Unions for Independent Contractors

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Introduction

The National Labor Relations Act (NLRA) was enacted at a time when a great majority of the nation's workers were "employees" in the traditional sense of that term: workers who directly worked for and were paid by their employers. That is no longer the case. Over a third of the nation's workers are now characterized as "contingent workers" who are either independent contractors, moonlighters, freelance business owners, or other kinds of temporary workers.[1] Of that number, about fifteen percent of adults may be classified as independent contractors.[2] That percentage has also increased over the last twenty years,[3] as a result of a fissured workplace in which traditional employers have contracted out many of the functions traditionally performed by the employer's own employees.[4] This issue has taken on new prominence with the growth of the so-called "gig economy," with sixteen percent of Americans now earning money from an online gig platform, and with thirty-one percent of current gig workers indicating that the gig work is their main job—representing three percent of the adult workforce.[5]

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1. *General Gig Economy Statistics*, Teamstage (2023), https://teamstage.io/gig-economy-statistics [https://perma.cc/HE35-VEFJ] (noting thirty-six percent of American workers participate in the gig economy, a number likely to rise to over fifty percent by 2027, and twenty-nine percent of workers currently perform gig work as their primary job). Alexaqz, *Contingent Workers Now Make Up 34% of the US Labor Force*, Quartz (Nov. 24, 2015), https://qz.com/472248/contingent-workers-now-make-up-34-percent-of-the-us-labor-force [https://perma.cc/UN8P-VL2X]; Jeremy Neuner, *40% of America's Workforce Will Be Freelancers by 2020*, Quartz (Mar. 20, 2013), https://qz.com/65279/40-of-americas-workforce-will-be-freelancers-by-2020 [https://perma.cc/75TB-RKJJ].

2. See Katherine G. Abraham, Brad Hershbein, Susan N. Houseman & Beth Truesdale, The Independent Contractor Workforce: New Evidence on Its Size and Composition and Ways to Improve Its Measurement in Household Surveys 31 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30997, 2023), https://www.nber.org/system/files/working_papers/w30997/w30997.pdf [https://perma.cc/EN73-R5HJ].

3. *See* Katherine Lim, Alicia Miller, Max Risch & Eleanor Wilking, *Independent Contractors in the U.S.: New Trends from 15 Years of Administrative Tax Data* 2, 14–15, 36 (IRS Working paper, 2019), https://www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf [https://perma.cc/L2NP-J7DX] (finding the percentage of workers with independent contractor income had grown since 2001).

4. *See generally* David Weil, The Fissured Workplace (2014).

5. Monica Anderson, Colleen McClain, Michelle Faverio & Risa Gelles-Watnick, *The State of Gig Work in 2021*, Pew Rsch. Ctr. (Dec. 8, 2021), https://www.pewresearch.org

Most of these gig personal service workers are categorized as independent contractors.[6] Our labor laws were not designed to address this workforce, and its growth tears at our social fabric because so many of our country's safety net social programs apply through the traditional employment relationship.

The regulatory response to this issue to date has been to impose or extend certain minimum labor standards and related laws to cover specific classes of gig workers.[7] None of these laws provides the full panoply of rights and benefits available to statutory employees. This has happened once at the federal level,[8] and sporadically at the state and municipal levels.[9] What has been entirely left out of the equation, to date, has been collective bargaining.

National labor policy promotes collective bargaining as a mechanism to secure appropriate wages and other terms and conditions of employment for workers.[10] However, there is no easy path forward for independent contractors who wish to bargain collectively through a union. In the 1948 Taft-Hartley amendments to the NLRA,[11] in response to a Supreme Court decision allowing independent contractor newsboys to organize under the NLRA,[12] Congress excluded independent contractors from the definition of "employee" under the Act.[13] Thus, independent contractors generally cannot organize under the NLRA, and typically there can be no NLRA unions of independent contractors.

/internet/2021/12/08/the-state-of-gig-work-in-2021 [https://perma.cc/V2JH-ZKBL]. For present purposes, a "gig" enterprise allows workers to engage customers through Internet-based platforms to purchase goods or perform services.

6. *See, e.g.*, Ian Hathaway & Mark Muro, *Tracking the Gig Economy, New Numbers*, BROOKINGS (Oct. 13, 2016), https://www.brookings.edu/research/tracking-the-gig-economy-new-numbers [https://perma.cc/UYM9-3J42]; JAMES MAJNIKA, SUSAN LUND, JACQUES BUGHIN, KELSEY ROBINSON, JAN MISCHKE & DEEPA MAHAJAN, MCKINSEY & CO., INDEPENDENT WORK: CHOICE, NECESSITY, AND THE GIG ECONOMY (2016), https://www.mckinsey.com/~/media/mckinsey/featured%20insights/employment%20and%20growth/independent%20work%20choice%20necessity%20and%20the%20gig%20economy/independent-work-choice-necessity-and-the-gig-economy-full-report.pdf [https://perma.cc/C6C4-RATA]; Emilie Jackson, Adam Looney & Shanthi Ramnath, *The Rise of Alternative Work Arrangements: Evidence and Implications for Tax Filing and Benefit Coverage* (Off. of Tax Analysis, Dep't of the Treasury Working Paper 114, 2017), https://apps.bea.gov/fesac/meetings/Ramnath%20Background%20Document.pdf [https://perma.cc/4UDH-N8C4] (concluding that the gig economy involved only 0.7 percent of the national economy in 2014).

7. *See* Deepa Das Acevedo, *The Rise and Scope of Gig Work Regulation*, *in* BEYOND THE ALGORITHM 15 (Deepa Das Acevedo ed., 2021).

8. *See* The Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, Pub. L. No. 116-136, § 2102 (a)(3)(II), 34 Stat. 281, 314 (providing certain gig workers with expanded unemployment insurance benefits).

9. At the state level, California has established a regulatory regime for certain gig workers, see *infra* note 14 and accompanying text, and certain municipalities have enacted regulations offering a variety of protections to classes of gig workers. *See, e.g.*, Acevedo, *supra* note 7, at 27 (discussing New York City municipal regulations).

10. 29 U.S.C. § 151.

11. 29 U.S.C. §§ 141–144.

12. NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 131–32 (1944).

13. 29 U.S.C. § 152(3).

To the extent there can be unions for independent contractors, then, either the particular group of independent contractors must either be re-classified as employees by the NLRB, or they must fall within an exceptional case under the NLRA or have organizing rights outside of the NLRA.

The first alternative—recharacterizing certain independent contractor workers as employees—is beyond the scope of this paper. But it is important to pause on this at the outset because as a practical matter it is the most straightforward manner to provide collective rights to gig and other independent contractor workers. It is also currently the subject of discussion at the federal and state level as well as within academia.[14] Moreover, as discussed in what follows, the uncertainty of the proper classification of gig and other independent contractor workers has important consequences for alternative mechanisms for collective action by independent contractors.

It is up to the NLRB and its reviewing courts to determine whether or not a worker is an independent contractor or an employee covered by the NLRA. The Board has repeatedly changed course as to the appropriate test to use to resolve this classification question, and the reviewing courts have also intervened.[15] In particular, long before the advent of the gig economy, courts have struggled with the appropriate classification of drivers, because they evidently share some characteristics of employees and some of independent contractors.[16]

If, however, the classification wars are resolved leaving a group of workers characterized as independent contractors, their ability to act collectively depends on their being treated either as an exceptional case under the NLRA or as workers whose collective rights are otherwise protected from antitrust rules that criminalize worker collective action. In either case, the path forward is challenging.

In what follows, Part I briefly reviews the relevant provisions of the federal antitrust laws and in particular addresses the fact that,

14. At the federal level, see *infra* note 15. States also have been adopting their own tests for identifying independent contractors, with several states adopting a variety of the so-called "ABC test," which would lead to many workers currently classified as independent contractors being reclassified as employees for state law purposes. *See, e.g.*, Dynamex Operations W. v. Super. Ct. of L.A. Cnty., 416 P.3d 1, 40 (Cal. 2018); Proposition 22 (2020) (Cal.) (ballot initiative overruling *Dynamex* as it applied to gig drivers). As to academia, see, for example, Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 Harv. L. & Pol'y Rev. 479 (2016).

15. For the recent history of vacillation on this point, see *FedEx Home Delivery*, 361 N.L.R.B. 610 (2014) (FedEx drivers properly characterized as employees); *enforcement denied*, *FedEx Home Delivery* v. *NLRB*, 849 F.3d 1123 (D.C. Cir. 2017) (ruling Fed Ex home delivery drivers as independent contractors); *SuperShuttle DFW*, 367 N.L.R.B. No. 75 (Jan. 25, 2019) (holding that SuperShuttle drivers are independent contractors, reversing *FedEx*); *Atlanta Opera, Inc.*, 372 N.L.R.B. No. 95 (June 13, 2023) (ruling that make-up artists, wig artists and hairstylists are employees of the Atlanta Opera, overruling *SuperShuttle* and reinstating the *FedEx* standard).

16. *See infra* note 67 and accompanying text.

generally speaking, collective actions by workers to improve their wages and terms and conditions of employment constitute "price fixing," a *per se* violation of the antitrust laws. Part II address the "labor exemption" which provides an exception to that antitrust proscription for traditional labor organizing activities, but expressly excludes from the exemption labor activities by independent contractors. Part III suggests alternative approaches that either (1) expand the labor exemption to cover gig workers even if they are classified as independent contractors, or (2) avoid antitrust liability through other legal alternatives.

I. The Antitrust Laws

The challenge facing workers categorized as independent contractors is due principally to the interaction between the federal labor laws and the federal antitrust laws.[17] Specifically, the difficulty derives from a broad reading by the courts of what constitutes a "contract, combination or conspiracy" in restraint of trade in violation of the antitrust laws, coupled with a narrow reading by the courts of the "labor exemption."[18] When it applies, that exemption excuses from the general prohibitions of the antitrust law collective actions taken by workers to increase their wages and otherwise improve the terms and conditions of their employment. Collective actions by independent contractors generally have not been protected by the labor exemption.

Section 1 of the Sherman Act makes it a crime to enter into a "contract, combination or conspiracy" that unreasonably restrains competition.[19] It takes two to violate section 1 of the Sherman Act. Each individual worker, including each independent contractor, is a separate actor. If two or more workers compete in a relevant market, their collective action is subject to antitrust scrutiny.[20] "Price fixing"—two or more individuals or groups getting together for the purpose of attempting to fix the price for which they can sell their services[21]—is a classic restraint of trade prohibited by section 1 of the Sherman Act. Such actions are prohibited on the theory that by their nature they impede

17. Collective action by workers excluded from coverage by the NLRA could also be subject to a claim that any such action should be preempted by the NLRA itself on the theory that the exclusion was meant to indicate that Congress by negative inference intended to deprive such workers of the right to collective action, or at the least intended to preempt any state law that might give such workers collective bargaining rights. Courts have, however, rejected claims that being excluded from the definition of "employee" under the Act had any such preemptive effect. *See, e.g.*, Chamber of Commerce of the USA v. City of Seattle, 890 F.3d 769, 791–92 (9th Cir. 2018) (municipal collective bargaining law for independent contractor drivers not preempted); Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 181 (2007) (states free to regulate public employees); United Farm Workers of Am. v. Ariz. Agric. Emp. Rels. Bd., 669 F.2d 1249, 1256 (9th Cir. 1982) (same as to agricultural workers).

18. *See infra* notes 47–57 and accompanying text.

19. 15 U.S.C. § 1.

20. *See, e.g.*, Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 43 (1930).

21. *See, e.g.*, Broadcast Music, Inc. v. CBS, 441 U.S. 1, 9–10 (1979).

competition and harm consumer welfare. Leaving, for the time being, everything else to one side, if the principal purpose of the antitrust laws is to promote competition, when two independent taxi drivers agree to offer the same fare instead of competing with one another, that is a most basic violation of the Sherman Act. If all drivers on a platform join together and seek to compel the platform operator to raise its rates and increase their pay, they have, in a similar way, impeded the operation of the competitive marketplace for their services.

The issue of application of the antitrust laws to criminalize worker collective action has reignited long-standing disputes about labor and antitrust[22] for three reasons. First, the growth of non-traditional employment—and in particular the gig businesses that offer personal services over an Internet platform—is small but it is rapidly growing.[23] The largest by far of these companies is the car-sharing service Uber, but there are also platforms offering such things as housecleaners, plumbers, painters, and cosmetologists. Second, the risk to employees and their unions of getting it wrong are high. The violations can be criminal and may involve treble damages.[24] And, third, as discussed, the classification rules concerning independent contractor status are unstable and by their nature involve a balancing of factors, making results unpredictable at the margins. This is especially so because classification issues are in the first instance generally contested in administrative agencies and boards whose views shift when administrations change.[25] This unpredictability is not likely to be resolved through a process of "litigating elucidation,"[26] or otherwise.

The "newness" of this problem should not be overstated. What is at issue are services offered by a company over the Internet that make it possible for retail customers to connect to a personal services provider through the company's web page—so-called "platform" services. Currently much of the debate centers on car sharing companies like Uber and Lyft and their relationships with their drivers. Ambiguity about the employment status of drivers is neither a new issue, nor is it the result of the functionality of the Internet. To the contrary, as discussed

22. *See, e.g.*, Sanjukta Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 Loyola Univ. L.J. 971 (2016); Seth D. Harris & Alan B. Krueger, The Hamilton Project, Discussion Paper 2015-10, A Proposal for Modernizing Labor Laws for Twenty-First Century Work: The Independent Worker 15–17 (2015), https://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf [https://perma.cc/XY9N-X5HY].

23. *See generally* Weil, *supra* note 4.

24. 15 U.S.C. § 15(a) (antitrust treble damages); 29 U.S.C. § 186(d) (labor law criminal provision).

25. *See supra* notes 14–15 and accompanying text. Confounding matters further, there are different independent contractor tests under the NLRA, the Fair Labor Standards Act, and, perhaps, the Sherman Act. *See, e.g.*, Re/Max Int'l, Inc. v. Smythe, Cramer Co., 265 F. Supp. 2d 882, 897 (N.D. Ohio 2003).

26. Int'l Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958).

in what follows, the status of drivers who own their own cars or trucks has long been an issue in antitrust, and the taxicab industry has used a "platform" model long before Uber began operating over the Internet. Stripped of its patina of edgy relevance, this problem may be more about the proper antitrust treatment of drivers who own their own cars than about workers in the gig economy.

The courts have applied two different kinds of analysis to allegations of section 1 violations: a "rule of reason" analysis, and a "*per se*" analysis.[27] On the one hand, the *per se* rule applies to collusion among rivals on price or output or to certain forms of boycott.[28] As its name implies, *per se* violations are flatly unlawful and cannot be justified by claims that the perpetrators lack market power or intend to accomplish some purpose that advances social welfare.[29] This is because "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[30]

On the other hand, a "rule of reason" analysis involves consideration of market power and a balancing of economic benefits against the harms to competition that result from a business combination.[31] Generally, rule of reason analysis applies when competitors combine to create a new economic entity that sells something economically beneficial that could not be accomplished without competitors joining together. Examples include a sports league[32] or music royalty holders who want to make their music available through a one-stop shop, like BMI or ASCAP.[33] In practice, the degree of scrutiny applied appears more like a sliding scale. A so-called naked restraint, where there is no purpose to the integration beyond the desire to fix prices, is subject to a *per* se analysis. Increasing scrutiny occurs as the degree of economic integration increases,[34] up to the point at which the two enterprises are so integrated that the law treats them as one economic actor and there is no antitrust scrutiny whatsoever.[35]

A union of taxi drivers joining together to increase their meager bargaining power against a large platform company like Uber might seem to present a strong case for avoiding a *per se* analysis and instead for engaging in the rule of reason balancing of public policy harms

27. *See, e.g.*, Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 343–47 (1982).
28. *Id.*
29. *Id.*
30. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).
31. See, e.g., Maricopa Cnty. Med. Soc'y, 457 U.S. at 343–47.
32. *See, e.g.*, Am. Needle, Inc. v. NFL, 560 U.S. 183, 186 (2010).
33. *See, e.g.*, Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1, 24 (1979).
34. *See, e.g.*, Cal. Dental Ass'n v. FTC, 526 U.S. 756, 779–80 (1999).
35. *See, e.g.*, Texaco, Inc. v. Dagher, 547 U.S. 1, 3 (2006).

and benefits that could be argued justify the need for such a union. Yet, in *FTC* v. *Superior Court Trial Lawyers Ass'n*, the Supreme Court ruled that it will not depart from *per se* analysis of naked restraints of trade based on worker claims that their collective economic behavior advanced social welfare and did not cause the kind of competitive harms that the antitrust laws were designed to combat.[36] Courts bound by that case are likely to apply a *per se* analysis to a collective effort by platform workers to raise their income.

In *Superior Court Trial Lawyers Ass'n*, a group of private lawyers who accepted appointments to represent indigent criminal defendants in the District of Columbia engaged in a group boycott in a (successful) effort to pressure the District government to raise their below-market billing rates.[37] The Federal Trade Commission found that the boycott violated the antitrust laws.[38] On review, the Supreme Court went out of its way to suggest that the boycott advanced a worthy cause and that the result of the boycott was to produce better legal representation for indigent defendants.[39] It suggested that that the Federal Trade Commission had exercised peculiar judgment in pursuing these lawyers acting in the public interest.[40]

The Court, however, ruled that the lawyers' boycott was a classic unlawful restraint of trade, constricting supply to fix a price. "The horizontal arrangement among these competitors was unquestionably a 'naked restraint' on price and output."[41] The boycott thus was subject to a *per se* analysis, since the Sherman Act "reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services."[42] An argument that a particular restraint on trade nevertheless benefits the public interest therefore is inconsistent with the policy of the Sherman Act. In particular, the Court rejected the argument that the boycott deserved First Amendment protection, pointing out that every concerted refusal to do work has an expressive component.[43] More relevant for present purposes, the Court rejected the lower court's view that, because the attorneys lacked market power of the kind the antitrust laws were designed to eliminate, a departure from the *per* se rule was appropriate.[44] In the Supreme Court's view, because by its nature naked price fixing has a substantial potential impact on competition, it is illegal *per se,* without any regard to the

36. FTC v. Super. Ct. Trial Laws. Ass'n, 493 U.S. 411, 430–31 (1990).
37. *Id.* at 415–18.
38. *Id.* at 418–20.
39. *Id.* at 421.
40. *Id.* ("Reasonable lawyers may differ about the wisdom of this enforcement proceeding.").
41. *Id.* at 423.
42. *Id.* (quoting Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 695 (1978)).
43. *Id.* at 429–36.
44. *Id.* at 424.

fact that in this case that market power was marshalled to accomplish a social benefit. Quoting Justice Douglas, the Court held that "whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy."[45]

When independent contractor drivers join together to demand a higher price for their services and threaten to withhold or otherwise disrupt services to accomplish that goal, the reasoning of *Superior Court Trial Lawyers* could lead courts to find such actions to be *per se* violations of the antitrust laws.[46]

II. The Labor Exemption

The reason that the holding of *Trial Lawyers* does not criminalize all worker collective action and union activity is because there is an exemption in the antitrust laws for labor activity. Generally speaking, "the antitrust laws are not concerned with competition among laborers or with bargains over the price or supply of labor—its compensation or hours of service or the selection and tenure of employees."[47] Specifically, "employees" subject to the NLRA (or other federal or state employee collective bargaining laws) and the unions that represent or seek to represent them are exempt from antitrust liability for their collective actions.[48] By far the most straightforward solution to criminalization of collective action by non-employee workers would be to persuade the courts that a class of independent contractor workers and their unions should be covered by this exemption.

The Supreme Court, however, has been exceptionally hostile to such claims and has repeatedly construed the exemption for labor activity in the most narrow of terms. The labor exemption is a product

45. *Id*. at 435 (quoting United. States v. Socony-Vacuum Oil Co., 310 U.S. 150, 225–26 n.59 (1940)).

46. As indicated *supra* notes 31–36 and accompanying text, the Supreme Court engages in rule of reason analysis when the restraints on trade are "ancillary" to an integration of the economic activities of the parties that appears capable of enhancing the group's efficiency. In *Superior Court Trial Lawyers Ass'n*, the Court refused to engage in rule of reason analysis based on public policy arguments, other than claims about the economic efficiencies created by the restraint. 435 U.S. at 424. Whether unions could successfully claim that they offer such efficiency benefits has not been tested because the existence of the labor exemption makes such proof unnecessary in the normal case. The argument would be challenging, as it would have to be based on something other than claims that the anti-competitive effects of unions lead to higher quality of work performed by unionized employees as a result of better training, higher pay, better retention rates, and the like. The Supreme Court rejected analogous arguments made by a society of professional engineers as a "a frontal assault on the basic policy of the Sherman Act." Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 695 (1978).

47. Archibold Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252, 255 (1955).

48. *See* United States v. Hutcheson, 312 U.S. 219, 233–34 (1941).

of both statute and common law. In particular, the first and principal federal antitrust law, the Sherman Act, contained no express protection for labor activities, and conflicting views exist on whether its restrictions were intended to apply to combinations of workers. Critics on the left insist that the Sherman Act was intended to break up large aggregation of economic power, and so its restrictions need to be construed in harmony with its economic purpose. On that view, stronger labor unions advance the purposes of the Act, not undermine them. To the extent that worker combinations are anti-competitive, given workers' inherent lack of bargaining power and their role in the economy, the anti-competitive features of worker combinations should be welcomed, not proscribed, by the Sherman Act.

Yet critics on the right tend to see the Sherman Act as advancing the principle of maximizing economic competition, with low worker wages helping reduce the cost of goods and services and, on that view, benefiting consumer welfare. Thus, organized labor is just another impediment to free markets.[49]

In the *Danbury Hatters* case, the Supreme Court took the side of the corporations and held that the Sherman Act applied to combinations of workers.[50] In response, Congress legislated an express exemption to the antitrust laws for labor activity. The labor exemption's first iteration was a provision of the 1914 Clayton Act declaring that "labor is not a commodity,"[51] and the exemption was more broadly established by the courts in reading the Clayton Act prohibition in conjunction with the 1932 Norris-LaGuardia Act's prohibition on labor injunctions.[52] This ruling allows employees to combine and trade unions to operate as an exception to general antitrust principles.[53]

One feature of treating worker combinations as an exception to general antitrust principles instead of treating them as lawful under core antitrust principles in the first instance is this: it is more difficult at the margins to establish that one's conduct should properly be treated as an exceptional case than it is to establish that the conduct should not be treated as raising an antitrust issue in the first instance.[54] Whether for that reason or another, the courts, having broadly concluded that labor activity violates core antitrust principles,

49. This issue has been endlessly discussed. For a recent discussion of the debate from the left in the context of a discussion of gig workers see Paul, *supra* note 22. This disputed history is also discussed in *Allen Bradley Co.* v. *Local No.* 3, *Int'l Brotherhood of Electrical Workers*, 325 U.S. 797, 801–03 (1945).

50. Loewe v. Lawlor, 208 U.S. 274, 292 (1908).

51. 15 U.S.C. § 17; 29 U.S.C. § 52.

52. 29 U.S.C §§ 101–115.

53. *See Hutcheson*, 312 U.S. at 233–34.

54. As the Court observed in finding a union's conduct was outside the labor exemption, "It must be remembered that the exemptions granted the unions were special exceptions to a general legislative plan." *Allen Bradley,* 325 U.S. at 809.

subsequently concluded that the labor exemption should be narrowly construed. Specifically, the courts have held that the exemption applies to employees, unions, and the bargaining processes sanctioned under employee collective bargaining laws, but not worker combinations of "non-labor groups."[55] Unions lose their antitrust immunity (and do not pass it on to those with whom they engage) when they "aid nonlabor groups to create business monopolies and to control the marketing of goods and services."[56]

While the "nonlabor group" cases generally concern unions conspiring with companies to control a market,[57] courts have excluded independent contractors and their unions from the protections of the labor exemption on the analogous rationale that they are also a non-labor group.[58] "Antitrust jurisdiction cannot be declined simply because independent contractors masquerade as a union."[59]

The courts' focus in independent contractor antitrust cases is "whether the employer-employee relationship [is] the matrix of the controversy,"[60] with the critical understanding that independent contractors typically should be considered businesses, not employees. Consequently, when independent contractors act collectively, aided and abetted by a union, courts typically treat them as they would two employers acting collectively.

III. What Is to Be Done?

While the law generally is hostile to independent contractor unions, particular approaches could potentially allow for such unions under certain conditions. First, a narrow class of independent contractor workers fall within an exceptional case and can organize under the NLRA under the labor exemption, and the class of workers entitled to this exceptional treatment may be expanded. Second, and related, the

55. *Id*.

56. *Id.* at 808.

57. For example, *Allen Bradley* was a challenge to an arrangement between a New York City IBEW local and electrical manufacturers and contractors with collective bargaining agreements with the local, whereby the contractors would purchase supplies only from the IBEW-represented manufacturers. *Id.* at 799. The arrangement was successful and advantageous to all of the parties, but harmed consumers who paid considerably more for electrical supplies than consumers outside of New York City. *Id.* at 800. The Court understood this to be an unlawful effort by IBEW to help non-labor groups create a business monopoly. *Id.* at 800–01.

58. *See, e.g.*, L.A. Meat & Provision Drivers Union v. United States, 371 U.S. 94, 96–98 (1962) (grease peddlers); United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460, 463–64 (1949) (stitching contractors); Columbia River Packers Ass'n v. Hinton, 315 U.S. 143, 145–47 (1942) (fishermen); Taylor v. Local No.7, 353 F.2d 593, 606 (4th Cir. 1965) (horseshoers).

59. Bernstein v. Universal Pictures, Inc., 517 F.2d 976, 980 (2d Cir. 1975) (union of music composers and lyricists); *see also L.A. Meat & Provision Drivers Union*, 371 U.S. at 103.

60. Jacksonville Bulk Terminals v. Int'l Longshoremen's Ass'n, 457 U.S. 702, 712 (1982).

antitrust law may develop in a way that permits certain independent contractors to act collectively through a union even though they are not subject to the NLRA. Third, states may enact legislation allowing these workers to engage in collective action under state law. Alternately, workers and their unions may engage in collective action that does not run afoul of the antitrust laws. Finally, an exclusion in the antitrust laws similar to the labor exemption exempts agricultural worker collectives from most antitrust scrutiny.

A. Collateral Application of the Labor Exemption

Workers characterized as independent contractors have been protected by the labor exemption and allowed to organize under the NLRA if they compete (or otherwise effect competition) in markets with traditional employees.[61] Most of these supportive cases can be narrowly construed as doing no more than extending the labor exemption to protect secondary activity by unions representing employees where the challenged activity is not targeted at the employer of the unionized workers but at independent contractors whose activities effect union members' wages. These cases implicitly or expressly rely on the fact that the Norris-LaGuardia Act broadened the scope of disputes over which courts lacked jurisdiction from the narrower definition provided in the Clayton Act to include labor disputes "regardless of whether or not the disputants stand in the proximate relation of employer and employee."[62]

While this provision was intended to cover certain kinds of secondary activity, by its terms it has broader meaning, and judges have on occasion extended the reach of the exemption to purely primary activity even when the workers involved are not employees.[63] It is not a large step from protecting through the labor exemption a taxi drivers' union's effort to organize independent contractor drivers to preserve their own members' wages, to protecting the same effort to organize independent contractor taxi drivers even if the union does not yet represent any taxi drivers. If the workers involved because of the nature of

61. *See, e.g.*, H.A. Artists & Assocs., Inc. v. Actors' Equity Ass'n, 451 U.S. 704, 720 (1981) (independent contractors properly protected by the labor exemption if they "occupy a critical role in the relevant labor market" of unionized employees); Am. Fed'n of Musicians of U.S. & Can. v. Carroll, 391 U.S. 99, l05 n.7 (1968) (unions seeking to organize independent contractor band leaders are protected by the labor exemption and may attempt to set prices and other terms for their performances outside of the context of collective bargaining because the band leaders are a "labor group," on the theory that the union's efforts to organize them will protect other unionized musician employees); Home Box Office, Inc. v. Directors Guild of Am., Inc., 531 F. Supp. 578, 597 (S.D.N.Y. 1982) (noting that freelance directors are eligible for exemption because they are in wage competition with each other), *aff'd*, 708 F.2d 95 (2d Cir. 1983).

62. 29 U.S.C. § 113(c).

63. *See, e.g.*, Confederación Hípica de P.R., Inc. v. Confederación de Jinetes Puertorriqueños, Inc., 30 F.4th 306, 311 (1st Cir. 2022), cert. denied, 143 S. Ct. 631 (2023), discussed infra notes 74–76 and accompanying text.

their job *could* be employees of an employer, then, as discussed in what follows language in the case law suggests that they should be given antitrust immunity for their collective actions even if the buyer of their services insists on treating them as independent contractors.

B. Expanding the Labor Exemption Beyond the NLRA

Courts may be unwilling to extend the coverage of the NLRA to independent contractors who perform work commonly performed by unionized workers absent some clearly identified collateral benefit to unionized employees performing the same kind of work. However, there is an argument derived from the case law for an expanded definition of the labor exemption to allow workers to act collectively in situations in which the workers are not covered by the NLRA but nevertheless are free to organize outside of the bounds of the NLRA.

Notably, in several of the landmark cases establishing the principle that there is no antitrust immunity for independent contractors, the courts have hesitated to set a clear demarcation between covered employees and not covered independent contractors. The Supreme Court has stated, for example, that while co-conspirators could not immunize themselves from antitrust "by the simple expedient of calling themselves 'Local 626-B' of a labor union . . . . [W]hat has been said is not remotely to suggest that a labor organization might not often have a legitimate interest in soliciting self-employed entrepreneurs as members."[64]

Indeed, in the cases that decline to extend the labor exemption to independent contractors, there is ambiguity, or dissent, on just this point. For example, in a case involving independent contractor grease peddlers, the concurring opinion expressed the view that the independent contractor "grease peddlers might properly associate among themselves or affiliate with a sympathetic and genuinely interested union to improve their working conditions."[65] And in other cases declining to provide antitrust immunity to independent contractor unions, the courts typically rely on other factors beyond the mere fact that the workers were independent contractors.[66]

64. L.A. Meat & Provision Drivers Union, 371 U.S. at 101, 103.

65. *Id.* at 105; *see also id.* at 109 (Douglas, J., dissenting); Taylor v. Local No. 7, 353 F.2d 593, 606–08 (4th Cir. 1965) (Sobeloff, J., dissenting).

66. For example, in a case involving independent contractor stitching contractors, the Court's decision focused on the fact that the challenged boycott was undertaken by an association, not a union, that a union was brought in only after the first attempt to pressure the buyers was found unlawful, "utilized as a cat's-paw to pull employers' chestnuts out of the antitrust fire," that the "union did not participate in making the agreement" pressuring buyers to deal only with association stitching contractors, and that the "restraints here went beyond limiting work to Union Shops." United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460, 462 (1949). In the grease peddlers case, the Court found it significant that the case came to it on a record in which it was stipulated that the "labor activity" was a scheme cooked up by union business agents and that the grease peddlers were not allowed to become regular members of the union. *L.A. Meat & Provision Drivers Union*, 371 U.S. at 98.

Moreover, the cases declining to extend the labor exemption to independent contractor workers generally lack any analysis of why the independent contractors at issue are more like businesses than employees. The cases usually involve a collective decision to withhold a group of workers' *products* from a buyer, and not their labor, and in that way appear to be less about treating labor as a commodity than about treating a commodity as a commodity.[67] The facts at issue in these cases have a different feel than situations involving platform *services* such as car rides, where the car and the driver cannot be separated. In most of the decided cases, the "employees" have nothing to do with their "employer" beyond the fact that they sell their products to him.

But this distinction is unsound as a matter of competition policy when the seller is dependent upon a particular buyer to purchase her goods or services. A seller of goods into a monopsony market faces many of the same problems as a seller of services. A worker who caught fish as an employee of a monopsony fishing company, who is then recharacterized by his employer as an independent contractor, is in a similar position to the recharacterized employee who mended the fishing lines. From an antitrust perspective at least, it makes little sense to say the former cannot act collectively while the latter can.

The goods/services distinction to one side, courts barely defend the proposition that because the workers are characterized as independent contractors they should for that reason alone be denied the right to take collective action available to employees. Some decisions point out that independent contractors are structured businesses regulated by state business law, as compared to individual working stiffs left to their own devices in a hostile marketplace. Thus, in declining to find a union of independent contractor fishermen protected by the labor exemption, the Supreme Court found it not worth "extended discussion" that there was a clear distinction to be had between "businessmen" and "the commonly helpless" "individual unorganized worker."[68] Similarly, in a case involving independent contractors who stitch clothing, the Court declined to apply the labor exemption in part because "[t]he stitching contractor . . . utilizes [his] labor through machines and has his rentals, capital costs, overhead and profits. He is an entrepreneur, not a laborer."[69] Put in the language of the labor exemption, which declares that labor is not a commodity, if the only thing you are selling is your labor (if you are not a "businessman"), your economic output should

67. For example, in a case involving independent contractor fishermen, the Court relied on the fact that the dispute was over the fishermen union's practice of refusing to sell fish to certain buyers and not about a decision to withhold labor, and the Court held that a dispute "over the terms of a contract for the sale of fish is something different from a 'controversy concerning terms or conditions of employment.'" Columbia River Packers v. Hinton, 315 U.S. 143, 145 (1942) (quoting the Norris-LaGuardia Act).

68. *Id.*

69. *Women's Sportswear Mfrs. Ass'n*, 336 U.S. at 463–64.

not be treated as a "commodity" subject to antitrust regulation. But if you are an independent contractor, you are, by definition, operating a business.

Of course, it would be anomalous to exclude *all* businesses operating as independent contractors from the reach of the antitrust laws, since they are, depending upon their situation, capable of exercising market power and causing precisely the kind of harm the antitrust laws are indisputably designed to prevent. Moreover, since Congress established a unique labor law regime for employees precisely because of their lack of market power, there is an unhelpful logic to limiting the labor exemption to those employees and their unions that Congress saw fit to subject to special treatment under the labor laws.

Notwithstanding this analysis, courts have occasionally exempted unions or collectives of owner taxi or other drivers from the antitrust laws through operation of the labor exemption.[70] Drivers who own their cars typically are dependent upon the cab companies and similar businesses that they must make use of to make a living, and they lack most of the capital investments and other accoutrements associated with a business (apart from the ownership of the car that they drive). This may have led courts to treat them as employees for purposes of the labor exemption. Courts may find that Uber and Lyft drivers, who similarly lack market power, and whose pay directly threatens the pay of those cab and other drivers who are in fact employees of an employer, are similarly part of a "labor group" protected by the labor exemption and not independent business people.

The antitrust laws are concerned with market power, and some sets of workers that the labor laws characterize as independent contractors are economically dependent upon another business to operate profitably and so structurally lack the market power to cause the competitive harms that the antitrust laws were designed to remedy. Other independent contractors have a different relationship to their retail customers and may exercise ample market power, and their business may not put them in competition with employees. As discussed, the courts at times define the first set of these workers as employees (or as independent contractors making up a labor group protected by the labor exemption), and the latter as independent contractors that should be treated like any other business engaging in anticompetitive behavior.

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70. Aetna Freight Lines, Inc. v. Clayton, 228 F.2d 384. 386–87 (2d Cir. 1955) (noting that truck owner-operators may be entitled to exemption); Mitchell v. Gibbons, 172 F.2d 970, 972 (8th Cir. 1949); Checker Taxi Co. v. Nat'l Prod. Workers Union, 113 F.R.D. 561, 569 n.11 (N.D. Ill. 1986) (dicta); Quality Limestone Prods., Inc. v. Drivers, Salesmen, Warehousemen, 207 F. Supp. 75, 77 (E.D. Wis. 1962) (truck owner-operators may be entitled to exemption); *see also L.A. Meat & Provision Drivers*, 371 U.S. at 103 (discussion of driver cases).

The test for employee status under the NLRA does not capture this distinction. It is the *respondeat superior* Restatement (Second) of Agency test and, at least according to the D.C. Circuit, must by law remain that test, no matter its relevance to competition and other issues intrinsic to the NLRA.[71] However, none of the common law *respondeat superior* factors that courts and the NLRB consider in evaluating whether a worker is an employee or an independent contractor directly addresses the market power of the worker as compared to the purchaser of his goods or services. This suggests that the employee/independent contractor line drawn in the NLRA should not be the test courts apply in considering the application of the labor exemption. For antitrust purposes, the more relevant inquiry is whether the contractor is a *dependent* contractor—dependent on the purchaser of his or her services for his livelihood, rather than whether the contractor's actions can fairly be imputed to the company that engaged her to do the work.[72] Indeed, there are a few cases which in analogous circumstances apply an "antitrust" definition of "independent contractor," rather than a definition drawn from the labor law.[73]

An unresolved issue is whether the Court's decision to apply the *per se* rule in the facts presented in the *Superior Court Trial Lawyers* case undercuts whatever vitality there is to an argument that certain gig workers should be entitled to the benefit of the labor exemption whether or not they are technically employees under the NLRA. On the one hand, that decision reflects a powerful disinclination to allow non-competition policy concerns (and, in particular, concerns that the sellers of personal services lack market power in relation to the buyer) to shield price fixing claims from *per se* treatment. On the other hand, the principal holding of that case was that the First Amendment did

71. In overruling the NLRB decision offering a definition of "employee" grounded in the policies and purposes of the NLRA, the occasional textualists of the D.C. Circuit faulted the NLRB because in defining the term "independent contractor" it had failed scrupulously to apply the common law of agency test as defined in the *Restatement (Second) of Agency*. FedEx Home Delivery v. NLRB, 849 F.3d 1123, 1128 (D.C. Cir. 2017). Instead, the Board was guilty of modifying the test to conform its definition to the policies of the NLRA. In so ruling, the court relied on prior authority with references to the *Restatement (Second) of Agency* found in the legislative history of the Taft-Hartley Act. *Id.* at 1124–25 (citing NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256 (1968), which itself cites the Congressional Record and other legislative history of the Labor Management Relations Act, *id.* at 256 n.2). The labor statute itself does not define the term "independent contractor." *See* 29 U.S.C. § 152(3).

72. *See, e.g.*, Naomi B. Sunshine, *Employees as Price-Takers*, 22 Lewis & Clark L. Rev. 105 (2018); Elizabeth Kennedy, *Freedom from Independence: Collective Bargaining Rights for "Dependent Contractors"*, 26 Berkeley J. Emp. & Lab. L. 143, 153 (2005) (discussing Canadian designation of "dependent contractor").

73. *See, e.g.*, Re/Max Int'l, Inc. v. Smythe, Cramer Co., 265 F. Supp.2d 882, 897 (N.D. Ohio 2003) (real estate agents are employees for purpose of a single entity defense (not a labor exemption case); Scott Paper Co. v. Gulf Coast Pulpwood Ass'n, Nos. 7820-73-P, 7821-73-P, 1973 U.S. Dist. LEXIS 11808, at *25–26 (S.D. Ala. Sep. 21, 1973) (pulpwood workers).

not protect those workers,[74] which is not directly relevant here. Moreover, the Court in that case did not consider the labor exemption, and the concern that the antitrust laws not be read so broadly as to limit worker collective action is not just another "non-competition policy concern," but a policy derived directly from the antitrust laws themselves through the operation of that labor exemption, if not intrinsic to the essential "trust busting" policy of antitrust.

Consequently, the use of the labor exemption to protect certain independent contractors may be a way to distinguish, without overruling, *Superior Court Trial Lawyers* if the courts become unhappy with the implications of that decision. Notably, *Superior Court Trial Lawyers* moved the law away from earlier antitrust orthodoxy, which applied the rule of reason to cases in which price fixing by sellers could be justified by their lack of market power in relation to their buyers, especially in monopsony markets where lack of competition on the part of the buyer caused competitive harm.[75] Academics also have criticized *Superior Court Trial Lawyers* on the ground that its broad application of the *per se* rule prevents antitrust courts from considering the market implication of price-taking small market actors who are required to deal with large buyers whose market power distorts the relevant market, including doctors and lawyers, small franchisees, small farmers, "and any independent contractor that sells services to a power buyer (such as a taxicab driver or a truck owner)."[76] A case could be made for including these entities within the labor exemption as a way to chip away at the holding of *Superior Court Trial Lawyers.*

Such a reconsideration of *Trial Lawyers* may be underway. In *Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc.*, the First Circuit held that independent contractor horse jockeys working in Puerto Rico were protected by the labor exemption when they engaged in a group boycott to raise their wages, where only one racetrack exists in Puerto Rico.[77] In that case, the court relied on the language of the Norris-LaGuardia Act that a labor dispute may exist "regardless of whether or not the disputants stand in the proximate relation of employer and employee,"[78] ignoring the legislative history establishing that phrase was intended to address secondary labor disputes and not independent contractor unions engaged

74. FTC v. Super. Ct. Trial Laws. Ass'n, 493 U.S. 411, 426–32 (1990).

75. *See, e.g.*, Appalachian Coals v. United States, 288 U.S. 344, 372–75 (1933), *overruled in part on other grounds*, Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984).

76. Warren S. Grimes, *The Sherman Act's Unintended Bias Against Lilliputians: Small Players' Collective Action as a Counter to Relational Market Power*, 69 ANTITRUST L.J. 195, 196–97 (2001).

77. Confederación Hípica de P.R., Inc. v. Confederación de Jinetes Puertorriqueños, Inc., 30 F.4th 306, 311 (1st Cir. 2022), *cert. denied*, 143 S. Ct. 631 (2023).

78. 29 U.S.C. § 113(c).

in a dispute with their primary "employer."[79] It distinguished the early cases involving the sale of goods on the grounds that the jockeys were offering only their services. And it dispatched *Trial Lawyers* with the back of the hand in a footnote parenthetical—"(labor exemption not argued)."[80]

Moreover, concern about the antitrust law's application to independent contractors who depend upon one or a few providers for their work has been accompanied by new developments in antitrust enforcement that focus on labor market competition, and in particular on monopsony characteristics of labor markets.[81] Given this focus, expanding the labor exemption to cover workers selling into monopsony markets would not exacerbate an antitrust problem; it would help address it, since increasing the bargaining power of sellers into such markets would be a corrective to counter monopsony market power. Conversely, criminalizing conduct that would otherwise help address problems caused by a non-competitive monopsony market would undermine, rather than strengthen, efforts to correct for that market failure.

In sum, there is a class of independent contractor workers who, while not covered by the NLRA, are nevertheless unable to earn a competitive wage because they sell their services into monopsony or monopsony-like markets. These workers and their unions are entitled to the protection of the labor exemption. They should be allowed to organize and act collectively without being subject to the strictures of either the NLRA or the antitrust laws. The current state of the law is sufficiently uncertain to permit such claims to go forward.

C. State Action

Another approach to avoiding antitrust liability for independent contractor collective action is through the so-called "state action" doctrine. In *Parker v. Brown*, the Court ruled that the antitrust laws were not intended to prohibit states from regulating their economies by enacting legislation that has anti-competitive effects.[82] Moreover, the Supreme Court has extended immunity to federal antitrust laws to "nonstate actors carrying out the State's regulatory program."[83] So long as a state

79. See Confederación Hípica de P.R., Inc., 30 F.4th at 314.

80. *Id.* at 316 n.4.

81. See, e.g., Antitrust and Economic Opportunity: Competition in Labor Markets, Hearing Before the Subcomm. on Antitrust, Competition Pol'y & Consumer Rights, S. Comm. on the Judiciary, 116th Cong. (Oct. 29, 2019) (Statement of Doha Mekki, Couns. to the Assistant Att'y Gen. of the Antitrust Division, U.S. Dep't of Lab.), https://docs.house.gov/meetings/JU/JU05/20191029/110152/HHRG-116-JU05-Wstate-MekkiD-20191029.pdf [https://perma.cc/D7VR-L8VY]; Eric Posner, How Antitrust Failed Workers (2021); Alan Manning, Monopsony in Labor Markets: A Review, 74 ILR Rev. 3 (2021); Suresh Naidu, Eric A. Posner & Glen Weyl, Antitrust Remedies for Labor Market Power, 132 Harv. L. Rev. 536 (2018).

82. Parker v. Brown, 317 U.S. 341, 350–51 (1943).

83. FTC v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 224–25 (2013).

law restraint on trade is "one clearly articulated and affirmatively expressed as state policy," and the "policy [is] 'actively supervised" by the state itself,[84] private parties are immune from antitrust liability when they act anticompetitively pursuant to that state policy.

It is sufficient that the state law authorizes the anticompetitive conduct. It is not required to command it.[85] But the state policy must expressly contemplate the kind of anticompetitive conduct that it authorizes.[86] As to the "active supervision" requirement, for there to be state action, the state must be able to regulate the anticompetitive behavior that it has authorized.[87] For example, a state law that establishes a board made up of private dentists and gives that board the power to restrain competition by non-dentists lacks the kind of active state supervision that would protect the anti-competitive actions of the dentists.[88]

Seeking to take advantage of the state action immunity, the City of Seattle passed an ordinance establishing collective bargaining rights for "gig" for-hire independent contractor drivers.[89] The law was struck down by the Ninth Circuit on the ground that the state of Washington had failed to "clearly articulate" a policy that authorized the collective action authorized by the Seattle ordinance, with the court requiring a strong showing that the state had adopted such a policy.[90] In the court's view, the Washington state law did not clearly intend to displace competition between platform companies as to the rates that they pay their drivers.[91] Nor did the law satisfy the "active state supervision" requirement, as the law established supervision by the City of Seattle, but not supervision by the state of Washington.[92]

Although the Seattle ordinance was struck down on these grounds, several states have ongoing efforts to enact similar laws that do not suffer the defects identified in the Seattle ordinance. None of this legislative activity has yet borne fruit.

D. Union-Employer Cooperative Efforts

Another approach to defending union efforts to support independent contractors would be for unions cooperatively to engage with the gig employers, who themselves are immune from antitrust liability because they are a single firm providing a business in a competitive

84. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 105 (1980).
85. S. Motor Carriers Rate Conf. v. United States, 471 U.S. 48, 65 (1985).
86. FTC v. Phoebe Putney Health Servs. Inc., 568 U.S. 216, 227 (2013).
87. N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 507 (2015).
88. *Id.* at 514–15.
89. SEATTLE, WASH., ORDINANCE 124968 (Dec. 23, 2015).
90. Chamber of Com. v. City of Seattle, 890 F.3d 769, 782–84 (9th Cir. 2018).
91. *Id.* at 784.
92. *Id.* at 789–90.

market place that depends on making use of independent contractors in this manner to provide an integrated service. It does not violate the antitrust laws for a union to cooperate in such a business.

There are two problems with this approach. The first is that there are evident limits to a union's ability to assist workers if it is doing so at the pleasure of the employer. The second is that these limits are so powerful that in many instances it is a criminal violation of section 302 of the Labor-Management Reporting and Disclosure Act (LMRDA)[93] for a union to cooperate with an employer.

A union that neither represents nor seeks to represent employees of an employer does not violate section 302 when it engages with that employer.[94] For purposes of section 302 liability, independent contractors are not "employees."[95] But when the workers' status as employees is unclear, if a union cooperates with the employer intending to avoid antitrust liability on the understanding that the workers that it is assisting are independent contractors, it runs the risk that if the workers are ultimately re-classified as employees, the union could find itself in violation of section 302. In this context, an agreement between the union and the company that the union will cease all cooperative efforts with the company in the event that the company's workers are subsequently found to be employees would not technically shield the union from liability for past violations of section 302, but it might as a practical matter offer the union considerable protection. Notwithstanding these limitations, it is possible to imagine situations in which such labor-management cooperative efforts might benefit independent contractor workers.

Unions following this approach might mitigate the risks associated with section 302 liability by offering their services to workers (or companies) on a for-profit basis subject to unrelated business income taxation (UBIT) rules (and in such a way that does not compromise the union's status as a section 501(c) organization). By acknowledging that the income so derived is not related to its core business of collective bargaining, the union would mitigate the risk that it would be seen as receiving money in violation of section 302. Instead, the compensation would better be characterized as services provided to the employer. Such compensation is specifically included as an exception to the section 302 prohibition on payments to a union.[96] Services that drivers and/or their platform companies might need, for example, could

93. 29 U.S.C. § 186(d)(l), (2). Section 302 is also one of the predicate acts that can be the basis of the RICO claim involving treble damages. 18 U.S.C. §§ 1961(1), 1964(c).

94. 29 U.S.C. § 186(a)(2).

95. Section 2(3), 29 U.S.C. § 152(3). To avoid section 302 liability, the union also cannot "represent, seek to represent or admit to membership" *employees* of the gig company with whom it is cooperating.

96. 29 U.S.C. § 186(c)(1).

include various types of portable insurance benefits, training, or assistance with immigration concerns.

E. Organizing Independent Contractor Agricultural Workers

Finally, there is an exception to the antitrust laws that would support unions for farmer or agricultural workers. To protect small farmers against the perfidies of large agri-business, Congress did for them the very thing it ought to do for small one-person independent contractor businesses selling into monopsony markets: give them a blanket exemption from antitrust laws so that they can join together and increase their market power in relation to the purchasers of their goods or services. Specifically, the Capper-Volstead Act[97] grants certain agricultural cooperatives limited immunity from the antitrust laws.[98] The law was intended to give small farmers "whose economic position rendered them comparatively helpless,"[99] adequate market power to negotiate with large wholesalers who Congress believed were preying upon small farmers. The law (and similar state laws) was (were) enacted as a reaction to concerns that the Sherman Act would make farmer cooperatives that existed almost since the founding of the republic criminal enterprises. In a history that has parallels to the development of the labor exemption, farmer cooperatives were threatened by the Sherman Act, given protection by a provision in the Clayton Act, denied that protection as a result of narrowing construction by the courts, resulting in the enactment of additional protective legislation.[100] While the Act was intended to increase the bargaining power of small farmers, it was not "intended to vest cooperatives with unrestricted power to restrain trade or to achieve monopoly."[101] Accordingly, it gives the Secretary of Agriculture the power to bring an antitrust-type action if the co-op "monopolizes or restrains trade . . . to such an extent that the price of any agricultural product is unduly enhanced."[102] The Secretary has apparently not brought such actions, though there has been litigation under section 2 of the Sherman Act for predatory pricing that courts have held is not foreclosed under the Capper-Volstead Act.

Relying on Capper-Volstead, a similar though somewhat broader law titled the Fisherman's Collective Marketing Act,[103] and a sim-

97. 7 U.S.C. §§ 291–292.

98. *See, e.g.*, Christine Varney, *The Capper-Volstead Act, Agricultural Cooperatives and Antitrust Immunity*, ABA ANTITRUST SOURCE, Dec. 2010, at 1. For a comparison of the Capper-Volstead exception to antitrust liability and the labor exemption, see John Hanna, *Antitrust Immunities of Cooperative Associations*, 13 LAW & CONTEMP. PROBS. (1948).

99. Nat'l Broiler Mkg. Ass'n v. United States, 436 U.S. 816, 826 (1978).

100. *See* Varney, *supra* note 98, at 2.

101. Md. & Va. Milk Producers Ass'n v. United States, 362 U.S. 458, 467 (1960).

102. 7 U.S.C. § 292.

103. 15 U.S.C § 521 (permitting production restrictions arguably not protected under the Capper-Volstead Act).

ilar Maine state law, Maine lobstermen and women established a cooperative and associated with the Machinists Union. The union helped them form the coop and provided financial support as well as lobbying support in the Maine legislature. As a result, the Machinists Union is likely the only affiliate of the AFL-CIO that owns and operates a lobster pond, and the lobstermen and women (who plainly are independent contractors and not employees of any employer) acting collectively are in a better position to extract a higher price for their catch from their wholesalers and better advance their policy concerns at the Maine legislature.

Conclusion

Independent contractors are excluded from the definition of employee under the NLRA. Generally speaking, their collective actions and the actions of unions that would support them must operate without the protection of the labor exemption that shelters unions and employees from antitrust liability when they act collectively to further their economic interests. However, the law in this area is not without ambiguity and exceptions. When independent contractors operate in a unionized sector, when they are economically dependent upon one or a few purchasers of their services, when a state intervenes to permit unionization of independent contractor workers, or when they are agricultural workers, supportable arguments may be made that these workers should be allowed to unionize. Failing that, unions can still assist workers but must do so without engaging in conduct that violates the antitrust or labor laws.