SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ZEHN-NY LLC; ZWEI-NY LLC; ABATAR, LLC; UNTER LLC; UBER TECHNOLOGIES INC.; UBER USA, LLC,

Petitioners,

v.

NEW YORK CITY TAXI AND LIMOUSINE COMMISSION; BILL HEINZEN, in his official capacity as Acting Commissioner of the New York City Taxi and Limousine Commission; THE CITY OF NEW YORK.,

Respondents.

Index No.: _____

VERIFIED ARTICLE 78 AND DECLARATORY JUDGMENT PETITION

Petitioners Zehn-NY LLC; Zwei-NY LLC; Abatar, LLC; Unter LLC; Uber Technologies Inc.; and Uber USA, LLC (collectively, "Petitioners"), by and through their undersigned counsel, for their Verified Petition, allege as follows.

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INTRODUCTION

1. On August 7, 2019, the New York City Taxi and Limousine Commission ("**TLC**") enacted two regulations that, as set forth in this petition, are arbitrary and capricious, preempted, and otherwise contrary to law. One imposes a 31% "**Cruising Cap**" on the amount of time that For-Hire Vehicles ("FHVs") using the application of a particular service such as Uber may spend without a passenger (whether waiting for a trip request or en route to pick up the passenger) in Manhattan south of 96th Street. The 31% Cap would require the City's high-volume FHV Bases to achieve levels that have never been sustained by personal-ride, point-to-point FHVs. The other regulation bars the issuance of new FHV licenses until at least August 2020 (the "**License Cap**"). Together, the regulations are referred to as the "**August 2019 Rule**" or just the "**Rule**." *See* August 2019 Rule, Ex. 1.

2. While reducing congestion in Manhattan is an important goal—and one Uber has publicly and vocally supported—the August 2019 Rule is the product of a rushed and unlawful process, including reliance on flawed and arbitrary economic modeling, which was designed to arrive at a predetermined result that is likely not even feasible. No city in the country has implemented an FHV Cruising Cap setting cruising at any level, yet the City selected its Cruising Cap number arbitrarily without even considering less restrictive options, without consulting with the affected companies about its impact as it was determining what level Cap to adopt, and without even evaluating the impact of the TLC's prior regulations. The TLC also failed to provide any response to the hundreds of comments—from industry, community groups, and drivers—opposing the Rule, and deliberately avoided responding to comments and disclosing the underlying economics of its Rule (and most of its projected results). Such a failure of transparency is usually

a sign that something is not right, and that is the case here, for the reasons enumerated in this Petition.

3. **The Rule Is Arbitrary, Based Not On The Study The TLC Was Required To Do By Law, But On A Deeply Flawed Economic Model.** The TLC selected its extremely ambitious 31% target arbitrarily, and attempts to support it with a deeply flawed economic model that relies on critical inputs—*e.g.*, the relationship of utilization to rider wait time, the relationship of price to demand, the relationship between increased wait times and demand, and projected trip growth—that lack any support at all. The model also fails to account for numerous flaws made known to the TLC during the comment period in a report from Professor Steve Tadelis of The Haas School of Business at the University of California, Berkeley and economists at Charles River Associates ("**Tadelis-CRA Report**"), including that the TLC's arbitrarily chosen number is likely not even achievable and threatens the viability of point-to-point app-based services in New York City and the vital service they provide to New Yorkers. Ex. 4. The TLC's reliance on a flawed economic model by itself requires vacatur of the Rule. *See* Decision & Order, *Tri-City, LLC, et al. v. N.Y.C. TLC, et al.*, Index No. 151037/2019 (N.Y. Sup. Ct. Apr. 30, 2019), Ex. 3 at 13 ("If an agency bases a regulation on a flawed study, the regulation must be vacated and annulled as arbitrary and without basis in the record." (citing *Schur v. N.Y. State Div. of Hous. & Cmty. Renewal*, 565 N.Y.S.2d 56 (App. Div. 1991))).

4. The Rule must also be vacated because the TLC failed to conduct the legally required study prior to imposing these regulations. In August 2018, the City Council compelled the TLC to study eight issues related to congestion in New York City and its causes, including "traffic congestion throughout the city," the "extent to which various categories of vehicles for hire contribute to such congestion," and the interests of drivers and riders throughout the City.

Local Law 147 § 3, Ex. 6 at 3 (codified as N.Y.C. Admin. Code § 19-550). The TLC was required to study those issues "during the 12 months following the effective date" of the law and ***prior to*** considering whether to impose vehicle utilization standards such as the Cruising Cap. *Id.* ("*Based on the results of the study conducted pursuant to subdivision a of this section*, the commission (1) may establish vehicle utilization standards . . . ." (emphasis added)). The TLC did not do so. Instead, it immediately proceeded to "model" the impact of the policies that it had already decided it wanted to impose. Further, rather than take until August 2019 to complete the required study and then evaluate particular policies based on the results, the TLC failed to conduct the required study and finished its modeling by March 2019, deliberately depriving itself of important, relevant data related to the impact of prior TLC regulations and a State congestion surcharge on FHVs and taxis that both went into effect in February 2019.

5. **The TLC Arbitrarily Disregarded Its Own Prior Regulations To Inflate The Perceived Benefit And Conceal The Harms Of The August 2019 Rule**. The TLC's minimum driver payment regulations (hereinafter the "**Minimum Payment Rule**"), which became effective in February of this year and were intended (like the Cruising Cap) to incentivize increased utilization rates, are already having a significant impact on the marketplace as companies have stopped allowing new drivers to use their platforms and implemented new features that limit the number of drivers that may access the platforms at particular times in an effort to increase utilization rates. Even though its prior regulations have only recently gone into effect and are designed to affect utilization, the very phenomenon the TLC regulates with its new Rule, the TLC arbitrarily charged ahead with a very dramatic new regulation amidst complex market adjustments. By choosing not to account for the impact of its existing rules, the TLC was able to falsely inflate

the anticipated effect on vehicle hours traveled of the new Rule, while greatly underestimating the harm it will cause to driver earnings.

6. **The Rule Is Preempted And Interferes With The State's Comprehensive And Evidence-Based Plan**. Prior to the City's consideration of this Rule, the State had already begun to move forward with a phased and comprehensive plan to reduce congestion in New York City, which was based on extensive study. The plan involves raising money from FHV riders for public transportation and the country's first zone pricing program, which will require the State to balance burdens across vehicles (ranging from personal vehicles to freight to taxis and FHVs) while seeking to address the competing goals of reducing congestion and raising revenue for public transportation. The TLC's Rule is preempted by the State's comprehensive anti-congestion legislation, including because it interferes with the State's efforts to strike the balance of burdens and goals it views as most appropriate and costs the State revenue for the public transportation that is at the center of the plan.

7. **The Rule Is Not Achievable.** Compliance with the Rule also is not feasible. It would require companies to reduce their "cruising" rates by 24-34% (depending on the company) when no service that provides predominantly individual rides and point-to-point service has ever achieved anything approaching those percentages. The Rule would threaten the viability of the ridesharing model as it currently exists, jeopardizing the benefits this model has created for riders and drivers. Moreover, the rates the City now says are too low and reflective of inefficiency for FHVs are the same rates the TLC said were too high for taxicabs and reflective of a failure to meet demand. The TLC conducted no analysis of how such levels would be achieved, and did not account for analysis submitted by Uber during the rulemaking process indicating that the TLC's target levels of utilization exceed that which can be sustained, including because of the TLC's

arbitrary decision to label "en route" time—the time spent traveling to pick up a passenger—as "cruising." Traveling to pick up a passenger is not the same thing as cruising, and imposing a cap on en route time prevents compliance with the high levels of utilization demanded by the TLC because of the increases in en route time that will result from limiting the number of drivers available.

8. Moreover, companies will not even know if they are in compliance with the Rule. Determining the amount of "cruising" time for an app-based service under the Rule will require knowledge of whether drivers are logged on to other apps, as well as knowledge of other companies' trip totals. Petitioners do not have access to this information. This renders the Rule unconstitutionally vague. *See Baldwin Union Free Sch. Dist. v. Cty. of Nassau*, 84 N.Y.S.3d 699, 722 (Sup. Ct. 2018) (local regulation unconstitutionally vague where fees are not calculated until after the time period they cover, making it "difficult" or "nearly impossible . . . to determine and calculate" the charges being imposed).

9. **The Rule Violates Separation Of Powers.** The Rule violates the basic principle of constitutional law, long recognized and applied in New York courts, that legislative decisions must be made by the people's elected representatives, not delegated or otherwise made by agencies like the TLC. The TLC could have chosen no Cruising Cap, a modest increase in required utilization, or as here, an increase that threatens great harm to driver earnings and the viability of a service relied on by millions of New Yorkers. The choice of any one of the three is legislative but was not dictated by any legislative body. Instead, it reflects the TLC's exercise of legislative authority to set whatever number it wants based on its legislative choice of how to balance fundamental policy interests, including driver income, congestion, and rider wait times and access to their preferred service in various geographical areas of the City.

10. **The TLC's Rule Is The Product Of A Secretive And Suspect Process, Violative Of The Administrative Procedure Act, FOIL, And Article 78.** The TLC has deliberately withheld from the public, and from those wishing to comment on its Rule, the complete picture of its economic model, upon which it says its Rule relies. The underlying modeling and important outputs like trips, rider prices, and driver earnings were never disclosed. In response to a FOIL request, the TLC waited for the comment period to elapse and then claimed it had *no responsive documents* regarding the model that it said was the basis for its Rule and that all materials were maintained by the Department of Transportation (the "**DOT**"). *See* FOIL Request to TLC, Ex. 7; July 30, 2019 email from TLC to M. Shube, Ex. 8. The DOT separately said it needed nine months from the date of the request (March 16, 2020) to respond and to this day the underlying modeling for the TLC's Rule remains undisclosed. *See* FOIL Request to DOT, Ex. 9; June 24, 2019 email from DOT to H. Levy, Ex. 10.

11. Uber nonetheless submitted a detailed comment (the "**Uber Comment**") that included the Tadelis-CRA Report. Uber Comment, Ex. 11; Tadelis-CRA Report, Ex. 4. Countless drivers and organizations representing their interests explained the economic hardship that the License Cap was inflicting. And contrary to the TLC's rosy predictions that the Rule would have no negative impact on driver pay and only a modest impact on core wait times, the TLC was made aware that its Rule—if it could even be achieved—would significantly harm driver income and likely result in much longer than expected rider wait times, reducing the utility of an option that New Yorkers have come to depend on and in turn, harming drivers who depend on these opportunities to earn money. The TLC, however, did not respond at all in the Statement of Basis and Purpose to any comments, much less provide a reasoned response or show how the Rule "resolved any significant problems raised by the comments" as the law requires. *St. Vendor*

Project v. City of New York, 811 N.Y.S.2d 555, 561 (Sup. Ct. 2005), *aff'd*, 841 N.Y.S.2d 79 (App. Div. 2007) (quoting *Indep. U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908, 919 (D.C. Cir. 1982)); *see also Carlson v. Postal Regulatory Comm'n*, No. 18-1328, 2019 WL 4383260, at *7 (D.C. Cir. Sept. 13, 2019). Instead, the Statement of Basis and Purpose submitted with the promulgated Rule is identical to the Statement of Basis and Purpose that was submitted with the Proposed Rule.

12. The TLC was in such a rush to impose its Cruising Cap that it did not even wait until it had a confirmed Commissioner in place, a lapse protested by 11 New York City Council Members. *See* Comment of N.Y. City Council Member Andy L. King, Chair of the Committee on Juvenile Justice, Ex. 31 at 194-95. The TLC made no attempt to justify the rush, nor could it have done so. Under the Rule, even the first phase of the Cruising Cap (a 36% Cap) was not scheduled to be implemented for six months.

13. While no reason was ever offered for these blatant efforts to avoid disclosure and failures of process, it is impossible not to wonder if it relates to the pre-determined nature of the result and the Mayor's publicly recognized commitment to targeting FHVs. Mayor de Blasio, who appoints the TLC chair, made no effort to conceal that the result was preordained. In January 2019, well before the close of the twelve month study period, he said "we're going to put ongoing caps in place on the for-hire vehicles"; he then again said in March 2019 that the TLC will "do its study and determine what is the right number. That is a cap. I do believe in it."[1]

[1] *See* Transcript: Mayor de Blasio Appears Live on the Brian Lehrer Show (Jan. 25, 2019), https://www1.nyc.gov/office-of-the-mayor/news/059-19/transcript-mayor-de-blasio-appears-live-the-brian-lehrer-show, Ex. 12 at 7; Dana Rubinstein & Samantha Maldonado, "De Blasio says he's '110 percent' in favor of keeping Uber cap," *Politico Pro* (March 20, 2019), https://subscriber.politicopro.com/article/2019/03/20/de-blasio-says-hes-110-percent-in-favor-of-keeping-uber-cap-925302, Ex. 13 at 2.

14. This Petition details the TLC's many arbitrary assumptions and errors made to justify a desired policy outcome, often assuming the result it wanted to reach, including those discussed above, among other errors that render the Rule arbitrary and capricious, preempted, and otherwise contrary to law.

15. Congestion is a real problem. The solutions and the process for arriving at them must be just as real, consistent with law, facts and sound process. Here, unelected appointees predetermined an outcome, rushed toward that outcome, and produced an error-laden and data-deficient report to justify the outcome. This was all done without any regard for the effect of other regulations with which industry is complying, and without accounting for the significant adverse impacts the Rule will have on drivers, riders, and competition as well as the viability of the point-to-point ridesharing model. We respectfully ask the Court, for the reasons enumerated herein, to vacate the Rule.

PARTIES

16. Petitioner Uber Technologies Inc. ("**UTI**") is a technology company headquartered in San Francisco, California. Uber licenses software that enables independent third-party transportation providers to receive and respond to requests for prearranged transportation from interested riders that also use software designed by Uber. As the ultimate parent company of the other Petitioners, which operate high-volume FHV bases in accordance with existing City regulations, UTI earns a share of revenue from trip requests dispatched from bases operated by the other Petitioners.

17. Petitioners Zehn-NY, LLC ("Zehn-NY"), Zwei-NY LLC ("Zwei-NY"), Abatar LLC ("Abatar"), Unter LLC ("Unter") (collectively, the "**Uber Bases**") are direct, wholly-owned subsidiaries of Uber USA, LLC and indirect, wholly-owned subsidiaries of UTI. The Uber Bases

are high-volume FHV bases under the City's regulations, which "dispatch"—to use the TLC's parlance—FHVs that TLC-licensed drivers possess and operate to transport riders who have requested a ride using the Uber app.

18. Petitioner Uber USA, LLC ("**Uber USA**") is a wholly-owned subsidiary of UTI, and is the parent company of the Uber Bases. Uber USA is a high-volume for-hire service as that term is defined in the City's regulations. Petitioners UTI, the Uber Bases, and Uber USA are together generally referred to herein as "**Uber**."

19. Respondent New York City Taxi and Limousine Commission ("**TLC**") is an administrative agency of the City of New York created and operating pursuant to Chapter 65 of the New York City Charter. *See* N.Y.C. Charter § 2300. The TLC's principal office is located at 33 Beaver Street, New York, New York 10004.

20. Respondent Bill Heinzen serves as the Acting Commissioner of the TLC. Commissioner Heinzen's principal office is located at 33 Beaver Street, New York, New York 10004.

21. Respondent City of New York (the "**City**") is a municipal corporation duly incorporated and existing pursuant to the laws of the State of New York.

JURISDICTION AND VENUE

22. This court has subject matter jurisdiction to decide this Petition pursuant to N.Y. C.P.L.R. 7803, as the August 2019 Rule was a final determination of the TLC, and this Petition challenges that determination as arbitrary and capricious, an abuse of discretion, and as affected by error of law or in violation of lawful procedure.

23. Venue is proper in New York Supreme Court Pursuant to N.Y. C.P.L.R. 506(b) and 7804(b) because the challenged determination occurred in New York County.

FACTUAL ALLEGATIONS

A. Uber's Entry And Success In New York City

24. Since 2013, Uber has provided in New York City a set of smartphone applications that match requests from riders to drivers who provide for-hire service and allow for payment via credit or debit card (the "**Uber Apps**"). Under the predominant option (known as "**UberX**"), drivers provide non-shared point-to-point service through which riders are picked up where they request and dropped off at their preferred location.

25. Drivers who use the Uber Driver App in New York City, and around the country, have been able to log on to the Uber platform and make themselves available to receive trip requests when and where they want, giving them flexibility over whether, when and where to drive.

B. Congestion In Manhattan And Its Causes

26. Congestion in the Manhattan Central Business District ("**CBD**"), and in particular in Midtown Manhattan, is a significant issue, with average speeds declining by 2.1 mph in the CBD (*i.e.*, the area of Manhattan south of 60th Street) and 1.5 mph in the most congested part of the CBD ("the Midtown Core") since 2010. *See* Council of the City of New York: Committee on For-Hire Vehicles, *Committee Report of the Infrastructure Division* (August 8, 2018) ("**2018 Committee Report**"), Ex. 16 at 21; N.Y.C. Taxi & Limousine Commission, *Improving Efficiency and Managing Growth in New York's For-Hire Vehicle Sector* (June 2019) ("**June 2019 Report**"), Ex. 2 at 5; N.Y.C. Department of Transportation, *New York City Mobility Report* (August 2019) ("**2019 Mobility Report**"), https://www1.nyc.gov/html/dot/downloads/pdf/mobility-report-2019-singlepage.pdf, Ex. 36 at 18-19.[2]

[2] The 2018 Committee Report referred to traffic speeds in the Manhattan CBD and the Midtown Core. The June 2019 Report refers to traffic speeds in Midtown Manhattan and refers to the area south of 96th Street as the "core" or "Manhattan core." Thus, as used in the June 2019 Report, the "core" is a significantly larger area than the CBD or Midtown Core.

27. Most of the decline in speeds occurred from 2012 to 2015 when speeds in the Manhattan CBD decreased 1.7 mph (19%), and speeds in the Midtown Core decreased 1.4 mph (22%). *See* 2018 Committee Report, Ex. 16 at 21; 2019 Mobility Report, Ex. 36 at 18-19.

28. In January 2016, in response to those increases in congestion, the Office of the Mayor commissioned a study to determine its causes. *See* City of New York: Office of the Mayor, *For-Hire Vehicle Transportation Study* (January 2016) ("**January 2016 Study**"), Ex. 14. That study identified causes of decreasing vehicle speeds other than FHVs, concluding that "[r]eductions in vehicular speeds are driven primarily by increased freight movement, construction activity, and population growth." *Id*. at 5.

29. The reduction in speeds after 2015 has been more muted. From 2015 through 2018 (a period of significant growth in the number of FHV trips), average speeds declined .4 mph in the CBD (6%) and just .2 mph (4%) in the Midtown Core. *See* 2018 Committee Report, Ex. 16 at 21; June 2019 Report, Ex. 2 at 5; 2019 Mobility Report, Ex. 36 at 18.

C. Based On A 2017 Advisory Panel Study, The State Of New York Is In The Process Of Implementing The Third Phase of Its Comprehensive, Interconnected, And Phased Plan For Addressing Congestion In The Manhattan CBD

30. The State of New York has implemented a comprehensive and phased plan to both improve the subway in Manhattan as well as to reduce congestion. As set forth in detail in Argument Section II(A) below, the State's plan preempts the TLC's new Cruising Cap. The factual details of the State's plan are as follows.

31. In 2017, New York Governor Andrew Cuomo convened the Fix NYC Advisory Panel, a state advisory panel that consisted of a mix of community representatives, government officials, and business leaders and was supported by staff from New York's State transportation agencies and the HNTB Corporation. *Fix NYC Advisory Panel Report* (January 2018) ("**Fix NYC Report**"), Ex. 15 at 3. The State recognized that fixing congestion and fixing the subways were

intertwined. The Governor expressly tasked the Advisory Panel "with developing recommendations to address the severe traffic congestion problems in Manhattan's CBD and identify [sic] sources of revenue to fix the ailing subway system." *Id.*

32. Consistent with the Governor's mandate, the Advisory Panel issued a report, identifying numerous causes of increased congestion. Those causes included: (1) the reduction in available roadway capacity because of the installation of pedestrian plazas, bike lanes, and dedicated bus lanes, (2) increased truck volumes fueled by the rise of e-commerce, (3) increased pedestrian traffic and increased tourism, (4) inadequate enforcement of traffic laws leading to various problematic conditions including double parking and the frequent blocking of dedicated bus lanes leading to declines in bus speeds, (5) increased app-based FHV traffic, and (6) increased bus traffic coupled with declining parking space available for bus traffic. *Id.* at 4, 7-8, 17.

33. The Advisory Panel further explained that the "subway system has suffered from years of overcrowding and neglected maintenance resulting in chronic breakdowns and delays." *Id*. at 4. "Even after short-term remedies are implemented, additional funding will be required for the transformative upgrades the system requires." *Id*. The panel also emphasized that the improvements were particularly needed in the City's outer boroughs. *Id*. at 15.

34. To address these problems, the Advisory Panel recommended a multi-step strategy, consisting of a number of interconnected measures, to raise revenue to improve public transportation while implementing a phased congestion pricing plan that forces people in the most congested areas to pay for the costs of the congestion they generate. The Advisory Panel described a "phased approach" as "essential for a congestion reduction and revenue generation program in NYC." *Id*. at 14.

35. As recommended by the Advisory Panel, "Phase One initiates investments to improve transit connectivity between the CBD and the outer boroughs and suburbs and calls for immediate stepped up enforcement by NYPD of existing traffic laws," specifically traffic laws that address moving violations that lead to congestion. *Id*. at 4, 15-16. "Phase Two calls for a surcharge on taxi and FHV trips in the CBD" beginning in 2019. *Id*. at 4, 19. "Phase Three features the installation of a zone pricing program," alternatively referred to and known as "congestion pricing," "first for trucks, and then for all vehicles, entering Manhattan's CBD below 60th Street." *Id*. at 4, 12, 28-29.

36. In April 2018, New York State took action to implement the first two phases of the Advisory Panel's plan.

37. To implement Phase One, the state passed a law, as part of its budget, appropriating funds to pay for the State's share of the Subway Action Plan ($418 million) developed by the Chairman of the Metropolitan Transportation Authority. 2018 N.Y. Sess. Laws 78, ch. 59, Part VV § 1, Ex. 17; MTA, NYC Subway Action Plan, http://www.mtamovingforward.com/files/NYC_Subway_Action_Plan.pdf, Ex. 18. The law also contained provisions designed to ensure that the City pays for its share (also $418 million) of the Subway Action Plan improvements. 2018 N.Y. Sess. Laws 79, ch. 59, Part VV § 4, Ex. 17. If the City did not pay its share, the law required the State comptroller to use state funds that otherwise would have gone to New York City to pay the City's share of the Subway Action Plan. *Id*.

38. To implement Phase Two, the law included a $2.75 congestion surcharge on each FHV trip, and a $2.50 surcharge on each taxicab trip, that originates in, travels through, or terminates in the congestion zone, defined as "the geographic area of the city of New York, in the borough of Manhattan, south of and excluding 96th street." 2018 N.Y. Sess. Laws 171-72, ch. 59,

Part NNN § 2, Ex. 17 (codified as N.Y. Tax Law §§ 1299(f), 1299-A(a)). The revenue from the surcharge is required by law to go to funds created by the statute that are dedicated to improving public transportation with a specific priority of distribution. 2018 N.Y. Sess. Laws 179-81, Ch. 59, Part NNN § 4, Ex. 17 (codified as N.Y. Pub. Auth. Law § 1270-i). The congestion surcharge went into effect in February 2019 (the same time as the TLC's Minimum Payment Rule).

39. To implement Phase Three, on March 31, 2019, the State voted to implement zoned congestion pricing for all vehicles that enter or remain in the area of Manhattan south of 60th Street to begin as early as December 31, 2020. 2019 N.Y. Sess. Laws 244-49, Part ZZZ, Subpart A, Ex. 19 (codified as N.Y. Veh. & Traf. Law §§ 1701-1704-a). The Triborough Bridge and Tunnel Authority is responsible for executing and evaluating the scheme, developing a system of variable tolls consistent with the goals of improving congestion and funding capital projects, and evaluating the impact of the congestion pricing on FHV use, congestion, and a wide variety of other issues. *Id.*

D. In August 2018, New York City Enacted Various Provisions Related To The FHV Industry, Including Mandated Minimum FHV Payment Rules, A One-Year Cap On New FHV Licenses, And A Required Study Of At Least Eight Topics Related To Congestion And The FHV Industry

40. On August 14, 2018, after an extensive lobbying campaign by the taxicab industry, Mayor de Blasio signed into law a package of five bills directed at the app-based FHV industry, which in turn led to extensive regulation by the TLC related to driver earnings.

41. First, the August 2018 legislation package included Local Law 150, Ex. 21, which called for the TLC to establish a method for determining a minimum per-trip payment for drivers who use app-based platforms such as Uber. The TLC proposed and enacted a formula (the "**Minimum Payment Rule**"), that establishes a minimum per-minute and per-mile payment and then divides that payment by the company's utilization rate, representing the amount of time that

the vehicles using the company's platform are occupied. Minimum Payment Rule § 25, Ex. 5 at 28-30 (codified as 35 RCNY § 59B-24). Thus, minimum payments increase with lower utilization and vice versa. The TLC's Minimum Payment Rule went into effect in February 2019, the same time as the State's mandatory $2.75 surcharge on FHV trips in Manhattan south of 96th Street.

42. The formula was based on a report by James A. Parrott and Michael Reich, which was actually issued before the City Council directed the TLC to establish a formula. *See* James A. Parrott & Michael Reich, *Report for the New York City Taxi and Limousine Commission* (July 2018), Ex. 22. As the report reflects, the purpose of featuring a company's utilization rate so prominently is twofold. First, it helps to ensure that the driver is effectively paid for driving time when the car is unoccupied. Second, it incentivizes companies to improve their utilization. *Id.* at 34-35. This is because a higher utilization rate means more trips for drivers and a lower cost per trip, thereby enabling companies to charge riders less per trip. A lower utilization rate, by contrast, means fewer trips per driver, a higher cost per trip, and therefore higher rider prices per trip. This in turn can lead to further decreases in demand, even lower utilization, and even higher prices, which in turn leads to even lower demand, lower utilization, and even higher prices. It therefore provides a powerful competitive incentive to improve utilization.

43. The TLC provided that companies could use an industry-wide utilization rate for the first year, rather than a company-specific rate, but could petition to use a company-specific rate for the first year. Minimum Payment Rule § 25, Ex. 5 at 28-30; Affidavit of Chad Dobbs ("**Dobbs Aff.**") ¶ 5. Companies must begin using a company-specific rate beginning in February 2020. Dobbs Aff. ¶ 5. For the first period the Rule was in effect (February to July 2019), the TLC calculated that both Uber and the industry rate for calculating payments was 58%, and the two other predominantly point-to-point services (Lyft and Juno) were lower (56% and 53%

respectively). *Id.* ¶¶ 6-7. For the next period, the TLC informed Uber that its rate and the industry rate would again be 58%. *Id.* ¶ 8. The TLC did not inform Uber of the other companies' rates. *Id.*

44. Second, the package of legislation included Local Law 147, which enacted a one-year cap on FHV licenses. Further, it required a TLC and DOT study of the issue of congestion and other matters. The study mandated by the law was to cover eight topics, as well as a broad catchall for "such other topics" that the TLC (and the City DOT) deemed appropriate. Specifically, the law states:

> The commission, in conjunction with the department of transportation, **shall** study
>
> (i) income drivers derive from operating vehicles that provide transportation services to passengers,
>
> (ii) traffic congestion throughout the city,
>
> (iii) the extent to which various categories of vehicles for hire contribute to such congestion,
>
> (iv) traffic safety,
>
> (v) vehicle utilization rates,
>
> (vi) access to services in different geographic areas of the city for one or more categories of vehicles for hire,
>
> (vii) the number of hours that drivers have made themselves available to accept dispatches from a base or from a high-volume for-hire service by day or week,
>
> (viii) driver income and well-being, and
>
> (ix) such other topics as the commission and the department of transportation deem appropriate.

Local Law 147 § 3, Ex. 6 at 3 (emphasis added).

45. Local Law 147 delegated authority to the TLC to exercise permanent license capping authority upon the expiration of the 12 month cap imposed by the City Council, and also

provided that "based on the results of the study" TLC "may establish vehicle utilization standards" and "may regulate the number of for-hire vehicle licenses." Local Law 147 § 3, Ex. 6 at 3.[3]

46. Well before the 12 month study period had concluded, and before the TLC purported to have performed any kind of study or model, in January 2019, Mayor de Blasio confirmed the City's intent to impose caps regardless of any study, stating, "we're going to put ongoing caps in place on the for-hire vehicles." Transcript: Mayor de Blasio Appears Live on the Brian Lehrer Show, Ex. 12 at 7. And in March 2019, de Blasio said, "I believe in the notion of caps." Rubinstein & Maldonado, "De Blasio says he's '110 percent' in favor of keeping Uber cap," Ex. 13 at 2. Mayor de Blasio further explained that the TLC "will do its study *and determine what is the right number*. That is a cap. I do believe in it." *Id.* (emphasis added).

E. Uber And Lyft Have And Are Implementing Measures To Improve Utilization In Response To TLC's Minimum Payment Rule

47. After the Minimum Payment Rule went into effect, Uber and Lyft took steps to increase utilization throughout New York City by placing limits on driver use of their platforms. Starting with prospective drivers, Petitioners and Lyft first stopped allowing drivers to sign up for new accounts to drive using the companies' platforms in New York City. Dobbs Aff. ¶ 9; Lyft New York City Website, https://www.lyft.com/driver/cities/new-york-city-ny, Ex. 23; *see also*

[3] The legality of Local Law 147's delegation of permanent FHV license capping authority to the TLC is the subject of other ongoing litigation. On February 15, 2019, Petitioners filed a complaint in the Supreme Court challenging the lawfulness of the initial one-year FHV License Cap imposed by Local Law 147 (which has now expired) and the delegation of permanent capping authority in Local Law 147. Specifically, Petitioners alleged that (1) the City exceeded its statutory authority under General Municipal Law § 181; (2) Local Law 147's statutory delegation of permanent capping power to the TLC is ultra vires and unconstitutional; (3) Local Law 147 is preempted by State Law; (4) Local Law 147 unconstitutionally delegated legislative power to the TLC; (5) Local Law 147 is an anticompetitive arrangement in violation of the Donnelly Act; and (6) Local Law 147 violates Plaintiffs' right to due process. Petitioners filed an Amended Complaint on April 26, 2019. Three FHV drivers and one Taxi driver have intervened in this suit. Defendants moved to dismiss the complaint, which as of July 19, 2019, was fully briefed. The Court has scheduled oral argument on the motion for October 23, 2019.

Andrew J. Hawkins, "Uber and Lyft stop hiring new drivers in New York City," *The Verge* (Apr. 29, 2019), https://www.theverge.com/2019/4/29/18522885/uber-lyft-not-accepting-new-drivers-nyc-rules-supply-demand, Ex. 24.[4] Drivers had previously been able to sign up for an account if they wanted. By limiting the number of drivers that use their apps, companies could increase their utilization rates and lower mandatory per trip driver payments and thus rider prices.

48. Then in June 2019, Lyft implemented a new "gating" mechanism that limits the number of drivers who can access its platform at particular times based on passenger demand. Lyft Video, "Supporting Lyft Drivers Through NYC Changes," https://www.youtube.com/watch?v=Vc2H5o7f5ZA, Ex. 25 ("We created this video to explain the connections between the app changes you're seeing and how the TLC now calculates driver earnings . . . . To keep utilization high, we've limited the number of cars that can be on the road based on passenger demand . . . . During periods of low demand, you might have to wait to go online or drive to a busier area."); Lyft Website, "What the New TLC Rules Mean for You," https://thehub.lyft.com/what-the-new-tlc-rules-mean-for-you, Ex. 26. Previously, drivers could choose when and where to log on to Lyft's platform.

49. In September 2019, also in response to the incentives to improve utilization created by the Minimum Payment Rule, Uber announced features that will limit the number of drivers able to use its platform at particular times throughout all five boroughs of New York City. Dobbs Aff. ¶ 9. The features will allow drivers to sign up in advance for specified time slots with the number of slots limited based on network characteristics such as level of demand. *Id.* The ability of drivers who have not signed up in advance to access the platform will depend upon the level of demand

[4] The vehicle License Cap would not have prevented such drivers from driving because drivers could still rent or lease vehicles that were previously licensed as for-hire vehicles before the Cap went into place.

at the times and places the drivers wish to drive. *Id.* A subset of drivers will be exempt from the new features. *Id.* The purpose of the new features is to enable Uber to improve its utilization throughout the City, including, but not limited to, the Manhattan core. *Id.* These features will be employed throughout all five boroughs of New York City, because the Minimum Payment Rule measures utilization across all five boroughs. *Id.* ¶¶ 9-10.

50. The TLC's Minimum Payment Rule is also affecting rider prices on the Uber platform. As stated in the Tadelis-CRA Report, following the implementation of the Minimum Payment Rule, initially rider prices did not rise, but during Q2 2019 rider prices were increased substantially, as the increases in costs resulting from the Minimum Payment Rule and FHV surcharge were passed through to riders. Tadelis-CRA Report, Ex. 4 ¶ 24. Trip growth had significantly slowed well below the 50% outer borough trip growth projected by the June 2019 Report even before the increase in prices as recognized in the June 2019 Report, and year over year trip growth has decreased every month from March 2019 through the publication of the Rule. *See* June 2019 Report, Ex. 2 at 16; Dobbs Aff. ¶ 11.

F. In June 2019, The TLC Released Its Report Recommending New Regulations Without Prior Consultation With Petitioners Or Other FHV Base Operators, Without Assessing The Impact Of A Less Stringent Cruising Cap, And Without Conducting The Required Study

51. The TLC released a report in June 2019, titled "Improving Efficiency and Managing Growth in New York's For-Hire Vehicle Sector" (the "**June 2019 Report**"). Ex. 2. The following day, the TLC certified proposed rules for comment (the "**Proposed Rule**") with a draft Statement of Basis and Purpose. Ex. 27. After the close of the comment period, the rules were approved on August 7, 2019 as the August 2019 Rule (with very few changes from the initial proposal). *See* New York City Press Release, "Mayor de Blasio Puts Into Effect For-Hire Vehicle Cruising Cap and Extends License Cap" (Aug. 9, 2019), https://www1.nyc.gov/office-of-the-

mayor/news/384-19/mayor-de-blasio-puts-effect-for-hire-vehicle-cruising-cap-extends-license-cap, Ex. 28. The Statement of Basis and Purpose for the Proposed Rule was identical to the Statement and Basis and Purpose for the final August 2019 Rule. *See* Exs. 1, 27.

52. The TLC's June 2019 Report recommended that the City implement two policies: (1) the Cruising Cap, which limits cruising time to 31% of total online time in the area of Manhattan below 96th Street; and (2) extending the License Cap for a minimum of one year. June 2019 Report, Ex. 2 at 3-4, 28, 29, 32, 33.

53. The June 2019 Report claimed that the TLC and DOT created a model comparing the projected impact of the two policies through August 2020 against a so-called "baseline" policy scenario where the policies were not in place and no other policies were added to the regulatory framework. *Id.* at 8. The TLC states in the June 2019 Report that the License Cap and Cruising Cap, when combined together, and as compared to the "baseline," would result in a 24% decrease in FHV "Vehicle Hours Traveled" in the Cruising Cap zone, a 13% increase in wait times *within* the Cruising Cap zone, and a 9% increase in wait times *outside* the Cruising Cap zone. *Id.* at 3. The June 2019 Report did not identify any improvement in congestion or vehicle speeds that would result if its policies did in fact reduce FHV vehicles hours traveled in the Cruising Cap zone by the amount projected or otherwise.

54. The June 2019 Report acknowledges that the TLC did not consider any Cruising Cap less restrictive than the 31% Cap that it ultimately required. *Id.* at 8.

55. The TLC also later stated in the Statement of Basis and Purpose for the August 2019 Rule that Local Law 147 "mandated that the TLC and DOT study the consequences of certain changes in traffic policy in terms of congestion in the Congestion Zone, driver pay, passenger fares, passenger wait times, and shifts to other modes of transportation." *See* August 2019 Rule,

Statement of Basis and Purpose, Ex. 1 at 2. This is inaccurate. The City Council in fact had required a study of the eight topics while also authorizing, but not requiring, the TLC to implement certain policies "based on the results of the study." Local Law 147 § 3, Ex. 6 at 3.

56. The TLC did not purport in its June 2019 Report to determine "the extent to which various categories of vehicles for hire contribute to such congestion." *See id.* Instead, it describes only what the June 2019 Report itself states was only a "step" towards "understanding the degree to which [FHVs] contribute to traffic congestion"—specifically, counting the relative number of vehicles on the street during particular peak times. June 2019 Report, Ex. 2 at 18-19.

57. The failure to study the impact of alternative causes of congestion, or make a judgment about the relative impact of FHVs on congestion, contrasted with the City's prior January 2016 Study, which did look at the causes of congestion, including but not limited to FHVs, and concluded that the primary drivers of the increased congestion that had occurred previously were "increased freight movement, construction activity, and population growth." January 2016 Study, Ex. 14 at 5. Each has continued to increase, yet the City has conducted no similar study since the January 2016 Study to determine whether those remain the primary drivers of changes in congestion or otherwise assess the relative impact of FHVs. *See* 2018 Committee Report, Ex. 16 at 20-21; June 2019 Report, Ex. 2 at 5 ("The city has seen continual growth in population, employment, commerce, and construction activity, all of which add pressure to the street network."); 2019 Mobility Report, Ex. 36 at 5, 10, 35, 38 (documenting continued population growth and observing that "freight traffic and home deliveries also continued to rise").

58. The Report also fails to address "congestion . . . throughout the City," including only a bare reference to traffic speeds south of 60th Street, and no reference to speeds between 60th and 96th Street. *See* June 2019 Report, Ex. 2 at 2, 5.

59. The June 2019 Report also fails to address "income drivers derive from operating vehicles that provide transportation services to passengers," "the number of hours that drivers have made themselves available to accept dispatches from a base or from a high-volume for-hire service by day or week," and "driver income and well-being" as required by Local Law 147 § 3, Ex. 6 at 3.

60. Likewise, whereas Local Law 147 required a study of "vehicle utilization standards," nothing in the June 2019 Report addresses vehicle utilization standards for "taxis," freight, or any type of vehicle other than app-based FHV services. Nor did it explain why it was imposing a Cruising Cap on FHVs but not taxicabs when according to the June 2019 Report, taxis make up a greater percentage of vehicles in parts of the most congested area (Midtown core) and close to the same percentage of vehicles in the CBD as a whole. June 2019 Report, Ex. 2 at 5, 20; 2019 Mobility Report, Ex. 36 at 17.

61. Prior TLC analysis of taxi utilization rates at particular times had concluded that rates ranging from 50-67% were too "high" and showed that "taxi supply is not meeting passenger demand." *See* 2016 TLC Factbook, https://www1.nyc.gov/assets/tlc/downloads/pdf/2016_tlc_factbook.pdf, Ex. 29 at 8. The June 2019 Report does not explain why a rate (59%) that is squarely in the middle of a range it had previously criticized as too high in the case of taxis was now too low and reflected inefficient management or excessive supply in the case of FHVs.

G. The TLC Failed To Disclose The Actual Models And Data That Went Into The June 2019 Report, Including In Response To Requests From Petitioners And Others

62. The June 2019 Report primarily described economic modeling that it did to project the impact of the proposed policies. The TLC, however, did not disclose the underlying model itself. Nor did it disclose most of the results of the analysis (as discussed in greater detail in Section II(B)(2) *infra*).

63. As a result, five days after the release of the TLC's Proposed Rule, on June 17, 2019, Petitioners' counsel filed a request with the TLC and the City DOT, on behalf of Petitioners, pursuant to the Freedom of Information Law ("FOIL"). Exs. 7, 9; *see* N.Y. Pub. Off. Law §§ 84 et seq. The requests sought 16 specific categories of documents, including, among other things, "All records, including all computer files and code, that, individually or in combination, form or are otherwise used to create, generate, perform or run the Economic Model, and/or any component or module of the model." Exs. 7, 9.

64. The FOIL requests specifically explained that documents should be produced expeditiously because the "requested documents are necessary in order to enable effective public comment on the Proposed Rule." Exs. 7, 9.

65. The TLC and the DOT have not provided the requested materials. Instead, the TLC initially took the position in responding to Petitioners' FOIL request that the TLC did not have *a single document* related to the study (other than two data-sharing contract documents) that it was required *by law* to conduct. July 30, 2019 email from TLC to M. Shube, Ex. 8.

66. Petitioners followed up with TLC several times, via both teleconference and in writing. Ex. 30. In those communications, Petitioners informed the TLC that its response to the FOIL request (*i.e.*, that it had only two relevant documents—the memoranda of understanding about data-sharing) could not possibly be correct. *Id.* at 2. After acknowledging that there are in

fact additional documents that should be produced, on August 2, 2019, the TLC estimated that it will require ***200 business days*** (*i.e.*, 40+ weeks) to search for emails and produce them, and on August 13, 2019, TLC estimated it would require an additional 15 business days to produce responsive non-email documents. *Id.* at 1, 3. As of the date of filing this Petition, nothing has been produced beyond the two data-sharing memoranda of understanding.

67. Nor has DOT produced documents. On June 24, 2019, the DOT sent an acknowledgment of the FOIL request, but indicated that a response should not be expected until "on or about Monday, March 16, 2020"—*i.e.*, ***nine months*** after the FOIL request was received. June 24, 2019 email from DOT to H. Levy, Ex. 10.

H. The TLC Made No Outreach Before Issuing Its Report Or Setting Its Cap, But Petitioners And Other Commenters Demonstrated The Flaws In The Report And Proposed Rule During The Comment Period

68. Before issuing the June 2019 Report and making its economic model, the TLC did not consult with Petitioners in regard to the assumptions of its economic modeling, such as the impact on wait times of increasing utilization, the impact of the Minimum Payment Rule, or any of the other inputs that went into the model. Dobbs Aff. ¶ 14. Even though the Cruising Cap was unprecedented, and even though it knew that FHV companies were evaluating ways to improve utilization in response to the Minimum Payment Rule, the TLC did not consult with Petitioners or other FHV base operators about what it would take to comply with the proposed Cruising Cap, whether compliance was reasonably achievable, and the likely impact of compliance on drivers and riders. *Id.*; *see* Comment of Lyft, Inc., Ex. 31 at 209, 211 ("The TLC proposed the Cruising Cap without speaking to the HVFHS companies, and therefore did not consider the costs and service changes the companies would have to make in order to comply.").

69. After releasing the Proposed Rule, the TLC provided for a 30-day comment period. Uber submitted comments to the June 2019 Report identifying flaws in the TLC's model and

problems with the August 2019 Rule. *See* Uber Comment, Ex. 11. It also submitted as part of the comment a detailed report from Professor Steven Tadelis of the Haas School of Business at the University of California, Berkeley, and a team of economists from Charles River Associates. *See* Tadelis-CRA Report, Ex. 4. The Tadelis-CRA Report explained that the June 2019 Report's description of the model is "very opaque," but that even the June 2019 Report's limited description made clear that the model was unfit for its basic purpose and suffered from multiple conceptual and methodological flaws. *Id.* ¶¶ 30-42. The Tadelis-CRA Report detailed the numerous flaws of the June 2019 Report, which are discussed in greater detail herein. The TLC did not attempt to discuss the Tadelis-CRA Report with Uber or otherwise inquire about its contents or underlying data. Dobbs Aff. ¶ 15.

70. Numerous other members of the public, including community stakeholders and drivers, submitted comments that raised concerns about the harms that would result from the Proposed Rule. *See, e.g.*, Ex. 31 at 180, 185; *see also* Comment of Arc of Justice, *id.* at 205-06 ("Lyft already announced rules last month that limit when drivers can work based on how busy the app is. App companies will have no choice but to create similar guidelines when they face millions of dollars in fines from the TLC."); Comment of Shisir Humagain, *id.* at 207 ("Lyft already changed their system that we can not go online if there is not high demand through out five boroughs which dropped driver earnings significantly."); Comment of Muhammad A. Alam, *id.* at 201 (stating that the Cruising Cap would have "a bad impact on FHV drivers"); Comment of Dany Boi, *id.* at 208 (stating with reference to the cruising cap that "[i]nstead of making things better for drivers, you are making them worse").

71. Drivers addressed the License Cap either by itself or in addition to addressing the Cruising Cap. Over 300 drivers submitted individual comments explaining that the License Cap

was hurting drivers who were being forced to pay to rent a vehicle when they otherwise could own the car. *Id.* at 1-175.

72. Numerous organizations representing the interests of drivers echoed these comments. These organizations included the Council on American-Islamic Relations, which stated that "drivers are paying very high rental costs which eats into their earnings and takes away independence they so value." *Id.* at 182. Other organizations making similar points included: One Hundred Black Men Inc., New York City Hispanic Chamber of Commerce, New York Urban League, United Chinese Association of Brooklyn, Council on American-Islamic Relations, and the Black Institute. *Id.* at 176-84.

73. Other commenters noted that it made no sense to enact these regulations prior to the State's enactment of comprehensive congestion pricing and without knowing how the State would address FHVs within the congestion pricing scheme. The Council on American-Islamic Relations observed that as the study admitted, "the Commission does not know how the State's new [CBD] tolling program will deal with FHVs. Nonetheless, TLC recommends enacting new regulations without knowing how they will complement the tolling program which is intended to alleviate and tackle the same issue." *Id.* at 181.

74. Many organizations commented on the speed of the process and urged postponement of the vote so that the rulemaking would not be so hasty and rushed. *See*, *e.g.*, Comment of Independent Drivers Guild, *Id.* at 189 ("We agree with the calls to postpone the vote. It seems rash to launch an additional cruising cap policy given what we have outlined above and before the company-specific utilization rate this commission passed in December has even gone into effect."). The Internet Association expressed concern "at the speed Mayor de Blasio and the Commission concluded a 12-month study in nine months and immediately issued new draft rules

regarding an expansion of the FHV licensing moratorium and limiting the time high-volume FHV operators can drive in Manhattan without a passenger." *Id.* at 203.[5]

75. Many organizations expressed concern that because the Cruising Cap would lead to many drivers being prevented from accessing companies' platforms in the congestion zone, drivers would be reluctant to take trips that originate in Manhattan to jurisdictions outside Manhattan, and that increased destination discrimination would be the result, similar to one type of discrimination committed by taxis. These included the NAACP New Jersey State Conference, *id.* at 222; the GRACE Baptist Church, *id.* at 224; Mobilizing Preachers and Communities, *id.* at 198; Queens Chamber of Commerce, *id.* at 196; Kingsbridge Riverdale Van Cortlandt Development Corporation, *id.* at 197; Internet Association, *id.* at 204; Arc of Justice, *id.* at 205; the Black Institute, *id.* at 183-84; and Manhattan Chamber of Commerce, *id.* at 215. Relatedly, others expressed concern that it would incentivize drivers to congregate just north of 96th Street and create increased traffic problems there. *Id.* at 196, 204, 216.

76. Various elected officials also criticized the Rule. These officials stated, among other things, that the Cruising Cap would "creat[e] the same scenario we saw for years around

[5] *See also* Comment of Lyft, Inc., Ex. 31 at 209; Comment of the Haitian American Caucus, *id.* at 221 (urging the TLC to "slow down and refrain from passing any new rules until we can all understand the impact that the recently-passed rules have had on drivers, riders, and the city's transportation landscape"); Comment of N.Y. State Senator Brian A. Benjamin, Chair of the Budget and Revenue Committee, *id.* at 217 (stating that the TLC "has not considered all of the unintended negative consequences that will occur as a result and will directly affect working class New Yorkers" and encouraging the commission to take "some more time to consider the impact of such proposals upon those who are already being squeezed as they live and work here."); Comment of Brooklyn Community Pride Center, *id.* at 218 ("The process is moving so fast that community-based nonprofits like Brooklyn Community Pride Center don't have enough time to review the study. . . . We urge the TLC to allow a more appropriate window of time to digest and discuss the study before establishing longer-term rules that could have serious implications for the LGBTQ+ community of Brooklyn."); Comment of Partnership for New York City, *id.* at 214 ("The TLC should allow time to assess the impact" of prior rules "on the industry, its customers and mobility throughout the city before taking further action.").

destination discrimination from the yellow taxi industry," Comment of N.Y. City Council Member Diana Ayala, Ex. 31 at 191, that the Rule would mark the "return[ ] to days when for-hire vehicles refused service to passengers who wished to travel from Manhattan to anywhere else," Comment of N.Y. City Council Member Kalman Yeger, *id.* at 227, that the Cruising Cap was a "new proposal that appears to have little analysis behind it," and that the "TLC rushed through new rules and policies without enough thought for how they could impact drivers," Comment of N.Y. City Council Member Andy L. King, Chair of the Committee on Juvenile Justice, *id.* at 194, and that the "TLC has not considered all of the unintended negative consequences that will occur as a result and will directly affect working class New Yorkers," Comment of N.Y. State Senator Brian A. Benjamin, Chair of the Budget and Revenue Committee, *id.* at 217.

77. A multitude of other comments also criticized various aspects of the Rule, including the inclusion of en route time in the formula, *see, e.g.*, Ex. 31 at 212, 219, the negative impact the License Cap was having on drivers with no discernible positive impact, *see, e.g.*, Ex. 31 at 185-87; Ex. 32 at 5, 62, 72, 98-99, the harm the Cruising Cap would have, *see, e.g.*, Ex. 31 at 188-89, 201, 205-06, 207; Ex. 32 at 26, 32, 45, the rushed nature of the process and failure to evaluate the impact of prior regulations, *see, e.g.*, Ex. 31 at 195, 204, 209-11, 220, 221; Ex. 32 at 63, 90, and concern about unintended consequences including concern over creating incentives for drivers to discriminate on the basis of destination, *see, e.g.*, Ex. 31 at 191-92, 227; Ex. 32 at 11, 38, 39, 40, 41, 42, 48, 49, 59, 60, 61, 62.[6]

[6] Exhibit 32 contains comments submitted to the TLC but not otherwise specifically cited in this petition.

I. The TLC Approved The Proposed Rule Despite The Flaws Identified By Petitioners And Others During The Notice-And-Comment Period And The Hearing And Without Responding To Comments

78. On August 7, 2019, the TLC approved the August 2019 Rule, just over two weeks after the close of the comment period. August 2019 Rule, Notice of Promulgation, Ex. 1 at 1. The Rule imposed a 31% Cruising Cap beginning in August 2020 with a cap of 36% beginning in February 2020. August 2019 Rule § 6, Ex. 1 at 7 (codified as 35 RCNY § 59D-21). In addition, the Rule extended the License Cap through August 2020. *Id.* § 3, Ex. 1 at 4 (codified as 35 RCNY § 59A-06). The Statement of Basis and Purpose for the Rule was identical to the Statement of Basis and Purpose that accompanied the Proposed Rule and did not address any of the comments. *See* Exs. 1, 27. The Statement of Basis and Purpose for the Rule claimed that its undisclosed model of the Cruising Cap projected that it would "result in significant reductions in FHV Vehicle Hours Traveled in the Congestion Zone" and would do so "without negatively impacting driver pay, passenger fares, or outer borough passenger wait times." August 2019 Rule, Statement of Basis and Purpose, Ex. 1 at 2.

STANDARD OF REVIEW

79. An Article 78 proceeding raises for review "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." N.Y. C.P.L.R. 7803(3).

80. "Administrative rules are not judicially reviewed pro forma in a vacuum, but are scrutinized for genuine reasonableness and rationality in the specific context." *N.Y. State Ass'n of Counties v. Axelrod*, 78 N.Y.2d 158, 166 (1991). An agency's action is arbitrary and capricious where it lacks a "sound basis in reason" or a "rational basis" in the record. *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 231 (1974) (quoting *Colton v. Berman*, 21 N.Y.2d 322, 329 (1967)).

81. "If an agency bases a regulation on a flawed study, the regulation must be vacated and annulled as arbitrary and without basis in the record." *Tri-City, LLC*, Index No. 151037/2019, Ex. 3 at 13 (citing *Schur*, 565 N.Y.S.2d 56 (finding agency action arbitrary and capricious where based on a flawed inspection report lacking relevant data)); *see also Nat. Res. Def. Council v. EPA*, 808 F.3d 556, 574 (2d Cir. 2015) (agency action is arbitrary and capricious under corresponding standard of Federal Administrative Procedure Act when based on a flawed study) (citing cases); *Tex. Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 935 (5th Cir. 1998) ("A regulation cannot stand if it is based on a flawed, inaccurate, or misapplied study."); *Humana of Aurora, Inc. v. Heckler*, 753 F.2d 1579, 1583 (10th Cir. 1985) (holding agency action is arbitrary when based on a flawed study).

82. Likewise, an administrative agency's action may be set aside where, among other things, it is "not based on a rational, documented, empirical determination," where it fails to consider an important aspect of the problem, or where "the calculations from which [it is] derived [are] unreasonable." *N.Y. State Ass'n of Counties*, 78 N.Y.2d at 166, 168 (alterations in original) (citations omitted); *see Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious" if the agency "entirely failed to consider an important aspect of the problem."); *Nat. Res. Def. Council*, 808 F.3d at 569, 574 (same and relying on this principle to strike down a rule); *see also Metro. Taxicab Bd. of Trade v. N.Y.C. TLC*, 18 N.Y.3d 329, 334 (2011); *Ahmed v. City of New York*, 10 N.Y.S.3d 233, 238 (Sup. Ct. 2015); *Comm. for Taxi Safety, Inc. v. City of New York*, 971 N.Y.S.2d 793, 800 (Sup. Ct. 2013) (invalidating other rules as arbitrary and capricious).

83. It is "the settled rule that judicial review of an administrative determination is limited to the grounds invoked by the agency." *Scherbyn v. Wayne-Finger Lakes Bd. of Coop.*

*Educ. Serv*s., 77 N.Y.2.d 753, 758 (1991). Likewise, "[i]f the reasons an agency relies on do not reasonably support its determination, the administrative order must be overturned and it cannot be affirmed on an alternative ground that would have been adequate if cited by the agency." *Nat'l Fuel Gas Distribution Corp. v. Pub. Serv. Comm'n of New York*, 16 N.Y.3d 360, 368 (2011).

ARGUMENT[7]

I. The August 2019 Rule Is Arbitrary And Capricious

84. While the TLC has only offered a selective description of its model's results and has not disclosed any of the underlying modeling, *see infra* Sections II(B)(1), (2), even the limited amount it has revealed makes clear that the August 2019 Rule is arbitrary and capricious. *See* Tadelis-CRA Report, Ex. 4 ¶ 5 ("[A]lthough the TLC's model is poorly documented, what has been disclosed already demonstrates that it lacks any reliable basis for its conclusions and fails to account for the likely negative consequences of its proposed cruising and license caps.").

A. The Cruising Cap Is Arbitrary And Capricious

1. The Rule Arbitrarily Relies On Critical Inputs That Are Unsupported By And Inconsistent With The Record

85. The June 2019 Report explains that the "core of the analysis was conducted in the Economic Model" and that the "Supply and Demand Module" was the "central component of the Economic Model." June 2019 Report, Ex. 2 at 12-13. That "Supply and Demand Module" purportedly "predicts the changes" that various market participants "would make in response to the introduction of a specific policy." *Id*. at 13. "Multiple elasticity coefficients are used in the Economic Model." *Id.* at 13. Elasticity coefficients measure the extent to which an output

[7] Article 78 petitioners often submit memoranda of law with petitions that in many instances, duplicate the Argument section of the petition. Rather than submit a duplicative document, Petitioners have in this instance included the legal basis and authority for their position in the Argument section of the Petition and also included a Table of Authorities with the Petition.

responds to changes in a particular variable, with a textbook example being how much demand would change in response to a change in price. *See id*. at 13, 34; *see also* Tadelis-CRA Report, Ex. 4 ¶ 29 n.7.

86. The June 2019 Report identifies as critical inputs, among others, the elasticity of wait time with respect to utilization, elasticity of demand with respect to rider price (or fare), and elasticity of demand with respect to wait time. June 2019 Report, Ex. 2 at 34. The TLC's description of how it derived these critical inputs makes clear that their selection was arbitrary, thus rendering arbitrary the model and Rule that relies on them. *See* Tadelis-CRA Report, Ex. 4 ¶ 5 (The TLC's model "is based on a collection of assumed relationships between variables populated with data taken from questionable sources, or based on no sources at all, which cannot be relied upon to make accurate predictions of ongoing and proposed policy changes."). The TLC also relied for its model on trip growth estimates when the actual data showed the estimates were badly flawed. *See N.Y. State Ass'n of Counties*, 78 N.Y.2d at 167-68 (invalidating rule as arbitrary and capricious because the rule was "not based on a rational, documented, empirical determination," and "failed to substantiate what therefore amounted only to a theory and assumption—arrived at swiftly and certainly not after any reasonable or measured period of empirical documentation, assessment and evaluation," and thus "[i]ts predicates [we]re entirely conclusory").

a. The TLC Relied For The Key Parameter Of Utilization's Impact On Wait Times On An Academic Article That Does Not Even Address How Utilization Affects Wait Times

87. A key input in the Economic Model is the extent to which wait times will change in response to increased utilization as mandated by the Cruising Cap. June 2019 Report, Ex. 2 at 34. The relationship is important: (i) utilization is what the Cruising Cap regulates; (ii) wait times are a "key output" that the Economic Model measures that is important to riders and (because it

impacts demand) to driver earnings; and (iii) such parameters are critical to determining all of the outputs of what the TLC's Report itself refers to as the "central component" ("the Supply and Demand Module") of the "core of the analysis" ("the Economic Model"). *Id.* at 12-13, 34.

88. The report asserts that the coefficient reflecting the relationship between utilization and wait times is .60, which means for every 10% increase in utilization, wait times will increase by 6%. *Id*. at 34.[8]

89. Nothing supports this assertion. The TLC cites a report by James A. Parrott and Michael Reich on driver earnings that the TLC relied on in formulating its Minimum Payment Rule. *Id*. Parrott and Reich in turn cite an unpublished 2018 paper by Cody Cook, Rebecca Diamond, Jonathan Hall, John A. List and Paul Oyer entitled, "The Gender Earnings Gap in the Gig Economy: Evidence from over a Million Rideshare Drivers." *See* Parrott & Reich, *Report for the New York City Taxi and Limousine Commission*, Ex. 22 at 58, 59, 72 (citing Cook article, Ex. 33).

90. The cited unpublished Cook article does not even address the issue of utilization's impact on rider wait times. *See* Tadelis-CRA Report, Ex. 4 ¶ 49 (explaining that the Cook "study does not provide any information on the relationship between utilization and passenger wait times"). The model on which the TLC has based its conclusions thus relies for the critical input, and everything that is impacted by it, on an article that says nothing about it. Such reliance is *per se* arbitrary and strips the purported study of any asserted reliability. The Rule relying on it must therefore be set aside. *See Metro. Taxicab Bd. of Trade*, 18 N.Y.3d at 334 (invalidating rule as arbitrary and capricious where based on "unsupported determination"); *see also infra* Sections

[8] Thus, under this formula, a 10% increase in utilization from the current industry utilization rate (58%) to 63.8% would lead to an average 6% increase in wait times.

I(A)(4), (5) (discussing various reasons and evidence ignored by the TLC as to why wait times would be far higher than projected even assuming the feasibility of attaining the increase).

b. The TLC's Measure Of The Relationship Between Demand And Price Contradicts Its Own Prior Study, And It Has Failed To Disclose The Basis For Doing So

91. The TLC's asserted relationship between price and demand is similarly arbitrary. Like the relationship between wait times and utilization (see prior subsection), the parameter is important to determining all of the outputs of the "central component" ("the Supply and Demand module") of the "core of the analysis" ("the Economic Model"). June 2019 Report, Ex. 2 at 12-13, 34.

92. The model assumes that a 10% increase in rider price would decrease demand by 12% outside the Cruising Cap zone but just 3% within the Cruising Cap zone. *Id.* at 34. In economic parlance, it assigns a price elasticity value of -1.2 to "Non-core markets" and a value of -.3 to "Core markets." *Id.* The model therefore assumes that the same price increase decreases demand at four times the rate in the non-core as in the core.[9] Likewise, it assumes that the same price decrease increases demand at four times the rate in the non-core as in the core.

93. The assertions concerning the relationship of demand and price are unexplained, unsupported, arbitrary, and contradicted by TLC's own prior study. The TLC cites its own prior driver earnings study as the basis for the non-core (-1.2) figure. *Id.* (citing Parrott & Reich, *Report for the New York City Taxi and Limousine Commission*, Ex. 22). That study, however, relies on 1.2 as the elasticity number for the entire City, including the core and non-core markets. Tadelis-

[9] The TLC's June 2019 Report also does not explain what it means by core and non-core markets for the purposes of this analysis. Specifically, it does not explain whether trips between the core and non-core (approximately one-fifth of trips using the Uber app) fall into the category of core markets or non-core markets. *See* Dobbs Aff. ¶ 12.

CRA Report, Ex. 4 ¶ 73. It nowhere purports to limit its 1.2 number to just the non-core. Accordingly, there is no basis for assigning the same 1.2 figure to the non-core markets, while assigning a much different number for the core.

94. Instead, as a matter of basic math, if 1.2 is the right number for the entire City, then 1.2 cannot be the right number for the non-core markets given that the TLC assumes there is a difference between the core and non-core. Instead, it would have to be higher in the non-core markets, and both would have to be higher than the TLC estimates to maintain the TLC's asserted 4-1 ratio between the non-core and core. For this reason alone, the assumption is arbitrary in light of its own prior study.

95. Likewise, as explained in the Tadelis-CRA Report:

> the core area elasticity of -0.3 used by the TLC does not appear to be based on any evidence at all. It is simply asserted and justified based on the view of 'subject matter experts'. Neither Parrott & Reich, nor Weyl et al., made a distinction between core and non-core areas. Moreover, the TLC provides no information on the logic or data used to justify this assumption.

Id. ¶ 74. The TLC's June 2019 Report asserts only that its source was unspecified "consultation with Team Subject Matter Experts." June 2019 Report, Ex. 2 at 34. It does not identify the experts or explain what they said, let alone provide any reliable basis for its conclusions about price elasticity in "core markets."

96. If anything, as explained in the Tadelis-CRA Report, there is ample reason to believe that price increases would have greater impact on demand in the core than in the non-core:

> taking consumer choice seriously implies the contrary; the wider availability of taxis together with the dense network of subways and busses suggest that switching away from ridesharing is easier in the core than in the periphery, which in turn imply that the elasticity in the core should be higher than in the periphery. Indeed, one of the key consumer benefits of app-based dispatch has been to make on-demand rides available in areas where taxis were previously scarce.

Tadelis-CRA Report, Ex. 4 ¶ 75.

c. The TLC's Measure Of The Relationship Between Wait Times And Demand Is Guesswork

97. The TLC also assumes a relationship between increases in wait time and rider demand. This is an important input because the more that demand is affected by increased wait time, the fewer trips there will be. This in turn will lower driver earnings and make it even less possible to achieve the mandated 61% utilization rate.

98. Unlike with the first two inputs discussed where the TLC claimed to have a source for the input but did not, here the TLC does not even claim to have a source. Instead, it acknowledges that an:

> elasticity of demand with respect to wait time applicable to the FHV market in the New York City boroughs is not available in the literature, so a set of estimates was made in consultation with economic and transportation subject matter experts James Parrott and Michael Reich. Elasticities of demand with respect to wait time were calculated as a function of the value of time (based on income levels) and fare elasticity in the core and non-core markets.

June 2019 Report, Ex. 2 at 34.

99. The TLC thus acknowledges that a third core input was based on nothing more than undisclosed guesswork—specifically an undisclosed "set of estimates" that were calculated "as a function of the value of time" that were in turn calculated "based on income levels." *Id.* It then failed to disclose the set of estimates, the function of the value of the time, and the assumptions it made with respect to income levels. Further, by linking the "set of estimates" to "fare elasticity in the core and non-core markets," the TLC further builds upon the arbitrariness of its assumptions related to fare elasticity that are addressed in the prior subsection. *See* Tadelis-CRA Report, Ex. 4 ¶¶ 77-80. Such guesswork is the definition of arbitrariness.

d. The TLC Relies On Severely Flawed Estimates Of Trip Growth And Ignores The Actual Data Showing Those Estimates Are Wrong

100. The August 2019 Rule also arbitrarily relied on estimates of trip growth that were demonstrably wrong. Specifically, to model the "baseline scenario,"—*i.e.*, what would happen from June 2018 to June 2020 if it did not implement the new policies—the TLC estimated 50% trip growth in outer borough or non-core markets and 1% trip growth in the core. June 2019 Report, Ex. 2 at 27. The TLC acknowledged, however, that outer borough growth had "slowed significantly" down to 20% since it began its work. *Id.* at 16, 27. The TLC, however, chose not to account for the slowed growth in the modeling. *Id.*; Tadelis-CRA Report, Ex. 4 ¶¶ 94-96.

101. The growth rate has continued to decline. Since March 2019, the year over year growth rate has declined each month such that by June there was only 8% growth, and by July 2019, there was negative growth, meaning fewer trips in July and August 2019 respectively than in July and August of 2018. Dobbs Aff. ¶ 11.

102. Accordingly, the baseline scenario against which the impact of the policy scenario is measured is wrong, further demonstrating the arbitrariness of the Rule. The TLC could have used the time permitted for the study and analyzed this growth rate data.

2. The TLC Failed To Account For The Intended Impact Of Its Own Prior Minimum Payment Rule And How The Cruising Cap Will Interact With The State's Anti-Congestion Law

a. The TLC Fails To Account For The Incentives in the Minimum Payment Rule To Improve Utilization

103. The Rule also is arbitrary because the underlying model does not take into account the impact of the TLC's own Minimum Payment Rule, and specifically the incentives it provides to improve utilization across the City. *See Motor Vehicles*, 463 U.S. at 43; *Nat. Res. Def. Council*, 808 F.3d at 569, 574; *Tri-City, LLC*, Index No. 151037/2019, Ex. 3 at 13; *Tex. Oil & Gas Ass'n*, 161 F.3d at 935; *Humana of Aurora*, 753 F.2d at 1583; *see also supra* ¶¶ 81-82.

104. The City's Minimum Payment Rule, which went into effect in February 2019, was designed to and does incentivize app-based FHV companies to increase utilization wholly apart from the Cruising Cap. Minimum Payment Rule, Ex. 5. Under the Minimum Payment Rule's formula, companies must pay higher per trip payments the lower their utilization rate and conversely, may pay lower per trip payments by increasing their utilization rate and securing more trips per hour for drivers. *See id.* § 25, Ex. 5 at 28-29. Lowering per trip costs allows more competitive pricing whereas higher per trip costs can lead to less competitive pricing which in turn can lower utilization further and require even higher per-trip payments. Tadelis-CRA Report, Ex. 4 ¶ 88.

105. Both the City Council and the TLC's own prior study on the Minimum Payment Rule specifically touted the incentives to increase utilization in the Minimum Payment Rule. *See* 2018 Committee Report, Ex. 16 at 16 ("The formula incentivizes each company to raise its company-wide utilization rate from one quarter to the next, by increasing the average number of trips per hour.");[10] *see also* Parrott & Reich, *Report for the New York City Taxi and Limousine Commission*, Ex. 22 at 35 ("This part of the policy in effect incentivizes each company to raise its company-wide utilization rate from one quarter to the next, that is, by increasing the average number of trips per driver hour."); *id*. at 39, 53. Further, Uber discussed these incentives in detail in the comments on the Proposed Rule, including with reference to specific actions. *See* Uber Comment, Ex. 11 at 8, 13-14. And as intended, and as discussed above, FHV companies already have taken steps to improve their utilization rates since the Minimum Payment Rule went into

[10] The TLC ultimately chose to provide for an industry-wide utilization rate until February 2020 and a company-specific rate to be updated every six months after that date. Dobbs Aff. ¶ 5; *see* Minimum Payment Rule § 25, Ex. 5 at 28-30.

effect, including but not limited to by strictly limiting onboarding of new drivers and new policies and features that limit drivers from accessing the platforms at particular times and places depending upon network characteristics like the level of demand. *See supra* Factual Background Section E.

106. The June 2019 Report nowhere discusses the Minimum Payment Rule's incentives to improve utilization, leading to what the Tadelis-CRA Report explains is a "seriously incomplete" analysis. Tadelis-CRA Report, Ex. 4 ¶ 90.[11] It also leads to three important errors in particular.

107. *First*, by ignoring utilization improvements from company restrictions on driver supply that are happening and would have occurred independent of the Cruising Cap, the TLC improperly treats those improvements as benefits of the Cruising Cap. Specifically, in the Cruising Cap scenario, the TLC's model assumes efforts to reduce supply to improve utilization. June 2019 Report, Ex. 2 at 28 (Where the "cruising target was not met, the model constrained the supply of high-volume FHV drivers in the core until it was achieved."). By contrast, in the 2020 No Action Baseline scenario, the TLC mentions no efforts to restrict supply. *Id*. at 27. Instead, it ignores that its own prior study for the Minimum Payment Rule predicted that the rule would provide powerful

[11] Instead, it discusses the Minimum Payment Rule only in terms of the impact of the increased pay on prices and commissions and by noting that it will slightly increase the number of drivers (attracted by the increased pay). Specifically, the June 2019 Report states in describing the Baseline Scenario:

> In the model, increases in driver pay to meet the minimum attracts a slightly larger FHV supply. The increase in supply reduces driver utilization, but it also lowers passenger wait times, which attracts riders. Company commissions are reduced to accommodate the increased pay. If commissions drop below 50% of current commissions, FHV prices are increased to restore the commissions to at least 50% of current commissions.

June 2019 Report, Ex. 2 at 27.

incentives to increase utilization by linking the per-trip payment to the company's utilization rate. It therefore takes reductions in vehicle hours traveled that will result from the Minimum Payment Rule and counts them as reductions caused by the Cruising Cap, and thus overestimates the reduction in vehicle hours traveled that will result from the Cruising Cap. *See* Uber Comment, Ex. 11 at 5, 11-12.

108. *Second*, by ignoring that the Minimum Payment Rule was designed to incentivize companies to make improvements in utilization and in fact had caused companies to do so, the TLC ignores and hides the predictable harms that the Cruising Cap will cause to drivers. The TLC asserts—with no basis—that the Cruising Cap will reduce trips that otherwise would have occurred and reduce driver hours in the Core by 21% "without negatively impacting driver pay." August 2019 Rule, Statement of Basis and Purpose, Ex. 1 at 2; June 2019 Report, Ex. 2 at 3, 28, 32. The TLC's only passing attempt at an explanation is an assertion in the June 2019 Report that the model assumed the hours would be "redistributed outside the core." *See id.* at 28 ("[E]xcess high-volume FHV drivers were redistributed outside the core based upon current distributions of FHV trip times."). It thereby ignores the fact that as Uber specifically explained during the comment process, the Minimum Payment Rule incentivizes companies to increase utilization throughout the City and thus to keep the lost driver hours in the core from lowering their utilization rates outside the core by limiting the number of drivers who can use the platform. *See* Uber Comment, Ex. 11 at 13-14. ("[T]he assumption that drivers kept out of the Congestion Zone and the associated reduction in trips will simply be absorbed in the outer boroughs is misplaced, because companies are incentivized by the driver earnings rule to minimize idle time. The TLC is therefore forcing

companies to keep drivers offline entirely when they otherwise would not be inclined to do so."); *see* Dobbs Aff. ¶ 10.[12]

109. *Third*, this error means that the TLC also lacks any basis for assuming that the Rule would achieve the projected reduction in vehicle hours in the core (the claimed benefit of the Rule). Limiting the number of drivers who can use the platform to provide trips in the core does not prevent those drivers who are unable to access their preferred platform from driving in the core while they seek access to their preferred platform. *See* Uber Comment, Ex. 11 at 14. And if they drive in the core, then vehicle hours by definition have not been reduced. *See id.* The TLC's apparent assumption is that the companies would have the incentive to facilitate trips for the drivers outside the core, but and as discussed in the prior paragraph, that assumption more fundamentally ignores the impact of the TLC's own Minimum Payment Rule, which incentivizes companies to limit access to their platforms throughout the City. Dobbs Aff. ¶ 10. Drivers in many cases will therefore not have promising driving opportunities outside the core and may therefore prefer to stay in the core.

[12] The price increases and decline in trip growth that followed the Minimum Payment Rule and State congestion surcharge in February 2019 will only further intensify incentives to limit access to the platform. *See* Tadelis-CRA Report, Ex. 4 ¶¶ 21-24 & Figure 1; *see also supra* Section I(A)(1)(d). Lower demand from increased prices will require further restrictions on supply even to maintain current levels of utilization, much less improve them to the 69% level demanded by the TLC. Since March 2019 (the month after the Minimum Payment Rule and State Congestion Surcharge went into effect), year over year growth rates have steadily declined each month, reaching negative growth in July and August 2019. Dobbs Aff. ¶ 11. These trends will intensify the pressure to limit access to the platform outside the core even without the Cruising Cap, and the Cruising Cap would only make it necessary to do so to a much greater extent both within the core and outside it. *Id.*

b. The TLC Acted Arbitrarily In Imposing The Cruising Cap Before The State's Comprehensive Congestion Pricing Plan, And Its Proffered Rationale For Doing So Is Factually Incorrect And Arbitrary

110. We explain in greater detail in Section II(A) the various ways that the Cruising Cap interferes with State law and seeks to regulate in a field that the State has occupied. But even apart from the preemptive impact of the State law, the TLC acted arbitrarily and capriciously in attempting to squeeze in the Cruising Cap just months prior to the State's comprehensive effort to address congestion caused by *all* vehicles in a systematic way.

111. The City's only proffered basis for doing so is factually incorrect. The Statement of Basis and Purpose does not address State law at all, and the June 2019 Report asserts only that the Cruising Cap remains "necessary" because "TLC's policies will take effect in August 2019 and aim to inform and complement the eventual tolling program structure." June 2019 Report, Ex. 2 at 2. That is incorrect. While the June 2019 Report ***modeled*** the 31% Cruising Cap as if it would go into effect in August 2019, *id*. at 15 ("Any selected policy is assumed to go into effect starting in August 2019[.]"), the Cruising Cap does not ***actually*** go into effect until ***August 2020***. Further, the City does not even attempt to explain how it can know that its policies are "necessary," or will "inform and complement" the State plan, when it does not even know what balance the State is going to strike. *Id*. at 2. The TLC has arbitrarily and capriciously promulgated a regulation that goes into effect just before the State determines—after years of development—how its program will strike the necessary balance between FHVs and other types of vehicles and balance the dual goals of reducing congestion and raising revenue from FHVs (through the congestion surcharge and any additional tolling added under the zone pricing program) for the public transportation improvements that are central to the plan.

3. The TLC Arbitrarily Selected The Cruising Cap Number, Did Not Study Its Feasibility, And Ignored Evidence It Is Not Feasible

112. The TLC's selection of the particular Cruising Cap number of 31% was arbitrary. The TLC's June 2019 Report states that the "TLC and DOT considered caps which limit cruising to 31%, 26%, and 21% of total driver VHT." June 2019 Report, Ex. 2 at 8. It ultimately selected the 31% for use in the Rule. The June 2019 Report provides no basis for the TLC's selection of these numbers as the ones to "consider," and they all constitute a dramatic change from the levels of utilization that have been sustained. *See* Comment of Lyft, Inc., Ex. 31 at 211 ("The TLC has offered no explanation or information for how it arrived at these numbers[.]"). Instead, it appears that the TLC chose them simply by taking the citywide average cruising rate from June 2018 (41%) and subtracting round numbers (10%, 15% and 20%). *See* June 2019 Report, Ex. 2 at 8.[13] It then plugged them into a severely flawed model, as discussed above.

113. The selection of three increments divisible by five as the ones to consider is inherently arbitrary. Further, under any rational policymaking process that is seeking to achieve or balance particular goals, the requirement imposed should be the outcome of the analysis, not the start of it. There is no legitimate reason for failing to consider less restrictive thresholds and determine the incremental benefit and cost of greater restrictions on the FHV industry. By failing even to consider and disclose the asserted impact of lower cruising caps, the TLC deprived itself

[13] *See N.Y. State Ass'n of Counties*, 78 N.Y.2d at 167-68 (striking down as arbitrary and capricious rule implementing blanket percentage reduction in reimbursement rates that was the result of "negotiation, compromise and estimation"); *Kelly v. Kaladjian*, 589 N.Y.S.2d 730, 734 (Sup. Ct. 1992) (invalidating rule basing eligibility for emergency assistance payments on whether income exceeded 125% of federal poverty level where there was no empirical basis for selecting the number to distinguish between worthy and unworthy applicants); *cf. Multicare Med. Ctr. v. Wash.*, 768 F. Supp. 1349, 1398 (W.D. Wash. 1991) ("[T]he State's marginal cost tests were not based on an objective investigation or reasonably principled analysis of the costs that must be incurred by economically and efficiently operated providers, but rather were merely efforts to make the best case to justify the State's rates.").

and the public of information that was critical to the decision and arbitrarily reached its conclusion before it conducted its analysis.

114. This process is still more arbitrary given (i) the unprecedented nature of the regulation, (ii) the absence of any consultation with the FHV companies as to how it would be implemented or its feasibility, (iii) the absence of any evidence that it was feasible, (iv) its own prior analysis of what level of utilization rates are required to meet demand for taxis, and (v) its failure to include basic protections that are standard in economic models (such as sensitivity analyses and confidence intervals) and particularly critical in modeling untested public policies.[14]

115. No jurisdiction in the country has implemented a cruising cap on FHVs at all, and the level set by the TLC will require an increase of 19-24% in utilization rates depending upon the company. Thus, the TLC could not fall back on the experience of other jurisdictions, or the actual facts on the ground, to justify picking its number. Nor has any platform enabling FHV drivers to offer predominantly point-to-point service and/or personal rides come close to satisfying the Cruising Cap requirements. The only high-volume FHV service that has is Via, which offers a different product that is a "shared" service where drivers will only wait 30 seconds for the rider and riders are picked up and dropped off at specific locations selected by Via, rather than being picked up and dropped off at their chosen location. *See* "What is Via?,"

[14] The TLC model fails to identify any "sensitivity analysis to assess the impact of changes in its underlying assumptions, and presents no confidence intervals." Tadelis-CRA Report, Ex. 4 ¶ 41. Sensitivity testing determines what impact a change in variables such as changes in utilization or price would have on a given output such as wait times, demand, or driver earnings. *Id.* Such testing "is standard for any credible economic modelling effort, and is especially critical when what's at stake is modelling the impact of regulatory changes that are entirely novel (not just in New York City but anywhere) and proposed on top of other recent changes whose effects have not yet played out." *Id.* Any policymaker genuinely interested in understanding the potential unintended impacts of a proposed policy based on economic modeling (and asserting that the Rule will have no such impacts) would want to know the reliability of the predictions and the impact if particular assumptions turn out to be wrong.

https://support.ridewithvia.com/hc/en-us/articles/360002366392-What-is-Via-, Ex. 34 at 1 ("Via is an on-demand transit system that takes multiple passengers heading in the same direction and books them into a shared vehicle."); *id.* (describing Via as a "corner-to-corner service"); *see* "Welcome to Via!," https://ridewithvia.com/new-rider-info/, Ex. 34 at 3 (stating that customers will be picked up "on a nearby corner" rather than where the customer orders the vehicle); *id*. at 3-4 (telling prospective riders on its website: "Your driver can only wait at the corner for 30 seconds. Please be ready to roll so you can hop right in.").

116. The TLC's failure to examine feasibility was also arbitrary because, as shown in the Tadelis-CRA Report and discussed in the next subsection, there is ample evidence in the record to demonstrate that the Cruising Cap likely is not feasible and instead threatens the viability of the ridesharing model as it currently exists.

4. The TLC Has Arbitrarily Included "En Route" Time In The Definition Of "Cruising" While Failing To Consider The Costs Of Doing So, Including Threatening The Viability Of The Ridesharing Model

117. The Rule defines "cruising" to include both time that a driver spends waiting for a dispatch and time spent en route to the trip. August 2019 Rule § 1, Ex. 1 at 3-4. The TLC's inclusion of en route time in the definition of "cruising" is arbitrary. *First*, there is no apparent justification for doing so, and no reason to believe the TLC considered whether there was a benefit to including en route time. *Second*, even if there were and even if it did, the TLC failed to consider the considerable costs of doing so. Instead, it ignored analysis in the Tadelis-CRA Report that Uber submitted with its comment establishing that the inclusion of en route time in the definition, alongside the high levels of utilization demanded by the TLC, makes compliance likely infeasible and threatens the viability of individual ride, point-to-point ride-sharing services. The Tadelis-CRA analysis and the TLC's apparent failure to consider the issue at all demonstrate the arbitrariness of both (i) the decision to include en route time in the definition and (ii) the TLC's

unsupported claim that the Cruising Cap would be effectively costless for riders and drivers but for a modest increase in wait times in the core.

118. Even apart from its costs, there is no apparent justification for including en route time in the definition. En route time simply is not "cruising." It is a necessary part of any trip. Also, companies are incentivized to minimize en route time because it maximizes trips and minimizes customer wait times, which is important to the appeal of the product. *See* Tadelis-CRA Report, Ex. 4 ¶ 44.[15]

119. An additional reflection of the apparent lack of consideration that the TLC gave to this important issue is that the consultant on whom the Council relied for its discussion of the impact of FHVs himself proposed that incentives to reduce "excessive" time be defined by reference to a particular amount above "the time greater than needed for driving to the pick-up location." *See* Bruce Schaller, *Empty Seats, Full Streets: Fixing Manhattan's Traffic Problem* (Dec. 21, 2017), http://www.schallerconsult.com/rideservices/emptyseats.pdf, Ex. 35 at 14; *see also* 2018 Committee Report, Ex. 16 at 19-27 (relying on Bruce Schaller throughout its discussion); Uber Comment, Ex. 11 at 15 (citing Schaller article). Yet there is no consideration of such a proposal anywhere in the TLC's June 2019 Report.

120. Nor does the June 2019 Report nor the Statement of Basis and Purpose attempt to justify including en route time within the definition of "cruising" for purposes of the Cruising Cap. Instead, the June 2019 Report's discussion focuses on what it claims is the eight minutes for every

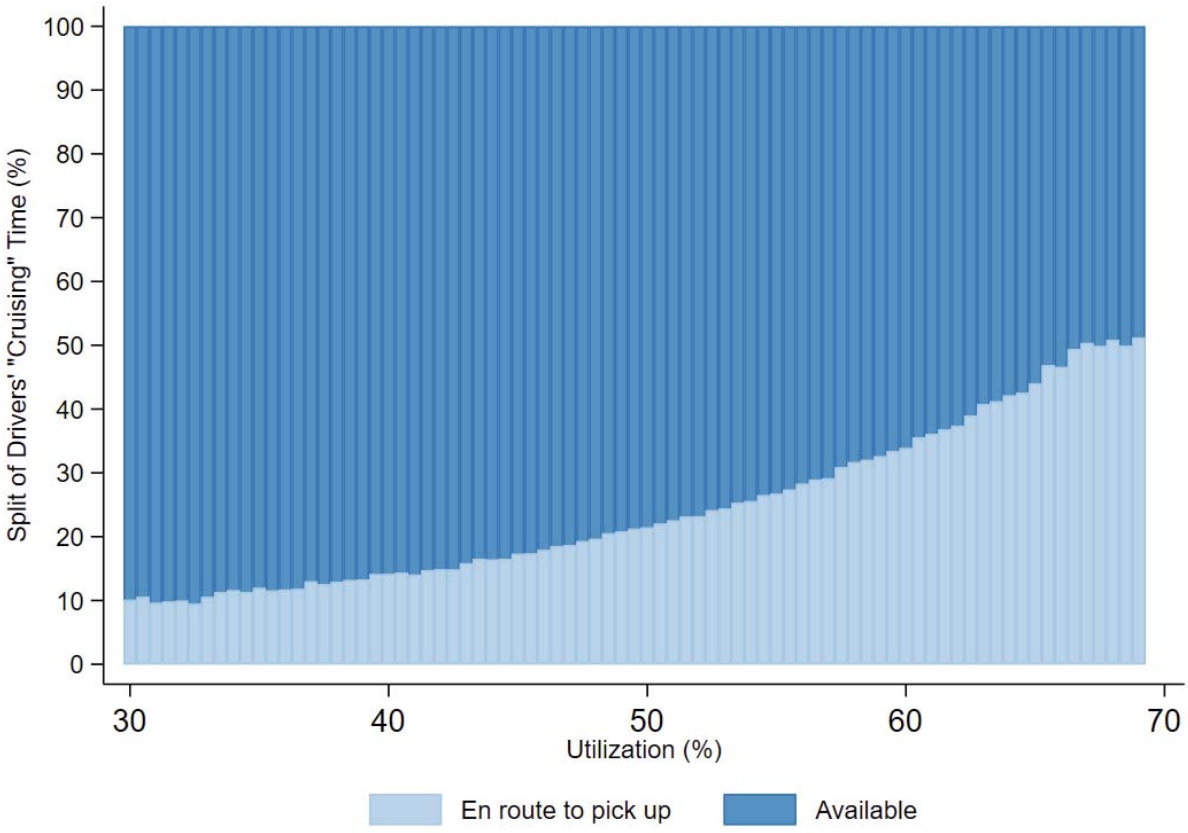
[15] *See id.* ("[I]t is not clear what market failure is believed to motivate the inclusion of 'time to pick-up' in the proposed cap[.]"); *see also* Comment of Tri-State Transportation Campaign, Ex. 31 at 219 (stating its concern that the cap "does not distinguish between time a driver spends waiting for a trip request and time spent driving to the pickup location once a trip request has been accepted. Drivers should not be penalized for the time it takes to reach their next pickup"); Comment of Lyft, Inc., *Id.* at 212 ("This runs contrary to common sense – a driver on her way to pick up a specific rider is necessarily no longer looking for a rider.").

20 minute trip where the driver is waiting for a trip and "does not have a specific destination." June 2019 Report, Ex. 2 at 9. It refers only in passing to both en route time and waiting time as time "when the driver is working but not earning money," *id.*, a concern that is addressed in the Minimum Payment Rule which, according to the study for that rule, is "constructed to compensate drivers for work-related time and expense when a passenger is not in the vehicle." Parrott & Reich, *Report for the New York City Taxi and Limousine Commission*, Ex. 22 at 35.

121. At the same time, and as Uber detailed during the comment process but the TLC ignored, including en route time likely renders compliance infeasible, particularly at the utilization levels that the TLC is demanding. This is because decreasing wait times between trips by limiting the supply of vehicles increases en route time by making the network more sparse. *See* Tadelis-CRA Report, Ex. 4 ¶¶ 44-45. The two are thus in inevitable tension, but this is not per se prohibitive at lower levels of utilization so long as the decrease in driver time waiting for a request between trips outweighs the increase in en route time.

122. This problem then intensifies as utilization increases. Under that situation, there are fewer drivers available to accept rides, and thus lower likelihood that a driver is nearby, and so on average there is even larger en route time in between rides. *Id.* As shown in the CRA-Tadelis Report, in addition to being logical, the "proposition that time en route to pick-up is an increasing share of driver cruising time as utilization rises, is supported by actual Uber data." *Id.* at ¶ 47 & Figure 3; *see also id*. (explaining that Uber data "shows that, as utilization increases, so does the share of cruising time taken up by driving to pick-up").

Tadelis-CRA Report Figure 3: The share of "cruising" time spent en route to pick up increases as utilization rises



123. As a result, at a certain point, that the TLC made no effort to estimate, "the effect of longer journeys to pick-up dominates, and while wait times continue to increase, utilization actually begins to fall rather than increase further, because time en route increases faster than time driving passengers." *Id.* ¶ 46. The Tadelis-CRA analysis "suggests that utilization rates above 60% are very difficult to sustain." *Id.* ¶ 60.

124. It is therefore no coincidence that the only service to meet the Cruising Cap requirement, as discussed in the prior subsection, is a different type of service that both provides predominantly shared rides (as opposed to Uber and Lyft which drivers use to offer predominantly individual rides), does so at locations designated by the service rather than at the rider's location (like Uber and Lyft), and tells riders that their drivers will only wait 30 seconds for them (unlike

Uber and Lyft). The TLC makes no claim that en route time can be meaningfully improved outside of the context of a transformation of these services into an entirely different model, nor does it claim to be trying to effect such a transformation. Instead, it claims that the Cap can be accomplished with just a modest impact on core wait times. *See* June 2019 Report, Ex. 2 at 3 (projecting an average 11% increase in average wait times).

125. The TLC's treatment of en route time is thus arbitrary and requires invalidation of the Rule. It does not purport to model a ceiling on utilization or the implications of considering en route time for wait times. Instead, it effectively and arbitrarily assumed the answer by assuming a relationship between utilization and wait times that is based on nothing. *See supra* Section I(A)(1)(a). Nor does it consider the reasons why the inclusion of en route time threatens the feasibility of the ridesharing model. It is therefore another critical flaw of the underlying model on which the Rule is based and another important aspect of the problem that the TLC failed to consider. *See Motor Vehicles*, 463 U.S. at 43; *Nat. Res. Def. Council*, 808 F.3d at 569, 574.

5. The Cruising Cap Is Arbitrary And Capricious Because It Will Harm Drivers And Riders By Increasing Wait Times And Cancellations Far More Than The TLC Estimates

126. The TLC asserts in its June 2019 Report that its Rule would only have a modest impact on wait times in the core, assuming in its model that an increase in utilization would increase wait times the same amount, regardless of the utilization starting point. We show above that the TLC arbitrarily based this assumption on nothing and instead relies on an article that does not say anything about it. Moreover, and in addition to the points made in the prior subsection, Uber demonstrated during the comment period that the TLC's assumption is not only unsupported and arbitrary, but also incorrect as a matter of economic logic and empirical fact. Tadelis-CRA Report, Ex. 4 ¶¶ 50-52.

127. As explained in the Tadelis-CRA Report, the relationship between utilization and wait times is nonlinear—meaning that each percentage increase in utilization becomes more difficult to achieve, and yields greater increases in wait times. This non-linear relationship between utilization increases and wait times occurs in part because each 1% increase in utilization yields steadily and marginally increasing percentages by which the percentage of available drivers decreases. For example, a 1% increase in utilization from 58 to 58.6% (58 + 0.58) means that the percentage of "cruising" drivers has declined from 42 to 41.4%, or by 1.4%. *Id.* ¶ 51. By contrast, at 68% utilization, a 1% increase from 68 to 68.7% (68 + 0.68) means that the percentage of "cruising" drivers has declined by 2.1%—*i.e.*, 50% higher than the proportional decrease at the lower level of utilization. *Id.* A larger reduction in the proportion of cars available for a trip will naturally impact wait times more than a smaller proportional reduction in the number of cars available for a trip. Basic logic thus forecloses the linear relationship the TLC invented based on a non-existent source.

128. Uber further demonstrated empirically in its comment and accompanying expert analysis the predictable fact that wait times increase more dramatically at higher levels of utilization and particularly at utilization rates that exceed 60%. *Id.* ¶¶ 54-55 & Figure 4. And this analysis if anything likely *under*estimated the impact of increased utilization on wait times because it did not include the wait times for trips that "didn't take place because riders were shown a wait-time that was too long." *Id.* ¶¶ 55.

129. There is no dispute that longer wait times in turn will cause riders to demand fewer trips. Thus, there can be no dispute that the underestimation of wait times also leads the TLC to overestimate demand, and misjudge the impact on trip numbers and harm to driver earnings. Moreover, Uber presented the TLC during the rulemaking process with data establishing that rider

cancellation rates (the rate at which riders cancel a trip after being matched with a driver) markedly increase at higher levels of utilization. *Id.* ¶¶ 57-58 & Figure 5. The data presented only further demonstrated that by significantly underestimating the expected impact of its Rule on riders with longer wait times, the TLC additionally underestimated the harm to drivers from reduced demand and trips.

B. The License Cap Rule Is Arbitrary And Capricious

1. The TLC Arbitrarily And Inaccurately States That The License Cap Will Have An Additional Impact On Supply Over The Cruising Cap

130. The fundamental arbitrariness of the City's model is further demonstrated by its attempt to model the combined impact of the two policies. The TLC's June 2019 Report states that its model projects that the extension of the FHV License Cap through 2020 would reduce vehicle hours traveled in the core by 4%. June 2019 Report, Ex. 2 at 3. It projects that the Cruising Cap would reduce those hours by 21%. *Id.* And it projects that the combined impact of the two policies would reduce those hours by 24%. *Id.* It explains that it reached the 24% figure not by considered analysis of how the two policies interact but instead by multiplying the effects of the two rules modeled separately—*i.e.*, it multiplied .79 (100%-21%) by .96 (100%-4%) to get .758 (76%), and then subtracted 76% from 100% to get 24%. *Id.* at 32.

131. This decision is arbitrary. Multiplying the two numbers together assumes that the License Cap would *add* to the impact of the Cruising Cap to the same extent as if the Cruising Cap did not exist. There is no basis for such an assumption. Instead, the TLC admits that mandating an increase in utilization from 59% up to 69% (even assuming it is achievable) would require FHV companies to limit the supply of vehicles using their app in the core, as the TLC's own model projects that companies would limit supply of vehicles in the core. *See* June 2019 Report, Ex. 2 at 28. And, as discussed above and further in the next subsection, companies have responded to

the incentives in the Minimum Payment Rule to improve utilization by limiting driver supply—*i.e.*, by not allowing new driver accounts and through new features that limit the number of drivers who can access the platform throughout New York City. Where the companies themselves are incentivized to limit the supply of vehicles in the core, the limitation on the overall number of licenses does not add to supply restrictions; it is only superfluous.

2. The Continuation Of The License Cap Is Arbitrary And Capricious

132. The TLC is similarly arbitrary in its attempt to model the impact of the FHV License Cap alone—*i.e.*, it rests on the same inexplicable disregard for the incentives that the Minimum Payment Rule itself provides to increase utilization and how the companies have responded to those incentives. By assuming away these incentives, the TLC contradicts the predictions of its own study on the impact of the Minimum Payment Rule, the actual efforts of the FHV companies to improve their utilization, and the ongoing and intensifying incentives to continue to work to improve their utilization rates. There is no basis for assuming that a License Cap will have any impact at all when, for example, the companies already are preventing new drivers who already have FHV licenses from coming onto the platforms. As summed up well during the rulemaking process by one driver: "Uber & lyft is not hiring new drivers. So what's the problem to give the plate to existing drivers? Because lots of people also leave the job." Comment of Md Mridha, Ex. 31 at 202. The TLC's modeling of the effect of the extended License Cap, however, ignores both those incentives and the facts on the ground regarding how the companies have responded to them.

133. At the same time, the License Cap is causing serious harm to drivers. It requires those who already drive for the FHV companies to continue to rent or lease when they already own a vehicle or would prefer to purchase one and thereby avoid the elevated costs of leasing. That takes money out of the drivers' pockets.

134. During the comment period, the TLC heard from over 300 drivers complaining that by preventing them from obtaining an FHV license, the License Cap requires them to pay significant costs (typically $400-500 per week and in some instances over $600) to rent a car, adding thousands of dollars per year of costs. *See* Ex. 31 at 1-175.

135. Further the TLC heard from various organizations making the same point, including:

a. One Hundred Black Men Inc.: "They are happy that their earnings have increased since you passed a rule to ensure they make a living wage – but they are stuck paying very high fees to rent vehicles." *Id.* at 176.

b. The New York City Hispanic Chamber of Commerce: "By creating a moratorium on new for-hire vehicle licenses, the City is only hurting drivers who are trying to make a living, many of whom are first and second generation immigrants from Central and South America. Anyone who wants to drive with an app will be required to rent a car, which is already much more expensive than owning one, and those costs are only going to grow over time as drivers become beholden to the whim of fleet owners who can charge higher and higher fees." *Id.* at 177.

c. United Chinese Association of Brooklyn: "Thousands of immigrants in the City, including many Chinese Americans have found that driving in the for-hire industry has allowed them to make a good living and support their families. But by prohibiting the licensing of new vehicles, the City is forcing this same group of people to pay more money to drive, and thereby reducing the amount of take home money the drivers have to support their families." *Id.* at 179.

d. Council on American-Islamic Relations: "As a result" of the License Cap, "drivers are paying very high rental costs which eats into their earnings and takes away independence they so value. TLC-109 will continue this pain and suffering." *Id.* at 180.

e. The Black Institute: "Drivers who have already been renting, and any new drivers who wish to enter the industry will be forced to rent their vehicle, costing them hundreds of dollars a week, and upwards of several thousands of dollars a year." *Id.* at 183.

f. New York Urban League: App-based drivers "are paying very high fees to rent a vehicle. They would like to own a car and register that to drive. The rental fees are making it harder for them to make ends meet - they want the empowerment to be in charge of their own destiny. But they can't under this system." *Id.* at 178.

g. Mobilizing Preachers and Communities: "Drivers in our communities continue to express uneasiness about how this proposal will impact their ability to earn a living, especially drivers who rent vehicles in order to use apps like Uber, Lyft and Juno. While earnings have increased as a result of your rule to ensure drivers make a living wage, many drivers have to spend hundreds of dollars a week to rent cars because they can't use their own. Their hope of making more money to support their families by owning their own vehicle is all but gone." *Id.* at 193.

h. Independent Drivers Guild: "The vehicle cap means that thousands of existing drivers and all new drivers are stuck renting TLC vehicles instead of licensing their own vehicle. These drivers pay thousands more to rent than it would cost to own – and have no vehicle at the end to show for it. Plain and simple, what a cap on FHV licenses has done is establish ***another failed medallion system,*** enabling predatory leasing companies and app-based companies to exploit and worsen the plight of working-class, mostly immigrant, FHV drivers." *Id.* at 185.

136. The TLC makes no attempt to address the issue. It does not address the fact that the companies have not been onboarding, nor does it address the harm to drivers. Instead, its sole basis for continuing the License Cap is its assertion that "FHV service has not been reduced so far under the current license pause." August 2019 Rule, Statement of Basis and Purpose, Ex. 1 at 3. This brief explanation ignores the serious harm it is causing to drivers who lack FHV licenses and the fact that that the License Cap has been rendered superfluous by the incentives to control utilization in the Minimum Payment Rule and the Cruising Cap.

II. The August 2019 Rule Is Contrary To Law[16]

A. The Rule Is Preempted

137. The State of New York has enacted a multi-phased, interconnected, and comprehensive plan to reduce congestion in New York City. The legislation implementing the plan preempts the August 2019 FHV Rule.

[16] This Petition challenges the August 2019 Rule. As discussed above, Petitioners have brought a separate challenge to the portions of Local Law 147 that address the capping of FHV licenses.

138. "Preemption applies both in cases of express conflict between local and State law and in cases where the State has evidenced its intent to occupy the field." *Albany Area Builders Ass'n v. Town of Guilderland*, 74 N.Y.2d 372, 377 (1989).

139. "Where the State has preempted the field, a local law regulating the same subject matter is deemed inconsistent with the State's transcendent interest, whether or not the terms of the local law actually conflict with a State-wide statute." *Id.* "Moreover, the Legislature need not express its intent to preempt," and its intent "may be implied from the nature of the subject matter being regulated and purpose and scope of the State legislative scheme, including the need for State-wide uniformity in a given area." *Id.*; *see also N.Y.C. Health & Hosps. Corp. v. Council of City of N.Y.*, 752 N.Y.S.2d 665, 671 (App. Div. 2003) (State legislature's intent to preempt "may be inferred from the legislative enactment of a comprehensive and detailed regulatory scheme").

140. Conflict preemption applies where local laws or regulations "prohibit what would be permissible under State law" or "impose prerequisite additional restrictions on rights under State law so as to inhibit the operation of the State's general laws." *Consol. Edison Co. of N.Y. v. Town of Red Hook*, 60 N.Y.2d 99, 108 (1983) (citations and quotations omitted); *see N.Y.C. Health & Hosps. Corp.*, 752 N.Y.S.2d at 672 (finding preemption where "inconsistency prohibits what would have been permissible under State law or, at a minimum, imposes prerequisite additional restrictions on [Plaintiff's] rights under State law, so as to inhibit the operation of the State's general laws").

141. New York Courts have not hesitated to strike down local laws and regulations preempted by State law where the laws were regulating the same activity for the same or a similar purpose but the local law imposed additional burdens not imposed by the State and/or where the State law was intended to strike a balance between various interests. *See People v. De Jesus*, 446

N.Y.S.2d 207, 209 (1981) (State liquor law that prohibited serving liquor after 4 a.m. preempted a local liquor law that prohibited selling liquor after 2 a.m.); *Robin v. Inc. Vill. of Hempstead*, 30 N.Y.2d 347, 349-50 (1972) (intent to occupy field of "abortion legislation" prohibited "additional regulation by local authorities in the same area" that required justifiable abortions as defined by the State to be performed in State-licensed hospitals); *Halpern v. Sullivan Cty.*, 574 N.Y.S.2d 837, 838-39 (App. Div. 1991) (State mobile home law preempted a local law in the same area where the State law was intended to "strike a balance between the interests of mobile home park owners/operators and mobile home tenants"); *Lansdown Entm't Corp. v. N.Y.C. Dep't of Consumer Affairs*, 530 N.Y.S.2d 574, 577 (App. Div. 1988), *aff'd*, 74 N.Y.2d 761 (1989) (comprehensive State Alcoholic Beverage Control Law prohibiting the sale of alcohol between 4 a.m. and 8 a.m. preempted a local law requiring businesses to close during that period); *Home Builders Ass'n of Cent. N.Y. v. Cty. of Onondaga*, 573 N.Y.S.2d 863, 865 (Sup. Ct. 1991) (state law establishing a scheme for regulating sewers and authorizing certain types of fees for sewer districts preempted a local law imposing a different type of fee); *Builders' Council of Suburban N.Y., Inc. v. City of Yonkers*, 434 N.Y.S.2d 566, 567 (Sup. Ct. 1979), *aff'd*, 434 N.Y.S.2d 696 (App. Div. 1980) (local law creating dwelling commission authorized to collect and hold money from tenants to address emergency conditions was preempted by a state law "directed at the same subject in the same area" that sought to achieve the same result and directed the deposit of money from tenants into the court for a similar purpose).

142. Multiple interrelated aspects of the State legislation preempt local regulations like the Cruising Cap and License Cap.

143. *First*, the State has treated congestion in New York City as a matter of "substantial" State concern and adopted a comprehensive, interconnected, balanced, and phased strategy for

addressing it based on a State Advisory Panel convened by the Governor. *See* 2018 N.Y. Sess. Laws 78-79, ch. 59, Part VV §§ 1, 4, Ex. 17; 2018 N.Y. Sess. Laws 171-72, ch. 59, Part NNN § 2, Ex. 17; 2019 N.Y. Sess. Laws 244-49, Part ZZZ, Subpart A, Ex. 19. The three phases are: initial public transportation improvements (along with securing the City's commitment to pay its share), a congestion surcharge on FHVs and taxis dedicated to funds created by the law to improve public transportation, and then a congestion pricing program for all vehicles deemed "essential for a congestion reduction and revenue generation program in NYC." Fix NYC Report, Ex. 15 at 4, 14.

144. The State Advisory Panel whose recommendations provided the basis for the legislation summarized its approach, and confirmed that improving public transportation is an integral component of efforts to reduce congestion, as follows:

> a comprehensive, phased congestion reduction plan that steps up enforcement of existing traffic laws and initiates transit improvements for the outer boroughs and suburbs. As confidence is restored in the subway system, it becomes appropriate to implement a surcharge on taxi and FHV trips in the CBD, followed by the installation of a zone pricing program, first for trucks, and then for all vehicles entering Manhattan's CBD below 60th Street.

Id. at 14.[17] In making this recommendation, it drew on the experience of other cities, including London and Stockholm, which "invested in public transportation improvements in advance of

[17] Courts routinely rely on Advisory Panel reports as legislative history and on legislative history to illuminate preemptive intent. *See, e.g.*, *Halpern*, 574 N.Y.S.2d at 838-39 (relying on various sources, including a joint report, to identify preemptive intent to craft a balance between mobile home park owners and tenants); *Goldsmith v. Howmedica, Inc.*, 500 N.Y.S.2d 640, 641-42 (1986) (relying on "clearly expressed legislative intent" reflected by report of Special Advisory Panel on Medical Malpractice); *Marine Midland Bank, N.A. v. N.Y. State Div. of Human Rights*, 552 N.Y.S.2d 65, 66-67 (1989) (relying on a Governor's Committee report to determine legislative intent as to the effect of dismissals of administrative proceedings for "administrative convenience" (citing 1968 Report of Governor's Committee to Review New York Laws & Procedures in Area of Human Rights)); *Bleiler v. Bodnar*, 489 N.Y.S.2d 885, 888 n.3 (1985) (relying on Report of Special Advisory Panel on Medical Malpractice); *Yalango by Goldberg v. Popp*, 620 N.Y.S.2d 762, 767 n.4 (1994) (same); *Consol. Edison Co. of N.Y.*, 468 N.Y.S.2d at 599 (relying on legislative history, including Governor statements, to find implied preemption).

implementing a zone pricing system, including substantial capacity expansion to accommodate diverted commuters." *Id*. It further stated that a "methodical approach, coupled with an ongoing awareness of how the myriad other transportation projects underway around NYC impact residents and their mobility, will ensure the congestion reduction program's success in the long run." *Id.*

145. *Second*, the City's Rule directly regulates in a field that the State has occupied including through its reliance, as the central element of its congestion-reduction strategy, on comprehensive congestion pricing to regulate for all vehicles the very activity that the City is seeking to regulate—driving and remaining in the Manhattan core. Congestion pricing is a particular form of regulation that seeks to achieve an efficient level of congestion (while also raising revenue) by setting a price for congestion for drivers. *See* Fix NYC Report, Ex. 15 at 11-12.

146. The law, which is to be implemented as early as December 31, 2020, directs the Triborough bridge and tunnel authority to establish the physical infrastructure for the tolling program and to set "variable tolls and fees for vehicles entering or remaining in the central business district" that are "[c]onsistent with the goals of reducing traffic congestion within the central business district and funding capital projects." N.Y. Veh. & Traf. Law § 1704-a(1). Further complicating its task, it requires the authority to develop "a plan to address credits, discounts, and/or exemptions for for-hire vehicles as defined by, and subject to" the previously established FHV surcharge. *Id.* § 1704-a(4).

147. Additionally, beginning one year after the operation date, the law tasks the authority with reporting:

> on the effect of the central business district tolling program on traffic congestion in and around the central business district and on mass transit use and taxi and for-hire vehicle use including the vehicle-miles traveled for each trip within the central business district for taxis and for-hire vehicles; the current and historic volume and

> type of vehicles including, but not limited to, commercial trucks, transportation network companies, taxis, private cars, and tour buses, entering the central business district; environmental improvements, including but not limited to, air quality, and emissions trends in and around the central business district; congestion reduction measures; and transit ridership and average bus speeds within the central business district, and on all receipts and expenditures relating to the central business district tolling program.

Id. § 1706.

148. Through its Cruising Cap, the City is therefore now directly seeking to regulate with a Cap the very activity that the State will be seeking to regulate—*i.e.*, entering and remaining in the core—through the setting of a particular price for congestion for different types of vehicles through a system of "variable tolls." *See* N.Y. Veh. & Traf. Law § 1704-a(1). In doing so, it invades the field of the State regulator tasked with the difficult task of using congestion pricing to strike the right balance of burdens across vehicles in light of the varying interests involved, whatever system of credits is established with respect to FHVs, as well as advancing and balancing the State's goals of improving congestion and raising revenue. As discussed above, the goal of congestion pricing is not the elimination of all sources of congestion but rather setting the right price for congestion while raising revenue. Any steps taken by the TLC in regulating the precise activity that the State is regulating through pricing will necessarily impact the balance the State is trying to establish. Moreover, given the TLC's ability to change the standard as set forth in its regulation, the TLC would have the ability at any time to alter the balance set by the State.

149. The requirement that the authority evaluate the impact of the congestion pricing program on the various issues identified by the Council, including in particular on traffic congestion and FHV use, further demonstrates the Legislature's preemptive intent. Because these regulations of the same vehicle activity will be happening at the same time and (in the case of the Cruising Cap) will have begun just months before the State program, they will necessarily

confound the ability to determine the impact that the State congestion tolling program is having. This will in turn impact the ability to make necessary adjustments to advance the State's goals.

150. *Third*, the State placed FHV trips in the core at the center of its strategy by imposing a congestion surcharge on FHVs traveling in the congestion zone that is dedicated to the public transportation improvements on which the strategy depends. This strategy included creation of three new funds dedicated to public transportation for deposit of the FHV funds and a distribution formula for allocating the proceeds of the FHV surcharge to the various funds. This reflects an intent to exclude from the field a parallel local regulator with the permanent ongoing power to impose a trip-reducing Cruising Cap and cap the supply of the very vehicles upon which the revenue depends. At the same time, the two levels of congestion pricing reflected the balanced role envisioned for FHVs, setting a $2.75 price that was in the middle of the range of possible options, *see* Fix NYC Report, Ex. 15 at 20, establishing ambitious revenue targets for all vehicles, *see id.* at 23; N.Y. Veh. & Traf. Law § 1704-a(1), and requiring a system of "credits, discounts, and/or exemptions" for FHVs under the overall congestion pricing plan, *see* N.Y. Veh. & Traf. Law § 1704-a(4).

151. The surcharge thus further demonstrates the preemptive impact of the State's law, and the City's Cruising Cap necessarily regulates in that field. The City's model, for example, contemplates that app-based FHV services would lower prices to stimulate demand and increase utilization by producing more trips. *See* June 2019 Report, Ex. 2 at 28. But incentivizing the companies to pay (even assuming incorrectly that existing commission levels allowed them to do so) would only confound the State's goal of ensuring that riders pay the surcharge. At the same time, incentivizing companies to limit the number of drivers and trips will reduce revenue for the public transportation improvements that are central to the State's plan—*i.e.*, FHV trips in the

Manhattan core. The power to cap licenses and utilization is indisputably the power to influence the number of trips and thereby invades the field that the State has occupied. Further, the June 2019 Report, which forms the basis for the Rule, even acknowledges that both the Cruising Cap and the combined Cruising Cap and License Cap will reduce trips in the core below what they otherwise would be. *See* June 2019 Report, Ex. 2 at 28, 32.

B. The Rule Is Contrary to Law Because The TLC Violated Local Law 147 And CAPA By Failing To Conduct The Legally Required Study And Then Failing To Respond To Comments And Disclose The Underlying Modeling And Data That It Claimed Constituted The Study And Provided The Basis For The Rule

1. The TLC Failed To Study The Extent To Which FHVs Are Contributing To Congestion And Other Required Topics

152. The City Council's August 2018 legislation required the TLC to conduct a study examining eight topics including "traffic congestion throughout the city" and "the extent to which various categories of vehicles for hire contribute to such congestion." Local Law 147 § 3, Ex. 6 at 3. The TLC failed to comply with this requirement.

153. The TLC's June 2019 Report did not, for example, measure the growth in or impact of alternative causes of congestion that the City's 2016 study identified as the primary causes of the significant declines in traffic speeds—*i.e.*, "increased freight movement, construction activity, and population growth." January 2016 Study, Ex. 14 at 5. Each has continued to increase, including what the New York City Department of Transportation's separate traffic mobility report refers to as increased "delivery-related curb pressures." *See* N.Y.C. Department of Transportation, *New York City Mobility Report* (June 2018) ("**2018 Mobility Report**"), http://www.nyc.gov/html/dot/downloads/pdf/mobility-report-2018-print.pdf, Ex. 20 at 29; 2019 Mobility Report, Ex. 36 at 5, 10, 11, 35, 38 (documenting continued population growth and rise in freight traffic and home delivery activities); *see also* 2018 Committee Report, Ex. 16 at 20-21; June 2019 Report,

Ex. 2 at 5 ("The city has seen continual growth in population, employment, commerce, and construction activity, all of which add pressure to the street network.").

154. There is no explanation or justification for failing to examine whether the primary causes of the speed decline prior to the January 2016 Study were also the primary causes of the much smaller speed decline that post-dated the January 2016 Study. Instead, the June 2019 Report states only in passing that other causes, including "continual growth in population, employment, commerce, and construction activity," all "add pressure to the street network" and that the growth of FHVs since 2010 "stands out" because it was very high. June 2019 Report, Ex. 2 at 5; *see also id*. at 2 (stating that FHVs were "certainly an important factor"). The TLC did not study or state the extent to which various categories of FHVs, which include traditional black cars, neighborhood liveries, and app-based FHVs, contribute to congestion or the slowing of vehicle speeds. Instead, it only counted vehicles on the road at certain locations.

155. Notably, the TLC's June 2019 Report itself acknowledges that what it has done did not comply with Local Law 147. In describing its analysis of the percentage of vehicles on the road that are FHVs, the June 2019 Report states that it is "*an important step* toward understanding the degree to which they contribute to traffic congestion." *See* June 2019 Report, Ex. 2 at 18-20 (emphasis added). The Council, however, did not simply ask that the TLC take an "important step." It asked for a study of "the extent to which various categories of vehicles for hire contribute to such congestion." Local Law 147 § 3, Ex. 6 at 3.

156. The June 2019 Report's lone discussion of traffic speeds also is significantly misleading, consisting of limited references to traffic speed declines in Midtown Manhattan since 2010. June 2019 Report, Ex. 2 at 2, 5. By using the 2010 date as the benchmark, the TLC seeks to mask the fact that by far the bulk of the decline preceded the significant growth in FHV service.

Average vehicle speeds in Midtown Manhattan declined far more on an absolute and percentage basis from 2012 to 2015 (a period during which the January 2016 Study stated that other causes were the primary cause of decline) (6.5 mph to 5.1 mph) than from 2015 to 2018 (5.1 mph to 4.9 mph). *See id.*; 2018 Committee Report, Ex. 16 at 21; 2019 Mobility Report, Ex. 36 at 18-19.

157. Studying the impact of FHVs on traffic congestion is important both because the TLC was required by law to do so and because the TLC cannot otherwise project the impact of its policies on congestion. By projecting only the decline in FHV VHT (vehicle hours traveled), *see* June 2019 Report, Ex. 2 at 3 (projecting a decline of 21% in FHV VHT for the cruising cap), the TLC did not determine the impact of its policy change on *congestion* because congestion is not nearly just a function of vehicle hours traveled. Rather, as reflected in the 2016 Study, it includes various factors including the behavior of vehicles (like blocking lanes to make deliveries), population growth and associated pedestrian traffic, construction (which often involves lane closures), and freight activity (which is associated with double parking).

158. Because the TLC failed to answer a key question it was required to study prior to promulgating the Rule related to the impact of FHVs on congestion as well as the impact of its policies on congestion, and because any utilization standard was to be based on the results of the study, the Rule is unlawful and arbitrary and capricious and must be set aside until such study is conducted.

159. Moreover, the TLC conducted no analysis at all of the area of Manhattan between 60th Street and 96th Street even though it has chosen to apply the Cruising Cap to that area as well. The June 2019 Report does not even contain a bare reference to traffic speeds in that area, much less an analysis of the extent to which FHVs contributed to whatever level of congestion exists. Moreover, it conducted no vehicle counts in that area. Instead, all of the vehicle counts in

the zone that will be covered by the Cruising Cap were from south of 60th Street. *See* June 2019 Report, Ex. 2 at 18, Figure 7; 2019 Mobility Report, Ex. 36 at 16-18. Further, speeds have increased in that area substantially since the City's 2016 FHV Study. 2018 Mobility Report, Ex. 20 at 23 ("[T]ravel speeds increased on Upper East Side avenues after the launch of the Second Avenue Subway."); 2019 Mobility Report, Ex. 36 at 26 (Upper East Side speed increases continued). The TLC's decision to impose a Cruising Cap on a large area of the City that its June 2019 Report does not address at all is both arbitrary and capricious and a further violation of its legal obligation to study "traffic congestion throughout the city" and the "extent to which" FHVs contributed to it prior to enacting new vehicle utilization standards. Local Law 147 § 3, Ex. 6 at 3.

160. The TLC confirmed in the Statement of Basis and Purpose for the Rule that it did not do what the statute said. The TLC asserts in the Statement that Local Law 147 "mandated that the TLC and DOT study the consequences of certain changes in traffic policy in terms of congestion in the Congestion Zone, driver pay, passenger fares, passenger wait times, and shifts to other modes of transportation." August 2019 Rule, Statement of Basis and Purpose, Ex. 1 at 2. That is *not* what the Council required. It required a study of numerous topics and then permitted the enactment of "vehicle utilization standards" or a license cap "based on the results of the study." Local Law 147 § 3, Ex. 6 at 3. The Council also allowed the TLC to consider minimum rider prices. *See* Local Law 150 § 1, Ex. 21 at 2 (codified as N.Y.C. Admin. Code § 19-549) ("*Following completion of the study required by section 19-550*, the commission shall determine whether the establishment of minimum fares to be charged by vehicles licensed by the commission would substantially alleviate any of the problems identified in the study." (emphasis added)). In misstating what the Council required, the Statement of Basis and Purpose acknowledges the TLC did not perform the study that the Council required.

161. The TLC also unlawfully and arbitrarily failed to study other topics required by Local Law 147. For example, it was supposed to study "income drivers derive from operating vehicles that provide transportation services to passengers," Local Law 147 § 3, Ex. 6 at 3, but it did not study the actual impact of its own Minimum Payment Rule. It was supposed to study "vehicle utilization rates" not limited to FHVs, *see id.*, but did not study taxis (which contribute close to the same percentage of vehicles in the CBD as FHVs according to the June 2019 Report, *see* Ex. 2 at 5) or other types of vehicles such as freight vehicles (which the January 2016 Study identified as one of the primary causes of congestion, *see* Ex. 14 at 5).

162. The TLC also cut short its work well prior to the conclusion of the study period prescribed by the Council, and in so doing, denied itself access to key data. The Council stated that the study "shall be conducted during the 12 months following the effective date of the local law that added this section." Local Law 147 § 3, Ex. 6 at 3. The TLC failed to do the study and completed the work it did do, an economic model, by March 2019. Thus, the TLC failed to consider, among other things, data demonstrating that its trip growth projections were wrong (*see* Section I(A)(1)(d)) and the actual impact of the Council's own law and the TLC's own Minimum Payment Rule on the marketplace. Further, it failed to consider the actual impact of the state congestion surcharge in February 2019 on fares and demand, the specific actions taken by the companies in response to these laws, and the likely impact of those actions on drivers and other interests that the TLC claims to be trying to protect. *See* Comment of Lyft, Inc., Ex. 31 at 211 ("[T]he data used to calculate the Cruising Cap did not incorporate any of this recent data, and in fact the data the TLC used was collected before implementation of any of the TLC's newest rules. If the TLC had included recent data, it would have seen that the proposed 36% Cruising Cap is

nearly impossible for Lyft and many of the HVFHS companies to achieve without severely restricting or outright prohibiting drivers from doing any pick-ups or drop-offs in Manhattan.").

2. The Rule Is Contrary To Law And Arbitrary Because The TLC Did Not Disclose The Underlying Modeling And Supporting Data And Failed To Provide Any Response To Comments On The Limited Amount It Did Disclose

163. By law the vehicle utilization standards are required to be "based on the results of the study" that the Council required the TLC to conduct over the 12 months following Local Law 147. The City Administrative Procedure Act ("**CAPA**") requires that rules contain a statement of basis and purpose. "The purpose of a basis and purpose statement is at least in part, to respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule." *St. Vendor Project*, 811 N.Y.S.2d at 561 (quoting *Lewis*, 690 F.2d at 919); *see also Carlson*, 2019 WL 4383260, at *7 (D.C. Cir. Sept. 13, 2019) (striking down increase in price of stamps because the Postal Commission "failed to 'demonstrate the rationality of its decision-making process by responding to those comments that are relevant and significant.'" (quoting *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 468 (D.C. Cir. 1998))). The TLC failed to comply with these legal requirements.

164. The TLC failed to provide any response to comments, much less a "reasoned" one that explains "how the agency resolved any significant problems raised by the comments." Here, the TLC received over 400 comments, including a detailed and data-based analysis in the Tadelis-CRA Report. We detail the content of those comments above in Section H of the Factual Background as well as Section I(B)(2). The final statement did not respond in a "reasoned manner to the comments received" or "explain how the agency resolved any significant problems raised by the comments." *St. Vendor Project*, 811 N.Y.S.2d at 561; *see also Carlson*, 2019 WL 4383260,

at *7. Instead, the statement did not mention the comments at all and was *identical* to the Statement of Basis and Purpose that accompanied the Proposed Rule. The Rule must therefore be vacated.

165. Nor did the TLC disclose what it claimed to be the underlying basis for the Rule. The Statement of Basis and Purpose for the law states that the Cruising Cap was based on the June 2019 Report, which it claims provides the basis for the Rule and purports to describe the TLC's economic model and its results. *See* August 2019 Rule, Statement of Basis and Purpose, Ex. 1 at 2 (stating that the "study" could be found at the link containing the June 2019 Report and stating "[a]s noted in the study" and "[f]ollowing the study's recommendations, the rules require . . . ."); *see also* N.Y.C. Charter § 1043(b)(1) (requiring submission of a draft statement of basis and purpose for the proposed rule). The TLC, however, has failed to disclose the economic modeling, and most of the results of the modeling, on which it claims to have based the Rule. Thus, in addition to its failure to respond to comments, and even assuming what it refers to as the "study" met its legal obligations, and it did not as discussed above, the TLC violated CAPA's requirement regarding a Statement of Basis and Purpose by failing to disclose the underlying analysis and results that it claims satisfied its study obligations and provided the basis for the Rule.

166. There are numerous aspects of the City's study that it has not disclosed.

167. *First*, as stated in the Tadelis-CRA Report, the City has not disclosed the underlying economic models, instead offering only a brief and incomplete summary of them: "the model is not publicly available and not presented in any real detail and, as such, its inner workings and assumptions are extremely opaque." Tadelis-CRA Report, Ex. 4 ¶ 29. Nor has the City disclosed the underlying data on which the models rely. For certain of the models it refers to (such as the Integrated Policy Model, *see* June 2019 Report, Ex. 2 at 12), the City does not provide any detail at all.

168. *Second*, the brief summary of the TLC's June 2019 Report provides only a highly selective summary of the model's outputs. In particular:

a. For outputs such as impact on wait times and vehicle hours traveled, the June 2019 Report discloses results only for the "PM peak period" amounting to four hours for two days of the week (Tuesday and Wednesday). June 2019 Report, Ex. 2 at 3 & n.1. The Rule, however, seeks to limit FHVs' "cruising" for 17 hours per day Monday through Friday and 15 hours per day on Saturday and Sunday. August 2019 Rule § 6, Ex. 1 at 7. It therefore fails to provide the results for most of the period to which the Rule will apply.

b. The Report purports to have conducted an analysis of 14 "location clusters" that purported to demonstrate the share of total vehicles made up by FHVs. *See* June 2019 Report, Ex. 2 at 18. According to the June 2019 Report, the analysis is reflected in Figure 7 of the Report. *See id.* at 20. This is significant because all of the clusters are below 60th Street, whereas the congestion zone for the Cruising Cap is the area of south of 96th Street. The June 2019 Report does not identify the percentage of vehicles that FHVs represent between 60th and 96th streets. It also does not even contain a bare reference to the traffic speeds in that area, much less the impact of FHVs in that area. The TLC thus either failed to study it at all (which as discussed in the prior subsection, renders the Cruising Cap unlawful and arbitrary and capricious) or it unlawfully and arbitrarily failed to disclose the results.

c. The June 2019 Report acknowledges that trips will decline in the core as a result of the policy options embodied in the Rule. *See* June 2019 Report, Ex. 2 at 28, 32. It further acknowledges that it looked at the impact of those policies on number of trips. *Id.* at 24. It fails, however, to disclose the projections of how much trips will decline, thus leaving drivers and the public in the dark about the driver income-reducing impacts of the Rule.

d. The June 2019 Report states, "Key outputs of the model include impacts on traffic, driver pay, passenger fares and wait times, and shifts to other modes of transportation." June 2019 Report, Ex. 2 at 2. The June 2019 Report, however, fails to provide outputs for certain of the categories at all: specifically, driver pay, passenger fares, and shifts to other modes of transportation. As discussed in the prior subsection, the June 2019 Report also provides no information on the alleged impact of the Cruising Cap and License Cap on congestion.

e. At the same time, the Statement of Basis and Purpose makes claims about the likely impact of the Cruising Cap on driver earnings and passenger fares without disclosing the basis for those claims. *See* August 2019 Rule, Statement of Basis and Purpose, Ex. 1 at 2 ("[T]he cap on cruising is the only policy that the modeling predicts will result in significant reductions in FHV Vehicle Hours Traveled in the Congestion Zone without negatively impacting driver pay, passenger fares, or outer borough passenger wait times."). It also fails to include any information about "impacts of traffic," June 2019 Report, Ex. 2 at 2, to the extent that category includes anything more than vehicle hours traveled.

169. The failure to disclose is still more egregious in this case because Uber, Lyft, and potentially others submitted timely requests for the underlying modeling, but the TLC has thus far refused to provide it. Counsel for Uber filed FOIL requests with the TLC and DOT immediately after the public release of the June 2019 Report and Proposed Rule seeking the underlying models. Exs. 7, 9. The requests stated that the "requested documents are necessary in order to enable effective public comment on the Proposed Rule, including the June 2019 FHV Report and underlying economic modeling that assertedly provided the basis for it." Ex. 7 at 5; Ex. 9 at 5.

170. The two agencies played a shell game. The TLC responded after 45 days with the astounding claim that it had ***no*** substantive documents related to the study that the Council had

required it to conduct, including communications involving the ***TLC*** and others concerning the study. Ex. 8 at 1. Instead, it claimed that all such documents were "maintained" by the DOT. *Id.* The DOT in turn offered a response period of nearly 200 business days. June 24, 2019 email from DOT to H. Levy, Ex. 10. When counsel for Uber contacted the TLC the next day stating that could not possibly be true and then followed up in writing, the TLC revised its position and stated that Uber could get communications by filling out a separate request. August 6, 2019 email from M. Shube to TLC, Ex. 30 at 2. It further stated that it was attempting to "double-check" that there were no responsive documents other than communications. August 2, 2019 email from TLC to M. Shube, Ex. 30 at 3. It subsequently said it needed another 15 business days to identify those documents. August 13, 2019 email from TLC to M. Shube, Ex. 30 at 1. Meanwhile, the comment period closed without any ability for Petitioners or other members of the public to use the documents to comment on the Proposed Rule. This basic failure of transparency is another reason why the Rule must be set aside as contrary to law and arbitrary and capricious.

C. The Rule Is Contrary to Law Because It Reflects Legislative Policymaking By An Unelected Administrative Agency And Therefore Violates The Constitutional Separation Of Powers Between The Legislative And Executive Branches

171. The Rule establishing the Cruising Cap, extending the License Cap for at least a full year, and providing the process for future decisions in both areas, violates the separation of powers because enactment of these regulations improperly exercised delegated legislative authority. In separate litigation, Petitioners have argued that the statutory delegation of license capping power embodied in Local Law 147 is an unconstitutional delegation of power. The claim in this Petition is that the TLC's rulemaking to establish the Cruising Cap, both by itself and in concert with its exercise of its license capping authority, violates the separation of powers.

172. Under New York law, agencies violate the separation of powers where they (1) go beyond delegated legislative authority or (2) where they unconstitutionally exercise legislative

authority that they have been delegated. *See, e.g.*, *Boreali v. Axelrod*, 71 N.Y.2d 1, 12-13 (1987) (holding administrative agency's usurpation of policymaking authority that the legislature had not actually delegated violated the Constitutional separation of powers and concluding that if the administrative action had been deemed within the scope of the designation, it would have constituted an unconstitutional delegation); *City of Tonawanda v. Tonowanda Theatre Corp.*, 287 N.Y.S.2d 273, 276 (App. Div. 1968) (delegation of legislative policymaking authority violated the separation of powers); *Marshall v. Vill. of Wappinger Falls*, 279 N.Y.S.2d 654, 656 (App. Div. 1967) (finding separation of powers violation where legislation authorized zoning board to issue special permits for 12 different specified land uses but did not prescribe standards for when they should be issued).

173. An administrative rule must be invalidated as a violation of the separation of powers when an administrative agency crosses the line from implementing legislative policy to engaging in "policy-making" of its own. The latter task is expressly reserved for the legislature. *See Boreali*, 71 N.Y.2d at 11; *Saratoga Cty. Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 821-22 (2003).

174. Administrative agencies' actions are invalid when the agency does more than "balance[ ] costs and benefits according to preexisting guidelines" and instead makes "value judgments entailing difficult and complex choices between broad policy goals to resolve social problems." *Nat'l Energy Marketers Ass'n v. N.Y. State Pub. Serv. Comm'n*, 88 N.Y.S.3d 259, 264 (App. Div. 2018) (citing *Boreali*, 71 N.Y.2d at 12).

175. Making value judgments entailing difficult and complex choices between broad policy goals to resolve social problems is what the TLC did here. In enacting the Rule, the TLC unconstitutionally exercised legislative authority that they were delegated because both the Cruising Cap and the License Cap reflect the weighing of various policy interests with no statutory

constraint, such that the TLC, not the City Council, made the fundamental policy decision itself. The TLC could have chosen no Cruising Cap, a modest increase in required utilization, or as here, an increase that threatens great harm to driver earnings and the viability of a service relied on by millions of New Yorkers. This choice—and how to weigh policy interests such as congestion, driver income, rider wait times, and threats to the viability of the ridesharing model—is legislative but was not dictated by any legislative body.

176. The exercise in policymaking authority is shown further by the initial statutory delegation, which as discussed above, required the TLC to conduct a study of eight topics that account for the various potential interests including congestion, the extent of contribution of various types of FHVs, driver income, rider access in various areas of the City, traffic safety, vehicle utilization rates, and "such other topics as the commission and the department of transportation deem appropriate." Local Law 147 § 3, Ex. 6 at 3. It then states that "[b]ased on the results of the study" the TLC "may establish vehicle utilization standards" and "shall review such standards" at least once annually "and based on such review" may revise the standards. *Id.* It further states that the City shall review "the number of for-hire vehicles licenses" at least once annually and "based on such review may regulate the number of for-hire vehicle licenses" issued. *Id.* It also allows the varying of the standards by any factor the TLC "deems appropriate" to address any of the conceivably relevant policy interests in could want to address (*i.e.*, "congestion, shared rides, traffic safety, vehicle emissions, for-hire vehicle ridership, the income drivers derive from providing transportation services to passengers, and the availability of for-hire vehicle services in different geographic areas of the city."). *Id.* at 4.

177. The statute thus makes clear that the TLC's exercise of these powers is the exercise of policymaking authority. It requires study of the range of interests that could be potentially

impacted, allows study of any factor not mentioned at the TLC's discretion, does not state how the interests should be weighed, and does not even require the interests to be weighed as opposed to favoring one over the other.

178. The Rule similarly shows that the TLC itself understands its authority to be legislative and policymaking in nature. The Cruising Cap says the TLC "will review compliance levels, service levels outside the Congestion Zone, *and any other information it deems relevant* to determine if adjustments need to be made . . . ." August 2019 Rule § 6, Ex. 1 at 8 (emphasis added). The License Cap says that the TLC "will review congestion levels, driver pay, License attrition rates, outer borough service, and *any other information it deems relevant to determine the number of Licenses to issue*." *Id.* § 3, Ex. 1 at 4 (emphasis added). Further, nothing states how the interests should be weighed or whether they should be weighed at all. The TLC thus is purporting to assume the permanent power to review anything it wishes to review and set whatever caps it wants to set with the information that it learns, to achieve whatever policy goals it wants. The TLC even chose to identify more topics it would review for the License Cap than for the Cruising Cap, further demonstrating its understanding that it has unconstrained authority to decide what it will review and how it will consider what it learns.

179. The combined exercise of its power to study with the power to make the final decision, with no legislative involvement after the release of the study, additionally confirms that the regulations reflect the exercise of legislative authority. The power to study is not legislative by itself when the Council has the option as to what to do with the information in the study. In such circumstances, if there are gaps in the analysis or risks that the proposed policy will have particular intended or unintended consequences, the Council can weigh all of the issues in making its legislative decision. But when an agency has the power to study the issue, decide itself upon

the acceptable level of uncertainty and risk, make its own judgment as to how to address the potential harm to the public interest of an erroneous decision, determine how to weigh competing policy interests and then make the final decision without meaningful constraints, then it is still more clear that the agency has engaged in policymaking.

180. In this case, Petitioners have shown in the foregoing sections the considerable errors and omissions in the TLC's analysis. In addition to demonstrating the arbitrariness of the decision, the choice to proceed in the face of these errors on top of weighing the various competing policy interests further demonstrates its legislative nature given the varying public policy interests at stake. Moreover, here, as discussed above, TLC chose even to depart from what the Council told it to study by failing to examine the actual impact of FHVs on congestion and various other statutorily prescribed factors.

181. The TLC's June 2019 Report itself further reflects the legislative nature of the decision. It contains extensive discussion of the policy options available to it and tradeoffs implicated by the different policy options from which the TLC was choosing, including with respect to wait times, driver earnings, drivers who rent and drivers who already have FHV licenses, the interests of taxi drivers, and congestion. *See* June 2019 Report, Ex. 2 at 8-10 (three pages discussing "policy options" that the TLC considered); *id.* at 15 (discussing the TLC's consideration of which policy options to "select[ ]"); *id.* at 24 (discussing the TLC's consideration of choosing from among six different "policy options"); *id.* at 33 (fashioning a recommendation of a "combination policy" to be adopted by the TLC from amongst different discrete policy options).

182. Weighing tradeoffs and tough choices about what is "equitable" for "all New Yorkers" is exactly the type of policymaking that must be exercised by the legislature. *See N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene*,

992 N.Y.S.2d 480, 484, 489 (2014) (acknowledging rule governing the size of sugary drinks was "especially suited for legislative determination" because "it involve[d] difficult social problems, which must be resolved by making choices among competing ends" (citations and quotations omitted)). By virtue of the TLC determining what is and is not "equitable" for everyone in the City, and what level of uncertainty and risk to various interests is acceptable, the City's elected officials have been exempted from ever having to consider what policy should govern. That violates the Constitution's separation of powers between the legislative and executive branches of government.

D. The Cruising Cap Arbitrarily And Unlawfully Prevents Petitioners And Other App-Based FHV Companies From Knowing If They Have Met The Cruising Cap Targets Until After The Time Period For Compliance Has Elapsed

183. Under the Rule, companies violate the law if they exceed the Cruising Cap for a particular month. The Rule, however, does not provide a way for companies to know if they are meeting the requirements until after the fact. For this reason, the Rule is unlawful, unconstitutional, and arbitrary and capricious.

184. Under the Rule, "Cruising time will be calculated as all the time a High-Volume For-Hire Service's Available Vehicles spend in the Congestion Zone without a passenger." August 2019 Rule § 6, Ex. 1 at 8. Because many drivers make themselves available to accept passengers from more than one company (a practice known colloquially as "dual-apping" and referred to in the Rule as "concurrent availability"), it is necessary to allocate cruising time between companies. The Rule does so in part by allocating time spent waiting for dispatch "based on the aggregate Congestion Zone trip volumes of each High-Volume For-Hire Service from which the Vehicle is available to accept dispatches." *Id*. But, an FHV company does not know whether a driver is dual-apping, and thus does not know whether the driver's time spent waiting for dispatch is subject to allocation. Even if they did know when a driver was dual-apping,

companies like Uber do not know the trip volumes of their competitors, nor do they have any way to figure that information out in real-time, and thus they would not be able to accurately allocate the dual-apping time. The Rule thus leaves app-based FHV companies like Uber unable to determine whether they are exceeding or below the Rule's 69% utilization standard.

185. Regulations that do not give "a person of ordinary intelligence ***fair notice that his contemplated conduct is forbidden by the statute***" are unconstitutionally void for vagueness. *Turner v. Mun. Code Violations Bureau of City of Rochester*, 997 N.Y.S.2d 876, 877 (App. Div. 2014) (emphasis added). The Cruising Cap therefore must be set aside because companies lack the ability to determine whether they are in compliance. *See id.* at 877-78 (setting aside municipal regulation as unconstitutionally vague where the regulation does not give notice of "the precise conduct that is prohibited"); *see also Baldwin*, 84 N.Y.S.3d at 722 (voiding local regulation as unconstitutionally vague where the municipality did not calculate applicable fees until after constituents became subject to them, thereby making it "difficult" or "nearly impossible" for constituents "to determine and calculate the sewer charges that will be imposed upon them").

E. The Rule Restrains Trade In Violation Of The Donnelly Act

186. The Rule is contrary to law because it violates the Donnelly Act by unreasonably and illegally restraining trade in the New York City market for transportation services. Legislation or regulation may be subject to antitrust scrutiny where, as here, the law or regulation is not a pure regulatory scheme but instead removes one element of competition. *Hertz Corp. v. City of New York*, 1 F.3d 121, 127 (2d Cir. 1993) (holding that under *Fisher v. City of Berkeley*, 475 U.S. 260 (1986), local legislation is subject to antitrust scrutiny where the law is not a pure regulatory scheme, but instead removes one element of competition).

187. The Cruising Cap rule violates the Donnelly Act by effectively forcing Petitioners and other app-based FHV companies to decrease driver access to their platform and limits

competition based on wait times and supply of drivers in order to comply with the regulations. As the TLC admits, "driver utilization affects both the demand and supply sides of the FHV market." June 2019 Report, Ex. 2 at 28. The Cruising Cap will effectively require Petitioners and other app-based FHV companies to decrease driver platform access in the core beyond what they would have chosen to do otherwise. It will also limit driver access to rides in order to reach the required utilization rate.

188. The anticompetitive effects are compounded still further by the prevalence of dual-apping, which has the effect of enabling one company's restriction of supply to influence a separate company's incentives to limit supply. This is because when Lyft restricts driver access to their platform, drivers who previously were dual-apping will just be using one app and decreasing the utilization rate of that company. This will in turn incentivize the second company to impose supply restrictions or risk having an impermissibly high utilization rate, artificially inflated by drivers whose unoccupied time otherwise would have been split between companies.

189. The continuation of the License Cap for another year also violates the Donnelly Act by further restricting competition by FHV services throughout the City, including in historically underserved areas. The TLC's License Cap is a supply constraint that prevents drivers from obtaining licenses for vehicles that meet the City's licensing standards to provide for-hire transportation services. It also prevents Uber and other companies from contracting with drivers who want to use these vehicles to provide such services using Uber's technology. Moreover, the City's own model found that the continued License Cap would have anticompetitive effects, causing a decrease in service in the outer boroughs and increased wait times outside of the core. June 2019 Report, Ex. 2 at 29.

190. The June 2019 Report did not identify any benefits to competition that would result from restricting supply through a Cruising Cap or continued License Cap, and there are none. The TLC has otherwise failed to support a determination that the Rule would provide any benefits to competition. Accordingly, the anticompetitive effects of the Rule outweigh any procompetitive benefits.

CAUSES OF ACTION

FIRST CAUSE OF ACTION
Arbitrary Reliance On Unsupported And Unreliable Inputs
(For Judgment Pursuant to N.Y. C.P.L.R. 7803(3) and 7806)

191. Plaintiffs re-allege and incorporate by reference the allegations of all paragraphs above as if fully set forth herein.

192. The August 2019 Rule is arbitrary and capricious because the model on which the Rule relies depends on critical inputs that are unsupported and inconsistent with the record and is therefore unreliable.

193. These inputs include the relationship between utilization and wait times (which rests on an article that does not even address it), the relationship between price and demand (which is unsupported and even contradicts the TLC's own prior study), the relationship between demand and wait times (which rests on guesswork), and the TLC's assumption about trip growth (which has been refuted by subsequent events).

194. Because the August 2019 Rule is based on unreliable inputs, the Rule is arbitrary and capricious.

195. Petitioners are therefore entitled to a judgment under N.Y. C.P.L.R. 7806 vacating and annulling the Rule.

SECOND CAUSE OF ACTION
Arbitrary Failure To Account For The Impact Of Prior TLC Regulations
(For Judgment Pursuant to N.Y. C.P.L.R. 7803(3) and 7806)

196. Plaintiffs re-allege and incorporate by reference the allegations of all paragraphs above as if fully set forth herein.

197. The August 2019 Rule is arbitrary and capricious because it fails to consider the incentives in its own Minimum Payment Rule to increase utilization.

198. The TLC's own study on the Minimum Payment Rule stated that the rule would incentivize increased utilization, and the companies have taken various actions in response.

199. The disregard for the utilization incentives in its own prior rule leads the TLC to overestimate the asserted benefits of the Rule with respect to reduced vehicle hours traveled, ignore the considerable harms to drivers that will result from the Cruising Cap (even as it falsely attempts to justify the Rule as having no negative impact on driver earnings), and overestimate the impact on vehicle hours traveled.

200. Petitioners are therefore entitled to a judgment under N.Y. C.P.L.R. 7806 vacating and annulling the Rule.

THIRD CAUSE OF ACTION
Arbitrary Failure to Account For Impact Of State Law
(For Judgment Pursuant to N.Y. C.P.L.R. 7803(3) and 7806)

201. Plaintiffs re-allege and incorporate by reference the allegations of all paragraphs above as if fully set forth herein.

202. The August 2019 Rule is arbitrary and capricious because the TLC fails to account for how it will interact with comprehensive, phased and interconnected State legislation designed to address congestion in New York City. The State legislation includes comprehensive congestion pricing for all vehicles entering or remaining south of 60th Street and a tax on FHVs in the

congestion zone dedicated to public transportation improvements that are central to the State's plan.

203. The TLC falsely claims in the June 2019 Report that its own Rule is still necessary because it will go into effect more than a year before the State congestion pricing. That justification is incorrect. The TLC model assumed the Cruising Cap would go into effect in August 2019, but it will not actually go into effect under the Rule until August 2020, just prior to the tolling program.

204. There likewise is no basis for the claim that it will aim to "inform and complement the eventual tolling program structure" when, among other reasons, the types of regulations are entirely different and the TLC has no knowledge of the balance that the State is intending to implement.

205. Petitioners are therefore entitled to a judgment under N.Y. C.P.L.R. 7806 vacating and annulling the Rule.

FOURTH CAUSE OF ACTION
Arbitrary Selection Of Cruising Cap Number Without Regard To Feasibility
(For Judgment Pursuant to N.Y. C.P.L.R. 7803(3) and 7806)

206. Plaintiffs re-allege and incorporate by reference the allegations of all paragraphs above as if fully set forth herein.

207. The August 2019 Rule is arbitrary and capricious because it selected the Cruising Cap number arbitrarily without any apparent basis for selecting that particular number and without considering less restrictive numbers. The selection of the number also was arbitrary because no other jurisdiction has implemented a Cruising Cap at the selected level or at any level, and yet the TLC selected the number without considering its feasibility, the measures it would take to achieve the number or the impact of those measures.

208. Petitioners are entitled to a judgment under N.Y. C.P.L.R. 7806 vacating and annulling the Rule.

FIFTH CAUSE OF ACTION
Arbitrary Definition Of "Cruising" To Include En Route Time
(For Judgment Pursuant to N.Y. C.P.L.R. 7803(3) and 7806)

209. Plaintiffs re-allege and incorporate by reference the allegations of all paragraphs above as if fully set forth herein.

210. The August 2019 Rule is arbitrary and capricious because it includes time spent driving to pick up a passenger as "cruising." There is no apparent basis for doing so given that such time is an integral part of the trip and not "cruising," and companies already have the incentive to reduce en route time. At the same time, as shown by economic analysis submitted by Uber during the comment period but ignored by the TLC, inclusion of en route time likely will render the Cruising Cap infeasible and at a minimum cause harm to riders and drivers that is well in excess of the projected impact that the TLC uses to justify the Rule.

211. Petitioners are entitled to a judgment under N.Y. C.P.L.R. 7806 vacating and annulling the Rule.

SIXTH CAUSE OF ACTION
Arbitrary Disregard For Economic Analysis Establishing Infeasibility Of Cruising Cap And Unreliability Of Model's Estimate Of The Harms Of The Rule
(For Judgment Pursuant to N.Y. C.P.L.R. 7803(3) and 7806)

212. Plaintiffs re-allege and incorporate by reference the allegations of all paragraphs above as if fully set forth herein.

213. The August 2019 Rule is arbitrary and capricious because economic analysis and other evidence submitted during the comment period that the TLC disregarded established the infeasibility of the Rule and that the harms of the Rule are well in excess of what the TLC and projected.

214. Petitioners are therefore entitled to a judgment under N.Y. C.P.L.R. 7806 vacating and annulling the Rule.

SEVENTH CAUSE OF ACTION
License Cap Is Arbitrary And Capricious
(For Judgment Pursuant to N.Y. C.P.L.R. 7803(3) and 7806)

215. Plaintiffs re-allege and incorporate by reference the allegations of all paragraphs above as if fully set forth herein.

216. The TLC's decision to extend the License Cap for a full year is arbitrary and capricious. It serves no purpose because the companies are not hiring new drivers as a result of the incentives to improve utilization under the Minimum Payment Rule. At the same time, it is causing significant harm to drivers who are forced to rent FHVs from owners who have licenses instead of driving their own cars.

217. The TLC's modeling of the Cruising Cap in addition to the License Cap also is arbitrary because it assumes without any justification and contrary to the record that the License Cap would add to the impact of the Cruising Cap to the same extent as if the Cruising Cap did not exist.

218. Petitioners are entitled to a judgment under N.Y. C.P.L.R. 7806 vacating and annulling the Rule.

EIGHTH CAUSE OF ACTION
Failure To Conduct And Base Rule On Legally Required Study
(For Judgment Pursuant to N.Y. C.P.L.R. 7803(1), (2), (3) and 7806)

219. Plaintiffs re-allege and incorporate by reference the allegations of all paragraphs above as if fully set forth herein.

220. Local Law 147 requires that any vehicle utilization standards established and regulation of the number of for-hire vehicle licenses must be "based on the results of the study"

that the law required. The TLC failed to conduct the study that the law required, and thus the August 2019 Rule must be set aside as unlawful and arbitrary and capricious.

221. Petitioners are therefore entitled to a judgment under N.Y. C.P.L.R. 7806 vacating and annulling the Rule.

NINTH CAUSE OF ACTION
Failure to Disclose Economic Modeling And Most Of Its Results And Failure To Provide A Reasoned Response To Comments
(For Judgment Pursuant to N.Y. C.P.L.R. 7803(1), (2), (3) and 7806)

222. Plaintiffs re-allege and incorporate by reference the allegations of all paragraphs above as if fully set forth herein.

223. Local Law 147 requires that any vehicle utilization standards established and regulation of the number of FHV licenses must be "based on the results of the study" that the law required. The TLC has failed to disclose both the economic modeling, and most of the results of the economic modeling, on which it claims to have based the Rule. It thereby failed to disclose the asserted basis for the Rule and deprived the public of the ability to comment on the asserted basis for the August 2019 Rule.

224. The TLC also received more than 400 comments during the period for comment following release of the Proposed Rule, including the submission of the Tadelis-CRA Report. The TLC, however, promulgated the Rule without providing a reasoned response, or any response, to the comments and without explaining how it dealt with any significant concerns expressed through the comments. Instead, the draft Statement of Basis and Purpose was identical to the Statement of Basis and Purpose that accompanied the August 2019 Rule.

225. The promulgation of the August 2019 Rule was therefore arbitrary and capricious and violated the City Administrative Procedure Act and Local Law 147.

226. Petitioners are therefore entitled to a judgment under N.Y. C.P.L.R. 7806 vacating and annulling the Rule.

TENTH CAUSE OF ACTION
Arbitrary And Capricious
(For Judgment Pursuant to N.Y. C.P.L.R. 7803(3) and 7806)

227. Plaintiffs re-allege and incorporate by reference the allegations of all paragraphs above as if fully set forth herein.

228. The August 2019 Rule is arbitrary and capricious for each of the reasons set forth in Counts 1 through 9 and all and any subsets of those reasons combined.

- The model's reliance on critical inputs that are based on nothing and also inconsistent with other evidence in the record,
- The TLC and model's disregard for the impact of the TLC's own regulations, and the failure to account for the impact of the State's comprehensive anti-congestion law,
- the failure to account for how its regulations would interact with the State's law and the failure to offer any justification for layering on new regulations after the TLC's prior ones and just prior to the implementation of the State's congestion tolling program,
- the arbitrary selection of the Cruising Cap number, failure to study its feasibility, and ignoring evidence it was not feasible while justifying the Rule as effectively costless,
- the arbitrary inclusion of en route time within the definition of "cruising,"
- the failure to account for economic analysis submitted establishing the likely infeasibility of the Rule and that it will cause far greater harm than projected,
- the arbitrary extension of the License Cap when it is serving no purpose and causing significant harm,
- failing to conduct the study required by Local Law 147, disclose the underlying model on which it based the Rule and most of the model's results, and provide a reasoned response to comments.

229. Petitioners are therefore entitled to a judgment under N.Y. C.P.L.R. 7806 vacating and annulling the Rule.

ELEVENTH CAUSE OF ACTION
Preemption By State Law
(For Judgment Pursuant to N.Y. C.P.L.R. 7803(2), (3), and 7806)

230. Plaintiffs re-allege and incorporate by reference the allegations of all paragraphs above as if fully set forth herein.

231. The August 2019 Rule was preempted by State law establishing a comprehensive, phased, and interconnected State plan for addressing congestion in New York City. *See* 2018 N.Y. Sess. Laws 78-79, ch. 59, Part VV §§ 1, 4, Ex. 17; 2018 N.Y. Sess. Laws 171-72, ch. 59, Part NNN § 2, Ex. 17; 2019 N.Y. Sess. Laws 244-49, Part ZZZ, Subpart A, Ex. 19.

232. Petitioners are therefore entitled to a judgment under N.Y. C.P.L.R. 7806 vacating and annulling the Rule.

TWELFTH CAUSE OF ACTION
Violation Of Separation Of Powers
(For Judgment Pursuant to N.Y. C.P.L.R. 7803(2), (3), and 7806)

233. Plaintiffs re-allege and incorporate by reference the allegations of all paragraphs above as if fully set forth herein.

234. Article IX § 1(a) of the New York State Constitution provides for a separation of powers between the legislative and executive branches of local government. The New York City Charter provides that the New York City Council will be the "legislative body of the city" and that it "shall be vested with the legislative power of the city." N.Y.C. Charter § 21.

235. The August 2019 Rule's setting of a Cruising Cap, imposition of a License Cap for at least a full additional year, and determination that it had unconstrained authority in making future decisions in those areas, reflects the exercise of legislative policymaking authority in violation of the separation-of-powers doctrine.

236. Petitioners are therefore entitled to a judgment under N.Y. C.P.L.R. 7806 vacating and annulling the Rule.

THIRTEENTH CAUSE OF ACTION
Inability To Determine Compliance
(For Judgment Pursuant to N.Y. C.P.L.R. 7803(2), (3), and 7806)

237. Plaintiffs re-allege and incorporate by reference the allegations of all paragraphs above as if fully set forth herein.

238. Determining a company's cruising rate for determining compliance with the Cruising Cap requires consideration of the data of other companies to which Petitioners do not have access. Petitioners are therefore unable to determine whether they have complied with the Cruising Cap until after the conclusion of the month for which compliance will be measured. The Rule is therefore arbitrary and capricious, an abuse of discretion, and unconstitutional.

239. Petitioners are therefore entitled to a judgment under N.Y. C.P.L.R. 7806 vacating and annulling the Rule.

FOURTEENTH CAUSE OF ACTION
Violation Of The Donnelly Act
(For Judgment Pursuant to N.Y. C.P.L.R. 7803(2), (3) and 7806)

240. Plaintiffs re-allege and incorporate by reference the allegations of all paragraphs above as if fully set forth herein.

241. There is a market in New York City for providing transportation services to individuals.

242. The August 2019 Rule constitutes, reflects, and/or imposes a contract, agreement, arrangement, and/or combination that significantly restrains the free exercise of trade, limits output, and restricts competition in this market in violation of the Donnelly Act, New York General Business Law § 340, by: (i) restricting competition by FHV services throughout the City by

requiring Petitioners and other FHV companies to decrease the supply of vehicles using the companies' software applications in order to comply with the regulations, and (ii) preventing drivers from obtaining licenses for vehicles that meet the City's licensing standards to provide for-hire transportation services. It thereby limits competition among Uber and its competitors and among for-hire drivers and the platforms they use and the taxicab industry.

243. The anticompetitive effects of the Rule outweigh any procompetitive benefits. Petitioners are therefore entitled to a judgment under N.Y. C.P.L.R. 7806 vacating and annulling the Rule.

FIFTEENTH CAUSE OF ACTION
Action For Declaratory Judgment
(For declaratory judgment pursuant to N.Y. C.P.L.R. 3001 and N.Y. C.P.L.R. 3017(b))

244. Plaintiffs re-allege and incorporate by reference the allegations of all paragraphs above as if fully set forth herein.

245. There is an actual, substantial and an immediate controversy with respect to the August 2019 Rule.

246. For the reasons set forth herein, Petitioners are entitled to a declaratory judgment that the August 2019 Rule is arbitrary and capricious and contrary to law and should be vacated and annulled.

PRIOR APPLICATION

247. No prior application has been made for the relief requested herein.

TRIAL DEMAND

248. Petitioners demand an evidentiary hearing on all causes of action so triable.

RELIEF REQUESTED

WHEREFORE, Petitioners respectfully request that this Court enter an Order:

A. Issuing a judgment pursuant to N.Y. C.P.L.R. 7806 vacating and annulling the August 2019 FHV Rule, as codified as 35 RCNY §§ 51-03, 59A-06, 59D-14, 59D-21

B. Issuing a declaratory judgment pursuant to N.Y. C.P.L.R. 3001 and N.Y. C.P.L.R. 3017(b) declaring that the August 2019 Rule is null, void, and invalid.

C. Holding an evidentiary hearing to resolve any material factual disputes;

D. Ordering Respondents to pay Petitioners their costs, fees, and disbursements incurred in connection with this action pursuant to N.Y. C.P.L.R. 8101; and

E. Granting such other and further relief as the Court deems just and proper.

Dated: September 20, 2019

New York, New York

Respectfully submitted,

/s/ Karen L. Dunn
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VERIFICATION

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

Chad Dobbs, being duly sworn, deposes and says:

1. I am Senior Manager, Head of Rides for the TRIPAD area for Uber Technologies Inc., and an agent of the Petitioners, which are wholly-owned subsidiaries of Uber Technologies Inc.

2. I have read the foregoing Petition and its factual contents are true to my personal knowledge, except as to those matters alleged therein to be upon information and belief, and as to those matters, I believe them to be true.

Chad Dobbs
Senior Manager, Head of Rides

Sworn to before me on this 20th day of September, 2019

Notary Public

LILLIAN MALTZ
NOTARY PUBLIC-STATE OF NEW YORK
No. 01MA6391047
Qualified in Kings County
My Commission Expires 04-29-2023