

Sneak Attacks: Workplace Raids and the Politics of Information

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ABSTRACT

This paper argues that worker protection necessarily includes worker information protection. As a case study, this paper considers the problem of immigration enforcement agencies’ workplace raids in meatpacking plants. Collective organizing and other forms of advocacy rely on bringing visibility to deplorable working conditions. But because visibility poses heightened risks to immigrant workers, undocumented or otherwise, exploitation goes unchallenged. This paper considers two strategies for pursuing better working conditions while protecting worker information: antitrust claims and surveillance transparency. First, this paper situates antitrust actions against the major meat companies within the pro-worker history of antitrust, arguing that worker-focused antitrust litigation can win better conditions for meat processing workers without putting undocumented workers at heightened risk. Then, this paper examines how transparency law can disrupt immigration enforcement agencies’ reliance on private surveillance. Taken together, these strategies demonstrate how advocates for workers’ rights can subvert the coercive function of status quo information privacy norms, while evading the violent impacts of surveillance.

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INTRODUCTION

In 2019, U.S. Immigration and Customs Enforcement (ICE) raided several poultry plants in Mississippi. One plant employee, Maria Domingo Garcia, wrote the following account:

This summer, I was one of the nearly 700 immigrants arrested in the massive ICE raid at a Koch Foods poultry plant in Morton, Mississippi, where I have worked for the past four years. It was the largest single-state workplace immigration raid in our nation’s history. As I found out later, this raid would not have been possible without technology provided by the private data firm Palantir. This is why I felt so angry when Palantir CEO Alex Karp argued that Silicon Valley companies like his are not responsible for making policy—all while providing the tools that enable the Trump administration’s mission to terrorize immigrant communities.

....

The morning of the raid, we heard the sound of helicopters and witnessed many children cry out for their parents as hundreds of workers were loaded into buses and taken away for processing. Similar scenes played out at six other food processing plants in Mississippi, resulting in nearly 700 arrests. In one fell swoop, hundreds of families were devastated.¹

Domingo Garcia’s op-ed explains how ICE arrested and detained her, separating her from her still-breastfeeding baby—but her ire is directed at Palantir, a firm that specializes in merging large data sets for the sake of surveillance. ICE may have executed the workplace raid, but Palantir enabled it. While Palantir deserves unique attention for its role in immigration enforcement (and it gets that attention later in this Note), Domingo Garcia emphasizes a broader point: there are enforcers, and there are enablers. Common methods of fighting for workers’ rights—journalism, labor organizing, impact litigation—rely on an assumption that publicizing exploitative conditions is part of changing those conditions. This paper challenges that assumption by considering the problem of labor advocacy as a potential enabler in times of zealous and cruel immigration enforcement. I argue that the struggle for worker protections must involve a struggle over information.

1. Maria Domingo Garcia, *I’m a Mother of Four: Palantir’s Tech Helped Put Me in an ICE Detention Center*, VICE (Dec. 20, 2019), <https://www.vice.com/en/article/im-a-mother-of-four-palantirs-tech-helped-put-me-in-an-ice-detention-center/>.

Domingo Garcia's op-ed stands as an example of brave self-advocacy—but it's important to remember that she wrote her words from a detention facility. With no further risk from visibility, her ability to speak out differs from mothers like her who withstand terrible working conditions in processing plants.² Due to advances in technology and shifts in policy under the new administration, undocumented workers face unprecedented risks associated with visibility of any kind. Of course, President Trump has no monopoly over mass deportations: though his first administration deported 1.5 million people, former President Biden exited office having deported around 1.49 million as well, and the Obama administration deported 2.9 million people in his first term alone.³ However, the first Trump administration's strategy of conducting mass workplace raids stands out in recent history, and Trump's advisors have signaled an even heavier reliance on them in his second administration.⁴

Sensitive to the concerns of protecting undocumented workers from being exploited because of immigration status, in October 2021, Secretary of Homeland Security Alejandro Mayorkas issued a memo explicitly disallowing the agencies within the Department of Homeland Security from carrying out workplace raids.⁵ The memo also called for cooperation between the Department of Homeland Security (DHS) and Department of Labor (DOL), the Department of Justice (DOJ), the Equal Employment Opportunity Commission (EEOC), the National Labor Relations Board (NLRB), and state labor agencies to prevent immigration agencies like ICE from turning investigations of labor law violations into fishing expeditions for undocumented immigrants.⁶

A few weeks later, the NLRB followed suit: General Counsel Jennifer Abruzzo issued a memo on "Ensuring Rights and Remedies for Immigrant Workers Under the NLRA."⁷ She outlined procedures for seeking and obtaining immigration relief for witnesses and victims of unfair labor practices, like certifying applications for U and T visas.⁸ The approach emphasized protecting workers from immigration enforcement; she explicitly pointed out that

2. See, *infra* Part I.

3. Zachary B. Wolf, *Why deportations actually dropped in Trump's first term*, CNN (Nov. 11, 2024), <https://www.cnn.com/2024/11/11/politics/deportations-trump-presidency-what-matters/index.html>.

4. Sergio Martínez-Beltrán, *Mississippi communities scarred by ICE raids fear future under Trump*, NPR (Dec. 9, 2024), <https://www.npr.org/2024/12/09/g-s1-35931/mississippi-ice-immigration-workplace-raid-deportation-poultry>.

5. U.S. DEP'T OF HOMELAND SEC., WORKSITE ENFORCEMENT: THE STRATEGY TO PROTECT THE AMERICAN LABOR MARKET, THE CONDITIONS OF THE AMERICAN WORKSITE, AND THE DIGNITY OF THE INDIVIDUAL (Oct. 12, 2021), https://www.dhs.gov/sites/default/files/publications/memo_from_secretary_mayorkas_on_worksite_enforcement.pdf.

6. *Id.*

7. NAT'L LAB. RELS. BD., ENSURING RIGHTS AND REMEDIES FOR IMMIGRANT WORKERS UNDER THE NLRA (Nov. 8, 2021), <https://www.nlrb.gov/news-outreach/news-story/gen-counsels-memo-on-ensuring-rights-and-remedies-for-immigrant-workers-under>.

8. *Id.* at 2.

while the NLRB has a general policy to cooperate with other federal and state agencies that request Agency case information to assist in law enforcement efforts, such cooperation does not include sharing NLRB witness information with ICE, unless an individual requests that the Agency share their information to assist them with obtaining an immigration benefit.⁹

The second Trump administration's NLRB is different. Trump fired General Counsel Abruzzo on his first day in office, after Biden set precedent by doing the same.¹⁰ The Board itself will be majority Republican, after the Senate blocked the nomination of Lauren McFerran to continue serving.¹¹ One can thus expect significantly less pushback on immigration enforcement from the Board. At the same time, immigration enforcement itself will change, as Trump appointed South Dakota Governor Kristi Noem, an immigration hardliner, Secretary of Homeland Security.¹² Trump has further named former ICE acting director Tom Homan "Border Czar," saying he will be "in charge of all Deportation of Illegal Aliens back to their Country of Origin."¹³

In anticipation of his new role, Homan told the press that "worksite operations have to happen."¹⁴ This kind of pervasive signaling will likely have a chilling effect on already risky self-advocacy in industries, like meat processing, that hire undocumented labor. Even when litigation for workers' rights succeeds in court, the win can still come at a heavy price. For example, in 2018, Koch Foods (one of the largest poultry producers in the U.S.) paid out \$3.75 million to settle an EEOC class action suit charging the company with sexual harassment, national origin and race discrimination, and retaliation against Latino workers in its Mississippi plants.¹⁵ But a year later, ICE raids targeted Koch Foods' Mississippi plants, resulting in the detention of Maria Domingo Garcia and nearly 700 others.¹⁶ Worker advocacy comes with a visibility that can scare even immigrant

9. *Id.* at 5.

10. Matt Bruenig, *What Does Trump's Win Mean for the NLRB?*, JACOBIN (Nov. 7, 2024) <https://jacobin.com/2024/11/trump-election-nlr-abruzzo-labor>.

11. Kaia Hubbard, *Senate Democrats fail to secure NLRB majority under Trump in razor-thin vote*, CBS NEWS (Dec. 11, 2024) <https://www.cbsnews.com/news/senate-nlr-vote-republicans-lauren-mcferran/>.

12. Kaitlan Collins, *Trump picks Kristi Noem to serve as his Homeland Security secretary*, CNN POLITICS (Nov. 12, 2024) <https://www.cnn.com/2024/11/12/politics/kristi-noem-homeland-security-secretary/index.html>.

13. Kaitlan Collins & Colin McCullough, *Trump announces Tom Homan, his former acting ICE director, will be administration's 'border czar'*, CNN POLITICS (Nov. 11, 2024) <https://www.cnn.com/2024/11/10/politics/tom-homan-border-czar-ice-donald-trump/index.html>.

14. *Id.*

15. Amy Goodman, *Mass ICE Raids in Mississippi After Workers Fought for Better Conditions Leave Kids Without Parents*, DEMOCRACY NOW (Aug. 9, 2019) https://www.democracynow.org/2019/8/9/mississippi_ice_raids_poultry_plant_arrests.

16. Domingo Garcia, *supra* note 1.

employees authorized to work in the U.S. from unionizing or even speaking out about exploitation.¹⁷

Information is the fundamental issue here. Litigation has an “information-forcing” function,¹⁸ but in this case, information comes with a visibility that hurts workers and prevents potential plaintiffs from stepping forward. At the same time, keeping working conditions in the dark facilitates exploitation. However, the meat industry has another information problem: repeated antitrust actions have shown that the already concentrated industry is colluding to keep prices high and wages low.¹⁹ Antitrust litigation has largely focused on the former, but this Note focuses on the latter. This Note joins a growing chorus arguing that antitrust must return to its pro-worker roots.²⁰ Antitrust claims are uniquely suited to serve the needs of undocumented workers, shifting the burden of information-forcing onto management, not workers. Furthermore, information asymmetry between labor and management sits within a broader context of commodified data.²¹ The role Palantir played in the 2019 raid should not be ignored; private surveillance is a serious threat to workers everywhere.

By examining the politics of information at play in ICE’s workplace raids on meat processing plants, this paper argues that legal strategies focusing on information can and must serve as a form of worker protection. Part I explains the obstacles impeding protections for undocumented workers in the meat industry. Part II situates antitrust actions against the major meat companies within the pro-worker history of antitrust, arguing that worker-focused antitrust litigation can win better conditions for meat processing workers without putting undocumented workers at heightened risk. Part III examines how information transparency law can help disrupt immigration enforcement agencies’ reliance on private surveillance.

I. THE PROBLEM

Since Upton Sinclair’s *The Jungle*, meatpacking has loomed in the American consciousness as dangerous, difficult work.²² While *The Jungle* inspired widespread critique of the meatpacking industry, Sinclair’s emphasis on the workers was quickly overshadowed by consumer welfare concerns, leading to the creation of the Food and Drug Administration—and a struggle over information.²³ In the 1990s, the meat industry successfully lobbied for “ag-gag” laws, state laws that

17. See Asad L. Asad, *On the Radar: System Embeddedness and Latin American Immigrants’ Perceived Risk of Deportation*, 54 LAW & SOCIETY REV. 133 (2020).

18. See, e.g., Aisha Saad, *Attribution for Climate Torts*, 64 BOSTON COLLEGE L. REV. 867, 923 (2023) (explaining that litigation can shed light on information previously withheld from the public, which can help inform public policy).

19. See Luke Herrine, *Cutthroat Business*, N. CAR. L. REV. (Forthcoming 2025).

20. See *infra* Part II.

21. See *infra* Part III.

22. See, e.g., UPTON SINCLAIR, *THE JUNGLE* (1906).

23. See MARK W. VAN WIENEN, *AMERICAN SOCIALIST TRIPTYCH: THE LITERARY-POLITICAL WORK OF CHARLOTTE PERKINS GILMAN, UPTON SINCLAIR, AND W.E.B. DU BOIS* (2012).

limit public access to information about meat industry practices.²⁴ By imposing civil or criminal penalties on investigating how livestock is raised, slaughtered, and packed, the industry has kept ugly and unethical practices out of sight and out of mind.²⁵

In the meantime, the industry has only gotten worse for workers.²⁶ Even when the data showed a reduction in workplace injuries between 2004 and 2013, the Government Accountability Office's main conclusion was not that the conditions had improved, but that the Department of Labor needs to a better job collecting data.²⁷ The decades-long decline in working conditions has led to a decline in those willing to work in meat processing, leading plants to employ marginalized workers with few other options.²⁸ This Part lays out the obstacles to improving working conditions for undocumented meat processing workers.

A. Meatpacking Workers are Exploited with No Recourse

Meatpacking workers endure notoriously difficult working conditions worldwide, and between the technological development and decline in union representation in the industry over the past few decades, conditions in the U.S. have gotten worse.²⁹ These factors together fostered the innovation of the "disassembly line," where workers performing repetitive motions replaced the work of skilled butchers.³⁰ Workers stand in very close proximity for hours, quickly performing the same dangerous tasks over and over, leading to a high prevalence of injury, musculoskeletal disorder, and carpal tunnel.³¹ One 2014 health hazard evaluation of a

24. See Caitlin A. Ceryes & Christopher D. Heaney, "Ag-Gag" Laws: Evolution, Resurgence, and Public Health Implications, 28 NEW SOLUTIONS 8 (2019).

25. *Id.* at 2 ("These laws criminalize and/or provide civil penalties or damages for either (1) acts of video recording or photographing agricultural facilities without express permission from the owners or (2) misrepresentation of oneself as a job applicant under false pretenses with motives to commit an unauthorized act, which includes collecting unauthorized data or imagery from a facility.").

26. See generally Daniel Calamuci, *Return to the Jungle: The Rise and Fall of Meatpacking Work*, 17 NEW LABOR FORUM 1, 66 (2008).

27. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-337, WORKPLACE SAFETY AND HEALTH: ADDITIONAL DATA NEEDED TO ADDRESS CONTINUED HAZARDS IN THE MEAT AND POULTRY INDUSTRY 21 (2016) ("DOL faces challenges gathering data on injury and illness rates for meat and poultry workers because of underreporting and inadequate data collection. For example, workers may underreport injuries and illnesses because they fear losing their jobs, and employers may underreport because of concerns about potential costs.").

28. Luis Velazquez, *Meatpacking Plants Have Long Relied on Immigrant Labor. Now, Some Are Turning to Foreign Visa Workers*, INVESTIGATE MIDWEST (August 19, 2021), <https://investigatemidwest.org/2021/08/19/meatpacking-plants-have-long-relied-on-immigrant-labor-now-some-are-turning-to-foreign-workers/> ("'(Plants) need to employ a lot of people, and you have to push them as hard as possible,' said Joshua Specht, a professor at the University of Notre Dame who has studied the meat industry. 'The best way to do that, obviously, is to focus on employing people who are rather marginal and who are willing to put up with being overworked.'").

29. Siân Jones, *Working Conditions: Unpacking Labour Risk in Global Meat Supply Chains*, FAIRR (Mar. 17, 2024), <https://www.fairr.org/resources/reports/working-conditions-phase-3>.

30. Herrine, *supra* note 19, at 9.

31. GAO, WORKPLACE SAFETY AND HEALTH, *supra* note 27, at 1. See also KRISTY NABHAN-WARREN, MEATPACKING AMERICA: HOW MIGRATION, WORK, AND FAITH UNITED AND DIVIDE THE HEARTLAND, 172-73 (2021).

poultry plant found that over 2/3 of workers reported “experiencing pain, burning, numbness, or tingling in their hands over the preceding 12 months” and “over half reported pain, aching, or stiffness in their backs during the same time-frame.”³² Compared to manufacturing work overall, meat and poultry workers have four times the reported rate of injury—and this is an industry with a pervasive *underreporting* problem for workplace injuries.³³ Beyond that, these workers face intimidation from supervisors to the point that many wear diapers to work rather than risk harsh consequences for leaving the disassembly line for a bathroom break.³⁴

“Deskilling labor also made it possible to push down wages”—for all the risks they face, workers in the meat industry often receive terrible compensation.³⁵ As unions lost bargaining power in the 1980s, they granted repeated concessions; for example, in 1984, the unionized workers at Hormel’s Austin, Minnesota plant made \$10.69 an hour.³⁶ In 1986, United Food and Commercial Workers’ then-president William Wynn signed a contract that cut wages to \$10 per hour and eliminated the guaranteed annual wage, and by 1988 Hormel cut wages at the plant to \$7 an hour.³⁷ Now, few meat processing plants are even unionized, and the wages have continued to decline.³⁸ At one poultry plant in 2016, workers tasked with rounding up chickens were paid around \$2.25 for every thousand chickens, estimated at \$168.75 an evening, shared amongst nine workers.³⁹ Companies like Tyson, Smithfield and JBS have been known to specifically recruit undocumented labor, leveraging the threat of deportation to keep workers from organizing.⁴⁰

B. Federal Labor Protections Have Eroded

Federal law ostensibly protects even undocumented workers from exploitation. As the NLRB pointed out in 1944, the National Labor Relations Act (NLRA), which protects the rights of private sector employees to organize, bargain collectively, and strike, does not differentiate between citizens and non-

32. GAO, WORKPLACE SAFETY AND HEALTH, *supra* note 27, at 37.

33. Velasquez, *supra* note 28 (“Meat and poultry workers experienced about 160 cases per 10,000 employees in 2013, compared to about 40 cases for manufacturing overall.”).

34. *No Relief: Denial of Bathroom Breaks in the Poultry Industry*, OXFAM (2016), <https://www.oxfamamerica.org/explore/research-publications/no-relief/>.

35. Herrine, *supra* note 19, at 9.

36. Calamuci, *supra* note 26, at 3.

37. *Id.*

38. NABHAN-WARREN, *supra* note 31, at 215 (“Beginning in the 1980s, packing plants and their unions were shuttered and reopened as ‘right-to-work’ plants in the Midwest.”). The failure of unions to protect workers from wage cuts and deskilling as employers started to leverage the coercive power of the state echoes Deleuze’s fear that because unions were built to combat structures of coercion that had since transformed, unions would either have to change in structure or tactics or risk irrelevance. See Gilles Deleuze, *Postscript on the Societies of Control*, 59 OCTOBER 3, 7 (1992).

39. Michael Grabell, *Exploitation and Abuse at the Chicken Plant*, NEW YORKER (May 1, 2017), <https://www.newyorker.com/magazine/2017/05/08/exploitation-and-abuse-at-the-chicken-plant>.

40. NABHAN-WARREN, *supra* note 31, at 215.

citizens.⁴¹ Forty years later, in *Sure-Tan, Inc. v. NLRB*, the Supreme Court confirmed that undocumented workers are statutory employees entitled to protection under the NLRA.⁴² But another forty years have passed, and the rights of *all* workers are on shaky grounds. The Roberts Court's jurisprudence has been especially marked by anti-worker activism, though often disguised as textualist umpiring on procedural matters.⁴³ Specifically, the Court has dismantled private enforcement mechanisms that labor and employment regulations often rely on in recent decisions like *Epic*, which upholds mandatory arbitration agreements that preclude employees from joining class action lawsuits against employers.⁴⁴ This Court has systematically undermined worker protections at almost every opportunity.⁴⁵

The outlook for undocumented workers is, of course, no better. In 2002, the Court ruled in *Hoffman Plastic Compounds v. NLRB* that undocumented workers, although covered by the NLRA, were ineligible for backpay as a remedy for unlawful termination.⁴⁶ Because the Immigration Reform and Control Act (IRCA) forbids employers from knowingly hiring undocumented workers, the Court held that awarding backpay for "work not performed" was likewise unlawful. While *Hoffman* specifically addressed the NLRA, its rationale has been applied more broadly; the EEOC has also concluded that while undocumented workers are protected from employment discrimination under laws like Title VII of the Civil Rights Act, they are not entitled to backpay for work not performed.⁴⁷ Some courts have even implied that the reasoning in *Hoffman* might be extended to deny undocumented workers standing altogether.⁴⁸

41. ENSURING RIGHTS AND REMEDIES *supra* note 7, at 1 (citing *Logan & Paxton*, 55 NLRB 310, 315 n.12 (1944)).

42. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984) ("Since undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly come within the broad statutory definition of 'employee.'").

43. See J. Maria Glover, *All Balls and No Strikes: The Roberts Court's Anti-Worker Activism*, 2019 J. DISP. RESOL. 129 (2019).

44. *Epic Systems Corp. v. Lewis*, 584 U.S. 497, 497 (2018) (holding that a mandatory arbitration provision between an employee and employer was enforceable against that employee under the Federal Arbitration Act, even when that provision prohibited the employee from bringing the claim in a class action proceeding).

45. *But see* *Muldrow v. City of St. Louis*, 601 U.S. 346, 346 (2024) (holding that harm from a discriminatory adverse employment action need not be "significant" to be actionable under Title VII of the Civil Rights Act).

46. *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 137 (2002).

47. Amy Sugimori et al., *Assessing the Impact of the Supreme Court's Decision in Hoffman Plastic Compounds v. NLRB on Immigrant Workers and Recent Developments*, NTL. EMPLOYMENT LAW PROJ. (2016), www.nilec.org/wp-content/uploads/2016/04/Hoffman_NELP_NILC_FINAL.pdf.

48. See, e.g., *Lopez v. Superflex, Ltd.*, No. 01 CIV. 10010 (NLRB), 2002 WL 1941484, at *2 (SDNY Aug. 21, 2002) ("If *Hoffman Plastics* does deny undocumented workers the relief sought by plaintiff, then he would lack standing. As that issue is not ripe for decision, we decline to rule on it at this time. However, if plaintiff were to admit to being in the United States illegally, or were to refuse to answer questions regarding his status on the grounds that it is not relevant, then the issue of his standing would properly be before us, and we would address the issue of whether *Hoffman Plastics* applies to ADA claims for compensatory and punitive damages brought by undocumented aliens.").

Undocumented workers nevertheless do have limited protections from exploitation and retaliation. A year before *Hoffman*, the NLRB clarified that undocumented workers are entitled to compensation for work already performed.⁴⁹ Likewise, in 2015, the NLRB found that conditional reinstatement can be an appropriate remedy if employees comply with IRCA's Form I-9 requirements within a "reasonable period of time."⁵⁰ And in her 2021 memo, Abruzzo highlighted the importance of deconfliction, the "process of preventing conflicting enforcement actions between immigration agencies and labor enforcement agencies" so that "individuals who cooperate with labor investigations can do so without fear of retaliation, and that the enforcement of immigration laws is not manipulated to thwart effective enforcement of employment and labor laws."⁵¹

However, under a different administration, deconfliction might not look like the approach taken by Abruzzo and Mayorkas. "Border Czar" Homan has framed his zealous approach to workplace raids as a *form* of labor law enforcement.⁵² Furthermore, though some have pointed out the logistical hurdles to Homan's promise to "run the biggest deportation operation this country's ever seen," the raids themselves are not the only issue.⁵³ In fact, the atmosphere created by the threat of raids has the potential to do far more harm than the raids themselves; although the direct consequences of the 2019 Mississippi poultry plant raids were brutal, the fact that they followed a successful EEOC complaint created a chilling effect on public speech about working conditions.⁵⁴

C. Immigration Enforcement Relies on Private Sector Surveillance

ICE's reliance on private sector data collection and aggregation is nothing new. Since 2011, ICE's Office of Homeland Security Investigations (HSI) has contracted Palantir to construct and operate a complex intelligence system called FALCON, which "allows ICE to store, search, and analyze troves of data that include family relationships, employment information, immigration history, criminal records, and home and work addresses."⁵⁵ When Peter Thiel, the billionaire founder of Palantir, joined Trump's transition team in 2016, some journalists sounded the alarm that Palantir would refine their tools to assist in Trump's mission to expand workplace raids.⁵⁶ Palantir's client, HSI, is generally tasked with pursuing serious cross-border crimes like terrorism-related cases and human

49. ENSURING RIGHTS AND REMEDIES *supra* note 7, at 7 (citing Tuv Taam Corp., 340 NLRB at 759 n.4).

50. Mezonos Maven Bakery, 362 NLRB 360 (2015).

51. ENSURING RIGHTS AND REMEDIES, *supra* note 7, at 10.

52. Collins & McCullough, *supra* note 13.

53. Joel Rose & Sergio Martínez-Beltrán, *Trump touts historic deportation plans, but his own record reveals big obstacles*, NPR (Aug. 14, 2024), <https://www.npr.org/2024/08/14/nx-s1-5037992/trump-immigrants-border-mass-deportation-presidential-race-migrants>.

54. Goodman, *supra* note 15.

55. Spencer Woodman, *Palantir Could Help ICE with Deportations*, INTERCEPT (Dec. 12, 2016), <https://theintercept.com/2016/12/12/transition-adviser-peter-thiel-would-directly-profit-from-mass-deportations/>.

56. *Id.*

trafficking, and is separate from ICE's deportation-focused division known as Enforcement and Removal Operations (ERO)—but that does not stop HSI from routinely sharing information about deportable noncitizens with ERO.⁵⁷ Even ignoring the egregiously inappropriate competitive advantage Palantir received when Thiel maintained his role in his private surveillance company while advising the President on policies that would rely on that company, surveillance technologies pose a serious threat to the rights of undocumented workers.

Private sector surveillance like Palantir's can significantly impact undocumented workers by increasing their risk (or perceived risk) of deportation and thus limiting their work options and access to services.⁵⁸ For example, research suggests that fears about ICE surveillance deter undocumented workers from seeking benefits to support their own and their children's well-being, from turning down food assistance and opting out of Medicaid to talking to law enforcement and even applying for a driver's license.⁵⁹ Because "every interaction of a non-citizen with a government agency, a utility company, or a social media platform, or even their mere presence in a public space, could be used to identify them and, eventually, to detain and deport them," even immigrants with work authorization fear negative complications from public interactions.⁶⁰ Knowledge of this surveillance amplifies its chilling effect: workers are far less likely to consider pursuing recourse for exploitative or abusive working conditions if they are afraid to talk about it.

Far from opposing it, the Biden administration expanded state reliance on private surveillance, requesting proposals for a program called Release and Reporting Management that would electronically monitor the 5.7 million individuals in immigration proceedings.⁶¹ If the DHS implements that program, not only will those millions of individuals be directly monitored by a private third party, but their interactions with others will *also* become data to sell to immigration enforcement, fostering paranoia and isolation in communities that rely on mutual aid. This expansion of private sector surveillance will undermine *any* attempts for undocumented workers to seek redress for wrongs they face, which will in turn embolden management to further leverage the threat of deportation.⁶²

57. *Id.* See also U.S. DEP'T OF HOMELAND SECURITY, ENTRY/EXIT OVERSTAY REPORT 6 (2016), <https://www.dhs.gov/sites/default/files/publications/FY%2015%20DHS%20Entry%20and%20Exit%20Overstay%20Report.pdf>.

58. NINA WANG, ALLISON McDONALD, DANIEL BATEYKO & EMILY TUCKER, AMERICAN DRAGNET: DATA-DRIVEN DEPORTATION IN THE 21ST CENTURY 62 (Center on Privacy & Technology at Georgetown Law 2022) ("Concerns about data sharing cause immigrants to avoid record-keeping institutions that are critical to the well-being of themselves and their families. That fear persists even when it comes to engaging with institutions that are unrelated to immigration.").

59. *Id.* at 63-64.

60. Maurizio Guerrero, *Surveillance capitalism has taken over immigration enforcement—stifling dissent and sowing fear for profit*, PRISM (Jan. 9, 2024), <https://prismreports.org/2024/01/09/surveillance-capitalism-taken-over-immigration-enforcement/>.

61. *Id.*

62. See ENSURING RIGHTS AND REMEDIES *supra* note 7, at 3 (citing Farm Fresh Co., 361 NLRB 848, 848 n.1 (2014)) ("Absent safeguards, immigration-related threats and retaliation directed at

As former General Counsel Abruzzo wrote in her 2021 memo, “when an employer targets immigrant employees in this way, it can undermine the labor rights of all employees by interfering with mutual aid, organizing efforts, and the effective enforcement of labor and employment laws.”⁶³ The expansion of surveillance in service of workplace raids poses significant threats to the civil liberties of every person in the United States. Labor advocates must take up strategies to counter the perverse mobilization of workers’ own information. Part II suggests a defensive posture towards worker information—antitrust claims that frame wage theft and labor abuse as an unfair competitive practice can pursue meat industry workers’ rights without having to disclose any worker’s immigration status. Part III suggests an offensive complement to this strategy, pushing for transparency and accountability around surveillance practices.

II. ANTITRUST FOR WORKERS

The meat industry faces information liabilities of its own; in September 2023, the DOJ filed a complaint against a company called Agri Stats, alleging that it suppresses competition by collecting, integrating, and distributing competitively sensitive information related to price, cost and output among competing meat processors.⁶⁴ Agri Stats produces comprehensive weekly and monthly reports for participating meat processors, who use the data to set prices and output levels.⁶⁵ The complaint alleges that Agri Stats understood that meat processors have used these reports for anticompetitive purposes and even encouraged meat processors to raise prices and reduce supply.⁶⁶ In October 2024, the DOJ also filed a statement of interest in a similar private antitrust case against Agri Stats.⁶⁷ As of this writing, litigation in both cases is ongoing.

Though many might think of antitrust as the laws limiting firms’ monopoly power, antitrust law has long regulated information. In fact, in the common law, “unfair competition” originally referred to a firm passing off their goods as products of another, a form of *misinformation*.⁶⁸ The common law definition evolved to include the misappropriation of trade secrets, and in 1890, the Sherman Act

workers who have come forward and assisted an NLRB investigation or litigation may chill, ‘even authorized employees . . . from exercising their Section 7 rights if it means they might be questioned about their actual or perceived immigration status.’”).

63. *Id.*

64. Press Release, U.S. Dep’t of Justice, Justice Department Sues Agri Stats for Operating Extensive Information Exchanges Among Meat Processors (Sept. 28, 2023), <https://www.justice.gov/archives/opa/pr/justice-department-sues-agri-stats-operating-extensive-information-exchanges-among-meat>.

65. *Id.*

66. *United States v. Agri Stats, Inc.*, No. CV 23-3009 (JRT/JFD), 2024 WL 2728450 (D. Minn. May 28, 2024).

67. Statement of Interest of the United States, *In re Pork Antitrust Litig.*, No. 0:18-cv-01776-JRTJFD (D. Minn. Oct. 1, 2024).

68. Neil Averitt, *The Meaning of “Unfair Methods of Competition” in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 235 (1980).

prohibited unfair business practices that included price and wage fixing.⁶⁹ The recent wave of antitrust claims against the major firms in meat processing illustrates the continuing information-regulating function of antitrust. However, a parallel wave of scholarship has recently emphasized that antitrust law functions as an allocator of the right to coordinate, and that the paradigm of focusing on “competition” between firms has undermined other forms of coordination like labor unions.⁷⁰

Proponents of a “Progressive Labor Antitrust” argue that the Clayton Act’s exemption of worker organizing from antitrust restrictions represents an understanding among policymakers that collective bargaining was a better mechanism than market-based wage setting.⁷¹ As antitrust has evolved to center employer competition in wage setting, enforcers have betrayed the broader pro-union regulatory vision behind antitrust law.⁷² This Part merges the pro-worker and information-regulating features of antitrust to argue for antitrust litigation as a tool for advancing better working conditions for meatpacking workers without subjecting individual workers to immigration enforcement scrutiny.

A. *The Antitrust Revolution Lives On*

With her full-throttle approach to litigation and broader interpretation of antitrust’s scope, some have argued that Biden’s Federal Trade Commission (FTC) chair, Lina Khan, started an antitrust revolution.⁷³ Many attribute her sudden rise in antitrust fame to her viral 2017 law review article about regulating Amazon, but five years before then and fresh out of college, she wrote an article about the Obama administration’s failure to stop large poultry processors from exploiting

69. Amy Kapczynski, *The Public History of Trade Secrets*, 55 U.C. DAVIS L. REV. 1367, 1384 (2022).

70. Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378 (2020) (“The reigning antitrust paradigm has turned the notion of competition into a talisman, even as antitrust law in reality has functioned as a sorting mechanism to elevate one species of economic coordination and undermine others. Thus, the ideal state idea of competition and its companion, allocative efficiency, have been deployed to attack disfavored forms of economic coordination, both within antitrust and beyond. These include horizontal coordination beyond firm boundaries, democratic market coordination, and labor unions.”).

71. Hiba Hafiz, *Towards a Progressive Labor Antitrust*, 125 COLUM. L. REV. (forthcoming 2025) (“Excavating this intellectual history reveals how labor advocates, policymakers, and economists converged to reject labor’s commodification based on one unifying principle: that arm’s-length, market-based wage-setting determined through competition and the forces of supply and demand was deeply socially harmful, and guaranteeing workers’ associational freedom, coordination, and collective power against employers through certain forms of strike activity was a better mechanism for achieving fair and reasonable employment terms that properly valued labor.”).

72. *Id.* at 3 (“[A]ntitrust’s labor and wage policy is to ensure labor’s countervailing leverage against employers to enable negotiation of acceptable terms and conditions of employment free from employer interference, restraint, or coercion. By exclusively prioritizing market- and competition-based metrics and goals, current labor antitrust enforcement betrays Congress’s regulatory vision.”).

73. Brian Fung & Catherine Thorbecke, *Lina Khan’s Rise was Heralded as an Antitrust Revolution. Now She has to Pull it Off*, CNN (Oct. 17, 2023), <https://www.cnn.com/2023/10/16/tech/lina-khan-risk-takers/index.html>.

independent chicken farmers on a vast scale.⁷⁴ Khan likened these farmers to employees, arguing that because small farmers sell everything they grow to individual processors, those processors effectively operate as employers, dictating the terms of labor.⁷⁵ Because of the market consolidation of meat processors (in 1980, the four biggest meatpacking companies in the country controlled 36 percent of the market; ten years later, their share had doubled to 72 percent), farmers have few options and must cede to the “increasingly outrageous terms” of the processors.⁷⁶ Khan attributed this market consolidation to a Reagan-era shift in anti-trust policy goals from promoting competition to increasing consumer access to cheap goods.⁷⁷

A decade later, Khan got what she wanted: the Biden administration attempted to address unfair competition in the meat industry, particularly through criminal trials pursued by the DOJ’s antitrust division.⁷⁸ While many of the criminal trials ended in mistrials or acquittals, the DOJ’s successful 2022 civil action against major poultry processors (Cargill, Sanderson Farms, Wayne Farms, and others) alleged that the defendants exchanged compensation information as part of a long-running conspiracy to suppress worker pay at poultry processing plants.⁷⁹ A class action lawsuit in 2019 revealed that the processors held secret annual meetings where representatives shared pay information, which prompted the DOJ’s complaint, resulting in an \$85 million restitution settlement for workers that also prohibited defendants from sharing competitively sensitive compensation information in the future.⁸⁰

While Trump’s DOJ and FTC are unlikely to take up Lina Khan’s revolutionary mantle, the successful DOJ claim’s roots in a prior class action lawsuit suggests that private litigation can continue the work of challenging the power of the

74. Sheelah Kolhatkar, *Lina Khan’s Battle to Rein in Big Tech*, NEW YORKER (Nov. 29, 2021), <https://www.newyorker.com/magazine/2021/12/06/lina-khans-battle-to-rein-in-big-tech>.

75. Lina Khan, *Obama’s Game of Chicken*, WASHINGTON MONTHLY (Nov. 9, 2012), <https://washingtonmonthly.com/2012/11/09/obamas-game-of-chicken/>.

76. *Id.*

77. *Id.* (“Traditionally, the goal of antitrust legislation had been to promote competition by weighing various political, social, and economic factors. But under Reagan, the Department of Justice narrowed the scope of those laws to promote primarily ‘consumer welfare,’ based on ‘efficiency considerations.’ In other words, the point of antitrust law would no longer be to promote competition by maintaining open markets; it was, at least in theory, to increase our access to cheap goods. Though disguised as an arcane legal revision, this shift was radical. It ushered in a wave of mergers that, throughout the course of the following decades, would transform agriculture markets.”).

78. Bob Van Voris, *In Denver Court, Chicken-Industry Executives Found Not Guilty of Price-Fixing*, DENVER POST (July 8, 2022), <https://www.denverpost.com/2022/07/08/chicken-industry-executives-not-guilty-price-fixing/>.

79. Press Release, U.S. Dep’t of Justice, Justice Department Files Lawsuit and Proposed Consent Decrees to End Long-Running Conspiracy to Suppress Worker Pay at Poultry Processing Plants and Address Deceptive Abuses Against Poultry Growers (July 25, 2022), <https://www.justice.gov/opa/pr/justice-department-files-lawsuit-and-proposed-consent-decrees-end-long-running-conspiracy#:~:text=The%20Department%20of%20Justice%20filed,for%20poultry%20processing%20plant%20workers.>

80. H. Claire Brown, *The Chicken Tycoons vs. the Antitrust Hawks*, N.Y. TIMES (Dec. 22, 2023), <https://www.nytimes.com/2023/11/29/magazine/chicken-industry-antitrust.html>.

consolidated meat industry. In fact, other recent private litigation has proven that the market's consolidation has become a source of liability. Legal advocacy organization FarmSTAND represented a mass action of growers in Western Kentucky who raise poultry for Tyson, the nation's largest poultry company, alleging that Tyson possesses anti-competitive power and has used that power to manipulate growers' outputs and income.⁸¹ After Tyson's motions to dismiss and for summary judgement failed, parties settled on confidential terms.⁸² Similar litigation has also focused on wage suppression; in early 2024, Tyson, JBS, and other major meat processors "agreed to pay a combined \$127.2 million to resolve a class action lawsuit accusing them of suppressing workers' pay at processing plants."⁸³ In total, the top three poultry processors named in the still-pending Agri Stats lawsuit have already "been subject to at least \$698 million in settlements for price- and wage-fixing lawsuits, many of which were also based on charges of anticompetitive information sharing."⁸⁴

Antitrust class-actions have successfully won restitution for suppressed wages without putting any particular workers in the spotlight and can thus be useful in supporting undocumented workers receiving deflated wages, but that strategy alone is far from sufficient. Wage suppression antitrust class-actions have been historically uncommon because "workers—unlike consumers—are frequently in diverse positions, defeating the common interest requirement": "some workers are senior, others are junior; some have benefits, others do not; some have outside job opportunities, others do not; qualifications vary; contract terms vary, and so on."⁸⁵ The meat processing industry is so consolidated that it is hard for firms to escape liability for anticompetitive information sharing, but it is even harder to show that consolidated labor market power causes abusive working conditions to a certifiable class.

Scholars have suggested one possible workaround by arguing that "labor-market practices—like how a company treats its workers—affect fair product-market competition, that is, the practices that are on-limits and off-limits to business competitors seeking advantage."⁸⁶ On this theory, firms can be liable for unfair practices outside of the firm but within their supply chain, as the labor practices cut costs and create an unfair competitive advantage.⁸⁷ Some have even argued that

81. See *Morris v. Tyson Chicken, Inc.*, 4:15-cv-77-BJB (W.D.Ky. Jan. 6, 2022).

82. *Morris v. Tyson*, FARMSTAND, <https://farmstand.org/case/morris-v-tyson/>.

83. Mike Scarcella, *Tyson, JBS to Pay \$127 Million to Resolve Workers' Wage-Fixing Lawsuit* (Mar. 11, 2024), <https://www.reuters.com/legal/litigation/tyson-jbs-pay-127-million-resolve-workers-wage-fixing-lawsuit-2024-03-11/>.

84. See, e.g., Press Release, Top 3 Chicken Producers Involved in DOJ Antitrust Lawsuit Racked Up Nearly \$700M In Settlements For Price-and-Wage-Fixing, ACCOUNTABLE.US (Oct. 10, 2024), <https://accountable.us/report-top-3-chicken-producers-involved-in-doj-antitrust-lawsuit-racked-up-nearly-700m-in-settlements-for-price-and-wage-fixing/>.

85. Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 2, 536 (2018).

86. Eamon Coburn, Note, *Supply-Chain Wage Theft as Unfair Method of Competition*, 134 YALE L. J. 615, 621 (2024).

87. Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1, 4-5 (2010).

the FTC should use its “unfair methods of competition” authority under Section 5 of the FTC Act to hold businesses responsible for failing to take “reasonable care to prevent” supply-chain wage theft.⁸⁸ However, this view expands potential litigants beyond workers and the government—if unfair labor practices impact product-market competition, consumers and competing firms might have a legitimate cause of action against firms relying on abusive labor practices to cut costs. When firms prevent meatpacking workers from using the restroom to keep costs low, that practice itself is an unfair method of competition. This can get around the workers’ class-certification hurdle and might insulate undocumented workers from investigation.

B. Reviving Antitrust’s Forgotten Labor Dimension

However, antitrust claims need not perpetuate the Reagan-era paradigm of consumer welfare, or even the Biden-era focus on fair and free competition between firms. Product-market competition between firms is not a panacea for labor exploitation.⁸⁹ Instead, because antitrust law functions as an allocator of the right to economic coordination, labor advocates must shift the scope of antitrust enforcement back to including the unequal bargaining power between employers and individual employees.⁹⁰ Public outcry has increasingly called for antitrust enforcers to attend to the racist consequences of the consolidated meat industry’s labor power, as the negative pressure on wages disproportionately impacts workers of color.⁹¹ Labor markets in the meat industry are fraught beyond the needs of undocumented workers. H-2A work visas are tied to their employer, and visa-holders cannot search for new jobs once in the country. Increased reliance on H-2A guest workers has allowed employers to offer appallingly low wages (sometimes below the federal minimum wage).⁹² When control over labor merges with control through immigration status, exploitation is to be expected.

If antitrust cannot provide a remedy for the fact that employers in the meat industry have substantial bargaining power through consolidation and have leveraged social factors like the threat of deportation to prevent organized opposition to abusive labor practices, then the current allocation of the right to coordination

88. See Coburn *supra* note 86, at 624.

89. See, e.g., Nathan Rosenberg & Bryce Wilson Stucki, *Don’t Trust the Antitrust Narrative on Farms*, LPE BLOG (May 5, 2021), <https://lpeproject.org/blog/dont-trust-the-antitrust-narrative-on-farms/>.

90. Hafiz, *supra* note 71.

91. See, e.g., Anthony Pahnke, *Antitrust Legislation Is Essential to Racial and Economic Justice in Agriculture*, TRUTHOUT (Feb. 14, 2021), <https://truthout.org/articles/antitrust-legislation-is-essential-to-racial-and-economic-justice-in-agriculture/> (“Mergers also negatively affect wages, especially as fewer and fewer employers and firms exist in an industry. The opportunities for collusion among established firms is increased in thin markets. Such spaces are ripe for employers to agree with one another, however tacitly, on wages and workplace standards. Furthermore, creating competitive labor markets is a racial justice issue. This is seen in the fact that the vast majority of farmworkers — over 80 percent—are Latinx. At 49 percent of all employees nationwide, people of color disproportionately count among the ranks of people who labor in food-processing firms.”).

92. Sandeep Vaheesan & Claire Kelloway, *A Fair Labor Market for Food-Chain Workers*, AM. PROSPECT (Nov. 21, 2019), <https://prospect.org/labor/a-fair-labor-market-for-food-chain-workers/>.

is perpetuating a criminal and gruesome state of affairs. For enforcers like the FTC, Progressive Labor Antitrust scholars suggest that “rather than modeling labor markets as perfectly competitive, enforcers should presume a model of imperfect competition, placing the burden on employers to prove the contrary in enforcement actions.”⁹³ However, it is, of course, unlikely that Trump’s FTC will take up the call for a Progressive Labor Antitrust. Rather, private litigants taking on antitrust claims against the meat industry must highlight how the legislative history in antitrust laws demonstrates a broader set of considerations than maintaining perfect competition. Workers’ rights were and are material to understanding whether an employer has undue labor market power.

Thus, the abuses workers face in meat processing plants around the country can be remedied through applying antitrust as labor law. This is the “defensive posture,” an option for litigating for undocumented workers’ rights that protects individual workers from visibility, and less clearly invites workplace raids. The next Part considers how advocates can go on the offense.

III. SEEKING TRANSPARENCY WITHIN SURVEILLANCE CAPITALISM

Shoshana Zuboff coined the term “surveillance capitalism” to describe the “surveillance-based economic order that now extends across a vast and varied range of products and services.”⁹⁴ The growing market for personal data (originally for the sake of targeted advertising, but now extended to a wide variety of uses) incentivizes product and service providers to track and sell personal information.⁹⁵ Scholars have written at length about how the resulting explosion of private surveillance practices and technologies have already impacted working people through the proliferation of workplace surveillance mechanisms.⁹⁶ Former General Counsel Abruzzo warned in 2022 that artificial intelligence-enabled monitoring of labor organizing activities could violate the NLRA, but that did not

93. Hafiz, *supra* note 71, at 4.

94. Shoshana Zuboff, *Surveillance Capitalism and the Challenge of Collective Action*, 28 NEW LABOR FORUM 11 (2019) (“In our time, surveillance capitalism repeats capitalism’s “original sin” of primitive accumulation. It revives Karl Marx’s old image of capitalism as a vampire that feeds on labor, but with an unexpected turn. Instead of claiming work [or land, or wealth] for the market dynamic as industrial capitalism once did, surveillance capitalism audaciously lays claim to private experience for translation into fungible commodities that are rapidly swept up into the exhilarating life of the market. Invented at Google and elaborated at Facebook in the online milieu of targeted advertising, surveillance capitalism embodies a new logic of accumulation. Like an invasive species with no natural predators, its financial prowess quickly overwhelmed the networked sphere, grossly disfiguring the earlier dream of digital technology as an empowering and emancipatory force. Surveillance capitalism can no longer be identified with individual companies or even with the behemoth information sector. This mutation quickly spread from Silicon Valley to every economic sector, as its success birthed a burgeoning surveillance-based economic order that now extends across a vast and varied range of products and services.”).

95. *Id.* at 13. Key to surveillance capitalism is the commodification of “behavioral surplus,” the “data reserves that are more than what is required for product and service improvements.” *Id.*

96. See, e.g., KAREN LEVY, DATA DRIVEN: TRUCKERS, TECHNOLOGY, AND THE NEW WORKPLACE SURVEILLANCE (2022); BRISHEN ROGERS, DATA AND DEMOCRACY AT WORK: ADVANCED INFORMATION TECHNOLOGIES, LABOR LAW, AND THE NEW WORKING CLASS (2023).

stop some employers from using AI tools (initially designed to map terrorist cells) to detect groups of workers interested in seeking union representation.⁹⁷ While many meatpacking workers still directly toil under the watchful eye of in-person management, surveillance technology has fundamentally empowered employers more than employees; labor advocates can and must harness information policy to counteract new coercive powers.

Surveillance capitalism has also empowered immigration enforcement agencies.⁹⁸ The commodification of data created a deluge of information for sale, and Palantir and similar firms quickly devised ways to integrate massive data sets into approachable dossiers for law enforcement agencies.⁹⁹ For example, when the Los Angeles Police Department (LAPD) used Palantir's software to import telecom data from Verizon, the software extracted the date and duration of each call, each caller and recipients' phone numbers, and the latitude and longitude of all the cell towers used, and then matched all of that data to existing records of individuals from other data sets.¹⁰⁰ Agencies use Palantir to integrate data farmed from the private sector with data shared by police departments, sheriff's offices, airport police, universities, school districts, Departments of Motor Vehicles and more.¹⁰¹ And Palantir is far from the only game in town: between 2008 and 2021, ICE spent almost \$2.8 billion on data collection and data-sharing initiatives, contracting with firms like LexisNexis Risk Solutions and Thomson Reuters' CLEAR.¹⁰²

Activists have expressed concerns that law enforcement agencies relying on Palantir unfairly target communities of color, criminalizing entire networks of people based on the correlations found by the opaque and sometimes flawed algorithms at the core of data-integration software.¹⁰³ ICE field agents have used database searches like CLEAR to pursue immigrants who match none of the agency's stated enforcement priorities, leading to random arrests and deportations.¹⁰⁴ As discussed in Part I, surveillance capitalism has contributed to creating an environment of fear among immigrants—"an uncertainty about who will be targeted for detention and deportation and why, which restricts their access to essential

97. Grace Scott, *Labor Organizing and AI Surveillance in the Workplace*, GEO. J. ON POVERTY L. & POL'Y (Jan. 14, 2024), https://www.law.georgetown.edu/poverty-journal/blog/labor-organizing-and-ai-surveillance-in-the-workplace/#_edn11.

98. See *infra*, Part I.C. and notes 50-58.

99. Caroline Haskins, *Scars, Tattoos, and License Plates: This Is What Palantir and the LAPD Know About You*, BUZZFEED (Sept. 29, 2020), <https://www.buzzfeednews.com/article/carolinehaskins1/training-documents-palantir-lapd>.

100. *Id.*

101. *Id.*

102. Guerrero, *supra* note 60.

103. Mark Harris, *How Peter Thiel's Secretive Data Company Pushed Into Policing*, WIRED (Aug. 9, 2017), <https://www.wired.com/story/how-peter-thiels-secretive-data-company-pushed-into-policing/>.

104. McKenzie Funk, *How ICE Picks Its Targets in the Surveillance Age*, N.Y. TIMES (Oct. 2, 2019), <https://www.nytimes.com/2019/10/02/magazine/ice-surveillance-deportation.html>.

services and their willingness to denounce abuse.”¹⁰⁵ Surveillance capitalism is holding workers back from pursuing better conditions.

Labor advocates must fight back. The fight for workers’ rights must include strategies for protecting undocumented workers from the negative consequences of visibility. Through transparency measures, lawyers can challenge the expansion of private surveillance for immigration enforcement.

To challenge private surveillance and its chilling effect on labor organizing, the public needs a better understanding of how local, state, and federal agencies are gaining and applying data. The Freedom of Information Act (FOIA) and its state-level equivalents, which provide the public the right to request access to records from any federal or state agency, presents one option.¹⁰⁶ “Federal agencies are required to disclose any information requested under the FOIA, unless it falls under one of nine exemptions which protect interests such as trade secrets, national security, and law enforcement.”¹⁰⁷ At first glance, these exemptions seem to rule out the usefulness of a FOIA request concerning immigration agencies’ use of private sector surveillance—many details about data integration software are protected trade secrets, and the actions of immigration agencies largely fall under the law enforcement exemption.

However, journalist Caroline Haskins used the California equivalent of FOIA (the California Public Records Act) to seek out any records pertaining to LAPD’s use of Palantir software.¹⁰⁸ While trade secrets and law enforcement exemptions restricted access to some of her requests (like software source code and examples of recent queries law enforcement officers have searched on Palantir software), LAPD did turn over 14 documents detailing their acquisition and use of Palantir software, all of which are now publicly available.¹⁰⁹ Legal advocates for undocumented workers should likewise make liberal use of FOIA requests, targeting ICE and other agencies likely to participate in worksite raids. In a time where the privatization of information has been so clearly mobilized against the public good, any efforts to publicize the opaque processes at play are merited.

Furthermore, FOIA can be situated in a broader “law of transparency and access” (FOIA, its state equivalents, and the First Amendment) that “codif[ies] expectations regarding the government’s disclosure of information to the public.”

¹¹⁰ Scholar Hannah Bloch-Wehba argues that “the public-facing structure of

105. Guerrero, *supra* note 60.

106. 5 U.S.C. § 552.

107. Office of Information Policy (OIP), U.S. Department of Justice, *What is FOIA?*, <https://www.foia.gov/faq.html>.

108. Caroline Haskins, *Request #19-6468*, PUBLIC RECORDS REQUESTS, CITY OF LOS ANGELES (Nov. 5, 2019), <https://lacity.nextrequest.com/requests/19-6468>.

109. *Id.*

110. Hannah Bloch-Wehba, *Access to Algorithms*, 88 FORDHAM L. REV. 1265, 1268 (2020) (“By codifying expectations regarding the government’s disclosure of information to the public, the law of transparency and access operates both to protect the balance of power between the public and the government and to ensure that key information regarding government decision-making is open to public scrutiny. While these concerns overlap somewhat with individual interests in understanding how the

transparency law” is especially useful in the context of rising public sector reliance on algorithms for decision-making, also known as “algorithmic governance.”¹¹¹ Algorithmic governance impacts workers in and beyond the workplace.¹¹² Furthermore, ICE relies on algorithmic systems of correlation to determine who they can arrest.¹¹³ Once an individual is arrested, ICE has been known to use “Risk Classification Assessment” algorithms to calculate whether to release or keep somebody in detention.¹¹⁴ This algorithm is clearly nonsensical, political, or (most likely) both: a FOIA request for ICE’s use of the system for detentions in New York revealed that between 2013 and 2017, the algorithm recommended detention without bond for individuals it deemed “low risk” 53% of the time, but from June 2017 to September 2019, that number jumped to 97%.¹¹⁵

One important feature of the “law of transparency” is that it creates *public* rights to information—unlike plaintiffs in litigation, a person does not have to be impacted by the decisions or policies they wish to expose.¹¹⁶ This shifts the burden of challenging secrecy around algorithmic governance from those who are affected—often those who suffer most from visibility—to the press and the public.¹¹⁷ In geographic areas with higher likelihoods of workplace raids, advocates who do not suffer any vulnerabilities based on immigration status should preemptively use transparency mechanisms to understand the forms of private surveillance and algorithmic governance that immigration enforcement might rely on. Even knowledge of the names of the products and services agencies purchase can advance public knowledge and tee up legal challenges because these names are likely trademarked; the federal registration process for trademarks requires extensive public disclosures.¹¹⁸ Scholar Amanda Levendowski has highlighted that these disclosures provide otherwise protected information about surveillance technologies.¹¹⁹

By taking an active stance and pursuing transparency measures outside of litigation, worker advocates can reduce the massive information-and-power differential between government agencies and the people, while also laying the groundwork for challenges to opaque systems of algorithmic governance. For

government has reached decisions that affect people, they are also distinct in their operation and effect. Because transparency law protects public rights of access to government, its remedies—chiefly, the disclosure of government records— can be sought by those who are unaffected by the particular decisions or policies they wish to expose.”)

111. *Id.* at 1269.

112. *See* Rogers, *supra* note 96.

113. *See* Funk, *supra* note 104.

114. Sam Biddle, *ICE’s New York Office Uses a Rigged Algorithm to Keep Virtually All Arrestees in Detention. The ACLU Says It’s Unconstitutional*, INTERCEPT (March 2, 2020), <https://theintercept.com/2020/03/02/ice-algorithm-bias-detention-aclu-lawsuit/>.

115. *Id.*

116. Bloch-Wehba, *supra* note 110, at 1268.

117. *Id.*

118. Amanda Levendowski, *Trademarks as Surveillance Transparency*, 36 BERKELEY TECH. L.J. 439, 445 (2022).

119. *Id.*

example, after the FOIA request revealed that ICE's "Risk Classification Assessment" algorithm in New York created a de facto "No-Release Policy" for individuals arrested by ICE, the ACLU and Bronx Defenders sued ICE for due process violations and were able to win a preliminary injunction requiring individualized assessments about whether detention is justified.¹²⁰ FOIA requests also revealed that ICE deceptively minimized the surveillance capabilities of its Intensive Supervision Appearance Program (ISAP), an electronic monitoring program marketed as an alternative to detention.¹²¹

Through ISAP, ICE subjects over 200,000 immigrants to various forms of tracking, including GPS ankle shackles and SmartLINK, a cell phone that tracks people via facial recognition, voice recognition, and location surveillance.¹²² The FOIA request provided evidence that ICE repeatedly published incorrect data regarding the number of individuals and families under ISAP surveillance, and that despite denying that SmartLINK can provide location data to ICE, ICE relied on the app to track individuals' locations.¹²³ Many of those under ICE surveillance through SmartLINK already suspected that the app had provided the agency location data—ICE's deception around SmartLINK is also a lesson for advocates to listen to the intuitions of those they support.¹²⁴ Now, many fear that SmartLink's geolocation feature could also jeopardize immigrants with whom they interact.¹²⁵

Efforts to legislate and litigate against private surveillance have highlighted that while "ICE's investigators cannot directly intercept oral, wire, or electronic communication, they face no explicit restrictions for using commercially available data."¹²⁶ For example, ICE sidesteps the Fourth Amendment right against unreasonable government searches and seizures by buying access to, and using, people's cell phone location information extracted from smartphone apps.¹²⁷ ICE also skirts around state and local "sanctuary laws" that restrict the information local law enforcement departments can exchange with immigration authorities.¹²⁸

120. Press Release, ACLU, NYCLU and Bronx Defenders Statement on Preliminary Injunction in No-Release Lawsuit (Mar. 30, 2020), <https://www.aclu.org/press-releases/nyclu-and-bronx-defenders-statement-preliminary-injunction-no-release-lawsuit>.

121. JUST FUTURES LAW, FACT SHEET ON ICE FOIA LAWSUIT: ICE DOCUMENTS REVEAL ALARMING SCALE OF SURVEILLANCE IN ISAP PROGRAM 2, <https://static1.squarespace.com/static/62c3198c117dd661bd99eb3a/t/6512da273ccb7321c334ab6c/1695734312687/ATDFOIAFinal.pdf>.

122. *Id.* at 1.

123. *Id.* at 4.

124. Guerrero, *supra* note 60.

125. *Id.*

126. *Id.*

127. Shreya Tewari & Fikayo Walter-Johnson, *New Records Detail DHS Purchase and Use of Vast Quantities of Cell Phone Location Data*, ACLU (July 18, 2022), <https://www.aclu.org/news/privacy-technology/new-records-detail-dhs-purchase-and-use-of-vast-quantities-of-cell-phone-location-data>.

128. Johana Bhuiyan, *US immigration agency explores data loophole to obtain information on deportation targets*, GUARDIAN (Apr. 20, 2022), <https://www.theguardian.com/us-news/2022/apr/19/us-immigration-agency-data-loophole-information-deportation-targets>.

While ICE has faced little accountability for exploiting these loopholes, the public has only had full knowledge of these DHS practices for a few years, and much litigation is still ongoing; like ACLU's challenge of the "Risk Classification Assessment" tool in New York, all of these issues came to light from FOIA requests initiated by advocacy groups.¹²⁹

Transparency law is not traditionally considered a form of labor law. But in the context of undocumented workers weathering awful employment conditions *and* a presidential administration vocally out for blood, worker advocates need to use every tool available.

CONCLUSION

This Note has argued that information regulation is inextricably linked to the past and the future of worker protections. When Maria Domingo Garcia endured a workplace raid and separation from her child, she was attacked as a worker, as an immigrant, and as a mother. She faced a sneak attack—ICE relied on data it should not have had to chase down workers who dared complain about sexual abuse to the EEOC. She deserved better, but right now, some of the most powerful people in the world are plotting for women like her to go through much worse. Advocates for workers' rights must attend to specific needs of undocumented workers in Trump's second administration; employers know their workers stand even less of a chance speaking out, and they will leverage their power to further exploit the undocumented workforce.

By relying on antitrust law, advocates can help meatpacking workers like Domingo Garcia secure better working conditions. Furthermore, applying antitrust law to build bargaining power for workers structurally prevented from organizing honors the original intentions of antitrust statutes, and can thus revive the progressive roots of antitrust. At the same time, lawyers and organizations seeking to improve working conditions for undocumented meat processing workers must be mindful of the way surveillance capitalism has commodified data about every person's every move. By pursuing transparency about immigration agencies' constitutionally questionable reliance on private surveillance data and algorithms, workers' rights advocates can sneak attack ICE in their own way, laying groundwork to cut off their access to private surveillance data. A more rigorous account of networked information technologies' impact on political economy and the lives of workers everywhere can help advocates turn transparency into resistance.¹³⁰ Of course, these interventions are in no way exhaustive, and must stand alongside state law, and broader initiatives to rebuild union power in the meatpacking industry.

129. JUST FUTURES LAW, *supra* note 121.

130. See JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM (2019).