SUPERIOR COURT OF THE STATE OF WASHINGTON
KING COUNTY

RASIER, LLC, Petitioner, v. CITY OF SEATTLE, SEATTLE DEPARTMENT OF FINANCE AND ADMINISTRATIVE SERVICES, AND FRED PODESTA, in his official capacity as Director, Finance and Administrative Services, City of Seattle, Respondents.	No. PETITION FOR CONSTITUTIONAL WRIT OF CERTIORARI UNDER ARTICLE 4, SECTION 6 OF THE WASHINGTON STATE CONSTITUTION

Petitioner, Rasier, LLC ("Rasier"), by and through its undersigned counsel, alleges the following:

I. INTRODUCTION

The process the City of Seattle used to create rules concerning the collective bargaining process for independent contractors who drive with transportation network companies ("TNCs"), taxicab, and for-hire transportation companies and the rules the City published were arbitrary and capricious. The City failed to provide comprehensive rules and disregarded the

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facts and circumstances of drivers and the industry. Moreover, the City's rules are inconsistent with fundamental labor law principles ensuring every worker has a voice in whether to be represented by a labor organization. The Court should immediately suspend implementation of the partial rules published by the City's Department of Finance and Administrative Services ("FAS") on December 29, 2016 and issue a constitutional writ of certiorari declaring the rules invalid. The City must follow a lawful rulemaking process and adopt rules which properly consider the facts and circumstances of drivers and the industry, and labor law precedent.

II. GROUNDS FOR PETITION

In late 2015, the City of Seattle adopted Ordinance 124968 (the "Ordinance," codified at SMC 6.310.735), a municipal law that is unprecedented nationally, and that purports to establish a collective bargaining process for independent contractors who drive with TNCs, such as Rasier, as well as for taxicab and for-hire transportation companies. Nearly a year later, on December 29, 2016, the Director of FAS, for the first time, issued an incomplete set of rules partially implementing the Ordinance. In doing so, the City followed an arbitrary and capricious piecemeal rulemaking process and denied the public a meaningful opportunity to comment. Moreover, as a result of this arbitrary and capricious process, the City has published a partial set of rules which (a) disregard the facts and circumstances of the for-hire transportation industry, as reflected in the public comments, and (b) are inconsistent with the governing ordinance and guiding labor law precedent.

There is no other avenue or appeal for judicial review of the City's administrative action, for neither the Seattle Administrative Code nor the Revised Code of Washington provide for independent review of municipal administrative rulemaking. Accordingly, Rasier asks the Court to grant this petition for a constitutional writ of certiorari under article IV, section 6, of the Washington State Constitution. *See Bridle Trails Cmty Club v. City of Bellevue*, 45 Wn. App. 248, 251-52, 724 P.2d 1110 (1986) (standard for constitutional writ).

Respondents acted arbitrarily and capriciously in adopting these rules for two independently sufficient reasons:

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First, FAS's piecemeal rulemaking process, which has led to publishing and implementing a partial set of rules before all of the rules are complete, was arbitrary and capricious. Publishing and implementing an incomplete set of rules disregards the legislative mandate in the Ordinance to establish a complete collective bargaining "process" by the commencement date, which came and went in September 2016. Because the Director has only promulgated some of the necessary rules, the "process" lacks critical checks and balances, or guidance for stakeholders involved in the organizing process, undermining the goals of the Ordinance. When, as here, "an agency makes rules without considering their effect on agency goals, it acts arbitrarily and capriciously" because it is again acting "without regard to the attending facts or circumstances. *Puget Sound Harvesters Ass'n v. Wash. State Dep't of Fish & Wildlife*, 157 Wn. App. 935, 950, 239 P.3d 1140 (2010). Moreover, the piecemeal approach to rulemaking deprives interested parties, including drivers, taxicabs, TNCs, and for-hire transportation companies of their right under the Ordinance, SMC § 3.02.030.B, to a "meaningful opportunity to comment" on the rules—rules that directly concern how they work and operate. An agency acts arbitrarily and capriciously when it adopts rules without giving interested parties a meaningful opportunity to comment, and without regard to the legislatively mandated process for rulemaking. *See, e.g.*, *N. Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 769-70 (4th Cir. 2012) (finding agency rules arbitrary and capricious because, among other things, agency adopted them without a "meaningful opportunity for comment").

Second, the rules disregard the facts and circumstances of the industry and lack a rational basis:[1] they represent a significant departure from well-settled principles of labor law and ignore the practical realities of the for-hire transportation industry, as reflected in the public comments. Indeed, the Director ignored feedback on the critical issue of defining "qualifying

[1] An agency acts arbitrarily and capriciously when, as here, it takes action that is "willful and unreasoning and . . . without regard to the attending facts or circumstances." *Puget Sound Harvesters*, 157 Wn. App. at 951 (invalidating rules as arbitrary and capricious because they lacked rational basis and the agency had acted only "cursorily in considering the facts and circumstances surrounding its actions").

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driver," i.e., which drivers would have a right to vote in the collective bargaining process, choosing to draw an arbitrary line which excludes thousands of drivers from having the right to vote. Rather than allowing all drivers to vote on whether or not they will be represented by a labor organization, FAS limited the voting population to drivers meeting a significant trip threshold before an arbitrary cutoff date. As a result, the City is, without a rational basis, effectively silencing the voices of thousands of drivers on decisions that will affect their work. Moreover, FAS has failed to provide due consideration and protection for the privacy protections of drivers whose information will be provided to organizations seeking to represent drivers and has failed to ensure drivers are protected from retaliation, harassment, and coercion.

Because the City, FAS, and Director acted arbitrarily and capriciously in adopting the incomplete set of rules implementing parts of the Ordinance, and "because the right to be free from arbitrary and capricious action is itself a fundamental right," the Court should grant Rasier's petition for a writ. *Wash. State Dep't of Corr. v. Wash. State Pers. Appeals Bd.*, 92 Wn. App. 484, 489, 967 P.2d 6 (1998) (citing *Pierce Cnty. Sheriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 693–94, 658 P.2d 648 (1983)).

III. STANDARD FOR ISSUANCE OF WRIT

Under article IV, section 6 of the Washington Constitution, Superior courts "have the power to issue writs of . . . certiorari." This inherent power extends to review of "administrative decisions for illegal and manifestly arbitrary acts." *Saldin Sec., Inc. v. Snohomish County*, 134 Wn.2d 288, 292, 949 P.2d 370 (1998). "In a constitutional writ action, the superior court 'looks initially to the petitioner's allegations to determine whether, if true, they clearly demonstrate [the agency acted illegal or arbitrary and capriciously]', and '[i]f they do, review should be granted . . .'" *Id.* at 293 (quoting *King County v. Wash. State Bd. of Tax Appeals*, 28 Wn. App. 230, 238, 622 P.2d 898 (1981)).

An "[a]rbitrary and capricious action is [a] willful and unreasoning action, without consideration and in disregard of facts and circumstances." *Klickitat County v. Beck*, 104 Wn. App. 453, 459, 16 P.3d 692 (2001) (internal quotation marks omitted); *see also Hood Canal*

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Sand & Gravel, LLC v. Goldmark, 195 Wn. App. 284, 307, 381 P.3d 284 (2016). An action based on administrative authority is arbitrary and capricious when it is not "exercised honestly and upon due consideration." *Hood Canal Sand & Gravel*, 195 Wn. App. at 308 (internal quotation marks omitted).

This articulated standard for court review under a constitutional writ of certiorari is identical to court review of a state agency rulemaking process under the "arbitrary and capricious" set forth in the state Administrative Procedure Act (APA), chapter 34.05 RCW. *See, e.g.*, *Puget Sound Harvesters Ass'n v. Wash. State Dep't of Fish & Wildlife*, 182 Wn. App. 857, 867, 332 P.3d 1046 (2014) ("[A]gency action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts and circumstances.") (quoting *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 148 Wn.2d 887, 905, 64 P.3d 606 (2003) (analyzing RCW 34.05.570(2)(c))). Under the APA, "[t]he remedy for failure to comply with applicable APA rulemaking procedures is invalidation of the action." *Failor's Pharmacy v. Dep't of Soc. & Health Servs.*, 125 Wn.2d 488, 497, 886 P.2d 147 (1994).

IV. PARTIES, JURISDICTION AND VENUE

Rasier is a Delaware limited liability company with its principal place of business in California. It is a wholly owned subsidiary of Uber Technologies, Inc. Rasier operates a transportation network used by thousands of drivers within the jurisdictional limits of the City of Seattle and is subject to the Ordinance.

Respondent City of Seattle is a First-Class Charter City under RCW 35.01.010 in the State of Washington.

Respondent FAS is a municipal agency of the City. The Ordinance has charged FAS with promulgating the rules necessary for implementing, administering and enforcing the Ordinance. It is the arbitrary and capricious nature with which FAS and its Director have acted in relationship to these duties that are at issue in this action.

Respondent Fred Podesta is the Director of FAS.

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The Superior Court of the State of Washington for King County has jurisdiction over this writ under article 4, section 6 of the Washington State Constitution.[2]

Venue is proper in King County pursuant to RCW 4.12.020. Venue is also proper because Rasier does business in the City of Seattle and in King County.

V. BACKGROUND

A review of the for-hire transportation industry, the origin of the Ordinance, and the rulemaking process, are essential to appreciate the arbitrary and capricious actions by the City, FAS and its Director.

A. Drivers and Passengers Benefit In The For-Hire Transportation Industry When Drivers Control Their Businesses.

Rasier is a software technology company that connects individual riders with independent transportation providers looking for paying passengers. Rasier provides this technology through a smartphone App. To pay for the ride service, the rider links a credit or debit card to his/her account, requests a ride by tapping on the App and providing a destination, and the App automatically deducts the price. The App also permits riders and drivers to provide real-time feedback on each other. The App is available to drivers and riders in over 150 cities across the country. Declaration of Brooke Steger ("Steger Decl.") ¶ 3.

To receive transportation requests via the App, drivers in and around Seattle download Uber's App, contract with Rasier, and agree to pay a licensing fee for the use of the App, which is a percentage of the price the rider pays. *Id.* ¶ 4. Fares vary based on the length of the ride, quality of vehicle requested, and supply and demand (including the time of day and the day of the week). Because weekend evenings are more popular for ride requests, the same ride may cost more on the weekend than if taken mid-day and mid-week. This dynamic pricing model ensures service reliability by correcting supply/demand imbalances. It guarantees that people

[2] Article IV, section 6 states in relevant part, "The superior court shall. . . have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court . . . Said courts and their judges shall have power to issue writs of . . . certiorari."

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who request a ride during a time of high demand will get one, and it incentivizes drivers to operate at peak times, increasing supply and lowering prices once again. *Id.* ¶ 5.

The App gives drivers great freedom and flexibility. Just as the rider can turn the App on whenever he/she needs a ride, drivers, too, can turn the App on whenever they wish to work, and can turn off the App whenever they decide to take a break for the day, the week, or season. Thus, drivers determine their own schedules, including whether they want to work part time, full time, or some other combination or variation of the two. *Id.* ¶ 6. Drivers using the App do not have an exclusive relationship with Rasier and are free to (and do) use other platforms. This freedom and flexibility, however, means there is no "typical" driver. Drivers often discontinue their use of the App for extended periods of time, and new drivers frequently start using the App, creating a constantly changing driver force. Additionally, many active drivers use the App only occasionally throughout the work week but more so on the weekend, while others use the App only when they need additional income for a specific project or purpose, after which they do not use it again for months, or ever. Notably, more than 50% of the drivers in Seattle who have an active account use the App for less than 12 hours per week. *Id.* ¶ 7.

The flexibility of this on-demand service and work opportunity benefits riders and drivers alike.[3] Many consumers, particularly in urban areas, now use these services as their principal form of transportation. And many workers who require a flexible work schedule, who were previously unable to find work, or who need to supplement their income, now earn money working as TNC drivers. *Id.* ¶ 8.

B. The Ordinance Deprives Drivers of Control of Their Businesses.

On December 14, 2015, the City adopted the Ordinance under RCW 46.72 and 81.72. The City enacted the Ordinance over Mayor Murray's expressed concerns that it contained "several flaws."[4] The Mayor returned the Ordinance unsigned on December 23, 2015, and

[3] *See* Hall & Krueger, An Analysis of the Labor Market for Uber's Driver-Partners in the United States (Jan. 22, 2015), https://irs.princeton.edu/sites/irs/files/An%20Analysis%20of0/o20the%20Labor%20Market%20for%20Ub24er%E2 %80%99s%20Driver-Partners%20in%20the%20United%20States%205 87 .pdf.

[4] Rasier includes the Ordinance and the Mayor's remarks as Appendix A.

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informed the City Council that to addresses his concerns, he would ask it to provide clarifying legislation. *See* Appendix A. The City Council did not provide the clarifying legislation or take other action to address the Mayor's concerns. On January 22, 2016, the Ordinance became law under SMC 1.04.020, without the Mayor's approval.

The Ordinance applies to drivers of taxicabs, for-hire vehicle companies, and TNCs. SMC § 6.310.110. These drivers are independent contractors. SMC § 6.310.100.[5] The Ordinance states that its purpose is to establish ***a collective bargaining process*** for these self-employed drivers and for TNCs, taxicab and for-hire companies. SMC § 6.310.100.[6] By its express terms, the Ordinance promised to create a process through which for-hire drivers would have "meaningful" input (Section 1, Paragraph E), "enabling driver participation" (Section 1, Paragraph I.2) through the Exclusive Driver Representatives that serve as the "representative of all-for hire drivers operating within the City for a particular driver coordinator." SMC § 6.310.110. Section 1.I states,

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

The process outlined in the Ordinance is keyed to the "Commencement Date," now January 17, 2017, SMC § 6.310.110, and establishes a timeline for certain milestones:

- Within 30 days of the Commencement Date, entities wishing to be Qualified Driver Representatives ("QDR") must submit their requests to the Director. SMC § 6.310.735.C.

[5] The ordinance necessarily applies only to independent contractors. The right for employees to collectively bargain is exclusively governed by existing federal labor law.

[6] A "driver coordinator" includes any entity that "contracts with" for-hire drivers "for the purpose of assisting them with, or facilitating them in, providing for-hire services to the public." SMC § 6.310.110. Driver coordinators include, but are not limited to, "taxicab associations, for-hire vehicle companies, and transportation network companies," including companies like Rasier.

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- Within 14 days of receiving such request, the Director must notify such entity whether it has been designated a QDR. The Director then provides a list of all the QDRs to the Driver Coordinators. SMC § 6.310.735.C.
- Within 14 days following its designation as a QDR, such entity must notify a Driver Coordinator that it wishes to be the exclusive driver representative ("EDR"). SMC § 6.310.735.C.2.
- Within 75 days following the Commencement Date, Driver Coordinators that have engaged 50 or more for-hire drivers in the 30 days prior to the Commencement Date must give each QDR that has notified such Driver Coordinator that it wishes to be that Driver Coordinator's EDR, a list of the names, addresses, email addresses and phone number of "all qualifying drivers they hire, contract with, or partner with." SMC § 6.310.735.D.
- Within 120 days following the receipt of such information, the QDRs must submit "statements of interest" from a majority of the "Qualifying Drivers" on the list provided. The statements of interest declare that the "Qualifying Driver" wants to be represented by the QDR for the purpose of negotiations with the driver coordinator. SMC § 6.310.735.F.1.
- If a majority of a Driver Coordinator's drivers consent to the representation, the Director must, within 30 days, certify the QDR as the EDR "for all drivers for that particular driver coordinator," representing all drivers who do business with that driver coordinator and, correspondingly, preventing 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. If more than one QDR obtains signatures from a majority of a particular coordinator's drivers, the Director is required to certify the QDR who received the most signatures as the EDR. SMC § 6.310.735.F.2.
- Within 90 days following the certification of the EDR, the EDR and the Driver Coordinator must "negotiate in good faith certain subjects to be specified in rules or regulations promulgated by the Director, including, but not limited to, best practices regarding vehicle equipment standards; safe driving practices; the manner in which the driver coordinator will conduct criminal background checks of all prospective drivers; the nature and amount of payments to be made by, or withheld from, the driver coordinator to or by the drivers; minimum hours of work, conditions of work, and applicable rules." SMC § 6.310.735.H.1.
- After reaching agreement, the EDR and the Driver Coordinator must transmit the written agreement to the Director for review. If the parties fail to reach agreement within 90 days, either party may request interest arbitration. SMC § 6.310.735.H.3.
- Within 60 days of receipt of the agreement, the Director determines whether the agreement complies with the Ordinance. If the Director finds that the agreement complies, it becomes binding on the parties. If not, the Director remands the agreement back for further negotiation. SMC § 6.310.735.H.2.

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C. The Director of FAS Conducts a Rulemaking Process Which Disregarded the Facts and Circumstances of the Industry, the Uniform Comments Received, and Promulgates Arbitrary and Capricious Rules.

The Ordinance leaves much of the detail of the collective bargaining process to administrative rulemaking under the Seattle Administrative Code, Chapter 3.02 SMC.[7] The Director of FAS is responsible for, and oversees, this rulemaking process. As detailed below, after months of delay, the Director and FAS began the rulemaking process with workshops and by receiving feedback from the public but abruptly changed course late in 2016 by: (a) preparing and finalizing a partial and incomplete set of rules, thereby denying the public the ability to comment meaningfully; (b) providing only eight working days' notice (over the Thanksgiving holiday) of a public hearing and sharply limiting the time for comments to half the typical time permitted; and (c) releasing rules that ignored the overwhelming public comments—consistent with fundamental labor law—that every driver who would be subject to a collective bargaining agreement should have the right to vote. Instead, FAS relied solely on a survey it knew was flawed to justify creating an arbitrary line excluding thousands of drivers from having a voice in their working conditions. The result of this arbitrary and capricious process was an incomplete set of rules which disregard the facts and circumstances of the industry, public comments, and labor law.

1. Prior to FAS Promulgating Draft Rules, Stakeholders Expressed the Importance of Every Driver Having A Right To Vote.

The Ordinance sets forth a process by which a labor organization may seek to represent all drivers for a particular driver coordinator (or for each TNC) and vests such a labor organization with the exclusive authority to "negotiate, obtain and **enter into a contract** that sets forth terms and conditions of work **applicable to all of the for-hire drivers** employed by that driver coordinator." SMC § 6.310.110 (emphasis added). Thus, under the expressed terms of the Ordinance, the "bargaining unit" to be represented by such labor organization is

[7] The scope of rulemaking was, according to *The Seattle Times*, a "hot potato" between the Mayor and City Council, each of which preferred to have the other decide critical aspects, such as which drivers would have the right to vote on whether to join a union. *See* *http://www.seattletimes.com/seattle-news/politics/which-uber-drivers-will-get-to-vote-on-unionization-neither-mayor-nor-council-wants-to-decide/*

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one composed of "all for-hire drivers" for the targeted driver coordinator. The fundamental question left to FAS rulemaking was whether "all of the for-hire drivers" within this defined bargaining unit and affected by representation of any elected labor organization will be considered as a "qualifying driver" and have a right to vote on the question of that representation (i.e., do the drivers that will be represented get to vote on that representation?). FAS ruled not "all of the for-hire drivers" would be given a voice and vote on the question of representation. Instead, FAS limited that right to an arbitrary subset thereby disenfranchising thousands of drivers that will come under any selected representation. In so ruling, FAS ignored the facts and circumstances of the industry, well established and fundamental principles of federal and state labor policy, as well as the public's comments.

In June and July 2016, FAS hosted stakeholder workshops to address several questions, including how to determine the group of drivers to come within the definition of "qualifying driver" and thereby given the right to vote on representation.[8] Approximately 200 stakeholders participated, including Rasier, who also provided written responses to the questions presented at the workshops. Steger Decl. ¶ 9, Ex. A.

Consistent with the scope of the bargaining unit that would be represented (i.e., all for-hire drivers), the considerations set out in the Ordinance, as well as federal labor policy, Rasier argued that the rule defining the term should be broad and inclusive, ***enfranchising every driver***.[9] *Id.* Any rule that limits drivers' participation and, therefore, drivers' voices based upon an arbitrary number of trips or "tenure" as a driver excludes drivers who still have a significant impact on safety and reliability, and should be a qualifying driver. Such drivers often choose to drive at times of peak demand, which helps ensure the supply of drivers meets the demand of riders. Similarly, any rule that limits driver participation based on the length of

[8] Additional questions presented included (1) the process by which the City should approve and select qualified driver representatives; (2) the manner and format by which drivers should be required to express interest in a QDR, and the mechanism by which an EDR should be selected; (3) mandatory and permissive subjects of bargaining; (4) the timing of when the Directors shall approve collective bargaining agreements, along with questions about the Director's role more broadly; and (5) and other potential areas of conflict and concern that need the stakeholders felt needed to be addressed.

[9] *See, e.g.*, https://www.seattlemet.com/articles/2016/9/5/uber-ordinance-doesn-t-meet-labor-law-standards

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trips would exclude urban drivers, whose trips may be frequent but short. For these reasons, Rasier argued that the only fair approach that is consistent with the Ordinance's stated purpose is to enfranchise every active driver (defined as all individuals eligible to drive on the driver coordinator's platform and remain eligible through the 120-day statement of interest period). *Id.*

In August 2016, the City Council encouraged FAS to consider looking to federal and state labor law for a standard.[10] Rasier agreed with the Council's suggestion and outlined federal and state labor principles for FAS. Id. ¶ 10, Ex. B. Apparently concerned about the ramifications of drawing lines among and between drivers, after the workshop, rather than moving forward with drafting rules that are consistent with the Ordinance, the executive sought to push the issue back to the City Council. On August 17, 2016, the Mayor's office informed City Council members that given the importance of the definition for "qualifying driver," the City Council should promulgate a legislative definition, as opposed to FAS promulgating a definition administratively.[11] Unwilling to hold the hot potato, the City Council refused, so no definition was promulgated in time for the original commencement date of September 18, 2016. Consequently, the City Council amended the Ordinance to allow for a later commencement date of January 17, 2017, to apparently give FAS time to address the politically sensitive issue of whether to allow all drivers the right to vote or to limit the voting pool which likely increases a union's chance of success.

2. The Director Conducts Flawed Surveys In Attempt to Fabricate A Rational Basis to Exclude Drivers From Voting.

Ignoring federal labor policy promoting voting rights for all affected workers, as well as the practical reality of the industry when set against the Ordinance's standard, FAS decided to create a per trip or duration of work threshold for voting. Compounding the error in pursuing

[10] *See, e.g.*, Video of City Council Committee meeting, held on August 3, 2016, at 1:06:18, http://www.seattlechannel.org/mayor-and-council/city-council/20162017-education-equity-and-governance-committee/?videoid=x66702 (last visited January 13, 2016).

[11] Video of City Council Committee meeting held on August 17, 2016, http://www.seattlechannel.org/mayor-and-council/city-council/20162017-education-equity-and-governance-committee/?videoid=x67439 (last visited Nov. 23, 2016).

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such a course, FAS created its voting threshold by relying upon a fatally flawed driver survey while refusing to consider more reliable data. This willful disregard of the facts and circumstances is arbitrary and capricious.

In October 2016, FAS notified stakeholders it intended to conduct driver surveys to gather more information to assist in determining who should have a right to vote. In explaining the survey process, it was apparent that the process was critically flawed and would permit an unknown number (potentially thousands) of former drivers to participate, while disenfranchising thousands of current drivers. Steger Decl. ¶ 11, Ex. C.

The survey had a response rate reported to be, at best, around 10 percent. In addition, FAS used an outdated database of cell phone numbers from King County which prevented thousands of current drivers from participating in the survey while allowing an unknown number of individuals who are no longer drivers to complete the survey. At the time the survey was conducted, King County had a backlog of over 2,000 applications for TNC driver permits, meaning that over 2,000 drivers were neither notified of the survey by FAS nor allowed to complete the survey, because their cell phone numbers had not yet been included in the list. In addition to omitting thousands of current drivers, it included unknown numbers of former drivers because the database had not been purged of inactive drivers. *Id.*

Rasier notified FAS of these deficiencies and repeatedly offered to facilitate FAS communicating with all of its current Seattle drivers, but FAS repeatedly declined those invitations. *Id.* ¶ 12. Instead, FAS proceeded with its misguided approach. The surveys denied drivers covered by the Ordinance the opportunity to be heard and captured information from individuals who are not covered by the Ordinance and have no stake in the rulemaking process.

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3. The Director Promulgates Limited Draft Rules that Would Disenfranchise Drivers and Fast-Tracks Public Comment to Limit Stakeholder Participation.

On November 23, 2016, the Director promulgated a limited and incomplete set of draft rules[12] which he acknowledges covers only a portion of the issues that must be included to implement the Ordinance; a second packet of rules will be released later in 2017. In particular, the proposed rules released thus far do not address:

- Rules or regulations deemed "necessary, appropriate, or convenient" to administer the Ordinance as required by SMC 6.310.735.M.1.
- Rules or regulations deemed "necessary, appropriate, or convenient" regarding just how the collective bargaining process itself will be conducted or just how interest arbitration will proceed.
- Rules or regulations deemed "necessary, appropriate, or convenient" for establishing standards for unlawful coercion and interference.
- Standards and procedures for submitting a decertification petition relating to the EDR as required by SMC 6.310.735.L.1.
- Standards and procedures for submitting and verifying statements of interest by qualifying drivers for decertifying an EDR as required by SMC 6.310.735.L.4.

The same day the Director promulgated the proposed rules, November 23, 2016, and the day before the Thanksgiving Holiday, the Director scheduled a public hearing for taking comments on the draft rules. The Director set the hearing for December 6, 2016, just eight working days later. Steger Decl. ¶ 13.

On December 2, 2016, Rasier sent a letter to Mr. Podesta raising a number of concerns with the comment process, including the fact that drivers and other concerned citizens were allowed only eight working days, including the day after Thanksgiving, to review and comment on the draft rules that the City spent over 11 months developing. *Id.* ¶ 14, Ex. D. The letter also protested a decision by the City to limit public comment at the hearing to one minute per commenter, which had a particularly detrimental impact on individuals from immigrant

[12] The draft rules defined "Qualifying Drivers" (FHDR-1); described the application process for designated QDRs (FHDR-2); outlined the certification process for EDRs (FHDR-3); and delineated mandatory subjects of bargaining (FHDR-4). Rasier attaches a true and accurate copy of the proposed rules as Appendix B.

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communities for whom verbal presentations are considered most appropriate but may require a longer period to communicate an opinion because English is not their primary language. *Id.* Notwithstanding Rasier' concerns, FAS proceeded with the public comment hearing as planned.

At the December 6, 2016 public hearing, an overwhelming majority of the hundreds of drivers who spoke sent a clear message—*EVERY* driver should have a fair and equal voice on whether to be represented by a union. On the day of the hearing, Rasier submitted written comments to the proposed rules and testimony at the hearing that echoed the comments of the drivers and offered alternative language for the rules. *Id.* ¶ 15, Ex. E. Rasier also engaged in an outreach effort to drivers through e-mails, phone calls, a website, hosting events, and in facilitating the creation of a driver and community organization. *Id.* ¶ 15.

In addition to Rasier, other stakeholders, such as Eastside for Hire ("Eastside"), a minority and locally owned business, and Lyft submitted comments to FAS raising similar concerns with the rulemaking process, asserting that the unnecessary rush toward implementation and the unreliable survey process denied drivers, including immigrant drivers, the opportunity to be heard and to be well informed about the process. *Id.* ¶ 16, Exs. F and G. Lyft explained that "nearly 45% of all drivers, and counting, would be disenfranchised from voting for or against representation that could significantly impact how they earn their livelihood." *Id.* at Ex. G. Of importance, Eastside noted that the proposed rules would exclude many of its drivers, including drivers who work reduced schedules or who do not pick-up in Seattle, from having a voice on whether to be represented by a union, yet their work would be governed by any collective bargaining agreement negotiated between Eastside and an EDR. *Id.* at Ex. F. Further, Eastside noted problems, similar to those noted above, created by the Director's decision to piecemeal the regulations, including possible conflicts created by the different for-hire models. *Id.*

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4. The Director Ignores Facts and Circumstances Evidenced by Public Comment and Finalizes Arbitrary and Capricious Rules.

The Director did not act on Petitioner's comments or the comments of other stakeholders, instead finalizing the subset of required rules without meaningful modification.[13] Incredibly, in a cover letter releasing the final rules, the Director erroneously proclaimed, "FAS received an overwhelming amount of feedback. However, that feedback ***did not offer*** many specifics on how FAS should address the Ordinance's critical question – what is a qualified driver." *Id.* at Ex. H (emphasis added). This willful disregard of the facts after conducting a hasty process addressing an incomplete set of rules is the very definition of arbitrary and capricious. Indeed, the overwhelming majority of comments – apparently all written comments – plainly provided specific guidance that all drivers should be qualified drivers entitled to vote.

This consistent theme – all drivers have a right to vote – is present not only in the written comments from Rasier, Eastside, Lyft, drivers, and outside parties, *id.* at Ex. I, but even ***the FAS Director's own staff's summary of oral public comments*** at the hearing. The staff's own summaries contradict the assertion in his cover letter that FAS did not receive many comments on the fundamental issue of who should vote:

- "all drivers vote"
- "Control business; deserves to decide and have vote"
- "each driver should have a voice"
- "every driver has a voice"
- "everyone needs to have a voice"
- "Thousands of voices silenced; voices equal votes; value flexibility and a vote"
- "Government did not help with my family; kids now have future; wants to speak for myself"
- "One of first Uber drivers; all drivers should have a vote"
- "all drivers get a vote"

[13] Rasier attaches a true and accurate copy of the final rules as Appendix C.

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- "every driver gets a vote"
- "every driver votes"
- "Don't take Uber and my right to vote away"
- "all drivers get a vote"
- "everybody needs to vote"
- "every driver deserves a vote"
- "Each driver must vote"
- "Want opportunity to vote"
- "Independent business person; many others who need to qualify as well"
- "Every driver needs a vote"
- "everyone who has an active license/permit gets a vote"
- "Right to vote for every driver"
- "every driver should have a vote"
- "What is City Council afraid of by letting group vote on proposals?; limiting voters is unfair and un-American"
- "Every driver gets a vote"
- "let everyone vote and see who wins"
- "Excluding voters reminds us of the 19th century; don't fix something that isn't broken"
- "a right to have a voice and be independent"
- "should have the right to vote (everyone)"

Id. at Ex. J.

Petitioner's written comments and testimony at the hearing, as well as those made by other stakeholders, showed that the incomplete proposed rules were not based in the factual realities of the industry and were, therefore, arbitrary and capricious. The proposed rules disenfranchised thousands of drivers who work part-time or work full-time but only recently began driving – presumably to favor labor organizations through the process. Indeed, the Director, in promulgating the proposed rules, ignored commonly held norms in labor law—

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designed to place individuals, companies and labor organizations on even footing—without providing any justification for the departure. The Director's segmented and piecemeal approach to rulemaking also contravened clear mandates in the Ordinance and deprived stakeholders of a meaningful opportunity to comment under Chapter 3.02 SMC.

VI. AUTHORITY

When deciding whether to issue constitutional writs of certiorari under article IV, section 6 of the Washington Constitution, courts apply a two-prong test (1) no other avenue or appeal must be available; and (2) facts must exist that, if verified, indicate the lower tribunal acted in an illegal or arbitrary and capricious manner. *See Saldin Sec., Inc. v. Snohomish County*, 134 Wn.2d 288, 294-95, 949 P.2d 370 (1988); *Pierce Cnty. Sheriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 693-94, 658 P.2d 648 (1983); *Bridle Trails Cmty Club v. City of Bellevue*, 45 Wn. App. 248, 251-252, 724 P.2d 1110 (1986). Both prongs are satisfied in this case.

A. No Other Adequate Remedy at Law Exists.

The City adopted its own Administrative Code at Chapter 3.02 SMC, which generally governs all City administrative rulemaking. But, the Seattle Administrative Code has no independent mechanism for seeking independent judicial review of City rulemaking. Furthermore, no legislatively created right to judicial review exists, and a statutory writ of certiorari under RCW 7.16.040 is not available because Petitioners do not seek review of judicial or quasi-judicial acts. Where, as here, no other method or procedure is available to obtain review of the Director's arbitrary and capricious rulemaking, no other adequate remedy at law exists and the writ should be granted. *See, e.g.*, *Bridle Trails*, 45 Wn. App. at 251-252.

B. The City Acted Arbitrarily and Capriciously in Process and Substance,

The process the City followed and the rules it published are arbitrary and capricious. The rules are, therefore, invalid. *Puget Sound Harvesters Ass'n v. Wash. State Dep't of Fish & Wildlife*, 157 Wn. App. 935, 944-945, 239 P.3d 1140 (2010) ("In a proceeding involving review of a rule, the reviewing court shall declare the rule invalid only if it finds that . . . the

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rule is arbitrary and capricious."). "An agency action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances." *Id*. at 945. "When an agency makes rules without considering their effect on agency goals, it acts arbitrarily and capriciously, without regard to the attending facts or circumstances." *Id*. at 950. Here, the City followed a process which prevented it from regarding the facts and circumstances of the industry and created arbitrary and capricious rules.

1. The City's Process was Arbitrary and Capricious.

The City's process was arbitrary and capricious in two ways. First, the Director's decision to publish and implement a partial set of rules is inconsistent with the authorizing ordinance's direction to create a comprehensive set of rules. Second, the process denied the public a meaningful opportunity to comment by (a) requiring comment on piecemeal rules without the ability to assess the interplay between those rules and yet-to-be created rules necessary for implementing the ordinance; (b) providing only eight working days' notice (during the holidays) in advance of a public hearing; (c) limiting testimony to one minute per speaker (which is half the typical time usually allotted for public comments); and (d) failing to respond to all comments by category or subject matter, indicating how the final rule reflects agency consideration of the comments, or why it fails to do so.[14]

a. The Director's Decision to Issue Rules in Piecemeal Form is Arbitrary and Capricious.

When an agency makes rules without considering their effect on agency goals, or without regard to the attending facts or circumstances, it acts arbitrarily and capriciously. *See Puget Sound Harvesters*, 157 Wn. App. at 950. Here, the Ordinance contains extensive "Findings" that underscore the importance of establishing a complete collective bargaining process between the for-hire drivers and individual driver coordinators. The City Council intended that this "process"—from the definition of qualifying drivers and QDRs, through the process of selecting the EDR, to the negotiation of the agreement upon the identified subjects

[14] *Puget Sound Harvesters*, 157 Wn. App. at 939 n.1 (citing RCW 34.05.325) (explaining APA requires state agencies to respond to all comments).

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of bargaining, to the decertification of EDRs—be a unified, holistic undertaking with a definite beginning and end. In other words, the legislative scheme put forth by the Council requires a *comprehensive set* of administrative rules to properly implement the Ordinance, not piece-meal rulemaking. Breaking up the rulemaking into batches is, therefore, antithetical to the holistic scheme contemplated by the Council. *See, e.g., Ctr. for Biological Diversity v. EPA*, 722 F.3d 401, 410 (D.C. Cir. 2013). (Biogenic carbon dioxide sources not sufficiently distinct from fossil fuel carbon dioxide sources to justify deferred, one-step-at-a-time regulation under the Clean Air Act.).

As indicated above, and in Rasier's comments to the proposed Rules, the existing rules do not constitute a full and comprehensive set of rules reflecting the legislative scheme enacted by the City Council. To date, no rules exist covering:

- The standards and procedures for submitting a decertification petition relating to the exclusive driver representative as required by SMC 6.310.735.L.1;
- The standards and procedures for submitting and verifying statements of interest by qualifying drivers for decertifying an exclusive driver representative as required by SMC 6.310.735.L.4; and
- Any rules or regulations deemed necessary, appropriate, or convenient to administer the Ordinance as required by SMC 6.310.735.M.1.

That there are no such rules is significant. The Ordinance does not provide sufficient direction regarding how the collective bargaining process itself will be conducted, how disputes arising from the collective bargaining process will be resolved, or how interest arbitration will be carried out. The Ordinance also fails to provide adequate guidance regarding standards for unlawful coercion and interference. And, the Ordinance does not provide sufficient direction on how to include future for-hire drivers in the process, including whether and how such future drivers may vote on the agreement. In addition to EDR decertification, each of these missing subjects – collective bargaining, interest arbitration, the rights of future drivers and standards for unlawful coercion and interference – is integrally related to the subjects covered by the Director's existing rules (FHDR-1, FHDR-2, FHDR-3, and FHDR-4). The Director should

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have issued rules governing these subjects as well. The Director acted arbitrarily and capriciously when he refused to do so.

Further, the Director's actions have hampered Rasier in its immediate need to educate drivers about the Ordinance and the potential impacts of exclusive representation by an EDR. Rules regarding unlawful coercion have not been released, tilting the scales heavily in favor of collective bargaining representatives. The Ordinance mandates that driver coordinators shall not offer anything of value to encourage the driver to exercise, or to refrain from exercising collective-bargaining rights under the Ordinance. SMC 6.310.735.K. Consequently, Rasier is faced with an untenable dilemma: either forego any outreach efforts (and forfeit its rights under the First Amendment) until all the rules and regulations are promulgated, or continue its education and outreach to educate drivers about the potential consequences of choosing to be represented by an EDR. If it chooses the former option, Rasier will not have the opportunity to communicate with drivers before they submit their statements of interest (rendering any education campaign too little, too late). If it chooses the latter option, Rasier runs the substantial risk of running afoul of rules promulgated after the commencement date, and incurring substantial penalties ($10,000 per violation per day). There is no rational or legal basis for forcing Rasier to operate in such an uncertain regulatory environment.

b. The Director Adopted Rules Without Compliance with Rule-making Procedures and Arbitrarily Prevented Stakeholders from Exercising their Rights for a Meaningful Opportunity to Comment.

The City arbitrarily and capriciously failed to follow even its own requirements to provide all interested persons an opportunity to comment on the proposed rules. Specifically, SMC § 3.02.030.B states, "Prior to the adoption, amendment or repeal of any rule, an agency shall: . . . [a]fford all interested persons an opportunity to present data, views, or arguments in regard to the proposed action; provided, that if the agency finds that oral presentation is unnecessary or impracticable, it may require that presentation be made in writing."

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To meet this "opportunity to comment" requirement, an administrative rulemaking agency must do more than merely receive the comments; it must afford interested parties a meaningful opportunity to make comments.

> The purpose of rule-making procedures is to give notice to the public of the proposed rule and to allow it to comment on the proposal. ***Technically sound, lawful, and politically responsive rules are more likely if there is ample advance notice of the terms of proposed rules and a full opportunity for, and consideration of, public comment***.

Hunter v. Univ. of Wash., 101 Wn. App. 283, 293, 2 P.3d 1022 (2000) (emphasis added) (internal citation and quotation marks omitted). A meaningful opportunity to comment is one where stakeholders have enough information about the entire regulatory scheme, and enough time to provide substantive comments. Perhaps more importantly, the regulatory agency must also keep an open mind, and then fully consider and respond to the submitted comments. *See, e.g., McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1325 (D.C. Cir. 1988) (discussing obligation to remain open-minded); *Prometheus Radio Project v. F.C.C.*, 652 F.3d 431, 449-50, 453 (3d Cir. 2011) (same); *Fed. Express Corp. v. Mineta*, 373 F.3d 112, 120 (D.C. Cir. 2004) (same); *see also Louis v. U.S. Dep't of Labor*, 419 F.3d 970, 976–77 (9th Cir. 2005) (invalidating rule because the agency "never afforded itself the opportunity educate itself on the full range of interests the rule affects"). Administrative rules adopted in a rulemaking process that denied interested parties a meaningful opportunity to comment are invalid. 419 F.3d at 976-77 (holding that rules adopted without public comment are invalid).

As the timing of the comment period alone illustrates, the Director did not keep an open mind in this case. After spending over eleven months working on what is being represented as just the first installment of an incomplete set of proposed rules, the City announced its proposed rules on November 23, 2016, allowed drivers and members of the public only eight working days[15] to review and understand the draft rules and to then prepare and then submit comments by December 6, 2016. FAS also limited each speaker at the hearing to one minute,

[15] The Friday after Thanksgiving is a holiday, not a working day. RCW 1.16.050(j).

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demonstrating that the City was not interested in hearing from those directly and substantially affected by its rulemaking. Plainly, the City had already formulated its approach to implementing the Ordinance and never intended to change its mind, regardless of the criticism and testimony offered by affected stakeholders. That the City did not engage Petitioner's comments substantively in any way or otherwise modify its proposed rules in response to Petitioner's written critique only further illustrates the City's closed-mindedness. Indeed, given the extensive public comments by Petitioner and others identifying significant issues presented by the draft rules, the essentially wholesale adoption of the draft rules in the final rules combined with the Director's inaccurate statement that public comments "did not offer many specifics on how FAS should address . . . what is a qualified driver" (in fact, the subject of the majority of comments) calls into question whether the comments were reviewed at all.

The City's rulemaking methodology, which develops rules for a holistic collective bargaining process in separate batches, also denies interested parties a "meaningful opportunity to comment." As discussed above, the City Council created a comprehensive collective bargaining process where each step depends on the prior step and shapes the subsequent steps. Each of the contemplated rules filling in the details for each of these steps is integrally related to the rules governing the prior and subsequent steps. As a result, an interested party wishing to comment upon these proposed rules cannot do so fully unless the comprehensive set of rules is proposed at the same time. The subjects missing from Director's existing rulemaking– collective bargaining, interest arbitration, standards for unlawful coercion and interference, the rights of future drivers and EDR decertification – are clearly integrally related to the included subjects – qualifying drivers, qualified driver representatives, exclusive driver representatives, and subjects of bargaining. Issuing rules in batches, rather than as a comprehensive set as contemplated by the Ordinance, makes it impossible for interested parties to comment on how these subjects are related and how proposed rules governing these subjects affect each other. As such, the Director deprived interested parties, including Petitioner, of an opportunity to comment meaningfully on this first batch of rules (because it is not known what the subsequent

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rules will be). The Director also deprived interested parties, including Petitioners, of an opportunity to comment meaningfully on the subsequently proposed rules (because the prior rules will have been adopted already). Administrative rules adopted in a rulemaking process that denies interested parties a meaningful opportunity to comment do not comply with the City's legislative process and are arbitrary and capricious.

2. The Director Acted Arbitrarily and Capriciously By Promulgating Rules That Are Not Based on the Facts and Circumstances of How the For-Hire Industry Operates and Are Inconsistent with Labor Precedent.

The Director promulgated a limited set of rules that ignored the facts and circumstances of the for-hire transportation industry and fundamental principles of labor law. As a result, the rules are invalid as arbitrary and capricious.

a. The Rules Arbitrarily Exclude Thousands of Drivers from having a Voice in Whether They will be Subject to Representation by a Labor Organization.

The rules arbitrarily limit the pool of for-hire "Qualifying Drivers" who can have a voice on whether to be represented by a labor organization, excluding thousands of drivers who should have the right to vote.

Under the new rule, a "Qualifying Driver" is a for-hire driver that "[(1)] [h]as been hired by, contracted with, partnered with or maintained a contractual relationship with a particular Driver Coordinator for the entire 90-day period immediately preceding the commencement date [January 17, 2017]; ***and*** [(2)] [h]as 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." FHDR-1 (emphasis added). Because the rule is stated in the conjunctive, both prongs must be satisfied. The line drawing is arbitrary and not tied to or supported by a rational basis.

First, the rule denies the right to vote to drivers joining a Driver Coordinator during the 120 day period set aside for signing a showing of interest while still allowing drivers who leave a driver coordinator during that period to vote. Thus, even a full-time driver who begins

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driving on January 18, 2017 and drives hundreds of hours over the following four months will still not have a vote.

Second, the rule disenfranchises thousands of intermittent, new, or part-time drivers, depriving them of a meaningful opportunity to voice concerns in the selection of exclusive driver representatives. The rule imposes – retroactively – a minimum trip requirement that excludes drivers who choose to make fewer than 52 trips during a quarter. Although drivers who, for example, drive only a few hours a week (e.g., the occasional airport trip) will not have a right to vote, they will still be subject to the terms and obligations of any collective bargaining agreement.[16]

Third, the Director offered no factual predicate for this definition of "Qualifying Driver." Instead, he arbitrarily selected a cutoff date and limited the voting population to drivers that meet and arbitrary trip threshold. In so doing, the Director unfairly disenfranchised thousands of for-hire drivers from selecting a collective bargaining representative and silenced the voices of thousands of drivers on a decision that will affect their work. Because there is no logical or rational basis to prop up the Director's decisions to exclude such drivers, especially in light of the Ordinance's express mandate to include them, the Director's rule is inconsistent with the legislative scheme and is arbitrary and capricious.

Fourth, by drawing an arbitrary line that excludes thousands of drivers, the rule conflicts with the Ordinance's directive that the Director shall promulgate a rule defining "qualifying driver" that encompasses all drivers whose work is "significant enough to affect the safety and reliability of for-hire transportation." SMC 6.310.110. The Director's definition violates this clear legislative mandate. Rather than allow all drivers the ability to vote, the definition thus excludes from the voting group thousands of drivers that—because the mandatory subjects of bargaining include, *inter alia*, vehicle maintenance and age—significantly affect safety and reliability in for-hire transportation in violation of the Ordinance's proclaimed purpose in SMC § 6.310.735.

[16] Again, more than half of drivers partnering with Rasier in Seattle drive for less than 12 hours per week.

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b. The Rules Arbitrarily and Capriciously Misconstrue, Misapply, or Ignore Decades of Labor Law.

The Director's rules also arbitrarily and capriciously misconstrue, misapply, or completely ignore decades of well-settled state and federal labor law. Federal labor law requires that any labor organization must have actual support among a majority of the unit employees to represent them – rather than be imposed on the group based on the sentiment of only some of the affected workers. The Ordinance decrees that all for-hire drivers operating in the City of Seattle for a particular driver coordinator shall be represented by a duly-elected EDR, but under the rules not all for-hire drivers subject to exclusive representation by an EDR will be permitted to vote. As a result, thousands of disenfranchised drivers will be unable to voice concerns over a collective bargaining agreement that restrains their ability to work their own schedules to meet their desires and needs.

To determine voter eligibility, FAS proclaims to have adopted a standard in the Washington Administrative Code for public employees under which an employee who works one-sixth or more of full time is part of the bargaining unit.[17] But this standard is used to determine which public sector employees will be considered part of the "bargaining unit." *See* WAC 391-35-350. Public sector employees that fit within this definition are included in the bargaining unit ***and vote on union representation***. *See, e.g.*, *City of Bellingham*, PECB Decision No. 792 (1979) and *City of Metropolitan Seattle*, PECB Decision No. 2986 (1988) (first, determining whether part-time workers perform similar work to full-time workers and have a history or expectation of continued employment and, if so, including them within the unit represented by the union and then allowing all the part-time workers so included the right to vote). The opposite is true here. The Director employed the standard to deny the right to vote to drivers who nonetheless will be included the bargaining unit and represented by the EDR selected. Furthermore, the Director's use of this standard is arbitrary and capricious because there is no definition of "full-time" driver – drivers decide their preferred schedule and

[17] *See* Letter from Mayor Edward B. Murray to Seattle City Council dated November 23, 2016, attached hereto as Appendix D.

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hours for themselves – and thus no standard by which to reference the "one-sixth or more" calculation.

Likewise, the National Labor Relations Board ("NLRB") has consistently found that workers with irregular hours, temporary positions, and jobs in irregular or fluctuating industries (much like the for-hire drivers in Seattle) have the right to vote under the National Labor Relations Act ("NLRA"). *See, e.g., Steiny & Co.*, 308 NLRB 1323, 1325 (1992); *Trump Taj Mahal Casino*, 306 NLRB 294, 296 (1992) (reiterating Board's obligation to be "flexible in . . . devis[ing] formulas . . .to afford employees with a continuing interest in employment the optimum opportunity for meaningful representation"); *and C.W. Post Ctr. of Long Island Univ.*, 198 NLRB 453, 454 (1972) (case involving adjunct faculty, the NLRB noting the importance of "prevent[ing] an arbitrary distinction" which disenfranchises employees with a continuing interest in their employment, but who happen not to be working at the time of the election.). The Board regularly allows employees with fluctuating and sporadic work histories and schedules to vote in representation elections, as long as these employees have a reasonable expectation of reemployment within a reasonable time in the future. *NLRB v. Atkinson Dredging Co.*, 329 F.2d 158, 162 (4th Cir. 1964).

In industries where work is irregular, the NLRB adopts special voter eligibly formulas to avoid disenfranchising workers. *Steiny & Co.*, 308 NLRB at 1325. The NLRB recognizes that each unit is different, and the unique circumstances of each case must be examined carefully. The Board also includes part-time, and even on-call, employees in a unit with full-time employees. *See* NLRB Representation Case Outline of Law, § 20-110 (2013). The Board does not apply its formulas for part-time or on-call employees rigidly, nor does it consider it the only way to determine voter eligibility. *See, e.g., Trump Taj Mahal Casino*, 306 NLRB at 296. The Director's rules turn these well-settled tenets of labor law on their head, and for no apparent reason.

The Director's rules are also arbitrary and capricious because they fail to fully and adequately protect the rights drivers purportedly gain from the ordinance. The Director states

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that FAS will follow PERC and NLRB precedent when applying the ordinance to drivers. The NLRA and decisions of the NLRB are designed to protect employees from retaliation, harassment, and coercion, ensuring that employees have free choice and free voice. FAS offers no explanation whatsoever for how that precedent will be applied or how FAS will gain competence to understand and apply that case law to address the myriad labor issues that may arise out of the driver's independent contractor relationship with companies in the for-hire industry.

The Director's rules also infringe unnecessarily on the privacy protections of driver coordinators and drivers. The rule requires driver coordinator to share, with any QDR, confidential, competitively sensitive trade secret driver lists as well as personally identifying and private driver information (i.e., name, mailing address, e-mail address, phone number, for-hire permit number, and driver's license number).

This list is only a small, illustrative sample of the myriad defects in the Director's arbitrary and capricious rulemaking. A full account is set out in Rasier's comments to the draft rules, incorporated herein in its entirety.[18]

VII. PETITION FOR WRIT OF CERTIORARI AND PRAYER FOR RELIEF

For all the reasons stated above, Rasier asks that the Court issue a Writ of Certiorari, review the Director's implementing regulations, and enter an order invalidating those rules as arbitrary and capricious.

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[18] Rasier hereby reserves its right to raise additional challenges to the Director's rulemaking in substantive briefing once a case schedule is set pursuant to Local Civil Rule 98.40.

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VIII. ORDER

Rasier submits a proposed order with its petition for Writ of Certiorari.

DATED this 17th day of January, 2017.

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