

## Uber, Lyft, and Regulating the Sharing Economy

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The “sharing economy” goes by many names such as the “gig economy,” the “1099 economy,” and the “on-demand economy,”<sup>1</sup> all of which describe the economic system that uses online platforms to connect workers and sellers with clients and consumers, primarily through smartphone applications.<sup>2</sup> Many of the sharing economy companies are also called the “tech disruptors.”<sup>3</sup> They earned this title because they have changed the way that people do business.<sup>4</sup> But in changing the way that people do business, they have also created unique regulatory challenges for governments across the country. The news is rife with stories about when these regulations go wrong. For example, tenants have been evicted from their apartments in many cities for renting their apartments through the “home sharing” company Airbnb.<sup>5</sup> Another example is the standoff between Uber and Lyft against the City of Austin over a law requiring drivers to pass a background check before they can operate in the city, resulting in Uber and Lyft ceasing operations in Austin and costing 10,000 drivers their jobs.<sup>6</sup> In response to these stories, some governments have

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1. Elizabeth J. Kennedy, *Employed by an Algorithm: Labor Right in the On-Demand Economy*, 40 SEATTLE U. L. REV. 987, 992 (2017).

2. DIANA FARRELL & FIONA GREIG, JP MORGAN CHASE & CO. INST., PAYCHECKS, PAYDAYS, AND THE ONLINE PLATFORM ECONOMY: BIG DATA ON INCOME VOLATILITY 29 (2016), <https://www.jpmorganchase.com/corporate/institute/document/jpmc-institute-volatility-2-report.pdf> [<https://perma.cc/H5KC-ZLSE>].

3. *Meet the 2017 CNBC Disruptor 50 Companies*, CNBC (May 16, 2017, 6:00 AM), <http://www.cnbc.com/2017/05/16/the-2017-cnbc-disruptor-50-list-of-companies.html> [<https://perma.cc/KBP5-RHHT>].

4. David Spiegel, *How We Chose 2016's Most Disruptive Innovators*, CNBC (June 7, 2016, 6:00 AM), <http://www.cnbc.com/2016/06/07/how-we-chose-cnbc-disruptor-50-companies.html> [<https://perma.cc/J9L8-V8S2>].

5. James Surowiecki, *Airbnb's New York Problem*, NEW YORKER (Oct. 8, 2013), <http://www.newyorker.com/business/currency/airbnbs-new-york-problem>.

6. Mike McPhate, *Uber and Lyft End Rides in Austin to Protest Fingerprint Background Checks*, N.Y. TIMES (May 9, 2016), <https://www.nytimes.com/2016/05/10/technology/uber-and-lyft-stop-rides-in-austin-to-protest-fingerprint-background-checks.html?mcubz=0>.

begun experimenting with innovative solutions to the unique regulatory challenges created by the sharing economy.

One solution that stands out is the ordinance adopted by the City of Seattle.<sup>7</sup> Seattle's ordinance created a system that allows Uber and Lyft drivers to create a union to collectively bargain with their "driver coordinators."<sup>8</sup> Seattle's ordinance is an innovative attempt to solve the problem of how to classify sharing economy workers, which has plagued local governments and courts across the country.<sup>9</sup> Companies like Uber claim that the workers who use their platforms are "independent contractors" rather than employees.<sup>10</sup> By being classified as independent contractors, workers lose many of the rights and privileges that employees have, including the right to form unions and collectively bargain without risk of federal antitrust liability.<sup>11</sup> While many local governments have attempted to challenge the way Uber classifies its workers directly, Seattle's ordinance is unique in that it bypasses the issue of classification by allowing drivers to collectively bargain regardless of their worker status.<sup>12</sup> However, it is possible that Seattle's ordinance itself violates federal antitrust law. The U.S. Chamber of Commerce has already sued on behalf of Uber in federal district court, but the case was dismissed without prejudice for lack of standing.<sup>13</sup> Proponents of the ordinance say that it is protected under state action immunity, which recognizes that action is permissible despite violating federal antitrust law if it is in pursuit of a specific state policy.<sup>14</sup> However, to date, the Washington legislature has made no effort to support Seattle's unique ordinance.

This Note will explore the labor issues presented by the sharing economy before taking a deeper look into the terms and viability of Seattle's innovative ordinance. Section I of this Note will provide an overview of the sharing economy and labor relations within the sharing economy. Section II will explore some of the ways in which Uber's worker classification has been challenged throughout the country, focusing primarily on the class action lawsuit Uber settled in 2016.<sup>15</sup> Section III will discuss the specifics of Seattle's ordinance and the challenges to the ordinance raised by the U.S. Chamber of Commerce. Finally, Section IV

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7. SEATTLE, WASH., MUN. CODE § 6.310.735 (2015).

8. *Id.*

9. Kennedy, *supra* note 1.

10. *See infra* pp. 7–10.

11. Kennedy, *supra* note 1.

12. *Id.*

13. O'Connor v. Uber Techs., Inc., 58 F. Supp. 3d 989 (N.D. Cal. 2014) (order granting motion to dismiss).

14. *See infra* pp. 15–20.

15. O'Connor v. Uber Techs., Inc., 201 F. Supp. 3d 1110 (N.D. Cal. 2016).

will discuss the state action doctrine as a defense to federal antitrust law before determining whether the ordinance would survive federal antitrust scrutiny under the state action doctrine. Ultimately, this Note will conclude that Seattle's ordinance, as written, would not survive an antitrust challenge under the state action doctrine.

## I. OVERVIEW OF THE SHARING ECONOMY AND LABOR RELATIONS

The most widely recognized sharing economy companies are the “ride share” companies, such as Uber and Lyft. However, there are many other sharing economy companies, such as Airbnb, Postmates, Etsy, and even Ebay.<sup>16</sup> Although sharing economy companies are relatively new, the global market for sharing economy companies is growing at an extremely fast rate.<sup>17</sup> For example, the number of Uber drivers doubled every six months between 2013 and 2015.<sup>18</sup> In 2013, the global sharing economy market was valued at \$26 billion, and it is expected to grow to \$110 billion in the near future.<sup>19</sup>

Much of the sharing economy's success can be attributed to the consumers and the workers. Consumers cite ease of use, convenience, and competitive pricing as reasons why they choose to do business with sharing economy companies.<sup>20</sup> Workers, on the other hand, are attracted to the compensation and flexible schedules that sharing economy companies advertise to potential workers.<sup>21</sup>

On the surface, the sharing economy seems great for everyone involved. A quick Google search shows Lyft boasting that drivers can make as much as \$35 an hour.<sup>22</sup> Further, Uber's website advertises potential income and flexible schedules as reasons for drivers to “partner” with Uber.<sup>23</sup> Yet, it has become increasingly clear that the realities

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16. Kennedy, *supra* note 1, at 992.

17. REBECCA SMITH & SARAH LEBERSTEIN, NAT'L EMP. L. PROJECT, RIGHTS ON DEMAND: ENSURING WORKPLACE STANDARDS AND WORKER SECURITY IN THE ON-DEMAND ECONOMY 6 (2015) [hereinafter RIGHTS ON DEMAND], <http://www.nelp.org/content/uploads/Rights-On-Demand-Report.pdf> [<https://perma.cc/X6U8-JXWA>].

18. *Id.* Another example is that Postmates grew from making 500,000 food deliveries to 1.5 million in the span of thirty weeks from 2014 to 2015. *Id.*

19. *Id.*

20. Kennedy, *supra* note 1, at 992–93.

21. Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States*, Jan. 22, 2015, at 2, (Princeton Univ. Indust. Relations Section, Working Paper No. 587.2015) [hereinafter *Labor Market Analysis*] <https://irs.princeton.edu/sites/irs/files/An%20Analysis%20of%20the%20Labor%20Market%20for%20Uber's%20Driver-Partners%20in%20the%20United%20States%20587.pdf> [<https://perma.cc/HH4A-PYK3>].

22. DRIVE WITH LYFT, <https://www.lyft.com/drive-with-lyft> [<https://perma.cc/8D9R-PSAB>].

23. DRIVE, UBER, <https://www.uber.com/drive/> [<https://perma.cc/TPC7-U7WY>].

experienced by sharing economy workers are vastly different from what the companies advertise.<sup>24</sup>

To begin, many sharing economy workers find that the compensation is not as good as advertised because of the unpaid time spent waiting for “jobs” from the platform and business expenses that are not covered by the platform.<sup>25</sup> For example, between the time lost waiting for and picking up a rider, vehicle maintenance costs, insurance fees, and gas expenses, Uber drivers are making less than minimum wage in many cities.<sup>26</sup> As one Uber driver put it, “[after driving 10 minutes to pick up a fare, spending 5 to 10 minutes waiting for the passenger, and a 10-minute ride] ‘before car depreciation and insurance, I end up with \$3.60 from [a fare of] \$8. If we look at it by hour, that will be \$7.20.’”<sup>27</sup> In addition, the companies take a cut from each fare, further decreasing the amount that a worker will take home at the end of the day.<sup>28</sup>

Many sharing economy workers also find that other promises made to them are not realized. First, workers find that their schedules are not as flexible as the companies advertise.<sup>29</sup> While the workers can theoretically work whenever they want, many of the companies find ways to incentivize workers to work at certain times.<sup>30</sup> For example, Uber increases its fares during times of high demand in a practice that is called “surge pricing.”<sup>31</sup> Second, because of the compensation issues listed above, sharing economy workers often must put in long hours that extend beyond the standard eight-hour workday in order to make a sufficient amount of money.<sup>32</sup> Finally, some sharing economy companies have implemented ways to penalize workers who do not work for the platform often enough.<sup>33</sup>

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24. See RIGHTS ON DEMAND, *supra* note 17, at 5.

25. *Id.*

26. *Id.* In Seattle, where the minimum wage is \$15 per hour, Uber drivers are making \$10.54 an hour on average before other expenses. For more examples, see *How Much Do Uber Drivers Actually Make? [The Inside Scoop]*, RIDESTER.COM, <http://uberdriverdiaries.com/how-much-do-uber-drivers-really-make/> [<https://perma.cc/7WRJ-DA78>].

27. RIGHTS ON DEMAND, *supra* note 17, at 6.

28. The fact that the platform takes a cut from the worker’s income per job could be considered an expected expense considering the platform is providing the job; however, the percentage that the companies choose to take varies greatly. For example, Uber takes 20% per trip across most of the United States, while Airbnb only takes 3% per night. *How Much Do Uber Drivers Actually Make? [The Inside Scoop]*, *supra* note 26.

29. RIGHTS ON DEMAND, *supra* note 17, at 6.

30. *Id.*

31. *How Surge Pricing Works*, UBER, <https://www.uber.com/info/how-surge-works/> [<https://perma.cc/N8HD-4YN4>].

32. RIGHTS ON DEMAND, *supra* note 17, at 6.

33. *Id.*

For example, Uber may unilaterally terminate a driver's account if the driver has not accepted enough rides.<sup>34</sup>

Many of the sharing economy workers' problems stem from the fact that the companies classify the workers as "independent contractors" rather than employees.<sup>35</sup> Under federal labor law, employers generally have considerable incentive to classify workers as independent contractors, while the workers lose certain labor rights as a result.<sup>36</sup> From a purely financial standpoint, companies benefit from classifying workers as independent contractors because independent contractors have no statutory right to minimum wage, overtime pay, compensation for injuries sustained on the job, and unemployment insurance.<sup>37</sup> Independent contractors are also not protected by federal labor and employment laws that impose legal obligations on the employer, such as the Civil Rights Act of 1964, the Age Discrimination Act, and the Americans with Disabilities Act.<sup>38</sup> Finally, independent contractors have no federally protected right to form unions and collectively bargain with their employers; thus, independent contractors are denied one of the key powers that workers have to address issues with their employers.<sup>39</sup> In the sharing economy, the disadvantages workers face by being classified as independent contractors are exacerbated by the fact that sharing economy workers frequently perform jobs in isolation from one another. As a result, they are unable to share concerns with other workers or address issues with supervisors face-to-face, like they could in a more traditional brick-and-mortar workplace.<sup>40</sup>

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34. *Id.* When *O'Connor* was settled, Uber agreed to only terminate drivers for "just cause" in the future. *See infra* p. 10.

35. Kennedy, *supra* note 1, at 996–97; *see also* RIGHTS ON DEMAND, *supra* note 17, at 4.

36. Kennedy, *supra* note 1, at 996–97. From a policy perspective, independent contractors do not have the same benefits as employees because they are presumed to have the economic, professional, and individual power to negotiate the terms and conditions of their work. *Id.* at 12. Examples of independent contractors that fall into this category include lawyers, doctors, architects, and insurance agents. *Id.* Workers from these fields come from stronger educational backgrounds and have a higher median annual income than the average worker; thus, it makes sense that they would have more bargaining power than the average worker. *Id.* However, in reality, independent contractors come from much more diverse economic and educational backgrounds; examples of occupations where workers are frequently considered independent contractors include barbers, landscapers, and traditional taxi drivers. Annette Bernhardt, *Labor Standards and Reorganization of Work: Gaps in Data and Research* 7 (Inst. for Res. on Lab. & Emp., Working Paper No. 100-14, 2014), <http://irle.berkeley.edu/files/2014/Labor-Standards-and-the-Reorganization-of-Work.pdf> [<https://perma.cc/AJD9-H6D5>]. For these kinds of workers, being classified as an independent contractor can mean poverty wages, unsafe workplaces, and wage and employment instability. *Id.*

37. RIGHTS ON DEMAND, *supra* note 17, at 4.

38. Kennedy, *supra* note 1, at 999.

39. RIGHTS ON DEMAND, *supra* note 17, at 4.

40. There are websites, like *coworker.org*, that provide a forum for sharing economy workers to take collective action by signing petitions; however, they are still in their infancy and do not seem to have made a major impact to date. *Id.* at 6. Additionally, a Google search will reveal numerous blogs

In short, sharing economy workers lose many labor rights by being classified as independent contractors, while also lacking economic power to bargain with the platforms through which they operate.

## II. CHALLENGES TO SHARING ECONOMY WORKER CLASSIFICATION

With the problems faced by sharing economy workers becoming increasingly apparent to legislatures, state and local governments across the United States have attempted to find solutions to the worker classification issue.<sup>41</sup> Facing regulation, sharing economy companies often default to the argument that they are not employers because they are merely offering an online platform that connects workers—or independent entrepreneurs—to consumers.<sup>42</sup> Critics of this argument point out that the sharing economy companies still manage their workers as if they were employees in various ways, such as unilaterally setting rates for services; dictating how the services are provided; and screening, testing, training, evaluating, promoting, and disciplining the workers based on standards set by the companies.<sup>43</sup>

Despite pushback from the sharing economy companies, local governments have successfully regulated in favor of the workers in a

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where sharing economy workers can voice their concerns, but these also do not seem to have had any impact on how the workers communicate with the sharing economy companies themselves.

41. For a more detailed overview of regulatory issues presented by the sharing economy, see for example Bryant Cannon & Hanna Chung, *A Framework for Designing Co-Regulation Models Well-Adapted to Technology-Facilitated Sharing Economies*, 31 SANTA CLARA HIGH TECH. L.J. 23 (2015) [hereinafter *Designing Co-Regulation Models*].

42. RIGHTS ON DEMAND, *supra* note 17, at 1.

43. *Id.* at 4. Interestingly, some analysts have begun categorizing the sharing economy companies in two distinct groups: “labor platforms” and “capital platforms.” FARRELL & GREIG, *supra* note 2, at 20. Labor platforms consist of companies that connect freelance or contingent workers with consumers in order to complete discrete tasks or projects. *Id.* Examples of labor platform companies under this definition are Uber and Postmates. *Id.* Capital platforms, on the other hand, connect customers with individuals who rent assets or sell goods peer-to-peer. *Id.* Examples of capital platform companies under this definition are Airbnb and eBay. *Id.* If nothing else, these classifications show that not all sharing economy companies can be treated the same. For example, if the policy behind why independent contractors are not afforded the same benefits as employees is applied to a labor platform worker, such as an Uber driver, and a capital platform worker, such as an Airbnb host, the difference between the workers becomes clear. *See* AIRBNB, <https://www.airbnb.com> [<https://perma.cc/2WUT-2L2U>]. In the case of the Airbnb host, the host has the economic and personal bargaining power that an independent contractor is presumed to have because he has sufficient resources to either own a home that is large enough that extra space can be rented out or he owns an extra home that can be rented out altogether. Moreover, Airbnb gives its hosts more freedom to directly set their prices and schedules. *Id.* The Uber driver, on the other hand, is only required to have insurance and possibly a vehicle, and has little to no control over where his rides are picked up and dropped off and how much the riders are charged. Kennedy, *supra* note 1, at 997–98. Thus, from a worker classification standpoint, labor platform workers, like Uber drivers, are much more detrimentally affected by being classified as independent contractors than capital platform counterparts, such as Airbnb hosts, who are more like true independent contractors.

handful of situations. For example, the Florida Department of Economic Opportunity found that an Uber driver was eligible for unemployment insurance as an employee of Uber.<sup>44</sup> Similarly, the California Labor Commission found that an Uber driver was entitled to reimbursement for certain expenses incurred while driving for Uber because he was an employee and not an independent contractor.<sup>45</sup> However, these examples are relatively small, localized successes for individual Uber drivers challenging their worker classification compared to the class action case Uber settled in April 2016.

In 2013, Uber drivers filed a class action law suit in federal district court for the Northern District of California alleging that they had been misclassified as independent contractors by Uber.<sup>46</sup> In standard class action fashion, Uber responded with a motion to dismiss, asserting that it is a “technology company” rather than a “transportation company”; thus, the drivers are, in fact, independent contractors using Uber’s services to contact riders.<sup>47</sup> Judge Edward M. Chen denied Uber’s motion on March 11, 2015, holding “that whether an individual should ultimately be classified as an employee or an independent contractor under California law presents a mixed question of law and fact that must typically be resolved by a jury.”<sup>48</sup>

Nevertheless, Judge Chen still discussed the merits of the case at some length, poking holes in much of Uber’s argument that it is merely a technology company and finding that Uber’s argument was “fatally flawed in numerous respects.”<sup>49</sup> To begin, the court found that simply because Uber is a “technologically advanced transportation company,” does not make it a technology company.<sup>50</sup> The court elaborated: “Uber is no more a ‘technology company’ than Yellow Cab is a ‘technology company’ because it uses CB radios to dispatch taxi cabs.”<sup>51</sup> The court also determined that Uber would not be a viable business entity without its drivers because it depends on revenue generated from rides given by its drivers and not revenue from software sales.<sup>52</sup> Finally, the court found that Uber exercises a significant amount of control over its drivers by unilaterally setting the rates it charges its riders, by requiring potential

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44. Kennedy, *supra* note 1, at 1004.

45. *Id.* at 1004–05.

46. *Id.* at 1005.

47. O’Connor v. Uber Techs., Inc., 201 F. Supp. 3d 1133 (N.D. Cal. 2015) (order granting motion to dismiss).

48. *Id.* at 1135.

49. *Id.* at 1141.

50. *Id.*

51. *Id.*

52. *Id.* at 1142.

drivers to meet certain qualifications before they can work for Uber, and by reserving the right to terminate drivers' accounts.<sup>53</sup>

Despite the court's strongly worded opinion denying the motion to dismiss, the question of whether Uber drivers are employees or independent contractors was ultimately left to be determined by a jury.<sup>54</sup> In April 2016, with the trial only a month away, the Ninth Circuit granted Uber's request for an emergency appeal of the district court's finding that Uber's binding arbitration clause was unenforceable.<sup>55</sup> At this point, the combination of the concerns that the drivers would lose their class certification and that a jury might find that Uber drivers are independent contractors, especially with Uber having the home field advantage in San Francisco, led the parties to settle.<sup>56</sup> Uber made some major concessions to the drivers in the settlement, including a \$100 million settlement to be split among 340,000 drivers in California and Massachusetts, agreeing to meet with a "Driver Association" once a quarter, agreeing to no longer deactivate drivers' accounts without just cause, and permitting drivers to collect tips.<sup>57</sup> Nevertheless, the drivers ultimately agreed to continue being classified as independent contractors, and the issue was never addressed in a federal court.<sup>58</sup>

In the aftermath of the settlement, drivers in New York City formed an "Independent Driver's Guild."<sup>59</sup> Although the guild does not afford the drivers the same collective bargaining rights as an official labor union—such as bargaining over fares, commissions, and benefits—Uber agreed to support and work with the guild to quell some of the driver unrest.<sup>60</sup>

### III. SEATTLE'S INNOVATIVE ORDINANCE

#### A. *Terms of the Ordinance*

While the class action lawsuit was still pending, the Seattle City Council passed a unique ordinance allowing Uber drivers to collectively bargain regardless of their classification, effectively avoiding the worker classification issues.<sup>61</sup> In December 2015, the Seattle City Council adopted Seattle Municipal Code (SMC) 6.310, which provides a framework for

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53. *Id.* at 1142–43.

54. *See* Kennedy, *supra* note 1, at 1006.

55. *Id.* at 1007.

56. *Id.*

57. *Id.* 1007–08.

58. *Id.*

59. *Id.*

60. Douglas MacMillan, *Uber Agrees to Work With a Guild for Its Drivers in New York City*, WALL ST. J. (May 10, 2016 4:54 PM), <https://www.wsj.com/articles/uber-agrees-to-work-with-a-guild-for-its-drivers-in-new-york-city-1462913669>.

61. *See* Kennedy, *supra* note 1, at 1010.



drivers to form a union, or an “exclusive driver representative” (EDR).<sup>62</sup> Although SMC 6.310 was clearly adopted in response to the sharing economy ride sharing companies, or “transport network companies” (TNC)—like Uber and Lyft—the Code extends to all “driver coordinators” in the city of Seattle, including taxicab associations and for-hire vehicle companies.<sup>63</sup>

Under the ordinance, an entity must go through a somewhat complicated process before it can be established as an EDR. To begin, an entity must seek designation as a “qualified driver representative” (QDR) from Seattle’s Director of Finance and Administrative Services (Director).<sup>64</sup> The designation of QDR status is subject to three conditions: (1) The entity must be registered as a nonprofit entity with the Washington Secretary of State; (2) the entity’s bylaws must give drivers the right to be members of the organization and participate in democratic control of the organization; and (3) the entity must have experience in assisting stakeholders in reaching consensus agreements with employers and contractors, a demonstrated commitment to assisting stakeholders in reaching consensus agreements with employers and contractors, or both.<sup>65</sup> A QDR can then move to be certified as an EDR by the Director upon showing that it has the support, in the form of a physical or electronic signature, from a majority of “qualified drivers” with a particular driver coordinator.<sup>66</sup>

Although there could be multiple QDRs, the EDR would represent all drivers for a particular driver coordinator once the EDR is designated.<sup>67</sup> Under the ordinance, the EDR will have the power to meet and negotiate

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62. SEATTLE, WASH., MUN. CODE § 6.310.735 (2015). The new ordinance is not Seattle’s first attempt at regulating the ride-sharing companies. When Uber and Lyft were first permitted to operate in Seattle in 2014, the city passed regulations limiting the total number of vehicles that could be operating for either company to 150. *Designing Co-Regulation Models*, *supra* note 41, at 43; Mike O’Brien, *A New Law is Letting Uber Drivers Unionize*, NATION (July 1, 2016), <https://www.thenation.com/article/a-new-law-is-letting-uber-drivers-unionize/> [<https://perma.cc/3RSA-BM5J>]. At that time, however, the ride share companies were seen as a needed transportation service that allowed drivers to make money outside of the rigid regulations of the taxi industry. *Id.* As a result, Uber was able to bolster enough user support to get the regulation overturned within three months. Davey Alba, *Inside Seattle’s Bold Plan to Let Its Uber Drivers Organize*, WIRED (Dec. 14, 2015), <https://www.wired.com/2015/12/inside-seattles-bold-plan-to-let-its-uber-drivers-organize/> [<https://perma.cc/8CKW-HVXQ>]. Nevertheless, in the time between 2014 and when the new ordinance was adopted in December 2015, the public perception of the ride share companies began to shift. In the words of Seattle City Councilmember Mike O’Brien, “[t]he companies, once seen as upstart innovators, came to be seen as major corporations intent on asserting power to the detriment of workers.” O’Brien, *supra* note 62.

63. SEATTLE, WASH., MUN. CODE § 6.310.110 (2016).

64. *Id.* § 6.310.735 (2015).

65. *Id.*

66. *Id.*

67. *Id.*

with the driver coordinator about subjects including, but not limited to, “vehicle equipment standards; safe driving practices; the manner in which the driver coordinator will conduct criminal background checks of all prospective drivers; the nature and amount of payments to be made by, or withheld from, the driver coordinator to or by the drivers; minimum hours of work, conditions of work, and applicable rules.”<sup>68</sup> Any agreement made between the EDR and driver coordinator would be binding upon approval of the Director, who would review the agreement in order “to ensure that the substance of the agreement promotes the provision of safe, reliable, and economical for-hire transportation services and otherwise advance[s] the public policy goals set forth in Chapter 6.310.”<sup>69</sup>

*B. First Challenge to the Ordinance*

The ride share companies did little to fight the adoption of SMC 6.310, and it was approved by a unanimous vote of the Seattle City Council.<sup>70</sup> However, once the ordinance was adopted, the U.S. Chamber of Commerce sued the City of Seattle on behalf of Uber and Eastside for Hire, Inc., a local Seattle transportation company.<sup>71</sup> The Chamber of Commerce made two predictable allegations. First, that SMC 6.310 is preempted by the National Labor Relations Act,<sup>72</sup> which the Supreme Court has interpreted to exclude independent contractors from collective bargaining.<sup>73</sup> Second, that SMC 6.310 violates and is preempted by Section 1 of the Sherman Antitrust Act, which reads “a contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is illegal.”<sup>74</sup> The Supreme Court has interpreted Section 1 to mean that independent contractors are forbidden from colluding on the prices they would accept for their services or otherwise engaging in concerted anticompetitive action in the marketplace.<sup>75</sup>

A federal district court judge for the Western District of Washington, Judge Lasnik, dismissed the case for lack of standing on two grounds.<sup>76</sup> First, the Chamber of Commerce was unable to show that the companies

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68. *Id.*

69. *Id.*

70. See Alba, *supra* note 62.

71. See Complaint, Chamber of Commerce of U.S. v. City of Seattle 2016 WL 836320 (W.D. Wash. 2016) (complaint).

72. 29 U.S.C. § 151 (1935).

73. *Chamber of Commerce*, 2016 WL 836320 (complaint).

74. 15 U.S.C. § 1 (2004).

75. *Id.*; *Chamber of Commerce*, 2016 WL 836320 (complaint).

76. Chamber of Commerce of the U.S. v. City of Seattle, No. C16-0322RSL, 2016 WL 4595981 (W.D. Wash. Aug. 9, 2016) (order granting motion to dismiss).

would sustain future injury under the provision of SMC 6.310 that allows QDRs to acquire driver contact information from companies in order to promote themselves to the drivers.<sup>77</sup> The court found that Chamber of Commerce was unable to show standing under this provision because it is equally as likely that a QDR would use other means to market to drivers.<sup>78</sup> Second, the court found that the companies were not injured by having to incur certain costs as a result of the ordinance, including hiring organized labor consultants, because companies cannot “manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.”<sup>79</sup> Ultimately, the first challenge to Seattle’s ordinance was dismissed without prejudice.

### C. Second Challenge to the Ordinance

The Chamber of Commerce refiled its lawsuit when the City of Seattle granted QDR status to the Teamster’s Local 117 in March 2017.<sup>80</sup> Pursuant to Seattle’s ordinance, the establishment of a QDR meant that Uber and Lyft, along with any other driver coordinator in Seattle, would have had to give the Teamsters drivers’ contact information by April 2017.<sup>81</sup> Believing the establishment of a QDR provided the requisite standing, the Chamber of Commerce promptly refiled its lawsuit against the City of Seattle.<sup>82</sup> The Chamber of Commerce was joined by a separate lawsuit from about a dozen Uber and Lyft drivers who are also opposed to Seattle’s ordinance.<sup>83</sup>

This time, Judge Lasnik sided with the Chamber of Commerce, not only finding that the Chamber of Commerce had standing, but also granting a preliminary injunction against Seattle’s ordinance.<sup>84</sup> In granting a preliminary injunction, the court needed to find, among other factors, that the plaintiff is likely to succeed on the merits of the case and that the plaintiff will suffer irreparable harm absent the preliminary relief.<sup>85</sup> Judge

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77. *Id.* at \*4.

78. *Id.* at \*6.

79. *Id.* at \*4.

80. David Gutman, *U.S. Chamber Sues Seattle Again, Says Uber, Lyft Taxi Drivers Can’t Form Union*, SEATTLE TIMES (Mar. 10, 2017) [hereinafter *U.S. Chamber Sues Seattle Again*], <http://www.seattletimes.com/seattle-news/politics/us-chamber-sues-seattle-a-second-time-over-uber-union-law/>.

81. David Gutman, *Judge Temporarily Blocks Seattle Law Allowing Uber and Lyft Driver to Unionize*, SEATTLE TIMES (Apr. 4, 2017) [hereinafter *Judge Temporarily Blocks Seattle Law*], <http://www.seattletimes.com/seattle-news/transportation/judge-puts-blocks-for-now-seattle-law-allowing-uber-and-lyft-drivers-to-unionize/>.

82. *U.S. Chamber Sues Seattle Again*, *supra* note 80.

83. *Judge Temporarily Blocks Seattle Law*, *supra* note 81.

84. Chamber of Commerce of the United States v. City of Seattle, No. C17-0370RSL, 2017 U.S. Dist. LEXIS 51563 (W.D. Wash. Apr. 4, 2017).

85. *Id.* at \*3.

Lasnik made it clear in his opinion that “this Order should not be read as a harbinger of what the ultimate decision in this case will be.”<sup>86</sup> Nevertheless, the Chamber of Commerce succeeded in preventing Uber and Lyft from having to give up their driver information until the merits of the case can be litigated.

For the time being, Seattle’s ordinance hangs in limbo. Opponents of the Ordinance remain confident that it violates federal antitrust law. After the court’s dismissal, the Chamber of Commerce stated that Seattle has merely “delayed coming to grips with the legal flaws at the heart of this ordinance.”<sup>87</sup> On the other hand, supporters of the ordinance believe it is legal because of the “state action doctrine” exception to federal antitrust law.<sup>88</sup>

#### IV. STATE ACTION DOCTRINE

##### A. Overview

The state action doctrine—also referred to as *Parker* immunity—was first established by the landmark Supreme Court case *Parker v. Brown* in 1943.<sup>89</sup> In *Parker*, the Court upheld the California Agricultural Prorate Act, which was enacted to limit the amount of agricultural goods produced in California in order to “conserve the agricultural wealth of the state.”<sup>90</sup> The Court held that “[w]e find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.”<sup>91</sup> Nevertheless, the Court did not articulate a clear state action doctrine test until it decided *California Retail Liquor Dealers Ass’n. v. Midcal Aluminum, Inc.* forty years after *Parker*.

In *Midcal*, the Court created a two-prong test for determining whether a particular private action qualifies for state action immunity.<sup>92</sup> Under the first prong of the *Midcal* test, the challenged action must be “clearly articulated and affirmatively expressed as state policy.”<sup>93</sup> Under the second prong of the test, the action must be actively supervised by the state itself.<sup>94</sup> In *Midcal*, the Court ultimately found that a statute that required wine producers to set prices through a fair-trade contract in

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86. *Id.* at \*29.

87. Kennedy, *supra* note 1, at 1014.

88. *Id.*

89. *See, e.g.*, *Parker v. Brown*, 317 U.S. 34 (1943).

90. *Id.* at 346.

91. *Id.* at 350–51.

92. *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

93. *Id.*

94. *Id.*

California did not qualify for state action immunity because the program was not actively supervised by the state.<sup>95</sup>

State action immunity is a key exception to federal antitrust law because it permits states to pursue specific public policy objectives without federal oversight.<sup>96</sup> Relying on principles of federalism and state sovereignty, the Court has consistently held that requiring states to conform to the Sherman Antitrust Act would “impose an impermissible burden on the States’ power to regulate.”<sup>97</sup> Nevertheless, the Supreme Court has stated that finding state action immunity is disfavored.<sup>98</sup>

### B. State Action Immunity Applied to Seattle’s Ordinance

It is unlikely that Seattle’s innovative ordinance allowing ride share drivers to form unions would pass the *Midcal* test. Although the ordinance would likely survive the second prong of the test, it is unlikely it would pass the first prong of the test.

Seattle has the easiest argument under the second prong of the test, which requires that the action in question must be supervised by the state. A court would likely find that the ordinance satisfies the state supervision requirement. The policy behind the state supervision requirement is to ensure that a private entity does not use state action immunity to engage in anticompetitive action in order to pursue its own interests.<sup>99</sup> For example, in *North Carolina State Board of Dental Examiners v. FTC*, the court found that a Board of Dentists who were ordering non-dentists to cease performing teeth whitening services were not protected by the state action doctrine, despite being granted broad administrative powers by the state of North Carolina.<sup>100</sup> The Court found that there was no state supervision in this case because the Board was made up primarily of market participants and, as such, the Board could not meet the state supervision requirement by supervising itself.<sup>101</sup>

Seattle’s ordinance requires that the Director of Finance and Administrative Services be active in every aspect of the process under SMC 6.310, including approving the designation of the QDR and EDR and approving any agreements between the EDR and driver coordinator.<sup>102</sup> Thus, a court would likely find that supervision by the director would

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95. *See id.*

96. *N.C. State Bd. of Dental Exam’rs v. F.T.C.*, 135 S. Ct. 1101 (2015).

97. *Id.* at 1109.

98. *F.T.C. v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013).

99. Kennedy, *supra* note 1, at 1033.

100. *N.C. State Bd. of Dental Exam’rs*, 135 S. Ct. 1101 (2015).

101. *Id.*

102. SEATTLE, WASH., MUN. CODE § 6.310.735 (2015).

satisfy the state supervision prong if it found that the city satisfied the first prong of the *Midcal* test.<sup>103</sup>

However, it is the first prong of the *Midcal* test that presents the biggest hurdle for Seattle's ordinance. The first prong of the *Midcal* test requires that the challenged action be enacted in pursuit of a clearly articulated and affirmatively expressed state policy.<sup>104</sup> In some cases following *Midcal*, the Supreme Court has seemingly relaxed the clear articulation test to mean that the anticompetitive effect of the regulation need only be the "foreseeable result" of what a state legislature authorized.<sup>105</sup> However, in a recent decision, the Court indicated that it may be returning to the more stringent interpretation of the clear articulation test.<sup>106</sup>

In *Hallie*, the Court was tasked with determining whether the City of Eau Claire, which had the only sewage treatment facility in the area, violated the Sherman Antitrust Act by refusing sewage services to surrounding towns unless individual landowners agreed to be annexed by the City of Eau Claire.<sup>107</sup> The Court found that by enacting a statute that permitted municipalities to limit the area in which they provide sewage services with no obligation to provide services beyond the delineated area, the Wisconsin Legislature contemplated that a city may engage in anticompetitive conduct.<sup>108</sup> Therefore, the state action doctrine allowed the City of Eau Claire to refuse service to surrounding towns unless the individual homeowners agreed to be annexed by the City.<sup>109</sup> Similarly, in *City of Columbia v. Omni Advertising, Inc.*, the Court found that state action immunity protected the City of Columbia's ability to enact zoning ordinances in order to restrict new billboard construction because the very purpose of zoning regulation is to regulate business freedom.<sup>110</sup> In both cases, the Court found that state action immunity applied because the challenged actions were a foreseeable result of the legislation in question.

However, more recently, the Court seemed to return to the more stringent interpretation of the clear articulation test. In *Phoebe Putney*, the Court held that a Georgia law that created public entities called hospital

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103. Judge Lasnik indicated that he did not believe the state supervision prong had not been met by the Seattle Ordinance in his order granting the preliminary injunction. However, his analysis does not seem to fully consider the scope of the Director's role in approving agreements under the ordinance. See Chamber of Commerce of U.S. v. City of Seattle, No. C17-0370RSL, 2017 U.S. Dist. LEXIS 51563 (W.D. Wash. Apr. 4, 2017).

104. Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

105. See, e.g., Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985).

106. See, e.g., F.T.C. v. Phoebe Putney Health Sys., Inc., 568 U.S. 216 (2013).

107. Town of Hallie, 471 U.S. 34 (1985).

108. *Id.* at 41-42.

109. *Id.*

110. City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365 (1991).

authorities—which had broad corporate powers, including the power to acquire hospitals—was not sufficient to satisfy the clear articulation test and allow the hospital authorities to engage in anticompetitive conduct.<sup>111</sup> The intent of the law was to create organizations that would improve the treatment of Georgia’s indigent sick.<sup>112</sup> When the law was first enacted in 1941, the Hospital Authority of Albany-Dougherty County acquired Phoebe Putney Memorial Hospital, as was permitted under the law.<sup>113</sup> Antitrust claims were triggered in 2010, however, when the Hospital Authority began to contemplate acquiring the only other hospital in the county, creating a hospital monopoly in the area.<sup>114</sup> The Supreme Court determined that the acquisition of the second hospital by the Hospital Authority failed the clear articulation test and, therefore, lacked state action immunity because “a State that has delegated such general powers ‘can hardly be said to have contemplated’ that they will be used anticompetitively.”<sup>115</sup> In its holding in *Phoebe Putney*, then, the Court suggests that it is moving away from the more lenient “foreseeable result” test in favor of the more stringent “clear articulation” test established by *Midcal*.

In order to uphold Seattle’s ordinance, a court would have to find that the ordinance was at least a foreseeable result of the powers granted to the City of Seattle by the State of Washington and was at most a clearly articulated power of the City of Seattle. The Washington statute that gives the City of Seattle power to regulate privately operated taxicab transportation services, including the ride share companies, allows Washington cities to do the following:

- (1) Regulat[e] entry into the business of providing taxicab transportation services;
- (2) Requir[e] a license to be purchased as a condition of operating a taxicab and the right to revoke, cancel, or refuse to reissue a license for failure to comply with regulatory requirements;
- (3) Control[] the rates charged for providing taxicab transportation service and the manner in which rates are calculated and collected, including the establishment of zones as the basis for rates;
- (4) Regulat[e] the routes of taxicabs, including restricting access to airports;
- (5) Establish[] safety, equipment, and insurance requirements; and
- (6) Any other requirements adopted to ensure safe and reliable taxicab service.<sup>116</sup>

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111. *Phoebe Putney*, 568 U.S. at 216.

112. *Id.* at 220.

113. *Id.* at 220–21.

114. *Id.*

115. *Id.* at 228 (internal quotation marks omitted).

116. WASH. REV. CODE § 81.72.210 (2016).

Given this statutory language, it would be difficult for the City of Seattle to argue that the Washington Legislature contemplated that Seattle would engage in the regulation of workers in the transportation industry. The statute clearly articulates the powers Seattle has to regulate aspects of transportation companies' relationships with consumers—for example, fares, routes, and safety—but is silent as to the relationships between the companies and their drivers. Thus, the ordinance would fail the clear articulation test.

In the alternative, a court may analyze Seattle's ordinance under the slightly less stringent "foreseeable result" test. Under this test, the court would need to determine whether Seattle's ordinance was a foreseeable result of the Washington statute. However, the ordinance would also likely fail under this test because, as Judge Lasnik aptly pointed out in granting the preliminary injunction against the City of Seattle, similar statutes regulating the transportation industry are fairly common, but they have never been used to regulate the relationship between the companies and their drivers.<sup>117</sup> Ultimately, Seattle's ordinance would likely fail the clear articulation prong of the *Midcal* test regardless of which standard a court would use to analyze it. Thus, it is likely that Seattle's ordinance would not be protected under state action immunity.

This problem can easily be remedied if the Washington legislature chooses to support Seattle by granting it the requisite power to satisfy the clear articulation test and qualify for state action immunity. Existing case law does not bar a state legislature from retroactively articulating that an entity may pursue anticompetitive action. Moreover, the Seattle City Council has already completed the difficult task of creating innovative legislation to address one of the many regulatory concerns stemming from the rise of the sharing economy; all that is left is for the state legislature to follow suit.

#### CONCLUSION

Creating a means for drivers to collectively bargain with their driver coordinators is only part of the battle; it is still up to the drivers to choose to get behind an entity that will allow them to exercise their new power. As it stands, the validity of Seattle's innovative ordinance has yet to be determined by federal courts. However, other cities, including New York and Cincinnati, have taken notice of Seattle's unique regulation, and it is possible the regulation extending collective bargaining rights to sharing economy workers will be seen in other cities soon.<sup>118</sup>

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117. Chamber of Commerce of U.S. v. City of Seattle, No. C17-0370RSL, 2017 U.S. Dist. LEXIS 51563, at \*8 (W.D. Wash. Apr. 4, 2017).

118. *Id.*



In conclusion, one thing is certain: the sharing economy is not going away. New and innovative companies create unique regulatory challenges for all levels of government, to which the best response is innovative legislation. In enacting SMC 6.310, the Seattle City Council became the first government to come up with a creative solution to the worker classification issues created by ride share companies like Uber and Lyft. A court would likely find that Seattle's ordinance violates federal antitrust law without more support from the State of Washington. Even if the ordinance does survive antitrust scrutiny, the creation of a new classification of worker, which some experts suggest would be the ideal solution,<sup>119</sup> or a Supreme Court ruling that finds that drivers are, in fact, employees of Uber, would be all that it takes to render Seattle's ordinance obsolete. Nevertheless, Seattle's unique solution shows that all levels of government can and should be more creative in addressing the regulatory challenges presented by the sharing economy.

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119. Kennedy, *supra* note 1.