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SUPREME COURT ASKED TO DECIDE APPLICATION OF ANTITRUST IMMUNITY TO INDEPENDENT CONTRACTORS

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The fight over the classification of employees and independent contractors, like gig workers, has been front and center in California and nationwide for years. Most recently, the U.S. Department of Labor announced a proposed rule that would change the bases for classifying employees and independent contractors. (News Release, U.S. Dept. of Labor, US Department of Labor Announces Proposed Rule on Classifying Employees, Independent Contractors; Seeks to Return to Longstanding Interpretation,Oct. 11, 2022.) The proposed rule has been widely publicized, invoking strong reactions from Main Street to Wall Street and guarantees of protracted litigation. (E.g., Daniel Wiessner, Legal challenges could hamper U.S. rule to limit independent contracting, Reuters, Oct. 12, 2022.) While important, antitrust practitioners keeping an eye on independent contractors have also been taking note of something receiving a lot less fanfare: a recently filed request for the U.S. Supreme Court to address whether federal antitrust law's statutory labor exemption applies to independent contractors.

On Oct 4, a racetrack owner and an association of horse owners filed a petition for writ of certiorari asking the U.S. Supreme Court to reverse the April 4 decision of the First Circuit Court of Appeals in *Confederacion Hipica de Puerto Rico, Inc. v. Confederacion de Jinetes Puertorriquenos, Inc.*, 30 F.4th 306 (1st Cir. 2022). The First Circuit held that the statutory labor exemption protected horse racing jockeys in Puerto Rico from antitrust scrutiny when they organized to delay and stop horse races because of their dissatisfaction with compensation. Confederacion Hipica de Puerto Rico, 30 F.4th at 310-311. Even though they were independent contractors, the jockeys were protected by the statutory exemption, flowing from the Clayton Act and the Norris- LaGuardia Act, that "shield[s] legitimate labor conduct from antitrust scrutiny." *Id.* at 312.

According to the First Circuit, "[t]he key question is not whether the

jockeys are independent contractors or laborers but whether what is at issue is compensation for their labor." *Id.* at 314. The jockeys' dispute was considered a "core labor dispute," centering on the jockeys' efforts to seek "higher wages and safer working conditions." *Id.* at 314. The First Circuit rejected contentions that the jockeys' "independent-contractor status categorically meant they were ineligible for the exemption" and that the exemption does not extend to regulated industries. *Id.* at 314, 316. Because the exemption applied, the First Circuit held that "the district court erred in granting the plaintiffs an injunction and summary judgment," the racetrack and horse owners "are legally precluded from prevailing on their antitrust claims," and "the district court must dismiss the complaint" on remand. *Id.* at 316.

In their petition for writ of certiorari, the racetrack and horse owners have characterized the First Circuit's decision as a "fundamental change in antitrust law" that is "likely to give rise to great harm." (Petition for Writ of Certiorari at 2, *Confederacion Hipica de Puerto Rico, Inc. v. Confederacion de Jinetes Puertorriquenos, Inc.*, No. 22-327 (Oct. 4, 2022).) The petitioners contend that the First Circuit's decision is in conflict with the Norris-LaGuardia Act's statutory language, as well as the decisions of several other Courts of Appeal and the Supreme Court, that have not applied the labor exemption's protections to independent contractors. Rather, the exemption's bearing turns on whether the employer-employee relationship - consistent with the conventional master-servant relationship of the common law - is the "matrix of the controversy." (*Id.* at 24-26.) According to the petitioners, a dispute involving independent contractors fall outside the scope of the statutory labor exemption regardless of whether the dispute at issue centers on compensation. (*Id.* at 1-2.)

The Supreme Court has not yet decided whether it will review the First Circuit's decision - it's anyone's guess what will happen. But the one thing you can bet on is for more to happen on this front. At a minimum, the First Circuit's interpretation and application of the statutory labor exemption is likely to encourage other independent contractors to make similar arguments when they organize and collectively act for better compensation and working conditions. Although the First Circuit's decision is binding precedent only in the Northeast and Puerto Rico, it should motivate companies and platforms heavily reliant on independent contractors and the gig economy to reevaluate their national policies and strategies going forward. Otherwise, they risk being on the receiving end of independent contractors "undertak[ing] economically damaging collusive action without any constraint by federal antitrust law or federal labor law." (Petition for Writ of Certiorari at 8, *Confederacion Hipica*, No. 22-327.) The jockeys in this case, for example, delayed the start of a race and then, weeks later, refused to race for three days, forcing the racetrack owner to cancel the races scheduled for those days and then file suit in federal court. Companies that have intentionally decided to use independent contractors over employees may not have anticipated this issue and should assess their potential risk accordingly.

The Department of Labor's proposed rule is not the only potential sea change. Don't sleep on this horse.

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