NO. 22–327

In the Supreme Court of the United States

CONFEDERACIÓN HÍPICA DE PUERTO RICO, INC.; CAMARERO RACETRACK CORP.,

Petitioners,

v.

CONFEDERACIÓN DE JINETES PUERTORRIQUEÑOS, INC. ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

Stephanie A. Maloney
Tyler S. Badgley
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

S. Conrad Scott
COVINGTON & BURLING LLP
New York Times Building
620 Eighth Avenue
New York, NY 10018

Beth S. Brinkmann
Counsel of Record
Lauren Willard
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000
BBrinkmann@cov.com

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

This case presents an issue of considerable importance, resolution of which will affect businesses, independent contractors, and consumers nationwide. The Chamber of Commerce of the United States of America ("Chamber") is particularly well-suited to provide additional insights into the broad implications of the decision below for businesses that rely on independent contractors and about the market disruptions that the decision will create.

Pursuant to Rule 37.2(b) of the Rules of this Court, the Chamber moves this Court for leave to file the attached *amicus curiae* brief in support of the petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the First Circuit in the above-captioned matter. Counsel of record for both parties were timely notified of the Chamber's intent to submit an *amicus curiae* brief in support of Petitioners. Petitioners consented to the filing of the brief; Respondents have withheld consent.

In this case, the First Circuit held that the statutory labor exemption from federal antitrust laws extends to horizontal price-fixing agreements among independent contractors, so long as those agreements concern compensation for the independent contractors' work. *See* Pet. App. 9a–11a. As the attached *amicus curiae* brief details, that holding conflicts with the decisions of this Court and at least six other Courts of Appeals. It is contrary to the statutory text and threatens to harm businesses and consumers

alike. By authorizing independent contractors to collude to set the rates they charge for their work at above-market levels, the decision below will increase the cost not only of independent-contractor work, but also goods that are made, shipped, or maintained with independent-contractor work. Moreover, by upsetting long-held understandings that only agreements among employees are covered by the statutory labor exemption from federal antitrust law, that holding will also lead to confusion and uncertainty among businesses and workers alike.

The Chamber directly and indirectly represents countless businesses and professional associations that will be adversely affected by the rule, and thus has a substantial interest in the Court's review and reversal of the judgment below. The attached brief also "brings to the attention of the Court relevant matter not already brought to its attention by the parties" regarding the First Circuit's legal error and the legal and economic implications of that mistaken decision. *See* S. Ct. R. 37.1.

Because the proposed brief will aid this Court's consideration of the petition, the Chamber respectfully requests that the Court grant leave to file the attached *amicus curiae* brief in support of Petitioners.

Respectfully submitted,

Stephanie A. Maloney
Tyler S. Badgley
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

S. Conrad Scott
COVINGTON & BURLING LLP
New York Times Building
620 Eighth Avenue
New York, NY 10018

Beth S. Brinkmann
Counsel of Record
Lauren S. Willard
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000
BBrinkmann@cov.com

Counsel for the Chamber of Commerce of the United States of America

November 2022

QUESTION PRESENTED

Whether the statutory labor exemption from the operation of the antitrust laws, which exempts "labor dispute[s]" that "concern[] terms or conditions of employment," 29 U.S.C. 113, encompasses concerted action by independent contractors that does not relate to an employer-employee relationship.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

Rules

Proposed Regulation

Legislative Materials

Briefs

Academic Articles and Studies

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber has a substantial interest in the predictable, uniform application of federal antitrust law and its exemptions. Antitrust law ensures that the markets in which Chamber members participate—as both buyers and sellers—are free, open, and competitive. The Chamber therefore advocates for antitrust laws that promote consumer interests without singling out specific industries or market participants for uniquely preferential or unfavorable treatment.

The Chamber is filing this *amicus* brief because the First Circuit's decision in this case has potentially

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Counsel for the parties received timely notice of *amicus*'s intent to file this brief. Petitioners consented to the filing of the brief; Respondents withheld consent.

sweeping and adverse implications for competition, businesses, and consumers.

INTRODUCTION AND SUMMARY OF ARGUMENT

The First Circuit's misreading of the statutory labor exemption from federal antitrust law to extend to collective action by independent contractors parts ways with the longstanding consensus of this Court and other Courts of Appeals. It effectively gives independent contractors carte blanche to engage in naked price-fixing conspiracies. If left standing, the decision will invite market disruptions and higher prices that will harm businesses and consumers inside the First Circuit and nationwide.

Federal antitrust law promotes competition by generally prohibiting horizontal restraints on trade and focuses on the interests of the consumer. There is "an inherent tension" between federal antitrust law and national labor policy because many traditional union activities (collective bargaining, strikes, boycotts) are horizontal agreements among competing suppliers of labor to fix the price of that labor at above-market levels. *See H. A. Artists & Assocs., Inc. v. Actors' Equity Ass'n*, 451 U.S. 704, 713 (1981). Immediately following passage of the Sherman Act, this tension did not escape the notice of federal courts, which routinely treated various union activities as restraints on trade in violation of the antitrust laws. *See, e.g.*, *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 467–68 (1921); *Loewe v. Lawlor*, 208 U.S. 274, 304–09 (1908).

In response to that judicial invalidation of union actions under the antitrust laws, Congress enacted a series of provisions to protect union actions by exempting them from antitrust law. Those provisions of the Clayton and Norris-LaGuardia Act, collectively known as the "statutory labor exemption," "immunize labor unions and labor disputes from challenge under the Sherman Act." *H. A. Artists*, 451 U.S. at 713; *see also* 15 U.S.C. § 17; 29 U.S.C. §§ 52, 104, 105, 113; *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 486–89 (1940) (some but not all union activities exempt from antitrust law).

As relevant here, the Norris-LaGuardia Act precludes federal courts from intervening in a case arising from a "labor dispute," which includes controversies "concerning the terms or conditions of employment." 29 U.S.C. § 113(c); *see also id.* §§ 101, 104–05. Congress provided for such labor disputes to be regulated, instead, under federal labor law (and in particular the National Labor Relations Act, 29 U.S.C. §§ 151–69 ("NLRA")). *See Brown v. Pro Football, Inc.*, 518 U.S. 231, 236 (1996) ("In the 1930s, when it ... enacted the labor statutes, Congress ... hoped to prevent judicial use of antitrust law to resolve labor disputes—a kind of dispute normally inappropriate for antitrust law resolution.").

The statutory labor exemption, however, has its limits. The exemption applies only when "a union acts in its self-interest and does not combine with non-labor groups," *United States v. Hutcheson*, 312 U.S. 219, 233 (1941), or directly restrain trade in the product markets, *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 663 (1965). Most important to this case,

only "a bona fide labor organization, and *not an independent contractor or entrepreneur*" can "seek[] refuge in the statutory exemption." *H. A. Artists*, 451 U.S. at 717 n.20 (emphasis added); Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 255d (5th ed. 2020 & Supp. 2022). By extending the statutory labor exemption to independent contractors, the First Circuit's decision disregards judicial precedent and upsets the balance Congress achieved between antitrust and labor law. [2]

There are multiple reasons why this Court should grant review in this case and reconfirm that the statutory labor exemption does not extend to conspiracies among independent contractors to fix prices for their work where no employer-employee relationship is involved.

First, the decision below conflicts with the consensus views of this Court, other Courts of Appeals, and federal antitrust enforcement, all of which have recognized that the statutory labor exemption does not immunize from antitrust scrutiny horizontal price-fixing agreements among independent contractors. In a line of cases stretching back nearly 80 years, this Court has repeatedly rejected attempts to apply the statutory labor exemption to agreements among independent contractors and other non-employees. No

---

[2] In addition to the statutory labor exemption, this Court has recognized a "nonstatutory" labor exemption based on federal labor law for certain collective-bargaining agreements between employers and unions. *See Brown*, 518 U.S. at 235–36; Areeda & Hovenkamp ¶ 256. Because this case relates solely to agreements among workers, the nonstatutory labor exemption is not at issue in this case.

fewer than six Courts of Appeals have expressly or implicitly agreed and recognized that the statutory labor exemption applies only when the "employer-employee relationship is the matrix of the controversy." *See Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 703, 713 (1982) (alteration adopted). Actions by the federal antitrust enforcement agencies and a bevy of academic commentary have also been in accord: Price-fixing agreements among independent contractors do not give rise to "labor disputes" protected from antitrust scrutiny under the statutory labor exemption.

Second, the First Circuit's focus on whether the alleged antitrust conspiracy involves compensation for work, instead of whether it involved an employer-employee relationship, conflicts with the text and purpose of the Norris-LaGuardia Act. That Act makes clear that a "labor dispute" that is exempt from antitrust law must implicate an employment relationship. *See* 29 U.S.C. § 113(c). Although the Act indicates that a labor dispute may exist even when the disputants do not "stand in the proximate relation of the employer and employee," *id.*, this Court long ago *rejected* the argument that the clause "expand[s] the application of the Act to include controversies upon which the employer-employee relationship has no bearing," *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143, 147 (1942).

The First Circuit's rationale also creates a regulatory gap. Because organizations of independent contractors are not regulated under the NLRA, the cornerstone of federal labor law, they would be free to engage in coercive tactics that unions cannot. That

result cannot be squared with the statutory regimes Congress created to address labor and antitrust concerns while protecting competition and consumers.

Third, the First Circuit's decision will have significant and negative impacts if not reviewed now and reversed by this Court. Independent contractors constitute a large and growing portion of the American work force. Approximately 10 million individuals work primarily as independent contractors, and another 10 million (if not more) supplement employment with independent-contractor work. The ranks of independent contractors are not limited to jockeys and tradespeople, and include numerous professionals, including doctors, lawyers, and realtors. The decision below green-lights these independent contractors to engage in horizontal price-fixing conspiracies. The inevitable result of such action would be higher prices for businesses and individuals who rely on independent-contractor work or purchase products made, distributed, or serviced with such work.

Moreover, by unsettling long-held understandings about the scope of the antitrust laws, the decision will lead to confusion among businesses and independent contractors alike regarding which agreements are subject to antitrust law and which are immune. If the ruling were left standing, the result would be dramatic disuniformity in federal antitrust law, with the First Circuit treating as lawful price-fixing agreements among independent contractors that would be illegal in other Circuits.

ARGUMENT

The Decision Below Is Contrary to Precedent and Statutory Text and Will Disrupt Markets and Harm Consumers.

There has long been a broad consensus across courts, antitrust enforcers, and academic commentators that the statutory labor exemption from antitrust law exempts only collective action among employees, not independent contractors. The First Circuit's decision is contrary to that consensus. It threatens to disrupt markets and harm consumers by allowing anticompetitive conduct otherwise outlawed by federal antitrust law. And it creates economic confusion and uncertainty that risk spreading through national commerce. The decision below therefore warrants this Court's immediate review.

I. The First Circuit's Decision Is Contrary to Judicial Precedent, Government Enforcement, and Recognized Antitrust Doctrine.

A. The ruling below conflicts with precedent of this Court and other Circuits.

In the more than 80 years since passage of the Norris-LaGuardia Act, this Court has never suggested that the Act immunizes price-fixing agreements among independent contractors or other non-employees. As *Columbia River Packers* explained, the Act focused on "disputes affecting the employer-employee relationship." 315 U.S. at 145. Nothing in the Act suggests that the statutory labor exemption extends to "controversies upon which the employer-employee relationship has no bearing" or in which the "employer-employee relationship was [not] the matrix of

the controversy." *Id.* at 147; *see also Jacksonville Bulk Terminals*, 457 U.S. at 713 ("The critical element in determining whether the [exemption] appl[ies] is whether the employer-employee relationship is the matrix of the controversy.").

The Court has repeatedly rejected efforts to apply the statutory labor exemption to non-employees. For example, this Court has upheld criminal convictions of medical trade associations that represented "individual practitioners each exercising his calling as an independent unit" for concerted action they took to prevent fellow doctors from working directly for a potential competitor. *Am. Med. Ass'n v. United States*, 317 U.S. 519, 535–36 (1943). The Court has likewise refused to extend the statutory labor exemption to agreements among "entrepreneurs" or "businessmen." *L.A. Meat & Provision Drivers Union v. United States*, 371 U.S. 94, 99–103 (1962); *id.* at 107 n.2 (Goldberg, J., concurring); *United States v. Women's Sportswear Ass'n*, 336 U.S. 460, 463–64 (1949).

This Court has held that in certain circumstances, bona fide employee unions can enter into price-fixing agreements with non-employees when the union's legitimate interests require them to do so. *See H. A. Artists*, 451 U.S. at 717–22; *see also Am. Fed'n of Musicians v. Carroll*, 391 U.S. 99, 106 (1968); *Teamsters v. Oliver*, 358 U.S. 283, 294 (1959). But, in so holding, the Court reiterated that "[o]f course, a party seeking refuge in the statutory exemption must be a bona fide labor organization, *and not an independent contractor or entrepreneur*"—in other words, the labor exemption does not extend to price-fixing conspiracies solely among independent contractors to inflate their own compensation. *H. A. Artists*, 451 U.S. at 717 n.20. It

speaks volumes that, although the decision below twice cited this footnote from *H. A. Artists* and quoted the first part of this sentence, it omitted the italicized material that highlights the decision's inconsistency with this Court's precedents. *See* Pet. App. 8a, 9a.

Consistent with this Court's decisions, the other Courts of Appeals to consider the question—namely, the Second, Third, Fourth, Sixth, Eighth, and Ninth Circuits—have all expressly or implicitly recognized that the statutory labor exemption does not protect horizontal price-fixing agreements among independent contractors. At least three Courts of Appeals—the Third, Fourth, and Sixth—have so held explicitly. *See Taylor v. Local No. 7, Int'l Union of Journeymen Horseshoers*, 353 F.2d 593, 606 (4th Cir. 1965) (en banc) (exemption inapplicable to "independent" farriers' efforts to restrain trade in horseshoeing, where collective conduct did not arise from, and was not intended to induce, an employment relationship); *see also Conley Motor Express, Inc. v. Russell*, 500 F.2d 124, 126 (3d Cir. 1974) (no "labor dispute" because truckers were independent contractors and lacked an employer-employee relationship with any company); *Int'l Ass'n of Heat & Frost Insulators v. United Contractors Ass'n*, 483 F.2d 384, 390 (3d Cir. 1973) ("If those belonging to the union are independent contractors rather than a group of workers, then what seemed to be a closed shop labor agreement becomes a conspiracy to restrain competition."); *Armco Steel Co. v. Tackett*, No. 90-5496, 1991 WL 21973, at *2 (6th Cir. Feb. 21, 1991) (per curiam). Although the Sixth Circuit's decision in *Armco* was unpublished, the Court has held in a published decision that the statutory la-

bor exemption applies only where the "employer-employee relationship is the matrix of the controversy," as "where an employer and a union representing its employees are the disputants, and the dispute concerns the interpretation of the collective bargaining agreement that defines their relationship." *Int'l Union United Auto., Aerospace & Agric. Implement Workers v. Lester Eng'g Co.*, 718 F.2d 818, 823 (6th Cir. 1983).

In addition to those explicit rulings, the Eighth Circuit has recognized "the principle that the relationship of employer-employee differs from that of independent contractors" for purposes of antitrust law, even though it ultimately concluded that the exemption applied to taxi drivers' unionization efforts because those drivers were employees, not independent contractors. *See Mitchell v. Gibbons*, 172 F.2d 970, 972–73 (8th Cir. 1949).

At least two other circuits—the Second and the Ninth—have recognized that the statutory labor exemption applies only when "the employer-employee relationship is the matrix of the controversy." *See Local 1814, Int'l Longshoremen's Ass'n v. N.Y. Shipping Ass'n*, 965 F.2d 1224, 1235 (2d Cir. 1992); *Burlington N. Santa Fe Ry. Co. v. Int'l Bhd. of Teamsters Local 174*, 203 F.3d 703, 709 (9th Cir. 2000) (en banc); *Ring v. Spina*, 148 F.2d 647, 651 (2d Cir. 1945). Under that reasoning, agreements among independent contractors, which by definition do not involve an employer-employee relationship, should not be entitled to the statutory labor exemption. *Cf. Bernstein v. Universal Pictures, Inc.*, 517 F.2d 976, 979–80 (2d Cir.

1975) (suggesting application of exemption would depend on whether composers were classified as employees and not as independent contractors).

B. Government enforcement agencies and established antitrust doctrine have recognized the statutory labor exemption does not extend to independent contractors.

Federal antitrust enforcement agencies have recognized that the statutory labor exemption does not apply to price-fixing agreements among independent contractors. The U.S. Federal Trade Commission has held that a trade association of interpreters could not avail itself of the statutory exemption. *Int'l Ass'n of Conf. Interpreters*, 123 F.T.C. 606, 619 (1997). Because the interpreters were freelance, "self-employed entrepreneurs and not employees," their trade association was "not a *bona fide* labor organization" and thus could not rely on the statutory labor exemption, which was "designed to protect union conduct." *Id.* (citing *H. A. Artists*, 451 U.S. at 717 n.20).

The U.S. Department of Justice's Antitrust Division has filed *amicus* briefs acknowledging that the statutory labor exemption does not extend to independent contractors. In 2017, the Department filed a brief on behalf of the United States and the Federal Trade Commission in the Ninth Circuit noting that "[u]nless the state action exemption applies," a Seattle ordinance authorizing ride-share drivers to engage in collective bargaining with their platforms would authorize "a *per se* violation of the Sherman Act" because the drivers, as "[i]ndependent contractors," were "horizontal competitors" who "may not collude to set the price for their services." Br. for U.S. and FTC as *Amici*

Curiae in Support of Appellants and Reversal at 8, *Chamber of Com. v. City of Seattle*, 890 F.3d 769 (9th Cir. 2018) (No. 17-35640), 2017 WL 5166667, at *8. Just this past year, the Department of Justice filed an amicus brief urging the NLRB for a clearer definition of "employee" precisely "because the antitrust laws otherwise scrutinize collective action among independent contractors or independent professionals, where they are not employees." Br. of U.S. Dep't of Justice as *Amicus Curiae* at 5, *The Atlanta Opera, Inc.*, NLRB Case 10-RC-276292 (brief filed Feb. 10, 2022), https://bit.ly/3SSWzcR; *see also id.* at 4 ("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.").[3]

Antitrust academic commentary also has generally agreed that the antitrust laws do not authorize collective action by independent contractors. The leading antitrust treatise is clear: "the parties on one side of the dispute or agreement in question must be employees or labor representatives, not independent contractors or entrepreneurs" or else their agreement "could be nothing more than a simple per se unlawful price-fixing agreement." Areeda & Hovenkamp ¶ 255d; *see also id.* ¶ 255a; Herbert Hovenkamp, *Worker Welfare and Antitrust* 23 & n.79, U. Chi. L. Rev. (forthcoming 2022) (noting that decision below contrasts with this general rule). And even most professors and student

[3] The Chamber does not take a position on whether the jockeys in this case were properly classified or whether the underlying conduct violated the antitrust laws.

authors who have argued for expanding the statutory labor exemption to encompass some collective action by independent contractors recognize that under existing law, independent contractors cannot rely on that exemption. *See, e.g.*, Marina Lao, *Workers in the "Gig" Economy: The Case for Extending the Antitrust Labor Exemption*, 51 U.C. Davis L. Rev. 1543, 1558–65 (2018) ("[T]he antitrust labor exemption, which shields legitimate labor activities from the application of the antitrust laws, has been held inapplicable to independent contractors"); Eugene K. Kim, Note, *Labor's Antitrust Problem: A Case for Worker Welfare*, 130 Yale L.J. 428, 447 (2020) ("Independent contractors' organizations are illegal under current antitrust law, in large part because consumers benefit from cheaper labor.").

II. The First Circuit's Focus on Compensation for Work Instead of an Employee Relationship Conflicts with the Text and Purpose of the Norris LaGuardia Act.

The First Circuit clearly erred when it held that "the key question is not whether the jockeys are independent contractors or laborers but whether what is at issue is compensation for their labor." Pet. App. 11a. By making compensation for work the focus without requiring an employer-employee relationship, the First Circuit's opinion conflicts with the text and purpose of the statutory labor exemption and creates a regulatory gap for independent contractors that is inconsistent with the antitrust and labor regimes Congress established.

A. The First Circuit misreads the statutory text.

The Norris-LaGuardia Act defines "labor dispute" as "any controversy concerning terms or conditions *of employment*, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions *of employment*, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U.S.C. § 113(c) (emphasis added). Accordingly, to constitute a "labor dispute" within the meaning of the Act, a "controversy" must relate to "employment." A dispute between a business and independent contractors it has retained or may retain does not concern "employment" and thus is not a "labor dispute" within the meaning of the Act.

In concluding otherwise, the First Circuit relied on the final clause of Section 113(c), which states that a labor dispute may exist "regardless of whether or not the disputants stand in the proximate relation of employer and employee." Pet. App. 10a. As this Court has explained, however, Congress by enacting that language sought to "establish[] that the allowable area of union activity was not to be restricted, as it had been in the *Duplex* case [254 U.S. 443], to an immediate employer-employee relation." *Hutcheson*, 312 U.S. at 231;[4] *see also* H.R. Rep. No. 72-669, at 8,

---

[4] *Duplex Printing* involved a "secondary boycott" in which a union sought to compel a company to unionize its factory and adopt other measures by threatening boycotts of the company's suppliers and customers. 254 U.S. at 462–64.

10–11 (1932); 75 Cong. Rec. 4903, 4916 (1932) (statement of Sen. Wagner). The fact that the statutory labor exemption extends to disputants beyond those directly in the employer and employee relationship does not mean that—contrary to the rest of Section 113(c)—the exemption applies to disputes that are not about "employment." Indeed, had Congress intended to exempt from antitrust law controversies lacking *any* employer-employee nexus, it would have made no sense to define "labor dispute" more narrowly as not requiring a "*proximate* relation of employer and employee," 29 U.S.C. § 113(c) (emphasis added); *cf. Duncan v. Walker*, 533 U.S. 167, 174 (2001) (invoking "duty to give effect, if possible, to every clause and word of a statute" (quotation marks omitted)).

According to the First Circuit, this Court's construction of Section 113(c) in *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938)—which held that the exemption covered a boycott of a grocery store that refused to hire African-American employees—"precludes an interpretation of the exemption limited to employees alone." Pet. App. 11a. That reading, however, ignores that the core issue in *Sanitary Grocery* was the seeking of an employment relationship. In other words, "the employer-employee relationship was the matrix of the controversy." *See Columbia River Packers*, 315 U.S. at 147. That case is therefore distinguishable from a price-fixing conspiracy among independent contractors who are neither employees nor seek to become employees.

Indeed, this Court in *Columbia River Packers* rejected much the same anything-goes interpretation of Section 113(c) and *Sanitary Grocery* that the First Circuit adopted in the decision below. As this Court

explained, "the statutory classification, however broad, of parties and circumstances to which a 'labor dispute' may relate does not expand the application of the Act to include controversies upon which the employer-employee relationship has no bearing." *Id.* at 146–47.

B. This Court's precedent makes clear that compensation-related agreements are not *ipso facto* exempt from antitrust law.

The First Circuit's extension of the statutory labor exemption to any disputes over compensation for work also conflicts with a long line of decisions recognizing that the Sherman Act prohibits horizontal agreements fixing compensation for work outside of collective action by actual or prospective employees. In *United States v. National Association of Real Estate Boards*, this Court rejected the argument that a real-estate trade association was comparable to "a labor union of real estate brokers" and could thus prescribe standard commission rates. 339 U.S. 485, 489–90 (1950). It was a "misconception" to analogize the real estate brokers to employees or the case "to those involving the application of the antitrust laws to labor unions" because the case did not present any "aspect of the employee-employer relationship to which the antitrust laws have made special concessions." *Id.* at 489–90 (citing, *inter alia*, *Am. Med. Ass'n*, 317 U.S. 519; *Women's Sportswear*, 336 U.S. 460; and *Columbia River Packers*, 315 U.S. 143). Instead, the real estate brokers were "entrepreneurs," and "[t]he fact that the business involves the sale of personal services rather than commodities" did not exempt that business from the antitrust laws. *Id.* at 490.

Subsequent decisions have reiterated, time and time again, that competing professionals—as distinct from fellow employees—may not collude to increase the compensation for their work. When lawyers agree to refuse indigent-defense appointments to force the government to increase their compensation for such appointments, they violate the Sherman Act. *FTC v. Superior Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 422–23 (1990). So do dentists who agree, when submitting claims for payment to insurers, not to include x-rays that insurance claims examiners could use to limit or deny payment. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 457–75 (1986). As do engineers who agree that professional ethics preclude competitive bidding for projects. *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 692–96 (1978). And attorneys also do if they agree on standard minimum fees for common legal services. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 786–87 (1975). In all these cases, the agreements in question involved compensation for professional work and not goods, but in none did the Court suggest that the agreements on compensation might therefore be exempt from the antitrust laws.

C. Exempting price-fixing conspiracies among independent contractors creates a regulatory gap.

The First Circuit's decision creates a sizeable regulatory gap. The decision allows collusion among independent contractors to become exempt from antitrust law *and* be unregulated by federal labor law, a result that is contrary to the antitrust and labor regimes created by Congress.

Although Congress made "labor disputes" exempt from federal antitrust law, it did not leave them free from federal oversight. To the contrary, labor disputes are widely regulated by federal labor law, most importantly the NLRA. The NLRA provides employees with the right to form or join unions and engage in collective bargaining and prohibits employers from engaging in certain unfair labor practices, including interference with employees' organizing efforts. 29 U.S.C. §§ 157, 158(a). The NLRA embodies a compromise between employees' interests and those of the broader economy. As a "necessary condition to the assurance" of employees' rights to organize, Congress also forbade as "unfair labor practices" various tactics unions had employed to coerce businesses and nonmembers, including secondary boycotts, featherbedding, and blackmail picketing. *Id.* § 158(b).

Critically, the NLRA does not apply to independent contractors. *Pa. Interscholastic Ath. Ass'n v. NLRB*, 926 F.3d 837, 839 (D.C. Cir. 2019) ("Because the lacrosse officials who sought to join the Union are independent contractors, the NLRA does not apply to them…."). Rather, that Act "protects an 'employee' only and specifically excludes 'any individual having the status of an independent contractor'" from the definition of "employee." *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 255 n.1 (1968) (quoting 29 U.S.C. § 152(3)); *see also* 29 U.S.C. § 152(5) (defining "labor organization" to include organizations "in which employees participate" and which exist to deal with employers concerning employees' work-related issues); NLRB, About NLRB – Frequently Asked Questions, https://bit.ly/3SQHTuQ (last visited Nov. 1, 2022)

("[NLRA] does *not* cover government employees, agricultural laborers, *independent contractors*, and supervisors (with limited exceptions)." (second emphasis added)).

As a result, under the First Circuit's ruling, independent contractors may now organize to increase their compensation but, unlike employees, do so without National Labor Relations Board oversight. The ruling also allows independent contractors to engage in secondary boycotts and other practices denied to unions. Such a result is contrary to the statutory schemes Congress created for antitrust and union regulation, leaving a "regulatory no man's land," *see, e.g.*, *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 289 (2016), in which unrecognized independent-contractor organizations enjoy *greater* rights in certain respects than employee unions.

III. The First Circuit's Decision Will Disrupt Markets and Harm Consumers.

The decision below presents an important matter with significant impact that warrants this Court's attention without delay. *See* S. Ct. R. 10(a). By greenlighting independent contractors to collude on the price of compensation, the decision will harm consumers and businesses alike, and those ill effects risk expanding beyond the First Circuit.

A. Independent contractors are a significant and growing part of the Nation's workforce.

Independent contractors make up a significant and growing part of the Nation's workforce and are a key

aspect of many industries vital to the Nation's economy. According to the Bureau of Labor Statistics ("BLS"), more than 10 million Americans (nearly 7 percent of the labor force) worked primarily as independent contractors in 2017. BLS, *Contingent and Alternative Employment Arrangements*, at 6 (May 2018), https://bit.ly/3h1BsI6.

At least as many individuals, and possibly far more, also supplement their employment income with additional income from independent contracting. The Department of Labor has estimated that 22.1 million Americans (more than 15 percent of the workforce) work as independent contractors at least part-time. Employee or Independent Contractor Classification under the Fair Labor Standards Act, 87 Fed. Reg. 62,218, 62,261–62 (proposed Oct. 13, 2022). BLS estimates that another 6.7 million Americans are self-employed and thus "employees" of their own companies. BLS, Current Population Survey: Employment Level – Total wage and salary, incorporated self employed (extracted Oct. 25, 2022). And the consulting firm McKinsey & Co estimates that "gig," contract, freelance, and temporary workers together make up about 59 million Americans and 36 percent of the workforce. McKinsey & Co., *Freelance, Side Hustles, and Gigs: Many More Americans Have Become Independent Workers* (2022), https://mck.co/3zvNwI7.

Studies suggest that independent contractors comprise a percentage of the workforce that has increased by double digits in the last two decades. *See, e.g.*, Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015*, at 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 22667, 2016),

https://bit.ly/3DSrIcd (50 percent increase in percentage of workers engaged in independent contracting and other alternative work arrangements 2005–2015); Katherine Lim et al., *Independent Contractors in the U.S.: New Trends from 15 Years of Administrative Tax Data* 14 (2019), https://bit.ly/3SX1Ekk (22 percent increase in share of workers reporting income from independent-contracting sources 2001–2016).

The "independent contractor" label does not mean that such workers are necessarily low-paid or lack bargaining power. BLS data indicate that the median part-time independent contractor earns considerably more than comparable part-time employees. BLS, *Contingent and Alternative Employment Arrangements*, tbl. 13. And federal tax filings reveal that the "independent contractor" category includes many "high-earning professional workers, many of whom do contract work to supplement a main (W2) job." Andrew Garin & Dmitri Koustas, *The Distribution of Independent Contractor Activity in the United States: Evidence from Tax Filings* 7 (2021), https://bit.ly/3zBl1IT.

Independent contractors are commonplace in a variety of well-compensated professions. One IRS-supported study found that the "professional, scientific, and technical services sector included more independent contractors—more than 1.2 million, as of 2016—than any other sector. Lim, *supra*, at 15, 38 fig.6. As of 2020, 5.8 percent of physicians—including 20.5 percent of emergency-room doctors, 12.9 percent of anesthesiologists, and 14.2 percent of psychiatrists—worked as independent contractors. Am. Med. Ass'n, *Recent Changes in Physician Practice Arrangements: Private Practice Dropped to less Than 50 Percent of*

Physicians in 2020, at 12–13 & tbl.3 (2021), https://bit.ly/3UhT153. Insurance salespeople typically work as independent contractors. *Weary v. Cochran*, 377 F.3d 522, 524 (6th Cir. 2004). And fully 87 percent of National Association of Realtors members are independent contractors. Nat'l Ass'n of Realtors, *NAR Member Highlights* 6 (2022), https://bit.ly/3UhT153. The First Circuit's extension of the statutory labor exemption to "independent contractors" thus green-lights collusion by a whole spectrum of independent contractors, including well-paid professionals.

B. The First Circuit's decision will inflate costs and harm consumers nationwide.

Predicting the consequences of the First Circuit's decision requires no advanced economic analyses. Outside the context of collective bargaining by employee unions, competitors' horizontal "[r]estrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit." *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 107 (1984). Such agreements are ordinarily subject to the most searching scrutiny precisely because they are so often anticompetitive. *See* Areeda & Hovenkamp ¶ 1906 ("naked" restraints "condemn[ed] ... almost as a matter of course"). The decision below effectively immunizes those agreements from antitrust scrutiny, so long as they relate to compensation for work.

It is economically rational that independent contractors in the First Circuit will avail themselves of this judicially created opportunity to collude to in-

crease the price paid for their work. Thus, the consequence of such collusion will be harm to consumers. A consumer in the First Circuit who retains an independent contractor—whether a plumber to fix a leaky pipe or an emergency-room doctor to treat a broken arm—faces the prospect of a higher bill due to suppression of competition in the market for that type of work. Businesses, including Chamber members, are significant buyers of work by independent contractors, and as such face the prospect of higher input costs, reduced profits, and potentially the need to recoup those costs by passing them through to consumers. Increases in the cost for work by independent contractors within the First Circuit thus stand to ripple out nationwide as consumers purchase goods made, serviced, or shipped with work by independent contractors in New England or Puerto Rico.

C. The First Circuit's decision will lead to market confusion and administrative problems.

By muddling the longstanding rule that independent contractors are not covered by the statutory labor exemption from the federal antitrust laws, the First Circuit's decision raises important yet hard-to-answer questions for independent contractors and companies that do business in the circuit, as well as for the lower courts there.

The decision upsets the expectations of businesses that have reasonably relied on the longstanding consensus that price-fixing agreements among independent contractors are not exempt from antitrust laws. Having clarity on what independent contractors can

and cannot collectively do is critical to smooth operation of the economy.

For example, the decision offers little guidance about when independent contractors may lawfully collude to inflate prices. Under that decision, agreements about "wages for labor" are immune from antitrust scrutiny, while those about "prices for goods" are not. Pet. App. 11a. But the real world does not always conform to that oversimplified dichotomy. *See Frost*, 483 F.2d at 390–91. Independent contractors are often compensated for both their work *and* the use of their equipment. *See, e.g.*, *Women's Sportswear*, 336 U.S. at 463. The decision below leaves considerable doubt about whether such mixed agreements are exempt from antitrust law.

Moreover, because independent-contractor associations are not recognized under the NLRA, it is unclear what (if any) obligation a company has to deal with such an association. And the decision below offers little guidance on whether companies could inadvertently expose themselves to potential antitrust liability by negotiating with non-regulated independent contractors.

The First Circuit's decision creates a glaring disuniformity among the Circuits regarding the reach of the federal antitrust laws. As a result of that decision, the *very same* price-fixing agreement among Northeastern and Mid-Atlantic independent contractors could be lawful in Boston but constitute a *per se* violation of the Sherman Act in New York and Philadelphia. *Compare* Pet. App. 10a–11a, *with Conley*, 500 F.2d at 126–27; *and Ring*, 148 F.2d at 651–52. That disuniformity will harm consumers inside and outside

the First Circuit and create uncertainty about the validity of independent-contractor agreements that is untenable for businesses and workers alike. It is also altogether unclear how courts will treat price-fixing conspiracies that are now lawful in one part of the country but lead to inflated prices and other anticompetitive effects elsewhere in the country.

Finally, if the decision below is left standing, the result will likely be a spate of litigation over how the application of the statutory labor exemption should apply to independent contractors, imposing unnecessary burdens on courts and litigants.

This Court's immediate review is therefore necessary to correct the First Circuit's errant decision and to prevent the uncertainty for businesses, independent contractors, and consumers that the decision below creates.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Stephanie A. Maloney
Tyler S. Badgley
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

S. Conrad Scott
COVINGTON & BURLING LLP
New York Times Building
620 Eighth Avenue
New York, NY 10018

Beth S. Brinkmann
Counsel of Record
Lauren S. Willard
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000
BBrinkmann@cov.com

Counsel for the Chamber of Commerce of the United States of America

November 2022