No. 17-35640

In the United States Court of Appeals
for the Ninth Circuit

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

Plaintiffs-Appellees,

v.

CITY OF SEATTLE, *et al.*,

Defendants-Appellants.

Appellants' Emergency Motion Under Circuit Rule 27-3 For Injunction Pending Appeal And Temporary Injunction Pending Resolution Of This Motion

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CORPORATE DISCLOSURE STATEMENT

Plaintiff Chamber of Commerce of the United States of America is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber is the world's largest business federation. The Chamber has no parent corporation, and no publicly held company owns 10% or more of its stock.

Dated: August 28, 2017

/s/ Michael A. Carvin
Michael A. Carvin
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Plaintiff Rasier, LLC is a wholly-owned subsidiary of Uber Technologies, Inc. No publicly held corporation owns 10% or more of its stock.

Dated: August 28, 2017

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CIRCUIT RULE 27-3 CERTIFICATE

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2. FACTS SHOWING THE EXISTENCE AND NATURE OF THE EMERGENCY

Based on the serious questions presented by Plaintiffs' antitrust preemption claim, the district court preliminarily enjoined Seattle's unprecedented collective-bargaining ordinance on April 4, 2017. The City of Seattle has appealed from that decision, and full briefing on the merits is complete (including an amicus brief filed by a group of antitrust law professors). No. 17-35371. Despite that pending appeal, the district court erroneously reversed course and dismissed the suit. It dissolved the preliminary injunction on August 24, 2017, and refused to grant an injunction pending appeal. Seattle Ordinance 124968 has now gone into effect.

Late in the afternoon of Friday, August 25, the City announced a new 5-day deadline for enforcement. Steger Decl. Ex. A. The City has since refused to pause that deadline even to allow this Court time to resolve this motion. In two days, on August 30, 2017, Seattle Ordinance 124968 will cause irreparable harm by requiring members of the Chamber of Commerce to disclose to the Teamsters Union confidential lists of for-hire drivers with whom they contract. *Id.* The Teamsters will use the information to unionize for-hire drivers who are independent contractors and represent them in collective price-fixing negotiations with companies that provide ride-referral services, such as the services provided through the popular Uber and Lyft smartphone applications. The Ordinance is an existential threat to these ride-referral companies' operations in Seattle. The Ordinance also flouts federal antitrust law, allowing independent economic actors to fix prices, and it turns labor law on its head,

treating independent businesses as employees. Indeed, the district court preliminarily enjoined the Ordinance because Plaintiffs had demonstrated serious questions on the merits—the same standard applicable to this motion—and showed that the balance of hardships "strongly favors the Chamber." App. 73. Even when the court later reversed course, it continued to agree that Plaintiffs had demonstrated serious questions on the merits, but it wrongly ignored those serious questions simply because it had reached a final resolution of the merits.

An emergency injunction is necessary by August 30, 2017, to preserve the status quo while this Court resolves the pending appeal and determines whether the Ordinance is preempted. At a minimum, Plaintiffs ask this Court to temporarily restrain enforcement of the Ordinance pending resolution of this motion.

A. Ride-Referral And Dispatch Services In Seattle

To find customers needing transportation, for-hire drivers have traditionally relied upon street hails, taxi stands, or a physical dispatch service. Chamber member Eastside for Hire, Inc. ("Eastside") is a traditional dispatch service that contracts with drivers to provide ride-referral services. *See* App. at 34.[1] The company uses advertising to generate passenger transportation requests by telephone or email, and refers the requests to drivers using a mobile data terminal. *Id.* The drivers are independent contractors, not Eastside employees. *Id.*

[1] Per Rule 8(a)(2)(B) of the Federal Rules of Appellate Procedure, Plaintiffs have included relevant parts of the record in the Appendix attached to this motion.

The smartphone made possible a new type of ride-referral system. Digital ride-referral applications allow potential riders to communicate their location through a smartphone, and allow computer systems to match a rider with an available driver who is nearby. Prominent examples are the Uber and Lyft smartphone applications developed by Chamber members Uber Technologies, Inc., and Lyft, Inc., respectively. *See* App. 40, 49.

Local transportation providers may contract with Uber's subsidiary, Plaintiff Rasier, Inc. (together with Uber Technologies, "Uber"), to use the Uber App for ride referrals in exchange for paying a service fee. App. 49–50. Likewise, they may contract with Lyft to use the Lyft App for that purpose. App. 40–41. All drivers who use the Uber and Lyft Apps are independent contractors; neither Uber nor Lyft employs drivers or operates commercial vehicles in Washington. App. 41, 51. Uber, Lyft, and Eastside are all members of Plaintiff the Chamber of Commerce of the United States of America.

B. The Ordinance

Professing concern about the impact, on drivers' earnings, of increased competition in the taxi and for-hire transportation market, Seattle Council members enacted Ordinance 124968. The Ordinance was the product of a collaborative effort by the Teamsters union and the Seattle City Council, whose stated objective was to "balance the playing field" between drivers and companies like Uber. Daniel

Beekman, *An Uber union? Seattle could clear way for ride-app drivers*, Seattle Times (Nov. 28, 2015), http://bit.ly/1PVXyq4.

The Ordinance requires "driver coordinator[s]" to collectively bargain with "for-hire drivers." Ordinance § 2 (App. 119). A "driver coordinator" is "an entity that hires, contracts with, or partners with for-hire drivers" to assist them in "providing for-hire services to the public." *Id.* This broad definition covers ride-referral companies like Uber, Lyft, and Eastside, but by its terms also includes an untold number of companies that contract with for-hire drivers in any way to assist them in providing for-hire services. The Ordinance expressly applies only to drivers who are independent contractors, *id.* § 3(D) (App. 122), and it gives them the power to unionize and collectively bargain as if they were employees under federal labor laws.

The collective-bargaining scheme begins with a union-election process. A union seeking to represent for-hire drivers first applies to the City's Director of Finance and Administrative Services for approval to be a "Qualified Driver Representative" (QDR). *Id.* § 3(C) (App. 121). Once the Director approves a QDR, any driver coordinator that contracts with fifty or more for hire drivers must, at the QDR's demand, disclose confidential lists of driver information, including the names, addresses, email addresses, and phone numbers of "all qualifying drivers" it contracts with. *Id.* The City has by regulation limited "qualified drivers" to those high-volume drivers who have driven "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" of the Ordinance. App. 136.

Armed with the confidential list of driver information, the QDR contacts the drivers and asks for their vote, and if a majority of qualified drivers consent to the QDR's exclusive representation, the Director must certify it as the "Exclusive Driver Representative" (EDR) "for all drivers for that particular driver coordinator." Ordinance § 3(F)(2) (App. 122–23). Thus, once a union representative is elected for a driver coordinator, it becomes the exclusive representative for *all* drivers (even "unqualified" nonvoting drivers) who contract with that driver coordinator. This designation prevents the driver coordinator from doing business with any drivers who do not wish to be represented by, or to work under the terms negotiated by, the EDR.

Once an EDR is certified, the driver coordinator must meet with it to negotiate over various subjects, including the "payments to be made by, or withheld from, the driver coordinator to or by the drivers." *Id.* § 3(H)(1) (App, 123). The Director does not participate in the negotiations but merely determines whether to approve any agreement as consistent with City policy. *Id.* § 3(H)(2)(c) (App. 124). If the coordinator and union do not reach agreement, the matter goes to binding arbitration, and the arbitrator submits what he believes is "the most fair and reasonable agreement" to the Director for approval. *Id.* § 3(I)(1)–(4) (App. 125–26).

C. Procedural History

The Chamber initially challenged the Ordinance in March 2016, alleging that the Sherman Antitrust Act preempts the Ordinance because the collective-bargaining scheme amounts to price fixing among horizontal competitors, and that the NLRA preempts the Ordinance because it conflicts with Congress's intent to leave independent contractors free from the restrictions of collective bargaining. *See Chamber of Commerce v. Seattle*, No. 2:16-cv-00322, Doc. 1 (W.D. Wash. filed Mar. 3, 2016). The City responded that the case was unripe. The Chamber opposed dismissal because, under the Ordinance's compressed timetable, waiting until a QDR had demanded driver lists would needlessly force the Chamber to seek expedited injunctive relief. *Id.*, Doc. 60, at 12 (Tr., July 19, 2016). Nevertheless, the district court dismissed the suit as unripe because no union had yet applied for QDR certification. *Id.*, Doc. 63 at 8, 2016 WL 4595981 at *2 (Aug. 9, 2016).

As expected, the City designated Teamsters Local 117 as a QDR on March 3, 2017. The Teamsters notified Uber, Lyft, and Eastside on March 7, 2017, that it intends to become the EDR of all drivers who contract with those companies, and demanded that each company turn over its driver information by April 3, 2017. App. 37, 46, 55.

Seeking to prevent both the compelled disclosure of the driver information and the costly and disruptive union-election process, the Chamber re-filed this suit and

moved for an emergency injunction.[2] The district court ordered expedited briefing and held oral argument on March 30, 2017, mere days before the Ordinance was slated to compel disclosure of the driver lists.

Ruling within a few days of argument, the district court granted Plaintiffs' motion, enjoining the "April 3 disclosure requirements" until final judgment. App. 74. First, the court said, Plaintiffs had demonstrated "serious questions" on the merits of the antitrust preemption claim, including "serious questions regarding both prongs of the immunity analysis." App. 62. As the court explained, the Washington statutes on which the City bases its immunity argument have been consistently used to "allow municipalities to establish rates and other regulatory requirements in the taxi industry," but "they have never … been used to authorize collusion between individuals in the industry in order to establish a collective bargaining position in negotiations with another private party." App. 61. The court also questioned whether the City's limited oversight of collective bargaining among private parties could satisfy the active-supervision requirement for state-action immunity. *Id.* Second, the Chamber's members would suffer irreparable harm if compelled to disclose their confidential driver lists, and would suffer additional harm when subjected to a disruptive union-election campaign. App. 73. Third, the balance of hardships tips sharply in Plaintiffs' favor, given the "competitive injury caused by the disclosure of a subset of prolific

[2] An amended complaint subsequently added Rasier, LLC, as a plaintiff. App. 1.

drivers and the potential destruction of the existing business model," and the City's inability to "articulate[] any harm that will arise from an injunction" aside from a delay "of its internal time line." *Id.* Finally, the court concluded, the public interest supports an injunction. *Id.* The district court did not agree, however, that the Chamber had shown serious questions on the merits of its preemption claim under the National Labor Relations Act. The court concluded that, by excluding independent contractors from collective bargaining under the NLRA, Congress had not intended to preempt local collective-bargaining laws applicable to independent contractors. App. 66–71.

The City appealed from that order, and the preliminary-injunction appeal is currently pending in this Court (No. 17-35371). The City also filed a motion to dismiss in the district court. Despite the pending appeal, the district court ruled on the motion and reversed course, now concluding that the Chamber failed to state a claim. App. 102. In the court's newly adopted view, the doctrine of state-action immunity shielded the City from federal antitrust law. App. 81–90.

The Chamber immediately asked the district court for an injunction pending appeal. App. 103. After all, the district court had already concluded that the Chamber had demonstrated serious questions on the merits of its "novel' and "complex" antitrust preemption claim. App. 73–74. It had already concluded that the Chamber's members would suffer irreparable harm absent an injunction to preserve the status quo during litigation. "Forcing the driver coordinators to disclose their

most active and productive drivers is likely to cause competitive injury that cannot be repaired once the lists are released," and their business is "likely to be disrupted in fundamental and irreparable ways if the Ordinance is implemented." App. at 73. The court had already concluded that the balance of the hardships "strongly favors the Chamber." *Id.* "Against the likelihood of competitive injury caused by the disclosure of a subset of prolific drivers and the potential destruction of the existing business model, the City has not articulated any harm that will arise from an injunction other than that it would delay the implementation of the Ordinance according to its internal time line." *Id.* Finally, the court had already concluded that the public interest will "be well-served by maintaining the status quo while" the "novel" and "complex" issues "at the intersection of national politics that have been decades in the making" are "given careful judicial consideration." App. at 73–74.

The district court nevertheless refused to grant an injunction pending appeal. Despite previously concluding that Plaintiffs had demonstrated serious questions on the merits, and despite continuing to agree that Plaintiffs had shown serious questions on the merits, the court reasoned that "the serious questions the Court perceived have been resolved in the City's favor." App. 110. The ruling on the motion to dismiss should have made no difference, however, because the standard for an injunction pending appeal is based on the *preliminary* assessment the court had already conducted—whether there are serious questions on the merits. The court also wrongly reversed course as to the balance of the hardships, concluding that the

public's interest in the "safety and reliability" of transportation "weighs heavily against the requested injunction and is not counterbalanced by whatever harm may arise from the disclosures required by the Ordinance." *Id.* The Court completely ignored the "potential destruction of the existing business model" that had compelled it to grant a preliminary injunction. *Compare* App. 73 *with* App. 110.

The court then dissolved the injunction on August 24, 2017, allowing the Ordinance to take immediate effect.[3] The next day, the City informed the Chamber's members that the City will require them to disclose their driver lists on Wednesday, August 30, 2017. *See* Steger Decl. Ex. A (attached hereto). On that date, the Ordinance will require the Chamber's members to disclose their proprietary driver information to the Teamsters union, which will use that information to begin its election campaign, and ultimately to force the Chamber's members to collectively bargain with independent contractors. *Id.* An emergency injunction is necessary by August 30, 2017, to preserve the status quo until the merits of the Chamber's antitrust claim are "given careful judicial consideration" by this Court. App. 74. At a minimum, this Court should temporarily enjoin the Ordinance pending resolution of this motion.

[3] The Court formally dissolved the injunction in an order granting the City's motion to dismiss a separate challenge to the Ordinance brought by a group of for-hire drivers. *Clark v. City of Seattle*, No. 2:17-cv-00382 (Aug. 24, 2017), Doc. 47 at 10.

3. When and How Counsel Was Notified

At approximately 9:00 a.m. P.S.T. on August 28, 2017, counsel for the Chamber emailed counsel for Appellees informing them of the Chamber's intent to file this motion. Counsel then emailed a copy of this motion to counsel for Appellees prior to filing the motion via ECF.

4. Motion Before the District Court

The Chamber moved in the district court for an injunction pending appeal on August 3, 2017. App. 103. The same grounds for an injunction in this motion were presented to the court below. The district court denied the motion on August 24, 2017. App. 111.

Dated: August 28, 2017

/s/ Michael A. Carvin

Michael A. Carvin
Counsel for Appellant Chamber of Commerce of the United States of America

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INTRODUCTION

The future of transportation in Washington is at stake in this case. It is essential to maintain the status quo while this Court determines the legality of Seattle's unprecedented collective-bargaining Ordinance. Because Plaintiffs had shown serious questions on the merits of their antitrust preemption claim, the district court preliminarily enjoined the Ordinance on April 4, 2017. Erroneously reversing course, however, the court dismissed the suit and then dissolved the preliminary injunction on August 24, 2017. Worse, it refused to grant an injunction pending appeal.

Late in the afternoon of Friday, August 25, the City announced a new 5-day deadline for enforcement. Steger Decl. Ex. A. The City has since refused to pause that deadline even to allow this Court time to resolve this motion. In two days, on August 30, 2017, Seattle Ordinance 124968 will cause irreparable harm by requiring members of the Chamber of Commerce to disclose to the Teamsters Union confidential lists of for-hire drivers with whom they contract. *Id.* The Teamsters will use that information to seek to unionize for-hire drivers who are independent contractors and represent them in price-fixing negotiations with companies that provide ride-referral services, such as provided by the Uber and Lyft smartphone apps. This scheme violates federal antitrust law by allowing independent contractors to fix prices. It conflicts with federal labor law by compelling collective bargaining with independent contractors.

Appellants (collectively, the Chamber) hereby move to enjoin Appellees (collectively, the City) from implementing or enforcing Seattle Ordinance 124968 until the mandate issues in this appeal. The factual background and procedural history are fully set forth in the Chamber's Rule 27-3 Certificate, *supra* at iv–xiii. An injunction is necessary by August 30, 2017, to preserve the status quo while this Court determines whether the Ordinance is preempted. At a minimum, the Chamber asks this Court to temporarily restrain enforcement of the Ordinance pending resolution of this motion.

ARGUMENT

The district court already determined the Chamber meets the standard for a preliminary injunction. App. 74. That is the same standard for granting an injunction pending appeal. *Southeast Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 472 F.3d 1097, 1100 (9th Cir. 2006). "An injunction pending appeal is appropriate" if (1) the moving party demonstrates "serious questions" on the merits, (2) "the balance of hardships tips sharply in his favor," (3) it "is likely to suffer irreparable harm" absent an injunction, and (4) the public interest favors an injunction. *Id.* Alternatively, an injunction is appropriate if (1) the moving party "is likely to succeed on the merits," (2) "the balance of equities tips in his favor," (3) it "is likely to suffer irreparable harm" absent an injunction, and (4) the public interest favors an injunction. *Id. See also Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011).

Just as the Chamber satisfied the requirements for a preliminary injunction, it now satisfies the requirements for an injunction pending appeal. Indeed, the district

court continued to agree that the Chamber has shown serious questions on the merits, but it erroneously thought an injunction pending appeal was unwarranted because "the serious questions the Court perceived have been resolved." App. 110. This was improper. The standard for an injunction pending appeal is not based on the final resolution of the merits, but on the assessment of serious questions. This is *necessarily* the rule because an injunction pending appeal always seeks to stay a decision in which the district court has decided the merits against the movant. Moreover, as shown below, the district court erred in dismissing the Chamber's claims.

I. THE CHAMBER HAS DEMONSTRATED AT LEAST SERIOUS QUESTIONS ON THE MERITS OF ITS ANTITRUST PREEMPTION CLAIM

Federal antitrust law preempts municipal laws that "authorize" private parties to commit "*per se* violation[s]" of the Sherman Act. *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982). The Ordinance authorizes for-hire drivers who are independent contractors to form unions and collectively bargain over the price terms of their contracts with driver coordinators. This is horizontal price-fixing—a bedrock *per se* antitrust violation. *L.A. Meat & Provision Drivers Union v. United States*, 371 U.S. 94, 96–98 (1962) (enjoining union of independent contractors); *United States v. Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 463–64 (1949) (same); *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143, 144–46 (1942) (same). The Defendants do not seriously contend that the collective-bargaining scheme could withstand antitrust scrutiny

without state-action immunity. Contrary to the district court's reasoning, the Ordinance does not qualify for state-action immunity.

The state-action doctrine allows a municipality to authorize private parties to violate the antitrust laws only if the "challenged restraint" on competition both is "clearly articulated and affirmatively expressed as state policy" and is "actively supervised by the State." *FTC v. Phoebe Putney*, 568 U.S. 216, 225 (2013). These are "rigorous" requirements, meant to allow antitrust immunity only if the anticompetitive conduct is "truly the product of state regulation," as opposed to municipal regulation. *Columbia Steel Casting v. Portland Gen. Electric*, 111 F.3d 1427, 1436 (1996). Courts closely scrutinize claims of municipal immunity because the doctrine is "disfavored" under antitrust law, *id.*, and because less-than-searching application "may inadvertently extend immunity to anticompetitive activity which the states did not intend to sanction." *Cost Mgmt. Servs., Inc. v. Wash. Nat. Gas Co.*, 99 F.3d 937, 941 (9th Cir. 1996).

A. The Ordinance Fails The Clear-Articulation Requirement

1. The City must demonstrate a "clearly articulated" Washington State policy to "displace competition" with respect to the "challenged restraint" in question: price fixing through collective bargaining between for-hire transportation providers and third-party ride-referral companies. *Phoebe Putney*, 568 U.S. at 225. The State must have "affirmatively contemplated [that] displacement of competition." *Id.* at 229.

The Supreme Court has aggressively applied this requirement in recent cases. In *Phoebe Putney*, the Court held that a statute authorizing a municipal hospital "to acquire" other hospitals was insufficient to immunize an anticompetitive merger. 568 U.S. at 219–21. Though the statute authorized hospital acquisitions generally, it did not expressly allow acquisitions "that will substantially lessen competition." *Id.* at 228. Under *Phoebe Putney*, a state's authorization for a municipality to regulate a type of activity is not enough—the state must go further and specify an intent to "displace competition" within the scope of that activity.

Under this Court's precedents, the state must have "authorized the challenged actions" and "intended to displace competition" within the scope of that activity. *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992). The City must prove "not only the existence of a state policy to displace competition with regulation, but also that the legislature contemplated the kind of actions alleged to be anticompetitive." *Springs Ambulance Serv. v. City of Rancho Mirage*, 745 F.2d 1270, 1273 (1984).

2. The legislature did not "clearly articulate" or "affirmatively contemplate" a policy to displace competition through regulation of ride-referral services, as opposed to regulation of for-hire drivers that provide transportation. Just as importantly, it did not contemplate displacement of competition in the relationship between those ride-referral companies and for-hire *drivers*, as opposed to the relationship between *passengers* and transportation providers. The City relies on RCW 46.72.001 (App. 139), which states that municipalities may "regulate for hire transportation services without

liability under federal antitrust laws." As the text and all other indicia of legislative intent show, however, that statute does not immunize regulation of ride-referral services, and certainly does not immunize regulation of the contractual relationship between for-hire drivers and third-party ride-referral companies.

i. To begin, the statute applies only to "transportation services," meaning companies that transport passengers in vehicles. RCW 46.72.001. Uber and Lyft are referral companies that provide digital ride-referral services. App. 6, 40–41, 49–51. They transport no passengers from one location to another; they own no vehicles; they employ no drivers. *Id.* They do not contract with drivers or passengers to provide transportation services. *Id.* They are analogous to a bulletin board that connects buyers and sellers but does not provide the underlying service.

The relevant statutory definitions confirm that when the legislature says "for hire transportation services," it means companies that provide actual transportation of passengers from point a to point b. The legislature defined "for hire vehicle" as "all vehicles used for the transportation of passengers for compensation." RCW 46.72.010(1). And it defined "for hire operator" as "any person, concern, or entity engaged in the transportation of passengers for compensation in for hire vehicles." RCW 46.72.010(2). It needed to define those terms because vehicles and operators naturally fit within the scope of "for hire transportation services." RCW 46.72.001. But the legislature has conspicuously not defined "for hire transportation services" to include third parties who contract with for-hire operators.

The legislature surely would have said so if it wanted to expand the definition of "transportation services" to include not just companies that provide transportation from point a to point b, but other companies that assist transportation companies.

The district court agreed that the Chamber has shown serious questions on the merits of the clear-articulation requirement. As the court explained, "whether existing state law covers, or was intended to cover, the sort of regulation the City attempts through the Ordinance is far from clear." App. 61. The business model of Uber and Lyft "simply did not exist" when the legislature enacted the statutes on which the City relies," and the City's novel collective-bargaining scheme is well outside the bounds of anything the City has previously attempted. *Id.* Those serious questions on the merits warrant an injunction pending appeal, just as they warranted a preliminary injunction.

In later dismissing the case, the district court's reasoning was incorrect. First, the district court wrongly believed that Uber and Lyft are for-hire transportation services within the meaning of RCW 46.72.001 because they "have contractual relationships with drivers regarding the provision of privately operated transportation services," they play a role in "organizing and facilitating the provision of private cars for-hire in the Seattle market," and they "handle the billing and payment functions" when a passenger accepts a ride from a for-hire driver. App. 85–86. But the statute cannot be stretched that far. The ordinary meaning of a "transportation service" is a service that transports passengers from point a to point b. The statute does not purport to apply to transportation services and all companies who contract with transportation

services. Under the district court's boundless reasoning, health-insurance companies would be considered healthcare providers. After all, insurers contract with hospitals and with individuals regarding the provision of healthcare services, they organize and facilitate the provision of managed healthcare, and they even handle billing and payment functions. Never mind that insurance companies are not physicians and provide no actual healthcare services. In the same way that health insurance companies are not physicians, Uber and Lyft are not transportation services. At a minimum, for a motion to dismiss, the court must accept the characterization of the business models of the Chamber's members as stated in the complaint.

ii. Moreover, the immunizing provision in RCW 46.72.001 extends only to regulations within the scope of regulatory authority delegated in RCW 46.72.160 (App. 140). The immunizing provision is not an independent grant of power to the City. It merely provides antitrust immunity for regulations promulgated under Chapter 46.72, and the only delegation of regulatory authority in that Chapter is RCW 46.72.160. To be clear, the legislature has delegated many authorities to municipalities outside of Chapter 46.72, but the immunizing provision in Chapter 46.72 applies only to regulations within the scope of authority delegated in RCW 46.72.160.

That enabling provision authorizes municipal regulation only of "for hire vehicles operating within their jurisdictions." RCW 46.72.160. Uber and Lyft are not for-hire vehicles, they do not operate for-hire vehicles, and they own no for-hire

vehicles. The enabling provision does not authorize the City to regulate third parties that provide services to operators of for-hire vehicles. *See* App. 188–92.

Nor do any of the six enumerated powers in RCW 46.72.160(1)–(6) say anything about regulating third-party ride-referral companies. The enumerated powers focus entirely on for-hire drivers and for-hire transportation itself. Municipalities may regulate "the routes and operations of for-hire vehicles, and may "[e]stablish[] safety and equipment requirements" of for-hire vehicles, RCW 46.72.160(4)–(5). But those provisions contemplate direct regulation of for-hire drivers and vehicles, not regulation of third parties that provide services to for-hire drivers. Similarly, municipalities may regulate "the *rates charged* for providing for hire vehicle transportation service," RCW 46.72.160(3) (emphasis added), but this conspicuously lacks any mention of the prices that for-hire drivers must pay for services from third parties. As *Phoebe Putney* explained, "regulation of an industry, and even the authorization of discrete forms of anticompetitive conduct pursuant to a regulatory structure, does not establish that the State has affirmatively contemplated other forms of anticompetitive conduct that are only tangentially related." 568 U.S. at 235. Collective bargaining between for-hire drivers and third-party service providers is, putting it mildly, only tangentially related to these enumerated authorities.

The district court shoehorned the Ordinance into the sixth enumerated power, which authorizes "[a]ny other requirements adopted to ensure safe and reliable for hire transportation service." RCW 46.72.160(6). But all six enumerated powers

merely describe the ways municipalities can regulate a specific entity: "for hire *vehicles* operating within their jurisdiction." RCW 46.72.160 (emphasis added). The sixth enumerated power, like the first five, is limited to for-hire *vehicles*. It does not authorize regulation of third parties that neither own nor operate for-hire vehicles.

Even if the sixth enumerated power could expand the entities subject to regulation, the authorization to ensure "safe and reliable for hire transportation service" does not implicitly grant authority to regulate any third-party interaction that purportedly affects the vehicle operator's willingness or ability to be safe and reliable. Were it otherwise, Seattle could regulate all manner of third parties that arguably affect the safety or reliability of a for-hire vehicle or driver, including auto repair shops or fuel suppliers. And if the authority to ensure safe and reliable transportation could be stretched to encompass anything that affects a driver's economic stability (as the City has claimed), then the statute would authorize regulating the rent landlords could charge the drivers. Rather than a limitless grant of power to regulate any entity that could arguably affect for-hire vehicles and for-hire drivers, the sixth enumerated provision is simply a garden-variety grant to regulate for-hire transportation itself.

In dismissing the case, the district court misunderstood Plaintiffs' argument about the scope of authority delegated in RCW 46.72.160. Plaintiffs do not argue that the Ordinance is "substantively defective because it exceeds the scope of the delegated authority," nor do they challenge the "efficacy of the means the municipality has chosen to promote" its goals. App. 84. The Ordinance may well

pass muster under state law because the City likely has many sources of delegated authority other than RCW 46.72.160 to regulate businesses. But the Ordinance's validity under state law is irrelevant. The relevant question is whether, as "a matter of federal law," *Community Comm's Co. v. City of Boulder*, 455 U.S. 40, 52 n.15 (1982), the Ordinance falls within the scope of the antitrust immunity expressed in RCW 46.72.001, which in turn is no broader than the reach of RCW 46.72.160.

For its part, the City asks for unprecedented deference to its interpretation of RCW 46.72.160. It has argued that federal courts cannot even inquire into the scope of RCW 46.72.160, so long as the statute can feasibly be construed to authorize the Ordinance's provisions. But antitrust immunity must be "clearly articulated"—not feasibly construed—under state law. *Phoebe Putney*, 568 U.S. at 229. The City's argument for deference "to avoid improper interference with state policy choices" "is inconsistent with the principle that state-action immunity is disfavored." *Id.* at 236.

It is true that the clear-articulation requirement does not transform "state administrative review into a federal antitrust job," meaning that federal courts need not examine every technical or procedural error in a municipal regulation under state administrative law. *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 372 (1991). But an ordinance is not immune when it falls outside the scope of the State's only clearly expressed policy to displace competition. For example, in *Omni* the legislature authorized municipal regulation of "the use of land and the construction of buildings and other structures within their boundaries," and the Court concluded that

the grant of authority amounted to a policy to displace competition when regulating billboards. *Omni*, 499 U.S. at 370. No one suggested, however, that if the legislature had authorized municipalities to regulate lakes and watercraft, it would have been sufficient for anticompetitive regulation of billboards. Likewise, Washington's authorization to regulate "for hire vehicles" under RCW 46.72.160 does not authorize anticompetitive regulation of third-party referral services. And because the Ordinance is not authorized under RCW 46.72.160, it is not immune under RCW 46.72.001.

iii. The novelty of digital ride-referral services and of the City's collective-bargaining scheme underscores that the legislature never "affirmatively contemplated" the "displacement of competition" in the form of the "challenged restraint"—collective bargaining between for-hire drivers and third-party ride-referral companies. *Phoebe Putney*, 568 U.S. at 229. The explosion of digital ride-referral services is a recent phenomenon enabled by smartphones. The legislature certainly did not "affirmatively contemplate" regulation of technology companies like Uber and Lyft in 1996, when it immunized regulation of "for hire transportation services" by enacting RCW 46.72.001. Not until 2015 did the legislature first enact legislation directed at digital ride-referral companies. *See* Final Bill Report, SB 5550 (Wash. 2015) (App. 141). It carefully defined them separately from for-hire transportation services under Chapter 46.72 and regulated them under a separate chapter of the code. *See* SB 5550, 64th Wash. Leg. (2015) (App. 143–57). The legislature tellingly stated that "current law does not specifically provide for the regulation of what are commonly known as

ridesharing companies, i.e. companies that use a digital network or software application to connect passengers to drivers for the purpose of providing a prearranged ride, often by use of the driver's personal vehicle." App. 141. Thus, the one thing the legislature has clearly articulated is that no legislation prior to 2015 contemplated regulation of digital ride-referral companies, so it certainly could not have clearly articulated a policy in 1996 to immunize price-fixing between drivers and digital ride-referral companies. *See* App. 193–94.

The district court worried that Plaintiffs' argument "would require prescience on the part of the state legislature and deprive municipalities of the flexibility they need to address new problems." App. 85. But flexibility for municipalities to address unforeseen problems is not the hallmark of state-action immunity, which is a "disfavored" exception that demands specificity from state legislatures and puts a thumb on the scale favoring free markets. *Phoebe Putney*, 568 U.S. at 236. The legislature must "affirmatively contemplate" that the municipality will displace competition with respect to the "challenged restraint," and it "must have foreseen … the anticompetitive effects" of the municipal regulation at issue. *Phoebe Putney*, 568 U.S. at 229. That requires specificity. Even *Southern Motor Carriers*, the case the district court most heavily relied on, requires the legislature to affirmatively contemplate the displacement of competition "in a particular field." *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 64 (1985). That, too, requires specificity. Thus, when revolutionary technologies and unforeseen businesses arise, the legislature

must make a conscious decision—it must affirmatively contemplate—that municipalities may displace competition in a "particular field." *Id.* Municipalities cannot rely on previous policy pronouncements that are only tangentially related to the particular business markets at issue. That is the balance the Supreme Court has struck between municipal flexibility and "the benefits of competition within the framework of the antitrust laws." *Ticor Title*, 504 U.S. at 636. And that balance is especially appropriate when a disruptive new business model creates a new type of economic market—so new that all previous statutes were enacted before the legislature had ever considered the costs and benefits of displacing competition with anticompetitive municipal regulation in this particular field. *See* App. 195–97.

B. The Ordinance Fails The Active-Supervision Requirement

The Ordinance fails the active-supervision requirement because it delegates price fixing to private parties with no state supervision. "Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern." *N.C. Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101, 1111 (2015). That is all the more true when a *municipality* seeks to delegate the State's regulatory authority to private parties. Immunity requires "[a]ctual State involvement, not deference to private price-fixing arrangements." *Id.* at 1113. A city cannot delegate to private parties the task of collective bargaining; rather, the program must be "implemented in its specific details"

"by the State." *FTC v. Ticor Title*, 504 U.S. 621, 633 (1992). This ensures that "the State has exercised sufficient independent judgment and control so 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." *Id.* at 634–35.

The Ordinance fails the active-supervision requirement because it authorizes price fixing by private parties with no supervision by a Washington State official. Active supervision means supervision "by the State itself." *Ticor Title*, 504 U.S. at 642. Every relevant Supreme Court case says "State" supervision, and the Court has never authorized or even mentioned "municipal supervision." *Id.*; *Dental Examiners*, 135 S. Ct. at 1110 ("actively supervised by the State"); *Phoebe Putney*, 568 U.S. at 225 ("the State"); *Patrick v. Burget*, 486 U.S. 94, 101 (1988) ("the State"); *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) ("the State"). Further, municipalities are not substitutes for states under state-action immunity. They "are not beyond the reach of the antitrust laws … because they are not themselves sovereign." *Town of Hallie v. City of Eau Claire*, 471 U.S. 38 (1985).

The Supreme Court has distinguished between municipalities that engage in anticompetitive conduct *themselves* and those that *delegate* anticompetitive conduct to private parties. *Town of Hallie*, 471 U.S. at 46. If the city itself is "the actor," no state supervision is required; the municipality can supervise itself. *Id.* But if the city delegates price fixing to a private party, "active state supervision must be shown." *Id.* at 46 n.10. *Town of Hallie* pointedly identified those instances in which "state or

municipal regulation [of prices] by a private party is involved," and in both those instances, "active state supervision must be shown." *Id.* If "municipal supervision" of private parties were sufficient, the Court would have said so in *Hallie*. *Id.*

It makes good sense to require state supervision when municipalities delegate price fixing authority to private parties. Municipal supervision of local private parties is more troubling than state supervision because municipalities—which are smaller than states and more closely enmeshed with local private interests—are more likely to be captured by local special interests. *See, e.g.*, *Omni*, 499 U.S. at 367 ("secret anticompetitive agreement" between city officials and market participants). Indeed, that appears to have occurred here with a too-cozy relationship between the Teamsters and certain Seattle officials. *See Chamber of Commerce v. Seattle*, No. 2:16-cv-00322, Doc. 39 at 3 (W.D. Wash. May 9, 2016) (describing the extensive interactions). When a municipality delegates price-fixing authority to local groups, it presents the precise "danger" of a "*private* price-fixing arrangement" that cannot be neutrally supervised by a municipality. *Hallie*, 471 U.S. at 47 (emphasis added).

Omni heightens this problem. 499 U.S. at 375. It rejected a conspiracy exception to state-action immunity, allowing immunity even when city officials corruptly conspire with private parties to enact anticompetitive laws favoring special interests. *Id.* As the Supreme Court has recognized, "*Omni*'s holding makes it all the more necessary to ensure the conditions for granting immunity are met in the first place." *Dental Examiners*, 135 S. Ct. at 1113. That reasoning applies here as well: *Omni*'s

holding makes it all the more necessary to require active state supervision—not municipal supervision—of private anticompetitive conduct.

Nor does it unduly disrupt municipalities to require active state supervision of private price-fixing regulation. The state would supervise only private parties, not municipalities. *Id.* State oversight of private parties would serve as an important internal check on the clear-articulation requirement: only if the state had truly authorized the municipality to delegate price-fixing regulation to private parties would the state be willing to oversee those private parties. In this way, rather than asking courts to decide difficult questions about whether a statute clearly articulates a policy to allow a challenged municipal regulation, the state itself could make the decision by actively supervising the private conduct.

This issue has never been squarely raised in this Court, although the Court assumed that municipal supervision of private parties is permissible in *Tom Hudson & Assocs., Inc. v. City of Chula Vista*, 746 F.2d 1370, 1374 (9th Cir. 1984). The issue in *Tom Hudson* was whether the degree of municipal supervision of private price fixing was sufficient to meet the "active" element of active supervision. *Id.* The case never raised the predicate issue of whether a municipality can supervise private parties at all; the court simply assumed, without affirmatively deciding, that municipalities do so. But *Tom Hudson* was decided before *Town of Hallie*, which requires "state supervision" when "state or municipal regulation by a private party is involved." 471 U.S. at 46 n.10. Other circuits have recognized *Hallie*'s impact. In *Riverview Investments, Inc. v.*

Ottawa Community Improvement Corp., 774 F.2d 162 (6th Cir. 1985) (order), the court reversed an earlier decision allowing municipal supervision of private parties because, "[i]n light of *Town of Hallie* and *Southern Motor Carriers*, that statement may not be a completely accurate statement of the law." *Id.* at 163.

II. THE CHAMBER HAS DEMONSTRATED AT LEAST SERIOUS QUESTIONS ON THE MERITS OF ITS LABOR PREEMPTION CLAIM

Plaintiffs have also shown at least serious questions on the merits of their *Machinists* preemption claim. *See Int'l Assoc. of Machinists v. Wisc. Emp't Relations Comm'n*, 427 U.S. 132 (1976). The NLRA creates unusually broad preemption for swaths of economic activity that Congress wanted to remain unregulated by federal or local collective-bargaining programs and instead "controlled by the free play of economic forces." *Id.* at 140; *Brown*, 554 U.S. at 65. In the NLRA, "Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes that would be upset if a state could also enforce statutes or rules of decision resting upon its views concerning accommodation of the same interests." *Machinists*, 427 U.S. at 140 n.4. Accordingly, state and local governments may not regulate "within a zone protected and reserved for market freedom" by the NLRA. *Brown*, 554 U.S. at 66.

Machinists preemption is based on the premise that, by excluding certain activity from collective-bargaining regulation under the NLRA, Congress intends to preempt local laws regulating that activity. In *Brown*, for example, an NLRA provision

excluded noncoercive employer speech from the definition of "an unfair labor practice." *Id.* at 67. A California statute withheld state funds from employer efforts to "deter union organizing." *Id.* at 62. The statute was preempted because, by excluding employer speech from the NLRA's definition of an unfair labor practice, Congress meant to leave employer speech entirely up to the free play of economic forces—free from regulation under either federal or local law. This was true even though Congress said nothing about preempting local law, and even though it said nothing about whether states could limit the available uses of their own funds. *Id.*

Analogous to *Brown*, in the Taft-Hartley Act Congress expressly excluded "any individual . . . having the status of an independent contractor" from the definition of "employee" for purposes of collective bargaining. 29 U.S.C. §152(3). In doing so, Congress meant to leave independent-contractor arrangements to the free play of economic forces, rather than subject to collective bargaining, federal or local.

The history of the NLRA's independent-contractor exclusion strongly suggests that Congress meant to exclude independent contractors from both federal and local collective-bargaining regimes. The original NLRA did not expressly exclude independent contractors from the definition of "employee." *See NLRB v. Hendricks Cty. Rural Elec. Membership Corp.*, 454 U.S. 170, 177–78 (1981). The Supreme Court then interpreted that term to include "newsboys," even though they were independent contractors under common-law standards. *NLRB v. Hearst Publ'ns*, 322 U.S. 111, 120, 130–31 (1944). "Congressional reaction to this construction of the Act was," to say

the least, "adverse." *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968). Congress swiftly passed the Taft-Hartley Act, amending the NLRA to expressly exclude independent contractors from the definition of employee. *United Ins. Co. of Am.*, 390 U.S. at 256. As the House Report emphasized, "there has always been a difference, and a big difference, between 'employees' and 'independent contractors.'" H.R. Rep. No. 80-245, at 18 (1947). "Employees work for wages or salaries under direct supervision," while independent contractors are entrepreneurial and rely on market forces for profit. *Id.* Because Congress intended independent contractors to be governed by market forces, rather than collective bargaining, it quickly "correct[ed]" their inclusion in the NLRA's collective-bargaining regime. *Id.*

Requiring independent contractors to collectively bargain is inconsistent with the basic objective of labor regulation under the NLRA. Labor unions arose because "a single employee was helpless in dealing with an employer," "he was dependent ordinarily on his daily wage for the maintenance of himself and family," and "if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937). These rationales do not apply to independent contractors, who do not depend on an employer for a daily wage and instead boast the "ability to operate an independent business and develop entrepreneurial opportunities" that leverage market forces to provide a profit. *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1098 (9th Cir. 2008).

The NLRA's separate exclusion from collective bargaining of "any individual employed as a supervisor" reinforces this conclusion. 29 U.S.C. § 152(3). The Supreme Court has held that the supervisor exclusion preempts state labor laws relating to supervisors, and a collective-bargaining scheme for supervisors would clearly be preempted. *Beasley v. Food Fair of N.C., Inc.*, 416 U.S. 653, 662 (1974). Congress exempted both supervisors and independent contractors at the same time in the Taft-Hartley Act, 61 Stat. 136–37, 29 U.S.C. § 152(3), and the two parallel exemptions should be interpreted to have a similar preemptive force. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 138 n.11 (1985).

It makes no difference that "supervisors and independent contractors were excluded from the reach of the NLRA for different reasons." App. 70. Congress's rationale for excluding independent contractors fits more closely with the rationale for *Machinists* preemption—allowing the free play of economic forces—than does the rationale for excluding supervisors. Congress excluded supervisors because their interests are often aligned with corporate owners rather than with non-supervisory employees, and this alignment of interests could distort the NLRA's collective-bargaining process. *Beasley*, 416 U.S. at 662. Independent contractors, in contrast, were excluded because they "have abandoned the 'collective security' of the rank and file voluntarily," and "because they believed the opportunities thus opened to them to be more valuable" than the benefits of employment. H.R. Rep. No. 80-245, at 17.

Thus, Congress excluded them because they should be left to free market forces, which is precisely the circumstance where *Machinists* applies. *See also* App. 219–220.

III. ABSENT AN INJUNCTION, IRREPARABLE INJURY IS LIKELY

The City did not contest the likelihood of irreparable injury in its response to the Chamber's motion in the district court for an injunction pending appeal. Doc. 69 at 3–5. That was no surprise because the Chamber's members are certain to suffer irreparable injury. In two days, the Ordinance will compel the Chamber's members to disclose a list of their most high volume and most recent drivers—those who have driven "at least 52 trips" in Seattle "during any three-month period during the 12 months preceding the commencement date." App. 136. That compiled information is closely guarded and highly valuable to competitors and to the Teamsters. App. 229, 234–35. As the district court explained in granting a preliminary injunction, "forcing the driver coordinators to disclose their most active and productive drivers is likely to cause competitive injury that cannot be repaired once the lists are released." App. 73. Disclosure threatens grave harm to the Chamber's members because competitors with the information "would seek to undermine business relationships with … drivers," and would use the information "to gain competitive insight into [their] strategy." App. 43. Disclosure is particularly harmful because the Teamsters seek information from every competitor in Seattle. This commingling of competitor information by an entity attempting to organize those competitors seriously increases the risk that the information will be misused, whether intentionally, negligently, or by hackers.

Worse, "the disclosure requirement is the first step in a process that threatens the business model on which the Chamber's members depend." App. 73. That model "is likely to be disrupted in fundamental and irreparable ways in the Ordinance is implemented." *Id.* The disclosures will trigger union-election campaigns. This will compel the Chamber's members to spend money educating drivers and hiring labor-relations experts, and will "disrupt and change" their business "in ways that most likely cannot be compensated with damages." *Am. Trucking v. City of Los Angeles*, 559 F.3d 1046, 1058 (9th Cir. 2009). The Ordinance culminates in collective-bargaining agreements that will complete the transformation of this innovative business model. Separately, the government causes irreparable injury whenever it subjects a business to regulations "which are likely unconstitutional because they are preempted." *Id.*

IV. THE BALANCE OF HARDSHIPS SHARPLY FAVORS THE CHAMBER, AND THE PUBLIC INTEREST FAVORS AN INJUNCTION

1. The balance of the hardships "strongly favors the Chamber," as the district court first concluded. App. 73. The Ordinance will compel the Chamber's members to take burdensome affirmative action in as soon as two days. They must prepare and disclose confidential lists of their most active drivers, and they must subject themselves to a disruptive election process in which the Teamsters attempts to burrow itself into the contractual relationships between drivers and the Chamber's members. The collective-bargaining scheme will ultimately upend the business model of the Chamber's members, potentially eliminating their presence in Seattle.

There is no comparable or even tangible risk of harm to the City. As the district court initially said, the City can "not articulate[] any harm that will arise from an injunction other than that it would delay the implementation of the Ordinance according to its internal time line." App. 73. In reversing course, the district court thought the delay "for over a year" while an appeal is pending caused a greater burden on the City than the delay for a "matter of months" while resolving the motion to dismiss. App. 110. But a few months of delay does not significantly alter the balance of hardships. The Ordinance itself deferred implementation for six to eight months (*see* Ordinance § 3), and the City amended it to delay four more months (App. 240). Moreover, when it granted the preliminary injunction, the district court presumably already balanced the time necessary to resolve an appeal from its preliminary-injunction order, which is similar to the time it will take to resolve this appeal.

More importantly, the "basic function of a preliminary injunction is to preserve the status quo pending a determination of the action on the merits." *Chalk v. United States Dist. Ct.*, 840 F.2d 701, 704 (9th Cir. 1988). While the City seeks to upend the status quo by implementing the Ordinance and altering the labor relationships of the Chamber's members, the Chamber merely seeks to preserve the status quo. In this context, the length of the appeal cuts strongly in favor of the Chamber, not the City.

2. The district court's initial analysis of why a preliminary injunction served the public interest is just as true for an injunction pending appeal. The "public is interested in this litigation" because its outcome "may well impact not only for-hire

transportation, but also other sectors of the economy that have come to rely heavily on independent contractors instead of employees." App. 73. "The issues raised in this litigation are novel, they are complex, and they reside at the intersection of national policies that have been decades in the making." App. 73–74. "The public will be well-served by maintaining the status quo while the issues are given careful judicial consideration as to whether the City's well-meaning Ordinance can survive the scrutiny our laws require." App. 74. Citing the City's goals of "safety and reliability," the district court completely ignored its earlier analysis when it refused to grant an injunction pending appeal. App. 110. But the City has provided no evidence whatsoever that delaying the ordinance by a few extra months will cause any concrete harm to safety or reliability of transportation. By contrast, the Chamber's members are certain to suffer concrete irreparable harm, immediately, absent an injunction.

CONCLUSION

For these reasons, the Court should temporarily enjoin the Ordinance pending resolution of this motion, and should then enjoin the Ordinance pending appeal.

August 28, 2017

Respectfully submitted,

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CIRCUIT RULE 28-2.6 STATEMENT

Defendants in the underlying case appealed from the district court's order granting Plaintiffs' motion for a preliminary injunction. Defendants' preliminary-injunction appeal is currently pending. *Chamber of Commerce v. City of Seattle*, No. 17-35371.

CERTIFICATE OF SERVICE

I certify that on August 28, 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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