No. 17-35640

# In the United States Court of Appeals for the Ninth Circuit

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND RASIER, LLC,

*Plaintiffs-Appellants*,

v.

CITY OF SEATTLE, ET AL.,

*Defendants-Appellees*.

On Appeal from the United States District Court
for the Western District of Washington, Seattle Division
Case No. C17-0370-RSL

## BRIEF OF ANTITRUST LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF THE PLAINTIFFS-APPELLANTS

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## Statement of Compliance with Rule 29

All parties have consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the amici curiae, their members, or their counsel financed the preparation or submission or this brief.

## Summary of the Argument

Antitrust law exists to protect consumers and the economy from anticompetitive arrangements that threaten to raise prices by curtailing output, especially through collusion by rivals. When competitors join forces in an effort to extract supracompetitive prices, they harm customers by forcing them to pay higher prices, and they harm the economy by reducing productivity.

Yet in today's economy, anticompetitive threats to consumers and economic output come not only from voluntary private cartels but also from alliances between would-be cartels and government regulators, who can enforce cartels and anticompetitive arrangements through the coercive powers of the State. *See, e.g.*, Office of Econ. Policy et al., *Occupational Licensing: A Framework for Policymakers* (2015), available at https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf (last visited on November 3, 2017). Moreover, while private cartels can sometimes be undercut by new entrants or by cartel participants who face strong incentives to cheat, government-created cartels are protected by law. It is for this reason that the Supreme Court has repeatedly held that state-action immunity is "disfavored," *N.C. State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101, 1110 (2015); *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013); *FTC v. Ticor Title Ins. Co.,* 504 U.S. 621, 636 (1992), and recent decisions from the Supreme Court have been chipping away at the doctrine and construing it narrowly. *See Phoebe Putney*, 568 U.S. 216; *N.C. Bd. of Dental Examiners*, 135 S. Ct. 1101.

Seattle has enacted an ordinance that compels ride-referral services, such as Uber and Lyft, to disclose the personal contact information of drivers who have offered rides through their online platforms whenever the Teamsters or other aspiring union organizers demand it. It facilitates the formation of cartels through these organizations, and it compels Uber and Lyft (and other ride-referral services) to collectively bargain with these city-enforced monopolies. Seattle's ordinance is preempted by the antitrust laws, and the district court erred by dismissing the plaintiffs' antitrust claims.

## ARGUMENT

The emergence of ride-referral services such as Uber and Lyft have produced enormous benefits for the American consumer. By matching customers with drivers who charge less than taxi cabs, they have dramatically increased the consumer surplus in the transportation market.[1] A recent study estimates that the Uber platform generated $6.8 billion in consumer surplus in 2015 alone.[2]

1. "Consumer surplus" is the difference between the maximum amount that a customer is willing to pay for a service and the amount that he actually pays. So if a customer is willing to pay up to but no more than $100 for a ride, but he obtains that ride for only $20, then the transaction has netted $80 in consumer surplus.
2. *See* Peter Cohen, et al., *Using Big Data to Estimate Consumer Surplus: The Case of Uber*, NBER Working Paper No. 22627 (September 2016), available at http://www.datascienceassn.org/sites/default/files/Using%20Big%20Data%20to%20Estimate%20Consumer%20Surplus%20at%20Uber.pdf (last visited on November 3, 2017).

But the emergence of disruptive innovation is almost always accompanied by resistance from those who are threatened with the loss of market power or political power, and the rise of Uber and Lyft has been no different. In response to these changes in the transportation market, the Seattle City Council—in an effort to buttress the Teamsters Union and organized-labor interests that have long been losing membership and clout due to technological changes and competition from nonunion entities—has decided to facilitate the establishment of a drivers' cartel, and allow unions such as the Teamsters to represent the cartel and "collectively bargain" with ride-referral services such as Uber and Lyft. *See* Seattle Municipal Code § 6.310.735. This city-sanctioned cartel will have the power to squeeze riders for higher payments than what the drivers could obtain in a competitive market. A cartel of this sort and Seattle's complicity in establishing it is a textbook violation of the antitrust laws—horizontal price fixing is *per se* illegal—and it strikes at the very core of what the antitrust laws are designed to prevent: collusive arrangements that seek to extract supra-competitive prices from consumers.

The only defense that Seattle has offered for its cartel ordinance is to point to statutes enacted by Washington legislature, claiming that the State has authorized municipalities to regulate for-hire vehicles and shielded the city's efforts to establish drivers' cartels from antitrust liability. *See* Opening Brief of City of Seattle, *U.S. Chamber of Commerce v. City of Seattle*, 17-35371, at 3 (9th Cir. May 26, 2017) (citing Wash. Rev. Code § 46.72.001); *id.* at 34

(citing Wash. Rev. Code §§ 46.72.160) ("City Br."). By invoking these statutes, the city relies on the "state-action immunity" doctrine, which exempts state-imposed market restraints from the antitrust laws. *See, e.g.*, *Parker v. Brown*, 317 U.S. 341 (1943). But a municipality such as Seattle is not the State, so it cannot claim state-action immunity directly. *See Phoebe Putney*, 568 U.S. at 225 ("Because municipalities and other political subdivisions are not themselves sovereign, state-action immunity under *Parker* does not apply to them directly."). Instead, a municipality must show that its would-be violations of the antitrust laws have been "clearly articulated and affirmatively expressed as state policy." *Id.* at 225; *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). Seattle cannot make this showing under either of the statutes on which it relies.

## I. THE STATE-ACTION IMMUNITY DEFENSE IS "DISFAVORED" AND RECENT SUPREME COURT DECISIONS HAVE WEAKENED AND NARROWED THE SCOPE OF THIS DEFENSE

The Supreme Court has repeatedly described the state-action immunity defense as "disfavored." *N.C. State Bd. of Dental Examiners*, 135 S. Ct. at 1110; *Phoebe Putney*, 568 U.S. at 225; *Ticor Title,* 504 U.S. at 636. And for good reason: Government-sponsored cartels pose a special threat to consumer well-being and economic growth that is not present in private collusive arrangements. When private competitors seek to fix prices without any assistance from the state, there may be remedies to be found in the market. Plucky entrepreneurs can enter the market and spoil the cartel, and partici-

pants in a private cartel can face strong incentives to cheat. But when a cartel is backed up with the coercive powers of government, market remedies become illegal.

Nevertheless, the Supreme Court has recognized that the antitrust laws do not limit a *state's* authority to regulate—even though state regulation can entrench cartels, thwart competition, and harm both consumers and the economy. *See Parker*, 317 U.S. 341. But the Supreme Court has also recognized important limits on this court-created immunity from the antitrust laws. First, a municipality is not a "state," so it cannot assert state immunity simply by relying on municipal enactments. *See Phoebe Putney*, 568 U.S. at 225. Instead, a municipality that has been sued for antitrust violations must show that its anticompetitive conduct has been "clearly articulated and affirmatively expressed as *state* policy." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (emphasis added). Second, when a state authorizes private conduct that would otherwise violate the antitrust laws, the state itself must "actively supervise[]" those activities. *Id.* (citation and internal quotation marks omitted).

The Supreme Court has also held in three of its recent decisions that the state-action immunity defense is "disfavored." *N.C. State Bd. of Dental Examiners*, 135 S. Ct. at 1110; *Phoebe Putney*, 568 U.S. at 225; *Ticor Title*, 504 U.S. at 636. When the Supreme Court announces on three separate occasions that a defense to antitrust liability is "disfavored," then the lower courts should not allow that defense unless the precedents of the Supreme

Court clearly and unambiguously support a finding of state-action immunity, and any doubts or uncertainties involving the scope of this defense should be resolved in the plaintiffs' favor.

## II. Seattle's Ordinance Is Not Entitled To State-Action Immunity

To establish a state-action immunity defense, Seattle must show that "the challenged restraint" has been "clearly articulated and affirmatively expressed as state policy." *Midcal*, 445 U.S. at 105. Seattle relies on two statutes enacted by the Washington legislature: Wash. Rev. Code § 46.72.001 and Wash. Rev. Code § 46.72.160. Neither of these statutes "clearly authorizes and affirmatively expresses" a drivers' cartel as state policy. And neither statute "clearly authorizes and affirmatively expresses" a state policy that compels ride-referral services to disclose drivers' personal contact information.

Seattle must also show that "the State itself" actively supervises the cartel arrangements that the city seeks to maintain. *See Ticor Title*, 504 U.S. at 642. The city has not attempted to make this showing, proceeding as though municipal supervision can suffice. *See* City Br. at 43–51.

### A. Seattle Must Show That The "Challenged Restraint" Has Been "Clearly Articulated And Affirmatively Expressed As State Policy"

The Supreme Court's cases since *Midcal* have been clear and consistent: a municipality that asserts state-action immunity must show that "the challenged restraint"—*i.e.*, the conduct that the plaintiffs seek to enjoin—has

been "clearly articulated and affirmatively expressed as state policy." It is not enough to show that a State merely "intends to displace competition in a particular field with a regulatory structure," as Seattle has asserted throughout this case. City Br. at 35, 37 (quoting *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 64 (1985)). Rather, the *actual conduct* that the plaintiffs challenge as a violation of the antitrust laws must be "clearly articulated and affirmatively expressed as state policy."

Let us start with *Midcal*, which established the two-part test for state-action immunity that the Supreme Court has used ever since. Midcal explained the test for state-action immunity as follows:

> These decisions establish two standards for antitrust immunity under *Parker v. Brown*. First, *the challenged restraint must be* "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself.

*Midcal*, 445 U.S. at 105. One must look to the "challenged restraint"—the actual conduct that has been challenged as unlawful—and ask whether that particular conduct has been "clearly articulated and affirmatively expressed as state policy."

The Supreme Court's recent cases have described the test for state-action immunity with identical language. In *Phoebe Putney*, the Court wrote:

> When determining whether the anticompetitive acts of private parties are entitled to immunity, we employ a two-part test, requiring first that "*the challenged restraint* . . . be one clearly articulated and affirmatively expressed as state poli-

> cy," and second that "the policy . . . be actively supervised by the State."

568 U.S. at 225 (emphasis added) (citation omitted). And *Phoebe Putney* went on to withhold state-action immunity from an anti-competitive hospital merger because *the challenged conduct itself*—the anti-competitive acquisition of a hospital—had not been "clearly articulated and affirmative expressed" as state policy. *See id.* at 236 ("We hold that Georgia has not clearly articulated and affirmatively expressed a policy to allow hospital authorities to make acquisitions that substantially lessen competition.")

The same language from *Midcal* and *Phoebe Putney* appears in *North Carolina Dental*:

> A nonsovereign actor controlled by active market participants—such as the Board—enjoys *Parker* immunity only if it satisfies two requirements: "first that '*the challenged restraint* . . . be one clearly articulated and affirmatively expressed as state policy,' and second that 'the policy . . . be actively supervised by the State.' "

135 S. Ct. at 1110 (emphasis added); *see also id.* at 1121 (Alito, J., dissenting) ("Such an entity is entitled to *Parker* immunity, *Midcal* held, only if *the anti-competitive conduct at issue* was both 'clearly articulated' and 'actively supervised by the State itself.'" (emphasis added) (citation omitted)).

The district court's opinion ignores all of this language in *Midcal*, *Phoebe Putney*, and *North Carolina Dental*. *See generally* App'x 80a-91a. Not once does the district court acknowledge that the "challenged restraint" is what must be "clearly articulated and affirmatively expressed as state policy."

*Midcal*, 445 U.S. at 105; *Phoebe Putney*, 568 U.S. at 225; *North Carolina Dental*, 135 S. Ct. at 1110. Instead, the district court propounds a much looser test that asks only whether the State "clearly intends to displace competition in a particular field with a regulatory structure." App'x 83a (quoting *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 64 (1985)). That is an untenable standard for state-action immunity, and it cannot be reconciled with *Midcal*, *Phoebe Putney*, or *North Carolina Dental*—or with any other decision that has denied state-action immunity. *Every* state regulation "displaces competition" to some extent; if that by itself were enough to confer state-action immunity on conduct that would otherwise the antitrust laws, then no one could bring an antitrust claim except in markets that have been left entirely untouched by state regulation. The district court correctly observes that the city "need not be able point to a specific, detailed legislative authorization for its challenged conduct," App'x 83a (citations omitted), but that is a far cry from saying that a state's mere intent to regulate a field—or to permit municipal regulation of a field—insulates all monopolists and cartels from antitrust liability.

What Seattle must show is that the "challenged restraint"—the *actual conduct* that the plaintiffs have challenged as violations of the antitrust laws—has been "clearly articulated and affirmatively expressed as state policy." Seattle cannot accomplish that. The State of Washington has not "clearly articulated and affirmatively expressed" a policy of drivers' cartels in either of the statutes on which Seattle relies. And the State has not "clear-

ly articulated and affirmatively expressed" a policy of compelling ride-referral services to hand over contact information about their drivers to the Teamsters and other aspiring cartel organizers.

### B. Section 46.72.160 Does Not Clearly Articulate And Affirmatively Express A State Policy For Drivers' Cartels Or Compelled Disclosure Of Drivers' Contact Information

One of the state statutes on which Seattle relies is section 46.72.160, which authorizes municipalities to regulate "for hire vehicles" in their jurisdictions. The full text of the statute provides:

> Cities, counties, and port districts may license, control, and regulate all for hire vehicles operating within their respective jurisdictions. The power to regulate includes:
>
> (1) Regulating entry into the business of providing for hire vehicle transportation services;
>
> (2) Requiring a license to be purchased as a condition of operating a for hire vehicle and the right to revoke, cancel, or refuse to reissue a license for failure to comply with regulatory requirements;
>
> (3) Controlling the rates charged for providing for hire vehicle transportation service and the manner in which rates are calculated and collected;
>
> (4) Regulating the routes and operations of for hire vehicles, including restricting access to airports;
>
> (5) Establishing safety and equipment requirements; and
>
> (6) Any other requirements adopted to ensure safe and reliable for hire vehicle transportation service.

Wash. Rev. Code § 46.72.160. The problem for Seattle is that this statute authorizes only the licensing, control, and regulation of "for hire vehicles." Uber and Lyft are not "for hire vehicles"; they are simply middlemen that help match passengers with for-hire drivers. Uber and Lyft do not own for-hire vehicles; they do not employ the drivers who operate those vehicles; and they do not provide for-hire vehicle transportation services. They are nothing more than an online platform that facilitates transactions between buyers and sellers, like eBay or Amazon. Their role in arranging these transactions does not make them into provider of for-hire transportation services, any more than eBay's platform makes it into a provider of goods sold by online merchants.

When Seattle compels Uber and Lyft to hand over drivers' personal contact information to the Teamsters, it is not controlling or regulating "for hire vehicles." It is controlling and regulating Uber and Lyft, and it cannot escape antitrust liability by pointing to a state statute that authorizes only the regulation of "for hire vehicles." Seattle (and the district court) have conveniently ignored the fact that section 46.72.160 authorizes municipalities to license, control, and regulate only the "*for hire vehicles* operating within their respective jurisdictions," and the city misleads the Court by characterizing sections 46.72.160 and 81.72.210 as authority to regulate the entire "for-hire transportation and taxicab *industries*." City Br. at 34. The text of section 46.72.160 allows the city to regulate only "for hire vehicles," and that does not include online platforms such as Uber or Lyft. The same problems afflict

the collective-bargaining requirements in Seattle's ordinance. When Seattle commands Uber and Lyft to recognize and bargain with drivers' cartels, it is not regulating "for hire vehicles"; it is a regulating a distinct and separate entity from the vehicles and their owners.

There is an additional problem with Seattle's efforts to rely on section 46.72.160: Even if the statute could be construed to authorize regulation of Uber and Lyft, none of its provisions "clearly articulate and affirmatively express" a state policy in favor of drivers' cartels or compelled disclosure of drivers' personal information. The language used throughout section 46.72.160 is too far removed from the requirements that Seattle is seeking to impose. The city has tried to squeeze its ordinance into subsection (6), which authorizes municipalities to impose "[a]ny other requirements adopted to ensure safe and reliable for hire vehicle transportation services." City Br. 7–8, 41; *see also* App'x 84a ("The Ordinance . . . falls within the scope of the 'other requirement' delegation [in section 46.72.160(6)]."). But how does establishing a drivers' cartel have anything to do with safety and reliability? The city contends that by enabling drivers to extract above-market rates for their services, they will encounter less "financial pressure to provide transportation in an unsafe manner (such as by working too many hours or operating vehicles at unsafe speeds, or ignoring necessary maintenance)." City Br. at 7 (quoting Ordinance § 1.C, 2d Whereas Cl. § 1.I.2). But if that is true, then section 46.72.160 would allow the city to establish *any* cartel or anti-competitive arrangement that increases the wealth of for-hire drivers. It

could, for example, require auto-repair shops, landlords, or anyone else that driver does business with to collectively bargain with the cartels established by section 46.72.160. *See* City Br. at 26. And in all events, a purported "health" and "safety" rationale that threatens federally protected rights must be supported with evidence, not bald conjecture. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

Of course, none of this means that Seattle is forbidden to regulate Uber and Lyft. The city may of course regulate these entities, but it must do so in a manner consistent with the antitrust laws. It cannot rely on section 46.72.160 to immunize its conduct from antitrust liability when the statute does not "clearly articulate and affirmatively express" a state policy for drivers' cartels or the compelled disclosures of drivers' personal information.

### C. Section 46.72.001 Does Not Clearly Articulate And Affirmatively Express A State Policy For Drivers' Cartels Or Compelled Disclosure Of Drivers' Contact Information

The city has also invoked section 46.72.001, which provides as follows:

> The legislature finds and declares that privately operated for hire transportation service is a vital part of the transportation system within the state. Consequently, the safety, reliability, and stability of privately operated for hire transportation services are matters of statewide importance. The regulation of privately operated for hire transportation services is thus an essential governmental function. Therefore, *it is the intent of the legislature to permit political subdivisions of the state to regulate for hire transportation services without liability under federal antitrust laws*.

Wash. Rev. Code. § 46.72.001 (emphasis added). The city seizes on the italicized language and insists that this immunizes *any* municipal regulation of "for-hire transportation services" from antitrust liability. *See* City Br. at 3, 35; *see also* App'x 91a ("[T]he Ordinance was enacted pursuant to the authority provided by RCW 46.72.001").

Boilerplate of this sort is insufficient to confer state-action immunity, and the Supreme Court said as much in *Parker v. Brown*: "[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." 317 U.S. at 351. Instead, the State must "clearly authorize and affirmatively express" a state policy in favor of the conduct that has been challenged. Section 46.72.001 does not come close to meeting that standard.

### D. The State of Washington Does Not "Actively Supervise" The Drivers' Cartels Enforced By The City of Seattle

Even if Seattle could somehow show that the state has "clearly authorized and affirmatively expressed" a state policy in favor of drivers' cartels and compelled disclosure of drivers' personal contact information, the city must *also* show that "the State itself" actively supervises the cartel arrangements. *See Ticor Title*, 504 U.S. at 642. This city has not made this showing, relying instead on the *municipal* supervision of the city's Director of Finance and Administrative Services. *See* City Br. at 43–51. The appellants' brief on the merits thoroughly and persuasively explains that "the State itself" must

provide the required supervision, and shows how the city misuses precedent in arguing to the contrary. *See* Appellants' Br. at 40–51.

## III. Seattle's Ordinance Threatens New And Disruptive Market Entrants That Have Greatly Benefitted Consumers

This case shows exactly why recent Supreme Court decisions have declared that state-action immunity is "disfavored." The City of Seattle is attempting to use its regulatory powers to thwart competition among drivers, benefitting a select few (drivers and union officials) at the expense of consumers who will bear the costs of these city-protected cartels in the form of higher fares. This is exactly what the antitrust laws were designed to prevent, yet the cartel participants think they can shield their collusive scheme simply by bringing city officials into the arrangement.

Perhaps the most pernicious feature of Seattle's scheme is its effort to extend collective bargaining to drivers who work entirely independent of each other in a highly competitive market. Seattle's ordinance would turn this competitive market into a cartel, and it would do so without any credible efficiencies or benefits to consumers that might result from collaboration between drivers. Horizontal price-fixing collusion by independent economic actors is the core evil targeted by the antitrust laws. It is *per se* unlawful, it is never subject to rule-of-reason review, and it comes with criminal penalties that include jail time. It is the one practice that almost every antitrust scholar agrees should be unlawful. *See, e.g.*, Robert H. Bork, *The Antitrust Paradox*

(1978). Yet Seattle's ordinance enshrines horizontal price-fixing into law, by creating a cartel of drivers and forcing Uber and Lyft to bargain with that government-created cartel.

## Conclusion

The judgment of the district court should be reversed.

Respectfully submitted.

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Dated: November 3, 2017

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