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WORKING STIFF: EXTENDING THE STATUTORY LABOR DISPUTE EXEMPTION TO WWE WRESTLERS

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INTRODUCTION

In 1987, professional wrestler and future Governor of Minnesota Jesse "the Body" Ventura attempted to unionize the wrestlers of the World Wrestling Federation (WWF). According to Ventura's telling, he stood in the middle of the locker room and appealed to a group of other WWF wrestlers on the eve of WrestleMania II, the second installment of the WWF's marquee pay-per-view

event.[1] Vince McMahon, then the chairman and chief executive officer of the WWF, had invested heavily in the event and promoted the show with the promise of matches between fan favorites like Ventura, Hulk Hogan, and King Kong Bundy.[2] Ventura reasoned with his fellow wrestlers that "if we all stick together and simply tell Vince we're refusing to wrestle unless we're allowed to unionize, what are they gonna be able to do?"[3]

Ventura soon learned the answer. One of the wrestlers, later revealed to be Hogan himself, informed McMahon of the plans to unionize.[4] Due either to actual pressure from management or fear of retaliation, the wrestlers backed out of Ventura's plan.[5] In the aftermath, the WWF fired one less-prominent wrestler known to be pro-union.[6] Ventura left the WWF shortly afterwards to film a movie, which gained him membership in the Screen Actors Guild.[7] WrestleMania II went on as planned, followed by thirty-seven more installments of the pay-per-view program to date.[8] The WWF, since re-branded as World Wrestling Entertainment (WWE), remains non-unionized.[9]

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[1] JESSE VENTURA, I AIN'T GOT TIME TO BLEED 105–06 (1999).

[2] *Id.*

[3] *Id.* at 106.

[4] *Id.* at 108.

[5] *See* Michael Schiavone, A Wrestler's Life: Full-Time Worker as Independent Contractor, 10 WORKINGUSA: J. LAB. & SOC'Y 485, 493 (2007).

[6] *See id.*

[7] VENTURA, *supra* note 1, at 106.

[8] *See, e.g.*, *WWE Wrestlemania 39 Matches, Card, Date, Location, News, Stories, and Information*, ESPN (Mar. 30, 2023, 9:30 AM), https://www.espn.com/wwe/story/_/id/31012524/wwe-wrestlemania-matches-card-date-location-news-stories-information [https://perma.cc/UJ89-HZZB].

[9] The company officially changed its name to WWE in 2002. To avoid confusion, I use "WWE" to refer to the company throughout this paper, even when discussing events that occurred prior to 2002. As of September 2023, WWE operates alongside the Ultimate Fighting Championship (UFC) as a division of TKO Group Holdings following an acquisition by UFC's parent company Endeavor. *See* Todd Spangler, *WWE, UFC Officially Merge to Form TKO Group, New Stock to Start Trading*, VARIETY (Sept. 12, 2023), https://variety.com/2023/tv/news/wwe-ufc-deal-closes-tko-group-1235719908/ [https://perma.cc/GMB5-9TSZ].

Academics, journalists, and wrestling fans alike have examined why the WWE does not have a union.[10] The main barrier to unionization is that the WWE classifies all its wrestlers as independent contractors rather than employees.[11] As independent contractors, WWE wrestlers are not covered by the rights and protections of the National Labor Relations Act (NLRA) and thus have no federal statutory right to engage in concerted activities and collective bargaining.[12] As such, wrestlers have no recourse under the NLRA should they face retaliation, including firing, for their organizing activities.[13] Further, there is another, often overlooked, obstacle to professional wrestlers' ability to organize and engage in collective action: the threat of antitrust liability.[14] Workers classified as employees are permitted to engage in otherwise-illegal concerted action as part of a dispute over wages or working conditions under the "statutory labor dispute exemption" derived from the Clayton Act of 1914 and the Norris-LaGuardia Act of 1932.[15] Historically, independent contractors have been categorically ineligible for this exemption.[16] Thus, as independent contractors, if wrestlers organized to demand

[10] *See* Schiavone, *supra* note 5; David Cowley, *Employees vs. Independent Contractors and Professional Wrestling: How the WWE Is Taking a Folding-Chair to the Basic Tenets of Employment Law*, 53 U. LOUISVILLE L. REV. 143, 150 (2014); Geoff Estes, *New Bargaining Order: How and Why Professional Wrestlers in the WWE Should Unionize Under the National Labor Relations Act*, 29 MARQ. SPORTS L. REV. 137, 138 (2018); Stephen S. Zashin, *Bodyslam from the Top Rope: Unequal Bargaining Power and Professional Wrestling's Failure to Unionize*, 12 U. MIAMI ENT. & SPORTS L. REV. 1, 4 (1995); David Shoemaker, *On WWE and Organized Labor*, GRANTLAND (July 18, 2012), https://grantland.com/features/wwe-hell-cell-john-cena-history-wrestling-real-scripted-labor-movement/ [https://perma.cc/92SL-ARMN]; *Last Week Tonight with John Oliver: WWE* (HBO television broadcast Mar. 31, 2019), https://www.youtube.com/watch?v=m8UQ4O7UiDs&ab_channel=LastWeekTonight [https://perma.cc/6ZD8-TW4V].

[11] *See, e.g.*, Cowley, *supra* note 10, at 150 ("The first step to unionization and, hence, collective bargaining, will be characterizing WWE wrestlers as employees in a court of law.").

[12] *See id.* at 151.

[13] *See id.*

[14] *See* Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. 969, 982 (2016) (documenting how the "specter of antitrust liability has significantly suppressed" the ability of independent contractor truck drivers to engage in collective action to improve their wages and working conditions).

[15] Cynthia Estlund & Wilma B. Liebman, *Collective Bargaining Beyond Employment in the United States*, 42 COMP LAB. L. & POL'Y J. 371, 373–77 (2021).

[16] *See id.* at 376–77.

higher wages or better working conditions, they could be sued under the Sherman Antitrust Act, enjoined, and forced to pay treble damages to the WWE.[17] Wrestlers could even face criminal antitrust liability.[18]

One option for WWE wrestlers interested in organizing would be winning reclassification as employees via private litigation.[19] However, litigating classification status is costly and time consuming.[20] Further, as the classification determination hinges on the specifics of the wrestlers' employment relationship, the WWE could respond by altering the working conditions of its wrestlers to frustrate litigation efforts, allowing the company to continue to identify wrestlers as independent contractors.[21]

Absent enduring and winning a fight over their classification status, WWE wrestlers, like other independent contractors, face dual threats to any attempt to organize for better pay or working conditions: retaliation by their employer and antitrust liability.[22] However, recent reanalysis of the statutory labor exemption

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[17] *See* Paul, *supra* note 14, at 979.

[18] *See id.*

[19] A group of former wrestlers attempted to litigate the classification issue as part of a 2008 lawsuit, but the case was dismissed on procedural grounds. Levy v. World Wrestling Ent., Inc., No. CIV.A.308-01289, 2009 WL 455258, at *2 (D. Conn. Feb. 23, 2009). Scholars considering the classification status of WWE wrestlers have consistently found them to be improperly classified as independent contractors. *See* Cowley, *supra* note 10, at 170–71 (concluding that WWE wrestlers are employees under the factors considered by the IRS); Estes, *supra* note 10, at 153 (concluding that WWE wrestlers are employees under the common law "right to control" test); Schiavone, *supra* note 5, at 490 (concluding that WWE wrestlers are employees under the factors considered by the IRS).

[20] *See generally* Scott Cummings, *Preemptive Strike: Law in the Campaign for Clean Trucks*, 4 U.C. IRVINE L.R. 939, 1130–40 (2014) (describing the practical barriers to classification litigation in the context of port truck drivers).

[21] *See* Noah D. Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment*, 26 A.B.A. J. LAB. & EMP. L. 279, 288–89 (2011) ("Another example of this dynamic is simply employer choices of organizational form in the shadow of anticipated legal classification. If a firm designs a work structure to achieve an independent contractor designation, simply asking after the fact whether the workers are employees or independent contractors misses the way that both the firm and the law already set up the problem.") (citation omitted).

[22] *See* Paul, *supra* note 14, at 969 ("[Independent contractors] find themselves in the position of most workers prior to the New Deal: at once lacking labor protections, yet exposed to antitrust liability for organizing to improve their conditions.").

provides an opportunity for professional wrestlers to organize, collectively bargain, and even strike while avoiding antitrust liability.[23] In *Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc.*, a 2023 case concerning a work stoppage organized by an association of Puerto Rican jockeys, the First Circuit rejected the categorical exclusion of independent contractors from the statutory labor dispute exemption and extended antitrust protection to a union of non-employee workers for the first time.[24] Following the lead of the jockeys in *Confederación Hípica*, professional wrestlers should be able to unionize and engage in collective action without facing antitrust liability.

This paper proceeds in three parts. In Part I, I detail some of the critical issues facing WWE wrestlers that demonstrate the need for collective representation. In Part II, I outline the statutory labor dispute exemption and deconstruct the common assumption that independent contractors fall outside of its protection. In Part III, I apply the First Circuit's decision in *Confederación Hípica* to professional wrestlers and demonstrate why they should be included under the statutory labor dispute exemption.

I
LABOR IN PROFESSIONAL WRESTLING

Wrestling for the WWE is a precarious job. Wrestlers lack assurances of long-term employment, receive compensation far below that of professional athletes, and endure serious injuries and an extensive travel schedule. In a 1998 documentary, former WWE wrestler Bret "The Hitman" Hart described the WWE's treatment of its wrestlers:

> Vince McMahon has always had this mentality about treating wrestlers like circus animals. All these wrestlers who have broke their backs making this living for years end up with nothing when it's over. And

[23] *See* Brief of Amicus Curiae Professor Samuel Estreicher in Support of Defendants-Appellees, Chamber of Com. v. City of Seattle, 890 F.3d 769 (9th Cir. 2018) (No. 17-35640) [hereinafter Estreicher Amicus Brief]; Estlund & Liebman, *supra* note 15.

[24] Confederación Hípica de P.R., Inc. v. Confederación de Jinetes Puertorriqueños, Inc., 30 F.4th 306, 307 (1st Cir. 2022), *cert. denied*, 143 S. Ct. 631 (2023) (mem.).

> then they sort of take you out back and they put a slug in the back of your head and dump you. That's the life of a professional wrestler.[25]

Hart knew the life of a professional wrestler well: he wrestled for the WWE for thirteen years before a concussion sustained in the ring ended his career.[26] A year after the documentary aired, Bret's brother Owen was killed during a WWE event when a harness malfunctioned and he fell seventy feet to the ground.[27] Although the WWE's treatment of its professional wrestlers has improved since Hart's time with the company,[28] a litany of hardships still remain that a wrestler's union could address.

The WWE currently employs close to 250 wrestlers, which includes wrestlers under WWE's two "main roster" brands, Raw and Smackdown, as well as its developmental promotion, NXT.[29] The WWE classifies all of its wrestlers as independent contractors.[30] WWE wrestlers' contracts include a clause specifying their status as independent contractors.[31] As a result, the WWE avoids providing its wrestlers with health insurance and contributing to Social Security, Medicare, and unemployment insurance.[32] As independent contractors, WWE wrestlers are forced to pay a 15% self-employment tax.[33] Despite WWE wrestlers' independent contractor status, the WWE imposes strict limitations on their ability to earn money outside of WWE events. WWE wrestlers are signed to exclusive contracts and thus cannot appear in matches for other wrestling promotions.[34] Further,

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[25] HITMAN HART: WRESTLING WITH SHADOWS (Trimark Pictures 1998), https://www.youtube.com/watch?v=U9ob-BZnhBQ [https://perma.cc/XB4U-S3KB].

[26] DAVID SHOEMAKER, THE SQUARED CIRCLE: LIFE, DEATH, AND PROFESSIONAL WRESTLING 354 (2013).

[27] *Id.* at 300.

[28] *See, e.g.*, Mick Rouse, *How the WWE is Taking Concussions Seriously*, GQ (Feb. 9, 2016), https://www.gq.com/story/daniel-bryan-retirement-wwe-cte [https://perma.cc/KCU6-VLHN].

[29] WORLD WRESTLING ENTERTAINMENT, 2021 ANNUAL REPORT 7 (2022) [hereinafter WWE ANNUAL REPORT], https://corporate.wwe.com/~/media/Files/W/WWE/annual-reports/wwe-2021-annual-report.pdf [https://perma.cc/E4GA-6RSD].

[30] *Id.*

[31] Exhibit D § 13.1, Laurinaitis v. World Wrestling Ent., Inc., No. 3:16-cv-01209 (D. Conn. July 18, 2016) [hereinafter Guerrero Contract].

[32] Cowley, *supra* note 10, at 148.

[33] *Id.*

[34] *See* Guerrero Contract, *supra* note 31, § 5.1.

this exclusivity extends not only to other work as wrestlers, but also to all other services. As such, wrestlers cannot secure work as actors on non-wrestling television shows or movies without the WWE's express consent.[35]

One recent episode demonstrates the extent of the WWE's control over its wrestlers' appearances outside of WWE content. When the COVID-19 pandemic forced the WWE to cease its usual touring schedule, several wrestlers began streaming on platforms such as Twitch to make money and connect with fans.[36] In October of 2020, WWE issued a memorandum to its wrestlers, requiring them to cease all such activities "within the next 30 days."[37] The memorandum stated that the wrestlers were using their names and likenesses, which the WWE owns outright in most cases, in "ways that are detrimental to [the] company."[38] Several wrestlers appealed to WWE management to rescind the order without success.[39] One wrestler, Thea Budgen, who wrestled under the in-ring name "Zelina Vega," defied the order and continued to stream on Twitch and other platforms.[40] Budgen, who as a "lower-card" female wrestler was likely earning in the mid-five figures,[41] claimed to be making more money on Twitch than from wrestling.[42] After her refusal to deactivate her Twitch account, the WWE fired Budgen.[43]

As part of their work, WWE wrestlers maintain an intense travel schedule. Former WWE wrestler Bryan Danielson, who wrestled for the company under the

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[35] *See id.*

[36] *See* Dave Powell, *Wrestlers Have Always Wanted a Union. Why Don't They Have One?*, ORG. WORK (Nov. 18, 2020), https://organizing.work/2020/11/wrestlers-have-always-wanted-a-union-why-dont-they-have-one/ [https://perma.cc/3NL2-HJS8] (describing the "proliferation of wrestlers starting streams" online to engage with fans).

[37] Ryan Boman, *The Power of the Pin: Pro Wrestling's State of the Union and WWE's Role*, SPORTSKEEDA (Oct. 6, 2020), https://www.sportskeeda.com/wwe/the-power-of-the-pin-pro-wrestling-s-state-union [https://perma.cc/5NVE-6J49].

[38] *Id.*

[39] Powell, *supra* note 36.

[40] *Id.*

[41] *See* Oliver Bateman, *How Pro Wrestling Gives its Talent a Raw Deal*, ALJAZEERA AMERICA (May 4, 2014), http://america.aljazeera.com/opinions/2014/5/wrestling-labor-wwevincemcmahonultimatewarrior.html [https://perma.cc/P39Y-3GEV].

[42] Powell, *supra* note 36.

[43] *Id.* WWE has since rehired Bugden. Tim Adams, *WWE Re-Signs Zelina Vega Seven Months After Her Release*, CBR (May 13, 2021), https://www.cbr.com/wwe-re-signs-zelina-vega-report/ [https://perma.cc/2ZZ6-VV3U].

in-ring persona "Daniel Bryan" from 2009 to 2021, described his travel schedule in a 2013 interview:

> We're on the road 250 days a year. Last year I ended up doing 219 shows. We don't have an offseason, so week in and week out, we fly out on Friday, we'll do a show Friday night, Saturday night, Sunday night, all of which are untelevised unless we're doing a pay-per-view on a Sunday. Then we do a live Raw on Monday, we film SmackDown and Main Event on Tuesday, and then we fly home on Wednesday. So we have half of Wednesday and Thursday to get our stuff repacked, and then we fly back out on Friday. And that's when we don't have international tours. . . . It's pretty grueling.[44]

The WWE pays for wrestlers' flights to the first event of the week and back from the last event of the week.[45] However, wrestlers are required to pay for their own rental cars, hotel accommodations, and other travel expenses incurred while on the road.[46] Due to the cost of these expenses, lower paid WWE wrestlers can suffer an overall loss when working a show as their compensation is not enough to cover their out-of-pocket expenses.[47] Although a rational wrestler might otherwise forgo traveling to a show where they would incur a loss, the WWE will fine, suspend, and even fire wrestlers who do not appear at events for which they are booked.[48]

In addition to the wear from travel, wrestlers regularly endure injuries as part of their work. As every young wrestling fan one day comes to realize, professional wrestling matches are staged exhibitions between cooperating performers. When a wrestler writhes on the mat after a body slam or falls over stunned from a right hook, they are more likely to be embellishing than hurt. Despite the theatrics, serious injuries are a common occurrence for professional wrestlers.[49] According

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[44] David Shoemaker, *Daniel Bryan: Q&A With a Reluctant Hero*, GRANTLAND (Dec. 27, 2013), http://grantland.com/features/masked-man-does-qa-wwe-superstar-daniel-bryan [https://perma.cc/GE96-CPU9].

[45] Schiavone, *supra* note 5, at 488.

[46] *See id.* at 489.

[47] *See id.*

[48] *See* Guerrero Contract, *supra* note 31, § 8.

[49] *See, e.g.*, Blake Oestriecher, *WWE Statistics Show Its Stars Are Being Overworked, Especially on SmackDown*, FORBES (Jan. 17, 2018, 8:36 AM), https://www.forbes.com/sites/blakeoestriecher/2018/01/17/

to former WWE wrestler Scott "Raven" Levy, injuries are "part of the job … If you want to be a wrestler, you have to be a big guy, and you have to perform in pain."[50] The WWE currently pays for all medical expenses stemming from in-ring injuries.[51] However, wrestlers need to purchase their own health insurance and, after their retirement from or termination by the WWE, are left to pay the medical costs for ongoing injuries incurred during their career.[52] Further, WWE contracts absolve the company of all liability for a wrestler's in-ring injuries, including death, even as a result of the company's own negligence.[53]

In recent years, WWE has taken measures to address some of the health and wellness issues of its wrestlers. In 2006, following the death of WWE wrestler Eddie Guerrero at the age of thirty-eight, the company implemented a new "Talent Wellness Policy" that includes required testing for steroids and other drugs.[54] The WWE has also instituted a concussion management program and banned moves that the company identified as causing concussions.[55] However, some observers have criticized the Talent Wellness Policy as being lenient to the point of ineffectiveness,[56] and wrestlers describe feeling pressured to perform while

wwe-statistics-show-its-stars-are-being-overworked-especially-on-smackdown/?sh=1f49de9fa622 [https://perma.cc/QR4A-3PLA]; Ryan Dilbert, *Exploring the Causes of WWE's Recent Surge in Injuries*, BLEACHER REPORT (May 18, 2016), https://bleacherreport.com/articles/2627439-exploring-the-causes-of-wwes-recent-surge-in-injuries?curator=SportsREDEF [https://perma.cc/KF3U-CAXN].

[50] Jon Swartz, *High Death Rate Lingers Behind Fun Facade of Pro Wrestling*, USA TODAY (Mar. 12, 2004), http://usatoday30.usatoday.com/sports/2004-03-12-pro-wrestling_x.htm [https://perma.cc/YU68-3GJ3].

[51] WWE ANNUAL REPORT, *supra* note 29, at 15.

[52] *See* Schiavone, *supra* note 5, at 487.

[53] Guerrero Contract, *supra* note 31, § 9.12(c).

[54] *Substance Abuse and Drug Testing Policy*, Corporate WWE (July 23, 2013), https://corporate.wwe.com/what-we-do/talent/substance-abuse-and-drug-testing-policy [https://perma.cc/4UXJ-AVGB].

[55] Rouse, *supra* note 28.

[56] *See* Pavitar Sidhu, *WWE: The Truth Behind Wellness Policy*, BLEACHER REPORT (Nov. 17, 2011), https://bleacherreport.com/articles/944506-wwe-the-truth-behind-wellness-policy [https://perma.cc/TU73-DGMS]; Shaun Assael, *WWE and Steroids: Still a Tough Target*, ESPN (Apr. 13, 2009), http://www.espn.com/espn/e60/columns/story?columnist=assael_shaun&id=4055522 [https://perma.cc/E7YM-7LR4].

injured.[57] Further, wrestlers' contracts include a clause allowing the WWE to unilaterally reduce their annual compensation should they miss more than eight weeks due to an injury sustained while performing.[58]

Despite maintaining travel and work schedules that greatly exceed those of other professional athletes, wrestlers are compensated at a level far below their counterparts in the "Big Four" professional sports.[59] In 2021, WWE reported net revenues of just over $1 billion.[60] According to wrestling journalist Dave Meltzer, WWE wrestlers earn less than 10% of the company's revenue.[61] In contrast, players in the NFL and NBA, both of which have players associations with collective bargaining agreements, are guaranteed roughly 50% of league revenues[62] Even fighters in the Ultimate Fighting Championship (UFC), who, like WWE wrestlers, are non-unionized and classified as independent contractors, earn

[57] *See* Joseph Fargiorio, *WWE: Wrestling, Wellness & Entertainment – An Analysis of Work and Health in Professional Wrestling* (2014) (M.A. thesis, University of Guelph) (on file with the Atrium, University of Guelph); Art of Wrestling, *CM Punk*, at 1:16 (Nov. 27, 2014) (downloaded using Apple Podcasts) ("I got a concussion. But we were leaving for Europe the next day. So, Doc was leaning on me going 'do you want me to . . . do you have a concussion or can you go to Europe' kind of thing. And I was just like 'you fucking . . . you pigs. I'll go to Europe. Whatever.'").

[58] Guerrero Contract, *supra* note 31, § 7.13.

[59] The "Big Four" refers to the National Football League (NFL), the National Basketball Association (NBA), Major League Baseball (MLB), and the National Hockey League (NHL).

[60] WWE ANNUAL REPORT, *supra* note 29, at 23.

[61] Wrestling Observer Radio, *RAW, Japan Restrictions, Tokyo Dome, Ratings, TripleMania, More!*, WRESTLING OBSERVER, at 45:03 (Nov. 30, 2021), https://www.f4wonline.com/podcasts/wrestling-observer-radio/wor-raw-japan-restrictions-tokyo-dome-ratings-triplemania-more-361116 [https://perma.cc/V8S6-59CT].

[62] *E.g.*, Kurt Badenhausen, *Baseball Salary Growth Trails NFL and NBA as Sports Revenues Boom*, YAHOO! SPORTS (Dec. 8, 2021), https://sports.yahoo.com/baseball-salary-growth-trails-nfl-050116056.html [https://perma.cc/5TUT-ST3H]; JC Tretter, *NFL Economics 101*, NATIONAL FOOTBALL LEAGUE PLAYERS ASS'N (Oct. 27, 2021), https://nflpa.com/posts/nfl-economics-101 [https://perma.cc/37ZE-C64X].

close to 20% of the company's revenues.[63] As Meltzer puts it, "there is not one person on [the WWE] roster who is not greatly underpaid."[64]

Although professional wrestling is not a professional sport per se, the collective bargaining agreements achieved by professional sports players associations provide some indication of what collective action in the WWE might be able to achieve. For example, per the NFL's collective bargaining agreement, active NFL players and their dependents receive medical and life insurance.[65] Further, players who attain at least three "credited seasons" are eligible for a 401(k) savings plan as well as a pension plan.[66] Former players who have reached such "vested" status also have access to medical and life insurance for five years after they retire.[67] WWE wrestlers do not enjoy any such benefits.[68]

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[63] Marc Raimondi, *UFC President Dana White Not Planning Fighter Raises: 'These guys get paid what they're supposed to get paid'*, ESPN (Aug. 12, 2022), https://www.espn.com/mma/story/_/id/34389555/ufc-president-dana-white-not-planning-fighter-raises-guys-get-paid-supposed-get-paid [https://perma.cc/DYU4-LJCB]. As of September 2023, the UFC and WWE have merged but continue to operate as independent businesses under the umbrella company TKO Group Holdings. *See* Spangler, *supra* note 9. UFC fighters' revenue share was uncovered prior to the merger as part of ongoing class action litigation brought against the UFC by a group of former fighters. *See* Le v. Zuffa, LLC, 216 F. Supp. 3d 1154 (D. Nev. 2016). The fighters allege that the UFC has engaged in anticompetitive conduct to achieve and maintain monopsony power in the market for fighter labor. *See id.*

[64] Wrestling Observer Radio, *supra* note 61, at 45:03.

[65] *See Player Benefits, Active Practice Squad Players*, NFL, (Aug. 2020), https://static.www.nfl.com/image/upload/v1613673602/league/k8j5zhaoxnmvdepreyrm.pdf [https://perma.cc/26GP-WSDW].

[66] *Player Benefits, Vested Active Players*, NFL, (Aug. 2020), https://static.www.nfl.com/image/upload/v1613673951/league/k6mtb60spqbrqkwre6ui.pdf [https://perma.cc/UW3V-RFDR].

[67] *Player Benefits, Vested Former Players*, NFL, (Aug. 2020), https://static.www.nfl.com/image/upload/v1613674163/league/zvha8z8hwj8mbvyprmii.pdf [https://perma.cc/SM9B-TJRB].

[68] *See* Christian D'Andrea, *WWE and UFC Now Have the Same Owner. Now's the Time for a Combat Sports Union*, FOR THE WIN (Apr. 3, 2023), https://ftw.usatoday.com/2023/04/wwe-sold-ufc-owner-endeavor-unionization-fighter-wrestler-pay [https://perma.cc/H5TX-DJSA].

II
THE STATUTORY LABOR DISPUTE EXEMPTION

WWE wrestlers themselves have cited the costs of health insurance, travel, and their treatment while injured as reasons for supporting unionization.[69] Following the pressure to deactivate her Twitch account, Thea Budgen announced her support for unionization in a tweet posted almost simultaneously with the announcement of her release from WWE.[70] As these wrestlers recognize, unionization and collective bargaining would help them to address many of their grievances. However, antitrust liability threatens to derail any concerted action by WWE wrestlers. Fortunately for wrestlers interested in organizing, a new conception of the statutory labor dispute exemption—the exception to antitrust laws traditionally applied only to employees—offers protection from antitrust action.

A. The Origins of the Statutory Labor Dispute Exemption

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade."[71] The main impetus behind the Sherman Act was the increasing concentration of corporate power in trusts and monopolies at the end of the twentieth century.[72] However, in the decades immediately following its passage, the Supreme Court invoked the Act to target the activities of organized labor.[73] In response to the Court's use of the Sherman Act to crush the efforts of organized labor,[74] Congress passed the Clayton Act of 1914.[75] Section 6 of the Clayton Act, as amended, states:

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[69] *See, e.g.*, VENTURA, *supra* note 1, at 105–06 (citing the cost of health insurance as the motivating factor for his push to unionize); Art of Wrestling Podcast, *supra* note 57 ("I would like to see them get some sort of a union for the boys and girls, that way I know they're serious about protecting them from concussions and other things."); Tim Gill, *In the WWE, Wrestlers Say Labor Abuses Are Everywhere*, JACOBIN (Oct. 13, 2022) (quoting wrestlers who cite the cost of travel as well as the need for better physical and mental health protections as the impetus to unionize) https://jacobin.com/2022/10/wwe-vince-mcmahon-wrestling-unions-health [https://perma.cc/Z3UV-YSK2].

[70] Powell, *supra* note 36.

[71] Sherman Antitrust Act of 1890, 15 U.S.C. § 1.

[72] *See, e.g.*, Estlund & Liebman, *supra* note 15, at 374.

[73] *See, e.g.*, Loewe v. Lawlor, 208 U.S. 274, 283 (1908).

[74] *See* Estlund & Liebman, *supra* note 15, at 374–75.

[75] Clayton Antitrust Act of 1914, 15 U.S.C. §§ 12–27.

> The labor of a human being is not an article of commerce and that nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor … organizations, instituted for the purposes of mutual help, … or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.[76]

Despite the explicit language of Section 6, the Court found in *Duplex Printing v. Deering* that the Act "merely put[] into statutory form … the law as it stood before."[77] Thus, the Act that American Federation of Labor leader Samuel Gompers initially hailed as "labor's Magna Carta" failed to protect labor activity from antitrust action.[78]

In response to the continued issuance of injunctions against labor groups by federal courts and pressure from organized labor,[79] Congress passed the Norris-LaGuardia Act of 1932.[80] The Norris-LaGuardia Act prohibited federal courts from issuing injunctions against a broad list of activities arising out of a "labor dispute."[81] In an early case interpreting the Norris-LaGuardia Act, *Milk Wagon Drivers Union v. Lake Valley Farm Products*, the Court considered a petition to enjoin the picketing activities of a union of milk delivery drivers.[82] The Court held that, given Congress's explicit rejection of *Duplex Printing* in the passage of the Norris-LaGuardia Act, federal courts lacked jurisdiction to grant injunctions in cases arising from a labor dispute, even where a labor group may have committed a violation of the Sherman Act.[83]

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[76] *Id.* § 17.

[77] Duplex Printing Press Co. v. Deering, 254 U.S. 443, 470 (1921).

[78] Estlund & Liebman, *supra* note 15, at 375.

[79] *See, e.g.*, Burlington N. R. Co. v. Bhd. of Maint. of Way Emps., 481 U.S. 429, 438 (1987) ("The Norris-LaGuardia Act responded directly to the construction of the Clayton Act in *Duplex*, and to the pattern of injunctions entered by federal judges.").

[80] Norris-LaGuardia Act, 29 U.S.C. §§ 101–115.

[81] *Id.*

[82] Milk Wagon Drivers Union v. Lake Valley Farm Prods., 311 U.S. 91, 94–96 (1940).

[83] *See id.* at 102–03.

Milk Wagon Drivers, like the text of the Norris-LaGuardia Act itself, concerned the ability of federal courts to enjoin labor activities. However, in 1941 the Court adopted a broader interpretation of the Norris-LaGuardia Act in *United States v. Hutcheson*.[84] *Hutcheson* concerned not an injunction but the criminal prosecution of a carpenters' union for Sherman Act violations arising from their striking and picketing activities.[85] The Court stated that the Norris-LaGuardia Act, properly read together with the Clayton Act, created a "harmonizing text" defining labor's exemption from antitrust liability.[86] The Act "reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the [Norris-LaGuardia] Act" and removed "all such allowed conduct from the taint of being 'violations of any law of the United States,' including the Sherman Law."[87] Thus, so long as a labor group "acts in its self-interest and does not combine with non-labor groups," the Norris-LaGuardia Act protects concerted action by labor groups from the reach of the Sherman Act.[88]

B. Independent Contractors Under the Statutory Labor Dispute Exemption

1. The Historical Consensus

The general scope of labor's statutory exemption from antitrust liability defined in *Hutcheson* persists to this day.[89] Immunity from the Sherman Act extends to activities that are undertaken by "bona fide" labor organizations, occur in the context of a labor dispute, promote the organization's self-interest, and do not include combinations with a non-labor group.[90] None of the requirements for application of the statutory exemption hinge on the employment classification of the workers involved in a labor dispute. Nevertheless, courts have interpreted the statutory exemption not to extend to the actions of independent contractors.[91] In *Columbia River Packers Association v. Hinton*, a case decided only a year after

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[84] United States v. Hutcheson, 312 U.S. 219 (1941).

[85] *See id.* at 227–28.

[86] *Id.* at 231.

[87] *Id.* at 236.

[88] *Id.* at 232.

[89] *See, e.g.*, Susan Schwochau, *The Labor Exemptions to Antitrust Law: An Overview*, 21 J. LAB. RSCH. 535, 544 (2000).

[90] *E.g., id.* at 545.

[91] *See, e.g., id.* at 545-46.

Hutcheson, the Court considered whether the exemption protected the Pacific Coast Fishermen's Union, an association of independent contractor fishermen, against an injunction sought by a fish processing and canning company.[92] The union had engaged in a boycott against the company following the company's refusal to enter into an agreement to buy fish exclusively from union members.[93] The Court determined that the fisherman, who owned and leased their own boats and sold their catch to processors, were not workers at all but "independent businessmen" engaged in a dispute "over the sale of commodities."[94] Thus, the Court reversed the circuit court's finding that the exemption applied, for as "however broad" the statutory definition of a labor dispute may be, it did not "include controversies upon which the employer-employee relationship has no bearing."[95]

Columbia River Packers presented the Court with a straightforward test case of the bounds of the definition of a "labor dispute" for purposes of the statutory labor exemption. The fishermen were "independent businessmen" engaged in the sale of goods, not workers engaged in the sale of labor.[96] Thus, the Court could exclude the fishermen from the reach of the exemption without answering directly whether the exemption might apply to independent contractors who were engaged in labor for wages. The Court repeated this reasoning in *L.A. Meat and Provision Drivers Union, Local 626 v. United States*.[97] *L.A. Meat* concerned the activities of a union of independent contractor "grease peddlers," middlemen who purchased grease from restaurants and sold it to processors.[98] The peddlers had joined the Meat and Provision Drivers Union, used strikes and boycotts to obtain higher purchase prices from processors, and agreed not to compete with each other for business.[99] In the district court action, the peddlers admitted to entering into a conspiracy in restraint of trade in violation of the Sherman Act and

[92] Columbia River Packers Ass'n v. Hinton, 315 U.S 143, *passim* (1942).
[93] *Id.* at 145.
[94] *Id.* at 145, 147.
[95] *Id.* at 146–47.
[96] *Id. passim.*
[97] *See* L.A. Meat and Provision Drivers Union, Local 626 v. United States, 371 U.S. 94 (1962).
[98] *Id.* at 95–97.
[99] *Id.* at 97.

consented to an injunction against them.[100] However, they challenged a provision of the injunction that required them to terminate their union membership.[101] In upholding the injunction, the Court again focused on the fact that the independent contractors functioned as "sellers of commodities," rendering them ineligible for the statutory labor exemption.[102] However, the Court explicitly stated that independent contractors might be protected under the labor exemption for joining in the collective activities of a union where they engaged in competition for jobs and wages with the union members.[103] Further, in his concurrence, Justice Goldberg commented that the Court was not passing judgment on whether the grease peddlers might properly join among themselves to improve their working conditions.[104]

In the cases decided since *Columbia River Packers*, courts have answered the question left open by Justice Goldberg by focusing the inquiry on whether, as the Court in *Columbia River Packers* stated, the "employer-employee relationship [forms] the matrix of the controversy."[105] Most instructive of this approach is the Fourth Circuit's decision in *Taylor v. Local No. 7.*[106] In *Taylor*, a group of horse owners and trainers brought action against two unions of horseshoers, alleging that the horseshoers were engaged in a group boycott and price fixing in violation of the Sherman Act.[107] The *Taylor* court interpreted *Columbia River Packers*, as well as *Milk Wagon Drivers*, to stand for the rule that the labor exemption applied only when the parties stood in the relationship of employer and employee or when an employment relationship otherwise formed the "matrix of the controversy."[108] Thus, the Fourth Circuit read the earlier case law as creating an almost categorical exclusion of independent contractors from the coverage of the statutory labor

[100] *Id.* at 95–96.
[101] *Id.* at 96.
[102] *Id.* at 102.
[103] *Id.* at 103.
[104] *Id.* at 105 (Goldberg, J., concurring).
[105] Columbia River Packers Ass'n v. Hinton, 315 U.S 143, 147 (1942). *See, e.g.*, H.A. Artists & Assocs. v. Actors' Equity Ass'n, 451 U.S. 704, 720-21 (1981); Am. Fed'n of Musicians of U.S. & Can. v. Carroll, 391 U.S. 99, 105-06 (1968).
[106] Taylor v. Local No. 7, Int'l Union of Journeymen Horseshoers of U.S. & Can., 353 F.2d 593 (4th Cir. 1965).
[107] *Id.* at 594–95.
[108] *Id.* at 606.

exemption. As such, the Court then considered whether the horseshoers were employees or independent contractors under the common law and concluded that, because they were properly classified as independent contractors, their collective action was subject to antitrust action.[109]

In *Taylor*, the Fourth Circuit described the horseshoers not as sellers of commodities but as individuals performing services for hire.[110] The court thus extended the rule from *Columbia River Packers* to cover individuals whom the court "plainly consider[ed] workers."[111] The critical distinction for the court in determining the applicability of statutory labor exemption was not whether the horseshoers were workers at all, as in *Columbia River Packers*, but what kind of workers they were: employees or independent contractors.

The approach adopted in *Taylor* is emblematic of the interpretation of the labor exemption to which the courts have historically adhered. Although the parties to a labor dispute need not stand in the proximate relation of employer and employee for the exemption to apply, the employer-employee relationship must form the "matrix of the controversy."[112] Independent contractors have been considered "labor" groups, and thus parties to a labor dispute exempted from antitrust action under the Norris-LaGuardia Act, only when they were in competition with workers classified as employees.[113] Outside of this exception, independent contractors have consistently been excluded from the labor dispute

[109] *Id.* at 596–602, 605-06.

[110] *Id. passim.*

[111] Paul, *supra* note 14, at 1031.

[112] Columbia River Packers Ass'n v. Hinton, 315 U.S 143, 147 (1942). *See also* Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n, 457 U.S. 702, 703 (1982) (quoting *Columbia River Packers*).

[113] *See* Am. Fed'n of Musicians of U.S. & Can. v. Carroll, 391 U.S. 99, 106 (1968) (finding that independent contractor band leaders constituted a "labor group" for purposes of the statutory labor exemption due to the "presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors").

exemption.[114] Lawyers and academics have generally treated the exclusion of independent contractors as categorical.[115]

2. Independent Contractors Revisited

Despite the general assumption that the statutory exemption does not protect the actions of independent contractors, this view is not grounded in the text of either the Clayton Act or the Norris-LaGuardia Act, the statutory foundations of the exemption[116] Neither law ties the exemption to "employee" status under federal labor law.[117] Both acts predate the NLRA, passed in 1935, which provided the first federal statutory definition of "employee" outside of the railroad industry.[118] The centrality of employee status to the applicability of federal labor law protections stems from the 1947 Taft-Hartley Act, which explicitly excluded "independent contractors" from the protections of the NLRA.[119] However, Taft-Hartley did not amend the Clayton Act or Norris-LaGuardia Act or change the statutory labor exemption.[120] Further, although the Norris-LaGuardia Act contains references to "employees" and "employment," the Court has recognized that the term "employment" had a broader meaning in the early twentieth century, which included the work of independent contractors.[121] Thus, there is nothing in the text

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[114] *See, e.g.*, L.A. Meat & Provision Drivers Union, v. United States, 371 U.S. 94, 101 (1962); United States v. Women's Sportswear Mfg. Ass'n, 336 U.S. 460, 463–464 (1949); *Taylor*, 353 F.2d at 606; Spence v. Se. Alaska Pilots' Ass'n, 789 F. Supp. 1007, 1012 (D. Alaska 1990) ("A party seeking refuge in the statutory exemption must be a bona fide labor organization and not independent contractors.").

[115] *See, e.g.*, Brief of the U.S. Department of Justice as Amicus Curiae in Support of Neither Party at 4, Atlanta Opera, Inc. and Make-up Artists & Hairstylists Union, Local 798, 372 NLRB No. 95 (No. 10-RC-276292) (N.L.R.B. 2023) ("[C]ourts have historically held that [the statutory and non-statutory labor] exemptions only protect *employees* and their unions, not independent contractors. By contrast, concerted action by independent contractors traditionally has been subject to antitrust scrutiny."); Katherine E. Hollist, *Time to Be Grown-Ups About Video Gaming: The Rising Esports Industry and the Need for Regulation*, 57 ARIZ. L. REV. 823, 839 (2015) (treating the ban as absolute).

[116] *See* Estreicher Amicus Brief, *supra* note 23, at 5.

[117] *Id.*

[118] *Id.*

[119] *Id.* at 6; Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141-197 (1947).

[120] Estreicher Amicus Brief, *supra* note 23, at 6–7.

[121] *See* New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539–40 (2019) ("Back then, dictionaries tended to treat 'employment' more or less as a synonym for 'work.' Nor did they distinguish

of the laws from which the statutory labor dispute exemption is derived that bars its application to independent contractors. In fact, as noted above, the Clayton Act declared in broad terms that the "labor of a human being is not an article of commerce" for purposes of federal antitrust law.[122]

In a recent decision, the First Circuit embraced a broader understanding of the scope of the statutory labor dispute exemption and its applicability to independent contractors. The case, *Confederación Hípica*, concerned the actions of an association of jockeys in Puerto Rico.[123] The jockeys, independent contractors, formed two associations to protest their low mount fees, the amount a jockey is paid for each race, as well as pre-race weigh-in procedures and the conduct of racing officials.[124] After negotiations with horse owners failed, one of the associations, Jinetes, organized a three-day work stoppage.[125] A group of horse owners and the owner of the racetrack then sued Jinetes and the jockeys, as well as their spouses, alleging that they had engaged in a group boycott in violation of the Sherman Act.[126] The district court found that the jockey's independent contractor status precluded them from the labor dispute exemption.[127] The court then awarded summary judgment against the jockeys, enjoined the work stoppage, and imposed over $1 million in damages.[128]

On appeal, the First Circuit rejected the district court's categorical approach, stating that "whether or not the jockeys are independent contractors does not by itself determine whether this dispute is within the labor-dispute exemption."[129] The court noted that, by the text of the Norris-LaGuardia Act, a labor dispute may exist "regardless of whether or not the disputants stand in the proximate relation

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between different kinds of work or workers: All work was treated as employment, whether or not the common law criteria for a master-servant relationship happened to be satisfied.").

[122] Clayton Antitrust Act of 1914, 15 U.S.C. § 17.

[123] Confederación Hípica De P.R., Inc. v. Confederación De Jinetes Puertorriqueños, Inc., 30 F.4th 306, passim (1st Cir. 2022).

[124] *Id*. at 311.

[125] *Id.*

[126] *Id.*

[127] *Id.* at 312.

[128] *Id.*

[129] *Id.* at 315.

of employer and employee."[130] Citing *Columbia River Packers*, the court held that the critical question was "not whether the jockeys are independent contractors or laborers but whether what is at issue is compensation for their labor."[131] Without answering whether the jockeys were properly classified as independent contractors, the court found that the dispute could qualify for the labor dispute exemption because what was at issue was "wages for labor" rather than "prices for goods."[132]

Having established that the jockeys were eligible for the labor dispute exemption notwithstanding their classification status, the court then considered the applicability of the labor dispute exemption to the jockeys' actions under the traditional four-part test. The exemption applies to "conduct arising (1) out of the actions of a labor organization and undertaken (2) during a labor dispute, (3) unilaterally, and (4) out of the self-interest of the labor organization."[133] The jockeys' association, which advocated for the jockeys' terms of employment, was a labor organization.[134] The controversy at issue was a "core labor dispute" as the jockeys sought "higher wages and safer working conditions."[135] The final two conditions were not in dispute.[136] Finding that the elements of the test were satisfied, the First Circuit held that the labor dispute exemption applied.[137]

III
THE PROMISE OF *Confederación Hípica* FOR PROFESSIONAL WRESTLERS

The First Circuit held in *Confederación Hípica* that the wage–price distinction, not the classification status of the workers engaged in collective action, is the "key question" in determining whether a dispute may fall within the

[130] *Id.* at 314 (quoting 29 U.S.C. § 113(c)). This phrase, though seemingly promising to independent contractors, was likely initially intended to extend the protections afforded by the Act to include secondary and sympathetic actions. Estlund & Liebman, *supra* note 15, at 379 n.43.

[131] *Confederación Hípica*, 30 F.4th at 314.

[132] *Id.* at 315.

[133] *Id.* at 313 (citing H.A. Artists & Assocs. v. Actors' Equity Ass'n, 451 U.S. 704, 714–15 (1981)).

[134] *Id.* at 314.

[135] *Confederación Hípica*, 30 F.4th at 314.

[136] *Id.*

[137] *Id.*

statutory exemption.[138] The court's approach is a promising sign for independent contractors. In fact, in a recent policy statement citing *Confederación Hípica*, the FTC announced that it would refrain from "enforcement or policy efforts that might undermine the ability of gig workers to organize."[139] What courts are likely to take away from *Confederación Hípica* is less clear. Outside of rejecting the categorical approach, the court offered little clarity as to how the wage–price distinction should be applied.[140] At its broadest, the distinction between wages and prices might mirror that between selling goods and selling services.[141] However, such a broad interpretation would seem to afford antitrust protection to concerted rate setting by professionals, such as dentists and lawyers, which the Court has previously deemed horizontal price fixing.[142] Further, important to the Court's decision in *Columbia River Packers*, on which the First Circuit relied, was the fact that the fisherman there owned or leased their own boats and acted as "independent businessmen, free from such controls as an employer might exercise."[143] Thus, the extent of the workers' investment and amount of independent control over their work, two factors in the common law agency test,[144] are important considerations in deciding whether a controversy is over wages or prices.[145] However, given the First Circuit's rejection of employment classification status being determinant of

[138] *See id.*

[139] FTC, POLICY STATEMENT ON ENFORCEMENT RELATED TO GIG WORK 6 n.68 (2022), 2022 WL 4366118.

[140] *See* Jack Samuel, Case Comment, Confederación Hípica v. Confederación De Jinetes Puertorriqueños, N.Y.U. L. REV. 2–3 (2023), https://www.nyulawreview.org/wp-content/uploads/2023/04/Case-Comment_Confederacio%CC%81nHi%CC%81pica-6.pdf [https://perma.cc/ET53-DBEZ].

[141] The First Circuit provided some suggestion that this might be the correct interpretation in a footnote distinguishing *Taylor* as a case involving "not just labor but also a product," referring to the horseshoes themselves. *Confederación Hípica*, 30 F.4th at 315 n.3. The court went on to distinguish *Taylor* on the facts as inapplicable to a "labor-only case." *Id.*

[142] *See* FTC v. Indep. Fed'n of Dentists, 476 U.S. 447 (1986) (regarding dentists); FTC v. Super. Ct. Trial Laws. Ass'n, 493 U.S. 411 (1990) (regarding lawyers); *see also* Samuel, *supra* note 140, at 9 n.48 (arguing that this interpretation would be both overinclusive of these groups as well as potentially underinclusive of some manufacturing workers).

[143] Columbia River Packers Ass'n v. Hinton, 315 U.S 143, 147 (1942).

[144] *See* RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958).

[145] *See* Samuel, *supra* note 140, at 9.

the applicability of the labor dispute exemption, the wage–price distinction must represent something different than the common law test.

A narrower definition of the bounds of the First Circuit's holding can be found in the work of Professors Cynthia Estlund and Wilma Liebman prior to *Confederación Hípica*.[146] Estlund and Liebman interpret the statutory labor exemption as creating a tripartite scheme of "employees", "independent workers," and "genuine[] independent contractors."[147] The latter two groups are distinguished from each other by whether they are primarily engaged in "selling their own labor" or in "selling goods *or services* produced with significant capital inputs or the labor of others."[148] Independent workers, defined by the activity of selling their labor, would be protected from antitrust liability for their concerted activities while remaining unprotected under federal labor law.[149] Estlund and Liebman's scheme thus ties together *Confederación Hípica*'s wage–price distinction with *Columbia River Packers*' focus on goods and labor while solving for the broader interpretation's problem of over-inclusivity. Further, the focus on independent investment as the distinguishing characteristic of those individuals selling services outside of the reach of the labor dispute exemption is consistent with the Court's precedent.[150]

Under the scheme posited by Estlund and Liebman, WWE wrestlers are a paradigm example of "independent workers." First, professional wrestlers are plainly workers engaged in the sale of labor, and not goods, for a price. The work of professional wrestlers consists of their in-ring performance as well as their work in promotional segments. Further, the WWE, not its wrestlers, is responsible for the "significant capital inputs" associated with wrestlers' work. Although wrestlers bear a portion of their travel costs, the WWE pays for wrestlers' training, venue

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[146] *See* Estlund & Liebman, *supra* note 15, at 378–380.

[147] *Id.*

[148] *Id.* at 380 (emphasis added).

[149] *Id.*

[150] *See* United States v. Women's Sportswear Mfg. Ass'n, 336 U.S. 460, 463–464 (1949) (holding that the concerted actions of a group of stitching contractors were not protected from antitrust action under the statutory labor dispute exemption as "[t]he stitching contractor, although he furnishes chiefly labor, also utilizes the labor through machines and has his rentals, capital costs, overhead and profits.").

rentals, production costs, equipment, and advertising.[151] The WWE's investment dwarfs that of its wrestlers.[152] Thus, professional wrestlers can be distinguished from the fishermen in *Columbia River Packers*, who owned or leased their own boats,[153] and the stitching contractors at issue in *Women's Sportswear*, who owned the machines on which they did their work and the workshops in which they worked.[154] The Court deemed the fisherman and stitching contractors "independent businessmen"[155] and "entrepreneurs."[156] Estlund and Liebman would likely call them "genuine[] independent contractors."[157] WWE wrestlers, by the nature of their work and the amount of their independent investment, are independent workers.

The amount of control that the WWE maintains over wrestlers' work further identifies them as workers who should be included in the statutory labor exemption under *Confederación Hípica*.[158] The WWE's standard booking contract includes under the heading "Wrestler's Obligations" that the "[w]restler agrees that all matches shall be finished in accordance with the Promoter's direction."[159] In practice, the WWE's control over wrestlers' work extends far beyond just who wins or loses a match. WWE management determines the time, location, and

[151] *See* Guerrero Contract, *supra* note 31, § 8; *cf.* Columbia River Packers Ass'n v. Hinton, 315 U.S 143, 144–145 (1942) ("The fishermen own or lease fishing boats . . . and carry on their business as independent entrepreneurs.").

[152] *See* Jamie Sharp, *Pinned Down: Labor Law and Professional Wrestling – Part II: Workers in the Billion Dollar Pro-Wrestling Industry*, 23 ENT. & SPORTS LAW. 16, 24 (2006); *cf.* Sec'y of Lab., U.S. Dep't of Lab. v. Lauritzen, 835 F.2d 1529, 1537 (7th Cir. 1987) (holding that where farm workers provided their own gloves, and the employer provided the farm equipment, land, seed, fertilizers, and living quarters, their work was not independent of the employer); Hopkins v. Cornerstone Am., 545 F.3d 338, 344 (5th Cir. 2008) (comparing each worker's individual investment to their employer's overall investment in the business).

[153] *Columbia River Packers*, 315 U.S. at 144–45.

[154] *Women's Sportswear*, 335 U.S. at 463–64.

[155] *Columbia River Packers*, 315 U.S. at 147.

[156] *Women's Sportswear*, 335 U.S. at 464.

[157] Estlund & Liebman, *supra* note 15, at 380.

[158] Although Estlund and Liebman do not focus on degree of control as a factor in their scheme, the First Circuit's focus on it by way of reliance on *Columbia River Packers* warrants its inclusion. *See* Confederación Hípica De P.R., Inc. v. Confederación De Jinetes Puertorriqueños, Inc., 30 F.4th 306, 314 (1st Cir. 2022); *Columbia River Packers*, 315 U.S. at 147 ([The fishermen] operate as independent businessmen, free from such controls as an employer might exercise.").

[159] Guerrero Contract, *supra* note 31, § 9.6.

duration of wrestlers' work.[160] In the complaint of a 2008 lawsuit filed by a group of former WWE wrestlers, the wrestlers alleged that the WWE "exercised total control over all aspects of the wrestlers' employment."[161] Specifically, the plaintiffs alleged that WWE's control covered wrestlers' training program, opponents and "tag team" partners, costumes and hairstyles, stage personas and mannerisms, and even the specific dialogue wrestlers use in pre- and post-match "boasting and badmouthing."[162]

In-ring performance is not entirely scripted, with wrestlers maintaining some creative license to dictate moves during a match, a practice known in the industry as "calling spots."[163] Additionally, WWE's most prominent wrestlers and longtime veterans of the profession often provide input regarding the presentation of their characters.[164] However, WWE management maintains final creative control.[165] As the district court in the 2008 lawsuit noted in its Memorandum of Decision on Motion to Dismiss, WWE matches are "scripted [and] choreographed by agents of [the WWE] and executed by wrestlers assigned by [the WWE] which directs and controls wrestlers' conduct and the outcome."[166]

One of the most controversial episodes in the WWE's history, the "Montreal Screwjob," demonstrates just how resistant the WWE has been to ceding creative control to its talent. In 1997, then Champion Bret Hart decided to leave WWE for its rival company, World Championship Wrestling (WCW).[167] Hart's contract included a clause that granted him creative control over his character for the final six months of his tenure with the WWE.[168] Exercising this control, Hart refused to lose his championship title to in-ring and real-life rival Shawn

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[160] *Id*. § 8.3.

[161] Complaint at 2, Levy v. World Wrestling Ent., Inc., 2009 WL 455258 (D. Conn. Feb. 23, 2009) (No. 3:08–01289), 2008 WL 5707884.

[162] *Id*. at 2-3.

[163] Cowley, *supra* note 10, at 155–58.

[164] *Id*.

[165] *Id.*

[166] Levy v. World Wrestling Ent., Inc., 2009 WL 255258, *1 (D. Conn. Feb. 23, 2009).

[167] Jimmy Traina, *It's the 25th Anniversary of the Most Significant Moment in Pro Wrestling History*, SPORTS ILLUSTRATED (Nov. 9, 2022), https://www.si.com/extra-mustard/2022/11/09/montreal-screwjob-anniversary-bret-hart-vince-mcmahon-shawn-michaels [https://perma.cc/E25Y-SV3R].

[168] *Id.*

Michaels.[169] Despite Hart's refusal and contractual creative control, then-WWE CEO Vince McMahon orchestrated a "double-cross" in which, in a championship match between Michaels and Hart, the referee indicated that Hart had submitted and called for the bell.[170] Thus, Michaels won the championship, and WWE management ensured its desired outcome.

The extent of the rule established in *Confederación Hípica* is uncertain. The horse owners unsuccessfully filed a petition for a writ of certiorari from the Supreme Court.[171] Nevertheless, even under a narrow conception of the First Circuit's decision, WWE wrestlers should be eligible for the statutory labor dispute exemption. Wrestlers furnish the WWE with their labor, in which the WWE makes a significant investment and over which the WWE maintains immense control. Further, application of the statutory labor dispute exemption to WWE wrestlers would be consistent not only with *Confederación Hípica* but also with the purpose of the exemption itself. As the Supreme Court has recognized, there is an "inherent tension between national antitrust policy, which seeks to maximize competition, and national labor policy, which encourages cooperation among workers to improve the conditions of employment."[172] The Norris-LaGuardia Act was intended to resolve this tension in favor of encouraging collective bargaining.[173] As the First Circuit explained in *Confederación Hípica*,

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[169] *Id.*

[170] *Id.*

[171] Petition for a Writ of Certiorari, Confederación Hípica De P.R., Inc. v. Confederación De Jinetes Puertorriqueños, Inc., 143 S. Ct. 631 (2023) (mem.) (No. 22-327), 2022 WL 5543022.

[172] H. A. Artists & Assocs. v. Actors' Equity Ass'n, 451 U.S. 704, 713 (1981).

[173] The preamble of the Norris LaGuardia Act made this purpose clear:

> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore … it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing … and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

although antitrust law generally forbids competitors from colluding to increase prices, "[w]hen the price is a laborer's wage, . . . a different set of rules apply. That must be so, lest antitrust law waylay ordinary collective bargaining."[174] Wrestlers, as laborers for a wage, should qualify for a "different set of rules" than independent entrepreneurs. Absent an extension of the statutory labor dispute exemption, the threat of antitrust liability will continue to cabin the ability of wrestlers to bargain collectively for the changes that they desire.[175]

CONCLUSION

In the specialized jargon of professional wrestling, the word "work" has a variety of usages. A wrestler looking to soften up his opponent's joints for a later submission is said to be "working the elbow." Fans praise exciting, action-oriented wrestlers for their "high work rate." While the public often refer to professional wrestling as "fake," the wrestlers themselves prefer to describe it as "worked." Often the highest praise one wrestler can give another is the understated acknowledgment that a wrestler is a "good worker."

Professional wrestling's linguistic fascination with "work," per one anthropological account of the sport, "reinforces awareness of labor relations between promoter and employee and reflects professional wrestling's blue-collar roots."[176] This succinct summation not only misstates wrestlers' employment classification but also elides the complexities of the role of labor in professional wrestling. In fact, working class consciousness and labor solidarity in professional wrestling have been invoked more often for on-screen effect than backstage impact. For example, in 1999, the WWE featured a storyline involving a "mock

29 U.S.C. § 102.

[174] Confederación Hípica De P.R., Inc. v. Confederación de Jinetes Puertorriqueños, Inc., 30 F.4th 306, 312 (1st Cir. 2022).

[175] Although some high-profile wrestlers may have substantial bargaining power, most wrestlers are at a severe disadvantage when bargaining with the WWE as individuals. *See* Karen Corteen, *In Plain Sight – Examining the Harms of Professional Wrestling as State-Corporate Crime*, 4 J. CRIMINOLOGICAL RSCH., POL'Y & PRAC. 46, 54 (2018) ("[A]s several lawyers have noted, wrestler contracts reflect the promoter's superior power to dictate the contract's terms and conditions.").

[176] Laurence de Garis, *The "Logic" of Professional Wrestling*, in STEEL CHAIR TO THE HEAD: THE PLEASURE AND PAIN OF PROFESSIONAL WRESTLING 192, 199 (Nicholas Sammond ed., 2005).

labor uprising" by a group of wrestlers who formed a faction called "the Union" to oppose the on-screen mistreatment of wrestlers by the WWE-management-aligned group known as "the Corporation."[177] The labor movement was scripted and, after a few weeks, died out entirely.[178]

The on-screen "Union" aside, there has been no serious effort for unionization in the WWE since Ventura's failed attempt in 1986.[179] The First Circuit's extension of the statutory labor dispute exemption to independent contractors provides a promising opportunity for WWE wrestlers to organize while claiming protection from antitrust liability. Of course, so long as they remain independent contractors, WWE wrestlers will not be protected from retaliation for their organizing actions under Section 7 of the NLRA.[180] However, there are reasons to be optimistic about the ability of WWE wrestlers to organize effectively. First, the market for professional wrestlers' labor is at its most competitive in twenty years. All Elite Wrestling (AEW) has emerged as the first viable competitor to WWE since WWE's former rival, WCW, went bankrupt in 2001.[181] WWE may be more inclined to negotiate with wrestlers given the increased competition for their labor. Further, AEW's contracts are generally less restrictive, even allowing their wrestlers to appear for independent promotions.[182] Second, although Vince McMahon remains a large shareholder in TKO Group Holdings, WWE's parent company, his level of day-to-day control seems to have declined.[183] The elevation of former wrestler Paul Levesque, professionally known as "Triple H," as Chief Content Officer may make WWE management more sympathetic, or at least less

[177] SHOEMAKER, *supra* note 26, at 342.

[178] *Id.*

[179] *Id.* at 344.

[180] *See, e.g.*, Cowley, *supra* note 10, at 170.

[181] Bill Hanstock, *For the First Time in 20 Years, WWE Has a Legit Competitor*, POLYGON (Oct. 7, 2021, 10:00 AM), https://www.polygon.com/2021/10/7/22709241/all-elite-wrestling-wwe-competitor [https://perma.cc/Q4GH-D9GK].

[182] *See* Matthew Wilkinson, *5 Ways AEW Contracts Are Different Than WWE Contracts (& 5 Ways They're the Same)*, SPORTSTER (Feb. 16, 2023), https://www.thesportster.com/wwe-aew-contracts-differences-similarities/#difference-aew-39-s-tiered-deals [https://perma.cc/5F6Z-YLDJ].

[183] *See* Sam Fels, *Vince McMahon Lost out to 1 of the Few People More Powerful Than Him*, DEADSPIN (Oct. 18, 2023), https://deadspin.com/vince-mcmahon-ari-emanuel-dana-white-wwe-ufc-tko-1850938517 [https://perma.cc/BZP8-FRYZ].

openly hostile, to the demands of its workers. For example, Levesque has since rescinded the ban on Twitch streaming that McMahon had imposed.[184] Lastly, in 2020, SAG-AFTRA's then-President Gabrielle Carteris issued a statement that the union would be reaching out to wrestlers and that it was "committed to doing what we can to help professional wrestlers secure the protections they deserve."[185]

Providing a practical roadmap to the unionization of WWE wrestlers is outside the scope of this paper.[186] The main purpose of this discussion has been to demonstrate that, following *Confederación Hípica*, WWE wrestlers' status as independent contractors should not be determinative of their eligibility for the statutory labor dispute exemption. Instead, as workers engaged in the sale of their labor to an employer who controls their work and provides the necessary capital investment, WWE wrestlers should be able organize and engage in collective action over the terms of their employment without facing antitrust liability. With the specter of antitrust action lifted, even absent classification as employees, there is one fewer barrier to the formation of a union in the WWE as more than an on-screen storyline.

[184] Subhojeet Mukherjee, *Triple H Nixes Vince McMahon's Controversial Third Party 'Twitch' Ban*, RINGSIDE NEWS (Aug. 18, 2022), https://www.ringsidenews.com/2022/08/18/triple-h-nixes-vince-mcmahons-controversial-third-party-twitch-ban/ [https://perma.cc/4FNQ-4G82].

[185] Nick Hausman, *SAG-AFTRA President Gabrielle Carteris On Pro Wrestlers Possibly Joining The Union*, WRESTLING INC. (Nov. 16, 2020, 9:51 AM), https://www.wrestlinginc.com/news/2020/11/exclusive-sagaftra-president-gabrielle-carites-on-pro-676989/ [https://perma.cc/8VYV-GZDU].

[186] For organizing advice for professional wrestlers, *see* Powell, *supra* note 36.