1 Honorable Robert S. Lasnik
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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE
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11 CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, 12 *Plaintiff*, 13 v. 14 CITY OF SEATTLE *et al.* 15 *Defendants*. 16 17	Case No. 17-cv-00370-RSL PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT CITY OF SEATTLE'S MOTION TO DISMISS **NOTED ON CALENDAR FOR ORAL ARGUMENT:** **April 14, 2017 at 3:00 p.m.**

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This Court has already preliminarily enjoined Seattle Ordinance 124968 pending final judgment in this case. The City's motion to dismiss raises many of the same arguments it presented in opposition to the Chamber's motion for preliminary injunction. Those should be rejected again here. As an initial matter, the Chamber's antitrust claim is ripe and the Chamber has associational standing to assert all claims on behalf of its members, as individual member participation is not required to adjudicate this facial challenge. The City's motion repeatedly (and wrongly) conflates preemption claims with substantive violation claims, leading to confused arguments about associational standing and the appropriate causes of action. On the merits of the federal claims, the City raises no new arguments. Nor does the City give this Court any reason to dismiss the Chamber's state claims.

BACKGROUND

Seattle Ordinance 124968 authorizes a collective-bargaining scheme for independent contractors who work as for-hire drivers and use a ride-referral service, such as that provided by Chamber members Uber Technologies (together with its subsidiaries, "Uber"), Lyft, Inc., and Eastside for Hire. The Chamber of Commerce of the United States of America sued to enjoin this Ordinance, raising federal antitrust and labor preemption claims, a federal antitrust violation claim, and three state-law claims. The Chamber moved for a preliminary injunction based on the federal preemption claims. While that motion was pending, the City filed its motion to dismiss. On April 4, this Court entered a preliminary injunction. Order (Dkt. 49). The Court explained that the Chamber's antitrust claim raised "serious questions regarding both prongs" of the state-action immunity doctrine, *id.* at 6, and that the balance of hardships sharply favored the Chamber because of the "competitive injury" that the Ordinance would impose, *id.* at 17.

ARGUMENT

I. THE CHAMBER'S ANTITRUST CLAIMS ARE RIPE

As this Court necessarily concluded by adjudicating the Chamber's motion for preliminary relief, the Chamber's antitrust preemption claim is ripe because its members are

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1 subject to "certainly impending" injury from the City's collective-bargaining scheme. *S.B.A. List*
2 *v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). Absent the preliminary injunction, those members
3 will immediately suffer two distinct concrete injuries from the Ordinance: they will be compelled
4 to (1) give the Teamsters proprietary driver lists for the sole, avowed purpose of unionizing the
5 drivers for collective bargaining; *i.e.*, convincing drivers to join an antitrust conspiracy, and
6 (2) engage in a costly, disruptive union organizing campaign.

7 Although the City does not dispute that these injuries are "certainly impending," it
8 nevertheless argues that the antitrust claims are not ripe until an additional, future injury occurs:
9 "there is an actual likelihood of the negotiations over price terms." Mot. 10. But this fails to
10 distinguish the Chamber's antitrust *violation* claim in count one of its complaint with the
11 antitrust *preemption* claims in counts two and seven. If the City means to apply this argument to
12 the *preemption* claim, it reveals a fundamental misunderstanding both of how such claims are
13 substantively adjudicated and when Article III authorizes adjudication. Even assuming arguendo
14 that only the collective bargaining itself violates the Sherman Act, the Chamber in count two is
15 not suing the City for violating the Sherman Act; it is suing under the Supremacy Clause for
16 imposing a regulatory regime that, on its face, conflicts with the Act. That claim is ripe when the
17 conflicting law is imposed on and injures the plaintiff, and the substantive preemption question is
18 whether the local law's regulatory regime is inconsistent with the federal statutory scheme—not
19 whether the defendants have violated the federal statute. *See Fisher v. City of Berkeley*, 475 U.S.
20 260, 264 (1986) (distinguishing between an illegal antitrust conspiracy and a preemption claim).
21 A local law is preempted when it "*authorizes* conduct that necessarily constitutes a violation of
22 the antitrust laws," not when private actors consummate the violation. *Id.* at 265 (emphasis
23 added). These same principles govern the Chamber's state-law preemption claim in count seven.

24 Here, the Ordinance authorizes coordinated price fixing by multiple independent actors.
25 There is no need to wait until the price-fixing conspiracy is consummated. A conflict with the
26 Sherman Act exists now because the entire Ordinance purports to implement a regulatory

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1 scheme that Congress has forbidden. And the Ordinance compels the Chamber's members to
2 take action—now—to further this preempted collective-bargaining scheme.
3 Further, *every* aspect of the Ordinance violates the Supremacy Clause because *every*
4 provision works together as an integrated whole to form the City's collective-bargaining scheme.
5 Where "the object of the statute under review [i]s to accomplish [a] single general purpose [that]
6 … fail[s] for want of constitutional power to effect it, the remaining provisions of the act, serving
7 merely to facilitate or contribute to the consummation of that purpose, must likewise fall."
8 *Williams v. Standard Oil Co. of La.*, 278 U.S. 235, 245 (1929), *overruled in part on other*
9 *grounds by Olsen v. Nebraska*, 313 U.S. 236, 244 (1941). Thus, in *Williams*, after finding
10 unlawful a state statute fixing the price of gasoline, the Supreme Court invalidated record-
11 collection and other requirements (notwithstanding the statute's severability provision) as "mere
12 adjuncts of the price-fixing provisions of the law or mere aids to their effective execution." *Id.* at
13 243; *see also Davis v. FEC*, 554 U.S. 724, 744 (2008) (because "disclosure requirements were
14 designed to implement" an unconstitutional scheme, "it follows that they too are
15 unconstitutional"). Here, likewise, there is no purpose for the disclosure provision, no purpose
16 for a QDR or an EDR, and no purpose for a union election other than for collective bargaining—
17 all are "mere adjuncts of the [illegal] price-fixing provisions … or mere aids to their effective
18 execution." *Williams*, 278 U.S. at 243. The entire scheme is therefore preempted.
19 In any event, the City is wrong that a *per se* antitrust violation will not occur until *after*
20 an EDR is certified and seeks to "negotiate[e] over price terms." Mot. 10. An antitrust
21 conspiracy is "ripe when the agreement to restrain competition is formed," *United States v.*
22 *Inryco, Inc.*, 642 F.2d 290, 293 (9th Cir. 1981), so the impending *per se* antitrust violations will
23 be complete as soon as the Teamsters start obtaining agreements from drivers to join the union.
24 *Cf. Meat Drivers v. United States*, 371 U.S. 94, 98–99 (1962) (upholding injunction ordering
25 dissolution of union of independent contractors).
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1 This certainly impending conspiracy likewise establishes the ripeness of the Chamber's
2 antitrust *violation* claim in count one. That claim seeks injunctive relief under section 16 of the
3 Clayton Act, 15 U.S.C. § 26, based on the City's participation in the conspiracy by authorizing
4 and facilitating the agreements among drivers to fix prices. Because this conspiracy is "certainly
5 impending," the Chamber's claim is ripe. This harmonizes with the rule that a plaintiff "need
6 only demonstrate a significant threat of injury from an impending violation of the antitrust laws"
7 to have statutory standing to seek injunctive relief, and this "remedy is characteristically
8 available even though the plaintiff has not yet suffered actual injury." *Zenith Radio Corp. v.*
9 *Hazeltine Research, Inc.*, 395 U.S. 100, 129–30 (1969).

10 **II. THE CHAMBER HAS ASSOCIATIONAL STANDING FOR ALL ITS CLAIMS**

11 There is no merit to the City's contention that the Chamber lacks standing for its federal
12 and state antitrust claims, its *Garmon* claim, and its claim under the Washington PRA.

13 **A. Federal And State Antitrust Claims**

14 **1.** The City contends (Mot. 5) that the "fact-specific nature of the Chamber's claims
15 requires individual participation" under the third prong of the associational standing test in *Hunt*
16 *v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). According to the City,
17 "analysis of the damage to the Chamber's members will require detailed factual inquiries" into
18 the "operations, market share, and financial performance" of the Chamber's members. Mot. 5–6.
19 This is false. *Hunt*'s third prong is a prudential factor that permits associational standing unless
20 individual member participation is "indispensable" to proper resolution of the claim. *Warth v.*
21 *Seldin,* 422 U.S. 490, 511 (1975) ("indispensable"); *Cent. Delta Water Agency v. United States*,
22 306 F.3d 938, 954 n.9 (9th Cir. 2002) ("prudential"). Although individual participation is
23 "indispensible" in damages actions, it "is not normally necessary when an association seeks
24 prospective or injunctive relief for its members." *United Food & Commercial Workers Union*
25 *Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 546 (1996). There is nothing different about *per se*
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1 antitrust claims for injunctive relief that makes individual member participation "indispensible,"
2 in contrast to other claims for injunctive relief, where associational standing is permitted.
3 It certainly cannot be the "antitrust injury" requirement that makes antitrust claims
4 different. *See* Mot. 5–6. The fact that a Chamber member must establish antitrust injury to have
5 standing under the Clayton Act hardly suggests that the member suffering the injury somehow
6 becomes "indispensable" under *Hunt*'s third prong. To the contrary, the question whether a
7 member has suffered sufficient injury is entirely separate from the "indispensability" issue.
8 Indeed, establishing member-specific injury is required in *every* associational standing case to
9 satisfy *Hunt*'s first prong—the requirement that a member suffer Article III injury. *Hunt*, 4232
10 U.S. at 343. If the need to show member-specific injury somehow meant the member was
11 "indispensible," there would *never* be associational standing: establishing the injury needed to
12 satisfy *Hunt*'s first prong would simultaneously *preclude* showing that the member was not
13 "indispensable" under *Hunt*'s third prong. That is obviously not the law. Similarly, the
14 preferred and classic relief sought in associational standing cases—injunctive relief—could
15 *never* be granted: establishing the necessary irreparable injury to a member would, again,
16 somehow establish "indispensability" of that injured member, precluding associational standing.
17 Needless to say, *Hunt* does not establish any such bizarre Catch-22. That is why courts
18 routinely grant associational standing even though individual members provide evidence
19 establishing member-specific injury. *E.g.*, *N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d
20 1339, 1349 (2d Cir. 1989).
21 And there is nothing about "antitrust injury" that uniquely and categorically exempts it
22 from this uniform rule. To the contrary, courts have repeatedly permitted associational standing
23 in Clayton Act challenges, even though only the association's members suffered an antitrust
24 injury. *E.g.*, *Mission Hills Condo. Ass'n M-1 v. Corley*, 570 F. Supp. 453, 458 (N.D. Ill. 1983)
25 (proof of antitrust injury from "tying arrangement" "would not require member participation");
26 *Nat'l Constructors Ass'n v. Nat'l Elec. Contractors Ass'n, Inc.*, 498 F. Supp. 510, 515, 522 (D.

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1 Md. 1980) (associational standing for Clayton act claim challenging the "collective bargaining
2 structure in the electrical construction industry"), *aff'd as modified*, 678 F.2d 492 (4th Cir. 1982);
3 *Nat'l Office Mach. Dealers Ass'n v. Monroe, The Calculator Co.*, 484 F. Supp. 1306, 1307–08
4 (N.D. Ill. 1980) (Clayton Act claim did not require "participation of individual members").
5 As this precedent reflects, it is not remotely true that antitrust injury for a price-fixing
6 claim requires an individualized "analysis of the damage to the Chamber's members," including
7 inquiries into their "operations, market share, and financial performance." Mot. 5–6. Antitrust
8 injury does not require a quantitative assessment of individual damages; it requires a qualitative
9 assessment of a particular category of injury—injury of "the type the antitrust laws were
10 intended to prevent and that flows from that which makes defendants' acts unlawful."
11 *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Whether a given type
12 of injury alleged in the complaint is sufficient for antitrust injury is a purely legal issue that can
13 be resolved without individual member participation.
14 Indeed, it is particularly easy in this case to demonstrate that collective bargaining under
15 the Ordinance will cause antitrust injury to the Chamber's members because it is a *per se*
16 antitrust violation. At its core, the City's collective-bargaining scheme enables horizontal price
17 fixing among for-hire drivers who are buyers of ride-referral technology services. "When
18 horizontal price fixing causes buyers to pay more, or sellers to receive less, than the prices that
19 would prevail in a market free of the unlawful trade restraint, antitrust injury occurs."
20 *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 988 (9th Cir. 2000). Thus, such "price
21 fixing" *ipso facto* establishes antitrust injury. When for-hire drivers conspire to pay below-
22 market prices for ride-referral services from the Chamber's members, the resulting loss to those
23 members "reflects the rationale for condemning buying cartels—namely, suppression of
24 competition among buyers, reduced upstream and downstream output, and distortion of prices."
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Id.[1] No factual inquiry into Uber's, Lyft's, or Eastside's market share, operational structure, or financial performance is necessary to show that receiving artificially low (or paying artificially high) prices because of price fixing is an antitrust injury.

2. The City also argues that "the Chamber does not have statutory standing to seek injunctive relief on behalf of its members" under section 16 of the Clayton Act because the statute requires proof that an associational plaintiff will suffer antitrust injury itself; antitrust injury to an association's members is insufficient. Mot. 5. That position is indefensible. First, as established above, even if the Clayton Act granted standing only to "persons" or "corporations" suffering antitrust injury, an association would have standing based on any such injury to the "person" or "corporation" in its membership, just like it can base its standing on any other statutory or constitutional injury suffered by its members. Indeed, similar language is routine in statutes creating a cause of action. *See, e.g.*, 42 U.S.C. § 1983 ("citizen" or "person" "injured" may sue); 5 U.S.C. § 702 (a "person suffering legal wrong" or otherwise "aggrieved" may sue); 16 U.S.C. § 1540(g)(1)(A) ("any person may commence a civil suit on his own behalf"). And associations are routinely granted standing to bring claims under those statutes. *See, e.g.*, *Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 659 (1993); *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1229–30 (9th Cir. 2008). That is why, again, courts routinely apply the same associational standing rules to antitrust cases as applied elsewhere. *See, e.g.*, *S.W. Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n*, 830 F.2d 1374, 1380 (7th Cir. 1987) (ordinary *Hunt* factors apply in antitrust cases); *Mission Hills Condo. Ass'n*, 570 F. Supp. at 458 (same); *Nat'l Constructors*, 498 F. Supp. at 520 (same); *Nat'l Office Mach. Dealers*, 484 F. Supp. at 1307–08 (same).[2]

[1] The result is the same if the Chamber's members are viewed as purchasers of driver services (rather than sellers of referral services), who must pay more for those services because of the horizontal price fixing, because either way the injury flows "from the collusive price manipulation itself." *Id.*

[2] In the face of this uniform authority, the City cites one outlier that provided no reasoning and simply assumed (incorrectly) that antitrust injury is somehow unique in the universe of associational standing claims. Mot. 5 (citing *Fin. & Sec. Prods. Ass'n*, 2005 WL 129813, *3 (N.D. Cal. 2005)).

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1 In any event, section 16 of the Clayton Act is *not* limited to "persons" and "corporations,"
2 but provides that "any … *association* shall be entitled to sue for and have injunctive relief …
3 against threatened loss or damage by a violation of the antitrust laws." 15 U.S.C. § 26 (emphasis
4 added). Notwithstanding the precedent cited above, the City asks this Court to limit "association"
5 to suits brought for antitrust injury to an association itself, not for injury to its members. Mot. 5.
6 But it offers no reason for this strained, unprecedented reading of the Clayton Act.
7 In its order granting a preliminary injunction, this Court cited *California v. American*
8 *Stores Co.*, 495 U.S. 271, 296 (1990), and *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S.
9 104, 111 (1986), for the proposition that an association suing under the Clayton Act must prove
10 injury to its "own" interests, rather than to its members' interests. Order at 3. But those cases
11 are inapposite: neither involved associational standing, and the issues in both cases had nothing
12 to do with associational standing. *Am. Stores*, 495 U.S. at 275; *Cargill*, 479 U.S. at 105. Further,
13 the Court's dictum in *American Stores* about injury to the plaintiff's "own" interests is inapposite
14 because the Court was drawing a distinction between a governmental plaintiff and a private
15 litigant, not between a private associational plaintiff and a private individual plaintiff. 495 U.S.
16 at 296. Similarly, in *Cargill* the Court said it would be "anomalous" to allow a plaintiff to seek
17 an injunction under section 16 of the Clayton Act without proving antitrust injury, since a
18 plaintiff must always prove antitrust injury for damages under section 4. 479 U.S. at 112. But
19 all that means is that one of the associations' members has to prove antitrust injury in section 16
20 cases, not that the association must prove antitrust injury to itself. Indeed, what would be truly
21 "anomalous" is a special associational-standing exception for antitrust cases inferred from an
22 irrelevant passage in a case that had nothing to do with associational standing.
23 **3.** An equally fundamental problem with the City's statutory-standing argument is
24 that the Chamber's preemption claim does not arise under the Clayton Act, but is instead a non-
25 statutory *preemption* claim under the Supremacy Clause, which is cognizable under federal
26 equity jurisprudence. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015)

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1 (explaining the "long history" of such claims).[3] The limits imposed for causes of action under
2 the Clayton Act are therefore inapplicable to the preemption claim. As a result, there is no
3 antitrust injury requirement for the preemption claim because that requirement applies only to
4 actions to enforce the Clayton Act. *See Brunswick*, 429 U.S. at 488–89. And the City has
5 presented no basis—because there is none—for importing antitrust injury under the Clayton Act
6 into a non-statutory preemption claim. Indeed, even in the absence of *any* statutory cause of
7 action, the Chamber could always raise a preemption claim. *Armstrong*, 135 S. Ct. 1384.
8 If the City means to argue that every antitrust claim *must* be brought under the Clayton
9 Act, and that non-statutory antitrust preemption claims are unavailable, that is incorrect. Non-
10 statutory preemption claims are available unless Congress has *abrogated* that cause of action,
11 such as through a "detailed and exclusive remedial scheme" intended to foreclose any other
12 claims. *Verizon Md., Inc. v. Pub. Service. Comm'n of Md.*, 535 U.S. 635, 647 (2002). In
13 *Verizon*, the Court permitted a non-statutory preemption suit involving the Telecommunications
14 Act of 1996. *Id.* Congress did not intend to foreclose a preemption suit, the Court said, because
15 even though the Telecommunications Act contained a private cause of action, it did not contain a
16 "detailed and exclusive remedial scheme" through which Congress meant to foreclose non-
17 statutory preemption suits. *Id.* Courts have frequently applied the same analysis to permit non-
18 statutory preemption claims for various federal statutes. *E.g.*, *Miranda B. v. Kitzhaber*, 328 F.3d
19 1181, 1188 (9th Cir. 2003) (non-statutory preemption suit under Title II of the ADA). Here, for
20 all the same reasons the Court explained in *Verizon*, the Clayton Act does not displace non-
21 statutory antitrust preemption claims. Thus, even though the plaintiff in *Fisher v. City of*
22 *Berkeley* raised "no claim under either § 4 or § 16 of the Clayton Act," he was permitted to assert
23 a claim that "the regulatory scheme established by [Berkeley's] Ordinance, on its face, conflicts
24
25 [3] The City makes the same incorrect argument with respect to the state-law antitrust claim. The Chamber is not suing directly under the Consumer Protection Act, but is raising a non-statutory preemption claim under state law. *See, e.g.*, *Cannabis Action Coal. v. City of Kent*, 351 P.3d 151, 154 (Wash. 2015); *Entm't Indus. Coal. v.*
26 *Tacoma-Pierce Cnty. Health Dep't*, 105 P.3d 985, 987 (Wash. 2005).

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1 with the Sherman Act and therefore is preempted." 475 U.S. at 264.

2 **B. *Garmon* Preemption Claim**

3 Seattle argues that the Chamber's *Garmon* preemption claim requires participation by its
4 members in order to "put forth enough evidence to enable the court to find that the Board
5 reasonably could uphold a claim based on such an interpretation." *Int'l Longshoremen's Ass'n,*
6 *AFL-CIO v. Davis*, 476 U.S. 380, 395 (1986). But, as explained more fully in the merits section
7 below, *infra* p. 21, the Court need not consider factual questions specific to individual driver
8 coordinators because the NLRB is currently considering actual claims by the very type of drivers
9 at issue here that they are "employees" within the meaning of the NLRA. *See* Steger Decl. ¶ 14;
10 Kelsay Decl. ¶ 8. There is nothing more the individual members need to provide to this court,
11 and no reason for them to participate.

12 **C. Public Records Act Claim**

13 The City incorrectly contends that member participation is necessary to support the
14 Chamber's PRA claim because the members must prove that they maintain their lists as trade
15 secrets and that they will suffer irreparable harm by disclosing them. Mot. 8. *First*, as discussed
16 above, in every case for injunctive relief the plaintiff must show irreparable harm and Article III
17 injury, and members of an association may provide individualized evidence of irreparable harm
18 and Article III injury in associational-standing cases. *See supra* pp. 4–6. *Second*, and similarly,
19 there is no problem with the Chamber's members providing individual proof that they maintain
20 their driver lists as trade secrets. The Chamber has already provided this proof through simple
21 declarations, and the City has not contended that those declarations are inaccurate. Dkt. 43 at 11
22 n.7; Kelsay Decl. ¶ 13–17; Steger Decl. ¶ 17; Takar Decl. ¶ 12. *Third*, the Chamber is not
23 claiming that the disclosure requirement is preempted as to particular members because their
24 driver lists are trade secrets. Rather, the Chamber's claim is that the disclosure requirement is
25 preempted *insofar as it requires any disclosure of a trade secret*. And the relief that the
26

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Chamber seeks is tailored to the limited nature of its claim. The Chamber asks that the Court declare (and enter a corresponding injunction) that the City cannot apply the Ordinance to compel the Chamber's members to release a trade secret. This claim therefore presents a pure question of law: whether the PRA preempts the Ordinance insofar as the Ordinance compels disclosure of trade secrets protected by the Washington Trade Secrets Act, RCW 19.108.010(4). That legal question can and should be answered without individual participation.

III. THE ORDINANCE CONFLICTS WITH FEDERAL AND STATE ANTITRUST LAW

A. The Sherman Act Preempts The Ordinance

Seattle contends that the Chamber has failed to state a claim under the Sherman Act because the City has not entered into a combination in restraint of trade. Mot. 10. This further highlights the City's conflation of a Clayton Act claim for violation of the Sherman Act and a non-statutory antitrust preemption claim. In count one of the complaint, the Chamber alleges that the City has *violated* the Sherman Act through a conspiracy in restraint of trade. The merits of count one are addressed separately below. *See infra* pp. 18–19. (The Chamber did not assert this claim in its motion for preliminary injunction.) In count two, however, the Chamber alleges that the City's Ordinance is *preempted by* the Sherman Act pursuant to the Supremacy Clause. The City completely ignores this distinction, and its argument that the City has not entered into a conspiracy is inapplicable to the Chamber's preemption claim. *See* Mot. 10. Thus, the City's only argument that the preemption claim should be dismissed is based on state-action immunity. But as this Court indicated in its order granting the preliminary injunction, the Ordinance satisfies neither element of state-action immunity because state law nowhere expresses a policy of permitting collective bargaining by for-hire drivers, and no state official (nor even any City official) actively supervises the collective-bargaining process.

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1
1. The Ordinance fails the clear-articulation requirement

2
a. The clear-articulation requirement is met only if the state has "affirmatively
3 contemplated" a "discrete form[]" of anticompetitive conduct within a scope of delegated
4 authority, and the local government is acting within the scope of that delegated authority. *FTC v.*
5 *Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1011, 1016 (2013). A mere "inference" that
6 the state intended to approve the conduct is insufficient; there must be a "forthright and clear
7 statement." *Columbia Steel Casting Co. v. Portland Gen. Elec. Co.*, 111 F.3d 1427, 1439 (9th
8 Cir. 1996). Moreover, "state-law authority to act is [alone] insufficient to establish state-action
9 immunity"; the City must also show that an "anticompetitive effect was the 'foreseeable result'
10 of what the State authorized" the municipality to do. *Phoebe Putney*, 133 S. Ct. at 1011–12; *see*
11 *also Columbia Steel*, 111 F.3d at 1444. A particular anticompetitive effect is not foreseeable
12 unless the State "affirmatively contemplated" that the municipality would displace competition
13 in a specific way, *Phoebe Putney*, 133 S. Ct. at 1011, and contemplated "the kind of actions
14 alleged to be anticompetitive," *Springs Ambulance Serv. v. City of Rancho Mirage*, 745 F.2d
15 1270, 1273 (9th Cir. 1984). These standards must be rigorously applied because "a broad
16 interpretation of the doctrine may inadvertently extend immunity to anticompetitive activity
17 which the states did not intend to sanction." *Cost Mgmt. Servs., Inc. v. Wash. Nat. Gas Co.*,
18 99 F.3d 937, 941 (9th Cir. 1996).

19 In *Phoebe Putney*, for example, the Supreme Court considered whether a state statute
20 clearly articulated and affirmatively expressed a state policy allowing a municipal hospital
21 authority to acquire a private competitor in a transaction that would violate the antitrust laws.
22 The statute at issue authorized the municipal hospital authority to exercise a broad range of
23 powers, including the express power "to acquire" other hospitals. 133 S. Ct. at 1007–08
24 (quotation marks and brackets omitted). Even this was insufficient to authorize the merger, the
25 Court unanimously concluded, because although the statute authorized hospital acquisitions
26 generally, it did not "clearly articulate and affirmatively express" a specific policy of allowing

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1 acquisitions "that will substantially lessen competition." *Id*. at 1012. And in *Columbia Steel*, the
2 Ninth Circuit held that a state agency's order approving an exchange of facilities by two electric
3 utilities to eliminate duplication within given service areas did not immunize the utilities from
4 claims that the utilities had unlawfully divided the market, because, even though the exchange
5 may have been "as a practical matter, the factual equivalent of an allocation of exclusive service
6 territories," the order "did not specifically and clearly authorize . . . a division of the . . . market
7 into exclusively served territories." 111 F.3d at 1441 (quotation marks and brackets omitted).

8 **b.** As in *Phoebe Putney* and *Columbia Steel*, the general authorizations of
9 Washington state law fall far short of expressly authorizing the challenged conduct or
10 affirmatively contemplating that the City would displace competition in the specific manner that
11 it did. The state delegated limited, enumerated authority to Seattle to regulate for-hire
12 transportation. RCW 46.72.160. That authority has "been used in a fairly consistent way, …
13 namely to allow municipalities to establish rates and other regulatory requirements in the taxi
14 industry." Order at 5. Thus, that authority allows the City to regulate for-hire drivers and their
15 relationship to the public, but in no way authorizes regulation of the contractual relationship
16 between for-hire drivers and third parties who do business with them, such as ride-referral
17 companies. And the state has granted antitrust immunity only within the scope of that delegated
18 authority. RCW 46.72.001. The statement of immunity appears in the statute's prefatory
19 "Finding and intent" provision, and thus demonstrates only that the State contemplated antitrust
20 immunity to the extent that municipalities enact the sorts of regulations specifically enumerated
21 in the statute's operative provision. RCW 46.72.160. For instance, the delegated power to
22 "[c]ontrol[] … rates" might authorize the imposition of an anticompetitive rate schedule for the
23 rates charged to the public, and the delegated power to require driver permits might authorize
24 anticompetitive exclusion of drivers. RCW 46.72.160(2)–(3).

25 Seattle's collective-bargaining Ordinance, however, falls far outside the activities that are
26 affirmatively contemplated by those statutes. Those statutes "have never … been used to

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1 authorize collusion between individuals in the industry in order to establish a collective
2 bargaining position in negotiations with another private party." Order at 5. There simply is no
3 language that can remotely be construed as contemplating anticompetitive unionization and
4 collective bargaining between for-hire drivers and third parties like Uber, Lyft, and Eastside.
5 Indeed, since the app-based rideshare business that is at the heart of this case "simply did not
6 exist" (Order at 5) when the state statutes were enacted, the state legislature could not possibly
7 have contemplated that a municipality would authorize the anticompetitive conduct and effects at
8 issue here.

9 Even if the delegated authority encompassed the relationship between drivers and third-
10 party coordinators, this is insufficient because the state must also have "affirmatively
11 contemplated" the type of anticompetitive restraint the City has undertaken—the "kinds of
12 actions alleged to be anticompetitive." *Springs Ambulance*, 745 F.2d at 1273. For example, in
13 circumstances analogous to *Phoebe Putney*, even if a legislature had affirmatively contemplated
14 that hospitals could collectively bargain with independent doctors, the clear-articulation
15 requirement still would not be met for an anticompetitive merger because the legislature did not
16 affirmatively contemplate such mergers—a different type of anticompetitive restraint than
17 collective bargaining. After all, "the authorization of discrete forms of anticompetitive conduct
18 pursuant to a regulatory structure[] does not establish that the State has affirmatively
19 contemplated other forms of anticompetitive conduct that are only tangentially related." *Phoebe*
20 *Putney*, 133 S. Ct. at 1016; *see also Medic Air Corp. v. Air Ambulance Auth.*, 843 F. 2d 1187,
21 1189 (9th Cir. 1988) (state-action immunity for monopoly provider of air-ambulance dispatching
22 did not extend to dispatcher's anticompetitive conduct in providing air-ambulance services).
23 Here, the state's general grant of immunity under RCW 46.72.001 says nothing about collective
24 bargaining by independent contractors to fix prices for ride-referral technology. Given the
25 revolutionary novelty of this scheme, it is not credible to suggest that the state "affirmatively
26 contemplated" this kind of anticompetitive action.

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Recognizing that the state never affirmatively contemplated the collective-bargaining scheme, and that the scheme's anticompetitive regulation of ride-referral companies is outside the scope of the delegated authority, the City seeks to preclude the Court from even examining these central inquiries, claiming that the Court must take at face value the City's assertion that the delegation authorizes the Ordinance. Mot. 13. But this reading of *City of Columbia*, 499 U.S. 365, 371 (1991), would gut the clear-articulation requirement and completely shield municipalities from any inquiry at all. To be sure, a municipality does not lose contemplated antitrust immunity merely because a local law is "defective" or wrongly implemented under state law. *Id.* But that hardly means the Court is estopped from examining whether the state law reasonably encompasses or contemplates the challenged local regulation—that question is the very core of the "clear articulation" inquiry. If the City claimed the state laws here authorized anticompetitive regulation of for-hire drivers and their *landlords* (on the theory that lower rents, like higher compensation, will improve the drivers' reliability), the Court could obviously examine the validity of that effort to distort state law. Indeed, under the City's theory, it could force collective bargaining upon all manner of companies doing business with for-hire drivers, such as automobile dealers, mechanics, fuel companies, and providers of GPS services. That cannot be right. This Court can and must examine whether state law affirmatively contemplates local regulation of contracts between drivers and third-party coordinators.

Indeed, the FTC has consistently rejected, in similar contexts, efforts by local governments to disguise collective-bargaining regimes as safety regulations. As the agency explained in testimony before Congress, collective bargaining cannot "solve issues regarding the ultimate safety or quality of products or services that consumers receive." Testimony of David Wales, at 8 (Oct. 18, 2007), http://bit.ly/2m9Pady. We do not, for example, "rely on [unions] to bargain for safer, more reliable, or more fuel-efficient cars." *Id.* Rather, "[c]ollective bargaining rights are designed to raise the incomes and improve the working conditions of union members," not to "ensure the safety or quality of products or services." *Id.*

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1 At bottom, the City seeks to fundamentally alter the status of independent drivers by
2 enabling them to form drivers' unions and bargain for wages like employees. The state
3 legislature plainly did not "affirmatively contemplate" such a sea change merely by authorizing
4 municipalities to ensure "safe and reliable" transportation service. Just as Congress does not
5 "hide elephants in mouseholes," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), the
6 state legislature does not hide collective-bargaining regimes in safety regulations.

7 **2. The Ordinance fails the active-supervision requirement**

8 The Ordinance also fails the "active supervision" requirement. The government cannot
9 simply delegate to private parties the task of implementing an anticompetitive program; rather, it
10 must be "implemented in its specific details" "by the State." *FTC v. Ticor Title Ins. Co.*, 504 U.S.
11 621, 633 (1992). "Actual state involvement, not deference to private price-fixing
12 arrangements . . . is the precondition for immunity." *Id.* This requirement ensures that "the State
13 has exercised sufficient independent judgment and control so that the details of the rates or prices
14 have been established as a product of deliberate state intervention, not simply by agreement
15 among private parties." *Id.* at 634–35. The ultimate question is whether the anticompetitive
16 prices come from private parties or are instead of "the State's own" devising. *Id.* at 635.

17 Under the Ordinance, collective bargaining is a private process; the Director's only role is
18 to approve or disapprove an agreement submitted to him after the parties (or an arbitrator) have
19 agreed to terms. This rubber-stamp review is not "active supervision" by the State.

20 As an initial matter, the Director is not a state official; he is a municipal one. But "where
21 state *or municipal* regulation [of] a private party is involved . . . active *state* supervision must be
22 shown." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 n.10 (1985) (emphasis added);
23 *see also Patrick v. Burget*, 486 U.S. 94, 101 (1992) ("the active supervision requirement
24 mandates that *the State* exercise ultimate control" (emphasis added)); *Cal. Retail Liquor Dealers*
25 *Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) ("the policy must be 'actively
26 supervised' by the State itself"). Municipalities are *not* substitutes for States and cannot simply

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step into the shoes of the State for purposes of state supervision—they "are not beyond the reach of the antitrust laws . . . because they are not themselves sovereign." *Town of Hallie*, 471 U.S. at 38. The absence of any involvement by state officials deprives the City of antitrust immunity.[4]

Even if a municipal official can fulfill the *state*-supervision requirement, the Director's role under the ordinance is insufficient because he does not participate in any way in the collective bargaining itself. He has no independent authority to "establish the terms and conditions under which for-hire transportation is offered" or otherwise specify the terms of a collective-bargaining agreement—"those terms and conditions are negotiated between private parties." Order at 5. He has only a veto power, and even then "there is no requirement that the City evaluate the competitive effects of the agreements reached." *Id.* And even if the Director disapproves of an agreement, "it is troubling that a disapproval again places the matter back in the hands of private parties, with no state oversight." *Id.* Thus, the Director is insufficiently involved "in the mechanics" of the anticompetitive price fixing scheme, *Ticor*, 504 U.S. at 633, and the arrangement cannot be considered "the State's own," *id.* at 635. State-action immunity therefore cannot shield the Defendants' Ordinance from scrutiny under the Sherman Act, as the collective-bargaining scheme "is really a private price-fixing conspiracy, concealed under a gauzy cloak of state involvement." *Fisher*, 475 U.S. at 269.

Finally, the City claims that collective bargaining by thousands of independent contractors is not concerted action for antitrust purposes because the Ordinance's anticompetitive effects arise from the City's unilateral action. Mot. 16. Anticompetitive restraints "unilaterally" imposed by government are permissible under the Sherman Act, while "hybrid restraints," where the anticompetitive effects stem from private concerted action, are impermissible. *Fisher*, 475 U.S. at 268; *see also Yakima Valley Mem. Hosp. v. Wash. Dept. of Health*, 654 F.3d 919, 927 (9th Cir. 2011) ("A regulation is a unilateral restraint when no further action is necessary by

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[4] Some courts have assumed municipal supervision is sufficient, but the issue was not squarely raised or decided in those cases. *E.g., Tom Hudson & Assocs. v. City of Chula Vista*, 746 F.2d 1370, 1374 (9th Cir. 1984).

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1 the private parties because the anticompetitive nature of the restraint is complete upon
2 enactment") (alteration omitted). Thus, no concerted action existed under Berkeley's rent-
3 control scheme because "the rent ceilings [were] imposed by the Ordinance" itself. *Fisher*,
4 475 U.S. at 266. Unlike in *Fisher*, Seattle's Ordinance gives for-hire drivers the power to
5 determine prices through their concerted action. The Director does not even have authority to
6 propose any price term—that comes exclusively from the private union or the private arbitrator.
7 Thus, the Teamsters' effort to have drivers band together to fix prices is no different than the
8 landlords in *Fisher* "voluntarily band[ing] together to stabilize rents"—the very action *Fisher*
9 distinguishes as proscribed concerted action. *Id*.

10
11 **B. Through Implementing The Ordinance, Defendants Are Participating In An Illegal Price-Fixing Conspiracy In Violation Of The Sherman Act**

12 The City's implementation of the Ordinance also means that it is participating in an
13 illegal conspiracy in restraint of trade, in violation of the Sherman Act. As discussed above,
14 *supra* p. 8, section 16 of the Clayton Act authorizes "any … association" to sue for injunctive
15 relief against "threatened loss or damage by a violation of the antitrust laws." 15 U.S.C. § 26;
16 *see also Zenith Radio*, 395 U.S. at 130 ("threatened" loss means "a significant threat of injury
17 from an impending violation of the antitrust laws"). The claim requires a showing of an
18 impending (1) "agreement or concerted action" (2) that will unreasonably restrain trade affecting
19 interstate commerce. *T.W. Elect. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626,
20 632–33 (9th Cir. 1987). The City does not dispute that, absent state-action immunity, the City's
21 collective-bargaining scheme is a *per se* unreasonable restraint of trade. And the City directly
22 participates in the "agreement or concerted action" by (1) authorizing and encouraging private
23 parties to engage in price fixing, (2) coordinating the union-election process, and (3) approving
24 the final price-fixing agreement. This level of participation is obviously sufficient to show
25 concerted action between private corporations. And, absent state-action immunity, the antitrust
26 laws "impos[e] civil or criminal sanctions" on "municipalities," just like "other corporate

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1 entities." *Community Comm's v. City of Boulder*, 455 U.S. 40, 56 (1982). The only exception is
2 inapplicable here: the Local Government Antitrust Act of 1984 (15 U.S.C. §§ 35–36) immunizes
3 municipalities from damages suits under section 4 of the Clayton Act (15 U.S.C. § 15), but does
4 not preclude suits for injunctive relief under section 16 of the Clayton Act (15 U.S.C. § 23).
5 Though the Chamber did not assert this Clayton Act claim as a basis for its motion for
6 preliminary injunction, the City has provided no reason for this Court to dismiss the claim.

7 **C. State Antitrust Law Preempts The Ordinance**

8 For the same reasons the Ordinance is preempted by the Sherman Act, it is preempted by
9 the Washington Consumer Protection Act (CPA). Mirroring the Sherman Act, the CPA prohibits
10 "[e]very contract, combination, in the form of trust or otherwise, or conspiracy in restraint of
11 trade or commerce." RCW 19.86.030. The statute is generally interpreted as coextensive with
12 the Sherman Act. *See* RCW 19.86.920 (courts will "be guided by final decisions of the federal
13 courts"). Thus, as with the Sherman Act, horizontal price fixing is a *per se* violation of the CPA.
14 *Ballo v. James S. Black Co., Inc.*, 692 P.2d 182, 186 (Wash. Ct. App. 1984). Since the
15 Ordinance authorizes *per se* price fixing, it is preempted by the CPA.

16 In opposing this argument, the City again conflates preemption claims with violation
17 claims. It argues that (1) municipalities are categorically exempt from the CPA, and (2) the
18 Chamber has not alleged that the City has itself engaged in an antitrust conspiracy sufficient to
19 show a violation of the CPA. Mot. 16–17. But the Chamber is not asserting a *violation* of the
20 CPA, and is not relying on the CPA for a cause of action. It is instead pursuing a common-law
21 cause of action analogous to its federal preemption claim. Washington courts routinely entertain
22 preemption suits under this principle. *See supra* p. 9 n.3. The City does not address the merits
23 of this claim. This is perhaps because state-action immunity for municipalities under
24 Washington law is even narrower than under federal law, and provides no protection for the
25 Ordinance. *Flying Eagle Espresso, Inc. v. Host Intern., Inc.*, 2005 WL 2318827, at *5 (W.D.
26 Wash. 2005); *Vogt v. Seattle-First Nat'l Bank*, 817 P.2d 1365, 1371 (1991); *Robinson v. Avis*

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1 *Rent A Car System*, 22 P.3d 818, 821–23 (Wash. Ct. App. 2001).

2 **IV. THE NATIONAL LABOR RELATIONS ACT PREEMPTS THE ORDINANCE**

3 Though the Court has held the Chamber unlikely to succeed on its labor-preemption
4 claims, the Chamber sets forth its legal views to preserve these issues for further review.

5 ***Machinists* preemption.** As in its preliminary-injunction brief, the City does not dispute
6 that the NLRA completely exempts independent contractors from coverage, or the legislative
7 history establishing Congress's view that they are fundamentally different from employees. The
8 City's argument, that Congress was indifferent to collective bargaining by independent
9 contractors and decided to permit the states to regulate, is wrong.

10 In *Beasley v. Food Fair of N.C., Inc.*, 416 U.S. 653, 662 (1974), the Supreme Court held
11 that the exclusion of "supervisors" from the NLRA's coverage meant that states could not
12 regulate them either, because Congress intended to exclude them from collective bargaining
13 entirely. To reach this conclusion, the Court relied on three things: Section 2(3)'s statutory
14 exclusion; the legislative history, in which Congress excluded supervisors from the Act's
15 coverage in response to NLRB and Court decisions including them against Congress's wishes;
16 and Section 14(a) of the NLRA. *Id.* at 658–62. The first two of these are identical with respect
17 to independent contractors. The statutory text excludes them from coverage, and Congress did
18 so immediately after NLRB and court decisions purported to permit independent contractors to
19 unionize. Mot. 15. And the avowed reason for the exclusion was that collective bargaining was
20 *inappropriate* for independent economic actors like independent contractors. H.R. Rep. No. 80-
21 245, at 18 (1947). The sole distinction between this case and *Beasley*—that Section 14(a) speaks
22 further to the status of supervisors—is entirely immaterial to the analysis. Section 14(a) simply
23 reflects the historical reality that some supervisors had joined unions, sometimes with the
24 consent of their employers, and Congress did not intend to upend *consensual* arrangements by
25 excluding supervisors from the Act's coverage. *Beasley*, 416 U.S. at 662. Thus, the first clause
26 of 14(a) *permits* supervisors to enjoy the Act's coverage if the employer agrees, necessitating the

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proviso in the second clause prohibiting any government efforts to *require* these arrangements.

***Garmon* preemption.** The City claims that *Garmon* preemption is not established simply because "there may *hypothetically* be a future dispute over whether some specific group of workers is covered by the NLRA." Opp. 8 (emphasis added). But the Chamber has not suggested that it does. Instead, it argues that the fact that the NLRB is *currently* considering *actual* (not hypothetical) claims *by the very type of drivers at issue* that they are "employees" within the meaning of the NLRA prevents the City, and the state courts, from adjudicating whether *those drivers* fall within the NLRA's definition of "employee." Dkt. 2 at 21. While *Davis* requires some factual showing that the individuals in question were "arguably" employees, 476 U.S. at 382, the NLRB's long consideration of that precise question provides that showing here. *See* Steger Decl. ¶ 14; Kelsay Decl. Nor does the *Garmon* preemption claim require proof that individual members contract with drivers who are arguably NLRA "employees." The Chamber does not claim that the Ordinance cannot be enforced against any *particular* member. Rather, the claim is that the Ordinance is preempted because it tasks local officials with applying the NLRA, while the crucial question is pending before the NLRB. This claim presents a "pure question of law" that does not require consideration of any Chamber members' specific factual circumstances.[5]

V. THE ORDINANCE CONFLICTS WITH STATE LAW

A. The Ordinance Exceeds The Scope Of Municipal Power Under State Law

According to the City, Washington delegated authority to enact the collective-bargaining scheme when it authorized "[a]ny other requirements adopted to ensure safe and reliable" for-hire and taxi service. Mot. 21. The City asks for a broad construction of this delegated authority, but that conflicts with basic principles of Washington state law.

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[5] Also, the City's argument that the Chamber's preemption claim under §§ 8b(4) and 8(e) of the NLRA should be dismissed (Mot. 18 n.8) should be rejected for the same reasons given in the motion for preliminary injunction in the related case, *Clark v. City of Seattle*, No. 2:17-cv-00382, Dkt. 13 at 6–13, Dkt. 34 at 1–5.

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1 Municipal authority in Washington "is limited to those powers expressly granted … or
2 fairly implied in or incident to the power expressly granted" by state law. *Arborwood Idaho,*
3 *LLC v. City of Kennewick*, 89 P.3d 217, 225 (Wash. 2004). This principle is strictly applied by
4 state courts, so "if there is a doubt as to whether [a] power is granted, it must be denied." *Id.*;
5 *accord Robinson v. Avis Rent A Car System, Inc.*, 22 P.3d 818 (Wash. Ct. App. 2001).
6 For example, in *Arborwood* the court struck down a city ordinance that had imposed a
7 monthly ambulance service charge on each household, business, and industry in the city.
8 89 P.3d at 218. The court parsed the language of several state laws and determined that none
9 expressly or impliedly permitted the city to impose the service charge. This was true even
10 though one statute permitted the city "by appropriate legislation [to] provide for the
11 establishment of a system of ambulance service to be operated as a public utility," *id.* at 219 n.1,
12 and another authorized the city to "adopt ordinances for the levy and collection of excise taxes"
13 on "all persons, businesses, and industries who are served and billed for said ambulance service,"
14 *id.* at 219 n.2. The import of *Arborwood* is clear: municipalities cannot usurp regulatory
15 authority by reading statutes to delegate broad implied powers.
16 But that is precisely what Seattle has done, reading a statute authorizing safety and
17 reliability regulations of for-hire vehicles as impliedly granting permission to regulate third
18 parties who contract with for-hire drivers, and as granting permission to establish a collective-
19 bargaining scheme in which for-hire drivers are effectively treated as employees. This sort of
20 bootstrapping is same type of argument the court rejected in *Arborwood*. Indeed, the collective-
21 bargaining scheme regulates much more than safety and reliability—most conspicuously the
22 prices that for-hire drivers will pay technology companies for use of a ride-referral service.
23 Defendants' apparent theory—that drivers who negotiate a better economic bargain will
24 provide safer and more reliable service—has no logical stopping point. If the state statute's
25 safety-and-reliability provisions are read to allow the City to force ride-referral providers to
26 collectively bargain with drivers, then they would likewise authorize the City to force collective

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1 bargaining upon drivers' landlords, or even grocery stores that sell food to for-hire drivers. But
2 where a government is given limited, enumerated authority, any theory that expands that
3 authority without any limiting principle must be rejected. Thus, just as the delegation of
4 authority to enact safety and reliability regulations does not authorize collective bargaining
5 between for-hire drivers and landlords, it does not authorize collective bargaining between for-
6 hire drivers and third-party referral companies.

7 **B. The Washington Public Records Act Preempts the Ordinance**

8 Finally, the Ordinance's disclosure provision is preempted because it "permits what is
9 forbidden by" Washington's Public Records Act (PRA). *Entm't Indus.*, 105 P.3d at 987. The
10 Ordinance compels the Chamber's members to disclose their driver lists to the Teamsters. This
11 conflicts with the PRA because (a) the PRA protects public records containing trade secrets from
12 disclosure, (b) the Chamber's members maintain their driver lists as trade secrets, and (c) the
13 driver lists are public records.

14 The PRA generally requires state and local governments to disclose public records upon
15 request, but it excludes certain categories of private information, RCW 42.56.070(1), and allows
16 the party who is the subject of that information to block disclosure, RCW 42.56.540. Trade
17 secrets are one of those categories of information, and the PRA protects private parties from
18 government disclosure of public records that contain trade secrets. *Robbins, Geller, Rudman &*
19 *Dowd, LLP v. State*, 328 P.3d 905, 911 (Wash. Ct. App. 2014); RCW 42.56.070(1).

20 That protection is applicable to the driver lists belonging to the Chamber's members. As
21 the Chamber explained in its motion for preliminary injunction, the lists are trade secrets. Dkt.
22 43 at 11 n.7. The City does not dispute this in this motion. Mot. 22 n.12. Further, under the
23 Ordinance, the City is treating the driver lists as "public records" because they are "used" by the
24 City to implement its collective-bargaining Ordinance. RCW 42.56.010. Indeed, without these
25 records, the City likely could not implement its scheme because the Teamsters could not
26 organize the drivers. Nor is there any requirement that the City "ever possessed" the records; the

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1 statute requires only that the records are "used" "within the meaning of the Act." *Concerned*
2 *Ratepayers Ass'n v. Public Utility Dist. No. 1 of Clark Cnty.*, 983 P.2d 635, 641 (Wash. 1999).
3 Again, the City does not dispute this in its motion. Mot. 23 n.15. Because the Ordinance
4 permits the City to compel disclosure of "public records" that contain trade secrets—even over
5 the objection of the Chamber's members—while the PRA forbids the City from disclosing those
6 records over the objection of the party to whom the trade secret belongs, the Ordinance conflicts
7 with and is preempted by the PRA. *Entm't Indus.*, 105 P.3d at 987.

8 The City asserts that "the PRA is not concerned with the exchange of information
9 between private actors," and that the statute would be implicated only if the Teamsters (or
10 another private party) requested the driver lists "from the City." Mot. 24. That is simply not true.
11 Documents containing trade secrets may be public records—and thus protected under the PRA—
12 "regardless of whether an agency ever possessed the requested information," because "an agency
13 may have 'used' the information within the meaning of the Act." *Concerned Ratepayers*,
14 983 P.2d at 641; *see also id.* at 638 n.6 (proprietary information held by General Electric).

15 The City also insists that any claim must be brought under the cause of action provided in
16 RCW 42.56.540. Mot. 24. But Washington law authorizes preemption claims, even aside from
17 a statutory cause of action, when a local law "permits what is forbidden by" state law. *Entm't*
18 *Indus.*, 105 P.3d at 987. And the Chamber's preemption claim is particularly important here
19 because the City's disclosure mandate is a naked attempt to evade the disclosure restrictions of
20 the PRA. There is no serious dispute that, under the PRA, the Chamber's members could block
21 the City itself from disclosing their trade secrets to the Teamsters. *Robbins, Geller, Rudman &*
22 *Dowd*, 328 P.3d at 911. The City has attempted to evade this restriction by compelling the
23 Chamber's members to disclose the trade secrets themselves. This direct conflict with the
24 purposes and objectives of state law is precisely what preemption claims are designed to address.

25 **CONCLUSION**

26 For the foregoing reasons, the Court should deny the City's motion to dismiss.

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Dated: April 10, 2017

Respectfully submitted,

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on April 10, 2017, I electronically filed the foregoing with the Clerk
3 of the Court using the CM/ECF system which will send notification of such filing to the parties
who have appeared in this case.

4

Dated: April 10, 2017 at Seattle, Washington.
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