

THE UBER LOOPHOLE THAT PROTECTS SURGE PRICING

*Keyawna Griffith**

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* University of Virginia School of Law, Class of 2018. I would like to thank Professor Stephen Braga for helpful comments he shared on the outline of this Note.

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Keyawna Griffith

Uber, a company that provides transportation services, significantly raises prices for rides in certain areas when demand is high. This system, known as surge pricing, causes some customers in a particular city to be charged double, triple, or quadruple what they would normally pay for a ride while other customers in the same city are charged significantly less for the same service. The fact that surge pricing can be and allegedly has been manipulated by Uber drivers, who are considered independent contractors, causes the system to have anticompetitive effects. Surge pricing also causes riders in surge areas to experience an economic loss because they do not have access to the normal fares. The Robinson-Patman Price Discrimination Act of 1936, 15 U.S.C. § 13, describes this type of system as illegal price discrimination. However, the Act does not apply to Uber because it only addresses commodities. Because Uber's transportation is a service, it does not fall under the Act's definition of "commodities." Therefore, Uber is free to continue using surge pricing to discriminate between purchasers. This type of discrimination contradicts the purpose of antitrust laws, which are intended to protect individual consumers from being overcharged by firms, monopolies, and cartels. Because Uber is a firm in the sharing economy, a forum that facilitates using, giving or sharing goods and services with peers through community-based online services, its surge prices should be prohibited by the Robinson-Patman Act. Congress can make this prohibition by amending the definition of "commodities" to include services. This amendment would further the goals of antitrust laws by preventing sharing economy firms like Uber from exploiting riders through surge prices.

INTRODUCTION

UBER, a company that allows customers to request rides through a smartphone application ("app"), engages in unfair price discrimination by implementing surge prices. Surge prices are increased charges for rides in certain areas when requests are in high demand.¹ These charges

¹ What is dynamic pricing?, UBER, <https://help.uber.com/h/34212e8b-d69a-4d8a-a923-095d3075b487> (last visited Apr. 30, 2018).

can double, triple, or quadruple the normal price of a trip.² While these charges are technically legal, they remain controversial.³

Surge charges injure competition between riders in surge areas and those outside of surge locations by causing riders in surge areas to suffer an economic loss. Uber drivers can manipulate surge prices through a coordinated effort by logging out of the app at the same time, leading the app to think there is a shortage of cars.⁴ Ultimately, surge pricing unfairly discriminates between riders in different areas that are often closely and similarly situated.⁵ This type of price discrimination is normally prohibited by the Robinson-Patman Price Discrimination Act of 1936 (“The Robinson-Patman Act” or “The Act”). It would typically raise a secondary-line injury claim under the Act, which is when a supplier gives favored customers a price advantage over competing customers.⁶ But, thanks to a loophole, Uber escapes the Act’s jurisdiction.

This Note explains how Uber slips through the loophole left open in the Robinson-Patman Act. Section (2)(a) of the Act, 15 U.S.C. § 13(a), requires products to be sold to all consumers at the same price.⁷ In other words, sellers cannot arbitrarily charge two different customers two different prices for the same product. This is where the loop hole is formed: Uber is not a product. It is a technology platform that connects riders with its driver-partners. In other words, it provides a service.⁸ Therefore, the Act does not apply to Uber’s surge pricing system.

² Le Chen, Alan Mislove & Christo Wilson, *Peeking Beneath the Hood of Uber*, Sept. 2015, at 1, https://www.ftc.gov/system/files/documents/public_comments/2015/09/00011-97592.pdf.

³ See Jonathan Stempel, *Uber CEO must face price-fixing lawsuit by passengers: U.S. judge*, REUTERS (Mar. 31, 2016, 5:00 P.M.), <https://www.reuters.com/article/us-uber-tech-lawsuit/uber-ceo-must-face-price-fixing-lawsuit-by-passengers-u-s-judge-idUSKCN0WX2QU> (explaining that the Uber CEO faces lawsuit over surge pricing).

⁴ See Cara McGoogan, *Uber drivers gang up to cause surge pricing, research says*, THE TELEGRAPH, Aug. 2, 2017, <https://www.telegraph.co.uk/technology/2017/08/02/uber-drivers-gang-cause-surge-pricing-research-says/> (citing a study that found that drivers manipulate Uber’s algorithm to trick the app into surge pricing).

⁵ See Chen et al., *supra* note 2, figs. 1 & 18.

⁶ *Price Discrimination: Robinson-Patman Violations*, FED. TRADE COMM’N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/price-discrimination-robinson-patman>.

⁷ *Id.*

⁸ Uber claims in its Terms of Use it is not a transportation provider. But it identifies itself as the Official Transportation Provider of Al Ahly Sporting Club in Egypt and the Dallas St. Patrick’s Day Parade and Concert. For this reason, along with additional evidence presented later in this paper, it is fair to classify Uber as a service that provides transportation. See *U.S. Terms of Service*, UBER, <https://www.uber.com/legal/terms/us/> (last visited Apr. 30, 2018); *Uber – Official Transportation Provider of Al Ahly SC.*, UBER,

Still, the Act should extend to services like Uber's to further the goals of antitrust laws. The purpose of antitrust laws is to protect individual consumers from being overcharged by firms, monopolies, or cartels.⁹ Uber is a firm in the sharing economy, "the peer-to-peer-based activity of obtaining, giving, or sharing the access to goods and services, coordinated through community-based online services,"¹⁰ thereby subject to the antitrust laws.¹¹ As a leader in the sharing economy,¹² it has significant market power that can be used to exploit customers. It is currently doing so by charging certain customers abnormally high prices during particular times. This is cause to analyze how Uber's surge pricing method conflicts with antitrust policy.

Current literature is mixed as to whether Uber engages in price fixing.¹³ However, the literature does not analyze Uber's surge prices in terms of price discrimination under the Robinson-Patman Act. This Note fills that gap. It argues that Congress should extend the Robinson-Patman Act so that companies like Uber cannot manipulate the market by self-identifying their platforms as services.¹⁴ Part II provides an overview of

<https://newsroom.uber.com/egypt/uber-official-transportation-provider-of-alahly-sc/> (last visited Apr. 30, 2018); *Parade like a pro on St. Paddy's Day*, UBER, Mar. 8, 2017, <https://newsroom.uber.com/us-texas/parade-like-a-pro-on-st-paddys-day/>.

⁹ See *infra* Part IV, Section B.

¹⁰ Juho Hamari, Mimmi Sjöklint & Antti Ukkonen, *The Sharing Economy: Why People Participate in Collaborative Consumption*, 67 J. ASS'N FOR INFO. SCI. AND TECH. 2047, 2048 (June 2, 2015), <https://onlinelibrary.wiley.com/doi/epdf/10.1002/asi.23552>.

¹¹ See generally Mark Anderson & Max Huffman, *The Sharing Economy Meets the Sherman Act: Is Uber a Firm, A Cartel, or Something in Between?*, 2017 COLUM. BUS. L. REV. 859 (2017) (applying antitrust law to sharing economy firms, including Uber).

¹² See Mereike Glöss, Moira McGregor & Barry Brown, *Designing for Labour: Uber and the On-Demand Mobile Workforce*, CHI, at 4–5 (2016), <http://www.mobilelifecentre.org/sites/default/files/uber%20final%20camera%20ready.pdf>. Additionally, Uber operates in over 600 cities across the globe. *Always the ride you want*, UBER, <https://www.uber.com/us/en/ride/> (last visited Jan. 26, 2019).

¹³ See Anderson & Huffman, *supra* note 7, at 908, 915 (explaining that Uber could be in violation of the Sherman Antitrust Act if its drivers make agreements amongst each other about prices); Sanjukta M. Paul, *Uber As For-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications*, 38 BERKELEY J. EMP. & LAB. L. 233, 233 (2017) (stating that Uber's model pushes the limits of intra-firm immunity from price-fixing liability); Hannah A. Posen, *Ridesharing in the Sharing Economy: Should Regulators Impose Uber Regulations on Uber?*, 101 IOWA L. REV. 405, 405 (2015) (arguing that Uber should not have to comply with current taxi regulations, like entry controls and price-fixing).

¹⁴ Lyft, another popular ride-sharing platform similar to Uber, also implements surge pricing. *Prime Time for drivers*, LYFT, <https://help.lyft.com/hc/en-us/articles/115012926467> (last visited May 1, 2018). Like Uber, Lyft takes

the Uber platform and how surge pricing works. Part III argues that Uber would violate the Robinson-Patman Act if its transportation services were considered products because its surge pricing system satisfies almost every element of a secondary line injury, which is when a supplier gives a favorable price to some customers over competing customers. Part IV argues that Congress should amend the definition of “commodities” in the Robinson-Patman Act by including “services” to bring Uber and its actions within the reach of the Act.

I. OVERVIEW OF UBER PLATFORM AND SURGE PRICING

Uber is a leader in the sharing economy.¹⁵ Its platform has made it convenient for people to travel to and from hundreds of locations throughout the world. Depending on their location, riders can choose from Uber’s numerous vehicle options.¹⁶ Their preference, along with other factors including distance and traffic,¹⁷ influence the total cost of the trip. But none of these factors affect the cost of an Uber ride to the extent that surge pricing does. This section will provide an overview of the Uber platform to demonstrate how it operates. It will then describe surge pricing to illustrate how the pricing system turns a convenient platform into an expensive scheme.

A. *Uber Platform*

Uber describes itself as a technology platform that connects drivers and riders.¹⁸ Drivers are legally designated as independent contractors or partners.¹⁹ Drivers use their own vehicles and make their own schedules.²⁰

advantage of passengers by exploiting the “commodities” loophole; it offers services not products. See *Lyft Terms of Services*, LYFT, <https://www.lyft.com/terms> (last visited Mar. 25, 2019) (stating in section 1 the Lyft platform provides driving services). Citation for this assertion (how do you know that Lyft does so?) However, this paper will only focus on Uber because it is the leader in the sharing economy.

¹⁵ Chen et al., *supra* note 2, at 1.

¹⁶ See *Uber moves New York City*, UBER, <https://www.uber.com/cities/new-york> (last visited Apr. 30, 2018) (listing several car options under “Explore your options” section).

¹⁷ *How are fares calculated?*, UBER, <https://help.uber.com/h/d2d43bbc-f4bb-4882-b8bb-4bd8acf03a9d> (last visited Apr. 30, 2018).

¹⁸ *How does Uber Work?*, UBER, <https://help.uber.com/h/738d1ff7-5fe0-4383-b34c-4a2480efd71e> (last visited Apr. 30, 2018).

¹⁹ Chen et al., *supra* note 2, at 2.

²⁰ *Id.*

Currently, Uber operates in over 600 cities throughout the world²¹, serving at least one million drivers on six continents.²²

Drivers and riders connect through Uber's smartphone app. The app allows customers to request a ride from a nearby driver.²³ Depending on the city, riders can choose from multiple types of cars when requesting a ride.²⁴ Options include Economy, which provides the most affordable vehicles, Premium, which provides high-end and luxury vehicles, Extra Seats, which provides vehicles with more space, and wheelchair accessible vehicles.²⁵ Specific vehicles include UberX and Uber XL (basic sedans that compete with taxis), UberBLACK and Uber SUV (luxury vehicles that compete with limousines), UberFAMILY (subset of UberX and UberXL equipped with car seats), UberWAV (wheelchair accessible vehicles), and UberPool (carpooling feature that allows multiple passengers to ride together).²⁶ Riders can also request a taxi from the Uber app using UberT.²⁷ Once a driver accepts the request, the app shows the driver's estimated time of arrival to the rider's pickup location.²⁸ After the trip ends, the fare is automatically calculated and charged to the customer's Uber account.²⁹

Depending on the city riders travel in, fares are calculated either upfront or after the ride ends.³⁰ Upfront fares show the cost of the trip before the ride is requested.³¹ Factors included in the fare are the base rate, rates for estimated time and distance of the route, the current demand for rides in the area,³² and type of vehicle requested (e.g., UberX versus UberSUV).³³ A booking fee, any applicable surcharges, additional fees, and tolls are also included in the calculation.³⁴ When riders request a ride, they

²¹ *Always the ride you want*, *supra* note 12.

²² Luz Lazo, *Uber turns 5, reaches 1 million drivers and 300 cities worldwide. Now what?*, WASH. POST (June 4, 2015), https://www.washingtonpost.com/news/dr-gridlock/wp/2015/06/04/uber-turns-5-reaches-1-million-drivers-and-300-cities-worldwide-now-what/?utm_term=.0bf342a28fcc.

²³ *How does Uber Work?*, *supra* note 18.

²⁴ *Selecting a vehicle option*, UBER, <https://help.uber.com/h/53d5ef29-0fa5-4252-a48c-43ff244ce6ce> (last visited Mar. 27, 2019).

²⁵ *Affordable rides in wheelchair-accessible vehicles, where available*, UBER, <https://www.uber.com/ride/uberwav/> (last visited Apr. 30, 2018).

²⁶ Chen et al., *supra* note 2, at 2.

²⁷ *Local taxicabs at the tap of a button*, UBER, <https://www.uber.com/ride/ubertaxi/> (last visited Apr. 30, 2018); Chen et al., *supra* note 2, at 2.

²⁸ *How does Uber Work?*, *supra* note 18.

²⁹ *Id.*

³⁰ *How are fares calculated?*, *supra* note 17.

³¹ *Id.*

³² *Id.*

³³ Chen et al., *supra* note 2, at 2.

³⁴ *Id.*

agree to be charged the upfront fare when the trip ends.³⁵ The fare may increase if the rider changes the destination, makes extra stops, or the trip is delayed.³⁶ Post-trip fares charge riders either a minimum fare or a fare that is based on the route taken, including a base fare, time, distance, and any booking fees, surcharges, tolls, or other relevant factors.³⁷

B. Surge Pricing

Surge pricing, also known as dynamic pricing,³⁸ sometimes affects fares. Surge pricing increases the cost of rides when many people in one area request Ubers simultaneously.³⁹ Le Chen, Alan Mislove, and Christo Wilson conducted an in-depth investigation of Uber to discover how surge pricing affects passengers and drivers.⁴⁰ They collected four weeks of data from Uber by replicating forty-three copies of the smartphone app and spreading them in a grid across downtown San Francisco (SF) and midtown Manhattan.⁴¹ The researchers calibrated the GPS coordinates reported by each replicated app to gather high-fidelity data about surge multipliers, estimated wait times, car supply, and passenger demand for all types of Uber vehicles.⁴²

They found that Uber uses a “surge multiplier” to increase prices when rides are in high demand.⁴³ But, Uber does not provide data about supply and demand.⁴⁴ The platform’s surge multipliers are set by an algorithm that is not transparent, essentially making its pricing system a “black

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ See Nicholas Diakopoulos, *How Uber surge pricing really works*, WASH. POST (Apr. 17, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/04/17/how-uber-surge-pricing-really-works/?utm_term=.d6c8dd88c8ac (using dynamic pricing information to analyze surge prices); M. Keith Chen & Michael Sheldon, *Dynamic Pricing in a Labor Market: Surge Pricing and Flexible Work on the Uber Platform* (Dec. 11, 2015) available at www.anderson.ucla.edu/faculty/keith.chen/papers/SurgeAndFlexibleWork_WorkingPaper.pdf (stating that dynamic pricing is known as “surge” pricing).

³⁹ *What is dynamic pricing?*, *supra* note 1; *How surge pricing works*, UBER, <https://www.uber.com/en-GB/drive/partner-app/how-surge-works/> (last visited Mar. 25, 2019).

⁴⁰ Chen et al., *supra* note 2, at 1.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

box.”⁴⁵ This “black box” distinguishes Uber from other sharing economy marketplaces that share data about supply and demand.⁴⁶

Despite the lack of transparency, the study shed more insight on Uber’s algorithm. It found that Uber has manually divided cities into “surge areas” with independent surge prices.⁴⁷ While entire cities like Chicago, San Francisco, and Manhattan are divided into surge areas, surge pricing does not always occur at the same time throughout any one city.⁴⁸ Prices update every five minutes and are highly correlated with supply, demand, and estimated wait time over the last five-minute interval.⁴⁹ According to the study, the maximum surge multiplier in Manhattan is 2.8 while that in SF is 4.1.⁵⁰ During surge times, UberXs (one of the more affordable, Economy services) can become 25–50% more expensive.⁵¹ Sometimes surges double, triple, or quadruple the price.⁵² For example, a ride from the Midwood, Brooklyn district to La Guardia Airport could cost \$780 when demand peaks.⁵³ A five mile trip in Pittsburgh that normally costs less than \$20 could end up costing \$122 during a surge on New Year’s Eve.⁵⁴ Finally, a trip from Oakland to downtown San Francisco that normally costs \$10.11 for UberPool and \$20.22 for UberX could jump to between \$60 and \$110.⁵⁵ These figures illustrate the wide range between a normal fare and a surged fare.

⁴⁵ *Id.*

⁴⁶ *Id.* See also Jessica Haywood, Patrick Mayock, Jan Freitag, Kwabena Akuffo Owoo & Blasé Fiorilla, *Airbnb & Hotel Performance*, STR, at 6, 17 (2017), http://www.str.com/Media/Default/Research/STR_AirbnbHotelPerformance.pdf (showing that Airbnb, a company that participates in the sharing economy by providing a platform for consumers to rent and share private rooms and homes, shares data about supply and demand for its services).

⁴⁷ Chen et al., *supra* note 2, at 2, 10.

⁴⁸ See *id.* at 2 (showing map of Chicago during surge time); *id.* at 13 (noting that surge prices strongly and negatively impact passenger demand on the micro-scale but may have a different impact on a macro-level, which the authors describe as an entire city).

⁴⁹ *Id.* at 2.

⁵⁰ *Id.* at 8.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Ben Feuerherd & Daniel Prendergast, *Uber says surge pricing benefits customers*, N.Y. POST (Jan. 13, 2015), <https://nypost.com/2015/01/13/uber-says-surge-pricing-benefits-customers/>.

⁵⁴ Tim Worstall, *So Uber and Lyft’s Surge Pricing Worked Perfectly on New Year’s Eve Then*, FORBES, (Jan. 3, 2015), <https://www.forbes.com/sites/timworstall/2015/01/03/so-uber-and-lyfts-surge-pricing-worked-just-perfectly-on-new-years-eve-then/#35e1d0aa6814>.

⁵⁵ Douglas Zimmerman, *Lyft and Uber rates surge to unbelievable prices after BART stoppage*, SFGATE (Mar. 27, 2017),

These significant hikes in fares amount to more than just an inconvenience. They constitute unfair price discrimination. The “black box” makes it possible for Uber drivers to manipulate surge prices to increase profits by “colluding to artificially decrease supply.”⁵⁶ This creates price discrimination between customers in surge areas and those not in surge areas but still requesting rides from Uber. This type of price discrimination is prohibited by section (2)(a) of the Robinson Patman Act. However, this section of the Act does not apply to Uber because the platform is a service and not a product.⁵⁷ Uber’s classification makes it possible for the platform to continue unfairly discriminating among various customers.

II. UBER WOULD VIOLATE SECTION 2(A) IF ITS SERVICES WERE PRODUCTS

If Uber’s transportation services were considered products, its surge pricing would violate section 2(a) of the Robinson-Patman Act.⁵⁸ Because the platform’s transportation options are considered services, Uber’s surge pricing system escapes the Act’s jurisdiction. This section will elaborate on the Act. It will describe each element of the statute to demonstrate how Uber’s surge pricing scheme could satisfy the elements of a secondary-line injury claim, which occurs when a supplier gives one set of customers a more favorable price over competing customers.⁵⁹

A. Overview of Robinson-Patman Price Discrimination Act

The Robinson-Patman Price Discrimination Act of 1936 amended section 2 of the Clayton Antitrust Act of 1914.⁶⁰ Section (2)(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), requires products to be sold to everyone at the same price.⁶¹ The original purpose of the Robinson-Patman Price Discrimination Act is to protect small independent retailers and their

<https://www.sfgate.com/news/article/BART-stoppage-causes-unbelievable-surge-prices-11030582.php#photo-12619538>.

⁵⁶ Chen et al., *supra* note 2, at 1. *See also infra*, Part III, Section I.

⁵⁷ *See infra* Part III, Section D.

⁵⁸ *See generally* Ann K. Wooster, Annotation, *Increased Costs Charged to, or Expenses Incurred by, Buyer as Secondary-Line Price Discrimination under § 2(a) of Clayton Act, as Amended by Robinson-Patman Price Discrimination Act (15 U.S.C.A. § 13(a))*, 170 A.L.R. Fed. 425, § 7 (2001) (describing various cases in which the Court has decided whether there was price discrimination under the Act).

⁵⁹ *Price Discrimination: Robinson-Patman Violations*, *supra* note 6 at 1.

⁶⁰ Donald S. Clark, *The Robinson-Patman Act Committee, Section of Antitrust Law, Forty-Sixth Annual Spring Meeting*, FED. TRADE COMMISSION (Apr. 2, 1998), <https://www.ftc.gov/public-statements/1998/04/robinson-patman-act-annual-update> (referencing § 2(a)–(f) of the Clayton Act, 15 U.S.C. § 13(a)–(f)).

⁶¹ *Id.* at 3.

independent providers from unfair competition from chain stores.⁶² But the Act still applies to individual consumers based on the purpose of anti-trust laws as a whole.⁶³ It states:

[i]t shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.⁶⁴

Three types of injury can lead to a claim under the Act: primary line, secondary line or tertiary line.⁶⁵ A primary line injury occurs when the conduct of a discriminating seller harms competition with its direct competitors.⁶⁶ A secondary line injury involves price discrimination that harms competition between a discriminating seller's customers.⁶⁷ A tertiary line injury occurs when competition between a purchaser's customers is harmed.⁶⁸ This Note will focus on the secondary line injury.

Under section 2(a) of the Robinson Patman Act, a secondary-line injury occurs when a seller harms competition between favored and disfavored purchasers by increasing costs and expenses for the disfavored purchaser.⁶⁹ To prove a violation under section 2(a), a plaintiff must show that (1) a seller made sales to two different buyers in interstate commerce, (2) the products were the same grade and quality, (3) the defendant discriminated between the purchasers when making the sale, and (4) the discrimination adversely affected competition.⁷⁰ Before an alleged discriminatory act can be evaluated under these elements, the plaintiff must satisfy

⁶² *Id.* at 1 (citing *Boise Cascade Corp.*, 107 F.T.C. 76, 210 (1986)).

⁶³ *See infra* Part IV, Section B.

⁶⁴ 15 U.S.C. § 13(a) (1936).

⁶⁵ *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 176 (2006).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Wooster*, *supra* note 61.

⁷⁰ *Feesers, Inc. v. Michael Foods, Inc.*, 489 F.3d 206, 212 (3d Cir. 2007).

the following jurisdictional factors:⁷¹ “discrimination in price,” “occurring in interstate commerce,” “involving commodities,” “of like grade and quality,” “sold,” “to two or more different purchasers,” “at the same time or reasonably contemporaneously,” and “for use, consumption, or resale within the United States and its territories.”⁷² The following sections will explain how Uber’s surge prices both satisfy nearly each of the jurisdictional factors and violates every element of the Act.

B. Uber’s Surge Charges Unfairly Discriminate in Price

Uber’s surge pricing system could constitute price discrimination under the Robinson-Patman Act. Price discrimination means a difference in price.⁷³ The courts determine price by the amount of money paid by the buyer.⁷⁴ While sellers can change their prices whenever they want, courts have held that they must charge all competing customers the same price at the same time.⁷⁵ Additionally, the plaintiff alleging price discrimination violation under the Act must prove that she had no access to the lower price.⁷⁶

Uber customers across the United States are charged different prices because fares are partially based on location.⁷⁷ These differences would not violate the Robinson-Patman Act because they do not injure

⁷¹ Hugh C. Hansen, *Robin-Patman Law: A Review and Analysis*, 51 *FORDHAM L. REV.* 1113, 1125 (1983).

⁷² See generally BRENT A. OLSON, *THE ROBINSON-PATMAN ACT: PRICE DISCRIMINATION AND PREFERENTIAL TREATMENT—SECTION 2(A) OF THE ROBINSON-PATMAN ACT—ELEMENTS OF A SECTION 2(A) CLAIM*, 20A1 *MINN. PRAC., BUSINESS LAW DESKBOOK* § 22:82 (2017) (describing the eight jurisdictional elements and citing relevant cases).

⁷³ See *Lewis v. Philip Morris Inc.*, 355 F.3d 515, 521 (6th Cir. 2004) (explaining that “price discrimination” in section 2(a) means that the statute prohibits differences in prices), cited in OLSON, *supra* note 75, at § 22:82.

⁷⁴ See *Black Gold V. Rockwool Indus. Inc.*, 729 F.2d 676, 682 (10th Cir. 1984) (stating that price is established by the invoice submitted by the buyer along with any discounts, offsets, or allowances); *Conoco Inc. v. Inman Oil Co., Inc.*, 774 F.2d 895, 902 (8th Cir. 1985) (explaining that “price” is the amount of money paid by the buyer).

⁷⁵ *K-S Pharmacies, Inc. v. American Home Prod.*, 962 F.2d 728, 733 (1992). See also *GSI Grp., Inc. v. Sukup Mfg. Co.*, 2007 WL 4219193, *3 (C.D. Ill. Nov. 27, 2007) (finding no price discrimination where prices changed over time but were raised or lowered to all customers generally).

⁷⁶ *Rod Baxter Imports, Inc. v. Saab-Scania of Am., Inc.*, 489 F. Supp. 245, 248 (D. Minn. 1980); *Shreve Equip., Inc. v. Clay Equip. Corp.*, 650 F.2d 101, 105 (6th Cir. 1981). See also OLSON, *supra* note 69, at §22:82.

⁷⁷ *How are fares calculated?*, *supra* note 12.

competition.⁷⁸ Surge pricing, however, does injure competition.⁷⁹ It also prevents customers in surge areas from taking advantage of normal fares. In fact, Uber's surge pricing scheme is similar to the one struck down in *Federal Trade Commission v. Cement Institute*.⁸⁰

In *Federal Trade Commission*, the Federal Trade Commission accused the Cement Institute of committing price discrimination under 15 U.S.C. § 13.⁸¹ The Cement Institute is an unincorporated trade association made up of seventy-four corporations, seventy-four corporate members of the Institute, and twenty-one individuals associated with the Institute.⁸² The corporations, members, and individuals were accused of harming competition in the sale and distribution of cement by agreeing to use a multiple basing point price system,⁸³ in which they used several geographic locations to compute freight charges, despite the location from which the products are actually shipped.⁸⁴ The system prevented almost all cement purchasers in the United States from buying cement for delivery in any area from any of the respondents at a lower price or on better terms than any of the other respondents.⁸⁵

The Cement Institute sells and delivers products to buyers either at the seller's mill or warehouse or for free on trucks and railroad cars next to the seller's mill or warehouse.⁸⁶ If the buyer purchases the products at the seller's mill or warehouse, or next to the mill or warehouse, the cost of the products to the buyer is the seller's mill price plus the buyer's cost of transportation.⁸⁷ If the seller delivers the products to the buyer, however, then the cost is the delivered price.⁸⁸ A seller who sets the same mill price for all buyers delivers his products at the same place (his mill) and for the same price (price at the mill), making the same net amount of money from every customer.⁸⁹ However, a delivered price system may cause a seller to earn different net amounts after selling the same products because the distance will result in varying prices for customers in different localities.⁹⁰

⁷⁸ See *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.* 909 F.2d 1524, 1532 (3d Cir. 1990) (explaining that price discrimination is not illegal per se, only when it has anticompetitive effect).

⁷⁹ See *infra* Part III, section I.

⁸⁰ *Fed. Trade Comm'n v. Cement Inst.*, 68 S. Ct. 793 (1948).

⁸¹ *Id.* at 797.

⁸² *Id.* at 796–97.

⁸³ *Id.* at 688.

⁸⁴ See *infra* notes 91–98.

⁸⁵ *Id.* at 688.

⁸⁶ *Id.* at 696.

⁸⁷ *Id.* at 696–97.

⁸⁸ *Id.* at 697.

⁸⁹ *Id.*

⁹⁰ *Id.*

The Cement Institute used multiple localities as basing points for the delivered price on all sales.⁹¹ The basing point was not actually located at the seller's mill and included a theoretical cost for fictitious shipment known as "phantom freight."⁹² All sellers quoted the same delivered prices in every area despite differences in costs of production and freight expenses.⁹³ Even though this pricing system did not always involve phantom freight,⁹⁴ the Court agreed with the FTC that the different net returns involving phantom freight from sales between buyers in different areas was price discrimination under 2(a).⁹⁵

Similar to the Cement Institute, Uber employs one million driver-partners.⁹⁶ Just as the corporations, members, and individuals in *Cement Institute* used the multiple basing point price system to distort prices, drivers may injure competition by manipulating surge prices.⁹⁷ Similar to how the point system prevented purchasers from buying cement at the lowest price, surge pricing excludes certain customers who either cannot afford or do not want to pay surge prices from the market⁹⁸ and prevents riders in surge areas from requesting drivers for the lowest possible fare. As a result, customers subjected to surge prices become disfavored purchasers while those free of surge prices are favored purchasers.

While there is inconclusive evidence that Uber uses phantom cars during surge times,⁹⁹ surge prices can be analogous to phantom freight when drivers trick the algorithm into detecting more demand than there actually is.¹⁰⁰ This scheme causes the algorithm to charge customers based on fictitious requests. *Cement Institute* shows how surge pricing meets the definition of price discrimination.

C. Surge Pricing Occurs in Interstate Commerce

Surge pricing would satisfy the interstate commerce requirement under the Robinson-Patman Act. According to the Act, the discriminatory purchases must be in interstate commerce, meaning at least one product

⁹¹ *Id.* at 699.

⁹² *Id.* at 698–99.

⁹³ *Id.* at 699.

⁹⁴ *Id.* at 724.

⁹⁵ *Id.* at 721, 725.

⁹⁶ Lazo, *supra* note 17.

⁹⁷ *See infra* p. 26.

⁹⁸ Chen et al., *supra* note 2, at 1. *See also* Feuerherd & Prendergast, *supra* note 56 (quoting Uber's public policy expert saying that demand would overwhelm supply if Uber prices were artificially capped during the normal course of business).

⁹⁹ Chen et al., *supra* note 2, at 4.

¹⁰⁰ *See infra* p. 26.

must cross a state line.¹⁰¹ It is not enough that the defendant engages in interstate commerce.¹⁰² The transaction at issue must have occurred in interstate commerce.¹⁰³ Additionally, a seller's prices cannot injure competition if the customers in different states are not competing with each other.¹⁰⁴

As explained in Section III, Part I, Uber customers are in interstate competition with one another. Additionally, surge pricing occurs in interstate commerce. Though Uber's platform is not considered a product, its vehicles cross state lines when bringing riders to their destinations. Uber acknowledges that its drivers can make long trips, indicating the potential for its vehicles to cross state lines.¹⁰⁵ More importantly, the platform acknowledges that its services cross state lines.¹⁰⁶ For example, riders can request an Uber from New York to New Jersey, from D.C. to Maryland or Virginia, and to and from other states that are within close proximity. Like many cities Uber operates in, rides requested in New York City are sometimes subject to surge prices.¹⁰⁷ When a customer traveling from New York to New Jersey accepts a ride during a surge, the transaction enters interstate commerce. As illustrated below, this type of interstate purchase is consistent with how courts have defined interstate transactions under the Robinson-Patman Act.

In *Moore v. Mead's Fine Bread Company*, the Supreme Court held that an interstate combine that wished to wage a price war, discriminating in the price of bread which was made purely intrastate, violated section 2(a) of the Robinson-Patman Act.¹⁰⁸ The Court explained that even though the victim was a local merchant and no interstate transactions were used to

¹⁰¹ 15 U.S.C. § 13(a) (1936). See *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 195 (1974) (noting that 15 U.S.C. § 13(a) only concerns items in interstate commerce). See *Mayer Paving & Asphalt Co. v. General Dynamics Corp.*, 486 F.2d 763 (7th Cir.1973) (finding no violation of Robinson-Patman Act because all purchases made by customer and competitors were in intrastate commerce).

¹⁰² *Willard Dairy Corp. v. Nat'l Dairy Prod. Corp.*, 309 F.2d 943, 946 (6th Cir. 1962).

¹⁰³ *Id.*

¹⁰⁴ *Mayer Paving & Asphalt Co.*, 486 F.2d 763, 770 (1973) (citing *Rowe, Price Discrimination Under the Robinson-Patman Act* (1962), § 4.9, 179).

¹⁰⁵ See *Requesting Long Trips*, UBER, <https://help.uber.com/h/f7d602d3-f2c5-4d63-8395-83a8ea4c34d7> (last visited Apr. 30, 2018).

¹⁰⁶ *Uber Moves New Jersey*, UBER, <https://www.uber.com/cities/new-jersey/> (last visited Apr. 30, 2018) (noting that there is a \$20 surcharge on all trips between New York City and New Jersey).

¹⁰⁷ See Maya Kosoff, *New York City Might Cap Uber Surge*, BUS. INSIDER (Jan. 13, 2015), www.businessinsider.com/new-york-city-considers-uber-surge-pricing-cap-2015-1 (explaining that New York City is considering limiting surge prices).

¹⁰⁸ *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, 118–19 (1954).

harm him, an interstate business benefitted from the price discrimination.¹⁰⁹ Contrast this case with *Willard Dairy Corporation v. National Dairy Products Corporation*.¹¹⁰

In *Willard Dairy*, the alleged price discrimination and competition occurred in and around Marion, Ohio.¹¹¹ These sales were from the defendant's processing plant in Shelby, Ohio.¹¹² The defendant also made shipments in interstate commerce from plants outside of Shelby, Ohio.¹¹³ However, the Court held that the alleged discriminatory transactions were intrastate commerce, even though the defendant did business in interstate commerce.¹¹⁴ It found that Willard Dairy Corporation did not engage in the defendant's business that was in interstate commerce.¹¹⁵ The sales Willard Dairy Corporation alleged were discriminatory did not occur interstate like those in *Moore*.¹¹⁶

Uber's surge pricing system produces similar effects as the price discrimination in *Moore*. Surge pricing happens in intrastate because surge areas are designated by cities.¹¹⁷ Therefore, the victims of surges would be the customers in surge areas who have to pay significantly more for a ride than customers outside of surge areas. Like the victim in *Moore*, riders can engage in the interstate aspect of Uber's platform by taking trips across state lines. Sometimes, these same trips are the products of the surge pricing system. Still, even a rider who is travelling purely intrastate would have standing to challenge the price discrimination because Uber is an interstate business, and the profits Uber earns from surge pricing come from both interstate and intrastate operations.¹¹⁸

Additionally, a rider travelling intrastate can still be a disfavored customer for purposes of section 2(a). For example, imagine two customers in Washington, D.C. requesting rides at the same time for approximately the same distance. One is traveling from D.C. to Maryland, and the other is travelling within D.C. If the D.C. rider is subject to a surge and the

¹⁰⁹ *Id.* at 119.

¹¹⁰ *Willard Dairy Corp. v. Nat'l Dairy Prod. Corp.*, 309 F.2d 943 (6th Cir. 1962).

¹¹¹ *Id.* at 946.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ "In *Moore v. Mead's Fine Bread Co.* . . . purchases involved in the alleged discrimination were in interstate commerce and interstate sales of like grade and quality were discriminated against." *Id.* at 946.

¹¹⁷ *Chen et al.*, *supra* note 2, at 2, 10.

¹¹⁸ *See Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, 19 (1954) (demonstrating that a victim had standing under the Robinson-Patman Act even though no interstate transactions negatively impacted him because the beneficiary is an interstate business and "the opportunities afforded by interstate commerce would be employed to injure local trade.).

Maryland rider is not, the D.C. rider is now experiencing price discrimination in relation to the Maryland rider. Unlike the plaintiff in *Willard Dairy*, the D.C. rider is subject to a transaction involving price discrimination that transcends state lines. Therefore, surge prices that apply to intrastate rides are still relevant to interstate commerce for purposes of the Robinson-Patman Act.

The Court has already determined that Uber's products and services are in interstate commerce for purposes of the Lanham Act, 15 U.S.C. § 1125(a).¹¹⁹ It noted that Uber advertises on the internet, which reaches a national and international audience.¹²⁰ Furthermore, Uber conducts background checks to identify criminal records in different states, and these investigations are a necessary part of the business.¹²¹ Finally, the Court found that Uber exists under Delaware state laws and has its principal place of business in San Francisco, California, as well as owner-operators and customers all over the United States and the World.¹²² The trend in the Court's rationale is that Uber's operations transcend state lines. Because Uber's transportation services cross state lines, a Court could find that Uber transactions involving surge prices occur in interstate commerce for purposes of the Robinson-Patman Act.

D. Uber Services Could be Classified as a Commodity

The Robinson-Patman Act would apply to platforms like Uber if "commodity" was amended to include services. Currently, the Act only applies to products.¹²³ Representative Wright Patman, a co-author of the Act, said that the Act uses the ordinary commercial definition of "commodity," which is any portable or tangible item made or used as the subject of barter, as opposed to services.¹²⁴ Examples of commodities include newspapers,¹²⁵ alcoholic beverages, automobiles, motorcycles, bananas, cans, cement, flooring, glucose, milk, paint, petroleum products, stone, and tobacco.¹²⁶ Examples of services include title insurance and title

¹¹⁹ *Greater Hous. Transp. Co. v. Uber Techs., Inc.*, 155 F. Supp. 3d 670, 703 (S.D. Tex. 2015).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *May Dep't Store v. Graphic Process Co.*, 637 F.2d 1211, 1214 (9th Cir. 1980) (finding that Congress did not distinguish goods and services and Congress did not mean for the Act to apply to services).

¹²⁴ *Tri-State Broad. Co. v. United Press Int'l, Inc.*, 369 F.2d 268, 270 n.2 (5th Cir. 1966) (citing Patman, *Complete Guide to the Robinson-Patman Act* 33 (1963); Rowe, *Price Discrimination under the Robinson-Patman Act* 61–62 (1962)).

¹²⁵ *Morning Pioneer, Inc. v. Bismarck Tribune Co.*, 493 F.2d 383, 389 n.11 (8th Cir. 1974).

¹²⁶ *See Wooster, supra* note 61 at §§ 3–15.

searches,¹²⁷ news wire services,¹²⁸ lending money,¹²⁹ and leasing a photocopy machine.¹³⁰ In 1957, the Chairman of the House Judiciary Committee tried to amend the Act by adding “services” to the definition of “commodities.”¹³¹ However, the amendment failed.¹³² Lower courts continue to decide whether the transaction at issue involved a product.

When determining if a transaction satisfies the commodity requirement, the Court will analyze the dominant nature of the transaction.¹³³ It will look at factors like the cost differences between intangible service and tangible goods provided, the supplying of ingredients, the breakdown of costs on billing invoices, and whether there was a separate bill for labor.¹³⁴ There is sufficient evidence that Uber’s platform, given these factors, is not a commodity.

Uber’s Terms of Use describe the connection it makes between riders and drivers as a service.¹³⁵ United States courts have described, in dicta, Uber’s transportation platform as a service.¹³⁶ The European Court of Justice has also held that Uber is a transportation service.¹³⁷ Therefore, the platform does not satisfy the definition of commodity under the Robinson-Patman Act. However, an amendment that extends section 2(a) of the Act to services could change the status of Uber. Part IV will elaborate more on this argument.

¹²⁷ *Freeman v. Chicago Title & Trust Co.*, 505 F.2d 527, 531 (7th Cir. 1974).

¹²⁸ *Tri-State Broad. Co.*, 369 F.2d at 270.

¹²⁹ *Bichel Optical Lab., Inc. v. Marquette Nat’l Bank of Minneapolis*, 336 F. Supp. 1368, 1371 (D. Minn. 1971).

¹³⁰ *SCM Corp. v. Xerox Corp.*, 394 F. Supp. 384, 385–86 (D. Conn. 1975).

¹³¹ *Tri-State Broad. Co.*, 369 F.2d at 270 n.2 (citing H.R. 8277, 85th Cong., 1st Sess., 103 Cong. Rec. 9898 (1957); 103 Cong. Rec. 9900-9901 (1957)).

¹³² *Id.*

¹³³ *Tri-State Broad. Co.*, 369 F.2d at 270. *See* *General Shale Prod. Corp. v. Struck Construction Co.*, 132 F.2d 425, 428 (6th Cir. 1942) (finding no commodity in a construction contract even though it listed the price of tangible items to be included).

¹³⁴ *May Dep’t Store v. Graphic Process Co.*, 637 F.2d 1211, 1215–16 (9th Cir. 1980).

¹³⁵ *U.S. Terms of Use, UBER*, <https://www.uber.com/legal/terms/us/> (last visited Apr. 23, 2018).

¹³⁶ *See* *O’Connor v. Uber Tech., Inc.*, 82 F. Supp. 3d 1133, 1135 (stating Uber provides a service for individuals who need transportation); *Boston Cab Dispatch, Inc. v. Uber Tech., Inc.*, No. CIV.A. 13-10769-NMG 2014 WL 1338148, *1 (D. Mass. Mar. 27, 2014) (saying Uber entered the Boston market for private transportation services).

¹³⁷ Arjun Kharpal, *Uber Is a Transportation Service and Could Need New Licenses in Europe, Top Court Advisor Says*, CNBC (May 11, 2017), <https://www.cnbc.com/2017/05/11/uber-europe-court-transportation-service.html>.

E. Uber Services are of Like Grade and Quality

Uber services are of like grade and quality. Courts determine “like grade and quality” by analyzing physical and chemical identity,¹³⁸ cross-elasticity of demand, substitutability, physical appearance, and identity of performance.¹³⁹ For example, in *F.T.C. v. Borden Company*, the Supreme Court held that milk sold by a company was of like grade and quality even though some of it was branded under the company’s label and some was branded under private labels.¹⁴⁰ The Court explained that labels do not distinguish products for purposes of the Act, even though one may appeal to customers more and generate a higher price in the market from a large segment of the public.¹⁴¹ Uber’s transportation services meet this test,

Despite different vehicles being offered through different services,¹⁴² Uber’s ridesharing services function the same way: drivers pick riders up and transport them to their destination.¹⁴³ The services have substitutability because they can work interchangeably. For example, if there are no UberSUVs available, riders still have the option of requesting UberX.¹⁴⁴ This substitutability suggests that the services have high cross-elasticity as well.¹⁴⁵ For these reasons, Uber would satisfy the like grade and quality test.

F. Uber Sells its Transportation Services

The Robinson-Patman Act could apply to Uber’s transportation services because the Act concerns sales.¹⁴⁶ The Act does not concern licensing agreements or arrangements.¹⁴⁷ At least two completed sales, as opposed to offers to sell, must have taken place to raise a claim under the

¹³⁸ *F.T.C. v. Borden Co.*, 383 U.S. 637, 638–39 (1966).

¹³⁹ *Checker Motors Corp. v. Chrysler Corp.*, 283 F. Supp. 876, 888–89 (S.D.N.Y. 1968).

¹⁴⁰ *Borden Co.*, 383 U.S. at 638.

¹⁴¹ *Id.* at 640.

¹⁴² *Affordable rides in wheelchair-accessible vehicles, where available, supra* note 26.

¹⁴³ *See Checkers Motor Corp.*, 283 F.Supp. at 889 (stating that naming one vehicle a “taxicab” and an identical one a “passenger car” does not prevent a finding of “like grade and quality”).

¹⁴⁴ *See Uber moves New York City, supra* note 16 (listing various service options).

¹⁴⁵ *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1271 (9th Cir. 1975).

¹⁴⁶ *Record Club of America, Inc. v. Columbia Broadcasting System, Inc.*, 310 F. Supp. 1241, 1243 (E.D. Penn. 1970).

¹⁴⁷ *Id.*

Act.¹⁴⁸ The same seller must make a favorable and unfavorable sale.¹⁴⁹ A purchase occurs when the buyer and seller complete their negotiations and agree that legally enforceable expectations and commitments exist.¹⁵⁰ The agreement only has to be executory; actual delivery and payment are not necessary.¹⁵¹ A refusal to deal, termination, or cut-off will not suffice.¹⁵²

Uber sells its transportation services to customers. It charges riders after they request a ride. Riders also receive a receipt after each trip, which is further evidence that a purchase has been made.¹⁵³ The Terms of Use indicate that Uber grants riders a license to use the applications to connect with a driver. But this agreement does not solely define the nature of the transaction between drivers and riders because the platform is ultimately selling a form of transportation. Uber's Terms of Use indicate that riders agree to the terms when it uses the app to request rides.¹⁵⁴ Ultimately, customers and drivers enter a legally enforceable agreement when customers use Uber's services. Additionally, Uber sells its services to customers in both surge areas and non-surge areas at the same time.¹⁵⁵ Therefore, the platform makes favorable and unfavorable sales simultaneously.

G. Uber Sells its Services to Multiple Buyers

The Act could apply to Uber's transportation services because price discrimination involves sales to two different buyers.¹⁵⁶ Section 2(a) only applies when two or more sales have occurred.¹⁵⁷ Courts have applied this

¹⁴⁸ *Terry's Floor Fashions, Inc. v. Burlington Industries, Inc.*, 568 F. Supp. 205, 216 (E.D.N.C. 1983). *Highspire, Inc. v. UKF America, Inc.*, 469 F. Supp. 1009, 1012 (S.D.N.Y. 1979).

¹⁴⁹ *Cleveland v. Viacom, Inc.*, 166 F. Supp. 2d 535, 537 (W.D. Tex. 2001).

¹⁵⁰ *J.W. Burrell, Inc. v. JLG Industries, Inc.*, 491 F. Supp. 15, 18 (W.D. Va. 1980).

¹⁵¹ *Id.*

¹⁵² *Canall PCS v. Omnipoint Corp.*, No. 99-3395, 2000 WL 272309, *8 (S.D.N.Y. Mar. 10, 2000); *Ralph Kearney & Sons, Inc. v. Emerson Elec. Co.*, No. 96-3280, 1996 WL 502315, *2 (E.D. Pa. Aug. 29, 1996).

¹⁵³ *See Record Club of America, Inc. v. Columbia Broadcasting System, Inc.*, 310 F. Supp. 1241, 1243-44 (E.D. Penn. 1970) (finding persuasive defendant's claim that no sale was involved because the transaction was a licensing agreement and there were "no sales invoices and no purchases").

¹⁵⁴ *U.S. Terms of Use*, *supra* note 138.

¹⁵⁵ *See infra* Part III, Section H.

¹⁵⁶ *South End Oil Co. v. Texaco, Inc.*, 237 F. Supp. 650, 652 (N.D. Ill. 1965); *Diamond Center, Inc. v. Leslie's Jewelry Mfg. Corp.*, 562 F. Supp. 2d 1009, 1014 (W.D. Wis. 2008); *Loren Specialty Mfg. Co. v. Clark Mfg. Co.*, 241 F. Supp. 493, 501 (N.D. Ill. 1965).

¹⁵⁷ Ross E. Elfand, *The Robinson-Patman Act*, AMERICAN BAR ASSOCIATION (Aug. 27, 2013), https://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/robinson_patman_act/.

rule differently.¹⁵⁸ The Fifth and Sixth Circuits acknowledge that there need to be two purchasers.¹⁵⁹ However, the Fifth Circuit has found that plaintiffs can bring a claim under the Act without making a purchase,¹⁶⁰ and the Sixth Circuit has allowed a claim to move forward without addressing whether the purchaser requirement was met.¹⁶¹

Other courts have found exceptions to the two-purchaser rule.¹⁶² Some courts have held that previous purchases can satisfy a claim under the Act.¹⁶³ Others have held that price discrimination claims must involve two purchases at two different prices by two different purchasers.¹⁶⁴

Either way, Uber could satisfy all of these standards because it sells its transportation services to multiple customers. As of April 2017, former Uber CEO, Travis Kalanick, claimed the platform had 40 million monthly active riders.¹⁶⁵ Uber is estimated to be gaining between 150,000 and 400,000 users per day.¹⁶⁶ The app makes it possible for users to access services at the same time. For this reason, Uber is able to simultaneously sell rides to surge customers and those not in surge areas.

H. Customers Purchase Uber's Services at the Same Time

Uber could fall under the Robinson-Patman Act because it sells its services at the same time to multiple customers. Favored and disfavored

¹⁵⁸ OLSON, *supra* note 75, at § 22:82.

¹⁵⁹ *Hiram Walker, Inc. v. A & S Tropical, Inc.*, 407 F.2d 4, 7 (5th Cir. 1969) (stating that a claim under § 2(a) must show two sales were made by the same seller to at least two different buyers); *Shavmoch v. Clark Oil and Refining Corp.*, 726 F.2d 291, 296 (6th Cir. 1984) (noting that 15 U.S.C. § 13(a) requires two sales by the same seller to two different purchasers).

¹⁶⁰ *American Can Co. v. Bruce's Juices*, 187 F.2d 919, 924 (5th Cir. 1951) (concluding that plaintiff did not have to make a purchase under the Act because the seller's discriminatory action prevented it from doing so).

¹⁶¹ *Allied Accessories and Auto Parts Co., Inc. v. General Motors Corp.*, 825 F.2d 971, 973 (6th Cir. 1987).

¹⁶² OLSON, *supra* note 75, at § 22:82.

¹⁶³ *See DeLong Equipment Co. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186, 1202 (11th Cir. 1993) (stating the Act does not require sales made to two different buyers at two different prices to be made at the same time or place); *Hartley & Parker, Inc. v. Florida Beverage Corp.*, 307 F.2d 916, 921 (5th Cir. 1962) (concluding that stock bought before price discrimination satisfied purchaser status under the Act); *Maier-Schule GMC, Inc. v. General Motors Corp. (GMC Truck & Bus Group)*, 780 F. Supp. 984, 990 (W.D.N.Y. 1991) (noting that prior purchases can establish claim under the Act).

¹⁶⁴ *Fusco v. Xerox Corp.*, 676 F.2d 332, 337 (8th Cir. 1982); *Shaw's v. Wilson-Jones Co.*, 105 F.2d 331, 333 (C.C.A. 3d Cir. 1939); *Cancall PCS v. Omnipoint Corp.*, No. 99-3395, 2000 WL 272309, *8 (S.D.N.Y. Mar. 10, 2000).

¹⁶⁵ Quora, *Has Uber's Ridership Been Impacted By Various Scandals?*, FORBES (Apr. 3, 2017), <https://www.forbes.com/sites/quora/2017/04/03/has-ubers-ridership-been-impacted-by-its-various-scandals/#3d88aaee2dec>.

¹⁶⁶ *Id.*

purchasers must make purchases at approximately the same time to violate the Robinson-Patman Act.¹⁶⁷ Courts determine contemporaneity by analyzing (1) the amount of time between sales,¹⁶⁸ (2) the characteristics of the platform,¹⁶⁹ and (3) the seasonality of the sales.¹⁷⁰ However, contracts that are entered at different times do not meet the contemporaneity requirement.¹⁷¹

Uber's platform could satisfy the contemporaneity requirement. First, surge prices occur when demand in pre-designated surge areas is high. Therefore, surge prices are not dependent on a particular season.¹⁷² Additionally, "trip requests are heaviest Monday through Friday during morning and evening rush hour, and on Friday and Saturday nights."¹⁷³ Because surge prices stem from high demand, they likely occur when trip requests are heaviest, which are multiple times throughout the year. This frequency demonstrates that surge prices occur consistently throughout the year as opposed to seasonally.¹⁷⁴

Second, as explained in the previous sub-section, customers order Uber's transportation services at the same time. Uber is a ride-sharing

¹⁶⁷ *Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc.*, 159 F.3d 129, 142 (3d Cir. 1998); *B-S Steel of Kansas, Inc. v. Texas Industries, Inc.*, 439 F.3d 653, 665 (10th Cir. 2006).

¹⁶⁸ *Atalanta Trading Corp. v. F.T.C.*, 258 F.2d 365, 372 (2d Cir. 1958) (holding that two different sales separated by five months did not violate the Act); *Dealers Wholesale Supply, Inc. v. Pacific Steel and Supply Co.*, No. C-81-3038-MHP, 1984 WL 775, *7 (N.D. Cal. 1984) (explaining that separate sales that took place more than five months apart are not contemporaneous).

¹⁶⁹ *In the Matter of Pacific Molasses Company et al.*, 65 F.T.C. 675, 704, 1964 WL 72961, *22 (1964) (noting that the type of industry determines whether sales separated by days, weeks or months are contemporaneous) (reversed and remanded on procedural grounds by *Pacific Molasses Co. v. F.T.C.*, 356 F.2d 386 (5th Cir. 1966)).

¹⁷⁰ *Valley Plymouth v. Studebaker-Packard Corp.*, 219 F. Supp. 608, 610-11 (S.D. Cal. 1963).

¹⁷¹ *Capital Ford Truck Sales, Inc. v. Ford Motor Co.*, 819 F. Supp. 1555, 1572 (N.D. Ga. 1992).

¹⁷² *See Valley Plymouth*, 219 F. Supp. at 611, 613 (explaining that the Robinson-Patman Act does not prevent sellers from changing prices for goods impacted by seasons); *Id.* at 612-13 (describing the meaning of "season" for purposes of the Robinson-Patman Act); *Id.* at 612 (stating that "season" can mean "a division of the year as determined by the difference in the length of days and nights and by distinctive physical conditions like rainy season or dry season or summer, spring, fall and winter").

¹⁷³ *Tips to get the most out of Uber*, UBER, <https://www.uber.com/info/get-started-tips> (last visited Jan. 27, 2019).

¹⁷⁴ *See Valley Plymouth*, 219 F. Supp. at 612 ("The word 'season' also signifies the period of the year in which something is more in vogue than at others, as when a particular trade, business, or profession is in its greatest state of activity, as the holiday season, the hop picking season.").

service.¹⁷⁵ It allows customers to share its services for a fare through an electronic app.¹⁷⁶

During surge times, customers in and outside of surge areas still access services through the app at the same time. Surge times last long enough for both the disfavored and favored riders to make a simultaneous purchase. For example, in Manhattan, surges sometimes last five minutes.¹⁷⁷ But it only takes a few seconds to open the Uber app and make a request. From there, customers throughout the city spend similar amounts of time waiting for their rides. In Manhattan, the median wait time throughout the city is two minutes and twenty-five seconds.¹⁷⁸ Because surge areas and non-surge areas can be separated by a matter of feet,¹⁷⁹ customers in both areas can experience similar wait times and, therefore, begin using Uber services at the same time. The wait times and distance between surge and non-surge areas illustrate how Uber customers in the same cities and looking to travel similar distances pay significantly different prices for the same services at the same time. These simultaneous purchases correlate with the Court's understanding of the contemporaneity requirement.

I. Uber's Surge Charges Have Anticompetitive Effects in the United States

Perhaps most importantly, The Robinson-Patman Act could apply to Uber because the company's surge pricing system has anticompetitive effects. Under the Act, price discrimination must injure competition.¹⁸⁰ To prove that the price discrimination had an anticompetitive effect, the favored and disfavored purchasers must be in actual competition with each other.¹⁸¹ Purchasers are in actual competition if they are in "competitive

¹⁷⁵ Matthew T. Bodie, *Lessons from the Dramatists Guild for the Platform Economy*, 2017 U. CHI. LEGAL F. 17, 28–29 (2017).

¹⁷⁶ See generally Anderson & Huffman, *supra* note 11 (defining the sharing economy and describing the Uber platform).

¹⁷⁷ Chen et al., *supra* note 2, at 1–2.

¹⁷⁸ Polly Mosendz & Hanna Sender, *Exclusive: Here's How Long It Takes To Get An Uber In U.S. Cities*, NEWSWEEK (Dec. 14, 2014 12:00 P.M.), www.newsweek.com/exclusive-heres-how-long-it-takes-get-uber-across-us-cities-289133.

¹⁷⁹ See Victor Luckerson, *Here's how you can avoid Uber surge pricing*, FORTUNE (Oct. 29, 2015), fortune.com/2015/10/29/tips-uber-surge-pricing (stating that riders in cities like Manhattan can avoid surge prices by moving a few hundred feet).

¹⁸⁰ OLSON, *supra* note 75, at § 22:82.

¹⁸¹ See *Lycon Inc. v. Juenke*, 250 F.3d 285, 289 (5th Cir. 2001); *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578, 586 (2d Cir. 1987). These cases found no anticompetitive effect because plaintiffs did not prove they were in competition with favored purchasers.

contact” with the higher and lower prices.¹⁸² The plaintiff must show that, during the time the price discrimination was implemented, the purchasers competed at the same functional level (e.g. all wholesalers or all retailers) in the same geographic market.¹⁸³ For example, in *Stelwagon Manufacturing Company v. Tarmac Roofing Systems, Inc.*, the Third Circuit found that two purchasers were in competition with each other because they both had customers and employees in Philadelphia.¹⁸⁴ It also found that the purchasers operated at the same distribution level because they had similar products either produced for or sold to them.¹⁸⁵ Once the plaintiff establishes a “competitive nexus,” it must show that the discrimination substantially affected the competition between them.¹⁸⁶ An example of a substantial effect on competition would be suffering an economic loss due to price discrimination.¹⁸⁷

Surge pricing satisfies the anticompetitive requirement. First, customers are in competition with each other during surge times. They are in “competitive contact” with the high and lower prices because they function as riders looking for transportation to and from the same locations. They also compete in the same geographic regions. A small change in a rider’s geographic location can significantly alter prices.¹⁸⁸ Therefore, two riders in Chicago or two riders in Manhattan can be subject to drastically different fares if one rider requests a driver in a surge area and the other requests a driver outside of that area and receives a normal fare.¹⁸⁹

¹⁸² *Best Brands Beverage*, 842 F.2d at 584–85 (explaining that there must be a “competitive nexus” between the purchasers).

¹⁸³ *Id.* at 585.

¹⁸⁴ *Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc.*, 63 F.3d 1267, 1271 (3d Cir. 1995).

¹⁸⁵ *Id.* at 1272.

¹⁸⁶ *Volvo Trucks N.A., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 180 (2006) (stating that price discrimination that substantially lessens competition is prohibited); *Cash & Henderson Drugs, Inc. v. Johnson & Johnson*, 799 F.3d 202, 210 (2d Cir. 2015) (holding that defendant did not commit secondary line injury under Robinson-Patman Act because its transactions only caused plaintiff to lose about three percent of customers per year and a little more than one percent of brand name prescription drug transactions per year); *Chrysler Credit Corp. v. J. Truett Payne Co., Inc.*, 670 F.2d 575, 581 (5th Cir. 1982) (finding no price discrimination under the Robinson-Patman Act because no proof that automobile manufacturer’s incentive program would substantially lessen competition among local dealers).

¹⁸⁷ *See Liberty Lincoln-Mercury v. Ford Motor Co.*, 134 F.3d 557, 572 (3d Cir. 1998) (finding no competitive injury because, even though franchisee suffered economic loss, it was no worse off than competitors facing the same conditions).

¹⁸⁸ *Chen et al.*, *supra* note 2, at 2.

¹⁸⁹ *Id.* at 2 fig. 1; *Id.* at 9 fig. 18 (illustrating how surge prices are designated across the city).

Second, surge pricing substantially affects competition between riders because it causes those subjected to surge prices to endure a significant economic loss whereas those outside of surge areas (but still in the same city) do not. As discussed previously, surge prices double, triple, or quadruple normal fares.¹⁹⁰ Customers who normally pay \$20 for a ride home may have to pay between \$60 and \$100 to travel that same distance in the relatively same amount of traffic, even if they choose the cheapest Uber service available. As a result, riders subjected to surge prices become worse off than those outside of surge areas, but otherwise using Uber under the same conditions of service. Even though surge times normally last a few minutes and it is possible to walk a few hundred feet to avoid surge prices, every rider may not always have that luxury.

Even worse, Uber drivers sometimes collude to make certain areas surge. Chen, Mislove, and Wilson have found that drivers strategize to artificially decrease supply.¹⁹¹ Another study found that drivers coordinate to manipulate Uber's algorithm by logging out of the app at the same time.¹⁹² By doing so, they trick the app into thinking that there are less cars on the road than are actually present and, hence, higher demand than there is.¹⁹³ This tells the algorithm to significantly increase prices in the area,¹⁹⁴ creating a manipulated surge. Even if Uber denies that its drivers manipulate surge pricing, the "black-box" system makes it possible for drivers to collude and exploit passengers.¹⁹⁵ Whether surge pricing is caused by collusion or solely a "black box" algorithm, it causes unfair economic injury to some riders and not others.

J. Surge Pricing Cannot be Justified as Good Faith under Section 2(b)

Uber's surge pricing system would not meet the good faith exception. Section 2(b) of the Robinson-Patman Act allows the seller to rebut a prima facie case made against it for price discrimination by showing that the lower price was made in good faith.¹⁹⁶ To satisfy this section, a seller must demonstrate a good-faith belief that its lower price was offered to meet a

¹⁹⁰ *Id.* at 8.

¹⁹¹ *Id.*

¹⁹² McGoogan, *supra* note 4.

¹⁹³ *See id.*

¹⁹⁴ *Id.*

¹⁹⁵ Chen et al., *supra* note 2, at 2 (citing *Uber Brotherhood, and a Few Sisters Too*, CONFESSIONS OF AN UBER DRIVER BLOG (May 26, 2014), <http://uberconfession.tumblr.com/post/86948127160/uber-brotherhood-and-a-few-sisters-too>); *see also* McGoogan, *supra* note 4 (citing a study that found that drivers manipulate Uber's algorithm to trick the app into surge pricing).

¹⁹⁶ 15 U.S.C. § 13(a) (1936); *Federal Trade Commission v. Cement Inst.*, 333 U.S. 683, 721 (1948).

competitor's equally low price.¹⁹⁷ Courts have held that a seller must show facts that would lead a reasonable and prudent person to conclude that the lower price was a good-faith effort to meet the low price of its competition.¹⁹⁸ There is no pattern for deciding what actions satisfy the good faith defense.¹⁹⁹ When determining whether a seller responded to competitive necessity in good faith, courts have considered whether (1) the seller saw reports of similar discounts from customers, (2) was threatened with losing an account if it did not give the discount, (3) tried to verify the discount with evidence or an appraisal considering market data, and (4) a prior relationship existed between the seller and the customer.²⁰⁰ The Court has found that a sales system that consistently brings a seller more money for identical products from some buyers and not others is not a practice done in good faith under section 2(b).²⁰¹ Additionally, if the Court finds the price discrimination to be a practice and not a good faith effort to conform to "individual competitive situations," it will not excuse the price system under section 2(b).²⁰²

Uber provides several justifications for its surge pricing system. It says surge fares help improve faster pickups.²⁰³ It also says surge pricing may temporarily increase fares.²⁰⁴ Uber claims this pricing scheme encourages more drivers to get on the road and go to areas where demand is high for rides.²⁰⁵ Additionally, it argues that surge pricing reduces demand by using prices to exclude some customers from the market, reducing the wait time for those who remain.²⁰⁶

These justifications do not amount to a good-faith belief under section 2(b) for several reasons. First, the nature of Uber's surge pricing conflicts with the spirit of section 2(b). This section gives sellers an opportunity to justify their reasons for offering a lower price in certain regions. But Uber is not offering prices below its normal fares. Instead, it is offering some riders significantly higher fares while offering normal fares to other riders

¹⁹⁷ U.S. v. U.S. Gypsum Co., 438 U.S. 422, 453 (1978).

¹⁹⁸ Falls City Indus., Inc. v. Vanco Beverage, Inc. 460 U.S. 428, 438 (1983).

¹⁹⁹ Angela Nwaneri, *The "Good Faith" Meeting Competition Defense to a Section 2(A) Violation of the Robinson-Patman Act: Area-wide Pricing as a Valid Response to Competition*, 14 WM. MITCHELL L. REV. 859, 878 (1988).

²⁰⁰ High Tech Comm'ns, Inc. v. Panasonic Co., 1995 WL 45847, at *2 (E.D. La. 1995).

²⁰¹ See *Cement Inst.*, 333 U.S. at 725.

²⁰² *Id.*

²⁰³ See *What is dynamic pricing?*, *supra* note 1.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Chen et al., *supra* note 2, at 1. See Feuerherd & Prendergast, *supra* note 56 (quoting Uber's public policy expert saying that demand would overwhelm supply if Uber prices were artificially capped during the normal course of business).

who are similarly-situated. Therefore, surge pricing does not conform to the language of section 2(b).

Second, surge pricing does not satisfy any of the four factors courts typically analyze.²⁰⁷ The factors concern setting a discount out of competitive necessity. The Supreme Court suggests that competitive necessity involves setting a lower price in a specific region to meet an equally low price of a competitor.²⁰⁸ While Uber does offer riders discounts, these have nothing to do with surge prices.²⁰⁹ And surge prices have nothing to do with competition among Uber drivers. Even though drivers are in competition with each other, surges are not the result of multiple drivers looking for rides in the same area. Instead, they stem from multiple customers requesting rides from the same area.²¹⁰ This makes it impossible for surge prices to be a good-faith response to competitive necessity for purposes of section 2(b). Not only does surge pricing increase fares, but it does so in response to its consumers, not its competitors. Additionally, surge prices and a lack thereof have nothing to do with prior relationships between Uber and its customers. As explained above, they are a product of high demand.

Third, there is mixed evidence as to whether surge pricing works the way Uber says. One article found that, during a New Year's Eve, surge pricing brought more drivers on the road and reduced the wait time.²¹¹ However, a study has found that surges seem to have a small effect on bringing new cars to a surge area but a larger, negative effect on influencing customers to request rides.²¹² This causes drivers to leave surge areas to collect more fares.²¹³ The study did not find conclusive evidence that surges bring more cars to surging areas.²¹⁴ These facts would not lead a reasonable and prudent person to believe that surge prices or normal fares during surge times satisfy a good-faith effort to meet the low price of competition. They instead reveal that Uber's justifications for surge pricing is supported by little evidence.

Finally, surge pricing is a "sales system that consistently brings a seller more money" for identical services from some riders and not others. As explained in previous sections, Uber provides services of "like grade

²⁰⁷ See *High Tech Commc'ns, Inc. v. Panasonic Co.*, 1995 WL 45847, at *2 (E.D. La. 1995).

²⁰⁸ See *Falls City Indus., Inc. v. Vanco Beverage, Inc.* 460 U.S. 428, 429 (1983).

²⁰⁹ See *Get up to \$15 off your first ride*, UBER, <https://www.uber.com/promo/> (last visited May 16, 2018).

²¹⁰ *How surge pricing works*, UBER, <https://www.uber.com/en-GB/drive/partner-app/how-surge-works/> (last visited Jan. 27, 2019) (showing that prices surge when demand increases in a particular area).

²¹¹ Worstall, *supra* note 57.

²¹² Chen et al., *supra* note 2, at 12.

²¹³ *Id.*

²¹⁴ *Id.*

and quality,” and surges discriminate between riders in the same city. The pricing system doubles, triples, or quadruples Uber’s profits for arbitrary reasons (e.g., the “black box” algorithm). It is also frequently implemented. Surge pricing constitutes a consistent scheme and not an individual, good faith effort to conform to “individual competitive situations.”

III. ROBINSON-PATMAN PRICE DISCRIMINATION ACT SHOULD EXTEND TO SERVICES

In response to surge pricing, Congress should amend the definition of “commodities” in the Robinson-Patman Act to include “services.” As explained previously, the Chairman of the House Judiciary Committee tried to amend the Act by adding “services” to the definition of “commodities” but was unsuccessful.²¹⁵ However, there is no fundamental distinction between discriminating between the sale of goods and the sale of services.²¹⁶ Therefore, Congress should not have created one. This section will argue that Congress can fix this unnecessary distinction by applying the Act to services. It will also explain that this extension will further the Act’s purpose and keep the Act consistent with broader antitrust policies.

A. Extension Would Further Purpose of Robinson-Patman Act

Applying the Robinson-Patman Act to services would advance the Act’s purpose. Scholars disagree over the purpose of the Robinson-Patman Act.²¹⁷ But it is clear that the Act is meant to protect competitors from unfair price discrimination because it acknowledges that unfair price discrimination injures competitors.²¹⁸ And the legislative history indicates that the Act was drafted to protect the general welfare of consumers.²¹⁹ Extending the Act to cover services would further both of these goals. It would prevent companies like Uber from injuring customers with unfair price discrimination by slipping through the “commodities” loophole.

²¹⁵ *Tri-State Broad. Co. v. United Press Int’l., Inc.*, 369 F.2d 268, 270 n.2 (5th Cir.1966) (citing H.R. 8277, 85th Cong., 1st Sess., 103 CONG. REC. 9898 (1957); 103 CONG. REC. 9900-9901 (1957)).

²¹⁶ 103 CONG. REC. 9900-9901 (1957). *See also* Federal Trade Comm’n v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 543 (1960) (stating that the legislative history of § 2(a) is plain).

²¹⁷ Angela Nwaneri, *supra* note 202, at 866 (citing R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978)).

²¹⁸ *Id.* at 869 (citing Jerry S. Cohen, *Let’s Retain It*, 45 ANTITRUST L.J. 44, 48 (1976)); *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1341 (8th Cir. 1987) (agreeing that Robinson-Patman Act targets unfair price discrimination that injures competition).

²¹⁹ Angela Nwaneri, *supra* note 202, at 871 n.59 (citing 80 CONG. REC. 3447 (1936); 79 CONG. REC. 11575 (1935)).

Congress can close the loophole without distorting the purpose of the Act. The Act is meant to be construed liberally.²²⁰ Therefore, Congress is permitted to broaden the Act's application. Expanding the definition of "commodities" to include services would enhance the general welfare of consumers by controlling a form of unfair price discrimination.

B. Extension Would Fit with Broader Antitrust Policy

Expanding the definition of "commodities" would keep the Robinson-Patman Act aligned with the principles of other antitrust laws, like the Sherman Anti-Trust Act (Sherman Act), 15 U.S.C. §§1–7, and the Clayton Act. The Sherman Act addresses excessive restraints of interstate commerce, the freedom of interstate commerce in the public interest, and disruptive or compulsive monopolies.²²¹ Commentators have disagreed over the true congressional purpose of the Sherman Act.²²² While it is evident that Congress intended the Sherman Act to protect consumer welfare, there is a debate over whether "consumer welfare" refers to the welfare of consumers or economic efficiency, also known as total welfare.²²³ Legislative history indicates that Congress passed the Sherman Act to protect both business and individual consumers from being overcharged.²²⁴

²²⁰ Rudner v. Abbott Lab., Inc., 664 F.Supp. 1100, 1103 (N.D. Ohio 1987). But note that exceptions to the statute are supposed to be construed narrowly. *Id.*

²²¹ Appalachian Coals v. U.S., 288 U.S. 344, 359 (1993), *overruled on other grounds by* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

²²² Douglas H. Ginsburg, *Bork's "Legislative Intent" and the Courts*, 79 ANTITRUST L.J. 941, 947–49 (2014) (citing Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Economic Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 93 (1982) (arguing that the Sherman Act was meant to reduce the market power of large producers to prevent them from taking wealth from consumers); Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 24 (1989) (arguing that the main purpose of the Sherman Act is to protect small business, not consumers); John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 207 (2008) (arguing that Congress only intended to protect sellers from being forced to sell below competitive price levels when passing the Sherman Act)). *See also* Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 10 (1966) (arguing that the purpose of the Sherman Act is to maximize consumer welfare, i.e. economic efficiency or total welfare, which is the sum of consumer surplus and producer surplus); Marshall Steinbaum, *The Consumer Welfare Standard Is an Outdated Holdover from Discredited Economic Theory*, ROOSEVELT INSTITUTE (Dec. 11, 2017), <http://rooseveltinstitute.org/consumer-welfare-standard-outdated-holdover-discredited-economic-theory/> (noting that the Senate Judiciary Committee held a hearing to determine whether the consumer welfare standard is still the crux of antitrust policy).

²²³ Kirkwood & Lande, *supra* note 225, at 213.

²²⁴ *Id.* at 202–03. *See also* Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 538 (1983) (stating that the legislative

Additionally, most courts agree that the general goal of the Sherman Act and antitrust laws is to protect consumers and not solely total welfare.²²⁵ While the Sherman Act, as well as antitrust laws generally, tends to promote economic efficiency, its ultimate goal is to prevent powerful firms from using market power to raise prices to consumers.²²⁶

The Clayton Act was intended to elaborate on the Sherman Act by providing more detail on trade restraints.²²⁷ In 1935, the Federal Trade Commission issued a report finding that section 2 of the Clayton Act did not adequately protect price discrimination.²²⁸ It recommended that section be amended to clearly define illegal price discrimination.²²⁹ As a result, the Robinson-Patman Act was added to the Clayton Act to protect competition and equal opportunity.²³⁰

The legislative history of the Sherman and Clayton Acts demonstrate that antitrust laws can be expanded to accomplish policy goals.²³¹ Just as the Clayton Act was enacted so the Sherman Act could be enforced more effectively and the Robinson-Patman Act was enacted to better protect

history reveals the Sherman Act was passed to allow customers to benefit from price competition); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 489 (1968) (acknowledging that buyers are owed protection); *La. Wholesale Drug Co. v. Hoechst Marion Roussel, Inc. (In re Cardizem CD Antitrust Litig.)*, 332 F.3d 896, 904 (6th Cir. 2003) (stating that the purpose of antitrust law is to allow injured purchasers to benefit from competition); Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1702–03 (1986) (stating that Congress passed the Sherman Act to protect consumers from overcharges).

²²⁵ *Kirkwood & Lande, supra* note 225, at 213–15 (citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993)) (equating “consumer welfare” with the welfare of consumers as opposed to total welfare); *See MetroNet Services Corp. v. Quest Corp.*, 383 F.3d 1124 (9th Cir. 2004) (distinguishing “consumer welfare” from allocative efficiency); *Kochert v. Greater Lafayette Health Servs., Inc.*, 463 F.3d 710, 715 (7th Cir. 2006) (stating that the primary purpose of the antitrust laws is to prevent customers from being overcharged). *See also United States v. Aluminum Co. of Am.*, 148 F.2d 416, 428 (2d Cir. 1945) (stating that Congress intended for the Sherman Act to reduce the “helplessness of the individual”).

²²⁶ *Kirkwood & Lande, supra* note 225, at 242, 243.

²²⁷ LOUIS ALTMAN & MALLA POLLACK, *CALLMANN ON UNFAIR COMP., TR. & MONO.* § 7:24 (4th Ed. 2017).

²²⁸ FTC, *CHAIN STORES: FINAL REPORT ON THE CHAIN-STORE INVESTIGATION*, S. DOC. NO. 4, 74TH CONG., 1ST SESS. (1935), at 15 [hereinafter *FTC REPORT*].

²²⁹ *Id.*

²³⁰ POLLACK, *supra* note 230, at § 7:24. *See also Nwaneri, supra* note 202, at 864 (stating that the FTC Report was largely the basis of the Robinson-Patman Act).

²³¹ *See also Nwaneri, supra* note 202, at 874 (noting that courts have demonstrated the flexibility of the Robinson-Patman Act by applying available defenses less restrictively).

competition and equal opportunity, the Robinson-Patman Act should be expanded to provide buyers better protection from price discrimination. Including “services” in the definition of “commodities” would further maximize consumer welfare. It would cover a range of transactions that currently go unnoticed by the Act, protecting consumers from abnormally high prices. This type of amendment also makes sense because the Robinson-Patman Act is supposed to be interpreted “consistently with the broader policies of the antitrust laws.”²³² Therefore, adding “services” to “commodities” would fulfill the purpose of antitrust policy as a whole by protecting customers from both overpriced products and services.

It is true that the Sherman Act applies to both commodities and services.²³³ But adding services to the Robinson-Patman Act would not make it superfluous to the Sherman Act. The Robinson-Patman and Sherman Acts target different aspects of competition law.²³⁴ “The Sherman Act looks to curb certain forms of illegal monopolies and conspiracies while the Robinson-Patman Act looks to protect smaller competitors by giving them the same access to discounts that would otherwise be reserved for those commanding more buying power.”²³⁵ In other words, as Angela Nwaneri has stated, the Sherman Act enforces competition while the Robinson-Patman Act controls it.²³⁶ Expanding the definition of “commodities” to include services would prevent platforms like Uber from exploiting customers through unfair price discrimination.

CONCLUSION

Uber’s current surge pricing method should be illegal. It arbitrarily discriminates between riders using Uber services under similar, if not identical, conditions. While customers can avoid surge prices by waiting a few extra minutes or walking to a different area, they may not always be able to. Nor should they have to. Putting the burden on customers to avoid unfair price discrimination defeats the purpose of antitrust laws, which were enacted to prevent large firms with vast market power from unfairly discriminating against consumers.

The Robinson-Patman Act was designed to prevent this type of exploitation. However, it does not apply to Uber because the platform falls outside the Act’s definition of a “commodity.” Because transportation does not constitute a tangible product, Uber’s ride-sharing platform is considered a service. For this reason, Uber can continue exploiting thousands of individual consumers through surge pricing. A simple amendment to

²³² Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69, 80 n.13 (1979).

²³³ See 15 U.S.C. § 1 (2004); Goldfarb v. Va. State Bar, 421 U.S. 773, 788 (1975) (stating that §1 of the Sherman Act includes the sale of services).

²³⁴ Drug Mart Pharmacy Corp. v. Am. Home Products Corp., 472 F.Supp.2d 385, 402 (E.D.N.Y. 2007).

²³⁵ *Id.*

²³⁶ Nwaneri, *supra* note 202, at 871.

the Robinson-Patman Act could fix this. Congress should add “services” to the definition of “commodity” so that consumers always pay a reasonable price for Uber and similar ride-sharing platforms.