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' Reply In Support of Emergency Motion Under Circuit Rule 27-3 For Injunction Pending Appeal

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INTRODUCTION

Absent an injunction, the City's collective-bargaining Ordinance will immediately and irreparably harm the Chamber's members, including Uber, Lyft, and Eastside for Hire. The district court recognized this when it entered a preliminary injunction under the same legal standard this Court now must apply. The irreparable harm will begin when the Chamber's members are forced to disclose to the Teamsters highly confidential driver lists revealing the most productive drivers that contract with each ride-referral service. Compelled disclosure is a classic irreparable harm because, once those lists are disclosed, the bell cannot be unrung. Worse, the Teamsters will use the information, as the Ordinance intends, to subject each of the Chamber's members to a disruptive and costly union-election campaign, constituting more irreparable harm. Finally, the Ordinance will compel them to enter into collective-bargaining agreements with the drivers, thereby transforming their contractual relationships and business models, and potentially eliminating their operations in Seattle.

These harms to a nascent, innovative business model far outweigh any potential harm to the City. An injunction will merely delay the Ordinance by a few months while this Court evaluates its legality. The City itself has previously delayed implementation of the Ordinance, and it has presented no evidence that an additional, relatively short delay will have any impact on transportation safety and reliability. Moreover, when the Chamber asked the City to stipulate to an expedited briefing schedule with an argument date this December, the City refused, insisting that a

December argument would not give amici, this Court, or the parties sufficient time to prepare. Any complaint by the City about a "years" long appeal should be rejected when the Chamber is trying to avoid just that. Opp. 34. The City would like it both ways, seeking to accelerate the Ordinance while simultaneously stalling the appeal.

As explained further below and in the amicus briefs supporting this motion, the Chamber has also demonstrated at least serious questions on the merits. This Court should enjoin the Ordinance to preserve the status quo pending appeal.

ARGUMENT

I. THE SERIOUS QUESTIONS STANDARD APPLIES TO A MOTION FOR INJUNCTION PENDING APPEAL

Citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), the City invents a rule that the serious-questions standard is inapplicable to a motion for an injunction pending appeal, arguing that the Chamber must demonstrate not just a likelihood of success on the merits, but "a *strong* likelihood of success" on the merits. Opp. 10–11 (Doc. 16-1). But this Court has repeatedly held, in cases decided after *Hilton*, that the standard for granting an injunction or stay pending appeal is materially identical to the standard for granting a preliminary injunction, and that the serious-questions standard always applies. *Feldman v. Ariz. Secretary of State's Office*, 843 F.3d 366, 367 (9th Cir. 2016) (en banc); *Se. 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 the moving party demonstrates "serious questions" on the merits of the appeal and "the

balance of hardships tips sharply in [its] favor."); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011) (same standard for preliminary injunction); *Tribal Village of Akutan v. Hodel*, 859 F.2d 662, 663 (9th Cir. 1988) (same for stay).

Nor is the serious-questions standard limited, as the City claims, to cases where evaluating the moving party's likelihood of success is difficult or impossible, such as when the issues require factual development. Opp. 11. *Wild Rockies* thoroughly examined the serious-questions standard and confirmed its vitality in all cases, without any hint that it should be limited to some narrow subclass in which analyzing the likelihood of success is impossible. *Wild Rockies*, 632 F.3d at 1131–35. Instead, the serious-questions standard is part of the Ninth Circuit's sliding-scale approach, in which "the required showing of harm varies inversely with the required showing of meritoriousness." *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988). In any event, for reasons discussed below, the Chamber has demonstrated a likelihood of success on the merits.

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

The City claims immunity from the antitrust laws, but it has not satisfied its burden to show that the requirements for immunity are met.

A. The Ordinance Fails The Clear-Articulation Requirement

The City argues that it "need not be able to point to a specific, detailed legislative authorization" for the Ordinance. Opp. 13. But it does need to show that the

legislature "clearly intends to displace competition in a particular field with a regulatory structure." *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 64 (1985). Thus, the City's burden is to show that a "particular field" is intended to be free of competition, even if it need not show the legislature specifically contemplated the precise competition-displacing method.

In *Southern Motor Carriers*, for example, the legislature authorized a state agency to "prescribe just and reasonable rates for the intrastate transportation of general commodities." *Id.* The issue was whether the agency could then delegate authority to prescribe those rates to private parties through collective rate setting. *Id.* The Court held that state-action immunity applied because the legislature had intended to displace competition in the "particular field" at issue—rates for intrastate transportation of general commodities—even if the legislature had not spelled out the collective-bargaining scheme itself. *Id.*

Here, the legislature has not clearly intended to displace competition in the "particular field" at issue: the relationship between for-hire drivers and third-party ride-referral services. This contrasts sharply with the circumstances in *Southern Motor Carriers*. If the state agency in *Southern Motor Carriers* had decided to impose collective bargaining (or otherwise regulate the contracts) between truck drivers and third-party referral services—rather than regulate the "rates for the intrastate transportation of general commodities"—the Supreme Court could not have said that the legislature "clearly intend[ed] to displace competition" in that "particular field." *Id.* So too here.

The Washington legislature has authorized municipalities to regulate rates "charged for providing for hire vehicle transportation service." RCW 46.72.160(3); Opp. 14. But the City does not seek to regulate that "particular field." Instead of regulating the rates charged to the public for transportation service, the City's collective-bargaining scheme operates to fix prices in an entirely different field—the market for the ride-referral services that Uber, Lyft, and Eastside sell to for-hire drivers. It makes no difference that these companies also control the manner in which public rates are calculated and collected. Opp. 19. The basis for the Chamber's antitrust claim is price fixing with respect to the contracts between for-hire drivers and ride-referral companies. That relationship is outside any "particular field" for which the legislature has ever intended to displace competition.

The City heavily relies on its authorization to "ensure safe and reliable for hire vehicle transportation service." RCW 46.72.160(6). Opp. 14, 20–21. Again, this authority does not contemplate the particular field at issue: the relationship between for-hire drivers and ride-referral services. It instead authorizes regulation of transportation providers themselves and their provision of transportation to the public. Realizing this problem, the City seeks to stretch this authority beyond what the legislature intended, arguing that this authority "broadly permits municipal regulation of *all* matters relating to the safety and reliability of for-hire transportation." Opp. at 15. But that limitless interpretation of the City's authority would eviscerate any limit on state-action immunity. The City claims that fixing the price Uber and

Lyft charge to use their smartphone applications is a safety and reliability regulation because better earnings for drivers alleviates financial pressure to work more. Opp. 15, 20–21. By that measure, anything is a safety and reliability regulation. The City could regulate the relationship between for-hire drivers and grocery stores because, after all, drivers must be well nourished to provide safe and reliable transportation service. That cannot be right. The limitless deference the City seeks is not warranted under an exception to the antitrust laws that is "disfavored" and that the Supreme Court warned should not be applied "too loosely." *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225, 229 (2013).

The City further reveals its untenable, boundless view of state-action immunity when it claims that the legislature has granted immunity to "*all* aspects of the 'for hire transportation services' industry," not just transportation services themselves. Opp. 18. State-action immunity does not apply unless the legislature "clearly articulates" a policy of immunity, *Phoebe Putney*, 568 U.S. at 234, and it "clearly intends" to displace competition within a "particular field," *S. Motor Carriers*, 471 U.S. at 64. Contrary to the City's position, the legislature has nowhere clearly stated any intent to immunize regulation of "all aspects" of the "industry." Instead, the relevant statute immunizes "for hire transportation services," RCW 46.72.001, and says nothing about "all aspects" of the "industry." The City seeks to expand the statute by implication rather than adhere to what the legislature clearly articulated.

Confirming the legislature's lack of any clearly articulated policy to displace competition in the relationship between referral companies and drivers, the City's underlying grant of authority extends merely to regulation of "for hire vehicles operating within" its jurisdiction, RCW 46.72.160, and to "for hire vehicle transportation services," RCW 46.72.160(1)-(6). The City does not quite argue that the Chamber's members are actually transportation providers, Opp. 19, presumably because they do not in fact provide any transportation of passengers. Yet the City seeks to evade the words of these statutes, arguing alternatively that the Chamber's members "control a number of the very activities" the City is authorized to regulate, Opp. 19, that the Chamber's argument "is of recent vintage," Opp. 19 n.16, and that Uber and Lyft "have complied with other City ordinances" without challenging the City's regulatory authority under state law. Opp. 20. But these arguments cannot change the language of the statutes, nor can they change the Supreme Court's requirement that the legislature must "clearly articulate" a policy to displace competition in the particular field at issue. Anyway, it makes no difference that Uber and Lyft have never challenged the City's authority under state law, nor does it matter whether the Ordinance is valid as a matter of state law, as the Chamber's antitrust claim is a matter of federal law. At bottom, if the legislature had wanted to "clearly articulate" a policy of immunizing regulation of "all aspects" of the for-hire transportation "industry," it would have said so. And for the City to qualify for state-action immunity, the legislature must have said so. It did not remotely do so.

B. The Ordinance Fails The Active-Supervision Requirement

The City contends that it can satisfy the active-supervision requirement if a municipal actor supervises private parties that fix prices. But cities are not substitutes for states under state-action immunity. "Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 412 (1978). Unlike States, municipalities "are not beyond the reach of the antitrust laws." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). That is why the sovereign legislature—not a municipal actor—is responsible for satisfying the clear-articulation requirement. Just as a municipality cannot satisfy the clear-articulation requirement by asking a municipal official to issue a policy statement, a municipality cannot satisfy the active-supervision requirement by asking a municipal official to supervise private actors who are fixing prices.

It is no coincidence that the Supreme Court has always referred to "state supervision," and never once referred to "municipal supervision." *North Carolina State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101, 1110 (2015). This is not just offhand dicta. In cases where distinctions between municipalities and States are important, the Court has always referred to "State supervision," never municipal supervision. *Town of Hallie*, 471 U.S. at 46; *Community Comms. Co., Inc. v. City of Boulder, Colo.*, 455 U.S. 40, 51 n.14 (1982); *City of Lafayette*, 435 U.S. at 411–12. Most importantly, when the Court clarified in *Town of Hallie* that a municipality's own conduct need not be supervised or directed by the state, it carefully cabined that holding, explaining that if a "state or

municipal" entity delegates regulatory authority to a "private party," "active state supervision must be shown, even where a clearly articulated state policy exists." 471 U.S. at 47 & n.10.

The City implausibly says that *Town of Hallie* really meant "municipal supervision must be shown" when it said "state supervision must be shown," and that "state" is merely shorthand that includes both states and municipalities. Opp. 25. But the core issue in *Town of Hallie* was the difference between states and municipalities. The Town argued that because there was "no active state supervision, the City may not depend on the state action exemption." 471 U.S. at 46. The Court discussed at length the differences between state actors, municipal actors, and private actors. *Id.* at 46–47. And the Court referred to each of these entities when it placed a caveat on its holding: "Where state or municipal regulation [of prices] by a private party [through delegated authority] is involved, however, active state supervision must be shown, even where a clearly articulated state policy exists." *Id.* at 47 n.10. That statement is integral to the Court's holding. The Court would not have conflated these entities at the same time it was squarely dealing with the difference between them. All agree that the Court means "state"—not municipality—when it refers to a "clearly articulated state policy." The same is true when the Court says "active state supervision."

Town of Hallie was also decided after *Tom Hudson & Associates, Inc. v. City of Chula Vista*, 746 F.2d 1370 (9th Cir. 1984). So even if *Tom Hudson* had held, rather than assumed in drive-by fashion, that municipalities could supervise private price fixing,

any such holding is overruled by *Town of Hallie*. The City also points to cases from other circuits holding that municipalities can step into the shoes of the state for purposes of active state supervision. Opp. 28. Those cases are, of course, not binding on this Court. What is binding on this Court is *Town of Hallie*, which holds that municipal regulation of private parties requires "active state supervision," "even where a clearly articulated state policy exists." 471 U.S. at 47 n.10.

It also makes sense that the Supreme Court would require state supervision when municipalities delegate price fixing authority to private parties, but not when municipalities themselves engage in anticompetitive conduct. "Where a private party is engaging in the anticompetitive activity"—as the Teamsters is doing here—"there is a real danger that he is acting to further his own interests, rather than the governmental interest of the State." *Town of Hallie*, 471 U.S. at 47. By contrast, the danger with a municipality's own conduct is not "that it is involved in a *private* price-fixing arrangement," but that "it will seek to further purely parochial public interests, rather than the governmental interests of the state." *Id.* Here, the City has delegated price-fixing authority to private parties, precisely the circumstance that is most troubling under the antitrust laws. If the City were allowed to supervise that private conduct, it would amplify both concerns discussed in *Town of Hallie*. Specifically, private parties would engage in self-interested price fixing, and the City would also seek "to further purely parochial public interests." *Id.* Far from negating each other, those two harms will synergize if a municipality is allowed to supervise private parties.

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

As the City notes, this Court has held that the NLRA's exclusion of agricultural employees does not preempt local collective-bargaining laws. Opp. 30. But cases about agricultural employees are inapplicable to independent contractors because Congress excluded the two groups from the NLRA for different reasons. Congress excluded agricultural employees because it intended the NLRA to cover "only those disputes which are of a certain magnitude and which affect commerce." S. Rep. No. 79-1184, at 3 (1934). Congress excluded independent contractors because requiring them to collectively bargain is inconsistent with the basic objective of the NLRA—to protect employees who are dependent on an employer for a wage. Unlike employees, independent contractors 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).

Unlike agricultural employees, both independent contractors and supervisors "have abandoned the 'collective security' of the rank and file voluntarily." H.R. Rep. No. 80-245, at 17 (1947). Tellingly, the Supreme Court has held that the NLRA's exclusion of supervisors preempts local laws requiring businesses to collectively bargain with supervisors. *Beasley v. Food Fair of N.C., Inc.*, 416 U.S. 653, 662 (1974).

The City says that Congress treated supervisors and contractors differently, and it points to an express preemption provision applicable to supervisors. Opp. 32

(citing § 14(a) of the NLRA, 29 U.S.C. § 164(a)). But that provision makes no difference. Section 14(a) reads as follows:

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

The first clause, not the second, is the informative part. That clause reflects the historical reality that some supervisors had joined unions, sometimes with the consent of their employers, and Congress did not intend to upend *consensual* arrangements by excluding supervisors from the Act's coverage. *See Beasley*, 416 U.S. at 662. Thus, the first clause of 14(a) *permits* supervisors to join unions if the employer agrees. This necessitates the proviso in the second clause prohibiting any government efforts to *require* these arrangements. Because the NLRA does not create an exception permitting independent contractors to join unions with the employer's consent, there was no need to clarify, as there was with supervisors, that permissive membership did not authorize mandatory membership.

IV. ABSENT AN INJUNCTION, IRREPARABLE INJURY IS LIKELY

The City claims that its revolutionary Ordinance will impose no irreparable harm on the Chamber's members until it is fully enforced and a collective-bargaining agreement is in place. The district court correctly rejected this argument when it granted the preliminary injunction. First, it found that "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." Appellants' Appendix, Doc. 6-3 (App.) at 73. "More importantly," it found, "the disclosure requirement is the first step in a process that threatens the business model on which the Chamber's members depend," and their businesses are "likely to be disrupted in fundamental and irreparable ways if the Ordinance is implemented." *Id.* The City does not even try to explain why these factual findings are clearly erroneous.

The City does argue that the Teamsters is not a competitor of the Chamber's members. Opp. 6. But that is irrelevant. The Ordinance's avowed and central purpose for mandating the disclosures is to allow the Teamsters to wage union-election campaigns, which will cause irreparable injury in at least two ways. *First*, the campaigns will effectively compel the Chamber's members to spend money educating drivers and hiring labor-relations experts. App. 36, 44, 53, 230, 235. This is not self-inflicted injury. Opp. 9. As with Article III injury, irreparable harm occurs when plaintiffs "reasonably incur costs to mitigate or avoid" a "substantial risk" of additional harm. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013). *Second*, the campaigns will "disrupt and change" these businesses "in ways that most likely cannot be compensated with damages." *Am. Trucking Ass'n v. City of Los Angeles*, 559 F.3d 1046, 1058 (2009); App. 36, 44, 53, 230, 235. The Teamsters efforts at unionizing drivers are likely to create a rift between the drivers and the Chamber's members, as the Teamsters will advocate views that will pit the drivers against the Chamber's members. *See* Amicus Brief of Lyft, Inc., Doc. 9 at 8–11.

The City claims that any injury is speculative. Opp. 9–10. But the election campaigns are not remotely speculative, as the very purpose of disclosure is to trigger the campaigns, and the Teamsters has expressly stated that it intends to attempt to unionize drivers that use Uber, Lyft, and Eastside. App. 37, 46, 55. Further, if the campaigns succeed, the Ordinance will compel collective bargaining, treating independent contractors as if they were employees. The business models of the Chamber's members depend on partnering with independent contractors, and forcing these businesses to collectively bargain with independent contractors constitutes a revolutionary change to their operations. Conversely, if the election campaigns fail, the City will obtain *none* of the supposed benefits of collective bargaining that it invokes. The equities in that scenario tip even more strongly in favor of a stay.

Moreover, disclosure to the Teamsters itself is an irreparable harm because the Teamsters' interests are adverse to Uber, Lyft, and Eastside, and the Teamsters can use the information against them. Most troubling is that the Teamsters seeks information from virtually every competitor in Seattle's ride-referral industry. App. 37, 46, 55. The Teamsters can therefore use the information to leverage the drivers of one competitor against the drivers of another during a union election campaign. In the process, it could convince drivers to realign their contracting with different competitors in the industry. All of that would be permissible, as the Ordinance does not limit how the Teamsters can use the driver lists, so long as it is for the "purpose of contacting drivers to solicit their interest in being represented." Ordinance § 3(E).

The City incorrectly claims that the information in the driver lists is already publicly available. Opp. 7. If that were true, the Teamsters would not need the Chamber's members to disclose it. The City neglects to inform this Court that any publicly available information does not show how *frequently* or *recently* a driver uses a specific ride-referral service. App. 229–30. No matter how much effort a competitor spends mining the public archives, it could at most compile a list of anyone who has ever been licensed as a for-hire driver. *Id.* It is useless to competitors to have thousands of names of drivers who might have once used a ride-referral app six years ago.[1] In contrast, the Ordinance forces 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—which amounts to frequent-customer lists of the targeted entities—is closely guarded and highly valuable to competitors. App. 229.

Finally, forced compliance with a preempted law is itself irreparable harm. *Am. Trucking*, 559 F.3d at 1058; *Valle del Sol, Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir.

[1] The City says the qualifying driver lists are now outdated by a few months. Opp. 8. Not only do those lists still contain information about frequent and recent drivers that is not publicly available, but the Ordinance gives the Teamsters the right to request new, updated lists at any time. *See* FHDR-10, http://clerk.seattle.gov/~CFs/CF_320279.pdf. The Teamsters have publicly represented that they intend to request updated lists at their earliest opportunity, *see* https://www.bna.com/uber-lyft-seek-n73014464098/.

2013) (citing cases). There are at least serious questions about the Ordinance's legality, and if the Chamber's members are forced to disclose their driver lists and submit to a costly union election, there is no available damages remedy for those injuries.

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

The balance of hardships also tips sharply in the Chamber's favor. Enforcement of the Ordinance while this appeal is pending will (1) force the Chambers' members to disclose their confidential driver lists, and (2) subject them to an election campaign, and, (3) if the appeal is not expedited, could compel them to enter into a collective-bargaining agreement against their will, fundamentally transforming their contractual relationships and their business model, and potentially eliminating their operations in Seattle. Any victory on appeal will ring hollow once that irreparable harm is complete.

In contrast, an injunction will require the City literally to do nothing. It will not be forced to disclose confidential information. It will not be forced to collectively bargain with independent contractors. It will not be forced to transform its business through a draconian collective-bargaining scheme. The City argues that an injunction will delay any safety and reliability benefits "for months if not years." Opp. 34. But if anything is speculative, it is the City's fabled safety and reliability benefits. As the district court initially concluded, "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." App. 73.

The City itself has not acted with any urgency. It waited years before enacting the Ordinance, and then it delayed implementation, first in the text of the Ordinance itself, and subsequently by amendment, all without the collapse of public safety. Further, when the Chamber sought to minimize the harm to either side by filing a motion to expedite this appeal and asking for an argument date in December of this year, Doc. 14, the City refused to agree to that expedited schedule, Vergonis Declaration (attached hereto) 2–4. Indeed, rather than agreeing to move as quickly as possible, the City sought delay, complaining that a December argument would not give amici, this Court, or the parties sufficient time to prepare. *Id.* The City cannot now complain about the delay in enforcing the Ordinance "for months if not years," while at the same time refusing to agree to expedite the appeal as quickly as possible.

Finally, the public always has an interest in enforcing federal laws, *Valle del Sol*, 732 F.3d at 1029, and in preventing local officials from subjecting regulated entities to illegal state laws, *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). The Court should enjoin the Ordinance to maintain the status quo, which is "the last uncontested status which preceded the pending controversy." *GoTo.com v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000). The "last uncontested status" is the state of affairs without the Ordinance in operation.

CONCLUSION

For these reasons, the Court should then enjoin the Ordinance pending appeal.

September 7, 2017

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CERTIFICATE OF SERVICE

I certify that on September 7, 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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