No. 17-35640

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

Opening Brief Of Appellants

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CORPORATE DISCLOSURE STATEMENT

Plaintiff Chamber of Commerce of the United States of America is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber is the world's largest business federation. The Chamber has no parent corporation, and no publicly held company owns 10% or more of its stock.

Dated: October 27, 2017

/s/ Michael A. Carvin
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Plaintiff Rasier, LLC is a wholly-owned subsidiary of Uber Technologies, Inc. No publicly held corporation owns 10% or more of its stock.

Dated: October 27, 2017

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INTRODUCTION

Seattle has enacted an unprecedented collective-bargaining ordinance—one never attempted by any of the other 40,000 municipalities in the United States. Seattle Ordinance 124968 purports to give independent contractors who work as for-hire drivers the right to unionize, collectively bargain, and fix the prices they pay for using ride-referral services. For example, independent-contractor drivers pay service fees for using smartphone applications, like those developed by Uber Technologies and Lyft, Inc, that provide drivers with transportation requests from passengers. The Ordinance blesses cartels of independent-contractor drivers organized expressly to fix prices for these ride-referral service fees.

Seattle's scheme clashes with the Sherman Act and the National Labor Relations Act. Both statutes preempt the Ordinance. After preliminarily enjoining its enforcement, however, the district court wrongly concluded otherwise and granted the City's motion to dismiss.

First, the City does not dispute that the Ordinance authorizes price-fixing by independent contractors. Instead, to evade antitrust scrutiny, the City engages in a tortured misapplication of state-action immunity, a doctrine that is narrow and "disfavored." *FTC v. Phoebe Putney*, 568 U.S. 216, 225 (2013). On this core defense, the City bears a heavy burden—one that is far from satisfied here—to show that (1) the State of Washington "affirmatively contemplated" and "clearly

articulated" a policy to permit price fixing in the particular field or market at issue, and (2) the private collective-bargaining process is "actively supervised by the State." *Id.* These requirements are stringent, and must not be applied "too loosely." *Id.* at 229. Yet that is just what the City wants: a loose, flexible, and extremely deferential application of both prongs.

On clear articulation, the City relies on a 1996 Washington statute authorizing municipalities to engage in anticompetitive regulation of "for hire transportation services." RCW 46.72.001. But Uber and Lyft do not transport passengers from one place to another and therefore are not transportation services; they instead provide referral services that connect for-hire drivers with passengers, and the drivers then provide transportation services. At most, the statute "clearly articulated" and "affirmatively contemplated" anticompetitive behavior only in the relationship between *drivers and their passengers*—such as standardized rates for trips. The statute therefore does not encompass the relationship at issue here: contracts between drivers and ride-referral services. Indeed, the technology and business model for ride-referral services like Uber and Lyft *did not exist* in 1996, when the legislature enacted RCW 46.72.001. Not until 2015 did the Washington Legislature ever pass *any* statute that specifically applied to these ride-referral companies, and a contemporaneous legislative report expressly stated that no prior legislation had ever specifically applied to ride-referral companies. Neither in the

1996 statute nor at any other time has the Washington Legislature affirmatively contemplated and clearly articulated a policy authorizing price fixing in contracts for ride-referral services.

On active state supervision, the City fares no better. A state actor, not a municipal actor, must actively supervise private parties engaged in anticompetitive conduct. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 & n.10 (1985). The Ordinance provides for *no* state supervision, much less *active* supervision. No state actor supervises Seattle's collective-bargaining process or approves the collective-bargaining agreement. The City therefore tries to transform this requirement into one of "municipal supervision"—an aggressive local power grab unsupported by antitrust law and one which, if allowed to succeed by this Court, would reshape municipal regulatory authority nationwide. "Municipal supervision" is not "state supervision," and no amount of linguistic gymnastics by the City changes that.

Second, the Ordinance is preempted by the NLRA, which protects broad swaths of economic activity that Congress intends to remain unregulated by federal or local governments and instead "controlled by the free play of economic forces." *Int'l Assoc. of Machinists v. Wisc. Emp't Relations Comm'n*, 427 U.S. 132, 140 (1976). One of those fields is the contractual relationship between independent contractors and their suppliers. Congress affirmatively excluded independent contractors from collective bargaining in the Taft-Hartley Act of 1947, expressing

its intent to leave nationwide regulation of independent contractors to market forces, rather than federal or local rules authorizing collective bargaining. The Ordinance obstructs that objective. Rather than leaving independent contractors to market forces, as Congress intended, the City has supplanted the NLRA with its own collective-bargaining regime.

The NLRA also preempts the Ordinance for a different reason. The National Labor Relations Board has exclusive jurisdiction to determine whether for-hire drivers are independent contractors or employees, yet the Ordinance usurps that authority from the NLRB and places it in the hands of City officials.

At bottom, the Ordinance is a broadside attack against independent-contractor arrangements not only in transportation but more broadly in the nascent "on demand" economy, which gives people the freedom and flexibility of deciding when and how long to work. If allowed to stand, Seattle's Ordinance not only could force Uber and Lyft to abandon their Seattle operations but also will place at risk the independent-contractor model in a host of business enterprises, including the burgeoning market of platform services that use smartphones to instantly connect buyers and sellers. The Court should reverse the judgment below.

JURISDICTION

The district court had jurisdiction over the Chamber's federal claims under 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1291 and § 1294(1)

to review the district court's order dismissing all claims in this suit, entered on August 1, 2017, and the final judgment entered on August 4, 2017. Appellants' Excerpts of Record ("ER") 1, 39. The Chamber filed a notice of appeal on August 9, 2017 (ER 32), which was timely under 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a)(1)(A).

STATEMENT OF ISSUES

(1) Whether state-action immunity saves Seattle's collective-bargaining Ordinance from preemption by the Sherman Antitrust Act.

(2) Whether Seattle's collective-bargaining Ordinance is preempted by the National Labor Relations Act, which excludes independent contractors from collective bargaining and gives the NLRB primary jurisdiction to determine whether for-hire drivers are independent contractors.

STATUES, ORDINANCES, AND REGULATIONS

All applicable statutes and other relevant legal materials are reproduced in the accompanying addendum.

STATEMENT OF THE CASE

A. Ride-Referral And Dispatch Services In Seattle

For-hire drivers have traditionally relied on street hails, taxi stands, or a physical dispatch service to find customers needing transportation. ER 58. Chamber member Eastside for Hire, Inc., is a dispatch service that contracts with drivers to provide ride-referral services. *See* ER 120. The company uses advertising to

generate passenger transportation requests by telephone or email, and refers the requests to drivers using a mobile data terminal. *Id.* The drivers are independent contractors, not Eastside employees. *Id.*

The smartphone made possible a new type of ride-referral system. Digital ride-referral applications allow riders and drivers to communicate their locations through a smartphone, and the application matches a rider with an available driver nearby. Prominent examples are the Uber and Lyft smartphone applications ("apps," for short) developed by Chamber members Uber Technologies, and Lyft, Inc., respectively. *See* ER 102, 111.

Local transportation providers may contract with Uber's subsidiary, Plaintiff Rasier, LLC (together with Uber Technologies, "Uber"), to use the Uber app for ride referrals in exchange for a service fee. ER 102–103. Likewise, they may contract with Lyft to use the Lyft app for that purpose. ER 111–112. The drivers who use the Uber and Lyft apps are independent contractors. Uber and Lyft do not employ those drivers and do not own or operate the drivers' vehicles. ER 104, 111–112. Indeed, the Uber and Lyft apps are frequently called "ridesharing" services because they enable individuals to use their personal vehicles to "share" rides with willing passengers. *See* ER 60.

B. Washington State Regulation Of Ride-Referral Services

The ridesharing business model of Uber and Lyft, which emerged in 2009 and 2012 respectively, was unlike anything that had operated in the State of Washington before. At those times, no state transportation law specifically regulated ridesharing companies like Uber and Lyft. The legislature passed the first statute expressly referring to them in 2015, which was limited to requiring all ridesharing drivers to have vehicle insurance coverage. SB 5550 (Wash. 2015) (Addendum A-18). The final bill report (used by the legislature when deliberating on the bill) explained the lack of any regulation prior to 2015:

> [C]urrent law does not specifically provide for the regulation of what are commonly known as ridesharing companies, i.e. companies that use a digital network or software application to connect passengers to drivers for the purpose of providing a prearranged ride, often by use of the driver's personal vehicle.

Final Bill Report, SB 5550 (Wash. 2015) (Addendum A-33).

Because of the lack of any additional state regulation, the legislature is currently considering a bill to comprehensively regulate ridesharing services, but it has yet to pass the legislation. *See* Senate Bill Report, SB 5620 (Wash. 2017) (Addendum A-35). Thus, according to the legislature, the only existing Washington law targeting ridesharing services is the insurance requirement under SB 5550.

C. Seattle's Collective-Bargaining Ordinance

The City of Seattle, in contrast to the State, has aggressively regulated the new ridesharing companies. Professing concern about reduced drivers' income caused

by increased competition in the for-hire transportation market, Seattle Council members enacted Ordinance 124968. The Ordinance was the product of a collaborative effort by the Teamsters union and the Seattle City Council, whose stated objective was to "balance the playing field" between drivers and companies like Uber. Daniel Beekman, *An Uber union? Seattle could clear way for ride-app drivers*, Seattle Times (Nov. 28, 2015), http://bit.ly/1PVXyq4.

The Ordinance requires a "driver coordinator" to collectively bargain with for-hire drivers. Ordinance § 1(I) (the entire Ordinance is included at Addendum A-40 to A-62). A "driver coordinator" is "an entity that hires, contracts with, or partners with for-hire drivers for the purpose of assisting them with, or facilitating them in, providing for-hire services to the public." *Id.* § 2. This broad definition covers ride-referral companies like Uber, Lyft, and Eastside, but by its terms also includes an untold number of companies that contract with for-hire drivers in any way to assist them in providing for-hire services. The Ordinance applies only to drivers who contract with a driver coordinator "other than in the context of an employer-employee relationship," *id.* § 3(D)—that is, to independent contractors—and gives them the power to unionize and collectively bargain as if they were employees under the federal labor laws.

The collective-bargaining scheme begins with a union election. A union seeking to represent for-hire drivers first applies to the City's Director of Finance

and Administrative Services for approval to be a "Qualified Driver Representative" (QDR). *Id.* § 3(C). Once the Director approves a QDR, any driver coordinator that contracts with fifty or more for hire drivers must, at the QDR's demand, disclose confidential lists of driver information, including the names, addresses, email addresses, and phone numbers of "all qualifying drivers" with whom it contracts. *Id.* The City has by regulation limited "qualified drivers" to those high-volume drivers who have driven "at least 52 trips originating or ending within the Seattle city limits for a particular Driver Coordinator during any three-month period in the 12 months preceding the commencement date" of the Ordinance. FHDR-1 (Addendum A-64).

Armed with the driver coordinator's confidential list of driver information, the QDR contacts the drivers and asks for their vote. If a majority of qualified drivers consent to the QDR's exclusive representation, the Director must certify it as the "Exclusive Driver Representative" (EDR) "for all drivers for that particular driver coordinator." Ordinance § 3(F)(2). Once a union representative is elected for a driver coordinator, it becomes the exclusive representative for *all* drivers (even "unqualified" nonvoting drivers) who contract with that driver coordinator.

Once an EDR is certified, the driver coordinator must meet with it to negotiate over various subjects, including the "payments to be made by, or withheld from, the driver coordinator to or by the drivers." *Id.* § 3(H)(1). In other words, through

collective bargaining, the drivers will fix the prices they pay Uber and Lyft to use their ride-referral apps, and the price they pay Eastside for its services.

The Director does not participate in the negotiation but merely determines whether to approve any agreement. *Id.* § 3(H)(2)(c). If the coordinator and union do not reach agreement, the matter goes to binding arbitration, and the arbitrator's decision is submitted to the Director. *Id.* § 3(I)(1)–(4).

D. Procedural History

The Chamber initially challenged the Ordinance in March 2016, raising the same antitrust and labor preemption claims that are at issue in this appeal. *See Chamber of Commerce v. Seattle*, No. 2:16-cv-00322, Doc. 1 (W.D. Wash. filed Mar. 3, 2016). The district court dismissed that suit as unripe because no union had yet applied for QDR certification. *Id.*, Doc. 63 at 8, 2016 WL 4595981 at *2 (Aug. 9, 2016). The City subsequently designated Teamsters Local 117 as a QDR on March 3, 2017. *See* ER 108. The Teamsters notified Uber, Lyft, and Eastside on March 7, 2017, that it intends to become the EDR of all drivers who contract with those companies, and demanded that each company turn over its confidential driver information. ER 108, 117, 123.

Seeking to prevent both the compelled disclosure of the driver information and the costly and disruptive union-election process that would ensue, the Chamber re-filed this suit and moved for a preliminary injunction. (Rasier, LLC, joined as a co-

plaintiff in an amended complaint. This brief hereinafter refers to both Plaintiffs together as "the Chamber.") ER 51. The district court granted the motion, concluding that the Chamber had demonstrated "serious questions" on the merits of the antitrust preemption claim, including "serious questions regarding both prongs of the immunity analysis." ER 88. As the court explained, the Washington statutes on which the City bases its state-action immunity argument have been consistently used to "allow municipalities to establish rates and other regulatory requirements in the taxi industry," but "they have never … been used to authorize collusion between individuals in the industry in order to establish a collective bargaining position in negotiations with another private party." ER 87. The court also questioned whether the City's limited oversight of collective bargaining among private parties could satisfy the active-supervision requirement for state-action immunity. *Id.* The court did not agree, however, that the Chamber had shown serious questions on the merits of its preemption claims under the National Labor Relations Act. ER 92–97.

The City appealed from that order (No. 17-35371), and it also filed a motion to dismiss in the district court. Although the district court had preliminarily enjoined the Ordinance because there were "serious questions" about the Ordinance's validity, the court reversed course and granted the motion, concluding that the Chamber failed to state a claim. ER 28. In the court's revised view, state-action immunity shielded the Ordinance because a Washington statute authorized "political

subdivisions of the state to regulate for hire transportation services without liability under the federal antitrust laws." ER 7–8 (quoting RCW 46.72.001).

The Chamber filed this appeal from the dismissal of its claims. It also asked the district court for an injunction pending appeal. ER 40. The court denied the Chamber's request and dissolved the preliminary injunction, allowing the Ordinance to take immediate effect.[1]

The Chamber filed an emergency motion for an injunction pending appeal in this Court to prevent the Ordinance from causing immediate irreparable harm to the Chamber's members. Doc. 6-1. The City opposed the motion, explaining that an injunction is warranted only if the Chamber has made a "strong showing" that it is "likely to succeed" on the merits of the appeal. Doc. 16-1 at 10. This Court agreed that the Chamber had satisfied its burden on the merits and enjoined the Ordinance pending appeal. Doc. 24.

STANDARD OF REVIEW

The grant of a motion to dismiss for failure to state a claim is reviewed *de novo*, "accepting all factual allegations in the complaint as true and construing them in the light most favorable to the nonmoving party." *Ebner v. Fresh, Inc.*, 838 F.3d 958, 962 (9th Cir. 2016).

[1] After the district court dissolved the injunction, this Court dismissed the City's preliminary-injunction appeal as moot. (No. 17-35371.)

SUMMARY OF ARGUMENT

1. The Sherman Antitrust Act preempts the Ordinance because it purports to authorize independent contractors to fix prices, a *per se* antitrust violation. The City defends the Ordinance entirely on its assertion of state-action immunity. But state-action immunity is "disfavored," and it applies only if the anticompetitive activity at issue is (1) "clearly articulated and affirmatively expressed as state policy" and (2) "actively supervised by the State." *FTC v. Phoebe Putney*, 568 U.S. 216, 225 (2013). The Ordinance fails both requirements.

First, to satisfy the clear-articulation requirement, the City must show that the Washington Legislature has affirmatively contemplated and clearly articulated a policy of authorizing anticompetitive conduct in the particular field or market in question. *Id.*; *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 64 (1985). The particular field or market here is the provision of ride-referral services to for-hire drivers who provide transportation to the public. The City relies on RCW 46.72.001, which authorizes municipalities to "regulate for hire transportation services without liability under federal antitrust laws." This statute, however, applies only to for-hire "transportation services," meaning the transportation of passengers from point a to point b. As noted, that is not the particular field at issue here. To be clear, the provision of ride-referral services to drivers is different than the provision of transportation services to passengers. The

fact that referral services are tangentially related to transportation services is not enough to satisfy the clear-articulation requirement, which demands specificity and clear articulation as to the particular field or market at issue.

Moreover, the immunity provision in RCW 46.72.001 applies only to ordinances within the scope of authority delegated by the state in the enabling provision, RCW 46.72.160. That provision authorizes municipal regulation only of "for hire vehicles operating within their respective jurisdictions," *id.,* which does not extend to third-party ride-referral companies like Uber and Lyft, which own no vehicles and employ no drivers. Nor do any of the powers listed in RCW 46.72.160(1)–(6) extend to ride-referral services. While the district court and the City seek to stretch these statutes to encompass all tangentially related aspects of the transportation industry, and any regulation indirectly affecting transportation safety and reliability, that sort of general, unfocused analysis is foreclosed under Supreme Court holdings requiring a clear expression from the legislature about the particular field at issue.

Far from clearly articulating and affirmatively contemplating anticompetitive regulation of ride-referral services, the Washington Legislature has recently stated that no state law had specifically provided for regulation of ridesharing companies like Uber and Lyft until 2015. *See* Final Bill Report, SB 5550 (Wash. 2015).

Tellingly, the statute on which the City relies was enacted in 1996, long before the ridesharing business model of Uber and Lyft ever existed.

Second, the Ordinance fails the active-supervision requirement. Active supervision of private parties requires supervision "by the State," and no Washington State actor supervises the collective bargaining. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985). Even if a municipality could supervise private price fixing, the municipal supervision contemplated under the Ordinance is insufficiently active. Although the City's Director of Finance must approve any collective-bargaining agreement, the Director cannot participate in the collective-bargaining process itself and has no authority to "modify particular decisions." *North Carolina State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101, 1116 (2015). This level of supervision is insufficient, particularly in these circumstances where the "gravity of the antitrust offense" is serious, there is significant "involvement of private actors throughout" the collective-bargaining process, and no state actor supervises the anticompetitive conduct of private parties. *Id.*

2. The Ordinance is also preempted by the National Labor Relations Act for two reasons. *First*, the NLRA preempts regulation of economic activity that Congress wanted to remain unregulated by federal or local collective-bargaining programs and instead "controlled by the free play of economic forces." *Int'l Assoc. of Machinists v. Wisc. Emp't Relations Comm'n*, 427 U.S. 132, 140 (1976).

Machinists preemption is based on the premise that, by excluding a subject from collective-bargaining regulation under the NLRA, Congress intends to preempt local laws regulating that subject.

Congress has expressly excluded "any individual … having the status of an independent contractor" from the definition of "employee" under the NLRA. 29 U.S.C. §152(3). In doing so, Congress expressed its intent that independent contractors should be controlled by the free play of economic forces at both the federal and local level, rather than allowed to unionize and collectively bargain through municipal ordinances. Requiring independent contractors to collectively bargain is inconsistent with the basic objective of labor regulation under the NLRA, which funnels employees into collective bargaining, but subjects entrepreneurial independent contractors to the risks and profit rewards of the free market.

The NLRA's separate exclusion of "any individual employed as a supervisor" reinforces the conclusion that independent contractors are exempt from local collective-bargaining ordinances. 29 U.S.C. § 152(3). The supervisor exclusion preempts local collective-bargaining schemes for supervisors. *Beasley v. Food Fair of N.C., Inc.*, 416 U.S. 653, 662 (1974). Congress exempted both supervisors and independent contractors at the same time in the Taft-Hartley Act, 61 Stat. 136–37, 29 U.S.C. § 152(3), and the two parallel exemptions have a similar preemptive force.

Congress has also excluded agricultural workers from the definition of "employee," but for a different reason: It expected the NLRA to cover "only those disputes which are of a certain magnitude and which affect commerce." S. Rep. No. 79-1184, at 3 (1934). Unlike commercial activities undertaken by independent contractors, Congress did not think agricultural work had a sufficient nexus to interstate commerce, so regulation of agricultural employees is properly left to the states. *See United Farm Workers of Am. v. Ariz. Agric. Emp't Relations Bd.*, 669 F.2d 1249, 1257 (9th Cir. 1982). That reasoning is inapplicable to independent contractors.

Second, the Ordinance requires municipal officials and state courts to determine whether for-hire drivers are independent contractors or employees subject to the NLRA. This impermissibly injects local officials and state courts into matters that are subject to the NLRB's exclusive jurisdiction under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244–45 (1959).

ARGUMENT

Seattle's collective-bargaining Ordinance is preempted by two federal statutes. First, the Sherman Antitrust Act preempts the Ordinance because it purports to authorize private contractors to fix prices through collusive negotiations—a *per se* antitrust violation—and the Ordinance fails to satisfy either requirement for state-action immunity. Second, the Ordinance is preempted by the National Labor

Relations Act, which excludes independent contractors from collective bargaining at both federal and state levels.

I. THE SHERMAN ANTITRUST ACT PREEMPTS THE ORDINANCE

A. The Ordinance Purports To Authorize Price Fixing Among Direct Competitors, A *Per Se* Violation Of The Sherman Act

Federal antitrust law preempts municipal laws, like Seattle's collective-bargaining Ordinance, that mandate or authorize private parties to commit a "*per se* violation" of the Sherman Act. *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982). Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. Certain particularly egregious collusive practices are condemned as *per se* illegal under § 1 "because of their pernicious effect on competition and lack of any redeeming virtue." *Rice*, 458 U.S. at 654, 659 n.5 (1982). These practices are *per se* unlawful on their face, without the need for a factfinder to decide whether they are reasonable under the circumstances. *Id.* "Foremost in the category of per se violations is horizontal price-fixing among competitors." *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 986 (9th Cir. 2000). This is the "supreme evil of antitrust." *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

The prohibition on price fixing applies to efforts by independent contractors who are horizontal competitors to join or form groups to collectively bargain over prices for goods and services. For example, independent grease peddlers violated

the Sherman Act by joining a union and collectively bargaining over the price at which they would sell restaurant grease to grease processors. *See L.A. Meat & Provision Drivers Union v. United States*, 371 U.S. 94, 96–98 (1962). Independent fishermen violated the Sherman Act by forming a union and collectively bargaining about the terms and conditions under which they would sell fish to processors and canneries. *See Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143, 144–46 (1942). And independent "stitching contractors" violated the Sherman Act by forming a union and collectively bargaining over the provision of stitching services to clothing sellers. *See United States v. Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 463–64 (1949). This much is clear: Independent contractors cannot legally fix prices, through collective bargaining or otherwise.

The FTC has consistently relied on these principles to condemn collective-bargaining measures similar to the Ordinance on the grounds that "collective bargaining over prices amounts to *per se* illegal price fixing." Letter to Wash. H. Rep. Brad Benson 5 (Feb. 8, 2002) (Addendum A-71). For instance, the FTC concluded that Washington State legislation authorizing physicians to collectively bargain with health insurers would permit "precisely the sort of conduct" that is a *per se* antitrust violation. *Id.* at 2 (A-68). The FTC reaffirmed this position when it opposed an Ohio bill allowing home health-care providers to collectively bargain over insurance reimbursements. Letter to Ohio H. Rep. Dennis Stapleton 6–7

(Oct. 16, 2002), (Addendum A-81 to A-82). And the FTC has reiterated this in congressional testimony. *See, e.g.*, Testimony of David Wales 6–9 (Oct. 18, 2007) (Addendum A-92 to A-95).

The Ordinance undeniably authorizes *per se* illegal price fixing that has a "pernicious effect on competition" and lacks "any redeeming virtue." *Rice*, 458 U.S. at 659 n.5. It allows for-hire drivers who are independent contractors and horizontal competitors to join together in a union—a cartel—and to collude with one another through collective bargaining over the price terms of their contracts with ride-referral companies. Ordinance § 3(H)(1). Like the illegal grease peddlers' union in *Los Angeles Meat*, the illegal fishermen's union in *Columbia River Packers*, the illegal stitchers' union in *Women's Sportswear*, and the physicians' and home-health-care workers' unions the FTC has condemned, the Ordinance's "collective bargaining over prices amounts to *per se* illegal price fixing." Letter to Wash. H. Rep. Brad Benson, *supra*, at 5 (A-71).

B. State-Action Immunity Does Not Save The Ordinance

The City does not seriously contend that its collective-bargaining scheme can withstand antitrust scrutiny. It instead seeks to evade the antitrust laws by invoking the disfavored doctrine of state-action immunity. Contrary to the district court's reasoning, however, the City does not remotely qualify for immunity.

State-action immunity is a narrow and "disfavored" exception to the Sherman Act, "given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws." *FTC v. Phoebe Putney*, 568 U.S. 216, 225 (2013). Under this doctrine, states themselves are immune from federal antitrust law. *Id.* Municipalities, however, "are not themselves sovereign." *Id.* State-action immunity therefore "does not apply to them directly," and they must instead rely entirely on the state for any potential immunity. *Id.* Municipal immunity applies "only when it is clear that the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that is the State's own." *Phoebe Putney*, 568 U.S. at 225. Private parties are even further afield from a sovereign state, so anticompetitive actions of private parties require even "[c]loser analysis" to ensure they derive from a "scheme that is the State's own," rather than merely from the local desires of a municipality. *Id.*

Thus, a municipality may authorize private parties to violate the antitrust laws only by meeting two stringent requirements. The anticompetitive activity must be (1) "clearly articulated and affirmatively expressed as state policy" and (2) "actively supervised by the State." *Id.* These are two "rigorous" requirements, meant to allow immunity only if the anticompetitive conduct is "truly the product of state regulation," as opposed to municipal regulation. *Columbia Steel Casting v. Portland Gen. Electric*, 111 F.3d 1427, 1436 (9th Cir. 1996). "Both are directed at ensuring that

particular anticompetitive mechanisms operate because of a deliberate and intended state policy." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992). Courts closely scrutinize claims of municipal immunity because less-than-searching review "may inadvertently extend immunity to anticompetitive activity which the states did not intend to sanction." *Cost Mgmt. Servs., Inc. v. Wash. Nat. Gas Co.*, 99 F.3d 937, 941 (9th Cir. 1996). "[T]oo loosely" doling out antitrust immunity to municipalities like Seattle would "permit[] purely parochial interests to disrupt the Nation's free-market goals." *Phoebe Putney*, 568 U.S. at 226, 229.

The Ordinance satisfies neither condition for immunity. First, Washington law nowhere clearly expresses a policy of permitting for-hire drivers to fix prices in their contracts with ride-referral companies. Second, no state official, nor even any City official, actively supervises the collective-bargaining process.

1. The Ordinance Fails The Clear-Articulation Requirement

a. To satisfy the clear-articulation requirement, the City must demonstrate a "clearly articulated" and "affirmatively expressed" Washington State policy to displace competition in the "particular field" or market at issue. *Phoebe Putney*, 568 U.S. at 225; *Southern Motor Carriers*, 471 U.S. at 48. Here, that means the Washington Legislature must have clearly articulated its authorization for municipalities to displace competition in the market for the provision of ride-referral

services to for-hire drivers, rather than in the market for the provision of transportation by those drivers to their passengers.

The Supreme Court has strictly enforced this standard, and has tightened its application in recent cases. In *Phoebe Putney*, for example, the Court held that a statute authorizing a municipal hospital "to acquire" other hospitals was insufficient to immunize an anticompetitive merger. 568 U.S. at 219–21. There was no evidence, the Court said, that "the State affirmatively contemplated that hospital authorities would displace competition by consolidating hospital ownership." *Id.* at 227. Though the statute authorized hospital acquisitions generally, and even authorized anticompetitive activity "in the market for hospital services in some respects," it did not expressly allow *mergers* that would substantially lessen competition. *Id.* at 235. A state's "authorization of discrete forms of anticompetitive conduct pursuant to a regulatory structure, does not establish that the State has affirmatively contemplated other forms of anticompetitive conduct that are only tangentially related." *Id.*

Under *Phoebe Putney*, a state's authorization for a municipality to regulate a type of activity is not enough—it must clearly articulate its intent authorize the "discrete forms of anticompetitive conduct" at issue. *Id.* As this Court has similarly explained, the City must prove "not only the existence of a state policy to displace competition with regulation, but also that the legislature contemplated the kind of

actions alleged to be anticompetitive." *Springs Ambulance Service v. City of Rancho Mirage*, 745 F.2d 1270, 1273 (9th Cir. 1984).

Thus, under these cases, the legislature must not only clearly articulate a policy authorizing a discrete form of anticompetitive conduct, it must do so with respect to the "particular field" or market at issue. *Southern Motor Carriers*, 471 U.S. at 64. The legislature in *Southern Motor Carriers* had authorized a state agency to "prescribe just and reasonable rates for the intrastate transportation of general commodities." *Id.* This specified both a discrete form of anticompetitive conduct (rate setting), and specified a particular field (the provision of intrastate transportation of general commodities). *Id.* Because the legislature "clearly intend[ed] to displace competition in a particular field,"—*i.e.*, the rates to be charged for transporting goods—state-action immunity applied to the private entities exercising delegated power to set those rates. But this immunization for setting the rates that trucking companies could charge for transporting goods would not authorize anticompetitive regulation of those companies outside that "particular field"—*e.g.*, requiring trucking companies to collectively bargain with their drivers. Indeed, *Southern Motor Carriers* expressly distinguished previous cases in which the "Legislature had indicated no intention to displace competition in the relevant market." *Id.* at 64; *see also Cantor v. Detroit Edison Co.*, 428 U.S. 579, 595–96

(1976) (immunity for utility's distribution of electricity did not extend to the utility's distribution of light bulbs).

For this reason, the courts of appeals have consistently rejected claims of state-action immunity when the legislature authorized some anticompetitive conduct, but not in the particular field or market at issue. *E.g.*, *Medic Air Corp. v. Air Ambulance Authority*, 843 F.2d 1187 (9th Cir. 1988) (state-action immunity for monopoly provider of air-ambulance *dispatching* did not extend to dispatcher's anticompetitive conduct in providing air-ambulance *services*); *First American Title Co. v. Devaugh*, 480 F.3d 438, 447 (6th Cir. 2007). Even before *Southern Motor Carriers*, this Court applied the same particularity principle in *Springs Ambulance*, 745 F.2d at 1273. There, the Court held that state-action immunity would not apply to challenged conduct that was outside the scope of the state's authorization to displace competition in a particular field. *Id.* The relevant statute authorized the city to "contract for ambulance service to serve the residents of the city as convenience requires." *Id.* at 1273. While that authorized the city to displace competition by contracting with a single provider for public ambulance service, it did not authorize a related ordinance setting maximum prices for private ambulance companies. *Id.* at 1272–73. The latter regulation of contracts between ambulances and private persons was outside the scope of the legislature's authorized displacement of competition in the contracts between ambulances and the city. *Id.* In other words,

the statute applied to one particular field, but the city's price-fixing ordinance regulated a different particular field.

b. Here, the Washington Legislature did not clearly articulate or affirmatively contemplate (or, for that matter, even remotely consider) a policy to displace competition in the particular field at issue: contracts for ride-referral services between ride-referral companies and for-hire drivers. The City relies on RCW 46.72.001, which states that municipalities may "regulate for hire transportation services without liability under federal antitrust laws." But as the text and all other indicia of legislative intent show, this is just a garden-variety authorization to regulate the provision of transportation services to the public, including anticompetitive regulation of transportation providers' interaction with the public—most obviously, a requirement to charge uniform rates to passengers. It does not contemplate or authorize regulation of those providing services or products *to* transportation providers, such as auto-repair shops or ride-referral services. Requiring cab drivers or other for-hire transportation services to charge uniform rates to passengers is entirely different from regulating the rates third-party service providers may charge the drivers. Moreover, price fixing by drivers or companies of the rates they charge their passengers (that is, the prices for their output) involves entirely different public-policy issues than price fixing by drivers of what they pay their ride-referral service providers (the prices for the drivers' inputs). Accordingly,

the fact that the state legislature authorized Seattle to regulate for-hire transportation services and contemplated that this would entail anticompetitive charges to their *passenger customers* for that transportation in no way "affirmatively contemplates" regulation of those entities providing services *to* transportation providers or that any such regulation would entail anticompetitive price fixing by transportation providers for the services provided to them. In short, the "particular field" and market between transportation providers and their passengers is entirely distinct from the field or market between transportation providers and their ride-referral service providers. It is quite clear that RCW 46.72.001 only authorizes regulation of transportation providers in the former market, so it cannot immunize the Ordinance's regulation of those contracting with transportation providers in the latter market.

i. To begin, RCW 46.72.001 applies only to "for hire transportation services." *Id.* A "transportation service" is a service that transports passengers from point a to point b. Uber and Lyft, in contrast, provide ride-referral services to for-hire drivers, who are themselves transportation providers. ER 56, 102–104, 111–112. As relevant to the Ordinance, Uber and Lyft transport no passengers from one location to another; they own no vehicles; they employ no drivers. *Id.* They do not contract with drivers or passengers to provide transportation services. *Id.* They instead contract with drivers and with passengers seeking access to software applications that allow those drivers and passengers to connect. This referral-service

function is analogous to a bulletin board that connects buyers and sellers. A company that operates a bulletin board is in the business of facilitating transactions; it is not in the business of providing the underlying service. Craigslist, for example, is not in the business of selling bobbleheads or teaching karate, though it may facilitate those transactions. AirBNB and Expedia do not operate hotels, they provide booking services to connect travelers with hotels.

The relevant statutory definitions in Chapter 46.72 confirm that when the legislature says "for hire transportation services," it means companies that provide transportation of passengers from point a to point b. The legislature defined "for hire vehicle" as "all vehicles used for the transportation of passengers for compensation." RCW 46.72.010(1). And it defined "for hire operator" as "any person, concern, or entity engaged in the transportation of passengers for compensation in for hire vehicles." RCW 46.72.010(2). It needed to define those terms because vehicles and operators naturally fit within the scope of "for hire transportation services." RCW 46.72.001. But the legislature conspicuously said nothing in any relevant definition about third parties who contract with for-hire operators but do not themselves transport passengers. The legislature surely would have said something if it wanted to expand the ordinary definition of "transportation services" to include not just companies that provide transportation from point a to

point b, but also other companies that, in the words of the Ordinance, "assist[]" or "facilitat[e]" transportation companies. Ordinance § 2 (Addendum A-47).

Apart from the technical statutory terms, common sense makes it clear that RCW 46.72.001 applies to the provision of transportation services *to passengers*, and does not contemplate anticompetitive regulation of contracts between drivers and companies that provide services *to drivers*. No one would think a municipality's traditional power to regulate taxis for safety and fares somehow authorized collective bargaining between taxi companies and third parties that provide services to them, such as auto-repair or auto-leasing services. This is particularly true for companies like Uber and Lyft that the legislature never anticipated until a few years ago, well after 1996, when RCW 46.72.001 was enacted. Price fixing for third-party service providers is quite different than setting rates for passengers.

Thus, in granting the preliminary injunction, the district court reasoned correctly: "Whether existing state law covers, or was intended to cover, the sort of regulation the City attempts through the Ordinance is far from clear." ER 87. In addition to the dispositive point that Uber and Lyft clearly fall outside the statutory definition of "for hire transportation services," the legislature could not realistically have contemplated the Ordinance because the business model of Uber and Lyft "simply did not exist" when the statutes were enacted. *Id.* That same reasoning compels a ruling in the Chamber's favor on the merits. The legislature must have

"clearly" intended and "affirmatively contemplated" to displace competition in the "particular field" at issue. *Phoebe Putney*, 568 U.S. at 225; *Southern Motor Carriers*, 471 U.S. at 64. Under this standard, if the case is close and the legislature has not been clear, there is no immunity. Here, as the district court concluded, it is (to say the least) "far from clear" that the legislature intended to do so. ER 87.

ii. In later dismissing the case, the district court's reasoning faltered. The district court wrongly believed that Uber and Lyft are for-hire transportation services within the meaning of RCW 46.72.001 because they "have contractual relationships with drivers regarding the provision of privately operated transportation services," they play a role in "organizing and facilitating the provision of private cars for-hire in the Seattle market," and they "handle the billing and payment functions" when a passenger accepts a ride from a for-hire driver. ER 11–12.

But the immunizing provision in RCW 46.72.001 cannot be stretched that far. It does not purport to apply to "transportation services" and "all companies that contract with companies that provide transportation services." Under that boundless reasoning, health-insurance companies would incorrectly be considered healthcare providers. Insurers contract with hospitals and physicians, on the one hand, and with individuals, on the other, regarding the provision of healthcare services. Insurers organize and facilitate the provision of healthcare, and they even handle billing and payment functions. But insurance companies are not hospitals or physicians and

provide no actual healthcare services. The market for physicians' services is different than the market for health insurance, even though those markets are "tangentially related." *Phoebe Putney*, 568 U.S. at 235. In the same way that health insurance companies are not physicians, Uber and Lyft do not provide transportation services. The market for selling transportation services to passengers is simply not the same thing as the market for selling ride-referral services to drivers.

Moreover, even if Uber and Lyft were (incorrectly) considered to provide transportation services to *passengers* under RCW 46.72.001, that statute still would not immunize price fixing in their contracts with *drivers*. Again, the relevant "particular field" or market immunized under RCW 46.72.001 is the provision of transportation services to *passengers*, while the particular field the Ordinance regulates is the provision of ride-referral services to for-hire *drivers*. These are two different markets. Immunization of one does not immunize the other. For example, a state law that clearly articulated a policy to displace competition in the market for groceries would allow the setting of prices that grocery stores charge to the public, but it would in no way authorize fixing the salaries that grocery stores pay their managers. The same result is true here. To the extent the Ordinance authorizes price fixing in contracts for ride-referral services, it is outside the scope of immunity because it does not regulate the provision of transportation services to *passengers*; it regulates the provision of ride-referral services to *drivers*.

iii. For its part, the City argues that the legislature has immunized regulation "of all aspects of the 'for hire transportation services' industry," not just transportation services themselves. Opp. to Mot. for Inj., Doc. 16-1 at 18. But the relevant statute speaks only to "for hire transportation services," RCW 46.72.001, and says nothing about "all aspects" of the "industry." *Id.* The legislature's authorization of anticompetitive conduct in the particular field of "for hire transportation services" does not establish that the state clearly intends to displace competition in different markets "that are only tangentially related" to transportation services themselves. *Phoebe Putney*, 568 U.S. at 235.

The City insists that courts in other states have rejected the argument that Uber and Lyft provide ride-referral services, not transportation services. Opp. to Mot. for Inj., Doc. 16-1 at 18 n.15 (citing *O'Connor v. Uber Techs.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015)). But those cases applied California law and addressed a different issue: whether drivers who contract with Uber and Lyft are employees rather than independent contractors. (Indeed, by passing an Ordinance directed at independent contractors, the City concedes that those drivers *are* independent contractors.) Further, those cases did not present federal antitrust claims, and they certainly did not address what the Washington Legislature clearly articulated in RCW 46.72.001. No other court has ever grappled with the state-action immunity question presented here: whether Washington's immunization of anticompetitive action in one

particular field—"for hire transportation services"—is enough to clearly articulate a policy of immunizing price fixing in contracts in a different field: ride-referral services. And there would be no immunity even if drivers were incorrectly viewed as Uber's and Lyft's employees, because the market between employers and employees likewise is different than the immunized market: the provision of transportation to the public.

iv. Not only is RCW 46.72.001 limited to regulation of "for hire transportation services," it is also limited to regulations within the scope of authority delegated in RCW 46.72.160. The immunizing provision (RCW 46.72.001) is not an independent grant of power to the City. It merely provides antitrust immunity for regulations promulgated under Chapter 46.72, and the only delegation of regulatory authority in that Chapter is RCW 46.72.160. To be clear, the legislature has delegated significant authorities to municipalities outside of Chapter 46.72, including the authority to regulate business licenses for businesses operating in the city, *see* RCW 35.90.050–60, and the authority to regulate the use of public roads within the city, *see* RCW 47.24.020. But the immunizing provision in Chapter 46.72 applies only to regulations within the scope of the enabling provision in that Chapter.

That enabling provision authorizes municipal regulation only of "for hire *vehicles* operating within their respective jurisdictions." RCW 46.72.160 (emphasis added). The power to regulate "vehicles" does not authorize the City to compel

collective bargaining by companies that provide referral services to operators of those vehicles.

Nor do any of the six enumerated powers in RCW 46.72.160(1)–(6) say anything about regulating ride-referral companies or contracts for referral services. The enumerated powers focus entirely on for-hire drivers and for-hire transportation itself. Municipalities may regulate "the routes and operations" of for-hire vehicles, and may "[e]stablish[] safety and equipment requirements" of for-hire vehicles, RCW 46.72.160(4)–(5). But those provisions contemplate direct regulation of for-hire drivers and vehicles, not regulation of third parties that provide services to for-hire drivers. Similarly, municipalities may regulate "the rates charged for providing for hire vehicle transportation service" to the public, RCW 46.72.160(3), but this conspicuously lacks any mention of the prices that for-hire drivers must pay for referral services from third parties. Fares charged to passengers and fees charged for the use of a referral service each represent a different market and a different "particular field." *Southern Motor Carriers*, 471 U.S. at 64. As *Phoebe Putney* explained, "the authorization of discrete forms of anticompetitive conduct pursuant to a regulatory structure[] does not establish that the State has affirmatively contemplated other forms of anticompetitive conduct that are only tangentially related." 568 U.S. at 235. Price fixing between for-hire drivers and third-party

service providers is only tangentially related to setting rates for taxi fares charged to passengers.

The district court shoehorned the Ordinance into the sixth provision (ER 8), which authorizes "[a]ny other requirements adopted to ensure safe and reliable for hire transportation service," RCW 46.72.160(6). But all six provisions merely describe *how* municipalities can regulate a specific entity: "for hire *vehicles* operating within their respective jurisdictions." RCW 46.72.160 (emphasis added). They cannot *expand* the entities that can be regulated. Since the sixth enumerated power, like the first five, is limited to for-hire *vehicles*, it does not authorize regulation of third parties that neither own nor operate for-hire vehicles. Even if the sixth provision could expand the entities subject to regulation, the authorization to ensure "safe and reliable for hire transportation service" does not contemplate the particular field at issue: contracts for referral services between for-hire drivers and ride-referral companies. It instead authorizes regulation of transportation providers themselves and their provision of transportation to the public.

The district court also misunderstood the Chamber's argument about the scope of authority delegated in RCW 46.72.160. The Chamber does not argue that the Ordinance is "substantively defective because it exceeds the scope of the delegated authority," nor does it challenge the "efficacy of the means the municipality has chosen to promote" its goals. ER 10. The Ordinance may well pass muster under

state law because, as shown above, the City has sources of delegated authority other than RCW 46.72.160 to regulate businesses that operate on Seattle's public roads, including the authority to require business licenses and the authority to regulate use of public roads. *Supra* p. 33. But the Ordinance's validity under state law is irrelevant. The relevant question is whether, as "a matter of federal law," *Community Comm's Co. v. City of Boulder*, 455 U.S. 40, 52 n.15 (1982), the Ordinance falls within the scope of the antitrust immunity expressed in RCW 46.72.001, which in turn can be no broader than the clearly articulated reach of RCW 46.72.160.

Like the district court, the City has tried stretch the authority in RCW 46.72.160(6) beyond what the legislature expressly authorized, arguing that this provision "broadly permits municipal regulation of all matters relating to the safety and reliability of for-hire transportation." Opp. to Mot. for Inj., Doc. 16-1 at 15. But that limitless interpretation of the City's authority would eviscerate any limit on state-action immunity. Indeed, the City claims that fixing the price Uber and Lyft charge to use their smartphone applications is a safety and reliability regulation because better earnings for drivers alleviates financial pressure to work more. *Id.* at 15, 20–21. By that measure, anything is a safety and reliability regulation. Seattle could regulate all manner of third-party transactions that arguably affect the safety or reliability of a for-hire vehicle or driver, including sales to drivers of goods and services by auto-repair shops, fuel suppliers, landlords, and even grocery stores.

After all, drivers must be well-rested and well-nourished to provide safe and reliable transportation service. That cannot be right. The limitless deference the City seeks is not warranted under an exception to the antitrust laws that is "disfavored" and that the Supreme Court warned should not be applied "too loosely." *Phoebe Putney*, 568 U.S. at 225, 229. Rather than a limitless grant of power to regulate any entity that could arguably affect for-hire vehicles and for-hire drivers, the sixth enumerated provision is simply a garden-variety grant to regulate for-hire transportation itself.

v. The City also seeks unprecedented deference to its interpretation of RCW 46.72.160. It claims that federal courts cannot even inquire into the scope of RCW 46.72.160, so long as the statute "can feasibly be construed to authorize the Ordinance's provisions." Appellants' Brief, Doc. 15 at 41, No. 17-35371. But policies alleged to support antitrust immunity must be "clearly articulated"—not feasibly construed. *Phoebe Putney*, 568 U.S. at 226. The City's argument for deference "to avoid improper interference with state policy choices … is inconsistent with the principle that state-action immunity is disfavored." *Id.* at 235–36.

It is true that the clear-articulation requirement does not transform "state administrative review into a federal antitrust job," meaning that federal courts need not examine every technical or procedural error in a municipal regulation under state administrative law. *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 372 (1991). But an ordinance is not immune when it regulates a different "particular

field" than the one addressed in the state's only clearly expressed policy to displace competition. *Southern Motor Carriers*, 471 U.S. at 64. For example, in *Omni* the legislature authorized municipal regulation of "the use of land and the construction of buildings and other structures within their boundaries," and the Court concluded that the grant of authority amounted to a policy to displace competition when regulating billboards. *Omni*, 499 U.S. at 370. No one suggested that if the legislature had authorized municipalities to regulate lakes and watercraft, it would have been sufficient for anticompetitive regulation of billboards. That is because there would have been a mismatch between the particular field for which the state had authorized anticompetitive conduct and the particular field targeted by the municipal regulation. Here, the Washington legislature has authorized anticompetitive regulation within the scope of RCW 46.72.160. The scope of that provision is the particular field to which the legislature has spoken. And RCW 46.72.160 does not authorize regulation of third-party referral services.

vi. The novelty of digital ride-referral services, sometimes called "ridesharing" services, underscores that the Washington Legislature never affirmatively contemplated the displacement of competition in the contracts between for-hire drivers and ride-referral companies. The explosion of ridesharing services is a recent phenomenon enabled by smartphones. The legislature certainly did not "affirmatively contemplate" or "clearly articulate" regulation of ride-referral

companies like Uber and Lyft in 1996, when it immunized regulation in the particular field of "for hire transportation services" by enacting RCW 46.72.001. Not until 2015 did the legislature first enact legislation directed at ridesharing companies. *See* Final Bill Report, SB 5550 (Wash. 2015) (Addendum A-33). It carefully defined them separately from for-hire transportation services under Chapter 46.72 and regulated them under a separate "new chapter" of the code. *See* SB 5550, 64th Wash. Leg. (Wash. 2015) (Addendum A-18). The legislature tellingly stated that "current law does not specifically provide for the regulation of what are commonly known as ridesharing companies, i.e. companies that use a digital network or software application to connect passengers to drivers for the purpose of providing a prearranged ride, often by use of the driver's personal vehicle." Final Bill Report, SB 5550 (Addendum A-33). Thus, the one thing the legislature has clearly articulated is that no legislation prior to 2015 contemplated regulation of ride-referral companies, so it certainly could not have clearly articulated a policy in 1996 to immunize price-fixing in contracts between drivers and ride-referral companies.

The district court worried that the Chamber's argument "would require prescience on the part of the state legislature and deprive municipalities of the flexibility they need to address new problems." ER 11. But flexibility for municipalities to address unforeseen problems is not the hallmark of state-action immunity, which demands specificity from state legislatures and puts a thumb on the

scale favoring free markets. *Phoebe Putney*, 568 U.S. at 236. The legislature must have "affirmatively contemplated" that the municipality will displace competition, *Phoebe Putney*, 568 U.S. at 229, and it must have "clearly articulated" its intent with respect to the "particular field" at issue, *Southern Motor Carriers*, 471 U.S. at 64. That requires specificity. When a revolutionary technology and an unforeseen business model emerge, the legislature must make a conscious decision—it must affirmatively contemplate and clearly articulate—that municipalities may displace competition in that particular field. *Id.* Municipalities cannot rely on previous policy pronouncements that are only tangentially related to the particular economic markets at issue. *Phoebe Putney*, 568 U.S. at 229. That is the balance the Supreme Court has struck between municipal flexibility and "the benefits of competition within the framework of the antitrust laws." *Ticor Title*, 504 U.S. at 636. And that balance is especially appropriate when a disruptive new business model creates a new type of economic market—so new that all previous statutes were enacted before the legislature had ever considered the costs and benefits of displacing competition with anticompetitive municipal regulation in this particular field.

2. The Ordinance Fails The Active-Supervision Requirement

The City's collective-bargaining scheme also fails the active-supervision requirement because it delegates price fixing to private parties without adequate state supervision. "Limits on state-action immunity are most essential when the State

seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern." *North Carolina State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101, 1111 (2015). "[A]ctual State involvement, not deference to private price-fixing arrangements … is the precondition for immunity." *Id.* at 1113. That is all the more true when a *municipality* seeks to delegate the state's regulatory authority to private parties. Cities "are not themselves sovereign," and they must rely entirely on the state for any potential immunity. *Phoebe Putney*, 568 U.S. at 225. A city cannot delegate to private parties the task of creating a collective-bargaining agreement; rather, the program must be "implemented in its specific details" "by the State." *FTC v. Ticor Title*, 504 U.S. 621, 633 (1992). This ensures that "the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties." *Id.* at 634–35. The ultimate question is whether the anticompetitive prices or terms "are an exercise of the State's sovereign power." *Dental Examiners*, 135 S. Ct. at 1110.

The Ordinance fails the active-supervision requirement for two reasons: (a) the Ordinance delegates price fixing to private parties with no supervision by the State of Washington, and (b) even if supervision by a municipal official could satisfy the requirement, the Ordinance does not mandate sufficient municipal supervision.

a. First, active supervision of private parties means supervision "by the State itself." *Ticor Title*, 504 U.S. at 642. In every relevant case, the Supreme Court has required "state" supervision, and the Court has never authorized or even mentioned "municipal supervision." *Id.*; *Dental Examiners*, 135 S. Ct. at 1110 ("actively supervised by the State"); *Phoebe Putney*, 568 U.S. at 225 ("the State"); *Patrick v. Burget*, 486 U.S. 94, 101 (1988) ("the State"); *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) ("the State"). This is not just offhand dicta. In cases where distinctions between municipalities and States are crucial, the Court has always referred to "State supervision," never municipal supervision. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985); *Community Comms. Co., Inc. v. City of Boulder, Colo.*, 455 U.S. 40, 51 n.14 (1982); *City of Lafayette v. Louisiana Power Light Co.*, 435 U.S. 389, 411–12 (1978).

To be sure, no state supervision is required for municipalities that engage in anticompetitive conduct *themselves*. *Town of Hallie*, 471 U.S. at 46. If the city itself is "the actor," no state supervision is required. *Id.* But if the city delegates price fixing to a private party, immunity requires "active state supervision." *Id.* at 46 n.10. *Town of Hallie* pointedly identified those instances in which "state or municipal regulation [of prices] by a private party is involved," and in both those instances, "active state supervision must be shown." *Id.* If "municipal supervision" of private parties were sufficient, the Court would certainly have said so in *Hallie.*

The City has implausibly argued that *Town of Hallie* meant "municipal supervision must be shown" when it said "state supervision must be shown," and that "state" is merely shorthand that includes both states and municipalities. Opp. to Mot. for Inj., Doc. 16-1 at 25. But the core issue in *Town of Hallie* was the *difference* between states and municipalities. The plaintiff argued that because there was "no active state supervision" of the municipality, "the City may not depend on the state action exemption." 471 U.S. at 46. The Court discussed at length the differences between state actors, municipal actors, and private actors. *Id.* at 46–47. And the Court referred to each of these entities when it placed a caveat on its holding: "Where *state or municipal* regulation [of prices] by a private party [through delegated authority] is involved, however, active *state* supervision must be shown, even where a clearly articulated state policy exists." *Id.* at 47 n.10 (emphasis added). That statement is integral to the Court's holding. The Court would not have conflated these entities at the same time it was squarely dealing with the difference between them.

All agree that the Court means "state"—not municipality—when it refers to a "clearly articulated state policy." *Town of Hallie*, 471 U.S. at 46 n.10. The same is true when the Court says "active state supervision." Just as a municipality cannot satisfy the clear-articulation requirement by showing a "clearly articulated *municipal*

policy," a municipality cannot satisfy the active-supervision requirement by showing "active *municipal* supervision" of private actors who are fixing prices.

It makes sense that the Supreme Court requires state supervision when municipalities delegate price-fixing authority to private parties, but not when municipalities themselves set prices. "Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interest of the State." *Town of Hallie*, 471 U.S. at 47. By contrast, the danger with a municipality's own conduct is not "that it is involved in a *private* price-fixing arrangement," but that "it will seek to further purely parochial public interests at the expense of more overriding state goals." *Id.*

Here, the City has delegated price-fixing authority to private parties, precisely the circumstance that is most troubling under the antitrust laws. If the City were allowed to supervise that private conduct, it would amplify both concerns discussed in *Town of Hallie*. Private parties would engage in self-interested price fixing, and the City would also seek "to further purely parochial public interests." *Id.* Far from negating each other, those two harms will be exacerbated if a municipality is allowed to supervise private parties.

The coupling of selfish private interests with parochial municipal interests is particularly troubling because municipal officials are so closely connected to local activities and are thus more likely than state actors to be influenced by local special

interests. *See, e.g.*, *Omni*, 499 U.S. at 367 ("secret anticompetitive agreement" between city officials and market participants). That appears to have occurred here with the too-cozy relationship between the Teamsters and certain Seattle officials, as demonstrated in the Chamber's previous suit. *See Chamber of Commerce v. Seattle*, No. 2:16-cv-00322, Doc. 39 at 3 (W.D. Wash. May 9, 2016).

Omni heightens the problems with combining self-interested private parties and locally enmeshed government officials. 499 U.S. at 375. It rejected a conspiracy exception to state-action immunity, allowing immunity even when city officials corruptly conspire with private parties to enact anticompetitive laws favoring special interests. *Id.* As the Supreme Court has recognized, "*Omni*'s holding makes it all the more necessary to ensure the conditions for granting immunity are met in the first place." *Dental Examiners*, 135 S. Ct. at 1113. That reasoning applies here as well: *Omni*'s holding makes it all the more necessary to require active state supervision—not municipal supervision—of private anticompetitive conduct.

This issue has never been squarely raised in this Court, though the Court assumed that municipal supervision of private parties is permissible in *Tom Hudson & Assocs., Inc. v. City of Chula Vista*, 746 F.2d 1370, 1374 (9th Cir. 1984). The issue in *Tom Hudson* was whether the degree of municipal supervision of private price fixing was sufficient to meet the "active" element of active supervision. *Id.* The case never raised the predicate issue of whether a municipality can supervise private

parties at all; the court simply assumed that municipalities could do so. But *Tom Hudson* was decided before *Town of Hallie*, which requires "state supervision" when "state or municipal regulation by a private party is involved." 471 U.S. at 46 n.10. Other circuits have recognized *Hallie*'s impact. In *Riverview Investments, Inc. v. Ottawa Community Improvement Corp.*, 774 F.2d 162 (6th Cir. 1985) (order), the court reversed an earlier decision allowing municipal supervision of private parties because, "[i]n light of *Town of Hallie* and *Southern Motor Carriers*, that statement may not be a completely accurate statement of the law." *Id.* at 163.

The City says this Court rejected any requirement of state supervision in "an indistinguishable context" in *Golden State Transit Corp. v. City of Los Angeles*, 726 F.2d 1430 (9th Cir. 1984). Opp. to Mot. for Inj., Doc. 16-1 at 29. That is wrong. The City simply ignores the obvious distinction: state supervision of municipalities themselves versus state supervision of private parties. The City of Los Angeles fixed prices itself in *Golden State Transit*, and this Court held that a state actor need not supervise municipal actors when they engage in anticompetitive conduct. *Id.* at 1434. But Los Angeles did not delegate authority to private parties to fix prices, as Seattle has done here through its collective-bargaining scheme. *Id.* at 1432. In that context, the opinion's reasoning about "supervisory functions that are best left to municipalities" makes perfect sense: Supervision of municipal actors is "best left to municipalities," but supervision of private actors presents different concerns that

were not at issue. *Id.* 1434. *Golden State* is therefore fully consistent with *Town of Hallie* (decided one year later), which held that (1) no state actor need supervise municipal actors, but (2) when "a private party is involved, however, active state supervision must be shown." 471 U.S. at 46 n.10

The City also cites contrary precedent from two other circuits, but those cases are flawed and of course do not bind this Court. Opp. to Mot. for Inj., Doc. 16-1 at 28. The first is *Tri-State Rubbish, Inc. v. Waste Management, Inc.*, 998 F.2d 1073, 1079 (1st Cir. 1993). The court acknowledged that municipal supervision is a "difficult" issue and that the Sixth Circuit had rejected municipal supervision in *Riverview Investments*. *Id.* The court nevertheless mistakenly relied on this Court's opinion in *Tom Hudson* and on the second case the City cites, *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983), both of which were decided before *Town of Hallie*. *Tri-State Rubbish*, 998 F.2d at 1079 n.7. The court also quoted an antitrust treatise, stating that "it would be implausible to rule that a city may regulate … taxi rates but only if a state agency also supervises the private taxi operators." *Id.* at 1079. That misses the fundamental point about delegating price fixing to private parties. The problem here is not that the City itself is regulating rates, but that it is delegating authority to private parties to regulate rates. There is nothing implausible about a rule that a municipality may regulate rates itself without state supervision, but that private parties may fix prices only if a state actor

supervises them. Only a state policy—not a municipal policy—can authorize the private price fixing, so it makes sense that a state actor must supervise that conduct.

b. Even if municipal supervision could satisfy the active-supervision requirement, the supervision contemplated under the Ordinance is insufficiently active. The "review mechanisms" must "provide realistic assurance that a nonsovereign actor's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Dental Examiners*, 135 S. Ct. at 1116. Although the supervisor must at a minimum "review the substance of the anticompetitive decision" and must "have the power to veto or modify particular decisions to ensure they accord with state policy," ultimately "the adequacy of supervision … will depend on all the circumstances of a case." *Id.* at 1117.

The active-supervision requirement is heightened when the "gravity of the antitrust offense" is serious and when there is significant "involvement of private actors throughout" the process. *Ticor Title*, 504 U.S. at 639. Those two factors, along with the unusual context of municipal supervision of private parties, require heightened supervision here. First, "[n]o antitrust offense is more pernicious than price fixing," *id.*, and the basic objective of the Ordinance is to authorize price fixing. Second, private actors run the show during the collective-bargaining process; municipal oversight is an afterthought. Third, because municipal supervision of

private parties combines the parochial interests of a city with the self-interested motives of private parties, courts should exercise heightened caution in this context.

Here, the fatal supervision problems are that the City's Director of Finance cannot "modify particular decisions" and cannot participate in the collective-bargaining process at all. *Dental Examiners*, 135 S. Ct. at 1116 (citing *Patrick*, 486 U.S. at 102). At most, once the bargaining process is already completed, if the Director does not accept the proposed agreement, he can send it back to the Teamsters for a new round of collective bargaining, and from there back to a private arbitrator. Ordinance § 3(H)(2). This scheme delegates authority to private parties or a private arbitrator, not a public official. By contrast, the Court upheld the rate-setting regulation in *Southern Motor Carriers* because the state agency had "the authority to accept, reject, *or modify* any recommendation" from the private parties. 471 U.S. at 48 (emphasis added). Here, because the Director lacks this authority to modify any proposal, he cannot have "exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention," and he cannot have played a sufficient "role in determining the specifics of the economic policy." *Ticor Title*, 504 U.S. at 634–35.

The Ordinance fails the test for similar reasons as the peer-review system in *Patrick*, 486 U.S. at 103. The scheme in *Patrick* lacked active supervision because, although the state had some involvement in the peer-review determinations, it was

not sufficiently involved in the making of the determinations themselves. *Id.* The City's similar lack of involvement is all the more troubling because the "gravity of the antitrust offense" is so serious, because of the significant "involvement of private actors throughout" the collective-bargaining process, *Ticor*, 504 U.S. at 639, and because there is no supervision by a state actor at all. Given "all the circumstances" of this case, *Dental Examiners*, 135 S. Ct. at 1117, the City cannot satisfy the strict active-supervision requirement by merely re-delegating price fixing to private parties, who negotiate and devise terms without any government supervision.

Separately, the City has incorrectly claimed that because the Director must approve any collective-bargaining agreement, the "Ordinance permits only *unilaterally imposed* restraints upon trade." Appellants' Brief, Doc. 15 at 46 n.22, No. 17-35371. Anticompetitive restraints "unilaterally" imposed by government do not meet the requirement of concerted action under the Sherman Act (because a conspiracy requires more than one actor), while "hybrid" restraints that are the product of both government and private action do. *Fisher v. City of Berkeley*, 475 U.S. 260, 267 (1986). "A regulation is a unilateral restraint when no further action is necessary by the private parties because the anticompetitive nature of the restraint is complete upon enactment." *Yakima Valley Memorial Hosp. v. Wash. Dep't of Health*, 654 F.3d 919, 927 (9th Cir. 2011). Seattle's Ordinance is a hybrid

restraint because it delegates regulatory authority to private parties and "further action is necessary by [those] private parties" before any price fixing occurs. *Id.*[2]

II. THE NATIONAL LABOR RELATIONS ACT PREEMPTS THE ORDINANCE

The Ordinance is also preempted by the National Labor Relations Act under both *Machinists*, 427 U.S. at 140, and *Garmon*, 359 U.S. at 236.

a. Beginning with *Machinists*, a long line of cases establishes unusually broad preemption under the NLRA for swaths of economic activity that Congress wanted to remain unregulated by federal or local collective-bargaining programs and instead "controlled by the free play of economic forces." *Machinists*, 427 U.S. at 140; *Chamber of Commerce v. Brown*, 554 U.S. 60, 66 (2008). In the NLRA, "Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes that would be upset if a state could also enforce statutes or rules of decision resting upon its views concerning accommodation of the same interests." *Machinists*, 427 U.S. at 140 n.4. Accordingly, state and local governments may not regulate "within a zone protected and reserved for market freedom" by the NLRA. *Brown*, 554 U.S. at 66.

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[2] In addition to the antitrust preemption claim, the Chamber's complaint asserts an antitrust violation claim, alleging that the enactment and enforcement of the Ordinance violates § 1 of the Sherman Act. ER 68, 70. The district court dismissed both claims based on the same analysis of state-action immunity. ER 5–6, 16. Accordingly, reversing the district court on the preemption claim would also warrant reversing on the violation claim.

Machinists preemption is based on the premise that, by excluding certain activity from regulation under the NLRA, Congress intends to preempt local laws regulating that activity. In *Brown*, for example, an NLRA provision excluded noncoercive employer speech from the definition of "an unfair labor practice." *Id.* at 67. A California statute withheld state funds from employer efforts to "deter union organizing." *Id.* at 62. The statute was preempted because, by excluding employer speech from the NLRA's definition of an unfair labor practice, Congress meant to leave employer speech entirely up to the free play of economic forces—free from regulation under either federal or local law. This was true even though Congress said nothing about preempting local law, and even though it said nothing about whether states could limit the available uses of their own funds. *Id.*

Analogous to *Brown*, in the Taft-Hartley Act Congress expressly excluded "any individual . . . having the status of an independent contractor" from the definition of "employee" for purposes of collective bargaining. Pub. L. 80–101, 61 Stat. 136 (1947), 29 U.S.C. §152(3). In doing so, Congress meant to leave independent-contractor arrangements to the free play of economic forces, rather than subject to collective bargaining, federal or local.

The history of the NLRA's independent-contractor exclusion strongly suggests that Congress meant to exclude independent contractors from both federal and local collective-bargaining regimes. The original NLRA did not expressly exclude

independent contractors from the definition of "employee." *See NLRB v. Hendricks Cty. Rural Elec. Membership Corp.*, 454 U.S. 170, 177–78 (1981). The Supreme Court then interpreted that term to include "newsboys," even though they were independent contractors under common-law standards. *NLRB v. Hearst Publ'ns*, 322 U.S. 111, 120, 130–31 (1944). "Congressional reaction to this construction of the Act was," to say the least, "adverse." *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968). Congress swiftly passed the Taft-Hartley Act, amending the NLRA to expressly exclude independent contractors from the definition of employee. *United Ins. Co. of Am.*, 390 U.S. at 256. As the House Report emphasized, "there has always been a difference, and a big difference, between 'employees' and 'independent contractors.'" H.R. Rep. No. 80-245, at 18 (1947) (Addendum A-17). "Employees work for wages or salaries under direct supervision," while independent contractors are entrepreneurial and rely on market forces for profit. *Id.* Because Congress intended independent contractors to be governed by market forces, rather than collective bargaining, it quickly "correct[ed]" their inclusion in the NLRA's collective-bargaining regime. *Id.*

Requiring independent contractors to collectively bargain is inconsistent with the basic objective of labor regulation under the NLRA. Labor unions arose because "a single employee was helpless in dealing with an employer," "he was dependent ordinarily on his daily wage for the maintenance of himself and family," and "if the

employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937). These rationales do not apply to independent contractors, who do not depend on an employer for a daily wage and instead boast the "ability to operate an independent business and develop entrepreneurial opportunities" that leverage market forces to provide a profit. *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1098 (9th Cir. 2008).

The NLRA's separate exclusion from collective bargaining of "any individual employed as a supervisor" reinforces this conclusion. 29 U.S.C. § 152(3). The Supreme Court has held that the supervisor exclusion preempts state labor laws relating to supervisors, and a collective-bargaining scheme for supervisors would clearly be preempted. *Beasley v. Food Fair of N.C., Inc.*, 416 U.S. 653, 662 (1974). Congress exempted both supervisors and independent contractors at the same time in the Taft-Hartley Act, 61 Stat. 136–37, 29 U.S.C. § 152(3), and the two parallel exemptions should be interpreted to have a similar preemptive force. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 138 n.11 (1985).

It makes no difference that "supervisors and independent contractors were excluded from the reach of the NLRA for different reasons." ER 96. Congress's rationale for excluding independent contractors fits more closely with the rationale for *Machinists* preemption—allowing the free play of economic forces—than does

the rationale for excluding supervisors. Congress excluded supervisors because their interests are often aligned with corporate owners rather than with non-supervisory employees, and this alignment of interests could distort the NLRA's collective-bargaining process. *Beasley*, 416 U.S. at 662. Independent contractors, in contrast, were excluded because they "have abandoned the 'collective security' of the rank and file voluntarily," and "because they believed the opportunities thus opened to them to be more valuable" than the benefits of employment. H.R. Rep. No. 80-245, at 16–17 (Addendum A-15 to 16). Thus, Congress excluded them because they should be left to free market forces, which is precisely the circumstance where *Machinists* applies.

The district court reasoned that the "deleterious effects" of allowing supervisors to collectively bargain "would arise regardless of whether supervisors unionized under the NLRA or under state law." ER 96. But the deleterious effects of allowing independent contractors to unionize would arise under either federal or state law as well. When Congress excluded independent contractors from the NLRA, it expressed a national pro-free market policy that independent contractors should compete under ordinary market forces, rather than collectively bargain. And that policy is certainly frustrated by Seattle's collective-bargaining scheme.

The district court also reasoned that Congress "included an express preemption provision related to supervisors, but not to independent contractors." ER 96. But

that provision, section 14(a) of the NLRA, 29 U.S.C. § 164(a), makes no difference either. The very point of *Machinists* preemption is that Congress impliedly preempts local regulation over categories of conduct simply by excluding federal regulation of that conduct under the NLRA. Thus, in *Brown* there was no express preemption provision, yet the Court inferred from Congress's exclusion of speech from regulation under the NLRA that Congress impliedly meant to preempt local laws regulating that type of conduct. 554 U.S. at 66.

Congress also saw a specific reason for including the express preemption provision for supervisors, whereas no provision was necessary for independent contractors, even though it would impliedly preempt local laws. Section 14(a) reads as follows:

> Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

The first clause, not the second, is the informative part. That clause reflects the historical reality that some supervisors had joined unions, sometimes with the consent of their employers, and Congress did not intend to upend *consensual* arrangements by excluding supervisors from the Act's coverage. *See Beasley*, 416 U.S. at 662. Thus, the first clause of section 14(a) *permits* supervisors to enjoy the Act's coverage if the employer agrees. This necessitates the proviso in the second

clause prohibiting any government efforts to *require* these arrangements. Because the NLRA does not create an exception permitting independent contractors to join unions with the employer's consent, there was no need to clarify, as there was with supervisors, that permissive membership did not authorize mandatory membership. Thus, section 14(a)'s explicit prohibition of "supervisor" regulation under state law does not implicitly authorize "independent contractor" regulation under state law. Any such inference is contrary to *Machinists*' basic rule that explicit exclusion from NLRA regulation implicitly precludes state regulation.

Finally, independent contractors and supervisors differ from other categories of individuals whom Congress excluded from the definition of employee: public employees, agricultural workers, and domestic workers. These groups are traditional employees, but Congress had specific reasons to leave regulation of those groups up to the states. For public employees, Congress respected the states' authority to manage their own employees. *See Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 181 (2007). For agricultural workers and domestic employees, Congress intended the NLRA to cover "only those disputes which are of a certain magnitude and which affect commerce." S. Rep. No. 79-1184, at 3 (1934) (Addendum A-13). Thus, states remain free to impose collective-bargaining requirements for those groups, as this Court held in *United Farm Workers of America v. Arizona Agricultural Employment Relations Board*, 669 F.2d 1249, 1257

(9th Cir. 1982). But by excluding independent contractors and supervisors from the NLRA, Congress placed them "within a zone protected and reserved for market freedom." *Brown*, 554 U.S. at 66.

b. Separately, the NLRA preempts state resolution of issues committed to the exclusive jurisdiction of the National Labor Relations Board. *Garmon*, 359 U.S. 236. "Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." *Id.* at 242. The Board has exclusive jurisdiction over whether individuals are "employees" covered under the NLRA. *Marine Eng'rs Beneficial Ass'n v. Interlake S.S. Co.*, 370 U.S. 173, 177–85 (1962) (whether individuals are supervisors or employees); *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261, 1274 (9th Cir. 1994) (whether individuals are agricultural laborers or employees).

The Ordinance is preempted because it requires local officials and state courts to decide whether for-hire drivers are employees under the NLRA. The Ordinance does not apply to employees; it applies only to independent contractors. *See* Ordinance § 6. To decide whether a driver coordinator has complied with the Ordinance's provisions, the Director must decide whether the drivers at issue are employees exempt from the Ordinance's coverage, or whether they are independent contractors within its scope. *See* §§ 3(M) & 6. As the Director's determination is

subject to judicial review in the state courts, *id.* § 3(M), those courts ultimately will be required to decide whether for-hire drivers are employees subject to the NLRA.

The NLRB has not resolved the employee status of for-hire drivers, and the Ordinance injects municipal officials and state courts into matters subject to the NLRB's exclusive jurisdiction before the NLRB has resolved the question. This is especially problematic because this very question is currently pending before the NLRB with respect to drivers who use the Uber app and the Lyft app (ER 104, 112), and the Teamsters Local 117 has previously claimed before the NLRB that drivers who contract with Chamber member Eastside for Hire are employees. *See Eastside for Hire*, NLRB Case No. 19-CA-204912. "The need for protecting the exclusivity of NLRB jurisdiction is obviously greatest when the precise issue brought before a court is in the process of litigation through procedures originating in the Board. While the Board's decision is not the last word, it must assuredly be the first." *Marine Eng'rs Beneficial Ass'n*, 370 U.S. at 185.

The district court incorrectly concluded that "the Chamber's claim of *Garmon* preemption is not tethered to the facts alleged" because "no party has asserted that for-hire drivers are employees." ER 19. But parties in other actions have alleged *to the NLRB* that these for-hire drivers are employees, and the NLRB is indisputably considering that issue in pending matters. Here, there is no need for the Chamber to take a position on the employment status of for-hire drivers, and there is no need for

the Chamber to provide any supporting evidence. The Teamsters itself—the very entity seeking to represent drivers under the Ordinance—has contended that for-hire drivers are employees. More to the point, the NLRB is currently hearing claims about Uber and Lyft under its exclusive jurisdiction.

CONCLUSION

For these reasons, the Court should reverse the judgment below.

October 27, 2017

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STATEMENT OF RELATED CASES
(Circuit Rule 28-2.6)

A group of for-hire drivers have also challenged the collective-bargaining Ordinance in a separate suit. The district court dismissed their claims, and an appeal is currently pending in this Court. *Clark v. City of Seattle*, No. 17-35693.

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.*

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Signature of Attorney or Unrepresented Litigant: s/ Michael A. Carvin

Date: Oct 27, 2017

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

CERTIFICATE OF SERVICE

I certify that on October 27, 2017, I electronically filed the foregoing brief with the United States Court of Appeals for the Ninth Circuit using the ECF system. All parties have consented to receive electronic service and will be served by the ECF system.

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ADDENDUM OF STATUTES, RULES, AND REGULATIONS

Table of Contents

15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

29 U.S.C. § 152. Definitions

When used in this subchapter—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under Title 11, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 158 of this title.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board provided for in section 153 of this title.

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term "professional employee" means--

> (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to

a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(14) The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person.

29 U.S.C. § 164. Construction of provisions

(a) Supervisors as union members

Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

(b) Agreements requiring union membership in violation of State law

Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

(c) Power of Board to decline jurisdiction of labor disputes; assertion of jurisdiction by State and Territorial courts

(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to subchapter II of chapter 5 of Title 5, decline to assert jurisdiction over any labor dispute involving any class or category of employers,

where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

(2) Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

Wash Rev. Code § 35.90.050. Authority retained by cities.

Cities whose general business licenses are issued through the business licensing system retain the authority to set license fees, provide exemptions and thresholds for these licenses, approve or deny license applicants, and take appropriate administrative actions against licensees.

Wash Rev. Code § 35.90.060. Geographic restrictions on license requirement.

Cities may not require a person to obtain or renew a general business license unless the person engages in business within its respective city. For the purposes of this section, a person may not be considered to be engaging in business within a city unless the person is subject to the taxing jurisdiction of a city under the standards established for interstate commerce under the commerce clause of the United States Constitution.

Wash Rev. Code § 46.72.001. Finding and intent.

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 § 46.72.010. Definitions.

When used in this chapter:

(1) The term "for hire vehicle" includes all vehicles used for the transportation of passengers for compensation, except auto stages, school buses operating exclusively under a contract to a school district, ride-sharing vehicles under chapter 46.74 WASH. REV. CODE, limousine carriers licensed under chapter 46.72A WASH. REV. CODE, vehicles used by nonprofit transportation providers for elderly or handicapped persons and their attendants under chapter 81.66 WASH. REV. CODE, vehicles used by auto transportation companies licensed under chapter 81.68 WASH. REV. CODE, vehicles used to provide courtesy transportation at no charge to and from parking lots, hotels, and rental offices, and

vehicles used by charter party carriers of passengers and excursion service carriers licensed under chapter 81.70 WASH. REV. CODE;

(2) The term "for hire operator" means and includes any person, concern, or entity engaged in the transportation of passengers for compensation in for hire vehicles.

Wash Rev. Code § 46.72.160. Local regulation.

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 § 47.24.020. Jurisdiction, control.

The jurisdiction, control, and duty of the state and city or town with respect to such streets is as follows:

(1) The department has no authority to change or establish any grade of any such street without approval of the governing body of such city or town, except with respect to limited access facilities established by the commission;

(2) The city or town shall exercise full responsibility for and control over any such street beyond the curbs and if no curb is installed, beyond that portion of the highway used for highway purposes. However, within incorporated cities and towns the title to a state limited access highway vests in the state, and,

notwithstanding any other provision of this section, the department shall exercise full jurisdiction, responsibility, and control to and over such facility as provided in chapter 47.52 WASH. REV. CODE;

(3) The department has authority to prohibit the suspension of signs, banners, or decorations above the portion of such street between the curbs or portion used for highway purposes up to a vertical height of twenty feet above the surface of the roadway;

(4) The city or town shall at its own expense maintain all underground facilities in such streets, and has the right to construct such additional underground facilities as may be necessary in such streets. However, pavement trenching and restoration performed as part of installation of such facilities must meet or exceed requirements established by the department;

(5) The city or town has the right to grant the privilege to open the surface of any such street, but all damage occasioned thereby shall promptly be repaired either by the city or town itself or at its direction. Pavement trenching and restoration performed under a privilege granted by the city under this subsection must meet or exceed requirements established by the department;

(6) The city or town at its own expense shall provide street illumination and shall clean all such streets, including storm sewer inlets and catch basins, and remove all snow, except that the state shall when necessary plow the snow on the roadway. In cities and towns having a population of twenty-five thousand or less according to the latest determination of population by the office of financial management, the state, when necessary for public safety, shall assume, at its expense, responsibility for the stability of the slopes of cuts and fills and the embankments within the right-of-way to protect the roadway itself. When the population of a city or town first exceeds twenty-five thousand according to the determination of population by the office of financial management, the city or town shall have three years from the date of the determination to plan for additional staffing, budgetary, and equipment requirements before being required to assume the responsibilities under this subsection. The state shall install, maintain, and operate all illuminating facilities on any limited access facility, together with its interchanges, located within the corporate limits of any city or town, and shall assume and pay the costs of all such installation, maintenance, and operation incurred after November 1, 1954;

(7) The department has the right to use all storm sewers on such highways without cost; and if new storm sewer facilities are necessary in construction of new streets by the department, the cost of the facilities shall be borne by the state and/or

city as may be mutually agreed upon between the department and the governing body of the city or town;

(8) Cities and towns have exclusive right to grant franchises not in conflict with state laws and rules, over, beneath, and upon such streets, but the department is authorized to enforce in an action brought in the name of the state any condition of any franchise which a city or town has granted on such street. No franchise for transportation of passengers in motor vehicles may be granted on such streets without the approval of the department, but the department shall not refuse to approve such franchise unless another street conveniently located and of strength of construction to sustain travel of such vehicles is accessible;

(9) Every franchise or permit granted any person by a city or town for use of any portion of such street by a public utility must require the grantee or permittee to restore, repair, and replace any portion of the street damaged or injured by it to conditions that meet or exceed requirements established by the department;

(10) The city or town has the right to issue overload or overwidth permits for vehicles to operate on such streets or roads subject to regulations printed and distributed to the cities and towns by the department;

(11) Cities and towns shall regulate and enforce all traffic and parking restrictions on such streets, but all regulations adopted by a city or town relating to speed, parking, and traffic control devices on such streets not identical to state law relating thereto are subject to the approval of the department before becoming effective. All regulations pertaining to speed, parking, and traffic control devices relating to such streets heretofore adopted by a city or town not identical with state laws shall become null and void unless approved by the department heretofore or within one year after March 21, 1963;

(12) The department shall erect, control, and maintain at state expense all route markers and directional signs, except street signs, on such streets;

(13) The department shall install, operate, maintain, and control at state expense all traffic control signals, signs, and traffic control devices for the purpose of regulating both pedestrian and motor vehicular traffic on, entering upon, or leaving state highways in cities and towns having a population of twenty-five thousand or less according to the latest determination of population by the office of financial management. Such cities and towns may submit to the department a plan for traffic control signals, signs, and traffic control devices desired by them, indicating the location, nature of installation, or type thereof, or a proposed amendment to such an existing plan or installation, and the department shall consult with the cities or towns concerning the plan before installing such signals, signs, or devices. Cities and towns having a population in excess of twenty-five

thousand according to the latest determination of population by the office of financial management shall install, maintain, operate, and control such signals, signs, and devices at their own expense, subject to approval of the department for the installation and type only. When the population of a city or town first exceeds twenty-five thousand according to the determination of population by the office of financial management, the city or town shall have three years from the date of the determination to plan for additional staffing, budgetary, and equipment requirements before being required to assume the responsibilities under this subsection. For the purpose of this subsection, striping, lane marking, and channelization are considered traffic control devices;

(14) All revenue from parking meters placed on such streets belongs to the city or town;

(15) Rights-of-way for such streets shall be acquired by either the city or town or by the state as shall be mutually agreed upon. Costs of acquiring rights-of-way may be at the sole expense of the state or at the expense of the city or town or at the expense of the state and the city or town as may be mutually agreed upon. Title to all such rights-of-way so acquired shall vest in the city or town: PROVIDED, That no vacation, sale, rental, or any other nontransportation use of any unused portion of any such street may be made by the city or town without the prior written approval of the department; and all revenue derived from sale, vacation, rental, or any nontransportation use of such rights-of-way shall be shared by the city or town and the state in the same proportion as the purchase costs were shared;

(16) If any city or town fails to perform any of its obligations as set forth in this section or in any cooperative agreement entered into with the department for the maintenance of a city or town street forming part of the route of a state highway, the department may notify the mayor of the city or town to perform the necessary maintenance within thirty days. If the city or town within the thirty days fails to perform the maintenance or fails to authorize the department to perform the maintenance as provided by WASH. REV. CODE 47.24.050, the department may perform the maintenance, the cost of which is to be deducted from any sums in the motor vehicle fund credited or to be credited to the city or town.

Calendar No. 1260

[9TH CONGRESS, 2d Session] SENATE [REPORT No. 1184]

TO CREATE A NATIONAL INDUSTRIAL ADJUSTMENT BOARD

MAY 10 (calendar day, MAY 26), 1934.—Ordered to be printed

Mr. WALSH, from the Committee on Education and Labor, submitted the following

REPORT

[To accompany S. 2926]

The Committee on Education and Labor, to whom was referred the bill (S. 2926) to equalize the bargaining power of employers and employees, to encourage the amicable settlement of disputes between employers and employees, to create a National Industrial Adjustment Board, and for other purposes, after holding hearings and giving consideration to the bill, report the same with amendments in the nature of a substitute and recommend the passage of the bill, as amended.

WHAT THE BILL DOES NOT DO

There has been such propaganda over the country in relation to this bill and in much of the material sent out there are so many misstatements, that many people have an erroneous idea as to what it sought to be accomplished by the bill. It seems, therefore, advisable to state at the outset what the bill does not do or try to do.

Nothing in the bill allows the National Industrial Adjustment Board or any other branch or agency of the Government to fix wages, to regulate rates of pay, to limit hours of work, or to affect or govern sanitary or similar working conditions in any establishment or place of employment. In such matters the Board (like any nongovernmental group of persons) is available for voluntary arbitration if and only if all the parties invoke its aid.

As now drafted, the bill does not relate to employment as a domestic servant or as an agricultural laborer. It does not affect establishments in which less than 10 persons are employed, and it does not relate to individuals employed by their parents or spouses.

There is nothing in the bill which requires any employee to join any form of labor organization.

If employees choose to organize, nothing in the bill will prevent them from organizing a shop committee or a union for a particular

plant or company, free and independent of any national or international organization as well as of any employer.

In cases in which employees choose to belong to an organization, there is nothing in the bill to compel an employer to make a closed-shop agreement with that organization or to consent to a deduction of pay to meet the dues of that organization (i. e., the check-off). These matters are left to the parties to settle by the orderly process of collective bargaining, and free from suggestion, much less direction, from the Government.

There is nothing in the bill which makes it impossible for grievances or disputes to be settled locally or through the aid of appropriate machinery in the several States; and every effort has been made to avoid the embarrassment and inconvenience to both employers and employees of being called to settle in Washington a dispute which might be adjusted locally.

The Board is not going to be empowered to settle all labor grievances.

The quasi-judicial power of the Board is restricted to four unfair labor practices and to cases in which the choice of representatives is doubtful. And even then the Board's compulsory action is limited to cases that have led or threaten to lead to labor disputes that might affect commerce or obstruct the free flow of commerce. The bill makes it impossible for the Board to exercise any compulsory power in a purely local and intrastate dispute. Employers and employees engaging in a local or intrastate business are not within the jurisdiction of this bill.

The Board is not given any unusual powers to hear evidence summon witnesses, or require testimony. Every power granted to the Board with respect to the taking of testimony, summoning of witnesses, and like matters, is duplicated in at least a majority, if not all, of the Federal administrative tribunals such as the Federal Trade Commission, the Interstate Commerce Commission, the United States Employees' Compensation Commission, and the proposed communications commission.

OBJECTS OF THE BILL

The bill aims primarily to clarify rather than to extend the existing law governing relations between employers and employees and to provide for a means of enforcement. Language of earlier statutes,

particularly section 7 (a) of the National Industrial Recovery Act, has been considered ambiguous, and that ambiguity has misled both employers and employees as to their rights under the law. Section 7 (a) of the National Industrial Recovery Act is as follows:

> Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment approved or prescribed by the President.

The interests of democratic government require that the policy of the United States should be clearly and briefly stated in authoritative form.

A second important objective of the bill is to establish some orderly method by which cases involving supposed violations of the law may be heard. At the present time there exist many different Federal (not to mention State) agencies that deal with labor questions—the Department of Labor has a conciliation service; the National Recovery Administration has a compliance board; a National Labor Board, set up by Executive order, exists in Washington and 20 regional boards have been established throughout the country subordinate to that National Labor Board, and recently the NRA has been establishing in various industries industrial boards. It is important that these agencies should not be multiplied, lest parties fail to know either the proper tribunal to which to resort or the proper construction of law to follow. Three essentials of justice are that it shall be administered promptly, clearly, and with finality. By establishing a quasi judicial board, this bill definitely establishes the agency that shall give the final administrative interpretation of the law.

Of course, court review remains available, as it always does under our system of government. But the officers of the executive branch of the Government, as well as private persons, will recognize and be bound by decisions of the Board until and unless they are reversed in the courts. Moreover, the existence of such an agency will relieve overburdened executives of what is in essence a quasi judicial function.

Another important aspect of the bill, as amended, is the emphasis it places on the strictly judicial aspect of the work of the Board. It is

not primarily a prosecuting agency to ferret out offenders. So far as possible all disputes will continue to be adjusted by conciliatory methods, such as those used in the Division of Conciliation of the Department of Labor. When a case cannot be adjusted because of the continuance of an unfair labor practice or because of disputes over representation, it can be referred to the Industrial Adjustment Board which can then judicially consider it. This makes two things plain: (1) The Board is to enforce the law as written by Congress; and (2) the Board acts only when enforcement is necessary and adjustment has failed.

ANALYSIS OF THE BILL

Section 1 is a self-explanatory declaration of policy.

Section 2 defines the terms used in the act. The most important of these definitions are those of "employer" and "employee." These words are so defined as to exclude from the operation of the act domestic servants, agricultural laborers, individuals employed by their parents or spouses, persons subject to the Railway Labor Act, and persons employing less than 10 employees. One of the important reasons or this exclusion is to make it clear that the Industrial Adjustment Board is to have jurisdiction over only those disputes which are of a certain magnitude and which affect commerce.

The definitions also make it clear that a person who has been discharged as a result of an employer's violation of this statute, if he has not obtained any other regular employment, may be considered by the Board as an employee. This does not mean that he will

necessarily be so considered, but the Board may decide that he is entitled to be reinstated or to vote in a choice of representatives. Without this provision it is possible that an employer might contend that a worker he had unlawfully discharged had no remedy.

The reason for stating that "employer" excludes "any labor organization, other than when acting as an employer" is this: In one sense every labor organization is an employer, it hires clerks, secretaries, and the like. In its relations with its own employees, a labor organization ought to be treated as an employer, and the bill so provides. But in relation to other employees it ought not to be treated as an employer, and ought to have the right to use lawful means to induce employees to join the organization.

"Representatives" is defined in a manner to make it clear that it includes any organization or any individual. Without such a statement it could be contented that the workers could only choose one of their fellow workers as a representative.

80TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 245

LABOR-MANAGEMENT RELATIONS ACT, 1947

APRIL 11, 1947.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. HARTLEY, from the Committee on Education and Labor, submitted the following

REPORT

[To accompany H. R. 3020]

The Committee on Education and Labor, to whom was referred the bill (H. R. 3020) to prescribe fair and equitable rules of conduct to be observed by labor and management in their relations with one another which affect commerce, to protect the rights of individual workers in their relations with labor organizations whose activities affect commerce, to recognize the paramount public interest in labor disputes affecting commerce that endanger the public health, safety, or welfare, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as so amended do pass.

The amendments are as follows:

Page 4, line 20, before "labor dispute", insert "current".

Page 5, in paragraph (5) before "dealing", strike out "or" and insert "of".

Page 9, line 20, strike out "Procedures and practices relating to".

Page 11, line 7, after "who", insert "by the nature of his duties".

Page 15, line 15, strike out "$15,000" and insert "$12,000".

Page 16, line 24, strike out "$15,000" and insert "$12,000".

Page 19, before the period at the end of section 7 (a), insert the following:

and shall also have the right to refrain from any or all of such activities: *Provided*, That nothing herein shall preclude an employer from making and carrying out an agreement with a labor organization as authorized in section 8 (d) (4).

Page 21, in subsection (b), strike out "thereof" where it first appears and insert "of a representative".

Page 22, strike out "2 (ii)" and insert in lieu thereof "2 (11)".

Page 24, after "the overthrow of the United States Government by force", insert "or by any illegal or unconstitutional methods".

them. The foremen cannot strike without the support of the rank and file and its agreement not to do the work of striking foremen. The association admits that it has such an agreement with the CIO. The association has adopted a formal "policy" forbidding *its* members, when the rank-and-file unions strike, to enter the struck plants and protect and maintain them without the consent of the rank-and-file unions.

The evidence further shows that rank-and-file unions tell the foreman's union when the foremen may strike and when they may not, what duties the foremen may do and what ones they may not, what plants the foreman's union may organize and what ones it may not. It shows that rank-and-file unions have helped foremen's unions, not for the benefit of the foremen, but for the benefit of the rank and file, at the expense of the foreman's fidelity in doing his duties. The chairman of a rank-and-file pit committee summed the matter up when he said:

> Well, we are trying to get them (the supervisors) to join the union, the bosses to join the union, and then we'll be their bosses. We'll be their bosses.

That most foremen themselves see the impropriety of their unionizing, and its danger for their own status, is clear from the fact that, although the Foreman's Association of America is the largest union of foremen, only about 1 percent of the foremen have joined it.

Management, like labor, must have faithful agents.—If we are to produce goods competitively and in such large quantities that many can buy them at low cost, then, just as there are people on labor's side to say what workers want and have a right to expect, there must be in management and loyal to it persons not subject to influence or control of unions, not only to assign people to their work, to see that they keep at their work and do it well, to correct them when they are at fault, and to settle their complaints and grievances, but to determine how much work employees should do, what pay they should receive for it, and to carry on the whole of labor relations.

Labor relations people negotiate labor agreements and handle disputes not settled in the shops. Employment and personnel people hire workers, and sometimes assign them to their departments. Plant policemen and guards prevent disorders and report misconduct of employees and of unions and their members. Time-study men help to fix the pace at which employees work and to determine the number of men the work calls for. Doctors, nurses, safety engineers, and adjusters handle claims for disability benefits and investigate alleged hazards to safety and health.

Other employees handle intimate details of the business that frequently are highly confidential. Some affect the employer's relations with labor. Others affect its relations with its competitors. In neither case should the employee's loyalty be divided. That which affects the company's relations with its competitors certainly ought not to be open to members of a union that deals also with the firm's competitors.

Supervisors are management people. They have distinguished themselves in their work. They have demonstrated their ability to take care of themselves without depending upon the pressure of collective action. No one forced them to become supervisors. They abandoned the "collective security" of the rank and file voluntarily,

because they believed the opportunities thus opened to them to be more valuable to them than such "security" It seems wrong, and it is wrong, to subject people of this kind, who have demonstrated their initiative, their ambition and their ability to get ahead, to the levelling processes of seniority, uniformity and standardization that the Supreme Court recognizes as being fundamental principles of unionism. (*J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332 (1944).) It is wrong for the foremen, for it discourages the things in them that made them foremen in the first place. For the same reason, that it discourages those best qualified to get ahead, it is wrong for industry, and particularly for the future strength and productivity of our country.

So, by this bill, Congress makes clear once more what it tried to make clear when, in passing the act, it defined as an "employer," not an "employee," any person "acting in the interest of an employer"; what it again made clear in taking up H. R. 2230 in 1943 and in dropping it when the Board decided the Maryland Drydock case, and what, for a third time, it made clear last year in passing the Case bill by a majority of about 2 to 1 and in barely falling short of enough votes to override the President's veto of that bill.

The bill does not forbid anyone to organize. It does not forbid any employer to recognize a union of foremen. Employers who, in the past, have bargained collectively with supervisors may continue to do so. What the bill does is to say what the law always has said until the Labor Board, in the exercise of what it modestly calls its "expertness," changed the law: That no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for *any* reason, he does not trust.

(C) "Agricultural laborers": The present act excludes from the definition of "employee" "any individual employed as an agricultural laborer," but it does not say who are agricultural laborers and who are not. Congress has defined this term in other legislation. The bill adopts the definition of agricultural laborer set forth in the Internal Revenue Code, section 1426 (h), namely:

> The term "agricultural labor" includes all services performed—
>
> (1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife.
>
> (2) In the employ of the owner, or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm.
>
> (3) In connection with the production or harvesting of maple sirup or maple sugar or any commodity defined as an agricultural commodity in section 1141j (g) of title 12, as amended, or in connection with the raising or harvesting of mushrooms, or in connection with the hatching of poultry, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying and storing water for farming purposes.
>
> (4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the

case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.

As used in this subsection, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(D) An "employee", according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the case of *National Labor Relations Board* v. *Hearst Publications, Inc.* (322 U. S. 111 (1944)), the Board expanded the definition of the term "employee" beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic "expertness" of the Board, upheld the Board. In this case the Board held independent merchants who bought newspapers from the publisher and hired people to sell them to be "employees". The people the merchants hired to sell the papers were "employees" of the merchants, but holding the merchants to be "employees" of the publisher of the papers was most far reaching. It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between "employees" and "independent contractors". "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, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits. It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes "independent contractors" from the definition of "employee".

The definitions appearing in section 2 of the present act of the terms "representative" (4), "labor organization" (5), "commerce" (6), "affecting commerce" (7), and "unfair labor practice" (8) remain unchanged, although, in section 8, the "unfair labor practices" themselves are changed substantially.

Section 2 (9) of the present act, which defines "labor dispute", is omitted. The term does not appear anywhere in the present act except in the definitions. It does appear in the bill, but its meaning is clear from the context and from the bill as a whole and does not need defining. In any event, the old definition would be inappropriate in the amended act because, as the Labor Board has construed the act, a "labor dispute" exists whenever a union disagrees with an

S-0817.1

SENATE BILL 5550

State of Washington 64th Legislature 2015 Regular Session

By Senators Habib and Fain

Read first time 01/23/15. Referred to Committee on Transportation.

AN ACT Relating to providers of commercial transportation services; amending RCW 51.12.183; and adding a new chapter to Title 46 RCW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Department" means the department of licensing.

(2) "Personal vehicle" means a vehicle that is used by a transportation network company driver in connection with providing services for a transportation network company that meets the vehicle criteria in this chapter and that is authorized by the transportation network company.

(3) "Prearranged ride" means a route of travel that begins when a driver accepts a requested ride through a digital network or software application, continues while the driver transports the passenger in a personal vehicle, and ends when the passenger departs from the personal vehicle.

(4) "Transportation network company" means a corporation, partnership, sole proprietorship, or other entity, operating in Washington, that uses a digital network or software application to

connect passengers to drivers for the purpose of providing transportation. A transportation network company is neither a taxicab company, passenger charter carrier, or auto transportation company, as described in Title 81 RCW, nor a limousine or for hire vehicle, as defined in this title. A transportation network company is not deemed to own, control, operate, or manage the personal vehicles used by transportation network company drivers. A transportation network company does not include a political subdivision or other entity exempt from federal income tax under 26 U.S.C. Sec. 115 of the federal internal revenue code.

(5) "Transportation network company driver" or "driver" means an individual who uses a personal vehicle to provide services for passengers matched through a transportation network company's digital network or software application. A driver need not be an employee of a transportation network company. A driver is not a for hire operator as that term is used in this title and Title 51 RCW.

(6) "Transportation network company passenger" or "passenger" means a passenger in a personal vehicle for whom transport is provided, including:

(a) An individual who uses a transportation network company's digital network or software application to connect with a driver to obtain services in the driver's vehicle for the individual and anyone in the individual's party; or

(b) Anyone for whom another individual uses a transportation network company's digital network or software application to connect with a driver to obtain services in the driver's vehicle.

(7) "Transportation network company services" or "services" means the provision of transportation by a driver to a passenger with whom the driver is matched through a transportation network company or all times the driver is logged in to a transportation network company's digital network or software application. The term does not include services provided either directly or under contract with a political subdivision or other entity exempt from federal income tax under 26 U.S.C. Sec. 115 of the federal internal revenue code.

NEW SECTION. **Sec. 2.** (1)(a) A transportation network company must comply with the requirements of this chapter, including those relating to a driver's compliance with insurance, qualification, conduct, nondiscrimination, maximum work hours, criminal history, and driving record requirements. Any penalty for a violation of this

chapter may be assessed only against the transportation network company, unless the transportation network company could not have reasonably known of the violation.

(b) This chapter does not relieve a driver from complying with the applicable requirements set out in this title, including those relating to drivers' licenses, vehicle registrations, minimum insurance, rules of the road, and the penalties associated with any violation.

(2) Except as provided in rules adopted by the department pursuant to this chapter, chapter 18.235 RCW governs unlicensed practice, the issuance and denial of licenses, and the discipline of licensees under this chapter.

(3) A transportation network company must comply with the filing requirements of chapter 23B.02 RCW and the registered agent requirements of chapter 23B.05 RCW.

(4) Pursuant to rules adopted by the department, every transportation network company operating under this chapter must submit a quarterly report to the department, providing at a minimum the total number of drivers using its digital network or software application, the total number of prearranged rides, the total hours that drivers are logged in to its network, the total hours spent providing transportation network company services, and describing any accident in which a personal vehicle was involved while carrying a passenger.

(5)(a) A transportation network company may not, with respect to drivers using its digital network or software application, or drivers using the digital network or software application of another transportation network company, engage in anticompetitive behavior, including requiring drivers to agree to a noncompetition agreement.

(b) A transportation network company may not prohibit a driver from using a personal vehicle to provide transportation network company services using the digital network or software application of another transportation network company.

(c) A transportation network company may prohibit a driver's use of any brand or mark of the company in a way that is confusing to the public.

(6) Every transportation network company must, if achievable, make its digital network or software application accessible to persons with disabilities.

NEW SECTION. **Sec. 3.** (1)(a) Before being used to provide transportation network company services, every personal vehicle must be covered by a primary automobile insurance policy. Except as provided in subsection (2) of this section, a transportation network company must secure this policy for every personal vehicle used to provide transportation network company services. For purposes of this section, a "primary automobile insurance policy" is not a private passenger automobile insurance policy.

(b) The insurance policy required under this section must:

(i) Provide liability coverage, applicable during the period before a driver accepts a requested ride through a digital network or software application, in an amount no less than that required under RCW 46.72.050, provide comprehensive and collision coverage, and provide underinsured motorist and personal injury protection coverage of one hundred thousand dollars per person and three hundred thousand dollars per accident;

(ii) Provide liability coverage, applicable during the period after a driver accepts a requested ride through a digital network or software application, in an amount no less than one hundred thousand dollars per person and one million dollars per accident, provide comprehensive and collision coverage, and provide underinsured motorist and personal injury protection coverage of one hundred thousand dollars per person and one million dollars per accident; and

(iii) Provide coverage at all times the driver is logged in to a transportation network company's digital network or software application and at all times a passenger, as defined in this chapter, is in the vehicle.

(2)(a) As an alternative to the provisions of subsection (1) of this section, if the office of the insurance commissioner approves the offering of an insurance policy that recognizes that a person is acting as a transportation network company driver and using a personal vehicle to provide transportation network company services, a driver may secure a primary automobile insurance policy covering a personal vehicle and providing the same coverage as required in subsection (1) of this section.

(b) If a driver secures a primary automobile insurance policy covering a personal vehicle, the transportation network company must maintain an excess insurance policy covering that personal vehicle providing the same coverage as required in subsection (1) of this section.

(c) If the primary automobile insurance policy purchased by a driver pursuant to this section does not provide coverage for any reason, including that the policy lapsed or did not exist, the transportation network company's policy required under (b) of this subsection must provide the coverage required under this section beginning with the first dollar of a claim.

(3) The insurer providing coverage under subsections (1) and (2) of this section is the only insurer having the duty to defend any liability claim from an accident occurring while transportation network company services are being provided.

(4) In addition to the requirements in subsections (1) and (2) of this section, before allowing a person to provide transportation network company services, a transportation network company must verify that he or she is complying with the requirements of RCW 46.30.020.

(5)(a) If a transportation network company purchases a primary automobile insurance policy under subsection (1) of this section, it must provide proof of the policy to the department.

(b) Alternatively, if a driver purchases a primary automobile insurance policy as allowed under subsection (2) of this section, the transportation network company must verify that the driver has done so. Additionally, the transportation network company must provide proof to the department of the excess insurance policy required under subsection (2)(b) of this section.

(c) Upon request from the department, drivers and transportation network companies must provide copies of the policies required under this section to the department.

(6) A primary automobile insurance policy required under subsection (1) or (2) of this section may be placed with an insurer licensed under Title 48 RCW to provide insurance in the state of Washington or as an eligible surplus line insurance policy as described in RCW 48.15.040.

(7) This section does not require a private passenger automobile insurance policy to provide coverage or a duty to defend for the period of time in which a driver is logged in to a transportation network company's digital network or software application.

(8) If more than one insurance policy provides valid and collectible coverage for a loss arising out of an occurrence involving a motor vehicle operated by a driver, the responsibility for the claim must be divided as follows:

(a) If the driver has been matched with a passenger and is traveling to pick up the passenger, or the driver is providing services to a passenger, the transportation network company that matched the driver and passenger must provide insurance coverage; or

(b) If the driver is logged in to more than one transportation network company digital network or software application but has not been matched with a passenger, the liability must be divided equally among all of the applicable insurance policies.

(9) In a claims coverage investigation, a transportation network company must cooperate with a private passenger automobile insurance policy insurer that also insures the driver's vehicle, including the provision of relevant dates and times during which an incident occurred that involved the driver while the driver was logged in to a transportation network company's digital network or software application.

(10) This section does not modify or abrogate any otherwise applicable insurance requirement set forth in Title 48 RCW.

(11) If a transportation network company's insurer makes a payment for a claim covered under comprehensive coverage or collision coverage, the transportation network company must, to the extent possible, direct the insurer to issue the payment directly to the business repairing the vehicle or jointly to the owner of the vehicle and the primary lienholder on the covered vehicle. The department may not assess any fines as a result of this subsection.

(12) After July 1, 2016, an insurance company regulated under Title 48 RCW may not deny an otherwise covered claim arising exclusively out of the personal use of the private passenger automobile solely on the basis that the insured, at other times, used the private passenger automobile covered by the policy to provide transportation network company services.

(13) The office of the insurance commissioner must track data regarding the levels of coverage provided in subsection (1) of this section. Beginning January 1, 2016, and annually thereafter, the office of the insurance commissioner must provide its findings to the transportation committees of the legislature.

(14) A city, county, political subdivision, or special purpose district may not:

(a) Adopt a law, rule, or ordinance that is in conflict with this chapter;

(b) Require a transportation network company to obtain any additional approval, such as a permit or license, before operating within the jurisdiction. However, this subsection (14)(b) does not apply to standard business licenses and the levying of business-related taxes at the local level; or

(c) Prohibit the provision of transportation network company services or the use of such services within the jurisdiction.

NEW SECTION. **Sec. 4.** (1) The following requirements apply to the provision of services:

(a) A driver may not provide services unless a transportation network company has matched the driver to a passenger through a digital network or software application. A driver may not solicit or accept the on-demand summoning of a ride.

(b) A transportation network company must make available to prospective passengers and drivers the method by which the transportation network company calculates fares or the applicable rates being charged and an option to receive an estimated fare.

(c) Upon completion of a prearranged ride, a transportation network company must transmit to the passenger an electronic receipt, either by electronic mail or by text message, which must document:

(i) The point of origin and destination of the passenger's trip;

(ii) The total duration and distance of the passenger's trip;

(iii) The total fare paid, including the base fare and any additional charges incurred or distance traveled or duration of the passenger's trip; and

(iv) The driver's first name and license plate number.

(d) Before permitting a person to act as a driver on its digital network or software application, a transportation network company must confirm that the person is at least twenty-one years of age and possesses:

(i) A valid driver's license;

(ii) Proof of private passenger automobile insurance;

(iii) Proof that the vehicle is registered in Washington; and

(iv) Within ninety days of the effective date of this section and pursuant to rules adopted by the department, proof that the person has certified that he or she does not experience any condition that interferes with his or her ability to safely provide services pursuant to this chapter.

(e) A driver may not provide transportation network company services for more than twelve consecutive hours or more than twelve hours in any twenty-four hour period, except that a driver may finish a prearranged ride that began before either time restriction.

(f) A transportation network company must implement an intoxicating substance policy for drivers that disallows any amount of intoxication of the driver while providing services. The transportation network company must include on its web site and mobile device application software a notice concerning the transportation network company's intoxicating substance policy.

(g)(i) Prior to providing transportation network company services, a transportation network company must require every personal vehicle to undergo a uniform vehicle safety inspection, approved by the department, and performed by an approved mechanic who must certify in writing that the vehicle is mechanically sound and fit for driving. The approved mechanic must also certify in writing that the plates, decals, and customer notices required under this chapter are legible and properly displayed.

(ii) The safety inspection required under this subsection (1)(g) must be conducted annually while the personal vehicle is being used to provide transportation network company services.

(h) A personal vehicle must have at least four doors and be designed to carry no more than eight passengers, including the driver.

(i)(i) A transportation network company must make the following disclosures to a prospective driver in the prospective driver's terms of service:

WHILE OPERATING ON THE TRANSPORTATION NETWORK COMPANY'S DIGITAL NETWORK OR SOFTWARE APPLICATION, YOUR PRIVATE PASSENGER AUTOMOBILE INSURANCE POLICY MIGHT NOT AFFORD LIABILITY, UNDERINSURED MOTORIST, PERSONAL INJURY PROTECTION, COMPREHENSIVE OR COLLISION COVERAGE, DEPENDING ON THE TERMS OF THE POLICY.

IF THE VEHICLE THAT YOU PLAN TO USE TO PROVIDE TRANSPORTATION NETWORK COMPANY SERVICES FOR OUR TRANSPORTATION NETWORK COMPANY HAS A LIEN AGAINST IT, YOU MUST NOTIFY THE LIENHOLDER THAT YOU WILL BE USING THE VEHICLE FOR TRANSPORTATION NETWORK COMPANY SERVICES THAT MAY VIOLATE THE TERMS OF YOUR CONTRACT WITH THE LIENHOLDER.

(ii) The prospective driver must acknowledge the terms of service electronically or by signature.

(j) A transportation network company must make available to a passenger a customer support telephone number on its digital network, software application, or web site for passenger inquiries.

(k)(i) A transportation network company may not disclose to a third party any personally identifiable information concerning the user of the transportation network company's digital network or software application, unless:

(A) The transportation network company obtains the user's consent to disclose personally identifiable information;

(B) Disclosure is necessary to comply with a legal obligation; or

(C) Disclosure is necessary to protect or defend the terms and conditions for use of the service or to investigate violations of the terms and conditions.

(ii) The limitation on disclosure does not apply to the disclosure of aggregated user data.

(iii) The department may revoke a transportation network company's permit upon the department's finding that the company knowingly or negligently violated the passenger privacy provisions of this subsection (1)(k).

(2) Each transportation network company must require that each personal vehicle providing transportation network company services display a plainly visible exterior marking that identifies the personal vehicle as one providing such services.

(3) A transportation network company or a third party must retain inspection records for at least fourteen months after an inspection was conducted for each personal vehicle used by a driver.

(4)(a)(i) Before a person is permitted to act as a driver through use of a transportation network company's digital network or software application, the person must undergo a criminal history record check. A driver must undergo a criminal history record check every five years while serving as a driver.

(ii) The criminal history record checks required under this section may be administered by the driver, who must provide a copy to the transportation network company, or the record checks may be administered by the transportation network company.

(b) A person who has been convicted of driving under the influence of drugs or alcohol in the previous five years before applying to become a driver may not serve as a driver.

(c)(i) If the criminal history record check reveals that the person has ever been convicted of the following felony offenses, the person may not serve as a driver:

(A) An offense involving fraud, as described in chapters 9.45 and 9A.60 RCW;

(B) A sex offense, as described in chapters 9.68A and 9A.44 RCW;

(C) Burglary, trespass, or vehicle prowling, as described in chapter 9A.52 RCW;

(D) Theft, robbery, extortion, or possession of stolen property, as described in chapter 9A.56 RCW;

(E) A violent offense, as defined in RCW 9.94A.030.

(ii) A person who has been convicted of a comparable offense to the offenses listed in (c)(i) of this subsection in another state may not serve as a driver.

(iii) A transportation network company or a third party must retain the results of a criminal history record check for each driver that provides services for the transportation network company until five years after the criminal history record check was conducted, or until the acquisition of an updated background check, whichever comes earlier.

(5)(a) Before permitting an individual to act as a driver on its digital network or software application, a transportation network company must obtain and review the individual's driving record.

(b) An individual with the following violations may not serve as a driver:

(i) More than three moving violations within the three-year period preceding the individual's application to serve as a driver; or

(ii) A violation for reckless driving under RCW 46.61.500; vehicular homicide under RCW 46.61.520; vehicular assault under RCW 46.61.522; negligent driving in the first or second degree under RCW 46.61.5249, 46.61.525, or 46.61.526; driving without a license under RCW 46.20.005; or driving with a revoked license under RCW 46.20.342 or 46.20.345.

(c) A transportation network company or a third party must retain the driving record for each driver that provides services for the transportation network company for at least three years.

(6) If any person files a complaint with the department against a transportation network company or driver, the department may inspect

the transportation network company's records as reasonably necessary to investigate and resolve the complaint.

(7) Vehicle safety inspections and criminal history record checks required under this section and retained by a transportation network company are not subject to inspection by the department, including as part of any quarterly report required under section 2(4) of this act, except pursuant to departmental audit.

(8)(a) Except for a trip whose destination is more than forty miles from where the passenger is picked up, a transportation network company and transportation network company drivers must provide services to the public in a nondiscriminatory manner, regardless of geographic location of the departure point or destination. A transportation network company or transportation network company driver may not refuse service or impose additional charges or conditions based on a passenger's race, religion, ethnicity, gender, sexual orientation, gender identity, or disability that could prevent customers from accessing transportation. A driver may not refuse to transport a passenger, unless:

(i) The passenger is acting in an unlawful, disorderly, or endangering manner; or

(ii) The passenger is unable to care for himself or herself and is not in the charge of a responsible companion.

(b) A driver must permit a service animal to accompany a passenger on a prearranged ride.

(c)(i) If a passenger with physical or mental disabilities requires the use of mobility equipment, a driver must store such equipment in the vehicle during a prearranged ride, if the vehicle is reasonably capable of doing so. If the driver is unable to store a passenger's mobility equipment in the driver's vehicle, the driver must refer the passenger to another driver or transportation service with a vehicle that is equipped to accommodate such equipment, and may not charge the passenger a cancellation fee.

(ii) If a passenger is traveling with a child who requires the use of a child restraint system under RCW 46.61.687, a driver must allow the passenger to temporarily install the restraint system in the personal vehicle, if the vehicle is reasonably capable of accepting it. If the child restraint system is unable to be temporarily installed in the vehicle, the driver must refer the passenger to another driver or transportation service with a vehicle

that is equipped to accommodate such a system, and may not charge the passenger a cancellation fee.

(9) Within ten days of receiving a complaint about a driver's alleged violation of subsection (8) of this section, the department must report the complaint to the transportation network company for which the driver provides services.

(10) A driver must immediately report to the transportation network company any refusal to transport a passenger pursuant to subsection (8)(a) of this section, and the transportation network company must annually report all such refusals to the department in a form and manner determined by the department.

NEW SECTION. **Sec. 5.** (1) A transportation network company may not operate without first having obtained a permit from the department. The department must require this permit to be renewed annually.

(2) The department must issue a permit to each transportation network company that meets the requirements of this chapter and pays to the department the fees required under subsection (3) of this section. The department may adjust the annual permit fee by rule to recover the department's direct and indirect costs associated with implementing this chapter, as well as the costs of implementing this chapter borne by the office of the insurance commissioner.

(3)(a) A transportation network company must pay the following fee to the department at the time of its initial application for a permit:

(i) Until July 1, 2016, the fee is one hundred thousand dollars; and

(ii) After July 1, 2016, the fee is five thousand dollars.

(b) Upon the annual renewal of a permit issued pursuant to this section, a transportation network company must pay the following applicable renewal fee, depending on the number of drivers shown in the transportation network company's most recent quarterly report sent to the department pursuant to section 2(4) of this act:

(i) For transportation network companies with ten or fewer drivers, the annual renewal fee is five thousand dollars;

(ii) For transportation network companies with more than ten but fewer than one hundred drivers, the annual renewal fee is twenty thousand dollars;

(iii) For transportation network companies with more than one hundred but fewer than one thousand drivers, the annual renewal fee is fifty thousand dollars; and

(iv) For transportation network companies with more than one thousand drivers, the annual renewal fee is one hundred thousand dollars.

(4) The department must determine the form and manner of the application for a transportation network company permit.

(5) Consistent with section 2(1)(a) of this act, the department may cancel, revoke, or suspend any permit issued under this chapter on any of the following grounds:

(a) The violation of any of the provisions of this chapter;

(b) The violation of an order, decision, rule, or requirement established by the department under this chapter;

(c) Failure of the transportation network company to pay a fee imposed on the company within the time required under law; or

(d) Failure of the transportation network company to maintain insurance coverage, if required under this chapter.

(6) The department may deny an application under this chapter, or refuse to renew the permit of a transportation network company, based on a determination that the transportation network company has not satisfied a civil penalty arising out of an administrative or enforcement action brought by the department.

NEW SECTION. **Sec. 6.** The transportation network company account is created in the custody of the state treasurer. All moneys received by the department pursuant to this chapter, and any interest earned on investments in the account, must be deposited into the account. Expenditures from the account may be used by the department for any purpose related to the regulation of transportation network companies that is consistent with this chapter, including, at a minimum, disbursements to (1) local governments to cover enforcement costs and (2) the office of the insurance commissioner to cover its costs incurred under section 3(13) of this act. Only the director or the director's designee may authorize expenditures from the account. The account is subject to allotment procedures under chapter 43.88 RCW, but an appropriation is not required for expenditures.

NEW SECTION. **Sec. 7.** (1) The department may adopt rules to implement this chapter, including rules concerning administration,

fees, fines and penalties, safety requirements, and the disbursement of funds for local enforcement as described in section 6(1) of this act.

(2) The department must adopt rules requiring a transportation network company to file with the department evidence of the transportation network company's insurance policies required under this chapter and proof of continued validity of these policies.

NEW SECTION. **Sec. 8.** All personally identifiable information collected under this chapter is exempt from disclosure under chapter 42.56 RCW.

Sec. 9. RCW 51.12.183 and 2011 c 190 s 2 are each amended to read as follows:

(1) Any business that owns and operates a for hire vehicle licensed under chapter 46.72 RCW, a limousine under chapter 46.72A RCW, or a taxicab under chapter 81.72 RCW and the for hire operator or chauffeur of such vehicle is within the mandatory coverage of this title.

(2) Any business that as owner or agent leases a for hire vehicle licensed under chapter 46.72 RCW, a limousine under chapter 46.72A RCW, or a taxicab under chapter 81.72 RCW to a for hire operator or a chauffeur and the for hire operator or chauffeur of such vehicle is within the mandatory coverage of this title.

(3) For the purposes of this section, the following definitions apply unless the context clearly requires otherwise:

(a) "Chauffeur" has the same meaning as provided in RCW 46.04.115; and

(b) "For hire operator" means a person who is operating a vehicle for the purpose of carrying persons for compensation.

(4) This section does not apply to transportation network companies or drivers providing transportation network company services.

NEW SECTION. **Sec. 10.** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. **Sec. 11.** Sections 1 through 8 of this act constitute a new chapter in Title 46 RCW.

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FINAL BILL REPORT
ESSB 5550

C 236 L 15
Synopsis as Enacted

Brief Description: Regulating providers of commercial transportation services.

Sponsors: Senate Committee on Transportation (originally sponsored by Senators Habib and Fain).

Senate Committee on Transportation
House Committee on Business & Financial Services

Background: State law currently provides for the regulation of certain private transportation providers, such as operators of aeroporters, limousines, for-hire vehicles, taxicabs, and charter and excursion buses. These regulations include various insurance requirements. However, current law does not specifically provide for the regulation of what are commonly know as ridesharing companies, i.e. companies that use a digital network or software application to connect passengers to drivers for the purpose of providing a prearranged ride, often by use of the driver's personal vehicle.

For-hire vehicle operators are currently required under state law to obtain a surety bond or liability insurance policy with the following minimum coverage: $100,000 per person, $300,000 per accident, and $25,000 for property damage.

Summary: Commercial transportation services providers are defined as businesses that use a digital network or software application to connect passengers to drivers for the purpose of providing a prearranged ride. However, a commercial transportation services provider is not a taxicab company, charter or excursion bus, aeroporter, special needs transportation provider, or limousine. A commercial transportation services provider driver is an individual who uses a personal vehicle to provide services for passengers matched through a commercial transportation services provider's digital network or software application. Commercial transportation services are defined as all times the driver is logged into a commercial transportation services provider's digital network or software application, or until the passenger leaves the personal vehicle, whichever is later.

Commercial transportation services providers, drivers if approved by the Office of the Insurance Commissioner, or a combination of a provider and a driver, must obtain a primary automobile insurance policy covering every personal vehicle used to provide commercial transportation services, described as follows:

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

- before a driver accepts a requested ride: $50,000 per person; $100,000 per accident; and $30,000 for property damage; and
- after a driver accepts a requested ride: a combined single limit liability coverage of $1,000,000; and underinsured motorist coverage of $1,000,000.

Commercial transportation services insurance policies must offer personal injury protection coverage, and underinsured motorist coverage, in line with existing motor vehicle insurance law that allows for the insured to reject the coverage options.

After July 1, 2016, an insurance company may not deny a claim arising exclusively out of the personal use of the private vehicle solely on the basis that the insured, at other times, used the vehicle to provide commercial transportation services.

The commercial transportation services insurance coverage requirements are alternatively satisfied by having for-hire vehicle or limousine insurance coverage applicable to the vehicle being used for commercial transportation services.

Commercial transportation services provider drivers, for-hire vehicle operators, limousine chauffeurs, and taxicab operators are exempt from workers' compensation requirements.

Votes on Final Passage:

Senate	30	18	
House	86	12	(House amended)
Senate	43	5	(Senate concurred)

Effective: July 24, 2015

SENATE BILL REPORT
SB 5620

As of February 9, 2017

Title: An act relating to transportation network companies.

Brief Description: Concerning transportation network companies.

Sponsors: Senators King, Hobbs, Fain, Mullet and Palumbo.

Brief History:
Committee Activity: Transportation: 2/08/17.

Brief Summary of Bill

- Creates a statewide regulatory program for transportation network companies under the Department of Licensing.

SENATE COMMITTEE ON TRANSPORTATION

Staff: Kellee Keegan (786-7429)

Background: State law currently provides for the regulation of certain private transportation providers, such as operators of aeroporters, limousines, for-hire vehicles, taxicabs, and charter and excursion buses. Cities, counties, and port districts may license, control, and regulate all for hire vehicles within their respective jurisdictions. The regulation of cities, counties, and port districts may include:

- regulating entry into the business of providing for-hire transportation services;
- requiring a license to be purchased and the ability to revoke, cancel, or refuse to reissue a license for failure to comply with regulatory requirements;
- controlling the rates changed and the manner in which rates are calculated and collected;
- regulating the routes and operations of for-hire vehicles, including restricting access to airports;
- establishing safety and equipment requirements; and
- any other requirements adopted to ensure a safe and reliable for-hire vehicle.

The Department of Licensing (DOL) is the statewide agency that licenses and regulates drivers.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

For-hire vehicles with drivers that are at all times logged in to a digital network or software application are defined in state law as commercial transportation services. A corporation, partnership, sole proprietorship, or other entity, operating in Washington, that uses a digital network or software application to connect passengers to drivers for the purpose of providing a prearranged ride is defined as a commercial transportation services provider. Every vehicle used for commercial transportation services in Washington State must be covered by an automobile insurance policy that specifically covers its services or that covers the vehicle being used. Before a commercial transportation services driver may accept a ride, the motor vehicle liability insurance policy must have limits of $50,000 dollars per person for bodily injury, $100,000 dollars per accident for bodily injury of all persons, and $30,000 dollars for damage to property. To the extent of the law, underinsured liability coverage and personal injury coverage are required. After a driver accepts a requested ride the driver must have a combined single limit liability coverage of $1,000,000, and underinsured motorist coverage of $1,000,000. Commercial transportation services provider drivers, for-hire vehicle operators, limousine chauffeurs, and taxicab operators are exempt from workers' compensation requirements.

Summary of Bill: The definition of commercial transportation services provider is redefined as a transportation network company (TNC). All other instances of commercial transportation services is redefined accordingly.

A TNC who wishes to operate in the state of Washington must obtain a permit from DOL. The permit fee for a TNC to operate in this state is $5,000 per year. A TNC must also:

- maintain an agent for service of process within the state;
- disclose the fare or fare calculation method on its website and the estimated fare to the rider;
- display a photograph of the TNC driver and the license plate of the TNC vehicle before the rider enters the vehicle; and
- transmit an electronic receipt to the rider on behalf of the driver that lists the trip's origin and total time and distance, and an itemization of total fare paid.

A motor vehicle that is used for the TNC must:

- not be more than 12 years of age;
- meet the emissions requirements for motor vehicles; and
- have received a safety inspection in the last year of certain vehicle components.

Vehicles used for TNC services are not for-hire vehicles, ride-sharing vehicles, common carriers or motor carriers, limousines, and taxicabs. A TNC driver is not required to register their vehicle as a commercial vehicle or for-hire vehicle. Other than what it stipulated in contract, the TNC is not deemed to control, direct, or manage the TNC vehicles or drivers.

A TNC driver is not an employee of the TNC but an independent contractor. The TNC does not stipulate when a driver must drive, or restrict the driver's ability to engage in another occupation or business or access the network of another TNC. A TNC must adopt a policy or nondiscrimination with respect to riders and drivers. For a person to become a TNC driver they must submit an application to the TNC. A third party must review the TNC driver. The review must include a search with a multistate/multijurisdictional criminal records locator, or a similar database search, and the U.S. Department of Justice national sex offender public

website. The driving history research report of the individual must also be reviewed by the third party. A person must not become a TNC driver if:

- the person has had more than three moving violations within the previous three years;
- they have attempted to elude police, had a reckless driving violation, or drove on a suspended or revoked license;
- in the last seven years they have been convicted of a Class A or B felony, a violent offense, a serious violent offense, a most serious offense as defined in law, a sex offense, or they have been convicted of driving under the influence, had a hit-and-run, or any other driver-related crime;
- they are a sex offender;
- they do not possess a driver's license;
- they do not possess proof of automobile liability insurance; or
- they are not at least 19 years of age.

It is required that the TNC implement a zero tolerance policy that addresses the use of drugs and alcohol while accessing the TNC network. The TNC must post this policy on its website and the procedures for a rider to report suspicion that their driver was under the influence of drugs or alcohol. A driver's ability to accept trip requests must be suspended while the TNC conducts an investigation.

A TNC driver must not solicit or accept a trip other than a trip arranged through the TNC. Each prearranged ride must be assessed a $0.10 per trip passenger surcharge fee to cover the costs of enforcement and regulation by the state and local municipalities. The surcharge would be deposited into the TNC account created in the custody of the State Treasurer. Within 60 days of the end of each calendar quarter after distribution to DOL for expenses, the funds in the TNC account must be distributed to each municipality or county where the trip originated during the reporting period. Within 30 days of the calendar quarter, the TNC must submit to the DOL the total amount of passenger surcharge fees collected and the percentage of trips that originated in each municipality or unincorporated county.

Individual trip records must be kept by the TNC for at least three years and individual records of the TNC drivers must be kept three years after termination of the relationship between the driver and the TNC. The DOL may audit TNC records no more than annually and the TNC reserves the right to exclude personally-identifying information. All records are designated confidential and are not subject to disclosure to a third party without written consent by the TNC.

The entire field of regulation of transportation network companies is fully occupied and preempted by the state. Local regulations applicable to transportation network companies are limited under the Act.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: This would bring TNCs to all of Washington. TNCs make transportation easier and they compliment existing transportation systems. Statewide legislation is a path to offering TNCs a clean uniform framework for providing safe and reliable rides everywhere. TNCs allow people to make money in a way that works for them. The patchwork system currently in existence limits the ability of drivers and riders to take advantage of TNC systems. Local governments will benefit by preempting their own regulations. This is a work in progress. Washington is a technology leader and they are behind in implementing a state-wide regulation. The $0.10 per trip surcharge enables new companies to operate and encourages competition. The flexibility of Lyft allows the option to leave Washington for work in Alaska and come back and work for Lyft in other seasons. There is a vetting process in King County and it is necessary to pay all the applicable fees. It would be much more efficient to have the state regulate this when driving to other cities. This is a way to serve people and help get them where they need to go. There needs to be a unified statewide system. The process today is not functioning. Uber and Lyft provide transportation options to people who drink and, therefore, make the roads safer. Riders rate their drivers and there is an opportunity every time for them to report their experience. To drive a TNC, a driver must file for a business license in Seattle. If not licensed in another city, the system shuts down. The problem is that different cities have different requirements and fees. The regulations are not clear. It is very cumbersome on drivers.

CON: In section 21 of this bill, local laws and ordinances that are more restrictive are repealed. There is inequity in the for-hire vehicle universe. The annual fee is only $5,000 for a multi-billion dollar company. A taxi owner pays more than $1,600 per year in taxes and fees. There is gross inequity in this market. It was at the TNCs motivation to charge the $0.10 surcharge. Drivers are a big part of the formula that make TNCs a success. Before, taxi cab drivers have been a part of the discussion. This bill broadly preempts local governments and there is a concern about local bargaining. Uber and Lyft are currently suing Seattle regarding collective bargaining. The background checks are not annual in this bill. There is no parity for taxicab operators. Regulatory work has been accomplished in King County and Seattle and this should be copied in state law. There is a major concern in that this bill creates another level where the Legislature determines what is required for safety. There should be a medical qualifier for driving a TNC. The requirements at the beginning of this bill are only reactive regarding a passenger and need to be proactive. It is about the quality of the driver and safety. The standard should be the same for TNCs as with other for-hire vehicles. There is a huge cost for implementing these standards in other regulated for hire markets.

OTHER: The City of Seattle is having productive conversations with TNCs. This bill is the start of an evolution for for-hire vehicles and King County is favorable to some of it. Conceptually, this is needed and is important but there are things regarding driver standards and annual vehicle checks that is concerning. This bill focuses on TNCs but there are a variety of business models out there with much different licensing and regulations. There needs to be uniformity. There should be a third background check by Washington State Patrol's Watch system. The Watch system has the ability to find sex offenders that may not be found in other systems. There is no limitation on how much the state may retain out of the $0.10 cent fee for administration and there should be. The bill falls short of its goals. The Utility and Transportation Commission regulates for hire vehicles and these statutes date back to 1921. The situation is very different today from what it was and, as a result, the state

has a patchwork of regulatory structures that deals with it. This piece meal approach creates an uneven playing field and confusion. This bill retroactively eliminates unemployment insurance coverage and needs to be dealt with.

Persons Testifying: PRO: Senator Curtis King, Prime Sponsor; Laura Bisesto, Lyft/ Government Relations Manager; Caleb Weaver, Uber, Public Affairs; Bryce Bennett, Uber, General Manager; Zachary Skezas, Lyft; Jon Pettit, Lyft; Shavonna Rivers, Uber/Lyft; Mike Ennis, Association of Washington Business; Joanie Deutsch, TechNet.

CON: Cindi Laws, Evergreen State Taxi Association; Brenda Wiest, Teamsters 117/App Based Driver Association; Paul Kajanoff, Shuttle Express; James Fricke, Capital Aeroporter.

OTHER: Lyset Cadena, City of Seattle; Sean Bouffio, King County; Briahna Murray, City of Tacoma; Neil Gorrell, Unemployment Insurance Director, Employment Security Department; Lauren McCloy, Utilities and Transportation Commission; Trent House, Port of Seattle; Tony Sermonti, Department of Licensing.

Persons Signed In To Testify But Not Testifying: No one.

SEATTLE CITY COUNCIL

Legislative Summary

CB 118499

Record No.: CB 118499 **Type:** Ordinance (Ord) **Status:** Passed

Version: 4 124968 **In Control:** City Clerk

File Created: 09/02/2015

Final Action: 12/23/2015

Title: AN ORDINANCE relating to taxicab, transportation network company, and for-hire vehicle drivers; amending Section 6.310.110 of the Seattle Municipal Code; adding a new Section 6.310.735 to the Seattle Municipal Code; and authorizing the election of driver representatives.

Notes: Waiting to bring forward after budget.

Sponsors: Licata,O'Brien

Date

Filed with City Clerk:

Mayor's Signature:

Vetoed by Mayor:

Veto Overridden:

Veto Sustained:

Attachments:

Drafter: jodee.schwinn@seattle.gov

Filing Requirements/Dept Action:

History of Legislative File **Legal Notice Published:** ☐ Yes ☐ No

Ver-sion:	Acting Body:	Date:	Action:	Sent To:	Due Date:	Return Date:	Result:
1	City Clerk	09/02/2015	sent for review	Council President's Office			
	Action Text: The Council Bill (CB) was sent for review. to the Council President's Office						
	Notes:						
1	Council President's Office	09/02/2015	sent for review	Finance and Culture Committee			
	Action Text: The Council Bill (CB) was sent for review. to the Finance and Culture Committee						
	Notes:						
1	Full Council	09/08/2015	referred	Finance and Culture Committee			
	Action Text: The Council Bill (CB) was referred. to the Finance and Culture Committee						
	Notes:						
1	Finance and Culture Committee	09/09/2015	discussed				
	Action Text: The Council Bill (CB) was discussed in Committee.						
	Notes:						

1	Finance and Culture Committee	09/23/2015	discussed	

Action Text: The Council Bill (CB) was discussed.

1	Finance and Culture Committee	10/02/2015	pass as amended	Pass

Action Text: The Committee recommends that Full Council pass as amended the Council Bill (CB).

In Favor: 7 Chair Licata, Vice Chair Godden, Member Burgess, Alternate Bagshaw, O'Brien, Harrell, Sawant

Opposed: 0

3	Full Council	12/14/2015	passed as amended	Pass

Action Text: The Motion carried, the Council Bill (CB) was passed as amended by the following vote, and the President signed the Bill:

Notes: ACTION 1:

Motion was made by Councilmember O'Brien, duly seconded and carried, to amend CB 118499 by sustituting Version 5 for Version 4.

ACTION 2:

Motion was made by Councilmember O'Brien, duly seconded and carried, to amend CB 118499 by substituting Version 6 for Version 5.

ACTION 3:

Motion was made and duly seconded to pass the Bill as amended.

In Favor: 8 Council President Burgess, Councilmember Godden, Councilmember González , Councilmember Harrell, Councilmember Licata, Councilmember O'Brien, Councilmember Rasmussen, Councilmember Sawant

Opposed: 0

4	City Clerk	12/16/2015	submitted for Mayor's signature	Mayor

Action Text: The Council Bill (CB) was submitted for Mayor's signature. to the Mayor

Notes:

4	Mayor	12/23/2015	returned unsigned

Action Text: The Council Bill (CB) was returned unsigned.

Notes:

4	Mayor	12/23/2015	returned	City Clerk

Action Text: The Council Bill (CB) was returned. to the City Clerk

Notes:

4	City Clerk	12/23/2015	attested by City Clerk

Action Text: The Ordinance (Ord) was attested by City Clerk.

Notes:

December 23, 2015

Honorable Tim Burgess, President
Seattle City Council
600 4th Avenue, Floor 2
Seattle, WA 98104

Dear Council President Burgess,

I am transmitting Council Bill 118499 without my signature, understanding that it will become law.

The tremendous growth of Transportation Network Companies (TNCs) in Seattle, both in terms of popularity and the number of trips, demonstrates that this new business model is changing how people move around the city. These companies are providing valuable new tools for city residents and innovating at a tremendous pace.

I said consistently during this debate that I support the right of workers to organize to create a fair and just workplace. I remain concerned that this ordinance, as passed by the Council, includes several flaws, especially related to the relatively unknown costs of administering the collective bargaining process and the burden of significant rulemaking the Council has placed on City staff. My office has shared my concerns with the Council throughout the debate.

As this ordinance takes effect, my administration will begin its work to determine what it will take to implement the law. I believe it will be necessary to seek additional clarifying legislation from the Council. I look forward to working with councilmembers in 2016 on their ordinance.

Sincerely,

Edward B. Murray
Mayor, City of Seattle

cc: Honorable Members of the Seattle City Council
Monica Martinez Simmons, City Clerk

FILED
CITY OF SEATTLE
2015 DEC 23 AM 11:53
CITY CLERK

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Seattle, Washington 98124-4749

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Hearing Impaired use the Washington Relay Service (7-1-1)
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Tony Kilduff
LEG Driver Collective Bargaining ORD
D6

CITY OF SEATTLE

ORDINANCE 124968

COUNCIL BILL 118499

AN ORDINANCE relating to taxicab, transportation network company, and for-hire vehicle drivers; amending Section 6.310.110 of the Seattle Municipal Code; adding a new Section 6.310.735 to the Seattle Municipal Code; and authorizing the election of driver representatives.

WHEREAS, the state of Washington, in Revised Code of Washington 46.72.001 and 81.72.200, has authorized political subdivisions of the state to regulate for-hire drivers and for-hire transportation services without facing liability under federal antitrust laws; and

WHEREAS, allowing taxicab, transportation network company, and for-hire vehicle drivers ("for-hire drivers") to modify specific agreements collectively with the entities that hire, direct, arrange, or manage their work will better ensure that they can perform their services in a safe, reliable, stable, cost-effective, and economically viable manner and thereby promote the welfare of the people; and

WHEREAS, the new responsibilities for the Department of Finance and Administrative Services (FAS) contemplated in this legislation will require additional resources; and

WHEREAS, the Director of FAS has authority to adjust fees to cover the cost of the regulatory functions FAS performs on behalf of the public; and

WHEREAS, should this legislation go into effect, the Director may exercise that authority to raise additional revenue through fees to cover the additional costs; NOW, THEREFORE,

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. Findings

A. In order to protect the public health, safety and welfare, The City of Seattle is granted express authority to regulate for-hire and taxicab transportation services pursuant to Chapters 46.72 and 81.72 RCW. This authority includes regulating entry, requiring a license, controlling rates, establishing safety requirements, and any other requirement to ensure safe and reliable transportation services.

B. Seattle Municipal Code (SMC) Chapter 6.310 is an exercise of The City of Seattle's power to regulate the for-hire and taxicab transportation industry. SMC Chapter 6.310, in subsection 6.310.100.A, states: "Some of its regulatory purposes are to increase the safety, reliability, cost-effectiveness, and the economic viability and stability of privately-operated for-hire vehicle and taxicab services within The City of Seattle."

C. The purpose of this ordinance is to ensure safe and reliable for-hire and taxicab transportation service pursuant to RCW 46.72.160 and RCW 81.72.210, respectively, and to exercise the City's authority to regulate for-hire transportation pursuant to RCW 46.72.001, which states: "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." RCW 81.72.200, governing taxicab transportation, has a similar statement of legislative intent.

D. As the City is acting under specific state statutory authority, it is immune from liability under antitrust laws.

E. At present, entities that hire, contract with, or partner with for-hire drivers for the purpose of assisting them with, or facilitating them in, providing for-hire transportation services to the public establish the terms and conditions of their contracts with their drivers unilaterally, and may impose changes in driver compensation rates or deactivate drivers from dispatch services without prior warning or discussion. Terms and conditions that are imposed without meaningful driver input, as well as sudden and/or unilateral contract changes, may adversely impact the ability of a for-hire driver to provide transportation services in a safe, reliable, stable, cost-effective, and economically viable manner.

F. Unilateral terms and working conditions established and imposed without driver input by entities that hire, contract with, or partner with for-hire drivers, as well as sudden and/or unilateral changes in those terms and conditions, have resulted in driver unrest and transportation service disruptions around the country.

G. There is currently no effective mechanism for for-hire drivers to meaningfully address the terms and conditions of their contractual relationship with the entity that hires, contracts with, or partners with them. For-hire drivers lack the power to negotiate these issues effectively on an individual basis.

H. Business models wherein companies control aspects of their drivers' work, but rely on the drivers being classified as independent contractors, render for-hire drivers exempt from minimum labor requirements established by federal, state, and local law.

I. Establishing a process through which for-hire drivers and the entities that control many aspects of their working conditions collectively negotiate the terms of the drivers' contractual relationships with those entities will enable more stable working conditions and better ensure that drivers can perform their services in a safe, reliable, stable, cost-effective, and economically

viable manner, and thereby promote the welfare of the people who rely on safe and reliable for-hire transportation to meet their transportation needs.

1. Drivers working under terms that they have negotiated through a collective negotiation process are more likely to remain in their positions over time, and to devote more time to their work as for-hire drivers, because the terms are more likely to be satisfactory and responsive to the drivers' needs and concerns. Such drivers accumulate experience that will improve the safety and reliability of the for-hire transportation services provided by the driver coordinator and reduce the safety and reliability problems created by frequent turnover in the for-hire transportation services industry.

2. Establishing the drivers' contractual terms through a collective negotiation process will also help ensure that the compensation drivers receive for their services is sufficient to alleviate undue financial pressure to provide transportation in an unsafe manner (such as by working longer hours than is safe, skipping needed breaks, or operating vehicles at unsafe speeds in order to maximize the number of trips completed) or to ignore maintenance necessary to the safe and reliable operation of their vehicles. Enabling driver participation in the formulation of vehicle equipment standards and safe driving practices will help ensure that those standards and practices are responsive to driver needs, including changing conditions, and that drivers will agree with and follow those standards and practices.

J. Collective negotiation processes in other industries have achieved public health and safety outcomes for the general public and improved the reliability and stability of the industries at issue including, but not limited to, job security provisions, scheduling predictability, job training, methods of communicating health and safety information and enforcing health and safety standards, processes for resolving disputes with minimal rancor or conflict, and reductions

in industrial accidents, vehicular accidents, and inoperative or malfunctioning equipment. In other parts of the transportation industry, for example, collective negotiation processes have reduced accidents and improved driver and vehicle safety performance.

Section 2. Section 6.310.110 of the Seattle Municipal Code, last amended by Ordinance 124524, is amended as follows:

6.310.110 Definitions

* * *

"Commencement date" means a calendar date set by the Director after the effective date of the ordinance introduced as Council Bill 118499 for the purpose of initiating certain processes pursuant to Section 6.310.735 and establishing timelines and deadlines associated with them.

* * *

"Director" means the Director of Finance and Administrative Services or the director of any successor department and the Director's authorized designee.

"Driver coordinator" means an entity that hires, contracts with, or partners with for-hire drivers for the purpose of assisting them with, or facilitating them in, providing for-hire services to the public. For the purposes of this definition, "driver coordinator" includes but is not limited to taxicab associations, for-hire vehicle companies, and transportation network companies.

"Exclusive driver representative" (EDR) means a qualified driver representative, certified by the Director to be the sole and exclusive representative of all for-hire drivers operating within the City for a particular driver coordinator, and authorized to negotiate, obtain and enter into a contract that sets forth terms and conditions of work applicable to all of the for-hire drivers employed by that driver coordinator.

* * *

"Personal vehicle" means a vehicle that is not a taxicab or for-hire vehicle licensed under this ((~~chapter~~)) Chapter 6.310. A personal vehicle that is used to provide trips via a transportation network company application dispatch system is subject to regulation under this ((~~chapter~~)) Chapter 6.310.

"Qualifying driver" means a for-hire driver, who drives for a driver coordinator and who satisfies the conditions established by the Director pursuant to Section 6.310.735. In establishing such conditions, the Director shall consider factors such as the length, frequency, total number of trips, and average number of trips per driver completed by all of the drivers who have performed trips in each of the four calendar months immediately preceding the commencement date, for a particular driver coordinator, and any other factors that indicate that a driver's work for a driver coordinator is significant enough to affect the safety and reliability of for-hire transportation. A for-hire driver may be a qualifying driver for more than one driver coordinator.

"Qualified driver representative" (QDR) means an entity that assists for-hire drivers operating within the City for a particular driver coordinator in reaching consensus on desired terms of work and negotiates those terms on their behalf with driver coordinators.

* * *

Section 3. A new Section 6.310.735 is added to the Seattle Municipal Code as follows:

6.310.735 Exclusive driver representatives

A. The Director shall promulgate a commencement date that is no earlier than 180 days and no later than 240 days from the effective date of the ordinance introduced as Council Bill 118499.

B. The process of designating a QDR shall be prescribed by Director's rule. The designation of a QDR shall be based on, but not limited to, consideration of the following factors:

1. Registration with the Washington Secretary of State as a not-for-profit entity;

2. Organizational bylaws that give drivers the right to be members of the organization and participate in the democratic control of the organization; and

3. Experience in and/or a demonstrated commitment to assisting stakeholders in reaching consensus agreements with, or related to, employers and contractors.

C. An entity wishing to be considered as a QDR for for-hire drivers operating within the City must submit a request to the Director within 30 days of the commencement date or at a later date as provided in subsection G of this section. Within 14 days of the receipt of such a request, the Director will notify the applicant in writing of the determination. Applicants who dispute the Director's determination may appeal to the Hearing Examiner within 10 days of receiving the determination. The Director shall provide a list of all QDRs to all driver coordinators.

1. An entity that has been designated as a QDR shall be required to establish annually that it continues to satisfy the requirements for designation as a QDR.

2. An entity that has been designated as a QDR and that seeks to represent the drivers of a driver coordinator shall notify the driver coordinator of its intent to represent those drivers within 14 days of its designation as a QDR. That notice may be provided by any means reasonably calculated to reach the driver coordinator, including by written notice mailed or delivered to a transportation network company or taxicab association representative at the mailing address listed with the City.

D. Driver coordinators who have hired, contracted with, partnered with, or maintained a contractual relationship or partnership with, 50 or more for-hire drivers in the 30 days prior to the commencement date, other than in the context of an employer-employee relationship, must, within 75 days of the commencement date, provide all QDRs that have given the notice specified in subsection 6.310.735.C.2 the names, addresses, email addresses (if available), and phone number (if available) of all qualifying drivers they hire, contract with, or partner with.

E. QDRs shall use driver contact information for the sole purpose of contacting drivers to solicit their interest in being represented by the QDR. The QDR may not sell, publish, or otherwise disseminate the driver contact information outside the entity/organization.

F. The Director shall certify a QDR as the EDR for all drivers contracted with a particular driver coordinator, according to the following:

1. Within 120 days of receiving the driver contact information, a QDR will submit statements of interest to the Director from a majority of qualifying drivers from the list described in subsection 6.310.735.D. Each statement of interest shall be signed, dated, and clearly state that the driver wants to be represented by the QDR for the purpose of negotiations with the driver coordinator. A qualifying driver's signature may be provided by electronic signature or other electronic means. The Director shall determine by rule the standards and procedures for submitting and verifying statements of interest by qualifying drivers choosing an EDR.

a. The methods for submitting and verifying statements of interest by qualifying drivers choosing an EDR may include, but not be limited to: signature verification, unique personal identification number verification, statistical methods, or third party verification.

2. Within 30 days of receiving such statements of interest, the Director shall determine if they are sufficient to designate the QDR as the EDR for all drivers for that particular

driver coordinator, and if so, shall so designate the QDR to be the EDR, except that, if more than one QDR establishes that a majority of qualifying drivers have expressed interest in being represented by that QDR, the Director shall designate the QDR that received the largest number of verified affirmative statements of interest to be the EDR.

3. Within 30 days of receiving submissions from all QDRs for a particular driver coordinator, the Director shall either certify one to be the EDR or announce that no QDR met the majority threshold for certification.

G. If no EDR is certified for a driver coordinator, the Director shall, upon the written request from a designated QDR or from an entity that seeks to be designated as a QDR, promulgate a new commencement date applicable to that driver coordinator that is no later than 90 days after the request, provided that no driver coordinator shall be subject to the requirements of Section 6.310.735 more than once in any 12-month period. The QDR, any other entity that seeks to be designated as a QDR, and the driver coordinator shall then repeat the processes in subsections 6.310.735.C, 6.310.735.D, and 6.310.735.F.

H. 1. Upon certification of the EDR by the Director, the driver coordinator and the EDR shall meet and negotiate in good faith certain subjects to be specified in rules or regulations promulgated by the Director, including, but not limited to, best practices regarding vehicle equipment standards; safe driving practices; the manner in which the driver coordinator will conduct criminal background checks of all prospective drivers; the nature and amount of payments to be made by, or withheld from, the driver coordinator to or by the drivers; minimum hours of work, conditions of work, and applicable rules. If the driver coordinator and the EDR reach agreement on terms, their agreement shall be reduced to a written agreement. The term of

such an agreement shall be agreed upon by the EDR and the driver coordinator, but in no case shall the term of such an agreement exceed four years.

2. After reaching agreement, the parties shall transmit the written agreement to the Director. The Director shall review the agreement for compliance with the provisions of this Chapter 6.310, and to ensure that the substance of the agreement promotes the provision of safe, reliable, and economical for-hire transportation services and otherwise advance the public policy goals set forth in Chapter 6.310 and in the Preamble to and Section 1 of the ordinance introduced as C.B. 118499. In conducting that review, the record shall not be limited to the submissions of the EDR and driver coordinator nor to the terms of the proposed agreement. The Director shall have the right to gather and consider any necessary additional evidence, including by conducting public hearings and requesting additional information from the EDR and driver coordinator. Following this review, the Director shall notify the parties of the determination in writing, and shall include in the notification a written explanation of all conclusions. Absent good cause, the Director shall issue the determination of compliance within 60 days of the receipt of an agreement.

a. If the Director finds the agreement compliant, the agreement is final and binding on all parties.

b. If the Director finds it fails to comply, the Director shall remand it to the parties with a written explanation of the failure(s) and, at the Director's discretion, recommendations to remedy the failure(s).

c. The agreement shall not go into effect until the Director affirmatively determines its adherence to the provisions of this Chapter 6.310 and that the agreement furthers the provision of safe, reliable, and economical for-hire transportation services and the public

policy goals set forth in the Preamble to and Section 1 of the ordinance introduced as C.B. 118499.

3. Unless the EDR has been decertified pursuant to subsection 6.310.735.L or has lost its designation as a QDR, the EDR and the driver coordinator shall, at least 90 days before the expiration of an existing agreement approved pursuant to subsections 6.310.735.H.2.c or 6.310.735.I.4.c, meet to negotiate a successor agreement. Any such agreement shall be subject to approval by the Director pursuant to subsection 6.310.735.H.2. If the parties are unable to reach agreement on a successor agreement within 90 days after the expiration of an existing agreement, either party must submit to interest arbitration upon the request of the other pursuant to subsection 6.310.735.I, and the interest arbitrator's proposed successor agreement shall be subject to review by the Director pursuant to subsections 6.310.735.I.3 and 6.310.735.I.4.

4. Nothing in this section 6.310.735 shall require or preclude a driver coordinator from making an agreement with an EDR to require membership of for-hire drivers in the EDR's entity/organization within 14 days of being hired, contracted with, or partnered with by the driver coordinator to provide for-hire transportation services to the public.

I. If a driver coordinator and the EDR fail to reach an agreement within 90 days of the certification of the EDR by the Director, either party must submit to interest arbitration upon the request of the other.

1. The interest arbitrator may be selected by mutual agreement of the parties. If the parties cannot agree, then the arbitrator shall be determined as follows: from a list of seven arbitrators with experience in labor disputes and/or interest arbitration designated by the American Arbitration Association, the party requesting arbitration shall strike a name. Thereafter

the other party shall strike a name. The process will continue until one name remains, who shall be the arbitrator. The cost of the interest arbitration shall be divided equally between the parties.

2. The interest arbitrator shall propose the most fair and reasonable agreement concerning subjects specified in rules or regulations promulgated by the Director as set forth in subsection 6.310.735.H.1 that furthers the provision of safe, reliable, and economical for-hire transportation services and the public policy goals set forth in the Preamble to and Section 1 of the ordinance introduced as C.B. 118499. The term of any agreement proposed by the interest arbitrator shall not exceed two years. In proposing that agreement, the interest arbitrator shall consider the following criteria:

a. Any stipulations of the parties;

b. The cost of expenses incurred by drivers (e.g., fuel, wear and tear on vehicles, and insurance);

c. Comparison of the amount and/or proportion of revenue received from customers by the driver coordinators and the income provided to or retained by the drivers;

d. The wages, hours, and conditions of employment of other persons, whether employees or independent contractors, employed as for-hire or taxicab drivers in Seattle and its environs, as well as other comparably sized urban areas;

e. If raised by the driver coordinator, the driver coordinator's financial condition and need to ensure a reasonable return on investment and/or profit;

f. Any other factors that are normally or traditionally taken into consideration in the determination of wages, hours, and conditions of employment; and

g. The City's interest in promoting the provision of safe, reliable, and economical for-hire transportation services and otherwise advancing the public policy goals set

forth in Chapter 6.310 and in the Preamble to and Section 1 of the ordinance introduced as C.B. 118499.

3. The arbitrator shall transmit the proposed agreement to the Director for review in accordance with the procedures and standards set forth in subsection 6.310.735.H.2. With the proposed agreement, the arbitrator shall transmit a report that sets forth the basis for the arbitrator's resolution of any disputed issues. The Director shall review the agreement as provided in subsection 6.310.735.H.2.

4. In addition to the review provided for in subsection 6.310.735.I.3, a driver coordinator or EDR may challenge the proposed agreement on the following grounds: that the interest arbitrator was biased, that the interest arbitrator exceeded the authority granted by subsection 6.310.735.H and this subsection 6.310.735.I, and/or that a provision of the proposed agreement is arbitrary and capricious. In the event of such a challenge, the Director will provide notice to the driver coordinator and the EDR, allow the driver coordinator and the EDR the opportunity to be heard, and make a determination as to whether any of the challenges asserted should be sustained.

a. If the Director finds the agreement fulfills the requirements of subsection 6.310.735.H.2, and that no challenges raised under this subsection 6.310.735.I.4 should be sustained, the Director will provide written notice of that finding to the parties and the agreement will be deemed final and binding on all parties.

b. If the Director finds that the agreement fails to fulfill the requirements of subsection 6.310.735.H.2, or that any challenge asserted under this subsection 6.310.735.I.4 should be sustained, the Director shall remand the agreement to the interest arbitrator with a

written explanation of the failure(s) and, at the Director's discretion, recommendations to remedy the failure(s).

c. The agreement shall not go into effect until the Director affirmatively deems the agreement final and binding pursuant to subsections 6.310.735.I.3 and 6.310.735.I.4.a.

d. A driver coordinator or EDR may obtain judicial review of the Director's final determination rendered pursuant to this subsection 6.310.735.I.4 by applying for a Writ of Review in the King County Superior Court within 14 days from the date of the Director's determination, in accordance with the procedure set forth in Chapter 7.16 RCW, other applicable law, and court rules. The Director's final determination shall not be stayed pending judicial review unless a stay is ordered by the court. If review is not sought in compliance with this subsection 6.310.735.I.4.d, the determination of the Director shall be final and conclusive.

5. If either party refuses to enter interest arbitration, upon the request of the other, either party may pursue all available judicial remedies.

J. During the term of an agreement approved by the Director under subsection 6.310.735.H or 6.310.735.I, the parties may discuss additional terms and, if agreement on any amendments to the agreement are reached, shall submit proposed amendments to the Director, who shall consider the proposed amendment in accordance with the procedures and standards in subsection 6.310.735.H.2. Any proposed amendment shall not go into effect until the Director affirmatively determines its adherence to the provisions of this Chapter 6.310 and that it furthers the provision of safe, reliable and economical for-hire transportation services and the public policy goals set forth in the Preamble to and Section 1 of the ordinance introduced as C.B. 118499.

1. During the term of an agreement approved by the Director under subsection 6.310.735.H or 6.310.735.I, the Director shall have the authority to withdraw approval of the agreement if the Director determines that the agreement no longer adheres to the provisions of this Chapter 6.310 or that it no longer promotes the provision of safe, reliable, and economical for-hire transportation services and the public policy goals set forth in the Preamble to and Section 1 of the ordinance introduced as C.B. 118499. The Director shall withdraw such approval only after providing the parties with written notice of the proposed withdrawal of approval and the grounds therefor and an opportunity to be heard regarding the proposed withdrawal. The Director's withdrawal of approval shall be effective only upon the issuance of a written explanation of the reasons why the agreement on longer adheres to the provisions of this Chapter 6.310 or no longer furthers the provision of safe, reliable, and economical for-hire transportation services or the public policy goals set forth in the Preamble to and Section 1 of the ordinance introduced as C.B. 118499.

2. The Director shall have the authority to gather and consider any necessary evidence in exercising the authority provided by this subsection 6.310.735.J.

3. A driver coordinator shall not make changes to subjects set forth in subsection 6.310.735.H or specified in rules or regulations promulgated by the Director without meeting and discussing those changes in good faith with the EDR, even if the driver coordinator and EDR have not included terms concerning such subjects in their agreement.

K. A driver coordinator shall not retaliate against any for-hire driver for exercising the right to participate in the representative process provided by this section 6.310.735, or provide or offer to provide money or anything of value to any for-hire driver with the intent of encouraging the for-hire driver to exercise, or to refrain from exercising, that right. It shall be a violation for a

driver coordinator or its agent, designee, employee, or any person or group of persons acting directly or indirectly in the interest of the driver coordinator in relation to the for-hire driver to:

1. Interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected under this section 6.310.735; or

2. Take adverse action, including but not limited to threatening, harassing, penalizing, or in any other manner discriminating or retaliating against a driver, because the driver has exercised the rights protected under this section 6.310.735.

L. Decertification. An Exclusive Driver Representative may be decertified according to the following:

1. The Director receives a petition to decertify an EDR no more than 30 days before the expiration of an agreement reached pursuant to this section 6.310.735 or no less than three years after the agreement's effective date, whichever is earlier.

a. A decertification petition must be signed by ten or more qualifying drivers. The Director shall determine by rule the standards and procedures for submitting the decertification petition.

2. Once a petition has been accepted by the Director, the Director shall issue notice to the driver coordinator and the EDR of the decertification petition and promulgate a decertification date.

3. The driver coordinator shall have 14 days from the decertification date to transmit the list of qualifying drivers to the petitioners and the EDR.

4. Within 120 days of receiving the driver contact information, petitioners for a decertification will submit to the Director statements of interest from a majority of qualifying drivers from the list described in subsection 6.310.735.K.3. The statements of interest shall be

signed and dated and shall clearly indicate that the driver no longer wants to be represented by the EDR for the purpose of collective bargaining with the driver coordinator. The Director shall determine by rule the standards and procedures for submitting and verifying the statements of interest of qualifying drivers.

5. Within 30 days of receiving such statements of interest, the Director shall determine if they are sufficient to decertify the EDR for that particular driver coordinator. The Director shall either decertify the EDR, or declare that the decertification petition did not meet the majority threshold and reaffirm that the EDR shall continue representing all drivers for that particular driver coordinator.

a. If an EDR is decertified for a particular driver coordinator, the process of selecting a new EDR may start according to the process outlined in subsection 6.310.735.G.

M. Enforcement

1. Powers and duties of Director

a. The Director is authorized to enforce and administer this section 6.310.735. The Director shall exercise all responsibilities under this section 6.310.735 pursuant to rules and regulations developed under Chapter 3.02. The Director is authorized to promulgate, revise, or rescind rules and regulations deemed necessary, appropriate, or convenient to administer the provisions of this section 6.310.735, providing affected entities with due process of law and in conformity with the intent and purpose of this section 6.310.735.

b. The Director shall investigate alleged violations of subsections 6.310.735.D and 6.310.735.H.1, and if the Director determines that a violation has occurred, the Director shall issue a written notice of the violation. The Director may investigate alleged

violations of other subsections of this section 6.310.735, and if the Director determines that a violation has occurred, the Director shall issue a written notice of the violation. The notice shall:

1) Require the person or entity in violation to comply with the requirement;

2) Include notice that the person or entity in violation is entitled to a hearing before the Hearing Examiner to respond to the notice and introduce any evidence to refute or mitigate the violation, in accordance with Chapter 3.02; and

3) Inform the person or entity in violation that a daily penalty of up to $10,000 for every day the violator fails to cure the violation will accrue if the violation is uncontested or found committed.

c. The person or entity named on the notice of violation must file with the Hearing Examiner's Office the request for a hearing within ten calendar days after the date of the notice of violation. The Hearing Examiner may affirm, modify, or reverse the Director's notice of violation.

d. If the person or entity named on the notice of violation fails to timely request a hearing, the notice of violation shall be final and the daily penalty of up to $10,000 will accrue until the violation is cured.

e. Nothing in this section 6.310.735 shall be construed as creating liability or imposing liability on the City for any non-compliance with this section 6.310.735.

2. Judicial review. After receipt of the decision of the Hearing Examiner, an aggrieved party may pursue all available judicial remedies.

3. Private right of action. Subsections 6.310.735.D, 6.310.735.E, 6.310.735.H, and 6.310.735.K may be enforced through a private right of action. Any aggrieved party,

including but not limited to an EDR, may bring an action in court, and shall be entitled to all remedies available at law or in equity appropriate to remedy any violation of this section 6.310.735. A plaintiff who prevails in any action against a private party to enforce this section 6.310.735 may be awarded reasonable attorney's fees and costs.

4. Contractual remedies. Nothing in this section shall be construed as preventing the parties to an agreement approved by the Director from pursuing otherwise available remedies for violation of such agreement.

Section 4. The provisions of this ordinance are declared to be separate and severable. The invalidity of any clause, sentence, paragraph, subdivision, section, or portion of this ordinance, or the invalidity of its application to any person or circumstance, does not affect the validity of the remainder of this ordinance, or the validity of its application to other persons or circumstances.

Section 5. Sections 2 and 3 of this ordinance shall take effect and be in force 150 days after the effective date of the ordinance introduced as Council Bill 118499.

Section 6. No provision of this ordinance shall be construed as a providing any determination regarding the legal status of taxicab, transportation network company, and for-hire vehicle drivers as employees or independent contractors. The provisions of this ordinance do not apply to drivers who are employees under 29 U.S.C. § 152(3).

Section 7. Should a court of competent jurisdiction, all appeals having been exhausted or all appeal periods having run, determine that any provision of this ordinance is preempted by federal law, any and all such provisions shall be deemed null and void.

Section 8. This ordinance shall take effect and be in force 30 days after its approval by the Mayor, but if not approved and returned by the Mayor within ten days after presentation, it shall take effect as provided by Seattle Municipal Code Section 1.04.020.

Passed by the City Council the 14th day of December, 2015, and signed by me in open session in authentication of its passage this 14th day of December, 2015.

President _____ of the City Council

Approved by me this ____ day of _____, 2015.

Edward B. Murray, Mayor

Filed by me this 23rd day of December, 2015.

Monica Martinez Simmons, City Clerk

(Seal)

City of Seattle

Edward B. Murray, Mayor

Finance and Administrative Services

Fred Podesta, Director

Applicant: City of Seattle Department of Finance and Administrative Services	Page: 1 of 4 Publication: 5/26/2017	Revises: Version published on 12/29/16 Effective: 5/26/2017
Director's Rule: FHDR-1, Qualifying Driver and Lists of Qualifying Drivers	Code and Section Reference: SMC 6.310.110, .735.D and .735.E Type of Rule: Code Interpretation Ordinance Authority: SMC 6.310.735.M.1.a	
Approved: Fred Podesta Fred Podesta, Director 5/25/2017 Date		

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http://www.seattle.gov/FAS

City of Seattle Rules for For-Hire Drivers

Rule FHDR-1, Qualifying Driver and Lists of Qualifying Drivers
(SMC 6.310.110, .735.D and .735.E)

Introduction
The following Rule establishes the conditions that define a Qualifying Driver as authorized by the Seattle Municipal Code (SMC).

In adopting the Rule, the Director has considered the available data regarding trips by for-hire drivers, discussions with and survey responses from drivers, standards established by other jurisdictions for granting persons the right to vote and to be represented in negotiations pertaining to the terms and conditions of employment and the factors set forth in the SMC, and has established conditions that indicate that a driver's work for a Driver Coordinator is significant enough to affect the safety and reliability of for-hire transportation in that the driver has a sufficient stake in and knowledge of conditions that affect the safety and reliability of that Driver Coordinator's for-hire transportation services.

Qualifying Driver
A qualifying driver is a for-hire driver licensed under the SMC who meets the following conditions:

- Was hired by or began contracting with, partnering with or maintaining a contractual relationship with a particular Driver Coordinator at least 90 days prior to the commencement date;[1] and
- Drove at least 52 trips originating or ending within the Seattle city limits for a particular Driver Coordinator during any three-month period in the 12 months preceding the commencement date. A trip is defined as transporting a passenger from one place to another for compensation.
    - Any driver who is an active member of the U.S. military and could not provide trips because he/she was deployed on a military assignment outside of the greater Seattle area will qualify if he/she drove at least 52 trips originating or ending within the Seattle city limits for a particular Driver Coordinator during any three-month period in the 24 months preceding the commencement date. A trip is defined as transporting a passenger from one place to another for compensation. The driver must provide documentation corroborating the deployment and trips driven to the Director for inspection and to confirm qualification.

The City recognizes that a driver may drive for multiple Driver Coordinators and may be a qualifying driver for more than one Driver Coordinator. For purposes of determining whether a driver is a "qualifying driver" under the provisions of the SMC, a Driver

[1] The initial commencement date is January 17, 2017. Ninety days prior to the initial commencement date is October 19, 2016 and 12 months prior is January 17, 2016. Subsequent commencement dates will be promulgated by the Director pursuant to the SMC.

Coordinator should count only the trips driven by the driver for that particular Driver Coordinator.

Nothing in this Rule or in the SMC will be construed to require or authorize a Driver Coordinator to ask drivers to identify themselves as driving for another Driver Coordinator.

Lists of Qualifying Drivers Created by Driver Coordinators

Within 14 calendar days of its designation as a Qualified Driver Representative (QDR), or within 58 days of the commencement date if the QDR has previously been designated, a QDR will notify a Driver Coordinator of its intent to represent those drivers.[2] Driver Coordinators that hire, contract with or partner with 50 or more non-employee for-hire drivers for the purpose of assisting them with, or facilitating them in, providing for-hire services to the public (which may include taxicab associations, for-hire vehicle companies, TNCs or other entities) will then create qualifying driver lists (driver list) based on the conditions established by this Rule. The accuracy of a driver list's content is the responsibility of the Driver Coordinator creating it, not the City's responsibility.

A driver list will include all drivers who satisfy the specified conditions above. After a QDR gives a Driver Coordinator notice as specified in the SMC, a Driver Coordinator will produce and transmit the list of qualifying drivers to the QDR within 75 calendar days of the commencement date. That same list will later be used to ascertain whether a QDR has obtained statements of interest from a majority of qualifying drivers.

A Driver Coordinator will notify the City by e-mail (DriverRepresentation@seattle.gov) of the date the driver list was transmitted to a QDR. A QDR will notify the City by e-mail (DriverRepresentation@seattle.gov) of the date the driver list was received from a Driver Coordinator. The notifications will not include a copy of the driver list.

At a minimum, a driver list will include the following information for all non-employee qualifying drivers working for a Driver Coordinator:

1. Name (last name, first name and middle initial)
2. Mailing address
3. E-mail address (if available)
4. Phone number (if available)
5. Valid for-hire driver license/permit number (issued by King County/City of Seattle)[3]

[2] Per the SMC, a Driver Coordinator will not be subject to the requirements of a driver representation effort associated with a specified commencement date more than once in any 12-month period. The 12-month period begins on the date a Driver Coordinator transmits a list of its qualifying drivers to any QDR. However, if the FAS Director determines that a Driver Coordinator has willfully delayed transmittal of the list in violation of the SMC, then the FAS Director has discretion to specify that the 12-month period begins on the date that the list was due. For any specified commencement date, however, more than one QDR may attempt to organize the drivers of the same Driver Coordinator.

[3] For purposes of creating a list of qualifying drivers, a driver must possess a valid (i.e., unexpired or, if expired, expired for no more than 60 days) for-hire driver license/permit on the date the list is created. Sixty days is given as a grace period while an expired license/permit goes through the renewal process.

A Driver Coordinator will make a driver list available in an electronic format such as an Excel spreadsheet that allows a QDR to read, sort and organize the driver information/data supplied. A scanned document presented in the Portable Document Format (PDF), for example, does not meet the standard under this Rule. A Driver Coordinator will devise and employ a way to securely transfer driver lists to a QDR and to secure, through password protection or other means, access to those lists.

Per the SMC, a QDR will use driver lists solely for the purpose of contacting drivers to solicit their interest in being represented by the QDR. A QDR may not sell, publish or otherwise disseminate driver contact information outside the QDR, the QDR's employees and the QDR's agents. A QDR must take all reasonable steps to ensure that another party does not misuse the list. A QDR will be held responsible if another party misuses the list provided by a Driver Coordinator to that QDR. Violations of this provision by a QDR and/or another party will be addressed through the enforcement processes specified in the SMC.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition
Office of Policy Planning
Northwest Region

February 8, 2002

By Facsimile and First Class Mail

The Honorable Brad Benson
Ranking Minority Member
Financial Institutions & Insurance Committee
State of Washington House of Representatives
412 John L. O'Brien Building
Olympia, WA 98504-0600

Re: Washington House Bill 2360

Dear Representative Benson:

We are pleased to provide comments on House Bill 2360 and the four specific issues you raised.[1] As you note, House Bill 2360 seeks to allow physicians and other health care providers to engage in collective bargaining with health plans over a variety of contract terms and conditions, including the fees they would receive for their services.

The Federal Trade Commission has opposed a federal antitrust exemption for collective bargaining between providers and health plans.[2] The Commission concluded that an exemption would not ensure better care for patients, and that permitting doctors to join together and exert their collective market power threatens to increase fees, raise insurance premiums, and diminish access to health care. The FTC staff has expressed similar concerns in commenting on collective bargaining bills introduced in Alaska, the District of Columbia, and Texas.[3]

In seeking to immunize provider collective bargaining over fees, House Bill 2360 similarly poses

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[1] This letter expresses the views of the Bureau of Competition, the Office of Policy Planning, and the Northwest Region of the Federal Trade Commission. The letter does not necessarily represent the views of the Commission or any individual Commissioner. The Commission has, however, voted to authorize the Bureau of Competition, the Office of Policy Planning, and the Northwest Region to submit these comments.

[2] See Testimony of Federal Trade Commission before the House Judiciary Committee on H.R. 1304 (June 22, 1999) *available at* <http://www.ftc.gov/os/1999/ 9906/ healthcaretestimony. htm>.

[3] See Letter to the Alaska House of Representatives on Senate Bill 37 (Jan. 18, 2002) *available at* <http://www.ftc.gov/be/v020003.htm >; Letter to the District of Columbia Office of Corporation Counsel on Bill No. 13-333 (Oct. 29, 1999) *available at* <http://www.ftc. gov/be/rigsby.htm>; Letter to the Texas Legislature on Senate Bill 1468 (May 13, 1999) *available at* <http://www.ftc. gov/be/v990009.htm>.

risks of substantial consumer harm. Although the legislative findings suggest that the Bill does not contemplate conduct that would otherwise constitute a *per se* violation of the antitrust laws – such as agreements between competing physicians "to fix the price of their services" – that is, in fact, precisely the sort of conduct that it expressly authorizes.[4] Moreover, measured against the proposed federal legislation and other bills, House Bill 2360 appears to increase the risk of consumer injury significantly because it *requires* health plans to bargain with providers. This requirement would make it more difficult for plans to resist provider pressures for higher fees. Furthermore, the Bill would expose health plans, but not providers, to severe punishments for a failure to bargain in good faith. Health plans alone could lose their licences, be enjoined from doing business in the state, and incur substantial fines. The Bill asserts that the "requirement of good faith negotiations is a . . . proven process for inducing parties . . . to resolve their differences with accommodations resulting in their mutual benefit."[5] While the process the Bill envisions may work to the "mutual benefit" of the bargaining parties, that process is likely to substantially harm consumers. Accommodations made by health plans to benefit providers are likely to significantly increase health care costs to consumers.

The specific issues you asked us to address raise additional questions about House Bill 2360. As we explain below:

- House Bill 2360 seeks to immunize conduct that the federal antitrust laws regard as illegal price fixing. Such conduct raises the most significant competitive concerns.

- The Bill is not needed to allow providers to exchange information among themselves in circumstances where the exchange is unlikely to harm consumers. Such conduct is competitively neutral or beneficial, and is not illegal under the antitrust laws.

- The Bill – despite its intended effect – may not confer federal antitrust immunity because fee agreements between health insurers and providers are not entitled to immunity under the McCarran-Ferguson Act, the federal statute that immunizes, under certain circumstances, the "business of insurance."

- Finally, House Bill 2360 cannot be said to be likely to provide federal antitrust immunity under the "state action" doctrine because it may not provide sufficient "active supervision" of the anticompetitive conduct at issue.

I. Physician Collective Bargaining Will Likely Harm Consumers

[4] For example, RCW 43.72.310(2)(c) provides that the Department of Health "[s]hall adopt rules permitting health care providers within the service area of a plan to collectively negotiate *all* terms and conditions of contracts, *including reimbursement for provider services*, with a health carrier" (emphasis added).

[5] RCW 43.72.300(1).

The Commission's testimony before Congress regarding a proposed federal antitrust exemption for physician collective bargaining details the predictable dangers such bargaining would create for consumers:[6]

> Without antitrust enforcement to block price fixing and boycotts designed to increase health plan payments to health care professionals, we can expect prices for health care services to rise substantially. Health plans would have few alternatives to accepting the collective demands of health care providers for higher fees. The effect of the bill . . . can be expected to extend to various parties, and in various ways, throughout the health care system:
>
> - Consumers and employers would face higher prices for health insurance coverage.
> - Consumers also would face higher out-of-pocket expenses as copayments and other unreimbursed expenses increased.
> - Consumers might face a reduction in benefits as costs increased . . .
> - State and local governments would incur higher costs to provide health benefits to their employees.
> - State Medicaid programs attempting to use managed care strategies to serve their beneficiaries could have to increase their budgets, cut optional benefits, or reduce the number of beneficiaries covered.
> - State and local programs providing care for the uninsured would be further strained, because, by making health insurance coverage more costly, the bill threatens to increase the already sizable portion of the population that is uninsured.
>
> These widespread effects are not simply theoretical possibilities. The record of antitrust law enforcement sets forth the impact of collective "negotiations" on the public. For example, as described in the Commission's complaints, collective bargaining by anesthesiologists in Rochester, New York, and by obstetricians in Jacksonville, Florida, forced health plans to raise their reimbursement, and the result was increased premiums for the HMOs' subscribers.[7] Other cases have challenged actions by associations of pharmacists who succeeded in forcing state and local governments to raise reimbursement levels paid under

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[6] FTC Testimony on H.R. 1304, supra note 2, at 5 (footnotes 7-9 in original).

[7] Southbank IPA, Inc., 114 F.T.C. 783 (1991) (consent order); Rochester Anesthesiologists, 110 F.T.C. 175 (1988) (consent order).

> their employee prescription drug plans.[8] In one such case, an administrative law judge found that the collective fee demands of pharmacists cost the State of New York an estimated $7 million.[9]

The Commission's testimony also examined two arguments frequently advanced to justify physician collective bargaining – that it would: (1) increase patients' quality of care, and (2) allow physicians to negotiate on a more "level playing field." The Commission pointed out that physicians do not need to engage in joint fee negotiation to improve quality of care; they can work to improve care directly.[10] Furthermore, providers can communicate the results of their efforts to health plans without violating existing law:

> [T]he antitrust laws do not prohibit medical societies and other groups from engaging in collective discussions with health plans regarding issues of patient care. Among other things, physicians may collectively explain to a health plan why they think a particular policy or practice is medically unsound, and may present medical or scientific data to support their views . . . . The Commission has never brought a case based on physicians' collective advocacy with a health plan on an issue involving patient care.[11]

The Commission also noted that a collective bargaining exemption would not level the playing field, but would instead favor physicians to the detriment of consumers:

> Arguments that consumers would not be harmed by an antitrust exemption for collective bargaining by independent health care professionals appear to rest on assertions that the [federal] bill would balance the bargaining power between health care professionals and health plans. These assertions, however, are incorrect. The bill would permit doctors to create monopolies. On the health plan side of the ledger, the evidence does not support the suggestion that most (or even many) areas have only one or two health plans.[12]

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[8] See, e.g., Baltimore Metropolitan Pharmaceutical Assoc., Inc., and Maryland Pharmacists Assoc., 117 F.T.C. 95 (1994) (consent order); Pharmaceutical Society of the State of New York, Inc., 113 F.T.C. 661 (1990) (consent order).

[9] See Peterson Drug Company, 115 F.T.C. 492, 540 (1992). See also Pharmaceutical Society of the State of New York, Inc., 113 F.T.C. 661 (1990) (consent order).

[10] As the Commission and others have noted, there are a variety of ways of improving quality of care (e.g., through evaluation of existing procedures, dissemination of best practices, and development of quality ratings for providers and health plans).

[11] FTC Testimony on H.R. 1304, supra note 2, at 7.

[12] Id. at 6.

II. Responses to Specific Questions Regarding HB 2360

Our responses to the specific issues you raised identify additional questions about House Bill 2360. In particular, our response to your "state action" question indicates that the Bill is insufficient either to establish this exemption or to protect consumers from the dangers of provider collective bargaining described above.

1. Would the Bill authorize conduct that is considered to be illegal price fixing under the federal antitrust laws?

Yes. Since the Bill would allow competing providers to agree on the prices they would accept for their services, it would authorize *per se* illegal price fixing. The Health Care Guidelines issued by the Federal Trade Commission and the U.S. Department of Justice address this issue directly.[13] In Example 3 of Statement 8, competing physicians form a hypothetical independent practice association ("IPA") to "combat the power" of managed care plans by negotiating with them collectively rather than individually. The IPA involves no integration that is likely to result in significant efficiencies (*i.e.*, no financial risk-sharing among the members; no indicia of clinical integration, such as joint development of protocols for improving care; *etc.*). This combination – collective negotiation over price and no significant efficiency-enhancing integration – means that "the physicians' agreement to bargain through the joint venture will be treated as *per se* illegal price fixing."[14] In short, collective bargaining over prices amounts to *per se* illegal price fixing.[15]

2. Do the current antitrust laws, as interpreted by the Federal Trade Commission, prohibit the exchange of information among competing health care providers in situations where such exchange of information is unlikely to harm consumers?

No. The antitrust laws do not prohibit information exchanges that are unlikely to harm consumers. The Supreme Court has determined that information exchanges among competitors must be evaluated on a case-by-case basis to determine whether their benefits outweigh any potential anticompetitive effects.[16] In an assessment of the net effect of a particular exchange, the decisive issue

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[13] See Statements of Antitrust Enforcement Policy in Health Care, 4 Trade Reg. Rep. (CCH) ¶ 13,153 (Aug. 1996) ("Health Care Guidelines") *available at* <http://www.ftc.gov/ reports/ hlth3s.htm>.

[14] Example 3, Statement 8, Health Care Guidelines, supra note 13.

[15] Federal Trade Commission v. Superior Court Trial Lawyers Association, 493 U.S. 411, 422 (1990).

[16] See United States v. United States Gypsum Co., 438 U.S. 422 (1978).

is the impact on consumer welfare.[17] Thus, if a plaintiff cannot show that an information exchange among competing providers is likely to injure consumers, the practice would not be held unlawful.

The Health Care Guidelines illustrate the law's approach to information exchanges. Statement 6 of the Guidelines notes that information exchanges among competing providers "can have significant benefits for health care consumers."[18] In general, therefore, the agencies will evaluate information exchanges by considering their benefits as well as their potential for anticompetitive effects. The Guidelines even identify circumstances in which an information exchange is so unlikely to harm consumers that it falls within an "antitrust safety zone."[19] Accordingly, passage of House Bill 2360 is not necessary to insulate from antitrust liability information exchanges that are unlikely to harm consumers.

3. Are agreements between health carriers and health care providers regarding the provision of services to subscribers of the health carriers within the "business of insurance" as defined in the McCarran-Ferguson Act (codified at 15 U.S.C. §§ 1011-1015)?

Although McCarran-Ferguson protects certain types of activities by insurers (to the extent such activity is regulated by state law), the Supreme Court has held that an insurance company's agreements with providers on the fees they will be paid are not "the business of insurance" and thus are not covered by the McCarran-Ferguson immunity.[20] This conclusion would not be altered by House Bill 2360's determination to "regulat[e] the procedures under which health carriers negotiate the terms and

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[17] See Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription'"); General Leaseways, Inc. v. National Truck Leasing Assn., 744 F.2d 588, 596 (7th Cir. 1984) (rule of reason inquiry ultimately "proceeds to the question whether the challenged practice was likely – with due consideration for any justificatory evidence presented by the defendant – to help rather than hurt competition, viewed not as rivalry as such but as the allocation of resources that maximizes consumer welfare").

[18] Statement 6, Health Care Guidelines, supra note 13.

[19] Specifically, the Health Care Guidelines state that, absent extraordinary circumstances, the antitrust enforcement agencies will not challenge provider participation in written surveys of prices for healthcare services or salaries of healthcare personnel if: (1) the survey is managed by a third party; (2) the information provided by participants is based on data more than three months old; and (3) at least five providers report data on each statistic, with no provider's data representing more than 25%, and all data are disseminated in aggregated form. Id.

[20] FTC Testimony on H.R. 1304, supra note 2, at 6 (citing Group Life & Health Insurance Co. v. Royal Drug, 440 U.S. 205 (1979)). See also Ratino v. Medical Serv., 718 F.2d 1260 (4th Cir. 1983) (Blue Shield's "usual, customary and reasonable" insurance plan involving provider agreements is not the business of insurance).

conditions of contracts for health care provider services."[21] State regulation of insurer-provider contracts would satisfy the second element of the McCarran-Ferguson exemption, the "regulated by state law" element. But it would not change the result under the first element – "the business of insurance" – which depends on specific business or economic characteristics, not the presence or absence of state regulation.[22]

4. Is the Bill likely to be effective in creating immunity from the federal antitrust laws, under the "state action doctrine," for collective bargaining by competing health care providers (*e.g.*, does this bill provide for "active supervision" by the State that is sufficient to satisfy the requirements of the state action doctrine as set forth by the United States Supreme Court)?

Under the judicially-created "state action" doctrine, a state may override the national policy favoring competition only where it expressly decides to govern aspects of its economy by state regulation rather than market forces. A state may not simply authorize private parties to violate the antitrust laws.[23] Instead, it must actually substitute its own active control for the discipline that competition would otherwise provide. To that end, the state legislature must clearly articulate a policy to displace competition with regulation, and state officials must actively supervise the private anticompetitive conduct.[24] The critical question here is whether the collective bargaining over fees authorized by the Bill will be subject to sufficient state supervision.

In order for state supervision to be adequate for state action purposes, state officials must "exercise ultimate control over the challenged anticompetitive conduct."[25] The Supreme Court has made it clear that the active supervision standard is a rigorous one, designed to ensure that an anticompetitive act of a private party is shielded from antitrust liability only when "the State effectively has made [the challenged] conduct its own."[26] Active supervision requires that the state exercise "sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private

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[21] RCW 43.72.300(2).

[22] See ABA Section of Antitrust Law, Antitrust Law Developments 1295-96 (4th ed. 1997) ("business of insurance" determined by three criteria: "(1) whether the practice has the effect of spreading or transferring a policyholder's risk, (2) whether the practice is an integral part of the policy relationship between insurer and the insured, and (3) whether the practice is limited to entities within the insurance industry").

[23] See Parker v. Brown, 317 U.S. 341, 351 (1943) ("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").

[24] See California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 92 (1980).

[25] Patrick v. Burget, 486 U.S. 94, 101 (1988).

[26] Id. at 106.

parties."[27]

Given the indeterminate nature of the supervisory regime created by House Bill 2360, it is not at all clear that it would satisfy the Supreme Court's rigorous standard. In particular, there is no provision in the Bill to ensure that the relevant state agencies receive sufficient information to be able to exercise "sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention."[28]

For example, both the Office of the Attorney General ("OAG") and the Department of Health ("DOH") are expected to determine if specific provider conduct is authorized by the Bill. OAG makes this assessment based on a request for informal opinion,[29] while DOH reviews a petition for approval of conduct.[30] Both are written documents prepared unilaterally by providers. But the Bill provides no guidance regarding the types of information that either document is required to contain. The annual progress reports to be filed by successful petitioners suffer from a similar defect.[31] To be sure, the Bill does not suggest that the OAG and DOH will lack authority to require the submission of a full factual record through regulatory provisions (as they have done in other contexts),[32] but neither does the Bill purport to provide guidance as to what the contours of those regulations should be. Thus, the Bill fails to specify any independent basis upon which the state would "effectively . . . ma[k]e [the challenged] conduct its own."

In some regulatory contexts, state agencies might be able to rely on interested non-parties, such as advocacy groups and consumers, to supply any missing information. House Bill 2360, however, does not necessarily provide an opportunity for notice and comment by the public, leaving it instead to OAG and DOH to decide whether to allow such input.

Even if the agencies were ultimately provided with adequate information, the lack of statutory guidance regarding the manner in which OAG and DOH should exercise their supervisory authority potentially creates another active supervision problem. For example, the Bill merely provides that OAG shall issue a legal opinion within 30 days of receipt of a request.[33] As OAG itself has noted, the

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[27] Federal Trade Commission v. Ticor Title Insurance Co., 504 U.S. 621, 634-35 (1992).

[28] Id. at 634.

[29] RCW 43.72.310(1).

[30] RCW 43.72.310(3).

[31] RCW 43.72.310(6).

[32] Cf. WAC 246-25-110 - 131, issued under RCW 43.72.

[33] RCW 43.72.310(1).

Bill does not provide sufficient guidance regarding the factors that OAG can, or should, consider when determining whether to approve particular provider conduct.[34] The manner in which DOH should exercise its statutory authority is similarly indefinite,[35] as are the "annual or more frequent reviews" DOH is expected to provide with OAG's "assistance."[36]

Even if the reviewing agencies are able to overcome these informational obstacles, it is unclear whether House Bill 2360 would survive court scrutiny. In order to constitute active supervision, state agencies must "have *and exercise* power to review" the challenged anticompetitive conduct.[37] Thus, the scope of actual agency conduct under the bill would be highly relevant to the state action inquiry. Currently, the DOH appears to have no formal program for overseeing collective provider conduct and no budget for such a function. Under the existing state antitrust immunity statute,[38] the OAG has conducted several investigations of proposed provider alliances and similar conduct in order to advise DOH. But as presently structured and funded, neither DOH nor OAG may be able to actively supervise the broad range of collective activity the Bill would authorize. And if the state regulatory scheme does not satisfy the requirements of the state action defense, private parties who engage in collective negotiation of fees will run the risk of potentially significant financial liability for their actions.

House Bill 2360 also raises a broader policy issue: how much costly regulatory oversight is the state willing to undertake to ensure that consumers are not harmed by the price fixing the Bill would permit? Regulations issued under the existing immunity statute do not allow providers to engage in collective negotiation of prices.[39] If Washington reversed that determination and authorized provider price fixing, but still wished to protect consumers from the predictable consequences of such price fixing, it would have to engage in price regulation. Yet as the experience of public utility commissions indicates, price regulation can be a complex, time-consuming, and expensive effort, requiring attention to numerous cost, risk, quality, and service issues with no assurance of achieving the correct result. If the state decides to replace the market with collective determination of prices, protecting consumers

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[34] See Letter of Hon. Christine O. Gregoire to Washington Legislature on SB 6642/HB 2360 (Feb. 4, 2002) at 3. For example, if a group of providers were to negotiate a 20% fee increase after the legislation was passed, how much would the providers have to increase their services or improve their quality of care to justify the higher fees? The Bill does not say. It lists several general factors the agencies must consider in evaluating a price increase, but it does not explain how much weight to give them.

[35] Rather than setting forth clear standards, the Bill simply provides that such standards will be articulated through subsequent DOH rulemaking. See RCW 43.72.310(2)(b)-(c).

[36] RCW 43.72.310(6).

[37] Patrick, 486 U.S. at 101 (emphasis added).

[38] RCW 43.72.

[39] WAC § 246-25-040 (finding that the costs of collective fee negotiations far outweigh any possible benefits).

and the public interest may require such costly and uncertain regulation.

* * *

We hope you find these comments helpful. If you have additional questions, please contact Jeff Brennan at (202) 326-3688 or John Kirkwood at (206) 220-4484. Our view, in short, is that House Bill 2360 poses substantial risks for residents of the State of Washington. The Bill would authorize provider price fixing and thus threatens consumers with higher prices and restricted access to health care – without compensating benefits. In addition, if the state did not engage in sufficient supervision to exercise genuinely independent control over collectively bargained fees, the Bill would fail to confer "state action" immunity and would expose providers who engage in collective bargaining to a significant risk of liability and damages.

Sincerely,

Joseph J. Simons, Director
Jeffrey W. Brennan, Assistant Director
Bureau of Competition

R. Ted Cruz, Director
John T. Delacourt, Attorney
Office of Policy Planning

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October 16, 2002

Via Facsimile and First Class Mail

The Honorable Dennis Stapleton
Chairman, Insurance Committee
Ohio House of Representatives
77 South High Street, 13th Floor
Columbus, OH 43266-0603

Re: *Ohio House Bill 325*

Dear Representative Stapleton:

This letter[(1)] responds to your request for comment on House Bill 325,[(2)] a bill to permit competing health care providers to engage in collective bargaining with health plans over fees and other contract terms. The Commission has opposed federal legislation that would create an antitrust exemption for physician collective bargaining,[(3)] and the Commission staff has expressed concerns about similar bills before state legislatures.[(4)] Such an exemption, the Commission has stated, likely will raise health care costs and reduce access to care, without ensuring better care for patients. In our judgment, House Bill 325 raises similar concerns.

In addition, it is unlikely that House Bill 325 would immunize health care providers from liability for conduct that violates the federal antitrust laws. State economic regulation can immunize private parties from federal antitrust liability, but only where it satisfies the requirements of the "state action" doctrine. In this case, the level of governmental involvement called for in the bill falls far short of the "active state supervision" that the Supreme Court has required to displace federal antitrust law. Although the bill provides for review of both collective negotiations and collectively-negotiated contracts by the state Attorney General, it does not provide the Attorney General with sufficient information, sufficiently clear standards, or sufficient time to exercise "independent judgment and control" over physician collective bargaining matters. Furthermore, the bill requires a written opinion only when the Attorney General denies a petition to negotiate or adopt collectively negotiated terms in spite of the fact that, from the perspective of most consumers, this may well be a less troubling result than approval of a petition, which constitutes authorization to depart from competitive market forces.

I. An Antitrust Exemption for Health Care Provider Collective Bargaining Would Harm Consumers

The opposition of the Commission to antitrust exemptions for physician collective bargaining is based on two core concerns. First, an antitrust exemption will authorize physician price fixing, which is likely to raise costs and reduce consumer access to care. Second, an antitrust exemption is *not* likely to improve the quality of care. Other approaches are available that would improve quality and protect consumers, without sacrificing benefits of competition.[(5)]

A. An Exemption Will Likely Raise Costs and Reduce Access

On its face, House Bill 325 authorizes collective physician conduct that would constitute *per se* price fixing under the federal antitrust laws. The Health Care Statements issued by the Federal Trade

Commission and the U.S. Department of Justice address this issue directly.[6] In Example 3 of Statement 8, competing physicians form a hypothetical independent practice association ("IPA") to "combat the power" of managed care plans by negotiating with them collectively rather than individually. The IPA involves no integration that is likely to result in significant efficiencies (such as financial risk-sharing or clinical integration). This combination - collective negotiation over price and no significant efficiency-enhancing integration - means that "the physicians' agreement to bargain through the joint venture will be treated as *per se* illegal price fixing."[7]

There is widespread agreement among antitrust authorities that this type of naked horizontal price-fixing is among the most serious of competitive concerns, as such conduct predictably and consistently results in substantial consumer harm. As the Commission observed in its testimony before Congress opposing a federal exemption for physician collective bargaining:

Without antitrust enforcement to block price fixing and boycotts designed to increase health plan payments to health care professionals, we can expect prices for health care services to rise substantially. Health plans would have few alternatives to accepting the collective demands of health care providers for higher fees. The effect of the bill . . . can be expected to extend to various parties, and in various ways, throughout the health care system.[8]

The affected parties would likely include consumers, who would be faced with higher insurance premiums and co-payments, as well as their employers. They also likely would include federal, state, and local governments, which would be forced to increase their health care budgets, cut benefits, or reduce the number of beneficiaries covered. Finally the affected parties would likely include the uninsured. Increases in health care costs likely resulting from physician collective bargaining would be expected to increase the number of individuals in this category and strain the resources of both the public and private entities that currently provide for their needs.

The consumer harm likely to result from physician collective bargaining is not merely a hypothetical concern. The Commission's experience investigating numerous cases of collective bargaining by competing health care providers has demonstrated that, in practice, such conduct can have a substantial negative impact on the public. For example, collective fee demands by pharmacists in the State of New York cost the state an estimated $7 million in increased health benefits expenditures for state employees.[9] In other cases, the Commission accepted consent orders settling charges that physician collective bargaining forced health plans to raise their reimbursement rates[10] - with the attendant risk of increases in premiums for policy holders - and state and local governments to raise the reimbursement levels paid under their employee prescription drug plans.[11]

In spite of these significant consumer harms, proponents of physician collective bargaining exemptions frequently argue that they are necessary to "level the playing field" between physicians and health plans. This argument, however, presupposes that physicians are at the mercy of monopsony health plans. Even were it the case that physicians were faced with monopsony health plans,[12] attempts to counterbalance that monopsony power with a physician cartel would *not* be likely to benefit consumers. If a health plan did, in fact, possess market power, health care consumers would be doubly harmed by physician collective bargaining, as they would be forced to pay any monopoly mark-up charged by that health plan *on top of* the elevated fees charged by the physician cartel. Without antitrust enforcement to block such price fixing, prices for health care services can be expected to rise substantially. Raising health care costs and making health insurance less affordable would threaten to increase the already substantial uninsured population, and thereby reduce access to health care services.

B. An Exemption Will Not Improve the Quality of Care

Even if physician collective bargaining exemptions are likely to raise costs, proponents of such exemptions argue that increased costs are nevertheless justified. These costs, they argue, are a small price to pay for improvements in the quality of care that may result from the types of communications that

simply would not be possible in the absence of an antitrust exemption. This argument is unpersuasive for two reasons.

First, discussions between physician groups and health plans are not illegal. Current antitrust law permits doctors to negotiate collectively with health plans in various circumstances in which consumers are likely to benefit. The Health Care Statements, for example, describe multiple, antitrust-compliant methods by which physicians may organize networks, and other joint arrangements, to deal collectively with health plans and other physicians.(13) These methods include physicians' use of professional societies and other groups jointly to provide information and express opinions to health plans.(14) As the Commission explained in its testimony before Congress:

[T]he antitrust laws do not prohibit medicals societies and other groups from engaging in collective discussions with health plans regarding issues of patient care. Among other things, physicians may collectively explain to a health plan why they think a particular policy or practice is medically unsound, and may present medical or scientific date to support their views.(15)

Second, in practice, physician collective bargaining has historically focused on physician *compensation*, rather than quality of care issues. This focus suggests that immunizing collective bargaining will impose costs without guaranteeing that patients' interests in quality care would be served. The Commission addressed this issue squarely in its congressional testimony as well, stating that:

Collective bargaining rights are designed to raise the incomes and improve working conditions of union members. The law protects the United Auto Workers' right to bargain for higher wages and better working conditions, but we do not rely on the UAW to bargain for safer cars. Congress addressed those concerns in other ways.(16)

Accordingly, blanket antitrust immunity for physician price fixing is not necessary to protect patient welfare.

II. House Bill 325

Like the other physician collective bargaining bills on which the Commission and Commission staff have commented, House Bill 325 would confer a broad authorization on competing health care providers to agree on the prices and other terms they will accept from health plans and to bargain jointly with plans to obtain these collectively-determined contract terms. While House Bill 325 differs from these bills in some respects, these differences do not eliminate the likelihood of substantial harm to consumers.

A. Minimum Threshold for Health Plan Market Power

House Bill 325 does not authorize physician collective bargaining in every instance, but rather limits bargaining over fees and fee-related matters to instances in which a health plan has "substantial market power over providers."(17) This market power screen, however, is unlikely to offer adequate protection to Ohio's health care consumers.(18)

The principal problem is that the concept of substantial market power used in the bill would perform no meaningful screening function. House Bill 325 provides that physicians may only engage in collective bargaining with a health plan regarding fees and fee-related matters after first demonstrating that the plan has "substantial market power." The bill further provides that a health plan has "substantial market power" if: (1) its market share exceeds 15 percent of health plan enrollees or 25,000 covered lives; or (2) the Attorney General determines that the plan's market power in the relevant area "significantly exceeds the countervailing market power of the providers acting individually." Neither definition represents "substantial market power" in the accepted legal or economic sense.

Market share can indicate market power if based upon a properly defined market, but even if the bill's categories correctly identified relevant markets, a 15 percent market share is not a level ordinarily presumed to constitute market power. Using 25,000 covered lives as the threshold is also problematic as, depending on the size of the market in question, this figure could represent substantially less than a 15 percent share. Furthermore, that a health plan will be deemed to have market power whenever its negotiating power significantly exceeds that of any given individual provider would make the limitation even less connected to any economically meaningful concept of market power. Indeed, it is likely that this provision could be used to justify collective fee setting in virtually all cases. As a result, although it purports to do otherwise, House Bill 325 would, in effect, authorize competing providers collectively to negotiate fees with health plans that lack market power.

B. Pre-Negotiation Physician Communications

House Bill 325 also attempts to shield consumers from the competitive harms resulting from physician collective bargaining by providing the state Attorney General with oversight of the negotiating process and collectively-bargained contract terms. The extent of this oversight is central to the state action analysis, and is discussed in further detail below.

As in the case of the market share screen, however, an initial problem with this protective mechanism is that it does not cover *all* conduct that requires oversight. Most notably, House Bill 325 allows physicians to agree on the fees that they will accept in their negotiations *before* they obtain the Attorney General's approval to undertake actual negotiations.[(19)] As a result, even if the health plan ultimately were deemed to lack substantial market power (making collective fee negotiations improper under the bill), the physicians already will have agreed on acceptable price terms. The likelihood that such an agreement on fees would spill over into individual negotiations on price terms is substantial.

C. Health Plan Opt-Out Power

Finally, House Bill 325 attempts to limit the anticompetitive impact of physician collective bargaining by preserving a health plan's power to opt-out of collective negotiations or collectively-negotiated terms. Nothing in the bill *requires* a health plan to participate in collective bargaining. A health plan may refuse to negotiate with a physician collective bargaining group and attempt to negotiate with its members individually. Also, the petition to the state Attorney General for approval of collectively-negotiated terms must be submitted jointly by the health plan and the physicians that are party to the contract.[(20)]

Once again, however, these provisions are not likely to offer substantial protection to Ohio's health care consumers. Although a health plan is not *required* to negotiate with a physician collective bargaining group, the economic pressure to do so is likely to be substantial. As the Commission has previously observed, collective negotiations can by their very nature convey an implicit threat that, if the health plan does not agree to terms acceptable to the physician group as a whole, it will be prevented from successfully negotiating agreements with the members of the group separately.[(21)] Furthermore, by immunizing agreements among competing physicians on the fees and other terms they will accept from health plans, the bill facilitates coordinated conduct - such as collusive refusals to deal - that, even though not immune, would be difficult to detect and prosecute. Notably, the bill does not address these concerns, as it only requires that the petition to the Attorney General for approval of collectively-bargained terms - a petition that will be filed *after* the physician group has had an opportunity to pressure the health plan - to be filed jointly. The petition to the Attorney General for permission to bargain collectively with a health plan in the first instance, in contrast, may be submitted by the physicians alone.[(22)]

III. State Action Immunity

The antitrust immunity that House Bill 325 is intended to confer can be effective only if there is adequate state supervision of the collective bargaining activities authorized by the statute. Under the judicially-created "state action" doctrine, states may override the national policy favoring competition and provide

that aspects of their economies will be governed by state regulation rather than market forces. States, however, may not simply authorize private parties to violate the antitrust laws.[23] Instead, a state must substitute its own control for that of the market. To that end, the state legislature must clearly articulate a policy to displace competition with regulation, and state officials must actively supervise the private anticompetitive conduct.[24] In House Bill 325, the Ohio legislature has articulated an intent to displace federal antitrust enforcement. The critical question is whether the bill establishes a regulatory scheme with sufficient state supervision to satisfy the second prong of the state action test.

In order for state supervision to be adequate for state action purposes, state officials must exercise "sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties."[25] Our review of the bill indicates that its proposed regulatory scheme is not adequate to confer antitrust immunity.

A. Attorney General Approval of Negotiations and Contract Terms

Although House Bill 325 provides that the Attorney General must approve bargaining groups before they commence negotiations and must approve contract terms, these provisions do not appear to confer the kind of authority needed to confer state action immunity. In assessing whether there is adequate state supervision of a price setting scheme, the question is whether the state has exercised sufficient "independent judgment and control" such that "the details of the rates or prices" can properly be attributed to the state rather than private parties.[26] Thus, the Supreme Court has held that where, as in the case of the procedure authorized by House Bill 325, "prices or rates are set as an initial matter by private parties, subject only to veto if the State chooses to exercise it, the party claiming immunity must show that state officials have undertaken the necessary steps to determine the specifics of the ratesetting scheme."[27]

1. *Lack of Clear Standards*

House Bill 325 does not provide the Attorney General with the means to exercise independent judgment and control over the details of price setting. For example, the bill fails to provide the Attorney General with clear standards to guide its decision to approve, or disapprove, a petition to negotiate or to adopt collectively-negotiated terms. The very nature and extent of the Attorney General's power under the bill to make such determination remains unclear. The Supreme Court has emphasized that active state supervision requires that state officials "have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy."[28] The bill sets no clear standard for the Attorney General's review of physician petitions. It provides only that the Attorney General shall not approve negotiations, or contract terms, that "prohibit or restrict the performance of health care services by the providers that are parties to the contract, which health care services are within the recognized scope of practice of that category of provider."[29] It is not clear what this provision is intended to mean, but it is the only standard contained in the bill.

The Supreme Court has made it clear that the active supervision standard is a rigorous one, designed to ensure that a private party's anticompetitive action is shielded from antitrust liability only when "the State has effectively made [the challenged] conduct its own."[30] In view of the highly limited examination of privately-set prices that the bill would authorize, it is unlikely that it would establish a sufficiently rigorous regulatory scheme to confer state action immunity.

2. *Limitations on Review*

In addition to failing to provide the Attorney General with sufficiently clear standards, House Bill 325 places strict limitations on the scope of the review, which further limit the Attorney General's ability to exercise independent judgment and control over the details of the physicians' private price setting.

a. Insufficient Information

For example, physicians petitioning for the permission to bargain collectively, or for approval of contract terms, are required to submit only basic identification and market share information, plus "such other data, information, and documents that the [petitioners] choose to submit."[(31)] In contrast, no provision grants the Attorney General the power independently to gather evidence or conduct hearings concerning the prices that result from the collective bargaining process, nor is there any mechanism by which to receive input from other physicians, affected health plans, or patients.

The limited nature of the state review is significant, because courts have rejected claims for state action immunity where state officials lacked the information necessary for a meaningful examination of rates.[(32)] In contrast, courts have found active state supervision of price setting arrangements where state officials' review included conducting hearings and providing a mechanism for complaining parties to challenge rates.[(33)]

b. Insufficient Time

House Bill 325 also imposes strict time limitations, allowing only 30 days for the Attorney General to review the facts and render a decision on a petition to negotiate or to adopt collectively-negotiated contract terms.[(34)] The time period is mandatory ("[t]he attorney general shall either approve or disapprove a petition . . . within thirty days") and there is no provision for extension. It is by no means clear that the Attorney General could complete the "pointed reexamination" required to immunize the underlying physician conduct in such a short time.

IV. Transparency

Finally, House Bill 325 requires a written explanation only when the Attorney General *denies* a petition to bargain collectively or disapproves collectively negotiated contract terms.[(35)] Notably, the bill contains no complementary provision requiring a written decision to *approve* a proposed contract. A written decision, expressly considering the potentially anticompetitive implications of a proposed contract and attempting to quantify the consumer impact and expected effect on consumer prices, would serve a number of salutary purposes. First, it would inform affected parties of the levels at which prices were being fixed, and so provide an opportunity for comment or challenge as to the appropriateness of those levels. Second, it would help inform the public of the likely impact of the proposed contract on their health care costs.

By requiring a written explanation only when permission is denied, House Bill 325 accomplishes neither of these objectives. In fact, from the perspective of most consumers, disapproval of these arrangements is likely to be the less troubling result. Disapproval indicates that market forces will continue to govern, whereas approval indicates that they will be temporarily suspended, with a potentially adverse impact on price and access. It is the latter situation - one that seeks to depart from the national policy favoring competition, rather than collaboration and price fixing among rivals - that more clearly warrants a written decision and is more properly subject to consumer scrutiny.

* * *

In summary, House Bill 325 poses a substantial risk of harm to Ohio citizens. By authorizing price fixing by health care providers, the bill is likely to increase costs and reduce access to care, without any assurance that the state's interest in promoting quality health care would be furthered. Moreover, the bill is unlikely to achieve its stated purpose of conferring state action immunity on provider collective bargaining, because the regulatory oversight provided is insufficient.

Parties claiming immunity under the state action doctrine bear the burden of establishing that they are entitled to such immunity. Thus, should the Ohio Legislature proceed with a collective bargaining bill, it will be important to ensure that the bill establishes a regulatory procedure that meets the rigorous requirements that the Supreme Court has established. Otherwise, providers relying on the bill's provisions

to provide antitrust immunity would risk exposure to potentially significant financial liability for their actions.

I hope you find these comments helpful. Should you have any additional questions, feel free to contact Jeffrey W. Brennan, Assistant Director for Health Care Products and Services, at 202-326-3688.

Sincerely,

Joseph J. Simons, Director
Jeffrey W. Brennan, Assistant Director
Bureau of Competition

R. Ted Cruz, Director
John T. Delacourt, Attorney
Office of Policy Planning

Endnotes:

1. This letter represents the views of the Federal Trade Commission's Bureau of Competition and Office of Policy Planning. It does not necessarily represent the views of the Commission or any individual Commissioner. The Commission, however, has voted to authorize the Bureau of Competition and the Office of Policy Planning to submit these comments.

2. H.B. 325, 124th Gen. Assem., Reg. Sess. (Ohio 2002) ("H.B. 325").

3. *See* Testimony of Federal Trade Commission before the House Judiciary Committee on H.R. 1304 (June 22, 1999) ("FTC Testimony on H.R. 1304"), *available at* <http://www.ftc.gov/os/1999/9906/healthcaretestimony.htm> (Attachment 1).

4. *See, e.g.,* Letter to the Washington House of Representatives on House Bill 2360 (Feb. 8, 2002), *available at* <http://www.ftc.gov/be/v020009.pdf> (Attachment 2); Letter to the Alaska House of Representatives on Senate Bill 37 (Jan. 18, 2002), *available at* <http://www.ftc.gov/be/v020003.htm> (Attachment 3); Letter to the District of Columbia Office of Corporation Counsel on Bill No. 13-333 (Oct. 29, 1999), *available at* <http://www.ftc. gov/be/rigsby.htm>; Letter to the Texas Legislature on Senate Bill 1468 (May 13, 1999), *available at* <http://www.ftc.gov/be/v990009.htm>.

5. *See* Staff Advisory Opinion Re MedSouth, Inc., reflected in letter dated February 19, 2002, from Jeffrey W. Brennan, Assistant Director, Bureau of Competition, to John J. Miles, Ober, Kaler, Grimes & Shriver, *available at* <http://www.ftc.gov/bc/adops/medsouth.htm>.

6. Statements of Antitrust Enforcement Policy in Health Care, 4 Trade Reg. Rep. (CCH) ¶ 13,153 (Aug. 1996) ("Health Care Statements"), *available at* <http://www.ftc.gov/ reports/ hlth3s.htm>.

7. *Id.* at Statement 8, Example 3.

8. FTC Testimony on H.R. 1304, *supra* note 3, at 5-6.

9. *See Peterson Drug Company*, 115 F.T.C. 492, 540 (1992). *See also Pharmaceutical Society of the State of New York, Inc.*, 113 F.T.C. 661 (1990) (consent order).

10. *See, e.g., R.T. Welter & Assocs., Inc. (Professionals in Women's Care),* Dkt. No. C-4063 (Oct. 8, 2002) (consent order), *available at* <http://www.ftc.gov/os/2002/10/piwcdo.pdf>; *System Health Providers,* File No. 011 0196 (Aug. 20, 2002) (proposed consent order accepted for placement on public record for comment), *available at* <http://www.ftc.gov/os/2002/08/shpdo.pdf>; *Aurora Associated Primary Care Physicians, L.L.C.,* Dkt. No. C-4055 (July 16, 2002) (consent order), *available at* <http://www.ftc.gov/os/2002/07/aurorado.pdf>; *Physician Integrated Services of Denver, Inc.,* Dkt. No. C-4054 (July 16, 2002) (consent order), *available at* <http://www.ftc.gov/os/2002/07/pisddo.pdf>; *Rochester Anesthesiologists*, 110 F.T.C. 175 (1988) (consent order).

11. *See, e.g., Baltimore Metropolitan Pharmaceutical Assoc., Inc. and Maryland Pharmacists Assoc.*, 117 F.T.C. 95 (1994) (consent order); *Pharmaceutical Society of the State of New York, Inc.*, 113 F.T.C. 661 (1990) (consent order).

12. *See also* FTC Testimony on H.R. 1304, *supra* note 3, at 7 (noting that available information covering the entire U.S. "does not support the suggestion that most (or even many) areas have only one or two health plans"). Furthermore, a health plan's ability to acquire and use monopoly power against providers is constrained by the antitrust laws. *See*, *e.g.*, *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979); and *United States v. Aetna, Inc.*, Civ. No. 3-99CV 1398-H (N. D. Tex. Dec. 7, 1999) (acquisition by a worldwide provider of

health, retirement, and financial services benefits of the health care business of a competing company allowed to proceed only after the acquirer agreed to divest its health maintenance organization businesses in Houston and Dallas-Forth Worth, Texas).

13. *See generally* Health Care Statements, *supra* note 6.

14. *See , e.g., Schachar v. American Academy of Opthalmology*, 870 F.2d 397 (7th Cir. 1989). *See also* Health Care Statements, *supra* note 6, at Statements 4-5.

15. FTC Testimony on H.R. 1304, *supra* note 3, at 7. *See also* Health Care Statements, *supra* note 6, at Statement 4 (creating an antitrust safety zone for health care providers' collective provision of non-fee-related information to health plans).

16. FTC Testimony on H.R. 1304, *supra* note 3, at 10.

17. H.B. 325 at § 1751.133(B).

18. An initial problem with this screening mechanism is that it does not apply to *all* price-related collective bargaining. For example, the bill does not require physicians to demonstrate "substantial" health plan market power before collectively negotiating "[t]he methods and timing of payments, including, but not limited to, interest and penalties for late payments." *Id.* at § 1751.132(I). Interest charges and penalties have a direct and significant impact on the ultimate price that providers receive for their services. Moreover, even collective bargaining over other, more clearly "non-price" terms can have a substantial effect on the ultimate price paid by consumers.

19. *Id.* at § 1751.135(C)-(D).

20. *Id.* at §§ 1751.137(A) and 3923.356(A).

21. *See Alaska Healthcare Network, Inc.*, Dkt. No. C-4007, (Apr. 25, 2001) (consent order) (In its complaint, the Commission alleged that "[p]ayors believed that they could not go around [Alaska Healthcare Network] to contract individually with physicians in Fairbanks, and thus that they had no alternative but to reach agreement with AHN or to give up their planned entry into Fairbanks."). *See also Michigan State Medical Society*, 101 F.T.C. 191, 296 n.32 (1983) ("the bargaining process itself carries the implication of adverse consequences if a satisfactory agreement cannot be obtained"); *Preferred Physicians Inc*., 110 F.T.C. 157, 160 (1988) (consent order) (threat of adverse consequences inherent in collective negotiations).

22. H.B. 325 at §§ 1751.136(A) and 3923.355(A).

23. *Parker v. Brown*, 317 U.S. 341, 351 (1943) ("[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or declaring that their action is lawful.").

24. *See California Retail Liquor Dealers Assn v. Midcal Aluminum, Inc.,* 445 U.S. 92 (1980). Although there are certain, limited exceptions to the active supervision requirement - *see Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985) (holding that the active supervision prong of *Midcal* does not apply to municipalities) - no such exception is applicable here.

25. *Federal Trade Commission v. Ticor Title Insurance Co.,* 504 U.S. 621, 634-35 (1992).

26. *Id.* at 634-35.

27. *Id*. at 638.

28. *Patrick v. Burget,* 486 U.S. 94, 100-101 (1988).

29. H.B. 325 at § 1751.137(B).

30. *Patrick*, 486 U.S. at 106.

31. H.B. 325 at §§ 1751.136(A)(9), 1751.137(A)(4), 3923.355(A)(9), and 3923.356(A)(4).

32. *See, e.g., Ticor Title Insurance Co. v. FTC*, 998 F.2d 1129, 1140 (3d Cir. 1993) (finding lack of state supervision where Connecticut never obtained necessary information that would have enabled it to assess the appropriateness of filed rates).

33. *See, e.g., TEC Cogeneration Inc. v. Florida Power & Light* Co., 76 F.3d 1560 (11th Cir. 1996), *amended in part,* 86 F.3d 1028 (11th Cir. 1996) (rates determined by Public Service Commission rulemaking and subject to extensive agency proceedings); DFW *Metro Line Services v. Southwestern Bell Telephone*, 988 F.2d 601, 606-607 (5th Cir. 1993) (Public Utility Commission conducted both broad-based ratemaking

proceedings and adjudications of specific complaints about the reasonableness of rates); *Lease Lights, Inc. v. Public Serv. Co.*, 849 F.2d 1330, 1334-35 (10th Cir 1988) (state held public hearings to assess the reasonableness of rates).

34. *See* H.B. 325 at §§ 1751.136(C), 1751.137(B), 3923.355(C), and 3923.356(B) ("The attorney general shall either approve or disapprove a petition . . . within thirty days.").

35. *Id.* at §§ 1751.136(C), 1751.137(C), 3923.355(C), and 3923.356(C).

Prepared Statement of
the Federal Trade Commission

Before the
Antitrust Task Force
of the Committee on the Judiciary
United States House of Representatives

Concerning
H.R. 971
"The Community Pharmacy Fairness Act of 2007"

October 18, 2007

Chairman Conyers, Ranking Member Keller, and Members of the Task Force, I am David Wales, Deputy Director of the Federal Trade Commission's Bureau of Competition. I appreciate the opportunity to present the Commission's views on H.R. 971, "The Community Pharmacy Fairness Act of 2007."[1] This bill would create an exemption from the antitrust laws to allow pharmacies to engage in collective bargaining to secure higher fees and more favorable contract terms from health plans. Simply put, although the Commission is sympathetic to the difficulties independent and family pharmacies face, the exemption threatens to raise prices to consumers, especially seniors, for much-needed medicine. It also threatens to increase costs to private employers who provide health care insurance to employees, potentially reducing those benefits, and to the federal government, which was projected to have paid over 30 percent of the costs of prescription drugs in 2006,[2] all without any assurance of higher quality care. For these reasons, the Commission opposes the legislation.

At various times since the advent of active antitrust enforcement in health care in the 1970s, health care providers have sought an antitrust exemption. In 1998 and 1999, then Chairman Robert Pitofsky testified on behalf of the Commission opposing similar bills that would have applied to all health care professionals.[3] Although those bills and others seeking

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[1] This written statement represents the views of the Federal Trade Commission. My oral presentation and responses to questions are my own and do not necessarily reflect the views of the Commission.

[2] Centers for Medicare and Medicaid Services, Office of the Actuary, Table 11, National Health Expenditures Projections 2006-2016 (2007), *available at* http://www.cms.hhs.gov/NationalHealthExpendData/downloads/proj2006.pdf.

[3] *See* Testimony of Robert Pitofsky, Chairman, Federal Trade Commission on H.R. 1304, the "Quality Health-Care Coalition Act of 1999" (June 22, 1999); Testimony of Robert Pitofsky, Chairman, Federal Trade Commission on H.R. 4277, the "Quality Health-Care Coalition Act of 1998" (July 29, 1998).

antitrust exemptions have differed in their scope or details, they all have sought some form of antitrust immunity for anti-competitive conduct that would tend to raise the prices of health care services. The Congressional Budget Office concluded, for example, that, if enacted, the 1999 exemption bill would significantly increase direct spending on pharmaceuticals both by private payers and under various government programs.[4] Recognizing that many American consumers already face difficult health care choices in the market, Congress wisely has declined to adopt such exemption proposals, which only would add to consumers' difficulties.

Just this year the Antitrust Modernization Commission ("AMC") – the body created by Congress to evaluate the application of our nation's antitrust laws – addressed the subject of antitrust exemptions. The AMC urged that Congress exercise caution, pointing out that antitrust exemptions typically "create economic benefits that flow to small, concentrated interest groups, while the costs of the exemption are widely dispersed, usually passed on to a large population of consumers through higher prices, reduced output, lower quality, and reduced innovation."[5] Accordingly, the AMC recommended that such statutory immunities be granted "rarely" and only where proponents have made a "clear case" that exempting otherwise unlawful conduct is "necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the U.S. economy in general."[6]

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[4] *See* notes 32 and 33, *infra*, and accompanying text.

[5] Antitrust Modernization Commission, Report and Recommendations (April 2007) at 335, *available at* http://www.amc.gov/report_recommendation/toc.htm.

[6] *Id.*

Is the proposed exemption for pharmacies in H.R. 971 one of those rare instances in which the societal benefits from dispensing with antitrust rules and the normal competitive process exceed the costs? In the Federal Trade Commission's view, it is not. The bill would immunize price-fixing and boycotts to enforce fee and other contract demands, conduct that would otherwise amount to blatant antitrust violations. Experience teaches that such conduct can be expected to increase health care costs, both directly through higher fees paid to pharmacies, and less directly by collective obstruction of cost containment strategies of purchasers. These higher costs would fall on consumers, employers – both public and private – who purchase pharmaceuticals and other products on behalf of their employees, and government assistance programs.

In addition, although the stated purpose of H.R. 971 is "[to] ensure and foster continued patient safety and quality of care," the Commission believes that the proposed exemption would not further these goals. Indeed, antitrust immunity not only would grant competing sellers a powerful weapon to obstruct innovative arrangements for the delivery and financing of pharmaceuticals, but also would dull competitive pressures that drive pharmacies to improve quality and efficiency in order to compete more effectively. Moreover, nothing in the bill requires that the collective bargaining it authorizes be directed at improving patient safety or quality, rather than merely increasing pharmacies' revenues from payers.

Health care markets are complex and dynamic, and pharmacy is no exception. The Commission is mindful of the challenges and economic pressures faced by small pharmacies, brought on by changes in the health care sector. Caring pharmacists across the nation work with dedication to serve the needs of patients, and we do not question the sincerity of those raising

concerns about the quality of patient care. But the solution to the concerns raised by pharmacies is not to give them immunity from the antitrust rules that guide our economy. If Congress concludes that the difficulties facing small pharmacies require a legislative solution, then one tailored to the specific problem is called for, not a sweeping antitrust exemption that may bring with it greater harm.

I. FTC Experience with Prescription Drug Competition

Competition in prescription drug markets occurs in the context of a complex web of relationships among physicians, patients, drug manufacturers, wholesalers, retail pharmacies, and various entities involved in pharmaceutical benefit programs, such as health insurers and health plans sponsored by employers, unions, and others. In addition, health plans often rely on pharmacy benefit managers (known in the industry as "PBMs"), which developed in response to the desire of purchasers to manage the cost and quality of the drug benefits provided to plan members.

The Commission's analysis of H.R. 971 is informed by a broad range of law enforcement activity, research, and regulatory analysis that it has undertaken as it seeks to protect competition and consumers in the pharmaceutical sector. The FTC has conducted numerous law enforcement

investigations, some resulting in challenges, involving drug manufacturers,[7] wholesalers,[8] and retailers.[9] In addition, Commission staff have done empirical studies and economic analyses of the pharmaceutical industry[10] and have analyzed competitive issues raised by proposed state and federal regulations affecting the industry.[11] Competition in the pharmaceutical sector was one of the subjects addressed in a series of joint FTC/Department of Justice hearings in 2003, and in an

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[7] *See, e.g.*, *Actavis Group/Abrika Pharmaceuticals, Inc.*, C-4190 (consent order issued May 18, 2007) (http://www.ftc.gov/os/caselist/0710063/index.shtm); *Watson Pharmaceuticals Inc./Andrx Corp.*, C-4172 (consent order issued December 6, 2006) (http://www.ftc.gov/os/caselist/0610139/index.htm); *Schering-Plough Corp.,* 2003 FTC LEXIS 187 (FTC Dec. 8, 2003), *vacated*, 402 F.3d 1056 (11th Cir. 2005), *cert. denied,* 126 S. Ct. 2929 (2006); *FTC v. Perrigo and Alpharma*, Civ. Action No. 1:04CV01397 (D.D.C. Aug. 12, 2004) (stipulated judgment); *FTC v. Mylan Labs., Inc. et al.*, 62 F. Supp. 2d 25 (D.D.C. 1999).

[8] *See, e.g.*, *Federal Trade Commission v. Cardinal Health, Inc. and Bergen Brunswig Corp./ Federal Trade Commission v. McKesson Corp. and Amerisource Health Corp*, 12 F. Supp. 2d 34 (D.D.C. 1998) (http://www.ftc.gov/os/caselist/ca98595ddc.htm).

[9] *See, e.g.*, *Rite Aid Corp./The Jean Coutu Group, Inc.*, C-4191 (consent order issued June 1, 2007) (http://www.ftc.gov/os/caselist/0610257/0610257.shtm); *CVS Corporation/Revco*, 124 F.T.C. 161 (1997) (consent order).

[10] *See, e,g.,* Federal Trade Commission, *Generic Drug Entry Prior to Patent Expiration: An FTC Study* (July 2002), *available at* http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf; David Reiffen & Michael R. Ward, *Generic Drug Industry Dynamics*, Bureau of Economics Working Paper No. 248 (Feb. 2002), *available at* http://www.ftc.gov/be/workpapers/industrydynamicsreiffenwp.pdf; Bureau of Economics Staff Report, Federal Trade Commission, *The Pharmaceutical Industry: A Discussion of Competitive and Antitrust Issues in an Environment of Change* (March 1999), *available at* http://www.ftc.gov/reports/pharmaceutical/drugrep.pdf.

[11] *See, e.g.*, FTC Staff Comment to the Hon. Nelie Pou Concerning New Jersey A.B. A-310 to Regulate Contractual Relationships Between Pharmacy Benefit Managers and Health Benefit Plans (April 2007), *available at* http://www.ftc.gov/opp/advocacy_date.shtm; Letter from FTC staff to Virginia Delegate Terry G. Kilgore (Oct. 2, 2006), *available at* http://www.ftc.gov/be/V060018.pdf; Comments of the FTC Staff Before the FDA In the Matter of Request for Comments on Agency Draft Guidance Documents Regarding Consumer-Directed Promotion (May 10, 2004), *available at* http://www.ftc.gov/os/2004/05/040512dtcdrugscomment.pdf.

ensuing report on health care competition law and policy issued by the agencies in 2004.[12] In 2005, the Commission reported the findings of an in-depth empirical study of PBM ownership of mail order pharmacies,[13] and the staff is currently conducting a study regarding the competitive effects of branded drug firms' use of "authorized generics."[14]

II. The Proposed Exemption

H.R. 971 would grant "independent pharmacies" broad antitrust immunity to band together and negotiate collectively with health plans.[15] Under the proposed law, groups of independent pharmacies would be treated like a bargaining unit of a labor union operating pursuant to federal labor laws. As we discuss below, this proposed exemption from the antitrust laws, like previous proposed antitrust exemptions, would permit price fixing, coercive boycotts, and other anti-competitive conduct likely to result in significant harm to consumers. Otherwise competing pharmacies could agree on the prices and other terms they would accept from health plans, and collectively refuse to deal with plans that did not accede to their contract demands.[16]

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[12] *See* Federal Trade Commission and Department of Justice, *Improving Health Care: a Dose of Competition*, Chapter 7 (July 2004), *available at* http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf.

[13] Federal Trade Commission, *Pharmacy Benefit Managers: Ownership of Mail-Order Pharmacies* (Aug. 2005), *available at* http://www.ftc.gov/reports/pharmbenefit05/050906pharmbenefitrpt.pdf.

[14] *See* 71 Fed. Reg. 16,779 (April 4, 2006); 72 Fed. Reg. 25,304 (May 4, 2007).

[15] An independent pharmacy covered by the bill is any pharmacy not owned or operated by a "publicly-traded company."

[16] Section 2 (e), entitled "Limitation on Exemption," states that the bill would not immunize any "agreement or otherwise unlawful conspiracy that excludes, limits the participation or reimbursement of, or otherwise limits the scope of services to be provided by any independent pharmacy . . . with respect to the performance of services that are within their scope

Antitrust law condemns such conduct because it harms competition and consumers – raising prices for health care services and health care insurance coverage, and reducing consumers' choices. Public and private programs that purchase or pay for pharmaceuticals for consumers are likely to have to pay more as a result of the anti-competitive conduct the bill would authorize, and those higher costs, in turn, could increase the costs or lessen the scope or availability of such programs for consumers.

H.R. 971 is modeled on a previous antitrust exemption bill that passed the House in 2000 and covered all health care professionals, including pharmacists. The Commission opposed that bill, as did the Department of Justice, the Antitrust Section of the American Bar Association, health care economists, employers, health plans, consumer groups, and even some health care providers. They did so on the grounds that the exemption would cause substantial harm to consumers, raising prices without any certainty of improved quality, and was not necessary to protect legitimate, pro-competitive cooperative arrangements. While H.R. 971 is limited to a single class of health care providers, it raises the same fundamental issues as the previous exemption bill. Moreover, if enacted, it would invite other health care providers to seek similar antitrust immunity.

Although styled as a labor exemption, the antitrust immunity that H.R. 971 would confer bears no relation to federal labor policy. The labor exemption is limited to the

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of practice as defined or permitted by relevant law or regulation." While it is unclear exactly what this provision is intended to carve out, it does not appear to limit pharmacies' immunity for boycotts of purchasers or payers in order to force price concessions.

employer-employee context; it does not protect combinations of independent business people.[17] H.R. 971, however, would override the distinction Congress drew in the labor laws between employees and independent contractors. Unlike the labor law system, H.R. 971 also lacks the exclusions from protected negotiations for subjects unrelated to the intended purpose of those laws, as well as the oversight of the process by the National Labor Relations Board.

Moreover, the creation of a labor exemption for pharmacies is offered as a way to remedy matters that collective bargaining was never intended to address. The stated goal of H.R. 971 is to promote the safety and quality of patient care. The labor exemption, however, was not created to solve issues regarding the ultimate safety or quality of products or services that consumers receive. Collective bargaining rights are designed to raise the incomes and improve the working conditions of union members. The law protects, for example, the United Auto Workers' right to bargain for higher wages and better working conditions, but we do not rely on the UAW to bargain for safer, more reliable, or more fuel-efficient cars. Congress has addressed those types of concerns in other ways, as well as relying on competition in the market among automobile manufacturers to encourage product improvements. Patient care issues in the delivery of pharmacy services deserve serious consideration, but a labor exemption is ill-suited to the task.

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[17] *See, e.g., Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143 (1942); *United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460 (1949); *American Medical Ass'n v. United States*, 317 U.S. 519, 533-36 (1943) (rejecting assertions that the labor exemption to the antitrust laws applied to joint efforts by independent physicians and their professional associations to boycott an HMO in order to force it to cease operating). NLRA Section 2 (3) gives the right to bargain collectively only to "employees." The 1947 Taft-Hartley amendments to the NLRA included a provision expressly stating that the term "employee" does not include "any individual having the status of an independent contractor." 29 U.S.C. § 152 (3).

In sum, H.R. 971 is designed to confer the labor exemption on parties whose situations are vastly different from those eligible for the exemption under long-standing and well-established principles of labor law. Instead, it would merely grant private businesses a broad immunity to present a "united front" when negotiating price and other terms of dealing with health plans, without any efficiency benefits for consumers or any regulatory oversight to safeguard the public interest.

III. The Exemption's Likely Effects

The proposed exemption can be expected to increase health care costs. There should be little dispute that the collective negotiations authorized by H.R. 971 likely would result in health plans' paying more to pharmacies – indeed that has been the intended and actual effect of such conduct in the cases involving collective negotiation by competing pharmacies that the Commission previously has brought.

The Commission's experience indicates that the conduct that the proposed exemption would allow could impose significant costs on consumers, private and governmental purchasers, and taxpayers, who ultimately foot the bill for government-sponsored health care programs. Past antitrust challenges to collective negotiations by health care professionals show that groups have often sought fee increases of 20 percent or more.[18] For example, in 1998, an association of approximately 125 pharmacies in northern Puerto Rico settled FTC charges that the association

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[18] *See, e.g.*, *Asociacion de Farmacias Region de Arecibo*, 127 F.T.C. 266 (1999) (consent order) (22 percent higher); *Advocate Health Partners*, *et al.*, C-4184 (consent order issued Feb. 7, 2007) (20-30 percent higher); *Health Care Alliance of Laredo*, C-4158 (consent order issued March 23, 2006) (30 percent higher regarding one payer; 20-90 percent higher for another payer, depending on the particular procedure); *San Juan IPA, Inc.*, 139 F.T.C. 513 (2005) (consent order) (up to 60 percent higher), all available at http://www.ftc.gov/bc/healthcare/antitrust/commissionactions.htm.

fixed prices and other terms of dealing with third-party payers, and threatened to withhold services from Puerto Rico's program to provide health care services for indigent patients.[19] According to the complaint, the association demanded a 22 percent increase in fees, threatened that its members would collectively refuse to participate in the indigent care program unless its demands were met, and thereby succeeded in securing the higher prices it sought. In another action in which the target of pharmacy collective price negotiations was a state program to assist the poor, the Commission charged that institutional pharmacies serving Medicaid patients in Oregon long-term care facilities agreed on the prices they would accept from the Oregon State Health Plan and negotiated collectively to raise reimbursement rates.[20]

Government-sponsored employee health benefit plans also have been victims of pharmacy boycotts. For example, in 1989 the Commission sued pharmacies in New York for conspiring to boycott the New York State Employees Prescription Plan to force an increase in reimbursement rates.[21] An administrative law judge found that the collective fee demands of the pharmacists cost the State of New York an estimated $7 million.[22] Other FTC actions challenged similar boycotts by pharmacies to obtain higher fees from government employee health plans,

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[19] *Asociacion de Farmacias Region de Arecibo*, *supra* note 18.

[20] *See Institutional Pharmacy Network*, 126 F.T.C. 138 (1998) (consent order).

[21] *Peterson Drug Company of North Chili, New York, Inc.*, 115 F.T.C. 492 (1992) (opinion and order); *Chain Pharmacy Assn of NY State, Inc.*, 114 F.T.C. 327 (1991) (consent order); *Empire State Pharmaceutical Society, Inc.,* 114 F.T.C. 152 (1991) (consent order); *Pharmaceutical Society of the State of New York, Inc.,* 113 F.T.C. 661 (1990) (consent order).

[22] *Peterson Drug*, 115 F.T.C. at 540.

including the Baltimore City employees' prescription-drug plan,[23] and a prescription drug program offered through a Colorado state health plan covering both union and salaried employees and retirees.[24] H.R. 971 would permit privately-held pharmacies to pursue this type of conduct without fear of antitrust challenge, and therefore likely would encourage pharmacies to engage in such actions.

Absent a sufficient number of alternative providers acceptable to the health plan and its consumer members, a health plan will have no choice but to accede to such fee demands, or it will not have a marketable pharmacy network to offer. Most PBMs, for example, contract with 90 percent of the retail pharmacies in the region they serve.[25] At the same time, the ability to exclude certain pharmacies from a network can foster both more competitive bargaining and certain economies of scale for businesses that are included in a network.[26] Moreover, payers may seek to limit the number of pharmacies with which they contract not only to induce more aggressive price competition among pharmacies, but also because their administrative costs might be lower for a limited-panel program than for one requiring the payer to deal with, and

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[23] *Baltimore Metropolitan Pharmaceutical Association, Inc. and Maryland Pharmacists Association*, 117 F.T.C. 95 (1994) (consent order).

[24] *Southeast Colorado Pharmacal Association*, 116 F.T.C. 51 (1993) (consent order).

[25] *See Improving Health Care*, *supra* note 12, at Chapter 7, p. 12.

[26] *See, e.g.*, discussion in Letter from FTC staff to Patrick C. Lynch, Attorney General, and Juan M. Pichardo, Deputy Senate Majority Leader, State of Rhode Island and Providence Plantations (Apr. 8, 2004), at notes 10-12 and accompanying text, *available at* http://www.ftc.gov/os/2004/04/ribills.pdf.

make payments to, all of the pharmacies doing business in a program's service area.[27] Collective bargaining can undercut such competitive efficiencies. To the extent that public payers or the private market demand a certain number and distribution of pharmacies, a health plan or PBM must accede to higher collective fee demands or it will not have a pharmacy network to offer.[28] At the end of the day, unless a health plan can assemble a network of pharmacies willing to contract with the plan, and attractive to consumers and employers, the plan will have nothing to sell in the marketplace.

Increases in unit prices paid to pharmacies are not the only reason that drug costs may increase. The exemption would also permit boycotts by pharmacies to obstruct purchaser cost containment strategies. For example, PBMs typically use formularies to create price competition among drug manufacturers, and many use financial incentives to encourage patients with chronic conditions who require repeated refills of their medications to use lower cost mail order pharmacies. Such cost control programs have been shown to yield significant savings.[29] If some

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[27] *Id.*

[28] The Medicare Part D drug program, for example, requires that a Part D plan sponsor submit a network that includes enough pharmacies to provide potential beneficiaries with "convenient access" to at least one pharmacy. Requirements vary depending on whether beneficiaries are urban, suburban, or rural. In rural areas, at least 70 percent of beneficiaries in a program must be within 15 miles of a network pharmacy. *See* Access to Covered Part D Drugs, 42 C.F.R. § 423.120 (2005), *available at* http://a257.g.akamaitech.net/7/257/2422/09nov20051500/edocket.access.gpo.gov/cfr_2005/octqtr/pdf/42cfr423.120.pdf.

[29] For example, programs to encourage the use of mail-order provision of maintenance drugs alone can offer substantial savings. According to a Maryland report, greater use of mail-order maintenance drugs, as would be enabled by liberalizing Maryland insurance law, would save Maryland consumers 2-6%, and third-party carriers 5-10%, on retail drug purchases *overall*. *See* Md. Health Care Comm. and Md. Ins. Admin., *Mail-Order Purchase of Maintenance Drugs: Impact on Consumers, Payers, and Retail Pharmacies*, 2-3 (Dec. 23, 2005).

of the cost saving strategies used by health plans to control costs for prescription drugs are curtailed as a result of the collective bargaining the bill would authorize – and some are extremely unpopular with independent pharmacies – these already sizable and rapidly increasing expenditures can be expected to increase significantly. Drug expenditures in the United States in 2005 were roughly $200 billion, which represented about ten percent of total health care spending.[30] Impeding cost control strategies could significantly increase the continued growth of these expenditures.[31]

What may be uncertain about the exemption's effect is the magnitude of the increase in drug costs, which may be different in different geographic areas depending on market conditions, as well as the degree to which such increased costs would be passed on to consumers and others who pay for prescription drugs. Although it is sometimes suggested that any fee increases imposed on health plans would not be passed on to consumers, but would simply reduce health plan profits, economic theory teaches that a significant industry-wide increase in input costs can

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This is consistent with the FTC's PBM Study, which found that mail-order pharmacies typically are less expensive than retail pharmacies, even after controlling for prescription size and drug selection. *See supra* note 13 at 25. *See also* General Accounting Office, *Effects of Using Pharmacy Benefit Managers on Health Plans, Enrollees, and Pharmacies* at 11 (Jan. 2003) ("GAO Report"), *available at* http://www.gao.gov/cgi-bin/getrpt?GAO-03-196 (reporting that PBMs negotiate substantial discounts with retail pharmacies, but achieve greater savings using mail-order pharmacies, with an average mail-order price "about 27 percent and 53 percent below the average cash price customers would pay at a retail pharmacy for the selected brand name and generic drugs, respectively"), GAO Report at 8.

[30] *See* Aaron Catlin, et al., *National Health Spending in 2005*, 26 Health Affairs 142, 143 (Jan./Feb. 2007).

[31] *See id.* at 143 (statistics on growth of categories of health care expenditures, including prescription drugs).

be expected to raise the price of the final product.[32] And, as noted above, past enforcement actions provide numerous examples in which health care professionals' collective demands for higher fees resulted in higher costs to government purchasers.

As a major purchaser of prescription drugs, the federal government could bear significant additional costs from conduct the bill would authorize. Although the bill contains an exclusion for certain federal programs from the bill, such as the State Children's Health Insurance Program (SCHIP), and the Federal Employees Health Benefits Program (FEHBP), it expressly includes the Medicare program. Moreover, the Congressional Budget Office evaluation of the 2000 bill to immunize collective bargaining by health care professionals determined that, despite carve-outs of certain federal programs, the legislation would nonetheless significantly increase direct spending for those programs because: (1) private plans administer government benefit programs and often do not separate private and federal programs in their provider contracts; (2) higher private compensation rates would increase the market price for services, which could affect the rates that plans serving federal programs would have to pay in order to secure providers; and

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[32] Health care researchers have found that, while health care costs and health insurance premiums do not necessarily increase at identical rates on a year-to-year basis, over time "the dominant influence on premiums is underlying costs" of health care products and services. Ginsberg & Gabel, "Tracking Health Care Costs: What's New in 1998," 17:5 Health Affairs 141, 145 (Sept./Oct. 1998). In its analysis of the 2000 bill immunizing collective negotiations by health care professionals, the Congressional Budget Office projected that price increases paid by private health plans would increase direct spending by federal programs. *See* Congressional Budget Office Cost Estimate on H.R. 1304, "Quality Health Care Coalition Act of 2000" (May 17, 2000) at 5-6, *available at* http://www.cbo.gov/showdoc.cfm?index=2047&sequence=0.

(3) negotiated relaxation of utilization controls would likely raise community standards for use of certain services, which plans serving federal programs would be pressured to meet.[33]

State and local governments could incur higher costs as well, both in drug benefits for their employees and in public assistance programs. As noted above, such plans have been the victims of coercive boycotts in the past. Absent antitrust enforcement, they are likely to face them again.

Finally, making prescription drug coverage more costly means some individuals may have to do without needed drugs. Fewer employers may offer health plans incorporating prescription drug coverage and some presently covered individuals may have to forgo certain prescription purchases. In those cases, patients would suffer and there could be increased use of hospital emergency rooms, further increasing overall costs for health care and exacerbating pressures on hospital emergency rooms and public assistance programs.

IV. No Compelling Need Has Been Shown for the Exemption

The fundamental premise of those who seek antitrust immunity for collective negotiations by pharmacies is that health plans, and pharmacy benefits managers in particular, have superior bargaining power when contracting with independent pharmacies. An antitrust exemption, it is said by some, will "level the playing field" by enabling pharmacies to exercise countervailing power. According to proponents, allowing pharmacies to exercise leverage to obtain more favorable contracts will help ensure the survival of small pharmacies, and thereby promote high quality and accessible health care. This type of rationale just as easily could be applied to justify

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[33] *See* Congressional Budget Office Study, *supra* n. 32 at 5-6.

special treatment for a host of situations and participants throughout our economy, both within and outside the health care sector.

To begin with, much joint conduct by health care providers can benefit consumers, create efficiencies, and be pro-competitive, without running afoul of the antitrust laws. For example, joint ventures among pharmacists to provide medication counseling and disease management programs for patients with chronic illnesses such as asthma, diabetes, and heart disease have the potential to improve care and reduce overall costs. Commission staff has issued advisory opinions to groups of pharmacies that planned to develop such programs and jointly negotiate the fees for such services with third-party payers, finding that the antitrust laws presented no barrier to their proposed arrangements.[34] Similarly, independent pharmacies often participate in joint purchasing groups that allow them to lower costs and compete more effectively.[35] However, the proposed exemption would blunt incentives for pharmacies to undertake such lawful,

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[34] Letter to Paul E. Levenson regarding *Northeast Pharmacy Service Corporation* (July 27, 2000) (network of independent pharmacies in Massachusetts and Connecticut offering package of medication-related patient care services to physician groups) (http://www.ftc.gov/bc/adops/neletfi5.htm); Letter to John A. Cronin, Pharm. D., J.D. regarding *Orange Pharmacy Equitable Network* (May 19, 1999) (network of retail pharmacies and pharmacists offering drug product distribution and disease management services) (http://www.ftc.gov/bc/adops/openadop.htm); Letter to Allen Nichol, Pharm. D. regarding *New Jersey Pharmacists Association* (August 12, 1997) (pharmacist network offering health education and monitoring services to diabetes and asthma patients) (http://www.ftc.gov/os/1997/08/newjerad.htm).

[35] For example, the Independent Pharmacy Cooperative (IPC), which describes itself as "the nation's largest group purchasing organization for independent pharmacies," is a member-owned cooperative that has been in operation since 1984. IPC claims to represent 3200 primary and 2500 affiliate pharmacy members, whose annual purchases exceed $8 billion. *See* http://www.ipcrx.com/public/thecooperative.aspx. Another independent pharmacy purchasing cooperative, EPIC Pharmacies, Inc., was formed in 1982, and describes itself as "a not-for-profit buying group of hundreds of independently owned pharmacies across the country." *See* http://www.epicrx.com/about/index.aspx.

pro-competitive, but perhaps less easy, collaborations in order to improve service and compete more effectively in the marketplace. Moreover, the bill would not guarantee that the benefits to pharmacies of such collective action would be used to help "ensure and foster continued patient safety and quality of care," the bill's stated purpose.

Antitrust law, and the enforcement agencies, recognize the risks of undue power on the part of buyers. Excessive buying power, known as "monopsony,"[36] enables buyers to depress prices below competitive levels. In response, sellers may reduce sales or stop selling altogether, ultimately leading to higher consumer prices, lower quality, or substitution of less efficient alternative products. It is important, however, to distinguish between this type of buyer power, which can harm competition and consumers, and disparities in bargaining power, which are common throughout the economy and can result in lower input costs and lower prices for consumers.

The FTC is mindful of the potential harm from aggregations of market power by purchasers in the health care sector. In 2004, the FTC conducted a thorough investigation of Caremark Rx's acquisition of Advance PCS, two large national PBM firms. As part of its analysis, the agency carefully considered whether the proposed acquisition would be likely to create monopsony power with regard to PBM negotiations with retail pharmacies and ultimately determined it would not.[37] For its part, under the clearance arrangement between the two enforcement agencies, the Department of Justice has investigated various mergers of health plans

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[36] Or "oligopsony," when it results from the combination of more than one buyer.

[37] *See* Statement of the Federal Trade Commission, *In the Matter of Caremark Rx, Inc./AdvancePCS,* File No. 031 0239 (Feb, 11, 2004).

and has taken enforcement action where it found that the transaction was likely to lead to the exercise of market power in the purchase of physician services.[38]

It appears that the concerns of retail pharmacies center on inequalities in bargaining power, rather than actual buyer market power. But even if there were evidence that health plans or PBMs were able to exercise such power over pharmacies, the Commission believes that the solution is not to authorize private competitors to use countervailing power, especially in ways that are likely to hurt consumers. Antitrust enforcement is designed to attack market power problems when and where they arise, and protecting competition in the health care sector remains a major focus of the Commission.

Proponents of antitrust exemptions in health care sometimes claim that the McCarran-Ferguson Act gives insurance companies leverage in bargaining with health care professionals. This is simply not the case. Although that Act protects certain types of activities by insurers (to the extent that such activity is regulated by state law), it has been clear for nearly thirty years that McCarran-Ferguson provides no antitrust immunity for an insurance company's agreements with providers on what they will be paid.[39] Collusion among insurers regarding the terms of such agreements would not be protected from antitrust challenge.

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[38] *See, e,g.*, *United States v. United Health Group, Inc., and Pacificare Health Systems*, *Inc.*, 2006 U.S. Dist. Lexis 45938 (D.D.C. 2006), *available at* http://www.usdoj.gov/atr/cases/unitedhealth.htm; *United States v. Aetna, Inc, and The Prudential Insurance Company of America*, 1999 U.S. Dist. Lexis 19691 (D. Tex. 1999), *available at* http://www.usdoj.gov/atr/cases/indx142.htm.

[39] *Group Life and Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979); *see also Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982).

Moreover, as for concerns about disparities in bargaining power in pharmacies' negotiations with health plans or PBMs, it is important to remember that PBMs may help keep pharmacy benefit programs affordable for consumers. It also bears emphasis that there are a variety of lawful ways – short of price fixing and coercive boycotts – that pharmacies can collectively express their concerns about both price and quality issues relating to managed drug benefit programs. In their joint *Statements of Antitrust Enforcement Policy in Health Care*, the antitrust agencies have expressly recognized the potential competitive benefits of joint action by health care professionals to provide information and views to health plans about such matters.[40] Nor does antitrust law prevent pharmacies from engaging in collective advocacy before legislatures and regulatory bodies, or presenting issues to the media and the public concerning reimbursement policies and procedures of third-party payers.[41]

Lawmakers are understandably concerned that some independent pharmacies may be unable to survive in the current environment, and especially about the prospect that some rural communities might be left without a local pharmacy. But these concerns do not justify a broad antitrust exemption that would apply to diverse businesses in markets throughout the country. "Independent pharmacies" under H.R. 971 include not just rural pharmacies, but urban and

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[40] *See* U.S. Department of Justice and the Federal Trade Commission, *Statements of Antitrust Enforcement Policy in Health Care* (August 1996) at Statements 4 and 5, 4 Trade Reg. Rep. (CCH) ¶ 13,153, *available at* http://www.ftc.gov/reports/hlth3s.pdf.

[41] For example, a 2003 FTC staff advisory opinion explains that the antitrust laws did not prevent physicians in Dayton, Ohio, from collecting and publicizing information about Dayton health care market conditions, including information about insurer payments, to educate the general public about the physicians' concerns about the reimbursement policies and procedures of third-party payers in Dayton. Letter from Jeffrey W. Brennan to Gregory G. Binford, (February 6, 2003), *available at* http://www.ftc.gov/bc/adops/030206dayton.shtm.

suburban ones, and not just single-store entities but multi-store chains, pharmacy franchises, and privately-owned supermarket pharmacies. To the extent that certain local concerns may warrant attention, targeted efforts to address particular issues in the distribution of pharmaceuticals and pharmacy services (perhaps looking to strategies used for medically under-served areas) may be a better way to address problems of access to prescription drugs, while avoiding the concerns that are raised by an antitrust exemption.

V. Conclusion

Antitrust enforcement in the health care sector has helped ensure that new and potentially more efficient ways of delivering and financing health care services can arise and compete in the market for acceptance by consumers. Although health care markets have changed dramatically over time, and continue to evolve, collective action by health care providers to obstruct new models for providing or paying for care, or to interfere with cost-conscious purchasing, remains a significant threat to consumers. The public is looking to policymakers to address widespread concerns about our health care system: high costs, uneven quality, and a large and increasing number of people who are uninsured. Giving health care providers – whether pharmacies, physicians, or others – a license to engage in price fixing and boycotts in order to extract higher payments from third-party payers would be a costly step backward, not forward, on the path to a better health care system.