No. 17-35640

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA and RASIER, LLC,

Plaintiffs-Appellants,

v.

CITY OF SEATTLE, *et al.*,

Defendants-Appellees

Reply Brief Of Appellants

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INTRODUCTION

The two federal agencies responsible for enforcing antitrust law agree that state-action immunity does not save Seattle's collective-bargaining Ordinance. (Brief of FTC & DOJ, Doc.61.) Both agencies urge reversal. Both are correct.

Indeed, contrary to Seattle's claim (Br.26 n.11), this Court must accord "some deference" to the FTC's "informed judgment" that the Ordinance "is to be condemned" under Section 1 of the Sherman Act. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986). For decades the Supreme Court has consistently sided with the FTC on state-action immunity issues. *North Carolina State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101, 1116 (2015); *FTC v. Phoebe Putney*, 568 U.S. 216, 225 (2013); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992). The FTC's position here is consistent with its long-held view—repeatedly endorsed by the Supreme Court—that state-action immunity is "disfavored and must be given a narrow application." Brief of FTC at 21, *Phoebe Putney*, 568 U.S. 216 (No. 11-1160).

Here, the Ordinance satisfies neither requirement for state-action immunity. Seattle's core argument is that federalism principles justify a loose application of the clear-articulation requirement. (Br.2, 3, 22, 35–36.) But the Supreme Court has squarely rejected that precise argument, and federalism cuts the other way. *Ticor Title*, 504 U.S. at 635. A "loose application of the clear-articulation test would attach

significant unintended consequences to States' frequent delegations of corporate authority to local bodies." *Phoebe Putney*, 568 U.S. at 236. Courts therefore *preserve* the states' flexibility by viewing a state's grant of anticompetitive authority *narrowly*. *Id.* If there is "any doubt about whether the clear-articulation test is satisfied," federal courts must err—not "on the side of recognizing immunity"—but on the side of free markets. *Id.*

Relying on its erroneous federalism argument, Seattle asks for a boundless reading of the relevant Washington statutes. But this plea for extreme deference fundamentally mischaracterizes the judicial review required here. The relevant question is not whether the statutes might plausibly be interpreted to cover the municipal regulation, but whether the legislature "affirmatively contemplated" anticompetitive regulation in the particular field or market at issue. *Phoebe Putney*, 568 U.S. at 227. Here there are two distinct fields or markets: the provision of transportation to passengers, and the provision of ride-referral services to drivers. Simply because the legislature contemplated anticompetitive regulation of one of these particular fields or markets—the provision of transportation to the public—does not mean it affirmatively contemplated a different market: the upstream transactions between drivers and ride-referral companies. *Id.* Indeed, the textual and contextual evidence, as well as common sense, affirmatively demonstrates that the statutes do not apply to that upstream market.

For the state-supervision requirement, Seattle hopes to avoid any state supervision of the private collective-bargaining process. (Br.37.) According to Seattle, "state supervision" actually means "municipal supervision," despite the Supreme Court's contrary instruction in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 n.10 (1985).

Thus, Seattle seeks to gut both prongs of the state-action doctrine to aggrandize its own power. Each requirement serves to ensure that any "anticompetitive conduct is undertaken pursuant to a regulatory scheme that is the State's own." *Phoebe Putney*, 568 U.S. at 225. Yet Seattle wishes to implement an unprecedented regulatory scheme that is plainly the City's creature, not the State's. Its unbounded version of clear articulation allows cities to expand a targeted grant of anticompetitive authority into unforeseen markets the legislature never contemplated. And its distortion of active supervision transforms state supervision into municipal supervision. At some point, however, this Court must ensure that the State is calling the shots.

In any event, the National Labor Relations Act (NLRA) preempts the Ordinance because it impedes Congress's nationwide policy of excluding independent contractors from the field of union organization and collective bargaining. At a minimum, the Ordinance is preempted until the NLRB determines whether the for-hire drivers at issue are employees or independent contractors.

ARGUMENT

I. State-Action Immunity Does Not Shield The Ordinance

Seattle stretches state-action immunity beyond the breaking point. The State of Washington has never affirmatively contemplated anticompetitive regulation of contracts between for-hire drivers and ride-referral companies. Nor will any Washington or Seattle official actively supervise the collective bargaining.

A. The Ordinance fails the clear-articulation requirement

Seattle first urges a permissive view of the clear-articulation requirement. It then seeks an expansive reading of a Washington statute authorizing municipalities to regulate "for hire transportation services" "without liability under federal antitrust laws." RCW 46.71.001. (Br.15, 19–21.) As Seattle would have it, this grants municipalities antitrust immunity to regulate, not just the provision of "for-hire transportation services" to the public, but "*all* aspects of the local for-hire transportation services industry." (Br.26). As both the FTC and Department of Justice explain (Doc.61), neither Seattle's view of the requirement nor its application of it here passes muster.

1. Seattle's misguided attempt to loosen the clear-articulation requirement fails

Seattle posits four reasons for loosening the "disfavored" state-action doctrine. *Phoebe Putney*, 568 U.S. at 236. None is persuasive.

a. The thrust of Seattle's brief is that enforcing a rigorous test would "eviscerate *Parker*'s federalism-promoting purposes." (Br.36.) According to Seattle, a state-action doctrine with teeth will prevent states from broadly delegating "flexible and discretionary regulatory powers" to cities, which are "best situated to deal with problems unforeseeable" to the legislature. (*Id.*)

This has it precisely backwards. Neither federalism nor *state*-action immunity is served by exalting municipalities *over* state governments and authorizing those sub-state entities to engage in anticompetitive regulation never "foreseen" or affirmatively contemplated, much less endorsed, by the state legislature whose protective shield they invoke. *Ticor Title*, 504 U.S. at 635. That is why the Supreme Court has directly "refut[ed]" Seattle's recycled argument that "principles of federalism justify a broad interpretation of state-action immunity." *Id.* Courts *protect* federalism by applying state-action immunity narrowly, declining to ascribe to states the intent to authorize anticompetitive regulation in a particular market if there is "any doubt about whether the clear-articulation test is satisfied." *Phoebe Putney*, 568 U.S. at 235.

This serves two federalism purposes. *First*, the narrow rule allows states to maintain control of anticompetitive regulation. States typically "regulate their economies in many ways not inconsistent with the antitrust laws." *Ticor Title*, 504 U.S. at 635–36. By rigorously applying the clear-articulation requirement, states are

free to authorize targeted anticompetitive regulation without fear that federal courts will erroneously expand the scope of that authorization at the urging of power-seeking municipalities and their rent-seeking constituents. *Id.*

Second, the narrow rule places political accountability where it belongs: with the state. *Id.* States must ultimately "accept political responsibility" for any anticompetitive regulation that is immune under the state-action doctrine. *Id.* The legislature—not a city, and not a federal court—must therefore make the "deliberate and intended" choice to authorize anticompetitive regulation in the particular market. *Id.* In contrast, Seattle's loose version of the immunity requirements would "compel a result that the States do not intend but for which they are held to account." *Id.* "Neither federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends." *Id.*

Conversely, by seeking to convert the legislature's targeted grant of anticompetitive authority to regulate one market into a broader grant to regulate a distinct market, Seattle creates precisely the problems the Supreme Court warned against in *Ticor*, 504 U.S. at 636. The Washington Legislature affirmatively contemplated a policy authorizing anticompetitive regulation only of the provision of transportation services to the public. It disserves the legislature to allow Seattle to morph that into an authorization to displace competition not only in the provision

of such services, but also in the provision by third parties of goods and services to those who provide transportation services to the public.

Seattle invokes the "states' ability to grant municipalities flexible" powers. (Br.36.) Yet the legislature's ability to regulate is not hampered. It is free to clearly articulate its policy at any time. It has had ample opportunity to authorize Seattle's regulation, but has declined to do so, even while considering state-wide regulation of ridesharing companies. (Appellants' Br.7, 39.) Indeed, the legislature is conspicuously absent from this litigation, especially given the presence of the federal government and myriad amici.[1]

The strict requirements of state-action immunity hamper *Seattle*, not the legislature. While invoking the legislature's interests, Seattle simply seeks to preserve its own broad power. Yet if Seattle gets its way, the legislature must accept political accountability for Seattle's Ordinance. By contrast, a narrow application of state-action immunity will hamper neither the State's ability to authorize targeted anticompetitive regulation nor Seattle's ability to address unforeseen problems *within* the particular field of transportation services to the public.

[1] Notably, not a single legislator joined the Washington Attorney General's amicus brief. (Doc.62.) That brief offers no new arguments and rightly claims no entitlement to deference, since the current Attorney General has no special insight into what the legislature affirmatively contemplated when it enacted the relevant statutes decades ago.

b. Seattle tries to weaken the standard even more by ignoring the affirmative-contemplation threshold, even suggesting it is not "necessary for *Parker* immunity." (Br.32.) To the contrary, the "ultimate requirement" for clear articulation is that the State must have "affirmatively contemplated the displacement of competition" (*Phoebe Putney*, 568 U.S. at 229) with respect to the "particular field" or "market" at issue (*Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 64 (1985)). Only with Seattle's head-in-the-sand approach can it arrive at an interpretation of RCW 46.72.001 that authorizes anticompetitive regulation of "*all* aspects of the local for-hire transportation services industry." (Br.26).

Seattle contends that failure to accept its toothless standard would require the legislature to "enumerate[] each specific form of regulation" or "conceive of every possible way delegated authority might be exercised." (Br.18, 36.) But this argument jousts with a straw man. Appellants do not argue that the legislature must authorize the specific form of regulation, such as collective bargaining or some other method of regulating prices. Nor do Appellants argue that the legislature must "explicitly authorize specific anticompetitive effects." (Br.33.) They instead argue only that the legislature must have affirmatively contemplated and clearly authorized anticompetitive regulation in the "*particular field*" at issue. *Southern Motor Carriers*, 471 U.S. at 48 (emphasis added).

c. Throughout its brief, Seattle emphasizes the language in RCW 46.72.001 saying that cities may regulate "without liability under the antitrust laws," suggesting that this language satisfies the clear-articulation requirement, negates every Supreme Court case, and overcomes the disfavored status of state-action immunity. (Br.15, 19–21.) This argument puts the cart before the horse.

That the statute expressly immunizes covered municipal regulations does not somehow expand or shed light on *what* municipal regulations the statute covers. As in any other case, that question is answered by examining in what area the statute "affirmatively contemplate[s]" anticompetitive regulation. *Phoebe Putney*, 568 U.S. at 229. Accordingly, the "without liability" language in the Washington statute does not bear on or circumvent the threshold inquiry into whether the legislature affirmatively contemplated anticompetitive regulation in the particular field governed by the challenged ordinance. It simply expressly says what is otherwise obvious—affirmatively contemplated anticompetitive regulation is subject to state-action immunity.

To be sure, at a high level of generality, the "without liability" language does reflect on legislative intent—it signals that the legislature contemplated *some* kind of anticompetitive regulation. But that insight is not relevant to the dispute here because, under *either* Appellants' or Seattle's interpretation, the legislature granted immunity for *some* anticompetitive regulation. Under Appellants' interpretation, for

example, an agreement between transportation providers to fix the rates they charge passengers is anticompetitive activity subject to immunity. The dispute here, rather, is whether the legislature affirmatively contemplated anticompetitive regulation only in the market involving transportation providers and passengers, or also in the distinct market between drivers and ride-referral companies. Seattle's argument simply assumes the conclusion that the immunity provision applies to the market for ride-referral services because it concededly applies to the market for transportation provided to passengers. The bare "without liability" language in the statute says nothing about this threshold question and certainly does not negate the need to resolve this question in the same way as is done in every other case. *Id.*

d. Finally, Seattle attempts to avoid the "disfavored" status of state-action immunity by invoking the "presumption against preemption." (Br.21.) Appellants have already overcome that presumption by showing that the Ordinance authorizes *per se* illegal price fixing. *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982).[2] State-action immunity is a *defense*. It operates *after* the "irreconcilable conflict" has

[2] Seattle did not contest this below, nor does it on appeal. (Br.46 n.25.) Amici's argument that price fixing by drivers under the Ordinance is not *per se* illegal (Doc.68 at 4–17) is foreclosed by precedent (Appellants' Br.18–20 (citing cases)). One amicus posits that for-hire drivers might fall within the Clayton Act's labor exemption to antitrust liability because they "are not independent businesses," but are "laborers." (Doc.66 at 2.) This factual question is not presented here, and Amicus's theory conflicts with the Ordinance, which expressly applies only to independent contractors, who are not exempted under the Clayton Act, even where they provide services instead of commodities. (Appellants' Br.18–20 (citing cases)).

already defeated the presumption against preemption. *Id.* This is why no courts mention the presumption when applying the "disfavored" doctrine of state-action immunity. *Phoebe Putney*, 568 U.S. 216.

2. The Washington Legislature did not affirmatively contemplate anticompetitive regulation of contracts between drivers and ride-referral companies

Stripped of its unduly loose clear-articulation test, Seattle cannot show that the Washington Legislature affirmatively contemplated a policy to displace competition in the particular field at issue: contracts between for-hire drivers and ride-referral companies. Taken together, the two relevant Washington statutes (RCW 46.72.001 & 46.72.160) show that the legislature contemplated anticompetitive regulation of transportation services provided to the public. The Ordinance regulates something different: the upstream relationship between drivers and ride-referral companies. Seattle's attempt to stretch these statutes over the Ordinance fails for several reasons.

a. First, Seattle lacks any textual basis for claiming that "for hire transportation service" in RCW 46.72.001 means "*all* aspects of the local for-hire transportation services industry." (Br.26.) That statute says nothing about "all aspects" or "industry."

Seattle claims that the repeated references in RCW 46.72.160 to "for-hire transportation services" must mean the legislature affirmatively contemplated anticompetitive regulation of the upstream relationship between independent drivers

and those who provide their economic inputs, such as ride-referral services. (Br.25.) But merely pointing to the phrase "for-hire transportation service" says nothing about what the legislature affirmatively contemplated when it used that phrase.

As explained in Appellants' opening brief, all the textual clues in the statute suggest the statute was "intended to achieve more limited ends." *Ticor Title*, 504 U.S. at 636. (Appellants' Br.27–29.) This includes everything from the statute's initial grant of authority to regulate "vehicles," to the substance of the six enumerated grants of authority, to the related definitions, to the title of Chapter 46.72: "Transportation of passengers in for hire vehicles." (Appellants' Br.33–35.) All of it fits together to show that the legislature contemplated regulation of the provision of transportation to the public.

Seattle points to a definition in a different title of the Washington Code, which applies to taxicab companies, not for-hire vehicles. (Br.31–32.) That provision defines "[t]ransportation of persons" as "any service in connection with the receiving, carriage, and delivery of persons transported." RCW 81.04.010(15). Not only has Seattle never contended that Uber and Lyft are taxicab companies or that taxicab regulations apply to them, but this definition supports Appellants, not Seattle. The services of "receiving, carriage, and delivery of persons" mean transporting *passengers* from point a to point b, not the separate, upstream market between drivers and ride-referral services.

b. The foregoing textual analysis underscores the common-sense proposition that the Washington statutes were simply garden-variety authorizations to regulate transportation services to the public. That is why "privately operated for hire transportation services are matters of statewide importance." RCW 46.72.001.

Seattle nonetheless seems to be arguing that the legislature authorized regulation of contracts between drivers and ride-referral services because those services help *connect* passengers and drivers. (Br.28–31.) This conceptual leap is not only contrary to the statute's language, but to what the legislature was thinking about in the real world in 1996.

At the outset, the legislature surely was not contemplating regulation of a relationship far more directly related to matching passengers and drivers, *i.e.*, the relationship between taxi companies and the employee-drivers those companies dispatch to pick up passengers. After all, the NLRA would have preempted state regulation of that labor relationship. *See Int'l Assoc. of Machinists v. Wisc. Emp't Relations Comm'n*, 427 U.S. 132, 140 (1976).

Nor was the legislature concerned about ridesharing companies, which did not exist at the time. The only reason Seattle now cares about the relationship between drivers and ridesharing services like Uber and Lyft is because their cutting-edge business model transformed the landscape and heightened the importance of the

driver/dispatcher relationship. So Seattle tries to force an elephant into a mousehole with its anachronistic reading of the Washington statutes.

But it is not remotely plausible that the legislature affirmatively contemplated anticompetitive regulation of driver/dispatcher relations through a statute, like RCW 46.72.160, that addresses the details of providing transportation services to the public, *i.e.*, "licenses," "rates charged for providing" services to passengers, "routes," and "operations of for hire vehicles." RCW 46.72.160. A statute actually directed at the contractual relationship between dispatch companies and drivers would look very different than RCW 46.72.160.

c. Seattle's argument that Uber and Lyft themselves provide "for hire transportation services" to the public under RCW 46.72.001 is both wrong and ultimately irrelevant. (Br.28, 30.) Uber and Lyft are transportation services, Seattle says, because they "control numerous matters within the scope of § 46.72.001 and § 46.72.160." (Br.28, 30.) Simply because Uber and Lyft contract with independent drivers and allegedly have tangential control over some aspects of transportation does not mean they are themselves providing transportation services to the public. As explained in Appellants' opening brief, Seattle's reasoning would mean that health-insurance companies provide physicians' services to the public. (Appellants' Br.30–31.) Health insurers contract with physicians, control rates, perform billing functions, and act as intermediaries to the public. But the market for physicians'

services is indisputably different than the market for health insurance. So too here. Understandably, Seattle makes no attempt to refute this analogy.

Seattle does claim that the analogy to other upstream suppliers of goods or services is inapt because they "have not built their business around facilitating and profiting from the sale of transportation to the public." (Br.31.) That is not necessarily true. Many auto-leasing companies build their entire business around leasing fleets of cars to for-hire transportation companies or taxicab companies. Under Seattle's view, the legislature has somehow affirmatively contemplated price fixing in those auto-lease contracts simply by authorizing anticompetitive regulation of for-hire transportation services to the public.

Contrary to Seattle's assertion, Appellants do not argue that Uber and Lyft's use of new technology is dispositive. (Br.30 n.14.) The relevant point is that Uber and Lyft do not transport passengers; they merely assist independent drivers in doing so. Seattle's district court cases addressing a new-technology argument are therefore irrelevant. (Br.29–30 & n.14.) Further, those cases are not antitrust cases and do not ask what the Washington Legislature affirmatively contemplated.

Regardless, Seattle's argument about for-hire transportation services is ultimately irrelevant. Even assuming arguendo that Uber and Lyft provide for-hire transportation services to the public, they still also separately contract with drivers in a distinct market. In Seattle's view, rather than Uber and Lyft providing inputs

(ride referrals) to drivers who sell transportation to passengers, drivers provide inputs (labor) to Uber and Lyft who sell transportation to passengers. But under either view, the legislature has authorized anticompetitive regulation only of the provision of transportation to passengers, while the Ordinance seeks to regulate the provision of services to those selling transportation to passengers. Thus, even if Seattle could hypothetically authorize Uber and Lyft to engage in price fixing for the rates charged to *passengers,* this would not suggest it could authorize price fixing in a different market—the transactions between these companies and drivers.

d. Seattle says the residual clause in RCW 46.72.160(6) somehow shows that the legislature affirmatively contemplated that cities could adopt any anticompetitive regulation, so long as the city believes it indirectly promotes safety or reliability of any "aspects of the for hire transportation industry." (Br.26.) But this argument simply reveals that Seattle's interpretation of the residual clause would vest it with boundless authority far beyond anything stated in the statute as a whole or contemplated by the legislature. Under Seattle's view, the residual clause in RCW 46.72.160(6) becomes a tail wagging the dog of RCW 46.72.160(1)–(5). Its interpretation would authorize it to regulate all manner of third-party transactions that arguably affect the safety or reliability of a for-hire vehicle or driver, including sales to drivers of goods and services by auto-repair shops, fuel suppliers, landlords, and even grocery stores. (Appellants' Br.36.)

e. Finally, Seattle contends that analyzing the clear-articulation requirement is different than analyzing whether a regulation is *ultra vires* or otherwise impermissible under state law. (Br.23.) We agree. Our analysis of the contours of the state law is not intended to show that the Ordinance is *ultra vires*, or that Uber and Lyft are beyond *any* municipal regulation, but to show that the relevant statutes do not clearly articulate or affirmatively contemplate authorization of price fixing in the contracts between drivers and ride-referral companies. These are separate questions that may well yield different answers. We disagree with Seattle only in its effort to transform this rule into the much different proposition that "principles of federalism justify a broad interpretation of state-action immunity"—a principle that has been "powerful[ly] refut[ed]." *Ticor Title*, 504 U.S. at 635.

Seattle's own cases illustrate this distinction. On the one hand, *Omni* instructs courts not to not transform "state administrative review into a federal antitrust job." *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 372 (1991). But *Omni* distinguished between a challenge to the underlying state-law validity of a municipal ordinance and the different question whether the legislature affirmatively contemplated "authority to suppress competition" in a specific market. *Id.* at 372. For the former question, a municipal ordinance need not be lawful in the "full administrative law sense." *Id.* The latter question, however, is approached with full

rigor so as not to "dilute[e] the ultimate requirement" of affirmative contemplation. *Phoebe Putney*, 568 U.S. at 229.

Boone addressed the former question. *Boone v. City of San Jose*, 841 F.2d 886, 890 (9th Cir. 1988). The City acted under a zoning statute aimed at eliminating urban blight. *Id.* The plaintiff argued that the city's zoning decision was invalid under state law because the relevant property was not in fact blighted. *Id.* at 891. The Court rejected this administrative-law argument, which alleged a factual error by the city, because the legislature had "contemplated the kind of municipal action about which the developers complain." *Id.*

Contrast that with cases in which the legislature affirmatively contemplated anticompetitive regulation in one market, but a municipality sought to regulate a different, albeit related, market. *E.g.*, *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 595–96 (1976) (electricity and light bulbs); *Medic Air Corp. v. Air Ambulance Authority*, 843 F.2d 1187, 1189 (9th Cir. 1988) (ambulance dispatching and ambulance services). There, courts do not hesitate to hold that the regulation does not satisfy the clear-articulation requirement. *Id.* That is not because courts scrutinize the regulation in the "full administrative law sense." *Omni Outdoor*, 499 U.S. at 372. It is because in those cases the "Legislature had indicated no intention to displace competition in the relevant market." *Southern Motor Carriers*, 471 U.S. at 64 (discussing *Cantor*).

Here, unlike in *Boone*, the legislature has never "contemplated the kind of municipal action" Seattle attempts. *Boone*, 841 F.2d at 891. And unlike in *Boone*, Appellants are not raising a factual or administrative-law argument. Appellants are not, for example, challenging the Ordinance as arbitrary and capricious because Seattle's true motive is to ally with labor unions to provide drivers with higher wages and a softer work life, rather than to achieve any pretextual safety and reliability benefits for public transportation. Nor are Appellants raising any state-law challenge to the authority of Seattle to regulate Uber and Lyft under its police power or even under some broad state-law conception of authority under RCW 46.72.160. (*See* Br.26.) Appellants do argue, however, that neither RCW 46.72.001 nor 46.72.160 remotely indicate that the legislature affirmatively contemplated anticompetitive regulation of contracts between drivers and ride-referral services.

B. The Ordinance fails the active-supervision requirement

Seattle fails to satisfy the active-supervision requirement as well. Seattle's view of active-supervision pushes it well outside the bounds of the Supreme Court's narrow state-action doctrine.

1. Any delegation of price fixing authority to private parties must be "actively supervised by the State," not a municipality. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985). Seattle incorrectly claims that this argument "relies entirely upon out-of-context quotations." (Br.38.) To the contrary, the issue in *Town*

of Hallie directly concerned the distinction between municipalities and states for purposes of active supervision. (Appellants' Br.43.) The Court cabined its broader holding (that states need not supervise municipal actors themselves) with a precise caveat that when municipalities delegate price-fixing authority to *private parties*, "active state supervision must be shown." *Id.* at 47 n.10.

Seattle remarkably claims that *Town of Hallie* casually used "state" as "shorthand for the State and all its agents, including municipalities." (Br.38–39.) But the difference between states and municipalities played a starring role in *Town of Hallie*. 471 U.S. at 46–47. Its reasoning and holding were based on distinctions among states, cities, and private parties. *Id.* The Court did not suddenly revert to casual shorthand when it required "active state supervision" of private parties acting under a municipal ordinance. *Id.* at 47 n.10.

Hallie's reasoning does not support Seattle either. *Hallie* acknowledged the "real danger" that municipalities "will seek to further purely parochial public interests at the expense of more overriding state goals." *Id.* at 47. That danger is minimized if a city is truly acting "pursuant to a clearly articulated state policy." *Id.* Here, however, that danger is exacerbated, not minimized, for two reasons. First, Seattle seeks to delegate price-fixing authority to private parties who are "acting to further [their] own interests, rather than the governmental interests of the State." *Id.* Second, the supposed clearly articulated policy is extraordinarily broad and open-

ended. Thus, even if Seattle somehow satisfies the clear-articulation requirement, no articulated state policy will prevent Seattle from seeking "purely parochial" municipal interests, rather than "more overriding state goals." *Id.*

None of Seattle's other arguments adequately respond to Appellants' opening brief. This Court's decision in *Tom Hudson* came before the controlling decision in *Town of Hallie*. (Appellants' Br.46) The only case Seattle cites that was decided after *Town of Hallie* is *Tri-State Rubbish, Inc. v. Waste Management, Inc.*, 998 F.2d 1073, 1079 (1st Cir. 1993). (Br.41.) But that case mistakenly relied on pre-*Hallie* cases and missed the fundamental point about delegating price-fixing authority to private parties. (Appellants' Br.47.) Finally, Seattle continues to claim that *Golden State Transit* is "a nearly identical context." *Golden State Transit Corp. v. City of Los Angeles*, 726 F.2d 1430 (9th Cir. 1984). (Br.42.) But Seattle continues to ignore the relevant distinction: state supervision of municipalities themselves versus state supervision of private parties. (Appellants' Br.46.) That is the distinction the Court drew in *Town of Hallie*, 471 U.S. at 47 n.10, which was decided after *Golden State* and addressed the same issue.

Supervision by a state official is particularly important here because of the looseness with which Seattle seeks to apply the clear-articulation requirement. Exacerbating this problem, Seattle seeks to delegate price-fixing authority to private parties. At some point, the State of Washington ought to be involved in Seattle's

price-fixing regulation. Loose application of both the prongs for state-action immunity fails to serve the fundamental goal of ensuring "that the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that is the State's own." *Phoebe Putney*, 568 U.S. at 225.

2. Even if Seattle could provide the necessary state supervision, it has not shown that the supervision required under the Ordinance is sufficiently active. Unlike the cases on which Seattle relies, the active-supervision requirement is heightened here because of the confluence of three factors: (1) the "gravity of the antitrust offense"—price fixing among direct competitors, (2) the significant "involvement of private actors throughout" the process, *Ticor Title*, 504 U.S. at 639, and (3) the absence of any state official supervising the private actors, *Town of Hallie*, 471 U.S. at 46 n.10.

Under this heightened requirement, Seattle's level of supervision is insufficiently active because it cannot "modify particular" provisions of any collective-bargaining proposal and cannot participate in the collective-bargaining process at all. *Dental Examiners*, 135 S. Ct. at 1116. These requirements are necessary to ensure that the terms of any collective-bargaining agreement are not merely the result of private parties "acting to further [their] own interests." *Town of Hallie*, 471 U.S. at 47.

Seattle claims this argument is foreclosed by *Southern Motor Carriers*. (Br.46.) But, in fact, that case underscores the problems with Seattle's Ordinance. In *Southern Motor Carriers*, a state official—not a municipal official—supervised the private truckers. 471 U.S. at 50. The state official also had the power to "modify any recommendation" from the truckers, which Seattle lacks. *Id.* at 65. Finally, Seattle's Ordinance contemplates much more private involvement than in *Southern Motor Carriers*. Seattle's scheme involves two sets of private parties—labor unions and ride-referral companies—who will each pursue their own private interests. *Southern Motor Carriers* involved only the truckers, who collectively submitted a rate proposal to the state agency. 471 U.S. at 50. The warring private interests in Seattle's scheme necessitate greater supervision.

II. Seattle's Collective-Bargaining Ordinance Is Not A Unilateral Restraint

Aside from antitrust preemption, Appellants claim that Seattle is threatening to violate Section 1 of the Sherman Act through a price-fixing conspiracy. (Appellants' Br.51 n.2) The claim seeks injunctive relief against "threatened loss or damage by a violation of the antitrust laws." 15 U.S.C. § 26. Absent state-action immunity, antitrust law treats municipalities just like any "other corporate entities" for purposes of injunctive relief. *Community Comm's v. City of Boulder*, 455 U.S. 40, 56 (1982).

The district court dismissed both claims based on state-action immunity. Seattle raises an alternative ground for affirmance—that its enactment and

enforcement of the Ordinance are "*unilateral* City actions categorically exempt from antitrust liability." (Br.48 & n.26.) Seattle's Ordinance, however, is not a unilateral restraint.

The violation claim requires an agreement or concerted action between Seattle and some other party to fix prices. *Fisher v. City of Berkeley*, 475 U.S. 260, 264 (1986). Anticompetitive restraints "unilaterally" imposed by government are not concerted action. *Id.* "A regulation is a unilateral restraint when" it gives "*no degree of discretion*" to private actors, meaning that "[n]o further action is necessary by the private parties because the … restraint is complete upon enactment." *Yakima Valley Mem. Hosp. v. Wash. Dept. of Health*, 654 F.3d 919, 927 (9th Cir. 2011) (emphasis added). In *Fisher*, for example, a city unilaterally regulated by enacting a fixed maximum rent. 475 U.S. at 266.

By contrast, when a city delegates price-fixing discretion to private parties, those "hybrid restraints" constitute concerted action. *Id.* Hybrid regulations "enforce private marketing decisions, granting a degree of private regulatory power to the regulated parties." *Yakima Valley*, 654 F.3d at 927.

Seattle's Ordinance gives private parties at least some "degree of discretion" to determine prices through collective bargaining, regardless of whether Seattle approves the final agreement. *Id.* Seattle does not collectively bargain; private parties do. Seattle has no authority to propose or modify any terms; all terms comes

from the private union or the private arbitrator. Drivers voluntarily banding together to fix prices under the Ordinance is no different than the landlords in *Fisher* "voluntarily band[ing] together to stabilize rents"—the very concerted action Fisher distinguished from unilateral action. *Fisher*, 475 U.S. at 266.

III. The National Labor Relations Act Preempts The Ordinance

a. The Ordinance also cannot survive *Machinists* preemption under the NLRA. Seattle's claim that *Machinists* preemption applies "*only* to NLRA-covered employers and employees" is without merit. (Br.49.) Congress intended a much broader preemptive force than Seattle asserts. As to certain groups, the NLRA fully occupies the field of "union organization, collective bargaining, and labor disputes." *Machinists*, 427 U.S. at 140 n.4. Congress cares just as much about which groups are included in "union organization, collective bargaining, and labor disputes" as it does about the particular rules governing those activities. *Id.* That is why it carefully defined which groups to include and which to exclude. 29 U.S.C. §152(3). By excluding independent contractors in the Taft-Hartley Act, Congress made a deliberate choice to exclude them from the field of collective bargaining. It did so because "there has always been a difference, and a big difference," between entrepreneurial independent contractors and employees working "for wages or salaries under direct supervision." H.R. Rep. No. 80-245, at 18 (1947). Congress

clearly intended to treat independent contractors as businesses governed by market forces, rather than as employees able to collectively bargain.[3]

The issue before the Court is not whether cities can simply fill a void in statutory coverage, but rather, the Court must determine "from conflicting indications of congressional will the area in which state action is still permissible." *Machinists*, 427 U.S. at 136. The only evidence of congressional will is that independent contractors are precluded from collective bargaining. The Ordinance distorts that nationwide policy by treating independent contractors like employees, wrongly placing them right back into the arena of "union organization, collective bargaining, and labor disputes." *Machinists*, 427 U.S. at 140 n.4.

Seattle and amici rely heavily on *United Farm Workers v. Arizona Agricultural Employment Relations Board*, 669 F.2d 1249, 1257 (9th Cir. 1982), to claim that all groups excluded from the NLRA's definition of employee, including independent contractors, are subject to state or local regulation. The Court did not reach this sweeping conclusion. *United Farm Workers* applies to agricultural employees, not

[3] To that end, the statutory text draws a clear distinction between persons "employed as" or "employed by" an employer on the one hand, and persons "having the status of" independent contractors on the other. 29 U.S.C. § 152(3). This difference in language indicates that Congress intended to treat employees differently than it intended to treat independent contractors for purposes of collective bargaining. Seattle's "treat them all the same" argument ignores the fact that all other groups excluded from the NLRA's coverage are employees, not independent contractors. 29 U.S.C. §152(3).

independent contractors. Indeed, other preemption cases address the other excluded groups. *Beasley v. Food Fair of N.C., Inc.*, 416 U.S. 653 (1974) (supervisors); *Greene v. Dayton*, 806 F.3d 1146 (8th Cir. 2015) (domestic workers); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (state and local government workers). Notably, neither Seattle nor amici cite any case holding that states and localities are permitted to regulate bargaining by independent contractors.

Congress excluded those distinct groups for different reasons, and it treated them differently for preemption purposes. It excluded agricultural employees in 1934 out of concern that federal power to regulate interstate commerce might not extend to farm labor, which was long-considered purely intrastate activity. *Compare* S. Rep. No. 79-1184, at 3 (1934), *with A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542–43 (1935). Congress meant something very different when it excluded independent contractors. Although they clearly "affect commerce," S. Rep. No. 79-1184, at 3, Congress excluded them because of their independent, entrepreneurial status, and therefore established a national policy that market forces—not collective bargaining—should govern them. H.R. Rep. No. 80-245, at 18.

Seattle and amici also claim that Congress's inclusion of the express language in Section 14(a) of the NLRA to preempt state and local regulation of "supervisors" is dispositive of Congress's intent not to preempt such regulation of independent

contractors. (Br.52, 53–54.) Appellants explained Congress's reason for that clause in its opening brief. (Appellants' Br.56.) Congress wanted to allow supervisors—who are employees—to *voluntarily* join unions, but did not want states to *compel* supervisors to join unions. *Beasley*, 416 U.S. at 662. Congress needed both clauses of Section 14(a) to reflect that two-sided policy choice. By contrast, Congress did not want to allow independent contractors—who are not employees—to voluntarily unionize because that would conflict with the free-market policy of the antitrust laws. H.R. Rep. No. 80-245, at 18. Congress therefore had no need to distinguish between voluntary and compelled unionization with respect to independent contractors.

Seattle says this is wrong because "independent contractors joined employee unions" prior to and after Taft-Hartley. (Br.55 n.31.) To the contrary, the Supreme Court has squarely held—both before and after Taft-Hartley—that independent contractors violate the antitrust laws by unionizing and collectively bargaining. *L.A. Meat*, 371 U.S. at 100–01. (Appellants' Br.19.)

b. The Ordinance also cannot survive *Garmon* preemption. If the for-hire drivers are "arguably" Section 2(3) employees and protected by the NLRA rather than independent contractors outside of the NLRA's protections, then the Ordinance is preempted under *Garmon*. It is essential to the administration of federal labor policy and the NLRA that the threshold issue of whether the for-hire drivers are Section 2(3) employees or independent contractors is left to the determination "in

the first instance" of the NLRB. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244–45 (1959). At a minimum, the Ordinance is preempted under *Garmon* until the NLRB conclusively determines whether the for-hire drivers who use Uber, Lyft, and Eastside are employees or independent contractors. Indeed, Seattle quietly concedes the crucial point: If for-hire drivers are "arguably employees" of Uber, Lyft, or Eastside, then "Seattle officials and Washington state courts would be obligated to defer to the NLRB to determine those drivers' status." (Br.59.)

Seattle and amici contend that Uber, Lyft, and Eastside must first present evidence showing that the drivers are "arguably employees," which they say is required under *International Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380 (1986). (Br.56.) The *Davis* standard exists to ensure that local laws are not preempted by a mere "conclusory assertion" that the NLRA arguably covers a specific group. *Davis*, 476 U.S. at 395. There is ample evidence of the ongoing dispute before the Board as to whether for-hire drivers are independent contractors or employees. (ER 104, 112, listing NLRB cases.) Indeed, the NLRB is *presently* conducting a nationwide investigation into the status of for-hire drivers using Uber. Related subpoena issues are pending in *NLRB v. Uber Technologies, Inc.*, No. 16-mc-80057-SK (N.D. Cal.). Moreover, the Teamsters itself—the very entity working with Seattle to unionize drivers—has argued to the NLRB that Eastside

drivers are employees. *Eastside for Hire*, NLRB Case No. 19-CA-204912.[4] It is disingenuous for Seattle to seek an end-run around *Garmon* in these circumstances. Based on the evidence presented in these pending cases, there is no need for the Chamber's members to present evidence themselves.[5] And there is no basis for forcing them to take a position contrary to their consistently held position in various other cases.

The reality is that all parties know the respective positions of the other parties regarding independent contractor versus employee status, and the NLRB is the body empowered by Congress to make that threshold determination. That is the very essence of *Garmon* preemption.

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[4] Further, many plaintiffs have argued in various courts that Uber and Lyft drivers are employees. One court has held that plaintiffs submitted sufficient evidence for a jury to draw "a reasonable inference of an employment relationship" for Uber drivers. *O'Connor v. Uber Technologies, Inc.*, 82 F. Supp. 3d 1133, 1148 (N.D. Cal. 2015). Another held that "plaintiffs ha[d] alleged sufficient facts to claim plausibly that an employment relationship exists." *Doe v. Uber Technologies, Inc.*, 184 F. Supp. 3d 774, 782 (N.D. Cal. 2016). A third held that plaintiffs submitted "at the very least sufficient indicia of an employment relationship between the plaintiff [d]rivers and [Lyft] such that a reasonable jury could find the existence of such a relationship." *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1081 (N.D. Cal.). While Uber, Lyft, and Eastside disagree with these decisions, there is no question that this is a live issue.

[5] For the same reason, the district court incorrectly concluded that individual participation of Lyft and Eastside is necessary. (ER 19–20 n.11.) Because the evidentiary showing is documented in previous cases, "individual participation" by Lyft and Eastside is not "indispensable," and the Chamber satisfies this prudential requirement for associational standing. *United Food Workers v. Brown Group, Inc.*, 517 U.S. 544, 546 (1996).

The Ordinance as written authorizes Seattle's Director of Finance to determine whether for-hire drivers are employees or independent contractors. Such a decision cannot be placed in the hands of the Director of Finance as it usurps the NLRB's function (regardless of the outcome) and is contrary to the holding in *Garmon*. Seattle and amici's arguments to prohibit *Garmon* preemption at this stage for a facial challenge, but conceding to the appropriateness of the NLRB determining the for-hire drivers' status on an applied basis is nonsensical. Any determination in the first instance by the Director of Finance as to the for-hire drivers' status warrants preemption under *Garmon*.

CONCLUSION

For these reasons, the Court should reverse the judgment below.

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Signature of Attorney or Unrepresented Litigant: s/ Michael A. Carvin

Date: Dec. 22, 2017

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I certify that on December 22, 2017, I electronically filed the foregoing brief with the United States Court of Appeals for the Ninth Circuit using the ECF system. All parties have consented to receive electronic service and will be served by the ECF system.

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