Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, Plaintiff, vs. THE CITY OF SEATTLE; SEATTLE DEPARTMENT OF FINANCE AND ADMINISTRATIVE SERVICES; and FRED PODESTA, in his official capacity as Director, Finance and Administrative Services, City of Seattle, Defendants.	No. 17-cv-00370-RSL DEFENDANTS' MOTION TO DISMISS **NOTED ON CALENDAR FOR ORAL ARGUMENT: April 14, 2017 at 3:00 p.m.**

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DEFENDANTS' FRCP 12(B)(1) AND 12(B)(6) MOTION TO DISMISS

All of the claims asserted in the Chamber's Complaint should be dismissed under Federal Rules of Civil Procedure 12(b)(1) and/or 12(b)(6).

The Chamber lacks associational standing to assert five of its eight claims—federal antitrust (Counts One and Two), state antitrust (Count Seven), National Labor Relations Act ("NLRA") *Garmon* preemption (Count Four), and the Public Records Act (Count Eight)—because the nature of those claims requires the participation of the Chamber's individual members.

The Chamber's federal and state antitrust claims (Counts One, Two, and Seven) also should be dismissed as unripe, because the alleged antitrust injury will not occur unless Teamsters Local 117 obtains statements of interest from a majority of qualifying drivers and becomes certified as an Exclusive Driver Representative ("EDR"). If no EDR is certified, no bargaining over matters including rates to be paid to drivers will ever occur. These claims should also be dismissed on the merits. The state antitrust claim fails because municipalities are immune under state law. The federal antitrust claims are invalid on three separate grounds: (1) the Chamber does not plead facts showing that any Defendant has entered into a combination in restraint of trade; (2) the Ordinance involves unilateral state action; and (3) the state action exemption applies to the Ordinance.

The NLRA preemption claims (Counts Three and Four) should also be dismissed on the merits. The Ordinance is not *Machinists*-preempted because Congress did not intend to preclude states or localities from regulating independent contractors' work relationships. And the Chamber cannot establish *Garmon* preemption without making an evidentiary showing that its members' for-hire drivers would arguably be deemed "employees" (rather than independent contractors) by the National Labor Relations Board ("NLRB"), a showing they do not even attempt to make.

The Chamber's state law authority claim (Count Six) should be dismissed because state law authorizes the City of Seattle to regulate for-hire companies to ensure safety and reliability. Finally, the Chamber's Public Records Act claim (Count Eight) lacks merit because no trade secrets are involved in this case and nothing in the PRA creates any affirmative right to non-disclosure.

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I BACKGROUND

On December 14, 2015, the Seattle City Council passed the Ordinance Relating to Taxicab, Transportation Network Company, and For-Hire Vehicle Drivers. Compl. (Dkt. #1) ¶34. The Council enacted the Ordinance "to ensure safe and reliable for-hire and taxicab transportation service." Ordinance ("Ord.") §1.C (attached as Exhibit A to the Declaration of Matt Eng, Dkt. #39-1). The Council explained that "driver coordinators"—the term used by the Ordinance to describe entities that provide for-hire transportation services to the public[1]—"establish the terms and conditions of their contracts with their drivers unilaterally," and may impose changes without advance warning or input from the drivers. *Id.* §1.E. In the Council's legislative judgment, this can adversely affect for-hire drivers' ability to provide "safe, reliable, stable, cost-effective, and economically viable" transportation service, and lead to unrest and service disruptions. *Id.* §1.E, F. The Council determined, based on outcomes in other industries, that providing a means through which for-hire drivers could address the terms and conditions of their contractual relationships collectively would improve the safety and reliability of for-hire transportation services by, among other things, reducing turnover, increasing driver commitment and experience, and alleviating the pressure drivers face to provide transportation services in an unsafe manner (such as by working too many hours, operating vehicles at unsafe speeds, or ignoring necessary maintenance). *Id.* §1.I, J. The Council's authority to enact the Ordinance derives from RCW 46.72.001 and RCW 81.72.200, which authorize Seattle to regulate for-hire and taxicab transportation services to ensure safety and reliability, and exempt such regulation from antitrust challenges.

To permit for-hire drivers to have input in establishing the terms and conditions of their contractual relationships with driver coordinators, the Ordinance establishes a process by which for-hire drivers may designate an "Exclusive Driver Representative" ("EDR") to negotiate with driver coordinators. The Ordinance applies only to independent contractors, and expressly excludes from coverage any driver who is an "employee" under the NLRA. Ord. §6.

[1] *See* Ord. §2 (amending SMC 6.310.110). These "driver coordinators" include taxicab associations, transportation network companies (like Uber and Lyft), and other for-hire passenger services.

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The City issued the first set of implementing regulations on December 29, 2016. Compl. ¶50. On March 3, 2017, the Director granted the QDR application of Teamsters Local 117 ("Local 117"). *Id.* ¶52. Four days later, Local 117 notified Uber, Lyft, and Eastside that it sought to become an EDR for their drivers. *Id.* Uber, Lyft, and Eastside will have to provide lists of their qualifying drivers to Local 117 by April 3, 2017. Compl. ¶53; SMC 6.310.735.D. If Local 117 elects to seek the support of a majority of any of those driver coordinator's qualifying drivers, it will have 120 days to submit statements of interest; if it submits such statements, the Director will determine whether Local 117 has shown support form a majority of qualifying drivers and, if so, will designate Local 117 as an EDR for that driver coordinator. SMC 6.310.735.F.1-3. If Local 117 is designated an EDR, a driver coordinator will be required to commence negotiations with it over certain specified subjects. SMC 6.310.735.H.1.

II LEGAL STANDARD

Motions challenging standing and ripeness are brought under Rule 12(b)(1) because they implicate a court's subject matter jurisdiction. *See Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). A Rule 12(b)(1) attack "can be either facial, confining the inquiry to allegations in the complaint, or factual, permitting the court to look beyond the complaint." *Savage v. Glendale Union High Sch. Dist. No. 205*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003). Here, the City brings both a facial challenge, where the court must accept as true all material allegations of fact (but need not accept bare legal conclusions), *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 & n.3 (9th Cir. 2011), and a factual challenge, which requires the Chamber to present evidence to support those allegations and the court to make findings of fact. *Kingman Reef Atoll Investments, LLC v. United States*, 541 F.3d 1189, 1195 (9th Cir. 2008).

To withstand a motion to dismiss under Rule 12(b)(6), a complaint must allege sufficient facts "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). While factual allegations must be presumed true, that does not apply to "labels and conclusions," "a formulaic recitation of the elements of a cause of action," "naked assertions devoid of further factual enhancement," "conclusory statements," or "legal conclusion[s] couched

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as … factual allegation[s].” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555, 557) (internal brackets and citations omitted). A facial challenge must establish that the Ordinance “is unconstitutional in all of its applications.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008); *U.S. v. Salerno*, 481 U.S. 739, 745 (1987) (requiring “that no set of circumstances exists under which the Act would be valid”).

III ARGUMENT

A. The Chamber lacks associational standing to assert its antitrust, *Garmon* preemption, and Public Records Act claims (Counts One, Two, Four, Seven, Eight).

To demonstrate “associational standing,” the Chamber must establish that “(a) [its] members would otherwise have standing to sue in their own right; (b) the interests [it] seek[s] to protect are germane to [its] purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *San Diego County Gun Rights Cte. v. Reno*, 98 F.3d 1121, 1130-31 (9th Cir. 1996) (citing *Hunt v. Wash. State Apple Advertising Comm’n*, 432 U.S. 333, 343 (1977)). Even assuming the Chamber’s members would have standing in their own right on these claims, the Chamber cannot satisfy the third of these requirements.

Although a request for injunctive and declaratory relief rather than damages typically involves a form of relief that can be provided without requiring individual members’ participation, *see, e.g., United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 553-54 (1996); *Columbia Basin Apartment Ass’n v. City of Pasco*, 268 F.3d 791, 799 (9th Cir. 2001), the third requirement for associational standing is not limited to the relief requested. Rather, to have associational standing, the Chamber must establish that *neither* the relief requested *nor* the claim proffered demands individualized proof from the association’s members. *See Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1408 (9th Cir. 1991). When variations in the individualized circumstances of an association’s members affect the nature of their injuries or claims, those claims “are not susceptible to judicial treatment as systematic policy violations that make extensive individual participation unnecessary,” and associational standing is improper. *Spinedex Physical Therapy USA Inc. v. United Healthcare of*

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Ariz., Inc., 770 F.3d 1282, 1293 (9th Cir. 2014) (internal quotation marks and ellipses omitted). Here, Claims One, Two, Four, Seven, and Eight demand that the allegedly injured members participate, and the Chamber thus lacks standing to pursue those claims on its members' behalf. In addition, Claims One, Two, and Seven may only be brought by an injured person, not by an association, and so the Chamber lacks statutory standing to assert those claims.

1. **Antitrust Claims**

a. Federal antitrust claims (Counts One, Two)

The Chamber lacks associational standing to pursue its federal antitrust claims. First, the Chamber does not have statutory standing to seek injunctive relief on behalf of its members under federal antitrust law. Section 16 of the Clayton Act permits claims for injunctive relief by a party "threatened [with] loss or damage by a violation of the antitrust laws." 15 U.S.C. §26. To pursue a claim under this section, a plaintiff must show more than an injury-in-fact; the plaintiff must establish that it has suffered or will imminently suffer an "antitrust injury"—*i.e.*, an injury "of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful." *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 113 (1986) (quotation omitted). This requires proof that the plaintiff "has or will suffer antitrust injury *itself*." *Fin. & Sec. Prods. Ass'n v. Diebold, Inc.*, No. C04-04347WHA, 2005 WL 1629813, *3 (N.D. Cal. Jul. 8, 2005) (emphasis added). The federal antitrust laws thus require that actions for injunctive relief be pursued by the individuals who have actually suffered an antitrust injury, not an associational representative. *See Fin. & Sec. Prods. Ass'n*, 2005 WL 1629813, *3; *Am. Chiropractic Ass'n, Inc. v. Trigon Healthcare, Inc.*, 151 F.Supp.2d 723, 730 (W.D. Va. 2001); *Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n*, 830 F.2d 1374, 1380 n.3 (7th Cir. 1987) (comparable language in Section 4 of the Clayton Act "does not encompass an association which has not itself suffered such injury").

Even if the federal antitrust laws permitted associational standing, the fact-specific nature of the Chamber's claims requires individual participation. Any analysis of the damage to the Chamber's members resulting from implementation of the Ordinance will require detailed factual

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inquiries regarding the impact of the Ordinance on those individual members' operations, market share, and financial performance, and any injunction must be tailored to the loss or damage to those members. The Court cannot evaluate the impact of the Ordinance on the Chamber's members or accomplish the necessary tailoring without their participation.

This is particularly true to the extent that the Chamber is challenging any aspect of the Ordinance other than the required negotiations over payments driver coordinators make to for-hire drivers. SMC 6.310.735.H.1. The other provisions of the Ordinance, including the remaining subjects of mandatory negotiations such as "best practices regarding vehicle equipment standards," "safe driving practices," criminal background checks of prospective drivers, and "minimum hours of work," *id.*, do not involve prices, and so are not even arguably subject to the kind of "*per se*" antitrust challenge asserted by the Chamber. *See* Compl. ¶¶58-59; *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 885-86 (9th Cir. 2008) ("[T]o be struck down, the regulation or restraint must effect a per se violation of the Sherman Act."); *Sanders v. Brown*, 504 F.3d 903, 910-11 (9th Cir. 2007) (quoting *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982)) ("'[T]he conduct contemplated by the statute [must] *in all cases* [be] *a per se* violation.'") (emphasis added). Evaluating the purportedly anticompetitive effects of negotiations over those subjects instead requires application of the "rule of reason," under which "all the facts, including the precise harms alleged to the competitive markets, and the legitimate justifications provided for the challenged practice" must be considered. *Cal. ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1133 n.10 (9th Cir. 2011) (*en banc*) (citation omitted). This Court cannot evaluate the impact on market competition of negotiations between a particular driver coordinator and an EDR over subjects such as criminal background checks or safety standards if that driver coordinator is not a party.[2]

[2] Even with respect to the mandatory price negotiations, Uber and Lyft's individual participation in these proceedings should be required so that the impact of those negotiations can be evaluated alongside the impact of the various forms of anticompetitive price-fixing that Uber and Lyft already enable through their business models. *See, e.g., Meyer v. Kalanick*, 174 F.Supp.3d 817, 824-25 (S.D.N.Y. 2016) (holding that plaintiff's complaint stated a valid claim of horizontal price fixing where plaintiff "alleged that drivers agree with Uber to charge certain fares with the clear understanding that all other Uber drivers are agreeing to charge the same fares").

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b. State antitrust claim (Count Seven)

Like federal antitrust laws, the Washington Consumer Protection Act ("CPA") does not permit an association to sue on behalf of its members. The CPA grants a cause of action (whether for injunctive relief or damages) only to a "person who is injured in his or her business or property." RCW 19.86.090; *see also Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 792 (1986) (injury to the plaintiff is indispensable element of private CPA claim). The CPA by its terms thus allows private suits *only* by an injured person, and so prohibits associational standing. *See Amalgamated Transit Union, Local 1756 v. Super. Ct.*, 209 P.3d 937, 944 (Cal. 2009) (California unfair competition statute granting private right of action only to "person who has suffered injury in fact" barred suit by association on behalf of injured members). In addition, because the association must establish that *each member* upon whom it relies for standing suffered an injury within the scope of the CPA, an association asserting a CPA claim on behalf of its members cannot satisfy the third prong of the *Hunt* test. *See Aspen Grove Owners' Ass'n v. Park Promenade Apartments, LLC*, No. CV09-1110, 2010 WL 4860345, *4 (W.D. Wash. Nov. 19, 2010).

2. NLRA *Garmon* preemption (Count Four)

The Chamber's NLRA *Garmon* preemption claim similarly demands the participation of its members. A party claiming *Garmon* preemption cannot simply point to some theoretical argument about the applicability of the NLRA, but must "put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation." *Int'l Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 395 (1986) (internal quotation omitted). In other words, the Court must determine whether there is evidence that the workforce of any specific Chamber member is comprised of drivers who are arguably employees rather than independent contractors under the NLRB's multi-factor, fact-specific analysis. *See infra* at 18. Any answer would depend upon the specific factual circumstances of the driver coordinator in question, and any injunctive relief would necessarily be tailored to that coordinator's specific circumstances—such as by providing for expiration of the injunction should the NLRB determine

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that the coordinator's drivers are independent contractors or should the coordinator make a material change in the drivers' working conditions that clarifies their status as independent contractors. The participation of individual Chamber members whose driver workforces might "arguably" be subject to the NLRA is thus required for any litigation of the Chamber's *Garmon* preemption claim. *See, e.g.*, *Lake Mohave Boat Owners Ass'n v. Nat'l Park Serv.*, 78 F.3d 1360, 1367 (9th Cir. 1995) (member participation required where legal issues involved member-by-member variations and therefore required "individualized proof").

3. Public Records Act (Count Eight)

The Chamber alleges that the Ordinance is preempted by the PRA because it requires the disclosure of its members' "trade secret[]" driver lists, which it contends are "public records." Compl. ¶¶109-110. To pursue such a claim, the Chamber's members must demonstrate that those lists are, in fact, trade secrets, *i.e.*, that they have spent time and money creating those lists, and that they derive economic value because of their secrecy and have taken reasonable efforts to keep the lists secret. *Ed Nowogroski Ins., Inc. v. Rucker*, 137 Wn.2d 427, 438 (1999); RCW 19.108.010(4). That means the Chamber's members "must provide specific, concrete examples illustrating that [their driver list] meets the requirements for a trade secret"—necessarily a case-by-case assessment. *Belo Mgmt. Servs., Inc. v. ClickA Network*, 184 Wn.App. 649, 657 (2014). The Chamber's individual members would also need to demonstrate that disclosure of the list "would clearly not be in the public interest and would substantially and irreparably damage" them, again requiring an individualized assessment. *Id.* at 661 (citing, *inter alia*, RCW 42.56.540). That fact-specific and individualized determination requires the participation of the Chamber's members in this proceeding.

Further, the plain language of the PRA's injunction provision—the *only* method a third party may use to prevent disclosure of public records—provides that a claim can only be brought by "a person who is named in the record or to whom the record specifically pertains." RCW 42.56.540; *see also DeLong v. Parmelee*, 157 Wn.App. 119, 151 (2010). Thus, the PRA's plain

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terms do not allow associational standing to prevent the disclosure of public records.[3]

B. Plaintiffs' antitrust claims are not ripe (Counts One, Two, Seven).

The federal and state antitrust claims also are not constitutionally ripe. "[R]ipeness can be characterized as standing on a timeline." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quotation omitted). The ripeness concerns here are particularly strong because the Chamber attacks the Ordinance on its face. Such challenges are "disfavored" not only because they are "contrary to the fundamental principle of judicial restraint" and "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution," but also because they "often rest on speculation" and require courts to resolve important legal questions prematurely and without sufficient factual context. *Wash. State Grange*, 552 U.S. at 450-51 (2008) (citations & quotations omitted). Moreover, the Chamber "must demonstrate standing for each claim [it] seeks to press and for each form of relief that is sought." *Davis*, 554 U.S. at 734 (quotation omitted).

The Chamber's antitrust claims are premised entirely on its concern that for-hire drivers will combine into a "single unit through an [EDR]" and then "engag[e] in horizontal fixing of prices and contractual terms" through collective negotiations. Compl. ¶59. But before such negotiations could occur, a QDR would have to procure statements of interest from a majority of qualifying drivers for a particular driver coordinator and then be certified by the City as the EDR. Whether Teamsters Local 117 or some other entity will ever succeed in procuring the support of a majority of Uber, Lyft, or Eastside's qualifying drivers—and indeed, whether any entity will even start a campaign to procure that support after receiving the required lists—is entirely speculative.

[3] In any event, even assuming that disclosure of a driver list would constitute an injury-in-fact for standing purposes, and that a challenge to this requirement were ripe and appropriately litigated by an association, the Chamber could challenge *only* the disclosure provision of the Ordinance, SMC 6.310.735.D. The injury would not provide a basis for challenging the Ordinance's other provisions, because the Chamber "must demonstrate standing for each claim [it] seeks to press and for each form of relief that is sought." *Davis v. FEC*, 554 U.S. 724, 734 (2008) (quotation omitted).

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Because the Chamber's antitrust claims are premised upon these uncertain future events, they are not ripe. *See Chamber of Commerce v. Seattle*, No. C16-0322RSL, 2016 WL 4595981, *2-4 (W.D. Wash. Aug. 9, 2016) (concluding that any injury to Uber or Eastside For Hire resulting from such collective negotiations is too speculative to establish the Chamber's Article III standing); *cf., e.g., Parish v. Dayton*, 761 F.3d 873, 876 (8th Cir. 2014) (challenge to law permitting collective bargaining by childcare workers unripe where "[t]he election of an exclusive representative [was] not certainly impending"); *see also Bierman v. Dayton*, No. 14-3021, 2014 WL 4145410, *4-6 (D. Minn. Aug. 20, 2014) (claim challenging implementation of exclusive union representation was unripe when results of union election were still unknown). The Chamber's antitrust claims should be decided (if at all) when there is an actual likelihood of the negotiations over price terms about which the Chamber complains.

C. The Chamber fails to state an antitrust claim under federal or state law.

1. Defendants have not entered into any combination in restraint of trade (Counts One, Two).

The Court should dismiss Count One, alleging a violation of Section 1 of the Sherman Act, because the Complaint does not plead facts showing that any Defendant has entered into a combination "in restraint of trade." 15 U.S.C. §1. The Complaint pleads that Defendants enacted the Ordinance, issued implementing regulations, and approved Local 117's QDR application, but none of these acts, on its own, involves the kind of "concerted action" in restraint of trade necessary to state an antitrust claim. *See, e.g., Fisher v. City of Berkeley*, 475 U.S. 260, 266 (1986). The City enacted the Ordinance and the Director agreed to implement and enforce it, but no Defendant has reached any *agreement* with any private party that might trigger a claim under Section 1. *Id.* at 266 ("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."). Tellingly, the only specific actions by Defendants that the Chamber identifies as violating the Sherman Act are Defendants' "approval and endorsement of concerted action by EDRs and of the terms of anticompetitive agreements," Compl. ¶61—actions that involve unilateral regulations

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categorically exempt from antitrust liability (*see infra* at 15-16) and that in any event have not yet occurred (because the EDR certification process has just begun and no EDR has yet been certified) and may never occur (because Local 117 may choose not to seek certification as the EDR for a Chamber member or may fail to garner the necessary support from that member's qualifying drivers). Because the Chamber does not plead that Defendants have violated the Sherman Act or will necessarily do so in the future, the Court should dismiss Count One of the Complaint.

2. The Ordinance involves state action exempts from antitrust liability (Counts One, Two).

The Chamber's federal antitrust claims should also be dismissed because the federal antitrust laws do not prohibit states and their political subdivisions from protecting their citizens' interests through reasonable state regulation. As *Parker v. Brown*, 317 U.S. 341, 350-51 (1943), explained, the federal antitrust laws should not be read "to restrain a state or its officers or agents from activities directed by its legislature." "The *Parker* decision was 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 would otherwise violate antitrust laws. *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56 (1985). That analysis applies in full to the Ordinance, and requires the dismissal of Counts One and Two.

a. State policy authorizes displacement of competition in the taxi and for-hire driver industries in order to further safety and reliability interests.

The first requirement for *Parker* immunity is that the regulation or conduct at issue be "clearly articulated and affirmatively expressed as state policy." *N.C. State Bd. of Dental Examiners v. Federal Trade Comm'n*, 135 S.Ct. 1101, 1110 (2015) (citation omitted). The Chamber contends that the Ordinance fails this standard because Washington law does not expressly authorize collective negotiations between for-hire drivers and driver companies. Compl. ¶¶64-65. But a party relying on *Parker* immunity "need not 'point to a specific, detailed legislative authorization' for its challenged conduct." *Southern Motor Carriers*, 471 U.S. at 64 (quoting *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978)). Rather, it suffices to show

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that "the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure." *Id.* In other words, so long as the State intended to displace competition within the field in question, the specific actions taken to effectuate that state policy need not be expressly authorized. *See id.* at 64-66 (holding that legislative intent to displace price competition among common carriers is sufficient to immunize collective ratemaking activity). The clear authorization test may be satisfied even if the policy of displacing competition is merely "implicit" or is "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. Dental Examiners*, 135 S.Ct. at 1112.

Thus, in the instant case, it does not matter whether Washington has expressly authorized *collective negotiations* between for-hire drivers and driver companies as a *specific* mechanism to further state objectives. Instead, all that matters is that state law *does* affirmatively authorize the displacement of competition in the for-hire transportation industry. As Washington law explains, "privately operated for hire transportation service is a vital part of the transportation system," making "the safety, reliability, and stability" of such service a matter of "statewide importance" and regulation of that service "an essential governmental function." RCW 46.72.001; *see also* RCW81.72.200 (similar findings regarding taxicab transportation service). Given the importance of such regulations to protecting the public, the law provides 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*." RCW 46.72.001 (emphasis added); *see also* RCW 81.72.200 (identical language for taxicab services). Washington's intent to authorize the City of Seattle to displace competition in the for-hire transportation industry could not any be more explicit.

State law gives cities like Seattle broad authority in choosing how to regulate the for-hire driver industry, including in manners that displace competition therein. For example, it authorizes municipalities to "license, control, and regulate all for hire vehicles operating within their respective jurisdictions," and specifies that this power "includes" a number of delineated subjects of regulation as well as "[a]ny other requirements adopted to ensure safe and reliable for hire vehicle transportation service." RCW 46.72.160(6); *see also* RCW 81.72.210 (same language for

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taxicab services). The City Council adopted the Ordinance pursuant to that statutory authority. Ord. §1.C. The Ordinance expressly sets forth its purpose of protecting safety and reliability in the for-hire and taxicab industries, and requires that the Director determine that any agreement reached by the parties or through interest arbitration further the City's purposes before that agreement may take effect. Ord. §§1.A, C, E-F, J, 3.H.2, 3.I.3, 4.

Contrary to the Chamber's contentions, no more is required to establish clear authorization under *Parker*. "If more detail than a clear intent to displace competition were required of the legislature," that would interfere with the ability of municipal authorities to address issues not foreseen by the state legislature. *Southern Motor Carriers*, 471 U.S. at 64. Such interference is particularly inappropriate in the context of municipal regulation, where "municipalities are electorally accountable … 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," such that the concern that regulation might be used to "pursue private interests" is substantially reduced. *N.C. Dental Examiners*, 135 S.Ct. at 1112-13.

In short, the "authorization requirement" does not "dictate[] transformation of state administrative review into a federal antitrust job." *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 372 (1991) (internal quotation marks omitted). This Court therefore need not determine whether the City has complied with applicable procedural and substantive requirements of state law, or has acted for the reasons or purposes authorized by state law. *Id.* at 371. "[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." *Id.* at 372. The statutory authorization to displace competition and the specific grant of authority to adopt regulations furthering the safety and reliability of the for-hire transportation industry provide "clear authorization" under *Parker*, and no further inquiry regarding the City's authority under state law is necessary.

b. The Ordinance provides for active supervision of collective negotiations.

The Chamber further alleges that, even if state law did authorize for-hire driver collective

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negotiations, *Parker* immunity does not apply because no State of Washington officials supervise the collective negotiations under the Ordinance. Compl. ¶65. However, *Parker* does not require that the supervision of private activity be by *state* rather than *local* officials. As *Tom Hudson & Associates, Inc. v. City of Chula Vista*, 746 F.2d 1370 (9th Cir. 1984), held, *Parker*'s "active state supervision" requirement is satisfied where potentially anticompetitive proposals made by private parties are "reviewed" for reasonableness and then "approved" *by a municipality*, such that any approved proposals are "directly attributable to action of the city." *Id.* at 1373-74; *Tri-State Rubbish, Inc. v. Waste Mgt., Inc.*, 998 F.2d 1073, 1079 (1st Cir. 1993) (endorsing view "that municipal supervision of private actors is adequate" to establish *Parker* immunity," and noting that this view is "supported by the greater weight of authority" and "endorsed by the leading antitrust treatise"); *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005, 1014-15 (8th Cir. 1983). Requiring the State to supervise local regulation of for-hire transportation options "erode[s] local autonomy" and "makes little sense" because there is no reason "to require a state to invest its limited resources in supervisory functions that are best left to municipalities." *Golden State Transit Corp. v. City of Los Angeles*, 726 F.2d 1430, 1434 (9th Cir. 1984).[4]

Here, the Director's supervision of the EDR certification and negotiation process easily satisfies the active supervision prong of *Parker*. *Parker* does not mandate that a government official have authority to dictate the terms of an agreement. Rather, "[t]he active supervision requirement demands, *inter alia*, 'that state officials have and exercise power to *review* particular anticompetitive acts of private parties and *disapprove* those that fail to accord with state policy.'" *N.C. Dental Examiners*, 135 S.Ct. at 1112 (quoting *Patrick v. Burget*, 486 U.S. 94, 101 (1988)) (emphases added). The purpose of the active supervision requirement is to ensure that "the details

[4] In *Town of Hallie v. City of Eau Claire*, the Supreme Court held that "the active state supervision requirement should not be imposed in cases in which the actor is a municipality." 471 U.S. 34, 46 (1985); *see also, e.g.*, *N.C. Dental Examiners*, 135 S.Ct. at 1112 ("[M]unicipalities are subject exclusively to [the] 'clear articulation' requirement.") (quotation omitted); *Southern Motor Carriers*, 471 U.S. at 57 n.20 ("Although its anticompetitive conduct must be taken pursuant to a clearly articulated state policy, a municipality need not be supervised by the State in order to qualify for *Parker* immunity."). Here, because the Director maintains the ultimate decision-making authority and there is no "regulation by a private party," this Court need not even apply *Parker*'s second prong. *See infra* at 15-16. But even assuming *Parker*'s second prong does apply, it is easily satisfied for the reasons set forth herein.

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of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634-35 (1992). That purpose is served so long as the supervisor can "*review* the substance of the anticompetitive decision, not merely the procedures followed to produce it;" has "the *power to veto or modify* particular decisions to ensure they accord with state policy;" and actually makes a decision rather than merely having the potential ability to intervene. *N.C. Dental Examiners*, 135 S.Ct. at 1116-17 (citations and internal quotations omitted; emphases added).

All of these elements are present under the Ordinance. The Director is required to review *every* proposed agreement, whether reached by the parties or through an interest arbitration, "to ensure that the substance of the agreement promotes the provision of safe, reliable, and economical for-hire transportation services and otherwise advance the policy goals" of the Ordinance. SMC 6.310.735.H.2, I.3. In conducting such review, the Director may gather evidence, hold public hearings, and request additional information, and must issue a written explanation of conclusions. *Id.* Only if the Director finds the agreement furthers those goals does it take effect. SMC 6.310.735.H.2.a, c., I.4.a, c. Otherwise, the Director must return the agreement to the parties (or interest arbitrator) with a written explanation of its deficiencies and, if the Director chooses, recommendations to remedy those problems. SMC 6.310.735.H.2.b, I.4.b.[5]

These provisions on their face fulfill the requirement that a government official review and have the authority to disapprove the specific acts by private parties that the Ordinance authorizes, and therefore satisfy the "active supervision" prong of *Parker* immunity doctrine. While it is possible that a party might in the future assert an as-applied challenge to the Ordinance, *see, e.g.*, *Ticor*, 504 U.S. at 638-40, no such challenge is possible in this lawsuit because there are no facts to apply: The Director has not yet reviewed any agreements and the Chamber challenges the Ordinance only on its face.

[5] Any amendments to agreements must also be approved. SMC 6.310.735.J. And if "the Director determines that the agreement no longer … promotes the provision of safe, reliable, and economical for-hire transportation services and the public policy goals" of the Ordinance, the Director may withdraw approval of the agreement after following specified procedures. SMC 6.310.735.J.1.

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Indeed, the Director's control over the ultimate terms of any agreement means the Ordinance permits only unilaterally imposed restraints upon trade, which are categorically exempt from antitrust challenges. *See Yakima Valley Mem. Hosp. v. Wash. Dep't of Health*, 654 F.3d 919, 926 (9th Cir. 2011) ("To determine whether a regulation facially conflicts with Sherman Act [Section] 1, we first consider whether the challenged regulation involves (1) unilateral action by the state and is thus not subject to preemption (because there is no concerted action)"); *Fisher*, 475 U.S. at 270; *Costco*, 522 F.3d at 891 ("[A] unilaterally imposed restraint of the sovereign ... is not subject to preemption."). Although the Ordinance permits certain terms governing the working conditions of a particular driver coordinator's drivers to be proposed to the Director in the form of an agreement reached through collective negotiations or interest arbitration, those proposals have *no effect unless and until* they are reviewed and approved by the Director based on a finding that the terms will promote the safety and reliability of for-hire transportation services in Seattle. Pursuant to the Ordinance, only the Director can impose arguably anticompetitive restraints on trade. Just as in *Fisher*, where the challenged rent-control ordinance was a unilateral restraint on trade even though private parties had "some power to trigger the enforcement of its provisions," 475 U.S. at 269, and in *Yakima Valley Memorial Hospital*, where a state-imposed ban on new cardiac care facilities was unilateral even though it enabled incumbent care providers to exclude new competition, 654 F.3d at 930, the Director—not any private party—unilaterally imposes any and all restraints on trade authorized by the Ordinance. Because such a unilateral decision does not involve the kind of "concerted action" required to sustain an antitrust claim, *Fisher*, 475 U.S. at 266, the Ordinance cannot be challenged on an antitrust preemption theory.

3. State antitrust claims (Count Seven)

The Chamber's CPA preemption claim must be dismissed for comparable reasons. First, Washington categorically "exempt[s] municipal corporations from the operation … of the Consumer Protection Act." *Wash. Nat. Gas Co. v. Pub. Util. Dist. No. 1*, 77 Wn.2d 94, 98 (1969); *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 169 (1987); *Ottgen v. Clover Park Tech. College*, 84 Wn.App. 214, 221 (1996) ("[M]unicipal corporations and political subdivisions

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are exempt from the CPA.").[6] Quite simply, the CPA does not provide any cause of action against a City or its officials. Second, like the Sherman Act, the CPA applies only to a "contract, combination …, or conspiracy in restraint of trade or commerce." RCW 19.86.030. As explained earlier, however, the Chamber has not alleged that any of the Defendants have entered into any combination or agreement that might trigger antitrust scrutiny. *See supra* at 10-14. For both of these reasons, Count Seven must be dismissed as well.

D. The Chamber fails to state an NLRA preemption claim.

1. *Garmon* preemption (Count Four)

The Chamber also alleges that the Ordinance is preempted under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), because local officials and state courts might have to determine whether for-hire drivers are "employees" under the NLRA (and so exempt from the Ordinance) or independent contractors (and so subject to the Ordinance). Compl. ¶84. However, the mere fact that a state or local official may need to determine whether a worker is an NLRA "employee" does not establish that a law is preempted. If it did, every law covering agricultural laborers, for example, would be preempted simply because disputes over whether some workers are covered might arise. *See, e.g.*, *Produce Magic*, 311 NLRB 1277 (addressing dispute over whether "cutter-packers" are employees or agricultural laborers). To be sure, the *application* of the law to a particular group of drivers *could* be challenged on *Garmon* preemption grounds if those drivers were arguably employees and so arguably covered by the NLRA. But here, the Complaint specifically alleges that the drivers at issue are independent contractors, *not* employees. Compl. ¶¶16-18. No party to this case takes the position that the Chamber's members' drivers are even "arguably" employees, which dooms the Chamber's *Garmon* preemption claim.

[6] Even if the City and its officials were arguably subject to suit under the CPA, the Ordinance was enacted pursuant to the City's express statutory authority to regulate the for-hire transportation industry, *see supra* at 12-13, and there is no reason to believe that in authorizing such regulations and expressly exempting them from antitrust challenges, the Legislature nonetheless intended to permit CPA-based antitrust claims. The Chamber contends that "the state-action" exemption to CPA liability "must be construed narrowly" under Washington law, *see* Compl. ¶104 (citing *Robinson v. Avis Rent A Car System, Inc.*, 106 Wn.App. 104, 110-13 (2001)), but that case involved CPA claims against private parties, and the purported statutory authorization for the unfair practices at issue there did not contain the kind of express exemption from antitrust liability present here.

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As the Supreme Court has held, a party who contends that a worker is "arguably" an employee covered by the NLRA, such that state or local regulation of that worker's relationship with an employer is preempted, "is required to demonstrate that his case is one that the [NLRB] could legally decide in his favor." *Int'l Longshoremen's Ass'n*, 476 U.S. at 394-95 (citing *Marine Engineers v. Interlake S.S. Co.*, 370 U.S. 173, 184 (1962)). "The party must ... put forth *enough evidence to enable the court to find that the [NLRB] reasonably could uphold a claim* based on such an interpretation." *Id.* (emphasis added). Here, the Chamber has not even alleged that any of its members' for-hire drivers could reasonably be held to be "employees" by the NLRB; in fact, it alleges the exact opposite. The Chamber has thus pled itself out of its own cause of action. "The precondition for pre-emption, that the conduct be 'arguably' protected or prohibited, ... is not satisfied by a conclusory assertion of pre-emption" such as "a claim, without more, that [the worker in question] was an employee rather than a supervisor." *Id.*[7] Because the Chamber challenges the Ordinance on its face, has admitted that its members' for-hire drivers are independent contractors, and has not introduced any evidence that those drivers are arguably employees subject to the NLRA, its *Garmon* preemption claim is meritless.[8]

[7] Nor does it matter that the employee or non-employee status of some Lyft and Uber drivers is pending before the NLRB. Compl. ¶85. That a charge is under NLRB investigation does not excuse the obligation to produce *evidence* showing that drivers for Lyft and Uber are arguably employees. *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261 (9th Cir. 1994), makes that clear. In *Bud Antle*, the NLRB had previously issued two separate unit clarification decisions holding that the workers at issue fell under the NLRB's jurisdiction; another unit clarification petition was at that time pending; and in granting review of that pending petition the NLRB had expressly criticized the California Agricultural Labor Relations Board's analysis and assertion of jurisdiction. *Id.* at 1267-68, 1273. Notwithstanding the NLRB proceedings, the Ninth Circuit considered whether there was a sufficient *evidentiary* showing that the workers at issue were arguably "employees" covered by the NLRA, rather than agricultural laborers excluded from the NLRA and left to state jurisdiction, *before* holding that the NLRA preempted the ALRB's assertion of jurisdiction. *Id.* at 1274-75.

[8] In passing, the Chamber also alleges that the Ordinance is preempted because it supposedly authorizes labor organizations to engage in activities that NLRA Sections 8(e) and 8(b)(4) prohibit. Compl. ¶¶86-87. But these claims are not ripe, because an agreement with terms that allegedly violate Section 8(e) could be reached only if all of the following events occur: Local 117 seeks statements of interest from a Chamber member, obtains support from a majority of that member's qualifying drivers, is certified by the City, seeks to negotiate a term that Section 8(e) prohibits, obtains such an agreement, and has that agreement approved by the Director. *See supra* at 9-10. Moreover, even if those events occurred, nothing in *the Ordinance* mandates such an agreement. Rather, the Ordinance—*just like every other facially neutral law or regulation*—is completely neutral as to any such conduct. Further, Section 8(e) and 8(b)(4) regulate only the conduct of "labor organizations," which do not include organizations representing individuals "having the status of an independent contractor." 29 U.S.C. §152(3), (5); *see Pac. Maritime Ass'n v. Local 63, Int'l Longshoremen's Union*, 198 F.3d 1078, 1081 (9th Cir. 1999). And the purpose of these provisions is "to prohibit only pressure brought to bear on a third person *who is wholly unconcerned in the disagreement* ...." *Chipman Freight Servs. Inc. v. NLRB*, 843 F.2d 1224, 1227 (9th Cir. 1988) (quotation marks and

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2. *Machinists* preemption (Count Three)

The Chamber alleges that the Ordinance's grant of certain collective negotiation rights to independent contractors is preempted under the doctrine established by *Machinists v. Wisc. Employment Relations Comm'n*, 427 U.S. 132 (1976), because the NLRA excludes independent contractors from its definition of "employee." 29 U.S.C. §152(3) ("The term 'employee' … shall not include any individual … having the status of an independent contractor."). According to the Chamber, this shows that Congress intended not only to exempt independent contractor relationships from NLRA coverage, but also to preclude any regulation of the work relationships of independent contractors by any state or local government. Compl. ¶76.

However, as discussed in greater detail in the City's preliminary injunction opposition, the NLRA excludes a number of groups from its definition of "employee," while *permitting* state regulation of those workers' employment relationships. The same provision that excludes independent contractors from the definition of "employee" (and thus from NLRA coverage) also excludes, *inter alia*, agricultural laborers, domestic workers, and public employees. 29 U.S.C. §152(2), (3). The Ninth Circuit has explained that where Congress excluded a group of workers from the NLRA's coverage, "nothing in the National Labor Relations Act … suggest[s] that Congress intended to preempt … state action by legislating for the entire field. Indeed, we draw precisely the *opposite* inference from Congress' exclusion of agricultural employees from the Act." *United Farm Workers of Am., AFL-CIO v. Ariz. Agricultural Employment Relations Bd.*, 669 F.2d 1249, 1257 (9th Cir. 1982) ("*UFWA I*") (emphasis added); *see also United Farm Workers of Am., AFL-CIO v. Ariz. Agricultural Employment Relations Bd.*, 727 F.2d 1475, 1476 (9th Cir. 1984) (regulation of agricultural workers' labor relations "is left to the states"). Based on this reasoning, courts have uniformly held that the NLRA does not preempt state or local regulation of such excluded groups. *See, e.g., Greene v. Dayton*, 806 F.3d 1146, 1149 (8th Cir. 2015) (agricultural and domestic service workers "are treated identically in the text of the [NLRA]," and

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citation omitted; emphasis added). That would not apply to an agreement between an EDR and a driver coordinator setting the terms and conditions of the EDR's members.

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"Congress did not demonstrate an intent to shield these workers from all regulation").[9] Here, similarly, Congress' exclusion of independent contractors from NLRA coverage leaves states and localities free to regulate such workers.

Although Congress amended the NLRA in 1947 to exclude both independent contractors and supervisors from the NLRA's definition of "employee," and courts have interpreted the 1947 amendments to preclude state and local regulation of *supervisors'* labor relations, the statutory text governing those two exclusions is different in a crucial manner. With respect to supervisorial employees, Congress *expressly* preempted states and localities from requiring employers to bargain with supervisors:

> [N]o employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

29 U.S.C. §164(a). *No similar express preemption provision* applies to independent contractors, and the Chamber offers no reason why this Court can imply one without any textual support.

To the contrary, the existence of an explicit preemption provision with respect to supervisors shows Congress' understanding that, in the absence of such a prohibition, states and municipalities may regulate labor relations for workers not covered by the NLRA, and that when Congress meant to prohibit such state and local regulation it knew how to do so. *See Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest."). Therefore, no intent to preclude local or state mandates with respect to independent contractor working relationships can be implied from Congress's decision not to regulate those relationships at the federal level.

Alternatively, the Chamber alleges that the Ordinance's imposition of requirements that

[9] *See also, e.g., Villegas v. Princeton Farms, Inc.*, 893 F.2d 919, 921 (7th Cir. 1990); *Willmar Poultry Co., Inc. v. Jones*, 430 F. Supp. 573, 577-78 (D. Minn. 1977); *Barsamian v. United Farm Workers Union*, 1973 WL 1091, *1 (E.D. Wis. Jan. 29, 1973).

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are *different* from the NLRA's (namely, the requirement of interest arbitration and the Director's authority to disapprove negotiated agreements) renders it preempted. Compl. ¶78. But the Chamber does not explain why the NLRA's exclusion of certain workers from its coverage would allow state and local regulation of those workers only insofar as such regulation parallels the NLRA. In fact, many local and state labor laws covering workers excluded from the NLRA (such as public employees) impose requirements that are different from the NLRA, and no courts have held them preempted on such grounds.[10]

E. The Chamber fails to state a lack of authority claim (Count Six)

The Chamber claims the City lacked the authority to pass the Ordinance because the legislature did not expressly use the words "regulate third-party businesses" or "collective bargaining." Compl. ¶96. Far from it. The applicable statutes provide the City with a broad grant of authority and the Ordinance, which advances the safety and reliability of the relevant industries, fits neatly into the legislature's statutory scheme. The Chamber's overly narrow reading of state law must be rejected and its claim dismissed.

The relevant statutes broadly state that, given the importance of the for-hire and taxi industries, it is the "intent of the legislature to permit political subdivisions of the state to regulate" those respective industries. RCW 46.72.001; RCW 81.72.200. In turn, those statutes provide a broad catch-all grant of authority permitting cities the power to regulate these industries through "*[a]ny other* requirements adopted to ensure safe and reliable" service. RCW 46.72.160 & RCW 81.72.210 (emphasis added); *see Robertson v. Wash. St. Parks & Rec. Comm'n*, 135 Wn.App. 1, 6 n.15 (2005) ("any" "means 'every' and 'all,'" and Legislature uses "any" to broaden a statute's scope) (citations omitted). The City properly relied on these grants of authority because the City Council, in its legislative judgment (which cannot be second-guessed), determined that providing

[10] *See, e.g.*, RCW 41.56.450 (authorizing interest arbitration for certain public employees); Cal. Gov't Code §3507.1 (requiring local government recognition of union based on submission of authorization cards); Cal. Labor Code §1164 (providing for mandatory mediation of agricultural worker contracts).

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a mechanism for drivers to organize advanced the safety and reliability of the relevant industries.[11] Given this grant broad grant of authority, the Chamber's so-called "unauthorized action" claim necessarily fails. After all, "[m]unicipal ordinances are presumed to be valid. We must try to harmonize municipal ordinances with state law when possible[.]" *Filo Foods, LLC v. City of SeaTac*, 183 Wn.2d 770, 793 (2015) (citations and quotation omitted). Here, the Ordinance, which is predicated on safety and reliability, is completely consistent with the broad grant of authority the legislature provided.

F. The Chamber fails to state a claim under the PRA (Count Eight)

Finally, the Chamber claims that the PRA preempts the Ordinance. Compl. ¶111.[12] The Chamber's tortured theory turns a statute whose purpose is the broad disclosure of public records on its head, treating it as a law creating some affirmative non-disclosure right that applies even outside the context of a request for disclosure of public records. Unsurprisingly, the Chamber cites no authority supporting its claim.[13] This claim is fundamentally flawed, and should be dismissed.

The PRA "is a strongly worded mandate for broad disclosure of public records [which] is to be liberally construed to promote full access to public records, and its exemptions are to be narrowly construed." *Newman v. King County*, 133 Wn.2d 565, 570-71 (1997) (quotations and citations omitted); *cf. Chrysler Corp. v. Brown*, 441 U.S. 281, 292 (1979) ("FOIA is exclusively a disclosure statute").[14] The PRA's exemptions are designed primarily to prevent disclosures that may cause "substantial damage to the privacy rights of citizens or damage to vital functions of

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[11] "It is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature." *Rousso v. State*, 170 Wn.2d 70, 75 (2010) (citation & quotation omitted).

[12] For purposes of this Motion only, the City assumes that the Chamber has adequately pled the existence of a trade secret. That said, the City vigorously disagrees that these lists are trade secrets, for the reasons set forth in Defendants' concurrently filed opposition to the Chamber's preliminary injunction motion.

[13] *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126 (1962) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.").

[14] The PRA does not contain an express exemption for "trade secrets." To the extent that trade secrets can be protected under the PRA, this has occurred through judicial interpretation of the PRA's "other statute" provision. *See, e.g.*, *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 262 (1994) (plurality). Thus, while is it odd to say that a disclosure statute creates some affirmative non-disclosure right, it is doubly odd to claim to claim that the PRA affirmatively protects something that the legislature did not even mention in the text of the PRA.

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government." *Limstrom v. Ladenburg*, 136 Wn.2d 595, 607 (1998). Nothing in the PRA's text or structure, however, creates any affirmative right to non-disclosure, other than a right to prevent the disclosure of certain records *in response to a PRA request for those records*. The Chamber's claim that the PRA itself affirmatively "prohibits disclosure of public records" is meritless. Compl. ¶106.[15]

The Chamber's view directly contradicts the broad disclosure mandate of the act, as well as its requirement that exemptions be narrowly construed and that it be liberally interpreted to *promote* disclosure. Also, the Chamber's view appears to rest on the faulty assumption that exemptions are mandatory, not permissive. *But see* WAC Chapter 44-14-06002 (Attorney General Model Rules) ("Exemptions are 'permissive rather than mandatory.'") (quoting Op. Att'y Gen. 1 (1980), at 5). Unless the City invokes an exemption, the only way to prevent disclosure is through the PRA's third-party injunction provision. *See Elster Solutions, LLC v. City of Seattle*, 2:16-cv-00771RSL, Dkt. #35, at 3 (Aug. 9, 2016) (citing RCW 42.56.540). Under that section a person may seek to enjoin the production of a public record only upon a showing that the "examination would *clearly not be in the public interest* and would substantially and irreparably damage any person[.]" RCW 42.56.540 (emphasis added). In other words, even if an exemption applies, a party must demonstrate that the public has no interest in the information contained in the requested record. The PRA does not even obligate an agency to notify an individual who may be personally impacted by the release of public record. *See id.* ("An agency has the option of notifying persons named in the record . . . that release of a record has been requested.").[16] Together, this demonstrates that the PRA does not create any affirmative right to nondisclosure that could ever be the source of a conflict between the PRA and the Ordinance and thus establish PRA preemption.

The Chamber's claim also fails as a matter of process. The PRA applies only "when an

[15] While it is a highly dubious proposition that the "driver lists" are "public records," *see, e.g., Dragonslayer, Inc. v. Wash. State Gambling Comm'n*, 139 Wn.App. 433, 444, 161 P.3d 428 (2007) (setting out three-part test to determine whether something is a "public record"), the City will assume for purposes of this motion that they are.

[16] "[A]n agency's promise of confidentiality . . . is not adequate to establish the nondisclosability of information; promises cannot override the requirements of the disclosure law." *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 137 (1978).

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agency is requested to disclose public records." *Nissen v. Pierce County*, 183 Wn.2d 863, 873 (2015) (emphasis added). The Chamber does not allege that any of its members fit within the definition of "public agency," *see* RCW 42.56.010(1), or are the "functional equivalent" of an agency, *see, e.g.*, *Fortang v. Woodland Park Zoo*, 387 P.3d 690, 698-703 (Wash. 2017) (rejecting claim that zoo was "functional equivalent" of Seattle). The claim fails for that reason as well.[17]

In short, the PRA is not concerned with the exchange of information between private actors. To be sure, if someone requested a similar driver list *from the City*, the PRA might be implicated, and the Chamber's members could seek to enjoin the release of such information under RCW 42.56.540. Until that point, however, the PRA has no role to play and any claim of "preemption" is baseless. The Chamber's PRA claim must be dismissed.

IV CONCLUSION

For these reasons, this Court should dismiss each of the Chamber's claims.[18]

DATED this 21st day of March, 2017.

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[17] If it did, that would be tantamount to an admission that any citizen could request records from the Chamber's members, and those members would be required to produce those records or overcome the strong presumption in favor of disclosure. Presumably, the Chamber's members do not accept such obligations.

[18] The Chamber's §1983 claim (Count Six) is entirely derivative of its other federal claims, and must be dismissed for the same reasons.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March, 2017, I electronically filed this DEFENDANTS' MOTION TO DISMISS with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the below-listed:

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DATED this 21st day of March, 2017, at Seattle, Washington.

By: /s/Michael K. Ryan
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