On-Demand Drivers And The Right To Collective Bargaining: Why Seattle's Ordinance Does Not Violate Federal Antitrust Laws

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ON-DEMAND DRIVERS AND THE RIGHT TO COLLECTIVE BARGAINING: WHY SEATTLE’S ORDINANCE DOES NOT VIOLATE FEDERAL ANTITRUST LAWS

JACOB ALEKNAVICIUS*

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INTRODUCTION

As the gig economy continues to grow,¹ concerns have been raised that
gig economy workers (“on-demand workers”) do not enjoy the same protections
under the law that traditional employees do.² And those concerns
should come as no surprise given that on-demand workers are not protected
by state unemployment insurance benefits systems, workers’ compensation
benefits, state and federal minimum wage and overtime laws, federal anti-
discrimination laws, anti-retaliation laws, federal collective bargaining laws,
family and medical leave laws, and the benefits of employer contributions
for Social Security and Medicare taxes.³

This Note focuses on one of the traditional employee protections: the
right to collective bargaining.⁴ While several proposals to secure collective
bargaining rights for on-demand workers have been advanced,⁵ this Note

¹. See Elizabeth Kennedy, Employed by an Algorithm: Labor Rights in the On-Demand Economy,
   40 SEATTLE U. L. REV. 987, 992 (2017) (noting that the gig economy is projected to be worth $335 Billion
   by 2025).
². See Dmitri Iglitzin & Jennifer L. Robbins, The City of Seattle’s Ordinance Providing Collective
   Bargaining Rights to Independent Contractor For-Hire Drivers: An Analysis Of The Major Legal Hur-
³. Id.
⁵. See Rick Bales, Resurrecting Labor, 77 MD. L. REV. 1, 42 (2017) (arguing that the protections
   of the National Labor Relations Act should be extended to on-demand workers); Seth D. Harris & Alan
   Worker,” THE HAMILTON PROJECT 15 (2015),
assesses the legality of an ordinance passed by the City of Seattle, which permits drivers who work for companies such as Uber and Lyft (“on-demand drivers”) to bargain collectively with those companies (“ride-hailing companies”). This Note sets forth two independent arguments that argue in favor of the Ordinance’s legality. First, the Labor Exemption to the Sherman Antitrust Act exempts the Seattle Ordinance from antitrust liability; and second, the Seattle Ordinance does not violate the Sherman Antitrust Act because the Ordinance’s pro-competitive effects on the labor market outweigh the Ordinance’s anti-competitive effects under the Rule of Reason.

Part I outlines the Seattle Ordinance and the current challenge against the Ordinance by the United States Chamber of Commerce. Part I also provides a background on the Labor Exemption to the Sherman Antitrust Act and the effects of collective bargaining on competition in the labor market. Lastly, Part I offers an overview of the gig economy, ride-hailing companies, and the current status of on-demand drivers. It clarifies that on-demand workers are independent contractors, and that on-demand drivers are a type of on-demand worker.

Part II argues that the Labor Exemption to the Sherman Antitrust Act covers the Seattle Ordinance. This section first addresses proposals to categorize on-demand drivers as employees and contends that such proposals are premised on an incorrect understanding of the Labor Exemption; thus, they are inadequate solutions to the problem that on-demand workers are unable to bargain collectively. Instead, by examining the text of the statutes underlying the Labor Exemption, the purpose of the Labor Exemption, the current conditions of the labor market for on-demand drivers, and Supreme Court precedent in Labor Exemption cases, it follows that the Labor Exemption covers the relevant labor market and not just those who are statutorily labeled as employees. Because the Seattle Ordinance primarily affects only the labor market, fits the Supreme Court’s definition of a “mandatory subject of collective bargaining,” and provides a framework for agreements to be products

http://www.hamiltonproject.org/papers/modernizing_labor_laws_for_twenty_first_century_work_independent_worker [https://perma.cc/5Y84-EWGL] (arguing for a new category of workers (“independent workers”) who would have the right to bargain collectively).
8. Iglitzin & Robbins, supra note 2, at 50.
of bona fide arm’s length bargaining,10 Part II concludes that the non-statutory Labor Exemption exempts the Seattle Ordinance from antitrust liability.

Part III presents an argument that is independent of Part II. Part III argues that under the Rule of Reason,11 the Seattle Ordinance does not violate the Sherman Antitrust Act because the Ordinance’s pro-competitive effects on the labor market outweigh the Ordinance’s anti-competitive effects. First, Part III contends that, despite the presence of a horizontal agreement between the on-demand drivers, it would be inappropriate to apply the per se rule to the Ordinance.12 Instead, the Rule of Reason should be applied to fully analyze the Ordinance’s effects on competition, given that the Ordinance’s framework permits agreements between on-demand drivers and ride-hailing companies that impose a vertical price restraint.13 Then, Part III applies the Rule of Reason to the Seattle Ordinance by weighing the pro-competitive effects of a vertical price restraint on the labor market against the horizontal agreement’s assumed anti-competitive nature and the vertical price restraint’s anti-competitive effects. Ultimately, Part III concludes that the former outweighs the latter.

I. BACKGROUND

A. Seattle’s Ordinance & the Challenge by the United States Chamber of Commerce

On December 14, 2015, the City of Seattle enacted Ordinance 124968, which permitted on-demand drivers to bargain collectively with ride-hailing companies.14 By excluding the Ordinance’s application to those “in the context of an employer-employee relationship,” the Ordinance strictly applies to independent contractors.15 Before on-demand drivers can bargain collectively with a ride-hailing company, both the on-demand drivers and the ride-

10. See Mackey v. NFL, 543 F.2d 606, 614 (8th Cir. 1976) (ruling that the non-statutory Labor Exemption applies when an agreement primarily affects only the parties to the agreement, concerns a mandatory subject of collective bargaining, and is a product of a bona-fide arm’s length bargaining). But see Clarett v. NFL, 369 F.3d 124, 133–34 (2d Cir. 2004) (rejecting the 3-prong test for applying the non-statutory Labor Exemption as set forth by the Eighth Circuit in Mackey v. NFL).
11. See Smith v. Pro Football, 593 F.2d 1173, 1183 (D.C. Cir. 1978) (“Under the rule of reason, a restraint must be evaluated to determine whether it is significantly anticompetitive in purpose or effect.”).
12. See Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 886 (2007) (citation omitted) (“Restraints that are per se unlawful include horizontal agreements among competitors to fix prices . . . .”).
13. See id. at 899 (2007) (“If the rule of reason, not a per se rule of unlawfulness, would be the appropriate standard to judge vertical price restraints.”).
15. Id. at 777 (citation omitted).
hailing company must satisfy certain requirements as set forth by the Ordinance.

First, an individual ("the representative") must be selected to represent the on-demand drivers; then, the representative must be approved by the City of Seattle’s Director of Finance and Administrative Services ("the director"). Following the director’s approval, the representative must inform the ride-hailing company that she or he intends to represent the company’s on-demand drivers. After the ride-hailing company is informed of the intended representation, the company must provide the representative with the contact information of all on-demand drivers who have provided driving services under the company’s platform.

Next, the representative contacts the on-demand drivers and inquires whether they are interested in being represented. If interested, the on-demand driver provides the representative with a written statement expressing that interest. Then, the representative submits these statements to the director, and if a majority of the drivers support the representative, the director certifies the representative as the sole individual who may represent the on-demand drivers for that particular ride-hailing company.

Finally, the representative and the ride-hailing company must meet and bargain collectively over a variety of subjects. For this Note’s purposes, the most important subject is “the nature and amount of payments to be made by, or withheld from, the [ride-hailing company] to or by the drivers.” If an agreement between the representative and ride-hailing company is reached, it is submitted to the director who ensures that the agreement complies with the purposes and public policy goals of the Ordinance. “If the [d]irector finds the agreement compliant, the agreement is final and binding on all parties.”

17. Id. § 6.310.735(D); see City of Seattle, 890 F.3d at 776 (noting that Uber and Lyft provide an online platform, which on-demand drivers use to provide individual rides to consumers).
18. Id. § 6.310.735(E).
19. Id. § 6.310.735(F)(1).
20. Id. § 6.310.735(F).
21. Id. § 6.310.735(H)(1).
22. Id. § 6.310.735(H)(2).
23. Id.
24. Id. § 6.310.735(H)(2).
25. Id. § 6.310.735(H)(2)(a).
On the other hand, if the agreement is non-compliant, the director shall remand the agreement to the parties with recommendations for how to remedy the agreement’s shortcomings.26 Should the parties fail to reach an agreement, “either party must submit to interest arbitration upon the request of the other,” and then, a mutually agreed upon arbitrator shall propose an agreement between the parties.27 If the director finds the arbitrator’s proposed agreement to be compliant, then it becomes binding on the parties.28 At any time during the term of the agreement, the parties may propose amendments to the agreement, which must be approved by the director.29

On March 3, 2016, the United States Chamber of Commerce filed a lawsuit, arguing that the Ordinance violated federal antitrust law and was preempted by federal antitrust law and the National Labor Relations Act.30 The District Court for the Western District of Washington held that the Chamber lacked standing because no representatives had been approved by the director, so the case was dismissed.31 On March 3, 2017, the director approved an individual to be a representative, which prompted the Chamber to file suit again, challenging the Ordinance on the same grounds as before and requesting a preliminary injunction against enforcement of the Ordinance.32 The District Court granted the Chamber’s preliminary injunction, but on August 1, 2017, the District Court granted the City of Seattle’s motion to dismiss.33

The Chamber filed an appeal and an emergency motion for an injunction against the Ordinance in the United States Court of Appeals for the Ninth Circuit.34 The Court of Appeals granted the Chamber’s emergency motion pending the appeal.35 Ultimately, the Ninth Circuit reversed the District Court’s dismissal of the Chamber’s federal antitrust claims.36 Although the Ninth Circuit’s decision was primarily premised on doctrines of preemption and state immunity, which are outside the scope of this Note, the federal

26. Id. § 6.310.735(H)(2)(b).
27. Id. § 6.310.735(I).
28. Id. § 6.310.735(I)(4)(a).
29. Id. § 6.310.735(J).
30. Chamber of Commerce of the United States v. City of Seattle, 890 F.3d 769, 778 (9th Cir. 2018).
32. City of Seattle, 890 F.3d at 779.
33. Id.
34. Id.
35. Id.
36. Id. at 776.
antitrust claims remanded to the District Court are the sole focus of this Note.37

B. The Labor Exemption to the Sherman Antitrust Act

Antitrust law aims to “enhance consumer welfare by ensuring that competition regulates markets.”38 And the Sherman Antitrust Act of 189039 is premised on the idea that “the interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress . . . .”40 Section 1 of the Act prohibits contracts or agreements, which restrain trade or commerce, and Section 2 prohibits monopolization in a particular industry.41

The federal courts initially viewed labor union activities as unlawful conspiracies to prevent trade and employed the Sherman Antitrust Act to issue injunctions against labor union activities.42 Employers frequently used injunctions to “stiff[en] labor disputes . . . [and] to defeat unions instantly by preventing them from using self-help and destroying the momentum of strikes before substantive legal rights were litigated.”43 Any collective activity of labor, whether a strike or a boycott, was commonly held to be an unlawful restraint of trade.44 As a result of the frequent injunctions against labor union activity,45 Congress passed the Clayton Antitrust Act in 191446 and the Norris-LaGuardia Act in 1932,47 which are commonly considered to be the sources of the statutory Labor Exemption.48 The Clayton Antitrust Act provided that antitrust law did not forbid labor unions from “lawfully carrying out . . . legitimate objects” and that labor unions were not “illegal combinations or conspiracies in restraint of trade, under the antitrust laws.”49 And the

37. See id. at 795.
42. See Loewe v. Lawlor, 208 U.S. 274, 308–09 (1908) (holding that workers organizing together to pursue their interests was an unlawful restraint of trade), superseded by statute, Clayton Act, Pub. L. No. 63-212, 38 Stat. 730 (1914).
43. Burlington N. & Santa Fe Ry. v. Int'l Bhd. of Teamsters Local 174, 203 F.3d 703, 707 (9th Cir. 2000) (en banc).
45. See Int'l Bhd. of Teamsters Local 174, 203 F.3d at 707.
48. See Perritt, supra note 38, at 135–36.
Norris-LaGuardia Act prevented federal courts from issuing "any restraining order or temporary or permanent injunction . . . involving or growing out of a labor dispute."  

Taken together, these Acts insulated "legitimate collective activity by employees . . . from the proscriptions of the antitrust laws." One of these legitimate collective activities protected by the Labor Exemption is employees unilaterally organizing themselves into unions for the purposes of collective bargaining. Subsequent federal legislation, such as the Railway Labor Act of 1926 and the National Labor Relations Act of 1935, legitimized the statutory Labor Exemption by granting "broad rights to employees to engage in collective bargaining through representatives of their choice." On its face, collective bargaining inherently limits competition because it seeks to create "private agreements to restrain competition in labor markets." A simple example of such an agreement is one where a labor union and an employer agree to fix wages; or in other words, they agree to fix the price at which the workers will sell their labor to the employer. A slightly more complicated example is an agreement where the employer agrees to hire only workers and future workers from a particular labor union, creating a monopoly in the labor market by restricting the supply of labor and a monopsony in the labor market by restricting the demand for labor.

Although the Sherman Antitrust Act intended to target agreements between businessmen in response to the anticompetitive and monopolistic tactics of the era, the Supreme Court held that the statutory Labor Exemption did not exempt bilateral activity, such as "concerted action or agreements between unions and nonlabor parties." In other words, "[w]hen labor unions enter into agreements with others such as employers . . . they are outside the statutory [labor] exemption." This was critical because an employer

50. 29 U.S.C. § 101 (§ 1 of the Norris-LaGuardia Act, 47 Stat. 70); see Milk Wagon Drivers' Union, Local No. 753 v. Lake Valley Farm Prods., 311 U.S. 91, 101 (1940) (ruling that the Norris-LaGuardia Act intended to end the granting of injunctions "based upon complaints charging conspiracies to violate the Sherman Antitrust Act.").
51. Mackey v. NFL, 543 F.2d 606, 611 (8th Cir. 1976).
52. See Perritt, supra note 38, at 136.
55. Perritt, supra note 38, at 135.
56. Id. at 132.
57. Id.
60. Perritt, supra note 38, at 136 (emphasis added).
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must be present at the bargaining table for collective bargaining to occur, and frequently, multi-employer bargains are sought by unions.61

The Supreme Court first addressed a restraint on competition imposed through collective bargaining in *Allen Bradley Company v. Local Union No. 3, International Brotherhood of Electrical Workers*, where it held that a labor union’s agreements with all local electrical manufacturers and contractors “to eliminate all competition among themselves and to prevent all competition from others” in the relevant product market were not covered by the statutory Labor Exemption; and thus, the agreements violated the Sherman Antitrust Act.62 Twenty years later, the Court reached a similar conclusion in *United Mine Workers v. Pennington* where it held that a labor union’s agreement with several large coal operators, which ultimately aimed to eliminate smaller operators from the industry, was not covered by the statutory Labor Exemption because the agreement primarily affected the product market.63

However, on the same day that the Supreme Court decided *Pennington*, the Court also decided *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Company*, where the Court set forth the non-statutory Labor Exemption,64 which shields agreements between a labor union and a nonlabor party if the agreement is “intimately related to the union’s vital concerns of wages, hours, and working conditions.”65 As explained by the Supreme Court:

> The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws. The Court therefore has acknowledged that labor policy requires tolerance for lessening of business competition based on differences in wages and working conditions.66

In *Jewel Tea Company*, the Court held that the labor union was covered by the non-statutory Labor Exemption because its agreement covered only

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61. See NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87, 89 (1957) (involving a multi-employer collective bargaining agreement between a union and 8 employers in the linen supply business).
64. 381 U.S. 676, 689–90 (1965).
marketing-hours restrictions in the labor market. Thus, courts have interpreted the Supreme Court’s precedent to suggest that collective bargaining agreements violate the Sherman Antitrust Act when the agreement reaches beyond the labor market and hurts the parties’ competitors by creating an anti-competitive effect in the product market.

Historically, federal courts have applied the Labor Exemption only to agreements that involve workers who are statutorily labeled as “employees.” Courts reasoned that the Labor Exemption should only cover employees because “only employees were thought to need the protection from their employers . . . .” Independent contractors were considered to have more bargaining power than employees because “they were typically highly skilled workers who commanded premium wages on the open market and could provide their services to . . . customers on a project-by-project basis, rather than being tied to a single employer.” As a result, courts have generally held that independent contractors are not covered by the Labor Exemption. While the view that only employees needed protection from their employers once held firm weight, the recent emergence of the gig economy has seriously called that view into question.

C. The Current State of the Gig Economy and Ride-Hailing Companies

The gig economy is “an economic system that uses online platforms to connect workers . . . with clients and consumers.” Typically, a business provides a platform through a smartphone application, which on-demand workers use to perform work on a free-lance basis for consumers. The consumers “pay ‘piece-rate’ for the goods or services, and the online

67. 381 U.S. at 689–93.
69. See Perritt, supra note 38, at 140.
70. Perritt, supra note 9, at 56–57.
72. See Perritt, supra note 38, at 142; Taylor v. Local No. 7, Int’l Union of Journeymen Horseshoers, 353 F.2d 593, 606 (4th Cir. 1965) (en banc) (holding that the respondents’ activity was not protected by the Labor Exemption because they were independent contractors). But see Am. Fed. of Musicians v. Carroll, 391 U.S. 99, 106 (1968) (quoting Carroll v. Am. Fed. of Musicians, 241 F. Supp. 865, 887 (S.D.N.Y. 1965)) (holding that the non-statutory Labor Exemption applied to a group of orchestra leaders because they were a “labor group” and party to a labor dispute under the Norris-LaGuardia Act” although they were independent contractors).
73. Kennedy, supra note 1, at 992.
intermediary takes a fee for facilitating the transaction.”75 Given the convenience and flexibility provided by these platforms, nearly half of adults in the United States have participated in the gig economy, either as consumers or as on-demand workers.76 As a result, business is booming in the gig economy.77

While companies such as Handy, Airbnb, and Postmates are well-known, “[t]he most widely recognized [gig] economy companies are ‘ride [hailing]’ companies, such as Uber and Lyft.”78 For example, consumers use the Uber app or the Lyft app to request a ride.79 Then, the app matches the consumer with an on-demand driver based on location, “uses a pricing algorithm to set [a] fare for [the] ride,” and provides a way for the consumer to pay the on-demand driver.80 The platform navigates the on-demand driver to the consumer’s pick up location;81 then, the on-demand driver drives the individual to her or his destination, and upon completion of the ride, the consumer pays the on-demand driver through the app.82 The ride-hailing company receives a percentage of the on-demand driver’s compensation for the ride, which is a software licensing fee for using the ride-hailing company’s platform.83 Also, ride-hailing companies use “surge pricing,” which increases a ride’s fare due to a higher supply of consumers than on-demand drivers in a given area, as well as other factors, such as distance, weather, and time.84 Lastly, most, if not all, ride-hailing companies allow on-demand drivers to drive for other ride-hailing companies’ platforms.85

Central to the business model of ride-hailing companies “is the characterization of its workforce as ‘independent contractors,’ rather than employees.”86 And by the business model’s inherent design, the self-determining schedules of on-demand drivers makes it difficult for them to come together

75. Kennedy, supra note 1, at 992.
76. See Steinmetz, supra note 7 (“44% of U.S. adults have participated in such transactions, playing the roles of lenders and borrowers, drivers and riders, hosts and guests.”).
77. See Brett Harris, Uber, Lyft, and Regulating the Sharing Economy, 41 SEATTLE U. L. REV. 269, 271 (2017) (“In 2013, the [gig economy] was valued at $26 billion.”).
78. Id.
79. Chamber of Commerce of the United States v. City of Seattle, 890 F.3d 769, 776 (9th Cir. 2018).
81. Perritt, supra note 9, at 59–60.
82. City of Seattle, 890 F.3d at 776.
83. Paul, supra note 80, at 237.
84. Perritt, supra note 9, at 60–61.
85. City of Seattle, 890 F.3d at 776.
86. Kennedy, supra note 1, at 993.
to take collective action. Not surprisingly, on-demand drivers do not fit the traditional labor-law categories. Thus, on-demand drivers do not have a “recognized [federal] legal right to bargain collectively with their employers in regard to the terms and conditions of their employment.” But given the growth of the gig economy, American labor law can no longer turn a blind eye to the disparities in bargaining power between traditional employees and a growing number of on-demand drivers in the gig economy.

II. THE LABOR EXEMPTION TO THE SHERMAN ANTITRUST ACT EXEMPTS THE SEATTLE ORDINANCE FROM ANTITRUST LIABILITY.

A. The Problem with the Employee - Independent Contractor Distinction

Recognizing that employees have the federal right to bargain collectively, while independent contractors do not, some have proposed that Congress or the courts should consider certain factors, such as working hours and economic dependence, as a means to categorize independent contractors – specifically, on-demand drivers – as employees, which would secure them the federal right to collective bargaining. But any approach that seeks to categorize on-demand drivers within the same legal category as employees is misguided for several reasons.

First, on-demand drivers’ relationship with a ride-hailing company’s platform is fundamentally different from the relationship that a traditional employee has with an employer. The law recognizes a traditional employer-employee relationship when the employer maintains control over an employee in regard to the employee’s wages, hours, working conditions, and duties or tasks. Meanwhile, ride-hailing companies “rely on new business models that thrive on fluid part-time work relationships, rather than traditional employment with employer-controlled work schedules and hours.”

Second, given the different relationship structures in which on-demand

87. Id.
88. Iglitzin & Robbins, supra note 2, at 50.
89. See Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1081–82 (N.D. Cal. 2015) (“Perhaps Lyft drivers who work more than a certain number of hours should be employees while the others should be independent contractors.”); Alex Kirven, Whose Gig is it Anyway? Technological Change, Workplace Control and Supervision, and Workers’ Rights in the Gig Economy, 89 U. COLO. L. REV. 249, 289 (2018) (arguing that on-demand drivers should be classified as employees because they provide a service that ride-hailing companies are economically dependent on).
90. Perritt, supra note 9, at 55.
91. See RESTATEMENT (THIRD) OF AGENCY § 7.07 (AM. LAW INST. 2006).
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Drivers and employees provide their labor, categorizing on-demand drivers as employees “would require fundamental structural changes” to ride-hailing companies’ business models, which would severely diminish the flexibility for workers that made the ride-hailing companies’ business model attractive to begin with. Also, such changes could greatly reduce the efficiency of a ride-hailing company’s platform to connect on-demand drivers with consumers.

Third, such fundamental structural changes would “produce inefficient outcomes and . . . undermine efficient and equitable distribution of resources.” If a ride-hailing company has to maintain an employer-employee relationship with each on-demand driver, managing the platform would increase administrative costs and cause logistical issues. As a result, ride-hailing companies would likely terminate on-demand drivers whose working hours are low or inconsistent in order to save costs. Another undesirable consequence of maintaining such an employer-employee relationship is that on-demand drivers would not be able to work for multiple platforms because a ride-hailing company, as an employer, would expect an on-demand driver, as an employee, to not work for a competitor; and this would ultimately reduce competition between the platforms and could lead to a single platform dominating the market. Thus, on-demand drivers should not be classified as employees because “[t]hey do not satisfy the traditional legal criteria for that status and because of the negative economic consequences that would arise from such a classification. Instead of categorizing on-demand drivers as employees in order to cover them under the Labor Exemption, I argue the inverse: The Labor Exemption covers labor markets, including Seattle’s on-demand driver labor market at issue here.

93. Id.; see Perritt, supra note 9, at 123 (“Classification of ride-hailing drivers as employees would subject them to all of the traditional types of labor and employment protection, forcing a considerable modification of existing practices.”).
94. See Lao, supra note 92, at 1574.
95. Perritt, supra note 9, at 55; see Harris & Krueger, supra note 5, at 8 (“Forcing these new forms of work into a traditional employment relationship could be an existential threat to the emergence of online-intermediated work, with adverse consequences for workers, consumers, businesses, and the economy.”).
96. Lao, supra note 92, at 1578.
97. Id.
98. Id. at 1580.
99. Perritt, supra note 9, at 146.
B. The Labor Exemption applies because it covers particular labor markets, including the labor market for on-demand drivers

Although such a broad interpretation of the Labor Exemption may appear unorthodox at first, the interpretation finds support in a variety of sources. First, it draws support from the text of the statutes underlying the Labor Exemption. Second, the interpretation attracts support from the Labor Exemption’s purpose to help workers improve the conditions of their labor through collective bargaining, especially when considering the current conditions of the labor market for on-demand drivers. And third, the interpretation is strengthened by the Supreme Court’s precedent in Labor Exemption cases, which has suggested that the Exemption covers labor agreements and disputes that involve more than just employees.

1. The Text of the Clayton Act and the Norris-LaGuardia Act

The Labor Exemption “traces its origin to sections 6 and 20 of the Clayton Act . . . and to the Norris-LaGuardia Act.” Beginning with the Clayton Act, section 6 states:

The labor of a human being is not a commodity or article of commerce. 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.

When looking closely at the text of Section 6, it does not mention “employees,” nor does it imply that only employees’ or specific types of workers’ organizations and activities are exempted from antitrust liability. Instead, Section 6 stresses the word “labor.” When the Clayton Act was passed in 1914, Webster’s Dictionary defined labor as “[p]hysical toil or bodily exertion . . . [or] intellectual exertion; mental effort . . . directed to some useful end.” Today, Webster’s Dictionary defines labor as

100. See Paul, supra note 80, at 235 ("[T]he L[abor] E[xemption] . . . creates the space for affirmative protections of collective bargaining by workers with their employers over wages and working conditions.").
103. Labor, WEBSTER’S DICTIONARY (1913 ed.).
“expenditure of physical or mental effort” and notes that the physical or mental effort “provides . . . goods or services in an economy.”

With either definition, the emphasis is on the worker’s activity and the beneficial end result of that activity. Neither definition suggests that the worker’s activity is controlled by an employer nor do they suggest that the beneficial end result must work to the benefit of an employer; thus, there is no implication of the traditional employer-employee relationship within the definition of labor. Also, because Section 6 excludes defining labor as a commodity or article of commerce, which is bought and sold in a product market, and because Section 6 concerns antitrust laws, which cover markets, it follows that Section 6 speaks only to labor markets. While Section 20 of the Clayton Act does refer to “employees” in regard to limiting the authority of federal courts to issue injunctions against labor union activities, Sections 1 and 2 of the Norris-LaGuardia Act, which also limit federal courts’ authority for issuing injunctions against labor union activities, does not refer to “employees.” Instead, Section 1 of the Norris-LaGuardia Act emphasizes that injunctions may not be issued “in a case involving or growing out of a labor dispute.” And Section 13 of the Act defines “labor dispute” as “any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating . . . terms or conditions of employment, regardless of whether or not disputants stand in proximate relation of employer and employee.”

Thus, the Act clarifies that a labor dispute can arise in contexts outside of the traditional employer-employee relationship. Indeed, the Supreme Court clarified that a “labor dispute” can arise out of a labor union’s activity “directed at the primary employer or at neutral ‘secondary’ employers,” i.e., third parties. And the Court further iterated that “the term ‘labor dispute’ must not be narrowly construed because the statutory definition itself is extremely broad.” All things considered, the text of the Clayton Act and the Norris-LaGuardia Act suggest that the Labor Exemption covers more than

just statutorily-labeled employees and instead, can cover a particular labor market.

2. The Purpose of the Labor Exemption & the On-Demand Driver Labor Market

The Clayton Act protects labor groups from antitrust liability when those groups’ activities aim to improve workers’ wages and working conditions. And Section 2 of the Norris-LaGuardia Act builds on this purpose as it states:

Whereas under prevailing economic conditions . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment . . . it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment.

The Supreme Court explained that the Act aimed “to restore the broad purpose which Congress thought it had formulated in the Clayton Act.” And that broad purpose was to protect labor union collective bargaining activities—centered on improving workers’ wages and conditions—beyond the context of an employer-employee relationship.

When considering the exchange of labor by an on-demand driver in return for payment by a consumer and the ride-hailing company receiving a percentage of that payment, “[o]ne can plausibly argue that [it is the] kind of exchange . . . within the scope of Norris-LaGuardia and is clearly what the statute meant to protect.” And when more specifically considering the current conditions of the labor market for on-demand drivers, their exclusion from the federal right to bargain collectively “has perpetuated an imbalance of economic bargaining power that labor and employment laws were intended to redress.” This imbalance of bargaining power has crippled the on-demand driver labor market in several ways.

First, on-demand drivers “typically experience high levels of income volatility” because most on-demand drivers are young adults and low-income individuals. Typically, federal labor policy in the United States has sought to aid such workers in their pursuit of higher wages and better

111. Iglitzin & Robbins, supra note 2, at 57.
114. See id. at 229–31.
115. Perritt, supra note 9, at 144.
116. Kennedy, supra note 1, at 1002.
117. Id. at 998.
working conditions, given that they may “lack the education, skills, and other economic leverage” to negotiate for better terms and conditions of their labor. Yet on-demand drivers’ wage insecurity has grown in the gig economy, as many on-demand drivers have experienced wrongful deductions from their pay. But under the Seattle Ordinance, on-demand drivers could bargain collectively over wrongful compensation deductions, as well as other payment-related issues, which would ultimately provide on-demand drivers with better wage security.

Second, many on-demand drivers are turning to ride-hailing companies as their primary source of income, but their wages are still low despite the fact that some on-demand drivers are working more than forty hours a week. This is not surprising given that on-demand drivers’ costs include “the time lost waiting for and picking up a [consumer], vehicle maintenance costs, insurance fees, and gas expenses.” Lastly, because their wages are usually low, on-demand drivers may have to rely on government assistance more frequently, which has negative consequences for taxpayers and government budgeting.

However, by providing on-demand drivers with a way to bargain collectively, like the Seattle Ordinance has set out to do, it would “give[] them a sense of empowerment and even[] out the balance of power” between on-demand drivers and ride-hailing companies. Indeed, the primary sponsor of the Seattle Ordinance, Mike O’Brien, stated that the Ordinance intended “to give drivers ‘a voice’ on the job” after he “witness[ed] how little power drivers themselves had in working for a living wage.” Therefore, given that the Labor Exemption’s broad purpose is to protect workers who seek to improve their wages and working conditions within a particular labor market, and because Seattle’s Ordinance provides a framework for on-demand drivers to address economic disparities through collective bargaining, it is

118. Id.
119. Id. at 994.
120. Perritt, supra note 9, at 129.
121. See id. at 136–38.
122. See Steinmetz, supra note 7 (noting that some on-demand drivers “use the platform 50 hours a week to feed themselves.”); Harris, supra note 77, at 272 (observing that on-demand drivers “must put in long hours that extend beyond the standard eight-hour workday in order to make a sufficient amount of money.”).
123. Harris, supra note 77, at 272.
124. See Kennedy, supra note 1, at 1001.
125. Perritt, supra note 9, at 137.
likely that Congress intended the Labor Exemption to cover such proposals.127

3. The Supreme Court’s precedent suggests a broad interpretation of the Labor Exemption.

The Supreme Court’s earlier Labor Exemption cases furthered the view that the Exemption only applied to employees,128 but these cases have been overblown and misunderstood. For example, in Columbia River Packers Association v. Hinton, which involved a buyer that processed and sold canned fish and seller that was a fishermen’s union of independent fishermen who caught and sold the fish to the buyer, the Court held that the Labor Exemption did not apply because the dispute between the parties was a dispute between businessmen and not a labor dispute between an employer and an employee.129 But Hinton embraced a narrow definition of “labor dispute” that the Court would later reject.130 And recent decisions by the Supreme Court, as well as the Federal Circuit Courts of Appeals and District Courts, suggest that “[e]nough ambiguity and flexibility exists in [the] case law on the [L]abor [E]xemption to allow them to be molded around the conditions of [a] particular labor market[].” 131

One line of cases has extended the Labor Exemption to workers who were acting as independent contractors and employees simultaneously. For example, in a labor market of milk drivers, a dispute arose between a labor union of milk wagon drivers and a group of milk vendors who were acting as independent contractors in nature although they were labeled as employees in their agreement with the Plaintiff.132 The milk vendors’ activity had led to a decrease in the union workers’ employment.133 The Supreme Court held that the Labor Exemption applied because a labor dispute existed, as “all the parties had direct or indirect interests in production, sale, and distribution of milk.” 134 In another instance, the Court held that a labor organization was covered by the Labor Exemption when it negotiated a minimum rental price for motor carriers who operated as independent contractors because they owned and drove their own vehicles.135 The Court’s reasoning for

127. See Kennedy, supra note 1, at 1013–14.
128. See generally Perritt, supra note 9, at 143–44.
129. 315 U.S. 143, 144, 146–47 (1942).
131. Perritt, supra note 9, at 149.
133. Id. at 95.
134. Id. at 93, 103.
applying the Labor Exemption rested on the fact that the agreement was correcting an abuse that had been occurring in the particular labor market.\textsuperscript{136}

Another line of cases applied the Labor Exemption to workers who were independent contractors because “there was ‘the presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors,’” thus, making them parties to a labor dispute.\textsuperscript{137} For example, in \textit{H.A. Artists & Associates v. Actors’ Equity Association}, the Supreme Court held that a group of independent agents for stage actors and actresses were a labor group, and that it was in a labor dispute with a labor union of agents who also worked for stage actors and actresses, as both parties provided the same type of services.\textsuperscript{138}

Both lines of cases ultimately suggest that the Labor Exemption, when broadly defined, covers labor markets because the Court’s reasoning for applying the Exemption usually rests on a dispute’s or an agreement’s effect on a particular labor market. Given that on-demand drivers provide the same labor and compete for the same wages as taxi drivers do, as well as the fact that taxi drivers are statutorily-labeled employees,\textsuperscript{139} the Supreme Court’s precedent suggests that the Labor Exemption would extend to a dispute in the particular labor market that includes on-demand drivers or a collective bargaining agreement under the Seattle Ordinance.

\textbf{C. The Labor Exemption extends to the on-demand drivers under the Seattle Ordinance.}

Because the Labor Exemption broadly extends to cover particular labor markets and not just employees, whether it covers the on-demand drivers under the Seattle Ordinance “turns on whether the relevant federal labor policy is deserving of pre-eminence over federal antitrust policy under the circumstances of the particular case.”\textsuperscript{140} Given that the Seattle Ordinance provides a framework for on-demand drivers to restrain competition through wage fixing agreements with ride-hailing companies, it “embodies the inherent tension between antitrust policy, which is designed to maximize . . .

\textsuperscript{136} Id. at 293–94.


\textsuperscript{138} 451 U.S. 704, 706, 721 (1981). \textit{But see} L.A. Meat & Provision Drivers Union v. United States, 371 U.S. 94, 98 (1962) (holding that the Labor Exemption did not apply to a group of independent contractors when “[t]here was no showing of any actual or potential wage or job competition, or of any other economic interrelationship, between the [independent contractors] and the . . . members of the union.”).


\textsuperscript{140} Mackey v. NFL, 543 F.2d 606, 613 (8th Cir. 1976) (citations omitted).
competition, and national labor policy, which is designed to promote cooperation between workers in the face of employer economic power.”

In Mackey v. NFL, the Eighth Circuit set forth a three-prong test for determining whether the non-statutory Labor Exemption applies, and although not every Circuit has adopted the Mackey test, it has been adopted by the Sixth and Ninth Circuits, as well as by District Courts in the Third Circuit and the District of Columbia. Under the Mackey test, the non-statutory Labor Exemption applies when “[1] the restraint on trade primarily affects only the parties to the collective bargaining relationship . . . [2] where the agreement sought to be exempted concerns a mandatory subject of collective bargaining [and] . . . [3] where the agreement sought to be exempted is the product of bona fide arm’s-length bargaining.”

Under the Seattle Ordinance, a collective bargaining agreement would primarily affect the on-demand drivers for whom the agreement was negotiated and the ride-hailing company for whom the on-demand drivers provide their labor. The Ordinance expresses that permissible subjects of negotiations are “the nature and amount of payments to be made by, or withheld from, the [ride-hailing company] to or by the [on-demand] drivers . . . [and] conditions of work,” which aligns with the Supreme Court’s emphasis that the non-statutory Labor Exemption applies to agreements “over wages and working conditions.” Also, the Ordinance expresses that the representative and the ride-hailing company are the only parties to the collective bargaining relationship.

Turning to the second prong, whether an agreement concerns a mandatory subject depends “not [on] the form of the agreement—e. g., prices or wages—but [on] its relative impact on the product market and the interests of union members.” Similarly to Oliver, any agreement arising out of the

141. Kennedy, supra note 1, at 1022.
142. 543 F.2d at 614.
144. See In re Detroit Auto Dealers Ass’n, 955 F.2d 457, 463 (6th Cir. 1992); Cont’l Mar. of S.F., Inc. v. Pac. Coast Metal Trades Dist. Council, 817 F.2d 1391, 1393 (9th Cir. 1987).
146. Mackey, 543 F.2d at 614 (citations omitted).
149. § 6.310.735(H)(1); see Brown v. Pro Football, 50 F.3d 1041, 1045 (D.C. Cir. 1995) (“[R]estrains on competition lawfully imposed through the collective bargaining process are exempted from antitrust liability so long as such restraints primarily affect only the labor market organized around the collective bargaining relationship.”).
collective bargaining process under the Seattle Ordinance would largely affect only the labor market and not the product market. Any minimal effects on the product market are more extensively discussed infra in Section III.B.3. And in regard to the interests of on-demand drivers, “the growth of the gig economy has created a critical demand for better wages and working conditions,” which on-demand drivers could collectively bargain for, given that the Ordinance expressly permits it. Hence, the Ordinance advances the goals of federal labor law, which seeks to alleviate economic inequality, and the goals of antitrust laws, which seeks to protect consumers.

Finally, under the Ordinance’s framework, any agreement that would arise between the on-demand drivers and the ride-hailing company would be a product of bona fide arm’s-length bargaining. The Ordinance explicitly authorizes the representative and the ride-hailing company to “meet and negotiate in good faith.” And the Ordinance’s framework correlates with the congressional policy favoring collective bargaining, which rejects “anti-competitive agreements imposed unilaterally by one party, usually management, without regard to the interests of the other [party].” Given that each prong of the Mackey test is satisfied by the Seattle Ordinance’s framework, the non-statutory Labor Exemption would apply to an agreement collectively bargained for by the representative and the ride-hailing company.

III. THE SEATTLE ORDINANCE IS EXEMPTED FROM ANTITRUST LIABILITY UNDER THE RULE OF REASON.

A. The Seattle Ordinance should be analyzed by the Rule of Reason because the Ordinance is not per se unreasonable.

The Sherman Antitrust Act prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.” Because the Supreme Court interpreted “restraint of trade” to mean an “undue restraint,” it concluded that “Congress intended to outlaw only unrestrainable restraints [of trade].” Therefore, in order to determine whether an agreement violates the Sherman Antitrust Act, courts first consider whether the agreement imposes a restraint

152. Kennedy, supra note 1, at 1002.
153. See id. at 1036.
154. § 6.310.735(H)(1).
that is per se unreasonable; and if the agreement does not impose a restraint that is per se unreasonable, courts then determine whether the agreement unreasonably restrains trade under the Rule of Reason.\textsuperscript{159}

Restraints are per se unreasonable when they concern “naked price fixing or output restrictions.”\textsuperscript{160} Also, “[t]ypically only ‘horizontal’ restraints—restraints ‘imposed by agreement between competitors’—qualify as unreasonable per se.”\textsuperscript{161} For example, where two providers of bar review courses agreed to share revenue, not to compete with one another in certain territories, and then raised the price of their courses to consumers, the Supreme Court held that the arrangement was a per se violation of the Sherman Act.\textsuperscript{162}

In another instance, where a local grocery association restricted its members from selling products in territories outside of each members’ exclusively licensed territory, the arrangement qualified as unreasonable per se.\textsuperscript{163}

Turning to the Seattle Ordinance, because the City of Seattle has agreed to not enforce the Ordinance while the District Court hears arguments regarding the federal antitrust claims, there has not been any collectively bargained for agreements between a representative and a ride-hailing company in Seattle.\textsuperscript{164} So, for the purposes of Part III, I analyze a hypothetical agreement (“the collective agreement”) between a representative and a ride-hailing company, in which on-demand drivers earn a larger percentage of the wage that they receive from each ride. Given that “[a] substantial portion of the complaints by Uber drivers relate[] to perceived inadequacy of compensation,”\textsuperscript{165} I presume that increasing the percentage that the on-demand drivers retain from each ride’s cost will be the most pressing topic of negotiation for the representative.

At first glance, aside from the vertical agreement between the representative and the ride-hailing company, the collective agreement includes a horizontal agreement (“the horizontal agreement”) among the on-demand drivers to fix the percentage that they retain for each ride’s cost. Because the on-demand drivers, as independent contractors, are not statutorily-labeled employees, they are outside the scope of the Labor Exemption, as it is


\textsuperscript{160} Perritt, supra note 38, at 128.


\textsuperscript{163} United States v. Topco Assocs., 405 U.S. 596, 602–03, 608 (1972).


\textsuperscript{165} Perritt, supra note 9, at 125.
currently understood. As a result, on-demand drivers can be characterized as competitors in the labor market, competing with each other for the rides. And the horizontal agreement would be characterized as stifling such competition among the on-demand drivers. Thus, the horizontal agreement between on-demand drivers under the collective agreement seems to be the type of anti-competitive agreement that the Supreme Court has traditionally held to be per se unlawful. However, characterizing the entire collective agreement as per se unreasonable solely because the horizontal agreement is present is inappropriate for the following reasons.

First, the Supreme Court directs the per se rule against horizontal agreements among individuals who are not statutorily-labeled employees because such agreements “abolish[] all competition between the parties” in the labor market at issue. But in the on-demand driver labor market presently, the ride-hailing companies set the percentage that they retain from the on-demand drivers in regard to each ride’s cost, preventing any competition between the drivers. Unlike competitors in a particular market, on-demand drivers “providing service on a platform are generally not independent businesses in competition with each other.” Thus, it would serve no purpose to employ the per se rule to the collective agreement because the horizontal agreement would not create the unlawful activity of eliminating price competition, as there is not any wage competition among on-demand drivers in the on-demand driver labor market currently.

Second, the Supreme Court has forgone applying the per se rule against a horizontal agreement when the agreement was essential for a product to be provided. For example, where member institutions of the NCAA created a horizontal agreement among themselves, in which they “place[d] a ceiling on the number of games [that] member institutions [could] televise,” the

166. See Paul, supra note 80, at 234–36.
168. See Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 886 (2007) (citation omitted) (“Restraints that are per se unlawful include horizontal agreements among competitors to fix prices . . . .”); Texaco Inc. v. Dagher, 547 U.S. 1, 6 (2006) (citation omitted) (“Price-fixing agreements between two or more competitors, otherwise known as horizontal price-fixing agreements, fall into the category of arrangements that are per se unlawful.”).
170. See Perritt, supra note 9, at 72.
171. Lao, supra note 92, at 1568.
172. Id. at 1566.
173. See Wilson v. Mobil Oil Corp., 940 F. Supp. 944, 954 (E.D. La. 1996) (Ruling that an agreement was not per se unreasonable because the agreement did “not eliminate price competition . . . because there was no competition between [the parties] to eliminate.”).
Supreme Court did not apply the *per se* rule because horizontal agreements between the institutions, such as the extensive rules that apply to all NCAA athletes, were necessary in order to provide college sporting events for consumers.\(^{175}\) And here, “at least some form of horizontal cooperation is necessary for the ride service to be offered to consumers through [a ride-hailing company’s] app.”\(^{176}\) While many ride-hailing companies have characterized themselves as technology companies, “the technological platform itself is valueless without the labor powering its application.”\(^{177}\) Given that ride-hailing companies “depend[] almost entirely upon the efficiency with which [their platforms] extract labor from the workers who provide the [on-demand rides],”\(^{178}\) the necessary relationship between the on-demand drivers and the platform suggests that it would be inappropriate to immediately characterize the collective agreement as *per se* unreasonable.

Third, the Supreme Court has applied the *per se* rule to horizontal agreements that restrict output.\(^{179}\) But here, the collective agreement is unlikely to substantially restrict output because even a slightly minor increase in the price of rides would not disincentive consumers from using a ride-hailing company’s service,\(^{180}\) given the convenience of on-demand rides and consumers’ high demand for them.\(^{181}\) Even if the collective agreement results in some output restrictions, the Rule of Reason would more carefully consider the output restrictions’ anti-competitive effects in the on-demand driver labor market, as well as the product market. Thus, output ‘restrictions anticipated anti-competitive effects are more extensively discussed infra in Section III.B.3.

Lastly, the Supreme Court has hesitated in applying the *per se* rule to horizontal agreements that are uniquely different from the typical price-fixing horizontal agreements that are considered *per se* unreasonable.\(^{182}\) The

\(^{175}\) Id. at 99, 101.

\(^{176}\) Anderson & Huffman, *supra* note 167, at 910.

\(^{177}\) Kennedy, *supra* note 1, at 993.

\(^{178}\) Id. (emphasis added).

\(^{179}\) *Bd. of Regents*, 468 U.S. at 100.

\(^{180}\) See *Lao*, *supra* note 92, at 1571 (arguing that the relatively inelastic demand for on-demand rides would not be significantly affected by a collective bargaining agreement by on-demand drivers and noting that such an agreement would not lead to a substantial increase in the price of rides).

\(^{181}\) See Mansoor Iqbal, *Uber Revenue and Usage Statistics*, BUSINESS OF APPS (Nov. 28, 2018), http://www.businessofapps.com/data/uber-statistics/ (“As of August 2018, 436,000 Uber rides took place per day, compared to 275,000 taxi rides, and 122,000 Lyft rides.”).

\(^{182}\) *Bd. of Regents*, 468 U.S. 85, 100–01 (1984); see, e.g., United States v. Capitol Serv., Inc., 756 F.2d 502, 506 n.1 (7th Cir. 1985) (noting how the Supreme Court did not apply the *per se* rule to a horizontal agreement because “the unique circumstances . . . called for the application of the Rule of Reason rather than the *per se* rule.”); R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 890 F.2d 139, 163 (9th Cir. 1989) (en banc) (Norris, J., dissenting) (“The Supreme Court has been reluctant to treat novel types of business relationships under *per se* rules . . . .”). *But see* Gelboim v. Bank of Am. Corp.,
per se rule is “invoked when surrounding circumstances make the likelihood of anticompetitive so great as to rend unjustified further examination of the challenged conduct.” But here, because the gig economy has created new and unique relationships between laborers and on-demand companies and because the Seattle Ordinance is the first of its kind, the collective agreement is precisely the type of novel and unfamiliar arrangement that requires further inquiry under the Rule of Reason.

In addition to why the per se rule should not be applied, one reason for applying the Rule of Reason is that ride-hailing companies’ platforms are two-sided platforms, and the Supreme Court has analyzed such platforms under the Rule of Reason. To clarify, a ride-hailing company’s platform is two-sided because it transacts with on-demand drivers in the labor market who are looking for a platform as a means to perform labor and the platform simultaneously transacts with consumers in the product market who are looking for on-demand rides. Given that two-sided platforms are relatively complex, the Rule of Reason should be employed to fully analyze the collective agreement’s effects on competition in the on-demand driver labor market.

B. Applying the Rule of Reason to the Seattle Ordinance

Under the Rule of Reason, “courts... conduct a fact-specific assessment of ‘market power and market structure... to assess the [restraint]’s actual effect’ on competition.” Additionally, courts “tak[e] into account a variety of factors, including specific information about the relevant business, its conditions before and after the restraint was imposed, and the restraint’s history, nature, or effect.” If a court finds that the agreement imposes a restraint that has a legitimate business purpose and promotes competition, “the court must then balance the ‘anticompetitive [effects]’ of the challenged restraint against its ‘procompetitive [effects].’” If the anti-competitive effects outweigh the pro-competitive effects, then the restraint is unlawful.

823 F.3d 759, 771 (2d Cir. 2016) (citation omitted) (“The unfamiliar context of appellants’ horizontal price-fixing claims provides no basis to disturb application of the per se rule.”).
183.  Bd. of Regents, 468 U.S. 85 at 103–04 (footnote omitted).
184.  Steinmetz, supra note 126.
185.  Perritt, supra note 9, at 75.
187.  Id. at 2284 (quoting Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768 (1984)).
under the Sherman Antitrust Act, but if the pro-competitive effects outweigh the anti-competitive effects, then the restraint is lawful.  

Aside from the horizontal agreement, which is naturally presumed to be anti-competitive, the collective agreement imposes a pro-competitive vertical price restraint. A vertical price restraint is defined as an “agreement[] involving actors at different levels of a distribution chain to set either minimum or maximum prices.” Vertical price restraints typically occur between a manufacturer and a distributor or reseller, and under the collective agreement, the ride-hailing company would provide its platform to the on-demand drivers, likewise to how a manufacturer would provide its product to a distributor; and then, in return for a fixed percentage earned on each ride, the on-demand driver would provide the platform’s service (in the form of rides) to consumers, similarly to how a distributor would provide a manufacturer’s product to consumers at a fixed price.

Therefore, because the collective agreement imposes a vertical price restraint, it must be judged by the rule of reason. And ultimately, the collective agreement’s pro-competitive effects outweigh its anti-competitive effects because the vertical price restraint would reduce the ride-hailing company’s market power and eliminate adhesion contracts; and the vertical price restraint would correct switching costs and price inelasticity and reduce labor turnover in the on-demand driver labor market.

1. The vertical price restraint reduces the ride-hailing company’s market power and eliminates adhesion contracts in the on-demand driver labor market.

Beginning with market power, the Supreme Court defined market power as “the ability of a single seller to raise price and restrict output, for reduced output is the almost inevitable result of higher prices.” Here, the ride-hailing company is the seller, and the on-demand drivers are the buyers; and the price is the percentage of each ride’s cost that the ride-hailing company retains from the on-demand driver in exchange for the on-demand driver providing its service to consumers.

190. Id.
191. See In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 316 (3d Cir. 2010) (noting the usual presumption that horizontal agreements are anti-competitive).
196. Perritt, supra note 9, at 69–70.
driver’s use of its platform. Within the on-demand driver labor market, an oligopsony exists because there are few ride-hailing companies who provide platforms, and there are many on-demand drivers who utilize the platforms in order to provide on-demand rides. Therefore, a few ride-hailing companies dominate the on-demand driver labor market, and as a result, “they have some degree of control over the [wages] they pay” to the on-demand drivers. Hence, the Supreme Court’s “concern . . . [that] the seller has the power to raise prices, or impose other burdensome terms” exists within the on-demand driver labor market.

And the ride-hailing companies’ market power is illustrated by adhesion contracts that pervade the on-demand driver labor market. Adhesion contracts occur when “one party has substantially more power than the other in creating the contract.” When considering the on-demand driver labor market, ride-hailing companies have disproportionate power, given that each ride-hailing company sets the terms for using its platform, and on-demand drivers “must accept them or not, on a take-it-or-leave-it [basis].” Indeed, Seattle’s City Council noted that ride-hailing companies “establish the terms and conditions of their drivers unilaterally, and may impose changes in driver compensation rates or deactivate drivers from dispatched services without prior discussion or warning.” Thus, ride-hailing companies function through adhesion contracts, which “preclude bargaining between buyer and seller, an assumption that underlies the model of perfect competition.”

However, the collective agreement would advance competition because the vertical price restraint would reduce the ride-hailing company’s market power, and it would eliminate adhesion contracts in the on-demand driver labor market. Because the Seattle Ordinance permits the representative and the ride-hailing company to bargain collectively in regard to “the nature and amount of payments to be made by, or withheld from, the [ride-hailing company] to or by the [on-demand] drivers,” the vertical price restraint would diminish the ride-hailing company’s market power—significantly undercutting the ride-hailing company’s ability to unilaterally control prices. And in

197. Id. at 70–71.
198. Id. at 71.
199. U.S. Steel Corp., 394 U.S. at 504.
200. See Perritt, supra note 9, at 72–73.
202. Perritt, supra note 9, at 72.
turn, the ride-hailing company could no longer utilize adhesion contracts, given that the vertical price restraint would be the result of a collectively bargained for agreement.

Lastly, because the on-demand driver labor market is currently anti-competitive due to the ride-hailing companies’ control over the percentage of each ride’s cost that they retain from each on-demand driver, the vertical price restraint would not create an anti-competitive effect; but instead, the vertical price restraint would “enable more stable [wages and] working conditions and better ensure that [on-demand] drivers can perform their services in a . . . stable, cost-effective, and economically viable manner.” Thus, it would create a pro-competitive effect in the on-demand driver labor market.

2. The vertical price restraint corrects market inefficiencies.

Vertical price restraints, and in general, “vertical contracts in a competitive market encourage . . . innovation . . . and create efficiencies – and thus reduce prices and lead to better goods and services for consumers.” The vertical price restraint, as imposed by the collective agreement, would (1) correct switching costs, (2) fix price inelasticity, and (3) reduce labor turnover in the on-demand driver labor market.

Returning to the current labor market for on-demand drivers, further barriers to competition exist given that oligopsonies (the ride-hailing companies), “exemplify a number of . . . market failure[s]” such as “switching costs . . . and price inelasticity.” Switching costs are the costs that a consumer incurs as a result of changing brands, suppliers or products. Again, here, the on-demand driver is characterized as the consumer, choosing among the ride-hailing companies’ platforms that she or he wishes to utilize, and the ride-hailing company provides the product in the form of a platform. Switching costs considerations to an on-demand driver include not only the price differences among ride-hailing companies—specifically, the percentage of each ride’s cost that each ride-hailing company retains from the on-demand driver—but also the fact that most ride-hailing companies’
platforms are easily substitutable for one another in regard to the on-demand driver’s ability to provide on-demand rides.211

Low switching costs can be anti-competitive because if “[on-demand drivers] fail to base their choices on differences in prices . . . liberalisation of markets will not be successful.”212 And currently, switching costs are low for on-demand drivers.213 Without the vertical price restraint, the price differences among the platforms are immaterial to the on-demand drivers, given that they utilize multiple platforms. However, with the vertical price restraint, the price differences among the platforms would become a significant consideration for an on-demand driver. For example, if the original vertical price restraint set forth that the on-demand drivers retain 76.5% of each ride’s cost, and subsequently, a collective agreement by a separate representative and ride-hailing company sets forth that the on-demand drivers retain 78% of each ride’s cost, on-demand drivers will increasingly utilize the latter ride-hailing company’s platform.

In response, the original ride-hailing company will have to either match or raise the percentage that its on-demand drivers retain for each ride’s cost in order to avoid a low supply of on-demand drivers and thus, avoid a decrease in output and revenue.214 Ensuing collective agreements among the remaining ride-hailing companies in Seattle’s on-demand driver labor market will vary in regard to the percentage (per ride) retained by each ride-hailing company’s on-demand drivers, but enough price differences among the platforms will exist, increasing switching costs for an individual on-demand driver. While higher switching costs in other contexts can have anti-competitive effects,215 here, a ride-hailing company could employ its collective agreement to gain a competitive edge in the on-demand driver labor market by offering a more attractive price, which in turn, will foster

211. See id. (“Although most prevalent switching costs are monetary in nature . . . [a] switching cost can manifest itself in the form of . . . a failure to obtain similar replacement of products or services.”).


213. Perritt, supra note 9, at 73–74.


innovative responses by the other ride-hailing companies,\textsuperscript{216}-- effectuating a more competitive on-demand driver labor market.

Turning to price inelasticity, for this Note’s purposes, I assume that under the collective agreement, percentage rates retained by on-demand drivers during “surge pricing” will be an issue that is negotiated separately, from the issue of percentage rates retained by on-demand drivers for each ride’s cost when “surge pricing” is not occurring; thus, the following price elasticity analysis exclusively focuses on the latter of the two issues. The price elasticity of demand is an “economic measure of the change in the quantity demanded . . . of a product in relation to its price change.”\textsuperscript{217} When the price is inelastic, its price “does not change even if supply or demand go up or down.”\textsuperscript{218} Presently, the price elasticity of demand in the on-demand driver labor market is relatively inelastic because on-demand drivers’ demand to utilize the platforms is insensitive to the set percentage rates that the ride-hailing companies retain for each ride’s cost,\textsuperscript{219} as on-demand drivers depend on the platforms to provide rides in order to make extra money or earn a living.\textsuperscript{220} Price inelasticity of demand in the on-demand driver labor market is anti-competitive “because it [hinders] driver willingness to look for a better deal.”\textsuperscript{221}

But, with the vertical price restraint and successive collective agreements by other ride-hailing companies, as discussed earlier, the price elasticity of demand in the on-demand labor market will become more elastic because on-demand drivers will become more sensitive to the percentage rate differences among ride-hailing companies.\textsuperscript{222} And in an on-demand driver labor market where switching costs are high and where the price elasticity of demand is elastic, on-demand drivers will have reasonable substitutes among

\textsuperscript{216} See generally F.T.C. v. Procter & Gamble Co., 386 U.S. 568, 598 (1967) (Harlan, J., concurring) (“Economies achieved by one firm may stimulate matching innovation by others, the very essence of competition.”).


\textsuperscript{221} Perritt, supra note 9, at 71.

the platforms and will choose whichever platform is most attractive in regard to price. Thus, the vertical price restraint corrects price inelasticity of demand in the labor market, creating a pro-competitive effect in the on-demand driver labor market.223

Lastly, labor turnover is “the rate at which [laborers] leave a company and are replaced by new [laborers].”224 In a competitive labor market, a lower labor turnover would promote productivity.225 However, in the current on-demand driver labor market, “low pay is resulting in turnover,”226 which affects the ride-hailing company’s output in the product market, as there have been “transportation service disruptions around the country.”227 But the vertical price restraint would reduce labor turnover because the improved wages and working conditions would eliminate the low pay that is causing the turnover; “and thus keep a stable supply of experienced drivers on the road.”228 Studies have demonstrated that “members of collective bargaining units are more likely to stay in their jobs than other workers,”229 and the City of Seattle concluded that on-demand drivers who are working under conditions they agreed to are more likely to “devote more time to their work as [on-demand] drivers, because the terms are more likely to be satisfactory and responsive to the drivers’ needs and concerns.”230 Therefore, the vertical price restraint would “lead[] to lower workforce turnover and increased worker productivity,”231 creating a pro-competitive effect in the on-demand driver labor market.

223. See generally Jonathan M. Orszag & Loren K. Smith, Toward a More Complete Treatment of Efficiencies in Merger Analysis: Lessons from Recent Challenges, 16-1 ANTITRUST SRC. 1, 4 n.18 (2016), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct16_orszag_10_18f.pdf [https://perma.cc/UHE6-SWNX] (“[M]arkets that experience more competition are associated with higher price elasticity of demand . . . .”).


228. Greenwich & Witt, supra note 226, at 3.

229. Id. at 21.

230. 124968 § 1(I)(1).

3. The anti-competitive effects do not outweigh the pro-competitive effects.

The Supreme Court has stated that anti-competitive effects typically include “reduced output, increased prices, or decreased quality in the relevant market.”\(^{232}\) In regard to reduced output of supply in the on-demand driver labor market, it seems counterintuitive that the vertical price restraint would dissuade on-demand drivers from utilizing the particular ride-hailing company’s platform, given that the drivers would retain a larger percentage of each ride’s cost in comparison to utilizing other ride-hailing companies’ platforms who have not yet reached a collective agreement with a representative. Indeed, a lower labor turnover in the on-demand driver labor market, as a result of the vertical price restraint, would increase the output of supply in the labor market, not reduce it.\(^{233}\)

Also, because the Seattle Ordinance positions the on-demand drivers as independent contractors and not as employees,\(^{234}\) it seems unlikely that the collective agreement would lock in the on-demand drivers to the agreement to only utilizing that particular ride-hailing company’s platform and thus, creating an anti-competitive effect in the on-demand driver labor market by restricting the supply of labor.\(^{235}\) Instead, on-demand drivers would still have the same freedom to use multiple platforms to provide on-demand rides because it is unlikely that a ride-hailing company would agree to any terms under the collective agreement that would severely hinder the company’s ability to “tout flexibility and convenience for . . . [its’] workers,” given that flexibility and convenience is what has made ride-hailing companies so popular to begin with.\(^{236}\)

Next, as previously mentioned, “[e]valuating both sides of a two-sided transaction platform is . . . necessary to accurately assess competition.”\(^{237}\) Therefore, it is necessary to consider reduced output in the product market but doing so necessarily requires examining price increases in the product market because ride-hailing companies, in response to retaining a smaller percentage of each ride’s cost due to the collective agreement, will seek to maximize their profits; thus, they will likely pass at least some, if not most, reduced output to the consumer.

\(^{233}\) See Greenwich & Witt, supra note 226, at 3.
\(^{234}\) See Chamber of Commerce of the United States v. City of Seattle, 890 F.3d 769, 777 (9th Cir. 2018).
\(^{236}\) Kennedy, supra note 1, at 992.
\(^{237}\) Am. Express Co., 138 S. Ct. at 2287.
of the cost off to consumers by increasing the cost of rides, possibly creating an anti-competitive effect.  

However, “[d]emand-side studies reinforce the intuition that passengers are relatively insensitive to price, but more sensitive to waiting times . . . .”239 In Seattle, consumers “take[]” over five million [on-demand] trips each year and, with demand growing, the number of trips provided is increasing.240 Furthermore, mobility impaired consumers with limited transportation options and consumers without access to public transportation rely on on-demand rides to get around.241 Thus, consumers’ high demand for on-demand rides is unlikely to be significantly affected by a minor increase in the price of rides.

Turning to reduced quality of the platform in the product market, the increased supply of on-demand drivers, as a result of the vertical price restraint, will likely decrease waiting times for consumers, improving the overall quality of the platform’s service.242 And low labor turnover may ultimately lead to safer rides for considers, given that “increased safety has been associated with longer job tenure, and longer tenure will result in more experienced [on-demand] drivers on the road, increasing both safety and reliability for the whole [on-demand] system.”243 Increased safety is especially critical to “[t]ravelers making late night trips for recreation, airport journeys and after-hour commutes [who] have long-relied on [on-demand] services,”244 given that “the risk of a fatal crash is three times greater at night . . . .”245 Thus, in the product market, the vertical price restraint would improve the quality of the ride-hailing company’s platform by increasing the safety of its use.

However, when considering reduced quality of the platform for the on-demand drivers, one could argue that the ride-hailing company would respond to the foregone revenue caused by the collective agreement by cutting

238. See Andrew Edgecliffe-Johnson, US Companies Push Rising Costs on to Customers, FIN. TIMES (Aug. 19, 2018), https://www.ft.com/content/500a359c-a369-11e8-8ecf-a7ae1beff35b [https://perma.cc/5QHE-XNGY] (noting that as a result of increased costs, including labor costs, companies in the United States are increasingly raising the prices of their products to consumers in order to offset the increased costs).
239. Perritt, supra note 9, at 77.
240. Greenwich & Witt, supra note 226, at 3 (emphasis added).
241. Id. at 3, 5–6.
242. See Seattle, Wash., Ordinance 124968 § 1(1)(1) (2015) (finding that the Seattle Ordinance “will improve the safety and reliability of the [on-demand] transportation services provided by the [ride-hailing companies] and reduce the safety and reliability problems created by frequent turnover in the [on-demand] services industry.”).
244. Id. at 5.
245. The Most Dangerous Time to Drive: As We ‘Fall Back’ to Shorter Days, Take Extra Care on the Road, NAT’L SAFETY COUNCIL, https://www.nsc.org/road-safety/safety-topics/night-driving [https://perma.cc/3PZ-WH3T].
internal costs, including maintenance costs,\textsuperscript{246} which could reduce the quality of the platform for the on-demand drivers. If other ride-hailing companies subsequently reach collective agreements and respond in a similar manner as the original ride-hailing company, it could generate a “race to the bottom” in the on-demand driver labor market where ride-hailing companies would “attempt\textsuperscript{[\ldots]} to undercut the competition’s prices” by scarifying the quality of their platforms for on-demand drivers.\textsuperscript{247} And if the “race to the bottom” renders the platform increasingly difficult to use by the on-demand drivers, that effect could spill over into the product market, decreasing the overall quality of rides for consumers.

But a “race to the bottom” is unlikely to occur because the Seattle Ordinance’s framework prevents ride-hailing companies from undermining the purposes of the Ordinance. First, if the representative believes that the platform is deteriorating in quality, due to the ride-hailing company’s maintenance costs cuts, the representative can submit proposed amendments (to the collective agreement) to the director.\textsuperscript{248} These amendments would likely entail that the ride-hailing company maintain the platform to an acceptable standard. Because such amendments would “further\textsuperscript{\ldots} safe, reliable and economical [on-demand] transportation services and the public policy goals” of the Ordinance,\textsuperscript{249} the director would likely approve the amendments.

Second, if such a standard for the platform is already present in the collective agreement, the representative can allege that the ride-hailing company has violated the agreement, in which case, the director would investigate the alleged violation; and if the director concludes that the ride-hailing company has violated the collective agreement, the director would issue the ride-hailing company a written notice, “requir\textsuperscript{[\ldots]} the [entity in violation] to comply with the requirement.”\textsuperscript{250} Furthermore, the written notice would inform the ride-hailing company that it faces an accruing “daily penalty of up to $10,000 for every day the [ride-hailing company] fails to cure the violation.”\textsuperscript{251} Facing such potentially large monetary losses, the ride-hailing company would likely comply with the collective agreement by either stopping maintenance cost cuts or by reversing course and increasing


\textsuperscript{248} SEATTLE, WASH., MUNICIPAL CODE § 6.310.735(J) (2015).

\textsuperscript{249} Id.

\textsuperscript{250} Id. § 6.310.735(M)(1)(b)(1).

\textsuperscript{251} Id. § 6.310.735(M)(1)(b)(3).
maintenance of the platform in order to comply with the collective agreement’s conditions for the platform.252 Hence, the Seattle Ordinance’s framework prevents the ride-hailing company from undermining the purposes of the Ordinance and thus, prevents a “race to the bottom” from occurring.

In conclusion, because the vertical price restraint’s pro-competitive effects, such as reducing ride-hailing companies’ market power, eliminating adhesion contracts, correcting switching costs and price inelasticity, and reducing labor turnover in the on-demand driver labor market, outweighs the vertical price restraint’s anti-competitive effects and the anti-competitive assumption associated with the horizontal agreement, the collective agreement satisfies the Rule of Reason, and thus, is a reasonable and lawful restraint of trade under the Sherman Antitrust Act.

CONCLUSION

In sum, the Seattle Ordinance “represents an innovative and real opportunity to both solve long-standing challenges in the [on-demand driver labor market] and provide a path forward for how cities can ensure safe and reliable transportation in our ever-evolving economy.”253 Thus, such a novel Ordinance that deals with a relatively new gig economy should invite new thinking and reasoning in regard to the intersection of federal antitrust laws and labor laws. So, by re-examining the Labor Exemption’s text, purpose, and its application by the Supreme Court, there is enough support to suggest that the Labor Exemption would exempt the Seattle Ordinance from antitrust liability. Or, alternatively, by truly considering the Ordinance’s effects on competition through the Rule of Reason, enough evidence suggests that it would not violate the Sherman Antitrust Act. Either way, both arguments demonstrate that the Seattle Ordinance is not only permissible but also, lawful.

252. See Daniele Nosenzo, Encouraging Compliance: Bonuses Versus Fines in Inspection Games, JLEO (2014) (“In an experiment we find that fines are effective in deterring non-compliance.”) (quotation in Abstract).