BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALI

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

LYFT, INC.'S APPLICATION FOR REHEARING OF DECISION DENYING APPEAL OF LYFT, INC. RE: RULING DENYING, IN PART, MOTIONS BY UBER TECHNOLOGIES, INC. AND LYFT, INC. FOR CONFIDENTIAL TREATMENT OF CERTAIN INFORMATION IN THEIR 2020 ANNUAL REPORTS

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LYFT, INC.'S APPLICATION FOR REHEARING OF DECISION DENYING APPEAL OF LYFT, INC. RE: RULING DENYING, IN PART, MOTIONS BY UBER TECHNOLOGIES, INC. AND LYFT, INC. FOR CONFIDENTIAL TREATMENT OF CERTAIN INFORMATION IN THEIR 2020 ANNUAL REPORTS

Pursuant to Commission Rule of Practice and Procedure 16.1, Lyft, Inc. ("Lyft") seeks rehearing of Decision (D.) 22-05-003, Denying Appeal Of Lyft, Inc. Re: Ruling Denying, In Part, Motions By Uber Technologies, Inc. and Lyft Inc. for Confidential Treatment of Certain Information in their 2020 Annual Reports ("Decision"). The Decision, which became effective upon issuance, denied Lyft's appeal of the ruling of the assigned Administrative Law Judge ("ALJ") on Lyft's June 2020 motion for confidential treatment of certain information in its 2020 Annual Report ("Motion"). Unless stayed, the Decision will require disclosure as part of a public version of Lyft's 2020 Annual Report trip data which Lyft has shown is a trade secret and which has profound implications for the privacy of Lyft and its users.[1] Lyft seeks rehearing on the grounds that the Decision contains numerous clear and unmistakable errors of law concerning matters of grave concern to Lyft and the millions of Californians who use Lyft and other Transportation Network Companies ("TNCs") and is unsupported by substantial evidence.

I. INTRODUCTION

Prior to 2020, Transportation Network Company ("TNC") Annual Reports were required to be filed on a confidential basis pursuant to (D.) 13-09-045, footnote 42. In Decision (D.) 20-03-014, the Commission created a "new protocol" for TNCs seeking confidential treatment of information in their Annual Reports, eliminating the presumption of confidentiality and requiring the filing of a motion for confidential treatment ninety days in advance of the Annual Report submission. In accordance with

[1] The categories of trip data required to be disclosed by the Decision include: Census Block of Passenger Drop Off, Trip Requestor Zip Code, Trip Requestor Census Block, Driver Zip Code, Driver Census Block, Trip Request Date/Time (to the second), Miles Traveled (P1), Request Accepted Date/Time (to the second), Request Accepted Zip Code, Request Accepted Census Block, Passenger Pick Up Date/Time (to the second), Miles Traveled (P2), Passenger Pick Up Zip Code, Passenger Pick Up Census Block, Passenger Drop Off Date/Time (to the second), Passenger Drop Off Zip Code, Passenger Drop Off Census Block, Miles Traveled (P3), and Total Amount Paid. This data is referred to herein as the "Trip Data."

that decision, in June 2020, Lyft timely submitted its Motion, accompanied by a declaration under penalty of perjury, requesting confidential treatment of certain data in its 2020 Annual Report. The ALJ granted Lyft's Motion in part, and denied it in part and Lyft appealed the Ruling to the extent it denied confidentiality for Lyft's Trip Data, composed of time-and-date stamped records of the millions of rides completed on Lyft's platform in California during the preceding year. Both Lyft's Motion and its Appeal established that the Trip Data is a compilation of information that derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use, and is the subject of efforts by Lyft that are reasonable under the circumstances to maintain its secrecy. Thus, Lyft established that the Trip Data is a trade secret as defined in Civil Code § 3426.1(d) and is exempt from disclosure under the CPRA. Lyft also demonstrated that although the Trip Data does not identify passengers or drivers by name, it may be combined with other publicly available data to identify specific individuals, retrace their movements over time, and reveal their intimate associations. As a result, public disclosure of the Trip Data would have grave implications for the privacy of Lyft's users.

For the reasons described below, the Decision is unlawful and erroneous. The Commission should grant rehearing and order the reopening of the record for further proceedings consistent with applicable law to correct the legal errors in the Decision as expeditiously as possible.

II. PROCEDURAL BACKGROUND

A. D.20-03-014 Created a "New Protocol" for Seeking Confidential Treatment

In D.13-09-045, the Commission established rules for the regulation of TNCs, including a requirement to submit Annual Reports, and ordered that those reports shall be treated as confidential.[2] For six years, TNC Annual Reports were filed on a confidential basis and shielded from public disclosure. On March 16, 2020, the Commission issued D.20-03-014, eliminating the presumption of confidentiality accorded TNC Annual Reports, and inventing a "new protocol" for requesting confidential treatment of information in Annual Reports applicable only to TNCs. With respect to the evidentiary showing necessary to sustain a claim of confidential treatment, the Commission stated:

> The TNC must provide a declaration (executed with personal knowledge and under penalty of perjury) in support of the legal authority relied on to support the confidentiality claims for Government Code §§ 6254(k) and 6255(a), General Order 66, Civil Code §§ 3426 through 3426.11, Government Code § 6254.7(d), and any other statu[t]e, rule, order, or

[2] D.13-09-045, fn 42.

> decision that the TNC is relying upon to support each claim of confidentiality.[3]

The Commission's protocol did not allow for a hearing on TNC claims of confidential treatment and provides no other guidance regarding what evidence the Commission would consider sufficient to sustain a claim of confidentiality.

Lyft and Uber filed applications for rehearing of D.20-03-014. The Commission denied rehearing in Decision (D.) 21-06-023, but in so doing, clarified, in response to Lyft's argument that TNCs cannot attest to the confidentiality of data that does not yet exist, that "[a] successful demonstration that a particular data category is confidential does not depend upon the existence (or nonexistence) of a particular piece of responsive data."[4] The Commission otherwise left it up to TNCs to determine what showing would suffice to sustain a claim of confidentiality through a motion and declaration. As explained below, the Commission's creation of a new, loosely-defined protocol for claiming confidentiality has generated substantial uncertainty as to what evidence may be considered and the legal standards to be applied to motions for confidential treatment.

B. Lyft Sought Confidential Treatment in Compliance with D.20-03-014, Identifying Each Individual Column for which Confidential Treatment Is Requested and Supporting Each Request with Facts under Penalty of Perjury

1. Lyft's Motion for Confidential Treatment of the Trip Data in Its 2020 Annual Report

In accordance with this new protocol, on June 22, 2020, Lyft filed its Motion with the Commission seeking an order authorizing Lyft to file under seal specified portions of its 2020 Annual Report, and providing a declaration by Brett Collins, Lyft's former Director of Compliance, based on her personal knowledge and executed under penalty of perjury explaining how and why the specified information was subject to protection from public disclosure. The Commission offered no hearing or other means of providing evidence to support Lyft's claims that the information at issue should be withheld from disclosure. Although Lyft filed its Motion ninety days before its 2020 Annual Report was due, given the delay in ruling on Lyft's Motion, on September 19, 2020, Lyft was required to and did submit a full version of its 2020 Annual Report to the Commission, subject to Lyft's pending Motion and reserving all rights.

2. The ALJ's Ruling

[3] D.20-03-014, p. 28-29.
[4] *Id.*, p. 24.

The Assigned ALJ's Ruling On Uber Technologies, Inc.'s and Lyft's Motion For Confidential Treatment of Certain Information in Their 2020 Annual Reports, issued December 21, 2020 ("Ruling"), agreed that certain fields in the TNC Annual Reports were confidential and should be redacted. Specifically, the Ruling determined that "the latitude and longitude of both the driver and rider of a particular TNC trip" should be redacted from TNC Annual Reports, finding "[s]upport for the proposition that this information might be engineered to identify the exact starting and ending addresses of a trip, which can then be combined with other information to identify a driver and/or passenger."[5] The Ruling also concluded, however, that "the balance of the geolocational data (date and time, census block and zip code of both the driver and rider; when the rider is picked up and dropped off; when the driver's app is turned on or the last rider dropped off; time a trip request was made; and when the trip request was accepted on the TNC's app)" presented no privacy concerns.[6] The Ruling cited no evidence to support the distinction between latitude and longitude data, which implicated personal privacy, and the data he ruled did not present any privacy concerns.

3. The Trip Data at Issue

Lyft appealed the Ruling as to the ALJ's denial of confidential treatment of the Trip Data.[7] Specifically, the data fields at issue are as follows:

Report	Field
Requests Accepted	
	VehicleMake
	VehicleModel
	VehicleYear
	AppOnOrPassengerDroppedOffZip
	AppOnOrPassengerDroppedOffTract
	AppOnOrPassengerDroppedOffCB
	AppOnOrPassengerDroppedOffDate
	TripReqRequesterZip
	TripReqRequesterTract
	TripReqRequesterCB
	TripReqDriverZip
	TripReqDriverTract
	TripReqDriverCB
	TripReqDate
	ReqAcceptedDate

[5] Ruling, p. 5. The Ruling did not identify the "support" for this conclusion, however, in its Motion Lyft cited to a number of academic studies and reports finding that mobility data can be used to identify specific individuals and track their movements. The Ruling did not consider the only other evidence on this point – an expert report prepared by Privacy Analytics, Inc. for Uber which is part of the record in the Rulemaking.

[6] *Id.*

[7] Lyft chose not to appeal as to several other categories of data.

	ReqAcceptedZip
	ReqAcceptedTract
	ReqAcceptedCB
	PassengerPickupDate
	PeriodTwoMilesTraveled
	PassengerPickupZip
	PassengerPickupTract
	PassengerPickupCB
	PassengerDropoffDate
	PassengerDropoffZip
	PassengerDropoffTract
	PassengerDropoffCB
	PeriodThreeMilesTraveled
	TotalAmountPaid
Requests Accepted Periods	
	VehicleMake
	VehicleModel
	VehicleYear
	PeriodStartZip
	PeriodStartTract
	PeriodStartCB
	PeriodEndDate
	PeriodEndZip
	PeriodEndTract
	PeriodEndCB
	PeriodMilesTraveled
Requests Not Accepted	
	VehicleMake
	VehicleModel
	VehicleYear
	TripReqDate
	TripReqRequesterZip
	TripReqRequesterTract
	TripReqRequesterCB
	TripRequesterDestinationZip
	TripRequesterDestinationTract
	TripRequesterDestinationCB
	NotAcceptedDate
	NotAcceptedDriverZip
	NotAcceptedDriverTract
	NotAcceptedDriverCB
Assaults & Harassments	
	VehicleMake
	VehicleModel
	VehicleYear

III. ARGUMENT

A. The Decision Is Premised Upon Conflicting Rulings Concerning Whether the Trip Data Is A Public Record

The core holding of the Decision is that the CPRA supports disclosure of the Census Block Trip Data,[8] but this holding is irreconcilable with the Decision's parallel conclusion that TNC Annual Reports cannot be "public records" under Gov. Code § 6252(e) as they are not written by government employees.

After first concluding that the CPRA supports disclosure, the Decision notes that § 6252 of the CPRA defines a public record as a "document written by a public employee" and that Art. I, § 3 of the Constitution refers to "writings of public officials." Decision, p. 15. The Decision then explains that its "interpretation of 'writing' being limited to writings prepared by government employees finds support from *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 619." *Id.*, p. 15-16. Drawing thereon, the Commission holds that "only [when a writing is prepared by a government employee] must the government generated writing shed light on an agency's performance of its duties or otherwise let citizens know what their government is up to," and concludes that "[a]s the trip data in the Annual Reports is prepared by each TNC rather than a Commission employee, it does not appear that Government Code §6152(e) provides Lyft with any legal support for its claim of trip data confidentiality." *Id.* at 16. Although this passage is rather cryptic, by interpreting the term "writing" in § 6252(e) as referring only to writings of public officials and finding that TNC Annual Reports are not writings of public officials, the Decision implicitly holds that Annual Reports are not public records subject to the CPRA – creating a logical disconnect in the Decision's core holding.[9]

The Decision attempts to explain these contradictory rulings by claiming that it was merely distinguishing Lyft's reliance on *City of San Jose*, and that "in making the distinction between an employee generated writing and a writing submitted by a regulated entity, the Commission did not determine that Lyft's Annual Reports were not public records." Decision, p. 101. But the

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[8] Census Block Trip Data is a defined term in Lyft's Appeal, and includes census tract and zip code data.

[9] As Lyft explained in its comments on the Proposed Decision, only public records under § 6252(e) are subject to disclosure under the CPRA or Art. I, § 3. See Gov. Code § 6253(b) ("Public records are open to inspection…"); *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 773 ("The basic rule providing access to public records is contained in section 6253."); *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 616. Thus, by finding that Annual Reports are not public records under § 6252(e), the Decision Commission directly undermines its core holding: that data contained in those reports are subject to disclosure. The Decision's conclusion that Gov. Code § 6252(e) is limited to "documents written by a public employee" also misses the point of Lyft's argument that the Annual Reports are not public records because there is no record evidence that the Annual Report relates to the conduct of the public's business. *See Bd. of Pilot Comm'rs for the Bays for San Francisco, San Pablo, and Suisun v. Superior Court* (2013), 218 Cal.App.4th 577, 594-600. No evidence shows how the Commission actually uses the subject data or how disclosure would shed light on such activity. Thus, they are not a public record.

Commission's attempt to clarify this issue has only further muddied the waters. If the Commission's interpretation of the term "writing" in § 6252(e) is that it is "limited to writings prepared by government employees," then it cannot simultaneously hold that TNC Annual Reports are public records, as they are not prepared by government employees. Among the many reasons rehearing should be granted is for the Commission to correct this clear legal error in the Decision, which creates the impression that the Commission misunderstands the CPRA.

B. The Decision Unlawfully and Erroneously Applies a Uniqueness or Novelty Requirement for Demonstrating Trade Secret That Does Not Exist Under Applicable Law

The Decision introduces a "novelty or uniqueness" requirement that appears nowhere in California law, and on the basis of this nonexistent requirement, finds that Lyft failed to establish its trade secret. As the Decision notes, Civil Code § 3426.1 defines "trade secret" as:

> Information, including a formula, pattern, compilation, program, device, method, technique, or process that:
>
> (1) Derives independent economic value, actual or potential, from not being generally known to the public or other persons who can obtain economic value from its disclosure or use; and
>
> (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

After reviewing these elements, the Decision correctly finds the Trip Data is a compilation, but nevertheless goes on to hold that it is not trade secret because Lyft failed to prove the data is "novel or unique." Decision, p. 32. The Decision cites *Morlife v. Perry* (1997) 56 Cal. App. 4th 1514, 1523 as support for a "uniqueness requirement," but *Morlife* does not require a proponent of a trade secret to show that the secret is novel or unique. Instead, the court in *Morlife* found that a customer list composed of publicly available contact information was a trade secret and that plaintiff need only show the compilation of elements is "not generally known to the public" to "satisf[y] … the first prong of the statutory definition of a 'trade secret.'"[10] The Decision argues that because the court noted the specialized nature of Morlife's roofing business in rejecting an argument that its customer list was not protectable, *Morlife* supports a uniqueness requirement, but in so doing, confuses the requirement that a trade secret be secret (i.e., not generally known) with a requirement that it be unique. *Morlife* noted the specialized nature of Morlife's customer list in rejecting an argument that "there is nothing inherently secret or confidential about Morlife's customer base as all commercial buildings will need either repairs to an existing roof or a new roof." 56 Cal. App. 4th at 1523. In other words, the customer

[10] 56 Cal. App. at 1523.

list would have no value if it was already generally known that every potential customer would need a new roof. Nothing about that holding requires a trade secret claimant to establish that its trade secret is novel or unique, only that it is not generally known to those who would make use of it.

The Decision also cites *US v. Nosal* (9th Cir. 2016) 844 F.3d 1024), but *Nosal* also does not support a uniqueness requirement. The Decision cites the following passage as evidence of a uniqueness requirement:

> Nosal takes the view that the source lists are merely customer lists that cannot be protected as trade secrets. This characterization attempts to sidestep the unique nature of the source lists, which are the customized product of a massive database, not a list of well-known customers.[11]

Again, this quote pertains to the ***secrecy*** element, not some unstated but implied "uniqueness" element. *Nosal* notes the "unique nature" of the source lists to distinguish them from lists that are "well-known" and thus not secret. Nowhere does it purport to create a new and distinct requirement beyond those imposed by the Legislature in § 3426.1.

The Decision also claims to find support for a uniqueness requirement in *Conseco Finance Servicing Corp. v. North American Mortgage Co.* (8th Cir. 2004) 381 F.3d 811, a decision applying Missouri law. The court in that case found that although the lead sheets at issue contained public information, they were not generally known because the computer program that generated them – which, notably, was ***not*** the claimed trade secret – "was uniquely Conseco's." 381 F. 3d, at 819. That is, the court held that the sheets were not generally known, even though they contained public information, because they had been generated by a unique software program. It did not impose a uniqueness requirement, contrary to the Decision's suggestion.

The Decision also curiously relies upon two decisions applying Washington law,[12] but those decisions, like the Decision here, mistake the "not generally known" requirement for a need to show information is unique to be trade secret. Not only do these decisions not apply here, they are bad law and it would be a serious mistake for the Commission to rely upon them. Further, the reliance upon these Washington decisions to justify a uniqueness requirement is particularly problematic here because the Decision declines to follow the holding ***of the Washington Supreme Court*** in *Lyft, Inc., et al., v. City of Seattle* (2018) 190 Wn.2d 769, in which it found that Lyft's Trip Data constitutes a trade

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[11] 844 F. 3d, at 1043.

[12] Decision, p. 37. The two Washington decisions cited by the Decision cite to *Machen, Inc. v. Aircraft Design, Inc*. (Wash. Ct. App. 1992) 65 Wash.App. 319, 332 [828 P.2d 73, 80], which was overruled in *Waterjet Technology, Inc. v. Flow Intern. Corp.* (2000) 140 Wash.2d 313. *Machen* confuses the "not generally known" requirement with the need to show novelty.

secret. Indeed, the Decision ironically attempts to distinguish *City of Seattle* on the grounds that "there was no discussion or finding that the compilation was novel or unique, which is a requirement under California law." Decision, p. 47. That is, the Decision relies upon Washington law as support for a uniqueness requirement in California that does not exist and then rejects the Washington Supreme Court's ruling on the very issue before this Commission on the grounds that Washington has no uniqueness requirement. These utterly contradictory rulings cannot be reconciled.

Contrary to what the Decision states there ***is no novelty or uniqueness requirement*** for trade secret protection. Put simply, "[n]ovelty, in the patent law sense, is not required for a trade secret." *Kewanee Oil Co. v. Bicron Corp.* (1974) 416 U.S. 470, 476; *BladeRoom Group Ltd v. Emerson Elec. Co*. (N.D. Cal. 2018) 331 F.Supp.3d 977, 981, *vacated and remanded* (9th Cir. 2021) 11 F.4th 1010, *and vacated and remanded* (9th Cir. 2021) 20 F.4th 1231 ("Information need not be complex, novel or outside the understanding of a layperson to constitute a trade secret."); *Graduation Solutions LLC v. Luya Ent. Inc.* (C.D. Cal., May 5, 2020, No. CV191382DMGJPRX) 2020 WL 9936697, at *10 ("California courts have found a protectable trade secret even if the concept 'might be evident to a [product's] end user.'"). The Decision faults Lyft for not including the whole of a lengthy quote from *Kewanee,* claiming that

> Lyft has misled the Commission in two material respects: first, it deliberately omitted the language "in the patent sense" between "novelty" and "is not required for a trade secret," thus giving the false impression that novelty is not a requirement for a trade secret claim. Second, Lyft left out the rest of the Supreme Court's comment that "some novelty will be required."

Decision, p. 105. Lyft firmly, but respectfully, disputes that its failure to cite the entire lengthy passage from *Kewanee* is misleading. As an initial, but not insignificant, matter, Lyft notes that the Commission denied Lyft's request to extend the page limit for comments. As a result, Lyft was severely (and in Lyft's view, unfairly) constrained in attempting to adequately address the errors in the 100-plus page Proposed Decision in only 15 pages, forcing Lyft to radically pare back its case citations to the absolute minimum necessary to preserve its arguments. To then criticize Lyft for not being more expansive is neither reasonable nor fair. More substantively and importantly, the portion of the quote omitted by Lyft – "[h]owever, some novelty will be required, if merely because that which does not possess novelty is usually known"[13] – does *not* support a uniqueness requirement, and instead supports precisely what Lyft said in its comments and above; that a trade secret must only "possess at least that

[13] *Kewanee*, *supra*, 416 U.S. at p. 476.

modicum of originality which will separate it from everyday knowledge."[14] That is, a trade secret need not be novel or unique – it simply cannot be generally known. The suggestion that because the omitted language mentions the word "novelty," it was misleading to omit it, is simply further confirmation of the Decision's error in mistaking the need for secrecy for a requirement to be unique. Lyft made precisely this point in its Opening Comments on the Proposed Decision, citing to *Phillips*, *infra*,[15] and including the omitted language would have only further served to bolster that point.

The Decision also attempts to distinguish *Altavion, Inc. v. Konica Minolta Systems Lab., Inc.* (2014) 226 Cal.App.4th 26, 54, in which the Court held that "[n]ovelty and invention are not requisite for a trade secret…," by claiming that it was limited only to cases in which prior art is a component of a claim. But *Altavion* simply affirms what *Kewanee*, *Bladeroom*[16] and other courts have held – that a trade secret need not be novel or unique; it must simply not be generally known by those who would make use of it.

It is no surprise that courts would reject the notion that a trade secret must be novel or unique, because neither the word "novel" nor "unique" appears in the definition of "trade secret" adopted by the Legislature. Civ. Code, § 3426.1(d). And, in fact, the courts uniformly find that a proponent need only show independent economic value and reasonable efforts at secrecy. As the court said in *Gartner, Inc. v. Parikh* (C.D. Cal., Oct. 10, 2008, No. CV 07-2039-PSG) 2008 WL 11336333, at *3:

> [T]wo requirements must be met for information to qualify as a trade secret. First, the information must have independent economic value. Cal. Civ. Code § 3426.1(d)(1). Second, the information must be the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Id. at § 3426.1(d)(2)

Id., at *3; *Get Seen Media Group, LLC, et al. v. Orion Tiller, et al. Additional Party Names: Francis Mustafa, LeadVerticals, Inc.* (C.D. Cal., June 23, 2021, No. 220CV11682JAKPDX) 2021 WL 5083741, at *5 ("Under both federal and California law, trade secret protection has two basic requirements: secrecy, and economic value derived from not being known."); *Softketeers, Inc. v. Regal West Corporation* (C.D. Cal., May 6, 2019, No. SACV19519JVSJDEX) 2019 WL 4418819, at *8, *aff'd in part, remanded in part* (9th Cir. 2019) 788 Fed.Appx. 468 ("Trade secret protection has two

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[14] *Phillips v. Frey*, 20 F.3d 623, 628, 30 U.S.P.Q.2d (BNA) 1755 (5th Cir. 1994).

[15] Comments Of Lyft, Inc. On Proposed Decision Denying Appeal Of Lyft, Inc. Re: Ruling Denying, In Part, Motions By Uber Technologies, Inc. And Lyft, Inc. For Confidential Treatment Of Certain Information In Their 2020 Annual Reports, p. 3.

[16] The Decision also attempts to distinguish *Bladeroom* as limited to expert testimony, but it was not so limited and the fact that the point was made in the context of expert testimony does not alter the fact that a trade secret need not be novel or unique.

basic requirements: secrecy, and economic value derived from not being known."). These cases leave no room for interjection of a uniqueness requirement found nowhere in the statute. Put simply, the Decision orders the destruction of Lyft's trade secret on the basis of a "requirement" which the courts have repeatedly rejected and which finds no support in California law. This is a clear, reversible error.

Compounding the error, the Decision justifies the failure to consider Lyft's evidence on the grounds that "once the assigned ALJ determined that Lyft had failed to carry its burden of proof on the first element of a trade secret claim [the erroneous uniqueness or novelty element], it was not necessary for the ALJ to continue and determine if the additional requirements specified in Civil Code § 3426.1(d) for establishing a trade secret claim had been satisfied."[17] The decision not to consider Lyft's evidence on the basis of a nonexistent uniqueness requirement was a clear error.

Finally, even if California law recognized such a requirement, the Decision cites to no record evidence indicating that Lyft's Trip Data is not novel or unique, and there is no evidence that any person or entity possesses the unique compilation of data elements derived from rides completed on Lyft's platform. The Commission should grant rehearing and reopen the record to correct the clear legal errors in the Decision and allow Lyft's Motion to be considered in accordance with applicable law.

C. The Decision Improperly Affirms the Ruling's Conclusion that Lyft Failed to Establish the Trip Data Has Independent Value

The Decision concludes that Lyft failed to establish the independent value of the Trip Data. The Decision states that "in determining if a trade secret has independent value, the fact finder ***may*** consider if the claimant established the amount of time, money, or labor that was expended in developing the trip data, as well as the amount of time, money, or labor that would be saved by a competitor who used the trip data,"[18] and even acknowledges in response to Lyft's comments that a proponent need not quantify the value of a trade secret,[19] but nevertheless rejects Lyft's trade secret on the grounds that Lyft "fails to quantify the independent value of Lyft's trip data…." Decision, p. 60; *see also* p. 61 ("Ms. Collins assertions lack any quantification regarding the independent value claim and, therefore, falls short of the evidentiary showing required by the Yield Dynamics decision."). These contradictory rulings cannot be reconciled.

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[17] Decision, p. 54; p. 55 (justifying the "Ruling's decision to stop its trade secret analysis after Lyft had failed to satisfy its first evidentiary requirement….").

[18] Decision, p. 58 (emphasis added) (the final decision replaces the word "must" with "may" in response to Lyft's comments, but does not modify the reasoning or hold based upon the Proposed Decision's interjection of the word "must."

[19] Decision, p. 107- 108 ("even if we were to agree with Lyft that the failure to quantify the economic value of the Annual Report data was not fatal to the trade secrecy claim (and we will modify Section 4.2 to reflect that acknowledgement)….").

Elsewhere, the Decision finds that "Lyft failed to establish the content of the secret and its impact on business operations, as well as the value the information would have to others who did not possess it." Decision, p. 108. Lyft is puzzled by the previously unstated contention that Lyft did not establish the "content of the secret," as Lyft precisely identified each field of data of which the trade secret is comprised. *See*, § II(B), *supra*. Equally important, *Yield Dynamics, Inc. v. TEA Systems Corp*. (2007) 154 Cal.App.4th 547, makes clear that a trade secret proponent must merely show the trade secret "is sufficiently valuable and secret to afford an actual or potential economic advantage over others," which "need not be great;" just "more than trivial." *Id.*, at 565. Further the very definition of "trade secret" in the CUTSA provides that the independent economic value does not have to be actual, but may be "potential." Civ. Code £ 3426.1(d)(1). And it is well established that a party may prove independent value by "[d]irect evidence relating to the content of the secret and its impact on business operations" or by "circumstantial evidence [such as]… the precautions taken by the plaintiff to protect the secrecy of the information ..., and the willingness of others to pay for access to the information." *Altavion,* 226 Cal.App.4th at 62. In fact, "there is no requirement that a trade secret have ***any*** value to the defendant; the value can be to others who do not possess it." *Religious Technology Center*, 923 F.Supp. at 1253 (emphasis added). For example, in *Cisco Systems, Inc. v. Chung* (N.D. Cal. 2020) 462 F.Supp.3d 1024, evidence the defendant shared the trade secret with another company in exchange for employment was sufficient to establish independent value. In *Workplace Tech. Research, Inc. v. Project Mngt Inst., Inc.* (S.D. Cal., Oct. 20, 2021, No. 18CV1927 JM (MSB)) 2021 WL 4895977, the court rejected the argument that the plaintiff was required to provide evidence of "the quantifiable value of its trade secrets," finding that although defendant's expert "conceded he had not quantified (or been asked to quantify) the time savings from using PMI's Flows," he "did testify that it was his 'general opinion' PMI's approach would 'accelerate things,' even if by a 'small amount.'" *Id.* at *23-24. Here, Collins' declaration offered in support of the Motion provided a lengthy and detailed explanation as to how the Trip Data is used by Lyft to more effectively target its marketing and promotional efforts— and thereby avoid spending money on ineffective campaigns— and how a competitor could use the data to similar effect. That is all that is required and the Decision errs in demanding some additional unspecified showing.

D. The Decision Engages in Unfounded and Unwarranted Speculation

The Decision also concludes that Lyft did not establish independent value because "[t]here could be other reasons why the passenger picked that particular trip that have nothing to do with Lyft's passenger promotions," and "the release of the trip data will not provide any insights into a Lyft customer's reason for requesting a trip, even if a competitor were to cross reference Lyft's ride

numbers against the Lyft passenger promotions run at that time the trip was requested." Decision, pp. 61-62. This contention directly contradicts the declaration of Lyft's former Director of Compliance, Brett Collins, lacks any supporting evidence, and fails to appreciate the intricacies of marketing data analysis. Analysis of large data sets involves identification of trends and patterns in data to glean broader insights, not analysis of individual instances in isolation.[20]

In response to Lyft's comments, the Decision claims that the Commission was not engaging in speculation, and that it was merely drawing inferences as the trier of fact. Decision, p. 108. What the Decision fails to acknowledge is that its conclusion must be based on substantial record evidence. *Clean Energy Fuels Corp. v. Public Utilities Com.* (2014) 227 Cal.App.4th 641, 649, *as modified* (June 27, 2014). The Decision's supposition that Lyft cannot draw significant conclusions concerning its marketing and promotional efforts by analyzing the Trip Data because there *might* be other reasons why any individual passenger took a particular trip is not supported by any record evidence. Respectfully, it is also contrary to common knowledge and experience, as it is akin to saying, for example, that a seller of soda cannot analyze sales figures before and after a marketing campaign in order to assess the effectiveness of the campaign because the company can never know why any single buyer purchased a can of soda. Such an assertion defies common sense, as data indicating that sales increased by 50% in the aftermath of a marketing campaign is a strong indication of the efficacy of that campaign. The Trip Data is no different. The suggestion that because Lyft cannot know with certainty why any individual took any particular ride does nothing to undermine the value of the Trip Data in evaluating broad trends and sharpening its marketing efforts. The Commission should not sanction the destruction of trade secrets on such an illogical, clearly erroneous, and unsupported rationale.

E. The Decision Errs in Finding that No Other TNC Would Want Access to Lyft's Trip Data

The Decision concludes that Lyft failed to "provide any credible rationale that Lyft's competitors could or would use Lyft's trip data to Lyft's disadvantage." Decision, p. 62. This assertion fails to acknowledge Collins' declaration in which she explained precisely the rationale--it would allow a competitor or would-be competitor to target their own marketing campaigns without having to make the substantial investment of time and money that Lyft has made in developing targeted campaigns. The assertion that there is no credible rationale is also contradicted by the fact that Uber

[20] *See, e.g.*, https://www.investopedia.com/terms/d/data-analytics.asp ("Data analytics techniques can reveal trends and metrics that would otherwise be lost in the mass of information. This information can then be used to optimize processes to increase the overall efficiency of a business or system."). Lyft requests official notice of the foregoing proposition, as one that is of such common knowledge within the jurisdiction of the court that it cannot reasonably be the subject of dispute (Evid. Code § 452(g)) and a proposition not reasonably subject to dispute and capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy (Evid. Code § 452(h)).

also attested under oath that its competitors, including Lyft, would gain an advantage with access to their trip data.[21] Thus, the record as a whole shows Lyft's trip data could and would be used by competing TNCs to their advantage and Lyft's disadvantage, and no contrary evidence exists.

Beyond the foregoing error, the Decision misapplies the law of trade secrets. Trade secrets must merely have value; they need not have value to a competitor. *Altavion,* 226 Cal.App.4th at 62 (value can be shown by willingness of third parties to pay for it); *Religious Tech. Center,* 923 F.Supp. at 1253 (owner need not have current competitors for information to be trade secret). The Decision attempts to distinguish *Religious Technology Center* by pointing out that Lyft "does not cite to any instances like those in Religious Technology Center where former Lyft employees took the trip data in the Annual Reports for their own profit." Decision, p. 110. But Lyft need show only "potential" value. Civ. Code 3426.1(d). It is absolutely not required to provide examples of actual misuse of its trade secret in order to establish the value of its trade secret, and the fact that examples were available in *Religious Technology Center* in no way undermines the holdings of that case, *Altavion*, and others, that a trade secret must merely have "independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use." Civ. Code § 3426.1(d).

The Decision also states: "[t]he Commission is similarly unpersuaded by Lyft's attempts to rely on secondary sources to establish its claim that the trip data has acquired independent value. Lyft cites to articles and reports that allegedly analyze the monetary value of mobility data." Decision, p. 65. The Decision refuses to consider this evidence on the grounds that Lyft "failed to submit any declarations from the authors of these reports and studies," and "Ms. Collins (sic) is not the author of these reports and studies so she cannot authenticate them." *Id.* Neither is a proper basis to exclude this evidence. To be clear, in referring to sources "analyzing the monetary value of mobility data," the Decision references sources cited in the declaration of Alix Rosenthal (submitted with Lyft's motion for confidential treatment of certain data in its 2021 Annual Report and referenced in Lyft's Appeal on its 2020 Motion) rather than the Collins declaration (submitted with Lyft's 2020 Motion). It is Rosenthal that attests to the emergence of an active marketplace for the licensing of vehicle-related mobility data, such as the Trip Data here, and further that "Lyft has been approached by at least one company, who is not a competitor, which has inquired about purchasing access to anonymized trip data, or portions

[21] Motion Of Uber Technologies, Inc. For Leave To File Confidential Information Under Seal, p. 18; Declaration Of Peter Sauerwein Pursuant To Decision 20-03-014 On Behalf Of Uber Technologies, Inc., *passim*.

thereof."[22] Rosenthal's declaration is based on her own personal knowledge and expertise in the industry and she is wholly capable of authenticating these sources. Moreover, authentication can be accomplished through a variety of methods sufficient to show that "the writing is actually what its proponent claims it to be." *Osborne v. Todd Farm Service* (2016) 247 Cal.App.4th 43, 53; Evid. Code § 1401. Indeed, as the court in *People v. Valdez* (2011) 201 Cal.App.4th 1429, 1435 explained, "[t]he author's testimony is not required to authenticate a document (§ 1411); instead, its authenticity may be established by the contents of the writing (§ 1421) or by other means." It is simply incorrect to conclude that Lyft must submit a declaration from the author of an article or website to establish that it is what Lyft purports it to be.

The Decision appears to acknowledge that it referred to the Rosenthal declaration in response to Lyft's comments, but nevertheless claims it "was appropriate to cite to the Collins Declaration as being legally insufficient to authenticate these secondary sources" cited by Rosenthal. Decision, p. 111. Lyft does not understand this contention, as it fails to address whether the sources are authenticated by Rosenthal. The Commission must clear up this confusion.

The Decision next claims that "Lyft cannot hope to bootstrap itself around its hearsay problem by trying to elevate either the Collins or Rosenthal declarants as experts who can rely on hearsay evidence to inform their opinions." Decision, p. 111. This statement is even more perplexing, as the Decision did not cite the hearsay rule as a basis to exclude this particular evidence; instead, it cited only a lack of authentication. *See*, Decision, p. 65-66. But authentication and hearsay are not the same thing. *People v. Dawkins* (2014) 230 Cal.App.4th 991, 1004 ("the issues of hearsay and authentication are independent of one another."), *as modified* (Oct. 21, 2014). The Commission thus creates an entirely new basis for excluding Lyft's evidence without allowing Lyft any opportunity to address that basis in comments on the Proposed Decision. In this respect, the Decision denies Lyft an opportunity to be heard.

Equally important, to the extent the Decision relies upon the hearsay rule to exclude Lyft's evidence in support of trade secret, as explained in Section H below, it acts contrary to Commission rules and precedent and misapplies the hearsay rule. The Commission should grant rehearing and reopen the record to allow for consideration of this evidence in accordance with law.

F. The Decision Erroneously Finds that Lyft Did Not Take Reasonable Efforts to Ensure Secrecy of Its Trip Data

[22] Declaration of Alix Rosenthal, at ¶ 9. As the Decision refers to this evidence, Lyft requests official notice of Lyft's 2021 motion for confidential treatment and supporting declaration, which has been lodged in the docket of this rulemaking and is thus a record of a proceeding subject to notice under Evid. Code § 452(h) and Rule of Pract. and Proc. 13.10.

The Decision errs again when it affirms the ALJ's conclusion that Lyft did not demonstrate reasonable efforts to maintain the secrecy of its Trip Data. The efforts described in the Collins declaration are precisely the kind that courts routinely find reasonable. *See, e.g.*, *Religious Technology,* 923 F.Supp. at 1253 ("'Reasonable efforts' can include advising employees of the existence of a trade secret, limiting access to the information on a 'need to know basis,' [citation] requiring employees to sign confidentiality agreements, [citation], and keeping secret documents under lock."). The Decision rejects the Collins declaration as insufficient on the grounds that a Lyft driver "knows what zip code from which the proposed ride originates and where it will terminate, and with that information the Lyft driver can determine the census block from where the ride commences and terminates." Decision, p. 69. It goes on to posit that secrecy of the Trip Data is destroyed because of "Lyft's failure to establish that its drivers must sign an exclusivity driving agreement as well as a nondisclosure agreement undermine the trade secret claim since the Lyft drivers are being provided with unrestrained access to alleged trade secret trip data," [*Id.*] but the courts have long held that compilations are protectable as trade secrets even though individual components are in the public domain.[23] The fact that a particular driver or passenger may have access to select information regarding ***their own*** rides (e.g., origination zip code or census block) does not mean the trade secret – *i.e.*, the collection of data elements from millions of rides – has become "generally known." *Religious Technology Center*, 923 F.Supp. 1231, 1255 ("disclosures that describe parts of the works or disclose isolated portions do not necessarily suffice to ruin the value of the entire works as secrets.").

Similar to the Decision's contention here, in *San Jose Construction, Inc. v. S.B.C.C., Inc.* (2007) 155 Cal.App.4th 1528, SBCC argued that project binders containing a complete set of bid materials for a construction project could not be trade secret because the bid materials were collected from third party subcontractors, each of whom had access to their own bids and pricing information. The court rejected that argument, explaining that "only SJC had the completed puzzle for each project, contained in the Project Binders.... No third party had it. The subcontractors each had a piece, and the owners had a piece, but no one except SJC had it all." 155 Cal.App.4th 1528, 1539; *see also id.*, at 1542 ("But here, as we have observed, that the binders contained individual components generated by or disclosed to third parties does not mean that the project proposal as a whole was available to each

[23] *See, e.g.*, *Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1522 (customer lists that are not generally available to the public are protected as trade secrets under California law though each customer is aware it is a customer); *Religious Technology Center,* 923 F.Supp. at 1253 (collection of teaching materials protectable as trade secret, even though certain components publicly disclosed); *Mattel*, 782 F.Supp.2d at 972.

individual contributor."). Likewise here, although an individual driver or passenger has information concerning their own rides, none have all of the pieces which make up the completed puzzle.[24]

The Decision attempts to justify this error by stating that "[w]hat the driver and passenger have unfettered access to is more than the partial disclosures of information in *Religious Technology* and *San Jose Construction*." Decision, p. 113. Not only is this assertion not accurate – in both of those cases, certain elements of the larger compilation were publicly disclosed – but it reveals the Decision's confusion as to what is claimed as a trade secret. Lyft does not claim data in connection with any particular ride as a trade secret, but rather that its trade secret is the compilation of data associated with millions of rides completed on the Lyft platform–it is the compilation of this data that is secret. There is no record evidence whatsoever that anyone other than Lyft has access to that data. It is clear error for the Commission to conclude that simply because any one driver or passenger has access to certain information concerning their own trips, Lyft failed to demonstrate the secrecy of its Trip Data reflecting every ride completed in the State of California during the reporting period.

G. The Decision Errs in Finding that Preserving Lyft's Trade Secret Would Work an Injustice

The Decision correctly acknowledges that the privilege protecting trade secrets may only be overcome if it would conceal fraud or work an injustice, but erroneously holds that preservation of TNC trade secrets would work an injustice. The Decision first misstates the burden of proof, holding that "the moving party must prove that the 'allowance of the privilege will not tend to conceal fraud or otherwise work injustice.'"[25] This is incorrect. As stated in *Bridgestone/Firestone, Inc. v. Superior Court* (1992) 7 Cal.App.4th 1384, 1393, the burden is on the proponent to establish the existence of a trade secret, but once established, the ***burden shifts*** to the party seeking access to the trade secret to show that nondisclosure would work an injustice. *See also Davis v. Leal* (E.D. Cal. 1999) 43 F.Supp.2d 1102, 1110. The Decision attempts to explain this error by positing:

> Apparently, Lyft thinks that by "moving party" the Commission is referring to Lyft. It is not. By "moving party," the Commission is referring to the party moving for access to information protected by an established trade secret privilege. As such, "moving party" and "party seeking access" are one in the same so the Commission stands on its earlier analysis as to the allocation of the burden of proof.

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[24] Indeed, even if Lyft ***had*** disclosed its entire Trip Data database to an individual driver or passenger, that alone would not destroy its trade secret. The law is clear that the disclosure of a trade secret to one or a few individuals will not preclude trade secret status in the absence of evidence that the secret has become "generally known." *Religious Technology Center*, 923 F.Supp. 1231, 1255 ("Such a disclosure, without evidence that the secrets have become generally known, does not necessarily cause RTC to forfeit its trade secrets.").

[25] Decision, p. 72.

Decision, p. 113-114. Respectfully, this explanation does nothing to correct the error. If by "moving party" the Decision means a local governmental agency or other person seeking access to TNC Trip Data, it makes no sense to say that such party must "prove that the 'allowance of the privilege will not tend to conceal fraud or otherwise work injustice.'" A ***proponent*** of the release of trade secret data would never argue that ***preservation*** of the privilege will not work an injustice. Under *Bridgestone*, the burden on the proponent seeking release of trade secret information is to show that preservation ***would*** work an injustice. The Decision does nothing to correct its fundamental error and instead creates more confusion.

Equally important, the Decision entirely fails to acknowledge that under *Bridgestone* an agency must consider less intrusive alternatives to public disclosure, including whether a protective order would suffice to prevent injustice. 7 Cal.App.4th at 1393 ("[I]n the balancing process the court must necessarily consider the protection afforded the holder of the privilege by a protective order as well as any less intrusive alternatives to disclosure proposed by the parties."). The Decision fails even to consider whether alternatives exist and thereby commits further clear error.

The Decision next errs in finding that not sharing the data with local governmental agencies would constitute an injustice, citing comments filed by the San Francisco Municipal Transportation Agency ("SFMTA") in this proceeding. Whether the SFMTA would benefit from free access to Lyft's trade secret information is not relevant in determining whether to grant Lyft's request for confidential treatment of its Trip Data. Decisional law makes clear that a desire by local governmental agencies to obtain free access to trade secret data does not qualify as an injustice. In *Bridgestone*, the court held that "[a]llowance of the trade secret privilege may not be deemed to 'work injustice' within the meaning of Evidence Code §1060 simply because it would protect information generally relevant to the subject matter of an action or be helpful to preparation of a case." 7 Cal.App.4th at 1393. In that case, the estate of a woman killed in a car accident arising from the defendant's tire sought disclosure of the chemical formula used in manufacturing on the grounds that it would assist the plaintiff's expert in establishing why the tire failed. The court held that to overcome the trade secret claim, plaintiff must prove that the formula was both "relevant and necessary" to her claim and "essential to a fair resolution of the lawsuit." *Id.*, at 1393. Although plaintiff's expert "gave specific examples of the manner in which formulas were helpful in evaluating the reasons why tire components fail," and "explained, from his own experience and that of others in the field, how information like that sought by real parties was important in an analysis and proof of why a tire failed," the court refused to order disclosure, finding that access to the formula was not essential to that analysis. *Id.*, at 1396-97.

In the few cases where courts have found injustice, the courts impose a very high bar. In *State Farm Fire & Casualty Co. v. Superior Court* (1997) 54 Cal.App.4th 625, 651, *as modified* (May 1, 1997), the court so held only because the crime-fraud exception vitiated both the attorney client privilege and the trade secret privilege, and the trade secret was essential to the dispute. That is not so here. In *Uribe v. Howie* (1971) 19 Cal.App.3d 194, the court declined to allow concealment of the composition of pesticide sprays because the information was necessary to "study the long range effects of pesticides on humans, and in the treatment of present illnesses traceable in whole or part to exposure to these chemicals." *Id.*, at 210. Thus, only because the data was necessary to preserve human health was it appropriate to require disclosure.

Here, the Decision concedes that TNC Trip Data is not essential. As stated in party comments, local governmental agencies have access to alternative data but would prefer to have the Commission seize Lyft's Trip Data and turn it over to them at no cost. The Ruling quotes SFMTA's admission that "[w]ithout TNC data, SFMTA transportation planners must rely instead on anecdotal information to fill the gap," and that "[c]reating public policy on factual, real time data, is clearly preferable."[26] In fact, the SFMTA concedes that it has alternate sources to TNC transportation data. The San Francisco County Transportation Authority ("SFCTA") prepared a highly detailed analysis of the impact of TNCs in San Francisco in 2018, called "TNCs and Congestion,"[27] in which SFCTA explained that it gathered data from a variety of sources, including data concerning "observed roadway conditions … derived using the GPS- and fleet-based speed data licensed from [a company called] INRIX,"[28] as well as "San Francisco's travel demand model, SF-CHAMP, [which] produces estimates of traffic volumes on all roads in San Francisco and requires inputs describing factors such as population, employment, and multi-modal transportation network capacity and performance."[29] Although SFCTA admits it could access alternative sources of data, it made clear that it did not think it should have to pay for the data, stating that "[t]he veil created by footnote 42 forced the TA to allocate hundreds of professional staff hours and tens of thousands of dollars to find alternative sources of data to inform its recent analysis of the impact of TNC service on traffic congestion in San Francisco."[30] As shown in

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[26] Ruling, p. 57.

[27] Opening Comments of the San Francisco Municipal Transportation Agency, San Francisco County Transportation Authority, San Francisco City Attorney's Office, and San Francisco International Airport To Phase III.C Scoping Memo And Ruling Of Assigned Commissioner: Track 3 – TNC Data ("SF III.C Comments") p. 10; TNCs and Congestion, at https://www.sfcta.org/sites/default/files/2019-05/TNCs_Congestion_Report_181015_Finals.pdf

[28] *See* TNCs and Congestion, p. 13, for a detailed description of the data obtained by SFTCA.

[29] *Id.*, p. 14.

[30] SF III.C Comments, p. 10.

Bridgestone, *State Farm* and *Howie,* however, the mere fact that it is preferable to confiscate TNC Trip Data that is trade secret rather than to have to pay for it elsewhere is patently insufficient.

Even more concerning, the Decision also attempts to bolster its finding on an injustice by citing *City and County of San Francisco v. Uber Technologies, Inc.* (2019) 36 Cal.App.5th 66, 73-74 for the proposition that "a municipality's interest in obtaining a TNC's trip data goes beyond environmental and infrastructure matters."[31] However, that decision merely illustrates the Ruling's dangerous implications. In *Uber Technologies, Inc.*, the City Attorney issued administrative subpoenas demanding that Uber produce Annual Reports, and Uber objected arguing production would impinge on the privacy of users and Uber's trade secrets. The court held the City Attorney "has a broad right to investigate, including the use of subpoenas, when it suspects an entity operating within its jurisdiction is violating the law" and that "[t]he subpoenaed items are relevant to an investigation of possible violations of law." 36 Cal.App.5th 66, 73–74, 75. The court did ***not*** find that Uber's Annual Reports should be publicly disclosed. Instead, the court acknowledged Uber's confidentiality interests and held that those interests could be preserved by a stipulated protective order which ***expressly required*** the city to withhold the Annual Reports under the CPRA. *Id.*, at 83.

Worse still, the Decision goes on to assert that "[s]everal investigations into whether a TNC such as Lyft is operating in violation of various state and local laws would be stymied if governmental entities could not review the relevant trip data. Accordingly, assuming that the trip data was a trade secret, keeping that trip data private is outweighed by the injustice inflicted on governmental entities who would be denied access to trip data." Decision, p. 76. That is, the Decision holds that although municipalities may obtain TNC data in support of a legitimate investigation into criminal or regulatory violations, an injustice would be "inflicted" upon them if they were not allowed to circumvent the due process limitations imposed on administrative or other subpoenas,[32] or had to agree to protect trade secrets under a protective order. In *Carpenter v. U.S.* (2018) 138 S.Ct. 2206, the Supreme Court warned against precisely this concern – warrantless fishing expeditions by law enforcement into a database of vehicle location data collected by a private company. *Id.* at 2218. The contention that Lyft's Trip Data must be disclosed for use by governmental entities in warrantless fishing expeditions in search of potential wrongdoing is contrary to law, including fundamental constitutional rights, and ominous in its implications.

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[31] PD, pp. 74-76.

[32] *City and County of San Francisco v. Uber Technologies, Inc.* (2019) 36 Cal.App.5th 66, 74 (administrative subpoena must (1) relate to an inquiry which the administrative agency is authorized to make; (2) seek information reasonably relevant to that inquiry; and (3) not be too indefinite).

The Decision disputes the foregoing by claiming that the decisional law on whether protection of a trade secret would work an justice does not, in fact, "impos[e] a high bar." Decision, p. 114. In particular, the Decision argues that *Bridgestone*, *State Farm*, and *Uribe* set a low bar, despite the fact that *Bridgestone* held the information must be "essential to a fair resolution" and denied access even where the expert testified it was necessary to determine the cause of the decedent's death, *State Farm* found that the crime-fraud exception vitiated the privilege, and *Uribe* found the pesticide data necessary to preserve human life. The Decision's assertion that the decisional law sets a low bar for destruction of trade secrets is irreconcilable with those decisions, and thousands of others, and would have the effect of eviscerating the property rights of regulated entities in violation of the Takings Clause of the Fifth Amendment to the Constitution.[33]

Furthermore, the Decision fails to address, or indeed even acknowledge, the fact that the court in *City and County of San Francisco v. Uber Technologies* based its ruling on a city's power to conduct a properly predicated criminal investigation and expressly conditioned its decision on the fact that a protective order was in place that specifically precluded production of Uber's data in response to a CPRA request. The Decision's reliance upon that decision is clear error.

H. The Decision Errs in Excluding Evidence of a Privacy Invasion on Hearsay Grounds

To demonstrate that disclosure of Trip Data would invade user privacy, Lyft submitted a variety of evidence, including: (1) US Health and Human Services administration regulations; (2) Congressional testimony of the Director of the Federal Trade Commission's Bureau of Consumer Protection; (3) official publications of the United States Census Bureau describing census blocks and the Bureau's Disclosure Avoidance Modernization project (designed to minimize the privacy risk of disclosing census-block level data); and (4) academic studies, including one by Massachusetts Institute of Technology data scientists entitled "The Tradeoff Between the Utility and Risk of Location Data and Implications for Public Good,"[34] speaking directly to the risks of disclosing mobility data at the level of granularity proposed by the Decision. The Decision dismisses all of this evidence as "inadmissible hearsay" and further questions why Lyft "did not follow the procedure of procuring declarations under oath to support their conclusions, or why declarations were not secured from the authors of the testimony, paper, and Health Insurance Portability and Accountability Act rules and submitted along with Lyft's Motion." Decision, p. 97. The Decision misconstrues the hearsay rule and

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[33] . The U.S. Supreme Court has recognized a property interest in trade secrets, even when the trade secrets are required to be submitted to a regulatory agency. *Ruckelshaus v. Monsanto Co.* (1984) 467 U.S. 986, 10024

[34] 2021 Motion, pp. 28-31.

contravenes its own rules and precedent. If allowed to stand, the Decision would result in a denial of due process. *App. of Pac. Gas & Elec. Co. for 2013 Rate Design Window Proceeding (U39e)* (June 11, 2015) 2015 WL 3879847, *12 ("It would be unlawful for the Commission to entirely exclude evidence on one side touching on an essential matter at issue, as this would amount to a denial of due process of law.").

First, reliance on the hearsay rule to exclude evidence is directly inconsistent with D.20-03-014, which created a "new protocol" that requires submissions of only a declaration and allows no hearing, leaving TNCs with no choice but to rely upon hearsay. Hearsay is any "statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." Evid. Code § 1200. With no hearing, all evidence offered for its truth is hearsay. In fact, D.20-03-014 expressly ***requires*** that TNCs rely on hearsay, by requiring a written declaration, which is a classic form of hearsay. *Rushing v. Neuschmid* (N.D. Cal., May 12, 2020, No. 18-CV-02351-BLF) 2020 WL 2404666, at *33, citing *In re Fields*, 51 Cal. 3d 1063, 1070 (1990) ("[A]n out-of-court declaration is hearsay, and unless subject to some exception permitting it to be admitted, should be excluded upon timely and proper objection."); *Fortune v. Fortune* (Fla. Dist. Ct. App. 2011) 61 So.3d 441, 445 ("The affidavit, an out-of-court statement offered to prove the truth of the matter asserted, is the most basic form of hearsay."). The Decision's rejection of Lyft's evidence as hearsay also contradicts longstanding Commission precedent and the Commission's own Rules of Practice and Procedure, which recognize that "hearsay evidence is admissible in Commission proceedings…." D.99-01-029, 84 CPUC 2d 698 (Jan. 20, 1999); D.99-01-029 (accepting into evidence a form submitted to the Securities Exchange Commission and explaining "[t]he Commission generally allows hearsay evidence if a responsible person would rely upon it in the conduct of serious affairs."); *see also The Utility Reform Network v. Public Utilities Com*. (2014) 223 Cal.App.4th 945, 959–960 ("The Commission's own precedent establishes that hearsay evidence is admissible in its proceedings.").

The Decision further fails to recognize that much of the evidence identified as "inadmissible hearsay" is not hearsay at all, as it is not submitted for the truth of the matter asserted. *People v. Turner* (1994) 8 Cal.4th 137 ("[A]n out-of-court statement is admissible if offered for a nonhearsay purpose—that is, for something other than the truth of the matter asserted—and the nonhearsay purpose is relevant to an issue in dispute."). The evidence cited above is submitted not for the truth of any particular statement asserted therein but as circumstantial evidence of the privacy implications of releasing even granular location data. Additionally, even if certain evidence did constitute hearsay, numerous exceptions are recognized; for example, where indicia of trustworthiness are present or

where the veracity of the declarant is of less concern. *People v. Cudjo* (1993) 6 Cal.4th 585, 608, *as modified on denial of reh'g* (Feb. 9, 1994) ("Because the rule excluding hearsay is based on these particular difficulties in assessing the credibility of statements made outside the jury's presence, the focus of the rule's several exceptions is also on the reliability of the out-of-court declaration. Thus, the various hearsay exceptions generally reflect situations in which circumstances affording some assurance of trustworthiness compensate for the absence of the oath, cross-examination, and jury observation."). Here, the Decision simply declared all of Lyft's evidence "inadmissible hearsay," without analyzing the evidence, the purpose for which it was submitted, and whether it falls within a recognized exception. This is particular unfair, and unlawful, where the Commission has created an entirely new and loosely-defined procedure out of whole cloth which nowhere purports to preempt longstanding Commission rules and precedent on consideration of hearsay.

For example, the Decision refuses to consider ***duly promulgated federal regulations***, going so far as to fault Lyft for not obtaining a declaration from the "author" of the "Health Insurance Portability and Accountability Act rules." Decision, p. 83. It cannot seriously be maintained that Lyft must obtain a sworn declaration from the Secretary of the Department of Health and Human Services in order to have the Commission consider federal HIPAA regulations. In any event, the rules are not even hearsay, as they are not offered for the truth of any assertion therein, but as circumstantial evidence of the federal government's concern that even data aggregated at a level far beyond what is contemplated here carries a significant risk of re-identification. Nor are the official publications of the US Census Bureau, which provide statistics on census block population and describe the Bureau's 2020 Disclosure Avoidance Modernization project, inadmissible hearsay. They are official US government publications and thus constitute non-hearsay public records under both state and federal law.[35] A finder of fact is entitled to presume that a public report is authentic and trustworthy, as public officials are presumed to perform their duties properly without motive or interest other than to submit accurate and fair reports. *See Gilbrook v. City of Westminster,* 177 F.3d 839, 858 (9th Cir. 1999); *Johnson v. City of Pleasanton,* 982 F.2d 350, 352 (9th Cir. 1992). As a result, cross-examination is unnecessary to test their credibility. *Ibid*. Furthermore, the Census Bureau records are offered not for the truth of any particular statement made therein, but as circumstantial evidence of the Bureau's acknowledgement of the serious privacy implications of disclosing data at the census block

[35] See Fed. Rule of Evid. 803(8) (public records); 803(17) (compilations or publications relied upon by people in certain occupations); Ca. Evid. Rule 1280 (record by public employee); Ca. Evid. Rule 1340 (published compilation relied upon as accurate by business); See *Gilbrook v. City of Westminster*, 177 F.3d 839, 858 (9th Cir. 1999) (A trial court is entitled to presume that a public report is authentic and trustworthy.)

level. Finally, official government statistics and publications are the kinds of documents upon which responsible people rely, and are thus properly considered by the Commission. *People v. ConAgra Grocery Prods. Co*., 17 Cal. App. 5th 51, 138 (2017) ("…if the documents that are being proffered are the product of a public agency, they will be admitted as an exception to the hearsay rule under Evidence Code Section 1280. That's a general proposition I don't think anyone can argue with.").

Moreover, although the official congressional testimony of the Director of the Federal Trade Commission's Bureau of Consumer Protection is technically hearsay, the testimony of a high ranking government official under oath and penalty of prosecution for lying to Congress constitutes an admissible public record. *Nelson v. Gaunt*, 125 Cal. App. 3d 623 (1981) (admitting testimony of public health official concerning dangers of silicone in malpractice suit concerning silicone breast implants). Even if it were not, it is certainly the kind of evidence upon which responsible persons would rely and is therefore admissible under Commission precedent. Yet, the Commission makes no effort at all to determine its provenance or assess its reliability.

Similarly, although the academic studies cited by Lyft, such as the published research report by MIT data scientists, are hearsay, the reports were prepared by leading scientists whose methods and assumptions are documented therein, and whose accuracy and reliability can be fairly evaluated by the Commission and accorded the weight appropriate thereto. This is significant because the reason administrative agencies are allowed to rely upon hearsay is that they are presumed to be more sophisticated than juries and can assess the appropriate weight to be accorded such evidence. *The Utility Reform Network v. Public Utilities Com.* (2014) 223 Cal.App.4th 945, 959–960 ("Administrative agencies like the Commission are given more latitude to consider hearsay testimony than are courts (ibid.), in part because 'factfinders in administrative proceedings are more sophisticated than a lay jury.'"); *Re Landmark Communications, Inc.* (1999) 84 C.P.U.C.2d 698, 701 (Commission can weigh hearsay evidence along with all other evidence); *cf. People v. Veamatahau* (2020) 9 Cal.5th 16, 29 ("As these examples make clear, an expert may consult specific sources in a case — a textbook, a treatise, or an academic paper — and supply the information found therein to the jury as background information without running afoul of the hearsay rules."); *People v. Bui* (2001) 86 Cal.App.4th 1187, 1196 ("Logan relied on scientific literature, statistical data, and an epidemiological study, all of which are the type of matter that reasonably may be relied on by an expert in forming an opinion."). The Decision's refusal to even address whether this evidence is of a type upon which serious people might rely unlawfully and erroneously misapplies from established Commission precedent without any reasoned explanation.

The Decision attempts to justify its refusal to consider Lyft's evidence by claiming that "Lyft has confused the evidentiary standard it must satisfy to substantiate a claim of privilege. D.20-03-014 did not provide TNCs with no other option but to rely on hearsay evidence." Decision, p. 117. This is simply not accurate. As Lyft explained, hearsay is any statement not made at the hearing and submitted for the truth of the matter asserted, including the declaration required by D.20-03-014. The Decision then goes on to again confuse the need to authenticate a document with the rule against hearsay, stating:

> The problem that Lyft is facing is one of authentication of the various studies and publications that its declarant did not author and does not have personal knowledge of the truth of their contents. Had Lyft obtained declarations from the authors of these studies, it would have overcome the hearsay evidentiary threshold and the Commission could have considered this evidence.

Decision, p. 117. First, as explained, authentication and hearsay are entirely distinct concepts which the Decision repeatedly confuses. Second, as Lyft has explained, one need not be the author of an article to authenticate it. *Valdez*, 201 Cal.App.4th 1429, 1435 ("[t]he author's testimony is not required to authenticate a document (§ 1411); instead, its authenticity may be established by the contents of the writing (§ 1421) or by other means."). Third, a declaration from the author of these articles would not solve any hearsay problem, as a declaration is a classic form of hearsay. *Rushing*, 2020 WL 2404666, at *33, citing *In re Fields*, 51 Cal. 3d 1063, 1070 (1990) ("[A]n out-of-court declaration is hearsay, and unless subject to some exception permitting it to be admitted, should be excluded upon timely and proper objection."); *Fortune,* 61 So.3d 441, 445 ("The affidavit, an out-of-court statement offered to prove the truth of the matter asserted, is the most basic form of hearsay."). The Decision's refusal to consider Lyft's evidence on an essential issue – the grave privacy implications of the Decision to the millions of Lyft's users – based upon an incorrect reading of the hearsay rule is a clear and unmistakable error and a clear denial of due process. *App. of Pac. Gas & Elec. Co. for 2013 Rate Design Window Proceeding (U39e)* (June 11, 2015) 2015 WL 3879847, *12 ("It would be unlawful for the Commission to entirely exclude evidence on one side touching on an essential matter at issue, as this would amount to a denial of due process of law.").

The Commission further confuses matters by stating:

> Nor does our decision not to consider unauthenticated hearsay contradict D.21-06-023, as Lyft wrongly suggests. Lyft quotes the following statement from D.21-06-023: "[a]successful demonstration that a particular data category is confidential does not depend upon the existence (or nonexistence of a particular piece of responsive data."

Decision, pp. 117-18. Respectfully, the Decision plainly misunderstands Lyft's point. Lyft cited to that quote from D.21-06-023 not with respect to the hearsay rule, but in response to the Decision's erroneous conclusion that it would not consider the official Census Bureau documents because Lyft failed to show that any particular rides ended in low-population census blocks.[36] Lyft did indeed argue that the Decision's refusal to consider hearsay was inconsistent with D.21-06-023, and D.20-03-014, but it did so because they ***require*** TNCs to rely upon hearsay – not based on the quote above. The Decision misapprehends Lyft's argument and therefore creates a muddled and confusing record.

I. The Decision Improperly Excludes Purported Extra-Record Evidence While Itself Relying on Such Evidence

The Decision rejects Lyft's reference to the expert report by Privacy Analytics, Inc. proffered by Uber, asserting that "[t]he evidentiary record consists of all evidence that the moving party proffers for the assigned ALJ to rule on the moving party's request," and that "the PAI report is not part of Lyft's evidentiary record." Decision, p. 98. The Decision cites no authority holding that the record of a proceeding includes only evidence submitted by the moving party, and it is commonly understood the record of a proceeding includes all evidence submitted or considered in that proceeding. *See, e.g.*, *Consolidated Irrigation Dist. v. City of Selma* (2012) 204 Cal.App.4th 187, 199 (record consists of evidence "presented to or considered by the decision makers…"); *cf.* Pub. Resources Code, § 21167.6 (defining record of proceeding to include all materials submitted to or considered by agency). The proceeding here is this rulemaking and the expert report of Privacy Analytics was proffered by Uber in this rulemaking. Equally important, the Commission itself violates "the principle that it will not consider evidence that is not part of the evidentiary record," [Decision, p. 99], by citing to ***extra-record evidence***, including a 2013 Lyft filing and a prior SFMTA filing. *See, e.g.*, Decision, p. 74. The Decision cannot lawfully restrict the record for Lyft's proffered evidence while introducing its own extra-record evidence to support its desired conclusions.

The Decision attempts to justify this undue restriction of the record by citing to the Evidence Code provision allowing a court to offer a limiting instruction. Decision, p. 119. That rule is of dubious relevance here, but in any event, it fails entirely to address the arbitrariness of the Commission's restriction on Lyft's ability to cite record evidence while itself relying upon extra-record evidence.

J. The Decision Errs in Failing to Recognize the Grave Privacy Concerns Presented by Disclosing a Massive Database of Even Coarse Location Data

[36] The Decision refuses to consider US Census Bureau publications on the ground that Lyft "does not claim that any of its TNC drivers travel from or to census blocks with few to no individuals and that those trips are part of the information provided to the Commission in Lyft's 2020 Annual Report." Decision, p. 96-97.

Of significant and broad concern, the Decision erroneously fails to acknowledge that an invasion of privacy can occur even where an individual's identity must be inferred from the data, which is the case with the highly detailed locational Trip Data.

For example, in *Sander v. Superior Court,* 26 Cal. App. 5th 651 (2018), a researcher sought to compel the State Bar to produce "individually ***un***identifiable records for all applicants to the California Bar Examination from 1972 to 2008 in the following categories: race or ethnicity, law school, transfer status, year of law school graduation, law school and … GPA, LSAT scores, and performance on the bar examination." *Id.*, at 658 (emphasis added). Plaintiffs sought no names, addresses or other personally identifiable information and argued that "making these records available to the public in a manner that protects the applicants' privacy and anonymity" would allow study of bar passage rates between racial and ethnic groups. The State Bar refused, saying the data might be re-identified. Although Plaintiffs proposed various de-identification protocols, the Court of Appeal upheld the State Bar's refusal, affirming the determination that "individual applicants may be identified from the data" and further holding that the CPRA does not require manipulation of data to prevent re-identification. *Id.* at 665.

In *Carpenter*, the Supreme Court likewise warned of the dangerous consequences of allowing access even to coarse location data where the data chronicles an individual's movements over time. At issue was whether the defendant had a reasonable expectation of privacy in Cell-Site Location Information ("CSLI") collected by a mobile carrier. The Court explained that even where data is collected by "leverag[ing] the technology of a wireless carrier,… an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI." *Id*. The Court rejected the government's contention that CSLI presented no privacy concerns because it is "less precise than GPS information" and sufficient only to place the defendant "within a wedge-shaped sector ranging from one-eighth to four square miles" – essentially the same as a census block – but the Court disagreed, "reject[ing] the proposition that 'inference insulates a search'" and noting that "[f]rom the 127 days of location data it received, the Government could, in combination with other information, deduce a detailed log of Carpenter's movements,…" *Id.* at 2218. "[T]he time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his "familial, political, professional, religious, and sexual associations." *Carpenter*, at 2217. Most ominously, the Court explained:

> [T]he retrospective quality of the data here gives police access to a category of information otherwise unknowable. In the past, attempts to reconstruct a person's movements were limited by a dearth of records

> and the frailties of recollection. With access to CSLI, the Government can now travel back in time to retrace a person's whereabouts, subject only to the retention policies of the wireless carriers…. Critically, because location information is continually logged for all of the 400 million devices in the United States—not just those belonging to persons who might happen to come under investigation—this newfound tracking capacity runs against everyone…. [P]olice need not even know in advance whether they want to follow a particular individual, or when. Whoever the suspect turns out to be, he has effectively been tailed every moment of every day for five years.

138 S.Ct. 2206, 2218. The same concerns expressed by the Supreme Court in *Carpenter* and *Sander* are presented here, as the Decision proposes to require public disclosure of a massive database of historical location data concerning the movements of the millions of people who used Lyft in California 2020, allowing anyone to essentially travel back in time to reveal intimate details of their lives. It does so without soliciting any input from the millions of Lyft users and in derogation of their constitutional right of privacy. Lyft respectfully submits that such a decision would have profound, negative reverberations for individuals who use any TNC in this state. The Commission should not so order and should instead grant rehearing and reopen the hearing to reconsider the evidence consistent with *Sander*, *Carpenter*, and the entire body of evidence and authorities cited herein and in Lyft's Motion and Appeal.

The Decision claims that although it excluded all of Lyft's evidence supporting the privacy implications for Lyft users posed by release of the Trip Data, it nevertheless "considered the privacy concerns raised by Lyft" and simply found Lyft has "failed to satisfy its burden." Decision, p. 120. But the Commission cannot be said to have fairly considered Lyft's showing when it has categorically refused to consider the evidence submitted by Lyft on that issue. Such an arbitrary contention is contrary to the Commission's obligation to provide a fair hearing.

K. The Ruling that Trip Data Does Not Present a Privacy Concern is Unsupported by Substantial Evidence

The Commission affirms the ALJ's ruling that "the latitude and longitude of both the driver and rider of a particular TNC trip" should be redacted from Lyft's 2020 TNC Annual Report, finding "[s]upport for the proposition that this information might be engineered to identify the exact starting and ending addresses of a trip, which can then be combined with other information to identify a driver and/or passenger."[37] However, the Commission rejects Lyft's contention that disclosure of the Trip Data—which includes the very same type of locational data at the granular census block and zip code

[37] Assigned Administrative Law Judge's Ruling On Uber Technologies, Inc.'S And Lyft's Motion For Confidential Treatment Of Certain Information In Their 2020 Annual Reports ("2020 ALJ Ruling"), p. 5.

level—presents serious privacy concerns because it *also can be combined with other information to identify a driver and/or passenger*. The Commission cites no evidence to support any distinction between latitude and longitude data (which the Commission has agreed to protect) and the Trip Data at issue here – and Lyft is aware of no evidence in the record that supports such a distinction.

The evidence presented by Lyft shows that the Trip Data pinpoints location to an area the size of a city block,[38] materially indistinguishable from the CLSI at issue in *Carpenter*, which discloses a wedge shaped area between an 1/8 and four square miles. Lyft established that although census block reporting provides a measure of anonymity in densely populated areas, in suburban or rural areas it may provide none at all because many census blocks include a mere handful of people, and the numerous data points in the Trip Data can be used to identify travel patterns and, combined with other available information, allow for re-identification.[39] Among the most cogent evidence is a recently published MIT study called *The Tradeoff between the Utility and Risk of Location Data and Implications for Public Good*. That study demonstrates that even coarse mobility data, at the census block and zip code level, presents a high risk of re-identification. As the authors explain, "[t]his data no longer reports people's precise locations, making it more difficult to infer home addresses or the sensitive places they may have visited[, h]owever, understanding the daily mobility traces of individuals still provides valuable information to skip-tracing firms and law enforcement agencies … to track suspects' movements and using their locations to implicate them at the time of trial has become common."[40] The study further finds that even when census block data is fully aggregated, "with advanced methods, the likely trajectories of neighborhood residents can be estimated" and "[r]ecent research has shown that in ideal scenarios, user trajectories can be recovered with up to 91% accuracy from aggregated location data that was collected from mobile applications."[41] Based upon these concerns, the study concludes that "[t]he re-identifiability risk in this data is high."[42] Indeed, understanding precisely how such data can be used to invade user privacy takes only a modicum of imagination, as Lyft vividly illustrated with a series of realistic examples.[43] Lyft also presented several

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[38] https://www.census.gov/newsroom/blogs/random-samplings/2011/07/what-are-census-blocks.html; Exhibit A, slide 9.

[39] Motion, p. 26-32.

[40] *Id.* at p. 11.

[41] *Id.* at p. 13.

[42] Id. at p. 11.

[43] See Motion, p. 28 ("Consider the revealing information one can learn with just a few details regarding a TNC ride, such as the precise time and general location at which the ride commenced. A spouse might, for example, ascertain the true destination of their partner after they leave the house; whether to the office located in one census block or zip code or to a suspected paramour's residence, a healthcare or psychiatric facility, a political rally, or another suspected location in a different census block or zip code. With these few additional details, acquiring private and personally revealing

illustrative examples showing precisely how such data could be used to reveal intimate private details of individual TNC users.[44]

Thus, although the Trip Data does not itself identify individuals, it presents a serious risk of re-identification— just like the data in *Sander* ***and*** the lat/long data the Decision agreed to protect. And like the data in *Carpenter*, the retrospective quality of the Trip Data would, in effect, create a massive and permanent historical record of the ***every*** Lyft trip taken by anyone in California in 2020, and as with the CLSI in *Carpenter*, once disclosed, it would represent precisely the historical repository of mobility data that the Supreme Court feared. It requires no stretch of the imagination to envision that once produced, a massive historical database of time-stamped records of every ride completed by TNCs in California could be mined by law enforcement, jilted ex-lovers, jealous spouses, and others for myriad purposes, both benign and nefarious. No one – the Commission included – can predict how such data might be used, and once released, there is no clawing it back. The Commission's decision that disclosure of latitude and longitude would constitute an unwarranted invasion of privacy but Trip Data would not is unsupported by substantial evidence and contrary to the record evidence. The Commission should grant rehearing to correct this clear error.

L. The Decision Errs in Failing to Even Acknowledge Lyft's Constitutional Right to Privacy

As Lyft explained in its Appeal, the Supreme Court recently affirmed that even closely regulated entities, such as TNCs, retain a constitutionally protected right of privacy in the data collected in the course of their operations. *See Patel v. City of Los Angeles*, 738 F.3d 1058, 1061-1062 (9th Cir. 2013) (regulated entities retain "both a possessory and an ownership interest" in their books and records, have "the right to exclude others from prying into the contents of [those] records…".and "retain[] that expectation of privacy notwithstanding the fact that the records are required to be kept by law."); *City of Los Angeles, Calif. v. Patel* (2015) 576 U.S. 409, 426 (affirming). The expectation of privacy recognized in *Patel* extends to internet-enabled platforms such as Lyft. *Airbnb, Inc. v. City of New York*, 373 F. Supp. 3d 467 (S.D.N.Y. 2019), *appeal withdrawn*, No. 19-288, 2019 WL 3492425 (2d Cir. May 9, 2019); *Airbnb, Inc. v. City of Boston,* (D. Mass. 2019) 386 F.Supp.3d 113, 125, *appeal dismissed* (1st Cir., Sept. 3, 2019, No. 19-1561) 2019 WL 6522166 ("Airbnb has a reasonable expectation of privacy in the nonpublic usage data for its listings—especially when paired with additional information such as the location of the unit…"). So too here, TNCs have compelling reasons

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information regarding specific individuals is a rather rudimentary exercise, even without knowledge of advanced data re-identification techniques. Put simply, it is impossible to anticipate -- and confidently dismiss -- the virtually endless nefarious purposes to which such a massive, detailed, and content-rich database might be put."

[44] *Id.*

to maintain the confidentiality of their data – both to preserve their competitive position and to promote their relationship with their users by maintaining their privacy where appropriate.

The Decision dismisses these decisions by claiming that because specific names and addresses are not disclosed, the decisions are distinguishable. But those decisions are clear that the property right at issue is Lyft's, not that of its users, and that right in no way depends upon the granularity of the data disclosed. Furthermore, as shown in *Carpenter* and *Sander,* even coarse data implicates constitutionally protected rights where it might be re-identified. The Decision also misunderstands the significance of these decisions; assuming that Lyft was claiming that the Commission's ***collection*** of Trip Data is a violation under the Fourth Amendment to the United States Constitution. Lyft does not. Lyft recognizes the Commission's legitimate regulatory interest in accessing Trip Data in carrying out its regulatory functions. That particular privacy deprivation is not at issue here. What ***is*** at issue is whether the Commission can go a step further and publish Lyft's Trip Data, effectively destroying any privacy interest in that data. The Decision fails to grapple with this issue, dismissing *Patel* and the *Airbnb* decisions as merely concerned with searches and seizures. It is undeniable, however, that the public disclosure of Lyft's Trip Data would constitute a further invasion of Lyft's right of privacy beyond that incident to the Commission's collection of that data, and it is that invasion which must be justified. Indeed, if the public disclosure of Lyft data in the Commission's possession did not constitute a further independent invasion of privacy, there would be no need for § 6254(c), or the balancing of interests required by *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 329–330. Any privacy interest protected by § 6254(c) or *International Federation* would have evaporated upon the information being collected by the Commission. Here, in analyzing whether § 6254(c) protects the Trip Data from disclosure, the Decision fails to consider Lyft's constitutionally protected privacy interest in the data. This is yet another reason why the Decision is unlawful and erroneous and should be corrected on rehearing.

IV. CONCLUSION

The Decision relies upon clearly erroneous legal theories, is unsupported by substantial record evidence, and impinges upon the constitutional rights of Lyft and its users. The Commission should grant rehearing, and remand to the ALJ with orders to reopen the record and reconsider Lyft's Motion consistent with the evidence and the law.

Dated: May 6, 2022 **Lyft, Inc.**	**BRYAN CAVE LEIGHTON PAISNER LLP**	
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