

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

TRI-CITY, LLC; ENDOR CAR AND
DRIVER, LLC; ZEHN-NY, LLC; ZWEI-NY,
LLC; ABATAR, LLC; and FLATIRON
TRANSIT, LLC;

Petitioners,

v.

NEW YORK CITY TAXI AND LIMOUSINE
COMMISSION and MEERA JOSHI, in her
official capacity as Chair, Commissioner, and
Chief Executive Officer of the New York City
Taxi and Limousine Commission,

Respondents.

Index No.: _____

Hon.

VERIFIED ARTICLE 78 PETITION

Petitioners Tri-City, LLC; Endor Car and Driver, LLC; Zehn-NY, LLC; Zwei-NY, LLC;
Abatar, LLC; and Flatiron Transit, LLC (collectively, “Petitioners”), by and through their
separate and respective undersigned attorneys, for their Verified Petition, allege as follows:

INTRODUCTION

1. Petitioners are for-hire vehicle (“FHV”) bases. As part of their commitment to enabling reliable FHV transportation for all riders, Petitioners’ parents—Lyft, Uber, and Via—have embraced the New York City Taxi & Limousine Commission’s (“TLC’s”) goal of increasing access to dependable, wheelchair accessible vehicle (“WAV”) transportation for all New Yorkers. Consistent with this goal, Petitioners’ parents have already been investing substantial resources to enhance the convenience and availability of transportation for WAV riders, leveraging their technological capabilities to develop next-generation solutions that are connecting drivers with WAVs to people who need them in several cities throughout the United

States. Such efforts have regularly led to significantly shorter wait times for many of Petitioners' WAV riders as compared to traditional public and private paratransit agencies and companies.

2. While the TLC's goal of enhancing access to WAV transportation is laudable, the manner in which the Commission has pursued this objective has been seriously flawed and threatens to make WAV transportation less—not more—accessible in New York City. As such, Petitioners must bring this Article 78 petition, which seeks to vacate the TLC's arbitrary and capricious rule issued in connection with WAV transportation. Specifically, on December 13, 2017, the TLC passed a well-intentioned but unreasonable rule requiring that, by July 2023, 25% of all trips dispatched each year by FHV bases in New York City take place in WAVs (the "25% Mandate"). The TLC took this extraordinary step without analyzing whether the number of WAVs required to meet the 25% Mandate—tens of thousands, at a prohibitive development and maintenance cost of hundreds of millions of dollars—would be effective or necessary to meet the demand of the approximately 65,000 people in New York City who use wheelchairs.¹ The 25% Mandate takes effect on July 1 of this year and would require that 5% of all trips dispatched through June 30, 2019 take place in a WAV.

3. The arbitrariness of the TLC's rule stems from the fact that there is no data to support the TLC's conclusion that a "percentage of trips dispatched" by FHV bases is the appropriate measure to increase the availability of WAVs for New Yorkers seeking WAV transportation. Yet, even assuming the "percentage of trips dispatched [by FHV bases]" was the correct metric (and the TLC has provided the public with no information as to why that should

¹ Despite identifying the purpose of the rule as to "put [WAVs] in circulation and available for passengers who *need* them," NYC Taxi & Limousine Commission, Notice of Public Hearing and Opportunity to Comment on Proposed Rules, City Record, Official Journal of New York City (July 7, 2017), at 4033 (attached to the Affirmation of Sara L. Shudofsky as Ex. D), the TLC did not even attempt to measure how many New Yorkers actually require a WAV, such as New Yorkers who use *non-folding* wheelchairs. Users of *folding* wheelchairs may use standard FHV's to travel (and Lyft, Uber, and Via already expect the accommodation of such riders).

be the case), the rule's flaw is compounded by the fact that there are no facts or reasoned analysis to suggest that 25% is the correct percentage. Indeed, the 25% Mandate does not even require that WAVs be dispatched to persons with wheelchairs. The rule's means, therefore, are not rationally related to achieving the TLC's stated goal of making WAVs "available for passengers who need them."

4. Put another way, even if the "percentage of trips dispatched" aspect of the 25% Mandate had some rational basis (it did not), there was still no rational basis to select 25% as the requirement. The public record indicates that the TLC arbitrarily chose 25%, in haste and without any analysis, to protect itself from "criticism of inaction" that may be leveled by accessibility advocates. Indeed, the Chair of the TLC conceded at the public hearing on the 25% Mandate that the TLC did not know the actual demand level for WAVs in New York City, astonishingly remarking that "people can speculate on demand based on statistics that are out there, but what is demand? When there is service, we'll know what demand is."

5. Sadly, the TLC's arbitrary selection of a percentage untethered to demand was in derogation of its agency function. Had the TLC conducted an objective analysis, informed by the facts, the available data concerning levels of demand for WAV access, and how the FHV industry operates in reality (*i.e.*, on a pre-arranged basis in which customers often request the specific type of vehicle desired), as well as the economic impact of its actions, the TLC would not have promulgated the 25% Mandate. Worthy goals, no matter how laudable, do not excuse public bodies from performing the due diligence necessary to ensure reasoned decision making. Unfortunately, in an effort to placate one constituency, the TLC has imposed an arbitrary and capricious mandate that unreasonably burdens another. If implemented, the TLC's rule will not only fail to meet any stated or defined metric of success; it also will wreak irreparable economic

damage on the entire FHV industry, from the largest app-based companies to the most vulnerable small base operators.²

6. Had the TLC conducted a complete analysis of the 25% Mandate, it would have revealed several issues. As expert economist Dr. Justin McCrary observes, the 25% Mandate arbitrarily requires a potential increase in the WAV supply by a factor of 100, without even estimating consumer demand and “*regardless of whether those rides actually reach people who use wheelchairs.*” Expert Report of Dr. Justin McCrary (“McCrary Report”) dated April 11, 2018, at 2-3/¶ 5(a), (d) (emphases added).

7. Meanwhile, the economic impact on the industry, which the TLC also did not consider, will be severe. As a threshold matter, despite Petitioners’ parents’ commitment to increasing WAV accessibility in New York City, the industry simply cannot comply with the 25% Mandate. Indeed, the TLC partly acknowledged that the automobile market does not have a supply of WAVs sufficient to meet the 5% fleet conversion that would likely be required in the first year of the 25% Mandate. *See infra* ¶ 57. But even if it were possible for the industry to comply, the costs to do so would be staggering, potentially reaching over \$1 billion. *See* McCrary Report at 2-3/¶ 5(b), Ex. 8.

8. To comply, Petitioners would also be forced to fundamentally alter the way they do business—incurring substantial expenses to incentivize drivers to use WAVs to provide rides. All of these costs “will translate into higher prices paid by consumers—both those who use wheelchairs and those who do not.” *Id.* These unsubsidized price increases, which could exceed \$2.00 per ride by 2023, will have negative impacts on all riders, and could destroy the FHV

² Separate from this Article 78 proceeding, a coalition (not including any Petitioners in this action) consisting of a black car base owner, an FHV driver, and trade and mutual benefit associations that respectively represent livery base, black car base, and luxury limousine base owners/operators are also challenging the validity of the 25% Mandate. *Livery Round Table, Inc., v. New York City Taxi & Limousine Comm’n*, No. 1:18-cv-02349-JGK (S.D.N.Y. filed Mar. 16, 2018).

industry, undoing some of the progress already made in enabling enhanced WAV access in New York City.

9. The flaws in the 25% Mandate cannot be cured by the TLC's well-intentioned, but temporary Pilot program, which was passed on the same day as the 25% Mandate. Loosely based on a collaborative FHV industry proposal for a centralized WAV dispatch center, the Pilot allows for the creation of up to three competing central dispatch entities, each of which can partner with multiple FHV bases to aggregate requests for WAV service and coordinate dispatches to meet WAV demand within a wait-time metric of success.

10. Petitioners are committed to making the Pilot a success, to enabling reliable access to WAV rides, and to reducing average wait times for people who require WAVs, not only because those efforts are consistent with their parents' anti-discrimination policies, but also because they are the right thing to do. The Pilot, however, offers no reasonable protection from the 25% Mandate, because the TLC has retained unilateral power to revoke the Pilot at any time for any reason, rendering Pilot participants subject immediately to the 25% Mandate. Even if the TLC were to allow the Pilot to continue for its two-year span, and the Pilot proved successful by objective measures, the TLC would still be free to enforce the 25% Mandate. The TLC would be under no obligation to adopt the Pilot as a rule or to extend the program; it could choose to allow the program to end, again rendering Pilot participants subject to the 25% Mandate. Having expended substantial economic and administrative resources trying to make the Pilot a success, Petitioners still run the risk of having that progress undone. Petitioners have thus been forced to seek relief from this Court.

11. Though well intentioned, the 25% Mandate is a roadblock standing between the people of New York City and a realistic, effective program for improving WAV service.

Because it was the product of misguided rulemaking in the absence of reasoned consideration of the relevant issues, the Court should, for all the reasons in this petition, declare that the TLC's determination to pass the 25% Mandate was arbitrary and capricious, and vacate it.

PARTIES

12. Petitioners Tri-City, LLC and Endor Car and Driver, LLC (the "Lyft Bases") are wholly owned subsidiaries of Lyft, Inc. ("Lyft"), a technology company headquartered in San Francisco, California. Drivers affiliated with the Lyft Bases utilize Lyft's ride-sharing platform as independent contractors. Neither Lyft nor the Lyft Bases own or lease any type of vehicle used for ridesharing in New York City; the independent contractor drivers who seek and accept dispatches from Lyft Bases select and then acquire, through purchase, lease, and sometimes rental, the vehicles they drive. The Lyft Bases are regulated as black car bases by the TLC. These bases already make available to their rider customers the option of requesting a WAV, and can dispatch such requests to WAVs, which can then choose to accept the requests.

13. Petitioners Zehn-NY, LLC; Zwei-NY, LLC; and Abatar, LLC (the "Uber Bases") are licensees of Uber Technologies Inc. ("Uber"), a technology company headquartered in San Francisco, California. The Uber Bases license and use software and other technologies for the ridesharing industry. The Uber Bases do not own or lease any type of vehicle used for ridesharing in New York City; the independent drivers who seek and accept dispatches from the Uber Bases select and then acquire, through purchase, lease, and sometimes rental, the vehicles they drive. The Uber Bases Zehn and Zwei are regulated as black car bases by the TLC, while Uber Base Abatar is regulated as a livery base. These bases already make available to riders the option of requesting a WAV, and can dispatch such requests to WAVs, which can then choose to accept the requests.

14. Petitioner Flatiron Transit, LLC is a wholly owned subsidiary of Via Transportation, Inc. (“Via”), a technology company headquartered in New York, New York. Flatiron Transit licenses and uses Via’s software platform for facilitating on-demand shared rides. Flatiron Transit does not own or lease any type of vehicle used for ridesharing in New York City; the vehicles utilized by the independent contractor driver partners associated with Flatiron Transit are owned or leased by the independent contractor driver partners. Flatiron Transit, LLC is regulated as a black car base by the TLC.

15. Respondent New York City Taxi and Limousine Commission is an administrative agency of the City of New York created and operating pursuant to Chapter 65 of the New York City Charter. *See* NYC Charter § 2300. The TLC’s principal office is located at 33 Beaver Street, New York, New York 10004.

16. Respondent Meera Joshi is the Chair of the TLC, as well as a Commissioner and its Chief Executive Officer, and was so at the time the TLC promulgated the 25% Mandate. Chair Joshi’s principal office is located at 33 Beaver Street, New York, New York 10004.

JURISDICTION AND VENUE

17. This court has subject matter jurisdiction to decide this petition pursuant to CPLR § 7803, as the 25% Mandate was a final determination of the TLC and this Petition challenges that determination as arbitrary and capricious.

18. Venue is proper in New York County Supreme Court pursuant to CPLR §§ 506(b) and 7804(b) because the challenged determination occurred in New York County and Respondents’ principal offices are in New York County.

FACTS

A. The FHV Industry

19. Although Petitioners are wholly owned subsidiaries or licensees of technology companies, each is regulated by the TLC as part of the FHV industry, which consists of for-hire bases, for-hire vehicles, and for-hire drivers. *See* 35 R.C.N.Y. § 59B-03.

20. All rides provided by the FHV industry “must be arranged through a TLC-licensed base or a TLC-licensed Dispatch Service Provider working with a licensed base, and all vehicles and drivers must be TLC-licensed.” NYC Taxi & Limousine Commission, Current Licensees, (last visited Apr. 9, 2018),

http://www.nyc.gov/html/tlc/html/industry/current_licensees.shtml.

21. “A For Hire Base can be any of the following: (1) A Black Car Base, (2) A Livery Base (or Base Station), (3) A Luxury Limousine Base.” *See* 35 R.C.N.Y. § 59B-03(f).

22. Livery bases, often referred to as community car services, and black car bases “provide pre-arranged transportation throughout New York City. These bases range in size from small, neighborhood-based operations to large fleet-type companies that provide citywide service.” NYC Taxi & Limousine Commission, Current Licensees, (last visited Apr. 9, 2018), http://www.nyc.gov/html/tlc/html/industry/current_licensees.shtml. Both types of bases typically operate under a business model pursuant to which their affiliated drivers own, lease, or rent the vehicles the drivers use, and the drivers are third-party transportation providers, not employees.

23. Luxury limousine bases “provide pre-arranged transportation to clients throughout New York City.” *Id.* Like black car and livery bases, luxury limousine bases range in size and often are owned by small business entrepreneurs. Luxury limousine bases typically are called upon by clients seeking luxury transportation.

24. Petitioners are each regulated by the TLC as black car or livery base owners, and the FHV's dispatched by Petitioners' bases are owned, leased, or rented by independent contractor for-hire drivers, not by Petitioners. *See* 35 R.C.N.Y. § 58B-03(c)(2).

25. In contrast to the medallion taxicab industry, which services most of its trips through street hails, all trips serviced by the FHV industry must be pre-arranged. *See* 35 R.C.N.Y. §§ 59B-03(c), (m), (p).

26. Unlike medallion taxicab passengers, who typically hail any available taxi that happens to be in their geographical vicinity, FHV passengers may request a specific vehicle type (such as an SUV or limousine) or, in the case of some bases, a specific vehicle model when pre-arranging their trip.

B. Petitioners' Service of Wheelchair Users & Anti-Discrimination Policies

27. The FHV industry serves hundreds of thousands of passengers each day, including substantial numbers of people with disabilities. thousands of passengers each day, including substantial numbers of people with disabilities. Serving people with disabilities, including people who use wheelchairs, is an important goal of Petitioners, and their parents' continued actions prove it.

28. To that end, Petitioners prohibit discrimination based on disability. *See* Lyft, Terms of Service, (last visited Apr. 9, 2018), <https://www.lyft.com/terms/preview>, at Section 9(o); Uber, Non-Discrimination Policy, (last visited Apr. 9, 2018), <https://www.uber.com/legal/policies/non-discrimination-policy/en/>; Via, Anti-Discrimination Policy, (last visited Apr. 9, 2018), <http://support.ridewithvia.com/customer/en/portal/articles/2463897-anti-discrimination-policy>.

29. Most relevant here, Petitioners expect the accommodation of passengers who use folding wheelchairs, regardless of the vehicle type a driver using Petitioners' technology chooses

to possess. *See, e.g.*, Lyft, Wheelchair Policy, (last visited Apr. 9, 2018), <https://help.lyft.com/hc/en-us/articles/115012926827>; Uber, Accessibility, (last visited April 12, 2018), <https://accessibility.uber.com/> (“driver-partners are expected to accommodate riders using walkers, canes, folding wheelchairs or other assistive devices to the maximum extent feasible”). In addition to serving those who use folding wheelchairs, Petitioners connect people who use non-folding motorized wheelchairs or motorized scooters to drivers who have chosen to drive WAVs and provide rides. Notwithstanding, Petitioners recognize that there is more work to be done and are committed to exploring creative solutions for increasing access to reliable rides for people who use wheelchairs.

30. Specifically, users of Lyft’s platform who require WAVs can connect with drivers offering rides in WAVs through Lyft Access Mode. When Access Mode is enabled, passengers may request a vehicle that is specially outfitted to accommodate wheelchairs. Lyft motivates drivers to use Lyft Access Mode by providing incentives to drivers based on the number of rides completed and availability. Lyft has committed to add 100 WAVs to the Lyft platform in New York City by the end of the 2018.

31. In New York City, Uber has enabled, and is committed to expanding, an option in the Uber App called “uberWAV.” This option enables riders who use non-folding wheelchairs to network with Drivers who have chosen to both possess WAVs and seek and accept ride requests via Uber App. In an effort to learn and assess the reliability, technical feasibility, and economic sustainability of enabling increased access to WAVs via the uberWAV option, Uber also has commenced experimental WAV pilots in several cities, including New York. Uber’s efforts in some or all of its WAV pilot cities involve some or all of the following: (i) direct outreach to Drivers to provide them with information regarding options to acquire WAVs from

third-party vendors, including information related to enhanced earning opportunities, (ii) entering into agreements to support those third-party vendors' missions to make WAV leases or rentals available, (iii) arrangements with owners and operators of WAV fleets that enable such operators' own drivers to seek and accept ride requests via the uberWAV option, and (iv) enabling a TAXI WAV option in the Uber App, which enables riders to request a ride from a taxi driver in a taxi WAV. Uber believes that its efforts have increased access to WAV leases or rentals to drivers who want to network with WAV riders, and that its cutting edge technology makes more efficient use of existing WAV fleets and taxi supply. Indeed, in the last 30 days in New York City, there were approximately 100 WAVs available via the uberWAV option in the Uber App, which perform hundreds of completed trips each week. Those trips are performed with wait times in the range of 17 minutes, which is far lower than the wait times offered by traditional paratransit options.

32. Customers of Via who require wheelchair accessible vehicles can connect with drivers offering rides in WAVs through Via's contractual agreement with a licensed WAV service provider.

C. The TLC's Hasty Passage of the 25% Mandate Without Study or Analysis

33. On information and belief, sometime in 2016, the TLC decided to make revisions to 35 R.C.N.Y. § 59B-17, a provision of the rules of the City of New York that requires FHV base owners to provide "equivalent service to persons with disabilities." The TLC began by reaching out to advocates for enhanced WAV access in New York City, but did not think through a solution that would make sense for both people who require WAVs and the FHV bases that provide the relevant services. Instead, what followed was a faulty attempt by the TLC to address an expressed need without considering the universe of relevant facts, without conducting any studies or meaningful analyses, and without fashioning an approach reasonably tailored to

actually meet a stated and definable metric of success. The ultimate result is the 25% Mandate, which will decimate the FHV industry and, regrettably, will not even guarantee that WAVs will be any more accessible for passengers who actually need them.

1. The Arbitrary Suggestion of a “Percentage of Trips Dispatched” Mandate

34. The resulting proposal—that FHV bases be required to dispatch a certain percentage of trips in WAVs—was fundamentally flawed. Nevertheless, it was attractive to some because of a perception that “it would prevent recurrence of the situation with yellow taxis, where accessible vehicles are purchased but sometimes stay parked in a garage, unused in revenue service and unavailable to wheelchair users.” Email chain between Taxis for All Campaign, TLC Chair Joshi, and City Hall (Apr. 24, 2017) (attached to the Affirmation of Sara L. Shudofsky dated April 12, 2018 (“Shudofsky Aff.”) as Exhibit (“Ex.”) A) at 5-8. That perception, however, is at odds with the realities of the FHV industry, and ignores critical distinctions between the FHV industry and the medallion taxicab industry. Unlike medallion taxis, which pick up passengers mostly through random street-hails, FHV trips are pre-arranged. Accordingly, a wheelchair user seeking an accessible FHV ride can pre-arrange the trip and specifically request a WAV. Thus, unlike the yellow taxi industry that has no incentive to utilize a WAV because it is unclear whether its customers will require a WAV, the FHV industry business model is designed to circulate vehicles as requested by customers, including WAVs. The FHV industry can thus meet the shared goal of enabling increased, reliable WAV service for wheelchair users without indiscriminately flooding New York City’s streets with WAVs.

35. The TLC’s percentage-of-trips requirement also misses the mark in a meaningful way in that a FHV base is not required to dispatch WAVs to riders who actually need or otherwise prefer them, as long as the requisite percentage of trips is dispatched to WAVs. That

benefits no one. Indeed, the TLC and advocates would later praise a very different TLC program, unrelated to FHV, that provides WAVs upon request to wheelchair users without any requirement that the WAVs be in regular circulation or conduct a certain percentage of trips. The TLC and advocates have rightfully called that program, which is subsidized by a surcharge on all yellow taxi rides, “a convenient, user-friendly way to request a wheelchair-accessible taxicab throughout the five boroughs,” Press Release, NYC Taxi & Limousine Commission, All Hail TLC’s Accessible Dispatch Program! (Jan. 24, 2018) (attached to Shudofsky Aff. as Ex. B), further underscoring the absence of any reasoned grounds for basing the rule on a percentage of trips.

36. Nevertheless, advocates first pressed the TLC to mandate that FHV bases dispatch 50% of all trips to WAVs, because such a mandate purportedly “would be easy to understand and implement, and [] there would be a strong *chance* that wheelchair users would be able to get rides.” Ex. A to Shudofsky Aff. at 6 (emphasis added). The proposal was not accompanied by, or based upon, any expert opinion or other analysis, and there was no consultation with the FHV industry to understand the potential feasibility or costs of such an approach or, indeed, any other relevant facts; it was merely floated to the TLC without analytic support.³

37. After failing to gain traction with the proposed 50% WAV trip mandate, advocates sent a letter, on April 20, 2017, proposing an alternative 25% WAV trip mandate, which could escalate to 50% of all trips if “equivalent service standards [were] not met” by the end of 2018. *Id.* at 6-7. Chair Joshi forwarded the advocates’ proposal to First Deputy Mayor Anthony Shorris, Dominic Williams (Chief of Staff to First Deputy Mayor Shorris), Chief

³ Petitioners do not fault the advocates for pressing for increased WAV service for wheelchair users; Petitioners share that goal. Petitioners, however, take issue with TLC’s adoption of the 25% Mandate without support or analysis.

Administrative Officer Laura Anglin⁴, Deputy Mayor Richard Buery, Mayor’s Office for People with Disabilities (“MOPD”) Commissioner Victor Calise, and David Lara. *Id.* at 3-4. In her April 24, 2017 email accompanying the advocates’ April 20 letter, Commissioner Joshi cautioned that the letter “sets up a clock, meaning that if nothing comes out of this correspondence they [the accessibility advocates] will have another go at us.” *Id.* at 4.

38. Commissioner Joshi then explained that in order to “protect [the TLC] from criticism of inaction,” the Commission could publish proposed rules without having a public hearing “right away.” *Id.*

39. On June 23, 2017, the same advocates sent a letter similar to their April 20 letter directly to First Deputy Mayor Shorris, noting that the advocates had “come up with a proposal”—a tacit admission that the proposal was not the product of any considered deliberation or analysis by the TLC. Email from Taxis For All Campaign to First Deputy Mayor Shorris (Jun. 23, 2017) (attached to Shudofsky Aff. as Ex. C) at 4.

2. The TLC Proposes the 25% Mandate

40. Just two weeks later, on July 7, 2017, a Notice of Public Hearing and Opportunity to Comment on Proposed Rules (the “Notice”) was published by the TLC in the City Record. Upon information and belief, at no time during the period prior to the TLC’s July 7, 2017 issuance of the Notice did the TLC conduct any studies or analyses that could have informed the actual contours of the proposed rule, or analyze its effect on the industry. As described *infra* ¶¶ 95-101, the TLC has produced no such documents (or any documents at all) in response to Freedom of Information Law (“FOIL”) requests submitted by members of the FHV industry. Instead, acting in the absence of any studies or analyses, the TLC published the Notice in order to avoid criticism from enhanced accessibility advocates. In so doing, the TLC adopted not only

⁴ Ms. Anglin is now Deputy Mayor of Operations.

the advocates' goal of increased service for wheelchair users, which Petitioners agree is proper, but also the' "percentage of trips" mandate approach, which fails to efficiently further that goal while at the same time harming the FHV industry.

41. Consistent with the advocates' suggestion, the proposed rule published by the TLC "require[d] all FHV Bases to send 25% of their dispatched trips to wheelchair accessible vehicles." NYC Taxi & Limousine Commission, Notice of Public Hearing and Opportunity to Comment on Proposed Rules, City Record, Official Journal of New York City (July 7, 2017), at 4033 (attached to Shudofsky Aff. as Ex. D). The first published version of the 25% Mandate was to be enforced for the 2021 calendar year and all years thereafter, with an initial 10% mandate for the 2018 calendar year, a 15% mandate for the 2019 calendar year, and a 20% mandate for the 2020 calendar year. *Id.* at 4034.

42. The stated purpose of the 25% Mandate was to "put wheelchair accessible for-hire vehicles in circulation and available for passengers *who need them*," or, as alternatively stated by the TLC, to provide "real accessible service," a vague term untethered to any defined standard. *Id.* at 4033-34,

43. As of the date of the Notice, the TLC had still not performed any analysis or study supporting that the 25% Mandate would in fact fulfill this stated purpose.

44. The publicly available written comments submitted during the written comment period did not provide any support for the 25% Mandate. During this time, the TLC received only two publicly available comments, both of which were unsupportive of the 25% Mandate.

45. The first comment was from Alexander Kalendariov, a self-described business owner, who commented that "[t]his rule will damage car service business[es] completely" and "will lead to [the] collapse and closure of all small businesses like my [car service]." NYC

Rules, Public Comments for: FHV Wheelchair Accessibility Rules, (last visited Apr. 9, 2018), at <http://rules.cityofnewyork.us/comments-view/27346>.

46. The second, jointly submitted by the Black Car Assistance Corp. (“BCAC”), New York Black Car Operators’ Injury Compensation Fund, Inc. (“BCF”), Livery Base Operators, Inc. (“LBO”), and Uber, identified numerous gaps in the record as to (i) the rationale for selecting the 25% figure, (ii) the impact of a percentage-of-trips 25% mandate on WAV service for wheelchair users, (iii) the economic consequences the 25% Mandate would have on FHV drivers and bases of all sizes, and (iv) the environmental impact of the 25% Mandate. NYC Rules, Public Comments for: FHV Wheelchair Accessibility Rules, (last visited Apr. 9, 2018), http://rules.cityofnewyork.us/sites/default/files/proposed_rules_sup_docs/2017-09-21_comment_to_tlc.pdf, (attached to Shudofsky Aff. as Ex. E).

47. Specifically, among other things, BCAC, BCF, LBO and Uber informed the TLC that the 25% Mandate could result in decreased service for wheelchair users as a result of the percentage of all trips WAV requirement because “under the 25% Rule, bases may need to dispatch WAVs to persons who do not need WAVs in order to fulfill their obligations to their clients, leaving bases unable to reserve WAVs” for wheelchair users who actually need or otherwise prefer WAVs. *Id.* at 2.

48. Further, the written submission projected that approximately 40,000 additional WAVs would be needed to meet the 25% requirement of the rule, with a resultant cost to the industry as a whole, including Petitioners, that was preliminarily estimated to be in the hundreds of millions of dollars per year. *Id.* at 3.

49. The submission also noted that:

because the Rule has been proposed before the completion of any studies, the industry has been unable to develop a complete

framework for assessing it. Absent some indication of how the 25% Rule might work to provide service, and a cost-benefit analysis justifying the costs of any such improvement, the 25% Rule is arbitrary and capricious. The industry and the TLC cannot even fully evaluate the 25% Rule, let alone support it.

Id. at 2. As a result, the industry suggested postponing a vote on the rule until “all of its likely effects c[ould] be modeled.” *Id.*

50. The TLC did not adopt the industry’s proposal to postpone the vote pending a full analysis, and did not say why it refused to do so.

51. The written comment period for the proposed rule closed on September 21, 2017 despite a request by the FHV industry to extend the written comment period to October 12, 2017 in order to allow for the submission of expert testimony analyzing the impact of the 25% Mandate. NEW YORK CITY TAXI & LIMOUSINE PUBLIC HEARING TRANSCRIPT, at 60:12-20 (Sept. 28, 2017) (attached to Shudofsky Aff. as Ex. F)⁵. By declining to extend the deadline, the TLC deprived the public record of expert analysis that could have informed the interested parties as to the impact and viability of the 25% Mandate.

3. The FHV Industry’s Proposal for a WAV Dispatch Alternative

52. The FHV industry urged the TLC to recognize the inherent flaws in the 25% Mandate, and even proposed an alternative solution that *both* aims to improve actual service for wheelchair users *and* is compatible with the FHV business model. Specifically, set forth in the comment submitted by BCAC, BCF, LBO and Uber was a “Central Dispatch” proposal (later joined by Lyft, Via, the Limousine Association of New York, Inc., and the Livery Round Table, Inc.) aimed to ensure that WAVs are directed in an efficient manner to riders who request them,

⁵ For convenience, the full transcript of the September 28, 2017 hearing can be accessed at http://www.nyc.gov/html/tlc/downloads/pdf/transcript_09_28_17.pdf.

subject to enforceable regulations such as wait-time benchmarks. *See* Ex. E to Shudofsky Aff. at 1, 4.

53. Under this alternative, wheelchair users would get the better service they need. Specifically, wheelchair users who actually need or prefer a WAV could request a WAV during the same hours and days of service available to all other clients of the FHV base, using all the same methods offered to customers not seeking WAVs. The proposal was based on the time it takes for a rider to receive the requested WAV, with a success metric of 15 minutes. *Id.* at 1. Further, the industry proposed to enforce the 15-minute service standard with fines: Failure to achieve an average wait-time of 15 minutes or less by January 1, 2019 would result in a fine of \$500,000, while failure to do so by December 31, 2019 would result in a \$1.5 million fine. *Id.* at 8. The TLC's 25% Mandate has no success metrics like these, making clear that its focus is on forcing compliance with arbitrary quotas, and not improving the service to those who need WAVs.

54. The TLC declined to hold a public hearing on the proposal. *See* NEW YORK CITY TAXI & LIMOUSINE PUBLIC HEARING TRANSCRIPT, at 12:19-13:5 (Dec. 13, 2017) (attached to Shudofsky Aff. as Ex. G).

4. The Public Hearing on the 25% Mandate

55. On September 28, 2017, the proposed rule was the subject of a public hearing held by the TLC at 85 West Street, New York, New York.

56. Many people testified in favor of the rule, identifying a general need (which Petitioners appreciate) for increased accessibility for those in wheelchairs. But no one testified how the 25% Mandate would actually meet everyone's shared goal of improved service or how the FHV bases would or could comply with the 25% Mandate, given the limited supply of WAVs available and the FHV industry's independent contractor model.

57. At the hearing, *the TLC itself* acknowledged that the proposed 25% Mandate might be impossible to comply with. Specifically, based on conversations with WAV converters (the suppliers of WAVs to drivers), Chair Joshi conceded that WAVs would only be available in quantities that would allow FHV Bases to meet “some” but not all of the requirements of the proposed Rule. Ex. F to Shudofsky Aff. at 99:12-24.

58. Additionally, transportation consultants, FHV base owners, FHV drivers, and accessibility advocates all testified as to significant concerns regarding the proposed 25% Mandate.

a. Consultant Testimony

59. Bruce Schaller of Schaller Consulting, an urban transportation policy expert, testified that the 25% Mandate was “problematic” and unlikely to connect wheelchair users with WAVs. He noted that the 25% Mandate:

requires a large number of accessible vehicles -- I would think 16,000 or more -- but it doesn’t address how the vehicles, the drivers, and the dispatch companies join together to provide an effective service and overall system. . . .

Moreover, the rule distributes this large number of vehicles across 900 FHV bases. That means when someone requests a trip, there’s likely to be an accessible vehicle nearby, but probably not working for the base that they just called.

The unintended consequence of this could be having thousands of vehicles on the street with few drivers who are willing to accept an accessible trip if you have to drive that much longer for the pick-up.

Id. at 148:21–149:19.

60. George Laszlo, Managing Director of the Taxi & Limousine Research Center, a not-for-profit organization focused on taxi, limousine, and other private transportation services, similarly testified “against this particular proposal” because the 25% Mandate is attempting to

address a “multi-dimensional problem” that will “have consequences on everybody in the industry and I don’t think [the TLC has] studied it closely enough to be basically making [the 25% Mandate] work. . . . [the TLC] really need[s] to go back, look at this holistically [because] you [the TLC] haven’t done that job . . . and look at the impact it will have on [the FHV industry].” *Id.* at 249:25–252:5.

61. In response to Mr. Laszlo, Chair Joshi commented that the TLC was not “putting rules into action today” and that she was “*sure* there will be amendments, clarifications, and changes.” *Id.* at 252:13-21 (emphasis added). Mr. Laszlo rejected that gradual approach and responded that the TLC should “look at other completely different proposals, not this one. In other words, don’t just look at it and go, well, start at 20 percent and go to 50 percent.” *Id.* at 252:22-253:4.

62. Mr. Laszlo’s testimony, along with the testimony of other parties concerning the approach and magnitude of the 25% Mandate, was ignored by the TLC. After the hearing, the TLC made only minor changes to the proposed 25% Mandate: starting the mandate at 5% (rather than 10%) of all trips and ramping up to the 25% of all trips requirement beginning on July 1, 2022 (rather than during the 2021 calendar year).

b. FHV Base Testimony

63. A variety of base owners testified, among other things, as to the severe economic impact the proposed rule would have on their livelihoods.

64. Eileen Kelly, owner of Kelly’s Base, a small car service located in Bayside, Queens that has been in operation for over 100 years,⁶ testified as to the destructive effect the 25% Mandate would have on her base, and similarly situated small businesses:

⁶ See Kelly’s Car Service, (last visited Apr. 9, 2018), <http://www.kellycarservice.com/mobile/about.html>.

Right now I'm going to tell you we [] probably spen[d] \$10,000 on a car and have the car maybe for a year to 18 months. And in that time probably spend another \$12,000 in repairs without any collision. . . . You [Chair Joshi] said something before about people who weren't interested in retrofitting or --

CHAIR JOSHI: Retrofitting is when you take an existing car and make it wheelchair accessible. But conversion is when you take a new car and put the ramp in before its used.

The conversion is the more durable way to go, and that costs between 8,000 and \$10,000 . . . it can cost up to [\$]14,000. . . .

MS. KELLY: So you're talking about 8 to 10,000 on a new car?

CHAIR JOSHI: Yeah, on top of the price of the car.

MS. KELLY: And the price of the car?

CHAIR JOSHI: The price of a car is similar to like a Toyota -- a minivan.

MS. KELLY: So when you talk about the total cost of the car, there's a big difference between spending \$10,000 and in some cases --

CHAIR JOSHI: -- \$14,000. Yeah, so you have to add at least 8 to \$10,000, and there's only certain kinds of cars that can be converted.

MS. KELLY: Well, I looked before I came here today. The best deal I could find was for \$29,000 for a car. That was a Toyota, and it had 128,000 miles on it already. So, you know -- and then to invest \$14,000 for a retrofit, if you're putting it on a car that has already got that kind of mileage, what are you going to get out of the car?

. . .

[T]his [25% Mandate] could really negatively [impact our business] . . . I'm struggling to pay the bills now. You know, everybody is in this position. I'm not the only one.

Id. at 188:13–190:11; 191:17–24.

65. Andrea Majer, Executive Vice President of Delux Transportation Services, Inc., a small luxury limousine base established 50 years ago,⁷ testified as to the economic impact the 25% Mandate would have on her business:

I feel that if this new proposed legislation is passed, and if I'm required to purchase 25 percent more vehicles that are handicap access -- or handicapped accessible vehicles -- it will be a nail in our coffin.

We have about 250 people that work for us now that will be out of work.

Id. at 211:12-19.

66. Ms. Majer also explained why the 25% Mandate was arbitrary in relation to the luxury base business model, which services trips often based on reservations for specific types of cars:

MS. MAJOR [sic]: So right now -- I contract with a company that is wheelchair accessible. So if I get a call -- and I get about two a year -- I pay him an annual fee plus the cost of the rides, and he provides that service.

CHAIR JOSHI: Right. So [the 25% Mandate] would involve using vehicles that are accessible, maybe like he has available or any other base in your regular dispatch routine starting at a smaller percentage and growing over time.

MS. MAJOR [sic]: But . . . I'm a luxury base, so most of [my regular dispatches] are reservations [for specific car types].

Id. at 212:10-24.

67. Jeff Rose, a luxury limousine operator and President of the Limo Association of New York, also offered testimony as to why the 25% Mandate was arbitrary in relation to the luxury base business model:

Unlike black car and livery bases, [luxury limousine bases] generally are not called upon to provide on-demand service.

⁷ See Delux Transportation, Our History (last visited Apr. 9, 2018), <https://deluxtransportation.com/about/>.

Probably less than 10 percent of our work comes from fewer than 12 hours['] notice. Our clients want the private chauffeur experience without hiring a full-time chauffeur. They specify the exact kind of car they desire down to the make, model, and color.

...

If the 25 percent proposal passes our clients will know that if they request a luxury sedan for that special night, that special client, that special loved one, regardless of what car they want to order, the TLC commands that they must tolerate a 25 percent chance that they will not get the car that they ordered. Demand would surely drop, and just as surely many thousands of these middle-class jobs would disappear in a heartbeat. (Applause.)

Id. at 69:13–69:23; 70:25–71:11.

c. FHV Driver Testimony

68. FHV drivers and their representatives voiced their concerns at the hearing. Pedro Joaquin Aguiar, President of the Coalition of Taxi Drivers,⁸ testified as to the serious economic repercussions the 25% Mandate would have on FHV drivers, specifically about how the 25% Mandate would affect their ability to make a livable wage:

In the establishment of this regulation, you are obligating us to make an investment in the purchase of this accessible vehicle, and we do not have any guarantee upon the return of such investment.

...

[Y]ou want to take away our calls to have them distributed among the taxi drivers that will purchase these accessible vehicles; something that will put us in a worse predicament in which we are already in.

Predicting this extreme measure, to remove a 10 percent of costs within the first year, a great amount of drivers will disappear, and when the 25 percent is applied, the difference of our taxi drivers will be trimmed.

Commissioners, we want to ask you the following question[]: Who will be affected with this regulation? We, the [FHV] drivers,

⁸ The phrase “Taxi Drivers” is being used here in a broader, colloquial manner and includes FHV drivers.

will be affected because the bases are not the owners of our vehicles.

Id. at 101:12-17; 102:21-103:13.

69. Mark Dilcom, an FHV driver and independent owner/operator, testified that the 25% Mandate would be “disastrous,” cause thousands of FHV drivers to go out of business, and fail to provide wheelchair users with access to WAVs. Specifically, Mr. Dilcom testified:

[The 25% Mandate] is disastrous because the numbers simply don’t work. If implemented, [the 25% Mandate] sacrifices thousands of people’s livelihoods while also failing to provide the services that people with disabilities so deserve. As proposed, this will be a failure in all respects.

...

The misguided attempt to address this problem fails to accomplish its basic goal; providing enough wheelchair accessible vehicles to meet the needs of the public. . . .

It is physically and logistically impossible to come anywhere near what the TLC is calling for on January 1st.

One simply does not go to an auto mall and buy a wheelchair accessible vehicle. Each is custom made, which adds 15 to \$25,000 on top of the vehicle price. We all witnessed how long it took to get current wheelchair accessible yellow cabs in service. It took years. . . .

This proposal does not address any of this, and so where is the money supposed to come from for those of us, like me, who would want to do this but are self-employed?

So please, listen carefully to what you hear today, and stop going down this path; I beg you. And instead, develop a well thought out plan. . . .

So -- and finally, if anything else, in today’s meeting what we’ve all learned here is we need a lot more discussion about this. So please, I beg you, do not move on any rules until we get together.

Id. at 120:12-21; 122:17-124:3.

d. Enhanced Accessibility Advocate Testimony

70. Even enhanced accessibility advocates identified adverse consequences of the 25% Mandate that run contrary to the parties' shared goal of enhancing access to WAVs in New York City. For example, Councilmember Brad Lander testified that the 25% Mandate should be adjusted to have a "slightly more specific strategy for making sure that the accessible FHV trips are matched to users who need them . . . so that we not only have the vehicles out on the road, but know that they're getting to the users who need them and request them in short order." *Id.* at 31:22–32:13.

71. Similarly, John Gresham, a member of Disabled In Action of New York and a lawyer, testified that the 25% Mandate "accomplishes rather little." Mr. Gresham explained:

It seems to me that the metric is rides, not cars, and I suppose the reason for that is you can't readily tell when accessible cars are actually being used, or hanging out at the garage, or at the curb or whatever. And I appreciate that that's what you're trying to do, but here's the problem:

Even when we get to 25 percent of the proposal for four years, that's not going to necessarily produce anything close to 25 percent of the accessible vehicles. It will be far less because you can meet the 25 percent by transporting anybody for any distance.

So if I was transported for two blocks -- I don't need a wheelchair yet -- that would count, and it's fairly easy to gain this metric by using the accessible -- one accessible vehicle for example -- as your workhorse for all your short trips that are in a concentrated area, and there's your 25 percent. It accomplishes rather little.

Id. at 199:8–200:7.

e. Testimony on WAV Demand

72. Testimony at the public hearing also revealed that (i) the TLC had (and still has) no idea what the level of demand is or will be for WAVs and (ii) the "25% of all trips" figure was selected without any rational basis or study. This was readily apparent during the following

exchange among Jim Weisman (a member of the Taxis For All Campaign), audience members, Chair Joshi, and Commissioner Nora Marino, in which Chair Joshi admitted that the TLC did not know, and had not attempted to determine, what level of WAV demand exists:

COMMISSIONER MARINO: [The FHV industry is] anticipating 700 [WAV] rides a day. How many do you anticipate?

MR. WEISMAN: Thousands. How many Access-A-Rides are there a day?

AUDIENCE MEMBER: 20,000 at least.

AUDIENCE MEMBER: 2,100.

AUDIENCE MEMBER: 6.4 million a year.

...

COMMISSIONER MARINO: Wait. 2,100 -- 25,000 -- it's very difficult --

CHAIR JOSHI: I think this is symbolic of the issue of what is demand. I mean, demand is difficult to gauge when people haven't had a service because you might find there's people that once the service is available use it.

COMMISSIONER MARINO: Right. If you build it, they will come.

MR. WEISMAN: Right.

CHAIR JOSHI: Part of the issue is people can speculate on demand based on statistics that are out there, but what is demand? When there is service, we'll know what demand is.

Id. at 96:1-97:7.

73. Upon information and belief, the TLC did not commission or conduct any kind of study or analysis to determine the level of WAV demand or the contours of the 25% Mandate, including as to the 25% figure or the underlying assumption that a rule based on the percentage of dispatched trips was reasonable and appropriate (which it is not). The TLC did hear from

several individuals about potential demand at the hearing, but none of their estimates came close to the number of daily WAV trips that the 25% Mandate would require.

74. Sarah Kaufman, Assistant Director of the NYU Rudin Center for Transportation, testified that 99,000 New Yorkers use wheelchairs and that Access-A-Ride provides 6.5 million rides a year, or approximately 18,000 trips a day, with ridership expected to double within the next five years. *Id.* at 137:12-24; 139:25-140:3. Those trips are not limited to riders who use non-folding wheelchairs.

75. Bruce Schaller of Schaller Consulting estimated, based on his experience in Washington, D.C., that demand for WAV trips will number between 6,000 to 8,000 trips per day. *Id.* at 151:12-15.

76. Avik Kabessa, CEO and Chairman of Carmel Car Service, testified that there are 60,000 people who use wheelchairs in New York City, an estimated 30,000 or 40,000 of whom use non-folding motorized wheelchairs necessitating a WAV. He also testified that extrapolating WAV demand based on per day MTA bus lift usage results in an estimated 764 daily WAV trips. *Id.* at 67:1–68:2.

77. Despite testimony suggesting that demand was far lower than the TLC's calculations, prepared before the public hearing, as to the number of WAVs and WAV trips per day that would result from the proposed 25% Mandate, the TLC did not adjust the dispatched trips percentage. The TLC calculated as follows:

Specific percentages [of WAV trips per day] would result in the following approximate number of daily trips performed by WAV vehicles (note: today the for-hire industry provides about 360,000 trips a day):

5%...

Approximately 18,000 trips a day, done in about 2,000 vehicles

10%...

Approximately 36,000 trips a day, done in about 4,000 vehicles

15%...

Approximately 54,000 trips a day, done in about 6,000 vehicles

20%...

Approximately 72,000 trips a day, done in about 8,000 vehicles

25%...

Approximately 90,000 trips a day, done in about 10,000 vehicles

Email from Chair Joshi to MOPD Commissioner Calise (Feb. 7, 2017) (attached to Shudofsky Aff. as Ex. H) at 2.

78. The TLC's predictions suggest that, under the 25% Mandate, each of New York City's 60,000 residents who use any type of wheelchair (folding or non-folding) would plan to take more than 500 WAV trips per year.

5. The TLC's Adoption of the 25% Mandate

79. On December 13, 2017, the TLC passed the 25% Mandate requiring FHV bases to provide 5% of all trips in WAVs between July 1, 2018 and June 30, 2019; 10% of all trips in WAVs between July 1, 2019 and June 30, 2020; 15% of all trips in WAVs between July 1, 2020 and June 30, 2021; 20% of all trips in WAVs between July 1, 2021 and June 30, 2022; and 25% of all trips in WAVs beginning July 1, 2022 and continuing each year thereafter. Ex. G to Shudofsky Aff. at 10:19-21. The 25% Mandate also requires FHV bases to offer wheelchair users the same vehicle types offered to non-wheelchair users, *see* 59B-17(c)(4)(ii)(F), even though Chair Joshi acknowledged that "only certain kinds of cars [] can be converted" to WAVs. Ex. F to Shudofsky Aff. at 190:1-2.

80. The vote approving the 25% Mandate was not unanimous. Commissioner Marino dissented, in part because the TLC was not sufficiently informed on all of the issues:

I don't think these rules best solve [the wheelchair user service] problem, and I think that the proposed pilot [the FHV Industry alternative proposal] has some very good ideas that we should give a better chance than the actual pilot we voted on today gives them.

...

I just think we can do better than what we have done here today. And I think these plans that were presented by the [FHV industry] at the last public hearing was in infancy and its come a long way from what I understand, the last couple of months. And I would like to have seen a public hearing on that plan, so everyone can hear what it has to offer including this commission, and then we could have had a more informed vote and understand what's at stake.

Ex. G to Shudofsky Aff. at 12:6-13:5.

81. Although Commissioner Bill Aguado voted in favor of the 25% Mandate, his comments are a tacit admission that appropriate study was not undertaken before premature passage of the 25% Mandate in response to public pressure for a solution, any solution. Specifically, he conceded that the 25% Mandate was “just the beginning of the process,” a “process we have to -- we have to undertake at this point,” while conceding that he was “concerned about the small fleet owners.” *Id.* at 14:5-7, 15:12-16.

82. Despite expressing similar concern for FHV drivers, Chair Joshi oversaw the passage of the 25% Mandate without conducting any study into the economic impact of the 25% Mandate on FHV drivers or the industry as a whole. *Id.* at 8:3-13.

6. The Pilot Program

83. On the same day, the TLC, in a vote separate from the 25% Mandate vote, enacted a two-year WAV Pilot program loosely based on the FHV industry's proposed

Centralized Accessible Dispatch Center.⁹ While not perfect, the Pilot shows how the needs of New Yorkers who use wheelchairs can be better met by leveraging the FHV industry’s business model, which is based on pre-arranged car reservations and accommodation of passenger choice. Specifically, the Pilot is a voluntary program that allows FHV bases to apply to participate in the program either as a WAV dispatcher or a participating base. The Pilot permits the creation of up to three competing WAV dispatchers, each of which can partner with multiple participating bases. The dispatcher then aggregates all WAV supply and all requests for WAV service associated with its partner bases, in addition to arranging additional WAV supply as needed. The program is focused on improving service to individuals who need or prefer WAVs by meeting or exceeding a defined metric of success: customer wait-time.

84. The stated purpose of the Pilot is to “evaluate whether a centralized dispatching system utilizing modern technology, with robust monitoring and other requirements . . . could provide excellent service to people with disabilities and overcome the potential pitfalls of utilizing a centralized dispatching entity to provide WAV FHV service.” NYC Taxi & Limousine Commission, Resolution Approving a Pilot Program to Evaluate a Response-Time Metric for Providing Wheelchair Accessible For-Hire Vehicle Service (Dec. 13, 2017) at preamble (attached to Shudofsky Aff. as Ex. I). These features of the Pilot—use of modern technology, robust monitoring, centralized dispatching—are exactly the features that Petitioners believe can help provide superior WAV service to wheelchair users. It stands in stark contrast to the 25% Mandate, which has arbitrary quotas that were issued without any study or meaningful analysis of how the FHV industry can best help that community.

⁹ As Commissioner Marino noted in explaining her vote against the 25% Mandate, there are concerns that the Pilot adopted by the Commission has less chance of success than the Centralized Accessible Dispatch Center proposal made by the industry. Ex. G to Shudofsky Aff. at 12:7-11.

85. FHV bases that decide to participate in the Pilot, if approved by the TLC, are temporarily exempt from the requirements of the 25% Mandate. *Id.* § 6. Specifically, pursuant to the Pilot program, a WAV dispatcher will be in compliance with the TLC rules if it services at least 60% of WAV trips within fifteen minutes during the first year of the Pilot (beginning July 1, 2018) and 80% of WAV trips within fifteen minutes during the second year of the Pilot. Additionally, during both years 90% of all trips must be serviced within 30 minutes.

86. Although FHV bases that are approved to participate in the Pilot are temporarily exempt from the requirements of the 25% Mandate, there is no guarantee that a successful Pilot period will result in the TLC continuing the Pilot or offer any permanent protection from the strictures of the 25% Mandate. *Id.* §8(e). Indeed, FHV bases can be dropped from the Pilot in several ways.

87. First, if the required average wait times of the Pilot are not met, the WAV dispatcher will be immediately subject to compliance with the 25% Mandate, and any participating base associated with the WAV dispatcher will also be subject to the 25% Mandate if that base cannot find another authorized WAV dispatcher with which to associate. WAV Dispatcher Memorandum of Understanding, Terms & Conditions for Taxi & Limousine Commission Authorization (attached to Shudofsky Aff. as Ex. J), § II(c); Participating Base Memorandum of Understanding, Terms & Conditions for Taxi & Limousine Commission Authorization (attached to Shudofsky Aff. as Ex. K), § V(b). Through no fault of Petitioners, the success of the Pilot for all participants (WAV dispatchers and participating bases), and indeed the ongoing existence of the Pilot itself, is highly uncertain. Despite its uncertainty, Petitioners are committed to try to make it a success.

88. Second, pursuant to the TLC-issued Memoranda of Understanding (“MOUs”) with bases and WAV dispatchers, at any time, the TLC may “immediately terminate [the Pilot] for cause if the Chair determines that the participating base [or WAV dispatcher] has failed to comply or is no longer in compliance with any of the terms of [the Pilot].” Ex. J to Shudofsky Aff. § V(a); Ex. K to Shudofsky Aff. § V(a).

89. Third, the Pilot Resolution explicitly states that “[t]he Chair may cancel the Pilot Program for any reason.” Ex. I to Shudofsky Aff. § 6(d). Accordingly, there is a very real threat that the Pilot could be shut down quickly, and without any reason, at any time.

90. Finally, in the absence of any further action by the TLC, the Pilot—and any exemption from the 25% Mandate—will automatically cease to exist in two years. Even if the Pilot proves successful by any objective measure, there is nothing that compels the TLC to adopt the Pilot program permanently, regardless of any significant investments incurred by Petitioners. Meanwhile, the 25% Mandate, which has no expiration date, would persist.

91. Members of the FHV industry attempted to negotiate the above-referenced MOUs with the TLC immediately following passage of the Pilot on December 13, 2017, in hopes of reaching reasonable terms and strengthening the Pilot’s chance at success—and, thus, the chance that the community of New Yorkers who use wheelchairs would see better WAV service. The attempted negotiations continued until March 2018 with limited progress. On March 23, 2018, the TLC issued the MOUs unilaterally, dictating the terms that all bases participating in the program will be required to execute without taking into account many of the concerns expressed by the FHV industry during negotiations about how WAV service could be improved.

92. With no assurance that the TLC will not choose to eliminate the Pilot for any reason, at any time, and immediately subject FHV bases like Petitioners to the 25% Mandate,

FHV bases must decide whether and how to participate by June 20, 2018¹⁰, and must launch operations by July 1. Such a decision to participate in the Pilot also means the immediate commitment of substantial monetary and administrative resources, and continued heavy use of resources going forward, all while Petitioners face the continuing risk that the Pilot will be terminated, resulting in the immediate enforcement of the 25% Mandate and the exorbitant expenses that follow from the rule.

93. Nevertheless, even with all of these administrative drawbacks, the Pilot presents a much more sensible and efficient way to meet the needs of New Yorkers who use wheelchairs than the 25% Mandate. The Pilot would actually match supply of WAVs with demand, and with defined levels of service. The 25% Mandate does neither. Instead, it mandates that a massive oversupply of WAVs be introduced into the market in the hopes that they will find their way to wheelchair users. In short, while the TLC and Petitioners share the same goal of increased WAV service, Petitioners have consistently tried to take a thoughtful route toward that end, while the TLC has relied on arbitrary quotas and a Pilot that could be discontinued at any time in the TLC's sole discretion.

94. The July 1, 2018 effective date of the 25% Mandate (and the launch of the Pilot Program) are fast approaching. Petitioners are thus left with no choice but to challenge the 25% Mandate in Court.

¹⁰ June 20, 2018 is the deadline by which bases must submit an application to be a participating base. Although the deadline to apply as a WAV dispatcher is not until July 1, 2019, the participating base application due June 20 must include "a statement outlining the manner in which it will adhere to the" Pilot Program requirement of "enter[ing] into an agreement with a WAV Dispatcher and remit any payments to the WAV Dispatcher in accordance with the agreement." Thus, for all practical purposes, both participating base and WAV dispatcher applicants must make critical decisions by the June 20 deadline.

7. The TLC's Failure to Provide Any Materials in Response to the FHV Industry's FOIL Requests

95. Since October 5, 2017, members of the FHV Industry have been making FOIL requests from the TLC for any materials in the record that could support the TLC's adoption of the 25% Mandate. Among other information, the requests sought "[a]ll documents reviewed or considered by the TLC in connection with the 25% Rule and any alternative proposals to mandate that FHV Bases or vehicles provide wheelchair accessible service." FOIL Request to Taxi & Limousine Commission (Oct. 5, 2017) (attached to Shudofsky Aff. as Ex. L), at request 1. The TLC's response has been to delay and refuse to produce any documents in response to the FOIL requests.

96. On October 12, 2017, the TLC responded to the members of the FHV industry that the October 5 requests were being reviewed, and that documents responsive to such requests or information regarding their availability would be produced in approximately 20 business days. The TLC also requested a list of custodians, keywords, and date parameters for requests that it deemed would require email searches, notwithstanding that FOIL does not limit searches for responsive documents to documents searchable using keywords. Email Chain between Taxi & Limousine Commission and FHV industry re: October 5, 2017 FOIL Requests (attached to Shudofsky Aff. as Ex. M).

97. On November 9, 2017, the TLC represented that it would provide documents or additional information regarding the availability of such documents within another 20 business days. *Id.* Yet more than a month later, on December 15, 2017, members of the industry only received an organizational chart from the TLC, purportedly to assist in identifying custodians for the email searches. *Id.* Notwithstanding the fact that the TLC—not the FHV industry—is best

suited to determine which custodians are relevant for any given request, members of the FHV industry provided to the TLC a list of custodians and search terms on February 9, 2018. *Id.*

98. On February 16, 2018, more than four months after the FOIL requests were first submitted, the TLC informed the industry members that the email searches associated with the requests would not be completed until *after the 25% Mandate took effect*. Moreover, the TLC did not address when it would produce any responsive documents. *Id.*

99. On February 3, 2018, Uber submitted a FOIL request to the TLC separate from the requests described above. It sought, among other items, “[t]he complete administrative record for the TLC’s decision to adopt the 25% Rule, including but not limited to the ‘transcript of the record of the proceedings under consideration,’ as that term is defined in CPLR 7804(e).” Taxi & Limousine Commission Response to Uber FOIL Requests (Feb. 9, 2018) (attached to Shudofsky Aff. as Ex. N), at request 1. On February 9, 2018, the TLC responded that it was granting Uber’s request, but only provided Uber with a link to the TLC’s website, noting that transcripts of TLC meetings could be found there. Although the link contained TLC transcripts dating back to 2004, the TLC did not identify the specific transcripts that constitute the administrative record here, other than to note that the December 2017 Commission hearing transcript should be available at the link “by the end of the week.” *Id.* The TLC also represented that it would produce responsive documents and/or more information regarding the availability of responsive documents within 20 business days. *Id.*

100. To date, the TLC has failed to produce a single document in response to any of the FOIL requests from members of the FHV industry.

101. That the TLC does not have any documents at hand in response to the industry’s requests—and proposes to take “300 days” from February 2018 to look for them—demonstrates

either that the TLC never marshaled evidence in connection with its rulemaking decision or that it is stonewalling for some kind of tactical advantage.

8. The TLC’s Failure to Consider Facts That Would Have Been Readily Apparent If an Appropriate Analysis Had Been Performed

102. In the absence of any studies or analyses regarding (i) the efficacy of a percentage-of-trips 25% Mandate, (ii) the actual or anticipated demand for WAVs, or (iii) the economic impact the 25% Mandate would have on the FHV industry, the TLC necessarily acted arbitrarily and capriciously in adopting the 25% Mandate. It should come as no surprise, then, that an expert economist has opined that the 25% Mandate is poorly suited to fulfill the TLC’s stated goal—shared by Petitioners—of making WAVs available for passengers who need them. If the TLC had done that work, alone or in collaboration with the FHV industry, it would not have passed the 25% Mandate. Instead, the TLC would have worked with Petitioners on a program that enabled improved service for wheelchair users, while leveraging Petitioners’ technological and organizational strengths.

103. Following the TLC’s adoption of the 25% Mandate, Petitioners engaged Dr. Justin McCrary, Ph.D., to evaluate its likely impacts. Dr. McCrary, an Assistant Professor of Law at Columbia University who obtained his doctorate in Economics from the University of California, Berkeley, is an economist with expertise in economic modeling, statistical methods, and law and economics. His analytical report on the 25% Mandate is part of this petition.

104. Dr. McCrary’s report confirms the industry’s concerns about the 25% Mandate. Based on a preliminary analysis of the TLC’s own publicly available data, basic observational data provided by Uber, and readily observable market conditions, Dr. McCrary concludes that: (i) the 25% Mandate may “not achieve the goal of increasing FHV service for people who use wheelchairs”; (ii) the demand for FHV rides by people who use wheelchairs is much smaller

than the 25 percent quota; and (iii) “the costs to convert existing WAV-compatible FHV’s to WAVs and the costs to rent additional WAVs necessary to comply with the 25% Mandate . . . amount to \$1.2–1.5 billion over the course of the [first] five years” alone—costs that “will translate into higher prices paid by consumers . . . who use wheelchairs and those who do not.” McCrary Report at 2-3/¶ 5, Ex. 8.

ARGUMENT

A. LEGAL STANDARD

105. 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.” CLPR § 7803(3).

106. “Administrative rules are not judicially reviewed pro forma in a vacuum, but are scrutinized for genuine reasonableness and rationality in the specific context.” *New York State Ass’n of Counties v. Axelrod*, 78 N.Y.2d 158, 166 (1991) (internal citation omitted). “The arbitrary or capricious test chiefly relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact.” *Ahmed v. City of New York*, 44 Misc. 3d 228, 236 (Sup. Ct. 2014). 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 Ed. Of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Co.*, 34 N.Y.2d 222, 231 (1974) (citing *Matter of Colon v. Berman*, 21 N.Y.2d 322, 329 (1967)).

107. If an agency fails to properly take into account the evidence presented and reaches a conclusion contradicted by that evidence, the determination should be reversed as arbitrary and capricious. *See, e.g., Trump on Ocean, LLC v. Cortez-Vasquez*, 76 A.D.3d 1080, 1083 (2d Dep’t 2010). Moreover, an action may be “declared null and void upon a compelling showing that the

calculations from which it is derived are unreasonable.” *Axelrod*, 78 N.Y.2d at 166 (internal citation and quotation marks omitted).

108. Finally, it is “the settled rule that judicial review of an administrative determination is limited to the ground invoked by the agency If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.” *Matter of Scherbyn v. Wayne-Finger Lakes Bd. Of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991) (internal citation omitted).

109. Notwithstanding the laudable goal of increasing WAV access for those who need them in New York City, the TLC ran afoul of these proscriptions in passing the 25% Mandate by, among other things: (i) basing the 25% Mandate on a percentage of trips dispatched, an approach made without reasoned consideration or analysis that does not conform to the realities of the FHV industry and is not reasonably tailored to actually meet a stated and definable metric of success; (ii) arbitrarily selecting a trip mandate standard of 25% without any analysis, including any analysis of WAV demand, and which is at odds with evidence in the record; and (iii) failing to give reasonable consideration to the staggering economic impact the 25% Mandate will have on the FHV industry and FHV riders. Each of these infirmities independently renders the 25% Mandate arbitrary and capricious, and it should be vacated.

B. BASING THE 25% MANDATE ON A PERCENTAGE OF TRIPS PER FHV BASE DOES NOT CONFORM TO THE REALITIES OF THE FHV INDUSTRY AND WILL NOT MEET THE TLC’S STATED GOAL

110. To start, the City Charter requires the TLC to draft rules “narrowly . . . to achieve [their] stated purpose.” NYC Charter § 1043(d)(1). The 25% Mandate was not “narrowly draft[ed]” to achieve increased WAV service for people with wheelchairs because it requires WAVs to be dispatched without any concern for whether that WAV is actually used by a person with a wheelchair. The TLC’s approach—forcing WAVs into general circulation without

matching them to WAV demand—is based on an assumption that lacks a basis, is at odds with the record, and is fundamentally misguided.

111. In its Notice of Promulgation of the 25% Mandate, the TLC articulated the following illogical rationale for its rulemaking: “If each base is required to dispatch a certain percentage of its trips to vehicles that are wheelchair accessible, then these vehicles will be on the road and available to pick up passengers that use wheelchairs.” NYC Taxi & Limousine Commission, Notice of Promulgation of Rules, City Record, Official Journal of New York City (Dec. 20, 2017), at 7616 (attached to Shudofsky Aff. as Ex. O). The TLC then acted on the unproven, unjustified assumption that requiring a percentage of vehicles to be dispatched to WAVs regardless of need or preference will result in WAV availability for wheelchair users who actually need or prefer such vehicles.

112. That approach overlooks the way the FHV industry operates. Unlike medallion taxis, which pick up passengers mostly through ad hoc street-hails, FHV trips are pre-arranged. Accordingly, a wheelchair user seeking an accessible FHV ride can pre-arrange the trip and specifically request a WAV. Indeed, the entire point of pre-arranged service is that people can specifically request the type of service and vehicle they want, at the time and place they want. Basing a rule on the requirement that a percentage of *all* trips be dispatched to and completed by a WAV makes no sense in the context of the FHV business model.

113. Indeed, requiring that a percentage of all trips be provided in WAVs could entirely backfire by *limiting* accessibility for wheelchair users. *See* Ex. E to Shudofsky Aff. at Section II. That is because the 25% Mandate will require bases to dispatch a WAV in one out of every four trips regardless of need, potentially tying up WAVs that could be directed to service wheelchair users. *Id.*

114. In short, the TLC’s core assumption—increased supply means increased service—is wrong. The “key to real accessible service” is WAV accessibility for *wheelchair* users who actually need or may otherwise prefer them—not WAV accessibility for *any and all* users.

115. The problem here is that the TLC did not undertake any meaningful study or analysis before adopting the 25% Mandate, such as the effect that eliminating the “dispatch upon request” model would have on WAV service. Had the TLC actually examined the record, barren as it is, the TLC would have seen evidence repeatedly contradicting the TLC’s assumption behind the “percentage of all dispatched trips” model.

116. For example, an urban transportation policy expert testified at the September 28, 2017 public hearing that the proposed rule was problematic because “it doesn’t address how the vehicles, the drivers, and the dispatch companies join together to provide an effective service and overall system.” Ex. F to Shudofsky Aff. at 149:1-6.¹¹ Most pointedly, the 25% Mandate’s distribution of WAVs across nearly 900 FHV bases, instead of aggregating WAVs for dispatch, “means that when someone requests a trip, there’s likely to be an accessible vehicle nearby, but probably not working for the base that they just called.” *Id.* at 149:9-13. In other words, the WAV would *not* be available for the wheelchair user who actually needs or wants it.

117. Dr. McCrary’s report sheds further light on this “mismatch” between the needs of wheelchair users and what the TLC proposes. Specifically, he opines that the TLC is inefficiently targeting an “‘intermediate goal’ (i.e., the fraction of all FHV rides dispatched to WAVs) rather than an ‘end goal’ (e.g., the average wait time experienced by people using a

¹¹ The testimony was provided by Bruce Schaller, Principal of Schaller Consulting and an urban transportation policy expert who previously worked at the New York City Department of Transportation as First Deputy Commissioner for Planning and Sustainability and as First Deputy Commissioner for Traffic and Planning. See Schaller Consulting, Bruce Schaller, (last visited Apr. 9, 2018), <http://www.schallerconsult.com/bio.htm>.

wheelchair).” McCrary Report at 9-10/¶ 24. “Heat maps” of the City prepared by Dr. McCrary demonstrate that most people who use wheelchairs live far away from the highly trafficked routes in central Manhattan, suggesting that people who need WAVs will wait longer if WAVs are required to occupy themselves in those high-traffic areas in order to meet the dispatch mandate. Dr. McCrary found that the vast majority of people who use wheelchairs (over 80%) reside in neighborhoods outside of Manhattan. Those neighborhoods do not have a high enough frequency of fares to justify keeping FHV’s in relatively constant circulation there. Other potentially severe mismatches, such as “time of day” demand discrepancies, ride-sharing preferences, and cost sensitivities, apparently went entirely unanalyzed by the TLC.

118. The fundamental concern about whether the “percentage of all dispatched trips” model for the 25% Mandate could achieve the TLC’s stated goal was even echoed at the hearing by the 25% Mandate’s advocates. As discussed *supra* ¶¶ 70, 71, for example, Councilmember Lander testified that the 25% Mandate should be adjusted in order to ensure that the WAVs are being dispatched to those who actually need them, Ex. F to Shudofsky Aff. at 31:22–32:13, and a member of Disabled In Action of New York testified that the 25% Mandate “accomplishes rather little” because a percentage of all trips requirement would fail to ensure the availability of WAVs for wheelchair users throughout the city. *Id.* at 199:8–200:7.

119. Finally, the 25% Mandate is particularly irrational as applied to FHV bases that fulfill customer requests for specific vehicle models. As discussed *supra* ¶ 67, the President of the Limousine Association of New York and the Executive Vice President of a small luxury FHV base that has been in operation for 50 years testified as to how a rule requiring luxury limousine FHV bases to dispatch WAVs as a percentage of overall trips would destroy their very business model. FHV luxury limousine bases typically dispatch trips based on pre-arranged

requests for a specific vehicle type and model; the 25% Mandate, however, would require a luxury limousine base to dispatch WAVs to certain customers in direct conflict with the vehicle requests of those customers.

120. The TLC ignored all of the above-referenced concerns and passed the 25% Mandate without study or analysis of its underlying approach or of the practical effect the 25% Mandate would have on the FHV Industry and the industry's riders. That was improper, because an agency's actions must be based on reasoned decision-making with appropriate consideration of the relevant facts. *Matter of Trump on the Ocean, LLC*, 76 A.D.3d at 1083 (quoting *Pell*, 34 N.Y.2d at 231). Here, the TLC has not provided any reasonable justification for a "percentage of all dispatched trips" requirement. Instead, that requirement, adopted without analysis, is at odds with the realities of the FHV industry and is not reasonably related to delivering the enhanced WAV service to wheelchair users that is the TLC's stated goal. For that reason alone, the 25% Mandate is arbitrary and capricious and should be vacated. *See id.* at 1083, 1085 (affirming reversal of agency action under Article 78, where the trial court "conclude[ed] that the [agency]'s reasoning was based upon misapprehensions of fact and was contradicted by the evidence," on the basis that the agency determinations "disregarded the facts or [were] irrationally speculative").

C. THE RECORD DOES NOT IN ANY EVENT SUPPORT SELECTION OF A TRIP MANDATE OF 25 PERCENT

121. Regardless of whether it was rational to base the 25% Mandate on the number of trips dispatched by each FHV base (and it was not), there is no support for the TLC's selection of 25% as the applicable percentage for the 25% Mandate. *See Matter of Jewish Mem. Hosp. v. Whalen*, 47 N.Y.2d 331, 343 (1979) (setting aside an "unsupported determination" that 10% of compensation for interns and residents would be excluded from hospital cost reimbursement

calculations as “wholly arbitrary” where it was conceded that the agency had never “made a study on the basis of which to fix 10% as the proper percentage to be excluded”). In fact, even “the TLC’s requirement of *five percent* of rides in 2018 to be dispatched to WAVs . . . grossly and unnecessarily overstates the demand for WAV rides.” See McCrary Report at 23/¶ 59 (emphasis added).

122. It is not clear that the 25% number was even the TLC’s idea. The number was floated by advocates, who initially suggested a 50% figure, and the TLC latched onto it without any study or analysis, likely fueled by pure expediency to get something—anything—passed so that the TLC would be “protect[ed] [] from criticism of inaction.” Ex. A to Shudofsky Aff. at 4. That is an unfortunate abdication of agency rule-making authority. Such agency action should be annulled, as was the fate of another TLC rule recently challenged as arbitrary and capricious in *Ahmed v. City of New York*. In that case, the First Department upheld the Supreme Court’s determination that a six-cent surcharge imposed by the TLC ostensibly for a \$10 million fund to provide healthcare service and disability insurance to drivers was arbitrary and capricious. 129 A.D. 3d 435, 441 (1st Dep’t 2015). The Court found that the TLC rule imposing the surcharge was “the essence of arbitrariness” because “the record fail[ed] to show how the \$10 million figure was determined or how the money [was] to be spent.” *Id.*

123. The same result should hold here, where the record is silent as to how the 25% Mandate was determined by the TLC and the number is not supported by anything in the record. At no time before passing the 25% Mandate did the TLC analyze or study the level of demand for WAVs by riders who actually need or may prefer WAVs or the percentage of trips that would be necessary to meet that demand. It gathered no information. It created no models for analyzing or forecasting demand. It hired no experts to examine the issue. It rejected the FHV

industry's request to allow for additional time so that it could assist the TLC by providing analysis and studies on WAV demand. And that is how the TLC arrived at the situation at the September 2017 hearing where Chair Joshi was openly wondering "what is demand?" Ex. F to Shudofsky Aff. at 97:3-7. The TLC disregarded the most basic elements of its rulemaking function and failed to match a rational solution to an identified problem that Petitioners agree should be met head-on with collaborative, creative solutions.

124. Moreover, the TLC disregarded evidence before it which made clear that there was no correlation whatsoever between the 25% figure and any reasonable estimate of WAV demand.

125. According to the TLC's own calculations, the 25% Mandate will result in approximately 90,000 WAV trips a day, which in turn will require 10,000 WAVs. Ex. H to Shudofsky Aff. at 2. But not a single estimate of WAV demand provided to the TLC at the public hearing can account for such a massive number of WAVs (and the TLC itself, as discussed, did not attempt to determine what the level of demand is for WAVs). The testimony at the hearing placed the demand for WAV trips at orders of magnitude lower: between 764¹² and 8,000¹³ daily trips.

126. That the 25% requirement is wildly disproportionate to actual WAV demand is readily apparent when one compares the number of WAV trips that the TLC said would result from the 25% Mandate—*i.e.*, 90,000—with the total population of people who use wheelchair users in the City of New York, which is approximately 64,000.¹⁴

¹² Ex. F to Shudofsky Aff. at 67:1–68:2.

¹³ *Id.* at 151:12-15. According to Dr. McCrary, 8,000 daily trips would translate to approximately just 1.3% of all FHV trips in December 2017. McCrary Report at 22/¶ 56.

¹⁴ Dr. McCrary estimates the population of people who use wheelchairs in New York City to be approximately 64,000 people based on publicly available data accessible by the TLC, including 2010 U.S. Census data and the United States Census Bureau's American Community Survey. See McCrary Report at 6/¶ 14.

127. The 64,000 number includes people who use folding wheelchairs, who may not require or may not even prefer WAVs. Regardless, the TLC’s own calculation translates to approximately 1.5 WAV trips per day for *every* wheelchair user in New York City. By comparison, the total population of the City is 8.5 million people,¹⁵ and FHV trips in NYC are estimated to number between approximately 360,000 and 400,000 each day. *See* Ex. H to Shudofsky Aff. at 2; Ex. O to Shudofsky Aff. at 7616. In other words, the FHV industry supplies approximately 0.04 FHV trips per day for each New Yorker, while the TLC’s estimated use of WAVs by wheelchair users is *35 times higher*, at 1.41 trips per day. There is no basis in the record to assume that the population of people using wheelchairs would use FHVs so dramatically out of proportion to the rest of the City’s population. That conclusion is echoed by Dr. McCrary, who opined that it was “very unlikely that the demand for WAV FHVs from people using wheelchairs would be so much higher as to require the quota specified in the 25% Mandate.” McCrary Report at 19-20/¶ 52.

128. Even relying on comparisons to the demand for Access-A-Ride, the MTA administered on-demand paratransit service for New York City, the 25% Mandate is highly disproportionate to the level of projected WAV demand. Specifically, Access-A-Ride ridership numbers approximately 18,000 trips a day, with some predicting that number will double in five years (to 36,000),¹⁶ still far below the 90,000 daily WAV trips required by the 25% Mandate.¹⁷

¹⁵ MOPD, New York City People with Disabilities Statistics Updated 2016, (last visited Apr. 9, 2018), <http://www1.nyc.gov/assets/mopd/downloads/pdf/selected-characteristics-disabled-population.pdf>, at slide 4.

¹⁶ Ex. F to Shudofsky Aff. at 139:25-140:3.

¹⁷ Comparisons to the demand for other accessibility services, such as Access-A-Ride, are also imperfect because any service provided by WAVs will not be replacing the services already available to wheelchair users. Accordingly, an MTA projection that in five years there will be 36,000 daily Access-A-Ride trips does not translate to demand for 36,000 daily WAV trips. The demand for such trips will be split between the various services available to wheelchair users, including non-WAVs provided by the FHV industry to folding wheelchair users and WAVs provided by medallion taxis. Further, Dr. McCrary notes that in 2015 Access-A-Ride provided approximately 6.5 million rides to 144,000 New Yorkers. This total, when adjusted for the estimated number of New Yorkers using wheelchairs (approximately 64,000 people), implies an average quarterly number of Access-A-

129. Comparisons to the TLC’s Accessible Dispatch program, which allows wheelchair users to request a WAV taxi, similarly illustrates the arbitrary and excessive nature of the 25% Mandate. In 2016, the Accessible Dispatch program, operating only in Manhattan, completed 63,500 trips—or 5,300 trips per month on average. McCrary Report at 22-23/¶ 58. In order to justify even the 5% level the rule imposes beginning July 1, 2018, the number of wheelchair users requesting WAV trips would need to increase nearly 200-fold. And to justify the 25% Mandate this number would need to increase nearly 1,000-fold.

130. At the very least, the TLC should have realized that it did not understand WAV demand and that it therefore needed to study the question before passing a rule designed to meet that demand. *Cf.* NYC Charter § 1043(d)(1) (drafting process of the rule should include “analysis sufficient to minimize compliance costs for the discrete regulated community or communities, to the extent one exists, consistent with achieving the stated purpose of the rule”). The TLC failed to do so.

131. Finally, the concession by Chair Joshi that FHV bases are not going to be able to meet all of the requirements mandated by the rule is, alone, a sufficient basis to vacate it. Specifically, at the September 28, 2017 public hearing Chair Joshi conceded that conversations with WAV manufacturers/converters established that WAVs would only be available in quantities that would allow FHV bases to meet “some,” but not all, of the mandates set forth by the TLC. *Ex. F to Shudofsky Aff.* at 99:12 – 100:4. There cannot be any rational basis for a mandate which, even in part, cannot be met.¹⁸ *See Matter of Bd. Of Educ. City School Dist. City*

Rides for wheelchair users of approximately 726,000 (only 1.3 percent of the Q4 2017 FHV trip number). McCrary Report at 22/¶ 57.

¹⁸ For the same reason, the requirement under the 25% Mandate to offer the same vehicle types offered to non-wheelchair users to wheelchair users, see 59B-17(c)(4)(ii)(F), is unreasonable. Chair Joshi acknowledged that there are “only certain kinds of cars that can be converted” to WAVs, *Ex. F to Shudofsky Aff.* at 190:1-2, an understanding shared by Dr. McCrary, who notes that “[a] WAV needs to be tall and large enough to accommodate

of *Mount Vernon v. Allen*, 32 A.D.2d 985, 985 (3d Dep’t 1969) (holding that a rule requiring the implementation of a plan that is “impossible to obey is clearly pure arbitrariness”); *see also* *Matter of Bd. of Educ. City School Dist. of Newburgh v. Nyquist*, 69 A.D.2d 182, 190 (3d Dep’t 1979) (a “financially disruptive plan would be pure arbitrariness”).

132. For all of these reasons, among others, the 25% of trips requirement of the 25% Mandate was the product of arbitrary and capricious rulemaking. It is unsupported by the record, it conflicts with evidence in the record, and it is clear that the percentage was selected arbitrarily and in haste to serve the expedient purpose of simply getting something passed to avoid criticism for inaction. It was incumbent upon the agency to conduct its diligence—*before* passage of the rule—to learn the facts, analyze the issues, and reasonably consider the evidence presented so as to exercise its rulemaking authority reasonably and appropriately.

133. The TLC unfortunately did not function here consistent with its responsibility, and the 25% Mandate should, therefore, be annulled. *See, e.g., Ahmed*, 129 A.D. 3d at 441 (holding TLC rule invalid because there was no basis in the record for a \$10 million funding figure); *Axelrod*, 78 N.Y.2d at 166 (holding that an agency action may be “declared null and void upon a compelling showing that the calculations from which it is derived are unreasonable”) (internal citation and quotation marks omitted); *Metropolitan Taxicab Bd. of Trade v. N.Y.C Taxi & Limousine Comm’n*, 18 N.Y.3d 329, 333 (2011) (striking down TLC rule prohibiting taxicab lessors from collecting sales tax from taxicab lessees, in part because the TLC did “not present[] any justification with any support in the record for its decision”); *Trump on Ocean, LLC*, 76 A.D.3d at 1083 (affirming reversal of agency action where trial court “conclude[ed] that the

both a wheelchair and have the equipment necessary to bring a wheelchair into . . . the vehicle. In practical terms, that implies that certain vans and minivans can be converted, but sedans and SUVs generally cannot.” McCrary Report at 11/¶ 29. As sedans and SUVs, two vehicle types offered to non-wheelchair users, cannot generally be offered to wheelchair users, the vehicle equivalency requirement imposed by the 25% Mandate is infeasible and thus arbitrary and capricious.

[agency]’s reasoning was based upon misapprehensions of fact and was contradicted by the evidence,” on the basis that the agency determinations “disregarded the facts or [were] irrationally speculative”); *see also Application of Gorham*, 86 A.D.2d 505, 506 (1st Dep’t 1982) (Fein, J., concurring) (overturning agency action on basis that agency respondents “[chose] to ignore the evidence and merely rely upon their general authority to administer” the programs it oversaw); *Thomas v. Blum*, 88 A.D.2d 601, 602 (2d Dep’t 1982) (affirming decision to overturn agency’s denial of public assistance due in part to there being “no evidence that the agency ever investigated or offered to investigate” petitioner’s claims).

D. THE TLC SHOULD HAVE GIVEN REASONABLE CONSIDERATION TO THE DAMAGING EFFECT OF THE MANDATE ON THE FHV INDUSTRY AND UPON FHV RIDERS

134. In its misguided attempt to improve WAV service for New Yorkers who use wheelchairs through the 25% Mandate, the TLC also embarked on a path that will harm Petitioners economically. Indeed, the agency record in this case is filled with testimony from FHV base owners and FHV drivers all imploring the TLC to reconsider the proposal in light of the damaging economic consequences to the FHV industry. According to Dr. McCrary’s estimates, compliance will cost potentially over \$1 billion, if even feasible at all. McCrary Report at 3, Ex. 3/¶ 5(b). The industry’s pleas were disregarded by the TLC, which vaguely promised to look into the 25% Mandate’s effect on FHV bases and drivers *after* it passed. Ex. G to Shudofsky Aff. at 8:3-13. The TLC also ignored that the 25% Mandate will likely require significant price increases across the board for *all* FHV passengers, including those with disabilities. An agency acting reasonably would have assessed and further explored these issues. *See* N.Y.C. Charter § 1043(d) (requiring City agencies to “engage in a process to the extent practicable and appropriate that includes analysis sufficient to minimize the compliance costs for the regulated community”). Indeed, the Court of Appeals in *New York Statewide Coalition of*

Hispanic Chambers of Commerce v. New York City Dep't of Health & Mental Hygiene, 23 N.Y.3d 681 (2014), noted that a “cost-benefit analysis is the essence of a reasonable regulation” and that “if an agency adopted a particular rule without first considering whether its benefits justify its societal costs, it would be acting irrationally.” *Id.* at 697.

135. The TLC’s irrational failure to consider or analyze the economic impact of the 25% Mandate on the FHV industry is apparent. That impact will be widely experienced across the industry, including by the smaller and more vulnerable “mom & pop” bases and by FHV drivers, who may find the costs of the 25% Mandate too steep to sustain their businesses going forward. For example, the owner of a small FHV base in Queens that has been in operation for over 100 years testified at the September hearing that the 25% Mandate could force her to give 25% of her business away to a base with the capacity to dispatch WAVs. Ex. F to Shudofsky Aff. at 191:17-24. Doing so, she feared, would exacerbate the difficulties she already faces in paying her bills. *Id.* Similarly, the Executive Vice President of a small luxury FHV base testified that the 25% Mandate could “be the nail in our coffin,” causing 250 people currently employed at the base to lose their jobs. *Id.* at 211:12–211:19.

136. Various FHV drivers, many of whom are self-employed and own their own vehicle, also testified at the public hearing, begging the TLC not to enact the 25% Mandate because of the large additional costs it will impose on them. But the 25% Mandate does absolutely nothing to defray the cost of acquiring WAVs, which Chair Joshi conceded could range from \$8,000 to \$14,000 on top of the cost of the vehicle (typically a minivan) itself. *Id.* at 188:25-190:2. Others at the public hearing testified that the cost of acquiring a WAV could add \$15,000 to \$25,000 on top of the vehicle price. *Id.* at 122:21-25. As a result, commented one FHV driver, the 25% Mandate will “sacrifice thousands of people’s livelihoods.” *Id.* at 120:16-

21. That outcome would have a devastating effect not only on the self-employed FHV drivers, but also on Petitioners, whose business models are based on maintaining and on-boarding independent self-employed drivers.

137. More broadly, the FHV industry as a whole will suffer. Written testimony from the FHV industry at the hearing projected that closer to 40,000 additional WAVs would be needed to meet the 25% requirement of the rule, with a colossally large cost to the industry, estimated to be in the hundreds of millions of dollars per year. Ex. E to Shudofsky Aff. at Section III. Indeed, Dr. McCrary estimates that compliance could cost the FHV industry more than \$1.2 billion in the first five years alone. McCrary Report at 3, Ex. 3/¶ 5. And those estimates are conservative, because they do not take into account potential exit of at least some WAV-compatible vehicles from the fleet, *id.* at 14/¶ 36, nor the increased expenditures for gas for rental WAVs as compared to the existing fleet, *id.* at 15/¶ 40, and also assume that the additional inconvenience of having to rent or hack up a vehicle would not result in FHV companies needing to provide additional incentives or compensation to drivers, *id.* at 17/¶ 46.

138. FHV bases such as Petitioners are in particular peril under the 25% Mandate, because their business model does not include controlling the types of vehicles that drivers operate. In most cases (the notable exception being luxury limousine companies), FHV drivers choose their own vehicles. And many drivers who are dispatched through the apps utilized by Petitioners' customers (*i.e.*, the Lyft, Uber, and Via apps) drive their own personal-use vehicles. In order to onboard the magnitude of WAVs necessary to meet the 25% Mandate, Petitioners would be forced to fundamentally restructure this aspect of their business model.

139. The FHV industry testimony at the hearing also addressed the dire economic consequences for FHV bases that cannot be upgraded to meet the requirements of the rule. Ex. E

to Shudofsky Aff. at Section III. The number of additional WAVs that would be necessary to meet the rule’s requirements is simply not feasible; there cannot be a rational basis for a rule that cannot feasibly be met. Further, FHV base inability to meet the 25% Mandate will result in monetary penalties imposed by the TLC in addition to the possible suspension and/or revocation of base licenses. 35 R.C.N.Y. §§ 59B-17(c)(1), (4).

140. Finally, the TLC did nothing to assess the impact that the 25% Mandate could have on FHV riders and the prices they pay. As set forth in Dr. McCrary’s analysis, the increased costs associated with the WAVs necessary to meet the 25% Mandate could lead to an increase in price per ride for all FHV customers, including those with disabilities, of \$2.00 or more by 2023. McCrary Report at 3, 18/¶¶ 5(c), 48.

141. The TLC ignored all of these issues. Its choice to disregard the contextual circumstances of its rulemaking—namely, the impact of the rule on the FHV industry and FHV riders, including its most economically vulnerable members—is grounds for that rulemaking to be vacated. *See New York Statewide Coalition of Hispanic Chambers of Commerce*, 23 N.Y.3d at 697 (noting that an agency acts irrationally when it adopts a rule “without first considering whether its benefits justify its societal costs”); *see also Axelrod*, 78 N.Y.2d at 166 (explaining that rules are not judicially reviewed “in a vacuum,” but must be “scrutinized for genuine reasonableness and rationality in the specific context”).

FIRST CAUSE OF ACTION
(For Judgment Pursuant to CPLR §§ 7803(3) & 7806)

142. Petitioners repeat and reallege the allegations made in paragraphs 1 through 141 above as if fully set forth in this paragraph.

143. Basing the 25% Mandate on a percentage of trips dispatched, an approach made without reasoned consideration or analysis, is completely divorced from the realities of the FHV industry and is ill-suited to meet the TLC's stated goal for the rule.

144. By imposing the 25% Mandate on FHV bases, which in most cases have no ability to control the vehicles that FHV drivers use, and which often respond to riders' specific requests for vehicle types, TLC made no account for the way the FHV industry actually operates: by prearranging trips with specific vehicles, usually operated by independent contractors.

145. In any case, the 25% Mandate will not result in improved service for wheelchair users. The 25% Mandate demands the deployment of tens of thousands of WAVs around the city, but provides no mechanism to ensure that WAVs are matched to those who need or prefer them. Instead, these WAVs would be available for use by everyone on the same terms. As a result, wheelchair users may not see improved WAV service.

146. For at least these reasons, the 25% Mandate was enacted in an arbitrary and capricious manner and is neither rational nor reasonable in this context. Petitioners are entitled to a judgment under CPLR § 7806 vacating and annulling it.

SECOND CAUSE OF ACTION
(For Judgment Pursuant to CPLR §§ 7803(3) & 7806)

147. Petitioners repeat and reallege the allegations made in paragraphs 1 through 141 above as if fully set forth in this paragraph.

148. The record does not support a trip mandate of 25%, a standard that was arbitrarily selected in haste and without any analysis, including any analysis of WAV demand, and which is at odds with evidence in the record.

149. Rather than fulfil its statutory mandate and carefully consider the facts surrounding wheelchair users' needs and the realities of the FHV industry, the TLC reflexively adopted a rule not grounded in the record for the purpose of avoiding criticism in the short term.

150. In doing so, the TLC admitted the 25% mandate was not enacted based on any analysis of demand—indeed, it publicly stated it did not know the demand for WAVs—and made no apparent effort to analyze or gather information needed for a proper consideration of the issue.

151. The TLC also ignored the evidence that was in the record. Had it considered this evidence, which describes WAV demand nowhere near approaching the level required by the 25% Mandate, no rational agency would have adopted the 25% Mandate or anything like it.

152. Further, the TLC ignored the possibility—which the TLC itself acknowledged—that WAVs might not even be available in the quantities and on the timeline that would be required for compliance with the 25% Mandate.

153. For at least these reasons, the 25% Mandate was enacted in an arbitrary and capricious manner and is neither rational nor reasonable in this context. Petitioners are entitled to a judgment under CPLR § 7806 vacating and annulling it.

THIRD CAUSE OF ACTION
(For Judgment Pursuant to CPLR §§ 7803(3) & 7806)

154. Petitioners repeat and reallege the allegations made in paragraphs 1 through 141 above as if fully set forth in this paragraph.

155. An agency acting reasonably would have given consideration to the damaging economic impact the 25% Mandate will have on the FHV Industry and FHV passengers, which the TLC did not do.

156. For example, the TLC failed to consider that the 25% Mandate will require FHV bases, which in most cases have no ability to control the vehicles that FHV drivers use and are subject to riders' specific requests for vehicle types, to fundamentally alter the way they do business at prohibitive costs. Compliance with the 25% Mandate would decimate the FHV bases' existing business model.

157. The TLC also completely failed to consider the economics of converting and maintaining such a large number of WAVs, which could reach into the hundreds of millions or billions of dollars and the resulting negative effect on prices and availability for wheelchair users and non-users alike.

158. For at least these reasons, the 25% Mandate was enacted in an arbitrary and capricious manner and is neither rational nor reasonable in this context. Petitioners are entitled to a judgment under CPLR § 7806 vacating and annulling it.

PRIOR APPLICATION

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

TRIAL DEMAND

160. 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 CPLR § 7806 vacating and annulling the 25% Mandate, codified at 35 R.C.N.Y. §§ 59A-11(e), 59B-17(c)-(d), in its entirety;
- B. Holding an evidentiary hearing to resolve any material factual disputes;
- C. Ordering Respondents to pay Petitioners their costs, fees, and disbursements incurred in connection with this action pursuant to CPLR § 8101; and

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

Dated: April 12, 2018
New York, New York

Respectfully submitted,

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Attorneys for Petitioner Flatiron Transit, LLC

VERIFICATION

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

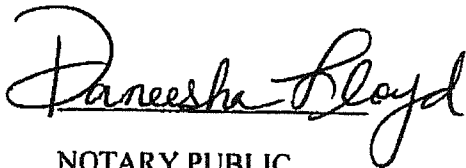
Vipul M. Patel, being duly sworn, states that he is the Vice President of Tri-City, LLC and Endor Car and Driver, LLC, Petitioners in this proceeding, and has read the foregoing Petition and knows the contents thereof; that the same is true to his own knowledge, except as to matters therein that are stated upon information and belief and matters wholly within the knowledge of co-Petitioners; and as to those matters, he believes them to be true.



Vipul M. Patel
*Vice President, Tri-City, LLC and Endor
Car and Driver, LLC*

Sworn to before me this

12 day of April, 2018



NOTARY PUBLIC

DANEESHA LLOYD
Notary Public, State of New York
No. 01LL6357879
Qualified in Kings County
Commission Expires April 24, 2021

VERIFICATION

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

Daniel Wu, being duly sworn, states that he is a manager of Zehn-NY, LLC; Zwei-NY, LLC; and Abatar, LLC, Petitioners in this proceeding, and has read the foregoing Petition and knows the contents thereof; that the same is true to his own knowledge, except as to matters therein that are stated upon information and belief and matters wholly within the knowledge of co-Petitioners; and as to those matters, he believes them to be true.



Daniel Wu

Sworn to before me this

12th day of April, 2018

KATHERINE MASON
NOTARY PUBLIC-STATE OF NEW YORK
NO 01MA6335989
QUALIFIED IN NEW YORK COUNTY
MY COMMISSION EXPIRES 01 25-2020



NOTARY PUBLIC

VERIFICATION

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

Erin Abrams, being duly sworn, states that she is a Manager of Flatiron Transit LLC, a Petitioner in this proceeding, and has read the foregoing Petition and knows the contents thereof; that the same is true to her own knowledge, except as to matters therein that are stated upon information and belief and matters wholly within the knowledge of co-Petitioners; and as to those matters, she believes them to be true.



Erin Abrams
Manager, Flatiron Transit LLC

Sworn to before me this

12th day of April, 2018



NOTARY PUBLIC

CECILE ABRAMOWICZ
Notary Public, State of New York
Reg. No. 02AB6358980
Qualified in Kings County
Commission Expires May 22, 2021