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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' OPPOSITION TO
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION

**NOTED ON CALENDAR FOR ORAL
ARUGMENT: March 30, 2017 at 3:00 p.m.**

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1 The Chamber contends that immediate injunctive relief is needed to stop implementation
2 of a law “that threatens the very existence of the for-hire and rideshare transportation system in
3 western Washington.” Mot. (Dkt. #2) at 1. That threat, it argues, is imminent because the
4 Ordinance requires Uber, Lyft, and Eastside-for-Hire to turn over purportedly confidential lists of
5 qualifying drivers on April 3, 2017. *Id.* at 1, 22. Rhetoric aside, the Chamber’s assertion of
6 irreparable harm lacks any basis. The lists do not reveal trade secrets or highly confidential
7 information; as recently determined by the King County Superior Court, the information is already
8 publicly available (and competitors Uber and Lyft already have it). The lists will be disclosed only
9 to one recipient, which may use them solely for specified purposes; there is no reason to believe
10 they will fall into competitors’ hands. Finally, the Chamber’s purported remaining injuries are
11 either speculative and non-imminent or otherwise fail to withstand analysis.

12 The Chamber has also not demonstrated likely success on the merits on its facial challenge.
13 Its National Labor Relations Act (“NLRA”) preemption arguments fail because in excluding
14 independent contractors from the NLRA’s coverage Congress left local and state governments free
15 to regulate such relationships, and because the Chamber provides no evidence that Uber, Lyft or
16 Eastside’s drivers could reasonably be deemed employees under federal labor law—a showing that
17 the Chamber not only declines to attempt to make, but affirmatively alleges to be false. The
18 Chamber’s antitrust claims are unlikely to succeed because they are unripe and cannot be pursued
19 by an association on behalf of its members, because the state action exemption to antitrust liability
20 applies, and because the Ordinance involves unilateral state action.

21 **I FACTUAL BACKGROUND**

22 **A. The Ordinance**

23 On December 14, 2015, the Seattle City Council adopted the Ordinance Relating to
24 Taxicab, Transportation Network Company, and For-Hire Vehicle Drivers. Mot. at 3. The Council
25 enacted the Ordinance “to ensure safe and reliable for-hire and taxicab transportation service.”
26 Ordinance (“Ord.,” attached as Ex. A to the Declaration of Matt Eng) §1.C. The Council explained
27 that “driver coordinators”—the term the Ordinance uses for entities that provide for-hire

1 transportation services to the public—“establish the terms and conditions of their contracts with
2 their drivers unilaterally,” and may impose changes without advance warning or input from the
3 drivers. *Id.* §1.E. In the Council’s judgment, this can adversely affect for-hire drivers’ ability to
4 provide “safe, reliable, stable, cost-effective, and economically viable” transportation service, and
5 lead to unrest and service disruptions. *Id.* §1.E, F. The Council determined, based on outcomes in
6 other industries, that providing a means through which for-hire drivers could address the terms and
7 conditions of their contractual relationships collectively would improve the safety and reliability
8 of for-hire transportation services by, among other things, reducing turnover, increasing driver
9 commitment and experience, and alleviating the pressure drivers face to provide transportation
10 services in an unsafe manner (such as by working too many hours, operating vehicles at unsafe
11 speeds, or ignoring necessary maintenance). *Id.* §1.I, J. The Council’s authority to enact the
12 Ordinance derives from RCW 46.72.001 and RCW 81.72.200, which authorize Seattle to regulate
13 for-hire and taxicab transportation services to ensure safety and reliability, and exempt such
14 regulation from antitrust liability.

15 To permit for-hire drivers to have input in establishing the terms and conditions of their
16 contractual relationships, the Ordinance establishes a process for independent contractor drivers
17 to designate an “Exclusive Driver Representative” (“EDR”) to negotiate with their driver
18 coordinators. The Ordinance applies only to independent contractors, and expressly excludes from
19 its coverage drivers who are “employees” for purposes of the NLRA. Ord. §6.

20 **B. Implementation of the Ordinance**

21 Following lengthy public comment, the City issued four rules relating to the Ordinance on
22 December 29, 2016. Eng Decl. ¶5. The City announced the remainder of the proposed rules on
23 March 6, 2017. *Id.* ¶6. On January 17, 2017, Uber’s subsidiary filed a writ in Superior Court
24 challenging the first four rules as arbitrary and capricious and seeking injunctive relief; Eastside
25 intervened. Declaration of Michael K. Ryan (“Ryan Decl.”) ¶3. On March 17, 2017, Judge Beth
26 M. Andrus denied the writ. *Id.* No appeal has been filed to date. *Id.*

27 Only Teamsters Local 117 applied for status as a Qualified Driver Representative

1 (“QDR”), allowing it to seek recognition as an EDR. Eng Decl. ¶7. Local 117 was certified as a
2 QDR on March 3, 2017, and then gave notice to all twelve identified driver coordinators seeking
3 a list of their qualifying drivers. Mot. at 4. Uber, Lyft, and Eastside must provide Local 117 these
4 lists by April 3, 2017. SMC 6.310.735.D; Mot. at 4. If it elects to collect statements of interest
5 from a company’s qualifying drivers, Local 117 will have 120 days to collect and submit them to
6 the City, and the Director will then determine whether Local 117 has shown support from a
7 majority of drivers; if it has, Local 117 will be certified as an EDR for that driver coordinator, and
8 negotiations over certain specified subjects will take place. SMC 6.310.735.F.1-3, H.1.

9 **C. Public availability of information on “qualifying driver” lists**

10 The City requires all for-hire drivers who provide rides originating within the City to obtain
11 business licenses. Declaration of Kara Main-Hester ¶3. For-hire driver business licensees can be
12 searched online at <http://www.seattle.gov/licenses/find-a-business>, to generate records that include
13 their name, address, and phone number. *Id.* ¶¶4-5 & Ex. A. A spreadsheet listing this information
14 for taxi drivers was produced in response to a public records request received by the City in late
15 2015. *Id.*, Exs. B, C. In response to another public records request, the City has also disclosed a
16 list showing the driver coordinator and Vehicle Identification Numbers (“VINs”) for all for-hire
17 vehicles in the City. *Id.* ¶¶13-14, 16 & Exs. H-J. Lyft and Uber both sought to enjoin that disclosure,
18 arguing that drivers’ identities could be ascertained from VINs so the disclosure would allow
19 competitors to create lists of all Lyft drivers and all Uber drivers. Ryan Decl., Exs. A at 5, 9-10; B
20 at 1, 4-5, 11-13, 18-19; C ¶¶12-13, 19-20; D ¶¶5-7. Judge Andrus rejected this trade secret claim
21 on the ground that information allowing the creation of such driver lists was already publicly
22 available; after no appeal was filed, the unredacted information was disclosed to the requestor, to
23 Lyft, and to Uber in late 2016. Ryan Decl., Ex. E at 6-7; Main-Hester Decl. ¶16 & Ex. J.

24 **II LEGAL STANDARD**

25 “A preliminary injunction is an extraordinary remedy never awarded as of right.” *Winter*
26 *v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). A plaintiff must establish that (1) it is likely
27 to succeed on the merits, (2) it or its members will likely suffer irreparable harm absent preliminary

1 relief, (3) the balance of equities tips in its favor, and (4) an injunction is in the public interest. *See*
2 *id.* at 20. Irreparable injury must be “likely.” *Id.* at 22 (emphasis in original). It must also be
3 “present or imminent.” *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 162 (2010).
4 “[S]ubstantial” injuries, “in terms of money, time and energy necessarily expended ... are not
5 enough” without a showing that the injury is “irreparable.” *Sampson v. Murray*, 415 U.S. 61, 90
6 (1974). To enjoin an activity of a state or local government, federalism requires the showing of
7 both “substantial and immediate irreparable injury.” *Hodgers-Durgin v. De La Vina*, 199 F.3d
8 1037, 1042 (9th Cir. 1999). Absent a “clear showing” on all these factors, injunctive relief is not
9 warranted. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

10 A “high threshold must be met if a state law is to be preempted for conflicting with the
11 purposes of a federal Act.” *Chamber of Commerce v. Whiting*, 563 U.S. 582, 607 (2011) (quotation
12 omitted). To succeed in its facial challenge, the Chamber must show that “no set of circumstances
13 exists under which the Act would be valid.” *U.S. v. Salerno*, 481 U.S. 739, 745 (1987).

14 III ARGUMENT

15 A. The Chamber is unlikely to succeed on the merits of its claims.

16 The Chamber cannot establish likely success on the merits for several reasons. The NLRA
17 preemption claims lack any merit, and the Chamber does not have associational standing to assert
18 the *Garmon* NLRA preemption claim. The Chamber’s antitrust claim is unripe because it is
19 entirely speculative whether any collective bargaining involving price-related terms will occur.
20 Even if it were ripe, the challenge would not be properly brought by the Chamber through
21 associational standing, and it would lack merit because the Ordinance involves state action that
22 cannot be challenged on an antitrust theory.

23 1. The Chamber is unlikely to succeed on its NLRA *Machinists* preemption claim.

24 The Chamber contends that the Ordinance’s grant of certain collective negotiation rights
25 to independent contractors is preempted under the doctrine established by *Machinists v. Wisc.*
26 *Employment Relations Comm’n*, 427 U.S. 132 (1976), because the NLRA excludes independent
27 contractors from its definition of “employee.” *See* 29 U.S.C. §152(3) (“The term ‘employee’ ...

1 shall not include any individual ... having the status of independent contractor.”). According to
2 the Chamber, this shows that Congress intended to preclude any state or local regulation of the
3 work relationships of independent contractors. Mot. at 20.

4 However, the Chamber acknowledges that the NLRA excludes a number of groups from
5 its definition of “employee,” while *permitting* state regulation of those workers’ employment
6 relationships. The same provision that excludes independent contractors from the definition of
7 “employee” (and thus from the NLRA’s coverage) also excludes, *inter alia*, agricultural laborers,
8 domestic workers, and public employees. 29 U.S.C. §§152(2), (3). The Ninth Circuit has explained
9 that where Congress excluded a group of workers from the NLRA’s coverage, “nothing in the
10 [NLRA] ... suggest[s] that Congress intended to preempt ... state action by legislating for the
11 entire field. Indeed, we draw precisely the *opposite* inference from Congress’ exclusion of
12 agricultural employees from the Act.” *United Farm Workers of Am., AFL-CIO v. Ariz. Agricultural*
13 *Employment Relations Bd.*, 669 F.2d 1249, 1257 (9th Cir. 1982) (emphasis added) (“*UFWA P*”);
14 *see also United Farm Workers of Am., AFL-CIO v. Ariz. Agricultural Employment Relations Bd.*,
15 727 F.2d 1475, 1476 (9th Cir. 1984) (regulation of agricultural workers’ labor relations “is left to
16 the states”). Based on this reasoning, courts have uniformly held that the NLRA does not preempt
17 state or local regulation of such excluded groups of individuals. *See, e.g., Greene v. Dayton*, 806
18 F.3d 1146, 1149 (8th Cir. 2015) (agricultural and domestic service workers “are treated identically
19 in the text of the [NLRA],” and “Congress did not demonstrate an intent to shield these workers
20 from all regulation”).¹ Here, similarly, Congress’ exclusion of independent contractors from
21 NLRA coverage leaves states and localities free to regulate such workers.

22 The Chamber contends that independent contractors differ from the other excluded groups
23 because those groups are “traditional ‘employees’” exempted for policy reasons. Mot. at 15. But
24 neither the text nor the legislative history identifies this rationale. States and localities may regulate
25

26 ¹ *See also, e.g., Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 181 (2007); *Villegas v. Princeton Farms, Inc.*, 893
27 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. Wisc. Jan. 29, 1973).

1 the labor relations of groups excluded from NLRA coverage not because of the purported policy
2 justifications for permitting such regulation, *see* Mot. at 17, but because courts assume that when
3 Congress *excludes* a group from federal regulation, it intends to allow “states ... to legislate as they
4 see fit.” *UFWA I*, 669 F.2d at 1257.²

5 Most important, the statutory text of the NLRA treats independent contractors like other
6 excluded groups, not like supervisors. Although Congress amended the NLRA in 1947 to exclude
7 both independent contractors and supervisors from the NLRA’s definition of “employee,” and
8 courts have interpreted the 1947 amendments to preclude state and local regulation of *supervisors’*
9 labor relations, Mot. at 15-16, the statutory text governing those two exclusions differs in a crucial
10 manner (which the Chamber neglects to mention). With respect to supervisorial employees,
11 Congress *expressly* preempted states and localities from requiring bargaining with supervisors:

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

15 29 U.S.C. §164(a).³ *No similar express preemption provision* applies to independent contractors,

16 ² The Chamber asserts that collective negotiations by independent contractors are “inconsistent with the fundamental
17 purpose of labor relation under the NLRA” because, in its view, independent contractors have entrepreneurial freedom
18 and autonomy that employees lack. Mot. at 15-16. But the NLRA’s authorization of collective bargaining based on
19 employees’ lack of individual power in no way conflicts with another governmental entity’s determination that other
20 groups of workers (here, independent contractor drivers) need the ability to speak collectively as well. In enacting the
21 Ordinance, the City Council concluded that for-hire drivers “lack the power to negotiate [the terms and conditions of
22 their contractual relationship] effectively on an individual basis.” Ord. §1.G; *see also id.* §1.E-I. As the Ninth Circuit
has pointed out, “where, as 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, and may apply their own views of proper public policy ... insofar as it is
subject to their jurisdiction.” *UFWA I*, 669 F.2d at 1257. In any event, *NLRB v. Friendly Cab Co.*, 512 F.3d 1090,
1098 (9th Cir. 2008) (cited at Mot. at 15) did not say that all workers who are classified by their employers as
independent contractors enjoy entrepreneurial opportunities. Rather, in rejecting a taxi company’s classification of its
drivers as independent contractors, the court noted that “[t]he ability to operate an independent business and develop
entrepreneurial opportunities” is an important factor in determining a worker’s status. *Id.*

23 ³ “Supervisor” is defined in 29 U.S.C. §152(a). Congress protected employers against any obligation to recognize or
24 bargain with unions representing supervisors because “supervisors were management obliged to be loyal to their
25 employer’s interests, and their identity with the interests of the rank-and-file employees might impair that loyalty and
26 threaten realization of the basic ends of federal labor legislation.” *Beasley v. Food Fair of N.C.*, 416 U.S. 653, 659-60
27 (1974); *see also* 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”; discussing problem that
supervisor unions were subservient to unions of rank and file employees whom they supervised). No such similar
concern about “divided loyalty” by those entrusted to represent management’s interests exists with respect to
independent contractors. In fact, the Supreme Court has recognized that the interests of employees and independent
contractors may often be closely intertwined. *See American Federation of Musicians v. Carroll*, 391 U.S. 99, 107

(Cont’d)

1 and the Chamber offers no reason why this Court could imply one in the absence of any support
2 in the NLRA's text. To the contrary, the existence of an explicit preemption provision with respect
3 to supervisors shows Congress' understanding that, in the absence of such a prohibition, states and
4 municipalities may regulate labor relations for workers not covered by the NLRA, and that when
5 Congress meant to prohibit such state and local regulation it knew how to do so. *See Jama v.*
6 *Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that
7 Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and
8 our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows
9 how to make such a requirement manifest.").

10 Nor does the Chamber's argument that state and local regulation of independent contractors
11 undermines national uniformity carry any force. Had Congress intended to ensure such national
12 uniformity, it would have included an express preemption provision comparable to 29 U.S.C.
13 §164(a). Where Congress excludes particular working relationships from NLRA coverage without
14 prohibiting state or local regulation of those workers, the "laws may be ... drastically different in
15 neighboring states," and "there is absolutely nothing inappropriate in such a state of affairs."
16 *UFWA I*, 669 F.2d at 1256-57. "[W]here, as here, Congress has chosen not to create a national
17 labor policy in a particular field, the states remain free to legislate as they see fit, and may apply
18 their own views of proper public policy to the collective bargaining process insofar as it is subject
19 to their jurisdiction." *Id.* at 1257.⁴

20 Alternatively, the Chamber argues that the Ordinance's imposition of requirements that are
21 *different* from the NLRA's (namely, the requirement of interest arbitration and the Director's
22 authority to disapprove negotiated agreements) renders it preempted. Mot. at 19-20. But the

23 (1968) (holding that orchestra leaders, who were independent contractors, were "labor group" under federal labor law
24 due to economic interrelationship with employees).

25 ⁴ Nor should the novelty of the Ordinance give this Court pause; it is an example of the state and local experimentation
26 that the federal system is intended to protect and encourage. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311
27 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State
may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the
rest of the country."). As the economy rapidly changes, forms of worker organization adapt, and by leaving the
regulation of the new working relationships emerging from those economic changes to states and localities, Congress
allows state and local governments to test different possible responses instead of establishing a single national policy.

1 Chamber's authority consists exclusively of cases involving employees who *are* covered by the
2 NLRA, not groups of workers who are *excluded*. *Id.* The Chamber does not explain why the NLRA
3 would allow state and local regulation of excluded workers only insofar as such regulation parallels
4 the NLRA. In fact, many local and state labor laws covering workers excluded from the NLRA
5 (such as public employees) impose requirements that are different from the NLRA, and no courts
6 have held them preempted on such grounds.⁵

7 **2. The Chamber is unlikely to succeed on its NLRA *Garmon* preemption claim.**

8 The Chamber also argues that the Ordinance is preempted under *San Diego Building*
9 *Trades Council v. Garmon*, 359 U.S. 236 (1959), because local officials and state courts might
10 have to determine whether for-hire drivers are “employees” under the NLRA (and so exempt from
11 the Ordinance) or independent contractors (and so subject to the Ordinance). Mot. at 21. However,
12 simply because a state or local official may be required to determine whether a worker is an NLRA
13 “employee” does not establish preemption. If it did, every law covering agricultural laborers, for
14 example, would be preempted simply because disputes over whether some workers are covered
15 might arise. *See, e.g., Produce Magic*, 311 NLRB 1277 (addressing dispute over whether “cutter-
16 packers” are NLRA employees or agricultural laborers). As the Chamber acknowledges, “the
17 Ordinance does not apply to ‘employees.’” Mot. at 21 (citing Ord. §6). That there may
18 hypothetically be a future dispute over whether some specific group of workers is covered by the
19 NLRA and so exempt from the Ordinance does not establish *facial* preemption.

20 To be sure, the *application* of the law to a particular group of drivers *could* be challenged
21 as *Garmon* preempted if those drivers were arguably employees and so arguably covered by the
22 NLRA. But here, the Chamber's Complaint specifically alleges that the drivers at issue are
23 independent contractors, *not employees*, and the Chamber members have all filed declarations
24 attesting to the same. Compl. (Dkt. #1) ¶¶16-18; Takar Decl. (Dkt. #3) ¶8; Kelsay Decl. (Dkt. #4)

25
26 ⁵ *See, e.g.,* RCW 41.56.450 (authorizing interest arbitration for certain public employees); Cal. Gov't Code §3507.1
27 (requiring local government recognition of union based on submission of authorization cards); Cal. Labor Code §1164
(providing for mandatory mediation of agricultural worker contracts).

1 ¶¶8, 10; Steger Decl. (Dkt. #5) ¶9. No party to this case takes the position that the Chamber's
2 members' drivers are even "arguably" employees. This dooms the Chamber's *Garmon* preemption
3 claim. As the Supreme Court held, "The precondition for pre-emption, that the conduct be
4 'arguably' protected or prohibited, ... is not satisfied by a conclusory assertion of pre-emption"
5 such as "a claim, without more, that [the worker in question] was an employee rather than a
6 supervisor." *Int'l Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 394-95 (1986). Rather,
7 a party who contends that a worker is "arguably" an NLRA employee so that state or local
8 regulation of that worker's relationship with an employer is preempted "is required to demonstrate
9 that his case is one that the [NLRB] could legally decide in his favor" by "put[ting] forth *enough*
10 *evidence to enable the court to find that the [NLRB] reasonably could uphold a claim* based on
11 such an interpretation." *Id.* (citing *Marine Engineers v. Interlake S.S. Co.*, 370 U.S. 173, 184
12 (1962)). Here, the Chamber contends the drivers are *not* employees and puts forth *no* evidence that
13 they could reasonably be held to be "employees" by the NLRB. *Id.*; *cf. Baggett Transp. Co. v. Int'l*
14 *Bhd. Teamsters*, 270 So.2d 800, 802-03 (Ala. 1972).⁶

15 The Chamber is also unlikely to succeed because its *Garmon* claim requires individualized
16 proof about its members' drivers, so it lacks associational standing. *See San Diego County Gun*
17 *Rights Cte. v. Reno*, 98 F.3d 1121, 1131 (9th Cir. 1996) (citing *Hunt v. Washington State Apple*
18 *Advertising Comm'n*, 432 U.S. 333, 343 (1977)) (no associational standing when claims require
19 participation of individual members); *Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ.*
20 *Equity*, 950 F.2d 1401, 1408 (9th Cir. 1991) (no associational standing if claims require
21 individualized proof). As explained, a party claiming *Garmon* preemption cannot simply point to

22 _____
23 ⁶ Nor does it matter that the employee or non-employee status of some for-hire drivers for Lyft and Uber is currently
24 pending before the NLRB. Mot. at 21. That a charge is under NLRB investigation does not excuse the Chamber from
25 its obligation to produce *evidence* showing that drivers for Lyft and Uber are arguably employees. *See, e.g., Bud Antle,*
26 *Inc. v. Barbosa*, 45 F.3d 1261, 1274-75 (9th Cir. 1994) (requiring evidentiary showing that workers were arguably
27 "employees" covered by the NLRA despite prior and pending NLRB proceedings). If the NLRB ultimately were to
determine that Lyft and/or Uber drivers are employees, the Ordinance would not apply to them. And presumably if
the NLRB were to hold those drivers are independent contractors, not employees, the Chamber would concede there
would be no *Garmon* preemption claim. Indeed, because the NLRA's test for distinguishing employees from
independent contractors is fact- and context-specific, the determination could vary for different groups of drivers in
different localities or states, even if they drive for the same company. The Chamber's facial challenge to the Ordinance,
however, does not require this Court to consider such issues at this point in time.

1 the theoretical applicability of the NLRA, but must “put forth enough evidence to enable the court
2 to find that the Board reasonably could uphold a claim based on such an interpretation.” *Int’l*
3 *Longshoremen’s Ass’n*, 476 U.S. at 395 (internal quotations omitted). That is, the Court must
4 determine whether there is evidence that the workforce of any specific Chamber member is
5 comprised of drivers who are arguably employees rather than independent contractors under the
6 NLRA’s multi-factor, fact-specific analysis. *See supra* at 9. Any answer would depend upon the
7 specific factual circumstances of the driver coordinator in question.⁷ The participation of
8 individual Chamber members whose driver workforces might “arguably” be subject to the NLRA
9 is thus required for any litigation of the Chamber’s *Garmon* claim. When variations in the
10 individualized circumstances of an association’s members affect the nature of their injuries or
11 claims, those claims “are not susceptible to judicial treatment as systematic policy violations that
12 make extensive individual participation unnecessary,” and associational standing is improper.
13 *Spinedex Physical Therapy USA Inc. v. United Healthcare of Ariz., Inc.*, 770 F.3d 1282, 1293 (9th
14 Cir. 2014) (internal quotation marks and ellipses omitted); *see also, e.g., Lake Mohave Boat*
15 *Owners Ass’n v. Nat’l Park Serv.*, 78 F.3d 1360, 1367 (9th Cir. 1995) (member participation
16 required where legal issues involved member-by-member variations and therefore required
17 “individualized proof”).

18 **3. The Chamber is unlikely to establish a federal antitrust claim.**

19 The Chamber’s federal antitrust preemption claim is also unlikely to succeed. Because the
20 purported violations of federal antitrust law are not imminent, the Chamber’s antitrust preemption
21 claim is unripe and would not justify emergency relief. The Chamber also lacks standing to pursue
22 federal antitrust claims on behalf of its members. And in any event, the Chamber is unlikely to
23 succeed on the merits for two reasons: a challenge to one of the numerous topics of potential
24 bargaining between EDRs and driver coordinators is insufficient to require the Ordinance’s *facial*

25 _____
26 ⁷ Moreover, any injunctive relief would necessarily be tailored to that driver coordinator’s specific circumstances—
27 such as by providing for expiration of the injunction should the NLRB determine 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.

1 invalidation, and the Ordinance is an exercise of the City’s regulatory power that is immune from
2 antitrust challenge. *See, e.g., Parker v. Brown*, 317 U.S. 341 (1943).

3 **i. The Chamber’s antitrust claim is not ripe.**

4 The Chamber is unlikely to succeed on its federal antitrust preemption claim in the first
5 instance because that claim is not ripe. “A claim is not ripe for adjudication if it rests upon
6 contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Texas*
7 *v. United States*, 523 U.S. 296, 300 (1998). Here, the Chamber’s antitrust claim is premised entirely
8 on its concern that for-hire drivers will “form unions and collectively bargain over the *price terms*
9 of their contracts with driver coordinators,” which the Chamber considers to be “horizontal price
10 fixing.” Mot. at 5 (emphasis added). But before any bargaining at all can occur, Local 117 would
11 need to procure statements of interest from a majority of qualifying drivers for a particular driver
12 coordinator and then be certified by the City as the EDR. Whether Local 117 will ever succeed in
13 procuring majority support from drivers for Uber, Lyft, or Eastside—and indeed, whether it will
14 even pursue statements of interest from one of those company’s qualifying drivers after receiving
15 the required lists—is entirely speculative. Because the Chamber’s antitrust claim is premised upon
16 these uncertain future events, that claim is not yet ripe and cannot justify emergency relief. *See*
17 *Chamber of Commerce v. Seattle*, No. C16-0322RSL, 2016 WL 4595981, *2-4 (W.D. Wash. Aug.
18 9, 2016) (concluding that any injury to Uber or Eastside For Hire resulting from collective
19 negotiations required by ordinance is too speculative to establish Article III standing); *cf., e.g.,*
20 *Parish v. Dayton*, 761 F.3d 873, 876 (8th Cir. 2014) (challenge to law permitting collective
21 bargaining by childcare workers unripe where “[t]he election of an exclusive representative [was]
22 not certainly impending”); *see also Bierman v. Dayton*, No. 14-3021, 2014 WL 4145410, *4-6 (D.
23 Minn. Aug. 20, 2014) (claim challenging implementation of exclusive union representation was
24 unripe when results of union election were still unknown). The Chamber’s antitrust preemption
25 claim should be decided if, and only if, the negotiations over price terms of which the Chamber
26 complains are *likely*. Such a conclusion is consistent with the requirement that, in addition to
27 Article III requirements, the Chamber must also demonstrate a specific “antitrust injury.” *See, e.g.,*

1 *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 110-11 (1986).

2 **ii. The Chamber cannot pursue antitrust claims on behalf of its members.**

3 The language of Section 16 of the Clayton Act (which governs claims for injunctive relief)
4 prohibits associations from bringing antitrust claims on their members' behalf by requiring that
5 claims be brought only by a party "threatened [with] loss or damage by a violation of the antitrust
6 laws." 15 U.S.C. §26; *see, e.g., Fin. & Sec. Prods. Ass'n v. Diebold, Inc.*, No. C04-04347WHA,
7 2005 WL 1629813, *3 (N.D. Cal. Jul. 8, 2005); *see also Am. Chiropractic Ass'n, Inc. v. Trigon*
8 *Healthcare, Inc.*, 151 F.Supp.2d 723, 730 (W.D. Va. 2001); *Beverly Area Planning Ass'n*, 830
9 F.2d 1374, 1380 n.3 (7th Cir. 1987) (comparable language in Section 4 of the Clayton Act "does
10 not encompass an association which has not itself suffered such injury"). Because the Chamber
11 does not contend that *the Chamber itself* is threatened with loss or damage, the Chamber cannot
12 pursue its federal antitrust preemption claim.

13 Further, as explained earlier, *supra* at 9-10, in order to pursue claims on its members' behalf
14 the Chamber must establish that *neither* the relief requested *nor* the claim proffered demands
15 individualized proof from the association's members. *See Associated Gen. Contractors*, 950 F.2d
16 at 1408. Even if Section 16 did not preclude associational standing, any analysis of the damage to
17 the Chamber's members (as required by Section 16) will require detailed factual inquiries
18 regarding the impact of the Ordinance on those companies' operations, market share, and financial
19 performance, and any injunction would need to be tailored to the loss or damage to those members.
20 The Court cannot evaluate the impact of the Ordinance on the Chamber's members or accomplish
21 the necessary tailoring without their participation. *See, e.g., Spinedex*, 770 F.3d at 1293 (when
22 variations in circumstances of association's members affect nature of injuries or claims, claims
23 "are not susceptible to judicial treatment as systematic policy violations that make extensive
24 individual participation unnecessary").

25 **iii. The Parker state action doctrine immunizes the Ordinance against the**
26 **Chamber's antitrust claims.**

27 The Chamber is also unlikely to succeed on its antitrust claim because the federal antitrust

1 laws do not prohibit states and their political subdivisions from protecting their citizens' interests
2 through reasonable state regulation. As the Supreme Court explained in *Parker*, the federal
3 antitrust laws should not be read "to restrain a state or its officers or agents from activities directed
4 by its legislature." 317 U.S. at 350-51. "The *Parker* decision was premised on the assumption that
5 Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate
6 their domestic commerce," including in ways that would otherwise violate antitrust laws. *Southern*
7 *Motor Carriers Rate Conf., Inc. v. U.S.*, 471 U.S. 48, 56 (1986).

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

10 The first requirement for *Parker* immunity is that the regulation or conduct at issue be
11 "clearly articulated and affirmatively expressed as state policy." *N.C. State Bd. of Dental*
12 *Examiners v. Federal Trade Comm'n*, 135 S.Ct. 1101, 1110 (2015). The Chamber contends that
13 the Ordinance fails this standard because Washington law does not expressly authorize collective
14 bargaining between for-hire drivers and driver companies. Mot. at 8-12. But a party relying on
15 *Parker* immunity "need not 'point to a specific, detailed legislative authorization' for its
16 challenged conduct." *Southern Motor Carriers*, 471 U.S. at 64 (quoting *Lafayette v. Louisiana*
17 *Power & Light Co.*, 435 U.S. 389, 415 (1978)). Rather, it suffices to show that "the State as
18 sovereign clearly intends to displace competition in a particular field with a regulatory structure."
19 *Id.* In other words, so long as the State intended to displace competition within the field in question,
20 the specific actions taken to effectuate that state policy need not be expressly authorized. *See id.*
21 at 64-66 (holding that legislative intent to displace price competition among common carriers is
22 sufficient to immunize collective ratemaking activity). The clear authorization test may be satisfied
23 even if the policy of displacing competition is merely "implicit" or is "defined at so high a level
24 of generality as to leave open critical questions about how and to what extent the market should
25 be regulated." *N. C. Dental Examiners*, 135 S.Ct. at 1112.

26 Thus, it does not matter whether Washington expressly authorized *collective bargaining*
27 between for-hire drivers and driver companies as a *specific* mechanism to further state objectives.

1 All that matters is that state law *does* affirmatively authorize the displacement of competition in
2 the for-hire transportation industry. The Legislature has explained “that privately operated for hire
3 transportation service is a vital part of the transportation system,” making “the safety, reliability,
4 and stability” of such service a matter of “statewide importance” and regulation of that service “an
5 essential governmental function.” RCW 46.72.001; *see also* RCW 81.72.200 (same with respect
6 to taxi companies). Given the importance of such regulations to protecting the public, Washington
7 law specifically provides that “it is the intent of the legislature to permit political subdivisions of
8 the state to regulate for hire transportation services *without liability under federal antitrust laws.*”
9 RCW 46.72.001 (emphasis added); *see also* RCW 81.72.200 (same for taxi companies).
10 Washington’s intent to authorize the City of Seattle to displace competition in the for-hire
11 transportation industry could not any be more explicit.⁸

12 State law gives cities like Seattle broad authority over how to regulate the for-hire driver
13 industry, including in manners that displace competition. It authorizes municipalities to “license,
14 control, and regulate all for hire vehicles operating within their respective jurisdictions,” and
15 specifies that this power “includes” a number of delineated subjects as well as “[a]ny other
16 requirements adopted to ensure safe and reliable for hire vehicle transportation service.” RCW
17 46.72.160(6); *see also* RCW 81.72.210. The City Council adopted the Ordinance pursuant to that
18 statutory authority. Ord. §1.B. The Ordinance expressly sets forth its purpose of protecting safety
19 and reliability, and requires the Director to determine that any agreement reached by the parties or
20 in interest arbitration furthers the City’s purposes before it may take effect. Ord. §1.A, C, E-F, J.⁹

21 ⁸ The Ninth Circuit statement the Chamber cites in arguing that the Legislature must have contemplated the specific
22 “kinds of actions alleged to be anticompetitive” was issued *before Southern Motor Carriers* clarified the clear
23 articulation requirement. Mot. at 8-9. Moreover, because the intent to displace competition here is explicit, this Court
24 need not ascertain whether “displacement of competition [i]s the inherent, logical, or ordinary result of the exercise
of authority delegated by the state legislature.” *FTC v. Phoebe Putney*, 133 S.Ct. 1003, 1013 (2013); *see also City of*
Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 372-73 (1991) (displacement of competition need not be
expressly authorized, so long as “suppression of competition is the foreseeable result of what the statute authorizes”).

25 ⁹ To the extent the Chamber contends that Seattle lacks authority to regulate “driver coordinators” or “ride-referral
26 companies” because such companies are not “transportation providers,” *see, e.g.*, Mot. at 10, its contention is meritless.
As the Chamber admits, Washington law gives Seattle “general regulatory authority over persons and businesses
27 providing for-hire transportation services,” *id.*, which necessarily includes the power to regulate companies like Uber,
Lyft, and Eastside that indisputably provide transportation services regardless of how they style themselves. Multiple

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1 Contrary to the Chamber's contentions, no more is required to establish clear authorization
2 under *Parker*. "If more detail than a clear intent to displace competition were required of the
3 legislature," as the Chamber contends, that would interfere with the ability of state agencies or
4 municipal authorities to address issues not foreseen by the state legislature. *Southern Motor*
5 *Carriers*, 471 U.S. at 64. Such interference is particularly inappropriate in the context of municipal
6 regulation: "[M]unicipalities are electorally accountable ... lack the kind of private incentives
7 characteristic of active participants in the market [and] exercise[] a wide range of governmental
8 powers across different economic spheres," such that the concern that regulation might be used to
9 "pursue private interests" is substantially reduced. *N.C. Dental Examiners*, 135 S.Ct. at 1112-13.

10 In short, the "authorization requirement" does not "dictate[] transformation of state
11 administrative review into a federal antitrust job." *City of Columbia*, 499 U.S. at 372 (internal
12 quotations omitted). This Court therefore need not determine whether the City has complied with
13 applicable procedural and substantive requirements of Washington law, or acted for the reasons or
14 purposes authorized by state law. *Id.* at 371.¹⁰ Likewise, the Court need not determine whether the
15 Ordinance is permissible as a matter of state law. "[I]n order to prevent *Parker* from undermining
16 the very interests of federalism it is designed to protect, it is necessary to adopt a concept of
17 authority broader than what is applied to determine the legality of the municipality's action under

18
19 federal courts have already rejected the claim that companies like Lyft and Uber are not transportation companies. See
20 *Cotter v. Lyft, Inc.*, 60 F.Supp.3d 1067, 1078 (N.D. Cal. 2015) ("[T]he argument that Lyft is merely a platform, and
21 that drivers perform no service for Lyft, is not a serious one."); *Doe v. Uber Technologies, Inc.*, 184 F.Supp.3d 774,
22 786 (N.D. Ca. 2016) (rejecting argument that Uber "is not a common carrier but ... a 'broker' of transportation
23 services"); *O'Connor v. Uber Technologies, Inc.*, 82 F.Supp.3d 1133, 1141 (N.D. Cal. 2015) (argument that Uber is
24 "merely a technological intermediary between potential riders and potential drivers ... is fatally flawed in numerous
25 respects"). Moreover, if this contention had merit, all municipal regulation of companies like Uber and Lyft would be
26 invalid. In fact, however, the Chamber's members have been subject to Seattle's regulations for years, never once
27 claiming the City lacked the authority to regulate them.

¹⁰ The Court can disregard the Chamber's attack upon the Council's determination that the negotiation process established by the Ordinance will improve the safety and reliability of for-hire transportation services within Seattle. See also, e.g., *Roussio v. State*, 170 Wn.2d 70, 75 (2010) ("It is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature.") (citation and quotation omitted). Notably, the only authority cited in support of the Chamber's attack on that determination is decade-old testimony by the FTC (an agency with an institutional interest in applying antitrust laws broadly but no particular expertise in transportation policy or collective worker negotiations) regarding collective bargaining by pharmacies with health plans. See Mot. at 11. Such irrelevant testimony provides no basis for this Court to second-guess the Council's legislative judgments.

(Cont'd)

1 state law.” *Id.* at 372. The statutory authorization to displace competition, and the specific grant of
2 authority to adopt regulations furthering the purposes of safety and reliability, establish the “clear
3 authorization” prong of *Parker* immunity doctrine, and no further inquiry regarding the scope of
4 the City’s authority under state law is necessary.¹¹

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

6 The Chamber further alleges that *Parker* immunity does not apply because no State of
7 Washington officials supervise the collective negotiations required under the Ordinance. Mot. at
8 12-13.¹² However, *Parker* does not require the supervision of private activity to be provided by
9 state rather than local officials. As *Tom Hudson & Associates, Inc. v. City of Chula Vista*, 746 F.2d
10 1370 (9th Cir. 1984), held, *Parker*’s “active state supervision” requirement is satisfied where
11 potentially anticompetitive proposals made by private parties are “reviewed” for reasonableness
12 and then “approved” by a municipality, such that any approved proposals are “directly attributable
13 to action of the city.” *Id.* at 1374; *see also Southern Motor Carriers*, 471 U.S. at 57 n.20 (“Although
14 its anticompetitive conduct must be taken pursuant to a clearly articulated state policy, a
15 municipality need not be supervised by the State in order to qualify for *Parker* immunity.”); *Tri-*
16 *State Rubbish, Inc. v. Waste Management, Inc.*, 998 F.2d 1073, 1079 (1st Cir. 1993) (endorsing
17 view “that municipal supervision of private actors is adequate” to establish *Parker* immunity, and

18 ¹¹ The Chamber contends that a different result is required under *Phoebe Putney* and *Columbia Steel Casting Co. v.*
19 *Portland Gen. Elec. Co.*, 111 F.3d 1427 (9th Cir. 1996), but in both cases the statutory authorizations for the actions
20 at issue were insufficient to trigger *Parker* immunity because they said nothing whatsoever about displacing
21 competition. *See Phoebe Putney*, 133 S.Ct. at 1011-12 (hospital entity had been granted only “general corporate
powers”); *Columbia Steel Casting*, 111 F.3d at 1438 (statutory authorization could have but did not authorize
“exclusive service” by utilities). By contrast, Washington clearly intended to empower the City to regulate the for-
hire transportation industry “without liability under federal antitrust laws.” RCW 46.72.001.

22 ¹² To the extent the Chamber contends that a Washington official must actively supervise any law enacted by the City
pursuant to its authorization to enact potentially anticompetitive regulations, the Chamber is wrong. *Town of Hallie v.*
23 *City of Eau Claire* specifically 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
24 (“[M]unicipalities are subject exclusively to [the] ‘clear articulation’ requirement.”) (quotation omitted). In arguing
to the contrary, the Chamber misquotes *Town of Hallie*. Compare Mot. at 12 (arguing that active supervision is
25 required “where state or municipal regulation [of] a private party is involved”) (alteration by Chamber), *with Town of*
Hallie, 471 U.S. at 46 n.10 (“Where state or municipal regulation *by* a private party is involved, however, active state
26 supervision must be shown, even where a clearly articulated state policy exists.”) (emphasis added). 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. *Infra* at 18-19. But even assuming it does apply, it is easily satisfied.

27 (Cont’d)

1 noting that view is “supported by the greater weight of authority” and “endorsed by the leading
2 antitrust treatise”); *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005,
3 1014-15 (8th Cir. 1983).¹³ Requiring the State to supervise local regulation of for-hire
4 transportation options not only “would erode local autonomy” but also “makes little sense”
5 because there is no good reason “to require a state to invest its limited resources in supervisory
6 functions that are best left to municipalities.” *Golden State Transit Corp. v. City of Los Angeles*,
7 726 F.2d 1430, 1434 (9th Cir. 1984).

8 The Chamber also contends that the “active state supervision” requirement is not met here
9 because the Director has “no independent authority to specify the terms of a collective-bargaining
10 agreement.” Mot. at 13. The active supervision requirement does not, however, mandate that a
11 government official be able to dictate an agreement’s terms. Rather, “[t]he active supervision
12 requirement demands, *inter alia*, that state officials have and exercise power to *review* particular
13 anticompetitive acts of private parties and *disapprove* those that fail to accord with state policy.”
14 *N.C. Dental Examiners*, 135 S.Ct. at 1112 (quotation omitted) (emphases added). The purpose of
15 the requirement is to ensure that “the details of the rates or prices have been established as a product
16 of deliberate state intervention, not simply by agreement among private parties.” *FTC v. Ticor*
17 *Title Ins. Co.*, 504 U.S. 621, 634-35 (1992). That purpose is served so long as the supervisor can
18 “*review* the substance of the anticompetitive decision, not merely the procedures followed to
19 produce it;” “the supervisor [has] the *power to veto or modify* particular decisions to ensure they
20 accord with state policy;” and the supervisor actually makes a decision rather than merely having
21 the potential ability to intervene. *N.C. Dental Examiners*, 133 S.Ct. at 1116-17 (citations and
22 internal quotations omitted; emphases added).

23 Here, the Ordinance requires the Director to review *every* proposed agreement “to ensure
24 that the substance of the agreement promotes the provision of safe, reliable, and economical for-

25 ¹³ The Chamber contends *Tom Hudson* merely “assumed that municipal supervision of private parties is sufficient,”
26 Mot. at 13 n.2, but the issue there was whether Chula Vista’s supervision of private parties was sufficient for *Parker*
27 immunity purposes, and the Ninth Circuit held it was. *Tom Hudson* is thus binding authority on that question. The
cases the Chamber cites simply restate the *Parker* immunity requirements in the most general terms, and do not even
purport to consider whether municipal supervision is sufficient for *Parker* immunity. Mot. at 12.

1 hire transportation services and otherwise advance the [Ordinance's] policy goals." SMC
2 6.310.735.H.2, I.3. In conducting such review, the Director may gather evidence, hold public
3 hearings, and request additional information, and must issue a written explanation of conclusions.
4 *Id.* Only if the Director finds the agreement furthers those goals does it take effect. SMC
5 6.310.735.H.2.a, c, I.4.a, c.¹⁴ Otherwise, the Director must return the agreement to the parties (or
6 interest arbitrator) with a written explanation of its deficiencies and, if the Director chooses,
7 recommendations to remedy those problems. SMC 6.310.735.H.2.b, I.4.b.¹⁵ These provisions on
8 their face (which is all that is at issue here) fulfill the requirement that a government official review
9 and have authority to disapprove the specific acts by private parties that the Ordinance authorizes,
10 and therefore satisfy *Parker's* "active supervision" prong.

11 Indeed, the Director's control over the ultimate terms of any agreement means that the
12 Ordinance permits only unilaterally imposed restraints on trade, which are categorically exempt
13 from antitrust preemption. *See Yakima Valley Mem. Hosp. v. Wash. Dep't of Health*, 654 F.3d 919,
14 926 (9th Cir. 2011) ("To determine whether a regulation facially conflicts with Sherman Act
15 [Section] 1, we first consider whether the challenged regulation involves (1) unilateral action by
16 the state and is thus not subject to preemption (because there is no concerted action)[.]"); *Costco*
17 *Wholesale Corp. v. Maleng*, 522 F.3d 874, 891 (9th Cir. 2008) ("[A] unilaterally imposed restraint
18 of the sovereign ... is not subject to preemption."); *Fisher v. City of Berkeley*, 475 U.S. 260, 270
19 (1986). Although the Ordinance permits certain terms to be proposed to the Director in the form
20 of an agreement reached through collective negotiations or interest arbitration, those proposals
21 have *no effect* unless and until they are reviewed and approved by the Director based on a finding

22 ¹⁴ This case does not involve the kind of "negative option regime" at issue in *Ticor*, where private parties' price-fixing
23 agreements became effective unless the government exercised its veto. *Ticor* held *Parker* immunity was not available
24 under such a regime where the facts showed "that the potential for state supervision was not realized in fact." 504 U.S.
25 at 638-40; *but see id.* at 639 (explaining why the "negative option regime" in *Southern Motor Carriers* was sufficient).
While a party might in the future assert an as-applied challenge to the Ordinance on the theory that the Director is not
actually exercising his authority (should such facts develop), no such as-applied challenge is possible in this lawsuit
because the Director has not yet reviewed any agreements and the Chamber challenges the Ordinance on its face.

26 ¹⁵ Any amendments to agreements must also be approved. SMC 6.310.735.J. And if "the Director determines that the
27 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.

1 that the terms will promote the safety and reliability of for-hire transportation services in Seattle.
2 Pursuant to the Ordinance's terms, only *the Director* can impose arguably anticompetitive
3 restraints on trade. Just as in *Fisher*, where the challenged rent-control ordinance was held a
4 unilateral restraint on trade even though private parties had "some power to trigger the enforcement
5 of its provisions," 475 U.S. at 269, and in *Yakima Valley Memorial Hospital*, where a state-
6 imposed ban on new cardiac care facilities was held unilateral even though it enabled incumbent
7 care providers to exclude new competition, 654 F.3d at 930, the Director—not any private party—
8 unilaterally imposes any and all restraints on trade authorized by the Ordinance. Because such a
9 unilateral decision does not involve the "concerted action" required to sustain an antitrust claim,
10 *Fisher*, 475 U.S. at 266, the Ordinance cannot be challenged on an antitrust preemption theory.

11 **iv. A single negotiation topic cannot render the entire Ordinance facially invalid.**

12 The Chamber's claim is also unlikely to succeed because it is premised on only one of the
13 numerous topics of collective negotiation between EDRs and driver coordinators—specifically,
14 negotiations regarding "the price terms of [drivers'] contracts with the driver coordinators." Mot.
15 at 7. Even if such negotiations *were* "per se illegal," that would not justify enjoining the entire
16 Ordinance. It would instead support only a limited injunction prohibiting such price term
17 negotiations (which, as previously explained, may never even occur). Other conduct authorized by
18 the Ordinance—including collective negotiations regarding other topics, such as driver safety—
19 would be subject to the antitrust "rule of reason" analysis rather than being deemed "unlawful *per*
20 *se*."¹⁶ And because that conduct is not "per se" unlawful, it could not support a claim that the
21 Ordinance is facially preempted or justify the injunctive relief sought herein.¹⁷

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25 ¹⁶ See, e.g., *Int'l Healthcare Mgt. v. Hawaii Coalition for Health*, 332 F.3d 600, 605 (9th Cir. 2003) ("joint efforts to
26 modify *non-fee* terms of [a participating physician agreement] is not in a class of restraints previously held to be per
27 se unreasonable") (emphasis added).

¹⁷ See, e.g., *Costco*, 522 F.3d at 885-86 ("[T]o be struck down, the regulation or restraint must effect a per se violation
of the Sherman Act.").

1 **B. The Chamber has not demonstrated likely irreparable injury.**

2 **1. Disclosure of publicly available driver information is not an irreparable injury.**

3 The Chamber's argument that it will suffer irreparable harm from the disclosure of
4 qualifying driver lists containing "confidential, trade secret information," Mot. at 1; *see also id.* at
5 22, is wrong for many reasons.

6 First, the disclosure that the Chamber complains would irreparably injure its members
7 involves information that is already publicly available. Any member of the public may access a
8 computer database containing the name, telephone number, and address of all licensed for-hire
9 drivers in the City. Main-Hester Decl. ¶¶5-6 & Ex. C.¹⁸ Other information could be obtained
10 through a public records request. *Id.* ¶9. And information allowing a competitor to create an
11 "aggregate" list of drivers who work for Lyft and/or Uber has already been disclosed to a television
12 station, to Uber, and to Lyft in response to a public records request. Main-Hester Decl. ¶16 & Ex.
13 J.¹⁹ On that basis alone, there could be no irreparable harm caused by disclosing that information.

14 Notably, the Chamber does not contend that Washington's Uniform Trade Secrets Act
15 supports its claim, perhaps because Uber and Lyft have already lost that argument in state court.
16 Judge Andrus previously held that aggregate information concerning the identities of Lyft and
17 Uber drivers is not a trade secret, reasoning that the "driver's identities are not secret" because
18 "[i]n order for a driver to obtain a business license ... they have to submit that license application
19 to the City, and that information—their name, their address—is all publicly available information."
20 Ryan Decl., Ex. E at 6. Withholding the information "for the purpose of protecting the identity of
21 Uber and LYFT drivers would be fruitless, as that information is already available to [Uber and
22 LYFT] from other sources." *Id.* at 6-7. The court thus ordered disclosure over objections by Uber
23 and Lyft that doing so would irreparably harm them by allowing their competitors to learn the
24 identities of all of their drivers, and neither Uber nor Lyft appealed. Ryan Decl., Ex. A at 5, 9-10;

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26 ¹⁸ Names do not have special private status under Washington state law. *See King County v. Sheehan*, 114 Wn.App.
325, 346 (2002).

27 ¹⁹ Lyft and Uber, who have the only substantial presence in the TNC market, Ryan Decl., Ex. D ¶5, thus already have
the information they need to create lists of one another's drivers, with contact information.

1 B at 1, 4-5, 11-13, 18-19; C ¶¶12-13, 19-20; D ¶¶5-7; Main-Hester Decl. ¶18. As a result, Uber
2 now possesses Lyft's VINs (allowing it to ascertain Lyft's drivers), and vice versa. *Id.*

3 Second, the Ordinance provides for disclosure of the lists of qualifying drivers *only to a*
4 *QDR*, and requires that the QDR use those lists *only* to contact drivers to solicit their support; the
5 QDR "may not sell, publish, or otherwise disseminate the driver contact information" to any other
6 person or entity. SMC 6.310.735.E. The Chamber submits no evidence that the QDR (Teamsters
7 Local 117) will violate the law by disclosing the lists of qualifying drivers to Uber's, Lyft's, or
8 Eastside's competitors. If Local 117 disclosed this information improperly, it would be subject to
9 hefty fines, and any injured entity would have a private right of action to seek damages and
10 equitable relief. SMC 6.310.735.M. Misuse could also potentially subject Local 117 to a
11 misappropriation claim. Irreparable injury cannot be established based on mere speculation about
12 such possible misuse. *See Earth Island Institute v. U.S. Forest Serv.*, 351 F.3d 1291, 1311 (9th Cir.
13 2003) ("The law does not require the identified injury to be certain to occur, but it is not enough
14 to identify a purported injury which is only theoretical or speculative.").

15 Third, even if the Chamber *had* demonstrated that the lists contained confidential
16 information that would likely fall into the hands of its members' competitors, its irreparable injury
17 showing would be deficient. The Chamber's evidence of injury consists of conclusory and
18 boilerplate assertions that competitors "could" or "can" use the lists to raid drivers. *See Steger*
19 *Decl.* ¶17; *Takar Decl.* ¶12; *Kelsay Decl.* ¶¶15-16. The declarations do not identify any competitor
20 that is likely to do so, nor otherwise show that such raiding is *likely*. Further, they fail to explain
21 with any specificity how such raiding would harm the business of the Chamber's members. *See*
22 *Steger Decl.* ¶17; *Takar Decl.* ¶12; *Kelsay Decl.* ¶15. Such speculative and conclusory testimony
23 is insufficient to show *likely* irreparable injury justifying a preliminary injunction. *See Caribbean*
24 *Marine Serv. Co., Inc. v. Baldrige*, 844 F.2d 668, 671-72, 675 (9th Cir. 1988); *Oakland Tribune*
25 *Inc. v. Chronicle Pub. Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985); *Goldie's Bookstore, Inc. v.*
26 *Superior Ct. of State of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984); *cf. International Franchise Ass'n,*
27 *Inc. v. City of Seattle*, 803 F.3d 389, 411-12 (9th Cir. 2015).

1 **2. Preemption would not itself establish irreparable injury.**

2 The Chamber also argues that “deprivation” of a constitutional right through application of
3 a preempted law “constitutes irreparable injury.” Mot. at 22. But the Chamber’s only
4 “constitutional” claim is a preemption claim arising under the Supremacy Clause. The sole
5 authority cited for the proposition that likely preemption establishes irreparable harm, *American*
6 *Trucking Ass’n, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058 (9th Cir. 2009), predates the
7 Supreme Court’s clarification that the Supremacy Clause protects the structure of government, and
8 does not convey a personal constitutional right. See *Armstrong v. Exceptional Child Ctr., Inc.*, 135
9 S.Ct. 1378, 1383 (2015) (“[T]he Supremacy Clause is not the ‘source of any federal rights’ and
10 does not ‘give affected parties a constitutional ... right to enforce federal laws against the States’”)
11 (internal quotations omitted). Given the structural nature of preemption claims, any presumption
12 that violations of *individual* constitutional rights cause irreparable harm would be inapplicable.

13 In any event, *American Trucking* cannot bear the weight the Chamber places on it. There,
14 the Ninth Circuit was concerned that by being forced to sign agreements that were likely
15 preempted, the plaintiff “will be forced to incur large costs which, if it manages to survive those,
16 will disrupt and change the whole nature of its business in ways that most likely cannot be
17 compensated with damages alone.” 559 F.3d at 1058. Such discussion of costs and business
18 disruption would have been unnecessary if the Supremacy Clause violation had alone been
19 sufficient. Indeed, under the Chamber’s theory, much of the irreparable harm discussion in the
20 case law would be unnecessary, and *Winter*’s mandate that irreparable injury be *likely* would
21 become irrelevant in all cases raising federal statutory claims against local and state officials.²⁰

22 **3. The Chamber’s remaining attempts to show irreparable harm also fail.**

23 The Chamber further contends that its members “will have to spend resources educating

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25 ²⁰ One would expect to find discussion of such a significant doctrinal shift in the case law. Instead, the few decisions
26 to expressly address the issue have held otherwise. See, e.g., *New York State Rest. Ass’n v. New York City Bd. of*
27 *Health*, 545 F.Supp.2d 363, 367 (S.D.N.Y. 2008) (“[P]er se irreparable harm is caused only by violations of ‘personal’
constitutional rights[,] to be distinguished from provisions of the Constitution that serve ‘structural’ purposes, like the
Supremacy Clause”) (quotation and alterations omitted), *rev’d on other grounds*, 556 F.3d 114 (2d Cir. 2009);
American Petroleum Inst. v. Jorling, 710 F.Supp. 421, 432 (N.D.N.Y. 1989) (“[A]sserted violation of the Supremacy
Clause cannot, without more, serve as the basis for a finding of irreparable harm.”).

1 drivers about the consequences of voting for union representation” and “are incurring substantial
2 and growing compliance costs.” Mot. at 22-23. But “a party may not satisfy the irreparable harm
3 requirement if the harm complained of is self-inflicted.” *Citizens of the Ebbey’s Reserve for a*
4 *Healthy, Safe & Peaceful Environment v. U.S. Dep’t of the Navy*, 122 F.Supp.3d 1068, 1083 (W.D.
5 Wash. 2015) (Zilly, J.) (internal quotations omitted); *see also Caplan v. Fellheimer Eichen*
6 *Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995); *San Francisco Real Estate Investors v.*
7 *Real Estate Investment Trust of Am.*, 692 F.2d 814, 818 (1st Cir. 1982) (Breyer, J.). Just as the
8 Chamber cannot “parlay actions taken to a risk of harm into” Article III injury, *Chamber of*
9 *Commerce v. Seattle*, No. C16-0322RSL, 2016 WL 4595981, * 4 (W.D. Wash. Aug. 9, 2016), it
10 cannot rely on such actions, none of which the Ordinance mandates, to establish irreparable injury.

11 Moreover, the Chamber’s declarations about costs are general, conclusory, and non-
12 specific, and may not be relied on for the reasons discussed *supra* at 21. The only concrete cost
13 the Chamber points to is a four-cent increase that is not attributable to the Ordinance. Main-Hester
14 Decl. ¶¶19-23. Even if it were, the amount to be refunded if the Ordinance were struck down would
15 be easy to calculate.

16 Finally, the Chamber asserts that the Ordinance “will threaten the very existence of
17 Chamber members” by “requiring seismic changes to the businesses that the business models may
18 fail to withstand.” Mot. at 23. But it cites no evidence to support its alarmist speculation. Moreover,
19 the Chamber does not acknowledge that its members could face such harm only if a series of
20 contingent events all occurred: Local 117 would have to decide to seek statements of interest from
21 the Chamber’s members’ drivers, secure such statements from a majority of those drivers, be
22 certified by the City as an EDR, and in the ensuing negotiations seek and obtain provisions that
23 would disrupt the Chamber’s members’ businesses. No one knows whether any (much less all) of
24 those events will occur, and so the Chamber cannot prove that such harm is likely or imminent.

25 **C. The remaining equitable factors do not favor an injunction.**

26 “[A] state suffers irreparable injury whenever an enactment of its people or their
27 representatives is enjoined.” *Coalition for Economic Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir.

1 1997); *see also Veasey v. Perry*, 769 F.3d 890, 895 (5th Cir. 2014) (“When a statute is enjoined,
2 the State necessarily suffers the irreparable harm of denying the public interest in the enforcement
3 of its laws.”) (internal quotation omitted). The Ordinance was enacted to address the public’s
4 interest in safe and reliable transportation, and to allow drivers a say over the terms and conditions
5 of their work. Ord. §1.C-J. When, as here, “the responsible public officials ... have already
6 considered th[e] public interest,” a court’s “consideration of the public interest is constrained.”
7 *Golden Gate Restaurant Ass’n v. City of San Francisco*, 512 F.3d 1112, 1126-27 (9th Cir. 2008)
8 (court could conclude injunction is in public interest only “if it were *obvious* that the Ordinance
9 was unconstitutional or preempted”) (emphasis added); *see also Planned Parenthood of the Blue*
10 *Ridge v. Camblos*, 116 F.3d 707, 721 (4th Cir. 1997) (state has “interest in ensuring that the laws
11 enacted by the General Assembly and signed into law by the Governor are implemented”);
12 *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, Circuit Justice, in chambers).

13 Thus, a preliminary injunction would cause irreparable harm to the City and deprive the
14 public of its interest in the implementation of laws adopted by their elected representatives. In the
15 Council’s legislative judgment, allowing for-hire drivers to collectively negotiate was a means to
16 create a safer, more reliable for-hire industry. Stopping this first-of-its-kind law in its tracks, based
17 on speculative and non-existent harms, is not in the public interest.²¹ An injunction also would not
18 preserve the status quo, because the Ninth Circuit has held that a duly enacted ordinance constitutes
19 the status quo. *See Golden Gate Restaurant Ass’n*, 512 F.3d at 1116.²²

20 CONCLUSION

21 For these reasons, the Chamber’s preliminary injunction motion should be denied.

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25 ²¹ The Chamber contends that the delayed implementation date and further deferral show “there plainly is no interest
26 in the Ordinance’s immediate implementation.” Mot. at 24. But the delayed “Commencement Date” allowed the
27 adoption of implementation rules. Eng Decl. ¶4 & Ex. B. And the need to further delay that date arose because the
Chamber’s members refused to provide data the City requested, which required the City to explore other methods
including driver surveys to gather such information. *Id.*

²² *Clark v. U.S. Dist. Ct.*, 840 F.2d 701 (9th Cir. 1988), cited by the Chamber, did not involve an enacted law.

DATED March 21, 2017

PETER S. HOLMES
Seattle City Attorney

By: /s/Michael K. Ryan
WSBA #32091
Gregory C. Narver, WSBA #18127
Sara O'Connor-Kriss, WSBA #41569
Josh Johnson, WSBA #33570
Assistant City Attorneys
Seattle City Attorney's Office
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
Phone: (206) 684-8207 — Michael K. Ryan
Phone: (206) 684-8233 — Gregory C. Narver
Phone: (206) 615-0788 — Sara O'Connor-Kriss
Phone: (206) 386-1099 — Josh Johnson
Fax: (206) 684-8284
E-mail: michael.ryan@seattle.gov
E-mail: gregory.narver@seattle.gov
E-mail: sara.oconnor-kriss@seattle.gov
E-mail: josh.johnson@seattle.gov

Stephen P. Berzon (pro hac vice)
Stacey M. Leyton (pro hac vice)
P. Casey Pitts (pro hac vice)
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Phone: (415) 421-7151
Fax: (415) 362-8064
E-mail: sberzon@altber.com
E-mail: sleyton@altber.com
E-mail: cpitts@altber.com

Attorneys for Defendants

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CERTIFICATE OF SERVICE

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

Timothy J. O'Connell	tim.oconnell@stoel.com
Michael A. Carvin	mcarvin@jonesday.com
Jacqueline M. Holmes	jholmes@jonesday.com
Christian G. Vergonis	cvergonis@jonesday.com
Robert Stander	rstander@jonesday.com
Lily Fu Claffee	lfclaffee@uschamber.com
Steven P. Lehotsky	slehotsky@uschamber.com
Warren Postman	wpostman@uschamber.com
Kathryn Comerford Todd	ktodd@uschamber.com

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

By: /s/Michael K. Ryan
Michael K. Ryan, WSBA #32091
michael.ryan@seattle.gov