

AVENUES FOR GIG WORKER COLLECTIVE ACTION AFTER
JINETES

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*Gig workers constitute an ever-increasing share of the American workforce, yet they are not afforded the rights to strike and bargain collectively under the National Labor Relations Act (NLRA) due to their independent contractor status. Independent contractors who attempt to act collectively face antitrust liability, whereas employees who are covered by the NLRA enjoy an antitrust exemption for the same collective action, known as the “labor exemption.” Observers have speculated that the First Circuit, in the recent case *Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc. (Jinetes)*, 30 F.4th 306 (1st Cir. 2022), has begun to remedy the exclusion of gig workers from the labor exemption by holding that workers engaged in a labor dispute may benefit from the exemption regardless of their employment status.*

*This Comment argues that courts following the First Circuit’s lead may afford the *Jinetes* reasoning either a narrow or a broad interpretation and that the latter should be adopted because it would promote gig worker collective action. Under the narrow interpretation, most gig workers are still excluded from the labor exemption and face many of the same challenges as before. Under the broad interpretation, gig workers may enjoy new organizing avenues through striking, which has been successful for gig workers internationally, and through state and local regulatory frameworks, which have succumbed to antitrust scrutiny in the past. The contrasting interpretations reflect competing approaches to the antitrust laws. As the modalities of work change, so too should the understanding of the antitrust labor exemption.*

INTRODUCTION

As work shifts away from the traditional employer–employee relationship,¹ alternative forms of organizing are more important than

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1. See André Dua, Kweilin Ellingrud, Bryan Hancock, Ryan Luby, Anu Madgavkar & Sarah Pemberton, *Freelance, Side Hustles, and Gigs: Many More Americans Have Become Independent Workers*, McKinsey & Co. (Aug. 23, 2022), <https://www.mckinsey.com/>

ever. The COVID-19 pandemic has shown that workers rely on their employers to provide workplace safety measures,² job and income stability,³ and health insurance benefits,⁴ especially in times of crisis. Yet with more workers taking part in the gig economy,⁵ these assurances are becoming harder to secure. Indeed, roughly half of gig workers feel that their gig platforms do not adequately provide unemployment, health care, and paid leave benefits.⁶ More than a third of gig workers say they have been harassed or have felt unsafe at work.⁷ With one in six Americans reporting that they have earned money from an online gig platform, these

featured-insights/sustainable-inclusive-growth/future-of-america/freelance-side-hustles-and-gigs-many-more-americans-have-become-independent-workers [https://perma.cc/Z5HS-D5W8] (finding that 36% of employed survey respondents identified as independent workers in 2022 compared to 27% in 2016, and attributing the growth to the proliferation of digital platforms, pandemic volatility driving employers away from permanent workforces, and economic issues); see also James Manyika, Susan Lund, Jacques Bughin, Kelsey Robinson, Jan Mischke & Deepa Mahajan, McKinsey & Co., *Independent Work: Choice, Necessity, and the Gig Economy 1* (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/8K9K-C43D] (“Independent work has significant growth potential in the years ahead, based on the stated aspirations of individuals and growing demand for services from consumers and organizations alike. This shift could have real economic benefits by raising labor force participation, stimulating consumption, providing opportunities for the unemployed, and boosting productivity.”).

2. See Katherine J. Igoe, *The Changing Face of Worker Safety, Health, and Well-Being in a Post-Pandemic Future*, Harv. T.H. Chan Sch. of Pub. Health (Mar. 7, 2022), https://www.hsph.harvard.edu/ecpe/the-changing-face-of-worker-safety-health-and-well-being-in-a-post-pandemic-future/ [https://perma.cc/7LRH-TDW9] (addressing worker safety adaptations in response to the pandemic and technological changes).

3. See ILO & OECD, *The Impact of the COVID-19 Pandemic on Jobs and Incomes in G20 Economies 22–23* (2020), https://www.ilo.org/wcmsp5/groups/public/-dgreports/-cabinet/documents/publication/wcms_756331.pdf [https://perma.cc/6KS3-P7EH] (explaining the importance of paid sick leave for income security during sickness).

4. See M. Kate Bundorf, Sumedha Gupta & Christine Kim, *Trends in US Health Insurance Coverage During the COVID-19 Pandemic*, 2 *JAMA Health Forum*, no. 9, art. 2487, 2021, at 1, 6, https://jamanetwork.com/journals/jama-health-forum/articlepdf/2783874/bundorf_2021_oi_210041_1630352209.01202.pdf [https://perma.cc/C35H-PS5Z] (noting that between April 23 and July 21, 2020, more than 2.7 million people lost health insurance in the United States, although Medicaid and Affordable Care Act health insurance exchanges were able to cover much of the losses).

5. See Lydia DePillis, *If the Job Market Is So Good, Why Is Gig Work Thriving?*, *N.Y. Times* (Aug. 15, 2022), https://www.nytimes.com/2022/08/15/business/economy/gig-work.html (on file with the *Columbia Law Review*) (last updated June 22, 2023).

6. Monica Anderson, Colleen McClain, Michelle Faverio & Risa Gelles-Watnick, *Pew Rsch. Ctr., The State of Gig Work in 2021*, at 10 (2021), https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2021/12/PI_2021.12.08_Gig-Work_FINAL.pdf [https://perma.cc/DBB3-872C] (finding that 46% of workers say they have been treated unfairly in relation to benefits).

7. *Id.* at 36 (finding that 37% of workers reported being treated rudely and 35% reported feeling unsafe).

inadequacies affect a broad swath of the population but disproportionately impact young, Hispanic, and low-income workers.⁸

One way that workers have historically remedied precarity in the workplace is through collective action.⁹ Workers who coordinate their efforts and negotiate collectively with their shared employer are better positioned to determine the terms and conditions of their employment.¹⁰ This option is not available to gig workers, however, who are typically classified as independent contractors rather than employees and are thus excluded from the striking and collective bargaining protections of the National Labor Relations Act (NLRA), which apply only to employees.¹¹ The law treats gig workers as independent businesspeople, so raising wages through collective bargaining is considered price-fixing, and striking a gig platform is considered a group boycott—both per se violations of section 1 of the Sherman Act.¹² Gig workers who do attempt to act collectively therefore are likely to face antitrust liability.¹³ Workers have long been exempted from antitrust liability through statutory carveouts from the antitrust laws, collectively known as the “labor exemption,”¹⁴ but courts

8. *Id.* at 18 (finding that 30% of workers aged eighteen to twenty-nine, 30% of Hispanic workers, and 25% of low-income workers have worked for an online gig platform, as compared to 16% of Americans generally).

9. See, e.g., Charles B. Craver, *Why Labor Unions Must [and Can] Survive*, 1 U. Pa. J. Lab. & Emp. L. 15, 20 (1998) (explaining that unionization and collective bargaining in the twentieth century led to increased wages, fringe benefits, and just cause protection for unionized workers, as well as improved conditions in nonunion workplaces). Additionally, collective action by workers has led to the passage of federal, state, and local wage and hour laws and workplace health and safety laws. Alexander Hertel-Fernandez, *Collective Action, Law, and the Fragmented Development of the American Labor Movement*, Stone Ctr. on Socio-Econ. Ineq. (Jan. 19, 2022), <https://stonecenter.gc.cuny.edu/collective-action-law-and-the-fragmented-development-of-the-american-labor-movement/> [https://perma.cc/Y5ER-Z2WL].

10. See Richard B. Freeman & James L. Medoff, *What Do Unions Do?* 94–110 (1984) (arguing that when workers are able to demand higher wages and benefits, workplace safety measures, and formalized management decisions through a union, rather than by exiting the firm, unionized workers gain better employment terms compared to nonunion workers, particularly for lower-paid workers); Jake Rosenfeld, *What Unions No Longer Do* 1–9 (2014) (arguing that declining union density is responsible for growing economic inequality and lower wages, particularly for immigrants and Black Americans).

11. 29 U.S.C. § 152(3) (2018).

12. See 15 U.S.C. § 1 (2018) (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 212–13 (1940) (holding that a conspiracy to fix prices is illegal despite the reasonableness of the prices); see also 58 C.J.S. Monopolies § 69 (2023).

13. See 58 C.J.S. Monopolies, *supra* note 12, § 69.

14. See 15 U.S.C. § 17 (“Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations . . . nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.”); see also 29 U.S.C. § 52 (“No restraining order or injunction shall be granted . . . in any case between an employer and

have traditionally excluded independent contractors from this exemption.¹⁵

The First Circuit in the recent case *Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc. (Jinetes)* made a step toward including gig workers in the exemption by holding that workers engaged in a labor dispute may benefit from the exemption regardless of their employment status.¹⁶ Courts in the First Circuit may construe this holding either narrowly or broadly, and other courts may similarly choose to adopt narrow or broad interpretations of the reasoning—or ignore it altogether. The scope and breadth of this interpretation will largely determine the policy effects of *Jinetes*. If the case is interpreted narrowly, most gig workers would still be excluded from the antitrust labor exemption, and their organizing options would be accordingly limited.¹⁷ If the case is interpreted broadly, not only would gig workers be able to strike and collectively bargain without inviting antitrust lawsuits, but states and municipalities would be able to enact affirmative protections granting these rights to gig workers.¹⁸ These state and local laws could protect workers from being fired or disciplined for engaging in collective action and even establish sectoral bargaining frameworks to set industry-wide standards.¹⁹

Part I of this Comment describes the contours of the labor exemption and explains how *Jinetes* builds on prior opinions. Part II explains how the reasoning in *Jinetes*, by eschewing the question of employment status altogether, opens the decision up to a narrow interpretation that in practice aligns with courts’ prior jurisprudence on the scope of the labor exemption. Part III argues instead, on policy grounds, for a broad interpretation of the *Jinetes* holding that expands the organizing terrain for gig workers.

I. THE ANTITRUST LABOR EXEMPTION AND THE *JINETES* APPROACH

The Sherman Antitrust Act of 1890 aims to promote competition by prohibiting monopolies and agreements that restrain trade.²⁰ While

employees . . . involving, or growing out of, a dispute concerning terms or conditions of employment . . .”).

15. See, e.g., *Columbia River Packers Ass’n v. Hinton*, 315 U.S. 143, 145–47 (1942) (holding that a dispute between independent fishermen and a cannery was not a “labor dispute” within the meaning of the Norris–LaGuardia Act, a statutory pillar of the labor exemption).

16. *Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc.*, 30 F.4th 306, 316 (1st Cir. 2022) (holding that disputes about compensation may be protected “labor dispute[s],” even in nontraditional employment contexts).

17. See *infra* Part II.

18. See *infra* Part III.

19. See *infra* Part III.

20. See 15 U.S.C. §§ 1–2 (2018).

individual legislators had different perspectives, the legislators who passed the Sherman Act showed a broad-based concern for containing the domination of large corporations, democratically allocating economic coordination rights, and institutionalizing norms of fair competition.²¹ But for decades after its passage, the Sherman Act was frequently used against workers with a stifling effect.²² Gilded Age courts often issued labor injunctions to end union activity on the basis of, among other things, antitrust liability.²³ These courts viewed labor unions as groups of workers seeking to restrain competition in the labor market by fixing prices for their labor through standardized wages and refusing to deal with certain employers through strikes.²⁴ Governments' ability to regulate employers was hamstrung too in the early twentieth-century *Lochner* era, as courts struck down state and local laws setting minimum labor standards, including wage and hour laws and even child labor laws, in the name of the freedom to contract.²⁵ Without the ability to act collectively without running afoul

21. See Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 *Yale L.J.* 175, 204–06 (2021) (arguing that the intent of the Sherman Act was to disperse economic coordination rights). But see Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 *J.L. & Econ.* 7, 10 (1966) (arguing that the sole intent of the Sherman Act was to promote consumer welfare).

This Comment assumes that the Sherman Act intended to remedy vast concentrations of economic power, a reading evidenced by congressional debate around the passage of the Act. For example, Senator James George of Mississippi, a key legislator in the formation of the Sherman Act, observed in 1889 that he hoped passage of the Act would “put an end forever to the practice, now becoming too common, of large corporations, and of single persons, too, of large wealth, so arranging that they dictate to the people of this country what they shall pay when they purchase, and what they shall receive when they sell.” 20 *Cong. Rec.* 1458 (1889) (statement of Sen. James George). Rather than being solely concerned with consumer welfare, as Professor Robert Bork suggested, Senator George was also concerned with concentrations of buying power. In Senator George’s case, this concern primarily contemplated the plight of farmers, but the same argument may apply to gig workers, who, in many cases, must contend with platforms that possess a labor monopsony. See, e.g., Arindrajit Dube, Jeff Jacobs, Suresh Naidu & Siddharth Suri, *Monopsony in Online Labor Markets*, 2 *Am. Econ. Rev.: Insights* 33, 34 (2020) (“[W]e find a highly robust and surprisingly high degree of market power even in this large and diverse online spot labor market.”).

22. See William E. Forbath, *The New Deal Constitution in Exile*, 51 *Duke L.J.* 165, 183 (2001) [hereinafter Forbath, *Constitution in Exile*] (emphasizing courts’ significant use of labor injunctions against workers in the period leading up to the Wagner Act); see also *Loewe v. Lawlor*, 208 U.S. 274, 304–09 (1908) (holding that union-organized strikes and boycotts may violate the Sherman Act).

23. See *Lawlor*, 208 U.S. at 304–09; Forbath, *Constitution in Exile*, *supra* note 22, at 183; see also William E. Forbath, *Law and the Shaping of the American Labor Movement* 74–77 (1991) (describing the Pullman strike).

24. Marina Lao, *Workers in the “Gig” Economy: The Case for Extending the Antitrust Labor Exemption*, 51 *U.C. Davis L. Rev.* 1543, 1560 (2018) (“Whatever the initial legislative intent, the Sherman Act in its earlier years was in fact used aggressively against labor unions, with courts finding that union-organized strikes constituted restraints of trade in violation of the Act.”).

25. See William E. Forbath, *The Shaping of the American Labor Movement*, 102 *Harv. L. Rev.* 1109, 1133 (1989) (“For workers, judicial review—the invalidation of labor laws

of antitrust laws, the situation for industrial workers was dire in the *Lochner* era.

Labor activists eventually won a statutory exemption from the antitrust laws through provisions of the 1914 Clayton Act and the 1932 Norris–LaGuardia Act (NLGA).²⁶ The Clayton Act attempted to expand upon the Sherman Act by, inter alia, including protections for labor organizing where the Sherman Act remained silent. Section 6 of the Clayton Act boldly begins, “The labor of a human being is not a commodity or article of commerce.”²⁷ The Clayton Act then prohibits federal courts from issuing injunctions in cases “involving, or growing out of, a dispute concerning terms or conditions of employment.”²⁸ Courts initially applied the Clayton Act’s exemption narrowly, prompting Congress to clarify its intent with the Norris–LaGuardia Act in 1932.²⁹ The NLGA specifies that federal courts cannot issue injunctions in “labor dispute[s]” and that federal courts cannot prevent people in labor disputes from joining a union, picketing, striking, or engaging in other enumerated acts.³⁰ Together, these provisions of the Clayton Act and the NLGA form the statutory labor exemption from the antitrust laws.³¹ Within a decade, courts finally enforced the exemption by ruling for employees in antitrust suits brought by their employers.³²

under the language of ‘liberty of contract’ and ‘property rights’—became both evidence and symbol of the intractability of the American state from the perspective of labor reform.”).

26. Forbath, *Constitution in Exile*, supra note 22, at 188–92; see also Clayton Antitrust Act of 1914, ch. 323, 38 Stat. 730 (codified at 15 U.S.C. §§ 12–27 (2018)); Act of Mar. 23, 1932, ch. 90, 47 Stat. 70 (codified at 29 U.S.C. §§ 101–115 (2018)).

27. 15 U.S.C. § 17.

28. 29 U.S.C. § 52.

29. Lao, supra note 24, at 1561.

30. 29 U.S.C. § 104.

31. From this statutory exemption flows a nonstatutory labor exemption as well, the contours of which courts have yet to precisely define. While the statutory exemption applies to unilateral worker collective action, the nonstatutory exemption applies to collective bargaining agreements between unions and employers. See *Connell Constr. Co. v. Plumbers & Steamfitters Loc. Union No. 100*, 421 U.S. 616, 622 (1975) (noting that the Court has recognized a “limited nonstatutory exemption from antitrust sanctions” for “some union-employer agreements”). The nonstatutory exemption requires restraints of trade resulting from collective bargaining agreements to be “so intimately related to wages, hours and working conditions” that a union’s successful procurement of the restraint necessarily implies some federal labor policy protection. *Loc. Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 689 (1965). Because the nonstatutory exemption pertains to the collective bargaining process governed by the NLRA, which excludes independent contractors, the nonstatutory exemption likely does not offer a route for gig workers to organize.

32. See, e.g., *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 512–13 (1940) (holding that the Sherman Act did not prohibit hosiery manufacturing workers from engaging in a sit-down strike that resulted in lost revenue); see also *United States v. Hutcheson*, 312 U.S. 219, 236 (1941) (deciding against the United States in a criminal conspiracy suit involving an

But, as with other labor and employment laws,³³ courts have typically excluded independent contractors from the exemption.³⁴ Even though the Clayton Act and the NLGA are silent as to whether independent contractors may claim the labor exemption, courts' treatment of independent contractors resembles the treatment of workers generally prior to the creation of a labor exemption. There is a strong argument to be made that gig workers should properly be classified as employees, and several states have sought to do so.³⁵ Nonetheless, platform apps such as Uber and food delivery services have insisted on classifying gig workers as independent contractors.³⁶

The first case examining the cumulative implications of the Clayton Act and the NLGA for independent contractors came a decade after the NLGA's passage in the 1942 case *Columbia River Packers Ass'n v. Hinton*.³⁷ In a dispute between a fish processor and a group of fishermen—the latter group described by the Court as “independent entrepreneurs” and

organization of workers because the Sherman Act must be read as consistent with the Clayton Act and the NLGA).

33. See, e.g., *Nat'l Lab. Rels. Bd. v. United Ins. Co. of Am.*, 390 U.S. 254, 260 (1968) (upholding an order by the NLRB for an employer–insurance company to bargain with its debit agents on the basis that the agents were employees and not independent contractors excluded from the NLRA); see also *Saleem v. Corp. Transp. Grp., Ltd.*, 854 F.3d 131, 134–35 (2d Cir. 2017) (rejecting an unpaid overtime claim by New York black-car drivers after concluding that they were independent contractors under both the Fair Labor Standards Act and the New York Labor Law).

34. See *L.A. Meat & Provision Drivers Union, Loc. 626 v. United States*, 371 U.S. 94, 96, 102–03 (1962) (holding that a group of grease peddlers who “unlawfully combined and conspired in unreasonable restraint of foreign trade and commerce in yellow grease” were not insulated by the NLGA); *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143, 144–47 (1942) (holding that a group of fishermen were independent businessmen and thus unprotected by the NLGA).

35. Samantha J. Prince, *The AB5 Experiment—Should States Adopt California's Worker Classification Law?*, 11 *Am. U. Bus. L. Rev.* 43, 82–84 (2022) (describing efforts in other states to model California's ABC test, which classifies workers as employees by default and places the burden on employers to demonstrate independent contractor status).

36. See Jennifer Pinsof, Note, *A New Take On an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 *Mich. Telecomm. & Tech. L. Rev.* 341, 353 (2016) (“As a growing part of the workforce holds non-traditional forms of employment, fewer and fewer people are protected by the labor and employment statutes that have protected workers for decades. . . . Classifying all gig-economy workers as contractors will result in an increasing number of workers left unprotected . . .”). Recent developments have boded well for gig workers seeking relief for misclassification as independent contractors under various labor and employment statutes. See *The Atlanta Opera, Inc.*, 372 N.L.R.B. No. 95, 1–2 (June 13, 2023) (returning to the Obama-era independent contractor standard that makes it easier for gig workers to be classified as employees under the NLRA); *Employee or Independent Contractor Classification Under the Fair Labor Standards Act*, 87 *Fed. Reg.* 62,218, 62,226 (Oct. 12, 2022) (to be codified at 29 C.F.R. pts. 780, 788, 795) (changing the DOL's standard to a six-factor economic reality test to determine whether a worker is an employee or an independent contractor under the FLSA). Resolving the misclassification issue under the NLRA would obviate the need for an expanded antitrust labor exemption for most gig workers.

37. 315 U.S. 143.

“independent businessmen”—the Court upheld the district court’s grant of injunctive relief to the processor, holding that the dispute was not a “labor dispute” under the NLGA.³⁸ Justice Hugo Black, writing for the Court, portrayed the dispute instead as one over the price of a commodity: “The controversy here is altogether between fish sellers and fish buyers.”³⁹

Despite the NLGA’s broad language specifying that a labor dispute need not involve an employer against an employee,⁴⁰ the Court in *Columbia River Packers* wrote that the employer–employee relationship must still be the matrix of the controversy.⁴¹ Notably, however, courts before and after the *Columbia River Packers* decision have held that the exemption does still encompass disputes between people not precisely in an employer–employee relationship⁴²—for instance, in circumstances involving prospective employees,⁴³ or in certain situations in which protected labor groups collaborate with independent contractors.⁴⁴ Nevertheless, courts have typically excluded independent contractors from the labor exemption altogether.⁴⁵

38. *Id.* at 144–47.

39. *Id.* at 147.

40. 29 U.S.C. § 113 (2018) (“The term ‘labor dispute’ includes any controversy concerning terms or conditions of employment . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee.”).

41. 315 U.S. at 147.

42. *Milk Wagon Drivers’ Union, Loc. No. 753 v. Lake Valley Farm Prods.*, 311 U.S. 91, 99–100 (1940) (deciding that a controversy between two unions was a labor dispute).

43. *New Negro All. v. Sanitary Grocery Co.*, 303 U.S. 552, 560 (1938) (finding that an advocacy group protesting an employer’s discriminatory hiring practices was exempt despite not working for the employer).

44. *Am. Fed’n of Musicians of the U.S. & Canada v. Carroll*, 391 U.S. 99, 100–06 (1968) (holding that independent contractors who collaborated with a union were parties to a labor dispute covered by the exemption because of the “presence of a job or wage competition or some other economic inter-relationship affecting the legitimate union interests between the union members and the independent contractors”). The motivation behind the dispute also need not be economic in nature; it may be political, see *Jacksonville Bulk Terminals, Inc. v. Int’l Longshoremen’s Ass’n*, 457 U.S. 702, 713 (1982) (holding that a union work stoppage to protest the Soviet intervention in Afghanistan was protected by the NLGA), or interpersonal, see *Hunt v. Crumboch*, 325 U.S. 821, 824–25 (1945) (holding that union members’ refusal to accept employment with a company in response to the killing of a fellow union member was protected by the NLGA).

45. See, e.g., *H. A. Artists & Assocs. v. Actors’ Equity Ass’n*, 451 U.S. 704, 717 n.20 (1981) (“Of course, a party seeking refuge in the statutory exemption must be a bona fide labor organization, and not an independent contractor or entrepreneur.”); see also *Taylor v. Loc. No. 7, Int’l Union of Journeymen Horseshoers*, 353 F.2d 593, 606 (4th Cir. 1965) (“[The defendant horseshoers] are independent businessmen . . . who have banded together . . . for their mutual benefit and improvement. We fail to discover the existence of any employer–employee relationship which is the ‘matrix’ of this controversy or any condition which . . . would protect the activities of the defendants.”).

Though *Columbia River Packers* and its progeny have featured contractors who are independent businesspeople,⁴⁶ the exigencies of contemporary work arrangements have complicated the picture, as gig workers fall somewhere in between traditional employees and traditional independent contractors, exhibiting characteristics of both.⁴⁷ Additionally, an increasing number of independent contractors perform work formerly performed by employees as employers prefer contingent workforce models.⁴⁸ But the First Circuit's approach in *Jinetes* may solve the problem of gig worker exclusion from the antitrust labor exemption.

The First Circuit in *Jinetes* held that workers may benefit from the labor exemption without regard to their employment status.⁴⁹ Following a work stoppage in Puerto Rico by a group of horse jockeys demanding higher wages, an association of horse owners and the owners of the only racetrack in Puerto Rico brought an antitrust suit.⁵⁰ The jockeys claimed that the statutory labor exemption applied to their conduct, but the district court ruled otherwise on account of the jockeys' independent contractor status.⁵¹ On appeal, the First Circuit sidestepped the question of employment status altogether, focusing instead on whether the jockeys were in a dispute over compensation for their labor.⁵² Reversing the district court, the circuit court noted that the jockeys sought higher wages and safer working conditions and held that the group was engaged in a labor dispute, regardless of whether the jockeys were independent contractors.⁵³ Though the ruling currently only applies to the fourteen million people living within the jurisdiction of the First Circuit,⁵⁴ the Supreme Court's

46. See, e.g., *Am. Med. Ass'n v. United States*, 317 U.S. 519, 536 (1943) (holding that the American Medical Association could not claim the labor exemption because their members were independent physicians).

47. Lao, *supra* note 24, at 1555–57 (explaining how rideshare drivers, as a common example of modern gig workers, have characteristics of independent contractors in setting their work schedules but are more similar to employees in terms of pricing, pay, and service quality).

48. Danielle Tarantolo, Note, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 *Yale L.J.* 170, 172–73 (2006).

49. *Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc.*, 30 F.4th 306, 314 (1st Cir. 2022) (“[B]y 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.’” (quoting 29 U.S.C. § 113(c) (2018))).

50. *Id.* at 311.

51. *Id.* at 312.

52. *Id.* at 314 (“The key question is not whether the jockeys are independent contractors or laborers but whether what is at issue is compensation for their labor.”).

53. *Id.*

54. Sandeep Vaheesan, *How 37 Puerto Rican Jockeys Created an Opening for Gig Worker Unionizing*, *New Republic* (May 2, 2022), <https://newrepublic.com/article/166253/gig-worker-labor-rights-antitrust> [<https://perma.cc/WDN6-LWBD>].

denial of the owners' certiorari petition⁵⁵ opens up the labor exemption to a rejuvenated development of case law at the circuit court level.

The First Circuit did not explicitly consider the Supreme Court's statement in *Columbia River Packers* that the employer–employee relationship must be the matrix of the controversy to claim the exemption, treating it as dicta.⁵⁶ Instead, the First Circuit rejected the traditional categorical approach entirely, holding that the dispositive factor is not whether a party claiming the exemption is an employee but rather whether the dispute is about wages for labor or prices for goods.⁵⁷ For the horse jockeys, the subjects of their bargaining would be the same as if the jockeys were employees.⁵⁸ The First Circuit made no determination regarding the jockeys' employment status and instead treated the question of whether a dispute is about compensation for labor as the essence of *Columbia River Packers*.⁵⁹

Focusing on employment status in determining coverage by the labor exemption, as prior courts have done, obviously implicates the misclassification issue that has plagued gig workers for years.⁶⁰ But the common law “control” test most commonly used to determine classification does not account for the economic dependence of nominally independent contractors, such as the horse jockeys forced to contend with a racetrack monopsony in *Jinetes*.⁶¹ Though the horse jockeys did not have

55. Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc., 143 S. Ct. 631 (2023).

56. Jack Samuel, Case Comment, *Confederación Hípica v. Confederación de Jinetes Puertorriqueños*, N.Y.U. L. Rev., Apr. 23, 2023, at 1, 8, https://www.nyulawreview.org/wp-content/uploads/2023/04/Case-Comment_Confederacio%CC%81nHi%CC%81pica-6.pdf [<https://perma.cc/6BBK-WZQF>] (“The First Circuit held that *Columbia River Packers* stands not for the categorical rule based on classification, but for the wages/prices distinction, effectively rejecting the Supreme Court’s claims about the importance of the employer–employee relationship as dicta.”).

57. *Jinetes*, 30 F.4th at 315.

58. See *id.* at 316 (“Contrary to the plaintiffs’ arguments, their dispute with the defendants is a labor dispute because it centers on the compensation they pay the jockeys for their labor.”).

59. *Id.* at 314–15. Textual support for this reading of *Columbia River Packers* comes from that opinion’s closing words: “[T]he dispute here, relating solely to the sale of fish, does not place in controversy the wages or hours or other terms and conditions of employment of these employees.” *Columbia River Packers Ass’n v. Hinton*, 315 U.S. 143, 147 (1942).

60. See Pinsof, *supra* note 36, at 344–49.

61. See Terry Buck, Note, Restraining the Uber Model: Antitrust Law and the Gig Economy in New York and California, 23 N.Y.U. J. Legis. & Pub. Pol’y 861, 866 (2022) (“The NLRB has frequently reformulated its test for determining employee status . . . but economic dependence has not featured in its determinations, maintaining the divorce between workers’ conditions and their classification.”); see also Samuel, *supra* note 56, at 11 (“In *Jinetes*, the owners of the horses and the track enjoyed a monopoly over Puerto Rican horse racing and thus a monopsony over the relevant labor market, but the First Circuit did not address the relevance, if any, of the monopsony power of the plaintiffs.”). The “control”

the option of racing at a competing racetrack and thus had no real alternative place to work, they were nonetheless classified as independent contractors, at least by the racetrack and the district court. The First Circuit's reasoning in *Jinetes* provides an avenue to allow independent contractors to organize without having to argue the misclassification issue. Instead, independent contractors claiming the exemption may argue that, regardless of their employment status, they are not truly independent like the fishermen in *Columbia River Packers*. While most notable labor exemption cases involving independent contractors have featured coordination between independent businesspeople, *Jinetes* featured workers in a bona fide labor dispute of the kind contemplated by gig worker organizers.⁶²

II. THE NARROW INTERPRETATION OF *JINETES*

The First Circuit's reasoning in *Jinetes* relies on a distinction between wages for labor and prices for commodities, which the court does not fully delineate.⁶³ The line between wages and prices is blurry, and much of the distinction depends on one's conception of the purposes of the antitrust laws. A focus on the consumer-welfare-maximization goal of the antitrust laws may lead a court to take a narrow view of labor and look at whether a putative independent contractor provides anything other than their labor—for instance, rideshare drivers provide both their labor and temporary usage of their cars.⁶⁴ In this case, a consumer-welfare-maximizing

test judges whether a worker is an employee by whether the putative employer actually controls how the worker completes tasks. See Buck, *supra*, at 865.

62. There is at least one Supreme Court case that involved a work stoppage by independent contractors seeking to improve their wages. In *Fed. Trade Comm'n v. Superior Ct. Trial Lavs. Ass'n*, 493 U.S. 411 (1990), an association of trial lawyers who served as court-appointed counsel for indigent defendants in the District of Columbia went on strike to raise their wages, which were statutorily set at \$20–\$30 per hour. *Id.* at 414–15. The strike was successful and the lawyers won an increase to \$35 per hour, but the FTC brought an antitrust suit alleging price-fixing, and the Supreme Court held that the agreement was a *per se* unlawful restraint of trade. *Id.* at 418–23. The defendants' briefs in the *Trial Lawyers* case focused on a different form of immunity from the antitrust laws grounded in the politically expressive nature of the lawyers' strike. See Brief for Respondent/Cross-Petitioner Superior Court Trial Lawyers Association at 27–37, *Trial Lawyers*, 493 U.S. 411 (Nos. 88-1198, 88-1393), 1989 WL 1126841; Brief of the Individual Respondents at 18–30, *Trial Lawyers*, 493 U.S. 411 (Nos. 88-1198, 88-1393), 1989 WL 1126840. The briefs made no mention of the availability of the labor exemption, and, accordingly, the Court did not consider the application of the labor exemption in this case. The labor exemption was arguably available under the *Columbia River Packers* rationale that the dispute was solely related to wages for labor and not prices for goods, see *supra* note 59, but the exemption would be easier to claim under the *Jinetes* approach.

63. See *Jinetes*, 30 F.4th 314–15 (“From *Columbia River Packers*, thus, comes a critical distinction in applying the labor-dispute exemption: disputes about wages for labor fall within the exemption but those over prices for goods do not.”); see also Samuel, *supra* note 56, at 8.

64. See Dan Papscun & Khorri Atkinson, Antitrust Shield for Independent Worker Action Gains Momentum, *Bloomberg L.* (May 9, 2023), <https://news.bloomberglaw.com/antitrust/antitrust-shield-for-independent-worker-action-gains-momentum> (on file with the

court applying *Jinetes* might hold that the labor exemption is unavailable because, although the labor of a human being may not be “a commodity or article of commerce,” to paraphrase the Clayton Act,⁶⁵ the contractor provides other goods or services that should properly fall within the ambit of the antitrust laws to ensure consumers enjoy the benefits of competition in the form of low prices.⁶⁶

Under this narrow view of *Jinetes*, which tends to treat compensation for services as prices rather than wages for labor, many gig workers would still not be able to claim the exemption. Indeed, much of the economic rationale behind platform companies is that gig workers typically provide material inputs, such as a rideshare driver using their own car to provide rideshare services.⁶⁷ These gig worker inputs, in turn, allow rideshare platforms to save significant money on capital expenditures because they obviate the need for the platform to purchase and maintain a fleet.⁶⁸ A narrow interpretation of *Jinetes* that restricts “labor disputes” to disputes involving *only* labor would still expand the exemption to include some independent contractors, but this expansion would only capture those gig platform models that do not rely on non-labor worker inputs.⁶⁹ For these task-based gig workers, even a narrow reading of *Jinetes* may expand opportunities for collective action.

But for gig workers such as the prototypical rideshare driver, the organizing environment would remain unchanged. These gig workers would still be treated by the law as workers were treated before the creation of the labor exemption, and today gig workers face many of the same problems that twentieth-century collective action ameliorated. For example, rideshare platform drivers commonly complain of low wages, but drivers on these platforms have no method of negotiating or giving input on their rates, meaning drivers in low-paying or low-demand markets must

Columbia Law Review) (quoting Professor Herbert Hovenkamp as stating that Uber drivers provide both labor and usage of their cars for antitrust purposes).

65. 15 U.S.C. § 17 (2018).

66. See Bork, *supra* note 21, at 12 (“Only a consumer-welfare value which, in cases of conflict, sweeps all other values before it can account for Congress’ willingness to permit efficiency-based monopoly.”); see also Papsun & Atkinson, *supra* note 64 (quoting Professor Hovenkamp stating that applying the decision in *Jinetes* to Uber drivers, who provide both labor and the usage of their cars, is problematic).

67. See Buck, *supra* note 61, at 868 (discussing how the gig economy re-commodifies a worker’s belongings such as a car or private home as a material input).

68. *Id.* at 869 (discussing how gig employers avoid statutory and regulatory responsibilities to their workers by labeling them as independent contractors).

69. See *id.* at 869 (illustrating how employers avoid regulatory responsibilities and achieve labor cost savings that make labor-only gig work models profitable, even in the absence of significantly lower capital expenditures); Wilma B. Liebman & Andrew Lyubarsky, *Crowdwork, the Law, and the Future of Work*, 20 *Persps. on Work* 22, 23–25 (2016) (reviewing how task-based gig models like Amazon Mechanical Turk and TaskRabbit use human labor).

work longer hours if they want to earn more.⁷⁰ Rideshare drivers also face occupational safety and harassment issues—Uber drivers, for instance, may be unable to avoid violent or abusive passengers because they cannot see passenger ratings before accepting a ride.⁷¹ Further, rideshare drivers have to contend with job insecurity, because they may be deactivated on a whim from their platforms due to changing platform standards like vehicle model requirements⁷² or to low ratings and passenger complaints—even if such complaints are unfounded.⁷³ Through a collective bargaining framework, gig workers could advocate for themselves and compel their platforms to address worker grievances. But such frameworks have come under vitiating antitrust scrutiny,⁷⁴ and gig worker collective action outside of established bargaining frameworks—for example, an indefinite rideshare driver strike—would likely invite antitrust lawsuits as well.⁷⁵

III. THE BROAD INTERPRETATION OF *JINETES*

The narrow view of *Jinetes* fails to consider gig workers as workers, but under a view of the antitrust laws that goes beyond consumer welfare and considers harms broadly construed, *Jinetes* may be more encompassing. The foremost school of thought that takes a broader approach to antitrust

70. See Henry H. Perritt, Jr., Don't Burn the Looms—Regulation of Uber and Other Gig Labor Markets, 22 SMU Sci. & Tech. L. Rev. 51, 84–88 (2019) (presenting a series of comments excerpted from uberpeople.net, an online forum for Uber drivers, discussing the insufficiency of wages paid to Uber drivers and the role of geography in wage differences).

71. *Id.* at 92–93 (describing how Uber drivers are not made aware of passenger ratings and the danger in which they can find themselves).

72. See, e.g., Eugene K. Kim, Labor's Antitrust Problem: A Case for Worker Welfare, 130 Yale L.J. 428, 430 (2020) (describing an incident in which an Uber driver was removed from the Uber Black service because his car no longer qualified).

73. Perritt, *supra* note 70, at 93–94 (recounting uberpeople.net posts detailing Uber drivers' experiences with false complaints).

74. See *infra* notes 87–108 and accompanying text.

75. See, e.g., Sanjukta M. Paul, The Enduring Ambiguities of Antitrust Liability for Worker Collective Action, 47 Loy. U. Chi. L.J. 969, 979 (2016) [hereinafter Paul, *Enduring Ambiguities of Antitrust Liability*] (“[A]ntitrust poses [a significant obstacle] to workers classified as independent contractors who organize to improve their pay and working conditions.”). For example, when port truck drivers—classified as independent contractors—organized themselves in the 1990s and 2000s to engage in concerted action over low wages and safety issues, they faced antitrust investigations and lawsuits from the Clinton-era Federal Trade Commission, port terminal operators, and even Miami-Dade County, which operates the Port of Miami. *Id.* at 980–82. Organizers of the campaign maintained that antitrust liability significantly constrained their ability to take collective action: “[The threat of antitrust liability] was one of the three or four major strategic factors in virtually everything that we did.” *Id.* at 982 (alteration in original) (internal quotation marks omitted) (quoting Interview by Sanjukta M. Paul with John Canham-Clyne, Former Dir., Ports Campaign, Change to Win (May 28, 2014)). Aside from the specter of injunction, cost was a significant consideration as well: “Apart from the merits and whether damages were recovered, the sheer cost of defending such an action would have been sufficient to shut the campaign down.” *Id.* (internal quotation marks omitted) (quoting Interview by Sanjukta M. Paul with Michael Manley, Staff Att’y, Int’l Bhd. of Teamsters (Jan. 8, 2015)).

is the New Brandeis movement, which considers the effects of vast concentrations of private economic power on all facets of economic, social, and political life.⁷⁶ The New Brandeis approach provides an avenue to address harms to workers caused by powerful economic actors. A more labor-oriented view of antitrust enforcement is already evident in the Biden Administration, which in 2022 blocked a merger between two publishing giants on the theory that the resulting labor monopsony would be harmful to workers.⁷⁷ Additionally, Biden’s FTC Chair Lina Khan has indicated that her agency will not prosecute cases of collective action by gig workers,⁷⁸ and Biden-appointed FTC Commissioner Alvaro Bedoya voiced support in 2023 for a broader labor exemption that allows for gig worker organizing.⁷⁹ In the gig platform context, a labor antitrust reading of *Jinetes* would allow gig workers to challenge platforms’ concentrated economic power by concentrating their own power through collective bargaining and striking.⁸⁰

76. See, e.g., Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* 72–73 (2018) (“[C]oncentrated economic power is used to avoid raising wages, to insist on intense conditions of employment, to abuse . . . ‘non-compete’ agreements, and to hire part-timers instead of full-time employees.”); Lina Khan, *The New Brandeis Movement: America’s Antimonopoly Debate*, 9 J. Eur. Competition L. & Prac. 131, 131 (2018) (“Brandeis feared that autocratic structures in the commercial sphere—such as when one or a few private corporations call all the shots—can preclude the experience of liberty, threatening democracy in our civic sphere.”).

77. See *United States v. Bertelsmann SE & Co*, No. 21-2886-FYP, 2022 WL 16949715, at *25 (D.D.C. Nov. 15, 2022) (“The loss of . . . head-to-head match-ups [between publishers] undoubtedly would harm the authors whose advances would have been bid up by the direct competition.”); Complaint at 15, *Bertelsmann*, No. 1:21-cv-02886-FYP, 2022 WL 5105483 (“[A] hypothetical monopsonist of anticipated top-selling books would profitably reduce advances paid to authors of anticipated top-selling [books] by a small but significant, non-transitory amount.”); Perry Stein, *After a String of Losses, Justice Dept. Notches Antitrust Victories*, Wash. Post (Nov. 11, 2022), <https://www.washingtonpost.com/national-security/2022/11/11/antitrust-biden-random-house-schuster/> (on file with the *Columbia Law Review*) (“[Jonathan Kanter, the assistant attorney general for the DOJ’s antitrust division, said] the approach the government took was significant. ‘We said that workers matter, this kind of harm matters,’ he said.”).

78. *Reviving Competition, Part 4: 21st Century Antitrust Reforms and the American Worker: Hearing Before the Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary, 117th Cong.* 142 (2021) (written statement of Lina Khan, Chair, FTC).

79. See Leah Nysten, *Gig Workers Can Organize Without Fearing Antitrust*, Bedoya Says, Bloomberg L. (Apr. 10, 2023), <https://news.bloomberglaw.com/antitrust/gig-workers-can-organize-without-fearing-antitrust-bedoya-says> (on file with the *Columbia Law Review*).

80. This approach is not novel in antitrust: As Senator George F. Hoar from Massachusetts remarked during congressional debate over passage of the Sherman Act:

[A]s legislators we may constitutionally, properly, and wisely allow laborers to make associations, combinations, contracts, agreements for the sake of maintaining and advancing their wages, in regard to which, as a rule, their contracts are to be made with large corporations who are themselves but an association or combination or aggregation of capital on the other side.

In contrast to the difficulties of collective action for gig workers in the United States, work stoppages have been a common tool for gig workers internationally.⁸¹ To return to the rideshare example, Indian rideshare drivers conducted a two-week strike in 2018, through which they won a national fuel price index ensuring that driver earnings will increase as fuel costs increase.⁸² Although U.S. rideshare drivers have also participated in strikes, these work stoppages have been limited in scope, often lasting for a single day, unlike the indefinite strikes seen in other countries.⁸³ Collective bargaining with gig platforms may become increasingly common internationally as well. The Supreme Court of the United Kingdom held in 2021 that Uber drivers were “workers,” an intermediate category between employees and independent contractors under U.K. law.⁸⁴ That classification not only entitled Uber drivers to the National Living Wage, holiday pay, and pensions, but it also allowed Uber’s 70,000 U.K. drivers to unionize and collectively bargain, which U.K. Uber drivers did three months after the ruling.⁸⁵ Uber Eats workers in Japan may soon follow suit, as labor authorities in Tokyo have held that these workers are covered by Japanese labor law and that Uber Eats must collectively bargain with them.⁸⁶

21 Cong. Rec. 2728 (1890) (statement of Sen. George Hoar).

81. See, e.g., Janella Hamilton, App-Based Gig Workers Warn of Strike if B.C. Does Not Improve Labour Protections, CBC News (May 6, 2023), <https://www.cbc.ca/news/canada/british-columbia/app-based-gig-workers-warn-of-strike-if-b-c-does-not-improve-labour-protections-1.6834642> [<https://perma.cc/KQ2C-XQZN>].

82. PTI, Uber Drivers May Earn Rs 2,200 Per Month More With New Fare Plan, New Indian Express (Nov. 16, 2018), <https://www.newindianexpress.com/business/2018/nov/16/uber-drivers-may-earn-rs-2200-per-month-more-with-new-fare-plan-1898836.html> [<https://perma.cc/9XAG-YCY4>].

83. Compare John Chandler & NBC N.Y. Staff, ‘I’m Working So They Can Hire a Private Jet’: NYC Uber Drivers Strike Over Blocked Raises, NBC N.Y. (Jan. 5, 2023), <https://www.nbcnewyork.com/news/local/nyc-uber-strike-drivers-hold-2nd-24-hour-protest-over-blocked-pay-raise/4030259/> [<https://perma.cc/T53X-P6JF>] (detailing a twenty-four hour strike by New York City rideshare drivers against Uber to oppose the company’s legal challenge to a scheduled pay increase), with Rael Ombuor, Kenya’s Digital Taxi Services Paralyzed, Strike Enters 4th Day, Voice of Am. (July 5, 2018), <https://www.voanews.com/a/kenya-digital-taxi-services-strike-fourth-day/4469471.html> [<https://perma.cc/AUN8-ZJHH>] (detailing an indefinite strike by Kenyan rideshare drivers against Uber in support of rate increases). For a discussion of antitrust considerations in conducting independent contractor strikes, see Paul, Enduring Ambiguities of Antitrust Liability, *supra* note 75, at 979–82.

84. See Recent Case, *Uber BV v. Aslam*, Harv. L. Rev.: Blog (Mar. 8, 2021), https://blog.harvardlawreview.org/recent-case_uber-bv-v-aslam/ [<https://perma.cc/LA93-DJSJ>].

85. Uber and GMB Strike Historic Union Deal for 70,000 UK Drivers, GMB Union (May 26, 2021), <https://www.gmb.org.uk/news/uber-and-gmb-strike-historic-union-deal-70000-uk-drivers> [<https://perma.cc/7CQ8-AS37>].

86. See Tokyo Recognizes Uber Eats Workers’ Collective Bargaining Right, Japan Times (Nov. 26, 2022), <https://www.japantimes.co.jp/news/2022/11/26/business/uber-eats-union-tokyo-ruling/> [<https://perma.cc/3FNW-8MZ6>] (describing a decision by the Tokyo Metropolitan Government’s Labor Relations Commission that Uber Eats delivery

If *Jinetes* were interpreted to stand for the propositions that workers must be able to engage in collective action regardless of their employment status and that therefore disputes with platform companies over wages, hours, and working conditions constitute “labor disputes,” then most gig workers would likely be protected by the decision. This protection could expand the organizing options available to gig workers, including actions like the strikes and collective bargaining seen internationally. This broad interpretation of *Jinetes* could also allow states and cities to pass laws affirmatively protecting this collective action, attempts at which have been ensnared by antitrust problems in the past.

In 2015, Seattle became the first city to adopt an ordinance allowing collective bargaining by rideshare drivers.⁸⁷ The city’s collective bargaining framework permitted an elected driver representative to meet with platform representatives and negotiate certain standards related to the drivers’ work, including wages, hours, and working conditions, in the form of a written agreement.⁸⁸ After approval by the City, the agreement would become binding on the parties.⁸⁹ The ordinance went into effect in 2016, and the U.S. Chamber of Commerce filed suit against the City of Seattle in 2017 alleging NLRA preemption and Sherman Act preemption and violation.⁹⁰

Seattle claimed state-action immunity on the Sherman Act preemption claim.⁹¹ Under state-action immunity (or *Parker* immunity), a state may enact an anticompetitive restraint if the restraint is a product of “an act of government.”⁹² But courts are skeptical of antitrust defendants claiming *Parker* immunity.⁹³ Without a showing that a putatively anticompetitive restraint flows directly from sovereign state action, a party claiming *Parker* immunity must satisfy the two-pronged *Midcal* test, which requires that (1) the challenged restraint be clearly articulated and affirmatively expressed as state policy, and (2) the policy be actively supervised

drivers are workers under the Japanese labor union law and must be able to negotiate for accident compensation and employment insurance programs).

87. See Chamber of Com. of the U.S. v. City of Seattle, 890 F.3d 769, 775 (9th Cir. 2018).

88. *Id.* at 777–78 (“[T]he driver coordinator and the EDR shall meet and negotiate in good faith certain subjects . . . including . . . best practices regarding vehicle equipment standards; safe driving practices; . . . criminal background checks . . . ; the nature and amount of payments . . . ; minimum hours of work, conditions of work, and applicable rules.” (emphasis omitted) (internal quotation marks omitted) (quoting Seattle, Wash., Municipal Code § 6.310.735(H)(1) (2015))).

89. *Id.* at 778.

90. *Id.* at 778–79.

91. *Id.* at 779.

92. See *Parker v. Brown*, 317 U.S. 341, 352 (1943).

93. See, e.g., *Fed. Trade Comm’n v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992) (“[S]tate-action immunity is disfavored . . .”).

by the State.⁹⁴ On appeal, the Ninth Circuit held that the city ordinance did not pass the *Midcal* test, finding that the State of Washington had not clearly articulated a policy authorizing price-fixing by private parties in the rideshare driver market and that the State played no role in supervising the bargaining process, approving the agreements, or enforcing the ordinance.⁹⁵ The ordinance was thus struck down,⁹⁶ and no collective bargaining framework exists for rideshare drivers in Seattle today.

Because city or state collective bargaining frameworks for gig workers generally involve private parties organizing themselves, usually through another private party like a union, restraints on trade resulting from such arrangements do not flow directly from sovereign state action and thus must be able to pass the *Midcal* test in order to survive antitrust suits. In California, labor-friendly state legislators introduced a bill in 2016 that was substantially similar to the Seattle ordinance.⁹⁷ A state legislature (rather than a city council) passing the bill would satisfy the “clearly articulated state policy” *Midcal* prong,⁹⁸ but such a bill may still run into antitrust issues regarding the “active supervision” requirement, depending on the State’s role in reviewing the resulting collective bargaining agreement.⁹⁹

The California bill’s author later removed the proposed legislation from consideration due to antitrust concerns.¹⁰⁰ When asked why they pulled the bill, a spokesperson for the bill’s author noted that the bill contained “a number of untested legal theories,” implying that the bill may not have been able to pass muster before the California Assembly Judiciary Committee.¹⁰¹ The spokesperson averred that their office needed to “really explore all the legal issues that could be involved with this bill” before putting it to a vote,¹⁰² but, so far, California legislators have not reintroduced the bill.

New York state legislators drafted a bill in 2021 that would have allowed gig worker bargaining by all delivery and transportation network

94. See *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 104–05 (1980).

95. *Seattle*, 890 F.3d at 781–90.

96. *Id.* at 795.

97. See Kate Conger, *California Bill to Give Gig Workers Organizing Rights Stalls Over Antitrust Concerns*, TechCrunch (Apr. 21, 2016), <https://techcrunch.com/2016/04/21/california-bill-to-give-gig-workers-organizing-rights-stalls-over-antitrust-concerns/> [https://perma.cc/PA2N-VLB8].

98. See, e.g., *S. Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 66–67 (1985) (granting state-action immunity to motor common carriers engaged in collective rate-making because the state legislatures of North Carolina, Georgia, and Tennessee expressly authorized the scheme).

99. See, e.g., *N.C. State Bd. of Dental Exam’rs v. Fed. Trade Comm’n*, 574 U.S. 494, 515 (2015) (denying state-action immunity for a North Carolina dental board because the state did not supervise its decisions regarding non-dentist teeth whiteners).

100. See Conger, *supra* note 97.

101. See *id.*

102. *Id.*

workers, including delivery drivers for platforms like DoorDash and Instacart.¹⁰³ But, unlike the Seattle ordinance, the New York bill established a sectoral bargaining framework, allowing gig worker unions to form industry councils with multi-platform company associations and negotiate standards that would govern entire industries.¹⁰⁴ This innovation addresses the “active supervision” requirement of the *Midcal* test because the State supervises the industry councils by approving or rejecting their recommendations. The bill’s authors, evincing concern about antitrust issues following the Ninth Circuit’s quashing of the Seattle ordinance, attempted to immunize their legislation from antitrust suits through several provisions: The bill invoked *Parker* immunity, the statutory and nonstatutory labor exemptions, and their New York State equivalents.¹⁰⁵ However, there was significant opposition to the bill from labor groups and it was ultimately never introduced.¹⁰⁶ Lawmakers in Connecticut and Massachusetts introduced similar bills in 2021 and 2023, respectively, but the Connecticut bill died in committee¹⁰⁷ and, as of November 2023, the Massachusetts bill is pending.¹⁰⁸ Both bills, like the New York bill, include clauses invoking various antitrust immunities and exemptions, showing a concern by lawmakers about opening their legislation up to antitrust liability.¹⁰⁹

Because the broad interpretation of *Jimetes* would make independent contractor organizing no longer a per se antitrust violation, states and municipalities that enact legislation authorizing or setting up frameworks

103. See Ben Penn & Keshia Clukey, *New York Gig Workers to Get Easy Unionizing Path in Draft Bill*, Bloomberg L. (May 21, 2021), <https://news.bloomberglaw.com/daily-labor-report/new-york-gig-workers-to-get-easy-unionizing-path-in-draft-bill> (on file with the *Columbia Law Review*).

104. See *id.*

105. *A Bill Requiring Regulation of Network Workers, and Providing for Their Protection and Benefits*, Bloomberg L., <https://aboutblaw.com/XEJ> (on file with the *Columbia Law Review*) (last visited Aug. 18, 2023) (providing the draft New York legislation).

106. See Annie McDonough, *How a Deal for Gig Workers Fell Apart*, City & St. N.Y. (June 25, 2021), <https://www.cityandstateny.com/policy/2021/06/how-a-deal-for-gig-workers-fell-apart/182731/> [<https://perma.cc/57KG-JLE6>] (reporting that worker advocacy groups opposed the bill for its lack of worker input, preemption of local laws favorable to gig workers, and restrictions on gig workers’ right to strike).

107. See Raised S.B. No. 1000, Session Year 2021: An Act Concerning Transportation Network Company Drivers, Conn. Gen. Assembly (2021), https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=SB01000&which_year=2021 [<https://perma.cc/U49B-TB9A>] (indicating that the Connecticut bill never made it out of the Joint Committee on Labor and Public Employees).

108. State House News Serv., *Goal of Mass. Bill Backed by Unions to Get Uber, Lyft Drivers Benefits, Increase Wages*, MassLive (Jan. 24, 2023), <https://www.masslive.com/news/2023/01/goal-of-mass-bill-backed-by-unions-to-get-uber-lyft-drivers-benefits-increase-wages.html> [<https://perma.cc/D9MM-EG9S>] (last updated Feb. 21, 2023).

109. See An Act Concerning Transportation Network Company Drivers, S. 1000, 2021 Gen. Assemb., Reg. Sess. (Conn. 2021); An Act Establishing Collective Bargaining Rights for TNC Drivers, H. 1099, 193d Gen. Ct., Reg. Sess. (Mass. 2023); S. 666, 193d Gen. Ct., Reg. Sess. (Mass. 2023) (same bill introduced simultaneously in the Senate).

for gig worker organizing would be able to withstand antitrust challenges under a broad *Jinetes* paradigm. States and cities would no longer have to claim *Parker* immunity if they can demonstrate that conduct authorized by their legislation does not violate the antitrust laws. For instance, the 2015 Seattle ordinance would likely have been able to survive legal challenges under a broad *Jinetes* labor exemption if Seattle could demonstrate that elected driver representatives and platforms were negotiating over wages, hours, and working conditions in the context of a labor dispute. And because the ordinance already survived NLRA preemption claims on appeal,¹¹⁰ the Chamber of Commerce would have had to resort to other, likely weaker legal arguments to challenge Seattle's collective bargaining framework.

The broad interpretation of *Jinetes* also specifically addresses the issue of gig worker striking. While cleverly drafted bills allowing sectoral bargaining by gig workers like those proposed in New York, Connecticut, and Massachusetts purport to resolve the collective bargaining issue without running afoul of antitrust laws,¹¹¹ it is difficult to imagine a state or local law allowing gig workers to strike without inviting antitrust liability. Without an antitrust exemption for gig workers, states understandably prefer sectoral bargaining frameworks to secure bargaining rights. By setting up industry councils that recommend industry-wide standards to be enacted by state agencies, states can avoid claims that they are sanctioning independent contractor collusion and more easily claim *Parker* immunity because no agreement is binding unless adopted by the State. But such frameworks do not work similarly for striking, which states cannot undertake by proxy like they can with collective bargaining. Indeed, the Connecticut and Massachusetts sectoral bargaining bills did not authorize striking, and the New York draft bill explicitly prohibited striking.¹¹² Under the broad *Jinetes* approach, on the other hand, gig workers who engage in strikes over the terms and conditions of their employment may claim exemption from the antitrust laws by demonstrating that they are in a labor dispute.

States and municipalities may even be able to improve on the NLRA's provisions by introducing, for example, card check, stronger good-faith bargaining obligations, and broader remedies for retaliation.¹¹³ Because

110. Chamber of Com. of the U.S. v. City of Seattle, 890 F.3d 769, 790–95 (9th Cir. 2018).

111. See *supra* notes 103–109 and accompanying text.

112. See A Bill Requiring Regulation of Network Workers, and Providing for Their Protection and Benefits, *supra* note 105 (“The union shall not cause any material disruption of work by network workers contracting with the network company, including but not limited to by directly or indirectly causing or encouraging any other entity to cause any picketing, strikes, slowdowns, or boycotts.”).

113. See Naomi B. Sunshine, Labor Rights for Platform Workers: A Response to *Social Change's* 2016 Symposium, 41 N.Y.U. Rev. L. & Soc. Change Harbinger 241, 246–48 (2016), https://socialchangenyu.com/wp-content/uploads/2016/12/sunshin_laborrightsplatform_workers_161212.pdf [<https://perma.cc/R55M-TMX8>] (“[P]otential future efforts[] could

independent contractors are excluded from the NLRA's coverage, states and municipalities that expand gig workers' collective action rights beyond NLRA protections will likely survive *Garmon*¹¹⁴ preemption claims and may survive *Machinists*¹¹⁵ preemption claims as well.¹¹⁶ Absent federal action on the misclassification of gig workers as independent contractors, state and local regulation of platform companies may be the most fruitful avenue for protecting collective action by gig workers.

CONCLUSION

Gig workers may face antitrust liability for organizing, and states and municipalities that attempt to immunize gig workers from such liability may face antitrust lawsuits themselves. In many ways, the growth of the gig economy is an effort by firms to evade American labor law—business models that rely on independent contractors have the advantage of significantly lower costs, both on labor and in capital expenditures. Unimpeded by labor law, the growth of gig platforms continues apace; restrained by the antitrust laws, gig workers have no means to resist.

By interpreting the antitrust laws in the context of the modern economy, the First Circuit's approach in the *Jinetes* case could represent the easiest path to securing collective action rights for gig workers. A reconceptualization of the antitrust labor exemption, the *Jinetes* rationale rejects the categorical approach in weighing the availability of the exemption. A court employing a broad *Jinetes* approach would not consider gig workers' independent contractor status—as long as a group of workers was engaged in a labor dispute, their concerted action would not automatically run afoul of the antitrust laws. This interpretation would allow gig workers to finally engage in collective action and improve the terms and conditions of their work.

allow for expanded, innovative worker organizing where traditional labor law has lagged behind.”).

114. See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959) (“When an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . .”).

115. See *Lodge 76, Int’l Ass’n of Machinists & Aerospace Workers v. Wis. Emp. Rels. Comm’n*, 427 U.S. 132, 140 (1976) (establishing that Congress, in enacting federal labor laws, intended to leave certain conduct unregulated and “to be controlled by the free play of economic forces” (internal quotation marks omitted) (quoting *Nat’l Lab. Rels. Bd. v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971))).

116. See, e.g., *Chamber of Com. of the U.S. v. City of Seattle*, 890 F.3d 769, 790–95 (9th Cir. 2018) (holding that the Seattle gig worker collective ordinance was “not preempted by the NLRA under either *Machinists* or *Garmon* preemption”).