No. 17-35640

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHAMBER OF COMMERCE OF THE UNITED STATES, et al.,

Plaintiffs-Appellants,

v.

CITY OF SEATTLE, et al.,

Defendants-Appellees.

On Appeal From the United States District Court
For the Western District of Washington

BRIEF OF AMICUS CURIAE PROFESSOR SAMUEL ESTREICHER IN SUPPORT OF DEFENDANTS-APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

Other Authorities

I. INTEREST OF THE AMICUS CURIAE[1]

Professor Samuel Estreicher is the Dwight D. Opperman Professor of Law and Director of the Center for Labor and Employment Law at New York University School of Law. One of the nation's leading experts in labor and employment law, he has taught the basic labor law course and seminars in labor and employment law for over 30 years. Professor Estreicher is the author or editor of over a dozen books, including a leading casebook in U.S. labor law (now in its 8th edition) and over 200 articles in academic and professional journals. He is a member of the College of Labor and Employment Lawyers. He has chaired NYU's Annual Conference on Labor since 1997. Professor Estreicher also has served as Chief Reporter of the American Law Institute's Restatement of Employment Law (2015). His professional interest in this case is the proper application of the antitrust laws to new work arrangements made possible by technical innovation.

II. ARGUMENT

The District Court in this case granted the defendants' motion to dismiss on the ground that City of Seattle Ordinance 124968 ("Ordinance") is shielded from challenge under the Sherman Act by the "state action" doctrine recognized in

[1] No party or party's counsel authored this brief in whole or in part or contributed money to fund preparing or submitting the brief. No person other than the amicus curiae or his counsel contributed money that was intended to fund preparing or submitting the brief. All parties have consented to the filing of this brief.

Parker v. Brown, 317 U.S. 341 (1943),[2] and that the Ordinance does not implicate federal labor law preemption principles. Amicus submits that an alternative ground for rejecting plaintiffs' antitrust challenge is labor's so-called "statutory" immunity from the federal antitrust laws derived from Section 6 of the Clayton Act of 1914, 38 Stat. 730, as amended, 15 U.S.C. §§12, 17. Section 6 declares:

> The labor of a human being is not an article of commerce and that nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor … organizations, instituted for the purposes of mutual help, …or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Because of judicial rulings refusing to apply the Clayton Act's labor-antitrust exemption to disputes involving businesses that were not the immediate employer of the labor group, Congress enacted the Norris-LaGuardia Act of 1932, 47 Stat.70, as amended, 19 U.S.C. §§ 101, 113(c) , to preclude federal court injunctions in peaceful "labor dispute[s]," a term that was broadly defined to include "any controversy concerning terms and conditions of employment … regardless of whether or not the disputants stand in the proximate relation of employer and employee."

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[2] Although Amicus is an expert in labor and employment law and in its interaction with antitrust law, his expertise does not extend to other areas of antitrust law. Accordingly, Amicus does not address the issue of state action immunity in this brief.

Labor's statutory antitrust exemption was solidified in two Supreme Court rulings in the early 1940s. In *Apex Hosiery v. Leader*, 310 U.S. 469 (1940), the Court held that the federal antitrust laws are not violated by labor-imposed restraints on competition in the market for the services of workers as opposed to restraints in product markets. A year later, in *United States v. Hutcheson*, 312 U.S. 219 (1941), the Court held that because of the combined operation of the Clayton and Norris-LaGuardia Acts, the criminal provisions of the antitrust laws could not be applied to activity of labor acting in its own interest and not in combination with business groups.

Specifically contrasting a combination of manufacturers of goods to suppress competition, the Court stated in *Hunt v. Crumboch*, 325 U.S. 821, 824 (1945):

> It is not a violation of the Sherman Act for laborers in combination to refuse to work. They can sell and not sell their labor as they please, and upon such terms and conditions as they choose, without infringing the Anti-trust laws…. A worker is privileged under congressional enactments, either acting alone or in concert with his fellow workers, to associate or decline to associate with other workers, or accept, refuse to accept, or to terminate a relationship of employment, and his labor is not to be treated as 'a commodity or article of commerce.'

Id. (internal citations omitted) (quoting 15 U.S.C. § 17; 29 U.S.C. § 101 *et seq*.).

Were the Uber and Lyft drivers covered by the Ordinance "traditional employees" in plaintiffs' parlance (Appellants' Br. 57), there would be no question that labor's statutory immunity from the antitrust laws bars plaintiffs' suit. The

terms of the Ordinance parallel in many respects the terms of the basic federal labor relations law, the National Labor Relations Act of 1935 ("NLRA"), 49 Stat. 449, as amended, 29 U.S.C. §§151-169.

The Ordinance differs in one important respect: its provisions apply to Uber and Lyft drivers denominated as "independent contractors" (a term that is not defined in the Ordinance other than to state it does not apply to "employees" covered under the NLRA). These contractors, however, are not independent businesses. They supply only their own personal services as drivers of a general-purpose vehicle on behalf of a "supply coordinator" who dictates their compensation, the prices customers are charged for those services, the customers for whom the services are provided, and in significant part the manner in which those services are to be provided. If these drivers are independent contractors under some federal labor and employment laws, it is because, under the common law of agency's "right to control" test that governs many of those laws, they are free to fashion their own working hours and (due to the coordinator's algorithm-assisted ability to supervise electronically their services) they work free of physical supervision of their work by their "coordinator".[3]

[3] As the Court stated in *NLRB v. Hearst Publication, Inc.*, 322 U.S. 111, 128 n.27 (1944): "Control of 'physical conduct in the performance of the service' is the traditional test of the 'employee relationship' at common law." (citing Restatement of the Law of Agency § 220(1)).

But even if they are not employees under the common law of agency, the Uber and Lyft drivers covered by the Ordinance are still "workers" or "laborers" who comfortably fall within the reach of the Clayton exemption because they sell only their own personal services, without any significant capital investment,[4] for particular "coordinators" who effectively control the terms and conditions of their work. There is nothing in the Clayton Act or Supreme Court decisions on labor's statutory antitrust exemption that hinges the applicability of the exemption on "employee" status under federal labor relations law. The Clayton Act was enacted well before the 1935 NLRA and well before the other important federal employment law, the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 203 et seq. Indeed, until 1935, outside the railroad industry, there was no federal statutory definition of "employee." Labor's antitrust immunity was framed in 1914 to protect workers' efforts to improve their wages and working conditions against antitrust challenge, at a time when there was no affirmative federal labor legislation at all.

In *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), the Supreme Court's initial approach to defining covered employees under the 1935 NLRA was quite expansive. Rejecting the strict applicability of the common law of agency's

[4] The provision of a general-purpose automobile, which is also available for personal use, does not reflect the kind of special-purpose investment in an office, equipment, and hiring of assistants associated with the running of a business. *See* note 6, *infra*.

"right to control" test, the Court held that whether an individual was a covered employee depended on whether "the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the [NLRA]." Under the "economic realities" test adopted in *Hearst*, the so-called "newsboys" in that case were properly found to be covered employees because, in addition to some supervision by publishers of their hours of work and effort, they "work continuously and regularly, rely upon their earnings for the support of themselves and their families, and have their total wages influenced in large measure by the publishers, who dictate their buying and selling prices, fix their markets and control their supply of papers." *Id*. at 131. The *Hearst* Court did not discuss whether the newsboys' attempt to organize a union would be outside the protective ambit of the Clayton antitrust immunity, but it is inconceivable, given the Court's reasoning, that it would have been.

Admittedly, Congress in the 1947 Taft-Hartley amendments to the NLRA disagreed with the Court's reading of the NLRA by adding an express provision excluding "independent contractors" and referencing in committee reports the common law of agency's "right to control" test as the appropriate test for statutory coverage. *See NLRB v. United Insurance Co*., 390 U.S. 254 (1968). The Taft-Hartley amendments left undisturbed labor's antitrust immunity and impart no

suggestion that such immunity changed because of the change in the NLRA coverage test.

There are good reasons why the definition of covered employee in a given labor or employment law does not, without more, alter the applicability of the Clayton antitrust immunity. Labor relations laws, like the NLRA, balance competing goals such as the employees' right to engage in concerted activities as against the employer's ability to manage the workforce, which may call for certain restrictions on statutory coverage that are generally irrelevant to the policies of the labor antitrust exemption. Supervisors, for instance, are excluded from the protection of the NLRA because they are viewed as management's agents, but they can form unions and seek collective bargaining free of antitrust liability under the Clayton exemption. The same should be true of the Uber and Lyft drivers covered by the Ordinance, who, although they are excluded from the protections of the NLRA, are still within the shelter of labor's Clayton Act antitrust exemption.

Labor's statutory exemption from the antitrust laws is not unlimited. Most importantly, labor cannot act in combination with business groups.[5] When workers or their union join forces with businesses to cartelize a product market, the

[5] The Supreme Court has recognized a "nonstatutory" exemption from the antitrust laws for collective bargaining activity between unions and employers. *See, e.g.*, *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996). This exemption is called "nonstatutory" because it is not based on the express terms of the Clayton and Norris-LaGuardia Acts, but rather is derived from the pro-collective bargaining policies of the NLRA and its analogue in the rail and airline industries.

labor exemption drops out of the picture. *See Allen-Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). In addition, if the individuals are principally involved in the selling of commodities or other products, they have no claim to the labor exemption, irrespective of whether they have organized as a labor union. *See Columbia River Packers Association, Inc. v. Hinton*, 315 U.S. 143 (1942).[6]

As the instant lawsuit involves a facial challenge to the Ordinance, there is no basis to believe that the Ordinance will operate other than as its express terms indicate – to provide a framework for Uber and Lyft drivers who fall shy of the traditional common law's "right to control" test to negotiate the terms and conditions of their employment with the "driver coordinator" who effectively controls those terms.[7]

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[6] Professional partnerships or corporations or individual practitioners providing principally professional services also fall outside the exemption if they hold themselves out as a business and make nontrivial investments in purchasing or leasing office space and equipment or other key entrepreneurial decisions such as deciding what to charge for their services and selecting which clients to serve. *Cf. FTC v. Superior Court Lawyers Association*, 493 U.S. 411 (1990) (labor exemption not raised in the Supreme Court).

[7] Although the statutory labor exemption is sometimes referred to as an exemption for labor "acting alone," the requirement is that labor not act in concert with business groups to restrain competition in product or other non-labor markets. It has been understood from the beginning of modern labor history that governments, whether federal, state, or local, have a constructive role to play in facilitating the organization and representation of workers by establishing a framework for selecting representatives and helping resolve disputes. Such a government role

III. CONCLUSION

For the reasons set forth herein, the Clayton Act's statutory exemption for labor from antitrust laws provides an alternate basis for affirmance.

RESPECTFULLY SUBMITTED this 8th day of December, 2017.

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does not alter the labor-exemption eligibility of the workers or their representatives.