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Artificial Surge Pricing as Price-Fixing: Why and How to Avoid It

Cheska Tolentino*

I. Introduction

While rideshare affords drivers flexible work opportunities to supplement their income,¹ it falls short of providing economic security for many drivers who rely on rideshare as their primary means of employment.² Many drivers face poor pay, lack of legal protections, and an inability to take collective action to improve their working conditions.³ According to an independent survey, the median hourly wage for most respondents driving for UberX⁴ was between \$13 and \$15.⁵ Another study published by the Massachusetts Institute of Technology reported that the median hourly rate was \$8.55,⁶ slightly higher than the federal minimum wage of \$7.25.⁷ A Reno, Nevada, Uber driver claimed to have made \$3.75 an hour “[a]fter gas, added monthly rideshare insurance,

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¹ Carson Kohler, *6 Uber Drivers Who Make Up to an Extra \$450/Week Setting Their Own Hours*, THE PENNY HOARDER (Jan. 29, 2018), <https://www.thepennyhoarder.com/make-money/side-gigs/how-much-you-make-driving-with-uber/>.

² Just over half of Uber drivers participating in an independent survey reported that driving for Uber was their only job. JC, *Ridester’s 2018 Independent Driver Earnings Survey*, RIDESTER (Mar. 29, 2019), <https://www.ridester.com/2018-survey/#introduction>.

³ Andrew J. Hawkins, *Uber and Lyft Face an Existential Threat in California—And They’re Losing*, THE VERGE (Sept. 2, 2019), <https://www.theverge.com/2019/9/2/20841070/uber-lyft-ab5-california-bill-drivers-labor>.

⁴ UberX is Uber’s low-cost option. *What is UberX?*, ESTIMATE FARE, <https://estimatefare.com/what-is-uberx/> (last visited Oct. 7, 2019).

⁵ JC, *supra* note 2.

⁶ Sam Levin, *Uber Drivers Often Make Below Minimum Wage, Report Finds*, THE GUARDIAN (Mar. 5, 2018), <https://www.theguardian.com/technology/2018/mar/01/uber-lyft-driver-wages-median-report>.

⁷ MINIMUM WAGE, DEPT. OF LABOR, <https://www.dol.gov/general/topic/wages/minimumwage> (last visited Oct. 7, 2019).

wear-and-tear, constant oil changes and taxes.”⁸ Some full-time drivers have resorted to sleeping in their cars to make ends meet.⁹ Others are homeless.¹⁰

Drivers’ primary legal roadblock to achieving better pay is their status as independent contractors. As independent contractors, rideshare drivers have limited ability to negotiate better pay and working conditions with rideshare companies because they have no rights to collective action or bargaining under labor law.¹¹ Despite the limitations resulting from their status as independent contractors, rideshare drivers have nonetheless engaged in self-help by informally banding together.¹² Whereas surge pricing ordinarily occurs when the demand for rideshare exceeds supply,¹³ rideshare drivers artificially trigger surge pricing by simultaneously switching off, then switching on their rideshare apps.¹⁴ Their goal is simple: raise their pay.¹⁵

This Comment explains that even though rideshare drivers justifiably desire higher pay, the potential legal and economic disadvantages of artificial surge pricing outweigh any short-term financial benefits for rideshare drivers. First, artificial surge pricing arguably constitutes unlawful

⁸ Michael Sainato, *‘I Made \$3.75 an Hour’: Lyft and Uber Drivers Push to Unionize for Better Pay*, THE GUARDIAN (Mar. 22, 2019), <https://www.theguardian.com/us-news/2019/mar/22/uber-lyft-ipo-drivers-unionize-low-pay-expenses>. Studies report different median hourly values because they use different methodologies to calculate pay and costs. Levin, *supra* note 6.

⁹ Eric Newcomer & Olivia Zaleski, *When Their Shifts End, Uber Drivers Set Up Camp in Parking Lots Across the U.S.*, BLOOMBERG (Jan. 23, 2017), <https://www.bloomberg.com/news/articles/2017-01-23/when-their-shifts-end-uber-drivers-set-up-camp-in-parking-lots-across-the-u-s>.

¹⁰ Carolyn Said, *He Drives 60 Hours a Week for Uber. He’s Still Homeless*, SF CHRON. (Sept. 23, 2019), <https://www.sfchronicle.com/business/amp/He-drives-60-hours-a-week-for-Uber-He-s-still-14457115.php>.

¹¹ Jeffrey M. Hirsch & Joseph A. Seiner, *A Modern Union for the Modern Economy*, 86 FORDHAM L. REV. 1727, 1740 (2018). Drivers are also limited by their ability to negotiate because they are contractually bound to arbitrate disputes. Carissa Laughlin, *Arbitration Clause Issues in Sharing Economy Contracts*, J. DISP. RESOL. 197, 206-209 (2017). In several cases, Uber has succeeded in enforcing arbitration against drivers. *Id.* But arbitration is not the focus of this comment.

¹² Minda Zetlin, *Here’s Why Uber and Lyft Drivers Are Artificially Creating Surge Prices*, INC. (May 23, 2019), <https://www.inc.com/minda-zetlin/uber-lyft-drivers-artificial-surge-pricing-reagan-national-washington-arlington-drive-united.html>.

¹³ Utpal M. Dholakia, *Everyone Hates Uber’s Surge Pricing – Here’s How to Fix It*, HAR. BUS. REVI. (Dec. 21, 2015), <https://hbr.org/2015/12/everyone-hates-ubers-surge-pricing-heres-how-to-fix-it>.

¹⁴ Isobel Asher Hamilton, *Uber Drivers Are Reportedly Colluding to Trigger ‘Surge’ Prices Because They Say The Company Is Not Paying Them Enough*, BUS. INSIDER (Jun. 14, 2019), <https://www.businessinsider.com/uber-drivers-artificially-triggering-surge-prices-reports-abc7-2019-6>.

¹⁵ *Id.*

restraint of trade under antitrust law.¹⁶ The practice would probably expose drivers and rideshare companies to legal liability.¹⁷ Second, because drivers cannot lawfully increase their pay through surge pricing or by negotiating with rideshare companies,¹⁸ rideshare will become a less attractive employment option. This will exacerbate rideshare companies' recruitment and retention problems.¹⁹ Finally, artificial surge pricing harms consumers by raising costs, diminishing price predictability,²⁰ and reducing affordable transportation options.²¹ Rider dissatisfaction will negatively affect business for rideshare companies and drivers alike.

This Comment proposes that the solution to artificial surge pricing is increasing driver compensation. Boosting driver pay would allow rideshare companies to directly address drivers' economic needs, avoid antitrust liability, and promote quality services for consumers. Bolstering driver compensation should involve outright ramping up earnings, providing benefits, giving drivers the choice to work as either independent contractors or employees, or any combination of these possibilities. This proposal would allow rideshare companies to somewhat preserve their independent contractor business model. It would also give rideshare drivers the freedom to choose whether they want to continue taking advantage of the flexibility of working as independent contractors.

¹⁶ See discussion *infra* Section IV(B).

¹⁷ *Id.*

¹⁸ Rideshare drivers “lack individual bargaining power vis-a-vis the platform companies and face bargaining disadvantages similar to those faced by employees in typical employment relationships.” Marina Lao, *Workers in the "Gig" Economy: The Case for Extending the Antitrust Labor Exemption*, 51 U.C. DAVIS L. REV. 1543, 1545 (2018). But drivers' inability to negotiate contract provisions is not the focus of this comment.

¹⁹ Eliot Brown, *Uber and Lyft Face Hurdle of Finding and Keeping Drivers*, WALL STREET J. (May 12, 2019), <https://www.wsj.com/articles/uber-and-lyft-face-tough-test-of-finding-and-keeping-drivers-11557673863>.

²⁰ Le Chen et al., *Peeking Beneath the Hood of Uber*, INTERNET MEASUREMENT CONF., 1, 2 (2015), https://www.ftc.gov/system/files/documents/public_comments/2015/09/00011-97592.pdf (short-term surge prices cannot be forecast).

²¹ Surge pricing incentivizes drivers to enter areas of high demand, such as near event venues. This can “help[s] ensure that riders can get a ride when they need one.” Travis Andersen & Adam Vaccaro, *Uber Used Surge Pricing During Storm Last March, State Agency Rules. It'll Cost Them \$950,000*, BOSTON GLOBE (Jan. 18, 2019), <https://www.bostonglobe.com/metro/2019/01/18/uber-used-surge-pricing-during-mass-storm-last-year-state-agency-rules-cost-them/V52OBSYinxOxLd6lG6L8WK/story.html>.

Part II will provide a background of Uber and Lyft, which occupy most of today’s rideshare market. It will also explain why the National Labor Relations Board (NLRB) concluded that rideshare drivers are independent contractors, not employees. Part III will discuss why rideshare drivers lack legal protections under the National Labor Relations Act (NLRA) and antitrust law because drivers are independent contractors under federal law. Part IV will discuss why artificial surge pricing constitutes unlawful price-fixing under antitrust law. Finally, Part V will discuss why increasing driver pay will discourage artificial surge pricing. It will also propose a solution that aims to strike a balance between honoring drivers’ desire for higher pay and job flexibility and rideshare companies’ goal of managing labor costs and making consumers happy. Part VI will conclude the Comment.

II. Background

The emergence of rideshare in 2010 transformed the transportation industry²² and labor market.²³ Rideshare has revolutionized the way people commute and arrange carpools.²⁴ Uber, the first rideshare company, debuted as the UberCab app in 2010.²⁵ Uber’s algorithms quickly and efficiently match drivers with passengers.²⁶ “The original Uber concept—a private ride, summoned by tapping an app on your smartphone—was so simple and universally appealing that it upended the traditional cab industry practically overnight.”²⁷ In 2012, the second rideshare

²² See generally Thor Berger et al., *Drivers of Disruption? Estimating the Uber Effect*, U. OF OXFORD (Jan. 23, 2017), https://www.oxfordmartin.ox.ac.uk/downloads/academic/Uber_Drivers_of_Disruption.pdf.

²³ See, e.g., Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, COMP. LAB. L. & POL’Y J., 577, 580 (2016).

²⁴ *Shifting the Transportation Paradigm*, RIDE AMIGOS, <https://rideamigos.com/ridesharing-shifting-the-transportation-paradigm/> (last visited Oct. 21, 2019).

²⁵ Nathan McAlone, *This Is How Uber Used to Look When It First Started Out — And How It's Changed Over Time*, BUS. INSIDER (Feb. 10, 2016), <https://www.businessinsider.com/ubers-design-history-2010-2016-2016-2/>.

²⁶ Rory Cellan-Jones, *Uber And Indiegogo - Tales of Disruption*, BBC (June 24, 2014), <https://www.bbc.com/news/technology-27999589>.

²⁷ Alison Griswold, *Uber’s Stunning Journey to a \$90 Billion IPO Changed Transportation Forever*, QUARTZ (Apr. 27, 2019), <https://qz.com/1592032/how-uber-got-to-its-90-billion-ipo-and-changed-transportation-forever/>.

company, Lyft, launched in San Francisco.²⁸ Known for its cars wearing pink moustaches, Lyft began as a “community ride-sharing model.”²⁹ Lyft and Uber work essentially the same: riders request a private ride through a smartphone app.³⁰

Together, Uber and Lyft dominate the US rideshare market.³¹ In the second quarter of 2019, Uber garnered 71% of rideshare spending, while Lyft earned 27%.³² Through July 2019, Uber and Lyft have made \$50 billion in revenue in the US.³³ Over 66 million people,³⁴ or more than one in three people in the US, have used rideshare apps.³⁵ 3.9 million people drive for Uber worldwide.³⁶ Approximately 1.5 million people drive for Lyft in the US.³⁷ Many people drive for both companies.³⁸

Central to rideshare companies’ success is working with drivers as independent contractors rather than employees.³⁹ As independent contractors, rideshare drivers have the flexibility to choose their own schedules; they, however, forego many benefits more often available through

²⁸ Andrew Greiner et al., *A History of Lyft, From Fuzzy Pink Mustaches to Global Ride Share Giant*, CNN (Mar. 28, 2019), <https://www.cnn.com/interactive/2019/03/business/lyft-history/index.html>.

²⁹ Christina Farr, *Lyft Team Gets \$60M More; Now It Must Prove Ride-Sharing Can Go Global*, VENTUREBEAT (May 23, 2013), <https://venturebeat.com/2013/05/23/lyft-races-ahead-with-60m-in-funding-but-what-challenges-lie-ahead/>.

³⁰ Levi Davis, *Lyft vs. Uber: What's the Difference?*, INVESTOPEDIA (Jun. 25, 2019), <https://www.investopedia.com/articles/personal-finance/010715/key-differences-between-uber-and-lyft.asp>.

³¹ Kathryn Gessner, *Uber vs. Lyft: Who's Tops in the Battle of U.S. Rideshare Companies*, SECOND MEASURE (Aug. 21, 2019), <https://secondmeasure.com/datapoints/rideshare-industry-overview/>.

³² *Id.*

³³ *Ride Hailing: United States*, STATISTA, <https://www.statista.com/outlook/368/109/ride-hailing/united-states> (last visited Sept. 12, 2019).

³⁴ *Id.*

³⁵ E. Mazareanu, *Ridesharing Services in the U.S.- Statistics & Facts*, STATISTA (Jul 9, 2019), <https://www.statista.com/topics/4610/ridesharing-services-in-the-us/>.

³⁶ Uber has not disclosed the number of drivers in the US. Company Info, UBER, <https://www.uber.com/newsroom/company-info/> (last visited Sept. 13, 2019). See also Melissa Berry, *How Many Uber Drivers Are There?*, THE RIDESHARE GUY (June 1, 2019), <https://therideshareguy.com/how-many-uber-drivers-are-there/> (estimating 1.5–2.5 million Uber drivers in the US).

³⁷ *Drivers Impact*, LYFT, <https://www.lyftimpact.com/impact/drivers> (last visited Sept. 13, 2019).

³⁸ Clarke Bowman, *I'm a Driver for Uber and Lyft — Here Are 10 Things I Wish I Knew Before Starting the Job*, BUS. INSIDER (Aug. 25, 2019), <https://www.businessinsider.com/uber-lyft-drivers-job-advice-car-2019-8>.

³⁹ Alexis Keenan, *Uber And Lyft Face 2 Big Threats to Their Business Model After New California Law*, YAHOO FIN. (Sept. 12, 2019), <https://finance.yahoo.com/news/uber-lyft-lawsuit-contractors-employees-law-174002068.html>.

traditional employment.⁴⁰ As independent contractors, rideshare drivers do not have the right under the NLRA to organize collectively to improve their working conditions.⁴¹ They do not receive benefits, such as health insurance, retirement plans, paid time off, or vacation days.⁴² Rideshare drivers fall outside scope of statutes prohibiting discriminatory conduct on the basis of race, sex, religion, national origin, sexual orientation, and age or the Family and Medical Leave Act of 1993.⁴³ Moreover, rideshare drivers are not entitled to unemployment compensation under the Social Security Act of 1935, or minimum wage, maximum workweek hours, and overtime guarantees under the Fair Labor Standards Act of 1938.⁴⁴

Recent news hints that trouble may be on the way for Uber and Lyft, possibly due in part to driver dissatisfaction.⁴⁵ In the second quarter of 2019, Uber posted more than \$5 billion in losses,⁴⁶ and Lyft posted \$644.2 million in losses.⁴⁷ Rideshare competition has contributed to Uber's slower growth rate.⁴⁸ Uber highlighted its labor issues as a risk to its competitiveness: "If we are unable to attract or maintain a critical mass of Drivers, consumers ... whether as a result of

⁴⁰ *How to Become an Uber Driver: Step-by-Step Guide*, GIGWORKER (June 25, 2019), <https://gigworker.com/how-to-become-uber-driver/>.

⁴¹ William B. Gould IV, *Dynamex Is Dynamite, but Epic Systems Is Its Foil - Chamber of Commerce: The Sleeper in the Trilogy*, 83 MO. L. REV. 989, 993 (2018).

⁴² *Id.*

⁴³ *Id.* at 995.

⁴⁴ *Id.* at 993. The US Department of Labor, the agency responsible for enforcing the FLSA, has recently ruled that gig economy workers (service providers working for a virtual marketplace company) are not employees within the meaning of the Fair Labor Standards Act. Letter from Keith E. Sonderling, Acting Administrator, U.S. Dept. of Labor Wage and Hour Division to [Redacted Party] (Apr. 29, 2019), https://www.dol.gov/whd/opinion/FLSA/2019/2019_04_29_06_FLSA.pdf.

⁴⁵ David Trainer et al., *Opinion: Uber's Own Numbers Show Why Investors Shouldn't Believe in Its Vision*, MARKETWATCH (Aug. 20, 2019), <https://www.marketwatch.com/story/ubers-own-numbers-show-why-investors-shouldnt-believe-in-its-vision-2019-08-19>.

⁴⁶ *Uber Reports Second Quarter 2019 Results*, UBER INV. (Aug. 8, 2019), <https://investor.uber.com/news-events/news/press-release-details/2019/Uber-Reports-Second-Quarter-2019-Results/default.aspx>.

⁴⁷ Kate Conger, *Lyft's Losses Continue, But Company Says They Will Abate*, NY TIMES (Aug. 7, 2019), <https://www.nytimes.com/2019/08/07/technology/lyft-earnings-revenue.html?module=inline>

⁴⁸ Mike Isaac et al., *How the Promise of a \$120 Billion Uber I.P.O. Evaporated*, NY TIMES (May 15, 2019), <https://www.nytimes.com/2019/05/15/technology/uber-ipo-price.html?module=inline>.

competition or other factors, our platform will become less appealing to platform users.”⁴⁹ Rideshare companies must proactively resolve their labor issues. Otherwise, their “ramp-up time, driver quality, and customer loyalty” will likely suffer.⁵⁰

A. Rideshare Drivers Are Independent Contractors Under the NLRA and *SuperShuttle*⁵¹

Applying the common law agency test adopted in *SuperShuttle*,⁵² the National Labor Relations Board (NLRB) concluded that Uber drivers are independent contractors within the meaning of the National Labor Relations Act (NLRA).⁵³ The NLRA endorses a national policy of encouraging workers to collectively bargain for better working conditions.⁵⁴ The NLRA grants employees the right to “engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . [and] the right to refrain from any or all of such activities”⁵⁵ The NLRA, as amended by the Taft-Hartley Act,⁵⁶ excludes independent contractors from the definition of “employee.”⁵⁷ The NLRB, the administrative agency charged with administering

⁴⁹ Uber Technologies, Inc., Registration Statement (Form S-1), 1, 13, (Apr. 11, 2019), <https://www.sec.gov/Archives/edgar/data/1543151/000119312519103850/d647752ds1.htm> [hereinafter *Uber SEC Registration Statement*].

⁵⁰ Russell Hensley, *Cracks in the Ridesharing Market—And How to Fill Them*, MCKINSEY Q. (July 2017), <https://www.mckinsey.com/industries/automotive-and-assembly/our-insights/cracks-in-the-ridesharing-market-and-how-to-fill-them>.

⁵¹ *SuperShuttle DFW, Inc., Local 1338*, 367 NLRB No. 75, 1, 1 (Jan. 25, 2019), <http://apps.nlr.gov/link/document.aspx/09031d4582a96a9c>.

⁵² See generally, *id.*

⁵³ Advice Memorandum from Jayme L. Sophir, Associate General Counsel, NLRB Office of the General Counsel, to Jill Coffman, Regional Director, NLRB Region 10, 1, 1 (Apr. 16, 2019), <https://www.nlr.gov/case/13-CA-163062> [hereinafter Advice Memorandum from Sophir]. See also *NLRB v Sears, Roebuck & Co.*, 421 US 132, 142 (1975) (“[T]he General Counsel will decide the issue submitted, and his ‘final determination’ will be communicated to the Regional Director by way of an Advice Memorandum. The memorandum will briefly summarize the facts, against the background of which the legal or policy issue is to be decided, set forth the General Counsel’s answer to the legal or policy issue submitted together with a ‘detailed legal rationale,’ and contain ‘instructions for the final processing of the case.’”).

⁵⁴ 29 U.S.C. § 151.

⁵⁵ 29 U.S.C. § 157.

⁵⁶ *SuperShuttle*, 367 NLRB No. 75 at 1.

⁵⁷ 29 U.S.C. § 152(3).

the NLRA,⁵⁸ enforces violations of employees' rights to organize and bargain.⁵⁹ Congress invested in the NLRB the primary power of interpretation and application of the NLRA.⁶⁰ The NLRB determines in the first instance whether particular conduct is protected or prohibited under the NLRA.⁶¹

The NLRB applies the common law agency test to determine whether a worker is an employee or an independent contractor.⁶² This test requires application of the Restatement (Second) of Agency § 220 (1958) common-law factors.⁶³ The Supreme Court declared that courts must consider all of the factors and that no single factor is dispositive.⁶⁴ The NLRB and lower courts have also considered that a worker's entrepreneurial opportunity weighs in favor of finding independent contractor status.⁶⁵ Finally, in the for-hire vehicle industry, the NLRB has considered two additional factors: whether the company receives compensation based on the amount of fares drivers collect and whether the company controls the manner and means of the drivers' work.⁶⁶

In determining that Uber drivers are independent contractors, the NLRB followed *SuperShuttle*, a case involving shared-ride van franchisees.⁶⁷ *SuperShuttle* arose from a union's

⁵⁸ 29 U.S.C. § 153.

⁵⁹ 29 U.S.C. § 160. See also Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 632 (2019).

⁶⁰ *Intl. Bhd. of Boilermakers v. Hardeman*, 401 U.S. 233, 240 (1971), holding that states and federal courts ““must defer to the exclusive competence of the National Labor Relations Board.”

⁶¹ *Id.*

⁶² *SuperShuttle*, 367 NLRB No. 75 at 1, citing *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968).

⁶³ *Id.* at 1–2. All of the common law factors are: “(a) The extent of control which, by the agreement, the master may exercise over the details of the work. (b) Whether or not the one employed is engaged in a distinct occupation or business. (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision. (d) The skill required in the particular occupation. (e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work. (f) The length of time for which the person is employed. (g) The method of payment, whether by the time or by the job. (h) Whether or not the work is part of the regular business of the employer. (i) Whether or not the parties believe they are creating the relation of master and servant. (j) Whether the principal is or is not in business.”

Id.

⁶⁴ *United Ins.*, 390 U.S. at 258.

⁶⁵ *SuperShuttle*, 367 NLRB No. 75 at 2.

⁶⁶ *Id.* at 1–2.

⁶⁷ *Id.* at 1.

attempt to represent SuperShuttle Dallas-Fort Worth (DFW) franchisees.⁶⁸ SuperShuttle drivers sign a franchise agreement that expressly characterizes them as independent business operators.⁶⁹ Drivers provide their own vehicles.⁷⁰ They pay for fuel, maintenance, tolls, and access fees.⁷¹ They choose their schedules and assignments.⁷² Drivers alone retain the fares paid by customers.⁷³

Although drivers exercise autonomy, SuperShuttle exerts significant influence over their work environments.⁷⁴ Drivers may not negotiate the terms of the franchise agreement.⁷⁵ They must wear uniforms.⁷⁶ Their vehicles must comply with SuperShuttle's requirements.⁷⁷ SuperShuttle sets fares.⁷⁸ Drivers must also pay SuperShuttle an initial franchise fee and weekly fees for the right to use the SuperShuttle brand and ride reservation system.⁷⁹ Further, SuperShuttle screens drivers' criminal backgrounds, driving records, and drug and alcohol use.⁸⁰

Despite evidence of SuperShuttle's control over the drivers, the NLRB concluded that drivers are independent contractors by highlighting several key facts.⁸¹ First, the extent of SuperShuttle's daily control over drivers is low because drivers have complete discretion over when and where they work.⁸² Second, SuperShuttle's method of payment allows drivers to keep all the fares they earn.⁸³ Third, drivers exercise control over their instrumentalities or tools of work by owning or leasing their vehicles and paying for licenses to use SuperShuttle's dispatch

⁶⁸ *Id.* at 3.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *SuperShuttle*, 367 NLRB No. 75 at 3.

⁷² *Id.*

⁷³ *Id.* at 5.

⁷⁴ *Id.* at 3–6.

⁷⁵ *Id.* at 4.

⁷⁶ *Id.* at 13.

⁷⁷ *SuperShuttle*, 367 NLRB No. 75 at 13.

⁷⁸ *Id.* at 13.

⁷⁹ *Id.* at 3.

⁸⁰ *Id.*

⁸¹ *Id.* at 7.

⁸² *Id.* at 12.

⁸³ *SuperShuttle*, 367 NLRB No. 75 at 13.

system.⁸⁴ Fourth, drivers work without supervision.⁸⁵ Finally, the franchise agreement between SuperShuttle and its drivers clearly shows that the parties intended to create an independent-contractor relationship.⁸⁶ Therefore, considering all the common law factor and the factors unique to the taxicab industry, the NLRB ruled that the SuperShuttle shared-ride van franchisees are independent contractors, not employees within the meaning of the NLRA.⁸⁷

In *Uber Technologies*, the NLRB applied the *SuperShuttle* common law agency test and taxicab factors to conclude that Uber drivers are independent contractors.⁸⁸ In this case, the facts are substantially similar to those in *SuperShuttle*. *Uber Technologies* arose from two charges alleging that Uber unlawfully terminated drivers and interfered with a labor organization of drivers.⁸⁹ Uber drivers directly contract with Uber or became independent contractors of businesses that contracted with Uber.⁹⁰ Uber drivers do not pay to use the app.⁹¹ Uber requires drivers to adhere to vehicle standards and wait for riders.⁹² Uber sets fares.⁹³ Riders pay Uber, which retains a portion of the fares, then later pays the remainder to drivers.⁹⁴ Riders rate their rides “on a scale of 1 (worst) to 5 (best).”⁹⁵ Uber terminates drivers with average low ratings.⁹⁶

Like the drivers in *SuperShuttle*, the Uber drivers exercise significant autonomy over their work, which supports the NLRB’s finding that they are independent contractors.⁹⁷ Uber’s

⁸⁴ *Id.*

⁸⁵ *Id.* at 14–15.

⁸⁶ *Id.* at 14.

⁸⁷ *Id.*

⁸⁸ Advice Memorandum from Sophir, *supra* note 53, at 1.

⁸⁹ *Id.* at 1–2.

⁹⁰ *Id.* at 2.

⁹¹ *Id.* at 6.

⁹² *Id.* at 8.

⁹³ *Id.* at 7.

⁹⁴ Advice Memorandum from Sophir, *supra* note 53, at 2.

⁹⁵ *Id.* at 3.

⁹⁶ *Id.*

⁹⁷ Harry Campbell, *Uber Drivers Just Want to Be Free*, N.Y. TIMES (Sept. 16, 2019), <https://www.nytimes.com/2019/09/16/opinion/uber-ab5-california.html>.

exercises low control over drivers because drivers could accept or reject ride requests, set their own schedules and geographic locations, and work for competitors.⁹⁸ While Uber provides the dispatch system through its app, commercial liability insurance, and assistance for minor rider-caused damage, drivers provide their own vehicles, fuel, and maintenance.⁹⁹ Drivers work without supervision.¹⁰⁰ Agreements between Uber and drivers “explicitly characterize[d]” their relationship as independent contractors.¹⁰¹ Although drivers shared fares with Uber, suggesting an employee relationship,¹⁰² the NLRB reasoned that the absence of a flat fee like that in *SuperShuttle* actually increased entrepreneurial opportunity; therefore, Uber’s fare-sharing arrangement with drivers was a neutral factor in the NLRB’s analysis.¹⁰³ Ultimately, NLRB determined that Uber drivers had more entrepreneurial opportunity than SuperShuttle drivers¹⁰⁴ and concluded that Uber drivers are independent contractors.¹⁰⁵

B. Why Rideshare Drivers Engage in Artificial Surge Pricing

Nearly half of Uber and Lyft drivers are dissatisfied with the companies.¹⁰⁶ To work as independent contractors, drivers must pay for insurance, vehicles, tolls and other fees, licenses, gas, and maintenance.¹⁰⁷ Drivers must also pay income taxes and self-employment taxes.¹⁰⁸

⁹⁸ *Id.* at 6.

⁹⁹ *Id.* at 11–12.

¹⁰⁰ Advice Memorandum from Sophir, *supra* note 53, at 12. Rather than control drivers through supervision, Uber relied on its customer-driven rating system to indirectly regulate driver behavior. *Id.* at 11.

¹⁰¹ *Id.* at 12.

¹⁰² *Id.* at 10 (“[I]n flat-fee arrangements, the company lacks motivation to control the manner and means of drivers’ work, giving drivers significant entrepreneurial opportunity because they retain all fares; whereas in commission-based compensation, in which the company’s earnings depend upon driver production, the company has a greater incentive to control drivers’ activities, thus giving them less entrepreneurial opportunity [suggesting an employment relationship].”).

¹⁰³ *Id.* at 11.

¹⁰⁴ *Id.* at 9.

¹⁰⁵ *Id.* at 15.

¹⁰⁶ Harry Campbell, *Lyft & Uber Driver Survey 2019: Uber Driver Satisfaction Takes a Big Hit*, THE RIDESHARE GUY (Nov. 19, 2019), <https://therideshareguy.com/uber-driver-survey/>.

¹⁰⁷ *How Much Does an Uber Driver Make in 2019?* [The Inside Scoop], RIDESTER (Sept. 4, 2019), <https://www.ridester.com/how-much-do-uber-drivers-make/>.

¹⁰⁸ *The Uber Partner's Tax Guide*, UBER, <https://www.uber.com/drive/resources/tax-tips-for-drivers/> (last visited Oct. 31, 2019).

Drivers do not get health insurance or sick leave.¹⁰⁹ Although fare rates have been increasing, drivers are not taking home additional pay.¹¹⁰ After expenses, drivers claim they earn \$5 or \$6 an hour.¹¹¹ Moreover, although drivers may earn more by working when surge price is in effect, they now make less than before.¹¹² Because of Uber's changes to its surge pricing policy, drivers earn fixed amounts instead of a percentage of the fare.¹¹³ Because of low take-home pay, fewer qualified people sign up to drive for Uber.¹¹⁴ Every quarter, Uber sees about a 30% rate of attrition.¹¹⁵ Every two years, nearly all of the pool of working rideshare drivers turn over.¹¹⁶ Drivers went on strike in seven cities across the country to call for better pay and benefits.¹¹⁷ A California driver participating in the strike earned \$1,500 working less than forty hours a week when she first started driving for Uber.¹¹⁸ Then Uber slashed surge rates and bonuses.¹¹⁹ Because of the changes to driver pay, she now works about eight to nine hours every day of the week.¹²⁰ She makes \$150 a day.¹²¹

¹⁰⁹ Kate Conger et al., *Uber Drivers' Day of Strikes Circles the Globe Before the Company's I.P.O.*, N.Y. TIMES (May 8, 2019), <https://www.nytimes.com/2019/05/08/technology/uber-strike.html>.

¹¹⁰ Greg Epstein, *Hundreds of Uber and Lyft Drivers to Launch a Protest Caravan Across California*, TECHCRUNCH (Aug. 22, 2019), <https://techcrunch.com/2019/08/22/hundreds-of-uber-and-lyft-drivers-to-launch-a-protest-caravan-across-california/>.

¹¹¹ *Id.*

¹¹² Amanda VanAllen, *Uber's Surge Pricing Policy Change Could Cost Workers \$1,000 a Month*, ABC (Feb. 16, 2019), <https://www.abcactionnews.com/news/national/uber-is-changing-its-surge-pricing-policy-it-could-cost-workers-up-to-1-000-a-month-driver-says>.

¹¹³ *Id.*

¹¹⁴ Johana Bhuiyan, *Drivers Don't Trust Uber. This Is How It's Trying to Win Them Back*, RECODE (Feb. 5, 2018), <https://www.vox.com/2018/2/5/16777536/uber-travis-kalanick-recruit-drivers-tipping>. See also Johana Bhuiyan, *If Lyft Can't Keep Its Drivers as Independent Contractors, It May Never Be Profitable*, LA TIMES (Mar. 9, 2019), <https://www.latimes.com/business/technology/la-fi-tn-lyft-ipo-drivers-20190309-story.html>.

¹¹⁵ *Id.*

¹¹⁶ Hensley, *supra* note 50.

¹¹⁷ Chris Morris, *Uber Drivers Plan 12-Hour Strike As Company Looks Toward IPO*, FORTUNE (Apr. 24, 2019), <https://fortune.com/2019/04/24/uber-drivers-plan-12-hour-strike/>.

¹¹⁸ Epstein, *supra* note 110.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* This rate comes out to \$1,050 a week.

To increase their pay, rideshare drivers have collectively engaged in artificial surge pricing in cities across the United States.¹²² Some drivers who do not want to engage in the practice say they nonetheless feel compelled to participate after three years of pay cuts.¹²³ Ordinarily, surge pricing raises the regular price of rideshare fares when demand exceeds supply.¹²⁴ Uber uses an algorithm that determines the price of fares based on the levels of demand and supply in a particular area.¹²⁵ The algorithm updates every five to ten minutes.¹²⁶ Lyft uses a similar price-adjusting system called “Personal Power Zones.”¹²⁷ Surge pricing incentivizes drivers to enter busy areas, restoring balance between supply and demand.¹²⁸ Uber’s former Chief Executive Travis Kalanick explained that “during the busiest times . . . [surge pricing] maximizes the number of trips and minimizes the number of people stranded.”¹²⁹ Common conditions triggering surge pricing include inclement weather and special events.¹³⁰ For example, after an Ariana Grande concert at Madison Square Garden in New York City in 2015, the uptick in demand for Uber rides triggered surge pricing.¹³¹ Fares were multiplied by up to 1.8 times the non-surge fare.¹³²

In contrast, artificial surge pricing occurs when drivers simultaneously turn off the app to create an apparent precipitous drop in demand, then turn it back on at the same time after surge

¹²² Sam Sweeney, *Uber Drivers Across the U.S. Are Manipulating Fares to Create Artificial Price Surges*, ABC7 (June 13, 2019), <https://wjla.com/features/7-on-your-side/uber-drivers-nationwide-manipulating-fares-artificial-surges>.

¹²³ *Id.*

¹²⁴ *How Surge Pricing Works*, UBER, <https://www.uber.com/us/en/drive/partner-app/how-surge-works/> (last visited Sept. 13, 2019).

¹²⁵ Omar Faroque, *How UBER Surge Price Works*, MEDIUM (Sept. 20, 2018), <https://medium.com/system-design/how-uber-surge-price-works-edd898ca3746>.

¹²⁶ *Id.*

¹²⁷ *Personal Power Zones*, LYFT, <https://help.lyft.com/hc/en-us/articles/115012926807-Personal-Power-Zones> (last visited Oct. 27, 2019).

¹²⁸ *How Surge Pricing Works*, *supra* note 124.

¹²⁹ Annie Lowrey, *Is Uber’s Surge-Pricing an Example of High-Tech Gouging?*, N.Y. TIMES MAG. (Jan. 10, 2014), https://www.nytimes.com/2014/01/12/magazine/is-ubers-surge-pricing-an-example-of-high-tech-gouging.html?_r=0.

¹³⁰ *How Surge Pricing Works*, *supra* note 124. *See also Id.*

¹³¹ Jonathan Hall et al., *The Effects of Uber’s Surge Pricing: A Case Study*, UBER, <https://eng.uber.com/research/the-effects-of-ubers-surge-pricing-a-case-study/> (last visited Sept. 13, 2019).

¹³² *Id.*

pricing is triggered, thus raising fares.¹³³ The practice has been reported at Ronald Reagan Washington National Airport,¹³⁴ Tampa Bay in Florida,¹³⁵ and New York City.¹³⁶ A driver in Tampa claimed that drivers have been engaging in artificial surge pricing “for a long, long time.”¹³⁷

Surge pricing’s volatility makes the algorithm unpopular among riders, a problem exacerbated when the increase is manipulated by drivers and unconnected to any obvious external trigger.¹³⁸ To riders, surge pricing feels like price gouging.¹³⁹ For “[t]he same service[,] [t]he same amount of time[,] [t]he same trip, if in reverse,” surge pricing has irritated many riders because it raises the price of rides precisely when rides are needed the most.¹⁴⁰ Further, surge pricing’s opaque algorithm generates frustration.¹⁴¹ No one, except the rideshare companies themselves, know exactly how surge pricing works.¹⁴² In fact, surge pricing was so detested in Honolulu, Hawaii, that the city passed an ordinance to ban it.¹⁴³ Supporters of the ordinance

¹³³ Sweeney, *supra* note 122.

¹³⁴ *Id.*

¹³⁵ Caitlin Johnston, *Uber's Low Fares Spark Backlash: Drivers Protest Pay Cuts, Customers May Face Surge Pricing*, TAMPA BAY TIMES (Jan. 15, 2016), <https://www.tampabay.com/news/transportation/ubers-low-fares-spark-backlash-drivers-protest-pay-cuts-customers-may-face/2261405/>.

¹³⁶ Bruce Schneier, *Uber Drivers Hacking the System to Cause Surge Pricing*, SCHNEIER ON SECURITY (Aug. 8, 2017, 9:35 AM), https://www.schneier.com/blog/archives/2017/08/uber_drivers_ha.html.

¹³⁷ Sweeney, *supra* note 122.

¹³⁸ Utpal M. Dholakia, *Why Do Consumers Hate Uber's Surge Pricing?*, PSYCHOL. TODAY (Dec. 8, 2015), <https://www.psychologytoday.com/us/blog/the-science-behind-behavior/201512/why-do-consumers-hate-uber-surge-pricing>.

¹³⁹ *Id.* See also Marcus Wohlsen, *Uber Boss Says Surging Prices Rescue People From the Snow*, WIRED (Dec. 17, 2013), <https://www.wired.com/2013/12/uber-surge-pricing/>.

¹⁴⁰ Lowrey, *supra* note 129.

¹⁴¹ *Id.*

¹⁴² Dholakia, *supra* note 138.

¹⁴³ Jennifer Sinco Kelleher, *Uber Decries Ride-Hailing Price Cap Passed in Honolulu*, AP (June 7, 2018), <https://apnews.com/3203ea475ebf4c268027fe89c74b4f15/Uber-decries-ride-hailing-price-cap-passed-in-Honolulu>. Honolulu Mayor Kirk Caldwell vetoed the measure. Gordon Y.K. Pang, *Honolulu Mayor Vetoes Bill That Caps Uber/Lyft Surge Pricing*, STAR ADVERTISER (June 19, 2018), <https://www.staradvertiser.com/2018/06/19/breaking-news/caldwell-vetoes-bill-that-caps-uberlyft-surge-pricing/>.

complained that surge pricing preys on riders, such as service members returning from sea or intoxicated people.¹⁴⁴

C. Current Developments

Recently, drivers have engaged in high-profile efforts in courts and state legislatures to amend laws around independent contractors.¹⁴⁵ In *Dynamex/AB-5* in California, drivers have aimed to simply reclassify rideshare drivers as employees.¹⁴⁶ Following California's adoption of AB-5, New Jersey¹⁴⁷ and New York¹⁴⁸ are considering similar measures.¹⁴⁹ In *Chamber of Commerce of the United States v. City of Seattle*, drivers sought to gain more power to change the terms of their agreements with rideshare companies.¹⁵⁰ In response, rideshare companies have

¹⁴⁴ *Council approves limits on 'surge pricing' for ride-hailing companies*, HAWAII NEWS NOW (June 6, 2018), <https://www.hawaiinewsnow.com/story/38367767/council-approves-limits-on-price-surgings-for-ride-hailing-companies/>.

¹⁴⁵ In New York City, drivers have also aimed to directly increase their wages through local laws. See N.Y.C., N.Y., ADMIN. CODE § 19-548 (2018); <https://nycadmincode.readthedocs.io/t19/c05/index.html>. See also Notice of Promulgation, N.Y.C. TAXI AND LIMOUSINE COMM'N, https://www1.nyc.gov/assets/tlc/downloads/pdf/driver_income_rules_12_04_2018.pdf.

¹⁴⁶ *Dynamex Operations W. v. Superior Ct.*, 416 P3d 1, 35–36 (Cal. 2018). “Under [the ABC] test, a worker is properly considered an independent contractor to whom a wage order does not apply only if the hiring entity establishes: (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.” See also Noam Scheiber, *Gig Economy Business Model Dealt a Blow in California Ruling*, NY TIMES (Apr. 30, 2018); Susan K. Lessack, *California Adopts Stricter Test for Independent Contractor Status*, PEPPER HAMILTON LLP (May 5, 2019), <https://www.pepperlaw.com/publications/california-adopts-stricter-test-for-independent-contractor-status-2018-05-09/>.

¹⁴⁷ New Jersey's version of California's AB-5 would go beyond that of California by deeming all workers employees for purposes of all state employment laws. S. 4204, 218th Legislature (N.J. 2019), https://www.njleg.state.nj.us/2018/Bills/S4500/4204_I1.HTM (last visited Jan. 23, 2020). S. 4204 has not been enacted. David M. Walsh, *New Jersey Independent Contractor Bill Based on “ABC” Test Has Failed – For Now*, NAT. L. R. (Jan. 23, 2020), <https://www.natlawreview.com/article/new-jersey-independent-contractor-bill-based-abc-test-has-failed-now>; Brent Johnson, *Contentious N.J. Independent Contractors Bill Won't Get Vote Before Session Ends Next Week*, NJ ADVANCE (Jan. 8, 2020), <https://www.nj.com/politics/2020/01/contentious-nj-independent-contractors-bill-wont-get-vote-before-session-ends-next-week.html>.

¹⁴⁸ Keshia Clukey, *N.Y. Governor to Address Gig Worker Status, Legalize Pot*, BLOOMBERG L. (Jan. 8, 2020), <https://news.bloomberglaw.com/daily-labor-report/n-y-governor-to-address-gig-worker-status-legalize-pot>.

¹⁴⁹ These state law changes do not change the definition of independent contractors under federal law. See, e.g., Stephen L. Carter, *California Truck Ruling Exposes Weakness of Gig Economy Law AB5*, BLOOMBERG (Jan. 9, 2020), <https://www.bloomberg.com/opinion/articles/2020-01-09/ab5-california-law-threatens-gig-workers>.

¹⁵⁰ *Chamber of Commerce of the United States v. City of Seattle*, 890 F3d 769 (9th Cir 2018).

forcefully objected to these efforts.¹⁵¹ Uber and Lyft claim that changes to worker classification will negatively affect their business.¹⁵²

In *Dynamex*, the California Supreme Court clarified that the “ABC test” is the appropriate standard in finding whether workers are employees or independent contractors under state wage law.¹⁵³ The plaintiffs worked as Dynamex drivers providing “on-demand, same-day pickup and delivery services.”¹⁵⁴ Prior to 2004, Dynamex classified the drivers as employees.¹⁵⁵ Thereafter, Dynamex reclassified the drivers as independent contractors to reduce expenses.¹⁵⁶ The drivers sued Dynamex asserting that, because they performed essentially the same work as when they were classified as employees, Dynamex misclassified the drivers as independent contractors.¹⁵⁷ Although the California Supreme Court did not directly address the question of whether the drivers were employees or independent contractors, the court concluded that the appropriate standard was the “ABC test.”¹⁵⁸ The ABC test creates a presumption that workers are employees rather than independent contractors unless the hiring entity satisfies a three-part test.¹⁵⁹ An entity must

¹⁵¹ Shirin Ghaffary, *Uber and Lyft Say They Don't Plan to Reclassify Their Drivers as Employees*, VOX (Sept. 11, 2019), <https://www.vox.com/2019/9/11/20861599/ab-5-uber-lyft-drivers-contractors-reclassify-employees>.

¹⁵² Uber SEC Registration Statement, *supra* note 49, at 28 (“If, as a result of legislation or judicial decisions, we are required to classify Drivers as employees . . . we would incur significant additional expenses for compensating Drivers, potentially including expenses associated with the application of wage and hour laws (including minimum wage, overtime, and meal and rest period requirements), employee benefits, social security contributions, taxes, and penalties. Further, any such reclassification would require us to fundamentally change our business model, and consequently have an adverse effect on our business and financial condition.”); Lyft, Inc., Registration Statement (Form S-1) (Mar. 1, 2019), 1, 28, <https://www.sec.gov/Archives/edgar/data/1759509/000119312519059849/d633517ds1.htm> (“A determination in, or settlement of, any legal proceeding, whether we are party to such legal proceeding or not, that classifies a driver of a ridesharing platform as an employee, could harm our business, financial condition and results of operations.”).

¹⁵³ *Dynamex*, 416 P3d at 5, 7.

¹⁵⁴ *Id.* at 8.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 9.

¹⁵⁸ *Id.* at 42.

¹⁵⁹ *Dynamex*, 416 P3d at 7.

establish that a worker (1) is free from its control, (2) performs work outside the usual course of its business, and (3) is engaged in an independent trade or business.¹⁶⁰

The decision, however, has been superseded by a new statute. Signed into law in September 2019, California's AB-5¹⁶¹ purports to codify the California Supreme Court's decision in *Dynamex*. AB5 "creates a presumption that a worker who performs services for a hirer is an employee for purposes of claims for wages and benefits arising under wage orders," unless the worker is shown to be an independent contractor under the ABC test.¹⁶² In response to AB5's enactment, Uber and Lyft are pursuing several strategies. First, Uber claims that it is still able to pass the ABC test because the work of driving is outside the scope of Uber's business which is serving as a technology platform, not as a transportation company.¹⁶³ Second, Uber and Lyft refuse to classify its drivers as employees.¹⁶⁴ Third, Uber has changed its app to relinquish more control to drivers.¹⁶⁵ Finally, Uber and Lyft are promoting a 2020 ballot initiative to expressly exempt themselves from AB5.¹⁶⁶

¹⁶⁰ *Id.*

¹⁶¹ *AB-5 Worker status: employees and independent contractors (2019-2020)*, CALIF. LEGIS. INFO. <https://legiscan.com/CA/text/AB5/2019> (last visited Oct. 28, 2019).

¹⁶² AB-5, 2019–2020 Leg., Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5

¹⁶³ Tony West, *Update on AB5*, UBER (Sept. 11, 2019), <https://www.uber.com/newsroom/ab5-update/>. See also Ghaffary, *supra* note 151 ("A spokesperson for Lyft similarly told Recode that the company has no immediate plans to reclassify its drivers.").

¹⁶⁴ Scott Rodd, *Uber, Lyft, Postmates Refuse to Comply with California Gig Economy Law*, NPR (Jan. 4, 2020), <https://www.npr.org/2020/01/04/793142903/as-california-tries-to-make-contract-workers-employees-industries-push-back>.

¹⁶⁵ Faiz Siddiqui, *Uber's Secret Project to Bolster Its Case Against AB5, California's Gig-Worker Law*, WASH. POST (Jan. 6, 2020), <https://www.washingtonpost.com/technology/2020/01/06/ubers-secret-project-bolster-its-case-against-ab-californias-gig-worker-law/>. These changes to the Uber app allow drivers to view estimated fares before accepting rides and to reject trips without penalties

¹⁶⁶ Sebastian Herrera, *Uber, Lyft Unveil Ballot Initiative to Counter California Gig-Economy Law*, WALL STREET J. (Oct. 29, 2019), <https://www.wsj.com/articles/uber-lyft-unveil-ballot-initiative-to-counter-california-gig-economy-law-11572386291>.

Unlike Dynamex/AB5, which established the standard for classifying workers, *Chamber of Commerce* addressed the question of whether a local law, Ordinance 124968,¹⁶⁷ violated federal antitrust law.¹⁶⁸ Through the ordinance’s prescribed collective bargaining process, drivers and rideshare companies could negotiate equipment standards, behaviors, background checks, payments, hours, and other work conditions.¹⁶⁹ The plaintiff, the Chamber of Commerce, argued that “the Ordinance violates, and is preempted by [the Sherman Antitrust Act] because the Ordinance sanctions price-fixing of ride-referral service fees by private cartels of independent-contractor drivers.”¹⁷⁰ The district court granted the City’s motion to dismiss because it concluded the City was immune from preemption.¹⁷¹ The Ninth Circuit, however, reversed and remanded, holding that the Ordinance did not meet the requirements for state-action immunity.¹⁷² To date, neither the district court nor the Ninth Circuit has addressed the underlying question of whether the ordinance violates federal antitrust law.¹⁷³

III. Rideshare Drivers’ Collective Actions Are Not Protected Under Antitrust Law¹⁷⁴

¹⁶⁷ Seattle, Wash., Ordinance 124968 (Dec. 14, 2015), http://clerk.seattle.gov/~legislativeItems/Ordinances/Ord_124968.pdf. See also SEATTLE, WASH., CODE § 6.310.110; § 6.310.735.

¹⁶⁸ Edward Gaus, “*Gig Economy*” Scores a Victory in Ninth Circuit Antitrust Case, A.B.A. (May 22, 2018), <https://www.americanbar.org/groups/litigation/committees/mass-torts/practice/2018/us-chamber-of-commerce-v-city-of-seattle/>.

¹⁶⁹ SEATTLE, WASH., CODE § 6.310.735(H).

¹⁷⁰ *Chamber of Commerce*, 890 F3d at 775.

¹⁷¹ *Chamber of Commerce of the United States v. City of Seattle*, 274 F. Supp 3d 1155, 1169 (W.D. Wash. 2017).

¹⁷² *Chamber of Commerce*, 890 F3d at 779–780.

¹⁷³ *Diva Limousine, Ltd. v. Uber Tech., Inc.*, No. 18-cv-05546-EMC, 2019 U.S. Dist. LEXIS 4274, at *27 (N.D. Cal. Jan. 9, 2019).

¹⁷⁴ In *Diva Limousine, Ltd. v. Uber Tech., Inc.*, 392 F Supp 3d 1074, 1091 (N.D. Cal. 2019), plaintiffs argued that Uber misclassifies its drivers as independent contractors, and that this misclassification violates antitrust law. Recently, Diva dropped the lawsuit. Kathleen Dailey & Erin Mulvaney, *Car Service Gets OK to Drop Antitrust Suit Against Uber*, BLOOMBERG LAW (Oct. 24, 2019), <https://news.bloomberglaw.com/daily-labor-report/car-service-gets-ok-to-drop-unfair-competition-suit-against-uber>.

Antitrust law does not shield rideshare drivers from liability for artificial surge pricing because drivers are independent contractors¹⁷⁵ engaging in a practice in restraint of trade within the meaning of the Sherman Act,¹⁷⁶ Clayton Act,¹⁷⁷ and the Federal Trade Commission (FTC) Act.¹⁷⁸ Federal antitrust laws prohibit “cartels, price fixing, and other combinations or practices that undermine the free market.”¹⁷⁹ Collective activities by workers to improve their pay may violate antitrust laws unless they fall within an exemption.¹⁸⁰ The Clayton Act¹⁸¹ and the Norris-LaGuardia Act¹⁸² provide labor exemptions from antitrust law. These laws, however, exclude collective action by independent contractors under the labor exemptions.¹⁸³ The FTC Act supplements and bolsters the Sherman Act and the Clayton Act.¹⁸⁴ Congress empowered the FTC with “regulatory and quasi-judicial authority”¹⁸⁵ “to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.”¹⁸⁶

The principal federal antitrust law, the Sherman Act aims to promote market competition by barring unreasonable restraints of trade or commerce.¹⁸⁷ The Sherman Act provides that

¹⁷⁵ Courts will likely defer to the NLRB’s determination that Uber drivers are independent contractors. *See* discussion *infra* Section II(A)(1). Separately, surge pricing arguably falls out of the scope of antitrust law because transportation services are not commodities within the meaning of the Robinson-Patman Act. *See* Keyawna Griffith, Note, *The Uber Loophole That Protects Surge Pricing*, 26 VA. J. SOC. POL’Y & L. 34, 36–38 (2019). But this comment focuses on antitrust implications because drivers are independent contractors engaging in the restraint of trade under the Sherman Act and the FTC Act.

¹⁷⁶ 15 U.S.C. §§ 1–38.

¹⁷⁷ 15 U.S.C. §§ 12–27.

¹⁷⁸ 15 U.S.C. §§ 41–58.

¹⁷⁹ N.C. State Bd. of Dental Examiners v. FTC, 574 US 494, 502 (2015).

¹⁸⁰ Lao, *supra* note 18, at 1546.

¹⁸¹ 15 U.S.C. § 17.

¹⁸² Columbia Riv. Packers Ass’n. v. Hinton, 315 U.S. 143, 143–44 (1942).

¹⁸³ Lao, *supra* note 18, at 1560–61.

¹⁸⁴ FTC v. Motion Picture Adv. Serv. Co., 344 U.S. 392, 394 (1953). *See also* FTC v. Cement Inst., 333 U.S. 683, 692 (1948).

¹⁸⁵ Craig Ganter, Note, *Disclosing Under the Influencer: How the FTC Fails to Guide Advertisers and Protect Consumers in Social Media “Influencer” Marketing*, RUTGERS U.L. REV. COMMENTS 47, 49 (2019), http://www.rutgerslawreview.com/wp-content/uploads/2019/01/Ganter_Commentary_Spring_2019-1.pdf.

¹⁸⁶ 15 U.S.C. § 45(a)(2).

¹⁸⁷ Lao, *supra* note 18, 1558.

“[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.”¹⁸⁸

In the Sherman Act’s early years, courts held that union labor activities were unlawful restraints of trade when a union's conduct or objectives were deemed “socially or economically harmful.”¹⁸⁹

Disagreeing with the courts’ enforcement of the Sherman Act against labor activities, Congress enacted the Clayton Act.¹⁹⁰ The Clayton Act declares that “[t]he labor of a human being is not a commodity or article of commerce.”¹⁹¹ The law expressly provides that activities by labor organizations “instituted for the purposes of mutual help” do not violate antitrust law.¹⁹² Labor organizations must be “bona fide,” which means combinations of employees, not independent contractors.¹⁹³

Enacted twenty years after the Clayton Act, the Norris-LaGuardia Act aimed to strengthen the Sherman Act and the Clayton Act by providing that courts may not enjoin labor activities that are lawful under those statutes.¹⁹⁴ In cases applying the Norris-LaGuardia Act, the Supreme Court has held that antitrust law does not permit collective activities in restraint of trade by independent entrepreneurs or independent contractors.¹⁹⁵ The Norris-LaGuardia Act prevents any federal court from having

jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or

¹⁸⁸ 15 U.S.C. § 1.

¹⁸⁹ Duplex Printing Press Co. v. Deering, 254 U.S. 443, 485 (1921) (Brandeis, J., dissenting).

¹⁹⁰ Lao, *supra* note 18, at 1559.

¹⁹¹ 15 U.S.C. § 17.

¹⁹² *Id.* See also H. A. Artists & Assoc. v Actors' Equity Ass'n, 451 U.S. 704, 713 (1981).

¹⁹³ *H. A. Artists*, 451 U.S. at 717 n. 20 (1981) (actors' agents were considered a labor group). The Supreme Court also held that labor unions acting in their self-interest and not in combination with nonlabor groups enjoy a statutory exemption from Sherman Act liability. *United States v. Hutcheson*, 312 U.S. 219, 232 (1941).

¹⁹⁴ See *Hutcheson*, 312 U.S. at 235–237. Despite the Sherman Act and the Clayton Act, courts routinely held that labor activities were unlawful under antitrust law. Daniel Belke, Note, *Blitzing Brady: Should Section 4(A) of the Norris-LaGuardia Act Shield Management from Injunctions in Labor Disputes?*, 113 COLUM. L. REV. 53, 60–61 (2013).

¹⁹⁵ *Columbia Riv. Packers Ass'n. v. Hinton*, 315 U.S. 143, 146–47 (1942); *L.A. Meat & Provision Drivers Union v. United States*, 371 U.S. 94, 102–103 (1962).

persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts: (a) Ceasing or refusing to perform any work or to remain in any relation of employment; (b) Becoming or remaining a member of any labor organization or of any employer organization . . . (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute¹⁹⁶

In *Columbia River Packers Ass'n v. Hinton*, the Supreme Court posited that the Norris-LaGuardia Act focused on labor disputes between employers and employees.¹⁹⁷ Because the respondents were independent entrepreneurs, not employees, the federal courts had jurisdiction to issue an injunction against their collective efforts to monopolize the regional fish industry.¹⁹⁸ In *Los Angeles Meat & Provision Drivers Union, Local 626 v. United States*, the Supreme Court similarly concluded that the federal courts had jurisdiction to dissolve an “illegal combination between businessmen and a union to restrain commerce.”¹⁹⁹ Although the independent entrepreneurs joined what they described as a “union,” they were not immune from antitrust law because their case did not arise from labor dispute.²⁰⁰

Because the antitrust labor exemption does not extend to independent contractors, the FTC has brought enforcement actions against independent contractors for collectively organizing to increase their wages.²⁰¹ For example, in *FTC v. Superior Ct. Trial Lawyers Ass'n*, the Supreme Court held that independent lawyers’ collective activities constituted “a ‘naked restraint’ on price and output.”²⁰² The lawyers in that case agreed to boycott the District of Columbia government to increase their public defense fees.²⁰³ Although the court did not discuss the antitrust labor exemption, the lawyers’ collective activities would have been immune if the lawyers were

¹⁹⁶ 29 U.S.C. § 104.

¹⁹⁷ *Hinton*, 315 U.S. at 145.

¹⁹⁸ *Id.* at 143, 147.

¹⁹⁹ *L.A. Meat*, 371 U.S. at 102.

²⁰⁰ *Id.* at 101–102.

²⁰¹ Lao, *supra* note 18, at 1558–9, 1562–1563. *See also Id.* at 1562 n. 88.

²⁰² *FTC v. Superior Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990).

²⁰³ *Id.* at 418.

employees rather than independent entrepreneurs.²⁰⁴ As another example, in *United States v. Fed'n. of Physicians & Dentists, Inc.*, the U.S. Government alleged that independent physicians impermissibly acted together to prevent a fee decrease.²⁰⁵ The district court's final judgment expressly distinguished the physicians from unionized employees who may lawfully exercise their right to organize as protected by the NLRA.²⁰⁶

IV. Artificial Surge Pricing Likely Violates Antitrust Law as Price-Fixing

Collusion among competitors is “the supreme evil of antitrust.”²⁰⁷ Under the Sherman Act, an agreement between competitors to raise, depress, or fix the price of a commodity in interstate or foreign commerce is illegal per se.²⁰⁸ Such unlawful price-fixing is also prohibited under the FTC Act.²⁰⁹ Because rideshare drivers are independent contractors whose actions fall outside the scope of antitrust labor exemptions, they are likely engaging in unlawful price-fixing when they work together to trigger surge pricing.²¹⁰ Since rideshare companies set surge prices, which drivers then manipulate, both rideshare companies and drivers will probably be vulnerable to litigation, including charges brought by the FTC.

A. What Is Price-Fixing?

Generally, most collective activities “aimed at affecting prices” constitute price-fixing, unless an exemption applies.²¹¹ Antitrust law recognizes two types of price-fixing: horizontal and

²⁰⁴ Lao, *supra* note 18, at 1562.

²⁰⁵ *United States v. Fed'n. of Physicians & Dentists, Inc.*, 63 F Supp 2d 475, 477 (D. Del. 1999).

²⁰⁶ *United States v. Fed'n. of Physicians & Dentists, Inc.*, No. CA 98-475 JFJ, 2002 US Dist LEXIS 22527, at *12 (D. Del. Nov. 5, 2002).

²⁰⁷ *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

²⁰⁸ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

²⁰⁹ *Eugene Dietzgen Co. v. FTC*, 142 F.2d 321 (7th Cir.), *cert. denied*, 323 U.S. 730 (1944).

²¹⁰ The focus of this Comment is unlawful price-fixing under 15 U.S.C. § 1 rather than unlawful price-gouging under 15 U.S.C. § 13(a). Because transportation services are not commodities, artificial surge pricing is unlikely price-gouging under 15 U.S.C. § 13(a). See *Ambook Enterprises v. Time, Inc.*, 612 F.2d 604, 609–10 (2d Cir. 1979), *cert. dismissed*, 448 U.S. 914 (1980).

²¹¹ Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 977 (2016). See also *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 423 (collective action by independent

vertical.²¹² Horizontal price-fixing agreements between independent competitors that dampen output or competition to raise prices are per se unlawful.²¹³ These agreements are per se unlawful because they are likely to produce anticompetitive effects.²¹⁴ To prove horizontal price-fixing, the plaintiff must show: (1) an agreement or conspiracy, (2) among actual competitors, (3) “with the purpose or effect of ‘raising, depressing, fixing, pegging, or stabilizing the price of a commodity’ (4) in interstate or foreign commerce.”²¹⁵ An explicit agreement or circumstantial evidence establishing conspiratorial conduct may satisfy the first element.²¹⁶ But “conscious parallel business behavior, standing alone, is insufficient to prove conspiracy.”²¹⁷

In contrast, because vertical price-fixing agreements between manufacturers and distributors or retailers may have pro-competitive effects, they are subject to the “rule of reason.”²¹⁸ In *Leegin Creative Leather Prods. v. PSKS, Inc.*, the Supreme Court endorsed the rule of reason as the standard for determining whether a vertical trade-restraining practice violates the Sherman Act.²¹⁹ The rule compares harmful, anticompetitive restraints with consumer-benefiting, pro-competitive restraints.²²⁰ The “rule of reason” test is highly fact-specific.²²¹ Courts must

lawyers constituted price-fixing); Fed. Trade Comm'n v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986) (collective action by independent dentists); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978); Spence v. Se. Alaska Pilots' Ass'n, 789 F. Supp. 1007, 1010 (D. Alaska 1990) (antitrust analysis involving association representing independent contractor pilots).

²¹² Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1219 (2008).

²¹³ *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 893 (2007); *Superior Ct. Trial Lawyers Ass'n.*, 493 U.S. at 423.

²¹⁴ *Natl. Coll. Athletic Ass'n. v Bd. of Regents*, 468 U.S. 85, 100 (1984).

²¹⁵ *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1361 (10th Cir 1989).

²¹⁶ *Loew's, Inc. v. Cinema Amusements, Inc.*, 210 F.2d 86, 93 (10th Cir.), *cert. denied*, 347 U.S. 976 (1954).

²¹⁷ *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954).

²¹⁸ *Leegin*, 551 U.S. at 882.

²¹⁹ *Id.* at 885–86.

²²⁰ *Id.* at 886.

²²¹ *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).

consider factors such as “specific information about the relevant business,” “the restraint's history, nature, and effect,” and “[w]hether the businesses involved have market power.”²²²

Vertical price-fixing inquiries focus on whether minimum-pricing agreements between manufacturers and retailers or distributors may benefit consumers.²²³ On one hand, vertical price-fixing may generate competition “among manufacturers selling different brands of the same type of product.”²²⁴ Consumers benefit by gaining more options.²²⁵ On the other hand, vertical price-fixing could incentivize collusion to fix and set higher prices to generate greater profits for retailers.²²⁶

B. Rideshare Pricing as Illegal Price-Fixing

Although courts have not yet directly addressed the question of whether surge pricing, artificial or not, constitutes illegal price fixing, legal challenges to the practice may succeed if certain facts suggested in media reports on surge pricing are found to be true.²²⁷ To prevail on a claim of horizontal price-fixing, the FTC or other plaintiffs must prove, at minimum, that drivers as competitors agreed among themselves to raise fares.²²⁸ Presumably, that alone establishes liability. In contrast, to prevail on a claim of vertical price-fixing, the FTC or other plaintiffs carry the initial burden of showing that the agreement between rideshare companies and drivers has anticompetitive effects on the market, such as reducing output and increasing price.²²⁹ If the plaintiffs succeed, however, then the burden shifts to the defendant to show that the agreement has procompetitive effects.²³⁰ If the defendant meets this burden, then burden shifts back to the

²²² *Leegin*, 551 U.S. at 885–86.

²²³ *See id.* at 890.

²²⁴ *Id.*

²²⁵ *Id.* at 890.

²²⁶ *Id.* at 893.

²²⁷ *See* discussion *infra* Section II(B).

²²⁸ *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1361 (10th Cir. 1989).

²²⁹ *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018).

²³⁰ *Id.*

plaintiff to show that the procompetitive effects “could be reasonably achieved through less anticompetitive means.”²³¹

In terms of a horizontal price-fixing claim, the FTC or other plaintiffs are likely to succeed. In Tampa, Florida, more than fifty drivers gathered to protest Uber’s reduced pay.²³² During the rally, passengers were unable to request rides, which could have then triggered surge pricing.²³³ Like the *SCTLA* lawyers who boycotted the District of Columbia to increase their pay,²³⁴ the drivers also refused to work to demand better wages. Similarly, at Reagan National Airport in Washington, D.C., fifty drivers for Uber and Lyft parked in the waiting area and turned off their apps, while two drivers monitored surge prices on the apps.²³⁵ Once the prices reached a certain level, all drivers were told to turn their apps back on to take advantage of the surge pricing. Additionally, drivers may also be using online forums to collectively plan surge-pricing.²³⁶ Evidence of drivers organizing a rally, cooperating at airport waiting areas, or communicating via the Internet to plan surge events may overcome the counterargument that the drivers merely engaged in parallel behavior. Therefore, if drivers are found to have agreed to shut off their apps at the same time to raise prices, then a court may conclude that the drivers engaged in horizontal price-fixing.

In contrast to a horizontal price-fixing claim, a vertical price-fixing claim will likely be more challenging. Uber, as the app creator, fixes prices that drivers agree to charge riders.²³⁷ Because vertical price-fixing requires a rule of reason analysis, the court will balance the pricing

²³¹ *Id.*

²³² Johnston, *supra* note 135.

²³³ *See id.*

²³⁴ *Superior Ct. Trial Lawyers Ass’n.*, 493 U.S. at 428 (“Respondents’ concerted action in refusing to accept further CJA assignments until their fees were increased was thus a plain violation of the antitrust laws.”).

²³⁵ Zetlin, *supra* note 12.

²³⁶ Cara McGoogan, *Uber Drivers Gang Up to Cause Surge Pricing, Research Says*, THE TELEGRAPH (Aug. 2, 2017), <https://www.telegraph.co.uk/technology/2017/08/02/uber-drivers-gang-cause-surge-pricing-research-says/>.

²³⁷ First Am. Compl. at 1 ¶ 2, *Meyer v. Kalanick*, 2016 U.S. Dist. LEXIS 82519.

system's procompetitive and anticompetitive effects. The court will first inquire whether surge pricing reduces output and whether it increases fare prices above the prices otherwise found in the market.²³⁸ On one hand, surge pricing may be anticompetitive because it increases prices, and Uber's pricing system generally discourages drivers from competing with each other.²³⁹ Surge prices, however, may not be higher than consumers would expect to find in the market because regular rideshare prices are artificially low.²⁴⁰ On the other hand, surge pricing may be procompetitive because it increases customer choices. When prices are high, other forms of transportation, such as taxis,²⁴¹ public transportation,²⁴² or other ridesharing apps,²⁴³ might be more attractive. Uber and Lyft's prices might actually encourage new apps to enter the market, creating more affordable consumer options.²⁴⁴

Meyer v. Kalanick may be the first case on point to explore the theory that surge pricing constitutes price-fixing.²⁴⁵ In this case, Spencer Meyer, an Uber user on behalf of himself and

²³⁸ Ohio v Am. Express Co. 138 S. Ct. 2274, 2288 (2018).

²³⁹ First Am. Compl. at 15 ¶ 56, Meyer v. Kalanick, 2016 U.S. Dist. LEXIS 82519.

²⁴⁰ Ginia Bellafante, *Why Your Uber Ride Can Cost as Much as a Plane Ticket*, NY TIMES (Jan. 3, 2020), <https://www.nytimes.com/2020/01/03/nyregion/uber-lyft-price.html>.

²⁴¹ Taxis may welcome surge pricing because it reduces rideshare's price advantage. In several cases, taxi drivers have sued rideshare companies on antitrust grounds. See Phila. Taxi Ass'n. v. Uber Tech., 886 F3d 332, 338 (3d Cir 2018) (alleging attempted monopolization); Malden Transp., Inc. v. Uber Tech., Inc., 321 F Supp 3d 174, 178 (D. Mass. 2018) (alleging attempted monopolization and predatory pricing); MacCausland v. Uber Tech., Inc., 312 F Supp 3d 209, 212–213 (D Mass 2018) (alleging attempted monopolization and predatory pricing); Miadeco Corp. v. Uber Tech., No. 15-20356-CIV, 2017 U.S. Dist. LEXIS 49410, *14–15 (S.D. Fla. Mar. 30, 2017) (alleging predatory pricing); DeSoto Cab Co. v Uber Tech., Inc., No. 16-cv-06385-JSW, 2018 U.S. Dist. LEXIS 226261, *13 (N.D. Cal. Sep. 24, 2018) (alleging monopolization and attempted monopolization).

²⁴² Harry Campbell, *Would Uber Be Better Without Surge Pricing?*, FORBES (Aug. 5, 2015), <https://www.forbes.com/sites/harrycampbell/2015/08/05/would-uber-be-better-without-surge-pricing/#433c9cc550de>.

²⁴³ *Even in Bad Weather, Weekends or Outside of That Concert Stadium, You'll Never Have to Pay More Than the Baseline for These 7 Ridesharing Apps*, USA TODAY (Dec. 26, 2015), <https://www.usatoday.com/story/travel/roadwarriorvoices/2015/12/26/7-alternatives-to-uber-and-lyft-that-dont-have-surge-pricing/83073422/>.

²⁴⁴ See Jessi Hempel, *Uber and Lyft's Never-Ending Quest to Crush Price Comparison Apps*, WIRED (July 11, 2018), <https://www.wired.com/story/uber-and-lyfts-never-ending-quest-to-crush-price-comparison-apps/>.

²⁴⁵ Meyer v. Kalanick, 174 F. Supp 3d 817 (S.D.N.Y. 2016).

others similarly situated, alleged that Travis Kalanick, Uber's CEO and co-founder,²⁴⁶ violated the Sherman Act.²⁴⁷ Meyer claimed that Kalanick himself "orchestrated and facilitated an illegal price-fixing conspiracy" with Uber drivers.²⁴⁸ On a motion to dismiss for failure to state a claim, the district court ruled that Meyer's complaint plausibly alleged that Kalanick and Uber engaged in both horizontal and vertical price-fixing.²⁴⁹ In terms of horizontal price-fixing, Meyer might have a strong case. Meyer alleged that drivers worked together to decrease output by "stay[ing] offline with UberX during non-surge times to trigger surges and thus obtain artificially increased fares."²⁵⁰ The court found that these alleged facts can plausibly show that drivers conspired to decrease output and reduce competition to increase price.²⁵¹ As a threshold matter, however, Meyer must prove conspiracy as an element of horizontal price-fixing.²⁵² Kalanick reasonably pointed out that Meyer has not demonstrated any agreements among drivers.²⁵³ Kalanick contended that drivers independently agreed to use Uber's pricing system, which does not sufficiently show conspiracy.²⁵⁴ As to whether drivers agreed to act together to raise fares, Meyer only stated that Uber organized "partner appreciation" events where drivers could meet.²⁵⁵ Without more evidence, it is unclear whether Meyer can prove conspiracy by a large workforce with high turnover rates.

²⁴⁶ Uber was later joined as a Fed. R. Civ. P. 19(a) necessary party. Meyer v. Kalanick, 15 Civ. 9796, 2016 U.S. Dist. LEXIS 82519, at *9 (S.D.N.Y. June 19, 2016).

²⁴⁷ Meyer, 174 F. Supp 3d at 819–820.

²⁴⁸ *Id.*

²⁴⁹ Peter Mazer, *Gig Economy: The Case for Local Regulation of Ride Apps*, LAW360 (May 3, 2016), <https://www.law360.com/articles/785104/gig-economy-the-case-for-local-regulation-of-ride-apps>.

²⁵⁰ *Id.* at 16 ¶ 60.

²⁵¹ See Meyer, 174 F. Supp 3d at 825–825.

²⁵² Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F2d 1357, 1361 (10th Cir 1989).

²⁵³ Meyer, 174 F. Supp 3d at 823.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 821.

The district court denied the motion to dismiss because Meyer “adequately pled both a horizontal and a vertical conspiracy.”²⁵⁶ Subsequently, Kalanick and Uber moved to compel arbitration, which the district court denied.²⁵⁷ The Second Circuit reversed and granted Kalanick’s motion to compel arbitration.²⁵⁸ Thus, while courts have never fully considered whether Uber or Uber’s drivers’ collective actions constituted price fixing, we may soon get a resolution. As of October 2019, an arbitrator will hear arguments concerning whether Uber’s surge pricing violates antitrust law in this case.²⁵⁹ Regardless of the outcome in this case, the FTC could still bring charges. In the meantime, rideshare companies could also improve their ability to detect and stamp out artificial surge pricing, which could prospectively reduce legal risk.

V. How to Decrease or Prevent Artificial Surge Pricing to Avoid Antitrust Liability

To reduce litigation or regulatory risks associated with surge pricing,²⁶⁰ rideshare companies should voluntarily adopt policies aimed at preventing or disincentivizing artificial surge pricing. Specifically, rideshare companies should increase driver compensation because drivers engage in artificial surge pricing to generate more income.²⁶¹ Rideshare companies could increase pay, provide benefits, give drivers the option of working as an employee, or any combination of

²⁵⁶ *Meyer*, 174 F. Supp 3d at 822.

²⁵⁷ *Meyer v. Kalanick*, 199 F. Supp 3d 752 (S.D.N.Y. 2016).

²⁵⁸ *Meyer v. Kalanick*, 291 F. Supp 3d 526 (S.D.N.Y. 2018), on remand from *Meyer v. Uber Tech., Inc.*, 868 F3d 66 (2d Cir 2017) (reversing district court’s denial of defendant’s motion to compel arbitration of plaintiff, a rider suing Uber for engaging in illegal price fixing).

²⁵⁹ Aaron Gordon, *The Legal Argument That Could Destroy Uber Is About To Be Tested*, JALOPNIK (Sept. 19, 2019), <https://jalopnik.com/the-legal-argument-that-could-destroy-uber-is-about-to-1838255672>; Edward Ongweso Jr., *This Case Will Decide If Uber’s Surge Pricing Is Illegal*, VICE (Sept. 23, 2019), https://www.vice.com/en_us/article/d3adbv/this-case-will-decide-if-ubers-surge-pricing-is-illegal.

²⁶⁰ Uber SEC Registration Statement, *supra* note 49, at 64 (“Furthermore, our pricing model has been the subject of litigation and regulatory inquiries related to, among other things, the calculation of and statements regarding consumer fares and Driver earnings (including rates, fees, surcharges, and tolls), as well as the use of surge pricing during emergencies and natural disasters. As a result, we may be forced to change our pricing model in certain jurisdictions, which could harm our revenue or result in a sub-optimal tax structure.”).

²⁶¹ See discussion *infra* Section II(B)(2).

these possibilities. This approach will also likely generate other benefits, such as reducing turnover and ensuring quality service.²⁶²

Increasing driver compensation will directly address drivers' dissatisfaction with their earnings. Rideshare companies could offer a minimum wage, such as the \$21 per hour rate that Uber and Lyft have proposed;²⁶³ increase the percentage that drivers take from fares;²⁶⁴ and increase bonuses based on performance.²⁶⁵ Uber and Lyft have also proposed offering drivers stock,²⁶⁶ which would not immediately provide cash.²⁶⁷

A significant benefit of increasing compensation is permitting rideshare companies to continue partnering with drivers as independent contractors rather than employees. For drivers, working as independent contractors is appealing precisely because of the flexibility.²⁶⁸ “[D]rivers change their work schedules from week to week, from day to day, and even from hour to hour.”²⁶⁹

²⁶² Jennifer Calfas, *Uber Just Admitted That Its Pay Policy Will Make Drivers Even More Unhappy. Here's How That Could Affect Your Future Rides*, CNN (Apr. 15, 2019), <http://money.com/money/5641753/uber-pay-policy-drivers-unhappy-riders/>.

²⁶³ Billy Binion, *Uber and Lyft Offer Drivers a \$21 Minimum Wage. California Lawmakers Say It's Not Enough*, REASON (Sept. 6, 2019), <https://reason.com/2019/09/06/uber-and-lyft-offer-drivers-a-21-minimum-wage-california-labor-activists-say-its-not-enough/>.

²⁶⁴ Eric Reed, *How Much Do Uber and Lyft Drivers Make in 2019?*, THE STREET (Oct. 24, 2019), <https://www.thestreet.com/personal-finance/education/how-much-do-uber-lyft-drivers-make-14804869> (“At time of writing Uber takes 30% of each fare for its operational costs. Lyft's platform fee varies, but is typically around 20% plus sales tax.”).

²⁶⁵ Uber SEC Registration Statement, *supra* note 49, at 14–15. (“In the United States, each qualifying Driver will receive a Driver appreciation reward in an amount equal to \$100, \$500, \$1,000, or \$10,000, based on the number of lifetime Trips completed by the qualifying Driver.”); *Ride Challenges*, LYFT, <https://help.lyft.com/hc/en-us/articles/360001943867-Ride-Challenges> (last visited Oct. 31, 2019). (“Ride Challenges allow you to earn more by completing a certain amount of rides in a set amount of time.”).

²⁶⁶ *Id.* at 15 (“At our request, the underwriters have reserved up to [] shares of common stock, or up to []% of the shares offered by this prospectus, for sale at the initial public offering price through a directed share program to certain qualifying Drivers in the United States. To qualify for the directed share program, a Driver must meet the minimum criteria for the Driver appreciation reward.”). *See also* Sainato, *supra* note 8.

²⁶⁷ Drivers may not accept rideshare stocks, which are currently trading low. Esha Day, *Uber and Lyft Analysts Look the Other Way as the Stocks Crater*, BLOOMBERG (Oct. 4, 2019), <https://www.bloomberg.com/news/articles/2019-10-04/uber-lyft-analysts-look-the-other-way-while-their-stocks-crater>.

²⁶⁸ M. Keith Chen et al., *The Value of Flexible Work: Evidence from Uber Drivers*, J. OF POL. ECON., 1, 5 (2019); Harry Campbell, *Uber Drivers Just Want to Be Free*, *supra*, note 97; Bowman, *supra* note 38.

²⁶⁹ Chen, *supra* note 268, at 16.

Drivers can work around family and childcare obligations, rather than the reverse.²⁷⁰ Drivers can supplement their income through rideshare.²⁷¹ For rideshare companies, preserving the independent contractor business model may help them avoid having to exert more control over the workforce, such as requiring certain work hours.²⁷²

While increasing compensation would address one major area of driver dissatisfaction, this approach may still be unsatisfactory for drivers. For example, increasing pay would not address the array of benefits that drivers want,²⁷³ such as healthcare²⁷⁴ and reimbursements for vehicle and maintenance expenses.²⁷⁵ Of course, rideshare companies could provide these benefits, which Uber and Lyft have offered.²⁷⁶ Uber and Lyft have also proposed “forming a new driver association, in partnership with state lawmakers and labor groups, to represent drivers’ interests and administer the sorts of benefits that meet their highly individual needs.”²⁷⁷ The costs of increasing pay and providing benefits, however, could be passed on to riders²⁷⁸ and further

²⁷⁰ Gretchen Frazee, *Why Uber and Lyft Drivers Are Going on Strike*, PBS (May 7, 2019), <https://www.pbs.org/newshour/economy/why-uber-and-lyft-drivers-are-going-on-strike>.

²⁷¹ Dara Khosrowshahi et al., *Open Forum: Uber, Lyft Ready to Do Our Part for Drivers*, SF CHRON. (June 12, 2019), <https://www.sfchronicle.com/opinion/openforum/article/Open-Forum-Uber-Lyft-ready-to-do-our-part-for-13969843.php>.

²⁷² Shirin Ghaffary, *Some Uber and Lyft Drivers Say They Were Misled into Petitioning Against Their Own Worker Rights*, VOX (June 27, 2019), <https://www.vox.com/recode/2019/6/27/18759387/uber-lyft-drivers-misled-companies-political-campaign>.

²⁷³ Hamilton Nolan, *Uber and Lyft Drivers Say They Want to Change Ridesharing's 'Predatory Business Model'*, SPLINTER (Sept. 5, 2019), <https://splinternews.com/uber-and-lyft-drivers-say-they-want-to-change-rideshari-1837844909>.

²⁷⁴ Christina Farr, *Who's Responsible for Your Uber Driver's Health Coverage?*, NPR (Oct. 11, 2015), <https://www.npr.org/sections/health-shots/2015/10/11/447157698/who-s-responsible-for-your-uber-driver-s-health-coverage>.

²⁷⁵ Judy Lin, *Despite Concessions, Worries Remain Over Gig Economy Bill*, COMSTOCK (Sept. 6, 2019), <https://www.comstocksmag.com/calmmatters/despite-concessions-worries-remain-over-gig-economy-bill>.

²⁷⁶ Khosrowshahi, *supra* note 271; *Stand Up for Drivers and Ridesharing*, UBER, <https://p2a.co/H9ggttWA> (last visited Oct. 31, 2019).

²⁷⁷ *Id.* See also Kari Paul, *California Uber and Lyft Drivers Rally for Bill Granting Rights to Contract Workers*, THE GUARDIAN (Aug. 27, 2019), <https://www.theguardian.com/us-news/2019/aug/27/california-uber-and-lyft-drivers-rally-for-bill-granting-rights-to-contract-workers>.

²⁷⁸ Gaby Del Valle, *Uber Prices in NYC Are About to Go Up, Because Drivers Are Getting a Wage Hike*, VOX (Feb. 1, 2019), <https://www.vox.com/the-goods/2019/2/1/18207332/uber-nyc-price-increase-wage-law>. See also Lao, *supra* note 18, at 1569.

endanger the companies' profitability.²⁷⁹ Still, the rideshare industry may be able to absorb these costs.²⁸⁰

Going a step farther than increasing pay and offering benefits, rideshare companies could also offer drivers a choice to work as an independent contractor or an employee. Instacart, an online grocery shopping and delivery app,²⁸¹ illustrates how this could work.²⁸² In 2015, Instacart allowed its grocery shoppers to work as independent contractors or employees.²⁸³ Additionally, in 2019, Instacart began to offer a menu of benefits to all its workers, such as student loan assistance and personal injury insurance.²⁸⁴ Instacart's independent contractors can work as much as they want, while employees may work up to twenty-nine hours a week.²⁸⁵ Instacart says that, although its employees are more expensive than independent contractors, "this change improved the quality and efficiency of order picking and made for a better customer experience."²⁸⁶ The change also allowed Instacart to "perform management trainings and provide more quality control."²⁸⁷ Despite these internal policy changes, however, Instacart workers are still seeking better pay.²⁸⁸

²⁷⁹ See Beth Kindig, *Opinion: The Path to Profitability for Uber and Lyft Looks More Like a Dead End*, MARKET WATCH (Sept. 20, 2019), <https://www.marketwatch.com/story/the-path-to-profitability-for-uber-and-lyft-looks-more-like-a-dead-end-2019-09-20>.

²⁸⁰ James A. Parrott & Michael Reich, *An Earnings Standard for New York City's App-Based Drivers: July 2018 Economic Analysis and Policy Assessment*, NEW YORK CITY TAXI AND LIMOUSINE COMMISSION at 75-76 (2018), <https://static1.squarespace.com/static/53e4f0be4b015b9c3690d84/t/5b3a3aaa0e2e72ca74079142/1530542764109/Parrott-Reich+NYC+App+Drivers+TLC+Jul+2018jul1.pdf>.

²⁸¹ Gia Liu, *What Is Instacart? Here's How to Use the Grocery Delivery App*, DIGITAL TRENDS (Sept. 19, 2018), <https://www.digitaltrends.com/home/what-is-instacart/>.

²⁸² Cherry, *supra* note 23, at 13.

²⁸³ Sara Ashley O'Brien, *The Uber Effect: Instacart Shifts Away from Contract Workers*, CNN (June 22, 2015), <https://money.cnn.com/2015/06/22/technology/instacart-employee-option/>.

²⁸⁴ Instacart, *Introducing New Shopper Perks for a More Holistic Shopper Experience*, MEDIUM (Aug. 21, 2019), <https://medium.com/shopper-news/shopper-perks-52e480f2788a>.

²⁸⁵ Devon Delfino, *Make Money as an Instacart Shopper: What to Expect*, NERD WALLET (Nov. 9, 2017), <https://www.nerdwallet.com/blog/finance/make-money-as-an-instacart-shopper-what-to-expect/>.

²⁸⁶ O'Brien, *supra* note 283.

²⁸⁷ *Id.*

²⁸⁸ Megan Rose Dickey, *Instacart Shoppers Plan a Series of Actions in Protest of Company's Wage Practices*, TECHCRUNCH (Dec. 9, 2019), <https://techcrunch.com/2019/12/09/instacart-shoppers-plan-a-six-day-protest-of-companys-wage-practices/>.

By classifying its workers as employees, rideshare companies could avoid antitrust liability resulting from artificial surge pricing.²⁸⁹ But rideshare companies are not receptive to this approach. First, employing drivers would be very costly.²⁹⁰ In California alone, employing drivers would cost \$508 million for Uber and \$290 million for Lyft.²⁹¹ Second, rideshare companies would have to exert more control over drivers.²⁹² This might involve less flexible scheduling for drivers.²⁹³ Finally, rideshare companies may have to pare back their workforce to accommodate the additional costs of employment.²⁹⁴

VI. Conclusion

While ordinary surge pricing erodes consumer trust in rideshare companies, artificial surge pricing will likely heighten this effect, expose rideshare companies to litigation, and further discourage people from becoming rideshare drivers. Even if the status quo is the most attractive choice for now, it may not be the most sustainable long-term option. Rideshare companies can and should get ahead of their labor problems by proactively meeting drivers' economic needs. Earning (or re-earning) drivers' trust is essential to ensuring continued rideshare growth.²⁹⁵ At minimum, rideshare companies should increase drivers' take-home pay. Ultimately, rideshare companies will choose their path forward by weighing their tolerance for risk of antitrust liability against the costs of paying drivers more, giving them benefits, or employing them.

²⁸⁹ See discussion *infra* Section III(C).

²⁹⁰ Griswold, *supra* note 26.

²⁹¹ *Id.*

²⁹² Khosrowshahi, *supra* note 271.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ Bhuiyan, *supra* note 114.