Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DAN CLARK, *et al.*,

Plaintiffs,

vs.

CITY OF SEATTLE, *et al.*,

Defendants.

No. 2:17-cv-00382-RSL

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

NOTED ON CALENDAR: May 5, 2017

ORAL ARGUMENT REQUESTED

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1 **DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS**

2 By failing to offer any argument to the contrary, Plaintiffs have effectively conceded that
3 any challenge to the Ordinance based on a membership or dues requirement that might be
4 included in an agreement between a driver coordinator and an Exclusive Driver Representative
5 ("EDR") is unripe at this time. For similar reasons, Plaintiffs' remaining First Amendment and
6 National Labor Relations Act ("NLRA") claims are also unripe, in that they depend upon a series
7 of contingent events that may or may not occur: a Qualified Driver Representative ("QDR")
8 seeking to represent Uber or Lyft's drivers, the QDR obtaining majority support from those
9 drivers, and the City certifying the QDR as an EDR of Uber or Lyft's drivers.

10 Besides lacking ripeness, Plaintiffs' claims also lack merit. Their NLRA claims fail
11 because (1) the Ordinance does not authorize or require any conduct that the NLRA arguably
12 prohibits; (2) a QDR is not necessarily a "labor organization" covered by the NLRA (and even if
13 it were in some instances, it would not be with respect to this dispute); and (3) there is no
14 "secondary" or "neutral" target of the organizing activity. Plaintiffs' First Amendment claim has
15 been rejected by every court to consider it, including the United States Supreme Court. And
16 Plaintiffs' claim under the Driver's Privacy Protection Act ("DPPA") fails because the DPPA
17 prohibits disclosure only of information that was obtained from a state's department of motor
18 vehicles, the information at issue here can be obtained directly from drivers rather than from any
19 source that is even arguably a "motor vehicle record," and the City is in the process of
20 eliminating any required disclosure of state-issued driver's license numbers.

21 **I ARGUMENT**

22 **A. Plaintiffs' NLRA and First Amendment claims are not ripe (Counts I-IV).**

23 A plaintiff has the burden to demonstrate standing and ripeness. *Chandler v. State Farm*
24 *Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121-22 (9th Cir. 2010). Plaintiffs have not done so here.

25 Initially, Plaintiffs have not established the ripeness of their NLRA claims. At the time
26 the Complaint was filed, and to date, all that has happened under the Ordinance is that Teamsters
27 Local 117 was designated as a QDR and it requested lists of qualifying drivers from all driver

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1 coordinators. Plaintiffs do not deny that it is not yet known (1) whether Local 117 will seek to
2 obtain statements of interests from drivers for Uber or Lyft; (2) if it does, whether it will be
3 successful in obtaining majority support from those drivers; and (3) if it is, whether the City will
4 certify Local 117 as an EDR of Uber or Lyft's drivers. Yet it is not until *all* of those events
5 occur, and a contract is reached and approved by the City, that Plaintiffs contend any even
6 arguably "coercive" conduct will occur. *See*, *e.g.*, Complaint (Dkt. #1) ¶57 ("However, they and
7 other drivers may cease doing business with Uber and/or Lyft, and may cease using the
8 compan[ie]s' Apps in Seattle, if compelled to accept the EDR's representation and abide by its
9 agreement to do business with Uber and/or Lyft."); *but see infra* at 2-3, 4-5 & n.6 (explaining
10 that representation and negotiations are not coercive within the meaning of the NLRA).

11 Plaintiffs do not deny that arguments predicated on the existence of a City-approved
12 agreement between a driver coordinator and an EDR that contains a provision requiring
13 membership or dues would be unripe. *See* Opp. (Dkt.#44) at 11-12; *cf.* Mot. (Dkt. #41) at 7-8.
14 And they tacitly concede that their Section 8(e) claim, which at a minimum requires a "contract
15 or agreement," 29 U.S.C. §158(e), is not ripe. *See* Opp. at 11-12; Mot. at 7-8; *Chamber of*
16 *Commerce v. City of Seattle*, C17-0370RSL, Dkt. #49 (W.D. Wash. April 4, 2017) at 8-9.

17 Nonetheless, Plaintiffs defend the ripeness of what remains of their NLRA claims by
18 arguing that "Section 8(b)(4) does not require that a union actually achieve its unlawful
19 objective," in that it prohibits coercive conduct with an unlawful secondary *objective*. Opp. at 12.
20 However, this Court has already indicated that Plaintiffs' Section 8(b)(4) claim is likely not ripe,
21 because it depends upon events that may or may not occur. *Chamber of Commerce*, C17-
22 0370RSL, Dkt. #49, at 9-10. And even assuming that a QDR could engage in unlawful coercion
23 within the meaning of Section 8(b)(4), *but see infra* at 4-9, Plaintiffs do not allege that any such
24 "coercive" conduct (as defined in the NLRA) has occurred here or will occur. "Coercion" under
25 the NLRA requires "violence, intimidation, blocking ingress and egress, or similar direct
26 disruption of the secondaries' business." *In re United Bhd. of Carpenters, Local Union No. 1506*,
27 355 NLRB 797, 800 (2010); *see also Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. &*

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Constr. Trades Council, 485 U.S. 568, 578 (1988) (the terms "threats, coercion, or restraints," as used in Section 8(b)(4), "are nonspecific, indeed vague, and should be interpreted with caution and not given a broad sweep;" no "coercion" when "no violence, picketing, or patrolling") (quotation omitted). Nothing about the Ordinance authorizes or requires such conduct, and Plaintiffs make no allegation that such conduct has occurred or likely will occur.[1]

Finally, Plaintiffs' assertion that their First Amendment claim is ripe "because there is no other feasible time for the Court to consider it" before they are injured, Opp. at 21, does not obviate the constitutional problem that their alleged injury is contingent upon uncertain future events that depend on the actions of third parties not before the Court.[2] Plaintiffs do not dispute that any harm to their alleged First Amendment right will arise "only after an exclusive driver representative is certified." *Chamber of Commerce*, C 17-0370RSL, Dkt. #49 at 15. Nor do they deny that an EDR will be certified only if multiple contingent future events occur. *See supra* at 2. While Plaintiffs need not await the actual infliction of injury before filing suit, the injury must be sufficiently likely to support standing, which it is not here. *See* Mot. at 6-7.[3]

B. Plaintiffs' NLRA claims fail as a matter of law (Counts I-III).

The City previously set forth three arguments, each of which provides an independent basis for dismissing Plaintiffs' NLRA claims. Plaintiffs fail to refute any of them.

First, Plaintiffs do not even respond to the City's argument that the *Ordinance* is facially neutral and nothing about *it* requires or causes an EDR to violate Section 8(b)(4) or 8(e). This is fatal, given that Plaintiffs bring only a facial challenge. Conduct made unlawful by Section 8 may or may not take place by parties acting under the Ordinance, or under any other facially neutral law, but that possibility is actionable directly under the NLRA (through an NLRB charge

[1] For reasons discussed *infra* at 3-4 & n.6, any argument that the Ordinance itself somehow operates in a coercive manner could not provide the basis for a Section 8 preemption claim.

[2] Plaintiffs do not seek to defend the ripeness of any First Amendment challenge based on mandatory financial support for or membership in an EDR. *See* Mot. at 7 n.7.

[3] Moreover, Plaintiffs' assertion that "drivers could be collectivized at any time and with little notice," Opp. at 21, is wrong. There would be ample opportunity for Plaintiffs to file suit if and when certification became imminent. *See* SMC 6.310.735.F; FHDR-4 (Director may certify EDRs within 30 days of statements of interest submission; written objections may be filed within 10 days of certification; Director must rule on objections within 30 days).

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or a lawsuit), *see* Mot. at 10, and does not render a neutral state or local law preempted.

The most Plaintiffs can say is that the Ordinance "facilitates" representation by an EDR and that drivers unhappy with that representation or with a contract negotiated by the EDR may choose to stop working with a driver coordinator. Speculation aside, that cannot possibly be the standard for NLRA preemption. No one would say that a cab company was "coerced" to "cease doing business" with a taxi driver who chose not to obtain a city-required taxi medallion.[4] And even if an EDR did engage in "coercive" conduct, it could violate Section 8(b)(4) only if that conduct's objective was to force or require someone to cease doing business with another person—*not* if the objective were simply, as here, a contract containing terms that might cause some independent contractors to elect, on their own accord, to cease doing business with a driver coordinator because they dislike those terms or the driver coordinator's relationship with an EDR. *See* 29 U.S.C. §158(b)(4)(ii)(A), (B).

Relatedly, because Section 8(b)(4) prohibits only coercion *by a union or its agents*, 29 U.S.C. §158(b)(4), it is irrelevant if the Ordinance—enacted by *the City*—is somehow inherently coercive, as Plaintiffs seem to suggest. As Plaintiffs acknowledge, Section 8 does not regulate cities or other legislative bodies.[5] For that reason and others, *see supra* at 2-3, "coercion" under the NLRA cannot possibly mean the requirement that driver coordinators follow the City's laws.[6]

The second, independent reason Plaintiffs' NLRA claims fail as a matter of law is that Sections 8(b)(4) and 8(e) regulate the conduct only of "labor organizations," which are limited to

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[4] Nor does the City's argument in this regard hinge on pretending that the driver coordinators and their drivers are "one entity," as Plaintiffs suggest. Opp. at 13-14. The point to which Plaintiffs purport to respond is simply that a city's regulation of a business within its jurisdiction does not constitute unlawful coercion within the meaning of the NLRA, regardless of the degree of separation between that business and those with whom it employs or contracts, and regardless of whether that regulation might affect how and whether those parties contract with one another.

[5] *See* Opp. at 3 ("*[A] union* violates Sections 8(b)(4) and 8(e) by requiring an employer only to do business with parties subject to a union's representation or contracts[.]") (emphasis added); *id.* at 4 ("*[A] union* violates Section 8(b)(4) and/or Section 8(e) by coercing employers to enter into hot cargo agreements.") (emphasis added); *id.* at 5 ("[A] Teamsters local violated Sections 8(e) and 8(b)(4)").

[6] Plaintiffs contend that the EDR recognition process, disclosure of driver information, and prohibition of certain conduct are all coercive. Opp. at 7 n.4. However, Plaintiffs fail to articulate how those provisions *threaten* or *coerce* anyone within the meaning Section 8(b)(4), and any such conclusion would be unwarranted given that many or all of these same procedures apply or are used in NLRA-*sanctioned* organizing. Even if these requirements could somehow be "coercive" within the meaning of the NLRA, moreover, they are mandates imposed *by the City*, not by a labor organization, and so could not violate Section 8(b)(4). *See supra* at 3-4 & n.5.

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entities representing NLRA "employees," not those representing independent contractors (as Plaintiffs allege themselves to be, *see* Compl. ¶¶29, 51-52). Plaintiffs' primary response is that *Local 117* should be regarded as a "labor organization" because it happens to represent some NLRA-covered employees working at different employers. But this argument only serves to highlight Plaintiffs' ripeness problem, because it assumes that Local 117 will eventually engage in threats, coercion, or other conduct with an unlawful object as prohibited by the NLRA.

Even aside from this ripeness problem, Plaintiffs have mounted a *facial* challenge to the Ordinance. That challenge cannot succeed unless they establish that *all* potential EDRs—*not* just Local 117—are "labor organizations" under the NLRA. *See, e.g.*, *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (to be facially invalid, a law must be "unconstitutional in all of its applications"). Plaintiffs do not even attempt to make such a showing.[7] To the extent Plaintiffs wish to advance an as-applied challenge to Local 117's status as a QDR or EDR, that challenge would provide no basis for striking down the Ordinance. At most, it might support an NLRB charge regarding Local 117's conduct, or provide an as-applied defense or claim in the context of actual enforcement.

In any event, Plaintiffs all but ignore the most recent, most relevant Ninth Circuit case on this issue, *Air Line Pilots Association v. NLRB*, 525 F.3d 862 (9th Cir. 2008) ("*ALPA*"), which makes clear that the applicability of the NLRA depends on the nature of the dispute at issue. In *ALPA*, the Ninth Circuit held that the NLRA did not apply to a dispute involving a union that represented NLRA-covered employees as well as employees covered by the Railway Labor Act, when none of the NLRA employee members were "in any way involved in the present case" and it was "fundamentally a Railway Labor Act dispute." *Id.* at 870. Similarly, here, Plaintiffs admit

[7] Plaintiffs assert in passing that "[o]ther QDRs arguably will also be labor organizations by virtue of the criteria for being certified as a QDR," Opp. at 16, but make no argument supporting this assertion, so any such argument is waived. *See FDIC v. Garner*, 126 F.3d 1138, 1145 (9th Cir. 1997) (claim waived where party presents "no case law or argument in support"); *Fry v. Pliler*, No. CIV. S011580FCDGGHP, 2004 WL 5264357, at *30 (E.D. Cal. Aug. 27, 2004) ("A bare contention, unsupported by explanation or authority, is deemed waived."). The QDR certification criteria (non-profit registration, bylaws giving drivers membership and participation rights, and experience with or commitment to helping stakeholders reach agreements with employers or contractors, SMC 6.310.735.B; FHDR-2) in no way limit eligibility for QDR or EDR status to "labor organizations" that represent NLRA-covered employees.

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that no NLRA-covered employees represented by Local 117 have anything to do with the conduct at issue (Local 117's organizing of independent contractors under the Ordinance), and under *ALPA* Local 117's representation of those employees in unrelated contexts is not sufficient to make Section 8 applicable here.[8]

In passing, Plaintiffs attempt to distinguish *ALPA* and other cases cited by the City on the ground that "the unions were acting under lawful (i.e., non-preempted) federal or state labor statutes." Opp. at 16. But this is classic circular reasoning. That the EDR is a "labor organization" is a necessary *premise* for Plaintiffs' contention that the Ordinance is preempted; otherwise Section 8(b)(4) and (e) would not apply. Plaintiffs cannot reason from their *conclusion*—that the Ordinance is preempted—to obtain that premise. Plaintiffs therefore offer no basis at all for distinguishing *ALPA*.[9]

The 1959 amendments to Section 8(b)(4) also offer no help to Plaintiffs, because those amendments merely closed a loophole with respect to the *forms* of labor organization activity covered by 8(b)(4), without in any way expanding the definition of "labor organization."[10]

The third, independent reason why Plaintiffs' NLRA claims fail is because campaigning and negotiating on behalf of a group of independent contractor drivers for Uber or Lyft is not activity aimed at a *neutral third party*, which is all that Sections 8(b)(4) and 8(e) regulate. As the

[8] *Marriott Corp. v. NLRB*, 491 F.2d 367 (9th Cir. 1974), relied upon by Plaintiffs, is clearly distinguishable, because the dispute in that case involved both an NLRA-exempt employer and its employees *and* an NLRA-covered employer and its employees, and related to employment conditions affecting the NLRA-covered employees. *Id.* at 370. No similar interaction with NLRA-covered employees exists here.

[9] Plaintiffs also grossly mischaracterize *Marine Engineers Beneficial Association v. Interlake Steamship Co.*, 370 U.S. 173 (1962), suggesting that it held that a union representing some NLRA-covered employees is a "labor organization" for all purposes despite also representing some non-NLRA employees. Opp. at 17. But *Marine Engineers* held no such thing. In fact, the Court expressly *declined* to decide whether the union there was a "labor organization." 370 U.S. at 180. Rather, the Court held merely that where a union could reasonably be deemed a "labor organization," as evidenced by prior NLRB determinations, the state court should defer to the NLRB rather than apply a state law to enjoin the union's conduct. *Id.* at 178.

[10] Before 1959, the NLRA made it an unfair labor practice for a union "to induce or encourage the '*employees of any employer*' to engage in a strike or certain other concerted activities where an object of such conduct was forcing or requiring any employer or other person to cease doing business with any other person." *Local 3, IBEW*, 244 NLRB 357, 358 (1979) (emphasis added). Because this was construed to apply only to NLRA-covered employees, "unions lawfully could enlist the aid of nonstatutory agricultural, governmental, railroad, or airline employees to carry out secondary boycotts." *Id.* To close this loophole, Congress replaced "employees of any employer" with "any person." *Id.* at 359. Both before and after the 1959 amendments, an entity is not a labor organization subject to Section 8(b)(4) and (e) unless it is representing NLRA-covered employees.

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Ninth Circuit held in *Chipman Freight Services, Inc. v. NLRB*, 843 F.2d 1224, 1227 (9th Cir. 1988), the use of coercive tactics to advance independent contractors' interests *with respect to the business entity with which they contract* does not violate Section 8(b)(4) so long as its object is not to force a *neutral* business to cease doing business with another.

Plaintiffs first attempt to distinguish *Chipman* on the ground that the union in that case already represented the independent contractors at issue, Opp. at 14, but they fail to explain how, for purposes of Section 8(b)(4), that is different from a union attempting to *organize* independent contractors. Nothing in *Chipman*'s reasoning depends upon the fact that the independent contractors had already been organized, and as noted already, none of the means through which a QDR achieves certification as an EDR are inherently coercive within the meaning of Section 8(b)(4). *See supra* note 6. Next, Plaintiffs seek to distinguish *Chipman* on the ground that that case involved picketing, but that fact makes a Section 8(b)(4) violation *more* (rather than less) likely, since picketing is recognized as coercive. *Chipman*'s reasoning did not rest on the existence of a picket, and its overarching principle applies equally here: Sections 8(b)(4) and (e) do not prohibit conduct on behalf of workers, *including independent contractors*, to advance their interests with respect to those that have hired them.[11]

Having failed to refute the City's specific arguments, Plaintiffs devote the bulk of their NLRA discussion to their contention that certification of an EDR and the uniform application of *any* Director-approved contract is akin to a "union signatory" clause, because it "require[s] contractors to be represented by a union or be a party to its contract." Opp. at 14:7-8.[12] But the cases upon which Plaintiffs rely (*see*, *e.g.*, Opp. at 3 n.2 & 5 n.3), involve situations where the union was seeking to force the employer to require contractors to become *union members*. That

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[11] Plaintiffs suggest that *Chipman* supports its position that a union representing independent contractors is an NLRA-covered "labor organization." But the Ninth Circuit never addressed that question, nor had occasion to, having concluded that the conduct was otherwise not regulated by the NLRA. The other cases cited by Plaintiffs similarly did not address that issue. *See, e.g.*, *Joint Council of Teamsters No. 42*, 248 NLRB 808, 809 (1980) (parties stipulated that unions were labor organizations).

[12] As the City explained in its opening brief, "union signatory" clauses require third party contractors to become union members and are generally unlawful. "Union standards" clauses, by contrast, simply require an employer to contract with third parties on the same terms that it applies to union members, and are lawful. Mot. at 11-12 & n.11.

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is the true definition of a "union signatory" clause. *See, e.g.*, *NLRB v. Chauffeurs Local 525*, 773 F.2d 921, 924 (7th Cir. 1985) ("The clauses at issue here, *which require owner-operators to join the Union* by requiring them to be carried on the payroll as employees, are union signatory clauses which focus on the union affiliation of, rather than the compensation paid, a subcontractor's employees.") (emphasis added); *Jt. Council of Teamsters No. 42*, 248 NLRB at 817 ("The evidence further shows that Respondent Local 420 … coercively insisted that Irvine cease doing business with independent contractors who were not and would not *become members* of Local 420.") (emphasis added). Yet Plaintiffs no longer contend that the Ordinance or the application of uniform contract terms, standing alone, requires membership in an EDR.[13]

Unlike a union signatory clause, an EDR's contract with a driver coordinator does not advance the EDR's organizational interests elsewhere. *See Nat'l Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 620 (1967) (Section 8(b)(4) and 8(e) were intended to prevent "labor's use of the boycott to … involv[e] an employer in disputes not his own"). Rather, such a contract seeks to advance the interests of the independent contractor drivers who drive for that driver coordinator. Plaintiffs cite no authority for the proposition that representation in bargaining and the uniform application of a negotiated contract, without more, violates the NLRA. Although Plaintiffs contend the City simply "rips [the 'union standards'] term-of-art out of context," Opp. at 14, this circumstance is functionally identical to the inclusion in a collective bargaining agreement of a lawful union standards clause, whereby an employer agrees to apply the terms of an agreement to subcontractors but does not require union membership. Just as in the context of a union standards clause, the uniform application of the terms of a Director-approved contract prevents a driver coordinator from undercutting a collectively negotiated agreement by farming out work at rates that undermine the terms of the agreement. Union standards clauses are lawful "[b]ecause the pressure generated by such an agreement is focused upon the primary employer, and benefits the employees of that employer." *NLRB v. Int'l Bhd. of Teamsters, Local 251*, 691

[13] Although the Ordinance does not prohibit the parties from agreeing to a contract requiring union membership, no such contract exists now, and one may never exist.

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F.3d 49, 57 (1st Cir. 2012). The same analysis applies here.[14]

C. Plaintiffs' Complaint does not state a First Amendment claim (Count IV).

As previously explained, the Supreme Court has rejected Plaintiffs' theory that systems of exclusive representation, standing alone, violate the First Amendment. Mot. at 14-16. Plaintiffs repeatedly assert that the Ordinance "strips drivers of their right to speak and contract with a driver coordinator," Opp. at 18, but authorizing EDRs to negotiate "the terms of [drivers'] business relationship," *id.*, does not prevent those drivers from expressing any views or concerns to their driver coordinators; nor does it require drivers to participate in or affiliate themselves with any of the EDR's expressive activities. As the previously cited Supreme Court and lower court decisions recognize, granting a designated representative the exclusive right to engage in *economic* activities like contract negotiation and enforcement on behalf of the individuals it represents does not infringe upon First Amendment-protected *speech* rights. *See* Mot. at 14-16.[15]

The sole case Plaintiffs cite in support of their theory that the First Amendment protects an individual driver's right to contract with a driver coordinator directly, rather than through a majority-designated representative, does not support their position. *Mullhall v. UNITE HERE Local 355*, 618 F.3d 1279 (11th Cir. 2010),[16] addressed only whether the plaintiff had *standing* to pursue a claim that his employer had violated a provision (not relevant here) of federal labor

[14] Plaintiffs further contend that if the conduct at issue were primary under *Chipman*, the Ordinance would be preempted under *Machinists* doctrine because "states and localities cannot regulate, much less assist, primary union campaigns against employers." Opp. at 15; *see also id.* at 9-10. While states and localities may be prohibited from *regulating* union campaigns in certain ways, Plaintiffs fail to explain how the Ordinance "assists" any primary conduct, or why "assistance" would trigger NLRA preemption. Further, *Machinists* preemption in connection with union campaigns could only apply in the context of NLRA organizing. *See Chamber of Commerce*, C17-0370RSL, Dkt. #49 at 10-15 (*Machinists* claim unlikely to succeed because workers not covered by NLRA); *Greene v. Dayton*, 806 F.3d 1146, 1149 (8th Cir. 2015), *cert. denied*, 136 S.Ct. 2014 (2016) (where Congress has excluded workers from NLRA definition of "employee," "states remain free to legislate as they see fit") (quotation marks and citation omitted).

[15] Plaintiffs contend that these cases are distinguishable because they involved "exclusive representation vis-à-vis the government." Opp. at 20 (emphasis omitted). But because public employee unionization arguably implicates the First Amendment-protected right to petition, while exclusive representation in the private context does not, Plaintiffs' distinction *weakens* their First Amendment claim. *See* Mot. at 16 n.15. Plaintiffs' distinction is also illusory, because the Ordinance *does* involve the City's exercise of its "right to choose to whom it listens," Opp. at 20: the EDR and driver coordinator merely have the right to submit a proposed agreement to the Director for his review and (if the agreement's terms will further the City's policy goals) his approval. SMC 6.310.735.H.2, I.3.

[16] Plaintiffs also cite *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009) and *Am. Communications Ass'n v. Douds*, 339 U.S. 382 (1950), but neither case considered the impact of exclusive representation on First Amendment rights.

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law, and specifically explained that there is a difference between an "interest" that supports standing and an infringement of First Amendment rights. *See id.* at 1286 ("At issue today is only whether Mulhall has a stake in this controversy that is real enough and concrete enough to entitle him to be heard in a federal district court concerning his §302 claim, nothing more."); *id.* at 1287-88; *see also D'Agostino v. Baker*, 812 F.3d 240, 245 (1st Cir. 2016), *cert. denied*, 136 S.Ct. 2473 (2016) (Souter, J., sitting by designation) (discussing *Mulhall*).[17]

Nor does *Harris v. Quinn*, 134 S.Ct. 2618 (2014), support Plaintiffs. *Harris* considered only whether the First Amendment prohibited Illinois from requiring home care workers *to financially support* "speech on matters of public concern by a union that they do not wish to join or support." *Id.* at 2623. *Harris* did not consider whether exclusive representation *itself* infringes upon First Amendment interests, and is thus irrelevant here. *See D'Agostino*, 812 F.3d at 244 ("*Harris* did not speak to … the premise assumed and extended in *Knight*: that exclusive bargaining representation by a democratically selected union does not, without more, violate the right of free association on the part of dissenting non-union members of the bargaining unit.").[18]

D. Plaintiffs' DPPA claim fails as a matter of law (Count V).

Plaintiffs' argument that the DPPA's provisions prohibiting private parties from knowingly obtaining or disclosing certain personal information apply even if that information was not obtained from a state's department of motor vehicles is premised upon a single outlier district court decision whose faulty reasoning is contrary to the vast weight of authority. Opp. at 22.[19] As previously explained, Plaintiffs' DPPA construction disregards the relevant statutory

[17] There are many situations in which a plaintiff has a First Amendment "interest" that is sufficient to support standing even though on the merits there is no First Amendment infringement. *See*, *e.g.*, *Univ. of Pa. v. E.E.O.C.*, 493 U.S. 182, 201 (1990) (plaintiff had standing to challenge compelled disclosure of peer review reports, but disclosure did not infringe First Amendment rights). Moreover, *Mulhall*'s holding with respect to standing was seriously questioned when the Supreme Court, having granted certiorari on the merits, dismissed the writ as improvidently granted. *See Unite Here Local 355 v. Mulhall*, 134 S.Ct. 594, 595 (2013) (Breyer, J., dissenting).

[18] Indeed, *Harris* declined to consider that question even though the petitioners specifically asked the Court to resolve it. *See* Brief of Petitioners at 23-24, *Harris*, 134 S.Ct. 2618 (No. 11-681), *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/11-681_pet.authcheckdam.pdf.

[19] *Compare* Opp. at 22 (citing *Pavone v. Law Offices of Anthony Mancini, Ltd.*, No. 15 C 1538, 2016 WL 4678311 (N.D. Ill. Sept. 7, 2016)), *with* Mot. at 18-19 (citing *Reno v. Condon*, 528 U.S. 141, 146 (2000); *Ocasio v. Riverbay*

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context of 19 U.S.C. §2722 and would subject so much noncommercial intrastate conduct to regulation as to call its constitutional validity into question. *See* Mot. at 18-19; *see also Chamber of Commerce*, C17-0370RSL, Dkt. #49, at 16 (recognizing that "purposes of the [DPPA] strongly suggest that the source of the personal information must be taken into consideration").[20]

Even if Plaintiffs' construction of the DPPA were correct, however, their claim would still fail for a fundamental reason that Plaintiffs do not even address: As the City has explained, the Ordinance does not require the disclosure of *any* information that will necessarily have been obtained from "motor vehicle records." Mot. at 17-18. The information that the Ordinance requires driver coordinators to include in their qualifying drivers lists (names, addresses, email addresses, and phone numbers) can be obtained directly from the drivers themselves. *Id.* The additional information required by FAS's implementing rules (drivers' locally issued for-hire permit number and state-issued driver's license number) can likewise be obtained directly from the drivers. *Id.* at 18. Accordingly, driver coordinators will be able to prepare and disclose these lists without triggering *any* of the DPPA's prohibitions on the use of information obtained from motor vehicle records, even assuming that such information falls under the scope of the DPPA.

Further, as Plaintiffs acknowledge, the City has proposed amendments to the Ordinance's implementing rules that remove the requirement that qualifying driver lists include state-issued driver's license numbers. Opp. at 24 n.1. If those amendments are approved (and there is no reason to believe they will not be), any DPPA challenge premised on the use of driver's license numbers in qualifying driver lists will be moot.[21] And Plaintiffs make no attempt to explain why

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Corp., No. 06 Civ. 6455, 2007 WL 1771770, at *1 (S.D.N.Y. Jun. 19, 2007); *Fontanez v. Skeppie*, 563 Fed.Appx. 847, 848-49 (2d Cir. 2014); *O'Brien v. Quad Six, Inc.*, 219 F.Supp.2d 933, 934-35 (N.D. Ill. 2002)).

[20] While 18 U.S.C. §2721(b)(3)(A) permits the use of motor vehicle records "to verify the accuracy of personal information *submitted by the individual to the business*" (emphasis added), that section would not apply where a business such as a bar or restaurant uses customers' driver's licenses to *determine* their ages, rather than to verify information that the customers have already provided. Accordingly, under Plaintiffs' construction of the DPPA, *see* Opp. at 23, any restaurant that failed to ask each customer to provide his or her age *before* reviewing the age listed in the customer's license would be liable for damages of at least $2,500 per customer. 18 U.S.C. §2724(a).

[21] *See, e.g.*, *Outdoor Media Grp., Inc. v. City of Beaumont*, 506 F.3d 895, 901 (9th Cir. 2007) ("A statutory change … is usually enough to render a case moot, even if the legislature possesses the power to reenact the statute"; repeal of challenged city ordinance mooted claims for declaratory and injunctive relief) (citation omitted); *Students for a Conservative Am. v. Greenwood*, 378 F.3d 1129, 1131, *amended*, 391 F.3d 978 (9th. Cir. 2004) (university's withdrawal of challenged provisions governing student elections mooted challenge to those provisions); *Lyons v.*

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information from a locally issued for-hire permit number would be covered by the DPPA.

Effectively admitting that they cannot establish that any provision of the Ordinance actually conflicts with specific DPPA requirements, Plaintiffs disavow any argument that compliance with both laws is impossible, and instead assert that the Ordinance "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Opp. at 23 (quotation omitted). As the Supreme Court has emphasized, however, Congress enacted the DPPA to address two specific concerns: "a growing threat from stalkers and criminals who could acquire personal information from state DMVs," and "the States' common practice of selling personal information to businesses engaged in direct marketing and solicitation." *Maracich v. Spears*, 133 S.Ct. 2191, 2198 (2013).[22] Nothing in the Ordinance's requirement that driver coordinators provide contact information that can be obtained from sources *other than* motor vehicle records to QDRs bound by confidentiality and permitted use restrictions poses any obstacle to Congress's goal of addressing the misuse of personal information contained in state DMV databases by criminals and mass marketers. There is therefore no basis for finding "obstacle" preemption, and the absence of any actual conflict between the Ordinance and the DPPA dooms Plaintiffs' preemption claim. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 90 (1990) ("[P]re-emption is ordinarily not to be implied absent an actual conflict.") (quotation omitted); *see also City of Los Angeles v. AECOM Servs., Inc.*, No. 15-56606, -- F.3d --, 2017 WL 1431084, at *7 (9th Cir. Apr. 24, 2017) ("[A]nalysis under the Supremacy Clause begins with a presumption against preemption, unless preemption was the clear and manifest purpose of Congress.") (citation and alteration omitted).

CONCLUSION

For the reasons set forth above, all of Plaintiffs' claims should be dismissed.

City of Los Angeles, 615 F.2d 1243, 1245 n.4 (9th Cir. 1980) (case was moot where "change in policy" meant there was "not a strong possibility of a recurrence of the behavior of which the [plaintiff] complain[ed]").

[22] The very case that Plaintiffs cite in support of their contrary position recognizes the DPPA's two specific purposes and references Congress's desire "to protect the personal privacy and safety of all American licensed drivers" only in describing the first purpose. *Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 944-45 (7th Cir. 2015).

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of May, 2017, I electronically filed this DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the below-listed:

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