No. 17-35640

In the United States Court of Appeals
For the Ninth Circuit

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

Plaintiffs-Appellants,

v.

CITY OF SEATTLE, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court for the Western District of Washington
Case No. 2:17-cv-00370-RSL

BRIEF OF COALITION FOR A DEMOCRATIC WORKPLACE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AND CONSUMER TECHNOLOGY ASSOCIATION AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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CERTIFICATE OF INTEREST

The Coalition for a Democratic Workplace ("CDW") is a business association comprising hundreds of organizations representing millions of businesses that employ tens of millions of workers nationwide in nearly every industry. CDW members are joined by their mutual concern over recent changes and proposed changes to labor law that threaten entrepreneurs, employers, employees, and economic growth. One of the CDW's primary missions is addressing regulatory overreach that seeks to increase the number of dues-paying union members without regard to the negative consequences for independent contractors, employees, employers, and the economy. The CDW continuously fights against these assaults and expansive overreach on both national and local levels.

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals.

NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

The Consumer Technology Association ("CTA") is the preeminent trade association for the U.S. consumer technology industry. CTA's more than 2,200 corporate members, 80% of which are small businesses and startups, contribute in excess of $125 billion to the U.S. economy.

The Seattle Ordinance at issue in this appeal exemplifies the type of regulatory overreach that concerns the members of the CDW, the NFIB Legal Center, and the CTA, and they file this brief as *amici curiae* to emphasize that both federal labor law and federal antitrust law preempt the Ordinance.[1]

[1] No party's counsel authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief. Fed. R. App. P. 29(c)(5). All parties have consented to the filing of this brief.

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ARGUMENT OF *AMICI CURIAE*

City of Seattle Ordinance 124968 (the "Ordinance") is preempted both by federal antitrust law and by federal labor law. Under antitrust principles, by permitting independent contractors to collude and jointly set the prices and terms of their contracts, the Ordinance authorizes illegal price-fixing conduct among horizontal competitors, which constitutes a *per se* violation of the Sherman Act. The Ordinance is not protected by state-action immunity because the underlying Washington statutes do not indicate that Washington State intended to sanction the specific anticompetitive activity condoned independently by the Seattle Ordinance.

Neither does the Ordinance mandate the state supervision required for state-action immunity. Supervision by a municipality is insufficient. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 n.10, 46-47 (1985). The district court erred in holding that state-action immunity saves the Ordinance under the Sherman Act.

The NLRA preempts the Ordinance under both the *Machinists* and *Garmon* tests. Under the *Machinists* field preemption inquiry, the NLRA preempts the Ordinance because the NLRA intentionally excludes independent contractors from the comprehensive national system of collective bargaining that it created. Nor can States and municipalities under *Machinists* provide independent contractors with the "economic weapon" of collective bargaining that Congress chose not to give them. 427 U.S. 132 (1976).

Under the *Garmon* conflict preemption inquiry, the NLRA preempts the Ordinance because it conflicts with Section 8 of the NLRA, 29 U.S.C. § 158(e), which prohibits conditioning an independent contractor's work on joining a union or becoming an employee. By forcing independent contractors to join collective bargaining groups as a condition of contracting with ride referral companies, the Ordinance requires precisely the unfair labor practice that Section 8 forbids. Under both the *Garmon* and *Machinists* tests, the NLRA preempts the Ordinance.

I. The Seattle Ordinance Is Not Entitled to the Sherman Act's State-Action Exemption.

As the district court recognized, "collusion between independent economic actors to set the prices they will accept for their services in the market is a per se antitrust violation." Order at 6-7. Our laws recognize horizontal price fixing as "so destructive of competition, and so devoid of redeeming value, that [it is] conclusively presumed to be unreasonable"—*i.e.*, a *per se* violation of the Sherman Act. *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 986 (9th Cir. 2000) (discussing 15 U.S.C. § 1).

As a limited exception to this rule, when acting in their sovereign capacities, the States are immune to the antitrust laws.[2] *See Parker v. Brown*, 317 U.S. 341,

[2] As discussed in detail below, state-action immunity may apply when a State violates antitrust law itself or when it clearly articulates a policy permitting municipalities to do so under state supervision.

350–51 (1943). This doctrine—state-action antitrust immunity—embodies "the federalism principle that the States possess a significant measure of sovereignty under our Constitution." *N.C. State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101, 1110 (2015) (quoting *Cmty. Cmmc'ns Co. v. City of Boulder*, 455 U.S. 40, 53 (1982)).

Because state-action immunity creates an exception to the fundamental purpose of antitrust law—to prohibit price-fixing collusion and other anticompetitive behavior—the doctrine has been consistently limited and is "disfavored" by the Supreme Court. *See FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013) ("[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state-action immunity is disfavored, much as are repeals by implication.'" (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992))).

Municipal immunity from the antitrust laws must meet even stricter requirements. Municipalities may authorize private violations of antitrust laws only if the municipal regulation is "an authorized implementation of state policy." *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 370 (1991). For a municipal regulation to receive immunity, (1) "the challenged restraint must be one clearly articulated and affirmatively expressed as state policy" and (2) "the policy must be 'actively supervised' by the State itself." *Cal. Retail Liquor Dealers Ass'n*

v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (internal quotation marks omitted). These requirements are applied strictly and "rigorous[ly]." *Columbia Steel Casting Co. v. Portland Gen. Elec. Co.*, 111 F.3d 1427, 1436 (9th Cir. 1996).

This test serves two purposes. First, it ensures "that particular anticompetitive mechanisms operate because of a deliberate and intended state policy." *Ticor Title*, 504 U.S. at 636. Second, it ensures political accountability: that States "accept political responsibility for actions they intend to undertake." *Id.*

The Ordinance satisfies neither requirement. Washington law does not authorize horizontal price fixing in the ride share industry. Nor does Washington State supervise the implementation of Seattle's Ordinance.

A. Washington law does not clearly express a policy of permitting horizontal price fixing among independent drivers.

A municipal ordinance receives state-action immunity only if it was "undertaken pursuant to a regulatory scheme that 'is the State's own'" and only when that scheme clearly demonstrates that the State "affirmatively contemplated the displacement of competition." *Phoebe Putney*, 568 U.S. at 225, 229. It does not suffice that some anti-competitive behavior, in general, was contemplated by the State: "[T]he challenged restraint [on competition] [must] be one clearly articulated and affirmatively expressed as state policy[.]" *N.C. State Bd. of Dental Examiners*, 135 S. Ct. at 1110. State-action immunity extends only to the specific

"anticompetitive activity which the states . . . intend[ed] to sanction." *Cost Mgmt. Servs., Inc. v. Wash. Nat. Gas Co.*, 99 F.3d 937, 941 (9th Cir. 1996).

In this case, Seattle has not demonstrated a "clearly articulated" Washington State policy to displace competition by permitting price fixing through collective bargaining in the for-hire driver industry.

The district court considered two statutes—Wash. Rev. Code § 46.72.160 and Wash. Rev. Code § 81.72.200—in holding that the challenged restraint is clearly articulated and affirmatively expressed as Washington State policy. Neither statute satisfies this requirement.

As an initial matter, although each Chapter purports to provide municipalities with blanket exemptions from the antitrust laws, blanket exemptions cannot create state-action immunity.[3] The Supreme Court has held that general immunizations are insufficient: "[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful[.]" *Parker*, 317 U.S. at 351; *see also Ticor Title*, 504 U.S. at 633 ("[A] State may not confer antitrust immunity on private persons by fiat[.]").

[3] *See* Wash. Rev. Code § 46.72.001 ("[I]t is the intent of the legislature to permit political subdivisions of the state to regulate for hire transportation services without liability under federal antitrust laws."); Wash. Rev. Code § 81.72.200 ("[I]t is the intent of the legislature to permit political subdivisions of the state to regulate taxicab transportation services without liability under federal antitrust laws.").

Instead, to confer state-action immunity, the State must clearly articulate and affirmatively express support for the displacement of competition through the challenged anticompetitive conduct—price-fixing agreements among the independent contractor drivers of for-hire vehicles—as state policy.

Neither statute contains the necessary specificity. Section 46.72.160(6) permits municipalities to "regulate all for hire vehicles operating within their jurisdictions," including adopting "[a]ny other requirements . . . to ensure safe and reliable for hire transportation service." Wash. Rev. Code § 46.72.160(6). Similarly, Section 81.72.210 permits—but does not require—municipalities to adopt requirements "to ensure safe and reliable taxicab service." Wash. Rev. Code § 81.72.210(6).

Neither statute clearly articulates a state policy of permitting price fixing through collective bargaining among for-hire drivers.[4] The Supreme Court has squarely rejected the proposition that "the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive

[4] Even under general principles of statutory interpretation, "[a]ny other requirements adopted to ensure safe and reliable . . . transportation" would not enable the Ordinance. Under the canon of *ejusdem generis*, the general phrase "other requirements" should be interpreted to include only regulations of the same type preceding that phrase in the statute, such as regulations like controlling rates drivers may charge passengers and requiring safety features on cars. *See* Wash. Rev. Code §§ 46.72.160(3), (5)); *see also Yates v. United States*, 135 S. Ct. 1074, 1086 (2015) (discussing *ejusdem generis*). None of the other five safety and stability requirements in the statute is anything like horizontal price fixing.

ordinances" because such a rule "would wholly eviscerate the concepts of 'clear articulation and affirmative expression[.]'" *Cmty. Commc'ns Co.*, 455 U.S. at 56.

The district court's analysis conflicts with the Supreme Court's decision in *Phoebe Putney*, which addressed a state law that gave a hospital authority "'all the powers necessary or convenient to carry out and effectuate' the Law's purposes." 568 U.S. at 220. The Supreme Court held that this language failed to clearly articulate a policy allowing the challenged restraint (there, an anticompetitive merger between hospitals) because there was "no evidence the State affirmatively contemplated that hospital authorities would displace competition by consolidating hospital ownership." *Id.* at 227. Here, the Washington statutes' general grant of authority to adopt "other requirements" provides no evidence that Washington affirmatively contemplated that municipalities would displace competition by encouraging price collusion among drivers of for-hire vehicles.

Indeed, the district court appeared to acknowledge that the specific restraint on competition adopted by Seattle was not contemplated by the Washington legislature. The Order describes (at 10) the Ordinance as a "novel approach" and recognizes (at 9) that Seattle exercised "creativity in its attempts to promote the goals specified in the statute." This (accurate) characterization of Seattle's actions is fatal to any suggestion that the Ordinance should receive state-action immunity.

State-action immunity leaves no room for municipal creativity. Seattle's "novel approach" is, by definition, not specific "anticompetitive activity" that Washington "intend[ed] to sanction." *Cost Mgmt. Servs., Inc.*, 99 F.3d at 941; *see also Springs Ambulance Serv., Inc. v. City of Rancho Mirage*, 745 F.2d 1270, 1273 (9th Cir. 1984) (holding that immunity applies only if the State "contemplated the kind of actions alleged to be anticompetitive").

The generally permissive nature of municipal authority further precludes state-action immunity. The state statutes allow different municipalities to regulate for-hire drivers in different ways, without expressing a preference about the type, amount, or anticompetitive nature of that regulation. Wash. Rev. Code § 46.72.160. In *Community Communications Co. v. City of Boulder*, the Supreme Court explained that a State's "mere *neutrality*" does not satisfy the requirement of "clear articulation and affirmative expression." 455 U.S. at 55. "A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought." *Id.* In *Community Communications*, the City of Boulder "c[ould] pursue its course of regulating cable television competition, while another home rule city c[ould] choose to prescribe monopoly service, while still another c[ould] elect free-market competition," all while complying with the state statute. *Id.* at 56. The

State thus did not intend to sanction any specific anticompetitive conduct by the municipality. *Id.* at 55-56.

The Supreme Court addressed a similar situation in *City of Lafayette v. Louisiana Power & Light Co.*, holding:

> When cities, each of the same status under state law, are equally free to approach a policy decision in their own way, the anticompetitive restraints adopted as policy by any one of them, may express its own preference, rather than that of the State. Therefore, in the absence of evidence that the State authorized or directed a given municipality to act as it did, the actions of a particular city hardly can be found to be pursuant to the state's command, or to be restraints that the state as sovereign imposed.

435 U.S. 389, 414 (1978) (internal quotation marks and alterations omitted).

That principle controls this appeal. Washington law permits Seattle and other cities to each approach the regulation of taxis and for-hire transportation in their own way. There is no evidence that Washington directed Seattle to act as it did or authorized this specific anticompetitive activity, so Seattle's "creative" actions cannot possibly have been undertaken pursuant to any clearly articulated state design or command.

Finally, the district court's application of state-action immunity leads to absurd results. Under the district court's holding that the statutes immunize any anticompetitive conduct related to "safe and reliable for hire vehicle transportation service," the statutes permit municipalities to authorize vehicle repair shops to collude with each other about the prices that they would charge for various repair

services to for-hire vehicles. Similarly, the statutes would permit municipalities to authorize car dealers to collude on the prices of cars sold to for-hire drivers. A municipality could conclude that such price collusion would further the safety and reliability of for-hire transportation services, much like the price collusion permitted by the Ordinance. But there is no serious argument that the Washington legislature contemplated or authorized such price-fixing cartels.

The Ordinance authorizes a horizontal price-fixing agreement among independent contractors who drive for-hire vehicles. Such price fixing was neither clearly considered nor expressly authorized by Washington state law and cannot qualify for state action immunity.

B. Washington does not actively supervise the collective-bargaining price fixing process.

Independently, because the State does not actively supervise the price fixing, state-action immunity cannot apply. Supervision by a municipality is insufficient. *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 n.10 (1985) ("Where state or municipal regulation by a private party is involved, . . . active ***state*** supervision must be shown[.]" (emphasis added)). The requirement that the resulting collective bargaining agreement covering the drivers be "approved" by Seattle's Director of Finance and Administrative Services—after that agreement has been either entirely negotiated by private parties or entirely created by a private arbitrator—cannot provide the requisite state supervision.

State supervision is particularly important in cases regarding "pernicious" antitrust offenses like "price fixing," and where there is "involvement of private actors throughout." *Ticor Tile*, 504 U.S. at 639-40; *see also Town of Hallie*, 471 U.S. at 47 (noting a real danger of diverging from the State's authorization in cases involving "a *private* price-fixing arrangement"); *Cost Mgmt. Servs.*, 99 F.3d at 943 (requiring state supervision to guarantee that fixed rates among private parties are "a product of deliberate state intervention").

The district court erred by relying on *Tom Hudson & Assocs., Inc. v. City of Chula Vista*, 746 F.2d 1370, 1374 (9th Cir. 1984), to hold that municipal supervision was sufficient. In *Tom Hudson*, this Court recognized a narrow exception to the requirement of state supervision, holding that municipalities "need make no showing of supervision by the State in suits challenging 'traditional municipal function[s],'" such as municipal trash collection. *Id.* at 1373. Chula Vista could enter into an exclusive trash-collection franchise with one trash removal company, and since trash removal was a traditional function taken by the municipality itself, no additional state supervision was necessary. *See id.* But for-hire transportation services are not a "traditional municipal function." Seattle has not demonstrated that it has historically provided a municipal taxi service for private riders or provided for-hire transportation.

Apart from the absence of a traditional municipal function, the collective bargaining required by the Ordinance is not a municipal action. Seattle is not a party to the collective bargaining agreement, which is among only private parties. Instead, Seattle seeks to permit horizontal price fixing among all competitors in the for-hire ride share space. In other words, it allows a "private party" to engage in a "price-fixing arrangement," which is governed squarely by *Town of Hallie*. 471 U.S. at 47.

Not only was this private anti-competitive scheme enacted without specific authority from the State, it is also not supervised by the State itself. Thus, the Ordinance satisfies neither requirement necessary for state-action immunity.

II. The NLRA Preempts the City's Attempt to Expand Collective Bargaining to Independent Contractors.

There are two forms of preemption under the NLRA. In *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), the Supreme Court recognized that Congress generally occupied the field of labor relations. In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), the Supreme Court held that the NLRA preempts state or local regulation of activities that "may fairly be assumed" to be protected under Section 7 of the NLRA or prohibited under Section 8. *Id.* at 244.

The district court purported to apply *Machinists* but its inquiry—whether a specific provision of the NLRA prohibited the Ordinance—sounds in *Garmon*.

The district court failed to apply the proper test for field preemption under *Machinists*, and incorrectly applied the test for conflict preemption under *Garmon*. Under either test, the Ordinance is preempted.

A. The NLRA preempts the Ordinance under *Machinists*.

The NLRA preempts state and local regulation of collective bargaining involving independent contractors. Under *Machinists*, the NLRA preempts any state or local attempt to upset the balance it struck between conduct Congress meant to regulate and conduct Congress intentionally left unregulated and "controlled by the free play of economic forces." 427 U.S. at 140. The purpose, structure, and legislative history of the NLRA confirm that Congress meant for independent contractors to remain free of any collective bargaining scheme.

The district court reversed the *Machinists* inquiry by demanding an "express preemption provision" rather than looking at the purpose and structure of the NLRA. Order at 24. Congress's silence showed that it intended for the rights and obligations of independent contractors to be determined by the free market. The district court erred in inferring that Congress was "indifferent to the labor rights" of independent contractors. *Id.*

1. Congress intentionally and structurally excluded independent contractors from collective bargaining.

One key purpose of the NLRA was to create a national collective bargaining system. *See* 29 U.S.C. § 151. But that nationwide system purposefully excluded independent contractors from its ambit.

To be sure, the "labor disputes" covered by the NLRA include disputes involving independent contractors. A "labor dispute" includes "any controversy concerning terms, tenure or conditions of employment . . . , regardless of whether the disputants stand in the proximate relation of employer and employee." 29 U.S.C. § 152(9); *see also* 29 U.S.C. § 158(b)(4)(ii) (regulating labor practices involving "person[s]" and deeming it an "unfair labor practice" to force a "self-employed person to join any labor . . . organization").

But even though "labor disputes" can involve independent contractors, the NLRA extends collective bargaining rights only to "employees." 29 U.S.C. § 157. And the definition of "employee" expressly excludes "independent contractor[s]." 29 U.S.C. § 152(3). Thus, Congress was hardly "indifferent" toward independent contractors; it contemplated their involvement in labor-related disputes and occurrences but chose for their rights to be controlled by the free market under *Machinists*.

Besides the textual provisions of the NLRA above demonstrating that Congress consciously excluded independent contractors from collective

bargaining, there is an even more fundamental structural reason why *Machinists* prohibits the Ordinance. The finding needed to save the Ordinance under antitrust law condemns it under *Machinists*. If this Court were to hold that the Ordinance was exempt from the antitrust laws as protected state action—that Washington State had clearly expressed a desire to insert itself into the labor market in order to actively create and calibrate collective-bargaining agreements among for-hire drivers—the State would *necessarily* be regulating the field prohibited by *Machinists*. The Ordinance requires the Director to review the substance of a privately-negotiated collective-bargaining agreement and reject agreements that are not "fair" and "reasonable." Ordinance § 3(I). State supervision of the substantive terms of a collective bargaining agreement runs afoul of *Machinists* under settled Supreme Court precedent: "[S]tate attempts to influence the substantive terms of collective-bargaining agreements are inconsistent with the federal regulatory scheme." 427 U.S. at 153; *see also Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 619 (explaining that the NLRA prevents municipalities from "intrud[ing] into the collective-bargaining process").

An Ordinance expressly empowering Seattle to systematically evaluate and reject collective bargaining agreements because they are not "fair" or "reasonable" is even worse under *Machinists* than depriving a taxicab company of its franchise simply because the Los Angeles city council offhandedly mentioned in

deliberations that the company was "negotiating unreasonably." *Golden State Transit Corp.*, 475 U.S. at 611. *Machinists* precludes all such attempts to intervene in collective bargaining. *See Golden State Transit Corp.*, 475 U.S. at 615-16. By extending the right of collective bargaining to independent contractors and influencing the substance of their agreements, the Ordinance trespasses on ground forbidden by *Machinists*.

2. Further upending *Machinists* preemption, the Ordinance provides "economic weapons" to independent contractors, including weapons that Congress chose not to make available to anyone under the NLRA.

The Ordinance provides "economic weapons" to independent contractors that are otherwise unavailable under the NLRA, further circumventing the NLRA's regulatory design. It upsets Congress's decision about "what economic sanctions might be permitted negotiating parties." *Machinists*, 427 U.S. at 150; *see also Bldg. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 227 (1993) (detailing prior case refusing "to permit the city's exercise of its regulatory power . . . to restrict [a company's] right to use lawful economic weapons in its [labor] dispute"); *Teamsters v. Morton*, 377 U.S. 252, 260 (1964) (holding that a state law depriving a union of self-help weapon would "frustrate the congressional determination to leave this weapon of self-help available").

The NLRA provides no economic weapons to independent contractors. Under Congress's scheme, independent contractors who demand more than the buyer is willing to pay may have their engagement terminated—unlike employees who are protected from termination while engaged in protected activity. Not so under the Ordinance. Indeed, the Ordinance provides drivers with economic weapons *beyond* those available to employees under the NLRA. For example, the Ordinance permits drivers to invoke involuntary "interest arbitration," through which drivers are entitled to "the most fair and reasonable agreement." Ordinance § 3(I). The Ordinance also requires Seattle's Director of Finance and Administrative Services to protect the interests of drivers by vetoing qualified driver representatives he deems insufficient and policing the results of collective bargaining agreements. *See* Ordinance §§ 3(F), 3(H)(2).

The NLRA's focus on the availability of certain "economic weapons" represents a conscious choice not to "attempt to control the results of negotiations." *Machinists*, 427 U.S. at 150 n.11. But the Ordinance reserves the right for the Director to determine if the substantive results of the negotiations effectuate the City's desired policy outcomes. Ordinance § 3(H)(2)(c). Here, once again, the requirement for approval of the terms of collective-bargaining agreements conflicts with the rule "that state attempts to influence the substantive terms of collective-

bargaining agreements are inconsistent with the federal regulatory scheme." *Machinists*, 427 U.S. at 153.

3. Legislative history confirms Congress's intent not to permit collective bargaining by independent contractors.

The Taft-Hartley Act's amendment removing both supervisors and independent contractors from the definition of employees indicates Congress's intent to not allow either to collectively bargain. In 1947, neither supervisors nor independent contractors were expressly excluded from the NLRA's definition of "employee." The exclusion of both groups resulted from Congress's reaction to decisions by the NLRB and the Supreme Court. After the NLRB permitted the unionization of some supervisors, H.R. Rep. No. 80-245, at 14 (1947), and the Supreme Court followed the NLRB's lead to interpret "employee" to include some independent contractors, *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 120 (1944), Congress moved swiftly to amend the NLRA to exclude both groups from the category of employee. *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968).

After the amendment, the Supreme Court concluded that any state law that pressures employers to treat supervisors as employees is preempted. *Beasley v. Food Fair of N.C.*, 416 U.S. 653, 662 (1974). Indeed, Congress decided that forcing supervisors to unionize was "inconsistent with the purpose of the act." H.R. Rep. No. 80-245, at 14. Thus, supervisors' exclusion from "employee" did not merely leave their regulation up to the States: it precluded any regulation,

including at the state level. The same reasoning should apply to independent contractors.

The reasons for excluding both groups were substantially similar. Congress intended independent contractors to be left to the free market, given their "demonstrated . . . ability to care for themselves without depending upon the pressure of collective action," especially since someone is typically an independent contractor because he "believe[s] the opportunities thus opened to [him] to be more valuable" than traditional employment. H.R. Rep. No. 80-245, at 17. The House Report also noted that the exclusion of independent contractors merely clarified what was already implied in the structure of the Act; independent contractors were not treated the same as employees. *See id.* at 18 ("[T]here has always been a . . . big difference between 'employees' and 'independent contractors.'" The former "work for wages or salaries under direct supervision," while the latter rely on market forces for profit and work unsupervised.). "To correct what the Board has done," Congress thus "exclude[d] 'independent contractors' from the definition of 'employee.'" *Id.* The district court erred by dismissing this legislative history.

Under a correct reading of *Machinists*, the NLRA preempts the Ordinance.

B. Under *Garmon*, the NLRA preempts the Ordinance because it requires that independent contractors be treated as employees to obtain work.

The Ordinance is also preempted under *Garmon*. The NLRA outright prevents state and local regulations from requiring independent contractors to be treated as employees or to join a union in order to obtain work. This Court held in *Newspaper & Periodical Drivers and Helpers Union v. NLRB* that an employer and union that permitted independent contractor newspaper distributors to work only if they joined the union as statutory employees ran afoul of Section 8(e) of the NLRA. 509 F.2d 99, 100 (9th Cir. 1974) (per curiam), *cert denied* 423 U.S. 831 (1975); *see also Highway Truck Drivers & Helpers*, 199 NLRB 531 (1972) (holding unlawful contractual provision requiring independent contractors to become employees or else lose business); *A. Duie Pyle, Inc. v. NLRB*, 383 F.2d 772 (3d Cir. 1967) (same).

Here, the Ordinance effectively forces independent contractors to become "employees" for collective bargaining purposes in order to work with ride referral companies or contract with riders in Seattle. The Ordinance has the same impact on independent contractors as did the prohibited contracting condition in *Newspaper & Periodical Drivers*. Because this requirement violates Section 8(e) of the NLRA, it is preempted under *Garmon*, 359 U.S. at 244.

Contrary to the district court's faulty conclusion, the NLRA is not "indifferent" to how independent contractors are regulated with respect to collective bargaining. If federal policy were neutral on this, the independent contractors in *Newspaper & Periodical Drivers* would have had no recourse; the termination of their status would be permissible because the union "decided to do it by contract, by collective bargaining," and the creation of "new employees who must become union members" through a collective-bargaining agreement would be permitted. *Newspaper & Periodical Drivers Local*, 204 NLRB 440, 441 (1973), *aff'd*, 509 F.2d 99 (9th Cir. 1974) (per curiam). These results cannot occur. Not only did the NLRA intentionally exclude independent contractors from the national collective bargaining system, it also designated as an unfair labor practice the forced treatment of independent contractors as employees. The Ordinance is thus preempted under both *Machinists* and *Garmon*.

C. The Ordinance cannot be shielded from preemption.

Seattle may argue that these issues are unripe for adjudication because the Ordinance has not had its full effect yet. Seattle may also argue that the Ordinance is shielded from preemption because the driver-unions set up by the Ordinance, labelled "Exclusive Driver Representatives," are not truly "labor organizations" under the NLRA, nor do they engage in "secondary activity" unlawful under the NLRA. These arguments both fail.

First, preemption does not wait until federal jurisdiction actually has been displaced; it is a preventative doctrine designed to keep infringements from occurring rather than reacting to them only after they have occurred. For example, in the Supreme Court's most recent case on NLRA preemption, *Chamber of Commerce of the United States of America v. Brown*, 554 U.S. 60 (2008), the Supreme Court did not require plaintiffs to show that absolutely every application of the statute would be preempted in order to reach a preemption holding. Under the field preemption logic of *Machinists*, the NLRA preempts attempted state action in the field, as well as state actions with definite effect. Under *Garmon*, that preemption occurs as soon as it becomes "arguable" that the conduct-to-be-regulated is NLRA-protected or prohibited, *id.* at 65, further demonstrates the prospective orientation of preemption doctrine.

Second, Seattle cannot hide behind the Ordinance's creative labelling scheme in order to declare that the Ordinance is actually a valid exercise of state power. The Ordinance set up a simulacrum of the NLRA's collective bargaining structure—albeit with additional features and "economic weapons" not even provided in the NLRA—for a class of drivers, who, whether they are independent contractors or employees, *fall within the NLRA's regulatory ambit*. As discussed above, effects upon independent contractors from labor activity are regulated under the NLRA—for example, they are "persons" under the statute—but Congress

chose *not* to give independent contractors collective bargaining rights. And under the NLRA, effects upon employees from labor activity are obviously regulated but, in addition, Congress chose to give those employees *their own defined set* of collective bargaining rights. Both are objects of regulation, but only statutory employees serve as the subjects of collective bargaining.

Seattle's Ordinance thus infringes on federal labor policy in two ways: first, the Ordinance creates an entire parallel and supplemental collective bargaining system to the NLRA system (regardless of how drivers' status is determined under the NLRA), and, second, the Ordinance provides additional, supplemental economic weapons or remedies, in the form of (a) involuntary interest arbitration of collective bargaining disputes and (b) city approval of the resulting collective bargaining agreements. *See id.* at 73 (however characterized, a State cannot "advance an interest that . . . frustrates the comprehensive federal scheme established by [the NLRA]."); *Wis. Dep't of Indus. v. Gould Inc.*, 475 U.S. 282, 288-89 (1986) (State cannot impose a "supplemental sanction" that conflicts with the NLRA's "integrated scheme of regulation").

The Court should not lose the forest for the trees. "*Machinists* pre-emption is based on the premise that 'Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes.'" *Chamber of Commerce*, 554 U.S. at 65 (quoting *Machinists*, 427 U.S.

at 140 n.4 (quoting Archibald Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1352 (1972))). Affecting any part of this balance is forbidden. It is merely common sense to observe that any comprehensive collective bargaining scheme, like that of the Ordinance, will necessarily intrude upon this balance.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request the Court to reverse the order granting Seattle's Motion to Dismiss.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 5,146 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 point font.

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Dated: November 3, 2017

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2017, I electronically transmitted this Brief of Coalition for a Democratic Workplace, National Federation of Independent Business Small Business Legal Center, and Consumer Technology Association as Amici Curiae in Support of Appellants to the Clerk of the Court using the Court's ECF system. I further certify that counsel of record are being served with a copy of this brief by electronic means via the Court's ECF system, or by email, as follows:

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