Off to the Races?: The Antitrust Labor Exemption and The Gig Economy after *Jinetes*

Introduction

Today, two trends reshaping the American economy—the explosive growth of the gig economy and the return of labor unions—are on a collision course due to their interactions with antitrust law.

Uber, Airbnb, DoorDash. Most had never heard of them a decade ago,[1] but today these companies and their competitors have changed not only how Americans live, but the structure of the workforce as well. While temporary work and independent contractors have existed for years, the growth of app-based startups has revolutionized temporary working arrangements.[2] The barriers to entry for workers have never been lower, and it is now easier than ever to connect the supply and demand for these services.[3] This has resulted in widespread adoption of the gig economy as a source of income, as over 16% of Americans have reported earnings through these platforms,[4] which is a greater percentage of the workforce than government workers, health care, or retail.[5] Demand is high for these platforms too, with nearly half of all Americans having used

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[1] *See* Ian Hathaway & Mark Muro, *Tracking the gig economy: New numbers*, BROOKINGS INSTITUTION (Oct. 13, 2016) https://www.brookings.edu/articles/tracking-the-gig-economy-new-numbers/ (finding that between 2012 and 2014, gig economy platforms saw explosive growth).
[2] *See* On Point, *The Origin Story of The Gig Economy*, WBUR (Aug. 20, 2018), https://www.wbur.org/onpoint/2018/08/20/gig-economy-temp-louis-hyman.
[3] *See id.*
[4] *See* Monica Anderson, et al., *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/.
[5] *Employment Projections*, U.S. BUREAU OF LAB. STAT. tbl.2.1 (Sept. 6, 2023) https://www.bls.gov/emp/tables/employment-by-major-industry-sector.htm. Those percentages are 13.1%, 13.4%, and 8.8% respectively. *Id.*

the applications in some capacity.[6] Use of these platforms has only grown over time,[7] and based on the disruptions caused to their traditional counterparts,[8] they seem to be here to stay.[9]

Unionized labor, after declining for several decades, seems to be returning in a major way to the American workforce. Public support for unions and organized labor is at a recent high.[10] Unionization is occurring at rates not seen in decades.[11] Several major strikes dominated the news cycle in recent months.[12] The Biden administration made enforcing NLRB obligations a

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[6] Jacob Aleknavicius, Comment, *On-Demand Drivers and the Right to Collective Bargaining: Why Seattle's Ordinance Does Not Violate Federal Antitrust Laws*, 95 CHI.-KENT L. REV. 299, 309 (2020) ("Given the convenience and flexibility provided by these platforms, nearly half of adults in the United States have participated in the gig economy, either as consumers or as on-demand workers.").

[7] *See* Hathaway, *supra* note 1.

[8] *See* Adi Gaskell, *Study Explores The Impact Of Uber On The Taxi Industry*, FORBES (Jan. 26, 2017, 9:29 AM) https://www.forbes.com/sites/adigaskell/2017/01/26/study-explores-the-impact-of-uber-on-the-taxi-industry/?sh=31cc3b5216b0 (finding that Uber entering a market resulted in a 10% decrease in the income of salaried drivers); John C. Roach, *How Airbnb has affected the hotel industry*, U.S. BUREAU OF LAB. STAT: BEYOND BLS (May 2018) https://www.bls.gov/opub/mlr/2018/beyond-bls/how-airbnb-has-affected-the-hotel-industry.htm (finding that Airbnb reduced hotel profits by up to 3.7%).

[9] Both Uber and Airbnb had record years in 2022. *See* Press Release, Uber, Uber Announces Results for Fourth Quarter and Full Year 2022 (Feb. 8, 2023) https://investor.uber.com/news-events/news/press-release-details/2023/Uber-Announces-Results-for-Fourth-Quarter-and-Full-Year-2022/default.aspx; Press Release, Airbnb, Airbnb Q4 2022 and full-year financial results (Feb. 14, 2013) https://news.airbnb.com/airbnb-q4-2022-and-full-year-financial-results/.

[10] *See* Jaclyn Diaz, *Support for labor unions in the U.S. is at a 57-year high*, NPR (Aug. 31, 2022, 5:30 AM) https://www.npr.org/2022/08/31/1120111276/labor-union-support-in-us; John Gramlich, *Majorities of Americans say unions have a positive effect on U.S. and that decline in union membership is bad*, PEW RSCH. CTR. (Sep. 3, 2021) https://www.pewresearch.org/short-reads/2021/09/03/majorities-of-americans-say-unions-have-a-positive-effect-on-u-s-and-that-decline-in-union-membership-is-bad/.

[11] *See* Heidi Shierholz, et al., *Unionization increased by 200,000 in 2022*, ECON. POL'Y INST. (Jan. 19 2023) https://www.epi.org/publication/unionization-2022/.

[12] These include strikes among the Union Autoworkers, Screen Actors Guild, and Writers Guild. *See* Jeanne Whalen, *How a brash, little-known union leader won record gains for autoworkers*, WASH. POST (Nov. 12, 2023, 6:00 AM) https://www.washingtonpost.com/business/2023/11/12/fain-uaw-contract-wins/; Brooks Barnes, et al., *Striking Actors and Hollywood Studios Agree to a Deal*, N.Y. TIMES (Nov. 8, 2023) https://www.nytimes.com/2023/11/08/business/media/actors-strike-deal.html; Yan Zhuang,

priority.[13] The Biden FTC has even stated that it would prefer to spend less resources pursuing unionizing workers for antitrust violations, the very topic of this article.[14] And for the first time in history, a sitting President joined a picket line to show his support for labor.[15]

Despite the strength and power of both the gig economy and collective labor efforts, they now appear to be on a collision course in the courts. Under current antitrust law, it is likely that the independent contractors who make their livelihoods through the gig economy cannot take collective action or form a union. This paper seeks to assess the current state of independent contractors within the antitrust labor exemption, examine the impact a recent decision may have, and analyze the odds of success various groups of workers (including rental property hosts, skilled laborers, and drivers) in the gig economy may have to unionize.

Studios and Writers Reached a Deal. Here's What Happens Next, N.Y. TIMES (Sept. 25, 2023) https://www.nytimes.com/2023/09/25/business/wga-writers-strike-deal-explained.html. This doesn't even include Teamsters nearly going on strike against UPS, which would have been the most impactful economically. *See* Lisa Baertlein, *UPS strike could be costliest in US in a century, study says*, REUTERS (July 14, 2023, 10:46 AM) https://www.reuters.com/world/us/potential-ups-strike-could-cost-customers-over-4-bln-report-2023-07-13/.

[13] *See* Daniel Wiessner, *Labor law landscape likely to shift in 2022 under Biden-era NLRB*, REUTERS (Dec. 30, 2021, 11:16 AM) https://www.reuters.com/legal/transactional/labor-law-landscape-likely-shift-2022-under-biden-era-nlrb-2021-12-30/.

[14] *See* Letter from Lina M. Khan, Chair, Fed. Trade Comm'n, to David Cicilline, Chair, Subcomm. Antitrust, Com., and Admin. L., U.S. House of Representatives (Sept. 28, 2021) (https://www.ftc.gov/system/files/documents/public_statements/1596916/letter_to_cicilline_and_buck_for_sept_28_2021_hearing_on_labor_antitrust.pdf).

[15] *See* Katie Rogers & Erica L. Green, *Biden Joins Autoworkers on Picket Line in Michigan*, N.Y. Times (Sept. 26, 2023) https://www.nytimes.com/live/2023/09/26/us/biden-uaw-strike-detroit. President Biden has also declared himself "the most pro-union President leading the most pro-union administration in American history." President Joseph Biden, Remarks in Honor of Labor Unions (Sept. 8, 2021) https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/08/remarks-by-president-biden-in-honor-of-labor-unions/?utm_source=npr_newsletter&utm_medium=email&utm_content=20230227&utm_term=8035455&utm_campaign=money&utm_id=208962&orgid=92&utm_att1=.

I. The Antitrust Labor Exemption

Labor unions are antitrust violations, or at least violate the spirit of the laws. They are an attempt to coordinate the supply of a service and use an attempted monopoly to drive higher prices and reduce competition.[16] This has created an inherent tension between the competition maximizing policies of antitrust law and the cooperative condition-improving policies behind labor law.[17] In the years after the passage of the Sherman Act, courts began to enjoin strikes and other collective actions while trying to navigate this conflict.[18] Courts navigating this issue sided with management, using the Sherman Act to limit the ability of labor to collectively act.[19] In fact, in the years after its passage, the Sherman Act began to be "perceived [as] a powerful union-busting device."[20] Congress, in recognition of the importance of organized labor in American society, passed laws to immunize unions from antitrust claims, under what has become referred to as the antitrust labor exemption.[21]

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[16] *See* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937 226 (1991) [hereinafter ENTERPRISE] (explaining how at common law the limited injury caused by collective labor action was not viewed as serious enough to outlaw strikes).
[17] *See* H.A. Artists & Assocs., Inc. v. Actors' Equity Ass'n, 451 U.S. 704, 713 (1981).
[18] *See id.* This was arguably intended by Congress, as attempts to include language immunizing labor unions in the Sherman Act failed. *See* Herbert Hovenkamp, 90 U. Chi. L. Rev. 511, 512 (2023) (recounting the history of Senator John Sherman's unsuccessful effort to include labor immunity in the statute). The judiciary's actions were supported by scholars at the time. *See id.* ("The consensus among prominent antitrust scholars of the day was that the [Sherman] Act was intended to treat combinations of capital and combinations of labor in the same way.").
[19] *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY, THE LAW OF COMPETITION AND ITS PRACTICE 915 (6th ed. 2020) ("Indeed, in the early years of antitrust enforcement the Sherman Act was employed much more effectively against labor than against restraints in product markets. Of the first thirteen antitrust violations found by American courts during the period 1890–1897, twelve were challenges to labor strikes, while only one was a challenge to an agreement among manufacturers.").
[20] ENTERPRISE, *supra* note 16, at 229.
[21] *See H.A. Artists*, 451 U.S. at 713; *see also* Duplex Printing Press Co. v. Deering, 254 U.S. 443, 484 (1921) (Brandeis, J., dissenting) ("Th[e Clayton Act] was the fruit of unceasing agitation, which extended over more than 20 years and was designed to equalize before the law the position of workingmen and employer as industrial combatants.").

In 1914, Congress passed the Clayton Act.[22] In Section 6, Congress laid clear its intentions by stating that "[t]he labor of a human being is not a commodity or article of commerce."[23] The statute went further and immunized from liability both labor organizations and their members, so long as the action being taken is for the "purposes of mutual help" and is "lawfully carrying out legitimate objects."[24] To enact this policy, Section 20 of the Act prohibited injunctions against specific labor activities such as boycotts and strikes.[25]

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[22] 15 U.S.C. § 12.
[23] 15 U.S.C. § 17.
[24] *Id.*
[25] 29 U.S.C. § 52. For reference, Section 20 of the Clayton Act follows:

> *No restraining order or injunction shall be granted* by any court of the United States, or a judge or the judges thereof, *in any case between an employer and employees*, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.
> And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or *from ceasing to perform any work or labor*, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or *from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do*; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

Id. (emphasis added).

Despite Congress's best intentions,[26] the Clayton Act was used primarily to foil organized labor,[27] because it created a private right of injunction against labor unions.[28] Reading into the Clayton Act "the very beliefs which [it] was designed to remove," the Supreme Court removed secondary boycotts from the scope of Section 20.[29] Congress was dismayed by judicial interpretations of the Clayton Act,[30] and took "the extraordinary step of divesting federal courts of equitable jurisdiction."[31]

In 1932 Congress enacted this plan by passing the Norris-LaGuardia Act.[32] There, Congress clarified the national policy towards labor, stating that the protections are given to help workers "exercise actual liberty."[33] The Act removed the court-imposed restraints upon labor

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[26] *See* ENTERPRISE, *supra* note 16, at 237 ("Congress intended to do three things in the Clayton Act: expand private plaintiff standing to sue business violators, enlarge the scope of illegal business activities, and give labor some kind of exemption for most nonviolent organizational activities.").
[27] For example, courts issued nearly 300 injunctions related to the railway shopmen's strike of 1922. *See* Milk Wagon Drivers' Union, Local No. 753, Int'l Bhd. Of Teamsters, Chauffeurs, Stablemen and Helpers of Am. V. Lake Valley Farm Prods., 311 U.S. 91, 102 (1940).
[28] *See id.*
[29] United States v. Hutcheson, 312 U.S. 219, 230 (1941); *see generally Duplex Printing Press Co.*, 254 U.S. 443; Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n of N. Am., 274 U.S. 37 (1927).
[30] *See Milk Wagon*, 311 U.S. at 102-03 (explaining Congress's dismay at judicial interpretations of the Clayton Act).
[31] Burlington N.R. Co. v. Bhd. of Maint. of Way Emps., 481 U.S. 429, 437 (1987).
[32] *See Hutcheon*, 312 U.S. at 230-31 (explaining the background of the passage of the Norris-LaGuardia Act).
[33] 29 U.S.C. § 102. The full statement of national policy follows:

> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, *the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor*, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows. It is *necessary* that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference,

unions by limiting the circumstances under which courts could grant injunctions in labor disputes.[34] Labor disputes are defined in the Act as "any controversy concerning *terms or conditions of employment*, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee*."[35] There are two noteworthy elements of the Act's definition of a labor dispute. The first is that it is defined as "any controversy concerning terms or conditions of employment."[36] The second is that the scope of the Act is not limited by the formal relationship between the two groups in the dispute, as they are not required to "stand in the proximate relation of employer and employee."[37] The Act's definition of labor dispute has been found to be "broad" by the courts, in part to prevent a redux of the anti-labor issues associated with the Clayton Act.[38]

Although the Norris-LaGuardia Act is not technically about antitrust law,[39] the Supreme Court has stated that it covers antitrust claims, because a failure to do so would "would run counter to the plain mandate of the Act and would reverse the declared purpose of Congress."[40]

> restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Id. (emphasis added).
[34] *See Hutcheson*, 312 U.S. at 231.
[35] 29 U.S.C. § 113.
[36] *Id.*
[37] *Id.*
[38] *See Burlington N.*, 481 U.S. at 441 ("Congress made the definition of labor dispute broad because it wanted it to be broad. . . . Congress attempted to write its bill in unmistakable language because it believed previous measures looking toward the same policy against nonjudicial intervention in labor disputes had been given unduly limited constructions by the Courts.") (quoting *Telegraphers v. Chicago & N.W.R. Co.*, 361 U.S. 330, 335-36 (1960)).
[39] The Norris-LaGuardia Act can best be thought of as labor law due to its presence in Title 29 of the U.S. code. *See generally* 29 U.S.C. (containing federal labor law and regulations).
[40] *Milk Wagon*, 311 U.S. at 103.

II. Case Law Interpreting the Exemption

As Courts have applied the statutes over the years, an exception exists to their otherwise wide scope. Independent contractors are generally found to sit outside the antitrust labor exemption.[41] This is because they are not negotiating for working conditions, but rather to influence the price of the good or service they wish to sell.[42] To fully understand the contours of this exception, one must study the case law, beginning with the Supreme Court's decision in *Columbia River Packers Ass'n v. Hinton*.[43]

A. Columbia River Packers

In *Columbia River Packers*, the Court found that the antirust labor exemptions did not apply to a group of independent contractors.[44] There, a dispute existed between a union of independent fishermen and a business they sell to that processes and cans the fish.[45] Members of the union own or lease fishing boats, and many of the fishermen are small businesses with employees of their own.[46] The union has a requirement that its members only sell fish through union contracts, and the contracts the union signs with processors require they only buy union-caught fish.[47] A processor refused the terms of the contract, and the union ordered its members to boycott the business, preventing them from obtaining the fish necessary to conduct

[41] *See* Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc., 419 F. Supp. 3d 305, 311 (D.P.R. 2019) (finding that because a party consisted of independent contractors they were not covered by the antitrust labor exemption).
[42] *See* Columbia River Packers Ass'n v. Hinton, 315 U.S. 143, 145 (1942) (explaining that a dispute among businesses over terms of sale is not covered by the antitrust labor exemption).
[43] 315 U.S. 143 (1942).
[44] *Id.* at 145-47.
[45] *Id.* at 144.
[46] *Id.* at 144-45.
[47] *Id.* at 145.

operations.[48] The processor then sought an injunction against the union for attempting to monopolize the local fishing industry.[49]

The Supreme Court found that this was not a "labor dispute" within the definition of the statute.[50] The Court categorized the dispute not as one centered on working conditions, but rather one "among businessmen over the terms of a contract for the sale of fish."[51] While noting that the parties are not required to "stand in the proximate relation of employer and employee," the Court found that here, where the dispute centered on the "sale of commodities," it fell outside the statute's immunity.[52]

B. The Contours of the Case Law

Columbia River Packers is not the only time the Court found a dispute to fall outside the exemption. In *Los Angeles Meat*,[53] the Court did not find a labor dispute under the Norris-LaGuardia Act because it was the exchange of goods, not labor, at the center of the dispute.[54] There, grease peddlers—independent entrepreneurs who functioned as middlemen between restaurants and grease processors—joined a union.[55] The grease peddlers earned their income through the margin between the prices for which they bought and sold the grease.[56] As part of the union, the grease peddlers worked to increase the margins of sales by using their

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[48] *Id.*
[49] *Id.* at 143.
[50] *Id.* at 145.
[51] *Id.* at 145.
[52] *Id.* at 145-46. The Court also pointed out that the fish sellers were not employees of the fish buyers, nor had any desire to be. *Id.* at 147. The Court found that the intentions of the fish sellers was to "continue to operate as independent businessmen, free from such controls as an employer might exercise." *Id.*
[53] L.A. Meat and Provision Drivers Union, Loc. 626 v. United States, 371 U.S. 94 (1962).
[54] *Id.* at 102-03.
[55] *Id.* at 96-97.
[56] *Id.*

collective power to fix purchase and sale prices throughout the city of Los Angeles.[57] The Court, in comparing to *Columbia River Packers*, found that the union here was selling a commodity, and joined a "union only for the purpose of bringing power to bear in the successful enforcement of the illegal combination in restraint of the traffic of yellow grease."[58]

Despite the focus on "products" and "goods," the restriction on this behavior also applies to services, as addressed by the Court in *American Medical*.[59] In that case, a nonprofit cooperative attempted a new risk-sharing payment method, where they would employ physicians as full-time employees, instead of the typical per-service basis.[60] A physician group was unhappy about the plan and, using their collective power, attempted to deter other physicians and hospitals from working with the cooperative.[61] The Court found no difference between the possible distinction of goods—the fish sold in *Columbia River Packers*—and services—the physician care being offered by the doctors here—in finding the behavior to be outside the antitrust labor exemption.[62]

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[57] *Id.* at 97.
[58] *Id.* at 102.
[59] Am. Med. Ass'n v. United States, 317 U.S. 519 (1943).
[60] *Id.* at 526.
[61] *Id.* at 526-27.
[62] *See id.* at 536 ("In truth, the petitioners represented physicians who desired that they and all others should practice independently on a fee for service basis where whatever arrangement for payment each had was a matter that lay between him and his patient in each individual case of service or treatment. The petitioners were not an association of employes in any proper sense of the term."). While the distinction between goods and services was not the main focus of the Court's opinion in *American Medical*, it nonetheless provides an important clarification, as the majority of the language used in this line of cases involves terms such as "commodity." *See* 15 U.S.C. § 17 ("[T]he labor of a human being is not a *commodity* or article of commerce.") (emphasis added).

These cases, while not explicitly stating so, have been taken for the proposition that independent contractors are not covered by the antitrust labor exemption.[63]

C. Jinetes

The case law described above has drawn the contours of the exemption, but the fact remains that independent contractors generally do not receive protection from the antitrust labor exemption. A recent First Circuit opinion, *Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc.* ("*Jinetes*") may have changed things.[64] In *Jinetes*, a dispute arose between horse owners and jockeys.[65] Puerto Rico has a single horse-racing track, where the jockeys are hired on a per-race basis and are paid a flat rate.[66] Prior to the dispute, the jockeys had been unhappy with their wages and working conditions.[67] The jockeys formed an association to negotiate these issues with the horse owners.[68] The negotiations were not fruitful, and the jockeys went on strike for three days, leading to cancelled races.[69] The owners sued the jockeys, alleging that they engaged in a group boycott in violation of antitrust

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[63] *See, e.g.*, Tayor v. Local No. 7, Int'l Union of Journeymen Horseshoes of U.S. and Can. (AFL-CIO), 353 F.2d 593, 603-04 (4th Cir. 1965) (comparing the status of defendants as independent contractors to the defendants in *Columbia River Packers*); Int'l Ass'n of Heat and Frost Insulators and Asbestos Workers, etc. v. United Contractors Ass'n, Inc. of Pittsburgh, Pa., 483 F.2d 384, 390 (3d Cir. 1973) ("If those belonging to the union are independent contractors rather than a group of workers, then what seemed to be a closed shop labor agreement becomes a conspiracy to restrain competition."); Checker Taxi Co., Inc. v. Nat'l Prod. Workers Union, 113 F.R.D. 561, 568 (N.D. Ill. 1986) (questioning if the workers' status as independent contractors precludes the dispute from being categorized as a "labor dispute").
[64] 30 F.4th 306 (1st Cir. 2022).
[65] *Id.* at 310.
[66] *Id.* at 311. The jockeys who finish in the top five also receive a bonus of prize money, but that is not relevant to the analysis. *Id.*
[67] *Id.* at 311. Specifically, the jockeys' fixed fee was only one-fifth of what jockeys would receive in the United States. *Id.* The jockeys were also unhappy with "pre-race weigh-in procedures and [] the conduct of racing officials." *Id.*
[68] *Id.* at 311.
[69] *Id.* at 311.

laws.[70] The District Court agreed, and granted an injunction against the jockeys, reasoning that because they were independent contractors, they were not shielded by the antitrust labor exemption.[71]

The First Circuit disagreed and reversed, finding that the ongoing controversy was a labor dispute because the "jockeys sought higher wages and better working conditions."[72] The lower court had erred when it determined that the jockeys, as independent contractors, were categorically outside the reach of the antitrust labor exemption.[73] The Court began by noting that the jockeys' status as independent contractors was irrelevant for the purposes of the inquiry, since the Norris-LaGuardia Act made clear that an employer-employee relationship is not necessary.[74] When attempting to define whether a controversy is covered by the labor exemption,[75] the relevant inquiry is "whether what is at issue is compensation for their labor."[76] In this case, the jockeys' labor was clearly what was at issue.[77] The jockeys were hired on a per-race basis to ride horses.[78] The Court had no trouble distinguishing the present issue from *Columbia River Packers*, because the jockeys, unlike the fishermen in that case, only sold their labor.[79] And here, since the jockeys were seeking "higher wages and better working conditions," their collective

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[70] *Id.* at 311.
[71] *Id.* at 312; *see also* Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc., 419 F. Supp. 3d 305, 311 (D.P.R. 2019) (finding that because a party consisted of independent contractors they were not covered by the antitrust labor exemption).
[72] *Jinetes*, 30 F.4th at 314.
[73] *Id.* at 314.
[74] *Id.* at 314; *see also* 29 U.S.C. § 113(c) ("[R]egardless of whether or not the disputants stand in the proximate relation of employer and employee.").
[75] Or really whether the controversy is a "labor dispute."
[76] *Jinetes*, 30 F.4th at 314.
[77] *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.").
[78] *Id.* at 311.
[79] *Id.* at 314-15.

action was part of a "labor dispute," thus availing them of legal protection from the labor exemption.[80]

The emphasis in *Jinetes* on text of the statute itself provides a way forward for independent contractors to collectively bargain.[81] While *Columbia River Packers* is still good law, *Jinetes* provides an illustrative example of the limits of its holding.[82] The "status" of the individuals striking does not matter, instead the only relevant inquiry is whether the controversy centers around labor and the associated working conditions,[83] or as the First Circuit put it: "disputes about wages for labor fall within the exemption but those over prices for goods do not."[84]

III. Applying the Exemption to the Gig Economy

As the baseline inquiry has long been whether the individuals attempting collective action are independent contractors, it makes sense that the assumption would be that the statutory exemptions do not reach those within the gig economy. While there are a variety of different platforms, what they have in common is critical to the argument that those who use the platforms would not be eligible for the exemption. In the gig economy, the platforms do not compensate

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[80] *Id.* at 316.
[81] *See* Dan Papscun, *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 ("Contractors are also getting a helping hand from the First Circuit.").
[82] Debate exists on the scope of the holding in *Jinetes*, with some taking the view that the First Circuit opened the door for nearly all gig economy workers to take collective action. *See* Josh Jacob, Comment, *Avenues for Gig Worker Collective Action After* Jinetes, 123 COLUM. L. REV. FORUM 208, 218-27 (describing two interpretations of *Jinetes*). This article instead focuses on the holding from the opinion as guided by prior case law and the statute itself, where labor is the critical distinction.
[83] *See Jinetes*, 30 F.4th 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.").
[84] *Id.* at 315.

workers for their labor. Instead, the platforms connect workers to those for whom they are providing services,[85] and they take a percentage of the workers' earnings for making the connection in the first place.[86] Since workers are not being compensated for their labor, some will argue these workers fall outside the text of the statutory exemption, which emphasizes the *labor* being done.[87] This final section of the paper will show the above argument to be an overly narrow and unrealistic view of the gig economy, and will demonstrate how certain groups of workers within it may be covered by the labor exemption. This will be done by looking at three groups of workers, proceeding in order of increasing likelihood of success: property rental hosts, skilled laborers, and drivers.[88] The inquiry, as outlined by the statutes and re-emphasized by the

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[85] There are many platforms out there that connect individuals with products to sell, such as Etsy and Amazon. *See* Stephen Layton & Laura McMullen, *12 Places to Sell Stuff Online*, NERDWALLET (Nov. 27, 2023) https://www.nerdwallet.com/article/finance/where-to-sell-stuff-online. Suppliers on these platforms would be attempting to use their collective bargaining power not to increase the compensation for their labor, but to raise the price of the finished goods they sell. This would be an antitrust violation, and as explained by *Columbia River Packers*, would not be covered by the labor exemption. *See Columbia River Packers*, 315 U.S. at 147 ("For the 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."; *see also Los Angeles Meat*, 371 U.S. at 102 ("[T]he grease peddlers were sellers of commodities, who became 'members' of the union only for the purpose of bringing upon power to bear in the successful enforcement of the illegal combination in restraint of the traffic in yellow grease.").

[86] *See, e.g.*, *Pricing*, UBER, https://www.uber.com/us/en/marketplace/pricing/service-fee/?uclick_id=126bb725-3b82-4d9c-b516-ab2c5deea0f5 (last visited Dec. 16, 2023); *The basics of hosting on Airbnb*, AIRBNB (Nov. 8, 2023) https://www.airbnb.com/resources/hosting-homes/a/the-basics-of-hosting-on-airbnb-3.

[87] *See* 15 U.S.C. § 17 ("The labor of a human being is not a commodity or article of commerce."); *see also* 29 U.S.C. § 113 (defining a labor dispute as "any controversy concerning terms or conditions of employment").

[88] Some of the suppliers of property rental hosts and skilled labor are not individuals working, rather they are companies, with their own employees, offering services. *See* Chris Dios, *Should Airbnb Hosts Form an LLC Holding Company?*, SHARED ECONOMY TAX (Mar. 25, 2022) https://sharedeconomycpa.com/blog/llc-holding-company/. For the purposes of this paper, these will be categorically excluded, as their corporate identity alone would mean that the antitrust labor exemption does not apply to them. *See Los Angeles Meat*, 371 U.S. at 101 (finding that the statutory labor exemption does not apply to groups of businessmen who join together and call themselves a union).

court in *Jinetes* is: whether the dispute is a one centered on the labor of those attempting to engage in collective action.

A. Rental Property Hosts

The first collection of workers are property rental hosts, including those on platforms such as Airbnb, and they are unlikely to be able to take advantage of the exemption. Property rental hosts supply short-term housing to individuals as an alternative to hotels. They supply the property and set their own prices and availability.[89] Here, property rental hosts don't necessarily provide any *labor* at all. Hosts supply a service, a rental unit, to customers through the platform. This is not to say that some hosts on the platforms do not provide labor in offering a rental property. Many hosts clean the premises, help guests check in and out, and provide complimentary hospitality services similar to that of hotels.[90] However, this does not change the analysis because the *involvement* of labor alone is not dispositive. In *Columbia River Packers*, the fishermen used their labor when going out and catching fish, however they were not compensated for their labor, rather they were compensated for the fish they sold to the processors.[91] Property rentals work much in the same way. Nobody is paying for the labor that the host provides, rather payment is for the ability to stay at the property.

In fact, Airbnb even offers the ability for hosts to be compensated for their labor, via the cleaning fee.[92] It is a one-time fee set by the host that compensates them for the cleaning

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[89] *See The basics of hosting on Airbnb*, *supra* note 86.
[90] *See id.*
[91] *See Columbia River Packers*, 315 U.S. at 145 ("That a dispute among businessmen over the terms of a contract for the sale of fish is something different from a 'controversy concerning terms or conditions of employment, or concerning the association . . . of persons . . . seeking to arrange terms or conditions of employment', calls for no extended discussion.") (quoting 29 U.S.C. § 113).
[92] *See* Stella Shon, *Demystifying Airbnb fees*, THE POINTS GUY (June 23, 2021) https://thepointsguy.com/guide/understand-airbnb-fees/.

associated with having a guest.[93] Not only is the fee set by the host themselves, but the hosts also receive the entirety of the fee, meaning Airbnb doesn't receive any of the compensation.[94]

While there have not been any large-scale attempts at unionization of rental property hosts, it provides a helpful benchmark for organizing that would almost assuredly *not* be allowed under the antitrust labor exemption.[95]

B. Skilled Laborers

Skilled laborers, or those that provide home-based services through platforms such as Angi, TaskRabbit, and Thumbtack, could be an area where workers have a chance of falling under the statutory exemption.[96] At first glance, skilled laborers seem to have a better argument than rental property hosts since they not only provide labor, but their labor is also the reason they are hired. However, even under *Jinetes*, it is unlikely skilled laborers could take advantage of the exemption.

The relationship skilled laborers have with the platforms is very far from an employee-employer relationship, with the platforms described as lead generation.[97] The platforms here are functionally advertising vehicles for the services of other businesses, not a

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[93] *See id.*
[94] *See id.*
[95] This analysis would apply for any other "capital-based" platforms, such as Etsy, where a finished good is what is being offered through the platform. *See* Elizabeth J. Kennedy, *Employed by an Algorithm: Labor Rights in the on-Demand Economy*, 40 SEATTLE U.L. REV. 987, 992 (2017) (describing "capital-based" platforms).
[96] Skilled laborers have been defined as having two years of training or post-secondary education. *See* 8 C.F.R. § 204.5(l)(2) (2023). This paper does not intend to use such a narrow definition, instead attempting to describe all types of workers that use those platforms, including but not limited to assemblers, movers, handymen, cleaners, lawn maintenance, pest control, painters, pool maintenance, roofers, plumbers, and HVAC repair.
[97] *See Thumbtack vs. Taskrabbit: Which Lead Generation Service Is Right for You?*, JOBBER (Dec. 16, 2021) https://getjobber.com/academy/thumbtack-vs-taskrabbit/ (describing them as "lead generation platforms"). This makes the platforms closer to advertising vehicles than to employers of skilled laborers.

catalog of services supplied by the platform. This attenuated relationship between the laborers and the platform is far from one that could impact negotiations involving "terms or conditions of employment".[98] Therefore, any type of collective action taken by the skilled laborers would not be likely to achieve the aims the statutes intended to protect.

While the skilled laborers are receiving compensation for their labor, it is distinguishable from the jockeys in *Jinetes*. There, the jockeys had a single job, riding horses, that exclusively required them to supply their labor. Here, the skilled laborers do supply their labor, but also supply much more. When customers use these platforms, they expect a complete service, including all the materials and equipment necessary to complete the job. This is particularly relevant for the types of skilled labor provided on the platforms. Construction equipment and supplies are essential for these types of jobs and can be a substantial part of the total cost of a project.[99] This complete service is much closer to what the fishermen provided in *Columbia River Packers* than what the jockeys provided in *Jinetes*.[100]

That the skilled laborers are being compensated not just for their labor, but oftentimes for specialized equipment they bring, explains why they remain outside the antitrust labor exemption, even after *Jinetes*.

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[98] 29 U.S.C. § 113

[99] https://www.constructionbusinessowner.com/business-management/what-your-equipments-true-cost ("Equipment, machinery and vehicles are essential tools to nearly all contractors and continue to be a significant expense on most of their income statements.").

[100] *See Am. Med.*, 317 U.S. at 536 (finding that physician services do not fall within the antitrust labor exemption).

C. Drivers

What will here be called "driver" jobs, those that involve the transport of goods or individuals through a platform,[101] are the most likely group of workers in the gig economy to fall under the statutory exemption. There are several different groupings of these platforms, including those that transport individuals, such as Uber and Lyft, those that deliver goods purchased from stores, such as InstaCart, and those that deliver food from restaurants, such as DoorDash and Grubhub. All these platforms clearly state that their drivers are "independent contractors."[102]

Despite the variety of services offered by these different platforms,[103] what is being transported in the vehicle does not have much impact on this analysis. Today most of the requirements for the jobs are the same, such as requiring background checks, with the only real

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[101] Delivery drivers that work for carriers, such as UPS, are able to unionize under the antitrust labor exemption. Their situation is quite different from those of gig economy workers because they are employees of the companies and do not supply their own vehicles. *See Package Division*, INT'L BHD. OF TEAMSTERS https://teamster.org/divisions/package-division/ (last visited Dec. 16, 2023).

[102] *See, e.g.*, *Full Service Shopper*, INSTACART https://shoppers.instacart.com/role/full-service. (last visited Dec. 16, 2023) (describing its shoppers as "independent contractors"). The legal status of these workers is currently being litigated. *See* The Associated Press, *California court says Uber, Lyft can treat state drivers as independent contractors*, NPR (Mar. 14, 2023, 3:35 AM) https://www.npr.org/2023/03/14/1163301631/california-court-says-uber-lyft-can-treat-state-drivers-as-independent-contracto. However, that inquiry is not particularly relevant for our purposes for two reasons. First, the lawsuits are about status for the purposes of employment law, which has a similar but not identical analysis to that of antitrust law. *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 ("The direction that these remarks are going is that the labor exemption to antitrust law is potentially broader than who is an employee under labor and employment law."). Second, the title of each party is irrelevant for purposes of the antitrust inquiry. *See* 29 U.S.C. § 113(c) ("[R]egardless of whether or not the disputants stand in the proximate relation of employer and employee.").

[103] The mechanics of the job would change with passengers in the car, involving more of the customer experience than the transportation of goods.

difference being whether the vehicle is required to undergo a separate inspection by the company.[104] Despite these minor differences, what the jobs have in common is what enables a single analysis to be conducted. For all these platforms, the worker is paid per task completed, at a prearranged price they can see before accepting the task.[105] The drivers are not locked into working with any specific platform, so many drivers work on multiple services at the same time.[106] The platforms do not set many working conditions for the drivers, such as hours.[107] The drivers must furnish their own vehicles,[108] ranging from bicycles to automobiles,[109] and they are

[104] *See Drive*, Uber https://www.uber.com/us/en/drive/ (last visited Dec. 16, 2023) (explaining Uber's requirements for getting a car approved for the service). This is to ensure that the vehicle is safe for passengers. *See* Steve Cook, *Can I Drive for Uber and Uber Eats at the Same Time?*, ZEGO (June 2, 2023) https://www.zego.com/blog/can-i-drive-for-uber-and-uber-eats/ ("Uber needs to ensure your vehicle is fit to transport passengers, which means you'll need a vehicle inspection."). There are also some differences in the timing of requirements, but those are negligible.

[105] *See Upfront pay and the next chapter of the Lyft driving experience*, LYFT (Oct. 10, 2022) https://www.lyft.com/blog/posts/upfront-pay-and-the-next-chapter-of-the-lyft-driving-experience (explaining how pre-approved pricing works on Lyft). All these platforms do offer the ability the tip your driver, which oftentimes will occur after the job is completed, however the base wage is established and shared prior to accepting the job.

[106] This has been described as multi-apping. *See* Farbod, *Why Multi Apping Delivery Services Is the New Normal*, MOVES (July 7, 2022) https://movesfinancial.com/blog/multi-apping-delivery-apps/ (explaining multi-apping).

[107] *See* Kennedy, *supra* note 95, at 995 ("Taking Uber as an example, once applicants qualify to work for (or, in Uber-speak, 'partner with') the company, they are free to spend as much or as little time as they like picking up passengers in any given month.").

[108] Technically some of the platforms provide the car rentals through partnership programs. *See Vehicle Solutions*, UBER https://www.uber.com/us/en/drive/vehicle-solutions/ (last visited Dec. 16, 2023). Either way the driver is responsible for the *cost* of supplying the vehicle. Uber has even gone as far to say that it does not have any drivers. *See* Greg Bensinger, *Uber: The ride-hailing app that says it has 'zero' drivers*, WASH. POST (Oct. 14, 2019, 1:16 PM) https://www.washingtonpost.com/technology/2019/10/14/uber-ride-hailing-app-that-says-it-has-zero-drivers/.

[109] *See* GEORGIA CORR, FOOD FOR THOUGHT: THE RISE OF ON-DEMAND FOOD DELIVERY SERVICES AND GROWING NEED TO SWITCH THESE JOURNEYS FROM MOTORS TO MUSCLE 8 fig.7 (2019) https://tps.org.uk/public/downloads/FZBCJ/Food%20for%20thought%20the%20rise%20of%20on-demand%20%20food%20delivery%20services%20and%20growing%20need%20to%20switch%

responsible for maintenance and expenses.[110] The platforms do not "pay" the drivers for their services, instead the users of the platforms pay the drivers, and the platforms take a fee for connecting the two parties together.[111]

It is reasonable to believe that drivers may have the best argument of any gig economy workers to be able to take collective action under the antitrust labor exemption, particularly in light of *Jinetes*.[112] Drivers likely sit somewhere between the jockeys from *Jinetes*, who were able to take advantage of the exemption, and the fish packers from *Columbia River Packers*, who were unable to. Only by comparing drivers to the other groups is it possible to understand how a court is likely to rule.

Comparing drivers and jockeys, the two parties seem to have much in common. Both the jockeys and drivers are independent of the organization from which they receive their income,

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20these%20journeys%20from%20motors%20to%20mU.S.C.le%20-%20G%20Corr.pdf. It is possible for drivers of some services (but not all), such as those that deliver groceries or food from restaurants, to walk and thus not need a vehicle. *Compare Signing up to deliver on Uber Eats with a book or on foot*, UBER https://help.uber.com/driving-and-delivering/article/signing-up-to-deliver-on-uber-eats-with-a-bike-or-on-foot?nodeId=d89506e6-5d67-42cd-aa2a-64e9f30b0a42 (last visited Dec. 16, 2023) (allowing on-foot delivery) *with Can I dash on a bike, scooter or by walking?*, DOORDASH https://help.doordash.com/dashers/s/article/Can-I-dash-on-a-bike-scooter-or-by-walking?language=en_US (last visited Dec. 16, 2023) (requiring a car, bike or scooter). Walking is not a fixed factor about deliverers, as anybody who currently walks would have the ability to buy and begin using a vehicle at any time, meaning that if all drivers were to be united in a bargaining group, the unit of analysis would be employees furnishing vehicles.

[110] While some of these platforms provide insurance to drivers during the course of employment, expenses such as maintenance and gas are the responsibility of the drivers. *Compare Insurance*, UBER https://www.uber.com/us/en/drive/insurance/ (last visited Dec. 16, 2023) *with* Tom Blake, *Do Uber Eats & Uber Pay You For Gas?*, THIS ONLINE WORLD (June 2, 2022) https://thisonlineworld.com/does-uber-pay-for-gas/.

[111] *See Pricing*, Uber https://www.uber.com/us/en/marketplace/pricing/service-fee/?uclick_id=126bb725-3b82-4d9c-b516-ab2c5deea0f5 (last visited Dec. 16, 2023).

[112] *Jinetes* has certainly received attention for that reason. *See* Papscun, *supra* note 102 ("Contractors are also getting a helping hand from the First Circuit.").

the horse owners and Uber respectively.[113] Their earnings are pre-arranged, and they are paid for a discrete task. If one wishes to be reductive, they both "steer" things. Despite all these similarities, the key element that distinguished *Jinetes* from its progeny, the labor itself, is what separates the two groups.

The jockeys were able to succeed in their fight because all that was at dispute was their labor.[114] They showed up to the racetrack and rode the horses supplied by the owners. The compensation the jockeys receive is for one thing only: the labor they provide by racing.[115] Delivery drivers, on the other hand, supply their own vehicles. This radically changes the analysis, because at the end of the day they are being compensated for more than their labor. Their compensation inherently includes the vehicles that they use to perform the services for which they are compensated. For these delivery platforms, the drivers are not only performing the service, but they are also providing the means by which to do so. That is very different than the jockeys, who exclusively provide the labor needed. If anything, by supplying both the labor and the means to achieve the service, what the drivers are proffering is closer to a finished service than it is to their labor alone.

While drivers are different from the jockeys, that does not mean they are fully analogous to the fishermen from *Columbia River Packers*. There are several major differences between the two groups. There is the surface level difference that drivers supply a service while the fishermen supply a good. This is unlikely to be particularly significant for the analysis because services can

[113] Independent in this context means that they do not sign employment contracts, can work for competitors, and do not work fixed hours.
[114] *See Jinetes*, 30 F.4th at 314-15.
[115] *See id.* at 316 ("[T]heir dispute with the defendants is a labor dispute because it centers on the compensation they pay the jockeys for their labor.").

fall outside the exemption.[116] More important is the relationship between the parties, or who they would be taking collective action against. The fishermen sold fish, a finished good, to the processors, in what can only be described as a supplier-customer relationship.[117] Once the fish were sold to the processors, the fishermen were fully removed from the process. The relationship drivers have with the platforms is entirely distinct. The drivers do not supply any finished goods or services to the platforms. Rather, the platforms enable the drivers to connect to their actual customers and provide them with services. So, there is still a supplier-customer relationship, however it is between the drivers and the end-users.

The relationships are also distinct in the inherent bargaining power between them. The fishermen were not reliant on the processors to sell their goods. The dispute that inspired *Columbia River Packers* involved the fishermen cutting out a processor entirely, leaving them unable to acquire the fish necessary to sustain their operations. Because they trade in a commodity, the fishermen were able to cut out a processor and continue business with other processors. Drivers, who fulfill customer service requests, do not have the same luxury. Drivers rely upon the apps to connect them to customers. Without the platforms to aggregate and organize consumer demand, there is no feasible way for the drivers to get in touch with their

[116] *See Am. Med.*, 317 U.S. at 536.
[117] *See Columbia River Packers*, 315 U.S. at 146 ("The controversy here is altogether between fish sellers and fish buyers.").

customers.[118] This, coupled with the intense market concentration that has occurred in the gig economy,[119] leave the drivers with little leverage.

These distinctions are critical because they change the purposes and concerns of collective actions. When the fishermen unionized, it was to gain exclusive rights to deal with fish processors.[120] If the drivers of a platform were to unionize, they would not be able to use that negotiating power to raise prices for their customers, the app users. Rather they would be negotiating their relationship with the platforms. This could include the percentage of their earnings the applications keep, alternate or enhanced benefits, driver safety requirements, or any number of conditions that impact their experience while providing services. This seems much more similar to the pursuit of "higher wages and safer working conditions" from *Jinetes* that was called "a core labor dispute" by that court.[121]

Drivers in the gig economy appear to sit in a middle ground between the jockeys in *Jinetes* that were able to take advantage of the antitrust labor exemption, and the fishermen in *Columbia River Packers* that were left outside the statutory protections. There are strong arguments distinguishing drivers from both groups. However, this analysis is guided by the

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[118] In 2016, Austin, Texas banned Uber and Lyft creating a vacuum for ridesharing services in the city. In response, a Facebook group was created, that allowed riders and drivers to connect without an application. Since it was completely unregulated, there was no formal payment structure, requiring some drivers to rely on donations. *See* Nicky Woolf, *With no Uber or Lyft, a Texas city is crowdsourcing rides on Facebook*, GUARDIAN (June 9, 2016, 4:42 PM) https://www.theguardian.com/technology/2016/jun/09/uber-lyft-austin-texas-facebook-rideshare-program (explaining the alternative to ridesharing platforms that emerged). This solution, while technically an alternative to ridesharing platforms, does not seem a realistic way for drivers to earn an income.

[119] *See* Vinny Venkat, Note, *Delivering Fairness: The Need for an Antitrust Standard That Considers Labor Market Consolidation in the Gig Economy*, 65 ARIZ. L. REV. 257, 271 (2023) ("99% of the food deliver market [is] concentrated in just three companies.").

[120] *See Columbia River Packers*, U.S. 315 at 145 (explaining the fishermen's scheme).

[121] *Jinetes*, 30 F.4th at 314.

statutory scheme, of which "labor" is a key term. A business model built upon drivers supplying their own vehicles means that it is unlikely the drivers will ever be negotiating over only their labor. Therefore, it is likely that the labor issue will be dispositive against the drivers, leaving them unable to take advantage of the antitrust labor exemption. However, until a judge decides, this remains an open question.

Conclusion

The gig economy has transformed parts of American life and is here to stay, resulting in thousands of individuals earning their livelihood through these platforms. The standard interpretation of the antitrust labor exemption left collective action outside the reach of many who rely upon the gig economy for their incomes. The recent First Circuit opinion *Jinetes* showed that the exemption is not as narrow as it is always presumed to be. Analyzing gig economy workers under *Jinetes* shows that many categories of workers, such as rental property managers and skilled laborers remain outside the scope of the exemption. Drivers for transportation and delivery services have a stronger argument to fall within the exemption. The text of the statute makes it unlikely, but this is a question that will likely come before a federal court in the coming years.