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## Capping Uber In New York City: Ramifications for Rideshares, the Road, and Outer-Borough Residents

Kaitlyn A. Laurie

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**CAPPING UBER IN NEW YORK CITY:  
RAMIFICATIONS FOR RIDESHARES, THE  
ROAD, AND OUTER-BOROUGH RESIDENTS**

*Kaitlyn A. Laurie\**

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## INTRODUCTION

At least nine drivers of taxicab, livery, and rideshare vehicles have committed suicide since November 2017, due to financial problems: Lu Wu (March 23, 2019);<sup>1</sup> Roy Kim (November 5, 2018);<sup>2</sup> Fausto Luna (September 26, 2018);<sup>3</sup> Abdul Saleh (June 15, 2018);<sup>4</sup> Yu Mein

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1. Georgett Roberts & Amanda Woods, *Lyft Driver Found Dead in Back of Car as Cabbie Suicide Epidemic Continues*, N.Y. POST (Mar. 23, 2019, 4:45 PM), <https://nypost.com/2019/03/23/cabbie-suicide-epidemic-continues-as-ninth-man-found-dead-in-back-of-car/> [https://perma.cc/9JL4-PBY7].

2. Danielle Furfaro & Gabrielle Fonrouge, *Another NYC Cab Driver Deep in Debt Kills Himself*, N.Y. POST (Nov. 14, 2018, 3:16 PM), <https://nypost.com/2018/11/14/another-nyc-cab-driver-deep-in-debt-kills-himself/> [https://perma.cc/ARK7-PHWP].

3. *Id.* At a vigil held in honor of the driver on October 7, 2018 the City's Taxi & Limousine Commissioner Meera Joshi attended to pay her respects, but was chased away by cursing and shouting attendees, some of whom blamed her for the recent suicides. Tyler Pager & Emily Palmer, *Uber Driver's Death Marks Seventh For-Hire Driver Suicide Within a Year*, N.Y. TIMES (Oct. 7, 2018),

“Kenny” Chow (May 23, 2018);<sup>5</sup> Nicanor Ochisor (March 16, 2018);<sup>6</sup> Doug Schifter (February 5, 2018);<sup>7</sup> Danilo Corporan Castillo (December 20, 2017);<sup>8</sup> and Alfredo Perez (November 2017).<sup>9</sup> For over a year, the media has put a spotlight on these stories of suicides by drivers — primarily immigrants themselves — characterizing drivers’ increasing debt and depression as an epidemic,<sup>10</sup> and adding immense pressure on local legislators and the Taxi and Limousine Commission (“TLC”) to take action and impose stringent regulations, like the temporary, one-year cap it set into motion last August.

To some, the sharing economy is an innovative new world of possibilities, from a job creation point of view (to be your own boss, work when and how you want) and a user perspective (order a shared ride, live like a local during your vacation and forgo the hotel for a

<https://www.nytimes.com/2018/10/07/nyregion/uber-driver-suicide-for-hire-taxis-new-york.html> [https://perma.cc/H49Y-VCA3].

4. Danielle Furfaro, *Another Cash-Strapped NYC Cabbie Commits Suicide*, N.Y. POST (July 15, 2018, 5:11 PM), <https://nypost.com/2018/06/15/another-cash-strapped-nyc-cabbie-commits-suicide/> [https://perma.cc/S94J-D94D].

5. Nikita Stewart & Luis Ferré-Sadurní, *Another Taxi Driver in Debt Takes His Life. That’s 5 in 5 Months.*, N.Y. TIMES (May 27, 2018), <https://www.nytimes.com/2018/05/27/nyregion/taxi-driver-suicide-nyc.html> [https://perma.cc/U3VF-2KJN].

6. Emma G. Fitzsimmons, *A Taxi Driver Took His Own Life. His Family Blames Uber’s Influence.*, N.Y. TIMES (May 1, 2018), <https://www.nytimes.com/2018/05/01/nyregion/a-taxi-driver-took-his-own-life-his-family-blames-ubers-influence.html> [https://perma.cc/C7BE-ZU8N]; Danielle Furfaro & Max Jaeger, *Cabbie Blamed Uber, Lyft for Financial Woes Before Hanging Himself*, N.Y. POST (Mar. 21, 2018, 3:20 PM), <https://nypost.com/2018/03/21/cabbie-blamed-uber-lyft-for-financial-woes-before-hanging-himself/> [https://perma.cc/9B3Q-H5V5].

7. Jessica Bruder, *Driven to Despair*, N.Y. MAGAZINE (May 14, 2018), <http://nymag.com/intelligencer/2018/05/the-tragic-end-to-a-black-car-drivers-campaign-against-uber.html> [https://perma.cc/PYH6-3CBZ]; see also Doug Schifter, FACEBOOK (Feb. 5, 2018), [https://www.facebook.com/permalink.php?story\\_fbid=1888367364808997&id=100009072541151](https://www.facebook.com/permalink.php?story_fbid=1888367364808997&id=100009072541151) [https://perma.cc/9DBH-M7AV].

8. Dan Rivoli et al., *Distraught Livery Driver Killed Himself Weeks Before Second City Hall Suicide*, N.Y. DAILY NEWS (Feb. 6, 2018, 9:33 PM), <https://www.nydailynews.com/new-york/distraught-driver-killed-weeks-city-hall-suicide-article-1.3803684> [https://perma.cc/NN2J-XU55].

9. Henry Goldman, *Suicides, Traffic Hell in NYC Spur Second Look at Uber’s Growth*, BLOOMBERG (June 18, 2018, 4:00 AM), <https://www.bloomberg.com/news/articles/2018-06-18/suicides-traffic-hell-in-nyc-spur-second-look-at-uber-s-growth> [https://perma.cc/2N4L-UUMS ].

10. Emma G. Fitzsimmons, *Suicides Get Taxi Drivers Talking: ‘I’m Going to Be One of Them’*, N.Y. TIMES (Oct. 2, 2018), <https://www.nytimes.com/2018/10/02/nyregion/suicides-taxi-drivers-nyc.html> [https://perma.cc/Y9G2-7DNT].

chic apartment). To others, the sharing economy provides the same services we have always had — just transacted through an app — and is, therefore, something to control and integrate into the existing governance and structural systems currently in place (as opposed to creating new, dynamic laws).

Uber is one of the most polarizing phenomenon in the sharing economy. Uber's informal, accessible app-based system of ordering a private car has rocked the taxi industry from New York to London. Flipping even the traditional structure of entrepreneurship on its head, the gig revolution and rideshare industry's success in New York City (the "City") creates extra costs, including slower traffic speeds, worsening traffic congestion, and increased competition for taxi and livery drivers (who are heavily regulated and capped by a draconian "medallion" system<sup>11</sup>).

There are two competing interests at play: one, the economic needs of all professional drivers, taxi, and rideshare alike; and, two, the problem of race-based refusals that have historically plagued residents living deep into Brooklyn, Queens, and the Bronx. More and more outer borough residents rely heavily upon Uber and other rideshare companies like it. But now the New York City Council is attempting to limit the number of rideshare vehicles on the streets of New York. Called a "ban first, study later" approach by Uber, the City Council's new legislation — Introduction No. 144-B ("Int. No. 144-B") — was passed into law in August 2018, halting the issuance of for-license vehicles for one year.<sup>12</sup> With New York's one-year cap now set to expire in August of this year, the nation's largest cities are watching what the mayor, city legislators, and the TLC will do next.

As part of a package of bills intended to strictly regulate app-based rideshares, relieve congestion, and increase driver pay, the moratorium — especially if it should become permanent — is ultimately a non-evidence-based solution that will hurt the lower-income, minority communities in the outer boroughs of New York City.

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11. Sam Harnett, *Cities Made Millions Selling Taxi Medallions, Now Drivers Are Paying the Price*, NAT'L PUB. RADIO (Oct. 15, 2018, 4:28 PM), <https://www.npr.org/2018/10/15/656595597/cities-made-millions-selling-taxi-medallions-now-drivers-are-paying-the-price> [<https://perma.cc/WRK4-V89B>].

12. See Complaint at 2, *Zehn-NY LLC v. City of New York*, No. 151730/2019 (N.Y. Sup. Ct. Feb. 15, 2019). See generally N.Y.C. Council, Introduction No. 144-B (enacted August 14, 2018) [hereinafter Int. No. 144-B]; N.Y.C. ADMIN. CODE § 19-502(hh) (2019); N.Y.C. ADMIN. CODE § 19-550 (2019).

Part I of this Note traverses the transportation landscape, from why the differences between rideshares and yellow cabs justify varying regulatory schemes, to patterns of rideshare growth. It also examines the empirical data supporting the notion that a blanket cap on rideshares hurts outer-borough communities, low-income residents, and minorities the most. Part II analyzes the constitutionality of the new law, exploring ways transit advocates can invoke possible civil rights arguments against such a regulatory cap. It also acknowledges the possibility that a law granting authority to the TLC to limit the number of rideshare vehicle licenses is preempted. Ultimately, this Part concludes that there are several underlying policy assertions for why, even if these claims are unsuccessful under federal or state statutes, neither the City Council nor the TLC should implement a permanent cap. Finally, Part III proposes alternative ways of thinking about rideshare regulation, recommendations (like congestion pricing), and ultimately embraces rideshares as an innovative transit alternative.

## I. THE NEW YORK CITY TRANSPORTATION LANDSCAPE IN 2018

Part I examines New York City's new local law capping rideshare vehicle licenses for one year and the transportation landscape as a result of the rapid growth of rideshares in the last several years. Section I.A. looks in particular at Int. No. 144-B and the events leading to its passage. Section I.B. discusses the differences between rideshare regulation and the taxi medallion administration. It also inspects the overlooked bus system, green cabs, and commuter vans. Section I.C. surveys the empirical data supporting the perspective that, because demand for rideshares in the outer boroughs in particular is significant and growing, rideshares are an important service on which low-income, minority communities rely. Lastly, Section I.D. considers the effect of rideshares on all five boroughs in general.

### A. New York City's New Local Laws: Background

On August 8, 2018, the New York City Council ("City Council") passed a one-year moratorium on the issuance of new licenses for rideshare vehicles. This is the first time a major U.S. city has enacted a law to limit the number of rideshares,<sup>13</sup> also known as "for-hire

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13. Emma G. Fitzsimmons, *Uber Hit With Cap as New York City Takes Lead in Crackdown*, N.Y. TIMES (Aug. 8, 2018), <https://www.nytimes.com/2018/08/08/nyregion/uber-vote-city-council-cap.html>

vehicles” (“FHVs”).<sup>14</sup> The City’s new law is one of the strongest laws attempting to regulate Uber, Lyft, and other transportation network companies (“TNCs”) in the country. During this one-year ban, the City says it will study the effect of for-hire vehicles in the city in order to evaluate future rideshare regulation and whether to make the cap on rideshare vehicle issuances permanent.<sup>15</sup> Thirty-nine Council members voted in favor of the cap, while six voted against it.<sup>16</sup> In

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[<https://perma.cc/ZN4F-GVFG>] [hereinafter Fitzsimmons, *Uber Hit with Cap*]. The new bill does *not* prohibit the issuance of licenses for wheelchair-accessible vehicles. *Id.*

14. In this Note, the term “rideshare” is used to refer to services provided by TNC companies like Uber and Lyft, but they are also often colloquially called “ride-hails.” In New York, rideshares are regulated as part of the for-hire industry (and thus, may also be called for-hire vehicles, or “FHVs”). See *infra* note 21 and accompanying text. Furthermore, rideshare companies may, in general, be called a “transportation network company” (“TNC”), originating from a 2013 California Public Utilities Commission ruling, which officially defined these services as TNCs. See Tomio Geron, *California Becomes First State to Regulate Ridesharing Services Lyft, Sidecar, UberX*, FORBES (Sept. 19, 2013, 3:40 PM), <https://www.forbes.com/sites/tomiogeron/2013/09/19/california-becomes-first-state-to-regulate-ridesharing-services-lyft-sidecar-uberx/#7ec7b7001804> [<https://perma.cc/AX8G-E68F>].

15. See Fitzsimmons, *Uber Hit with Cap*, *supra* note 13.

16. The six members who voted against the new law were three Democrats (Inez Barron, 42<sup>nd</sup> district; Robert Cornegy, 36<sup>th</sup> district; and Mark Gjonaj, 13<sup>th</sup> district) and three Republicans (Joseph Borelli, 51<sup>st</sup> district; Eric Ulrich, 32<sup>nd</sup> district; and Steven Matteo, 50<sup>th</sup> district). City Council, City of New York, Transcript of the Minutes of the Council Stated Meeting 47–51, 56–122 (Aug. 8, 2018) [hereinafter Transcript of the Minutes]. Explaining his vote, Ulrich said that his borough of Queens was home to many transportation deserts that “don’t have the luxury . . . of having multiple subway lines beneath our feet and adequate bus service,” and that yellow cabs, while “nostalgic,” were,

a declining industry with an outdated business model, and by placing the cap on new licenses for for-hire vehicles, that would be the equivalent of the City Council deciding that we’re going to put a cap on Netflix subscription because we’re worried about Blockbusters that are closing. Technology changes. Society changes. The economy changes. This is a free market and we have to be able to move with the market. The fact that we’re now capping for one year instead of waiting for this study to come back, we’re also going to be limiting thousands of New Yorkers from bringing in extra income that they work hard for that they need to sustain themselves and to support their families.

*Id.* at 110–11. Similarly, Barron said in her community of Brooklyn,

from the time that I was little many years ago, we did not see yellow cabs unless we were coming from the airport and you got a yellow taxi to bring you home. So from that need, the ingenuity and the resourcefulness of people led to the cabs that you could call. You put in a call, they would

addition, the new law permitted New York to set a minimum pay rate for rideshare drivers — also the first in the country.<sup>17</sup> Calling the growth of app-based, for-hire vehicles a “crisis,”<sup>18</sup> Mayor Bill de Blasio signed the bill into law, adding that the new laws are part of his broader efforts to combat income inequality.<sup>19</sup>

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come and pick you up. And now it has expanded to where we have the app hails and people get service in that way. This industry that has expanded has provided a great service, and I think that perhaps if a study had been done prior to the legislation, we would see what it is in fact we needed to do to bring some equity to the situation. I think that my community will be hindered, suffer, and not have services that they need with this.

*Id.* at 78–79. Finally, Gjonaj remarked that the cap does not adequately consider rideshare drivers working part-time or as an additional source of income. *Id.* at 84–85.

17. *Id.*; see also Peter Holley, *New Rules Guarantee Minimum Wage for NYC Uber, Lyft Drivers*, WASH. POST BLOGS (Dec. 4, 2018), <https://www.washingtonpost.com/technology/2018/12/04/new-rules-guarantee-minimum-wage-nyc-uber-lyft-drivers/?noredirect=on> [<https://perma.cc/5KPD-6GPU>] (noting that the new pay floor for rideshare drivers is set at \$17.22 per hour to bring the minimum pay in line with the City’s \$15.00 per hour minimum wage for typical employees — with the extra \$2.22 accounting for contract drivers’ payroll taxes and paid time off). On December 4, 2018, the TLC voted to adopt the minimum pay rate for app-based drivers, which went into effect on December 31, 2018. *Id.* Because rideshare drivers are considered independent contractors rather than employees, they are not subject to the standard minimum wage laws. *Id.*; Mallory Locklear, *NYC Passes Minimum Pay Wage for Uber and Lyft Drivers*, ENGADGET (Dec. 4, 2018), <https://www.engadget.com/2018/12/04/nyc-minimum-pay-wage-uber-lyft-drivers/> [<https://perma.cc/ANY8-RX8P>]. A study by the TLC recommended a \$17.22 hourly minimum wage after expenses to cover paid time off and the costs of owning and driving a car in the City. James A. Parrott & Michael Reich, *An Earnings Standard for New York City’s App-Based Drivers: Economic Analysis and Policy Assessment*, CTR. N.Y.C. AFFAIRS (July 2018), <http://www.centernyc.org/an-earnings-standard> [<https://perma.cc/938Y-YLLN>]; see Faiz Siddiqui, *New York City Council Passes First-in-the-Nation Cap on Uber and Lyft*, WASH. POST BLOGS (Aug. 8, 2018), [https://www.washingtonpost.com/news/dr-gridlock/wp/2018/08/08/new-york-city-council-votes-to-cap-uber-and-lyft/?utm\\_term=.b7a1dbecab78](https://www.washingtonpost.com/news/dr-gridlock/wp/2018/08/08/new-york-city-council-votes-to-cap-uber-and-lyft/?utm_term=.b7a1dbecab78) [<https://perma.cc/S3VD-ND7K>] [hereinafter Siddiqui, *New York City Council Passes First-in-the-Nation Cap*]. The Independent Drivers Guild reports that app-based drivers currently earn about \$11.90 an hour. *NYC Sets Nation’s First Minimum Wage for App-Based Drivers*, INDEP. DRIVERS GUILD (Dec. 4, 2018), <https://drivingguild.org/2018/12/04/nyc-sets-nations-first-minimum-wage-for-app-based-drivers/> [<https://perma.cc/Y6AQ-RUWL>].

18. Mayor Bill de Blasio (@NYCMayor), TWITTER (Aug. 8, 2018, 1:24 PM), <https://twitter.com/NYCMayor/status/1027289516145557505> [<https://perma.cc/AT95-PGNM>]; see Siddiqui, *New York City Council Passes First-in-the-Nation Cap*, *supra* note 17.

19. Henry Goldman, *NYC Is Set to Impose A Cap on Uber*, BLOOMBERG (Aug. 6, 2018, 12:52 PM), <https://www.bloomberg.com/news/articles/2018-08-06/nyc-set-to-impose-cap-on-uber-as-ride-hail-vehicles-clog-streets> [<https://perma.cc/L4F7-24VX>].

### 1. Four Years in the Making

New York City Council's initiative to cap Uber began in 2015.<sup>20</sup> While Uber started operating in New York City in 2011, by 2015, the number of FHV's<sup>21</sup> grew by more than 60%,<sup>22</sup> or to over 63,000.<sup>23</sup> About 20,000 of those 63,000 for-hire vehicles were affiliated with Uber, according to the TLC.<sup>24</sup> At the time, the number of vehicles associated with Uber were growing at a rate of 3% per month.<sup>25</sup> Mayor de Blasio, citing the worsening Manhattan traffic congestion, proposed placing "a cap on Uber's growth, pending a study of traffic patterns."<sup>26</sup> Uber launched an aggressive anti-cap ad campaign, replete with criticism of de Blasio.<sup>27</sup> Before it ever reached a Council

20. See Matt Flegenheimer, *De Blasio Administration Dropping Plan for Uber Cap, for Now*, N.Y. TIMES (July 22, 2015), <https://www.nytimes.com/2015/07/23/nyregion/de-blasio-administration-dropping-plan-for-uber-cap-for-now.html> [https://perma.cc/SKV3-XL3D]; Issie Lapowsky, *Uber Wins Its Battle Against NYC's Mayor—For Now*, WIRED (July 22, 2015, 5:25 PM), <https://www.wired.com/2015/07/uber-wins-battle-nyc-mayor-now/> [https://perma.cc/EAP9-NW2D].

21. N.Y.C. ADMIN. CODE § 19-502 (2019). A "for-hire vehicle" is defined as: "a motor vehicle carrying passengers for hire in the city, with a seating capacity of twenty passengers or less, not including the driver, other than a taxicab, coach, wheelchair accessible van, commuter van or an authorized bus operating pursuant to applicable provisions of law . . ." *Id.* Furthermore, as of August 14, 2018, "[h]igh-volume for-hire service" has been added to the Code to mean:

[A]n individual, partnership, limited liability company, business corporation, sole proprietorship . . . operating under, or in affiliation with, one brand or trade name . . . that offers, facilitates or otherwise connects passengers to for-hire vehicles by prearrangement, including through one or more licensed black car bases, luxury limousine bases, or livery base stations . . . utilizing software that allows a passenger or prospective passenger to arrange for transportation using a passenger-facing booking tool, including a smartphone or other electronic device, and that dispatches, or facilitates the dispatching of, 10,000 or more trips in the city in one day . . .

*Id.*

22. Matt Flegenheimer & Emma G. Fitzsimmons, *City Hall and Uber Clash in Struggle Over New York Streets*, N.Y. TIMES (July 16, 2015), [https://www.nytimes.com/2015/07/17/nyregion/city-hall-and-uber-clash-in-struggle-over-new-york-streets.html?\\_r=0](https://www.nytimes.com/2015/07/17/nyregion/city-hall-and-uber-clash-in-struggle-over-new-york-streets.html?_r=0) [https://perma.cc/R665-FSVF].

23. See Flegenheimer, *supra* note 20.

24. *Id.*

25. *Id.*

26. See Flegenheimer & Fitzsimmons, *supra* note 22.

27. See Issie Lapowsky, *Uber's New Fake Feature in NYC Derides Regulators*, WIRED (July 15, 2015), <https://www.wired.com/2015/07/uber-de-blasio/> [https://perma.cc/3PYA-VF3J]. In July 2015, Uber added the "de Blasio" feature to

vote, de Blasio agreed to drop his plan to cap the number of Uber and ridesharing vehicles operating in New York City, much to the dismay of taxi drivers and medallion-holders.<sup>28</sup> Instead, the company and the City struck an agreement: The City would conduct a four-month study on the effects of rideshare growth on New York City traffic, and Uber would be required to “release a trove of data the city had been seeking for its analysis”<sup>29</sup> of traffic patterns and rideshare growth, which the company reluctantly shared in exchange for avoiding the moratorium.<sup>30</sup> The New York City Charter was thereafter amended to reflect the occurrence of this study.<sup>31</sup> However, City officials warned a restriction similar to the proposed cap “remained a possibility down the line.”<sup>32</sup>

Uber’s proliferation today, compared to its growth in 2015, continues to be significant. In 2018, there were 80,000 FHV’s in New York City associated with ride-hailing apps.<sup>33</sup> Approximately 65,000 of those vehicles were affiliated with Uber<sup>34</sup> — making it Uber’s

its app, available only to New York City riders, as part of its ad campaign opposing a cap. Using this function, the map showed zero available cars — or a car twenty-five minutes away — followed by the message, “[t]his is what Uber will look like in NYC if Mayor de Blasio’s Uber cap bill passes.” *Id.* Coupled with local television commercials featuring drivers calling on people to oppose the cap, Uber’s ad campaign further criticized Mayor de Blasio, depicting him “as a protector of the yellow taxi industry, whose leaders have been significant campaign contributors to the mayor.” *See* Flegenheimer, *supra* note 20; Uber, *Integration on Moleskine Timepage*, YOUTUBE (July 15, 2015), <https://www.youtube.com/embed/xFOQ6ID6lvk> [<https://perma.cc/GY98-BCRE>].

28. *See* Flegenheimer, *supra* note 20; Lapowsky, *supra* note 27.

29. *See* Flegenheimer, *supra* note 20.

30. *Id.*

31. N.Y.C. CHARTER § 2303.

32. *See* Flegenheimer, *supra* note 20.

33. Jeffrey C. Mays, *3 Years Ago, Uber Beat Back a Cap on Vehicles. What’s Changed? A Lot*, N.Y. TIMES (Aug. 9, 2018), <https://www.nytimes.com/2018/08/09/nyregion/uber-cap-nyc-decision-strategy.html> [<https://perma.cc/FJR5-TZVW>]. In New York City, there are a variety of on-demand rideshare apps connecting users to private for-hire vehicles, including Uber, Lyft, Via, and Juno. *See* Kailla Coomes, *The Best Ridesharing Apps for 2019*, DIGITAL TRENDS (July 1, 2018), <https://www.digitaltrends.com/mobile/best-ride-sharing-apps/> [<https://perma.cc/F63Y-SBJX>]. Alternatively, Gett, Curb, and Arro are app-based services booking riders with yellow and green cabs and other established taxi operators. *Id.*

34. Emma G. Fitzsimmons, *Taxi Drivers in New York Are Struggling. So Are Uber Drivers.*, N.Y. TIMES (June 17, 2018), <https://www.nytimes.com/2018/06/17/nyregion/uber-taxi-drivers-struggle.html> [<https://perma.cc/W6G7-R6R8>] [hereinafter Fitzsimmons, *Taxi Drivers in New York Are Struggling*]; *see also* Paul Berger & Greg Bensinger, *New York Plans to Cap Uber and Lyft*, WALL ST. J. (Aug. 9, 2018),

largest market in the United States.<sup>35</sup> Ubers provide more than 400,000 trips a day, while Lyft accounts for 112,000 trips a day.<sup>36</sup> Furthermore, it is likely that the number of FHV's operating in New York City will continue to grow. To date, the TLC has issued a total of 130,000 licenses to FHV's<sup>37</sup> and since May 2016, an average of 1700 new FHV's "have become active every month."<sup>38</sup> By contrast, New York City taxicabs, which are capped at 13,587 licensed drivers, have expanded in fleet number little since the 1930s and provide 300,000<sup>39</sup> trips a day.<sup>40</sup>

## 2. *Attack on Tech for the Sake of . . . Attacking Tech?*

The City Council cited a number of factors as justification for the one-year cap on rideshares and minimum wage floor: increased protection for drivers (both of rideshares and taxis);<sup>41</sup> mitigation of traffic congestion in Manhattan's central business district; regulation of the otherwise unrestricted growth of the booming rideshare industry because this growth is unsustainable;<sup>42</sup> and address of the growing environmental concerns stemming from the rideshare economy's rapid proliferation.<sup>43</sup>

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<https://www.wsj.com/articles/new-york-city-council-votes-to-cap-uber-and-lyft-1533759263> [<https://perma.cc/W6G7-R6R8>] (noting that ride-hail vehicles — like Uber and Lyft — numbered 25,000 in 2015, while in 2018, there were about 80,000).

35. See Fitzsimmons, *Uber Hit with Cap*, *supra* note 13.

36. See Fitzsimmons, *Taxi Drivers in New York Are Struggling*, *supra* note 34. According to experts, if Uber's drivers were classified as employees rather than independent contractors, Uber would be New York City's number one private for-profit employer. See Holley, *supra* note 17.

37. See generally N.Y.C. Council, Committee on For-Hire Vehicles, PROPOSED INT. No. 144-B, at 7 (Aug. 8, 2018) <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3331789&GUID=6647E630-2992-461F-B3E3-F5103DED0653&Options=&Search=> [<https://perma.cc/N2UW-95ZX>] [hereinafter Committee Report 8/8/18]. Note that licenses for vehicles, drivers themselves, and bases are issued separately. *FAQ for TNC Drivers*, DEP'T MOTOR VEHICLES, <https://dmv.ny.gov/more-info/faq-tnc-drivers> [<https://perma.cc/VQ2F-TKP5>].

38. See Committee Report 8/8/18, *supra* note 37, at 9.

39. See Holley, *supra* note 17.

40. NEW YORK CITY TAXI AND LIMOUSINE COMMISSION, 2017 ANNUAL REPORT 8 (2017).

41. *Id.*

42. See Goldman, *supra* note 19; Siddiqui, *New York City Council Passes First-in-the-Nation Cap*, *supra* note 17.

43. See Goldman, *supra* note 19; Siddiqui, *New York City Council Passes First-in-the-Nation Cap*, *supra* note 17.

Many council members acknowledged the serious, legitimate concern that discrimination and racism has led to communities of color being denied access to taxis, that transit deserts were indeed a serious problem that needs addressing, and that rideshares were indeed filling a gap in transit access.<sup>44</sup> A strong majority nevertheless voted in favor of the package of bills that included a cap and minimum wage because it included a broad exemption for wheelchair-accessible vehicles and would create of the Office of Inclusion at the TLC to examine discrimination.<sup>45</sup>

The City's exertion of control over rideshare economy sent a strong message to the tech industry.<sup>46</sup> New York City's move to curb the growth of rideshares could inspire other major cities nationwide to impose similar regulations.<sup>47</sup> The new regulatory strategy is a blow to Uber, which had a projected valuation of \$120 billion in early 2019,<sup>48</sup> and after months of anticipation, went public on May 10, 2019 at the disappointingly low price of \$45 per share (valuing the company at about \$75.46 billion).<sup>49</sup> Similarly, it will heavily impact

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44. See, e.g., City Council of New York Hearing Transcript 102-04, 110 (Aug. 8, 2018).

45. See Transcript of the Minutes, *supra* note 16, at 47, 77; William Neuman, *New York Office to Address Discrimination by Taxis and For-Hire Vehicles*, N.Y. TIMES (July 31, 2018), <https://www.nytimes.com/2018/07/31/nyregion/uber-taxis-minorities-bias-refusal-nyc.html> [<https://perma.cc/6T73-AJDP>].

46. See generally Transcript of the Minutes, *supra* note 16. Indeed, many Council members noted that this bill was intended to send a message to billion-dollar tech companies. *Id.* at 98. Richards, who voted yes, said he was “proud to be part of a body led by Speaker Johnson that is sending a message to billion dollar companies that have aggressively waged a public campaign against raising standards for their own drivers and regulations that would reign in the oversaturation of their cars on our city streets that have added to an ever-growing congestion problem. In New York City, there should be one set of rules for everyone, and no corporation should feel that they are entitled to a monopoly at the expense of people’s lives.” *Id.* at 98.

47. Fitzsimmons, *Uber Hit with Cap*, *supra* note 13; see also Owain James, *Uber and Lyft Are Lobbying States to Prohibit Local Regulation*, MOBILITYLAB (July 24, 2018), <https://mobilitylab.org/2018/07/24/uber-and-lyft-are-lobbying-states-to-prohibit-local-regulation/> [<https://perma.cc/YQ75-5ZN5>].

48. Liz Hoffman et al., *Uber Proposals Value Company at \$120 Billion in a Possible IPO*, WALL ST. J. (Oct. 16, 2018, 1:28 PM), <https://www.wsj.com/articles/uber-proposals-value-company-at-120-billion-in-a-possible-ipo-1539690343> [<https://perma.cc/5HJ3-RAZF>] (basing the estimated, pre-IPO valuation off of proposals from Wall Street banks).

49. Andrew J. Hawkins, *Uber Goes Public: Everything You Need to Know About the Biggest Tech IPO in Years*, VERGE (May 10, 2019, 12:50 PM), <https://www.theverge.com/2019/5/10/18564197/uber-ipo-stock-valuation-pricing-fares-drivers-public-market> [<https://perma.cc/K2WP-XF53>]. In its first earnings report since listing its shares on the stock market, Uber reported losses of more than \$1 billion for the quarter (compared to profit a year ago resulting from divestitures), while revenues rose twenty percent to \$3.1 billion, which is “slower than the 25 percent annual

Lyft, which became the first ridesharing company to go public on March 29, 2019, and is now valued at \$27 billion.<sup>50</sup>

But in terms of any practical ramifications for the cap — for example, mitigating congestion in Manhattan — whether a cap on rideshares will be actually effective is questionable.<sup>51</sup> Manhattan’s traffic congestion problems existed long before Uber and Lyft’s appearance,<sup>52</sup> and as a regulatory strategy meant to decongest traffic, transportation experts say that citywide cap on for-hire vehicles is suboptimal with “questionable efficacy.”<sup>53</sup> And, as previously mentioned, there are alarming externalities, which council members explicitly acknowledged during the hearing, that should make such a regulatory strategy unjustified.

Finally, there is uncertainty regarding whether a cap on for-hire vehicles, provided by private tech companies, is legally justifiable. Ubers, to put it simply, are not taxis. The services, while comparable, are not the same, and conflating the two from a regulatory standpoint has little basis in the law, however little law there is about this burgeoning industry.

Today, New York City is home to over 8.5 million people and 4.4 million daily commuters in its five boroughs (Manhattan, Brooklyn, Queens, the Bronx, and Staten Island).<sup>54</sup> The City has welcomed 300,000 residents, 700,000 jobs, and 16 million tourists in the last decade.<sup>55</sup> Meanwhile, growth, or at least improvement, of transit, has

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growth it had recorded in the prior quarter” — which is “the company’s lowest quarterly growth rate since it began disclosing its results in 2017.” Kate Conger, *Uber’s First Earnings Report After I.P.O.: \$1 Billion Loss*, N.Y. TIMES (May 30, 2019), <https://www.nytimes.com/2019/05/30/technology/uber-stock-earnings.html> [https://perma.cc/KF9T-BGNG].

50. Kate Conger & Michael J. de la Merced, *Lyft’s Shares Jump in Trading Debut, Cementing Rise of the Gig Economy*, N.Y. TIMES (Mar. 29, 2019), <https://www.nytimes.com/2019/03/29/technology/lyft-stock-price.html> [https://perma.cc/VP5Y-W6AU].

51. See NICK SIFUENTES & LIAM BLANK, HIRE CONGESTION, LOWER SPEEDS: IS IT TIME TO CAP FOR-HIRE VEHICLES? 4 (2018), <http://www.tstc.org/wp-content/uploads/2018/06/Hire-Congestion.pdf> [https://perma.cc/E8PH-AV83] [hereinafter HIRE CONGESTION] (“An overly-aggressive citywide cap on FHV’s would not only reduce availability in lower-income communities; it would potentially depress revenues from the congestion surcharge as well, thereby impacting funding for transit.”).

52. *Id.* at 5.

53. *Id.* at 4, 6.

54. OFFICE OF THE N.Y.C. COMPTROLLER SCOTT M. STRINGER, THE OTHER TRANSIT CRISIS: HOW TO IMPROVE THE NYC BUS SYSTEM 9 (2017), <https://comptroller.nyc.gov/reports/the-other-transit-crisis-how-to-improve-the-nyc-bus-system/> [https://perma.cc/ABJ9-CQF7].

55. *Id.*

been less than proportional to the increase of people relying on transportation. Of the various ways people — inhabitants and tourists alike — traverse around the City, buses are not reaching their maximum potential<sup>56</sup> and subways are increasingly failing.<sup>57</sup> In their places, Uber has filled the gap for many residents.<sup>58</sup>

### 3. *Uber's Response to the City's One-Year Ban*

On February 25, 2019, Uber filed a lawsuit against the City of New York. Their complaint alleges, among other things, that Int. No. 144-B, in delegating to the TLC permanent FHV capping power, exceeds the City Council's power, was imposed without first studying what effect FHVs have on congestion, and is ultimately preempted by other interconnected regulatory measures put forth by the State of New York in 2018.<sup>59</sup>

According to City Clerk records, Uber, Lyft, and other rideshare companies reportedly spent over \$1 million lobbying the de Blasio administration to scale back rideshare regulations between January and June 2018 — 70% more than what they spent lobbying the city in 2017 alone.<sup>60</sup> Their recent efforts fighting the temporary moratorium may not have been a success, especially in comparison to their fierce, successful challenge of the same cap back in 2015. But these companies are certainly not done putting up a fight, and their concern, however self-interested, does shine a light on the fact that a cap as a regulatory strategy is problematic.

Uber may be a private company concerned with protecting their bottom line. But as earnest critics of the one-year cap, they — alongside transit and civil rights advocates — argue that the communities that will be hit the hardest by a cap on rideshare vehicles are those in the outer boroughs of New York City, which tend to be low-income, minority communities.<sup>61</sup> Certainly, research shows that

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56. *Id.*

57. Emma G. Fitzsimmons, *They Vowed to Fix the Subway a Year Ago. On-Time Rates Are Still Terrible.*, N.Y. TIMES (July 23, 2018), <https://www.nytimes.com/2018/07/23/nyregion/nyc-subway-delays-failure.html> [<https://perma.cc/93L9-JC65>].

58. *See infra* Section I.C.3.

59. *See generally* Complaint, *Zehn-NY LLC v. City of New York*, No. 151730/2019 (N.Y. Sup. Ct. Feb. 15, 2019).

60. Anna Sanders, *Ride-Sharing Companies Spent over \$1M Lobbying in NYC*, N.Y. POST (Aug. 4, 2018, 5:35 PM), <https://nypost.com/2018/08/04/ride-sharing-companies-spent-over-1m-lobbying-in-nyc/> [<https://perma.cc/JR68-7PPW>].

61. *Id.*

rideshares serve a higher proportion of low-income neighborhoods than yellow cabs.<sup>62</sup>

Residents in the outer boroughs (areas that tend to be considered “transit deserts”)<sup>63</sup> lack accessible public transit options, endure poor bus service that is infrequent and overcrowded,<sup>64</sup> and are underserved by traditional taxi services<sup>65</sup> — despite the City’s attempts to remedy this underservice by implementing green taxis in 2015. Uber considers their service a remedy to this ongoing problem. An Uber ride may not be a commuter’s first choice, but sometimes it may be their only option when the bus does not show up or subway service is down.

## B. Regulating Rideshares Alongside the Taxi Medallion Regime

### 1. *Aren’t Ubers Just Taxis?*

For-hire vehicles, such as Ubers, Lyfts, and the like, are currently subject to a different set of regulations than yellow taxis due to a few crucial differences.<sup>66</sup> Mainly, yellow taxis have been regulated by a medallion regime since the 1930s, which gives them a monopoly over picking up passengers from street hailing.<sup>67</sup> But because yellow taxis are the only vehicles permitted to pick up street-hail passengers, they are subject to more stringent regulation as opposed to FHVs, which may only serve customers who have made a phone call, or called for the car via a smartphone app (which, in the latter case, would also require them to have a credit card, and share specific information like pick-up and drop-off locations).<sup>68</sup>

In justifying the distinction between medallion taxicabs from FHVs, the Second Circuit noted that the different circumstances by

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62. See generally HIRE CONGESTION, *supra* note 51.

63. See *infra* Section I.C.

64. Amy Yensi, *Soundview Residents Say Bronx Neighborhood Is Transit Desert*, NY1 (Sept. 9, 2018, 5:25 PM), <https://www.ny1.com/nyc/bronx/news/2018/09/09/soundview-residents-say-bronx-neighborhood-is-transit-desert-> [<https://perma.cc/W44L-WDTL>]. Bus rider Sharon Nelson commented, “If you’re waiting a long time that throws you off for the connecting bus. I check the transit app and if it’s too long, I take an Uber. I don’t always want to have to take an Uber. Thank God it’s here right now.” *Id.*

65. Shoshana Wodinsky, *In Major Defeat for Uber and Lyft, New York City Votes to Limit Ride-Hailing Cars*, VERGE (Aug. 8, 2018, 4:39 PM), <https://www.theverge.com/2018/8/8/17661374/uber-lyft-nyc-cap-vote-city-council-new-york-taxi> [<https://perma.cc/57WU-7WPE>].

66. See Committee Report 8/8/18, *supra* note 37, at 4.

67. *Id.*

68. *Id.* at 6.

which these services obtain riders have resulted in certain regulations on medallion taxicabs by the TLC that are not appropriate for FHV's:

[Taxi have] . . . vehicle attributes, such as a distinctive yellow color, overhead lights, air conditioning, and a uniform rate structure. These regulations conceivably promote safety, convenience, easy identification, comfort, and uniformity of service for customers who hail a taxicab on the street and have had no prior dealings with the driver or the taxicab company. Moreover, other regulations, such as the requirement of a partition between a driver and a passenger or an emergency warning light, may promote driver safety when picking up customers who have no prior relationship with the taxicab company.<sup>69</sup>

Furthermore, taxis are frequently understood to be part of the “common carrier system,”<sup>70</sup> and thus subject to limited entry, rate regulation, and universal service obligations.<sup>71</sup> Uber may have hastened the demise of the taxi industry by upending the financial security that a taxi medallion provided,<sup>72</sup> but the business of driving a taxi was strained even before the growth and proliferation of FHV's by way of its strict regulation and uncompromising numerical cap. Although New York City first issued taxi medallions in 1937, it took nearly sixty years before New York started to release any new medallions.<sup>73</sup> In 1996, the City held the first auction for 1800 new medallions.<sup>74</sup> The most recent medallion auction was held in 2014;

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69. *Progressive Credit Union v. City of New York*, 889 F.3d 40, 50 (2d Cir. 2018) (upholding the “TLC’s decision to impose increased accessibility fleet requirements on medallion taxicabs and not also on FHV's [because it] rationally serves the City’s legitimate object of making it easier for disabled persons to obtain transportation via street hail”).

70. James B. Speta, *Southwest Airlines, MCI, and Now Uber: Lessons for Managing Competitive Entry into Taxi Markets*, 43 *TRANSP. L.J.* 101, 114 (2016) (noting that according to the Supreme Court, a taxi’s “status as a common carrier depends on how they operate; if taxicabs serve the public generally, they were considered common carriers”) (citing *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252, 255–56 (1916)).

71. *Id.*

72. Winnie Hu, *Taxi Medallions, Once a Safe Investment, Now Drag Owners Into Debt*, *N.Y. TIMES* (Sept. 10, 2017), <https://www.nytimes.com/2017/09/10/nyregion/new-york-taxi-medallions-uber.html> [<https://perma.cc/MSS6-DGN9>] (“Taxi ownership once seemed a guaranteed route to financial security, something that was more tangible and reliable than the stock market since people hailed cabs in good times and bad.”).

73. Jeff Horwitz & Chris Cumming, *Taken for a Ride*, *SLATE: MONEYBOX* (June 6, 2012, 6:30 AM), <https://slate.com/business/2012/06/taxi-medallions-how-new-yorks-terrible-taxi-system-makes-fares-higher-and-drivers-poorer.html> [<https://perma.cc/22EG-P4XQ>].

74. *See* Hu, *supra* note 72.

350 new medallions were sold, generating \$359 million in revenue.<sup>75</sup> Today, by law, there are a total of 13,587 taxi medallions.<sup>76</sup>

There are positive aspects to having a medallion system for taxis, in that the numerical cap, in theory, regulates the proportion of cabs per people and it may provide equity to taxi owners.<sup>77</sup> However, these stringent regulations have created a crisis for the medallion regime, in that it is financially incompatible with rideshare competition for its drivers. In 1979, taxi drivers also became “independent contractors” under federal labor laws when the TLC modified its rules to allow medallions to be leased out for twelve-hour shifts.<sup>78</sup> The need to make daily lease payments to operate a medallion chipped away at the economic value of driving a taxi, and this business model continues in full force today.<sup>79</sup> For example, in 2012, less than 20% of taxis were owner-operated, meaning taxi fleets or brokers who rent taxis out to drivers own the majority of medallions.<sup>80</sup>

The rise of FHV's has caused a massive plummet in the value of taxi medallions and placed significant economic strain on one of New York City's largest working-class populations.<sup>81</sup> While the medallion used to steadily rise in value, after reaching a record-high price of \$1.3 million in 2014, medallions are now selling for a fraction of that price (falling to around \$160,000).<sup>82</sup> In fact, because of the rise of FHV's, many medallions are worth far less than what their owners borrowed to buy them.<sup>83</sup> Taxi cab owners, struggling to pay back the loans they took out to purchase their medallion, no longer have what was once considered a guaranteed “retirement fund.”<sup>84</sup> Between 2015 to 2017, eighty-five medallions were sold as part of foreclosure proceedings, according to city records.<sup>85</sup>

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75. *Id.*

76. *See Get a Vehicle License*, N.Y.C. TAXI & LIMOUSINE COMMISSION, <https://www1.nyc.gov/site/tlc/vehicles/get-a-vehicle-license.page> [<https://perma.cc/8W92-XMQZ>]; Fitzsimmons, *Taxi Drivers in New York Are Struggling*, *supra* note 34.

77. *See* Harnett, *supra* note 11.

78. *See id.*; Horwitz & Cumming, *supra* note 73.

79. *See* Horwitz & Cumming, *supra* note 73 (commenting that rising gas prices or traffic jams could deeply impact a driver's daily wage since they still had to break even and afford the daily lease payment).

80. *See* Harnett, *supra* note 11; *id.*

81. *See* Harnett, *supra* note 11.

82. *Id.*

83. *See* Horwitz & Cumming, *supra* note 73.

84. *Id.*

85. *Id.* In August 2017 alone, twelve of the twenty-one medallions sold were done so as part of foreclosure, with sales prices ranging from \$150,000 to \$450,000. *Id.*

## 2. What Are Green Taxis?

The green taxi business, a relatively new player itself to the City's transportation landscape, has likewise been impacted by FHV's before it ever had the chance to take off.<sup>86</sup> Green cabs were implemented in 2013 — just around the time FHV's began picking up speed and when the value of a medallion reached a high of over \$1 million.<sup>87</sup> Mayor Michael Bloomberg originally devised the plan (the “HAIL Plan”) in 2011<sup>88</sup> to create a new fleet of so-called borough taxis to “bring safe, reliable taxi service to the 4½ boroughs that don't currently have it.”<sup>89</sup> At the time, a survey conducted by the taxi commission revealed that 95% of yellow taxis picked up passengers below 96th Street in Manhattan and at the airports.<sup>90</sup> Green taxis were to be geographically restricted to above East 96th and West 110th streets in Manhattan, and the outer boroughs (except for two airports in Queens: LaGuardia and JFK) — areas that are traditionally underserved by yellow cabs.

Today, there are an estimated 3500 green taxis on the road in New York City.<sup>91</sup> While green taxis were theoretically intended to operate as yellow taxis do, in reality, their geographical restrictions have

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86. James Barron, *Where Yellow Cabs Didn't Go, Green Cabs Were Supposed to Thrive. Then Came Uber.*, N.Y. TIMES (Sept. 3, 2018), <https://www.nytimes.com/2018/09/03/nyregion/green-cabs-yellow-uber.html> [<https://perma.cc/3XTL-VJ59>].

87. Katrina M. Wyman, *Taxi Regulation in the Age of Uber*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 78–79; see Ted Mann, *Mayor's Taxi Plan Gets Green Light; Appeals Court Upholds Plan to Allow New Street-Hail Livery Cabs*, WALL ST. J. (June 7, 2013, 8:50 PM), <https://www.wsj.com/articles/SB10001424127887324798904578529600046666448> [<https://perma.cc/Y4SU-7945>].

88. Dana Rubinstein, *Bloomberg's Radical Proposal to Solve New York City's Taxi Problem, Stalled*, POLITICO (Oct. 5, 2011, 11:07 AM), <https://www.politico.com/states/new-york/albany/story/2011/10/bloombergs-radical-proposal-to-solve-new-york-citys-taxi-problem-stalled-000222> [<https://perma.cc/4ZQG-R86Z>]. After the HAIL Plan was passed by legislative initiative in Albany, thereby bypassing City Council, the District Court ruled it unconstitutional as a violation of New York's Home Rule provision and New York's State Constitution. *Taxicab Serv. Ass'n v. State*, No. 102553-2012 (N.Y. Sup. Ct. Aug. 21, 2012), *rev'd in part by* *Greater N.Y. Taxi Ass'n v. State*, 21 N.Y.3d 289 (N.Y. 2013). In 2013, the HAIL Plan was ultimately upheld by the New York Court of Appeals. See *generally* *Greater N.Y. Taxi Ass'n v. State*, 993 N.E.2d 393 (N.Y. 2013).

89. See Mann, *supra* note 87.

90. See Barron, *supra* note 86.

91. See *id.* The New York Times reported this estimate from City officials on September 3, 2018. *Id.*

stymied their behavior.<sup>92</sup> According to Mitchell L. Moss, director of the Rudin Center for Transportation Policy and Management at New York University, green taxis are more likely to find passengers by waiting at retail hubs, transit hubs, or areas where subway lines end, rather “than if they cruise the streets they are authorized to cruise where people are not used to seeing cabs.”<sup>93</sup> Furthermore, Moss notes that “[t]he benefit of Uber is it can come pick you up in highly dispersed locations, which the green taxi can’t really do because it’s got to stay near dense transit pickup locations.”<sup>94</sup>

Because many green taxi operators also drive for Uber, the rideshare company contends they help green taxi drivers by connecting them with riders.<sup>95</sup> More than 50,000 trips to green taxis are dispatched from Uber every month.<sup>96</sup> This dispatch connection is particularly advantageous for riders in distant neighborhoods, since green taxis can be more difficult to hail from the street than from an app. However, seeing an apple green-colored borough taxi pull up, rather than the expected personal vehicle, can be confusing to users.<sup>97</sup> Nevertheless, because green taxis are geographically restricted, they have a difficult time competing with app-based FHV. Green taxis are especially at a disadvantage compared to yellow taxis and FHVs at airports, where they are allowed to drop off passengers but cannot pick them up unless the pick-up is prearranged (sent by a dispatcher). Thus, because of these restrictions, the green taxi must “go to the airports empty if they are dispatched for a pickup or return empty if they take someone there.”<sup>98</sup>

### C. Rideshares Embrace, Rather than Overlook, the Outer Boroughs

#### 1. *Rideshares (By the Numbers): More Popular than Taxis in Outer Boroughs*

There is a significant, growing demand for rideshares in the outer boroughs. Rideshare services have been more popular in the outer

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92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* Yellow cabs, on the other hand, can wait in taxi lines, while FHVs are not restricted from picking up passengers at airports. *Id.*

boroughs than yellow taxis since 2016.<sup>99</sup> Today, half of all Uber rides start outside Manhattan — up from one-fourth just two years ago — and this number does *not* include pickups at the City’s two airports in Queens.<sup>100</sup>

In 2015, FiveThirtyEight conducted a study analyzing pickup data from nearly 19 million Uber rides in New York City from April to September 2014 and January to June 2015.<sup>101</sup> It found that “Uber has not caused a net increase in pickups, at least not in Manhattan . . . . Instead, the ride-share service is replacing cabs in the center of the city and supplementing them in the outer boroughs.”<sup>102</sup> The study concluded that in central Manhattan, where green taxis (aka borough taxis) are not allowed to make pick-ups,

Uber added 3.82 million trips in April through June of [2015] . . . compared with the same period [in 2014] . . . . Taxis, in the same area, lost 3.83 million pickups. The total number of pickups was virtually unchanged: 39.37 million in 2014 versus 39.36 million in 2015.<sup>103</sup>

In 2017, Uber, after years of being notoriously withholding about its data, released ridership data to the *New York Times* taken from fifty sample residential areas in the Bronx, Brooklyn, Queens, and on Staten Island (areas that were known to have limited access to public transportation).<sup>104</sup> This data revealed that ridership in the outer boroughs significantly rose from the year before. In August 2017, for example, Uber made a total of 167,194 weekly pickups in these areas, compared to the 56,721 weekly pickups it made as of August 2016.<sup>105</sup>

99. Todd W. Schneider, *Analyzing 1.1 Billion NYC Taxi and Uber Trips, with a Vengeance* (Mar. 2018), <http://toddwscneider.com/posts/analyzing-1-1-billion-nyc-taxi-and-uber-trips-with-a-vengeance/> [<https://perma.cc/ZS2L-PGFY>] (aggregating data from ride-hail apps Uber, Lyft, and Via, compared to yellow and green taxis).

100. Winnie Hu, *Uber, Surging Outside Manhattan, Tops Taxis in New York City*, N.Y. TIMES (Oct. 12, 2017), <https://www.nytimes.com/2017/10/12/nyregion/uber-taxis-new-york-city.html> [<https://perma.cc/AYY6-U3X6>] [hereinafter Hu, *Uber Surging*].

101. Reuben Fischer-Baum & Carl Bialik, *Uber Is Taking Millions of Manhattan Rides Away from Taxis*, FIVETHIRTYEIGHT (Oct. 13, 2015), <https://fivethirtyeight.com/features/uber-is-taking-millions-of-manhattan-rides-away-from-taxis/> [<https://perma.cc/6MRD-U9C8>]; see also Schneider, *supra* note 99.

102. Fischer-Baum & Bialik, *supra* note 101.

103. *Id.*

104. See Hu, *Uber Surging*, *supra* note 100.

105. *Id.* (“In St. Albans, [Queens,] weekly pickups rose to 6,370 from 1,870 the year before, . . . . In the Flatlands neighborhood in Brooklyn, which has no subway station, there were 13,380 weekly pickups, or nearly four times the 3,598 pickups the previous year. In Starrett City, a vast housing development, weekly pickups rose to 2,261 from 699. Nine areas were on Staten Island, a borough where public transit is sparse . . . . In the New Springville area, weekly pickups soared to 1,494 from 591.”).

The study drew more than half of the fifty sample residential areas from Queens alone,<sup>106</sup> where access to public transportation is sparse and commutes into Manhattan by bus or subway are long.<sup>107</sup>

Indeed, rideshares are outperforming taxicabs in New York City. As of October 2017, more passengers are choosing ride-hail apps over yellow taxis.<sup>108</sup> Analyzing TLC datasets of over 1.1 billion individual taxi trips between January 2009 and June 2015, Todd W. Schneider reported that “February 2017 marked the first month that ride-hailing services collectively made more trips than yellow and green taxis combined, and by December 2017, ride-hailing services made 65% more pickups than taxis did.”<sup>109</sup> Schneider concluded that the ride-hail sector “now makes more pickups per month than taxis did in *any* month since the dataset began [in] 2009.”<sup>110</sup> In addition, according to City data, yellow taxis made an average of 277,042 daily trips in July 2017 (collecting \$4 million in fares per day), as compared to 332,231 daily trips (and \$4.9 million in fares) the year before.<sup>111</sup> Data indicates FHV use is increasing while taxi trips are declining, suggesting that FHVs have created new demand for backseat rides in Manhattan.<sup>112</sup> Not only are rideshare passengers choosing FHVs over yellow taxis, but FHVs are also replacing other modes of transit. Without FHVs, approximately 49% to 61% of ride-hailing trips would not have been made at all, or made by walking, biking, or transit.<sup>113</sup>

106. *See id.*

107. *See* Eric Jaffe, *Where the New York City Subway Doesn't Go*, CITYLAB (Aug. 5, 2015), <https://www.citylab.com/transportation/2015/08/where-the-new-york-city-subway-doesnt-go/400538/> [<https://perma.cc/98BJ-LHLE>].

108. *See* Hu, *Uber Surging*, *supra* note 100.

109. Schneider, *supra* note 99.

110. *Id.*

111. Hu, *supra* note 72.

112. *See* Laura Bliss, *How to Fix New York City's 'Unsustainable' Traffic Woes*, CITYLAB (Dec. 21, 2017), <https://www.citylab.com/transportation/2017/12/how-to-fix-new-york-citys-unsustainable-traffic-woes/548798/> [<https://perma.cc/86HL-UX53>] (“Total passenger trips increased 15 percent, even as taxi trips declined, in that time period. That means TNCs [transportation network companies] have created new demand for backseat rides in Manhattan. And they increased the amount of miles traveled by for-hire vehicles around by a whopping 36 percent, over the same time period. That adds up to more than 600 million miles of motor vehicle traffic in the past 3 years alone — reflecting not only the staggering growth in rides, but a trend toward lengthier trips and more ‘deadheading,’ or cars traveling without passengers.”).

113. *See* REGINA R. CLEWLOW & GOURI SHANKAR MISHRA, *DISRUPTIVE TRANSPORTATION: THE ADOPTION, UTILIZATION, AND IMPACTS OF RIDE-HAILING IN THE UNITED STATES* 8 (2017), <https://its.ucdavis.edu/research/publications/?frame=https%3A%2F%2Fitspubs.ucdavis.edu>

Additionally, 50% of for-hire vehicle users surveyed in the City's Mobility Report said they had substituted a mass transit journey with a trip in a FHV.<sup>114</sup> Importantly, FHVs have become so successful in part due to the decline in subway and bus service: "[T]he Mobility Report shows that subway ridership fell by just under one percent in 2017, while bus ridership continued its decline from 697 million rides in 2010 to 638 million today."<sup>115</sup> Thus, because riders would otherwise use subways or buses, improving public transit would significantly help reduce congestion.<sup>116</sup>

## 2. *How TNCs Compare to SHLs and Taxis*

The Tri-State Transportation Campaign recently conducted a study using publicly-available data from the TLC.<sup>117</sup> The data, which reflects pick-ups and drop-offs from July through December 2017, constitutes the most recently available data and includes information for street-hail liveries ("SHLs," more commonly known as green taxis or borough taxis), yellow taxis *and* FHVs.<sup>118</sup> Before mid-2017, TNCs were not required to report this data.<sup>119</sup> Aggregating hundreds of thousands of individual pick-ups and drop-offs by FHVs, SHLs, and yellow taxis, the study cross-references geo-tagged taxi data with the Census districts to analyze the income level of the neighborhood where a given pick-up or drop-off occurred.<sup>120</sup> The original purpose of the study was to assess the viability of a cap on FHVs in New York City by analyzing rider data to determine whether FHVs like Uber and Lyft make more pick-ups and drop-offs in congested areas of Manhattan than yellow or green taxis.<sup>121</sup> While the study *does* conclude that FHVs tended to accumulate in dense, congested parts of Manhattan, it also reveals an interesting trend: The service patterns of FHVs more closely resemble those of green taxis, as opposed to yellow taxis, in that they serve low-income communities that are

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s.edu%2Findex.php%2Fresearch%2Fpublications%2Fpublication-detail%2F%3Fpub\_id%3D2752 [https://perma.cc/PKM6-CPZ7].

114. HIRE CONGESTION, *supra* note 51, at 5.

115. *Id.*

116. *Id.*

117. *See generally id.*

118. *Id.* at 7.

119. *Id.*

120. *Id.* (explaining that researchers "broke census tracts apart as they intersected taxi zones, dividing up the people in each income category based on the percentage overlap, and then re-aggregated these by taxi zones. The end result is an approximate sixteen-category income breakdown per taxi zone.").

121. *Id.* at 4.

poorly-served by yellow taxis.<sup>122</sup> While green taxis and FHV's tend to serve a more widely-distributed area, yellow taxis, as a result of their artificial cap, tend to operate with relative frequency in higher-income areas of New York, particularly in Manhattan below 96th Street.<sup>123</sup>

The disparity in service between yellow taxis and FHV's becomes even more striking when the data is broken down into narrower income categories.<sup>124</sup> Over 25% of yellow taxis' pick-ups and drop-offs come from neighborhoods with average incomes above \$200,000, compared to 15% of the customer base for FHV's, and 10% of the customer base for SHL's.<sup>125</sup> As a result of FHV's' widespread service into territories occupied by green cabs, green taxi drivers are likewise suffering economically from Uber's growth.<sup>126</sup> Not only are the number of active green taxis on the decline,<sup>127</sup> but green taxi drivers are working fewer hours than they used to,<sup>128</sup> making fewer trips than they were in previous years, and are generating less daily revenue overall.<sup>129</sup> For example, in May 2018, green taxis made 25,693 trips a day across the *entire city*, a 55% decrease from May 2015 (the busiest month on record), which accounted for 57,637 trips.<sup>130</sup> Uber, on the other hand, accounted for over 84,000 trips in one month to or from a

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122. *Id.* at 7 (“TNCs [transportation network companies] . . . draw 36% of their customer base from neighborhoods with an average income below \$45,000. By contrast, yellow cabs only draw 26% of their customer base from those same neighborhoods. At the other end of the income scale, TNCs serve barely more passengers in neighborhoods with high average incomes: 37%. Yellow cabs, however, draw over half of their customer base from those high-income neighborhoods.”).

123. *Id.* at 6.

124. *Id.* at 8.

125. *Id.* (“The inflection point where the proportion of trips switches is around \$99,999. Below that threshold, SHLs and TNCs derive a larger share of their customers from those income levels than yellow cabs. Above \$100,000, the reverse is true.”).

126. *See generally supra* Section I.B.2. As previously mentioned, green taxis (also known as borough taxis or street-hail liveries (“SHLs”)) can pick up above East 96th Street, West 110th Street, and in the outer boroughs.

127. *See Barron, supra* note 86 (stating that only 3514 permits are considered active by the taxi commission, even though 8345 have been issued since 2013).

128. *Id.* (finding that green cab drivers' working hours declined from 6.5 hours in May 2015 to 5.7 hours in May 2018).

129. *Id.* Fewer trips and decreased hours spent working has created less revenue for the green taxi sector, from \$862,099 a day citywide in May 2015 to \$386,965 a day citywide in May 2018. *Id.*

130. *Id.* According to the taxi commission, a third of green cabs' service between January and May 2018 stemmed from pick-ups in Brooklyn; about 31% came from northern Manhattan; 29.5% were in Queens; only 5.3% were in the Bronx; and only 1/100th of 1% on Staten Island. *Id.*

single *neighborhood* (East New York, Brooklyn) during Summer 2018.<sup>131</sup>

While FHV's also skew towards higher income levels, and SHLs serve a higher proportion of low-income neighborhoods than either FHV's or yellow cabs, the disparity between FHV's and SHLs is much narrower than between FHV's and yellow cabs.<sup>132</sup> The report attributes the similarity in service patterns between FHV's and SHLs — and, therefore, the benefit to lower-income riders — to their licensing model.<sup>133</sup> Unlike yellow taxis, which operate under a strict medallion regime that caps their numbers, FHV's and green taxis do not have an “over-inflated” cost of entry.<sup>134</sup> In recent years, as previously mentioned, the yellow taxi economy has become depressed due to the influx of marketplace competition like Uber. As this study reveals, subjecting rideshares to an artificial cap will impact service to lower-income customers — who proportionately tend to live in boroughs further from Manhattan,<sup>135</sup> in communities that are made up predominantly of minorities<sup>136</sup> — not to mention disabled

131. *Id.*

132. See HIRE CONGESTION, *supra* note 51, at 8.

133. *Id.* at 8.

134. *Id.*; see also Speta, *supra* note 70, at 114. The regulation of taxi cabs as “common carriers” can be justified in terms of market failures:

Average rate regulation, especially if based on distance or a combination of distance and time for the trip, creates another problem: not all trips of the same distance or time are of equal value. This is because some trips will result in deadheading—an ‘empty’ return trip—and thus any trip has two values, the value of the trip itself and the odds that a deadhead will result. Given this variation, cabs, even when subject to average rate regulation, will compete for trips that are less likely to result in empty returns and may simply refuse trips that are highly likely to result in empty returns. In practical terms, this means that cabs will congregate in downtown areas and may refuse to travel to less dense or poorer areas. It is not surprising therefore that one regulation that has generally accompanied taxi regulation is the requirement to haul all customers. This is the duty to serve of common carrier regulation.

Speta, *supra* note 70, at 114.

135. See generally HIRE CONGESTION, *supra* note 51.

136. Richard A. Marcantonio et al., *Confronting Inequality in Metropolitan Regions: Realizing the Promise of Civil Rights and Environmental Justice in Metropolitan Transportation Planning*, 44 FORDHAM URB. L.J. 1017, 1019 (2017) (“Continuing disparities manifest themselves in astonishingly high income and wealth inequality between whites and people of color, especially African Americans and Latinos.”); see also *id.* at 1022 (“Twentieth century metropolitan growth in the United States resulted in regions nominally linked by transportation infrastructure

riders.<sup>137</sup> The effects of this uneven access to rideshare transportation may be far-reaching for major urban cities like New York, given the link between transportation access with “employment outcomes and other opportunities, especially in communities of color.”<sup>138</sup> Because yellow taxis “disproportionately serve higher-income communities”<sup>139</sup> as a result of their cap, maintaining accessible, affordable TNC and green taxi service in the outer boroughs is essential. Ultimately, the study concluded that an artificial cap on FHV’s would not accomplish as much decongestion as the City Council might hope.<sup>140</sup>

Similar patterns have emerged in other large U.S. cities like San Francisco, Chicago, and Houston, where demand for rideshares tends to concentrate in downtown or central business district parts of the city, spreading outwardly to outlying neighborhoods and suburbs.<sup>141</sup> A similar phenomenon is also occurring in Los Angeles,<sup>142</sup> a city with a dense population like New York, albeit one that is massively interconnected by highways: Lyft drivers serve 99.8% of the population of L.A. County.<sup>143</sup> While rideshare users in Los Angeles live disproportionately in high-income neighborhoods relative to the

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and shared housing and labor markets, but separated by vast differences in racial composition, wealth, crime, health outcomes, and access to opportunities like quality education and employment. These disparities often map consistently onto patterns of racial segregation.”).

137. Molly Taft, *Why Can't Uber and Lyft Be More Wheelchair-Friendly?*, CITYLAB (Dec. 11, 2018), <https://www.citylab.com/transportation/2018/12/ride-hailing-users-disabilities-wheelchair-access-uber/577855/> [https://perma.cc/8J65-3HE4].

138. Marcantonio, *supra* note 136, at 1019–20 (“Although race and class residential segregation diminished somewhat in the late 1980s, differential access to opportunities remains a significant problem today. Transportation is both a key driver of these continued problems and a sector on which billions of dollars of federal, state, regional, and local funds are spent every year. Although transportation infrastructure is but a single component of a mix of factors at play, there is overwhelming evidence linking transportation with employment outcomes and other opportunities, especially in communities of color.”).

139. HIRE CONGESTION, *supra* note 51, at 4.

140. *See id.* at 5.

141. *See* Hu, *Uber Surging*, *supra* note 100.

142. *See* Anne Elizabeth Brown, *Ridehail Revolution: Ridehail Travel and Equity in Los Angeles* (Jan. 1, 2018) (unpublished Ph.D. dissertation, UCLA) (on file with UCLA Electronic Theses and Dissertations); *see also* Laura Bliss, *Lyft Is Reaching L.A. Neighborhoods Where Taxis Wouldn't*, CITYLAB (June 29, 2018), <https://www.citylab.com/transportation/2018/06/lyft-is-reaching-la-neighborhoods-where-taxis-wouldnt/563810/> [https://perma.cc/367Z-SPRG]; David Z. Morris, *Ride-Hailing Apps May Benefit Poor and Minority Communities the Most, Study Suggests*, FORTUNE (June 30, 2018), <http://fortune.com/2018/06/30/uber-lyft-poor-minority-communities/> [https://perma.cc/7JLF-X6W2].

143. Brown, *supra* note 142, at 134.

broader population,<sup>144</sup> users living in low-income areas made *more* Lyft trips per person in comparison to middle- and high-income communities.<sup>145</sup>

### 3. *Transit Inequity in the Outer Boroughs*

Significant reliance and ridership from the outer boroughs are attributable to a variety of factors. First, outer boroughs tend to offer poorer, more limited access to transportation.<sup>146</sup> New York City has 472 stations connecting 122 of the City's 189 neighborhoods, but only 75% of the population (6.3 million New Yorkers out of a population of over 8 million) has access to a subway within their neighborhood.<sup>147</sup> Transit deserts, or areas that are further than a ten-minute walk from the subway,<sup>148</sup> are common in outer borough areas like Queens, the Bronx, and Southeast Brooklyn.<sup>149</sup> For instance, while 50% of FHV users citywide indicated that ride-hail service replaced a transit trip, a staggering 68% of riders in Northern Manhattan and Northern Bronx reported using ride-hail services to replace transit trips.<sup>150</sup> Additionally, in Southern Bronx, Northern Bronx, and Staten Island, over 68% of people said that ride-hail services replaced local bus trips.<sup>151</sup>

"[B]ootstraps capitalists" have been filling the transportation voids in transit deserts by providing commuter vans, aka "jitney" or "dollar vans,"<sup>152</sup> since the mid-80s.<sup>153</sup> Known as the "shadow transportation

144. *Id.*; see also CLEWLOW & MISHRA, *supra* note 113, at 7 (citing Aaron Smith, *Shared, Collaborative and On Demand: The New Digital Economy*, PEW RESEARCH CENTER (May 19, 2016), <http://www.pewinternet.org/2016/05/19/the-new-digital-economy/> [<https://perma.cc/L8BL-3Y5R>]).

145. Brown, *supra* note 142, at 134. Ultimately, a rider's greater use of Lyft depended not on income, but whether they owned a personal car. *Id.*

146. See Jaffe, *supra* note 107.

147. See OFFICE OF THE N.Y.C. COMPTROLLER SCOTT M. STRINGER, SERVICE DENIED: ACCESSIBILITY AND THE NEW YORK CITY SUBWAY SYSTEM 1 (2018), [https://comptroller.nyc.gov/wp-content/uploads/documents/Service\\_Denied\\_072018.pdf](https://comptroller.nyc.gov/wp-content/uploads/documents/Service_Denied_072018.pdf) [<https://perma.cc/QE7V-SR53>] [hereinafter SERVICE DENIED].

148. See Jaffe, *supra* note 107.

149. See Thomas J. Campanella, Opinion, *Watering New York's Transit Deserts*, N.Y. TIMES (Aug. 13, 2018), <https://www.nytimes.com/2018/08/13/opinion/mta-new-york-transit-deserts.html> [<https://perma.cc/3RKF-U8MR>].

150. N.Y.C. DEP'T OF TRANSP., NEW YORK CITY MOBILITY REPORT 26 (2018), <http://www.nyc.gov/html/dot/downloads/pdf/mobility-report-2018-print.pdf> [<https://perma.cc/3LEA-V72X>].

151. *Id.*

152. Nicole Stelle Garnett, *The Road from Welfare to Work: Informal Transportation and the Urban Poor*, 38 HARV. J. LEGIS. 173, 176 (2001). The name

system,”<sup>154</sup> dollar vans and other shuttles operate heavily in the areas identified as transit deserts, or areas that are underserved by buses and subways.<sup>155</sup> Over 100,000 riders a day rely on these unofficial shuttles.<sup>156</sup> Today, much of the informal culture of dollar vans is a vestige of its tenacious, utilitarian roots: typically, there are no timetables or service maps, or even official stops or stations.<sup>157</sup> In fact, most riders hear about this shadow network through word of mouth, or by chancing upon the vans in the street. New Yorkers living in outer boroughs are heavily reliant on this informal bus system, touted as an efficient way to supplement mass transit with privately-owned transit entrepreneurs<sup>158</sup> and as providing not only an alternative source of transportation, but job creation.

Many areas in the outer boroughs may also be classified as “transit deserts” because they do not provide access to the subways for disabled or elderly residents. Over half of the neighborhoods (sixty-two out of 122) served by subways are inaccessible under Americans with Disabilities Act (“ADA”) standards.<sup>159</sup> Neighborhoods without

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“dollar vans” is a nod to the early days when a ride cost \$1.00. *See* Annie Correal, *Inside the Dollar Van Wars*, N.Y. TIMES (June 8, 2018), <https://www.nytimes.com/2018/06/08/nyregion/inside-the-dollar-van-wars.html> [https://perma.cc/5NYU-36Q9].

153. The history of New York City’s dollar vans is rooted in a 1980 transit strike, which halted subway trains and bus transportation throughout the five boroughs. *See* Aaron Reiss, *New York’s Shadow Transit*, NEW YORKER (Apr. 4, 2019), <https://projects.newyorker.com/story/nyc-dollar-vans/> [https://perma.cc/YXN3-9D5U]. Residents in these transit deserts crowdsourced together and began using their own vehicles to transport people to their destinations, charging a dollar for the service. *Id.* The strike ended eleven days later, but what started as an ad hoc community transportation system carried on. *Id.* Even though subways and buses resumed, there was still “huge demand in neighborhoods that weren’t well served by public transit even when buses and trains were running.” *See also* Garnett, *supra* note 152, at 203–04; Lisa Margonelli, *The (Illegal) Private Bus System that Works*, ATLANTIC (Oct. 5, 2011), <https://www.theatlantic.com/national/archive/2011/10/the-illegal-private-bus-system-that-works/246166/> [https://perma.cc/L5VZ-SLY5].

154. *See* Reiss, *supra* note 153.

155. *See id.* (noting these areas are “mostly in peripheral, low-income neighborhoods that contain large immigrant communities and lack robust public transit”).

156. *See* Correal, *supra* note 152.

157. *See* Reiss, *supra* note 153 (“Dollar-van lines, by their nature, change slightly from day to day owing to the needs of passengers, road maintenance, or the caprice of drivers . . .”).

158. Margonelli, *supra* note 153.

159. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2008); *see* OFFICE OF THE N.Y.C. COMPTROLLER SCOTT M. STRINGER, *supra* note 54, at 3, 24; *see also* Danielle Furfaro, *Over Half of NYC Neighborhoods Leave Disabled People Stranded*, N.Y. POST (July 17, 2018, 4:00 PM), <https://nypost.com/2018/07/17/over->

ADA accessible stations are in Manhattan's Lower East Side and many parts of Harlem; in Queens, Long Island City; and in Brooklyn, in the neighborhoods of Bushwick, Bay Ridge, Sunset Park, and most of Coney Island.<sup>160</sup> Critically, of these sixty-two ADA transit deserts, fifty-five are located in the Bronx, Brooklyn, and Queens.<sup>161</sup> Furthermore, 76% of New York City's 472 subway stations are not ADA accessible, with the quarter that are accessible geographically clustered rather than evenly dispersed throughout neighborhoods.<sup>162</sup> As a result, 640,000 mobility-impaired and elderly residents live near subway stations that they cannot use.<sup>163</sup> For older New Yorkers, parents with young children in strollers, and people who use wheelchairs or have a disability, subway stations lacking elevators limit their ability to travel. These riders must instead devise alternative routes and plan out their travel to ensure they can access transportation.<sup>164</sup> This may involve taking accessible buses to *another* subway that is ADA accessible but further away from their home, making for even longer commute times.<sup>165</sup> However, these residents can alternatively call Uber or hail a taxi to take them to an accessible station. Ride-share apps include an option for accessible vehicles, and a new rule going into effect on July 1, 2019, will require rideshare companies to complete 25% of their trips every year using wheelchair-accessible vehicles.<sup>166</sup> In fact, according to the City's Mobility Report, respondents who reported having a disability were significantly more likely to call for a FHV several times a week than were those who did not indicate having a disability.<sup>167</sup>

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half-of-nyc-neighborhoods-leave-disabled-people-stranded/ [https://perma.cc/PSG9-7FG4].

160. See Furfaro, *supra* note 159.

161. *Id.*

162. *Id.*; see also *Access2024*, TRANSITCENTER (Jan. 31, 2019), <http://transitcenter.org/2019/01/31/access2024/> [https://perma.cc/FEQ4-ZUTR].

163. See SERVICE DENIED, *supra* note 147, at 4 (noting that ADA upgrades are not only an "ethical measure towards greater inclusivity or a regulatory measure towards legal compliance," but essential in order to increase access to the subway system and "relieve overcrowding at the handful of 'key' stations that serve a disproportionate share of mobility-impaired riders").

164. See *id.* at 2.

165. See *id.*

166. See Luis Ferré-Sadurní, *Riders Outside Manhattan Can Now Hail Accessible Taxis, Too*, N.Y. TIMES (Jan. 24, 2018), <https://www.nytimes.com/2018/01/24/nyregion/accessible-taxis-disabled-nyc.html> [https://perma.cc/VD8L-S634].

167. See N.Y.C. DEP'T OF TRANSP., *supra* note 150, at 26.

Meanwhile, paratransit services — a special transportation services for people with disabilities — are generally not affordable. The average cost of a paratransit ride in the United States is \$29.30, which is three and a half times more expensive than the average cost of a regular fixed-route bus or rail trip.<sup>168</sup> While New York City’s federally-mandated paratransit service, Access-A-Ride, costs only \$2.50 per ride (the same price as a subway fare), the MTA pays a staggering \$67.33 on average per trip.<sup>169</sup> In New York, Washington D.C., Boston, Philadelphia, Chicago, and Toronto, Uber is now contracting directly with the paratransit firm MV Transportation to provide services for disabled customers, promising a fifteen-minute wait time or less and fares equivalent to UberX.<sup>170</sup> These wheelchair-accessible vehicles are operated by MV Transportation drivers using the Uber app.<sup>171</sup> While fifteen minutes is still a long wait time, it is more reliable than Access-a-Ride door-to-door paratransit service in New York City, which can be “hit or miss,” according to wheelchair users who cannot rely on the subway to get around because less than a quarter are accessible to wheelchairs.<sup>172</sup> Even so, only 554 vehicles out of the nearly 118,000 active rideshare vehicles are wheelchair accessible, prompting accessibility advocates to sue Uber and Lyft for providing “substandard or nonexistent service to people in

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168. Luz Lazo, *Uber Flirts with Transit Agencies Across the U.S. for a Share of Paratransit Services*, WASH. POST (Mar. 5, 2016), [https://www.washingtonpost.com/local/trafficandcommuting/uber-flirts-with-transit-agencies-across-the-us-for-a-share-of-paratransit-services/2016/03/05/5eb8b118-d751-11e5-9823-02b905009f99\\_story.html](https://www.washingtonpost.com/local/trafficandcommuting/uber-flirts-with-transit-agencies-across-the-us-for-a-share-of-paratransit-services/2016/03/05/5eb8b118-d751-11e5-9823-02b905009f99_story.html) [<https://perma.cc/6VFW-4BKF>] (reporting that a fixed-route bus or rail trip costs, on average, \$8.15, according to the Government Accountability Office).

169. Stephen M. Joseph & Michael Gartland, *MTA Denying Access-A-Ride to Some Riders Claiming Disabilities*, N.Y. POST (Apr. 20, 2014, 4:26 AM), <https://nypost.com/2014/04/20/mta-denying-access-a-ride-to-some-riders-claiming-disabilities/> [<https://perma.cc/FRM3-MU44>].

170. Faiz Siddiqui, *Wheelchair-Accessible Uber Service Comes to D.C. and Five Other Cities, Expanding Mobility Options for People with Disabilities*, WASH. POST: BLOGS (Nov. 20, 2018), <https://www.washingtonpost.com/transportation/2018/11/20/uber-launches-wheelchair-accessible-service-dc-five-other-cities/> [<https://perma.cc/SH7P-MPM9>].

171. *See* Taft, *supra* note 137.

172. *Id.* While paratransit rides in most cities need to be booked a day in advance, riders are often forced to wait for late or delayed vans or spend long periods of time on a bus following a scheduled pickup. *Id.* Wheelchair user, Valerie Piro, commented that in the ten years she has used a wheelchair, she “has been routinely stranded by no-show vans and trucked around for hours on tangled routes,” referring to her “extended Access-A-Ride trips from . . . Bay Ridge to Manhattan as ‘the Great Tour of Brooklyn.’” *Id.*

wheelchairs.”<sup>173</sup> Notably, wheelchair-accessible vehicles are exempted from the City’s new law capping FHV licenses.

#### 4. *Deteriorating Subway System Plagues the Entire Transit Landscape*

Subway delays have a more significant impact on low-income New Yorkers, who tend to have longer commute times.<sup>174</sup> Moreover, neighborhoods with lower household incomes — which tend to be in the outer boroughs — are more likely to have longer periods of unreliable service during the morning commute.<sup>175</sup> Delays for lower-income commuters can have significant consequences, like missed appointments or lost wages.<sup>176</sup> For commuters who work fixed shifts, like fast food workers, the consequences are even more severe. Riders with the longest commutes tend to have fewer backup options because alternative lines are often further away, while commuters who work night shifts or odd hours are more likely to encounter commute disruptions for planned maintenance work.<sup>177</sup>

Meanwhile, even with Governor Andrew M. Cuomo declaring the subway to be in a state of emergency in 2017, the subway system is still plagued by delays and overcrowding and is, in general, not operating efficiently or improving.<sup>178</sup> According to the MTA, the “on-time rate for weekday trains is about 66 percent,” which is down from about 85% in 2012.<sup>179</sup>

An increasingly unreliable subway system has, over the last five years, prompted an uptick in rideshare use throughout the City.<sup>180</sup>

173. *Id.* Uber and Lyft have been sued at least ten times nationwide by accessibility advocates. *Id.*

174. Emma G. Fitzsimmons & Tyler Blint-Welsh, *Subway Delays Hit Low-Income New Yorkers the Hardest, Report Says*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/nyregion/mta-subway-delays-income-neighborhoods.html> [<https://perma.cc/4C3G-D9XR>].

175. *Id.*

176. *Id.*

177. *Id.*

178. See Emma G. Fitzsimmons, *Cuomo Declares a State of Emergency for New York City Subways*, N.Y. TIMES (June 29, 2017), <https://www.nytimes.com/2017/06/29/nyregion/cuomo-declares-a-state-of-emergency-for-the-subway.html> [<https://perma.cc/627Q-RTL6>].

179. Fitzsimmons & Blint-Welsh, *supra* note 174.

180. See BRUCE SCHALLER, MAKING CONGESTION PRICING WORK FOR TRAFFIC AND TRANSIT IN NEW YORK CITY 2–3 (2018), <http://www.schallerconsult.com/rideservices/makingpricingwork.pdf> [<https://perma.cc/VM7F-V37M>] (“The current trend toward more driving represents a reversal of 25 years of less driving and more transit ridership in the city.”).

Indeed, the extra fees associated with taking a yellow taxi are not as affordable as public transit — especially for low-income commuters — which makes the increased accessibility, lower costs, and stabilized access of rideshares, and options like UberPOOL so much more essential. If a permanent cap causes service by rideshares in these areas to decrease, the costs associated with the ride will increase.<sup>181</sup>

Additionally, riding the bus, especially from the outer boroughs, makes for a slow commute with inefficient routes, too many stops, and too many delays. However, with improved service, buses have the potential to be “the future of New York City public transit, connecting emerging job hubs outside of lower-Manhattan that are ill-served by the subway’s hub-and-spoke network.”<sup>182</sup> New York is home to 5700 buses along 330 routes with 16,000 stops and serves over 2 million passengers a day, which accounts for more than the daily ridership of LIRR, MetroNorth, PATH, and New Jersey Transit combined.<sup>183</sup> And yet, as the Office of the New York City Comptroller Scott M. Stringer notes, the bus system receives insufficient attention compared to subways, commuter rail, and bridges, and is “too often neglected” to be performing optimally.<sup>184</sup> In fact, bus ridership is on the decline. Since 2011, ridership is down by 16% in Manhattan, and 4% in Brooklyn.<sup>185</sup> Declining ridership is no surprise when the average New York City bus spends half of its time moving, and the other half in traffic.<sup>186</sup> Demographically, 75% of bus commuters are people of color, and 55% are foreign born (which is “significantly higher than subway commuters and New Yorkers more generally”).<sup>187</sup> Regarding income level, the average

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181. *See generally id.*

182. *See* OFFICE OF THE N.Y.C. COMPTROLLER SCOTT M. STRINGER, *supra* note 54, at 1.

183. *Id.*

184. *Id.*

185. *Id.* at 5 (noting the bus system lost 100 million passenger rides in the last 8 years). In 2017, taxis and rideshare drivers transported three-quarters as many people as local buses in New York City in 2017 (543 million taxi/for-hire passengers compared with 712 million local bus passengers). *See* SCHALLER, *supra* note 180, at 4.

186. *See id.* (“21 percent is spent at red lights and 22 percent at bus stops.”). Average bus speeds vary dramatically among the boroughs: the slowest average speeds are in Manhattan (5.5 mph), Brooklyn (6.3 mph), and the Bronx (6.5 mph), compared to local routes in Queens (8.1 mph) and Staten Island (11.4 mph). *Id.*

187. OFFICE OF THE N.Y.C. COMPTROLLER SCOTT M. STRINGER, *supra* note 54, at 9–10 (citing U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY (ACS): 2011-2015 ACS 5-YEAR ESTIMATES (2016), <https://www.census.gov/programs-surveys/acs/technical-documentation/table-and-geography-changes/2015/5-year.html> [<https://perma.cc/588Y-CGR2>]).

personal income of bus commuters is \$28,455, compared to \$40,000 for subways commuters.<sup>188</sup> Therefore, low-income and minority residents are hurt the most by the lack of effective bus service and likewise may be most inclined to turn to services like UberPOOL.

##### 5. *Yellow Taxis Do Not Reliably Service the Outer Boroughs*

Yellow taxi cabs have traditionally underserved or unlawfully denied rides to people and communities of color.<sup>189</sup> Research and anecdotal evidence supports the notion that discrimination and implicit racial biases affect the treatment of people of color in public accommodations in general, including taxis.<sup>190</sup> For example, “shopping while black” was coined to describe the racial profiling experiences African American shoppers experience while in stores when a clerk follows them around to ensure they are not shoplifting,<sup>191</sup> and African Americans traditionally have a more difficult time hailing taxi cabs.<sup>192</sup> As for the home-sharing economy, a Harvard Business School study revealed that Airbnb users with African American sounding names were 16% less likely to be accepted as guests.<sup>193</sup> Anecdotally, the hashtag #AirbnbWhileBlack

188. *Id.* New Yorkers’ bus commuters have an average personal income of \$38,840, based on data from the United States Census Bureau. *Id.*

189. *See* Brown, *supra* note 142, at 135 (“[T]axi drivers’ discrimination against black riders is as present today as it was in audit studies conducted three decades ago . . . . Taxicab drivers failed to pick up black riders for more than one-quarter of their trip hails (26.3%), compared to about one-fifth of trips hailed by Asian and Hispanic riders (19.9%) and one-seventh (14.4%) of trips hailed by white riders. By contrast, ridehail services nearly eliminated the differences across rider characteristics. On taxis, black riders waited 52 percent longer (between about 6 and 15 minutes) than white riders; by comparison, black riders waited between 11 seconds and 1 minute 43 seconds longer for ridehail services than white riders.”) (citing STANLEY RIDLEY ET AL., TAXI SERVICE IN THE DISTRICT OF COLUMBIA: IS IT INFLUENCED BY PATRONS’ RACE AND DESTINATION? (1989)).

190. *See* Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271, 1290 (2017).

191. *See* Dan Harris & Gitika Ahuja, *Race for a Cab: When Hailing a Ride Isn’t So Black and White*, ABC NEWS (Apr. 1, 2009), <https://abcnews.go.com/GMA/race-cab-hailing-ride-black-white/story?id=7223511> [<https://perma.cc/T9FW-NPE2>].

192. *See* CORNELL BELCHER & DEE BROWN, HAILING WHILE BLACK: NAVIGATING THE DISCRIMINATORY LANDSCAPE OF TRANSPORTATION 3 (2015), <http://www.brilliant-corners.com/post/hailing-while-black> [<https://perma.cc/EC2B-DTHV>] (surveying the discriminatory transportation landscape in Chicago in an Uber-sponsored study); *see also* Harris & Ahuja, *supra* note 191; *see* Leong & Belzer, *supra* note 190, at 1290.

193. *See* Benjamin Edelman et al., *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 2 AM. ECON. J. 9, 1 (2017). While the app-based, algorithmic nature of rideshare platforms should theoretically rectify the historical problem of discrimination in the transportation industry, a study conducted by

is used by minority and black Airbnb users to highlight the discrimination.<sup>194</sup> Overall, discrimination by taxi drivers has posed a very real, unfair, and unlawful problem for minorities based on the color of their skin or destination.<sup>195</sup>

Faced with the accessibility issues of public transit, the prospect of a private car or less-expensive carpool option at the tap of an app has incentivized riders across all income groups to use the service. Thus, seemingly overnight, rideshares have assimilated into the lives of city-dwellers. The growing popularity and proliferation of rideshares is evidence they fill a gap in New York City's public transit system,<sup>196</sup> particularly for lower-income communities, communities of color, and for neighborhoods in the outer boroughs of New York, providing these communities with access to reliable transportation.<sup>197</sup>

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researchers from Stanford, MIT, and the University of Washington found discrimination on the basis of race and gender by individual rideshare drivers. See Yanbo Ge et al., *Racial and Gender Discrimination in Transportation Network Companies* (Nat'l Bureau Econ. Research, Working Paper No. w22776, 2016); see Taylor Kubota, *Researchers from Stanford, MIT and the University of Washington Find Ride-Share Drivers Discriminate Based on Race and Gender*, STAN. NEWS (Oct. 31, 2016), <https://news.stanford.edu/2016/10/31/researchers-stanford-mit-university-washington-find-ride-share-drivers-discriminate-based-race-gender/> [<https://perma.cc/99FB-SSTK>]. While it is illegal for taxi drivers to deny a streethailer, it is well-known that taxi drivers do discriminate, exercising "subjective" discretion over who they stop for. See, e.g., Anne E. Brown, *L.A.'s Taxi Industry Discriminates Against Black Riders. If We Don't Force Them to Change, They Won't*, L.A. TIMES (Aug. 12, 2018, 4:10 AM), <https://www.latimes.com/opinion/livable-city/la-oe-brown-racism-taxi-uber-lyft-201812-story.html> [<https://perma.cc/9UM6-2KW5>]; Neuman, *supra* note 45. Rideshare drivers on the other hand connect with passengers using an app's objective algorithm. Conducting tests in Seattle and Boston, using African American and white university students to study the behavior of UberX and Lyft drivers, the Stanford, MIT, and the University of Washington researchers collected data on nearly 1500 rides on controlled routes. See Ge et al., *supra*. While the wait time discrepancy for passengers with African American-sounding names was minimal (a 30% longer wait tended to be a ninety-second difference and could be based on a variety of factors), the cancellation rate for African American sounding names was more than twice as frequent compared to white sounding names. *Id.* at 9, 12. Moreover, because rideshare platforms operate using a rating system, "the likelihood that the ratings will reflect the conscious or unconscious bias of the provider entering the rating" is increased. See Leong & Belzer, *supra* note 190, at 1293. *But see* text accompanying *supra* note 189.

194. See Maggie Penman et al., *#AirbnbWhileBlack: How Hidden Bias Shapes The Sharing Economy*, NPR (Apr. 26, 2016, 12:10 AM), <https://www.npr.org/2016/04/26/475623339/-airbnbwhileblack-how-hidden-bias-shapes-the-sharing-economy> [<https://perma.cc/65W7-G3WW>].

195. See generally Leong & Belzer, *supra* note 190.

196. See SCHALLER, *supra* note 180, at 4.

197. See Carl Bialik et al., *Uber Is Serving New York's Outer Boroughs More Than Taxis Are*, FIFTYEIGHT (Aug. 10, 2015, 2:06 PM),

### D. The Transportation Landscape in Light of Rideshares

Research supports the City's assertion that the increased number of vehicles, which is linked to the rideshare economy's recent growth, has lowered traffic speeds, especially in denser areas of Manhattan below 60th street.<sup>198</sup> Traffic speeds have declined consistently since 2012, from 9.1 miles per hour in 2010 to 7.2 miles per hour in 2016<sup>199</sup> — a 23% reduction in rate.<sup>200</sup> Further, the average wait time for drivers, in between trips, is now eleven minutes, while the number of unoccupied taxi or FHV vehicles has increased by 81% in Manhattan's central business district since 2013.<sup>201</sup> According to one transportation analytics firm, lost hours spent in traffic and the excess fuel costs as a result of longer times spent on the road cost the New York City economy \$17 billion in 2016.<sup>202</sup> However, the disparate impact that such a cap on FHV's will have on outer borough communities should dissuade the TLC from permanently implementing one moving forward.

#### 1. Problems Arising as a Result of a Permanent Cap

Access to rideshares in the boroughs will become even more restricted if the supply of FHV's remains permanently capped. Drivers will opt instead to drive around areas they expect to have higher demand — such as Midtown, Manhattan. As transportation expert Bruce Schaller notes:

[v]ehicle caps have been used for taxicabs for decades in major cities across the country. They have been applied to overall fleet size, however. Rather than reducing traffic in the most congested part of

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<https://fivethirtyeight.com/features/uber-is-serving-new-yorks-outer-boroughs-more-than-taxis-are/> [<https://perma.cc/GXT8-3V7Q>].

198. See generally HIRE CONGESTION, *supra* note 51.

199. See N.Y.C. DEP'T OF TRANSP., *supra* note 150, at 13, 18; see also Vincent Barone, *Congestion Pricing, Not a Cap on Uber, Will Fix NYC Traffic Woes*, AMNEWYORK (June 25, 2018, 8:06 PM), <https://www.amny.com/transit/congestion-pricing-nyc-1.19429971> [<https://perma.cc/U6QD-RTE7>] (“[T]ravel speeds in Manhattan below 60th Street slowed to 7.2 mph last year, a drop from 9.1 mph in 2010.”); Laura Bliss, *supra* note 112 (noting that the average traffic speed in central Manhattan during business hours dropped to about six miles per hour in 2017).

200. See HIRE CONGESTION, *supra* note 51, at 5.

201. See BRUCE SCHALLER, EMPTY SEATS, FULL STREETS: FIXING MANHATTAN'S TRAFFIC PROBLEM 1 (2018), <http://www.schallerconsult.com/rideservices/emptyseats.pdf> [<https://perma.cc/P3A9-XM6D>].

202. See Bliss, *supra* note 112.

town, the result has been that cab drivers tend to concentrate in congested downtown areas where trip demand is most intense.<sup>203</sup>

Thus, as a result of a cap, customers in the outer boroughs searching for a rideshare vehicle will likely suffer from even longer wait times and inflated prices.

In addition, there tends to be high turnover amongst Uber drivers. For example, the thirty-day user retention for the Uber driver app dropped to around 47% between January and May of 2017 based on an analysis of app downloads and usage.<sup>204</sup> If potential new drivers are unable to obtain a vehicle, either because leasing an already licensed FHV is too expensive or because they are unable to now license their personal vehicle as an FHV as a result of the moratorium, then the number of available rideshare drivers will fall over time, further impacting supply. Similarly, not all rideshare drivers work full-time. A big draw of the gig economy for workers is that they can drive for Uber or Lyft as a part-time independent contractor for a source of alternative income.

## 2. *In Light of Enduring Transit Inequality, Rideshares Provide Meaningful Service*

Ridesharing's popularity and growth in New York City and other urban centers over the last decade is evidence not simply of society's enthusiasm for a tech-dominated world, but also of a very real need for reliable transportation.<sup>205</sup> Lawmakers should recognize and

203. BRUCE SCHALLER, *THE NEW AUTOMOBILITY: LYFT, UBER AND THE FUTURE OF AMERICAN CITIES* 30 (2018), <http://www.schallerconsult.com/rideservices/automobility.pdf> [<https://perma.cc/6ZMA-NG2S>].

204. See Natasha Lomas, *Uber Has Seen a Sharp Drop in New Driver Retention this Year: Apptopia*, TECHCRUNCH (June 23, 2017), <https://techcrunch.com/2017/06/23/uber-has-seen-a-sharp-drop-in-new-driver-retention-this-year-apptopia/> [<https://perma.cc/4RSJ-TT22>]. In June 2017, Uber made driver retention a focus with its "180 Days of Change" pledge to make improvements for its 750,000 drivers in the United States (and 2 million drivers globally). See Sara Ashley O'Brien, *Uber Has More Work to Do Winning over Drivers*, CNN: BUSINESS (Dec. 18, 2017, 11:54 AM), <https://money.cnn.com/2017/12/18/technology/uber-drivers-180-days-of-change/index.html> [<https://perma.cc/6PT3-5PFH>] ("Among the new features introduced since June are a 24/7 hotline for drivers, payment for the time drivers spend waiting for fares, and changes to the app to make it easier for customers to tip.").

205. See Abbey Stemler, *Betwixt and Between: Regulating the Shared Economy*, 43 FORDHAM URB. L.J. 31, 35 (2016) ("There are three interconnected forces that gave rise to the sharing economy: modern trust, technology, and economic pressure.").

capitalize that rideshares are filling an essential “transit gap” — a not-so-new phenomenon where people without cars, dependent on transit to get to work and live productively in their urban society, have to turn to alternative options like rideshares for transportation.<sup>206</sup> Transportation is inextricably linked to one’s quality of life, impacting “health, education, employment, economic development, access to municipal services, residential mobility, and environmental quality.”<sup>207</sup> Private cars remain the dominant mode of transportation in America and, in New York City, transit inequity is being further exacerbated by gentrification and continued residential segregation.<sup>208</sup> Although equal access to mass transportation was at the forefront of the civil rights movement, from Rosa Parks refusing to give up her bus seat to a white passenger in 1955 (leading to the Montgomery Bus Boycotts), to the Freedom Riders of 1961, and even

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206. See Robert D. Bullard, *Addressing Urban Transportation Equity in the United States*, 31 *FORDHAM URB. L.J.* 1183, 1191 (2003) (“Lack of car ownership and inadequate public transit service in many central cities and metropolitan regions with a high proportion of ‘captive’ transit dependents exacerbate social, economic, and racial isolation, especially for low-income people of color—residents who already have limited transportation options.”).

207. *Id.* at 1184; see Marcantonio et al., *supra* note 136, at 1038 (“[I]n most regions, local urban transit services (mostly bus, but sometimes light rail) typically provide the workhorse connectivity required to meet daily travel needs for those without automobiles.”); Marcantonio et al., *supra* note 136, at 1035–36 (“Because individuals generally must travel to reach their desired destinations, mobility and access are a precondition for participating in critical, life-enhancing activities such as employment, education, health care, and social contact.”).

208. See Bullard, *supra* note 206, at 1184 (calling this phenomenon potentially “a new urban crisis and a new form of ‘residential apartheid’”); see also Sean B. Seymore, *Set the Captives Free!: Transit Inequity in Urban Centers, and the Laws and Policies Which Aggravate the Disparity*, 16 *GEO. MASON U. C.R. L.J.* 57, 65–66 (2005). Seymore states that:

“White flight” and the racial polarization of metropolitan areas lie at the heart of modern transit inequity. Both of these phenomena have been fueled by the construction of the interstate highway system. Transportation and urban development plans destroyed black communities, split them in half, or physically separated black residents from transportation, jobs, and white persons. These policies and practices laid the foundation for low-income minority enclaves, which were usually concentrated in central cities or unstable older communities. As jobs, wealth, and political power moved to the suburbs, transportation planning was directed toward highway development rather than transit access.

*Id.*

harkening back to 1896 with *Plessy v. Ferguson*,<sup>209</sup> transit inequity continues to endure today.<sup>210</sup>

Based on the evidence that ridesharing is working as an alternative to public transit, particularly when compared to the traditional business of capped taxis, regulators need to take seriously the promise of this new economy and regulate it by different rules and regulations — otherwise these transit disparities will continue to endure.

## II. SEEKING JUSTICE AND TRANSIT EQUALITY

If the City's temporary blanket cap on rideshare vehicles is to become permanent, it would leave residents worse off, hindering residents' much-needed access to transportation in transit deserts, and disproportionately affect low-income communities, communities of color, and ADA passengers. Section II.A. examines whether transit equity advocates or residents could seek relief through the courts under civil rights laws, as a result of the disparate impact that would be created by a permanent cap on the number of rideshare vehicles in the five boroughs.<sup>211</sup> If New York City's actions violate any of these statutes, then what obligation or responsibility does the City have to provide an alternative scheme (if any)? Section II.B. addresses the framework for evaluating the legality of a permanent cap, should the TLC attempt to implement one.

### A. Constitutionality

Section II.A. examines the constitutionality of Int. No. 144-B, and possible arguments transit advocates could raise in support of the argument that the new law is unlawfully discriminatory because it decreases access to meaningful transportation options in outer

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209. 163 U.S. 537 (1896).

210. See David B. Oppenheimer, *Color-Blindness, Racism-Blindness, and Racism-Awareness: Revisiting Judge Henderson's Proposition 209 Decision*, 13 BERKELEY J. AFR.-AM. L. & POL'Y 229, 251 (2011) (“[S]ubsidized public transportation is disproportionately provided to white neighborhoods, even though the need is greater in minority neighborhoods, where fewer people can afford to own cars.”).

211. See Seymore, *supra* note 208, at 74 (“Even though Congress and the President seek to bring transportation equity to the urban core, ‘the executive orders, laws, and regulations are only as good as their enforcement.’ Residents in low-income communities must constantly fight for their rights in spite of clear-cut mandates. The continued disparate treatment has caused the transportation equity and environmental justice movement to seek relief through the courts.”) (citing Robert D. Bullard, *The Anatomy of Transportation Racism*, in HIGHWAY ROBBERY: TRANSPORTATION RACISM & NEW ROUTES TO EQUITY 15, 25 (Robert D. Bullard et al. eds., 2004)).

boroughs and transit deserts. And, if advocates cannot raise any effectively, why it is therefore troubling for a city to regulate something that private citizens cannot challenge in court.

1. *Title VI of the Civil Rights Act of 1964*

Title VI of the Civil Rights Act of 1964 is a federal law that broadly prohibits discriminatory policies and practices, stating, “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>212</sup> Under Title VI, “program or activity” refers to all operations that receive federal financial assistance by:

a department, agency, special purpose district, or other instrumentality of a State or of a local government; or The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government.<sup>213</sup>

Referred to as the “sleeping giant” of civil rights law, Title VI was passed to ensure taxpayer dollars are not “spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination.”<sup>214</sup> It also provides that recipients of federal funds cannot “utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin,” in addition to prohibiting intentional

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212. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d).

213. Title VI § 2000d-4a(1). As a result of the 1988 amendments to the Act, “program or activity” is defined broadly to include “all of the operations” of state or local governments “any part of which is extended Federal financial assistance.” Civil Rights Restoration Act of 1987 § 6, 42 U.S.C. § 2000d-4a. Federal regulations make clear that “[f]ederal financial assistance” includes grants, loans of funds, donations or grants of federal property, and the detail of federal personnel. *See* 28 C.F.R. § 42.102(c) (2013).

214. *See* Jerett Yan, *Rousing the Sleeping Giant: Administrative Enforcement of Title VI and New Routes to Equity in Transit Planning*, 101 CALIF. L. REV. 1131, 1134-35 (2013); *see, e.g.*, U.S. DEP’T OF JUSTICE, PROTECTING AGAINST RACE, COLOR, AND NATIONAL ORIGIN DISCRIMINATION BY RECIPIENTS OF FEDERAL FUNDS 2 (2013), [http://www.justice.gov/crt/about/cor/4yr\\_report.pdf](http://www.justice.gov/crt/about/cor/4yr_report.pdf) [<https://perma.cc/5FEF-SUXD>] (quoting Assistant Attorney General for the Civil Rights Division, Thomas E. Perez).

discrimination.<sup>215</sup> While Title VI has been successfully used to fight racial disparities in transportation-related claims,<sup>216</sup> “typical transit agency equity policy consists of little more than the box-checking exercise required by federal ‘Title VI’ regulation, which is designed to limit further harm to people of color — not to advance equity.”<sup>217</sup>

It is questionable as to whether Title VI could be used by transit advocates and rideshare users to challenge the City’s cap on rideshares. Title VI plainly pertains to activities and services receiving federal funding, and Uber, Lyft, and the like are privately owned corporations that do not receive direct federal funding.<sup>218</sup> Traditionally, in the context of transportation equity in New York City, Title VI claims have been raised against public authorities like the MTA, a commuter rail service (which receives federal funds to maintain the City’s bus and subway systems); the New York City Transportation Authority (“NYCTA”), a public bus and rail service; the Metro-North Commuter Railroad (“Metro-North”), a commuter rail service to the northern suburb; and the Long Island Railroad (“LIRR”), a commuter rail service to Long Island.<sup>219</sup> The TLC itself

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215. 28 C.F.R. § 42.104(b)(2) (2013); 49 C.F.R. § 21.5(b)(2) (2013); *see also* Olatunde C.A. Johnson, *Lawyering that Has No Name: Title VI and the Meaning of Private Enforcement*, 66 STAN. L. REV. 1293, 1295 (2014).

216. *See, e.g.*, *Labor/Cmty. Strategy Ctr. v. L.A. Cty. Metro. Transp. Auth.*, 263 F.3d 1041, 1043–44 (9th Cir. 2001); *N.Y. Urban League, Inc. v. Metro. Transp. Auth.*, 905 F. Supp. 1266 (S.D.N.Y. 1995), *vacated by* *N.Y. Urban League, Inc. v. New York*, 71 F.3d 1031 (2d Cir. 1995).

217. ZAK ACCUARDI, TRANSITCENTER, INCLUSIVE TRANSIT: ADVANCING EQUITY THROUGH IMPROVED ACCESS & OPPORTUNITY 6 (2018), <http://transitcenter.org/wp-content/uploads/2018/07/Inclusive-1.pdf> [<https://perma.cc/4LWN-UHJ2>]. “The industry-standard ‘Title VI’ analysis, a federal Civil Rights law compliance requirement, does not require a rigorous standard for evaluating whether planned projects, service cuts, or fare changes are likely to create disparate impacts on communities of color.” *Id.* at 32.

218. In some cities, rideshare companies may receive a subsidy by the local government to provide more affordable rides. Wyatt Cmar, *How Cities Are Integrating Rideshare and Public Transportation*, GOV’T TECH. (Feb. 14, 2017), <https://www.govtech.com/dc/articles/How-Cities-are-Integrating-Rideshare-and-Public-Transportation.html> [<https://perma.cc/YX79-599A>]. As of yet, providing subsidies to rideshare users has not occurred in New York City, though the use of commuter benefits, or paying with pre-tax dollars, has for UberPOOL rides. *Id.* *But see* Sarah Buhr, *It’s Not Your Imagination, You Are Waiting Longer for an UberPOOL Using Your Commuter Card*, TECHCRUNCH (June 28, 2017), <https://techcrunch.com/2017/06/28/its-not-your-imagination-you-are-waiting-longer-for-an-uberpool-using-your-commuter-card/> [<https://perma.cc/Q3EF-2E7W>].

219. *See* David A. King, *Why Public Transit Is Not Living Up to Its Social Contract*, CITYLAB (June 26, 2014), <https://www.citylab.com/transportation/2014/06/why-public-transit-is-not-living-up-to-its-social-contract/373368/> [<https://perma.cc/24U8-F9WW>].

receives federal funding as a licensing and regulatory agency for rideshares, but its funding is provided by City tax-levy funds.<sup>220</sup> Nevertheless, insofar that Title VI does provide an enforcement mechanism by which aggrieved transit advocates or residents could sue for discrimination, it is an important framework by which to understand these discrimination claims resulting from the actions and regulations by a city agency. Where Section 601 of Title VI bars recipients of federal funds from “subjecting beneficiaries to racial discrimination,” Section 602 directs “federal agencies to promulgate regulations which ‘effectuate the provisions of 601.’”<sup>221</sup>

For example, in *Labor/Community Strategy Center v. Los Angeles County Metropolitan Transportation Authority*, minority bus riders originally sued the Los Angeles County Metropolitan Transportation Authority under Title VI for funding and expanding rail services used primarily by white, suburban commuters, while at the same time reducing funding for buses that were largely ridden by minorities.<sup>222</sup> The district court held that the MTA violated Title VI’s disparate impact regulations, and the plaintiffs and MTA negotiated a consent decree that increased funding and services for the bus system.<sup>223</sup> The consent decree entailed the transportation authority ultimately agreeing to make service improvements in the bus fleet to alleviate overcrowding, but fourteen months after the decree, the bus riders sued for enforcement, alleging the transportation authority failed to meet its obligations. While the minority bus riders’ grassroots advocacy was ultimately effective through litigation, this suit seeking enforcement of the consent decree proves how difficult it is to obtain compliance.<sup>224</sup> Conversely, in *New York Urban League, Inc. v. New York*, the Second Circuit reversed the district court’s finding that the State was preliminarily enjoined from implementing a proposed fare increase on subways and buses, in violation of Title VI.<sup>225</sup> Plaintiffs, originally suing for an injunction, claimed that NYCTA riders of the subway and bus system, a majority of whom are members of protected minority groups, pay a higher share of the cost of operating

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220. See COUNCIL OF THE CITY OF NEW YORK, REPORT OF THE FINANCE DIVISION ON THE FISCAL 2019 PRELIMINARY BUDGET AND THE FISCAL 2018 PRELIMINARY MAYOR’S MANAGEMENT REPORT FOR THE TAXI AND LIMOUSINE COMMISSION 2 (2018), <https://council.nyc.gov/budget/wp-content/uploads/sites/54/2018/03/FY19-Taxi-and-Limousine-Commission.pdf> [https://perma.cc/5PFS-CMUH].

221. Title VI §§ 601–02.

222. 263 F.3d 104, 1043 (9th Cir. 2001).

223. *Id.* at 1047.

224. See Yan, *supra* note 214, at 1143.

225. 71 F.3d 1031, 1040 (2d Cir. 1995)

these systems than commuter line passengers, who are predominantly white, pay to support the commuter rail system.<sup>226</sup> Consequently, they claim that this is forbidden by U.S. Department of Transportation (“U.S. DOT”) regulations promulgated under Title VI.<sup>227</sup> The Second Circuit found that the District Court did not assert a sufficient enough basis for disparate impact.<sup>228</sup> Furthermore, even if for argument’s sake plaintiffs had made a prima facie showing of disparate impact, the court found that the defendants showed a substantial legitimate justification for the challenged conduct.<sup>229</sup> That being said, minority communities have at times been successful in challenging regulations and transportation schemes under Title VI. While technical functions of Title VI may bar transit advocates from suing the City based on their regulations capping Uber, it is nevertheless important to analyze the City’s new law under this lens.

Finally, private vehicles and independent contractor drivers for FHV’s function in the public sphere. Anyone is a potential customer who may call for a ride, so long as they have smartphone access.<sup>230</sup> Further, FHV’s are changing the transportation landscape.<sup>231</sup> From serving more passengers than taxis to capturing riders that would otherwise be using public transit, rideshares have tapped into a market of customers who are replacing public transit methods with rideshares.<sup>232</sup> In addition, Uber and Lyft have begun accepting responsibility for this evolution by investing in plans to support sustainable mobility and transit innovation, such as by sharing trip data with cities and helping to come up with more effective street designs that will positively impact traffic patterns.<sup>233</sup> Moreover, with Uber’s expansion into even more inherently communal or shared services like bikes and scooters<sup>234</sup> — and one day, autonomous

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226. *Id.* at 1033.

227. *Id.*

228. *Id.* at 1038.

229. *Id.* at 1038–39.

230. *See supra* Section I.B.1.

231. *See supra* Section I.C.1.

232. *See supra* Section I.C.1.

233. Patrick Sisson, *Uber Makes \$10M Bet on Bikes and Transit*, *CURBED* (Sept. 26, 2018, 1:29 PM), <https://www.curbed.com/2018/9/26/17903112/uber-dara-khosrowshahi-electric-bikes-transit> [<https://perma.cc/4MPW-7NKM>]. Uber announced it will share “more segmented, street-level speed data, and help develop best practices for street design, part of a collaboration between Ford, Uber, and Lyft to offer actionable information to help local governments better manage curb space.” *Id.*

234. *Id.* (“Uber will spend \$10 million over three years as part of a Fund for Sustainable Mobility to support campaigns for safety and improved transit. This will

vehicles — its push into the public transportation realm (call it a *quasi*-public realm) is even more apparent. Uber’s new CEO, Dara Khosrowshahi, even announced he wants Uber to become the “Amazon of transportation.”<sup>235</sup> In Mr. Khosrowshahi’s utopia, Uber would “offer third party transportation services” to allow “any transportation, totally frictionless, real time.”<sup>236</sup> Transportation would be optimized linearly so the rider or commuter could choose between alternatives (from bikes to Uber to public transit).<sup>237</sup>

Arguably, if Uber were to assimilate linearly alongside public transit like buses and subways, an exception may need to be made qualifying rideshares of this type to be classified as “public transportation.”<sup>238</sup> Should Uber, as a private company, down the line become “public transportation,” decisions as to whether or not Title VI applies should probably not be determined by whether it receives federal funding. The federal funding limitation for Title VI applicability would be difficult to justify in this hypothetical scenario, as such linear accessibility between Ubers and public transit would necessitate Uber working closely alongside the City government. Even if Uber does not receive federal funding to the extent that the MTA does, Uber would be acting as a system of public transportation. This behavior by a public company may therefore warrant and trigger the type of protections for racial minorities Title

include a \$1 million investment to push for the passage of congestion pricing in New York City as well as funding for the non-profit PeopleForBikes.”); see also Andrew J. Hawkins, *Coming Soon to the Uber App: Bikes, Rental Cars, and Public Transportation*, VERGE (Apr. 11, 2018, 10:30 AM), <https://www.theverge.com/2018/4/11/17220408/uber-jump-getaround-masabi-cities-data> [https://perma.cc/LE6R-HTJC]. Residents of Washington, D.C. are now able to reserve and pay for Jump bikes using Uber’s app, following Uber’s acquisition of the electric, dockless bike-sharing company. And in San Francisco, Uber launched a new car-sharing program called “Uber Rent,” allowing users to rent cars on Uber’s app through a partnership with Getaround. This opportunity has since been expanded to Los Angeles, Philadelphia, and San Diego. Prior to this new product, Uber’s partnership with Getaround allowed people who wanted to drive for Uber, but who did not own their own vehicle, to rent cars via the Uber app. *Id.*

235. Recode, *Uber CEO Dara Khosrowshahi Says He Wants to Be the “Amazon of Transportation”*, YOUTUBE (May 30, 2018), <https://www.youtube.com/watch?v=5Yo32U4mtE0> [https://perma.cc/TB6X-MM2B].

236. Recode, *Full Video and Transcript: Uber CEO Dara Khosrowshahi at Code 2018*, RECODE (June 4, 2018, 1:27 PM), <https://www.recode.net/2018/5/31/17397186/full-transcript-uber-dara-khosrowshahi-code-2018> [https://perma.cc/VL52-TUBP].

237. *Id.*

238. Currently, the market of Ubers versus subways is like choosing between apples and oranges; Uber’s dream to become the “Amazon of transportation” would create the effect of choosing between apples and apples.

VI was meant to protect. Under this lens, a blanket cap on rideshares coupled with the existing phenomenon of transit deserts would further highlight the disparate impact in the outer boroughs and for communities of color.

If plaintiffs could raise claims under Title VI in fighting the TLC and City's regulation of rideshare companies, the bar to proving such a violation is nonetheless very high and very difficult to prove in the wake of the Supreme Court's key 2001 decision in *Alexander v. Sandoval* — a transportation case itself.<sup>239</sup> In *Sandoval*, the Supreme Court held that no private right of action existed to enforce Title VI's disparate impact regulations and that challengers of an allegedly discriminatory policy must prove the policy *intended* to cause discrimination, not that it merely had a discriminatory impact.<sup>240</sup> Thus, *Sandoval's* elimination of private actors' utilization of the courts to implement Title VI severely weakened Title VI's potential bite against state defendants and federal funding recipients like the TLC. There is little basis that the City's regulatory scheme regarding a cap on the number of rideshares, most of all in a progressive city like New York City, would be implemented with the intent to cause discrimination.

## 2. *EJ Executive Order and Administrative Enforcement*

*Sandoval's* weakening of judicial enforcement of Title VI's regulations (by eliminating a private right of action) does, however, leave open the possibility of seeking administrative enforcement of Title VI.<sup>241</sup> Individuals may no longer have a right of action to enforce Title VI disparate impact regulations in federal courts, but Title VI regulations are nevertheless still valid. As asserted by the Civil Rights Division's 2001 memo following *Sandoval* for "Heads of Departments and Agencies, General Counsels and Civil Rights Directors," funding agencies retained their authority and responsibility to enforce Title VI regulations. Thus, a funding agency's Title VI disparate impact regulation continues to be a vital

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239. 532 U.S. 275 (2001) (arising out of Alabama plaintiffs' efforts to provide access to driver's licenses for individuals that were not English-proficient).

240. *Id.* Holding that the implied private right of action does not exist, the Supreme Court found that § 601 of Title VI allowed a plaintiff only to sue an agency or program for intentional discrimination. *Id.* at 293.

241. C.R. DIVISION, U.S. DEP'T OF JUST., TITLE VI LEGAL MANUAL 5 (2019), <https://www.justice.gov/crt/case-document/file/923556/download> [<https://perma.cc/FKS4-RLQ8>].

administrative enforcement mechanism.<sup>242</sup> In particular, the EJ Executive Order issued by President Bill Clinton in 1994 requires federal agencies and entities receiving federal funds to implement Title VI by incorporating environmental justice concerns concerning planning and regulations. The Order states that federally funded entities must “identify[] and address[], as appropriate, disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority populations and low-income populations . . . .”<sup>243</sup> Furthermore, it “prohibits the exclusion of persons (or populations) from participating in, reaping the benefits of, or being discriminated against under such programs, policies, and activities, because of their race, color, or national origin.”<sup>244</sup> By protecting “populations” rather than just “communities,” the EJ Executive Order thus “extends its protections to ‘low-income populations’ not otherwise protected under federal civil rights law.”<sup>245</sup>

The test used by courts to determine whether a recipient’s policy or practice violates Title VI’s disparate impact regulations is aligned with that used in the pre-*Sandoval* case, *New York Urban League, Inc.*<sup>246</sup> In *New York Urban League, Inc.*, the court assessed (1) whether the adverse effect of the practice or policy disproportionately affect members of a group identified by race, color, or national origin (also referred to as a prima facie inquiry); (2) if so, whether the recipient can demonstrate the existence of a substantial legitimate justification for the policy or practice; and (3) whether there is an alternative that would achieve the same legitimate objective but with less of a discriminatory effect.<sup>247</sup>

Lastly, the U.S. DOT is “one of the federal agencies charged with oversight authority,” and thus, the U.S. DOT’s regulations include affirmative obligations such as “to remove or overcome the effects of

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242. *Id.*

243. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

244. *See* Marcantonio et al., *supra* note 136, at 1047.

245. *Id.* (noting the significance of “population” for transportation-related issues, as “population” denotes not only residents of a specific geography, but also similarly situated populations that live far apart from each other. This is crucial for “users of a particular portion of the transportation network, such as buses, and who are ‘similarly affected’ by a plan or policy,” as they may comprise of a protective population compared to under Title VI, in which low-income populations would not be classified as protected.)

246. 71 F.3d 1031 (2d Cir. 1995).

247. *Id.*; *see also* N.Y.C. Env’t Justice All. v. Giuliani, 214 F.3d 65, 68–72 (2d Cir. 2000).

discrimination . . . ’ [e]ven in the absence of prior discriminatory practice . . . ’ to ensure no future discrimination occurs.”<sup>248</sup> However, although the U.S. DOT and Federal Transit Authority (which funds state and local transportation agencies) govern public transit like the MTA in New York City, they do not have regulatory or licensing authority over rideshare vehicles (which fall under the authority of the TLC). Depending on how the U.S. DOT involves itself in regulating and overseeing rideshares in the future, aggrieved plaintiffs may have more access to make discrimination claims under the EJ Executive Order and Title VI.

### 3. Equal Protection Claims

The Equal Protection Clause of the Fourteenth Amendment prohibits states from denying any person equal protection of the laws.<sup>249</sup> Rideshare users from the outer boroughs who are negatively impacted by a cap, and other transit equity advocates, could contemplate raising Equal Protection claims under the theory that a cap on rideshares violates their right to intrastate travel.<sup>250</sup> However, while the Second Circuit recognizes a constitutional right to intrastate travel, or the right to free movement,<sup>251</sup> when a statute or regulation merely has “an effect on travel” that right does not appear to “raise an issue of constitutional dimension.”<sup>252</sup> Although universal access to transportation is inspirational as a policy matter, it is not a constitutionally granted right.<sup>253</sup> Certainly, a permanent cap on the number of rideshare vehicles will have an effect on lower-income, outer-borough residents, but because it does not rise to any

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248. See Marcantonio et al., *supra* note 136, at 1042.

249. U.S. CONST. amend. XIV, § 1. The Equal Protection Clause of the Fourteenth Amendment requires the government to treat all similarly situated individuals alike. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).

250. *Nassau & Suffolk Cty. Taxi Owners Ass’n v. New York*, 336 F. Supp. 3d 50, 76 (2018) (citing *Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001) (“[T]he prototypical equal protection involves discrimination against people based on their membership in a vulnerable class . . . ”)).

251. *Ramos v. Town of Vernon*, 353 F.3d 171, 176 (2d Cir. 2003); *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648 (2d Cir. 1971), *cert. denied*, 404 U.S. 863 (1971); see *Spencer v. Casavilla*, 903 F.2d 171, 174 (2d Cir. 1990) (“[T]he Constitution . . . protects the right to travel freely within a single state.”).

252. *Soto-Lopez v. N.Y.C. Civil Serv. Comm’n*, 755 F.2d 266, 278 (2d Cir. 1985).

253. The Supreme Court does recognize the right to travel as a fundamental right protected by the Fourteenth Amendment to the Constitution. See *generally* *Sáenz v. Roe*, 526 U.S. 489 (1999). However, that right is not unlimited, extending so far as to grant universal access to transportation.

constitutionally relevant level, an Equal Protection argument is unlikely to be accessible for potential plaintiffs.

Nevertheless, another aspect under Equal Protection Clause of the Fourteenth Amendment that potential claimants could raise is a “class of one” argument, wherein the plaintiff alleges an equal protection violation without alleging discrimination based on membership in a particular, protected class, the “the equal protection guarantee also extends to individuals who allege no specific class membership but are nonetheless subjected to invidious discrimination at the hands of government officials.”<sup>254</sup> A class of one plaintiff “must plausibly allege that he or she has been intentionally treated differently from others similarly situated and no rational basis exists for that different treatment.”<sup>255</sup> In this case, “similarity” would mean arguing that:

- (i) no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy; and (ii) the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendants acted on the basis of a mistake.<sup>256</sup>

Courts require the plaintiff to show she and her comparators are “prima facie identical” to those who are allegedly receiving “irrationally different” treatment,<sup>257</sup> to prove “an inference that the difference in treatment ‘lack[s] any reasonable nexus with a legitimate governmental policy.’”<sup>258</sup>

Positioning themselves as residents of outer boroughs compared to residents who live either closer to transportation, or within the areas of Manhattan that are well-known to be serviced by taxis, challengers may be able to raise a “class of one” argument because they could argue that rideshares mitigated the lack of yellow taxis in areas like the outer boroughs. The standard of review for a government action that purportedly violates the Equal Protection Clause is rational basis review, meaning that there is no violation if the disparate treatment is

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254. *Progressive Credit Union v. City of New York*, 889 F.3d 40, 49 (2d Cir. 2018) (“Such a claim, often referred to as a ‘class of one’ equal protection claim, stems from the Equal Protection Clause’s requirement that the government treat all similarly situated people alike.”).

255. *Id.* at 49 (citing *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)).

256. *Nassau & Suffolk Cty. Taxi Owners Ass’n v. New York*, 336 F. Supp. 3d 50, 76 (2018) (citing *Fortress Bible Church v. Feiner*, 694 F.3d 208, 222 (2d Cir. 2012)).

257. *Neilson v. D’Angelis*, 409 F.3d 100, 105 (2d Cir. 2005).

258. *Nassau & Suffolk Cty. Taxi Owners Ass’n*, 336 F. Supp. 3d at 77 (citing *Progressive Credit Union v. City of New York*, 889 F.3d 40, 49 (2018)).

ultimately linked to a justifiable end (and in this case, that justifiable end would be the City Council's attempt to reduce traffic congestion). As a matter of threshold, if the City were to overtly ban all rideshares throughout the five boroughs, then potential claimants would have a stronger argument.

4. *Americans with Disabilities Act of 1990 Claims (Title II and Title III)*

The ADA is a civil rights law enacted in 1990 prohibiting discrimination against individuals with disabilities in all areas of public life including jobs, schools, transportation, and all public and private places that are open to the general public.<sup>259</sup> Disabled riders have filed several lawsuits arguing that a lack of accessibility in rideshares and taxis violates the ADA.

*Noel v. New York City Taxi & Limousine Commission* is one such case providing several guiding principles by which we may understand the regulation of the taxi industry — and possibly rideshare — under the ADA.<sup>260</sup> In 2012, plaintiffs sued the TLC alleging the City's taxi services failed to provide disabled persons with meaningful access to transportation, discriminating in violation of the ADA Title II(A). But the Second Circuit found that "Title II . . . and its implementing regulations prohibit discrimination against qualified individuals only by public entities" and do "not go so far as to require public entities to impose on private establishments, as a condition of licensure, a requirement that they make their facilities physically accessible to persons with disabilities." In other words, although the TLC regulates and controls the taxi industry in New York City, it is *not* required under ADA Title II(A) to "deploy their licensing and regulatory authority to mandate that persons who needed wheelchairs be afforded meaningful access to taxis."<sup>261</sup>

Title II of the ADA concerns discrimination against individuals with disabilities in access to public services, whereas Title III concerns public accommodations. The *Noel* plaintiffs raised challenges under Title II's public services provision rather than Title III's public accommodations, which taxis traditionally fall under,<sup>262</sup> because Title

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259. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2009).

260. 687 F.3d 63 (2d Cir. 2012).

261. *Id.* at 65. The Second Circuit noted that "[a]lthough licensing standards are covered by [T]itle II, the licensee's activities themselves are not covered. An activity does not become a 'program or activity' of a public entity merely because it is licensed by the public entity." *Id.* at 70.

262. *See supra* Section II.A.4.

III expressly *exempts* taxi providers from being required to purchase or lease “accessible automobiles.”<sup>263</sup> Under Title III of the ADA, “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”<sup>264</sup>

The Second Circuit thus used Title III’s exemption to bolster its Title II(A) denial: If the TLC were required under Title II(A) to ensure that private taxi providers required a sufficient number of accessible vehicles, then this requirement would be in tension with the ADA’s explicit Title III exemption for taxis.<sup>265</sup> However, the *Noel* court did concede that “more such [accessible] taxis would be on the streets if the TLC required more of them to be accessible. But the TLC’s failure to use its regulatory authority does not amount to discrimination within the meaning of the ADA or its regulations.”<sup>266</sup>

In November 2018, plaintiffs filed a class action in the Southern District of New York against Lyft for failing to provide wheelchair-accessible vehicles, thus excluding people with mobility disabilities from using their service in *Lowell v. Lyft, Inc.*<sup>267</sup> To state a claim for relief under Title III, a plaintiff must show: (1) he or she is disabled within the meaning of the ADA; (2) the defendants own, lease, or operate a place of public accommodation; and (3) the defendants discriminated against the plaintiff by denying them a full and equal opportunity to enjoy the defendant’s services.<sup>268</sup> The *Lowell* plaintiffs are suing Lyft, a rideshare company, directly under Title III claims, and Title III explicitly exempts taxis. FHV’s are not explicitly written into Title III — yet — so, as a result, the defendant’s motion to dismiss was denied. However, *Lowell* (pending in court) has yet to

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263. 49 C.F.R. § 37.29(b).

264. 42 U.S.C. § 12182(a).

265. *Noel*, 687 F.3d at 73–74. (“If the TLC is required under Title II(A) to ensure that the taxi industry provides a sufficient number of accessible taxis, then private taxi owners would be required to purchase or lease accessible taxis even though the ADA explicitly exempts them from such requirements. 49 C.F.R. § 37.29(b). The exemption compels the conclusion that the ADA, as a whole, does not require the New York City taxi industry to provide accessible taxis.”).

266. *Id.* at 73.

267. 352 F. Supp. 3d 248 (S.D.N.Y. 2018).

268. *Id.* at 261 (citing *Camarillo v. Carrols Corp.*, 518 F.3d 153, 156 (2d Cir. 2008)).

determine whether a rideshare is a “public accommodation” under Title III.<sup>269</sup>

A recent case from the Northern District of Illinois, *Access Living of Metropolitan Chicago v. Uber Technologies, Inc.*,<sup>270</sup> evaluated whether rideshares like Uber were in fact places of “public accommodation” based on whether the vehicles were a real, physical space.<sup>271</sup> The Court noted that, “the Third, Fifth, Sixth, and Ninth Circuits agree with Uber that a place of public accommodation must be a physical space.”<sup>272</sup> The First Circuit, in *Carparts Distribution Center, Inc. v. Automobile Wholesaler’s Association of New England, Inc.*,<sup>273</sup> however, concluded otherwise.<sup>274</sup> The Fifth Circuit reasoned that the terms listed in section 12181(7) of the ADA are not only physical places and might encompass, for example, a travel service that conducts its “business by telephone or correspondence” because “[i]t would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are

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269. *Id.* (“It is premature to decide the question of whether a defendant is a public accommodation at the motion to dismiss phase.” *Nat’l Fed’n of the Blind of Cal. v. Uber Techs., Inc.*, 103 F. Supp. 3d 1073, 1083 (N.D. Cal. 2015) (denying the defendant’s motion to dismiss because more factual development was required to determine whether the defendant, Uber, was a public accommodation under the ADA)); see *Ramos v. Uber Techs., Inc.*, No. 14-CA-502(XR), 2015 WL 758087, at \*6 (W.D. Tex. 2015) (denying the defendant’s motion to dismiss and holding that the plaintiffs had not failed to prove that Lyft and Uber offer public accommodations under the ADA. Thus, the court considered defendants to be a covered entity under Title III of the ADA for the purposes of this motion).

270. 351 F. Supp. 3d 1141 (N.D. Ill. 2018).

271. *Id.* at 1154; see *Leong & Belzer*, *supra* note 190, at 1300 (“Courts have reached varying conclusions as to whether websites operated by public accommodations are, themselves, public accommodations for purposes of the ADA. The most recent precedents, however, tend toward a broader understanding of public accommodations. In *National Federation of the Blind v. Scribd Inc.*, for example, the District of Vermont held that Scribd — an online-only document repository — was a public accommodation within the meaning of Title III of the ADA. The court reasoned that the meaning of a public accommodation is not limited to physical places because ‘it would make little sense if a customer who bought insurance from someone selling policies door to door was not covered but someone buying the same policy in the parent company’s office was covered. It is highly unlikely Congress intended such inconsistent results.’”).

272. *Access Living of Metro. Chicago*, 351 F. Supp. 3d at 1154–55.

273. 37 F.3d 12, 19 (1st Cir. 1994).

274. *Id.* (“In drafting Title III, Congress intended that people with disabilities have equal access to the array of goods and services offered by private establishments and made available to those who do not have disabilities.”).

not.”<sup>275</sup> The Seventh Circuit has also seemingly followed the First Circuit, noting

that the owner or operator of a store, hotel, restaurant, dentist’s office, travel agency, theater, Web site, or other facility (whether in physical space or in electronic space) that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do.<sup>276</sup>

*Access Living*, falling under the jurisdiction of the Seventh Circuit, held that Uber was indeed a place of public accommodation because it does not have to be a physical space. While the Second Circuit has cited *Carparts* approvingly, it has not definitively agreed with the *Caparts* position.<sup>277</sup>

How the Second Circuit resolves whether FHV’s are public accommodations could determine the extent to which companies like Uber and Lyft are liable under the ADA and other laws engaging “public accommodations” (like the New York City Human Rights Law, set forth below). In *Noel*, the Court’s interpretation of Title III’s exclusion of taxis was also understood in the context of Title II — which protects qualified individuals with disabilities from discrimination on the basis of disability in services, programs, and activities provided by State and local government entities. Thus, if FHV’s possibly are classified as a “public accommodation,” it could open a local government up to liability under Title II as well. As in civil rights claims against state and local governments,<sup>278</sup> plaintiffs could attempt to sue the TLC directly, but a court would probably need to construe rideshares as a service provided by the state or local government itself as a type of “public transportation,” at which time it is not.

However, this is a fine line of interpretation; to classify FHV’s as a public accommodation, but *not* as public transportation (as taxis are) under the ADA would be consistent with the theory that from a regulatory perspective, FHV’s and taxis are justifiably distinct.<sup>279</sup> The distinction is also not as clear-cut as it may seem, since Ubers operate in virtually the same market as taxis do. Depending on how companies expand and develop in the future, the gap between FHV’s

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275. *Id.*

276. *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999) (citing *Carparts*, 37 F.3d at 19).

277. *See Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 32 (2d Cir. 1999).

278. *See supra* Section II.A.2.

279. *See supra* Section I.B.

private-public existence may be closed. As companies like Uber and Lyft go public this year, and expand their services to operate more consistently and seamlessly with that of public transit, courts may start to look at rideshares from the perspective that not only are they places of public accommodations, but that they step over the line into “public transportation” territory.

### 5. *New York City Human Rights Laws*

New York City has its own civil rights laws called the New York City Human Rights Laws (“NYCHRL”), which prohibit a public accommodation from withholding or refusing to provide full and equal enjoyment of goods or services based on the following protected classes: race, color, creed, age, national origin, alienage or citizenship status, gender, sexual orientation, disability, marital status, partnership status, caregiver status, uniformed service, any lawful source of income, status as a victim of domestic violence or status as a victim of sex offenses or stalking, whether children are, may be or would be residing with a person or conviction or arrest record.<sup>280</sup> Furthermore, any prejudice, intolerance, bigotry, discrimination, bias-related violence, or harassment and disorder threatens the rights and privileges of the City’s inhabitants and is a menace the institutions and foundation of a free democratic state.<sup>281</sup> The Human Rights Law thus grants agency authority to eliminate and prevent discrimination from playing any role in actions relating to public accommodations, not to mention housing and other real estate, and employment.

The argument can be made that taxis and rideshares are a type of “public accommodation” in light of a broad reading of Title III of the ADA, whose definition for “public accommodation” is more comprehensive than it is in Title II of the Civil Rights Act.<sup>282</sup> Under

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280. N.Y.C. ADMIN. CODE §§ 8-101, 8-402, 8-502 (2019).

281. *Id.*

282. Elizabeth Brown, *Fare Trade: Reconciling Public Safety and Gender Discrimination in Single-Sex Ridesharing*, 35 YALE L. & POL’Y REV. 367, 394–95 (2017). Brown argues that “legislative and judicial exceptions should be made for women-only transportation services, allowing sex-based distinctions in both hiring drivers and accommodating riders, because the social value of public safety outweighs the interest of gender equality in this unique context. Single-sex rideshare companies should be permitted to engage in gender discrimination when they can demonstrate that the purpose and effect of such discrimination is to improve public safety.” *Id.* at 368. Insofar as rideshares are a “public accommodation” pursuant to Title VI and ADA, single-sex ridesharing should be exempted from state public accommodation law because the “public” connotation does not apply to ridesharing per se. *Id.* at 395. “Ridesharing is a unique form of public accommodation because, unlike riding a train or bus, it involves inviting a customer into the driver’s own car . . . . Ridesharing is

the ADA, discrimination is prohibited in “specified public transportation,” which is defined as “bus, rail, or any other conveyance . . . that provides the general public with general or special service . . . on a regular and continuing basis.”<sup>283</sup> Limiting access to rideshares in the outer boroughs will be severely hindered if a permanent cap were to be implemented by the TLC. With substantial evidence that these negative outcomes will occur, and guided by potential ADA understanding of “public accommodations,” aggrieved plaintiffs may be able to contemplate NYCHLR claims that the TLC denies access to rideshares as public accommodations.

### B. Int. No. 144-B May Be Preempted by State Law

Fundamentally, the City Council may not have the authority to grant the TLC the power to permanently limit the number of rideshares. While state law grants all municipalities the authority to limit taxicabs, only in two other counties does it expressly expand this limitation to vehicles other than taxis, and nowhere to vehicles that are for-hire.

#### 1. State Law Grants No Municipality the Power to Limit TNC Vehicles

In passing the new law capping the number of FHV’s for one year, first, the City Council amended the New York City administrative code to reflect the addition of a study to be conducted by the Commission of the impact of for-hire vehicles in the City, called the “vehicle utilization standard.” Second, the Council authorized the commission to establish and revise these standards for high-volume for-hire services, and to regulate the number of FHV licenses.

Under Section 2302(a) of the New York City Charter, the Commission has broad authority to regulate and supervise “the business and industry of transportation of persons by licensed vehicles for hire in the city.” This authority includes licensing of taxis and FHV drivers and owners and the setting of standards for their conduct. But Int. No. 144-B has extended the commission’s authority over rideshares like never before. Whether this extension of the

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even more private than a taxi. The privately-owned cars rarely have the kind of structural dividers between the front and back seats, intercoms, or diverting video screens usually found in taxis.” *Id.* at 395.

283. 42 U.S.C. § 12181(10) (2012).

commission's power to regulate the issuance of new licenses to for-hire vehicles by imposing a *limit*, or cap, on them, is open to question.

While New York City has express authority to "limit the number of taxicabs to be licensed," it does not have express authority to limit the number of FHV's, and in only two counties has this limiting authority been expanded to other vehicles (none of which are FHV's).<sup>284</sup> Under New York State law, municipalities have the authority to adopt ordinances regulating the registration and licensing of taxis, and municipalities *may* limit the number of taxicabs to be licensed.<sup>285</sup> Furthermore, section 181 of New York General Municipal Laws, an ordinance regulating taxicabs and limousines, states that Westchester county *may* limit the number of taxicabs and limousines to be licensed, while Rockland county *may* limit the number of taxicabs, limousines, and livery vehicles to be licensed.<sup>286</sup> The counties of Nassau, Suffolk, Dutchess, and Ulster, in comparison, are not expressly granted this authority, even though Nassau, like Westchester, may adopt ordinances regulating the registration of taxicabs and limousines, and Suffolk, Dutchess, and Ulster, like Rockland, may adopt local laws or ordinances regulating the registration of taxicabs, limousines, and livery vehicles.<sup>287</sup> In other words, all cities, villages, and towns in New York may limit the number of licensed taxis, and only in two counties — Westchester and Rockland — may licensed limousines also be limited (with Rockland being the sole county authorized to limit livery vehicles as well).

Since the introduction of rideshares into the City, section 181 has been amended in 2012 (adding the counties of Suffolk and Rockland), 2015 (adding language for "local laws"), and 2016 (adding the counties of Dutchess and Ulster). Again, this legislative history shows that distinctions were made regarding whether a county may limit certain types of vehicles, with no mention ever being made of FHV's. The municipal general law's silence as to limiting FHV's is not

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284. N.Y. GEN. MUN. LAW § 181 (McKinney 2016).

285. *Id.*

286. *Id.*; see *In re Melrose Credit Union v. City of New York*, 76 N.Y.S.3d 579, 579 (App. Div. 2018) (noting the differences between the three types of vehicles available to passengers for hire in New York are "(1) yellow medallion taxicabs; (2) Street Hail Liveries, which are green taxicabs; and (3) for-hire vehicles"). "FHV's include livery cars, luxury limousines, and "black cars," which are FHV's that are "dispatched from a central facility . . . , where such central facility has certified to the satisfaction of the [TLC] that more than ninety percent of the central facility's for-hire business is on a payment basis other than direct cash payment by a passenger." *Id.* (citing N.Y.C. ADMIN CODE § 19-502[u]).

287. N.Y. GEN. MUN. LAW § 181 (McKinney 2016).

for the state legislature's lack of trying or contemplation. In the 2015–2016 session, Senate Bill S3538 was introduced in order to clarify section 181(1). The original bill as proposed read that ordinances may regulate “[t]he registration and licensing of taxicabs, *limousines, and livery vehicles* and may limit the number of taxicabs, *limousines, and livery vehicles* to be licensed.”<sup>288</sup> The legislature could have included “transportation network company vehicles” in the list of vehicles municipalities could limit but did not.

Regardless, the amended version of this bill (Senate Bill S3538B), which ultimately passed the Senate and was vetoed by the Governor, was changed to *remove* the latter amendment that would have added “limousines, and livery vehicles” to vehicles that could be limited in number. In other words, while the legislature may have initially attempted to authorize municipalities to cap the number of limousines and livery vehicles, they expressly removed it in later amendments, effectively keeping taxicabs as the only type of vehicle that may be capped.

In 2017, New York State passed the TNC Act, which greenlit TNC operation throughout the state and explicitly excluded New York City taxicabs and FHV — over which the New York City Taxi & Limousine Commission (the “Commission”) already had existing authority.<sup>289</sup> As the law states, “[t]he purpose of this act is to ensure the safety, reliability, and cost-effectiveness of transportation network company (TNC) services within the state of New York and to preserve and enhance access to these important transportation options for residents and visitors to the state.”<sup>290</sup> In enacting a regulatory regime for the state, the legislature proved its awareness of Section 181, by adding the new regulations to Section 182 (local regulation of transportation network companies) and had the power and opportunity to expressly allow municipalities to limit the number of TNC vehicles. But instead, Section 182 provides counties and cities with populations over 100,000 the authority to “prohibit the pick-up of any person by a transportation network company . . . within their geographic boundaries pursuant to the enactment of a local law or

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288. S. 03538, 2015–2016 Gen. Assemb., Reg. Sess. (N.Y. 2016).

289. N.Y. VEH. & TRAFF. LAW § 1691(1) (McKinney 2017); N.Y. GEN. MUN. LAW § 182 (McKinney 2016). The law, included in the 2018 state budget, was signed by Governor Andrew Cuomo on April 10, 2017. It authorizes any county, or a city with a population of more than 100,000, to prohibit the pick-up of a person by a TNC within the bounds of the jurisdiction (none of which have done so). S. Res 2009C, 2017–2018 Leg. Sess. (N.Y. 2018).

290. S. Res. 1264, 2017–2018 Leg. Sess. (N.Y. 2018).

ordinance,”<sup>291</sup> again, making no mention of “limiting” TNC vehicles, as it does with taxicabs in Section 181.

## 2. *What Authority Does the TLC Have?*

The City Council, aligned with its broad constitutional home rule powers conferred on local government, has “in addition to all enumerated powers,” broad authority to:

adopt local laws which it deems appropriate, which are not inconsistent with the provisions of this charter or with the Constitution or laws of the United States or this state, for the good rule and government of the city; for the order, protection and government of persons and property; for the preservation of the public health, comfort, peace and prosperity of the city and its inhabitants; and to effectuate the purposes and provisions of this charter or of the other law relating to the city.<sup>292</sup>

As a City agency, the TLC has broad authority under the New York City charter and administrative code to promulgate rules and regulations that supervise, regulate, and control for-hire vehicles in the City.<sup>293</sup> Title 35 of the Rules of the City of New York similarly provides that, “[t]o promote public comfort and convenience, and taking into account the overall public transportation network of the City, the [TLC] will establish an overall public transportation policy governing for-hire transportation services in the City, including taxi, limousine, paratransit and commuter van services.”<sup>294</sup> Thus, the TLC has broad authority to implement stand-alone regulations and regulatory schemes related to the taxi industry.<sup>295</sup>

Furthermore, in *In re Melrose Credit Union v. City of New York*,<sup>296</sup> the Court elaborated that the TLC’s authority included the power to adopt “E-Hail” and “FHV E-Dispatch” rules for rideshares like Ubers, which “establish regulations for E-Hail and E-Payment that will encourage innovation, provide desired services to taxi

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291. N.Y. GEN. MUN. LAW § 182 (McKinney 2016). Additionally, the law added other provisions regarding licensing, driver background checks (but, controversially, not fingerprinting), required disclosure to passengers, and insurance. *Id.*

292. N.Y.C. CHARTER § 28 (2019).

293. N.Y.C. ADMIN. CODE § 19-501 (2019); N.Y.C. CHARTER § 2300.

294. 35 R.C.N.Y. § 52-01.

295. N.Y.C. Comm. for Taxi Safety v. N.Y.C. Taxi & Limousine Comm’n, 681 N.Y.S.2d 509, 510 (App. Div. 1998) (noting that the City Charter delegates the Commission a “broad grant of authority . . . to promulgate and implement a pervasive regulatory program for the taxicab industry, including . . . requirements for the maintenance of financial security”).

296. 76 N.Y.S.3d 579 (App. Div. 2018).

passengers, promote safety and consumer protection, and create income opportunities for drivers.”<sup>297</sup> The goal of the E-Hail Rules is to “accommodate new technology into the taxi industry while taking into account the needs of E-Hail application developers, drivers, vehicle owners and passengers.”<sup>298</sup> This ruling narrowly explained the TLC’s authority with respect to regulations regarding rideshare vehicles.

### 3. Preemption?

New York State can indicate its intent to preempt an area of law either by express statutory language, clearly indicating it has preempted the field, or by implication.<sup>299</sup> While no specific preemption language is involved in the matter here, preemption may be inferred if the state establishes a “comprehensive and detailed regulatory scheme.”<sup>300</sup> Uber argues the latter point, pointing to the State’s *Fix NYC Advisory Panel Report*.<sup>301</sup> In establishing the *Fix NYC Advisory Panel Report*, the State may have implicitly preempted the City from making rules pertaining to capping rideshares because the report urges consideration of reducing the rates for rideshare carpools, and implementation of a congestion pricing surcharge on FHV’s, with the revenues going towards MTA improvement.<sup>302</sup> Ultimately, legislation that imposes caps on the number of for-hire vehicles that can operate in the congestion zone could depress anticipated revenues the MTA would receive through the surcharge on for-hire vehicles.<sup>303</sup>

There are many reasons why the preemption argument is valid with respect to the new law. At one time, the state contemplated, then withdrew, an amendment to the law that would give municipalities authority to limit TNCs. The state also created an aspirational, state-wide regulatory plan wherein rideshare vehicles play an integral role in not just decreasing congestion but raising revenue for the MTA.

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297. *Id.* at 584.

298. *Id.*

299. *McDonald v. N.Y.C. Campaign Fin. Bd.*, 965 N.Y.S.2d 811, 815 (Sup. Ct. 2013), *aff’d*, *McDonald v. N.Y.C. Campaign Fin. Bd.*, 985 N.Y.S.2d 557 (App. Div. 2014).

300. *Id.*

301. *See generally* FIX NYC ADVISORY PANEL, FIX NYC ADVISORY PANEL REPORT (2018), <http://www.hntb.com/hntb/media/hntbmedialibrary/home/fix-nyc-panel-report.pdf> [<https://perma.cc/AB96-XPQB>].

302. *Id.*

303. *See* HIRE CONGESTION, *supra* note 51, at 10.

Lastly, as a policy matter, a law of this sort is not merely local in character, but national (and perhaps even international).

What is most troubling here is that local legislators have given broad authority to the TLC to regulate FHV's in a way that the state legislature has done only narrowly, and in a way that no other city — big or small — has done before. Simply put, municipal legislators invariably have the authority to adopt certain taxi and rideshare vehicle regulations because it impacts the health and safety of the City's citizens.<sup>304</sup> But the threshold of their power to regulate is not unlimited. It must be beyond the scope of a city council, even one as large and powerful as New York City's, to delegate to an agency the authority to limit the growth of a company, where the state has not explicitly granted them that power, and especially more so in an area where this practice is unprecedented. The manner and form of rideshare regulations — from licensing and background checks — is within the scope of local authority. As a threshold question, where a municipality's right to ban rideshares is expressly delegated, the right to arbitrarily cap rideshare licenses is not symmetrically defined and therefore cannot be assumed.

Before the rise of rideshares, no other type of vehicle, except taxis, was permitted to pick up passengers right off the street. And the many instances of black livery cars being fined for attempting to pick up street hails in the outer boroughs underscores even further how Uber and other rideshare vehicles has filled a gap. But this phenomenon does not make ridesharing a local problem, or solution, depending on which side of the table one sits. Limiting rideshares with a permanent cap is not within the authority of a city and should not be under the authority of a city because it is part of a larger industry. There is no turning back the clock and disassembling the entire rideshare industry; the sharing economy is here to stay.

### III. RETHINKING RIDESHARE REGULATION

Section III.A. first proposes that legislators of major cities not seek to impose strict regulations like a permanent capping mechanism on rideshare vehicles. Second, Section III.B. advances alternatives to a

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304. *G&C Transp., Inc. v. McGrane*, 928 N.Y.S.2d 208, 214 (Sup. Ct. 2011) (“N.Y. Gen. Mun. Law § 181 did not preempt a municipality's authority to adopt taxicab regulations because (1) the statute authorized the municipality to adopt such regulations that were consistent with state law, and (2) N.Y. Const. art. IX, § 2(c)(ii)(10) and N.Y. Mun. Home Rule Law § 10(1)(ii)(a)(12) conferred broad police power on local government related to the welfare of a municipality's citizens.”), *aff'd*, 949 N.Y.S.2d 113 (App. Div. 2012).

blanket cap on rideshares, such as congestion pricing (that contains a poverty exemption) and providing subsidies for rides.

Regulators should ultimately embrace, rather than impede, the innovative aspects of FHV as a way to expand access to low-income, minority, and disabled residents, instead of imposing regulatory schemes that are proven to aggravate disparities in transit equity. Rideshares like Ubers are distinct from taxis, even from a legal standpoint, and so they deserve different regulations and protections.

### A. Avoid Overly Strict Regulations

For various reasons, the market will, for better or for worse, self-regulate, deeming a cap not just draconian, but unnecessary. Uber has finally gone public, and only time will tell if the company can overcome its lackluster debut and start to turn a profit — especially if autonomous, driverless vehicles are the future.<sup>305</sup> A portion of the company's losses are on account of subsidized rides, so for the company to begin creating a profit, the cost of rideshares will likely go up. A permanent cap on rideshares would further raise prices and disproportionately impact low-income and minority riders. Ultimately, capping rideshares is a counterproductive regulatory scheme and sends an overly restrictive message against innovative new companies and industries that are adapting to technological changes and societal needs.

### B. Alternatives to Capping Rideshares

#### 1. Utilize Rideshares Alongside Public Transit

New York City should consider merging private rideshares with public transportation because this will improve residents' quality of life by creating multiple accessible transit options. For example, one opportunity for City officials to capitalize on ridesharing is by providing first and last mile travel subsidies, or subsidies that cover rides to and from popular transit hubs in the outer boroughs, which would encourage rides to destinations outside the typical transit zone or underserved by public transit. For example, in 2016, Pinellas Suncoast Transit Authority in St. Petersburg, Florida, became the first agency in the country to subsidize Uber trips.<sup>306</sup> The Authority

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305. See Hawkins, *supra* note 49.

306. See Laura Bliss, *Where Ride-Hailing and Transit Go Hand in Hand*, CITYLAB (Aug. 3, 2018), <https://www.citylab.com/transportation/2018/08/where-ride-hailing-and-transit-go-hand-in-hand/566651/> [<https://perma.cc/AQ9C-STPT>]; see also JOSEPH

gave \$5.00 discounts on Uber and Lyft rides, as well on rides provided by a local taxi company, to and from twenty-four popular bus stops in its service area to as many as 1000 riders per month.<sup>307</sup>

And since 2016, at least twenty-seven more communities across the United States (including Los Angeles and Marin, California; Denver, Colorado; Detroit, Michigan; Portland, Oregon; Boston, Massachusetts; Washington, D.C.; and Philadelphia, Pennsylvania) have partnered with Uber, Lyft, and other rideshare companies “to supplement or substitute traditional service.”<sup>308</sup> The Denver suburb of Centennial, Colorado provided free Lyft trips to light rail stations,<sup>309</sup> while in Washington, D.C., the fire and EMS department is exploring ways to contract Uber to transport non-emergency 911 callers.<sup>310</sup>

At the very least for ADA passengers, a partnership between public transit and private rideshares would be incredibly more cost-efficient than current paratransit systems in place.<sup>311</sup> In Boston, The Ride (a door-to-door transportation service for residents who are disabled and elderly) costs \$31.00 per ride and has a budget of over \$100 million a year; but under a program between the Massachusetts Bay Transportation Authority and rideshare companies like Uber and Lyft, every Uber and Lyft ride will cost the agency \$13.00 per ride.<sup>312</sup>

With both Uber and Lyft now expanding their businesses into scooters and bikes, incorporating a more seamless and integrated

P. SCHWIETERMAN ET AL., PARTNERS IN TRANSIT 5 (2018), <https://drive.google.com/file/d/1cJtCJ-7JctKh8fsYyY3AidrETdKGx8wz/view> [<https://perma.cc/F3U9-JDTF>].

307. See Bliss, *supra* note 306.

308. *Id.*

309. However, the pilot program in Centennial, Colorado was not extended due to insufficient demand. *Id.*

310. See SCHWIETERMAN ET AL., *supra* note 306, at 11.

311. Luz Lazo, *Uber, Lyft Partner with Transportation Authority to Offer Paratransit Customers Service in Boston*, WASH. POST (Sept. 16, 2016), <https://www.washingtonpost.com/news/dr-gridlock/wp/2016/09/16/uber-lyft-partner-with-city-to-offer-paratransit-customers-on-demand-service-in-boston/> [<https://perma.cc/6CRV-KVN5>]; see, e.g., Tayjus Surampudi, *The MBTA's On Demand Paratransit Pilot Program: A Case for Public Transit Agencies to Partner with Uber and Lyft to Improve Paratransit*, MEDIUM (Oct. 18, 2018), <https://medium.com/@tssurampudi/the-mbtas-on-demand-paratransit-pilot-program-a-case-for-public-transit-agencies-to-partner-with-2815a53f939c> [<https://perma.cc/67ZT-XNVM>].

312. See Lazo, *supra* note 311; see also Athena Kan, *Ride-Sharing to Replace MBTA's RIDE*, MEDIUM (Apr. 28, 2018), [https://medium.com/@kan\\_academy/ride-sharing-to-replace-mbtas-ride-fa0bd142e9f3](https://medium.com/@kan_academy/ride-sharing-to-replace-mbtas-ride-fa0bd142e9f3) [<https://perma.cc/34M5-49ZW>].

rideshare system (between traditional public transit, rideshare vehicles, bikes, and scooters) is even more easily foreseeable. Partnering with Uber and Lyft would also allow New York transit agencies to complement public transit at a time when transit ridership is on the decline due to inadequate, inefficient, and overcrowded system that underserves a significant portion of the City's population. There is great demand to improve transit infrastructure, and linking on-demand transportation with traditional transit services could be a way to increase ridership while providing reliable service to all riders especially those in transit deserts, areas plagued by poor transit options.

## 2. *Implement Congestion Pricing*

Now that congestion pricing for Manhattan's central business district, or the geographical area below 60th street, was officially passed in New York City on April 1, 2019, the City — the first to implement such pricing — should take care devising a hardship exemption.<sup>313</sup> Congestion pricing will include surcharging rides in zones where transit is most plentiful and reliable and congestion costs are highest while charging little or nothing else for rides elsewhere, where these conditions are reversed.<sup>314</sup> In addition to reducing traffic, congestion pricing will raise funds that could be allocated to the MTA. Using data like pick-up and drop-off information for rideshares and taxis could help regulators identify which areas are most congested and therefore which areas require congestion fees.<sup>315</sup> Moreover, Uber supports congestion pricing in Manhattan as long as

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313. See, e.g., Lauren Cook, *Congestion Pricing in NYC: What to Know About the Manhattan Toll Plan*, AMNEWYORK (Apr. 2, 2019, 12:42 PM), <https://www.amny.com/transit/congestion-pricing-nyc-1.29251703> [<https://perma.cc/8FU6-U4PX>]; Emma G. Fitzsimmons & Winnie Hu, *Congestion Pricing Is Coming. Now Everyone Wants a Break.*, N.Y. TIMES (Apr. 4, 2019), <https://www.nytimes.com/2019/04/04/nyregion/congestion-pricing-trucks-new-jersey.html> [<https://perma.cc/8JMY-ARDN>].

314. Charles Komanoff, *No Uber-Lyft Cap Needed Because New York Can Price Its Way Out of Congestion and Despair*, STREETS BLOG NYC (July 31, 2018), <https://nyc.streetsblog.org/2018/07/31/no-uber-lyft-cap-needed-because-new-york-can-price-its-way-out-of-congestion-and-despair/> [<https://perma.cc/NL22-9ZMA>] (“[I]t’s now state policy devised as a mass transit revenue-raiser that’s scheduled to take effect on New Year’s Day when for-hire vehicle rides that touch the Manhattan taxi zone will be surcharged \$2.50 for yellow cabs and \$2.75 for Ubers and Lyfts. A surcharge on time traveled in the taxi zone would have been more effective than the legislature’s flat fee, but the policy should make at least a modest dent in Manhattan gridlock by deterring a fraction of rides.”).

315. See Speta, *supra* note 70, at 131.

the pricing applies to all vehicles.<sup>316</sup> Congestion pricing has been imposed on traffic in the busy central business districts of other major cities,<sup>317</sup> including London, where congestion pricing successfully reduced private car use 39% between 2002 and 2014.<sup>318</sup>

Ironically, when Mayor de Blasio criticized congestion pricing proposals back in 2017, he did so because he asserted it would be a burden on outer-borough residents.<sup>319</sup> In actuality, only 4% of employed outer-borough residents — about 118,000 — commute to work in Manhattan by car, and only 2% of those who do — about 5000 — are considered to be poor, or living under the federal poverty limit.<sup>320</sup>

Schaller reports that “[a] multi-pronged strategy that is anchored around a comprehensive congestion pricing plan that charges all vehicles entering the central business district below 60th Street in Manhattan is far more likely to produce positive results than imposing artificial caps on FHV’s.”<sup>321</sup> Rather than replicate the taxi medallion system, which imposes a numerical cap and leads “to artificial inflation of medallion values and economic distress,” Schaller supports implementing a congestion pricing plan that “would impose fees on drivers of personal, commercial, and for-hire vehicles.”<sup>322</sup> These fees could then be used to raise revenue to fix,

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316. Winnie Hu, *When Calling an Uber Can Pay Off for Cities and States*, N.Y. TIMES (Feb. 18, 2018), <https://www.nytimes.com/2018/02/18/nyregion/uber-lyft-public-transit-congestion-tax.html> [<https://perma.cc/AE6F-TRXT>] (“A comprehensive congestion pricing plan that is applied to all vehicles in the central business district is the best way to fully fund mass transit, reduce congestion and improve transportation for outer borough New Yorkers.”).

317. Theodore Brown, *Five Cities with Congestion Pricing*, THISBIGCITY (Aug. 22, 2011), <http://thisbigcity.net/five-cities-with-congestion-pricing/> [<https://perma.cc/3QGB-FLF5>].

318. Nicole Badstuber, *London’s Congestion Charge Is Showing Its Age*, CITYLAB (Apr. 11, 2018), <https://www.citylab.com/transportation/2018/04/londons-congestion-charge-needs-updating/557699/> [<https://perma.cc/EH2L-MZUM>] (“The number of vehicles driving into Central London is a quarter lower than a decade ago. The charge has been particularly successful at deterring personal use cars from entering Central London: the number of private cars entering the zone fell 39 percent between 2002 and 2014.”).

319. Vincent Barone, *Congestion Pricing Impact on Outer-Borough Residents Would be Nominal, Analysis Shows*, AMNEWYORK (Oct. 24, 2017, 8:22 PM), <https://www.amny.com/transit/congestion-pricing-nyc-1.14604676> [<https://perma.cc/ZF86-AQ4B>].

320. *Id.*

321. *See* HIRE CONGESTION, *supra* note 51, at 5.

322. *Id.* at 10.

improve, and maintain public transit, which Schaller argues is the “most equitable form of transportation in New York City.”<sup>323</sup>

### CONCLUSION

New York City would not be promulgating an effective or legal regulation by enacting a permanent cap on the number of rideshares in the City. Such a limit exacerbates existing problems of transit inequality, especially for outer borough residents. City council members, transit experts and advocates, and rideshare companies recognize the disparate impact and discriminatory externalities that a cap on FHV's would impose on riders living in the outer boroughs and any community that suffers from inadequate access to transportation. While it is essential for the New York City Council and the City's TLC to prioritize the more significant and systemic public transit issues, these entities should also recognize that FHV's are an invaluable supplement to the public transit system, particularly for the low-income and minority riders living outside of Manhattan. FHV's are offering transportation options to the most underserved members of New York City's population and fill a key gap created by an underinvested and discriminatory transit system. Limitations on FHV's simply cause too great of a disparate impact on the City's most vulnerable residents.

Underlying the potentially discriminatory impact of a rideshare cap is the more significant, national issue of unequal access to public transit. As asserted by the Civil Rights Division of the U.S. Department of Justice's Title VI Legal Manual, social psychological research proves that implicit bias against people of color continues to be a widespread problem.<sup>324</sup> From an inequality perspective, there are greater implications from capping Uber regarding equal access to transportation insofar that it stifles innovation rather than producing potential solutions. Better public transit could result if local governments were to embrace technological innovations as positive transportation opportunities. Uber and other rideshares could be a keystone for this transportation puzzle, and may not merely mitigate transit inequality in the outer boroughs but instead solve these greater transit inequality issues. It would be unjust for policymakers in New York to sideline the concerns of outer borough residents by implementing a scheme that will ultimately harm disadvantaged populations.

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323. *Id.* at 9.

324. C.R. DIVISION, *supra* note 241, at 4.

Rather than extend this one-year moratorium, the City should focus its efforts on enforcing taxes for drivers in congested zones. This will better address the undeniable problems of traffic congestion in New York City without removing a vital transit service from the City's most marginalized residents.

Rideshare platforms are an undeniable part of the fabric of urban life. They have not only changed the transportation landscape by providing on-demand car service; they have the potential to operate in a more integrated manner with public transit and provide substantially more access to transit and help residents in every area of the five boroughs escape the transit desert. Instead of banning these valuable services, cities should work with these companies to offer better transit for all.