

# Workers of the World, Differentiate: Expanding Protections for Workers in the Age of Labor Antitrust

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*Antitrust has traditionally served consumers—how can the law regulate firms in a manner that prevents monopolization and preserves competition among sellers of goods? A recent turn in scholarship and shifting application of antitrust law from a regulatory perspective suggests the possibility for a broader expansion of antitrust protections into the labor market. Rather than considering monopoly effects in a market (where a market is dominated by a single seller), this line of work suggests a turn to focus on monopsony effects (where a market—such as a labor market—is dominated by a single buyer), and a particular focus on the risk of harm to employees created by one company dominating a labor market. Existing theoretical work on merger review regarding labor markets thus far has been in the context of traditional employees, as has been the broader consideration of antitrust’s application to labor. But the positioning of a worker that emerges from a situation like the recent attempt by publisher Penguin Random House to acquire Simon & Schuster is distinct. This Comment proposes and attempts to answer two questions: first, how can we think not only about new applications of antitrust law, but about a new category of worker? And second, how can we broadly position workers, regardless of how they may be categorized, to best respond to issues of monopsony in their relevant markets?*

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## I. INTRODUCTION

Legal scholarship in the realm of antitrust law has increasingly turned its focus to the question of how legislation and regulatory enforcement can protect workers in addition to consumers and competition in the product market.<sup>1</sup> In looking to labor markets rather than product markets, antitrust moves its concern from whether a firm holds *monopoly* power to whether a firm holds *monopsony* power.<sup>2</sup> In instances where a firm holds a monopoly in a market, they are positioned as the single seller amongst a crowd of buyers.<sup>3</sup> One centralized firm or seller monopolizing a product market means that the firm-as-seller can functionally set prices at their whim, leading to consumers being harmed by non-competitive pricing.<sup>4</sup> The application of antitrust legislation to prevent monopolists engaging in anticompetitive actions is well-established.<sup>5</sup> Monopsony power is somewhat of an inverse of monopoly power—rather than one single seller dominating a market, one *buyer* dominates the market.<sup>6</sup> This is most easily seen in the context of labor, where single monopsonists may exercise an unreasonable amount of control over the ability of

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<sup>1</sup> Ioana Marinescu and Eric A. Posner, *A Proposal to Enhance Antitrust Protection Against Labor Market Monopsony* (Roosevelt Inst. Working Paper, 2018), <https://perma.cc/C37H-8NRS>; see also Efraim Benmelech, Nittai K. Bergman, & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?*, 57 J. HUM. RES. (SUPPLEMENT) S200 (2022); ERIC A. POSNER, HOW ANTITRUST FAILED WORKERS (2021).

<sup>2</sup> See Orley C. Ashenfelter, Henry Farber, & Michael R. Ransom, *Labor Market Monopsony*, 28 J. LAB. ECON., 203, 204 (2010).

<sup>3</sup> *Id.* at 203.

<sup>4</sup> See Herbert Hovenkamp, *Antitrust: What Counts as Consumer Welfare?*, (Penn Law Legal Scholarship Repository, 2020), <https://perma.cc/UK7D-NVJV>.

<sup>5</sup> 15 U.S.C. § 2; *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767–68 (1984).

<sup>6</sup> GEORGE STIGLER, THE THEORY OF PRICE 216–18 (1987).

workers to sell their labor at competitive prices.<sup>7</sup> And the turn towards this approach is certainly justified—anticompetitive behavior resulting in concentration has been found to be as prevalent in labor markets as it is in product markets; more foundationally, monopsony has been found to exist in a majority of U.S. labor markets.<sup>8</sup>

Theories of applying antitrust law to protect workers in monopsonistic situations have been evaluated primarily in relation to non-compete and no-poach agreements in hiring contracts as well as in merger review.<sup>9</sup> In the context of non-compete and no-poach agreements, it has been argued that their restriction on workers' mobility has an anticompetitive effect on the labor market, and as such the agreements should be evaluated as per se illegal under existing antitrust law.<sup>10</sup> The DOJ has taken steps to consider labor market harms in their regulatory work, having recently brought cases and submitted statements of interest concerning monopsony power in regards to non-compete and no-poach agreements.<sup>11</sup>

In the context of merger review, the argument is as follows: mergers that create monopsonies in a labor market have the effect of depressing workers' wages as competition for buying labor decreases.<sup>12</sup> Antitrust law as traditionally applied can prevent companies from entering into wage-setting agreements to reduce worker mobility, and thus prevent competitors from recruiting employees through a promise of higher wages.<sup>13</sup> But firms currently face no per se restrictions on merging with or acquiring one another and subsequently choosing to set wages at the single merged firm at a low rate, functionally providing a loophole

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<sup>7</sup> Ashenfelter et al., *supra* note 2, at 204–5.

<sup>8</sup> See José Azar, Ioana Marinescu, & Marshall Steinbaum, *Labor Market Concentration*, 57 J. HUM. RES. (SUPPLEMENT) S167, S197 (2022); see also José Azar, Ioana Marinescu, Marshall Steinbaum, & Bledi Taska, *Concentration in US Labor Markets: Evidence From Online Vacancy Data* 15 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24395, 2018), <https://perma.cc/4MGW-CHKS>.

<sup>9</sup> POSNER, *supra* note 1, at 76; see also *id.* at 91.

<sup>10</sup> Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 ANTITRUST L. J. 165, 194 (2020).

<sup>11</sup> See, e.g., *Indictment, U.S. v. Patel*, No. 3:21-cr-00220-VAB (D. Conn. Dec. 15, 2021); *Statement of Interest of the United States at 7–9, Markson v. CRST International, Inc.*, No. 5:17-cv-01261-SB-SP (C.D. Cal. Aug. 5, 2022).

<sup>12</sup> See POSNER, *supra* note 1, at 91 (when firms are not competing to obtain labor, they have no incentive to offer higher wages as a bargaining chip for potential workers).

<sup>13</sup> See, e.g., *Press Release, U.S. Dep't of Just., Health Care Company Pleads Guilty and is Sentenced for Conspiring to Suppress Wages of School Nurses* (Oct. 27, 2022), <https://perma.cc/QHM6-5H95> (announcing a healthcare staffing company guilty plea for entering into an agreement with a competitor to fix the wages of employee nurses).

through which firms could reach the outcome of a wage-setting agreement without violating existing law. This disconnect is where labor antitrust can step in by framing the merger in terms of monopsony effects, subsequently laying the groundwork for merger review on labor grounds. However, rates of enforcement concerning monopsony-generating mergers are substantially lower; the DOJ's official merger guidelines at present lack any reference to considerations of market power in labor markets.<sup>14</sup> Additionally, merger review in the context of labor has focused on one category of worker in considering who to protect—the hired employee, as independent contractors are assumed to generally have sufficient competition within their labor markets so as not to require protection from the antitrust laws.<sup>15</sup>

The drought of tangible review of monopsony-generating mergers came to an end in 2021, when publishing giant Penguin Random House (hereinafter “PRH”) announced its plan to acquire publishing house Simon & Schuster.<sup>16</sup> In addition to significantly harming competition within the publishing industry, this merger was flagged by the DOJ as having substantial negative effects on authors by reducing the number of buyers available for authors to pitch their manuscripts to.<sup>17</sup> However, the author as worker occupied a unique position. Rather than being a formally hired employee or an independent contractor, the author occupied a sort of in-between space, while still dependent on the publishing house for compensation in the form of advances. The merger was ultimately blocked; the ruling focused largely on monopsony concerns in its conclusion, suggesting that the turn towards monopsony consideration in antitrust enforcement is not a passing trend.<sup>18</sup>

However, this merger is only a small piece of the larger intersection between labor and antitrust. This Comment will look not only to how aspects of labor antitrust preceded it, but also what the broader implications of a merger like the failed PRH/Simon &

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<sup>14</sup> See U.S. DEP'T OF JUSTICE AND THE FEDERAL TRADE COMM'N (F.T.C.), HORIZONTAL MERGER GUIDELINES (2010) [hereinafter Horizontal Merger Guidelines]; note that these are being revised, see *infra* note 40.

<sup>15</sup> See POSNER, *supra* note 1, at 159.

<sup>16</sup> Benjamin Mullin & Jeffrey A. Trachtenberg, *Penguin Random House Parent to Buy Simon & Schuster From ViacomCBS*, WALL STREET JOURNAL (Nov. 25, 2020), <https://perma.cc/6SJJ-M5JD>.

<sup>17</sup> See Complaint at 13, *United States v. Bertelsmann SE & Co.*, No. 1:21-cv-02886 (D.D.C. Nov. 2, 2021) (No. 1), 2021 WL 5105483.

<sup>18</sup> See *United States v. Bertelsmann SE & Co.*, No. 21-2886-FYP, slip op. (D.D.C. Nov. 7, 2022).

Schuster (hereinafter “PRH/SS”) would have been, and how workers could find protection in a world where regulatory work falls short of providing it. While regulatory enforcement on issues of labor antitrust is a recently emerging trend, the idea of using antitrust law to protect workers is not—the legislative history of the first major pieces of antitrust legislation shows concern for workers as a motivating factor for enactment. And while labor law may provide recourse for some, it does not always go far enough to cover workers who are in a unique relationship with the firm for which they provide labor, such as authors in the PRH merger.

Two specific concerns that this Comment will theorize answers to arise out of the post-merger landscape and the historical context of labor antitrust. First, insofar as the author is positioned in a unique labor relationship with the publishing house, how can we define a new term—the “quasi-employee”—to cover not only this distinct labor relationship but other similar workers in different industries? Second, in a world where labor antitrust is growing in prominence, how can workers—quasi-employees, traditional workers, and independent contractors alike—gain protection against the harms of labor monopsony through regulatory enforcement, the labor law-labor antitrust intersection, or private enforcement of antitrust legislation?

Part II will present the historical background behind the antitrust laws and how they considered the plight of workers as well as how regulatory agencies have turned towards enforcement on labor grounds. Part III will discuss the current approach to categorization of workers into employees versus independent contractors and lay out which workers can garner protection under labor law and antitrust alike. Part IV will provide an analysis of the Penguin Random House merger and highlight its unique significance as a labor market-focused case brought by regulatory agencies. Part V will present arguments for introducing a new class of workers into the present classification system and discuss various approaches to providing expanded protection for all workers, regardless of their classification.

## II. HISTORY AND REGULATORY CHANGES

### A. Labor’s Presence in Legislative History

While the shift towards using antitrust in a labor market context may appear to be relatively recent, the legislative history of core antitrust legislation—the Sherman and Clayton Acts, although substantially more so the second—illustrates a running

concern for how the legislation would be used to protect (or potentially harm) workers. Antitrust's orientation towards workers as a group to protect can be viewed in three stages: first, in response to the use of the Sherman Act to bar union activity, labor advocates asked: "how is antitrust being used to harm labor, and how can we remedy that?" Next, in the drafting of the Clayton Act, pro-labor members of Congress remedied that by enacting a statutory antitrust exemption for labor organizing.<sup>19</sup> Finally, today's pro-worker antitrust thinkers ask, "how can antitrust help labor?" as opposed to, "how can antitrust not hurt labor?"

Discussion in the Senate and House debates over the original Sherman Act focused on the way legislation could be used to protect not only businesses but also workers.<sup>20</sup> Even if the major motivating factor for the legislation was to preserve competition among businesses, consideration of how it could be used to safeguard the interests of workers was present as well. The enacted bill includes a provision allowing for private claims to be brought against corporations. This language, found in Section 7, established that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue."<sup>21</sup> While most litigation now occurs between companies or between the government and corporations, the text of the provision was aimed at providing a remedy for individuals—inclusive of laborers—and corporations alike. Even elements of the debates that were not reflected in the final text show attention paid to the plight of workers; for example, an amendment to expand remedies was proposed against a backdrop of concern for "the small men . . . at which all this legislation ought to be directed."<sup>22</sup> This amendment would have permitted individuals who had been separately harmed by the same trust to join as plaintiffs, whether

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<sup>19</sup> 15 U.S.C. § 17.

<sup>20</sup> See generally LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES (Earl W. Kintner, Ed., 1978) (reprinting transcripts of the debates over the Sherman and Clayton Acts, as well as other antitrust legislation). *E.g.*, 21 Cong. Rec. 2556 reprinted in LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 150, 160 (Earl W. Kintner, Ed., 1978) (senator describing a concern that the bill as proposed would harm workers' "absolutely justifiable" rights to organize); *id.* at 162 ("[criminalizing] the combinations of workingmen to promote their interests, promote their welfare, and increase their pay . . . [cannot] be included in the words or intent of the bill.").

<sup>21</sup> 15 U.S.C. § 15.

<sup>22</sup> 21 Cong. Rec. 3145 reprinted in LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 279, 284 (Earl W. Kintner, Ed., 1978). This quote illustrates a fundamental difference in the way antitrust *could* be viewed as compared to how it *has* been viewed—a protective tool for workers, small businesses, and consumers alike, rather than for the purpose of promoting efficiency.

they were buyers of goods or sellers of labor, strengthening their claim in numbers.<sup>23</sup> For example, in the case of a trust whose anticompetitive actions had led to increased prices for consumers as well as decreased wages for workers, this amendment would have allowed both workers and consumers to bring suit together rather than being relegated to individual claims. Ultimately, this amendment lacked the support needed to be incorporated into the final legislation.<sup>24</sup> But while it may be argued that the lack of support shows a lack of concern for workers, consider instead that the mere introduction of the amendment likely shows a concern for the ability of workers and individuals to unite in bringing claims against trusts that had caused them harm. Compare, for example, a hypothetical legislative history which makes no mention of laborers at all, only discussing the impact on competition among businesses and consumers. In this hypothetical, it would be reasonable to assume no concern for labor—or at least no strong concern—was present. However, the legislative history suggests that labor was considered in the earliest formulations of antitrust, even if it failed to be fully reflected in legislation. More broadly, the history of the Act illustrates early showings of the potential for antitrust to protect workers *and* competition between businesses, rather than just the latter.<sup>25</sup>

The Sherman Act ultimately fell short of its aims. Even after its passage, calls for proper legislation to protect workers continued, best embodied in then-presidential nominee Woodrow Wilson's speech accepting the Democratic nomination for President, where he declared that "[t]he working people of America . . . are, of course, the backbone of the Nation. No law . . . that protects them where they cannot protect themselves, can properly be regarded as . . . anything but a measure taken in the interest of the whole people."<sup>26</sup> The subsequent history of the Clayton Act shows a similar theme of concern for workers. In the House debates, representatives introduced examples of failed legislation aimed at protecting workers as well as examples of court decisions ruling against workers in corporation-worker disputes, presumably in an attempt to highlight the need for heightened protections for labor in the proposed legislation.<sup>27</sup> And in the Senate, the Clayton

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<sup>23</sup> *Id.* at 292.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 285.

<sup>26</sup> Speech of Governor Wilson Accepting the Democratic Nomination for President of the United States, S. Doc. No. 62-903, at 17 (2d Sess. 1912).

<sup>27</sup> 51 Cong. Rec. 9153 reprinted in LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 1233, 1274–81 (Earl W. Kintner, Ed., 1978).

Act's power to protect laborers was explicitly flagged; described as "plac[ing] the laboring men upon the same equality under the law with every other citizen . . . this bill give[s] to labor a bill of rights on eight different propositions."<sup>28</sup> When complaints emerged in the debates over the Clayton Act, they were often raised on the grounds that the bill did not go *far enough* in protecting workers.<sup>29</sup> The Act's ultimate gesture towards labor can be seen in the labor exemption; a provision which insulates labor organizations from facing liability for potential violations of the antitrust laws.<sup>30</sup>

Thus, the idea of using antitrust to protect workers is not necessarily new—rather, it has been revitalized. There was an intent for antitrust law to do more than just preserve competition among businesses: to also reach further in its protections for individuals. Legislators discussed the way their bills would be applied to workers and voiced concerns about interpretations that could be harmful to them.<sup>31</sup> In this light, the proposal to broaden antitrust's potential protection of workers should not be a surprise. Scholarship on using antitrust to protect workers puts this concept simply: "the history of applying these statutes so as to protect labor is much thinner than antitrust intervention in product markets, but that is not a result of any imbalance in the statutory language . . . [t]he coverage has always been there."<sup>32</sup>

## B. The Emergence of Labor Antitrust in Scholarship

While early 1900s history shows concern for workers in antitrust spheres, there has long been a relative dearth of scholarship on the issue. To the extent early antitrust scholarship focused on

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<sup>28</sup> 51 Cong. Rec. 13658 *reprinted in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 1768, 1770 (Earl W. Kintner, Ed., 1978).

<sup>29</sup> *See, e.g.*, 51 Cong. Rec. 14312 *reprinted in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 2136, 2183 (Earl W. Kintner, Ed., 1978).

<sup>30</sup> 15 U.S.C. § 17. The practical purpose of this exemption is to exculpate labor organizations from being captured under 15 U.S.C. § 1's prohibition on combinations formed in restraint of trade, which could be interpreted to include labor organizations on its face.

<sup>31</sup> *See, e.g.*, 51 Cong. Rec. 13897 *reprinted in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 1823, 1876 (Earl W. Kintner, Ed., 1978) ("when commerce is embarrassed, hindered, or restrained through [unnatural monopolies] . . . lower wages must inevitably follow."); 51 Cong. Rec. 16212 *reprinted in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 2758, 2778 (Earl W. Kintner, Ed., 1978) ("We have written a new bill of rights for labor . . . [they] are not chattels or commodities or even unlawful conspirators . . . but, on the contrary . . . entitled to every right and privilege and immunity that was ever conceived by the mind of man for his own protection and preservation.")

<sup>32</sup> Herbert Hovenkamp, *Worker Welfare and Antitrust*, 90 U. CHI. L. REV. 511, 516–17 (2023).



labor, it centered mainly on the way legislation interacted with workers' unions and other similar organizations.<sup>33</sup> However, by the start of the twenty-first century, a turn towards using antitrust law as a protection for workers began to emerge out of a landscape dominated by analysis of product markets. This shift is what led to the theory of antitrust known colloquially as "labor antitrust."<sup>34</sup> Labor antitrust generally refers to the application of antitrust regulations to workers and the labor market (rather than the product market). Labor antitrust affects workers in two main ways. First, it can impact their ability to unionize: an employer or customer could claim that workers have combined to restrain trade and thus violated Section 1 of the Sherman Act.<sup>35</sup> While some workers are afforded protection through the Clayton Act's labor exemption,<sup>36</sup> not all have that luxury. This labor-related function of antitrust has been well-recognized throughout history.<sup>37</sup> Second, antitrust could serve as a sword for workers to use when anti-competitive behavior on the part of their employer causes them harm, such as collusion between firms or a merger to monopsony. Unlike antitrust's relation to unionization, the affirmatively pro-worker function of antitrust is a more recent evolution.

The general theme running through this work is that labor market litigation (the sword-side of the two aforementioned paths) has been extremely limited. The traditional wisdom was that labor markets were competitive, or workers were adequately protected through other regulations, so there was no need to enforce antitrust laws within that sphere. This created a self-reinforcing cycle: no case law exists, so there's nothing for litigation to build off of, which means potential litigation is rarely pursued.<sup>38</sup> Enforcement on a regulatory basis has been similarly lacking; for example, the Merger Guidelines used in regulatory review of mergers currently say nothing about possibly adverse effects of mergers on labor markets.<sup>39</sup> (These guidelines are currently being revised, and the Federal Trade Commission and Department of Justice (hereinafter, "Agencies") are considering whether to

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<sup>33</sup> See, e.g., Archibald Cox, *Labor and the Antitrust Laws: A Preliminary Analysis*, 104 U. PENN L. REV. 252 (1955).

<sup>34</sup> See, e.g., Jay B. Sykes, Cong. Rsch. Serv., LSB10725, *Antitrust Issues in Labor Markets* (2022).

<sup>35</sup> See 15 U.S.C. § 1.

<sup>36</sup> 15 U.S.C. § 17.

<sup>37</sup> See *supra* Section II.A.

<sup>38</sup> POSNER, *supra* note 1, at 36.

<sup>39</sup> See Horizontal Merger Guidelines, *supra* note 14.

include labor effects in the new guidelines.<sup>40</sup>) Since relatively few examples exist of using antitrust legislation and doctrines to protect workers, most labor antitrust work remains theoretical.<sup>41</sup>

Consider, in the context of this Comment, merger review. When evaluating the impact of a horizontal merger<sup>42</sup> in relation to protection provided by antitrust laws, the Agencies have issued a set of guidelines to determine whether evidence of adverse competitive effects exists.<sup>43</sup> This evidence includes actual anticompetitive effects, historical comparisons of similar anticompetitive (or competitive) mergers, the weight of the companies' market shares and level of concentration in the relevant market, and the amount of head-to-head competition that exists between the merging companies.<sup>44</sup> To determine market share, the Agencies generally use the companies' actual or projected revenues in the market; market concentration is typically analyzed through the number of competitors or the current value and change in value of the company's Herfindahl-Hirschman Index (HHI) number, calculated by taking the sum of the squares of the companies' market shares.<sup>45</sup> In defining the relevant market, the Agencies look to both the type of product sold and the geographic reach of the companies in question.<sup>46</sup>

While these standards are generally applied to product market analysis, labor antitrust scholarship explores applying the same framework to a merger that suppresses wages or reduces opportunities for worker mobility.<sup>47</sup> When applying the merger review framework to labor, the Agencies could determine the HHI of the labor market at present, and the post-merger HHI of the labor market.<sup>48</sup> If the current HHI or increase in HHI are deemed unreasonably high, the merger would be considered

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<sup>40</sup> See Federal Trade Commission, Remarks of Chair Lina M. Khan Regarding the Request for Information on Merger Enforcement, FTC-2022-0003 (Jan. 18, 2022), <https://perma.cc/5V9M-MA76> [hereinafter Remarks on Merger Information Request].

<sup>41</sup> See POSNER, *supra* note 1, at 5 (as of the time of the book's publication "[the DOJ and FTC] have never blocked a merger because of its effects on labor markets").

<sup>42</sup> When companies that sell similar products at the same stage in the production chain merge together, as compared to a vertical merger (where companies at different points in the production chain merge together).

<sup>43</sup> Horizontal Merger Guidelines, *supra* note 14.

<sup>44</sup> *Id.* at 3–4.

<sup>45</sup> *Id.* at 18; mergers resulting in a change in HHI of less than 100 or an HHI below 1500 will not require further analysis, changes in HHI over 100 or HHIs above 1500 will likely require scrutiny.

<sup>46</sup> See *generally id.* at 7–14 (describing how to define the relevant market and what evidence to do so with).

<sup>47</sup> POSNER, *supra* note 1, at 77.

<sup>48</sup> See, e.g., *id.* at 89.

presumptively anticompetitive and blocked unless defendants could show that it would not actually have the expected anti-competitive effect on workers via an efficiencies defense.<sup>49</sup> The sort of justifications that emerge would aim to show that the merger would create, by way of increased productivity or reduced redundancy, efficiencies that would lead to increased wages in the long run for workers.<sup>50</sup> Merger review in the context of labor has, until recently, remained somewhat theoretical, but there is significant scholarly interest in expanding antitrust's protections for labor, and federal enforcers are beginning to take notice.

### C. Shifting Regulatory Enforcement

Antitrust cases concerning violations within the labor market have been, to this point, few and far between, and the cases that have been brought have rarely resulted in a pro-labor judgment.<sup>51</sup> But recently, the DOJ has begun to shift towards bringing cases or filing supplementary materials on regulatory grounds with more consideration for the worker. For example, in *US v. Patel*, the DOJ brought an indictment alleging that the defendants had entered into a conspiracy to constrain trade by way of highly restrictive noncompete agreements which violated § 1 of the Sherman Act.<sup>52</sup> And in *Markson v. CRST International, Inc.*, the DOJ filed a statement of interest arguing that the no-poach agreements at the heart of the case should be considered per se illegal under § 1 as well.<sup>53</sup> The theory behind this argument rests on the idea that non-compete agreements and no-poach agreements are forms of market allocation agreements, which are per se violations of the Sherman Act; whether they are based on “territory,

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<sup>49</sup> For a discussion of efficiency defenses in a real life merger context, see Fed. Trade Comm'n v. Hackensack Meridian Health, Inc., 30 F.4th 160, 176 (3d Cir. 2022).

<sup>50</sup> Posner sets forth a scenario in his book illustrating how the consideration of efficiencies in a merger context could occur in relation to a merger of two hospitals. See POSNER, *supra* note 1, at 89.

<sup>51</sup> POSNER, *supra* note 1, at 31–35 (explaining that product market cases under § 1 of the Sherman Act occur at a rate 10x higher than those of labor market cases and a rate 18x higher under § 2).

<sup>52</sup> Indictment, United States v. Patel, No. 3:21-cr-00220-VAB (D. Conn. Dec. 15, 2021).

<sup>53</sup> Statement of Interest on Behalf of Plaintiffs at 7–9, *Markson v. CRST International, Inc.*, No. 5:17-cv-01261-SB-SP, (C.D. Cal. Aug. 5, 2022) (this case reached settlement on August 10, 2022). The DOJ has filed similar statements of interest on labor grounds in other no-poach and noncompete agreement cases; see Statement of Interest of the United States, *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, 395 F. Supp. 3d 464 (W.D. Pa. Feb. 8, 2019); Statement of Interest of the United States, *Beck v. Pickert Med. Grp.*, No. CV21-02092, (Nev. 2d. Jud. Dist. Ct., Feb. 25, 2022).

customers, or workers . . . they prevent those unhappy with one company from taking their business [labor] to another company,” thus reducing competition between firms.<sup>54</sup> Antitrust law has also been applied in the criminal context to prevent competing employers from forming agreements to fix employees’ wages, suppressing the wages paid to workers the same way a price-fixing agreement would suppress prices paid by consumers.<sup>55</sup>

While some of these cases are yet to be decided, the increasing level of DOJ enforcement illustrates a new shift towards using antitrust law as a protection for workers. The FTC has furthered this shift by proposing a new rule which would ban employers from using noncompete agreements in their hiring contracts on the grounds that the restrictive nature of noncompete agreements harms both workers and consumers.<sup>56</sup> This proposal follows a recent trend of action at state levels to either bar noncompete clauses entirely or render them unenforceable unless appropriately tailored to the labor market (evaluated both in terms of service and region) in which a worker is situated.<sup>57</sup> These cases and labor antitrust regulation have, however, largely remained focused on issues related to non-compete and no-poach provisions; concerns are generally centered around a worker’s ability to move between jobs.<sup>58</sup> This is a distinct line of analysis in labor antitrust; most existing academic commentary on antitrust and the labor market focuses on the same area.<sup>59</sup>

While there remains a litigation gap in terms of cases challenging mergers on labor grounds, the landscape appears to be

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<sup>54</sup> Statement of Interest on Behalf of Plaintiffs at 9, *Markson v. CRST International, Inc.*, No. 5:17-cv-01261-SB-SP, (C.D. Cal. Aug. 5, 2022).

<sup>55</sup> See Eduardo Porter, *A New Legal Tactic to Protect Workers’ Pay*, THE NEW YORK TIMES (Apr. 14, 2022), <https://perma.cc/KL76-GKKR>. For a recent example of litigation on a wage-fixing agreement, see Dan Papsun, *DOJ Notches First No-Poach Win With Staffing Firm’s Sentencing*, BLOOMBERG LAW (Oct. 27, 2022), <https://perma.cc/9WA6-Q58U>.

<sup>56</sup> Press Release, Fed. Trade Comm’n, *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition* (Jan. 5, 2023), <https://perma.cc/T3HC-FYZJ> [hereinafter FTC Press Release].

<sup>57</sup> See Lily Duong et al., *The Only Constant is Change: Recent (and Potential) Changes in State and Federal Non-Compete Legislation*, Baker McKenzie (Apr. 11, 2022), <https://perma.cc/T3AT-XQ2W> (noting that Colorado, Illinois, Nevada, Oregon, and Washington, D.C. have recently passed new laws on non-competes, limiting the circumstances in which non-compete agreements may be enforced). See also Andrea Hsu, *Millions of Workers Are Subject to Noncompete Agreements. They Could Soon Be Banned*, NATIONAL PUBLIC RADIO (Jan. 5, 2023), <https://perma.cc/2WM3-87N7>.

<sup>58</sup> Non-compete provisions generally bar employees from pursuing work in competition against the hiring party; no-poach provisions generally bar competing firms from soliciting each other’s employees.

<sup>59</sup> See, e.g., Posner, *supra* note 10 (discussing how antitrust law could be applied to noncompete covenants in employment contracts).

shifting, as it has with non-compete and no-poach agreements. In 2020, the FTC released commentary on a proposed merger between healthcare providers analyzing its impact on the labor market; specifically, it analyzed how the merger would affect wages for employees of the merged firms and its effects, more broadly, in the relevant labor market.<sup>60</sup> And in early 2022, the FTC and DOJ announced that they would be conducting a reconsideration of the merger guidelines.<sup>61</sup> In their request for comments, the agencies specifically flagged the impact of monopsony in labor markets.<sup>62</sup> Labor rights organizations have also filed commentary recommending that the agencies focus on labor as they overhaul the merger guidelines.<sup>63</sup>

Company A cannot join with Company B in an agreement to set their workers' wages at a low rate.<sup>64</sup> Yet the law does not necessarily bar Company A from paying their workers a low rate, then *acquiring* Company B, and subsequently paying all the merged firm's employees at a low rate.<sup>65</sup> This is the gap labor antitrust can fill. By reviewing mergers along labor lines, regulatory enforcement has the ability to prevent the exploitation of workers in a post-merger, consolidated firm landscape. The PRH merger highlights a unique area of concern in this regard. Traditionally, applications of antitrust in relation to consideration of workers have been performed in circumstances where a firm's *employees* are at risk of harm from anti-competitive behavior.<sup>66</sup> But a gap

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<sup>60</sup> Fed. Trade Comm'n, Federal Trade Commission Staff Submission to Texas Health and Human Services Commission Regarding the Certificate of Public Advantage Applications of Hendrick Health System and Shannon Health System 36 (Sept. 11, 2020), <https://perma.cc/BT35-42QF>.

<sup>61</sup> Remarks on Merger Information Request, *supra* note 40.

<sup>62</sup> Press Release, Fed. Trade Comm'n, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), <https://perma.cc/EX5T-K6CJ>; *see also Reviving Competition, Part 4: 21<sup>st</sup> Century Antitrust Reforms and the American Worker: Hearing Before the Subcomm. on Antitrust, Commercial, and Administrative Law of the H. Comm. On the Judiciary*, 117<sup>th</sup> Cong. (2021) (statement of Eric A. Posner, Professor, University of Chicago Law School) (testifying on potential applications of antitrust law in labor markets, in the face of potential reforms).

<sup>63</sup> CWA Urges FTC, DOJ to Prioritize Labor Market Impacts as Agencies Prepare to Overhaul Corporate Merger Guidelines, COMM'N WORKERS OF AM. (Apr. 4, 2022), <https://perma.cc/JM7C-85A2>.

<sup>64</sup> *See Price Fixing*, FED. TRADE COMM'N, <https://perma.cc/ZDY8-UCCG> (last visited Mar. 22, 2023); *see, e.g., In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d 1167, 1179 (N.D. Cal. 2013).

<sup>65</sup> It is, functionally, easier for a company to merge and potentially achieve this outcome than it would be for them to simply set wages. The former has valid reasons to permit it going forward (efficiencies); the latter is *per se* illegal.

<sup>66</sup> *E.g., in Patel*, the workers in focus were employees of engineering companies. In *dictment*, *United States v. Patel*, No. 3:21-cr-00220-VAB (D. Conn. Dec. 15, 2021). In the

emerges when independent contractors, or more broadly, workers who do not slot neatly into the category of employee, come into the picture. While an analysis of labor markets in relation to a merger under the theoretical framework outlined in the prior section would consider things such as the change in salary and job mobility as additional factors, the quasi-status of authors creates difficulties; for example, there is no standardized salary being paid to authors nor is there an opportunity to be “hired” by a different publishing house given the nature of the author-publisher interaction.<sup>67</sup> It remains muddled if, and when, non-employees can receive the protection of labor antitrust.

The increased consideration of labor impacts in the application of antitrust regulation not only suggests a shift in the regulatory landscape, but foreshadows more widely-protective antitrust litigation on grounds related to labor harms caused by a merger. Existing analysis considering how antitrust regulations in merger review could be applied to protect workers focuses mainly on employees who have a traditional employer-employee relationship with the merged firm. So too do the examples of litigation on labor antitrust. Thus, the PRH merger and the position of the author as a worker creates a new lens through which we can analyze the application of antitrust protections to workers; more importantly, it highlights the need to reconsider how current law classifies different categories of workers and determines who is afforded protections.

### III. THE CATEGORIZATION OF WORKERS

#### A. Who Is an Employee?

A standard legal differentiation between workers is the division between employee (roughly, those hired by a company on a long-term basis) and independent contractor (those retained by individuals and companies alike on what is usually a short-term basis for specific projects and work assignments).<sup>68</sup> While this

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criminal no-poach case, the workers were hospital employees. Papsun, *supra* note 55. To clarify a possible point of confusion, the workers in *Curtis Markson* were referred to as “under-contract” drivers; this term is not equivalent to “independent contractor” but rather is used to cover the workers who had completed or were enrolled in the company’s driver training program. See *Markson v. CSRT International, Inc.*, 2020 WL 7089957 at \*2 (C.D. Cal. 2020).

<sup>67</sup> See *infra* Section V.A.

<sup>68</sup> Gig workers are often seen as derivations of independent contractors and thus not analyzed as a separate grouping. See Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 L. & CONTEMP. PROBS. 45, 53–54 (2019).

seems relatively straightforward, “[the d]istinction can be elusive” when attempting to delineate between employees and independent contractors.<sup>69</sup> Various government agencies have set out the two-category method of classification for workers. For example, the Internal Revenue Service separates employees from independent contractors for taxation purposes;<sup>70</sup> the Department of Health and Human Services does the same.<sup>71</sup>

But how do those delineations arise? There is no singular test that dispositively determines whether a worker is a traditional employee or an independent contractor. One definition of “employee” is provided in the Fair Labor Standards Act (“FLSA”); this definition states that “the term ‘employee’ means any individual employed by an employer.”<sup>72</sup> However, this definition is so broad as to capture any type of work-for-hire relationship without distinguishing between employee and contractor.<sup>73</sup> The Department of Labor (“DOL”) has since released an interpretive rule aiming to clarify what courts should consider under the FLSA when determining a worker’s status.<sup>74</sup> That said, the DOL has even more recently issued a notice of proposed rulemaking aimed at revising that standard of evaluation, suggesting confusion remains even in the narrow statutory classification under the FLSA, let alone the broader distinction between employee and contractor.<sup>75</sup> The National Labor Relations Board (“NLRB”) uses a multi-factor “common law” test to distinguish employees from contractors,

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<sup>69</sup> POSNER, *supra* note 1, at 137.

<sup>70</sup> *Independent Contractor (Self-Employed) or Employee?*, INTERNAL REVENUE SERVICE, <https://perma.cc/7AFG-GTSC> (Mar. 21, 2023) (explaining that the difference between independent contractors and employees is largely, although not entirely, reliant on the level of control exercised over their work).

<sup>71</sup> *What’s the Difference Between an Independent Contractor and an Employee?*, U.S. DEP’T HEALTH AND HUM. SERV. (Jun. 18, 2020), <https://perma.cc/DAH8-DGWU> (providing a table illustrating differences in tax law application between independent contractors and employees).

<sup>72</sup> 29 U.S.C. § 203.

<sup>73</sup> See *Goldberg v. Whitaker House Co-op., Inc.*, 366 U.S. 28, 33 (1961) (explaining that “economic realities” rather than “technical concepts” should be the determinant of a laborer’s employee status).

<sup>74</sup> *Independent Contractor Status Under the Fair Labor Standards Act*, 29 C.F.R. § 795 (2021) (recommending that courts adopt a five-factor test considering economic realities with an emphasis on worker control over work and the worker’s opportunity for profit or loss).

<sup>75</sup> *Employee or Independent Contractor Classification Under the Fair Labor Standards Act*, 87 Fed. Reg. 62218 (proposed Oct. 13, 2022) (advocating for a holistic application of the five factors, rather than isolating the two emphasized in the above footnote as dispositive factors for consideration).

which largely follows the economic realities test, which is described in more detail below.<sup>76</sup>

As of 2021, over twenty states also have a separate statutory test known as the ABC test for independent contractors, which evaluates three factors: A) the worker is free from the control and direction of the hirer, B) the worker performs work outside of the hiring entity's business, and C) the worker is engaged in an independently established trade of the same nature as that of the work performed.<sup>77</sup> Under this test, all three factors must be met (hence the "ABC" name). Additionally, certain statutes have set definitions of what an employee is, but "determination of employment status must be made separately under each law," meaning that a worker categorized as an employee under one statute's application may not be considered an employee under another.<sup>78</sup>

Given the variance of classification that arises both at the state level and in regard to specific statutory applications, it should be apparent that the delineation between employee and contractor introduces a line-drawing problem for courts. As such, when evaluating a worker's status, courts may look to other factors to guide their differentiation of potential employees from contractors. One common law test is often referred to as the "control test," established by *Community for Creative Non-Violence v. Reid*.<sup>79</sup> This test asks whether the hiring party has the right to control the manner and/or means by which the product of labor is created. Various factors are considered (skill required, source of materials, relationship between parties, reliance method of payment, tax treatment, etc.); none are dispositive.<sup>80</sup> The control test is largely a question of worker agency; the less control the worker

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<sup>76</sup> See *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 at 17–20 (2019). The eight common-law factors the NLRB applied in *SuperShuttle* are as follows: (i) extent of control by employer, (ii) form of payment, (iii) ownership of tools/place of work, (iv) supervision by employer, (v) the relationship the parties believed they had created, (vi) the work as distinct from the employer's business, (vii) the length of the employment term, and (viii) special skills required by the worker.

<sup>77</sup> Jon O. Shimabukuro, Cong. Rsch. Serv., R46765, *Worker Classification: Employee Status Under the National Labor Relations Act, the Fair Labor Standards Act, and the ABC Test 9* (2021). See also *Dynamex Operations W., Inc. v. Superior Ct.*, 179 Cal. Rptr. 3d 69, 74–75 (Cal. Ct. App. 2014) (California court case prompting the codification of the ABC test into state law); for examples of state legislation that utilize the ABC test, see Cal. Lab. Code § 2775 (West 2020); see also Del. Code Ann. tit. 19 § § 3501(a)(7), 3503(c) (2019); Mass. Gen. Laws ch. 149, § 148B (2019).

<sup>78</sup> *Fair Labor Standards Act Advisor*, DEP'T OF LAB., <https://perma.cc/7PLG-REAV> (last visited Jan. 19, 2023).

<sup>79</sup> 490 U.S. 730, 751 (1989); see also *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (applying the control test to an ERISA dispute).

<sup>80</sup> *Reid*, 490 U.S. at 751–52.



has over their work, the more likely they are to be categorized as a hired employee.

There are also a set of six factors that courts consider in evaluation of whether somebody fits the “employee” category known as the “economic realities” test—again, none are dispositive. The factors are: 1) the nature and degree of alleged employer’s control over the manner in which work is to be performed (higher control is suggestive of employee); 2) the worker’s opportunity for loss or profit depending on managerial skill (if management is able to influence the worker’s ability for profit through their specific actions in relation to the worker’s actions, it is suggestive that the worker is an employee rather than a contractor); 3) the worker’s investment in equipment and materials required for their role (self-investment is suggestive of contractor); 4) whether the service rendered requires a high degree of skill in a unique area (if so, suggestive of contractor); 5) the degree of permanency and the duration of the working relationship (high permanency and duration is suggestive of employee); and 6) the extent to which the service rendered is an essential part of the employer’s business (if the employer regularly traffics in this trade, suggestive of employee). An overarching chord struck in the courts’ determination of whether somebody fits employee status is that these factors are difficult to apply consistently.<sup>81</sup> Table 1 shows distinctions that can help to differentiate between an employee and an independent contractor:

**Table 1: Distinctions Between Contractor and Employee<sup>82</sup>**

<b>Legal label:</b> what is the worker named as?	Contractor	Employee
<b>Type of work relationship:</b> does the worker need to form a relationship with the buyer?	Discrete: work can be completed without an established relationship with buyer (hirer)	Relational: work is influenced by relationship with buyer (hirer)
<b>Property right:</b> who owns the tools used in the labor?	Worker: worker owns tools of labor	Labor buyer: hirer owns tools of labor used by worker

<sup>81</sup> See *NLRB v. Hearst Publ'ns.*, 322 U.S. 111, 121 (1944).

<sup>82</sup> Modified from POSNER, *supra* note 1, at 149.

<b>Hirer's control over work:</b> who has agency over the labor performed?	Low: worker retains relatively high levels of agency in work	High: worker operates according to desire of hirer
<b>Opportunity for profit based on managerial skill:</b> does worker gain or lose depending on management skill?	Nonexistent: worker's profit is predetermined, not set by hirer's profit	Existent: worker's profit is influenced by success overall of hirer
<b>Service necessity to hirer's business:</b> could the hirer normally operate without this worker?	Low: worker exists outside of the general trade of the hirer's business	High: hirer's business could not function without the worker's service
<b>Exit cost:</b> how easy is it for the worker to find other competitive work opportunities?	Low: worker can find other competitive opportunities for work	High: worker may not immediately find other opportunities for work

It is important to note that these factors are not always easy to apply, nor do they necessarily point to a clear answer. Take “necessity to hirer’s business” in the context of Uber drivers, who are generally classified as independent contractors.<sup>83</sup> It is difficult to imagine a world in which Uber’s business model remains successful without the independent contractors it hires. While that, when viewed in isolation, would suggest that a driver is an employee, looking at all factors supports the classification of a driver as an independent contractor (the driver has relatively low exit costs, the driver retains relative agency in their work, the driver possesses their car as their tool of labor).

A new test has also been proposed in academic literature, referred to as the “relational work test.”<sup>84</sup> This test states that a worker is an employee of a firm, rather than an independent contractor, when the cost of finding alternative work opportunities of the same type and comparable pay is high (known as having high exit options). High exit options generally exist when work is

<sup>83</sup> Vanessa Romo, *Uber Drivers Are Not Employees, National Relations Board Rules. Drivers Saw It Coming*, NATIONAL PUBLIC RADIO (May 15, 2019), <https://perma.cc/TWL9-HHKZ>.

<sup>84</sup> POSNER, *supra* note 1, at 153.

relational; to determine if work is relational, consider if the worker needs to establish a relationship with the buyer in order to sell their labor (relational), or if labor can be sold sans relationship building (discrete).<sup>85</sup>

The line of argument that follows from this suggests that the structure of the labor market can help define whether a worker is an independent contractor or an employee.<sup>86</sup> Workers who perform relational work are more likely to face a non-competitive market (e.g. an employee who has invested in the relationship with their employer will face high exit costs; once they have invested in their firm, they likely earn higher wages than they could at competitors and thus lack the ability to make a credible threat of quitting) while those who perform discrete work can simply move to another labor buyer (e.g. a contracted locksmith who finishes a job at one house can quickly move to work at another house).<sup>87</sup> Thus, under this approach, classification of a worker as a contractor versus an employee can be conducted according to whether workers perform relational work and thus are subjected to a monopsonized market for their labor.<sup>88</sup> The relational work test assumes that the market for independent contractors is competitive because of the discrete nature of their work. Professor Eric Posner, a proponent of the relational work test as a classification method, suggests as much: “When workers engage in discrete work in competitive labor markets, they should be classified as contractors because competition adequately protects them . . . . When workers engage in relational work in uncompetitive labor markets, they should be classified as employees.”<sup>89</sup> Under the relational work analysis, one more row could be added to the chart above, where a competitive market suggests status as a contractor, and a monopsonized market suggests status as an employee:<sup>90</sup>

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<sup>85</sup> This theory suggests the answer to the Uber driver uncertainty as above lies in whether the drivers perform relational or discrete work, rather than whether drivers control their work. See Eric A. Posner, *The Economic Basis of the Independent Contractor/Employee Distinction*, 100 TEX. L. REV. 353, 358 (2021)

<sup>86</sup> *Id.* at 356.

<sup>87</sup> *Id.* at 357.

<sup>88</sup> *Id.* at 366–67.

<sup>89</sup> *Id.* at 370.

<sup>90</sup> *But see infra* section V.A (challenging the assumption that market status defines categorization).

<b>Labor market:</b> what characterizes the market the worker participates in?	Competitive	Monopsonized
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### B. Who Receives Protection, and How?

Once the lines have been drawn—even if loosely—defining the position of a worker as employee or independent contractor, who can be protected under labor antitrust?<sup>91</sup> The answer, at present, is not necessarily as broad nor as clear as one might think. Workers classified as employees, regardless of which test results in that classification, receive protection from employment and labor law. In addition, they seem to have a prima facie case for labor antitrust protections. The (recent) history of using antitrust in the context of worker protection has largely, if not entirely, centered around protections for workers classified as traditional employees.<sup>92</sup> And the earliest codified protection for workers in antitrust legislation—the labor exemption in the Clayton Act—affords employees who form labor unions protections from being penalized under antitrust law.<sup>93</sup> Throughout history, the default is to protect employees. Without those protections, their ability to find different buyers for their labor may be eliminated.<sup>94</sup>

Conversely, independent contractors enjoy substantially fewer protections under the law. They do not receive shelter from unfair employment practices through labor or employment law; the Fair Labor Standards Act specifies that only “employees” can receive protection under the statute, which means workers classified as independent contractors are not covered by its provisions concerning fair hours and wages.<sup>95</sup> Employers may choose to classify workers who are edge cases as contractors rather than employees so as to reduce the number of protections they must afford

<sup>91</sup> See generally POSNER, *supra* note 1.

<sup>92</sup> See *supra* Sections II.B, II.C.

<sup>93</sup> 15 U.S.C. § 17.

<sup>94</sup> *Id.*

<sup>95</sup> See *Independent Contractor vs. Employee*, COMMUNICATIONS WORKERS OF AMERICA, <https://perma.cc/6WFY-E5LD> (last visited Mar. 18, 2023); see also Yuki Noguchi, *Unequal Rights: Contract Workers Have Few Workplace Protections*, NATIONAL PUBLIC RADIO (Mar. 26, 2018), <https://perma.cc/NNN5-G5YY> (explaining that independent contractors lack protection against harassment and discrimination in the workplace as compared to their employee counterparts).

them.<sup>96</sup> The independent contractor has, thus far, fared no better turning to labor antitrust. The antitrust exemption for labor organizing, discussed above, has been interpreted to not apply to contractors; local ordinances aimed at providing independent contractors with collective bargaining rights have been challenged as violations of the antitrust laws.<sup>97</sup> While the narrow application of the labor exemption has been questioned in theory, its practical application has yet to change.<sup>98</sup>

Differentiating between employee and contractor matters a great deal, regardless of what test or factors are used in making that distinction. An employee receives protection from labor law, so there are limits on the extent to which their employer can depress wages or worsen working conditions; an independent contractor is not subject to those protections, and the market structure/relational work theory assumes that a contractor in a competitive market needs no such protection because of their ability to move between employers.

Traditional forms of differentiation between employee and contractor<sup>99</sup> seem to ignore market structure altogether, failing to consider harms a worker might face because of lack of labor market competition. The relational work test as a manner of classification relies more on market structure but presumes that a formalized distinction remains between employees and contractors; protection is extended when the market for a worker's labor is monopsonized. While the test may capture some workers classified as independent contractors under a traditional test, it may not always go far enough.<sup>100</sup>

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<sup>96</sup> Steinbaum, *supra* note 68, at 46.

<sup>97</sup> *Chamber of Commerce of the United States of America v. City of Seattle*, 890 F.3d 769 (9th Cir. 2018) (Seattle City Council passed an ordinance providing bargaining rights to Uber drivers not classified as employees; the Chamber of Commerce sued on behalf of Uber challenging it under the Sherman Act).

<sup>98</sup> The National Labor Relations Act, 29 U.S.C. §§ 151–169, protects collective bargaining for “employees,” a category which has been interpreted to exclude independent contractors. For a proposal to allow independent contractors to engage in unionizing efforts and receive the protection of the Clayton Act’s labor exemption, *see* Hiba Hafiz, *Labor Antitrust’s Paradox*, 87 U. CHI. L. REV. 381, 411 (2020); *see also* Steinbaum, *supra* note 68, at 63.

<sup>99</sup> *See supra* Section II.A.

<sup>100</sup> For example, it would not necessarily capture the PRH merger authors as workers who perform relational work (some authors stay with publishers, but not all do, and many move between publishers).

## IV. THE PENGUIN RANDOM HOUSE MERGER

## A. The Nature of the Publishing Landscape

In November 2020, media company Bertelsmann SE (owner of the publishing giant Penguin Random House) entered into an agreement to acquire publishing house Simon & Schuster from Paramount Global.<sup>101</sup> Penguin Random House and Simon & Schuster together account for 31% of all print books sold in the United States.<sup>102</sup> Importantly, entry into the publishing market is limited. While independent publishing houses exist, the landscape is controlled mainly by a handful of mega-publishers, known as the Big Five, who control nearly 60% of the market for “trade books.”<sup>103</sup> When looking at shares of the publishing market, Penguin Random House is the largest of the Big Five, and Simon & Schuster is the third-largest; as of 2022, PRH was annually publishing over 2,000 new titles in the U.S. and bringing in nearly \$2.5 billion in revenue, while Simon & Schuster was publishing 1,000 new titles and generating over \$760 million in revenue.<sup>104</sup> Outside of the Big Five, small publishers do not have sufficient capital to compete in a manner that would benefit authors.<sup>105</sup> Self-publishing provides even less financial support to authors.<sup>106</sup> Thus, the Big Five, including PRH, dominate the publishing market; in the government’s complaint, the publishing industry was characterized as being an “oligopoly” dominated by PRH.<sup>107</sup>

Authors are in a unique position. As authors usually do not self-publish, they rely on publishing houses to print and distribute their work. When authors are looking to sell publishing rights to their work, they approach publishing houses with a proposed draft or manuscript in an attempt to receive a bid. Bids for work come in the form of advances—a set payment made upfront

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<sup>101</sup> Mullin & Trachtenberg, *supra* note 16.

<sup>102</sup> Jan Wolfe, *Penguin Random House CEO Defends Publishing Merger at Antitrust Trial*, WALL STREET JOURNAL (Aug. 4, 2022), <https://perma.cc/EB9Q-HBFN>.

<sup>103</sup> United States v. Bertelsmann SE & Co., No. 21-2886-FYP, slip op. at 3 (D.D.C. Nov. 7, 2022) (“trade books” are books intended for general readership as opposed to specialized manuals).

<sup>104</sup> *Id.* at 1; note that the second largest publishing house after Penguin Random House, HarperCollins, had a market share worth less than half of Penguin’s at 11%; see Bhuma Shrivastava & Natalia Drozdiak, *ViacomCBS Sells Simon & Schuster to Penguin Random House Owner for \$2.2 Billion*, FORTUNE (Nov. 25, 2020), <https://perma.cc/4MNM-BHU3>.

<sup>105</sup> *Bertelsmann SE*, slip op. at 15.

<sup>106</sup> *Id.* at 19.

<sup>107</sup> Complaint at 3, United States v. Bertelsmann SE & Co., No. 1:21-cv-02886 (D.D.C. Nov. 2, 2021) (No. 1), 2021 WL 5105483.

against the projected royalties the author will receive in the future.<sup>108</sup> Oftentimes, authors only receive compensation from their advance for the publishing rights to their book; rarely will an author earn out royalties in excess of the value of the advance.<sup>109</sup> Authors are not tied to one single publishing house. Rather, they may present their work to various houses in what is known in the industry as a publishing auction, to receive multiple offers and land at the best offer possible.<sup>110</sup>

Authors exercise some level of control over the auction, and thus over their wages. When multiple publishing houses are interested in the publishing rights to a book, the author and agent can “capitalize on [that] enthusiasm” and play publishing house bids off each other in order to get the largest possible advance.<sup>111</sup> For instance, one unnamed author was able to increase the value of their advance from \$150,000 to \$775,000 because of “stiff competition” between publishing houses for their manuscript.<sup>112</sup> Authors can submit manuscripts to multiple subdivisions of a publishing house (known as “imprints”) but the ability to negotiate the value of their advance is substantially weaker when submitting only internally, because a publishing house has no economic incentive to compete internally—why unnecessarily drive up the price amongst themselves?<sup>113</sup>

Thus, the wage structure for authors is unique. Their compensation comes from work created outside of their relationship with the publishing house, the value of which is determined by competition among bidders; any subsequent compensation for their work is not guaranteed. In one sense, the author could be viewed not only as a worker in relation to the publishing house, but a direct supplier of goods. Without their inputs, the publishing house would have no product to sell. The more publishing houses that compete in the bidding process, the more the author can extract in the form of an advance. The inverse of this is obvious: the fewer publishing houses that exist, the less likely the

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<sup>108</sup> *Bertelsmann SE*, slip op. at 6.

<sup>109</sup> *Id.* at 7.

<sup>110</sup> Martha Woodroof, *First Novels: Under the Gavel of a Book Auction*, NATIONAL PUBLIC RADIO (Mar. 13, 2014), <https://perma.cc/6TCM-F5TD>. If an author chooses not to participate in the auction process, it is often because they either have a pre-existing “first look” provision in a prior publishing contract or because one publisher is willing to pay a premium to avoid facing competition in the auction process. *See Bertelsmann SE*, slip op. at 9.

<sup>111</sup> *Bertelsmann SE*, slip op. at 11–12.

<sup>112</sup> *Id.* at 12.

<sup>113</sup> *Id.* at 14. There is evidence that publishing house imprints actually coordinate bids, to suppress advances. *See id.* at 15.

author will see competition for their product, and the less control authors will have over their wages.

### B. Concerns Emerging From The Merger

Following the announcement of the merger, and consistent with the Biden Administration's increased focus on antitrust enforcement, the Department of Justice sued to block the merger.<sup>114</sup> The complaint filed by the DOJ sheds light on the concerns surrounding the merger, largely centered around preserving competition within the publishing sector and preventing single-firm domination. First, the merged firm would have controlled nearly half of the relevant product market as defined by the DOJ. Together with the next largest competitor it would have controlled more than two thirds of the market.<sup>115</sup> Second, the merger would have unilateral effects via the direct elimination of one of PRH's major competitors.<sup>116</sup> Lastly, the merged firm would have coordinated effects via increasing the possibility of collusion between the remaining publishers in the Big Five.<sup>117</sup>

Throughout the complaint, there was a focus on how the merger would impact authors and their compensation. The introduction to the filing states that "[PRH]'s proposed acquisition of Simon & Schuster would result in substantial harm to authors, particularly authors of anticipated top-selling books."<sup>118</sup> Competition among firms gives authors the opportunity to negotiate for and secure high-paying advances.<sup>119</sup> The merger's elimination of head-to-head competition would, as the DOJ argued, have enabled the consolidated PRH firm to "pay less and extract more from authors who often work for years . . . before producing a book."<sup>120</sup> This is because compensation is generally negotiated on an individual basis with publishing houses; publishers increase their offers when they perceive competition for a manuscript as high in order to secure acquisition rights for themselves.<sup>121</sup>

When evaluating sell-side competition, regulators ask whether a hypothetical monopolist of the relevant market would impose a small but significant and non-transitory increase in

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<sup>114</sup> Wolfe, *supra* note 102.

<sup>115</sup> Complaint at 4, *United States v. Bertelsmann SE & Co.*, No. 1:21-cv-02886 (D.D.C. Nov. 2, 2021) (No. 1), 2021 WL 5105483.

<sup>116</sup> *Id.* at 16.

<sup>117</sup> *Id.* at 21.

<sup>118</sup> *Id.* at 2.

<sup>119</sup> *Id.* at 17.

<sup>120</sup> *Id.* at 5.

<sup>121</sup> *Id.* at 13.



price (“SSNIP”) on products in that market without losing enough buyers to make the SSNIP unprofitable.<sup>122</sup> In the complaint, the DOJ applied a variant of this test to the wage structure for authors, concluding that the merger would “decrease the advances paid to authors by a small but significant, non-transitory amount” without leading to a loss in profit for the merged firm.<sup>123</sup> Application of the SSNIP test to wages takes a test generally used in sell-side analysis and applies it in a buy-side setting. Authors earning less from advances from decreased competition would mean authors earning less, full stop—many authors do not earn royalties past the value of their advances, which means that the advance received is often the sum total of an author’s compensation from the publishing house.<sup>124</sup> A post-merger world would have been one in which authors had fewer alternatives from whom they could solicit advance offers in auctions, and subsequently they would lose leverage in negotiations with publishing houses from whom they had already secured offers, leading to depressed compensation.<sup>125</sup>

This line of concern wasn’t limited to the paper complaint. In one of the higher-profile moments of the trial, the DOJ called author Stephen King to speak on the merger.<sup>126</sup> In his testimony, King also discussed the aforementioned fears of reduced competition due to consolidation of market players.<sup>127</sup> But King’s testimony spoke more broadly to the concerns of authors—fewer publishing houses means that authors would have less opportunity to garner multiple bids at auction and negotiate the price for which they’ll sell their work.<sup>128</sup> His testimony explicitly framed the merger in labor terms, demonstrating the shift in the focus of antitrust enforcement the PRH trial represented—away from a product market lens into the world of labor.

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<sup>122</sup> Horizontal Merger Guidelines, *supra* note 14, at 8.

<sup>123</sup> Complaint at 13, *United States v. Bertelsmann SE & Co. et al.*, No. 1:21-cv-02886 (D.D.C. Nov. 2, 2021) (No. 1), 2021 WL 5105483.

<sup>124</sup> *Id.* at 20.

<sup>125</sup> *Id.* at 4.

<sup>126</sup> Adam Bednar, *Stephen King Testifies That Merger Between Publishing Giants Would Hurt Writers*, N. Y. TIMES (Aug. 2, 2022), <https://perma.cc/KS49-WRER>.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

### C. Grounds For Rejection

Ultimately, Judge Florence Pan blocked the PRH-Simon & Schuster merger.<sup>129</sup> The DOJ's complaint brought concerns on both sell-side and buy-side grounds; the ruling's analysis centers on the buy-side (labor) effects of the merger.<sup>130</sup> The framing of the merger can be distinguished from a traditional sell-side case in regards to who would face harms from decreased competition and increased consolidation between publishing houses.<sup>131</sup> Cases decided along sell-side lines, where the harm arises from consolidation reducing the number of firms selling, focus on the impact to consumers, asking "do consumers face higher prices and/or decreased options as a result of this merger?"<sup>132</sup> Conversely, the judge's analysis regarding the PRH merger asked the question, "do authors face decreased opportunities for competitive work options?", highlighting buy-side harms; or put simply, the merger's impact on *workers* as compared to *consumers*.<sup>133</sup>

In the opinion, there was a "[s]trenuous dispute" between the parties over the appropriate boundary of the product market.<sup>134</sup> The government centered their argument around top-selling books as a subset of trade books, while PRH argued that the market should be defined in terms of *all* trade books rather than a subset.<sup>135</sup> In determining the relevant market, the court looked to three points of evaluation: practical indicia<sup>136</sup> of a relevant market; the possibility for supply substitution;<sup>137</sup> and application of the SSNIP test to the DOJ's proposed market.<sup>138</sup> In looking at

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<sup>129</sup> *United States v. Bertelsmann SE & Co.*, No. 21-2886-FYP, slip op. (D.D.C. Nov. 7, 2022).

<sup>130</sup> *See Bertelsmann SE*, slip op. at 21, n.15.

<sup>131</sup> Alexandra Alter & Elizabeth Harris, *Judge Blocks a Merger of Penguin Random House and Simon & Schuster*, N. Y. TIMES (Oct. 31, 2022), <https://perma.cc/2BHN-B2MN>.

<sup>132</sup> Horizontal Merger Guidelines, *supra* note 14, at 18–20.

<sup>133</sup> As a hypothetical, a ruling on this merger which focused more on monopoly effects would likely have centered analysis around how a theoretical consumer would have been impacted by consolidation through factors such as facing higher prices for bestselling books or decreased choice in what books they could buy. *See id.* at 6–7.

<sup>134</sup> *Bertelsmann SE*, slip op. at 24; *see generally id.* at 24–30.

<sup>135</sup> *Id.* at 35.

<sup>136</sup> Practical indicia include "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct [sellers], distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe v. United States*, 370 U.S. 294, 325 (1962).

<sup>137</sup> Supply substitution as applied to a buy-side case considers the buyers of the relevant product, asking to whom those buyers could turn for substitutes in the event of consolidation. *See id.*

<sup>138</sup> *Bertelsmann SE*, slip op. at 25. The SSNIP test is also referred to as the hypothetical monopolist test.

practical indicia, the court found that there was clear industry recognition of the submarket by way of standard baseline pricing for advances on potential top-selling books as well as specialized treatment for books anticipated to be top-sellers within trade books.<sup>139</sup> The hypothetical monopolist test as presented in the government's complaint was found to sufficiently support the definition of the market as centered around top-selling books.<sup>140</sup>

The court's analysis focused on how the merger would impact competition among publishing houses to acquire potential top-selling books, and whether it would have increased concentration in that market.<sup>141</sup> Post-merger, the Penguin Random House-Simon & Schuster (PRH-SS) firm was found to have the potential to control 49% of the relevant market, with the Big Four (no longer the Big Five, after the merger) controlling 91% of the market.<sup>142</sup> This showing of undue concentration gave the government a *prima facie* case that the merger would violate the Clayton Act.<sup>143</sup>

The opinion is the first major antitrust merger case to focus on buy-side effects on workers. Moreover, it's an opinion that relies on sophisticated statistical evidence—including application of the SSNIP and HHI tests—to reach its conclusion.<sup>144</sup> The government's earlier characterization of the publishing industry being an oligopoly is not off-base. The publishing industry has been increasingly trending towards consolidation, with the Big Five heavily contributing to this, and the PRH merger would have only furthered that.<sup>145</sup> Firms in the publishing market are “prone to collusion”—their actions had previously increased prices for consumers and reduced compensation for authors.<sup>146</sup> The opinion called attention to the high likelihood that a merger would

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<sup>139</sup> *Id.* at 26; *see also id.* at 35. Defendants argued that the government had not proven anticompetitive effects in their preferred market, that of all trade books, but the court found that anticompetitive effects in *any* line of market were sufficient to base a Clayton Act violation on. *See id.* at 30.

<sup>140</sup> *Id.* at 42.

<sup>141</sup> *Id.* at 41.

<sup>142</sup> *Id.* at 44.

<sup>143</sup> *Id.* at 45. This was supported by the results of the Herfindahl-Hirschman Index analysis as well. *See id.* at 46; *see generally* United States v. Anthem, Inc., 855 F.3d 345, 349 (D.C. Cir. 2017) (explaining that undue concentration can establish a *prima facie* case, after which the burden shifts to the defendant to disprove either the underlying facts showing concentration or the ultimate effects of concentration).

<sup>144</sup> *Bertelsmann SE*, slip op. at 51.

<sup>145</sup> *See id.* at 4.

<sup>146</sup> *Id.* at 59–60 (In the case of e-book royalties, for example, consolidation among firms led to author royalty rates decreasing from 50% to 25%).

weaken an author's ability to negotiate between publishing houses and would thus decrease advances.<sup>147</sup>

The PRH trial exposed to public scrutiny the workings of a relatively unique labor industry.<sup>148</sup> The ruling's focus on anticompetitive effects on authors rather than on consumers shows the increasing importance of monopsony considerations in addition to monopoly considerations in merger review. And from the broadest perspective, Judge Pan's decision suggests we are entering a new era of antitrust: one in which harm to workers is not a side consideration, but a central issue in antitrust analysis.

What can we learn from the attempted PRH merger about the future of antitrust protections for workers? It is important to note, first, that the court's analysis conceptualizes the author in terms as both a supplier and a worker, rather than purely one or the other. On one hand, the publisher as firm would have no product were they unable to buy it from the author, suggesting a supplier-like role for the author. On the other, the firm has control over the authors' compensation structure, and the author performs work for the firm in the production of the good which the firm eventually comes to own, suggesting a worker-like role.

Second, it should prompt us to reconsider how antitrust fits into the constellation of legal protections available to different categories of workers. In considering what *kind* of worker the author is, the lines are blurry.<sup>149</sup> Authors are not conventional employees, but they do not fit perfectly in the independent contractor category either. While the ability for workers to form a union was not directly at issue in the merger, it remains important to think about how this case may impact the anti-worker functions of antitrust—would a group of authors who combined to bargain for collectively higher advances have been treated as a valid combination subject to the protection of the labor exemption, or as an illegal combination under Section 1 of the Sherman Act? The PRH merger lays the groundwork for earlier questions to be answered: whether *workers*—not just *employees*—can receive protections from potentially harmful employers, and how those protections can be implemented.

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<sup>147</sup> *Id.* at 53; see also *id.* at 57.

<sup>148</sup> See *Penguin Random House Scraps \$2.2bn Deal to Merge With Simon & Schuster*, REUTERS (Nov. 21, 2022), <https://perma.cc/5MAW-2AH4>; Christian Lorentzen, *Publishing on Trial*, HARPER'S MAGAZINE, March 2023, at 25.

<sup>149</sup> See *supra* Section IV.A.

## V. A PROPOSAL FOR EXPANDED PROTECTION

Categorizing workers accurately is important, because that categorization determines whether they can unionize and will benefit from other labor law protections—generally, employees are allowed to unionize but independent contractors may not. In this section, I discuss the employer-independent contractor dichotomy, and show why it is inadequate in context of authors selling manuscripts to publishing houses. Then, I propose a new category of worker: the quasi-employee. This employee faces high exit costs and develops long-term relationships with her employer; she is not an employee, but like an employee she does not have much bargaining leverage against her employer. For that reason, she should be able to unionize. At the very least, the decision on whether or not employees in this position are allowed to unionize should be made based on an analysis of market structure; they should not be categorically forbidden from unionizing.

### A. The “Quasi-Employee” as a Discrete Category

Professor Posner has offered a theory of worker categorization based on the structure of the market the worker is in and the manner of interaction the worker has with their employer.<sup>150</sup> Under this theory, independent contractors can be identified by the competitive nature of the market for their labor; workers who are locked in to a particular labor relationship (who generally must only deal with one buyer for their labor) are employees.<sup>151</sup> This theory explains why employees are allowed to unionize, but independent contractors may not. If a worker is in a competitive market (contractor), they should in theory be restricted from organizing because of a risk of cartelization; if a worker is in a monopsonized market (employee), they should be permitted to organize, because the monopsonist (employer) will otherwise push wages below the competitive level.<sup>152</sup> (Categorization only matters for the application of the labor exemption. In any anticompetitive market setting, regardless of the classification of the worker,

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<sup>150</sup> Posner, *supra* note 85, at 369–70 (“Where markets are monopsonized. . . [legal regulation] takes the form of what is conventionally called ‘employment law’ and ‘labor law’. . . [w]here markets are competitive, they do not fail. Legal regulation is not called for.”) See also *supra* Section III.A for a discussion of categorization based on relationship to employer (the relational work test).

<sup>151</sup> Posner, *supra* note 85, at 370 (“[If workers are in competitive markets] competition adequately protects them. . . . [Workers in uncompetitive markets] should be classified as employees because both employment and labor law can help them.”).

<sup>152</sup> *Id.* at 382.

antitrust merger review can step in to protect workers.<sup>153</sup>) The assumption required for this theory to hold water is that independent contractors are naturally in competitive markets—or put differently, that competitive markets mark the workers within them as independent contractors.

This theory of the difference between employees and independent contractors has the virtue of paying attention to market structure in determining which employees should be allowed to unionize. But it overgeneralizes. Importantly, the assumption that contractors are in naturally competitive markets (because multiple buyers are always competing for their labor) may be incorrect. The PRH-SS merger, in fact, illustrates its shortcomings. In PRH-SS, the most prominent antitrust case on labor markets to date, the worker in question looks more like an independent contractor than an employee. But the theory above would categorize the author as an employee, given the monopsonized (or potentially monopsonized) nature of the publishing landscape. And that result cannot be right; if the author is placed in one category of the employee-contractor dichotomy, they certainly seem to fall closer to a contractor. Thus, the PRH-SS case demonstrates a problem with using market conditions to determine whether a worker is an independent contractor or an employee, when we are restricted to only those two categories: it suggests that workers who are not employees *necessarily* face competitive markets.<sup>154</sup> It does not adequately account for the PRH-SS situation, in which workers clearly are not employees, but do not face a competitive market for their labor, and it demonstrates the need for finer-tuned analysis of how to categorize workers.

The factors discussed in Section II.A serve to help delineate between contractors and employees. However, they fail to cover

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<sup>153</sup> *Id.*

<sup>154</sup> Professor Posner observes that some “discrete-work markets,” in which workers would typically be classified as independent contractors may not be competitive, because “a discrete worker may still face high exit costs if there are few labor buyers.” *Id.* at 382. He concludes that antitrust law—merger review and other anti-monopoly enforcement—is the “logical source” of protection in this context, rather than labor law. *Id.* at 382–83. One concern with this approach is that courts will miss this nuance, and think antitrust action is inappropriate in these markets because they have been classified as “competitive” because they involve discrete work. The larger concern is that economic analysis of market structure does not map perfectly on to the employer-independent contractor dichotomy. There are workers in an in-between space—quasi-employees—who deserve a more detailed analysis of market structure to determine whether they should benefit from labor law protections or be allowed to unionize. As the PRH-SS case shows, and as explained more fully *infra*, the employee-independent contractor dichotomy risks foreclosing protections for many workers who deserve them.

what the PRH merger highlights as a distinct kind of worker: what this Comment proposes to term the “quasi-employee.”<sup>155</sup> The quasi-employee is a worker that floats between the employee-contractor bounds, paralleling employees in some aspects and contractors in another, while remaining outside of fitting into either category entirely. The variable nature of the quasi-employee’s labor means that categorization, at present, runs the risk of trying to fit a square peg into a round hole in placing workers who do not slot into either category into one or the other.

The authors in the PRH merger are a timely example of the quasi-employee. They are not employees of the publishing house in the traditional sense. The authors are not bound to work with a specific publishing house and can explore different options for different books they seek to publish. But they do not seem to be independent contractors either; the product of their labor exists external to any provision of wages. That is, authors write manuscripts prior to entering the bidding process; independent contractors enter a bidding contest or are hired prior to the delivery of their labor product. And authors are not the only examples of workers who fit the idea of the quasi-employee—consider screenwriters (who prepare screenplays and auction them to studios); musicians (who produce musical works with the aim of signing to or receiving an advance from a record label); and architects (who prepare designs and plans prior to submission to a builder).

So where would one position the author, or more broadly, the quasi-employee, on the independent contractor-employee dichotomy? Unlike employees and contractors, quasi-employees simply do not slot easily into either position. But labor antitrust is in a period of growth and innovation—the relative flexibility of its application at present means that this is a ripe time to propose a new category of worker in relation to labor antitrust analysis.

In applying the control test from *Reid*, quasi-employees look like contractors. They retain the ability to control the product of their labor and the way it is produced; quasi-employees often come to compensation discussions with the work already having been created, largely under their control (e.g., authors with manuscripts, architects with design plans). A counterpoint is that

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<sup>155</sup> As inspired by Ethan Heben, *Prisoners As “Quasi-Employees”*, 31 U. FLA. J. L. & PUB. POL’Y 183, 205 (2021) (“Courts have found quasi-employee status for workers who do not meet the statutory definition of ‘employee,’ but who nonetheless may or should qualify for certain rights or privileges under the labor laws”); not to be confused with *United States v. Farhane*, 634 F.3d 127, 152 n.24 (2d Cir. 2011) (quasi-employees are those who serve under foreign entity’s direction or control).

some workers receive advances prior to submitting the final version of their work (e.g. an author who receives an advance for a book proposal who then must reach certain page milestones to proceed), suggesting that control is not guaranteed to always be solely exercised by the worker. Notwithstanding, the worker still retains primary control over their work insofar as they choose the path they will follow for producing early iterations of work product and have a choice to give up control; for example, an author who does not want to bind themselves to page milestones can opt to sign with a publishing house who structures their contract differently.

The relational work test returns a slightly murkier outcome. Quasi-employees do not necessarily have to form a relationship with the buyer to successfully sell their labor—for example, publishing houses will bid on manuscripts of authors they have not auctioned with prior, and builders may choose to work with new architectural firms. At this step, the discrete nature of the work is suggestive of a contractor position. However, quasi-employees would theoretically face higher exit costs than independent contractors, especially in a monopsonized world; in the PRH example, an aspiring author would not have a large number of opportunities to sell their manuscripts for comparable compensation in a post-merger world (as the number of competing firms has decreased and thus their options for competitive advances have decreased), but even without the merger faces relatively few options for selling their manuscripts.<sup>156</sup> Thus, the relational work test produces conflicting results; quasi-employees complete discrete tasks, but develop long-term relationships with their employers and thus face high exit costs.

The economic realities test produces the most conflicting results as to where the quasi-employee could fit. The first factor, hirer's control, suggests that the quasi-employee is a contractor (they retain control over their own work, as under the *Reid* test). The second, opportunity for additional loss or profit, is debatable but likely suggestive of employee status—while original compensation (in the form of an advance, for example) is unaffected by the later actions of the hirer, subsequent opportunities for compensation (royalties, for example) is impacted to a significant extent by the actions of the hirer.<sup>157</sup> Investment in materials required for the production of labor is also murky; the quasi-

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<sup>156</sup> See *supra* Section III.B.

<sup>157</sup> For example, a publishing house that is able to effectively promote a book will likely lead to greater profit through royalties for an author as quasi-employee.



employee invests in the preliminary materials to make a product (e.g. a book manuscript) but the hirer invests in finishing materials (e.g. book formatting and marketing). The requirement of a unique skillset is indicative of a contractor position as the quasi-employee specializes in a specific area of labor (e.g. authors' unique writing styles and genres). The nature of the working relationship is variable: some quasi-employees enjoy long-lasting relationships with a specific hirer, while others move between hirers based on compensation offers.<sup>158</sup> But once the advance is made, the author is unlikely to move to another publisher, which suggests a long-term relationship.<sup>159</sup> Lastly, the service offered by the quasi-employee is generally an essential part of the hirer's business (a publisher needs manuscripts to publish), which is suggestive of employee status.

Labor antitrust is in a period of development, and it should categorize workers accurately rather than forcing them into ill-fitting groups, in order to not only maximize protection but to lay a groundwork for clear application of protections moving forward. While independent contractors should be able to receive protections offered by labor antitrust, courts may be hesitant to broadly expand its application to workers traditionally left unprotected by law. If that is true, categorization of the quasi-employee may serve to better provide protections for workers in a narrower lens than broad expansion to all workers would. The quasi-employee is a worker who operates in potentially monopsonized markets, who may look like an independent contractor in terms of their (generally) discrete relationship with the labor-buyer (employer), but who is relatively centralized to the employer's business model and, importantly, faces high exit costs in finding new competitive opportunities for work. Table 2 replicates the above contractor-employee table, but with an expansion to include quasi-employees as a new form of worker and subsequent distinguishing characteristics in accordance with their position.

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<sup>158</sup> For example, Stephen King works primarily with Simon & Schuster as a publisher. Other authors utilize different publishers for different books.

<sup>159</sup> Barring an active desire by the author to breach their contract with the publisher.

**Table 2: Contractor, Employee, and Quasi-Employee Distinctions**<sup>160</sup>

<b>Legal label</b>	Contractor	Employee	Quasi-Employee
<b>Type of work relationship</b>	Discrete: can be completed without an established relationship with buyer (hirer)	Relational: influenced by relationship with buyer (hirer)	Variable: relationship is not required to sell labor, but can arise in certain situations to seller's benefit
<b>Property right</b>	Worker: worker owns tools of labor	Labor buyer: employer owns tools of labor used by employee	Both: worker owns early variant of labor product, employer owns tools used to hone labor product after buying from worker (for example, publishing rights)
<b>Hirer's control over work</b>	Low: worker retains relatively high levels of agency in work	High: worker operates according to desire of hirer	Low: worker generally creates work prior to receiving compensation or entering arrangement to do so with hirer
<b>Opportunity for profit based on managerial skill</b>	Nonexistent: worker's profit is predetermined, not set by hirer's profit	Existent: worker's profit is influenced by success overall of hirer	Variable: early compensation is set external to hirer's success; subsequent compensation is influenced by hirer
<b>Service necessity to hirer's business</b>	Low: worker exists outside of the general trade of	High: hirer's business could not function without the worker's service	High: worker is a central aspect of the hirer's business

<sup>160</sup> Modified and expanded from POSNER, *supra* note 1, at 147.

	the hirer's business		
<b>Exit cost</b>	Low: worker can find other opportunities for work	High: worker may not immediately find other opportunities for work	High: difficult to find competitive compensation (e.g., authors would have to look to less powerful big 5 publishers or independent publishers, neither of which could adequately match advance values)

### B. Labor Antitrust, Labor Law, and the Quasi-Employee

Market structure matters in determining the risk of monopoly a worker faces, but it isn't as simple as drawing a line between employee and contractor. Expanding the legal categorization of worker to include the quasi-employee creates the possibility for greater protections for workers deemed to fit this category on both labor antitrust and labor law grounds. But any worker—employee or otherwise—can benefit from antitrust merger enforcement. This subsection explains how courts have interpreted the antitrust labor exemption, demonstrating why it is important to carve out a new category of worker in order to prevent gaps in legal protections for workers. In *SuperShuttle*, the NLRB held that workers who were classified as contractors were not covered by the NLRA, and thus could not seek union representation.<sup>161</sup> And workers who collectively bargain but are not part of a recognized union are outside of the protection of the Clayton Act's labor exemption, which means they risk liability for acting as a cartel.<sup>162</sup> Thus, at present, only a subset of all workers—those who are classified as traditional employees—receive the benefit of being able to form a recognized union, and subsequently receive the protection of the labor exemption.

<sup>161</sup> See *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019). *But see* *Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños*, 30 F.4th 306, 313–14 (1st Cir. 2022), *cert. denied*, 143 S. Ct. 631 (2023) (arguing that it is not worker status, but the matter at issue, which determines ability to unionize).

<sup>162</sup> 15 U.S.C. § 17.

Antitrust agencies appear to be turning towards considering how workers may be protected under application of antitrust laws, and the inclusion of the labor exemption in the Clayton Act reflects—from a very early point in the history of antitrust law—an attempt to protect certain workers’ rights to organize and negotiate for improved working conditions. But the FTC has a past pattern of bringing antitrust litigation against worker’s organizations that have attempted to collectively bargain for increased wages when those workers were categorized as independent contractors.<sup>163</sup>

Classification influences who can unionize under labor law, and workers who are able to unionize can bargain for a variety of benefits that un-unionized workers might not be able to achieve: fairer wages, workplace protections, benefits, etc. Those unions and their collective efforts are protected by labor antitrust through the labor exemption. Authors, were they to be classified as independent contractors, would be unable to receive union recognition and collectively bargain with the protection of the labor exemption. But this does not have to be the case.

Reclassifying a subset of workers who have traditionally been slotted into the position of independent contractor as quasi-employees means that they could, in theory, seek to form a recognized union. Thus, even if existing precedent on merger review vis-à-vis the PRH-SS merger could conceivably protect workers who straddle the line between contractor and traditional employee from the worst-case scenario—a fully monopsonized market for their labor—expanding out from the employee-independent contractor dichotomy to more appropriately classify authors as quasi-employees could afford broader protection under labor law and labor antitrust for workers who need them.

### C. Labor Antitrust and the Independent Contractor

As of this Comment, the labor exemption in the Clayton Act has generally been interpreted as applying to employees, not independent contractors.<sup>164</sup> Collective organizing on the part of

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<sup>163</sup> See, e.g., *In re Prof'l Skaters Ass'n*, 2015 FTC LEXIS 46 (Fed. Trade Comm'n February 13, 2015) (organization of professional figure skaters); *In re Music Teachers Nat'l Ass'n*, 2014 FTC LEXIS 68 (Fed. Trade Comm'n April 3, 2014) (organization of music teachers); *In re Am. Guild of Organists*, 2017 FTC LEXIS 76 (Fed. Trade Comm'n May 26, 2017) (organization of professional organists); *In re Nat'l Ass'n of Residential Prop. Managers*, 2014 FTC LEXIS 217 (Fed. Trade Comm'n October 1, 2014) (organization of residential property managers); *FTC v. Sup. Ct. Trial Lawyers' Ass'n*, 493 U.S. 411 (1990) (trial lawyers bargaining for higher hourly rates).

<sup>164</sup> See *supra* Section III.B at n.98.

employees aimed at increasing wages is exempted under the Clayton Act to prevent the labeling of worker unions as cartels. This makes sense—as Professor Posner’s theory of the employee-independent contractor distinction shows, employees are locked into a relationship with one employer (monopsony), so unions push wages closer to the competitive level. Conversely, a group of workers who organize collectively to push wages above an already-competitive price run the risk of operating more like a labor cartel—collaborating to achieve anti-competitive ends. If any worker is provided with the right to unionize, bargain for better wages, and garner protection through the labor exemption, the risk of labor cartels appears.

A recent First Circuit case challenged that assumption. In *Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños*,<sup>165</sup> the First Circuit read the labor exemption to apply to any group of workers who organizes around a labor issue.<sup>166</sup> In this case, it was Puerto Rican jockeys who bargained for better wages, and they were clearly marked as independent contractors.<sup>167</sup> While this Comment argues for the expansion of protections for workers, the choice to grant the expansion to any labor-based organizing effort presents a risk of negative outcomes. Under this holding, a group of anesthesiologists who wanted better wages, irrespective of their current rate, would be able to organize into a cartel and garner protection; their organizing would be on the basis of labor. In contrast to what the First Circuit has held, the line for determining which workers get what protection should not be whether or not an action was taken

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<sup>165</sup> 30 F.4th 306, 313–14 (1<sup>st</sup> Cir. 2022), cert. denied, 143 S. Ct. 631 (2023). Note that the Court also relied on interpreting the Norris-LaGuardia Act to read that a labor dispute does not require an employee-employer relationship to reach their conclusion. Note also, however, that this is not the prevailing view. Courts have generally read the Norris-LaGuardia Act as barring independent contractors from unionizing on two grounds: they do not have the employee-employer relationship necessary to dispute terms of employment, and disputes between employer and contractor generally are around the terms of sale of a product rather than labor. This would be true of the author in the PRH-SS merger case: the author is selling their manuscript, and a dispute over the value paid for it would be in relation to the terms of sale of the manuscript, not necessarily labor. This proposition is laid out most clearly by *Columbia River Packers Ass’n v. Hinton*, 315 U.S. 143, 147 (1942) (explaining that the employer-employee relationship must bear on the controversy at matter and distinguishing the case law that *Confederación* cites in support of their contrary proposition). In the *Confederación* decision, the court neglected to discuss the employer-employee relationship that *Columbia River* held as necessary for a bona fide labor dispute. If the prevailing interpretation of unionization ability stands, the author would not be able to unionize.

<sup>166</sup> 30 F.4th 306 at 313–14.

<sup>167</sup> *Id.* at 314.

on the basis of labor. Otherwise, any worker, even those who have no need to bargain for competitive wages, could form a bargaining unit that would operate as a cartel but be exempted from anti-trust liability.

Section V.A proposes a manner in which the classification regime can remain in place, expanded to protect a slightly broader subset of workers. Reclassifying certain independent contractors would enable genuine labor organizations (as distinct from labor cartels) to unionize, which would be preferable to the First Circuit's broad interpretation. However, what if one imagines "an alternative legal regime, in which . . . protections are extended to all workers on the basis of market structure" without any need for or emphasis on classification?<sup>168</sup> Moving away from classification as a qualifier for what protection is extended to workers may not be possible in the employment context, where policymakers have relied on that distinction for decades in determining who receives statutory protection.<sup>169</sup> But the application of antitrust to labor is new (not forgetting early discussions in its legislative history) and ripe for re-formulation to consider how it could be applied in a protective manner to *all* workers who are operating in non-competitive markets, regardless of their classification.<sup>170</sup>

This proposal should not be seen as changing how antitrust enforcement should be used to protect workers; rather, a logical extension of its application. As the PRH-SS case shows, merger review, as it stands today, can protect workers and independent contractors alike.<sup>171</sup> The process of analyzing the HHI of labor markets can be done for labor markets for independent contractors the same way as it is done for traditional employees: compare pre- and post-merger HHIs for the independent-contractor-labor market. If the HHI delta is too high, the merger should be

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<sup>168</sup> If the law refuses to forego classifications, the preceding and following subsections provide alternative paths forward for protecting workers.

<sup>169</sup> Posner, *supra* note 85, at 386.

<sup>170</sup> In a world where this was the norm, the First Circuit decision could be justified on the grounds that the jockeys in question were operating in a non-competitive market, rather than arbitrarily drawing the line at a discussion of labor amongst the bargaining group. This would prevent the over-broad application of unionization protections to potentially competitive markets as discussed in the preceding sections.

<sup>171</sup> This should especially be the case in light of the FTC's proposed ban on non-compete clauses, which would make illegal under the antitrust laws non-compete clauses applied to traditional workers and independent contractors alike. See FTC Press Release, *supra* note 56.

blocked, barring defendants showing that it will have no anti-competitive effect on independent contractors.<sup>172</sup>

Taking a step back to look at merger analysis from a broad perspective, there is no reason to restrict consideration of independent contractors under labor antitrust. A merger that increases monopsony among firms on the buy-side (or in the labor market) should be evaluated with regard to the harm it causes workers, without differentiation between whether those workers are employees or independent contractors. Courts should be careful not to assume that independent contractors are inherently protected from anticompetitive behavior by doing discrete work; contractors have more options than employees, but they can suffer harms from monopsony and collusion just like employees can. If labor law will not fill the gaps to protect independent contractors from unfair employment practices, antitrust can take its place.

#### D. Private Rights of Action under Labor Antitrust

While this Comment primarily seeks to argue that labor antitrust can protect independent contractors via merger review, and that both labor law and labor antitrust can protect workers who function as quasi-employees via unionizing, it is possible that the courts will be reluctant to extend these protections. If that is the case, certain workers would remain blocked from unionizing, because they will not benefit from the labor exemption. But all workers, regardless of classification, can pursue private rights of action using labor antitrust as a sword when anticompetitive behavior on the part of firms results in harms within the labor market. It is important to distinguish *how* monopsony arises when considering whether protection is necessitated. Under the antitrust laws, there are instances in which monopolies (and by extension monopsonies) can arise that do not require protective responses. A monopoly that arises by virtue of a “superior product, business acumen, or historic accident” is a legal monopoly under the Sherman Act.<sup>173</sup> A monopsony that arises by virtue of superior offers to buy labor is unlikely to be found to be an illegal monopsony for the same reason. And mergers with a relatively small

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<sup>172</sup> E.g., a merger which does not depress wages. Higher concentration alone does not necessarily rise to an antitrust violation.

<sup>173</sup> See *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

effect on the relevant market, even if technically forbidden under the antitrust laws, are difficult to act against.<sup>174</sup>

Those situations excluded, all workers should be subject to protection from monopsonies that arise out of illegal conduct.<sup>175</sup> This approach should capture employees, quasi-employees and independent contractors alike, and should provide for protections on a regulatory basis. However, what happens in a situation where a merger is approved due to a lack of competition concerns in the product market but still results in substantial harm for workers? For example, consider Firm X, which sells in a national product market in which many other firms compete with them. But Firm X is located in a small town, where they compete with only Firm Y to buy labor. If Firm X merged with Firm Y, the overall impact on the (national) product market would be minimal (due to the presence of other firms). But the impact on the labor market would be substantial. Workers would have lost an opportunity for competitive compensation.<sup>176</sup>

Such possibilities indicate the need for workers to be able to file private antitrust lawsuits, given that the regulatory focus remains primarily on product market effects, not labor market effects.<sup>177</sup> The view that every merger which could harm workers will be blocked is optimistic. Thus, it may be helpful to briefly think about post-merger solutions for not only quasi-employees, but workers more broadly, through private rights of action, at least as labor antitrust continues to develop.<sup>178</sup> A proposal has previously been set forth suggesting that employees could bring private actions under § 2 of the Sherman Act in response to harm caused by monopsonization.<sup>179</sup> The requirements would be as follows: to bring a claim against an employer who monopsonized a labor market, plaintiffs should define the labor market, establish

<sup>174</sup> See Respondent's Motion to Withdraw, In the Matter of Meta Platforms, Inc., No. 9411 (Fed. Trade Comm'n February 8<sup>th</sup>, 2023) Document No. 606888.

<sup>175</sup> See Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 CORNELL L. REV. 1343, 1391 (2020) (proposing revised merger review along the lines of labor market effects); see also Remarks on Merger Information Request, *supra* note 40 (requesting commentary on revising the merger guidelines, specifically noting the importance of recognizing labor effects); see also *supra* Section IV.C.

<sup>176</sup> Or less theoretically, a world in which the PRH merger was upheld. This would have been unlikely, given the market shares of the competitors in the PRH case, hence the hypothetical of a firm with a small market share in the relevant product market, but a substantial market share in the labor market.

<sup>177</sup> See Marinescu & Posner, *supra* note 1, at 8 (arguing for new legislation facilitating litigation against market monopsonists).

<sup>178</sup> See Hafiz, *supra* note 98, at 382–83.

<sup>179</sup> 15 U.S.C. § 2.



that the employer controls an unreasonably large share of said market, and show how that share has been obtained or maintained through anticompetitive actions.<sup>180</sup> Although this type of claim was proposed specifically in relation to traditionally-categorized employees, there is no reason it could not be extended to workers more broadly; for example, an author in the hypothetical world of an approved PRH merger could have defined the labor market (authors of books, or authors of bestselling books), shown that the merged firm controlled a large share of the market, and argued that the monopsony was obtained through a merger that was anticompetitive in its effects on the labor market.

This Comment also aims to set forth an alternative proposal: workers should bring claims under § 7 of the Clayton Act in cases of monopsony harm caused by mergers.<sup>181</sup> Private claims under the Clayton Act provide an opportunity to recoup treble damages and a court order prohibiting future anticompetitive conduct by the firm in question.<sup>182</sup> Although there has been increasing resistance towards private rights of action against corporations and a preference for use of the Federal Arbitration Act, bringing a claim is not impossible.<sup>183</sup> 15 U.S.C. § 15(a) grants individuals a statutory basis for a private right to action.<sup>184</sup> The courts have laid out guidelines for what is required of individuals bringing private claims under this section of the Clayton Act; plaintiffs must show both antitrust standing and antitrust injury to succeed. *United States v. American Building Maintenance Industries*<sup>185</sup> established how broad a geographic area a merger must cover for a claim under § 7 to be appropriate; the merger must concern firms that both operate across state lines.<sup>186</sup> *Illinois Brick Co v. Illinois*<sup>187</sup> limits who can show standing for harm connected to the federal antitrust statutes, but this limitation does not create a problem for private antitrust suits by workers.<sup>188</sup> Under *Illinois Brick*, standing is granted to direct purchasers and/or individuals who were directly harmed by anticompetitive behavior—the goal

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<sup>180</sup> See Marinescu & Posner, *supra* note 175, at 1370–71.

<sup>181</sup> 15 U.S.C. § 18 (15 U.S.C. § 15 guides damages).

<sup>182</sup> 15 U.S.C. § 15.

<sup>183</sup> See Sandeep Vaheesan, *Killing Antitrust Softly (Through Procedure)*, LAW AND POLITICAL ECONOMY PROJECT (June 11, 2019), <https://perma.cc/W527-37UV>.

<sup>184</sup> 15 U.S.C. § 15.

<sup>185</sup> 422 U.S. 271 (1975).

<sup>186</sup> *Id.* at 285–86.

<sup>187</sup> 431 U.S. 720 (1977).

<sup>188</sup> *Id.* at 745–46 (encouraging “vigorous private enforcement” by those directly injured by anticompetitive behavior).

of antitrust legislation “is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it.”<sup>189</sup> This was upheld by *Apple Inc. v. Pepper*,<sup>190</sup> in which the Court declined to further limit who could bring suit for damages.<sup>191</sup> A worker could reasonably establish standing as an individual; while they are a seller (of labor) rather than a purchaser, they could show that they were directly harmed by anticompetitive behavior (e.g. an author faces direct harm from a merger which lessens the number of bidders and subsequently depresses the value of possible advances paid out to them).

The standard for what constitutes an antitrust injury was established by *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*<sup>192</sup> To establish antitrust injury, the plaintiff must show “injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.”<sup>193</sup> This definition is broad, but was narrowed by the Court’s later holding that the injury doctrine “ensures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant’s behavior.”<sup>194</sup> A worker would likely be able to show injury of this sort in a case like the PRH merger. The injury (in this case, loss of profits as a result of not being able to auction books to as many competitors) would flow from the result of the merger monopolizing the publishing market (either anti-competitive conduct directly challenged as illegal under § 7 of the Clayton Act, or which has an anti-competitive effect under the narrowed holding).<sup>195</sup> Mergers that reduce the value of a worker’s labor through elimination of competing opportunities for work cause harm of the sort the antitrust laws are aimed at preventing.<sup>196</sup>

Quasi-employees (and employees more broadly) should feel emboldened to bring private claims. In one sense, quasi-employees might be uniquely positioned to bring such claims against monopsonists. Earlier arguments about the difficulty of success for

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<sup>189</sup> *Id.* at 746.

<sup>190</sup> 139 S.Ct. 1514 (2019).

<sup>191</sup> *Id.* at 1519.

<sup>192</sup> 429 U.S. 477 (1977); while originally about damages claims only, this holding was extended to cover injunctive claims in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986).

<sup>193</sup> *Brunswick*, 429 U.S. at 489.

<sup>194</sup> *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990).

<sup>195</sup> 15 U.S.C. § 18.

<sup>196</sup> *Marinescu & Posner, supra* note 175, at 1374.

private litigants centered on geographic region, claiming that “labor market concentration is mostly a local phenomenon.”<sup>197</sup> But this is less likely to be an issue for quasi-employees, as their market is often broad by way of being global (i.e., publishing houses pull from global markets, not regional enclaves). The quasi-employee, as a seller of labor-as-a-good,<sup>198</sup> may be in a position that permits them to act more like a corporation whose business is harmed by a merger than a worker whose wages are depressed.

Broadly, though, all workers should feel emboldened to consider pursuing private claims. As noted above, this can be done through § 2 claims for damages, or § 7 claims to unwind mergers. The path to a § 7 claim may be slightly more difficult, but this Part argues that it should be considered as one of many tools workers could use when seeking the protection of labor antitrust. One case has been brought by private litigants under § 7 for harms caused by labor market monopsony power.<sup>199</sup> While the Court held that the plaintiffs failed to state a valid claim, the Court’s reasoning for invalidating it was that “plaintiffs focused on the product market side and said little about the labor market. As a result, the Court seemed to think the employees sought standing to challenge the product market harm.”<sup>200</sup> A plaintiff (or group of plaintiffs) bringing claims under § 7 would likely find more success if they were to base their arguments on the labor market rather than the product market.

While regulatory enforcement by the agencies can potentially stop harmful mergers before they come to light, private litigants can push back against excessive control in labor markets if regulatory review lets these mergers through; “[b]y blocking mergers more vigorously, private litigants . . . can slow down or halt excessive market power.”<sup>201</sup> And while § 7 claims have previously been dismissed on the basis that DOJ or FTC approval of a merger forecloses private litigation, the shift in regulatory concern towards labor suggests courts may turn toward interpreting this foreclosure narrowly.<sup>202</sup>

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<sup>197</sup> POSNER, *supra* note 1, at 117.

<sup>198</sup> See *supra* Sections III, IV.A.

<sup>199</sup> Int’l Ass’n of Machinists and Aerospace Workers, AFL–CIO, Local Lodge No. 1821 v. Verso Paper Corp., 80 F.Supp.3d 247, 266–68 (D. Me. 2015).

<sup>200</sup> Marinescu & Posner, *supra* note 175, at 1374.

<sup>201</sup> Suresh Naidu, Eric A. Posner, & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 547 (2018).

<sup>202</sup> See, e.g., Marinescu & Posner, *supra* note 175, at 1373.

The question that remains for private plaintiffs is whether they would seek damages for harm caused by the merger<sup>203</sup> or request divestiture as relief (or perhaps both).<sup>204</sup> Seeking an equitable remedy may be an uphill battle, but is not unheard of.<sup>205</sup> The Supreme Court held in *California v. American Stores*<sup>206</sup> that private parties can seek divestiture as a remedy just as the government can.<sup>207</sup> Yet divestiture is rarely invoked. Until 2021, no private claims had resulted in an order for divestiture since *American Stores*. But the tide may be changing. In *Steves & Sons, Inc. v. JELD-WEN, Inc.*,<sup>208</sup> the Fourth Circuit upheld an order for equitable relief in addition to damages.<sup>209</sup> The concurring opinion in this case noted that divestiture as a remedy in private actions is extremely rare to see ordered by a court.<sup>210</sup> And this case was brought along product market lines, not labor market ones. But the slight opening of the door for private claimants to successfully request divestiture is noteworthy, and as private claimants determine what tools they have in their legal toolbox, seeking divestiture on the grounds that a merger created harmful effects in the labor market is something to consider. Regardless of what path quasi-employees, and workers more broadly, choose to pursue, labor antitrust should protect them—if not at the regulatory stage of merger review, then by letting them bring private claims against monopsonists who cause them injury through anticompetitive behavior.

## VI. CONCLUSION

One question remains at the conclusion of this Comment, and as labor antitrust continues its development—why does this matter? Put bluntly, why do we care about using antitrust as a worker protection if we have labor laws; why do we care about carving out a space of analysis for the quasi-employee if the employee is already protected? Isn't the quasi-employee as seen in the PRH

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<sup>203</sup> 15 U.S.C. § 15.

<sup>204</sup> 15 U.S.C. § 21.

<sup>205</sup> See Susannah Torpey, Neely Agin, & Dana Cook-Milligan, *Jeld-Wen: Opening the Door to Private Merger Challenges?*, 31 CAL. L. ASS'N: COMPETITION 75 (2021).

<sup>206</sup> 495 U.S. 271 (1990).

<sup>207</sup> *Id.* at 295–296. Note that private plaintiffs must still show standing and injury, which means that government requests for divestiture may be subject to a slightly lower bar. See *id.* at 295 (“[This decision] does not, of course, mean that such power should be exercised in every situation in which the Government would be entitled to such relief.”).

<sup>208</sup> 988 F.3d 690 (4th Cir. 2021).

<sup>209</sup> *Id.* at 703.

<sup>210</sup> *Id.* at 729.

merger circumstance a niche group? Not particularly. There are, in fact, various other workers who qualify as quasi-employees; movie studios and record labels are structured similarly, and risks of monopoly and subsequently monopsony may arise in those industries as well.<sup>211</sup> If record labels begin to consolidate, for example, recording artists face similar risks of receiving less compensation from decreased advances. Defining a space for the quasi-employee can serve as a preemptive measure against future issues of monopsony.

First and foremost, labor antitrust should be used proactively to guard against labor monopsony, to the benefit of all workers. Labor antitrust has a distinctive ability to help workers such as quasi-employees: “[it] promises an effective attack because agency discretion and judicial enforcement can police labor markets without substantial amendments to existing law . . . . [L]abor antitrust is uniquely positioned to challenge industry-wide wage suppression.”<sup>212</sup> Similarly, quasi-employees and independent contractors may, in some circumstances, be the single best situated worker to challenge labor monopsony because they look more like small firms than they do employees—which is what antitrust is used to dealing with. Even if labor laws could provide sufficient protections for quasi-employees and workers more broadly, we should nonetheless consider how the law could further expand protections for workers. 60% of the labor markets in the top 200 occupations—in which 8 million people work—are highly concentrated.<sup>213</sup> This creates a high risk of monopsony and subsequent worker disenfranchisement; policymakers should react appropriately, and consider how they can reduce monopsony power.<sup>214</sup>

Expanding worker categorization to carve out a space for quasi-employees creates a possibility of collective bargaining by way of protection under the NLRA and subsequent protection from litigation through the labor exemption. The NLRB has begun to signal a potential shift away from traditional methods of categorization used to differentiate independent contractors and

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<sup>211</sup> See, e.g., *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) (concerning monopoly risk posed by movie studios); Press Release, U.S. Dep’t of Just., Federal Court Terminates Paramount Consent Decrees (Aug. 7, 2020), <https://perma.cc/T6HD-HQN3> (the holding’s subsequent repeal). See also Ron Knox, *Big Music Needs to be Broken Up to Save the Industry*, WIRED (Mar. 16, 2021), <https://perma.cc/5C7C-LATT>.

<sup>212</sup> Hafiz, *supra* note 98, at 382–83.

<sup>213</sup> POSNER, *supra* note 1, at 35.

<sup>214</sup> Tirza J. Angerhofer and Roger D. Blair, *Considerations of Buyer Power in Merger Review*, 10 J. OF ANTITRUST ENF’T 260, 269 (2021).

traditional employees for the purpose of labor law protection.<sup>215</sup> In light of that, this Comment has sought to propose a potential broadening of who falls under the “employee” umbrella and examines how they could effectively garner protection through labor law and labor antitrust in conjunction. Alternatively, it has also sought to present the idea that categorization may not be the appropriate baseline for determining when workers receive protection from anti-worker functions of antitrust; instead proposing a turn to evaluations of market structure for determining when to allow workers to unionize when they operate in anti-competitive markets.

Reconsidering how labor antitrust could be used in relation to independent contractors further allows us to expand protections for vulnerable workers. Contractors slot into a uniquely under-protected position at present—limited protections from labor law and less case law on protection from labor antitrust in comparison to traditional employees. If labor law fails to protect independent contractors when they collectively bargain or seek protection under the NLRA, labor antitrust can step in as a substitute.

And even if no action is taken by regulatory agencies, workers should be emboldened in an age of increasing concern for labor to bring private actions under the antitrust laws. Traditional employees and independent contractors alike can show antitrust injury and standing; quasi-employees may be uniquely positioned to bring suit as a supplier, almost stepping into the role of a pseudo-firm in litigation.

Antitrust legislation was originally enacted with both competition and worker protection in mind; expanding protection—including more protection for quasi-employees—is in line with legislative intent, and is welfare-maximizing for workers.<sup>216</sup> Strong enforcement of antitrust law in product markets should be complemented by strong enforcement in labor markets as well.<sup>217</sup> The threat of monopsony power causing harm to workers in the quasi-employee position has not been eliminated just because the PRH merger was blocked. As labor antitrust continues to grow in prominence, it will be imperative to consider how it can be used: in

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<sup>215</sup> Michael J. Volpe, Jake W. Goodman, & Taylor A. Bleistein, *Employers Beware: The Changes Foreshadowed by the NLRB's General Counsel Are on the Horizon*, LAW.COM (Feb. 24, 2023), <https://perma.cc/H5G3-DQ9C>.

<sup>216</sup> Eugene K. Kim, *Labor's Antitrust Problem: A Case for Worker Welfare*, 130 YALE L. J. 428, 275 (2020).

<sup>217</sup> POSNER, *supra* note 1, at 3 (“[T]he dangers to public welfare posed by product market power and labor market power are the same”).

pressing back against antitrust's anti-worker function through expanding unionization opportunities, and creating new spaces for workers to secure affirmative pro-worker protections that only labor antitrust can provide.