AN ANTITRUST EXEMPTION FOR COLLECTIVE BARGAINING BY INDEPENDENT CONTRACTORS

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In today's labor market, a growing share of workers and small businesses fall outside traditional employment relationships but remain economically dependent on firms that control their work through contractual and algorithmic constraints. These actors—including not only misclassified employees, but also small operators such as franchisees, e-commerce sellers, and platform-dependent service providers—are excluded from labor law protections and risk antitrust liability if they organize collectively. We propose a statutory antitrust exemption for economically dependent actors operating outside formal employment relationships. Unlike existing and proposed exemptions, which focus on specific legal classifications (e.g., employees, farmers, or publishers), our proposal targets actors whose autonomy is constrained by parallel vertical restraints imposed by dominant firms. The fact of being bound by shared vertical restraints both determines the scope of parties eligible to bargain collectively and defines the substantive terms subject to negotiation. Our proposed exemption is designed to foster durable, institutionalized collective bargaining organizations with the legal authority and institutional power to engage in horizontal coordination, subject to governance and conduct limits that prevent misuse. This horizontal coordination, in turn, serves as an alternative to hierarchical corporate integration by means of vertical control and thus a counterweight to concentrated market power on the part of dominant firms. Our framework would also enable sectoral bargaining across adjacent production segments, such as labor and output markets, while preserving existing labor law protections and antitrust liability for exclusionary or non-bargaining conduct.

I. INTRODUCTION

A. THE RETURN OF THE COLLECTIVE: LABOR COORDINATION IN A FISSURED WORKPLACE

Across the U.S. labor market, workers are increasingly subject to the control of firms who are not their legal employer. From franchise operators and gig workers to warehouse subcontractors and e-commerce sellers, a growing segment of the workforce now falls outside traditional employment relationships.[1] These workers are not employees,[2] but neither are they free agents in any meaningful sense.[3] They operate under rigid, non-negotiable terms set unilaterally by dominant firms—through contracts, platforms, software, and performance metrics that dictate pay, access to work, and conditions of labor.[4]

Yet despite this control, they lack any recognized right to coordinate in response.[5] The legal system treats them as independent contractors, with all the individual risk that status entails and little of the collective protections.[6] As a result, if they attempt to organize to negotiate rates or terms, they are exposed not just to employer retaliation, but to the full force of antitrust liability.[7]

This is not a minor technicality. It is the direct consequence of a legal framework built around a binary distinction: "employees," who are permitted to bargain collectively under the National Labor Relations Act (NLRA), and "independent contractors," who are considered market competitors prohibited from coordinating under antitrust law.[8] This distinction—codified in the 1930s and hardened by decades of judicial interpretation— no longer reflects the realities of economic production.[9]

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[1] David Weil, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014); Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 LAW & CONTEMP. PROBS. 45, 47–49 (2019); see also Patrick Coate, *Drilling Down on the Gig Economy*, Nat'l Council on Comp. Ins. (June 3, 2019), https://www.ncci.com/SecureDocuments/QEB/II_Insights_QEB_2019_Q2_Drilling_Down.html (estimating 15 million workers in alternative arrangements and up to 30% of U.S. adults engaged in informal work).

[2] While legal proceedings claiming gig workers are employees remain ongoing as of this writing, most have been resolved with the workers in question remaining outside traditional employment protections under state and federal law.

[3] Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378, 385–86 (2020) (arguing that many independent contractors lack meaningful autonomy due to structural subordination, despite being treated by antitrust law as free market actors).

[4] Christopher L. Peterson & Marshall Steinbaum, *Coercive Rideshare Practices*, U. CHI. L. REV. 623, 631–35 (2023) (describing how rideshare drivers are subject to unilateral, algorithmically enforced pricing and discipline regimes imposed by platforms, impairing competition at the platform level); Am. Ass'n of Franchisees & Dealers, *Fair Franchising Standards* § 3.4 (rev. 2023), https://www.aafd.org/fair-franchising-standards/ (identifying franchisor control over key business terms, including pricing, advertising, and supplier selection).

[5] FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990); Columbia River Packers Ass'n v. Hinton, 315 U.S. 143, (1942) (holding that independent contractors who act collectively to improve their compensation or terms of work may be subject to antitrust liability, as such coordination falls outside the labor exemption).

[6] Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2687–89 (2008) (arguing that employment law defines and limits collective action by excluding independent contractors from labor protections); National Labor Relations Act § 2(3), 29 U.S.C. § 152(3) (excluding independent contractors from statutory labor protections).

[7] FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 423–26 (1990) (holding that independent attorneys violated antitrust law by collectively refusing work to protest compensation rates); United Mine Workers of Am. v. Pennington, 381 U.S. 657, 664–65 (1965) (explaining that unions lose antitrust immunity when they coordinate with employers to restrain competition).

[8] *See* 29 U.S.C. § 157 (granting employees the right to organize and bargain collectively); 15 U.S.C. § 1 (prohibiting agreements in restraint of trade); Columbia River Packers Ass'n v. Hinton, 315 U.S. 143, 145 (1942) (holding that the labor exemption does not apply to coordination among independent contractors selling a commodity).

[9] DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014) (describing the decline of the traditional employer-employee relationship across major sectors); Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 LAW & CONTEMP. PROBS. 45, 47–49 (2019) (arguing that fissured work

The consequences remain stark. Workers who fall outside the NLRA are not merely unprotected; they are actively penalized for acting collectively.

B. WHY ANTITRUST BARRIERS MATTER

The foundational basis for exempting labor from antitrust liability was a collective recognition that labor is not a commodity. That principle was codified in the Clayton Act of 1914, which declared that "the labor of a human being is not a commodity or article of commerce."[10] Congress reinforced this idea through the Norris-LaGuardia Act of 1932, which restricted the issuance of injunctions in labor disputes, and through judicial interpretation in *United States v. Hutcheson*, where the Supreme Court held that labor unions acting independently to further their own interests were not subject to antitrust liability.[11]

Yet these protections now apply to a shrinking share of the workforce and strictly cabin the types of collective action exempted organizations may undertake.[12] As firms increasingly adopt fissured employment structures—outsourcing, subcontracting, franchising, and platform-based arrangements—they are able to shed formal employer status while retaining control over work conditions.[13] In this environment, the line between workers who are protected and those who are not is both legally consequential and substantively incoherent.

The result is a doctrinal gap. Workers who are excluded from labor law protections because of their classification are simultaneously exposed to antitrust liability if they act collectively. They exist in a legal void: prohibited from forming unions, and punished for organizing in any other form.[14] As this article argues, that gap is no longer sustainable.

C. SCOPE AND GOALS OF THIS ARTICLE

This Article proposes a new statutory exemption from antitrust law for economically dependent actors who currently fall outside the protection of labor law but remain subject to employer-like control. Unlike existing exemptions, which apply narrowly to employees, agricultural producers, or state-supervised entities, our proposed framework extends coordination rights to entities that—though legally independent—are bound by substantially similar vertical constraints imposed by a dominant firm. These may include app-based service providers, franchisees, subcontractors, or small sellers operating under platform-imposed terms.

The core insight is that it is not formal classification that should determine whether actors may coordinate, but functional subordination. Where multiple entities operate under parallel, non-negotiable terms—algorithmic pricing, required performance benchmarks, mandatory exclusivity clauses or Most-Favored Nations-style restrictions on pricing autonomy—they should be permitted to organize collectively in response.[15]

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arrangements undermine labor market competition and require new legal frameworks); Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378, 392–94 (2020) (explaining how antitrust law reinforces formal classification boundaries that no longer reflect actual economic dependence).

[10] Clayton Act section 6, 15 U.S.C. section 17.

[11] Norris-LaGuardia Act § 1, 29 U.S.C. § 101; *United States v. Hutcheson*, 312 U.S. 219, 232–35 (1941).

[12] *See* Section II.A (discussing the decline in union coverage); Section II.D (describing the limits imposed by *Pennington* and *Columbia River Packers* on the scope of labor exemptions).

[13] *See* Section III.A.

[14] *See* Section III.B (discussing antitrust liability for collective action by independent contractors).

[15] *See* Section IV.A; Peterson & Steinbaum, *supra* note 3, at 631–35.

Our proposed exemption treats such coordination not as unlawful collusion but as collective bargaining—especially when undertaken to improve compensation, negotiate standard terms, or rebalance contractual asymmetries. It explicitly authorizes conduct that current doctrine treats as per se illegal, including joint refusals to deal, coordinated rate-setting, and standardized contractual terms chosen by the collective—provided the coordination is limited to similarly situated, structurally subordinated actors.[16]

To prevent abuse, the exemption imposes clear guardrails. Capital-rich firms and entities that exercise control over others are excluded. Internal governance structures must be democratic, and oversight mechanisms calibrated to organizational complexity. Critically, the exemption does not immunize conduct under Section 2 of the Sherman Act, preserving antitrust scrutiny for exclusionary or monopolistic behavior.[17]

By recognizing the legitimacy of bottom-up coordination among structurally subordinate actors, the exemption restores collective agency in domains where traditional labor law offers no recourse. It builds on existing statutory models—most notably Capper-Volstead and the labor exemption—but adapts them to the structural realities of the fissured workplace. In doing so, it seeks to realign legal protections with economic dependency, not legal form.

D. Roadmap

The remainder of this article proceeds in seven subsequent parts.

Part II reviews existing antitrust exemptions and immunity doctrines that permit horizontal coordination in limited settings, including the statutory and non-statutory labor exemptions, the Capper-Volstead Act, the state action doctrine, and recent sector-specific legislative proposals.

Part III examines how contemporary contracting structures and worker-classification doctrines leave many economically dependent actors excluded from labor law protections while remaining subject to antitrust liability.

Part IV develops the Article's proposed framework for collective bargaining by bilaterally-dominated actors. Part IV.A defines bilateral dominance and explains its relationship to existing antitrust concepts. Part IV.B sets out the legal consequences of that framework, including proposed statutory language providing immunity from Section 1 of the Sherman Act for qualifying collective conduct.

Part V surveys recent policy interventions and case studies involving collective action by non-employees, including municipal, state, and international approaches.

Part VI presents the remaining elements of the proposed statutory framework. Part VI.A specifies eligibility indicators for bilateral dominance and includes draft statutory language codifying those criteria. Part VI.B addresses governance, administration, and institutional design considerations.

Part VII applies the proposed framework to contested forms of coordination and addresses anticipated objections, including its treatment of conduct previously found unlawful under existing antitrust doctrine.

Part VIII concludes.

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[16] *Compare* United Mine Workers of Am. v. Pennington, 381 U.S. 657, 664–65 (1965) (holding that coordination between unions and employers to eliminate smaller competitors falls outside the labor exemption), *with* Capper-Volstead Act, 7 U.S.C. § 291 (authorizing agricultural producers to collectively process, prepare, and market their products without violating antitrust law).

[17] *See* Section IV (describing eligibility thresholds, governance requirements, and limits on exclusionary conduct).

II. THE EXISTING LANDSCAPE OF ANTITRUST EXEMPTIONS

A. Labor Exemption: Statutory and Non-Statutory Variants

1. Origins and Interpretation: From Debs to Hutcheson

The labor exemption to antitrust law was not born out of judicial generosity but wrestled into existence through decades of legislative pushback against an aggressive judicial campaign to treat labor organizing as a form of illicit market restraint. In the late nineteenth and early twentieth centuries, the Supreme Court routinely applied the Sherman Act to union conduct, interpreting labor strikes and boycotts as *per se* violations of antitrust law. In *In re Debs*,[18], the Court upheld a federal injunction against a nationwide railway strike on the grounds that it interfered with the flow of interstate commerce.[19] This case set the tone for the judiciary's use of equitable remedies to suppress labor activity on public interest grounds.

In *Loewe v. Lawlor*,[20] the Supreme Court held that the United Hatters union's secondary boycott—a nationwide campaign urging retailers not to carry products from a nonunion manufacturer—violated the Sherman Act. The Court found the union's conduct to be a "combination in restraint of trade" and thus subject to antitrust liability, exposing individual union members to treble damages.[21] Although the Court did not explicitly compare labor organizing to cartel behavior, it treated the boycott as anticompetitive based on its effect on interstate commerce, not the union's market power as would be the case for a corporate defendant facing liability for unilateral conduct.[22] This marked a foundational moment in U.S. labor-antitrust jurisprudence. Collective worker action, even when lacking dominance, was swept into the same legal framework built to police commercial collusion.[23]

Congress attempted to correct course in 1914 with the Clayton Act, which stated that "the labor of a human being is not a commodity or article of commerce" and sought to exempt labor unions from antitrust prosecution.[24] Specifically, section 6 clarified that organizations of workers should not be construed as illegal combinations or conspiracies, and section 20 restricted the use of injunctions in labor disputes.[25] However, the courts quickly undermined this statutory protection. In *Duplex Printing Press Co. v. Deering*,[26] the Court interpreted section 20 narrowly, holding that the statute did not protect union-led secondary boycotts.[27]

The Supreme Court's decision in *United States v. Hutcheson*[28] is the doctrinal cornerstone of the statutory labor exemption. Synthesizing the Clayton and Norris-LaGuardia

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[18] In re Debs, 158 U.S. 564 (1895).
[19] *Id.* at 582 (emphasizing the federal government's authority under the Commerce Clause to ensure the unobstructed flow of interstate commerce and the transportation of mail).
[20] Loewe v. Lawlor, 208 U.S. 274 (1908).
[21] *Id.* at 300–02 (holding that a union's secondary boycott campaign against a nonunion manufacturer violated the Sherman Act and exposed individual members to treble damages); *see also* Apex Hosiery Co. v. Leader, 310 U.S. 469, 488–89 (1940) (interpreting the Sherman Act not to apply to strikes that do not restrain commercial competition); United Mine Workers v. Coronado Coal Co., 259 U.S. 344, 388 (1922) (reaffirming *Loewe* and applying antitrust liability to labor activity deemed anticompetitive).
[22] *Id.*
[23] *See* United Brick & Clay Workers v. Danville Brick Co., 283 F. 909, 911–12 (7th Cir. 1922) (holding that a union's collective refusal to work with nonunion contractors constituted an illegal restraint of trade under the Sherman Act).
[24] Clayton Act § 6, 38 Stat. 730, 731 (1914).
[25] *Id.*
[26] Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921).
[27] *Id.* at 467 (holding that section 20 of the Clayton Act did not protect union-led secondary boycotts from injunctions).
[28] United States v. Hutcheson, 312 U.S. 219 (1941).

Acts, the Court held that labor unions acting unilaterally in pursuit of their own economic interests are not subject to antitrust liability, provided they do not combine with non-labor entities.[29] Justice Frankfurter, the author of the opinion, emphasized that courts had previously ignored the plain language of the Clayton Act and reaffirmed that union conduct in pursuit of legitimate labor objectives was not subject to antitrust liability unless undertaken in combination with non-labor groups.[30]

At its core, *Hutcheson* reflects the view that concerted action by workers—situated on the subordinate end of the employment relationship—differs in kind from collusion among firms with independent bargaining power. That distinction later becomes a conceptual predicate for bilateral-dominance analysis in this paper, which likewise turns on asymmetries of bargaining power and the structural position of the coordinating parties.

The principle that emerges from *Hutcheson* is now foundational: unions may engage in concerted conduct to improve working conditions but lose the exemption when they conspire with non-labor actors to restrain trade.[31] This marks the outer boundary of the statutory labor exemption and sets the stage for later cases that struggle to classify collective action by workers who fall outside traditional employment categories.

2. *Confederación Hípica and the De Facto Labor Dispute Standard*

In *Confederación Hípica de Puerto Rico v. Confederación de Jinetes Puertorriqueños*,[32] the First Circuit reversed a district court decision that denied Norris-LaGuardia Act protections to a group of striking jockeys classified as independent contractors. The court held that the dispute qualified as a "labor dispute" under the Act's expansive definition and thus barred the employer's request for injunctive relief.[33] To reach that conclusion, the court applied a four-part test commonly used to determine whether collective action qualifies for protection under the Act: (1) the conduct was carried out by a bona fide labor organization; (2) it arose in the context of a labor dispute as defined by NLRA section 152(9)[34]; (3) the action was undertaken unilaterally (i.e., without collusion with non-labor commercial actors); and (4) it was aimed at advancing the group's own interests regarding employment conditions.[35] Although the court did not reach the antitrust issues, it rejected the argument that independent contractor status alone foreclosed reliance on the Act.[36]

Confederación thus demonstrates one way courts have used existing statutory language to extend limited protection to workers formally classified as non-employees. It reflects judicial recognition that economic dependence and employment-like constraints may exist even where

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[29] *See id.* (interpreting the Clayton and Norris-LaGuardia Acts to exempt labor unions from antitrust liability when acting independently to further their own economic interests).
[30] *Id.* at 231–35.
[31] *See also* H.A. Artists & Assocs. v. Actors' Equity Ass'n, 451 U.S. 704, 717–18 (1981) (reaffirming that the labor exemption applies so long as the union acts in its self-interest and not in combination with employers); Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797, 809–11 (1945) (distinguishing between protected union activity and anticompetitive employer-union conspiracies).
[32] Confederación Hípica de P.R. v. Confederación de Jinetes Puertorriqueños, 30 F.4th 306 (1st Cir. 2022), *cert. denied*, 143 S. Ct. 631 (2023).
[33] *Id.* at 314.
[34] 29 U.S.C. § 152(9).
[35] Confederación at 313.
[36] *Id.*

the traditional employer–employee relationship is absent.[37] At the same time, the decision highlights the limits of relying on statutory definitions developed for a prior industrial era. The analysis ultimately turns on whether the protest fits within the Norris–LaGuardia Act's conception of a "labor dispute," leaving unresolved how similar groups would be treated when their coordination involves rate-setting, joint refusals to deal, or challenges to standardized contract terms—especially where those terms arise from uniform vertical restraints imposed by a common counterparty.[38]

In this respect, *Confederación* functions as a narrow doctrinal bridge rather than a general framework. It recognizes the economic subordination of non-employees, but it does not supply a durable standard for when such actors may coordinate without facing antitrust liability. The case underscores the need for a functional approach—such as the bilateral-dominance framework developed in this Article[39] —that identifies when structurally subordinated workers should be permitted to organize collectively.

3. *Boundaries of the Labor Exemption: The Limits of Coverage*

a. Columbia River Packers and the Commodification of Labor

In *Columbia River Packers Ass'n v. Hinton*,[40] the Supreme Court delineated a key limitation of the statutory labor exemption by holding that a group of independent fishermen could not claim protection under the Norris–LaGuardia Act. The Court held that a group of independent fishermen could not claim labor exemption protection because their dispute concerned the sale of fish to a cannery, not the terms or conditions of employment.[41] Although the Norris-LaGuardia Act defines a "labor dispute" broadly and does not require a proximate employer-employee relationship, the Court emphasized that the fishermen were "entrepreneurs" selling commodities, not laborers seeking to improve their working conditions.[42] Their coordination aimed at regulating the price of fish—a commercial output—not wages, hours, or workplace standards. As such, the Court held the coordination fell outside the scope of the statutory exemption.[43]

The decision has since been treated as a doctrinal boundary case: where collective action is directed primarily at regulating the sale of goods or services, courts have refused to treat it as protected labor activity. Subsequent decisions reinforce this distinction. In *L.A. Meat & Provision Drivers Union v. United States*, the Court held that union-affiliated distributors' efforts to restrain trade in meat products were not protected by the labor exemption.[44] Likewise, in

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[37] *See, e.g.*, Alvaro Bedoya & Bryce Tuttle, *"Aiming at Dollars, Not Men": Recovering the Congressional Intent Behind the Labor Exemption to Antitrust Law*, 85 ANTITRUST L.J. 805 (2024), https://www.americanbar.org/groups/antitrust_law/resources/journal/85-3/aiming-at-dollars-not-men/ (noting the novelty of the Court's attempting to expand the definition of a "labor dispute").

[38] *See* Confederación at 314 (emphasizing that protection depended on the group's unilateral conduct, which left unclear whether joint rate-setting, refusals to deal, or platform-wide coordination would receive the same treatment).

[39] *See* Section IV.

[40] 315 U.S. 143 (1942).

[41] *Id.* at 145–47

[42] *Id.* at 144–45.

[43] *Id.* at 314 (noting 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' as required for a labor dispute).

[44] L.A. Meat & Provision Drivers Union v. United States, 371 U.S. 94, 102 (1962) (noting that "the present case was not one 'involving or growing out of any labor dispute,' but one involving an illegal combination between businessmen and a union to restrain commerce").

American Medical Association v. United States, the Court found that coordinated efforts to restrict competition among medical service providers did not qualify as labor activity.[45] Across these cases, the decisive factor was not worker status, but the object of the coordination.

This distinction has proven problematic in the context of modern fissured labor markets, where the boundary between the employment relationship and the sale of products or services is increasingly blurred. In many contemporary sectors—such as platforms, logistics networks, and franchising—the same standardized contractual restraints simultaneously govern how labor is performed and how output is delivered.[46] *Columbia River Packers* offers little guidance in such hybrid structures, where economic subordination arises from vertical constraints that span both labor and product markets.

b. FTC v. Superior Court Trial Lawyers and Strike as Conspiracy

The Supreme Court's decision in *FTC v. Superior Court Trial Lawyers Ass'n*[47] further illustrates the limits of the statutory labor exemption when applied to workers outside traditional employment relationships. In *SCTLA*, a group of court-appointed criminal defense attorneys organized a collective refusal to accept new cases until the District of Columbia increased their compensation rates. Although the attorneys framed their action as a protest against inadequate pay—functionally akin to a labor strike—the Court held that the boycott constituted an unlawful price-fixing conspiracy under section 1 of the Sherman Act.[48]

The Court explicitly rejected arguments that the boycott was protected under the First Amendment, distinguishing it from the expressive boycotts upheld in *NAACP v. Claiborne Hardware Co.*[49] In the Court's view, the lawyers' strike lacked the "expressive character" that justified constitutional protection in *Claiborne*, and instead functioned as a "naked restraint on price and output" with no special features warranting departure from the per se rule.[50]

Notably, the petitioners in *SCTLA* did not argue that their conduct qualified for protection under the statutory labor exemption—focusing instead on First Amendment grounds.[51] As the First Circuit later observed in *Confederación Hípica de P.R., Inc. v. Confederación de Jinetes Puertorriqueños*, the case "was not argued" as a labor dispute, leaving unresolved whether a similar action—had it been framed as arising from a labor dispute and undertaken unilaterally—might have met the criteria for protection under the Norris–LaGuardia Act.[52] This nuance underscores the doctrinal instability facing non-employee workers. When collective action

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[45] American Medical Association v. United States, 317 U.S. 519, 533–36 (1943) (noting that the fact that the activities of persons, such as physicians and medical associations, may not constitute a "trade" does not prevent them from being subject to prosecution under the Sherman Act for imposing restraints on trade).
[46] Peter Norlander, *New Evidence on Employee Noncompete, No Poach, and No Hire Agreements in the Franchise Sector*, 52B Research in Labor Economics (2025), https://papers.ssrn.com/abstract=4342586; Ulrich Atz et al., The Balance of Power in Franchising (2025), https://marshallsteinbaum.org/wp-content/uploads/2025/10/balance_of_power_in_franchising_10-19-25.pdf.
[47] 493 U.S. 411 (1990) [hereinafter "SCTLA"].
[48] *Id.* at 434–36.
[49] *Id.* at 423 (rejecting First Amendment defense and distinguishing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), which involved a protest against racial injustice); *id.* at 432 (describing the boycott as a "naked restraint on price and output" with no special characteristics justifying a departure from the per se rule).
[50] *Id.*
[51] *Id.*
[52] Confederación Hípica de P.R., Inc. v. Confederación de Jinetes Puertorriqueños, 30 F.4th 306, 317 n.4 (1st Cir. 2022) (noting that *SCTLA* "was not argued as a labor exemption case" and did not resolve whether similar coordination by independent professionals could fall within the exemption).

targets compensation or working conditions but involves parties formally classified as independent contractors, its legal characterization can depend on litigation posture rather than economic reality.

c. The Role of NLRA §152(9): Labor Disputes as the Doctrinal Fulcrum

Courts have long looked to the definition of a "labor dispute" under the National Labor Relations Act (NLRA) § 152(9),[53] to determine the scope of antitrust immunity for collective action. This provision, incorporated from the Norris-LaGuardia Act and later interpreted in antitrust contexts, defines a labor dispute broadly to include "any controversy concerning terms, tenure, 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."[54] This breadth has, at times, given courts a statutory basis to protect certain forms of collective action even when the workers involved fall outside the NLRA's employee category.[55]

At the same time, reliance on section 152(9) as a doctrinal bridge between labor and antitrust law has produced unstable results. As seen in *Columbia River Packers*, the absence of a traditional employment relationship can disqualify even highly dependent workers from exemption if their coordination is framed as relating to the sale of goods rather than labor.[56] And in *SCTLA*, the lack of a formal labor dispute—despite the attorneys' economic dependency—led the Court to treat their strike as an illegal price-fixing conspiracy.[57]

Even *Confederación Hípica*, which appeared to vindicate the exemption for non-employee jockeys, ultimately tethered its reasoning to whether the protest fit within the statutory definition of a labor dispute.[58] The jockeys' unilateral strike received protection not because the court adopted a functional definition of economic dependence, but because their conflict could be characterized as arising from "employment conditions" within the meaning of § 152(9).[59]

The limits of this approach are especially stark where coordination challenges standardized contract terms, algorithmic pricing, most-favored-nations clauses, or other uniform vertical restraints that structure working conditions through product-market mechanisms. Because these restraints do not map cleanly onto the NLRA's employment-centric categories, the statutory "labor dispute" test provides no reliable basis for determining when non-employees may organize collectively without triggering antitrust liability.

Taken together, these cases illustrate a consistent judicial pattern. Permissible collective action by non-employees is confined to disputes framed as addressing employment conditions, not the terms of transactions in the product or service market. Once coordination extends beyond employment-like concerns and touches product-market terms such as prices, output, or distribution, courts revert to treating the conduct as per se unlawful under the Sherman Act. When collective action impinges on product market competition rather than labor-market conditions, the statutory labor exemption ends.

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[53] 29 U.S.C. § 152(9).
[54] *Id.*
[55] *See* Section II.A.2 (discussing Confederación Hípica and the use of NLRA § 152(9)'s broad "labor dispute" definition to extend statutory protection to independent contractors).
[56] *See* Section II.A.3.a.
[57] *See* Section II.A.3.b.
[58] *See* Section II.A.2.
[59] *Id.*

B. LIMITS ON STATUTORY EXEMPTIONS: PENNINGTON AS A DOCTRINAL CAUTION

The Supreme Court's decision in *United Mine Workers v. Pennington*,[60] illustrates the outer boundary of the labor exemption and the vulnerability of labor market coordination under section 1 of the Sherman Act when it impinges on the product market. In *Pennington*, the Court held that the United Mine Workers (UMW) violated antitrust law by conspiring with large coal operators to impose high, uniform wage scales across the industry—including on smaller, non-union firms.[61] The Court found that this strategy, aimed at driving low-cost competitors out of the market, went beyond the bounds of protected collective bargaining and entered the domain of anti-competitive collusion.[62]

The Court's primary focus was on section 1 of the Sherman Act, which prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade."[63] The UMW's collaboration with employers was held to fall squarely within this prohibition. While a union may lawfully advocate for uniform wage standards and engage in adversarial bargaining, it cannot conspire with non-labor entities to impose those standards across the market.[64] The Court made clear that the labor exemption derived from the Clayton Act and Norris-LaGuardia Act does not shield union-employer agreements that restrain competition outside the bargaining relationship, by removing a competitive strategy—lower wages than the collectively-bargained scale—that might otherwise power a non-union entrant.

Critically, the Court also acknowledged (but did not center) section 2 of the Sherman Act, which prohibits monopolization or attempts to monopolize.[65] Although the facts of *Pennington* could plausibly have supported a section 2 claim, given the union's alleged effort to drive out smaller rivals, the Court rested its holding on section 1's prohibition against concerted agreements in restraint of trade.[66] The decision thus reinforces the legal vulnerability of worker collectives who engage in horizontal coordination, particularly when that coordination impacts third parties. The implication is that even if a group of workers does not possess market dominance (a section 2 concern), they can still be found liable under section 1 for merely coordinating if their coordination has a significant effect on competition, implicitly in the output market.

Subsequent decisions have affirmed this interpretation. Courts have repeatedly refused to extend the labor exemption to union-employer collaborations that exert market-wide influence.[67]

For purposes of this Article, *Pennington* underscores the limits of the current legal regime. Even worker-driven efforts to impose fairer terms industry-wide—through exclusivity, vertical integration, or joint refusals to deal—risk being struck down under section 1. These forms of economic self-organization are not protected unless a statutory exemption clearly

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[60] 381 U.S. 657 (1965).
[61] *Id.*
[62] *Id.* at 634–35.
[63] Section II.A.1.
[64] *Pennington* at 634.
[65] *Id.*
[66] *Id.*
[67] *See* Altemose Constr. Co. v. Bldg. & Constr. Trades Council, 751 F.2d 653, 659–60 (3d Cir. 1985) (holding that union-employer coordination aimed at excluding a nonunion contractor was not protected by the labor exemption); Bodine Produce, Inc. v. United Farm Workers Organizing Comm., 494 F.2d 541, 556–57 (9th Cir. 1974) (denying exemption where labor and employer groups jointly pressured competitors); Sun-Land Nurseries, Inc. v. S. Cal. Dist. Council of Laborers, 793 F.2d 1110, 1112–13 (9th Cir. 1986) (finding antitrust violation where union activity extended beyond traditional bargaining); Home Box Off., Inc. v. Directors Guild of Am., Inc., 531 F. Supp. 578, 589–91 (S.D.N.Y. 1982) (holding that guild conduct aimed at controlling employment across an industry exceeded the scope of protected labor activity).

authorizes them. And while section 2 still offers a check on actual monopolization, *Pennington* shows that courts are willing to intervene well before dominance is established.[68] This is precisely the zone in which our proposed exemption would operate: authorizing concerted action by structurally subordinate workers, while leaving room for antitrust scrutiny if those efforts evolve into exclusionary control.

C. Capper-Volstead and the Agricultural Cooperative Exemption

The Capper-Volstead Act of 1922 provides a statutory exemption from antitrust laws for agricultural producers who form cooperatives to collectively process, market, or price their products. Specifically, it allows "[p]ersons engaged in the production of agricultural products" to "act together in associations . . . in collectively processing, preparing for market, handling, and marketing" their goods.[69] In doing so, Capper-Volstead affirms Congress's judgment that horizontal coordination among small producers is necessary to counterbalance the monopsony power of large buyers in agricultural supply chains. In the case of Capper-Volstead, part of Congress's motivation was to permit farmers to act collectively to prevent deflation of agricultural commodities, which Congress recognized as a macroeconomic threat, without seeking direct federal intervention to curtail agricultural production or to set statutory minimum prices (as ultimately happened when the agricultural economic crisis intensified in the 1930s).[70]

Courts have construed the Capper-Volstead exemption to permit a broad array of cooperative conduct. Producer cooperatives may engage in joint price setting, maintain exclusive dealing provisions with members, and vertically integrate into processing and distribution.[71] Vertical integration, in particular, has been upheld as consistent with the cooperative's legitimate business functions, provided the integrated activity serves the interests of producer-members.

However, the exemption is not unlimited. Courts have drawn a line at conduct that targets or disadvantages non-members. Capper-Volstead does not protect collective boycotts or refusals to deal with third-party buyers or processors.[72] Moreover, the cooperative must be composed entirely of "actual producers," meaning the inclusion of even a single non-producer may void the exemption entirely.[73]

There is less clarity on whether Capper-Volstead permits discriminatory pricing among buyers. While nothing in the statute expressly requires cooperatives to charge all buyers the same price, courts have expressed concern when differential pricing appears designed to exclude or

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[68] *See Pennington* at 664–65 (holding that union coordination with employers to impose uniform wages could violate Section 1 of the Sherman Act even absent monopoly power); *cf.* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–24 (1993) (clarifying that a predatory pricing claim under Section 2 requires both below-cost pricing and a dangerous probability of recouping losses, reflecting a higher threshold for finding monopolization).
[69] Capper-Volstead Act, 7 U.S.C. §§ 291–92 (1922).
[70] Victoria Woeste, The Farmer's Benevolent Trust: Law and Agricultural Cooperation in Industrial America (2020) (describing efforts by agricultural lawyers in the 1920s to charter producer cooperatives under Capper-Volstead as a market-based strategy to address declining commodity prices).
[71] *See* Maryland & Va. Milk Producers Ass'n v. United States, 362 U.S. 458, 466–67 (1960) (noting that the Capper-Volstead Act protects "the fixing of minimum prices by cooperative associations"); Case-Swayne Co. v. Sunkist Growers*, Inc.*, 389 U.S. 384, 389–90 (1967) (recognizing that agricultural cooperatives may operate processing facilities and require members to sell exclusively through the co-op).
[72] *See* Maryland & Va. Milk Producers Ass'n at 472 (1960) (holding that exclusionary conduct targeting non-member processors was not protected by the Capper-Volstead Act); United States v. Borden Co., 308 U.S. 188, 204–05 (1939) (explaining that the Act does not exempt cooperatives that collaborate with non-producers or impose general restraints on the market).
[73] In re Mushroom Direct Purchaser Antitrust Litig., 621 F. Supp. 2d 274, 288–89 (E.D. Pa. 2009) (holding that the presence of non-producer members within a cooperative nullifies the Capper-Volstead exemption).

disadvantage rivals.[74] Still, most courts have deferred to the cooperative's discretion, provided the differential pricing serves legitimate business ends and is not a pretext for exclusionary conduct.

In short, Capper-Volstead grants agricultural cooperatives substantial leeway to coordinate horizontally and even vertically—so long as they remain internally composed of producers and refrain from using their market power to suppress external rivals. This balance reinforces the idea that statutory antitrust exemptions can accommodate robust coordination, without allowing that coordination to become a tool of exclusion or domination.

D. The State Action Doctrine

The state action doctrine provides an antitrust exemption for conduct undertaken pursuant to a clearly articulated state policy and actively supervised by the state. It was first recognized in *Parker v. Brown*,[75] where the Supreme Court held that the Sherman Act does not apply to state-imposed market regulation. There, the Court upheld California's agricultural marketing program as an act of state sovereignty immune from antitrust liability.[76] The modern two-prong test for private parties was later formalized in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*,[77] requiring (1) a "clearly articulated and affirmatively expressed" state policy and (2) "active supervision" by the state.[78] *Midcal* invalidated California's wine resale pricing law for failing the second prong: the state had delegated authority but did not monitor or control its implementation.[79] In *FTC v. Ticor Title Insurance Co.*, the Court reiterated that nominal or passive oversight is insufficient; the state must meaningfully review and approve the conduct to confer immunity.[80]

In practice, the doctrine offers limited protection to structurally subordinated workers or independent contractors. Because it applies only when state authorization is explicit and ongoing, it cannot shield bottom-up organizing or coordination unless the state affirmatively endorses and supervises it—conditions rarely met. This structural limitation also constrains the doctrine's usefulness as a tool for building durable collective bargaining entities. Without continuous state oversight, those organizations lose immunity, making it difficult to build sustained, independent countervailing power. For this reason, the doctrine is generally ill-suited to contexts in which workers or small businesses seek autonomous collective action rather than delegated regulatory authority.

E. Journalism Competition and Preservation Act (JCPA)

The Journalism Competition and Preservation Act,[81] introduced in the 117th Congress, would have granted eligible digital journalism providers a limited exemption from antitrust laws to collectively negotiate with dominant online platforms (e.g., Google, Facebook) over the terms

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[74] *See* Alexander v. Nat'l Farmers Org., 687 F.2d 1173, 1183–84 (8th Cir. 1982) (recognizing that discriminatory pricing by agricultural cooperatives may raise antitrust concerns if used to eliminate competitors).
[75] 317 U.S. 341 (1943).
[76] *Id.* at 368.
[77] 445 U.S. 97 (1980) [hereinafter "Midcal"].
[78] *Id.* at 105.
[79] *Id.*
[80] 504 U.S. 621 (1992)
[81] Journalism Competition and Preservation Act of 2021, S. 673, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/senate-bill/673/text [hereinafter "JCPA"].

of access to and compensation for their content. Eligibility was narrowly defined—qualifying publishers had to employ fewer than 1,500 full-time employees, generate at least $100,000 in editorial revenue in the prior year, and publish original content on matters of public interest at least weekly, among other editorial and ownership criteria.[82] The bill was modeled in part on Australia's News Media Bargaining Code, which mandates that platforms bargain with registered news outlets to address power imbalances in digital advertising markets.[83]

Though the bill passed out of the Senate Judiciary Committee in September 2022, it ultimately failed to advance, due in part to a concerted lobbying campaign by dominant platforms and growing bipartisan skepticism. Critics argued that the JCPA would function as a wealth transfer from platforms to large publishers like News Corp and the New York Times, effectively entrenching incumbent media power without adequately supporting smaller or local outlets.[84] Further, critics expressed concern that the bill could authorize private cartels under the guise of protecting journalism, and noted the lack of evidence that such collective bargaining would preserve editorial diversity or public interest reporting.[85] As one journalist summarized, "platform interests were able to establish the point that this would basically be an enforced tax on them to the private benefit of the most dominant publishers."[86]

The JCPA's collapse highlights the difficulty of crafting collective bargaining exemptions that balance antitrust principles with sectoral support—particularly when those exemptions are perceived to benefit entrenched incumbents. Its failure underscores the need for carefully tailored, bottom-up exemptions that empower structurally vulnerable actors without reinforcing existing hierarchies or distorting market competition.

F. PHYSICIAN COLLECTIVE BARGAINING BILL (2000)

In 2000, the U.S. House of Representatives passed legislation—H.R. 1304, the "Quality Health-Care Coalition Act of 2000"[87]—that would have allowed healthcare professionals to collectively negotiate with health plans over fees and contract terms, provided the negotiations mirrored those permitted under the NLRA (albeit without the right to strike). The bill limited eligibility to healthcare professionals in private practice and specifically excluded negotiations involving public healthcare programs or politically sensitive services such as abortion and assisted reproduction.[88] Its scope was carefully tailored to protect against claims of excessive coordination—applying only to negotiations with health plans—and barred boycotts as well as discussions of medically unnecessary services.[89] It passed the House with bipartisan support but stalled in the Senate—where it was referred to committee and never scheduled for a vote[90]—after

[82] *Id.* at § 2.
[83] Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021 (Cth) (Austl.), https://www.legislation.gov.au/Details/C2021A00021.
[84] Alden Abbot, *Congress Should Not Legalize a News Media Cartel*, TRUTH ON THE MARKET (Mar. 16, 2021), https://truthonthemarket.com/2021/03/16/congress-should-not-legalize-a-news-media-cartel/.
[85] *See, e.g.,* Geoffrey A. Manne & R. Ben Sperry, *TL;DR – Journalism Competition and Preservation Act: Not What It Says on the Box*, INT'L CTR. FOR L. & ECON. 1–2 (Dec. 2022), https://laweconcenter.org/wp-content/uploads/2022/12/tldr-Journalism-Competition-Preservation-Act.pdf.
[86] Cristiano Lima Strong, *Why the Journalism Competition and Preservation Act Lost Momentum*, WASH. POST (Dec. 6, 2022), https://www.washingtonpost.com/technology/2022/12/06/ndaa-jcpa-newspapers-fail/.
[87] Quality Health-Care Coalition Act of 2000, H.R. 1304, 106th Cong. (1999), https://www.congress.gov/bill/106th-congress/house-bill/1304.
[88] *Id.*
[89] *Id.*
[90] *See* H.R. 1304, 106th Cong. (1999), Actions (noting that the bill was received in Senate and referred but never passed).

strong opposition from the Federal Trade Commission (FTC) and the Department of Justice (DOJ).[91]

The FTC's opposition to H.R. 1304 centered on concerns about creating overly broad antitrust immunity. In 1999 testimony before the House Judiciary Committee, FTC Chairman Robert Pitofsky warned that the proposed exemption would permit group arrangements among independent physicians that would otherwise violate antitrust law—potentially facilitating anti-competitive behavior.[92] The DOJ echoed these concerns, cautioning that collective bargaining among non-employee professionals would function as a form of price-fixing that "ultimately will be borne by consumers."[93] These arguments reflected the dominant antitrust orthodoxy of the time: coordination among independent professionals was presumed to harm allocative efficiency by raising input and therefore retail prices, even when structured to counterbalance concentrated buyer power.

Since the bill's failure, there has been a significant shift in the healthcare landscape. Physician practice consolidation has accelerated, with many independent practices being absorbed by hospital systems, private equity firms, and other corporate entities.[94] This consolidation has been driven by similar motivations that underpinned the 2000 bill: the need for physicians to gain negotiating leverage against dominant insurers. However, unlike collective bargaining, consolidation has led to increased healthcare costs and potential negative impacts on patient care. Research indicates that private equity acquisitions of physician practices are associated with higher healthcare spending. For instance, a study published in JAMA Network found that private equity-acquired practices exhibited an average increase of 20.2% in charges per claim compared to non-acquired practices.[95] Although the study does not disaggregate how this revenue is distributed, such structures typically allocate a substantial share to financial backers.[96] In contrast, a legally sanctioned right to engage in horizontal coordination might have offered an alternative margin of adjustment—one that increased physicians' bargaining power vis-à-vis insurers without relying on consolidation or generating the consumer-facing price effects that accompany vertically integrated or private-equity-driven systems.

The rejection of the physician collective bargaining bill arguably contributed to this trend by signaling that coordination among independent professionals was off-limits, while consolidation through corporate acquisition was permissible. This policy stance may have inadvertently encouraged a healthcare structure that is less competitive and potentially less

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[91] U.S. Dep't of Justice, Antitrust Div., *Statement of the U.S. Department of Justice Before the House Committee on the Judiciary on H.R. 1304, the Quality Health-Care Coalition Act of 1999* (June 22, 1999), https://www.justice.gov/sites/default/files/atr/legacy/2015/05/05/2502.pdf (warning that the bill would grant overbroad antitrust immunity to physicians); *Prepared Statement of Robert Pitofsky, Chairman, Federal Trade Commission*, Before the H. Comm. on the Judiciary, 106th Cong. (1999), reprinted in 12 LOY. CONSUMER L. REV. 31 (1999) (criticizing "broad antitrust immunity" as proposed).

[92] *See id.* (opposing H.R. 1304 due to its broad immunity for physicians who otherwise would violate antitrust law).

[93] *DOJ Statement on H.R. 1304, supra* note [84], at 9 (arguing that immunity granted under the bill would "ultimately will be borne by consumers").

[94] Physicians Advocacy Institute & Avalere Health, *Updated Report: Hospital and Corporate Acquisition of Physician Practices and Physician Employment 2019–2023* (Apr. 2024), https://www.physiciansadvocacyinstitute.org/PAI-Research/PAI-Avalere-Study-on-Physician-Employment-Practice-Ownership-Trends-2019-2023 (reporting that, as of January 2024, 77.6% of physicians were employed by hospitals, health systems, or other corporate entities, and 58.5% of physician practices were owned by such entities).

[95] Yashaswini Singh, Zirui Song, Daniel Polsky, Joseph D. Bruch & Jane M. Zhu, *Association of Private Equity Acquisition of Physician Practices With Changes in Health Care Spending and Utilization*, JAMA HEALTH FORUM (Sept. 2, 2022), https://pubmed.ncbi.nlm.nih.gov/36218927/.

[96] *See generally* Healthcare Pricing Project, https://healthcarepricingproject.org/ (last visited June 16, 2025) (aggregating empirical studies on provider consolidation and its effects on healthcare prices, utilization, and market power).

responsive to patient needs. While it's speculative to assert that the bill's passage would have entirely prevented these outcomes, it could have provided an alternative path that empowered physicians to negotiate collectively without sacrificing their independence or the quality of patient care. The episode ultimately underscores how the absence of a clear legal channel for collective negotiation by structurally subordinated but legally independent professionals can steer entire sectors toward consolidation as the only viable means of countervailing concentrated buyer power.

G. COMPARATIVE TABLE OF EXISTING EXEMPTIONS

Appendix A includes a detailed chart comparing the labor exemption, Capper-Volstead, state action, the JCPA, and the physician bargaining proposal along key dimensions: who is included, what conduct is immunized, what conduct is still prohibited, what oversight is required, and relevant legal foundations. The table also sets up a placeholder for our proposed independent contractor exemption, which we elaborate in Section IV.

III. WHY A NEW EXEMPTION IS NEEDED

The preceding section surveyed the existing doctrines that structure how antitrust and labor law treat collective action outside traditional employment. Section III explains why those doctrines do not address the conditions of dependence created by fissured labor markets and why a new statutory exemption is needed to protect coordination by workers classified as independent but subject to uniform vertical restraints.

A. REVERSING HORIZONTAL DISEMPOWERMENT

The existing legal framework draws a sharp asymmetry between top-down and bottom-up coordination. Courts have consistently upheld vertical control—franchise systems, platform governance, corporate ownership structures—as presumptively efficient and immune from antitrust scrutiny. In *Copperweld Corp. v. Independence Tube Corp.*, for example, the Supreme Court held that a parent company and its wholly-owned subsidiary could coordinate without violating Section 1 of the Sherman Act because they functioned as a "single economic unit."[97] Likewise, in *Continental T.V., Inc. v. GTE Sylvania Inc.*, the Court shifted vertical non-price restraints to the rule of reason, justifying hierarchical control as a mechanism to enhance inter-brand competition.[98]

But when similarly situated, legally independent actors attempt to coordinate horizontally in response to shared vertical restraints—such as small franchisees resisting mandatory pricing rules, or drivers seeking to negotiate platform terms—the law often treats that coordination as a per se violation.[99] The same structural logic that justifies internal coordination within a firm becomes a liability when pursued by those excluded from the firm itself.

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[97] *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771–73 (1984) (holding that a parent corporation and its wholly owned subsidiary are incapable of conspiring under section 1 of the Sherman Act because they constitute a single economic entity).

[98] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54–59 (1977) (holding that vertical non-price restraints are subject to rule of reason analysis and may promote interbrand competition).

[99] *See, e.g.*, United States v. Topco Assocs., 405 U.S. 596, 608 (1972) (condemning horizontal agreements among regional grocery chains to divide markets as per se unlawful); FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 422–26 (1990)

This doctrinal asymmetry entrenches a one-way allocation of power. It protects centralized firms that coordinate from above, while penalizing structurally subordinated actors who seek to coordinate from below. As a result, the law invites consolidation and vertical integration, while rendering horizontal resistance legally precarious.

This is not a flaw at the margins, it is a foundational design choice. As Sanjukta Paul has argued, antitrust law systematically allocates coordination rights in ways that favor hierarchical control over solidaristic organization.[100] Coordination is treated as lawful when exercised by firms, franchisors, or platforms, but unlawful when exercised by workers, franchisees, or independent service providers in the very same market, bargaining against the party that exercises hierarchical control.[101] As a result, coordination by dominant firms is often immunized as efficient, while coordination by subordinated actors is penalized as collusive.

Our proposed exemption inverts that allocation. It recognizes that where multiple actors are bound by common vertical terms—pricing, algorithmic management, performance thresholds—their horizontal coordination should not be presumed anticompetitive. It should be understood as a form of collective bargaining, which is a necessary response to structural subordination.

B. WHY CLASSIFICATION-BASED DOCTRINES FAIL

The distinction between "employees" and "independent contractors" no longer serves as a coherent proxy for bargaining power or economic dependence. Courts and agencies continue to rely on formal indicia—such as ownership of tools, freedom to set schedules, or the ability to accept multiple jobs—to determine worker classification.[102] Yet in many fissured labor markets, those features obscure more than they reveal. Gig workers, platform service providers, and franchisees may bear the risks of business ownership while remaining functionally subordinate to the firms that set their prices, allocate customers, and unilaterally impose performance standards.[103] Crucially, all of the dimensions of control exerted by lead firms pertain to dealing in product markets, with consumers, yet it is precisely this domain in which the disempowered independent contractors are prohibited from acting collectively.

This doctrinal formalism allows firms to externalize the costs of coordination while maintaining control. By classifying workers as independent, lead firms shed labor law obligations without relinquishing their control over the work process. The result is a legal architecture that confers autonomy in name but enforces subordination in practice.

The antitrust cases and exemptions surveyed in Part II reveal just how unstable this classification system has become. The piecemeal, industry-specific carveouts in *Capper-Volstead*, the state action doctrine, the Journalism Competition and Preservation Act, and the

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(holding that a collective refusal by independent lawyers to accept cases in protest of compensation rates was a per se unlawful boycott under the Sherman Act).

[100] Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. Rev. 378, 397–98 (2020) (arguing that antitrust law confers coordination rights on firms through ownership structures while denying them to other economic actors or arrangements).

[101] *Id.*

[102] NLRA § 2(3), 29 U.S.C. § 152(3) (excluding "any individual having the status of an independent contractor" from the definition of "employee"); NLRA § 2(3); *see, e.g.*, *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019) (holding that franchisee shuttle drivers were independent contractors excluded from NLRA coverage, emphasizing their "entrepreneurial opportunity" despite being bound by uniform contract terms, fare rates, and scheduling software imposed by SuperShuttle).

[103] Christopher Peterson & Marshall Steinbaum, *Coercive Rideshare Practices*, U. CHI. L. REV. (2023) at 631–34; *see also* Am. Ass'n of Franchisees & Dealers, *Fair Franchising Standards* § 3.4 (rev. 2023), https://www.aafd.org/fair-franchising-standards/ (describing franchisor control over pricing, supplier terms, and operational requirements).

failed physician bargaining bill all reflect political attempts to mitigate the inadequacies of the employee/contractor binary.[104] Each arose from sector-specific crises in which independent actors faced structurally powerful counterparties and sought some form of collective negotiation: agricultural producers in a monopsonized supply chain; physicians confronting insurer consolidation; small publishers dealing with platform intermediaries.[105]

These interventions offer partial models, but they also underscore the limitations of a sector-by-sector approach. They are politically costly, slow to implement, and often vulnerable to legal challenge or preemption. Worse, they entrench a contingent, uneven system in which organizing rights depend not on structural subordination but on the ability of a given sector to mount a sustained lobbying campaign. The result is an unstable patchwork of carveouts—one that may blunt the worst outcomes in select industries but leaves the underlying doctrinal contradiction unresolved.

Rather than continue refining an unstable binary through exception and workaround, the law should abandon classification as the starting point. Coordination rights should not turn on whether an actor is formally "independent," but on whether that actor is structurally subordinate to a dominant firm and lacks meaningful access to collective negotiation. Our proposal, set out in the next section, offers a path toward that shift: not by dismantling existing regimes, but by building a new exemption that operates on more functional and durable grounds.

C. Dominance as a Structuring Concept

We have thus far referred to lead firms that constrain similarly-situated classes of subordinate independent contractors by means of standard contracts as 'dominant,' a legally-significant term in antitrust doctrine, albeit one with an uncertain meaning. Here we delineate two conceptually separate but inter-related meanings.

The first meaning, bilateral dominance, means the ability to dictate bilateral trading terms so as to reallocate surplus in favor of the dominant counterparty. For example, the ability to impose obligations or disadvantages on a counterparty, or simply re-price the transaction in favor of the more powerful party.[106] This form of dominance is made precise in bargaining theory: the party with the better threat point, thanks to the more advantageous outside options, is dominant in a given bilateral relationship. Throughout our proposal, we treat the ability to constrain a subordinate class of independent contractors with similar or identical contracts as constituting evidence of bilateral dominance.

The second meaning, market dominance, means dominance vis-à-vis horizontal rivals. The dominant competitor has the ability to set or significantly affect production and pricing at its own level of the supply chain, beyond those production and pricing decisions to which it is itself a party. Market dominance is related to the concept of market power (the ability to price above marginal cost), but we draw the distinction with our stipulation that a firm that is dominant vis a vis its rivals affects their pricing and production decisions (in a manner that serves the dominant firm), not simply its own. This notion of market dominance is central to the "Raising Rivals' Cost" paradigm for anticompetitive unilateral conduct.[107]

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[104] *See* Section II.
[105] *Id.*
[106] Marshall Steinbaum, *Establishing Market and Monopoly Power in Tech Platform Antitrust Cases*, 67 The Antitrust Bulletin 130 (2022).
[107] Thomas Krattenmaker & Steven Salop, *Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power over Price*, 96 YALE L.J. 209 (1986).

Bilateral dominance can bring about market dominance. For example, anti-competitive platform Most-Favored Nations (MFN) provisions restrict a third-party seller from retail price discounting via a rival platform. If the provision is effective, that constrains the ability of the rival platform to profit by discounting its take rate (the share of intermediated commerce it retains), because doing so will not pass through to lower retail prices and therefore will not steer consumers to the discounting rival. That eliminates the incentive to discount the take rate–if consumers can't be steered via lower retail prices, then there's no upside, only downside from lost profit on the transactions that platform is already intermediating. The platform MFN therefore excludes the would-be discounting rival, and instead encourages rivals to increase their take rates in parallel with the dominant firm—a quasi-collusive outcome among competing retailer-platforms.

Our proposal makes bilateral dominance the precondition for immunizing horizontal collective action on the part of disempowered counterparties. In the above case, that would be the third-party sellers otherwise bound by the MFN, which would be the parallel vertical restraint that designates that class as dominated and therefore whose collective action would be immunized by our proposal. The rationale is that doing so would create a counterweight to the bilaterally-dominant firm achieving market dominance, i.e. it would deter "Abuse of Dominance" in the European jurisprudential sense. For this reason, we expressly do not cabin our immunized entities to operate only in the market in which the dominant firm is their counterparty, but rather expressly invite them to deal with third parties (either rivals at the same level of the supply chain, such as rival retailer-platforms, or consumers) with the aim of disrupting powerful gatekeepers and thereby diffusing economic power.

D. MONOPSONISTIC EXPLOITATION, OR DOUBLE-MARGINALIZATION?

The standard economic objection to permitting disempowered upstream counterparties to bargain collectively would be that it invites anti-competitive double-marginalization: the resulting collectively-bargained input price would increase relative to the bilaterally-bargained status quo, thereby increasing retail prices and so reducing output at the end of the supply chain. Until recently, this was the only consideration in economic evaluations of collective action in supply chains, and since there is no countervailing consideration on the other side that would militate in favor of coordination by upstream market actors, the result is an assumed blanket condemnation, tempered only by the labor exemption's supposed cabining of *bona fide* labor organizations due to "non-economic" policy considerations. If double-marginalization is the only competitively-relevant factor at play, then the implication is all collective action aimed at raising input prices is anti-competitive, but some of it is carved out of legal liability because "non-economic" factors trump competition. If all that the law cared about was competition, so this reasoning goes, no horizontal collective action should be exempted from section 1 liability. That perspective is evident in, for example, the FTC and DOJ's opposition to the Quality Health-Care Coalition Act of 2000.

Recently, in light of the economics research on pervasive monopsony power in labor markets,[108] that "offsetting" factor has been brought into antitrust analysis: it is possible that the

[108] For reviews and interpretation of this literature, see José Azar & Ioana Marinescu, *Monopsony Power in the Labor Market*, *in* Handbook of Labor Economics (2024); José Azar & Ioana Marinescu, *Monopsony Power in the Labor Market: From Theory to Policy*, 16 ANNUAL REV. ECON. 491 (2024).

input price is anti-competitively low, thanks to concentrated power on the part of buyers in a supply chain, hence countervailing collective power can restore bilateral parity and thus raise the input price to the competitive level. On this reading, the reason a low input price is anti-competitive is that it acts like a tax on production for the output market: the monopsonistic buyer in the input market does not want to increase output because that would raise the input price, and lower output at a lower input price is more profitable.[109] A recent paper by Demirer and Rubens, "Welfare Effects of Buyer and Seller Power,"[110] is the most relevant theoretical treatment of these two countervailing effects, double-marginalization versus monopsony, setting conditions on when one effect dominates the other.

However, we do not find this framework compelling for the economic realities of bilateral dominance and its competitive effects, hence we do not limit the collective action covered by our exemption either narrowly to the upstream market or to that which would rectify monopsonistic input price reductions but "stop short" of risking double-marginalization. The reason why is that the vertical control that is the source of structural subordination is not itself limited to input markets, and the anti-competitive effects of that control in output markets are unlikely to be rectified by collective action that is only exempted if it is cabined to the upstream market. That is in part because the rigid supply chain structure in which double-marginalization makes conceptual sense is not a good model for the fissured workplace context where our proposal is directed: many powerful platform gatekeepers operate on a third-party basis (in fact, that is the premise of their claim not to be employers), so the conduct at issue is who gets to set prices and production in the output market. Here, the source of the inefficiency is the high take rate set by platform intermediaries, sustained by means of vertical control that precludes dealing directly with consumers in the output market. That control is what our exempted collective entities would contest. Vertical restraints prohibit off-platform steering; in response, collectives of platform service providers would withdraw their services from the offending dominant platform and either supply them to a platform offering better terms (a lower take rate), or direct-to-consumers through an intermediary owned and controlled by the collective. Likewise, an organization of disempowered franchisees must be able to exercise collective power by standing up their own brand (or threatening to do so). The essence of contesting bilateral dominance is the ability to bypass gatekeepers.

IV. A STATUTORY FRAMEWORK FOR COLLECTIVE ACTION BY THE BILATERALLY DOMINATED

The statutory exemption proposed in this Article is grounded in a simple but underutilized premise: bilaterally dominated actors should be permitted to coordinate in response to common vertical restraints. Rather than rely on formal classifications like "employee" or "independent contractor," the exemption identifies economic dependence based on functional conditions—non-negotiable terms, algorithmic control, exclusivity obligations, and other standard-form restraints imposed by the dominant firm. Section IV outlines (A) who is covered,

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[109] See Brianna L. Alderman & Roger D. Blair, Monopsony in Labor Markets: Theory, Evidence, and Public Policy (2024), https://www.cambridge.org/core/books/monopsony-in-labor-markets/monopsony-in-labor-markets/4E509673DA08A828979DC2849D3DF87C. But see Marshall Steinbaum, *Monopsony in Labor Markets: Theory, Evidence, and Public Policy by Brianna L. Alderman and Roger D. Blair*, J. ECON. LITERATURE (2026), https://www.aeaweb.org/articles?id=10.1257/jel.20250024&&from=f (offering a critique).
[110] Mert Demirer & Michael Rubens, *Welfare Effects of Buyer and Seller Power* (2025), https://www.nber.org/papers/w33371.

(B) the scope of permissible coordination and retained limits under existing antitrust principles, (C) prohibited conduct and exclusions, (D) administration/oversight and NLRA coordination, (E) sectoral illustrations, and (F) a comparison to the proposal by Melamed & Salop (2024) "An Antitrust Exemption for Workers: And Why Worker Bargaining Power Benefits Consumers, Too."

A. WHO IS COVERED: FUNCTIONAL SUBORDINATION TO COMMON VERTICAL RESTRAINTS

The legal threshold for inclusion under our proposed exemption is not employment classification, but rather subjection to bilateral dominance, which we define as being on the subordinate end of a market relationship in which a dominant counterparty dictates the terms of exchange.[111] This approach both reflects a factual account of economic subordination in a bilateral relationship and is more administrable. Workers and small-scale firms across sectors—rideshare drivers, delivery couriers, franchisees, subcontractors, and third-party sellers on e-commerce platforms—are often required to comply with non-negotiable terms set unilaterally by a larger entity: pricing algorithms, exclusivity arrangements, performance metrics, Most-Favored Nations clauses, and resale restrictions. The detection of these terms, and not any subjective "effects" assessment, would be the predicate for eligibility for the exemption we propose.

Our proposal treats such vertical restraints as evidence of bilateral dominance and therefore as the organizing principle for eligibility. Where a similarly-situated class of subordinated counterparties is bound by substantially parallel vertical restraints imposed by a common counterparty, that class should be allowed to coordinate in response. Eligibility would extend to natural persons and corporate entities, with capitalization functioning as an indicator rather than a dispositive requirement. Entities commonly organized as LLCs, S corporations, and other pass-through forms would ordinarily fall within the contemplated scope, and statute or agency rulemaking—such as by the FTC—could specify how capitalization should be evaluated in assessing component-level dominance. Higher capitalization would not, however, disqualify a class that is collectively subject to substantially parallel vertical restraints.

Under this framework, indicators for component-level eligibility include whether an entity: (1) exercises control over the labor of others beyond a minimal threshold, (2) operates under substantially similar, non-negotiable terms imposed by a common counterparty, and (3) has capitalization falling within parameters that—while not dispositive—may be specified by statute or agency rulemaking to help identify components likely to experience bilateral dominance.[112] These indicators guide, but do not determine, eligibility. Capitalization and the use of hired labor weigh against a finding that a particular component is bilaterally dominated, yet they do not automatically disqualify a similarly situated, vertically restrained class when that class as a whole occupies the subordinate side of a bilateral dominance relationship.

The following statutory language illustrates how these eligibility indicators could be codified:

> "For purposes of this subsection (a), whether an entity or class of entities is bilaterally dominated shall be determined based on the totality of circumstances. Relevant indicators

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[111] *See* Section IV.B.

[112] *See* Capper-Volstead Act, 7 U.S.C. § 291 (limiting cooperative membership to "persons engaged in the production of agricultural products"); *see also* 13 C.F.R. § 121.201 (2024) (defining small business size standards by industry under the U.S. Small Business Administration).

may include: (1) whether the entity exercises control over the labor of others beyond a minimal threshold; (2) whether the entity operates under substantially similar, non-negotiable contractual or operational terms imposed by a common counterparty; and (3) whether the entity's capitalization falls within parameters that may be specified by statute or by rule of the administering agency to identify entities likely to experience bilateral dominance. No single indicator shall be dispositive. Capitalization levels or the use of hired labor shall not, standing alone, disqualify an entity or class of entities from eligibility where the class as a whole occupies the subordinate side of a bilateral dominance relationship."

This model draws loose inspiration from early agricultural cooperatives, which similarly sought to coordinate among small actors facing concentrated buyer power. As described in *The Farmer's Benevolent Trust*, these co-ops experimented with different governance formulas—equal voting, production-weighted voting, and later the inclusion of investor representation—to balance participation with capital needs.[113] Each model carried distinct trade-offs. Equal voting preserved democratic legitimacy but limited access to financing; production-weighted voting increased efficiency but risked internal domination by larger producers; and investor representation facilitated capital access but ultimately compromised the co-ops' autonomy when outside investors voided price guarantees to producing members of the cooperative under antitrust pressure.[114]

The lesson is structural, not historical: effective coordination among the subordinated requires a governance design that distributes influence roughly in proportion to contribution without allowing capital or scale to overwhelm voice. For bargaining-only collectives,[115] that may mean a hybrid between equal and production-based voting. For capitalized cooperatives, it may require layering investor participation under explicit caps on voting power—such as a rule that no member or investor may hold more than twice the voting weight of the smallest member. Consistent with this principle, the exemption could delegate to an implementing agency the authority to specify the permissible voting ratio by rule. Doing so would provide flexibility across sectors while preserving the underlying requirement of democratic control.

To preserve the integrity of the exemption, entities that genuinely function as managerial intermediaries or exercise independent market power would be excluded. Within a mixed class, however, democratic governance of the collective serves as the safeguard against internal domination.[116] Ensuring that voting rights and participation track labor contribution or active participation—rather than capital investment—prevents larger or more capitalized members from steering collective decisions and preserves the exemption's purpose of countervailing the power of the dominant counterparty.[117]

B. Scope of Antitrust Immunity Under the Proposed Framework

1. Immunity from Section 1 of the Sherman Act

[113] Victoria Saker Woeste, The Farmer's Benevolent Trust: Law and Agricultural Cooperation in Industrial America, 1865–1945 20 (Univ. of N.C. Press, 1998).
[114] *Id.*
[115] See Section IV.D.
[116] *See* Section IV.B.
[117] *Id.*

The proposed exemption shields coordination among bilaterally-dominated counterparties from liability under Section 1 of the Sherman Act. Where such actors organize to respond to a common set of vertical restraints imposed by a dominant firm, conduct that would ordinarily be treated as *per se* unlawful[118]—joint price-setting in the input or output market (or both), standardized contract negotiation, joint refusals to deal, exclusive supply contracts binding members, and jointly standing up a marketing agent—should instead be recognized as a legitimate form of collective bargaining or self-organization.

To ensure clarity and predictability, the statutory language could follow this model:

> "Notwithstanding section 1 of the Sherman Act (15 U.S.C. § 1), no court shall find unlawful any collective negotiation, coordination, or joint action undertaken by a similarly situated class of bilaterally-dominated counterparties engaged in the provision of labor or services to a common contracting entity when such coordination responds to substantially parallel vertical restraints imposed by that entity and is directed toward improving compensation, working conditions, or contractual terms on the part of the bilaterally dominated parties. Eligibility for immunity under this subsection shall be determined in accordance with the eligibility criteria governing bilateral dominance described in subsection (a)."

This language captures the essential principle: coordination among the subordinated is not collusion but self-defense, and collective action to overcome that subordination is a form of business rivalry from which the broader political economy benefits. The exemption reclassifies collective rate-setting and related horizontal arrangements as legitimate bargaining strategies when undertaken to restore parity in a vertically concentrated market. Under this text, the key consideration is not whether coordination restricts competition in the abstract, but whether it operates to counteract an existing structure of unilateral dominance.

Yet the same logic that justifies immunity also defines its boundary. Once a collective no longer functions as a countervailing force against dominance but instead acquires dominance of its own, the rationale for protection disappears.

2. Retained Accountability Under Section 2 of the Sherman Act

The exemption does not immunize actors from scrutiny under Section 2 of the Sherman Act, which prohibits monopolization, attempted monopolization, or exclusionary conduct by firms with market power. As with agricultural cooperatives under Capper-Volstead,[119] the preservation of section 2 enforcement provides a safeguard against independent contractor collectives abusing their protected status to foreclose competition or dominate a market.[120]

Under this proposed framework, a cooperative that collectively bargains with a dominant buyer remains protected under section 1 even if it employs internal exclusivity or standardized pricing. But if the same entity acquired competitors, denied access to critical markets, or imposed terms that foreclosed competition among similarly-situated non-members, it could still face liability under section 2. The collective entities we envision arising from a section 1

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[118] *See, e.g.*, FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990); United States v. Topco Assocs., 405 U.S. 596 (1972).

[119] *See* Section II.C.

[120] *See* Section Part VI (discussing section 2 enforcement and limits on exclusionary conduct by worker-led collectives).

exemption would be exactly as subject to section 2 liability as any other putatively-dominant firm. This retained accountability ensures that the exemption operates as a tool for empowering the subordinated, not entrenching new intermediaries of control. The overall purpose of the exemption, therefore, is to create a level playing field between capitalistic firms under shareholder control and collective entities governed by their producer-members, eliminating what Sanjukta Paul has called the Firm Exemption that privileges unilateral internal coordination by capitalistic firms while prohibiting it on the part of collectives.[121]

C. What is Prohibited: Market Division, Bid Rigging, and Misuse of the Exemption

The proposed exemption is not a license for collusion or market control. Certain forms of conduct remain outside its scope to preserve the line between countervailing coordination and anticompetitive exclusion.

First, coordination directed at dividing markets, rigging bids, or suppressing competition on the part of unaffiliated third parties falls outside the proposed exemption. Although bilaterally dominated actors may lawfully standardize rates or jointly negotiate terms with a common counterparty, they may not allocate territories, customers, or contracts among themselves or withhold services to coerce non-members.[122]

Second, the exemption's boundaries mirror its eligibility criteria. Entities whose structure or conduct reflects functional dominance rather than subordination—such as those that (1) control the labor of others at scale, (2) act as buyer-intermediaries or platform managers for a dominant firm, or (3) exceed the statutory asset threshold—fall outside the safe harbor.[123] This safeguard delineates the exemption's limits, and in doing so protects coordination among bilaterally dominated actors without extending to well-capitalized or vertically integrated firms engaged in traditional cartel behavior.

Capitalized collectives that operate shared platforms or pooled infrastructure remain eligible only if they maintain democratic governance and open, nondiscriminatory membership. While outside funding may be permitted, voting rights must reflect labor contribution or active participation rather than capital stake.[124] As such, no member or investor may exercise disproportionate control inconsistent with the cooperative's representative purpose.

Finally, collective entities may not exploit their protected status to exclude similarly situated non-members from the relevant market. Coordination is protected only when directed toward improving members' contractual conditions or negotiating with a dominant counterparty.[125] When it becomes a mechanism for market foreclosure or gatekeeping, the justification for protection disappears. In doing so, the exemption legitimizes collective bargaining power, but not the recreation of monopoly power in collective form.

D. Administration: Registration, Certification, and NLRA Coordination

As part of the statutory framework implementing this exemption, Congress should include a graduated oversight mechanism tailored to the organizational structure and risk profile

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[121] Sanjukta Paul, *Fissuring and the Firm Exemption*, 82 Law and Contemporary Problems 65 (2019).
[122] *See* Section VII.D. (describing guardrails).
[123] *See* Section IV.A.
[124] *Id.*
[125] *See* Section IV.B.1 (discussing internal versus external coordination).

of the exempt entity. This framework ensures accessibility for informal collective efforts while preserving safeguards against misuse by capitalized or operationally complex entities. The aim is to make protection claimable *ex ante* through a straightforward filing process rather than only *ex post* in litigation.

Bargaining-only entities—those that do not hold or deploy capital and instead negotiate terms on behalf of members—could be subject to a minimal registration process. This model is envisioned for, for example, a franchisee association moving from petitioning the franchisor over the terms of contracts reached bilaterally between the franchisor and individual franchisees to collectively bargaining the terms of those contracts on behalf of its members. These organizations could be required to attest that: (1) they represent a majority of similarly situated participants bound by a common vertical restraint evidencing bilateral dominance, and (2) their coordination is directed at improving compensation, work conditions, or contractual fairness.[126] Upon submission of this attestation, the group could receive legal immunity under section 1 of the Sherman Act for activities within the scope of the exemption, with no further oversight required.

Capitalized entities—such as worker-led platforms, service cooperatives, or franchisee associations that pool capital or infrastructure with the aim of standing up their own, rival franchise brand—could be subject to a more robust certification process. To qualify for the exemption, these entities could be required to satisfy the same baseline eligibility criteria described in Section IV.A and additionally demonstrate: (1) democratic governance, including labor-based voting rights; (2) internal rules that are non-discriminatory and transparent; and (3) safeguards to prevent exclusionary conduct or market foreclosure. These conditions would allow capitalized entities to retain their legitimacy as labor-driven organizations and do not replicate the top-down structures the exemption is meant to counteract.[127]

Oversight for both entity types could be administered by a designated federal agency, such as the Federal Trade Commission, which could maintain a public registry and promulgate rules for registration, certification, and ongoing compliance. Delegating limited rulemaking authority would provide flexibility across sectors while preserving the statute's core bilateral-dominance test and democratic-governance safeguards. This model parallels how federal agencies currently promote transparency and legitimacy for other sector-specific exemptions, including the Capper-Volstead Act.[128]

To avoid overlap with the NLRA, the exemption could include a worker-status determination at the point of registration. Applicants could be required to demonstrate that their members are not "employees" within the meaning of NLRA section 152(3), ensuring that the exemption is used only by those excluded from existing collective-bargaining protections.[129] This determination could follow existing NLRB precedent but be refined by the implementing agency through interpretive guidance.[130] Embedding this screen in the registration process would protect NLRA-covered employees from being reclassified or diverted into less protective

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[126] Parallel to NLRA majoritarian representation model; *see also* Section VI.B.
[127] *See* Section IV.A and IV.C.
[128] *Compare* 7 U.S.C. §§ 291–292 (Capper-Volstead Act, granting agricultural producers limited antitrust exemption, administered in part by USDA), *with* 15 U.S.C. § 46(f) (authorizing FTC to oversee nonprofit corporations through investigatory and reporting powers under the FTC Act).
[129] 29 U.S.C. § 152(3); *see also supra* Part III.
[130] Sanjukta Paul & Marshall Steinbaum, *Comment to the Federal Trade Commission on Its Pending Noncompete Rule: An Antitrust Test for Employment Status*, (2023), https://marshallsteinbaum.org/assets/ftc-definition-of-employment_paul_steinbaum.pdf.

regimes while providing a lawful organizing pathway for independent contractors, franchisees, and small-business operators who remain economically dependent but legally excluded.

The result is an administrable, interoperable structure that complements existing labor law rather than undermining it. It preserves the primacy of the NLRA for employees while creating a parallel legal channel for the bilaterally dominated and structurally subordinated who lack access to collective-bargaining rights under current law.

E. Examples: Franchising, Gig Platforms, Subcontracting Networks

Actors across franchising, platform labor markets, and subcontracting networks exemplify how bilateral dominance operates in practice.

In the franchising sector, franchisees are nominally independent businesses but are typically subject to franchisor-imposed controls over pricing, advertising, territorial allocation, supply chains, and operational procedures.[131] A close reading of the American Association of Franchisees and Dealers' (AAFD) *Fair Franchising Standards* reveals how these contractual constraints replicate employer-style control while denying franchisees the protections associated with employment.[132] Despite facing uniform terms imposed by the franchisor, franchisees are generally barred from coordinating with one another to contest or renegotiate those terms, as such efforts risk a *per se* antitrust violation. As a result, structurally disempowered franchisees often cascade their disempowerment to their own workforces, undercutting labor standards when they lack any other margin of adjustment to improve profitability.[133] Franchisee associations may petition franchisors for changes, but they cannot back their petitions with the credible threat of coordinated refusal to deal or collective defection to rival brands, which are the very forms of pressure that characterize genuine bargaining.

Platform-based labor markets reveal similar patterns. App-based drivers and delivery couriers may choose when to log in, but their access to work, compensation, and customer visibility is governed by platform-controlled algorithms, pay formulas, and penalty systems.[134] Sellers on e-commerce platforms or restaurants on food-delivery platforms face Most Favored Nations clauses, price parity rules, and non-negotiable service terms that functionally determine the conditions of participation and foreclose access to the downstream market while strengthening the power of platform-intermediaries.[135] Though not classified as "employees," these actors operate under unilateral control that mirrors the structures of employment while depriving them of NLRA protections.[136] Their attempts at collective negotiation—whether over base pay, deactivation, or platform fees—face antitrust risk absent a statutory safe harbor.

Subcontracting networks, such as in warehousing and logistics, reflect yet another manifestation of bilateral dominance. Lead firms frequently outsource labor through chains of subcontractors, each of which is formally independent but constrained by top-down requirements

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[131] Ulrich Atz et al., The Balance of Power in Franchising (2025), https://marshallsteinbaum.org/wp-content/uploads/2025/10/balance_of_power_in_franchising_10-19-25.pdf.

[132] Am. Ass'n of Franchisees & Dealers, *Fair Franchising Standards* §§ 2.3–2.6 (rev. 2023), https://www.aafd.org/fair-franchising-standards/ (detailing franchisor control over pricing, advertising, territory, suppliers, and operations).

[133] Brian Callaci et al., *Vertical Restraints and Labor Markets in Franchised Industries*, 52B Research in Labor Economics 255 (2025).

[134] Christopher Peterson & Marshall Steinbaum, *Coercive Rideshare Practices*, U. Chi. L. Rev. (2023) at 627–37.

[135] Marshall Steinbaum, *Establishing Market and Monopoly Power in Tech Platform Antitrust Cases*, 67 The Antitrust Bulletin 130 (2022).

[136] Christopher Peterson & Marshall Steinbaum, *Coercive Rideshare Practices: At the Intersection of Antitrust and Consumer Protection Law in the Gig Economy*, 90 University of Chicago Law Review 623 (2023).

embedded in upstream agreements: deadlines, equipment standards, staffing levels, service-time guarantees.[137] Because each subcontractor faces the same imposed conditions, competition becomes structurally artificial; firms cannot meaningfully adjust their terms of service, yet any effort to coordinate horizontally over shared contract terms faces *per se* antitrust exposure.[138] Such service providers and staffing companies then succumb the market pressure to coordinate in a different way: by illegally agreeing to suppress labor standards.[139]

Across these examples, the pattern is the same: vertically imposed, non-negotiable terms eliminate meaningful individual bargaining. The exemption addresses this structural reality by allowing bilaterally dominated actors to coordinate over those imposed terms without incurring *per se* antitrust liability.

F. COMPARISON TO MELAMED AND SALOP

Melamed and Salop (2024)[140] propose a superficially similar antitrust exemption for collective bargaining in the face of a monopsonistic buyer, establishing what they refer to as Joint Negotiation Entities or JNEs that would be similarly exempted from Section 1. It's useful, therefore, to state explicitly what the differences are between our proposal and theirs.

First, and most conceptually, their JNEs are envisioned as output-increasing, a response to the anti-competitive effect of monopsonistic output reductions. As such, they claim that when employers have labor market power, minimal collective bargaining is justified to achieve an efficient allocation, but excessively powerful collective bargaining organizations might "go too far" and reduce output by withholding labor.[141] Hence, their proposal is calibrated to the limited end of restoring parity between employers and workers to the point that output is maximized, and limiting the power of workers' collective organizations such that they serve this circumscribed end.

Aside from the inability to calibrate the reality of collective bargaining rights and the scope of an antitrust exemption permitting them to the empirical scale of monopsonistic output reductions, our view is that this is but one model in which employer power has anti-competitive effects, hence our collective bargaining entities are not conceived (or constrained) to achieve maximum output, but to go no further.[142] Instead, we believe that horizontal coordination is superior to vertical control, and that collective organizations should have all the rights that firms have, namely what Paul calls the Firm Exemption from Section 1 liability.[143] There is no reason to discriminate in granting such powers on the basis of corporate form. More concretely, a monopsonistic wage reduction can be achieved without affecting output, or even by increasing it (by forcing disempowered counterparties to work harder than they would want at a given wage,

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[137] DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014)

[138] *Id.*

[139] Heidi Shierholz, Marshall Steinbaum & Sandeep Vaheesan, *In the Matter of Your Therapy Source, LLC; Neeraj Jindal; and Sheri Yarbray*, (2018).

[140] A. Douglas Melamed & Steven C. Salop, *An Antitrust Exemption for Workers: And Why Worker Bargaining Power Benefits Consumers, Too*, 85 ANTITRUST L. J. (2024), https://www.americanbar.org/groups/antitrust_law/resources/journal/85-3/antitrust-exemption-for-workers/.

[141] In that sense, their proposal assumes a similar starting point to the paper by Demirer and Rubens cited *supra* section III.D.

[142] For further extensive discussion of the shortcomings of such a circumscribed model of competitive harm arising from employer power in labor markets, see Eric Posner, *The New Labor Antitrust*, 86 ANTITRUST L.J. 503 (2024).

[143] *See* Section III.C.

for example, or through price or wage discrimination). Countervailing power must be established to prevent this, not cabined to achieve only a theoretical minimum.

Second, Melamed and Salop expressly contemplate potential membership to overlap with the NLRA, eliding the employer/independent contractor distinction. While there appears to be good reason for doing this (as the FTC's 2024 noncompete rule did) given that employment classification has come to depend on the discretion of employers, so undermining the 20th Century's distinction between employment and independence, functionally permitting JNEs to represent employees threatens to further weaken extant labor unions. The JNEs Melamed and Salop contemplate are effectively minority unions without the benefit of exclusive representation and without legally binding the employer with a duty to bargain, the two pillars of the NLRA's collective bargaining regime. As such, JNEs are effectively weaker labor unions, and so employers currently obliged to bargain with extant NLRA unions would be invited to replace them with JNEs, effectively repealing Section 7 of the National Labor Relations Act (the ban on company unions). Like Melamed and Salop, our proposal does not include exclusive representation or a legal duty to bargain, but it also is not available to NLRA employees. Our exempted entities lack the legal authorization to compel bargaining, but they have a concomitantly wider scope of allowable action with which to bring it about, namely coordination in the output market, in keeping with the constituent entities' status as bilaterally dominated independent contractors. As such, our proposal strictly increases the economic sphere in which horizontal collective bargaining and collective action may take place.

Third, Melamed and Salop import a concept similar to the distinction between mandatory and permissive subjects of bargaining from labor law into antitrust. Their JNEs are not permitted to bargain over terms and conditions in the output market, such as retail prices. We perceive that a crucial element of platform power is the ability to set terms in the output market that are unfavorable to disempowered suppliers. For example, Most-Favored Nations clauses bind ecommerce sellers and other platform counterparties, inhibiting consumer steering that would otherwise threaten platform dominance.[144] Those are exactly the type of contractual terms and platform policies that our entities would be empowered to bargain over. As the discussion of farmers' cooperatives above indicates, the ability to access and set transaction terms in the retail market is critical for collective entities consisting of sellers to vindicate boycott threats, including by outright vertical integration (as would be allowed to our capitalized collective organizations, which Melamed and Salop do not envision).

Fourth, and finally, Melamed and Salop's JNEs are allowed to represent workers in only one bilateral relationship, bargaining with a given employer. In their schema, there may be multiple JNEs per employer (due to minority/members-only status), but not multiple employers per JNE. This would mean, for example, separate JNEs for rideshare drivers bargaining with Uber and with Lyft. We permit our collective organizations to bargain with multiple employers as long as they are similarly situated and impose similar vertical restraints. We view the possibility to facilitate multi-homing, as well as to bypass dominant counterparties entirely, as key to vindicating collective power. Confining a JNE to a single putatively dominant counterparty concedes that putative independent contractors represented by that JNE are not in fact independent, whereas our organizations are designed to protect and secure the independence for their independent contractor-members.

[144] Jonathan Baker & Fiona Scott Morton, *Antitrust Enforcement Against Platform MFNs*, 127 YALE L.J. 2176 (2018).

V. CASE STUDIES IN NON-EMPLOYEE COLLECTIVE BARGAINING

A. UBER AND THE SEATTLE RIDESHARE COLLECTIVE BARGAINING ORDINANCE

Chamber of Commerce v. Seattle illustrates the fragility of local efforts to authorize collective bargaining by non-employees.[145] The City of Seattle's 2015 ordinance authorized an "exclusive driver representative" to negotiate over pay and working conditions with companies like Uber and Lyft.[146] Because the ordinance extended collective bargaining rights to non-employees, it was challenged by the Chamber of Commerce and Uber before taking effect.[147] The litigation never reached the point of challenging an actual worker organization or its conduct; instead, the plaintiffs sought an injunction against the ordinance itself, claiming it would inevitably result in per se illegal price-fixing under Section 1 of the Sherman Act.[148]

The Ninth Circuit ultimately ruled that the ordinance failed to qualify for state action immunity, holding that the State of Washington had not actively supervised the driver collectives' anticipated conduct just because the City of Seattle, which enacted the ordinance, is an instrumentality of the State.[149] Notably, neither the City nor the court relied on the labor exemption, and the case was resolved without ever addressing whether the drivers' coordination might be protected as labor activity.[150] In effect, the ordinance was enjoined not because it affirmatively violated antitrust law, but because no clear statutory safe harbor existed for a collective entity representing structurally subordinated non-employees. And because no such entity got off the ground in this case, there was no "dispute" wherein the de facto Labor Dispute exemption ultimately created by *Confederacion Confederación Hípica* might have come into play.

Had the statutory exemption proposed in this article been in effect, the case would likely have been resolved quite differently. A driver organization formed under the Seattle ordinance could have claimed safe harbor, shifting the litigation posture entirely. Instead of challenging the legality of collective bargaining as such, plaintiffs would have had to argue that the driver collective failed to meet the exemption's structural criteria—for example, by lacking democratic governance, failing to demonstrate economic subordination, or permitting intermediary profit-taking.[151] The relevant question would not be whether the City or the State actively supervised the ordinance's effects, as it was in the *Chamber of Commerce* decision, but whether the driver collective satisfied a set of affirmative, worker-centered eligibility requirements.

Because the exemption would have affirmatively authorized the conduct envisioned by the ordinance, the preliminary injunction blocking its implementation would likely never have been issued. Any challenge would instead have proceeded against specific worker collectives, contesting whether they satisfied the exemption's structural requirements. Courts would evaluate a clear factual record: whether the organization exercises democratic control by its members, as

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[145] Chamber of Commerce of the U.S. v. City of Seattle, 890 F.3d 769 (9th Cir. 2018).
[146] Seattle Ordinance No. 124968, § 2 (Dec. 14, 2015) (codified at Seattle, Wash., Mun. Code ch. 6.310), available at: https://clerk.seattle.gov/search/ordinances/124968).
[147] Chamber of Com. of the U.S. v. City of Seattle, 890 F.3d 769 (9th Cir. 2018).
[148] *Id.* at 778–80 (describing plaintiffs' argument that collective negotiation by independent contractors would amount to per se illegal price-fixing under the Sherman Act section 1).
[149] *Id.*
[150] *Id.*
[151] *See* Section IV.C.

reflected in principles akin to corporate or LLC governance standards;[152] whether its members are economically subordinated to the firms with which they negotiate, in line with recent economic analysis of platform-based work;[153] and whether the collective is engaged in labor-side coordination over working conditions, consistent with the longstanding distinction drawn by the Supreme Court between protected labor activity and unprotected supplier price-fixing.[154] The answers to those questions—not whether employment status fits the NLRA, or whether state supervision was adequate—would determine the legality of the coordination.

This hypothetical illustrates how a statutory exemption could replace ambiguous immunity doctrines (like *Midcal*[155]) with a direct, fact-driven inquiry into whether labor-side coordination by non-employees deserves protection. More broadly, it provides a model for future federal or state legislation: define safe harbors for horizontal coordination not based on formal employment status, but on structural position and governance form. That shift in emphasis would likely have altered the outcome in Seattle and could prevent similar efforts from being preempted or frozen before they begin.

B. Fast Food Sectoral Bargaining in California

California's FAST Recovery Act (FAST Act) marked a significant legislative effort to establish a form of sectoral standard-setting outside traditional labor law frameworks. Enacted in 2022, the law created a Fast Food Council with authority to set minimum standards for wages, hours, and working conditions across the fast food industry.[156] The statute applied to national chains with 100 or more locations and a shared brand identity, targeting large employers while excluding smaller operators.[157] The Council was composed of representatives from labor, franchisors, franchisees, and state agencies, and was empowered to promulgate binding industry-wide standards through a public process.[158] Although the statute did not create collective bargaining rights per se, it aimed to replicate some of the structural features of sectoral negotiation through state-facilitated standard-setting.

The law responded to a market structure in which fast food franchisees—though formally independent—operate under extensive contractual control by national franchisors. Brand headquarters typically dictate pricing, hours of operation, marketing strategy, product sourcing, and permitted product offerings, and even scheduling software, leaving franchisees with little discretion over core business decisions other than labor costs.[159] Workers and franchisees alike are subject to these vertical constraints, but neither group has a legal mechanism to negotiate the

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152 See Revised Unif. Ltd. Liab. Co. Act § 407 (Unif. Law Comm'n 2006) (providing default governance rules for member-managed LLCs, including equal voting rights among members); Model Nonprofit Corp. Act § 8.01 (Am. Bar Ass'n 3d ed. 2008) (requiring nonprofit corporations to be managed under the direction of a board of directors elected or appointed by the members).

153 Christopher L. Peterson & Marshall Steinbaum, Coercive Rideshare Practices, U. CHI. L. REV. 623, 631–35 (2023) (describing how rideshare drivers are subject to unilateral, algorithmically enforced pricing and discipline regimes imposed by platforms, impairing competition at the platform level).

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

155 Section II.D.

156 CAL. ASSEMB. B. 257, 2021–2022 Leg., Reg. Sess. (Cal. 2022) (enacted), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB257.

157 *Id.* at § 1470(f)(2)(A) (applying to fast food chains with 100 or more locations nationally and a common brand).

158 *Id.* §§ 1471(a)–(d) (detailing appointment and authority of the Fast Food Council).

159 *See* Am. Ass'n of Franchisees & Dealers, *Fair Franchising Standards* §§ 2.3–2.6 (rev. 2023), https://www.aafd.org/fair-franchising-standards/ (detailing franchisor control over pricing, advertising, territory, suppliers, and operations).

terms collectively. The FAST Act sought to address this asymmetry by authorizing a state-level council to set binding, industry-wide minimum standards.[160]

The legislation faced immediate opposition from industry groups, which launched a ballot referendum to repeal it.[161] In response, a compromise bill was passed in 2023 that implemented a statewide $20 minimum wage for fast food workers but substantially curtailed the council's broader authority.[162] The revised law eliminated joint employer liability for franchisors and limited the council's role to setting basic standards, sidelining its broader function as a dynamic forum for ongoing negotiation.[163] By exchanging a minimum wage for excusing franchisors from joint employment liability, the legislation itself effectively undercut the tripartite structure of the putative sectoral council. Franchisees, despite bearing the brunt of the increased labor costs, were excluded from meaningful input into the final agreement negotiated between the International Franchise Association and the Service Employees International Union in the governor's office.[164]

This trajectory underscores the political and structural fragility of top-down models for sectoral standard-setting. While the revised law delivered material gains for some workers, it did so by narrowing the scope of collective governance and preserving the legal fragmentation that makes coordination difficult. A statutory framework that affirmatively authorizes horizontal coordination among structurally subordinated actors—such as workers or franchisees bound by common vertical restraints—would enable more durable and inclusive models of sectoral bargaining. Rather than relying on state-mediated councils with limited authority, such a framework would allow collective negotiation to emerge directly from those affected by shared vertical control and could sidestep the fragility of state-action immunity by grounding legality in a federal safe harbor rather than delegated regulatory oversight.

C. AUSTRALIA'S VOLUNTARY NOTIFICATION SYSTEM

Australia offers an instructive model for how antitrust regimes can accommodate collective bargaining by non-employee actors without requiring formal labor law reform. Under a framework administered by the Australian Competition and Consumer Commission (ACCC), small businesses—including sole traders, franchisees, and independent contractors—can obtain authorization to bargain collectively with dominant firms.[165] Authorization is granted if the proposed coordination is unlikely to substantially lessen competition or is expected to result in a net public benefit.[166]

In addition to formal authorization, the ACCC operates a "notification" regime for streamlined review.[167] Participants may file a short-form notice describing their proposed

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[160] CAL. ASSEMB. B. 257 §§ 1470(a)–(b), 1471(a)–(d) (2022).
[161] *See, e.g.*, *California Fast Food Restaurant Minimum Wage and Labor Regulations Referendum (2024)*, BALLOTPEDIA, https://ballotpedia.org/California_Fast_Food_Restaurant_Minimum_Wage_and_Labor_Regulations_Referendum_(2024) (last visited June 17, 2025).
[162] Cal. Assemb. B. 1228, 2023–2024 Leg., Reg. Sess. (Cal. 2023) (enacted), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240AB122.
[163] *Compare* AB 257 § 1471(a)–(c) *with* AB 1228 § 1474.2
[164] *See, e.g.*, Ben Hensley, *AB 1228 Raising Concerns Among Franchise Owners, Franchisees*, S.J. BUS. J. (Sept. 29, 2023), https://thebusinessjournal.com/ab-1228-raising-concerns-among-franchise-owners-franchisees/.
[165] Australian Competition & Consumer Commission, *Small Business Collective Bargaining: Notification and Authorisation Guidelines* (Dec. 2022), https://www.accc.gov.au/about-us/publications/small-business-collective-bargaining-guidelines. (explaining the ACCC's collective bargaining authorization process for small businesses, including sole traders and franchisees)
[166] *Id.*
[167] *Id.*

collective conduct, including who they intend to negotiate with and over what terms.[168] If the ACCC does not object within a prescribed period, the conduct is presumed lawful.[169] The system is available to a wide range of actors—truck drivers, farmers, franchisees, tradespeople—and applies across industries.[170] While authorizations do not compel the counterparty to negotiate, they provide legal certainty that collective action will not violate Australia's Competition and Consumer Act.[171]

The Australian system rests on two core insights. First, small firms and independent service providers often face imbalanced relationships with dominant buyers or platforms—a dynamic comparable to bilateral dominance—creating a need for lawful coordination. Second, horizontal bargaining among such actors need not harm competition, in particular where participants lack market power and the goal is to correct power asymmetries, not to fix prices across markets.

While Australia's regime is grounded in competition law rather than a separate labor framework, it demonstrates that collective bargaining by structurally subordinated actors can be evaluated under a permissive logic. The availability of a notification pathway also helps avoid the chilling effects of legal uncertainty, enabling coordination without triggering litigation risk.

A U.S. exemption modeled on these principles—augmented with statutory clarity, defined eligibility thresholds, and enforceable rights—could offer similar protections in a more stable and predictable form. Unlike Australia's discretionary system, a statutory exemption could confer default legality for coordination among workers and small entities subject to common vertical restraints, while still permitting targeted oversight where market power or exclusionary conduct is at issue.

D. The AAFD Standards: Proto-Collective Bargaining Without Power

The American Association of Franchisees and Dealers (AAFD) has developed a comprehensive set of "Fair Franchising Standards" intended to promote equity, transparency, and accountability in the franchisor-franchisee relationship. These standards address recurring issues in the franchising model, including territorial encroachment, supply chain control, advertising obligations, contract renewal terms, and pricing restrictions.[172] In practice, they function as a model code that franchisees can use as a template when negotiating with franchisors.

Yet despite their sophistication, these standards lack legal force. They are voluntary and non-binding. Franchisees who attempt to coordinate around them risk being accused of antitrust violations if their conduct is interpreted as a horizontal agreement on price, territory, contract terms, and/or a joint refusal to deal.[173] The absence of a statutory exemption leaves franchisees unable to collectively push for adherence, even where their demands reflect industry norms or aspirational best practices.

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[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *See* Appendix B.
[173] *See, e.g.*, *United States v. Topco Assocs., Inc.*, 405 U.S. 596(1972) (treating horizontal market division as per se unlawful); In re Mushroom Direct Purchaser Antitrust Litig., 621 F. Supp. 2d 274 (E.D. Pa. 2009) (disqualifying a Capper-Volstead exemption where participants were not all bona fide producers and coordinated pricing across firms).

This dynamic exposes the asymmetry at the heart of antitrust enforcement in fissured markets. Franchisors are permitted to impose highly standardized contract terms on hundreds or thousands of individual outlets—controlling pricing, marketing, branding, and operations through vertical agreements. But when those franchisees attempt to coordinate horizontally to challenge or renegotiate those terms, their efforts are treated as presumptively unlawful even though they are responding to substantially parallel vertical restraints imposed by a single counterparty.[174]

The AAFD's framework represents a form of proto–collective bargaining: an attempt to standardize expectations and level the bargaining field through bottom-up coordination. But without legal protection for that coordination, the framework remains aspirational. A bilateral-dominance-based exemption would change this. By permitting structurally subordinated actors—such as franchisees subject to common vertical controls—to coordinate over shared contract terms, the exemption would give legal force to models like the AAFD standards. These voluntary norms could become enforceable baselines, transforming proto–collective bargaining into actual bargaining. Appendix B analyzes how each component of the AAFD standards would be evaluated under this framework.

E. COLLECTIVE BARGAINING IN MEDIATED PLATFORM MARKETS: THE SPOTIFY EXAMPLE

Spotify exemplifies a mediated contracting environment where the relevant counterparty is obscured. Independent musicians almost never contract with Spotify directly. Instead, they are incentivized to work through digital distributors or through aggregators affiliated with labels, which handle metadata delivery, licensing, and payments. Spotify itself instructs artists to "work with a distributor" and maintains a directory of preferred providers.[175] The effect is that Spotify can plausibly argue it has no contractor relationship with musicians; artists are merely customers or licensors of distributors. Any collective bargaining right would thus run against those distributors rather than the platform that dictates commercial terms.

Recent legislative efforts illustrate the stakes. The Protect Working Musicians Act of 2023[176] would authorize independent creators and sound recording owners to negotiate collectively with dominant online platforms. To avoid extending that right to large corporate entities, it proposes eligibility limits based on NAICS industry classifications and firm size thresholds (using licensing revenues as a guiding metric).[177] Meanwhile, the Living Wage for Musicians Act of 2024[178] proposes a statutory royalty fund paid by platforms, with distribution to be managed through a new independent board. Although the latter has drawn attention for its novel revenue structure, critics note it leaves key terms undefined, lacks empirical modeling, and may reinforce Spotify's dominance by linking royalty assessments to ad and subscription revenues—potentially undercutting artist-friendly platforms.[179] These divergent approaches highlight the difficulty of reconciling distributive goals with the orthodox consumer-welfare lens.

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[174] ATZ ET AL., *supra* note 131.
[175] *See* Spotify for Artists, Getting Music on Spotify, https://support.spotify.com/us/artists/article/getting-music-on-spotify; Spotify for Artists, Provider Directory (listing preferred distributors such as CD Baby, DistroKid, and TuneCore), https://artists.spotify.com/en/providers.
[176] H.R. 5576, 118th Cong. (2023), https://www.congress.gov/bill/118th-congress/house-bill/5576.
[177] *Id.*
[178] H.R. 7763, 118th Cong. (2024), https://www.congress.gov/bill/118th-congress/house-bill/7763/text.
[179] Julia Selinger, Musicians Want Streamers to Pay a Living Wage, Fast Company (Mar. 20, 2024), https://www.fastcompany.com/91063051/new-bill-living-wage-musicians-tlaib-umaw; Peter Kirn, The Living Wage for Musicians Act Is Getting a Second Push, Create Digital Music (Aug. 20, 2025), https://cdm.link/living-wage-for-musicians-act/.

Our proposed exemption offers a structural solution. It would allow musicians' collectives to bypass opaque intermediaries by assuming the distributor function themselves, operating as capitalized collective enterprises that meet the governance and eligibility criteria described above.[180] Alternatively, collectives could designate preferred distributors while collectively excluding others, so long as favored intermediaries remain democratically accountable to members.[181] Either path realigns bargaining leverage with the entity exercising actual control and ensures that intermediaries remain subordinate to worker-led institutions.

Historical analogues reinforce this model. In *H.A. Artists v. Actors' Equity Ass'n*, the Court held that theatrical agents subject to union licensing rules qualified as a "labor group," illustrating how intermediaries can be disciplined through collective bargaining.[182] More recently, the Writers Guild of America's 2019–2021 campaign against packaging fees followed a similar playbook: writers forced talent agencies to sever conflicted deals and sign Code of Conduct agreements aligning agency incentives with writers' interests.[183] Our proposal would extend this logic from employees to independent contractors—ensuring that worker collectives can govern intermediary behavior even when members fall outside the NLRA's scope.

From an antitrust perspective, this might raise concerns about consumer prices or platform output. But collective bargaining can also produce under-supplied efficiencies. In the streaming context, those include fixing metadata errors, reducing fraud, and improving royalty transparency—failures that cost artists millions annually.[184] Governance requirements embedded in the exemption are designed to secure those efficiencies while ensuring that any price effects translate into a more equitable distribution of surplus.[185] The European Commission's 2022 Guidelines on collective bargaining by solo self-employed workers adopt a similar framework, tolerating worker coordination where structural subordination is evident, even if traditional consumer welfare analysis might disfavor it.[186]

These dynamics show why the exemption should extend beyond the labor exemption's existing application to employees. In the streaming context, bargaining asymmetry arises not just from contract form, but from institutional design: musicians face a platform that controls access to the market while disclaiming direct privity, and intermediaries that fragment representation and diffuse accountability. A statutory exemption that authorizes capitalized collectives to internalize distribution—or discipline intermediaries through member-governance—would help realign bargaining power while promoting accountability, efficiency, and fairness in digital creative markets.

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[180] *See* Section IV.
[181] *Id.*
[182] H.A. Artists & Assocs. v. Actors' Equity Ass'n, 451 U.S. 704, 718 (1981).
[183] *See* Writers Guild of Am., WGA Agency Campaign Timeline (2019–2021), https://www.wga.org/members/membership-information/agency-agreement/wga-agency-campaign-timeline.
[184] *See* Nathalie Lefever, The Challenges of the Metadata Infrastructure for Digital Works and the Role of Cultural Policy, 6 The Cultural Pol. Rsch. Playbook 31 (2023), https://doi.org/10.17409/kpt.125633; Zoe Stern, The Inequalities of Digital Music Streaming, Reg. Rev. (May 30, 2024), https://www.theregreview.org/2024/05/30/stern-the-inequalities-of-digital-music-streaming/; Dani Deahl, Metadata Is the Biggest Little Problem Plaguing the Music Industry, The Verge (May 29, 2019), https://www.theverge.com/2019/5/29/18531476/music-industry-song-royalties-metadata-credit-problems; Nick Messitte, Inside the Black Box: A Deep Dive into Music's Monetization Mystery, Forbes (Apr. 15, 2015), https://www.forbes.com/sites/nickmessitte/2015/04/15/inside-the-black-box-a-deep-dive-into-musics-monetization-mystery/.
[185] *See* Section VI.B.
[186] *See* European Commission, Guidelines on the Application of EU Competition Law to Collective Agreements Regarding the Working Conditions of Solo Self-Employed Persons, EUR-Lex (Sept. 30, 2022), https://eur-lex.europa.eu/EN/legal-content/summary/guidelines-on-applying-eu-competition-law-to-collective-agreements-regarding-the-working-conditions-of-solo-self-employed-persons.html.

VI. TESTING THE EXEMPTION IN PRACTICE

In this section, we analyze two patterns of conduct under our proposed exemption, in the form of historical, litigated antitrust cases that resulted in Section 1 liability for coordinated conduct. We first consider *United Mine Workers v. Pennington*, the 1965 US Supreme Court case discussed in Section II that cabined the labor exemption by ruling it did not extend to a collective bargaining agreement that had the economic effect of excluding non-parties from the market. We then consider *United States v. Apple*,[187] a 2013 case that found liability for a platform coordinating conduct with a group of disempowered upstream counterparties to exclude a previously-dominant rival those counterparties wished to bypass.

A. *PENNINGTON* UNDER THE PROPOSED EXEMPTION

Under *Pennington*, the offending conduct was a collective bargaining agreement in which the employer association agreed to, in effect, pay penalties to the UMW's pension fund for orders from non-union coal mines, creating cost parity from the employer's perspective across union and non-union operators. This is the essential aim of any decentralized sectoral bargaining regime: use bilateral leverage over employers to extract an agreement that limits their ability to source labor and hence production other than through the workers' collective representative. The Supreme Court ruled the agreement had the effect of excluding non-party operators who could have competed using their low-wage advantage and was thus anti-competitive, and that it stood outside the scope of the labor exemption since the restriction covered non-parties.[188]

The UMW CBA at issue in *Pennington* would be excluded from our proposed exemption because it pertained to NLRA-covered employees. But analyzing the conduct by itself illuminates the economic bite of our proposal. The conduct would only incur antitrust liability if the exclusion had the effect of preserving the union's dominant position as a supplier of labor within the meaning of section 2. That would require a finding of dominance on the union's part before the conduct could be considered anti-competitive, which was not the case in the actual *Pennington* decision.

Notably, the conduct the UMW engaged in was economically identical to Most-Favored Nations provisions that have been the subject of contemporary monopolization proceedings: the UMW forced its counterparty to pay it a penalty for dealing with discounting rivals (unorganized mines), discouraging the counterparty from doing so and arguably excluding those rivals through customer foreclosure. Moreover, the UMW was only in a position to be able to extract that provision from its employer-counterparties thanks to decades of zealous representation of its membership in the face of employer and government hostility,[189] resulting in its "dominance" of the coal-mining workforce–i.e., "competition on the merits" as that term is understood in antitrust. Such representation gave it a loyal following among workers the same way dominant platforms utilize consumer loyalty to compel agreement to MFNs from their upstream counterparties.

Most-Favored Nations provisions imposed by dominant firms are the subject of monopolization and exclusion proceedings under section 2 and its equivalents today. Our

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[187] 952 F. Supp. 2d 638 (S.D.N.Y. 2013) [hereinafter "Apple E-Books"].
[188] Commenting on the decision after the fact, Oliver Williamson agreed. Oliver E. Williamson, *Wage Rates as a Barrier to Entry: The Pennington Case in Perspective*, 82 THE QUARTERLY JOURNAL OF ECONOMICS 85 (1968).
[189] *See, e.g.*, NELSON LICHTENSTEIN, LABOR'S WAR AT HOME: THE CIO IN WORLD WAR II (1983).

proposal would level the playing field between collective organizations representing independent contractors and capitalistic, shareholder-controlled firms by shielding such organizations from liability until they achieve a level of control over the market sufficient to act as dominant, exclusionary monopolists.

B. *APPLE E-BOOKS*

The conduct at issue in *Apple E-Books* involved a consortium of five major book publishers that were aggrieved by Amazon's low retail and wholesale prices for e-books.[190] Seeking to bypass Amazon's platform tied to its Kindle e-reader and its flat $9.99 retail price for newly released titles—which the publishers feared would cannibalize higher-margin hardcover sales—the publishers jointly entered into an agreement with Apple to supply e-books for its then-novel iPad.[191] Before the conduct challenged in *Apple E-Books*, individual publishers attempted to exert leverage over Amazon by delaying or withdrawing certain newly released titles and offering them through alternative retail channels.[192] Amazon responded by throttling sales of the publishers' remaining titles, a strategy that proved effective in compelling the publishers to restore their full catalog of new releases to Amazon's platform.

The terms of the subsequent collective (in fact, parallel) agreement with Apple were simple: the publishers would set retail prices for original issues, on the condition that they promised Apple would be the beneficiary of a retail price MFN, thereby excluding lower-retail-price competition from Amazon.[193] By cooperating in this scheme, Apple gained access to considerable content libraries, which it could then offer prospective iPad purchasers as justification for spending considerably on a new device, on which Apple's own profitability depends. This collective conduct succeeded at enforcing higher retail prices at Amazon, where previous unilateral action had failed.

The fact pattern in *Apple e-books* mirrors the conduct our proposal would seek to immunize. Individual publishers at a structural disadvantage relative to Amazon's prior dominance in the retail market for e-books and who were subject to similar vertical restraints acted collectively to bypass the dominant platform and cooperate in standing up a favored alternative. While the publishers themselves and any organization they might empower to negotiate such a deal would not necessarily satisfy our criteria for the exemption (e.g., capitalization limits, limits on employing others), the conduct itself would until such time as it was exclusionary within the meaning of Section 2. The aspect of the conduct that might have had that effect would have been the retail price MFN favoring Apple. But the bare fact of collective action against a disfavored intermediary where unilateral action was unsuccessful is exactly what our proposal seeks to immunize.

VII. OBJECTIONS AND RESPONSES

A. THE FTC AND COST-BASED CRITIQUES: LESSONS FROM THE PHYSICIAN BILL

[190] Apple E-Books, 952 F. Supp. 2d at 649–52, 657–59, 662–64.
[191] *Id.*
[192] Id. at 652–54.
[193] Jonathan Baker, *Cartel Ringmaster or Competition Creator? The E-Books Case Against Apple (2013)*, *in* THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY 471 (Seventh Edition ed. 2019).

A common objection to collective bargaining rights for non-employees is that such coordination would increase consumer costs by enabling providers of services to fix and thereby increase prices absent competition. Given supply chain market power, the result would be double-marginalization and an increase in consumer prices. This was the central argument behind the Federal Trade Commission's opposition to the 2000 physician bargaining bill, where the agency warned that allowing doctors to jointly negotiate with insurers would drive up prices and reduce consumer choice.[194] That critique, however, rests on the assumption that current market arrangements are efficient—a premise increasingly at odds with the empirical reality of dominant intermediaries, concentrated buyers, and high-cost intermediation.

In fact, economic literature on supply chain intermediation consistently shows that dominant middlemen—such as franchisors, dealer networks, and digital platforms—can extract significant margins by controlling access, visibility, and pricing.[195] Courts have found these artificial chokepoints reduce price transparency and discipline, effectively inflating costs for end users.[196]

Platform labor markets illustrate this problem acutely. Workers are often prohibited from coordinating, while platforms freely set retail and wholesale prices, control demand flows, and impose Most-Favored Nation clauses that sustain inflated intermediation costs by inhibiting sellers from steering customers to the lowest-cost intermediary. The result is a distorted market in which dispersed workers are barred from seeking efficiency through collective bargaining—even as centralized platforms extract economic rents.[197]

Horizontal coordination among structurally subordinated actors may, in fact, restore competitive discipline. By organizing collectively, workers can negotiate more transparent and standardized terms, discipline buyer power, and reduce the need for horizontal consolidation as a workaround to antitrust liability for more dispersed forms of horizontal coordination.[198] Even the courts have long recognized that not all horizontal restraints are inherently anticompetitive. Under the rule of reason, some forms of coordination may facilitate transparency, reduce transaction costs, or allow markets to function more effectively.[199] In this context, collective bargaining by structurally subordinated actors serves not to suppress competition, but to enable it.

In this light, the exemption we propose does not undermine price discipline. It offers a lawful channel for independent contractors to counteract buyer-side concentration, encourage efficiency, and promote market transparency.

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[194] *See* Section II.F (discussing FTC opposition to the Quality Health-Care Coalition Act of 2000 based on concerns about increased prices and reduced consumer choice).

[195] *See* Peterson & Steinbaum, *supra* note 3(documenting how rideshare platforms use algorithmic pricing and dispatch controls to extract value from drivers while maintaining formal independence); Am. Ass'n of Franchisees & Dealers, *Fair Franchising Standards*, Section V.D, §§ 2.3–2.6 and Appendix B; DAVID WEIL, THE FISSURED WORKPLACE, supra note 1 (2014) (describing how franchisors, subcontractors, and platforms shape labor conditions through indirect control of pricing and visibility).

[196] *See, e.g.*, Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978) (rejecting ethical ban on price competition as inherently anticompetitive); Broadcast Music, Inc. v. CBS*, 441 U.S.* 1 (1979) (recognizing that some horizontal coordination may enhance market efficiency).

[197] *See* Sections I.A and V (describing platform-imposed pricing, steering restrictions, and coordination restraints).

[198] *See supra* Section II.F (discussing physician practice consolidation and the role of collective bargaining alternatives in counterbalancing insurer power and avoiding antitrust exposure).

[199] *See generally* Chi. Bd. of Trade v. United States, 246 U.S. 231 (1918) (explaining that the legality of a trade restraint turns on whether it "merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition," and must be evaluated in light of its purpose, effect, and business context).

B. ANTITRUST ORTHODOXY AND ALLOCATIVE EFFICIENCY

A common objection to collective rights for non-employees is that horizontal coordination among independent actors distorts market efficiency. Rooted in Chicago School-derived antitrust doctrine, this view treats competition as the default mechanism for optimal resource allocation and frames coordination—outside the firm—as presumptively harmful.[200] Yet this baseline is not as neutral as it appears.

As Sanjukta Paul argues, antitrust doctrine does more than prohibit anticompetitive conduct—it allocates who may coordinate and on what terms. Courts routinely permit coordination within vertically integrated firms or franchisor-franchisee relationships, but condemn equivalent coordination among workers or contractors as per se unlawful.[201]

This asymmetry reflects a normative preference for hierarchy over solidarity. For example, in *Continental T.V., Inc. v. GTE Sylvania Inc.*,[202] the Supreme Court overturned the per se rule against certain vertical restraints, instead applying the rule of reason to evaluate exclusive distribution arrangements. The Court reasoned that vertical nonprice restraints could enhance interbrand competition by aligning manufacturer and distributor incentives, even if they reduced intrabrand rivalry.[203] However, the Court did not extend this reasoning to horizontal coordination among similarly situated actors, such as workers or small business owners.[204] Indeed, while vertical restraints have since benefited from a more deferential standard of review, horizontal agreements—particularly those involving price or output—continue to face per se condemnation.[205] This doctrinal asymmetry reflects not only a structural bias in antitrust enforcement but also an implicit preference for hierarchical coordination through vertical control over solidaristic coordination among independent actors.

Our proposed exemption challenges that logic. It extends coordination rights to actors who, while legally independent, are structurally subordinated to the same vertically integrated counterparty. In doing so, it repositions antitrust not as a categorical bar to collective action, but as a framework for evaluating power and dependence—restoring its original concern with market fairness as much as allocative efficiency.

C. LABOR UNION RESISTANCE AND THREATS TO NLRA SOLIDARITY

A likely objection to a new antitrust exemption for collective bargaining and collective action from traditional labor advocates is that creating a parallel exemption for non-employees may encourage employers to reclassify workers as independent contractors to avoid NLRA obligations. The concern is that by offering a lawful path to coordination outside the NLRA, the

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[200] *See generally FTC v. Superior Ct. Trial Laws. Ass'n*, 493 U.S. 411 (1990) (treating a collective boycott by independent attorneys as a per se illegal restraint, despite their economic disadvantage, and citing Robert Bork to justify the suppression of horizontal coordination in the name of allocative efficiency); see also Paul, *Antitrust as Allocator of Coordination Rights*, at 384.

[201] *See* Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. Rev. 378, 383–84, 391 (2020) (arguing that antitrust doctrine "allocates coordination rights" in ways that favor concentrated control over dispersed cooperation; contrasting permitted vertical coordination in firms and franchises with per se prohibitions on horizontal coordination among independent workers; and noting that franchisors may lawfully set prices and marketing terms, while equivalent horizontal coordination among franchisees is typically condemned); *see also* Ariz. v. Maricopa Cnty. Med. Soc., 457 U.S. 332, 348–49 (1982) (applying the per se rule to fee agreements among independent physicians, even where quality-of-care justifications were asserted).

[202] 433 U.S. 36 (1977).

[203] *Id.*

[204] *Id.*

[205] *See, e.g.*, United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972) (holding that horizontal agreements among competitors to allocate territories are per se unlawful restraints of trade under the Sherman Act).

proposed exemption could create perverse incentives to sidestep unionization altogether.[206] This concern is not without merit. Misclassification is a widespread tactic used by employers to avoid the legal and financial responsibilities that come with employee status.[207] But our proposal addresses this risk in two key ways. First, it explicitly excludes NLRA-covered employees from the scope of the exemption, ensuring that the antitrust safe harbor cannot be used to displace or undermine existing union rights. Second, it incorporates a robust status determination process at the time of exemption registration, guided by existing case law and clarified through FTC rulemaking. This reinforces, rather than erodes, the boundary between employee and contractor classification.

Moreover, the organizations protected under our framework serve a function distinct from traditional labor unions. NLRA unions are built to operate within a bilateral employment relationship, where dependence is presumed.[208] In contrast, the worker-led organizations we envision are structured around shared subordination to a dominant firm, but not to an employer. Their goal is to recover meaningful independence, not merely to secure better terms within a dependent relationship, but to rebalance power in contexts where formal independence masks structural subordination.

In this respect, our framework complements the NLRA, rather than competing with it. By providing a lawful organizing pathway for those who fall outside the statute's reach, it addresses a growing fissure in labor protections without displacing the hard-won rights of employees. Rather than a threat to labor solidarity, the exemption represents an expansion of collective rights into corners of the economy where they are urgently needed and long overdue. Given that labor standards suffer where employers-of-record are themselves structurally subordinate, our proposal offers relief to existing unions of statutory employees.[209]

D. ADDRESSING POTENTIAL FOR ABUSE: GUARDRAILS IN THE EXEMPTION DESIGN

Critics may also worry that the exemption could be exploited by capital-rich actors masquerading as small contractors. That risk is addressed directly by eligibility criteria that weigh capitalization and control over others against coverage.[210] The proposed statutory text also bars collusive conduct unrelated to bargaining—such as market division, bid rigging, or boycotts of unaffiliated third parties.[211] The administrative mechanism we propose—a simple registration and disclosure process—would further deter strategic misuse while preserving access for legitimate independent contractor associations.[212] In sum, the design features of the exemption guard against abuse without undermining its core purpose.

Importantly, the exemption would not protect conduct where an internal governance mechanism—such as a standard contract or collective agreement—is manipulated to harm

[206] Jane McAlevey, *Silicon Valley's Offer of Sectoral Bargaining Is a Trick*, NATION (Mar. 3, 2021), https://www.thenation.com/article/politics/silicon-sectoral-bargaining-unions/ ((highlighting concerns from labor organizers that creating a third worker category could be used by employers—particularly in the tech industry—to avoid unionization by reclassifying employees as independent contractors in exchange for weaker, state-sponsored sectoral bargaining).
[207] *Id.*
[208] Benjamin Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2686–88 (2008) (arguing that the NLRA was built around the notion of employees negotiating within a dependent, bilateral employment relationship and discusses its limits for workers outside that model)
[209] Brian Callaci et al., *Vertical Restraints and Labor Markets in Franchised Industries*, 52B RESEARCH IN LABOR ECONOMICS 255 (2025).
[210] S*ee* Section IV.A.
[211] S*ee* Section IV.B.1.
[212] S*ee* Section IV.B.

competition outside the exempted group. Courts have recognized that internal processes can give rise to antitrust liability when used to distort market outcomes.[213] The exemption's scope is limited to coordination among members for purposes of bargaining or operational governance, and not to exclusionary conduct or pressure directed at third parties.

VIII. CONCLUSION

Antitrust law has long permitted extensive vertical coordination by franchisors, platforms, and dominant firms while treating horizontal coordination by the structurally subordinated as presumptively unlawful. That asymmetry is not doctrinally required. It reflects a framework built around an outdated employee–contractor divide that no longer tracks who holds bargaining power or who controls the terms of economic participation.[214]

The exemption proposed in this Article attempts to rebalance that allocation. It treats horizontal coordination by structurally subordinated workers, franchisees, and small service providers as a form of bargaining, not collusion—so long as it arises in response to shared vertical restraints rather than an effort to distort product-market competition.[215] By identifying economic subordination, scale limits, and democratic governance as key indicators of eligibility,[216] the exemption authorizes core bargaining conduct while preserving antitrust scrutiny for exclusionary or monopolistic behavior.[217]

This is not a departure from the goals of antitrust law. It is a restoration of one of its original purposes: preventing concentrated market power from extinguishing fair negotiation.[218] In fissured markets defined by algorithmic control, standardized contracts, and franchisor dominance, collective action is often the only mechanism through which autonomy can be reclaimed.[219]

A statutory exemption grounded in bilateral dominance provides a principled, administrable pathway to recognize that reality. It offers structurally subordinated actors a lawful means to organize, and aligns antitrust law with the economic conditions of modern work.

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[213] S*ee, e.g.,* Allied Tube & Conduit Corp. v. Indian Head, 486 U.S. 492 (1988) (holding that packing a private standards-setting body to exclude a rival constituted anticompetitive conduct subject to the antitrust laws).
[214] S*ee* Section II (discussing the divide between the labor exemption and the employee–contractor divide).
[215] S*ee* Section IV.A (discussing eligibility criteria).
[216] S*ee* Section IV.B–C.
[217] S*ee* Section IV.A (discussing permissible conduct); see also Section IV.B.
[218] S*ee* Section II.A.
[219] S*ee* Section III (discussing fissured markets).

APPENDIX A: Comparison Table of Antitrust Exemptions

This table summarizes legal regimes governing horizontal coordination in labor and commercial settings, emphasizing eligibility, legal basis, oversight, liability standards, and excluded conduct or actors.

	Eligibility: Covered Actors	**Eligibility: Non-covered Actors**	**Permitted Collective Conduct**	**Prohibited Collective Conduct**	**Oversight Conditions for Eligibility**
Labor Exemption: Pre-*Confederación Hípica* Interpretation	Employees, as defined by the NLRA.[220]	Independent contractors.[221] Later cases apply a multifactor test emphasizing entrepreneurial opportunity, capital investment, and control.[222]	Peaceful union activities including strikes, picketing, and primary boycotts are broadly protected under the statutory exemption. The nonstatutory exemption covers collective bargaining agreements between employees and employers, shielding terms reached through bargaining	Secondary boycotts (NLRA § 8(b)(4)(B)) and hot cargo agreements (NLRA § 8(e)) are prohibited, with limited exceptions in construction and garment sectors. Coordination with non-labor entities, for example to exclude non-unionized competition, is not protected and may trigger antitrust liability, as in	Oversight is shared between the NLRB (union activity) and DOJ/FTC/private plaintiffs (antitrust enforcement). Unions must work with the NLRB to gain recognition via election if not voluntarily recognized by the employer.[225]

[220] *Brief for the United States as Amicus Curiae at 4*, *The Atlanta Opera, Inc.*, NLRB Case 10-RC-276292 (2022), https://www.justice.gov/atr/case-document/file/1470846/download ("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.").

[221] Independent contractors were traditionally excluded under a formal employment standard first articulated in *Columbia River Packers*, 315 U.S. 143 (1942) (holding that commercial fishermen were independent contractors excluded from the NLRA because they owned their boats and operated independently).

[222] FedEx Home Delivery v. NLRB, 563 F.3d 492, 496–98 (D.C. Cir. 2009) (describing the ten-factor independent contractor test as resisting bright-line rules, and instead assessing independent contractors based on the totality of the circumstances); SuperShuttle DFW, Inc., 367 N.L.R.B. No. 75, slip op. at 12–16 (2019) (finding franchisee-drivers were independent contractors based on control and opportunity for profit or loss).

[225] *See* Section II.A.1.

			from antitrust challenge. However, protections extend only to labor acting independently, not in combination with employers or non-labor groups.[223]	*H.A. Artists* and *Pennington*.[224]	
Labor Exemption, statutory and non-statutory under *Confederación Hípica*	*Confederación Hípica* identifies four required conditions for immunity under the statutory labor exemption: the statutory labor-dispute exemption applies to conduct arising (1) out of the actions of a labor organization and undertaken (2) during a labor dispute, (3) unilaterally, and (4) out of the self-interest of the labor organization.[226]	Independent contractors are excluded unless their conduct arises from a bona fide labor dispute concerning compensation or working conditions. *Confederación Hípica* clarifies that the exemption turns not on formal employment status but on the nature of the dispute. In doing so it protects coordination over labor compensation, but not over commercial pricing terms.[227]	*Confederación Hípica* affirms that primary strikes and direct action aimed at improving wages and working conditions may qualify for the statutory labor exemption—even when undertaken by unrecognized or informal labor groups. However, the non-statutory exemption remains unavailable absent a formal bargaining relationship	Conduct traditionally excluded from the statutory labor exemption—such as secondary boycotts, hot cargo agreements, or coordination with non-labor entities—is presumably also excluded for de facto labor organizations under *Confederación Hípica*. The opinion does not expand the scope of exempted conduct, only the types of	DOJ and private antitrust scrutiny is the extent of regulation.[229]

[223] *See* DOJ Amicus Br. at 4, *The Atlanta Opera*, NLRB Case 10-RC-276292 (2022); *see also United States v. Hutcheson*, 312 U.S. 219 (1941).
[224] *See* 29 U.S.C. § 158(b)(4), (e); *H.A. Artists & Assocs., Inc. v. Actors' Equity Ass'n*, 451 U.S. 704, 705 (1981) ("Labor unions, acting in their self-interest and not in combination with nonlabor groups, enjoy statutory exemption from Sherman Act liability, but the exemption does not apply when a union combines with a "nonlabor group," or persons who are not "parties to a labor dispute" within the meaning of the Norris-LaGuardia Act"); *United Mine Workers v. Pennington*, 381 U.S. 657, 665–66 (1965) ("A union may make wage agreements with a multiemployer bargaining unit and may, in pursuance of its own self-interests, seek to obtain the same terms from other employers, but it forfeits its antitrust exemption when it agrees with a group of employers to impose a certain wage scale on other bargaining units, and thus joins a conspiracy to curtail competition"); *Woman's Sportswear Mfrs. Ass'n v. NLRB*, 494 F.2d 1230 (2d Cir. 1974).
[226] *See* Section II.A.2 (discussing *Confederación Hípica*).
[227] *Id.*
[229] Labor organizations that are not NLRA unions but are exempted by *Confederación Hípica* have no formal oversight as of this writing.

			with the employer.[228]	labor organizations eligible for exemption.	
Capper-Volstead Act	Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers.[230]	Entities that are not agricultural producers—such as handlers, processors, or downstream dealers—are excluded. A single non-producer member within a cooperative can void the exemption for the entire group.[231]	Collective price-setting, processing, handling, and marketing of agricultural products by producer-only cooperatives is explicitly permitted.[232]	Agricultural cooperatives remain subject to antitrust liability for conduct that monopolizes or unreasonably restrains trade. The exemption does not permit exclusionary or anti-competitive practices against non-cooperative actors.[233]	The Secretary of Agriculture is nominally responsible for overseeing cooperative conduct, but enforcement is rare—only seven investigations have ever been initiated, none resulting in litigation. In practice, antitrust oversight falls to the DOJ and private plaintiffs.
State Action Doctrine	Entities authorized to coordinate under a clearly articulated state policy and subject to active supervision by the state.[234]	Entities not directly operating under a clearly articulated state policy or lacking active state supervision.[235] This includes self-regulatory boards dominated by market participants, unless they are actively	Conduct undertaken pursuant to a clearly articulated state policy and actively supervised by the state. This includes delegated activities like utility monopolies, rate-setting, and entry restrictions to	Private conduct lacking active state supervision or clear state policy articulation remains subject to antitrust liability. States cannot simply declare immunity; they must engage in "pointed reexamination" of private	It is a prerequisite of the exemption that the state in question plays a large part in regulation. For example, a municipality operating under its general state authorization is not sufficient.[239]

[228] *Id.*; Confederación Hípica de P.R., Inc. v. Federación de Jinetes Puertorriqueños, Inc., 30 F.4th 306, 313–16 (1st Cir. 2022).
[230] *See* Section II.C. (discussing eligibility under Capper).
[231] In re Mushroom Direct Purchaser Antitrust Litig., 621 F. Supp. 2d 274, 288–89 (E.D. Pa. 2009) (holding that the presence of non-producer members within a cooperative nullifies the Capper-Volstead exemption).
[232] Capper-Volstead Act, 7 U.S.C. § 291 ("[P]ersons engaged in the production of agricultural products ... may act together ... in collectively processing, preparing for market, handling, and marketing . . . such products.").
[233] Maryland & Va. Milk Producers Ass'n v. United States, 362 U.S. 458, 463 (1960) (("Neither § 6 of the Clayton Act nor § 1 of the Capper-Volstead Act leaves agricultural cooperatives free to engage in practices against others which are designed to monopolize trade or to restrain and suppress competition.").
[234] *See* Section II.D (discussing the *Midcal* test for state action immunity).
[235] *See N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 511–15 (2015) (denying state-action immunity to a dental board composed of practicing dentists due to lack of active state supervision).
[239] Chamber of Commerce v. Seattle (9th Circuit).

		supervised by the state.[236]	promote public interests.[237]	actions to satisfy the active supervision requirement.[238]	
Journalism Competition and Preservation Act	News publishers with annual revenue above $100,000 and fewer than 1,500 full-time employees, provided they are not owned or operated by a broadcast or network television company. Eligible publishers may collectively negotiate with covered platforms that have at least 50 million monthly U.S. users.[240]	Entities that do not meet the statute's size and structural thresholds. For example, publishers with over 1,500 full-time employees or those owned by broadcast networks.[241]	Joint negotiation over terms of platform access, including pricing and content licensing, within a defined bargaining unit governed by good-faith negotiation rules. The Act also authorizes certain pressure tactics, such as coordinated content withholding.[242]	Conduct falling outside the Act's narrowly defined exemption—such as coordinating over content moderation policies or engaging in viewpoint-based negotiations—is prohibited. The statute limits bargaining to pricing and terms of access, expressly excluding agreements that differentiates content based on viewpoint.[243]	Requires notice to DOJ/FTC upon initiation of negotiations; no dedicated regulatory body. Enforcement presumed to occur through standard antitrust litigation mechanisms.[244]
Physician Collective Bargaining Proposal (2020)	Licensed health care professionals (e.g., physicians, dentists) negotiating with health plans, as	Health care providers negotiating with government health plans (e.g., Medicare, Medicaid); providers seeking to	This bill makes specific reference to the NLRA, saying that the healthcare providers will be able to do anything the	The bill explicitly prohibits any "new right for collective cessation of service," meaning physicians may	NLRB oversight excluded. GAO required to issue impact report after two years; Congress to determine renewal

[236] *Id.*
[237] *See* Section II.D ((discussing the *Midcal* test for state action immunity).
[238] California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105–06 (1980).
[240] *See* Section II.E (discussing eligibility criteria under the JCPA).
[241] *See* Section II.E (discussing eligibility criteria under the JCPA).
[242] *See* Section II.E.
[243] Journalism Competition and Preservation Act of 2021, S. 673, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/senate-bill/673/text.
[244] Journalism Competition and Preservation Act of 2021, S. 673, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/senate-bill/673/text.

	defined by applicable state or Federal law.[245]	compel coverage of abortion or adoption services.[246]	NLRA would permit a union to do, except strike.[247]	not strike or walk out of active contracts.[248] However, it does not bar coordinated refusals to renew contracts after expiration.	following three-year sunset.[249]
Melamed and Salop (2024) "An Antitrust Exemption for Workers: And Why Worker Bargaining Power Benefits Consumers, Too." ***Antitrust Law Journal***	Employees (who are not already members of NLRA unions) and independent contractors who are sole proprietors bargaining over terms and conditions of work. The eligibility is broadly similar to the labor exemption post-*Confederación Hípica*.	Independent contractors who are not sole proprietors.	Joint negotiation over wages and other terms of the bilateral relationship between a single employer and similarly-situated workers, as well as strikes over those terms. Permissive subjects of bargaining are similar to those judged within the purview of the labor exemption under	Collective bargaining over terms affecting the output market: "JNEs would be exempted from the antitrust laws only for purposes of negotiating terms of employment. An agreement between a JNE and an employer that restricts the terms on which the employer trades with suppliers in other markets (such as exclusive	Registration and oversight conducted by the National Labor Relations Board.[250]

245 Quality Health-Care Coalition Act of 2000, H.R. 1304, 106th Cong. (1999), https://www.congress.gov/bill/106th-congress/house-bill/1304.
246 Quality Health-Care Coalition Act of 2000, H.R. 1304, 106th Cong. § 2(g)–(h) (1999), https://www.congress.gov/bill/106th-congress/house-bill/1304.
247 Quality Health-Care Coalition Act of 2000, H.R. 1304, 106th Cong. § 2(a) (1999), https://www.congress.gov/bill/106th-congress/house-bill/1304.
248 Quality Health-Care Coalition Act of 2000, H.R. 1304, 106th Cong. § 2(c)(1) (1999), https://www.congress.gov/bill/106th-congress/house-bill/1304.
249 Quality Health-Care Coalition Act of 2000, H.R. 1304, 106th Cong. (1999), https://www.congress.gov/bill/106th-congress/house-bill/1304.
250 A. Douglas Melamed & Steven C. Salop, *An Antitrust Exemption for Workers: And Why Worker Bargaining Power Benefits Consumers, Too*, 85 Antitrust Law Journal (2024), https://www.americanbar.org/groups/antitrust_law/resources/journal/85-3/antitrust-exemption-for-workers/.
("We therefore recommend that the NLRB we charged with implementing the JNE concept if Congress is confident that NLRB leadership is committed to promoting the success of JNEs as an option for eligible workers in addition to the existing alternatives of worker atomization and traditional labor unions.").

			Confederación Hípica.	dealing) or with its customers (such as resale price maintenance) would not be exempted from the antitrust laws."	
Proposed exemption (this article)	Classes of non-employee actors that operate under substantially similar, non-negotiable terms imposed by a common counterparty and occupy the subordinate side of a bilateral dominance relationship. Eligibility is determined based on a totality of circumstances, including indicators related to vertical restraints, capitalization, and control over the labor of others; no single factor is dispositive.[251]	Employees covered by the NLRA; entities that exercise managerial control over the labor of others beyond a minimal threshold; and actors for whom the relevant indicators do not support a finding of bilateral dominance (including where formal independence does not coincide with structural subordination to a common counterparty).[252]	Collective bargaining and related coordination undertaken in response to parallel vertical restraints imposed by a common counterparty, including joint negotiation of compensation or pricing terms, standardization of contractual provisions, and concerted refusals to deal.[253]	Collective conduct that extends beyond bargaining over counterparty-imposed terms, including exclusionary coordination targeting similarly situated nonmembers or conduct amounting to market allocation or cartel behavior.[254]	Governance and oversight requirements calibrated to organizational form, including distinctions between bargaining-only collectives and capitalized collective entities, with registration and administrative oversight. [255]

[251] *See supra* Section IV.A.
[252] *See supra Section* IV.A.
[253] *See supra* Section IV.B.1.
[254] *See supra* Sections IV.B.1 & VII.
[255] *See supra* Section IV.B.

APPENDIX B: Excerpts from AAFD Standards

One of the contexts in which immunizing collective bargaining from liability under Section 1 would further the aims of the antitrust laws to de-consolidate economic power is franchising. Over the last several decades, franchising has both expanded as a business model and become more onerous on franchisees across a range of dimensions.[256] The American Association of Franchisees and Dealers issued a document stating "Fair Franchising Standards."[257] While it is not itself a model collectively-negotiated agreement envisioned by this paper, its standards summarize what would be bargained over and included in such an agreement between the franchisor and the collective-represented franchisees exempted from Section 1 under the scope of this article. Hence, to lend concreteness to what we envision resulting from the exemption proposed in this paper, we summarize some of its key terms below, and elucidate what further collective conduct would be immunized under our proposal if it is not expressly contemplated in the AAFD standards.

1. Territorial Rights (Ch. 3)

The standards provide "reasonable market protection" for the franchisees, but also that the "franchisor has the right to create and secure its market share/for the benefit of the whole." In opening a new location that punctures a franchisee's local market, the franchisor should consider six factors (market characteristics, existing ability to fill, impact on customers, terms of the original agreement, whether the franchisor will be harmed, and whether the franchisee will be harmed) and "develop a procedure for resolving market expansion issues which will provide any franchisee whose business might be impacted by the proposed market expansion with the opportunity to express its position regarding the proposed expansion."

Whether the franchisor would in fact be permitted to license new entrants would be subject to bargaining under our proposal. A contractual stipulation capping entry or requiring collective franchisee prior approval for entry would be immune from challenge under Section 1.

2. Franchisee autonomy to offer products for sale that are not approved by the franchisor (ch 8.2)

Franchisees can "respond and adapt to their markets in a manner that is consistent with the image of the system branding and with the reasonable approval of their franchisor."

3. Franchisee autonomy to source inventory/equipment other than under contracts negotiated by the franchisor (ch 9.2)

Franchisors retain the right to designate the suppliers of proprietary products and services, but should approve in "reasonable and good faith" multiple suppliers for use. Supplier kickbacks to the franchisor are allowed as long as they are disclosed to the franchisee.

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[256] Ulrich Atz et al., The Balance of Power in Franchising (2025), https://marshallsteinbaum.org/wp-content/uploads/2025/04/balance_of_power_in_franchising_4-16-25.pdf.
[257] *Fair Franchising Standards*, (2012), https://www.aafd.org/fairness-initiatives/fair-franchising-standards/.

4. Franchisee autonomy to set retail prices (ch 9.5)

Franchisee price-setting autonomy is assumed, but the franchisors are allowed to set maximum retail prices if they apply to all units in the same area, take franchisee input on them, and make provision for shops whose special circumstances cause them to be disproportionately negatively affected by the change.

If a franchise agreement permitted franchisees to collectively set retail prices, that would be immune from Section 1 liability under our proposal, as would franchisee collective challenges to and defections from franchisor-set retail prices.

5. Franchisor control over the disposition of franchisee assets (11.3)

The franchisor is given "right of first purchase", which means that the franchisee can transfer the franchise however they want, provided they first give the franchisor the ability to buy the franchise on terms no less favorable than to a third party. There are specific exceptions, discussed below in 6.

Restrictions on asset sales set by the franchisees collectively on their own membership would be immune under our proposal since they pertain to organizational self-governance and freedom of association, provided that the means by which those restrictions are reached is internally democratic among franchisees, and only franchisees are party to them (voting rights based on class and labor contributed to the whole, not capital).

6. Franchisee personal, spousal, and business partner guarantees of liabilities to the franchisor (ch 6.4)

Personal guarantees are allowed, but are subject to good faith negotiations between the parties. An unadopted commentary suggests that the guarantees only extend to the franchisee's primary principals and their spouses.

7. Restriction on franchisee affiliation with a rival chain/independent business. Within term/post-term. (ch. 13)

These restrictions should only be applied if the franchisee defaults on obligations to the franchisor, and should be "reasonable in scope, duration and geography and should protect the legitimate business interests of the franchisor."

Joint refusals to deal/to boycott a franchisor by the franchisees and their association, and to affiliate *en masse* with a rival or stand up an alternative brand, are exempted under our proposal. The latter would be an example of our proposed capitalized collective entity.

8. Right of association/joint negotiations (ch. 2.5 and 2.7)

Franchisees have the right to join in a franchisee association, which itself has the right to "collectively negotiate solutions to problems, opportunities and agreements between the parties."

9. Dispute resolution (ch 14 and 16)

Franchisees should not have to waive the right to a jury trial, the right to seek punitive damages, caps to damages, to start a class action lawsuit, or, in most situations, sign a general release that the franchisor would not also sign.

Advertising (Ch. 10)

Franchisors should be transparent about how the money in the advertising fund is used, and include the franchisees in decisions about marketing, including on online platforms.