Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; and RASIER, LLC, Plaintiffs, 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' REPLY IN SUPPORT OF MOTION TO DISMISS **NOTED ON CALENDAR: April 14, 2017**

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This Court has concluded that the only claims in this case involving even serious merits questions are the Chamber's antitrust claims. In its opposition brief, however, the Chamber fails to show that it faces any imminent injury relevant to its antitrust claims, and tellingly does not even attempt to address the Supreme Court's application of *Parker* immunity to indistinguishable circumstances in *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985). The Court should therefore grant Defendants' motion to dismiss in its entirety.[1]

A. Plaintiffs' antitrust claims are not ripe.

The Chamber does not deny that it "must demonstrate standing," including ripeness, "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). It *also* concedes that it is uncertain whether Local 117 will collect statements of interest from drivers for any of its member companies and, if so, whether it will obtain majority support and be certified as an EDR.[2] Thus, the Chamber admits that any injury from the Ordinance's provision requiring collective negotiations is contingent and speculative, depends on uncertain events, and is not actual or imminent as Article III requires. *See Chamber of Commerce v. Seattle*, No. C16-322-RSL, Dkt. #63 at 4-5 (W.D. Wash. Aug. 9, 2016).

The *only* provision of the Ordinance allegedly causing Chamber members imminent injury at the time of filing was the mandate to disclose qualifying driver lists. The Chamber does not allege that this provision itself violates or is preempted by the Sherman Act; rather, it asserts that "*every* provision [of the Ordinance] works together as an integrated whole to form the City's collective-bargaining scheme," and that its antitrust preemption claims are ripe as soon as *any* provision of the Ordinance causes injury. Opp. at 2-3 (emphasis in original). The Chamber, however, fails to cite a single *ripeness* case suggesting that purported harms arising from the Ordinance's disclosure requirements provide it with Article III standing to challenge other

[1] The Chamber filed an Amended Complaint on April 11, 2017, adding Uber parent company Rasier, LLC as a plaintiff. Dkt. #53. The parties conferred and agree that, with the exception of associational standing, the arguments raised in Defendants' motion to dismiss are equally applicable to the Amended Complaint and should be resolved at this time. *See Oliver v. Alcoa, Inc.*, No. C16-741JLR, 2016 WL 4734310, *3 n.3 (W.D. Wash. Sept. 12, 2016).

[2] Whether Local 117 could obtain statements from a majority of Uber's drivers, for example, is highly uncertain in light of the approximately 14,000 Uber drivers operating in the City of Seattle. *See* Kelsay Decl. (Dkt. #45-2) at 3.

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provisions on antitrust grounds—claims for which the Chamber must demonstrate not only Article III standing but also "antitrust injury, which is 'injury of the type the antitrust laws were intended to prevent and which flows from that which makes defendants' acts unlawful.'" *See* April 4, 2017 Order (Dkt. #49) ("Order") at 4 (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990)).[3] *Fisher v. Berkeley*, 475 U.S. 260, 264-65 (1986), did not address when a preemption claim is ripe. The issue in *Williams v. Standard Oil Co. of La.*, 278 U.S. 235 (1929), was *severability*, not whether the alleged interrelationship between separate provisions gives a litigant standing to challenge provisions that do not cause present injury. And in the cited portion of *Davis*, there was no question that the challenge to the disclosure provisions was ripe. 554 U.S. at 744.

While the cited portion of *Davis* offers the Chamber no help, *Davis*' *relevant* portion is in fact on point. There, as here, the plaintiff had standing to challenge a disclosure requirement, 554 U.S. at 733, but the Court did not conclude that the plaintiff therefore had standing to challenge a *different* provision of the Act. Instead, the Court *separately* considered whether that provision would injure the plaintiff. *Id.* at 734-35. *Davis* thus reaffirms that standing must be shown as to each provision the Chamber challenges. Because the only allegedly imminent injury here relates to the Ordinance's disclosure provision, an antitrust challenge to its other provisions is unripe.

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

1. Washington law authorizes the City to restrict competition to promote the safety and reliability of the for-hire transportation industry.

In arguing that the "clear authorization" prong of the test for "state action" immunity under *Parker v. Brown*, 317 U.S. 341 (1943), is not satisfied, the Chamber's opposition *fails to even address* the language of the statutory provisions establishing the City's extraordinarily broad authority to restrict competition in order to promote the safety and reliability of the for-hire transportation industry. Those provisions provide authority that far exceeds the statutory

[3] *Atlantic Richfield Co.*, 495 U.S. at 346, forecloses the Chamber's contention that an allegation of "'price fixing' *ipso facto* establishes antitrust injury." Opp. at 6. And *Armstrong v. Exceptional Child Ctr. Inc.*, 135 S.Ct. 1378 (2015), establishes that the Chamber cannot evade the Clayton Act's antitrust injury requirement simply by styling its antitrust preemption claim as a Supremacy Clause claim. *Id.* at 1384-85.

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authorization in the Chamber's cases and easily satisfies the first condition for *Parker* immunity.

The City enacted the Ordinance pursuant to RCW 46.72.160 and RCW 81.72.210, which authorize cities to "license, control, and regulate" the for-hire transportation and taxicab industries. Those statutes authorize several specific types of municipal regulation, but also include a broad catchall (which the Chamber's opposition does not acknowledge) permitting cities to adopt "[a]ny other requirements ... to ensure safe and reliable ... service." RCW 46.72.160(6); RCW 81.72.210(6). The Legislature thus made clear its intent to authorize cities to regulate for-hire transportation in ways it could not anticipate. The statutes also expressly set forth the Legislature's intent to permit cities to restrict competition in the taxicab and for-hire transportation industries: "political subdivisions of the state" are allowed "to regulate for hire transportation services [and taxicab services] *without liability under federal antitrust laws*." RCW 46.72.001 (emphasis added); RCW 81.72.200. The authorizing statutes thus "clearly contemplate anticompetitive effects," as this Court has recognized. Order at 5.

The Chamber counters that the authorization is inadequate because the authorizing statutes do not expressly address collective negotiations between driver coordinators and their drivers. *See, e.g.*, Opp. at 13. But the Chamber's opposition fails to address the Supreme Court decisions cited in the City's opening brief that make it clear that no such language is required. In *Southern Motor Carriers*, for example, the Supreme Court considered whether *Parker* immunity applied to private motor carriers' joint submission to state public service commissions of proposed rates for intrastate transportation, which took effect "if the state agenc[ies] t[ook] no action within a specific period of time." 471 U.S. at 50-51. Mississippi had *not* expressly authorized *collective* ratemaking, and had instead simply authorized the commission "to prescribe 'just and reasonable' rates for the intrastate transportation of general commodities." *Id.* at 63-64. The Supreme Court nonetheless found that *Parker*'s clear articulation prong was satisfied because Mississippi had "made clear its intent that intrastate rates would be determined by a regulatory agency, rather than by the market" while leaving "the details of the inherently anticompetitive rate-setting process ... to the agency's discretion." *Id.* at 63-64. The Court explained that "[a] private party acting pursuant to an

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anticompetitive regulatory program need not point to a specific, detailed legislative authorization for its challenged conduct .... *As long as the State as sovereign entity clearly intends to displace competition in a particular field with a regulatory structure*, the first prong … is satisfied." *Id.* (quotations omitted; emphasis added). Similarly, in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), the Supreme Court found "clear authorization" sufficient to immunize local billboard regulations that significantly reduced competition (to the benefit of a politically powerful local company) when the state law in question authorized municipal regulation of "the use of land and construction of buildings and other structures within their boundaries" to promote "health, safety, morals or the general welfare of the community," without specifically addressing billboard regulations *or* stating that such regulations could restrict competition. *Id.* at 370-72 & n.3.

The "clear authorization" standard "should not be exacting" and is satisfied "as long as the local enactment is within a broad view of the authority granted by the state." *Elec. Inspectors, Inc. v. Village of East Hills*, 320 F.3d 110, 118-19 (2d Cir. 2002).[4] The Ordinance falls within the City's broad authority to regulate for-hire and taxicab transportation services, and *Southern Motor Carriers*' endorsement of Mississippi's collective ratemaking system makes it clear that the Legislature did not have to address collective activity expressly in order to provide "clear authorization" for the Ordinance's restrictions on competition. Indeed, the Ordinance closely tracks *Southern Motor Carriers*. Like the ratemaking at issue there, the Ordinance establishes a

[4] Contrary to the Chamber's contentions, the standard set forth in *Southern Motor Carriers* and *Omni Outdoor Advertising* does not "gut the clear-articulation requirement and completely shield municipalities from any inquiry at all." Opp. at 15. The Court must still determine that the regulation at issue falls within "a broad view of the authority granted by the state." *Village of East Hills*, 320 F.3d at 118-19. Moreover, the Chamber premises its argument on comparing the relationship between drivers and companies like Uber and Lyft to the drivers' relationships with their landlords. Opp. at 15. Like numerous other courts, this Court should reject the Chamber's implicit contention that Uber and Lyft cannot be regulated because they do not provide for-hire transportation services and instead merely contract with drivers to provide "ride referrals." *See, e.g., Cotter v. Lyft, Inc.*, 60 F.Supp.3d 1067, 1078 (N.D. Cal. 2015) ("[T]he argument that Lyft is merely a platform, and that drivers perform no service for Lyft, is not a serious one."); *Doe v. Uber Technologies, Inc.*, 184 F.Supp.3d 774, 786 (N.D. Cal. 2016) (rejecting argument that Uber "is not a common carrier but … a 'broker' of transportation services"); *O'Connor v. Uber Technologies, Inc.*, 82 F.Supp.3d 1133, 1141 (N.D. Cal. 2015) (argument that Uber is "merely a technological intermediary between potential riders and potential drivers … is fatally flawed in numerous respects"). If the Chamber were correct, Washington cities would have no authority *at all* to regulate such companies (which have been paying mandatory fees and complying with regulatory mandates for years without challenging that authority).

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process through which drivers can develop collective proposals regarding the terms and conditions that should govern their work. Although those proposals must be negotiated with the driver coordinator before they are submitted to the Director, that difference is not relevant in determining whether the collective action authorized by the Ordinance is permissible. Under *Parker* and *Southern Motor Carriers*, the City could have permitted the drivers to submit collective proposals directly to the Director, and there is no reason to prohibit the City from requiring that those proposals first be subject to negotiations with the driver coordinator.[5]

Contrary to the Chamber's contentions, the question whether the Legislature "specific[ally]" and "affirmatively contemplat[ed]" enactments like the Ordinance when it granted the City its broad regulatory authority, *see, e.g.*, Opp. at 13-14, is irrelevant. The Supreme Court has repeatedly emphasized that the "clear authorization" standard does *not* require such a showing. The very purpose of delegating authority to state agencies and local government is to permit those entities "to deal with problems *unforeseeable* to, or outside the competence of, the legislature," and requiring the Legislature to specify all of the potential forms of regulation an agency or municipality might choose to implement "would diminish, if not destroy," the usefulness of that delegation. *Southern Motor Carriers*, 471 U.S. at 64 (emphasis added); *see also Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 43 (1985) ("No legislature can be expected to catalog all of the anticipated effects of a statute" authorizing anticompetitive municipal regulation). The Washington Legislature authorized the City to respond to unforeseeable future problems threatening the safety and reliability of the for-hire transportation and taxicab industry (such as those created by the entrance of companies like Uber and Lyft into those industries) in a manner that might restrict competition, and *Southern Motor Carriers* makes it clear that such a delegation is sufficient for the purposes of *Parker* immunity.[6]

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[5] If anything, this approach *mitigates* the Ordinance's impact on competition by involving a market participant with different interests in developing proposed terms and conditions.

[6] None of the cases relied upon by the Chamber suggest a different conclusion. To the contrary, in each case the state's intent to allow displacement of competition within the area in question was *completely* absent. In *FTC v. Phoebe Putney Health System, Inc.*, 133 S.Ct. 1003 (2013), the Supreme Court concluded that a regional hospital authority's general corporate powers to acquire and lease property—which "mirror[ed] general powers routinely conferred by state law upon private corporations"—were inadequate for the purposes of *Parker* immunity because, in granting those

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2. The Ordinance mandates "active supervision" by the Director.

The Chamber contends that the Ordinance also fails the "active supervision" requirement, because supervision is by a *municipal* (rather than Washington State) official and because no government official participates "in the collective bargaining itself." Opp. at 16-17. But the Chamber does not cite a *single* case holding that either showing is required for *Parker* immunity, and its opposition fails to even address the Supreme and Circuit Court authority cited in the City's opening brief establishing that the Ordinance satisfies the active supervision requirement.

As the City previously explained, Mot. at 14, "active state supervision" is satisfied where potentially anticompetitive proposals by private parties are "reviewed" and "approved" *by a municipality*, such that any approved proposals are "directly attributable to action of the city." *Tom Hudson & Associates, Inc. v. City of Chula Vista*, 746 F.2d 1370, 1373-74 (9th Cir. 1984). The issue in *Chula Vista* was whether that city's supervision of private parties satisfied the "active supervision" requirement, and the Ninth Circuit held that it did. *Id. Chula Vista* is thus binding circuit precedent on that issue. And contrary to the Chamber's misrepresentations, the other authorities cited in the City's motion expressly *discuss* and *reject* the argument that municipal supervision is inadequate. Mot. at 14 (citing *Tri-State Rubbish, Inc. v. Waste Mgt., Inc.*, 998 F.2d 1073, 1079 (1st Cir. 1993); *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005, 1014-15 (8th Cir. 1983)). As those decisions recognize, it would make no sense to permit a state to delegate regulatory authority to municipalities while requiring that state (rather than local) officials supervise any resulting municipal regulatory structure. Nothing in *Parker* or *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), "require[s] 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).

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powers, the Legislature had in no way suggested that the hospital authority could "act or regulate *anticompetitively*." *Id.* at 1011-12 (emphasis added). Likewise, in *Columbia Steel Casting Co., Inc. v. Portland General Elec. Co.*, 111 F.3d 1427 (9th Cir. 1996), the state authorized a potentially anticompetitive exchange of electrical transmission facilities, but never authorized the anticompetitive establishment of exclusive service territories. *Id.* at 1437. And in *Medic Air Corp. v. Air Ambulance Authority*, 843 F.2d 1187 (9th Cir. 1988), the defendant was granted the exclusive right to *dispatch* air ambulances, but that grant of authority did not include any right to exclude other air ambulance *operators* from the market by denying them dispatches. *Id.* at 1189.

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Nor is there any merit to the Chamber's contention that the Ordinance provides for inadequate supervision because the Director reviews and approves or disapproves proposed agreements rather than participating in the collective negotiations. Opp. at 16-17. To the contrary, the Supreme Court has specifically held that active supervision is present so long as supervising 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. State Bd. of Dental Examiners v. FTC*, 135 S.Ct. 1101, 1112 (2015) (quoting *Patrick v. Burget*, 486 U.S. 94, 101 (1988)) (emphases added); *id.* at 1116-17 (active supervision present if supervisor has "the power to veto or modify particular decisions to ensure they accord with state policy") (citations omitted).

The supervision the Ordinance requires satisfies that standard, especially in a facial challenge such as this. The Ordinance expressly requires the Director to affirmatively determine that any proposed agreement's terms will further the City's policy goals. SMC 6.310.735.H.2, I.3. If the Director does not so act, *the proposed terms and conditions have no force and cannot be implemented*. SMC 6.310.735.H.2.a, c, I.4.a, c.[7] If the Director disapproves a proposed agreement, he is *required* to explain the reasons for his disapproval. SMC 6.310.735.H.2.b, I.4.b. Although the parties then return to the negotiating table, they are *not* then free to implement whatever terms or conditions they prefer. Instead, they must attempt to address the Director's concerns and submit any subsequent agreement to the Director for renewed consideration.[8]

The Supreme Court and Ninth Circuit have repeatedly recognized that adequate supervision is present where supervisors play far less active roles, including where they merely have an obligation to investigate private parties' submission and the right to veto any proposal. In *Southern Motor Carriers*, for example, private parties' rate proposals became effective "if the state agency [took] no action within a specified period of time." *Southern Motor Carriers*, 471 U.S. at 50-51; *see also FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 639 (1992) (explaining circumstances

[7] The Ordinance also gives the Director the right to gather whatever evidence he might need to make that determination, including by conducting public hearings. SMC 6.310.735.H.2, I.3.

[8] Because the Director's approval of any agreement is a condition for its validity under the Ordinance, parties that attempted to implement an agreement without the Director's approval would not benefit from *Parker* immunity, and their conduct could be challenged under federal and state antitrust laws.

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in which "negative option regime" like *Southern Motor Carriers* may be permissible); *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 825 (9th Cir. 1982) (active supervision satisfied when private parties' agreement was investigated and reviewed by government supervisor before being approved). Because the Ordinance requires the Director to *affirmatively* determine that any proposed agreement serves the City's policy purposes before that agreement can have any legal force, the Ordinance requires far more than the negative option held sufficient in *Southern Motor Carriers*, and does not involve the mere "rubber-stamp review" of anticompetitive agreements between private parties (a showing that the Chamber could in any event only make in an as-applied challenge, *see, e.g.*, *Ticor*, 504 U.S. at 638). Nor can the Director's active supervision of all proposed agreements be compared to the "gauzy cloak of state involvement" in the private price-fixing schemes at issue in the decisions cited by the Chamber, where the prices were not reviewed at all. *See* Opp. at 17. In *Midcal*, 445 U.S. at 105, and *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 777-78 (1975), for example, the government enforced private parties' agreements regarding price *without in any way reviewing their reasonableness.* And in *North Carolina Dental Examiners* and *Patrick v. Burget*, 486 U.S. 94 (1988), active supervision was lacking where the anticompetitive decisions at issue were made by "active market participants" without *any* state oversight. *N.C. Dental Examiners*, 135 S.Ct. at 1114; *Patrick*, 486 U.S. at 102.

Further, "active supervision" does not require the Director to consider the effect of a proposed agreement on competition, separate and apart from his determination that the agreement will further the City's policy goals. The *Parker* doctrine presupposes that the conduct at issue will restrict competition: Its very purpose is to immunize conduct the state has determined is desirable notwithstanding its anticompetitive effect. *See, e.g.*, *N.C. Dental Examiners*, 135 S.Ct. at 1109 (*Parker* doctrine prevents the Sherman Act from "promoting competition at the expense of other values a State may deem fundamental"); *Tri-State Rubbish*, 998 F.2d at 1076 (*Parker* doctrine recognizes "that governments often restrict competition for public purposes"). The purpose of active supervision is not to limit that conduct's impact on competition, but to ensure that the anticompetitive conduct serves policy goals that by their very nature relate to purposes *other than*

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promoting competition.[9] In many instances, such as in cases involving physician peer review or the legal profession's promulgation of ethical standards, requiring the active supervisor to consider the competitive effects of a particular decision could *undermine* the policies at issue by subordinating goals such as patient safety (*see Patrick*, 486 U.S. at 105-06) or ethical legal practice (*see generally Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)) to concerns about efficient market conditions.[10]

* * *

Seattle's Ordinance closely adheres to *Southern Motor Carriers*' guidance. Like Mississippi, the Washington Legislature granted the City broad authority to regulate the for-hire transportation industry in ways that might restrict competition, while leaving "details ... to the [City's] discretion" and allowing the City to address "problems unforeseeable to … the legislature." 471 U.S. at 63-64. And the Ordinance requires a degree of supervision that significantly exceeds Mississippi's supervision of collective ratemaking. *Compare* SMC 6.310.735.H.2.a, c, I.4.a, c (requiring affirmative *approval* of proposed agreement after determination it furthers Ordinance's purposes); *with Southern Motor Carriers*, 471 U.S. at 50-51 (proposed rate "becomes effective if the state agency *takes no action* within a specific period of time") (emphasis added). Accordingly, the Ordinance satisfies both requirements for *Parker* immunity.[11]

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[9] *See, e.g., Ticor*, 504 U.S. at 634-35 (active supervision requirement provides "assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests," rather than requiring meeting of "some normative standard, such as efficiency" or asking "how well state regulation works") (citation omitted); *Patrick*, 486 U.S. at 100-01 (active supervision requirement "ensure[s] that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that … actually further state regulatory policies").

[10] While not relevant, the Ordinance is unlikely to have any significant impact on variability within the for-hire transportation industry. Uber and Lyft's existing practice is to apply the same *uniform* terms and conditions to all drivers providing a particular kind of service. *See, e.g.*, Ord. §1.E; *Cotter*, 60 F.Supp.3d at 1080 (individual drivers cannot negotiate percentage of fares); *O'Connor*, 82 F.Supp.3d at 1144 (prices "set by Uber, without negotiation or input from the drivers"). The Ordinance simply changes the process through which those terms are established.

[11] *Fisher* rejects the Chamber's theory (unsupported by any citations) that the City "is participating in an illegal conspiracy in restraint of trade" through its mere "implementation of the Ordinance." Opp. at 18. As *Fisher* explained, "A restraint imposed unilaterally by government does not become concerted-action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law. The ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy." 475 U.S. at 267. The Chamber's failure to plead that the City has entered into any *agreement* or *combination* provides a separate basis for dismissing Count One. *See* Mot. at 10-11.

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3. The Court should dismiss the Chamber's state antitrust claim.

The Chamber admits that the CPA is "coextensive with the Sherman Act." Opp. at 19. Its CPA claim therefore fails for the same reasons as its federal antitrust claims. There is no reason the Legislature would exempt anticompetitive regulation of the for-hire transportation industry from federal, but not state, antitrust liability. Moreover, the Chamber's own authority acknowledges that the CPA exempts from its coverage "actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state.'" *Flying Eagle Espresso, Inc. v. Host Int'l Inc.*, No. C04-1551P, 2005 WL 2318827, *5 (W.D. Wash. Sept. 22, 2005) (quoting RCW 19.86.170); *see also* Mot. at 16-17. On its face, that exemption applies here.

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

The Chamber apparently concedes (as it must) that its *Garmon* preemption claim requires it to allege facts from which the NLRB could reasonably determine that Uber, Lyft, or Eastside's drivers are NLRA employees; yet the Chamber does not even *allege* that those drivers are employees. Opp. at 21. For that reason, as this Court preliminarily concluded, the claim lacks merit. *See* Order at 7-9.[12] The Chamber counters that "the NLRB's long consideration" of charges filed by private individuals fulfills that requirement, Opp. at 21, but that is contrary to Ninth Circuit and Supreme Court authority requiring a factual "showing sufficient to permit the [NLRB] to find" the drivers are employees, *Int'l Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 395 (1986), not a mere showing that someone filed an NLRB charge that has not yet been adjudicated (or even, in this case, made it to the complaint stage).[13] With respect to *Machinists* preemption, the exclusion of supervisors from NLRA coverage was accompanied by a statutory preemption provision, whereas the exclusion of independent contractors was not, and the legislative history

[12] Contrary to the Chamber's contention, City officials will have to decide whether a given company's drivers are NLRA "employees" *only* if someone advocates such a position (which no one here has). If such a position is taken, those officials must defer to the NLRB only if a *factual showing* is made that the workers at issue are *arguably* employees covered by the NLRA. *Marine Engineers v. Interlake S.S. Co.*, 370 U.S. 173, 182 (1962) (courts should decline jurisdiction when party presents "reasonably arguable case" for NLRA coverage).

[13] *See* https://www.nlrb.gov/resources/nlrb-process; *compare Davis*, 476 U.S. at 396 (fact that NLRB has not decided whether worker is employee does not establish required showing); *Interlake*, 370 U.S. at 184-85 (NLRB "had actually determined" that group was covered by NLRA); *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261, 1267-68, 1273-75 (9th Cir. 1994) (NLRB itself had twice determined agricultural workers *were* NLRA employees).

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reveals the reason, as this Court preliminarily recognized: "unionization of supervisors was deemed a threat to the very purposes of the Act as well as the interests of both labor and management," while there is no similar concern about unionization of independent contractors. Order at 13-15.[14]

D. The Chamber fails to establish that the City exceeded its broad state law authority.[15]

In arguing that the City exceeded its authority under state law, the Chamber's opposition fails to address the actual statutory text authorizing the City's enactment of the Ordinance. As previously explained, the relevant statutes delegate broad regulatory authority over the for-hire transportation industry. In particular, RCW 46.72.160(6) permits the City to adopt "any … requirement[]" that promotes the safety and reliability of for-hire transportation. Under state law, that provision must be construed broadly. *See, e.g.*, *Robertson v. Washington State Parks & Rec. Comm'n*, 135 Wn.App. 1, 6 n.15 (2005) ("'[A]ny' in a statute means 'every' and 'all.'") (citation omitted). Indeed, the Washington Supreme Court has rejected the Chamber's argument that grants of municipal authority must be narrowly construed: under state law, "*grants of municipal power are to be construed liberally*, rather than narrowly;" "municipal ordinances and statutes are to be harmonized if possible;" "the court gives considerable weight to a statutory interpretation by a party who has been designated to implement the statute;" and these principles are particularly applicable to ordinances enacted by "a first class city *with broad legislative powers*" like Seattle. *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 566 (2001) (citations omitted; emphasis added);

[14] In challenging this Court's conclusion, the Chamber misrepresents the reasoning of *Beasley v. Food Fair of N.C., Inc.*, 416 U.S. 653 (1974), which in fact reinforces the distinction between supervisors and independent contractors, and shows that independent contractors should be treated like groups of excluded workers other than supervisors. *See* 416 U.S. at 657-59, 662 (discussing text of section 14(a)); *id.* at 659-62 (legislative purposes and history).

[15] Because the Chamber's federal claims must be dismissed, this Court should decline to exercise supplemental jurisdiction over the Chamber's state law claims. *See* 28 U.S.C. §1367(c)(3). Although the Chamber alleges that diversity jurisdiction exists based on its own citizenship, Amended Complaint ¶12, the Chamber brings suit solely in its representative capacity, such that the citizenship *of its members* is what matters in evaluating whether complete diversity is present. *See American Land Title Ass'n v. Great American Ins. Co.*, No. C-05-4365, 2006 WL 1329782, *4 (N.D. Cal. May 16, 2006); *Zee Medical Distributor Ass'n v. Zee Medical, Inc.*, 23 F.Supp.2d 1151, 1155-56 (N.D. Cal. 1998) (citing numerous cases). Because, according to the Washington Secretary of State, Eastside-for-Hire is incorporated in Washington State, there is no diversity jurisdiction in this case.

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see also City of Olympia v. Mann, 1 Wn. 389, 396-97 (1890).[16] Accordingly, under the plain language of the relevant statutes and well-established state law principles, the City has the authority and flexibility to address both foreseen and unforeseen issues affecting the safety and reliability of the for-hire transportation industry through regulations such as the Ordinance.

E. The Chamber fails to state a claim under the Public Records Act.

There is significant doubt that the information in qualifying driver lists would be exempt from mandatory disclosure if it were subject to the Public Records Act ("PRA"). *See* Order at 17 (concluding that "no trade secret protections or confidentiality attach[] to [the] basic identifying information" contained in qualifying driver lists). Even if it were, however, the Chamber's PRA preemption claim would still have to be dismissed because nothing in the PRA provides private parties with any *affirmative* right other than a right to prevent the disclosure of certain records *in response to a PRA request*. Mot. at 22-23. *Concerned Ratepayers Ass'n v. Public Utility Dist. No. 1*, 138 Wn.2d 950 (1999), the sole case cited for the contention that qualifying driver lists are "public records" whose disclosure is "protect[ed]" by the PRA, held only that records a public entity uses in making a decision may be subject to compelled disclosure (assuming no exemption applies) even if the entity no longer possesses those records. *Id.* at 958. It nowhere suggests that records *never* seen or utilized by a public entity are public records if they may come into a public entity's possession *in the future*, let alone that the PRA grants private parties an affirmative right to prevent disclosure of those records in a non-PRA context. The PRA exempts certain records from mandatory disclosure, but it does not "forbid[]" the City from requiring the release of information from one third party to another. Opp. at 23. Because nothing in the Ordinance involves the kind of request for records governed by the PRA, it cannot conflict with the PRA. Mot. at 24.

CONCLUSION

For these reasons, this Court should dismiss the Chamber's Amended Complaint.

[16] The sole Washington decision the Chamber cites discusses statutory interpretation principles unique to municipal *taxation*. *See Arborwood Idaho, LLC v. City of Kennewick*, 151 Wn.2d 359, 366 (2004) (under state law "municipalities must have express authority, either constitutional or legislative, to levy taxes").

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of April, 2017, I electronically filed this DEFENDANTS' REPLY IN SUPPORT OF 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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