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**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking on Regulations Relating to Passenger Carriers, Ridesharing and New Online Enabled Transportation Services.	R.12-12-011 (Filed December 20, 2012)

UBER TECHNOLOGIES, INC. APPEAL OF PRESIDING OFFICER'S DECISION IMPOSING PENALTIES AGAINST UBER TECHNOLOGIES, INC.

Lisa P. Tse
Jane Y. Lee
UBER TECHNOLOGIES, INC.
1455 Market Street, 4th Floor
San Francisco, CA 94103
Email: ltse@uber.com
Email: jylee@uber.com

Roberta Kaplan
Shawn G. Crowley
Kaplan Hecker & Fink LLP
350 Fifth Avenue, Suite 7110
New York, NY 10118
Tel. (212) 763-0883
Email: rkaplan@kaplanhecker.com
Email: scrowley@kaplanhecker.com

Vidhya Prabhakaran
Robert Maguire
DAVIS WRIGHT TREMAINE LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111-6533
Tel. (415) 276-6500
Fax. (415) 276-6599
Email: vidhyaprabhakaran@dwt.com
Email: robmaguire@dwt.com

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Attorneys for Uber Technologies, Inc.

TABLE OF CONTENTS

I. INTRODUCTION 1

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY 3

A. Uber Voluntarily Issued Its Safety Report to Bring Awareness to Critical Safety Issues 3

B. The ALJ Demand for Personally Identifiable Information; Advocacy Groups and Uber Respond 3

C. The ALJ Summarily Denied Uber's Motion for Reconsideration and Uber Filed a Fulsome, but Partial Response to the ALJ Demand 4

D. Uber Used the Available Procedural Options to Address Its Concerns with the Ruling and, Instead of Responding to Uber's Concerns, the ALJ Issued the Order to Show Cause 6

E. The ALJ Dismissed Uber's Request for ADR and Procedural Due Process Concerns, Excluded Third Party Experts, and Conducted a Truncated Hearing 6

F. The ALJ Issued a POD Modifying the December 2019 Ruling and Acknowledged Privacy Concerns But Found that Uber Violated Rule 1.1 and Fined Uber $59,085,000 8

III. THE POD'S PENALTY IS UNCONSTITUTIONAL 8

A. The Process Leading to the $59 Million Fine Violated Uber's Fundamental Due Process Rights 8

B. The Proposed Penalty Violates the Excessive Fines Clause of the Eighth Amendment 12

IV. THE CMMISSION MUST PROTECT THE PRIVACY RIGHTS OF SEXUAL ASSAULT VICTIMS 17

A. The Disclosure of Victim Information to the Commission Risks Re-Traumatizing Victims of Sexual Misconduct 17

B. The POD Requiring Uber to Disclose Victim-Related Personal Information to the Commission Under Seal Disincentivizes Future Reporting of Sexual Assaults 18

C. Uber Complied With the December Ruling to the Extent Possible While Protecting Victims' Rights and Provided the Commission with Sufficient Information to Fulfill Its Regulatory Purpose 19

D. The Commission Is Not Law Enforcement and the Law Constrains Even Law Enforcement's Access to Victim Information 21

E. Section 5437 Prohibits the Disclosure of Any Personally Identifiable Information of a TNC Passenger to Third Parties, Including the Commission 24

V. THE POD MISCHARACTERIZES UBER'S ARGUMENTS PERTAINING TO THE PUBLIC DISCLOSURE OF EMPLOYEE INFORMATION AND CONTRADICTS THE JANUARY RULING 26

VI. THE PROPOSED PENALTY EXCEEDS THE STATUTORY CAP AND CONTRAVENES COMMISSION PRECEDENT 29

A. The POD Artificially Multiplies the Number of Uber's Violations to Bypass the Statutory Cap on Civil Penalties and Unlawfully Inflates Uber's Fine 29

B. The POD Contravenes Commission Precedent by Imposing a Penalty that Is Grossly Disproportional to the Gravity of Uber's Offense 31

C. The Commission Should Not Impose a Daily Fine for Continuing Violations 35

VII. CONCLUSION 37

4814-2928-3542v.1 0096932-000066

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I. INTRODUCTION

The Commission cannot, on the one hand, acknowledge that victims of sexual assault are entitled to protect their personal information but simultaneously impose an extraordinary $59 million fine on Uber Technologies, Inc. ("Uber") for raising the need for such protections. The dispute at issue on this appeal is that simple.

In December 2019, ALJ Mason demanded that Uber produce to the Commission unredacted names and contact information for survivors of sexual assault as the result of Uber's industry-leading decision to publish its U.S. Safety Report. That demand was unlawful. The law and fundamental principles of respect for the dignity of sexual assault survivors prevent Uber from providing such information to anyone—including the government—without the survivors' consent. And for good reason. As Uber, informed by victim advocates and experts, has stressed throughout this proceeding, victims, and victims alone, must control when, how, and to whom they share personal information about the trauma they experienced.

Uber provided the Commission with substantial information in response to ALJ Mason's demand but drew the line at providing unfettered access to sexual assault victims' private information.[1] Victim advocacy groups agreed.[2] They objected to the December Ruling, sought party status in this proceeding, and requested an opportunity to speak on behalf of victims whose privacy rights were implicated. The

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[1] Uber noted "it is unclear how the requirement in the December Ruling and January Denial for individual incident information (***rather than aggregated and anonymized data***) will assist the Commission in making rules and best practices to make the entire industry safer." Uber Motion for Reconsideration to the Full Commission, at 13 (Jan. 31, 2020) (emphasis added). But the ALJ waited almost 11 months to issue the Presiding Officer's Decision ("POD") which first allowed for anonymized data, and used the 11 month delay as the basis for calculating a daily fine ultimately totaling $59 million.

[2] These groups included the Rape, Abuse & Incest National Network ("RAINN"), California Coalition Against Sexual Assault ("CALCASA"), Pennsylvania Coalition Against Rape ("PCAR"); National Sexual Violence Resource Center ("NSVRC"); and National Network to End Domestic Violence ("NNEDV").

4814-2928-3542v.1 0096932-000066

ALJ, however, ignored these requests, dismissed these concerns, and prevented Uber from working collaboratively with the Commission and advocacy groups to determine how to provide the requested data while protecting victims' rights.

Now, nearly a year later, ALJ Mason appears to have changed his mind, agreeing (at least to some extent) with Uber and the advocacy groups that the Commission does not need access to victims' personal identifying information to achieve its regulatory objectives. At the same time, however, he inexplicably seeks to fine Uber a draconian amount ($59 million) for failing to comply with a ruling he has since changed. That fine violates Uber's right to fair notice and constitutes a constitutionally impermissible penalty because it punishes Uber for its refusal to do something—turn over anonymized data—that the ALJ's prior decisions prohibited Uber from doing.

More troubling however, is that the POD, on its face, still fails to adequately protect victims' rights. While the POD now permits Uber to provide anonymized victim information, it provides no specifics about how or any guarantee that such victim information will, in fact, remain anonymous. Instead, it explicitly leaves open the possibility that the Commission may seek additional information or seek to contact victims in the future. Thus, while the POD's anonymization ruling is a positive step forward in implementing the victim protection measures Uber and advocacy groups have sought throughout this proceeding, its uncertainty and ambiguity require further clarification to ensure victim protection.

To be clear: Uber does not object—and has never objected—to providing anonymized data about reported sexual assaults to the Commission, as long as it can do so in a manner that protects victims' legitimate and understandable privacy concerns. Had the ALJ, at any point in this proceeding, afforded Uber an opportunity to collaborate with the Commission and victim advocacy groups to determine how best to accomplish that, then this impasse would not exist. But instead, the ALJ repeatedly denied Uber this opportunity and then illegally and unconstitutionally penalized Uber for its principled commitment to protecting sexual assault victims' personal information that the POD now recognizes should be protected. This fine violates Uber's fundamental Due Process rights under the Fifth and Fourteenth Amendment, as well as the Eighth Amendment's prohibition against excessive fines, and must be set aside.

The draconian and illegal fine sends a dangerous message to anyone who stands up for the privacy and autonomy of sexual assault victims in the face of intrusive demands for disclosing personally identifiable information. The Commission should reject the unlawful results of the POD and make clear it does not need sexual assault victim personal, identifying information to accomplish its regulatory objectives.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Uber Voluntarily Issued Its Safety Report to Bring Awareness to Critical Safety Issues

On its own volition, Uber issued a first-of-its kind Safety Report[3] in December 2019, after a multi-year collaboration with sexual violence prevention advocacy groups.[4] The Safety Report described Uber's comprehensive efforts to address safety concerns, including the development of new technology, strengthening of background screenings for drivers, deployment of new safety features, an overhaul of support staff training, updated policies, and a tripling in size of Uber's safety team.

Uber issued the Safety Report to bring awareness to critical safety issues, promote increased transparency in the TNC industry itself, and help Uber and other companies facing similar problems to develop best practices that will prevent serious safety incidents from occurring in the first place. Although neither the Commission nor any other regulatory agency required such a report, Uber committed to do far more than was required and hoped to encourage companies across industries to do the same.

B. The ALJ Demand for Personally Identifiable Information; Advocacy Groups and Uber Respond

Rather than lauding Uber's effort to help confront a serious societal issue, the ALJ responded to the Safety Report by singling Uber out and treating it as a bad actor. In the December Ruling,[5] the ALJ demanded that Uber, and only Uber, produce documents and data and answer questions concerning sexual assaults and sexual misconduct. The ruling also ordered Uber to *publicly* disclose detailed information about the circumstances of every safety incident (Questions 2.4.1, 2.4.2); the identities and contact information of every witness (including victims and alleged perpetrators) to each incident (Question 2.4.3); and the names, job titles, contact information, and responsibilities of every Uber employee to whom incidents were reported (Question 2.4.4), and who were involved in the drafting and approval of the Safety Report (Questions 1.1, 1.2, 1.3, and 1.4). The December Ruling failed to recognize the extreme sensitivity of the information it demanded be turned over and articulated no regulatory purpose for its disclosure.

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[3] *See* Uber, *US Safety Report* (Dec. 5, 2019) ("Safety Report"). The Safety Report is a comprehensive publication that shares details on Uber's safety progress, its processes, and national aggregate and anonymized data related to the most serious safety incidents reported in connection with its platform. *See* Attachment A to its January 10, 2020 Motion for Reconsideration of the December 19 ALJ Ruling Ordering Uber to File and Service Its US Safety Report and https://www.uber.com/us/en/about/reports/us-safety-report/.

[4] *See* Foreword by Karen Baker, Chief Executive Officer, National Sexual Violence Resource Center Safety Report at 6.

[5] *See* Administrative Law Judge's Ruling Ordering Uber Technologies, Inc. to File and Serve Its US Safety Report for 2017-2018 and to Answer Questions Regarding Alleged Sexual Assault and Sexual Misconduct Incidents. (Dec. 19, 2019).

In response to the December Ruling, leading experts in sexual violence prevention—including RAINN, CALCASA, PCAR and NSVRC, and NNEDV—submitted letters to the Commission explaining why sweeping disclosures of victim information and the circumstances of their sexual assaults would be harmful to sexual assault victims, would violate hard-won victim confidentiality rights, and would harm public safety by deterring future sexual assault reporting.[6] These advocates for sexual violence prevention requested modification of the December Ruling "to remove or rescind Section 2.4 of the ruling, so as not to require undue disclosure of victim information or information about sexual assaults," emphasizing this information should not be shared without victim consent.[7]

In its January 10, 2020 Motion for Reconsideration of the December Ruling, and pertinent to this appeal, Uber explained: (1) why the public filing of—and party comment on—victim and incident information was unconscionable, actively harms the public interest, and risks re-traumatizing victims; and (2) why disclosure of such information to the Commission (whether done publicly or confidentially) and use of that information by untrained Commission staff was inappropriate. Uber asked for rescission and replacement of the December Ruling with a ruling directed to the entire TNC industry.

C. The ALJ Summarily Denied Uber's Motion for Reconsideration and Uber Filed a Fulsome, but Partial Response to the ALJ Demand

The ALJ denied Uber's Motion for Reconsideration in a three-page January Ruling.[8] Conceding that victims' personal information should be afforded *some* protection, the January Ruling provided that Uber could file sexual assault incident and witness information under seal. But the January Ruling failed to address Uber's or advocacy groups' privacy concerns for victims or the impropriety of disclosing such information—even to Commission staff—without victim authorization. Once again, the January Ruling provided *no* regulatory justification for requesting this information. The January Ruling also provided no response to Uber's concerns regarding the public disclosure of the identities and contact information of every employee and contractor involved in drafting the Safety Report. Instead, the January Ruling expressly required that employee information "shall not be filed under seal."[9]

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[6] *See* Hearing Exhibits Uber-9 (CALCASA Letter); Uber-10 (NNEDV Letter), Uber-11 (PCAR NSVRC Letter) and Uber-12 (RAINN Letter).
[7] Hearing Ex. Uber-9 (CALCASA Letter).
[8] *See* January Ruling (Jan. 27, 2020).
[9] *Id.* at 3 (Ruling Para. No. 3).

On January 30, 2020, Uber filed a partial but fulsome response to the December Ruling, in which it responded to every question and provided as much information as it could while protecting victims' and employees' privacy rights.[10] Specifically, Uber explained:

1. how investigations are conducted;[11]
2. the taxonomy by which sexual assault and sexual misconduct is categorized and how data is tracked;[12]
3. when and how information is shared with law enforcement;[13]
4. how reported incidents are resolved;[14]
5. when and how drivers' or riders' access to the Uber app is restricted or outright banned;[15]
6. what sexual assault and misconduct training has been provided to TNC drivers and employees,[16]
7. what safety features and prevention initiatives Uber has implemented;[17] and,
8. what further training and programs Uber is developing.[18]
9. the number of incidents of various categories of sexual assault incidents in California.[19]

The *only* questions Uber declined to answer were those that required the disclosure of incident information, including personally identifiable information of sexual assault victims and employee information. Uber explained that it could not provide this information because doing so would violate sexual assault victim and employee privacy rights and harm the public interest.[20]

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[10] *See* Response to the December 19, 2019 Administrative Law Judge's Ruling Ordering Uber Technologies, Inc. to File and Serve its US Safety Report (Jan. 30, 2020) ("Uber Response").
[11] *See* Safety Report at 25-29; Uber Response at 3-5, 8-9.
[12] *See* Safety Report at 41-45, Appendix II, Appendix IV; Uber Response at 12-13, 20.
[13] *See* Safety Report at 29.
[14] *See* Uber Response at 17-19.
[15] *See* Safety Report at 12-13, 27-28; Uber Response at 15-17.
[16] *See* Safety Report at 13, 29; Uber Response at 9-11, 19-20, 23-24.
[17] *See* Safety Report at 23-25, 29-30; Uber Response at 21-22.
[18] *See* Safety Report at 14, 31-32; Uber Response at 24-25.
[19] *See* Safety Report at 18, 58-71; Uber Response at 5.
[20] Uber also reiterated its hope that the Commission would address sexual assault and sexual misconduct prevention industry-wide and require other TNCs, not just Uber, to respond to similarly targeted questions. To date, the Commission has not done so.

D. Uber Used the Available Procedural Options to Address Its Concerns with the Ruling and, Instead of Responding to Uber's Concerns, the ALJ Issued the Order to Show Cause

To allow for the Commission's attention to the issues Uber and victims' rights advocates raised, Uber filed a Motion for Stay and a Motion for Reconsideration of the December Ruling to the Commission on January 31, 2020.[21] Neither the Motion for Stay nor the Motion for Reconsideration to the Full Commission were addressed, however, until ALJ Mason issued the POD almost eleven months later.

Instead of responding to Uber's Motions or allowing the Commission to do so, the ALJ unilaterally issued an Order to Show Cause on July 27, 2020 ("OSC Ruling").[22] Inexplicably, and contrary to applicable procedural rules, the ALJ issued the OSC Ruling without a Commissioner first initiating an adjudicatory phase in this proceeding and without a Commissioner appointing a presiding officer. And the ALJ failed to provide any clarity in the OSC Ruling as to the protocols and procedures in the OSC phase, leading to uncertainty about what evidence Uber would be permitted to present, how, and when. Although Uber's Motion for Stay and Motion for Reconsideration to the full Commission were still pending, the OSC Ruling threatened Uber with sanctions for noncompliance.

E. The ALJ Dismissed Uber's Request for ADR and Procedural Due Process Concerns, Excluded Third Party Experts, and Conducted a Truncated Hearing

Uber moved for Reassignment of ALJ Mason in the OSC proceeding on August 5, 2020, which was denied. Uber filed a Motion requesting Alternative Dispute Resolution ("ADR") and clarification of the OSC procedures on August 12, 2020.[23]

Also on August 12, 2020, RAINN, one of the nation's largest anti-sexual violence organizations, moved for party status in both the proceeding and this OSC phase. CALCASA, which oversees California's 84 rape crisis center programs, moved for party status on August 20, 2020. RALIANCE, another national organization dedicated to ending sexual violence, submitted a declaration opposing the request for sensitive sexual assault and sexual misconduct information.

On August 20, 2020, the day before Uber's Verified Statement was due, the Assigned Commissioner, presumably in an effort to address the ALJ's procedural misstep, issued a ruling appointing

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[21] *See* Motion of Uber Technologies, Inc. for an Assigned Commissioner or Administrative Law Judge Ruling Staying Certain Requirements of the December 19, 2019 ALJ Ruling Ordering Uber Technologies, Inc. to file and serve its US Safety Report (Jan. 31, 2020) ("Motion for Stay"); Motion of Uber Technologies for Reconsideration to the Full Commission of the January 27, 2020 ALJ Ruling (Jan. 31, 2020) ("Motion for Reconsideration to Full Commission").

[22] *See* OSC Ruling, at 16 (Ordering Para. No. 8).

[23] *See* Motion Requesting ADR and Clarification (Aug. 12, 2020).

ALJ Mason as the Presiding Officer for this OSC and largely adopted ALJ Mason's OSC Ruling.[24] The Assigned Commissioner's Ruling was the first time the Commission articulated its intention to evaluate how TNCs investigate sexual assault, while also recognizing that the Commission's function is to respond to individual complaints made to the Commission and not to serve a law enforcement purpose.[25]

Also on August 20, 2020, the ALJ responded to Uber's Motion for Clarification via e-mail ("August 20 Email"), which was sent to a subset of the service list that included *none* of Uber's attorneys. Uber was not made aware of the August 20 Email until August 25, 2020. The e-mail explained that there would be no opposing party at the September 1, 2020 hearing; no interested third parties – including RAINN and CALCASA who were granted party status and had expressly requested to participate in this OSC— would be permitted to participate in the hearing; Uber would not be allowed to call additional witnesses; and Uber would have only one hour to examine its witnesses and be cross-examined by the Assigned Commissioner and Presiding Officer. When Uber learned of the August 20 Email five days later, it immediately requested additional time to prepare witnesses and evidence for the hearing. Uber's request was denied.

Uber filed its Verified Statement on August 21, 2020, expanding on its legal and policy-based objections to disclosing victims' personally identifiable information and the public filing of employee information.

On September 1, 2020, the ALJ held the Evidentiary Hearing for the Order to Show Cause. Uber called as witnesses Vidhya Prabhakaran, outside counsel, and Tracey Breeden, Uber's Head of Women's Safety and Gender-Based Violence Operations. The ALJ permitted Uber to make an opening statement of approximately 10 minutes, and then gave Uber approximately one hour to conduct direct examination of both of its witnesses and respond to cross-examination by the Assigned Commissioner and the ALJ.[26] During the hearing, Mr. Prabhakaran reiterated Uber's request for ADR, asked to include victims' advocates in the discussion, and suggested that the information could be provided in an aggregated or anonymized format.[27] Ms. Breeden's direct testimony began providing evidence on several issues directly relevant to the OSC. However, the ALJ terminated Ms. Breeden's direct testimony after only

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[24] *See* Assigned Commissioner's Ruling Ordering Uber to Show Cause (Aug. 20, 2020).
[25] *See id.* at 3.
[26] *See* Hearing Tr. at 490:08-10, 490:28-491:07.
[27] *Id.* at 566:15-568:11.

approximately 20 minutes and proceeded to cross-examine her,[28] hampering Uber's ability to present the full extent of its prepared evidence.

F. The ALJ Issued a POD Modifying the December 2019 Ruling and Acknowledged Privacy Concerns But Found that Uber Violated Rule 1.1 and Fined Uber $59,085,000

On December 14, 2020, the ALJ issued the POD. The POD explicitly modified the December 2019 ruling by directing Uber to "work with Commission staff ... to develop a code or numbering system as a substitute for the actual names and other personally identifiable information" and file the information under seal.[29] Similarly, the POD contradicted the January Ruling's express requirement for Uber to file employee information publicly by claiming that, notwithstanding the January Ruling's requirement to the contrary, "Uber should have filed a motion for confidential treatment pursuant to the procedures set forth in GO 66-D."[30] The POD rejected Uber's Motion for Stay and Motion for Reconsideration to the Full Commission—which had been pending for nearly a year—and ignored Uber's Motion for ADR. Finally, it found that Uber violated Rule 1.1, penalized Uber $59,085,000, and threatened suspension of Uber's permits to operate as a Transportation Network Company and a Charter-party Carrier.

III. THE POD'S PENALTY IS UNCONSTITUTIONAL

The Commission should reject the POD's fine on Constitutional grounds. *First,* the POD violates the Due Process Clauses of the Fifth and Fourteenth Amendments by violating Uber's right to fair notice and imposing an impermissible retroactive fine. *Second*, the $59,085,000 penalty violates the Excessive Fines Clause of the Eighth Amendment because it is grossly disproportionate to the conduct at issue—Uber's refusal to produce employee information publicly and unredacted, highly-sensitive personally identifiable victim information.

A. The Process Leading to the $59 Million Fine Violated Uber's Fundamental Due Process Rights

In the December Ruling, ALJ Mason ordered Uber to produce publicly victim data and employee information with personal identifying information. Uber objected to that ruling, arguing that disclosing personal information served no regulatory purpose, violated privacy rights and risked causing harm to victims. The ALJ denied Uber's request to reconsider his December Ruling, and, for nearly a year, refused to consider any subsequent attempt by Uber—and victim advocacy groups—to voice concerns for victim

[28] *Id. at* 527:15-22.
[29] POD, at 86 (Ordering Para. No. 3).
[30] *Compare* POD at 56 *with* January Ruling at 3 (Ordering Para. No. 3).

safety. The ALJ did not permit Uber to work with the Commission to find a way to provide the requested data in a manner that properly protected victims' and employees' privacy rights. Now, more than eleven months after that initial ruling, the ALJ provides Uber, for the first time, with a new avenue for compliance: provide victim data anonymously and employee data under seal. Yet, the ALJ still fined Uber $59 million for failing to do something—produce anonymized or confidential data—that his previous rulings did not permit. The POD effectively punishes Uber for successfully following established Commission procedures to litigate the legality of rulings he now implicitly concedes were infirm.[31] That grossly excessive fine—and the process that led to it—violate basic notions of fairness and constitutional Due Process requirements, and must be reversed.

When the ALJ denied Uber's request to reconsider his December Ruling, the ALJ left Uber with two choices: (1) comply with the order in full and violate victims' rights by immediately producing their unredacted personally identifiable information to the Commission (thereby mooting out, as a practical matter, the possibility of any appeal), or (2) appeal the December Ruling to the full Commission on an interlocutory basis and risk paying a fine if the order was upheld. The ALJ's ruling foreclosed a third option that has only now surfaced: allow Uber to collaborate with Commission staff to determine how to provide the data required in a manner that protected victims' and employees' privacy.[32] Faced with these two options, Uber chose to stand with victims. It sought relief directly from the Commission with a motion for reconsideration, and now seeks relief from the Commission with this appeal. Uber also sought ADR in an effort to reach a compromise that would allow the Commission to meet its regulatory purpose while protecting victims' and employees' privacy.

Now, the POD abandons the ALJ's prior demand for personally identifiable victim information. Instead, it contemplates allowing Uber to work with Commission staff to anonymize the sexual assault incident information to protect victim privacy and autonomy. It also authorizes Uber to move to seal

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[31] As a matter of due process, a party whose conduct is made subject to an administrative order, and who, like Uber, has challenged the validity of such action, should not be subjected to penalties that accumulated while its challenge was ongoing, particularly where, as here, the ALJ ultimately agreed with the basis for Uber's challenge. A right of judicial review is merely "nominal and illusory" if it can be exercised "only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law. *Wadley Southern Railway Co. v. Georgia,* 235 U.S. 651, 661 (1915). Thus, a litigant's "right to test the validity of [a] Commission order free from the risk of statutory penalties must be judged, not by [a] court's after-the-fact determination, but by whether defendants mounted a substantial attack upon the validity of the statute and order." *United States v. Pacific Coast European Conference*, 451 F.2d 712, 719 (9th Cir. 1971).

[32] *See* Hearing Tr. at 567:8-568:11 (subsequent testimony from Uber representative that Uber would cooperate with such an obligation).

employee information under seal. Thus, the POD fines Uber an extraordinary amount for having raised legitimate objections to turning over victims' personal information and employee information publicly through established Commission procedures despite the ALJ ultimately indicating in the POD that protections for this information are appropriate. But "sanctions should not result from normal advocacy" or "chill or deter" litigants from pursuing challenges or appeals "on which our civil justice system depends."[33] Put differently, judges may not levy penalties solely because they are "'insulted' and 'angered'" with a litigant for exercising her due process right to challenge a decision.[34] In the criminal context, for example, the "judicial vindictiveness" doctrine bars judges from imposing a higher sentence on criminal defendants solely for exercising their right to an appeal.[35] Unfortunately, that is exactly what happened here.

Consider the following scenario: when a party asserts attorney-client privilege in connection with documents or information requested by the other side, and the court ultimately affirms that assertion, it would be absurd for the court to fine the party asserting privilege for its failure either to produce the relevant materials at the outset or for the time it took to challenge the request. This is because once a party produces documents or information subject to a valid claim of privilege, the proverbial "cat is already out of the bag" and the privilege assertion is waived, including in connection with any subsequent appeal.[36]

This principle is directly analogous because that is essentially what happened here. Uber properly objected to the December Ruling and had Uber produced the victims' personal identifying information anyway, the cat would have been out of the bag. Not only would this have been wrong and unjust given the rights of sexual assault survivors but Uber would have risked forfeiting its right to appeal the ALJ's

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[33] *Mount Hope Church v. Bash Back!*, 705 F.3d 418, 426, 429–30 (9th Cir. 2012).

[34] *Tollett v. City of Kemah*, 285 F.3d 357, 366-67 (5th Cir. 2002); *see also Dazzio v. FDIC*., 970 F.2d 71, 79 (5th Cir.1992) (After penalized entity appealed a penalty of $125,000, the FSIC raised the penalty to $175,000. The Court of Appeals found there had been "no change in the record that would indicate the appropriateness of an increase in penalty. . . . This looks to us uncomfortably like judicial vindictiveness, or 'charging for the use of the courthouse.'"); *Oberstar v. FDIC*, 987 F.2d 494, 503-04 (8th Cir. 1993) (finding that raising the penalty after penalized entity filed its appeal was an abuse of discretion, "the inference that the money penalty proceeding was commenced to punish the penalized entity for seeking judicial review of the Prohibition Order is deeply disturbing.").

[35] *Tollett*, 285 F.3d at 366-67.

[36] *Williams & Connolly v. SEC.*, 662 F.3d 1240, 1243–44 (D.C. Cir. 2011) (citations omitted) ("Because the Department of Justice already turned over to Williams & Connolly eleven sets of notes pursued in this appeal, the controversy is moot with respect to those documents. "); *United States v. Bergonzi*, 403 F.3d 1048, 1049–50 (9th Cir. 2005) ("McKesson now concedes that the defendants are entitled to use the materials in their defense, and thus . . . Because McKesson does not seek reversal of the disclosure order as to these defendants, there is no other relief we can provide and the appeal is now moot.").

ruling. The idea that it was appropriate for the ALJ to sanction Uber for properly asserting these arguments offends basic concepts of fairness and due process by which any public body or regulator is supposed to operate.

The Due Process Clauses of the Fifth and Fourteenth Amendments protect "interests in fair notice and repose" that prohibit the Commission, as an arm of California's state government, from imposing "retroactive" civil penalties.[37] The prohibition on retroactive penalties is rooted in "considerations of fairness" which are deeply-embedded in our legal tradition and expressed "in several provisions of our Constitution," which "dictate that" regulated entities "should have an opportunity to know what the law is, and to conform their conduct accordingly" before facing government sanction.[38] Due process requires that an agency provide "fair notice of what conduct is prohibited before a sanction can be imposed."[39]

Prior to the POD, Uber had no notice at any point in this proceeding that the ALJ would have permitted the company to provide victims' information anonymously or to provide employee information under seal. In the absence of such notice, Uber was forced to litigate the legality of the ALJ's rulings while at the same time refusing to comply with this aspect of them.[40] The ALJ appropriately changed course by now authorizing Uber to work with Commission staff to produce anonymized data and employee information under seal but cannot impose a fine on Uber for failing to pursue an avenue that the ALJ had previously not permitted. Any such fine would violate Uber's rights to fair notice and must be reversed.

Compounding the POD's fundamental unfairness is the fact that it ignores Uber's good-faith substantial compliance with the ALJ's prior rulings. As discussed in Section IV, C., Uber responded to the December Ruling by producing substantial information to satisfy the Commission's regulatory needs. The information included explaining how Uber categorizes sexual assault and misconduct; how Uber tracks sexual assault data; when and how information is shared with law enforcement; how reported

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[37] *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265-66 (1994).

[38] *Id.*; *see also E. Enters. v. Apfel*, 524 U.S. 498, 532 (1998) ("fundamental notions of justice that have been recognized throughout [American and English legal] history" disfavor retroactivity) (citation and internal quotation marks omitted).

[39] *Stillwater Mining Co. v. Federal Mine Safety & Health Review Comm'n,* 142 F.3d 1179, 1182 (9th Cir.1998) (quoting *Newell v. Sauser,* 79 F.3d 115, 117 (9th Cir.1996)). The fair notice doctrine "has now been thoroughly 'incorporated into administrative law.'" *General Elec. Co. v. U. S. EPA,* 53 F.3d 1324, 1329 (D.C. Cir.1995).

[40] *See, e.g., Lesavoy Found. v. Commissioner*, 238 F.2d 589, 591 (3d Cir. 1956) (although commissioner could "change his mind" to issue a new ruling, he could not "arbitrarily and without limit" apply "the effect of that change" to prior conduct in which the "taxpayer operated under the previous ruling"); *Gehl Co. v. Commissioner*, 795 F.2d 1324, 1333-34 (7th Cir. 1986) (abuse of discretion for agency to retroactively repeal its ruling after assuring plaintiff he could rely on it).

incidents are resolved; when drivers or riders are restricted from the Uber app; the sexual assault training provided to TNC drivers and to Uber employees; Uber's safety features and prevention initiatives; and aggregated data on sexual assault and misconduct allegations. The POD goes too far by imposing an extraordinary $59 million fine when Uber has substantially complied with the December Ruling and the POD ultimately concludes that Uber may—as it has requested throughout these proceedings—protect victim and employee privacy.

B. The Proposed Penalty Violates the Excessive Fines Clause of the Eighth Amendment

The POD's $59 million penalty violates the Excessive Fines Clause of both the U.S. and California Constitution.[41] The penalty is grossly disproportionate to Uber's refusal to provide unredacted, highly-sensitive personally identifiable information about victims of sexual assault and misconduct, particularly when doing so would have violated their statutorily-protected rights.[42]

"The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."[43] The Ninth Circuit set forth a four factor test to assess the proportionality of civil fines: "(1) the nature and extent of the underlying offense; (2) whether the underlying offense related to other illegal activities; (3) whether other penalties may be imposed for the offense; and (4) the extent of the harm caused by the offense."[44] Moreover, California also considers whether, as here, a defendant acted in good faith and whether, as here, delay by a government enforcement agency contributed

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[41] *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.,* 37 Cal. 4th 707, 728 (2005), *as modified* (Jan. 18, 2006) (Addressing a $14 million civil penalty on a tobacco company for distributing cigarettes to children on public property and explaining "[t]he California Constitution contains similar protections [to the Eighth Amendment]. Article I, section 17, prohibits 'cruel or unusual punishment' and 'excessive fines'; article I, section 7, prohibits the taking of property 'without due process of law.'").

[42] *United States v. Bajakajian*, 524 U.S. 321 (1998) (superseded by statute as stated in *United States v. Jose,* 499 F.3d 105, 110 (2007)) (A fine is excessive when it is grossly disproportionate to the gravity of the offense that it was designed to punish.). The Excessive Fines Clause applies in the context of civil penalties. *Hudson v. United States,* 522 U.S. 93, 103 (1997); *United States v. Mackby*, 261 F.3d 821, 829-30 (9th Cir. 2001). And the prohibition against excessive fines applies to fines levied against corporations, just as to individuals. *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 285-86 (1989) (O'Connor, concurrence).

[43] *Bajakajian,* 524 U.S. at 334.

[44] *Pimentel v. City of Los Angeles,* 974 F.3d 917, 921 (9th Cir. 2020) (citing *United States v. $100,348 in U.S. Currency*, 354 F.3d 1110, 1122 (9th Cir. 2004)). California courts analyze the state Constitutional corollary by referring to the same concepts considered by federal courts interpreting the Eighth Amendment. *See People ex rel. Lockyer,* 37 Cal. 4th at 728 (citing *Bajakajian* with approval).

to the size of the fine.[45] Under these factors, the $59 million penalty the POD levies against Uber is disproportional and excessive under the United States and California Constitutions.

1. The Nature and Extent of the Underlying Offense

In determining the nature and extent of the underlying offense:

> Courts typically look to the violator's culpability to assess this factor. … if culpability is high or behavior reckless, the nature and extent of the underlying violation is more significant. Conversely, if culpability is low, the nature and extent of the violation is minimal. It is critical, though, that the court review the specific actions of the violator rather than by taking an abstract view of the violation.[46]

As an initial matter, any purported "culpability" for Uber's failure to comply with the December and January Rulings is mitigated substantially by its motivation for doing so. Uber "violated" the ALJ's prior rulings for one reason: to protect the privacy of sexual assault victims and certain Uber employees. Uber's conduct was not "reckless."[47] To the contrary, Uber attempted at every stage in this proceeding to comply with the ALJ's rulings to the extent possible, while also raising its legal and procedural objections through established Commission protocol.

Moreover, the nature of any purported violation highlights the excessiveness of the fine. Uber's decision to challenge the ALJ's rulings was not a criminal act from which it benefitted, but a "reporting offense," which the Supreme Court has held evinces "minimal culpability."[48] And, unlike in most "reporting offense" cases—in which defendants violate existing statutes or regulations by failing to disclose information to the government or regulating entity—the December 2019 Ruling was the first time Uber was required to produce the information in this form. Uber voluntarily issued its Safety Report though it had no duty to do so, in an effort to – like the Commission – better combat, prevent and respond to incidents of sexual assault and misconduct in the TNC industry. Far from being culpable, Uber has

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[45] *See People ex rel. Lockyer,* 37 Cal. 4th at 728 (California's Supreme Court collected cases and reaffirmed that a defendant's good faith is relevant to evaluating the constitutionality of a fine. Moreover, the Court explained that the Attorney General's delay in asserting a claim and against a tobacco company for distributing cigarettes to minors on public property was a factor in analyzing the constitutionality of a fine that was based on cumulative penalties.).

[46] *Pimentel*, 974 F.3d at 922–23.

[47] *United States v. $100,348.00 in U.S. Currency*, 354 F.3d 1110, 1122 (9th Cir. 2004) (culpability increased if defendant's violation involved reckless behavior).

[48] *Bajakajian*, 524 U.S. 321 at 337–38; *see also Chocktaw,* D.01-04-038 at 10, 13 (finding "no evidence that Choctaw has significantly benefited from its unlawful conduct" and that Choctaw's "plausible arguments why it reasonably believed that it could not feasibly offer MRS as required by D.96-10-066" were factors that "weigh[] in favor of a smaller fine.").

consistently acted in good faith to provide the Commission with as much information as possible while protecting the privacy of sexual assault victims.

This stands in stark contrast to *Pacific Gas & Electric Co. v. Public Utilities Commission* ("*PG&E*"), for example, in which PG&E willfully violated its then-existing obligation to provide the Commission with accurate information concerning its gas pipelines. PG&E's violation—unlike Uber's--created a very real and grave danger that, fortunately, never materialized.[49] Unlike *PG&E*, Uber did not attempt to mislead the Commission. It did not conceal, mischaracterize, nor fail to correct any information. Uber's decision to not make public the requested, highly-sensitive information about individual victims of sexual assault and misconduct, is not a willful flouting of any law (indeed, Uber believes it cannot legally provide the requested information), but rather a concerted effort to protect victims' privacy rights in alliance with victims' rights organizations.[50] Uber has repeatedly confirmed its commitment to cooperate with the Commission and work alongside it in combating and preventing sexual assault and misconduct, but in a manner that guarantees the protection of victims' privacy.[51]

2. Whether the Underlying Offense Related to Other Illegal Activities

The alleged offense does not relate to illegal activity in any way. Uber issued the Safety Report with the express goal of working to *eradicate* crimes like sexual assaults on TNC platforms. And Uber declined to provide the requested data to the Commission to avoid violating victims' and employees' privacy rights. Far from relating to illegal conduct, Uber's actions throughout this proceeding have been driven by its desire to prevent future crimes and protect crime victims.

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[49] *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n,* 237 Cal. App. 4th 812 (2015). There, the Commission imposed an emergency reporting obligation targeting PG&E's gas pipeline leaks following the San Bruno pipeline explosion, a massive 2010 explosion of an underground gas pipeline that killed eight people, injured 58 others, and damaged hundreds of homes. *Id. at* 819-21. The event was considered the largest pipeline explosion in an urban or suburban setting in U.S. history, and the most catastrophic in California history. *Id.* at 821-22. The Commission discovered that PG&E's gas pipelines were poorly constructed, PG&E's records regarding its pipelines were inaccurate, and PG&E had violated longstanding pipeline safety regulations. *Id.* at 823-25. As a result, PG&E conducted mandated pressure leak tests and certified that the pipelines were safe, so the Commission permitted pipeline pressures to increase. *Id.* at 825-26. Seven months later, PG&E quietly submitted "[e]rrata" to the Commission to amend its prior pipeline safety reports. *Id.* at 827-28. On all those facts, the court rejected PG&E's argument that safety was not implicated by its violation simply because pipelines had not exploded again and were running below maximum pressure. *Id*. at 865.

[50] *See supra* II.B, *infra* IV.A.

[51] *See* Request for ADR at 3; Hearing Tr.at 565:06-568:11.

3. Whether Other Penalties May Be Imposed for the Offense

A determination of whether other penalties may be imposed for the offense requires looking to '"other penalties that the Legislature has authorized'."[52] Here, the penalty greatly exceeds the vast majority of penalties the Commission has imposed over the last decade.[53] The POD's penalty not only represents the maximum allowed for the alleged offense, but a *greater* amount than permitted by statute because of an erroneous interpretation of what constitutes a continuing violation.[54] Moreover, Uber's refusal to comply fully with the December Ruling in the *form* requested should not require multiplication of the penalty for each subpart of each question that was unanswered.[55] Failing to disclose an employee's job title should not be a separate penalty from failing to disclose his/her name. The alleged harm to the Commission does not increase after failing to provide the employee's name.

Moreover, the magnitude of the penalty improperly rests on the calculation of daily penalties during the nearly eleven months it took the ALJ to rule on Uber's motions for reconsideration and to stay the proceeding. As the California Supreme Court has repeatedly recognized, an agency's delay in acting is a basis for striking the fine as excessive.[56]

Finally, by imposing the maximum possible penalty, the POD leaves no room for higher penalties resulting from more culpable or harmful conduct. This is especially striking under the circumstances here, where unlike *PG&E*, Uber has created no danger to the public, but instead is endeavoring to promote

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[52] *$100,348.00 in U.S. Currency*, 354 F.3d at 1122 (quoting *United States v. 3814 NW Thurman St.,* 164 F.3d 1191, 1197 (9th Cir.1999)).
[53] *See Cingular,* D.04-09-062 at 63-66 (violation impacted thousands of customers over multiple years, "causing monetary losses for many and obliging some to deal with collection and credit rating agencies; total penalty was $12,140,000); *Qwest,* D.02-10-059 (3,581 "slamming" violations and 4,871 "cramming" violations; total penalty of $5,000 each for a total of $20,340,500); *Southern California Edison Company,* D.08-09-038 (falsification and manipulation of customer service data over seven years to game the Performance Based Ratemaking system and obtain $28 million in customer satisfaction rewards to the detriment of ratepayers; total penalty of $30 million); *PG&E, Rancho Cordova,* D.11-11-001 (penalty for safety violations in the aftermath of a natural gas explosion that resulted in one fatality, other injuries, and property damage; total penalty of $38 million); *PG&E, San Bruno,* D.15-04-024 (gas transmission line explosion in San Bruno claimed the lives of eight people, injured 58 people, destroyed 38 homes and damaged 70 other homes; total penalty of $1.6 billion).
[54] *See infra* VI.C.
[55] *See infra* VI.A.2.
[56] *See People ex rel. Lockyer,* 37 Cal. 4th at 728 (Remanding to consider Attorney General's delay in informing defendant that its conduct violated the law and subsequent delay in bringing action until the Attorney General had accumulated cumulative penalties); *see also Walsh v. Kirby,* 13 Cal.3d 95 (1974) (invalidating a fine from the Department of Alcoholic Beverages for accumulating evidence of numerous different but essentially identical violations before filing accusations charging licensee with all of the violations and assessing concomitant cumulative penalties).

safety. The vast disparity between any damages caused by the alleged offense and the $59 million penalty arising from the ALJ's delay violates the federal and California Constitutions.

4. The Extent of the Harm Caused By the Offense

Uber's refusal to produce specific victim information and employee information publicly has caused no harm—monetary or otherwise—to the Commission or the public.[57] To the contrary, Uber acted to *protect* the victims' identities and other personally identifiable information by declining to produce it to the Commission—an act that victims' advocacy groups have vigorously supported.[58]

Moreover, any assertion from the Commission that Uber has harmed its "regulatory process" overlooks the fact that Uber already provided the Commission with all of the information it needs to achieve its stated objectives. By trying to determine the proper legal requirements and privacy obligations implicated by the December Ruling, and by seeking engagement with the Commission on these issues through motions and requests for ADR, Uber did not disregard the ALJ's rulings or flout the process—it attempted to use Commission procedures to raise valid constitutional and legal challenges to the Commission's request.[59]

Further, any alleged harm to the regulatory process is minimal here compared to other reporting offenses.[60] Uber has not failed to comply with a Commission investigation or self-reporting requirement, nor has it impeded the Commission's ability to carry out existing regulation. The December Ruling admittedly only seeks the requested information for potential rulemaking. In other incidents of impeded regulatory process, the Commission penalized entities for misleading, misreporting, mischaracterizing or concealing required information.[61] That is not the case here; Uber has caused no harm to the Commission or to the public.

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[57] *See Pimentel,* 974 F.3d at 923 ("The most obvious and simple way to assess this factor is to observe the monetary harm resulting from the violation… But our review … is not limited to monetary harms alone. Courts may also consider how the violation erodes the government's purposes for proscribing the conduct.").

[58] *See supra* II.B, *infra* IV.A.

[59] *See California Rest. Ass'n. v. Henning,* 173 Cal. App. 3d 1069, 1075–76 (1985).

[60] *See, e.g.,* D.14-11-041 at 7 (finding violation of *ex parte* rules to be particularly harmful, because "the very purpose of the *ex parte* rules is to ensure the integrity of the regulatory process by providing a level playing field and transparency, and PG&E's illegal *ex parte* communications thwart these purposes.").

[61] *See, e.g.,* D.15-12-016 at 2 (failure to accurately and timely report his ex parte communications, which triggered other misleading acts and omissions by penalized entity, "which misled the Commission, showed disrespect for the Commission's Rules, and undermined public confidence in the agency"); D.15-04-024 at 200 (penalized entity "recognized its duty pursuant to Commission orders and federal regulations to maintain specific documents for all segments of its gas transmission pipeline system, yet did not take adequate steps to ensure compliance prior to the San Bruno explosion and fire"); *see also* D.14-01-037 at 46 ("Ultimately, CPSD failed to prove by a preponderance of the evidence that the regulatory process had been harmed. Although [penalized

IV. THE COMMISSION MUST PROTECT THE PRIVACY RIGHTS OF SEXUAL ASSAULT VICTIMS

The Commission's final decision should include a clear and unambiguous statement that the Commission will follow the law and protect victims' privacy. Otherwise, the Commission risks re-traumatizing victims and disincentivizing future reporting of sexual assaults while crossing over the line into law enforcement's jurisdiction without appropriate safeguards and in conflict with existing statutory limits on the collection of personally identifiable information.

A. The Disclosure of Victim Information to the Commission Risks Re-Traumatizing Victims of Sexual Misconduct

The POD concludes that it is "irrelevant" whether victims have permitted Uber to disclose their identities and incident reports to the Commission because the Commission's purported right to access such information trumps victims' rights to protect their privacy.[62] This dangerous logic risks additional harm to individuals who have already suffered immense pain. As RAINN described in its appeal of the POD, the mere possibility that their personally identifiable information may be disclosed to a third party without their knowledge or consent is itself traumatizing to sexual assault victims.[63] That this sharing may cause "follow up" from Uber or the Commission,[64] requiring them to re-visit potentially life-shattering incidents, compounds the trauma these victims will face.

This very concern led experts in sexual violence prevention, including RAINN, CALCASA, PCAR, NSVRC, and NNEDV to oppose the December Ruling. Each group submitted letters to the Commission emphasizing that the information should not be shared without victim consent. The letters explained how crucial it is that victims control the process of coming forward. RAINN described that:

> [t]rauma is not simply a one-time reaction to a single event; it is an individual and life-changing response that sometimes includes feelings of powerlessness, terror, and shame. Sharing victims' private information . . .

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entity] could have made a better interpretation of the law earlier in the process, [penalized entity] has provided evidence that it did attempt to comply with the Commission's regulatory process. For example, [penalized entity] did speak with Commission staff regarding [penalized entity's] view that revenue from prepaid service is not subject to PPP surcharges…If [penalized entity] had instead shown an intent to disregard the regulatory process altogether, or had attempted to conceal its failure to collect and remit user fees and PPP surcharges, then a finding that [penalized entity] had harmed the regulatory process would be appropriate.").

[62] POD at 48-49.

[63] *See* The Rape Abuse & Incest National Network's (RAINN) Appeal of the Presiding Officer's Decision Imposing Penalties Against Uber Technologies, Inc. for Violating the Assigned Administrative Law Judge's December 19, 2019 and January 27, 2020 Rulings Requiring Information Regarding Sexual Assault and Sexual Harassment Claims (Jan. 11, 2020) at 4-5.

[64] *Id.* at 46.

> without their consent would only compound the damage done by the assault itself.[65]

The need for the victim, and the victim only, to control the dissemination of his or her experience applies with equal force if Uber provides the data under seal, as contemplated by the January Ruling. The advocacy group RALIANCE explained that providing information—even confidentially—risks "nullify[ing] each victim's right to decide if, when and to whom they disclose their stories."[66] CALCASA agreed that "survivors themselves should retain control of whether and to whom to report."[67] The POD's subordination of a victim's right to decide whether and how to share his or her story stands in stark contrast to the practices of nationally-recognized advocacy groups whose core missions are supporting sexual assault survivors.

B. The POD Requiring Uber to Disclose Victim-Related Personal Information to the Commission Under Seal Disincentivizes Future Reporting of Sexual Assaults

Uber and the Commission share the common goal of protecting California residents from sexual assault and sexual harassment. Decisions on the appropriate treatment of victim-related information should, therefore, be driven by how best to empower and incentivize survivors to come forward, report safety incidents, and prevent future harm. As explained in CALCASA's letter to the Commission, the mere threat of disclosure would result in many victims being "unwilling to report to Uber or any other company if they fear their identities or details of their stories could be disclosed. . . [e]ven the perception of lack of privacy can prevent victims from reaching out for help."[68] Thus, any disclosure of data to the Commission or anyone else must be thoughtfully executed so as not to discourage future reporting.

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[65] *See* Hearing Ex. Uber-12 (RAINN Letter); *see also* Lori Haskell and Melanie Randall, Dep't of Justice, *The Impact of Trauma on Adult Sexual Assault Victims* 1, 11 (2019), https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma_eng.pdf; Alison Bowen, Harm from a Sexual Assault Can Continue for Years. The Triggers Are All Around., CHI. TRIB (Sept. 27, 2018), https://www.chicagotribune.com/lifestyles/sc-fam-how-assault-lingers-1002-story.html.

[66] Hearing Ex. Uber-3 (RALIANCE Declaration) at Para. 7.

[67] *See* Hearing Ex. Uber 9 (CALCASA Letter). NNEDV similarly explained:

> Disclosing victim information without their consent further traumatizes individuals who have already had their control and bodily autonomy wrenched away from them. . . . Only they can choose to tell their stories or give informed consent for details to be shared. The experiences of survivors are theirs alone; they should be in control over their privacy and who knows their stories. Rideshare providers, transportation companies, and government regulators like CPUC have a responsibility to safeguard the privacy of victims of domestic violence, sexual assault, and stalking to the greatest extent possible. Taking away the control of victims' stories will cause further harm to the individuals CPUC seeks to protect.

Hearing Ex. Uber-10 at 2 (NNEDV Letter).

[68] Hearing Ex. Uber-9 (CALCASA Letter); *see also* Hearing Ex. Uber-8 (CALCASA Response to Uber's Motion for Reconsideration) at 11.

The POD now contemplates that Uber may anonymize the names of victims and witnesses it provides to the Commission. However, the scope and force of the anonymization ruling are unclear, and provide no guarantee to victims that their privacy rights will be protected. For example, the POD's ambiguous language concerning Uber's provision of victim data does not preclude the Commission from making additional requests for incident- or victim-specific information in the future. In fact, the POD states that "[t]he Commission is at the preliminary stage of gathering information regarding the sexual assault and sexual harassment claims,"[69] suggesting that additional requests for information may be forthcoming.

Until there are explicit limits on the use and regulation of victim and witness data, the Commission must be concerned that any disclosures will harm survivors and prevent future victims from coming forward.[70] The Commission's final decision should, therefore, protect sexual assault victims by carefully considering their privacy interests in any future requests for data.

C. Uber Complied With the December Ruling to the Extent Possible While Protecting Victims' Rights and Provided the Commission with Sufficient Information to Fulfill Its Regulatory Purpose

The POD states that the purpose of the December Ruling is "to gather information that would allow the Commission to determine if Uber's TNC operations are being conducted safely in light of the numerous sexual assault and sexual harassment claims that Uber documented in its US Safety Report" and "to explore Uber's safety commitment, especially with respect to how Uber investigates and resolves sexual assault and sexual harassment claims made against drivers operating on the Uber platform."[71] Uber produced substantial information in response to the December Ruling, which is more than sufficient to address its stated regulatory purposes. Far from resisting the Commission's regulatory authority, Uber has complied with the ALJ's ruling to the extent possible, while at the same time attempting to use the Commission's procedures to explain why the demand for personally identifiable information is unlawful and improper.

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[69] POD at 48.
[70] Moreover, the $59,085,000 fine was so widely reported in the media, *see, e.g.*, Mike Murphy, *California Fines Uber $59 Million For Stonewalling Questions About Sexual Assault, Market Watch* (Dec. 14, 2020); Faiz Siddiqui, *California Fines Uber $59 Million, Threatens License Over Refusal to Hand Over Sexual Assault Data*, Washington Post (Dec. 14, 2020), and will continue to be reported on if adopted by the Commission, it has undoubtedly already discouraged victims from reporting future incidents to Uber.
[71] POD at 16-17.

Uber filed a partial response to the December Ruling*,* answering every question it could without violating victims' and employees' privacy rights. Uber's Response and the Safety Report itself explain how investigations are conducted;[72] the taxonomy by which sexual assault and sexual misconduct is categorized and how this data is tracked;[73] when and how information is shared with law enforcement;[74] how reported incidents are resolved;[75] when and how drivers' or riders' access to the Uber app is restricted or outright banned;[76] the sexual assault and misconduct training has been provided to TNC drivers and employees;[77] the safety features and prevention initiatives Uber has implemented;[78] and the further training and programs Uber is developing.[79] The only questions Uber declined to answer were those requiring disclosure to the Commission of individual incident information that included sexual assault victims' personally identifiable information, and employee personally identifiable information. To date, the Commission has not articulated a regulatory purpose for either set of the specific disclosures demanded.[80]

Commission staff apparently need passenger, driver, and employee information to pursue follow up investigations of specific incidents.[81] The POD, for the first time, presents a set of follow-up inquiries that Commission staff *might* want to pursue.[82] However, Commission staff needs neither the personally identifiable information of sexual assault victims provided confidentially nor the public production of employee information to pursue those lines of inquiry.

By acknowledging that "Commission staff can conduct a follow up investigation without contacting the sexual assault and sexual harassment victims" and by ordering the victims' and employees' names and personally identifiable information may be anonymized, the POD makes Uber's point: the information that Uber is penalized for withholding is unnecessary for the Commission's regulatory

[72] Safety Report at 25-29; Uber Response at 3-5, 8-9.
[73] Safety Report at 41-45, Appendix II, Appendix IV; Uber Response at 12-13, 20.
[74] Safety Report at 29.
[75] Uber Response at 17-19.
[76] Safety Report at 12-13, 27-28; Uber Response at 15-17.
[77] Safety Report at 13, 29; Uber Response at 9-11, 19-20, 23-24.
[78] Safety Report at 23-25, 29-30; Uber Response at 21-22.
[79] Safety Report at 14, 31-32; Uber Response at 24-25.
[80] *City of Los Angeles v. Patel,* 576 U.S. 409, 426 (2015); *New York v. Burger*, 482 U.S. 691, 702 (1987); *Donovan v. Dewey*, 452 U.S.594, 600 (1980) (finding that under the 4th Amendment an inspection of records must be "necessary to further [the] regulatory scheme").
[81] POD at 46.
[82] Note that these follow up questions are provided in the POD for the first time. No such rationale for the requested information was provided in previous rulings.

purpose.[83] Uber should not be penalized for failure to disclose information where the Commission has acknowledged that its demand of such information was unnecessary.

D. The Commission Is Not Law Enforcement and the Law Constrains Even Law Enforcement's Access to Victim Information

In explaining why requesting personally identifiable information of potential crime victims and witnesses was an appropriate exercise of the Commission's "expansive" authority over TNCs,[84] the POD relies on the striking—but incorrect—premise that the Commission can appropriately "engage[] in . . . law enforcement activities."[85] On this basis, the POD seems to conclude that the Commission has the power to deputize itself to investigate any serious crime, so long as the crime has some connection to regulated transportation companies.[86] That cannot be—and is not—right.

The POD's conclusion that the Commission may function, effectively, as law enforcement had no basis in the authorities cited, and asserts authority over criminal matters that the Commission cannot properly wield. That the Commission may occasionally collaborate with law enforcement where *both* violations of its own regulations *and* potential misdemeanor criminal offenses might be uncovered does not mean that the Commission can unilaterally usurp the role of law enforcement to investigate felony offenses such as sexual assault. And in granting certain specified agents of the Commission authority to wield some powers of peace officers as necessary to carry out their assigned functions, the Legislature clearly did not intend to deputize the Commission itself as a bureau of criminal investigation, authorized to investigate and enforce laws against violent crime.

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[83] POD at 86 (Ordering Para. No. 86) ("Uber shall work with the Commission's staff … to develop a code or numbering system as a substitute for the actual names and other personally identifiable information requested by Questions 2.4.2, 2.4.3, and 2.4.4.").

[84] POD at 15.

[85] POD at 24. The POD asserts that the Commission has been involved in criminal law enforcement "since it began its regulation of the transportation services," citing a handful of examples where Commission personnel participated *alongside* police officers as part of undercover "Strike Team[s]" targeting noncompliance with Commission regulatory requirements as well as misdemeanor criminal violations by passenger carriers serving major airports. POD at 24-25 & n.54. The POD also relies on a statute allowing certain designated Commission personnel—who by law are *not* actually California "peace officers"—to exercise some powers of peace officers as necessary to enforce "laws, orders, or regulations *administered by the commission*." Pub. Util. Code § 308.5 (emphasis added); *see* POD at 44 (relying § 308.5)].

[86] *See* POD at 27 ("Uber has failed to cite any authority that expressly prohibits the Commission from carrying out that function."); *id.* at 22 (asserting that there is no "subject matter limitation on the Commission's exercise of its safety authority . . . investigative powers"). Under that logic, the Commission could unilaterally take responsibility for enforcing criminal prohibitions on violent felonies—so long as it in some way relates to transportation and the legislature has not had occasion to specifically prohibit the Commission from doing it.

Commission personnel are not peace officers, but merely authorized to exercise certain powers usually assigned to peace officers for limited purposes within the scope of their employment by the Commission.[87] As Commissioner Shiroma acknowledged at the September 1, 2020 evidentiary hearing, the Commission is "not in law enforcement."[88] The Commission itself has repeatedly recognized that its authority does not extend to the criminal domain.[89]

The POD further ignores the crucial fact that even law enforcement officials are regulated and restricted in how they may interact with sexual assault victims and what information they can access and share relating to sexual assaults.[90] For example, Section 293 of the Penal Code requires that law enforcement officials responding to sexual assault reports must inform potential victims of their right to request that their names be concealed from the public record, and mandates further restrictions on the dissemination of victims' names and addresses.[91] Federal law similarly restricts law enforcement's ability to access victim information without notice to victims. For example, the Federal Rules of Criminal Procedure provide that a victim must be given notice of, and an opportunity to quash, a grand jury subpoena requiring production of his or her personal or confidential information.[92] And grand jury subpoenas in general must relate to an ongoing investigation of a *specific* criminal offense and be narrowly-tailored to request only that information which may constitute evidence of the particular crime being investigated. Law enforcement may not—as the ALJ attempts to do here—require the wholesale production of large swathes of data and personal information relating to thousands of individuals,

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[87] *See* Penal Code § 830.11 (listing CPUC personnel as "persons [who] are not peace officers" but who may nevertheless exercise peace officer powers under certain circumstances); Pub. Util. Code § 308.5 (limiting such authority to "investigating the laws, orders, or regulations administered by the commission or commencing directly or indirectly any criminal prosecution arising from any investigation conducted under these laws").

[88] Hearing Tr. at 539:27-540:01.

[89] *See, e.g.*, Decision No. 92455, 1980 Cal. PUC LEXIS 982 at *99 (Conclusion of Law No. 5) (finding that "This Commission is not a court with criminal jurisdiction, and … has no power to find anyone guilty of being a principal in an alleged crime…."); *Goldin v. Pub. Util. Comm'n*, 23 Cal. 3d 638, 661 n.10 (1979) (quoting a Commission decision: "As a regulatory body we should not shoulder the responsibility to determine and squelch unlawful activity involving telephone use. The criminal court system exists to provide for resolution of alleged unlawful activity.").

[90] The California State Constitution explicitly provides that: "In order to preserve and protect a victim's rights to justice and due process, a victim shall be entitled to the following rights: (1) To be treated with fairness and *respect for his or her privacy* and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process." Cal. Const. art. I, § 28(b) (emphasis added).

[91] Similarly, Section 13823.95(b)(1) of the Penal Code provides that a victim who seeks a medical evidentiary examination in connection with a sexual assault "shall not be required to participate or to agree to participate in the criminal justice system, either prior to the examination or at any other time."

[92] Fed. R. Crim. P. 17(c)(3).

untethered from any particular investigation and without any meaningful opportunity for the targeted entity (much less the victims themselves) to challenge the production order.[93]

Given the incredibly sensitive nature of sexual assault crimes, California also has robust laws and procedures governing how law enforcement may interact with victims.[94] As the head of Uber's Global Women's Safety and Gender-Based Violence Programs testified at the September 1 hearing, specialized training is crucial "for anybody who receives a disclosure or report of sexual assault. Because if there is not training or there is not understanding... you can re-traumatize a victim…. You don't understand what the victim has went through. You don't understand how trauma impacts the victim."[95]

And police departments throughout the state have instituted special victims units comprised of officials trained and experienced in investigating and responding to sexual assault offense and given them primary jurisdiction over such crimes.[96] By contrast, the Commission does not employ specialized, trained investigators with experience in interacting with sexual assault victims. Nor does it have in place protocols or procedures for how to request, treat, or protect personally identifiable information relating to sexual

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[93] *See, e.g.,* Fed. R. Crim. P. 17(c)(2) ("the court may quash or modify [a] subpoena if compliance would be unreasonable or oppressive); *In re Grand Jury Subpoena, JK-15-029*, 828 F.3d 1083, 1089 (9th Cir. 2016) (affirming order quashing subpoena that was overly-broad and unduly burdensome); United States v. Bergeson, 425 F.3d 1221 (9th Cir. 2005) (subpoena may be quashed when no effort is made to tailor the request to the investigation); *In re Grand Jury Subpoena, Dated Apr. 18, 2003*, 383 F.3d 905, 910 (9th Cir. 2004) (same).

[94] For example, the California legislature enacted in 2017 the Sexual Assault Survivors' Bill of Rights, which mandates that all law enforcement agencies develop a card that "explains all of the rights of sexual assault victims in clear language,"—including that a victim is "never required to participate in the criminal justice system"—and requires that the card be made accessible to medical providers who conduct examinations arising from a sexual assault. *See* Penal Code § 680.2; *see also* Penal Code § 679.04 (providing "that sexual assault victims have "the right to have victim advocates and a support person of the victim's choosing present at any interview by law enforcement authorities, district attorneys, or defense attorneys"). In a similar vein, the California Attorney General and police departments throughout the state have designated "special victims' units" comprised of specialized investigators with experience handling the unique needs of sexual assault victims, and given them primary jurisdiction over sexual assault investigations. *See e.g.*, Victims' Services Unit, California Attorney General's Office, https://oag.ca.gov/victimservices.

[95] *See* Hearing Tr. at 519:9-17.

[96] For example, the California legislature enacted in 2017 the Sexual Assault Survivors' Bill of Rights, which mandates that all law enforcement agencies develop a card that "explains in a clear language the rights of sexual assault victims,"—including that a victim is "never required to participate in the criminal justice system"—and requires that the card be made accessible to medical providers who conduct examinations arising from a sexual assault. *See* Penal Code § 680.2; *see also* Penal Code § 679.04 (providing "that sexual assault victims have "the right to have victim advocates and a support person of the victim's choosing present at any interview by law enforcement authorities, district attorneys, or defense attorneys"). In a similar vein, the California Attorney General and police departments throughout the state have designated "special victims' units" comprised of specialized investigators with experience handling the unique needs of sexual assault victims, and given them primary jurisdiction over sexual assault investigations. *See e.g.*, Victims' Services Unit, California Attorney General's Office, https://oag.ca.gov/victimservices.

assaults. The Commission is simply not equipped to navigate the unique sensitivities involved in investigating and prosecuting sexual assaults—nor need it be, as these duties are primarily and appropriately the province of police departments and other law enforcement bodies.

E. Section 5437 Prohibits the Disclosure of Any Personally Identifiable Information of a TNC Passenger to Third Parties, Including the Commission

Even if the Commission were to find that investigating and prosecuting sexual assaults was an appropriate activity for the Commission, the December Ruling (even as clarified by the January Ruling) contravenes Section 5437, which prohibits the disclosure by a TNC of a TNC passenger's personally identifiable information to any third party, except under three limited circumstances not applicable here.

1. The Commission is a Third Party with Respect to the Transmission of TNC Passenger Personally Identifiable Information

The POD incorrectly suggests that the Commission is not a third party under Section 5437,[97] but that is the only logical construction of the term as used in Section 5437. Both law and legislative sources support this construction.

Section 5437 states: "A transportation network company shall not disclose to a third party any personally identifiable information of a transportation network company passenger unless one of the following applies:…." The only two parties in possession of TNC passenger personally identifiable information is the TNC and the TNC passenger. All other persons or entities are thus, by definition, third parties.[98]

As delineated in subparts (1) through (3) of Section 5437, certain circumstances permit TNCs to disclose the personally identifiable information of TNC passengers to third parties. Subpart (3) specifically identifies the Commission as one example of a third party, but only "in order to investigate a complaint filed with the commission" *and* if the "commission treats the information under confidentiality protections." Since the *exceptions* to the general rule specifically reference the Commission, it follows that the Commission is an *excepted third party* under those circumstances outlined in subpart (3). Indeed, if Section 5437 intended to exclude the Commission from the definition of "third party," there would be no need for subpart (3).

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[97] POD at 36.

[98] *See* Black's Law Dictionary THIRD PARTY, Black's Law Dictionary (11th ed. 2019) Someone who is not a party to a lawsuit, agreement, or other transaction but who is usu. somehow implicated in it; someone other than the principal parties. — Also termed *outside party*; *third person*); Merriam-Webster's Dictionary "Third-party." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/third-party. Accessed 26 Dec. 2020 ("a person other than the principals.").

The legislative history of Section 5437 supports this logical reading of the statute. The legislature passed Section 5437 to set insurance requirements that applied to TNCs.[99] While under consideration, concerns arose over insurance companies and others involved in incidents requesting personally identifiable information about TNC passengers (that the TNC passengers disclosed to the TNC).[100] Knowing there would be situations requiring TNC disclosure of this personally identifiable information, including insurance disputes and the already encoded Commission complaint process, the authors drafted Section 5437 to include only these narrow exceptions and even guaranteed the confidentiality of personally identifiable information provided pursuant to the Commission complaint process.[101]

2. The ALJ's Rulings in this Proceeding Do Not Create a Legal Obligation

Section 5437 provides three narrow exceptions to its blanket prohibition on the disclosure by TNCs of TNC passenger personally identifiable information, none of which are applicable here:

> (1) The customer knowingly consents.
>
> (2) Pursuant to a legal obligation.
>
> (3) The disclosure is to the commission in order to investigate a complaint filed with the commission against transportation network company or a participating driver and the commission treats the information under confidentiality protections.

Citing no legislative sources, the POD states that the plain meaning of "legal obligation" in subpart (2) is "expansive enough to include an ALJ ruling such as the *December 19, 2019* and *January 27, 2020 Rulings*."[102] The POD also incorrectly claims that the Commission has an unlimited right to order the disclosure of any and all other personally identifiable information. Yet the legislative history confirms that the Commission may not have such "unfettered" access to TNC passenger personally identifiable information. The Comments from the June 16, 2014 Senate Energy, Utilities and Communications Committee Report on A.B. 2239 note:

> Unfettered access to TNC records, with details of where and when TNC passengers travel, may contravene privacy protections. While the CPUC may need access to records to investigate complaints, personal information should be kept confidential. With insurance disputes likely to center on whether a TNC driver's app was on or a ride accepted, requests for customer information may be common, and privacy protections should be required. Thus, the author and committee may wish to consider amending the bill to

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[99] Stats 2014, c. 389 (A.B.2293), § 1 ("Subject: Transportation network companies: insurance coverage")
[100] *Id.*
[101] *Id.*
[102] POD at 37.

> prohibit a TNC from disclosing to a third party any personally identifiable information of a TNC passenger unless there is customer consent or legal obligation, or to the CPUC to investigate a complaint and under confidentiality protections.[103]

These comments confirm that the authors and committee, who subsequently adopted the amendment proposed here, agreed the Commission's access to TNC passenger information must be limited to its existing right to inspect TNC records to resolve passenger complaints on a confidential basis.

Subpart (3) recognizes that the Commission may continue to have limited access to personally identifiable information pursuant to "[a] separate rule stat[ing] that CPUC staff shall have the right to inspect TNC records to investigate and resolve any passenger complaint against a TNC or TNC driver."[104] It therefore explicitly limits the Commission's right to demand TNC users' personal information to situations in which the Commission is investigating complaints. Section 5437 also makes clear that the Commission may not exercise that right in a way that "contravene privacy protections." No plain reading of the statute would give the Commission authority to order the wholesale disclosure of *all* victim information of *every* incident of sexual assault and misconduct that occurred in California in 2017-2019, without consent and for quasi-legislative purposes[105] unrelated to the encoded Commission complaint process.

V. THE POD MISCHARACTERIZES UBER'S ARGUMENTS PERTAINING TO THE PUBLIC DISCLOSURE OF EMPLOYEE INFORMATION AND CONTRADICTS THE JANUARY RULING

Although the Commission regularly allows parties to file documents under seal and to redact employee names in the public versions, the POD finds "factually baseless" and "speculative" Uber's argument that "the *December 19, 2019 Ruling* [directing a public filing of employee information] was contrary to Commission policy."[106] Moreover, the POD mischaracterizes Uber's position, stating that

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[103] Bill Analysis (June 16, 2014), Stats. 2014, c. 389 (A.B.2293), § 1 (emphasis omitted).

[104] *Id.*

[105] August 14, 2020 E-mail Ruling of Chief Administrative Law Judge Simon determining that the OSC "is not a proceeding" and that the categorization of this proceeding is quasi-legislative, despite the issuance of the OSC.

[106] POD at 52. Bizarrely, in support of dismissing the evidence on the record, the POD argues that the testimony of Tracey Breeden, Uber's Head of Safety and Gender-Based Violence Operations, undermines Uber's claim that public disclosure of employee information would be harmful to employees. POD at 58. Because Ms. Breeden freely disclosed her name and job title and explained her role with the Safety Report, the POD concludes "[i]t is difficult to fathom how making similar disclosures regarding the other authors and contributors to the US Safety Report will harm those individuals." POD at 59. It is well established that public figures have a lesser right to privacy. As an employee who is a well-established high-profile expert in victim rights appearing before the Commission as Uber's representative, Ms. Breeden does not have an expectation of privacy as to her name, title,

"Uber does not wish to provide the Commission with its employee information under any circumstances."[107] To the contrary, although Uber continues to believe that the Commission should instead request information through Uber's Regulatory Affairs Group, Uber would have sought to provide the requested employee information under seal if the ALJ had not expressly prohibited that action in the January Ruling.[108]

Employee information must be entitled to protection and should not be disclosed publicly absent a compelling reason. This should not be controversial; in fact, the Commission regularly acknowledges that employee information should remain confidential by routinely allowing regulated entities to redact personally identifiable employee information when making public filings.[109]

As the Commission itself has recognized, Uber's desire to protect its employees' information is grounded in a well-founded concern for their safety. It is all too easy and common in today's world for disgruntled members of the public to launch harassment campaigns targeting Uber employees, broadcasting their personal information on the Internet, and encouraging their followers to take action against them, as is demonstrated by this YouTube video:[110]

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job responsibilities and role in drafting the Safety Report. In contrast, other employees who do not serve in a public role should not be faced with the possibility of being targeted with public inquiries, public scrutiny, or any other kind of exposure or harm for the mere fact of performing the activities for which they were hired by their employer. The POD's reliance on Ms. Breeden's public appearance as evidence against employees' right to privacy is arbitrary and capricious.

[107] POD at 54.

[108] January Ruling at 3 (Ordering Para. No. 3) (directing that, except for Questions 2.4.1., 2.4.2, 2.4.2, and 2.4.4, "Uber's answers to the remaining questions in the *Ruling* shall not be filed under seal.").

[109] Verified Statement at 22.

[110] https://youtu.be/2DpqFuAXRPQ. This campaign was launched in the lead-up to California's vote on Proposition 22, when dozens of videos containing the names, titles, and photographs of more than 20 Uber attorneys were posted on YouTube, labeling them "disgraced' and "100% pure evil."

It was for this reason that Uber objected to the ALJ's order in the December Ruling regarding the disclosure of employee information. The ALJ did not even attempt to provide a justification for the public disclosure of the names and contact information of every employee who responded to a safety incident and/or worked on the Safety Report. Nor did the ALJ meaningfully address any of the concerns the company raised when objecting to the disclosure order. And, although the POD contends that "Uber does not wish to provide the Commission with its employee information under any circumstances," Uber has made clear throughout this proceeding that it is willing to provide the requested employee information under seal. Indeed, Uber would have explicitly requested sealing of employee information had not the ALJ expressly prohibited it from doing so in the January Ruling.[111] Now that the POD has presented such an option, Uber will move to provide the employee information under seal and request confidential treatment to comply with this request if the Commission affirms the December Ruling's requirement that Uber provide this information.

The December Ruling, as clarified by the January Ruling, did not articulate a regulatory purpose for the public disclosure of employee names, titles, contact information, and involvement with the drafting of the Safety Report.[112] Any need for information from a particular employee could be directed through well-established contacts between Uber and the Commission. Indeed, the Commission's Consumer Protection and Enforcement Division regularly requests and routinely receives the information it needs from Uber by submitting data requests to Uber's Regulatory Affairs Group.[113] If Commission staff want to "follow up with the appropriate Uber employees,"[114] the Regulatory Affairs Group can arrange for employees most knowledgeable about a subject matter to present that information. It is unnecessary and irresponsible for the Commission to demand that Uber *publicly* file a complete directory of employee's names, contact information, job responsibilities, and description of the work they did on the Safety Report. Doing so exposes employees to the real possibility of being targeted with inquiries from third parties, public scrutiny, or any other harm.[115]

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[111] January Ruling at 3 (Ordering Para. No. 3) (directing that, except for Questions 2.4.1., 2.4.2, 2.4.2, and 2.4.4, "Uber's answers to the remaining questions in the *Ruling* shall not be filed under seal.").
[112] The Fourth Amendment requires tailoring of a Government's request for records to further a regulatory purpose. *See Patel,* 576 U.S. at 426; *Burger,* 482 U.S. at 702*; Donovan,* 452 U.S. at 600.
[113] Hearing Tr. at 504:1-5. Had the ALJ not cut off the examination of Ms. Breeden, Uber would have further "substantiated" the existence of such a team and its functions as part of her discussion of the robust protocols that Uber has in place to ensure privacy when responding to regulatory and law enforcement requests.
[114] POD at 56.
[115] *See* Verified Statement at 23.

VI. THE PROPOSED PENALTY EXCEEDS THE STATUTORY CAP AND CONTRAVENES COMMISSION PRECEDENT

For all the reasons discussed above, no penalty is warranted nor is it appropriate to find that Uber violated Rule 1.1. However, if the Commission affirms the POD's determination of a penalty, the Commission should find that the POD's proposed penalty not only violates constitutional limits but exceeds the statutory cap and is inconsistent with Commission precedent.[116] Specifically, the POD artificially multiplies the number of Uber's violations to bypass the statutory cap on civil penalties and unlawfully inflates Uber's fine. The POD also contravenes Commission precedent by imposing a penalty grossly disproportional to the gravity of Uber's offense. Finally, the Commission should not impose a daily fine for continuing violations where Uber's interlocutory appeal went unanswered for eleven months and Uber requested to resolve this issue through ADR.

A. The POD Artificially Multiplies the Number of Uber's Violations to Bypass the Statutory Cap on Civil Penalties and Unlawfully Inflates Uber's Fine

Section 5378 allows the Commission to impose a maximum civil penalty of $7,500 for "[t]he violation of any order, decision, rule, regulation, direction, demand, or requirement established by the commission." "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him [or her] to punishment but also of the severity of the penalty that a State may impose."[117] Thus, it is improper for the Commission to artificially multiply the number of Uber's violations to bypass this statutory cap.[118]

1. The POD Relies on the January Ruling to Unlawfully Impose Double Penalties for Uber's Failure to Respond to a Single Set of Questions

The POD unlawfully imposes double penalties for a single violation to bypass the statutory cap.[119] The January Ruling, issued three days before the deadline by which Uber was ordered to comply with the

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[116] In proposing the penalty, the POD also glosses over numerous failures to provide Uber with procedural due process in this Order to Show Cause, makes findings that are not supported by substantial evidence, and includes dicta on subjects outside of the scope of this proceeding like whether TNCs are a public utility that do not bear on establishing a fine and should be the subject of a broader rulemaking. Uber expressly reserves the right to raise these concerns in a future filing should the POD remain unmodified, but chooses here to focus on the POD's failure to follow Commission precedent in assessing this excessive and draconian fine.

[117] *De Anza Santa Cruz Mobile Estates Homeowners Ass'n. v. De Anza Santa Cruz Mobile Estates*, 94 Cal. App. 4th 890, 912 (2001).

[118] The POD arbitrarily inflates the penalties by imposing double penalties and dividing each individual question into arbitrary subparts, turning one request for information into 26 separate violations.

[119] *Troensegaard v. Silvercrest Indus.,* 175 Cal. App. 3d 218, 227 (1985) (citing *In re N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.,* 526 F. Supp. 887, 899 (1981) (vacated on other grounds, *In re N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982)); *see also Abed* v. *A. H. Robins Co*., 693

December Ruling, serves as an amendment of the December Ruling. In response to Uber's *Motion for Reconsideration* requesting rescission of the December Ruling, the January Ruling denies Uber's motion but attempts to address a small portion of Uber's privacy concerns by amending the December Ruling to allow that "Uber's answers to questions 2.4.1, 2.4.2, 2.4.3, and 2.4.4 [in the December Ruling] shall be filed under seal." The January Ruling makes no new demand of Uber; it merely clarifies that certain information requested in the prior ruling shall be treated as confidential.

Thus, Uber has only one obligation as it pertains to Questions 2.4.1, 2.4.2, 2.4.3, and 2.4.4: to file its response to said questions under seal by January 30, 2020. Illogically, the POD treats the January Ruling as distinct from the obligation created by the December Ruling. The POD relies on this fictitious dual obligation to fine Uber twice in violation for each question it failed to answer. The POD's double penalization of Uber's failure to respond to a single set of questions is arbitrary and a gross violation of fundamental fairness and Uber's due process right to be protected against unlimited multiple punishments for the same act.

2. The POD Abuses the Commission's Discretion by Unlawfully Subdividing the December Ruling to Establish an Arbitrary Number of Violations

The POD assigns separate violations by arbitrarily and unnecessarily subdividing the December Ruling into separate clauses of every question unanswered. Thus, failure to fully comply with a portion of the December Ruling requirement "to file and serve answers to the questions set forth in this Ruling" should be considered a single violation.[120] The Commission may not arbitrarily divide a demand into multiple subparts, such that failure to comply with each element of the order constitutes a distinct violation to bypass the statutory cap.

For example, in Amended Administrative Law Judge's Ruling Finding Violations of Rule 8.4, Requiring Reporting of Ex Parte Communications, and Ordering SCE to Show Cause Why it Should Not Also be Found in Violation of Rule 1.1 and be Subject to Sanctions for All Rule Violations ("SONGS amended ruling"), the assigned ALJ found that SCE failed to timely report ten ex parte communications

F.2d 847 (1982) (finding that "[a] defendant has a due process right to be protected against unlimited multiple punishment for the same act. A defendant in a civil action has a right to be protected against double recoveries … because overlapping damage awards violate that sense of 'fundamental fairness' which lies at the heart of constitutional due process."); *see also De Anza Santa Cruz Mobile Estates*, 94 Cal. App. 4th at 912 (citing the prohibition against "double penalties for the same conduct" as a fundamental principle of due process that prevents the imposition of both common law tort-based punitive damages and statutory penalties for the same conduct).

[120] December 19, 2019 Ruling at 5 (Ordering Para. No. 2).

in violation of Rule 8.4.[121] Rule 8.4 requires a party to provide approximately 12 categories of information (three numbered categories of information, each with multiple subcategories). Nevertheless, the ALJ found SCE's failure to provide timely notice constitutes a single violation of Rule 8.4, not twelve violations. SCE was ordered to show cause why it should not be sanctioned for 10 ex parte violations (one for each unreported ex parte communication) not 120 ex parte violations (one for each unreported category of information about the ex parte communication).

Similarly, Uber's failure to provide all the information demanded in the December Ruling should constitute a single violation at most. Like Rule 8.4, the December Ruling required Uber to produce multiple sub-categories of information. However, unlike the Commission's rulings on ex parte violations, where failure to report information required by Rule 8.4 constituted a single violation, here the POD treats Uber's failure to answer every *element* of every *subpart* of every *part* of every *question* in the December Ruling as a separate violation that afforded the maximum statutory penalty. Moreover, Uber's refusal to comply fully with the Commission's request for information in the *form* requested should not require multiplication of the penalty for each subpart of each question that was unanswered. For example, failing to disclose an employee's job title should not be a separate penalty from failing to disclose his/her name. The alleged harm to the Commission's regulatory process does not increase after failing to provide the victim's name. This clearly violates Section 5378 by inventing a penalty multiplier that does not exist solely to bypass the statutory cap on civil penalties.

B. The POD Contravenes Commission Precedent by Imposing a Penalty that Is Grossly Disproportional to the Gravity of Uber's Offense

The factors identified in D.98-12-075 are the appropriate factors for determining a penalty amount.[122] However, the Commission erred and/or abused its discretion by not applying or considering these factors properly, by reaching findings not supported by substantial evidence, and by imposing a penalty grossly disproportional to the gravity of the offense.

[121] Amended Administrative Law Judge's Ruling Finding Violations of Rule 8.4, Requiring reporting of Ex Parte Communications, and Ordering SCE to Show Cause Why it Should Not Also be Found in Violation of Rule 1.1 and be Subject to Sanctions for All Rule Violations (Ruling and OSC), I.12-10-013 (Aug. 5, 2015) at 46-47 (Ruling Para. No. 1(a)).

[122] *See* D.98-12-075, 1998 Cal. PUC LEXIS 1016 at *52-60.

1. *Severity of the Offense*: The Facts Do Not Support a Finding of Significant Harm Warranting a Maximum Penalty

When weighing the "severity of offense," the Commission considers economic harm, physical harm, harm to the integrity of the regulatory process, and the number and scope of violations.[123] In failing to answer a limited subset of questions in the December Ruling, Uber caused neither economic nor physical harm. Yet, every precedent for large penalties cited by the POD, except for the previous violation found against Uber's subsidiary Rasier-CA, LLC, is for violations where the economic and physical harms indisputably outweigh the severity of the offense at issue here.[124] And among those cited cases that caused more economic and physical harm, only the *PG&E San Bruno* case that killed 58 people and destroyed or damaged over 100 homes imposes a penalty greater than the POD seeks to impose on Uber.

Similarly, while violation of a Commission directive is "accorded a high level of severity," the POD does not demonstrate that Uber's failure to fully respond to the December Ruling has caused enough "harm to the integrity of the regulatory process" to justify the maximum civil penalty or even a violation of Rule 1.1. Uber's offense is "not []especially egregious … because the violation has not caused any physical or economic harm to others, including [the penalized entity's] customers."[125] The mere fact that an entity violated a Commission directive does not justify the highest statutorily permissible civil penalty or a Rule 1.1 violation – especially given that Uber had no option to challenge the legal justification for that directive but to not comply.[126]

Despite the POD's artificial multiplication of Uber's violation into thousands of offenses compounding daily, in reality the number and scope of Uber's violation is small. Unlike the precedent cases cited by the POD, Uber has neither committed a "series of temporally distinct violations" nor "a

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[123] *Id.*

[124] POD at 78-80; *see Cingular,* D.04-09-062 at 63-66 (violation impacted thousands of customers over multiple years, "causing monetary losses for many and obliging some to deal with collection and credit rating agencies; total penalty was $12,140,000); *Qwest,* D.02-10-059 (3,581 "slamming" violations and 4,871 "cramming" violations; total penalty of $5,000 each for a total of $20,340,500); *Southern California Edison,* D.08-09-038 (falsification and manipulation of customer service data over seven years to game the Performance Based Ratemaking system and obtain $28 million in customer satisfaction rewards to the detriment of ratepayers; total penalty of $30 million); *PG&E, Rancho Cordova,* D.11-11-001 (penalty for safety violations in the aftermath of a natural gas explosion that resulted in one fatality, other injuries, and property damage; total penalty of $38 million); *PG&E, San Bruno,* D.15-04-024 (gas transmission line explosion in San Bruno claimed the lives of eight people, injured 58 people, destroyed 38 homes and damaged 70 other homes; total penalty of $1.6 billion).

[125] D.01-04-038 at 11.

[126] *See* D.14-11-041 at 7-9, 15 & 30 (finding that, despite a finding of severe harm to the integrity of the regulatory process, such harm should be distinguished from harm done "not only to the integrity of the regulatory process, but potentially to the public's safety" in imposing a lower total fine).

widespread violation which affects a large number of consumers."[127] Thus, the penalty imposed in this POD is grossly disproportional to the severity of the offense.

2. *Conduct of the Entity*: Uber Has Made Proactive Efforts to Increase Transparency and Prevent Sexual Assault and Misconduct in the TNC Industry, Made Good Faith Attempts to Comply, and Demonstrated Willingness to Cooperate with the Commission

The Commission has held that the size of the fine should reflect the conduct of the entity being penalized.[128] Some considerations include: the entity's actions to prevent a violation, whether the wrongdoing was deliberate or inadvertent, and promptness and cooperativeness of the entity in reporting and correcting violations.[129]

Uber has consistently acted in good faith, and has been forthcoming, candid, and transparent with the Commission about its concerns with divulging the requested information. To protect the integrity of the regulatory process and pursue its shared goal of sexual violence prevention, Uber has responded promptly by producing information on its policies and procedures for receiving, tracking, investigating, and resolving reports of sexual assault incidents, without violating victim and privacy rights. Uber has also repeatedly and promptly asked the Commission to articulate its regulatory purpose for its information demands and even informally and formally asked for ADR hoping to aid the Commission to eradicate sexual violence on TNC platforms without causing harm to sexual assault victims and Uber employees. Uber promptly asked for relief from producing only private information. Uber's conduct supports a lesser penalty.

3. *The Totality of Circumstances* in Furtherance of the Public Interest Weigh in Favor of a Lesser Penalty

When assessing the unique facts of each case, the Commission "will review facts which tend to mitigate the degree of wrongdoing as well as any facts which exacerbate the wrongdoing. In all cases, the harm will be evaluated from the perspective of the public interest."[130]

First, Uber reasonably believed that compliance with the December Ruling would constitute an illegal violation of privacy rights. Even if the Commission rejects Uber's arguments, Uber's good faith reasons for noncompliance are a mitigating factor.[131] Uber provided ample statutory references, case law,

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[127] D.98-12-075, 1998 Cal. PUC LEXIS 1016 at *56.
[128] *See* D.98-12-075.
[129] *Id.* at *73-75.
[130] D.98-12-075 1998, Cal. PUC LEXIS 1016 at *59.
[131] D.01-04-038, at 13, 15 (finding that "[the penalized entity's] presented a plausible explanation for [its failure]," but while the Commission was "not convinced" by [the penalized entity's] explanation, the Commission

and witness testimony supporting its arguments. Moreover, multiple sexual assault prevention advocacy groups have sent letters to the Commission and made filings in this proceeding supporting Uber's privacy arguments. The POD itself acknowledges the legitimacy of Uber's privacy concerns by modifying the December ruling.[132]

While the Commission may not "be convinced" by Uber's arguments for noncompliance, the Commission must nevertheless acknowledge that Uber's violation "is not due to a wanton disregard" for the December Ruling, but a result of Uber's reasonable belief that it cannot comply with the December Ruling without violating other legal obligations.

Second, Uber did not benefit from its failure to comply.[133] Uber's sole motive was to protect the privacy rights of victims and employees. Uber has not otherwise benefited from withholding this information, economically or otherwise. Thus, the totality of the circumstances support a smaller penalty.

4. *The Role of Precedent*: The Cases Cited as Precedent by the POD Demonstrate that the Penalty Imposed by the POD is Grossly Disproportionate to the Offense

The Commission "will be expected to explicitly address those previously issued decisions which involve the most reasonably comparable factual circumstances and explain any substantial differences in outcome."[134] The cases cited as precedent by the POD demonstrate that the penalty levied on Uber is grossly disproportionate to the offense.

The POD cites D.16-01-014. In that decision—which itself was an outlier among other Commission decisions assessing a penalty—the Commission fined Rasier-CA, LLC $7,626,000 for its failure to comply with TNC reporting requirements regarding accessibility requests, service by zip code, and driver problems. The circumstances of that Decision are the most factually similar to the present case, yet the penalty here is eight-fold the penalty in the *Rasier-CA* decision and involves a smaller subset of data.

No other precedent cited by the POD has "reasonably comparable factual circumstances" or comparable severity of harm. The precedent cited by the POD involve widespread violations that caused economic harm to thousands, created significant risks to public safety, or resulted in loss of life, physical

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nevertheless found that the penalized entity's "plausible arguments" was a factor that "weighs in favor of a smaller fine").

[132] POD at 86 (Ordering Para. No. 3).

[133] D.01-04-038 at 11, 15 (finding that "there is no evidence that [the offender] has significantly benefited from its unlawful conduct" and cites this as further evidence that "that the public interest has not been seriously harmed.").

[134] D.98-12-075, 1998 Cal PUC LEXIS 1016 at *60.

injury, and large-scale destruction. The severity of the harm in these cases is significantly greater than the harm at issue here. Paradoxically, the POD imposes a penalty that eclipses the fines imposed in these precedent cases (except for the $300 million fine in the *PG&E, San Bruno* decision where a pipeline explosion killed 58 people and destroyed or damaged over 100 homes). The POD makes no attempt to explain this "substantial differences in outcome."

C. The Commission Should Not Impose a Daily Fine for Continuing Violations

"Commission precedent indicates that where there is a continuing violation, the Commission has discretion in deciding whether to assess a fine for each day of the violation."[135] The Commission should not assess a daily fine for a continuing violation where doing so would cause a penalty disproportionate to the offense. [136]

In light of Uber's good-faith reasons for noncompliance, the limited harm resulting from that noncompliance,[137] the fact that Uber's prayers for interlocutory relief remained unaddressed by the Commission for the nearly *11 months* before the issuance of the POD,[138] and the fact that Uber requested ADR to come to a solution that would likely have satisfied all stakeholders, a daily fine of $195,000 is excessive. The Commission should not find a continuing violation where the resulting multi-million dollar penalty is grossly disproportional to the gravity of Uber's offense.

1. The Commission Should Not Impose a Daily Fine Where Uber's Motion for Stay and Motion for Reconsideration by the Commission Remained Pending for 11 Months

Uber filed a Motion for Stay of the December Ruling and a Motion for Reconsideration to the Full Commission on January 30, 2020. Uber's interlocutory appeals went unanswered for 11 months before the issuance of the POD. Moreover, Uber was afforded no meaningful opportunities to engage with the Commission to address Uber's concerns, to understand the Commission's need for the requested information, or to identify alternative means of compliance.

Although the POD finds that Uber's pending motions for stay and reconsideration do not excuse compliance, it is contrary to basic principles of fairness and equity to penalize Uber with a daily fine while

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[135] D.01-04-038 at 16; *see also* D.16-09-055 at 78 ("in the case of a continuing violation, Staff has the discretion to assess penalties on less than a daily basis.").

[136] D.01-04-038 at 17-18 ("Although we have authority to assess a fine for each day that [the violation occurred], we decline to do so, since this would result in a large fine that would be grossly disproportionate to the offense."

[137] As discussed in VI.B.1 above, Uber's partial non-compliance with the December Ruling caused no physical or economic harm, nor did it cause egregious damage to the integrity of the regulatory processes.

[138] *See* Uber's Motion for Stay and Motion for Reconsideration to the Full Commission, each filed on January 31, 2020.

Uber awaited relief from the Commission from producing the remainder of the information. It is also contrary to California law which recognizes that agency delay in enforcement leading to cumulative fines should be considered in determining whether a fine is excessive.[139]

2. The Commission Should Not Find a Continuing Violation After Uber Requested to Resolve This Issue Through ADR

The Commission should also not impose a continuing violation penalty after the entity has stated its willingness to cooperate and requested to resolve the issue through ADR. This dispute could have been entirely avoided if there had been a mechanism to discuss the issues and work together on a solution, including the use of anonymized data, but there has been no procedural vehicle for such discussions and Uber's request for ADR was rejected.

Uber filed a motion requesting ADR on August 12, 2020. Uber asserted that "[i]f CPED or another Commission representative is authorized to engage in ADR to discuss the need for the requested information and the options for addressing that need without jeopardizing victims and their privacy rights, Uber expects this issue could be easily resolved."[140] Uber renewed this request for ADR at the evidentiary hearing on September 1, 2020, where Uber clarified that it was ready and willing to cooperate with Commission staff to provide the Commission with the information it needs "without infringing on victims' rights and the constitutionally protected privacy rights."[141] Uber suggested that anonymizing sensitive information might be a way to provide information helpful to the Commission without harming survivors.[142]

Only if the POD is adopted will Uber be granted permission to "work with the Commission's staff in the Consumer Protection and Enforcement Division, Transportation Enforcement Branch and Transportation Licensing and Analysis Branch to develop a code or numbering system as a substitute for the actual names and other personally identifiable information requested by Questions 2.4.2, 2.4.3, and 2.4.4."[143] For this additional reason, Uber should not be assessed a daily fine for the 4 months between Uber's ADR request and the issuance of the POD.

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[139] *See supra* n.45 and accompanying text.
[140] Uber Motion for ADR at 3.
[141] Hearing Tr. at 504:17-22, 566:20-568:11.
[142] *Id.* at 566:20-568:8.
[143] POD at 86 (Ordering Para. No.3).

VII. CONCLUSION

For the reasons explained above, the Commission should reject the POD, protect victims and employees, and incent industry to engage in efforts to combat sexual violence.

Respectfully submitted,

/s/ ______________________________

Vidhya Prabhakaran
Robert Maguire
DAVIS WRIGHT TREMAINE LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111-6533
Tel. (415) 276-6500
Fax. (415) 276-6599
Email: vidhyaprabhakaran@dwt.com
Email: robmaguire@dwt.com

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Attorneys for Uber Technologies, Inc.