TNC-User Tax: Getting Rideshare Companies to Pay Their 'Fare' Share

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By Benjamin Fay and Carolyn Liu[1]

Introduction

Since Uber was founded in 2009 as Ubercab, "rideshare" companies or "Transportation Network Companies" ("TNCs") have proliferated across the United States and around the world. They provide convenient, reasonably-priced transportation for customers and employment for numerous drivers, but they also disrupt existing modes of transportation and impose burdens on the communities in which they operate, particularly in the form of increased traffic congestion. Across the United States, states and cities have begun imposing taxes to provide revenue to offset some of the burdens resulting from TNCs. These taxes are most often imposed directly on the TNCs, usually as a percentage of each fare or a flat amount for each ride. In California, however, local governments are preempted by State law from imposing a tax directly on TNCs, unless the TNC has an office in the city, which it usually does not. As a result of successful lobbying by TNCs, cities have also been preempted from imposing meaningful taxes on TNC drivers working within their borders. But a user tax imposed directly on the TNC customer and collected by the TNC along with the fare has not been preempted, and in the November 2020 general election the voters of Berkeley approved a TNC-user tax of fifty cents per ride on TNC rides originating within the city. Although politically opposed by the TNCs, Berkeley's tax has not been challenged legally. Other cities are undoubtedly looking to see if a TNC user tax is a viable way to address the negative impacts of TNCs without depriving communities of their benefits.

In this paper we examine the constitutionality of imposing taxes on TNCs, TNC drivers, and TNC customers, and explain why there is a sufficient nexus between a city and a TNC, TNC driver, and TNC customer for a city to impose a tax on TNC rides that originate or terminate in the city. We also discuss the extent to which California law preempts local taxes on TNCs, TNC drivers, or TNC customers.

A. The TNC business model.

In the TNC business model, the TNC connects a customer who wishes to be driven from a specific pick-up point to a specific destination with a contractor who provides the ride in the contractor's personal car. The connection is generally made through a smartphone app through which the TNC also handles payment and billing. The California Public Utilities Code provides the following definition:

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> "Transportation network company" means an organization, including, but not limited to, a corporation, limited liability company, partnership, sole proprietor, or any other entity, operating in California that provides prearranged transportation services for compensation using an online-enabled application or platform to connect passengers with drivers using a personal vehicle.[2]

The two dominant TNCs are currently Uber and Lyft.

B. Burdens caused by TNCs on the communities in which they operate.

In the nine large U.S. metropolitan areas of Boston, Chicago, Los Angeles, Miami, New York, Philadelphia, San Francisco, Seattle, and Washington, D.C., it is estimated that TNCs add an additional 5.7 billion miles of driving annually.[3] Moreover, instead of replacing personal automobiles, TNCs are primarily supplanting more space-efficient modes of transportation such as buses, subways, biking, and walking. Studies show that, in general, most TNC riders would have taken public transportation (15-50 percent), walked or biked (12-24 percent), or not made the trip (2-22 percent) had TNCs not been an option.[4]

While the extent of the burden caused by TNCs on the cities in which they operate may be disputed, there is not much question that TNCs do cause burdens on cities. For instance, the San Francisco County Transportation Authority (SFCTA) estimates that TNCs account for 20 percent of the total amount of driving done in the city,[5] while Uber and Lyft estimate that this amount is closer to 12 to 14 percent of the total amount of driving done in San Francisco.[6] In Boston, Uber and Lyft estimate that TNCs account for seven to eight percent of all vehicle miles, and in Washington D.C. six to seven percent.[7] While the exact percentages may be disputed, it is clear that in many areas, especially dense city centers, TNCs make up a significant amount of the cars on the road.

This increase in vehicles on the road and miles travelled by TNCs leads to an increase in congestion in city streets. A 2018 report conducted by the SFCTA found that TNCs accounted for approximately 50% of the rise in congestion in San Francisco between 2010 and 2016.[8] It further found that TNCs caused the greatest increases in congestion in the densest parts of the city—up to 73% in the downtown financial district—and along many of the city's busiest

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[2] Pub. Util. Code § 5431(c).
[3] Bruce Schaller, *The New Automobility: Lyft, Uber and the Future of American Cities*, July 25, 2018, at p. 20. (http://www.schallerconsult.com/rideservices/automobility.pdf)
[4] *Id*. at p. 15.
[5] San Francisco County Transportation Authority, *TNCs Today*, June 2017, at p. 2. (https://www.sfcta.org/sites/default/files/2019-02/TNCs_Today_112917_0.pdf)
[6] Fehr & Peers' Study Findings Memorandum, *Estimated TNC Share of VMT in Six US Metropolitan Regions*, 2018, at p. 2. (https://drive.google.com/file/d/1FIUskVkj9lsAnWJQ6kLhAhNoVLjfFdx3/view)
[7] *Id*. at pp. 12, 17.
[8] San Francisco County Transportation Authority, *TNCs & Congestion*, October 2018, at p. 4. (https://www.sfcta.org/sites/default/files/2019-05/TNCs_Congestion_Report_181015_Finals.pdf)

corridors.[9] Overall, TNCs comprised an estimated 25% of total vehicle congestion citywide and 36% of delay in the downtown core in 2016.[10]

Some of this congestion is due to the way TNCs operate. Drivers often drive around while waiting for a ride request and once they receive a request have to drive to the pick-up location. Uber and Lyft found that approximately one third of TNC vehicle miles travelled can be attributed to a driver waiting for a ride request, approximately 10 percent to a driver heading to pick up a passenger, and approximately only half to when a passenger is in the vehicle.[11] Not only do these additional vehicle miles add to traffic congestion, they also result in additional emissions of greenhouse gas and other pollutants.

TNCs also impact cities by taking riders away from public transportation. In its regulatory filing with the Securities and Exchange Commission, Uber identifies a "massive market opportunity" in the estimated 4.4 trillion miles traveled by people on public transit in the 63 countries in which it operates.[12] Part of its long-term business plan is to compete with public transportation in order to take a share of this $1 trillion market.[13]

Indeed, surveys of TNC riders have consistently found impacts on public transit.[14] A study conducted by the University of California Davis, Institute of Transportation Studies, shows that while TNCs have led to a 3% net increase in the use of commuter rail services, they attract riders away from bus services and light rail services at a higher rate.[15] These services have shown a 6% and 3% reduction due to TNCs, respectively.[16] Between an increase in congestion and a decrease in public transit use, many cities are being burdened with increased costs in building and maintaining streets and a decrease in revenue that is needed to maintain public transit systems.

C. Cities and states have begun addressing these burdens by imposing taxes on the TNC business structure.

A number of cities across the United States have imposed some kind of tax or fee on TNC trips. For instance, beginning in January 2018, Chicago imposed a tax on TNC trips at a flat rate of $0.72 per trip. In January 2020, Chicago implemented new "congestion pricing" to

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[9] *Id*. at p. 28.
[10] *Id*. at p. 4.
[11] These numbers are from a study commissioned by Uber and Lyft. (Fehrs & Peers' Study Findings Memorandum, *supra*, at p. 9.) Being rough estimates, they do not add up to 100%.
[12] CNN Business, *Uber Wants to Compete with Public Transit. These Experts Are Horrified*, April 25, 2019, https://www.cnn.com/2019/04/25/tech/uber-public-transportation.
[13] *Id*.
[14] Schaller, *supra*, at p. 15.
[15] University of California Davis, Institute of Transportation Studies, *Disruptive Transportation: The Adoption, Utilization, and Impacts of Ride-Hailing in the United States*, October 2017, at p. 27. (https://escholarship.org/uc/item/82w2z91j)
[16] *Ibid*.

combat congestion, promote sustainable forms of transportation, support the public transit system, and encourage shared rides.[17] The tax is now assessed according to a tiered rate structure—ranging from $0.53 to $1.75 per ride—based on the day, time, and location where trips originate and end, and whether the trip is a single or shared trip.[18] The tax applies if the trip either originates or ends in Chicago, and the ordinance includes provisions to prevent multiple taxation.[19] In addition to the per-trip fees, Chicago also assesses a $5 tax on all rides to or from the airport, the convention center, and popular tourist destinations.[20] The tax is imposed on the driver, and the TNC is required to collect and remit the tax to the city.[21]

Seattle has also imposed a tax on TNC trips. Beginning July 1, 2020, all trips originating within Seattle are taxed at a flat rate of $0.57 per trip.[22] The tax is imposed on the TNC and "is a general excise tax on the privilege of conducting certain business within Seattle …."[23] While the tax was not intended to be imposed on the passenger or customer, Seattle allows TNCs to pass the tax on to their customers.[24]

Many states have also imposed taxes or fees on TNC trips. Massachusetts has had a tax on TNC trips since November 2016.[25] It is imposed at a flat rate of $0.20 per ride for every trip originating in Massachusetts.[26] The tax is imposed on the TNC, and, unlike Seattle's TNC tax, TNCs operating in Massachusetts may not pass the charge onto their drivers or customers.[27] Alabama and South Carolina have also imposed taxes on TNC trips, both at a rate of 1% of the

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[17] City of Chicago Business Affairs and Consumer Protection Department's Supporting Information on Congestion Pricing, https://www.chicago.gov/city/en/depts/bacp/supp_info/city_of_chicago_congestion_pricing.html.

[18] Chicago Municipal Code § 3-46-030 (B).

[19] *Id*.

[20] *Id*.

[21] Chicago Municipal Code § 3-46-035.

[22] Seattle City Council Ordinance No. 125971; Seattle Municipal Code § 5.39.030.

[23] Seattle Municipal Code § 5.39.070 (A).

[24] Seattle Municipal Code § 5.39.070 (B). "If the TNC elects to pass the taxes on to their customers, the taxes collected from customers are included in gross receipts for the Seattle Business License tax." (FAQ on the TNC Tax issued by the Seattle Finance & Administrative Services, December 29, 2020, https://www.seattle.gov/Documents/Departments/FAS/BusinessLicenseTax/TNC%20Tax%20FAQS.pdf.)

[25] In January 2021, the Governor of Massachusetts vetoed a fee increase passed by the Massachusetts Legislature. It would have increased the fee based on a scaled structure such that a shared ride would have a per-ride assessment of $0.40; a non-shared ride would have a per-ride assessment of $1.20; and a shared or non-shared luxury ride would have an additional per-ride assessment of $1.00. In his veto, the Governor stated that the proposed fees were based on pre-pandemic assumptions about travel patterns and "[b]efore instituting fees that are aimed at incentivizing certain travel behaviors, we need to understand what ridership and congestion patterns are going to look like after the pandemic." (NBC Boston, *Baker Carves Up $16.5 Billion Mass. Transportation Bill with Vetoes*, January 16, 2021, https://www.nbcboston.com/news/local/baker-carves-up-16-5-billion-mass-transportation-bill-with-vetoes/2281771/.)

[26] TRANSPORTATION NETWORK COMPANIES—REGULATION, 2016 Mass. Legis. Serv. Ch. 187 (H.B. 4570).

[27] H.B. 4570 (2016), §8(b).

total fare for rides originating within each state.[28] Overall, as of July 2018, seven major cities and twelve states have imposed some type of fee or tax on TNC trips.[29]

In California, the City and County of San Francisco and the City of Berkeley have taken the lead on imposing taxes on the TNC business model. On November 3, 2019, the voters of San Francisco passed Proposition D, which imposes a tax on TNCs at a rate of 3.25% for trips originating in San Francisco, with a reduced 1.5% rate for pooled rides and rides in zero-emission vehicles.[30] The tax is halved for trips that originate in the City but terminate outside the City.[31]

At the November 3, 2020 general election, the voters of Berkeley passed Measure GG, which adopted a TNC user tax at a rate of $0.50 for every ride originating in the City.[32] Pooled rides are taxed at a lower rate of $0.25 per ride.[33] Trips paid for by a government healthcare program and wheelchair accessible trips are exempt from the tax.[34]

D. There is sufficient constitutional nexus for a city to impose a tax on a TNC operating within its borders because the activities of the TNC drivers in the city are necessary for the TNC to establish and maintain its market in the city.

A city can constitutionally tax a business if the business has representatives conducting activities in the city who are necessary for the business to establish and maintain a market in the city. "The pivotal question when testing a [jurisdiction's] taxing authority against the dormant commerce clause is . . . whether the activities of the [business's] in-[jurisdiction] representatives are 'significantly associated with [its] ability to establish and maintain a market in [the] [jurisdiction] for the sales.'"[35]

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[28] Advance Local Media, *Statewide Regulations for Uber, Lyft Approved by Senate*, March 7, 2019, https://www.al.com/news/2018/01/statewide_regulations_for_uber.html; TRANSPORTATION NETWORK COMPANY ACT, South Carolina General Assembly, 121st Session, 2015-2016, https://www.scstatehouse.gov/sess121_2015-2016/bills/3525.htm.

[29] Cities: Chicago, IL; New Orleans, LA; New York, NY; Philadelphia, PA; Portland, OR; Seattle, WA; and Washington, D.C. States: Alabama, California, Connecticut, Hawaii, Maryland, Massachusetts, Nevada, New York, Rhode Island, South Carolina, South Dakota, and Wyoming. (Eno Center for Transportation, *Taxing New Mobility Services: What's Right? What's Next?*, July 2018, at p.2, https://www.enotrans.org/wp-content/uploads/2018/07/Eno_Brief_Taxing_New_Mobility_Services.pdf.)

[30] San Francisco Business and Tax Regulations Code, §3204.

[31] *Ibid.*

[32] Berkeley Municipal Code, § 7.71.030.

[33] *Ibid.*

[34] Berkeley Municipal Code, § 7.71.020.

[35] *Borders Online, LLC v. State Bd. of Equalization* (2005) 129 Cal.App.4th 1179, 1197, quoting *Tyler Pipe Industries v. Dept. of Revenue* (1987) 483 U.S. 232, 250; see also *Harley-Davidson, Inc. v. Franchise Tax Board* (2015) 237 Cal.App.4th 193, 213.

For the purposes of constitutional nexus, TNC drivers are representatives of the TNC and there is no question that the activities of the drivers in a city are necessary for the TNC to establish and maintain its market in the city.

Although TNCs generally try to classify their drivers as independent contractors who do not legally represent the companies, for nexus purposes they are representatives. Several cases have held that independent contractors are sufficient representatives of a company for nexus purposes. "The physical presence requirement need not be satisfied directly by the taxpayer itself; it can be satisfied by independent contractors, 'jobbers,' and agents acting on the taxpayer's behalf."[36] The seminal case is *Scripto, Inc. v. Carson*,[37] which involved an attempt by Florida to require a Georgia business to collect Florida's use tax on products the company sold to customers in Florida. The business had no office, store, or employees in Florida. Its only physical presence in Florida was ten brokers who arranged the sale of products that were then sent to Florida from Georgia. The brokers were not employees; they were independent contractors who were compensated by commissions on the sales. The Supreme Court held that this was a sufficient contact for Florida to require the company to collect its use tax.[38]

In two California cases, *Scholastic Book Clubs, Inc. v. State Bd. of Equalization*[39] and *Illinois Commercial Men's Assn. v. State Bd. of Equalization*,[40] the court found that a company's representatives who were not employees were sufficient representatives to subject the company to taxation or to require the company to collect California use tax.

In *Illinois Commercial Men's Assn. v. State Bd. of Equalization*, out-of-state insurance companies contended that they could not be subjected to a tax on insurance premiums for policies they sold to California customers. The companies sold the policies through the mail, and they did not have any employees or property in the state. However, they did hire independent contractors to investigate some applications and claims. Following *Scripto*, the California Supreme Court held that for nexus purposes these independent contractors were agents of the companies.

> "[T]he circumstance that investigation and/or settlement services on behalf of [the insurance companies] in California were performed by independent contractors is of little constitutional significance. The undeniable fact is that they were acting as agents of [the companies] . . . . What is significant in the present context is that the investigation and settlement of claims is an integral and crucial aspect of the business of insurance."[41]

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[36] *Harley-Davidson, Inc. v. Franchise Tax Board*, *supra*, 237 Cal.App.4th at 213.
[37] *Scripto, Inc. v. Carson* (1960) 362 U.S. 207.
[38] *Id.* at 211-13.
[39] *Scholastic Book Clubs, Inc. v. State Bd. of Equalization* (1989) 207 Cal.App.3d 734.
[40] *Illinois Commercial Men's Assn. v. State Bd. of Equalization* (1983) 34 Cal.3d 839.
[41] *Id.* at 849.

The court explained that it was appropriate for California to tax the companies because the companies' independent contractors, who were essential to the companies' business activities in the state, received the benefit of the protections provided by California.[42]

In *Scholastic Book Clubs, Inc. v. State Bd. of Equalization*, California sought to require a New Jersey company to collect California's use tax for books sold in California. The company did not have an office, store, or employees in California. It sold its books by sending catalogs to teachers and school librarians who then distributed the catalogs to their students and helped the students place orders for books. The teachers and librarians were not employees of the company, and their only compensation was "bonus points" they received for arranging the orders, which could then be redeemed for various "gift items." The teachers and librarians were clearly not employees; they were not even independent contractors; they simply facilitated the sale and distribution of the books, and in that capacity were essential to the company's business model. The court found that the teachers and librarians were sufficient representatives of the company such that California could require the company to collect California's use tax.[43]

TNC drivers have at least the same degree of connection with the TNC for which they drive that the brokers in *Scripto*, the investigators in *Illinois Commercial Men's Assn.*, and the teachers and librarians in *Scholastic Book Clubs* had with the companies in those cases. The TNC drivers are essential for the TNC to establish and maintain its markets in the city in which it is operating. Without them, the TNC's market in the city could not function. In fact, the TNC drivers are arguably more necessary to their companies than the "agents" in *Scripto*, *Illinois Commercial Men's Assn.*, and *Scholastic Book Clubs*. In *Scripto* and *Scholastic Book Clubs*, customers could probably purchase items directly from the companies and not buy through the brokers or the teachers. Similarly, most of the insurance policies in *Illinois Commercial Men's Assn.* were sold and managed without the use of the independent contractor investigators. By contrast, a person cannot take a TNC ride without using a TNC driver. The TNC drivers are essential for TNCs to establish and maintain their markets, and therefore are representatives of these companies sufficient to allow a city to tax the company.[44]

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[42] *Id.* at 850.

[43] *Scholastic Book Clubs, Inc. v. State Bd. of Equalization*, *supra*, 207 Cal.App.3d at 739-40.

[44] TNCs would also be constitutionally subject to municipal taxation under the theory that companies that actively exploit a jurisdiction's market can be taxed by the jurisdiction even when they do not have a physical presence or representatives in the jurisdiction. This theory has been adopted by several state supreme courts, but not California's. (See *Fluor Enterprises, Inc. v. Revenue Div., Dept. of Treasury* (2007) 477 Mich. 170; *Lanco, Inc. v. Director, Div. of Taxation* (2006) 188 N.J. 380; *Geoffrey, Inc. v. South Carolina Tax Com'n* (1993) 313 S.C. 15.)

E. There is sufficient constitutional nexus for a city to impose a tax on a TNC driver or a TNC customer who begins or ends a ride in the city.

There is certainly sufficient constitutional nexus for a city to impose a tax on a TNC driver who picks up or drops off a customer in the city. When a TNC driver is transporting a customer for hire, the driver is in the business of providing personal transport. If the driver picks up or drops off a customer in a city, the driver is conducting business in that city and can therefore be taxed by that city.[45] Similarly, the customer can also be taxed for the business transaction, since the customer is the other half of the transaction, just as an excise tax on a sale can be imposed on either the buyer or the seller. Both the driver and the customer are physically present in the jurisdiction in which the ride begins or terminates and their business transaction is directly tied to the jurisdiction. They are also clearly using the roads of the jurisdiction for their business transaction. However, simply carrying a passenger through a city is not a sufficient nexus for taxation.[46]

F. State legislation has limited a city's ability to tax a TNC to when the TNC has a business office in the city.

If a city imposes a tax on a TNC for operating within its jurisdiction, it would be a business license tax, which is "a tax upon the privilege of doing business within the taxing jurisdiction."[47] Section 5371.4 of the Public Utilities Code, however, prohibits a city from imposing a business license tax on a TNC, unless the TNC is domiciled or maintains a business office in the city. It does this by prohibiting cities from imposing "a fee on charter-party carriers operating limousines" except for a "charter-party carrier domiciled or maintaining a business office within that city." Section 5371.4 states in full:

> The governing body of any city, county, or city and county may not impose a fee on charter-party carriers operating limousines. However, the governing body of any city, county, or city and county may impose a business license fee on, and may adopt and enforce any reasonable rules and regulations pertaining to operations within its boundaries for, any charter-party carrier domiciled or maintaining a business office within that city, county, or city and county."[48]

A TNC is a form of charter-party carrier, which is defined to include "every person engaged in the transportation of persons by motor vehicle for compensation, whether in

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[45] *City of Los Angeles v. London Towne Livery Service, Ltd*. (1979) 97 Cal.App.3d 814, 817 [city can tax limousine service when it picks up or drops off customers in the city].

[46] *Ibid.*; see *Security Truck Line v. City of Monterey* (1953) 117 Cal.App.2d 441, 451 ["A city may not tax a carrier simply because its trucks pass through the city."].

[47] *Park 'n Fly v. City of South San Francisco* (1987) 188 Cal.App.3d 1201, 1215; Gov. Code § 37101(a) ["The legislative body may license, for revenue and regulation, and fix the license tax upon, every kind of lawful business transacted in the city."].

[48] Pub. Util. Code § 5371.4(a).

common or contract carriage, over any public highway in this state."[49] This has been recognized by the Public Utilities Commission.[50]

Although at first glance a regular TNC ride would not normally be considered a ride in a "limousine" and therefore not subject to section 5371.4,[51] statutory construction shows that in the specific context of section 5371.4 most vehicles provided by TNCs are "limousines," and consequently TNCs are "charter-party carriers operating limousines" that enjoy the limitation on business license taxes in section 5371.4.

The expansive definition of "limousine" for section 5371.4 is found in subdivision (h) of section 5371.4, which states that "[f]or the purposes of this section, 'limousine' includes any sedan or sport utility vehicle, of either standard or extended length, with a seating capacity of not more than 10 passengers including the driver, used in the transportation of passengers for hire on a prearranged basis within this state." This definition covers just about every vehicle likely to be provided by a TNC, and it also matches the definition of "limousine" in section 5359 of the Public Utilities Code.[52]

Somewhat confusingly, however, the term "limousine" as used in section 5431, which provides definitions for the regulation of TNCs, must be interpreted in that context more narrowly. A TNC is defined in section 5431 to provide "prearranged transportation services … with drivers using a personal vehicle."[53] And a "personal vehicle" is defined as "not a taxicab or limousine."[54] Therefore, in section 5431 a TNC does not provide services in limousines. However, the definition in section 5431 is explicitly limited to the article of the Public Utilities Code in which it is located—Article 7 of Chapter 8 of Division 2—and section 5371.4 of the Public Utilities Code is in a different article—Article 2.[55] Additionally, as mentioned above, the special definition of "limousine" in section 5371.4 is specifically limited to that section. Therefore, it appears that "limousine" in section 5371.4 has a very broad meaning, while "limousine" in section 5431 has a narrower meaning.

Although section 5371.4 only states that it prohibits cities from imposing a "fee" on charter-party carriers operating limousines, in this context "fee" should be interpreted to

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[49] Pub. Util. Code § 5360.

[50] Public Utilities Commission, Rulemaking 12-12-011, "Order Instituting Rulemaking on Regulations Relating to Passenger Carriers, Ridesharing, and New Online-Enabled Transportation Services," Sep. 23, 2013, pp. 3, 23, 71.

[51] All references in this paper to unidentified code sections are to the Public Utilities Code.

[52] "'Limousine' means any sedan or sport utility vehicle, of either standard or extended length, with a seating capacity of not more than 10 passengers including the driver, used in the transportation of passengers for hire on a prearranged basis within this state, and includes a modified limousine as defined in subdivision (d) of Section 1042." (Pub. Util. Code § 5359(c).)

[53] Pub. Util. Code § 5431(c).

[54] Pub. Util. Code § 5431(b).

[55] The introductory line of section 5431 of the Public Utilities Code states: "For purposes of this article, the following terms have the following meanings."

include business license taxes. This is apparent from the exception in section 5371.4 for cities in which a charter-party carrier is domiciled or operates a business office. While the first sentence states that a city cannot impose a "fee" on a charter-party carrier operating limousines, the exception in the second sentence states that a city can impose a "business license fee" on a charter-party carrier operating limousines if it is domiciled in or has a business office in the city. If the prohibition against fees in the first sentence did not include "business license fees," then the exception to allow "business license fees" in the second sentence would be meaningless surplusage, an interpretation that must be avoided.[56] Consequently, the word "fee" in the first sentence must be construed to include "business license fees," and the term "business license fee" has traditionally been synonymous with "business license tax." Case law is replete with examples of taxes, particularly business taxes, being called fees. For example, in *Weekes v. City of Oakland*, which is frequently cited for the proposition that the nature of a fee or tax is determined by its incidences and not by its label, the California Supreme Court held that the City of Oakland's "employee license fee" was an "occupation tax."[57] Other cases that have treated "business license fees" as taxes include *City of Los Angeles v. Shell Oil Co.*,[58] *City of Alameda v. Premier Communications Network, Inc.*,[59] *People ex rel. Flournoy v. Yellow Cab Co.*,[60] and *Long v. City of Anaheim*.[61]

Therefore, because TNCs are charter-party carriers that, for purposes of section 5371.4, operate "limousines," a city cannot impose a business license tax on a TNC unless the TNC is domiciled in or maintains a business office in the city.

G. State legislation limits a city's ability to tax TNC drivers to those drivers "domiciled" in the city.

Until 2018 cities could impose business license taxes on TNC drivers operating within their borders. However, in 2017, in response to heavy lobbying by TNCs, the Legislature passed S.B. 182, which added sections 16550, 16550.1, and 16550.2 to the Business and Professions Code. These new sections strictly limit the ability of a city to require a TNC driver to obtain a business license and therefore to pay a business license tax. These sections provide that a driver for a TNC can only be required to obtain one business license, regardless of the number of jurisdictions in which the driver operates.[62] Only the city in which the driver is domiciled can issue that license, and if the city in which a driver is domiciled does not require a business license, then that driver does not have to obtain one.[63] These provisions make it largely ineffective to tax TNC drivers to offset their burdens on the cities in which they operate

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[56] *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1437 ["Whenever possible, we must give effect to every word in a statute and avoid a construction making a statutory term surplusage or meaningless"].
[57] *Weekes v. City of Oakland* (1978) 21 Cal.3d 386, 390-91.
[58] *City of Los Angeles v. Shell Oil Co*. (1971) 4 Cal.3d 108, 121, fn.9.
[59] *City of Alameda v. Premier Communications Network, Inc*. (1984) 156 Cal.App.3d 148, 151-52.
[60] *People ex rel. Flournoy v. Yellow Cab Co*. (1973) 31 Cal.App.3d 41, 46.
[61] *Long v. City of Anaheim* (1967) 255 Cal.App.2d 191, 197.
[62] Bus. & Prof. Code §§ 16550, 16550.2(a).
[63] Bus. & Prof. Code § 16550.2(b).

because many drivers are not domiciled in the cities in which they do most of their driving. Denser urban areas, such as San Francisco, where parking is expensive and the cost of living is high, draw drivers from surrounding suburban and rural areas. Due to these provisions, these drivers cannot be taxed to offset the burdens their business activities cause to the cities in which they operate.

H. A city can impose a user tax on TNC customers for rides originating or terminating in the city.

A tax on TNC trips beginning or ending in a city is within the taxing power of cities. Charter cities have the power because the imposition of local taxes is a municipal affair,[64] and general law cities have the power because the Legislature has given them the power to enact any tax that a charter city can enact.[65] A tax imposed on TNC trips that is paid by the TNC user and collected by the TNC company is very similar to other use taxes, such as taxes on the use of utilities (utility user taxes), the use of hotels (transient occupancy taxes), and the use of parking spaces (parking taxes). There are numerous cases upholding these taxes.[66]

That a TNC trip may begin or terminate outside the city does not create a problem. In *City of Los Angeles v. London Towne Livery Service, Ltd*., the California Court of Appeal upheld a tax on charter transportation services that either began or terminated in the city.[67] And in *Oklahoma Tax Com'n v. Jefferson Lines, Inc.*,[68] the Supreme Court upheld against commerce clause and due process challenges a tax on bus ticket sales that was imposed on all bus rides that originated in the state and was measured by the full sale price of each bus ticket, even when the ride terminated in another state.

No California law preempts a municipal tax on TNC customers using TNC services in a city. Although the State has preempted local taxation of TNCs and TNC drivers, it has not preempted the taxation of TNC users. Article 7, Chapter 8, of Division 2 of the Public Utilities Code (sections 5430-5450) contains provisions regarding insurance coverage for TNC companies and TNC drivers, driving records and driver's licenses of TNC drivers, the provision of certain information about drivers to passengers, and criminal background checks for drivers. It also contains provisions requiring the California Public Utilities Commission to establish a program to make TNC services accessible for persons with disabilities and requiring the State Air

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[64] *City of San Bernardino Hotel/Motel Assn. v. City of San Bernardino* (1997) 59 Cal.App.4th 237, 242-43; *City of Los Angeles v. London Towne Livery Service, Ltd.*, *supra*, 97 Cal.App.3d at 816.
[65] Gov. Code § 37100.5.
[66] *Fenton v. City of Delano* (1984) 162 Cal.App.3d 400 [city's gas, electricity, telephone, and cable television user taxes upheld as valid]; *City and County of San Francisco v. Flying Dutchman Park, Inc*. (2004) 122 Cal.App.4th 74 [San Francisco's parking tax upheld as constitutional]; *Patel v. City of Gilroy* (2002) 97 Cal.App.4th 483 [city's transient occupancy tax upheld as valid and constitutional].
[67] *City of Los Angeles v. London Towne Livery Service, Ltd.*, *supra*, 97 Cal.App.3d at 816, 821.
[68] *Oklahoma Tax Com'n v. Jefferson Lines, Inc*. (1995) 514 U.S. 175.

Resources Board to establish a program to reduce greenhouse gas emissions by TNCs.[69] The Public Utilities Code does not, however, address the local taxation of users of TNCs, and local taxes imposed for revenue purposes are generally not considered regulation and can be imposed on businesses by a city even when the city cannot regulate those businesses.[70] In fact, many businesses that are much more closely regulated by the California Public Utilities Commission than TNCs are regularly subjected to local taxation of their services. For example, gas and electricity are both very heavily regulated by the California Public Utilities Commission, and yet local gas and electricity user taxes are very common.

In 2018, the Legislature passed A.B. 1184, which added section 5446 to the Public Utilities Code and expressly authorized the City and County of San Francisco to impose a tax on TNC rides, measured at 1.5% of the fare for shared rides and 3.25% of the fare for regular rides. Although A.B. 1184 does not contain any express statements of preemption, it initially caused concern that it might imply that without such legislation a city cannot tax TNC rides. However, implied preemption will only be inferred "when the circumstances 'clearly indicate' a legislative intent to preempt,"[71] and the legislative history shows that the Legislature did not intend A.B. 1184 to preempt the local taxation of TNC rides. In fact, the legislative history shows that the Legislature was unsure whether the bill was even needed, since San Francisco already had the power to enact such a tax. The August 31, 2018 Assembly Floor Analysis, which analyzed the assembly's concurrence in the Senate amendments, stated that "[t]he California Constitution allows charter cities, such as the City and County of San Francisco, to levy taxes which are not preempted by state or federal governments. It is unclear whether this bill would confer any additional authority to San Francisco beyond what it currently possesses."

The legislative history explained that the bill was the result of an agreement between San Francisco and TNCs to withdraw a proposed gross receipts tax on TNCs and to replace it with a tax measured by the revenues actually received by the TNCs, excluding additional charges such as tolls, airport fees, and tips to drivers. The apparent intent was to allow the City to apply the tax to the TNC companies directly. Although this legislation was not necessary in order to apply such a tax to Uber or Lyft, since they are both headquartered in San Francisco

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[69] As part of the program to make TNC services accessible for persons with disabilities, TNCs are required to pay a fee of $0.05 for each TNC trip completed in certain geographical areas, the funds from which are used to establish transportation programs for persons with disabilities. (Pub. Util. Code, § 5440.5.) These provisions are enacted "[a]s part of the [California Public Utilities Commission's] regulation of transportation network companies (TNCs)." (*Id*.) A TNC would be exempt from the fee or subject to a reduced fee in a geographic area if the TNC demonstrates that it meets specified levels of services set by the California Public Utilities Commission in providing wheelchair-accessible vehicles for that particular area. (*Id*.)

[70] See *Oakland Raiders v. City of Berkeley* (1976) 65 Cal.App.3d 623, 627 [upholding the application of a City of Berkeley business license tax on the Oakland Raiders when playing on the UC campus even though the city cannot regulate the campus]. As discussed below, section 5446 expressly authorizes the City and County of San Francisco to impose a tax on TNC rides, but this provision does not indicate any intent to preempt local taxes on TNC users.

[71] *California Rifle & Pistol Assn. v. City of West Hollywood* (1998) 66 Cal.App.4th 1302, 1317.

and are therefore subject to San Francisco's business license taxes under section 5371.4 of the Public Utilities Code, Uber had previously planned to move its headquarters out of San Francisco, and this bill would allow San Francisco to continue to tax both Uber and Lyft even if they move their offices from San Francisco, and it would also apply the tax to any other TNC that operates in San Francisco, but does not have an office there. After the passage of A.B. 1184, San Francisco submitted to its voters, with support from Uber and Lyft, a tax on TNCs along the lines provided in A.B. 1184, and as mentioned above, the tax was approved by the San Francisco voters in the November 2019 election.

Significantly, when the City of Berkeley proposed its TNC user tax, it was opposed by Uber and Lyft, but only on policy grounds. No argument was raised that the tax was preempted or otherwise beyond the power of the City to enact.

Conclusion

TNCs have exploded in popularity since Uber was founded in 2009. The TNC business model creates new opportunities to utilize resources, generates employment opportunities, and provides convenient transportation. But TNCs also impose burdens on the communities in which they operate. Studies show that the use of TNCs leads to increased congestion and decreased public transit use, burdening those communities with increased costs for building and maintaining streets and decreased revenues for maintaining public transit systems. The increased vehicle miles also mean increased air pollution. To address and offset some of these burdens, governments have begun imposing taxes on TNCs—as taxes on the TNC itself, the driver, or the user. Some jurisdictions, such as Chicago, have also begun experimenting with congestion pricing. For cities in California, the most viable tax is one imposed on TNC users for trips beginning or terminating in the city. In its simplest form, the tax can be a flat tax per ride or a tax measured as a percentage of the fare for each ride. The next decade will probably bring more variations of these taxes as the TNC business model becomes more entrenched in our communities. The introduction of driverless cars could add a further wrinkle to the situation.