THE GIG WORKER QUESTION: REVIVING THE FTC'S COMPETITION RULEMAKING AUTHORITY TO PROTECT COLLECTIVE BARGAINING

SARAH MADSEN*

INTRODUCTION

In 2020, then-candidate Joe Biden ran a staunchly pro-labor campaign, promising to become the nation's strongest labor President in history.[1]

* J.D. Candidate, American University Washington College of Law (2025); B.A. Political Science & Public Policy, Gettysburg College (2022). I am so grateful for my incredible friends and family, who have been an endless source of encouragement, love, and patience. I would also like to thank the staff of the *Administrative Law Review*, especially Alexander Deziel, Jordan Griffin, Professor Seth Grossman, and Professor Andy Popper, for their invaluable feedback and guidance throughout this process.

1. *See* Kendall Karson & Molly Nagle, *2020 Presidential Candidate Joe Biden Appeals to Labor Unions, Blue Collar Workers at Rally*, ABC NEWS (Apr. 29, 2019, 6:08 PM), https://abcnews.go.com/Politics/2020-presidential-candidate-joe-biden-appeals-labor-

Nearly four years later, President Biden sought to prove that he had kept that promise, highlighting the significant gains this administration had delivered to the labor movement.[2] Among those promises was a pledge to ensure that workers in the so-called "gig economy"[3] "receive the legal benefits and protections they deserve."[4] In line with such promises, President Biden appointed Lina M. Khan as Chair of the Federal Trade Commission (FTC) in June 2021.[5] Khan was already an academic celebrity, rising to fame as a law student after the Yale Law Journal published her article *Amazon's Antitrust Paradox* in 2017.[6] Under her leadership, the FTC promptly issued a policy statement announcing a series of enforcement priorities, including "[p]olicing unfair methods of competition that harm gig workers."[7] Under the Biden

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unions/story?id=62665235 [https://perma.cc/S5S9-T74W]; Andrew Solender, *Biden Vows to Be 'Strongest Labor President You've Ever Had' At Union Event*, FORBES (Sept. 7, 2020, 6:22 PM), https://www.forbes.com/sites/andrewsolender/2020/09/07/biden-vows-to-be-strongest-labor-president-youve-ever-had-at-union-event/?sh=6eea8b585d5d [https://perma.cc/9ZEU-8J33].

2. *See* Jason Vazquez & Kevin Vazquez, *Is Joe Biden the Most Pro-Union President You've Ever Seen?*, ONLABOR (Nov. 9, 2023), https://onlabor.org/is-joe-biden-the-most-pro-union-president-youve-ever-seen [https://perma.cc/AM5V-8JWU] ("[President Biden's] administration, through a battery of executive actions, regulatory initiatives, and legislative packages, has delivered significant gains to the labor movement.").

3. While there is no universally recognized definition of "gig economy," *Merriam-Webster* defines the "gig economy" as "economic activity that involves the use of temporary or freelance workers to perform jobs typically in the service sector." *Gig Economy*, MERRIAM-WEBSTER'S ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/gig%20economy [https://perma.cc/5FR2-HC6E] (last visited Nov. 10, 2024); *see also infra* note 12 and accompanying text (highlighting various views and definitions for "gig economy").

4. *The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions*, BIDEN FOR PRESIDENT, https://joebiden.com/empowerworkers/?mc_cid=fab5d4fe7c&mc_eid=cd47b4e9c2 [https://perma.cc/QHS7-L9ST] (last visited Nov. 11, 2024); *see also* Lauren K. Gurley, *Biden Promised to Reclassify Gig Workers. But How Will He Actually Do It?*, VICE: MOTHERBOARD (Nov. 11, 2020, 10:00 AM), https://www.vice.com/en/article/4adv8g/biden-promised-to-reclassify-gig-workers-but-how-will-he-actually-do-it [https://perma.cc/BKW9-C94C].

5. *See* Press Release, Fed. Trade Comm'n, Lina M. Khan Sworn in as Chair of the FTC (June 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/06/lina-m-khan-sworn-chair-ftc [https://perma.cc/P773-GUYC].

6. *See* Jennifer Saba, *Amazon One-Ups No. 1 Antitrust Critic Lina Khan*, REUTERS (Mar. 7, 2022, 9:47 AM), https://www.reuters.com/legal/litigation/amazon-one-ups-no-1-antitrust-critic-lina-khan-2022-03-04 [https://perma.cc/GV63-BVQY]; Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017).

7. Press Release, Fed. Trade Comm'n, FTC to Crack Down on Companies Taking

Administration, the FTC and Department of Justice (DOJ) pursued aggressive antitrust enforcement to combat what it perceived as "excessive market concentration,"[8] reversing a decades-long policy of passive enforcement.[9] Armed with three Democrat-appointed commissioners and broad authority to enforce the nation's antitrust laws, the FTC is uniquely poised to execute the Biden Administration's pro-labor agenda, particularly where it concerns workers in the gig economy.[10]

The gig economy has grown enormously in the last several years, notably during and after the COVID-19 pandemic.[11] Although the gig economy is

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Advantage of Gig Workers (Sept. 15, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-crack-down-companies-taking-advantage-gig-workers [https://perma.cc/7LLU-DBL4]; *see also* FED. TRADE COMM'N, FTC POLICY STATEMENT ON ENFORCEMENT RELATED TO GIG WORK 1, 13–14 (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Matter%20No.%20P227600%20Gig%20Policy%20Statement.pdf [https://perma.cc/7WJJ-B9GU].

8. Exec. Order No. 14,036, 86 Fed. Reg. 36,987, 36,987–90 (July 14, 2021) (stating that a "whole-of-government" approach to combat overconcentration and monopolization is needed and supported by existing statutory mandates).

9. *See* Franklin Foer, *Biden Declares War on the Cult of Efficiency*, THE ATLANTIC (July 21, 2023), https://www.theatlantic.com/ideas/archive/2023/07/biden-administration-corporate-merger-antitrust-guidelines/674779 [https://perma.cc/5NMF-DMDN] (discussing the Biden Administration's proposed merger guidelines); *Biden Administration Steps Up Antitrust Enforcement*, AM. BAR ASS'N, https://www.americanbar.org/news/abanews/aba-news-archives/2021/11/antitrust-enforcement [https://perma.cc/E2ZQ-M9H7] (last visited Nov. 11, 2024) ("[T]he administration's revitalization of antitrust marks a return to the original intent of the nation's antitrust laws after 40 years of scaling back enforcement that began in the Reagan administration."); Aurelien Portuese, *Biden Antitrust: The Paradox of the New Antitrust Populism*, 29 GEO. MASON L. REV. 1087, 1089–90 (2022) ("President Biden . . . called for new rulemaking authority . . . and supported numerous antitrust bills aimed at reforming antitrust laws.").

10. *See Commissioners*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/commissioners-staff/commissioners [https://perma.cc/7ED2-DFDL] (last visited Nov. 11, 2024); *Commissioners, Chairwomen and Chairmen of the Federal Trade Commission*, FED. TRADE COMM'N [hereinafter *Chairwomen and Chairmen*], https://www.ftc.gov/system/files/attachments/commissioners/commissioner_chart_timeline.pdf [https://perma.cc/4DCB-HNBB] (last visited Nov. 10, 2024). *See generally A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM'N [hereinafter *Overview of FTC Authorities*], https://www.ftc.gov/about-ftc/mission/enforcement-authority [https://perma.cc/89NR-H4YZ] (last visited Nov. 10, 2024) (discussing the Federal Trade Commission's (FTC's) antitrust enforcement and rulemaking authority).

11. *See* Samantha Delouya, *The Rise of Gig Workers is Changing the Face of the US Economy*, CNN (July 25, 2023, 3:59 PM), https://www.cnn.com/2023/07/24/economy/gig-workers-

not always easily defined, the Internal Revenue Service (IRS) understands gig work to be any activity where income is earned (often through a digital platform) by "providing on-demand work, services[,] or goods."[12] As of 2023, estimates show more than 57 million freelancers are working in the United States—comprising nearly 15% of the active workforce.[13] A study by the University of Chicago found that the number of people who earned income from platform gig work expanded dramatically between 2016 and 2021.[14] These numbers are only expected to rise over the next decade as the share of the American workforce preferring traditional full-time employment continues to decline.[15] By some estimates, a majority of American workers are expected to be freelance by as early as 2027.[16]

Job satisfaction remains high among gig workers, with many valuing the work-life balance and flexible working hours that the profession permits.[17] However, freelance work generally does not provide access to traditional employment benefits.[18] A significant share of gig workers report having no retirement savings, and fewer than half report having access to employer-

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economy-impact-explained/index.html [https://perma.cc/GLG8-KT2U] (illustrating that, according to tax forms used to report nonemployment income, the total number of people who received payment from "platform gig work" went from approximately 1.4 million in January 2017 to approximately 5 million in January 2021).

12. *See Gig Economy Tax Center*, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/gig-economy-tax-center [https://perma.cc/6HDM-ZVTU] (Sept. 9, 2024); Elka Torpey & Andrew Hogan, *Working in a Gig Economy*, U.S. BUREAU OF LAB. STAT. (May 2016), https://www.bls.gov/careeroutlook/2016/article/what-is-the-gig-economy.htm [https://perma.cc/J2Z5-VW63] (noting that "there is no official definition of the 'gig economy'").

13. *See Gig Economy in the U.S. - Statistics & Facts*, STATISTA (July 3, 2024), https://www.statista.com/topics/4891/gig-economy-in-the-us/#topicOverview [https://perma.cc/RRC7-QJAU]; Katharine G. Abraham, Brad J. Hershbein, Susan N. Houseman & Beth C. Truesdale, *The Independent Contractor Workforce: New Evidence on Its Size and Composition and Ways to Improve Its Measurement in Household Surveys*, 77 INDUS. & LAB. RELS. REV. 336, 354 (2024).

14. *See* Andrew Garin, Emilie Jackson, Dmitri Koustas & Alicia Miller, *The Evolution of Platform Gig Work, 2012–2021*, at 1–2 (Nat'l Bureau Econ. Rsch., Working Paper No. 31273, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4461623 [https://perma.cc/U268-AUN3] (finding a net increase of 3 million workers).

15. *See Gig Economy in the U.S. - Statistics & Facts*, *supra* note 13 (noting that only 22% of full-time independent workers would prefer traditional employment in 2018, compared to 34% in 2012).

16. *Id.*

17. *See id.* (noting that 80% of people in the gig economy reported they were very satisfied or somewhat satisfied with their current job in September 2018).

18. *Id.* (explaining that this is because gig economy workers are not traditional salaried employees but that a majority of gig workers have a full-time position in addition to their gig work, which could provide these benefits).

provided medical insurance.[19] While gig work is not always an individual's primary source of income, most gig workers have two or more jobs, and a majority report having experienced wage theft on at least one occasion.[20] Disproportionally, these workers tend to be young, low-income, and nonwhite—a fact that raises additional equity concerns.[21]

But as lawmakers look to regulate the industry, they face limited official government data on the subject.[22] The Bureau of Labor Statistics (BLS) last tracked workers with alternative job arrangements in 2017—when it found that just 1% of such workers used an app to find work—long before the surge in popularity of many online platforms during the COVID-19 pandemic.[23] Researchers estimate that the federal government has significantly undercounted independent contractors, potentially distorting existing government economic data tracking employment levels.[24] Although the BLS expects to release an updated survey of people holding temporary or alternative job arrangements in the coming months, the current lack of quality data poses a significant obstacle to obtaining an accurate understanding of America's workforce.[25]

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19. *See id.* (noting that the share of gig workers reporting no retirement savings came from a survey of gig workers whose gig work was their primary job).

20. *See id.* A bill introduced in the Senate in 2019 sought to define wage theft as:

> [W]hen an employer does not pay an employee for work that the employee has performed, depriving the worker of wages and earnings to which the worker is legally entitled. This theft occurs in many forms, including by employers violating minimum wage requirements, failing to pay overtime compensation, requiring off-the-clock work, failing to provide final payments, misclassifying employees as exempt from overtime compensation or as independent contractors rather than employees, and improperly withholding tips.

Wage Theft Prevention and Wage Recovery Act, S. 2101, 116th Cong. § 2(1) (2019).

21. *See* Monica Anderson, Colleen McClain, Michelle Faverio & Risa Gelles-Watnick, *The State of Gig Work in 2021*, PEW RSCH. CTR. (Dec. 8, 2021), https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021 [https://perma.cc/SPZ7-5LVW].

22. *See* Delouya, *supra* note 11.

23. *See id.*

24. *See id.*

25. *See id.*; *see also Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/cps/notices/2024/contingent-release-date.htm [https://perma.cc/2AEC-9JKV] (last visited Nov. 11, 2024). The Bureau of Labor Statistics expects to release an updated report for the Contingent and Alternative Employment Arrangements in early November 2024, after this Comment is set to publish. *Notice: Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/cps/notices/2024/contingent-release-date.htm [https://perma.cc/G73Z-964C] (last accessed Nov. 11, 2024).

The gig economy's rapid growth in the United States has also drawn attention to the fact that as nonsalaried employees, gig workers are classified as independent contractors and are, therefore, generally denied access to the employer-provided benefits typically granted to traditional employees.[26] Among these benefits are the labor protections that allow employees to bargain collectively without concern that their activities constitute illegal concerted action in violation of the nation's antitrust laws.[27] These protections are often referred to as the "labor exemption," which creates an antitrust liability shield for workers involved in "dispute[s] concerning terms or conditions of employment."[28] As a result, independent contractors—and, by extension, gig workers—face unique antitrust liabilities that may pose a barrier to any organized efforts to advance their workplace interests.[29]

However, the push to extend antitrust protections to gig workers gained momentum during the Biden Administration, when Democrats secured a majority of commission seats at the FTC.[30] All Democrat-appointed

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26. *See Gig Economy in the U.S. - Statistics & Facts*, *supra* note 13; *see also* Veena Dubal, *On Algorithmic Wage Discrimination*, 123 COLUM. L. REV. 1929, 1946 (2023) ("On-demand labor platform companies adopted algorithmic wage discrimination, a highly personalized and variable form of compensation, to solve a particular problem that accompanies the (mis)classification of their workers as independent contractors.").

27. *See* Dan Papscun & Khorri Atkinson, *Antitrust Shield for Independent Worker Action Gains Momentum*, BLOOMBERG L. (May 9, 2023, 5:00 AM), https://news.bloomberglaw.com/antitrust/antitrust-shield-for-independent-worker-action-gains-momentum [https://perma.cc/7F8R-UEGA].

28. Clayton Act, ch. 323, § 20, 38 Stat. 730, 738 (1914) (current version at 29 U.S.C. § 52); *see also The Basis of Labor Exemptions from the Antitrust Acts*, 54 YALE L.J. 853, 853–55 (1945).

29. *See* Richard Blum, *Worker Collective Action in the Time of Fissuring: Independent Contractor Labor Boycotts, the Thirteenth Amendment, and Antitrust Law*, 19 NEV. L.J. 365, 373 (2018).

30. *See* Papscun & Atkinson, *supra* note 27; *Commissioners*, *supra* note 10. The Senate has since confirmed two Republican commissioners, Melissa Holyoak and Andrew Ferguson, to the FTC; but their appointment does not alter the balance of power at the FTC. *Commissioners*, *supra* note 10; *Utah Solicitor General Melissa Holyoak Confirmed to Fill Republican Slot at the Federal Trade Commission*, UTAH OFF. OF THE ATT'Y GEN. (Mar. 9, 2024), https://attorneygeneral.utah.gov/utah-solicitor-general-melissa-holyoak-confirmed-to-fill-republican-slot-at-the-federal-trade-commission/ [https://perma.cc/D2XT-SK9W]. The Commission is traditionally headed by five commissioners, no more than three of whom can be of the same political party, but the FTC has been without a Republican commissioner since March 2023. *See* Papscun & Atkinson, *supra* note 27; Press Release, Fed. Trade Comm'n, FTC Chair Welcomes Ferguson and Holyoak as FTC Commissioners, Congratulates Commissioner Slaughter on Confirmation to Another Term (Mar. 8, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/03/ftc-chair-welcomes-ferguson-holyoak-ftc-commissioners-congratulates-commissioner-slaughter [https://perma.cc/SP5B-U7QC]; *Chairwomen and Chairmen*, *supra* note 10.

commissioners have made statements indicating that the FTC will not prioritize "crack[ing] down on independent contractors' collective action."[31] In addition, the National Labor Relations Board (NLRB) recently issued a decision returning to a more worker-friendly "standard for determining independent contractor status under the National Labor Relations Act [(NLRA)]."[32] The Department of Labor (DOL) adopted a similar approach in a recently announced final rule, making it more difficult to classify workers as independent contractors rather than employees.[33] But perhaps most significant has been the speculation that a recent First Circuit case "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."[34]

As an independent agency, the FTC is uniquely positioned to seize the growing political momentum surrounding gig workers and should act swiftly to ensure that gig workers are provided with necessary labor protections.[35] Current agency efforts to protect the rights of gig workers are insufficient because they rely on the discretion of the FTC and DOJ to enforce—or not enforce—certain aspects of the law, placing gig workers in a state of uncertainty.[36] There have been growing calls among academics to extend the

31. *See* Papscun & Atkinson, *supra* note 27.

32. Press Release, Nat'l Lab. Rels. Bd., Board Modifies Independent Contractor Standard under National Labor Relations Act (June 13, 2023) [hereinafter Board Modifies Standard], https://www.nlrb.gov/news-outreach/news-story/board-modifies-independent-contractor-standard-under-national-labor [https://perma.cc/MS77-ZHNR]; *see also* Atlanta Opera, Inc., 372 N.L.R.B. No. 95 (June 13, 2023).

33. *See* Press Release, U.S. Dep't of Lab., US Department of Labor Announces Final Rule on Classifying Workers as Employees or Independent Contractors Under the Fair Labor Standards Act (Jan. 9, 2024) [hereinafter Final Rule on Classifying Workers], https://www.dol.gov/newsroom/releases/whd/whd20240109-1 [https://perma.cc/G6JQ-48AU].

34. Josh Jacob, Comment, *Avenues for Gig Worker Collective Action After* Jinetes, 123 COLUM. L. REV. F. 208, 208 (2023); *see also* Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc. (*Jinetes*), 30 F.4th 306, 314 (1st Cir. 2022).

35. *See* Papscun & Atkinson, *supra* note 27; *see also* Press Release, Fed. Trade Comm'n, FTC to Crack Down on Companies Taking Advantage of Gig Workers (Sept. 15, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-crack-down-companies-taking-advantage-gig-workers [https://perma.cc/ER77-Y3KS].

36. *See* Ethan Dodd, *Misclassifying Employees as Gig Workers Creates 'A Race to the Bottom' For Businesses, Biden's Top Labor and Antitrust Regulators Say*, BUS. INSIDER (May 14, 2023), https://www.businessinsider.com/contract-jobs-gig-work-worse-pay-benefits-competition-ftc-nlrb-2023-5 [https://perma.cc/9KCQ-DXH9].

labor exemption unequivocally to independent contractors.[37] However, independent contractors are not created equally, and the gig economy encompasses a wide variety of employment.[38] Therefore, without further study of the practical implications of such a proposal, the FTC should pursue a measured approach that balances worker protections against antitrust concerns.

Although the FTC has historically favored adjudication in enforcing antitrust measures,[39] the Commission should utilize its rulemaking authority under the Administrative Procedure Act (APA) and the Federal Trade Commission Act (FTC Act) to issue an Advance Notice of Proposed Rulemaking (ANPRM) to clarify the Clayton Act's labor exemption, which extends only to "dispute[s] concerning terms or conditions of employment."[40] The Notice should establish that the antitrust labor exemption is independent from, and therefore potentially broader than, who is understood as an employee under federal labor law.[41] Furthermore, it should propose a standard for determining a worker's independent contractor status for the purposes of antitrust law that is largely inspired by those adopted by the NLRB and DOL, which rely in part on a series of common law factors enumerated in the Second Restatement of Agency.[42] Given the contentious nature of such reforms and the limited official data available to lawmakers, an ANPRM would allow the Commission to collect more information while it refines its draft proposal.[43]

Part I of this Comment provides a brief overview of antitrust law, discussing the historical foundations of the relevant antitrust laws and exploring recent developments in antitrust enforcement. Part II evaluates the FTC's antitrust enforcement authority and weighs the options available to the

37. *See* Marina Lao, *Workers in the "Gig" Economy: The Case for Extending the Antitrust Labor Exemption*, 51 U.C. DAVIS L. REV. 1543, 1558–68, 1587 (2018) (examining different avenues for extending the antitrust labor exemption to independent contractors); Jacob, *supra* note 34, at 227 (encouraging courts to adopt the First Circuit's approach to extending the antitrust labor exemption to independent contractors).

38. *See Gig Economy in the U.S. - Statistics & Facts*, *supra* note 13.

39. *See* JAY B. SYKES, CONG. RSCH. SERV., LSB10635, THE FTC'S COMPETITION RULEMAKING AUTHORITY 1 (2023).

40. Clayton Act, ch. 323, § 20, 38 Stat. 730, 738 (1914) (current version at 29 U.S.C. §§ 52–53); Administrative Procedure Act, 5 U.S.C. §§ 551–559 (detailing limitations on court authorities and definitions of "persons" to include various types of organizations).

41. *See* Papscun & Atkinson, *supra* note 27.

42. *See* Board Modifies Standard, *supra* note 32; Final Rule on Classifying Workers, *supra* note 33; *see, e.g.*, Atlanta Opera, Inc., 372 N.L.R.B. No. 95, at 1 (June 13, 2023) (relying on the Second Restatement of Agency).

43. *See A Guide to the Rulemaking Process*, OFF. OF THE FED. REG., https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf [https://perma.cc/B9UE-D3NC] (last visited Nov. 11, 2024).

Commission to promote competition and protect collective bargaining, while Part III explores proposed reform strategies. Finally, Part IV provides a brief recommendation and asserts that the FTC should revive its dormant competition rulemaking authority under the FTC Act and APA to expand the collective bargaining rights of independent contractors through notice-and-comment rulemaking.

I. AN OVERVIEW OF ANTITRUST LAW

A. A Brief History of Antitrust Law

The antitrust regulatory scheme in the United States is primarily composed of three core federal antitrust laws, each passed over a century ago.[44] In 1890, Congress passed the Sherman Act as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade," the nation's first antitrust law.[45] It outlawed "every contract, combination[,] . . .

or conspiracy[] in restraint of trade," and any "monopoliz[ation], or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize[,]" and it exposed violators to both civil and criminal liability.[46] Two decades later, Congress passed the FTC Act and Clayton Act in 1914.[47] The FTC Act created the FTC as an independent agency and banned "unfair methods of competition" and "unfair or deceptive acts or practices."[48] Thus, the FTC was granted the authority to target conduct violative of the FTC Act, which necessarily also violates the Sherman Act.[49] The Clayton Act, on the other hand, addressed specific anticompetitive practices not explicitly prohibited by the Sherman Act and has been amended several times since its passage to address evolving economic conditions.[50] The Clayton Act is also the source of the labor exemption, which provides an antitrust shield for those engaged in "dispute[s] concerning terms or

44. *See The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/8UYC-2LAN] (last visited Nov. 11, 2024).

45. *Id.* (quoting N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958)); *see also* Sherman Act, 15 U.S.C. §§ 1–38.

46. Sherman Act, 15 U.S.C. §§ 1, 2.

47. *See The Antitrust Laws*, *supra* note 44.

48. Federal Trade Commission Act, 15 U.S.C. §§ 41–58.

49. *See The Antitrust Laws*, *supra* note 44.

50. *See id.* (stating that the Clayton Act prohibits certain mergers and interlocking directorates not addressed by the Sherman Act and requires companies planning large mergers and acquisitions to notify federal agencies in advance).

conditions of employment."[51] The standard of this exemption was later refined with the passage of the Norris–LaGuardia Act in 1932, which clarified the definition of "labor dispute" to encompass a broader range of activities "includ[ing] any controversy concerning terms or conditions of employment . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee."[52] However, because "labor groups strive to end competition over wages and improve working conditions, national policies that favor both the organization of workers and competition in the business market will inevitably clash."[53]

B. Antitrust Enforcement Against Independent Contractors

Although the current FTC leadership has been sympathetic to the gig worker cause, this has not always been the case. Nearly a century of case law demonstrates the FTC's willingness to condemn attempts by independent contractors to bargain collectively.[54] Examples date back to 1942, when the Supreme Court declined to recognize an association of independent fishermen as legitimately engaged in a labor dispute.[55] As recently as 2017, the FTC's conservative majority denounced a Seattle city ordinance allowing rideshare drivers to unionize.[56] Along with the DOJ, the agency filed an amicus brief in the legal battle that followed, reiterating its position that "[a]ntitrust law forbids independent contractors from collectively negotiating the terms of their engagement" and cautioning against "rule[s] of construction that would allow 'essential national policies' embodied in the antitrust laws to be displaced by state delegations of authority . . . ."[57]

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51. Clayton Act, ch. 323, § 20, 38 Stat. 730, 738 (1914) (current version at 29 U.S.C. §§ 52–53).

52. Norris–LaGuardia Act, ch. 90, § 13, 47 Stat. 70, 73 (1932) (current version at 29 U.S.C. § 113(c)).

53. James G. Paulsen, *Labor's Exemption from Federal Antitrust Law: The Diminishing Protection for Union Activity*, 28 FLA. L. REV. 620, 621 (1976).

54. *See, e.g.*, Columbia River Packers Ass'n v. Hinton, 315 U.S. 143, 143–47 (1942); Fed. Trade Comm'n v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 422–23 (1990); Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Appellant and in Favor of Reversal at 2, Chamber of Com. of the U.S. v. City of Seattle, 890 F.3d 769 (2017) (No. 2:17-cv-00370).

55. *See Columbia River Packers Ass'n*, 315 U.S. at 145; *Superior Ct. Trial Laws. Ass'n*, 493 U.S. at 423; Brief for the United States and the Federal Trade Commission, *supra* note 54, at 2.

56. *See* Brief for the United States and the Federal Trade Commission, *supra* note 54, at 2.

57. *Id.* at 2, 17 (first quoting Fed. Trade Comm'n v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 236 (2013); then Fed. Trade Comm'n v. Ticor Title Ins., 504 U.S. 621, 636

The case attempted to build upon jurisprudence developed in an earlier dispute in 1990 when the FTC successfully brought an antitrust action against a group of independent contractors who orchestrated a strike for higher pay.[58] *FTC v. Superior Court Trial Lawyers Association*[59] remains one of the most notable examples of antitrust enforcement challenging collective action by independent contractors.[60] A group of lawyers acting as court-appointed counsel for indigent defendants agreed to refuse all new appointments until the government granted them a substantial pay increase.[61] Despite the government quickly acquiescing and local officials stating that they recognized the beneficial net effect of the strike, the Supreme Court held that the agreement was a boycott under the Sherman Act, constituting a "horizontal arrangement among . . . competitors [that] was unquestionably a 'naked restraint' on price and output."[62]

As a result, even if the FTC and DOJ—which share antitrust enforcement responsibility—"were to exercise [their] . . . discretion not to pursue action against workers whose status as employees is unclear, the threat of private antitrust lawsuits and treble damages might nonetheless substantially chill worker organizing, since employers and other interested parties would remain free to pursue antitrust litigation."[63] The enduring legacy of *Superior*

(1992)) (internal quotation marks omitted); *see also* Avi Asher-Schapiro, *Trump Administration Fights Effort to Unionize Uber Drivers*, THE INTERCEPT (Mar. 26, 2018, 1:14 PM), https://theintercept.com/2018/03/26/uber-drivers-union-seattle [https://perma.cc/7ZQD-A8V2]. Although the Supreme Court has long held that the antitrust laws were "not intended to constrain states in the exercise of their sovereign regulatory powers" and that "[s]tates can authorize anticompetitive activity, provided that the policy of curtailing competition is 'clearly articulated' as a matter of state policy, . . . the Court has also described the state action exemption as 'disfavored,' and has been fairly exacting in applying its conditions." Cynthia Estlund & Wilma B. Liebman, *Collective Bargaining Beyond Employment in the United States*, 42 COMPAR. LAB. L. & POL'Y J. 371, 383 (2021) (citation omitted). As a result, the path toward state-authorized collective bargaining is "strewn with obstacles." *Id.* at 384–85.

58. *See Superior Ct. Trial Laws. Ass'n*, 493 U.S. at 414, 422–25.

59. 493 U.S. 411.

60. *See* Lao, *supra* note 37, at 1561–65 (describing *Superior Court Trial Lawyers Association* as the "case that most resembles a regular labor strike" and along with other cited cases, "ma[kes] clear the federal government's position that the antitrust labor exemption may not and should not be applied to independent contractors"); Jacob, *supra* note 34, at 218 n.62 (citing *Superior Court Trial Lawyers Association* as an example of "at least one Supreme Court case that involved a work stoppage by independent contractors seeking to improve their wages").

61. *See Superior Ct. Trial Laws. Ass'n*, 493 U.S at 414.

62. *Id.* at 423.

63. Brief of the United States Department of Justice as Amicus Curiae in Support of Neither Party at 5, Atlanta Opera, Inc., 372 N.L.R.B. No. 95 (June 13, 2023) (No. 10-RC-276292), https://www.justice.gov/atr/case-document/file/1470846/dl?inline [https://perma.cc/2UJS-FZLP].

Court Trial Lawyers Association makes clear that regardless of whether regulators choose to enforce them, antitrust laws currently prohibit independent contractors from engaging in any form of collective bargaining.[64]

C. A Shifting Regulatory Landscape for Independent Contractors

Despite how independent contractors have fared with regulators in the past, recent developments indicate that the tide may be turning. The FTC has been particularly vocal on this matter.[65] Each of the three Democrat-appointed commissioners currently serving at the FTC has made statements suggesting that the agency will not prioritize cracking down on independent contractors who attempt to bargain collectively.[66] In a letter to Congress written shortly after her appointment in 2021, FTC Chair Khan stated that "[t]he FTC should be judicious in its use of scarce resources, focusing on antitrust enforcement on tackling monopolization or mergers involving dominant firms," rather than focusing on suing workers seeking to organize.[67] The letter also called for legislation that clarified that regardless of whether a worker is classified as an employee, labor organizing regarding the terms and conditions of their work falls outside the scope of federal antitrust law.[68] More recently, FTC Commissioner Rebecca Kelly Slaughter wrote that she "would oppose devoting any resources . . . to challenging gig workers who engage in collective action to fight back against unfair labor practices and to seek better wages, terms of employment, and working conditions[;]"[69] and FTC Commissioner Alvaro M. Bedoya declared in a speech at the University of Utah that "because of antitrust [laws], the people most vulnerable to mistreatment are the ones least capable of organizing to stop it."[70]

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64. *See Superior Ct. Trial Laws. Ass'n*, 493 U.S. at 422–23.

65. *See* Papscun & Atkinson, *supra* note 27.

66. *See id.*

67. *See* Letter from Lina M. Khan, Chair, Fed. Trade Comm'n, to David Cicilline, Chair, Subcommittee on Antitrust, Commercial, and Administrative Law, U.S. House of Representatives & Ken Buck, Ranking Member, Subcommittee on Antitrust, Commercial, and Administrative Law, U.S. House of Representatives (Sept. 28, 2021) [hereinafter Letter from FTC Chair Khan], https://www.ftc.gov/system/files/documents/public_statements/1596916/letter_to_cicilline_and_buck_for_sept_28_2021_hearing_on_labor_antitrust.pdf [https://perma.cc/3HBN-8MVB].

68. *See id.*

69. Rebecca Kelly Slaughter, *Statement of Commissioner Rebecca Kelly Slaughter FTC Policy Statement on Enforcement Related to Gig Work*, FED. TRADE COMM'N (Sept. 15, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/rks-gig-worker-policy-statement.pdf.

70. Alvaro M. Bedoya, Comm'r, Fed. Trade Comm'n, Keynote Address at the

The FTC has not been alone in adopting this shift.[71] The NLRB, too, worked hard to execute the Biden Administration's pro-labor agenda, announcing a partnership with the FTC in 2022 to promote competitive labor markets.[72] In tackling the question of worker classification, the Board issued its ruling in *Atlanta Opera, Inc.*, a recent decision concerning makeup artists' and hair stylists' attempts to unionize.[73] The NLRB ultimately abandoned the standard adopted under the Trump Administration and returned to an earlier, worker-friendly standard for determining the status of an independent contractor under the NLRA.[74] In reverting to this standard, the NLRB embraced the common-law agency principles enumerated in the Second Restatement of Agency and adopted a multifactor test in which "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."[75] The list is nonexhaustive, but relevant factors include: (a) "the extent of control which . . . the master may exercise over the details of the work"; (b) "the skill required in the particular occupation"; (c) "whether the employer . . . supplies the instrumentalities, tools, and the place of work for the person doing the work"; (d) "the length of time for which the person is employed"; (e) "the method of payment"; and (f) "whether or not the work is part of the regular business of the employer."[76]

University of Utah S.J. Quinney College of Law: Do Consumers Still Reign Supreme in the Antitrust Hierarchy? How Antitrust Can Promote the Interests of Workers and Other Stakeholders in the Economy (Apr. 10, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/bedoya-aiming-dollars-not-men.pdf [https://perma.cc/S9K9-BSKZ] (emphasis removed).

71. *See* Press Release, Fed. Trade Comm'n, Federal Trade Commission, National Labor Relations Board Forge New Partnership to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices (July 19, 2022) [hereinafter FTC & NLRB Forge Partnership], https://www.ftc.gov/news-events/news/press-releases/2022/07/federal-trade-commission-national-labor-relations-board-forge-new-partnership-protect-workers [https://perma.cc/9GJV-HGFK]; Board Modifies Standard, *supra* note 32; Atlanta Opera, Inc., 372 N.L.R.B. No. 95, 2 (June 13, 2023); Final Rule on Classifying Workers, *supra* note 33.

72. *See* FTC & NLRB Forge Partnership, *supra* note 71.

73. *See* Board Modifies Standard, *supra* note 32; *see also* Atlanta Opera, Inc., 372 N.L.R.B. at 1.

74. *See* Board Modifies Standard, *supra* note 32. In *SuperShuttle DFW, Inc.*, the Board declared "entrepreneurial opportunity as a principle by which to evaluate the significance of the common-law factors" and placed particular importance on a "contractor's independence to pursue economic gain." 367 N.L.R.B. No. 75, 10, 15 (Jan. 25, 2019).

75. Atlanta Opera, Inc., 372 N.L.R.B. at 12; *see also* Board Modifies Standard, *supra* note 32; RESTATEMENT (SECOND) OF AGENCY § 220 (AM. L. INST. 1958).

76. RESTATEMENT (SECOND) OF AGENCY § 220 (AM. L. INST. 1958). The Board also considered:

Following the NLRB's decision, the DOL similarly undertook an effort to combat worker misclassification, a practice whereby employers attempt to classify workers as independent contractors rather than employees in an effort to reduce labor costs.[77] Issuing its final rule in January 2024, DOL set forth a multifactor "economic realities" test to determine a worker's status under the Fair Labor Standards Act, rescinding a Trump-era rule in the process.[78] The rule would reclassify certain independent contractors as employees where they are "economically dependent on a company" to ensure they receive basic labor protections.[79] Independent contractors, unlike traditional employees on payroll, are not covered by federal minimum wage laws and are not entitled to receive "overtime pay, unemployment insurance[, or] workers' compensation."[80] It remains unclear to what extent DOL will enforce the reclassification, but studies suggest that it could affect an estimated 3.4 million gig workers.[81]

However, clues that these reforms could outlast a change in presidential administration came from a case out of the First Circuit.[82] Somewhat unexpectedly, the court broke with decades of precedent when it decided *Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc.*[83] in

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> [W]hether or not the one employed is engaged in a distinct occupation or business; . . . the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; . . . whether or not the parties believe they are creating the relation of master and servant; and . . . whether the principal is or is not in business.

Id.

77. *See* Final Rule on Classifying Workers, *supra* note 33; Courtenay Brown, *Biden Administration Revamps Gig Worker Rule*, AXIOS (Jan. 9, 2024), https://www.axios.com/2024/01/09/biden-administration-revamps-gig-worker-rule [https://perma.cc/H4WC-4TSE].

78. *See* Final Rule on Classifying Workers, *supra* note 33; *see also* Chris Marr & Rebecca Rainey, *Labor Department Cements Rule Change on Gig Worker Status*, BLOOMBERG L. (Jan. 9, 2024, 6:00 AM), https://news.bloomberglaw.com/daily-labor-report/labor-department-cements-changes-to-gig-worker-classification [https://perma.cc/42AK-QY8T].

79. Daniel Wiessner, *Biden Administration Issues Rule That Could Curb 'Gig' Work, Contracting*, REUTERS (Jan. 9, 2024, 5:50 PM) [hereinafter Wiessner, *'Gig' Work*], https://www.reuters.com/world/us/biden-administration-issues-rule-that-could-curb-gig-work-contracting-2024-01-09 [https://perma.cc/H344-WBSQ]; Final Rule on Classifying Workers, *supra* note 33.

80. *See* Brown, *supra* note 77.

81. *See* Wiessner, *'Gig' Work*, *supra* note 79.

82. *See* Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc., 30 F.4th 306, 314 (1st Cir. 2022).

83. *See id.* at 310–12; *see also* Jack Samuel, Case Comment, Confederación Hípica v. Confederación de Jinetes Puertorriqueños, N.Y.U. L. REV. 1, 1 (2023).

2022, a case concerning an association of jockeys in Puerto Rico. The First Circuit rejected the district court's conclusion that "the jockeys' alleged independent contractor status categorically meant they were ineligible for the [Clayton Act's labor] exemption," and held that "[a]s long an employee-employer relationship—broadly understood—is at the core of the controversy, . . . then any political motivations for a work stoppage would not take a dispute out of the labor exemption."[84] Though it may be too early to accurately assess the ruling's impact, *Jinetes* suggests the possibility that Article III courts, in addition to agency adjudicators, may be becoming increasingly accepting of the view that "workers engaged in a labor dispute may benefit from the exemption regardless of their employment status."[85] These developments indicate that the gig worker discussion has moved beyond Executive policymaking to include other branches of government and may signal a lasting change in antitrust and labor law.

II. THE FTC'S ENFORCEMENT AUTHORITY

A. Scope of Statutory Authority

The Sherman Act, passed by Congress in 1890 as the nation's first antitrust law, outlawed "every contract, combination, . . . or conspiracy[] in restraint of trade," and any "monopoliz[ation], or attempt to monopolize, or combine or conspire with any other persons[] to monopolize."[86] However, the Supreme Court quickly clarified that "the Sherman Act does not prohibit *every* restraint of trade, only those that are *unreasonable*."[87] The Sherman Act provides a private right of action for victims of antitrust violations, but because the law predates the FTC Act, it is enforced not by the FTC but by the Justice Department's Antitrust Division.[88] This distinction became all but meaningless when Congress passed the FTC Act in 1914, establishing the FTC as an independent agency tasked with "protecting the public from deceptive or unfair business practices and from unfair methods of competition through law enforcement, advocacy, research, and education."[89] The law provided that any violations of the Sherman Act necessarily violate the FTC Act, thereby allowing the FTC to "bring cases under the FTC Act against

84. *Jinetes*, 30 F.4th at 314, 316.

85. Jacob, *supra* note 34, at 211; *see also Jinetes*, 30 F.4th at 314; Papscun & Atkinson, *supra* note 27.

86. Sherman Act, 15 U.S.C. §§ 1–38.

87. *The Antitrust Laws*, *supra* note 44.

88. *See id.*

89. *Mission*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/mission (last visited Oct. 17, 2024); *see also The Antitrust Laws*, *supra* note 44.

the same kinds of activities that violate the Sherman Act."[90] More specifically, the FTC Act prohibited "unfair methods of competition" and "unfair or deceptive acts or practices."[91]

Meanwhile, the Clayton Act sought to address specific practices not explicitly prohibited by the Sherman Act.[92] Although the general purpose of the antitrust acts "is to secure for the nation the advantages of a freely competitive economy[] with commodity prices regulated by the market," the Clayton Act created a series of antitrust exemptions.[93] This included a labor exemption to shield workers engaged in "dispute[s] concerning terms or conditions of employment."[94] The rationale for the exemption grew out of a desire to "stimulate the growth of trade unions so as to equalize bargaining power between individual workers and more powerful employers by permitting labor unions to obtain . . . a monopoly of labor in any given field."[95] Section 6 of the Clayton Act declared that "[t]he labor of a human being is not a commodity or article of commerce" and that "[n]othing contained in the antitrust laws shall 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 thereof . . . ."[96] It further stated that such organizations shall not "be held or construed to be illegal combinations or conspiracies in restraint of trade[] under the antitrust laws."[97] Moreover, § 52 significantly restricted the injunctive remedies available to federal courts considering labor disputes by providing that none of the labor activities specified in § 52 are to be considered to violate any law of the United States.[98] Such actions generally include: peaceful assembly,[99] communicating about the labor dispute, ceasing to patronize

90. *The Antitrust Laws*, *supra* note 44.

91. Federal Trade Commission Act, 15 U.S.C. § 45(a).

92. *The Antitrust Laws*, *supra* note 44.

93. *The Basis of Labor Exemptions from the Antitrust Acts*, *supra* note 28, at 853; *see also* Clayton Act, 29 U.S.C. § 52.

94. Clayton Act, ch. 323, § 20, 38 Stat. 730, 738 (1914) (current version at 29 U.S.C. § 52); *see also The Basis of Labor Exemptions from the Antitrust Acts*, *supra* note 28, at 854.

95. *The Basis of Labor Exemptions from the Antitrust Acts*, *supra* note 28, at 853.

96. Clayton Act, ch. 323, § 6, 38 Stat. at 731 (current version at 15 U.S.C. § 17).

97. *Id.*

98. Clayton Act, 29 U.S.C. § 52.

99. *See generally 15 Freedom of Assembly Examples You Should Know*, FREEDOM F., https://www.freedomforum.org/freedom-of-assembly-examples [https://perma.cc/79FQ-TQRC] (last visited Nov. 11, 2024) (highlighting notable peaceful protests throughout history).

a party to the dispute,[100] and striking or providing strike benefits to workers.[101]

However, the Supreme Court's narrow interpretation of the Clayton Act in the decades following its passage prompted Congress to clarify its labor policy with the enactment of the Norris–LaGuardia Act in 1932.[102] The Act proclaimed that "under prevailing economic conditions . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract" and declared it "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 . . . ."[103] Specifically, the Norris–LaGuardia Act refined the definition of "labor dispute" to encompass a broader range of activities "includ[ing] any controversy concerning terms or conditions of employment . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee."[104]

In enforcing these laws, the FTC has historically favored administrative adjudication.[105] Adjudication proceeds on a case-by-case basis and requires the aid of an Article III court to "obtain civil penalties or consumer redress for violations of its orders to cease and desist or trade regulation rules," even when the FTC has determined through adjudication that a given practice violates the law.[106] As a result of these procedural hurdles, some commentators have argued that expanding the enforcement toolkit is necessary to address the issue properly.[107] The Commission is additionally authorized to "use rulemaking to address . . . unfair methods of competition that occur

100. *See generally* Truax v. Corrigan, 257 U.S. 312, 325–26 (1921) (holding that having agents hold a strike near the entrance of a restaurant during business hours and continuously scream that the restaurant was unfair to the labor union was not a legal practice under the Clayton Act).

101. *See* Clayton Act, 29 U.S.C. § 52; Paulsen, *supra* note 53, at 622 n.15.

102. *See* Norris–LaGuardia Act, 29 U.S.C. §§ 101–10, 113–15; *see also* Paulsen, *supra* note 53, at 622. Several years after Congress passed the Clayton Act, the Supreme Court decided *Duplex Printing Press Co. v. Deering*, in which it read "labor dispute" to apply only to controversies between "an employer and his immediate employees," finding that secondary (nationwide) boycotts are not a protected activity. Paulsen, *supra* note 53, at 622 (citing Duplex Printing Press Co. v. Deering, 254 U.S. 443, 472 (1921)). In effect, the ruling placed judicial judgment on whether a union has departed from its "normal and legitimate objectives" as the key issue in determining whether a Sherman Act violation has occurred. *See id.* (citing *Duplex Printing Press Co.*, 254 U.S. at 469).

103. Norris–LaGuardia Act, 29 U.S.C. § 102.

104. *Id.* § 113(c).

105. *See* SYKES, *supra* note 39, at 1.

106. *Overview of FTC Authorities*, *supra* note 10, at 10.

107. *See* SYKES, *supra* note 39, at 1, 4–5.

commonly, in lieu of relying solely on actions against individual respondents."[108] This authority stems from § 46(g) of the FTC Act, which authorizes the Commission "to make rules and regulations for the purpose of carrying out the provisions of [the Act]."[109] Although § 18 of the FTC Act, which permits the Commission to prescribe "rules which define with specificity acts or practices which are unfair or deceptive," later "became the Commission's exclusive authority for issuing rules with respect to unfair or deceptive practices under the FTC Act[,] . . . [§ 46(g)] continues to authorize rules concerning unfair methods of competition."[110] Still, the FTC has been hesitant to assert its authority to promulgate rules related to unfair methods of competition.[111]

But the pervasive challenges facing workers in the gig economy has prompted some to argue that it is time for the FTC to activate its dormant competition rulemaking authority.[112] Although the existence of this authority as it relates to "unfair methods of competition" remains unsettled in part due to the historical absence of such rules, there is some case law to support this position.[113] In 1973, the D.C. Circuit Court decided *National Petroleum Refiners Association v. FTC*,[114] which held that § 46(g) of the FTC Act authorizes the FTC to promulgate substantive rules defining both "unfair or deceptive acts or practices" and "unfair methods of competition." Congress responded to the decision with the passage of the Magnuson–Moss Act, which established specific procedures for the FTC's "unfair or deceptive acts or practices" rulemakings,[115] but it contained a provision disclaiming any intent to "affect any authority of the Commission to prescribe rules (including interpretive rules)[] and general statements of policy, with respect to unfair methods of competition . . . ."[116] Although some commentators argue that the D.C. Circuit's interpretive approach is incompatible with the principles of statutory construction, the FTC tested the matter in January 2023 when it relied on this authority to issue a Notice of Proposed Rulemaking (NPRM)

108. *Overview of FTC Authorities*, *supra* note 10, at 11.

109. Federal Trade Commission Act, 15 U.S.C. § 46(g).

110. *Overview of FTC Authorities*, *supra* note 10, at 11–12; *see also* Federal Trade Commission Act, 15 U.S.C. § 57(a).

111. *See* SYKES, *supra* note 39, at 1.

112. *See id.* at 1, 4–5.

113. *See id.* at 1–2; *see also* Nat'l Petrol. Refiners Ass'n v. Fed. Trade Comm'n, 482 F.2d 672, 672 (D.C. Cir. 1973).

114. 482 F.2d 672, 672–73; *see also* SYKES, *supra* note 39, at 2.

115. SYKES, *supra* note 39, at 2.

116. Magnuson–Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified at Federal Trade Commission Act, 15 U.S.C. § 57(a)(2)).

to prohibit the use of noncompete clauses by employers.[117] The move is all but certain to ignite a legal battle, but the Commission asserts that its rulemaking authority is well-founded in § 6(g) of the FTC Act and that it is authorized "to make rules and regulations for the purpose of carrying out the provisions of [the Act]," which "continues to authorize rules concerning unfair methods of competition."[118]

However, any agency wishing to promulgate such substantive rules is generally subject to the APA.[119] The APA applies to the Executive and independent agencies alike and outlines the necessary procedures for agencies engaged in rulemaking.[120] Rulemaking is described as the "agency process for formulating, amending, or repealing a rule," which is in turn defined expansively to include any "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ."[121] Rules that are issued in compliance with the APA's requirements and which fall within the scope of Congress's properly delegated authority have the force and effect of law.[122] Section 553's notice-and-comment rulemaking procedures are the most commonly used among agencies and require that agencies "provide the public with adequate notice of a proposed rule followed by a meaningful opportunity to comment on the rule's content."[123] Notices are generally published in the *Federal Register* and must include "(1) the time, place, and nature of [the] public rulemaking proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved."[124] Once adequate notice is provided, interested persons must be given a meaningful opportunity to submit any data, views, or arguments pertaining to the proposed rule.[125] Agencies are then

117. *See* SYKES, *supra* note 39, at 2; *Fact Sheet: FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, FED. TRADE COMM'N, https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete_nprm_fact_sheet.pdf [https://perma.cc/2D4B-FTKU] (last visited Nov. 11, 2024); *Non-Compete Clause Rulemaking*, FED. TRADE COMM'N (Jan. 5, 2023), https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking [https://perma.cc/5QB8-LQJF].

118. *Overview of FTC Authorities*, *supra* note 10; *see also* Federal Trade Commission Act, 15 U.S.C. §§ 41–58.

119. *See* Administrative Procedure Act, 5 U.S.C. §§ 551–559.

120. *See id.* § 551.

121. *See id.* § 551(4)–(5).

122. *See* TODD GARVEY, CONG. RSCH. SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 1 (2017); 5 U.S.C. §§ 551–559.

123. GARVEY, *supra* note 122, at 2; *see also* 5 U.S.C. § 553.

124. *See* 5 U.S.C. § 553(b)(1)–(3).

125. *See id.* § 553(c); GARVEY, *supra* note 122, at 2.

directed to consider any relevant material and craft a concise general statement of the basis and purpose of the final rule, which is then published in the *Federal Register*.[126]

However, agencies in the very early stages of rulemaking may take some preliminary steps before formally issuing a proposed rule.[127] One such step is to publish an ANPRM in the *Federal Register*.[128] These notices are most commonly used to solicit public participation early in the policy formulation process and are useful to test the public's reaction to an agency's proposal.[129]

B. Lessons From a Century of Case Law

Because the FTC relies on Article III courts to enforce its orders once it has adjudicated that a practice is violative of federal antitrust law, case law presents a guide for how the courts have historically interpreted the FTC's authority.[130] For example, *Superior Court Trial Lawyers Association* predates the gig economy by decades and is in many ways outdated; no such cases have been brought on similar grounds, even in the wake of high-profile strikes and boycotts by gig workers.[131] But crucially, it demonstrates that the FTC is willing and able to enforce antitrust laws against small-scale attempts to engage in collective bargaining and suggests that workers may be dissuaded from organizing over well-founded fears of antitrust liability.[132]

However, *Superior Court Trial Lawyers Association* is consistent with decades of Supreme Court jurisprudence. In 1942, the Supreme Court handed down *Columbia River Packers Association v. Hinton*,[133] declining to extend the labor exemption to "a group of fishermen on the grounds that they were '*independent businessmen*' selling commodities, not their labor."[134] Yet the Court acknowledged that "by the terms of the statute, there may be a 'labor dispute' where the disputants do not stand in the proximate relation of employer and

126. *See* 5 U.S.C. §§ 551–559; GARVEY, *supra* note 122, at 3.

127. *See A Guide to the Rulemaking Process*, *supra* note 43.

128. *See id.*

129. *See Advance Notice of Proposed Rulemaking (ANPRM)*, REGUL. GRP., INC., https://www.regulationwriters.com/library/ANPRM.html [https://perma.cc/74XU-ZU8Z] (last visited Nov. 11, 2024).

130. *See Overview of FTC Authorities*, *supra* note 10.

131. *See* Fed. Trade Comm'n v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 422–23 (1990); Veena Dubal, *Why the Uber Strike Was a Triumph*, SLATE (May 10, 2019, 1:33 PM), https://slate.com/technology/2019/05/uber-strike-victory-drivers-network.html [https://perma.cc/24UQ-9NTF].

132. *See* Blum, *supra* note 29, at 373.

133. Columbia River Packers Ass'n v. Hinton, 315 U.S. 143, 146 (1942).

134. Bedoya, *supra* note 70, at 9; *see also Columbia River Packers Ass'n*, 315 U.S. at 145–47.

employee,"[135] indicating that the Court understood the implications of construing the labor exemption too narrowly.[136]

Consequently, in holding that the labor exemption may apply to any worker who is involved in a dispute over wages regardless of their independent contractor status,[137] the First Circuit squarely contradicted existing Supreme Court precedent.[138] The Supreme Court has consistently held that the labor exemption does not apply to independent contractors whose work is of an entrepreneurial nature.[139] However, the Court has left open the question of the exemption's applicability to workers who only sell their labor outside of a formal employment relationship.[140] *Jinetes*, therefore, represents a significant departure from antitrust jurisprudence, setting the stage for future legal conflicts if another federal court were to reach a different conclusion on a similar matter.[141]

In 2022, the NLRB announced a partnership with the FTC to protect workers from anticompetitive practices, even though the NLRB has no Article III mandate to enforce FTC orders.[142] The NLRB's decision in *Atlanta Opera, Inc.* provides insight into how the FTC may pursue attempts to clarify the language of the Clayton Act's labor exemption.[143] In finding for the workers at issue, the Board held that the majority of the traditional common law factors pointed toward the workers qualified for employee status under the NLRA.[144] These factors provide a more comprehensive view of how a

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135. *Columbia River Packers Ass'n*, 315 U.S. at 146.

136. *See id.*

137. *See* Samuel, *supra* note 83, at 1; *Jinetes*, 30 F.4th 306, 314 (1st Cir. 2022).

138. *See* Jacob, *supra* note 34, at 208, 227.

139. Samuel, *supra* note 83, at 1.

140. *See id.*

141. *See* Jacob, *supra* note 34, at 227. The Supreme Court denied a petition for a writ of certiorari in January 2023, leaving the First Circuit's judgment in place. Confederación Hípica v. Confederación de Jinetes Puertorriqueños, 30 F.4th 306 (1st Cir. 2022), *cert. denied*, 143 S. Ct. 631 (2023). But the potential remains for a circuit split. While a circuit split alone is not sufficient to warrant Supreme Court review, the importance of the matter may prompt intervention by the Court. MICHAEL JOHN GARCIA, CRAIG W. CANETTI, ALEXANDER H. PEPPER & JIMMY BALSER, CONG. RSCH. SERV., R47899, THE UNITED STATES COURTS OF APPEALS: BACKGROUND AND CIRCUIT SPLITS FROM 2023 8 (2024).

142. *See* FTC & NLRB Forge Partnership, *supra* note 71.

143. *See* Atlanta Opera, Inc., 372 N.L.R.B. No. 95 (June 13, 2023).

144. *Id.* The traditional common law factors the Board considered are drawn from the Second Restatement of Agency and include: (a) "the extent of control which . . . the master may exercise over the details of the work"; (b) "the skill required in the particular occupation"; (c) "whether the employer . . . supplies the instrumentalities, tools, and the place of work for

worker may be classified for purposes of collective bargaining beyond their technical employment status.[145] If this standard is consistently successful in allowing independent contractors to assert their interests collectively, it suggests that the FTC may achieve a similarly effective outcome by adopting a measured and multifactored approach.

III. CURRENT REFORM PROPOSALS

Various approaches to protect the rights of gig workers have been proposed, many of which focus in some manner on extending the labor exemption to independent contractors. Perhaps the most obvious recourse for the apparent ambiguity in the Clayton Act's labor exemption would be to seek congressional action that either clarifies or revises the exemption.[146] While FTC Commissioner Bedoya acknowledged the FTC's responsibility to address this issue, he ultimately felt that "in an ideal world, Congress would step in and clarify this in statute."[147] FTC Chair Khan has similarly called for "legislation clarifying that labor organizing by workers regarding the terms and conditions of their work is outside the scope of the federal antitrust statutes, regardless of whether the worker is classified as an employee."[148] These statements acknowledge that statutorily enshrining these protections is the only true way to safeguard workers from future partisan decisions or changes in presidential administrations.[149] But while inconsistency between administrations is a legitimate concern, political polarization and partisan gridlock may render Congressional action an unreliable, if not impossible, avenue for reform in the near future.[150]

Other advocates take a more pragmatic approach, suggesting that courts adopt the First Circuit's approach to defining the labor exemption.[151] This proposal has seen some support in academic literature but has yet to be

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the person doing the work"; (d) "the length of time for which the person is employed"; (e) "the method of payment"; and (f) "whether or not the work is a part of the regular business of the employer . . . ." RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. L. INST. 1958).

145. Atlanta Opera, Inc., 372 N.L.R.B. at 10; *see also* RESTATEMENT (SECOND) OF AGENCY § 220 (AM. L. INST. 1958); Carolina A. Schwalbach, *NLRB Revives a More Stringent Standard for Independent Contractor Classification,* CAL. LAB. & EMP. L. BLOG (Jun. 20, 2023), https://www.callaborlaw.com/entry/nlrb-revives-a-more-stringent-standard-for-independent-contractor-classification [https://perma.cc/48DN-WS6D].

146. *See* Papscun & Atkinson, *supra* note 27.

147. *Id.*

148. Letter from FTC Chair Khan, *supra* note 67, at 3.

149. *See* Papscun & Atkinson, *supra* note 27.

150. *See id.*

151. *See, e.g.*, Jacob, *supra* note 34, at 227; Lao, *supra* note 37, at 1543.

embraced outside the First Circuit.[152] Although the procedural constraints on the FTC's enforcement authority may render judicial intervention an attractive alternative, it still fails to address the limitations of tackling unfair methods of competition on a case-by-case basis.[153] Furthermore, there are legitimate concerns that a move to universally extend the labor exemption to independent contractors without further study of the practical implications of such a decision could be overly broad and politically infeasible.[154] Attempts to extend labor protections have already faced strong pushback by industry leaders.[155] Therefore, generalist judges may be insufficiently equipped to analyze the political and economic considerations that are central to contemporary antitrust litigation.[156]

Finally, a statutory interpretation approach to the labor exemption looks to existing laws for recourse. Sanjukta Paul, a professor at the University of Michigan Law School, suggested that "the labor exemption to antitrust law is potentially broader than who is an employee under labor and employment law" and noted that "[t]here's nothing in the law that says the exemption is only 'limited to employees.'"[157] However, there is evidence that conservative groups like the Federalist Society and Cato Institute would push back on such an expansive interpretation, arguing the exemptions were historically limited and "Congress tied them strictly to employment disputes[,]"making "that limitation explicit in [S]ection 20's language: [that] the exemptions applied only to 'a dispute concerning terms or conditions of employment.'"[158] Regardless, for an interpretation to have the force of law, a court or agency must first apply it.[159]

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152. *See* Jacob, *supra* note 34, at 227.

153. *Overview of FTC Authorities*, *supra* note 10.

154. *See* Marr & Rainey, *supra* note 78.

155. *See id.*

156. *See* SYKES, *supra* note 39, at 4.

157. Papscun & Atkinson, *supra* note 27.

158. Alexander Thomas MacDonald, *The FTC's Indefensible Position on Collective Bargaining*, FEDERALIST SOC'Y (Apr. 17, 2023), https://fedsoc.org/commentary/fedsoc-blog/the-ftc-s-indefensible-position-on-collective-bargaining [https://perma.cc/TN2V-APHM]; *see also* Matthew Feeney & Rachel Chiu, *Gig Economy Regulation Under Biden*, CATO INST. BLOG (Jan. 4, 2021, 1:04 PM), https://www.cato.org/blog/gig-economy-regulation-under-biden [https://perma.cc/YW8T-NM9Y].

159. *See* VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 1–2 (2023) (explaining that Congress may delegate interpretive authority to the agency that enforces a particular statute, but that judicial pronouncements are generally the final word on issues of statutory meaning).

IV. RECOMMENDATION

The FTC should utilize its rulemaking authority under the APA and the FTC Act to issue an ANPRM to clarify the Clayton Act's labor exemption, which extends only to "dispute[s] concerning terms or conditions of employment."[160] The clarification must establish that the antitrust labor exemption is independent from, and therefore potentially broader than, who is understood as an employee under federal labor law. Further, it should set forth a multifactor common law test to determine a worker's independent contractor status that looks to (1) the extent that a worker is economically dependent on their employer;[161] as well as (2) the degree of control exercised by the employer; (3) "whether the employer . . . supplies the instrumentalities, tools, and the place of work"; (4) the length of employment (5) "the method of payment"; and (6) "whether or not the work is part of the regular business of the employer."[162] A review of current efforts to protect the rights of gig workers reveals that the existing regulatory framework is insufficient because it relies on the discretion of the FTC and DOJ to decline to enforce certain aspects of the law, necessarily placing workers in a state of uncertainty.[163] Similarly, existing reform proposals face challenges of political feasibility, and further study of the practical implications of any proposal is necessary for the FTC to pursue a measured approach that balances worker protections against anticompetitive concerns.

An evaluation of the FTC's statutory authority under the FTC Act reveals that the Commission is authorized to "use rulemaking to address . . . unfair methods of competition that occur commonly, in lieu of relying solely on actions against individual respondents."[164] This authority stems from § 46(g) of the FTC Act, which grants the Commission the authority to promulgate rules for the purpose of carrying out the Act.[165] Although the existence of the FTC's competition rulemaking authority has been contested due to the historical absence of such rules, the D.C. Circuit Court's decision in *National Petroleum*, paired with Congress's explicit intent, as stated in the Magnuson–Moss Act, to preserve the authority of the FTC to prescribe rules and general statements of policy with respect to unfair methods of competition are strong indicators that the FTC can proceed as any other agency would regarding its rulemaking authority.[166]

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160. Clayton Act, 29 U.S.C. § 52; *see also* Administrative Procedure Act, 5 U.S.C. § 553.

161. *See* Final Rule on Classifying Workers, *supra* note 33.

162. RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. L. INST. 1958).

163. *See* Dodd, *supra* note 36.

164. *Overview of FTC Authorities*, *supra* note 10.

165. *See* Federal Trade Commission Act, 15 U.S.C. § 46(g).

166. *See* Nat'l Petrol. Refiners Ass'n v. Fed. Trade Comm'n, 482 F.2d 672 (D.C. Cir. 1973); *see also* Magnuson–Moss Warranty—Federal Trade Commission Improvement Act,

Nevertheless, an exercise of competition rulemaking authority by the FTC would be a significant departure from agency precedent and would be certain to face legal challenges that could stall the action in court for years.[167] The status of the Commission's rulemaking authority is further complicated by recent changes in Supreme Court jurisprudence—particularly the Court's decision to overrule the longstanding *Chevron* Doctrine in *Loper Bright Enterprises v. Raimondo*[168] and its embrace of the Major Questions Doctrine in *West Virginia v. EPA*.[169] It is difficult "to predict the impact the ruling will have on administrative law and regulatory practice,"[170] but the current Court's efforts "to limit the ability of federal agencies to implement statutes" suggest that the FTC has a difficult battle ahead.[171]

Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified at Federal Trade Commission Act, 15 U.S.C. § 57(a)); SYKES, *supra* note 39, at 2.

167. *See* SYKES, *supra* note 39, at 2–3.

168. *See* 144 S. Ct. 2244, 2273 (2024) ("*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires."); VALERIE C. BRANNON & JARED P. COLE, CONG. RSCH. SERV., R44954, *CHEVRON* DEFERENCE: A PRIMER i (2017). In *Chevron*, the Court laid out a two-step framework for reviewing an agency's interpretation of a statute it is charged with administering: first the court must ask "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, . . . the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). However, if "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

169. 142 S. Ct. 2587, 2614 (2022). Although "lower courts have applied the [D]octrine in thousands of cases," the Supreme Court had not itself relied upon *Chevron* since 2016. Leah Malone & Emily Holland, *What the Supreme Court's Loper Bright Decision Means for ESG, and Other Key Trends*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 4, 2024), https://corpgov.law.harvard.edu/2024/07/04/what-the-supreme-courts-loper-bright-decision-means-for-esg-and-other-key-trends [https://perma.cc/ZNR4-7LBL]. Instead, it invoked the Major Questions Doctrine in *West Virginia v. EPA*—"a judicially-created doctrine requiring that regulatory initiatives with major economic or societal significance be explicitly articulated by Congress." *Id.*; *see also West Virginia*,142 S. Ct. at 2614 ("[T]he Government must—under the major questions doctrine—point to 'clear congressional authorization' to regulate in that manner.") (citation omitted); Thomas W. Merrill, *Antitrust Rulemaking: The FTC's Delegation Deficit*, 75 ADMIN. L. REV. 277, 279 (2023).

170. Christopher J. Walker, *What* Loper Bright Enterprises v. Raimondo *Means for the Future of Chevron Deference*, YALE J. ON REGUL.: NOTICE & COMMENT (June 28, 2024), https://www.yalejreg.com/nc/what-loper-bright-enterprises-v-raimondo-means-for-the-future-of-chevron-deference [https://perma.cc/5L2K-J4NC].

171. Malone & Holland, *supra* note 169; *see also* Merrill, *supra* note 169, at 279. Although

In exercising its rulemaking authority, the Commission remains subject to the procedural requirements of the APA, which apply to all executive and independent agencies and prescribes the necessary procedures for agency rulemaking.[172] Rules that are issued in compliance with the APA's procedural requirements and within the scope of authority delegated by Congress to the agency are granted the force and effect of law.[173] The informal rulemaking process, more commonly referred to as notice-and-comment rulemaking, is outlined in § 553 of the APA and is by far the most commonly used procedure among agencies.[174] It requires that the agency "provide the public with adequate notice of a proposed rule followed by a meaningful opportunity to comment on the rule's content."[175] But agencies in the very early stages of rulemaking may take some preliminary steps before formally issuing a proposed rule in the *Federal Register*, such as publishing an ANPRM.[176] These notices are most commonly used to solicit "public participation in the formulation of a regulatory change before the agency has done significant research or investigation on its own" and may be useful in testing the public's reaction to a proposal.[177]

The FTC has historically relied upon adjudication when enforcing antitrust measures, but procedural hurdles associated with that approach and the pervasive challenges facing workers in the gig economy justify a shifting strategy toward notice-and-comment rulemaking.[178] Whereas rulemaking allows an agency to set a uniform standard across a particular industry—thus providing regulated entities with greater legal certainty—adjudication proceeds on a case-by-case basis and often involves open-ended standards.[179] And in the case of the FTC, adjudication requires the aid of an Article III court to enforce its orders even when "the Commission determines through adjudication that a practice violates consumer protection or competition

much remains uncertain about the Major Questions Doctrine, the Supreme Court indicated that it "will not uphold novel agency interpretations that seek to regulate questions of economic and political significance unless the agency can point to clear congressional authorization for such actions." Merrill, *supra* note 169, at 280–81.

172. GARVEY, *supra* note 122, at 1.

173. *See id.* at 1–2.

174. *See id.*; Administrative Procedure Act, 5 U.S.C. § 553.

175. GARVEY, *supra* note 122, at 2; *see* 5 U.S.C. § 553.

176. *See A Guide to the Rulemaking Process*, *supra* note 43.

177. *Advance Notice of Proposed Rulemaking (ANPRM)*, *supra* note 129.

178. *See* SYKES, *supra* note 39, at 1; *Gig Economy in the U.S. - Statistics & Facts*, *supra* note 13 (noting a majority of American workers will be employed by the gig economy by 2027); *see, e.g.*, Abraham et al., *supra* note 13 (stating many gig economy workers are denied benefits typically afforded to traditional American Workers).

179. *See* SYKES, *supra* note 39, at 4.

law."[180] Furthermore, in the face of constantly changing markets, *ex post* adjudication may move too slowly to effectively address anticompetitive conduct.[181] Rulemaking also allows for greater democratic participation in the development of competition policy, and while "generalist judges and lay juries [may be] ill-equipped to analyze the complex economic evidence that plays a central role in contemporary antitrust litigation[,] . . . expert regulators often develop detailed knowledge of specific industries and conduct[] which they can deploy during the rulemaking process."[182] But while rules may offer speed and certainty, they may risk additional incidents of error and may present risks of institutional conflict between the FTC and the DOJ's Antitrust Division if such reach rules extend beyond the Sherman and Clayton Acts and, therefore, create disparate standards of liability between the agencies.[183] There is also legitimate concern that competition rulemaking would result in inconsistent regulations that vary with changes in presidential administration, potentially undermining any certainty benefits.[184] Still, the inadequacy of the current tools available to the FTC to prevent unfair methods of competition where they concern gig workers supports further exploration of the FTC's competition rulemaking authority.

Given the contentious nature of the reforms at issue and the limited official data available to lawmakers, an ANPRM would be appropriate in this case to allow the FTC to collect more information and stakeholder input while it refines its draft proposal.[185] The Notice should propose a standard for determining a worker's employment status as an independent contractor or traditional employer for the purposes of the Clayton Act's labor exemption, which relies on the multifactor evaluation inspired by the NLRB and DOL.[186] In particular, the FTC should look to (1) the extent that a worker is economically dependent on their employer;[187] as well as (2) the degree of control exercised by the employer; (3) "whether the employer . . . supplies the instrumentalities, tools, and the place of work . . . "; (4) the length of employment; (5) "the method of payment"; and (6) "whether or not the work is a part of the regular business of the employer."[188] This kind of test, in which "all of

180. *Overview of FTC Authorities*, *supra* note 10.

181. *See* SYKES, *supra* note 39, at 4.

182. *Id.*

183. *See id.* at 5.

184. *See id.*

185. *See A Guide to the Rulemaking Process*, *supra* note 43.

186. *See* Board Modifies Standard, *supra* note 32; Final Rule on Classifying Workers, *supra* note 33; RESTATEMENT (SECOND) OF AGENCY § 220 (AM. L. INST. 1958).

187. *See* Wiessner, *'Gig' Work*, *supra* note 79.

188. RESTATEMENT (SECOND) OF AGENCY § 220(2).

the incidents of the relationship must be assessed and weighed with no one factor being decisive," provides necessary discretion on the part of the adjudicator.[189] Further, by engaging in a necessary balancing test between the contradictory goals of worker organization and competition in the business market,[190] a multifactor common law test ensures that the labor exemption is extended only to independent contractors whose relationship to their employer reflects that of a traditional employer and employee.[191] Clarifying that the antitrust labor exemption may be broader than who is understood as an employee under federal labor law also allows the FTC to adopt reforms without relying on outside agency action or disrupting other areas of federal law.[192]

However, such a lenient standard is likely to face significant opposition throughout the notice-and-comment process from industry stakeholders fearful of rising labor costs and conservative political organizations who argue that the exemptions were historically limited.[193] In addressing these concerns, the FTC must engage in delicate political maneuvering, which stresses the balancing test employed by a common law based multifactor evaluation of a worker's independent contractor status. A well-crafted Notice has the potential to protect independent contractors' collective bargaining rights while still preserving the goals of the nation's antitrust laws. A targeted rulemaking approach does so without sweeping action needed by either the Legislative or Judicial Branches, making it a both feasible and widely effective approach. Although the FTC is certain to face political and procedural challenges, an expansion of the FTC's enforcement authority is necessary to address anticompetitive conduct in the face of constantly changing markets.

CONCLUSION

The gig economy's rapid growth during the COVID-19 pandemic has drawn attention to the fact that independent contractors, who make up as much as 15% of America's workforce, are generally denied access to traditional employer-provided benefits—among them the labor protections that

189. Atlanta Opera, Inc., 372 N.L.R.B. No. 95, at 1 (June 13, 2023) (quoting FedEx Home Delivery, 361 N.L.R.B. 610, 618 (2014)); *see also* Schwalbach, *supra* note 145 (same).

190. *See* Paulsen, *supra* note 53, at 625, 627.

191. *See* Atlanta Opera, Inc., 372 N.L.R.B. at 1; RESTATEMENT (SECOND) OF AGENCY § 220.

192. *See* Papscun & Atkinson, *supra* note 27.

193. *See* MacDonald, *supra* note 158 ("Congress tied them strictly to employment disputes," making "that limitation explicit in [S]ection 20's language: [that] the exemptions applied only to 'a dispute concerning terms or conditions of employment.'"); Feeney & Chiu, *supra* note 158; Brown, *supra* note 77.

allow employees to unionize without violating the nation's antitrust laws.[194] The Clayton Act's labor exemption creates an antitrust liability shield for workers involved in "dispute[s] concerning terms or conditions of employment,"[195] but leaves independent contractors—and by extension gig workers—with additional antitrust liabilities that may chill workers from organizing.[196]

But the campaign to extend antitrust protections to gig workers has gained momentum in recent years, receiving support from an array of government agencies.[197] All three Democrat-appointed commissioners at the FTC have pledged to deprioritize enforcement actions against independent contractors engaging in collective action.[198] The NLRB also recently issued a decision returning to a more worker-friendly standard for determining independent contractor status under federal labor law—an approach that was adopted in similar form by a final rule announced by the DOL, which will make it more difficult to classify workers as independent contractors rather than traditional employees.[199] But the most unexpected source of support has been from a recent First Circuit case, which suggested that workers engaged in a labor dispute may benefit from the labor exemption regardless of their formal employment status.[200] Although it may be too early to accurately assess the ruling's impact, it indicates that the gig worker discussion has moved beyond Executive policymaking and suggests that Article III courts may uphold the Biden Administration's reforms, which are certain to face legal challenges.[201]

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194. *See* Abraham et al., *supra* note 13, at 336; *Gig Economy in the U.S. - Statistics & Facts*, *supra* note 13.

195. Clayton Act, 29 U.S.C. § 52.

196. Brief of the United States Department of Justice as Amicus Curiae in Support of Neither Party, *supra* note 63 at 5.

197. *See* Papscun & Atkinson, *supra* note 27.

198. *See id.*

199. *See* Board Modifies Standard, *supra* note 32; Final Rule on Classifying Workers, *supra* note 33.

200. *See* Jacob, *supra* note 34, at 227; *see also Jinetes*, 30 F.4th 306, 314 (1st Cir. 2022).

201. *See* Jacob, *supra* note 34, at 227; *see also* Papscun & Atkinson, *supra* note 27; Daniel Wiessner, *Business Groups Move to Strike Down Biden Rule on Contracting, Gig Work*, REUTERS (Apr. 18, 2024, 5:34 PM), https://www.reuters.com/legal/government/business-groups-move-strike-down-biden-rule-contracting-gig-work-2024-04-18 [https://perma.cc/6R8A-DB6X] (discussing legal challenges to a Biden administration rule that would reclassify some workers as employees rather than independent contractors); Tony Romm, *Businesses Escalate Fight Against Biden Rule on Gig Worker Pay*, WASH. POST (Mar. 5, 2024, 2:16 PM), https://www.washingtonpost.com/business/2024/03/05/gig-workers-pay-rules-lawsuit [https://perma.cc/2SBW-3RBQ] ("[T]he legal challenge could prevent more ride-sharing drivers, home-health

Several options remain available to the FTC to promote competition and protect collective bargaining. The FTC has historically relied upon adjudication in enforcing antitrust measures, but procedural hurdles associated with this approach and the pervasive challenges facing workers in the gig economy justify a shifting strategy.[202] The FTC should revive its dormant competition rulemaking authority under the APA and FTC Act to expand the collective bargaining rights of independent contractors through notice-and-comment rulemaking. The agency should issue an ANPRM to clarify the Clayton Act's labor exemption, which extends to "dispute[s] concerning terms or conditions of employment" and has been historically understood to include only those workers classified as traditional employees.[203] The ANPRM should propose a standard for determining a worker's employment status that is largely inspired by those adopted by the NLRB and DOL, which both rely on a series of common law agency principles.[204] Given the contentious nature of such reforms and the limited official data available to lawmakers, an ANPRM would allow the agency to collect more information while it refines its draft proposal and represents a measured approach that balances worker protections against anticompetitive concerns.[205]

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aides, janitors and truckers from being treated as employees, rather than independent contractors, which would ultimately deny these workers access to a minimum wage and overtime pay.").

202. *See* SYKES, *supra* note 39, at 1.

203. Clayton Act, 29 U.S.C. § 52; *see also* Administrative Procedure Act, 5 U.S.C. § 553; *Advance Notice of Proposed Rulemaking (ANPRM)*, *supra* note 129.

204. *See* Board Modifies Standard, *supra* note 32; Final Rule on Classifying Workers, *supra* note 33.

205. *See A Guide to the Rulemaking Process*, *supra* note 43.