No. 17-35371

In the United States Court of Appeals
for the Ninth Circuit

Chamber of Commerce of the United States of America,
Plaintiff-Appellee,

v.

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

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

OPENING BRIEF OF DEFENDANTS-APPELLANTS CITY OF SEATTLE ET AL.

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INTRODUCTION

Concerned about the public impact of the rapid and dramatic growth of for-hire transportation resulting from the emergence of new transportation providers like Uber and Lyft, in January 2016 the City of Seattle enacted Ordinance 124968 ("Ordinance"), establishing a process for for-hire and taxicab drivers to collectively negotiate with the companies for which they drive, should the drivers so choose. The City Council determined that providing drivers with such an option would "enable more stable working conditions and better ensure that drivers can perform their services in a safe, reliable, stable, cost-effective, and economically viable manner," and that the Ordinance was therefore a proper exercise of its broad state-delegated authority to regulate the for-hire transportation and taxicab industries to promote their safety and reliability, including in ways that restrict competition. Ordinance §§1.B-J) (Addendum A-19 to A-22).[1] The City must approve any agreement between a for-hire transportation company and its drivers before it can take effect, and the City will approve such an agreement only if it determines that the agreement furthers the City's policy goals. SMC 6.310.735.H.2, I.3.

[1] The text of the Ordinance is reproduced at pages A-19 to A-35 of the Addendum to this brief. Where provisions of the Ordinance have been codified in the Seattle, Washington Municipal Code ("SMC"), the brief cites directly to the Municipal Code. The relevant Municipal Code provisions are also reproduced in Addendum pages A-8 to A-19.

The United States Chamber of Commerce ("Chamber") filed suit on behalf of its members, for-hire transportation companies Uber, Lyft, and Eastside for Hire, and sought a preliminary injunction. On April 4, 2017, long before any of the Chamber's members could possibly be required to engage in collective negotiations (which will occur only if a majority of the active drivers for one or more of the Chamber's members expresses support for the designation of an "exclusive driver representative"), the District Court granted a preliminary injunction halting implementation of the City's effort to respond to the changing for-hire transportation industry. Excerpts of Record ("ER") 1-18. The Court did so *without* concluding that the Chamber was likely to succeed on any of its claims, instead holding only that there were "serious questions" regarding whether the Ordinance violated the Sherman Antitrust Act. ER 4-6, 18.

For numerous reasons, this Court should reverse the District Court's decision and permit the City to continue serving as a "laboratory" for testing innovative policy responses to the problems created by new technologies and the changing economy. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (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.").

In finding "serious questions" with respect to the merits of the Chamber's antitrust claim, the District Court failed to recognize that the Ordinance easily satisfies the two requirements for establishing "state action" immunity from antitrust liability under *Parker v. Brown*, 317 U.S. 341 (1943)—a clearly articulated legislative policy of displacing competition with regulation, and active supervision of any anticompetitive conduct by private parties. *See Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

With respect to the "clear articulation" requirement, the Washington State Legislature expressly delegated to the City of Seattle the authority to regulate taxicab and for-hire transportation industries in "any" manner that it determines will promote the safety and reliability of those industries, and *expressly stated* its intent "to permit political subdivisions of the state to regulate [for-hire transportation] *without liability under federal antitrust laws.*" Wash. Rev. Code §46.72.001 (emphasis added). The District Court's apparent belief that *Parker* immunity only applies if a state legislature anticipated the *specific* form that the City's exercise of its delegated authority would take directly contradicts the Supreme Court's directive that "clear articulation" is present so long as the state legislature intended to authorize the City's displacement of competition with regulation in the field in question. And it would undermine the very federalism interests served by *Parker*

immunity, which protects the States' ability to choose when and how to allocate power to their political subdivisions.

The Ordinance also fulfills the "active supervision" requirement, because no agreement between for-hire drivers and companies can take effect without the City's review and approval of the agreement based on a finding that it furthers the City's policy goals.

The District Court also committed reversible error in analyzing the other injunction factors. The District Court's finding that the Chamber's members faced a threat of irreparable injury was based on the mere *possibility* that an entity might violate the law by disclosing identifying information for a Chamber member's most active drivers to a competitor, and upon speculation about other uncertain future events—rather than on any evidence that concrete harm to those members was imminent or likely. And the District Court's analysis of the public interest and balance of the hardships ignored the public's interest in the implementation of duly enacted laws.

For these reasons, as well as others set forth in this brief, the decision below must be reversed.

JURISDICTION

The District Court had jurisdiction over the Chamber's federal claims under 28 U.S.C. §1331. The District Court's order granting a preliminary injunction is

appealable, and this Court has jurisdiction over that appeal pursuant to 28 U.S.C. §1292(a)(1). The District Court issued its injunction order on April 4, 2017, and the City's timely notice of appeal was filed on May 3, 2017. *See* Fed. R. App. P. 4(a)(1)(A); ER 19-20, 371-72.

STATEMENT OF ISSUES

(1) Whether the District Court erred in concluding that the Chamber's facial federal antitrust preemption theory raised "serious questions" justifying preliminary injunctive relief, when (a) the legal issues did not require further factual development, (b) the Chamber did not face substantial or irreparable hardship in the absence of an immediate decision, (c) there was no imminent risk that any Chamber member would be harmed by any purportedly anticompetitive conduct authorized by the Ordinance, and (d) the Ordinance satisfies the requirements for *Parker* immunity.

(2) Whether *Parker*'s "clear articulation" requirement is satisfied where a state legislature delegates broad regulatory authority over a particular industry to local governments and expressly states its intent to permit those governments to displace competition.

(3) Whether *Parker*'s "active supervision" requirement is satisfied where a municipal official has the obligation to review any proposed agreement reached between private parties and the agreement cannot take effect unless the official

affirmatively approves it on the basis of a determination that the agreement will serve the City's policy goals.

(4) Whether the District Court erred in concluding that the mere disclosure of driver lists containing non-confidential information to an organization required to maintain the confidentiality of those lists and to use the information therein only for a single limited purpose was likely to cause irreparable injury to the Chamber's members.

(5) Whether the District Court erred in concluding that the balance of hardships and public interest favored issuance of a preliminary injunction.

STATEMENT OF THE CASE

I. The challenged Seattle Ordinance

On December 14, 2015, the Seattle City Council adopted Ordinance 124968, the Ordinance Relating to Taxicab, Transportation Network Company, and For-Hire Vehicle Drivers, in order "to ensure safe and reliable for-hire and taxicab transportation service" within Seattle by establishing a process through which taxicab, transportation network company, and for-hire vehicle drivers can "modify specific agreements collectively with the entities that hire, direct, arrange, or manage their work." Ordinance §1.C, 2d Whereas Cl. (Addendum A-19, A-20).[2] The City

[2] Transportation network companies ("TNCs") are companies like Uber and Lyft that that "offer[] prearranged transportation services for compensation using an

Council found that at the time of the Ordinance's enactment, such entities (which the Ordinance calls "driver coordinators") "establish[ed] the terms and conditions of their contracts with their drivers unilaterally, and [could] impose changes … without any prior warning or discussion." *Id.* §1.E. In the Council's judgment, such unilaterally imposed terms "adversely impact the ability of a for-hire driver to provide transportation services in a safe, reliable, stable, cost-effective, and economically viable manner," including by leading to "driver unrest and transportation service disruptions." *Id.* §§1.E, 1.F The Council concluded that establishing a framework for collective negotiations between driver coordinators and their drivers would "enable more stable working conditions and better ensure that drivers can perform their services in a safe, reliable, stable, cost-effective, and economically viable manner." *Id.* §1.I.

According to the Council, drivers working under such collectively negotiated terms "are more likely to remain in their positions over time" and thereby accumulate valuable experience. *Id.* §1.I.1. Such drivers would also face reduced "financial pressure to provide transportation in an unsafe manner (such as by working too many hours or operating vehicles at unsafe speeds, or ignoring necessary maintenance) or

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online-enabled TNC application or platform to connect passengers with drivers using their personal vehicles." SMC 6.310.110.

to ignore maintenance necessary to the safe and reliable operation of their vehicles." *Id.* §1.I.2.[3]

To permit such collective negotiations, the Ordinance establishes a multistep process. Non-profit entities may apply for designation as a "qualified driver representative" ("QDR"). SMC 6.310.735.B, C. If an applying entity satisfies the Ordinance's requirements and any implementing rules issued by the City's Director of Finance and Administrative Services ("Director") and is designated as a QDR, it may then notify a driver coordinator operating within Seattle that it intends to seek to represent that coordinator's drivers. SMC 6.310.735.C.2. A driver coordinator receiving such notice must provide the QDR with contact information for all of its "qualifying drivers" after a specified amount of time. SMC 6.310.735.D.[4]

A QDR is permitted to use the information "for the sole purpose of contacting drivers to solicit their interest in being represented by the QDR," and "may not sell, publish, or otherwise disseminate the driver contact information outside the entity/organization." SMC 6.310.735.E. If a QDR uses or discloses the information in the list improperly, it is subject to financial penalties and any injured entity has a

[3] These Council findings were based upon outcomes in other industries. *Id.* §1.J.

[4] Under the Ordinance, the Director establishes the specific conditions that a driver must satisfy to be designated a "qualifying driver." SMC 6.310.110; *see also* Director's Rule FHDR-1 (Director's rule specifying conditions) (Addendum A-35 to A-37).

private right of action to seek damages or equitable relief. SMC 6.310.735.M.[5] Such actions could also threaten its status as a QDR. FHDR-7 (Addendum A-39 to A-43) (requiring that QDRs remain "in good standing" including by complying with the Ordinance and implementing rules).

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

After an EDR is certified, the Ordinance requires the EDR and driver coordinator to meet and negotiate in good faith regarding certain subjects, including "best practices regarding vehicle equipment standards; safe driving practices; the manner in which the driver coordinator will conduct criminal background checks of

[5] The Ordinance requires that the lists include qualifying drivers' names, addresses, email address, and phone numbers. SMC 6.310.735.D. An implementing rule issued by the Director originally required that the lists also include drivers' state-issued driver's license numbers and City-issued for-hire permit numbers, ER 130, but that rule has since been amended to eliminate the mandatory inclusion of state-issued driver's license numbers. Director's Rule FHDR-1 (Addendum A-38).

all prospective drivers; the nature and amount of payments to be made by, or withheld from, the driver coordinator to or by the drivers; minimum hours or work, conditions of work, and applicable rules." SMC 6.310.735.H.1.

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

If the parties are unable to reach agreement within 90 days of the EDR's certification, either party may demand interest arbitration, through which a neutral interest arbitrator will consider the parties' positions and recommend "the most fair

and reasonable agreement" concerning the specified subjects of negotiation. SMC 6.310.735.I. An interest arbitrator's recommendation is subject to the same Director review process as a proposed agreement negotiated by the parties. SMC 6.310.735.I.3.

After an agreement takes effect, any proposed amendments must be submitted for approval by the Director under the same procedures and standards governing approval of the original proposed agreement. SMC 6.310.735.J. The Director also has the authority to withdraw approval of an agreement during its term should he determine that it no longer promotes the policy goals specified in the Ordinance. SMC 6.310.735.J.1.

II. Litigation history

The Ordinance took effect on January 22, 2016. ER 318. On March 3, 2016, the Chamber sued the City, the Seattle Department of Finance and Administrative Services ("FAS"), and Fred Podesta, in his official capacity as Director of FAS (collectively "Defendants"), in the United States District Court for the Western District of Washington, asserting that the Ordinance violates and is preempted by the Sherman Act, is preempted by the NLRA, is not authorized by Washington law, and violates Washington's Consumer Protection and Public Records Acts. *See* Complaint (Dkt. #1) ¶¶49-113, *in Chamber of Commerce v. Seattle*, No. 2:16-cv-00322 (W.D. Wash. Mar. 3, 2016). On August 9, 2016, the District Court dismissed

the case on standing grounds, finding that none of the Chamber's members faced any current or imminent injury caused by the Ordinance. *Chamber of Commerce*, 2016 WL 4595981, at *2-4.

On March 9, 2017, after Teamsters Local 117 ("Local 117") was designated as a QDR and requested qualifying driver lists from twelve driver coordinators (including Chamber members Uber, Lyft, and Eastside for Hire), the Chamber filed a new complaint asserting the same claims against the same Defendants. ER 308-337. The Chamber also moved for a preliminary injunction barring enforcement of the Ordinance. D. Ct. Dkt. #2. The preliminary injunction motion argued that the Sherman Act and NLRA preempted the Ordinance, and that the Chamber's members would be irreparably harmed "through compulsory production of confidential, trade secret information and forced compliance with a novel regulatory scheme." D. Ct. Dkt. #2 at 1. The Chamber asked the Court to issue an injunction in early April, before Uber, Lyft, and Eastside for Hire would be required to provide Local 117 with their qualifying driver lists. *Id.* At the preliminary injunction hearing, in response to the District Court's inquiry, the City agreed to refrain from enforcing the Chamber's members' obligation to produce qualifying driver lists until after the District Court had ruled on the preliminary injunction motion and provided time for an emergency appeal. ER 2 n.1; Reporter's Transcript (D. Ct. Dkt. #50) 79-81.

On April 4, 2017, the District Court granted the Chamber's motion. In reaching its decision, the court also considered the briefing and argument offered by eleven Uber and Lyft drivers (hereinafter "*Clark* plaintiffs") who had also sued the City and filed their own preliminary injunction motion. ER 1; *see also* Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction (Dkt. #2), *in Clark v. Seattle*, 2:17-cv-00382-RSL (W.D. Wash. Mar. 10, 2017).

With respect to the Chamber's Sherman Act preemption claim, the District Court noted that the federal antitrust laws generally require plaintiffs, including associations, to establish an injury to their own personal interests as "a prerequisite to instituting a private antitrust action." ER 3. Nonetheless, the court "assume[d], for purposes of [the preliminary injunction] motion only," that the Chamber could pursue its antitrust preemption claim on behalf of its members without establishing any injury to its own interests. ER 4. The court was also "willing to assume" that the Chamber could show that its members were threatened with antitrust injury, because "one can reasonably infer that the Ordinance will reduce, if not extinguish, any variability in the terms and conditions on which for-hire drivers offer their services to the driver coordinators," and because of "the anticompetitive potential of all price-fixing agreements." *Id*.

In terms of the merits of that antitrust claim, the District Court concluded that "[w]hether the Chamber will succeed ... is unclear." ER 4. The court acknowledged

that cities like Seattle may "protect[] their citizens' interests through reasonable regulation, even if those regulations have anticompetitive effects." *Id*. It concluded, however, that the Chamber had "raised serious questions regarding both prongs of the [*Parker*] immunity analysis." ER 6.

With respect to the "clear articulation" prong, the District Court noted that the relevant Washington statutes "clearly contemplate anticompetitive effects in the for-hire transportation industry." ER 5. The court was not certain, however, that "existing state law covers, or was intended to cover, the sort of regulation the City attempts through the Ordinance"—i.e., the creation of a collective negotiation process in lieu of the direct imposition of "rates and other regulatory requirements" on the regulated parties by the City. *Id*. With respect to the "active supervision" prong, the District Court acknowledged the Director's obligation "to review and approve the negotiated terms," but was concerned that the terms were "negotiated between private parties" in the first instance, that "there is no requirement that the City evaluate the competitive effects of the agreements reached," and that the Director's disapproval of proposed terms "places the matter back into the hands of private parties, with no state oversight." *Id*.

While concluding that the Chamber's antitrust preemption claim had raised "serious questions," the District Court determined that the Chamber was *not* likely to succeed with respect to its claim that the Ordinance was NLRA-preempted under

either *San Diego Building Trade Council v. Garmon*, 359 U.S. 239 (1959), or *Machinists v. Wisconsin Employment Commission*, 427 U.S. 132 (1976). ER 6-8, 10-15.[6]

With respect to the irreparable harm that would result from disclosure of the qualifying driver lists, the District Court concluded that "no trade secret protections or confidentiality attached to th[e] basic identifying information" in those lists, but that their disclosure was "likely to cause competitive injury" to the Chamber's members because it would reveal "their most active and productive drivers." ER 17.[7] The court also concluded that the disclosure would cause irreparable harm because it was "the first step in a process that threatens the business model on which the Chamber's members depend," which would be "disrupted in fundamental and

[6] In reaching its decision, the District Court also considered the *Clark* plaintiffs' claims, finding that they were unlikely to succeed on their NLRA preemption claims and faced no imminent injury with respect to their First Amendment claim. ER 8-10, 15. The court did conclude that the *Clark* plaintiffs' Driver's Privacy Protection Act ("DPPA") claim raised "serious questions," because qualifying driver lists might include information obtained by driver coordinators from state-issued driver's licenses. ER 16-17. However, the Court did not find that disclosure of that information would cause irreparable injury to the *Clark* plaintiffs. As explained below, the *Clark* plaintiffs' DPPA claim is not at issue in this appeal. *See infra* note 25.

[7] In reaching this conclusion, the District Court did not address the limitations the Ordinance imposes on Local 117's use or disclosure of the information contained in the lists. *See* SMC 6.310.735.M. The Chamber presented no evidence that Local 117 would misuse the information or disclose the information to others despite those prohibitions. *See infra* at 53-54.

irreparable ways if the Ordinance is implemented." *Id*. The court concluded that these threatened injuries outweighed any harm arising from issuance of an injunction, which in the court's view was limited to the delayed implementation of the Ordinance.

Finally, the District Court concluded that the public interest favored an injunction because the issues presented were "novel, … complex, and … reside at the intersection of national policies that have been decades in the making," and the public would be "well-served by maintaining the status quo while the issues are given careful consideration." ER 18; *see also id.* (stating that court's order "should not be read as a harbinger of what the ultimate decision in this case will be" and that questions presented "deserve careful, rigorous judicial attention, not a fast-tracked rush to judgment").[8]

Three weeks after issuing its preliminary injunction decision in this case, the District Court issued an order denying the *Clark* plaintiffs' preliminary injunction request as moot. Order (Dkt. #43), *Clark v. Seattle*, 2:17-cv-00382-RSL (W.D. Wash. Apr. 25, 2017).

[8] Defendants' motion to dismiss the Chamber's complaint has been fully briefed since April 14, 2017 but has not yet been decided. *See* D. Ct. Dkt. ##42, 52, 56.

STANDARD OF REVIEW

Injunctive relief is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. NRDC*, 555 U.S. 7, 22 (2008) (citation omitted). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20 (citation omitted). In addition, "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

A preliminary injunction must be set aside "if the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Puente Arizona v. Arpaio*, 821 F.3d 1098, 1103 (9th Cir. 2016) (citation omitted). "The district court's legal conclusions, such as whether a statute is preempted, are reviewed de novo." *Id.*; *see also Amarel v. Connell*, 102 F.3d 1494, 1507 (9th Cir. 1996) (existence of antitrust standing reviewed de novo). "Reversal for clear error is warranted when the district court's factual determination is illogical, implausible or lacks support in inferences that may be drawn from facts

in the record." *Americans for Prosperity Found. v. Harris*, 809 F.3d 536, 539 (9th Cir. 2015).

SUMMARY OF ARGUMENT

The District Court erred in issuing an injunction based on its conclusion that the Chamber's antitrust claim raised "serious questions." The serious questions test is appropriate when factual issues or the nature of an emergency prevent a determination regarding likely success on the merits, *and* when the severity of the likely injury causes the balance of hardships to tilt *sharply* in a plaintiff's favor. Neither was the case here.

The Chamber is not likely to succeed, and has not even demonstrated serious merits questions, with respect to its antitrust claim. Initially, the District Court failed to address Defendants' ripeness argument. The antitrust claim challenges the provision of the Ordinance requiring negotiations over terms including payments to drivers, but that provision will cause injury only if a series of contingent events occur, so the challenge is unripe. The District Court also erroneously assumed that the Chamber's members faced an imminent "antitrust injury" as required to establish antitrust standing.

Further, the Ordinance on its face fulfills the requirements for *Parker* immunity, precluding any finding of "serious questions" or "likelihood of success" with respect to that claim. "Clear articulation" is present because the Washington

Legislature authorized municipalities to adopt "any" regulation that they determine will further the safety and reliability of for-hire and taxicab transportation, and *explicitly* exempted such regulations from antitrust liability. Contrary to the District Court's suggestion, the clear articulation requirement does not require that the Washington Legislature have specifically contemplated the precise manner in which the City would exercise that delegated authority. And "active supervision" exists because the City must approve any proposed agreement before it becomes effective, based on a determination that the agreement furthers the Ordinance's policy purposes. The District Court misread Supreme Court precedent in concluding that the supervision required by the Ordinance may be inadequate because the Ordinance does not involve the City in the negotiations between drivers and for-hire companies or require an analysis of the effect of any proposed agreement upon competition.

The District Court also erred in analyzing irreparable injury and the equities. Its finding of competitive injury was clearly erroneous because there was no evidence that Local 117 would disclose the driver list to any *competitor* of a Chamber member. Likewise, its conclusion that the disclosure of the list would be the first step in a process that would threaten the Chamber's members' business model finds no support in the record, and is entirely speculative. With respect to the equities, the District Court improperly disregarded the public's interest in the

implementation of duly enacted laws and misunderstood the relevant status quo in concluding that the public interest and balance of hardships favored injunctive relief.

ARGUMENT

I. The District Court erred in concluding that "serious questions" with respect to the merits of the Chamber's federal antitrust claim warranted injunctive relief.

A. The Chamber was required to establish likely success on the merits.

The District Court issued an injunction based on its conclusion that the Chamber's federal antitrust claim raised "serious questions." ER 6, 18. The court erred by applying the "serious questions" test even though the Chamber's members did not face substantial, irreparable, or non-speculative hardships and the issues here were primarily legal, did not require significant factual development, and could be adequately considered in the context of the Chamber's preliminary injunction motion—particularly given the City's agreement not to enforce the list disclosure obligation prior to the issuance of the District Court's decision and an opportunity for appeal. ER 2 n.1; Reporter's Transcript 79-81.

This Court's "serious questions" standard permits the issuance of a preliminary injunction where (1) "there are serious questions going to the merits," (2) "there is a likelihood of irreparable injury to plaintiff," (3) "the balance of hardships tips sharply in favor of the plaintiff," and (4) "the injunction is in the public interest." *M.R. v. Dreyfus*, 697 F.3d 706, 725 (9th Cir. 2012). "[U]nder this approach,

the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Alliance for the Wild Rockies*, 632 F.3d at 1131.

The District Court's first error was to apply the "serious questions" test to predominantly legal issues, when likely success could be considered on the available timeline without significant further factual development or litigation. "For the purposes of injunctive relief, 'serious questions' refers to questions *which cannot be resolved one way or the other at the hearing on the injunction* and as to which the court perceives a need to preserve the status quo lest one side prevent resolution of the questions or execution of any judgment by altering the status quo." *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) (en banc) (emphasis added). The serious questions approach is therefore most appropriate when resolution of a legal issue requires further development of the factual record. *See, e.g.*, *M.R.*, 697 F.3d at 736–37 (finding serious questions given fact-intensive nature of merits inquiry); *Alliance for the Wild Rockies*, 632 F.3d at 1136–37 (finding serious questions where record contained insufficient evidence supporting challenged agency action).[9]

[9] To be certain, application of the serious questions standard to predominantly legal issues may in rare cases be justified under certain extenuating circumstances not present here. *Cf., e.g.*, *United States v. Loughner*, No. 11-10339, 2011 WL 2694294, at *1 (9th Cir. July 12, 2011) (granting relief on basis of serious question with respect

By contrast, if the questions raised are primarily legal and do not require further development of the record—as is the case with respect to the Chamber's facial challenge to the Ordinance—applying the "serious questions" standard for injunctive relief is not appropriate. This is true even if the legal issues presented are particularly thorny. In *Puente Arizona v. Arpaio*, for example, this Court vacated a preliminary order enjoining provisions of Arizona's identity theft laws alleged to be preempted by federal immigration laws. *See* 821 F.3d at 1101. The court noted that "there [was] tension between the federal scheme and some applications of the identity theft laws," but held injunctive relief unwarranted "because [the plaintiff] ha[d] not come forward with a compelling reason why the statute is preempted on its face." *Id.* at 1106, 1108.

Like this Court in *Puente Arizona*, the District Court should have conducted a preliminary analysis of the Chamber's likelihood of success on its antitrust preemption theory (as it did with respect to the Chamber's NLRA preemption claim) instead of avoiding that analysis entirely based on its determination that the issues presented here were "novel" or "debatable." ER 17; *see also Lopez v. Brewer*, 680 F.3d 1068, 1073 (9th Cir. 2012) (noting that "serious questions" test is not a

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to predominantly legal issue in context of emergency motion filed before merits briefing).

"separate and independent analysis from the court's assessment of [plaintiff's] likelihood of success on the merits").

The District Court's reliance on the "serious questions" standard was also misplaced because the Chamber did not establish that its members faced the kind of severe and non-speculative hardship that might justify application of that standard. The District Court's finding of irreparable injury was premised entirely upon the competitive harms that might occur if qualifying driver lists were leaked to the Chamber's members' competitors after their disclosure to Local 117, and the purported harm to those members' "fundamental … business model" that might result from full implementation of the Ordinance. ER 17. Such speculative harms provide no basis for granting injunctive relief at all, much less in the absence of a finding that a plaintiff is likely to succeed on the merits. *See, e.g.*, *Harris*, 809 F.3d at 540 (vacating injunction prohibiting nonpublic disclosure of certain nonprofit entities' tax forms in "absence of evidence showing confidential disclosure would cause *actual* harm") (emphasis added); *Lopez*, 680 F.3d at 1071-74 (affirming denial of preliminary injunction where "pain [different inmate] purportedly suffered" during IV placement prior to execution was insufficient to establish "objectively intolerable" risk that plaintiff would suffer comparable pain during his execution).

Even if the Chamber's members had faced non-speculative and irreparable harm in the absence of an injunction, moreover, the balance of hardships here does

not tip *sharply* in favor of injunctive relief, as it must to justify application of the "serious questions" standard. As explained in Section III *infra*, the balance of hardships favored denial of the injunction. But even if it did not, the amorphous "hardships" purportedly facing the Chamber's members do not involve the kinds of concrete and severe hardships that can justify granting extraordinary relief on the basis of "serious questions" rather than likely success on the merits. *Cf., e.g.*, *Nelson v. NASA*, 530 F.3d 865, 881 (9th Cir. 2008), *rev'd on other grounds*, 562 U.S. 134 (2011) (injunctive relief appropriate where plaintiffs faced "stark choice—either violation of their constitutional rights or loss of their jobs"); *M.R.*, 697 F.3d at 737 (plaintiffs faced "serious risk of institutionalization in violation of the ADA and the Rehabilitation Act"); *Alliance for the Wild Rockies*, 632 F.3d at 1137 (if proposed logging were not enjoined, "work and recreational opportunities that would otherwise be available on that land [would be] irreparably lost").

For all these reasons, the District Court should have required the Chamber to demonstrate likely success on the merits, rather than granting injunctive relief on the basis of claims that were merely "novel" or "debatable." ER 17.

B. The Chamber's antitrust claim is not likely to succeed and does not raise "serious questions."

The Chamber cannot establish likely success regarding the merits of its federal antitrust preemption theory, nor even "serious questions" as to that theory, because

its antitrust claim is not ripe, it cannot establish antitrust injury, and the Ordinance satisfies the requirements for *Parker* immunity.

1. The Chamber's antitrust claim is not ripe.

The Chamber's antitrust claim is unripe because any injury arising from the Ordinance's provision requiring collective negotiations—the only provision properly subject to antitrust challenge—is contingent and speculative, depends on uncertain events, and is not actual or imminent as Article III requires. The District Court's preliminary injunction decision failed to address ripeness at all, although Defendants raised the issue. *See* D. Ct. Dkt. #38 at 11-12.[10]

This Court has characterized ripeness "as standing on a timeline." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc). The ripeness requirement prevents federal courts from issuing "advisory opinions" and "entangling themselves in abstract" disputes. *Id.* (quotation omitted). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quotation

[10] "Federal courts are presumed to lack jurisdiction, unless the contrary appears affirmatively in the record," *Casey v. Lewis*, 4 F.3d 1516, 1519 (9th Cir. 1993) (quotations omitted), and have an "independent obligation to inquire into" their jurisdiction under Article III, *Bova v. City of Medford*, 564 F.3d 1093, 1095 (9th Cir. 2009) (quotations omitted). The District Court analyzed Defendants' associational standing argument, but never actually decided whether any Chamber member had a ripe antitrust claim. ER 2-4.

omitted); *see also In re Coleman*, 560 F.3d 1000, 1005 (9th Cir. 2009) ("Where a dispute hangs on future contingencies that may or may not occur, it may be too impermissibly speculative to present a justiciable controversy.") (quotations and citations omitted). Justiciability concerns are heightened where a facial challenge is asserted. Such challenges are "disfavored" not only because they "run contrary to the fundamental principle of judicial restraint" and "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution," but also because they "often rest on speculation" and require courts to resolve important legal questions prematurely and without sufficient factual context. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51 (2008) (quotations and citations omitted).

As the party invoking federal court jurisdiction, the Chamber had the burden to establish justiciability, and was required to do so "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). At the time that the Chamber filed its complaint and sought a preliminary injunction, the *only* provision of the Ordinance allegedly causing Chamber members imminent injury was SMC 6.310.735.D, which mandated disclosure of qualifying driver lists to Local 117. The Chamber's antitrust preemption theory, however, is premised on its assertion that a *different* provision

of the Ordinance, SMC 6.310.735.H, authorizes "price fixing" by requiring driver coordinators to bargain with certified EDRs over matters relating to payments to or from drivers. D. Ct. Dkt. #2 at 6-7.[11] Because nothing in the Ordinance's *disclosure* requirement compels or authorizes price fixing, the Chamber cannot bootstrap any alleged injuries arising from that requirement to establish that its antitrust claim is ripe. *See, e.g.*, *Davis*, 554 U.S. at 733-35 (plaintiff with standing to challenge disclosure requirement must separately establish standing to challenge related contribution limits); *Cal. Pro-Life Council, Inc. v Getman*, 328 F.3d 1088, 1095-96 (9th Cir. 2003).[12]

Unlike injuries purportedly resulting from the mandatory disclosure of qualifying driver lists to Local 117, the injuries that might provide Chamber members with standing to pursue an antitrust challenge to the mandatory negotiations provision of the Ordinance are "wholly contingent upon the occurrence of unforeseeable events," *Thomas*, 220 F.3d at 1141 (9th Cir. 2000), most of which

[11] The City does not concede that the Ordinance authorizes or requires price fixing, much less that it does so "in all cases," as is required for an antitrust preemption challenge. *Fisher v. City of Berkeley*, 475 U.S. 260, 265 (1986).

[12] As *Davis* makes clear, standing to challenge a disclosure requirement that is part of a broader regulatory scheme does *not* confer standing to challenge other elements of that scheme. 554 U.S.at 730 (required disclosures provided information necessary to calculate contribution limits). This is so even in First Amendment cases, where the standing requirements are less rigid. *Getman*, 328 F.3d at 1094.

depend on the actions of third parties not before the court (including Local 117, the Chamber's members, and the members' drivers). Before any "price fixing" can occur under the Ordinance and injure a Chamber member, for example, Local 117 must decide to seek statements of interest from that member, as opposed to from one of the other nine companies from which Local 117 requested the driver lists (or no company at all). Then, a majority of that member's "qualifying drivers" must sign statements of interest, and the Director must verify that this has occurred and certify the QDR as the EDR for the member's drivers.[13] After this certification, either the EDR or the Chamber member must initiate negotiations about "prices," and the parties must either reach an agreement that includes price-related terms or submit to binding interest arbitration over that issue. And finally, the Director must approve a proposed agreement containing such price-related terms.

Absent any one of these speculative and contingent future events, any alleged harm to the Chamber's members resulting from "price fixing" in purported violation of federal antitrust law will not occur.[14] Because that "price fixing" is not imminent or certain, any claim premised upon such conduct—including the Chamber's

[13] This may be a herculean task. Uber, for example, has at least 14,000 drivers in Seattle. ER 73.

[14] Given the internal timelines in the Ordinance, it could be over a year before any such conduct occurs. *See* ER 97-100 (laying out timeline).

antitrust preemption theory—is not yet ripe. *See Clapper v. Amnesty Intern. USA*, 133 S. Ct. 1138, 1150 (2013) ("We decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors."); *Parrish v. Dayton*, 761 F.3d 873, 876 (8th Cir. 2014) (challenge to recognition of exclusive representative not ripe where "election of an exclusive representative is not certainly impending, and may not occur at all").

2. The Chamber cannot establish antitrust injury

In addition to Article III requirements, a party seeking injunctive relief under the antitrust laws must also establish "antitrust injury," which is "an injury of the type the antitrust laws were designed to prevent." *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 111 (1986); *see also Lucas Automotive Engineering, Inc. v. Bridgestone/Firestone, Inc.*, 140 F.3d 1228, 1234 (9th Cir. 1998) ("[T]hreatened antitrust injury [is] a prerequisite to equitable relief."); *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 341 (1990) (rejecting "suggestion that no antitrust injury need be shown where a *per se* violation is involved"). The Clayton Act permits an injunction preventing "threatened loss or damage by a violation of the antitrust laws" only when a party can make "a showing that the danger of irreparable loss or damage is immediate." 15 U.S.C. § 26.[15] Accordingly, to establish a right to

[15] The Chamber argued below that it need not demonstrate "antitrust injury" because its claim for injunctive relief arises under the Supremacy Clause rather than the

injunctive relief, the Chamber must show it is threatened with an immediate injury "of the type the antitrust laws were designed to prevent." *Cargill*, 479 U.S. at 111. The Chamber cannot do so.

Even assuming associations can maintain antitrust claims on their members' behalf, *but see Financial & Security Prods. Ass'n v. Diebold, Inc.*, No. C04-04347 WHA, 2005 WL 1629813, at * 3 (N.D. Cal. Jul. 8, 2005), the Chamber failed to demonstrate any imminent antitrust injury. As detailed above, no alleged "price fixing" can occur until an agreement is reached and approved by the Director; thus, no injury relating to such conduct is imminent. *Accord Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 540 (1983) (finding absence of antitrust injury where claim depended upon attenuated "chain of causation between Union's injury and the alleged restraint in the market").

The only immediate "harm" facing the Chamber's members at the time of the injunction was the production of "qualifying driver" lists containing identifying

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Clayton Act. Its argument, however, is foreclosed by *Armstrong v. Exceptional Child Center, Inc.*, which held "that the Supremacy Clause is not the source of any federal rights, and certainly does not create a cause of action." 135 S. Ct. 1378, 1383 (2015) (quotation and citation omitted). *Armstrong* establishes that where, as here, Congress has provided a statutory mechanism for the precise form of relief at issue, an aggrieved party must channel its claims through that mechanism. *See also* ER 4 (recognizing Chamber's obligation to establish "antitrust injury").

information that the District Court expressly determined to be neither trade secrets nor confidential. ER 17. Any purported harm resulting from the disclosure of *that information* is not the type of injury the federal antitrust laws were designed to prevent, because it has no negative impact on competition. *Somers v. Apple, Inc.*, 729 F.3d 953, 967 (9th Cir. 2013) ("competition" is key to antitrust injury); *Atlantic Richfield Co.*, 495 U.S. at 334 (rejecting assertion that every injury "causally linked" to alleged antitrust violation creates "antitrust injury"). Where the alleged "injury flows from aspects of the defendant's conduct that are beneficial or neutral to competition, there is no antitrust injury, even if the defendant's conduct is illegal *per se*." *Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1034 (9th Cir. 2001). Because the Chamber has never asserted that the disclosure of qualifying driver lists to Local 117 will inhibit competition in the for-hire transportation or taxicab industries, as opposed to simply harming its members' proprietary interests, it failed to make the "clear showing" that its claim for injunctive relief was supported by an immediate "antitrust injury."

Although unclear, the District Court appeared to find antitrust injury based on its inference "that the Ordinance will reduce, if not extinguish, any variability in the terms and conditions on which for-hire drivers offers their services to the driver coordinators." ER 4. But as with the Chamber's price-fixing theory, the District Court's concerns depend upon the assumption that a speculative chain of events will

occur and that, at some point, an EDR and a Chamber member will negotiate a Director-approved agreement that will decrease such variability.[16] This speculation about possible future effects falls short of the "clear showing" necessary to establish immediate antitrust injury.

3. The Ordinance satisfies the requirements for *Parker* immunity.

"As a general rule, the anticompetitive actions of a state are immune from the reach of antitrust laws." *Traweek v. City and County of San Francisco*, 920 F.2d 589, 591 (9th Cir. 1990) (citing *Parker*, 317 U.S. at 350-52). That rule is "premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce," including in ways that would otherwise violate antitrust laws. *Southern Motor Carriers Rate Conf., Inc. v. U.S.*, 471 U.S. 48, 56 (1986); *see also Traweek*, 920 F.2d at 591 ("[T]he free market principles espoused in the Sherman Antitrust Act end where countervailing principles of federalism and respect for state sovereignty begin.").

The Supreme Court "has explicitly extended state action protection to the conduct of municipalities" like Seattle. *Id.* For such immunity to apply, the

[16] The District Court suggested that "the limited record evidence" supported its conclusion, but did not identify the evidence upon which it was relying. ER 4. The Chamber's conclusory declarations provided no such support.

"anticompetitive conduct must be taken pursuant to a clearly articulated state policy." *Southern Motor Carriers*, 471 U.S. at 57 n.20 (emphasis added). The clear articulation requirement is satisfied if "the alleged anticompetitive conduct" is undertaken "'pursuant to state policy to displace competition with regulation.'" *Mercy-Peninsula Ambulance, Inc. v. San Mateo County*, 791 F.2d 755, 757 (9th Cir. 1986) (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978)).

The "active supervision" requirement does not require that a municipality's actions be supervised by state officials. *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985) ("[T]he active state supervision requirement should not be imposed in cases in which the actor is a municipality."); *N.C. State Bd. of Dental Examiners v. FTC*, 135 S.Ct. 1101, 1112 (2015) ("[M]unicipalities are subject exclusively to [the] 'clear articulation' requirement.") (quotation omitted); *Southern Motor Carriers*, 471 U.S. at 57 n.20 ("Although its anticompetitive conduct must be taken pursuant to a clearly articulated state policy, a municipality need not be supervised by the State in order to qualify for *Parker* immunity."). If municipal regulation authorizes anticompetitive conduct by *private* parties, that conduct must be actively supervised by government officials to ensure that it "promotes state policy, rather than merely the party's individual interests." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634-35 (1992) (citation omitted).

a. The Washington Legislature has expressly authorized anticompetitive municipal regulation of the taxicab and for-hire driver industries.

Washington statutes grant the City very broad authority to restrict competition in "any" manner the City determines will promote the safety and reliability of the for-hire transportation and taxicab industries. These statutory provisions declare that "privately operated for hire transportation service is a vital part of the transportation system," making "the safety, reliability, and stability" of such service a matter of "statewide importance" and regulation of that service "an essential governmental function." Wash. Rev. Code §46.72.001; *see also* Wash. Rev. Code §81.72.200 (similar findings regarding taxicab transportation service).

To implement that regulatory policy, the Washington Legislature authorized cities to "license, control, and regulate" the for-hire transportation and taxicab industries. Wash. Rev. Code §§46.72.160, 81.72.210. The authorizing statutes specify several specific types of permissible municipal regulation, while also including a broad catchall provision permitting cities to adopt "[a]ny other requirements ... to ensure safe and reliable ... service." Wash. Rev. Code §§46.72.160(6), 81.72.210(6).[17] Crucially, the relevant statutes *expressly* set forth

[17] Under Washington law, the word "any" "means 'every' and 'all,'" and the term is used to broaden a statute's scope. *Robertson v. Wash. St. Parks & Rec. Comm'n*, 145 P.3d 379, 381 n.15 (Wash. Ct. App. 2005).

the "intent of the legislature to permit political subdivisions of the state to regulate for-hire transportation services *without liability under federal antitrust laws*." Wash. Rev. Code §46.72.001 (emphasis added); *see also* Wash. Rev. Code §81.72.200.

This statutory authorization easily satisfies the clear articulation requirement for *Parker* immunity. To show that an act is authorized by a clearly articulated state policy to permit anticompetitive regulations, a party "need not 'point to a specific, detailed legislative authorization' for its challenged conduct." *Southern Motor Carriers*, 471 U.S. at 64 (quoting *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978)); *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1413 (9th Cir. 1986) ("Narrowly drawn, explicit delegation is not required."). Rather, it suffices to show that "the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure." *Southern Motor Carriers*, 471 U.S. at 64; *see also Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 403 (9th Cir. 1991) ("[W]hen the circumstances indicate that a state's general policy is to displace competition with regulation, a subordinate state entity need show no more than an authorization to 'do business' to qualify for the state action exemption."); *Mercy-Peninsula Ambulance*, 791 F.2d at 757 ("[S]tate statutes need not require anti-competitive conduct for the exemption to apply when it is apparent that anti-competitive effects would result from a broad authority to regulate.").

Because the "clear articulation" standard is not intended to limit a state's "use of municipalities to regulate areas requiring flexibility and the exercise of wide discretion at the local level," *Preferred Communications*, 754 F.2d at 1413-14, the standard may be satisfied even if the policy of displacing competition is merely "implicit" or is "defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated," *N.C. Dental Examiners*, 135 S.Ct. at 1112.

Here, the authorization to regulate the for-hire industry is explicit, not implicit. The Washington Legislature expressly set forth its intent to permit municipal regulation of the taxicab and for-hire transportation industries in a potentially anticompetitive manner, Wash. Rev. Code §§46.72.001, 81.72.200, while granting cities like Seattle the flexibility to determine the precise form such regulation would take. Because Washington indisputably intended to displace competition within the for-hire transportation and taxicab industries through municipal regulation, the specific manner and means by which that displacement occurs need not be specifically spelled out in the authorizing statute. *See Southern Motor Carriers*, 471 U.S. at 64-66 (holding legislative intent to displace price competition among common carriers sufficient to immunize collective ratemaking activity). If the rule were otherwise, a state's delegation of regulatory authority to a

local authority would be thwarted, undermining the very principles of federalism embodied in *Parker*.

The Supreme Court has repeatedly found the clear articulation standard satisfied in comparable contexts. 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 unless the commissions affirmatively disapproved them). 471 U.S. at 50-51. Mississippi had *not* expressly authorized such collective price setting, 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 *Parker*'s clear articulation requirement 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 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 articulation sufficient to immunize local billboard regulations that significantly reduced competition (to the benefit of a politically powerful local company) when the state law 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.

This Court has likewise recognized that general grants of authority will satisfy the clear articulation standard if a state legislature's intent to displace competition is clear. In *Traweek*, for example, this Court concluded that San Francisco's authority "to adopt a comprehensive, long-term general plan for the physical development of the county or city" provided clear authorization for its prohibition of the conversion of large apartment complexes into condominiums, even though the relevant statute nowhere specifically addressed such property conversions. 920 F.2d at 593.

The Washington Legislature's express statement of intent to permit the City to displace competition when regulating the for-hire transportation and taxicab industries distinguishes the instant case from those in which the state's intent to allow displacement of competition within the field in question was completely absent. In *FTC v. Phoebe Putney Health System, Inc.*, 133 S.Ct. 1003 (2013), for

example, 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 purposes of *Parker* immunity because in granting those powers the legislature had in no way suggested that the hospital authority could "act or regulate anticompetitively." *Id.* at 1011-12. Similarly, 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 between two utilities, but *never* authorized their 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 was never granted the exclusive right to *operate* those ambulances. *Id.* at 1189.

In concluding that the Chamber had raised "serious questions" regarding the clear articulation requirement, the District Court expressed concern that the Ordinance might not be a permissible exercise of the City's state law authority to regulate the for-hire transportation and taxicab industries. ER 5-6. In evaluating whether the clear articulation requirement is satisfied, however, the role of the federal courts is not to determine whether the regulation in question is ultimately permissible under state law. *See City of Columbia*, 499 U.S. at 372. "[A]n in-depth

substantive review of a statute to determine the legislature's intent is not appropriate." *Traweek*, 920 F.2d at 593.

Rather, "in order to prevent *Parker* from undermining the very interests of federalism it is designed to protect, it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law." *City of Columbia*, 499 U.S. at 372; *see also id.* at 371-72 (explaining that clear articulation requirement does not "dictate[] transformation of state administrative review into a federal antitrust job" and rejecting argument that clear articulation was lacking because challenged ordinance was not enacted for purposes specified in statutory grant of regulatory authority) (internal quotations omitted). As this Court has repeatedly explained, the proper remedy for actions taken in excess of a city's statutory authority rests in state law, not federal antitrust law.[18]

[18] *See Boone v. Redevelopment Agency of City of San Jose*, 841 F.2d 886, 892 (9th Cir. 1988) ("[T]he concerns over federalism and state sovereignty raised in *Hallie* and *Llewellyn* dictate that the [plaintiffs] not be allowed to use federal antitrust law to remedy their claim that the city and the agency exceeded their authority under state law. They do not forfeit their immunity merely because their execution of the powers granted to them under the redevelopment act may have been imperfect in operation."); *Kern-Tulare Water Dist. v. City of Bakersfield*, 828 F.2d 514, 522 (9th Cir. 1987) ("Where ordinary errors or abuses in exercise of state law … serves to strip the city of state authorization, aggrieved parties should not forego customary state corrective processes, in favor of federal antitrust remedies.") (citations omitted); *Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir. 1985) ("'Ordinary' errors or abuses in the administration of powers conferred by the state should be left for state tribunals to control.") (citation omitted). Tellingly, when seeking injunctive

Instead of delineating the complete scope of the City's authority under state law, this Court must determine only whether the relevant statutory provisions can feasibly be construed to authorize the Ordinance's provisions—a standard the Ordinance easily satisfies. The Ordinance is an exercise of the City's statutory authorization to "license, control, and regulate" the for-hire transportation and taxicab industries, including by adopting "[a]ny" requirements that the City believes will ensure "safe and reliable" for-hire transportation and taxicab service. Ordinance §1.A-D (Addendum A-20) (citing Wash. Rev. Code §§46.72.001, 46.72.160, 81.72.200, 81.72.210); *see also id.* §1.E-J (Addendum A-20 to A-22) (setting forth factual basis for City's conclusion that Ordinance will promote "safe and reliable" for-hire transportation and taxicab service).[19] No more is required to satisfy the clear articulation requirement. *See also Elec. Inspectors, Inc. v. Village of East Hills*, 320

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relief, the Chamber did *not* contend that it was likely to succeed on its claim that the Ordinance exceeded the City's authority under state law.

[19] In applying the clear articulation test, this Court need not consider whether the City's conclusions were factually correct. *See Kern-Tulare Water Dist.*, 828 F.2d at 522 (error of "fact" or "judgment" does not "strip the [c]ity of its [*Parker*] immunity"); *City of Columbia*, 499 U.S. at 371-72, 376 (in applying "clear articulation" requirement, courts should not consider whether, as factual matter, ordinance was intended to or did serve policy goals for which state authorized municipal regulation); *Rousso v. State*, 239 P.3d 1084, 1086 (Wash. 2010) ("'It is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature.'") (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470 (1981)).

F.3d 110, 118-19 (2d Cir. 2002) (explaining that clear articulation 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").

The District Court also expressed concern that the Washington Legislature may not have specifically contemplated the *precise* form of regulation established by the Ordinance when it authorized the City to enact "[a]ny … requirements" to promote "safe and reliable" service. ER 5-6. But the Supreme Court has repeatedly emphasized that clear articulation 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." *Southern Motor Carriers*, 471 U.S. at 64 (emphasis added). Requiring the State Legislature to specify all the potential forms of regulation an agency or municipality might choose to implement "would diminish, if not destroy," the usefulness of that delegation. *Id.*; *see also Town of Hallie*, 471 U.S. at 43 ("No legislature can be expected to catalog all of the anticipated effects of a statute" authorizing anticompetitive municipal regulation).

As this Court has made clear, the clear articulation requirement should not be construed in a manner that "would unduly hamper the state's ability to allocate governmental authority between itself and its subdivisions" or would overly restrict a state legislature's "use of municipalities to regulate areas requiring flexibility and

the exercise of wide discretion at the local level," *Preferred Communications*, 754 F.2d at 1413-14—which is precisely what occurred here.

The Washington Legislature authorized the City to respond to unforeseeable future problems threatening the safety and reliability of the for-hire transportation and taxicab industries (such as problems created by the rapid growth of new companies like Uber and Lyft) in a manner that might restrict competition. It does not matter whether Washington expressly authorized *collective negotiations* over particular subjects as a *specific* mechanism to further those state objectives; all that matters is that Washington law affirmatively authorized the displacement of competition in the for-hire transportation and taxicab industries through municipal regulation, while permitting the City to determine the particular forms of appropriate regulation. The decisions of this Court and the Supreme Court establish that Washington may delegate its regulatory authority to the City in this manner while preserving the resulting regulations' *Parker* immunity.

b. The Ordinance requires active supervision of private parties

As a general rule, the active supervision requirement does not apply "in cases where the actor is a municipality." *Town of Hallie*, 471 U.S. at 46 (1985). Nevertheless, the Ordinance satisfies the second *Parker* immunity requirement—that private anticompetitive conduct be "actively supervised" by government

officials—because it permits a proposed agreement between a driver coordinator and an EDR to take effect only if the Director reviews and approves it, after determining that the proposed agreement complies with the Ordinance and will "promote[] the provision of safe, reliable, and economical for-hire transportation services and otherwise advance the public policy goals set forth in [the Ordinance]." SMC 6.310.735.H.2, I.3.

The active supervision requirement ensures that "the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties." *Ticor*, 504 U.S. at 634-35. That purpose is served if a government supervisor has the authority to "*review* the substance of the anticompetitive decision, not merely the procedures followed to produce it;" has "the *power to veto or modify* particular decisions to ensure they accord with state policy;" and actually makes a decision rather than merely having the *potential* ability to intervene. *N.C. Dental Examiners*, 135 S.Ct. at 1116-17 (citations and internal quotations omitted; emphases added); *see also id.* at 1112 (government officials must "have and exercise power to *review* particular anticompetitive acts of private parties and *disapprove* those that fail to accord with state policy") (quotation omitted; emphases added).

The terms of the Ordinance easily satisfy the active supervision requirement.[20] The Ordinance mandates that the Director review *every* proposed agreement, whether reached by the parties or through interest arbitration, "to ensure that the substance of the agreement promotes the provision of safe, reliable, and economical for-hire transportation services and otherwise advance the policy goals" of the Ordinance. SMC 6.310.735.H.2, I.3.[21] In conducting that review, the Director may gather evidence, hold public hearings, and request additional information, and must issue a written explanation of conclusions. *Id.* Only if the Director finds that the agreement furthers the City's policy goals does it take effect. SMC 6.310.735.H.2.a, c., I.4.a, c. Otherwise, the Director must return the agreement to the parties (or interest arbitrator) with a written explanation of its deficiencies and, if the Director chooses, recommendations to remedy those problems. SMC 6.310.735.H.2.b, I.4.b.

These provisions on their face fulfill the requirement that a government official review and affirmatively approve or disapprove any purportedly

[20] While some litigant in the future might assert an as-applied challenge based on the manner in which the Director actually exercises these obligations, *see, e.g.*, *Ticor*, 504 U.S. at 638-40, no such challenge is possible here because the Director has not yet reviewed any agreements and the Chamber challenges the Ordinance on its face.

[21] As noted earlier, *supra* at 11, the Director must also approve amendments to existing agreements before they may take effect, and may withdraw approval of the agreement during its term if it no longer furthers the City's purposes.

anticompetitive agreements proposed by private parties.[22] In nonetheless finding "serious questions" regarding the active supervision requirement, the District Court was concerned that the Director reviews and approves or disapproves proposed agreements rather than participating directly in the collective negotiations or unilaterally deciding what terms to impose. ER 5-6. The Supreme Court, however, has 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. Dental Examiners*, 135 S.Ct. at 1112 (quoting *Patrick v. Burget*, 486 U.S. 94, 101 (1988)) (emphases added); *id.* at 1116-17 (active supervision present if supervisor has "power to veto or modify particular decisions to ensure they accord with state policy") (citations omitted).

[22] Indeed, the Director's control over the ultimate terms of any agreement means the Ordinance permits only *unilaterally imposed* restraints upon trade, which are categorically exempt from antitrust challenges. *See Yakima Valley Mem. Hosp. v. Wash. Dep't of Health*, 654 F.3d 919, 926 (9th Cir. 2011); *Fisher*, 475 U.S. at 270; *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 891 (9th Cir. 2008). Although the Ordinance permits certain terms to be *proposed* to the Director, those proposals have no effect *unless and until* they are reviewed and approved by the Director based on a finding that they will promote the safety and reliability of for-hire transportation services. Just as in *Fisher*, where the challenged rent-control ordinance was a unilateral restraint on trade even though private parties had "some power to trigger the enforcement of its provisions," 475 U.S. at 269, and in *Yakima Valley Memorial Hospital*, where a state-imposed ban on new cardiac care facilities was unilateral even though it enabled incumbent care providers to exclude new competition, 654 F.3d at 930, the Director—not any private party—unilaterally imposes any and all restraints on trade authorized by the Ordinance.

That is exactly (if not less than) what the Director does under the Ordinance's plain terms.

There is no requirement that state officials participate directly with the private parties in formulating proposals. *See, e.g.*, *Tom Hudson & Associates, Inc.* v. *City of Chula Vista*, 746 F.2d 1370, 1374 (9th Cir. 1984) (adequate supervision present so long as municipal official "'pointedly reexamines'" proposals submitted by private parties); *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 825 (9th Cir. 1982) (adequate supervision requirement satisfied where government had duty to "thoroughly investigate" reasonableness of private parties' agreements) (quotations omitted). Indeed, the Supreme Court has found adequate supervision where supervisors played far less active roles in monitoring the conduct of private parties, including where the private parties' proposals took effect automatically unless *vetoed* by the relevant state official.

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 Ticor*, 504 U.S. at 639 (explaining circumstances in which "negative option regime" like *Southern Motor Carriers* system constitutes "active supervision"). 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*.[23]

Contrary to the District Court's other stated concern, ER 5-6, "active supervision" does not require the Director to consider a proposed agreement's effect *on competition*, separate and apart from a determination that the agreement will further the City's policy goals. The *Parker* doctrine itself 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 Sherman Act from "promoting competition at the expense of other values a State may deem fundamental"); *Tri-State Rubbish, Inc. v. Waste Mgmt., Inc.*, 998 F.2d 1073, 1076 (1st Cir. 1993) (*Parker* doctrine recognizes "that governments often restrict competition for public purposes"). The purpose of active supervision is not to limit the impact of private party conduct on competition, but to ensure that such conduct

[23] The District Court also expressed concern that disapproval "places the matter back into the hands of private parties, with no state oversight." ER 5. But any agreement that the parties reach after having the opportunity to consider the Director's reasons for disapproval and recommendations for reaching an acceptable agreement is still subject to the requirement that it be approved by the Director. Because the Director's approval of any agreement is a condition for its validity under the Ordinance, parties that attempt to implement agreed-upon terms without such approval would be in violation of the Ordinance and would not benefit from *Parker* immunity.

serves policy goals that by their very nature relate to purposes *other than* promoting competition.[24] In many instances, 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, e.g.*, *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. There is no basis in the decisions of this Court or the Supreme Court to impose such a requirement.

Nor is "active state supervision" lacking under the Ordinance simply because a municipal (rather than Washington State) official reviews and approves proposed agreements. To the contrary, this Court's binding precedent establishes that municipal supervision suffices. In *City of Chula Vista*, this Court held that the Chula Vista's supervision of private anticompetitive conduct satisfied the active state supervision requirement because potentially anticompetitive proposals from private parties were "reviewed" for reasonableness and then "approved" *by Chula Vista*,

[24] *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," and does not require meeting of "some normative standard, such as efficiency" or ask "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").

such that the approved proposals were "directly attributable to action of the city." 746 F.2d at 1374. *City of Chula Vista*'s holding is consistent with the decisions of other circuit courts. *See Tri-State Rubbish*, 998 F.2d at 1079 (endorsing view "that municipal supervision of private actors is adequate" to establish *Parker* immunity, and noting this view is "supported by the greater weight of authority" and "endorsed by the leading antitrust treatise"); *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005, 1014-15 (8th Cir. 1983).

The rule established by *Chula Vista* makes sense as a matter of both federalism and public policy. Because the very purpose of *Parker* immunity is to protect state sovereignty, this Court has recognized that its requirements should not be construed in a manner that "would unduly hamper the state's ability to allocate governmental authority between itself and its subdivisions." *Preferred Communications*. 754 F.2d at 1413-14. Requiring the State to supervise local regulation of for-hire transportation options would do just that, while also "erod[ing] local autonomy." *Golden State Transit Corp. v. City of Los Angeles*, 726 F.2d 1430, 1434 (9th Cir. 1984); *see also Preferred Communications*, 754 F.2d at 1413-14 (*Parker* immunity requirements should not unduly restrict legislature's "use of municipalities to regulate areas requiring flexibility and the exercise of wide discretion at the local level").

Such a rule would also "make[] little sense," because there is no compelling reason "to require a state to invest its limited resources in supervisory functions that are best left to municipalities." *Golden State Transit Corp.*, 726 F.2d at 1434. This is all the more so given that the regulation at issue here "is a traditional municipal function." *Id*. The purpose of the active supervision requirement—to avoid immunizing private market participants' pursuit of only their own private anticompetitive interests—is well-served by municipal supervision, and there is no further need for state supervision of a municipality that lacks such private motives and can be presumed to act in the public interest. *See N.C. Dental Examiners*, 135 S.Ct. at 1112-13; *Town of Hallie*, 471 U.S. at 46-47; *Gold Cross Ambulance & Transfer*, 705 F.2d at 1014-15.

For all these reasons, the Ordinance satisfies both prongs of the *Parker* immunity test. Because the Chamber has not raised "serious questions," let alone shown it is likely to succeed, with respect to its federal antitrust claim, the District Court's injunction should be vacated.[25]

[25] Presumably the Chamber will not defend the injunction on grounds raised *only* by the *Clark* plaintiffs: whether the DPPA claim presents serious merits questions. The District Court never found that the *Clark* plaintiffs faced irreparable harm and therefore did not base its decision to issue an injunction on their DPPA claim. *See* ER 17; Order, *Clark v. Seattle*, 2:17-cv-00382-RSL, Dkt. #43 (W.D. Wash. Apr. 25, 2017) (denying preliminary injunction motion as moot). In any event, the *Clark* plaintiffs' DPPA claim presents no serious merits questions, because the DPPA regulates only the use and disclosure of information "obtained from a state DMV."

II. The Chamber failed to establish likely irreparable harm

The District Court concluded that the disclosure of the driver lists would likely cause the Chamber's members irreparable harm because it (1) might result in "competitive injury," and (2) was the "first step in a process that threatens the business model on which the Chamber's members depend." ER 17. The record evidence, however, supports neither finding. Because the Chamber failed to make the requisite "clear showing" that irreparable harm is likely, *Winter*, 555 U.S. at 22, there was no basis to grant a preliminary injunction.

Irreparable harm is the "single most important prerequisite for the issuance of a preliminary injunction." *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004) (collecting cases; quotation omitted); *cf. Golden Gate Restaurant Ass'n v. City & County of San Francisco*, 512 F.3d 1112, 1116 (9th Cir. 2008). "The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended ... are not enough." *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (quotation

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See, e.g., *Fontanez v. Skeppie*, 563 Fed.Appx. 847, 848-49 (2d Cir. 2014); *see also Reno v. Condon*, 528 U.S. 141, 146 (2000); *Ocasio v. Riverbay Corp.*, No. 06 Civ. 6455, 2007 WL 1771770, *1 (S.D.N.Y. Jun. 19, 2007); *O'Brien v. Quad Six, Inc.*, 219 F.Supp.2d 933, 934-35 (N.D. Ill. 2002). And the implementing rule requiring that qualifying driver lists include state-issued driver's license numbers has now been modified to eliminate this requirement. *See* Director's Rule FHDR-1 (Addendum A-38).

omitted). A party "seeking injunctive relief must proffer evidence sufficient to establish a likelihood of irreparable harm." *Herb Reed Enterprises, LLC v. Florida Enter. Mgmt., Inc.*, 736 F.3d 1239, 1251 (9th Cir. 2013).

The District Court correctly concluded that "no trade secret protections or confidentiality attached" to the basic driver information contained in qualifying driver lists.[26] But it nonetheless concluded that compliance with the Ordinance was "likely to cause competitive injury" to the Chambers' members because the lists would identify the members' "most active and productive drivers." ER 17. The record, however, provides no support for this finding of *competitive* injury. *All* the declarations filed in support of the Chamber's motion addressed the competitive harms that might occur if the information in the qualifying driver lists were released *to a competitor*, not if that information were released *to Local 117*. *See, e.g.*, ER 357 ("If competing firms gain access to the information …"), 340 (similar), 347-48 (similar). The District Court never even attempted to explain how releasing these lists to Local 117—which is required to keep the lists confidential and may use them

[26] The record shows that virtually all of the information contained in those lists is publicly available. ER 300-01; *see also* ER 185-86, 188-89, 193-99, 209-14 232, 236-37, 243, 246-47, 253-55, 260-61, 268-71, 290-91.

only to contact drivers to solicit their support, *see* SMC 6.310.735.E —would cause irreparable *competitive* harm to any Chamber member.[27]

Nor did the Chamber's declarations even purport to establish any likelihood that Local 117 would inadvertently or purposefully disclose those lists to a Chamber member's competitors. A finding of likely irreparable injury cannot be based on mere speculation, as it must have been here. *See, e.g., Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1311 (9th Cir. 2003) ("The law does not require the identified injury to be certain to occur, but it is not enough to identify a purported injury which is only theoretical or speculative."); *Harris*, 809 F.3d at 541 (plaintiff's claim that "that technical failures or cybersecurity breaches [were] likely to lead to inadvertent public disclosure" of information disclosed only to attorney general was "too speculative to support issuance of an injunction"); *see also Winter*, 555 U.S. at 20 (injunctive relief appropriate only if plaintiff is "*likely* to suffer irreparable harm in the absence of preliminary relief") (emphasis added).

[27] If a QDR violates the Ordinance, it faces hefty fines—up to $10,000 a day—as well as a private right of action for damages and injunctive relief. *See* SMC 6.310.735.M.3. Moreover, a QDR must remain in good standing and comply with all applicable requirements to maintain its QDR status. Director's Rule FHDR-7 (Addendum A-39, A-42 to A-43). If Local 117 misused the information in the qualifying driver lists, its QDR status could be revoked.

There is even less support for the District Court's finding that the disclosure of the qualifying driver lists will cause irreparable injury because it is "the first step in a process that threatens the business model on which the Chamber's members depend." ER 17.

Initially, the Court's finding is entirely speculative. The District Court concluded that "driver coordinators operate through mobile application software and independent contractors, an innovative model that is likely to be disrupted in fundamental and irreparable ways if the Ordinance is implemented." ER 17. But it pointed to no evidence in support of this conclusion, which is unsurprising because *there is no record evidence whatsoever* that the implementation of the Ordinance would undermine the Chamber's members' use of mobile application software or independent contractors, much less cause "seismic" changes to their business model.[28] Any such disruption could not, of course, result from the mere disclosure

[28] The Chamber did submit declarations stating in a boilerplate and conclusory manner that "[t]he union election will severely disrupt [the company's] business." ER 45, 49. This bald assertion fails to explain *how* such disruption might occur, and cannot be the basis for the District Court's conclusion that the Ordinance will undermine the companies' use of a mobile application or of independent contractors (which could only occur as the result of a negotiated contract provision, not a mere election). The declarations should have been disregarded. *See American Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985) (irreparable harm not established by "affidavits [that] are conclusory and without sufficient support in facts"); *Herb Reed*, 736 F.3d at 1250 (9th Cir. 2013) (irreparable harm findings must be "grounded in [ ] evidence").

of qualifying driver lists, but would depend on an EDR becoming the representative for a Chamber member's drivers, negotiating (or convincing an interest arbitrator to recommend) provisions that undermine the use of those methods, and the Director deciding to approve a proposed agreement containing those provisions.[29] That kind of speculation, unsupported by *any* evidence that these events will likely occur, cannot support a finding of likely irreparable injury.

Because the "chain of events" necessary for the alleged harms to arise does "not rise beyond the mere 'possibility' of harm," the Ordinance's alleged threat to Chamber members' business models did not warrant injunctive relief. *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 412 (9th Cir. 2015) (citation omitted); *see also Caribbean Marine Serv., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) ("Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction.").

For similar reasons, any such purported harm is not "immediate." As this Court has recognized, "a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief." *Caribbean Marine*, 844 F.2d at 674

[29] Notably, in addressing the *Clark* plaintiffs' First Amendment claim, the District Court recognized that harms arising from designation of an EDR were not imminent and so could not justify injunctive relief. ER 15. The harms at issue here are no different (and indeed require additional speculative assumptions).

(emphasis in original). Even if one were to assume that the Ordinance might ultimately undermine a Chamber member's business model, there was no evidence that this would occur in the immediate or imminent future. Indeed, the District Court expressly acknowledged the lack of immediacy, noting that disclosure of the driver lists was merely "the first step in a process." ER 17. Even if a campaign were to begin immediately and to be successful, it would still be more than a year before a Chamber member could be required to make any changes, much less "fundamental" changes, as a result of collective negotiations mandated by the Ordinance. ER 97-100.

III. The balance of hardships and the public interest favor the City.

In concluding that the balance of the hardships "strongly favors the Chamber at this point in the litigation," ER 17, the District Court simply ignored the harm an injunction would cause the City, which it characterized as being limited to a "delay [in] the implementation of the Ordinance according to its internal time line." *Id*. To the contrary, it is well-settled "that a state suffers irreparable injury *whenever* an enactment of its people or their representatives is enjoined." *Coalition for Economic Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (emphasis added); *see also Veasey v. Perry*, 769 F.3d 890, 895 (5th Cir. 2014) ("When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws.") (quotation omitted). The District Court concluded that its

injunction merely maintained the status quo, ER 18, but when a plaintiff seeks to enjoin a duly enacted law, maintaining the status quo state of affairs requires that the law be allowed to take effect, rather than being enjoined. *Golden Gate Restaurant Ass'n*, 512 F.3d at 1116 (9th Cir. 2008) (enjoining law disrupts status quo); *Planned Parenthood of Blue Ridge v. Camblos*, 116 F.3d 707, 721 (4th Cir. 1997) ("In this context, the status quo is that which the People have wrought"). Given the harm the injunction imposed on the City and the absence of any evidence whatsoever that the Chamber's members faced significant and irreparable harm without an injunction, the balance of the hardships sharply favored denial of the requested injunction, and the District Court erred in ignoring Defendants' harms and concluding otherwise.

The District Court likewise failed to properly weigh the public interests at stake. "The public interest may be declared in the form of a statute." *Golden Gate Restaurant Ass'n*, 512 F.3d at 1127 (9th Cir. 2008) (quotation & citation omitted). It is axiomatic that the public has an interest in the health, safety, and reliability of its transportation services, and in the City Council's legislative judgment allowing for-hire drivers to collectively negotiate will make the for-hire transportation and taxicab industries safer and more reliable. Ordinance §1.A-J (Addendum A-20 to A-22). "[T]he responsible public officials in [Seattle] … considered [the public] interest" in enacting the Ordinance, *Golden Gate Restaurant Ass'n*, 512 F.3d at

1126-27, and the District Court erred in disregarding that legislative judgment. *See also Int'l Franchise Ass'n*, 803 F.3d at 412.

While ignoring the public's interest in the enforcement of laws duly enacted by local governments, the District Court suggested that injunctive relief was warranted because the public has an interest in enforcing federal laws. ER 17. But as the District Court implicitly acknowledged by finding only "serious" merits questions rather than likely success, it is far from "obvious that the Ordinance [is] unconstitutional or preempted by a duly enacted federal law, in which elected federal officials [have] balanced the public interests differently." *Golden Gate Restaurant Ass'n*, 512 F.3d at 1127. The public's interest in seeing that local laws duly enacted by local government are given effect outweighs any interest the public might have in enjoining such laws pending the litigation of questionable claims arising under federal law. *Cf.*, *e.g.*, *Camblos*, 116 F.3d at 721 ("Once it is apparent that plaintiffs cannot show a substantial likelihood of prevailing on the merits of their claims, however, it is apparent that the particular balancing of the harms undertaken by the court was necessarily in error.").

CONCLUSION

For the reasons discussed, the District Court's preliminary injunction decision should be reversed.

Dated: May 26, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type limitations provided in Federal Rule of Appellate Procedure 32(a)(7). The foregoing brief was prepared using Microsoft Word 2013, and contains 13,999 words in 14-point proportionately-spaced Times New Roman typeface.

Dated: May 26, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2017, I filed and served the foregoing with the Clerk of the Court by causing a copy to be electronically filed and served via the appellate CM/ECF system. All counsel of record are registered CM/ECF users.

Dated: May 26, 2017

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STATEMENT OF RELATED CASES

(Circuit Rule 28-2.6)

There are no related cases pending in this Court.

Dated: May 26, 2017

/s/ Michael K. Ryan
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ADDENDUM OF STATUTES, RULES, AND REGULATIONS

Table of Contents

United States Constitution, Article VI, Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

15 U.S.C. §1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. §26. Injunctive relief for private parties; exception; costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of Title 49. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

Driver's Privacy Protection Act, 18 U.S.C. §2721 *et seq.*

18 U.S.C. §2721. Prohibition on release and use of certain personal information from State motor vehicle records

(a) In general. – A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity:

(1) personal information, as defined in 18 U.S.C. 2725(3), about any individual obtained by the department in connection with a motor vehicle record, except as provided in subsection (b) of this section; or

(2) highly restricted personal information, as defined in 18 U.S.C. 2725(4), about any individual obtained by the department in connection with a motor vehicle record, without the express consent of the person to whom such information applies, except uses permitted in subsections (b)(1), (b)(4), (b)(6), and (b)(9): *Provided*, That subsection (a)(2) shall not in any way affect the use of organ donation information on an individual's driver's license or affect the administration of organ donation initiatives in the States.

(b) Permissible uses. – Personal information referred to in subsection (a) shall be disclosed for use in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of non-owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of titles I and IV of the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act (15 U.S.C. 1231 et seq.), the Clean Air Act (42 U.S.C. 7401 et seq.), and chapters 301, 305, and 321-331 of title 49, and, subject to subsection (a)(2), may be disclosed as follows:

(1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.

(2) For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle manufacturers.

(3) For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only—

> **(A)** to verify the accuracy of personal information submitted by the individual to the business or its agents, employees, or contractors; and
>
> **(B)** if such information as so submitted is not correct or is no longer correct, to obtain the correct information, but only for the purposes of preventing fraud by, pursuing legal remedies against, or recovering on a debt or security interest against, the individual.

(4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

(5) For use in research activities, and for use in producing statistical reports, so long as the personal information is not published, redisclosed, or used to contact individuals.

(6) For use by any insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, antifraud activities, rating or underwriting.

(7) For use in providing notice to the owners of towed or impounded vehicles.

(8) For use by any licensed private investigative agency or licensed security service for any purpose permitted under this subsection.

(9) For use by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver's license that is required under chapter 313 of title 49.

(10) For use in connection with the operation of private toll transportation facilities.

(11) For any other use in response to requests for individual motor vehicle records if the State has obtained the express consent of the person to whom such personal information pertains.

(12) For bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains.

(13) For use by any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains.

(14) For any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety.

(c) Resale or redisclosure. – An authorized recipient of personal information (except a recipient under subsection (b)(11) or (12)) may resell or redisclose the information only for a use permitted under subsection (b) (but not for uses under subsection (b) (11) or (12)). An authorized recipient under subsection (b)(11) may resell or redisclose personal information for any purpose. An authorized recipient under subsection (b)(12) may resell or redisclose personal information pursuant to subsection (b)(12). Any authorized recipient (except a recipient under subsection (b) (11)) that resells or rediscloses personal information covered by this chapter must keep for a period of 5 years records identifying each person or entity that receives information and the permitted purpose for which the information will be used and must make such records available to the motor vehicle department upon request.

(d) Waiver procedures. – A State motor vehicle department may establish and carry out procedures under which the department or its agents, upon receiving a request for personal information that does not fall within one of the exceptions in subsection (b), may mail a copy of the request to the individual about whom the information was requested, informing such individual of the request, together with a statement to the effect that the information will not be released unless the individual waives such individual's right to privacy under this section.

(e) Prohibition on conditions. – No State may condition or burden in any way the issuance of an individual's motor vehicle record as defined in 18 U.S.C. 2725(1) to obtain express consent. Nothing in this paragraph shall be construed to prohibit a State from charging an administrative fee for issuance of a motor vehicle record.

18 U.S.C. §2722. Additional unlawful acts

(a) Procurement for unlawful purpose. – It shall be unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b) of this title.

(b) False representation. – It shall be unlawful for any person to make false representation to obtain any personal information from an individual's motor vehicle record.

18 U.S.C. §2724. Civil action

(a) Cause of action. – A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court.

(b) Remedies. – The court may award—

(1) actual damages, but not less than liquidated damages in the amount of $2,500;

(2) punitive damages upon proof of willful or reckless disregard of the law;

(3) reasonable attorneys' fees and other litigation costs reasonably incurred; and

(4) such other preliminary and equitable relief as the court determines to be appropriate.

18 U.S.C. §2725. Definitions

In this chapter—

(1) "motor vehicle record" means any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles;

(2) "person" means an individual, organization or entity, but does not include a State or agency thereof;

(3) "personal information" means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status.

(4) "highly restricted personal information" means an individual's photograph or image, social security number, medical or disability information; and

(5) "express consent" means consent in writing, including consent conveyed electronically that bears an electronic signature as defined in section 106(5) of Public Law 106-229.

Wash. Rev. Code §46.72.001. Finding and intent

The legislature finds and declares that privately operated for hire transportation service is a vital part of the transportation system within the state. Consequently, the safety, reliability, and stability of privately operated for hire transportation services are matters of statewide importance. The regulation of privately operated for hire transportation services is thus an essential governmental function. Therefore, it is the intent of the legislature to permit political subdivisions of the state to regulate for hire transportation services without liability under federal antitrust laws.

Wash. Rev. Code §46.72.160. Local regulation

Cities, counties, and port districts may license, control, and regulate all for hire vehicles operating within their respective jurisdictions. The power to regulate includes:

(1) Regulating entry into the business of providing for hire vehicle transportation services;

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

(3) Controlling the rates charged for providing for hire vehicle transportation service and the manner in which rates are calculated and collected;

(4) Regulating the routes and operations of for hire vehicles, including restricting access to airports;

(5) Establishing safety and equipment requirements; and

(6) Any other requirements adopted to ensure safe and reliable for hire vehicle transportation service.

Wash. Rev. Code §81.72.200. Legislative intent

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

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

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

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

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

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

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

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

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

Seattle, Wash. Municipal Code §6.310.110 - Definitions

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

…

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

…

"Exclusive driver representative" (EDR) means a qualified driver representative, certified by the Director to be the sole and exclusive representative of all for-hire drivers operating within the City for a particular driver coordinator, and authorized to negotiate, obtain and enter into a contract that sets forth terms and conditions of work applicable to all of the for-hire drivers employed by that driver coordinator.

…

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

…

"Qualifying driver" means a for-hire driver, who drives for a driver coordinator and who satisfies the conditions established by the Director pursuant to Section 6.310.735. In establishing such conditions, the Director shall consider factors such as the length, frequency, total number of trips, and average number of trips per driver completed by all of the drivers who have performed trips in each of the four calendar months immediately preceding the commencement date, for a particular driver coordinator, any other factors that indicate that a driver's work for a driver coordinator is significant enough to affect the safety and reliability of for-hire transportation, and standards established by other jurisdictions for granting persons the right to vote to be represented in negotiations pertaining to the terms and

conditions of employment. A for-hire driver may be a qualifying driver for more than one driver coordinator.

…

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

…

"Transportation network company" (TNC) means an organization whether a corporation, partnership, sole proprietor, or other form, licensed under this chapter and operating in the City of Seattle that offers prearranged transportation services for compensation using an online-enabled TNC application or platform to connect passengers with drivers using their personal vehicles and that meets the licensing requirements of Section 6.310.130 and any other requirements under this chapter.

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

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

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

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

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

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

C. An entity wishing to be considered as a QDR for for-hire drivers operating within the City must submit a request to the Director within 30 days of the

commencement date or at a later date as provided in subsection G of this section. Within 14 days of the receipt of such a request, the Director will notify the applicant in writing of the determination. Applicants who dispute the Director's determination may appeal to the Hearing Examiner within 10 days of receiving the determination. The Director shall provide a list of all QDRs to all driver coordinators.

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

2. An entity that has been designated as a QDR and that seeks to represent the drivers of a driver coordinator shall notify the driver coordinator of its intent to represent those drivers within 14 days of its designation as a QDR. That notice may be provided by any means reasonably calculated to reach the driver coordinator, including by written notice mailed or delivered to a transportation network company or taxicab association representative at the mailing address listed with the City.

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

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

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

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

signature or other electronic means. The Director shall determine by rule the standards and procedures for submitting and verifying statements of interest by qualifying drivers choosing an EDR.

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

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

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

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

H. 1. Upon certification of the EDR by the Director, the driver coordinator and the EDR shall meet and negotiate in good faith certain subjects to be specified in rules or regulations promulgated by the Director, including, but not limited to, best practices regarding vehicle equipment standards; safe driving practices; the manner in which the driver coordinator will conduct criminal background checks of all prospective drivers; the nature and amount of payments to be made by, or withheld from, the driver coordinator to or by the drivers; minimum hours of work, conditions of work, and applicable rules. If the driver coordinator and the EDR reach agreement on terms, their agreement shall be reduced to a written agreement. The term of such an

agreement shall be agreed upon by the EDR and the driver coordinator, but in no case shall the term of such an agreement exceed four years.

2. After reaching agreement, the parties shall transmit the written agreement to the Director. The Director shall review the agreement for compliance with the provisions of this Chapter 6.310, and to ensure that the substance of the agreement promotes the provision of safe, reliable, and economical for-hire transportation services and otherwise advance the public policy goals set forth in Chapter 6.310 and in the Preamble to and Section 1 of the ordinance introduced as C.B. 118499. In conducting that review, the record shall not be limited to the submissions of the EDR and driver coordinator nor to the terms of the proposed agreement. The Director shall have the right to gather and consider any necessary additional evidence, including by conducting public hearings and requesting additional information from the EDR and driver coordinator. Following this review, the Director shall notify the parties of the determination in writing, and shall include in the notification a written explanation of all conclusions. Absent good cause, the Director shall issue the determination of compliance within 60 days of the receipt of an agreement.

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

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

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

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

expiration of an existing agreement, either party must submit to interest arbitration upon the request of the other pursuant to subsection 6.310.735.I, and the interest arbitrator's proposed successor agreement shall be subject to review by the Director pursuant to subsections 6.310.735.I.3 and 6.310.735.I.4.

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

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

1. The interest arbitrator may be selected by mutual agreement of the parties. If the parties cannot agree, then the arbitrator shall be determined as follows: from a list of seven arbitrators with experience in labor disputes and/or interest arbitration designated by the American Arbitration Association, the party requesting arbitration shall strike a name. Thereafter the other party shall strike a name. The process will continue until one name remains, who shall be the arbitrator. The cost of the interest arbitration shall be divided equally between the parties.

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

a. Any stipulations of the parties;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. During the term of an agreement approved by the Director under subsection 6.310.735.H or 6.310.735.I, the Director shall have the authority to withdraw approval of the agreement if the Director determines that the agreement no longer adheres to the provisions of this Chapter 6.310 or that it no longer promotes the provision of safe, reliable, and economical for-hire transportation services and the public policy goals set forth in the Preamble

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

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

3. A driver coordinator shall not make changes to subjects set forth in subsection 6.310.735.H or specified in rules or regulations promulgated by the Director without meeting and discussing those changes in good faith with the EDR, even if the driver coordinator and EDR have not included terms concerning such subjects in their agreement.

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

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

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

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

1. The Director receives a petition to decertify an EDR no more than 30 days before the expiration of an agreement reached pursuant to this section

6.310.735 or no less than three years after the agreement's effective date, whichever is earlier.

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

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

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

4. Within 120 days of receiving the driver contact information, petitioners for a decertification will submit to the Director statements of interest from a majority of qualifying drivers from the list described in subsection 6.310.735.K.3. The statements of interest shall be signed and dated and shall clearly indicate that the driver no longer wants to be represented by the EDR for the purpose of collective bargaining with the driver coordinator. The Director shall determine by rule the standards and procedures for submitting and verifying the statements of interest of qualifying drivers.

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

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

M. Enforcement

1. Powers and duties of Director

a. The Director is authorized to enforce and administer this section 6.310.735. The Director shall exercise all responsibilities under this section 6.310.735 pursuant to rules and regulations developed under Chapter 3.02. The Director is authorized to promulgate, revise, or rescind rules and regulations deemed necessary, appropriate, or convenient to

administer the provisions of this section 6.310.735, providing affected entities with due process of law and in conformity with the intent and purpose of this section 6.310.735.

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

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

   2) Include notice that the person or entity in violation is entitled to a hearing before the Hearing Examiner to respond to the notice and introduce any evidence to refute or mitigate the violation, in accordance with Chapter 3.02; and

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

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

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

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

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

3. Private right of action. Subsections 6.310.735.D, 6.310.735.E, 6.310.735.H, and 6.310.735.K may be enforced through a private right of action. Any aggrieved party, including but not limited to an EDR, may bring an action in

court, and shall be entitled to all remedies available at law or in equity appropriate to remedy any violation of this section 6.310.735. A plaintiff who prevails in any action against a private party to enforce this section 6.310.735 may be awarded reasonable attorney's fees and costs.

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

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

Seattle, Wash. Ordinance No. 124968

AN ORDINANCE relating to taxicab, transportation network company, and for-hire vehicle drivers; amending Section 6.310.110 of the Seattle Municipal Code; adding a new Section 6.310.735 to the Seattle Municipal Code; and authorizing the election of driver representatives.

WHEREAS, the state of Washington, in Revised Code of Washington 46.72.001 and 81.72.200, has authorized political subdivisions of the state to regulate for-hire drivers and for-hire transportation services without facing liability under federal antitrust laws; and

WHEREAS, allowing taxicab, transportation network company, and for-hire vehicle drivers ("for-hire drivers") to modify specific agreements collectively with the entities that hire, direct, arrange, or manage their work will better ensure that they can perform their services in a safe, reliable, stable, cost-effective, and economically viable manner and thereby promote the welfare of the people; and

WHEREAS, the new responsibilities for the Department of Finance and Administrative Services (FAS) contemplated in this legislation will require additional resources; and WHEREAS, the Director of FAS has authority to adjust fees to cover the cost of the regulatory functions FAS performs on behalf of the public; and

WHEREAS, should this legislation go into effect, the Director may exercise that authority to raise additional revenue through fees to cover the additional costs; NOW, THEREFORE,

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. Findings

A. In order to protect the public health, safety and welfare, The City of Seattle is granted express authority to regulate for-hire and taxicab transportation services pursuant to Chapters 46.72 and 81.72 RCW. This authority includes regulating entry, requiring a license, controlling rates, establishing safety requirements, and any other requirement to ensure safe and reliable transportation services.

B. Seattle Municipal Code (SMC) Chapter 6.310 is an exercise of The City of Seattle's power to regulate the for-hire and taxicab transportation industry. SMC Chapter 6.310, in subsection 6.310.100.A, states: "Some of its regulatory purposes are to increase the safety, reliability, cost-effectiveness, and the economic viability and stability of privately-operated for-hire vehicle and taxicab services within The City of Seattle."

C. The purpose of this ordinance is to ensure safe and reliable for-hire and taxicab transportation service pursuant to RCW 46.72.160 and RCW 81.72.210, respectively, and to exercise the City's authority to regulate for-hire transportation pursuant to RCW 46.72.001, which states: "The legislature finds and declares that privately operated for hire transportation service is a vital part of the transportation system within the state. Consequently, the safety, reliability, and stability of privately operated for hire transportation services are matters of statewide importance. The regulation of privately operated for hire transportation services is thus an essential governmental function. Therefore, it is the intent of the legislature to permit political subdivisions of the state to regulate for hire transportation services without liability under federal antitrust laws." RCW 81.72.200, governing taxicab transportation, has a similar statement of legislative intent.

D. As the City is acting under specific state statutory authority, it is immune from liability under antitrust laws.

E. At present, entities that hire, contract with, or partner with for-hire drivers for the purpose of assisting them with, or facilitating them in, providing for-hire transportation services to the public establish the terms and conditions of their contracts with their drivers unilaterally, and may impose changes in driver compensation rates or deactivate drivers from dispatch services without prior

warning or discussion. Terms and conditions that are imposed without meaningful driver input, as well as sudden and/or unilateral contract changes, may adversely impact the ability of a for-hire driver to provide transportation services in a safe, reliable, stable, cost-effective, and economically viable manner.

F. Unilateral terms and working conditions established and imposed without driver input by entities that hire, contract with, or partner with for-hire drivers, as well as sudden and/or unilateral changes in those terms and conditions, have resulted in driver unrest and transportation service disruptions around the country.

G. There is currently no effective mechanism for for-hire drivers to meaningfully address the terms and conditions of their contractual relationship with the entity that hires, contracts with, or partners with them. For-hire drivers lack the power to negotiate these issues effectively on an individual basis.

H. Business models wherein companies control aspects of their drivers' work, but rely on the drivers being classified as independent contractors, render for-hire drivers exempt from minimum labor requirements established by federal, state, and local law.

I. Establishing a process through which for-hire drivers and the entities that control many aspects of their working conditions collectively negotiate the terms of the drivers' contractual relationships with those entities will enable more stable working conditions and better ensure that drivers can perform their services in a safe, reliable, stable, cost-effective, and economically viable manner, and thereby promote the welfare of the people who rely on safe and reliable for-hire transportation to meet their transportation needs.

1. Drivers working under terms that they have negotiated through a collective negotiation process are more likely to remain in their positions over time, and to devote more time to their work as for-hire drivers, because the terms are more likely to be satisfactory and responsive to the drivers' needs and concerns. Such drivers accumulate experience that will improve the safety and reliability of the for-hire transportation services provided by the driver coordinator and reduce the safety and reliability problems created by frequent turnover in the for-hire transportation services industry.

2. Establishing the drivers' contractual terms through a collective negotiation process will also help ensure that the compensation drivers receive

for their services is sufficient to alleviate undue financial pressure to provide transportation in an unsafe manner (such as by working longer hours than is safe, skipping needed breaks, or operating vehicles at unsafe speeds in order to maximize the number of trips completed) or to ignore maintenance necessary to the safe and reliable operation of their vehicles. Enabling driver participation in the formulation of vehicle equipment standards and safe driving practices will help. ensure that those standards and practices are responsive to driver needs, including changing conditions, and that drivers will agree with and follow those standards and practices.

J. Collective negotiation processes in other industries have achieved public health and safety outcomes for the general public and improved the reliability and stability of the industries at issue including, but not limited to, job security provisions, scheduling predictability, job training, methods of communicating health and safety information and enforcing health and safety standards, processes for resolving disputes with minimal rancor or conflict, and reductions in industrial accidents, vehicular accidents, and inoperative or malfunctioning equipment. In other parts of the transportation industry, for example, collective negotiation processes have reduced accidents and improved driver and vehicle safety performance.

Section 2. Section 6.310.110 of the Seattle Municipal Code, last amended by Ordinance 124524, is amended as follows:

6.310.110 Definitions

* * *

<u>"Commencement date" means a calendar date set by the Director after the effective date of the ordinance introduced as Council Bill 118499 for the purpose of initiating certain processes pursuant to Section 6.310.735 and establishing timelines and deadlines associated with them.</u>

* * *

"Director" means the Director of Finance and Administrative Services or the director of any successor department and the Director's authorized designee.

<u>"Driver coordinator" means an entity that hires, contracts with, or partners with for-hire drivers for the purpose of assisting them with, or facilitating them in,</u>

providing for-hire services to the public. For the purposes of this definition, "driver coordinator" includes but is not limited to taxicab associations, for-hire vehicle companies, and transportation network companies.

"Exclusive driver representative" (EDR) means a qualified driver representative, certified by the Director to be the sole and exclusive representative of all for-hire drivers operating within the City for a particular driver coordinator, and authorized to negotiate, obtain and enter into a contract that sets forth terms and conditions of work applicable to all of the for-hire drivers employed by that driver coordinator.

* * *

"Personal vehicle" means a vehicle that is not a taxicab or for-hire vehicle licensed under this ((~~chapter~~)) Chapter 6.310. A personal vehicle that is used to provide trips via a transportation network company application dispatch system is subject to regulation under this ((~~chapter~~)) Chapter 6.310.

"Qualifying driver" means a for-hire driver, who drives for a driver coordinator and who satisfies the conditions established by the Director pursuant to Section 6.310.735. In establishing such conditions, the Director shall consider factors such as the length, frequency, total number of trips, and average number of trips per driver completed by all of the drivers who have performed trips in each of the four calendar months immediately preceding the commencement date, for a particular driver coordinator, and any other factors that indicate that a driver's work for a driver coordinator is significant enough to affect the safety and reliability of for-hire transportation. A for-hire driver may be a qualifying driver for more than one driver coordinator.

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

* * *

Section 3. A new Section 6.310.735 is added to the Seattle Municipal Code as follows:

6.310.735 Exclusive driver representatives

A. The Director shall promulgate a commencement date that is no earlier than 180 days and no later than 240 days from the effective date of the ordinance introduced as Council Bill 118499.

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Within 30 days of receiving such statements of interest, the Director shall determine if they are sufficient to designate the QDR as the EDR for all drivers for that particular driver coordinator, and if so, shall so designate the QDR to be the EDR, except that, if more than one QDR

establishes that a majority of qualifying drivers have expressed interest in being represented by that QDR, the Director shall designate the QDR that received the largest number of verified affirmative statements of interest to be the EDR.

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

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

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

2. After reaching agreement, the parties shall transmit the written agreement to the Director. The Director shall review the agreement for compliance with the provisions of this Chapter 6.310, and to ensure that the substance of the agreement promotes the provision of safe, reliable, and economical for-hire transportation services and otherwise advance the public policy goals set forth in Chapter 6.310 and in the Preamble to and Section 1 of the ordinance introduced as C.B. 118499. In conducting

that review, the record shall not be limited to the submissions of the EDR and driver coordinator nor to the terms of the proposed agreement. The Director shall have the right to gather and consider any necessary additional evidence, including by conducting public hearings and requesting additional information from the EDR and driver coordinator. Following this review, the Director shall notify the parties of the determination in writing, and shall include in the notification a written explanation of all conclusions. Absent good cause, the Director shall issue the determination of compliance within 60 days of the receipt of an agreement.

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

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

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

3. Unless the EDR has been decertified pursuant to subsection 6.310.735.L or has lost its designation as a QDR, the EDR and the driver coordinator shall, at least 90 days before the expiration of an existing agreement approved pursuant to subsections 6.310.735.H.2.c or 6.310.735.I.4.c, meet to negotiate a successor agreement. Any such agreement shall be subject to approval by the Director pursuant to subsection 6.310.735.H.2. If the parties are unable to reach agreement on a successor agreement within 90 days after the expiration of an existing agreement, either party must submit to interest arbitration upon the request of the other pursuant to subsection 6.310.735.1, and the interest arbitrator's proposed successor agreement shall be subject to review by the Director pursuant to subsections 6.310.735.1.3 and 6.310.735.1.4.

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

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

1. The interest arbitrator may be selected by mutual agreement of the parties. If the parties cannot agree, then the arbitrator shall be determined as follows: from a list of seven arbitrators with experience in labor disputes and/or interest arbitration designated by the American Arbitration Association, the party requesting arbitration shall strike a name. Thereafter the other party shall strike a name. The process will continue until one name remains, who shall be the arbitrator. The cost of the interest arbitration shall be divided equally between the parties.

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

a. Any stipulations of the parties;

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

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

d. The wages, hours, and conditions of employment of other persons, whether employees or independent contractors, employed as

for-hire or taxicab drivers in Seattle and its environs, as well as other comparably sized urban areas;

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

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

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

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

4. In addition to the review provided for in subsection 6.310.735.1.3, a driver coordinator or EDR may challenge the proposed agreement on the following grounds: that the interest arbitrator was biased, that the interest arbitrator exceeded the authority granted by subsection 6.310.735.H and this subsection 6.310.735.1, and/or that a provision of the proposed agreement is arbitrary and capricious. In the event of such a challenge, the Director will provide notice to the driver coordinator and the EDR, allow the driver coordinator and the EDR the opportunity to be heard, and make a determination as to whether any of the challenges asserted should be sustained.

a. If the Director finds the agreement fulfills the requirements of subsection 6.310.735.H.2, and that no challenges raised under this subsection 6.310.735.1.4 should be sustained, the Director will provide written notice of that finding to the parties and the agreement will be deemed final and binding on all parties.

b. If the Director finds that the agreement fails to fulfill the requirements of subsection 6.310.735.H.2, or that any challenge asserted under this subsection 6.310.735.1.4 should be sustained, the Director shall remand the agreement to the interest arbitrator with a written explanation of the failure(s) and, at the Director's discretion, recommendations to remedy the failure(s).

c. The agreement shall not go into effect until the Director affirmatively deems the agreement final and binding pursuant to subsections 6.310.735.1.3 and 6.310.735.1.4.a.

d. A driver coordinator or EDR may obtain judicial review of the Director's final determination rendered pursuant to this subsection 6.310.735.1.4 by applying for a Writ of Review in the King County Superior Court within 14 days from the date of the Director's determination, in accordance with the procedure set forth in Chapter 7.16 RCW, other applicable law, and court rules. The Director's final determination shall not be stayed pending judicial review unless a stay is ordered by the court. If review is not sought in compliance with this subsection 6.310.735.1.4.d, the determination of the Director shall be final and conclusive.

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

J. During the term of an agreement approved by the Director under subsection 6.310.735.H or 6.310.735.1, the parties may discuss additional terms and, if agreement on any amendments to the agreement are reached, shall submit proposed amendments to the Director, who shall consider the proposed amendment in accordance with the procedures and standards in subsection 6.310.735.H.2. Any proposed amendment shall not go into effect until the Director affirmatively determines its adherence to the provisions of this Chapter 6.310 and that it furthers the provision of safe, reliable and economical for-hire transportation services and the public policy goals set forth in the Preamble to and Section 1 of the ordinance introduced as C.B. 118499.

1. During the term of an agreement approved by the Director under subsection 6.310.735.H or 6.310.735.1, the Director shall have the authority to withdraw approval of the agreement if the Director determines that the agreement no longer adheres to the provisions of this

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

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

3. A driver coordinator shall not make changes to subjects set forth in subsection 6.310.735.H or specified in rules or regulations promulgated by the Director without meeting and discussing those changes in good faith with the EDR, even if the driver coordinator and EDR have not included terms concerning such subjects in their agreement.

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

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

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

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

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

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

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

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

4. Within 120 days of receiving the driver contact information, petitioners for a decertification will submit to the Director statements of interest from a majority of qualifying drivers from the list described in subsection 6.310.735.K.3. The statements of interest shall be signed and dated and shall clearly indicate that the driver no longer wants to be represented by the EDR for the purpose of collective bargaining with the driver coordinator. The Director shall determine by rule the standards and procedures for submitting and verifying the statements of interest of qualifying drivers.

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

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

M. Enforcement

1. Powers and duties of Director

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

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

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

2) Include notice that the person or entity in violation is entitled to a hearing before the Hearing Examiner to respond to the notice and introduce any evidence to refute or mitigate the violation, in accordance with Chapter 3.02; and

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

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

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

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

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

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

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

Section 4. The provisions of this ordinance are declared to be separate and severable. The invalidity of any clause, sentence, paragraph, subdivision, section, or portion of this ordinance, or the invalidity of its application to any person or circumstance, does not affect the validity of the remainder of this ordinance, or the validity of its application to other persons or circumstances.

Section 5. Sections 2 and 3 of this ordinance shall take effect and be in force 150 days after the effective date of the ordinance introduced as Council Bill 118499.

Section 6. No provision of this ordinance shall be construed as a providing any determination regarding the legal status of taxicab, transportation network company, and for-hire vehicle drivers as employees or independent contractors. The provisions of this ordinance do not apply to drivers who are employees under 29 U.S.C. § 152(3).

Section 7. Should a court of competent jurisdiction, all appeals having been exhausted or all appeal periods having run, determine that any provision of this ordinance is preempted by federal law, any and all such provisions shall be deemed null and void.

Section 8. This ordinance shall take effect and be in force 30 days after its approval by the Mayor, but if not approved and returned by the Mayor within ten days after presentation, it shall take effect as provided by Seattle Municipal Code Section 1.04.020.

Passed by the City Council the 14th day of December, 2015, and signed by me in open session in authentication of its passage this 14th day of December, 2015.

s/ Tim Burgess
President of the City Council

Approved by me this ___ day of _____, 2015.

_____
Edward B. Murray, Mayor

Filed by me this 23rd day of December, 2015.

s/ Monica M. Simmons
Monica Martinez Simmons, City Clerk

Director's Rule FHDR-1, Qualifying Driver and Lists of Qualifying Drivers *

(SMC 6.310.110, .735.D and .735.E)

Introduction

The following Rule establishes the conditions that define a Qualifying Driver as authorized by the Seattle Municipal Code (SMC).

* Director's Rules FHDR-1 and FHDR-7 as produced here are the versions in effect as of Friday, May 26, 2017. The original versions of these rules can be found at ER 128 (FHDR-1) and ER 160 (FHDR-7).

In adopting the Rule, the Director has considered the available data regarding trips by for-hire drivers, discussions with and survey responses from drivers, standards established by other jurisdictions for granting persons the right to vote and to be represented in negotiations pertaining to the terms and conditions of employment and the factors set forth in the SMC, and has established conditions that indicate that a driver's work for a Driver Coordinator is significant enough to affect the safety and reliability of for-hire transportation in that the driver has a sufficient stake in and knowledge of conditions that affect the safety and reliability of that Driver Coordinator's for-hire transportation services.

Qualifying Driver

A qualifying driver is a for-hire driver licensed under the SMC who meets the following conditions:

- Was hired by or began contracting with, partnering with or maintaining a contractual relationship with a particular Driver Coordinator at least 90 days prior to the commencement date;[1] and
- Drove at least 52 trips originating or ending within the Seattle city limits for a particular Driver Coordinator during any three-month period in the 12 months preceding the commencement date. A trip is defined as transporting a passenger from one place to another for compensation.
    - Any driver who is an active member of the U.S. military and could not provide trips because he/she was deployed on a military assignment outside of the greater Seattle area will qualify if he/she drove at least 52 trips originating or ending within the Seattle city limits for a particular Driver Coordinator during any three-month period in the 24 months preceding the commencement date. A trip is defined as transporting a passenger from one place to another for compensation. The driver must provide documentation corroborating the deployment and trips driven to the Director for inspection and to confirm qualification.

The City recognizes that a driver may drive for multiple Driver Coordinators and may be a qualifying driver for more than one Driver Coordinator. For purposes

[1] The initial commencement date is January 17, 2017. Ninety days prior to the initial commencement date is October 19, 2016 and 12 months prior is January 17, 2016. Subsequent commencement dates will be promulgated by the Director pursuant to the SMC.

of determining whether a driver is a "qualifying driver" under the provisions of the SMC, a Driver Coordinator should count only the trips driven by the driver for that particular Driver Coordinator.

Nothing in this Rule or in the SMC will be construed to require or authorize a Driver Coordinator to ask drivers to identify themselves as driving for another Driver Coordinator.

Lists of Qualifying Drivers Created by Driver Coordinators

Within 14 calendar days of its designation as a Qualified Driver Representative (QDR), or within 58 days of the commencement date if the QDR has previously been designated, a QDR will notify a Driver Coordinator of its intent to represent those drivers.[2] Driver Coordinators that hire, contract with or partner with 50 or more non-employee for-hire drivers for the purpose of assisting them with, or facilitating them in, providing for-hire services to the public (which may include taxicab associations, for-hire vehicle companies, TNCs or other entities) will then create qualifying driver lists (driver list) based on the conditions established by this Rule. The accuracy of a driver list's content is the responsibility of the Driver Coordinator creating it, not the City's responsibility.

A driver list will include all drivers who satisfy the specified conditions above. After a QDR gives a Driver Coordinator notice as specified in the SMC, a Driver Coordinator will produce and transmit the list of qualifying drivers to the QDR within 75 calendar days of the commencement date. That same list will later be used to ascertain whether a QDR has obtained statements of interest from a majority of qualifying drivers.

A Driver Coordinator will notify the City by e-mail (DriverRepresentation@seattle.gov) of the date the driver list was transmitted to a QDR. A QDR will notify the City by e-mail (DriverRepresentation@seattle.gov) of

[2] Per the SMC, a Driver Coordinator will not be subject to the requirements of a driver representation effort associated with a specified commencement date more than once in any 12-month period. The 12-month period begins on the date a Driver Coordinator transmits a list of its qualifying drivers to any QDR. However, if the FAS Director determines that a Driver Coordinator has willfully delayed transmittal of the list in violation of the SMC, then the FAS Director has discretion to specify that the 12-month period begins on the date that the list was due. For any specified commencement date, however, more than one QDR may attempt to organize the drivers of the same Driver Coordinator.

the date the driver list was received from a Driver Coordinator. The notifications will not include a copy of the driver list.

At a minimum, a driver list will include the following information for all non-employee qualifying drivers working for a Driver Coordinator:

1. Name (last name, first name and middle initial)
2. Mailing address
3. E-mail address (if available)
4. Phone number (if available)
5. Valid for-hire driver license/permit number (issued by King County/City of Seattle)[3]

A Driver Coordinator will make a driver list available in an electronic format such as an Excel spreadsheet that allows a QDR to read, sort and organize the driver information/data supplied. A scanned document presented in the Portable Document Format (PDF), for example, does not meet the standard under this Rule. A Driver Coordinator will devise and employ a way to securely transfer driver lists to a QDR and to secure, through password protection or other means, access to those lists.

Per the SMC, a QDR will use driver lists solely for the purpose of contacting drivers to solicit their interest in being represented by the QDR. A QDR may not sell, publish or otherwise disseminate driver contact information outside the QDR, the QDR's employees and the QDR's agents. A QDR must take all reasonable steps to ensure that another party does not misuse the list. A QDR will be held responsible if another party misuses the list provided by a Driver Coordinator to that QDR. Violations of this provision by a QDR and/or another party will be addressed through the enforcement processes specified in the SMC.

[3] For purposes of creating a list of qualifying drivers, a driver must possess a valid (i.e., unexpired or, if expired, expired for no more than 60 days) for-hire driver license/permit on the date the list is created. Sixty days is given as a grace period while an expired license/permit goes through the renewal process.

Director's Rule FHDR-7, Renewal Application Process for a Qualified Driver Representative

(SMC 6.310.110 and .735.C)

The following rule establishes the application process for a Qualified Driver Representative (QDR) to renew its designation annually as authorized by the Seattle Municipal Code (SMC).

Application for Renewal

Any organization previously designated by the City as a QDR and wishing to extend its designation must meet all of the following qualifications:

1. Be registered with the Washington Secretary of State as a nonprofit corporation
2. Have organizational bylaws that give for-hire drivers the right to be members of the organization and participate in the democratic control of the organization
3. Have experience in and/or a demonstrated commitment to assisting stakeholders in reaching consensus agreements with, or related to, employers and contractors
4. Not interfere with, restrain or coerce drivers in the exercise of their right to decide whether to authorize the QDR to represent them, their right to become members of or refrain from membership in the QDR, their right to decide whether to decertify the organization as their Exclusive Driver Representative (EDR) or any other right protected in the SMC. This will not impair the right of a QDR or EDR to prescribe its own rules with respect to the acquisition or retention of membership therein.
5. Not be dominated or controlled by any Driver Coordinator and not receive any financial support from a Driver Coordinator. Domination or control will mean that the Driver Coordinator has assisted and supported the QDR's operation and activities to such an extent that it must be looked at as the Driver Coordinator's creation.[1]
6. Comply with all applicable provisions of SMC Chapter 6.310.735 and the Director's Rules, including the use and safeguarding of lists of qualifying drivers.

[1] The Director will rely primarily on Washington State Public Employment Relations Commission (PERC) cases and secondarily upon federal National Labor Relations Board authority to interpret the terms "interfere with, restrain or coerce" and "dominate or control."

Failure to renew the QDR designation on an annual basis will result in loss of the designation. An organization seeking the renewal of its designation must submit the following information on a City supplied application form:

Section 1

Organization's name and contact information (mailing address, phone number and e-mail address)

Section 2

Designated representative, which includes the name of and contact information (mailing address, phone and e-mail address) for the person representing the organization and certifying the application on the organization's behalf; the person must be vested with authority to manage or direct the affairs of the organization or to bind the organization in dealings with third parties

Section 3

Proof of nonprofit status, which includes either a Unified Business Identifier (UBI) number or a certificate of formation from the Washington Secretary of State

Section 4

Current bylaws

a. The bylaws will need to include language allowing for-hire drivers to be members of the organization and to participate in democratic control of the organization
b. The organization will highlight relevant language in a copy of the bylaws provided to the City

Section 5

Statement of experience and/or commitment

a. The statement will highlight commitment to and/or experience with, including any specific and relevant examples, assisting stakeholders in reaching consensus agreements with, or related to, employers and contractors
    i. If organization has experience as an EDR, the statement will include specific information regarding how the organization has assisted EDRs and Driver Coordinators in reaching consensus agreements and/or promoted safe, reliable and economical for-hire transportation through its representation of drivers
b. The statement will be 1,500 words or less and include three references for the organization itself (name and contact information for each)

Section 6

Disclosures

a. Answers to questions and, if applicable, explanations of those answers provided as attachments to the application form. Questions will cover:
    i. Financial indebtedness, if any, and funding sources,
    ii. Financial support received from any Driver Coordinator,
    iii. Involvement by current and former City employees,
    iv. Compliance/criminal background and
    v. Any parent or affiliated organization.

Section 7

Certification

a. An original signature and date from the organization's representative

At the Director's discretion, the City may require an organization to submit additional information to assist decision-making on the renewal of the QDR's designation.

As part of the renewal application process, the Director will accept statements from any person or entity in support of or in opposition to renewal. Specific documentary or other evidence may be submitted to support a statement. The Director has discretion regarding the weight to give any statement submitted by considering its credibility, relevance to the applicable qualifications, evidentiary support and/or seriousness. The Director may contact the person or entity submitting the statement for additional information and/or clarification.

Upon receipt of an application for renewal, the Director will perform an initial screen of all application materials for completeness. If the application is deemed incomplete, the Director may provide an opportunity for the applicant to correct the deficiency.

Within 30 calendar days of receipt of the application, or, if requested by the Director, receipt of additional information from the applicant, the City will notify applying entities by e-mail whether their designation as a QDR has been renewed.

Timeline for Renewal

The Director will establish a renewal deadline each year applicable to all currently designated QDRs. A QDR's renewal application materials, including disclosures, will be made publicly available via a City website.

The following timeline will govern the QDR renewal process:

- Submitting renewal applications to the City: annual deadline established by the Director
    - City will make renewal application forms available at least 30 calendar days prior to this deadline
- Submitting statements of support for or opposition to a QDR's renewal application: within 10 calendar days of the annual deadline established by the Director
- Director's ruling: the Director will notify the organization, by e-mail, of its determination within 30 calendar days of receipt of application for renewal
- Opportunity to remedy: the Director may allow a QDR the opportunity to remedy a deficiency (amount of time will be commensurate with the extent of the deficiency to remedy)
- Appeal: an applicant may appeal the Director's determination to the Office of Hearing Examiner within 10 calendar days after the notice of the determination

Obligation to Remain in Good Standing and Filing of Complaints

A QDR must continuously meet the qualifications described in this Rule and all applicable requirements specified in other Director's Rules implementing Ordinance 124968 and in SMC Chapter 6.310.735 to maintain its QDR designation. If at any time the Director determines that an entity no longer meets one or more of the qualifications described in this Rule and/or any requirement(s) specified in other Director's Rules implementing Ordinance 124968 or in SMC Chapter 6.310.735, the Director may withdraw the entity's QDR designation, in accordance with the procedures described herein.

To determine whether a QDR remains in good standing, the Director may initiate an investigation based on a complaint made on a form supplied by the Director and supported by specific evidence or upon the Director's own initiative. The Director may consider any available documents, data audits, evidence or other information giving the Director reason to believe that a QDR no longer meets the required qualifications.

If the Director initiates such an investigation, the Director will notify the QDR and any Driver Coordinator with respect to whom the QDR is an EDR, if applicable, of the nature of the complaint(s) or concern(s) via email and public online notice. Any QDR responses to such complaint(s) or concern(s) must be written and received

by the Director by U.S. mail, personal delivery or e-mail within 10 calendar days of the date of such notice. The Director may extend this deadline for good cause.

As part of any investigation, the Director has authority to request information from a QDR, Driver Coordinator, complainant, or any other entity or person, and may convene a hearing for the presentation of testimony.

Director's Review and Determination

For the qualifications addressed in sections 3 and 4 of the renewal application, the Director will assign either a pass or a fail.

To determine whether an organization has sufficient experience in or commitment to reaching consensus agreements (as addressed in section 5 of a renewal application or if at issue in a potential withdrawal of designation), the Director will consider factors including but not limited to:

1. The organization's bylaws, constitution or other evidence of its purposes and functions;

2. The length of time the organization and/or the person or persons vested with authority to manage or direct the affairs of the organization has assisted stakeholders in reaching consensus agreements with, or related to, employers and contractors;

3. The number of consensus agreements reached;

4. The number of persons covered by the consensus agreements and

5. The nature and number of activities/campaigns demonstrating a commitment to reaching consensus agreements and the outcome of those activities/campaigns.

If the organization has experience as an EDR, the Director may consider whether and how the organization has assisted EDRs and Driver Coordinators in reaching consensus agreements and/or promoted safe, reliable and economical for-hire transportation through its representation of drivers.

For the various disclosures covered under section 6, the Director has the discretion to consider any affirmative response and its supporting explanation to determine whether the organization can or cannot fulfill the QDR responsibilities and requirements set forth in the SMC and Director's Rules. In the event of a potential withdrawal of designation where these factors are at issue, the Director may request supplemental disclosures and/or may consider changes in circumstances since the entity's most recent QDR designation to determine whether the

organization can or cannot fulfill the QDR responsibilities and requirements set forth in the SMC and Director's Rules.

The Director has discretion regarding the weight to give any statement submitted by considering its credibility, evidentiary support and/or seriousness. The Director may contact the person or entity submitting the statement for additional information and/or clarification.

If the Director determines that a QDR no longer meets the qualifications described in this Rule, the Director will give the QDR a notice of intent of nonrenewal or withdrawal of the QDR designation and an opportunity and deadline to come back into compliance, unless the Director determines that it is not possible for the QDR to come back into compliance, in which case the Director will give the QDR a notice of intent of nonrenewal or withdrawal of the QDR designation without any opportunity to correct.

If the Director intends not to renew or to withdraw the QDR's designation, either after or in lieu of an opportunity to achieve compliance, the Director will provide the QDR with written notice of the proposed decision and the grounds therefor, as well as an opportunity for the QDR to be heard on the matter. The Director may request the QDR to respond to the notice in writing by a date certain and/or set a hearing and establish hearing procedures to listen to live testimony. The Director's decision to withdraw or not to renew a QDR's designation can be appealed to the Hearing Examiner per the SMC within 10 calendar days of the withdrawal or nonrenewal of designation.

Loss of QDR Status by an EDR

If an EDR loses its QDR status, it will automatically lose its EDR status. Any other QDR or QDR applicant may request a new commencement date to seek to represent that Driver Coordinator's drivers per the SMC. Any new commencement date must be set at least 12 months after that Driver Coordinator transmitted a list of its qualifying drivers to any QDR, provided that, if the FAS Director determines that the Driver Coordinator willfully delayed transmittal of the list in violation of the SMC, then the FAS Director has discretion to specify that the 12-month period begins on the date the list was due.

If an EDR loses its status during the term of an approved agreement with a Driver Coordinator, the agreement will continue in effect for the remainder of its term or until a new EDR is certified and the Director approves a new agreement, except that terms regarding membership in the EDR, payments made to the EDR or

any other rights of the EDR will not continue in effect. Drivers covered by that agreement will have the authority to enforce it as third-party beneficiaries.