17-35640

United States Court of Appeals for the Ninth Circuit

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

Plaintiffs-Appellants,

v.

CITY OF SEATTLE; SEATTLE DEPARTMENT OF FINANCE AND ADMINISTRATIVE SERVICES; FRED PODESTA, in his official capacity as Director, Finance and Administrative Services, City of Seattle,

Defendants-Appellees.

On Appeal from the United States District Court for the Western District of Washington

BRIEF FOR THE STATES OF NEW YORK, HAWAI'I, ILLINOIS, IOWA, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, OREGON, PENNSYLVANIA, RHODE ISLAND, and VERMONT, and the DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF APPELLEES

ERIC T. SCHNEIDERMAN
Attorney General
State of New York
120 Broadway
New York, NY 10271
(212) 416-8921

BARBARA D. UNDERWOOD
Solicitor General
ANISHA S. DASGUPTA
Deputy Solicitor General
SETH M. ROKOSKY
Assistant Solicitor General
of Counsel

Dated: December 8, 2017

(*Counsel list continues on signature page*)

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (cont'd)

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES (cont'd)

Cases **Page(s)**

TABLE OF AUTHORITIES (cont'd)

Cases **Page(s)**

Laws

City

TABLE OF AUTHORITIES (cont'd)

Laws **Page(s)**

State

Federal

Miscellaneous Authorities

TABLE OF AUTHORITIES (cont'd)

Miscellaneous Authorities **Page(s)**

INTEREST OF AMICI

New York, Hawai'i, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Oregon, Pennsylvania, Rhode Island, Vermont, and the District of Columbia file this amicus brief to defend their right to regulate in the space that Congress left them when it enacted the National Labor Relations Act (NLRA) and the Sherman Antitrust Act. Both of these statutes embody national, fundamental policies that serve important state interests. They also, however, leave room for States to enact other regulations for the good of their people.

Amici States strongly support the federal labor policies advanced by the NLRA. That statute provides critical protections to workers as part of a determination that unequal bargaining power can lead to labor unrest and impair the safety, reliability, and stability of our nation's industries. *See* 29 U.S.C. § 151. Yet while Congress chose to afford federal collective bargaining rights to certain workers to address this problem, Congress decided that federal protections were not necessary for certain other workers. It therefore excluded those workers from the NLRA without expressing any intention to preempt State regulation of their collective bargaining. This group includes independent contractors. And

while Amici States take no position on whether drivers-for-hire for companies such as Uber, Lyft, and Eastside for Hire are independent contractors or employees, Amici States have an interest in defending their right to regulate in the space left by Congress.

Admittedly, state action with respect to such workers may be in tension with other important policies advanced by the Sherman Act. Amici States, no less than the Chamber of Commerce, have an interest in safeguarding competition within their borders. But States likewise have an interest in regulating to further other policies, including as to independent contractors. And the Sherman Act does not prohibit States from doing so. Instead, the Act respects the balance in our federal system by providing state regulatory actions with immunity from federal antitrust laws.

ISSUES PRESENTED

1. Whether the National Labor Relations Act, which excludes independent contractors from federal protections for collective bargaining, preempts state and local governments from regulating collective bargaining by independent contractors.

2. Whether the State of Washington has manifested its intent to displace competition with regulation and confer regulatory authority on the City of Seattle sufficiently clearly to shield Seattle's ordinance authorizing collective negotiating by drivers-for-hire.

STATEMENT OF THE CASE

A. Federal Antitrust Laws

In 1890, Congress enacted the Sherman Antitrust Act, *see* Ch. 647, 26 Stat. 209 (1890), 15 U.S.C. §§ 1-7, which prohibited "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states." 15 U.S.C. § 1. The Act's enforcement provisions authorize federal prosecutions and private causes of action, including suits brought by the States. *Id.* §§ 15, 26; *see, e.g., New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638 (2d Cir. 2015).

In the years following the Sherman Act, a number of courts enjoined strikes as unlawful restraints of trade. *See H.A. Artists & Assoc., Inc. v. Actors' Equity Ass'n*, 451 U.S. 704, 714 (1981). And in 1908, the Supreme Court held that an antitrust violation could be established if concerted action by employees obstructed the flow of interstate commerce. *See Loewe v. Lawlor*, 208 U.S. 274, 305-09 (1908). Congress accordingly enacted several statutory provisions to ensure that courts do "not use the antitrust laws as a vehicle to interfere in labor disputes." *H.A. Artists & Assoc.*, 451 U.S. at 714.

The Clayton Act, passed by Congress in 1914, *see* Ch. 323, 38 Stat. 730 (1914), 15 U.S.C. §§ 12-27, contains two provisions in furtherance of this policy. Section 6 of the Clayton Act provides that labor "is not a commodity or article of commerce" and that the antitrust laws do not prohibit labor organizations from "lawfully carrying out" their "legitimate objectives." 15 U.S.C. § 17. Section 6 also makes clear that labor organizations shall not be "held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." *Id.* Section 20 of the Clayton Act legalizes certain labor activities including "terminating any relation of employment" and "ceasing to perform any work or labor." 29 U.S.C. § 52.

Congress eventually expanded these protections through the Norris-LaGuardia Act, *see* Ch. 90, 47 Stat. 70 (1932), 29 U.S.C. §§ 101-115, which prohibits federal-court injunctions of certain labor activities claimed to be an unlawful combination or conspiracy, *see* 29 U.S.C. § 105. In passing this statute, Congress explained that workers must be free from interference by federal courts to negotiate terms and conditions of their employment and to engage in "collective bargaining or other mutual aid or protection." *Id.* § 102.

B. The National Labor Relations Act (NLRA)

Notwithstanding Congress's exemption of certain labor activities from the federal antitrust laws, employees continued to face obstacles from their employers when they sought to join together for bargaining purposes. *See* 29 U.S.C. § 151.

Congress, upon examining the phenomenon, found that these denials of the right "to organize" and failures "to accept the procedure of collective bargaining" were leading to "strikes and other forms of industrial strife or unrest" that impeded the flow of commerce. *Id.* It further found that "inequality of bargaining power" between employees and employers was substantially affecting interstate commerce by "depressing wage rates" and by "preventing the stabilization of competitive wage rates and working conditions," within and between industries. *Id.*

Accordingly, in 1935, Congress passed the National Labor Relations Act (NLRA). *See* Ch. 372, 49 Stat. 449 (1935), 29 U.S.C. §§ 151-163. The NLRA declares that it is "the policy of the United States" to "encourag[e] the practice and procedure of collective bargaining" and to "protect[] the exercise by workers of full freedom of association, self-organization, and

designation of representatives of their own choosing." 29 U.S.C. § 151. The Act embodies Congress's determination that protecting "the right of employees to organize and bargain collectively" promotes the flow of commerce by removing "sources of industrial strife and unrest" and "restoring equality of bargaining power between employers and employees." *Id.*

Section 7 of the NLRA gives employees the "right to self-organization, to form, join, or assist labor unions, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining." *Id.* § 157. Section 8 requires employers to bargain collectively with employees through representatives of their choosing. *Id.* § 158.

The NLRA confers these rights and protections on all employees—not just "the employees of a particular employer." *Id.* § 152(3). At the same time, it expressly provides that certain workers are not to be considered "employees" for purposes of the Act, such as "agricultural laborer[s]" and persons employed "in the domestic service of any family or person at his home." *Id.*

As originally enacted, the NLRA did not mention independent contractors or supervisors. But in 1947, Congress amended the NLRA to exclude "independent contractors" and "supervisors" from the definition of "employee." *See* Ch. 120, 61 Stat. 138 (1947), 29 U.S.C. § 152(3). As explained in a House report on the amendment, the exclusion of independent contractors sought to address certain decisions of the Supreme Court and the National Labor Relations Board (NLRB) that treated as "employees" workers who would have been considered independent contractors at common law. *See* H.R. Rep. No. 80-245, at 18 (1947); *see also NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968).

The exclusion of supervisors sought to address certain decisions of the Supreme Court and NLRB that required employers to collectively bargain with supervisors. *See* Ch. 120, 61 Stat. 138, 151 (1947), 29 U.S.C. §§ 152(3), 164(a); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 490-91 (1947). According to Congress, such a requirement ran counter to the NLRA's carefully calibrated balance between management and labor. *See Beasley v. Food Fair of N.C., Inc.*, 416 U.S. 653, 659 (1974). Congress therefore made two statutory changes: it defined "employee" to exclude

"supervisors," 29 U.S.C. § 152(3); and it exempted employers from ever having to treat supervisors as employees under any "national or local" law relating to collective bargaining, *id.* § 164(a).

C. Seattle's Regulation of For-Hire Transportation Pursuant to Washington State Law

Washington State has found that privately operated for-hire transportation is a "vital part of the transportation system within the state." Wash. Rev. Code § 46.72.001. Washington has also determined that the "safety, reliability, and stability" of that service are matters of "statewide importance." *Id.* To further those state interests, Washington has authorized political subdivisions, such as municipalities, to regulate for-hire transportation "without liability under federal antitrust laws." *Id.* The non-exhaustive list of ways that Washington's political subdivisions may do so include (1) "[r]egulating entry into the business"; (2) "[r]equiring a license"; (3) "[c]ontrolling the rates charged"; (4) "[r]egulating the routes"; and (5) "[e]stablishing safety and equipment requirements." *Id.* § 46.72.160(1)-(5). In addition to these enumerated powers, political

subdivisions also may impose "[a]ny other requirements adopted to ensure safe and reliable for hire vehicle transportation service." *Id.*[1]

Pursuant to these laws, in December 2015, the City of Seattle enacted the Ordinance at issue in this case. The City Council found that companies in the for-hire transportation industry unilaterally establish and modify contracts with drivers. *See* Seattle, Wash., Ordinance No. 124968 (Ordinance), § 1.E (2015). This adversely impacts the ability of drivers to provide services in a "safe, reliable, stable, cost-effective, and economically viable manner," resulting in "unrest and transportation service disruptions around the country." *See id.* §§ 1.E, F. Yet such drivers "lack the power to negotiate these issues effectively on an individual basis," and are excluded from labor protections if they are independent contractors. *See id.* §§ 1.G, H.

The Council found that collective bargaining has improved public health and the safety and stability of other industries, including in other

[1] Prior to the enactment of these statutory provisions in 1996, the Legislature had passed materially identical provisions relating solely to taxicab service. *See* Wash. Rev. Code §§ 81.72.200, 81.72.210.

parts of the transportation industry, by reducing accidents and improving driver performance. *Id.* § 1.J. The Council therefore concluded that collective bargaining among those for-hire drivers who are not protected by the NLRA would help such drivers perform services in a "safe, reliable, stable, cost-effective, and economically viable manner," ultimately promoting the welfare of the people "who rely on safe and reliable for-hire transportation to meet their transportation needs."[2] *Id.* § 1.I.

To that end, Seattle adopted Ordinance 124968. Consistent with the Washington Legislature's authorization for municipalities to ensure safe and reliable service in the for-hire transportation industry, the Ordinance seeks to "ensure safe and reliable for-hire and taxicab transportation service" by providing a mechanism for drivers of ride-referral companies to engage in collective bargaining so long as they are independent contractors rather than employees. *Id.* §§ 1.A-D, 3.D, 6.

---

[2] As the Council noted, the Ordinance would help drivers "remain in their positions over time," accumulating experience and reducing problems associated with frequent turnover in their industry. Ordinance § 1.I.1. It also would ease "financial pressure" to work unsafe hours, drive at unsafe speeds, and neglect vehicle maintenance. *Id.* § 1.I.2.

Under the Ordinance, the City's Director of Finance and Administrative Services can certify a non-profit entity as the exclusive bargaining representative of all for-hire drivers of a company who are independent contractors. The company must then negotiate in good faith with the representative about a variety of issues, including safe driving practices, payments, hours, and working conditions. *See id.* §§ 3.D-H, 6. Failure to do so can give rise to a monetary penalty and private right of action. *See id.* § 3.M. If the parties ultimately reach an agreement, they must submit it to the Director, who determines whether to approve it. *See id.* § 3.H. If they fail to reach agreement, they must submit to arbitration upon the request of either party. *See id.* § 3.I.

ARGUMENT

The Chamber of Commerce seeks to invalidate Seattle's Ordinance on the ground that Congress—through the NLRA—has preempted state and local governments from regulating collective bargaining practices of independent contractors. The Chamber also argues that the Sherman Act preempts Seattle from enacting the Ordinance and that Seattle has

violated the Sherman Act; according to the Chamber, Washington State has not sufficiently manifested its intent to extend state-action immunity to enactments such as the Ordinance. None of these arguments has merit, and all run afoul of basic principles of federalism.

POINT I

THE ORDINANCE IS NOT PREEMPTED BY THE NLRA

As an initial matter, the Chamber is wrong that state and local governments have been entirely preempted from regulating collective bargaining by independent contractors. *See* Opening Br. of Appellants (Chamber Br.) 51-58. The Chamber claims that, to the extent for-hire drivers are deemed independent contractors,[3] Congress intended for their bargaining practices to be unregulated and left to the "free play of economic

[3] As noted earlier, Amici States take no position on whether for-hire drivers for Uber, Lyft, and Eastside for Hire are independent contractors or employees. And no party has asserted that for-hire drivers for those companies are employees rather than independent contractors. The Chamber thus misses the mark when it argues that the Ordinance is preempted under *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959), on the basis that the NLRB has not determined whether those drivers are employees or independent contractors. *See* Chamber Br. 58-60.

forces." *Machinists v. Wisconsin Empl. Relations Comm'n,* 427 U.S. 132, 144 (1976). But Congress has manifested no such intent, as the NLRA's legislative history confirms.

Under the NLRA, an employer may not interfere with certain bargaining rights of "employees," 29 U.S.C. § 158, including their rights to organize, join unions, and bargain collectively through representatives of their own choosing, *id.* § 157. And the term "employee" generally includes "any employee" of an employer,[4] except as specifically excluded by the NLRA. For example, the statute's definition of "employee" excludes workers who are agricultural laborers, domestic workers, supervisors, and independent contractors. *See id.* § 152(3).

The preemptive effect of these exclusions is not uniform. *See NLRB v. Committee of Interns & Residents*, 566 F.2d 810, 815 n.5 (2d Cir. 1977). The relevant question is whether Congress intended a particular exclusion to preclude States and localities from providing protections at the State

---

[4] *See NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 718 (2001) (quoting 29 U.S.C. § 152(3)); *see also NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 90-91 (1995) (explaining that the definition of employee is "broad" and covers nearly anyone who works for hire); H.R. Rep. No. 80-245, at 18.

or local level. As explained below, Congress has manifested that intent for supervisors, but not for agricultural and domestic workers or for independent contractors.

A. The NLRA Preempts State and Local Governments from Regulating Collective Bargaining by Some Workers and Not Others.

1. Agricultural and Domestic Workers.

The NLRA addresses "disputes which are of a certain magnitude and which affect commerce." *See* S. Rep. No. 73-1184, at 1, 4 (1934). When excluding agricultural and domestic workers, Congress stated a view that such workers were sufficiently rare and dispersed that there "never would be a great number suffering under the difficulty of negotiating with an actual employer," making federal collective bargaining rights for them unnecessary. *North Whittier Heights Citrus Ass'n v. NLRB*, 109 F.2d 76, 80 (9th Cir. 1940). In other words, Congress expressed the view that labor disputes involving agricultural and domestic workers did "not impact national 'labor peace'" and were "not significant enough to regulate

federally" through the NLRA. *Greene v. Dayton*, 806 F.3d 1146, 1149 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 2014 (2016) (citation omitted).[5]

Congress's exclusion of agricultural and domestic workers from the NLRA thus did not aim to "impliedly preempt[] local regulation." Chamber Br. 56. Instead, Congress determined that such workers did not require uniform, nationwide protection and that States and localities could provide collective-bargaining rights whenever circumstances warranted that. *See id.* at 57-58.[6] Indeed, this Circuit has recognized that as a result of "Congress's exclusion of agricultural employees from the [NLRA]," States "remain fully competent to enact laws governing agricultural labor." *United Farm Workers*, 669 F.2d at 1256. This confirms that simply excluding certain workers from the NLRA's definition of "employee" does not, without more, preempt state or local regulation of such workers.

---

[5] *See also* Debates in House on S. 1958, *reprinted in* 2 NLRB, Legislative History of the National Labor Relations Act, 1935, at 3202-04 (1949).

[6] *See also, e.g.*, *Greene*, 806 F.3d at 1149 (domestic workers); *United Farm Workers of Am., AFL-CIO v. Arizona Agric. Empl. Relations Bd.*, 669 F.2d 1249, 1257 (9th Cir. 1982) (agricultural workers); *Villegas v. Princeton Farms, Inc.*, 893 F.2d 919, 921 (7th Cir. 1990) (same); *Committee of Interns*, 566 F.2d at 815 n.5 (same).

2. Supervisors.

By contrast, Congress's exclusion of supervisors does manifest an intent to preempt state and local regulation of collective bargaining practices by those persons. *See, e.g.*, *Beasley*, 416 U.S. at 662.

When Congress enacted the NLRA, it made clear that it was concerned "with the welfare of 'workers,'" not their "boss." H.R. Rep. No. 80-245, at 13. Nevertheless, Congress's broad definition of "employee" in the NLRA—"any employee"—seemed to encompass workers who supervised other employees. *Kentucky River*, 532 U.S. at 711, 717-18. As a result, the NLRB interpreted the term "employee" to include supervisors. *See Packard*, 330 U.S. at 485; *Beasley*, 416 U.S. at 658 n.4.

Congress responded by making two statutory amendments to the NLRA. First, Congress excluded from the definition of "employee" any "individual employed as a supervisor," Ch. 120, 61 Stat. 138 (amending 29 U.S.C. § 152(3)), and then defined "supervisor," *see id.* (enacting

29 U.S.C. § 152(11)).[7] Second, Congress enacted an entirely new provision stating that although nothing in the NLRA would prohibit a supervisor from joining or remaining in a labor organization, no employer would "be compelled to deem . . . supervisors as employees for the purpose of any law, *either national or local*, relating to collective bargaining." Ch. 120, 61 Stat. 151 (emphasis added) (enacting 29 U.S.C. § 164(a)).

The legislative history of these amendments—unlike the legislative history for agricultural and domestic workers—reveals a clear intent to preempt state law by relieving employers "under the Act *and under state law*" from having to bargain with unions of supervisors. *Hanna Mining Co. v. District 2, Marine Eng'rs Beneficial Ass'n, AFL-CIO*, 382 U.S. 181, 190 (1965) (emphasis added). Specifically, the Senate Report accompanying the amendments stated that the amendments would relieve employers from any duty "by [the NLRB] *or any local agency* to accord to [supervisors]

[7] A "supervisor" is an individual with "authority, in the interest of the employer," to take certain actions such as hiring or firing other employees. Ch. 120, 61 Stat. 138 (1947), 29 U.S.C. § 152(11).

the anomalous status of employees." S. Rep. No. 80-105, at 5 (1947) (emphasis added).

Based on this statutory language and legislative history, the Supreme Court has concluded that States are preempted from extending collective bargaining rights to supervisors. *See Beasley*, 416 U.S. at 662. And as the Court has noted, such preemption is consistent with the goals of the NLRA more broadly.

Collective bargaining by supervisors, unlike for other categories of workers, puts supervisors "in the position of serving two masters"—the employer and the union. 416 U.S. at 661-62. And that result threatens the careful balance that the NLRA sought to strike between employer and employee interests. This is because "[m]anagement, like labor, must have faithful agents" whom they can trust to act in their best interests. *See* H.R. Rep. No. 80-245, at 16-17 (emphasis omitted); *see also id.* at 8. Just "as there are people on labor's side to say what workers want," management needs loyal workers who are "not subject to influence or control of unions." *Id.* at 16. Otherwise, supervisors are subject to "control

by the rank and file union, and, instead of their bossing the rank and file, the rank and file bosses them." *Id.* at 14; *see also id.* at 8.

B. The Factors Courts Have Found to Support Preemption Are Not Present in the Case of Independent Contractors.

Comparing Congress's treatment of independent contractors with its treatment of supervisors underscores the lack of congressional intent to preempt States and localities from regulating collective bargaining by independent contractors. States and localities thus "remain free to legislate as they see fit" with regard to the collective bargaining of independent contractors "and may apply their own views of proper public policy to the collective bargaining process." *United Farm Workers of Am.*, 669 F.2d at 1257.

As the NLRA's legislative history sets forth, Congress sought to confer federal collective bargaining rights on "employees," not "independent merchants." H.R. Rep. No. 80-245, at 18. But because the statute as originally enacted did not specifically address independent contractors, the NLRB and Supreme Court concluded that certain workers having the common-law characteristics of independent contractors could be treated as "employees" for purposes of the NLRA. *See NLRB v. Hearst Publ'ns*,

322 U.S. 111, 131-32 (1944); *see* Ch. 372, 49 Stat. 450 (1935), 29 U.S.C. § 152(3).

Congress, in response, amended the NLRA to clarify that independent contractors fell outside the Act's definition of "employee." *See* Ch. 120, 61 Stat. 138 (amending 29 U.S.C. § 152(3)).[8] As explained in a House Report accompanying the proposed amendment, Congress determined that independent contractors did not warrant federal collective-bargaining rights because they differed in key ways from traditional employees. Whereas employees "work for wages or salaries under direct supervision," independent contractors "undertake to do a job for a price, decide how the work will be done, and depend for their income" on profits—*i.e.*, "the difference between what they pay" to do the job and "what they receive for the end result." H.R. Rep. No. 80-245, at 18.

Unlike in collective bargaining by supervisors, however, no "imbalance in labor-management relationships," *Beasley,* 416 U.S. at 661-62, arises

---

[8] Congress also clarified that "general agency principles" should determine whether a person was an "employee" for purposes of the NLRA. *United Ins. Co. of Am.*, 390 U.S. at 256.

when independent contractors collectively bargain with employers. Instead, Congress excluded independent contractors because it determined that—like domestic and agricultural workers—independent contractors have no need for collective bargaining rights on a national scale, and that excluding them would not materially threaten national labor peace.

Congress thus did not include any provision prohibiting any "national *or local*" law from regulating collective bargaining by independent contractors. *See* 29 U.S.C. § 164(a); see also *supra* at 18. Nor did Congress otherwise express an intention to leave the work of independent contractors entirely to the "free play of economic forces," *Machinists,* 427 U.S. at 144.

In sum, the NLRA leaves States and localities room to regulate collective bargaining by independent contractors in order to pursue certain policy goals in a particular industry. That is what Washington and the City of Seattle have done in this case, as explained below.

POINT II

THE ORDINANCE IS COVERED BY STATE-ACTION IMMUNITY AND THUS DOES NOT VIOLATE ANTITRUST LAWS

The Chamber argues that the Ordinance permits independent-contractor drivers to engage in "illegal price-fixing" in violation of federal antitrust laws. *See* Chamber Br. 18-20. But the Ordinance is not subject to antitrust scrutiny because the State of Washington has conferred state-action immunity on the City of Seattle sufficiently clearly to authorize the Ordinance.

A. The Sherman Act Recognizes That States May Regulate in an Anticompetitive Manner When Pursuing Policy Goals Within Their Borders.

Federal antitrust laws, such as the Sherman Act, are part of a longstanding national policy favoring the elimination of practices that undermine the free market. *See North Carolina State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101, 1109 (2015). This policy is based upon the premise that free markets are "essential to economic freedom"—a premise so "fundamental" that it forms the backdrop against which States administer their own laws for the "advancement of their people." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 632 (1992). By promoting

competition, the Sherman Act empowers States to protect the free flow of commerce and provides state citizens with the freedom to advance their own welfare. *See N.C. State Bd.*, 135 S. Ct. at 1109.

In some contexts, however, there may be an "inherent tension" between federal antitrust policy, which seeks to maximize competition, and state policies seeking to promote collective action. *See H.A. Artists & Assoc.*, 451 U.S. at 713. In *Parker v. Brown*, the Supreme Court upheld a market-sharing scheme authorized by California, concluding that the Sherman Act should not be interpreted to prohibit anticompetitive actions in furtherance of such policies by the States. *See* 317 U.S. 341 (1943). *Parker* concerned a state law authorizing private raisin producers to withhold raisins from the market in order to raise prices and prevent "economic waste." *Id.* at 346. Because nothing in the Sherman Act suggested that Congress had intended to restrict States from regulating commerce—and because "an unexpressed purpose to nullify a state's control over its officers and agents" is not to be attributed lightly to Congress—the Court ultimately held that States are not barred by the Sherman Act from permitting market restraints "as an act of Government."

See id. at 350-52. As the Court recognized, "the Sherman Act confers immunity on the States' own anticompetitive policies out of respect for federalism." *N.C. State Bd.*, 135 S. Ct. at 1110. This immunity "exists to avoid conflicts between state sovereignty and the Nation's commitment to a policy of robust competition." *Id.*

The "[s]tate-action" immunity from the antitrust laws recognized in *Parker* has particular force where state labor policy is concerned. Unlike federal antitrust law, which forbids certain anticompetitive agreements, state labor policy may welcome such agreements if they are "conducive to industrial harmony." *Brown v. Pro Football, Inc.*, 518 U.S. 231, 241 (1996). And as Congress recognized when it declared a national policy in the NLRA, conferring collective bargaining rights can significantly improve the stability and reliability of particular markets. See *supra* at 6-7. The Amici States express no opinion about the wisdom of the state policy choice embodied in the Ordinance, but strongly support the right of each State to make the judgment that local conditions in a particular industry warrant a choice of that sort.

B. The Sherman Act Gives States Latitude to Delegate Authority to Local Subdivisions When Regulating Markets Within Their Borders.

As part of their sovereign regulation of markets within their borders, States may defer to local authorities' regulation of local markets. Indeed, the reasons for allocating power within a State may be similar to the reasons "that drive our ideas about national/state federalism." 1A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* 88 (4th ed. 2013).

Decentralizing power can serve a number of benefits for the States. For example, municipalities like Seattle can "deal quickly and flexibly with local problems" and "experiment[] with innovative social and economic programs." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 435, 439 & n.27 (1978) (Stewart, J., dissenting) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). Municipalities also may be better equipped to carry out policies at a local level, freeing up States "to devote more time to statewide problems." *See id.* at 434-35; *see also, e.g.*, Herbert Hovenkamp & John

A. MacKerron III, *Municipal Regulation and Federal Antitrust Policy*, 32 UCLA L. Rev. 719, 721, 768-74 (1985).

For these reasons, States may create municipalities to "assist in the carrying out of state governmental functions," *Reynolds v. Sims*, 377 U.S. 533, 574 (1964), and often delegate policymaking authority to such entities, *see Avery v. Midland County*, 390 U.S. 474, 481 (1968). And when States do so, federal courts should respect state sovereignty by providing ample flexibility to ensure that state policies may be effectively executed. In order to provide that flexibility, federal courts permit the States to confer their *Parker* immunity on municipalities in order to carry out state objectives. *See FTC v. Phoebe Putney*, 568 U.S. 216, 225 (2013). To receive *Parker* immunity, a municipality must be acting pursuant to state policy to displace competition with state regulation. *See id.*

States always operate "against the backdrop of federal antitrust law" and are presumed not to authorize anticompetitive action unless they have expressed a "clearly articulated" policy of allowing the challenged

conduct.[9] *See, e.g.*, *id.* at 225, 228, 231. In order to determine whether the State has a sufficiently articulated policy, courts approach the inquiry "practically." *Id.* at 229.

The State need not "describe the implementation of its policy in detail," *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 65 (1985), and "[t]he municipality need not be able to point to a specific, detailed legislative authorization," *City of Columbia v. Omni Outdoor Adv., Inc.*, 499 U.S. 365, 373 n.4 (1991) (citation and quotation marks omitted). "No legislature can be expected to catalog all of the anticipated effects" of its laws. *Town of Hallie*, 471 U.S. at 43. Moreover,

---

[9] If the State has expressed a policy of allowing private actors to engage in anticompetitive action, courts generally require the State to supervise the challenged action. *N.C. State Bd.*, 135 S. Ct. at 1112. Yet this requirement is unnecessary when the anticompetitive action is undertaken by a municipality. First, "[c]oncern about the *private incentives* of active market participants animates [the] supervision mandate," *id.* (emphasis added), and that concern is not present where the actor is a municipality operating as an arm of the State and in the public interest. *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 45 (1985). Second, a municipality is electorally accountable. *See N.C. State Bd.*, 135 S. Ct. at 1112. To be sure, a municipality could seek to further "parochial public interests at the expense of more overriding state goals." *Id.* But this danger is "minimal" because the municipality must act pursuant to a clearly articulated state policy. *Town of Hallie*, 471 U.S. at 47.

State Legislatures often make the conscious choice to empower a municipality with a broad delegation of authority because municipalities can act flexibly and are well situated to determine the best means of addressing a state policy goal. *See Southern Motor Carriers*, 471 U.S. at 64. Demanding too much specificity by a State Legislature can therefore have "deleterious and unnecessary consequences," *Town of Hallie*, 471 U.S. at 44, by removing a grant of authority "that the State clearly intended for cities to have," *Phoebe Putney*, 568 U.S. at 230.

At the same time, overbroad readings of a State delegation of power do not serve the best interest of the States. *See Ticor Title*, 504 U.S. at 635. Such readings may permit a municipality to displace competition when the State intended to achieve more limited ends. *See Phoebe Putney*, 568 U.S. at 225, 236. And because delegations of authority to municipalities are common, too broad an immunity rule for such delegations would place the onus on States to "disclaim any intent to displace competition" before empowering municipalities, in order to avoid authorizing anticompetitive conduct inadvertently. *Id.* at 236 (crediting

concerns of twenty *amici* States). The result would be to "impede [the States'] freedom of action, not advance it." *Ticor Title*, 504 U.S. at 635.

Because of these concerns, courts have held that States will not be found to have validated anticompetitive conduct by authorizing conduct that is only "tangentially related" to the actions at issue. *Phoebe Putney*, 568 U.S. at 235. Instead, courts have held that a State "must have foreseen and implicitly endorsed the anticompetitive effects [of the authorization] as consistent with its policy goals"—which can be shown when "displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." *N.C. State Bd.*, 135 S. Ct. at 1112 (quotation marks omitted).

In sum, while the Sherman Act grants States significant latitude to delegate authority to local subdivisions, courts must exercise caution when determining whether a State has (or has not) conferred antitrust immunity on a municipality. Too broad an immunity rule saddles States with unintended consequences from delegations of authority. Too narrow an immunity rule removes policy options that States intended municipalities

to have. A proper balance is thus necessary to "protect[] competition while also respecting federalism." *Id.* at 1117.

C. This Court Should Uphold the Ordinance.

Applying the correct standard for state-action immunity, the Court should uphold the Ordinance.

As an initial matter, the State of Washington has taken the unusual step of submitting an amicus brief to explain why the Ordinance is within the scope of the authority that Washington has delegated to its local subdivisions.[10] That position is entitled to deference for the same federalism-based reasons that undergird the state-action immunity

---

[10] When States express their view regarding whether they have authorized anticompetitive conduct, they often urge courts *not* to find an intent to confer immunity. *See, e.g.*, Br. of Amici Curiae States, *N.C. State Bd.*, No. 13-534, 2014 WL 2536518 (May 30, 2014); *Phoebe Putney*, 568 U.S. at 222; *Ticor Title*, 504 U.S. at 636; Br. of Amici Curiae States, *Cmty. Commc'ns Co. v. City of Boulder*, No. 80-1350, 1980 WL 339591 (Oct. 1980). By contrast, in *Town of Hallie*, Wisconsin joined a brief supporting conduct by a municipality in that State. *See* Br. of Amici States of Seventh Circuit, *Town of Hallie*, No. 82-1832, 1984 WL 564132 (Sept. 14, 1984). And the Court ruled in the municipality's favor. *See Town of Hallie*, 471 U.S. at 47.

doctrine. *See Southern Disposal, Inc. v. Texas Waste Mgt.*, 161 F.3d 1259, 1264-65 (10th Cir. 1998).

Moreover, there is no inconsistency between Washington's stated position and the established contours of state-action immunity. The City's approval of collective bargaining for certain drivers in the for-hire transportation industry is an "inherent, logical, or ordinary result of the exercise of authority delegated by [Washington's] legislature" to the City in this case.[11] *N.C. State Bd.*, 135 S. Ct. at 1112 (quotation marks omitted). Washington law authorizes the State's political subdivisions to adopt *any* measure to "ensure" that for-hire transportation remains "safe and reliable." Wash. Rev. Code § 46.72.160(6). And the State has found that the "safety, reliability, and stability" of such service is critical enough that cities must regulate "without liability under federal antitrust laws." *Id.* § 46.72.001.

Providing for-hire transportation drivers with the right to collectively bargain is an "inherent, logical, or ordinary" means, *see N.C.*

---

[11] The Amici States take no position on whether the active supervision prong of the state-action immunity doctrine is met. The court below found that it was. *See Chamber of Commerce of U.S. v. City of Seattle*, 2017 WL 3267730, at *6-7 (W.D. Wash. Aug. 1, 2017).

State Bd., 135 S. Ct. at 1112 (quotation marks omitted), of ensuring that the transportation they provide is safe, reliable, and stable. As Congress recognized when enacting the NLRA, denying the right to collectively bargain can lead to "strikes and other forms of industrial strife or unrest" that impair the "*efficiency, safety, or operation* of the instrumentalities of commerce." 29 U.S.C. § 151 (emphasis added). Congress also found that "inequality of bargaining power" can prevent the "*stabilization* of competitive wage rates and working conditions." *Id.* (emphasis added). And it found that the right to "bargain collectively" can remove certain "sources of industrial strife and unrest" by restoring "equality of bargaining power between employers and employees." *Id.*

To be sure, Congress did not afford such protections to independent contractors. See *supra* at 20-22. But economic stability can be impaired nevertheless when a significantly-sized category of workers are denied the right to collectively bargain because of technical distinctions between "employees" and "independent contractors." *See Hearst Publ'ns*, 322 U.S. at 125-27. As the Supreme Court has noted, "[i]nequality of bargaining power in controversies over wages, hours and working conditions" may

afflict independent contractors as well as employees. *Id.* at 127. Likewise, "strikes and unrest may stem as well from labor disputes between some who, for other purposes, are technically 'independent contractors' and their employers as from disputes between persons who, for those purposes, are 'employees' and their employers." *Id.*[12] That the bargaining at issue in this case would be covered by the NLRA and exempt from the Sherman Act if the affected drivers are considered "employees" (see *supra* at 7, 14) makes it all the more foreseeable that a municipality might supplement the NLRA by affording them the right to collectively bargain.

The connection between collective bargaining and safe and reliable service is even less "tangential," *Phoebe Putney*, 568 U.S. at 235, when viewed in context of the "private for hire transportation" industry, Wash. Rev. Code §§ 46.72.001, 46.72.160. In that industry, drivers whom some may deem independent contractors at least closely resemble employees.

---

[12] *See, e.g.*, Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 Berkeley J. Empl. & Labor L. 295, 300, 335-37 (2001) (explaining that some independent contractors resemble employees and benefit from similar protections).

Indeed, in the Amici States' experience, drivers such as those at Uber, Lyft, and Eastside for Hire—if they are considered independent contractors—share a number of characteristics of traditional employees: playing an integral role in company services; lacking specialized businesses, skills, or equipment; having little control over services (*i.e.*, whom they pick up, where they will drive, and how much they will be paid); signing adhesion contracts; undergoing a vetting process; and submitting to company oversight (*i.e.*, monitoring of approval ratings and cancellation rates).[13] They also often face difficult working conditions, including unpredictable pay, low wage rates, and long hours. These are exactly the sorts of circumstances that may threaten the safety, reliability, and stability of an industry.[14]

---

[13] *See, e.g.*, *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1135-37, 1147-53 (N.D. Cal. 2015); *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1070-72, 1079-1080 (N.D. Cal. 2015).

[14] *See, e.g.*, Puget Sound Sage & Partnership for Working Families, Policy Brief, *Driving Public Good: How Collective Bargaining Can Increase Reliability & Safety in the Seattle For-Hire Transportation System* 5 (2015), http://pugetsoundsage.org/wp-content/uploads/2016/09/DrivingPublicGood.pdf (discussing "challenges to safety and reliability that trouble [Seattle's] for-hire transportation system and how collective bargaining by drivers can improve the whole system").

Indeed, Seattle's City Council has expressly found that the disparity in bargaining power between transportation companies in the City and those drivers-for-hire who are considered independent contractors adversely impacts the drivers' ability to provide "safe, reliable, stable" services, causing "unrest and transportation service disruptions." *See* Ordinance § 1.E-H. The Council then concluded that collective bargaining for any independent contractors driving in the for-hire-transportation industry will improve performance in those areas by reducing industry turnover, increasing the time drivers devote to driving for hire, and easing financial pressure to work unsafe hours, skip breaks, and drive at unsafe speeds. *Id.* § 1.I.

To be sure, whether a State has authorized particular anticompetitive conduct will turn on the facts in a given case, and different facts require a different analysis. For that reason, we express no view with respect to how the state-action immunity doctrine might apply in other circumstances. In this case, however, Washington State has explicitly authorized municipalities to adopt "any" regulation to ensure "safe," "reliable" for-hire transportation service. And Washington has taken the significant

step of indicating that its delegation of authority does in fact include authority for subdivisions to permit collective bargaining by those drivers-for-hire who are considered independent contractors. Moreover, Congress has suggested—and experience has confirmed—that collective bargaining by such drivers may help ensure safe, reliable services in the for-hire transportation industry. Under these circumstances, recognizing that Washington State has extended its state-action immunity to local government action is consistent with the policies underlying the state-action immunity doctrine, and is supported by fundamental principles of federalism.

In arguing that the State has not adequately extended its immunity, the Chamber's arguments misconceive the relevant inquiry. The Chamber argues, for example, that the provision authorizing the City to adopt "any" requirement to "ensure safe and reliable for hire vehicle transportation service" (*see* Wash. Rev. Code § 46.72.160(6)) does not "say anything about regulating ride-referral companies or contracts for referral services" (*see* Chamber Br. at 34-36). But a "municipality need not be able to point to a specific, detailed legislative authorization in

order to assert a successful *Parker* defense." *City of Columbia*, 499 U.S. at 373 n.4 (citation and quotation marks omitted); see *supra* at 28-29.

The Chamber also argues that interpreting this provision by its terms would "eviscerate any limit" by permitting the City to regulate "all manner of third-party transactions that arguably affect the safety or reliability" of service. *See* Chamber Br. at 36-37. But the standard is not whether the Ordinance "arguably" affects service; the standard is whether the Ordinance is an "inherent, logical, or ordinary" result of the State's delegated authority to ensure safe and reliable service. *N.C. State Bd.*, 135 S. Ct. at 1112.

Finally, the Chamber argues that the "novelty" of "digital ride-referral services" is dispositive because "flexibility for municipalities to address unforeseen problems is not the hallmark of state-action immunity," and *Parker* "puts a thumb on the scale favoring free markets." *See* Chamber Br. 39-40. But that is not true. As the Amici States have explained (see *supra* Point II.B), *Parker* requires the "scale" to be balanced: permitting States to empower municipalities with flexibility on the one hand, and

guarding against "purely parochial" restraints on competition on the other. *See, e.g.*, *Phoebe Putney*, 568 U.S. at 226.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Dated: New York, NY
December 8, 2017

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General
State of New York
Attorney for Amici Curiae

By: /s/ Barbara D. Underwood
BARBARA D. UNDERWOOD
Solicitor General

120 Broadway
New York, NY 10271
(212) 416-8921

BARBARA D. UNDERWOOD
Solicitor General
ANISHA S. DASGUPTA
Deputy Solicitor General
SETH M. ROKOSKY
Assistant Solicitor General
of Counsel

(*Counsel listing continues on next page.*)

DOUGLAS S. CHIN
Attorney General
State of Hawai'i
425 Queen St.
Honolulu, HI 96813

LISA MADIGAN
Attorney General
State of Illinois
100 W. Randolph St., 12th Floor
Chicago, IL 60601

THOMAS J. MILLER
Attorney General
State of Iowa
1305 E. Walnut Street
Des Moines, IA 50319

JANET T. MILLS
Attorney General
State of Maine
6 State House Station
Augusta, ME 04333

BRIAN E. FROSH
Attorney General
State of Maryland
200 Saint Paul Place
Baltimore, MD 21202

MAURA HEALEY
Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, MA 02108

LORI SWANSON
Attorney General
State of Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court Street, N.E.
Salem, OR 97301

JOSH SHAPIRO
Attorney General
Commonwealth of Pennsylvania
16th Floor, Strawberry Sq.
Harrisburg, PA 17120

PETER F. KILMARTIN
Attorney General
State of Rhode Island
150 S. Main Street
Providence, RI 02903

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609

KARL A. RACINE
Attorney General
District of Columbia
441 4th Street, N.W., Suite 600 South
Washington, DC 20001

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-35640

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☒ This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.
The brief is [6,959] words or [39] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated [ ]
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant: s/ Anisha S. Dasgupta

Date: Dec 8, 2017

("s/" plus typed name is acceptable for electronically-filed documents)