No. 17-35693

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
For Western Washington, Seattle

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Pacific Legal Foundation, a corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public, and that no publicly held corporation owns 10% or more of its stock.

Dated: November 2, 2017

By: /s/ Deborah J. La Fetra

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as the most experienced nonprofit legal foundation of its kind, representing the views of thousands of supporters nationwide. Among other matters affecting the public interest and personal liberty, PLF has repeatedly litigated in defense of the First Amendment rights of workers. To that end, PLF attorneys were counsel of record in *Keller v. State Bar of Cal*., 496 U.S. 1 (1990); *Brosterhous v. State Bar of Cal*., 12 Cal. 4th 315 (1995); and *Cumero v. Pub. Emp't Relations Bd*., 49 Cal. 3d 575 (1989); and PLF participated as amicus curiae in all of the most important cases involving labor unions and compelled speech, from *Abood v. Detroit Bd. of Educ*., 431 U.S. 209 (1977), to *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298 (2012), *Harris v. Quinn*, 134 S. Ct. 2618 (2014), *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016), *Janus v. Am. Fed'n of State, Cty. and Mun. Emps.*, 851 F.3d 746 (7th Cir. 2017), *cert. granted* (U.S. Sept. 28, 2017) (No. 16-1466), and *Hill v. Serv. Emps. Int'l Union*, 850 F.3d 861 (7th Cir. 2017), *petition for cert. filed* (U.S. Jun. 13, 2017) (No. 16-1480).

[1] All parties, through their attorneys, have consented to the filing of this brief. In accordance with Fed. R. App. P. 29(a)(2), Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the Amicus, its members, or its counsel have made a monetary contribution to this brief's preparation or submission.

PLF submits this brief because it believes that its public policy perspective and litigation experience will provide an additional viewpoint with respect to the issues presented, which will be helpful to this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The idea that "[T]here are more instances of the abridgement of freedom of the people by gradual and silent encroachments by those in power than by violent and sudden usurpations," is one of the primary justifications for the inclusion of a Bill of Rights in the U.S. Constitution. *See* James Madison, *Speech in the Virginia Ratifying Convention on Control of the Military, June 16, 1788* in: History of the Virginia Federal Convention of 1788, vol. 1, p. 130 (H.B. Grigsby ed. 1890). The present case, in which the City of Seattle seeks to force independent contractors associated with ride-sharing applications such as Uber and Lyft into unwelcome exclusive representation by an organized labor union in violation of their rights to free speech and association under the First Amendment, is a prime example of the continuing danger of this dynamic.

At the behest of the Teamsters union, in December, 2015, the Seattle City Council passed a first-in-the-nation ordinance allowing unions to insert themselves as exclusive representatives to collectively negotiate contract terms for independent contractors for ride-sharing apps including Uber and Lyft. Seattle Ordinance 124968 became effective on January 1, 2016, without the mayor's signature. Dan Clark and

ten other drivers sued, alleging that the Ordinance is preempted by the National Labor Relations Act and the Drivers' Privacy Protection Act, and violates the First Amendment. The Ordinance eliminates drivers' rights to speak and contract with driver coordinators, like those employed by Uber and Lyft, because the City certifies 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. Neither the drivers nor the coordinators can alter the terms of their business relationships without going through the union empowered by the city. SMC § 6.310.735.J.3.

The Ordinance violates the First Amendment for three reasons: 1) The government can only force private independent contractors into an exclusive-representative relationship if it satisfies the requirements of heightened First Amendment scrutiny; 2) the government may not force independent contractors to accept an exclusive representative for speaking and contracting with their private business partners; and 3) public policy counsels against putting up roadblocks in the path of the new sharing economy.

The purpose of the First Amendment, like all provisions of the Bill of Rights, was to withdraw certain pre-existing rights from the vagaries of political controversy by placing them beyond the majoritarian whims of bodies like the Seattle City Council. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). This

Court should protect the First Amendment rights of these independent contractors, and reverse the decision of the district court.

ARGUMENT

I

FREEDOM OF ASSOCIATION REQUIRES RIGOROUS CONSTITUTIONAL PROTECTION

There is a "close connection between our Nation's commitment to self-government and the rights protected by the First Amendment." *Knox*, 567 U.S. at 308. The First Amendment encourages "an open marketplace" where the ideas of individuals and groups are given free rein to vie for public acceptance sans government interference. *N.Y. State Bd. of Elections v. Torres*, 552 U.S. 196, 208 (2008). The government may not prohibit the ideas that it disfavors, nor compel endorsement of ideas that it approves. *See Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (per curiam); *Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705, 713–15 (1977). The state cannot "place obstacles" to a person's exercise of these collaborative freedoms. *See Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549–50 (1983). A governmental interest in favoring one form of speech over another is constitutionally illegitimate. *Carey v. Brown*, 447 U.S. 455, 468 (1980).

Primary among the rights derived from the First Amendment is the right of free association. *See Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984).

Minnesota State Bd. for Cmty. Colleges v. Knight, 465 U.S. 271, 309 (1984) ("[T]he First Amendment protects freedom of association because it makes the right to express one's views meaningful."). Freedom of association, like the freedom of speech, "lies at the foundation of a free society." *Shelton v. Tucker*, 364 U.S. 479, 486 (1960). The right to associate includes the corresponding right *not* to associate. *Knox*, 567 U.S. at 309 ("Freedom of association . . . plainly presupposes a freedom not to associate."). *See also Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988) ("[F]reedom of speech . . . necessarily compris[es] the decision of both what to say and what not to say.").

The right to speak and associate, and the corresponding right to abstain from such activities, are protected by related First Amendment analyses. *See Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989). There is no requirement that associational rights be directly impinged to trigger heightened First Amendment scrutiny. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958) ("[A]bridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action."); *Knight*, 465 U.S. at 312 (Stevens, J., dissenting) ("[T]he Constitution's protection is not limited to direct interference with fundamental rights."). The state must justify direct *and* indirect limitations on associational rights. *Perry v. Schwarzenegger*, 591 F.3d 1126, 1139 (9th Cir. 2009)

(quoting *NAACP*, 357 U.S. at 461). This chilling effect on fundamental rights "must survive exacting scrutiny." *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1 (1976)).

The heightened First Amendment scrutiny required for laws impinging associational freedom has three requirements: 1) The law must serve a compelling state interest; 2) unrelated to the suppression of ideas; 3) that cannot be achieved through means significantly less restrictive of associational freedoms. *Jaycees*, 468 U.S. at 623 (citing *Abood*, 431 U.S. at 234–35); *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000); *Elrod v. Burns*, 427 U.S. 347, 362 (1976). The government's failure to satisfy any one of these requirements renders the law unconstitutional. In analyzing the compelling state interest element, the court considers "the associational interest in freedom of expression set on one side of the scale, and the State's interest on the other." *Boy Scouts*, 530 U.S. at 658–59. They are not equally weighted, however. Even in cases where the state's purported interests appear facially compelling, the Supreme Court gives great weight to related associational rights under the First Amendment. *See e.g.*, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 574–75 (1995); *Boy Scouts*, 530 U.S. at 659.

A. Imposing Exclusive Representation on Independent Contractors Requires Heightened First Amendment Scrutiny

This Court's focus in this case must be on the individual First Amendment rights of the independent contractors threatened by the Seattle Ordinance, which

warrants application of heightened First Amendment scrutiny. The court below held that *Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, relying on *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, forecloses the application of heightened First Amendment scrutiny to the claims of the independent contractors in the present action. This is incorrect.

First, the Court in *Knight* assumed without analysis that *Abood* stands for the proposition that compelled association with labor unions is constitutionally permissible. *Knight*, 465 U.S. at 289 n.11, 291 n.13 (the Court's minimal discussion confined to several short footnotes). But that reads *Abood* too broadly. A careful reading of *Abood* reveals that its holding was directed to the question of compelled monetary support by public employees to public employee unions supporting a political cause, *not* the question of compelled independent contractors to associate with private unions. *See Abood*, 431 U.S. at 230 (citing Clyde W. Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 U. Cin. L. Rev. 669, 670 (1975) ("The uniqueness of public employment is not in the employees nor in the work performed; the uniqueness is in the special character of the employer."). *Abood* does not answer the present question, because the litigants in *Abood* did not raise it.

Second, *Abood* is a highly suspect case, *see Harris*, 134 S. Ct. 2618, and represents a gross aberration from long held First Amendment jurisprudence.[2] *Abood* was the first time in American history that the Court held that the state had no affirmative obligation to show a compelling interest when a state law intruded upon protected speech, *Abood*, 431 U.S. at 263, and was based on misreading of precedent, *Harris*, 134 S. Ct at 2632 ("The *Abood* Court seriously erred in treating *Hanson* and *Street* as having all but decided the constitutionality of compulsory payments to a public-sector union."). *Abood* relaxed First Amendment protections based on two justifications: the preservation of "labor peace" and the prevention of "free riders." *Harris*, 134 S. Ct. at 2631. These justifications are highly questionable even as applied to public sector employees, *id.* at 2634, and have no relevance to the private sector independent contractors in this case.

The Court specifically recognized in *Harris v. Quinn* that free rider concerns "are generally insufficient to overcome First Amendment objections." *Id.* at 2627 (citing *Knox*, 132 S. Ct. at 2289). In terms of the labor peace justification, "*Abood* itself has clear boundaries; it applies to *public* employees." *See id.* at 2638 (emphasis added). This justification is *inapplicable* to "partial-public employees, quasi-public employees, or [] private employees . . ." *Id.* While the litigants in *Harris* did not

[2] The Supreme Court recently granted certiorari in *Janus v. Am. Fed'n of State Cty. and Mun. Emps., cert. granted* (U.S. Sept. 28, 2017) (No. 16-1466), specifically to address the question of the continuing validity of *Abood*.

explicitly challenge the exclusive representation provision present in that case, *id.* at 2640, the implications of the Court's holding plainly apply to the present action. If the justifications for impinging the First Amendment are not present, then the case advancing those justifications is inapplicable. And if the *Abood* foundation is removed, the entire structure of *Knight* as applied to this case must fall.

Lastly, even if *Knight's* reading of *Abood* is correct, *Knight* itself only applies in the context of public employees' access to public policy makers, not to private independent contractors and their right to speak and associate with other private parties. *Cf. Knight*, 465 U.S. at 283 ("Appellees have no constitutional right to force the government to listen to their views."). Nowhere does *Knight* address private speech between private parties; it instead focuses squarely on whether public employees' right to speak is infringed "when government simply ignores that person while listening to others." *Id.* at 288. Moreover, *Knight* only briefly touches upon the question of freedom of association, likening the pressure to join a public union with the pressure to join a majority political party, which is "inherent in our system of government." *Id.* at 290. This brief comment, addressing a tangential issue to the main question of the case and directed squarely at public employees, has been seized upon and advanced by pro-unionization advocates in recent years.

Nowhere does *Knight* suggest that this limited observation was intended to be applied across the board to all non-union members, public and private, at all possible

times. Since it was first decided, *Knight* has been overwhelmingly cited for the limited proposition that the right to speak does not guarantee a commensurate right to be heard by the government. *See e.g.*, *Bridgeport Way Cmty. Ass'n v. City of Lakewood*, 203 F. App'x 64, 66 (9th Cir. 2006) ("The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy."). The D.C. Circuit's rationale in *Autor v. Pritzker* explicitly recognizes this limited scope. 740 F.3d 176, 181 (D.C. Cir. 2014) ("[T]he Supreme Court recognized [in *Knight*] that the government may choose to hear from some groups at the expense of others . . ."). It has only been within the last two years that some circuits suddenly discovered *Knight*'s applicability to privately employed individuals. *See e.g.*, *D'Agostino v. Baker,* 812 F.3d 240 (1st Cir. 2016), *cert. denied*, 136 S. Ct. 2473 (2016); *Jarvis v. Cuomo,* 660 F. App'x 72 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1204 (2017); *Hill v. Serv. Emps. Int'l Union*, 850 F.3d 861 (7th Cir. 2017), *petition for cert. filed* (U.S. Jun. 13, 2017) (No. 16-1480). As opposed to Seattle's assertions, these recent circuit decisions do not represent the application of the *Knight* rule as it has traditionally been applied, but rather constitute an unwarranted expansion that this Court should reject in light of clearly applicable First Amendment jurisprudence.

Even if this Court is persuaded that the recent extensions of *Knight* were warranted, the facts of the present case are entirely distinguishable. While not full-

fledged public employees under the *Harris* standard, the non-union member plaintiffs in *Hill* and *D'Agostino* were providers of home-based care services, and received public subsidies. *See Hill*, 850 F.3d at 862; *D'Agostino*, 812 F.3d at 242. As recognized by Justice Alito in *Harris*, accepting public money could, in some circumstances, result in private employees being characterized as public employees. *See Harris*, 134 S. Ct. at 2638. *Jarvis* is an outlier and an aberration because the plaintiffs received no public funds, *Jarvis*, 660 F. App'x at 74. The Second Circuit never analyzed the implications of extending *Knight* in this circumstance; the court's entire consideration of the question of associational rights is summed up in *Jarvis* by a single line: "The argument is foreclosed by [*Knight*]." *Jarvis*, 660 F. App'x at 74. "Surely a First Amendment issue of this importance [deserves] better treatment." *See Harris*, 134 S. Ct. at 2632.

As opposed to following the trend of distorting the holding of *Knight* far beyond its proper scope, this Court should rely on the necessary implications of *Harris* to hold in favor of the drivers' individual constitutional rights.

B. Imposing Exclusive Representation on Independent Contractors Violates their First Amendment Rights

The district court below found no infringement of the independent contractors' First Amendment rights because they were not required to become members of the union. *Clark v. City of Seattle*, No. C17-0382RSL, 2017 WL 3641908, at *3 (W.D. Wash. Aug. 24, 2017). The contractors' refusal to join the

union, however, cannot resolve the constitutional issue because the Ordinance explicitly deprives any non-union provider, or association of non-union providers, of any role whatsoever in negotiating their own contracts or communicating with their own business partners. SMC § 6.310.110. Neither the drivers nor Uber or Lyft can alter the terms of their business relationships without going through the union. SMC § 6.310.735.J.3. Thus, 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." *NLRB v. Allis-Chalmers Mfg. Co*., 388 U.S. 175, 180 (1967).

Justice Stevens expanded on this point in his dissent in *Knight*. While the majority in that case rested on a unique theory that the government is not bound to listen just because people choose to speak, *Knight*, 465 U.S. at 283, the dissenting Justices' view reflected the reality that a government communicative prohibition based on the identity of a speaker in favor of a communicative monopoly for a preferred speaker is odious to the First Amendment. *Id.* at 301 (Stevens, J., dissenting).[3] While it is true that the government is under no affirmative duty to listen, preventing citizens from competing in the market place of ideas renders their speech futile. *Id.* at 308–09 ("[T]he First Amendment was intended to secure

[3] Justice Stevens was joined by Justice Brennan in all but Part III of his *Knight* dissent, and by Justice Powell in all but Part II.

something more than an exercise in futility—it guarantees a meaningful opportunity to express one's views."). By extension, the freedom of association is protected by the First Amendment because it "makes the right to express one's views meaningful." *Id.* at 309. A government grant of communicative monopoly stands directly at odds with the well-recognized principle that government endorsing one form of speech over another is illegitimate. *Carey v. Brown*, 447 U.S. 455, 468 (1980). *See also Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). *See also Whitney v. Cal.*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[I]t is hazardous to discourage thought, hope and imagination; [the Founders understood] that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies[.]"). Even if the contractors leased a billboard prominently placed outside the local headquarters for Uber or Lyft, declaring their opposition to the union's positions, the companies are compelled to ignore it in favor of the union's positions. Whether they join the union or not, non-union contractors' voices will be silenced, and any attempt to speak contrary to the union would be futile. *See* Merriam-Webster Dictionary (defining

"futile" as "serving no useful purpose" and "completely ineffective").[4] Applying the required heightened First Amendment scrutiny to the Seattle Ordinance in this case, this Court should hold that the law impermissibly abrogates the independent contractors' associational rights, and the city's general police power to regulate transportation cannot save it.

In order to pass constitutional muster, a law impinging the freedom of association or the right to refrain from associating must be adopted to serve a compelling state interest. *Knox*, 132 S. Ct. at 2289. So long as *Abood* remains good law, one of the two justifications for impinging the First Amendment associational rights identified in that case must be present in order to fulfill the compelling state interest element of heightened First Amendment scrutiny. Seattle does not assert that its Ordinance promotes labor peace or prevents free rider concerns, but if it had, it would still not be enough. As noted above, free rider problems "are generally insufficient to overcome First Amendment objections," and "*Abood* [] has clear boundaries" as applied to labor peace justifications outside the context of public employees. *See Harris*, 134 S. Ct. at 2627, 2638. Even where asserted state interests have included the most seemingly compelling goals, like combating discrimination and providing for equal access to public accommodations, such goals are outweighed

[4] https://www.merriam-webster.com/dictionary/futile.

by expressive interests under the First Amendment. *See Hurley*, 515 U.S. at 574-75; *Boy Scouts*, 530 U.S. at 659.

While the failure of the Seattle Ordinance to satisfy the compelling interest requirement is enough to render it unconstitutional, it also fails to meet the other two requirements. Seattle's Ordinance directly suppresses the expression of ideas, *Knox*, 132 S. Ct. at 2289, namely any ideas that the affected independent contractors may have regarding their own working arrangements, contract terms, or any other related issues they may wish to discuss with the driver coordinators with whom they choose to associate.

But the reasons Seattle *does* assert them as the purpose behind the Ordinance are to "ensure that [independent contractors associated with Uber and Lyft] perform their services in a safe, reliable, stable, cost-effective, and economically viable manner and thereby promote the general welfare of the people." City of Seattle Ordinance 124968, pg. 1, ln. 15-17.[5] These oft-lauded goals, so often the pretext for government overreach, do not defeat the requirements of the First Amendment in this case. There are a whole host of less restrictive means and alternative means to achieve the Ordinance's stated objectives. To operate as an independent contractor with Uber or Lyft in Seattle, drivers first are required to obtain a Transportation Network Company "For-Hire" permit issued by Seattle and King County. *Driving*

[5] http://clerk.seattle.gov/~archives/Ordinances/Ord_124968.pdf.

in Seattle: Local regulations and testing, Uber Technologies Inc. (2017)[6] (goes to safety, reliability, stability). Next, drivers must obtain a Transportation Network Company "Vehicle Endorsement" issued by the government. *Id.* (again, goes to safety, reliability, stability). Drivers are required to complete two courses: a Seattle City knowledge test (reliability, stability) and a defensive driving course (safety). *Id.* Finally, drivers must obtain a Seattle Business License (cost-effective, economically viable, general welfare). *Id.* For every interest asserted by Seattle in enacting this Ordinance, regulations *already exist* to achieve those goals through significantly less restrictive means.

Applying the heightened First Amendment scrutiny required by laws impinging associational freedom, this Court should hold that the Seattle Ordinance violates the independent contractors' rights to freedom of speech and association.

[6] https://www.uber.com/drive/seattle/resources/local-regulations/.

II.

IMPOSING EXCLUSIVE REPRESENTATION ON THE SHARING ECONOMY IS BAD PUBLIC POLICY

A. Imposing Unionization and Increased Regulation on the New Sharing Economy will Destroy the Flexibility That Makes it so Successful at Providing Goods, Services, and Opportunities to the Public

The new "sharing economy" functions by "allow[ing] individuals and groups to make money from underused assets. In this way, physical assets are shared as services." *The Sharing Economy*, Consumer Intelligence Series, PricewaterhouseCooper (PWC) LLP (2015).[7] Goods and services made available to the public through the sharing economy include Hospitality and Dining (CouchSurfing, Airbnb, Feastly, LeftoverSwap), Automotive and Transportation (RelayRides, Hitch, Uber, Lyft, Getaround, Sidecar), Retail and Consumer Goods (Neighborgoods, SnapGoods, Poshmark, Tradesy), and Media and Entertainment services (Amazon Family Library, Wix, Spotify, SoundCloud). *Id.*

According to survey results from an in-depth 2015 study performed by PWC, 44% of U.S. consumers are familiar with the sharing-economy, and 19% have engaged in a sharing economy transaction. *Id.* at 8. Of those Americans familiar with

[7] https://www.pwc.com/us/en/industry/entertainment-media/publications/consumer-intelligence-series/assets/pwc-cis-sharing-economy.pdf.

the sharing economy, 76% agree that it is better for the environment, 78% agree that it helps build a stronger community, 83% agree that it makes life more convenient and efficient, and 86% agree that it makes life more affordable. *Id.* at 9. Approximately 25 million people, or 8% of Americans, report having used ride-sharing services like Uber and Lyft. *Id*. at 8. Finally, 64% of those familiar with the sharing economy said that in the sharing economy peer regulation is more important than government regulation. *Id.* at 16. Economists describe the benefits of the sharing economy as putting underutilized capital to productive use, increasing competition among both supply and demand side markets, reducing transaction costs, and diminishing the problem of asymmetric information between producers and consumers. Christopher Koopman, et al., *The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change*, 8 J. Bus. Entrepreneurship & L. 529, 531-532 (2015).

This innovative new economic system, also known as "Uberization" because that company was at the forefront of the change, *see* Farhad Manjoo, *Uber's Business Model Could Change Your Work*, New York Times (Jan. 28, 2015),[8] thrives on flexibility. Rachel Botsman, *Can the Sharing Economy Provide Good Jobs? YES: Different Kinds of Workers Derive Different Benefits*, The Wall Street

[8] https://www.nytimes.com/2015/01/29/technology/personaltech/uber-a-rising-business-model.html.

Journal (May 10, 2015).[9] The positive benefits of this new economic system were even recognized by former Seattle Mayor Ed Murray in his letter to the City Council rejecting the proposed exclusive representation Ordinance at issue in this case: "The tremendous growth of [ride-sharing companies] in Seattle, both in terms of popularity and number of trips, demonstrates that this new business model is changing how people move around the city." Letter from Edward B. Murray, Mayor of Seattle, to Tim Burgess, Seattle City Council President (Dec. 23, 2015) (on file with Seattle City Clerk).[10] No longer are commuters in Seattle and elsewhere dependent on the availability of taxi cabs within their eyesight or their ability to navigate antiquated taxi websites.[11] Even when a commuter opts to ride in a traditional taxi over a ride-sharing service, the cost of the trip is likely to be higher, Mark Fahey, *What's cheaper in your city: Cabs or ride shares?*, CNBC (Aug. 31, 2015)[12] and the wait time will be longer, Ellen Huet, *Uber, Lyft Cars Arrive Much Faster Than Taxis, Study Says*, Forbes (Sept. 8, 2014).[13] In contrast, an Uber or Lyft

[9] https://www.wsj.com/articles/can-the-sharing-economy-provide-good-jobs-1431288393.
[10] http://murray.seattle.gov/mayor-comments-on-tnc-ordinance/.
[11] *See e.g.*, http://www.yellowcab.com/.
[12]https://www.cnbc.com/2015/08/31/whats-cheaper-in-your-city-cabs-or-ride-shares.html.
[13] https://www.forbes.com/sites/ellenhuet/2014/09/08/uber-lyft-cars-arrive-faster-than-taxis/#18cc56cdf2cb.

driver is available at the flick of a finger on a smart phone screen, can be at a commuter's location in minutes, at competitively affordable prices.

The flexibility and convenience that makes ride-sharing companies so attractive to consumers carries over to the independent contractors with whom they are associated. Independent contractors who choose their own hours based on their individual schedules and availability leads to a mutually beneficial voluntary arrangement to provide affordable and convenient transportation for communities in hundreds of cities across the world. *See The Sharing Economy* at 14. Ride-sharing companies also afford employment opportunities to independent contractors across a diverse swath of American society, often from highly underrepresented segments. *See generally Uber: The Driver Roadmap 2.0*, Benenson Strategy Group (2015).[14] For example, 24% of independent contractors with Uber are African American, 20% are Hispanic, and 13% are of Asian or Pacific Islander descent. *Id.* Twenty three percent of Uber contractors are over the age of fifty, with 54% falling between the ages of thirty and forty-nine. *Id.* Approximately 20% are women. *Id.* And when it comes to job satisfaction, 80% of current Uber contractors are satisfied with their overall arrangement, with near unanimity 97% reporting satisfaction with the flexibility their contractual arrangement affords them. *Id.* The government's

[14] https://newsroom.uber.com/wp-content/uploads/2015/12/BSG_Uber-Driver-Roadmap-2.0_12.7.15_FIN2.pdf.

imposition of exclusive representation agreements on the sharing economy reduces the very flexibility that enabled Uber and Lyft's unprecedented growth and success, while providing opportunities for some for some of society's most economically-disadvantaged people.

Nothing in the economy occurs in a vacuum. Imposing unionization on independent contractors empowers unions to demand mandatory union dues and agency shop fees. To offset this cost, the ride-sharing companies will be forced to increase prices as a way to recompense independent contractors for the union dues taken from them against their will. Many current contractors may decide that the new associated costs are simply too high, and potential contractors who might otherwise have offered their services to the public may be priced out of the market. *See generally* Koopman, et al.[15] Forced exclusive representation will not maintain affordable pricing or an ample market of independent contractors; it will diminish both. *See* Adam Hayes, *Economics Basics: Supply and Demand*, Investopedia.[16] Instead of being able to negotiate the terms of their own contractual relationships,

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[15] *See also* Frederic Bastiat, *That Which is Seen and That Which is Not Seen* (1850) ("[T]o be ignorant of political economy is to allow ourselves to be dazzled by the immediate effect of a phenomenon; to be acquainted with it is to embrace in thought and in forethought the whole compass of effects."), http://bastiat.org/en/twisatwins.html#SECTION_G013.

[16] http://www.investopedia.com/university/economics/economics3.asp.

those forced into exclusive representation will be shoe-horned into a take it or leave it scenario that runs directly opposite to the current ride-share business model.

Equally pernicious may be the effects of increased regulation enabled through this Ordinance. *See generally* Jared Meyer, *Embracing the Millennial American Dream*, Manhattan Institute for Policy Research (Nov. 18, 2015) at 1 ("[G]overnment policy, particularly in regards to regulation . . . continues to hold back economic opportunity.").[17] Even seemingly banal regulation, like imposing minimal hour requirements on drivers, could have a negative effect on public access. "The mere fact that academics or policymakers claim that well intentioned regulation will protect consumers does not mean it actually will do so." Koopman, *supra*, at 533. Regulations should be judged by the results they actually produce, not by the good intentions of their proponents. Becker Friedman Institute, *Milton Friedman in His Own Words*, Univ. of Chicago (Nov. 9, 2012).[18] The unintended, and no less pervasive, result of unwarranted economic regulation can include regulatory capture, rent-seeking, restrictions on entry and innovation, higher prices, fewer choices, and lower quality service. Koopman, *supra*, at 534-539. In short, constraining the flexibility upon which the sharing economy depends is akin to encouraging the growth of a houseplant by limiting its access to sunlight.

[17] https://www.jec.senate.gov/public/_cache/files/4d096d89-6273-4b7d-be2c-cf968521cc15/jec-meyer-written-testimony.pdf.
[18] https://bfi.uchicago.edu/news/post/milton-friedman-his-own-words.

If this Court allows the Seattle exclusive representation Ordinance to stand, it will set a dangerous precedent that could prove disastrous for both the continued success of the sharing economy and the First Amendment rights of private contractors and other private workers across the United States. *See Harris*, 134 S. Ct. at 2638 ("If we allowed *Abood* to be extended to those who are not full-fledged public employees, it would be hard to see just where to draw the line . . ."). A ruling by this Court in favor of the unions and the City could encourage the proliferation of exclusive representation laws for private workers in a wide array of different sharing economy industries. City councils across this jurisdiction could impose exclusive representation on any industries they desire. Such an arrangement threatens the future of the sharing economy from which providers and consumers are deriving a benefit, and stands directly at odds with the First Amendment. *See Shelton*, 364 U.S. at 486 ("[F]ree association . . . like free speech, lies at the foundation of a free society."). This undermines the very concept of limited government upon which this country was founded. *See* James Madison, Federalist No. 48 (Feb. 1, 1788) ("[P]ower is of an encroaching nature and that it ought to be effectually restrained from passing the limits assigned to it.").

B. Declining Labor Unions are Seeking Preservation Through the Forced Unionization of Independent Contractors

Unions are facing multiple challenges, even as they enjoy considerable political power. *See generally*, Jared Meyer, *Drivers And Riders Will Lose From*

Unionized Uber, Forbes (Dec. 14, 2015) (Union "[m]embership is declining, public pension plans are dangerously underfunded, right-to-work legislation is expanding . . ."). [19] Currently, only approximately seven percent of private sector workers and eleven percent of all workers belong to unions. U.S. Bureau of Labor Statistics, *Union Members Summary*, Economic News Release (Jan. 26, 2017). [20] Only four and half percent of Americans aged sixteen to twenty-four belong to a union. U.S. Bureau of Labor Statistics, *Union affiliation of employed wage and salary workers by selected characteristics*, Economic News Release (Jan. 26, 2017). [21] Contrast this with the number of Americans providing services through the sharing economy: Thirty-eight percent were between the ages of eighteen and thirty-four in 2015. *The Sharing Economy* at 10. With these facts in mind, it becomes easier to understand why unions like the Teamsters are so intent on imposing unionization on young independent contractors across the sharing economy. *See* Meyer, *Drivers and Riders* ("Without a heavy influx of new members, many more union retirement plans will be insolvent long before millennials retire.").

Seattle is only the tip of the iceberg when it comes to the unions' plans for self-preservation at the expense of independent contractors. California is already the

[19] https://www.forbes.com/sites/jaredmeyer/2015/12/14/uber-union-vote-seattle-millennials/#79d8dba26602.
[20] https://www.bls.gov/news.release/union2.nr0.htm.
[21] https://www.bls.gov/news.release/union2.t01.htm.

most unionized state, with over 2.5 million workers belonging to a union, and over one million of that number belonging to a private union. U.S. Bureau of Labor Statistics, *Union Members Summary*. After meeting with the "incredible folks behind the Uber organizing legislation [in Seattle],"[22] California Assemblywoman Lorena Gonzalez, a former labor leader, introduced a bill to impose unionization on all independent contractors in California. *Id.* "As the economy changes, the law has to change as well," says Gonzalez,[23] "[We] can't allow this kind of unregulated atmosphere." *Id.* Ironically, as noted above, the precise reason that these ride sharing companies have been so successful is because of the very flexibility that lawmakers like Gonzalez want to squash. Greenhut, *California Proposal to Let Uber Drivers, Unionize*. While Assemblywoman Gonzalez eventually pulled the bill from committee because it contained "a number of untested legal theories," DeAnn Flores Chase, *About AB 1727: The California 1099 Self-Organizing Act*, Chase Law Group (Nov. 14, 2016)[24] this effort exemplifies the lengths to which struggling unions and

[22] Steven Greenhut, *California Proposal to Let Uber Drivers, Other Sharing Economy Workers, Unionize*, Reason (Mar. 11, 2016), http://reason.com/archives/2016/03/11/california-proposal-to-let-uber-drivers.
[23] George Skelton, *Capitol Journal Organizing bill aims to provide safety net for workers in 'gig' economy*, L.A. Times (Dec. 14, 2015), http://www.latimes.com/local/california/la-me-pol-sac-cap-gig-economy-20151214-column.html.
[24] http://www.chaselawmb.com/about-ab-1727-the-california-1099-self-organizing-act/.

their government allies will go to preserve the status quo, bolster their diminishing numbers, and pad their coffers.

CONCLUSION

This Court is fully cognizant of "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." *Thomas v. Collins*, 323 U.S. 516, 530 (1945). Exclusive representation severely infringes on these rights of independent contractors who would use their own voice to negotiate the terms and conditions of their employment, as well as impeding the ability of the new sharing economy to effectively provide services and opportunities to the general public.

For these reasons, this Court should reverse the decision below and hold that Seattle Ordinance 124968 violates the First Amendment.

DATED: November 2, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2017, I electronically filed the foregoing **BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLANTS** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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DEBORAH J. LA FETRA

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