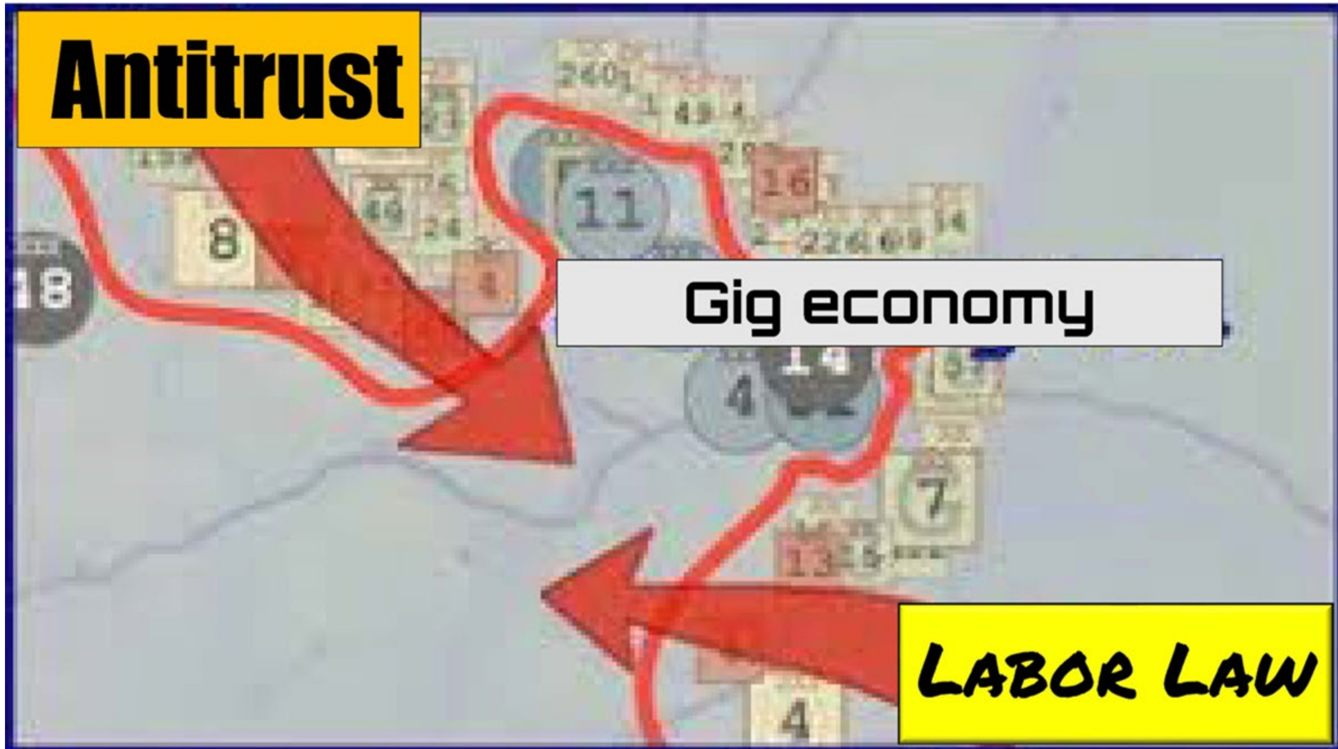


Attacking From Both Sides:

Tactics for Executing a Pincer Movement Against Gig Employers

Michael T. Anderson
Murphy Anderson PLLC
NELA Conference March 24, 2023

This paper addresses three tactical opportunities for lawyers confronting the gig economy.

First, I look at the use of external law, including antitrust, trademark and tort law, to create a boundary against which we may drive gig employers in employment litigation. Gig employers typically take legal positions riddled with contradictions. They claim their workers are “independent contractors” outside the firm structure, yet they assume the power to regulate their operations as intensively as a firm would its own employees. They claim that their workers are responsible for the quality of their own services, yet they permit the unified firm trademark to be used as a common source- and quality-identification. They claim that independent contractors are not their agents, yet would never dare to tell a common-law court to absolve them of vicarious tort liability for the acts of their “independent contractor” agents. This allows us to invoke antitrust, trademark and tort law to expose the fallacy in ”independent contractor” assertions.

Second, I look at the strategic possibilities of concerted worker action opened by *Confederación Hípica de Puerto Rico v. Confederación de Jinetes Puertorriqueños*, 30 F.4th 306 (1st Cir. 2022) *cert. denied*, 143 S.Ct. 631 (Jan.

9, 2023). That case holds that the labor exemption in the Clayton Act, 15 U.S.C. § 17, applies to any person who sells their own labor, regardless of whether they are classified as employees or independent contractors. In effect, the First Circuit is saying that *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990) is not good law against defenses based under the Clayton Act labor exemption, simply because the Clayton Act exemption was never raised in *Superior Court Trial Lawyers Ass'n*.

Third, I look at possible counter-measures against employer arguments that existing antitrust law may only be changed by Congress under the "major questions" doctrine.

I. Asserting "Independent Contractor" Status Brings Employers Into Jeopardy in Other Areas of the Law.

First, "independent contractor" claims in employment litigation often create indefensible conflicts with antitrust, trademark, and tort law. If the business models of the gig economy do in fact amount to the coordinated activity of independent entrepreneurs, employers are potentially asking the NLRB to bless horizontal price-fixing. *See FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990) (independent contractors' collective activity is illegal price-fixing); *Meyer v. Kalanick*, 174 F.Supp.3d 817, 824 (S.D.N.Y. 2016) (allegations that Uber platform established fare-fixing agreements among Uber drivers stated claim for violation of Sherman

Act).Furthermore, such employers risk cancellation of their trademark rights under "naked licensing" doctrine. *Freecycle Sunnyvale v. Freecycle Network*, 626 F.3d 509, 515 (9th Cir. 2010) (app-driven networks lost trademark protection by allowing independent operators to use the mark without sufficient control).

Furthermore, many "independent contractor" defenses run headlong into the emerging consensus in tort law that gig employers are liable for their agents' torts under *respondeat superior* doctrine based on the very agency principles that the gig employers urge before the NLRB.

A. Congress intends that the common law of agency will evolve in response to a changing legal and economic background.

The 1947 Taft-Hartley amendments to Section 2(3) of the National Labor Relations Act adopted the "general principles of the law of agency." 93 Cong. Rec. 6441—6442, 2 Leg. Hist. of the Labor Management Relations Act, 1947, p. 1537. But nothing in the NLRA or its legislative history freezes the common law of master and servant set forth in *Blackstone's Commentaries*. Congress intended that the common law of agency would evolve in response to social and economic changes. In *NLRB v. United Insurance Co.,* the Court stressed: "Whether the term 'employee' includes (particular) workers must be answered primarily from the history, terms and purposes of the legislation.

Thus the standard was one of economic and policy considerations within the labor field." 390 U.S. 254, 258 (1968) (cleaned up).,

When Congress expects the common law of agency to be applied in a statute, it does so with the understanding that the common law evolves over time against a background of external laws and economic realities. *See Minerva Surgical, Inc. v. Hologic, Inc.*, 594 U.S. ___, 141 S. Ct. 2298, 2309 (2021) (changing principles of assignor estoppel in patent law were not eviscerations of prior rights, "but only the kind of doctrinal evolution typical of common-law rules."); *Burlington N. & Santa Fe Ry. Co. v. U.S.*, 556 U.S. 599, 613 (2009) ("Congress intended the scope of liability to be determined from traditional and evolving principles of common law.") (internal quotation omitted). This is equally true in labor law. *See Bowen v. U.S. Postal Service*, 459 U.S. 212, 224 (1983) ("In defining the relationships created by such an agreement, the Court has applied an evolving federal common law grounded in national labor policy.").

B. Courts and agencies deciding employee status are not free to ignore external law in framing the "independent contractor" exemption.

In considering the common law of agency, therefore, courts and the NLRB may not ignore the background of non-labor law that shapes it. The courts and the NLRB not only have the discretion to consider the antitrust, trademark and tort-law implications of an "independent contractor" claim;

they have the duty to consider such implications. *See BASF Wyandotte*, 274 NLRB 978, 978-979 (1985), *enf'd*, 798 F.2d 849 (5th Cir. 1986) (even where NLRB is not charged with enforcing external law, it must take that external law into account in interpreting NLRA duties).

The Courts have repeatedly criticized the NLRB for deciding NLRA cases without due consideration for other non-labor laws. The NLRB has been forbidden from applying the NLRA to trench on the Immigration and Naturalization Act, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002) or the law of mutiny, *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942) or the Federal Arbitration Act, *Epic Systems Corp. v. Lewis*, 584 U.S. ____, 138 S.Ct. 1612, 1630 (2018) (citing *Hoffman Plastic*). "[T]his Court has never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA … In devising remedies for unfair labor practices, the NLRB is obliged to take into account another 'equally important Congressional objectiv[e],'" *Southern S.S. Co. v. NLRB*, 316 U.S. at 47—to wit, the objective of deterring unauthorized immigration that is embodied in the INA." *Hoffman Plastic*, 535 U.S. at 144.

This duty applies here where the NLRB considers arguments that alleged employees are really independent businesses acting in concert. We analyze antitrust, trademark, and tort law in turn:

C. Antitrust law

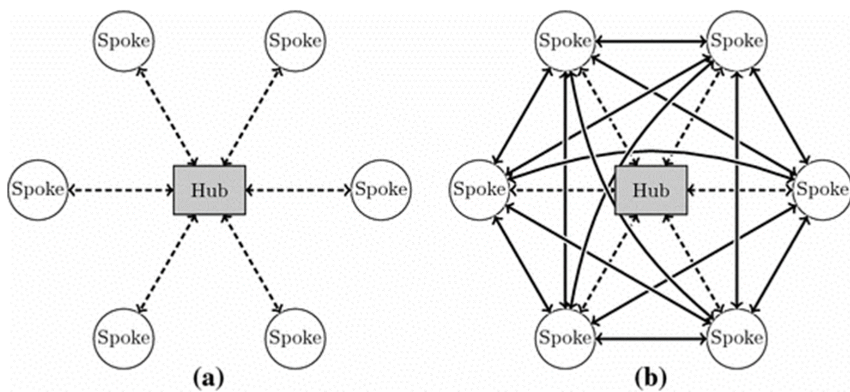
1. Coordination and rate-fixing among independent enterprises raise important antitrust concerns.

The perils of asserting that workers are really independent businesses are illustrated by *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990) (concerted activity among workers amounted to per se price-fixing because the defendants were independent contractors). The peril is not merely for the subordinate contractors, but also for the business that coordinates their allegedly independent activity. See *American Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 195 (2010).

Member Miscimarra unwittingly made this point in his dissent in *Pennsylvania Interscholastic Athletic Ass'n*, 365 NLRB No. 107 (2017), slip op. at 18: "Any effort by independent contractors to collectively set minimum rates would be a per se violation of the antitrust laws. *H.A. Artists & Associates, Inc. v. Actors' Equity Ass'n*, 451 U.S. 704, 717 fn. 20 (1981) (labor antitrust exemption inapplicable to "independent contractor or entrepreneur"); *Meyer v. Kalanick*, 174 F.Supp.3d 817 (S.D.N.Y 2016) (allegations that Uber platform established agreement among Uber drivers to

set fares stated claim for violation of Sherman Act where drivers were alleged to be independent contractors).” Accordingly, the prohibition on officials collectively setting minimum fees is not only consistent with independent contractor status but does no more than what the antitrust laws require.” The D.C. Circuit upheld Member Miscimarra’s dissent in *Pennsylvania Interscholastic Athletic Ass’n v. NLRB*, 926 F.3d 837 (D.C. Cir. 2019).

Yet neither Member Miscimarra nor the D.C. Circuit acknowledged the glaring antitrust problem raised by respondents’ assertion of their subordinates’ “independent entrepreneurial” status. In the case Member Miscimarra cited, *Meyer v. Kalanick*, 174 F. Supp. 3d 817, 824 (S.D.N.Y 2016), Judge Rakoff held that Uber’s entire business model may constitute illegal horizontal price-fixing precisely because its drivers are held out as independent contractors. He distinguished cases analyzing bona fide vertical price restraints under the more permissive “rule of reason,” holding that “where parties to vertical agreements have knowledge that other market participants are bound by identical agreements, and their participation is contingent upon that knowledge, they may be considered participants in a horizontal agreement in



restraint of trade." 174 F. Supp. 3d at 824 (citing *Interstate Circuit v. United States*, 306 U.S. 208 (1939), *U.S. v. Apple, Inc.*, 791 F.3d 290, 319-320 (2d Cir. 2015), and *Laumann v. Nat'l Hockey League*, 907 F.Supp.2d 465, 486–87 (S.D.N.Y. 2012)). In *U.S v. Apple*, the Second Circuit explained the *per se* rule in terms that would directly apply to most gig-economy employers asserting "independent contractor" status: "it is well established that vertical agreements, lawful in the abstract, can in context 'be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel,' particularly where multiple competitors sign vertical agreements that would be against their own interests were they acting independently." 791 F.3d at 319-320 (quoting *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 893 (2007)).

This unacknowledged antitrust problem looms large in many of the NLRB's "independent contractor" cases, including *SuperShuttle DFW*, 367 NLRB No. 75 (2019). Since these firms set prices charged to customers, and because individual drivers are not free to compete with each other in offering lower prices, these respondents might only escape Sherman Act liability if they admitted the employee status of their drivers.

2. Courts and agencies in employment law cases may not develop their own doctrine of "entrepreneurial freedom" at odds with antitrust law.

At least once before, the NLRB has had to scale back expansive pro-employer doctrines in response to intervening antitrust law.

In *Los Angeles Newspaper Guild Local 69 (Hearst Corp.*), 185 NLRB 303, 304 (1970), *enf'd per curiam* 443 F.2d 1173 (9th Cir. 1971), the NLRB reasoned that separate division of the same company could be "neutrals" as to picketing arising from a dispute with a sister division. This decision was untethered to antitrust law. It merely reflected the Board's own construction of the law of corporate form.

The underpinnings of this *Hearst* doctrine were knocked out in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771-772 (1984). The *Copperweld* Court held, contrary to the *Hearst* Board's reasoning, that a parent and sister subsidiaries are not separate economic entities capable of conspiring with each other. *Copperweld*, 467 U.S. at 771-772. The antitrust principle in *Copperweld* was decisive in *Painters and Allied Trades District Council No. 51 (Manganaro Corp.*), where the NLRB held that an anti-dual-shop clause restraining the formation of double-breasted subsidiaries was <u>not</u>

an illegal secondary restraint, notwithstanding the Hearst doctrine, precisely because of the contrary antitrust principle subsequently declared in *Copperweld*. 321 NLRB 158, 174 (1996) (quoting *Copperweld*, 467 U.S. at 771-772).

In other words, the NLRB has already recognized that it is not free to develop its own, more pro-business doctrine of corporate separateness if that doctrine is at odds with the Supreme Court's application of the same concepts in antitrust law.

3. At a minimum, courts and agencies should refer cases where "independent contractor" status is asserted to the FTC and DOJ Antitrust Division.

To be sure, the NLRB and other agencies like the EEOC and DOL are not authorized to enforce antitrust law on their own. That is the duty of the Federal Trade Commission and the Department of Justice Antitrust Division. However, where an employer in a wage-and-hour case successfully establishes that it presides, not over employees, but over allegedly independent entrepreneurs in a coordinated plan to fix prices and rates for service, the courts and agencies owe it to their sister law enforcement agencies to refer the record to permit appropriate antitrust review.

This is the basis of interagency coordination over many subjects where issues cross the jurisdictional lines of separate agencies. See NLRB Memorandum GC 22-03, 2022 WL 444499 (issued Feb. 10. 2022) (NLRB

General Counsel is "proceeding with efforts to establish partnerships with IRS, DOJ's Antitrust Division, and FTC to address unfair methods of competition that undermine workers' rights. This includes coordination in order to: reduce the incidence of misclassification of employees and ensure that employers properly pay their employees and their employment taxes; create mechanisms for sharing data about acquisitions, mergers or similar employer organizational actions that may detrimentally affect organizing or bargaining efforts, such that workers are more in need of whistleblower and anti-retaliation protections; and give greater attention to non-disclosure, non-solicitation, and non-compete agreements that harm fair competition and violate employees' rights under Section 7 of the Act.")

D. Trademark law and "naked" licensing

In many independent-contractor cases, the NLRB has relied on the use of the respondent's common logo. *See FedEx Home Delivery*, 361 NLRB 610, 622 & ns. 46-47 (2014), *enf. denied* 849 F.3d 1123 (D.C. Cir. 2017); *Corporate Express Delivery Systems*, 332 NLRB 1522 (2000), *enf'd*, 292 F.3d 777 (D.C. Cir. 2002). "By virtue of their uniforms and logos and colors on their vehicles, drivers are, in effect, doing business in the name of FedEx rather than their own. Even those drivers who operate as incorporated businesses do business in FedEx's name." *FedEx Home Delivery*, 361 NLRB at 622.

The NLRB's reasoning has been correct, but the NLRB has unnecessarily weakened its rationale by neglecting to connect it to external trademark law. In cases like *FedEx*, the NLRB simply offered its own opinion that the use of a common logo indicates control, without any reference to the strong support this argument has in trademark law. 361 NLRB at 622.

This unnecessarily weakens the NLRB's analysis. The intuitive point the NLRB was articulating in *FedEx* and *Corporate Express* is a well-established doctrine of trademark law. The Lanham Act, 15 U.S.C. §§ 1111 *et seq.*, condemns "naked licensing," defined as the practice of allowing third parties to use a trademark without retaining sufficient control to ensure the public's source-identifying association between the mark and a centralized guarantee of quality control. *See Freecycle Sunnyvale v. Freecycle Network*, 626 F.3d 509, 515 (9th Cir. 2010) (citing 3 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 18:48 (4th ed. 2010); *Eva's Bridal Ltd. v. Halanick Enterprises, Inc.*, 639 F.3d 788, 790 (7th Cir. 2011)).

A customer who orders an Uber driver or a Supershuttle ride relies on the source-identifying nature of the trademark to ensure known quality standards:

cleanliness, vetting of the driver's background, and above all a fixed rate structure that does not vary among drivers using the mark. But in NLRB cases, respondents frequently assert that workers who wear the company logo are entirely independent entrepreneurs. This is contrary to the reality of the marketplace and to trademark law. The mere fact that the drivers are organized through some central software platform is not enough to avoid "naked" licensing, as the Ninth Circuit held in *Freecycle*. 626 F.3d at 516-517.

The consequence of uncontrolled "naked" licensing is that the trademark owner loses its exclusive rights to the trademark. *Id*. See also 3 J. McCarthy, *Trademarks & Unfair Competition* § 18:48, p. 18–112 (4th ed. 2012) ("[U]ncontrolled and 'naked' licensing can result in such a loss of significance of a trademark that a federal registration should be cancelled."); *Restatement (Third) of Unfair Competition* § 33(c). Courts rely on the use of a common trademark as a strong indication that the worker is in fact the servant of the trademark owner under general agency principles. *See Huggins v. FedEx Ground Package System, Inc*., 592 F.3d 853, 859 (8th Cir. 2010) (holding that FedEx driver made a triable case of employee status in part because his agreement required "its drivers to look and act like FedEx

employees while they performed FedEx services, and we believe that these provisions show the extent of FedEx's control over some details of [their] work, see *Restatement (Second) of Agency*, § 220(2)(a)").

It follows that any claim to resist employee status in employment litigation might permit the addition of a claim for declaratory judgment or an action to cancel the trademark of the owner. If a business has engaged in naked licensing, the unaffected driver using the trademark may bring a claim for cancellation of the trademark under 15 U.S.C. §§ 1064 and 1119 (giving courts in Lanham Act suits the power to cancel the plaintiff's invalid trademark registrations). *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 99 (2013) (quoting 3 J. McCarthy, *Trademarks & Unfair Competition* § 18:48, p. 18–112 (4th ed. 2012) ("[U]ncontrolled and 'naked' licensing can result in such a loss of significance of a trademark that a federal registration should be cancelled.")).

This would mean that Supershuttle drivers could continue to use Supershuttle's logo and uniform without paying tribute to the centralized corporation, since Supershuttle would have been deemed to have abandoned exclusive rights in the mark.

E. ***Respondeat superior*** doctrine in tort law

The common law of agency defined in the Restatements of Agency is normally developed in tort cases. Common-law courts routinely must decide

whether a defendant company is liable for torts committed by someone the defendant maintains is an independent contractor. For example, if a Supershuttle driver negligently crashes her van in an accident, may the injured customer sue Supershuttle in addition to the driver on the theory of respondeat superior?

The answer is determined by the common law of agency. But here, the very gig-economy employers who assert "independent contractor" status before the NLRB face substantial *respondeat superior* liability under the common law of agency in ordinary tort cases. *See, e.g., Murray v. Uber Technologies*, 486 F.Supp.3d 468, 477 (D. Mass. 2020) (denying motion to dismiss *respondeat superior* claim against Uber where customer adequately pled sufficient control to establish agency for tort purposes); *Search v. Uber Technologies*, 128 F.Supp.3d 222, 231-232 (D.D.C. 2015) (under District of Columbia law, passenger sufficiently alleged that Uber was the employer of driver committing a tort pursuant to *respondeat superior* doctrine, where operator screened new drivers, paid drivers weekly, and, upon threat of termination, subjected drivers to a host of specific requirements, and exercised control of its drivers by controlling the rate of refusal of ride requests, the timeliness of drivers' responses to requests, the display on vehicles of its logo, the drivers' interactions with passengers, and the quality of drivers via its rating system).

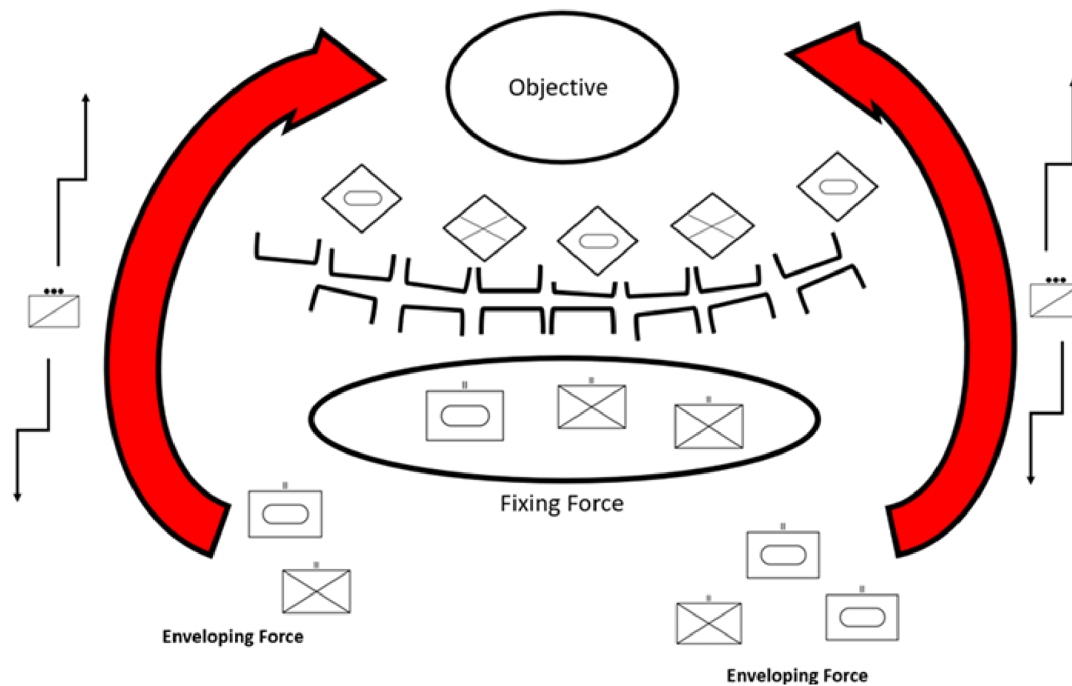
For example, Fed Ex Home Delivery is now admitting its *respondeat superior* liability for drivers as its employees in tort cases, in order to preclude a more damaging theory of negligence liability. *See Bogdanski v. Budzik*, 408 P.3d 1156, 2018 WY 7 (Wyo. 2018); *see also Craig v. FedEx Ground Package System*, 300 Kan. 788, 335 P.3d 66 (2014) (finding Fed Ex drivers to by employees under common law).

The courts and agencies should therefore analyze whether the respondent in a given case would be liable under a *respondeat superior* theory under the state common law of agency for torts committed by the workers in dispute. If the answer is yes, then the court or agency has its answer that these are not independent contractors for NLRA purposes. See *Buffalo Cab Co.*, 189 NLRB 410, 411 (1971) (employer's "independent contractor" claim rejected where "[t]he company occupies the legal relation of principal and agent with respect to liability to the public and assumes responsibility for the driver's tort actions").

E. The Contradictions in the Gig Economy's Legal Position Should Not Be Bewailed-- They Should Be Exploited.

Above all, the pro-worker bar should not simply <u>complain</u> about the contradictions in the gig economy's legal position. We should see them as an opportunity to <u>exploit</u> them. Instead of attacking the employer only through a frontal assault on the employer's doctrine, against which the employer is

heavily fortified, we should seize the opportunity to attack the employer on two different axes. “A commander is skillful in attack when his opponent does not know what to defend.” – Sun Tzu



II. The Clayton Act labor exemption, 15 U.S.C § 17

Much of the outrage over “independent contractor” status relates to the fact that concerted action by such workers has long been assumed to be illegal, as a violation of the Sherman and Clayton antitrust Acts. This is associated with *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 423

(1990), which greenlighted an FTC enforcement action against lawyers acting collectively to boycott their employer to obtain higher compensation.

A. *Confederación Hípica*

But the lawyer defendants in *Superior Court Trial Lawyers* never invoked the Clayton Act labor exemption, 15 U.S.C § 17.[1] They only defended their boycott on First Amendment grounds. The First Circuit found this telling in *Confederación Hípica de Puerto Rico v. Confederación de Jinetes Puertorriqueños*, 30 F.4th 306, 313-317 (1st Cir. 2022) *cert. denied*, __ S.Ct. ___, 2023 WL 124413 (Jan. 9, 2023).

In *Confederación Hípica,* a group of racehorse owners and a racetrack operator sued and association of jockeys, alleging that their three-day work stoppage violated antitrust law by staging a group boycott. The District Court granted an injunction,

[1] "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." 15 U.S.C § 17, (Oct. 15, 1914, ch. 323, § 6, 38 Stat. 731.)

and awarded $1.19 million in damages and sanctions against the jockeys and their counsel. Even though the owners and racetrack appeared to have a slam-dunk case under *Superior Court Trial Lawyers,* the First Circuit dismissed that case in a footnote: "*F.T.C. v. Superior Ct. Trial Laws. Ass'n*, 493 U.S. 411, 425 (1990) (labor exemption not argued)." 30 F.4th at 316 n.4.

The First Circuit proceeded to hold that the Clayton Act labor exemption, by its terms, is not limited to "employees": "The key question is not whether the jockeys are independent contractors or laborers but whether what is at issue is compensation for their labor. Whether or not the jockeys are independent contractors does not by itself determine whether this dispute is within the labor-dispute exemption." 30 F.4th at 314-315.

The First Circuit then held that the labor exemption protected the jockey's concerted work stoppage, because they were combining to resist the plaintiffs' own efforts to constrain their wages. The First Circuit could have been talking about Uber, Lyft and Amazon as well:

> The record shows that the plaintiffs have considerable influence with regulators and have direct ability to affect the jockeys' earnings. The plaintiffs admit that the horse owners could have paid the jockeys at least some of the money they sought, e.g., payment for exercising horses, without permission from racing regulators. The record also shows that, in 1989, the regulators set the jockeys' payment under the influence of both the jockeys and the owners. As the plaintiffs conceded at oral argument, the owners still can influence the jockeys' pay, but they never offered to ask the regulators to raise rates. Further, the plaintiffs agreed in 2007 to increase the jockeys' compensation by

> giving the jockeys a share of the revenue from simulcast races. Taken together, the evidence establishes that the plaintiffs have power to influence -- and in some cases to adjust unilaterally -- the jockeys' compensation.

30 F.3d at 315-316.

The plaintiffs sought rehearing *en banc*, and then petitioned for certiorari. The Chamber of Commerce filed an *amicus* brief in support of the Petition. Nevertheless, the Supreme Court denied *certiorari.* 143 S.Ct. 631 (Jan. 9, 2023).

The jockeys' excellent Opposition to the Petition for Certiorari written by Deepak Gupta and Alisa Tiwari[2] deserves to be studied and emulated. It cites the DOJ action in *Atlanta Opera* at p. 18 n.4. It points out that Section 6 of the Clayton Act does not refer to "employees" – it only refers to "labor." When Congress amended the NLRA in 1947 to exclude independent contractors from the definition of "employee," it did not make the same amendment in the Clayton Act. So as a textual matter, the Court has no business importing the NLRA amendment defining "employee" retroactively into the Clayton Act, when Congress knew how to do it and declined to do so. "Thus, despite how the statutes' words may sound to 'lawyerly ears today,'

[2]Opposition to Certiorari in S Ct. Case No. 22-327, available at https://www.supremecourt.gov/DocketPDF/22/22-327/249746/20221212143831408_22-327%20Brief%20in%20Opposition%20Final.pdf

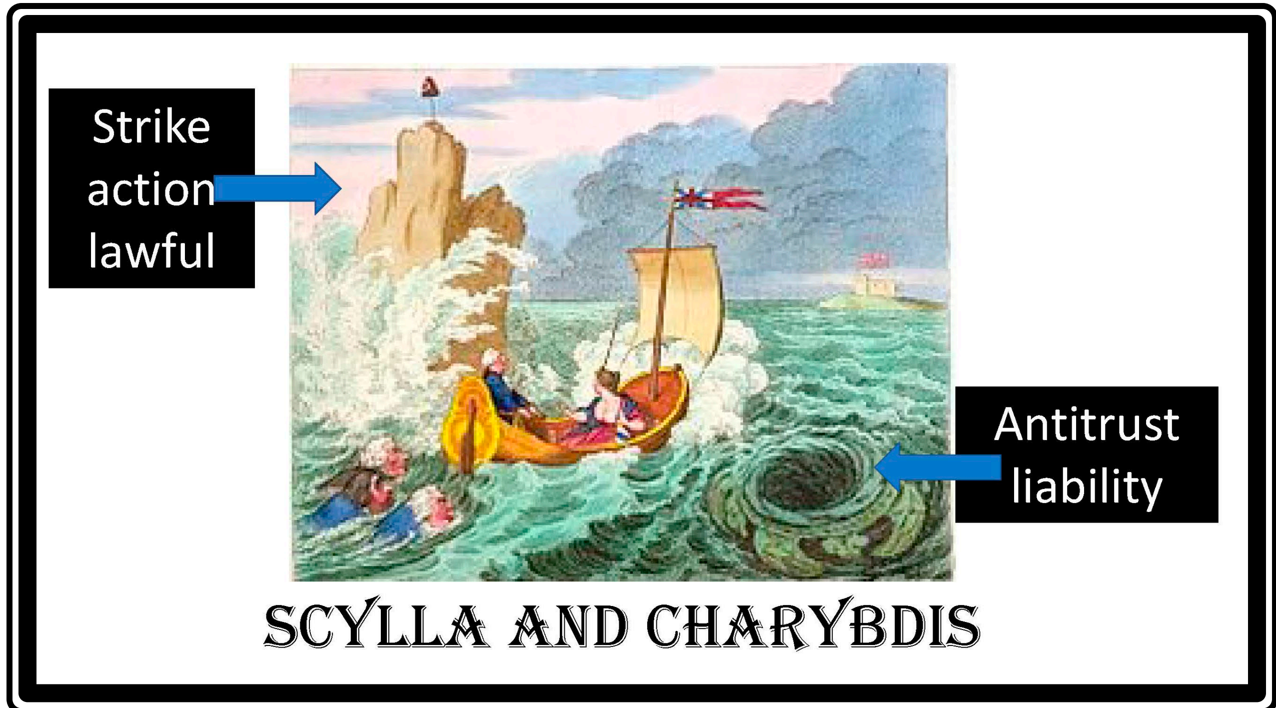
'most people then would have understood' them to reach 'not only agreements between employers and employees but also agreements that require independent contractors to perform work.' *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (discussing the meaning of the phrase 'contracts of employment' in the Federal Arbitration Act of 1925)." Opposition to cert, *Confederación Hípica* p. 20.

B. Gig employers might not be able to avail themselves of the same exemption.

This could be double-edged, of course. It might allow Uber to say "even if our arrangement with independent contractors was a horizontal price-fixing conspiracy, it is exempt from antitrust liability because of the labor exemption." But even there we might get them both ways.

The jockeys' Opposition to cert in *Confederación Hípica* at p. 14 distinguishes prior wage-fixing cases by saying wage-fixing by <u>employers</u> is not protected by the Clayton Act, because the employers are fixing prices for others' labor instead of their own. That is, jockeys may organize and strike to

improve the wages for their own labor, but employers can't do that in fixing wages. That would be the best of both worlds.



But even if that distinction were rejected, at a minimum Uber would be admitting that Uber drivers may organize and strike without worrying about antitrust! Uber might claim that its drivers are supplying more than labor, by operating their own cars—so perhaps *Confederación Hípica* only protects independent contractors who supply nothing but pure labor. But then Uber wouldn't have a labor-exemption defense to antitrust liability.

3. FTC announces it won't prosecute worker/contractor concerted action.

The FTC has now announced, in the wake of *Confederación Hípica*, that it will no longer mount enforcement actions against group boycotts by independent contractor who supply their labor. *FTC Policy Statement On Enforcement Related To Gig Work*, 2022 WL 4366118 (F.T.C. 2022). It focuses mainly on coordination among gig employers without specifically mentioning the *Meyers v. Kalanick* hub-and-spokes theory of horizontal price-fixing within a gig employer's own business model. However, at n.68, the FTC memo explains: "At least one court has ruled that the labor-dispute exemption under Section 1 of the Sherman Act applies to workers regardless of whether they are classified as employees or independent contractors. See *Confederación Hípica de P.R., Inc. v. Confederación de Jinetes Puertorriqueños*, 30 F.4th 306, 314-15 (1st Cir. 2022). Commission enforcement therefore will not focus on organizing efforts undertaken by gig workers. Despite past efforts, the Commission will also refrain from other enforcement or policy efforts that might undermine the

ability of gig workers to organize." [repudiating the FTC's 2018 amicus position against the Seattle ordinance allowing drivers to organize)]."

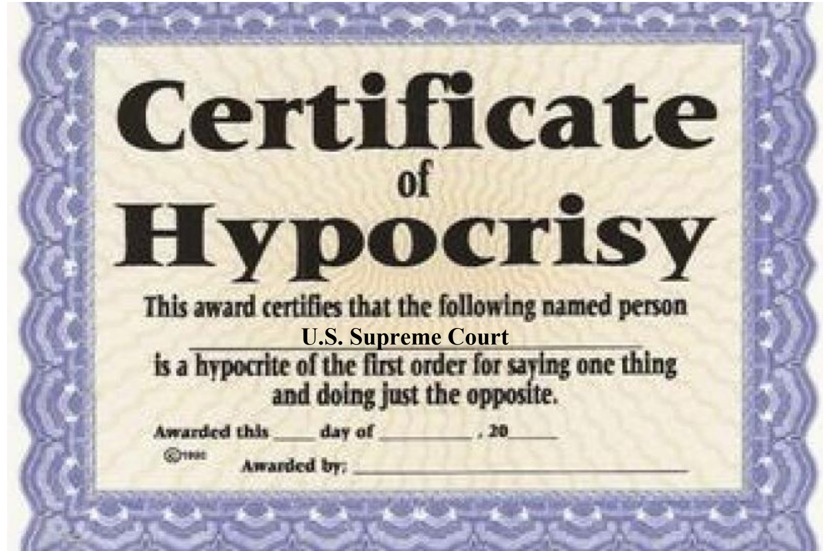
III. Answering Employer Objections That FTC Policy Changes Are *Ultra Vires* Under The "Major Questions" Doctrine.

The employer commenters on new FTC rulemaking against non-compete agreements argue that the FTC may not make substantive rules articulating the Sherman and Clayton Acts because this is a "major question" reserved to Congress. The "major questions" objection is grounded in the separation of powers—that only the legislature, and not the other two branches of government, may develop "major" rules under the Sherman and Clayton Acts.

If this argument were valid, it would prohibit the judicial as well as the executive branch from developing major antitrust rules. If the FTC as an executive agency usurps Congress' legislative power by developing "major" antitrust rules, then do so the Courts when developing "major rules" through common-law adjudication. This would render the last century of judge-made doctrine in antitrust law invalid. The Courts' development of "*per se*" versus "rule of reason" tests would all be unconstitutional, since these would all be legislative decisions on "major questions" of antitrust law that should have been reserved for Congress.

The Supreme Court rejects that view. In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007), for example, the Court described the Sherman Act as a "common law statute" that gives the non-legislative branch greater leeway to frame and revise major antitrust rules. "From the beginning the Court has treated the Sherman Act as a common-law statute. *See National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 688 (1978); *see also Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 98, n. 42 (1981) ("In antitrust, the federal courts ... act more as common-law courts than in other areas governed by federal statute"). Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on 'restraint[s] of trade' evolve to meet the dynamics of present economic conditions. The case-by-case adjudication contemplated by the rule of reason has implemented this common-law approach." *Leegin*, 551 U.S. at 899. The Court further supported its change of law on that major question by directly invoking the FTC's stated expertise: "It is also significant that both the Department of Justice and the Federal Trade Commission—the antitrust enforcement agencies with the ability to assess the long-term impacts of resale price maintenance—have recommended that this Court replace the per se rule with the traditional rule of reason." *Id.* at 900.

Yet now, the employer commenters argue the exact opposite—that the FTC's views on antitrust rules are irrelevant because the FTC cannot displace Congress. That argument is foreclosed by *Leegin*. The Supreme Court sees no separation-of-powers issue in its own "common law" development of major antitrust rules, and justifies its own change in antitrust rules by invoking the FTC's expertise. The employer commenters' "major questions" objection has no merit against this background.



CONCLUSION

Lawyers defending workers should not merely complain about the contradictions in gig employers' legal position. We should exploit them by attacking at all levels, on the ground level of fact-specific litigation and in the air, exposing internal schisms in long-established, but incoherent doctrine.