No. 17-35371

In the United States Court of Appeals
for the Ninth Circuit

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA and RASIER, LLC,

Plaintiffs-Appellees,

v.

CITY OF SEATTLE, *et al.*,

Defendants-Appellants.

Appellees' Response Brief

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INTRODUCTION

The City of Seattle enacted an unprecedented Ordinance that would allow independent contractors to fix the price they pay for using ride-referral technology. The Ordinance—entitled an Ordinance Relating to Taxicab, Transportation Network Company, and For-Hire Vehicle Drivers—applies only to individuals working as independent contractors, and purports to enable those distinct economic actors to form a union to collude on the prices and terms of their contracts with third parties that provide ride-referral services. In doing so, it imposes onerous collective-bargaining duties on those third parties.

There are good reasons why this Ordinance is unprecedented and why none of the other approximately 40,000 municipal entities in this Nation has previously tried to authorize collective bargaining by independent contractors: such an action is barred by well-established law under the Sherman Act and the National Labor Relations Act, among other laws. Under long-settled federal antitrust law, independent contractors may not combine and jointly set prices for which they will buy or sell a product or service. Antitrust law calls this a cartel, and it calls collective bargaining by a cartel a price-fixing conspiracy. Such price fixing is the most obvious and facially illegitimate of all antitrust violations. Because the Ordinance purports to authorize illegal price fixing, the Sherman Antitrust Act

preempts it unless the City can satisfy the rigorous requirements for state-action immunity.

As the district court correctly concluded below, however, there are, at an absolute minimum, serious doubts about whether the City can satisfy the two required elements for immunity. First, the State of Washington has not "clearly articulated" and "affirmatively contemplated" a state policy to displace competition between for-hire drivers and third-party service providers, especially not through collective bargaining. *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 226–27 (2013). The City points to a Washington statute providing antitrust immunity for municipal regulation of for-hire drivers and vehicles, but that garden-variety authorization to regulate transportation safety and reliability does not enable the City to authorize collective bargaining between for-hire drivers and third-party service providers, any more than it sanctions compelled bargaining between the drivers and their fuel suppliers, their auto-repair shops, or their landlords. Indeed, the statute's antitrust immunity did not contemplate anticompetitive regulation of drivers and their *suppliers*, but was directed at shielding otherwise prohibited collective price fixing of the rates that taxis and similar companies charged their *passengers*. Second, the Ordinance delegates price-fixing authority to private parties, but it provides for no supervision at all by the State, nor does it provide for "active" supervision by any municipal official. *Id.*

Based on these serious questions going to the merits, the district court properly enjoined the Ordinance pending final judgment. This grant of temporary relief was unremarkable and entirely appropriate given the grave antitrust issues at stake. Plaintiffs' preemption claim under the National Labor Relations Act also raises at least serious questions because, in excluding independent contractors from that statute, Congress expressed its intent that these individuals would be subject to the free play of economic forces, not government imposed collective-bargaining.

The court properly exercised its broad discretion in finding that members of Plaintiff the Chamber of Commerce of the United States of America, including Uber Technologies, Inc. (or its subsidiary, Rasier, Inc.), Lyft, Inc., and Eastside For Hire, would suffer irreparable harm if the Ordinance were not enjoined. Indeed, if the injunction is lifted, the Ordinance will immediately impose irreparable costs and business disruption, compelling the Chamber's members to disclose confidential, proprietary lists of the most active drivers for the avowed purpose of triggering a union-election campaign. Consequently, it is clear that the balance of the hardships sharply favors Plaintiffs because, in contrast to the obvious harm caused by fundamentally altering these companies' business models, pausing the long-delayed and unprecedented Ordinance during litigation will cause no affirmative harm to the City and will prevent it from wasting its resources implementing an Ordinance that conflicts with federal law.

JURISDICTION

Appellees agree with appellants' statement of jurisdiction.

STATEMENT OF ISSUES

Whether the district court abused its discretion by preliminarily enjoining the City's collective-bargaining ordinance after determining that (1) Plaintiffs have shown serious questions on the merits of their antitrust preemption claim, (2) Plaintiffs have shown a likelihood of irreparable harm, and (3) the balance of hardships sharply favors Plaintiffs and the public interest supports an injunction.

Whether Plaintiffs have shown serious questions on the merits of their *Machinists* preemption claim under the National Labor Relations Act (NLRA).

STATEMENT OF THE CASE

A. Ride-Referral And Dispatch Services In Seattle

For-hire drivers must connect with riders. Traditionally, drivers relied upon street hails, taxi stands, or physical dispatch services. Taxicab associations and limousine companies often maintain dispatch centers where riders call to request service that is provided by affiliated drivers. Chamber member Eastside for Hire, Inc. ("Eastside") is a traditional dispatch service that contracts with drivers to provide ride-referral services. Defendants' Excerpts of Record ("ER") 339 ¶ 5. The company uses advertising and a client base to generate passenger transportation requests by telephone or email, and refers the requests to drivers

using a mobile data terminal. *Id.* ¶ 6. The drivers are independent contractors, not Eastside employees. *Id.* ¶ 8.

The smartphone made possible a revolutionary type of ride-referral system. Digital ride-referral applications allow potential riders to communicate their location through a smartphone, and for computer systems to match those riders with an available driver. Prominent examples are the "Uber App," and the "Lyft App," developed by Chamber members Uber Technologies, Inc., and Lyft, Inc., respectively. ER 354 ¶ 3; ER 345 ¶ 4.

Local transportation providers may contract with Uber's subsidiary, Plaintiff Rasier, Inc. (together with Uber Technologies, "Uber"), to use the Uber App for ride referrals in exchange for paying a service fee. ER 354–55 ¶¶ 3, 8–10. Likewise, they may contract with Lyft to use the Lyft App for that purpose. ER 345–46 ¶¶ 5–7. All drivers who use the Uber or Lyft Apps are independent contractors; neither Uber nor Lyft employs drivers or operates commercial vehicles in Washington. ER 356 ¶¶ 14–15; ER 346 ¶¶ 8, 10. Uber, Lyft, and Eastside are all members of Plaintiff the Chamber of Commerce of the United States of America.

B. The Ordinance

Professing concern about the impact, on drivers' earnings, of increased competition in the taxi and for-hire transportation market, Seattle Council members

enacted Ordinance 124968. The design of the Ordinance was a collaborative effort by the Teamsters union and the Seattle City Council, whose stated objective was to "balance the playing field" between companies like Uber and "drivers making less than minimum wage." Daniel Beekman, *An Uber union? Seattle could clear way for ride-app drivers*, Seattle Times (Nov. 28, 2015), http://bit.ly/1PVXyq4.

The Ordinance requires "driver coordinator[s]" to collectively bargain with "for-hire drivers." Ordinance § 1(I) (reproduced in Defendants' Addendum at A-19 to A-35). A "driver coordinator" is "an entity that hires, contracts with, or partners with for-hire drivers" to assist them in "providing for-hire services to the public." *Id.* § 2. This broad definition covers ride-referral companies like Uber, Lyft, and Eastside, but by its terms also includes an untold number of companies that contract with for-hire drivers in any way to assist them in providing for-hire services. The Ordinance applies only to drivers who contract with a driver coordinator "other than in the context of an employer-employee relationship," *id.* § 3(D)—that is, to independent contractors—and gives them the power to unionize and collectively bargain as if they were employees under the federal labor laws.

The collective-bargaining scheme begins with a union-election process. A union seeking to represent for-hire drivers first applies to the City's Director of Finance and Administrative Services for approval to be a "Qualified Driver Representative" (QDR). *Id.* § 3(C). Once the Director approves a QDR, any

driver coordinator that contracts with fifty or more for hire drivers must, at the QDR's demand, disclose confidential lists of driver information, including the names, addresses, email addresses, and phone numbers of "all qualifying drivers" it contracts with. *Id.* The City has by regulation limited "qualified drivers" to those high-volume drivers who have driven "at least 52 trips originating or ending within the Seattle city limits for a particular Driver Coordinator during any three-month period in the 12 months preceding the commencement date" of the Ordinance. A-36.

Armed with the driver coordinator's confidential list of driver information, the QDR contacts the drivers and asks for their vote, and if a majority of qualified drivers consent to the QDR's exclusive representation, the Director must certify it as the "Exclusive Driver Representative" (EDR) "for all drivers for that particular driver coordinator." Ordinance § 3(F)(2). Thus, once a union representative is elected for a driver coordinator, it becomes the exclusive representative for *all* drivers (even "unqualified" nonvoting drivers) who contract with that driver coordinator. This designation prevents the driver coordinator from doing business with any drivers who do not wish to be represented by, or to work under the terms negotiated by, the EDR. *Id.* § 2.

Once an EDR is certified, the driver coordinator must meet with it to negotiate over various subjects, including the "payments to be made by, or

withheld from, the driver coordinator to or by the drivers." *Id.* § 3(H)(1). The Director does not participate in the negotiation but merely determines whether to approve any agreement as consistent with City policy. *Id.* § 3(H)(2)(c). If the coordinator and union do not reach agreement, the matter goes to binding arbitration, and the arbitrator submits what he believes is "the most fair and reasonable agreement" to the Director for approval. *Id.* § 3(I)(1)–(4).

C. Procedural History

The Chamber initially challenged the Ordinance in March 2016, alleging that the Sherman Antitrust Act preempts the Ordinance because the collective-bargaining scheme amounts to price fixing among horizontal competitors, and that the NLRA preempts the Ordinance because it conflicts with Congress's intent to leave independent contractors free from the restrictions of collective bargaining. *See Chamber of Commerce v. Seattle*, No. 2:16-cv-00322, Doc. 1 (W.D. Wash. filed Mar. 3, 2016). The City responded that the case was unripe. The Chamber opposed dismissal because, under the Ordinance's compressed timetable, waiting until a QDR had demanded driver lists would needlessly force the Chamber to seek expedited injunctive relief. *Id.*, Doc. 60, at 12 (Tr., July 19, 2016). Nevertheless, the district court dismissed the suit as unripe because no union had yet applied for QDR certification. *Id.*, Doc. 63 at 8, 2016 WL 4595981 at *2 (Aug. 9, 2016).

As predicted, the City designated Teamsters Local 117 as a QDR on March 3, 2017. The Teamsters notified Uber, Lyft, and Eastside on March 7, 2017, that it intends to become the EDR of all drivers who contract with those companies, and demanded that each company turn over its confidential driver information by April 3, 2017. ER 342–43, 351–52, 360–61.

Seeking to prevent both the compelled disclosure of the driver information and the costly and disruptive union-election process, the Chamber re-filed this suit and moved for an emergency injunction.[1] The district court ordered expedited briefing and held oral argument on March 30, 2017, mere days before the Ordinance was slated to compel disclosure of the driver lists.

Ruling within a few days of argument, the district court granted Plaintiffs' motion, enjoining the "April 3 disclosure requirements" until final judgment. ER 18. First, the court said, Plaintiffs had demonstrated "serious questions" on the merits of the antitrust preemption claim, including "serious questions regarding both prongs of the immunity analysis." ER 2, 6. As the court explained, the Washington statutes on which the City bases its immunity argument have been consistently used to "allow municipalities to establish rates and other regulatory requirements in the taxi industry," but "[t]hey have never been used … to authorize

[1] An amended complaint subsequently added Rasier, LLC, as a plaintiff. *See* ER 372, Dkt. 53.

collusion between individuals in the industry in order to establish a collective bargaining position in negotiations with another private party." ER 5. The court also questioned whether the City's limited oversight of collective bargaining among private parties could satisfy the requirements for state-action immunity. *Id.* Second, the Chamber's members would suffer irreparable harm if compelled to disclose their confidential driver lists, and also if they were subjected to a disruptive union-election campaign. ER 17. Third, the balance of hardships tips sharply in Plaintiffs' favor, given the "competitive injury caused by the disclosure of a subset of prolific drivers and the potential destruction of the existing business model," and the City's inability to "articulate[] any harm that will arise from an injunction" aside from a delay "of its internal time line." ER 17. Finally, the court concluded, the public interest supports an injunction. *Id.*

STANDARD OF REVIEW

An order granting "preliminary injunctive relief is subject to limited review and will be reversed only if the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1120–21 (9th Cir. 2005). "Mere disagreement with the district court's conclusions is not sufficient reason for [the Court] to reverse the district court's decision." *Id.*

SUMMARY OF ARGUMENT

The district court did not abuse its discretion by preliminarily enjoining the Ordinance. The court properly relied on the "serious questions" standard, which is applicable in every case, not just in fact-intensive cases lacking predominantly legal questions.

Plaintiffs have shown serious questions going to the merits of their antitrust preemption claim. Indeed, Plaintiffs have shown a likelihood of success. The City does not seriously dispute that the Ordinance authorizes illegal price fixing among independent competitors. Instead, the City relies on state-action immunity, but it fails to satisfy both the "clear articulation" and "active supervision" requirements.

The City fails the clear-articulation requirement because Washington has never articulated a policy to allow anticompetitive municipal regulation of the relationship between for-hire transportation providers (i.e., drivers) and third-party service providers, such as the Chamber's members. The City relies entirely on a state statute authorizing anticompetitive municipal regulation of for-hire transportation. But the Ordinance regulates third parties who are not for-hire drivers and do not own for-hire vehicles, and the state legislature never remotely contemplated anticompetitive regulation of third-party service providers, much less affirmatively authorized such regulation. The City also fails the active-supervision requirement, both because no state official supervises the private price fixing, and

because even the City's Director has no active involvement in the price-fixing process.

Plaintiffs' antitrust claim is ripe because Seattle has authorized an antitrust violation by enacting the Ordinance, and the Ordinance's operation clearly imposes immediate injury on the Chamber's members by forcing them to disclose confidential driver information that triggers a disruptive union-election campaign. Separately, "antitrust injury" is present because the Ordinance will cause competitive injury to the Chamber's members—price fixing—and in any event, Plaintiffs base their preemption claim on a non-statutory cause of action that does not require antitrust injury.

Plaintiffs have also shown at least serious questions on the merits of their labor preemption claim under *Machinists*, which broadly preempts state regulation of activity that Congress intended to remain controlled only by economic forces. Congress expressly excluded independent contractors from collective-bargaining regulation in the Taft-Hartley Act, intending to leave independent contractors free from collective bargaining under local law.

The district court did not abuse its discretion in concluding that irreparable harm is likely. Absent the injunction, the Ordinance will immediately compel Chamber members to give the Teamsters confidential lists of particularly active drivers. Even if the Teamsters do not misuse the information, the purpose and

effect of disclosure is to trigger a union-election campaign, which will disrupt the business of the Chamber's members and compel them to spend resources educating drivers about the consequences of joining a union.

Nor did the district court abuse its discretion in concluding that the balance of the hardships sharply favors Plaintiffs or that the public interest favors an injunction. Absent the injunction, the Chamber's members must take burdensome compliance measures. In contrast, an injunction merely preserves the status quo until the Ordinance's validity can be resolved, and requires the City only to delay its artificial internal timeline.

ARGUMENT

I. PLAINTIFFS HAVE SHOWN AT LEAST SERIOUS QUESTIONS ON THE MERITS OF THEIR ANTITRUST PREEMPTION CLAIM

The City has authorized naked price-fixing by independent contractors but seeks to shield it from antitrust scrutiny under the narrow state-action doctrine. But there is no state policy authorizing that kind of plainly anticompetitive conduct. Accordingly, it was no surprise the district court granted a preliminary injunction. Both the standard for an injunction and the deferential standard of review militate heavily in favor of affirmance. To warrant an injunction, Plaintiffs must show only "serious questions" going to the merits. That is a low hurdle. "Serious questions need not promise a certainty of success, nor even present a probability of success, but must involve a fair chance of success on the merits." *Republic of the*

Philippines v. Marcos, 862 F.2d 1355, 1362 (9th Cir. 1988). Recognizing that Plaintiffs easily satisfy this standard, the City claims the serious-questions standard is inapplicable to questions that are "primarily legal." Appellants' Brief ("Br.") at 20. That is plainly incorrect under binding precedent. Regardless, Plaintiffs are likely to succeed on the merits.

A. The Serious Questions Standard Applies

The district court properly relied on the "serious questions" standard to grant a preliminary injunction. Under this Court's precedent, a preliminary injunction is authorized in two circumstances. First, it is proper if the plaintiff satisfies the *Winter* factors by establishing a likelihood of success on the merits, that the balance of equities tips in favor of relief, that irreparable harm is likely, and that an injunction is in the public interest. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 21 (2008)). Alternatively, a preliminary injunction is proper if the plaintiff demonstrates "serious questions" going to the merits, that the balance of equities tips sharply in favor of relief, that irreparable harm is likely, and that an injunction is in the public interest. *Id.* at 1135. It is reversible error for a district court to deny a preliminary injunction based on the *Winter* factors without first considering the serious-questions test. *Id.*

The City invents a rule that the serious-questions test does not apply "to predominantly legal issues" that can be decided "without significant further factual development or litigation." Br. at 21. But the City cites no case rejecting the serious-questions test because the issues were predominantly legal. To the contrary, *Wild Rockies* thoroughly examined and reaffirmed the vitality of the serious-questions test with no hint of limiting it to fact-intensive cases. *Wild Rockies*, 632 F.3d at 1132–35.

Anyway, even under the City's proposed rule, the serious-questions test is appropriate in "extenuating circumstances." Br. at 21 & n.9. And there is an extenuating circumstance here: The district court was acting under the tight timeframe resulting from the City's delay of this litigation until the eve of the Ordinance's enforcement. Moreover, when the City insisted that the Chamber's previous suit was unripe, the Chamber put the City and the court on notice that delaying that litigation would result in emergency litigation. *See Chamber of Commerce*, No. 2:16-cv-00322, Doc. 60 at 12, Doc. 39 at 1. The City thus has no one but itself to blame for the district court's forced need to make a quick decision on an injunction before the Ordinance took effect. (The City claims it informally agreed not to enforce the disclosure requirement before the district court issued its order (Br. at 20), but it ignores both that it refused the Plaintiffs' request to stipulate to a formal temporary injunction pending the district court's decision on

the preliminary injunction (*see* Seattle Letter to Judge Robert S. Lasnik, Dkt. 48, Mar. 31, 2017), and that the City's informal agreement could not and did not protect Plaintiffs' members from the private enforcement remedies the Ordinance provides (*see* Ordinance § 3(M)(3)).

Finally, the City never made this novel assertion about the serious-questions standard to the district court, and it is therefore forfeited here. Particularly with respect to threshold issues, such as the governing legal standard, litigants obviously cannot raise the argument on appeal after failing to bring the fundamental issue to the district court's attention. *Baccei v. United States*, 632 F.3d 1140, 1149 (9th Cir. 2011). This Court "will not reframe an appeal to review what would be in effect a different case than the one decided by the district court." *Id.* Anyway, Plaintiffs have demonstrated a likelihood of success on the merits.

B. The Sherman Act Preempts The Ordinance Because It Authorizes *Per Se* Illegal Price Fixing

Federal antitrust law preempts municipal laws, like Seattle's collective-bargaining Ordinance, that mandate or authorize private parties to commit "*per se* violation[s]" of the Sherman Act. *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982). Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. Certain particularly egregious collusive practices are condemned as *per se* illegal under § 1 "because of their pernicious effect on competition and lack of any redeeming

virtue." *Rice*, 458 U.S. at 654, 659 n.5 (1982). These practices are unlawful on their face, without the need for a factfinder to decide whether they are reasonable under the circumstances. *Id.*; *see, e.g.*, *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 342–48 (1982). "Foremost in the category of per se violations is horizontal price-fixing among competitors." *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 986 (9th Cir. 2000).

The prohibition on price fixing applies to efforts by independent contractors who are horizontal competitors to join or form groups to collectively bargain over prices for goods and services. For example, independent grease peddlers violated the Sherman Act by joining a union and collectively bargaining over the price at which they would resell restaurant grease to grease processors. *See L.A. Meat & Provision Drivers Union v. United States*, 371 U.S. 94, 96–98 (1962). Independent fishermen violated the Sherman Act by forming a union and collectively bargaining about the terms and conditions under which they would sell fish to processors and canneries. *See Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143, 144–46 (1942). And independent "stitching contractors" violated the Sherman Act by forming a union and collectively bargaining over the provision of stitching services to clothing sellers. *See United States v. Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 463–64 (1949). The law is clear: independent contractors cannot fix prices, through collective bargaining or otherwise.

The FTC has consistently relied on these principles to condemn collective-bargaining measures similar to the Ordinance on the grounds that "collective bargaining over prices amounts to *per se* illegal price fixing." Letter to Wash. H. Rep. Brad Benson 5 (Feb. 8, 2002), http://bit.ly/2lsuMQP. For instance, the FTC concluded that Washington State legislation authorizing physicians to collectively bargain with health insurers would permit "precisely the sort of conduct" that is a *per se* antitrust violation: horizontal price fixing. *Id.* at 2. The FTC reaffirmed this position when it opposed an Ohio bill allowing home health-care providers to collectively bargain over insurance reimbursements. Letter to Ohio H. Rep. Dennis Stapleton 6–7 (Oct. 16, 2002), http://bit.ly/2lsvRrT. And the FTC has reiterated this in congressional testimony. *See, e.g.*, Testimony of David Wales 7 (Oct. 18, 2007), http://bit.ly/2m9Pady.

The Ordinance undeniably authorizes *per se* illegal price fixing—conduct with a "pernicious effect on competition" that lacks "any redeeming virtue." *Rice*, 458 U.S. at 659 n.5. It allows for-hire drivers who are independent contractors and horizontal competitors to join together in a union—a cartel, as antitrust law sees it—and to collude with one another through collective bargaining over the price terms of their contracts with ride-referral companies. Ordinance § 3(H)(1). Like the illegal grease peddlers' union in *Los Angeles Meat*, the illegal fishermen's union in *Columbia River Packers*, the illegal stitchers' union in *Women's*

Sportswear, and the physicians' and home-health-care workers' unions the FTC has condemned, this "collective bargaining over prices amounts to *per se* illegal price fixing." Letter to Wash. H. Rep. Brad Benson, *supra*, at 5. In fact, the mere agreement by an independent contractor to join such a conspiracy constitutes an antitrust violation, which is complete when the "agreement … is formed." *United States v. Inryco, Inc.*, 642 F.2d 290, 293 (9th Cir. 1981).[2]

C. State Action Immunity Does Not Shield The City's Horizontal Price Fixing Scheme

The City seeks to evade the antitrust laws by invoking the disfavored state-action immunity doctrine. This doctrine allows a municipality to authorize private parties to violate the antitrust laws only if the challenged conduct is both "clearly articulated and affirmatively expressed as state policy" and is "actively supervised by the State." *Phoebe Putney*, 568 U.S. at 225. These are "rigorous" requirements, meant to allow antitrust immunity only if the anticompetitive conduct is "truly the product of state regulation," as opposed to municipal regulation. *Columbia Steel*

[2] Nor is price fixing the only aspect of the Ordinance that constitutes a *per se* antitrust violation. Under the Ordinance, a collective-bargaining agreement for a particular third-party service provider is "applicable to all of the for-hire drivers" who contract with that service provider, and service providers cannot contract with drivers who are not subject to the bargaining agreement. Ordinance § 2. Thus, every bargaining agreement will necessarily boycott those drivers who do not wish to be subject to the collective-bargaining agreement or who cannot abide by its terms. It is well established that this boycott of horizontal competitors—an indispensable ingredient of any agreement under the Ordinance—constitutes a *per se* antitrust violation. *See Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 134 (1998).

Casting v. Portland Gen. Electric, 111 F.3d 1427, 1436 (1996). Courts closely scrutinize claims of municipal immunity because the doctrine is "disfavored" under antitrust law, *id.*, and because less-than-searching application "may inadvertently extend immunity to anticompetitive activity which the states did not intend to sanction." *Cost Mgmt. Servs., Inc. v. Wash. Nat. Gas Co.*, 99 F.3d 937, 941 (9th Cir. 1996). The fundamental question under both elements is whether anticompetitive conduct "is undertaken pursuant to a regulatory scheme that is the State's own." *Phoebe Putney*, 568 U.S. at 225.

The Ordinance satisfies neither condition for immunity: (1) Washington law nowhere clearly expresses a policy of permitting collective bargaining between for-hire drivers and third-party ride-referral companies, and (2) no state official, nor even any City official, actively supervises the collective-bargaining process.

1. The Ordinance fails the clear-articulation requirement

a. Anticompetitive conduct is immune only if it is "clearly articulated and affirmatively expressed as state policy." *Phoebe Putney*, 568 U.S. at 225. As it admits, the City must demonstrate a "clearly articulated" Washington State policy to "displace competition" with respect to the conduct in question: price fixing through collective bargaining between for-hire transportation providers and third-party ride-referral companies. *Id.* The State must have "affirmatively contemplated [that] displacement of competition." *Id.* at 229.

The Supreme Court has aggressively applied this requirement in recent cases. In *Phoebe Putney*, for example, the Court considered whether a statute authorizing a municipal hospital to "to acquire" other hospitals was sufficient to immunize an anticompetitive merger. 568 U.S. at 219–21. As the Court unanimously concluded, the specific authority "to acquire" other hospitals was insufficient to authorize the merger. *Id.* Although the statute authorized hospital acquisitions generally, it did purport to allow acquisitions "that will substantially lessen competition." *Id.* at 228. Thus, under *Phoebe*, a state's authorization for a municipality to engage in or regulate a type of activity is not enough—the state must go further and specify an intent to "displace competition" within the scope of that activity.

This Court, too, has aggressively applied the clear-articulation requirement. Under this Court's precedents, the legislature must have "authorized the challenged actions" and "intended to displace competition" within the scope of the authorized activity. *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992). This Court has also repeatedly held that "the City must demonstrate not only the existence of a state policy to displace competition with regulation, but also that the legislature contemplated the kind of actions alleged to be anticompetitive." *Springs Ambulance Serv. v. City of Rancho Mirage*, 745 F.2d 1270, 1273 (1984).

Thus, for example, *Springs Ambulance* held that state-action immunity would not apply to challenged conduct that was outside the scope of the state's authorization to displace competition. *Id.* The relevant statute authorized the city to "contract for ambulance service to serve the residents of the city as convenience requires." *Id.* at 1273. The city contracted with a single provider for public ambulance service, but it also enacted an ordinance setting maximum prices for private ambulance companies. *Id.* at 1272–73. This Court explained that the legislature had displaced competition to some extent under the statute, which was sufficient to immunize the city's conduct of contracting with a single provider. But the city's price regulation of other ambulance companies appeared to be outside the scope of the legislature's authorized displacement of competition. *Id.* Similarly, in *Columbia Steel*, 111 F.3d at 1441, the Court held that the creation of exclusive service territories was outside the scope of a state authorization that allowed utility companies to exchange properties within a city.

b. Here, the state legislature did not "clearly articulate" or "affirmatively contemplate" a policy to displace competition in the relationship between for-hire drivers and third-party ride-referral companies. The City relies on RCW 46.72.001, which states that municipalities may, with respect to certain specifically delegated powers, "regulate for hire transportation services without liability under federal antitrust laws." The question is whether collective bargaining between for-hire

drivers and third-party ride-referral companies falls within the scope of that statute. It does not.

i. At the threshold, the statute provides no immunized authority to regulate third parties, like the Chamber's members, that *do business* with "for hire transportation services"—but only authorizes regulation of the "transportation services" themselves. *Id.* The "for hire transportation services" referred to in RCW 46.72.001 are the independent contractors providing the service of transporting passengers. Uber and Lyft, in contrast, are technology companies that provide a digital ride-referral mobile application to those independent contractors.

Thus, the statute provides no warrant for Seattle to impose the Ordinance's stark affirmative duties on Uber and Lyft—such as recognizing and negotiating with a City-designated "exclusive representative" and being compelled to accept the prices resulting from collective bargaining. Ordinance § 3(H). Just as the statute does not authorize Seattle to compel *passengers* to contract with transportation providers for a ride, it provides no authority to compel Uber or Lyft to contract with those providers for various services. Under the City's distorted view of the statute, it could dictate the contractual relationships and prices charged by all manner of suppliers and contractors to transportation providers, such as auto repair shops. That cannot be what the legislature intended.

This is confirmed by the relevant statutory definitions. A "for hire vehicle" "includes all vehicles used for the transportation of passengers for compensation," with a few irrelevant exceptions. RCW 46.72.010(1). And a "for hire operator" "means and includes any person, concern, or entity engaged in the transportation of passengers for compensation in for hire vehicles." RCW 46.72.010(2). Uber and Lyft own no for-hire vehicles, they are not for-hire operators, and they employ no for-hire operators. Instead, like auto repair shops, they are third parties that provide a service to independent for-hire operators. But neither of those companies is itself a for-hire transportation service.

Moreover, the basic enabling statute—RCW 46.72.160—controlling whether municipalities have *any* "power to regulate" "for hire vehicle transportation," clearly does not reach third parties providing services to those operating for hire vehicles. *Id.*[3] Rather, that enabling statute authorizes municipal regulation only of "for hire *vehicles* operating within their jurisdictions." *Id.* (emphasis added) It plainly does not reach third-parties providing services to vehicle operators.

Nor do any of the six enumerated authorities in RCW 46.72.160(1)–(6) say anything about regulating ride-referral companies, or about collective bargaining

[3] The immunizing provision in RCW 46.72.001 is not an independent grant of regulatory power; it merely provides antitrust immunity for regulations promulgated under the preexisting "power to regulate" granted by RCW 46.72.160. Thus, RCW 46.72.001 does not immunize any municipal regulations outside the scope of the "power to regulate" granted in RCW 46.72.160.

between for-hire transportation providers and third-party service providers. Instead, the enumerated grants of authority focus entirely on for-hire drivers and for-hire transportation itself. For example, municipalities may regulate "the routes and operations of for-hire vehicles, and may "[e]stablish[] safety and equipment requirements" of for-hire vehicles, RCW 46.72.160(4)–(5). But those provisions contemplate direct regulation of for-hire drivers and vehicles, not regulation of third parties who provide services to for-hire drivers. Similarly, municipalities may regulate "the *rates charged* for providing for hire vehicle transportation service," RCW 46.72.160(3) (emphasis added), but this conspicuously lacks any mention of the prices that for-hire drivers must pay for services from third parties. As *Phoebe Putney* explained, "regulation of an industry, and even the authorization of discrete forms of anticompetitive conduct pursuant to a regulatory structure, does not establish that the State has affirmatively contemplated other forms of anticompetitive conduct that are only tangentially related." 568 U.S. at 235. Here, collective bargaining between drivers and third-party service providers is, putting it mildly, only tangentially related to the authorities enumerated in RCW 46.72.160.

The City tries to shoehorn the collective-bargaining scheme into the sixth enumerated power, which authorizes "[a]ny other requirements adopted to ensure safe and reliable for hire transportation service." RCW 46.72.160(6); Br. at 34. This argument is doubly flawed.

First, the sixth provision, like the preceding five, enumerates what *kinds* of regulation cities may impose under their authority to regulate "for hire vehicles operating within their jurisdiction." RCW 46.72.160. It cannot *expand* the general regulatory grant to encompass regulation of those who are not "operating" such "vehicles." Second, even if this provision enumerating the kinds of permissible regulation could expand the entities subject to regulation, the authorization to regulate "safe and reliable for hire transportation service" does not implicitly grant Seattle authority to regulate any third-party interaction that purportedly affects the vehicle operator's willingness or ability to be safe and reliable. Again, were it otherwise, Seattle could regulate auto repair shops under this provision, because their services could potentially affect the vehicle's safety and reliability. And if the safety and reliability mandate could be stretched to encompass anything that affects the driver's economic stability (as the City claims, Br. at 34), then the statute would authorize regulating how much rent landlords could charge the drivers. Indeed, the City appears to take this view, as the Ordinance's own definition of "driver coordinator" is broad enough to include landlords and other third parties who "contract[] with" for-hire drivers and "facilitat[e] … them in providing for-hire services." Ordinance § 2. Such expansive regulation of economic stability is particularly misplaced, however, because while the immunizing provision in RCW 46.72.001 refers to "safety, reliability, and stability,"

the reference to stability is conspicuously absent from the regulatory power granted under RCW 46.72.160(6). All of this confirms that the sixth enumerated power, just like the first five, is simply a garden-variety grant to regulate for hire transportation itself, not all activities and entities arguably affecting those providing the transportation. This is particularly obvious because the sixth enumerated power must be read in context with its neighboring provisions to avoid giving the phrase an overly broad meaning that is "inconsistent with its accompanying words." *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015).

In short, the plain text, structure and context of RCW 46.72.001 establishes that the legislature did not "affirmatively contemplate" regulation of third parties providing services to vehicle operators, much less "clearly articulate" a policy endorsing *anticompetitive* regulation of those third parties.

Instead, the grant of immunity in RCW 46.72.001 has a far less ambitious goal. The legislature was concerned that, without it, municipalities might subject themselves to liability through routine types of ordinary regulation: setting ride fares charged to the public or imposing license requirements that limit entry into the for-hire vehicle business. Thus, the relevant statutes just immunize ordinary licensing and regulation of for-hire vehicles and drivers. They no more authorize for-hire drivers to fix prices for their contracts with Uber and Lyft than a statute

immunizing municipal garbage regulation authorizes private sanitation collectors to fix prices for the purchase of dump trucks.

ii. More generally, the sheer novelty of the City's collective-bargaining scheme makes it highly unlikely that the legislature could have "affirmatively contemplated" the "displacement of competition" in the relationship between for-hire drivers and ride-referral companies. *Phoebe Putney*, 568 U.S. at 229. For starters, the explosion of digital ride-referral services is a recent phenomenon enabled by smartphones. The legislature certainly did not "affirmatively contemplate" regulation of technology companies like Uber and Lyft when it immunized regulation of "for hire transportation services" from antitrust liability in 1996, when it enacted RCW 46.72.001. The history of Washington statutes governing digital ride-referral services powerfully underscores this point. Not until 2015 did Washington first enact legislation directed at digital ride-referral companies. *See* Final Bill Report, SB 5550 (Wash. 2015) (Appellees' Supplemental Addendum "SA" at 1). It carefully defined them separately from for-hire transportation services under Chapter 46.72, and regulated them under a separate chapter of the code. *See* SB 5550, 64th Wash. Leg. (2015) (SA-5). Tellingly, the legislature stated that "current law does not specifically provide for the regulation of what are commonly known as ridesharing companies, i.e. companies that use a digital network or software application to connect passengers

to drivers for the purpose of providing a prearranged ride, often by use of the driver's personal vehicle." SA-1. Thus, the one thing the legislature has clearly articulated is that no legislation prior to 2015 contemplated regulation of digital ride-referral companies, so it certainly could not have clearly articulated a policy in 1996 to immunize price-fixing between drivers and digital ride-referral companies.

Moreover, it is particularly unlikely that the legislature "affirmatively contemplated" anti-competitive regulation of third-party suppliers that took the form of *collective bargaining*. Imposing collective bargaining between *suppliers* (such as Uber, Lyft, and Eastside) and *independent contractors* would have constituted a seismic, unprecedented shift in the relationship between these entities. Just as Congress does not "hide elephants in mouse holes," the Washington Legislature does not hide revolutionary efforts to expand collective bargaining in safety and reliability provisions. *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 468 (2001). Conversely, if the legislature had contemplated *traditional* collective bargaining between *employees* and *employers*, it would have known that the NLRA "forbids States to regulate activity" like traditional collective bargaining "that the NLRA protects." *Chamber of Commerce v. Brown*, 554 U.S. 60, 65 (9th Cir. 2008). It would not have authorized such a facially preempted regulation. In short, it is not remotely plausible that the legislature "affirmatively contemplated"

the City's novel scheme creating a junior-varsity National Labor Relations Act to govern independent contractors.

iii. Recognizing these insoluble problems with the clear-articulation requirement, the City's arguments seek to dilute that requirement and ask for unprecedented deference. The City primarily claims that this Court cannot even inquire into the scope of RCW 46.72.160, so long as the statute "can feasibly be construed to authorize the Ordinance's provisions." Br. at 41. But the City creates the "feasibly construed" standard out of whole cloth. Antitrust immunity must be "clearly articulated"—not "feasibly construed"—under affirmative state law, and the State "must have foreseen" or "affirmatively contemplated" the challenged conduct. *Phoebe Putney*, 568 U.S. at 229.

It is true that the clear-articulation requirement does not transform "state administrative review into a federal antitrust job," meaning that federal courts need not examine every technical or procedural error in a municipal regulation under state administrative law. *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 372 (1991); *see* Br. at 39–40. But an ordinance is emphatically not immune when it falls outside the scope of the State's only clearly expressed policy to displace competition. The relevant question is not whether "the city and the agency exceeded their authority under state law." Br. at 40 n.18. It is whether, as "a matter of federal law," *Cmty. Commc'ns Co. v. City of Boulder*, 455 U.S. 40, 52

n.15 (1982), the Ordinance falls within the scope of the antitrust immunity expressed in RCW 46.72.001, which in turn is no broader than the reach of RCW 46.72.160. In any event, as discussed above, it is quite a stretch to say that RCW 46.72.160 can be feasibly construed to authorize collective bargaining between for-hire drivers and third parties.

Nor do the City's favored cases change the analysis. It primarily relies on *Southern Motor Carriers* (Br. 35), arguing that clear articulation does not require a "specific, detailed" legislative authorization as long as the state "clearly intends to displace competition in a particular field with a regulatory structure." *S. Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 64 (1985). But that just highlights the problem in this case. The Washington Legislature did not clearly intend to displace competition in the "particular field" at issue: the relationship between for-hire drivers and third-party service providers. That contrasts sharply with the state law in *Southern Motor Carriers*, which expressly authorized the relevant Mississippi state agency "to prescribe just and reasonable rates for the intrastate transportation of general commodities." *Id.* at 63. The issue in *Southern Motor Carriers* was whether the state agency could, once it had been authorized to set rates in the relevant field, allow private parties to engage in collective bargaining as the method of "prescrib[ing] just and reasonable rates." *Id.* Here, the threshold state authorization is missing: Washington never authorized

municipalities to "prescribe just and reasonable rates" for contracts between for-hire drivers and third-party service providers.

Similarly, in *Omni* the legislature authorized municipal regulation of "the use of land and the construction of buildings and other structures within their boundaries," and the Court concluded that the grant of authority amounted to a policy to displace competition when regulating billboards. *Omni*, 499 U.S. at 370. No one suggested, however, that if the legislature had authorized municipalities to regulate lakes and watercraft, it would have been sufficient for anticompetitive regulation of billboards. Likewise, Washington's authorization to regulate for-hire vehicles and drivers does not authorize anticompetitive regulation of third-party service providers.

Finally, the City relies on *Traweek* for the assertion that "general grants of authority will satisfy the clear articulation standard." Br. at 38. But *City of Boulder* squarely rejected the proposition that "the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances," because that "would wholly eviscerate the concepts of clear articulation and affirmative expression." 455 U.S. at 56. Further, Washington has not given municipalities a general grant of authority, but instead has listed several enumerated powers for regulating for-hire vehicles and drivers.

2. The Ordinance fails the active-supervision requirement

The City's collective-bargaining scheme also fails the active-supervision requirement because it delegates price fixing to private parties with no state supervision. "Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern." *N.C. Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101, 1111 (2015). That is all the more true when a *municipality* seeks to delegate the State's regulatory authority to private parties. "[A]ctual State involvement, not deference to private price-fixing arrangements … is the precondition for immunity." *Id.* at 1113. A city cannot simply delegate to private parties the task of creating a collective-bargaining agreement; rather, the program must be "implemented in its specific details" "by the State." *FTC v. Ticor Title*, 504 U.S. 621, 633 (1992). This ensures that "the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties." *Id.* at 634–35. The ultimate question is whether the anticompetitive prices or terms "are an exercise of the State's sovereign power." *Dental Examiners*, 135 S. Ct. at 1110.

For two reasons, this requirement is not met here. First, the Ordinance authorizes price fixing by private parties with no supervision by a Washington State official. Second, even if supervision by a municipal official can satisfy the requirement, the Ordinance does not mandate sufficient municipal supervision.

a. The active-supervision requirement demands supervision "by the State itself"—Washington. *Ticor Title*, 504 U.S. at 642. Every relevant Supreme Court case says "State" supervision, and the Court has never authorized or even mentioned "municipal supervision." *Id.*; *Dental Examiners*, 135 S. Ct. at 1110 ("actively supervised by the State"); *Phoebe Putney*, 568 U.S. at 225 ("the State"); *Patrick v. Burget*, 486 U.S. 94, 101 (1988) ("the State"); *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) ("the State"). Further, municipalities are *not* substitutes for states under state-action immunity—they "are not beyond the reach of the antitrust laws … because they are not themselves sovereign." *Town of Hallie v. City of Eau Claire*, 471 U.S. 38 (1985).

The Supreme Court resolved this issue in *Town of Hallie*, 471 U.S. at 46. That case distinguished between municipalities that engage in anticompetitive conduct *themselves* and those that delegate anticompetitive conduct to *private* parties. If the city itself is "the actor," no state supervision is required; the municipality can supervise itself. *Id.* But if the city delegates anticompetitive regulation to a private party, "active state supervision must be shown." *Id.* at 46

n.10. The Court expressly referred to those instances in which "state or municipal regulation [of prices] by a private party is involved," and in both those instances, "active state supervision must be shown." *Id.* If "municipal supervision" of private parties were sufficient, the Court would have said so in *Hallie*. *Id.* The City misleadingly cites *Hallie* for the proposition that active supervision does not apply when municipalities delegate price fixing to private parties. Br. at 43. But *Hallie* says no such thing.

It makes good sense to require state supervision when municipalities delegate price fixing authority to private parties. Municipal supervision of local private parties is more troubling than state supervision because municipalities—which are smaller than states and more closely enmeshed with local private interests—are more likely to be captured by local special interests. *See, e.g.*, *Omni*, 499 U.S. at 367 ("secret anticompetitive agreement" between city officials and market participants). Indeed, that appears to have occurred here with a too-cozy relationship between the Teamsters and certain Seattle officials. *See Chamber of Commerce v. Seattle*, No. 2:16-cv-00322, Doc. 39 at 3 (W.D. Wash. May 9, 2016) (describing the extensive interactions). So when a municipality delegates price fixing authority to local special interest groups, it presents the precise "danger" of a "*private* price-fixing arrangement" that cannot be neutrally supervised by a municipality, and must be supervised by the state. *Hallie*, 471 U.S. at 47.

Omni heightens this problem. 499 U.S. at 375. It rejected a conspiracy exception to state-action immunity, allowing immunity even when city officials corruptly conspire with private parties to enact anticompetitive laws favoring special interests. *Id.* As the Supreme Court has recognized, "*Omni*'s holding makes it all the more necessary to ensure the conditions for granting immunity are met in the first place." *Dental Examiners*, 135 S. Ct. at 1113. That reasoning applies here as well: *Omni*'s holding makes it all the more necessary to require active state supervision—not municipal supervision—of private anticompetitive conduct.

Nor does it unduly disrupt municipalities to require active state supervision of private price-fixing regulation. The state would supervise only private parties, not municipalities, whose own conduct would never require state oversight for antitrust immunity. *Id.* And since states have greater resources than cities, any state supervision of private conduct would ease cities' fiscal burdens. State oversight of private parties would also serve an important internal check on the clear-articulation requirement: only if the state had truly authorized the municipality to delegate price-fixing regulation to private parties would the state be willing to oversee those private parties. In this way, rather than asking courts to decide difficult questions about whether a state statute clearly articulates a policy to allow

a challenged municipal regulation, the state itself could make the decision by actively supervising the private conduct.

The City points to *Golden State Transit Corp. v. City of Los Angeles*, 726 F.2d 1430, 1434 (9th Cir. 1984), suggesting that "supervisory functions" are "best left to municipalities." Br. at 51. But *Golden State* addressed state supervision of *municipal conduct*, not municipal supervision of private conduct under a purported delegation from a municipal ordinance. 726 F.2d at 1434. That is the very distinction drawn in *Town of Hallie*, a distinction the City ignores.

Contrary to the City's assertion (Br. at 50), this issue has never been squarely raised in this Court, although *Tom Hudson* assumed that municipal supervision of private parties is permissible. *Tom Hudson & Assocs., Inc. v. City of Chula Vista*, 746 F.2d 1370, 1374 (9th Cir. 1984). The issue in *Tom Hudson* was whether the degree of municipal supervision of private price fixing was sufficient to meet the "active" element of active supervision. *Id.* The case never raised the predicate issue of whether a municipality can supervise private parties at all; the court simply assumed, without affirmatively deciding, that municipalities do so. But *Tom Hudson* was decided before (and conflicts with) *Town of Hallie*, which requires "state supervision" when "state or municipal regulation by a private party is involved." 471 U.S. at 46 n.10. Other circuits have recognized *Hallie*'s impact. In *Riverview Investments, Inc. v. Ottawa Community Improvement Corp.*, 774 F.2d

162 (6th Cir. 1985) (order), the court reversed an earlier decision allowing municipal supervision of private parties because, "[i]n light of *Town of Hallie* and *Southern Motor Carriers*, that statement may not be a completely accurate statement of the law." *Id.* at 163. The court carefully amended its previous decision to ensure that private conduct "was actively supervised by the state." *Id.*

b. Even if municipal supervision could satisfy the active-supervision requirement, the supervision contemplated under the Ordinance is insufficiently active. The "review mechanisms" must "provide realistic assurance that a nonsovereign actor's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Dental Examiners*, 135 S. Ct. at 1116. Although the supervisor must at a minimum "review the substance of the anticompetitive decision" and must "have the power to veto or modify particular decisions to ensure they accord with state policy," ultimately "the adequacy of supervision … will depend on all the circumstances of a case." *Id.* at 1117.

The active-supervision requirement is heightened if the "gravity of the antitrust offense" is serious, and there is significant "involvement of private actors throughout" the process. *Ticor*, 504 U.S. at 639. Those two factors require heightened supervision here. "No antitrust offense is more pernicious than price fixing," *id.*, and the basic objective of the Ordinance is to authorize private price

fixing. Private actors run the show throughout the collective-bargaining process, and municipal oversight is an afterthought.

The key supervision problems are that the City cannot "modify particular decisions" and cannot participate in the collective-bargaining process at all. *Id.* At most, once the bargaining process is already completed, if the City does not accept the proposed agreement, it can send it back to the Teamsters for a new round of collective bargaining, and from there back to a private arbitrator. Ordinance § 3(H)(2). This scheme delegates authority to private parties or a private arbitrator, not a public official. It fails the test for similar reasons as the hospital peer-review determinations in *Patrick*, 486 U.S. at 103. The scheme in *Patrick* lacked active supervision because, although the state had some involvement in the peer-review determinations, it was not sufficiently involved in the making of the determinations themselves. *Id.* Seattle's similar lack of involvement is all the more troubling because the "gravity of the antitrust offense" is so serious. *Ticor*, 504 U.S. at 639. The City cannot satisfy the strict active-supervision requirement by merely re-delegating price fixing to private parties, who negotiate and devise terms without any government supervision.

Separately, the City claims that because the Director must approve any collective-bargaining agreement, the "Ordinance permits only *unilaterally imposed* restraints upon trade." Br. at 46 n.22. That is incorrect. Anticompetitive restraints

"unilaterally" imposed by government do not constitute concerted action under the Sherman Act. *Fisher v. City of Berkeley*, 475 U.S. 260, 267 (1986). "A regulation is a unilateral restraint when no further action is necessary by the private parties because the anticompetitive nature of the restraint is complete upon enactment." *Yakima Valley Mem'l Hosp. v. Wash. Dep't of Health*, 654 F.3d 919, 927 (9th Cir. 2011). Seattle's Ordinance is not a unilateral restraint because it delegates regulatory authority to private parties, and "further action is necessary by [those] private parties" before any price fixing occurs. *Id.*

D. Plaintiffs' Antitrust Claim Is Ripe

Remarkably, the City is still arguing, after the district court found irreparable injury, that Plaintiffs' antitrust preemption claim is not ripe because prices have not yet been fixed. The City does not dispute that compelled disclosure of the driver lists is an Article III injury, nor that the challenge to the Ordinance's disclosure provision is ripe. Br. at 26–27. Instead it argues that the disclosure injury does not support standing "to pursue an antitrust challenge to the mandatory negotiations provision." Br. at 27. In the City's view, the disclosure injury cannot support the antitrust claim because the disclosure provision itself does not authorize price fixing, so the antitrust claim must wait until price fixing actually occurs.

This ill-conceived argument is wrong because the entire collective-bargaining scheme is inextricably intertwined. The disclosure provision functions only to

facilitate a union election that is itself an illegal conspiracy, and the union's stated purpose is to fix prices. As a result, whether viewed as a challenge to the entire Ordinance or only to the disclosure provision, the antitrust claim is ripe.

1. Because the entire collective-bargaining scheme is inextricably intertwined, an Article III injury from the disclosure provision ripens the preemption claim as to the entire scheme. A facial preemption challenge to a regulatory scheme is ripe when a municipality has "authorize[d] conduct that necessarily constitutes a violation of the antitrust laws," *Fisher*, 475 U.S. at 265, and the scheme imposes an "imminent" Article III injury on the plaintiff, *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). As long as some Article III injury from the scheme is imminent, there is no requirement that the "authorize[d] conduct"—price fixing—actually occurs before suit is brought. The City cites no case imposing an additional requirement that private actors *consummate* the price-fixing conspiracy before a facial preemption challenge can be brought. Imposing such a requirement would conflict with the basic premise of *pre-enforcement* review, which is that the "injury required for standing need not be actualized." *Davis v. FEC*, 554 U.S. 724, 734 (2008).

The City's argument confuses an antitrust violation claim for damages against the Teamsters, which might have to wait until the Teamsters conspire to fix prices, with a facial antitrust preemption claim against the City, which is ripe when the

preempted scheme causes Article III injury. *See Fisher*, 476 U.S. at 265 (distinguishing an antitrust conspiracy from a facial preemption claim). But the Plaintiffs are not suing the *Teamsters* for *violating* the Sherman Act; they are suing the *City* based on the *Supremacy Clause* for imposing a regulatory regime that, on its face, conflicts with the Sherman Act. The preemption claim is ripe now because Plaintiffs are facing an imminent Article III injury from the scheme.

The City cites *Davis*, 554 U.S. at 730, claiming that "standing to challenge a disclosure requirement that is part of a broader regulatory scheme does not confer standing to challenge other elements of that scheme." Br. at 27 n.12 (emphasis omitted). But that question was not presented in *Davis* because the plaintiff had suffered direct injury from *both* provisions. *Davis*, 554 U.S. at 734. The plaintiff thus never asserted that the two provisions were part of an intertwined regulatory scheme, and the court never addressed whether that argument would prevail.

When that argument has been raised, courts have repeatedly held that injury from one part of an integrated scheme supports standing (and thus ripeness) to challenge an entire scheme if the provisions of the scheme are sufficiently intertwined. *See, e.g.*, *Lewis v. Alexander*, 685 F.3d 325, 338–39 (3d Cir. 2012); *Advantage Media v. City of Eden Prairie*, 456 F.3d 793, 800–01 (8th Cir. 2006). Those cases hold that when various provisions are inseverable from one another

under state law, an imminent injury from one provision is sufficient to challenge the entire scheme. *Id*.

Plaintiffs challenge to the entire Ordinance is ripe even under the test established in *Lewis* and *Advantage Media*, which looks to whether the provisions in a challenged ordinance are severable under state law, because the collective-bargaining mandate is clearly inseverable from the disclosure mandate. *Id.* Under Washington law, a provision is inseverable "if its connection to the remaining [provisions] is so strong that it could not be believed that the legislature would have passed one without the other; or where the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature." *In re Parentage of C.A.M.A.*, 109 P.3d 405, 413 (Wash. 2005). A severability clause "is not dispositive." *McGowan v. State*, 60 P.3d 67, 75 (Wash. 2002). Here, the disclosure provision is "so intimately connected" with the collective-bargaining mandate that the City Council could not rationally have passed it without the rest of the Ordinance. The sole purpose of disclosure is to implement the collective-bargaining mandate, and the collective-bargaining provision cannot operate without the disclosure provision, since a union will never be certified without access to the driver lists.

2. Even assuming Plaintiffs have standing to challenge only the disclosure provision, the preemption claim is ripe. Plaintiffs assert that the Sherman Act

preempts the disclosure provision itself because it functions only to facilitate an illegal collective-bargaining scheme. A disclosure provision that "serves merely to facilitate or contribute to" a preempted regulatory scheme "must likewise fail." *Williams v. Standard Oil Co. of La.*, 278 U.S. 235, 245 (1929), *overruled in part on other grounds by Olsen v. Nebraska*, 313 U.S. 236, 244 (1941). In *Williams*, after finding unlawful a state statute fixing the price of gasoline, the Supreme Court invalidated record-collection and other requirements as "mere adjuncts of the price-fixing provisions of the law or mere aids to their effective execution." *Id.* at 243. This principle is as true now as it was then. When "disclosure requirements [are] designed to implement" an unconstitutional regulatory scheme, "it follows that they too are unconstitutional." *Davis*, 554 U.S. at 744.

The City's contrary rule would require wholly impractical piecemeal litigation that has never been countenanced by any federal court. Under the City's theory, the district court was apparently required to "rule" on the disclosure provision (which concededly presents a ripe controversy), and then *dismiss* the case as unripe unless and until the Teamsters finalize their price-fixing scheme by embarking on collective bargaining. Thus, the Plaintiffs must suffer *current ongoing* Article III injury, such as that caused by the disclosure provision and the ensuing union election campaign that are solely designed to accomplish the price-fixing conspiracy, but cannot seek relief for this current injury until the conspiracy

is complete—even assuming the state action exception does *not* apply and this price fixing is therefore *per se* illegal. This, of course, runs headlong into the bedrock principle that a controversy is ripe for a court to adjudicate a law's validity when it currently injures the plaintiff, or even when it threatens imminent injury. *SBA List*, 134 S. Ct. at 2341.

Indeed, under the City's bizarre Article III framework, a law ordering taxi companies to fire every employee belonging to a union, under which the first step is compelled disclosure to the City of all union drivers, could not be challenged as preempted by the NLRA until the drivers are fired, because the disclosure provision itself did not order the employers to fire the drivers. This, of course, is not the law.

3. All of this is even more obviously true for injuries arising from a union-election campaign. But for the preliminary injunction, a union-election campaign would be in full swing, triggered by the disclosure of the driver lists. Ordinance § 3(D)–(F); ER 342–43, 351–52, 360–61. During such a campaign, the Teamsters will attempt to convince drivers to join together in an antitrust conspiracy. The campaign will disrupt the business operations of the Chamber's members and force them to take costly measures to educate drivers about union representation. ER 358 ¶ 19–21. As with the disclosure provision, the union-election campaign is preempted because it has no function other than to facilitate illegal price fixing.

For the same reasons that injury from the disclosure provision ripens the challenge to the entire Ordinance, the injury from the union election also ripens that claim.

Moreover, the union election will ripen the antitrust claim even under the City's own theory. Unlike the disclosure provision, the union election itself is a *per se* violation of the antitrust laws because the drivers' letters of consent to collectively bargain are an agreement to restrain competition. And, even for an as-applied antitrust violation claim (as opposed to a facial preemption claim), an antitrust conspiracy is "ripe when the agreement to restrain competition is formed." *Inryco*, 642 F.2d at 293. The Teamsters will therefore commit a *per se* violation of the Sherman Act the moment it begins obtaining letters of consent from drivers. *Id.* Absent the district court's injunction, the Teamsters would already have those letters. Thus, the only effect of accepting the City's ripeness argument would be to dismiss this case and then revive it in a few days when the Teamsters start *using* the lists to begin a union-election campaign that, it is uncontested, would create a ripe antitrust preemption controversy.

E. The Antitrust Injury Requirement Is Met And Is Also Inapplicable

The City's antitrust-injury arguments fail as well. First, the collective-bargaining scheme will cause antitrust injury. Second, antitrust injury is a statutory requirement that is inapplicable to preemption claims.

1. The City's price-fixing scheme will cause antitrust injury to the Chamber's members. Antitrust injury means "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Knevelbaard Dairies*, 232 F.3d at 987. Horizontal price fixing by buyers or sellers in an industry is a classic form of restraint that harms competition in that industry and inflicts antitrust injury on buyers or sellers of the price-fixed goods or services. *Id.* at 988. The City does not dispute that price fixing through collective bargaining constitutes antitrust injury. Br. at 30–31. It instead claims that Plaintiffs must avert their eyes from that antitrust injury and focus myopically on the injury of compelled disclosure. *Id.* This simply retreads the City's flawed ripeness argument and is incorrect for the same reason: The disclosure provision is an integrated part of a price-fixing scheme that causes antitrust injury.

2. Regardless, antitrust injury is a statutory requirement applicable to antitrust violation claims relying on the cause of action under the Clayton Act. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488–89 (1977). But Plaintiffs' preemption claim relies on the Supremacy Clause and the non-statutory cause of action discussed in *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1384 (2015) (explaining the "long history" of such claims). Antitrust injury does not apply to this claim, which is not based on the Clayton Act.

There is no basis for importing the statutory requirement of antitrust injury into a non-statutory preemption claim because the interests vindicated by preemption claims are different than the interests vindicated by antitrust violation claims. As *Brunswick* explains, Congress intended to allow treble damages under the Clayton Act only if the plaintiff suffers injury resulting from *decreased* competition. *Id.* Congress did not intend to allow private parties to sue for injuries resulting from *increased* competition because the basic objective of the antitrust laws is to prevent harm to competition, not just to competitors. *Id.* But non-statutory preemption claims have a far broader reach, allowing plaintiffs to challenge state and local laws simply to "prevent an injurious act by a public officer," vindicating the general principle of freedom from unlawful government action. *Armstrong*, 135 S. Ct. at 1384.

Nor is there any basis to foreclose non-statutory antitrust preemption claims. *See* Br. at 29 n.15. Those claims are available unless Congress has abrogated them through a "detailed and exclusive remedial scheme" intended to bar any other claims. *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 647 (2002). For example, in *Verizon* the Court permitted a non-statutory preemption suit involving the Telecommunications Act of 1996 because, even though the statute contained a private cause of action, it did not contain an exclusive remedial scheme through which Congress meant to foreclose non-statutory preemption suits. *Id.*;

see also, e.g., *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1188 (9th Cir. 2003) (non-statutory preemption suit under Title II of the ADA). For the same reasons explained in *Verizon*, the Clayton Act does not displace non-statutory antitrust preemption claims. That is why, even though the plaintiff in *Fisher* raised "no claim under either § 4 or § 16 of the Clayton Act," he was permitted to assert a claim that "the regulatory scheme established by [Berkeley's] Ordinance, on its face, conflicts with the Sherman Act and therefore is preempted." 475 U.S. at 264.

II. PLAINTIFFS HAVE SHOWN AT LEAST SERIOUS QUESTIONS ON THE MERITS OF THEIR LABOR PREEMPTION CLAIM

Plaintiffs have also shown serious questions on the merits of their *Machinists* preemption claim under the NLRA. *See Int'l Assoc. of Machinists v. Wisc. Emp't Relations Comm'n*, 427 U.S. 132 (1976). Beginning with *Machinists*, a long line of cases establishes unusually broad preemption under the NLRA for swaths of economic activity that Congress wanted to remain unregulated by federal or local collective-bargaining programs and instead "controlled by the free play of economic forces." *Id.* at 140; *Brown*, 554 U.S. at 65. In the NLRA, "Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes that would be upset if a state could also enforce statutes or rules of decision resting upon its views concerning accommodation of the same interests." *Machinists*, 427 U.S. at 140 n.4.

Accordingly, state and local governments may not regulate "within a zone protected and reserved for market freedom" by the NLRA. *Brown*, 554 U.S. at 66.

Machinists preemption is based on the premise that, by excluding certain activity from collective-bargaining regulation under the NLRA, Congress intends to preempt local laws regulating that activity. In *Brown*, for example, the relevant NLRA provision excluded noncoercive employer speech from the definition of "an unfair labor practice." *Id.* at 67. A California statute withheld state funds from employer efforts to "deter union organizing." *Id.* at 62. The statute was preempted because, simply by excluding employer speech from the NLRA's definition of an unfair labor practice, Congress impliedly meant to leave employer speech entirely up to the free play of economic forces—free from regulation under either federal or local law. This was true even though Congress said nothing about preempting local law, and even though it said nothing about whether states could limit the available uses of their own funds. *Id.*

Analogous to *Brown*, in Taft-Hartley Congress expressly excluded "any individual . . . having the status of an independent contractor" from the definition of "employee" for purposes of collective bargaining. 29 U.S.C. §152(3). In doing so, Congress meant to leave independent-contractor arrangements to the free play of economic forces, rather than subject to collective bargaining, federal or local.

The history of the NLRA's independent-contractor exclusion strongly suggests that Congress meant to exclude independent contractors from both federal and local collective-bargaining regimes. The original NLRA did not expressly exclude independent contractors from the definition of "employee." *See NLRB v. Hendricks Cty. Rural Elec. Membership Corp.*, 454 U.S. 170, 177–78 (1981). The Supreme Court then interpreted that term to include "newsboys," even though they were independent contractors under common-law standards. *NLRB v. Hearst Publ'ns*, 322 U.S. 111, 120, 130–31 (1944). "Congressional reaction to this construction of the Act was," to say the least, "adverse." *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968). Congress swiftly passed the Taft-Hartley Act, amending the NLRA to expressly exclude independent contractors from the definition of employee. *United Ins. Co. of Am.*, 390 U.S. at 256. As the House Report emphasized, "there has always been a difference, and a big difference, between 'employees' and 'independent contractors.'" H.R. Rep. No. 80-245, at 18 (1947). "Employees work for wages or salaries under direct supervision," while independent contractors are entrepreneurial and rely on market forces for profit. *Id.* Because Congress intended independent contractors to be governed by market forces, rather than collective bargaining, it quickly "correct[ed]" their inclusion in the NLRA's collective-bargaining regime. *Id.*

Congress's reaction to *Hearst* makes sense. Requiring independent contractors to collectively bargain is inconsistent with the basic objective of labor regulation under the NLRA. Labor unions arose because "a single employee was helpless in dealing with an employer," "he was dependent ordinarily on his daily wage for the maintenance of himself and family," and "if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937). These rationales do not apply to independent contractors, who do not depend on an employer for a daily wage and instead boast the "ability to operate an independent business and develop entrepreneurial opportunities" that leverage market forces to provide a profit. *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1098 (9th Cir. 2008). Collective-bargaining schemes designed to protect and stabilize economically dependent employees do not translate to the entrepreneurial world of independent contractors—risk-taking businesspersons striving to profit in the free market.

The NLRA's separate exclusion from collective bargaining of "any individual employed as a supervisor" reinforces this conclusion. 29 U.S.C. § 152(3). The Supreme Court has held that the supervisor exclusion preempts state labor laws relating to supervisors, and a collective-bargaining scheme for supervisors would clearly be preempted. *Beasley v. Food Fair of N.C., Inc.*, 416 U.S. 653, 662 (1974).

Congress exempted both supervisors and independent contractors at the same time in the Taft-Hartley Act, 61 Stat. 136–37, 29 U.S.C. § 152(3), and the two parallel exemptions should be interpreted to have a similar preemptive force. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 138 n.11 (1985).

The district court rejected this conclusion because "supervisors and independent contractors were excluded from the reach of the NLRA for different reasons." ER 14. But Congress's rationale for excluding independent contractors fits more closely with the rationale for *Machinists* preemption—allowing the free play of economic forces—than does the rationale for excluding supervisors. Congress excluded supervisors because their interests are often aligned with corporate owners rather than with non-supervisory employees, and this alignment of interests could distort the NLRA's collective-bargaining process. *Beasley*, 416 U.S. at 662. Independent contractors, in contrast, were excluded because they "have demonstrated their ability to take care of themselves without depending upon the pressure of collective action" and "have abandoned the 'collective security' of the rank and file voluntarily, because they believed the opportunities thus opened to them to be more valuable" than the benefits of employment. H.R. Rep. No. 80-245, at 17. Thus, Congress excluded independent contractors because they should be left to the free play of economic forces, which is precisely the circumstance where *Machinists* applies.

The district court reasoned that the "deleterious effects" of allowing supervisors to collectively bargain "would arise regardless of whether supervisors unionized under the NLRA or under state law." ER 14. But the deleterious effects of allowing independent contractors to unionize would arise under either federal or state law as well. When Congress excluded independent contractors from the NLRA, it expressed a national pro-free market policy that independent contractors should compete under ordinary market forces, rather than collectively bargain. And that policy is certainly frustrated by Seattle's collective-bargaining scheme.

The district court also reasoned that Congress "included an express preemption provision related to supervisors, but not to independent contractors." ER 14. But that provision, § 14(a) of the NLRA, 29 U.S.C. § 164(a), makes no difference either. The very point of *Machinists* preemption is that Congress impliedly preempts local regulation over categories of conduct simply by excluding federal regulation of that conduct under the NLRA. Thus, in *Brown* there was no express preemption provision, yet the Court inferred from Congress's exclusion of speech from regulation under the NLRA that Congress impliedly meant to preempt local laws regulating that type of conduct. 554 U.S. at 66.

Congress also saw a specific reason for including the express preemption provision for supervisors, whereas no provision was necessary for independent

contractors, even though it would impliedly preempt local laws. Section 14(a) reads as follows:

> Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

The first clause, not the second, is the informative part. That clause reflects the historical reality that some supervisors had joined unions, sometimes with the consent of their employers, and Congress did not intend to upend *consensual* arrangements by excluding supervisors from the Act's coverage. *See Beasley*, 416 U.S. at 662. Thus, the first clause of 14(a) *permits* supervisors to enjoy the Act's coverage if the employer agrees. This necessitates the proviso in the second clause prohibiting any government efforts to *require* these arrangements. Because the NLRA does not create an exception permitting independent contractors to join unions with the employer's consent, there was no need to clarify, as there was with supervisors, that permissive membership did not authorize mandatory membership. Thus, section 14(a)'s explicit prohibition of "supervisor" regulation under state law does not implicitly authorize "independent contractor" regulation under state law. Any such inference is contrary to *Machinists*' basic rule that explicit exclusion from NLRA regulation implicitly precludes state regulation.

Finally, independent contractors and supervisors differ from other categories of individuals whom Congress excluded from the definition of employee: public employees, agricultural workers, and domestic workers. These groups are traditional employees, but Congress had specific reasons to leave regulation of those groups up to the states. For public employees, Congress respected the states' authority to manage their own employees. *See Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 181 (2007). For agricultural workers and domestic employees, Congress intended the NLRA to cover "only those disputes which are of a certain magnitude and which affect commerce." S. Rep. No. 79-1184, at 3 (1934). Thus, states remain free to impose collective-bargaining requirements for those groups. *United Farm Workers of Am. v. Ariz. Agric. Emp't Relations Bd.*, 669 F.2d 1249, 1257 (9th Cir. 1982). But by excluding independent contractors and supervisors from the NLRA, Congress placed them "within a zone protected and reserved for market freedom." *Brown*, 554 U.S. at 66.

III. IRREPARABLE HARM IS LIKELY

The district court did not abuse its discretion in finding that Plaintiffs are likely to suffer irreparable harm. An injunction is warranted if irreparable harm is "likely." *Am. Trucking Assocs. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). It need not be certain. *Id.*

The district court concluded that irreparable harm is likely because "forcing the driver coordinators to disclose their most active and productive drivers is likely to cause competitive injury that cannot be repaired once the lists are released." ER 17. The City does not dispute that disclosure of these confidential lists would constitute irreparable harm if disclosed to competitors of the Chamber's members; it disputes only whether disclosure to the Teamsters is irreparable harm. Br. at 53.

But disclosure to the Teamsters itself is an irreparable competitive harm because the Teamsters' interests are adverse to Uber, Lyft, and Eastside, and the Teamsters can use the information against them. Most troubling is that the Teamsters seeks information from virtually every competitor in Seattle's ride-referral industry, and disclosure will commingle this information in the hands of a single adverse entity. The Teamsters could use this information to leverage the drivers of one competitor against the drivers of another during a union election campaign. In the process, it could convince drivers to realign their contracting with different competitors in the industry. Nor is that implausible, as the Ordinance does not limit how the Teamsters can use the driver lists, so long as it is for the "purpose of contacting drivers to solicit their interest in being represented." Ordinance § 3(E). Separately, disclosure to the Teamsters increases the risk of purposeful or inadvertent dissemination to competitors in the ride-referral industry. Although each of these risks is a serious concern, the principal irreparable harm is

the disclosure itself, because once the Teamsters has the information, "confidentiality will be lost for all time," and the status quo can "never be restored." *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979). At a minimum, the district court did not abuse its discretion in saying so.

The district court also found irreparable harm likely because "the disclosure requirement is the first step in a process that threatens the business model on which the Chamber's members depend." ER 17. The City says this is speculative. Br. at 56–57. But the core objective of the Ordinance is to change the business model of companies like Uber and Lyft by transforming an independent-contractor relationship into the functional equivalent of an employment contract, complete with a collective-bargaining agreement. The terms of the Ordinance itself sufficiently support the district court's finding that disclosure of the driver list triggers a process threatening this business model. It makes no difference whether a finalized collective-bargaining agreement is imminent, because the process is undoubtedly imminent.

Moreover, the disclosures immediately trigger the union-election campaigns, which even the City does not claim are speculative events. The election campaigns constitute additional irreparable injury because they will compel the Chamber's members to spend money educating drivers and hiring labor-relations experts, and

will "disrupt and change" their business "in ways that most likely cannot be compensated with damages." *Am. Trucking*, 559 F.3d at 1058; ER 358 ¶ 19–21.

Finally, forced compliance with a local law that conflicts with federal law is itself irreparable harm. *Am. Trucking*, 559 F.3d at 1058; *Valle del Sol, Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013) (citing cases). As the district court explained in *Valle del Sol*, "if an individual or entity faces the imminent threat of enforcement of a preempted state law and the resulting injury may not be remedied by monetary damages, the individual or entity is likely to suffer irreparable harm." *Valle del Sol, Inc. v. Whiting*, 2012 WL 8021265 (D. Ariz. 2012). Here, there are at least serious questions about the Ordinance's legality, and if the Chamber's members are forced to disclose their driver lists and submit to a costly union election, there is no available damages remedy for those injuries.

IV. THE BALANCE OF THE HARDSHIPS SHARPLY FAVORS THE PLAINTIFFS

The district court did not abuse its discretion in weighing the relevant hardships of the parties and finding that the balance "strongly favors the Chamber." ER 17. Absent an injunction, the Ordinance will compel the Chamber's members to take burdensome affirmative actions. They must prepare and disclose confidential lists of their most active drivers, and they must subject themselves to a disruptive election process in which the Teamsters Local 117 attempts to burrow itself into the contractual relationships between drivers and the Chamber's

members. In contrast, enjoining the Ordinance merely allows the law's (at least) questionable legality to be adjudicated before it creates disruption and detrimental reliance.

As the district court explained, the City could "not articulate[] any harm that will arise from an injunction other than that it would delay the implementation of the Ordinance according to its internal time line." ER 17. And the City has never treated that time line with any urgency: the Ordinance itself delayed its effective date for almost six months (Ordinance § 5), and the City then postponed its effective date for another four. SA-21. The City is still unable to articulate any specific harm from the injunction. It instead claims that it suffers ipso facto injury any time "an enactment of its people or their representatives is enjoined." Br. at 57. But that assumes the Ordinance is valid, and it is equally true that a business suffers irreparable harm when forced to comply with a preempted law. *Valle del Sol*, 732 F.3d at 1029.

V. THE PUBLIC INTEREST FAVORS AN INJUNCTION

Finally, the district court did not abuse its discretion in concluding that "[t]he public will be well-served by maintaining the status quo while the issues are given careful judicial consideration." ER 18. The public always has an interest in enforcing federal laws, *Valle del Sol*, 732 F.3d at 1029, and it always has an

interest in preventing government officials from subjecting a party to illegal state laws, *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012).

The City claims that the status quo "requires that the law be allowed to take effect." Br. at 58. But the City's own cited case explains that preservation of the status quo is subordinate to the "prevention of injury." *Golden Gate Restaurant Ass'n v. City & Cty. of San Francisco*, 512 F.3d 1112, 1116 (9th Cir. 2008). However one defines the status quo, the district court properly focused on "prevention of injury" to the parties in exercising its discretion. Anyway, the status quo is defined as "the last uncontested status which preceded the pending controversy," and since the validity of the Ordinance is contested, the "last uncontested status" is the state of affairs without the Ordinance in operation. *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000).

The City also says the public interest in halting preempted state laws is weak because the district court relied on serious questions going to the merits, rather than a likelihood of success. Br. at 59. Under this argument, however, any time a court relied on a showing of serious questions, the public interest would by definition not favor an injunction. It cannot be true that the public interest in an injunction is defeated simply because the district court relied on that standard, because this Court has already confirmed that the serious-questions standard can support an injunction. *Wild Rockies*, 632 F.3d at 1134.

CONCLUSION

For these reasons, this Court should affirm.

June 23, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type limitations provided in Federal Rule of Appellate Procedure 32(a)(7). The foregoing brief was prepared using Microsoft Word 2013, and contains 13,937 words in 14-point proportionately spaced Times New Roman typeface.

Dated: June 23, 2017

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CERTIFICATE OF SERVICE

I certify that on June 23, 2017, I electronically filed the foregoing brief with the United States Court of Appeals for the Ninth Circuit using the ECF system. All parties have consented to receive electronic service and will be served by the ECF system.

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STATEMENT OF RELATED CASES

(Circuit Rule 28-2.6)

There are no related cases pending in this Court.

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SUPPLEMENTAL ADDENDUM

FINAL BILL REPORT
ESSB 5550

C 236 L 15
Synopsis as Enacted

Brief Description: Regulating providers of commercial transportation services.

Sponsors: Senate Committee on Transportation (originally sponsored by Senators Habib and Fain).

Senate Committee on Transportation
House Committee on Business & Financial Services

Background: State law currently provides for the regulation of certain private transportation providers, such as operators of aeroporters, limousines, for-hire vehicles, taxicabs, and charter and excursion buses. These regulations include various insurance requirements. However, current law does not specifically provide for the regulation of what are commonly know as ridesharing companies, i.e. companies that use a digital network or software application to connect passengers to drivers for the purpose of providing a prearranged ride, often by use of the driver's personal vehicle.

For-hire vehicle operators are currently required under state law to obtain a surety bond or liability insurance policy with the following minimum coverage: $100,000 per person, $300,000 per accident, and $25,000 for property damage.

Summary: Commercial transportation services providers are defined as businesses that use a digital network or software application to connect passengers to drivers for the purpose of providing a prearranged ride. However, a commercial transportation services provider is not a taxicab company, charter or excursion bus, aeroporter, special needs transportation provider, or limousine. A commercial transportation services provider driver is an individual who uses a personal vehicle to provide services for passengers matched through a commercial transportation services provider's digital network or software application. Commercial transportation services are defined as all times the driver is logged into a commercial transportation services provider's digital network or software application, or until the passenger leaves the personal vehicle, whichever is later.

Commercial transportation services providers, drivers if approved by the Office of the Insurance Commissioner, or a combination of a provider and a driver, must obtain a primary automobile insurance policy covering every personal vehicle used to provide commercial transportation services, described as follows:

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

- before a driver accepts a requested ride: $50,000 per person; $100,000 per accident; and $30,000 for property damage; and
- after a driver accepts a requested ride: a combined single limit liability coverage of $1,000,000; and underinsured motorist coverage of $1,000,000.

Commercial transportation services insurance policies must offer personal injury protection coverage, and underinsured motorist coverage, in line with existing motor vehicle insurance law that allows for the insured to reject the coverage options.

After July 1, 2016, an insurance company may not deny a claim arising exclusively out of the personal use of the private vehicle solely on the basis that the insured, at other times, used the vehicle to provide commercial transportation services.

The commercial transportation services insurance coverage requirements are alternatively satisfied by having for-hire vehicle or limousine insurance coverage applicable to the vehicle being used for commercial transportation services.

Commercial transportation services provider drivers, for-hire vehicle operators, limousine chauffeurs, and taxicab operators are exempt from workers' compensation requirements.

Votes on Final Passage:

Senate	30	18	
House	86	12	(House amended)
Senate	43	5	(Senate concurred)

Effective: July 24, 2015

CERTIFICATION OF ENROLLMENT

ENGROSSED SUBSTITUTE SENATE BILL 5550

Chapter 236, Laws of 2015

64th Legislature
2015 Regular Session

AUTOMOBILE INSURANCE--COMMERCIAL TRANSPORTATION SERVICES

EFFECTIVE DATE: 7/24/2015

Passed by the Senate April 16, 2015
Yeas 43 Nays 5

BRAD OWEN

President of the Senate

Passed by the House April 15, 2015
Yeas 86 Nays 12

FRANK CHOPP

Speaker of the House of Representatives

Approved May 11, 2015 2:34 PM

JAY INSLEE

Governor of the State of Washington

CERTIFICATE

I, Hunter G. Goodman, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE SENATE BILL 5550** as passed by Senate and the House of Representatives on the dates hereon set forth.

HUNTER G. GOODMAN

Secretary

FILED

May 12, 2015

Secretary of State
State of Washington

ENGROSSED SUBSTITUTE SENATE BILL 5550

AS AMENDED BY THE HOUSE

Passed Legislature - 2015 Regular Session

State of Washington 64th Legislature 2015 Regular Session

By Senate Transportation (originally sponsored by Senators Habib and Fain)

READ FIRST TIME 02/27/15.

AN ACT Relating to providers of commercial transportation services; amending RCW 51.12.020, 51.12.185, 48.22.030, 48.22.085, and 48.22.095; adding a new section to chapter 46.72 RCW; adding a new section to chapter 46.29 RCW; adding a new chapter to Title 48 RCW; and repealing RCW 46.72.073, 46.72A.053, 51.12.180, 51.12.183, 51.16.240, and 81.72.230.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Personal vehicle" means a vehicle that is used by a commercial transportation services provider driver in connection with providing services for a commercial transportation services provider and that is authorized by the commercial transportation services provider.

(2) "Prearranged ride" means a route of travel between points chosen by the passenger and arranged with a driver through the use of a commercial transportation services provider's digital network or software application. The ride begins when a driver accepts a requested ride through a digital network or software application, continues while the driver transports the passenger in a personal

vehicle, and ends when the passenger departs from the personal vehicle.

(3) "Commercial transportation services provider" means a corporation, partnership, sole proprietorship, or other entity, operating in Washington, that uses a digital network or software application to connect passengers to drivers for the purpose of providing a prearranged ride. However, a commercial transportation services provider is not a taxicab company under chapter 81.72 RCW, a charter party or excursion service carrier under chapter 81.70 RCW, an auto transportation company under chapter 81.68 RCW, a private, nonprofit transportation provider under chapter 81.66 RCW, or a limousine carrier under chapter 46.72A RCW. A commercial transportation services provider is not deemed to own, control, operate, or manage the personal vehicles used by commercial transportation services providers. A commercial transportation services provider does not include a political subdivision or other entity exempt from federal income tax under 26 U.S.C. Sec. 115 of the federal internal revenue code.

(4) "Commercial transportation services provider driver" or "driver" means an individual who uses a personal vehicle to provide services for passengers matched through a commercial transportation services provider's digital network or software application.

(5) "Commercial transportation services provider passenger" or "passenger" means a passenger in a personal vehicle for whom transport is provided, including:

(a) An individual who uses a commercial transportation services provider's digital network or software application to connect with a driver to obtain services in the driver's vehicle for the individual and anyone in the individual's party; or

(b) Anyone for whom another individual uses a commercial transportation services provider's digital network or software application to connect with a driver to obtain services in the driver's vehicle.

(6) "Commercial transportation services" or "services" means all times the driver is logged in to a commercial transportation services provider's digital network or software application or until the passenger has left the personal vehicle, whichever is later. The term does not include services provided either directly or under contract with a political subdivision or other entity exempt from federal

income tax under 26 U.S.C. Sec. 115 of the federal internal revenue code.

NEW SECTION. **Sec. 2.** (1)(a) Before being used to provide commercial transportation services, every personal vehicle must be covered by a primary automobile insurance policy that specifically covers commercial transportation services. However, the insurance coverage requirements of this section are alternatively satisfied by securing coverage pursuant to chapter 46.72 or 46.72A RCW that covers the personal vehicle being used to provide commercial transportation services and that is in effect twenty-four hours per day, seven days per week. Except as provided in subsection (2) of this section, a commercial transportation services provider must secure this policy for every personal vehicle used to provide commercial transportation services. For purposes of this section, a "primary automobile insurance policy" is not a private passenger automobile insurance policy.

(b) The primary automobile insurance policy required under this section must provide coverage, as specified in this subsection (1)(b), at all times the driver is logged in to a commercial transportation services provider's digital network or software application and at all times a passenger is in the vehicle as part of a prearranged ride.

(i) The primary automobile insurance policy required under this subsection must provide the following coverage during commercial transportation services applicable during the period before a driver accepts a requested ride through a digital network or software application:

(A) Liability coverage in an amount no less than fifty thousand dollars per person for bodily injury, one hundred thousand dollars per accident for bodily injury of all persons, and thirty thousand dollars for damage to property;

(B) Underinsured motorist coverage to the extent required under RCW 48.22.030; and

(C) Personal injury protection coverage to the extent required under RCW 48.22.085 and 48.22.095.

(ii) The primary automobile insurance policy required under this subsection must provide the following coverage, applicable during the period of a prearranged ride:

(A) Combined single limit liability coverage in the amount of one million dollars for death, personal injury, and property damage;

(B) Underinsured motorist coverage in the amount of one million dollars; and

(C) Personal injury protection coverage to the extent required under RCW 48.22.085 and 48.22.095.

(2)(a) As an alternative to the provisions of subsection (1) of this section, if the office of the insurance commissioner approves the offering of an insurance policy that recognizes that a person is acting as a driver for a commercial transportation services provider and using a personal vehicle to provide commercial transportation services, a driver may secure a primary automobile insurance policy covering a personal vehicle and providing the same coverage as required in subsection (1) of this section. The policy coverage may be in the form of a rider to, or endorsement of, the driver's private passenger automobile insurance policy only if approved as such by the office of the insurance commissioner.

(b) If the primary automobile insurance policy maintained by a driver to meet the obligation of this section does not provide coverage for any reason, including that the policy lapsed or did not exist, the commercial transportation services provider must provide the coverage required under this section beginning with the first dollar of a claim.

(c) The primary automobile insurance policy required under this subsection and subsection (1) of this section may be secured by any of the following:

(i) The commercial transportation services provider as provided under subsection (1) of this section;

(ii) The driver as provided under (a) of this subsection; or

(iii) A combination of both the commercial transportation services provider and the driver.

(3) The insurer or insurers providing coverage under subsections (1) and (2) of this section are the only insurers having the duty to defend any liability claim from an accident occurring while commercial transportation services are being provided.

(4) In addition to the requirements in subsections (1) and (2) of this section, before allowing a person to provide commercial transportation services as a driver, a commercial transportation services provider must provide written proof to the driver that the driver is covered by a primary automobile insurance policy that meets

the requirements of this section. Alternatively, if a driver purchases a primary automobile insurance policy as allowed under subsection (2) of this section, the commercial transportation services provider must verify that the driver has done so.

(5) A primary automobile insurance policy required under subsection (1) or (2) of this section may be placed with an insurer licensed under this title to provide insurance in the state of Washington or as an eligible surplus line insurance policy as described in RCW 48.15.040.

(6) Insurers that write automobile insurance in Washington may exclude any and all coverage afforded under a private passenger automobile insurance policy issued to an owner or operator of a personal vehicle for any loss or injury that occurs while a driver for a commercial transportation services provider is logged in to a commercial transportation services provider's digital network or while a driver provides a prearranged ride. This right to exclude all coverage may apply to any coverage included in a private passenger automobile insurance policy including, but not limited to:

(a) Liability coverage for bodily injury and property damage;

(b) Personal injury protection coverage;

(c) Underinsured motorist coverage;

(d) Medical payments coverage;

(e) Comprehensive physical damage coverage; and

(f) Collision physical damage coverage.

(7) Nothing in this section shall be construed to require a private passenger automobile insurance policy to provide primary or excess coverage or a duty to defend for the period of time in which a driver is logged in to a commercial transportation services provider's digital network or software application or while the driver is engaged in a prearranged ride or the driver otherwise uses a vehicle to transport passengers for compensation.

(8) Insurers that exclude coverage under subsection (6) of this section have no duty to defend or indemnify any claim expressly excluded under subsection (6) of this section. Nothing in this section shall be deemed to invalidate or limit an exclusion contained in a policy, including any policy in use or approved for use in Washington state before the effective date of this section that excludes coverage for vehicles used to carry persons or property for a charge or available for hire by the public.

(9) An exclusion exercised by an insurer in subsection (6) of this section applies to any coverage selected or rejected by a named insured under RCW 48.22.030 and 48.22.085. The purchase of a rider or endorsement by a driver under subsection (2)(a) of this section does not require a separate coverage rejection under RCW 48.22.030 or 48.22.085.

(10) If more than one insurance policy provides valid and collectible coverage for a loss arising out of an occurrence involving a motor vehicle operated by a driver, the responsibility for the claim must be divided as follows:

(a) Except as provided otherwise under subsection (2)(c) of this section, if the driver has been matched with a passenger and is traveling to pick up the passenger, or the driver is providing services to a passenger, the commercial transportation services provider that matched the driver and passenger must provide insurance coverage; or

(b) If the driver is logged in to the digital network or software application of more than one commercial transportation services provider but has not been matched with a passenger, the liability must be divided equally among all of the applicable insurance policies that specifically provide coverage for commercial transportation services.

(11) In an accident or claims coverage investigation, a commercial transportation services provider or its insurer must cooperate with a private passenger automobile insurance policy insurer and other insurers that are involved in the claims coverage investigation to facilitate the exchange of information, including the provision of (a) dates and times at which an accident occurred that involved a participating driver and (b) within ten business days after receiving a request, a copy of the provider's electronic record showing the precise times that the participating driver logged on and off the provider's digital network or software application on the day the accident or other loss occurred. The commercial transportation services provider or its insurer must retain all data, communications, or documents related to insurance coverage or accident details for a period of not less than the applicable statutes of limitation, plus two years from the date of an accident to which those records pertain.

(12) This section does not modify or abrogate any otherwise applicable insurance requirement set forth in this title.

(13) After July 1, 2016, an insurance company regulated under this title may not deny an otherwise covered claim arising exclusively out of the personal use of the private passenger automobile solely on the basis that the insured, at other times, used the private passenger automobile covered by the policy to provide commercial transportation services.

(14) If an insurer for a commercial transportation services provider makes a payment for a claim covered under comprehensive coverage or collision coverage, the commercial transportation services provider must cause its insurer to issue the payment directly to the business repairing the vehicle or jointly to the owner of the vehicle and the primary lienholder on the covered vehicle.

(15)(a) To be eligible for securing a primary automobile insurance policy under this section, a commercial transportation services provider must make the following disclosures to a prospective driver in the prospective driver's terms of service:

WHILE OPERATING ON THE DIGITAL NETWORK OR SOFTWARE APPLICATION OF THE COMMERCIAL TRANSPORTATION SERVICES PROVIDER, YOUR PRIVATE PASSENGER AUTOMOBILE INSURANCE POLICY MIGHT NOT AFFORD LIABILITY, UNDERINSURED MOTORIST, PERSONAL INJURY PROTECTION, COMPREHENSIVE, OR COLLISION COVERAGE, DEPENDING ON THE TERMS OF THE POLICY.

IF THE VEHICLE THAT YOU PLAN TO USE TO PROVIDE COMMERCIAL TRANSPORTATION SERVICES FOR OUR COMPANY HAS A LIEN AGAINST IT, YOU MUST NOTIFY THE LIENHOLDER THAT YOU WILL BE USING THE VEHICLE FOR COMMERCIAL TRANSPORTATION SERVICES THAT MAY VIOLATE THE TERMS OF YOUR CONTRACT WITH THE LIENHOLDER.

(b) The prospective driver must acknowledge the terms of service electronically or by signature.

NEW SECTION. **Sec. 3.** A new section is added to chapter 46.72 RCW to read as follows:

RCW 46.72.040 and 46.72.050 do not apply to personal vehicles under chapter 48.--- RCW (the new chapter created in section 11 of this act).

Sec. 4. RCW 51.12.020 and 2013 c 141 s 3 are each amended to read as follows:

The following are the only employments which shall not be included within the mandatory coverage of this title:

(1) Any person employed as a domestic servant in a private home by an employer who has less than two employees regularly employed forty or more hours a week in such employment.

(2) Any person employed to do gardening, maintenance, or repair, in or about the private home of the employer. For the purposes of this subsection, "maintenance" means the work of keeping in proper condition, "repair" means to restore to sound condition after damage, and "private home" means a person's place of residence.

(3) A person whose employment is not in the course of the trade, business, or profession of his or her employer and is not in or about the private home of the employer.

(4) Any person performing services in return for aid or sustenance only, received from any religious or charitable organization.

(5) Sole proprietors or partners.

(6) Any child under eighteen years of age employed by his or her parent or parents in agricultural activities on the family farm.

(7) Jockeys while participating in or preparing horses for race meets licensed by the Washington horse racing commission pursuant to chapter 67.16 RCW.

(8)(a) Except as otherwise provided in (b) of this subsection, any bona fide officer of a corporation voluntarily elected or voluntarily appointed in accordance with the articles of incorporation or bylaws of the corporation, who at all times during the period involved is also a bona fide director, and who is also a shareholder of the corporation. Only such officers who exercise substantial control in the daily management of the corporation and whose primary responsibilities do not include the performance of manual labor are included within this subsection.

(b) Alternatively, a corporation that is not a "public company" as defined in RCW 23B.01.400 may exempt eight or fewer bona fide officers, who are voluntarily elected or voluntarily appointed in accordance with the articles of incorporation or bylaws of the corporation and who exercise substantial control in the daily management of the corporation, from coverage under this title without regard to the officers' performance of manual labor if the exempted officer is a shareholder of the corporation, or may exempt any number of officers if all the exempted officers are related by blood within

the third degree or marriage. If a corporation that is not a "public company" elects to be covered under subsection (8)(a) of this section, the corporation's election must be made on a form prescribed by the department and under such reasonable rules as the department may adopt.

(c) Determinations respecting the status of persons performing services for a corporation shall be made, in part, by reference to Title 23B RCW and to compliance by the corporation with its own articles of incorporation and bylaws. For the purpose of determining coverage under this title, substance shall control over form, and mandatory coverage under this title shall extend to all workers of this state, regardless of honorary titles conferred upon those actually serving as workers.

(d) A corporation may elect to cover officers who are exempted by this subsection in the manner provided by RCW 51.12.110.

(9) Services rendered by a musician or entertainer under a contract with a purchaser of the services, for a specific engagement or engagements when such musician or entertainer performs no other duties for the purchaser and is not regularly and continuously employed by the purchaser. A purchaser does not include the leader of a group or recognized entity who employs other than on a casual basis musicians or entertainers.

(10) Services performed by a newspaper vendor, carrier, or delivery person selling or distributing newspapers on the street, to offices, to businesses, or from house to house and any freelance news correspondent or "stringer" who, using his or her own equipment, chooses to submit material for publication for free or a fee when such material is published.

(11) Services performed by an insurance producer, as defined in RCW 48.17.010, or a surplus line broker licensed under chapter 48.15 RCW.

(12) Services performed by a booth renter. However, a person exempted under this subsection may elect coverage under RCW 51.32.030.

(13) Members of a limited liability company, if either:

(a) Management of the company is vested in its members, and the members for whom exemption is sought would qualify for exemption under subsection (5) of this section were the company a sole proprietorship or partnership; or

(b) Management of the company is vested in one or more managers, and the members for whom the exemption is sought are managers who would qualify for exemption under subsection (8) of this section were the company a corporation.

(14) A driver providing commercial transportation services as defined in section 1 of this act. The driver may elect coverage in the manner provided by RCW 51.32.030.

(15) For hire vehicle operators under chapter 46.72 RCW who own or lease the for hire vehicle, chauffeurs under chapter 46.72A RCW who own or lease the limousine, and operators of taxicabs under chapter 81.72 RCW who own or lease the taxicab. An owner or lessee may elect coverage in the manner provided by RCW 51.32.030.

Sec. 5. RCW 51.12.185 and 2011 c 190 s 4 are each amended to read as follows:

(1) ((~~In order to assist the department with controlling costs related to the self-monitoring of industrial insurance claims by independent owner-operated for hire vehicle, limousine, and taxicab businesses,~~)) The department may appoint a panel of individuals with for hire vehicle, limousine, or taxicab transportation industry experience and expertise to advise the department.

(2) The owner or lessee of any for hire, limousine, or taxicab vehicle ((~~subject to mandatory industrial insurance pursuant to RCW 51.12.183~~)) is eligible for inclusion in a retrospective rating program authorized and established pursuant to chapter 51.18 RCW.

NEW SECTION. **Sec. 6.** A new section is added to chapter 46.29 RCW to read as follows:

This chapter does not apply to the coverage exclusions under section 2(6) of this act.

Sec. 7. RCW 48.22.030 and 2009 c 549 s 7106 are each amended to read as follows:

(1) "Underinsured motor vehicle" means a motor vehicle with respect to the ownership, maintenance, or use of which either no bodily injury or property damage liability bond or insurance policy applies at the time of an accident, or with respect to which the sum of the limits of liability under all bodily injury or property damage liability bonds and insurance policies applicable to a covered person

after an accident is less than the applicable damages which the covered person is legally entitled to recover.

(2) No new policy or renewal of an existing policy insuring against loss resulting from liability imposed by law for bodily injury, death, or property damage, suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be issued with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of underinsured motor vehicles, hit-and-run motor vehicles, and phantom vehicles because of bodily injury, death, or property damage, resulting therefrom, except while operating or occupying a motorcycle or motor-driven cycle, and except while operating or occupying a motor vehicle owned or available for the regular use by the named insured or any family member, and which is not insured under the liability coverage of the policy. The coverage required to be offered under this chapter is not applicable to general liability policies, commonly known as umbrella policies, or other policies which apply only as excess to the insurance directly applicable to the vehicle insured.

(3) Except as to property damage, coverage required under subsection (2) of this section shall be in the same amount as the insured's third party liability coverage unless the insured rejects all or part of the coverage as provided in subsection (4) of this section. Coverage for property damage need only be issued in conjunction with coverage for bodily injury or death. Property damage coverage required under subsection (2) of this section shall mean physical damage to the insured motor vehicle unless the policy specifically provides coverage for the contents thereof or other forms of property damage.

(4) A named insured or spouse may reject, in writing, underinsured coverage for bodily injury or death, or property damage, and the requirements of subsections (2) and (3) of this section shall not apply. If a named insured or spouse has rejected underinsured coverage, such coverage shall not be included in any supplemental or renewal policy unless a named insured or spouse subsequently requests such coverage in writing. The requirement of a written rejection under this subsection shall apply only to the original issuance of policies issued after July 24, 1983, and not to any renewal or

replacement policy. When a named insured or spouse chooses a property damage coverage that is less than the insured's third party liability coverage for property damage, a written rejection is not required.

(5) The limit of liability under the policy coverage may be defined as the maximum limits of liability for all damages resulting from any one accident regardless of the number of covered persons, claims made, or vehicles or premiums shown on the policy, or premiums paid, or vehicles involved in an accident.

(6) The policy may provide that if an injured person has other similar insurance available to him or her under other policies, the total limits of liability of all coverages shall not exceed the higher of the applicable limits of the respective coverages.

(7)(a) The policy may provide for a deductible of not more than three hundred dollars for payment for property damage when the damage is caused by a hit-and-run driver or a phantom vehicle.

(b) In all other cases of underinsured property damage coverage, the policy may provide for a deductible of not more than one hundred dollars.

(8) For the purposes of this chapter, a "phantom vehicle" shall mean a motor vehicle which causes bodily injury, death, or property damage to an insured and has no physical contact with the insured or the vehicle which the insured is occupying at the time of the accident if:

(a) The facts of the accident can be corroborated by competent evidence other than the testimony of the insured or any person having an underinsured motorist claim resulting from the accident; and

(b) The accident has been reported to the appropriate law enforcement agency within seventy-two hours of the accident.

(9) An insurer who elects to write motorcycle or motor-driven cycle insurance in this state must provide information to prospective insureds about the coverage.

(10) An insurer who elects to write motorcycle or motor-driven cycle insurance in this state must provide an opportunity for named insureds, who have purchased liability coverage for a motorcycle or motor-driven cycle, to reject underinsured coverage for that motorcycle or motor-driven cycle in writing.

(11) If the covered person seeking underinsured motorist coverage under this section was the intended victim of the tort feasor, the incident must be reported to the appropriate law enforcement agency

and the covered person must cooperate with any related law enforcement investigation.

(12) The purpose of this section is to protect innocent victims of motorists of underinsured motor vehicles. Covered persons are entitled to coverage without regard to whether an incident was intentionally caused. However, a person is not entitled to coverage if the insurer can demonstrate that the covered person intended to cause the event for which a claim is made under the coverage described in this section. As used in this section, and in the section of policies providing the underinsured motorist coverage described in this section, "accident" means an occurrence that is unexpected and unintended from the standpoint of the covered person.

(13) The coverage under this section may be excluded as provided for under section 2(6) of this act.

(14) "Underinsured coverage," for the purposes of this section, means coverage for "underinsured motor vehicles," as defined in subsection (1) of this section.

Sec. 8. RCW 48.22.085 and 2003 c 115 s 2 are each amended to read as follows:

(1) No new automobile liability insurance policy or renewal of such an existing policy may be issued unless personal injury protection coverage is offered as an optional coverage.

(2) A named insured may reject, in writing, personal injury protection coverage and the requirements of subsection (1) of this section shall not apply. If a named insured rejects personal injury protection coverage:

(a) That rejection is valid and binding as to all levels of coverage and on all persons who might have otherwise been insured under such coverage; and

(b) The insurer is not required to include personal injury protection coverage in any supplemental, renewal, or replacement policy unless a named insured subsequently requests such coverage in writing.

(3) The coverage under this section may be excluded as provided for under section 2(6) of this act.

Sec. 9. RCW 48.22.095 and 2003 c 115 s 4 are each amended to read as follows:

(1) Insurers providing automobile insurance policies must offer minimum personal injury protection coverage for each insured with benefit limits as follows:

((~~(1)~~)) (a) Medical and hospital benefits of ten thousand dollars;

((~~(2)~~)) (b) A funeral expense benefit of two thousand dollars;

((~~(3)~~)) (c) Income continuation benefits of ten thousand dollars, subject to a limit of two hundred dollars per week; and

((~~(4)~~)) (d) Loss of services benefits of five thousand dollars, subject to a limit of two hundred dollars per week.

(2) The coverage under this section may be excluded as provided for under section 2(6) of this act.

NEW SECTION. **Sec. 10.** The following acts or parts of acts are each repealed:

(1) RCW 46.72.073 (Certificate suspension or revocation—Failure to pay industrial insurance premiums—Rules—Cooperative agreements) and 2011 c 190 s 5;

(2) RCW 46.72A.053 (Certificate suspension or revocation—Failure to pay industrial insurance premiums—Rules—Cooperative agreements) and 2011 c 190 s 6;

(3) RCW 51.12.180 (For hire vehicle businesses and operators—Findings—Declaration) and 2011 c 190 s 1;

(4) RCW 51.12.183 (For hire vehicle businesses and operators—Mandatory coverage—Definitions) and 2011 c 190 s 2;

(5) RCW 51.16.240 (For hire vehicle businesses and operators—Basis for premiums—Rules) and 2011 c 190 s 3; and

(6) RCW 81.72.230 (License suspension or revocation—Failure to pay industrial insurance premiums—Rules—Cooperative agreements) and 2011 c 190 s 7.

NEW SECTION. **Sec. 11.** Sections 1 and 2 of this act constitute a new chapter in Title 48 RCW.

Passed by the Senate April 16, 2015.
Passed by the House April 15, 2015.
Approved by the Governor May 11, 2015.
Filed in Office of Secretary of State May 12, 2015.

SEATTLE CITY COUNCIL

Legislative Summary

CB 118793

Record No.: CB 118793 **Type:** Ordinance (Ord) **Status:** Passed

Version: 1 **Ord. no:** Ord 125132 **In Control:** City Clerk

File Created: 09/06/2016

Final Action: 09/22/2016

Title: AN ORDINANCE relating to the regulation of the for-hire industry, amending Sections 6.310.110 and 6.310.735 of the Seattle Municipal Code to add clarity to the qualifying driver description and extend the commencement date, and ratifying and confirming certain prior acts.

Date

Notes:

Filed with City Clerk:

Mayor's Signature:

Sponsors: Harrell

Vetoed by Mayor:

Veto Overridden:

Veto Sustained:

Attachments:

Drafter: jodee.schwinn@seattle.gov

Filing Requirements/Dept Action:

History of Legislative File **Legal Notice Published:** ☐ Yes ☐ No

Ver-sion:	Acting Body:	Date:	Action:	Sent To:	Due Date:	Return Date:	Result:
1	Full Council	09/06/2016	referred	Full Council			
1	Full Council	09/12/2016	passed				Pass
	Action Text:	The Motion carried, the Council Bill (CB) was passed by the following vote, and the President signed the Bill:					
	Notes:	Motion was made and duly seconded to pass Council Bill 118793.					
		In Favor: 9	Councilmember Bagshaw, Councilmember Burgess, Councilmember González , Council President Harrell, Councilmember Herbold, Councilmember Johnson, Councilmember Juarez, Councilmember O'Brien, Councilmember Sawant				
		Opposed: 0					
1	City Clerk	09/14/2016	submitted for Mayor's signature	Mayor			
1	Mayor	09/22/2016	Signed				
	Action Text:	The Council Bill (CB) was Signed.					
	Notes:						

1	Mayor	09/22/2016	returned	City Clerk
	Action Text:	The Council Bill (CB) was returned. to the City Clerk		
	Notes:			
1	City Clerk	09/22/2016	attested by City Clerk	
	Action Text:	The Ordinance (Ord) was attested by City Clerk.		
	Notes:			

CITY OF SEATTLE

ORDINANCE 125182

COUNCIL BILL 118793

AN ORDINANCE relating to the regulation of the for-hire industry, amending Sections 6.310.110 and 6.310.735 of the Seattle Municipal Code to add clarity to the qualifying driver description and extend the commencement date, and ratifying and confirming certain prior acts.

WHEREAS, the comprehensive outreach needed to create rules to implement the collective negotiation rights of for-hire drivers established by Ordinance 124968 is taking more time than anticipated; and

WHEREAS, the Seattle City Council seeks to give additional guidance on the concept of a qualifying driver; NOW, THEREFORE,

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. Section 6.310.110 of the Seattle Municipal Code, last amended by Ordinance 124968, is amended as follows:

***

"Qualifying driver" means a for-hire driver, who drives for a driver coordinator and who satisfies the conditions established by the Director pursuant to Section 6.310.735. In establishing such conditions, the Director shall consider factors such as the length, frequency, total number of trips, and average number of trips per driver completed by all of the drivers who have performed trips in each of the four calendar months immediately preceding the commencement date, for a particular driver coordinator, ((~~and~~)) any other factors that indicate that a driver's work for a driver coordinator is significant enough to affect the safety and reliability of for-hire transportation, and standards established by other jurisdictions for granting persons the right to

vote to be represented in negotiations pertaining to the terms and conditions of employment. A for-hire driver may be a qualifying driver for more than one driver coordinator.

***

Section 2. Section 6.310.735 of the Seattle Municipal Code, as enacted by Ordinance 124968, is amended as follows:

6.310.735 Exclusive driver representatives

A. The Director shall promulgate a commencement date((~~that is no earlier than 180 days and~~)) no later than ((~~240 days from the effective date of the ordinance introduced as Council Bill 118499~~))January 17, 2017.

***

Section 2. Any act consistent with the authority of this ordinance that is taken after its passage but prior to its effective date is hereby ratified and confirmed.

Section 3. This ordinance shall take effect and be in force 30 days after its approval by the Mayor, but if not approved and returned by the Mayor within ten days after presentation, it shall take effect as provided by Seattle Municipal Code Section 1.04.020.

Passed by the City Council the 12th day of September, 2016, and signed by me in open session in authentication of its passage this 12th day of September, 2016.

President _____ of the City Council

Approved by me this 22nd day of September, 2016.

Edward B. Murray, Mayor

Filed by me this 23rd day of September, 2016.

Monica Martinez Simmons, City Clerk

(Seal)