NO. 17-35640

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

CITY OF SEATTLE et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

No. 2:17-cv-00370-RSL
The Honorable Robert S. Lasnik, United States District Court Judge

AMICUS CURIAE BRIEF OF THE STATES OF WASHINGTON AND CALIFORNIA, ILLINOIS, IOWA, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, NEW JERSEY, NEW YORK, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, AND WASHINGTON, D.C. IN SUPPORT OF REHEARING OR REHEARING EN BANC

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The States, like the federal government, have an interest in promoting economic competition within their borders. But the States, as sovereigns within our federal system, also have a duty to protect the health, safety, and welfare of their residents—a duty ordinarily implemented through legislation that directly regulates private activities or that delegates to state agencies or municipalities the power to regulate private activities. In *Parker v. Brown*, 317 U.S. 341, 352 (1943), and its progeny, the Supreme Court upheld the balance in our federal system by providing state regulatory actions with immunity from federal antitrust liability.

This amicus brief is filed by the States of Washington and California, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington, D.C.[1] Amicus States file this brief to defend their sovereign authority to delegate regulatory power to their municipalities, authority that would be undermined if, for state action immunity to apply, States had to specify in statute every way a

[1] This brief is filed pursuant to Fed. R. App. P. 29(b)(2) and Circuit Rule 29-2(a).

municipality might reasonably exercise its delegated authority—both now and in the future—and then supervise any municipal programs created pursuant to that delegated authority. But that is the effect of the panel's decision in this case. It requires a specificity in state statutes that delegate regulatory authority to municipalities and a degree of state involvement in municipal regulation that is inconsistent with the Supreme Court's requirements for *Parker* immunity from antitrust liability. In doing so, it disregards both the status of municipalities as political subdivisions of the State, and the importance and the appropriateness of regulatory cooperation between States and their municipalities. This amicus brief expresses no opinion about the wisdom of the state policy choice embodied in the challenged municipal ordinance, but amici States strongly support the right of each State to make the judgment that local conditions in a particular industry warrant a choice of that sort. The Court should grant the City of Seattle's Petition for Rehearing or Rehearing En Banc to correct this intrusion on state sovereignty.

II. ARGUMENT

A. Application of the State Action Doctrine to Municipalities

State action immunity is rooted in principles of federalism. *Parker*, 317 U.S. at 352 (concluding that the state program at issue was immune from a

Sherman Act challenge because the Act was not intended to restrain the state's actions taken in its capacity as a sovereign entity). This immunity "exists to avoid conflict between state sovereignty and the Nation's commitment to a policy of robust competition." *N. Car. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n*, 135 S. Ct. 1101, 1110 (2015). States, exercising their sovereign authority, may regulate their economies to serve important interests in addition to or apart from federal antitrust law. "If every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal antitrust law would impose an impermissible burden on the States' power to regulate." *Id.* at 1109. For that reason, the *Parker* state-action immunity confers immunity on anticompetitive conduct by the States when acting in their sovereign capacity. *Id.* at 1110.

States as sovereigns can determine how to exercise their power to regulate, and can choose to delegate regulatory authority to their agencies and political subdivisions, including municipalities.[2] For a private entity or a state agency

[2] "The number, nature and duration of the powers conferred upon [municipalities] and the territory over which they shall be exercised rests in the

comprised of members of a regulated community to successfully claim state-action immunity, it must be acting pursuant to a clearly articulated state policy to allow the anticompetitive conduct (the "clear articulation requirement") and the anticompetitive conduct must be actively supervised by government officials (the "active supervision requirement"). *N. Car. State Bd. of Dental Exam'rs*, 135 S. Ct. at 1112 (citing *Fed. Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. 621, 631 (1992)). Where municipalities (as opposed to private parties) are acting pursuant to state policy, the active supervision requirement does not apply, because municipal action is politically accountable and presumed to be taken in the public interest. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 45-47 (1985).

1. The "Clear Articulation" Requirement

The Supreme Court has described the clear articulation requirement as both realistic and practical in how it addresses state regulation. The Court specifically recognized that "it would 'embod[y] an unrealistic view of how legislatures work and of how statutes are written' to require state legislatures to

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absolute discretion of the state." *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (quoting *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907)).

explicitly authorize specific anticompetitive effects before state-action immunity could apply." *Fed. Trade Comm'n v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 229 (2013) (quoting *Town of Hallie*, 471 U.S. at 43). "No legislature can be expected to catalog all of the anticipated effects" of a statute delegating authority to a substate governmental entity. *Id.* Rather, the "ultimate requirement" is that the State must have "affirmatively contemplated" the displacement of competition such that the challenged anticompetitive effects can be attributed to the State itself. *Id.* (citing *Parker*, 317 U.S. at 352). Thus, the clear articulation requirement is satisfied "where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." *Id.*; *accord N. Car. State Bd. of Dental Exam'rs*, 135 S. Ct. at 1112.

Where the State's intent to displace competition is clear, the State is not required to "describe the implementation of its policy in detail" to satisfy the clear articulation requirement. *S. Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 65 (1985). Nor is a municipality required to "point to a specific, detailed legislative authorization in order to assert a successful *Parker*

defense to an antitrust suit." *City of Columbia v. Omni Outdoor Adv., Inc.*, 499 U.S. 365, 373 n.4 (1991) (quoting *Town of Hallie*, 471 U.S. at 39). Rather, a statute authorizing municipal regulation must be construed "to prevent *Parker* from undermining the very interests of federalism it is designed to protect[.]" *Id.* at 372.

2. The Panel Did Not Construe the State Statutes as Directed by the Supreme Court's Decisions and Mischaracterized the Conduct Authorized Under the Delegated Regulatory Authority

The state statutes at issue here satisfy the clear articulation requirement. The intent to displace competition with regulation is explicit. The Washington Legislature found that "privately operated for hire transportation service is a vital part of the transportation system within the state" and declares the "safety, reliability, and stability of privately operated for hire transportation services" to be "matters of statewide importance." Wash. Rev. Code § 46.72.001. To that end, the Legislature specifically authorized municipal regulation of "privately operated for hire transportation services . . . *without liability under federal antitrust laws*." Wash. Rev. Code § 46.72.001 (emphasis added).

The delegation of authority also is explicit, and it is not just a grant of "general corporate power" like that disapproved of in *Phoebe Putney*, 568 U.S.

at 228. Rather it is a specific grant of regulatory authority that specifically contemplates the displacement of competition. Wash. Rev. Code § 46.72.160 authorizes cities to regulate all for hire vehicles operating within their jurisdictions by "[c]ontrolling the rates charged for providing for hire vehicle transportation service and the manner in which rates are calculated and collected" and adopting "[a]ny other requirements" they deem necessary to "ensure safe and reliable for hire transportation service." Moreover, providing the for hire transportation drivers at issue in this case with the right to collectively bargain is a logical and foreseeable means of ensuring that the transportation those drivers provide is safe, reliable, and stable. *See* Amicus Curiae Br. States of New York et al. (Dkt 67) at 32-37; *see also N. Car. State Bd. of Dental Exam'rs*, 135 S. Ct. at 1112; *Phoebe Putney*, 568 U.S. at 229.

The panel's decision in this case misapplied governing law. The question presented is whether the displacement of competition accomplished by Seattle Ordinance 124968 was foreseeable by the State as consistent with its policy goals—i.e., is it an "inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." *N. Car. State Bd. of Dental Exam'rs*, 135 S. Ct. at 1112. Instead of engaging in that analysis, the panel narrowly

construed the statute as focused on the regulation of "vehicles" rather than "vehicle transportation services," on the rate charged to passengers rather than the "manner in which rates are calculated and collected," and on "for hire vehicle transportation service[s]" rather than "[a]ny other requirements adopted to ensure" that those services are "safe and reliable." *Chamber of Commerce v. City of Seattle*, 890 F.3d 769, 784-85 (9th Cir. 2018). On these bases, the panel held that "ride-referral service fees" are outside the regulatory authority delegated to municipalities in Wash. Rev. Code 46.72. This narrow reading of the statute is not compelled by this Circuit's precedent,[3] and the panel's conclusion that the particular state statutes at issue here did not adopt a policy "authorizing for-hire drivers to fix the rates Uber and Lyft charge for use of their ride-referral apps", *Chamber of Commerce*, 890 F.3d at 786, is flatly inconsistent with *Southern Motor Carriers*, 471 U.S. at 65 (State need not "describe the implementation of

[3] *Medic Air Corp. v. Air Ambulance Authority*, 843 F.2d 1187 (9th Cir. 1988), cited by the panel at 890 F.3d at 785, says nothing about the proper construction of state statutes in applying the clear articulation requirement. That opinion looked only at whether a local decision to "centralize[ ] the dispatch of emergency medical services under a plan that would have a neutral impact on competition" could immunize private parties who engaged in anticompetitive conduct. *Medic Air*, 843 F.2d at 1189. No state policy to displace competition was at issue. *Id.*

its policy in detail" to satisfy the clear articulation requirement), *City of Columbia*, 499 U.S. at 373 n.4 (municipality need not "point to a specific, detailed legislative authorization in order to assert a successful *Parker* defense to an antitrust suit"), and *Town of Hallie*, 471 U.S. at 39 (same).

Having failed to properly construe the state statutes in accordance with governing precedents from the Supreme Court, the panel then erroneously characterized the regulated conduct as "state or municipal regulation by a private party," *Chamber of Commerce*, 890 F.3d at 782, or "private pricefixing arrangements," *id.* at 784, and concluded that the State did not clearly articulate and affirmatively express a state policy authorizing that conduct, *id.* at 783-84. The panel was correct that the State did not authorize "private pricefixing arrangements" or "regulation by a private party," but that is not the conduct Appellants challenged in this case. Rather, they challenged the ordinance Seattle adopted under authority of state legislation that specifically authorizes municipalities to "regulate for hire transportation services without liability under federal antitrust laws." Wash. Rev. Code § 46.72.001.

The District Court here, like other courts to have examined "ride-referral services" such as Uber and Lyft, concluded that they are not just software

applications that connect passengers and drivers, but privately operated for hire transportation services that are squarely within the scope of local regulation authorized by the state statutes. *Chamber of Commerce v. City of Seattle*, 274 F. Supp. 3d 1155, 1165-66 (W.D. Wash. 2017). *See* Amicus Curiae Brief of the State of Washington (Dkt 62) at 8-12 (further explaining how the District Court correctly found that these "ride-referral services" are "for hire transportation services" under Wash. Rev. Code 46.72. The fact that they use smartphones rather than payphones to connect drivers and passengers does not remove them from regulation under the statute.

Because the panel did not construe the pertinent state statutes consistent with the Supreme Court's direction and mischaracterized the conduct authorized by the state statutes, it failed to properly apply the clear articulation requirement.

3. The Panel Misapplied the "Active Supervision" Requirement

The active supervision requirement does not apply where anticompetitive action is undertaken by a municipality. *Phoebe Putney*, 568 U.S. at 225-26; *Town of Hallie*, 471 U.S. at 47. As explained above, the state statutes here delegate authority to municipalities to adopt certain regulations. Seattle's Ordinance, adopted pursuant to authority delegated in clearly articulated state policy, does not allow private entities to set prices or engage in "municipal

regulation," *Town of Hallie*, 471 U.S. at 46 n.10; it places that responsibility with the City's Director of Finance and Administrative Services, who reports to elected officials. *See* Seattle Ordinance 124968 § 6.310.735(H)(2) (specifying procedure for submitting proposals to the Director for his or her approval or rejection). The panel overlooked the significance of this critical point. *See Chamber of Commerce*, 890 F.3d at 788.

But even if the active supervision requirement were applicable here, the panel further erred by concluding that such supervision must be performed by state government officials rather than by responsible officials of the municipality, to whom the Washington Legislature validly delegated regulatory authority. That holding imposes significant new burdens on state governments and substantially interferes with States' ability to choose how to exercise their sovereign powers.

The purpose of the active supervision requirement is to ensure that regulatory decisions serve the government's interests, and are not driven by the interests of private parties. *See, e.g.*, *Ticor Title Ins. Co.*, 504 U.S. at 634-35.

Contrary to the panel's analysis, that purpose may be fully served where a municipality is the effective decision-maker and actively supervises the private parties involved in the implementation of its regulatory program, which has been clearly authorized by the State. Every other Circuit to consider the issue has taken an approach that is different from the panel's in this case. *See Elec. Inspectors, Inc. v. Village of E. Hills*, 320 F.3d 110, 127 (2d Cir. 2003); *Mich. Paytel Joint Venture v. City of Detroit*, 287 F.3d 527, 536-38 (6th Cir. 2002); *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005, 1014 (8th Cir. 1983). As the Eighth Circuit explained, "it would seem rather odd to require municipal ordinances to be enforced by the State rather than the city itself," and "requiring state supervision could force the state and its municipalities to engage in duplicative, wasteful regulation and could erode the local autonomy that the state has sought to encourage." *Gold Cross Ambulance*, 705 F.2d at 1015 (citation and alteration omitted); *see also Tri-State Rubbish, Inc. v. Waste Mgmt., Inc.*, 998 F.2d 1073, 1079 (1st Cir. 1993) ("[I]t would be implausible to rule that a city may regulate, say, taxi rates but only if a state agency also supervises the private taxi operators.")

The panel's reasoning could have negative implications for Washington and other States that have chosen to delegate regulatory authority to municipal governments, by suggesting that States may need to take burdensome measures to ensure state supervision, such as by establishing state-level entities whose purpose is to supervise the programs the State has authorized the municipalities to create and implement. No decision of the Supreme Court requires such a commitment of state resources for state action immunity to apply. To the contrary, where the state Legislature has *already* decided that regulation is best enacted at the local level, has clearly delegated the authority for municipalities to implement the regulation, and has complied with the clear articulation requirement by explicitly stating its intent to displace competition with regulation, the Supreme Court's test for state action immunity is satisfied. Requiring state officials to supervise municipal programs directly interferes with the Legislature's ability to choose how to exercise its sovereign powers. Contrary to the panel's decision, nothing in the Supreme Court's *Parker* immunity decisions requires such a substantial intrusion upon State sovereignty.

III. CONCLUSION

Amici States respectfully ask that the Court grant the City of Seattle's Petition for Rehearing or Rehearing En Banc.

RESPECTFULLY SUBMITTED this 5th day of July 2018.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule of Appellate Procedure 28-2.6, Appellant, by and through her undersigned counsel, hereby states that she is unaware of any related cases to the instant appeal that are currently pending in this Court.

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule of Appellate Procedure 29-2(a), the attached brief is proportionately spaced, has a typeface of 14 points or more and contains 2,700 words.

s/ Alan D. Copsey
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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of July 2018, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

s/ Alan D. Copsey
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