No. 17-35640

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

CITY OF SEATTLE; SEATTLE DEPARTMENT OF FINANCE AND ADMINISTRATIVE SERVICES; and

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s.

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STATEMENT OF INTEREST

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

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

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

QUESTION PRESENTED

Antitrust law forbids independent contractors from collectively negotiating the terms of their engagement 5 Twypes EN(6)C1D006 Tw 5 ral la5n (e)Tj 0tsta8.3(or)3..1(l)Tf.5(

regulating their economies. Id. at 350. Thus, states may, within certain limits, adopt and implement policies that would otherwise violate the Sherman Act. Application of the

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

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

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

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

Relying on this authority, the City of Seattle enacted the Ordinance now before the Court. It permits for-hire drivers to negotiate collectively their contractual relationships with "driver coordinators"—taxicab associ0 T.004 Tw 0.248 TJ 0.0

the Ordinance thus violates and is preempted by

ARGUMENT

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

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

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

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

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

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

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

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

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

The district court mistakenly relied on Southern Motor Carriers in support of its decision. Op. 9-10 (ER 9-10). There, the Supreme Court considered whether a Mississippi agency authorized by state law to set common-carrier trucking rates could lawfully allow private truckers to engage in collective ratemaking as the method for establishing those rates. 471 U.S. at 663. The Court concluded that, although the statute did not expressly authorize collective ratemaking, the grant of authority to set rates "articulated clearly [the State's] intent to displace price competition among common carriers with a regulatory structure." *Id.* at 65. Southern Motor Carriers has no relevance here because, while the Washington State statutes grant municipalities authority to regulate rates and

vehicle transportation service." Op. 10 (citing

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

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

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

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

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

Indeed, the district court's mistaken version of the state action doctrine's clear articulation prong has the potential to undercut state policy as well as federal law. See Hallie, 471 U.S. at 47 (noting that the requireme

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

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

CONCLUSION

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

Respectfully submitted,

November 3, 2017

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) in that it contains 3,900 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and the signature block, as prepared using the Microsoft Word word-processing system.

November 3, 2017

/s/ Michele Arington
Assistant General Counsel

CERTIFICATE OF SERVICE

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

November 3, 2017

/s/ Michele Arington
Assistant General Counsel