No. 17-35640

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA and RASIER, LLC,
Plaintiffs-Appellants,

v.

CITY OF SEATTLE; SEATTLE DEPARTMENT OF FINANCE AND ADMINISTRATIVE SERVICES; and FRED PODESTA, in his official capacity,
Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Washington
No. 2:17-cv-00370 (Hon. Robert S. Lasnik)

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE IN SUPPORT OF APPELLANT AND IN FAVOR OF REVERSAL

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STATEMENT OF INTEREST

The United States and the Federal Trade Commission both enforce the federal antitrust laws and have a strong interest in proper application of the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), that is central to this case. Under the state action doctrine, a state must clearly articulate its intention to displace competition in a particular field with a regulatory structure. The Supreme Court has carefully cabined that antitrust exemption because it sacrifices the important benefits that antitrust laws provide consumers and undermines the national policy favoring robust competition.

We file this brief under Federal Rule of Appellate Procedure 29(a) and urge the Court to reject application of the state action doctrine to this case. A municipality may displace competition under the state's antitrust exemption only if that anticompetitive restraint is the inherent, logical, or ordinary result of the exercise of authority delegated by the state. That standard is not satisfied in this case. The State of Washington's delegation of authority to regulate the for-hire transportation market does not imply authority to displace competition among drivers for their services provided to transport companies. The district court's expansive interpretation of the Washington code provisions plainly violates the strict bounds of the state action defense. We express no view on any other issue in this case beyond the proper application of the state action doctrine. In particular,

we take no position on whether or not the drivers covered by the challenged statutes are employees or independent contractors or how federal labor law may apply to this matter.

QUESTION PRESENTED

Antitrust law forbids independent contractors from collectively negotiating the terms of their engagement. For example, jointly setting fees is price fixing, which is at the very core of the harms the antitrust laws seek to address. An ordinance of the City of Seattle nevertheless allows independent drivers for taxi companies and car services like Uber and Lyft to bargain collectively. The City claims exemption from Sherman Act liability under the state action doctrine.

The question presented is whether the State of Washington clearly and affirmatively expressed a legislative decision to allow Seattle to displace competition, and authorize what otherwise would be *per se* violations of the Sherman Act, in the for-hire driver service market.

STATEMENT

1. The State Action Doctrine and Subordinate State Entities

In *Parker v. Brown*, 317 U.S. 341 (1943), the Supreme Court held that the Sherman Act, 15 U.S.C. § 1, which bars "restraints of trade," should not be read to bar states from imposing market restraints "as an act of government." *Id.* at 350, 352. The Court explained that "nothing in the language of the Sherman Act or in its history" suggested that Congress intended to restrict the sovereign states from

regulating their economies. *Id*. at 350. Thus, states may, within certain limits, adopt and implement policies that would otherwise violate the Sherman Act. Application of the state action defense, however, is "disfavored," and the doctrine must be applied narrowly. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992). That is because "[t]he preservation of the free market and of a system of free enterprise" is a "national policy of * * * a pervasive and fundamental character * * *." *Id*. at 632; *accord FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013); *North Carolina State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1110 (2015); *Shames v. California Travel & Tourism Comm'n*, 626 F.3d 1079, 1084 (9th Cir. 2010).

Unlike states, subordinate state entities such as cities or municipalities "are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38 (1985). Instead, the acts of substate entities come within the state's own sovereignty only when they "demonstrate that their anticompetitive activities were authorized by the state 'pursuant to state policy to displace competition with regulation or monopoly public service.'" *Id.* at 38-39 (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978)).

To ensure that the state truly intends to displace the national policy of free-market competition, the state's intent to displace competition must be "clearly

articulated and affirmatively expressed." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); *see Phoebe Putney*, 568 U.S. at 225.[1] A state legislature need not "explicitly authorize specific anticompetitive effects" of a municipality's or city's actions, but such effects must be "the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." *Phoebe Putney*, 568 U.S. at 229. "[T]he State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." *Id*.

To ensure further that the state action doctrine does not unduly interfere with federal antitrust policy, the doctrine applies only to conduct "in [the] particular field" where the state has articulated its intent to displace competition. *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 64 (1985). In *Phoebe Putney*, for example, the Court held that Georgia's regulation of *entry* into the hospital services market through a certificate-of-need requirement did not clearly articulate a policy favoring the *consolidation* of hospitals already in the market. As the Court explained,

[1] Additionally, private actors claiming a state action defense must show that the policy is "actively supervised by the State itself." *Midcal*, 445 U.S. at 105 (internal quotation marks omitted). The "active supervision" requirement does not apply to the conduct of municipalities. *Hallie*, 471 U.S. at 46-47. Because we conclude that the Seattle Ordinance fails to meet the clear articulation requirement, we express no view on whether the supervision of private conduct contemplated by the Ordinance satisfies the active supervision prong of the state action test.

> regulation of an industry, and even 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.

Phoebe Putney, 568 U.S. at 235. Anticompetitive consolidation of the hospital market remained subject to the antitrust laws because it was not the "inherent, logical, or ordinary result" of regulating the entry of new hospitals into the market. *Id*. at 229. *See also Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-92 (1975) (state action defense did not apply to price-fixing by lawyers despite the State's extensive regulation of the practice of law, where the State did not intend to displace price competition for legal services).

2. The Seattle Ordinance

Chapter 46.72 of the Revised Code of Washington (entitled "Transportation of Passengers in For Hire Vehicles") authorizes municipalities to "license, control, and regulate all for hire vehicles operating within their respective jurisdictions." Wash. Rev. Code § 46.72.160. Specifically, this authority includes (1) "[r]egulating entry"; (2) "[r]equiring a license"; (3) "[c]ontrolling the rates charged" for the transportation service; (4) "[r]egulating the routes"; (5) "[e]stablishing safety and equipment requirements"; and (6) "[a]ny other requirements adopted to ensure safe and reliable for hire vehicle transportation service." *Id*. A related provision states the Washington's legislature's "intent * * * to permit political subdivisions of the State to regulate for hire transportation

services without liability under federal antitrust laws." *Id*. § 46.72.001. Chapter 81.72 ("Taxicab Companies") contains nearly identical language concerning taxicab transportation services. *See id*. §§ 81.72.200; 81.72.210.

Relying on this authority, the City of Seattle enacted the Ordinance now before the Court. It permits for-hire drivers to negotiate collectively their contractual relationships with "driver coordinators"—taxicab associations and transportations network companies such as Uber and Lyft that hire or contract with drivers. Under the Ordinance, drivers may act in concert to bargain over the terms of their contracts, including "the nature and amount of payments to be made by, or withheld from, the driver coordinator to or by the drivers." Ordinance 124968 § 3(H)(1). The Ordinance applies only to drivers who are independent contractors. *Id*. § 3(D). In enacting the Ordinance, the City made findings that allowing drivers to negotiate collectively their contracts—ordinarily plainly unlawful conduct—"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 * * *." *Id*. § 1(I).

3. This Case

The Chamber of Commerce sued the City, alleging, among other things, that collective bargaining by independent competing drivers would be price fixing, and

the Ordinance thus violates and is preempted by Section 1 of the Sherman Act, 15 U.S.C. § 1. Am. Compl. ¶¶ 58-72 (ER 68-71).[2]

In the order on review, the district court dismissed the Sherman Act claim on the ground that the City's authorization of collective bargaining among for-hire drivers is exempt from the federal antitrust laws under the state action doctrine. The court held that the City "satisfie[d] the 'clearly articulated and affirmatively expressed' requirement for state immunity," because the State had "clearly delegate[d] authority for regulating the for-hire transportation industry to local government units," and "'affirmatively contemplated' that municipalities would displace competition in the for-hire transportation market." Op. 8 (quoting *Phoebe Putney*, 568 U.S. at 226) (ER 8).[3] The court found that the municipal regulation fell within Section 46.72.160's authorization of "[a]ny other requirements adopted to ensure safe and reliable for hire transportation service." Op. 10 (ER 10). Although the court recognized that the City's use of this provision to implement collective bargaining by drivers was "novel," it found the State's general "authorization of anticompetitive regulations" sufficient to meet the state action test. Op. 9 (ER 9).

[2] "ER" refers to Appellants' Excerpts of Record.

[3] The district court found that companies like Uber and Lyft are "privately operated for hire transportation services" within the scope of Chapter 46.72. Op. 11-12 (ER 11-12). We express no view on that issue but assume, for purposes of argument, that the district was correct on that point.

ARGUMENT

I. THE STATE OF WASHINGTON DID NOT CLEARLY ARTICULATE AN INTENT TO DISPLACE COMPETITION WITH RESPECT TO NEGOTIATION OF DRIVER CONTRACTS.

Unless the state action exemption applies to the Seattle Ordinance, the joint negotiation permitted by the Ordinance would be a *per se* violation of the Sherman Act. Independent contractors, as horizontal competitors, may not collude to set the price for their services. *See FTC v. Superior Trial Court Lawyers Ass'n*, 493 U.S. 411, 422-23 (1990). The critical question here is whether the challenged ordinance was "undertaken pursuant to a regulatory scheme that is the State's own." *Phoebe Putney*, 568 U.S. at 225 (internal quotation marks omitted). Absent clear evidence that Seattle's sanctioning of anticompetitive restraint of the driver service market reflects the State's deliberate and intended policy choice, the City's action does not constitute state action exempt from the Sherman Act.

In accepting the City's state action defense, the district court: (1) failed to require that the City's restraint on competition be a foreseeable consequence—"the inherent, logical, or ordinary result"—of the State's general grant of authority to regulate "for hire vehicles" and "for hire vehicle [and taxicab] transportation services," Wash. Rev. Code §§ 46.72.001; 46.72.160; 81.72.200; 81.72.210; (2) interpreted the state legislative language "to ensure safe and reliable for hire vehicle transportation service" so loosely as to nullify limits on the state action

defense; and (3) contrary to established precedent, read a general antitrust exemption clause to negate the requirement that a state must clearly articulate and affirmatively express state policy to displace competition in a particular field. In sum, the immunizing provisions of Sections 46.72.001 and 81.72.200 do not show a deliberate State policy to displace competition among providers of driver services to taxi companies and car services. Reading them that way also would have significant adverse consequences by placing clearly anticompetitive conduct out of reach of the antitrust laws, potentially undercutting state policy as well as federal law.

A. The State Laws Authorizing Regulation of Transportation Services Do Not Show a State Policy to Displace Competition for Negotiating Driver Contracts.

The State of Washington's for-hire transportation laws do not clearly show that the State intended to displace competition in the *driver services market*. State law permits municipalities to regulate transportation services provided to consumers. Wash. Rev. Code §§ 46.72.160 & 81.72.210. The Seattle Ordinance at issue here, however, is directed not at competition in the market for provision of transportation service to consumers, but at the market for hiring drivers. The State statutes cannot be read to imply a policy to exempt from the Sherman Act contractual negotiations between drivers and companies.

A careful review of the statutory language makes clear that the legislation addresses the provision of service by transportation entities to consumers. Specifically, the Washington legislature made statutory findings that "transportation service" is an important state interest and that the government should regulate the "safety, reliability, and stability" of such services. Wash. Rev. Code §§ 46.72.001 & 81.72.200. Those statutes focus on the *consumer market* for transportation services, as consumers are the only users of that service.

The separately enumerated list of conferred regulatory powers further bolsters the conclusion that the State legislature focused on the provision of service to customers, not drivers' relationships with companies. The statute states that the conferred "power to regulate includes" market entry, licensing, rates, routes, safety, and a catch-all provision for other requirements concerning safety and reliability. *Id.* §§ 46.72.160(1)-(6); 81.72.210(1)-(6). Every item on the list—level of supply, price, safety, reliability—pertains to the terms of provision of service to customers; nothing addresses the conduct of drivers negotiating pay. The only reference to pricing relates to controlling the rates charged to consumers and the manner in which the rates are calculated and collected, matters that relate solely to provision of service to customers. *Id.* § 46.72.160(3).

It is implausible to read the Washington statute as intended to displace competition in the market for driver services. Regulating the negotiation of wages

or other contractual terms between drivers and transportation companies is not an "inherent, logical, or ordinary result" of the bundle of regulatory powers the State has conferred on municipalities. *Phoebe Putney*, 568 U.S. at 229. Put differently, the statutes do not "clearly articulate[] and affirmatively express[]" the State's intent that local governments allow anticompetitive conduct in the market for hiring or contracting with drivers. *Midcal*, 445 U.S. at 105. Although it authorized displacement of competition in the provision of transportation service, the State has not acted "in [the] particular field" at issue here. *Southern Motor Carriers*, 471 U.S. at 64. The State did not "affirmatively contemplate * * * anticompetitive conduct" in the market for driver services, which is distinct from the consumer service market. *Phoebe Putney*, 568 U.S. at 235.

In that respect, this case is similar to *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), where the Supreme Court held that a state utility commission that had authority to regulate electricity rates did not also have the authority to confer antitrust exemption for a utility's restraint of trade in the light-bulb market. The commission's authorizing statute "contain[ed] no direct reference to light bulbs," and the state legislature had not spoken to the desirability of the utility's conduct. *Id*. at 584. The Court thus concluded that the utility commission's approval of anticompetitive conduct did not "implement any statewide policy relating to light bulbs"; at most, "the State's policy [was] neutral on the question whether a utility

should, or should not, have such a program." *Id*. at 585. So too here, the State statutes say nothing about bargaining over wages paid to drivers; it is impossible to divine a legislative intent to displace competition in that market even though the State legislature clearly did displace competition in a different market.

The district court mistakenly relied on *Southern Motor Carriers* in support of its decision. Op. 9-10 (ER 9-10). There, the Supreme Court considered whether a Mississippi agency authorized by state law to set common-carrier trucking rates could lawfully allow private truckers to engage in collective ratemaking as the method for establishing those rates. 471 U.S. at 63-66. The Court concluded that, although the statute did not expressly authorize collective ratemaking, the grant of authority to set rates "articulated clearly [the State's] intent to displace price competition among common carriers with a regulatory structure." *Id*. at 65. *Southern Motor Carriers* has no relevance here because, while the Washington State statutes grant municipalities authority to regulate rates and conditions for *services provided to consumers*, nothing in the statutes addresses the setting of prices by drivers for their services provided to companies.

B. The Authority to Ensure "Safe and Reliable" Transportation Service Cannot Be Read to Clearly Articulate and Affirmatively Express a State Intent to Displace Competition in Driver Services or Other Input Markets.

In finding clear articulation, the district court focused on the statute's language authorizing municipal regulation "to ensure safe and reliable for hire

vehicle transportation service." Op. 10 (citing Wash. Rev. Code § 46.72.160(6)) (ER 10). It held that the Ordinance fell within the scope of that delegated authority, citing the City's finding that allowing drivers to negotiate contracts collectively would promote safety and reliability. *Id.* From that finding of delegated authority, the court then made the leap to find that the delegation of authority automatically satisfied the clear articulation requirement. It concluded that "[o]nce the Court concludes that the challenged conduct falls within the clearly articulated and affirmatively expressed state policy to displace competition in a particular field, no more is needed to satisfy the first prong of the *Midcal* test." Op. 11 (ER 11).

The district court thus conflated the question of whether the City "possess[ed] the delegated authority to act," Op. 10 (ER 10), with the clear articulation inquiry. As the Supreme Court has explained, however, "state-law authority to act is insufficient to establish state-action immunity; the substate governmental entity must *also* show that it has been delegated authority to act or regulate anticompetitively." *Phoebe Putney*, 568 U.S. at 228 (emphasis added). The delegation of authority to regulate for "safety and reliability" does not demonstrate that the Washington legislature anticipated and authorized the achievement of those goals through such indirect means as suppressing competition among drivers in their contract negotiations. The district court's expansive interpretation of the "safe and reliable" authorizing language cannot be

squared with the strict limits the Supreme Court has placed on the state action defense. *See supra* 2-5.

Taken to its logical conclusion, moreover, the district court's reading of the statute's "safe and reliable" authorizing language could cover nearly any type of anticompetitive restriction. For example, the City of Seattle could allow tire manufacturers (who, like drivers, also provide an input to taxi service) to collude to set prices charged to taxi operators on the ground that ensuring good tire quality is important to the safety of passengers. Or it could allow auto mechanics to collude on the prices they charge for their services on the ground that ensuring high-quality mechanical service promotes passenger safety. The State surely did not intend to allow such absurd results, yet they would flow from the district court's reasoning.

C. General State Grants of Antitrust Exemption Do Not Satisfy the Clear Articulation Requirement.

The district court found that a statutory provision stating the legislature's intent "to permit political subdivisions of the state to regulate for hire transportation services without liability under federal antitrust laws," Op. 7-8 (citing Wash. Rev. Code § 46.72.001) (ER 7-8), provided blanket antitrust protection. That conclusion is at odds with the established state-action principle that "the State may not validate a municipality's anticompetitive conduct simply by declaring it to be lawful." *Hallie*, 471 U.S. at 39 (citing *Parker*, 317 U.S. at 351); *see Ticor*, 504 U.S. at 633 ("[A] State may not confer antitrust immunity on private

persons by fiat."). In the court's view, that provision showed that "anti-competitive results were not merely foreseeable, they were expressly authorized." Op. 9 n.5 (ER 9). But as shown above, the State did not expressly authorize anticompetitive results *in the market for drivers' compensation*; it clearly articulated and affirmatively expressed an intent to allow for the municipal regulation only of distinct aspects of the provision of transportation services to consumers.

The district court took the State legislature's narrow grant of antitrust exemption for regulation of the provision of service to customers as a broad grant of immunity for anything related to for-hire transportation services. That approach is antithetical to the long-established rules that the state action defense is "disfavored" and must be construed narrowly, *Ticor*, 504 U.S. at 636, and that legislative intent to displace antitrust law in the particular area at issue must be "clearly articulated and affirmatively expressed," *Midcal*, 445 U.S. at 105. Given "our national policy favoring competition," the State statutes "should be read to reflect more modest aims" than total displacement of competition law in any area having anything to do with for-hire transport. *Phoebe Putney*, 568 U.S. at 234.

II. THE DISTRICT COURT'S ERRONEOUS STATE ACTION ANALYSIS HAS POTENTIALLY SERIOUS CONSEQUENCES.

Under the district court's approach, any time a state were to authorize its subordinate entities to restrain competition through regulation of particular aspects of an industry to ensure safe and reliable service, it would open the antitrust

exemption door for nearly any type of regulation. That outcome is precisely what the Supreme Court has warned against, not only because it fails to meet the well-established contours of the clear articulation requirement, but also because it would effectively put a large swath of plainly anticompetitive conduct out of reach of the antitrust laws, seriously undermining the public interest in fostering competition.

Indeed, the district court's mistaken version of the state action doctrine's clear articulation prong has the potential to undercut state policy as well as federal law. *See Hallie*, 471 U.S. at 47 (noting that the requirement that a municipality act pursuant to state policy provides protection against the danger that the municipally-directed enterprise "will seek to further purely parochial public interests at the expense of more overriding state goals"). Exempting subordinate entities from the Sherman Act absent evidence that a state clearly intended to displace competition in that particular sphere of activity interferes with the state's ability to implement its policies. As the Supreme Court observed in rejecting a broad application of the state action doctrine in *Ticor*, 504 U.S. at 635, "[i]f the States must act in the shadow of state-action immunity whenever they enter the realm of economic regulation, then our doctrine will impede their freedom of action, not advance it." *See Cost Mgmt. Servs., Inc. v. Wash. Nat. Gas Co.*, 99 F.3d 937, 941 (9th Cir. 1996) (less rigorous application of clear articulation requirement "may

inadvertently extend immunity to anticompetitive activity which the states did not intend to sanction").

The Supreme Court has made clear that both "federalism and state sovereignty are poorly served by a rule of construction that would allow 'essential national policies' embodied in the antitrust laws to be displaced by state delegations of authority 'intended to achieve more limited ends.'" *Phoebe Putney*, 568 U.S. at 236 (quoting *Ticor*, 504 U.S. at 636). The district court transgressed that principle here, and its ruling should be reversed.

CONCLUSION

The district court's order dismissing the case on the ground that the conduct alleged is exempt from the federal antitrust laws under the state action doctrine should be reversed, and the cause should be remanded for further proceedings.

Respectfully submitted,

November 3, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2017, I electronically filed the foregoing by using the Court's CM/ECF system. I certify that all participants in the case are registered CM/ECF users, and thus service will be accomplished by the CM/ECF system.

November 3, 2017

/s/ Michele Arington
Assistant General Counsel

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