

REGULATING MICROTRANSIT IN  
SAN FRANCISCO: GREENER  
TRANSPORTATION OR  
THE END OF PUBLIC  
TRANSIT FOR ALL?

ALEX WALKER

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## INTRODUCTION

While carbon dioxide emissions from the electric power sector in the United States have been steadily declining, with a 20 percent drop between 2005 and 2015,<sup>1</sup> carbon dioxide emissions from the transportation sector have been rising since 2012.<sup>2</sup> Transportation is lagging behind electric power in terms of greenhouse gas reductions. Public transit could be an important tool for decarbonizing transportation in the United States, as public transit vehicles emit much less greenhouse gas per passenger than private automobiles.<sup>3</sup> Unfortunately, public transit ridership is declining in most cities,<sup>4</sup> and overall public transit ridership has been stagnant since about 2007.<sup>5</sup> Buses, the most commonly used form of public transit, have seen a significant drop in ridership, with almost 12 percent fewer riders in 2016 compared to 2008.<sup>6</sup>

Given the urgency of climate change, environmentalists should be willing to turn to creative solutions to reduce greenhouse gas emissions. One potential answer to the lagging ridership of public transit agencies is to encourage the formation and growth of new private transit companies to provide transportation services to the public using buses and other high-capacity vehicles. Private transit companies can use smartphone technology to be more user-

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<sup>1</sup> See ENERGY INFO. ADMIN., ELECTRIC POWER ANNUAL 2015 table 9.1 (2016), [https://www.eia.gov/electricity/annual/html/epa\\_09\\_01.html](https://www.eia.gov/electricity/annual/html/epa_09_01.html); see also Perry Lindstrom, *U.S. Energy-Related CO2 Emissions Fell 1.7% in 2016*, TODAY IN ENERGY (Apr. 10, 2017), <https://www.eia.gov/todayinenergy/detail.php?id=30712> (discussing further reduction of 1.7% of carbon dioxide emissions in 2016).

<sup>2</sup> See ENERGY INFO. ADMIN., MONTHLY ENERGY REVIEW APRIL 2017 table 12.5, [https://www.eia.gov/totalenergy/data/monthly/pdf/sec12\\_8.pdf](https://www.eia.gov/totalenergy/data/monthly/pdf/sec12_8.pdf).

<sup>3</sup> See FED. TRANSIT ADMIN., U.S. DEP'T OF TRANSP., PUBLIC TRANSPORTATION'S ROLE IN RESPONDING TO CLIMATE CHANGE 2 (2010), <https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/PublicTransportationsRoleInRespondingToClimateChange2010.pdf>. The report notes that as public transit vehicles achieve higher occupancy rates, their emissions per passenger fall even lower. See *id.* at 3.

<sup>4</sup> See Angie Schmitt, *Transit Ridership Falling Everywhere — But Not in Cities with Redesigned Bus Networks*, STREETS BLOG USA (Feb. 24, 2017), <http://usa.streetsblog.org/2017/02/24/transit-ridership-falling-everywhere-but-not-in-cities-with-redesigned-bus-networks/> (discussing citywide transit ridership in 2015 and 2016).

<sup>5</sup> See *Quarterly and Annual Totals by Mode*, AM. PUB. TRANSP. ASS'N (with data up to 2016 Q4), <http://www.apta.com/resources/statistics/Documents/APTA-Ridership-by-Mode-and-Quarter-1990-Present.xls>.

<sup>6</sup> See *id.*

friendly and enjoyable, just as companies like Uber and Lyft have used their smartphone apps to outcompete traditional taxis and car services.<sup>7</sup>

In fact, entrepreneurs in multiple cities have already started private transit companies to fill exactly this niche.<sup>8</sup> But is private transit a valuable tool to reduce car emissions and traffic congestion, or will it cause a downward spiral for public transit agencies and harm the vulnerable populations they serve? This debate arose recently in San Francisco when several new “microtransit” companies began operating. These companies offered fixed-route transportation for fares lower than a taxi or a ride-sharing company while promising more comfort and speed than public buses.

Many people in San Francisco reacted with excitement about the promise of this new service, but others were critical and raised important concerns. These private transit companies could lead to a two-tiered system that separates the poor and disabled from the wealthy and the middle-class, the critics argued, which could lead to a downward spiral for San Francisco’s public transit agency as it loses customers and political support.<sup>9</sup> However, supporters argued that microtransit companies could serve trips in the “missing middle” price range between taxis or ride-sharing companies and public transit, complementing the existing transportation network.<sup>10</sup> Furthermore, they claimed microtransit could bring an innovative approach to a somewhat calcified industry.<sup>11</sup>

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<sup>7</sup> New York City taxis have begun using smartphone apps to better compete with Uber and Lyft, showing the importance of these apps. See Dan Rivoli, *Arro App Will Allow Riders to Order Green and Yellow Cabs from Devices, Hopes to Help Taxis Challenge Uber, Lyft*, N.Y. DAILY NEWS (Aug. 31, 2015), <http://www.nydailynews.com/new-york/arro-app-lets-riders-order-cabs-remotely-new-rival-uber-article-1.2343838>. But the taxi industry continues to be devastated by competition from Uber and Lyft. See, e.g., Brian Solomon, *Uber’s First Casualty? San Francisco’s Largest Taxi Company Filing for Bankruptcy*, FORBES (Jan. 6, 2016), <https://www.forbes.com/sites/briansolomon/2016/01/06/ubers-first-casualty-san-franciscos-largest-taxi-company-filing-for-bankruptcy/#89a36c8341f7>; Ameena Walker, *Uber Is Driving Down Value of NYC’s Yellow Cab Medallions*, CURBED N.Y. (Apr. 5, 2017), <https://ny.curbed.com/2017/4/5/15197500/uber-nyc-yellow-cab-medallion-value-declining>.

<sup>8</sup> See Eric Jaffe, *How the Microtransit Movement Is Changing Urban Mobility*, CITYLAB (Apr. 27, 2015), <http://www.citylab.com/commute/2015/04/how-the-microtransit-movement-is-changing-urban-mobility/391565/>.

<sup>9</sup> See *infra* notes 40, 264 and accompanying text.

<sup>10</sup> See *infra* note 320 and accompanying text.

<sup>11</sup> See *infra* note 286.

This Note tells the story of these microtransit companies in San Francisco and the legal framework that has regulated them. It also addresses how these companies should be regulated in the interest of the environment and the public. It concludes that a light touch by regulators is needed, and that current law allows regulators to take such an approach. Under current conditions, microtransit is unlikely to significantly harm the ridership of public transit agencies or to exacerbate market failures connected to transportation. Instead, microtransit will likely reduce personal vehicle use, encourage public transit agencies to improve their services, and broaden consumer choice. In addition, microtransit may be key to harnessing the green potential of self-driving vehicles.

This Note recounts the stories of the microtransit companies in San Francisco and public reaction to them in Section I. Section II examines the California Public Utilities Code and the frameworks it provides for regulating different types of transportation services, along with the California Public Utility Commission's (CPUC's) policies on private transit services. Section III recounts the legal saga of the San Francisco microtransit companies and how they have been regulated at the state and local levels. Finally, Section IV provides a framework for regulating microtransit, arguing that microtransit should be regulated at the state level for consumer protection and worker welfare, but that fares charged and the entry of new microtransit companies should not be regulated.

#### I. "DISRUPTING" PUBLIC TRANSIT IN SAN FRANCISCO

Among large cities in the United States, San Francisco is heavily reliant on public transit, second only to New York City and Washington, D.C. In 2014, 33 percent of San Francisco commuters used public transit, compared to the national average of 5 percent.<sup>12</sup> Only 36 percent of San Franciscans drove alone to work

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<sup>12</sup> See Yonah Freemark, *Travel Mode Shares in the U.S.*, TRANSPORT POL., <http://www.thetransportpolitic.com/databook/travel-mode-shares-in-the-u-s/> (last visited Nov. 30, 2017), (in the table titled "Travel to work by city in 2014," click on the tab titled "All cities with at least 30,000 commuters"; national data can be seen by hovering the cursor over the first graph). This is the third-highest percentage among large cities, after New York City and Washington, D.C. See *id.*

in 2014, compared to the national average of 76 percent.<sup>13</sup> Public transit within San Francisco is run by the San Francisco Municipal Transit Agency (SFMTA or Muni),<sup>14</sup> which uses buses (both electric and diesel), light rail, and historic cable cars and streetcars.<sup>15</sup> In 2016, Muni estimated an average of 700,000 boardings per weekday.<sup>16</sup> San Francisco is also served by two regional heavy rail systems, BART<sup>17</sup> and Caltrain,<sup>18</sup> and at least three regional bus systems.<sup>19</sup> All these transit systems are run by governmental entities.

However, Muni does not provide speedy service. In 2014, its buses moved only slightly faster than eight miles per hour, while the light rail moved at slightly faster than nine miles per hour.<sup>20</sup> This is likely due in part to the high density and heavy traffic within San Francisco. But pressure from the public to retain an excessive number of stops contributes to the problem: in 2011, Muni officials admitted that 69 percent of stops were spaced more closely than called for by Muni's guidelines.<sup>21</sup> Many San

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<sup>13</sup> See *id.* This is the third-lowest percentage among large cities, after New York City and Washington, D.C. See *id.*

<sup>14</sup> See SFMTA, <https://www.sfmta.com/> (last visited Apr. 29, 2017).

<sup>15</sup> See S.F. MUN. TRANSP. AGENCY, SAN FRANCISCO TRANSPORTATION FACT SHEET 5 (2016), <https://www.sfmta.com/sites/default/files/reports/2016/2015%20SFMTA%20Transportation%20Factsheet.pdf> (note that the 2016 fact sheet begins on the page 4 of the linked file).

<sup>16</sup> See *id.*

<sup>17</sup> See BAY AREA RAPID TRANSIT, <http://www.bart.gov/> (last visited Apr. 29, 2017).

<sup>18</sup> See CALTRAIN, <http://www.caltrain.com/> (last visited Apr. 29, 2017).

<sup>19</sup> These are Golden Gate Transit (connecting San Francisco to Marin and Sonoma counties in the north), AC Transit (connecting San Francisco with the East Bay), and SamTrans (connecting San Francisco with San Mateo County to the south). See *Golden Gate Transit Current Bus Schedules*, GOLDEN GATE BRIDGE HIGHWAY & TRANSP. DIST., <http://goldengatetransit.org/schedules/current/index.php> (last visited Apr. 29, 2017); *AC Transit Lines by City*, AC TRANSIT, <http://www.actransit.org/rider-info/ac-transit-lines-by-city/> (last visited Apr. 29, 2017); *Maps*, SAMTRANS, <http://www.samtrans.com/schedulesandmaps/maps.html> (last visited Apr. 29, 2017).

<sup>20</sup> See S.F. COMPTROLLER, CITY SERVICES BENCHMARKING: PUBLIC TRANSPORTATION 6 (2014), <http://sfcontroller.org/sites/default/files/FileCenter/Documents/5192-City%20Services%20Benchmarking%20Report%20-%20MTA.pdf>.

<sup>21</sup> See Zusha Elinson, *Too Many Stops, but Leave Mine!*, N.Y. TIMES (Dec. 29, 2011), <http://www.nytimes.com/2011/12/30/us/san-francisco-buses-are-slow-but-just-try-eliminating-a-stop.html>. For a more recent example of political pressures to retain too many stops, see Aaron Bialick, *Cafe Owner, Breed, Sway Muni to Keep Two 21-Hayes Stops Within a Block*, STREETS BLOGSF (May 1,

Franciscans are unhappy with Muni's slowness, high labor costs,<sup>22</sup> dirty vehicle interiors, passenger fare evasion, and old equipment.<sup>23</sup>

Due to frustration with Muni and other existing transit providers, and the rapid growth of the technology sector in the Bay Area, it is not surprising that several microtransit companies were created to provide an alternative form of transportation. Three microtransit companies appeared in San Francisco in 2013 and 2014:<sup>24</sup>

- Leap Transit earned heavy criticism for its yuppie-centric marketing and failure to provide wheelchair access. After a couple of brief runs, Leap was shut down by the California Public Utilities Commission (CPUC) over regulatory issues in May 2015, and never recovered.
- Night School received favorable press for its plan to provide late-night weekend service between San Francisco and Oakland, but its launch was stalled by the CPUC in May 2014 and it never began service. Media commenters decried the CPUC's approach to regulating Night School.<sup>25</sup>

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2015), <http://sf.streetsblog.org/2015/05/01/cafe-owner-breed-sway-muni-to-keep-two-21-hayes-stops-within-a-block/>.

<sup>22</sup> See Joe Eskenazi & Greg Dewar, *The Muni Death Spiral*, S.F. Weekly (Apr. 14, 2010), <http://archives.sfweekly.com/sanfrancisco/the-muni-death-spiral/Content?oid=2176739&showFullText=true>.

<sup>23</sup> See Jules Suzdaltsev, *San Francisco's Public Transit System Is Doomed*, VICE (Apr. 18, 2014), [https://www.vice.com/en\\_us/article/san-franciscos-muni-is-doomed](https://www.vice.com/en_us/article/san-franciscos-muni-is-doomed).

<sup>24</sup> Another company, Loup, was often grouped with the other microtransit companies in the news media. It operated along fixed routes with standard-size sedans during 2014 and 2015. See Liz Gannes, *Loup: The Love Child of Uber and a Bus Service*, RECODE (Dec. 2, 2014), <https://www.recode.net/2014/12/2/11633422/loup-the-love-child-of-uber-and-a-bus-service> (describing Loup); Laura Waxmann, *Can New Shuttle Service Curb San Francisco's Transportation Trouble?*, MISSION LOCAL (Feb. 22, 2016), <http://missionlocal.org/2016/02/can-new-shuttle-service-curb-san-franciscos-transportation-trouble/> (noting that Loup has gone out of business). Loup appears to have stopped operating sometime in 2015, see Annie Gaus, *How Chariot Has Thrived Where Other Private Transit Startups Failed*, SILICON VALLEY BUS. J. (Sept. 1, 2015), <http://www.bizjournals.com/sanjose/blog/techflash/2015/09/chariot-leap-loup-uber-cpuc-muni-transit.html>, but its website was still working as of the time of writing. See LOUP, <http://loupapp.com/> (last visited Apr. 30, 2017). Loup arguably was not a "microtransit" company because it did not use high-capacity vehicles. There is relatively little information on Loup in the media, and no available regulatory decisions or other legal documents of interest concerning Loup, so it is not further discussed in this Note.

<sup>25</sup> See *infra* notes 74–75 and accompanying text.

- Chariot, the sole survivor of the microtransit companies in San Francisco, was able to avoid the regulatory problems of Leap and Night School. Chariot began service in spring 2014 and was acquired by Ford Motors in September 2016. It currently provides regular service along twelve public routes in San Francisco, as well as numerous routes for specific employers.<sup>26</sup> Chariot now provides regular service along five public routes in Austin, Texas,<sup>27</sup> four public routes in New York City,<sup>28</sup> and plans to expand to other cities.<sup>29</sup>

This Note will first focus on the perspective of the news media, then turn to the legal issues these stories present in Section III after giving an overview of the legal framework in Section II. While many in the media were disdainful of Leap's tone-deaf marketing, Night School and Chariot gained relatively favorable coverage.

#### A. *Leap Transit: "Gentrified Buses" and Legal Problems*

The growth of the technology sector in the San Francisco Bay Area has brought a huge infusion of money and new jobs to the area, but has also led to skyrocketing real estate prices, increasing traffic congestion, and growing economic inequality. Some long-time residents are resentful towards tech workers (or "techies") and blame them for gentrification and displacement.<sup>30</sup> Buses provided by tech companies for their employees have been a flash point for tensions, and several protests have targeted Google buses.<sup>31</sup>

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<sup>26</sup> See *Routes*, CHARIOT (last visited Dec. 12, 2017), <https://www.chariot.com/routes> (switch tab at top left to "SF Bay Area").

<sup>27</sup> See *id.* (switch tab at top left to "Austin").

<sup>28</sup> See *id.* (switch tab at top left to "New York").

<sup>29</sup> See Darrell Etherington, *Ford's Chariot Ride-Sharing Service Will Expand to 8 Cities in 2017*, TECHCRUNCH (Jan. 9, 2017), <https://techcrunch.com/2017/01/09/fords-chariot-ride-sharing-service-will-expand-to-8-cities-in-2017/>.

<sup>30</sup> See, e.g., Rory Carroll, *How Wealth of Silicon Valley's Tech Elite Created a World Apart*, GUARDIAN (May 25, 2013), <https://www.theguardian.com/technology/2013/may/26/silicon-valley-elite-san-francisco>; Jean Elle, *Tech Workers in San Francisco Feel Threatened by Long Term Residents*, NBC BAY AREA (Sept. 25, 2015), <http://www.nbcbayarea.com/news/local/Tech-Workers-in-San-Francisco-Feel-Threatened-by-Long-Term-Residents-329627811.html>.

<sup>31</sup> See, e.g., Sean Hollister, *Protesters Block Silicon Valley Shuttles, Smash Google Bus Window*, VERGE (Dec. 20, 2013), <http://www.theverge.com/2013/12/20/5231758/protesters-target-silicon-valley-shuttles-smash-google-bus-window>. See also Hamish McKenzie, *Behold Leap Transit: The Uber for City Buses Is Nigh*, PANDO (Nov. 26, 2013), <https://pando.com/2013/11/26/ behold-leap-transit->

Leap Transit began operations in May 2013 and almost immediately became a symbol of tech culture and its perceived problems.<sup>32</sup> Its initial route ran from the Marina, an upscale residential neighborhood of San Francisco with many young adults, to downtown.<sup>33</sup> Leap's vehicles were used buses bought from a public transit agency,<sup>34</sup> but were enhanced with leather seating, payment by phone, Wi-Fi, blue paint, and a hip logo.<sup>35</sup> A ticket was \$6, compared with \$2 for Muni buses.<sup>36</sup>

In early coverage of Leap, one journalist argued that Leap “symbolises [sic] everything that is wrong with the current bubble and boom of internet startup culture,” and described its riders as “those who simply can’t bear standing up for a few minutes when all the seats are taken, or even sharing space with lesser humans.”<sup>37</sup> Another journalist called Leap “the latest coddle[d] libertarian startup” and linked it to Google’s buses.<sup>38</sup> One of Leap’s founders, 28-year-old Kyle Kirchoff, argued that the Muni bus that ran along the same route was overcrowded and described Leap’s service as in between public buses and a taxi.<sup>39</sup> However, San Francisco Supervisor John Avalos reacted angrily to Leap’s use of Muni bus stops and argued that Leap was “creating a two-tiered transportation system in San Francisco.”<sup>40</sup>

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the-uber-for-city-buses-is-nigh/ (“People suspicious of the effects of tech wealth and excess in the Bay Area have pointed to the tech companies’ private buses, and services such as Uber, as classist instruments of divisions.”).

<sup>32</sup> See Kevin Montgomery, *Startup Looks to Replace Shitty-Ass Muni with Bougie-Ass Shuttle Bus*, UPTOWN ALMANAC (May 29, 2013), <http://uptownalmanac.com/2013/05/startup-looks-replace-shitty-ass-muni-bougie-ass-shuttle-bus>; Stilgherrian, *iPhone, Therefore I Am . . . a Selfish Disruptor*, ZDNET (May 24, 2013), <http://www.zdnet.com/article/iphone-therefore-i-am-a-selfish-disruptor/>.

<sup>33</sup> See Montgomery, *supra* note 32.

<sup>34</sup> See Cyrus Farivar, *Private Bus Startup Leap Hit with Complaint Under US Disabilities Law*, ARS TECHNICA (Apr. 18, 2015), <https://arstechnica.com/tech-policy/2015/04/private-bus-startup-leap-hit-with-complaint-under-us-disabilities-law/>.

<sup>35</sup> See Ellen Huet, *Leap Transit Offers Private Shuttle Service Along Muni Route*, SFGATE (May 30, 2013), <http://blog.sfgate.com/cityinsider/2013/05/30/leap-transit-offers-private-shuttle-service-along-muni-route/>.

<sup>36</sup> See *id.*

<sup>37</sup> Stilgherrian, *supra* note 32.

<sup>38</sup> Montgomery, *supra* note 32.

<sup>39</sup> See Huet, *supra* note 35.

<sup>40</sup> *Id.* Arguably, most places in the U.S. already have a starkly “two-tiered transportation system”—cars for those who can afford to own them and are able to drive, and public transit for everyone else. See *infra* notes 331–333 and accompanying text.

Leap did not operate for long in 2013, and later characterized this period as its “beta test.”<sup>41</sup> It resumed operations in March 2015<sup>42</sup> and attracted even more publicity than before, mostly negative. One publication joked that Leap was “here to rescue us all from public transportation,”<sup>43</sup> and another called the buses “a twee fantasy, complete with unfinished wood interior and pressed juices for sale.”<sup>44</sup> One writer ruthlessly mocked Leap’s video ad, noting that the bus’s “wall paneling . . . looks ripped from an old, weathered barn . . . .”<sup>45</sup> Even a journalist who defended Leap admitted that “Leap may reek of elitism” and noted that Leap “strikes many people as the epitome of Bay Area douchebaggery.”<sup>46</sup>

In mid-April 2015, not long after Leap’s second launch, the San Francisco Chronicle reported that a complaint had been filed against Leap for violating the Americans with Disabilities Act.<sup>47</sup> The Chronicle noted that the used buses were originally wheelchair-accessible, but “[t]he spaces once reserved for wheelchairs now feature bar-style seating and plush leather armchairs.”<sup>48</sup> The person responsible for the complaint, a transportation engineer who used a wheelchair, compared the lack of wheelchair access to racial segregation.<sup>49</sup> Leap claimed that the

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<sup>41</sup> See Nitasha Tiku, *All Aboard San Francisco’s Startup Bus Craze*, VERGE (Mar 23, 2015), <http://www.theverge.com/2015/3/23/8279715/san-francisco-bus-leap-loup-chariot>.

<sup>42</sup> See *id.*

<sup>43</sup> Caleb Pershan, *Private Bus Service Leap Arrives to Rescue Us All from Public Transportation*, SFIST (Mar. 18, 2015), [http://sfist.com/2015/03/18/private\\_bus\\_service\\_leap\\_is\\_here\\_to.php](http://sfist.com/2015/03/18/private_bus_service_leap_is_here_to.php).

<sup>44</sup> Katie Dowd, *Luxury Bus Is Here to Disrupt Your S.F. Commute*, SFGATE (Mar. 18, 2015), <http://www.sfgate.com/bayarea/article/Luxury-bus-is-here-to-disrupt-your-S-F-commute-6142528.php>.

<sup>45</sup> John Metcalfe, *San Francisco Gets the Ridiculous Luxury Bus It Deserves*, CITYLAB (Mar. 18, 2015), <http://www.citylab.com/commute/2015/03/san-francisco-gets-the-ridiculous-luxury-bus-it-deserves/388090/>. The video ad is still available online. See *Leap - Your Daily Commute. Redesigned*, VIMEO (last visited Nov. 30, 2017), <https://vimeo.com/122275278>.

<sup>46</sup> Alex Davies, *What Mass Transit Can Learn from Elitist Buses Like Leap*, WIRED (Mar. 31, 2015), <https://www.wired.com/2015/03/public-transit-can-learn-elitist-private-buses/>.

<sup>47</sup> See Kristen V. Brown, *Complaint: Commuter Buses Yanked Disabled Access for Bar Seating*, S.F. CHRON. (Apr. 15, 2015), <http://www.sfchronicle.com/news/article/Bus-startup-Leap-s-luxury-doesn-t-extend-to-6203093.php>.

<sup>48</sup> *Id.*

<sup>49</sup> See *id.*

ADA had different requirements for used vehicles such as its buses,<sup>50</sup> and said that the buses still had their wheelchair ramps.<sup>51</sup> Some of these wheelchair ramps were not working, Leap admitted, but it “planned to address this later” and was making short-term arrangements to accommodate wheelchairs on one of its five buses.<sup>52</sup>

In May 2015, however, Leap ran into more trouble. The California Public Utilities Commission issued a letter on May 11 ordering the company to stop operations, and on May 19 Leap announced that “it has temporarily suspended service” in response to the letter.<sup>53</sup> As discussed below in Section III.A, Leap may have believed that it was not under the CPUC’s jurisdiction at this point in time, although Leap’s intentional seeking of CPUC jurisdiction makes this argument hard to believe.

After stopping service on May 19, Leap never restarted. In June 2015, a journalist noticed that three of Leap’s five buses were up for auction.<sup>54</sup> In July, Leap filed for bankruptcy, and its remaining buses were auctioned off in September 2015.<sup>55</sup>

Unsurprisingly, some media outlets were unsympathetic to Leap’s demise. One journalist accused Leap of trying to “skirt stricter oversight by local government” by seeking authority to operate from CPUC.<sup>56</sup> Another journalist mused that Leap’s attempt “to ‘game’ the regulatory system” was “no longer paying off.”<sup>57</sup> More dispassionately, a journalist at the New York Times surmised that Leap failed because of its “association with Silicon Valley’s tech-bro sensibilities,” elaborating that “Leap was created by and for techies. It was born inside the bubble, and it could never

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<sup>50</sup> *See id.*

<sup>51</sup> *See* Farivar, *supra* note 34.

<sup>52</sup> *Id.*

<sup>53</sup> Kristen V. Brown, *Leap Transit Shut Down by the State for Operating Illegally*, SFGATE (May 20, 2015), <http://www.sfgate.com/business/article/Leap-Transit-shut-down-by-the-state-for-operating-6276298.php>.

<sup>54</sup> *See* Kristen V. Brown, *For Sale: Startup Bus, Barely Worn*, FUSION (June 12, 2015), <http://fusion.net/for-sale-startup-bus-barely-worn-1793848380>.

<sup>55</sup> *See* Joe Fitzgerald Rodriguez, *Leap Files for Bankruptcy, Auctions off Remaining Buses*, S.F. EXAMINER (Sept. 15, 2015), <http://www.sfexaminer.com/leap-files-for-bankruptcy-auctions-off-remaining-buses/>.

<sup>56</sup> Brown, *supra* note 54.

<sup>57</sup> *See* Julia Carrie Wong, *Leap Transit Forced to Cease Operations by State*, SF WEEKLY (May 20, 2015), <http://archives.sfweekly.com/thesnitch/2015/05/20/leap-transit-forced-to-cease-operations-by-state>.

escape.”<sup>58</sup>

### B. *Night School: Regulatory Martyr?*

While Leap was perceived by many Bay Area residents as a symbol of the tech industry’s separatism and excess, journalists celebrated Night School’s plans to fill an important gap in regional public transit service.<sup>59</sup> Night School planned to use off-duty school buses to shuttle people between one stop in San Francisco’s Mission District and one stop in downtown Oakland between the hours of midnight and 4 a.m. after Friday and Saturday nights.<sup>60</sup>

One journalist noted the paucity of public transit between San Francisco and Oakland during the late-night hours, especially when BART shuts down.<sup>61</sup> The founders of Night School explained that drunk driving was most prevalent at these hours.<sup>62</sup> One of the founders spoke positively about the late-night buses of AC Transit, the regional bus operator that serves Oakland and Alameda County, but noted that AC Transit did not offer late-night service in San Francisco’s Mission District despite its vibrant nightlife.<sup>63</sup> Night School planned to charge \$19 per month for unlimited rides, with early discounts of \$10 per month.<sup>64</sup> To show how publicly-minded they were, and in keeping with the “school” theme, the founders decided to “donate 5% of profits to the Great

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<sup>58</sup> Farhad Manjoo, *Behind the Failure of Leap Transit’s Gentrified Buses in San Francisco*, N.Y. Times (Oct. 14, 2015), <http://www.nytimes.com/2015/10/15/technology/behind-the-failure-of-leap-transits-gentrified-buses-in-san-francisco.html>.

<sup>59</sup> In addition to the article discussed below, see Cheryl Hurd, “*Night School*” *Bus Service Offers Late-Night Rides Between SF and Oakland*, NBC BAY AREA (May 22, 2014), <http://www.nbcbayarea.com/news/local/Night-School-Bus-Service-Offers-Late-Night-Rides-Between-SF-and-Oakland-260369721.html>; Evan Karp, *Night School: Stay Out Late, Take the School Bus Home*, S.F. WEEKLY (May 20, 2014), <http://archives.sfweekly.com/exhibitionist/2014/05/20/night-school-stay-out-late-take-the-school-bus-home>; Sam Levin, *New Private Bus Service Offers Late Night Rides From San Francisco’s Mission District to Uptown Oakland*, EAST BAY EXPRESS (May 15, 2014), <http://www.eastbayexpress.com/SevenDays/archives/2014/05/15/new-private-bus-service-offers-rides-from-san-franciscos-mission-district-to-uptown-oakland-after-midnight>.

<sup>60</sup> See Jennifer Maerz, *Take the New SF-Oakland Late Night School Bus Home*, BOLD ITALIC (May 14, 2014), <https://thebolditalic.com/take-the-new-sf-oakland-late-night-school-bus-home-the-bold-italic-san-francisco-9c79ad1669b>.

<sup>61</sup> See *id.*

<sup>62</sup> See Maerz, *supra* note 60.

<sup>63</sup> See *id.*

<sup>64</sup> See *id.*

Oakland Public Schools Leadership Center to support its Teacher Fellowship Program to recruit, train, and retain effective teachers.”<sup>65</sup>

However, Night School never successfully launched its service, which it intended to begin on May 23, 2014. Shortly before the planned start date, Night School announced that the California Public Utilities Commission had blocked their launch because they determined that Night School lacked a proper permit to operate.<sup>66</sup> Night School attempted to resolve the problem,<sup>67</sup> and, in June 2014, announced it had received authority to operate from CPUC. That August, it stated that it was still “working our way through the bureaucracy involved in our bus-sharing arrangement.”<sup>68</sup> In October 2014, Night School’s founders expressed frustration with CPUC:

California recognizes several categories of transportation company and, not surprisingly, we don’t fit into any of them. Our talks with the California Public Utilities Commission (CPUC) have all focused on a plan to license us as one of the existing categories, then make adjustments in order to fit our unique model. Despite months of promising negotiations and several moments when an agreement and launch seemed imminent, we still have not been able to reach a solution that simultaneously works for Night School, the CPUC, and our subcarriers (the school bus companies).<sup>69</sup>

They nonetheless expressed optimism that they would find a solution soon by making changes to “the simple, efficient resource-sharing model that inspired us to start Night School.”<sup>70</sup>

In late 2014, Night School announced that the company was disbanding, and its founders blamed the CPUC in harsh terms.<sup>71</sup> They declared defeat: “We are not seeking more money or

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<sup>65</sup> *Id.*

<sup>66</sup> See Michael Cabanatuan, *Night School Bus Service Postponed*, SFGATE (May 23, 2014), <http://www.sfgate.com/bayarea/article/Night-School-bus-service-postponed-5499019.php>.

<sup>67</sup> *See id.*

<sup>68</sup> See *News*, NIGHT SCHOOL (as archived on Oct. 6, 2014), <https://web.archive.org/web/20141006052638/http://www.night.sc:80/news/>.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> See NIGHT SCHOOL (as archived on Feb. 25, 2015), <http://web.archive.org/web/20150225051758/http://www.night.sc/>. (For the timing of this post, see *infra* note 74.)

lobbying for a change in laws. After spending much of the past year banging our heads against a wall of bureaucracy, we have reached a dead end.”<sup>72</sup> According to them, CPUC “never raised any substantive objections to the safety or soundness of our plan” but nonetheless “effectively made it impossible for us to launch.”<sup>73</sup>

One commenter criticized the CPUC’s inconsistent regulations and contrasted Night School’s rule-following behavior with Uber’s defiance of regulators, concluding angrily that “[c]ompanies without tremendous venture capital and influential lobbyists can’t afford to be disruptors; their struggles don’t even inspire political outrage.”<sup>74</sup> Another commenter used Night School to illustrate of “the regulatory hell of operating in California.”<sup>75</sup>

### C. *Chariot: No-Frills Microtransit Wins the Day*

Chariot, which uses passenger vans with fifteen seats to transport customers,<sup>76</sup> began operating in April 2014.<sup>77</sup> It was helped in its early stages by the start-up incubator Tumml.<sup>78</sup> Much like Leap, Chariot’s first route served commuters in the Marina District.<sup>79</sup> In 2014, Chariot charged about \$4 per ride, with discounts for monthly passes, and added new routes through crowdfunding.<sup>80</sup> By November 2014, Chariot had about 400 boardings per weekday, a small fraction of Muni’s 700,000.<sup>81</sup>

Unlike Leap, Chariot offered basic service at a lower price.<sup>82</sup>

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> See Susie Cagle, *How a Start-Up That Wouldn’t Break the Rules Was Forced to Fail*, PAC. STANDARD (Jan. 27, 2015), <https://psmag.com/how-a-start-up-that-wouldn-t-break-the-rules-was-forced-to-fail-657d60b71ef0>.

<sup>75</sup> Scott Beyer, *Chariot Wins First Round of San Francisco’s Private Transit Battle*, FORBES (Sept. 8, 2015), <http://www.forbes.com/sites/scottbeyer/2015/09/08/chariot-wins-first-round-of-san-franciscos-private-transit-battle/#12bf6b546e92>.

<sup>76</sup> *See id.*

<sup>77</sup> *See About Chariot*, CHARIOT (last visited Nov. 30, 2017), <https://www.chariot.com/about>.

<sup>78</sup> See Ronald Brownstein, *Forget Dating Apps. These Millennials Want to Save the World*, CNN MONEY (Oct. 30, 2014), <http://money.cnn.com/2014/10/30/smallbusiness/tumml-next-economy-millennials/index.html>.

<sup>79</sup> See Kim-Mai Cutler, *As A Cohort of Bus Startups Emerge, Chariot Looks to Source New Routes Through Crowdfunding*, TECHCRUNCH (Nov. 10, 2014), <https://techcrunch.com/2014/11/10/chariot/>.

<sup>80</sup> *See id.*

<sup>81</sup> *See id.*

<sup>82</sup> See Beyer, *supra* note 75 (“Rather than providing food, drinks, and luxury

Chariot decided to operate during commuting hours, rather than trying to provide service when other public transit was not operating, like Night School.<sup>83</sup> Chariot seems to have gained less media attention than Leap or Night School, and has avoided major controversy in the eyes of the media.<sup>84</sup> However, media commenters have noted that microtransit companies like Chariot create the risk of a two-tiered public transit system, which could lead to lower political support for public transit as its more affluent customers switch to microtransit.<sup>85</sup>

By January 2016, Chariot had about 2,250 boardings per weekday.<sup>86</sup> In September 2016, Ford Motors purchased Chariot<sup>87</sup>—which then used about one hundred vans<sup>88</sup>—for more than \$65 million, a major increase from its \$3 million initial funding.<sup>89</sup>

Chariot currently provides regular service along twelve public routes in San Francisco, as well as numerous routes for specific employers.<sup>90</sup> Chariot expanded to Austin, Texas in October 2016,<sup>91</sup>

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interiors, Chariot provides rudimentary vans that get from point A to B.”).

<sup>83</sup> See *Common Questions About Chariot*, CHARIOT (last visited Apr. 30, 2017), <https://www.chariot.com/faqs> (click on question “When is Chariot in service?”).

<sup>84</sup> See, e.g., Jack Morse, *Private Shuttle Service Chariot Swears They’re for Everyone, Adds New Routes (Maybe)*, SFIST (Dec. 8, 2015), [http://sfist.com/2015/12/08/private\\_shuttle\\_service\\_chariot\\_swe.php](http://sfist.com/2015/12/08/private_shuttle_service_chariot_swe.php) (noting that “Chariot “has thus far managed to avoid much of the controversy that accompanied their more upscale competitor Leap”). See also *Herrera Files Complaint Against Muni Union for Sickout*, ABC7NEWS (June 4, 2014), <http://abc7news.com/traffic/herrera-files-complaint-against-muni-union-for-sickout/92724/>. This is the earliest news article I have found that mentions Chariot, and it is also the earliest article noted in Chariot’s “Press” webpage. See *Chariot in the News*, CHARIOT (last visited Nov. 30, 2017), <https://www.chariot.com/press>. The next article is in October 2014. See *id.*

<sup>85</sup> See Alana Semuels, *The End of Public Transit?*, ATLANTIC (Oct. 28, 2016), <http://www.theatlantic.com/business/archive/2016/10/public-transportation-uber-chariot/505658/>; Joseph Stromberg, *These Startups Want to Do for Buses What Uber Did for Taxi Rides*, VOX (July 7, 2015), <http://www.vox.com/2015/7/7/8906027/microtransit-uber-buses>.

<sup>86</sup> See CHARIOT, *supra* note 77 (noting 50,000 rides in one month—divided by the approximate number of weekdays, this equals 2,258 rides per weekday, since Chariot only offers weekday service).

<sup>87</sup> See Matt Rosoff & Biz Carson, *Ford Paid More Than \$65 Million for Shuttle-Van Startup Chariot*, BUS. INSIDER (Sept. 12, 2016), <http://www.businessinsider.com/ford-buys-chariot-65-million2016-9>.

<sup>88</sup> See CHARIOT, *supra* note 77.

<sup>89</sup> See Rosoff & Carson, *supra* note 87.

<sup>90</sup> See *Routes*, CHARIOT, <https://www.chariot.com/routes>, (last visited Aug.

and now provides regular service along four public routes there.<sup>92</sup> Chariot also plans “to expand to eight new cities in 2017 . . . .”<sup>93</sup> In August 2017, Chariot began serving its first two routes in New York City.<sup>94</sup>

## II. HOW CALIFORNIA REGULATES PRIVATE TRANSIT

California’s laws regulating transportation services present microtransit companies with a series of strategic choices to make, which can result in different kinds of regulation at different levels of government. Under California law, microtransit companies that offer their services to all or part of the public are subject to comprehensive regulation. This will most likely apply to any microtransit company, unless they provide transportation incidental to some other service or do not charge for their services.<sup>95</sup> Even if a microtransit company could avoid comprehensive regulation, it would still need to apply for a permit as a “private carrier.”<sup>96</sup>

State law provides two frameworks for regulating microtransit: these companies can operate as either a “passenger stage corporation” or a “charter party carrier.” Due to the archaic terminology of “passenger stage corporation,” this Note will use the more modern and descriptive term “fixed-route carrier.” Arguably, smartphone technology has blurred the lines between fixed-route carriers and charter carriers, but the three microtransit companies discussed above have generally been regulated as fixed-route carriers. While operating as a charter carrier would present certain challenges, microtransit companies could gain an important

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22, 2017) (switch tab at top left to “SF Bay Area”; to see routes for specific employers, include “private” routes in the filter settings on the map).

<sup>91</sup> See Michael Theis, *Powered by Ford, Austin Gets New App-based Bus Service*, AUSTIN BUS. J. (Oct. 6, 2016), <http://www.bizjournals.com/austin/news/2016/10/06/powered-by-ford-austin-gets-new-app-basedbus.html>.

<sup>92</sup> See *Routes*, *supra* note 90 (switch tab at top left to “Austin”).

<sup>93</sup> See Darrell Etherington, *Ford’s Chariot Ride-Sharing Service Will Expand to 8 Cities in 2017*, TECHCRUNCH (Jan. 9, 2017), <https://techcrunch.com/2017/01/09/fords-chariot-ride-sharing-service-will-expand-to-8-cities-in-2017/>.

<sup>94</sup> See Darrell Etherington, *Ford’s Chariot Shuttles Are Expanding to New York City*, TECHCRUNCH (July 27, 2017), <https://techcrunch.com/2017/07/27/fords-chariot-shuttles-are-expanding-to-new-york-city/>; see also *Routes*, *supra* note 90 (switch tab at top left to “New York”).

<sup>95</sup> See *infra* notes 97–98, 99–100 and accompanying text.

<sup>96</sup> See *infra* note 101 and accompanying text.

advantage by being regulated as charter carriers: their fares would no longer be subject to regulation. In contrast, public transit agencies are not subject to fare regulation by external regulators.

Microtransit companies are subject to either state or local regulation, depending on the routes they serve. If the microtransit company's routes are entirely or almost entirely within a single city, then the municipal government regulates the microtransit company. However, if the microtransit company serves multiple cities, then it is regulated by the California Public Utilities Commission. This allows microtransit companies to strategically seek operating authority from either state or local officials.

This Section will describe the nested categories of transportation services under California law, first discussing the difference between common carriers and private carriers, then explaining the distinction between fixed-route carriers and charter carriers. It will then examine when microtransit is subject to state regulation and when it is subject to local regulation. Finally, it will summarize San Francisco's recent and current laws regulating microtransit.

#### A. *Private and Common Carriers*

California law distinguishes between common carriers and private carriers, and regulates common carriers much more stringently. However, it would be difficult for any microtransit company to persuasively argue that it is not a "common carrier."

Under the Public Utilities Code, a common carrier is defined as "every person and corporation providing transportation for compensation to or for the public or any portion thereof . . ."<sup>97</sup> This definition would almost certainly apply to any microtransit company, and the statutory exclusions do not aid microtransit companies.<sup>98</sup>

In contrast, private carriers transport passengers "by special agreement only in a particular instance" or provide "transportation [which] is incidental to or in furtherance of any commercial enterprise other than transportation."<sup>99</sup> The CPUC gives as examples of private carriers "a church transporting members of its

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<sup>97</sup> CAL. PUB. UTIL. CODE § 211.

<sup>98</sup> See CAL. PUB. UTIL. CODE § 212.

<sup>99</sup> 11A CAL. JUR. *Carriers* § 2 (West 2017).

congregation [or] an employer transporting its own employees.”<sup>100</sup>

Even if a microtransit company is able to avoid classification as a common carrier, it still must register with the CPUC as a private carrier.<sup>101</sup> This would alert the CPUC to the microtransit company’s existence and may trigger an investigation.

### B. *Fixed-Route Carriers and Charter Carriers*

If a microtransit company is deemed a common carrier under the Public Utilities Code, California law must classify it in one of two ways:<sup>102</sup> as a fixed-route carrier<sup>103</sup> or a charter carrier.<sup>104</sup> While microtransit companies in San Francisco have mostly been regulated as fixed-route carriers, charter carrier regulation presents an important advantage: the CPUC does not regulate the fares charged by charter carriers. However, microtransit companies have limited power to strategically choose between these two forms of operation, as the CPUC has the final say about whether a company is operating as a fixed-route carrier or a charter carrier. The CPUC’s determination on this question is not subject to judicial review.<sup>105</sup>

The primary difference between fixed-route carriers and charter carriers is their method of obtaining passengers. Fixed-route carriers operate “between fixed termini or over a regular route”<sup>106</sup> and charge individual fares<sup>107</sup>—in other words, they show up at a particular stop and take passengers who will pay the fare. In

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<sup>100</sup> *Applications and Lists of Related Forms for Carriers*, CAL. PUB. UTILS. COMM’N (last visited Nov. 30, 2017), [http://www.cpuc.ca.gov/transportation\\_forms/](http://www.cpuc.ca.gov/transportation_forms/).

<sup>101</sup> See CAL. PUB. UTIL. CODE § 4005.

<sup>102</sup> There are other categories, but they are very unlikely to apply to microtransit. For example, microtransit may be able to escape classification as either a charter carrier or a fixed-route carrier by operating as a “vanpool.” In a vanpool, vehicles with 15 seats or fewer are used to transport employees of the same firm to their workplace. See CAL. PUB. UTIL. CODE §§ 226(c), 5353(h) (exempting vanpools from regulation as fixed-route operators or charter carriers). However, to qualify for a regulatory exemption as a vanpool, the trip cannot be primary to make a profit, *see id.*, making this category of limited use to microtransit companies.

<sup>103</sup> See CAL. PUB. UTIL. CODE §§ 226, 1031–46 (using the term “passenger stage corporation”).

<sup>104</sup> See CAL. PUB. UTIL. CODE §§ 5351–5420.

<sup>105</sup> See CAL. PUB. UTIL. CODE § 1035.

<sup>106</sup> CAL. PUB. UTIL. CODE § 226.

<sup>107</sup> See CAL. PUB. UTIL. CODE § 1035 (noting that any company charging individual fares is presumed to be a fixed-route carrier).

contrast, charter carriers must arrange to transport their passengers in advance, “either by written contract or telephone,”<sup>108</sup> and may not charge individual fares.<sup>109</sup> While these two categories are clearly distinguishable in the pre-cellphone age, modern technology has created new gray areas. What if a transportation service runs along fixed routes, but requires reservations on a smartphone app?<sup>110</sup> What if a transportation service varies its routes dynamically to accommodate passengers who reserve seats a few minutes in advance? Under California law, these issues are for the CPUC to resolve.

One important consequence of categorization as either a fixed-route carrier or a charter carrier is that the CPUC regulates the fares or rates charged by fixed-route carriers, but not charter carriers. Fixed-route carriers are subject to rate regulation by the CPUC as public utilities,<sup>111</sup> and like other public utilities, fixed-route carriers can only charge “just and reasonable” rates.<sup>112</sup> Fixed-route carriers must have their rates approved when they file for authority to operate with the CPUC and when they change their rates.<sup>113</sup> If a microtransit company challenges the decision of the CPUC denying a rate increase, courts can only review the CPUC decision on the issue of “whether confiscation of property will result” from the denial.<sup>114</sup> Fixed-route carriers are also prohibited from discriminating between customers in the fares that they charge, including but not limited to discrimination on the basis of

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<sup>108</sup> See CAL. PUB. UTIL. CODE § 5360.5.

<sup>109</sup> See CAL. PUB. UTIL. CODE § 5401 (with exceptions for “schoolbus contractors” and “round-trip sightseeing tour services,” which are very unlikely to apply to microtransit).

<sup>110</sup> This is how Chariot works: you must reserve a seat in advance, even though the vehicles operate along the same routes. See CHARIOT, *supra* note 83 (see answer to the question “Am I guaranteed a seat on a Chariot?”).

<sup>111</sup> See CAL. CONST. art. XII §§ 3 (subjecting public transportation providers to jurisdiction of the CPUC as public utilities), 4 (subjecting public transportation companies to rate regulation by the CPUC); see also CAL. PUB. UTIL. CODE §§ 211(c) (classifying fixed-route carriers as a type of common carrier), 216(a) (defining “public utility” to include all common carriers offering service to the public). However, this regulation of rates only applies to for-profit companies. Public transit agencies are exempt from rate regulation, as discussed below in notes 128–130 and accompanying text.

<sup>112</sup> CAL. PUB. UTIL. CODE § 451.

<sup>113</sup> CAL. PUB. UTIL. CODE § 454. The approval of initial rates is part of the CPUC’s decision to grant a certificate of public convenience and necessity, as discussed below.

<sup>114</sup> CAL. CONST. art. XII § 4.

disability.<sup>115</sup>

It is unclear what public policy considerations justify the regulation of fixed-route carriers by the CPUC. The framework of rate regulation may be a vestige of a period in history when transit services were provided primarily by private companies, which generally had *de facto* monopolies over transit within a given area.<sup>116</sup> Rate regulation is more commonly associated with the regulation of natural monopolies, such as electric utilities. There is evidence that California law previously sought to grant local monopolies to private passenger carriers in order to avert perceived problems caused by inter-carrier competition,<sup>117</sup> in which case fare regulation would be necessary to ensure reasonable fares. Today, transit is provided by government agencies with significant subsidies, so that rationale no longer applies. Fortunately, California law gives fixed-route carriers some flexibility by allowing them to request a “zone of rate freedom,” a range of fares which the CPUC may approve in advance.<sup>118</sup> In addition, the CPUC has adopted a general stance in favor of competition in the industry of passenger transportation.<sup>119</sup>

Charter carriers may also benefit from federal preemption of state rate regulation if they provide “charter bus” service.<sup>120</sup> Federal law only allows states to regulate the safety and required insurance of charter bus operations, and to impose “highway route controls or limitations based on the size or weight of the motor vehicle . . . .”<sup>121</sup> Confusingly, there is no clear definition of “bus” in the relevant statute, and federal courts have not adopted a uniform definition when applying this law.<sup>122</sup> California law

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<sup>115</sup> See CAL. PUB. UTIL. CODE §§ 453 (general prohibition on rate discrimination), 460.3 (specific prohibition on charges to disabled passengers on fixed-route operators).

<sup>116</sup> Cf. *In re* Regulation of Passenger Carrier Services, 33 CPUC 2d 5 § III (1989) (discussing changes in the passenger transportation industry).

<sup>117</sup> See *infra* notes 140–145 and accompanying text.

<sup>118</sup> CAL. PUB. UTIL. CODE § 454.2.

<sup>119</sup> See *In re* Regulation of Passenger Carrier Services, 33 CPUC 2d 5 § III.

<sup>120</sup> See 49 U.S.C. § 14501(a) (2012).

<sup>121</sup> *Id.*

<sup>122</sup> See *Kozak v. Hillsborough Pub. Transp. Comm’n*, 695 F. Supp. 2d 1285, 1301 (M.D. Fla. 2010) (holding that a bus is “a vehicle designed to carry more than 15 passengers”), *aff’d sub nom.* *Kozak v. Hillsborough Cty., Fla.*, 644 F.3d 1347 (11th Cir. 2011); *Alex’s Transp., Inc. v. Colo. Pub. Utils. Comm’n*, 88 F. Supp. 2d 1147, 1149 (D. Colo.) (finding a bus is “a vehicle with a minimum capacity of thirty-two passengers”), *aff’d*, 242 F.3d 387 (10th Cir. 2000).

suggests that a “bus” in this context should be any vehicle with 10 seats or more, but it allows any federal court with jurisdiction to select a different definition.<sup>123</sup> The California Constitution and the Public Utilities Code do not explicitly exempt charter carriers in the body of law providing for rate regulation.<sup>124</sup> It appears that the CPUC does not attempt to regulate the rates charged by any charter carriers, regardless of whether they use buses,<sup>125</sup> perhaps due to the legal confusion over what a “charter bus” is.

While freedom from rate regulation is a benefit of classification as a charter carrier, charter carriers must meet certain other requirements that do not apply to fixed-route operators. They must follow strict protocols to prevent underage drinking on their vehicles<sup>126</sup> and keep detailed records of who they transport and how the travel was arranged.<sup>127</sup>

Public transit agencies are not subject to rate regulation by the CPUC. Instead, they are able to set their own rates.<sup>128</sup> However, public transit may be subject to CPUC regulation in other areas, such as vehicle safety,<sup>129</sup> where the legislature clearly writes statutes that include the public transit agency in CPUC’s jurisdiction.<sup>130</sup>

### C. *Local and State Regulation*

Microtransit companies that are common carriers will be subject to regulation at either the state or the local level. Current California law allows microtransit companies to strategically choose between regulation from these two different levels of government. If a fixed-route carrier provides service entirely within a single city, or if 98 percent or more of the fixed-route

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<sup>123</sup> See CAL. PUB. UTIL. CODE § 5363.

<sup>124</sup> See CAL. CONST. art. XII § 4; CAL. PUB. UTIL. CODE §§ 216(a) (including all common carriers in the definition of “public utility”), 451, 454, 730.

<sup>125</sup> CAL. PUB. UTILS. COMM’N, TRANSP. ENFORCEMENT SECTION, CPUC RULES AND REGULATIONS ON PASSENGER CARRIERS 10 (undated), [http://www.octap.net/CPUC\\_Presentation.pdf](http://www.octap.net/CPUC_Presentation.pdf).

<sup>126</sup> See CAL. PUB. UTIL. CODE § 5384.1.

<sup>127</sup> See CAL. PUB. UTIL. CODE § 5381.5.

<sup>128</sup> See, e.g., CAL. PUB. UTIL. CODE § 25,807 (giving AC Transit the ability to set its own rates, provided they are “reasonable”).

<sup>129</sup> See *Los Angeles Met. Trans. Auth. v. Pub. Utils. Comm’n*, 382 P.2d 583, 585–86 (Cal. 1963).

<sup>130</sup> See *Cnty. of Inyo v. Pub. Utils. Comm’n*, 604 P.2d 566, 573 (Cal. 1980); 53 CAL. JUR. 3d *Public Utilities* § 46 (West 2017).

carrier's route mileage is within a single city, the fixed-route carrier is only subject to regulation by the local government, and not by the CPUC.<sup>131</sup> But if a fixed-route carrier is already regulated by the CPUC, local governments may not regulate its within-city operations.<sup>132</sup> If a charter carrier operates entirely within a single city, and if that city regulates the charter carrier, the CPUC may not regulate it.<sup>133</sup>

If a microtransit company falls under the jurisdiction of the CPUC and not the local government, it will probably need to obtain a "certificate of public convenience and necessity" from the CPUC.<sup>134</sup> However, some specific types of charter carriers can obtain more generic permits from the CPUC.<sup>135</sup> For example, "[s]pecialized [charter] carriers, who do not hold themselves out to serve the general public, but only provide service under contract with industrial and business firms" are only required to get a permit instead of a certificate, as are "[charter] [c]arriers using only vehicles under 15-passenger seating capacity."<sup>136</sup>

Before 2007, applicants seeking to operate as fixed-route carriers were required to demonstrate to the CPUC that the service they would provide was in the public's interest and that other local fixed-route carriers would not provide the proposed service.<sup>137</sup> The CPUC was required to consider the effect of the applicant's proposed service on nearby public transit agencies.<sup>138</sup> In addition, the CPUC considered the market impacts of the new service.<sup>139</sup>

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<sup>131</sup> See CAL. PUB. UTIL. CODE § 226(a) (excluding such a company from the definition of "passenger stage corporation").

<sup>132</sup> See *Asbury Rapid Transit Sys. v. R.R. Comm'n*, 114 P.2d 573, 574–75 (Cal. 1941) (discussing previous versions of the relevant statutes and the jurisdiction of the California Railroad Commission, the CPUC's predecessor).

<sup>133</sup> See CAL. PUB. UTIL. CODE § 5353(a).

<sup>134</sup> See CAL. PUB. UTIL. CODE §§ 1031, 5371.

<sup>135</sup> See CAL. PUB. UTIL. CODE § 5384.

<sup>136</sup> CAL. PUB. UTIL. CODE § 5384(a)–(b). Based on the statutory language, these permits would seem to be easier to obtain than a certificate. Compare § 5384 (requiring the CPUC to issue permits to applicants "otherwise qualified" whose services fit into the statutory categories) with CAL. PUB. UTIL. CODE § 5375 (giving the CPUC more discretion when issuing a certificate for charter carrier service). However, given current federal law on charter bus service and CPUC's policies, the CPUC now has little discretion to deny charter carrier certificates. See *supra* notes 120–125 and accompanying text.

<sup>137</sup> See CAL. PUB. UTIL. CODE §§ 1031, 1032(b) (2006) (previous versions of the current law).

<sup>138</sup> See CAL. PUB. UTIL. CODE § 1032(c) (2006).

<sup>139</sup> See Cal. P.U.C. Decision No. 15-05-029, at 3, Docket No. R09-12-001

Historically, certificates of public convenience and necessity have been used by regulators to limit entry to industries where competition is seen as harmful.<sup>140</sup> This generally allows existing firms in the industry to intervene in regulatory proceedings and oppose the application, and argue that the public interest will be harmed if the regulator authorizes the new competitor.<sup>141</sup> Some contemporary scholars argue that certificates of public convenience and necessity are largely harmful because “[t]hese laws enrich existing businesses by restricting the supply of services, raising prices for consumers, and—worst of all—depriving would-be entrepreneurs of their constitutional right to earn a living without unreasonable government interference.”<sup>142</sup>

The California Supreme Court has noted that these certificates serve the purpose of limiting competition in the regulated industries,<sup>143</sup> and has also explained that the CPUC regulates carriers in order to “protect[] . . . the public against ruinous carrier competition and such possible attendant evils as improperly maintained equipment, inadequate insurance, and poor service.”<sup>144</sup> However, beginning in 1976, the CPUC has opened the passenger transportation industry to greater competition, as the industry has moved from “scheduled carriers operating from fixed termini on regular routes in large buses with monopoly service” to a “more loosely regulated, competitive, and multi-service market” with a focus on transportation to and from airports.<sup>145</sup> The CPUC has sought to promote “innovative service,” for example, by allowing on-call airport shuttles to be scheduled as fixed-route carriers despite their flexible timetables.<sup>146</sup> In the face of arguments by large bus operators for “limiting market entry, protecting service

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(May 7, 2015).

<sup>140</sup> See William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870–1920*, 79 COLUM. L. REV. 426, 427 (1979).

<sup>141</sup> See *id.*

<sup>142</sup> Timothy Sandefur, *State “Competitor’s Veto” Laws and the Right to Earn a Living: Some Paths to Federal Reform*, 38 HARV. J.L. & PUB. POL’Y 1009, 1010 (2015).

<sup>143</sup> See *Greyhound Lines, Inc. v. Pub. Utils. Comm’n*, 438 P.2d 801, 803 n.3 (Cal. 1968).

<sup>144</sup> *Keller v. Thornton Canning Co.*, 429 P.2d 156, 158 (Cal. 1967).

<sup>145</sup> See *In re Rulemaking Concerning the Regulation of Passenger Carrier Services*, 33 CPUC 2d 5 § III (1989).

<sup>146</sup> *Id.* at § IV.

routes,” and “[c]ost based rate regulation,” the CPUC instead chose to allow free entry of new market participants in ground transportation for airports in 1989.<sup>147</sup>

In 2006, the California legislature passed a bill making it simpler to obtain a certificate to operate as a fixed-route carrier.<sup>148</sup> Applicants are no longer required to show that existing local fixed-route carriers cannot provide the proposed service, and the CPUC is no longer required to consider the effects of the proposed service on public transit.<sup>149</sup> Instead of general considerations of public interest, the law now requires the CPUC to evaluate fixed-route carrier applications using relatively clear criteria.<sup>150</sup> The applicant must show that they will follow certain practices in the interest of passenger and driver safety, including implementing preventive maintenance programs and safety training for drivers.<sup>151</sup> Workers’ compensation insurance is required, and the applicant must show “reasonable fitness and financial responsibility” to provide the proposed services.<sup>152</sup>

In 2009, the CPUC began a rulemaking process to amend its regulations for fixed-route carrier applications to reflect these legislative and policy changes.<sup>153</sup> The CPUC noted that its application procedures were oriented towards the “scheduled, fixed-route bus services” which used to dominate the industry, while the current industry was mostly composed of “on-call, door-to-door airport shuttle services.”<sup>154</sup> The CPUC argued that “streamlining” this process would help “small operators who find the current formal application process difficult and time consuming.”<sup>155</sup> However, the CPUC did not finalize the changes to

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<sup>147</sup> *Id.* at §§ I, III.

<sup>148</sup> *See* 2006 Cal. Legis. Serv. ch. 694, §§ 2–3 (S.B. 1840) (West).

<sup>149</sup> *Compare id.* at § 3, with CAL. PUB. UTIL. CODE § 1032(b)–(c) (2006).

<sup>150</sup> *Compare* 2006 Cal. Legis. Serv. ch. 694, § 2 (specifying that “public convenience and necessity” now means meeting the criteria in CAL. PUB. UTIL. CODE § 1032), with CAL. PUB. UTIL. CODE §§ 1031–32 (2006). *See also* Order Instituting Rulemaking Regarding the Procedures for Processing Applications for Passenger State Corporations, Cal. P.U.C. Decision No. 15-05-029, at 7, Docket No. R09-12-001 (May 7, 2015) (explaining the legislative changes).

<sup>151</sup> *See* CAL. PUB. UTIL. CODE § 1032 (West 2010) (effective Jan. 1, 2007).

<sup>152</sup> *Id.*

<sup>153</sup> *See* Order Instituting Rulemaking Regarding the Procedures for Processing Applications for Passenger Stage Corporations, Cal. P.U.C. Docket No. R09-12-001 (Dec. 3, 2009).

<sup>154</sup> *See id.* at 2.

<sup>155</sup> *Id.*

its application procedures until May 2015,<sup>156</sup> after several of the microtransit applications discussed below were filed. This may have confused both microtransit companies and CPUC staff about which standards applied. Fortunately, however, the CPUC did not deny any microtransit applications under a broad public-interest rationale, although it did discuss the public interest in its decisions granting certificates.<sup>157</sup>

The Public Utilities Code contains language for charter carriers that could be read to allow the CPUC to require charter carriers to show that their service would serve the public interest.<sup>158</sup> However, that language is most likely unenforceable due to the federal preemption of much state regulation of charter bus service, as discussed above.<sup>159</sup> As a result, charter carriers may obtain certificates of public convenience and necessity without making a showing that their operation would serve the public interest.

#### D. *Private Transit Regulation in San Francisco*

When microtransit first arose in San Francisco in 2013, the local government already had a set of basic regulations for some private fixed-route carriers. San Francisco Police Code regulated “jitney buses,” defining a jitney bus as “[a] motor vehicle for hire less than 20 feet in length traversing the public streets between certain definite points or termini and conveying no more than 15 passengers for a fixed charge, between such points or any intermediate points.”<sup>160</sup> Any “jitney bus” was required to obtain a certificate of public convenience and necessity from the San Francisco Taxi Commission,<sup>161</sup> and was required to charge regulated rates pegged to Muni fares.<sup>162</sup> Jitneys were allowed to

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<sup>156</sup> See Order Instituting Rulemaking Regarding the Procedures for Processing Applications for Passenger State Corporations, Cal. P.U.C. Decision No. 15-05-029, Docket No. R09-12-001 (May 7, 2015). See also CAL. CODE REGS. tit. 20, § 3.3 (2017) (current procedures for applying for a fixed-route carrier certificate).

<sup>157</sup> See *infra* Sections III.A, III.B.

<sup>158</sup> See CAL. PUB. UTIL. CODE §§ 5371, 5375.

<sup>159</sup> See *supra* notes 120–121 and accompanying text.

<sup>160</sup> S.F., Cal., Ordinance 56-15 § 10 (Apr. 28, 2015) (quoting S.F. POLICE CODE art. 16, div. 1 § 1076(f), *repealed by* Ordinance 56-15).

<sup>161</sup> See *id.* (referencing art. 16, div. 3 § 1150, which requires meeting the standards of §§ 1079–81, *repealed by* Ordinance 56-15).

<sup>162</sup> *Id.* (referencing art. 16, div. 3 § 1152(b), *repealed by* Ordinance 56-15).

use certain pre-approved routes in the Police Code; other routes had to be approved by the San Francisco Board of Supervisors.<sup>163</sup> The law contained little guidance on the criteria for obtaining a certificate of public convenience and necessity from the Taxi Commission. Aside from the general criteria of “public convenience and necessity,”<sup>164</sup> the Police Code mentioned only that the Taxi Commission should consider an applicant’s financial responsibility, general compliance with the law, and past history with for-hire vehicle permits.<sup>165</sup>

In April 2015, this language regulating “jitney buses” was repealed by the San Francisco Board of Supervisors, and local microtransit companies were regulated as “non-standard vehicles” (a broad catch-all category) by the San Francisco Municipal Transportation Agency.<sup>166</sup> Operators of non-standard vehicles were required to obtain a permit from the SFMTA.<sup>167</sup> The non-standard vehicle law provided little guidance for the criteria to be considered in applications for non-standard vehicle permits, besides past regulatory and criminal violations of the applicant, and gave the SFMTA wide discretion in considering these applications.<sup>168</sup> When non-standard vehicles ran along fixed routes, their routes were required to be included in the application and approved by the SFMTA, which must consider the impact of the non-standard vehicle on public transit.<sup>169</sup>

As described below, the SFMTA updated its regulations on microtransit in October 2017.<sup>170</sup> The SFMTA also operates the Muni buses and light rail within San Francisco. This situation helps the SFMTA ensure that public transit within the city is not harmed by microtransit companies. But it also incentivizes the SFMTA to impose potentially onerous regulations on its

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<sup>163</sup> *Id.* (referencing art. 16, div. 3 § 1151–52, *repealed* by Ordinance 56-15).

<sup>164</sup> *Id.* (referencing art. 16, div. 1 § 1079(c), *repealed* by Ordinance 56-15).

<sup>165</sup> *Id.* (referencing art. 16, div. 1 §§ 1079(c)–(d), 1081(a), *repealed* by Ordinance 56-15).

<sup>166</sup> See S.F. Mun. Transp. Agency, Resolution No. 171017-134 (Oct. 17, 2017), <http://www.amlegal.com/pdffiles/sanfran/MTARes171017-134.pdf> (*amending* S.F., CAL., TRANSP. CODE § 1102).

<sup>167</sup> See *id.* (*amending* S.F., CAL., TRANSP. CODE § 1105(a)(1)). As shown in the changes to § 1102, Non-Standard Vehicles were included within the term “Motor Vehicle for Hire.”

<sup>168</sup> See *id.* (*amending* S.F., CAL., TRANSP. CODE § 1104(a)).

<sup>169</sup> *Id.* (*amending* S.F., CAL., TRANSP. CODE § 1103(e)(2)).

<sup>170</sup> See *infra* notes 276–278 and accompanying text.

competitors in order to preserve its ridership and fare revenue.

### III. MICROTRANSIT MEETS THE REGULATORS

With this legal backdrop in mind, it is possible to understand the regulatory paths taken by the three San Francisco microtransit companies. Contrary to the stories told by some observers in the media, the California Public Utilities Commission does not appear to be an anti-innovation villain responsible for a “regulatory hell.”<sup>171</sup> The CPUC does not appear to have blocked the entry of any microtransit companies in order to protect incumbent public transit agencies, and seems to have only enforced relatively uncontroversial laws such as safety and insurance requirements. Both Leap and Night School argued that their service would have a beneficial environmental impact by reducing congestion and emissions,<sup>172</sup> but neither company made this the centerpiece of their applications, and one protestor to Chariot’s application made some troubling counterarguments about the environmental impact of microtransit.<sup>173</sup>

While Leap encountered opposition when it filed to apply for a certificate of public convenience and necessity to operate as a fixed-route carrier, it ran into understandable opposition from local public transit agencies and one municipality. However, Leap was able to resolve its differences with these government entities and was granted a certificate to operate in April 2015. The CPUC ordered Leap to stop operating because Leap never filed the requisite paperwork after receiving its certificate, either due to Leap’s oversight or because Leap failed to meet some of the CPUC’s requirements for fixed-route carriers.

Night School had an even easier time acquiring a certificate to operate as a fixed-route carrier, encountering no opposition and receiving its certificate in late June 2014. Night School’s launch was delayed because the CPUC refused to accept its creative attempt to avoid regulation as a fixed-route carrier despite clearly qualifying as one. It is unclear exactly what problems with the CPUC ultimately led to Night School’s demise, although there appears to be a link with Night School’s plan to use subcarriers to operate its vehicles.

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<sup>171</sup> See *supra* notes 71–75 and accompanying text.

<sup>172</sup> See *infra* notes 181, 227 and accompanying text.

<sup>173</sup> See *infra* note 263 and accompanying text.

Chariot, in contrast, initially sought state regulation, but ultimately decided to opt for local regulation. The San Francisco Municipal Transit Agency, which also operates the Muni buses in San Francisco, is currently drafting regulations for Chariot and similar microtransit companies.

A. *Leap Transit: Problems Resolved, but Failure to Follow Up*

On June 13, 2014, after its “beta test” and before its second launch, Leap filed an application with the CPUC both for a certificate of public convenience and necessity to operate as a fixed-route carrier as well as for a zone of rate freedom.<sup>174</sup> Despite seeking CPUC authorization, Leap proposed to operate entirely within San Francisco.<sup>175</sup> Leap proposed to charge \$6 per ride and requested a zone of rate freedom that would let it charge between \$4 and \$11 per ride.<sup>176</sup> Leap argued that “its proposed fares and Zone of Rate Freedom are fair and reasonable” based on the quality of the service and its amenities, and by comparison to companies like Uber and Lyft.<sup>177</sup>

In its application, Leap stated that its goal was “to *supplement* existing transportation options” and “provide . . . a *complement* to existing transportation options.”<sup>178</sup> Because of its differences with Muni, Leap argued that it would “address a different customer base” and would “not compete directly with existing service.”<sup>179</sup> Leap stated that it had met with staff at the SFMTA “to ensure that [Leap’s] service is complementary to and does not interfere with existing transportation alternatives within San Francisco,” and that SFMTA had been “generally supportive” of Leap’s proposal.<sup>180</sup>

To address the general requirement of “public convenience and necessity,” Leap claimed that it would benefit the public by complementing existing transportation options and by “significantly reduc[ing] the number of single or double occupancy vehicles on the road during peak commute hours, with resulting

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<sup>174</sup> *Application of Leap Transit, Inc.*, Cal. P.U.C. App. No. 14-06-015 (June 13, 2014).

<sup>175</sup> *See id.* at 1–2, Ex. B (showing maps of proposed routes).

<sup>176</sup> *See id.* at 2.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 2–3 (emphasis added).

<sup>179</sup> *Id.* at 3.

<sup>180</sup> *Id.* at 5.

reductions in traffic congestion and greenhouse gas emissions.”<sup>181</sup> As discussed above, California law no longer required Leap to make a showing that its service would advance the public interest, but the CPUC’s procedures for fixed-route carrier applications did not yet reflect those statutory changes.<sup>182</sup> Leap was either acting out of an abundance of caution or confused about the legal requirements to obtain a certificate.

In response, the SFMTA filed a protest to Leap’s application, arguing that Leap was not subject to the CPUC’s jurisdiction because its proposed service was entirely within San Francisco.<sup>183</sup> SFMTA also protested that Leap was planning to operate on roads that were restricted for large commercial vehicles under San Francisco law.<sup>184</sup> Leap responded that it believed that it could voluntarily chose to be within the jurisdiction of CPUC instead of SFMTA, based on CPUC precedent.<sup>185</sup> Leap noted that it would likely add routes going outside of San Francisco in the future, and wished to obtain CPUC approval in order to make those expansions quickly.<sup>186</sup> Leap also changed its routes to avoid the restricted roads.<sup>187</sup> In turn, SFMTA disputed Leap’s characterization of the CPUC precedent, and argued that SFMTA had exclusive jurisdiction over Leap’s services as long as its service was entirely within San Francisco.<sup>188</sup> SFMTA explained that Leap would be required to obtain a “Non-Standard Vehicle Permit” under San Francisco law, and that SFMTA was currently working on more detailed regulations for companies like Leap.<sup>189</sup>

At the prehearing conference before an administrative law judge (ALJ) from the CPUC in October 2014, Leap and SFTMA discussed the jurisdictional issue.<sup>190</sup> The ALJ appeared to side with

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<sup>181</sup> *See id.* at 4–5.

<sup>182</sup> *See supra* notes 148–156 and accompanying text.

<sup>183</sup> *See* Protest of the San Francisco Municipal Transportation Agency at 2–3, Cal. P.U.C. App. No. 14-06-015 (July 25, 2014).

<sup>184</sup> *See id.* at 3–4.

<sup>185</sup> *See* Reply of Leap Transit to Protest of San Francisco Municipal Transportation Agency at 1–2, Cal. P.U.C. App. No. 14-06-015 (Aug. 4, 2014).

<sup>186</sup> *See id.* at 2.

<sup>187</sup> *Id.* at 3.

<sup>188</sup> *See* Prehearing Conference Statement of SFMTA at 2–6, Cal. P.U.C. App. No. 14-06-015 (Oct. 14, 2014).

<sup>189</sup> *Id.* at 6.

<sup>190</sup> *See* Transcript of Prehearing Conference at 16–27, Cal. P.U.C. App. No. 14-06-015 (Oct. 17, 2014).

the SFMTA's assertion that Leap's proposed services would fall under SFMTA's authority rather than CPUC's jurisdiction.<sup>191</sup> Leap's attorney claimed that Leap was "agnostic[]" about whether it fell under the CPUC's or the SFMTA's jurisdiction, wanted to obtain approval quickly, and anticipated that it would definitely need CPUC approval once it expanded beyond the borders of San Francisco.<sup>192</sup>

The ALJ asked if Leap's proposed service would actually qualify it as a fixed-route carrier.<sup>193</sup> Leap's attorney replied that Leap "definitely will have fixed points within fixed routes," although Leap's buses would not operate on a traditional fixed schedule because passengers could track the buses on Leap's smartphone app.<sup>194</sup> The ALJ compared Leap's proposed service to Uber and Lyft,<sup>195</sup> and asked if the CPUC needed to change any of its rules to accommodate Leap.<sup>196</sup> Leap's attorney replied that it was not necessary.<sup>197</sup>

To ensure that it would fall under the jurisdiction of the CPUC, Leap filed an amended application in November 2014 that included two proposed routes outside of San Francisco.<sup>198</sup> One route extended northward into Marin County and the city of Sausalito, while another extended southward into Daly City in San Mateo County.<sup>199</sup> Leap described the route extending to Marin County as anticipated to begin in "mid 2015," before which Leap planned to begin two routes serving neighborhoods of San Francisco (the Marina and the Mission).<sup>200</sup> Leap anticipated beginning service on a third San-Francisco-only route, then beginning a route to Daly City in "late 2015."<sup>201</sup> These actions suggest that Leap preferred to be regulated by the CPUC rather than the SFMTA, perhaps because the SFMTA was also its main

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<sup>191</sup> *See id.* at 18–20.

<sup>192</sup> *Id.* at 22–23.

<sup>193</sup> *See id.* at 8.

<sup>194</sup> *Id.* at 8–9.

<sup>195</sup> *See id.* at 11 (comparing Leap's proposed service to a "transportation network company").

<sup>196</sup> *Id.* at 15.

<sup>197</sup> *Id.*

<sup>198</sup> *See* Amended Application of Leap Transit at 1, Cal. P.U.C. App. No. 14-06-015 (Nov. 26, 2014).

<sup>199</sup> *See id.* at Ex. B.

<sup>200</sup> *See id.*

<sup>201</sup> *See id.*

competitor.

However, the proposed route into Marin County soon ran into opposition from the City of Sausalito due to concerns about traffic in Sausalito's downtown.<sup>202</sup> Leap agreed to not operate in Sausalito in exchange for Sausalito's agreement to not oppose Leap's application.<sup>203</sup> Leap retained the route into San Mateo County, however, and made agreements with several public transit agencies to avoid using their bus stops.<sup>204</sup>

These negotiations paid off, and on March 26, 2015, the CPUC granted a certificate of public convenience and necessity to Leap to operate as a fixed-route carrier.<sup>205</sup> Curiously, Leap had already relaunched on March 18.<sup>206</sup> Perhaps Leap had advance notice of the CPUC's approval. In its decision to grant the certificate, the CPUC noted that its policy of generally granting zones of rate freedom where applicants will operate in "highly competitive environment[s]," and therefore approved Leap's zone of rate freedom.<sup>207</sup> The CPUC favorably discussed Leap's proposed amenities and use of technology and found that Leap's operations were "Required by Public Convenience and Necessity" as a result.<sup>208</sup> As discussed above, California law only allows the CPUC to evaluate fixed-route carrier applications using specific criteria in the statute, not general considerations of the public interest, but the CPUC's procedures did not yet reflect this.<sup>209</sup> The decision also noted that "Leap's operations will reduce the number of single or double occupancy vehicles during peak commute hours, resulting in reductions in traffic congestion and greenhouse gas emissions," and therefore concluded that the application did not require assessment of its environmental impact under the

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<sup>202</sup> See Motion for Party Status of City of Sausalito at 2–3, Cal. P.U.C. App. No. 14-06-015 (Feb. 18, 2015).

<sup>203</sup> See Decision Granting Certificate of Public Convenience and Necessity to Leap Transit, Inc. at Attach. C, Cal. P.U.C. Decision No. 15-03-031 (Mar. 26, 2015), App. No. 14-06-015.

<sup>204</sup> See *id.* at Attach. A, Attach. D.

<sup>205</sup> See *id.* at Attach. A.

<sup>206</sup> See Dowd, *supra* note 44.

<sup>207</sup> Decision Granting Certificate of Public Convenience and Necessity to Leap Transit, Inc. at Attach. C, Cal. P.U.C. Decision No. 15-03-031 (Mar. 26, 2015), App. No. 14-06-015.

<sup>208</sup> See *id.* at 9–10.

<sup>209</sup> See *supra* notes 148–156 and accompanying text.

California Environmental Quality Act (CEQA).<sup>210</sup>

However, on May 11, 2015, the CPUC sent a cease-and-desist letter to Leap ordering it to stop service.<sup>211</sup> According to the letter, Leap had failed to follow up on several required items following the approval of its certificate to operate. Leap had not filed proof of the required liability insurance or worker's compensation insurance.<sup>212</sup> While Leap may have failed to acquire the insurance policies due to their cost, other problems that the CPUC cited seem to have been simple oversight. For example, Leap had failed to file both a written acceptance of the certificate to operate and a copy of its tariffs.<sup>213</sup> Unfortunately for Leap, the deadline to file for acceptance of the certificate was 30 days after the approval, or April 25.<sup>214</sup> The CPUC's letter also explained that Leap had not filed evidence of the required drug and alcohol testing program, had not enrolled in a DMV program that lets employers monitor their employees' driving records, and had not requested required safety inspections.<sup>215</sup>

Leap's CEO seems to have believed that Leap was not required to meet the CPUC's requirements until Leap expanded outside of San Francisco, which may explain why Leap failed to comply with the CPUC's requirements by the deadline.<sup>216</sup> In fact, the CPUC arguably did not have authority to order Leap to cease operations until Leap expanded outside of San Francisco, because Leap did not qualify as a fixed-route operator until that occurred.<sup>217</sup> However, given that Leap had sought to be regulated by the CPUC

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<sup>210</sup> Decision Granting Certificate of Public Convenience and Necessity to Leap Transit, Inc. at 12, Cal. P.U.C. Decision No. 15-03-031 (Mar. 26, 2015), App. No. 14-06-015.

<sup>211</sup> See Letter from Brian Kahrs, Supervising Investigator, Cal. Pub. Utils. Comm'n, to Kyle Kerchoff, CEO, Leap Transit, Inc. (May 11, 2015), <https://cdn.arstechnica.net/wp-content/uploads/2015/05/leap1.pdf>.

<sup>212</sup> *Id.*

<sup>213</sup> *See id.*

<sup>214</sup> See Decision Granting Certificate of Public Convenience and Necessity to Leap Transit, Inc. at 18, Cal. P.U.C. Decision No. 15-03-031 (Mar. 26, 2015), App. No. 14-06-015.

<sup>215</sup> Letter from Brian Kahrs to Kyle Kerchoff, *supra* note 211. For information on the California DMV's pull-notice program, which allows employers to monitor the driving records of their employees, see *Employer Pull Notice (EPN) Program General Information*, CAL. DEP'T OF MOTOR VEHICLES, [https://www.dmv.ca.gov/portal/dmv/?1dmy&urile=wcm:path:/dmv\\_content\\_en/dmv/vehindustry/epn/epngeninfo](https://www.dmv.ca.gov/portal/dmv/?1dmy&urile=wcm:path:/dmv_content_en/dmv/vehindustry/epn/epngeninfo) (last visited Apr. 30, 2017).

<sup>216</sup> Brown, *supra* note 53.

<sup>217</sup> See CAL. PUB. UTIL. CODE § 226(a).

and not the SFMTA by amending its application with the routes outside of San Francisco, it would have been inconsistent for Leap to argue that the CPUC actually did not have jurisdiction in its case. In addition, there is no evidence that Leap received a non-standard vehicle permit from the SFMTA or a jitney permit from the San Francisco Taxi Commission, so if Leap was under the SFMTA's jurisdiction, then it probably was not following the law.

Why did Leap declare bankruptcy instead of fixing the problems explained in the CPUC's letter? It is possible that the CPUC refused to let Leap accept the certificate to operate because the deadline had already expired. It is also possible that Leap found the required insurance too expensive for its business model, or that Leap simply lacked the capacity to address its regulatory issues.

Overall, Leap was able to successfully navigate the regulatory process in time for its relaunch in March 2015, but not thereafter. Perhaps the jurisdictional confusion and opposition from public transit agencies delayed Leap's second launch. Regardless, Leap appears to have made significant mistakes after receiving approval from the CPUC.

B. *Night School: Certificate Received Quickly,  
but Unclear Problems Arise*

In contrast to the complications Leap encountered, Night School seems to have breezed through the regulatory process, encountering no opposition and receiving authority to operate about ten weeks after filing its application with the CPUC. It seems that some issue with subcontracting the bus service to another company presented a roadblock, although the details of the precise issue are unclear. One factor that likely contributed to Night School's failed launch is that AC Transit, the regional bus operator serving the East Bay, expanded its late-night service shortly before Night School decided to shut down.

Night School initially hoped to avoid regulation by the CPUC by characterizing itself as a "private club" instead of either a fixed-route carrier or a charter carrier. One of its founders explained that Night School initially needed to charge monthly fees because it "need[ed] to operate as a private club that charters buses on behalf of its members."<sup>218</sup> However, Night School intended to get

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<sup>218</sup> Evan Karp, *Night School: Stay Out Late, Take the School Bus Home*, S.F.

authorization “[b]y the end of the summer” of 2014 from the CPUC in order to be able to charge individual fares.<sup>219</sup> CPUC appears to have rejected this rationale, most likely because it would open up a large loophole in the regulatory scheme for fixed-route operators and charter carriers. Night School was clearly advertising its future services to the public at large, not offering transportation incidental to the activities of a club with a non-transportation purpose, so it clearly planned to be a fixed-route carrier.<sup>220</sup>

Before this “private club” rationale was rejected by the CPUC in May 2014, however, Night School had already filed an application for a certificate of public convenience and necessity to operate as a fixed-route carrier in April.<sup>221</sup> In this application, Night School argued that its service could reduce drunk driving and produced statistics showing that drunk driving was worst at the time periods that Night School proposed to operate.<sup>222</sup> As discussed above, the CPUC is no longer allowed to broadly consider the public interest when evaluating fixed-route carrier applications,<sup>223</sup> but Night School filed this application before the CPUC updated its procedures for fixed-route carrier applications.

In its application, Night School asked for fares set at \$10 per ride, or \$31 for a monthly pass, with a zone of rate freedom between \$2 and \$20 per ride and between \$11 and \$51 for a monthly pass.<sup>224</sup> Night School stated that its proposed zone of rate freedom would be reasonable because it would be in competition with other transportation providers, including “taxis, buses, and online-enabled transportation services operating in San Francisco

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WEEKLY (May 20, 2014), <http://archives.sfweekly.com/exhibitionist/2014/05/20/night-school-stay-out-late-take-the-school-bus-home>.

<sup>219</sup> *Id.*

<sup>220</sup> See *supra* notes 97–100 and accompanying text. At the prehearing conference for Leap, the lawyer for SFMTA explained that Leap was offering service “open to the general public” as compared to buses for tech company employees. Transcript of Prehearing Conference at 13–14, Cal. P.U.C. App. No. 14-06-015 (Oct. 17, 2014).

<sup>221</sup> See Application of Night School LLC for a Certificate of Public Convenience and Necessity, Cal. P.U.C. App. No. 14-04-024 (Apr. 14, 2014).

<sup>222</sup> See *id.* at 7.

<sup>223</sup> See *supra* notes 148–156 and accompanying text.

<sup>224</sup> See Application of Night School LLC for a Certificate of Public Convenience and Necessity, at 5 Cal. P.U.C. App. No. 14-04-024 (Apr. 14, 2014).

and Alameda County.”<sup>225</sup> This argument that Night School would have sufficient competitors was somewhat inconsistent with Night School’s original reason for existing: the lack of good transit options at this time and the prohibitive cost of taking a taxi.<sup>226</sup>

In addition to its arguments about drunk driving and fare competition, Night School argued that CEQA analysis was unnecessary because Night School would have a positive environmental impact. Night School claimed that its service would “reduce both noise and exhaust fume pollution” by “removing single passenger, taxi and similar traffic from the routes” served by Night School.<sup>227</sup> Night School did not mention climate change impacts or benefits to traffic congestion, likely because there is generally little congestion so late at night.

The CPUC approved Night School’s application on June 26, 2014.<sup>228</sup> The CPUC discussed Night School’s arguments that its service would reduce drunk driving, and found without elaboration that “[p]ublic convenience and necessity requires the proposed service.”<sup>229</sup> The CPUC agreed with Night School’s argument that its service would have a positive environmental impact and concluded that CEQA review was “not necessary because this will not have a significant adverse effect on the environment.”<sup>230</sup> The CPUC found that, for CEQA purposes, Night School would have a beneficial environmental impact: “Proposed service will reduce the number of vehicles on the public highways therefore it can be seen with certainty that there is no possibility that the activity in question may have a significant adverse effect on the environment.”<sup>231</sup> The CPUC also agreed that Night School would compete with a broad range of transportation options, leading Night School to offer reasonable fares.<sup>232</sup>

Ultimately, it appears that Night School shut down because of an issue with its model of subcontracting for the use of school buses after school hours. According to one of Night School’s

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<sup>225</sup> *Id.* at 5–6.

<sup>226</sup> This was discussed elsewhere in the application. *See id.* at 8–9.

<sup>227</sup> *See id.* at 11.

<sup>228</sup> *See* Decision Granting Application, Cal. P.U.C. Decision No. 14-06-039 (June 26, 2014), App. No. 14-04-024.

<sup>229</sup> *Id.* at 2, 4.

<sup>230</sup> *Id.* at 2.

<sup>231</sup> *Id.* at 5.

<sup>232</sup> *Id.* at 2.

founders, their “business model was predicated on the fact that school buses are already maintained, so it would be a net gain to use them when they’re not being used . . . [The CPUC] didn’t give us a way to subcontract the bus operation.”<sup>233</sup> In its application, Night School explained that it would “operate exclusively through the use of subcarriers who are fully licensed Charter-Party Carriers.”<sup>234</sup> Night School claimed that “the same insurance and safety requirements” apply to both fixed-route carriers and charter carriers.<sup>235</sup> The CPUC’s decision to issue a certificate to operate to Night School mentioned its plan to use charter carrier subcarriers, and did not raise any problems with it.<sup>236</sup> Before Night School failed, its founders explained that they were hoping to quickly resolve their problems with the CPUC by “duplicat[ing] some of the work our subcarriers are already taking care of.”<sup>237</sup> This suggests that CPUC may have been requiring Night School to independently comply with safety and insurance requirements with which the subcarriers were already in compliance. Without a comprehensive comparison of the safety and insurance requirements of charter carriers and fixed-route carriers, it is hard to know if that requirement (assuming CPUC instituted it) was reasonable.

An alternative explanation for Night School’s failure to launch is the concurrent expansion of AC Transit’s late-night bus service. In December 2014, just before Night School shut down, AC Transit began operating a new late-night bus line starting in the Mission District and stopping in downtown Oakland.<sup>238</sup> AC

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<sup>233</sup> Gary Moskowitz, *SF Weighs Late-Night Transit Options*, S.F. WEEKLY (June 3, 2015) (brackets in original), <http://archives.sfweekly.com/sanfrancisco/san-francisco-news-bart-transit-transportation-train-bus-uber/Content?oid=3680222>.

<sup>234</sup> Application of Night School LLC for a Certificate of Public Convenience and Necessity at 6, Cal. P.U.C. App. No. 14-04-024 (Apr. 14, 2014). While Night School was planning to partner with companies licensed as charter carriers, most school buses are not subject to regulation as either fixed-route carriers or charter carriers. See CAL. PUB. UTIL. CODE §§ 226(b), 5353(b). If the school bus company charges individual fares, however, it may be subject to regulation as a fixed-route carrier. See CAL. PUB. UTIL. CODE § 226(b).

<sup>235</sup> See *id.*

<sup>236</sup> See Decision Granting Application at 2, Cal. P.U.C. Decision No. 14-06-039 (June 26, 2014), App. No. 14-04-024.

<sup>237</sup> NIGHT SCHOOL, *supra* note 68.

<sup>238</sup> See Jerold Chinn, *Late-Night East Bay Bus Service Gets Boost*, SFBAY.CA (Dec. 10, 2014), <http://sfbay.ca/2014/12/10/late-night-east-bay-bus-service-gets-boost/>.

Transit also extended an existing late-night bus line to include a stop in the Mission District and increased its frequency.<sup>239</sup> BART provided financial support for the service expansion,<sup>240</sup> and BART had been planning to support more late-night bus service between San Francisco and Oakland since at least May 2014.<sup>241</sup> AC Transit charged \$4.20 per ride, far below Night School's proposed \$10. Night School's founders even encouraged people to use the new AC Transit late-night service in their final update to Night School's website, noting that "[i]t won't be as good as Night School would have been, but it's reasonably priced."<sup>242</sup>

Night School's failure to launch ultimately presents a sort of regulatory mystery story. Without more information, it is hard to assess its founders' claims that the CPUC acted unfairly to block the launch of their service.

### C. *Chariot: Jurisdictional Shopping Leads to Local Regulation*

Like Leap, Chariot ran into difficulties obtaining regulatory approval due to opposition from transit agencies. Unlike Leap, Chariot's regulatory challenges failed to attract press coverage. Instead of resolving issues that arose in its CPUC proceeding, Chariot chose to withdraw its application and seek regulation by the SFMTA, which is currently creating more comprehensive regulations for Chariot and other private transit providers.

In the summer of 2015, Chariot expanded its operations into Marin County, north of San Francisco. To do so, Chariot used bus stops owned by Golden Gate Transit, which operates the regional bus system connecting San Francisco and Marin and Sonoma counties.<sup>243</sup> This annoyed Golden Gate Transit, which was already unhappy with Chariot's use of Golden Gate Transit's bus stops within San Francisco.<sup>244</sup> In May 2016, Golden Gate Transit brought the issue to the CPUC's attention, and in June 2016 Golden Gate Transit told Chariot to stop using its bus stops. According to Golden Gate Transit, Chariot persisted.<sup>245</sup> Also in

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<sup>239</sup> *See id.*

<sup>240</sup> *See id.*

<sup>241</sup> *See Cabanatuan, supra* note 66.

<sup>242</sup> NIGHT SCHOOL, *supra* note 71.

<sup>243</sup> *See* Protest to Application by The Golden Gate Bridge, Highway and Transportation District at 3, Cal. P.U.C. App. No. 16-08-015 (Sept. 30, 2016).

<sup>244</sup> *Id.* at 2–3.

<sup>245</sup> *Id.* at 4.

June 2016, the CPUC ordered Chariot to stop operating in Marin County, or else to apply for a certificate to operate as a fixed-route carrier.<sup>246</sup>

Likely as a result of the CPUC's letter, Chariot filed an application for a certificate of public convenience and necessity to operate as a fixed-route carrier in June 2016. The CPUC rejected the application as deficient.<sup>247</sup> Chariot filed a new application on August 24, 2016.<sup>248</sup> Chariot argued that its service would fill the gap between traditional public transit and ridesharing companies, providing a more reliable and comfortable ride than public transit, but a cheaper one than a ridesharing company.<sup>249</sup> Chariot did not address the impact of its service on the environment or whether its service warranted CEQA analysis.<sup>250</sup> Chariot also emphasized that its drivers were employees rather than independent contractors,<sup>251</sup> likely trying to draw a favorable comparison to Uber. Unlike Leap's and Night School's applications, Chariot's application was filed after the CPUC had updated its procedures to reflect California law restraining the Commission's discretion to consider the general public interest when evaluating fixed-route carrier applications.<sup>252</sup>

However, Chariot appeared to be confused about the extent of the CPUC's jurisdiction. The application noted that Chariot's routes outside of San Francisco were "privately funded routes that do not charge individual fares," except for a route to Mill Valley in Marin County, which Chariot claimed accounted for "less than 2% of all business."<sup>253</sup> This seems to be a reference to the law that fixed-route carriers with 98 percent or more of all route mileage within a single city are not regulated by the PUC, but misstates the issue as in terms of percentage of "business" instead of route miles.<sup>254</sup> However, if the portion of the Mill Valley route in Marin County accounted for less than 2 percent of Chariot's mileage for

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<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> See Application for Passenger Stage Corporation Certificate of Public Convenience and Necessity, Cal. P.U.C. App. No. 16-08-015 (Aug. 24, 2016).

<sup>249</sup> See *id.* at 5.

<sup>250</sup> See generally *id.*

<sup>251</sup> See *id.* at 5.

<sup>252</sup> See *supra* notes 148–156 and accompanying text.

<sup>253</sup> See Application for Passenger Stage Corporation Certificate of Public Convenience and Necessity at Ex. C at 1, Cal. P.U.C. App. No. 16-08-015.

<sup>254</sup> See CAL. PUB. UTIL. CODE § 226(a).

its fixed-route operations, then Chariot would *not* be subject to the jurisdiction of CPUC. Presumably, by filing the application to the CPUC, Chariot sought regulation by the CPUC instead of the SFMTA, so Chariot should have argued that its Mill Valley route made it subject to the CPUC's jurisdiction. There appears to be no signature from a lawyer on Chariot's application, so it is possible that Chariot prepared its application without legal advice.

To be fair, the SFMTA also appears to have been initially confused about regulatory jurisdiction over Chariot. In response to a question from the public about regulation of Chariot in late 2014, the SFMTA responded that it did not regulate Chariot, but suggested that the CPUC might have jurisdiction over Chariot.<sup>255</sup> At that time, the San Francisco Taxi Commission probably had jurisdiction over Chariot (assuming 98 percent or more of Chariot's route mileage was inside San Francisco); the San Francisco Board of Supervisors transferred that jurisdiction to the SFMTA in April 2015.<sup>256</sup>

Both the SFTMA and Golden Gate Transit filed protests to Chariot's application. The SFMTA argued the application was deficient because of its lack of clarity about whether CPUC had authority to regulate Chariot.<sup>257</sup> The SFMTA also expressed concern about Chariot's vehicles improperly blocking bus lanes, traffic, and driveways while picking up passengers.<sup>258</sup> In addition, the SFMTA noted problems with Chariot's use of large commercial vehicles on restricted streets and its use of sidewalk signs.<sup>259</sup> Finally, the SFMTA noted that Chariot had failed to serve it with a copy of its application, as required by CPUC procedure.<sup>260</sup>

Golden Gate Transit's pointed protest of the application detailed a long list of conflicts between Chariot and Golden Gate Transit, including Chariot's use of its bus stops.<sup>261</sup> Golden Gate

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<sup>255</sup> See S. F. MUN. TRANSP. AGENCY, CITIZENS' ADVISORY COUNCIL, INFORMATION REQUESTS MATRIX – 2014, at 25 (2014), <https://www.sfmta.com/sites/default/files/reports/2014/2014%20CAC%20Requests%20for%20Information.pdf>.

<sup>256</sup> See *supra* notes 160–169 and accompanying text.

<sup>257</sup> See Protest of the San Francisco Municipal Transportation Agency to Application at 3–5, Cal. P.U.C. App. No. 16-08-015 (Sept. 30, 2016).

<sup>258</sup> See *id.* at 9–10.

<sup>259</sup> See *id.* at 8–9, 11.

<sup>260</sup> See *id.* at 5.

<sup>261</sup> See Protest to Application by the Golden Gate Bridge, Highway and Transportation District at 2–5, Cal. P.U.C. App. No. 16-08-015 (Sept. 30, 2016).

Transit recommended denial of Chariot's application because it was not served with a copy of the application and because of ambiguities in the description of Chariot's proposed service.<sup>262</sup> In addition, Golden Gate Transit criticized Chariot's failure to address its environmental impact and its accessibility for the disabled. Golden Gate Transit argued that Chariot would have a negative impact on the environment because it would attract passengers who would otherwise use public buses, and "running additional vehicles to carry the same passengers, leaving behind public transportation buses that will be on the road regardless of their vacancy, is inefficient in terms of traffic congestion and greenhouse gas concerns."<sup>263</sup> Golden Gate Transit also raised concerns with Chariot's impact on the equity of the transportation system, noting that Chariot's vehicles may not be accessible to the disabled and suggesting that Chariot could lead to "a two-tiered system."<sup>264</sup>

In advance of the prehearing conference for Chariot's application, scheduled in December 2016, Golden Gate Transit and the SFTMA informed the presiding ALJ that discovery and an evidentiary hearing may be necessary because of "several unresolved questions regarding the nature and scope of Chariot's operations in the counties outside of . . . San Francisco . . ."<sup>265</sup> No representative from Chariot showed up to the prehearing conference.<sup>266</sup>

At the end of February 2017, Chariot reversed course, seeking to withdraw its application to the CPUC.<sup>267</sup> Chariot stated that it had recently retained new counsel "to reassess the proposed services . . . and to address the issues raised by the protests . . ."<sup>268</sup> Chariot explained that it had concluded that its application was barred by law because its fixed-route carrier services were entirely within San Francisco.<sup>269</sup> (Presumably, this means that Chariot's

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<sup>262</sup> *See id.* at 5–6.

<sup>263</sup> *Id.* at 6.

<sup>264</sup> *Id.*

<sup>265</sup> Prehearing Conference Statement Submitted Jointly at 2, Cal. P.U.C. App. No. 16-08-015 (Dec. 12, 2016).

<sup>266</sup> *See* Transcript of Prehearing Conference at 3, Cal. P.U.C. App. No. 16-08-015 (Dec. 16, 2016).

<sup>267</sup> *See* Stipulated Rule 11.2 Motion for Chariot Inc. to Voluntarily Withdraw Application, Cal. P.U.C. App. No. 16-08-015 (Feb. 28, 2017).

<sup>268</sup> *See id.* at 1.

<sup>269</sup> *See id.* at 2.

routes outside of San Francisco were operated on a charter basis. Chariot's current routes that extend outside the city are marked as "private routes" and appear to be available only to employees of specific companies,<sup>270</sup> and Chariot holds a charter carrier license from the CPUC.<sup>271</sup>) Chariot presented a proposed order of dismissal to the ALJ, to which the SFMTA and Golden Gate Transit had agreed.<sup>272</sup> In May 2017, the ALJ agreed to Chariot's motion and dismissed the application.<sup>273</sup>

The jurisdictional divide between the CPUC and the SFMTA has probably had a negative impact on Chariot's operations, hindering Chariot from offering fixed-route services outside of San Francisco. However, the concerns raised by Golden Gate Transit and SFTMA are understandable, although apparently not severe enough for SFMTA and Golden Gate Transit to have brought any legal actions against Chariot in other forums. In addition, there are strange gaps in the narrative of Golden Gate Transit's protest, with long delays between alleged misdeeds and Golden Gate Transit's attempts at corrective action.<sup>274</sup>

#### D. *The SFMTA's Regulations for Microtransit*

Spurred by the appearance of Chariot and other microtransit companies, the SFMTA began to develop new regulations for private transit vehicles.<sup>275</sup> The SFMTA's staff developed a draft set of regulations under which the SFMTA would review and approve all stops used by private transit, and require the vehicles to use

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<sup>270</sup> See CHARIOT, *supra* note 26 (note that clicking on "All Routes" and then clicking on any private route leads to a page advertising Chariot's services for employers).

<sup>271</sup> See *BASIC DETAILS for PSG0035485*, CAL. PUB. UTILS. COMM'N, [https://apps.cpuc.ca.gov/apex/f?p=203:37:0::NO:RP:P37\\_CARRIER\\_TYPE,P36\\_CARRIER\\_TYPE:PSG,PSG](https://apps.cpuc.ca.gov/apex/f?p=203:37:0::NO:RP:P37_CARRIER_TYPE,P36_CARRIER_TYPE:PSG,PSG) (last visited Dec. 17, 2017).

<sup>272</sup> See Stipulated Rule 11.2 Motion, Cal. P.U.C. App. No. 16-08-015.

<sup>273</sup> See Order Dismissing Application, Cal. P.U.C. App. No. 16-08-015 (May 18, 2017).

<sup>274</sup> See Protest to Application by The Golden Gate Bridge, Highway and Transportation District at 2–4, Cal. P.U.C. App. No. 16-08-015 (Sept. 30, 2016).

<sup>275</sup> The SFMTA's previous regulations for microtransit are discussed above in Section II.D. This was not the first time that the SFMTA has been asked to update its regulations for microtransit. In May 2015, San Francisco Supervisor Mark Farrell asked the SFMTA "to develop San Francisco's policy toward private commuter services and report back to the Board of Supervisors in six months," but no new policy appears to have resulted. Moskowitz, *supra* note 233.

loading zones instead of bus stops.<sup>276</sup> The draft regulations also required access for the disabled, and the sharing of some data with the local government.<sup>277</sup> In addition, the draft regulations did not allow private transit to use bus-only lanes, set a maximum length of twenty-five feet for the vehicles, and required the vehicles to meet pollution standards.<sup>278</sup> SFMTA staff added a requirement that new microtransit routes that “match Muni routes ‘75 percent’ or more will not be allow,” but would allow existing microtransit routes that duplicate Muni routes to continue.<sup>279</sup>

The SFMTA approved most of these draft regulations in October 2017.<sup>280</sup> However, the SFMTA declined to adopt the draft regulation prohibiting microtransit route that mostly duplicate Muni routes, finding that the issue required more work.<sup>281</sup> Instead, the SFMTA gave its Director of Transportation the authority to set criteria for determining when microtransit overlaps too much with existing public transit routes, and requires microtransit companies to avoid violating these criteria.<sup>282</sup>

The SFTMA should reconsider the stringency of these regulations. These extensive requirements could drive companies such as Chariot to seek the CPUC’s jurisdiction. At a hearing before the SFMTA, a union representative for Chariot’s drivers pointed out that Lyft’s new shuttle service (using sedans along

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<sup>276</sup> See Joe Fitzgerald Rodriguez, *SF Planning First-of-Its-Kind Laws for ‘Jitney’ Private Bus System Chariot*, S.F. EXAMINER (Mar. 13, 2017), <http://www.sfexaminer.com/sf-planning-first-kind-laws-jitney-private-bus-system-chariot/>. For the SFMTA’s ongoing development of these regulations, see *Private Transit Vehicle Permitting*, SFMTA, <https://www.sfmta.com/projects-planning/projects/private-transit-vehicle-permitting> (last visited Oct. 18, 2017).

<sup>277</sup> See *id.*

<sup>278</sup> See Jerold Chinn, *Chariot Prompts Fresh Look at ‘Jitney’ Rules*, SFBAY.CA (Mar. 21, 2017), <https://sfbay.ca/2017/03/21/chariot-prompts-fresh-look-at-jitney-rules/>.

<sup>279</sup> Joe Fitzgerald Rodriguez, *New SF Jitney Rules Ban Chariot from Competing Directly with Muni*, SF EXAMINER (Sept. 14, 2017), <http://www.sfexaminer.com/new-sf-jitney-rules-ban-chariot-competing-directly-muni/>.

<sup>280</sup> See S.F. Mun. Transp. Agency, Resolution No. 171017-133 (Oct. 17, 2017), <http://www.amlegal.com/pdffiles/sanfran/MTARes171017-133.pdf>; see also Joe Fitzgerald Rodriguez, *New Regulations for Jitneys Leave Ban on Muni Competition in Flux*, SF EXAMINER (Oct. 18, 2017), <http://www.sfexaminer.com/new-regulations-jitneys-leave-ban-muni-competition-flux/>.

<sup>281</sup> See *id.*

<sup>282</sup> S.F., CAL. TRANSP. CODE § 1207(f) (2017).

fixed routes)<sup>283</sup> was not regulated as stringently as the SFMTA's regulations for Chariot.<sup>284</sup> Ridesharing companies such as Lyft and Uber are regulated by the CPUC.<sup>285</sup> The SFMTA should also consider whether these extensive regulations would be harmful for the environment because of their deterrent effect on environmentally-friendly microtransit and the potential innovation that microtransit can bring to the transit industry.<sup>286</sup>

Unfortunately, Chariot has not helped the case for laxer regulation. On October 19, 2017, the CPUC forced Chariot to suspend operations after Chariot drivers were found to lack proper licenses on three consecutive inspections by the California Highway Patrol.<sup>287</sup> Chariot resumed service on October 23.<sup>288</sup>

A longer-term problem is the allocation of curb space in San Francisco. If Chariot has been using public bus stops, perhaps it is because there are not enough places for Chariot to load and unload its passengers. To obtain passenger loading zones at the stops it serves, it appears that Chariot must apply for yellow or white curb loading zones, which the SFMTA can grant at its discretion.<sup>289</sup>

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<sup>283</sup> See *Shuttle*, LYFT, <https://www.lyft.com/shuttle> (last visited Oct. 18, 2017). See also Alyssa Pereira, *Critics Call out Lyft for Reinventing the Bus with Its New 'Shuttle' Feature*, SFGATE (June 19, 2017), <http://www.sfgate.com/technology/article/Critics-call-out-Lyft-for-reinventing-the-bus-11230357.php>.

<sup>284</sup> See Rodriguez, *supra* note 280.

<sup>285</sup> See Decision Adopting Rules and Regulations to Protect Public Safety While Allowing New Entrants to the Transportation Industry, Cal. P.U.C. Decision No. 13-09-045, at 2, Docket No. R12-12-011 (Dec. 20, 2012). See also CAL. PUB. UTIL. CODE §§ 5430–43.

<sup>286</sup> For a discussion of the potential for microtransit to bring innovation to the transit industry, see Semuels, *supra* note 85. See also *infra* note 320 and accompanying text.

<sup>287</sup> See Patrick Chu, *UPDATE: Chariot Commuter Van Service Temporarily Halted in San Francisco*, S.F. BUS. TIMES (Oct. 19, 2017), <https://www.bizjournals.com/sanfrancisco/news/2017/10/19/chariot-van-service-halted.html>; Megan Rose Dickey, *Chariot Resumes Shuttle Service in SF Today*, TECHCRUNCH (Oct. 23, 2017), <https://techcrunch.com/2017/10/23/chariot-resumes-shuttle-service-in-sf-today/>. Because the CPUC ordered this shutdown, this probably means Chariot had violated terms of its charter carrier license from the CPUC. See *supra* note 271 and accompanying text.

<sup>288</sup> See Dickey, *supra* note 287.

<sup>289</sup> See *Color Curbs*, SFMTA, <https://www.sfmta.com/getting-around/parking/curb-colors> (last visited Oct. 18, 2017) (showing “White Zones” and “Yellow Zones” are only appropriate zone for loading and unloading); see also Ben Jose, *Up for Approval: A New Permit Program for Private Transit, SF's Modern 'Jitneys'*, SFMTA BLOG (Sept. 14, 2017), <https://www.sfmta.com/about-sfmta/blog/approval-new-permit-program-private-transit-sf%E2%80%99s-modern-%E2%80%98jitneys%E2%80%99> (listing both yellow and white zones).

However, the application process for these types of loading zones is designed for local businesses and institutions, not private transit providers.<sup>290</sup> Without its own loading zones, Chariot must either use existing loading zones or pray for open parking spaces.

#### IV. A FRAMEWORK FOR REGULATING MICROTRANSIT

How should state and local governments regulate microtransit? This Section reviews the main aspects of microtransit regulation and provides a potential framework for microtransit regulation from an environmentalist perspective. This Section will first argue that microtransit should be regulated by the state government, not local governments. Following that, it will address five central aspects of taxi regulation that also apply to microtransit regulation:<sup>291</sup>

1. Entry regulation, which can limit the number of microtransit companies or vehicles;
2. Fare regulation;
3. Consumer-oriented protections, such as insurance requirements and safety inspections;
4. Worker-oriented protections, such as workers' compensation insurance requirements; and
5. Universal service requirements, such as non-discrimination requirements and requirements to allow access for disabled people.<sup>292</sup>

This Section will argue that microtransit should be regulated for public safety purposes and the interests of its workers, but that microtransit companies should not be subject to fare regulation or entry regulation through certificates of public convenience and necessity, and that regulators should generally use a light touch.

Furthermore, while microtransit should clearly not be allowed to discriminate on the basis of categories like race and gender, disability access presents a difficult question. Requiring access for all disabled people would promote their mobility and dignity, an obvious benefit.<sup>293</sup> Public transit agencies are already required to

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as permissible for passenger loading under then-draft microtransit regulations).

<sup>290</sup> See SFMTA, COLOR CURB PROGRAM (2017), [https://www.sfmta.com/sites/default/files/pdfs/2017/ColorCurbBrochure\\_2017%20Eng.pdf](https://www.sfmta.com/sites/default/files/pdfs/2017/ColorCurbBrochure_2017%20Eng.pdf).

<sup>291</sup> See Katrina Wyman, *Taxi Regulation in the Age of Uber*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 31–32 (2017).

<sup>292</sup> See *id.*

<sup>293</sup> Many disabled people are reliant on public transit for mobility. See

make their services accessible to the disabled by federal law.<sup>294</sup> But the cost of providing access for all disabled people could put a large burden on microtransit companies and make them unprofitable, preventing society from realizing the potential benefits of microtransit. Public transit agencies face a large financial burden from their obligation to serve the disabled, which has led many agencies to reduce and eliminate service.<sup>295</sup> To allow for access by disabled people without potentially compromising the viability of microtransit, the government could provide grants to microtransit companies to make their vehicles accessible to the disabled.

A. *State Regulation Can Provide a Consistent and Predictable Framework for Microtransit Regulation*

California law provides that microtransit is regulated at the local level if it operates entirely within a single city, or if the microtransit company is regulated as a fixed-route carrier and 98 percent or more of its route mileage is within a single city.<sup>296</sup> The CPUC regulates where cities cannot, leading to strategic behavior on the part of microtransit companies like Leap and Chariot and to confusion about the extent of CPUC's jurisdiction. Uniform regulation of all microtransit companies through the CPUC would be a better approach.

Moving all regulation of microtransit to the state level would create a single, consistent framework for regulation of microtransit rather than a confusing set of regulatory environments with differing rules. While it is sometimes beneficial to allow local governments to experiment with different policy approaches (much as state governments can act as laboratories of democracy in our federal system<sup>297</sup>), a single regulatory framework for

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Michael Lewyn, "*Thou Shalt Not Put a Stumbling Block Before the Blind*": *The Americans with Disabilities Act and Public Transit for the Disabled*, 52 HASTINGS L.J. 1037, 1037–38 (2001).

<sup>294</sup> See *id.* at 1066–72.

<sup>295</sup> See *id.* at 1084–90.

<sup>296</sup> See *supra* notes 131–133 and accompanying text.

<sup>297</sup> See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). Brandeis' dissent in this case defended the use of certificates of public convenience and necessity by state governments, while the majority struck down

microtransit would provide the greatest benefit to society. It is burdensome for each municipal government to draft and administer a comprehensive set of regulations for microtransit. In addition, microtransit companies that could obtain a single statewide license to operate would be able to easily spread beyond their initial municipal routes as demand dictates.

Furthermore, allowing local governments to regulate microtransit creates a significant conflict of interest. Local governments very frequently provide public transportation, and allowing microtransit companies to operate unimpeded could risk undermining the ridership of public transit. This conflict is most acute when the same government agency provides public transit and regulates private passenger carriers, like the SFMTA in San Francisco. While it may be undesirable for microtransit to undermine the ridership of public transit, local governments who receive farebox revenue from public transit are likely to overestimate its benefits in relation to the potential benefits of microtransit services.

In California, moving all regulation of microtransit to the CPUC would require legislative action due to the unambiguous language in the Public Utilities Code. Such a bill would be consistent with the California legislature's 2006 repeal of statutory language requiring the CPUC to consider the effects of new fixed-route carrier service on public transit,<sup>298</sup> which arguably showed a legislative policy to override the concerns of public transit agencies faced with private competition. Absent such legislation, the CPUC can and should adopt an expansive interpretation of its jurisdiction that allows new microtransit companies to apply for certificates when they merely have plans to operate beyond municipal borders. The CPUC already took this approach with Leap.<sup>299</sup>

#### B. *Microtransit Should Be Regulated for Public Safety and Worker Welfare*

While some types of regulation would be counterproductive when applied to microtransit, reasonable regulations that protect the public and workers are beneficial. Consumers generally expect

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a state statute requiring a license to operate an ice company. *See generally id.*

<sup>298</sup> *See supra* note 149 and accompanying text.

<sup>299</sup> *See supra* notes 198–205 and accompanying text.

transportation services they use to be reasonably safe, and to carry insurance to protect against accidents. Consumers lack the time and resources to research the safety of each transportation service they use, so they cannot select a transportation service that matches their particular preferences for safety and value. This problem of asymmetrical information justifies regulating microtransit vehicles and drivers for safety.<sup>300</sup>

Among other requirements, California law requires microtransit companies regulated by the CPUC to have programs for preventive maintenance,<sup>301</sup> follow laws regulating the hours that drivers can work,<sup>302</sup> and carry liability insurance.<sup>303</sup> Regulated companies must also have drug and alcohol testing programs for their drivers<sup>304</sup> and receive updates on the driving records of their employees.<sup>305</sup> Regulations of these general areas are probably warranted, although the costs and benefits of each provision should ideally be studied to determine if their benefits exceed their costs.

The optimal level of safety for microtransit is probably the same as for traditional public transit. But if this approach disadvantages microtransit relative to taxis and ridesharing, legislators and regulators should also consider equalizing the levels of safety required for both industries, in order to allow microtransit to compete effectively with its competitors that cause greater congestion and emissions.

In addition, regulations to protect the welfare of workers can be beneficial, because they address unequal bargaining power between microtransit companies and their employees. For example, California law requires microtransit companies regulated by the CPUC to hold worker's compensation insurance.<sup>306</sup> As with public safety regulation, these regulations are probably warranted. Legislators and regulators should also consider equalizing worker protections between microtransit companies, taxi companies, and

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<sup>300</sup> Cf. Wyman, *supra* note 291, at 49–50 (arguing for consumer-oriented safety regulation of taxis and ridersharing companies).

<sup>301</sup> See CAL. PUB. UTIL. CODE §§ 1032(b)(1)(C), 5374(a)(1)(C).

<sup>302</sup> See CAL. PUB. UTIL. CODE §§ 1032(b)(1)(B), 5374(a)(1)(B).

<sup>303</sup> See CAL. PUB. UTIL. CODE §§ 1040, 5391. See also Cal. P.U.C. General Orders 101-E (insurance requirements for fixed-route carriers), 115-A (insurance requirements for charter carriers).

<sup>304</sup> See CAL. PUB. UTIL. CODE §§ 1032.1, 5374(a)(1)(I).

<sup>305</sup> See CAL. PUB. UTIL. CODE §§ 1032(b)(1)(D), 5374(a)(1)(D).

<sup>306</sup> See CAL. PUB. UTIL. CODE §§ 1032(b)(1)(G), 5374(a)(1)(G).

ridesharing companies. Chariot's drivers have voted to join the Teamsters Union, which will provide additional protections and bargaining power to Chariot's employees.<sup>307</sup>

### C. *Fare and Entry Regulation of Microtransit Is Harmful*

In contrast to regulations that protect public safety and workers' welfare, the regulation of microtransit companies' fares and the entry of new microtransit companies is counterproductive, and states should not regulate these aspects of microtransit. Microtransit companies are not natural monopolies, but face stiff competition from subsidized public transit agencies with strong advantages. In addition, to the extent that microtransit can substitute for private automobiles, taxis, and ridesharing vehicles, microtransit can provide major benefits by reducing vehicle emissions of greenhouse gases and other pollutants, and by ameliorating traffic congestion.

It is generally beneficial for the government to regulate the prices of the goods and services provided by monopolies, because the market power of monopolies allows them to charge higher prices than would occur in a free market, leading to a loss of social welfare. However, there is much less value and much greater risk in regulating the prices of goods and services provided in a competitive market. Because most jurisdictions in the United States are served by public transportation agencies, especially urban jurisdictions that could provide a more attractive market to microtransit, microtransit companies face tough competition.

Public transit agencies, which are subsidized through tax revenues, can offer services at prices far below cost. For example, Muni only covers 35 percent of its costs through the fares paid by passengers.<sup>308</sup> This is virtually the same as the national average for transit agencies.<sup>309</sup> This makes competition very difficult for

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<sup>307</sup> See Riley McDermid, *Teamsters Unionize S.F. Jitney Bus Company Chariot*, S.F. BUS. TIMES (May 3, 2017), <http://www.bizjournals.com/sanfrancisco/news/2017/05/03/teamsters-chariot.html>.

<sup>308</sup> See STANDARD & POOR'S, MARY ELLEN E. WRIEDT, SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY, CALIFORNIA 5 (2016), [https://www.sfmta.com/sites/default/files/pdfs/2016/CA%20San%20Francisco%20Muni%20Trans%20Agy\\_Rationale\\_777631.pdf](https://www.sfmta.com/sites/default/files/pdfs/2016/CA%20San%20Francisco%20Muni%20Trans%20Agy_Rationale_777631.pdf). This combines the revenues and costs of SFMTA's transit and parking services—figures for SFMTA transit alone were unavailable.

<sup>309</sup> See NAT'L TRANSIT DATABASE, 2015 NATIONAL TRANSIT SUMMARY AND TRENDS 13 (2016), <https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/2015>

private companies, which need to both cover their costs through fares and produce a profit for their investors. In April 2017, the microtransit company Bridj ceased operations. It had begun operating in June 2014 and offered services in Boston, Kansas City, and Washington, D.C.<sup>310</sup> Aside from Chariot, Bridj had appeared to be one of the few success stories of the microtransit industry, but its demise shows the difficulty of making a profit as a microtransit company.<sup>311</sup>

In addition, if microtransit agencies demonstrate the feasibility of a new route (or express service along an existing route), little prevents the public transit agency from copying the microtransit company's success and taking its riders. For example, after Leap's and Chariot's arrival in the Marina in San Francisco, the SFMTA made improvements to the 30X bus line, which runs express from the Marina to downtown, by adding longer buses<sup>312</sup> and eliminating stops.<sup>313</sup> AC Transit's expansion of late-night service after Night School attracted media buzz is another example of this phenomenon.<sup>314</sup> Furthermore, existing public transit agencies benefit from name recognition, an existing customer base, and networks of transit routes that generally allow passengers to transfer from one route to another.

Because of the harmful effects of regulating the fares charged by microtransit companies, the California legislature should pass a bill repealing the CPUC's ability to regulate the fares of microtransit companies. In the meantime, the CPUC should

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<sup>310</sup> See Scott Kirsner, *Anatomy of the Bridj Collapse: Startup Moved Too Fast*, BOS. GLOBE (May 11, 2017), <https://www.bostonglobe.com/business/2017/05/11/anatomy-bridj-collapse-startup-moved-too-fast/XJAIYrm3kWQWkuUCrmp4AL/story.html>.

<sup>311</sup> See James Aloisi, *Lessons from the Collapse of Bridj*, COMMONWEALTH MAG. (May 1, 2017), <https://commonwealthmagazine.org/transportation/lessons-from-the-collapse-of-bridj/>; Laura Bliss, *Bridj Is Dead, But Microtransit Isn't*, CITYLAB (May 3, 2017), <https://www.citylab.com/transportation/2017/05/bridj-is-dead-but-microtransit-isnt/525156/>.

<sup>312</sup> See Joe Fitzgerald Rodriguez, *Muni Set to Use Longer Buses on Popular 30X-Marina Express*, S.F. EXAMINER (Dec. 21, 2015), <http://www.sfexaminer.com/muni-set-to-use-longer-buses-on-popular-30x-marina-express/>.

<sup>313</sup> See *30 Stockton Proposals Approved by MTA Board*, SFMTA, <https://www.sfmta.com/news/project-updates/30-stockton-proposals-approved-mta-board> (last visited Apr. 30, 2017). The 30 and 30X buses use the same stops along Chestnut Street.

<sup>314</sup> See *supra* notes 238–242 and accompanying text.

continue its policy of approving the fares of microtransit companies that face competition from public and private transit.

It can be beneficial for the government to regulate the entry of new companies into industries that are characterized by natural monopolies, because new companies can lead to a wasteful duplication of infrastructure and investment. But given the ubiquity of public transit agencies and the subsidies they receive, as well as the competition from taxis and ridesharing companies, there is practically no risk that microtransit companies will become monopolies. As a result, states should not regulate the entry of new microtransit companies or limit the number of microtransit vehicles on the road.

Under pre-2007 California law and the CPUC's procedures for fixed-route applications prior to May 2015, the CPUC was empowered to regulate the entry of new microtransit companies.<sup>315</sup> While it might seem harmless to require a microtransit applicant to show that its operation will serve the public interest, in practice this requirement can do significant harm. The vagueness of this mandate makes it hard for a new microtransit company to be sure that it will qualify for a certificate to operate, making it much harder to obtain investor support. In addition, it gives the competitors of microtransit companies an opportunity to oppose the entry of new microtransit companies. Finally, regulators such as the CPUC cannot always be trusted to make decisions based on the best interests of the public—instead, regulators may be captured by established companies that want to avoid competition.

Fortunately, the California legislature has repealed its statutory language requiring microtransit companies regulated as fixed-route carriers to show their operation serves the public interest, and replaced that statutory language with a regulatory system where applicants are evaluated based on certain clear criteria.<sup>316</sup> The CPUC's current regulations reflect this statutory change, although it may have benefitted the microtransit industry if the CPUC had been faster to revise its regulations.<sup>317</sup> As a result, the CPUC no longer truly regulates the entry of new microtransit companies, but the microtransit industry may benefit from clear and accessible statements by the CPUC emphasizing the

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<sup>315</sup> See *supra* notes 137–145 and accompanying text.

<sup>316</sup> See *supra* notes 148–152 and accompanying text.

<sup>317</sup> See *supra* notes 153–156 and accompanying text.

constraints on the CPUC's discretion when considering applications for fixed-route carrier operation, both aimed at the industry and at the CPUC's own staff.

One harmful strategy that microtransit companies could adopt would be to copy public transit routes and time their schedules to arrive at stops shortly before public transit vehicles. This scenario, which can lead to wasteful duplication of service with little public benefit, has occurred with jitney operators in New Jersey and Tel Aviv.<sup>318</sup> However, as Chariot requires a reservation on a van ahead of time, riders cannot simply choose whatever vehicle (Chariot or public bus) arrives first and Chariot cannot benefit from strategic scheduling.<sup>319</sup> To ensure that microtransit companies do not resort to strategic scheduling, regulators or legislators can require microtransit companies to use a reservation-based system in areas that are served by public transit.

Microtransit can serve as a badly-needed alternative to private automobile usage, reducing greenhouse gas emissions from transportation. It is true that microtransit could take riders from existing public transit, which would likely have harmful consequences: increased traffic congestion and higher vehicle emissions. But instead of seeing microtransit as a competitor only to public bus service, regulators should consider that microtransit also competes with less efficient forms of transportation. Ideally, microtransit can serve as the "missing middle" transportation option between high-capacity public transit and personal transportation in automobiles or by bicycle.<sup>320</sup>

Microtransit may be especially important in harnessing the power of self-driving vehicle technology for environmentally beneficial outcomes. Some researchers argue that self-driving car technology may lead to greater sprawl and traffic congestion unless policies are used to promote greater sharing of vehicles.<sup>321</sup>

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<sup>318</sup> See Alon Levy, *Chariot vs MUNI: A Transit Compromise*, Bay City Beacon (Oct. 3, 2017), [https://www.thebaycitybeacon.com/politics/chariot-vs-muni-a-transit-compromise/article\\_de981b46-a895-11e7-8f78-f3b92e958424.html](https://www.thebaycitybeacon.com/politics/chariot-vs-muni-a-transit-compromise/article_de981b46-a895-11e7-8f78-f3b92e958424.html).

<sup>319</sup> See CHARIOT, *supra* note 83 (see answer to the question "Am I guaranteed a seat on a Chariot?").

<sup>320</sup> See Lisa Nisenson, *Transportation's Missing Middle*, STRONG TOWNS (Mar. 13, 2015), <http://www.strongtowns.org/journal/2015/3/2/transportations-missing-middle>.

<sup>321</sup> See LEW FULTON ET AL., THREE REVOLUTIONS IN URBAN TRANSPORTATION 1–4 (2017), <https://www.itdp.org/wp-content/uploads/2017/>

Vehicle sharing in combination with self-driving vehicle technology also can greatly reduce greenhouse gas emissions relative to a future without increased vehicle sharing.<sup>322</sup> Microtransit can be an important driver of increased vehicle sharing, as these researchers note.<sup>323</sup> In addition, it may be easier for self-driving vehicles to drive repeatedly over the same familiar route, as fixed-route microtransit does, rather than being used for on-demand trips to varied destinations. A few U.S. cities and many European cities are already experimenting with self-driving technology for buses.<sup>324</sup>

In terms of environmental impact, microtransit companies' potential vehicle emissions and effects on congestion are hardly unique. Instead of singling out microtransit for special treatment,<sup>325</sup> it would be preferable by far to regulate all vehicles equally for their effects on traffic and their emissions.<sup>326</sup> For example, state and local governments can impose congestion charges on all vehicles that enter congested areas, to internalize the externalities of each vehicle's effect on traffic congestion.<sup>327</sup> The CPUC expressed a similar view in a 1989 order on the regulation of passenger carriers when it refused to limit the entry of new passenger carriers for airport ground transportation despite congestion concerns, and argued that airports needed to study general traffic management instead.<sup>328</sup> In addition, through pollution fees or cap-and-trade systems, governments can

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<sup>322</sup> See *id.*

<sup>323</sup> See *id.* at 11.

<sup>324</sup> See Mark Scott, *The Future of European Transit: Driverless and Utilitarian*, N.Y. TIMES (May 28, 2017), <https://www.nytimes.com/2017/05/28/technology/the-future-of-european-transit-driverless-and-utilitarian.html>.

<sup>325</sup> See Susan Vaughn, *Regulate Chariot, Charge Fair-Market Value for Use of Government Property*, S.F. EXAMINER (Oct. 17, 2017), <http://www.sfexaminer.com/regulate-chariot-charge-fair-market-value-use-government-property/> (arguing that the SFMTA should “charge [Chariot] fair-market value for use of government property, in this case city streets” without suggesting any similar charge for private automobiles or delivery companies).

<sup>326</sup> Cf. Roger Rudick, *Should San Francisco Regulate Chariot?*, STREETS BLOGSF (Oct. 3, 2017), <https://sf.streetsblog.org/2017/10/03/should-san-francisco-regulate-chariot/> (suggesting that Uber, Lyft, and private cars create greater problems for transit than Chariot).

<sup>327</sup> See generally Michael H. Schuitema, Comment, *Road Pricing as a Solution to the Harms of Traffic Congestion*, 34 TRANSP. L.J. 81 (2007).

<sup>328</sup> See *In re Regulation of Passenger Carrier Services*, 33 CPUC 2d 5 § VII (1989).

internalize the externalities from vehicle emissions. For example, California has a cap-and-trade system for greenhouse gas emissions that includes transportation fuels.<sup>329</sup>

State-imposed congestion charges and pollution fees on vehicles would have the beneficial effect of reducing the price of a microtransit ride (and public transit ride) relative to riding in a private automobile, taxi, or ridesharing vehicle.<sup>330</sup> This would cause more people to ride in microtransit instead of private automobiles, taxis, and ridesharing vehicles, and as a result it would reduce both pollution and congestion relative to the status quo. However, if microtransit is regulated for its effects on congestion and emissions while other vehicles are not, it will have the perverse effect of pushing more people to drive and take taxis and ridesharing vehicles instead of taking microtransit, increasing emissions and congestion.

Finally, when critics of microtransit argue that microtransit will lead to a two-tiered public transportation system, it is hard to ignore that private automobiles already create such a system. Outside of a few metropolitan areas with successful public transit systems, there is already a two-tiered transportation system in which the middle-class and wealthy mostly drive or hire their own cars, while the poor disproportionately use public transit.<sup>331</sup> Even in New York City, which has the highest transit ridership of any major U.S. city,<sup>332</sup> car owners tend to be significantly wealthier than people who do not own cars.<sup>333</sup> If critics of microtransit are truly concerned about a two-tiered transportation system,

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<sup>329</sup> See CAL. CODE REGS. tit. 17, §§ 95802(a)(161) (defining “fuel supplier” to include suppliers of transportation fuels), 95812(d)(1) (including fuel suppliers in the cap-and-trade system beginning in 2015). See also CAL. AIR RES. BD., OVERVIEW OF ARB EMISSIONS TRADING PROGRAM (2015), [https://www.arb.ca.gov/cc/capandtrade/guidance/cap\\_trade\\_overview.pdf](https://www.arb.ca.gov/cc/capandtrade/guidance/cap_trade_overview.pdf).

<sup>330</sup> Microtransit vehicles would be able to spread the costs of the congestion charge and pollution fees onto more riders. Cf. Alex Armlovich, *New York, Pave the Way for Uberized Bus Companies Like Chariot*, N.Y. DAILY NEWS (May 2, 2017), <http://www.nydailynews.com/opinion/pave-uberized-bus-companies-chariot-bridj-article-1.3130229> (arguing for congestion pricing and allowing companies like Chariot to operate in New York).

<sup>331</sup> See Mike Maciag, *Public Transportation’s Demographic Divide*, GOVERNING (Feb. 25, 2014), <http://www.governing.com/topics/transportation-infrastructure/gov-public-transportation-riders-demographic-divide-for-cities.html>.

<sup>332</sup> See Freemark, *supra* note 12.

<sup>333</sup> See TRI-STATE TRANSPORTATION CAMPAIGN, HOW CAR-FREE IS NYC? (2017), <http://blog.tstc.org/wp-content/uploads/2017/04/how-car-free-is-nyc.pdf>.

microtransit is a much smaller problem than the existing ubiquitous use of private automobiles.

#### CONCLUSION

San Francisco's experience with microtransit presents a case study of how microtransit companies interact with regulators and public transit agencies and shows how regulators apply longstanding regulatory frameworks to new technology-enabled transportation services. While observers in the media may allege that California has overregulated microtransit and caused the bankruptcy of microtransit start-ups like Night School, there is little evidence for this claim. The California Public Utilities Commission generally enforces uncontroversial policies without unreasonably blocking the entry of new microtransit companies. However, it would be beneficial for the California legislature to end local regulation of microtransit and roll back fare regulation of fixed-route carriers to improve the regulatory environment for microtransit.

Microtransit could be a useful tool for reducing vehicle emissions and traffic congestion, and environmentalists should not blame it for preexisting problems that are largely caused by private automobile use. Rather than regulating microtransit to reduce its impact on traffic and vehicle emissions, environmentalists should advocate for policy solutions that address all vehicles' emissions and traffic impacts. As pointed out by the economist Tyler Cowen, "the absence of congestion pricing in most major urban centers means we are already bad at running roads," and as a result new technologies like driverless cars could end up causing horrible traffic congestion.<sup>334</sup> But with the right policy tools like congestion pricing and pollution fees, the government can incentivize people to switch from riding alone in a car to taking microtransit, especially once self-driving technology becomes widespread. Regulators should allow new microtransit companies to offer their services to the public, so that the public can realize the potential benefits of microtransit.

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<sup>334</sup> Tyler Cowen, *Three Counterintuitive Scenarios for Driverless Vehicles*, MARGINALREVOLUTION (Oct. 28, 2015), <http://marginalrevolution.com/marginalrevolution/2015/10/three-counterintuitive-scenarios-for-driverless-vehicles.html>.