No. 17-35640

In the United States Court of Appeals
for the Ninth Circuit

Chamber of Commerce of the United States of America, et al.,
Plaintiffs-Appellants,

v.

City of Seattle, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

DEFENDANTS-APPELLEES' ANSWERING BRIEF

PETER S. HOLMES
Seattle City Attorney
GREGORY C. NARVER
MICHAEL K. RYAN
SARA O'CONNOR-KRISS
JOSH JOHNSON
Assistant City Attorneys
Seattle City Attorney's Office
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
(206) 684-8200

STEPHEN P. BERZON
STACEY M. LEYTON
P. CASEY PITTS
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

Attorneys for Defendants-Appellees City of Seattle et al.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

JURISDICTION 5

ISSUES 5

STATEMENT OF THE CASE 6

I. The challenged Seattle Ordinance 6

II. Litigation history 10

SUMMARY OF ARGUMENT 13

ARGUMENT 15

I. The Ordinance is exempt from federal antitrust law as an exercise of Seattle's delegated authority to regulate the local for-hire transportation and taxicab industries 15

A. The Ordinance satisfies the "clear articulation" requirement 18

1. *Parker* permits states to delegate discretionary regulatory authority to municipal governments 18

2. The Ordinance falls within the City's delegated authority, which is construed broadly for *Parker* immunity purposes 22

3. Transportation companies like Uber and Lyft are not exempt from the City's delegated regulatory authority 28

4. *Parker* immunity preserves states' ability to grant municipalities discretionary regulatory powers 35

B. The Ordinance satisfies the "active supervision" requirement 37

1. Municipal supervision is sufficient 37

2. The Director's affirmative obligation to review and approve or reject all proposed agreements constitutes active supervision 43

II. The District Court properly dismissed the Sherman Act claim 47

III. The NLRA does not preempt the Ordinance 48

A. The District Court properly dismissed the *Machinists* preemption claim 48

B. The District Court properly dismissed the *Garmon* preemption claim 56

CONCLUSION 60

CERTIFICATE OF COMPLIANCE 61

CERTIFICATE OF SERVICE 62

SUPPLEMENTAL ADDENDUM ..... SA-i

TABLE OF AUTHORITIES

Cases

Acosta v. Gonzales,
439 F.3d 550 (9th Cir. 2001) 26

Am. Fed. of Musicians v. Carroll,
391 U.S. 99 (1968) 55

Beasley v. Food Fair of N.C., Inc.,
416 U.S. 653 (1974) 50, 54, 55

Boone v. Redevelopment Agency,
841 F.2d 886 (9th Cir. 1988) 24, 27, 28

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,
441 U.S. 1 (1979) 47

Bud Antle, Inc. v. Barbosa,
45 F.3d 1261 (9th Cir. 1994) 56, 58

California Liquor Dealers v. Midcal Aluminum,
445 U.S. 97 (1980) 18, 41

California v. ARC Am. Corp.,
490 U.S. 93 (1989) 21

Cantor v. Detroit Edison Co.,
428 U.S. 579 (1976) 20

Chamber of Commerce v. Brown,
554 U.S. 60 (2008) 49

Chamber of Commerce v. Seattle,
No. 2:16-cv-00322, 2016 WL 4595981 (W.D. Wash. Aug. 9, 2016) 10

City of Columbia v. Omni Outdoor Advertising, Inc.,
499 U.S. 365 (1991) ..... *passim*

City of Lafayette v. La. Power & Light Co.,
435 U.S. 389 (1978) 18, 35

Columbia Steel Casting Co., Inc. v. Portland Gen. Elec. Co.,
111 F.3d 1427 (9th Cir. 1996) 20

Community Communications Co. v. City of Boulder,
455 U.S. 40 (1982) 20

Costco Wholesale Corp. v. Maleng,
522 F.3d 874 (9th Cir. 2008) 46

Cotter v. Lyft, Inc.,
60 F.Supp.3d 1067 (N.D. Cal. 2015) 30, 31, 57

Doe v. Uber Techs., Inc.,
184 F.Supp.3d 774 (N.D. Cal. 2016) 29

Elec. Inspectors, Inc. v. Village of East Hills,
320 F.3d 110 (2d Cir. 2003) 23

First Am. Title Co. v. Devaugh,
480 F.3d 438 (6th Cir. 2007) 20

Fisher v. City of Berkeley,
475 U.S. 260 (1986) 14, 47, 48

FTC v. Phoebe Putney Health Sys., Inc.,
568 U.S. 216 (2013) ..... *passim*

FTC v. Ticor Title Ins. Co.,
504 U.S. 621 (1992) 21, 37, 45

Garfias-Rodriguez v. Holder,
702 F.3d 504 (9th Cir. 2012) 26

Gold Cross Ambulance & Transfer v. City of Kansas City,
705 F.2d 1005 (8th Cir. 1983) 41

Golden State Transit Corp. v. City of Los Angeles,
726 F.2d 1430 (9th Cir. 1984) 19, 42, 43

Heinsma v. City of Vancouver,
29 P.3d 709 (Wash. 2001) 26

Int'l Longshoremen's Ass'n, AFL-CIO v. Davis,
476 U.S. 380 (1986) 56, 57

Jama v. ICE,
543 U.S. 335 (2005) 53

Kern-Tulare Water Dist. v. City of Bakersfield,
828 F.2d 514 (9th Cir. 1987) 27

Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.,
940 F.2d 397 (9th Cir. 1991) 19

Llewellyn v. Crothers,
765 F.2d 769 (9th Cir. 1985) 27, 28

Machinists v. Wisc. Employment Relations Comm'n,
427 U.S. 132 (1976) 12, 48, 49, 50

Marine Engineers Beneficial Ass'n v. Iternale S.S. Co.,
370 U.S. 173 (1962) 58, 59

Medic Air Corp. v. Air Ambulance Authority,
843 F.2d 1187 (9th Cir. 1988) 20

Mercy-Peninsula Ambulance, Inc. v. San Mateo County,
791 F.2d 755 (9th Cir. 1986) 18

Mich. Paytel Joint Venture v. City of Detroit,
287 F.3d 527 (6th Cir. 2002) 42

N.C. State Bd. of Dental Examiners v. FTC,
135 S.Ct. 1101 (2015) ..... *passim*

New State Ice Co. v. Liebmann,
285 U.S. 262 (1932) 5

O'Connor v. Uber Technologies, Inc.,
82 F.Supp.3d 1133 (N.D. Cal. 2015) 29, 30, 57

Parker v. Brown,
317 U.S. 341 (1943) ..... *passim*

Patrick v. Burget,
486 U.S. 94 (1988) 45

Preferred Communications, Inc. v. City of Los Angeles,
754 F.2d 1396 (9th Cir. 1985) 18, 35, 36, 43

Rhone v. Try Me Cab Co.,
65 F.2d 834 (D.C. Cir. 1933) 31, 33

Riverview Investments, Inc. v. Ottawa Community Improvement Corp.,
774 F.2d 162 (6th Cir. 1985) 41

San Diego Building Trades Council v. Garmon,
359 U.S. 236 (1959) 12, 56, 57, 59

Southern Motor Carriers Rate Conf., Inc. v. United States,
471 U.S. 48 (1985) ..... *passim*

Springs Ambulance Serv. v. City of Rancho Mirage,
745 F.2d 1270 (9th Cir. 1984) 20

Stump v. Sparkman,
435 U.S. 349 (1978) 24

Tom Hudson & Associates, Inc. v. City of Chula Vista,
746 F.2d 1370 (9th Cir. 1984) 14, 40, 41, 44

Town of Hallie v. City of Eau Claire,
471 U.S. 34 (1985) ..... *passim*

Traweek v. City & County of San Francisco,
920 F.2d 589 (9th Cir. 1990) 2, 17

Tri-State Rubbish, Inc. v. Waste Mgmt., Inc.,
998 F.2d 1073 (1st Cir. 1993) 41

Turf Paradise, Inc. v. Arizona Downs,
670 F.2d 813 (9th Cir. 1982) 44

United Farm Workers of Am., AFL-CIO v. Ariz. Agricultural Emp't Relations Bd.,
669 F.2d 1249 (9th Cir. 1982) ..... *passim*

Wyeth v. Levine,
555 U.S. 555 (2009) 21

Yakima Valley Mem. Hosp. v. Wash. Dep't of Health,
654 F.3d 919 (9th Cir. 2011) 48

Statutory Authorities

15 U.S.C. §1 ..... *passim*

29 U.S.C. §152 52

29 U.S.C. §158 58

29 U.S.C. §164 ..... 15, 50, 52

Cal. Lab. Code §1164 50

Seattle, Wash. Municipal Code §6.310.110 ..... 6, 8

Seattle, Wash. Municipal Code §6.310.150 31

Seattle, Wash. Municipal Code §6.310.175 31

Seattle, Wash. Municipal Code §6.310.270 31

Seattle, Wash. Municipal Code §6.310.400 31

Seattle, Wash. Municipal Code §6.310.540 31

Seattle, Wash. Municipal Code §6.310.735 ..... *passim*

Wash. Rev. Code §46.72.001 ..... *passim*

Wash. Rev. Code §46.72.160 ..... *passim*

Wash. Rev. Code §48.177.005 34

Wash. Rev. Code §48.177.010 34

Wash. Rev. Code §81.04.010 ..... 32, 34

Wash. Rev. Code §81.72.200 ..... *passim*

Wash. Rev. Code §81.72.210 ..... 15, 29

Legislative Materials

1955 Wash. Sess. Laws 1409 32

1961 Wash. Sess. Laws 413 32

1961 Wash. Sess. Laws 465 32

H.R. Rep. No. 80-245 (1947) 54

Additional Authorities

Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 Yale L.J. 486 (1987) 17, 39

INTRODUCTION

The Seattle Ordinance challenged in this appeal establishes a system to authorize the collective organization of independent contractor drivers in the local for-hire transportation and taxicab industries, based on the City Council's legislative findings that such a system will promote the Seattle public's health, safety, and welfare. The Ordinance was enacted pursuant to the City's broad grant of statutory authority from the Washington Legislature to regulate those industries to promote their safety and reliability. That statutory authority includes an *explicit* grant of antitrust immunity expressing the Legislature's desire to allow municipalities like Seattle to displace competition with municipal regulation within those industries. Wash. Rev. Code §§46.72.001, 81.72.200 (delegating authority to regulate for-hire transportation and taxicab services "without liability under federal antitrust laws").

Under the Ordinance, if drivers for a particular company elect to be collectively represented, taxicab and for-hire transportation companies must negotiate with the drivers' designated representatives about a number of issues including safe driving, vehicle equipment standards, hours, working conditions, and payments to drivers. Seattle, Wash. Municipal Code ("SMC") 6.310.735.H.1. No agreement between such companies and representatives may take effect, however, without an affirmative finding by a city official "that the substance of the agreement promotes the provision of safe, reliable, and economical for-hire transportation

services and otherwise advance[s] the public policy goals set forth in" the Ordinance. SMC 6.310.735.H.2, I.2.

As the District Court held, the Ordinance is consistent with state and federal law. The Ordinance is immune from federal antitrust challenge under *Parker v. Brown*, 317 U.S. 341 (1943), which protects from federal antitrust scrutiny conduct that constitutes "state action or official action directed by a state," *id.* at 351. *Parker* immunity is premised upon the recognition that "the free market principles espoused in the Sherman Act" must sometimes give way in order to accommodate "countervailing principles of federalism and respect for state sovereignty." *Traweek v. City & County of San Francisco*, 920 F.2d 589, 591 (9th Cir. 1990).

Plaintiffs-Appellants the Chamber of Commerce of the United States and Rasier, LLC (collectively "the Chamber"), do not dispute that *Parker* immunity can extend to municipal regulations. The Chamber contends, however, that *Parker* immunity attaches to such regulations only if the state legislature specifies the precise way that municipal governments might choose to exercise their delegated authority, and only if state (not local) officials supervise implementation of private conduct under any regulatory scheme.

There is no basis in the decisions of the Supreme Court or this Court to impose such restrictions on the states' sovereign powers, which would eviscerate the federalism principles served by *Parker* immunity by preventing states from

delegating regulatory authority to the entities they deem best situated to respond to changing needs and conditions in local markets. *See, e.g.*, *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 229 (2013) (state legislatures need not "explicitly authorize specific anticompetitive effects before state-action immunity [can] apply"); *Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 64 (1985) (*Parker* immunity protects legislatures' ability to delegate to entities able to respond to "problems unforeseeable to, or outside the competence of, the legislature").

The Chamber also contends that the Ordinance is not a proper exercise of the City's delegated authority to regulate local for-hire transportation. But the Chamber's crimped interpretation of that authority has no basis—particularly given that the City's authority must be construed *broadly* for *Parker* immunity purposes. *See, e.g.*, *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 372 (1991) ("*Omni*") (*Parker* immunity analysis requires "concept of authority broader than what is applied to determine … legality … under state law"). Contrary to the Chamber's contentions, nothing in the relevant Washington statutes limits the City's authority to regulate the for-hire transportation and taxicab industries "without liability under federal antitrust laws" to vehicles and drivers, or to aspects of those industries involving direct consumer transactions. To the contrary, the Washington Legislature defined the City's authority broadly, in a manner that easily encompass

companies like Uber and Lyft that organize, control, and profit from the sale of rides to the Seattle public.

The District Court also properly dismissed the Chamber's claims that the National Labor Relations Act preempts the Ordinance. This Court has held that where Congress excluded particular workers from the NLRA without *expressly* preempting state or local regulation of those workers, state and local governments remain free to regulate the excluded workers' labor relations as they deem appropriate. *United Farm Workers of Am., AFL-CIO v. Ariz. Agricultural Emp't Relations Bd.*, 669 F.2d 1249, 1257 (9th Cir. 1982). And because the Chamber alleges that the workers covered by the Ordinance are independent contractors and has made no allegations that would support a finding that they are instead NLRA-covered employees, the District Court properly dismissed its alternative NLRA preemption theory.

Ultimately, the Chamber and its amici complain that the Ordinance is a novel response to changing conditions in Seattle's for-hire transportation and taxicab industries, including the rise of smartphone-based services like Uber and Lyft. The purpose of our federal system, however, is to enable such state and local experimentation, rather than requiring that such efforts be implemented federally. "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic

experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Accordingly, this Court should affirm the decision below.

JURISDICTION

The City agrees with the Chamber's jurisdictional statement.

ISSUES

(1) Whether the District Court correctly concluded that the Ordinance is immune from federal antitrust challenge as an exercise of Seattle's delegated authority to regulate the local for-hire transportation and taxicab industries "without liability under federal antitrust laws." Wash. Rev. Code §§46.72.001, 84.72.200.

(2) Whether Defendants' unilateral actions in adopting and implementing the Ordinance constitute a "contract, combination … or conspiracy" prohibited by the Sherman Act, 15 U.S.C. §1.

(3) Whether the District Court properly concluded that, as with other groups similarly excluded from the NLRA's protections, Congress did not intend to preclude state and local regulation of independent contractors' labor relations.

(4) Whether the District Court properly dismissed the Chamber's alternative NLRA preemption claim because no party to this litigation has alleged facts suggesting that the drivers covered by the Ordinance are arguably NLRA-covered "employees" rather than independent contractors.

Relevant statutory and regulatory authorities appear in the separate Supplemental Addendum.

STATEMENT OF THE CASE

I. The challenged Seattle Ordinance

On December 14, 2015, the Seattle City Council adopted Ordinance 124968, the Ordinance Relating to Taxicab, Transportation Network Company, and For-Hire Vehicle Drivers, in order "to ensure safe and reliable for-hire and taxicab transportation service" within Seattle by establishing a process through which taxicab, transportation network company, and for-hire vehicle drivers can "modify specific agreements collectively with the entities that hire, direct, arrange, or manage their work." Ordinance (Addendum A-43–A-62) 2d Whereas Cl., §1.C.[1] The City Council found that such entities (deemed "driver coordinators") "establish the terms and conditions of their contracts with their drivers unilaterally, and can impose changes … without prior warning or discussion." *Id.* §1.E.

In the Council's judgment, such unilaterally imposed terms "adversely impact the ability of a for-hire driver to provide transportation services in a safe, reliable, stable, cost-effective, and economically viable manner," including by leading to

[1] Transportation network companies ("TNCs") are companies like Uber and Lyft that that "offer[] prearranged transportation services for compensation using an online-enabled TNC application or platform to connect passengers with drivers using their personal vehicles." SMC 6.310.110.

"driver unrest and transportation service disruptions." *Id.* §§1.E, 1.F The Council concluded that establishing a framework for collective negotiations between driver coordinators and their drivers would "enable more stable working conditions and better ensure that drivers can perform their services in a safe, reliable, stable, cost-effective, and economically viable manner." *Id.* §1.I.

According to the Council, drivers working under such collectively negotiated terms "are more likely to remain in their positions over time" and accumulate valuable experience. *Id.* §1.I.1. They also face reduced "financial pressure to provide transportation in an unsafe manner (such as by working longer hours … or operating vehicles at unsafe speeds ...) or to ignore maintenance necessary to the safe and reliable operation of their vehicles." *Id.* §1.I.2.[2]

To permit such negotiations, the Ordinance establishes a multistep process. First, non-profit entities may apply for designation as a "qualified driver representative" ("QDR"). SMC 6.310.735.B, C. If an entity satisfies the Ordinance's requirements and any implementing rules and is designated a QDR, it may notify a driver coordinator that it intends to seek to represent that coordinator's drivers. SMC

[2] These findings were based upon outcomes in other industries, including the transportation industry. *Id.* §1.J.

6.310.735.C.2. The driver coordinator must then provide the QDR with contact information for its "qualifying drivers." SMC 6.310.735.D.[3]

After receiving this list, a QDR has 120 days to submit statements of interest from a majority of qualifying drivers expressing their desire to be represented by the QDR for the purpose of collective negotiations with that driver coordinator. SMC 6.310.735.F.1. If the Director of the Seattle Department of Finance and Administrative Services ("FAS") determines that the QDR has submitted statements from a majority, the Director certifies the QDR as the "exclusive driver representative" ("EDR") for that driver coordinator. SMC 6.310.735.F.2, 3.

If an EDR is certified, the EDR and driver coordinator must meet and negotiate in good faith regarding certain subjects, including "best practices regarding vehicle equipment standards; safe driving practices; the manner in which the driver coordinator will conduct criminal background checks of all prospective drivers; the nature and amount of payments to be made by, or withheld from, the driver coordinator to or by the drivers; minimum hours of work, conditions of work, and applicable rules." SMC 6.310.735.H.1.

If the parties reach agreement, they must submit their proposed agreement to the Director, who reviews it for compliance with the Ordinance "and to ensure that

[3] The specific conditions a driver must satisfy to be designated a "qualifying driver" are established by rule. SMC 6.310.110.

the substance of the agreement promotes the provision of safe, reliable, and economical for-hire transportation services and otherwise advance[s] the public policy goals set forth in [the Ordinance]." SMC 6.310.735.H.2. In conducting that review, the Director has the authority to gather evidence, including by holding public hearings or requesting information from the EDR or driver coordinator. *Id*. If the Director approves the agreement, it becomes final and binding on the parties. SMC 6.310.735.H.2.a. If the Director does not approve the agreement, he must provide the parties with a written explanation of its inadequacies, and may offer recommendations for remedying those inadequacies. SMC 6.310.735.H.2.b. No agreement can take effect until the Director affirmatively determines that it complies with the Ordinance and promotes the City's policy goals. SMC 6.310.735.H.2.c.

If the parties are unable to reach agreement within 90 days of the EDR's certification, either party may demand interest arbitration, through which a neutral interest arbitrator considers the parties' positions and recommends "the most fair and reasonable agreement" concerning the specified negotiation subjects. SMC 6.310.735.I.2. An interest arbitrator's recommendation is subject to the same Director review process as a negotiated agreement. SMC 6.310.735.I.3.

After an agreement takes effect, proposed amendments must be submitted for the Director's approval under the same procedures and standards governing approval of the original agreement. SMC 6.310.735.J. The Director has the authority to

withdraw approval of an agreement during its term should it no longer promote the Ordinance's policy goals. SMC 6.310.735.J.1.

II. Litigation history

The Ordinance took effect January 22, 2016. ER 135. On March 9, 2017, after Teamsters Local 117 was designated a QDR and requested qualifying driver lists from twelve driver coordinators (including Chamber members Uber, Lyft, and Eastside-for-Hire), the Chamber sued the City, FAS, and the FAS Director (collectively "the City"), asserting, among other claims, that the Ordinance is preempted by the Sherman Act and the NLRA and not authorized by Washington law. ER 125-154.[4] The Chamber moved for a preliminary injunction barring enforcement of the Ordinance. *See* ER 160.

On April 4, after expedited briefing, the District Court (Lasnik, J.) granted a preliminary injunction, stating that the public would be "well-served by maintaining the status quo while the issues are given careful judicial consideration" but the decision was not "a harbinger of what the ultimate decision in this case [would] be." ER 100.

[4] An earlier Chamber lawsuit challenging the Ordinance was dismissed for lack of standing. *Chamber of Commerce v. Seattle*, No. 2:16-cv-00322, 2016 WL 4595981 (W.D. Wash. Aug. 9, 2016).

The parties briefed the City's motion to dismiss on a regular schedule. After holding oral argument, the court granted the motion on August 1. ER 1-28.

The court held that the Ordinance was exempt from federal antitrust challenge pursuant to *Parker* immunity doctrine. ER 6-16. The court explained that Washington law "clearly delegate[s] authority for regulating the for-hire transportation industry to local government units and authorize[s] them to use anticompetitive means in furtherance of the goals of safety, reliability, and stability," and so the Ordinance satisfied *Parker* immunity's first requirement—that the state's policy permitting displacement of competition be "'clearly articulated and affirmatively expressed.'" ER 8 (citing *Phoebe Putney*, 133 S.Ct. at 1011).

In reaching that conclusion, the court rejected the Chamber's argument that the "clear articulation" standard required the Washington Legislature to authorize the precise forms of regulation embodied in the Ordinance. The court explained that the "clear articulation" requirement is satisfied if the state "'clearly intends to displace competition in a particular field with a regulatory structure.'" ER 9 (quoting *Southern Motor Carriers*, 471 U.S. at 64-65). "Given the undisputed facts regarding plaintiffs' role in organizing and facilitating the provision of private cars for-hire in the Seattle market," the court rejected the Chamber's argument that companies like Uber and Lyft are not subject to municipal regulation. ER 12.

The court concluded that the Ordinance also satisfies *Parker* immunity's second requirement, "active supervision" of private parties' anticompetitive conduct, because the Director's extensive involvement in certifying driver representatives and approving any proposed agreement was sufficient to ensure that the agreement would promote the City's policy goals. ER 16. The court rejected the Chamber's argument that the State of Washington itself had to supervise the negotiations, explaining that such a rule "would eviscerate *Parker* and has no support in the case law." ER 14.

The court also dismissed the Chamber's NLRA preemption claims. The court rejected the Chamber's preemption claim under *Machinists v. Wisc. Employment Relations Comm'n*, 427 U.S. 132 (1976), because the NLRA's history and text showed that Congress's exclusion of independent contractors from the NLRA reflected its "willingness to allow state regulation of the balance of power between independent contractors and those who hire them," rather than a desire to prevent such workers from negotiating collectively. ER 22-24. It concluded that the Chamber failed to state a preemption claim under *San Diego Building Trade Council v. Garmon*, 359 U.S. 236 (1959), because all parties "have taken the position that the for-hire drivers covered by the Ordinance are independent contractors and not

subject to the NLRA," and whether the drivers are NLRA-covered employees "will not be considered or resolved in this litigation." ER 19.[5]

SUMMARY OF ARGUMENT

The District Court properly concluded that the Washington Legislature's express statutory delegation of municipal authority to regulate local for-hire transportation and taxicab services in a potentially anticompetitive manner satisfies the "clear articulation" requirement for *Parker* immunity from federal antitrust law. The Chamber's argument that the City's regulatory authority extends only to for-hire *vehicles* and *drivers*, and that ride-referral *companies* like Uber and Lyft do not provide "transportation services" subject to that authority, ignores the broad scope of the City's statutory authority to regulate local for-hire transportation "without liability under federal antitrust laws," the courts' obligation to construe that authority broadly for *Parker* immunity purposes, and the reality that businesses like Uber and Lyft organize, facilitate, and profit from selling rides to the public.

Further, when a state legislature expressly states its intent to permit anticompetitive municipal regulation of a particular field, as Washington plainly did here, it need not specify each precise form of regulation that might be enacted under that delegated authority, and may instead provide municipalities with the flexibility

[5] The court also dismissed the Chamber's other claims. ER 17, 24-27.

to respond to changing or unforeseen local circumstances. The Chamber's contrary rule disregards Supreme Court and Ninth Circuit precedent, while undermining the federalism-promoting purposes served by *Parker* immunity.

The City's ongoing supervisory role in any collective negotiations conducted under the Ordinance also satisfies the "active supervision" requirement for state action immunity. *Tom Hudson & Associates, Inc. v. City of Chula Vista*, 746 F.2d 1370 (9th Cir. 1984), held that supervision by a municipal official satisfies the "active supervision" requirement, and multiple other circuits have similarly rejected the Chamber's argument that supervision by state government officials is required. The Director's supervision suffices to ensure that any agreement promotes the City's policy goals rather than purely private interests, and the Chamber cannot cite any decision deeming the degree of supervision the Ordinance mandates insufficient.

Even if the Ordinance were not protected by *Parker* immunity, the District Court's dismissal of the Chamber's claim under the Sherman Act, 15 U.S.C. §1, was proper. None of the unilateral actions by Defendants the Chamber alleges involve any *agreement* with a private party in restraint of trade, a necessary prerequisite for any §1 claim. *Fisher v. City of Berkeley*, 475 U.S. 260, 266 (1986).

The District Court also properly dismissed the NLRA preemption claims. Congress's treatment of independent contractors is indistinguishable from its treatment of other groups excluded from NLRA coverage, which this Court has held

may be regulated by states and localities. *United Farm Workers*, 669 F.2d at 1257. Where Congress intended to preempt such regulation, as with supervisors, it did so *expressly*. *See* 29 U.S.C. §164(a). And because the Ordinance only covers independent contractor drivers and the Chamber did not plead any facts showing that such drivers are instead NLRA-covered "employees," the Ordinance does not regulate matters arguably protected or prohibited by the NLRA.

ARGUMENT

I. The Ordinance is exempt from federal antitrust law as an exercise of Seattle's delegated authority to regulate the local for-hire transportation and taxicab industries.

The District Court correctly held that the Ordinance is immune from federal antitrust challenge because it satisfies all requirements for *Parker* immunity.

The City Council enacted the Ordinance pursuant to its broad delegated authority to regulate local for-hire and taxicab transportation services to promote their safety and reliability, including in ways that restrict competition within those industries. The relevant statutes authorize Seattle to regulate "privately operated for hire transportation services" and "privately operated taxicab transportation services" "without liability under federal antitrust laws." Wash. Rev. Code §§46.72.001, 81.72.200. In doing so, Seattle may adopt "[a]ny" requirement needed "to ensure safe and reliable … transportation service." Wash. Rev. Code §§46.72.160(6), 81.72.210(b).

The Chamber does not appeal the District Court's conclusion that the Ordinance is a proper exercise of the City's authority under Washington law. ER 24-26. Nor does the Chamber challenge the City Council's determination that the collective negotiations permitted under the Ordinance (and subject to City approval) will "ensure safe and reliable for hire vehicle service" within Seattle, and thus fall within its authority under Washington Revised Code §46.72.160(6). Ordinance §1.C.[6]

As the Council explained, "Drivers working under terms that they have negotiated through a collective negotiation process are more likely to remain in their positions over time, and to devote more time to their work as for-hire drivers, because the terms are more likely to be satisfactory and responsive to the drivers' needs and concerns." *Id.* §1.I.1. The resulting increase in driver experience and reduction in turnover would, in the Council's view, promote the safety and reliability of local for-hire and taxicab transportation. *Id.* The Council likewise determined that permitting collective negotiations would "help ensure that the compensation drivers receive for their services is sufficient to alleviate undue financial pressure to provide transportation in an unsafe manner (such as by working longer hours than is safe,

[6] Although the City expressly relied on §46.72.160(6) in enacting the Ordinance, the Chamber ignores that provision until page 35 of its Opening Brief.

skipping needed breaks, or operating vehicles at unsafe speeds in order to maximize the number of trips completed) or to ignore maintenance necessary to the safe and reliable operation of their vehicles." Ordinance §1.I.2.[7]

To permit such exercises of regulatory authority and protect states from federal overreach, the "state action" doctrine first recognized in *Parker* immunizes certain government-directed acts from federal antitrust liability. *Parker* is "premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce," including in ways that might otherwise violate antitrust laws. *Southern Motor Carriers*, 471 U.S. at 56. Under *Parker*, "the free market principles espoused in the Sherman Antitrust Act end where countervailing principles of federalism and respect for state sovereignty begin." *Traweek*, 920 F.2d at 591; *see* Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 Yale L.J. 486, 487-88 (1987) (*Parker* "represents the judiciary's effort to respect the results of the political process").

[7] The Chamber admits it is not this Court's role to revisit these findings. Opening Brief of Appellants ("OB") 36 ("[T]he Ordinance's validity under state law is irrelevant.").

A. The Ordinance satisfies the "clear articulation" requirement.

1. *Parker* permits states to delegate discretionary regulatory authority to municipal governments.

The first requirement for *Parker* immunity is that the challenged conduct be undertaken "'pursuant to state policy to displace competition with regulation.'" *Mercy-Peninsula Ambulance, Inc. v. San Mateo County*, 791 F.2d 755, 757 (9th Cir. 1986) (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 413 (1978)). That policy must be "clearly articulated and affirmatively expressed." *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97, 105 (1980).

The Chamber and its amici contend that the clear articulation requirement is satisfied only if the state legislature enumerates each specific form of regulation that municipal governments might permissibly enact pursuant to their delegated regulatory authority. OB 23-24, 33-35; Brief of Antitrust Law Professors ("Professors' Br.") at 6-8 (arguing legislature must have authorized "the challenged restraint"). But the Supreme Court and this Court have rejected that argument, holding that a city need not "be able to point to a specific, detailed legislative authorization" for its regulation. *Lafayette*, 435 U.S. at 415. "Narrowly drawn, explicit delegation is not required." *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1413 (9th Cir. 1985). The City's regulatory authority may be "defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated." *N.C. State Bd. of Dental*

Examiners v. FTC, 135 S.Ct. 1101, 1112 (2015). A showing that "the State as sovereign clearly intends to displace competition in [the] particular field [at issue] with a regulatory structure" is sufficient. *Southern Motor Carriers*, 471 U.S. at 64.

This rule applies with particular force in areas that burden public resources (like public streets) and that are traditionally subject to municipal regulation, like the inherently local market for taxicab and for-hire transportation. *See Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 401-03 (9th Cir. 1991); *Golden State Transit Corp. v. City of Los Angeles*, 726 F.2d 1430, 1434 (9th Cir. 1984).

The purportedly contrary authorities the Chamber and its amici cite (many of which pre-date *Southern Motor Carriers*), *e.g.*, OB 23-25; Professors Br. 6-8; have no relevance here because *none* involved an explicit statement of legislative intent to permit displacement of competition to promote specified purposes comparable to the Washington Legislature's. *See* Wash. Rev. Code §§46.72.001, 81.72.200 (permitting regulation "without liability under federal antitrust laws"); *Omni*, 499 U.S. at 372 (distinguishing showing required to establish "authority to regulate" in particular manner from showing required to establish "authority to suppress competition"; explaining latter showing is made where "delegating statute explicitly permits the displacement of competition"). In each cited case, the legislature authorized certain conduct but was *silent* regarding its intent to authorize the

displacement of competition.[8]

As the District Court explained, "Plaintiffs rely on a number of cases in which the delegating statute did not explicitly permit the displacement of competition." ER 9. Without any express statement of legislative intent, the courts had to determine whether to *infer* intent to displace competition, and thus looked for statutory language authorizing the specific conduct at issue or evidence that the Legislature affirmatively contemplated such conduct. In this case, there is no need to draw such

---

[8] *See Phoebe Putney*, 568 U.S. at 227-28 (general corporate powers to acquire and lease property did not authorize hospital to "act or regulate anticompetitively"); *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 55-56 (1982) (city given only "general grant of power to enact ordinances"). In the other cases the Chamber and its amici cite, the courts recognized that the Legislature's decision to permit anticompetitive conduct in one particular area did not authorize anticompetitive conduct in entirely different areas. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 584-85 (1976) (pervasive regulation of electricity market did not authorize anticompetitive conduct in "unregulated" light bulb market); *Columbia Steel Casting Co., Inc. v. Portland Gen. Elec. Co.*, 111 F.3d 1427, 1437 (9th Cir. 1996) (state commission authorized exchange of electrical transmission facilities and customers but not establishment of exclusive service territories); *Medic Air Corp. v. Air Ambulance Authority*, 843 F.2d 1187, 1189 (9th Cir. 1988) (defendant granted exclusive right to *dispatch* air ambulances, but not exclusive right to *operate* those ambulances); *Springs Ambulance Serv. v. City of Rancho Mirage*, 745 F.2d 1270, 1273-74 (9th Cir. 1984) (statute authorized city to contract with company for emergency ambulance services, but did not address regulation of non-emergency service prices); *see also First Am. Title Co. v. Devaugh*, 480 F.3d 438 (6th Cir. 2007) (authority to receive original title documents did not authorize county registers to establish monopoly over "duplicate title documents or mere title information"). Amici also cite *Dental Examiners*, 135 S.Ct. at 1110, and *Midcal Aluminum*, 445 U.S. 97, Professors' Br. 6-7, but the clear articulation requirement was not at issue there.

inferences, because the Washington Legislature made its intent explicit. "[A]nti-competitive results were not merely foreseeable, they were expressly authorized." ER 9.[9]

For the same reason, the Supreme Court's references to *Parker* immunity as "disfavored" have no bearing here. The Supreme Court has emphasized that courts must always begin with a "presumption *against* [federal] preemption" of state and local law, out of respect for the "historic police powers of the States." *Wyeth v. Levine*, 555 U.S. 555, 575 & n.3 (2009) (emphasis added); *see also California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) (presumption applies to federal antitrust laws). Rather than endorsing a conflicting bias in favor of federal antitrust preemption, the cited references merely reflect the Court's insistence that legislative

[9] Amici propose disregarding §46.72.001's express statement of legislative intent because states "'may not validate a municipality's anticompetitive conduct simply by declaring it to be lawful.'" Brief of U.S. & F.T.C. ("U.S. Br.") at 14 (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 39 (1985)); Brief of Coalition for Democratic Workplace et al. ("CDW Br.") at 5; Professors' Br. 14. But Washington has not merely declared anticompetitive conduct lawful—it has expressed its intention to permit displacement of competition as part of the City's regulatory scheme. The cited cases simply reiterate that state action immunity requires such a clearly articulated state policy *to displace competition* (not a mere declaration of "lawfulness"), as well as active supervision. *See, e.g.*, *Hallie*, 471 U.S. at 39 (distinguishing declaration that conduct is "lawful" from evidence of state's "policy to displace competition"); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992) ("[W]hile a State may not confer antitrust immunity on private persons by fiat, it may displace competition with active state supervision….").

intent to permit displacement of competition should not be inferred absent adequate statutory justification—as evidenced by the Court's comparison of "disfavor[ed]" *Parker* immunity to the presumption against repeals by implication. *See, e.g.*, *Dental Examiners*, 135 S.Ct. at 1110. Where the State's intent to sanction potentially anticompetitive regulation is unambiguous, as here, clear articulation does not *also* require that the legislature unduly restrict its agents' discretion and flexibility.[10]

2. The Ordinance falls within the City's delegated authority, which is construed broadly for *Parker* immunity purposes.

Through the statutes at issue, the Washington Legislature explicitly authorized municipal regulation of "privately operated for hire transportation services" and "privately operated taxicab transportation service" within Seattle "*without liability under federal antitrust laws*." Wash. Rev. Code §§46.72.001, 81.72.200 (emphasis added). The Legislature further provided that pursuant to that authority the City may, among other things, regulate "the manner in which rates are calculated and collected" and adopt "[a]ny other requirements … to ensure safe and reliable for hire vehicle transportation service." Wash. Rev. Code §46.72.160(3), (6).

[10] Amici contend that clear articulation is absent because the Washington Legislature did not *require* the City to regulate in a particular manner. CDW Br. 8-9. *Southern Motor Carriers*, however, expressly rejected the contention that actions must be "compelled by a State" to qualify for *Parker* immunity. 471 U.S. at 58, 61 (state policy that "expressly *permits*, but does not compel, anticompetitive conduct may be 'clearly articulated'") (emphasis in original).

As the District Court recognized, these provisions "clearly delegate authority for regulating the for-hire transportation industry to local government units and authorize them to use anticompetitive means in furtherance of the goals of safety, reliability, and stability." ER 8.

In arguing that the Legislature's intent to displace competition with municipal regulation does not extend to the transportation services and forms of regulation at issue here, the Chamber and its amici contend that the City's authority extends only to for-hire vehicles and their drivers, not to "ride-referral services" like Lyft and Uber. OB 27; Professors' Br. 11. But as the District Court concluded, the Chamber's argument is belied by the relevant statutes and the reality of Uber and Lyft's business—particularly when the statutes are construed broadly, as they must be for *Parker* immunity purposes.

The Supreme Court has made this requirement of broad construction clear: "[I]n order to prevent *Parker* from undermining the very interests of federalism it is designed to protect, it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law." *Omni*, 499 U.S. at 372. Accordingly, to satisfy the clear articulation requirement, the Ordinance need only fall "within a broad view of the authority granted by [Washington]" to the City. *Elec. Inspectors, Inc. v. Village of East Hills*, 320 F.3d 110, 118-19 (2d Cir. 2003). The Supreme Court has compared this inquiry to the test

for absolute judicial immunity, which applies unless a judge "acted in the clear absence of all jurisdiction"—even if the action "was in error, was done maliciously, or was in excess of his authority." *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978) (quotations omitted); *id.* at 358-59 (judge who "err[ed] as a matter of [state] law" in granting sterilization petition retained judicial immunity); *Omni*, 499 U.S. at 372 (citing *Stump v. Sparkman*); *see also Boone v. Redevelopment Agency*, 841 F.2d 886, 891-92 (9th Cir. 1988) (municipal action unauthorized under state law protected by *Parker* immunity).

Under this standard, the Ordinance easily falls within the City's broad authority to regulate for-hire transportation and taxicab services. The Washington Legislature did not limit the scope of the City's antitrust exemption to regulation of for-hire *vehicles*, as the Chamber contends, or to matters that directly involve consumer transactions, as the United States argues. U.S. Br. 9. Instead, the Legislature declared broadly that "*privately operated for hire transportation service* is a vital part of the transportation system within the state," that "the safety, reliability, and stability of *privately operated for hire transportation services* are matters of statewide importance," that "[t]he *regulation of privately operated for hire transportation services* is thus an essential governmental function," and that it is "the intent of the legislature to permit political subdivisions of the state to regulate *for hire transportation services* without liability under federal antitrust laws." Wash.

Rev. Code §46.72.001 (emphases added); *see also* Wash. Rev. Code §81.72.200 (identical taxicab language).

Washington Revised Code §46.72.160 likewise is not limited to for-hire vehicles, drivers, or consumer transactions. Rather, §46.72.160 repeatedly references "for hire vehicle transportation services" *generally*, without any limitation to vehicle-specific regulations. *See* Wash. Rev. Code §46.72.160(1), (3), (6) (permitting municipal regulation of "entry into *the business of providing for hire vehicle transportation services*" and "rates charged for providing *for hire vehicle transportation service*," and permitting adoption of "[a]ny other requirements adopted to ensure safe and reliable *for hire vehicle transportation service*) (emphasis added). Section 46.72.160's repeated references to municipal regulation of "for-hire transportation services" underscore why the Chamber's contrary assertion that the City may regulate only "for-hire vehicles," which is based solely on that section's precatory language, is simply incorrect. Indeed, the Chamber's interpretation of §46.72.160 as excluding certain municipal regulations that promote "the safety, reliability, and stability of privately operated for hire transportation services" but that do not directly target for-hire vehicles would significantly undermine the Washington Legislature's stated purpose of delegating broad municipal authority to perform the "essential government function" of regulating such "matters of statewide importance." Wash. Rev. Code §46.72.001.

Much as the Supreme Court has required that municipal authority be construed broadly for *Parker* immunity purposes, *Omni*, 499 U.S. at 372, the Washington Supreme Court has established that grants of municipal authority must "be construed liberally, rather than narrowly," in a manner that harmonizes state and local law and gives "considerable weight to a statutory interpretation by a party who has been designated to implement the statute"—here, the City. *Heinsma v. City of Vancouver*, 29 P.3d 709, 713-14 (Wash. 2001).[11] Accordingly, under both state and federal precedent, for *Parker* immunity purposes the Washington Legislature authorized regulation of *all* aspects of the local for-hire transportation services industry—not simply regulation of for-hire vehicles or for-hire drivers' interactions with passengers—while granting particularly broad authority to adopt requirements "to ensure safe and reliable for hire vehicle transportation service." Wash. Rev. Code §46.72.160(6).

Disregarding the natural reading of these statutory provisions, and without citing any statutory or precedential support, the Chamber and United States both posit that the "particular field" the City may regulate under its delegated authority is

[11] The United States has no special expertise in Washington law. Nor do its views regarding *Parker* immunity merit deference. *See, e.g., Acosta v. Gonzales*, 439 F.3d 550, 553 n.4 (9th Cir. 2001) (courts do not defer to agency interpretations of judicial precedent), *overruled on other grounds in Garfias-Rodriguez v. Holder*, 702 F.3d 504 (9th Cir. 2012) (en banc).

limited to "the provision of transportation services to passengers." OB 31; U.S. Br. 9 (arguing that authority includes "market for provision of transportation service to consumers," not "market for hiring drivers"). But neither identifies any *textual* basis for engrafting such a limitation upon the City's authority, and "clear articulation" does not require any greater degree of specificity. *See Omni*, 499 U.S. at 373 n.4 (rejecting argument that authorizing statute must "pertain to [the] specific industry" or that general authority to regulate in broadly defined field is inadequate to establish *Parker* immunity); *id.* at 370-74 (delegation of municipal authority to regulate "use of land" and "construction of buildings and other structures" sufficient to immunize anticompetitive municipal billboard restrictions).

Even if the City were wrong in construing state law to authorize the Ordinance, that error would not deprive the Ordinance of immunity. For example, in *Boone v. Redevelopment Agency*, 841 F.2d 886 (9th Cir. 1988), this Court held that the clear articulation requirement could be satisfied even if a city acted *without* state law authority by relying on its authority to develop blighted areas when developing an area that was *not* blighted. *Id.* at 891.[12] The Chamber has abandoned

[12] The proper remedy for actions taken in excess of statutory authority rests in state law, not federal antitrust law. *See Boone*, 841 F.2d at 892 ("[T]he concerns over federalism and state sovereignty raised in *Hallie* and *Llewellyn* dictate that the [plaintiffs] not be allowed to use federal antitrust law to remedy their claim that the city and the agency exceeded their authority under state law."); *see also Kern-Tulare Water Dist. v. City of Bakersfield*, 828 F.2d 514, 522 (9th Cir. 1987) ("Where

its claim that the Ordinance exceeds the City's state law authority, and as *Boone* establishes, its federal antitrust claims have no greater merit.[13]

3. Transportation companies like Uber and Lyft are not exempt from the City's delegated regulatory authority.

The Chamber's argument that Uber and Lyft (but apparently not Chamber member Eastside-for-Hire) do not fall within the City's regulatory authority because they merely "provide ride-referral services to for-hire drivers" rather than providing "transportation service[s]," OB 27, is meritless.

The Chamber contends that Uber and Lyft fall outside the scope of the City's authority because they do not "transport[] passengers from point a to point b." *Id.* But even if this Court were to accept that assertion (notwithstanding its rejection by every other court to consider it, as noted below), the companies' own descriptions of their business models show that they control numerous matters within the scope of §46.72.001 and §46.72.160—including the price for rides and the safety and reliability thereof—such that both companies fall within the City's regulatory

---

ordinary errors or abuses in exercise of state law … serves to strip the city of state authorization, aggrieved parties should not forego customary state corrective processes, in favor of federal antitrust remedies.") (citations omitted); *Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir. 1985).

[13] The Chamber defends its abandonment of the state law claim by saying the Ordinance might be a proper exercise of the City's police powers, OB 36, but the City Council did not invoke its general police powers when adopting the Ordinance, and the City has never defended the Ordinance on those grounds.

authority. As the District Court explained, Uber and Lyft "organiz[e] and facilitate[e] the provision of private cars for-hire in the Seattle market," and it is "disingenuous to argue that they are beyond the reach of a statute that deems 'privately operated for hire transportation services' vital to the state's transportation system and authorizes regulation thereof." ER 12; *see also* ER 102 (admitting that Uber application "facilitate[s] transportation services"). The companies' "technology and contractual relationships, which control a number of the very activities RCW 46.72.160 and RCW 81.72.210 expressly authorize municipalities to regulate, put plaintiffs squarely within the scope of local regulation under those statutes." *Id.*

Further, the argument that Uber and Lyft do not provide transportation services has been rejected by every court to consider it. As one explained:

> Uber's self-definition as a mere "technology company" focuses exclusively on the mechanics of its platform (*i.e.*, the use of internet enabled smartphones and software applications) rather than on the substance of what Uber actually *does* (*i.e.*, enable customers to book and receive rides)…. *Uber does not simply sell software; it sells rides*. Uber is no more a "technology company" than Yellow Cab is a "technology company" because it uses CB radios to dispatch taxi cabs …. If … the focus is on the substance of what the firm actually does …, *it is clear that Uber is most certainly a transportation company, albeit a technologically sophisticated one*.

O'Connor v. Uber Technologies, Inc., 82 F.Supp.3d 1133, 1141 (N.D. Cal. 2015) (emphasis added); *see also Doe v. Uber Techs., Inc.*, 184 F.Supp.3d 774, 786 (N.D.

Cal. 2016); *Cotter v. Lyft, Inc.*, 60 F.Supp.3d 1067, 1078 (N.D. Cal. 2015).[14]

These decisions are premised on undisputed aspects of Uber and Lyft's business model, including that customers contact drivers for Uber and Lyft through the Uber- or Lyft-provided platform; Uber and Lyft set the prices for rides and drivers have no authority to change those prices; Uber and Lyft collect all fares from passengers and remit all payments to drivers while retaining a portion of the fare that Uber and Lyft determine; and Uber and Lyft retain unilateral authority to deactivate drivers based on their customer ratings or willingness to accept passengers. *See, e.g.*, *O'Connor*, 82 F.Supp.3d at 1135-37, 1142, 1149 & n.19, 1151; *Cotter*, 60 F.Supp.3d at 1070, 107-71 & n.3, 1072 n.2, 1079-80. In all these ways, Uber and Lyft operate businesses built around *actively* organizing, facilitating, and profiting from the sale of rides in for-hire vehicles to the public at prices Uber and Lyft establish.

Given the nature of their businesses, companies like Uber and Lyft are not remotely comparable to bulletin board services like Craigslist or eBay that passively

[14] The Chamber contends these cases are irrelevant because they considered whether drivers were employees under California law. OB 32. But the defense rejected in those decisions is indistinguishable from the Chamber's argument here. *Compare* OB 31 (arguing "Uber and Lyft do not provide transportation services" but only "sell[] ride-referral services to drivers"), *with, e.g.*, *O'Connor*, 82 F.Supp.3d at 1141 ("central premise" of Uber's defense was "that it is not a 'transportation company,' but instead is a pure 'technology company' that merely generates 'leads' for its transportation providers through its software," and that drivers "are simply its customers who buy dispatches that may or may not result in actual rides").

facilitate transactions between third parties who may also conduct business outside the platform and who independently establish the substantive terms of their exchange. *See Cotter*, 60 F.Supp.3d at 1078 (comparison of Lyft to eBay "obviously wrong"). Equally inapt is the Chamber's comparison of Uber and Lyft to mechanics or landlords who happen to do business with for-hire drivers but have not built their business around facilitating and profiting from the sale of transportation to the public. *Cf., e.g., Rhone v. Try Me Cab Co.*, 65 F.2d 834, 835 (D.C. Cir. 1933) (rejecting taxi dispatch company's argument that it could not be held liable for passenger injuries because it merely "furnish[ed] its members a telephone service").

Indeed, without objecting to the City's regulatory authority, both Uber and Lyft have complied with other City ordinances adopted under the same grant of authority involved here, including by paying fees, *see* SMC 6.310.150.B, 6.310.175; providing data, *see* SMC 6.310.540; submitting vehicles for inspection, *see* SMC 6.310.270.R; and applying for for-hire licenses for their drivers, *see* SMC 6.310.400—none of which would apply to them if the Chamber were correct.

Numerous statutory provisions make clear the Washington Legislature did not intend to permit transportation companies to evade regulation through such sophistry. The Legislature defined "transportation of persons" to include not simply moving passengers "from point a to point b," but "*any service in connection with* the receiving, carriage, and delivery of persons transported and their baggage and all

facilities used[.]" Wash. Rev. Code §81.04.010(15) (emphasis added).[15] Likewise, the Legislature defined "for hire operator" to include "*any* person, concern, or entity engaged in the transportation of passengers for compensation in for hire vehicles." Wash. Rev. Code §46.72.010(2) (emphasis added). The Washington Legislature thus intended that state and local regulatory authority over transportation services be construed broadly to encompass *all* companies directly involved in the provision of such services to the public, regardless of their business structure.

The Chamber contends that even if the City's authority can be construed to authorize regulation of companies like Uber and Lyft, the "novelty" of their business model and of the City's regulatory response, and the fact that their smartphone application-based model did not exist in 1996, show that the Legislature did not "affirmatively contemplate" the regulation of such companies, which the Chamber contends is necessary for *Parker* immunity. OB 38. But the fact that Uber and Lyft use new technologies to provide for-hire transportation services is irrelevant when evaluating the City's *Parker* immunity. As the Supreme Court has held, *Parker*

[15] The provisions of Wash. Rev. Code §46.72 were previously codified in Title 81, *see* 1961 Wash. Sess. Laws 413, 465-66, and the Legislature's definition of passenger transportation to include "any service in connection with" such transportation predated the transfer of those provisions from Title 81 to Title 46, *see* 1955 Wash. Sess. Laws 1409 (defining "conveyance of persons"). Copies of the cited Washington Sessions Laws are available at http://leg.wa.gov/CodeReviser/Pages/session_laws.aspx.

immunity permits delegation to the entities best situated "to deal with problems *unforeseeable* to, or outside the competence of, the legislature." *Southern Motor Carriers*, 471 U.S. at 64 (emphasis added). "[I]t would embody an unrealistic view of how legislatures work and of how statutes are written to require state legislatures to explicitly authorize specific anticompetitive effects before state-action immunity could apply." *Phoebe Putney*, 568 U.S. at 229. Even if the Legislature did not anticipate the emergence of smartphone technology in 1996, its broad delegation of municipal authority to regulate for-hire transportation is sufficient.

Further, Uber and Lyft's use of technology is not nearly as "novel" as the Chamber contends—and certainly not so novel as to suggest that the Legislature did not authorize the City to respond to such technological changes. While Uber and Lyft use smartphone applications to dispatch drivers, taxicab companies have been using radios for that purpose for nearly a century. Much like the Chamber, taxicab companies unsuccessfully characterized themselves more than 80 years ago as mere "telephone services" that could not be held responsible for passenger injuries. *See Rhone*, 65 F.2d at 835 (taxi dispatch company contended it was "nonprofit-sharing corporation, incorporated … for the purpose of furnishing its members a telephone service and the advantages offered by use of the corporate name" that "did not own … any … cab"). Courts rejected those arguments, and the Washington Legislature defined passenger transportation broadly to include *any* service connected to "the

receiving, carriage, and delivery of persons." Wash. Rev. Code §81.04.010(15). Just as taxi dispatch services' use of radios to dispatch drivers did not insulate them from regulation in the 1930s, Uber and Lyft's reliance on smartphone applications to dispatch drivers and to calculate and collect passenger fares does not exempt them from regulation as for-hire transportation services.

In a final attempt to establish that Uber and Lyft are not subject to regulation, the Chamber cites a 2015 bill regarding "commercial transportation services providers." OB 39; *see* Wash. Rev. Code §§48.177.005, 48.177.010. But as the District Court recognized, that legislation says nothing about the scope of then-existing Washington laws regarding for-hire transportation—particularly given the Legislature's decision to *delete* the original bill's provision exempting Uber and Lyft from §46.72. App. 86a-87a n.7; *see also* http://app.leg.wa.gov/billsummary?BillNumber= 5550&Year=2015 (collecting bill drafts).[16] The Chamber's reliance on the "Final Bill Report" as purportedly noting what "[t]he legislature … stated," OB 39, is misplaced: By its own terms the report "is not a part of the legislation *nor does it constitute a statement of legislative intent*." Addendum A-33 (emphasis added);

[16] The Chamber misleadingly cites the bill originally introduced instead of the law the Legislature actually *enacted*. OB 39. Rather than exempting covered entities from §46.72, the *enacted* legislation provided that such entities could satisfy its requirements by *complying* with the provisions of §46.72. Wash. Rev. Code §48.177.010.1(a) ("[T]he insurance coverage requirements of this section are alternatively satisfied by securing coverage pursuant to chapter 46.72[.]").

ER 13 n.7 (noting Chamber's error).

4. *Parker* immunity preserves states' ability to grant municipalities discretionary regulatory powers.

The Chamber's amici separately contend that the City's broad statutory authorization to regulate the local for-hire transportation services industry is inadequate because the Washington Legislature did not specifically reference collective driver negotiations. Professors' Br. 6-8. But as noted already, the Supreme Court and this Court have rejected that argument, holding that a city need not "be able to point to a specific, detailed legislative authorization'" for its regulation. *Lafayette*, 435 U.S. at 415; *see also Preferred Communications*, 754 F.2d at 1413 ("Narrowly drawn, explicit delegation is not required.").

Southern Motor Carriers establishes that the City's broad authority to regulate the for-hire transportation industry in ways that potentially restrict competition is sufficient to immunize regulations authorizing collective action within that industry. That decision held that a state agency's statutory grant of authority to regulate intrastate transportation rates was sufficient to immunize private motor carriers' *joint submission of proposed rates* for such transportation—i.e., coordinated price-fixing—because the state had "made clear its intent that intrastate rates would be determined by a regulatory agency, rather than by the market," while leaving "[t]he details of the inherently anticompetitive rate-setting process ... to the agency's discretion." 471 U.S. at 50-51, 63-64. Similarly here, the Washington Legislature's

express decision to permit the City to restrict competition within the for-hire and taxicab transportation industries in order to promote their safety and reliability is sufficient to immunize collective action under the Ordinance.

Ultimately, the Chamber and its amici ask this Court to hold that the Legislature must conceive of every possible way delegated authority might be exercised before *Parker* immunity can attach to municipal regulation, even where the legislature indisputably intended to permit municipal government regulation of an inherently local field or industry in ways that might reduce competition. Such a rule would eviscerate *Parker*'s federalism-promoting purposes by preventing states from "allocat[ing] governmental authority [to] …. municipalities to regulate areas requiring flexibility and the exercise of wide discretion at the local level." *Preferred Communications*, 754 F.2d at 1414. The clear articulation requirement does not so restrict state authority, but instead *preserves* states' ability to grant municipalities flexible and discretionary regulatory powers. *Id.* at 1413-14. As the Supreme Court recognized, *Parker* permits delegation to entities like cities that are better situated than legislatures to address "unforeseeable" problems that emerge within a particular field. *Southern Motor Carriers*, 471 U.S. at 64.

Here, the Washington Legislature authorized potentially anticompetitive municipal regulation of the local taxicab and for-hire transportation industries, while defining that authority at a "high a level of generality" to allow cities like Seattle to

exercise discretion and flexibility when choosing, based on local conditions, "how and to what extent the [for-hire transportation] market should be regulated." *Dental Examiners*, 135 S.Ct. at 1112. Seattle's "creativity in its attempts to promote the goals specified in the statute does not abrogate state immunity." ER 9. If anything, this creativity reflects a core aspect of our federalist system of governance that should be encouraged, not thwarted by an overly restrictive view of *Parker* immunity.

B. The Ordinance satisfies the "active supervision" requirement.

The Ordinance also satisfies the second *Parker* immunity requirement—active government supervision of private party conduct.[17]

1. Municipal supervision is sufficient.

The active supervision requirement ensures 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." *Ticor Title*, 504 U.S. at 634-35. That purpose is served if government officials "have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Dental Examiners*, 135 S.Ct. at 1112 (quotation omitted). The Ordinance easily meets that standard: A city official must review every proposed

[17] The United States does not join the Chamber's "active supervision" arguments in any respect.

agreement, make an affirmative finding that the agreement furthers the City's purposes, and issue a written explanation—*before* any agreement may take effect. SMC 6.310.735.H.2, I.3, I.4.[18]

The Chamber's argument that municipal officials cannot provide "active supervision" relies entirely upon out-of-context quotations from Supreme Court decisions referencing "'State'" supervision. OB 42. None of the cited cases address the issue here: whether, when the State has expressly delegated regulatory authority to a municipality, municipal (rather than state government) officials may supervise private party conduct authorized pursuant to that authority.

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985), upon which the Chamber primarily relies, addressed whether municipal actors must themselves be actively supervised (and said no)—not whether private parties acting pursuant to municipal regulation must be supervised by state rather than municipal officials. *Id.* at 46. Rather than opining on an issue not presented by drawing a distinction between state and municipal supervision, the footnote upon which the Chamber premises its argument simply describes the general standard requiring "active state supervision." *Id.* at 46 n.10. Like other cases referencing "state" supervision, *see* OB 42, the footnote does not use "state" as a term of art excluding municipalities, but as

[18] The Director is also an active participant in numerous earlier steps in the negotiation process. ER 14.

shorthand for the State and all its agents, including municipalities. *See* Garland, *Antitrust and State Action*, 96 Yale L.J. at 495 n.57 (*Hallie*'s use of "state" "is best read in its generic sense as contemplating either state or municipal supervision").

If anything, *Hallie* supports the City. In rejecting the argument that municipalities must be supervised by the States, *Hallie* explained that when private parties engage in anticompetitive conduct, "there is a real danger that [they are] acting to further [their] own interests, rather than the governmental interests of the State." 471 U.S. at 47. But "[w]here the actor is a municipality, *there is little or no danger that it is involved in a private price-fixing arrangement*," and the risk the municipality will act to "further purely parochial public interests … is minimal … because of the requirement that the municipality act pursuant to a clearly articulated state policy." *Id.* (emphasis modified).[19]

Other Supreme Court decisions similarly explain that municipal governments are unlikely to become involved in private price-fixing arrangements because they "are electorally accountable and lack the kind of private incentives characteristic of active participants in the market," and "exercise[] a wide range of governmental powers across different economic spheres, substantially reducing the risk that [they] would pursue private interests while regulating any single field." *Dental Examiners*,

[19] The Chamber quotes this language out of context in a manner that suggests *Hallie* expressed the opposite view. OB 44.

135 S.Ct. at 1112-13; *Phoebe Putney*, 568 U.S. at 226 (municipalities "have less of an incentive to pursue their own self-interest under the guise of implementing state policies"). While the Chamber and its amici distrust municipalities, contending they are "more likely than state actors to be influenced by local special interests," OB 44, the Supreme Court has never endorsed such distrust—much less incorporated it into *Parker* immunity doctrine.[20]

Multiple circuit courts, including this one, have recognized that municipal supervision is sufficient. The Chamber acknowledges this Court's decision in *Tom Hudson*, 746 F.2d 1370, asserting it "simply assumed" that municipal supervision of private party conduct sufficed. OB 46. But *Tom Hudson* held that Chula Vista's supervision of private parties fulfilled *Parker*'s requirements, and the Ordinance at issue here involves the identical supervisory structure (albeit with a greater degree of supervision). The Chamber also contends that *Hallie* overruled *Tom Hudson*, but

[20] *Omni* also does not support the Chamber. *Cf.* OB 45. *Omni* rejected a conspiracy exception to *Parker* immunity because, among other reasons, it would interfere with the legislative process and compromise states' ability to regulate, while "reiterat[ing] that," except when the government is a market participant, "*any* action that qualifies as state action is '*ipso facto*' … exempt from the operation of the antitrust laws.'" 499 U.S. at 375-79 (ellipsis and emphases in original). Nor is there merit to the contention that the Ordinance reflects a "too-cozy relationship between the Teamsters and certain Seattle officials." OB 45. Besides its irrelevance under *Omni* and reliance on double hearsay, the Chamber's argument ignores the City Council's express findings regarding the Ordinance's safety and reliability benefits (which the Chamber does not challenge).

Tom Hudson cited the very same language regarding "State" supervision the Chamber relies upon, which was originally set forth in a 1980 Supreme Court decision. *See* 746 F.2d at 1374 ("The actions of a private person are not exempt from federal antitrust laws ... unless actively supervised *by the State*.") (citing *Cal. Liquor Dealers*, 445 U.S. 97) (emphasis added).

The First and Eighth Circuits have since reached the same conclusion in fully reasoned decisions. *See Tri-State Rubbish, Inc. v. Waste Mgmt., Inc.*, 998 F.2d 1073, 1079 (1st Cir. 1993) (post-*Hallie*); *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005, 1014-15 (8th Cir. 1983). Both recognize that municipal supervision provides sufficient safeguards against private party abuses because municipal officials—like state government officials—are politically accountable. *See id.* at 1014. They conclude that when state legislators delegate a function to local officials in areas that involve private actors, it makes no sense to require state government employees to oversee private actors' conduct. *See id.* at 1014-15; *Tri-State*, 998 F.2d at 1079 & n.6 (quoting "the leading antitrust treatise" for the principle that "it would be implausible to rule that a city may regulate, say, taxi rates but only if a state agency also supervises the private taxi operators").[21]

[21] The Chamber contends "[o]ther circuits have recognized *Hallie*'s impact," OB 46, but cites only a Sixth Circuit order that did not address the question in depth and simply amended a statement the panel was concerned "*may* not be a completely accurate statement of the law." *Riverview Investments, Inc. v. Ottawa Community*

The Chamber disagrees with this assessment, but its argument lacks any precedential support and ignores the ubiquitous nature of state delegations of regulatory authority to municipalities in inherently local areas where private parties engage in significant anticompetitive conduct, such as utility provision, garbage collection, ambulance and emergency services, and taxicab transportation. This Court has consistently held that active supervision doctrine should not be applied in a manner "requir[ing] municipal ordinances to be enforced by the State rather than the City itself," *Golden State Transit*, 726 F.2d at 1434 (quotation omitted)—which is just what the Chamber seeks here.

Indeed, in a nearly identical context—regulation of "public transportation by taxicab," which California had determined "should be handled by local government"—this Court refused to construe *Parker* doctrine to interfere with California's decision to assign regulatory and supervisory functions to municipal governments, because doing so would "erode local autonomy" while requiring the State to "invest its limited resources in supervisory functions that are best left to

---

Improvement Corp., 774 F.2d 162, 163 (6th Cir. 1985) (order) (emphasis added). Subsequent Sixth Circuit decisions hold that where (as here) a municipal official has ultimate decision-making authority, the municipal government is the "effective decision maker" and the active supervision requirement is inapplicable. *See, e.g.*, *Mich. Paytel Joint Venture v. City of Detroit*, 287 F.3d 527, 536-38 (6th Cir. 2002). Thus, the Ordinance also qualifies for *Parker* immunity in that circuit.

municipalities." *Id.*; *cf. Preferred Communications*, 754 F.2d at 1414 (recognizing state's right to delegate "authority between itself and its subdivisions").[22] The very purpose of *Parker* immunity is to permit states to make such regulatory decisions, including by choosing which of their agents—be they state agencies *or* municipal governments—should develop the appropriate regulations and provide the required supervision. *Preferred Communications*, 754 F.2d at 1414.[23]

2. The Director's affirmative obligation to review and approve or reject all proposed agreements constitutes active supervision.

Finally, the Chamber argues that even if municipal supervision can satisfy the "active supervision" requirement, the Ordinance fails because "the supervision contemplated under the Ordinance is insufficiently active." OB 48. Its argument is contrary to Supreme Court precedent.

The Chamber complains that the Ordinance does not authorize municipal officials to "modify particular decisions" or "participate in the collective-bargaining

[22] The Chamber contends that *Golden State Transit* considered only "state supervision of municipalities themselves," OB 46, but if the "supervisory functions" referenced in *Golden State Transit* included only the "[s]upervision of municipal actors," the municipal actors would be "supervising" *themselves*—which can hardly be called "supervision."

[23] The Supreme Court has never questioned the adequacy of supervision by state agencies. *See Southern Motor Carriers*, 471 U.S. at 62-63. Like municipalities (but unlike state legislatures), state agencies are not themselves the "sovereign." And no authority suggests that state agencies are less prone to capture than local governments.

process." OB 49. But there is no requirement that government officials participate in *developing* proposals or be able to "modify" those proposals unilaterally. Rather, the Supreme Court has held that supervision is sufficient so long as government officials "have and exercise power to *review* particular anticompetitive acts of private parties and *disapprove* those that fail to accord with state policy." *Dental Examiners*, 135 S.Ct. at 1112 (emphasis added); *see also Tom Hudson*, 746 F.2d at 1374 (supervision adequate where municipal official "pointedly reexamine[d]" private parties' proposals); *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 825 (9th Cir. 1982) (supervision adequate where government "thoroughly investigate[d]" reasonableness of private agreements).

The Ordinance easily satisfies that standard: No proposal can take effect unless and until the Director affirmatively determines it will "promote[] the provision of safe, reliable, and economical for-hire transportation services and otherwise advance the public policy goals set forth in [the Ordinance]," and the Director may gather evidence, hold public hearings, and request information needed for that determination. SMC 6.310.735.H.2, I.3. The Director must approve amendments to existing agreements before they take effect, and may withdraw approval of an agreement that no longer furthers the City's purposes. SMC 6.310.735.J. While the Ordinance does not instruct the Director to modify unsatisfactory proposals unilaterally, and instead requires him to return such

proposals to the parties with a written explanation of their deficiencies and (should he choose) remedial recommendations, SMC 6.310.735.H.2.b, I.4.b, no precedent requires such unilateral authority. Imposing such a requirement would be effectively meaningless, because the parties will incorporate the Director's reasoning into subsequent proposals in order to procure approval.

The Chamber cites *Patrick v. Burget*, 486 U.S. 94 (1988), but the supervision there was inadequate not because government officials were "not sufficiently involved in the making of the determinations themselves," OB 50, but because no official had the power "to *review* private peer-review decisions and *overturn* a decision that fail[ed] to accord with state policy," *Patrick*, 486 U.S. at 102 (emphasis added)—the very powers the Director exercises here. Similarly, *Ticor Title* held active supervision lacking because the prices set by private parties were "subject only to a veto if the State ch[ose] to exercise it," and the evidence showed the state agencies *never* exercised that authority. 504 U.S. at 638-39.[24] The Ordinance, by contrast, requires the Director's *affirmative* approval of any agreement. Finally, the defendant in *Dental Examiners* admitted there was no supervision *at all*. 135 S.Ct. at 1116.

The Chamber asserts that a "heightened" standard applies here because

[24] In this pre-enforcement facial challenge, the Chamber cannot present the type of evidence offered in *Ticor Title*.

negotiated agreements might include terms about payments between drivers and coordinators (as well as numerous other topics, such as vehicle safety and the standard for deactivating drivers). OB 48-49. That argument, however, is foreclosed by *Southern Motor Carriers*, which indisputably involved "price fixing" by private parties. *Id.* Indeed, the price-fixing regime at issue there permitted private actors to develop proposals that took effect unless *disapproved* by state commissions, while the proposals at issue here take effect only if the Director *affirmatively* approves them. *Southern Motor Carriers*, 471 U.S. at 50-51. Although those commissions exercised significantly *less* supervision over private parties than exists here, the Supreme Court found sufficient active supervision, without suggesting any heightened scrutiny applied. *Id.* at 66.

Because the Director exercises every power the Supreme Court's and this Court's decisions require and the Chamber cannot cite a single case holding a comparable degree of supervision inadequate, the Ordinance easily satisfies the second *Parker* immunity requirement.[25]

[25] For purposes of its motion to dismiss, the City did not challenge the Chamber's contention that collective negotiations regarding topics such as payments to drivers could, absent *Parker* immunity, constitute per se antitrust violations. The Ordinance, however, also allows for collective negotiations on other topics (such as driver safety) that cannot even arguably amount to *per se* violations of federal antitrust law, and the Ordinance cannot possibly be preempted in those respects. *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 885-86 (9th Cir. 2008) ("[T]o be struck down [as preempted], the regulation or restraint must effect a per se violation of the Sherman

II. The District Court properly dismissed the Sherman Act claim.

Assuming the Chamber has not abandoned its appeal by failing to brief the issue, *see* OB at 51 n.2, the District Court properly dismissed Count One of the Chamber's complaint alleging Defendants' substantive violation of the Sherman Act, 15 U.S.C. §1, because even if the Ordinance were not immune under *Parker*, the Chamber does not plead facts showing that any Defendant has entered into a combination in restraint of trade.

The Chamber alleges that Defendants violated the Sherman Act by enacting the Ordinance, issuing implementing regulations, and approving Local 117's QDR application. ER 66, 69. But Defendants cannot be held liable for merely enacting and implementing regulations. "Even where a single firm's restraints directly affect prices and have the same economic effect as concerted action might have, there can be no liability under §1 in the absence of *agreement*." *Fisher*, 475 U.S. at 266 (emphasis added).

The Chamber does not plead that any defendant has reached an *agreement* with any private party, a necessary element of a Section 1 claim. Instead, the

---

Act."). Moreover, should this Court reverse, the City intends to establish that *none* of the conduct the Ordinance mandates constitutes a per se violation, given the unique businesses involved. *See Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8-10 (1979) (declining to apply per se rule based on lack of judicial familiarity with conduct and industry).

Chamber challenges only *unilateral* City actions categorically exempt from antitrust liability under *Fisher*. Because none of those acts involve the kind of "concerted action" in restraint of trade necessary to state a claim under Section 1 of the Sherman Act, the District Court properly dismissed this claim. *Id.*[26]

III. The NLRA does not preempt the Ordinance.

A. The District Court properly dismissed the *Machinists* preemption claim.

The Chamber contends that in excluding independent contractors from the NLRA's protections, Congress "expressed a national pro-free market policy that independent contractors should compete under ordinary market forces," which preempts any state or local regulation that would interfere with such market competition, including the Ordinance. OB 55. But the Chamber cites nothing in the NLRA's text or legislative history to support this imagined congressional purpose, because none exists. The NLRA's text and history establish that, as with other groups excluded from the NLRA's coverage, state and local governments are free to

[26] Because the Ordinance permits certain terms to be *proposed* to the Director but those proposals have no effect without the Director's findings and approval, the Ordinance permits only *unilaterally imposed* restraints upon trade categorically exempt from antitrust challenges—an alternative ground upon which to affirm the dismissal of *all* antitrust claims. *See Fisher*, 475 U.S. at 269-70 (rent-control ordinance unilateral even though private parties could "trigger the enforcement of its provisions"); *Yakima Valley Mem. Hosp. v. Wash. Dep't of Health*, 654 F.3d 919, 926, 930 (9th Cir. 2011) (state-imposed ban on new facilities unilateral even though it enabled incumbent providers to exclude competition).

regulate concerted activity by independent contractors in the manner they deem most appropriate. *United Farm Workers*, 669 F.2d at 1257.

The Chamber characterizes its argument as one arising under *Machinists*, 427 U.S. 132 (1976), but its characterization is misplaced. *Machinists* preemption prevents state and local governments from upsetting the "*balance* of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes" that Congress struck in the NLRA. *Id.* at 140 n.4 (emphasis added).[27] Those NLRA protections and prohibitions extend *only* to NLRA-covered employers and employees. Because independent contractors are *not* covered by the NLRA, there is no congressional balancing of interests to protect from state or local disruption. *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008), which applied *Machinists* to hold that Congress intended to leave employer speech *in labor disputes covered by the NLRA* unregulated, is wholly inapposite.[28]

---

[27] *See also id.* at 143-44 (discussing Congress's decision "to outlaw particular economic weapons on the part of unions" while leaving other forms of "economic pressure" available as "part and parcel of the process of collective bargaining"); *id.* at 144 ("The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint.") (citation omitted); *id.* at 146 (NLRA struck "balance … between the uncontrolled power of management and labor to further their respective interests") (citation omitted).

[28] Contrary to amici's contentions, CDW Br. 14-17, *Machinists* preemption applies only to state or local interference with collective bargaining *between NLRA-covered employers and employees*. Because the NLRA does not regulate concerted activity

That *Machinists* preemption is irrelevant when evaluating state or local regulation of matters involving groups *excluded* from NLRA coverage is evident from the Supreme Court's decision in *Beasley v. Food Fair of N.C., Inc.*, 416 U.S. 653 (1974), which considered whether the NLRA preempts state regulation of the labor relations of a different group of excluded workers (supervisors). *Beasley* did not ask whether the exclusion of supervisors, standing alone, demonstrated preemption. Instead, *Beasley* considered whether Section 14(a) of the NLRA, 29 U.S.C. §164(a), *expressly* preempted such regulations—and held, after considering both the statutory text of Section 14(a) and Congress' reasons for excluding supervisors, that it did. *Beasley*, 416 U.S. at 657.

The Chamber contends that Congress "meant to leave independent contractor arrangements to the free play of economic forces, rather than subject to collective bargaining, federal or local." OB 52. This Court has held, however, that when the NLRA excludes a group of workers from its coverage and is otherwise silent, state and local regulation of those workers' collective organization is *not* preempted. *See*

---

or collective bargaining by independent contractors, the various differences between the Ordinance and the NLRA do not establish *Machinists* preemption. "If … the NLRA does not apply because for-hire drivers are independent contractors, the right to bargain collectively and the procedures through which that right is exercised will be determined by state law, as is the case with public employees and agricultural workers." ER 22 n.12; *see, e.g.*, Cal. Labor Code §1164 (creating "mandatory mediation and conciliation" process for agricultural workers).

United Farm Workers, 669 F.2d at 1257 ("[W]here … Congress has chosen not to create a national labor policy in a particular field, the states remain free to legislate as they see fit."). The *exact same* statutory provision that excludes independent contractors from the NLRA's definition of "employee" also excludes agricultural laborers, domestic workers, and public employees—groups the Chamber admits are subject to state and local regulation. 29 U.S.C. §§152(2), (3); *see* OB 57.

As *United Farm Workers* held, the exclusion of a group from NLRA coverage does not show Congress had any preemptive intent; rather, this Court "draw[s] precisely the *opposite* inference," allowing state and local regulation absent contrary statutory direction. *United Farm Workers*, 669 F.2d at 1257 (emphasis added). That Congress may have had different *reasons* for excluding different categories of workers from the NLRA, *see* OB 57-58, does not alter their identical statutory treatment. Because "Congress has chosen not to create a national labor policy" regarding those excluded workers, "the states remain free to legislate as they see fit, and may apply their own views of proper public policy to the collective bargaining process insofar as it is subject to their jurisdiction." *United Farm Workers*, 669 F.2d at 1257.[29]

[29] Amici contend that Congress "contemplated [independent contractors'] involvement in labor-related disputes and occurrences" while otherwise excluding them from the NLRA, demonstrating that Congress "chose for their rights to be controlled by the free market." CDW Br. 14. But the cited provisions apply with

This conclusion is supported by the NLRA's text, which demonstrates that where Congress intended to preempt state and local regulation of a particular group of workers' labor relations, it did so *expressly*. Like independent contractors, agricultural employees, domestic workers, and public employees, supervisors are excluded from the NLRA's definition of "employee," and thus denied the NLRA's substantive protections. 29 U.S.C. §152(3). But unlike the NLRA's silence regarding state regulation of the former categories of workers (including independent contractors) who are simply excluded from coverage, Section 14(a) expressly provides that supervisorial labor relations may *not* be regulated by states, stating, "no employer ... 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*." 29 U.S.C. §164(a) (emphasis added). No similar provision preempts state or local regulation of independent contractors (or other excluded workers). This Court must "not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply," especially

---

equal force to groups the Chamber admits are subject to state and local regulation, such as agricultural workers and public employees. *See* OB 57. Rather than demonstrating Congress's desire to preempt state or local regulation, the provisions merely acknowledge that traditional employer-employee labor disputes sometimes involve others. *See, e.g.*, *IBEW Local 3*, 244 NLRB 357, 358 (1979) (1959 NLRA amendments eliminated unions' ability to "enlist the aid of nonstatutory agricultural, governmental, railroad, or airline employees to carry out secondary boycotts").

"when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama v. ICE*, 543 U.S. 335, 341 (2005).[30]

The Chamber advocates ignoring this textual distinction, as well as this Court's precedents, based on differences between employees and independent contractors that Congress identified when it excluded independent contractors from the NLRA in 1947's Taft-Hartley Act. OB 52-54. But even if those justifications explain why Congress did not believe independent contractors needed *federally protected* rights, nothing in Taft-Hartley's legislative history, much less the NLRA's text, suggests Congress intended to *preempt* state or local regulation of such matters or to establish a new federal rule that such workers' labor relations *must* "be governed by market forces, rather than collective bargaining." OB 53.

To the contrary, as the Chamber and its amici acknowledge, Taft-Hartley's goal with respect to independent contractors was simply to *restore* the NLRA to its original scope, which was limited to common law employees. OB 53; CDW Br. 19. Because in Congress's view the original NLRA did not address the rights of independent contractors, their status following Taft-Hartley remained the same as prior to the NLRA's enactment: They had no federally protected collective

[30] That Congress chose to preempt state regulation of supervisorial labor relations *expressly* while adopting no similar provision regarding independent contractors shows the two provisions are *not* "parallel exemptions [that] should be interpreted to have a similar preemptive force." OB 54.

bargaining (or other employment) rights and, as in all cases where Congress has not acted, the states retained their traditional power to regulate relationships between independent contractors and contracting enterprises.

Congress's views regarding supervisors were notably different. As the Chamber acknowledges, OB 55, Taft-Hartley broadly preempted state regulation of supervisors because Congress concluded that supervisor unionization *affirmatively undermined* the NLRA's goals and processes. *Beasley*, 416 U.S. at 659-62. Specifically, Congress expressed concern that supervisor unions acted in ways subservient to unions of rank-and-file employees whom they supervised, causing divided loyalties. H.R. Rep. No. 80-245, at 14-17 (1947) ("Management, like labor, must have faithful agents.... [T]here must be in management and loyal to it persons not subject to influence or control of unions."). Unionization made it difficult for supervisors to act as "management obliged to be loyal to their employer's interests," and "might impair [their] loyalty and threaten realization of the basic ends of federal labor legislation." *Beasley*, 416 U.S. at 659-60. Congress thus determined "that unionizing supervisors threatened realization of the basic objectives of the Act to increase the output of goods in commerce by promoting labor peace." *Id.* at 661.

As the District Court explained, "[t]hese deleterious effects would arise regardless of whether supervisors unionized under the NLRA or under state law." ER 23; *see also* ER 96. To avoid "putting supervisors in the position of serving two

masters" and to protect employers against having to recognize supervisor unions, Congress expressly preempted state and local laws mandating their recognition. *Beasley*, 416 U.S. at 662.[31]

The Supreme Court relied upon this legislative history, as well as Section 14(a)'s language, in concluding that the NLRA broadly preempts state regulation of supervisor unionization. *Beasley*, 416 U.S. at 657-62. Those justifications have no application in the context of independent contractors. While the Chamber proclaims "the deleterious effects of allowing independent contractors to unionize would arise under either federal or state law as well," OB 55, it points to nothing supporting its speculation that Congress perceived such "deleterious effects." Rather, as with other excluded groups, Congress left the states "free to legislate as they see fit." *United Farm Workers*, 669 F.2d at 1257.

[31] The Chamber's tortured attempt to explain away Section 14(a), OB 55-56, not only lacks any support in Taft-Hartley's legislative history or subsequent decisions, but also disregards the fact that independent contractors joined employee unions prior to Taft-Hartley's enactment, and that such arrangements remained permissible after Taft-Hartley. *See, e.g., Am. Fed. of Musicians v. Carroll*, 391 U.S. 99, 105-06 (1968) (rules governing conditions under which independent contractor members' of musicians' union accepted engagements fell within labor exemption to federal antitrust liability).

B. The District Court properly dismissed the *Garmon* preemption claim.

Finally, the Chamber contends that the Ordinance is preempted under *Garmon*, 359 U.S. 236, because local officials and state courts may be required to determine whether certain for-hire drivers are NLRA-covered "employees" exempt from the Ordinance or independent contractors subject to the Ordinance. OB 58-59. But the mere fact that a state or local official might at some future point need to determine whether a driver is an "employee" does not establish that a law is preempted in every application. If it did, every law covering agricultural laborers, for example, would be preempted simply because disputes over whether particular workers are covered might arise. *See, e.g.*, *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261 (9th Cir. 1994) (considering whether particular workers were employees covered by NLRA or agricultural workers covered by California law). That is not the law. *United Farm Workers*, 669 F.2d at 1255-57.

When there is doubt as to whether particular workers or organizations are covered by the NLRA, state or local regulation of those workers or organizations is preempted only if the party asserting preemption has "put forth enough evidence to enable the court to find that the [NLRB] reasonably could" determine that they are NLRA-covered. *Int'l Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 395 (1986). Only after the showing that a particular worker is "*arguably* an employee" is made must "the issue … be initially decided by the NLRB, not the state courts."

Id. at 394 (emphasis added).

As the District Court recognized, dismissal of the *Garmon* preemption claim was appropriate because the Chamber made no allegations that, if proven, would establish that its members' drivers are arguably NLRA employees. ER 19. In fact, the Chamber alleged precisely the opposite. ER 56-58, 67. Nor did the Chamber allege any facts that the NLRB could reasonably rely upon to hold that its members' drivers are NLRA-covered employees. Indeed, doing so would be contrary to Uber's and Lyft's position in numerous other cases. *See, e.g.*, *O'Connor*, 82 F.Supp.3d at 1135; *Cotter*, 60 F.Supp.3d at 1078. Accordingly, the Chamber's claim was properly dismissed. *See Int'l Longshoremen's Ass'n*, 476 U.S. at 394-95 (conclusory assertions of NLRA coverage insufficient to establish preemption).

It does not matter that the employee or non-employee status of some for-hire drivers is pending before the NLRB (or that Teamsters Local 117 may have taken a position on some of those disputes). OB 59.[32] That a charge is under NLRB investigation does not excuse the Chamber from satisfying its obligation to allege facts showing that drivers for Lyft, Uber, and Eastside-for-Hire are arguably NLRA-

[32] The Chamber does not challenge the District Court's holding that because of the fact-bound nature of such claims, the Chamber cannot rely upon associational standing to pursue *Garmon* preemption claims on behalf of its members. ER 19-20 n.11. Accordingly, the only such claim arguably before this Court is Rasier's claim that the Ordinance is preempted as to Uber's drivers.

covered employees.

This Circuit made that clear in *Bud Antle*. There, the NLRB had previously issued two decisions holding that the workers at issue fell under the NLRB's jurisdiction; another unit clarification petition was pending; and the NLRB had expressly criticized the California Agricultural Labor Relations Board's analysis and assertion of jurisdiction. 45 F.3d at 1267-68, 1273. Notwithstanding these NLRB proceedings, this Court considered whether there was a sufficient evidentiary showing that the workers were arguably "employees" covered by the NLRA, rather than agricultural laborers left to state jurisdiction, *before* holding that the NLRA preempted the ALRB's assertion of jurisdiction. *Id.* at 1274-75; *see also Marine Engineers Beneficial Ass'n v. Iternale S.S. Co.*, 370 U.S. 173, 183 (1962) (determining that two NLRB *decisions* declaring union at issue an NLRA-covered "labor organization" were sufficient to require state court to defer). Here, the NLRB has never held that the for-hire drivers who contract with the Chamber's members are NLRA-covered employees, and the Chamber made no allegations showing that the NLRB could reasonably reach that conclusion.[33]

[33] Amici contend that the Ordinance is preempted because contracts that require independent contractors to become NLRA employees and to join NLRA-covered labor organizations purportedly violate Section 8(e) of the NLRA, 29 U.S.C. §158(e). CDW Br. 20-21. Because the Chamber makes no such argument in its Opening Brief, it has waived that theory, which in any event fails for the reasons set forth in the District Court's order dismissing the *Clark* plaintiffs' challenge to the

The Chamber cites *Marine Engineers* for the proposition that the need to protect the NLRB's jurisdiction is greatest when the "precise issue brought before a court is in the [NLRB's litigation] process." OB 59. But the Supreme Court made that point in *Marine Engineers* only *after* determining that the party claiming preemption had made "*a reasonably arguable case*" that the organization at issue was an NLRA-covered "labor organization." 370 U.S. at 182 (emphasis added). Such a showing is a predicate for ousting state and local bodies of jurisdiction over particular workers. Without it, the mere fact that the NLRB has not yet decided whether the NLRA covers certain workers does not establish preemption. As *Davis* explained, "[t]he lack of a Board decision in no way suggests how it would or could decide the case if it had the opportunity to do so," so "those claiming pre-emption must carry the burden of showing at least an arguable case before the jurisdiction of a state court will be ousted." 476 U.S. at 396.

To be sure, the Ordinance's *application* to a particular group of drivers *could* be challenged as *Garmon*-preempted based on an evidentiary showing that *those* drivers were arguably employees and so arguably covered by the NLRA. If such a showing were made, Seattle officials and Washington state courts would be obligated to defer to the NLRB to determine those drivers' status. But in this facial

---

Ordinance, and in the City's Answering Brief in the *Clark* appeal. *See Clark v. Seattle*, Case No. 17-35693, Dkt. #12-1, ER 7-9; *id.* Dkt. #25.

challenge to the Ordinance, "no party has asserted that for-hire drivers are employees," and "the issue will not be considered or resolved." ER 19.

CONCLUSION

For the foregoing reasons, the decision below should be AFFIRMED.

Respectfully submitted,

Dated: December 1, 2017

/s/ Michael K. Ryan

Michael K. Ryan
Gregory Colin Narver
Sara Kate O'Connor-Kriss
Josh Johnson
SEATTLE CITY ATTORNEY'S OFFICE

Stephen P. Berzon
Stacey M. Leyton
P. Casey Pitts
ALTSHULER BERZON LLP

Attorneys for Defendants-Appellees City of Seattle, Seattle Department of Finance and Administrative Services, and Fred Podesta

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-35640

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1.
The brief is _____ words or _____ pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☒ This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.
The brief is 13,982 words or _____ pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).
The brief is _____ words or _____ pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated _____
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is _____ words or _____ pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is _____ words or _____ pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is _____ words or _____ pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is _____ words or _____ pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant: s/Michael K. Ryan

Date: 12/1/2017

("s/" plus typed name is acceptable for electronically-filed documents)

9th Circuit Case Number(s) 17-35640

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) 12/1/2017 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) s/Stacey M. Leyton

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)

SUPPLEMENTAL ADDENDUM OF STATUTES, RULES, AND REGULATIONS

Table of Contents

Wash. Rev. Code §48.177.005 ..... SA-1
Wash. Rev. Code §48.177.010 ..... SA-2
Wash. Rev. Code §81.04.010 ..... SA-7
Wash. Rev. Code §81.72.200 ..... SA-7
Wash. Rev. Code §81.72.210 ..... SA-8
Seattle, Wash. Municipal Code §6.310.110 ..... SA-8
Seattle, Wash. Municipal Code §6.310.735 ..... SA-10

Wash. Rev. Code §48.177.005. Definitions

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) “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.

(2) “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, a limousine carrier under chapter 46.72A RCW, or a commuter ride-sharing or flexible commuter ride-sharing arrangement under chapter 46.74 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.

(3) “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.

(4) “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.

(5) “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.

(6) “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.

Wash. Rev. Code §48.177.010. Insurance that covers commercial transportation services--Requirements--Terms of coverage

(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 July 24, 2015, 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.

Wash. Rev. Code §81.04.010. Definitions

As used in this title, unless specially defined otherwise or unless the context indicates otherwise:

…

(6) "Person" includes an individual, a firm, or copartnership.

…

(14) "Transportation of property" includes any service in connection with the receiving, delivery, elevation, transfer in transit, ventilation, refrigeration, icing, storage, and handling of the property transported, and the transmission of credit.

(15) "Transportation of persons" includes any service in connection with the receiving, carriage, and delivery of persons transported and their baggage and all facilities used, or necessary to be used in connection with the safety, comfort, and convenience of persons transported.

…

(17) The term "service" is used in this title in its broadest and most inclusive sense.

Wash. Rev. Code §81.72.200. Legislative intent

The legislature finds and declares that privately operated taxicab transportation service is a vital part of the transportation system within the state and provides demand-responsive services to state residents, tourists, and out-of-state business people. Consequently, the safety, reliability, and economic viability and stability of privately operated taxicab transportation service are matters of statewide importance. The regulation of privately operated taxicab transportation services is thus an essential governmental function. Therefore, it is the intent of the legislature to permit political subdivisions of the state to regulate taxicab transportation services without liability under federal antitrust laws.

Wash. Rev. Code §81.72.210. Local regulatory powers listed

To protect the public health, safety, and welfare, cities, towns, counties, and port districts of the state may license, control, and regulate privately operated taxicab transportation services operating within their respective jurisdictions. The power to regulate includes:

(1) Regulating entry into the business of providing taxicab transportation services;

(2) Requiring a license to be purchased as a condition of operating a taxicab and the right to revoke, cancel, or refuse to reissue a license for failure to comply with regulatory requirements;

(3) Controlling the rates charged for providing taxicab transportation service and the manner in which rates are calculated and collected, including the establishment of zones as the basis for rates;

(4) Regulating the routes of taxicabs, including restricting access to airports;

(5) Establishing safety, equipment, and insurance requirements; and

(6) Any other requirements adopted to ensure safe and reliable taxicab service.

Seattle, Wash. Municipal Code §6.310.110 - Definitions

For the purposes of this chapter and unless the context plainly requires otherwise, the following definitions apply:

…

"Driver coordinator" means an entity that hires, contracts with, or partners with for-hire drivers for the purpose of assisting them with, or facilitating them in, providing for-hire services to the public. For the purposes of this definition, "driver coordinator" includes but is not limited to taxicab associations, for-hire vehicle companies, and transportation network companies.

…

"Exclusive driver representative" (EDR) means a qualified driver representative, certified by the Director to be the sole and exclusive representative of all for-hire drivers operating within the City for a particular driver coordinator,

and authorized to negotiate, obtain and enter into a contract that sets forth terms and conditions of work applicable to all of the for-hire drivers employed by that driver coordinator.

…

"For-hire driver" means any person in physical control of a taxicab, for-hire vehicle, or transportation network company endorsed vehicle who is required to be licensed under this chapter. The term includes a lease driver, owner/operator, or employee, who drives taxicabs, for-hire vehicles, or transportation network company endorsed vehicles.

…

"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, 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.

…

"Qualified driver representative" (QDR) means an entity that assists for-hire drivers operating within the City for a particular driver coordinator in reaching consensus on desired terms of work and negotiates those terms on their behalf with driver coordinators.

…

"Transportation network company" (TNC) means an organization whether a corporation, partnership, sole proprietor, or other form, licensed under this chapter and operating in the City of Seattle that offers prearranged transportation services for compensation using an online-enabled TNC application or platform to connect

passengers with drivers using their personal vehicles and that meets the licensing requirements of Section 6.310.130 and any other requirements under this chapter.

Seattle, Wash. Municipal Code §6.310.735 - Exclusive driver representatives

A. The Director shall promulgate a commencement date no later than January 17, 2017.

B. The process of designating a QDR shall be prescribed by Director's rule. The designation of a QDR shall be based on, but not limited to, consideration of the following factors:

1. Registration with the Washington Secretary of State as a not-for-profit entity;

2. Organizational bylaws that give drivers the right to be members of the organization and participate in the democratic control of the organization; and

3. Experience in and/or a demonstrated commitment to assisting stakeholders in reaching consensus agreements with, or related to, employers and contractors.

C. An entity wishing to be considered as a QDR for for-hire drivers operating within the City must submit a request to the Director within 30 days of the commencement date or at a later date as provided in subsection G of this section. Within 14 days of the receipt of such a request, the Director will notify the applicant in writing of the determination. Applicants who dispute the Director's determination may appeal to the Hearing Examiner within 10 days of receiving the determination. The Director shall provide a list of all QDRs to all driver coordinators.

1. An entity that has been designated as a QDR shall be required to establish annually that it continues to satisfy the requirements for designation as a QDR.

2. An entity that has been designated as a QDR and that seeks to represent the drivers of a driver coordinator shall notify the driver coordinator of its intent to represent those drivers within 14 days of its designation as a QDR. That notice may be provided by any means reasonably calculated to reach the driver coordinator, including by written notice mailed or delivered to a

transportation network company or taxicab association representative at the mailing address listed with the City.

D. Driver coordinators who have hired, contracted with, partnered with, or maintained a contractual relationship or partnership with, 50 or more for-hire drivers in the 30 days prior to the commencement date, other than in the context of an employer-employee relationship, must, within 75 days of the commencement date, provide all QDRs that have given the notice specified in subsection 6.310.735.C.2 the names, addresses, email addresses (if available), and phone number (if available) of all qualifying drivers they hire, contract with, or partner with.

E. QDRs shall use driver contact information for the sole purpose of contacting drivers to solicit their interest in being represented by the QDR. The QDR may not sell, publish, or otherwise disseminate the driver contact information outside the entity/organization.

F. The Director shall certify a QDR as the EDR for all drivers contracted with a particular driver coordinator, according to the following:

1. Within 120 days of receiving the driver contact information, a QDR will submit statements of interest to the Director from a majority of qualifying drivers from the list described in subsection 6.310.735.D. Each statement of interest shall be signed, dated, and clearly state that the driver wants to be represented by the QDR for the purpose of negotiations with the driver coordinator. A qualifying driver's signature may be provided by electronic signature or other electronic means. The Director shall determine by rule the standards and procedures for submitting and verifying statements of interest by qualifying drivers choosing an EDR.

    a. The methods for submitting and verifying statements of interest by qualifying drivers choosing an EDR may include, but not be limited to: signature verification, unique personal identification number verification, statistical methods, or third party verification.

2. Within 30 days of receiving such statements of interest, the Director shall determine if they are sufficient to designate the QDR as the EDR for all drivers for that particular driver coordinator, and if so, shall so designate the QDR to be the EDR, except that, if more than one QDR establishes that a majority of qualifying drivers have expressed interest in being represented by that QDR, the Director shall designate the QDR that received the largest number of verified affirmative statements of interest to be the EDR.

3. Within 30 days of receiving submissions from all QDRs for a particular driver coordinator, the Director shall either certify one to be the EDR or announce that no QDR met the majority threshold for certification.

G. If no EDR is certified for a driver coordinator, the Director shall, upon the written request from a designated QDR or from an entity that seeks to be designated as a QDR, promulgate a new commencement date applicable to that driver coordinator that is no later than 90 days after the request, provided that no driver coordinator shall be subject to the requirements of Section 6.310.735 more than once in any 12-month period. The QDR, any other entity that seeks to be designated as a QDR, and the driver coordinator shall then repeat the processes in subsections 6.310.735.C, 6.310.735.D, and 6.310.735.F.

H. 1. Upon certification of the EDR by the Director, the driver coordinator and the EDR shall meet and negotiate in good faith certain subjects to be specified in rules or regulations promulgated by the Director, including, but not limited to, best practices regarding vehicle equipment standards; safe driving practices; the manner in which the driver coordinator will conduct criminal background checks of all prospective drivers; the nature and amount of payments to be made by, or withheld from, the driver coordinator to or by the drivers; minimum hours of work, conditions of work, and applicable rules. If the driver coordinator and the EDR reach agreement on terms, their agreement shall be reduced to a written agreement. The term of such an agreement shall be agreed upon by the EDR and the driver coordinator, but in no case shall the term of such an agreement exceed four years.

2. After reaching agreement, the parties shall transmit the written agreement to the Director. The Director shall review the agreement for compliance with the provisions of this Chapter 6.310, and to ensure that the substance of the agreement promotes the provision of safe, reliable, and economical for-hire transportation services and otherwise advance the public policy goals set forth in Chapter 6.310 and in the Preamble to and Section 1 of the ordinance introduced as C.B. 118499. In conducting that review, the record shall not be limited to the submissions of the EDR and driver coordinator nor to the terms of the proposed agreement. The Director shall have the right to gather and consider any necessary additional evidence, including by conducting public hearings and requesting additional information from the EDR and driver coordinator. Following this review, the Director shall notify the parties of the determination in writing, and shall include in the notification a written explanation of all conclusions. Absent good cause, the Director shall

issue the determination of compliance within 60 days of the receipt of an agreement.

a. If the Director finds the agreement compliant, the agreement is final and binding on all parties.

b. If the Director finds it fails to comply, the Director shall remand it to the parties with a written explanation of the failure(s) and, at the Director's discretion, recommendations to remedy the failure(s).

c. The agreement shall not go into effect until the Director affirmatively determines its adherence to the provisions of this Chapter 6.310 and that the agreement furthers the provision of safe, reliable, and economical for-hire transportation services and the public policy goals set forth in the Preamble to and Section 1 of the ordinance introduced as C.B. 118499.

3. Unless the EDR has been decertified pursuant to subsection 6.310.735.L or has lost its designation as a QDR, the EDR and the driver coordinator shall, at least 90 days before the expiration of an existing agreement approved pursuant to subsections 6.310.735.H.2.c or 6.310.735.I.4.c, meet to negotiate a successor agreement. Any such agreement shall be subject to approval by the Director pursuant to subsection 6.310.735.H.2. If the parties are unable to reach agreement on a successor agreement within 90 days after the expiration of an existing agreement, either party must submit to interest arbitration upon the request of the other pursuant to subsection 6.310.735.I, and the interest arbitrator's proposed successor agreement shall be subject to review by the Director pursuant to subsections 6.310.735.I.3 and 6.310.735.I.4.

4. Nothing in this section 6.310.735 shall require or preclude a driver coordinator from making an agreement with an EDR to require membership of for-hire drivers in the EDR's entity/organization within 14 days of being hired, contracted with, or partnered with by the driver coordinator to provide for-hire transportation services to the public.

I. If a driver coordinator and the EDR fail to reach an agreement within 90 days of the certification of the EDR by the Director, either party must submit to interest arbitration upon the request of the other.

1. The interest arbitrator may be selected by mutual agreement of the parties. If the parties cannot agree, then the arbitrator shall be determined as follows:

from a list of seven arbitrators with experience in labor disputes and/or interest arbitration designated by the American Arbitration Association, the party requesting arbitration shall strike a name. Thereafter the other party shall strike a name. The process will continue until one name remains, who shall be the arbitrator. The cost of the interest arbitration shall be divided equally between the parties.

2. The interest arbitrator shall propose the most fair and reasonable agreement concerning subjects specified in rules or regulations promulgated by the Director as set forth in subsection 6.310.735.H.1 that furthers the provision of safe, reliable, and economical for-hire transportation services and the public policy goals set forth in the Preamble to and Section 1 of the ordinance introduced as C.B. 118499. The term of any agreement proposed by the interest arbitrator shall not exceed two years. In proposing that agreement, the interest arbitrator shall consider the following criteria:

   a. Any stipulations of the parties;

   b. The cost of expenses incurred by drivers (e.g., fuel, wear and tear on vehicles, and insurance);

   c. Comparison of the amount and/or proportion of revenue received from customers by the driver coordinators and the income provided to or retained by the drivers;

   d. The wages, hours, and conditions of employment of other persons, whether employees or independent contractors, employed as for-hire or taxicab drivers in Seattle and its environs, as well as other comparably sized urban areas;

   e. If raised by the driver coordinator, the driver coordinator's financial condition and need to ensure a reasonable return on investment and/or profit;

   f. Any other factors that are normally or traditionally taken into consideration in the determination of wages, hours, and conditions of employment; and

   g. The City's interest in promoting the provision of safe, reliable, and economical for-hire transportation services and otherwise advancing the public policy goals set forth in Chapter 6.310 and in the Preamble to and Section 1 of the ordinance introduced as C.B. 118499.

3. The arbitrator shall transmit the proposed agreement to the Director for review in accordance with the procedures and standards set forth in subsection 6.310.735.H.2. With the proposed agreement, the arbitrator shall transmit a report that sets forth the basis for the arbitrator's resolution of any disputed issues. The Director shall review the agreement as provided in subsection 6.310.735.H.2.

4. In addition to the review provided for in subsection 6.310.735.I.3, a driver coordinator or EDR may challenge the proposed agreement on the following grounds: that the interest arbitrator was biased, that the interest arbitrator exceeded the authority granted by subsection 6.310.735.H and this subsection 6.310.735.I, and/or that a provision of the proposed agreement is arbitrary and capricious. In the event of such a challenge, the Director will provide notice to the driver coordinator and the EDR, allow the driver coordinator and the EDR the opportunity to be heard, and make a determination as to whether any of the challenges asserted should be sustained.

    a. If the Director finds the agreement fulfills the requirements of subsection 6.310.735.H.2, and that no challenges raised under this subsection 6.310.735.I.4 should be sustained, the Director will provide written notice of that finding to the parties and the agreement will be deemed final and binding on all parties.

    b. If the Director finds that the agreement fails to fulfill the requirements of subsection 6.310.735.H.2, or that any challenge asserted under this subsection 6.310.735.I.4 should be sustained, the Director shall remand the agreement to the interest arbitrator with a written explanation of the failure(s) and, at the Director's discretion, recommendations to remedy the failure(s).

    c. The agreement shall not go into effect until the Director affirmatively deems the agreement final and binding pursuant to subsections 6.310.735.I.3 and 6.310.735.I.4.a.

    d. A driver coordinator or EDR may obtain judicial review of the Director's final determination rendered pursuant to this subsection 6.310.735.I.4 by applying for a Writ of Review in the King County Superior Court within 14 days from the date of the Director's determination, in accordance with the procedure set forth in Chapter 7.16 RCW, other applicable law, and court rules. The Director's final determination shall not be stayed

pending judicial review unless a stay is ordered by the court. If review is not sought in compliance with this subsection 6.310.735.I.4.d, the determination of the Director shall be final and conclusive.

5. If either party refuses to enter interest arbitration, upon the request of the other, either party may pursue all available judicial remedies.

J. During the term of an agreement approved by the Director under subsection 6.310.735.H or 6.310.735.I, the parties may discuss additional terms and, if agreement on any amendments to the agreement are reached, shall submit proposed amendments to the Director, who shall consider the proposed amendment in accordance with the procedures and standards in subsection 6.310.735.H.2. Any proposed amendment shall not go into effect until the Director affirmatively determines its adherence to the provisions of this Chapter 6.310 and that it furthers the provision of safe, reliable and economical for-hire transportation services and the public policy goals set forth in the Preamble to and Section 1 of the ordinance introduced as C.B. 118499.

1. During the term of an agreement approved by the Director under subsection 6.310.735.H or 6.310.735.I, the Director shall have the authority to withdraw approval of the agreement if the Director determines that the agreement no longer adheres to the provisions of this Chapter 6.310 or that it no longer promotes the provision of safe, reliable, and economical for-hire transportation services and the public policy goals set forth in the Preamble to and Section 1 of the ordinance introduced as C.B. 118499. The Director shall withdraw such approval only after providing the parties with written notice of the proposed withdrawal of approval and the grounds therefor and an opportunity to be heard regarding the proposed withdrawal. The Director's withdrawal of approval shall be effective only upon the issuance of a written explanation of the reasons why the agreement on longer adheres to the provisions of this Chapter 6.310 or no longer furthers the provision of safe, reliable, and economical for-hire transportation services or the public policy goals set forth in the Preamble to and Section 1 of the ordinance introduced as C.B. 118499.

2. The Director shall have the authority to gather and consider any necessary evidence in exercising the authority provided by this subsection 6.310.735.J.

3. A driver coordinator shall not make changes to subjects set forth in subsection 6.310.735.H or specified in rules or regulations promulgated by the Director without meeting and discussing those changes in good faith with

the EDR, even if the driver coordinator and EDR have not included terms concerning such subjects in their agreement.

K. A driver coordinator shall not retaliate against any for-hire driver for exercising the right to participate in the representative process provided by this section 6.310.735, or provide or offer to provide money or anything of value to any for-hire driver with the intent of encouraging the for-hire driver to exercise, or to refrain from exercising, that right. It shall be a violation for a driver coordinator or its agent, designee, employee, or any person or group of persons acting directly or indirectly in the interest of the driver coordinator in relation to the for-hire driver to:

1. Interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected under this section 6.310.735; or

2. Take adverse action, including but not limited to threatening, harassing, penalizing, or in any other manner discriminating or retaliating against a driver, because the driver has exercised the rights protected under this section 6.310.735.

L. Decertification. An Exclusive Driver Representative may be decertified according to the following:

1. The Director receives a petition to decertify an EDR no more than 30 days before the expiration of an agreement reached pursuant to this section 6.310.735 or no less than three years after the agreement's effective date, whichever is earlier.

   a. A decertification petition must be signed by ten or more qualifying drivers. The Director shall determine by rule the standards and procedures for submitting the decertification petition.

2. Once a petition has been accepted by the Director, the Director shall issue notice to the driver coordinator and the EDR of the decertification petition and promulgate a decertification date.

3. The driver coordinator shall have 14 days from the decertification date to transmit the list of qualifying drivers to the petitioners and the EDR.

4. Within 120 days of receiving the driver contact information, petitioners for a decertification will submit to the Director statements of interest from a majority of qualifying drivers from the list described in subsection 6.310.735.K.3. The statements of interest shall be signed and dated and shall

clearly indicate that the driver no longer wants to be represented by the EDR for the purpose of collective bargaining with the driver coordinator. The Director shall determine by rule the standards and procedures for submitting and verifying the statements of interest of qualifying drivers.

5. Within 30 days of receiving such statements of interest, the Director shall determine if they are sufficient to decertify the EDR for that particular driver coordinator. The Director shall either decertify the EDR, or declare that the decertification petition did not meet the majority threshold and reaffirm that the EDR shall continue representing all drivers for that particular driver coordinator.

    a. If an EDR is decertified for a particular driver coordinator, the process of selecting a new EDR may start according to the process outlined in subsection 6.310.735.G.

M. Enforcement

1. Powers and duties of Director

    a. The Director is authorized to enforce and administer this section 6.310.735. The Director shall exercise all responsibilities under this section 6.310.735 pursuant to rules and regulations developed under Chapter 3.02. The Director is authorized to promulgate, revise, or rescind rules and regulations deemed necessary, appropriate, or convenient to administer the provisions of this section 6.310.735, providing affected entities with due process of law and in conformity with the intent and purpose of this section 6.310.735.

    b. The Director shall investigate alleged violations of subsections 6.310.735.D and 6.310.735.H.1, and if the Director determines that a violation has occurred, the Director shall issue a written notice of the violation. The Director may investigate alleged violations of other subsections of this section 6.310.735, and if the Director determines that a violation has occurred, the Director shall issue a written notice of the violation. The notice shall:

        1) Require the person or entity in violation to comply with the requirement;

        2) Include notice that the person or entity in violation is entitled to a hearing before the Hearing Examiner to respond to the notice and

introduce any evidence to refute or mitigate the violation, in accordance with Chapter 3.02; and

3) Inform the person or entity in violation that a daily penalty of up to $10,000 for every day the violator fails to cure the violation will accrue if the violation is uncontested or found committed.

c. The person or entity named on the notice of violation must file with the Hearing Examiner's Office the request for a hearing within ten calendar days after the date of the notice of violation. The Hearing Examiner may affirm, modify, or reverse the Director's notice of violation.

d. If the person or entity named on the notice of violation fails to timely request a hearing, the notice of violation shall be final and the daily penalty of up to $10,000 will accrue until the violation is cured.

e. Nothing in this section 6.310.735 shall be construed as creating liability or imposing liability on the City for any non-compliance with this section 6.310.735.

2. Judicial review. After receipt of the decision of the Hearing Examiner, an aggrieved party may pursue all available judicial remedies.

3. Private right of action. Subsections 6.310.735.D, 6.310.735.E, 6.310.735.H, and 6.310.735.K may be enforced through a private right of action. Any aggrieved party, including but not limited to an EDR, may bring an action in court, and shall be entitled to all remedies available at law or in equity appropriate to remedy any violation of this section 6.310.735. A plaintiff who prevails in any action against a private party to enforce this section 6.310.735 may be awarded reasonable attorney's fees and costs.

4. Contractual remedies. Nothing in this section shall be construed as preventing the parties to an agreement approved by the Director from pursuing otherwise available remedies for violation of such agreement.

(Ord. 125132 , § 2, 2016; Ord. 124968 , § 3, 2015.)