No. 17-35371

In the United States Court of Appeals
for the Ninth Circuit

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

v.

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

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

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

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In defending the decision below, the Chamber of Commerce of the United States ("Chamber") largely ignores the District Court's reasoning, and instead asks this Court to accept its own entirely unprecedented legal theories. Its arguments provide no basis for affirming the decision below.

I. The District Court erred in granting injunctive relief based on the Chamber's federal antitrust claim.

A. The Ordinance is a proper exercise of Seattle's delegated authority to regulate the for-hire transportation industry.

The Ordinance challenged here was enacted pursuant to the City's delegated authority to regulate for-hire transportation in Seattle "without liability under federal antitrust laws." Wash. Rev. Code §46.72.001. To permit such exercises of regulatory authority, the "state action" doctrine recognized in *Parker v. Brown*, 317 U.S. 341 (1943), immunizes certain government-directed acts from antitrust liability. Under *Parker*, "the free market principles espoused in the Sherman Antitrust Act end where countervailing principles of federalism and respect for state sovereignty begin." *Traweek v. City & County of San Francisco*, 920 F.2d 589, 591 (9th Cir. 1990).

The Chamber argues that the requirements for *Parker* immunity are not satisfied because the Washington Legislature failed to expressly authorize the *precise* form of regulation of the *specific* types of transportation providers at issue here. That argument misconstrues both Washington law and governing precedent, and would eviscerate *Parker*'s federalism-promoting purposes by preventing states

from "allocat[ing] governmental authority [to] municipalities to regulate areas requiring flexibility and the exercise of wide discretion at the local level." *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1413-14 (9th Cir. 1985); *see also* Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 Yale L.J. 486, 487-88 (1987) (*Parker* immunity "represents the judiciary's effort to respect the results of the political process" and should not be construed to permit "return to the era the Court left behind when it repudiated *Lochner v. New York*," because "[t]he substitution of 'antitrust' for 'due process' and 'economic efficiency' for 'liberty of contract' does not make the assault on democratic politics any more palatable").

1. Clear articulation

The first, "clear articulation" requirement for *Parker* immunity requires that the conduct at issue be undertaken "'pursuant to state policy to displace competition with regulation.'" *Mercy-Peninsula Ambulance, Inc. v. San Mateo County*, 791 F.2d 755, 757 (9th Cir. 1986) (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 413 (1978)). Here, the Washington Legislature's intent to displace competition could not be clearer: It expressly authorized municipal regulation of "privately operated for hire transportation services … without liability under federal antitrust laws." Wash. Rev. Code §46.72.001.

Accordingly, the sole question presented is whether the Ordinance falls "within a broad view of the authority granted by the state." *Elec. Inspectors, Inc. v. Village of East Hills*, 320 F.3d 110, 118-19 (2d Cir. 2003); *see also City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 372 (1991) ("[I]n order to prevent *Parker* from undermining the very interests of federalism it is designed to protect, it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law."). In *City of Columbia*, the Supreme Court compared this inquiry to the test for absolute judicial immunity, *see id.* at 372, which applies unless the judge "acted in the clear absence of jurisdiction"—even if the action "was in error, was done maliciously, or was in excess of his authority." *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978) (quotations omitted); *id.* at 358-59 (judge who "err[ed] as a matter of [state] law" in granting sterilization petition retained judicial immunity). Indeed, in *Boone v. Redevelopment Agency*, 841 F.2d 886 (9th Cir. 1988), this Court held the clear articulation requirement satisfied even where the defendant city had acted *without* state law authority. In that case, the California Redevelopment Act authorized redevelopment activities by the city in "blighted" areas, but the Court assumed that the city had exceeded its statutory authorization by engaging in such activities in *non*-blighted areas. *Id.* at 891. Nonetheless, *Boone* concluded that *Parker* immunity

applied, explaining that municipal entities are not stripped of antitrust immunity "merely because they imperfectly exercise their power under state law." *Id.*

Given this standard, and the Washington Legislature's express statement of intent to displace competition with regulation in relation to for-hire transportation, this Court need determine only whether the Ordinance falls within a broad view of the City's authority under state law. It easily does so. The Washington Legislature authorized the City to regulate "for hire transportation services," including (but not limited to) by regulating rates ("the manner in which rates are calculated and collected") and adopting "[a]ny other requirements … to ensure safe and reliable for hire vehicle transportation service." Wash. Rev. Code §§46.72.001, 46.72.160(3), (6).

Viewed broadly, as it must be for antitrust immunity purposes, that authority extends not only to traditional for-hire transportation companies, but also to companies like Uber and Lyft whose profits are derived entirely from selling for-hire transportation to the public at prices the companies set. That authority likewise broadly permits municipal regulation of all matters relating to the safety and reliability of for-hire transportation. The City's authority to regulate such matters unilaterally is sufficient to immunize from antitrust liability regulations like the Ordinance involving collective action on such matters by regulated parties. *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 64 (1985).

Further, the City Council determined that the collective negotiations permitted under the Ordinance (and subject to City approval) would "ensure safe and reliable for-hire and taxicab transportation service" within Seattle, and thus fall within its statutory authority. Ordinance §1.C (Addendum A-20) (citing Wash. Rev. Code §§46.72.160, 81.72.210). As the Council explained, "Drivers working under terms that they have negotiated through a collective negotiation process are more likely to remain in their positions over time, and to devote more time to their work as for-hire drivers, because the terms are more likely to be satisfactory and responsive to the drivers' needs and concerns." *Id.* §1.I(1). In the Council's view, the resulting increase in driver experience and reduction in turnover would promote the safety and reliability of for-hire and taxicab transportation. *Id.* The Council likewise determined that permitting collective negotiations would "help ensure that the compensation drivers receive for their services is sufficient to alleviate undue financial pressure to provide transportation in an unsafe manner (such as by working longer hours than is safe, skipping needed breaks, or operating vehicles at unsafe speeds in order to maximize the number of trips completed) or to ignore maintenance necessary to the safe and reliable operation of their vehicles." *Id.* §1.I(2).[1]

[1] The Council based these findings in part on "[c]ollective negotiation processes in other industries" that "have achieved public health and safety outcomes for the general public and improved the reliability and stability of the industries," including

In arguing that, notwithstanding the Council's findings, the Legislature's intent to displace competition with municipal regulation does not extend to the precise transportation services and forms of regulation at issue here, the Chamber first contends that the City's regulatory authority extends only to traditional for-hire vehicles and their drivers, not to companies like Lyft and Uber.[2] But the Chamber's argument is belied by the relevant statutes—particularly when construed broadly for *Parker* immunity purposes. The Washington Legislature did not limit the scope of the City's antitrust exemption to municipal regulation of for-hire *vehicles*. Instead, the Legislature declared "that *privately operated for hire transportation service* is a vital part of the transportation system within the state," "the safety, reliability, and stability of *privately operated for hire transportation services* are matters of statewide importance," "[t]he *regulation of privately operated for hire transportation services* is thus an essential governmental function," and it is "the

by helping "enforc[e] health and safety standards" and reducing "industrial accidents, vehicular accidents, and inoperative or malfunctioning equipment." Ordinance §1.J (Addendum A-22). The Council noted that "[i]n other parts of the transportation industry … collective negotiation processes have reduced accidents and improved driver and vehicle safety performance." *Id.*

[2] This argument should first be disregarded because the Chamber brings a "*facial* antitrust preemption claim," Response Brief ("RB") 41 (emphasis added), yet does not dispute the City's authority to regulate taxicab and for-hire transportation. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) (facial invalidation requires that "no set of circumstances exists under which the [Ordinance] would be valid").

intent of the legislature to permit political subdivisions of the state *to regulate for hire transportation services* without liability under federal antitrust laws." Wash. Rev. Code §46.72.001 (emphases added). The Legislature thus authorized regulation of *all* aspects of the "for hire transportation services" industry.

The statute setting forth certain specific forms of permissible municipal regulation, Wash. Rev. Code §46.72.160, is likewise not limited to vehicles or drivers. Instead, it repeatedly references "*for hire vehicle transportation services*." *See* Wash. Rev. Code §46.72.160(1), (3) (permitting municipal regulation of "entry into the business of providing for hire vehicle transportation services" and "rates charged for providing for hire vehicle transportation service"). The Chamber contends that by referring to "for hire vehicles" at the start of §46.72.160, the Legislature granted regulatory authority over only that subpart of the for-hire transportation industry, RB 25, but its argument ignores both §46.72.160's delegation of authority to regulate "the business of providing for hire vehicle transportation services," and §46.72.001's statement of the Legislature's "intent to permit political subdivisions of the state to regulate for hire transportation services." The Chamber's narrow construction is contrary to Washington law. *See Heinsma v. City of Vancouver*, 29 P.3d 709, 714 (Wash. 2001) ("grants of municipal power are to be construed liberally, rather than narrowly," and "court[s] give[] considerable

weight to a statutory interpretation by a party who has been designated to implement the statute").

Nor is there any merit to the Chamber's contention that *Parker* immunity does not apply to regulations governing Uber and Lyft because they are mere "technology companies" that do not "engage[] in the transportation of passengers for compensation" or operate "vehicles used for the transportation of passengers for compensation." Wash. Rev. Code §§46.72.010(1), (2). That argument has been rejected by every court to consider it.

> Uber's self-definition as a mere "technology company" focuses exclusively on the mechanics of its platform (*i.e.*, the use of internet enabled smartphones and software applications) rather than on the substance of what Uber actually *does* (*i.e.*, enable customers to book and receive rides)…. *Uber does not simply sell software; it sells rides*. Uber is no more a "technology company" than Yellow Cab is a "technology company" because it uses CB radios to dispatch taxi cabs, John Deere is a "technology company" because it uses computers and robots to manufacture lawn mowers, or Domino Sugar is a "technology company" because it uses modern irrigation techniques to grow its sugar cane…. If … the focus is on the substance of what the firm actually does …, it is clear that Uber is most certainly a transportation company, albeit a technologically sophisticated one.

O'Connor v. Uber Technologies, Inc., 82 F.Supp.3d 1133, 1141 (N.D. Cal. 2015) (emphasis added).[3] Indeed, as *O'Connor* observes, the Chamber's theory is no

[3] *See also Doe v. Uber Technologies, Inc.*, 184 F.Supp.3d 774, 786 (N.D. Cal. 2016) (rejecting argument that Uber "is not a common carrier but … a 'broker' of transportation services"); *Cotter v. Lyft, Inc.*, 60 F.Supp.3d 1067, 1078 (N.D. Cal.

different from a taxicab company asserting it is a technology company or, as unsuccessfully argued in a 1933 case, a mere "telephone service" without responsibility for passenger injuries. *See, e.g.*, *Rhone v. Try Me Cab Co.*, 65 F.2d 834 (D.C. Cir. 1933) (taxi dispatch company contended it was not transportation company but merely "nonprofit-sharing corporation, incorporated … for the purpose of furnishing its members a telephone service and the advantages offered by use of the corporate name" that "did not own … any … cab").

Because Uber and Lyft profit from selling rides in for-hire vehicles to the public *at prices they establish*, any comparison to mechanics or landlords who happen to do business with for-hire drivers is inapt. Indeed, both companies have complied with other City ordinances adopted pursuant to the same grant of authority the City Council invoked here.[4] Notably, although the Chamber vaguely claimed in

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2015) (theory that Lyft "is an uninterested bystander of sorts, merely furnishing a platform that allows drivers and riders to connect … is obviously wrong"); *Meyer v. Kalanick*, 174 F.Supp.3d 817, 826 (S.D.N.Y. 2016) ("The fact that Uber goes to such lengths to portray itself—one might even say disguise itself—as the mere purveyor of an 'app' cannot shield it from the consequences of its operating as much more."); Wash. Rev. Code §46.72.010(2) (defining "for hire operator" as "any person, concern, or entity engaged in the transportation of passengers for compensation in for hire vehicles").

[4] Those ordinances and regulations require, for example, that Uber and Lyft provide data to the City and pay fees associated with Seattle-based rides; while Uber and Lyft have complained about fees and challenged the disclosure of data, *see, e.g.*, ER 52-93, 228-307, 349, 357-58, neither has asserted that the City lacks authority to regulate them under state law.

the proceedings below that Washington law applies to "transportation providers, not ride-referral companies," D. Ct. Dkt. #2, at 10, it did *not* argue that the City lacks *any* authority to regulate Uber and Lyft. The Chamber's acknowledgement that litigants "cannot raise [an] argument on appeal after failing to bring the fundamental issue to the district court's attention," RB 16, applies with particular force where the argument might require significant factual development. Because the Chamber did not cite the relevant statutes in the District Court, let alone develop a record, its argument that Uber and Lyft are not "for hire operators" under Washington Revised Code §46.72.010 should be ignored. *See* RB 24 (citing §46.72.010); D. Ct. Dkt. #2, at iv (omitting §46.72.010 from table of authorities); D. Ct. Dkt. #43, at iii (same).

The Chamber tries to bolster its argument by citing a 2015 bill regarding "commercial transportation service providers," *see* Wash. Rev. Code §§48.177.005, 48.177.010, and "Final Bill Report" stating that the bill was the first to "specifically" regulate "ridesharing companies," Supplemental Appendix at SA-1; *but see id.* (bill report "is not a part of the legislation nor does it constitute a statement of legislative intent"). Neither supports the Chamber. While the *original* version of the legislation would have changed existing law to expressly exclude companies like Uber and Lyft from Washington Revised Code §46.72, the Legislature ultimately chose to do no more than establish certain insurance requirements for such companies—which may

be satisfied by complying with §46.72. *See* Wash. Rev. Code §48.177.010(1)(a).[5] Nothing in the legislation suggests the Legislature viewed the scope of cities' authority under §46.72 narrowly.[6]

The Chamber also contends clear articulation is absent because the Legislature did not expressly reference collective negotiations when authorizing potentially anticompetitive municipal regulation of the taxicab and for-hire transportation industries. But the City "need not 'point to a specific, detailed legislative authorization' for [the Ordinance]." *Southern Motor Carriers*, 471 U.S. at 64 (quoting *Lafayette*, 435 U.S. at 415); *Preferred Communications*, 754 F.2d at 1413 ("Narrowly drawn, explicit delegation is not required."). "[W]hen the circumstances indicate that a state's general policy is to displace competition with regulation" (circumstances *not* present in any of the Chamber's cited cases, *see* note 7 *infra*), "a subordinate state entity need show no more than an authorization to 'do business' to qualify for the state action exemption"—particularly in areas

[5] The bill's legislative history, including its various versions, is available at http://app.leg.wa.gov/billsummary?BillNumber=5550&Year=2015.

[6] When the Washington Legislature wants to exclude a specific mode of transportation from §46.72, it does so explicitly. *See, e.g.*, Wash. Rev. Code §46.74.020 (excluding traditional commuter ride-sharing vehicles). A bill to establish such an exemption for Uber and Lyft was introduced in February, but failed. *See* S.B. 5620 (Wash. 2017-18), *available at* http://app.leg.wa.gov/billsummary?BillNumber=5620&Year=2017.

traditionally subject to regulation that burden public resources (here, public streets), such as local for-hire and taxicab transportation. *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 401-03 (9th Cir. 1991); *see also Golden State Transit Corp. v. City of Los Angeles*, 726 F.2d 1430, 1434 (9th Cir. 1984).

In such circumstances, it suffices that "the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure." *Southern Motor Carriers*, 471 U.S. at 64. Here, there is no ambiguity: The Washington Legislature unambiguously stated its "intent … to permit political subdivisions of the state to regulate for hire transportation services without liability under federal antitrust laws." Wash. Rev. Code §46.72.001.

The Chamber's amici suggest that the standard articulated in *Southern Motor Carriers* has been overruled. *See, e.g.*, Amicus Br. 7-9. But the very case they cite *reiterates* that clear articulation may be shown even if the Legislature's intent to displace competition is "defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated." *N.C. State Bd. of Dental Examiners v. FTC*, 135 S.Ct. 1101, 1112 (2015). As this Court has emphasized, the clear articulation requirement does not limit a state's "use of municipalities to regulate areas requiring flexibility and the exercise of wide discretion at the local level." *Preferred Communications*, 754 F.2d at 1413-14. That is precisely what the Washington Legislature did, authorizing potentially

anticompetitive municipal regulation of the taxicab and for-hire transportation industries while defining that authority at a "high a level of generality" to allow cities to exercise discretion and flexibility when choosing, based on local conditions, "how and to what extent the market should be regulated." *Dental Examiners*, 135 S.Ct. at 1112.

The clear articulation standard the Chamber and its amici propose renders such delegations of state authority impermissible. Indeed, under their narrow standard, *any* requirement the City adopted pursuant to Washington Revised Code §46.72.160(6) would fall outside its *Parker* immunity, simply because the Legislature failed to delineate *every* precise rule the City might adopt to promote safe and reliable for-hire transportation. If *Parker* immunity required the Legislature to contemplate each precise form of regulation that might be exercised under a general grant of authority, the Legislature could *never* delegate to local governments *or* state agencies the power to respond to unforeseen future problems, and would instead be required to enact *new* state legislation every time changing conditions in a particular industry demanded new regulatory responses. *But see Southern Motor Carriers*, 471 U.S. at 64 (*Parker* immunity permits delegation to entities best situated "to deal with problems unforeseeable to, or outside the competence of, the legislature").

None of the cases the Chamber or its amici cite support their proposed rule. In each, the statute at issue authorized certain conduct but was *silent* regarding any intent to displace competition.[7] Without any express statement, the courts had to determine whether to *infer* intent to displace competition. In contrast, where, as here, the intent to sanction potentially anticompetitive regulation is unambiguous, clear articulation does not also require that the legislature unduly restrict its agents' discretion and flexibility. *See, e.g., Southern Motor Carriers*, 471 U.S. at 63-64.

Finally, the Chamber and its amici contend that the Ordinance is not a valid exercise of the City's delegated authority because it will not in fact promote the safety and reliability of taxicab and for-hire transportation services. But when evaluating the City's *Parker* immunity, this Court's role is not to revisit the

[7] *See, e.g., FTC v. Phoebe Putney Health Sys., Inc.*, 133 S.Ct. 1003, 1011-12 (2013) (general corporate powers to acquire and lease property did not authorize hospital to "act or regulate anticompetitively"); *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 55-56 (1982) (city given only "general grant of power to enact ordinances"); *Columbia Steel Casting Co., Inc. v. Portland Gen. Elec. Co.*, 111 F.3d 1427, 1437 (9th Cir. 1996) (state commission authorized exchange of electrical transmission facilities and customers but not establishment of exclusive service territories); *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992) (legislature stated it did *not* intend to discourage competition); *Springs Ambulance Serv. v. City of Rancho Mirage*, 745 F.2d 1270, 1273-74 (9th Cir. 1984) (statute authorized city to contract with company to provide emergency ambulance services, but did not address regulation of non-emergency service prices). In the also-cited *Dental Examiners*, 135 S.Ct. at 1110, and *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97, 105-06 (1980), the only disputed issue was active supervision, not clear articulation.

Council's finding that the Ordinance will ensure drivers "can perform their services in a safe, reliable, stable, cost-effective, and economically viable manner and thereby promote the welfare of the people." Ordinance 2d Whereas Cl. (Addendum A-19); *see Boone*, 841 F.2d at 891 ("[T]he concerns over federalism and state sovereignty [underlying *Parker* immunity] dictate that [plaintiffs] not be allowed to use federal antitrust law to remedy their claim that the city and the agency exceeded their authority under state law."); Opening Br. ("OB") 40 n.18; *see also City of Columbia*, 499 U.S. at 379 (rejecting "any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns"). The Chamber will have a full opportunity to develop its claims about the City's regulatory authority in pursuing its sixth cause of action. *See* ER 332-33 (asserting "municipal action unauthorized by Washington law" claim). As *Boone* makes clear, the Washington Legislature's decision to allow the City to adopt potentially anticompetitive requirements to promote safe and reliable for-hire transportation, and the City Council's determination that the Ordinance will do so, are sufficient for *Parker* immunity purposes—regardless of whether the Council's judgment is ultimately correct under state law. 841 F.2d at 891.

2. Active supervision

The Chamber contends that the second requirement for *Parker* immunity—active government supervision of private parties—also is not met because a

municipal (not Washington state) official provides the supervision, *and* because that official does not actively participate in the initial development of proposed terms but instead reviews such proposals and approves them only if they promote the City's policy goals. Neither argument has merit.

In arguing that municipal officials cannot provide "active supervision," the Chamber relies entirely upon *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). If anything, *Hallie* supports the City. *Hallie* considered whether municipal actors must themselves be actively supervised (and concluded they need not)—not whether private parties acting pursuant to municipal regulation must be supervised by state rather than municipal officials. *Id.* at 46. As in *Hallie*, the City is the relevant actor here: Without the Director's affirmative approval, proposed terms and conditions have *no effect whatsoever*. Indeed, because the City unilaterally imposes those terms and conditions following their approval, those requirements are entirely exempt from any antitrust challenge. *See* OB 46 n.22.

Even assuming active government supervision of private party conduct under the Ordinance is required, *Hallie* does not support the Chamber's argument. Rather than drawing any legally significant distinction between state and municipal supervision, the *Hallie* footnote the Chamber cites simply describes the general standard requiring "active state supervision." 471 U.S. at 46 n.10. Like other cases referencing active "state" supervision, *see* RB 34, the footnote does not use "state"

as a term of art excluding municipalities, but as shorthand for the State and *all* its agents. *See* Garland, *supra*, at 495 n.57 (*Hallie*'s use of "state" "is best read in its generic sense as contemplating either state or municipal supervision"). Just as "active state supervision" may be provided by state agencies rather than the Legislature itself, *see, e.g.*, *Southern Motor Carriers*, 471 U.S. at 62 (supervision provided by state public service commissions), a state may use other agents, including municipal governments, to provide such supervision. *See, e.g.*, *Parker*, 317 U.S. at 351 (Sherman Act does not limit States' ability to act through "officers and agents"). The very purpose of the *Parker* doctrine is to permit states to make such choices without congressional interference. *Preferred Communications*, 754 F.2d at 1414.

This Circuit and two others have already held municipal supervision sufficient. In *Tom Hudson & Associates, Inc. v. City of Chula Vista*, 746 F.2d 1370 (9th Cir. 1984), this Court deemed a city's supervision of private party conduct sufficient to establish *Parker* immunity, while citing the very same language regarding "state" supervision the Chamber quotes here. *Id.* at 1374 ("The actions of a private person are not exempt from federal antitrust laws ... unless actively supervised *by the State*.") (citing *Cal. Liquor Dealers v. Midcal Aluminum*, 445 U.S.

97 (1980)) (emphasis added).[8] The First and Eighth Circuits reached the same conclusion, in decisions the Chamber ignores. *See Tri-State Rubbish, Inc. v. Waste Mgmt., Inc.*, 998 F.2d 1073, 1079 (1st Cir. 1993) (post-*Hallie*); *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005, 1014-15 (8th Cir. 1983).[9]

The Chamber also contends that requiring state officials to supervise private parties acting under a municipal regulatory regime would not "unduly disrupt municipalities" or burden the State, and that municipalities are "likely to be captured by local special interests." RB 35-36. These contentions have been rejected by the Supreme Court and this Court. As *Dental Examiners* explained, there is little risk that municipal governments will become "'involved in a private price-fixing arrangement.'" 135 S.Ct. at 1112 (quoting *Hallie*, 471 U.S. at 47). That is because

[8] The Chamber distinguishes *Chula Vista* as decided before *Hallie*, but as the *California Liquor Dealers* citation makes clear, the *Chula Vista* panel was aware of the language upon which the Chamber relies (which *Hallie* simply reiterated).

[9] The Chamber contends "[o]ther circuits have recognized *Hallie*'s impact," RB 37, but cites only a Sixth Circuit order that did not address the question in depth, simply amending a prior opinion to revise a statement the panel was concerned "may not be a completely accurate statement of the law." *Riverview Investments, Inc. v. Ottawa Community Improvement Corp.*, 774 F.2d 162, 163 (6th Cir. 1985) (order). Subsequent Sixth Circuit decisions hold that where (as here) a municipal official has ultimate decision-making authority, the municipal government is the "effective decisionmaker" and the active supervision requirement is inapplicable. *See, e.g.*, *Mich. Paytel Joint Venture v. City of Detroit*, 287 F.3d 527, 536-38 (6th Cir. 2002).

"municipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market," and "exercise[] a wide range of governmental powers across different economic spheres, substantially reducing the risk that [they] would pursue private interests while regulating any single field." *Id.* at 1112-13; *see also Phoebe Putney Health Sys.*, 568 U.S. at 226 (municipalities "have less of an incentive to pursue their own self-interest under the guise of implementing state policies").

This Court has also consistently held that active supervision should not be applied in a manner "requir[ing] municipal ordinances to be enforced by the State rather than the City itself.'" *Golden State Transit*, 726 F.2d at 1434 (quotation omitted). In an indistinguishable context—regulation of "public transportation by taxicab," which California determined "should be handled by local government"—this Court refused to construe *Parker* doctrine to interfere with California's decision to assign regulatory and supervisory functions to municipal governments, because doing so would "erode local autonomy" while requiring the State to "invest its limited resources in supervisory functions that are best left to municipalities." *Id.*;

cf. Preferred Communications, 754 F.2d at 1414 (recognizing state's right to delegate "authority between itself and its subdivisions.").[10]

The Chamber's further contention that active supervision is lacking because the Ordinance does not authorize municipal officials to "modify particular decisions" or "participate in the collective-bargaining process," RB 39, is meritless. No authority requires that government officials participate in *developing* proposals or be able to "modify" those proposals unilaterally. Rather, the Supreme Court acknowledges that supervision is sufficient so long as government officials "have and exercise power to *review* particular anticompetitive acts of private parties and *disapprove* those that fail to accord with state policy." *Dental Examiners*, 135 S.Ct. at 1112 (emphasis added); *see also Chula Vista*, 746 F.2d at 1374 (adequate supervision where municipal official "pointedly reexamines" private parties' proposals); *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 825 (9th Cir. 1982) (adequate supervision where government "thoroughly investigate[d]" reasonableness of private agreements).

[10] The Chamber argues that *Golden State Transit* considered only "state supervision of *municipal* conduct," RB 37 (emphasis in original), but its discussion of supervisory functions "best left to municipalities" would make no sense if the Court were considering only supervision of those very municipalities.

The Ordinance easily satisfies that standard: No proposal takes effect unless the Director affirmatively determines it will "promote[] the provision of safe, reliable, and economical for-hire transportation services and otherwise advance the public policy goals set forth in [the Ordinance]," and the Director may gather evidence, hold public hearings, and request information needed for that determination. Seattle, Wash. Municipal Code ("SMC") 6.310.735.H.2, I.3. While the Ordinance does not instruct the Director to modify unsatisfactory proposals unilaterally, and instead requires him to return such proposals to the parties with a written explanation of their deficiencies and (should he choose) remedial recommendations to obtain City approval, SMC 6.310.735.H.2.b, I.4.b, no case suggests the Director must have such unilateral authority.[11]

The Chamber asserts that a "heightened" standard applies because the agreements might include terms about financial payments between drivers and companies like Uber and Lyft (as well as numerous other topics, such as vehicle safety and the standard for deactivating drivers). RB 38-39. This argument is

[11] The Chamber cites *Patrick v. Burget*, 486 U.S. 94 (1988), but the supervision there was inadequate not because state officials were "not sufficiently involved in the making of the determinations themselves," RB 39, but because no state official had the power "to *review* private peer-review decisions and *overturn* a decision that fails to accord with state policy," *Patrick*, 486 U.S. at 102 (emphasis added)—the very power the Director exercises here.

foreclosed by *Southern Motor Carriers*, which indisputably involved "private price fixing." *Id.* Indeed, that price-fixing regime permitted private actors to develop rate proposals that took effect unless *disapproved* by state public service commissions. *Southern Motor Carriers*, 471 U.S. at 50-51. Although those commissions exercised significantly *less* supervision over private parties than exists here, the Supreme Court nonetheless found sufficient active supervision. *Id.* at 66.[12]

B. The Chamber's federal antitrust claim is not ripe.

The only Ordinance provision that could even arguably cause imminent Article III injury to the Chamber's members is SMC 6.310.735.D, which mandates

[12] As the City has explained, the District Court erred by granting injunctive relief after finding the antitrust claim raised only "serious questions." OB 20-25; *see also* D. Ct. Dkt. #38, at 3-4 (contending that "likelihood of success" standard alone applied). That standard applies only to merits questions "which cannot be resolved one way or the other at the hearing on the injunction and as to which the court perceives a need to preserve the status quo lest one side prevent resolution of the questions or execution of any judgment." *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) (en banc). This case did not involve any pressing need to preserve the status quo or severe imbalance of hardships. OB 52-57; *infra* Section III. And the Chamber admits the merits questions presented here are "predominantly legal," RB 15, while nowhere attempting to explain why those questions "[could not] be resolved one way or the other at the hearing on the injunction," *Marcos*, 862 F.2d at 1362; *see* ER 6-15. While the Chamber claims the City is responsible for the Court's use of that standard because it successfully moved to dismiss the Chamber's prior suit on Article III grounds, RB 15, federal courts must independently evaluate their Article III jurisdiction, *Bova v. City of Medford*, 564 F.3d 1093, 1095 (9th Cir. 2009).

disclosure of qualifying driver lists. But that purported injury does not make the Chamber's antitrust claim ripe, because the Chamber does not claim that 6.310.735.D itself violates federal antitrust law. Instead, the Chamber contends that the purported injury 6.310.735.D inflicts allows it to pursue an antitrust challenge to *other* Ordinance provisions (specifically, SMC 6.310.735.H, the mandate to negotiate over rates paid to drivers), even if those provisions could cause injury only after a series of uncertain future events occurs. *See, e.g.*, RB 40; *but see* OB 27-28. The Chamber identifies no support for its view that an alleged injury from one statutory provision gives it standing to challenge other related provisions.[13]

Nor does it refute the binding authority holding otherwise. In *Davis v. FEC*, 554 U.S. 724 (2008), the Supreme Court determined that the plaintiff faced imminent injury from the challenged campaign finance disclosure requirements, then stated that "standing is not dispensed in gross" and that "[t]he fact that Davis has standing to challenge [the disclosure requirements] does not necessarily mean

[13] The Chamber's theory that its antitrust claim will ripen as soon as a QDR collects statements of support from drivers, RB 45-46, has no merit. Far from constituting an "agreement to restrain competition" or "antitrust conspiracy," drivers who provide statements of support do not agree to *do* anything, and their statements have no effect until the City certifies that a QDR has received majority support. The Chamber's amici appear to contend that the disclosure of qualifying driver lists to a QDR itself violates federal antitrust law, Amicus Br. 6, but do not explain how such disclosures restrain competition.

that he also has standing to challenge the scheme of contribution limitations [at issue]." *Id.* at 733-34 (internal quotations and brackets omitted). The Court proceeded to analyze whether the plaintiff faced imminent injury from those contribution limitations *before* considering the merits. *Id.* at 734. *Davis* is thus binding precedent rejecting the Chamber's approach.

The Chamber argues that, because *both* provisions injured the plaintiff, *Davis* never addressed whether standing could derive from the "two provisions [being] part of an intertwined regulatory scheme." RB 42 (emphasis in original). But that ignores *Davis*' express holding that the plaintiff had to demonstrate injury from *each* challenged provision, even though the disclosure provision was necessary to operation of the contribution limitation provision. 554 U.S. at 729, 733-34. The Chamber does not even address this Court's decision in *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1095-96 (9th Cir. 2003), which held that while the plaintiff had standing to challenge the definition of "independent expenditure" in relation to its ballot measure advocacy, it lacked standing in relation to its candidate advocacy. Not only was the scheme at issue in *Getman* "intertwined," but the legal claims challenged *the very same* definitional provision. This Court nonetheless required that the plaintiff demonstrate standing for each claim.

As support for its view that standing is different for facial preemption claims, the Chamber cites two wholly inapposite cases. *Fisher v. City of Berkeley*, 475 U.S.

260 (1986), does not concern standing or ripeness at all, and *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334 (2014), simply addresses when a First Amendment pre-enforcement challenge may be brought. The Chamber additionally points to two cases from other circuits where plaintiffs challenging statutory provisions that injured them sought also to challenge other elements of the same statutory scheme, but both held that the plaintiffs were required to demonstrate standing as to each challenged provision, and neither held that plaintiffs injured by a *lawful* element of a purportedly non-severable scheme have standing to challenge a *different* provision that may never injure them. *See Lewis v. Alexander*, 685 F.3d 325, 338-39 (3d Cir. 2012); *Advantage Media v. City of Eden Prairie*, 456 F.3d 793, 799-801 (8th Cir. 2006). The Chamber also cites *Williams v. Standard Oil Company of Louisiana*, 278 U.S. 235 (1929), but *Williams* involved severability, not ripeness.[14]

Finally, the Chamber contends that under the City's approach an antitrust claim would ripen only after price-fixing has occurred. RB 41, 44-45. But the City does not dispute that the provision authorizing collective negotiations about driver

[14] Unlike the Chamber's backwards approach, a proper severability analysis asks whether *an unlawful provision* is severable, such that only that provision should be invalidated, or whether its non-severability requires invalidation of the entire statute—not whether a *non-challenged* provision is severable.

payments may be challenged once it is reasonably certain that injury from that provision is likely. That is not the case here. OB 28-29.[15]

C. The Chamber cannot establish antitrust injury.

"[A]n association may not sue on its own to assert the rights of its members under the antitrust laws." *Pac. Coast Agr. Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1207 (9th Cir. 1975); *see also Fin. & Sec. Prods. Ass'n v. Diebold, Inc.*, No. C04-04347 WHA, 2005 WL 1629813, at *3 (N.D. Cal. July 8, 2005); OB 30. Even assuming the Chamber could bring an antitrust claim on its members' behalf, it cannot demonstrate antitrust injury, as it must to pursue its federal antitrust claim.

[15] The Chamber contends that even without mandatory negotiations over rates, the Ordinance authorizes *per se* antitrust violations (and is thus facially preempted) because it permits "horizontal boycotts." RB 19 n.2. But the Director's approval of a proposed agreement merely requires the driver coordinator to apply the agreement's terms to all drivers; every driver remains eligible to contract with that coordinator and no driver is subject to a "boycott." In that sense, the Ordinance does not change the status quo: Companies like Uber and Lyft currently contract only with drivers willing to accept their unilaterally established terms. *See* Ordinance §1.E (Addendum A-21). Moreover, the *per se* rule applies only to boycotts arising from "horizontal agreements *among direct competitors*." *Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998) (emphasis added). The Ordinance does not authorize or require *drivers*—the only "direct competitors" implicated here—to engage in any boycott. Instead, the requirement to apply uniform terms to all drivers arises from the Director's decision to approve the agreement, and the only entity choosing whether to contract with any driver is the driver coordinator. *See id.* at 135 (*per se* rule against group boycotts does not apply to "agreement by a buyer to purchase goods or services from one supplier rather than another").

The Chamber does not argue that disclosing the driver lists constitutes antitrust injury. Instead, it first suggests that its price-fixing allegations establish antitrust injury. RB 47. But the Supreme Court has rejected the notion "that no antitrust injury need be shown where a *per se* violation in involved." *Atl. Richfield Co. v. USA Petroleum*, 495 U.S. 328, 341 (1990).

The Chamber next argues that it need not show antitrust injury because the "disclosure provision is an integrated part of a price-fixing scheme that causes antitrust injury." RB 47. But not every injury "causally linked" to an alleged antitrust violation constitutes an "antitrust injury." *Atl. Richfield*, 495 U.S. at 334. The Chamber "may not substitute allegations of injury to [plaintiffs] for allegations of injury *to competition*." *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1200 (9th Cir. 2012) (emphasis added).

Ultimately, rather than demonstrating actual antitrust injury, the Chamber argues that a party pursuing what it labels a "non-statutory preemption claim" need not satisfy the standing requirements of the allegedly preempting law. RB 47-49. But the Chamber's claim is premised entirely on its contention that the Ordinance authorizes *per se* Sherman Act violations. ER 327. And "causal antitrust injury is a *substantive component* of an antitrust claim." *Somers v. Apple, Inc.*, 729 F.3d 953, 963 (9th Cir. 2013) (emphasis added). The Chamber cannot evade that substantive requirement simply by labeling its cause of action "non-statutory."

The Chamber cites no case waiving the antitrust injury requirement when a plaintiff brings an antitrust preemption claim. *Fisher* never considered whether antitrust standing was required, and *Armstrong v. Exceptional Child Center, Inc.*, 135 S.Ct. 1378 (2015), supports the City, holding that where Congress has provided a statutory mechanism for obtaining a particular form of relief (as Congress did here with respect to injunctions enforcing federal antitrust law, *see* 15 U.S.C. §26), parties must channel their requests for such relief through that mechanism, *Armstrong*, 135 S.Ct. at 1385. "Courts of equity can no more disregard statutory and constitutional requirements and provisions than courts of law." *Id.* (quotation omitted); *see also Lucas Auto. Engineering, Inc. v. Bridgestone/Firestone, Inc.*, 140 F.3d 1228, 1234 (9th Cir. 1998) ("threatened antitrust injury [is] a prerequisite to equitable relief" under antitrust laws).

II. The District Court properly concluded that the Chamber was unlikely to succeed on its *Machinists* NLRA preemption claim.

The District Court correctly rejected the Chamber's argument that, in excluding independent contractors from the NLRA's definition of "employee," Congress intended to preclude all state and local regulation of independent contractors' work relationships. ER 10-15.

The NLRA's statutory language is clear. As the Chamber acknowledges, RB 56, the *same* statutory provisions that exclude independent contractors from the

NLRA's "employee" definition also exclude, *inter alia*, agricultural laborers, domestic workers, and public employees. 29 U.S.C. §§152(2), (3). This Court has held that the exclusion of these groups from NLRA coverage does not show Congress had any preemptive intent; courts should instead "draw precisely the opposite inference." *United Farm Workers of Am., AFL-CIO v. Ariz. Agricultural Emp't Relations Bd.*, 669 F.2d 1249, 1257 (9th Cir. 1982). Absent contrary statutory direction, when Congress excludes a group from NLRA regulation it intends to allow "states ... to legislate as they see fit." *Id.*

In support of its argument that Congress meant to treat independent contractors like supervisors (who, unlike the other excluded groups, expressly may *not* be regulated by states), the Chamber notes that the NLRA's independent contractor and supervisor exclusions were both added by 1947's Taft-Hartley Act. Taft-Hartley, however, also added NLRA Section 14(a), an *express* preemption provision concerning supervisors stating that "no employer ... 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*." 29 U.S.C. §164(a) (emphasis added). That Congress adopted *no* similar provision regarding state or

local regulation of independent contractors is dispositive of the preemption question here.[16]

This difference in statutory treatment is explained by Taft-Hartley's legislative history. Taft-Hartley broadly preempted state regulation of supervisors because Congress recognized that supervisor unionization affirmatively undermined the NLRA's goals. *Beasley v. Food Fair of N.C., Inc.*, 416 U.S. 653, 659-62 (1974). As the District Court explained, "[t]hese deleterious effects would arise regardless of whether supervisors unionized under the NLRA or under state law." ER 14.[17] While the Chamber may *wish* Congress had identified "deleterious effects of

[16] This statutory distinction belies the Chamber's characterization of the NLRA's treatment of supervisors and independent contractors as "two parallel exemptions [that] should be interpreted to have a similar preemptive force." RB 53.

[17] Congress expressed concern that supervisor unions acted in ways subservient to unions of rank-and-file employees whom they supervised, causing divided loyalties. H.R. Rep. No. 80-245, at 14-17 (1947) ("Management, like labor, must have faithful agents.... [T]here must be in management and loyal to it persons not subject to influence or control of unions."). Unionization made it difficult for supervisors to act as "management obliged to be loyal to their employer's interests," and "might impair [their] loyalty and threaten realization of the basic ends of federal labor legislation." *Beasley*, 416 U.S. at 659-60. Congress thus determined "that unionizing supervisors threatened realization of the basic objectives of the Act to increase the output of goods in commerce by promoting labor peace." *Id.* at 661. To avoid "putting supervisors in the position of serving two masters" and to protect employers against having to recognize supervisor unions, Congress adopted Section 14(a). *Id.* at 662. *Beasley* based its conclusion that the NLRA broadly preempts state regulation of supervisor unionization upon this legislative history and the language of Section 14(a)—which does not address independent contractors. *Id.* at 657-62.

allowing independent contractors to unionize," or "expressed a national pro-free market policy that independent contractors should compete under ordinary market forces," RB 54, no such legislative history exists. *See* ER 14 (Congress did not identify independent contractor unionization "as a threat to the free flow of goods" or to "the rights of management").

Machinists preemption effectuates Congress' intent to leave certain conduct *by NLRA-covered employers and employees*—the "combatants" in NLRA-covered "labor disputes"—unregulated. *See Local 76, Int'l Ass'n of Machinists v. Wisc. Emp't Relations Comm'n*, 427 U.S. 132, 150-51 (1976). Because independent contractors are *not* covered by the NLRA, that concern is not implicated here. Regardless of whether Congress believed that independent contractors *need* collective bargaining, no statutory text or legislative history supports the Chamber's assumption that Congress intended to *prohibit* state regulation of such matters.

III. The equitable factors did not favor injunctive relief.

A. Irreparable injury

The City has explained why the District Court's irreparable harm conclusion rests on speculation unsupported by the record. OB 52-57. The Chamber points to no evidence to defend that conclusion, but instead raises new theories of harm never asserted below. These theories, like those the District Court accepted, lack any

evidentiary basis. Indeed, the Chamber's irreparable harm argument does not cite a single page of the record. *See* RB 56-59 (citing only decision below).

The Chamber's sole defense of the District Court's finding of irreparable "competitive injury" arising from the possibility that qualifying drivers lists will be given to Chamber members' competitors is that "disclosure to the Teamsters *increases the risk* of purposeful or inadvertent dissemination." RB 57 (emphasis added). The Chamber cites no supporting evidence, because there is none. Nor is that the applicable standard. Irreparable injury must be *likely*; a mere increased risk is inadequate. *See* OB 52-53 (citing *Winter v. NRDC*, 555 U.S. 7, 22 (2008)).

The Chamber's new competitive injury theory—that Local 117 may "comingle" lists from different driver coordinators and "use the information against" Chamber members by "leverag[ing] the drivers of one competitor against the drivers of another during a union election campaign," including by "convinc[ing] drivers to realign their contracting with different competitors in the industry," RB 57—fares no better. Initially, the Chamber forfeited this argument by not raising it below. *See* RB 16; *Bolker v. CIR*, 760 F.2d 1039, 1042 (9th Cir. 1985). Even if that were not the case, the Chamber again points to no *evidence* showing the lists will likely be used in that manner. Indeed, the Chamber does not even assert this injury is likely,

but merely states it is "no[t] … implausible." RB 57. That is insufficient under *Winter*.[18]

With respect to possible harm to Chamber members' business models, *see* ER 17, the Chamber does not defend as *likely* the series of events that would need to occur for the threat to arise: (1) an organizing campaign targeting a Chamber member, (2) a QDR gaining majority support and becoming that member's drivers' exclusive driver representative ("EDR"), (3) negotiation of an agreement that undermines the use of mobile applications and/or independent contractors, *and* (4) the Director's approval of the agreement. OB 55-56. Instead, the Chamber simply asserts that undermining its members' business model is the "core objective of the Ordinance." RB 58. Besides being unsupported by any evidence (the Chamber cites nothing), proof that undermining a business model is the Ordinance's objective (which it is not) would not show this outcome is likely *or* imminent, and thus could not support the preliminary injunction. *See* OB 55-57.[19]

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[18] Moreover, the Chamber acknowledges that the Ordinance restricts use of the lists to soliciting drivers' support for representation, RB 57, but fails to explain how convincing drivers to quit one company and join another falls within that purpose.

[19] In making its argument, the Chamber wrongly contends that the City does not posit that a campaign for EDR representation is "speculative." RB 58. In fact, it is unknown whether Local 117 will seek statements of interest from drivers *for a Chamber member*, as opposed to one of the other companies or no company at all. OB 28. The District Court was also right to reject the Chamber's contention that

Disclosure of a list also does not involve irreparable harm simply because the status quo of nondisclosure "can 'never be restored.'" RB 57-58. Rather, the Chamber has the burden to show that disclosure will result in cognizable injury to its members. But the Chamber does not challenge the District Court's conclusion that "no trade secret protections or confidentiality attached" to the driver information contained in the lists. ER 17.

Finally, preemption itself cannot provide the basis for irreparable injury because *the list disclosure mandate* is not preempted by federal law. RB 59. In any event, that would not present the type of individual rights violation that might, without more, establish irreparable injury. The Chamber cites *American Trucking Ass'n, Inc. v. City of Los Angeles*, 559 F.3d 1046 (9th Cir. 2009), but that decision predates *Armstrong*'s recognition that the Supremacy Clause protects the structure of government, not individual rights. 135 S.Ct. at 1383. Further, *American Trucking* involved harm in the form of "large costs" that would "disrupt and change the whole

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such a campaign (should it occur) would cause irreparable injury by requiring members to spend money opposing EDR representation, because the Ordinance does not require such opposition. *See Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995) ("If the harm complained of is self-inflicted, it does not qualify as irreparable."); *accord* 11A Wright, Miller, Kane & Marcus, *Federal Practice & Procedure* §2948.1 (3d ed. 2011).

nature of [the plaintiff's] business." 559 F.3d at 1058. There is *no* evidence of such harm here.

B. The balance of the equities and the public interest

The Chamber does not defend the District Court's decision not to address the irreparable injury to the City and the public that results from enjoining any duly-enacted law. *See* OB 57. Instead, the Chamber pretends the only injury the City asserted below was a delay in its internal timeline. RB 60. The briefing belies that assertion. *See* D. Ct. Dkt. #38, at 23-24; *see also* OB 58.[20]

When the harm to the City and the public and the Chamber's failure to provide any evidence of irreparable injury are properly considered, it becomes apparent that the equities weighed in the City's favor, not the Chamber's. At the very least, the equities did not tip *sharply* in the Chamber's favor, as was necessary to justify relief under the "serious questions" standard.

CONCLUSION

For these reasons and those in the Opening Brief, the District Court's decision should be reversed.

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[20] The Chamber contends the delayed implementation of the Ordinance undermines this interest. RB 60. But the "Commencement Date" was set six months after the Ordinance's enactment to allow promulgation of implementing rules, and the further delay was attributable to Chamber members' refusal to provide data needed to develop those rules. ER 95 ¶4, 125.

Dated: July 14, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief was prepared using Microsoft Word 2013, and contains 8,487 words in 14-point proportionately-spaced Times New Roman typeface. Pursuant to Ninth Circuit Rule 32-2, Defendants-Appellants have requested a 1,500-word extension of the type-volume limitation for the foregoing relief. I hereby certify that this brief complies with the type limitations provided in Federal Rule of Appellate Procedure 32(a)(7) and Ninth Circuit Rule 32-1(b), as extended should the relief requested in Defendants-Appellants' motion be granted.

Dated: July 14, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2017, I filed and served the foregoing with the Clerk of the Court by causing a copy to be electronically filed and served via the appellate CM/ECF system. All counsel of record are registered CM/ECF users.

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