

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, *et al.*,

Defendants.

No. 17-cv-00370RSL

DEFENDANTS' NOTICE OF APPEAL AND
REPRESENTATION STATEMENT

PRELIMINARY INJUNCTION APPEAL

Notice is hereby given that Defendants, the City of Seattle, Seattle Department of Finance and Administrative Services, and Fred Podesta, appeal to the United States Court of Appeals for the Ninth Circuit from the Order (Dkt. # 49) of the United States District Court for the Western District of Washington entered on April 4, 2017, granting the Chamber of Commerce of the United States of America's motion for a preliminary injunction (Dkt. # 2). A copy of the District Court's Order (Dkt. # 49) is attached.

Defendants' Representation Statement is attached to this Notice pursuant to Ninth Circuit

1 Rule 3-2(b). Because this is a preliminary injunction appeal, “[i]mmediately upon filing, the notice of
2 appeal must be transmitted by the district court clerk’s office to the Court of Appeals clerk’s office.”
3 Circuit Rule 3-3(a).

4 DATED this 3d day of May 2017.

5 PETER S. HOLMES
6 Seattle City Attorney

7 By: /s/Michael K. Ryan
8 WSBA #32091
9 Gregory C. Narver, WSBA#18127
10 Sara O’Connor-Kriss, WSBA#41569
11 Josh Johnson, WSBA#33570
12 Assistant City Attorneys
13 Seattle City Attorney’s Office
14 701 Fifth Avenue, Suite 2050
15 Seattle, WA 98104
16 Phone: (206) 684-8207 – Michael K. Ryan
17 Phone: (206) 684-8233 – Gregory C. Narver
18 Phone: (206) 615-0788 – Sara O’Connor-Kriss
19 Phone: (206) 386-1099 – Josh Johnson
20 Fax: (206) 684-8284
21 E-mail: michael.ryan@seattle.gov
22 E-mail: gregory.narver@seattle.gov
23 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

1
2
3 **3. Defendants City of Seattle, Seattle Department of Finance and
Administrative Services, and Fred Podesta**

4 Michael K. Ryan
5 Gregory Colin Narver
6 Josh Johnson
7 Sara O'Connor-Kriss
8 SEATTLE CITY ATTORNEY'S OFFICE
9 701 Fifth Avenue, Suite 2050
10 Seattle, Washington 98104-7097
11 Phone: (206) 684-8200

12 Stacey Leyton
13 P. Casey Pitts
14 Stephen P. Berzon
15 ALTSHULER BERZON LLP
16 177 Post Street, Suite 300
17 San Francisco, California 94108
18 Phone: (415) 421-7151

19 DATED this 3d day of May, 2017.

20 PETER S. HOLMES
21 Seattle City Attorney

22 By: /s/Michael K. Ryan
23 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

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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 3d day of May, 2017, I electronically filed this Notice of Appeal and Representation Statement 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
Kathryn Comerford Todd	ktodd@uschamber.com
Michael A. Carvin	macarvin@jonesday.com
Steven P. Lehotsky	slehotsky@uschamber.com
Jacqueline M. Holmes	jholmes@jonesday.com
Christian G. Vergonis	cvergonis@jonesday.com
Warren Postman	wpostman@uschamber.com
Lily Fu Claffee	lfclaffee@uschamber.com
Robert Stander	rstander@jonesday.com
Robert Maguire	robmaguire@dwt.com
Douglas Ross	douglasross@dwt.com

DATED this 3d day of May, 2017, at Seattle, Washington.

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

1 license numbers of their drivers to the union so that it may solicit their interest in collective
2 representation by the Teamsters.¹ Three of the driver coordinators, Eastside For Hire, Inc., Lyft,
3 Inc., and Uber Technologies, Inc., are members of the plaintiff Chamber of Commerce. The
4 Chamber seeks to enjoin enforcement of the Ordinance, arguing that it violates and is preempted
5 by federal antitrust law and is preempted by the National Labor Relations Act (“NLRA”). The
6 Clark plaintiffs argue that the Ordinance should be enjoined because it is preempted by the
7 NLRA and violates the First Amendment and the Driver’s Privacy Protection Act.

8 Although the procedure for obtaining a temporary restraining order differs from that
9 which is applicable in the preliminary injunction context, the factors considered by the Court are
10 the same. In order to obtain preliminary injunctive relief, plaintiff must establish “that he is
11 likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of
12 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the
13 public interest.” Winter v. Natural Res. Def. Council, 555 U.S. 7, 20 (2008). In the Ninth Circuit,
14 “if a plaintiff can only show that there are serious questions going to the merits – a lesser
15 showing than likelihood of success on the merits – then a preliminary injunction may still issue
16 if the balance of hardships tips *sharply* in the plaintiff’s favor, and the other two Winter factors
17 are satisfied.” Feldman v. Ariz. Sec. of State’s Office, 843 F.3d 366, 375 (9th Cir. 2016)
18 (quoting Shell Offshore, Inc. v. Greenpeace, Inc., 709 F.3d 1281, 1291 (9th Cir. 2013)) (internal
19 quotation marks omitted, emphasis in original).

20 **A. ANTITRUST CLAIM**

21 The judicial power of the federal courts extends to “Cases” and “Controversies” pursuant
22 to Article III, Sec. 2 of the United States Constitution. An Article III case or controversy exists if
23 plaintiff can show that “(1) it has suffered an ‘injury in fact’ that is (a) concrete and
24

25 ¹ At oral argument, the City agreed to postpone enforcement of and/or penalties for violation of
26 the disclosure requirement until the Court rules on the Chamber’s pending motion.

1 particularized and (b) actual and imminent, not conjectural or hypothetical; (2) the injury is
2 fairly traceable to the challenged action of the defendant[s]; and (3) it is likely, as opposed to
3 merely speculative, that the injury will be redressed by a favorable decision.” Friends of the
4 Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000) (quoting Lujan v.
5 Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). An association, such as the Chamber, “has
6 standing to bring suit on behalf of its members when: (a) its members would otherwise have
7 standing to sue in their own right; (b) the interests it seeks to protect are germane to the
8 organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the
9 participation of individual members in the lawsuit.” Hunt v. Wash. State Apple Advertising
10 Comm’n, 432 U.S. 333, 343 (1977).

11 Section 16 of the Clayton Act, which governs claims for injunctive relief, provides in part
12 that “[a]ny person, firm, corporation, or association shall be entitled to sue for and have
13 injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws”
14 15 U.S.C. § 26. By its very terms, § 16 authorizes suits by associations, but it, like every other
15 private litigant, “must have standing - in the words of § 16, [it] must prove “threatened loss or
16 damage” to [its] own interests in order to obtain relief.” Cal. v. Am. Stores Co., 495 U.S. 271,
17 296 (1990). The Supreme Court has found that “[i]t would be anomalous . . . to read the Clayton
18 Act to authorize a private plaintiff to secure an injunction against a threatened injury for which
19 he would not be entitled to compensation if the injury actually occurred” and that Congress did
20 not intend such a result. Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 111 (1986).
21 Personal injury is therefore a prerequisite to instituting a private antitrust action – regardless of
22 whether monetary or injunctive relief is sought.²

23 _____
24 ² One of the cases on which the Chamber relies, Nat’l Constructors Ass’n v. Nat’l Elec.
25 Contractors Ass’n, 498 F. Supp. 510 (D. Md. 1980), recognized that this rule was supported by “long-
26 standing authority,” but concluded that a broader, more flexible standing requirement should be applied.
Id. at 518-19. The case was decided before the Supreme Court reiterated in Cargill that a private
plaintiff may exercise the remedy provided in § 16 only on a showing of “threatened loss or damage”

1 Nevertheless, the Court will assume, for purposes of this motion only, that although the
2 Chamber itself does not face a “threatened loss or damage,” it may sue on behalf of its members
3 if it can satisfy the three-part Hunt test. See Sw. Suburban Bd. of Realtors, Inc. v. Beverly Area
4 Planning Ass’n, 830 F.2d 1374, 1380-81 (7th Cir. 1987). The City does not dispute that the
5 Chamber’s interests in this litigation are germane to its organizational purposes, but argues that
6 the antitrust claim cannot be pursued without the participation of individual members in the
7 lawsuit. Hunt, 432 U.S. at 343. The Chamber has the burden of proving that its members,
8 Eastside, Uber, and Lyft, have suffered antitrust injury, which is “injury of the type the antitrust
9 laws were intended to prevent and which flows from that which makes defendants’ acts
10 unlawful.” Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334 (1990) (internal
11 quotation marks and citations omitted). Simply showing “injury causally linked to an illegal
12 presence in the market” will not suffice if the injury flows from aspects of the Ordinance that are
13 beneficial or neutral to competition. Id.; Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1433
14 (9th Cir. 1995). Based on the limited record evidence, one can reasonably infer that the
15 Ordinance will reduce, if not extinguish, any variability in the terms and conditions on which
16 for-hire drivers offer their services to the driver coordinators. The anticompetitive potential of all
17 price-fixing agreements is likely to arise and may justify facial invalidation of the Ordinance
18 without the need for Eastside, Uber, and/or Lyft to be party to this litigation. The Court is willing
19 to assume that the Chamber will be able to satisfy the third prong of the Hunt analysis. 432 U.S.
20 at 343.

21 Whether the Chamber will succeed on the merits of its antitrust claim is unclear, however.
22 Federal antitrust laws do not prohibit states or their political subdivisions from protecting their
23 citizens’ interests through reasonable regulation, even if those regulations have anticompetitive
24 effects. Parker v. Brown, 317 U.S. 341 (1943). A municipality like the City of Seattle may

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26 that is personal to the plaintiff.

1 enable a price-fixing scheme that would otherwise violate the antitrust laws “when it is clear that
2 the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that is the
3 State’s own.” FTC v. Phoebe Putney Health Sys., Inc., ___ U.S. ___, 133 S. Ct. 1003, 1010 (2013)
4 (internal quotation marks omitted). The challenged regulation must “be one clearly articulated
5 and affirmatively expressed as state policy” and “the policy must be actively supervised by the
6 State itself.” Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc., 445 U.S. 97, 105
7 (1980) (internal quotation marks omitted).

8 The statutes on which the City relies clearly contemplate anticompetitive effects in the
9 for-hire transportation industry. The taxi industry in Washington is heavily regulated at a local
10 level under regulatory schemes that allow or require agreements which, in most other contexts,
11 would be invalid as anticompetitive or monopolistic. The statutes have been used in a fairly
12 consistent way, however, namely to allow municipalities to establish rates and other regulatory
13 requirements in the taxi industry. They have never, as far as the Court is aware, been used to
14 authorize collusion between individuals in the industry in order to establish a collective
15 bargaining position in negotiations with another private party. There can be no doubt that
16 rideshare companies such as Uber and Lyft have, at a truly startling rate, created havoc in this
17 industry using a business model that simply did not exist before its recent technological
18 development. Whether existing state law covers, or was intended to cover, the sort of regulation
19 the City attempts through the Ordinance is far from clear. Questions also remain regarding the
20 level of state supervision contemplated by the Ordinance. The City does not establish the terms
21 and conditions under which for-hire transportation is offered. Rather, those terms and conditions
22 are negotiated between private parties, and there is no requirement that the City evaluate the
23 competitive effects of the agreements reached. The City’s sole role is to review and approve the
24 negotiated terms. While approval may be sufficient to trigger state immunity under governing
25 case law, it is troubling that a disapproval again places the matter back into the hands of private
26 parties, with no state oversight. Id., at 105-06. The novelty of the City’s claim for antitrust

1 immunity, the potential absence of any state oversight of the agreements, the lack of any
2 evaluation of competitive effect, and the potential impact on an important transportation option
3 for thousands of Seattle residents and visitors cannot be ignored. The Court finds that the
4 Chamber has raised serious questions regarding both prongs of the immunity analysis.

5 **B. NATIONAL LABOR RELATIONS ACT CLAIM**

6 The Chamber and the Clark plaintiffs argue that the Ordinance is preempted by the
7 NLRA because (1) it regulates activity that arguably falls within the statute, including the
8 determination of whether a particular individual is an employee or an independent contractor
9 (known as “Garmon preemption”) and (2) it regulates conduct Congress intended to leave
10 unregulated, such as bargaining between independent contractors and the entities that hire them
11 (known as “Machinists preemption”). The NLRA does not contain an express preemption
12 provision. Nevertheless, the courts have found that certain areas of labor law are under the
13 federal government’s exclusive power. Other areas, however, are subject to state regulation even
14 where they “intercede in the relationships between employees and employers.” Babler Bros., Inc.
15 v. Roberts, 995 F.2d 911, 914 (9th Cir. 1993). The line between permissible interference and
16 preemption is set forth in case law, in light of congressional intent, and “is continually
17 evolving.” Id.

18 **1. Garmon Preemption**

19 In San Diego Bldg. Trades Council v. Garmon, 359 U.S. 239, 242 (1959), the Supreme
20 Court noted that “Congress has entrusted administration of the labor policy for the Nation to a
21 centralized administrative agency, armed with its own procedures, and equipped with its
22 specialized knowledge and cumulative experience.” Determining which of “the variegated laws
23 of the several States are displaced by a single, uniform, national rule” had proved difficult,
24 however. Id. at 241. The interest in a uniform labor policy was often in direct conflict with the
25 judiciary’s regard for our federal system, including local control over activities that had long
26 been the subject of state regulation. Id. at 243-44. After evaluating prior case law, the Supreme

1 Court held that, in the context of activities that “may fairly be assumed” to be protected by § 7 of
2 the NLRA (such as collective bargaining, the right to strike, the right to picket, etc.) or to
3 constitute an unfair labor practice under § 8 of the statute (such as interfering with § 7 rights or
4 discriminating between union and non-union employees), state regulation and jurisdiction must
5 yield. Id. at 244. Where it is not clear whether a particular activity is governed by § 7 or § 8, the
6 Court deemed it “essential to the administration of the Act that these determinations be left in the
7 first instance to the National Labor Relations Board.” Id. at 244-45.

8 The Chamber argues that the Ordinance is facially and categorically preempted because it
9 allows local officials and courts to make a factual determination (whether the for-hire drivers
10 covered by the Ordinance are “employees” or “independent contractors”) that must be left in the
11 first instance to the Board. “The precondition for pre-emption” – that the conduct be arguably or
12 fairly assumed to be protected under § 7 or prohibited under § 8 of the NLRA – “is not without
13 substance. It is not satisfied by a conclusory assertion of pre-emption and would therefore not be
14 satisfied in this case by a claim, without more, that [a for-hire driver] was an employee rather
15 than [an independent contractor].” Int’l Longshoremen’s Ass’n v. Davis, 476 U.S. 380, 394 -95
16 (1986). Neither the Chamber nor the individual plaintiffs has made even a bare assertion that for-
17 hire drivers are employees: both have taken the position that the for-hire drivers covered by the
18 Ordinance are independent contractors and not subject to the NLRA. Thus, the Chamber’s claim
19 of Garmon pre-emption is not tethered to the facts alleged. Because no party has asserted that
20 for-hire drivers are employees, the issue will not be considered or resolved in this litigation. It is
21 not enough for the Chamber to simply raise the possibility that for-hire drivers may ultimately
22 prove, in some other case, that they are properly classified as employees.

23 Even if the employee/independent contractor issue had been raised in this litigation, the
24 Chamber would have the burden of putting forth enough evidence to enable the Court to find
25 that the Board could reasonably conclude that for-hire drivers are employees subject to the
26 protections and prohibitions of the NLRA. Davis, 476 U.S. at 395. Whether a driver is an

1 employee or an independent contractor depends on the details of the relationship between a
2 specific driver coordinator and its drivers, including numerous factors such as the degree of
3 control the coordinator exercises. See NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256
4 (1968). The driver coordinators' participation in this litigation would then be necessary to ensure
5 that the preemption analysis proceeds on actual facts regarding a coordinator's operations and
6 relationship with its drivers rather than some stylized amalgam arising from the industry at large.
7 Based on the existing record, it appears that the operations and relationships experienced by
8 Eastside drivers varies significantly from those who drive for Lyft. Because the participation of
9 its individual members is required, the Chamber lacks associational standing to pursue the
10 Garmon preemption claim (Hunt, 432 U.S. at 343) and cannot show a likelihood of success on
11 the merits..

12 The Clark plaintiffs argue that the Ordinance authorizes conduct that is expressly
13 prohibited by § 8(e) of the NLRA and is therefore preempted. The drivers are concerned that the
14 Teamsters and the driver coordinators will negotiate an agreement that requires the drivers to
15 become union members (*i.e.*, a union shop agreement) and argue that such an agreement would
16 violate § 8(e). There are three distinct problems with this argument. First, the issue is not ripe for
17 judicial determination. There are too many facts that need to be developed before the preemptive
18 effect of § 8(e) could be properly addressed. Contrary to the drivers' repeated assertion, the
19 Ordinance does not "require that the driver coordinator cease doing business with drivers
20 unwilling to accept Teamsters' representation." Clark v. City of Seattle, C17-0382RSL (Dkt.
21 # 13 at 16). Section H.4. of the Ordinance authorizes the negotiation of a union shop provision,
22 but it neither requires nor precludes such an arrangement. Dkt. # 39-1 at 11. Whether the
23 Teamsters will obtain statements of interest from a majority of qualified drivers working for any
24 particular driver coordinator, whether the Teamsters will be certified as the "exclusive driver
25 representative," and whether the union will successfully negotiate a union shop provision must
26 all be resolved before the identified conflict between § 8(e) and the Ordinance could appear. The

1 Court is loath to offer an advisory opinion or to declare rights in a hypothetical case. Neither the
2 factual readiness of the issue for adjudication nor the potential hardships that would be caused
3 by awaiting the negotiation of the contract terms justify the exercise of jurisdiction at the
4 moment. Nat'l Park Hosp. Ass'n v. Dep't of the Interior, 538 U.S. 803, 807 (2003).³ Second,
5 other than a conclusory statement that "Section 8(e)'s prohibitions apply with particular force to
6 a union signatory agreement that targets independent contractors who operate motor vehicles"
7 (Clark v. City of Seattle, C17-0382RSL (Dkt. # 13 at 15)), the drivers offer no analysis or
8 authority showing that a section of the statute prohibiting agreements to boycott other employers
9 has any applicability in these circumstances. The drivers have been variously described as
10 independent contractors, customers, and clients: they are not employers in their own right. See
11 Local 3, Int'l Bhd. of Elec. Workers (N.Y. Elec. Contractors Ass'n, Inc.), 244 NLRB. 357, 357
12 (1979). Third, § 8 of the NLRA prohibits certain activities on the part of labor organizations.
13 "Labor organization" is defined as an organization in which employees participate for particular
14 purposes. 29 U.S.C. § 152(5). As discussed above, none of the parties to this dispute contends
15 that the drivers are employees, making it doubtful that the driver representative is a labor
16 organization for purposes of § 8. Pac. Maritime Assoc. v. Local 63, Int'l Longshoremen's Union,
17 198 F.3d 1078, 1081 (9th Cir. 1999).⁴

18 The Clark plaintiffs also argue that the Ordinance is preempted because it conflicts with
19 § 8(b)(4) of the NLRA. Section 8(b)(4) makes it an unfair labor practice for a labor organization
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22 ³ In their reply memorandum, the Clark plaintiffs take the position that a violation of § 8(e) will
23 arise as soon as the Teamsters are certified as the exclusive bargaining representative. Section 8(e)
24 precludes a labor organization and an employer from entering into a certain type of agreement. The
25 terms of the contract, not the designation as a bargaining representative, is the key to a § 8(e) violation.

26 ⁴ The Clark plaintiffs suggest that, because the Teamsters represent NLRA-covered employees in
other contexts, it qualifies as a "labor organization" in all contexts. Clark v. City of Seattle, C17-
0382RSL (Dkt. # 34 at 6). The case cited in support of this proposition says nothing of the sort,
however.

1 to “threaten, coerce, or restrain any person engaged in commerce” with the object of forcing a
2 self-employed person to join the labor organization⁵ or forcing any person to cease doing
3 business with any other person. For the reasons discussed above, this claim is not ripe for
4 resolution. Ripeness is “peculiarly a question of timing designed to prevent the courts, through
5 avoidance of premature adjudication, from entangling themselves in abstract disagreements.”
6 Thomas v. Anchorage Equal Rights Comm’n, 220 F.3d 1134, 1138 (9th Cir. 1999) (internal
7 citations and quotation marks omitted). In this case, whether the Teamsters will be designated as
8 the representative of any group of for-hire drivers, whether it will be able to negotiate a union
9 shop provision with the driver coordinator, and whether any of the Clark plaintiffs will be
10 affected have yet to be seen. In addition, plaintiffs have not shown that they are likely to
11 establish that § 8(b)(4) applies to an organization representing independent contractors.

12 **2. Machinists Preemption**

13 In Lodge 76, Int’l Ass’n of Machinists and Aerospace Workers v. Wis. Emp’t Relations
14 Comm’n, 427 U.S. 132 (1976), the employer attempted to obtain a declaration from the NLRB
15 that its employees’ concerted refusal to work overtime during contract negotiations was an
16 unfair labor practice. The NLRB dismissed the charge, finding that the concerted effort was
17 neither protected nor prohibited by the NLRA and therefore was not conduct cognizable by the
18 Board. The employer then sought and obtained a cease and desist order from the Wisconsin
19 Employment Relations Commission against the same conduct. The state appellate courts upheld
20 the cease and desist order, and certiorari was granted. Garmon preemption did not apply because
21 the concerted refusal to work overtime was not expressly protected under § 7 or prohibited under
22 § 8. Instead, the Supreme Court looked to and expanded on a second line of cases that focused
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24 ⁵ In their reply, the Clark plaintiffs conflate union representation with union membership.
25 Section 8(b)(4) precludes a labor organization from requiring a self-employed person to join the
26 organization: it does not preclude universal representation of members and non-members in a work
group.

1 “upon the crucial inquiry whether Congress intended that the conduct be unregulated because
2 left ‘to be controlled by the free play of economic forces.’” Machinists, 427 U.S. at 140 (quoting
3 NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)). The Supreme Court concluded that
4 Congress’ specific descriptions of the types of economic weapons that were both prohibited and
5 protected left no room for the states to either forbid or encourage other forms of economic
6 pressure tactics. The Supreme Court reasoned that if the state law

7 can be applied to proscribe the same type of conduct which Congress focused upon
8 but did not proscribe when it enacted [the NLRA], the inevitable result would be to
9 frustrate the congressional determination to leave this weapon of self-help
10 available, and to upset the balance of power between labor and management
11 expressed in our national labor policy. For a state to impinge on the area of labor
12 combat designed to be free is quite as much an obstruction of federal policy as if
13 the state were to declare picketing free for purposes or by methods which the
14 federal Act prohibits.

15 Machinists, 427 U.S. at 146-47 (quoting Local 20, Teamsters, Chauffeurs & Helpers Union v.
16 Morton, 377 U.S. 252, 259-60 (1964) (internal quotation marks and citation omitted)). Because
17 the Wisconsin law was utilized to overcome self-help efforts that were permitted under the
18 NLRA when the employer’s own economic power proved to be insufficient, there was “simply
19 no question that the Act’s processes would be frustrated . . . were the State’s ruling permitted to
20 stand.” Machinists, 427 U.S. at 148-49.

21 The Ordinance at issue in this case authorizes independent contractors to bargain
22 collectively, in part because the NLRA specifically excludes independent contractors from the
23 definition of “employee” and the protections of the Act. 29 U.S.C. § 152(3). Other groups are
24 also excluded: “any individual employed as an agricultural laborer, or in the domestic service of
25 any family or person at his home, or any individual employed by his parent or spouse, or any
26 individual having the status of an independent contractor, or any individual employed as a
supervisor, or any individual employed by an employer subject to the Railway Labor Act,” or
public employees are not “employees” under the NLRA. 29 U.S.C. § 152(2) and (3). The

1 excluded groups are not treated alike for preemption purposes, however. Courts have found that,
2 for some of these groups of workers such as agricultural and domestic workers, this exclusion
3 means that “Congress has chosen not to create a national labor policy . . . [and] the states remain
4 free to apply their own views of proper public policy to the collective bargaining process insofar
5 as it is subject to their jurisdiction.” United Farm Workers of Am. v. Ariz. Agric. Emp’t
6 Relations Bd., 669 F.2d 1249, 1257 (9th Cir. 1982). With regards to supervisors, however, the
7 courts have concluded that any state law that pressures employers to treat supervisors as
8 employees is preempted. Beasley v. Food Fair of N.C., 416 U.S. 653, 662 (1974). The Chamber
9 argues that Congress chose to treat independent contractors like supervisors and leave them to
10 their own economic fates, confident in their individual bargaining power, and that the Ordinance
11 is therefore preempted by an affirmative national labor policy that precludes independent
12 contractors from collectively bargaining.⁶ The City argues that Congress simply chose not to
13 regulate the collective conduct of independent contractors, just as it did with agricultural and
14 domestic workers, leaving it to the states to develop their own policies in light of local needs and
15 concerns.

16 For purposes of this motion, the Court must determine whether the Chamber is likely to
17 show that the exclusion of independent contractors represents a congressional determination that
18 workers in that category should be prevented from bargaining collectively, as opposed to
19 evidencing a willingness to allow state regulation of the balance of power between independent
20

21 ⁶ The Chamber also argues that the Ordinance conflicts with Congress’ choice to leave the actual
22 negotiations and adoption of working conditions to the parties, without government interference. If,
23 however, the NLRA does not apply because for-hire drivers are independent contractors, the right to
bargain collectively and the procedures through which that right is exercised will be determined by state
law, as is the case with public employees and agricultural workers.

24 The Clark plaintiffs assert that “the NLRA preempts the Ordinance under Machinists to the
25 extent that it facilitates and/or regulates union tactics permitted by Sections 8(e) and 8(b)(4).” Clark v.
26 City of Seattle, C17-0382RSL (Dkt. # 13 at 23). As is the case for the Chambers’ alternative argument,
if the NLRA does not apply because for-hire drivers are not employees, state law would provide the
parameters for representation and collective bargaining.

1 contractors and those who hire them. In the absence of controlling case law, the Court turns to
2 the language of the statute and its legislative history. When the NLRA was enacted in 1935,
3 neither supervisors nor independent contractors were expressly excluded from the definition of
4 “employee.” See NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170, 178
5 (1981) (noting that the 1935 act excluded only agricultural laborers, domestic workers, and
6 individuals employed by a parent or spouse from the definition of “employee”). Between 1935
7 and 1947, the NLRB certified unions of supervisors, a practice which Congress deemed
8 “inconsistent with the purpose of the act to increase output of goods that move in the stream of
9 commerce,” “inconsistent with the policy of Congress to assure to workers freedom from
10 domination or control by their supervisors in their organizing and bargaining activities,” and
11 “inconsistent with our policy to protect the rights of employers.” H.R. Rep. No. 80-245, at 14
12 (1947). Congress amended the NLRA to exclude supervisors from the definition of employee. 29
13 U.S.C. § 152(3). It also added § 14(a):

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

19 29 U.S.C. § 164(a). Although supervisors could still organize and employers could voluntarily
20 recognize a union of supervisors, the amendments ensured “[t]hat no one, whether employer or
21 employee, need have as his agent one who is obligated to those on the other side, or one whom,
22 for *any* reason, he does not trust.” H.R. Rep. No. 80-245, at 17 (emphasis in original).

23 In 1944, the Supreme Court, following the NLRB’s lead, interpreted the term “employee”
24 broadly to encompass individuals who, under the common law, were clearly independent
25 contractors. NLRB v. Hearst Publ’ns, Inc., 322 U.S. 111, 126-29 (1944). Congress was not
26 impressed, noting the differences between employees and independent contractors and
confirming its original intent to include the former in the NLRA scheme and to exclude the

1 latter. Congress rejected the NLRB's effort to expand the definition of employee beyond the
2 common understanding at the time the NLRA was enacted. H.R. Rep. No. 80-245, at 18. The
3 NLRA was amended in 1947: independent contractors and supervisors were both excluded from
4 the meaning of "employee" at that time.

5 The Chamber relies on this coincidence of timing and argues that "the two parallel
6 exemptions should be read *in pari materia* and interpreted to have the same scope." Dkt. # 2 at
7 22 (internal quotation marks and citation omitted). The legislative history on which the Chamber
8 relies shows that supervisors and independent contractors were excluded from the reach of the
9 NLRA for different reasons. The unionization of supervisors was deemed a threat to the very
10 purposes of the Act as well as the interests of both labor and management. See Beasley, 416 U.S.
11 at 659-62 (summarizing legislative history of the 1947 amendments). These deleterious effects
12 would arise regardless of whether supervisors unionized under the NLRA or under state law.
13 The reference to independent contractors, on the other hand, was added to correct an NLRB
14 interpretation that had wandered from Congress' original intent. While Congress undoubtedly
15 had its reasons for not subjecting independent contractors to the NLRA, allowing them to
16 unionize was not identified as a threat to the free flow of goods, nor is there any indication that
17 allowing them to participate in collective action would threaten the independence of labor
18 organizations or the rights of management. The legislative history does not support the
19 Chamber's argument that Congress intended to treat independent contractors and supervisors the
20 same for preemption purposes.

21 Just as importantly, Congress included an express preemption provision related to
22 supervisors, but not to independent contractors. When the Supreme Court was asked to
23 determine whether state laws promoting supervisor unionization are preempted, it relied heavily
24 on the existence of § 14(a) to support its conclusion that any law that requires an employer to
25 treat supervisors as employees is unenforceable. Beasley, 416 U.S. at 657-59. The statutory text
26 thus treats independent contractors more like the other excluded groups who have long been the

1 subject of state regulation. It is at least as likely, if not more so, that Congress was indifferent to
2 the labor rights of independent contractors – just as it was to the rights of agricultural and
3 domestic workers – because their disputes were thought to be of insufficient magnitude to affect
4 commerce. S. Rep. No. 79-1184, at 3 (1934). The Chamber has not shown that it is likely to
5 succeed on the merits of its Machinists claim.

6 **C. FIRST AMENDMENT RIGHTS OF SPEECH AND ASSOCIATION**

7 The Clark plaintiffs assert that, by allowing the majority of qualifying drivers to designate
8 a bargaining representative, the Ordinance will deprive them of the right to speak for themselves
9 and will compel them to associate with a representative they oppose in violation of the First
10 Amendment. These harms are not associated with the April 3rd driver list deadline and will arise
11 only after an exclusive driver representative is certified. The absence of preliminary injunctive
12 relief is not, therefore, likely to result in irreparable harm.

13 **D. DRIVER’S PRIVACY PROTECTION ACT**

14 Once a qualified driver representative makes a request, the Ordinance requires the driver
15 coordinator to disclose the names, addresses, and, if available, email addresses and phone
16 numbers of its qualifying drivers. The implementing rules also require disclosure of for-hire
17 driver’s license/permit numbers and the state driver’s license numbers. The Clark plaintiffs argue
18 that this disclosure violates and is preempted by the Driver’s Privacy Protection Act (“DPPA”),
19 18 U.S.C. § 2722(a). The DPPA precludes a state department of motor vehicles from disclosing
20 personal information obtained about an individual in connection with a motor vehicle record
21 unless the information is sought for a permissible purpose. 18 U.S.C. § 2721. The statute also
22 makes it unlawful for private actors to knowingly obtain or further disclose “personal
23 information, from a motor vehicle record, for any use not permitted” by the statute. 18 U.S.C.
24 § 2722.

25 The Clark plaintiffs do not allege and have made no attempt to show that the Ordinance
26 will require Eastside, Lyft, or Uber to obtain information from the state department of motor

1 vehicle records. Plaintiffs allege that they provided copies of their drivers' licenses to the driver
2 coordinators when they applied to drive for Lyft and/or Uber. Clark v. City of Seattle, C17-
3 0382RSL (Dkt. # 1 at ¶ 48). All of the information required by the Ordinance (names and
4 addresses) and some of the information required by the implementing rules (drivers' license
5 numbers) can be gleaned from the document plaintiffs provided without any need to acquire or
6 disclose information from the state department of motor vehicles.

7 Plaintiffs argue that obtaining and disclosing information from a state-issued license,
8 rather than from the state department of motor vehicles, is prohibited by the DPPA because the
9 license itself is "a motor vehicle record." Pavone v. Law Offices of Anthony Mancini, Ltd., ___ F.
10 Supp.3d ___, 2016 WL 4678311, at *4 (N.D. Ill. Sept. 7, 2016). There is a split within the
11 Northern District of Illinois on this issue (O'Brien v. Quad Six, Inc., 219 F. Supp.2d 933, 934
12 (N.D. Ill. 2002)), and the Court doubts that the legislative purpose or statutory language support
13 Pavone or plaintiffs' argument. In enacting the DPPA, Congress was concerned that many states
14 were collecting personal information as a condition of granting a driver's license and then selling
15 the information to generate revenue for the state. 139 Cong. Rec. 29466, 29468, 29469 (1993);
16 140 Cong. Rec. 7929 (1994). To combat this practice, Congress expressly prohibited the state
17 department of motor vehicles from disclosing personal information obtained by the department
18 in connection with a motor vehicle record except for specified purposes. 18 U.S.C. § 2721. "The
19 Act also regulates the resale and redisclosure of drivers' personal information by private persons
20 who have obtained that information from a state DMV." Reno v. Condon, 528 U.S. 141, 143-44
21 (2000).

22 The Court finds that, although the purposes of the statute strongly suggest that the source
23 of the personal information must be taken into consideration when evaluating a DPPA, the Clark
24 plaintiffs have raised serious questions regarding its application in this case. Whether
25 information is universally protected from disclosure because it originated from the state
26 department of motor vehicles, because it is in the possession of the state department of motor

1 vehicles, or simply because it happens to be on a motor vehicle record (such as a license) is
2 debatable.

3 **E. IRREPARABLE HARM**

4 The Chamber and the Clark plaintiffs assert that they will be irreparably harmed if the
5 names and addresses of for-hire drivers are turned over to the Teamsters. Although there is no
6 trade secret protections or confidentiality attached to this basic identifying information, the
7 Court finds that forcing the driver coordinators to disclose their most active and productive
8 drivers is likely to cause competitive injury that cannot be repaired once the lists are released.
9 More importantly, the disclosure requirement is the first step in a process that threatens the
10 business model on which the Chamber's members depend. The driver coordinators operate
11 through mobile application software and independent contractors, an innovative model that is
12 likely to be disrupted in fundamental and irreparable ways if the Ordinance is implemented.

13 **F. BALANCE OF THE HARDSHIPS**

14 The balance of hardships strongly favors the Chamber at this point in the litigation.
15 Against the likelihood of competitive injury caused by the disclosure of a subset of prolific
16 drivers and the potential destruction of the existing business model, the City has not articulated
17 any harm that will arise from an injunction other than that it would delay the implementation of
18 the Ordinance according to its internal time line.

19 **G. PUBLIC INTEREST**

20 The attempt by the City of Seattle to bring some measure of regulation to the rideshare
21 industry is clearly based on reasonable public policy concerns. But the public not only has an
22 interest in safe and reliable transportation networks, but also in the enforcement of the laws
23 Congress has passed. The Court is cognizant of the fact that the public is interested in this
24 litigation and its outcome: that the issues raised here may well impact not only for-hire
25 transportation, but also other sectors of the economy that have come to rely heavily on
26 independent contractors instead of employees. The issues raised in this litigation are novel, they

1 are complex, and they reside at the intersection of national policies that have been decades in the
2 making. The public will be well-served by maintaining the status quo while the issues are given
3 careful judicial consideration as to whether the City's well-meaning Ordinance can survive the
4 scrutiny our laws require.

5
6 For all of the foregoing reasons, the Chamber's motion for preliminary injunctive relief is
7 GRANTED. The April 3rd disclosure requirements are hereby enjoined until this matter is
8 finally resolved. The Court emphasizes that this Order should not be read as a harbinger of what
9 the ultimate decision in this case will be when all dispositive motions are fully briefed and
10 considered. The plaintiffs have raised serious questions that deserve careful, rigorous judicial
11 attention, not a fast-tracked rush to judgment based on a date that has no extrinsic importance.

12
13 Dated this 4th day of April, 2017.

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15 _____
16 Robert S. Lasnik
17 United States District Judge
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