No. 17-35693

In the United States Court of Appeals
For The Ninth Circuit

DAN CLARK, *et al.*,
Plaintiffs-Appellants,

v.

CITY OF SEATTLE, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court,
Western District of Washington

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellants Dan Clark, et al., make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly-owned corporation?

   NO.

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   NO.

s/William L. Messenger
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INTRODUCTION

This case concerns whether the City of Seattle can assist the Teamsters in coercing rideshare companies Uber[1] and Lyft, Inc. only to do business in the City with independent-contractor drivers represented by the Teamsters. The City cannot because National Labor Relations Act ("NLRA") Sections 8(b)(4) and 8(e), 29 U.S.C. §§ 158(b)(4), 158(e), regulate this type of union conduct.

NLRA Section 8(b)(4) regulates union conduct intended to coerce or restrain any person to "cease doing business with any other person." 29 U.S.C. § 158(b)(4). Section 8(e) regulates union agreements with that effect. 29 U.S.C. § 158(e). Congress amended and enacted those provisions, in part, to stop the Teamsters from coercing companies to enter into "hot cargo" agreements that require they only do business with Teamsters-represented drivers. *Nat'l Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 635–37 (1967).

Seattle Ordinance 124968 authorizes the very conduct Sections 8(b)(4) and 8(e) prohibit, as it empowers the Teamsters to coerce Uber and Lyft only to do business in Seattle with Teamsters-represented drivers. The Ordinance authorizes the City to certify a qualified organization—which currently includes only Teamsters Local 117—to be the "sole and exclusive representative of *all* for-hire drivers operating within the City for a particular driver coordinator," and for that representative "to negotiate, ob-

[1] "Uber" collectively refers to Raiser, LLC, and Uber USA, LLC, which are wholly owned subsidiaries of Uber Technologies, Inc.

tain 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." Seattle Municipal Code ("SMC") § 6.310.110 (emphasis added). The Ordinance calls for an illegal hot cargo arrangement—i.e., a union requirement that companies like Uber and Lyft only do business with unionized drivers. By so doing, the Ordinance runs afoul of NLRA Sections 8(b)(4) and 8(e) and is preempted.

The Ordinance also violates drivers' First Amendment rights to free association and speech. The Ordinance calls for stripping drivers of their individual right to speak and contract with driver coordinators and transferring their rights to a union they may oppose. The government cannot transfer a nonconsenting individual's First Amendment rights to speak to an advocacy group without a compelling reason for so doing. The City cannot show a compelling reason because *Harris v. Quinn,* 134 S. Ct. 2618, 2640–41 (2014) holds that the government has no "labor peace" interest in collectivizing independent contractors.

Plaintiffs-Appellants Dan Clark, Tami Dunlap, Ali Hassan, Jennifer Immel, Gary Kunze, Elisabeth Lowe, Dale Montz, Abdi Motan, Frederick Rice, Michael Riebs, and Firew Teshome (collectively "Drivers")—who are all independent drivers subject to the Ordinance—thereby request that the Court reverse the district court's decision dismissing their complaint.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over the Drivers' 42 U.S.C. § 1983 claims pursuant to 28 U.S.C. § 1343. The lower court also had jurisdiction over the Drivers' constitutional claims pursuant to 28 U.S.C. § 1331, and over their claims for declaratory relief under 28 U.S.C. §§ 2201 and 2202. Pursuant to 28 U.S.C. § 1291, this Court has appellate jurisdiction over this appeal of the lower court's August 24, 2017 Order Granting Defendants' Motion to Dismiss, Excerpts of the Record ("ER") 6, and its August 25, 2017 final Judgment, ER 5. Drivers filed a timely notice of appeal on August 28, 2017. ER 1.

STATEMENT OF ISSUES PRESENTED

I. Did the district court err in dismissing the Drivers' claims that the Ordinance is preempted by NLRA Sections 8(b)(4) and 8(e)?

II. Did the district court err in dismissing the Drivers' claim that the Ordinance violates their First Amendment rights?

STATEMENT OF THE CASE

A. The Ordinance

On December 23, 2015, the City of Seattle passed Ordinance 124968, an Ordinance Relating to Taxicab, Transportation Network Co., and For-Hire Vehicle Drivers, codified at SMC § 6.310.110 et seq. The Ordinance regulates the relationship between three parties: (1) "for-hire drivers," who are independent contractors

who operate motor vehicles and do business with driver coordinators, SMC § 6.310.110; (2) a "driver coordinator," which is an "entity that hires, contracts with, or partners with for-hire drivers for the purpose of assisting them with, or facilitating them in, providing for-hire services to the public," *id.*; and (3) unions that are, or seek to become, an "exclusive driver representative" ("EDR"), *id.*

An "exclusive driver representative" is an organization certified by the Director of Seattle's Department of Finance and Administrative Services ("Director") to "be the sole and exclusive representative of all for-hire drivers operating within the City for a particular driver coordinator, and authorized 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. The Director will certify a preapproved organization—which the Ordinance calls a "qualified driver representative" ("QDR")—to be an exclusive driver representative if it obtains statements of interest from a majority of "qualifying drivers" who do business with that coordinator. SMC § 6.310.735.F. Qualified drivers are those who do a substantial degree of business with driver coordinators during a given time period. Seattle Fin. & Admin. Servs. Dirs. Rule [FHDR]-3, p.2, ER 24.[2]

[2] Specifically, the Director defined a "qualifying driver" as one who (1) had a contractual relationship with the driver coordinator before October 19, 2016; (2) had driven at least fifty-two (52) trips originating or ending in Seattle's city limits for the driver coordinator during any three (3) month period from January 17, 2016 to January 17, 2017 (with an exception for active military members); and 3) has a valid (i.e.

The Ordinance empowers unions that seek to become exclusive driver representatives with authority to compel driver coordinators not to interfere with or restrain their organizing campaign against drivers, SMC § 6.310.735.K; not to assist drivers financially with resisting the union, *id.*; and to provide the union with information about the qualified drivers with whom it does business, SMC § 6.310.735.D. That information includes the drivers' names, addresses, email addresses, phone numbers, and for-hire driver license/permit numbers.[3] FHDR-1, p. 3, ER 42. These means are enforceable through a private cause of action and an administrative process that carries with it $10,000 daily penalties for violations. SMC § 6.310.735.M.

The Ordinance grants a union certified to be an EDR with legal authority to act as the "sole and exclusive representative of all for-hire drivers operating within the City for a particular driver coordinator." SMC § 6.310.110. This authority includes the power "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." *Id.* These terms and conditions include drivers' vehicle equipment standards, safe driving practices, background checks, payments made or withheld, minimum working hours, conditions of work, and policies concerning discipline and

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unexpired or not more than sixty (60) days expired) for-hire driver's license/permit on the date the driver coordinator makes the list of drivers for the qualified driver representative. FHDR-1 pp. 2–3, ER 41–42.

[3] The Rules initially required the disclosure of the qualified drivers state-issued drivers license number. FHDR-3 p. 7, ER 29. Seattle subsequently removed this requirement, effective April 21, 2017. *See* Order p. 8 n.6, ER 13.

deactivation. FHDR-4, p. 2, ER 19; SMC § 6.310.735.H.1. It also includes a requirement that drivers become union members to do business with a driver coordinator. SMC § 6.310.735.H.4.

The Ordinance's arbitration provision further grants an exclusive driver representative authority to compel a driver coordinator to enter into an agreement that governs the terms under which it does business with drivers in Seattle, if an agreement is not reached within ninety (90) days of certification. SMC § 6.310.735.I. Upon the Director's approval, the resulting agreement is binding on all drivers who do business with that driver coordinator. SMC §§ 6.310.735.H.2 & I(3).

The inherent result of an exclusive driver representative's certification is that only those drivers who accept that union's representation and contract can do business with that driver coordinator in Seattle. Conversely, that driver coordinator can only do business in Seattle with unionized drivers. Drivers and that driver coordinator must otherwise cease doing business with one another.

B. Enforcement of the Ordinance

1. On March 3, 2017, the Director deemed Teamsters Local 117 to be a QDR under the Ordinance. Drivers' Decl.[4], ¶ 8, ER 69, 73, 76–77, 81, 85, 89, 93, 97, 101. On March 7, 2017, the Teamsters notified driver coordinators Uber and Lyft of its intent to represent drivers who do business with them. *Id.* Teamsters Local 117 is a

[4] Citation to "Drivers' Decl." is the citation utilized for the joint citation of all eleven Driver Declarations. ER 67–102.

"labor organization" under 29 U.S.C. § 152(5), as it represents employees subject to the NLRA. Compl. ¶ 43, ER 113.

The for-hire drivers Teamsters Local 117 targeted for collectivization include the Drivers, all of whom are for-hire drivers who do business with Uber. Drivers' Decl. ¶ 2, ER 68, 72, 76, 80, 84, 88, 92, 96, 100. Appellants Dan Clark and Elisabeth Lowe also do business with Lyft. Clark Decl. ¶ 2, ER 100; Lowe Decl. ¶ 2, ER 84. Drivers meet the Ordinance's requirements to be a "qualified driver," Drivers' Decl. ¶ 7, ER 68–69, 72, 76, 80, 85, 89, 92, 96, 101, except Drivers Clark and Dunlap due to the lack of requisite trips in a three-month period, Clark Decl. ¶ 7, ER 101; Dunlap Decl. ¶ 7, ER 96.

The Appellant Drivers do not want to be forced to accept Teamsters' representation or to abide by the terms of a Teamsters' contract to do business with Uber or Lyft. Drivers' Decl. ¶¶ 9 & 11, ER 69, 73, 77, 81, 85–86, 89, 93, 97, 101. They also do not want the Teamsters to speak and contract on their behalf. *Id.* Drivers wish to remain free to speak, contract, and otherwise do business with Uber and/or Lyft on their own terms and without the Teamsters' unwanted interference. *Id.* at ¶¶ 4, 8–12, ER 68–69, 72–73, 76–77, 80–81, 84–86, 88–89, 92–93, 96–97, 100–01.

2. On March 10, 2017, the Drivers filed a five-count Complaint against the Director and City of Seattle that asserts the Ordinance is preempted by NLRA Sections 8(e) and 8(b)(4) and violates the First and Fourteenth Amendments to the United

States Constitution and 42 U.S.C. § 1983. Complaint, ER 103–104.[5] That same day, Drivers filed a motion for a temporary restraining order and preliminary injunction to enjoin the Ordinance. ECF No. 2.

One day earlier, the Chamber of Commerce filed a separate lawsuit challenging the Ordinance and also sought a preliminary injunction. *See Chamber of Commerce v. City of Seattle*, No. 2:17-cv-00370-RSL (W.D. Wash. Mar. 9, 2017) [hereinafter *Chamber*], appeal filed, No. 17-35640 (9th Cir. Aug. 9, 2017), ECF No. 70. On April 4, 2017, the district court granted the preliminary injunction sought by the Chamber, Order, *Chamber*, No. 2:17-cv-00370-RSL (W.D. Wash. Apr. 4, 2017), ECF No. 49, and thereafter denied the Drivers' motion for the same relief as moot, Order, ER 16.

In the same time period, Seattle moved to dismiss both the Drivers' and the Chambers' complaints pursuant to Rules 12(b)(1) and (b)(6). Defs.' Mot. to Dismiss, ECF No. 41; Defs.' Mot. to Dismiss, *Chamber*, No. 2:17-cv-00370-RSL (W.D. Wash. Mar. 21, 2017), ECF No. 42. The district court dismissed the Chambers' complaint on August 1, 2017. Order Granting Defs.' Mot. to Dismiss, *Chamber*, No. 2:17-cv-00370-RSL (W.D. Wash. Aug. 1, 2017), ECF No. 66. The appeal of

[5] The Drivers' fifth count alleged the Ordinance was preempted by the Drivers' Privacy Protection Act because its regulations required disclosure of drivers' license numbers to the union. Compl. ¶¶ 82–86, ER 124–25. Drivers are no longer pursuing that claim because the City rescinded that requirement. Order p. 8 n.6, ER 13.

that decision is before this Court in case number 17-35640. *Chamber of Commerce v. City of Seattle*, No. 17-35640 (9th Cir. Aug. 9, 2017), ECF No. 70.

The district court dismissed the Drivers' complaint on August 24, 2017. Order, ER 6–15. Though the Drivers repeatedly informed the court that this was *not* their primary preemption claim,[6] the court stated that "Plaintiffs argue that the Ordinance violates § 8(e) of the NLRA insofar as it allows the Teamsters and the driver coordinators to negotiate an agreement requiring drivers to become union members (*i.e.*, a union shop agreement)." *Id.* at 2–3, ER 7–8. The court then burned this strawman to the ground by holding such a claim is not ripe because it is speculative whether a union shop clause will be negotiated and/or obtained by a labor organization. *Id.* at 3, ER 8. The district court dismissed Drivers' Section 8(b)(4) preemption claim as premature based on a similar false predicate—i.e., that the claim turned on "whether [the Teamsters] will attempt to negotiate a union shop provision with the driver coordinator." *Id.* at 5, ER 10. Finally, the court dismissed the Drivers' First Amendment claim on the merits, reasoning that compelling the drivers to accept an exclusive representative for dealing with the City and driver coordinators did not impinge on their associational rights. *Id.* at 6–8, ER 11–13.

Drivers filed a timely notice of appeal with this Court four (4) days later, ER 1, along with a motion for an injunction pending appeal with the district court, ECF

[6] *See* Pls.' Resp. in Opp'n to Mot. to Dismiss 11–13, ECF No. 44; *see also* Compl. ¶¶ 62–73, ER 118–121.

No. 51. On September 13, 2017, Drivers withdrew their motion because the Court enjoined the Ordinance pending resolution of the appeal in *Chamber of Commerce v. City of Seattle*, No. 17-35640. Pls.' Notice of Withdrawal of Their Motion for an Inj. Pending Appeal, ECF No. 53.

SUMMARY OF THE ARGUMENT

The Supreme Court repeatedly has held the NLRA preempts state and local governments from regulating union conduct that is regulated by NLRA Sections 8(b)(4) and 8(e). *E.g., San Diego Bldg. Trades Council Local 2020 v. Garmon*, 359 U.S. 236 (1959); *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 636–37 (1975). Yet, that is what the City of Seattle is doing through the Ordinance. It is regulating the means by which unions can coerce certain employers (driver coordinators) to do business only with unionized drivers. The Ordinance is preempted because it regulates union conduct that NLRA Sections (8b)(4) and 8(e) arguably prohibit or, alternatively, that Congress intended to be unregulated and left to the free play of economic forces.

An example proves the point. If Teamsters Local 117 attempted to coerce Uber to agree only to do business in Seattle with drivers subject to a Teamsters' contract, the National Labor Relations Board ("NLRB") would certainly have jurisdiction to determine if this union coercion and hot cargo agreement violates Sections 8(b)(4) and 8(e), respectively. The NLRB often has held similar Teamsters' campaigns

against companies and independent contractor drivers to violate these very statutes. *See infra* p. 19. Given federal regulation of this type of union campaign, the City cannot regulate it so as to assist the Teamsters with their campaign. The City's Ordinance is preempted by Sections 8(b)(4) and 8(e).

Even if the Ordinance were not preempted, it is unconstitutional under the First Amendment. The City seeks to dictate that drivers must speak and deal with driver coordinators through a mandatory advocate imposed by the City. The City cannot both restrict nonconsenting drivers' right to speak with others and mandate that they associate with an unwanted exclusive representative without a compelling reason for so doing. Under *Harris*, the City cannot establish a compelling interest for collectivizing independent contractors. 134 S. Ct. at 2639–41.

ARGUMENT

I. Standard of Review

The district court's decision is subject to de novo review. The Court "review[s] *de novo* a district court's application of the doctrine of preemption," *Hawaii Newspaper Agency v. Bronster*, 103 F.3d 742, 748 (9th Cir. 1996) (citation omitted), "a district court's dismissal for lack of ripeness," *Colwell v. Department of Health & Human Services*, 558 F.3d 1112, 1121 (9th Cir. 2009), and a district court's dismissal for failure to state a claim under Rule 12(b)(6), *Navarro v. Block*, 250 F.3d 729, 731–32 (9th Cir. 2001).

When reviewing a Rule 12(b)(6) dismissal order, "all material allegations of the complaint are accepted as true, as well as all reasonable inferences to be drawn from them." *Navarro*, 250 F.3d at 732. By contrast, because "a Rule 12(b)(1) motion can attack the substance of a complaint's jurisdictional allegations despite their formal sufficiency," the court can consider "affidavits or any other evidence properly before the court." *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989).

"Dismissal is proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Navarro*, 250 F.3d at 732 (citing *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988)). The district court's opinion must therefore be reversed if the facts alleged in the complaint "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

II. NLRA Sections 8(b)(4) and 8(e) Preempt the Ordinance.

The district court dismissed the Drivers' preemption claims because it misapprehended those claims and the scope of Sections 8(b)(4) and 8(e). The Drivers will first discuss the federal statutory framework in Section A, then address why Sections 8(b)(4) and 8(e) preempt the Ordinance in Sections B through D, and lastly turn to why the Drivers' preemption claims are ripe for adjudication in Section E.

A. The Federal Statutory Framework: NLRA Sections 8(b)(4) and 8(e) Regulate Union Campaigns and Agreements Intended to Cause Persons to Cease Doing Business With Other Persons.

1. NLRA Sections 8(b)(4) and 8(e) regulate the means by which unions can and cannot interfere in the business relationships between independent parties. *See Connell Constr. Co.*, 421 U.S. at 632–37. Section 8(b)(4) prohibits, among other things, union coercion with the object of forcing one person to cease doing business with another person. The statute states, in relevant part, that a union commits an unfair labor practice when it:

> (ii) . . . threaten[s], coerce[s], or restrain[s] any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e);
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . .

29 U.S.C. §§ 158(b)(4)(ii)(A), (B).

Section 8(e) makes it unlawful for unions to achieve an objective prohibited by Section 8(b)(4)(A), namely to have an employer *agree* to cease doing business with another person. Section 8(e) states, subject to exemptions inapplicable here, that:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or

> hereafter containing such an agreement shall be to such extent unenforcible.

29 U.S.C. § 158(e). Taken together, Section 8(b)(4) prohibits unions from coercing one party to cease doing business with another, and Section 8(e) prohibits union agreements with that effect.

The statutes, however, have been construed only to prohibit union conduct that has a secondary objective, as opposed to a primary objective, such as protecting the work of unionized employees from outsourcing. *NLRB v. Int'l Longshoremen's Ass'n*, 447 U.S. 490, 504 (1980). A primary objective exists where a union's conduct "is addressed to the labor relations of the contracting employer vis-a-vis his own employees." *Id.* (quoting *Nat'l Woodwork Mfrs. Ass'n*, 386 U.S. at 645). A secondary objective exists where the union's coercion or agreement targets a third-party—i.e., where a union coerces one party to cause another party to capitulate to the union's demands. *See NLRB v. Local 825, Int'l Union of Operating Eng'rs (Burns & Roe, Inc.)*, 400 U.S. 297, 302–03 (1971).

Sections 8(b)(4)'s and 8(e)'s proscriptions were intended to be broad. "Congress . . . was intent on reaching every device, no matter how disguised, which, fairly considered, is tantamount to an agreement to cease doing business for an unlawful reason." *Dan McKinney Co. (Cal. Beer Wholesalers' Ass'n, Inc.)*, 137 N.L.R.B. 649, 653 (1962) (footnote omitted). To this end, "when Congress used 'coerce' in section 8(b)(4)(B) it did not intend to proscribe only strikes or picketing, but intend-

ed to reach any form of economic pressure of a compelling or restraining nature." *Associated Gen. Contractors of Cal., Inc. v. NLRB*, 514 F.2d 433, 438 (9th Cir. 1975). The phrase "cease doing business" means more than just a termination of a business relationship. It encompasses any "attempt to cause a significant change in a secondary person's method of doing business." *Id.* at 437 n.6. The statutes protect from union coercion not just employees and employers, but any "person." 28 U.S.C. §§ 158(b)(4), 158(e). "Person" includes independent contractors, like the drivers the Ordinance targets. *See id.* at § 158(b)(4)(A) (protecting "self-employed persons"); *id.* at § 152(1) (defining "person" to include "one or more individuals"); *infra* p.19 (citing cases involving independent-contractor drivers).

2. Sections 8(b)(4) and 8(e) prohibit agreements requiring employers only to do business with independent contractors who are union members. *E.g.*, 29 U.S.C. § 158(b)(4)(A) (prohibiting union coercion whose object is "forcing or requiring any employer or self-employed person to join any labor or employer organization"). But even a cursory review of the statutory language and case law evinces that the statutes prohibit more than just agreements requiring union membership.

By its terms, no agreement of any sort, much less a membership agreement, is required to violate Section 8(b)(4), which applies to union coercion where "an object thereof is" prohibited by the statute. 29 U.S.C. § 158(b)(4)(ii). Prohibited objectives under Section 8(b)(4) include "forcing or requiring any person to cease using, selling,

handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person." 29 U.S.C. § 158(b)(4)(ii)(B); *see* 29 U.S.C. § 158(e) (similar). Those words encompass far more than just requiring union membership in a contract.

"[T]he case law makes it clear that 'cease doing business' . . . extends to situations where a primary employer exerts any pressure calculated to cause a significant change or disruption of the neutral employer's mode of business." *Sheet Metal Workers, Local Union No. 91 v. NLRB*, 905 F.2d 417, 421 (D.C. Cir. 1990); see *Associated Gen. Contractors*, 514 F.2d at 437 n.6 (similar). It is thus "well established that the 'cease doing business' language . . . is not to be literally read as requiring the total cancellation of a business relationship," but is "sufficiently satisfied if the conduct or contractual provision has the purpose or effect of interfering with normal business relationships." *ILA, Local 1418 (New Orleans Steamship Ass'n)*, 235 N.L.R.B. 161, 168 (1978).

Consequently, "[s]econdary coercion to force a neutral to add a condition . . . to its existing contractual arrangement with the primary employer is an illegal [cease doing business] objective within the meaning of [Section 8(b)(4)(ii)(A)]." *NLRB v. Carpenters Dist. Council of New Orleans & Vicinity,* 407 F.2d 804, 806 (5th Cir. 1969). That condition need not be union membership. Conditioning a business relationship on a contractor's acceptance of a union's representation and/or contract is more

than sufficient to "cause a significant change in a secondary person's method of doing business." *Associated Gen. Contractors*, 514 F.2d at 437, n.6.

3. It is for this reason that "'[a]greements which limit the employer . . . to subcontracting with businesses that recognize the union or have a union contract violate section 8(e).'" *NLRB v. Teamsters Local 525*, 773 F.2d 921, 924 (7th Cir. 1985) (quoting *Bldg. Material & Dump Truck Drivers, Teamsters Local Union No. 36 v. NLRB*, 669 F.2d 759, 764 (D.C. Cir. 1981), *aff'd sub nom. Shepard v. NLRB*, 459 U.S. 344 (1983)). These types of requirements are known as "union signatory" requirements. They compel an employer to "cease doing business" under Sections 8(b)(4) and 8(e) because the "clear implication" of requiring an employer to do business with unionized contractors is that the employer cannot do business with nonunion contractors. *Burns & Roe,* 400 U.S. at 305.[7]

[7] *See e.g., Sheet Metal Workers, Local Union No. 91*, 905 F.2d at 421 (holding the requirement that employers extend a union contract's terms to affiliates means the employers are "obliged either to terminate their relationships with their nonunionized affiliates or to induce those affiliates to *become* unionized," and "[e]ither outcome is within the ambit of section 8(e)"); *NLRB v. Bangor Bldg. Trades Council*, 278 F.2d 287, 288, 290 (1st Cir. 1960) (holding a clause stating that "this Agreement binds all the subcontractors as well as the general contractor" requires a cessation of business because a subcontractor "must be compelled to unionize, or he must be displaced"); *Carpenters Dist. Council of Ne. Ohio (Alessio Const.)*, 310 N.L.R.B. 1023, 1025 (1993) (holding a clause requiring that an employer's affiliates be covered by the union's contract violates Section 8(e) because it will "cause Alessio to sever its ownership relationship with affiliated firms that seek to remain nonunion or to forbear from forming relationships with such firms"); *Chem. Workers Local 6-18 (Wis. Gas)*, 290 N.L.R.B. 1155, 1155–56 (1988) (holding "a clause [which] permits subcontracting . . . only to those employers who have labor agreements with unions"

A union signatory requirement is secondary in nature because it "focuses on union affiliation by prohibiting an employer from subcontracting work to any employer not signatory to or approved by the union." *NLRB v. HERE Local 531*, 623 F.2d 61, 67 (9th Cir. 1980); *Gen. Truck Drivers, Local 957 v. NLRB*, 934 F.2d 732, 736 (6th Cir. 1991) (same). Consequently, "it is well settled that union signatory clauses violate section 8(e)." *HERE Local 531*, 623 F.2d at 67; *see Chi. Dining Room Emps. (Clubmen)*, 248 N.L.R.B. 604, 606 (1980) (similar).

4. Sections 8(b)(4)'s and 8(e)'s prohibitions apply with particular force to a union signatory requirement that targets owner-operators of motor vehicles, which is "known as a 'hot cargo' clause because of its prevalence in Teamsters Union contracts." *Nat'l Woodwork*, 386 U.S. at 634. "'[A] primary target of the 1959 amendments'" that added Section 8(e) to the NLRA and amended Section 8(b)(4) "'was the secondary boycotts conducted by the Teamsters Union, which ordinarily represents employees not of manufacturers, but of motor carriers.'" *NLRB v. Joint Council of Teamsters No. 38*, 338 F.2d 23, 26 (9th Cir. 1964) (quoting *NLRB v. Servette, Inc.*, 377 U.S. 46, 55 (1964)). In fact, the initial Senate amendment *only* applied to motor carriers. *Nat'l Woodwork*, 386 U.S. at 636. While Section 8(e) ultimately was made applicable to all industries, the point remains that Congress enacted Section 8(e) and

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is "a classic union-signatory clause," because it "precludes the Employer from doing business with any other employer who does not have a labor agreement with a union").

amended Section 8(b)(4), in part, to stop the Teamsters from coercing employers only to do business with drivers the Teamsters represent. *Id.* at 636–37.

Since Sections 8(b)(4)'s and 8(e)'s enactment, the NLRB and courts repeatedly have found the Teamsters to have violated those sections by coercing or causing companies to enter into hot cargo arrangements requiring the companies only do business with independent-contractor drivers subject to the Teamsters' representation and contract. *See Gen. Truck Drivers, Local 957,* 934 F.2d at 736–37; *Constr., Bldg. Material, Ice & Coal Drivers, Local 221 v. NLRB*, 899 F.2d 1238, 1243 (D.C. Cir. 1990); *Teamsters Local 525*, 773 F.2d at 924; *Teamsters Local 36*, 669 F.2d at 764; *Local 814, Teamsters v. NLRB,* 512 F.2d 564, 566–67 (D.C. Cir. 1975); *A. Duie Pyle v. NLRB*, 383 F.2d 772, 775–78 (3d Cir. 1967); *Joint Council of Teamsters No. 38*, 338 F.2d at 30–31; *Associated Gen. Contractors (Cal. Dump Truck Owners Ass'n)*, 280 N.L.R.B. 698, 701–02 (1986); *Milk Drivers & Dairy Emps., Local 537 (Sealtest Foods)*, 147 N.L.R.B. 230, 235–36 (1964); *Joint Council of Teamsters No. 38 (Cal. Ass'n of Emp'rs)*, 141 N.L.R.B. 341 (1963).

For example, in *Joint Council of Teamsters No. 42 (California Dump Truck Owners Association)*, the NLRB held that a Teamsters local violated Sections 8(e) and 8(b)(4) by entering into, and seeking to enforce, clauses that required contractors to make dump truck drivers abide by the Teamsters' contract. 248 N.L.R.B. 808, 817 (1980), *enforced,* 702 F.2d 168 (9th Cir. 1981), *judgment vacated on other*

grounds, 459 U.S. 1193 (1983). The NLRB found that "[s]uch provisions, applied to individual [dump truck drivers] whom we have found to be independent contractors, are secondary on their face," and cited six (6) cases supporting that proposition, all of which involved the Teamsters. 248 N.L.R.B. at 814–15 & 815 n.18.

B. NLRA Sections 8(b)(4) and 8(e) Preempt the Ordinance Under the *Garmon* Doctrine.

1. The NLRA preempts the Ordinance because it empowers the Teamsters to coerce driver coordinators into the very hot cargo arrangements that Sections 8(b)(4) and 8(e) prohibit—i.e., arrangements wherein Uber and Lyft only do business in Seattle with independent drivers covered by a Teamsters' contract.

"Congress implicitly mandated two types of preemption as necessary to implement federal labor policy." *Chamber of Commerce v. Brown*, 554 U.S. 60, 65 (2008). The first is *Garmon* preemption. 359 U.S. 236. The second is *Machinists* preemption. *Lodge 76, Int'l Ass'n of Machinists v. Wis. Emp't Relations Comm'n*, 427 U.S. 132, 140 (1976)). The latter will be discussed in Section II(C) *infra*.

"*Garmon* pre-emption forbids States to 'regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits.'" *Brown*, 554 U.S. at 65 (quoting *Wis. Dep't of Indus. v. Gould Inc.*, 475 U.S. 282, 286 (1986)). The term "arguably" has significance. As this Court held in *Idaho Building & Construction Trades Council v. Inland Pacific Chapter, ABC.*, "[t]o prevail, 'a party asserting pre-emption' under *Garmon's* 'arguably' standard need only 'advance an interpretation of the Act that is

not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts or the Board.'" 801 F.3d 950, 962 (9th Cir. 2015) (quoting *ILA v. Davis*, 476 U.S. 380, 395 (1986)). "This is not a demanding standard." *Id.* at 965. A plaintiff "need not, for example, show that the Board *will* or is even *likely* to ultimately agree with their position." *Id.* *Garmon* merely requires that plaintiffs "'demonstrate that [the issue] is one that the Board could legally decide in [their] favor.'" *Id.* (quoting *Davis*, 476 U.S. at 395).

2. Drivers easily meet this low standard for *Garmon* preemption. The Ordinance authorizes conduct that Sections 8(b)(4)(ii)(A) and (B) prohibit because it empowers unions to "coerce[ ] or restrain" driver coordinators with the "object" of "(A) forcing or requiring any [driver coordinator] . . . to enter into any agreement which is prohibited by [Section 8(e)]" and "(B) forcing or requiring [driver coordinators] . . . to cease doing business with any other [drivers]." 29 U.S.C. §§ 158(b)(4)(ii)(A) and (B). The Ordinance does so by granting unions' legal authority to coerce driver coordinators with the object of requiring that they only do business in Seattle with drivers who the union represents and who are bound to the union's contract.

The Ordinance's certification provisions empower a union to coerce unwilling driver coordinators and drivers to accept the union as an exclusive driver representative. These coercive means include the Ordinance's card check process, the results of which are binding on drivers and driver coordinators, SMC § 6.310.735.F, as well

as the Ordinance's provisions empowering unions to force unwilling driver coordinators to turn over information about their drivers, SMC § 6.310.735.D, and not to take certain actions to oppose union campaigns, SMC § 6.310.735.K. The Ordinance's bargaining provisions further grant a certified union the legal authority to coerce, by means of mandatory arbitration, a driver coordinator to enter into an agreement with that union. SMC § 6.310.735.I. These are coercive and restraining means under Section 8(b)(4). *See Local 32B-32J, SEIU v. NLRB*, 68 F.3d 490, 495–96 (D.C. Cir. 1995) (holding a union's demand for arbitration to compel the employer to extend the terms of a union contract to its contractors violates Section 8(b)(4)(ii)(B)); *Newspaper & Mail Deliverers Union (N.Y. Post),* 337 N.L.R.B. 608 (2002) (same).

The object for this coercion—certification of the union to be the "sole and exclusive representative of all for-hire drivers operating within the City for a particular driver coordinator," SMC § 6.310.110—is one that inherently will require the driver coordinator to "cease doing business" with all drivers unwilling to accept union representation. Conversely, nonunion drivers will have to "cease doing business" with, and "cease using . . . the products of," that driver coordinator. 29 U.S.C. § 158(b)(4)(ii)(B). To illustrate the point, if the Teamsters become the sole representative of all drivers operating within the City for Uber, then, as a matter of basic logic: (1) Uber cannot do business in the City with drivers not represented by the Team-

sters; and (2) drivers not represented by the Teamsters cannot do business with Uber. Union coercion with this "cease doing business" objective violates Section 8(b)(4)(ii)(B). *See supra* p. 17.

The other union object facilitated by the Ordinance—to require driver coordinators to enter into a union 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)—likewise will require that the driver coordinator "cease doing business" with drivers unwilling to be bound to that contract. This object is a classic "union signatory" requirement, which is the archetype of Sections 8(b)(4) and/or 8(e) violations. *See supra* pp. 17–18; *HERE, Local 274 (CHC Hotel)*, 326 N.L.R.B. 1058, 1058–59 (1998) (holding a clause making a union contract "applicable to and binding upon any successor, assignee, lessee or concessionaire" violates Section 8(e) because the employer is "prohibited from doing business with such potential lessee or concessionaire who refused to be bound by that agreement").

Tellingly, the Ordinance's objectives are indistinguishable from an illegal Teamsters hot cargo requirement. This includes Teamsters' hot cargo requirements directed against contractors that employ drivers,[8] as well as those directed against self-

[8] *See Local 277, Teamsters (J & J Farms Creamery Co.)*, 335 N.L.R.B. 1031, 1031–32 (2001) (holding the requirement that an employer "subcontract work only to an employer who is a signatory to a collective-bargaining agreement" is an unlawful "'union signatory' clause" because it "plainly limits subcontracting to union 'signatory' employers"); *Teamsters Local 631 (Reynolds Elec. & Eng'g Co.)*, 154 N.L.R.B.

employed drivers. *See supra* p. 19 (citing cases). To pick one example, the agreement held to violate Section 8(e) in *Joint Council of Teamsters No. 38* required that hauling "must be performed by persons operating under a collective bargaining agreement with a local of the Teamsters Union." 338 F.2d at 31. Here, the Ordinance similarly seeks to require that driving done using Uber's or Lyft's rideshare application must be performed by persons operating under a Teamsters' contract.

3. The union conduct the Ordinance facilitates has a prohibited secondary objective, as opposed to a primary work preservation objective, because the Ordinance imposes union representation on drivers who currently are *nonunion*. Union organizing is the epitome of a secondary objective. *E.g.*, *Connell Constr.*, 421 U.S. at 632–34. It partially is for this reason that union signatory requirements intrinsically are secondary in nature. *See HERE Local 531*, 623 F.2d at 67; *supra* p. 18 (discussing additional cases). "[U]nionization of . . . independent contractors," in particular, is a "secondary purpose." *Teamsters Local 525*, 773 F.2d at 924–25; see *Joint Council of Teamsters No. 38,* 338 F.2d at 31 (holding a requirement that hauling be done by

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67, 69 (1965) (holding clauses that "*permit* the subcontracting of unit work to companies observing all the terms of the instant contract" violate Section 8(e) because they "limit the choice of subcontractors to those which recognize and have collective-bargaining agreements with a union"); *Local 47, Teamsters (Tex. Indus.)*, 112 N.L.R.B. 923, 924 (1955), *enforced*, 234 F.2d 296 (5th Cir. 1956) (holding an agreement requiring subcontractors abide by a Teamsters contract has a "cease doing business objective" because "the Union's demand for adoption of the 'subcontractor clause' necessarily contemplated that the general contractors would be precluded by that clause from dealing with such subcontractors as might refuse to abide by the terms of the Union's contract").

drivers operating under a Teamsters contract is secondary because "it is primarily in aid of the union's organizing efforts outside the bargaining unit"); *Local 814, Teamsters v. NLRB,* 512 F.2d at 567 (holding a clause that subjects drivers to a union contract "is clearly a union signatory agreement violative of sections 8(b)(4) and 8(e) if the owner-operators are not 'employees,'" but independent contractors); *Cal. Dump Truck Owners Ass'n*, 248 N.L.R.B. at 814–15 & 815 n.18 (holding union signatory provisions applied to drivers "found to be independent contractors are secondary on their face," and citing six (6) cases).

To approach the issue from the opposite direction, the Ordinance does not authorize primary union activity because "a lawful work preservation agreement . . . must have as its objective the preservation of work traditionally performed by employees represented by the union." *Int'l Longshoremen's Ass'n*, 447 U.S. at 504. The Ordinance (1) does not "apply to drivers who are employees," Ordinance, § 6, ER 63; (2) does not apply only to drivers represented by a union; and (3) does not preserve the work of any union-represented drivers from outsourcing. The Ordinance cannot possibly facilitate a primary union objective.

The City argued to the district court that union campaigns waged under the Ordinance's auspices will be a primary activity under *Chipman Freight Services v. NLRB*, 843 F.2d 1224 (9th Cir. 1988). *Chipman* held that union picketing on behalf of subhaulers *who were union members* constituted a "primary strike or primary

picketing" under Section 8(b)(4)(ii)(B)'s proviso. *Id.* at 1224–25. *Chipman* does not help the City because the Ordinance does not authorize a "primary strike or primary picketing" by union drivers. Rather, it empowers a union to impose its representation on drivers who are *nonunion*, which is a secondary organizing objective. *Chipman* recognized that the union in that case "may not picket against the other subhaulers" who are nonunion. *Id.* at 1227. A union campaign directed against nonunion drivers, and their business relationships with driver coordinators, is secondary under *Chipman*.

4. The Ordinance facilitates union conduct that, at the very least, "arguably" violates Sections 8(b)(4) and 8(e). That is all *Garmon* preemption requires. *Inland Pacific Chapter, ABC*, 801 F.3d at 965. The Ordinance is preempted under *Garmon*, which held that the NLRA preempted application of a state law to a union's picketing and "use of other pressures to force an agreement" that arguably violated Section 8(b)(4). 359 U.S. at 237, 246; *see Marine Eng'rs Beneficial Ass'n v. Interlake S.S. Co.*, 370 U.S. 173, 176 (1962) (holding state regulation of union campaign that "was of a kind arguably prohibited by § 8(b)(4)(A)" preempted under *Garmon*).

The application of *Garmon* preemption especially is appropriate in these circumstances because Congress intended that Section 8(b)(4) apply to union coercion exerted through public entities. *See Local 3, IBEW (N.Y. Elec. Contractors Ass'n)*, 244 N.L.R.B. 357, 358–59 (1979). Under Section 8(b)(4)'s original language, "un-

ions lawfully could enlist the aid of nonstatutory agricultural, governmental, railroad, or airline employees to carry out secondary boycotts." *Id.* at 358. In 1959, Congress amended Section 8(b)(4) to end this ploy. *Id.* at 359. Believing "boycotts by these groups are just as much against the public interest as boycotts by anyone else," Congress "extend[ed] the protection of the secondary boycott provisions of the act to public employers, railroads, or agricultural enterprises without subjecting them to other provisions of the act." *Id.* (emphasis added) (footnote omitted). Congress did so by using the broadly-defined word "person" throughout Section 8(b)(4).

Section 8(b)(4) applies to union coercion exerted through public bodies against private contractors. *See Plumbers v. Door Cty.*, 359 U.S. 354, 357–59 (1959).[9] Seattle's decision to assist the Teamsters with coercing driver coordinators and drivers to bend to the Teamsters' will places the City directly at odds with the congressional intent behind Section 8(b)(4).

C. Alternatively, the Ordinance Is Preempted Under the *Machinists* Doctrine.

In the alternative, if not preempted under *Garmon*, the Ordinance is preempted under *Machinists* because it facilitates union tactics permitted by Sections 8(b)(4)

[9] *See also Local 399, IBEW (Ill. Bell Tel. Co.)*, 235 N.L.R.B. 555, 559 (1978), *enforced*, 601 F.2d 593 (7th Cir. 1979) (holding a union violated Section 8(b)(4) by attempting to cause a public utility not to lease equipment from an employer); *Local No. 16, ILWU (City of Juneau)*, 176 N.L.R.B. 889 (1969) (holding Section 8(b)(4) applies to union picketing to pressure a state agency to cease doing business with a city); *Local 3, IBEW (Mansfield Contracting Corp.)*, 205 N.L.R.B. 559 (1973) (holding a union violated Section 8(b)(4) by pressuring New York City not to do business with a contractor).

and/or 8(e) that are meant to be unregulated. *Machinists* prohibits state and local governments from regulating lawful "economic weapons" and means of "self-help" that Congress intended to be "unregulated" and "left to be controlled by the free play of economic forces.'" 427 U.S. at 140, 147–48. "*Machinists* pre-emption is based on the premise that 'Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes.'" *Brown*, 554 U.S. at 65 (quoting *Machinists*, 427 U.S. at 140 n.4).

Among the types of conduct Congress intended to be unregulated are union pressure tactics that Section 8(b)(4) permits, for "[t]he detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint." *Garner v. Teamsters, Local Union No. 776*, 346 U.S. 485, 499 (1953) (holding NLRA preempts enforcement of state law against Teamsters' picketing of trucking company); *Local 20, Teamsters Union v. Morton*, 377 U.S. 252, 259–60 (1964) (holding NLRA preempts state law that penalized a union for persuading employers not to do business with a company in a manner not proscribed by Section 8(b)(4)). "[F]or a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." *Garner*, 346 U.S. at 499.

Here, even if union coercion to compel driver coordinators and drivers only to do business with one another under the aegis of a union contract were a lawful primary objective under Section 8(b)(4), the Ordinance would still be preempted. The City is regulating union pressure tactics that are meant to be unregulated and left to the free play of economic forces under *Machinists*.

A hypothetical proves the point. Section 8(b)(4)(ii)(B) permits a union to engage in "primary strike[s] or primary picketing." 29 U.S.C. § 158(b)(4)(ii)(B). If Seattle passed an ordinance that assisted unions with engaging in primary strikes and picketing—such as an ordinance that granted unions authority to compel picketed employers to bargain with the union and arbitrate the dispute—that ordinance certainly would be preempted under *Machinists*. The City could not place its thumb on the NLRA's carefully balanced scales in that manner. So too here, even if one assumes, *arguendo*, that a Teamsters' campaign to compel Uber or Lyft only to do business with Teamsters-represented drivers is a permissible primary activity under Section 8(b)(4), the fact remains that Seattle cannot assist the Teamsters with that endeavor.

D. The Ordinance Is Preempted Because It Regulates Conduct Governed by Sections 8(b)(4) and 8(e).

Taken together, the Ordinance is preempted under *Garmon* to the extent it regulates secondary conduct arguably prohibited by Sections 8(b)(4) and 8(e), and is preempted under *Machinists* to the extent it regulates primary union tactics permitted under Sections 8(b)(4) and 8(e). Either way, the Ordinance's *regulation* of the

means by which the Teamsters and other unions can coerce and restrain driver co-ordinators and independent drivers to accept union representation and/or a union contract interferes with Congress' regulation of this field.

This particularly is true given that classifying a union objective as "secondary" or "primary" is "normally [a] difficult task." *Burns & Roe*, 400 U.S. at 303. "[T]he tapestry that has been woven in classifying such conduct is among the labor law's most intricate." *Id.* While Drivers submit this is an easy case, as union signatory objectives epitomize a secondary objective, the greater point is that Congress entrusted the NLRB with the task of regulating this field of conduct.

Garner is instructive. There, the Supreme Court held that the NLRA preempted application of state law to a Teamsters' campaign directed against a trucking company because "[t]he federal Board, if it should find a violation of the [NLRA], would issue a cease-and-desist order and perhaps obtain a temporary injunction to preserve the status quo. Or if it found no violation, it would dismiss the complaint, thereby sanctioning the picketing." 346 U.S. at 499. Either way, application of state law to the Teamsters' conduct would be preempted. *Id.* at 499–501.

Connell is even more instructive, as it holds the NLRA preempts the application of state law to union organizing tactics that implicate Sections 8(e) and 8(b)(4). 421 U.S. at 636. *Connell* concerned a union's attempt to coerce a construction contractor (Connell), whose employees the union did not represent, to enter into a union

signatory agreement requiring it only to subcontract with mechanical firms that are parties to a union contract. *Id.* at 619–20. Connell filed federal and state anti-trust claims challenging this arrangement. *Id.* at 620–21. The union countered that its conduct was authorized by Section 8(e)'s construction industry exemption. *Id.* at 621.The Supreme Court made two holdings applicable here.

First, the Court held that a union signatory agreement with a "stranger" employer—i.e., one whose employees the union does not represent—is so repugnant to the NLRA's purpose of "limit[ing] 'top down' organizing campaigns" that the agreement violated Section 8(e), notwithstanding the construction industry exemption. *Id.* at 631–34. The Court found that the NLRA's "careful limits on the economic pressure unions may use in aid of their organizational campaigns would be undermined seriously if the proviso to § 8(e) were construed to allow unions to seek subcontracting agreements, at large, from any general contractor." *Id.* at 633. Here, the Ordinance facilitates a top-down organizing tactic similar to that at issue in *Connell*, as it empowers unions to coerce "stranger" employers—namely non-union driver coordinators—only to do business with independent contractors subject to that union's representation and contract.

Second, *Connell* held "[t]he use of state antitrust law to regulate union activities in aid of organization must . . . be preempted because it creates a substantial risk of conflict with policies central to federal labor law," *id.* at 635–46, and could "interfere

with the detailed system Congress has created for regulating organizational techniques." *Id.* at 636. "Because employee organization is central to federal labor policy and regulation of organizational procedures is comprehensive, federal law does not admit the use of state antitrust law to regulate union activity that is closely related to organizational goals." *Id.* at 637.

Connell's holding that the NLRA preempts state regulation of a union campaign to coerce an employer to impose a union's representation and agreement on its contractors dooms the Ordinance, for that is exactly the type of top-down campaign that the Ordinance authorizes. The Ordinance is preempted under *Connell*.

E. Drivers' NLRA Preemption Claims Are Ripe for Adjudication.

The district court's grounds for dismissing the Drivers' preemption claims collapse once those claims are understood. The false premise of the court's opinion, that the Drivers' claims center on the threat of a union membership agreement, Order pp. 3, 5, ER 8, 10, is erroneous for reasons already stated. The Drivers' actual preemption claims are ripe for adjudication for the reasons stated below.

"[R]ipeness is 'peculiarly a question of timing,' designed to 'prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (internal citations omitted). "A proper ripeness inquiry contains a constitutional and a prudential component." *Bishop Paiute Tribe v. Inyo Cty.*, 863

F.3d 1144, 1153 (9th Cir. 2017) (citing *Thomas*, 220 F.3d at 1138). Under the constitutional component, the court "consider[s] whether the plaintiffs face 'a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement,' or whether the alleged injury is too 'imaginary' or 'speculative' to support jurisdiction." *Thomas*, 220 F.3d at 1139 (citations omitted).

"[T]he prudential component, on the other hand, focuses on whether there is an adequate record upon which to base effective review," *Portman v. County of Santa Clara*, 995 F.2d 898, 903 (9th Cir. 1993), and its consideration is discretionary, *Bishop Paiute Tribe*, 863 F.3d at 1154. "The question of prudential ripeness 'is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Colwell*, 558 F.3d at 1124 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). The Drivers satisfy all of these criteria.

1. The Drivers' preemption claims constitutionally are ripe because the City is poised to enforce the Ordinance against them. Seattle's enforcement is delayed only by this Court's injunction. Order, *Chamber of Commerce v. City of Seattle*, No. 17-35640 (Sept. 8, 2017), ECF No. 24. "[T]he inevitability of the operation of [the] statue against certain individuals is patent." *Hawaii Newspaper Agency,* 103 F.3d at 746 (second alteration in original).

The Drivers "face 'a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement,'" *Thomas*, 220 F.3d at 1139 (citations omitted), for at least three reasons. *First*, it will infringe on their privacy rights, as several Drivers' personal information will be disclosed to the Teamsters under the Ordinance's disclosure provisions. SMC § 6.310.735.D; FHDR-1 p. 3, ER 42.

Second, certification of an exclusive driver representative will result in a contract governing the manner in which Drivers can do business with Uber and/or Lyft. SMC § 6.310.735.I (requiring arbitration if no agreement is reached within ninety (90) days of certification). This includes the Driver's payment rates, minimum working hours, work conditions, driving practices, and other matters. FHDR-4 pp. 2–4, ER 19–21. This constitutes a sufficiently imminent injury under *American Trucking Ass'ns v. City of Los Angeles*, which held that a district court abused its discretion by not preliminarily enjoining a port regulation that called for requiring independent truck drivers to become employees because it threatened the drivers with irreparable injury to how they did business. 559 F.3d 1046, 1057–59 (9th Cir. 2009).

Third, and perhaps most pertinently, the Ordinance's certification process will violate the Drivers' federal right under Section 8(b)(4) not to be subject to union *campaigns* prohibited by that statute. Section 8(b)(4) prohibits unions from engaging in coercive or restraining conduct "where . . . *an object thereof* is" to compel a cessation of business or a Section 8(e) agreement. 29 U.S.C. § 158(b)(4)(ii) (emphasis

added). Unions need not actually attain this object to violate Section 8(b)(4). Coercive union conduct in pursuit of a prohibited objective is itself unlawful.

The certification campaign that the Ordinance empowers unions to wage against drivers and driver coordinators is preempted by Section 8(b)(4), irrespective of whether that campaign comes anywhere close to attaining its objectives. It is enough under Section 8(b)(4) that the "object[s]" of this coercive campaign are ones that a union lawfully cannot pursue, which (again) are compelling driver coordinators to "cease doing business" in Seattle with: (1) drivers not represented by that union, which is the inherent implication of a union becoming the "sole and exclusive representative of all for-hire drivers operating within the City for a particular driver coordinator," SMC § 6.310.110; and (2) drivers not subject to that union's contract, which is the inherent implication of a union agreement "applicable to all of the for-hire drivers employed by that driver coordinator," *id.; see supra* pp. 21–26.[10]

The Ordinance should be enjoined before its prohibited objectives are reached because Congress sought to stop union campaigns that violate Section 8(b)(4) *before* they reached fruition. This is made apparent by NLRA Section 10(l), which requires the NLRB to seek temporary injunctive relief from district courts if the agency finds

[10] The same analysis governs the Drivers' *Machinists* preemption claim. Even if the Teamsters' objective of compelling Uber and Lyft only to do business in Seattle with unionized drivers is a primary objective under Section 8(b)(4), the City's regulation and facilitation of that primary union campaign is preempted, irrespective of whether that campaign attains its objectives.

reasonable cause to believe that a union is violating Sections 8(b)(4) or 8(e). 29 U.S.C. § 160(l).

> Section 10(l) reflects a Congressional determination that the unfair labor practices enumerated therein are so disruptive of labor-management relations and threaten such danger of harm to the public that they should be enjoined whenever a district court has been shown reasonable cause to believe in their existence and finds that the threatened harm or disruption can best be avoided through an injunction.

Retail Clerks Union, Local 137 v. Food Emp'rs Council, Inc., 351 F.2d 525, 531 (9th Cir. 1965). Consistent with that intent, the Drivers' preemption claims immediately should be adjudicated, and the Ordinance permanently enjoined. *Cf. Retail Clerks Union,* 351 F.2d at 531–33 (issuing an injunction to stop a union from using arbitration to cause a company to enforce a union signatory agreement); *Danielson v. Teamsters Local 814*, 355 F. Supp. 1293 (S.D.N.Y. 1973) (issuing an injunction to stop a Teamsters local from pressuring a company to compel truck drivers to accept Teamsters' representation and contract because the drivers likely are independent contractors).

Turning to the prudential concerns, the Drivers' challenges are fit for judicial decision because the question of "whether a federal law 'occupies the field' and thereby preempts state law is purely legal.'" *Hawaii Newspaper Agency,* 103 F.3d at 746 (quoting *Sayles Hydro Assocs. v. Maughan*, 985 F.2d 451, 454 (9th Cir. 1993)). "'Legal questions that require little factual development are more likely to be ripe.'"

Id. (quoting *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1434 (9th Cir. 1996)). In *HERE v. Nevada Gaming Commission*, this Court held a union lawsuit alleging a state regulation to be preempted by federal law was ripe because preemption "is predominantly a legal question, resolution of which would not be aided greatly by development of a more complete factual record." 984 F.2d 1507, 1513 (9th Cir. 1993). The same reasoning and result applies here.

Postponing a decision will work substantial hardships on the Drivers. As noted, the union certification campaign the Ordinance authorizes and facilitates will infringe on Providers' privacy interests, threaten their business interests, and violate their federal rights under NLRA Section 8(b)(4). The Drivers' challenge to the Ordinance should be adjudicated now. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 299–301 (1979) (holding union challenge to election procedures to be ripe for adjudication).

2. The district court also found the Drivers' facial challenge to the Ordinance premature for a reason not yet discussed: because it is possible that an organization seeking certification under the Ordinance (i.e., a QDR) might not be a "labor organization" within the meaning of 29 U.S.C. § 152(2). Order pp 4–5, ER 9–10. Foremost, this reasoning has no bearing on the Drivers' as-applied challenge to the Ordinance because the Complaint alleges that Teamsters Local 177 is a labor organization. Compl. ¶ 43, ER 113. This allegation cannot be disputed on a motion to dis-

miss. *Navarro*, 250 F.3d at 732. It certainly is true, in any event. Teamsters Local 177 represents NLRA-covered employees. *E.g. Indus. Container Servs. (Teamsters Local 117)*, 2015 WL 3413478 (NLRB Jan. 1, 2015). It also files LM-2 reports as a labor organization with the United States Department of Labor. Compl. ¶ 43, ER 113. The Teamsters, quite simply, are a labor organization.

With respect to the facial challenge, "courts [must] . . . concede that a union is a 'labor organization' for § 8(b) purposes whenever a reasonably arguable case is made to that effect," because "the task of determining what is a 'labor organization' in the context of § 8(b) must, in any doubtful case, begin with the Labor Board." *Marine Eng'rs Beneficial Ass'n,* 370 U.S. at 182. A QDR will arguably be a labor organization subject to the NLRB's jurisdiction because the criterion for a QDR closely tracks that of a labor organization. Compl. ¶ 32, ER 110.[11] That is sufficient for preemption purposes. *See Marine Eng'rs Beneficial Ass'n,* 370 U.S. at 181-85.

The district court suggested, but decided that it "need not resolve," that the NLRA might not apply "where the NLRA-covered union members are not involved

[11] Among other things, a QDR must be a "nonprofit corporation," "[h]ave organizational bylaws that give for-hire drivers the right to be members of the organization and participate in the democratic control of the organization," and "[h]ave experience in and/or a demonstrated commitment to assisting stakeholders in reaching consensus agreements with, or related to, employers and contractors." FHDR-2 p. 2, ER 35. Labor organizations are non-profit organizations, 26 U.S.C. §§ 501(a), (c)(5) (federal tax code), must give members a right to participate in the democratic control of the organization, *see* 29 U.S.C. § 411, and have experience with reaching agreements on behalf of stakeholders with employers and contractors.

in a particular dispute." Order p. 5, ER 10. That proposition is untenable given that a labor organization is defined as an organization "in which employees *participate* and which exists for the purpose, *in whole or in part*, of dealing with employers." 29 U.S.C. § 152(5) (emphasis added). An organization satisfies this definition, and is subject to Sections 8(b)(4) and 8(e), if some NLRA-covered employees "participate" in the overall organization, irrespective of whether the individuals targeted by the union action at issue are NLRA-covered employees. *IBEW (B. B. McCormick & Sons, Inc.)*, 150 N.L.R.B. 363, 370–72 (1964); *see Marine Eng'rs Beneficial Ass'n,* 370 U.S. at 182–84 (discussed *infra* p.40); *Marriott Corp. v. NLRB*, 491 F.2d 367, 370 (9th Cir. 1974) (upholding the NLRB's decision that a union party to a subcontracting agreement with a non-NLRA airline carrier is a "labor organization" subject to Section 8(e) because it represents some NLRA covered employees).

The NLRB repeatedly has exercised jurisdiction in Section 8(b)(4) cases where unions (usually the Teamsters) target drivers who are independent contractors. *E.g.*, *Chipman*, 843 F.2d 1224; *supra* p. 19 (citing ten cases). The reason is that Sections 8(b)(4) and 8(e) expressly protect "person[s]" from prohibited union conduct. 29 U.S.C. §§ 158(b)(4), (e). That term encompasses not only independent contractors, but a host of other individuals and entities. *See* 29 U.S.C. § 152(1). The notion that Section 8(b)(4) reaches only union coercion directed at NLRA-covered employees

flies in the face of Congress' decision to extend Sections 8(b)(4) protections to any "person." *See supra* pp. 26–27; *Local 3, IBEW*, 244 N.L.R.B. at 358–59.

The cases the district court cites are inapposite. The first addressed which *federal* labor law—the NLRA or the Railway Labor Act ("RLA")—governed "a dispute between a traditional railway labor organization (ALPA), acting on behalf of employees subject to the [RLA] (ASTAR pilots), and a carrier subject to the [RLA]." *Air Line Pilots Ass'n v. NLRB*, 525 F.3d 862, 869 (9th Cir. 2008). The second case involved a union acting under an indisputably non-preempted state labor statute. *Pac. Mar. Ass'n v. ILA Local 63*, 198 F.3d 1078, 1081 (9th Cir. 1999). Here, the Ordinance is preempted by the NLRA. Acting under a local law that the NLRA preempts cannot possibly exempt a labor organization from the NLRA's jurisdiction. The proposition turns the Supremacy Clause on its head.

The dispositive case on this issue is *Marine Engineers Beneficial Ass'n*. 370 U.S. 173. There, the Supreme Court held the NLRA preempted enforcement of a state law to picketing by a union that almost exclusively represented individuals who were *not* NLRA covered employees because that union arguably was a "labor organization" subject to Section 8(b)(4) by virtue of it representing or seeking to represent a few NLRA covered employees. 370 U.S. at 182–85. Here, the Teamsters represent far more than just a few NLRA covered employees. The Teamsters unequivocally is a labor organization whose campaign against independent drivers is subject to Sec-

tions 8(b)(4) and 8(e). *See supra* pp. 37–38. Under *Marine Engineers Beneficial Association*, Seattle's regulation and facilitation of that campaign is preempted. The district court's dismissal of the Drivers' preemption claim should be reversed.

III. The Ordinance Violates Drivers' First Amendment Rights of Speech and Association Through Its Authorization of an Exclusive Representative.

The Ordinance not only is preempted by federal law, but also violates the First Amendment. The Ordinance infringes on Drivers' speech and associational rights because certification of an exclusive driver representative will strip them of their right to speak and contract with driver coordinators and transfer their rights to an advocacy group that they oppose. *See infra* Section A. Unlike with employees, no overriding state interest justifies this infringement. *See infra* Section B.

A. The Ordinance Impinges on Drivers' First Amendment Rights to Speak and Choose with Whom They Associate.

1. "The First Amendment protects [individuals'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). The Ordinance infringes on both constitutional rights.

First, the Ordinance deprives drivers of their right to speak and deal with driver coordinators. This deprivation is inherent in the City certifying a union to be "the *sole and exclusive* representative of all for-hire drivers operating within the City for a particular driver coordinator." SMC § 6.310.110 (emphasis added). The phrase

"sole and exclusive representative" means what it says: drivers cannot deal with a driver coordinator individually or through other representatives. Drivers also cannot alter the terms of their business relationship without going through their imposed representative. SMC § 6.310.735.J.3. Exclusive representation "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

That infringes on free speech rights because the City will be precluding two private parties—drivers and driver coordinators—from freely speaking with one another. *See generally McCullen v. Coakley*, 134 S. Ct. 2518, 2523 (2014) (holding that a statute prohibiting knowingly standing and leafletting on a public sidewalk within 35 feet of an abortion facility infringed on freedom of speech). This prior restraint on speech bears a "heavy presumption against its constitutional validity." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

Second, the Ordinance transfers the drivers' speech rights to a City-designated representative, which is empowered "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. This mandatory representative's agency authority to speak and contract for drivers necessarily associates

unconsenting drivers with the representative and its speech. As the Eleventh Circuit succinctly stated when addressing whether exclusive representation threatened an employee with associational injury in *Mulhall v. UNITE HERE Local 355*: "[r]egardless of whether [the employee] can avoid contributing financial support to or becoming a member of the union[,] . . . its status as his exclusive representative plainly affects his associational rights," because "[i]f [the union] is certified as the majority representative of . . . employees, [the employee] will have been thrust unwillingly into an agency relationship" with a union that may pursue policies with which he disagrees. 618 F.3d 1279, 1286–87 (11th Cir. 2010). Given that "[f]reedom of association . . . plainly presupposes a freedom not to associate," *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984), this compelled association impinges on Drivers' rights to free association.

The Supreme Court has recognized that exclusive representation of employees results in a "corresponding reduction in the individual rights of the employees so represented," *Vaca v. Sipes*, 386 U.S. 171, 182 (1967), and "the sacrifice of individual liberty that this system necessarily demands," *14 Penn Plaza LLC v. Pyett,* 556 U.S. 247, 271 (2009). However, "although the federally-created right of a majority-favored union to supersede an employee's direct bargaining relationship with his employer amounts to '*compulsory association*.' . . . that compulsion 'has been sanctioned as a permissible burden on employees' free association rights,' . . . based on a

legislative judgment that collective bargaining is crucial to labor peace." *Mulhall*, 618 F.3d at 1286 (internal citation omitted, emphasis added). As will be shown below, irrespective of whether that interest justifies exclusive representation of employees, it does not justify collectivizing independent contractor drivers.

B. The Ordinance Cannot Survive Heightened First Amendment Scrutiny Under *Harris*.

To survive First Amendment scrutiny, the City must prove that its Ordinance was "adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623; *see O'Hare Truck Serv., Inc. v. City of Northlake,* 518 U.S. 712, 714–15 (1996) (holding this standard of scrutiny applied to where a city required owner-operators of tow trucks to affiliate with a political party). The Ordinance cannot survive this scrutiny under *Harris,* 134 S. Ct. 2618.

Harris concerned whether the State of Illinois constitutionally could compel individuals who were *not* public employees (personal assistants) to subsidize an exclusive representative. *Id.* at 2623. In the course of holding the requirement unconstitutional, *Harris* held the labor peace interest said to justify exclusive representation of employees had limited force as applied to personal assistants who are not full-fledged employees. *Id.* at 2640. The Court reasoned that (1) "any threat to labor peace is diminished because the personal assistants do not work together in a common state facility but instead spend all their time in private homes," *id.*; (2) "[f]ederal labor law

reflects the fact that the organization of household workers like the personal assistants does not further the interest of labor peace," because such individuals are not employees subject to exclusive representation under the NLRA, *id.*; and (3) the union had limited authority given the absence of an employment relationship, *id.*

Likewise here, Drivers do not work together in a common facility, but in their own vehicles; the Drivers are independent contractors who are not considered employees under the NLRA, 29 U.S.C. § 152(3); and there is no employment relationship between the Drivers and the driver coordinators. Under *Harris*, the labor peace interest that courts have cited to justify exclusive representation of employees does not justify the collectivization of independent drivers. The City has no compelling state interest to justify the Ordinance's infringement on the First Amendment rights of Drivers. The Ordinance is unconstitutional.

C. *Knight* Does Not Exempt the Ordinance from First Amendment Scrutiny.

1. The district court held the Ordinance need not satisfy First Amendment scrutiny based upon its reading of *Minnesota State Board v. Knight*, 465 U.S. 271, 273 (1984). Order pp. 6–8, ER 11–13. The court misconstrued *Knight,* which addressed an issue not present here: whether *excluding* an employee from union bargaining sessions with a public employer infringed on the employee's ostensible constitutional right to participate in those sessions. 465 U.S. at 273.

Knight framed "[t]he question presented . . . [as] whether this *restriction on participation* in the nonmandatory-subject exchange process violates the constitutional rights of professional employees." *Id.* (emphasis added). The "appellees' principal claim [was] that they have a right to force officers of the state acting in an official policymaking capacity to listen to them in a particular formal setting." *Id.* at 282. The Supreme Court disagreed, finding that "[t]he Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." *Id.* at 283. Consequently, the employee's "speech and associational rights . . . have not been infringed by Minnesota's restriction of participation in 'meet and confer' sessions to the faculty's exclusive representative." *Id.* at 288. The Court concluded that "[t]he District Court erred in holding that appellees had been unconstitutionally denied *an opportunity to participate* in their public employer's making of policy." *Id.* at 292 (emphasis added).

Knight has no bearing on this case. The fact that a government body, like the City of Seattle, constitutionally is free to choose to whom they listen under *Knight* says nothing about the constitutionality of the City forcing one group of private parties (drivers) to accept a mandatory representative for speaking and dealing with another private party (driver coordinators) and a City regulator.

At most, *Knight* could support the proposition that the Ordinance could require the Director only consider the input of an exclusive driver representative, and not

drivers, when deciding whether to approve a proposed contract. But that proposition is not challenged here. It is academic in any event, as the Ordinance allows the Director to consider anyone's input. SMC § 6.310.735.H.2.[12]

2. Some courts have interpreted *Knight* to mean that the government can compel individuals to accept an exclusive representative for dealing with the government without satisfying First Amendment scrutiny. Order p. 7, ER 12 (citing cases). This interpretation of *Knight* is untenable for the reasons discussed above. *Knight* itself made clear that the case "involve[d] no claim that anyone is being compelled to support [union] activities." 465 U.S. at 291, n.13.

In any event, the Court need not determine if those cases correctly were decided because they are distinguishable. Those cases concerned whether states could designate representatives to represent individuals in their relations with *the state*. By contrast, this case concerns whether the City can designate an exclusive representative to represent independent contractors primarily in their relations with *a private party* (a driver coordinator). This is a distinction with a difference. Even if *Knight*'s holding that the government constitutionally can choose to listen only to a union means the government is also free to dictate who that union speaks for (which does not fol-

[12] This section provides that, in reviewing a proposed contract, "the record shall not be limited to the submissions of the EDR and driver coordinator nor to the terms of the proposed agreement. The Director shall have the right to gather and consider any necessary additional evidence, including by conducting public hearings and requesting additional information from the EDR and driver coordinator." SMC § 6.310.735.H.2.

low),[13] that "reasoning" has no application where, as here, the government forces individuals to accept a mandatory representative primarily for dealing with private parties. The City's ability to choose whom it listens to under *Knight* has no bearing on the Ordinance's regulation of how private parties speak with one another.

CONCLUSION

For the foregoing reasons, the Drivers' NLRA preemption claims are ripe, the Ordinance is preempted under either the *Garmon* or *Machinist* preemption doctrines, and the Ordinance violates the Drivers' First Amendment rights. The Court should therefore reverse the district court's opinion and judgment, and remand for further proceedings consistent with the Court's opinion.

Dated: October 27, 2017.

Respectfully submitted,

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[13] The fact that the government can choose to whom it *listens* does not mean the government is free to dictate who *speaks* for citizens.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, the following case is related to the present case: *Chamber of Commerce v. City of Seattle*, No. 17-35640,

Dated: October 27, 2017

/s/ William L. Messenger
William L. Messenger

Counsel for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type limitations provided in Federal Rule of Appellate Procedure 32(a)(7). The foregoing brief was prepared using Microsoft Word 2013, and contains 12,075 words in 14-point proportionately spaced Baskerville Oldface typeface.

Dated: October 27, 2017

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 27, 2017. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 27, 2017

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