

Case 10-RC-276292

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

**The Atlanta Opera, Inc.
and
Make-Up Artists and
Hair Stylists Union, Local 798, IATSE**

**BRIEF OF THE UNITED STATES DEPARTMENT OF JUSTICE AS AMICUS CURIAE
IN SUPPORT OF NEITHER PARTY**

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I. INTEREST OF AMICUS AND SUMMARY OF ARGUMENT

The Antitrust Division of the U.S. Department of Justice (“Division”) respectfully submits this brief pursuant to the Board’s Order of December 27, 2021, which invited the filing of briefs by amici on the question of whether the Board should revisit its decision in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019). The Division enforces the federal antitrust laws, including the Sherman Act (15 U.S.C. § 1 *et seq.*), and has a strong interest in their correct application. The Division has a particular interest in this case because it involves the intersection of antitrust law and labor, a topic with which the Antitrust Division has engaged for nearly a century, and because it may affect the rights of workers to organize consistent with the protections provided to workers by federal law.

Our national economy has seen a dramatic change in the “facts of industrial life” in recent years,¹ particularly with respect to workers in the so-called “gig economy.” Millions of American workers who, until recently, would have been properly classified as employees have seen their work recategorized as independent contracting and have thereby lost crucial protections that the National Labor Relations Act (“NLRA”) and similar labor statutes would otherwise provide. This trend has been accelerated by the rapid rise of digital platform intermediaries, whose core business model often relies on coordinating the work of large numbers of workers while disclaiming the traditional responsibilities of an employer. The fundamental economic changes resulting from the erosion of traditional employment raise important questions not only for the NLRB, which is charged with protecting the right to organize, but also for the Division, which is charged with enforcing the antitrust laws in a manner consistent with recognized exemptions from antitrust scrutiny for collective action by employees and other protected labor-related activity.

Given the close practical relationship between the NLRB’s definition of “employment” and the availability of these antitrust exemptions, any ambiguity in interpreting the NLRB’s “employee” standard created by recent economic changes may have significant consequences for

¹ *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 481 (1921) (Brandeis, J., dissenting) (“The change in the law by which strikes once illegal and even criminal are now recognized as lawful was effected in America largely without the intervention of legislation. This reversal of a common-law rule was not due to the rejection by the courts of one principle and the adoption in its stead of another, but to a better realization of the facts of industrial life.”); *see also Brown v. Pro Football, Inc.*, 518 U.S. 231, 236 (1996) (noting that “Congress intended the labor statutes,” including the Norris-LaGuardia Act, “in part to adopt the views of dissenting Justices in [*Duplex*]”).

antitrust enforcement, to the detriment of workers and employers alike. Additionally, a growing consensus suggests that a vague or under-inclusive standard also may risk harming competition directly, both by reducing the ability of workers to resist anticompetitive terms and conditions of employment and by creating opportunities for employers to undercut competition by misclassifying their own employees. The Division therefore supports the NLRB in its efforts to modernize its standard in a way that reflects these significant, recent changes in our national economy and advances the shared goals of both the antitrust laws and the NLRA.

II. ARGUMENT

A. Congress Intended to Protect Legitimate Collective Bargaining and Labor Union Activities from Antitrust Scrutiny

Congress enacted the Sherman Act in 1890 to be a “comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.”² Early courts, however, interpreted the Act as outlawing not only the industrial trusts that it was originally passed to combat, but also certain types of worker organizing.³ Twenty-four years later, Congress passed the Clayton Act, in part, to overturn such decisions, and to affirm that “[t]he labor of a human being is not a commodity or article of commerce.”⁴ This helped ensure that the antitrust laws would be interpreted in a way that allowed workers to collectively organize for better wages and working conditions.⁵ Congress further affirmed this principle in passing the Norris-LaGuardia Act of 1932,⁶ which exempted certain worker-organizing activities from

² *N. Pac. Railway Co. v. United States*, 356 U.S. 1, 4 (1958).

³ *See Loewe v. Lawlor*, 208 U.S. 274, 301 (1908).

⁴ 15 U.S.C. § 17; *see also* 29 U.S.C. § 52 (limiting injunctive relief in certain labor disputes). This language from Section 6 of the Clayton Act has been interpreted to remove certain labor union activity from antitrust scrutiny. *See Apex Hosiery Co. v. Leader*, 310 U.S. 469, 503 (1940). This provision, however, does not apply to employer collusion, which remains prohibited by the antitrust laws. “It is readily apparent that Congress, in enacting § 6, was concerned with the right of labor and similar organizations to continue engaging in such activities, including that right to strike, not with the right of employers to ban together for joint action in fixing the wages to be paid by each employer.” *Cordova v. Bache & Co.*, 321 F. Supp. 600, 606 & Appendix (S.D.N.Y. 1970). The Division has criminally prosecuted wage-fixing agreements and agreements among employers not to hire or solicit each other’s employees. *See* Indictment, *United States v. Neeraj Jindal*, 4:20-cr-00358 (E.D. Tex. Dec. 9, 2020); Indictment, *United States v. DaVita, Inc.*, 1:21-cr-00229 (D. Colo. Jul. 14, 2021).

⁵ *See also Duplex*, 254 U.S. at 488 (Brandeis, J., dissenting) (noting that the Clayton Act was meant to recognize “the right of industrial combatants to push their struggle to the limits of the justification of self-interest”).

⁶ *Brown*, 518 U.S. at 236.

antitrust injunctions and reaffirmed Congress’s intent for worker organizing to help equalize bargaining power between workers and their employers.⁷

As this history makes clear, the antitrust laws were intended by Congress to be interpreted in harmony with the aims of the labor laws, including the National Labor Relations Act of 1935 (“NLRA”), which “encourag[es] the practice and procedure of collective bargaining” to “restor[e] equality of bargaining power between employers and employees.”⁸ To harmonize these two bodies of law, including to preserve protections for worker organizing, courts have recognized both the “statutory” and “nonstatutory” labor exemptions from the antitrust laws.

The statutory exemption excepts “specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws.”⁹ It “has been interpreted broadly” to cover “substantially all, if not all, of the normal peaceful activities of labor union.”¹⁰ But it does not cover agreements between workers (or unions) and “non-labor groups,” i.e., their employers.¹¹

The nonstatutory labor exemption insulates certain agreements between workers and their employers “imposed through the bargaining process” from challenge under the antitrust laws, under the view that Congress intended rulemaking and interpretive authority on these topics to be delegated to the NLRB.¹² In doing so, the exemption “accommodate[es] . . . the congressional policy favoring collective bargaining under the NLRA.”¹³ But that accommodation has limits. For example, “the nonstatutory exemption offers no similar protection when a union and a nonlabor party agree to restrain competition in a business market,” e.g., with an agreement on

⁷ See 29 U.S.C. §§ 102 (concluding that “the individual unorganized worker is commonly helpless . . . to protect his freedom of labor” and so “it is necessary that he have full freedom of association, self-organization, and designation of representatives of his choosing, to negotiate the terms and conditions of his employment”) and 104-05 (enumerating acts not subject to injunctive relief).

⁸ 29 U.S.C. § 151.

⁹ *Connell Const. Co. v. Plumbers & Steamfitters Loc. Union No. 100*, 421 U.S. 616, 621–22 (1975); see also *United States v. Hutcheson*, 312 U.S. 219, 231–32 (1941) (“the conduct enumerated in § 20 of the Clayton Act . . . do[es] not constitute a crime within the general terms of the Sherman [Act]”).

¹⁰ *H. A. Artists & Assocs., Inc. v. Actors’ Equity Ass’n*, 451 U.S. 704, 714 (1981); *Allen Bradley Co. v. Loc. Union No. 3, Int’l Bhd. of Elec. Workers*, 325 U.S. 797, 810 (1945); see also *Hutcheson*, 312 U.S. at 235–37 (“Such legislation must not be read in a spirit of mutilating narrowness.”).

¹¹ *Allen Bradley*, 325 U.S. at 808, 812.

¹² *Brown*, 518 U.S. at 236-7.

¹³ *Connell*, 421 U.S. at 622.

how much consumers will pay for a product.¹⁴ Nor does it protect agreements among competing employers—imposed outside the collective bargaining process—that restrain competition in labor markets, e.g., agreements to fix prices or allocate markets.

B. Ambiguity and Underinclusiveness in the NLRB’s Definition of Employment May Expose Both Workers and Employers to Potential Antitrust Liability

A dramatic expansion during the past decade in the number and variety of workers who are categorized as independent contractors has created significant ambiguity about the appropriate treatment of such workers under antitrust law.¹⁵ While the statutory and nonstatutory labor exemptions provide important protections for worker organizing and bargaining, courts have historically held that these exemptions only protect *employees* and their unions, not independent contractors.¹⁶ By contrast, concerted action by independent contractors traditionally has been subject to antitrust scrutiny.¹⁷

Because of this distinction, if the NLRB adopts or maintains an ambiguous or overly-narrow definition of “employee,” certain workers, including those who might qualify as employees under *FedEx* but not under *SuperShuttle*, may be subjected to antitrust liability for organizing to improve their conditions—a risk that is heightened by the tendency of courts to construe the labor exemptions narrowly.¹⁸ Consistent with the reasoning in these and other cases, there may be potential benefits to extending certain labor protections to workers who seek

¹⁴ *Connell* at 622–23.

¹⁵ See Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 Loy. U. Chi. L.J. 969 (2016); see also Marina Lao, *Workers in the “Gig” Economy: The Case for Extending the Antitrust Labor Exemption*, 51 U.C. Davis L. Rev. 1543, 1563 n.88.

¹⁶ See, e.g., *H.A. Artists*, 451 U.S. at 717 n. 20 (“a party seeking refuge in the statutory exemption must be a bona fide labor organization, and not an independent contractor or entrepreneur.”). Antitrust courts typically draw on common law principles to evaluate whether workers are employees or independent contractors. See, e.g., *United States v. Women’s Sportswear Mfg. Ass’n*, 336 U.S. 460, 463–64 (1949) (“The stitching contractor, although he furnishes chiefly labor, also utilizes the labor through machines and has his rentals, capital costs, overhead and profits. He is an entrepreneur, not a laborer.”); *Chamber of Com. of United States of Am. v. City of Seattle*, 426 F. Supp. 3d 786, 788 (W.D. Wash. 2019).

¹⁷ See, e.g., *Columbia River Packers Ass’n v. Hinton*, 315 U.S. 143, 146–47 (1942) (agreements between fish sellers); *Women’s Sportswear* 336 U.S. at 463–64 (garment workers); *FTC v. Superior Court Trial Lawyers’ Ass’n*, 493 U.S. 411 (1990) (trial lawyers).

¹⁸ See *Grp. Life & Health Inc. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979) (antitrust exemptions should be “narrowly construed”); *N.C. State Bd. Of Dental Exam’rs v. FTC*, 135 S. Ct. 1101, 1110 (2015 (“[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, state-action immunity is disfavored, much as are repeals by implication.”) (internal citation omitted); but see *Hutcheson*, 312 U.S. at 235 (explaining that courts should give the statutory labor exemption “hospitable scope” in light of “Congressional purpose” supporting federal labor policy).

to bargain with a single employer—including digital platforms and other firms whose business models have led to the proliferation of the “gig economy.” Clarity as to employee status is important, in part, because the antitrust laws otherwise scrutinize collective action among independent contractors or independent professionals, where they are not employees.¹⁹

The potential for confusion with respect to the applicability of the labor exemption among both courts and workers is likely to be compounded by the growing number of states and other federal agencies which have recently adopted a broader definition of employment than that used in *SuperShuttle*, thereby creating an interpretive split among labor regulators.²⁰ Even if the Antitrust Division were to exercise its prosecutorial 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.²¹ Such an outcome would leave affected workers with fewer tools to combat the exercise of monopsony power or superior bargaining leverage by employers in the manner that Congress intended when it passed the NLRA.²²

In addition to harming workers, ambiguity about the definition of employment may also create uncertainty and risk of antitrust liability for employers. In general, firms can decide how much they pay their employees and, in turn, how much to charge consumers for their employees’

¹⁹ Traditional antitrust analysis scrutinizes concerted action among professional associations or non-employee independent contractors. Some types of concerted action, like price fixing, bid rigging, or market allocation, are *per se* unlawful. See *Nat’l Soc’y of Prof. Eng’rs v. United States*, 435 U.S. 679 (1978) (agreement among professionals to refuse to bid on projects except under specified conditions violates the Sherman Act); *FTC v. Superior Court Trial Lawyers’ Ass’n*, 493 U.S. 411 (1990) (collective boycott among professionals *per se* unlawful under the Sherman Act).

²⁰ For examples of these standards, see Congressional Research Service, No. R46765, *Worker Classification: Employee Status Under the National Labor Relations Act, the Fair Labor Standards Act, and the ABC Test*, (Apr. 20, 2021) (listing 20 states that have adopted the “ABC test” for employee status); Department of Labor, 86 FR 24303, *Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Withdrawal* (May 5, 2021) (withdrawing rule that would have established employment test focused on “nature and degree of control” and “opportunity for profit or loss”).

²¹ *Chamber of Com. of United States v. City of Seattle*, 274 F. Supp. 3d 1140 (W.D. Wash. 2017) (private action challenging attempted labor organizing by rideshare drivers).

²² Consumers may also lose out as a result. See *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 970 (N.D. Cal. 2014) (noting that professional athletes typically negotiate group licenses for their names, images, and likenesses and that Electronic Arts “would be interested in acquiring the same rights from student-athletes . . . if it were permitted to do so”), *aff’d in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015); see also *White v. Nat’l Football League*, 836 F. Supp. 1458, 1495 (D. Minn. 1993) (discussing group licensing rights and the nonstatutory labor exemption).

services.²³ But independent contractors generally cannot coordinate their pricing decisions absent some exemption from the antitrust laws. Nor can they do so through a third party.²⁴ Thus, firms that set the prices at which their workers offer services to consumers may face uncertainty about their potential antitrust exposure if there is ambiguity about whether those workers are independent contractors rather than employees.²⁵

C. An Ambiguous Standard for Classifying Employees May Result in Competitive Harm

Recent legal scholarship suggests that an ambiguous NLRB definition of employment may lead to competitive harm by encouraging employers to misclassify their workers as non-employees. This scholarship indicates that misclassification has the potential to harm competition in at least three ways. First, employers may take advantage of workers' relative lack of bargaining power to coordinate unlawfully with each other regarding employee classification or other terms of employment.²⁶ Second, since being misclassified reduces or eliminates workers' ability to bargain collectively for better terms, it increases the likelihood that employers will impose one-sided contract provisions, such as blanket non-competes or restrictions on employee information-sharing regarding wages or terms of employment, that themselves may tend to further restrain competition in the labor market.²⁷ The imposition of such anti-competitive contract terms may become a self-reinforcing cycle, since if workers are unable to

²³ Cf. *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) (Sherman Act Section 1 does not reach conduct that is “wholly unilateral”).

²⁴ See, e.g., *United States v. Apple, Inc.*, 791 F.3d 290, 322–23 (2d Cir. 2015) (explaining that so-called “‘hub-and-spoke’ conspiracies” are still condemned as “*per se* unreasonable”).

²⁵ *Meyer v. Kalanick*, 174 F. Supp. 3d 817, 824 (S.D.N.Y. 2016) (allegations that Uber platform established fare-fixing agreements among Uber drivers stated claim for violation of Sherman Act).

²⁶ See Ioana Marinescu and Eric. A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 Cornell. L. Rev. 1343, 1388 (2020) (observing that “collusion appears to be easier in labor markets than in product markets, because labor markets are often more concentrated than product markets are”).

²⁷ See David Seligman, *Having Their Cake and Eating It Too: Antitrust Laws and the Fissured Workplace*, at 2 (2018), (observing that “[b]usinesses within a fissured workplace often strive to limit competition for and among workers within the fissured workplace.”),

https://lwp.law.harvard.edu/files/lwp/files/webpage_materials_papers_seligman_june_13_2018.pdf; Benjamin H. Harris, *Fostering More Competitive Labor Markets through Transparent Wages*, at 3 (2018) (discussing anticompetitive effects of “policies and environments that discourage workers from talking about their pay”),

https://lwp.law.harvard.edu/files/lwp/files/webpage_materials_papers_harris_june_13_2018.pdf; Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 0131, 1056 (2019),

<https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=11340&context=ilj> (noting that non-competes serve “to increase the level of effective market concentration to the extent that employees subject to such agreements face fewer competitive choices”).

resist such terms without the organizing rights and protections provided by the NLRA, anticompetitive contracts may become more pervasive.²⁸

Finally, firms that misclassify their workers as independent contractors may gain an unfair competitive advantage over their rivals in cutting their costs, potentially enabling predatory schemes that may harm competition in the markets for goods and services in which they participate.²⁹ As a panelist at the Division’s December 2021 Public Workshop on Promoting Competition in Labor Markets (“Labor Workshop”) explained, “misclassification [can be an] unfair method of competition[, since] through this competitive tactic, firms [can] lower their labor costs and obtain an advantage over rivals that faithfully and diligently comply with federal and state labor and employment law.”³⁰ To the extent such misclassification is not addressed through vigorous enforcement by the NLRB and other agencies, the result could be “a race to the bottom,” with rivals facing the unappetizing choice of either joining in the unlawful practice of misclassification or ceding the marketplace to their less-scrupulous competitors.³¹

Recent economic and empirical evidence suggests these are not merely hypothetical concerns. In December 2021, the Division and the Federal Trade Commission conducted the Labor Workshop to examine the state of competition in labor markets, including identifying potential competitive issues at the intersection of antitrust and labor law and the effects of the rise of independent contracting, including in the so-called “gig economy.”³² As part of the Labor Workshop public comment period, the Division and the FTC received numerous comments from Americans who testified to the potential competitive concerns created by the rapid growth of independent contractor-based business models, with multiple commenters stating that they

²⁸ See Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 Loy. U. Chi. L.J. 969 (2016); see also Orly Lobel, *The Gig Economy & the Future of Employment and Labor Law*, 51 U.S.F. L. Rev. 51, 52 (2017) (discussing other trends driving the rise of “gig” workers including technology, shifts in lifestyles, generational preferences, and other factors).

²⁹ See *Diva Limousine, Ltd. v. Uber Techs., Inc.*, 392 F. Supp. 3d 1074, 1093 (N.D. Cal. 2019) (concluding that “[Plaintiff] Diva’s allegations support the inference that Uber could not have undercut market prices to the same degree without misclassifying its drivers to skirt significant costs.”); *Meyer*, 174 F. Supp. 3d at 824 (allegations that Uber platform established fare-fixing agreements among Uber drivers stated claim for violation of Sherman Act).

³⁰ Sandeep Vaheesan, Remarks at U.S. Department of Justice and Federal Trade Commission, “Making Competition Work”, Tr. at 70 (Dec. 7, 2021), <https://www.ftc.gov/news-events/events-calendar/making-competition-work-promoting-competition-labor-markets>.

³¹ Heidi Shierholz, *Strengthening Labor Standards and Institutions to Promote Wage Growth*, Economic Policy Institute (Feb. 2018) (misclassification “leads to a race to the bottom: employers who misclassify workers are at a competitive advantage relative to responsible employers who comply with labor standards and responsibilities.”).

³² U.S. Department of Justice and Federal Trade Commission, “Making Competition Work” (Dec. 6-7, 2021), <https://www.ftc.gov/news-events/events-calendar/making-competition-work-promoting-competition-labor-markets>.

believed misclassification was pervasive in their firms or industries.³³ Labor Workshop participants further testified that abuse of independent contractor status is especially common “in low-wage, labor-intensive industries where women and people of color are overrepresented,” with significant potential consequences for competition in those markets.³⁴ A majority of commenters and panelists who addressed the issue urged the Department of Justice to use its prosecutorial discretion in interpreting the antitrust labor exemptions to mitigate, at least in part, the attendant harms to workers. At the same time, commenters also highlighted the necessary role of the labor agencies—including the NLRB—in using their own statutory powers to resolve any ambiguity and ensure that labor law is applied in a manner consistent with Congressional intent.³⁵

Economic evidence from multiple sources also confirms the growing number of workers potentially affected by the NLRB’s decision in this matter. According to a 2017 study by the U.S. Bureau of Labor Statistics and academic research by Lawrence Katz of Harvard University and the late Alan Krueger of Princeton University, employment in independent contracting rose by about 30 percent from 2005 to 2015, with between 6.9 percent and 9.6 percent of all American workers in 2015 classified as independent contractors.³⁶ A contemporaneous study by U.S. Department of the Treasury economists Emilie Jackson, Adam Looney, and Shanthi Ramnath also found that self-employment had risen by about 30 percent since 2001, with nearly all of that increase due to the growing number of workers being classified as independent

³³ See Federal Trade Commission Docket. No. FTC-2021-0057-0018, Comment from Communications Workers of America, Dec. 21, 2021 (alleging frequent misclassification “in the wireless tower climber workforce”); Docket No. FTC-2021-0057-0024, Comment of the International Brotherhood of Teamsters, Dec. 20, 2021 (alleging widespread misclassification by “not only platform application or ‘gig’ employers such as Uber, Lyft, Instacart, but also companies that control networks of smaller companies that in turn employ workers themselves”); John Marshall, Labor Workshop, Tr. at 36-37 (Dec. 6, 2021) (alleging increasing use of misclassified independent contractors in “delivery and logistics work ... along with millions of other workers in a number of other occupational categories, including healthcare and transportation and the retail sector”).

³⁴ Federal Trade Commission, Docket. No. FTC-2021-0057-0026, Comment from Service Employees International Union, Dec. 20, 2021.

³⁵ See Comment from Communications Workers of America, *supra* n.33, at 5 (urging the NLRB to “establish[] better rules” to address alleged misclassification); John Marshall, Labor Workshop, *supra* n.33, Tr. at 36 (expressing support for NLRB action to “closely scrutinize cases involving misclassification and independent contract status that arise under the NLRA”).

³⁶ See Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements* (June 7, 2018), <https://www.bls.gov/news.release/pdf/conemp.pdf>; Lawrence Katz and Alan Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015* (June 18, 2017), https://scholar.harvard.edu/files/lkatz/files/katz_krueger_cws_resubmit_clean.pdf.

contractors.³⁷ While the Division is not aware of any definitive data on what percentage of these workers would have been classified as employees under alternative definitions of employment, the available evidence shows that there has been a significantly greater rise in independent contracting among low-wage workers than among high-wage workers, suggesting that many of the workers in question have been defined as independent involuntarily, rather than as a matter of entrepreneurial initiative.³⁸ This possibility is supported by a 2019 study by IRS economists, which found that the fastest-growing group of independent contractors are those in the bottom quartile of income, with particularly high rates occurring among women and workers contracted by small firms.³⁹ Absent intervention by NLRB, such data suggest that the trend towards employer use of purportedly independent contractors is likely to continue, further disempowering workers who may be particularly vulnerable to employers' exercise of unequal bargaining leverage.

III. CONCLUSION

For the reasons discussed above, the Division supports clarifying the NLRB's definition of "employee." Evidence collected by the Division at our recent Labor Workshop as well as a growing body of legal and economic scholarship both support the view that labor markets are currently undergoing substantial change and disruption, including but not limited to changes resulting from the rise of the so-called "gig economy." Given these changes in the underlying economic realities, the Division believes that the NLRB is in a position to better protect both labor market competition and the welfare of workers by adopting a sound, up-to-date, consistent approach to worker classification that adequately protects workers' rights to organize. Such an effort would not only be consistent with the legislative history of the statutory sources of the antitrust labor exemptions, such as the Norris-LaGuardia Act, which were explicitly passed to clarify the Congress's interest in harmonizing antitrust law and labor law in a way that reflects

³⁷ Emilie Jackson, Adam Looney, and Shanthi Ramnath, *The Rise of Alternative Work Arrangements: Evidence and Implications for Tax Filing and Benefit Coverage*, Department of the Treasury Office of Tax Analysis Working Paper 114, (Jan. 2017), <https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/WP-114.pdf>.

³⁸ Katz and Krueger, *supra* n.36, at 14-16.

³⁹ Katherine Lim, Alicia Miller *et al.*, *Independent Contractors in the U.S.: New Trends from 15 years of Administrative Tax Data* (Jul. 2019) ("[T]rends suggest that the long-run growth in IC labor in the U.S. cannot solely be attributed to individuals seeking supplemental income, or to the rise of a few online platform firms, but may represent a structural shift in the labor market, particularly for women."), <https://www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf>.

the special status of labor organizing within our economic and political system, but would also would help to increase the effectiveness of antitrust enforcement and aid the Division's efforts to protect competition, particularly in markets where employee misclassification may harm competition.

Respectfully submitted.

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Certificate of Service

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