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

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FTC, *To Settle FTC Charges, Two Trade Associations Agree to Eliminate Rules that Restrict Competition* (Dec. 23, 2014), https://tinyurl.com/yrxejtjy 11

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Certiorari is warranted because the First Circuit held the antitrust laws do not apply to collusive agreements about the work of independent contractors. That new rule departs from this Court's precedent, splits from other courts of appeals, and legitimizes anticompetitive agreements that have been unambiguously illegal for a century. As amicus confirms, the doctrinal mistakes and harmful effects of the First Circuit's ruling require this Court's urgent attention.

I. The First Circuit Split From This Court And Other Circuits

This Court has held repeatedly that the antitrust labor exemption applies only where an "employer-employee relationship [i]s the matrix of the controversy," *Columbia River Packers* v. *Hinton*, 315 U.S. 143, 147 (1942)—and has confirmed that "an independent contractor or entrepreneur" has no such relationship, *H.A. Artists* v. *Actors' Equity*, 451 U.S. 704, 717 n.20 (1981). The courts of appeals consistently hold that independent contractors fall outside the exemption unless their dispute concerns *someone else's* employer-employee relationship. The leading antitrust treatises—and even sources cited by respondents—agree that has always been the line. Pet.14, 22; *e.g.*, Khan Ltr. 2, https://perma.cc/PP8S-NM3Q (Sept. 28, 2021) ("federal courts have held" labor exemption "appl[ies] only to workers formally classified as employees"), cited in Opp.18 n.4. Yet the First Circuit held here that the exemption is *not* "limited to" disputes involving "employees" and so disputes involving those with "independent-contractor status" can qualify. Pet.App.10a-11a. The conflict is stark.

Respondents would ignore the clear line the First Circuit crossed and gerrymander their own new test. According to respondents, courts have actually been analyzing whether "workers" are paid "solely for their

own labor," based on factors such as whether workers use their own equipment, whether they operate as business entities, how "sophisticated" they are, and whether they make "capital investments." Opp.9, 11, 16. Nonsense. No court, agency, or treatise uses such a test. Nothing in the statutes supports those fine distinctions. And from the wide world in which tens of millions of independent contractors have worked for the past century, respondents offer *not one example* of independent contractors paid "solely for their own labor" who freely organize cartels. Respondents' assertion that such collusion always "enjoyed the protection of the labor exemption" (Opp.16) is pure fiction.

A. The decision below certainly does not reflect respondents' invented test. The court did not deem respondents "employees" under the antitrust statutes on some overbroad understanding of that term. And the court did not analyze whether the jockeys provide "solely their own labor," as respondents describe that concept. For instance, the court did not discuss whether jockeys invest in and use their own saddles, girdles, whips, and attire (each does), or whether jockeys hire workers to maintain their books and select their races (some do). *E.g.*, Pet.App.86a. Rather, the court gravely misread this Court's precedent, rejected the proposition that the exemption applies only with respect to employer-employee relationships, and held that any "independent contractor" providing services, rather than selling goods, qualifies for the exemption. Pet.6-7, 23-26; Pet.App.10a-11a.

B. That holding clashes with this Court's decisions.

1. *American Medical Association* v. *United States* and *United States* v. *National Association of Real Estate Boards* both held that the exemption does not apply to disputes involving independent contractors rather than employees. See 317 U.S. 519, 536 (1943)

(doctors were "individual practitioners each exercising his calling as an independent unit," not "employes [sic] in any proper sense"); 339 U.S. 485, 489-490 (1950) (dispute involving real-estate agents involved no "aspect of the employee-employer relationship to which the antitrust laws have made special concessions"). References to "employees" in those decisions are not, as respondents charge, question-begging. The terms "employee" and "employee-employer relationship" invoke a traditional master-servant relationship—especially as used when those decisions issued. See *New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532, 541 (2019); *Employee*, Black's Law Dictionary (3d ed. 1933) ("'[e]mployee' must be distinguished from 'independent contractor'"); *Employee*, Black's Law Dictionary (4th ed. 1955); Pet.20-21.*

Respondents claim that those two cases were decided on the principle that "sophisticated, professional business enterprises were not the disempowered laborers envisioned by" the labor-exemption statutes. Opp.11. But the cases contain no such reasoning, and no court has understood those decisions to tie the exemption to a vague assessment of a contractor's size or sophistication.

Moreover, respondents' case descriptions are inaccurate. Respondents state that *AMA* emphasized the "size and importance of the [medical practices]." Opp.11 (alteration in Opp.; quoting 317 U.S. at 529). But the quoted statement, without respondents' interpolation, describes only the *associations* that the independent-contractor doctors joined. 317 U.S. at 520,

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* Respondents say *Milk Wagon Drivers' Union* v. *Lake Valley* referred to independent-contractor vendors as "employees." But that decision merely quoted a contract specially *defining* "employees" to include vendors. 311 U.S. 91, 98 (1940).

529. Respondents claim that the agents in *Real Estate Boards* had "large staffs." Opp.11. But this Court identified some as "individual proprietors" with "no employees"; the key was not the size of the agents' enterprises but rather that the agents were "in business on [their] own." 339 U.S. at 489-490. What respondents cannot explain away is that both decisions involved independent contractors being paid (in respondents' terms) solely for their labor—and both refused the exemption.

2. Respondents object that the petition does not "discuss the cases in which this Court held or stated that independent contractors enjoy the protection of the labor exemption." Opp.12 n.2. But the petition does cite those cases, and more importantly, there is a reason that *respondents* do not discuss them: those cases hold that independent contractors (or others) who engage in a dispute *relating to employees' employment* fall within the scope of the labor exemption—precisely because there the "employer-employee relationship [i]s the matrix of the controversy." *Columbia River*, 315 U.S. at 147; see *Am. Fed'n of Musicians* v. *Carroll*, 391 U.S. 99, 106-107, 112 (1968) (dispute involving employee union members); *H.A. Artists*, 451 U.S. at 720-721 (same); Pet.23-25 (exemption covers those not in "proximate" employer-employee relationship who nonetheless have a dispute regarding that relationship). This Court's careful tethering of the exemption to the "employer-employee relationship" is contrary to the First Circuit's holding that exempts an agreement solely about the work of independent contractors.

3. Respondents' account of *Columbia River* fares no better. Certainly, the fishermen sold commodities. But this Court's reason for refusing the exemption was

that the fishermen were "not employees of" any "employer" and "operate[d] as independent businessmen, free from such controls as an employer might exercise." 315 U.S. at 147 (exemption excludes "controversies upon which the employer-employee relationship has no bearing"). And yet the First Circuit here held that the exemption is not "limited" to disputes involving "employees." Pet.App.10a.

4. Finally, respondents are mute on some of this Court's most hallowed antitrust precedents. For instance, the lawyers, dentists, and engineers in *FTC* v. *Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990), *FTC* v. *Indiana Federation of Dentists*, 476 U.S. 447 (1986), and *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978), were highly skilled, but so are the jockeys here. And plainly many of those professionals were solo practitioners who supplied no more than labor. Regardless, no precedent or logic suggests that the exemption should apply differently to a lawyer with a secretary than to one without, or to a dentist who supplies goods in the form of cavity fillings than to one who merely examines teeth.

C. Nor do lower courts embrace respondents' "solely labor" test. Rather, they hold that the exemption's application hinges on whether an employer-employee relationship is at issue and that independent contractors are not employees. In other circuits, this case would have come out the other way.

1. It takes some chutzpah for respondents to deny the conflict with *Taylor* v. *Local No. 7*. The Fourth Circuit held that "an employer-employee relationship, as distinguished from that of employer-independent contractor, is necessary to constitute a 'labor dispute' within the meaning of" the exemption. 353 F.2d 593, 596, 605-606 (4th Cir. 1965). Having identified the

disputants as independent contractors and the dispute as concerning the contractors' work, the court refused the exemption. See *id.* at 605-606.

In holding the opposite, the First Circuit acknowledged that divergence, but tried to distinguish *Taylor* on the meritless ground that the farriers there supplied horseshoes. Pet.10-11. Respondents try a different distinction: that the farriers were "highly skilled" "specialists" who made "capital investments in tools" and hired assistants. Opp.13. But such characteristics do not distinguish farriers from jockeys, and the Fourth Circuit found those facts relevant, at most, to the *antecedent* question whether the farriers were independent contractors, see 353 F.2d at 595-606. The court made clear that, upon concluding that the farriers were independent contractors, its analysis of the exemption was complete. See *id.* at 605-606.

2. Respondents do no better distinguishing other circuit decisions cited in the petition—just some of many applying this Court's labor-exemption precedent. See Chamber.Br.7-11 (citing cases). In *Conley Motor Express* v. *Russell*, as respondents observe, the drivers provided both "services as operators" and "use of their trucks." 500 F.2d 124, 125 (3d Cir. 1974). But *Conley*'s analysis does not turn on that latter fact; it turns on a determination that the drivers had "independent contractor status" and their dispute involved no "employer-employee relationship," the "primary prerequisite for exemption from the anti-trust laws." *Id.* at 126.

In *Heat & Frost Insulators* v. *United Contractors*, involving a dispute between unions, the Third Circuit unequivocally *rejected* a sale-of-labor versus sale-of-goods test, instead focusing on whether a dispute is over the work of "independent contractors." 483 F.2d 384, 390-391 (3d Cir. 1973). Respondents' description

(Opp.14) of that dispute is simply incorrect. See 483 F.2d at 391-392.

And in *Ring* v. *Spina* and *Local 36* v. *United States*, the courts' analyses turn on the absence of a dispute involving "an employer-employee relationship," 148 F.2d 647, 652 (2d Cir. 1945), and the presence of a dispute involving the work of "independent business men," 177 F.2d 320, 336 (9th Cir. 1949). As in *Columbia River*, the fact that the independent contractors supplied tangible or intangible property was peripheral to the analysis. *E.g.*, 177 F.2d at 336 (approving instruction that exemption is inapplicable to "persons who are self employed" and "engaged in business" for "their own account and profit, free from such controls" as an "employer" has over an "employee").

The First Circuit's decision conflicts with all those holdings.

II. The Decision Is Wrong

Respondents do not defend the First Circuit's reasoning, instead offering a new test to justify its result. Their resort to a novel test in such a long-developed area of the law is a reason to *grant* certiorari, not deny it: if respondents were right and certiorari were denied, millions of independent contractors outside the First Circuit would continue to labor under a fundamental misimpression about antitrust law. If respondents are wrong—as indeed they are—then little can be said in defense of the decision below.

A. Respondents pluck out of context the statutory phrase "terms or conditions of employment" and insist that the word "employment" embraces independent contractors and employees alike. Opp.18. Respondents rely on this Court's decision in *New Prime*, holding that independent contractors outside a "formal employer-employee" relationship fall within the Federal

Arbitration Act (FAA) carve-out for "contracts of employment" of certain "class[es] of workers." *Id.* at 540 (quoting 9 U.S.C. 1).

New Prime is irrelevant here because the statutory texts differ. As that decision explains, the FAA carve-out "didn't use the word 'employees' or 'servants,'" which would have been "the natural choices if the term 'contracts of employment' addressed them alone," but instead used the broader term "workers." 139 S. Ct. at 541-542. This Court added that the words "employment" and "employee" have different meanings and histories; when the FAA was enacted in 1925, the former "did not necessarily imply the existence of an employer-employee" relationship. *Ibid*.

By contrast, Section 113 (defining "labor dispute") never mentions "workers"—but it uses "employee" and "employer" repeatedly. Most notably, it does so in explaining that the disputants need not "stand in the *proximate* relation of employer and employee," 29 U.S.C. 113(c) (emphasis added)—text that led this Court to rule that, no matter the disputants, the labor exemption applies only where the "employer-employee relationship [is] the matrix of the controversy." *Jacksonville Bulk* v. *Longshoremen*, 457 U.S. 702, 712-713 (1982); see Pet.19. And in describing the possible types of labor disputes, Section 113 repeatedly speaks of disputes between "employers" and "employees." 29 U.S.C. 113(a). The same is true of 29 U.S.C. 52, which invokes "employees" and "employers" but never "workers." Congress's use of "employee" describes "the conventional master-servant relationship." *Cmty. for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739-740 (1989); see p. 3, *supra*.

B. Respondents get the history wrong too. True, after this Court interpreted the NLRA term "employees" to cover independent contractors, Congress

amended that statute to exclude such contractors, see 29 U.S.C. 152(3). But respondents draw the wrong inference from the absence of an amendment to the antitrust statutes: the whole point of the NLRA amendment was that it was *incorrect* to interpret "employees" to extend beyond a traditional employer-employee relationship to cover independent contractors. Interpreting the labor exemption in the antitrust laws so expansively would be equally incorrect—which is why no court (until now) ever did so, and no cause for an amendment ever existed. The scope of the NLRA and the labor exemption were always meant to be coterminous, so a massive gap in federal law would exist if independent contractors are unregulated by labor law and immunized by antitrust law. Pet.21-22, 27-28, 30 n.4. Respondents have nothing to say about that gap.

C. In all events, respondents' statutory arguments (to treat independent contractors just like employees in all cases) go far beyond the invented distinctions they propose (*e.g.*, between independent contractors who provide solely labor and those who bring along tools, and between solo contractors and those operating as business entities). Respondents are thus caught between offering arguments that would logically overrule many of this Court's decisions and proposing a test that has no textual or historical support (and was not even adopted below). In short, neither the reasoning nor the result below is defensible.

III. This Is A Perfect Vehicle To Address An Exceptionally Important Issue

The decision below holds that independent contractors providing services rather than goods need not comply with the federal antitrust or labor laws—and are therefore free to collude against customers, price-fix, form cartels, and adopt group boycotts against ri-

vals. Such a sea change would affect numerous industries and, as the Chamber's brief confirms, cause widespread economic harm and confusion.

The disruption has begun and is accelerating. See, *e.g.*, *FTC Policy Statement on Enforcement*, 2022 WL 4366118, at *6 n.68 (Jan. 1, 2022) (First Circuit is the "one court" ruling that labor exemption "applies to workers regardless of whether they are classified as employees or independent contractors"); Vaheesan, *How 37 Puerto Rican Jockeys Created An Opening*, New Republic (May 2, 2022) (decision below affects "[t]housands" of independent contractors "whose collective action was presumed to be outlawed," and is "harbinger of more to come"), https://tinyurl.com/2akkaxea; Lebowitz, *Against the Odds: Did a Court of Appeals Just Grant Independent Contractors the Right to Strike and Organize?* (Apr. 11, 2022) (decision below "grant[s] new rights" and "union organizers and the plaintiffs' bar will see how far they can ride this horse"), https://tinyurl.com/yc2pen98; Alexander & Salop, *Antitrust Worker Protections* 49 (2022) (First Circuit "upended" longstanding view that independent-contractor cartels are impermissible), https://tinyurl.com/4mmf4rrb; Br. 31 n.13, 2022 WL 2827020 (No. A163655, Cal. Ct. App.) (July 1, 2022) (union-filed brief seeking to capitalize on decision below).

Respondents insist the issue is not recurring, as if to praise how singularly wrong the decision below is. The recurrence question is not about tallying cases (as might be appropriate as to a procedural or jurisdictional issue), but about the real world: the issue here was previously understood to be settled, but because of the First Circuit's novel interpretation will recur with frightening frequency in the vast and growing ranks of independent contractors. See Pet.27. Even respondents' narrow "solely labor" theory would create an

enormous law-free zone inhabited by countless independent contractors who are solo operators and do not sell commodities—including many real-estate agents, doctors, lawyers, nurses, music teachers, interpreters, sports coaches, and so many others. *E.g.*, https://tinyurl.com/yrxejtjy (FTC antitrust charges in 2014 against independent-contractor ice-skating coaches and electricians).

Respondents also propose "percolation." But many courts (including this Court) have weighed in on this issue, and the percolation argument has little force as to federal statutory interpretation questions. *E.g.*, Justice William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 Fla. St. U. L. Rev. 1, 11 (1986). Respondents' parallel claim about the Executive Branch—that it has "just begun to study" (Opp.17-18) how century-old statutes apply to independent contractors—is preposterous. DOJ and the FTC are on record about the exemption's inapplicability to independent contractors, both in briefs and in enforcement actions.

Finally, respondents assert that this case is a poor vehicle, but identify no impediment to reaching the question presented. This case is ideal: it arises from a final judgment; everyone agrees the jockeys are independent contractors (and the First Circuit assumed so); the First Circuit cleanly held that disputes involving only independent contractors qualify for the exemption and clearly announced its (mis)reading of this Court's opinions, Pet.App.10a-11a; and that holding was case-dispositive. Respondents' vague complaint that this case involves only a few jockeys is especially misplaced. How would it be *better* for this Court to await the emergence of, say, a cartel of all independent nurses in greater Boston? Now is the time for this Court to restore the uniformity that had prevailed

since the antitrust statutes' enactment, to avert the chaos the decision below will sow, and to forestall the arrival of an extensive and costly category of litigation in the lower courts. That course would best "further the policies of the federal antitrust laws" (Opp.2).

CONCLUSION

The petition should be granted.

Respectfully submitted,

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