

257. *See Badji*, 36 N.Y.3d at 414, 165 N.E.3d at 1083, 142 N.Y.S.3d at 143.

258. *Id.*

259. *See id.* at 417–18, 165 N.E.3d at 1085, 142 N.Y.S.3d at 145 (citing People v. Golb, 23 N.Y.3d 455, 468, 15 N.E.3d 805, 814, 991 N.Y.S.2d 792, 801 (2014), quoting People v. Green, 68 N.Y.2d 151, 153, 497 N.E.2d 665, 666, 506 N.Y.S.2d 298, 299 (1986)).

260. *See id.* at 417–18, 165 N.E.3d at 1085–86, 142 N.Y.S.3d at 145–46.

261. *See id.* at 405, 165 N.E.3d at 1076, 142 N.Y.S.3d at 136.

262. *See Badji*, 36 N.Y.3d at 418, 165 N.E.3d at 1086, 142 N.Y.S.3d at 146.

application of section 511-a, the defendant could not have known his criminal exposure.[263]

In *Lynch v. City of New York*, the Court of Appeals had to decide if New York City Police Officers hired after June 30, 2009, receive the same benefits as officers hired prior to that date.[264] In 1976, the legislature created a new tier for public employees known as "Tier 3" to provide equal benefits for all employees hired after June 30, 1976.[265] Police Officers were exempt and continued to be classified as Tier 2 employees until 2009, when new Police Officers also became subject to the Tier 3 rules.[266] The President of the Patrolman's Benefit Association (PBA) commenced an action in supreme court to allow Tier 3 Police Officers to purchase pension credit time spent on unpaid childcare leave – a benefit given only to Tier 1 and Tier 2 officers.[267] Supreme Court sided with the PBA, finding that Administrative Code section 13-218(h) grants Police Officer's this benefit.[268] On appeal, the appellate division reversed, finding that Retirement and Social Security Law trumps the Administrative Code, and does not provide credits for unpaid childcare leave to Tier 3 Police Officers.[269]

The Court of Appeals turned to Administrative Code section 13-218(h) to determine whether Tier 3 Police Officers should receive the credits, finding that the statutes use of the word "any" can only mean that all Police Officers of all tiers are eligible for the credits.[270]

263. *See id.*

264. *See* 35 N.Y.3d 517, 521, 159 N.E.3d 213, 214, 134 N.Y.S.3d 297, 298 (2020); (first citing Lynch v. City of New York, 23 N.Y.3d 757, 764–65, 16 N.E.3d 1204, 1208, 992 N.Y.S.2d 726, 730 (2014); then citing N.Y. RETIRE. & SOC. SEC. LAW §§ 501(26), (28) (McKinney 2021).

265. *See id.* at 520, 159 N.E.3d at 214, 134 N.Y.S.3d at 298 (first citing Civ. Serv. Emps. Ass'n, Loc. 1000 v. Regan, 71 N.Y.2d 653, 657, 525 N.E.2d 1, 2, 529 N.Y.S.2d 461, 462 (1988); then citing N.Y. RETIRE. & SOC. SEC. LAW ART. 14 (2021)).

266. *See id.* at 520–21, 159 N.E.3d at 214, 134 N.Y.S.3d at 298.

267. *See id.* at 533, 159 N.E.3d at 223, 134 N.Y.S.3d at 307.

268. *See id.* at 522, 159 N.E.3d at 215, 134 N.Y.S.3d at 299 (citing Lynch v. City of New York, 59 Misc.3d 433, 442, 56 N.Y.S.3d 785, 792 (Sup. Ct. N.Y. Cnty. 2020)).

269. *See Lynch*, 35 N.Y.3d at 522–23, 159 N.E.3d at 215–16, 134 N.Y.S.3d at 299–300 (citing Lynch v. City of New York, 162 A.D.3d 589, 589, 80 N.Y.S.3d 249, 249 (1st Dep't 2018)).

270. *See id.* at 524, 159 N.E.3d at 216, 134 N.Y.S.3d at 300 (first citing N.Y.C. ADMIN. CODE 13-234 i(4) (McKinney 2021); then citing N.Y.C. ADMIN. CODE 13-256.1(b) (McKinney 2021); and then citing N.Y.C. ADMIN. CODE 13-218(h) (McKinney 2021)).

Although the Court reviews legislative history of a statute in some cases, the majority determined that the use of the word "any" was so clear that there was no need to review the history of the statute.[271]

The Court reviewed the appellate division's argument, that Retirement and Social Security Law (RSL) conflicts with the Administrative Code and overrules the directive to provide credits for unpaid childcare leave to all Police Officer's.[272] Although the RSL states that it governs in the case of conflict with other laws, the Court found that Administrative Law section 13-218(h) controls when the RSL does not address an issue, as in this case.[273] Therefore, credit for unpaid childcare leave granted under the Administrative Law is granted to all Police Officers of all tiers because the credit is not prohibited by the RSL.[274] The Court then addressed the City's arguments against providing credits to Tier 3 Policer Officers.[275] First, although the City argued that the RSL is the exclusive source of retirement benefits, the Court found that no exclusivity was incorporated, RSL incorporates non-conflicting portions of the Administrative Law, and the Court's case law does not support exclusivity in this context.[276] Second, although credits for unpaid childcare leave (creditable service) are defined within the RSL differently for Tier 2 and Tier 3 employees, this has no bearing on section 13-218(h) in the Administrative Law, which grants the credit to all Police Officers without regard to their tier.[277]

Judge Rivera dissented, joined by Chief Judge DiFiore, because the RSL was enacted to cut costs, and the idea that the new law intended to extend benefits to Tier 3 employees does not comport with the intent of the legislation.[278] She believes that the RSL is the sole provider of retirement benefits, and the relevant portions of the RSL

271. *See id.* at 524, 159 N.E.3d at 216–17, 134 N.Y.S.3d at 300–01 (citing Roosevelt Raceway v. Monaghan, 9 N.Y.2d 293, 304–05, 174 N.E.2d 71, 75, 213 N.Y.S.2d 729, 735 (1961)).

272. *See id.* at 524, 159 N.E.3d at 217, 134 N.Y.S.3d at 301.

273. *See id.* at 525, 159 N.E.3d at 217, 134 N.Y.S.3d at 301.

274. *See Lynch*, 35 N.Y.3d at 526, 159 N.E.3d at 218, 134 N.Y.S.3d at 302.

275. *See id.* at 526–27, 159 N.E.3d at 218, 134 N.Y.S.3d at 302.

276. *See id.* at 527, 159 N.E.3d at 218, 134 N.Y.S.3d at 302 (citing N.Y. RETIRE. & SOC. SEC. LAW § 519(1) (McKinney 2021)).

277. *See id.* at 531, 159 N.E.2d at 221, 134 N.Y.S.3d at 305 (first citing N.Y. RETIRE. & SOC. SEC. LAW § 513(h) (McKinney 2021); then citing Lynch v. City of New York, 162 A.D.3d 589, 590, 80 N.Y.S.3d 249, 250 (1st Dep't 2018)).

278. *See id.* at 531, 159 N.E.2d at 222, 134 N.Y.S.3d at 306 (Rivera, J., dissenting).

in this case do not provide childcare leave credit to tier 3 Police Officers.[279] Further, amendments to the RSL to eliminate tier 3 corrections' officer's credits for unpaid child care leave for the purpose of granting CO's the same benefits as Tier 3 police officers and firefighters showed the legislature's belief that the RSL controlled benefits, not the Administrative Law.[280]

The Office of Victim Services (the agency, or OVS) pays compensation to attorneys representing claimants in front of the agency.[281] In early 2016, the agency amended its regulations, limiting the stages of a claim for which an attorney may receive reimbursement for fees from the agency.[282] Following the amendment, the petitioners commenced this case, *Matter of Juarez v. New York State Office of Victim Services*, an Article 78 proceeding, alleging that the amended regulations and subsequent denial of attorney fee requests were arbitrary and capricious.[283] The Supreme Court sided with OVS, finding that the legislature granted OVS authority to determine reasonable attorneys' fees for representation before the agency.[284] On appeal, the appellate division reversed, holding that Article 22 of the Executive Law, the enabling statute for OVS, did not give OVS the authority to deny all fee claims from attorneys at specific stages of a claim, the determination to grant or deny claims should be on a case by case basis.[285]

When reviewing amended agency regulations, the Court of Appeals must decide "whether the amended regulations are inconsistent with the statutory text and, if not, whether they are 'so lacking in reason' that they are 'essentially arbitrary.'"[286] Here, the

279. *See Lynch*, 35 N.Y.3d at 535, 159 N.E.3d at 224–25, 134 N.Y.S.3d at 308–09 (citing RETIRE. & SOC. SEC. § 513(h)).

280. *See id.* at 539, 159 N.E.2d at 227, 134 N.Y.S.3d at 311.

281. *See* Juarez v. N.Y. State Off. of Victim Servs., 36 N.Y.3d 485, 488, 167 N.E.3d 478, 480, 143 N.Y.S.3d 310, 312 (2021) (citing N.Y. EXEC. LAW § 626(1) (McKinney 2021)).

282. *See id.* (first citing 9 N.Y.C.R.R. § 525.3 (2021); and then citing 9 N.Y.C.R.R. § 525.9 (2021)).

283. *See id.* at 490, 167 N.E.3d at 481, 132 N.Y.S.3d at 313.

284. *See id.* (citing EXEC. § 620).

285. *See id.* at 490–91, 167 N.E.3d at 482, 132 N.Y.S.3d at 314 (first citing 9 N.Y.C.R.R. § 525.9 (2021); then citing Juarez v. N.Y. State Off. of Victim Servs., 169 A.D.3d 52, 60, 92 N.Y.S.3d 738, 744–45 (3d Dep't 2019); and then citing EXEC. § 620).

286. *Juarez*, 36 N.Y.3d at 493, 167 N.E.3d at 483, 132 N.Y.S.3d at 316 (citing Acevedo v. N.Y. State Dep't of Motor Vehicles, 29 N.Y.S.3d 202, 226–27, 77 N.E.3d 331, 347 (2017)).

agency must determine whether the agency's decision to limit attorney fee reimbursement to the later stages of the claim, administrative reconsideration and judicial review of a final decision, is allowed under Article 22 of the Executive Law.[287]

Reviewing Article 22 of the Executive Law, the Court found that OVS may determine the factors and formula governing attorney reimbursement.[288] The Executive Law grants OVS authority to reimburse reasonable fees and does not define a reasonable fee.[289] Therefore, OVS has discretion to define a reasonable fee, and is not acting in an arbitrary fashion by choosing to limit fees to the late stages of an OVS claim.[290] As the agency did not adopt any regulations that allow it to disregard the legislature's orders, defining reasonable fees where no definition was present does not create a conflict.[291] Further, the agency used its expertise in the area to determine that less expensive alternatives to attorneys are available to claimant's in the early stages of a claim, so disallowing attorney fee claims for early stage help is a rational restriction on attorney fees.[292]

Judge Wilson concurred with the majority but found the agency's authority to regulate attorney fees was granted by a different statute than the majority relied on.[293] This separate section has no requirement that the agency allow reasonable fees, only requiring that the agency adopt "suitable" rules, which would give the agency even more discretion than rules requiring reimbursement for "reasonable" attorney fees.[294]

Finally, Judge Rivera dissented, arguing that the agency overstepped its authority by denying all attorney fees in the early stages of a claim.[295] Her interpretation of the relevant statutes is that

287. *See id.* at 488, 167 N.E.3d at 480, 132 N.Y.S.3d at 312 (citing EXEC. § 620).

288. *See id.* at 493, 167 N.E.3d at 484, 132 N.Y.S.3d at 316 (citing Regan v. Crime Victims Comp. Bd., 57 N.Y.2d 190, 194, 441 N.E.2d 1070, 1072, 455 N.Y.S.2d 552, 554 (1982)).

289. *See id.*

290. *See id.*

291. *See Juarez*, 36 N.Y.3d at 494, 167 N.E.3d at 484, 132 N.Y.S.3d at 316.

292. *See id.* at 497, 167 N.E.3d at 486, 132 N.Y.S.3d at 318 (citing Sigety v. Ingraham, 29 N.Y.2d 110, 115, 324 N.Y.S.2d 10, 13 (1971)).

293. *See id.* at 498, 167 N.E.3d at 487, 132 N.Y.S.3d at 319 (Wilson, J., concurring) (citing N.Y. EXEC. LAW § 623 (McKinney 2021)).

294. *See id.* at 499, 167 N.E.3d at 488, 132 N.Y.S.3d at 320.

295. *See id.* at 502, 167 N.E.3d at 490, 132 N.Y.S.3d at 322 (Rivera, J., dissenting) (citing EXEC. § 620).

the legislature wanted OVS to reimburse legal fees, and the only discretion they were granted was to determine the reasonableness of each claim.[296] By regulating attorney's fees out of certain stages of the process, OVS is not considering whether a fee is reasonable or not because there are no exceptions to the rule in extraordinary circumstances.[297] "OVS does not allow for any deviation from the regulation – no fees are reimbursed regardless of the complexity or nature of the filing."[298] Judge Rivera believes this rule is a policy choice that should be made by the legislature and not through agency regulation.[299]

In the case *People v. Warden, Westchester County Correction Facility*, Chance McCurdy was released from prison to five years of post-release supervision (PRS) in 2011.[300] During PRS, he plead guilty to additional crimes, was adjudicated a level three sex offender, and could no longer live within 1,000 feet of any schools pursuant to the Sexual Assault Reform Act (SARA).[301] In 2015 he violated PRS and after completing a drug treatment program, was again eligible for PRS, but could not locate housing more than 1,000 feet from any schools (SARA compliant housing).[302] McCurdy was required to live at a state Residential Treatment Facility (RTF) until he could located SARA-compliant housing.[303] He commenced a proceeding in state supreme court arguing the Department of Corrections and Community Supervision (DOCCS) could not "send a PRS violator to an RTF after the six-month period under Penal Law Section 70.45 (3) has expired."[304]

The supreme court agreed with McCurdy, finding that Penal Law Section 70.45(3) did not allow McCurdy to be assigned to an RTF when eligible for PRS.[305] On appeal, the appellate division reversed,

296. *See Juarez*, 36 N.Y.3d at 506, 167 N.E.3d at 493, 132 N.Y.S.3d at 325 (first citing EXEC. § 620; and then citing EXEC. § 623).

297. *See id.*

298. *Id.* at 509, 167 N.E.3d at 495, 132 N.Y.S.3d at 327.

299. *Id.* at 511, 167 N.E.3d at 497, 132 N.Y.S.3d at 329.

300. *See* 36 N.Y.3d 251, 254, 163 N.E.3d 1087, 1089, 140 N.Y.S.3d 170, 172 (2020).

301. *See id.* (citing EXEC. § 259-c (14) (McKinney 2021); and then citing N.Y. PENAL LAW § 220.00 (14) (McKinney 2021)).

302. *See id.* at 255, 163 N.E.3d at 1089, 140 N.Y.S.3d at 172.

303. *See id.*

304. *Id.*

305. *See Warden, Westchester Cnty. Corr. Facility*, 36 N.Y.3d at 256, 163 N.E.3d at 1090, 140 N.Y.S.3d at 173.

finding that Corrections Law Section 73(10) authorizes the use of RTFs as residences for people under community supervision, and Penal Law Section 70.45(3) does not prohibit DOCCS from doing it.[306]

The Court of Appeals found that Corrections Law Section 73(10) allows DOCCS to use a RTF as a residence for individuals under PRS who are unable to find suitable housing, in this case SARA-compliant housing.[307] Penal Law Section 70.45(3) allows DOCCS to keep someone in PRS in an RTF for six months after parole or conditional release.[308] "The statutes are not in conflict because they involve different types of authority that the legislature has granted to DOCCS – a mandatory, fixed term in an RTF that ends when a SARA-compliant residence is located" compared to a six month period of PRS required to take place at a RTF after parole or conditional release.[309] Therefore, the Court held that McCurdy's required placement at a RTF until he found SARA compliant housing under Corrections Law Section 73 (10) does not conflict with Penal Law Section 70.45 (3).[310]

Judge Fahey dissented, arguing that Penal Law Section 70.45 (3) superseded Corrections Law Section 73 (10).[311] Penal Law Section 70.45 (3) was enacted after Corrections Law Section 73 (10) and includes the phrase "notwithstanding any other provisions of law," meaning that it supersedes any inconsistent provision of state law.[312] "In this instance, Penal Law § 70.45 (3), dealing specifically with the duration of confinement of individuals on PRS in RTFs, superseded the more general Correction Law § 73 (10) to the extent it is inconsistent."[313] Additionally, Judge Fahey reviewed the history of Correction Law Section 73 (10), stating that the legislature did not intend the statute to be used to justify placement of sex offenders in

306. *See id.* (citing People v. Warden, Westchester Cnty. Corr. Facility, 164 A.D.3d 692, 692, 83 N.Y.S.3d 520, 522 (2d Dep't 2018)).

307. *See id.* at 256–57, 163 N.E.3d at 1090, 140 N.Y.S.3d at 173 (citing *Warden, Westchester Cnty. Corr. Facility*, 164 A.D.3d at 694, 83 N.Y.S.3d at 523).

308. *See id.* at 257, 163 N.E.3d at 1091, 140 N.Y.S.3d at 174.

309. *See id.* at 262, 163 N.E.3d at 1094, 140 N.Y.S.3d at 177.

310. *See Warden, Westchester Cnty. Corr. Facility*, 36 N.Y.3d at 264, 163 N.E.3d at 1096, 140 N.Y.S.3d at 178.

311. *See id.* at 265, 163 N.E.3d at 1096, 140 N.Y.S.3d at 178.

312. *See id.* at 267, 163 N.E.3d at 1097, 140 N.Y.S.3d at 181 (citing State v. John S., 23 N.Y.3d 326, 341, 15 N.E.3d 287, 297, 991 N.Y.S.2d 532, 542 (2014)).

313. *Id.* at 267, 163 N.E.3d at 1097, 140 N.Y.S.3d at 181.

RTF's for longer than six months, and Penal Law Section 70.45 (3) was enacted specifically to prevent such placement.[314]

### *G. Statute of Limitations*

In *Freedom Mortgage Corp. v. Engel*, the Court of Appeals consolidated multiple foreclosure cases to review appellate division decisions about the effect of voluntary withdrawal of a foreclosure action on the statute of limitations on foreclosure, which is six years.[315] In these cases, the appellate division dismissed foreclosure actions by noteholders (the bank) after finding, among other reasons, that voluntary dismissal of a foreclosure was not sufficient to revoke acceleration of the mortgage.[316] This led to dismissal of the noteholders' foreclosures because later foreclosure actions were outside the statute of limitations begun by the original acceleration.[317]

The Court reviewed how a lender may accelerate a mortgage debt.[318] Acceleration must be (1) "made in accordance with the terms of the note and mortgage," and (2) there must be an "unequivocal overt act" electing to accelerate the debt.[319] Actual notice by the borrower nor intent of the bank is relevant.[320] There is no dispute here that commencing a foreclosure action constitutes a valid acceleration of the debt and begins the six year statute of limitations to foreclose.[321] On the other hand, a letter that threatens to accelerate the debt at a future time or date if payment is not is not a valid acceleration of the debt.[322]

Once the mortgage has been accelerated, the six-year statute of limitations to commence a foreclosure action begins.[323] The bank has the option to revoke the acceleration through an "affirmative act" within six years of the acceleration.[324] The Court takes issue with the

314. *See id.* at 268, 163 N.E.3d at 1099, 140 N.Y.S.3d at 182.

315. *See* 37 N.Y.3d 1, 19, 169 N.E.3d 912, 917, 146 N.Y.S.3d 542, 547 (2021).

316. *See id.* at 28, 169 N.E.3d at 923–24, 146 N.Y.S.3d at 553–54.

317. *See id.* at 33, 169 N.E.3d at 927, 146 N.Y.S.3d at 557.

318. *See id.* at 22, 169 N.E.3d at 919, 146 N.Y.S.3d at 549.

319. *Id.* (citing Albertina Realty Co. v. Rosbro Realty Corp., 258 N.Y. 472, 475–76, 180 N.E. 176, 177 (1932)).

320. *See Freedom Mortg. Corp.* at 22–23, 169 N.E.3d at 919, 146 N.Y.S.3d at 549.

321. *See id.* at 23, 169 N.E.3d at 920, 146 N.Y.S.3d at 550.

322. *See id.* at 27, 169 N.E.3d at 921, 146 N.Y.S.3d at 551.

323. *See id.* at 35, 169 N.E.3d at 928–29, 146 N.Y.S.3d at 558–59.

324. *Id.* at 28–29, 169 N.E.3d at 924, 146 N.Y.S.3d at 554 (citing NMNT Realty Corp. v. Knoxville 2012 Tr., 151 A.D.3d 1068, 1069–70, 58 N.Y.S.3d 118, 120 (2d

current rule regarding revocation of acceleration followed by the Appellate Divisions, who look at the bank's intent through "examination of post-discontinuance acts," because it requires an intensive analysis of the banks actions over a longer period of time.[325] The Court creates the following rule: "[W]hen a bank effectuated an acceleration via the commencement of a foreclosure action, a voluntary discontinuance of that action – *i.e*, the withdrawal of the complaint – constitutes a revocation of that acceleration."[326]

As voluntary dismissal of foreclosure actions is now a valid revocation of acceleration, the Court reversed the Appellate Division decisions.[327] Judges Wilson and Rivera wrote separately to discuss issues with revocation other than revocation through voluntary dismissal.[328] Judge Rivera states that while she agrees that voluntary dismissal of the foreclosure would revoke the acceleration, she would require the bank to notify the borrower that voluntary dismissal is also revocation of the bank's acceleration of the debt.[329]

## II. EXECUTIVE BRANCH

COVID-19 consumed the Executive Branch during 2020-2021. On March 7, 2020, pursuant to section 29-a of the Executive Law,[330] Governor Andrew M. Cuomo issued Executive Order 202, declaring a state-wide disaster emergency to address the threat of COVID-19,[331] "an acute respiratory disease caused by the SARS-CoV-2 or a virus

Dep't 2017); then citing Lavin v. Elmakiss, 302 A.D.2d 638, 639, 754 N.Y.S.2d 741, 743 (3d Dep't 2003); and then citing Fed. Nat'l Mortg. Ass'n v. Rosenberg, 180 A.D.3d 401, 402, 119 N.Y.S.3d 441, 443 (1st Dep't 2020)).

325. *See Freedom Mortg. Corp.* at 30, 169 N.E.3d at 925, 146 N.Y.S.3d at 555.

326. *Id.* at 31, 169 N.E.3d at 926, 146 N.Y.S.3d at 556.

327. *See id.* at 36, 169 N.E.3d at 929, 146 N.Y.S.3d at 559.

328. *See id.* at 36, 169 N.E.3d at 929, 146 N.Y.S.3d at 559 (Wilson, J., concurring); *id.* at 37, 169 N.E.3d at 930, 146 N.Y.S.3d at 560 (Rivera, J., dissenting in part).

329. *See id.* at 37, 169 N.E.3d at 930, 145 N.Y.S.3d at 560 (Rivera, J., dissenting in part).

330. N.Y. EXEC. LAW § 29-a (McKinney 2020) (amending to include the term "disease outbreak," and allowing the governor to suspend "statute, local law, ordinance, or orders, rules or regulations, or parts thereof, of any agency during a state disaster emergency, . . . if necessary to assist or aid in coping with such disaster").

331. *See* 9 N.Y.C.R.R. § 8.202 (2021).

mutating therefrom."[332] The executive order remained in effect until June 25, 2021.[333] The order noted that a national public health emergency that involves a novel (new) coronavirus had been declared in February 2020 by the Secretary of Health and Human Services,[334] and at the time of the order Covid-19 cases had been reported in the state and more were anticipated.[335] Executive Order 202 expressed concern about the threat COVID-19 posed to public health and the ability of local governments to address the threat.[336] In response to those concerns, the order authorized the implementation of the state comprehensive emergency management plan;[337] and suspended or modified certain state and local laws, ordinances, orders, rules, and regulations.[338] These actions allowed, among other things, expedited procurement of testing equipment, cleaning supplies,[339] "qualified professionals other than doctors and nurses to conduct testing,"[340] and permitting emergency medical services to "transport patients to quarantine locations other than just hospitals."[341] Subsequent executive orders relating to COVID-19 followed as the state grappled with rapid spread of the disease. The scope of the orders were broad as the government addressed a multitude of issues. Among the decisions are the closing of on-premise service at bars and restaurants;[342] the closing of casinos, fitness centers, gyms, and movie

332. Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15198 (Mar. 17, 2020).

333. *See* 9 N.Y.C.R.R. § 8.202.111 (2021).

334. *See* Determination of Public Health Emergency, 85 Fed. Reg. 7316 (Feb. 7, 2020).

335. *See* 9 N.Y.C.R.R. § 8.202 (2021).

336. *See id.*

337. *See id.* Pursuant to Article 2-B of the Executive Law, the plan has three components: 1) multi-hazard mitigation, 2) "response and short-term recovery," and 3) "long term recovery plan." *NYS Comprehensive Emergency Management Plan (CEMP)*, NYS DIV. OF HOMELAND SEC. AND EMERGENCY SERVS. (2021), http://www.dhses.ny.gov/planning/cemp/.

338. *See* 9 N.Y.C.R.R. § 8.202 (2021).

339. Press Release, *At Novel Coronavirus Briefing, Governor Cuomo Declares State of Emergency to Contain Spread of Virus*, N.Y. STATE (Mar. 7, 2020), https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-novel-coronavirus-briefing-governor-cuomo-declares-state.

340. *Id.*

341. *Id.*

342. *See* 9 N.Y.C.R.R. § 8.202.3 (2021).

theaters;[343] the closing of schools;[344] allowing physicians, nurses, nurse practitioners, practical nurses "licensed and in current good standing in any state in the United States to practice . . . in New York State without civil or criminal penalty related to lack of licensure [or registration];"[345] allowing for virtual notarization of documents;[346] allowing for absentee ballot applications based on COVID-19;[347] restricting the size of "all non-essential gatherings of more than ten individuals;"[348] and limiting court operations.[349]

Over the course of the year, transmission of COVID-19 and community spread of the virus continued throughout the state,[350] and a variant of the virus, Delta, emerged.[351] At the same time, over 20 million New Yorkers had received the COVID-19 vaccine as of June 2021; and it was anticipated that that number will likely continue to grow.[352] As a result of the slowing transmission rate of the COVID-19 virus and the increasing vaccination rate, on June 23, 2021, Executive Orders 202 through 202.111 which had declared a disaster, and suspended certain laws, and placed restrictions on certain activities,[353] and Executive Orders 205 through 205.3 which had established quarantine restrictions on travelers arriving in New York, were rescinded effective immediately.[354]

Although a detailed discussion of the pandemic's impact on New York is beyond the scope of this article, two areas of concern, implicating two state agencies, should be mentioned for the public attention they have already received and are likely to continue to receive: the difficulties and challenges of residential care for vulnerable populations in nursing homes overseen by the Department

343. *See id.*

344. *See id.* § 8.202.4.

345. *Id.* § 8.202.5.

346. *See* 9 N.Y.C.R.R. § 8.202.7 (2021).

347. *See* 9 N.Y.C.R.R. § 8.202.15 (2021); 9 N.Y.C.R.R. § 8.202.28 (2021).

348. 9 N.Y.C.R.R. § 8.202.33 (2021).

349. *See* 9 N.Y.C.R.R. § 8.202.8 (2021).

350. *See* 9 N.Y.C.R.R. § 8.202.111 (2021).

351. *Delta Variant: What We Know About the Science*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html (last updated Aug. 26, 2021).

352. Press Release, *Governor Cuomo Announces COVID-19 Restrictions Lifted as 70% of Adult New Yorkers Have Received First Dose of COVID-19 Vaccine* (June 15, 2021), https://www.governor.ny.gov/news/governor-cuomo-announces-covid-19-restrictions-lifted-70-adult-new-yorkers-have-received-first.

353. *See supra* text accompanying notes 327–44.

354. *See* 9 N.Y.C.R.R. § 8.210 (2021).

of Health (DOH), and residential care facilities for intellectual and developmental disabilities overseen by the Office of People with Developmental Disabilities (OPWDD).

New York's 619 nursing homes provide long term care for almost 90,000 individuals unable to care for themselves, and for whom a nursing home is likely their last home.[355] One of the most contentious issues to emerge regarding the care of nursing home residents during this past year was how the number of deaths of nursing home residents was calculated, and who bears responsibility for the deaths. New York Attorney General issued a report in January 2021, stating that "a larger number of nursing home residents died from COVID-19 than public DOH data reflected."[356] The Department of Justice has declined to open a civil rights investigation into the treatment of residents in state-run facilities.[357] However, the issue remains unresolved at the state level.[358]

New York provides lifetime care to almost 40,000 individuals via 104,000 direct care and clinical staff in residences overseen by OPWDD.[359] In March 2021, Disability Rights New York, [360] and its

355. *See* NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL, NURSING HOME RESPONSE TO COVID-19 PANDEMIC 1, 52 & 63 (2021).

356. *See id.* at 10.

357. Joseph Spector, *Justice Department Drops Investigation into New York Nursing Homes,* DEMOCRAT & CHRONICLE, July 24, 2021, https://www.democratandchronicle.com/story/news/politics/albany/2021/07/24/covid-deaths-ny-nursing-homes-justice-department-drops-probe/8080189002/ (last updated July 26, 2021).

358. *See, e.g.,* N.Y.S. DEP'T OF HEALTH, FACTORS ASSOCIATED WITH NURSING HOME INFECTIONS AND FATALITIES IN NEW YORK STATE DURING THE COVID-19 GLOBAL HEALTH CRISIS 26 (2021); Michael Gold & Ed Shanahan, *What We Know About Cuomo's Nursing Home Scandal,* N.Y. TIMES (Aug. 4, 2021), https://www.nytimes.com/article/andrew-cuomo-nursing-home-deaths.html; J. David Goodman et al., *Cuomo Aides Spent Months Hiding Nursing Home Death Toll,* N.Y. TIMES, https://www.nytimes.com/2021/04/28/nyregion/cuomo-aides-nursing-home-deaths.html (last updated July 14, 2021); Spector, *supra* note 358.

359. Marina Villeneuve, *Advocates: NY Must Protect People in Group Homes Amid COVID,* ASSOCIATED PRESS (June 6, 2021), https://auburnpub.com/news/local/govt-and-politics/advocates-ny-must-protect-people-in-group-homes-amid-covid/article_9811df83-2bdd-58ac-b476-3517946704ec.html; *see* DISABILITY RIGHTS NEW YORK ET AL., INVESTIGATORY REPORT: NEW YORK STATE'S RESPONSE TO PROTECT PEOPLE WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES IN GROUP HOMES DURING THE COVID-19 PANDEMIC 2 (2021).

360. Disability Rights New York is "the designated federal Protection and Advocacy System ("P&A") for individuals with disabilities in New York State." DISABILITY RIGHTS NEW YORK ET AL., *supra* note 359 at 3. The other co-authors of

partners who also serve individuals with developmental disabilities, released a report about the care received by individuals in group homes certified by OPWDD.[361] The report described failures of both OPWDD and DOH in meeting the needs of the residents and a lack of agency transparency in accounting for its activities.[362]

the report are Lawyers for the Public Interest and the New York Civil Liberties Union. *Id.* at 3–4.

361. *See id*. at 1. The group homes are comprised of "Individualized Residential Alternatives ("IRAs") are OPWDD-certified homes for up to 14 residents. IRAs provide room, board and other services depending on an individual's needs. Intermediate Care Facilities ("ICFs") are a residential option for individuals with specific medical or behavioral needs whose disabilities severely limit their ability to live independently." *Id*. at 4–5.

362. *See id*. at 2.