FILED: APPELLATE DIVISION - 1ST DEPT 08/15/2025 02:28 PM 2024-02398
NYSCEF DOC. NO. 13 RECEIVED NYSCEF: 08/15/2025

To be argued by: **Allison Langley**
Time Requested for Argument: 15 Minutes

Appellate Division Docket No.: 2024-02398

New York Supreme Court

APPELLATE DIVISION – FIRST DEPARTMENT

In the Matter of

NEW YORK TAXI WORKERS ALLIANCE; NORMAN BUENAVENTURA; AMARA SANOGO,

Petitioners-Appellants,

-against-

THE NEW YORK CITY TAXI & LIMOUSINE COMMISSION; DAVID DO, AS COMMISSIONER AND CHAIR OF THE NEW YORK CITY TAXI & LIMOUSINE COMMISSION; THE CITY OF NEW YORK,

Respondents-Respondents.

REPLY BRIEF FOR APPELLANTS

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New York County Clerk's Index No. 154424/2023

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PRELIMINARY STATEMENT

This is an appeal of an Article 78 proceeding seeking to declare unlawful and enjoin implementation of a Taxi and Limousine Commission ("TLC") pilot program that authorizes an additional 2,500 For-Hire Vehicle ("FHV") licenses in violation of TLC rules, for use with Street Hail Livery ("SHL") permits whose issuance conflicts with state law. Respondents-Respondents implemented this unlawful pilot program without engaging in the regulatory review required to issue new FHV licenses, which includes review of the impact new FHV licenses will have on driver income. Now, drivers across the industry face the risk of diminished income should the additional FHV licenses, which Respondents-Respondents number at nearly 2,000, become operational.

Local Law 147 of 2018, codified at N.Y.C. Admin. Code § 19-550, requires TLC to engage in a regular review of the for-hire vehicle industry, and was implemented precisely because TLC had failed to appropriately regulate its licensees. As a result of the unregulated entry of companies like Uber and Lyft, there was an explosive growth in the number of FHVs in operation. This growth oversaturated the market, causing drivers' earnings to plummet. For decades, driving in New York City had been a middle-class job, but in the span of just a few years, drivers suddenly struggled to make even the equivalent of a minimum wage. The human cost of this failure in regulation cannot be overstated: in addition to the

thousands of drivers and their families who were dragged into poverty, nine drivers across the industry died by suicide.

It was in direct response to this crisis that the City Council passed Local Law 147, pursuant to which the TLC issued regulations that require the TLC to review driver income, among other factors, before issuing any new FHV licenses. 35 R.C.N.Y. § 59A-06(a)(1). Yet TLC has failed to engage in that regulatory review here. Instead, they argue that Petitioners-Appellants lack standing to challenge the issuance of these new, improperly authorized FHV licenses. Respondents-Respondents maintain this stance even in the face of a recent Supreme Court determination, in a similar action, issuing a Temporary Restraining Order ("TRO") upon a showing that drivers would be irreparably harmed by the income loss caused by the improper issuance of FHV licenses and necessarily rejecting respondents' argument that petitioners did not have standing.

Nevertheless, Respondents-Respondents repeat the argument that Petitioners-Appellants lack standing here. Once again, however, Respondents-Respondents have failed to show that the harm Petitioners-Appellants will suffer is speculative and conjectural. Respondents-Respondents have failed to distinguish the controlling case law that considers future harm "injury-in-fact" and thus supports a finding of standing. Instead, they ignore its application entirely to the facts of this case. Simultaneously, Respondents-Respondents make conclusory

assertions that the impact of an additional 2,500 vehicles on driver income is unclear, ignoring the well-settled concept established by the legislature and the courts, and echoed by Respondents-Respondents' own administrative decisions, that driver income is directly impacted by the number of FHVs on the road. In a further attempt to frame the harm Petitioners-Appellants will suffer as speculative, Respondents-Respondents repeat mischaracterizations regarding vehicle licensing, the size of the for-hire vehicle fleet, and driver pay and income that ignore the evidence at issue, seemingly failing to understand the impact of their own regulations. In light of the record and the rather straightforward controlling law, it is plain that Petitioners-Appellants have established they are at risk for suffering the loss of income should the remaining FHV licenses authorized by the SHL pilot program become operational. This is sufficient to support a finding of standing, as Respondents-Respondents fail to show that Petitioners-Appellants' injury falls within the category of competitive injury that would prevent such a finding. This Court should therefore reverse the Supreme Court's decision and remand for further proceedings on the merits.

ARGUMENT

I. PETITIONERS-APPELLANTS HAVE ESTABLISHED THEY WILL SUFFER CONCRETE HARM, AND THEREFORE HAVE STANDING TO ASSERT THEIR CLAIMS.

In order to establish standing, "a plaintiff must show 'injury in fact,' meaning that plaintiff will actually be harmed by the challenged administrative action." *N.Y. State Ass'n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211 (2004) (internal citations omitted). The harm must be a "'cognizable harm,' meaning that an individual member of plaintiff organizations 'has been *or will be* injured[.]'" *Id.* at 214 (emphasis added) (internal citations omitted). The Court of Appeals has recently reaffirmed, as it indicated in *Novello*, that even the "unique risk" of future harm can be a "cognizable" injury that is "not 'founded on [impermissible] layers of speculation[.]'" *Matter of Stevens v. N.Y. State Div. of Criminal Justice Servs.*, 40 N.Y.3d 505, 515 (2023) (internal citations omitted). The broad principle that future harm can establish standing has already been applied to the specific question of future loss of driver income resulting from the issuance of FHV licenses. In *NYTWA et al. v. Do et al.*, petitioner NYTWA, along with individual drivers, alleged drivers would be irreparably harmed by the future loss of income caused by the improper issuance of new FHV licenses. Index No. 160795/2023 (Sup. Ct. N.Y. Co.), NYSCEF Doc. No. 1. Although the TLC attempted to argue the harm was speculative, the Supreme Court issued a temporary restraining order ("TRO"), which requires a finding of the likelihood of irreparable harm, and could not have been issued if the harm was speculative. *Id.* at NYSCEF Doc. No. 54. In this case, Petitioners-Appellants have again

demonstrated that they will lose income should the 2,500 additional FHV licenses authorized by the SHL Pilot Program become operational; so long as the pilot program remains active, Petitioners-Appellants remain at risk of income loss. Thus, Petitioners-Appellants have established a cognizable injury that supports a finding of standing.

A. Respondents-Respondents Fail To Distinguish Or Apply The Controlling Case Law Holding That Future Harm Can Establish Standing.

Respondents-Respondents fail to distinguish the case law holding that future harm can be the basis for standing, and then simply ignore its application to the case while arguing that the harm Petitioners-Appellants will suffer is speculative and conjectural. In line with the case law on future harm, this Court has repeatedly held that "[p]etitioners [do] not have to wait for the specific adverse contact contemplated by the regulation to occur in order to sustain an injury-in-fact" necessary to establish standing. *Matter of Stevens v. N.Y. State Div. of Criminal Justice Servs.,* 206 A.D.3d 88, 99 (1st Dep't 2022), standing analysis affirmed in 40 N.Y.3d 505 (2023), citing *Lino v. City of New York*, 101 A.D.3d 552, 555-556 (1st Dep't 2012). *See also Valmonte v. Bane*, 18 F.3d 992, 999 (2d Cir. 1994) ("[Plaintiff] does not need to 'await the consummation of threatened injury to obtain preventative relief.'") (internal citations omitted). In fact, this Court found that the "peculiar risk" alone was sufficient to support standing, rejecting

respondents' arguments that "petitioners' injuries are speculative because they are based upon events which may never come to pass." *Stevens*, 206 A.D.3d at 97-98. The Court of Appeals subsequently affirmed the analysis that a "unique risk" of harm was not speculative and thus was sufficient to support a finding of standing. *Stevens*, 40 N.Y.3d at 515.

Respondents-Respondents' superficial attempts at distinguishing *Stevens* and *Lino* from the instant matter fail; there is simply no basis in the case law for requiring, as Respondents-Respondents seem to suggest, a "present harm" to support a "future harm" (Brief for Respondents ("Resp. Br.") 25-26). After all, a present harm would make any discussion of future harm superfluous, as it could, standing alone, serve as the basis for standing. Assuming, *arguendo,* that such a standard existed, Petitioners-Appellants would meet the standard in the same manner that the plaintiffs in *Stevens* did. Just as in *Stevens*, Petitioners-Appellants brought suit due to the "fear and anxiety" that the "peculiar risk" of future harm provokes. *Stevens,* 206 A.D.3d at 99. Similarly, Respondents-Respondents' argument that *Stevens* and *Lino* can be distinguished on the ground that they implicate "much more significant risks to individual liberty attendant to criminal law," and thus, by implication, a different type of harm, is unsupported by the case law. (Resp. Br. 26) In fact, *Lino* militates against Respondents-Respondents' argument that the Court should engage in such line-drawing exercises. There,

plaintiffs were found to have standing in part because of economic consequences they feared resulting from the improper disclosure of unsealed arrest records, similar to the economic harm Petitioners-Appellants fear here. *Lino*, 101 A.D.3d at 555 (finding that "it makes little sense for plaintiffs to have to wait until their job applications are in the mail or they are about to appear for job interviews before they have standing to bring a cause of action against the effect of the unsealed records.").

Having failed to distinguish the case law on future harm, Respondents-Respondents' brief ignores its application to the facts of the case. Respondents-Respondents attempt to argue that Petitioners-Appellants' injury is speculative because not all 2,500 FHV licenses authorized by the SHL pilot program are operational and Petitioners-Appellants have not demonstrated that "every permit is going to be issued[.]" (Resp. Br. 20). Yet these facts are irrelevant, as this Court and the Court of Appeals have made plain; future harm, as well as the risk of future harm, support a finding of standing. *Stevens,* 40 N.Y.3d 505; *Lino*, 101 A.D.3d 552. Here, Petitioners-Appellants remain at risk for a loss of income so long as the pilot program remains operational and the remaining licenses—which Respondents-Respondents now number as nearly 2,000 (Resp. Br. 20)—may be issued to new pilot program participants.

To compound the matter, not only do these licenses remain available, but Respondents-Respondents admit, for the first time, that they intend to keep the pilot program open for a year longer than initially planned–seemingly without having engaged in any subsequent rulemaking or other administrative action (Resp. Br. 13, n. 3). Despite Respondents-Respondents' past assertions that the program was temporary (*see, e.g.,* R. 436; R. 678; R. 680), they have now extended the program by another year (Resp. Br. 13, n. 3). This action was not unforeseeable: Respondents-Respondents had extended other pilot programs in the past without any apparent legal authority to do so, and Petitioners-Appellants accurately predicted they could do so again here. R. 404-405. Indeed, Respondents-Respondents could continue this course of action and extend the program for years; in this scenario, if Petitioners-Appellants are denied standing, Petitioners-Appellants would either remain at risk of or suffer harm from the loss income caused by the additional FHV licenses, without any method to challenge it, as the four month statute of limitations that began running at the promulgation of the program is long past. (Brief for Appellants ("App. Br.") 36-37). This is plainly an absurd outcome. Therefore, as long as the SHL Pilot Program remains in operation, Petitioners-Appellants suffer the risk of future harm that, under controlling case law, supports a finding of standing.

B. Respondents-Respondents' Assertions That The Impact Of An Additional 2,500 Vehicles On Driver Income Is Unclear Is Contrary To The Statutory And Regulatory Language, Previous Determinations By The Courts, And Respondents-Respondents' Own Past Understanding.

Despite Respondents-Respondents assertions that the impact of an additional 2,500 vehicles on driver income is unclear, the straightforward relationship between an increase in the number of vehicles on the road and a decrease in driver income has been well established. This relationship not only serves as the basis for Local Law 147 and is codified in the structure of the law itself, at N.Y.C. Admin. Code §19-550 and its subsequent regulations at 35 R.C.N.Y. § 59A-06, but has been affirmed by the courts in *Zehn-NY LLC v. City of New York*, 2019 NY Slip Op 31540(U), and *NYTWA et al. v. Do et al.*, Index No. 160795/2023 (Sup. Ct. N.Y. Co.), NYSCEF Doc. No. 54. Respondents-Respondents themselves have repeated it in their administrative decisions and in previous communications and litigation. (App. Br. 28-31). There is simply no support, across this broad range of determinations and findings, for the notion that a certain threshold must be crossed before an increase in the number of vehicles on the street will undermine driver pay.

The causal relationship between driver income and an increase of vehicles on the street is not a matter of first impression for the courts: in two separate instances, the Supreme Court has affirmed it. See *Zehn-NY LLC v. City of New York*, 2019 NY Slip Op 31540(U), and *NYTWA et al. v. Do et al.*, Index No.

160795/2023 (Sup. Ct. N.Y. Co.), NYSCEF Doc. No. 54. In *Zehn*, the Court highlighted the "abundance of legislative history, and the legislation itself [supporting Plaintiff's] contention that over-saturation of FHV licenses was causing a decline in driver income and well being[.]" *Zehn-NY LLC v. City of N.Y.*, 2019 NY Slip Op 31540(U), at *2. (App. Br. 31-32). In *NYTWA v. Do*, the Supreme Court issued a temporary restraining order after NYTWA, alongside several drivers, initiated a suit challenging the TLC's unlawful issuance of an unlimited number of new FHV licenses without engaging in any rulemaking or regulatory review process. As is the case here, Respondents-Respondents argued that the petitioners did not have standing because of the "speculative" nature of the harm. *See, e.g., NYTWA v. Do*, Index No. 160795/2023, NYSCEF Doc. No. 71 at lines 38-39. While the matter was ultimately settled, the Supreme Court issued a TRO in the interim, which necessarily required rejecting Respondents-Respondents arguments that the harm was speculative.

Despite their own past determinations and statements that reflected a shared understanding with the courts, Respondents-Respondents now discount this well-established relationship and incorrectly suggest that drivers will only face a "concrete injury" when some unspecified threshold of vehicles are added to the road. (Resp. Br. 24). Respondents-Respondents, however, cite no case law, either from the body of law on standing or that on drivers' standing under N.Y.C. Admin.

Code § 19-550, for the proposition that a certain threshold of harm must be passed before a plaintiff is found to have standing. Nor is there support in the statutory or regulatory language in N.Y.C. Admin. Code § 19-550 or 35 R.C.N.Y. § 59A-06 for the concept that a certain number of vehicles must be added before drivers lose income and thus have standing to challenge the addition of more FHV licenses. Indeed, the fact that the TLC's only determination prior to the implementation of the SHL pilot program that allowed for the issuance of additional FHV licenses authorized only 1,000 additional licenses supports the conclusion that small numbers of vehicles may adversely impact driver income. (That the report does not make any specific finding as to the SHL Pilot Program, as Respondents-Respondents point out (Resp. Br. 25), is an indication only of Respondents-Respondents failure to engage in the required regulatory review before issuing new FHV licenses, and does not, as Respondents-Respondents incorrectly suggest, have any bearing on whether the industry could support additional vehicles at the time). Respondents-Respondents conclusory statements that the impact an additional 2,500 vehicles will have on driver income is unclear thus fail.

C. Respondents-Respondents Repeatedly Fail To Understand The Impact Of Their Own Regulations On Vehicle Licensing, The Size Of The For-Hire Vehicle Fleet, And Driver Pay And Income.

Throughout their brief, Respondents-Respondents repeatedly fail to grasp the impact of their own regulations on vehicle licensing, the size of the for-hire

vehicle fleet, and driver pay and income. In service of painting the harm Petitioners-Appellants will suffer as speculative, Respondents-Respondents seek to minimize the loss of income by repeating a series of inaccurate statements about the impact of their own regulations. Initially, Respondents-Respondents restate their incorrect assertions regarding the size of the increase of the for-hire vehicle fleet and the distinctions between SHL and FHV licenses as it relates to assessing how many new vehicles will be added by the pilot program, failing to substantively engage with the corrections Petitioners-Appellants have raised in the course of the litigation. Then, Respondents-Respondents further mischaracterize the impact of the High Volume For-Hire Vehicle driver pay rules, and the extent to which the pilot SHL vehicles will impact the number of trips other vehicles receive. Once these errors are corrected for, it is plain that the harm Petitioners-Appellants are at risk for is not speculative or conjectural.

1. The SHL Pilot Program would have increased the active FHV fleet by 3.4% and reduced drivers' net income by approximately 6%.

While the Supreme Court and Respondents-Respondents erroneously assert that the FHV fleet would have increased by only 2.34% if all 2,500 FHVs became operational, this is because of an error in their collective analysis: they fail to take into account the difference between active and licensed vehicles. (Resp. Br. 20). There is no dispute that the SHL pilot program has authorized the addition of 2,500 new For-Hire Vehicle licenses (FHVs). Had the vehicles become operational at the

time the lawsuit was brought, the pool of active vehicles would have increased by 3.4%, thus spreading out the same finite number of trips over 3.4% more vehicles. R. 51 (comparing 2,500 new FHV licenses to 74,404 active vehicles in February 2023). Because drivers bear their own vehicle expenses, a 3.4% reduction in gross pay would likely reduce an individual driver's net pay by roughly 6%. [1]*Id.* Respondents-Respondents and the Supreme Court err when they focus on the increase to the number of total licensed vehicles. This number includes vehicles not performing trips, including vehicles that are currently in storage and thus not in use. *See* 35 RCNY § 59A-36 (describing the process for putting an inactive FHV license into storage). Because not all licensed vehicles are in operation, it is more accurate to look at the total number of *active* vehicles, or vehicles defined as having worked in the last month, when analyzing how trips would be distributed differently upon the addition of 2,500 new vehicles.

2. Regardless of whether the SHL permits are re-issued or not, if all vehicles become operational, the SHL Pilot Program will lead to an additional 2,500 FHVs.

[1] Respondents-Respondents incorrectly state that a 3.4% increase in the fleet would reduce driver income by 3.4%. (Resp. Br. 20). However, as alleged in the Second Amended Petition, because drivers bear their own vehicle expenses, they face a higher percentage decrease in their net income. R. 404 ("For example, a driver who may annually earn $70,000 in fare revenue, may incur $30,000 in annual expenses (vehicle payments, commercial insurance, fuel, licensing costs, maintenance). Thus the impact is greater: gross pay of $70,000, reduced by 3.4% ($67,620), means a diminution in take home pay from $40,000 to $37,620, or a 5.95% decrease in take home pay.").

Respondents-Respondents misunderstand that the Pilot Program issues new, and additional FHV licenses, even if such licenses are attached to previously returned SHL permits. Respondents-Respondents repeat the argument that the SHL pilot vehicles should not be considered new vehicles because the SHL permits are re-issued. (Resp. Br. 22). Respondents-Respondents cannot dispute that SHL permits are distinct from FHV licenses, and that both licenses are required for an SHL vehicle, pilot or otherwise, to operate. R. 349; 35 R.C.N.Y. § 82-06(b)(1). Here, it is irrelevant that the SHL permits are re-issued because the SHL permits are being used in conjunction with newly issued FHV licenses, and it is the issuance of new FHV licenses that is being challenged. In fact, had the TLC sought to implement a pilot program in which SHL permits were re-issued to be used with *existing* FHV licenses, Petitioners-Appellants could not have challenged it under N.Y.C. Admin. Code § 19-550 and 35 R.C.N.Y. § 59A-06.

It is not speculative to say the FHV licenses will lead to new vehicles on the road, as Respondents-Respondents assert (Resp. Br. 22), because Respondents-Respondents themselves explicitly stated that "[e]ach SHL permit would be paired with a newly issued FHV license[.]" R. 349. It is irrelevant that the SHL permits were previously surrendered; as the record shows, FHV licenses and SHL permits operate independently from each other. Not only can SHL permits be returned while the previously attached FHV licenses continue in other classes of FHV

service (R. 726), but SHL permits were initially intended to be used with FHVs that were already in operation, and did not require the issuance of new FHV licenses. *See, e.g.,* R. 463, R. 722. It is also irrelevant who drives the new vehicles, and NYTWA does not need to demonstrate that the SHL pilot vehicles will be driven by new drivers, as Respondents-Respondents seem to contend. (Resp. Br. 22). Rather, as noted during oral argument before the Supreme Court, the addition of 2,500 new vehicles allows additional drivers to enter the industry, even if it is because, e.g., a driver who was previously leasing a vehicle purchases a pilot SHL vehicle, thus opening up his prior lease to be assumed by a new driver. R. 773.

The implication of Respondents-Respondents argument is that because the SHL permits have been re-issued, this Court should overlook the issuance of new FHV licenses. (Resp. Br. 22). This argument betrays the TLC's apparent misunderstanding of its own licensing frameworks. N.Y.C. Admin. Code § 19-550 and 35 R.C.N.Y. § 59A-06 govern *all* issuances of FHV licenses. There have been statutory and regulatory carveouts over its history for specific vehicle types, including wheelchair accessible vehicles, lease-to-own vehicles, and, at one point, electric vehicles. *See* R. 581, Local Law 147 of 2018, §§ 1(b), (c) (enumerating exceptions for wheelchair accessible vehicles and lease-to-own vehicles in the initial one year pause on issuing FHV licenses instituted by Local Law 147); 35 R.C.N.Y. § 59A-06(a)(2) (describing a current exception for wheelchair accessible

vehicles and a sunsetted exception for lease-to-own vehicles). There is not, and has never been, a carve out for SHL vehicles, or for SHL permits that were reissued. There is no pool of FHV licenses being held in reserve for all of the SHL permits that were issued. Any issuances of new FHV licenses must go through the processes outlined in N.Y.C. Admin. Code § 19-550 and 35 R.C.N.Y. § 59A-06; had the legislature or Respondents-Respondents intended such a carveout, it would be reflected in the statutory and regulatory text, as the numerous other carveouts have been. But there is no such carveout here. Respondents-Respondents' argument that the newly issued FHV licenses should not be considered "new" because they attach to re-issued SHL permits thus fails.

3. The High Volume For-Hire Vehicle pay rules no longer automatically protect drivers from loss of income due to decreased trips.

Just as Respondents-Respondents fail to understand the distinctions between FHV licenses and SHL permits within their own licensing regime, Respondents-Respondents fail to understand that the pay rules for High Volume For-Hire Vehicle ("HVFHV") drivers do not and will not absorb the shock of lost income. Respondents-Respondents inexplicably claim that the effects of its own pay rules are unclear, stating that "the impact of having more cars on the street on driver pay is not straightforward, even when the additional cars are operating in the same area." (Resp. Br. 21). This is simply untrue. The HVFHV driver pay rule is a per

trip payment. *See* 35 R.C.N.Y. §59D-22 ("A High-Volume For-Hire Service must pay Drivers, at minimum the following amounts for each trip dispatched by the Base[…]"). This means drivers receive a per trip payment, not a minimum wage; if they perform fewer trips, their pay goes down. One component of the pay rule, called the utilization rate, is designed to account for the amount of time drivers spend empty and, historically, to compensate drivers for changes if they spend more time empty through regular adjustments to the measured rate. 35 R.C.N.Y. §59D-03(j). However, prior to the initiation of the lawsuit, this TLC altered the rule such that it wouldn't update the pay rules unless the utilization rate decreased more than 5%, to below 53%. R. 401-402. Because of the way the pay formula works, this means drivers would have suffered up to an 8.6% decrease in work without seeing adjustments in their pay. (App. Br. 16). Since then, the TLC altered the pay rule even further, removing the automatic adjustment of the utilization rate that ensured drivers were eventually compensated for reductions in work. *See* 35 R.C.N.Y 59D-22(b) (establishing a set "applied utilization rate" with no provisions for change); *See* Driver Pay Rules Statement of Basis and Purpose (Adopted June 25, 2025), available at https://www.nyc.gov/assets/tlc/downloads/pdf/driver_pay_rules_6_6_25.pdf ("TLC will not automatically calculate and adjust applied utilization rates going

forward.")[2]. As a result, there is no longer a guarantee that the TLC will adjust the pay rules at all if the number of trips drivers perform decreases. In addition, of course, Petitioners-Appellants include and represent yellow cab, Street Hail Livery, and livery drivers, who are paid based on the metered rate or fares set by their companies and are not protected by the pay rules. If the number of trips they perform decreases, their pay decreases, with no possible protection in sight.

4. SHL pilot program drivers will accept trips that otherwise would have gone to existing drivers.

Finally, Respondents-Respondents attempt to argue that the harm caused by the pilot program will be minimal because SHL pilot program drivers will not meaningfully compete with current drivers. Respondents-Respondents proffer several reasons for this, including positing that because pilot SHLs cannot work in certain zones in Manhattan and "[p]articipants in the pilot program are also confined to prearranged trips, […] so cannot compete anywhere in the city with vehicles that can accept street hails." (Resp. Br. 21). That Respondents-Respondents can make this argument with a straight-face is stunning; the industry is still recovering from the devastating effects caused by the entry of companies like Uber and Lyft whose drivers, like SHL pilot participants, cannot accept street hails. In just one example, as of February 2023, the most recent data available

[2] The Court may take judicial notice of legislative history. *State v. Green*, 96 N.Y.2d 403, 408 n.2 (2001) ("[W]e may take judicial notice of these provisions and their legislative history.")

when the underlying petition was filed, yellow cabs were performing just 22% of the trips they performed in February 2014, approximately when companies like Uber and Lyft entered the market—despite the fact that yellow cabs primarily accept street hails and Uber and Lyft drivers cannot accept any. *See* Taxi and Ridehailing Usage in New York City (website), available at https://toddwschneider.com/dashboards/nyc-taxi-ridehailing-uber-lyft-data/ (Date accessed: May 13, 2023), R. 51-52 (comparing 466,522 trips per day in February 2014 to 103,632 trips per day in February 2023)[3]. Regardless of the method of acquiring the trip, SHL Pilot Program drivers will be accepting trips that otherwise would have gone to existing drivers in the industry. That Respondents-Respondents point to the fact that Uber and Lyft are not currently dispatching to pilot SHLs as another factor limiting competition is similarly irrelevant; Respondents-Respondents did nothing in the creation or implementation of the pilot program to ensure this was the case and indeed, nothing in the record indicates that Uber and Lyft are not participating in the SHL pilot program.

Respondents-Respondents' arguments and attempts at muddling the record are unavailing; Petitioners-Appellants have proved that they face a cognizable,

[3] Exact figures for the statistics in the exhibit's graphs can be seen by viewing the graphs on the website, and positioning the cursor over a point in the line graph to view the number of trips for a given month.

non-speculative injury and stand to lose income should additional FHV licenses become operational as the result of the SHL pilot program.

D. Respondents-Respondents Fail To Show That Petitioners-Appellants' Injury Falls Within The Category Of Competitive Injury That Would Prevent A Finding Of Standing.

An injured competitor typically does not have standing on the basis of economic harm alone; however, if the statute at issue presents an "overriding legislative purpose to prevent destructive competition[,]" injured competitors have standing. *Dairylea Coop., Inc. v. Walkley*, 38 N.Y.2d 6, 11 (1975). While Respondents-Respondents continue to characterize the harm Petitioners-Appellants have suffered as "competitive injury." (Resp. Br. 17), the loss of income Petitioners-Appellants will suffer is distinct. That said, assuming, *arguendo*, that the income loss drivers will suffer is competitive injury, N.Y.C. Admin Code § 19-550 and 35 R.C.N.Y. § 59A-06 demonstrate a clear "overriding legislative purpose to prevent destructive competition"; Petitioners-Appellants would therefore have standing regardless. *Dairylea*, 38 N.Y.2d at 11.

As an initial matter, competitive injury is that which occurs between business competitors; at issue in the instant case is individual drivers' ability to earn the equivalent of the minimum wage, which will affect both new entrants and incumbent drivers equally. Respondents-Respondents blithely characterize this as the natural result of competition, which results in "an increase in overall output and

a decrease in revenue for each individual business or laborer[.]" (Resp. Br. 17). The harm, here, however is not happening at the level of competing businesses; it is happening to drivers, many of whom do work for larger companies like Uber and Lyft. That is, drivers lose income even as Uber and Lyft–who set the conditions of drivers' work, such as fare price, the amount of their pay, and other working conditions–*are* competing with other large companies for profit and market share. Prior to the implementation of the vehicle cap in 2018, for example, 85% of Uber drivers earned less than the equivalent of minimum wage – even though it was companies like Uber and Lyft driving the addition of new vehicles in the pursuit of profit, and many of the drivers studied would have been operating with new FHV licenses. R. 78. Indeed, this phenomena was noted explicitly by City Council Member Karen Koslowitz during the vote on Local Law 147, who summarized it succinctly: "[D]rivers end up making less than the minimum wage while Uber's corporate profits steadily rise." Transcript of the City Council Stated Meeting (Aug. 8, 2018) at 89, lines 6 - 8, available at https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3596222&GUID=E5BB4786-752E-484E-B7A1-08ADB07A34B4&Options=&Search=.[4] Calling the economic harm experienced by all drivers "competitive injury" obscures the realities of industry dynamics and ignores the human devastation, including driver

[4] Legislative history is an appropriate subject for judicial notice. *See* n. 2, *supra.*

suicides, that occurred because of oversaturation of vehicles on the road. R. 400, para. 49-50. New driver entrants to the market are not, as Respondents-Respondents contend, succeeding while lowering overall output; they are low wage workers who will struggle to support themselves and their families in the face of not making the equivalent of minimum wage that is guaranteed to workers in other industries.

However, assuming, *arguendo*, that the harm is competitive injury, it is plain that it falls into the exception established by the Court of Appeals in *Dairylea,* which holds that "where a statute reflects an overriding legislative purpose to prevent destructive competition, an injured competitor has standing to require compliance with that statute[.]" *Dairylea*, 38 N.Y.2d at 6.

Respondents-Respondents' brief's inability to recognize the blatant and repeated legislative intent to prevent destructive oversaturation of the FHV market is simply puzzling. Here, N.Y.C. Admin. Code § 19-550 explicitly lists driver income as a factor to weigh when making determinations about issuing FHV licenses, and the legislative history plainly shows that preventing destructive competition was a motivating concern of the legislature when it passed Local Law 147. (App. Br. 9-11). To highlight just two examples, the prime sponsor of Local Law 147 described the law as "balance[ing] the need for varied transportation access with our city wide goals of maintaining a living […] wage and a fair public

transit system." R. 270. Meanwhile, in explaining his vote in support of Local Law 147, and other FHV regulations then before the Council, Council Speaker Corey Johnson reiterated this sentiment, referencing the driver suicides and stating that "[t]here has been a real human impact [...] for us not figuring out how to deal with a regulatory framework that would allow the for-hire vehicle industry to exist and grow to meet demand while [...] ensuring that all workers, all drivers [...] are able to make ends meet[.]" (App. Br. 11) (citing Transcript of the City Council Stated Meeting (Aug. 8, 2018) at 121, lines 12 - 23, available at https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3596222&GUID=E5BB4786-752E-484E-B7A1-08ADB07A34B4&Options=&Search=.

Respondents-Respondents incorrectly assert that this plain legislative intent is not sufficient to meet the standard articulated by *Dairylea* because there, they allege, "the statute's sole and explicit purpose was to prevent 'destructive competition[.]'" (Resp. Br. 18). But Respondents-Respondents attempts to manufacture a higher standard fall flat. On its face, the statute at issue in *Dairylea*, which governs the issuance of licenses to milk dealers, makes plain that it has multiple purposes; it enumerates a number of factors aside from destructive competition that must be considered when issuing licenses.

At the time *Dairylea* was decided, the relevant section of the Agricultural and Markets law required the Commissioner of Agriculture and Markets deny a license to a dealer if it found that:

> "(1) that the applicant is not qualified by character or experience or financial responsibility or equipment properly to conduct the proposed business, provided however, that no new application shall be denied solely for the reason of inadequate equipment if it is shown that provision has been made for the acquisition of same; (2) that the issuance of the license will tend to a destructive competition in a market already adequately served; or (3) that the issuance of the license is not in the public interest."
>
> New York Agriculture and Markets Law, § 258-c; L. 1964, ch. 117.

The statute then proceeds to list over ten permissive reasons the commissioner may decide to deny or revoke a license, including offenses like failure to keep records or having committed acts against the public health or public welfare. *Id.* In *Dairylea*, of course, the plaintiff challenged their competitor's license on the grounds that "the commissioner failed to consider the effect which would tend to destructive competition in a market already adequately served." *Dairylea*, 38 N.Y.2d at 10. But it is simply incorrect to say that the statute's "sole and explicit purpose" was to prevent destructive competition–rather, that was simply the allegation at issue in the case. (Resp. Br. 18).

Inexplicably, Respondents-Respondents contend that N.Y.C. Admin. Code § 19-550 does not evince an intent to prevent destructive competition, arguing that "the legislature intended a balanced consideration of all the factors relevant to the

industry." (Resp. Br. 19). But the legislative intent here was overwhelming: the City Council sought to prevent the destructive oversaturation that led to such a devastating "human impact" of driver suicides, as City Council Speaker Corey Johnson described. Transcript of the City Council Stated Meeting (Aug. 8, 2018) at 121, lines 12 - 23, *supra.*

Even were this not the case, however, Respondents-Respondents' argument is meritless, as the structure of the statute that Respondents-Respondents seem to take issue with–namely, that it mandates the consideration of factors such as service needs and congestion in conjunction with driver income– parallels the statute at issue in *Dairylea.* The legislative history of New York Agriculture and Markets Law, § 258-c indicates that the "the primary concern of the Legislature was to assure an adequate supply of milk for the consuming public and assure a reasonable return to the milk producers[.]" *Friendship Dairies, Inc. v. Du Mond*, 284 A.D. 147, 153 (App. Div. 3rd Dept. 1954). And indeed, just like N.Y.C. Admin. Code § 19-550 and 35 R.C.N.Y 59A-06, the Agriculture and Markets law enumerates a number of factors for consideration when determining whether to issue further licenses, including, but not limited to, a factor that requires regulators to consider destructive competition. Further, just as N.Y.C. Admin Code § 19-550 and 35 R.C.N.Y. § 59A-06 require the regulator to weigh driver income against other factors, including the service available to passengers, so too does the

Agriculture and Markets law, which requires that a license be denied if it promotes destructive competition only if it does so in "in a market already adequately served." New York Agriculture and Markets Law, § 258-c. Respondents-Respondents attempt to distinguish N.Y.C. Admin. Code § 19-550 and 35 R.C.N.Y § 59A-06 from the statute at issue in *Dairylea* fails.

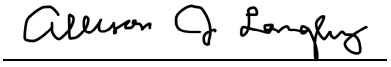
Finally, the case law Respondents-Respondents cite suggesting that "courts routinely dismiss claims of an 'overriding purpose' where, as here, the law at issue has a purpose beyond limiting competition" is inapposite. (Resp. Br. 19). In each case, plaintiffs are found to lack standing not because consideration of destructive competition was one factor among many, but because the court found that economic status of competitors was not a factor at all in the statutes at issue. *Blue Cross of W. N.Y., Inc. v. Cooper*, 164 A.D.2d 578, 581 (3d Dep't 1991) ("[T]he relevant statute (Insurance Law § 4308 [b]) contains no requirement that economic competition be considered as a factor.") *Sheehan v. Ambach*, 136 A.D.2d 25, 28 (3d Dep't 1988) ("Petitioners have not cited any provision in the professional licensure sections of the Education Law indicating that one of the statutory purposes was to protect members of the professions from competition."); *N.Y. Hearing Aid Soc'y v. Children's Hosp. & Rehab. Ctr.*, 91 A.D.2d 333, 334 (2d Dep't 1983) (same). Respondents-Respondents have failed to produce any support for their erroneous assertion that preventing destructive

competition must be the sole purpose of a statute in order to demonstrate an "overriding legislative purpose to prevent destructive competition" that allows an injured competitor to have standing. It is plain that, should this Court determine that the injury Petitioners-Appellants will suffer is competitive injury, that Petitioners-Appellants will still have standing because of the "overriding legislative purpose to prevent destructive competition" found in the text and history of N.Y.C. Admin. Code § 19-550 and 35 R.C.N.Y. § 59A-06.

CONCLUSION

For all of the foregoing reasons, Petitioners-Appellants respectfully request that this Court reverse the lower court, the Supreme Court's Decision that Petitioners-Appellants lacked standing, and remand the case for further proceedings in line with this Court's order.

Respectfully Submitted,



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Dated: August 15, 2025
Long Island City, NY

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Type:	A proportionately spaced typeface was used as follows: Name of Typeface: Times New Roman Point Size: 14 Spacing: Double
Word Count:	The total number of words in this brief, inclusive of point headings and footnotes, and exclusive of pages containing the Table of Contents, Table of Authorities, and this Printing Specification Statement is 6,323.