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Dmitri Iglitzin

Jennifer L. Robbins

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# The City of Seattle’s Ordinance Providing Collective Bargaining Rights to Independent Contractor For-Hire Drivers: An Analysis Of The Major Legal Hurdles

Dmitri Iglitzin  
Jennifer L. Robbins<sup>†</sup>

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<sup>†</sup>. Partners at Schwerin Campbell Barnard Iglitzin & Lavitt, LLP. The authors wish to acknowledge the contributions of Michael Robinson, Associate Attorney at Schwerin Campbell Barnard Iglitzin & Lavitt, whose research and analysis on these issues were invaluable.

## INTRODUCTION

On December 14, 2015, the City of Seattle, Washington, adopted an unprecedented<sup>1</sup> ordinance (“the Ordinance”)<sup>2</sup> that grants collective bargaining rights to independent contractor for-hire drivers performing services for taxicab companies and so-called “transportation network companies” (“TNCs”).<sup>3</sup> Cabbies and drivers for app-based TNC companies like Uber and Lyft, if classified by the companies for whom they work as independent contractors, have not previously had any recognized legal right to bargain collectively with their employers regarding the terms and conditions of their employment. For-hire drivers have thus been part of the labor pool of service-oriented workers in the so-called “gig economy,”<sup>4</sup> whose legal status as independent contractors denies them the right to collectively bargain that acknowledged “employees” under the National Labor Relations Act (“NLRA” or “the Act”)<sup>5</sup> enjoy, but whose dependence on their employers and the control exercised over the workers by those companies deny them any meaningful ability to individually bargain regarding their wages and working conditions. The Ordinance grants independent contractor for-hire drivers working in the City of Seattle many such rights, including the right to collectively form a union, to select an exclusive bargaining representative, to bargain a contract covering the terms and conditions of their employment and to obtain a collectively bargained agreement through binding interest arbitration, if necessary.<sup>6</sup>

The Ordinance, which substantially alters the relationship between for-hire drivers and the companies for whom they work, presents an obvious challenge to the economic and political interests of taxicab companies and TNCs,<sup>7</sup> and as a result, faced an immediate legal challenge seeking to

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1. See Phuong Le, *Seattle Becomes First U.S. City to Let Uber Drivers Unionize*, NW. ASIAN WKLY. Dec. 18, 2015, <http://nwasianweekly.com/2015/12/seattle-becomes-first-u-s-city-to-let-uber-drivers-unionize/>.

2. SEATTLE, WASH., MUN. CODE §§ 6.310.110, 6.310.735 (2015).

3. Under the ordinance, a “transportation network company” is “an organization whether a corporation, partnership, sole proprietor, or other form, licensed under this chapter and operating in the City of Seattle that offers prearranged transportation services for compensation using an online-enabled TNC application or platform to connect passengers with drivers using their personal vehicles and that meets the licensing requirements of Section 6.310.130 and any other requirements under this chapter.” § 6.310.110.

4. “Borrowed from the music industry, the word ‘gig’ has been applied to all sorts of flexible employment (otherwise referred to as ‘contingent labor,’ ‘temp labor,’ or the ‘precariat.’” Gerald Friedman, *The Rise of the Gig Economy*, DOLLARS & SENSE, Mar.-Apr. 2014, at 28.

5. 29 U.S.C. §§ 151-169 (2012). The NLRA excludes from the definition of “employee” individuals with the status of an “independent contractor,” as well as agricultural laborers, certain domestic service workers, supervisors and employees of employers subject to the Railway Labor Act, 45 U.S.C. §§ 151-165 (2012). 29 U.S.C. § 152.

6. SEATTLE, WASH., MUN. CODE § 6.310.735.

7. See, e.g., Press Release, U.S. Chamber of Com., U.S. Chamber Strongly Opposes Seattle’s Drivers’ Union Ordinance (Jan. 5, 2016), <https://www.uschamber.com/press-release/us-chamber->

invalidate the Ordinance and render it unenforceable.<sup>8</sup> Other state and local governments seeking to level the playing field for for-hire drivers in the “gig economy” by enacting statutes or ordinances that confer collective bargaining rights on such workers classified by their employers as independent contractors can expect to face a similar legal fight. As the Chamber of Commerce’s challenge to the Seattle ordinance demonstrates, opponents of such laws are likely to argue: (1) that the Ordinance violates the Sherman Antitrust Act, 15 U.S.C. §§ 1-7; and (2) that the Ordinance is preempted by the National Labor Relations Act, 29 U.S.C. §§ 151-159.<sup>9</sup>

This article provides a broad overview of the law governing these two challenges and demonstrates why neither has substantial merit.

## I.

### THE LEGAL STATUS OF FOR-HIRE DRIVERS: EMPLOYEES OR INDEPENDENT CONTRACTORS?

In 2010, Uber Technologies, Inc., formerly known as UberCab, Inc., (“Uber”) entered the consumer market for for-hire drivers by introducing a new and disruptive technology (an “app”) that facilitated the submission of trip requests from prospective passengers to a fleet of drivers.<sup>10</sup> Other companies, such as Lyft and Sidecar, quickly followed.<sup>11</sup> However, the essential nature of the services Uber and these other TNCs provide, the methods they use to provide those services, and the social and economic implications of those methods, are far from new. Since at least the 1910’s, taxicab companies have provided transportation services to customers

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strongly-opposes-seattle-s-drivers-union-ordinance (asserting that legislation like Seattle’s stifles innovation, limits consumer choices, causes higher prices, and reduces quality of service).

8. The Chamber of Commerce of the United States of America brought a federal lawsuit against the City of Seattle on March 3, 2016. *See* Chamber of Com. of the U.S. v. City of Seattle, No. C16-0322RSL, 2016 WL 4595981 (W.D. Wash. Aug. 9, 2016).

9. *See id.* at \*1.

10. *See* Bloomberg, Company Overview of Uber Technologies, Inc., <http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=144524848> (last visited Nov. 4, 2016); Travis Kalanick, Uber’s Founding, Uber Newsroom (Dec. 22, 2010), <https://newsroom.uber.com/ubers-founding/>.

11. *See, e.g.*, Carolyn Said, *Ride-sharing Pioneer Sidecar to Shut Down Ride, Delivery Service*, SFGATE, Dec. 29, 2015, <http://www.sfgate.com/business/article/Ride-sharing-pioneer-Sidecar-to-shut-down-ride-6726144.php> (asserting that Sidecar offered peer-to-peer rides from people in their personal cars starting in 2011); Spencer A. Brown, *Lyft and Sidecar Replace Voluntary Donations with Set Prices*, BIZJOURNALS, Nov. 18, 2013, <http://www.bizjournals.com/sanfrancisco/blog/2013/11/lyft-sidecar-uber-ride-sharing.html?page=all> (stating that Lyft and Sidecar are services that connect riders through smartphone apps to private individuals who give rides in private vehicles, and also stating that both launched in mid-2012) In addition, similar technological innovations, such as the smartphone apps (also known as “e-hail apps”) Flywheel, Arro, and Way2Ride, introduced in 2015, allow traditional taxicab companies to function more or less identically to the new market entrants with regard to the customer-driver relationship. *See* Andrew J. Hawkins, *Flywheel just opened up a new front in the taxi wars*, THE VERGE, Oct. 29, 2015, <http://www.theverge.com/2015/10/29/9636700/flywheel-vs-uber-lyft-ride-hailing-taxi-OS>.

through for-hire drivers who the companies classify as independent contractors.<sup>12</sup> Uber and the other TNC new market entrants likewise classify their for-hire drivers as independent contractors.

As in all other industries, when TNCs classify for-hire drivers as independent contractors, the workers suffer a whole host of serious disadvantages relative to workers who are legally classified as employees under state and federal law.<sup>13</sup> These disadvantages typically include that workers are (1) not protected by state unemployment insurance benefit systems, (2) not covered by employer-provided workers' compensation benefits, (3) not protected by most state and federal minimum wage and overtime laws, (4) deprived of the benefit of having their employers contribute a one-half share of the applicable Social Security and Medicare taxes, (5) deprived of protections conferred on employees by federal anti-discrimination, anti-retaliation, and family and medical leave laws,<sup>14</sup> and (6) deprived of the right to organize and bargain collectively under federal labor law, specifically the NLRA, regarding wages, hours and working conditions.<sup>15</sup>

Consequently, some for-hire drivers, both individually and collectively, have for many decades contested their classification as independent contractors, arguing that they are in fact "employees" for various purposes. These challenges have repeatedly been addressed by the National Labor Relations Board ("Board") in the context of disputes over the status of for-hire drivers working for specific taxicab companies, and by the federal courts that have been asked to enforce or vacate the Board's rulings. The outcomes in these cases have differed markedly depending upon the facts presented as

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12. See *Dennis Melancon, Inc. v. City of New Orleans*, 889 F. Supp. 2d 808, 814 (E.D. La. 2012) ("By the 1910s, New York had half a dozen large fleets, and thousands of independent owner/drivers.").

13. There is extensive treatment in the academic and non-academic literature of the advantages and disadvantages to workers of being classified or treated as independent contractors rather than as employees. See, e.g., Steven Cohen & William B. Eimecke, *Independent Contracting, Policy and Management Analysis*, COLUM. UNIV. SCH. OF INT'L AFFAIRS (2013), [http://www.columbia.edu/~sc32/documents/IC\\_Study\\_Published.pdf](http://www.columbia.edu/~sc32/documents/IC_Study_Published.pdf) [<http://dx.doi.org/10.7916/D8CR5SR9>.] Both the benefits of being an independent contractor and the question of whether such benefits do or do not outweigh the disadvantages of that status are beyond the scope of this article.

14. But see *Hirst v. City of Oceanside*, 187 Cal. Rptr. 3d 119, 131 (2015), *rev. denied* (Aug. 19, 2015) (finding contract worker entitled to recover under California's Fair Employment and Housing Act for sexual harassment); *Currier v. Northland Servs., Inc.*, 332 P.3d 1006 1012 (2014) (holding that the Washington Law Against Discrimination, Wash. Rev. Code §§ 49.60.030, 49.60.210(1), protects independent contractors from discrimination and retaliation).

15. See generally Mitchell H. Rubinstein, *Our Nation's Forgotten Workers: The Unprotected Volunteers*, 9 U. PA. J. LAB. & EMP. L. 147, 159 (2006) (listing various statutes that rely on the employee/independent contractor distinction). These statutes include the National Labor Relations Act, Fair Labor Standards Act, Employee Retirement Income Security Act, the Internal Revenue Code, Family and Medical Leave Act, Civil Rights Act of 1964, Title VII, Age Discrimination in Employment Act, and Americans with Disabilities Act, as well as various state employment statutes. *Id.*

well as, arguably, factors such as the individual decision-makers called upon to make these judgments.<sup>16</sup>

As the District of Columbia Circuit stated in *Local 777, Democratic U. Org. Com. v. NLRB*,<sup>17</sup> a case in which the Court refused to enforce the Board's ruling that the lessee-drivers working for Yellow and Checker were employees and not independent contractors:

Not only has the NLRB repeatedly reached diametrically opposite conclusions on the basis of virtually identical fact situations, but moreover, it has done so in a series of opinions which typically offer no explanation for their result other than a recitation of the pertinent facts.<sup>18</sup>

The dispute about whether taxi drivers are properly classified as employees or independent contractors has endured, and the federal circuit courts of appeal have not been uniform or consistent on this question.<sup>19</sup>

Because the stakes are so high, the proper classification of workers remains a recurring and contentious question for the Board<sup>20</sup> and the courts.<sup>21</sup> To date, this litigation does not appear to have led Uber or any other TNC to classify its drivers as employees.<sup>22</sup>

## II.

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16. The District of Columbia Circuit, referencing prior Board decisions on this question, characterized those decisions as reflecting “[a] process of ad hoc and inconsistent judgments in which the only determinative elements seems to be the composition of the NLRB panel which happens to hear the case.” *Local 777, Democratic U. Org. Com. v. NLRB*, 603 F.2d 862, 869 n.20 (D.C. Cir. 1978).

17. *Id.* at 869 (internal citations omitted).

18. *Id.* at 869 (citing numerous cases where courts had reached different conclusions despite the similarity of the facts presented).

19. Compare *Local 777, Democratic U. Org. Com.*, 603 F.2d 862, with *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1103 (9th Cir. 2008) (affirming a Board decision holding that a taxi cab company must negotiate with its drivers' union because the drivers are not independent contractors, but are instead employees, as defined by the National Labor Relations Act).

20. Recent Board proceedings relating to the question of whether Uber drivers, for example, are employees or independent contractors under the NLRA include *Uber USA, LLC*, No. 29-RC-168855 (N.L.R.B. filed Feb. 2, 2016); *Husein*, No. 14-CA-158833 (N.L.R.B. filed Aug. 27, 2015) (unfair labor practice); *London*, No. 20-CA-160720 (N.L.R.B. filed Sept. 24, 2015) (unfair labor practice); *Billington*, No. 20-CA-160717 (N.L.R.B. filed Sept. 24, 2015) (unfair labor practice); *Nicol*, No. 28-CA-160792 (N.L.R.B. filed Sept. 25, 2015) (unfair labor practice). The NLRB has also petitioned for enforcement of administrative subpoenas against Uber, noting that a threshold issue before it is whether the drivers are employees or independent contractors. *NLRB v. Uber Techs., Inc.*, No. 3:16-cv-00987 (N.D. Cal. Feb. 29, 2016).

21. See, e.g., *FedEx Home Delivery*, 361 N.L.R.B. 55 (2014) (holding delivery drivers to be employees under the Act and not independent contractors); Tracey Lien, *Uber Sued Again over Drivers' Employment Status*, L.A. TIMES, May 2, 2016, <http://www.latimes.com/business/technology/la-fi-tn-uber-nationwide-class-action-20160502-story.html> (discussing two nationwide class action misclassification lawsuits filed on the heels of a \$100 million proposed settlement of class action suits in California and Massachusetts).

22. See, e.g., Mike Isaac & Noam Scheiber, *Uber Settles Cases with Concessions, but Drivers Stay Freelancers*, N.Y. TIMES (Apr. 21, 2016), <http://www.nytimes.com/2016/04/22/technology/uber-settles-cases-with-concessions-but-drivers-stay-freelancers.html>.

SEATTLE BREAKS GROUND TO CONFER COLLECTIVE BARGAINING RIGHTS  
ON INDEPENDENT CONTRACTOR FOR-HIRE DRIVERS.

In light of the foregoing lack of meaningful worker protection at the federal level, some labor leaders, elected officials, academics, and others have advocated for a new approach to allow workers who are not classified as employees to collectively advocate for improvements in wages and working conditions.<sup>23</sup> To date, however, only one local law has been enacted to provide such collective bargaining rights:<sup>24</sup> Seattle's Ordinance Relating to Taxicab, Transportation Network Company, and For-Hire Vehicle Drivers, Ordinance No. 124968, which passed by unanimous (8-0) vote of the Seattle City Council on December 14, 2015.<sup>25</sup> Specifically, in enacting the Ordinance, the Seattle City Council found:

[E]ntities that hire, contract with, or partner with for-hire drivers . . . 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.<sup>26</sup>

Responding to this perceived problem,<sup>27</sup> the Ordinance provides a process by which for-hire drivers within the City of Seattle (hereafter, "the City") can organize collectively and seek representation by a third party that, in turn, may become the exclusive representative of those drivers for the purposes of collective bargaining. That exclusive representative may then attempt to

23. See, e.g., Elizabeth Kennedy, *Freedom from Independence: Collective Bargaining Rights for "Dependent Contractors"*, 26 BERKELEY J. EMP. & LAB. L. 143 (2005); Mike O'Brien, *A New Law Is Letting Uber Drivers Unionize*, THE NATION (July 1, 2016), <https://www.thenation.com/article/a-new-law-is-letting-uber-drivers-unionize/>; HOWARD GREENWICH & HAYS WITT, DRIVING PUBLIC GOOD: HOW COLLECTIVE BARGAINING CAN INCREASE RELIABILITY & SAFETY IN THE SEATTLE FOR-HIRE TRANSPORTATION SYSTEM (2015), <http://www.pugetsoundsage.org/downloads/DrivingPublicGood.pdf>; Jonathan Rosenblum, *To Fight Back Against Companies Like Uber, Workers Need Organizing – Not Technocratic Fixes*, IN THESE TIMES: WORKING IN THESE TIMES (Jan. 19, 2016), <http://inthesetimes.com/working/entry/18787/GigEconomy-Workersrights-taxies-labor-Uber>.

24. See *Le*, *supra* note 1.

25. Seattle's Mayor, Ed Murray, declined to sign the ordinance and returned it to the Council unsigned on December 23, 2015. Memorandum from Mayor Ed Murray, (Dec. 23, 2015) <http://seattle.legistar.com/LegislationDetail.aspx?ID=2451983&GUID=E69B3AB7-88E1-491A-A49F-B32BE688D16C>; see also Taylor Soper, *Seattle Mayor Objects to Uber Union Legislation, Declines to Sign Bill and Asks for Changes*, GEEKWIRE, Dec. 14, 2016 8:50PM, <http://www.geekwire.com/2015/seattle-mayor-objects-uber-union-legislation-declines-sign-bill-asks-changes/>. By operation of the Seattle Municipal Code, § 1.04.020, the ordinance became effective without the Mayor's approval on January 22, 2016.

26. Seattle, Wash., Ordinance 124968, § 1(E) (Dec. 23, 2015).

27. Cf. Heidi Groover, *Seattle City Council Member Mike O'Brien Wants to Give Uber and Lyft Drivers The Right to Unionize*, THE STRANGER: SLOG, Aug. 31, 2015, <http://www.thestranger.com/blogs/slog/2015/08/31/22788144/seattle-city-council-member-mike-obrien-wants-to-give-uber-and-lyft-drivers-the-right-to-unionize>.

bargain a contract with the company whose drivers it represents and, if such negotiations are not successful, may move the dispute to binding interest arbitration. The decision of the arbitrator, if approved by the City, will be binding on both the company and the drivers' representative.<sup>28</sup>

Given that the Ordinance dramatically alters the relationship between for-hire drivers and the taxicab companies and TNCs for whom they work, it is unsurprising that a federal lawsuit was filed immediately upon passage of the Ordinance to have it enjoined and declared unlawful. The suit, filed by the Chamber of Commerce of the United States of America against the City of Seattle in federal court in Seattle on March 3, 2016, *Chamber of Commerce of the United States of America v. City of Seattle, et. al.*, Case No. C16-0322RSL, leveled a number of challenges against the Ordinance. Foremost among those challenges were the following assertions: (1) that the Ordinance violates the Sherman Antitrust Act; and (2) that the Ordinance is preempted by the NLRA.

The suit was subsequently dismissed on standing grounds.<sup>29</sup> However, similar suits will undoubtedly be brought if and when a particular taxicab company or TNC is faced with a direct effort by its drivers to exercise their rights under the Ordinance. Although the City of Seattle was the first municipality to confer collective bargaining rights on independent contractor for-hire drivers, the legal challenges to the Seattle law will undoubtedly continue, while other local jurisdictions may consider creating a similar regulatory scheme to protect workers and public health and safety. This article provides a broad overview of the law governing the two most likely legal challenges to such legislation and demonstrates why neither anti-trust law nor the NLRA presents an insurmountable hurdle to enacting a lawful local ordinance granting collective bargaining rights to independent contractor for-hire drivers.

### III.

#### THE SHERMAN ANTITRUST ACT

##### *A. Overview of Anti-trust Liability and Applicable Exemptions*

The Sherman Antitrust Act of 1890 prohibits a range of allegedly anticompetitive business activities.<sup>30</sup> Its key provisions include a prohibition on “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce,” and a provision making it unlawful for any person to “monopolize, or attempt to monopolize, or

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28. Seattle, Wash., Mun. Code sec. 6.310.735.

29. Chamber of Com. of the U.S. v. City of Seattle, No. C16-0322RSL, 2016 WL 4595981 (W.D. Wash. Aug. 9, 2016).

30. 15 U.S.C. §§ 1-7 (2012).

combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States.”<sup>31</sup>

The Clayton Act, enacted in 1914, proscribes certain additional activities, including: price discrimination between different purchasers, if such discrimination tends to create a monopoly; exclusive dealing agreements; tying arrangements; and mergers and acquisitions that substantially reduce market competition.<sup>32</sup> The Clayton Act also carves out a specific exception from federal antitrust laws for the activities of labor organizations and their members.<sup>33</sup>

The argument that the Ordinance runs afoul of these federal antitrust laws, in summary, is as follows.<sup>34</sup> Under Section 1 of the Sherman Antitrust Act, a “contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States” is unlawful.<sup>35</sup> This provision has been held to prohibit independent economic actors, such as independent contractors, from colluding on the prices they will accept for their services or otherwise engage in concerted action in the marketplace that will have an anticompetitive effect.<sup>36</sup> The Ordinance violates the Sherman Antitrust Act by authorizing for-hire drivers to engage in concerted action by forming a cartel (under the aegis of a “qualified driver representative,” or QDR), speaking as a single unit through an “exclusive driver representative” (an EDR), and engaging in the horizontal fixing of prices and other terms of their contracts with the TNC or taxicab company with whom the EDR is negotiating. This would lead to the unlawful anticompetitive effect of shielding drivers from competition amongst themselves, which will ultimately harm consumers, who will pay more for personal transportation.

The argument lacks merit, however, because federal antitrust law does not preclude local jurisdictions from adopting a municipal ordinance regulating wages and working conditions in the for-hire vehicle industry if either of the following is true: 1) the activities authorized by the ordinance fall within the Clayton Act’s labor exemption or 2) the ordinance is exempt from antitrust liability by the state action doctrine.<sup>37</sup>

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31. *Id.* §§ 1-2.

32. 15 U.S.C. §§ 12-27.

33. *Id.* § 17.

34. *Cf.* Complaint, Chamber of Com. of the U.S. v. City of Seattle, No. 2:16-cv-0322, 2016 WL 836320 (W.D. Wash. Mar. 16, 2016) (No. 2:16-cv-00322).

35. 15 U.S.C. § 1.

36. *See, e.g.*, *FTC v. Super. Ct. Trial Lawyers Ass’n*, 493 U.S. 411, 422 (1990) (finding boycott constituted antitrust law violation); *FTC v. Ind. Fed’n. of Dentists*, 476 U.S. 447, 459 (1986) (finding refusal to cooperate with insurance companies anti-competitive); *Nat’l Soc. of Prof. Eng’rs v. U.S.*, 435 U.S. 679, 692 (1978) (finding limits to competitive bidding constituted anti-competitive activity).

37. 15 U.S.C. § 36 (providing an exemption from antitrust liability for “action directed by a local government”).

*B. The Clayton Act's Labor Exemption*

While the Clayton Act generally prohibits concerted activity in restraint of trade, it expressly exempts from antitrust liability labor organizations' concerted activity aimed at improving the wages and working conditions of represented workers. Article 6 of the Clayton Act provides:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.<sup>38</sup>

This antitrust exemption permits a labor organization to engage in collective negotiations involving the wages and working conditions of independent contractors where there is wage or job competition between the independent contractors and employees represented by the labor organization.<sup>39</sup> The Clayton Act's labor exemption thus protects collective bargaining activities authorized by a local ordinance regulating TNCs and their drivers where the bargaining representative is a labor organization whose members include drivers who are in wage competition with for-hire drivers operating as independent contractors.<sup>40</sup>

In *American Federation of Musicians of the United States & Canada v. Carroll*, the Supreme Court held that a labor organization's efforts to establish a minimum engagement fee for orchestra leaders operating as independent contractors fell within the labor exemption.<sup>41</sup> Though the orchestra leaders operated as independent contractors when they performed at private events, the engagement fees they charged to private clients directly affected the wages of musicians represented by the labor organization.<sup>42</sup> This is because the orchestra leaders hired represented musicians, known as "sidemen," to perform at private engagements and the sidemen were paid

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38. *Id.* § 17.

39. *See Am. Fed'n of Musicians of U. S. & Canada v. Carroll*, 391 U.S. 99, 107-09 (1968) (holding that a labor organization establishing a minimum fee to be charged by orchestra leaders operating as independent contractors fell within the labor exemption, because the price floor protected the wage scale of musicians represented by the labor organization from wage competition); *Local 24 of Int'l Bhd. of Teamsters, v. Oliver*, 358 U.S. 283, 293-97 (1959) (holding that labor organization's efforts to fix a minimum rental fee to be charged by drivers operating as independent contractors fell within the labor exemption because of wage competition between the independent contractors and employee drivers represented by the labor organization).

40. *See, e.g., Carroll*, 391 U.S. 99; *Oliver*, 358 U.S. 283; *Milk Wagon Drivers' Union, Local No. 753, Int'l Bhd. of Teamsters v. Lake Valley Farm Products*, 311 U.S. 91 (1940).

41. *Carroll*, 391 U.S. at 106-14.

42. *Id.* at 106.

from the engagement fee.<sup>43</sup> Accordingly, the orchestra leaders could undercut the collectively-bargained wage scale for represented musicians if they offered their services for an engagement fee that was not sufficient to allow them to pay the union wage scale to the sidemen.<sup>44</sup> This put the orchestra leaders in wage competition with the represented musicians because the leaders could erode the negotiated wage scale by reducing their engagement fees to attract customers and pay the sidemen below scale.<sup>45</sup>

The Supreme Court held that the union was immune from antitrust liability when it engaged in concerted activity to establish a minimum engagement fee that represented the minimum wage scales for sidemen, a minimum fee for the orchestra leader, and an amount necessary to cover social security and unemployment insurance contributions.<sup>46</sup> The Supreme Court rejected the argument that establishing a minimum price for the services of independent contractors was a per se violation of the Clayton Act because it amounted to “price-fixing” as opposed to regulation of “wages.”<sup>47</sup> The Court reasoned:

[T]he crucial determinant is not the form of the agreement — e.g., prices or wages — but its relative impact on the product market and the interests of union members. It is therefore not dispositive of the question that petitioners’ regulation in form establishes price floors. The critical inquiry is whether the price floors in actuality operate to protect the wages of the subleader and sidemen.<sup>48</sup>

Where a labor organization’s efforts to regulate the wages and working conditions of independent contractors who are in direct competition with represented workers is necessary to protect the collectively bargained wages and working conditions of the represented workers, the labor organization’s action is immune from antitrust liability.<sup>49</sup>

Similarly, in *Oliver*, the Supreme Court held that a labor organization was immune from antitrust liability when it negotiated a minimum rental price for motor carriers who own and drive their own vehicles, and thus operate as independent contractors.<sup>50</sup> There, the independent drivers were in direct competition with drivers represented by the labor organization who worked as employees. The employee drivers were paid wages by their employer for their services as drivers. The independent drivers were paid a rental fee, which amounted to compensation for the use of their vehicle and

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43. *Id.* at 111.

44. *Id.* at 111-14.

45. *Id.*

46. *Id.* at 107-09.

47. *Id.* at 107-08.

48. *Id.* (internal quotations omitted).

49. *Id.* at 109 (“Thus the price floors, including the minimum for leaders, are simply a means for coping with the job and wage competition of the leaders to protect the wage scales of musicians who respondents concede are employees on club-dates, namely sidemen and subleaders.”).

50. *Oliver*, 358 U.S. at 293-97.

for their services as a driver. The collective bargaining agreement (“CBA”) negotiated by the labor organization representing the employee drivers and the independent drivers included provisions that fixed the wages for employee drivers and fixed a minimum rental price and other mandatory lease provisions for the independent drivers.<sup>51</sup> The minimum rental price for independent drivers was attacked as price-fixing in violation of antitrust law.<sup>52</sup>

However, echoing the reasoning of *Carroll*, the Supreme Court held that the minimum rental price fell within the Clayton Act’s labor exemption.<sup>53</sup> The Court found that fixing the minimum rental price for drivers operating as independent contractors was necessary to protect the wages of the employee drivers because “the inadequacy of a rental which means that the owner makes up his excess costs from his driver’s wages not only clearly bears a close relation to labor’s efforts to improve working conditions but is in fact of vital concern to the carrier’s employed drivers.”<sup>54</sup> Because permitting the independent drivers to lease their vehicles for an amount that would undercut the negotiated wage rate for the employee drivers would threaten the wage scale for the represented employee drivers, the minimum rental price amounted to “a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract.”<sup>55</sup> Therefore, the Court concluded, “the point of the Article [setting the minimum rental price for independent drivers] is obviously not price fixing but wages.”<sup>56</sup>

The Court applied the same reasoning in *Milk Wagon Drivers’ Union*, holding that a labor organization’s efforts to organize milk vendors operating as independent contractors was exempted from antitrust liability.<sup>57</sup> The Court reached this conclusion based on the existence of wage competition between the vendors, who bought milk from a dairy and sold it to retailers for their own account, and employee milk wagon drivers, who delivered milk from the dairy to retailers as an employee of the dairy.<sup>58</sup>

Thus, labor organizations bargaining on behalf of for-hire drivers pursuant to local legislation will be immune from antitrust liability if there is wage competition between drivers operating as independent contractors for TNCs and drivers employed by traditional taxi companies who are represented by that labor organization. As in the cases cited above, there is

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51. *Id.* at 284-88.

52. *Id.*

53. *Id.* at 294; *see Carroll*, 391 U.S. at 107-09.

54. *Oliver*, 358 U.S. at 294.

55. *Id.*

56. *Id.*

57. *Milk Wagon Drivers’ Union, Local No. 753, Int’l Bhd. of Teamsters v. Lake Valley Farm Products*, 311 U.S. 91, 100-02 (1940).

58. *Id.* at 94-95.

likely to be direct competition in the for-hire driver industry in Seattle and elsewhere between drivers operating as independent contractors and drivers employed by traditional taxi companies. Like the orchestra leaders in *Carroll* or the independent drivers in *Oliver*, the independent for-hire drivers could undercut the wages of employee drivers by charging fees below the represented drivers' wages in order to attract customers.<sup>59</sup> Since this would directly threaten the wages of employee drivers, a labor organization's efforts to regulate the compensation for independent drivers would fall within the Clayton Act's labor exemption where the labor organization acts to protect the wages of represented employee drivers.

### C. State Action Doctrine

In *Parker v. Brown*, the Supreme Court held that federal antitrust law does not "restrain a state or its officers or agents from activities directed by its legislature."<sup>60</sup> This state action doctrine exempts from antitrust liability: (1) the actions of state officers adopting and carrying out a regulatory scheme pursuant to a clearly-articulated state policy, and (2) the actions of regulated private parties that are actively supervised by the municipality charged with implementing the regulatory scheme.<sup>61</sup>

In explaining this exemption from anti-trust liability, the Court has described the circumstances in which *Parker* immunity is available to private parties, and to state agencies or officials regulating the conduct of private parties:

We set forth a two-pronged test for determining whether state regulation of private parties is shielded from the federal antitrust laws. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy." . . . Second, the State must supervise actively any private anticompetitive conduct.<sup>62</sup>

Pursuant to the Local Government Antitrust Act ("LGAA"), the state action exemption also attaches to municipal regulation.<sup>63</sup> "Congress passed the LGAA in response to 'an increasing number of antitrust suits, and threatened suits, that could undermine a local government's ability to govern

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59. See *Carroll*, 391 U.S. 99; *Oliver*, 358 U.S. 283.

60. 317 U.S. 341, 350-51 (1943).

61. See *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 57 (1985) (holding that immunity from antitrust liability "is available to private parties, and to state agencies or officials regulating the conduct of private parties" where the regulation is "one clearly articulated and affirmatively expressed as state policy" (internal quotation marks omitted) (quoting *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)) and "the State must supervise actively any private anticompetitive conduct" (footnote omitted) (citing *id.*); *GF Gaming Corp. v. City of Black Hawk*, 405 F.3d 876, 886-87 (10th Cir. 2005) (applying the same two-prong test to private action pursuant to a municipal regulation).

62. *S. Motor Carriers*, 471 U.S. at 57 (quoting *Midcal*, 445 U.S. at 105, in turn quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978) (plurality opinion)).

63. See 15 U.S.C. § 36(a) (2012) (providing that no person will face antitrust liability "based on any official action directed by a local government").

in the public interest.”<sup>64</sup> The act provides that “[n]o damages, interest on damages, costs, or attorney’s fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity.”<sup>65</sup>

Where the defendant is a private actor, as opposed to a municipality or local government official, that person must show the two-pronged *Midcal* test is met, namely that “1) the challenged restraint is one clearly articulated and affirmatively expressed as state policy; and 2) the policy is actively supervised by the state.”<sup>66</sup> The LGAA provides immunity to a private party if that person is engaged in official action directed by a government or official or employee.<sup>67</sup>

To satisfy the first prong of the test, the local legislation must “plainly show that the legislature contemplated the kind of action complained of.”<sup>68</sup>

To satisfy the “active supervision” prong of the *Midcal* test “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.”<sup>69</sup> Notwithstanding the language just quoted, where municipal action is involved, “active” supervision by a higher state body is not required. “Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality’s execution of what is a properly delegated function.”<sup>70</sup> “It is sufficient if the municipality is acting pursuant to a ‘clearly articulated state policy’ reflected in actual legislation or high state court decisions, where the challenged conduct is a foreseeable consequence of what the state law authorizes.”<sup>71</sup>

64. *GF Gaming Corp.*, 405 F.3d at 885 (quoting *Tarabishi v. McAlester Reg’l Hosp.*, 951 F.2d 1558, 1564 (10th Cir. 1991)).

65. 15 U.S.C. § 35(a). The provisions of the Clayton Act cited by the LGAA provide the private damages remedy for violation of the Sherman Act. *See Crosby v. Hosp. Auth. of Valdosta & Lowndes Cnty.*, 93 F.3d 1515, 1536 (11th Cir. 1996).

66. *Crosby*, 93 F.3d at 1536 (first citing *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992); and then citing *Midcal*, 445 U.S. at 105) (applying the same two-pronged test to determine whether a private party was entitled to *Parker* immunity for actions authorized by municipal regulation); *see also GF Gaming Corp.*, 405 F.3d at 886 (“Applying the two-part test by analogy to the private defendants here, the relevant questions therefore become: (1) whether the challenged restraint was the clearly articulated and affirmatively expressed policy of [the City of] Black Hawk, and (2) whether the policy was actively supervised by Black Hawk.” (citing *Crosby*, 93 F.3d at 1536)); *Cohn v. Bond*, 953 F.2d 154, 157 (4th Cir. 1991) (“Whether actions are ‘directed by’ an official, as contemplated by the LGAA, is determined by borrowing and applying the State Action Doctrine two prong test.” (quoting *Sandcrest Outpatient Servs. v. Cumberland Cty. Hosp. Sys.*, 853 F.2d 1139, 1143 (4th Cir. 1988)), *cert. denied*, 505 U.S. 1230, 1992).

67. *GF Gaming Corp.*, 405 F.3d at 886; *Crosby*, 93 F.3d at 1536; *Cohn*, 953 F.2d at 157.

68. *GF Gaming Corp.*, 405 F.3d at 886 (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 44 (1985)) (internal quotation marks omitted).”)

69. *Id.* (quoting *Patrick v. Burget*, 486 U.S. 94, 101 (1988)).

70. *Town of Hallie*, 471 U.S. at 47.

71. *Delta Turner, Ltd. v. Grand Rapids–Kent Cty. Convention/Arena Auth.*, 600 F. Supp. 2d 920, 928 (W.D. Mich., 2009) (quoting WILLIAM C. HOLMES, *ANTITRUST LAW HANDBOOK* 795 (2007–2008 ed. 2007)).

Under the standards set forth in these cases, negotiations between private parties—a company that provides for-hire drivers to the public, and a stakeholder representative elected by a majority of qualifying drivers—about working conditions of for-hire drivers pursuant to a local collective bargaining ordinance are insulated from antitrust liability so long as the two-pronged *Midcal* test is satisfied. Seattle’s Ordinance is an example of legislation that satisfies both prongs of the *Midcal* test, and therefore officials and private parties acting pursuant to the ordinance are immune from antitrust liability under the state action exemption.

The State of Washington has authorized the City of Seattle to regulate the for-hire vehicle industry and the displacement of competition was clearly a foreseeable result of the regulatory authority granted by the state. In fact, the delegating statute explicitly permits the displacement of competition. The Revised Code of Washington (RCW) § 46.72.001 provides, “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.”<sup>72</sup> Accordingly, RCW § 81.72.210 permits cities to “license, control, and regulate privately operated taxicab transportation services operating within their respective jurisdictions.”<sup>73</sup> This regulatory authority includes the authority to adopt regulations “controlling the rates charged for providing taxicab transportation service and the manner in which rates are calculated and collected,”<sup>74</sup> “establishing safety, equipment, and insurance requirements,”<sup>75</sup> and imposing “[a]ny other requirements adopted to ensure safe and reliable taxicab service.”<sup>76</sup>

The fact that these statutory provisions do not state expressly that a city may engage in the type of anti-competitive conduct authorized by the Ordinance does not mean that there was not a state policy to displace competition in the for-hire passenger delivery industry. As the Supreme Court discussed in *Town of Hallie v. City of Eau Claire*, it is sufficient if such conduct is a foreseeable result of the authority expressly granted by the statute.<sup>77</sup> As the Court stated in that decision:

[T]he statutes clearly contemplate that a city may engage in anticompetitive conduct. Such conduct is a foreseeable result of empowering the City to refuse to serve unannexed areas. It is not necessary . . . for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects. [I]t is sufficient that the statutes authorized the City to provide sewage services and also to determine the areas

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72. Wash. Rev. Code § 46.72.001 (2016).

73. *Id.* at § 81.72.210.

74. *Id.* at § 81.72.210(3).

75. *Id.* at § 81.72.210(5).

76. *Id.* at § 81.72.210(6).

77. 471 U.S. 34, 42 (1985).

to be served. We think it is clear that anticompetitive effects logically would result from this broad authority to regulate.<sup>78</sup>

The Ordinance, which grants collective bargaining rights to drivers in the for-hire transportation industry, clearly falls within this broad grant of regulatory authority, because the Ordinance regulates for-hire transportation services within the City of Seattle and comfortably falls within the City of Seattle's authority to implement "requirements adopted to ensure safe and reliable taxicab service."<sup>79</sup>

The Ordinance contains a clear expression of the municipal policy to be achieved by authorizing the parties to engage in collective bargaining negotiations. The Ordinance contains detailed legislative findings indicating that the City of Seattle has identified concerns relating to the safety and reliability of for-hire transportation services and setting forth the reasons the City has determined that providing collective bargaining rights to for-hire drivers will improve the safety and reliability of for-hire transportation service in the city.<sup>80</sup> This should be sufficient to satisfy the first prong of the *Midcal* test. Among the Ordinance's findings are:

- "[E]ntities 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."<sup>81</sup>
- "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."<sup>82</sup>
- "For-hire drivers lack the power to negotiate [the terms and conditions of their contractual relationship] effectively on an individual basis."<sup>83</sup>
- Collective negotiations regarding 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."<sup>84</sup>

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78. *Id.* at 41-42 (first citing *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 97 (1978); and then citing 1 PHILIP AREEDA & DONALD F. TURNER, *ANTITRUST LAW* ¶ 212.3, at 54 (Supp. 1982)).

79. Wash. Rev. Code § 81.72.210(6).

80. Seattle, Wash., Ordinance 124968 (Dec. 23, 2015).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

- Job retention and stability will result, which will “improve the safety and reliability of the for-hire transportation services.”<sup>85</sup>
- Establishing collectively bargained terms will “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.”<sup>86</sup>

These detailed findings, and the others set forth in the Ordinance, all of which clearly set forth the public policies served by the Ordinance, should easily satisfy the first prong of the *Parker* test.

The Supreme Court has held that the active supervision prong “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.”<sup>87</sup> This ensures that the private party’s conduct “promotes state policy, rather than merely the party’s individual interests.”<sup>88</sup> The Court has held that a “negative option” scheme for approval of a private rate-setting, in which private parties submitted rate proposals to a state agency and the rates automatically went into effect if the agency did not take action within a specified period of time, failed to meet the requirements of the active supervision prong.<sup>89</sup> Because the rates could become effective automatically without any actual action by the state agency, this regulatory scheme only provided the potential for government supervision of private conduct, as opposed to requiring actual supervision.<sup>90</sup>

By contrast, the Ordinance establishes a regulatory scheme that requires direct review and approval of private action by government officials before such action becomes effective.<sup>91</sup> Specifically, after reaching an agreement the taxicab company or TNC and the driver representative must transmit the written agreement to the City’s Director of Finance and Administrative Services.<sup>92</sup> The Director must review the agreement, in part, to ensure that the substance of the agreement promotes the provision of safe, reliable and economical for-hire transportation services and otherwise advances the public policy goals set forth in the Ordinance.<sup>93</sup> The agreement is final and binding only if the Director finds the agreement compliant, and if s/he does

85. *Id.*

86. *Id.*

87. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 (1992) (quoting *Patrick v. Burget*, 486 U.S. 94, 101 (1988)).

88. *Id.*

89. *Id.* at 638.

90. *See id.* (“Where prices or rates are set as an initial matter by private parties, subject only to a veto if the State chooses to exercise it, the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme.”).

91. *See* Seattle, Wash., MUN. CODE § 6.310.735 (2015).

92. *Id.* § 6.310.735.H.2.

93. *Id.* § 6.310.735.H.2.a-b.

not, the Director remands the agreement to the parties for further action.<sup>94</sup> A similar approval process is followed when the agreement is reached through interest arbitration.<sup>95</sup>

This significant level of government oversight should meet the requirements of the active supervision prong of the test for *Parker* immunity. The Ordinance provides for ongoing governmental review, which ensures that the conduct of the TNC and stakeholder representative continues to adhere to the City's articulated policies as the parties negotiate subsequent CBAs.<sup>96</sup> Because the Ordinance requires the City to substantively review and affirmatively approve any agreement reached by the private parties and/or imposed by an interest arbitrator, it ensures that the agreement adheres to the City's articulated policies and it empowers the City to reject an agreement or any provision(s) therein that do not adhere to such policies before the agreement becomes effective.<sup>97</sup>

#### IV.

##### NLRA PREEMPTION

###### *A. Overview of NLRA Preemption Issues Relating to State and Local Regulation of For-Hire Drivers Excluded from the NLRA*

There are two theories of NLRA preemption that could apply to a state or municipal law providing collective bargaining rights to for-hire drivers.

The first, which is known as “*Garmon* preemption,”<sup>98</sup> prohibits states from regulating activity that the NLRA protects, prohibits or “arguably” protects or prohibits.<sup>99</sup> However, *Garmon* preemption will not apply “‘where the activity regulated was a merely peripheral concern of the Labor Management Relations Act,’ or ‘where the regulated conduct touch[es] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [it] could not [be inferred]

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94. *Id.*

95. *Id.* § 6.310.735.H.3.

96. *Id.* § 6.310.735.J.1.

97. *Id.* § 6.310.735.H.3.

98. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959) (“When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.”).

99. Section 7 of the NLRA protects the right of employees to engage in protected concerted activity. 29 U.S.C. § 157 (2012). Section 8 of the NLRA makes it an unfair labor practice for an employer to “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157,” *id.* § 158(a)(1), to discriminate or retaliate against an employee for exercising his or her Section 7 rights, *id.* § 158(a)(3), and to refuse to bargain with the employees’ collective bargaining representative, *id.* § 158(a)(5), among other acts.

that Congress had deprived the States of the power to act.”<sup>100</sup> This attack on local collective bargaining laws like the Ordinance will be premised on the argument that because independent contractor drivers are “arguably” protected by Section 7 of the Act (even though the TNCs and taxicab companies, as a matter of course, vigorously dispute that the drivers actually *are* so protected), the NLRA preempts any state or local government from providing any collective bargaining rights to these workers.

The second is known as “*Machinists* preemption.”<sup>101</sup> *Machinists* preemption applies where “the NLRA neither protects nor prohibits the activity in question, but national labor policy requires that the activity should be wholly unregulated and left to the free play of economic forces.”<sup>102</sup> This federal preemption doctrine “protects against state interference with policies implicated by the structure of the Act itself, by pre-empting state law and state causes of action concerning conduct that Congress intended to be unregulated.”<sup>103</sup> Thus, the *Machinists* Court held that a State may not penalize a concerted refusal to work overtime that was neither prohibited nor protected under the NLRA, for “Congress intended that the conduct involved be unregulated because left [sic] ‘to be controlled by the free play of economic forces.’”<sup>104</sup> Cases applying the *Machinists* preemption doctrine “rely on the understanding that in providing in the NLRA a framework for self-organization and collective bargaining, Congress determined both how much the conduct of unions and employers should be regulated, and how much it should be left unregulated.”<sup>105</sup>

Whether a *Garmon* or *Machinists* preemption analysis is applied, however, it is clear that of the various groups of workers excluded from NLRA coverage, such as railway and airline employees, supervisors, public employees, and farmworkers, only state and local regulation of collective bargaining rights of supervisors is subject to NLRA preemption. The text and legislative history of the NLRA includes a clear expression of Congressional intent to prohibit states and municipalities from adopting laws

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100. *Hume v. Am. Disposal Co.*, 124 Wash. 2d 656, 663-64 (1994) (alterations in original) (quoting *Garmon*, 359 U.S. at 243-44), *cert. denied*, 513 U.S. 1112 (1995).

101. See *Lodge 76, Int’l Ass’n of Machinists v. Wis. Emp’t Relations Comm’n*, 427 U.S. 132, 140 (1976) (“[A] second line of pre-emption analysis has been developed in cases focusing upon the crucial inquiry whether Congress intended that the conduct involved be unregulated because left ‘to be controlled by the free play of economic forces.’” (footnote omitted) (quoting *NLRB v. Nash-Finch Co.* 404 U.S. 138, 144 (1971)).”).

102. *Willmar Poultry Co. v. Jones*, 430 F. Supp. 573, 576 (D. Minn. 1977) (citing *Machinists*, 427 U.S. 132; then citing *Beasley v. Food Fair of N.C., Inc.*, 416 U.S. 653 (1974); then citing *Local 20, Teamsters Union v. Morton*, 377 U.S. 252 (1964); and then citing *NLRB v. Ins. Agents’ Int’l Union*, 361 U.S. 477, 488-89 (1960)).

103. *Metro. Life Ins. v. Massachusetts*, 471 U.S. 724, 749 (1985).

104. *Machinists*, 427 U.S. at 140 (footnote omitted) (quoting *Nash-Finch Co.*, 404 U.S. at 144).

105. *Metro. Life*, 471 U.S. at 751 (citing *N.Y. Tel. Co. v. N.Y. State Dep’t of Labor*, 440 U.S. 519, 554 (1979) (Powell, J., dissenting)).

that would require employers to engage in collective bargaining with supervisors.

In *Beasley v. Food Fair of North Carolina*,<sup>106</sup> the Supreme Court held that the text of Section 14(a) of the NLRA and the legislative history accompanying the 1947 amendments to the NLRA clearly indicated that Congress intended to prohibit states and municipalities from adopting any law that would grant collective bargaining rights to supervisors.<sup>107</sup> Section 14(a) of the Act provides that no employer “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.”<sup>108</sup> The Court found that this provision of the Act “is a broad command that no employer shall be compelled to treat supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.”<sup>109</sup> The Court also found that the House and Senate reports accompanying the 1947 amendments to the NLRA indicated that Congress intended to carve out supervisors “because supervisors were management obliged to be loyal to their employer’s interests, and their identity with the interest of rank-and-file employees might impair that loyalty and threaten realization of the basic ends of federal labor legislation.”<sup>110</sup> Because of this clear statement of Congressional intent, the Court held that a state law providing collective bargaining rights to supervisors is preempted by the NLRA.<sup>111</sup>

In sharp contrast, courts have consistently held that state laws providing collective bargaining rights to other groups of workers who are also excluded from the Act, including agricultural workers, public employees, domestic workers, and independent contractors, are not preempted because the activities of workers who are expressly excluded from the NLRA cannot be, even arguably, protected or prohibited by the Act, and there is no indication in the text or legislative history of the Act that Congress intended to leave such workers entirely unregulated by any law.<sup>112</sup>

As is demonstrated below, under neither of these doctrines does the NLRA preempt state or municipal laws that confer collective bargaining

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106. 416 U.S. 653 (1974).

107. *Id.* at 657-60.

108. 29 U.S.C. § 164(a) (2012).

109. *Beasley*, 416 U.S. at 657 (quoting *id.*).

110. *Id.* at 659-60.

111. *Id.* at 661-62.

112. See, e.g., *United Farm Workers of Am. v. Ariz. Agric. Emp’t Relations Bd.*, 669 F.2d 1249, 1257 (9th Cir. 1982) (agricultural laborers); *Greene v. Dayton*, 81 F. Supp. 3d 747, 750-52 (D. Minn. 2015) (domestic workers); *Willmar Poultry Co. v. Jones*, 430 F. Supp. 573, 577-78 (D. Minn. 1977) (agricultural workers); *Baggett Transp. Co. v. Int’l Bhd. of Teamsters*, 289 Ala. 666, 669 (1972) (independent contractors). See also *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 181 (2007) (“The National Labor Relations Act leaves States free to regulate their labor relationships with their public employees.” (citing 29 U.S.C. § 152(2))).

rights to independent for-hire drivers who are not covered by that Act.<sup>113</sup> So long as there is no indication in the text or legislative history of the NLRA that Congress intended to leave such workers entirely unregulated, as is true for independent contractors, neither of those doctrines will operate to invalidate the Ordinance at issue here.

### B. *Garmon Preemption*

A local ordinance regulating the collective bargaining rights of independent contractors will not be deemed preempted by the NLRA pursuant to *Garmon* preemption because independent contractors are expressly excluded from the definition of employee, so their conduct cannot even arguably be protected or prohibited by the Act. Cases have repeatedly applied this rationale to reject *Garmon* preemption challenges to state and local regulation of conduct of categories of employees excluded from the NLRA's definition of "employee."<sup>114</sup> As one court explained:

Section 2(3) of the NLRA, 29 U.S.C. § 152(3), excludes agricultural laborers from the definition of "employees." Therefore, it follows that provisions of the NLRA employing that pivotal term would cease to operate where agricultural laborers are the focus of concern. Most obviously, § 7 of the NLRA, 29 U.S.C. § 157, which bestows rights upon employees, does not bestow upon agricultural laborers the right to engage in self-organization, collective bargaining and other concerted activities. Accordingly, activity designed to secure organization or recognition of agricultural laborers cannot be protected by § 7. . . . Correspondingly, § 8(b) of the NLRA, 29 U.S.C. § 158(b), which defines labor organization unfair labor practices, prohibits no conduct carried on by organizations composed exclusively of agricultural laborers. . . . Therefore, because the NLRA neither protects nor prohibits labor relations activity by agricultural laborers, preemption based on the NLRA's protections and prohibitions does not apply.<sup>115</sup>

This reasoning is sound and applies with equal force to any category of worker expressly excluded from the Act's definition of "employee."<sup>116</sup> Hence, given that independent contractors, agricultural workers, public employees and domestic service workers are expressly excluded from the Act's definition of "employee,"<sup>117</sup> courts have consistently held that *Garmon* preemption does not apply to state or municipal regulation of the collective

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113. Independent contractors, agricultural workers, public employees and domestic service workers are expressly excluded from the Act's definition of "employee." 29 U.S.C. § 152(2)-(3).

114. See *Willmar Poultry*, 430 F. Supp. at 577-78 (agricultural workers); *Greene*, 81 F. Supp. 3d at 750-52 (domestic workers).

115. *Willmar Poultry*, 430 F. Supp. at 577 (internal citation omitted).

116. See, e.g., *United Food & Commercial Workers Local 99 v. Bennett*, 934 F. Supp. 2d 1167, 1193 (D. Ariz. 2013) (holding that state statutes relating to harassment, trespass, assembly and picketing in the context of labor relations were not preempted as to independent contractors and other workers excluded from the NLRA's definition of "employee," including agricultural workers and domestic workers, because such workers are not actually or arguably subject to the Act).

117. 29 U.S.C. § 152(2)-(3).

bargaining rights or activities of such workers.<sup>118</sup> Thus, *Garmon* preemption does not apply to state laws regulating the collective bargaining rights of workers who are excluded from the NLRA because workers who are clearly excluded from the Act, other than supervisors, cannot even “arguably” be subject to that Act.<sup>119</sup>

### C. *Machinists Preemption*

The NLRA also protects employee and employer rights to resort to peaceful means of economic pressure free of governmental regulation and interference.<sup>120</sup> By enacting the NLRA, Congress intended to give employers and employees “the right to make use of ‘economic weapons,’ not explicitly set forth in the Act, free of governmental interference.”<sup>121</sup> A state is “without authority to attempt to ‘introduce some standard of properly “balanced” bargaining power.’”<sup>122</sup> *Machinists* preemption applies to ensure that state and local governments do not interfere where “national labor policy requires that the activity should be wholly unregulated and left to the free play of economic forces.”<sup>123</sup>

However, where the Act’s legislative history does not demonstrate that Congress intended to prohibit state and local regulation of the collective

118. See, e.g., *Baggett Transp. Co. v. Int’l Bhd. of Teamsters*, 289 Ala. 666, 669 (“[S]ince Congress has expressly excluded ‘independent contractors’ from the group to which it extends the protection of the National Labor Relations Act, matters predicated on disputes between them and those with whom they contract are specifically not subject to the act; and such disputes, therefore, cannot be ‘arguably’ subject to the same.” (first quoting 29 U.S.C. § 152(3); and then quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959))); see also *Bennett*, 934 F. Supp. 2d at 1193 (“[T]he NLRA does not apply when the employer is a state or any political subdivision thereof. Nor does it apply to agricultural laborers, domestic servants, employees of immediate family members [or] independent contractors . . . . Thus, [a state law regulating picketing by labor organizations] is not preempted as to these specific employers and employees.” (internal citations omitted)); *Willmar Poultry*, 430 F. Supp. at 577-78 (agricultural workers); *Greene*, 81 F. Supp. 3d at 750-52 (domestic workers).

119. The issue would be different if there were a dispute between a taxicab company or TNC, on the one hand, and an entity seeking to become certified as the representative of that company’s drivers under the Ordinance, on the other, regarding whether or not those drivers are, or are not, independent contractors. A strong argument could be made that *Garmon* preemption would preclude either a state or federal court from deciding that issue if the question is “arguable.” See, e.g., *Marine Eng’rs Beneficial Ass’n v. Interlake S. S. Co.*, 370 U.S. 173, 177-78 (1962) (“The petitioners contend that the principles of the *Garmon* decision confined the state court to deciding only whether the evidence in this case was sufficient to show that either of them was arguably a ‘labor organization’ within the contemplation of § 8(b). We agree, and hold that the evidence was sufficient to deprive the Minnesota courts of jurisdiction over this controversy.”); *Bernstein v. Universal Pictures, Inc.*, 517 F.2d 976, 981 n.4 (2d Cir. 1975) (“The *Garmon* rule seems equally applicable where the ‘arguable’ issue may be thought of as jurisdictional.” (citing *Marine Eng’rs*, 370 U.S. 173)).

120. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 111-12 (1989).

121. *Id.* at 111 (quoting *Lodge 76, Int’l Ass’n of Machinists v. Wis. Emp’t Relations Comm’n*, 427 U.S. 132, 150 (1976)).

122. *Id.* at 111 n.8 (quoting *NLRB v. Ins. Agents’ Int’l Union*, 361 U.S. 477, 497 (1960)).

123. *Willmar Poultry*, 430 F. Supp. at 576 (citing *Machinists*, 427 U.S. 132; then citing *Beasley v. Food Fair of N.C., Inc.*, 416 U.S. 653 (1974); then citing *Local 20, Teamsters Union v. Morton*, 377 U.S. 252 (1964); and then citing *Ins. Agents’ Int’l Union*, 361 U.S. at 488-89 (1960)).

bargaining rights of that group of workers, *Machinists* preemption does not apply. As was noted above, courts have not found any clear indication in the text or legislative history of the Act that Congress intended to leave the collective bargaining rights of workers not covered by the Act, other than supervisors, entirely free from regulation. Courts have also held that state laws regulating the conduct of public employees and domestic service workers are not subject to *Machinists* preemption due to the express exclusion of such workers from the definition of “employee” under the Act and the lack of legislative history suggesting that Congress intended to leave such workers totally free from regulation.<sup>124</sup> For example, the Ninth Circuit in *United Farm Workers*, inferred from Congress’s express exclusion of agricultural employees from the NLRA that Congress intended not to preempt state laws regulating the collective bargaining process in the agricultural industry.<sup>125</sup> Noting that state laws are often drastically different, even among neighboring states, one of which may be a “right to work” state and one of which may confer a host of collective bargaining rights on agricultural workers, the Ninth Circuit explained:

Where Congress “leaves the employer-employee relation free of regulation in some aspects, it implies that in such matters federal policy is indifferent . . .” . . . Thus, where, as here, Congress has chosen not to create a national labor policy in a particular field, the states remain free to legislate as they see fit, and may apply their own views of proper public policy to the collective bargaining process insofar as it is subject to their jurisdiction.<sup>126</sup>

Likewise, in *Willmar Poultry*, the court held that a Minnesota statute providing collective bargaining rights to agricultural workers was not subject to *Machinists* preemption.<sup>127</sup> The court found that there is no “explicit expression of a national labor policy that agricultural laborers be denied all representational rights” anywhere in the text of the NLRA and that there is nothing in the legislative history of the Act which indicates Congressional intent to preclude state or municipal regulation of the collective bargaining rights of agricultural workers.<sup>128</sup> The court reasoned that, standing alone, exclusion of agricultural workers from the Act indicates that federal policy is indifferent regarding the collective bargaining rights of such workers.<sup>129</sup> In each of the foregoing cases, the Courts found nothing in the text or legislative history of the NLRA to suggest that Congress intended to preempt state

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124. See *Willmar Poultry*, 430 F. Supp. at 577-78 (agricultural workers); *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 181 (2007) (public employees); *Greene v. Dayton*, 81 F. Supp. 3d 747, 751-52 (D. Minn. 2015) (home healthcare workers).

125. *United Farm Workers of Am. v. Ariz. Agric. Emp’t Relations Bd.*, 669 F.2d 1249, 1256 (9th Cir. 1982).

126. *Id.* at 1256-57 (quoting *Bethlehem Steel Co. v. N.Y. State Labor Relations Bd.*, 330 U.S. 767, 773 (1947)).

127. 430 F. Supp. at 577-78.

128. *Id.* at 578.

129. *Id.*

action governing the collective bargaining rights of workers excluded from the NLRA's definition of employee.

Where other kinds of employees are likewise excluded from the definition of "employee" in the NLRA and there is no clear expression in the text or legislative history of the Act indicating that Congress intended to preclude state or municipal regulation regarding the collective bargaining rights of such employees, courts must conclude that "federal policy is indifferent" regarding the collective bargaining rights of such workers unless there is a clear indication somewhere in the text or legislative history of the Act that Congress intended to prohibit states or municipalities from adopting any rules regarding collective bargaining for that group of workers.<sup>130</sup>

Independent contractors are expressly excluded from the NLRA's definition of employee, and there is no clear expression in the text or legislative history of the Act suggesting that Congress intended to preempt local regulation regarding the collective bargaining rights of independent contractors. Accordingly, state and local laws regarding the collective bargaining rights of independent contractors like the Seattle Ordinance are not preempted by the NLRA under either a *Garmon* or a *Machinists* preemption analysis.<sup>131</sup>

#### CONCLUSION

For decades, transportation companies have used for-hire drivers to provide services to their customers. How those workers should be classified has been hotly contested before the National Labor Relations Board and in courts throughout the country for many years. The advent and popularity of app-based TNCs like Uber have once again focused attention on the question: should for-hire drivers be classified as employees with all the rights and protections afforded to employees under a host of federal and state laws? Or should for-hire drivers be classified as independent contractors, and continue to be denied those rights and protections? The NLRB and the courts continue to handle cases seeking answers to these questions. Yet the vast majority of

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130. *Id.* (quoting *Bethlehem Steel*, 330 U.S. at 773).

131. *See* *Bernstein v. Universal Pictures, Inc.*, 517 F.2d 976, 980 (2d Cir. 1975) (holding that determining whether the composers at issue were independent contractors or "employees" subject to the NLRA was "critical" to determine whether the matter was preempted by the NLRA or not); *United Food & Commercial Workers Local 99 v. Bennett*, 934 F. Supp. 2d 1167 at 1193 (D. Ariz. 2013) ("[T]he NLRA does not apply when the employer is a state or any political subdivision thereof. Nor does it apply to agricultural laborers, domestic servants, employees of immediate family members [or] independent contractors . . . . Thus, [a state law regulating picketing by labor organizations] is not preempted as to these specific employers and employees." (internal citations omitted)); *Baggett Transp. Co. v. Int'l Bhd. of Teamsters*, 289 Ala. 666 (1972); *Rackley v. Int'l Navigation Corp.*, 337 S.W.2d 613, 616-17 (Tex. Civ. App. 1960) (holding that the NLRB did not have exclusive jurisdiction because the "appellants are not employees but independent contractors"); *Sternberg Knitting Co. v. Dist. 65, Wholesale Union*, 1970 WL 7659, at \*2 (N.Y. Sup. Ct. Dec. 4, 1970) (holding that defendants failed to establish that the NLRB had exclusive jurisdiction over the dispute because they had not demonstrated that the workers at issue were employees and not independent contractors).

for-hire drivers continue to be denied essential tools to advocate for improvements in their wages and working conditions, including the rights to organize and to collectively bargain.

Local governments that wish to enact legislation, such as Seattle's Ordinance No. 124968, will almost certainly face legal challenges to those laws. The challenges will most likely include arguments that the legislation is preempted by the National Labor Relations Act and that the conduct of the parties under the legislation violates federal antitrust laws. Local governments have the authority to address the clear need for creative solutions to protect the rights of this vulnerable class of working people. Provided that the local legislation is structured like the Seattle ordinance, in a way to proactively address these two potential pitfalls, neither challenge is likely to succeed.