Federal Trade Commission Enforcement Policy Statement on Exemption of Protected Labor Activity by Workers from Antitrust Liability[1]

I. Introduction

Congress enacted the Clayton and Norris-LaGuardia Acts in significant part to protect the ability of workers to organize and to collectively bargain over wages and labor conditions. Several provisions of these acts prevent courts from enjoining qualifying labor activity and shield such activity from antitrust liability. Collectively, these provisions are known as the labor exemption to the antitrust laws, and they shield from antitrust liability the conduct of bona fide labor organizations engaged in labor disputes—*i.e.*, organizing and bargaining over the terms and conditions of employment.

It has long been clear that employees who are directly hired by an employer are protected from antitrust liability by the labor exemption when they are organizing or bargaining with that employer over their compensation and/or working conditions. More recently, however, the rise of independent contracting, and of "gig work" in particular, has presented questions about the labor exemption's application to the organizing and bargaining of workers who are classified—or potentially misclassified—by a firm as independent contractors.[2] Particularly as gig workers contemplate efforts to organize or bargain collectively with platforms for the first time, they face a patchwork of cases regarding the exemption's application.

In this enforcement policy statement, the Commission clarifies its view that the labor exemption's application does not turn on whether a worker is formally classified by a firm as an independent contractor under the Fair Labor Standards Act ("FLSA"), the National Labor Relations Act ("NLRA"), tax law, state common law, or any other law. Rather, workers' organizing and collective bargaining activity may be protected from antitrust liability when what is at issue is the compensation for their labor or their working conditions. Workers engaged in such protected activity are not categorically beyond the scope of the labor exemption from antitrust liability simply because they do not have a formal employer-employee relationship with the firm with whom they seek to negotiate over the compensation for their labor or their working conditions.

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[1] This Policy Statement does not confer any rights on any person and does not operate to bind the FTC or the public. In any enforcement action, the Commission must prove the challenged act or practice violates one or more existing statutory or regulatory requirements. In addition, this Policy Statement does not preempt federal, state, or local laws. Compliance with those laws, however, will not necessarily preclude Commission law enforcement action under the FTC Act or other statutes. Pursuant to the Congressional Review Act (5 U.S.C. § 801 et seq.), the Office of Information and Regulatory Affairs designated this Policy Statement as not a "major rule," as defined by 5 U.S.C. § 804(2).

[2] *See, e.g.,* Rebecca K. Slaughter, Comm'r, Fed. Trade Comm., Comment Letter on Dep't of Labor Notice of Proposed Rulemaking re: Independent Contractor Status under the Fair Labor Standards Act (Oct. 26, 2020), https://www.ftc.gov/system/files/documents/public_statements/1582178/comment_of_commissioner_rebecca_kelly_slaughter_on_the_department_of_labor_proposed_rule_on_0.pdf.

II. Background

A. Enactment of the Labor Exemption from the Antitrust Laws

The labor exemption from the antitrust laws stems from several enactments in which Congress sought to broadly protect workers' ability to organize and to negotiate for better pay and working conditions. After Congress passed the Sherman Act in 1890, employers used the Act to challenge and disrupt the activities of labor unions. Indeed, twelve of the first thirteen successful antitrust lawsuits under the Sherman Act were brought against labor unions, not corporations.[3] In what was popularly known as the "Danbury Hatters' Case," the Supreme Court in 1908 enjoined employees of a Danbury, Connecticut hat manufacturer from unionizing, unanimously holding that organizations of laborers were not exempt from the Sherman Act.[4]

In response to such uses of the Sherman Act against organizing workers, Congress enacted Sections 6 and 20 of the Clayton Act in 1914,[5] creating what is known as the labor exemption to the antitrust laws. Section 6 of the Clayton Act provides that the "labor of a human being is not a commodity or article of commerce" and that the antitrust laws shall not be "construed to forbid the existence and operation of labor . . . organizations" or "to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects" of those organizations.[6]

Section 20 of the Clayton Act prohibits "restraining order[s] or injunction[s] . . . in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment," unless necessary to protect certain property interests.[7] It further prohibits "restraining order[s] or injunctions" that "prohibit any person or persons" from engaging in certain protected activities, including "ceasing to perform any work or labor," peacefully persuading others to "abstain from working," "ceasing to patronize" parties to a dispute, peacefully persuading others not to patronize parties to a dispute, peacefully and lawfully assembling, providing strike benefits, and "doing any act or

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[3] Edward Berman, LABOR AND THE SHERMAN ACT 3 (1930). *See also* Kate Andrias, Beyond the Labor Exemption: Labor's Antimonopoly Vision and the Fight for Greater Democracy 6 (2023) ("By one count, at least 4,300 injunctions were issued against union activity between 1880 and 1930.").

[4] *Loewe v. Lawlor*, 208 U.S. 274 (1908).

[5] Senator Ashurst specifically noted the "Danbury Hat" case as one of many "strained and harsh" judicial interpretations of the Sherman Act that militated for the adoption of explicit exemptions in the Clayton Act to protect laborers from antitrust enforcement. 51 Cong. Rec. 13663 (1914) (statement of Sen. Henry Ashurst). Senator Hollis similarly remarked that the Sherman Act had been "tortured into a meaning" that transformed a law "intended for the relief of the plain people . . . into an instrument for their oppression." *Id*. at 13967 (statement of Sen. Henry Hollis). *See generally* Alvaro M. Bedoya & Bryce Tuttle, *"Aiming at Dollars, Not Men": Recovering the Congressional Intent Behind the Labor Exemption to Antitrust Law,* 85 ANTITRUST L.J. 805, 809-13 (2024).

[6] 15 U.S.C. § 17 (1914).

[7] 29 U.S.C. § 52 (1914). Section 20 generally prohibits restraining orders or injunctions in cases "growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury" to specific property interests. The statute also enumerates a number of protected activities for which restraining orders or injunctions may not issue.

thing which might lawfully be done in the absence of such dispute by any party thereto."[8] Senator Ashurst referred to the labor provisions of the bill as the "laborer's bill of rights."[9]

Despite the broad language of the Clayton Act, courts construed Sections 6 and 20 narrowly and continued to issue injunctions and impose antitrust liability on labor unions' organizing and collective bargaining activity.[10] In response, Congress passed the Norris-LaGuardia Act in 1932, which expanded the labor exemption.[11] As the Supreme Court has explained, "[t]he underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction."[12]

The Norris-LaGuardia Act states that "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment."[13] Specifically, Section 2 of the Norris-LaGuardia Act declares "the public policy of the United States" as follows:

> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.][14]

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[8] *Id.*

[9] 51 Cong. Rec. 13663 (1914) (statement of Sen. Henry Ashurst).

[10] *See, e.g.,* 3 Julian O. von Kalinowinski, ANTITRUST LAWS AND TRADE REGULATION § 54.02(1) (collecting cases) ("[D]espite the statutes' broad terminology and the intent of Congress to exempt labor organizations from the antitrust laws, the courts strictly construed Sections 6 and 20 of the Clayton Act and continued to hold labor unions and their members liable under the Sherman Act," thus "weaken[ing]" Section 20 of the Clayton Act and "virtually nullify[ing]" Section 6 of the Act); *Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702, 712 (1982) (noting that the Supreme Court "unduly restricted the Clayton Act's labor exemption" after it was created).

[11] *See United States v. Hutcheson,* 312 U.S. 219, 231 (1941) ("whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct"); 15 U.S.C. § 17 (1914); 29 U.S.C. §§ 101–14 (1932).

[12] *Hutcheson*, 312 U.S. at 235-36. Congressman LaGuardia himself explained that judicial opinions following enactment of the Clayton Act had "willfully disobeyed the law," "emasculated it," "took out its meaning as intended by Congress," and "made the law absolutely destructive of the very intent of Congress." 75 Cong. Rec. 5478 (1932) (Statement of Rep. Fiorello LaGuardia).

[13] 29 U.S.C. § 102 (1932).

[14] *Id.*

Section 1 of the Norris-LaGuardia Act strips federal courts of jurisdiction "to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute" except in limited cases where necessary to prevent "substantial and irreparable injury to complainant's property" flowing from "unlawful acts."[15] It further provides that "nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy" quoted above.[16] Section 113(c) of the Act then defines "labor dispute" to include:

> any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.[17]

The Norris-LaGuardia Act further explains that in addition to encompassing disputes involving "employees of the same employer" and other scenarios, "[a] case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft or occupation; or have direct or indirect interests therein."[18]

Although the Norris-LaGuardia Act is phrased as a bar on judicial injunctions, the Supreme Court has long read it in conjunction with the Clayton Act provisions as establishing a labor exemption that operates as a general shield from antitrust liability.[19]

B. The Rise in Independent Contracting and Gig Work and Confusion Regarding the Labor Exemption's Application

Across the U.S. economy, firms are turning to independent contracting models to accomplish work previously performed under traditional direct hire employment models.[20] In particular, online gig platforms often seek to categorize their workers as independent contractors, even though in practice these firms may tightly prescribe their workers' tasks and compensation in ways that run counter to the promise of independence.[21] Additionally, many gig workers have

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[15] *Id.* §§ 101, 107.
[16] *Id.* § 101.
[17] *Id.* § 113(c); *see, e.g., Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n,* 457 U.S. 702, 709 (1982) (observing that the term "labor dispute" is defined "broadly" in Section 113(c)).
[18] 29 U.S.C. § 113(a) (1932); *see also id.* § 113(b).
[19] *United States v. Hutcheson*, 312 U.S. 219, 235 (1941) ("[I]t would be strange indeed" if Congress's "elaborate efforts to permit [activities related to labor disputes] failed to prevent criminal liability punishable with imprisonment and heavy fines. That is not the way to read the will of Congress, particularly when expressed by a statute which, as we have already indicated, is practically and historically one of a series of enactments touching one of the most sensitive national problems. Such legislation must not be read in a spirit of mutilating narrowness."); *see also id. at* 231 (noting that "whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text").
[20] *See, e.g.,* David Weil, Preparing for the Future of Work Through Understanding the Present of Work: A Fissured Workplace Perspective, Testimony before the U.S. House of Representatives Committee on Education and Labor Subcommittee on Workforce Protections and Subcommittee on Health, Employment, Labor, and Pensions, at 2 (Oct. 23, 2019).
[21] *See* FTC Policy Statement on Enforcement Related to Gig Work, at 4 (Sept. 15, 2022), https://www.ftc.gov/legal-library/browse/policy-statement-enforcement-related-gig-work.

lower incomes and may earn less than the minimum wage.[22] More than half of American gig workers report that the money they earn through the gig economy is essential or important for meeting their basic needs.[23]

Against this backdrop, some gig workers have begun contemplating forming unions to bargain with online gig platforms, giving rise to questions about the protections afforded to such activity under federal law. To date, courts have not addressed whether organizing and bargaining activities of gig workers are shielded from antitrust liability by the labor exemption, and there is a patchwork of cases addressing whether independent contractors are excluded from the exemption's protections against antitrust liability. The Commission accordingly seeks to clarify its enforcement policy relating to the labor exemption from antitrust liability.

The Commission notes that while this enforcement policy statement reflects its view of the correct application of the labor exemption, it does not bind other potential antitrust litigants, such as private plaintiffs or other enforcement agencies. Accordingly, the Commission's policy not to challenge labor organizing or bargaining activity by independent contractors that the Commission believes to be properly protected under the labor exemption does not provide workers any guarantee against antitrust claims by others. Additionally, the Commission notes that this enforcement policy statement addresses only the labor exemption from antitrust liability. This policy statement thus does not address the legal status of organizing, bargaining, or other labor activity by independent contractors under the National Labor Relations Act or any other statute.

III. Analysis

The protection of all workers from antitrust liability when they are engaged in protected labor activities is firmly grounded in the statutory text of the Clayton and Norris-LaGuardia Acts, is consistent with existing case law, and constitutes sound enforcement policy reflective of the original meaning of the labor exemption.

A. Workers Engaged in Protected Labor Activity Are Exempt from Antitrust Liability Even if Classified (or Misclassified) as Independent Contractors

The Supreme Court has explained that the labor exemption's definition of a protected "'labor dispute' must not be narrowly construed because the statutory definition itself is extremely broad and because Congress deliberately included a broad definition to overrule judicial decisions that had unduly restricted the Clayton Act's labor exemption from the antitrust laws."[24] Indeed, several aspects of the plain text of the labor exemption make clear that the

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[22] *See* Ben Zipperer, Celine McNicholas, Margaret Poydock, Daniel Schneider, and Kristen Harknett, Econ. Pol'y Inst., *National Survey of Gig Workers Paints a Picture of Poor Working Conditions*, at 1 (June 1, 2022) ("[A] survey of gig workers reveals that these workers often are paid low wages, in some instances less than the minimum wage [and] they face economic insecurity at high rates . . . ."); *see also* Monica Anderson, Colleen McClain, Michelle Faverio, and Risa Gelles-Watnick, Pew Research Center, *The State of Gig Work in 2021*, at 4–5, 7, 23 (Dec. 8, 2021); Gallup, *Gallup's Perspective on the Gig Economy and Alternative Work Arrangements*, at 8 (2018).

[23] *See* Anderson et al., *supra* n. 22, at 31 (reporting that 58% of current or recent gig workers said that money earned via gig jobs has been "essential or important for meeting their basic needs").

[24] *Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702, 712 (1982); *see also Bowater SS Co. v. Patterson*, 303 F.2d 369, 383 (2nd Cir. 1962) (cautioning against allowing formal legal distinctions imported

exemption's protections are not limited to workers who are formally classified as the direct employee of an employer.

First, the original Clayton Act labor exemption provisions protect not only "employees," but also "any person or persons."[25] And the subsequently enacted Norris-LaGuardia labor exemption provisions extend to the "individual unorganized worker,"[26] and to "persons engaged in the same industry, trade, craft, or occupation."[27] As the Supreme Court has explained in another context, "'workers' [is] a term that everyone agrees easily embraces independent contractors."[28]

In any event, even were the labor exemption limited to "employees," as used in statutes enacted in the early 20th century, that term often had a broader meaning than that used in the common law to differentiate employees from independent contractors.[29] For that reason, when interpreting the term "employee" in the original versions of the NLRA and the FLSA, the Supreme Court construed the term to be broader than the workers who would have constituted employees under the common law.[30] For example, interpreting the term "employee" in the original version of the NLRA, the Court rejected the argument that newsboys classified as independent contractors under common law tests were unprotected.[31] Rather, it held that where "the economic facts of the relation make it more nearly one of employment than of independent business enterprise . . . those characteristics may outweigh technical legal classification for purposes unrelated to [the NLRA's] objectives and bring the relation within its protections."[32]

Congress later overruled the Court's expansive interpretation of "employee" in the NLRA (but not the FLSA) by expressly exempting "independent contractors" from the definition of "employee" in the NLRA in 1947.[33] Congress similarly amended the Social Security Act to expressly exclude independent contractors.[34] However, never in the intervening decades did it adopt such a limitation on the labor exemption to the antitrust laws.

Second, the definition of "labor dispute" adopted in the Norris-LaGuardia Act expressly provides that the exemption's application does not turn on formalistic "employer and employee"

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from other areas of law to undermine the public policy set forth in Norris-LaGuardia, even though those legal distinctions might be accorded deference in other legal settings: "the policy behind the Norris-LaGuardia Act was a strong one; we cannot think Congress would have meant this to be defeated by" technical legal distinctions between corporate entities, "however much these might properly be respected for other purposes").

[25] 29 U.S.C. § 52 (1914).

[26] *Id.* § 102 (declaring public policy); *see also id.* § 101 (precluding orders "contrary to the public policy declared").

[27] *Id.* § 113(a).

[28] *New Prime Inc. v. Oliveira,* 586 U.S. 105, 116 (2019).

[29] *See NLRB v. Hearst Publications*, *Inc.*, 322 U.S. 111, 120 (1944).

[30] *See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) (holding that definitions of "employee," "employer," and "employ" in the FLSA were "comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category"); *Hearst Publications*, 322 U.S. at 126 (holding that "[t]he mischief at which the [National Labor Relations] Act is aimed and the remedies it offers are not confined exclusively to 'employees' within the traditional legal distinctions separating them from 'independent contractors'").

[31] *Hearst Publications*, 322 U.S. at 120-26.

[32] *Id.* at 128.

[33] Labor Management Relations Act (Taft-Hartley Act) § 2(3), 29 U.S.C. § 152(3) (1947).

[34] Social Security Act of 1948, ch. 468, § 1(a), 62 Stat. 438 (1948).

relationships between the disputants. Instead, disputes are covered "regardless of whether or not the disputants stand in the proximate relation of employer and employee."[35] The definition of "labor dispute" thus "establishe[s] that the allowable area of union activity was not to be restricted to an immediate employer-employee relation."[36]

The Supreme Court has accordingly held exempt from antitrust liability the labor organizing activities of persons who were not employees of the firm whose labor practices they sought to change. For example, in *New Negro Alliance v. Sanitary Grocery Co*., the Court found that alliance members who picketed a grocery store to press the store to hire Black workers were "persons interested" in a "labor dispute" despite the fact that they were not employees of the store.[37] And in *Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc.*, the Court held that the labor exemption protected members of a drivers' union who picketed dairies that did not use union labor, because the drivers were "engaged in the same industry, trade, craft, or occupation" as the dairies, "namely the milk industry."[38]

Third, the labor exemption's use of the phrase "terms or conditions of employment" to define covered labor disputes further indicates that its protections do not categorically exclude independent contractors, because the original meaning of "employment" in the early 20th century did not categorically exclude independent contracting arrangements.

In *New Prime Inc. v. Oliveira*, the Supreme Court considered whether the Federal Arbitration Act ("FAA") applied and required arbitration of a dispute over alleged failure to pay the minimum wage to a driver labeled by the parties' contracts as an independent contractor.[39] The Court analyzed the original meaning of the phrase "contracts of employment" in an exception to the FAA—which Congress enacted in 1925, just seven years before the Norris-LaGuardia Act. The Court explained that although "[t]o many lawyerly ears today, the term 'contracts of employment' might call to mind only agreements between employers and employees (or what the common law sometimes called masters and servants)[,] . . . this modern intuition isn't easily squared with evidence of the term's meaning at the time of the Act's adoption in 1925."[40] Rather, examining dictionaries spanning from 1891 and 1933, the Court held that the original meaning of "contracts of employment" referred to "agreements to perform work," and was not limited to "agreements between employers and employees (or what the common law sometimes called masters and servants)."[41] Accordingly, the Court held that the exception to the FAA for certain "contracts of employment" applied to exempt the wage dispute from arbitration, even though the parties assumed that the relevant contract "establish[ed] only an independent contractor relationship."[42]

By the same reasoning, the original meaning of "terms or conditions of employment" in the labor exemption encompasses disputes over wages or job conditions, irrespective of whether

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[35] 29 U.S.C. § 113(c) (1932).
[36] *Am. Fed'n of Musicians v. Carroll*, 391 U.S. 99, 106 (1968).
[37] 303 U.S. 552, 560-61 (1938).
[38] 311 U.S. 91, 97 (1940).
[39] 586 U.S. 105, 108-09 (2019).
[40] *Id.* at 114.
[41] *Id.*
[42] *Id.* at 113-14, 121.

the worker is classified (or misclassified) as an independent contractor. Nothing in the legislative history of the Clayton and Norris-LaGuardia Acts suggests Congress intended the phrase to have anything other than its ordinary meaning at the time and, as elaborated above, several other aspects of the labor exemption's plain text also indicate that the exemption is not limited to disputes involving formal, direct employer-employee relationships.

The First Circuit recently reached a similar conclusion and held that the labor exemption does not categorically exclude independent contractors from its protections.[43] In *Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc.*, the First Circuit considered claims by horse owners alleging that thirty-seven horse jockeys' refusal to race constituted a group boycott in violation of federal antitrust laws.[44] Examining the text and history of the labor exemption, the First Circuit held that "[t]he district court erred when it concluded that the jockeys' alleged independent-contractor status categorically meant they were ineligible for the [labor] exemption," reasoning that "by the express text of the Norris-LaGuardia Act, a labor dispute may exist 'regardless of whether or not the disputants stand in the proximate relation of employer and employee.'"[45] The First Circuit further noted Supreme Court cases rejecting "interpretation of the exemption limited to employees alone."[46] The court concluded that, notwithstanding that the jockeys were independent contractors, they "sought higher wages and safer working conditions, making this a core labor dispute [to which] the labor-dispute exemption applies."[47]

The Commission agrees with the First Circuit. The Commission acknowledges that some cases have held particular independent contractors or other third-parties are unprotected by the labor exemption. However, such cases do not hold that all independent contractors are *categorically* beyond the scope of the labor exemption due to their formal status as independent contractors. Rather, they examine the specific facts of a given dispute and the trade relationships involved and reject application of the exemption where the core of the dispute does not involve the wages or working conditions of a worker who provides labor services.

For example, in *Columbia River Packers Assoc. v. Hinton*, the Supreme Court rejected application of the exemption to a group of independent contractor fishermen who were "an association of commodity sellers," holding that the Norris-LaGuardia Act "was not intended to have application to disputes over the sales of commodities."[48] Courts have similarly rejected application of the labor exemption to disputes regarding the sale of other commodities,[49] or

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[43] *Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc.,* 30 F.4th 306, 314 (1st Cir. 2022), *cert. denied*, 143 S. Ct. 631 (2023).
[44] *Id.* at 311.
[45] *Id.* at 314.
[46] *Id.* (citing *New Negro Alliance v. Sanitary Grocery Co*., 303 U.S. 522, 560-61 (1938); *Am. Fed'n of Musicians v. Carroll*, 391 U.S. 99, 111-14 (1968); *H.A. Artists & Assocs. v. Actors' Equity Ass'n*, 451 U.S. 704, 718, 721-22 (1981)).
[47] *Id.*
[48] 315 U.S. 143, 145 & n.3 (1942).
[49] *L.A. Meat & Provision Drivers Union, Loc. 626 v. United States*, 371 U.S. 94, 101-02 (1962) ("as in *Columbia River Assn*., the grease peddlers were sellers of commodities"; they were businessmen who attempted to "immunize themselves from [the antitrust laws] by the simple expedient of calling themselves . . . a labor union").

regarding the terms of sale of a finished product.[50]

Courts have also rejected application of the exemption where the party seeking the exemption was best characterized as an independent business pursuing its business interests, rather than as a worker who provides labor services seeking to improve his or her compensation or labor conditions. For example, courts have rejected application to disputes involving "an entrepreneur, not a laborer,"[51] to "a businessman organization" seeking a better "return on capital investment,"[52] and to "an association of individual practitioners each exercising his calling as an independent unit."[53] These cases are all consistent with the First Circuit's holding that the core question is "whether what is at issue is compensation for [a worker's] labor" or working conditions.[54] As such, owners of independent businesses that sell finished products or are primarily concerned with a return on capital investments are often appropriately characterized as independent contractors and will generally be outside the labor exemption's protections. For example, highly paid professionals who operate their own businesses would often be more appropriately characterized as entrepreneurs pursuing business interests as opposed to workers who provide labor services. However, that does not mean that the labor exemption's application stands or falls with whether a worker is formally classified (or misclassified) as an independent contractor.

To further dispel confusion, two other cases bear mention. In *H.A. Artists & Associates, Inc. v. Actors' Equity Assoc.*, the Supreme Court held that the Equity actors' union was protected by the labor exemption when it sought to regulate the conduct of independent contractor agents in order to protect actors' compensation.[55] In a footnote, the Court stated, "[o]f course, a party seeking refuge in the statutory exemption must be a bona fide labor organization, and not an independent contractor or entrepreneur."[56] However, this statement was mere dicta because, as the Court explained, there was "no dispute" that the Equity union seeking the labor exemption's protections was a bona fide labor group.[57] In any event, the Commission does not read this dicta as opining on whether *workers* who provide labor services would be unprotected by the labor

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[50] *Ring v. Spina*, 148 F.2d 647, 652 (2d Cir. 1945) (dispute concerned "the terms at which a finished product or certain rights therein may be sold. And no wages or working conditions of any group of employees are directly dependent on these terms.").

[51] *United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460, 463-464 (1949) (holding labor exemption inapplicable to stitching contractors who turned fabric supplied by jobbers into completed garments and shipped them directly to the customer, because "although he furnishes chiefly labor, [he] also utilizes the labor through machines and has his rentals, capital costs, overhead, and profits"); *see also United States v. Nat'l Ass'n of Real Est. Bds.*, 339 U.S. 485, 490 (1950) (real estate board members were "entrepreneurs . . . each is in business on his own").

[52] *U.S. Steel Corp. v. Fraternal Ass'n of Steelhaulers*, 431 F.2d 1046, 1049 (3d Cir. 1970) (holding labor exemption inapplicable to truck owner-operators who were "demand[ing] . . . a more profitable operation of [their] equipment" rather than "a raise [that] goes to the driver").

[53] *Am. Med. Ass'n v. United States*, 317 U.S. 519, 536 (1943) (holding that independent physician practices who operated on a fee-for-service model not protected by labor exemption where they objected to a nonprofit hospital's "method of doing business" using a risk-sharing prepayment model; independent physician practices "were interested in the terms and conditions of the employment only in the sense that they desired wholly to prevent Group Health from functioning by having employes").

[54] *Confederación Hípica de Puerto Rico v. Confederación de Jinetes Puertorriqueños, Inc.*, 30 F.4th 306, 314 (1st Cir. 2022), *cert. denied*, 143 S. Ct. 631 (2023).

[55] 451 U.S. 704, 720 (1981).

[56] *Id.* at 717 n.20.

[57] *Id.*

exemption if classified (or misclassified) as independent contractors. Rather, in referring to "independent contractor or entrepreneur[s]," the Commission believes the Court was referring to the types of business entities and interests discussed above that would indeed be beyond the scope of the labor exemption because they do not reflect a worker who provides labor services seeking better compensation or working conditions (*e.g.*, businesses negotiating over finished products or highly paid professionals who operate their own businesses furthering other non-labor interests).

In another case, *Taylor v. Local No. 7, International Union of Journeymen Horseshoers of the United States & Canada (AFL-CIO)*, the Fourth Circuit held the labor exemption did not protect the conduct of "independent businessmen" horseshoers who charged an agreed-upon fixed price for shoeing a horse (for both the horseshoe and the service) and who boycotted those who did not use union horseshoers.[58] The Fourth Circuit reversed the district court's holding that the horseshoers were protected by the labor exemption because they were employees. In rejecting the district court's reasoning, the Fourth Circuit applied the NLRA's test for independent contractor status—*i.e.*, the test Congress adopted when it enacted an express exemption to the NLRA for independent contractor status.[59] The Fourth Circuit found the horseshoers to be independent contractors because, among other things, they controlled when and how much to work, controlled their own horseshoeing process, chose and owned their own tools, controlled their own prices and the risk of profit and loss, did not work regular hours for one employer, chose whether to hire their own employees, and regarded themselves as independent contractors.[60]

The Fourth Circuit did not, however, find the horseshoers' independent contractor status under the NLRA test dispositive of the labor exemption's application, acknowledging that the exemption can apply to disputes in which the parties to the dispute do not themselves stand in the relationship of employer and employee.[61] Instead, the court went on to reject application of the exemption to the horseshoers' conduct because it found that there was no employer-employee relationship involved in the dispute—whether extant or prospective.[62] The Fourth Circuit explained, "the horseshoers are not attempting to force the owners and trainers to use any of them as employees, nor are the unions attempting to organize any employees of the trainers or owners."[63] Rather, "[t]he only interests [they] sought to . . . advance[]" through their boycott and price-fixing were "of those independent horseshoers who render services to trainers and owners for a certain fee, unilaterally fixed, per horse."[64]

Accordingly, *Taylor* did not confront a scenario, like that in *Confederación Hípica de Puerto Rico*, in which independent contractors who provide labor services engage in a dispute over their compensation and job conditions. Nor did *Taylor* hold that the conduct of a worker currently classified (or misclassified) as an independent contractor can never be protected by the labor exemption. To the contrary, the Fourth Circuit's decision implied that it would have found

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[58] 353 F.2d 593, 595-606 (4th Cir. 1965).
[59] *See id.* at 595-601 (applying test from *NLRB v. A.S. Abell Co.*, 327 F.2d 1 (4th Cir. 1964)).
[60] *Id.* at 599-600.
[61] *Id.* at 605-06.
[62] *Id.*
[63] *Id.* at 606.
[64] *Id*.

the horseshoers' conduct protected were they organizing for the purpose of becoming directly hired union employees.[65] Moreover, although *Taylor* applies the NLRA test for independent contractor status in the course of rejecting the district court's reasoning, it never addressed the fact that the Clayton and Norris-LaGuardia Acts lack the express independent contractor exemption present in the NLRA.

For the forgoing reasons, the Commission believes that the First Circuit's decision in *Confederación Hípica de Puerto Rico* is correct and that workers who provide labor services and that are engaged in protected labor activities can be shielded by the labor exemption, even if formally classified (or misclassified) as independent contractors. As the First Circuit explained, this understanding is consistent with the plain text and original meaning of the Clayton and Norris-LaGuardia Acts, as well as with judicial decisions applying the labor exemption.[66]

B. Proper Application of the Labor Exemption

As explained above, the labor exemption's application does not turn on how a worker is classified (or misclassified) under other laws. Rather, applying Supreme Court precedents, the Commission assesses whether the exemption applies based on "whether this is a 'case involving or growing out of any labor dispute,'" which is "broadly defin[ed] . . . to include 'any controversy concerning terms or conditions of employment.'"[67] A dispute concerning "the hours, wages, job security, and working conditions" of workers who provide labor services qualifies as "concerning terms or conditions of employment."[68] In contrast, disputes concerning the price of commodities or other finished products are not protected.[69] Accordingly, with respect to organizing or bargaining by workers who provide labor services classified (or misclassified) as independent contractors, "the key question" is generally "whether what is at issue is compensation for their labor" or their working conditions.[70]

Note that for a labor organization such as a union to be protected under the labor exemption, it must be acting in its self-interest and not in combination with non-labor groups.[71] Formal recognition as a union is not necessary for a labor group to be considered a bona fide labor organization.[72] Moreover, the protected conduct of a labor organization such as a union

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[65] *Id.* ("[T]he horseshoers are not attempting to force the owners and trainers to use any of them as employees . . . .").
[66] For this reason, the Commission would exercise its enforcement discretion not to pursue actions inconsistent with this policy statement even if another circuit court (or district court) were in the future to disagree with the First Circuit.
[67] *Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702, 709 (1982) (quoting 29 U.S.C. § 113(c)).
[68] *Am. Fed'n of Musicians v. Carroll*, 391 U.S. 99, 106 (1968).
[69] *See, e.g.*, *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143, 145, 147 (1942) (explaining that the Norris-LaGuardia Act "was not intended to have application to disputes over the sale of commodities" and that a dispute "relating solely to the sale of fish," did not qualify for protection because it "does not place in controversy the wages or hours or other terms and conditions of employment").
[70] *Confederación Hípica de Puerto Rico v. Confederación de Jinetes Puertorriqueños, Inc.*, 30 F.4th 306, 314 (1st Cir. 2022), *cert. denied*, 143 S. Ct. 631 (2023).
[71] *United States v. Hutcheson*, 312 U.S. 219, 232 (1941).
[72] *See, e.g., New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 522, 555(1938) (applying labor exemption to actions by a non-union organization founded for the "mutual improvement of its members and the promotion of civic, educational, benevolent, and charitable enterprises"); *Brady v. NFL*, 644 F.3d 661, 670-73 (8th Cir. 2011) (rejecting argument that the labor exemption applies only to disputes involving recognized labor organizations); *see*

does not lose its protected status merely because the labor organization seeks to work with independent contractors. Independent contractors can constitute "labor groups" such that when a union works in concert with them on legitimate labor interests (such as compensation and/or job conditions), the union's activity can still be protected by the labor exemption.[73] The test for whether the "independent contractors [are] a 'labor group' and party to a labor dispute" is "the presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors."[74] In contrast, "antitrust immunity is forfeited when a union combines with one or more employers in an effort to restraint trade."[75]

IV. Conclusion

The Commission believes that workers who provide labor services are not subject to antitrust liability when engaging in protected collective action—such as seeking better compensation and job conditions—even if the firm whose labor practices the workers seek to improve classifies (or misclassifies) them as independent contractors. This view is not only the best reading of the labor exemption's text and history, but it is also sound policy. As the Norris-LaGuardia Act recognizes, workers must be free to organize and to bargain collectively as a counterbalance to the power of "owners of property . . . organize[d] in the corporate and other forms of ownership association."[76] That is no less true simply because a firm seeks to classify such workers as independent contractors; for example, many gig workers face significant power imbalances in securing adequate compensation and safe, secure working conditions.[77]

Reading the labor exemption as categorically excluding all independent contractors would give employers both the incentive and the opportunity to exploit such asymmetries. Under such a reading, firms could absolve themselves of responsibilities under employment and labor laws by classifying their workforce as independent contractors. Firms could also simultaneously wield antitrust law to prevent those same workers from organizing to attain the rights afforded to employees under such laws. Additionally, businesses would have an opportunity and incentive to classify (or misclassify) their workers as independent contractors to suppress wages and to gain an unfair advantage against competitors who provide better compensation and job conditions to workers.[78] Just as Congress did nearly a century ago, the Commission emphasizes that the

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also NLRB v. Wash. Aluminum Co., 370 U.S. 9, 14-15 (1962) (finding a walkout by unorganized workers who lacked a formal bargaining representative to be protected activity related to a "labor dispute" under the National Labor Relations Act).

[73] *See H. A. Artists & Assocs. v. Actors' Equity Ass'n*, 451 U.S. 704, 707 (1981) (holding actors' union did not forfeit immunity by combining with a non-labor group when independent contractor theatrical agents agreed to become franchised by the union; franchise restrictions protected the wage structure the union negotiated with theatre producers); *Am. Fed'n of Musicians,* 391 U.S. at 105 (holding that "involvement of the orchestra leaders" who were "employers and independent contractors" did not "create[] a combination or conspiracy with a 'non-labor' group which violates the Sherman Act").

[74] *Am. Fed'n of Musicians,* 391 U.S. at 105-106.

[75] *H. A. Artists*, 451 U.S. at 716.

[76] 29 U.S.C. § 102 (1914).

[77] *See* FTC Policy Statement on Enforcement Related to Gig Work, at 5-6 (Sept. 15, 2022), https://www.ftc.gov/legal-library/browse/policy-statement-enforcement-related-gig-work.

[78] Alvaro Bedoya & Max M. Miller, *"Overawed": Worker Misclassification as a Potential Unfair Method of Competition*, 44 YALE L. & POL'Y REV. 333, 345-348 (Fall 2024 forthcoming).

antitrust laws should not be used to disrupt collective action by workers who provide labor services to improve their terms and conditions of employment. Accordingly, the Commission will not challenge collective action by independent contractors who provide labor services and are seeking better compensation and job conditions because such activities are exempted under the Clayton Act and the Norris-LaGuardia Act.