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A Commentary on Litigation Involving Uber Technologies, Inc.

by

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## Introduction

Uber Technologies, Inc. is a peer-to-peer ridesharing, food delivery, and transportation network managed in San Francisco, California. Travis Kalanick and Garrett Camp developed the idea for the ridesharing app in 2008, after experiencing difficulty hailing a cab. They originally designed the app to be used in major metropolitan areas, but the business inevitably took off; it now operates in 633 cities worldwide. In 2017, Uber claimed that the company earned roughly \$7.5 billion in revenue, employed more than 12,000 “independent drivers,” and connected over one billion people (“Finding the Way”). Though widely successful and heralded as a major influencer in the “gig economies,”<sup>1</sup> or “sharing economies,”<sup>2</sup> its role in the vanguard has attracted much criticism and engendered a plethora of lawsuits. According to the Courthouse News database, Uber has been sued at least 433 times in 2017 alone (Kahn, Robert).

These criticisms include—but are not limited to—negligence, misclassification of drivers, failure to properly train drivers, misconduct related to drivers’ background checks, liability of drivers’ actions, lack of employee diversity, discrimination against riders, competitive advantage due to lack of federal regulation, sexual misconduct of upper management and drivers, an alleged death caused by an Uber driver, etc.

Not only has the company had to face a deluge of litigation, the company atmosphere has also been notoriously scrutinized. Travis Kalanick—Uber’s former CEO—resigned after copious complaints regarding the “abusive” workplace environment and after a prominent shareholder sued the company to remove him. In the wake of these accusations and Kalanick’s resignation, a surfeit amount of top management left the company, of both their own and of forced accord. Uber’s tumultuous company history has consistently been featured in the media since its incipient stages, creating a rather infamous company review in the public, and private, opinion.

The objective of this thesis is to highlight two interesting disputes in which Uber is entangled by first explaining the details of the particular case, followed by the large-scale implications of the outcome and a referral to the overarching dilemma each case presents. Part I of the thesis addresses the case *Judith Smith, et al. v. Uber Technologies, Inc., et al.* in which the plaintiffs sued Uber for discrimination against riders in wheelchairs. This begs an analysis of the larger question of whether or not Uber is a technology company or a transportation company, which is examined in Part II. Part III of the thesis addresses the case *U.S. Chamber of Commerce, et al. v. City of Seattle, et al.* in which the plaintiffs sued the city of Seattle for an “illegal city ordinance” that allows drivers of ridesharing apps (like Uber and Lyft) to collectively bargain. This solicits an examination of the larger question as to whether or not Uber’s employees should be classified as independent contractors or employees, explained in Part IV. Finally, the thesis conclusion will be stated in Part V.

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<sup>1</sup> Gig economy: where temporary, flexible jobs are commonplace and companies tend toward hiring independent contractors and freelancers instead of full-time employees (Dragonette, Laura)

<sup>2</sup> Sharing economy: “an economic model often defined as a peer-to-peer based activity of acquiring, providing or sharing access to goods and services that are facilitated by a community based on-line platform” (Radcliffe, Brent)

## PART I

### Judith Smith, et al. v. Uber Technologies, Inc., et al.

This case was filed February 27, 2018 in Berkeley, California. The plaintiffs include Independent Living Resource Center of San Francisco (ILRCSF)<sup>3</sup>, Community Resources for Independent Living (CRIL)<sup>4</sup>, and three individuals: Judith Smith, Julie Fuller, and Sascha Bittner, all of whom use wheelchairs. The main defendant is Uber Technologies, Inc., but Raiser LLC, Raiser-CA LLC, etc. are also included in the case as defendants (The Superior Court of the State of California). The Disability Rights Advocates (DRA) originally filed this as a class action lawsuit in the Alameda County Superior Court. The plaintiffs argue that Uber is guilty of discriminatory policies and practices against individuals in need of wheelchair-accessible transportation, which is a violation of California Anti-Discrimination Law as well as the Americans with Disabilities Act.<sup>5</sup> Uber, the defendant, claims that it does plenty to support individuals with disabilities, in both policy and practice.

#### Plaintiff's Argument

Uber does provide a service called UberWAV, short for “wheelchair accessible vehicle,” which it claims is sufficient to meet the demands of the area’s disabled members (“Accessibility at Uber”). The DRA refutes these claims, arguing that 80% of the time UberWAV is unavailable in the Bay Area, and the service is completely unavailable outside the major metropolitan area. Furthermore, UberWAV has a 14-times longer wait than a regular Uber vehicle. Ride-hailing companies like Uber and Lyft generate roughly 20% of the miles driven on San Francisco streets, and a report from June 2017 stated that, per weekday, these companies operated 5,700 cars in San Francisco alone (Brinklow, Adam and Lee, Vic, respectively). Jessie Lorenz, executive director of the ILRCSF, says that Uber is “such an important transportation option in the Bay Area,” especially since individuals in need of wheelchairs already have limited transportation options (the BART has poor elevator maintenance and busses are slow). Thus, individuals heavily rely on Uber’s services, and Uber is not sufficiently meeting this demand (Kerr, Dara). Moreover, the plaintiffs also claim that many users of wheelchairs have been refused service once the Uber has arrived to pick them up on account of their having a wheelchair, a further act of discrimination. In sum, the defendants claim that Uber “has chosen to neglect people with disabilities who use wheelchairs and provide them with inferior service, or exclude them

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<sup>3</sup> Independent Living Resource Center of San Francisco: main objective is to advocate on transportation issues in the area; the ILRCSF is also currently a plaintiff in a case against San Francisco’s BART (Bay Area Rapid Transit) for insufficient access to the regional mass transit system for people with disabilities (“Home”).

<sup>4</sup> Community Resources for Independent Living: an organization acts as a support for people who live with disabilities supports people who live with disabilities so that they may live life independently, advocate for themselves, and access the community's resources (Independent Living History | Community Resources for Independent Living)

<sup>5</sup> Americans with Disabilities Act: Added to law in 1990, and amended in 2008, the ADA ensures equal rights and prevents discrimination against people with disabilities (United States, Congress, *Americans with Disabilities Act*.)

altogether—in direct violation of the law” (“Uber Sued by Disability Rights Groups for Illegal Discrimination Against Wheelchair Users”). A board member of CRIL stated, “People with mobility disabilities could really benefit from the convenience and independence and flexibility of being able to order an Uber ride. Uber’s failure to make its transportation network accessible to people who use wheelchair accessible vehicles discriminates against a community of people who should be able to access this valuable service” (“Judith Smith, et al. v. Uber Technologies, Inc., et al.”). DRA staff Attorney Melissa Riess agrees, saying, “If Uber is going to be the transportation of the future, it needs to make wheelchair accessible Ubers part of that future. It is disgraceful that even in its hometown, Uber has ignored its obligation to make its service available to all people equally” (“Uber Sued by Disability Rights Groups for Illegal Discrimination Against Wheelchair Users”).

### **Defendant’s Argument**

Not only does Uber argue that services such as UberWAV and UberAssist<sup>6</sup> adequately service the disabled consumer, it also claims that there is no public action. Since Uber classifies itself as a technology company instead of a transportation company, it defends that it doesn’t fall under the jurisdiction of the Americans with Disabilities Act, saying, “We’re not a public service, the ADA doesn’t apply to us” (Strochlic, Nina). Furthermore, drivers are recognized as independent contractors, thus, Uber claims it is unable to control their actions directly. Instead, they provide voluntary trainings on how to assist customers with disabilities, and they cite the following policy on their “Accessibility at Uber” page:

Driver-partners must comply with all applicable state, federal and local laws governing the transportation of riders with disabilities. A partner’s violation of the laws governing the accommodation of riders with disabilities constitutes a breach of the parties’ Technology Services Agreement. Accordingly, driver-partners are expected to accommodate riders using walkers, canes, folding wheelchairs or other assistive devices to the maximum extent feasible. Any report of unlawful discrimination will result in the temporary deactivation of a partner’s account while Uber reviews the incident. Confirmed violations of the law with respect to riders with disabilities may result in permanent loss of a partner’s access to the Uber platform.

Additionally, Uber claims they neither discriminate against disabled riders nor discriminate against hiring disabled drivers, citing their policy that “Uber provides economic opportunities for people with mobility disabilities. Uber welcomes driver-partners who use modified vehicles and hand controls on the Uber platform. Anyone who is legally able to drive can apply to partner with Uber” (“Accessibility at Uber.”).

In response to the case, an Uber spokesperson commented, “We take this issue seriously and are continuously exploring ways to facilitate mobility and freedom via the Uber App for all riders, including riders who use motorized wheelchairs” (Kerr, Dara). Uber concludes that they are doing the best they can to assist disabled members of society with the policies, practices, and services established by the company, and they continue to seek ways to improve their services.

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<sup>6</sup> UberAssist: allows passengers to request a driver trained to accommodate disabled individuals

## Damages Sought

The plaintiffs are not seeking monetary damages, requesting instead the specific performance that Uber provide “equal access to Uber for themselves and the class” (“Uber Sued by Disability Rights Groups for Illegal Discrimination Against Wheelchair Users”). The plaintiff’s ultimate goal is ensuring that Uber institutes a “comprehensive remedial scheme” to address its current exclusion of riders with mobility disabilities (“Judith Smith, et al. v. Uber Technologies, Inc., et al.”).

## Applicable Law

The most obvious law to apply in this case is the American with Disabilities Act. At the macro level, the ADA ensures equal rights and prevents discrimination against people with disabilities. The ADA defines a disabled person as one who’s impairment affects a “major life activity,” like walking. It states that an individual is a person who: “Has a physical or mental impairment that substantially limits one or more major life activities; has a record of such an impairment; or is regarded as having such an impairment” (“Facts About the Americans with Disabilities Act”).

Generally, the ADA is applied by the Equal Employment Opportunities Commission to ensure disabled workers receive adequate and appropriate workplace accommodations. In regard to this case specifically, the ADA is applicable to the private operation of vehicles as a public transportation service:

“No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce” (United States, Congress, *Americans with Disabilities Act.*)

It requires all transportation providers by law to accommodate wheelchairs and their users if the equipment can fit in their car (Strochlic, Nina). The plaintiffs claim that 1) Uber does not provide adequate services for disabled people, 2) this failure to assist is considered discrimination, and 3) the ADA requires Uber to provide adequate services.

## Other Cases

Uber is currently in a legal battle against the National Federation of the Blind<sup>7</sup> in California, filed in September 2017. The NFBA complains that Uber systematically refused to pick up blind passengers who needed the assistance of service dogs, citing over 40 cases in their defense (Strochlic, Nina). This case names similar allegations as the Judith Smith, et al. v. Uber Technologies, Inc., et al. case, claiming that this discrimination is against both ADA and state

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<sup>7</sup> National Federation of the Blind: an organization that strives to help blind people realize their true capacity, and that claims it has “the power, influence, diversity, and determination to help transform our dreams into reality” (“About the National Federation of the Blind”).

laws, as Uber functions as a taxi service. Uber argues that since they are a technology service and not a transportation service, neither of the above laws are applicable to the company. In December of 2017, the U.S. Justice department weighed in on the case, stating that the case goes “to the very heart of the ADA’s goals,” mentioning that the U.S. Code of Federal Regulations for transportation outlines that the ADA doesn’t just apply to taxi services (Strolic, Nina). It “ensures that, while a public entity may contract out its service, it may not contract away its ADA responsibilities” (Appendix D, Section 37.23). The result of this case may have interesting implications and set a precedent for the Judith Smith, et al. v. Uber Technologies, Inc., et al. case, and may even set binding precedent that will be applicable to all California discrimination cases.

Uber is also battling litigation for failure to provide adequate UberWAV services in New York City, Washington D.C., and Chicago. Additionally, similar lawsuits were filed within an eight-month span in California, Texas, and Arizona. Thus, the Judith Smith, et al. v. Uber Technologies, Inc., et al. case—though it will not have binding precedent in states other than California, will have widespread consequences for other cases once resolved.

## **Part II**

### **Overarching Problem: Is Uber a Technology Company or a Transportation Company?**

The resolution of the technicality of the label placed on ride-hailing apps would have major implications for the regulatory process of such companies. If companies like Uber remain classified as technology companies (like they claim they should be), regulators have very little jurisdiction. If, however, the courts rule that such companies are transportation companies (as regulators claim they should be), they would be subject to the same kind of regulation to which normal taxi services submit.

In the United States, the regulatory authority for ride-hailing companies varies by state; while regulations may occur in some areas at the municipal level, other areas may be regulated at the state level. The main issues for regulators is that the new technology has a different impact than the traditional taxi industry does in regard to insurance, tort issues, employment law, and discrimination, making previous statues not applicable and unrealistic. For example, in the above case study, regulators struggle with applying the American with Disabilities Act to the company. Courts both in the U.S. and out of the U.S. are increasingly ruling against Uber’s definition of itself.

U.S. Courts have not yet concretely ruled on the matter. However, on December 20, 2017 the European Court of Justice (ECJ), the European Union’s top court, ruled that Uber is a transportation service and not a digital one. The case was brought to the ECJ by a group of taxi drivers in Barcelona, Spain who argued that Uber had an unfair advantage over them because they weren’t regulated as heavily as the city’s taxi firms (Aleem, Zeeshan).

During the proceedings, Advocate General Maciej Szpunar, advisor of the ECJ, noted two factors to be considered when classifying Uber as either a transportation or technology service. The first is whether or not the “part of the service which is not made by electronic means is ‘economically independent’ of the service” (Meredith, Sam, and Arjun Kharpal). The drivers are the part of the service that is not made by technology, and Szpunar does not consider them economically independent of the company. Thus, he advises that Uber cannot be classified as an

“information society service.” The second factor Szpunar mentioned that needed to be considered is whether Uber provides “the entire offering.” If it did, it would be a technology service. To explain what he meant, Szpunar uses the example of an online retailer that has both a website/app and also ships the goods it sells as an example of a company with the “entire offering.” He claims that in Uber’s case, since it classifies its drivers as independent contractors and not employees, this criteria is not met. Since Uber meets neither of the above criteria, it must be classified as a transportation company, not a technology company (Meredith, Sam, and Arjun Kharpal). In a press release prior to the ruling, the ECJ stated:

In today’s judgment, the Court declares that an intermediation service such as that at issue in the main proceedings, the purpose of which is to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys, must be regarded as being inherently linked to a transport service and, accordingly, must be classified as ‘a service in the field of transport’ within the meaning of EU law. Consequently, such a service must be excluded from the scope of the freedom to provide services in general as well as the directive on services in the internal market and the directive on electronic commerce. It follows that, as EU law currently stands, it is for the Member States to regulate the conditions under which such services are to be provided in conformity with the general rules of the Treaty on the Functioning of the EU....The Court takes the view, first of all, that the service provided by Uber is more than an intermediation service...Therefore, the Court finds that that intermediation service must be regarded as forming an integral part of an overall service whose main component is a transport service and, accordingly, must be classified not as ‘an information society service’ but as ‘a service in the field of transport’ (“The Service Provided by Uber Connecting Individuals with Non-Professional Drivers Is Covered by Services in the Field of Transport”).

The European top court and regulators are sending a message to Uber and to the world that Uber’s narrative is misleading. They disprove the company’s claim that the use of digital technology changes the nature of the service they provide, when in fact it does not, insinuating that “A taxi is a taxi by any other name” (Bershidsky, Leonid).

As a result of the ruling, Uber now faces national regulation in up to twenty-eight EU member states, which will force it to deal more closely with local governments in relation to transportation rules and licensing. However, an Uber spokesperson commented that the ECJ’s ruling “will not change things in most EU countries,” as Uber already largely acts under transportation law as a transportation service (Meredith, Sam, and Arjun Kharpal). Nevertheless, the implications of this ruling in the U.S. for Uber are vastly different, since Uber mostly operates as an information service and not as a transportation service. Though the ECJ verdict has no binding precedent on U.S. rulings, it does make a serious case against Uber. If the U.S. ruled similarly, the effect would be to make not only the U.S. Federal Transportation Law and the ADA strictly applicable to the ridesharing company, it would also allow regulatory policy to apply the company. This would result in a ruling in the plaintiff’s favor in the Judith Smith, et al. v. Uber Technologies, Inc., et al. case.



## PART III

### U.S. Chamber of Commerce, et al. v. City of Seattle, et al.

This case was filed on March 3, 2016 in Seattle, Washington. The plaintiff is the U.S. Chamber of Commerce, and the defendants include the City of Seattle, Seattle Department of Finance and Administrative Services, and Fred Podesta (in his official capacity as director of the Seattle Department of Finance and Administrative Services). The case was filed as a response to the Seattle City Ordinance, passed by the Seattle City Council in December 2015, that approves of the unionization of employees of for-hire transportation companies. The U.S. Chamber of Commerce claims that this law goes against federal and state anti-trust laws.

The general timeline of the proceedings is as follows:

Prior to December 2015: Uber drivers protest for collective bargaining rights in Seattle  
December 2015: Seattle City Ordinance legalizing unionization passed  
March 3, 2016: U.S. Chamber of Commerce sues the City of Seattle, et al.  
March 2016: Uber launches campaign against driver unionization  
April 2017: U.S. District Judge Robert Lasnik placed law on hold  
August 2017: U.S. District Judge Robert Lasnik rejected case and Seattle started implementing the ordinance  
August 2017: U.S. Chamber of Commerce appealed  
September 2017: 9<sup>th</sup> Circuit Court of Appeals put law on hold  
September 2017: Seattle appeals  
February 2018: 9<sup>th</sup> Circuit Court of Appeals proceeds questioning both parties

Uber drivers are considered by Uber as independent contractors, so the National Labor Relations Act<sup>8</sup> doesn't offer them a framework for collective bargaining. Under the NRLA, "only people defined as "employees" are viewed as having the right to organize without violating antitrust laws" (Estreicher, Samuel). An "employee" is one in a master-servant relationship with their employer, meaning they are under their direct supervision and control. Independent contractors are considered "business owners" and are prohibited by law to band together to collectively bargain, under the premise that it would negatively affect public welfare if they worked together to curve markets or set prices (Estreicher, Samuel).

It is for this exact reason that Seattle passed an ordinance that provides the courts an opportunity to extend labor rights to workers in the gig economies (Estreicher, Samuel). The Uber driver's short term, generally temporary contracts that lack benefits were a major catalyst for the protests that prompted the creation of this ordinance. The ordinance "requires companies that hire or contract drivers of taxis, for-hire transportation companies, and app-based services to bargain with the drivers if a majority show they want to be represented" (Johnson, Gene). In essence, the ordinance allows drivers to participate in collective bargaining without the risk of being fired for antitrust liability.

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<sup>8</sup> National Labor Relations Act: Enacted by Congress in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy (United States, Congress, *National Labor Relations Act*)

## Plaintiff's Argument

While Seattle uses NRLA's lack of coverage to legitimize their ordinance, the U.S. Chamber of Commerce claims that the ordinance violates antitrust laws and alleges that the unionization of non-employee drivers is considered price fixing. As mentioned above, since the legal status of drivers from ride-hailing apps remains unresolved in United States' higher courts, company classification of drivers as independent contractors makes any and all attempts for employees to unionize or collectively bargain a violation of antitrust laws. The Chamber considers the collective bargaining of workers "union worker collusion," since existence of the union would allow drivers to agree to sell their labor for wages at a fixed price, with fixed benefits, etc. This in turn prevents companies like Uber from being as competitive as possible, the Chamber argues (Denton, Jack). The actual complaint filed at the district court level reads:

[C]ollective bargaining by independent contractors over the price and terms of a service is per se illegal under § 1 of the Sherman Act<sup>9</sup>...The Ordinance unlawfully authorizes for-hire drivers to engage in this per se illegal concerted action by forming a cartel...speaking as a single unit through an exclusive representative..., and engaging in horizontal fixing of prices and contractual terms (United States District Court Western District of Washington at Seattle).

A spokesperson for the U.S. Chamber of Commerce adds, "Seattle's unprecedented attempt to permit independent contractors to organize a union is clearly inconsistent with federal antitrust and labor laws, if adopted more broadly, Seattle's approach would lead to a morass of inconsistent state and local regulations that would stifle innovation and undermine economic growth" (Denton, Jack).

Moreover, the U.S. Chamber of Commerce notes in their complaint that, in addition to violating both the Sherman and Clayton<sup>10</sup> Antitrust Acts, the ordinance would also burden future innovation in the gig economy sector, increase the prices for customers using these gig economy services, and reduce the overall quality of the services for the consumer ("Chamber of Commerce, Et Al. v. City of Seattle, Et Al"). The Chamber notes, "The implementation of the ordinance would result in a balkanized set of labor schemes that would negatively impact the sharing economy and jeopardize the flexible work schedules and earnings opportunities that economy provides to millions of people nationwide" ("Chamber of Commerce, Et Al. v. City of Seattle, Et Al"). The president of the Chamber's Center for Advanced Technology & Innovation, Amanda Eversole, remarked, "This ordinance threatens the ability not just of Seattle, but of every community across the country, to grow with and benefit from our evolving economy. Technology companies are leading the charge when it comes to empowering people with the

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<sup>9</sup> Sherman Act: passed by Congress in 1890 as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade" ("The Antitrust Laws"). It makes price fixing illegal.

<sup>10</sup> Clayton Act: enacted by Congress in 1914 to "strengthen the antitrust laws that were put into place by the Sherman Act. It provided more detailed provisions to prohibit anticompetitive price discrimination, kept corporations from making exclusive dealing practices and expanded the ability for individuals to sue for damages. This act also allowed unions to organize and prevented anticompetitive mergers" ("Clayton Act").

flexibility and choice that comes with being your own boss, and that is something to be championed, not stifled” (“Chamber of Commerce, Et Al. v. City of Seattle, Et Al.”).

Finally, the U.S. Chamber of Commerce cites the Norris-LaGuardia Act<sup>11</sup> in their argument. Though it is an interesting law to use for their plea (since it is pro-labor), the Chamber argues that the Act only addressed the unionization of employees in a master-servant relationship, and not independent contractors. This differentiation of terms has previously been brought to trial for clarification. The Chamber cites two cases in which the verdict has ruled against the unionization of independent contractors: Federal Trade Commission v. Superior Court Trial Lawyers Association and National Society of Professional Engineers v. United States (Denton, Jack). The verdicts of both cases declared that the banding together of independent contractors violated antitrust laws.

### **Defendant’s Argument**

In relation to the antitrust argument, Seattle links driver pay with safety. Washington State Law allows cities to create some safety related regulations for for-hire ride services; Seattle lawyers argue that the driver’s low pay “creates a safety hazard,” therefore the city of Seattle can grant unionization rights to allow drivers to bargain for better pay through union-negotiated contracts (Groover, Heidi).

### **Uber’s Response**

Though Uber is neither the plaintiff nor the defendant in this case, the company remains a key player in Seattle. An Uber spokesperson in Seattle stated, “We share the concerns about the legality of the ordinance raised by the Chamber of Commerce in their lawsuit” (Denton, Jack). Uber claims a union of its drivers threatens their freedom to work as much or as little as they wish. Additionally, Uber asserts that a union is not even something its drivers want (Bensinger, Greg). Brooke Steger, Uber’s general manager for the Pacific Northwest said, “There’s a tremendous amount at stake in this case, namely the rights and the livelihoods of thousands of drivers and the fate of the transportation option that many Seattle residents and visitors have come to rely on...” (Johnson, Gene).

While the case was waiting a verdict at the district level, Uber launched a campaign to urge its drivers not to unionize. In an attempt to sway drivers, Uber began sending phone surveys, text messages, and meeting invites. The aforementioned Ms. Steger circulated a series of podcasts in which she interviews drivers about how the unionization would affect them, where she ultimately concluded that it isn’t in their best interests. She said, “It’s totally impossible to know how the ordinance could limit who can drive, when you can drive and where you can drive, as well as what you might be required to pay in union dues” (Bensinger, Greg). Despite Uber’s propaganda campaign against unionization, many drivers aren’t convinced. One

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<sup>11</sup> Norris-LaGuardia Act: enacted by Congress in 1932 with the purpose to stop anti-labor injunctions. It allows workers to collectively organize. (“The Basic Labor Laws (United States of America)”)

interviewed driver said, “Uber is telling us they don’t want us to join a union...Uber also tells us we’re their partners, but they don’t treat us like we are partners” (Bensinger, Greg).

### **Applicable Law**

In their defense, Seattle cites the state action antitrust immunity precedent stemming from the U.S. Supreme Court’s ruling in the case *Parker v. Brown*. This precedent, commonly referred to as the “Parker Immunity Doctrine,” provides immunity to state and municipal governments from federal antitrust lawsuits for actions in accordance with explicitly expressed state policy that, when legislated, has foreseeable anticompetitive effects. It shields these governments from liability in antitrust violations when the effects of said statute displaces competition and protects private entities when they act under the direction of the government in the same situation (Ryan, Meghan). *Parker v. Brown* ruled that “anti-competitive behavior is not an antitrust violation when given the state’s legislative blessing (or municipality’s, with the state’s authorization)” (Denton, Jack). The rationale behind the Parker Immunity Doctrine is that in instituting the Sherman Act, Congress indicated no resolve to curb state behavior. The Doctrine is applicable only when a state acts as a sovereign, and upholds the two-pronged requirement. First, the state policy must be expressly and clearly articulated; second, the state must actively supervise and regulate the policy/activity (Ryan, Meghan). If these criteria aren’t met, the state policy will receive no immunity and may be fully prosecuted under the antitrust accusations brought against it. If, however, the criteria are met, and prove anticompetitive under the Federal Trade Commission and the Department of Justice’s standards, the federal government must adhere to the decision of the state.

The implication of this for the example case is that if the state of Washington has given its cities the ability to regulate ride sharing, then federal antitrust law doesn’t apply. Thus, the ordinance in question may continue to function as it does, but is contingent upon the question of whether Washington has actually granted the cities the authority to regulate in this manner. Thus, the question remains whether or not the state “clearly and affirmatively expressed a legislative decision to allow Seattle to displace competition, and authorize what otherwise would be per se violations of the Sherman Act, in the for-hire driver service market” (9th Circuit Court of Appeals).

Upon review, the district court ruled that Seattle “‘satisfie[d] the ‘clearly articulated and affirmatively expressed’ requirement for state immunity,’ because the State had ‘clearly delegate[d] authority for regulating the for-hire transportation industry to local government units,’ and ‘affirmatively contemplated’ that municipalities would displace competition in the for-hire transportation market” (9th Circuit Court of Appeals). The courts also found that the city’s efforts to displace competition met the required tests.

The U.S. Chamber of Commerce appealed the decision. They continued arguing that the ordinance was against antitrust laws, even though the district court dismissed the Sherman Act claim on the ground that the City’s authorization of collective bargaining among for-hire drivers is exempt from the federal antitrust laws under the state action doctrine. In regard to the Parker Immunity Doctrine and claim to state action, the staff of the Washington Attorney General in an appeal to the 9<sup>th</sup> Circuit Court of stated:

A municipality may displace competition under the state’s antitrust exemption only if that anticompetitive restraint is the inherent, logical, or ordinary result of the exercise of

authority delegated by the state. That standard is not satisfied in this case. The State of Washington's delegation of authority to regulate the for-hire transportation market does not imply authority to displace competition among drivers for their services provided to transport companies. The district court's expansive interpretation of the Washington code provisions plainly violates the strict bounds of the state action defense. We express no view on any other issue in this case beyond the proper application of the state action doctrine (9th Circuit Court of Appeals).

Furthermore, the brief complains that there was a lack of evidence supporting Seattle's consent of anticompetitive control of the for-hire market demonstrates the State of Washington's intended policy choice, and Seattle's actions don't warrant protection of state action to exempt them from the Sherman Act. Three main claims are detailed in the brief that highlight the arguments of the Chamber clearly. First, the State laws authorizing regulation of transportation services do not show a state policy to displace competition for negotiating driver contracts. Second, the authority to ensure "safe and reliable" transportation service cannot be read to clearly articulate and affirmatively express a state intent to displace competition in driver services or other input markets. Third, general state grants of antitrust exemption do not satisfy the clear articulation requirement. Finally, it warns that if the Seattle City Ordinance is deemed legal, the decision would have negative future consequences, as it would open the door for any number of future antitrust exemption for nearly any regulation.

Multiple similar lawsuits have been filed in relation to comparable issues. The very same Seattle ordinance is also challenged by 11 drivers represented by the National Right to Work Legal Defense Foundation. Also, Uber itself is facing a federal antitrust lawsuit in a southern district of New York (Denton, Jack).

## **Part IV**

### **Overarching Problem: Are Uber Drivers Independent Contractors or Employees?**

The main question this lawsuit begs to have answered is, are Uber drivers independent contractors, or are they employees? If this distinction had been clearly ruled on by a higher court, many of the issues in this case would have a much more direct resolution. If the courts proclaimed drivers "employees," meaning they indeed are in a master-servant relationship with Uber, this would give the drivers the labor protections they are currently lacking--including the right to legally unionize and collectively bargain. There would therefore be no need for state and local governments (like Seattle) to provide a policy to protect these drivers. If, however, the courts ruled that drivers are independent contractors, the question would remain whether or not Washington State law allows cities to create policy like the one Seattle developed, and whether or not the Seattle Ordinance is immune under the Parker Immunity Doctrine. The ruling on this would have vast effects in future immunity cases in Washington and elsewhere. Either way, the Chamber of Commerce's argument in this case allows for either possibilities, "Even if drivers are employees, the Chamber says the NLRA preempts local rules. If they're independent contractors, bargaining together would amount to price-fixing in violation of federal anti-trust law, an argument supported by the U.S. Department of Justice and Federal Trade Commission" (Groover, Heidi).

## O'Connor and Yucesoy Cases

Uber has had a myriad of lawsuits filed against it where the main question boils down to the employee versus independent contractor dilemma. Similar class action cases in the states of Massachusetts and California were filed against Uber in 2016. These were the Yucesoy and O'Connor cases, respectively. The heart of both of these cases was to resolve the employment status of Uber drivers. The plaintiffs argued that Uber misclassified them as independent contractors, and spoke in favor of being classified as employees. This would therefore entitle them to the benefits of the states' labor laws (O'Connor v. Uber Techs. and Yucesoy v. Uber Techs., Inc.). Uber argued that because it minimally controls driver's work schedule they cannot be considered employees. The plaintiffs complained that Uber does indeed exercise considerable control and supervision over the drivers, citing that Uber "provided iPhones to their drivers, monitored their approval ratings by customers, and deactivated their accounts if they were inactive for 180 days or if their approval ratings fell below 4.6 stars" (Barreiro, Attorney Sachi).

California's two-step process for determining whether a worker is an employee or independent contractor was used to resolve the case. The jury found first that drivers provide a service to Uber because "Uber is ultimately a transportation company, albeit a technologically sophisticated one" (O'Connor v. Uber Techs.). The fact that Uber drivers provide a service distinguishes them as employees. Second, the California Court applied the state's "Borello Multi-Factor Test," where they focused on the most important details of the test that pertain to the employer's "right to control work details" ("S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989)"). The test did not yield an unambiguous result and disfavored Uber, but the court eventually referred the question to the jury, since they needed to rule on disputed matters of fact in the case.

In Massachusetts, the claims of the Yucesoy case were that the drivers of Uber were misclassified, Uber violated the state's tip law, and interference with "advantageous relations" (Yucesoy v. Uber Techs., Inc.). Massachusetts's three-part test was used in this case, rather than California's eleven-factor Borello test. This case verdict ruled similarly to that of California, so repetitive details will not be expounded.

Ultimately, on April 21, 2016, Uber reached a settlement in both class action lawsuits. Both sides agreed to the following terms:

- Drivers will remain independent contractors, not employees;
- Uber will pay \$84 million to the plaintiffs. There will be a second payment of \$16 million if Uber goes public and our valuation increases one and a half times from our December 2015 financing valuation within the first year of an IPO;
- Uber will provide drivers with more information about their individual rating and how it compares with their peers. Uber will also introduce a policy explaining the circumstances under which we deactivate drivers in these states from using the app; and
- We will work together to create a driver's association in both states. Uber will help fund these two associations and meet them quarterly to discuss the issues that matter most to drivers ("Uber Drivers").

Thus, Uber was allowed to continue classifying drivers as independent contractors. This was a big win for the company because they don't have to provide employee benefits, a boon for

them because it drives down their operating costs and limits the companies liability for the drivers actions (McCormick, Rich). Since the case was settled, no binding precedent as to the classification of divers was set to use in future cases.

### **Other Relevant Cases**

Currently, Uber is facing a federal lawsuit relating to antitrust issues (this time by the fault of Uber, not the drivers) in a southern district of New York. It was charged with fixing the prices its drivers can charge riders. If the drivers were employees instead of independent contractors this would be legal; however, since they aren't classified in this manner it is claimed to be illegal. This case has yet to be resolved in court.

In another New York lawsuit, the Legal Services NYC's Brooklyn program pressed charges against Uber on behalf of the New York Taxi Workers Alliance and two former Uber drivers in the fall of 2016. The complaint stated that "Uber does not contribute to unemployment benefit funds or guarantee a minimum wage for drivers because the company insists that its drivers are independent contractors" ("New York Taxi Workers Alliance, Uber Drivers Win Employee Status"). Uber neither contributes to unemployment benefits nor pays minimum wage because of how they classify drivers. In a dramatic turn of events, the Department of Labor concluded that the two former Uber drivers in the suit were in fact employees of the company.

Finally, while New York, Texas, and Georgia have thus far ruled in favor of Uber's classification of drivers, the case *Berwick v. Uber Technologies* in California did not follow suit. In the fall of 2014, Barbara Berwick filed a wage complaint with the Labor Commissioner of California in which she sought reimbursement for outstanding business expenses from Uber. In a similar retort as the previously mentioned cases, Uber declared Berwick was an independent contractor and not entitled to the compensation. The Labor Commissioner applied the "economic realities" test, one of the eleven factors under the aforementioned *Bordello* test. The California Labor Commissioner ultimately disagreed with Uber's classification, emphasizing that the drivers were not involved in a distinctly separate occupation from Uber's core business. In fact, the drivers were deemed "an essential component to Uber's regular business operations. The Commissioner also found that Uber exerted strong control over the drivers—control that was too detailed and unnecessary for the nature of the work. The court awarded Berwick more than \$4,000 in damages.

### **Part V**

#### **Conclusion**

The development of radically disruptive, technologically advanced industries, like ridesharing and gig economies, creates a need for new precedent of United States law to be set. This is a process that requires an excess of legal study and debate. The two cases featured in this thesis, as well as the additional example cases, provide a small glimpse of the vast array of litigation in which Uber is either a main or involved party. Though there have been hundreds of varied cases filed against Uber over the course of the company's history, many of the disputed issues fall in one of two categories: the classification of the type of company Uber is (technology or transportation), and the classification of Uber's drivers. Though lawyers, professors, and

thesis students may sit and discuss each detail of the copious cases, the U.S. Supreme Court rulings on these two questions would decisively clarify many of the main issues. It will be interesting to see what the future of Uber in the U.S. Courts turns out to look like.



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