

EXHIBIT B

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

-----X
UBER USA, LLC,

Petitioners,

-against-

**Index No.
160451/2022**

**NEW YORK CITY TAXI AND LIMOUSINE
COMMISSION; DAVID DO,** in his official capacity as
Chair and Commissioner of the New York City Taxi and
Limousine Commission; **THE CITY OF NEW YORK.,**

Respondents.
-----X

**BRIEF OF THE NEW YORK TAXI WORKERS ALLIANCE
AS AMICUS CURIAE IN SUPPORT OF THE NEW YORK
CITY TAXI AND LIMOUSINE COMMISSION; DAVID DO;
THE CITY OF NEW YORK**

Zubin Soleimany, Esq.
Allison Langley, Esq.
New York Taxi Workers Alliance
31-10 37th Ave. Ste. 300
Long Island City, NY 11101
(718) 706-9892
zsoleimany@nytwa.org
alangley@nytwa.org
Attorneys for Amicus Curiae

December 23, 2022

TABLE OF CONTENTS

	<u>Page</u>
INTEREST OF AMICUS CURIAE.....	1
PRELIMINARY STATEMENT	2
BACKGROUND.....	5
ARGUMENT	10
I. THE TLC’S DECEMBER 2022 RULEMAKING IS SUPPORTED BY A RATIONAL BASIS IN THE RECORD AND IS NEEDED TO REIMBURSE DRIVERS FOR THE FULL COSTS OF THE EXPENSES INCURRED IN DRIVING FOR UBER AND OTHER FHV SERVICES.....	10
A. Using The Transportation Component To Adjust The Per-Mile Rate Is A Rational Exercise Of Agency Power.....	11
1. N.Y.C. Admin. Code 19-549 Mandates The TLC to Consider Driver Expenses And Amend the Rules As Necessary.....	11
2. TLC’s Consultation of Transportation Costs Component of the CPI is Supported by A Rational Basis in The Record and Comports With TLC’s Pattern of Specifically Assessing Vehicle Costs When Setting Baseline Rates.....	12
B. The TLC’s Proposed Driver Pay Rules Satisfy the City Administrative Procedure Act, As The Statement Of Basis And Purpose Cite To The Transportation Component, And Its Use Is Supported By The Record.....	14
C. Given The Rational Basis For The Initial Rate Adjustments And The Balance Of The Equities, Preliminary Relief Would Be Particularly Inappropriate.....	17

II. ALTERNATIVELY, IF THE COURT FINDS SOME PORTIONS OF THE PROPOSED RULE TO BE INVALID, BUT NOT THE INITIAL RATE ADJUSTMENT, SEVERANCE OF ANY INVALID PROVISIONS WOULD BE APPROPRIATE.....20

CONCLUSION.....23

AUTHORITIES

<u>CASES:</u>	<u>Page:</u>
<i>Am. Fuel & Petrochemical Mfrs. v. EPA</i> , 3 F.4th 373 (D.C. Cir. 2021)	21
<i>Carlson v. Postal Regul. Comm'n</i> , 938 F.3d 337 (D.C. Cir. 2019)	20, 21
<i>Charles A. Field Delivery Serv. Inc.</i> , 66 N.Y. 2d 516 (1985)	16
<i>Doe v. Axelrod</i> , 73 N.Y.2d 748 (1988)	17
<i>People ex rel. Alpha Portland Cement Co. v. Knapp</i> , 230 N.Y. 48 (1920)	21
<i>People v. Viviani</i> , 36 N.Y.3d 564 (2021)	21
<i>Price v. N.Y.C. Bd. of Educ.</i> , 51 A.D.3d 277 (1st Dep't 2008) <i>leave denied</i> , 11 N.Y.3d 702 (2008)	15, 16
<i>Metro. Taxicab Bd. of Trade v. N.Y.C. Taxi & Limousine Comm'n</i> , 18 N.Y.3d 329 (2011)	12
<i>Seitzman v. Hudson River Assocs.</i> , 126 A.D.2d 211 (1st Dept. 1987)	18
<i>Siwek v. Mahoney</i> , 39 N.Y.2d 159 (1976)	15
<i>St. Vendor Project v. City of N.Y.</i> , 811 N.Y.S.2d 555 (Sup. Ct. N.Y. Co. 2005)	16
<i>Teamquest v. Unisys Corp.</i> , 2000 WL 34031793 (N.D. Iowa April 20, 2000)	18
<i>Tri-City, LLC v. New York City Taxi and Limousine Commission</i> , 189 A.D. 3d 652 (1st Dep't 2020)	4, 11, 15, 16
<i>Trump on the Ocean, LLC v. Ash</i> , 81 A.D.3d 713 (2d Dep't 2011)	17, 18
<i>Zehn-NY LLC v. New York City Taxi and Limousine Commission</i> , 2019 N.Y. Misc. LEXIS 6789, 2019 WL 7067072 (Sup. Ct. N.Y. Co. Dec. 23, 2019)	20

STATUTES/LOCAL LAWS:

CPLR § 6301.....	17
N.Y.C. Admin. Code § 19-549	<i>passim</i>
N.Y. City Charter §1041(5)	20

N.Y. City Charter § 1043(d)(1)(iv) 15-16

RULES:

§ 59D-22(a)9, 10, 20, 21, 22

GOVERNMENTAL AUTHORITIES:

Components of Consumer Price Index for Transportation (website) available at
<https://www.bts.gov/components-consumer-price-index-transportation> (Date Accessed:
 Dec. 23, 2022).....13

Help and Tutorials: CPI-Urban Wage Earners and Clerical Workers (Current Series)
 (website) available at
[https://www.bls.gov/help/one_screen/cw.htm#:~:text=The%20Consumer%20Price%20Ind
 ex%20for,of%20consumer%20goods%20and%20services](https://www.bls.gov/help/one_screen/cw.htm#:~:text=The%20Consumer%20Price%20Index%20for,of%20consumer%20goods%20and%20services)13

MISCELLANEOUS:

Liza Winship, *New fuel surcharge to help drivers and couriers* (website) (Mar. 11, 2022),
 available at <https://www.uber.com/newsroom/new-fuel-surcharge/> (Date accessed: Dec.
 21, 2022).3, 7

INTEREST OF AMICUS CURIAE

The New York Taxi Workers Alliance (“NYTWA”) submits this *amicus curiae* brief in support of Respondents’ promulgation and enforcement of New York City Taxi and Limousine Commission (“TLC”) rules adjusting High Volume For-Hire Vehicle (“HVFHV”) driver payment rates to account for recent increases in fuel and vehicle operation expenses, that outpace the general rate of inflation. The NYTWA is a membership-based, non-profit organization which was founded in 1998 with the express purpose of seeking to improve the lives and working conditions of professional taxi and for-hire vehicle (“FHV”) drivers. While, prior to the advent of HVFHV services such as Uber, the NYTWA had previously served mostly yellow-cab drivers, with the recent growth of app-based FHV services, drivers for app-based FHV services now make up more than half of the NYTWA’s 25,0000 members.

The NYTWA has been involved in consistent efforts to expand legal and regulatory protections for professional drivers working in all sectors of the taxi and FHV industries, and to seek legislative and regulatory change that promotes driving for-hire as sustainable, living-wage work. The NYTWA advocates for its Uber driver members, both through seeking improved regulatory conditions around driver income standards and through supporting litigation. For example, the NYTWA has litigated, and contributed staff resources to litigation ensuring that Uber drivers’ unemployment insurance claims would be processed by New York State in accordance with federal law,¹ and ultimately vindicating drivers’ rights as employees to receive unemployment benefits,² settling their status as employees under the New York Labor Law, as well as to cases

¹ See *Islam v. Cuomo*, 475 F. Supp. 3d 144 (E.D.N.Y. 2020) (granting Plaintiffs’ motion for a preliminary injunction requiring timely processing of app-based FHV drivers’ unemployment claims, and granting NYTWA organizational standing on the basis of its advocacy for its app-based FHV driver members.)

² In the *Matter of Uber Technologies, Inc.*, N.Y.S. Unemployment Insurance Appeal Board Nos. 596722-596727 (July 12, 2018); *Matter of Lowry (Uber Tech., Inc.--Commissioner of Labor)*, 189 A.D.3d 1863, leave denied 37 N.Y. 3d 1045 (2021).

seeking restitution from Uber for wage theft and breaches of contract involving unlawful deductions from driver earnings.³

The NYTWA strongly supported the City Council's passage of Local Law 150 of 2018, which mandated the adoption of minimum payment rules for app-based drivers. Local Law 150, and the rules promulgated pursuant to it, were crucial lifelines for drivers who, after initial incentives and promises of high pay, found their rates of take-home pay falling, with 85% earning below the minimum wage. As the initial TLC driver pay rules' inclusion of annual CPI indexing sought to ensure that rates would not lose value over time, the NYTWA strongly supports the TLC rule amendments that aim to preserve the inflation-adjusted value of the initial rates, by accounting for the significant divergence between increases in vehicle operating costs and the general consumer rate of inflation. Accordingly, the NYTWA supports the Respondents' defense of TLC's FHV driver pay rate increase rules.

PRELIMINARY STATEMENT

Uber operates the City's largest TLC-licensed car service, yet owns no vehicles, and burns no fuel to provide this service. In recent years, vehicle operating expenses in the New York area have skyrocketed, outpacing historically high increases in the general consumer rate of inflation by more than 250%,⁴ while driver pay rates increased only minimally. Drivers alone have borne these expenses. The TLC's proposed rule now seeks to account for this divergence, and prevent driver pay rates from declining, in real dollars, in light of these increased expenses. While Uber

³ See, e.g., *Aleksanian et al. v. Uber Technologies*, 19-cv-10308-ALC (S.D.N.Y.), appeal docketed 22-19 (2d Cir.)

⁴ Compare Bureau of Labor Statistics, CPI for Urban Wage Earners and Clerical Workers (CPI-W) for the NY-NJ Metro Region, attached as Ex. C to the annexed affirmation of Zubin Soleimany (hereinafter "Soleimany Aff.") (showing an 8.5% increase in CPI-W from the second half of 2020 to the first half of 2022, using half-year averages), and Bureau of Labor Statistics, CPI for All Urban Consumers (CPI-U), Transportation Component, NY-NJ Metro Region (showing a 23.3% increase in CPI-U's transportation component over the same time period), attached as Ex. D to the Soleimany Aff.

posits that raising its prices or else absorbing higher business costs would irreparably harm its business, drivers have had no choice in the matter: with expenses skyrocketing and pay rates failing to keep up, they have already taken the loss. Uber's drivers have spent the whole year paying higher expenses, without an increase that adequately accounts for increased fuel and vehicle costs. By its motion and petition, Uber seeks to ensure that it is the drivers— and only the drivers— who must continue to shoulder increased costs.

The unprecedented spike in vehicle operating costs warranted a mid-year increase. Other agencies and even Uber itself acknowledged this. For the first time since 2011, the IRS instituted a mid-year increase to its mileage reimbursement rate, which is typically only adjusted annually. *IRS increases mileage rate for remainder of 2022* (website), available at <https://www.irs.gov/newsroom/irs-increases-mileage-rate-for-remainder-of-2022> (June 9, 2022) (Date accessed: Dec. 21, 2022), attached as Ex. E to the Soleimany Aff. Uber itself instituted a mid-year “fuel surcharge” in every U.S. market outside of New York City. *See* Liza Winship, *New fuel surcharge to help drivers and couriers* (website) (Mar. 11, 2022), available at <https://www.uber.com/newsroom/new-fuel-surcharge/> (Date accessed: Dec. 21, 2022).

The proposed rules' increases to the base rates of per-mile and per-minute pay that Uber challenges do no more than what City law requires the TLC to do: consider drivers' expenses when setting rates of minimum driver pay. *See* N.Y.C. Admin. Code § 19-549(b). Upon the initial promulgation of the driver pay rules, driver expenses were studied and rates were set, aiming to achieve full compensation for driver expenses, plus a minimum take-home pay standard. Where changes in the cost of vehicle expenses have so far outpaced the general rate of inflation such that applying a general household measure of the CPI to rate adjustments cannot produce real reimbursements for drivers, it is the TLC's duty under § 19-549 to alter the rule so that it achieves

this reimbursement, in line with the initial post-study rates, to which Uber had no objection. *See* Petition, at paras. 33-35. The rate adjustment scheduled for December 19, 2022 that Uber seeks to enjoin does nothing more than adjust the initial pay rates to the realities of consumer pricing, and ensure that its mileage reimbursement still covers drivers' expenses, instead of leaving them paying for expenses out of the portion of their earnings that should be reserved for take-home pay. Should the adjustment be enjoined, the result will be this: after putting down thousands of dollars annually for the expenses required to work for Uber, drivers will be left with sub-minimum wage pay.

TLC's use of the CPI's transportation costs component to prevent this outcome is undoubtedly a rational exercise of agency power; Uber cannot seriously argue that applying the increase in the costs of vehicles, fuel, and insurance, as measured by the federal Bureau of Labor Statistics, to the rules' per-mileage rate presents an irrational choice. The administrative record is replete with evidence supporting a more focused measure of accounting for vehicle expense increases, and noting the extent to which they outpace more general measures of inflation. *See, e.g.*, the testimony of Professor James Parrott, the architect of the initial TLC driver pay formula, in support of the use of the transportation component index. Written Comments of Prof. James Parrott on the Proposed Rule, at 2-3 attached as Ex. F to the Soleimany Aff. As in *Tri-City, LLC v. New York City Taxi and Limousine Commission*, where the First Department upheld the inaugural version of the driver pay rules, it is this record evidence, and not the specific invocation of policy in a notice of promulgation, that provides the rational basis for the rule. 189 A.D. 3d 652, at 652-53 (1st Dep't 2020).

TLC's 2023 and 2024 rate adjustments fall in line with TLC's prior practice in its inaugural version of the rules: initial reimbursement rates were set based on a more specific analysis of transportation costs, with future increases pegged to the general CPI-W.

If, however, the Court decides to annul any of these further rate adjustments, which it should not, severance of any non-offending portions is appropriate here, as Uber has noted. This preserves the initial rate increase to provide drivers immediate and essential relief from rising prices. Such an approach is consistent with mandates of Local Law 150 and the TLC's intent: it would allow drivers' pay to not lose value, through increases in line with universally accepted federal measures of transportation costs, while preserving the original structure of the rules, to which Uber had no objections.

BACKGROUND

The New York City Council Passes Local Law 150

After more than five years of Uber and other app-based for-hire vehicle services operating with no regulation of either fares or driver payments, the New York City Council passed Local Law 150 of 2018, mandating that the TLC establish a rule setting minimum payment amounts for drivers of high-volume FHV services such as Uber and Lyft. With 85% of drivers earning below the equivalent of the New York minimum wage, the council specifically noted the burden that vehicle expenses placed on drivers. *See* New York City Council, FHV Committee Report (Aug. 8, 2018), attached as Ex. G to the Soleimany Aff., at 18; 9), who unlike most low-wage workers start each workweek at a negative, having to recoup hundreds of dollars in weekly costs from vehicle payments, insurance, and fuel costs before they can even begin earning their take-home pay.

Accordingly, Local Law 150, codified at N.Y.C. Ad. Code § 19-549, mandated that, in setting such rates the TLC must consider “the expenses of operation to the driver” and “the

adequacy of for-hire vehicle driver income in relation to for-hire vehicle driver expenses.” N.Y.C. Admin. Code § 19-549(b).

After Commissioning the Parrott & Reich Report, the TLC Establishes a Minimum Rate of Driver Pay in Line with Its Policy Recommendations

Pursuant to this mandate, the TLC proposed its initial version of its FHV driver pay rules in September of 2018. Basing the methodology of the rules largely on a report the TLC commissioned from the economists James Parrott and Michael Reich, the rules set forth driver payments broken down into two portions: a per-mile component, that would pay drivers enough to cover operating costs per mile driven, thus bringing drivers to a “break-even” point, and a per-minute component, that could lead to hourly pay for drivers of \$17.22/ hour.

Parrott and Reich’s 85-page report contains one short paragraph on the annual indexing of the pay rule components to inflation. James A. Parrott and Michael Reich, *An Earnings Standard for New York City’s App-Based Drivers: Economic Analysis and Policy Assessment* (July 2018), at 37, attached as Ex. H to the Soleimany Aff. The report straightforwardly notes that the purpose of annually indexing the components of the pay rules to inflation is to “ensure that the purchasing power of the minimum pay standard is maintained over time.” *Id.*

At the time the report was published, and the initial driver pay rules were promulgated, policymakers could not have anticipated any significant spike in the cost of vehicle operating expenses that would so far outpace the general rate of inflation. *See* Comment of James Parrott, Ex. F to Soleimany Aff. at 1 (noting the war in Ukraine, the pandemic-induced supply changes as among other unanticipated factors contributing to rising vehicle operation expenses).

When TLC published the proposed text of the initial driver pay rules in 2018, it noted its reliance on the Parrott and Reich report in the statement of basis and purpose, and largely followed its policy recommendations. *See* TLC Notice of Proposed Rulemaking (Aug. 20, 2018), attached

as Ex. I to the Soleimany Aff., at 3-5. The statement of basis and purpose of the proposed initial rules itself said nothing about the portion of the rules requiring annual adjustments to driver pay rates. *See id.*, at 3-7. As Uber notes in its petition, it did not oppose these pay rules (Petition, at Para. 33-35), despite the fact that the statement of basis and purpose did not set forth any reason for adopting annual indexing, and despite the fact that New York minimum wage law contains no analogous provision.

During the first two years of the rules' implementation, 2019 and 2020, the CPI-W increased incrementally, in line with previous years. *See* CPI-W Table, Ex. C to Soleimany Aff. At the same time, the CPI-U Transportation component did not wildly diverge from the general rate of inflation. But by 2021, while average annual inflation, measured by the NY regional CPI-W, increased by 3.61%, the CPI-U for transportation costs increased by 10.42%. *Compare* Ex. C and D to the Soleimany Aff.

Despite vehicle operating expenses outpacing the general rate of inflation during this period, limited to applying the rules as written, the TLC ordered an increase to the Driver Pay Rates of 5.34%, accounting for two years of increases to the CPI-W. *See*, Petition, at para. 74. While this increase was welcome relief to New York's FHV drivers, it fell far short of compensating drivers for their increased expenses.

During this period, Uber voluntarily imposed a fuel surcharge on its fares in every U.S. market, except New York City. *See New fuel surcharge* (website), *supra*.

Uber claimed that a fuel surcharge was not necessary in New York because of the recent 5.7% increase that accounted for the general increase in inflation from 2020 to early 2022. Of course, by the time of this increase in March, measuring from 2019's annual average to March 2022, the transportation component increased by 18.3% (*see* Ex. D to Soleimany Aff.), with prices

continuing to rise further in following months. Despite this, as gas costs approached \$5 a gallon in 2022, drivers were still being compensated for their expenses at the initial TLC pay rate set in January 2019, plus an overall total CPI-W adjustment of only 6.71%. *See* Ex. C. to Soleimany Aff.

Public Comments, Including Comments from the Author of the Original Driver Pay Formula, Support the Use of The Transportation Component of the CPI to Compensate Drivers for Increased Costs

Not long after, the TLC called for a public hearing seeking comment on, *inter alia*, driver pay and expenses. At this hearing, NYTWA staff testified that vehicle operation costs had far outpaced general inflation as measured by household goods and suggested that TLC assess these operating expenses “when setting a new baseline rate for vehicle expenses,” in the TLC rules. Transcript of Taxi & Limousine Commission Hearing (May 24, 2022), at 62-63, attached as Ex. J to the Soleimany Aff.

Uber driver Richard Anderson testified about the stark increase in gas prices, and the amount spent on vehicle maintenance, saying “minimum wage or a little bit over minimum wage is not enough to compensate for all of these expenses and still be able to live a lifestyle that I would consider just surviving.” *Id.*, at 59.

TLC published its proposed notice of rulemaking and called for a hearing on the proposal to be held October 6, 2022.

At the October 6 hearing, Professor James Parrott, whose research and report formed the policy basis for the inaugural version of the driver pay rules, testified and submitted a written comment, writing that “the transportation component of the consumer price index of the regional CPI-W [...] is a better indication of the vehicle-related cost borne by drivers.” Ex. F to the Soleimany Aff., at 2. Professor Parrott noted that the transportation costs component actually

represented a very conservative approach to measuring drivers' expenses, as the component rose 36.5% from February 2019 to June 2022, while the private transportation component rose 44% during the same time period.⁵ *Id.* While noting the "historic inflation" occurring generally, Professor Parrott highlighted that "new and used vehicle prices rose by 40%" and that "gas cost doubled" over the same period. *Id.*

NYTWA member and Uber and Lyft driver Lamin Jatta testified that the cost to fill his tank, once \$30 had risen to \$60, and testified in support of the shift to a transportation specific index for the pay rules' mileage rate. NYSCEF Doc No. 62 (October 6, 2022 Hearing Transcript), at 105.

NYTWA member and Uber and Lyft driver Nusrat Jahan testified, noted that all consumer costs and vehicle costs were rising and advocated for the use of the part of the Consumer Price Index that would reflect "professional driver expenses." *Id.*, at 108-09.

Similarly, NYTWA member and Uber driver Xavier Koudougou testified in support of TLC to "use a better CPI," noting the difference between the weight of gas in driver's expenses compared to a household's expenses. *Id.*, at 110.

TLC published the final text of the proposed rules, noting its rationale for adjusting the rates in § 59D-22(a) as rooted in changes to the Bureau of Labor Statistics' measure of changes to the transportation component of the CPI. *See* Taxi and Limousine Commission, Notice of Promulgation, Amended Proposed Rule (Nov. 9, 2022), attached as Ex. K to the Soleimany Aff.

⁵ Here, it is worth noting, that while Uber insistently accuses the TLC of always cherry-picking those data points and gerrymandering timeframes that would produce the highest increase possible, Professor Parrott's testimony proves that this is simply false. As Professor Parrott noted, the TLC opted not to use the private transportation component, even where doing so would have produced significantly higher increases than using the transportation costs component.

Seemingly in line with Uber's comments regarding methodology, TLC made significant reductions to the proposed rate adjustments; where the initially proposed per-mile rate had been \$0.846/mile it was adjusted to \$0.782/mile. *Compare* Taxi and Limousine Commission, Notice of Promulgation, Initial Proposed Rule (Aug. 28, 2022), attached as Ex. L to the Soleimany Aff, at § 59D-22(a)(1) and Amended Proposed Rule (Ex. K to Soleimany Aff.), at §59D-22(a)(1).

Thus, in the amended version of the proposed rule, the TLC's use of the transportation component resulted in a 23.93% increase to the per-mile rate from the initial rates, first effective in 2019, but represents only a 16.11% increase from the current effective rates; after administrative increases, the current per-mile rate, after factoring for utilization rates, is \$1.161/mile. This accounts for the two CPI-W adjustments of 1.46%. *See Driver Pay Rates* (website), available at <https://www.nyc.gov/site/tlc/about/driver-pay-rates.page> (Date accessed: Dec. 23, 2022), attached as Ex. M to the Soleimany Aff. TLC also proposed an increase of 7.18% to the per-minute rate based on the increase from the 2021 average of the CPI-W to September 2022, the most recent month available at the time of promulgation.

The percentage increase in TLC's proposed per-mile rate, from the current effective per-mile rate, is only 8.95% higher than the percentage change proposed to the per-minute rate.

On November 15, 2022, TLC commissioners voted unanimously in support of the rules; Uber's petition and motion followed.

ARGUMENT

- I. THE TLC'S DECEMBER 2022 RULEMAKING IS SUPPORTED BY A RATIONAL BASIS IN THE RECORD AND IS NEEDED TO REIMBURSE DRIVERS FOR THE FULL COSTS OF THE EXPENSES INCURRED IN DRIVING FOR UBER AND OTHER FHV SERVICES.**

When reviewing the administrative determination of an agency pursuant to an Article 78, a court's role is clear: it may overturn a regulation only where it is "so lacking in reason that it was essentially arbitrary[.]" *Matter of Tri-City, LLC v. N.Y.C. Taxi & Limousine Comm'n*, 189 A.D.3d 652, 652, (1st Dep't). Administrative agencies are given significant deference: "[i]n exercising its rule-making power, TLC is afforded a high degree of judicial deference and may apply broader judgmental considerations based upon its expertise[.]" *Tri-City*, at 652. Here, the TLC increased the per-mile driver pay rate; in the statement of basis and purpose, it explained that it did so using a calculation based on the transportation component index of the CPI-U. *See* Amended Proposed Rule, Notice of Promulgation, at 9 (Ex. K to Soleimany Aff.) Using a universally-accepted measure of inflation published by the federal government, specifically tailored to the costs at issue, for the region at issue, plainly presents a rational basis for the increase in the per-mile rate.

Much of Uber's complaint boils down to this: the TLC did not adopt Uber's preferred proposals, and instead proposed an increase that, while grounded in an accurate measure of the cost of doing business, Uber feels is too high. Such objections do not meet the bar for annulment of a rule.

A. Using The Transportation Component To Adjust The Per-Mile Rate Is A Rational Exercise Of Agency Power.

1. N.Y.C. Admin. Code 19-549 Mandates The TLC to Consider Driver Expenses And Amend the Rules As Necessary.

A rate adjustment in line with increases in driver expenses is not only a rational exercise of agency power, but is required by statute. Local Law 150, passed by the New York City Council in 2018, instructs the Taxi and Limousine Commission to develop a methodology to establish a for-hire vehicle rate of pay. Notably, the Council instructed the TLC to, "at a minimum, consider [...] the expenses of operation to the driver [.]" N.Y.C. Admin. Code §19-549(b). After hearing testimony regarding the soaring expenses drivers experienced that substantially reduced their take

home pay, *see supra* at 8-9, the TLC promulgated an amendment to the minimum pay rule that accounted for the drastic increase in drivers' operating expenses.

Where directed by the Ad. Code to consider a field of data when setting rates, the TLC is not free to ignore that data. *See Metro. Taxicab Bd. of Trade v. N.Y.C. Taxi & Limousine Comm'n*, 18 N.Y.3d 329, 333 (2011). In *Metro. Taxicab*, upon review of Article 78 concerning TLC rate-setting, the court addressed a provision of the N.Y. City Charter that directed the TLC to consider a variety of factors when setting the rates for lease caps for taxicabs, such as whether owners would receive a fair rate of return. There, the Court noted that, "It seems obvious that, if the Commission had before it data showing that a proposed lease rate would not bring the owners a fair return, it would not be free to ignore the data." *Id.* Here, the TLC is similarly subject to N.Y.C. Admin. Code § 19-549 (b), which requires it to consider driver expenses when regulating the rate of pay. As such, the TLC cannot ignore the data before it: that is, the transportation component of the CPI demonstrated an increase in the type of expenses drivers are responsible for that outpaced the general rate of inflation. *See* Exs. C and D to the Soleimany Aff. This was further confirmed by driver testimony at the May and October 2022 hearings.

2. TLC's Consultation of Transportation Costs Component of the CPI is Supported by A Rational Basis in The Record and Comports With TLC's Pattern of Specifically Assessing Vehicle Costs When Setting Baseline Rates.

After taking testimony from drivers, advocates, and other interested parties at the May 24th hearing about increased expenses of fuel and vehicle expenses, *see supra*, at 8, the TLC proposed an amendment to the FHV minimum pay rules in the fall of 2022. The final rule increases the per-mile portion of the pay rules by using an average of the transportation component of the CPI-U of

the preceding six months, rather than using the general CPI-W that had been used in previous rate adjustments.⁶

Professor James Parrot, author of the original study on driver expenses and pay, see xxx supra, testified in its favor at the October 6 hearing and in a written comment, noting, “[t]he transportation component of the consumer price index [...] is a better indication of the vehicle related costs borne by drivers[.]” Ex. F, to the Soleimany Aff, at 2. Advocates like the NYTWA similarly called for the use of the transportation component, (see NYSCEF Doc. No. 61, at p. 163 of 218), and drivers themselves called for it. See, e.g. the comments of Lamin Jatta, noting that he used to pay \$30 to fill up his tank and now pays \$60, asking the “TLC to use” a CPI index that measures “drivers professional expenses as opposed to the consumer index.” NYSCEF Doc. No. 62, at 104-105. See also the comments of Xavier Koudougou, requesting the TLC use a CPI that reflects driver expenses because “we [drivers] are consumer[s], but we use more gas than regular driver[s] and when the gas price [is] high, they have [other] options. But we don’t.” *Id.*, at 110.

Given drivers’ documentation of their increased expenses, the federal government’s tracking of such increases in a widely-accepted metric of cost-specific inflation, and Prof. Parrott’s support for this metric, TLC’s use of the CPI transportation component to reset the baseline for driver expenses is an eminently rational use of the rulemaking power.

Uber critiques the reliability of federal Bureau of Labor Statistics data by calling the transportation component volatile and labeling the resultant increase as “drastic.” Petition, at para

⁶ The transportation component of the CPI-U is comprised of, among other transportation costs, “purchases made by households on new and used motor vehicles; motor fuel; motor vehicle parts and equipment; motor vehicle insurance; and motor vehicle fees.” See *Components of Consumer Price Index for Transportation* (website) available at <https://www.bts.gov/components-consumer-price-index-transportation> (Date Accessed: Dec. 23, 2022). The CPI-W, meanwhile, is the measure of inflation as it relates to a “market basket of consumer goods.” *Help and Tutorials: CPI-Urban Wage Earners and Clerical Workers (Current Series)* (website) available at https://www.bls.gov/help/one_screen/cw.htm#:~:text=The%20Consumer%20Price%20Index%20for,of%20consumer%20goods%20and%20services. This includes, e.g., groceries, clothing, and food and beverages. (Date Accessed: Dec. 22, 2022).

4. This analysis misses the mark. Uber doesn't attempt to argue that federal BLS data is inaccurate; the fact the transportation component increased significantly in recent years obviously doesn't indicate any infirmity with the metric itself, it merely reflects just how much transportation costs have risen.

Uber decries the consultation of the BLS' transportation component index to set the baseline rates in the body of TLC regulations as inconsistent with TLC's use of the CPI-W for future administrative rate adjustments, but this methodology is in line with past practice: the TLC's initial driver pay rules based the per-mile rates on a specific analysis of drivers' vehicle operation expenses, while simultaneously establishing use of the CPI-W for the annual administrative adjustments in the per-minute and per-mile rates.⁷ When unforeseen circumstances caused inflation to spike, *see* Comment of James Parrott, *supra*, at 1, the TLC consulted the transportation component to correct the rates' alignment with the true costs of driver expenses and, as before, proposed using the general CPI-W for future administrative adjustments to the pay rates in 2023 and 2024. *See* Amended Proposed Rule (Ex. K to Soleimany Aff.). The TLC's proposed use of the transportation component has a clear rational basis and ample support in the record; to pretend otherwise is to ignore the realities of the current economic condition.

B. The TLC's Proposed Driver Pay Rules Satisfy the City Administrative Procedure Act, As The Statement Of Basis And Purpose Cite To The Transportation Component, And Its Use Is Supported By The Record.

The TLC explained its proposed increase of the per-mile rate of the driver pay rules by citing to the transportation component of the CPI in the statement of basis and purpose. That is,

⁷ In any case, Uber's objections to a change in the use of the specific CPI index (Petition, at 110(c)), are misplaced, relying on cases that describe an agency's requirement for consistency in its interpretation of law. These cases concern an agency acting in its quasi-judicial role, and rendering consistent decisions interpreting the law. In its rulemaking role, TLC is of course not interpreting a law or regulation, but amending its rules based on the transportation component of the CPI.

the change in the driver pay rate is the rule change. Why is TLC adjusting the rate to the selected number? Because it is in line with the increase in the transportation component of the CPI; this is a sufficient explanation for this rule change.⁸ It is for good reason that government data are subject to judicial notice; such measures need no further rationalization as their reliability should not be in doubt. *See, e.g., Siwek v. Mahoney*, 39 N.Y.2d 159, 163 n.2 (1976) (“Data gathered from public reports is, of course, a proper subject of judicial notice.”) All parties are aware of what the Bureau of Labor Statistics’ transportation component represents, and *amicus* NYTWA does not seriously believe that Uber did not understand why this well-known metric of transportation costs was being applied, and that Uber needed such an explanation spelled out for it in the statement of basis and purpose to understand its significance.

Assuming, *arguendo*, that this explanation is insufficient to explain the TLC’s changes, the record provides ample explanation of the increase. Uber incorrectly argues that the agency must explain its reasoning in the statement of basis and purpose of a rule and that, in the absence of such an explanation, a rule is arbitrary and capricious. But, while the agency’s rational basis must be grounded in the record, there is simply “no requirement that an agency must have articulated its proffered rational basis for a regulation at the time of promulgation.” *Price v. N.Y.C. Bd. of Educ.*, 51 A.D.3d 277, 290, (1st Dep’t 2008) *leave denied*, 11 N.Y.3d 702 (2008); *see also Tri-City, supra*, at 653 (finding that if “the record reveals that the rule had a rational basis,” there is no requirement that the TLC articulate its rationale for a rule in the statement of basis and purpose). The City Administrative Procedure Act (“CAPA”) is clear: a proposed rule must “to the extent practicable and appropriate, contain a statement of basis and purpose that provides a clear explanation of the

⁸ Similarly, Uber argues elsewhere that the TLC has failed to provide all of the data it relied upon to develop the rules. Petition at paras. 87-88. It is not clear what further data Uber might be seeking regarding the initial per-mile increase; the TLC explained clearly that it used the transportation component of the CPI-U to calculate the increase to the per-mile portion of the rule, and the data is publicly available at the Bureau of Labor Statistics’ website.

rule and the requirements imposed by the rule.” N.Y. City Charter § 1043(d)(1)(iv). There is no requirement that an agency provide a rationale for a rule within the statement of basis and purpose itself.

In support of this proposition, Uber cites to cases regarding quasi-judicial determinations made by administrative agencies, where individuals challenged specific determinations after an opportunity to be heard; there, agencies are required to provide their basis for determinations that deviate from past practice. *See, e.g., Charles A. Field Delivery Serv. Inc.*, 66 N.Y. 2d 516, 520 (1985) (remanding a decision to the Unemployment Insurance Appeals Board when it failed to apply its own relevant precedent to a case and did not explain why it reached a different result). It is well established, however, that the standard of review differs for quasi-judicial actions than rulemaking and administrative determinations; such “cases are inapposite because here, the challenge is not to an administrative determination made after the [parties] had an opportunity to be heard. Rather, it is to a policy made by the [agency] pursuant to statute.” *Price* at 289. Uber cites to one New York Supreme Court decision from 2005 finding otherwise, *see* Petition, at para. 127, discussing *St. Vendor Project v. City of N.Y.*, 811 N.Y.S.2d 555 (Sup. Ct. N.Y. Co. 2005), but far more to the point, the First Department rejected Uber’s precise argument in *Tri-City*, a 2020 case also regarding the TLC driver pay rules, reiterating *Price*’s holding that “there is no requirement that TLC articulate its rationale for choosing company-specific utilization rates at the time of promulgation” so long as there was support for the rationale in the record. *Tri-City*, at 652-653. Uber makes no mention of *Tri-City* in its Petition. Finally, it bears noting that the statement of basis and purpose behind the initial driver pay rules was completely silent on the matter of CPI adjustments. *See* 2018 Notice of Promulgation, Ex. I to Soleimany Aff. As Uber notes in its papers, it did not challenge the 2018 pay rules.

C. Given The Rational Basis For The Initial Rate Adjustments And The Balance Of The Equities, Preliminary Relief Would Be Particularly Inappropriate.

In light of the TLC's rational basis for the December 2022 rate adjustments, preliminary injunctive relief is especially inappropriate. Uber's papers make much of the alleged infirmities of the Pay Rules Package's rate adjustments that will take place on March 1, 2024, March 1, 2025, and beyond. Uber's objections to these portions of the pay rules have no bearing on the preliminary injunction analysis required by CPLR § 6301, which focuses solely on acts that would "[p]roduce injury" to Uber "if committed or continued during the pendency of the action." As the future adjustments will not occur during the pendency of this litigation, they have no bearing on this court's consideration of Uber's request for preliminary relief.

Preliminary and injunctive relief is an extraordinary remedy; the Plaintiff bears a heavy burden of demonstrating that (1) it will succeed on the merits; (2) it will experience irreparable harm, and (3) the balance of the equities weighs in its favor. *Doe v. Axelrod*, 73 N.Y.2d 748 (1988). As discussed *supra*, Uber has failed to demonstrate that the portions of the proposed rules which were scheduled to take effect during the pendency of this litigation are "so lacking in reason for its promulgation that it is essentially arbitrary." *Id.*, at 750 (quotation omitted). For the reasons set forth *supra*, Petitioner has not shown a likelihood of success on the merits.

While Uber makes several arguments asserting irreparable harm, it fails to demonstrate that "the alleged harm was imminent, and not remote or speculative." *Trump on the Ocean, LLC v. Ash*, 81 A.D.3d 713, 716 (2d Dep't 2011). An analysis concerning irreparable harm must focus on the part of the rules intended to go into effect on December 19, 2022—the only portion of the rules with a plausible imminent impact. Uber's discussion of the potential harm contains no definitive statements about the consequences of the rules: it may absorb the cost, or may pass some onto customers; if it passes the cost onto consumers, it may lose goodwill. *See, e.g.*, Petition at

para. 196. A corporation's "vague and conclusory allegations" regarding harm to a business reputation, however, are "not sufficient to establish irreparable injury." *Trump on Ocean*, at 716. If Uber does pass on some of the cost to customers, it cites no authority that increased costs to consumers, as a result of generally applicable government regulations, are likely to cause a loss of goodwill. The closest Uber comes is to cite *Teamquest v. Unisys Corp.*, a Northern District of Iowa case, which discusses a loss of goodwill based on increased consumer costs that would be imposed by one corporation, as a result of a specific business dealings with another private party at issue in the litigation. 2000 WL 34031793 (N.D. Iowa April 20, 2000). This is clearly inapposite here, where the challenged rules apply to all companies operating in the FHV sector, and contains no cost applying specifically to Uber.

Finally, the balance of the equities undoubtedly favors the working drivers who are the intended beneficiaries of the minimum pay rules. When assessing the balance of the equities, the Court must consider not only the parties but "the enormous public interests involved." *Seitzman v. Hudson River Assocs.*, 126 A.D.2d 211(1st Dept. 1987) (quotation omitted). Here, there is an essential constituency who will be severely and directly affected by the significant loss of income occasioned by further delay to the increase in driver pay rates: the 80,000 low-wage, largely immigrant drivers who make Uber's business run.

Uber relies on drivers not only to provide the labor that powers its transportation services, but to bear the costs of providing the services: purchasing a car, paying for liability insurance, the steady stream of maintenance required to keep a car that drives up to 100 miles a day in professional, working order. These expenses are significant. As expenses have risen in the past year, the amount of income drivers take home to support their families has dwindled – even as the

cost of everyday essentials, from bread and milk to rent, has increased due to inflation levels not seen in the past forty years.

Uber speaks of the choice it must make: bear the cost itself—as a major multi-national company—or pass it onto customers, in whole or in part, and potentially upset customers with higher fare pricing. Uber repeatedly acknowledges the variety of strategies it could use to absorb the additional cost, but more pressing here than the choices that Uber can make, is the stark reality that drivers have no choice: the costs which the proposed rules seek to account for are not some arbitrary amounts imposed by an overzealous regulator, but the BLS-calculated *cost of doing business*, that whether or not Uber wishes to acknowledge it, the drivers must pay. They cannot increase what Uber charges for fares; they must pay and have already paid higher vehicle costs; they cannot pass the increased cost of cars, insurance, repairs, and fuel onto customers; and they cannot decrease Uber’s commission take from each fare. Drivers’ working conditions – the fares they make, the cost of gas and vehicle maintenance – are strictly dictated to them, by Uber and the market at-large. In the last year of record-breaking inflation, drivers have already paid the price of soaring prices and seen their take home pay drop precipitously. The results of such decrease have immediate, human impact for drivers and their families who, beginning with a base-line of low-wage earnings, cannot make any more trade-offs. Indeed, the record reflects that nearly 80% of drivers were already struggling to pay rent, and nearly 50% struggling to afford food. *See* NYSCEF Doc. No. 61, at page 154 of 218.

Uber, on the other hand, repeatedly acknowledges the variety of strategies it can use to absorb the additional cost—which is not an arbitrary cost imposed by a regulator but the *cost of doing business*. This is not a question, as Uber would have the court believe, of bottom lines and whether a profit margin may decrease, but of whether drivers will be able to feed their families

and pay their rent. *See* the testimony of Nusrat Jahan, NYSCEF Doc. No. 62, at 109-10 (“We are not asking for this raise for vacation. Just to survive with our family, our children, and put food on the table.”)

The Court must not ignore drivers as it weighs the balance of the equities. Uber has a choice about how to absorb the increased costs of today’s economy. Meanwhile, drivers have no way to soften the blow of inflation. The balance of equities is clear: the court must allow the December 2022 raise to go into effect during the pendency of this litigation.

II. ALTERNATIVELY, IF THE COURT FINDS SOME PORTIONS OF THE PROPOSED RULE TO BE INVALID, BUT NOT THE INITIAL RATE ADJUSTMENT, SEVERANCE OF ANY INVALID PROVISIONS WOULD BE APPROPRIATE.

Much of Uber’s objections to the proposed rules package focus on those parts which will not be immediately implemented, but which Uber alleges are irrational, driver pay rate adjustments in future years. As Uber correctly notes in its petition, a “court adjudicating an administrative challenge to a rule may ‘sever a rule by setting aside only the offending parts of the rule.’” Petition, at para. 173, quoting *Carlson v. Postal Regul. Comm’n*, 934 F.3d 337, 351-52 (D.C. Cir. 2019).⁹

Accordingly, in the event that this court finds invalid portions of the pay rules relating to future increases, it should set aside only such portions of the proposed rules relating to future increases and allow the changes in the rates contained in § 59D-22(a)(1)-(2) of the proposed rule to take effect, allowing for the implementation of the scheduled raise.

⁹ Although the federal APA and the CAPA are not identical, as Uber notes, the CAPA tracks with the APA’s definition of a rule as a whole or part of any rule. *See* CAPA, N.Y. City Charter §1041(5). Accordingly, courts may uphold parts of a proposed rule package even where finding other parts invalid. *See Zehn-NY LLC v. New York City Taxi and Limousine Commission*, 2019 N.Y. Misc. LEXIS 6789, 2019 WL 7067072 (Sup. Ct. N.Y. Co. Dec. 23, 2019).

Whatever the Court may think of Uber's objections to the proposed amendments to the methods and schedule for future rate adjustments contained in § 59D-22(a)(4), such amendments operate independently of § 59D-22(a)(1)-(2)'s rate adjustments, scheduled to be implemented on December 19, 2022. The initial adjustments to the underlying per-mile and per-minute rates are undoubtedly supported by the Bureau of Labor Statistics' noted increase in transportation costs within the New York metro area, and the general rate of inflation. TLC's decision to adjust rates in line with inflation mid-year, including a re-assessment of vehicle operations costs undoubtedly has a rational basis in the record and federal government data. These immediate rate adjustments represent the main thrust of the rulemaking and may operate independently of any changes to the methods and schedule for future rate adjustments.

As Uber notes, whether or not a provision of a rule is severable depends on the agency's intent and whether or not the remaining portions of a rule may stand on their own. Petition, at para.173, quoting *Am. Fuel & Petrochemical Mfrs. v. EPA*, 3 F.4th 373, 384 (D.C. Cir. 2021); *Carlson v. Postal Regul. Comm'n*, 938 F.3d 337, 351-52 (D.C. Cir. 2019). "Severance is improper if there is substantial doubt that the agency would have adopted the severed portion on its own." *Am Fuel*, 3 F.4th, at 384 (internal quotation omitted). New York courts have long applied a similar test when analyzing the severability of statutory provisions. See *People v. Viviani*, 36 N.Y.3d 564, at 583 (2021), quoting *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60 (1920) (analyzing whether the legislature would have wished the remainder of a statute to be enforced with any invalid portion severed, considering how the statute will function post-severance, and severing some sub-sections but not others of proposed legislation.)

Here, there is no doubt the TLC would have adopted the underlying rate adjustments in § 59D-22(a)(1)-(2), even without part or all of the amendments to the methods and schedules for

future rate adjustments proposed in § 59D-22(a)(4). The statement of basis and purpose notes its intent to “increase minimum pay amounts to account for inflation and increased driver expenses,” based on, *inter alia*, testimony and comments received at May and October public hearings, written comments, and “changes in inflation as reflected in the Consumer Price Index (CPI) and the transportation costs component of that index.” Ex. K to Soleimany Aff., at 1.

TLC would have passed rate adjustments designed to match driver’s real expenses regardless, because achieving full reimbursement for driver expenses is baked into the statutory and regulatory scheme for TLC’s driver pay standards, and doing so serves these purposes. N.Y.C. Admin. Code § 19-549(b) requires TLC to consider driver expenses; the Parrott & Reich report noted that CPI indexing would be required to maintain purchasing power over time; Professor Parrott, the architect of the initial rules proposal, testified that, with increases in inflation, and particularly vehicle expenses, the use of the transportation cost index was an appropriate and “conservative” measure that TLC should adopt; a mid-year adjustment comports with the urgency of the inflationary moment, and aligns with similar practice by the IRS.

Second, the rate adjustments in 59D-22(a)(1)-(2) can function sensibly, even if the Court were to annul some or all of the amendments to 59D-22(a)(4). Even assuming annulment of all proposed amendments to 59D-22(a)(4), the rule would simply retain the structure and function of the initial version of the driver pay rules, and would be consistent with TLC’s past practice. When TLC promulgated the initial version of the driver pay rules in 2018, it based the initial per-mile rule on a specific assessment of vehicle operation costs, and adopted the general CPI-W for future rate adjustments. Assuming severance of the 59D-22(a)(4) amendments, the rules would continue in line with this practice, with TLC making an evaluation of vehicle-operation specific costs (measured by the CPI’s transportation component), and applying the CPI-W to future rate

adjustments. As Uber has noted, it did not oppose this structure in 2018, and the rules survived legal challenge.

CONCLUSION

For the foregoing reasons, the NYTWA urges this Court to uphold the TLC's amendments to the driver pay rules.

Dated: Long Island City, NY

December 23, 2022

Respectfully Submitted,

/s/ Zubin Soleimany

Zubin Soleimany, Esq.

Allison Langley, Esq.

NEW YORK TAXI WORKERS ALLIANCE

31-10 37th Ave. Ste. 300

Long Island City NY 11101

(718)706-9892