SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

UBER TECHNOLOGIES, INC., Petitioner, v. NEW YORK CITY DEPARTMENT OF CONSUMER AND WORKER PROTECTION; VILDA VERA MAYUGA, in her official capacity as Commissioner of the New York City Department of Consumer and Worker Protection; THE CITY OF NEW YORK, Respondents.	Index. No. _____ **VERIFIED ARTICLE 78 PETITION AND APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Petitioner Uber Technologies, Inc. ("Uber"), by and through its undersigned counsel, for its Verified Petition ("Petition"), alleges as follows.

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INTRODUCTION

1. Food delivery platforms like Uber Eats have become an increasingly popular feature of life in New York City and elsewhere. Consumers, merchants, and people looking to earn money on their own schedules in New York City now use and enjoy platforms like Uber Eats. These platforms have presented new opportunities for the City's restaurant industry to satisfy their customers' preferences for convenience and connect with new customers, and facilitated flexible earnings opportunities for thousands of food delivery workers.

2. Uber Eats supports and has supported fair courier earnings rules that work, such as California's Proposition 22. The New York City Department of Consumer and Worker Protection (the "Department") has enacted a set of experimental new rules regarding compensation for couriers. This new, complex economic experiment will require food delivery platforms to pay couriers a base rate of $17.96 per hour starting on July 12, 2023, and increasing to $18.96 per hour by April 2024 and $19.96 per hour by April 2025, for all of the time that couriers are logged onto an app—including the time that they are waiting for a delivery opportunity, even if they are declining them (what the Department calls "on-call time"), in addition to time spent on deliveries. Because of the novel way the Department chose to approach on-call time and other elements of the rule, tens of thousands of couriers will, by the Department's design, lose access to food delivery platforms and the opportunities to earn money by making deliveries, and restaurants will lose orders they otherwise would have received.

3. Under the Department's new rules, even using the Department's optimistic estimate, delivery costs to consumers would increase nearly $6.00 (before inflation) and orders would decrease by nearly 18%.[1] Furthermore, the Department's assessment of increased fees and

[1] Uber's April 5, 2023 Comment at 14, Ex 1.

reduced demand depends on assumptions about how many trips per hour couriers will make, which determines how many trips can absorb the increased costs, and how consumers will react to increased fees. If the Department is even slightly off in its assumptions about how many trips couriers can make per hour or how responsive consumers are to price, New York's restaurants will see their food delivery orders shrink by more than a third. In other words, the Department's grand marketplace experiment risks crushing restaurants and the increasingly important food delivery market.

4. The Department developed and assessed its new rules based on flawed data resulting from biased surveys and unrealistic assumptions that amount to little more than wishful thinking.

5. Perhaps most egregiously, the Department is assuming that this seismic shift in the industry, even its large expected reduction in orders, will have no impact on the profitability of thousands of restaurants in the City that now benefit from food delivery platforms like Uber Eats to make profits and cover their costs, *assuming* these restaurants currently make a 0% margin on such orders.

6. The "0% margin" assumption is absurd on its face. It assumes that all restaurants make no profit whatsoever on the additional sales that food delivery platforms indisputably provide—begging the question as to why thousands of restaurants would bother to use the apps if that were the case. The Department has attempted to support its common sense-defying 0% margin assumption with a citation to a single internet article that is not tailored to New York City, is not current, and does not say restaurants make no margin on food delivery platform orders. The Department chose not to ask the restaurants themselves, even when it commissioned its own restaurant survey, and ignored contrary findings in surveys the delivery apps have conducted.

Then, the Department concealed this assumption, excluding it from a table it said contained the inputs to its model. Finally, in a last attempt to justify its unsupported assumptions, the Department's Notice of Adoption alluded to previously undisclosed, and still undocumented, confidential "discussions with restaurant industry stakeholders."[2] When and where these conversations took place is unknown to the public, as is who these "stakeholders" are and whether they actually own or work in restaurants or are familiar with margin on delivery orders. Secret backroom discussions are not the place to gather critical assumptions that impact the bottom line of thousands of New York City restaurants, their owners, and the people who work there.

7. The Department's assumption that restaurants are not rational economic actors has enabled the Department to conceal some of the severely negative impacts of the Challenged Rule. Reduced orders means reduced profits and revenues. If platforms can no longer maintain delivery fulfillment in certain neighborhoods, many restaurants will be cut off from the opportunity to deliver altogether. As one restaurant owner commented, "even slight changes to prices can deter customers from ordering delivery" and "many small businesses would not be able to survive such a stark drop in orders. And the decrease in volume of deliveries would be especially hard for restaurants and local businesses in further out areas of New York City."[3]

8. The Department never even modeled the real-world scenario where restaurants accept food delivery platform orders because they help the top and bottom line. The Department's failure to even consider the implications of this core assumption means that the Challenged Rule is "not based on a rational, documented, empirical determination" and must be set aside. *N.Y.*

[2] N.Y.C. Dep't of Consumer and Worker Protection, Notice of Adoption of Final Rule (June 12, 2023) ("Challenged Rule") at 21, Ex. 2.

[3] Comment by Shuai Zhang, Owner of POPRICE, Ex. 3.

State Ass'n of Counties v. *Axelrod*, 78 N.Y.2d 158, 168 (1991); *see also see Motor Vehicles Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43, 52 (1983).

9. Even when the Department did do some sensitivity analysis (demanded by commenters), it ignored the implications. For example, the Department's model projected different rates of pass through to consumers of the increased costs that delivery apps will incur. According to the Department's own data, an adjustment from 100% to 50% pass through results in a 69% reduction in delivery apps' total gross margins, plummeting from $725 million down to $232 million—a $493 million decrease. The Department showed this nearly half a billion dollar drop in one line of a table buried in the Challenged Rule but appears not to have considered it at all.

10. Worse still, the Department concealed its economic model from public view and to date, has still not produced the model underlying the Challenged Rule. Economic modeling underlying an earlier version of the Rule was produced only to Uber pursuant to a FOIL request, and even that came only after the comment period for that version of the Rule had closed. It is only from Uber's analysis of the model—analysis that required considerable expertise—that the Department's critical assumption of a 0% margin for restaurant owners was revealed. On the whole, its reliance on a model, hidden from the public eye and from interested stakeholders, demonstrates that the Department has not engaged in rational rulemaking based on documented, empirical evidence.

11. Nor were these the only fatal flaws in the Department's rulemaking.

12. The Department's minimum pay rate includes what the Department calls a "workers' compensation component" of $1.68 per hour. The Department calculated the amount of this component based on the average reimbursements received by similarly positioned workers

who are covered by workers' compensation insurance. But as the Department admits, there is no requirement that any courier purchase such insurance, nor evidence that any courier actually has bought or will buy such insurance, and the one-size-fits-all payments will not replicate such insurance.

13. Rather, couriers who are not injured will pocket the money as additional compensation. And the couriers who *do* suffer a work-related injury will not receive enough money nor any amount that approximates what they would get if they had insurance.

14. Thus, this "compensation" component of the pay mandate is guaranteed to *over*compensate most couriers and *under*compensate an unlucky few. That is arbitrary and irrational. In addition, the Department does not even attempt to explain why it chose the particular insurance rate it did—foregoing, for instance, the state's published rate for "Restaurants – Fast Food & Drivers." That, too, reflects arbitrary and irrational decision-making.

15. The Department also did not consider what other impacts the Challenged Rule will have on restaurants and couriers in New York. Because the Challenged Rule incentivizes food delivery apps to increase the number of trips per hour in order to absorb the increased delivery costs per hour, platforms will be incentivized to shrink the delivery radius around each restaurant. Whether a restaurant is a neighborhood restaurant, a pizzeria, or a gourmet establishment, deliveries will necessarily be limited only to customers living much closer to the restaurant, severely curtailing options and variety for consumers, while costs are going up, curbing demand. Rising costs, and decreasing options, risks a downward spiraling effect both on the restaurant and the couriers who service it, an effect ignored by the Department despite numerous comments, including an economic analysis by Ph.D. economists at Charles River Associates and testimony on behalf of traditionally underserved communities throughout New York City.

16. These are just the start of the problems, as set forth more fully below. The "surveys" of delivery workers that the Department used to justify critical components of the Rule violated every fundamental principle required for neutral, unbiased data collection, as detailed by a professor at the Stanford University Graduate School of Business who specializes in such surveys. Indeed, Uber's expert reported that he had never before seen a survey with such blatant built-in biases. Moreover, the Challenged Rule also imposes unreasonable recordkeeping requirements on third-party apps like Uber Eats that have no basis in law or common sense. It likewise provides food delivery platforms only the worst option for responding to fraud by couriers—deactivation—and not the lesser remedies like simply not paying for fraudulent behavior.

17. Additionally, the Challenged Rule is contrary to law and should be set aside because it was enacted contrary to its authorizing statute, Local Law 115 of 2021. The City Council required the Department to study the working conditions of third-party delivery workers for all "food service establishments," meaning all businesses that sell individual portions of food directly to the consumer, and craft a minimum earnings standard based on the results of its study. There are a number of services that meet the City Council's instructions—including restaurant-focused delivery apps like Uber Eats, Grubhub, DoorDash, and Relay, as well as grocery and convenience delivery apps like Instacart, since many of the stores these platforms connect with sell individual portions of food. Yet the Department studied and developed regulations covering only the platforms more focused on restaurants.

18. The Department's decision to exclude grocery and convenience delivery apps is contrary to the letter of the authorizing statute and common sense. For example, one could order a sandwich from Morton Williams with Uber Eats, and that delivery would be subject to the

Challenged Rule. But if the very same order, from the same grocery store—and perhaps even delivered by the same delivery worker—was arranged through Instacart, the Department would not consider the delivery or Instacart to be governed by the Challenged Rule. This conflicting interpretation is confirmed by the Department's contradictory responses to comments, revealing the arbitrary nature of its rulemaking process. And in failing to even study these other services, let alone implement an appropriate minimum earnings standard, the Department acted contrary to law.

19. The Challenged Rule is set to go into effect on July 12, 2023. If allowed to take effect, it will cause immediate and irreparable harm to Uber in the form of lost goodwill with couriers and customers and in the form of nonrecoverable costs.

20. A core premise of the Challenged Rule is to cause food delivery platforms to increase couriers' "utilization"—that is, time spent delivering food instead of merely having the app open, waiting to receive a delivery request and then deciding whether to accept or reject the request. This means food delivery platforms must restrict couriers' access to platforms by not allowing couriers to log into the app at certain times of day or days of the week and in certain communities, or allowing them to access the platform only during pre-appointed times of the day or days of the week, and selecting a large number of couriers that will not be provided with any available slots to pre-select for access. This will destroy Uber Eats' goodwill with the couriers who use its platform—and also its other platforms like ridesharing—perhaps permanently, even if the Court eventually strikes down or modifies the Challenged Rule.

21. Uber Eats also stands to suffer significant costs and losses in complying with the Challenged Rule on an interim basis—amounts that it will not be able to recover from the City, even if it eventually prevails in having the Rule struck down or modified. There are two

components to such costs. First, Uber will be forced to commit thousands of hours of personnel time to rebuild its technology products to be able to implement the complex new compensation rules and restrict courier access to its platform. This will require Uber to divert significant time and resources of its product management, engineering, and legal teams away from projects that Uber included on its existing product and tech road map, which irreparably harms Uber's ability to manage and develop its products. All of these efforts, which are described in the accompanying affidavit of Laura Hahn, will require diverting high-value team members away from existing engineering projects where their know-how cannot be replaced. Second, the Department predicts that apps like Uber will pass on the increased costs to consumers in the form of increased fees, which, also as the Department predicts, will cause reduced demand and loss of goodwill, or Uber will have to absorb the increased costs. As set forth in the affidavit of Laura Hahn, this assumption makes sense. These increased costs are irreparable injury because Uber has no way to recover such costs, even if the Court ultimately strikes down or modifies the Challenged Rule.

22. The Court must also consider the full range of impacts across the board in balancing the equities. For couriers, the Challenged Rule is a mixed bag that will create some winners and some losers. The rule is designed to cause platforms to restrict couriers' access, using technologies being built as described in the affidavit of Laura Hahn. This means existing couriers will attempt to go online as they have done historically, but find they cannot go online at the time(s) of their choice, and those who would like to become couriers will not be able to do so. Others will be online, and then be forced offline. Others will find they can go online, but only at times that do not work for their schedules or lives. Some couriers will thus not be able to access the platform at all. The Department never addresses the tens of thousands of couriers who stand to lose economic opportunities, other than to say that the impacts of the rule will be felt by those whose "engagement

on the apps" is "most casual."[4] And it is entirely unclear why commenters like Ryan Grant, a New York State employee whose full-time job involves helping adults with disabilities and who relies on courier work to make ends meet, should be considered "casual" users. Couriers who do retain platform access may see their earnings go up, but at the cost of now having to think about speed and their utilization levels, facing increased pressures to be on trip as much as possible. And for merchants, the Rule will cause them to suffer a reduction in orders, revenues, and profits. Restaurant employees, like cooks, bussers, and dishwashers, will lose their jobs.

23. It is more important to get the issue of courier earnings right than to get it done a month or two more quickly. The equitable solution is to enjoin the Challenged Rule from taking effect until the Court can consider and adjudicate the serious issues this Petition presents.

PARTIES

24. Petitioner Uber Technologies, Inc. ("Uber") is a technology company that operates Uber Eats, which is a "third-party food delivery service," as that term is defined by New York City Administrative Code § 20-1501. Uber facilitates the finding and ordering of food, beverages, and other goods from merchants and pick up of the same, and facilitates delivery for consumers and merchants. Currently and absent the Rule going into effect, for couriers, the Uber Eats platform provides flexibility and convenience to earn on their schedules, when and where they want. They have the freedom to access the marketplace as they wish and to refrain from accessing it when they wish, as well as to accept or decline any opportunity that is presented to them.

25. Respondent New York City Department of Consumer and Worker Protection (the "Department") is an administrative agency of the City of New York created and operating pursuant

[4] N.Y.C. Dep't of Consumer and Worker Protection, *A Minimum Pay Rate for App-Based Restaurant Delivery Workers in NYC* (the "Report"), at 36 (Nov. 2022), Ex. 4.

to Chapter 64 of the New York City Charter. *See* N.Y.C. Charter § 2203. The Department's principal office is located at 42 Broadway, New York, New York 10004.

26. Respondent Vilda Vera Mayuga serves as the Commissioner of the Department. Commissioner Mayuga's principal office is also located at 42 Broadway.

27. Respondent City of New York (the "City") is a municipal corporation duly incorporated and existing pursuant to the laws of the State of New York.

JURISDICTION AND VENUE

28. This Court has subject matter jurisdiction to decide this Petition pursuant to Section 7803 of the New York Civil Procedure Law and Rules. The Challenged Rule is a final determination of the Commission. This Petition challenges that determination as made in violation of lawful procedure, affected legal error, and as being arbitrary and capricious.

29. Venue is proper in New York County Supreme Court pursuant to Sections 506(b) and 7804(b) of the New York Civil Procedure Law and Rules because the challenged determination occurred in New York County, which is also where Respondents' principal offices are located.

FACTUAL ALLEGATIONS

A. Uber Contributes to New Yorkers' Food Delivery Ecosystem

30. Companies like Uber Eats, DoorDash, Grubhub, and others have developed app- and web-based food ordering and delivery platforms that have improved the ability of consumers to find new restaurants and items, of restaurants to reach existing and new customers, and of restaurants, couriers, and consumers to arrange for food delivery. Consumers value the convenience; couriers value the flexibility; and merchants value the additional revenues and ability to satisfy their customers' preferences, making food delivery platforms increasingly popular.

Utilizing Uber's platform and technology, consumers and restaurants are now able to connect for delivery in ways they simply could not before, and couriers are able to earn in new ways.

31. Prior to 2019, consumer use of Uber Eats in New York was largely centered around Manhattan and western Brooklyn. After the COVID-19 pandemic, however, Uber Eats saw a shift to the other boroughs for both customers and couriers. In the first few months of 2020, after COVID-19 hit New York City, tens of thousands of new customers in New York signed up for the Uber Eats app, with the largest increases coming from the outer rings of the outer boroughs.

32. In that same time period, New Yorkers in traditionally low-income neighborhoods began relying on Uber Eats more than anyone else. Those residents, who were forced to stay home due to social distancing concerns and did not have the ability to leave the City, turned to Uber Eats to get basic food and grocery necessities for their families.

33. Uber Eats and other delivery apps have also been a huge boon to New York's restaurant industry, which was almost crushed by COVID-19. While some third-party services simply offer listing or marketing to local merchants, a restaurant can list its menu on Uber Eats and also have Uber Eats aid in the fulfillment of the orders for their restaurants, including handling all the logistics and facilitating payments to couriers for the cost of their delivery services. Uber Eats also performs background checks on couriers, and maintains additional costs related to safety on its platform, insurance costs, technology services, and customer support—costs otherwise undertaken by restaurants employing their own delivery workers, now spread across the many restaurants a courier may service.

34. The Department estimates that Uber Eats and other delivery apps facilitated $3.6 billion of the $24.7 billion in New York City restaurants sales between March 2021 and May 2022,

which is nearly 15%.[5] The Department estimates that, as of the second quarter of 2022, 61,000 couriers used food delivery platforms to make restaurant deliveries in the City in any given week, and that more than 122,000 people had courier accounts.[6]

B. The City Council Passes a Law to Establish Minimum Payments to Couriers

35. In September 2021, the New York City Council (the "City Council") signed into law a package of legislation directed at platforms like Uber Eats. Among the relevant measures was Local Law 115, which obligated the Department to "study the working conditions of food delivery workers,"[7] meaning persons who serve as independent contractors for third-party services[8] to deliver food, beverages, or other goods from a "food service establishment,"[9] which is any business in the City where food is provided "for individual portion service." N.Y.C. Admin. Code § 20-1552(a)(1).

36. The City Council required the study to include "at a minimum, consideration of the pay food delivery workers receive and the methods by which such pay is determined, the total income food delivery workers earn, the expenses of such workers, the equipment required to perform their work, the hours of such workers, the average mileage of a trip, the mode of travel

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5 Report at 6, Ex. 4.

6 Report at 12, Ex. 4.

7 "Food delivery worker" means any person "who is hired, retained, or engaged as an independent contractor by a third-party food delivery service . . . or a third party courier service to deliver food, beverage, or other goods from a business to a consumer in exchange for compensation." N.Y.C. Admin. Code § 20-1501.

8 "Third-party food delivery service" means "any website, mobile application, or other internet service that: (i) offers or arranges for the sale of food and beverages prepared by, and the same-day delivery or same-day pickup of food and beverages from, a food service establishment; and (ii) that is owned and operated by a person other than the person who owns such food service establishment." *Id.*

"Third-party courier service" means a service that "(i) facilitates the same-day delivery or same-day pickup of food, beverages, or other goods from a food service establishment on behalf of such food service establishment or a third-party food delivery service; (ii) that is owned and operated by a person other than the person who owns such food service establishment; and (iii) and is not a third-party food delivery service." *Id.*

9 "Food service establishment" means "a business establishment located within the city where food is provided for individual portion service directly to the consumer whether such food is provided free of charge or sold, and whether consumption occurs on or off the premises or is provided from a pushcart, stand or vehicle." *Id.*

used by such workers, the safety conditions of such workers, and such other topics as the department deems appropriate." *Id.*

37. Local Law 115 also vested the Department with the limited authority, based on the results of its study, to "establish a method for determining the minimum payments that must be made to a food delivery worker by a third-party food delivery service or third-party courier service." N.Y.C. Admin. Code § 20-1552(a)(3). The City Council gave specific instructions to the Department to "at minimum, consider the duration and distance of trips, the expenses of operation associated with the typical modes of transportation such workers use, the types of trips, including the number of deliveries made during a trip, the on-call and work hours of food delivery workers, the adequacy of food delivery worker income considered in relation to trip-related expenses, and any other relevant factors, as determined by the department." *Id.*

38. The Department conducted two surveys of delivery workers and one survey of merchants.

39. Between October 1 and December 31, 2021, the Department distributed an online survey, the "NYC Delivery Workers Survey," by text message and email to all food delivery workers—over 122,000 in total.[10] The Department prefaced its survey with the following introduction: "NYC is surveying New Yorkers about their work for delivery apps. This is part of a new law to raise pay for app delivery workers. Your answers will help NYC set a minimum pay rate that reflects your expenses and needs."[11] The Department received nearly 7,956 responses to this survey.[12]

[10] Report at 2, Ex. 4.

[11] Module 1 Questionnaire, NYC Delivery Worker Survey at 1 (emphasis added), Ex. 5.

[12] Report at 3, Ex. 4.

40. The Department also conducted a separate in-person field survey of delivery workers, the "Columbia-Sam Schwartz Deliveristas Survey."[13] This survey consisted of a 58-item questionnaire, and prefaced its survey with the statement that it would "help DCWP set a minimum pay rate for delivery workers."[14] Survey respondents "were recruited from delivery workers visiting Worker's Justice Project offices, at Los Deliveristas Unidos events held throughout the city, and through street canvassing."[15] This survey generated 465 responses.[16]

41. Between June 28 and July 22, 2022, the Department sent its restaurant survey to over 23,000 restaurants in New York City.[17] The Department asked restaurant operators sixteen questions, covering the volume of deliveries at respondents' restaurants and how these deliveries were fulfilled.[18] However, the Department did not ask questions about restaurants' profit margins

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[13] *Id*.

[14] Columbia-Sam Schwartz-Deliveristas Survey Questionnaire at 1 (emphasis added), Ex. 6.

[15] Report at 3, Ex. 4.

[16] *Id*.

[17] *Id*.

[18] The questions asked by the Department were:

1. Do you acknowledge that you are 18 years of age or older and freely consent to participate in the survey?
2. Does your restaurant prepare orders for delivery?
3. In the past 12 months, above what percentage of your sales came from delivery?
4. How is your food delivered to customers?
5. [If a mix of own employees and delivery services] Currently, which happens more?
6. How do customers order delivery from your restaurant?
7. Which third-party apps or websites does your restaurant use?
8. Which delivery services send workers to deliver food from your restaurant?
9. How many locations does your business have in NYC?
10. How many total employees does your business have in NYC?
11. Does your restaurant provide waiter service?
12. Is your restaurant part of a franchise or chain?
13. What best describes the cuisine at your restaurant?

or the impact that heightened prices might have on their business. The Department received 371 responses.[19]

42. The Department also subpoenaed Uber, Grubhub, DoorDash, and Relay for documents and information, and obtained additional documents data and information from Chowbus, Club Feast, Fantuan, HungryPanda, Patio, and GoHive—all of which are primarily restaurant-based delivery services.[20] The Department did not subpoena grocery or convenience delivery companies, nor did it subpoena restaurants.

C. The DCWP Holds a Preliminary Public Hearing in June 2022

43. On June 15, 2022, the Department held a public hearing to "hear directly from delivery workers and other stakeholders about pay and working conditions for third-party delivery app workers."[21] Commissioner Mayuga expressed the Department's desire "to make sure our rule reflects the public's values and concerns," its efforts to "seek[] input from a diversity of voices," and its intention to provide a second opportunity for public comment to "come later this year when the draft rule is formally published in the city record."[22] Advocacy groups received the vast majority of speaking slots at this hearing.[23] In so arranging the hearing, the Department denied itself the opportunity to hear from the thousands of unaffiliated couriers who highly value

14. What zip code is your restaurant in?
15. If we have any follow-up questions, is it okay to contact you by phone?
16. What's the best number at which to reach you?

DCWP Restaurant Delivery Survey Questionnaire, Ex. 7.

19 *Id*.

20 Report at 2, Ex. 4.

21 N.Y.C. Dep't of Consumer & Worker Protection, Public Hearing, June 15, 2022 ("June 15, 2022 Tr.") at 10:3-6, Ex. 8.

22 *Id.* at 10:9-11, 16-20.

23 *See id.* at 2-3.

flexibility and are worried they may lose such flexibility, and perhaps their jobs entirely, as a result of gating and other changes the Challenged Rule will lead to.

44. Numerous couriers who did testify emphasized the value of the flexibility provided by food delivery apps and expressed a hope that the Department would adopt rules that would allow them to maintain their flexibility. Gustavo Ajche, a delivery worker and a member of the Proyecto de Justicia Laboral (or Worker's Justice Project), testified that he started delivering with the apps "[m]ostly because of the flexibility."[24] Joshua Wood, who uses the Uber Eats platform to make deliveries, testified that he "was initially drawn to app delivery work because [of] the flexibility and low barrier to entry."[25] And Johnny Marrero, a courier who made DoorDash deliveries from Brooklyn, testified about how delivering part time helped him and his family make ends meet, and asked the Department "to consider all delivery workers and set an earning standard that lets us continue to earn in a flexible and easy way."[26]

45. Platforms, including Uber Eats, also submitted testimony encouraging the Department to apply a multiplication factor to whatever rate it sets rather than tether the minimum pay rate to a "utilization" standard. As the apps explained, by basing the minimum pay rate on a constant multiplier that accounts for on-call time and avoids basing it on an app's shifting utilization rate. Thus the Department could avoid compelling apps to limit courier platform access, which limits couriers' flexibility and may prevent many from earning at all. In fact, the New York City Taxi & Limousine Commission paused its own rule applying a dynamic utilization rate formula after only one year due to driver complaints about reduced flexibility.[27]

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[24] *Id.* at 28:19-24.

[25] *Id.* at 32:17-18.

[26] *Id.* at 129:22-24.

[27] Uber's December 12, 2022 Comment at 2, Ex. 9; *see also* N.Y.C. Taxi and Limousine Comm'n, Notice of Promulgation, Statement of Basis and Purpose of Rules (Dec. 4, 2018), Ex. 10.

46. Following that hearing, Uber sought to better understand the information on which the Department was basing its rulemaking. Uber's counsel submitted requests to the Department under FOIL. Among other things, Uber's counsel requested: (i) a copy of the Department's surveys referenced in its June 14, 2022, press release announcing the public hearing; (ii) records explaining or showing how the list of recipients of the surveys were generated; (iii) responses to the surveys; and (iv) information regarding who the surveys were sent to and the responsiveness rate.[28]

D. In November 2022, the DCWP Proposes a Rule Using Inaccurate Survey Data and Based on Arbitrary Assumptions That Fails to Accurately Account for Courier Behavior

47. On November 3, 2022, the Department released the first version of its proposed minimum earnings rule (the "First Proposed Rule").[29] The First Proposed Rule had a base pay component, a "workers' compensation" component, and an expense component.[30] The Department also published its Report discussing the "findings of its study into the working conditions of restaurant delivery workers who are engaged by apps as independent contractors in NYC."[31] In addition to the factors set forth under Local Law 115, the Department also considered other relevant factors including "the existing pay and benefit standards that apply to other workers in NYC, ease of implementation for apps, workers, and the Department, and the impact of the rule on apps, workers, consumers, and restaurants."[32]

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[28] *See* Letter from Karen Dunn, Paul, Weiss, Rifkind, Wharton & Garrison LLP, to John DeVito, N.Y.C. Dep't of Consumer and Worker Protection (July 14, 2022) ("July 14, 2022 FOIL Request"), Ex. 11.

[29] N.Y.C. Dep't of Consumer and Worker Protection, Notice of Public Hearing and Opportunity to Comment on Proposed Rules (Nov. 3, 2022) ("First Proposed Rule"), Ex. 12.

[30] *Id*.

[31] Report, Ex. 4.

[32] *Id.* at 27.

48. The base pay component of the minimum pay rate was intended to be similar to the compensation food delivery workers would receive if they were classified as employees under state and City law. The Department modeled the base pay component on the minimum payment standard for high-volume for hire vehicle service drivers, as reflected in the Taxi and Limousine Commission's recent proposed rule.[33]

49. The workers' compensation component was per the Department intended to "compensate for expected income loss and medical expense associated with on-the-job injuries that food delivery workers experience," given that food delivery workers "do not have access to traditional workers' compensation."[34] The First Proposed Rule, however, did not require that delivery workers use these funds to acquire workers' compensation or other medical coverage.

50. The expense component was intended to compensate workers for expenses they incur to perform delivery work, including vehicle and phone expenses.[35]

51. The First Proposed Rule established a method for meeting the minimum pay requirement that contained both an "Individual Pay Requirement" and an "Aggregate Pay Requirement" that services must meet. Under the Individual Pay Requirement, apps must pay each worker an amount at least equal to that workers' total "trip time"[36] during that week multiplied by the minimum pay rate set forth in the rule. In addition, under the Aggregate Pay Requirement,

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33 First Proposed Rule. at 3, Ex. 12; Proposed R.C.N.Y § 59D-22(a).

34 First Proposed Rule at 4, Ex. 12.

35 *Id*.

36 Trip time was defined as "the span of time between the moment a food delivery worker accepts an offer from a third-party delivery service or third-party courier service to perform a trip or receives an assignment to perform a trip with a pickup or drop-off location in New York City through the moment a trip is completed or canceled." *Id.* § 7-801(5).

each service's total payments to all couriers that use its app must equal the sum of their total trip time and "on-call time"[37] during a pay period, multiplied by the minimum pay rate.

$$\text{(1) Weekly Pay Per Courier} = \text{Minimum Pay Rule} \times \text{Courier's Total Trip Time}$$

$$\&$$

$$\text{(2) Weekly Pay (Aggregate)} = \text{Minimum Pay Rule} \times \left(\begin{array}{c} \text{All Couriers' Total Trip Time} \\ + \\ \text{On-Call Time} \end{array} \right)$$

The rule did not mandate how the required Aggregate Pay amount would be paid out to delivery workers. Platforms have discretion to determine which couriers receive money for on-call time and in what amount, so long as the total Aggregate Pay amount is transferred.

52. The First Proposed Rule would also have required apps to maintain records regarding compensation paid and time worked by food delivery workers, and to share certain statistical data with the Department unrelated to courier compensation. The purpose of these recordkeeping and reporting requirements was purportedly to help the Department "effectively investigate violations of the minimum pay rule, analyze the effect of the minimum payment method and determine whether updates to the minimum payment obligations are warranted."[38]

53. The First Proposed Rule and the Report did not anywhere disclose to the public or explain that in all instances the Department assumed that Restaurants earned zero margin on orders for delivery from the apps.

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[37] "On-call time" was defined as "the time a food delivery worker is connected to a third-party food delivery service or third-party courier service's electronic system for arranging or monitoring trips in a status where the food delivery worker is available to receive or accept trip offers or assignments with a pickup or drop-off location in New York City, and excludes all trip time." *Id.* § 7-801(2).

[38] *Id.* at 5.

54. The Department relied heavily on its two surveys of delivery workers and one survey of merchants. These surveys are mentioned over 90 times in the Department's Report,[39] and helped determine the expense reimbursement component of the Challenged Rule, among other things.[40] The Department explicitly stated that the First Proposed Rule is based on the Department's analysis of "survey responses from over 8,000 food delivery workers and over 350 restaurant operators."[41]

55. Specifically, the Department used these surveys to (among other things):

a. justify various calculations of assumed expenses that delivery workers incur, including for the purchase of cell phones and batteries;

b. determine the frequency with which delivery workers use multiple apps at one time;

c. determine delivery worker demographics, their mix of vehicles, and hours of work; and

d. estimate time that delivery workers are unable to work due to medical issues, as well as associated medical costs.[42]

E. The Commission Fails to Disclose the Information and Documents It Relied On in Proposing the First Proposed Rule

56. Uber sought to better understand—and meaningfully comment on—the First Proposed Rule. Uber sent a FOIL letter on July 14, 2022,[43] which the Department first acknowledged a week later, indicating that it would take approximately four months to complete its response (*i.e.*, by November 21, 2022).[44] Yet by November, 2022 the Department had produced

[39] *See generally* Report; *see also* Uber's December 16, 2022 Comment at 22, Ex. 13.

[40] *See* Report at 5, 17–20, Ex. 4.

[41] First Proposed Rule at 4, Ex. 12.

[42] Report § 4, Ex. 4; N.Y.C. Dep't of Consumer and Worker Protection, Notice of Public Hearing and Opportunity to Comment on Proposed Rule (Mar. 7, 2023) ("Second Proposed Rule") at 9, Ex. 14.

[43] July 14, 2022 FOIL Request, Ex. 11.

[44] Letter from Karen Dunn, Paul, Weiss, Rifkind, Wharton & Garrison LLP, to John DeVito, Dep't of Consumer and Worker Protection (Nov. 23, 2022), Ex. 15.

only a few documents, and unilaterally extended its estimate of its response time to February 16, 2023—more than seven months after the request was made. As Uber explained in a November 23, 2022, letter to the Department's Freedom of Information Officer, such a delay "would prevent commenters from reviewing the requested materials, and from providing timely comments," as these records "are essential for the public to understand, prior to the public hearing date and the effective date of any adopted rule, the Department's rulemaking process, and the Department's assessment of the DCWP Minimum Pay Rule's likely and intended effects."[45]

57. On November 29, 2022, Uber's counsel submitted a second FOIL request seeking, among other things: (i) records regarding the Department's surveys, including the results; (ii) qualitative information collected from meetings with delivery workers, worker advocates, app representatives, and restaurant association representatives; and (iii) the model used by the Department to estimate or assess the potential impact of the minimum pay rule or any alternatives.[46]

58. On December 5, 2022, the Department turned over redacted survey data that it purportedly used to craft the First Proposed Rule. But the Department failed to turn over documents about, among other things, how the NYC Delivery Worker Survey was actually conducted or the actual model the Department used—information that is critical to permit commenters to meaningfully understand and comment on the efficacy and reliability of the survey. When Uber requested that the notice and comment period be extended to permit timely production and review of this information, the Department refused.[47]

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[45] *Id*.

[46] Letter from Karen Dunn, Paul, Weiss, Rifkind, Wharton & Garrison LLP, to John DeVito, Dep't of Consumer and Worker Protection (Nov. 29, 2022), Ex. 16.

[47] Email from Charlie Driver, N.Y.C. Dep't of Consumer & Worker Protection, to Armikka Bryant, Sr. Counsel, Delivery, Regulatory, Emerging Technologies, Uber (Dec. 9, 2022), Ex. 17.

F. Commenters Demonstrate the Numerous Flaws in the First Proposed Rule During the Initial Comment Period and Offer Alternatives

59. Commenters representing apps, couriers, merchants, consumers, and other key stakeholders identified severe flaws with the First Proposed Rule. For example, DoorDash, a platform that Uber Eats competes with for the business of merchants, couriers, and consumers, submitted a comment on December 12, 2022; Grubhub and Relay, also competitor delivery apps, both submitted comments on December 16, 2022.[48] Additionally, more than 1,300 couriers submitted comments asking the Department not to enact rules that would force the delivery app companies to take away their freedom and flexibility.[49] When it issued its revised rule, which is set to take effect on July 12, 2023, the Department failed to address many of the issues the commenters raised.

60. Uber itself submitted a series of comments in the days leading up to the public hearing on the First Proposed Rule in an attempt to work cooperatively with the Department and develop a minimum earnings standard that would provide adequate compensation for couriers without disrupting the food delivery industry or forcing services to engage in gating. This proposal was consistent in its methods with the solution that Uber supported in California and which was adopted.

61. Uber submitted its first comment on December 8, 2022. Uber explained how the First Proposed Rule was "designed to *require* the introduction of restrictions like gating and

[48] *See* DoorDash's December 12, 2022 Comment, Ex. 18; Grubhub's December 16, 2022 Comment, Ex. 19; Relay's December 16, 2022 Comment, Ex. 20.

[49] *See* Public Comments to the First Proposed Rule at 2-1392, Ex. 25; *see also* Uber's December 16, 2022 Comment at 30, Ex. 13.

scheduling that would limit NYC couriers from working when, where, and however they want," while still resulting in a 15.6% *decrease* in total orders (per the Department's own estimates).[50]

62. To alleviate this issue, Uber proposed that the Department adopt a minimum pay rate for "on-trip time," and then multiply that rate by a static factor to account for the inevitable waiting time between deliveries, without tying the pay rate to an app's utilization.[51] Uber recommended a multiplier of 1.15 for this alternative system. This multiplier acts as a 15% increase in the minimum pay rate, based on the ratio of average waiting time between offers (3 minutes) and average trip duration (20 minutes).[52] DoorDash presented a similar proposal for a static, industry-wide multiplier of 1.2 to account for waiting time, calculated as the time preceding an accepted offer.[53]

63. Uber's proposed alternative reflected its longstanding efforts to support reasonable earnings for couriers without leading to significant reductions in courier flexibility. For instance, Uber did not challenge the original implementation of the minimum earnings rule applicable to High-Volume For-Hire Vehicle drivers, unlike its main rideshare network competitor, Lyft. Uber also proudly supports California's Proposition 22, which provides food delivery couriers with protections and benefits including a guarantee that couriers receive at least 120% of the local minimum wage, plus tips.[54] Notably, unlike New York City's minimum pay rate, which requires couriers to be compensated for all time that they are logged on to apps, the minimum pay multiplier

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50 Uber's December 8, 2022 Comment at 1 (emphasis added), Ex. 21.

51 *Id*.

52 *Id.* at 3.

53 Door Dash's December 12, 2022 Comment at 1–3, Ex. 18.

54 Camiel Irving (Head of US Mobility) and Sarfraz Maredia (Head of US Delivery), Uber, "Prop 22: Improving the lives of California drivers and couriers," (Dec. 8, 2022), https://www.uber.com/newsroom/prop-22-benefits/, Ex. 22.

under Proposition 22 only applies to time engaged in rides.[55] In addition, Proposition 22 requires Uber and other platforms to provide occupational accident insurance to cover medical expenses and lost income resulting from on-the-job illnesses and injuries, as well as a healthcare stipend of up to $424.76 each month for qualifying drivers.[56]

64. Uber submitted a second comment to the Department on December 12, 2022. This comment noted that the First Proposed Rule mandates that platforms employ only the operating model utilized by Relay, the least widely used of the four major delivery apps in New York City, effectively requiring the three larger platforms to change how their businesses operate and to curtail courier flexibility and choice.[57] Specifically, Uber explained that the proposed rule would force platforms to use gating tools to limit delivery workers' on-call time, which may increase trips per hour but, as Uber explained, would also foster fierce competition among couriers to access different times to access the platform based on performance and productivity, and leave thousands of couriers without the ability to earn at all.[58]

65. Uber also noted that the First Proposed Rule paradoxically included a workers' compensation component, but without requiring that delivery workers actually use the additional funds they would receive to purchase insurance coverage for work-related injuries.[59] Uber commented that the Department could instead require third-party delivery and courier services to

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[55] Protect App-Based Drivers and Services Act (Proposition 22), Cal. Bus. & Prof. Code, 1 §§ 7448–7467, as added by Prop. 22, approved by the voters at Gen. Elec. (Nov. 3, 2020).

[56] *Id*.

[57] Uber's December 12, 2022 Comment at 2, Ex. 9.

[58] *Id*. at 4.

[59] *Id*. at 5.

provide occupational accident insurance for workers that provide deliveries on their apps, or alternatively could work at the State level to create a Workers' Compensation Fund for couriers.[60]

66. Finally, Uber commented that implementing the rule would present many practical challenges, such as calculating aggregated waiting time and calculating payments across a changing field of couriers in order to allocate that aggregated waiting time, every single week.[61] Uber noted that this aggregate payment rule would inject a significant amount of uncertainty into courier earnings because companies would likely pay out the required Aggregate Pay amount differently than each other as well as change their approaches week to week, which would cause confusion and make it difficult for couriers to predict how much they might earn in any given week.[62]

67. Uber submitted a third comment on December 15, 2022. This comment explained that the Department's assessment of the increased costs per delivery is based on its assumption that the platforms could achieve 2.5 trips per hour per courier, which is optimistic and untested in the marketplace.[63] Because a higher amount of trips per hour means the increased costs per hour will be shared across more trips, trips per hour is a key assumption in the amount of costs that will be passed on to consumers, thus reducing demand. Uber commented that restaurants in New York City may face serious revenue losses if the Department's assumption of 2.5 trips per hour is not correct—including a drastic almost 30% reduction in orders.[64]

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60 *Id*.

61 *Id*. at 6.

62 *Id.* at 2, 4.

63 Uber's December 15, 2022 Comment at 3, Ex. 23.

64 *Id*., Ex. 23.

68. Uber submitted a fourth comment on December 16, 2022. Uber commented that the Department's model relied on multiple, unexplained assumptions for "core model inputs" that drove the Department's projections of the Proposed Rule's effects, such that commenters were not able to fully comment on the accuracy of the Department's estimates.[65] In support of this comment, Uber submitted an expert report prepared by Dr. Oliver Latham, Ph.D., and a team of economists from Charles River Associates who assessed the sensitivity of the Department's model (the "Latham Report").[66] Dr. Latham's analysis showed the expected additional costs per trip under various reasonable assumptions of how trips per hour may change depending on the "elasticity" of demand—that is, how sensitive demand for deliveries is to a change in price. His analysis revealed that reductions in consumer demand will be much higher if couriers are unable to achieve the Department's assumed trips per hour—effectively doubling the expected additional cost per trip from $5.18 to a staggering $10.26 if trips per hour were to stay at their current rate of 1.63 rather than jumping to the Department's arbitrary and unexplained assumption of 2.50, and that this huge increase in price would cause a 31% reduction in delivery orders.[67]

69. Uber's comment also noted the Department's rule requires apps to compensate food delivery workers for fraudulent activities, for example, when couriers accept trips with no intention of completing them or needlessly extend the time necessary to complete a trip.[68] This is arbitrary and leaves apps with only a few tools, such as deactivation, to combat fraud, each of which is more harmful than withholding compensation solely for fraudulent trip time.

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65 Uber's December 16, 2022 Comment at 2, Ex. 13.

66 *Id.*, Ex. A ("Latham Report"), Ex. 13 at Ex. A.

67 Latham Report at 16-17, Ex. 13 at Ex. A.

68 Uber's December 16, 2022 Comment at 21–23, Ex. 13.

70. Uber's comment also noted the Department based its rule on data from unreliable surveys.[69] In part, the comment highlighted that the Department's surveys inexplicably failed to solicit feedback from couriers themselves on what the Department itself recognizes are the "greatest adverse impacts from the rule."[70]

71. Uber submitted a report by Dr. Itamar Simonson, Ph.D., a professor at the Graduate School of Business, Stanford University, that was sharply critical of the surveys the Department relied on (the "Simonson Report").[71] The Simonson Report concluded that the Department's surveys "violated fundamental principles of survey design, which calls into question the ability of the Department to reasonably rely on their results."[72]

72. Dr. Simonson noted that the surveys failed to comply with six "basic principles of survey design."[73] Specifically, he showed that the surveys: (1) failed to avoid "demand effects" (that is, the survey design revealed to respondents the purpose, expected answers and results, and whether providing certain answers is in the respondent's self-interest, each of which generates bias); (2) inappropriately employed leading questions; (3) failed to include a proper "control"; (4) failed to avoid "focalism bias," whereby questions suggest items that respondents might not have attributed to the subject at issue; (5) did not properly rely on open-ended questions, where possible; and (6) used biased phrasing for questions.[74] In light of these errors, Dr. Simonson concluded "it

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69 *Id*.

70 Report at 36.

71 Uber's December 16, 2022 Comment, Ex. B ("Simonson Report"), Ex. 13 at Ex. B.

72 *Id*. at 1.

73 *Id*. at 2.

74 *Id*.

would not be consistent with accepted survey science to rely upon their results for use in justifying the rules at issue here."[75]

73. At the time of these comments, Uber had not received the Department's model because the Department elected to not produce it, even though it presumably had it readily at hand. Thus, Uber did not know at the time that the Department assumed that restaurants make no margin on orders from food delivery platforms.

74. Restaurant owners and advocates also commented on the negative impact the rule would have on their business, contrary to the Department's findings.[76] However, they did so without the benefit of the Department's model, which to this point had been concealed, and without knowing that the Department had assumed that restaurants make no money on app-based delivery orders, which the Department had not disclosed.[77]

75. Kathleen Reilly, the NYC Government Affairs Manager for the New York State Restaurant Association ("NYSRA"), commented that "[i]f third-party delivery platforms are required to pay their delivery workers at a higher rate, and not just for time spent on deliveries but also for 'on call' time," NYSRA anticipated platforms "responding with some combination of the following: passing on much higher delivery costs to customers; creating more regimented and less flexible work opportunities for drivers; reducing or eliminating delivery fulfillment in New York City. Each one of these responses would negatively impact restaurants. If consumers are hit with much higher delivery fees, they will likely reduce their demand for delivery orders. If third-party platforms implement more regimented and less flexible work opportunities, for instance, placing

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75 *Id*. at 21.

76 Ruby Dong's December 9, 2022 Comment, Ex. 24.

77 *See generally* Affidavit of Harry Elworthy in Support of Petitioner's Verified Article 78 Petition and Application for a Temporary Restraining Order and Preliminary Injunction ("Elworthy Affidavit").

a low cap on how many drivers can have the app open at once, or setting more rigorous delivery-per-hour metrics, we foresee slower delivery times and rushed or unsafe delivery driving. If the platforms choose to simply reduce or eliminate delivery fulfillment in New York City, many restaurants will be cut off from the opportunity to deliver altogether, if hiring their own staff delivery worker is not feasible."[78]

76. Over 1,300 couriers also conveyed their desire to maintain flexibility and commented on the negative impact the rule would have on their well-being.[79] For example, Gurcharan Singh explained that the "reason why I choose to deliver with Uber is because I enjoy the full flexibility to pick which days of the week, hours of the day, and parts of the city I work in" and urged the Department "not to force apps to take away my freedom & flexibility."[80] Another courier, Marcos Gonzalez, commented that the "draft rule threatens my ability to earn extra income making deliveries when, where, and how often I want . . . . If platforms are required to restrict this flexibility in response to the minimum pay rule, it will make it difficult for me to continue pursuing these earning opportunities altogether."[81]

77. Another courier, Ryan Grant, explained how the apps' current business model enabled him to work as a food delivery worker to supplement the income he earns working for the state helping adults with disabilities. He commented that the "flexibility to either work for [one] order or as long as I wanted has given me a lot of peace of mind and the ability to pay my rent on time, put gas in my car, or eat a meal that day when otherwise I couldn't even afford to work my

[78] Kathleen Reilly's Comment, Ex. 51.

[79] Public Comments to the First Proposed Rule at 2-1392, Ex. 25.

[80] Gurcharan Singh's December 5, 2022 Comment, Ex. 26.

[81] Marco Gonzalez's December 15, 2022 Comment, Ex. 27.

first job."[82] He further commented that the aggregate pay component of the proposed rule "seems to account for my situation, but in a way that punishes *me* for not making doordash my only job."[83] "[W]ithout revision, this proposal would make my life 2x as hard."[84]

78. Yet another courier, Jose Estrella, commented that "[w]hat I value the most is the freedom [and] flexibility."[85] He explained that he is "[n]ot interested in being forced to work under stress of taking orders I don't want in traffic areas where the police will give me parking tickets which will mean I worked the entire day for nothing."[86] Accordingly, Mr. Estrella's acceptance rate for deliveries "is well below 30%."[87] Mr. Estrella commented that he "should not be penalized for not accepting everything [the apps] offer. Let me work in peace. Let me work when, where & how I want."[88]

G. In March 2023, the Department Modifies the Proposed Rule Introducing a Flawed "Alternative Method" That Does Not Address Numerous Outstanding Problems with the First Proposed Rule

79. On March 7, 2023, the Department issued an amended proposed minimum pay rule (the "Second Proposed Rule"), scheduling a second public hearing for April 7, 2023.[89]

80. The Second Proposed Rule changed the proposed minimum pay rate to $19.96 per hour, to reflect "multi-apping"—that is, that many delivery workers make deliveries for more than

82 Ryan Grant's December 16, 2022 Comment, Ex. 28.

83 *Id.,* Ex. 28.

84 *Id.*, Ex. 28.

85 Jose Estrella's December 16, 2022 Comment, Ex. 29.

86 *Id*.

87 *Id*.

88 *Id*.

89 Second Proposed Rule, Ex. 14.

one app—while also changing its base pay component to $19.62 in order to reflect parity with recent inflation adjustments made by the TLC.[90] Specifically, the Department proposed:

a. base pay of $19.62 per hour, reflecting $18.12 for wages and time off, and $1.50 for a 7.65% adjustment for Medicare and Social Security contributions;

b. a workers' compensation component of $1.68 per hour;

c. an expense component of $2.26, based on the Department's determination of average hourly expenses of e-bike workers; and

d. an adjustment of these amounts ($23.56) by applying a "multi-apping" factor of 0.8471, resulting in a final minimum pay rate of $19.96 per hour.[91]

81. The Department also established a phase-in schedule such that the minimum pay rate would be applied at 90% ($17.96) in 2023, 95% ($18.96) in 2024, and then 100% ($19.96) in 2025, subject to inflation adjustments on April 1 of every year.[92]

82. The Department explained that it calculated the workers' compensation component of $1.68 "to provide for comparability to the actuarial value of the workers' compensation coverage received by employed restaurant delivery workers in New York State (7.84% of payroll)," though it did not explain how it arrived at this determination or define what "actuarial value" is.[93] The Department explained that the "purpose of the workers' compensation component" of the minimum pay rate "is to compensate for expected income loss and medical expenses associated with on-the-job injuries that food delivery workers experience," as couriers "do not have access to traditional workers' compensation" or to an alternative system like the Black Car Fund.[94] However, the Department confusingly claimed that the "purpose of the

[90] *Id.* at 2, 6, & Table 1.

[91] *Id.* at Table 1.

[92] *Id.* at 13 & Table 2.

[93] *Id.* at 7.

[94] *Id*.

workers' compensation component is *not* to enable workers to purchase their own insurance"—which would provide coverage for injuries—but instead "to compensate food delivery workers for their exclusion from the workers' compensation benefits available to most workers."[95]

83. In regard to how the minimum pay rate would be applied, rather than use a simple fixed multiplier to the minimum pay rate to account for time that delivery workers are logged in but not making deliveries—as Uber and other commenters proposed[96] and as has been applied with success by the New York City Taxi & Limousine Commission[97] and states like California[98]—the Department instead retained its original minimum pay method (which included both the Individual Pay requirement and the Aggregate Pay requirement), renaming it the "Standard Method," while also introducing a new "Alternative Method" dependent on a minimum utilization rate.[99]

84. Under the Alternative Method, services must pay each worker an amount at least equal to that workers' total trip time multiplied by the alternative minimum pay rate—calculated by dividing the standard minimum pay rate by 60%.[100] However, as of April 2024, a service may use the Alternative Method only if it has a utilization rate (or "UR") of at least 53% for the week-long pay period in which the method is applied.[101] Services were thus left with two options in applying the minimum pay rule:

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95 *Id.* at 8 (emphasis added).

96 Uber's December 8, 2022 Comment at 3, Ex. 21; Door Dash's December 12, 2022 Comment at 2, Ex. 18.

97 N.Y. Comp. Codes R. & Regs. tit. 35, § 59D-22.

98 Camiel Irving (Head of US Mobility) and Sarfraz Maredia (Head of US Delivery), "Prop 22: Improving the lives of California drivers and couriers," (Dec. 8, 2022) https://www.uber.com/newsroom/prop-22-benefits/, Ex. 22.

99 Second Proposed Rule at 3-4, Ex. 14.

100 *Id.* at 4.

101 *Id*. The Department stated that this 53% floor was determined by subtracting the "standard deviation of 7%" that the "median app" had in its weekly utilization rate from the 60% average. *Id.* at 12.

Standard Method:

$$\text{(1) Weekly Pay Per Courier} = \text{Minimum Pay Rule} \times \text{Courier's Total Trip Time}$$

&

$$\text{(2) Weekly Pay (Aggregate)} = \text{Minimum Pay Rule} \times \left(\begin{array}{c} \text{All Couriers' Total Trip Time} \\ + \\ \text{On-Call Time} \end{array} \right)$$

OR

Alternative Method:

$$\text{Weekly Pay Per Courier, if UR} \geq 53\% = \left(\frac{\text{Minimum Pay Rule}}{60\%} \right) \times \text{Courier's Total Trip Time}$$

85. Additionally, the Department claimed that it updated its impact estimates to reflect the changes to the Second Proposed Rule. In doing so, the Department assumed that Relay would operate under the Standard Method while Uber Eats, Grubhub, and DoorDash would operate under the Alternative Method.[102] The Department shared few details of the assumptions and inputs behind its model, simply stating that the only difference from the original report was that it assumed apps would average 1.94 deliveries per hour for each courier, instead of the 2.5 figure it had assumed earlier.[103] The Department also stated opaquely that it "reviewed its impact model and assumptions in light of criticisms raised in comments but found that no changes were warranted."[104]

86. The Department stated that it modeled the Alternative Method under its same economic model as it did for the Standard Method, employing a 60% utilization. The Standard

[102] *Id.* at 15.

[103] *Id.* at 16.

[104] *Id*. at 15.

Method and Alternative Method in fact converge at a 60% utilization rate. However, the financial incentives under the rule drives apps away from that 60% assumption. Services applying the Standard Method are incentivized to increase their utilization rate as high as they can in order to decrease the amount of the Aggregate Pay Requirement accountable to unutilized minutes. And because a service's costs per minute are exactly the same under the Alternative Method regardless of its utilization rate, there is no financial incentive to increase utilization rates above the 53% floor; rather, apps are incentivized to decrease their utilization rate in order to decrease costs per utilized minute.

87. The Second Proposed Rule also imposes unprecedented, burdensome, and intrusive recordkeeping and reporting requirements. The information covered by these requirements invades every aspect of Uber Eats' business but has no bearing on the administration of a minimum earnings standard, including:

a. The number of consumers who received at least one delivery with a pickup or drop-off location in New York City;

b. The number of completed deliveries with a pickup or drop-off location in New York City;

c. The total amount charged to consumers for the food, beverage, or other goods on deliveries with a pickup or drop-off location in New York City;

d. The fees charged to consumers on orders for delivery with a pickup or drop-off location in New York City;

e. The subscription and membership fees charged to consumers in New York City;

f. The number of merchants who prepared at least one order for delivery with a pickup or drop-off location in New York City; and

g. The delivery fees, payment processing fees, and other fees charged to merchants on orders for delivery with a pickup or drop-off location in New York City, itemized by type.[105]

[105] *Id.* § 7-805(d).

H. The Commission Fails to Disclose the Information and Documents It Relied on When It Proposed the Challenged Rule

88. On March 24, 2023, Uber submitted another FOIL request to better understand the decision-making behind the Second Proposed Rule. The requests included, but were not limited to: (i) the model that the Department used to assess the potential impacts of the Second Proposed Rule; (ii) all comments received in connection with promulgation of the Second Proposed Rule; (iii) records relating to the Department's decision to adjust the minimum earnings standard in the Second Proposed Rule, including the addition of the Alternative Method and the retention of the workers' compensation component; and (iv) records relating to the Department's impact estimates, including its assumptions regarding utilization rates, deliveries per hour, and multi-apping.[106]

89. On April 3, 2023—*four months after* Uber's earlier November 29, 2022 FOIL request, and just *four days before* the scheduled public hearing and the end of the comment period on the Second Proposed Rule—the Department produced—to only Uber, in response to its five-month old FOIL request—34 PDF files containing part of the Department's modeling, written in the coding language "R," and apparently underlying the First Proposed rule. These files were produced without annotation, explanation, or documentation of how (if at all) the files relate to the Department's Report or either Proposed Rule. It was not clear why it took the Department four months to produce 34 files that it presumably had at its fingertips at all times during the rulemaking process. Moreover, the Department produced its model in a non-editable PDF form (a form different from that which Uber understands such documents are normally stored or maintained), with computer code requiring specialized economic expertise *and* computing skills to interpret how it works and on what assumptions it relies.

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[106] *See* Letter from Karen Dunn, Paul, Weiss, Rifkind, Wharton & Garrison LLP, to John DeVito, Dep't of Consumer and Worker Protection (Mar. 24, 2023) ("March 24, 2023 FOIL Request"), Ex. 30.

90. The Department did not grant Uber's request to immediately produce the entirety of the modeling underlying the Second Proposed Rule, or to delay adoption of the rule until at least 60 days after the production of such documents in order to provide the public meaningful opportunity to review this previously undisclosed data, which should have been disclosed at the outset of the rulemaking process.[107]

91. Making the best of this last-minute production, Uber immediately set about analyzing the documents, requiring the work of internal analysts and expert economists, in order to glean what it could from the Department's model and rulemaking in the short time remaining.

92. Uber learned from its review of the model that the Department's model assumes that the "margin" for restaurants on orders from food delivery platforms is zero.[108] Moreover, nothing in the model allowed for the possibility that restaurants may actually have positive margins on such orders.[109] This critical assumption, which allows the model to avoid showing, and the Department to avoid confronting, negative impacts on restaurants' bottom line, was not otherwise disclosed by the Department to the public.

I. Commenters Demonstrate the Flaws in the Second Proposed Rule, Including the DCWP's Reliance on Undisclosed Modeling

93. Uber submitted an initial comment on the Second Proposed Rule on April 5, 2023. Uber reiterated its support for "reasonable protections for the couriers who deliver goods using Uber Eats and similar apps," but commented that the Department had failed to consider the impact of the proposed rule—including by failing to produce the model underlying the Second Proposed Rule. Uber explained that the Department's reliance on arbitrary assumptions of (among other

[107] *See* Josh Gold, Uber Technologies, Inc., April 7, 2023 Letter Comment ("April 7, 2023 Letter"), Ex. 31.

[108] *See* Elworthy Affidavit ¶ 7; *see also, e.g.*, Incidence_Model_A.pdf at 1 ("restaurant_margin_app<-0"), Ex. 32.

[109] *See* Elworthy Affidavit ¶ 7.

things) the number of completed deliveries per hour, elasticity of demand, and impact of the rule on utilization rates and trip length, led to the Department underestimating the adverse impacts of the revised rule.

94. For instance, Uber previously explained the flaws in the Department's assumption that deliveries would increase from 1.63 per hour to 2.50 per hour, despite acknowledging that demand may go down by 15.6% due to an increase in costs.[110] Following this critique, the Department lowered its assumption to apps averaging 1.94 deliveries per hour.[111] But simply taking one previously arbitrary assumption (increases in deliveries to 2.50 per hour) and replacing it with another unjustified assumption (increases in deliveries to 1.94 per hour, still nearly a 20% increase) does not reflect reasoned rulemaking. Such arbitrary changes to an assumption in response to a critique are the epitome of unreasoned rulemaking.

95. Uber also noted the disastrous impact that the Challenged Rule could have if the Department's productivity and elasticity assumptions were just slightly off. Under the Department's own assumptions of a 60% utilization rate, elasticity of demand of 1.0, and productivity of 1.94 deliveries per hour, the Challenged Rule would lead to $5.94 additional costs per delivery and a 17.9% reduction in demand in 2025. If just one of these assumptions was wrong, the impact could be enormous—for instance, if productivity was 1.81 deliveries per hour, the costs of delivery orders would rise $6.68 instead of $5.94, causing a 20.2% decrease in demand; if elasticity was 1.5 instead of 1, there would be a 26.9% drop in delivery orders; and if both assumptions were incorrect, and productivity were 1.81 deliveries per hour and elasticity was 1.5, there would be a more than **30% decrease in delivery orders**.[112]

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[110] Uber's December 15, 2022 Comment at 1–2, Ex. 23.

[111] Second Proposed Rule at Table 3, Ex. 14.

[112] Uber's April 5, 2023 Comment at 14, Ex. 1.

2025 Impact of Pay Per Trip Requirement Under the Standard and Alternative Method (minimum pay of $19.96 p/h, utilization rate of 60%)				
		Elasticity = 1*	**Elasticity = 1.5**	**Elasticity = 2**
Productivity (Deliveries Per Hour)	Added Cost per Delivery	% Δ in Orders	% Δ in Orders	% Δ in Orders
1.94*	$5.94	-17.9%	-26.9%	-35.9%
1.87	$6.32	-19.1%	-28.7%	-38.2%
1.81	$6.68	-20.2%	-30.3%	-40.4%
1.75	$7.06	-21.3%	-32.0%	-42.6%
1.69	$7.46	-22.5%	-33.8%	-45.1%
1.63**	$7.90	-23.9%	-35.8%	-47.7%

96. Two days later, on April 7, 2023—the day of the Department's public hearing and the close of the comment period—Uber submitted a supplemental comment reflecting its initial analysis of the model underlying the First Proposed Rule, which the Department had withheld until just days earlier, thus frustrating Uber's ability to fully digest and comment on the pieces of the models that had been produced, and of course giving the public no opportunity to review in advance of earlier comment periods. While the model incorporated a number of different assumptions, there were no sensitivity analyses of assumptions that would have portrayed worse outcomes for New Yorkers.[113]

97. First, the model relies on a critical but unrealistic assumption: that restaurants earn 0% margin on food delivery platform orders, such that restaurants make no more or no less money as order volumes go up or down. As Uber explained, however, this is obviously false: fewer deliveries means less revenue and lower profits for small businesses.[114] As evidence of this, Uber pointed to a recent nationwide survey of single, local, and independent businesses.[115] Those small

[113] *See* Uber's April 7, 2023 Supplemental Comment at 2, Ex. 33.

[114] *See id.* at 6.

[115] *See id.* at 6 n.9.

businesses reported that Uber Eats increased their revenue by an average of 15%, and 86% of respondents reported that Uber Eats had boosted their bottom line profitability.[116]

98. Second, the model assumes that industry growth will continue at the historically high rate of 17% as in previous years. That growth rate was likely inflated by the boom of the delivery industry during the pandemic. As Uber commented, this assumption allows the Department to brush off some of the large negative effects apparent under even the Department's own modeling. For instance, if the annual growth rate is half of what the Department assumes (8.5%), the Department's model predicts a 25% reduction in both total deliveries and in apps' total gross margins, equal to 35 million fewer trips and a staggering $147 million less in gross margin.[117]

99. Third, the Department's model did not account for the strong incentives it creates for services to change their operations in ways that may impact restaurants and consumers negatively, to achieve high trips per hour and high levels of utilization. For example, achieving high trips per hour, such as the 1.93 per hour that the Department assumes, likely requires shrinking the radius around restaurants where delivery is available, which would in turn shrink those restaurants' customer bases.

100. As Cindy Estrada, the Executive Director at the New York City Hispanic Chamber of Commerce noted, this risk is of particular concern in "less-dense areas, which may not consistently have high delivery volume."[118] She explained, "[i]f, as expected, these rules force platforms to adjust their operations, it's likely they would need to restrict opportunities for delivery

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[116] Uber Eats, "Supporting merchants in business growth and in times of need" (Jan. 10, 2022), available at https://www.uber.com/newsroom/supporting-merchants-in-business-growth-and-in-times-of-need/, Ex. 34.

[117] Challenged Rule at Table 7, Ex. 2.

[118] Cindy Estrada, "NYC must brace for impacts of new minimum pay rate for food deliverers," AMNY (Apr. 6, 2023), https://www.amny.com/opinion/new-york-city-irreversible-impacts-minimum-wage-delivery-workers/ ("Estrada"), Ex. 35; *see also* Uber's April 7, 2023 Supplemental Comment at 3, Ex. 33.

workers in certain areas to help cut down on costs, making it even harder for many restaurants to fulfill the orders they need to stay open. For many of our member restaurants located in Harlem, the Upper West Side, Washington Heights and the Bronx, this proposed rule could significantly impair their ability to offer delivery services at all."[119]

101. DoorDash submitted a comment for the Department's consideration on April 7, 2023. It claimed that the proposed minimum pay rate "will result in unsustainable new costs for New York City consumers and hundreds of millions in lost revenue for local restaurants and businesses."[120] Like Uber, DoorDash recognized that these impacts would "necessitate severe and unpopular restrictions on valued delivery worker flexibility."[121] DoorDash also presented data from a recent survey of DoorDash couriers that indicates the vast majority of couriers highly value the flexibility provided by apps' current business model and will be negatively impacted by the Second Proposed Rule.[122]

102. Grubhub also submitted a comment for the Department's consideration on April 7, 2023. Like Uber and DoorDash, Grubhub commented that the Second Proposed Rule would "limit flexibility and impose other negative ramifications on workers," including "slashing earning opportunities" for more than 40% of delivery partners.[123] Grubhub reiterated its view that requiring apps to pay for all on-call time under the Standard Method "would force companies to take drastic action to reduce multi-apping, dramatically harming delivery drivers by restricting choice, earning opportunities and flexibility."[124] Grubhub also stated that, under the Alternative

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119 Estrada, Ex. 35.

120 DoorDash's April 7, 2023 Comment at 1, Ex. 36.

121 *Id*.

122 *Id.* at 7-8.

123 Grubhub's April 7, 2023 Comment, at 2-3, Ex. 37.

124 *Id*. at 4-5.

Method, apps "would be forced to fully manage [couriers] engaged time on the app," thereby "eliminating the very flexibility they seek."[125] Grubhub also commented that the Second Proposed Rule would burden restaurants and create opportunity for courier fraud.[126] Finally, Grubhub said that the Second Proposed Rule, as written, was contrary to law because it applied only to certain third-party delivery companies but not to others, including Instacart, Shipt, or GoPuff, arguing that the Second Proposed Rule "unfairly targets one group of third-party delivery companies without justification."[127]

J. The Department Adopts the Challenged Rule Without Adequately Addressing the Rule's Flaws or Its Own Arbitrary Rulemaking

103. The Department adopted its final version of the rule on June 12, 2023 (the "Challenged Rule"), by releasing a Notice of Adoption, that contained the final text of the Rule and some further explanation. The Challenged Rule contained only two adjustments from the Second Proposed Rule: (i) providing a limited "safe harbor" to the Alternative Method's utilization floor; and (ii) requiring the Department to review the components of the minimum pay rate, the utilization rate floor, and the calculation of the alternative minimum pay rate in connection with a September 24, 2024 report it must submit to the City Council and the Mayor, in order to determine if further revisions to the minimum earnings standard may be necessary.[128] But the Department did little to address the myriad of issues the commenters raised. In particular:

104. The Department responded to Uber's comments that the Department's assumption of a 0% margin for restaurants was inaccurate and inconsistent with apps' own surveys. The Department responded with the simple statement that its finding was "consistent with prior

[125] *Id*.

[126] *Id*.

[127] *Id.* at 1-3.

[128] Challenged Rule at 2, 34, Ex. 2.

research" and cited its Report.[129] The Report states "A recent analysis found that margins on app deliveries were slightly negative for restaurants nationally, and that profitability tends to decline as the delivery share of sales increases" and cites an internet article by the McKinsey & Co. consulting firm's website entitled "Ordering In: The rapid evolution of food delivery" (the "McKinsey internet article").[130]

105. The McKinsey internet article says that "As the COVID-19 pandemic began to pose an existential threat to restaurants, delivery became a saving grace. Many restaurants that delivered through online platforms were able to grow their delivery revenue throughout 2020. Even so, their overall profits generally declined, occasionally resulting in negative margins (Exhibit 3)." Moreover, Exhibit 3 demonstrates that app-based delivery orders in fact have positive variable profit margins—meaning revenue less variable costs—such that each incremental order helps restaurants recover against their fixed costs. It is thus not accurate to cite the McKinsey internet article for the assumption that restaurants make zero margin on orders and that a reduction in orders will not reduce restaurant profitability.[131]

106. The Department did not even acknowledge the contrary findings of the survey results submitted by the apps—let alone explain why it did not simply ask merchants during its merchant survey. The Department also asserted—for the first time—that it "confirmed this finding through discussions with restaurant industry stakeholders."[132] It failed to specify anything further about those conversations—including who they were with, when, and what was said—in its

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[129] *Id.* at 21 (citing Report at 15).

[130] Kabir Ahuja et al., "Ordering in: The rapid evolution of food delivery, McKinsey and Company" (Sept. 22, 2021), https://www.mckinsey.com/industries/technology-media-and-telecommunications/our-insights/ordering-in-the-rapid-evolution-of-food-delivery ("McKinsey"), Ex. 38.

[131] Elworthy Aff. ¶ 12; Ex. 38.

[132] Challenged Rule at 21, Ex. 2.

rulemaking. No documents related to any such conversations were produced in response to Uber's FOIL requests, and no explanation for that fact was or has been provided.

107. This critical assumption—which allows the Department to pretend there can be no negative impact to restaurants' bottom lines—was not otherwise disclosed by the Department to the public. In fact, the Department provided in the Notice of Adoption a new table, Table 8, which purports to list "the Model Inputs and Calculations Used to Project Impacts Under the Final Rule." Table 8 lists 15 assumptions, but does *not* include the Department's assumption of zero percent restaurant margins that the Department had programmed into its coding files at the outset of the process, back in at least as early as November 2022, and nowhere in the 13 calculations listed does the Department even purport to measure the Challenged Rule's effect on restaurants' profitability.[133]

108. Despite comments pointing out the irrationality of providing a workers' compensation component that will undercompensate injured couriers and provide a windfall to others, the Department responded only that "[f]or the reasons stated previously, the Department did not adopt this recommendation and is maintaining the workers' compensation component."[134] The Department did not explain how its proposal was not arbitrarily awarding additional amounts to couriers with no rational basis, depriving other couriers from adequate protection, nor did it provide explanations as to why it rejected alternatives proposed by apps that solved these problems or why its approach is preferable.

109. While commenters showed how the rule incentivizes apps to shrink their delivery radii and the negative consequences this is likely to have for couriers, restaurants, consumers, and

[133] *Id.* at Table 8.

[134] *Id.* at 13 (citation omitted).

apps, the Department simply asserted, with no support, that the impact of fewer customers and fewer options is "ambiguous." It claimed "[l]onger delivery distances benefit some restaurants, though these restaurants' enlarged markets come at the expense of other restaurants that face increased competition. If consumers value long delivery distances, apps are free to continue offering them and can set the fees they charge to consumers at any level they choose."[135] The Department provided no source or justification for its findings to support its untested assumptions, ignored that consumers do not like ordering repeatedly from a small set of restaurants where they previously enjoyed variety, and did not meaningfully consider how the industry was built on expanding consumers' access to new restaurants, and restaurants' access to new customers.

110. Finally, the Department performed a sensitivity analysis testing some alternatives to its prior assumptions.[136] Some changed assumptions resulted in differences worth hundreds of millions of dollars, but the Department failed to discuss the implications of any of the outcomes under these alternative assumptions.[137]

111. For example, if the price elasticity of demand is -1.5 instead of -1.0, the Department's model predicts that consumers would spend $800 million less on app delivery, shrinking the market by nearly 12% and depriving restaurants of hundreds of millions of dollars of revenue.[138] Again, the Department does not acknowledge this highly impactful difference, stating simply: "Results from an alternative considering higher elasticity are presented in Table 7."[139]

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135 *Id.* at 21.

136 *Id.* at Table 7.

137 *Id*.

138 *Id*.

139 *Id.* at 18.

112. The Department's changing analysis of projected growth rates also reveals how the Department's original and unrealistic assumptions mask the potential effects of the Challenged Rule. Initially, the Department assumed that the underlying annual growth in app deliveries would be 17.0%. However, as commenters noted, this high growth rate accompanied the COVID-19 pandemic, and the Department did not explain why it expected that high growth rate to continue. In response, the Department analyzed the impact of the Challenged Rule if the growth rate were cut in half to 8.5%. By changing just this one assumption, the model predicted that total spending on app delivery would decrease by a staggering $1.4 billion dollars (26%), and the platforms' gross margins would plummet by $147 million (25%).[140] Remarkably, the Department did not even mention these potential impacts and a shift of almost one and a half billion dollars in the market, simply concluding "no changes were warranted in light of the additional sensitivity analysis."[141]

STANDARD OF REVIEW

113. An Article 78 proceeding raises for review "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." N.Y. C.P.L.R. 7803(3).

114. "Administrative rules are not judicially reviewed *pro forma* in a vacuum, but are scrutinized for genuine reasonableness and rationality in the specific context." *Axelrod*, 78 N.Y.2d at 166. An agency's action is arbitrary and capricious where it lacks a "sound basis in reason" or a "rational basis" in the record. *Pell* v. *Bd. of Educ.*, 34 N.Y.2d 222, 231 (1974) (quoting *Colton* v. *Berman*, 21 N.Y.2d 322, 329 (1967)).

[140] *Id.* at Table 7.

[141] *Id.* at 19.

115. An administrative agency's action may be set aside where, among other things, it is "not based on a rational, documented, empirical determination," where it fails to consider an important aspect of the problem, or where "the calculations from which it is derived are unreasonable." *Axelrod.*, 78 N.Y.2d at 166, 168 (cleaned up); *see Motor Vehicles Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43, 52 (1983); *NRDC* v. *EPA*, 808 F.3d 556, 569, 574 (2d Cir. 2015).[142]

116. An agency's rulemaking may also be set aside where an agency "relied on" undisclosed materials, including "economic modeling," that are not in the administrative record, such that "the Court does not have a full record to evaluate the action taken by the [agency] and whether such decision was rational." *Zehn-NY LLC* v. *N.Y.C. Taxi & Limousine Comm'n*, 2019 WL 7067072, at *4 (N.Y. Sup. Ct. Dec. 23, 2019).

117. In addition, agency actions that exceed the authority granted by a lawmaker cannot stand. *N.Y. State Superfund Coal., Inc.* v. *N.Y. State Dep't of Envtl. Conservation*, 18 N.Y.3d 289, 294–95 (2011); *see also Tze Chun Liao* v. *N.Y. State Banking Dep't*, 74 N.Y.2d 505, 510 (1989) ("An agency cannot create rules, through its own initial declaration, that were not contemplated or authorized by the Legislature and thus, in effect, empower themselves to rewrite or add substantially to the administrative charter itself.").

118. Courts also may annul agency actions that fail to meet the procedural specifications set out under CAPA, which require all local rules to go through a notice-and-comment process to

[142] New York Courts have recognized that the City's "public policy, as set forth in CAPA . . . reflects" basic principles of administrative law "articulated at both the federal and state levels, in respectively, the federal Administrative Procedure Act [and] New York State's Administrative Procedure Act." *Street Vendor Project*, 811 N.Y.S.2d at 561. Thus, New York courts look to federal decisions applying the federal Administrative Procedure Act (the "APA") in construing CAPA's strictures. *See, e.g.*, *id.* (relying on federal case law regarding APA to apply principles of administrative law to CAPA).

be valid. *See Council of N.Y.C.* v. *Dep't of Homeless Servs. of N.Y.C.*, 22 N.Y.3d 150, 157–58 (2013); *Singh* v. *Taxi & Limousine Comm'n of N.Y.C.*, 282 A.D.2d 368, 368 (1st Dep't 2001).

119. It is "the settled rule that judicial review of an administrative determination is limited to the grounds invoked by the agency." *Scherbyn* v. *Wayne-Finger Lakes Bd. of Coop. Educ. Serv*s., 77 N.Y.2d 753, 758 (1991). Likewise, "[i]f the reasons an agency relies on do not reasonably support its determination, the administrative order must be overturned and it cannot be affirmed on an alternative ground that would have been adequate if cited by the agency." *Nat'l Fuel Gas Distrib. Corp.* v. *Pub. Serv. Comm'n of N.Y.*, 16 N.Y.3d 360, 368 (2011).

120. Another "central purpose" of notice-and-comment rulemaking is "to obligate the agency to respond to the material comments and concerns that are voiced." *Make the Road N.Y.* v. *Wolf*, 962 F.3d 612, 634 (D.C. Cir. 2020). Thus, an agency must "respond to significant comments received during the period for public comment," *Perez* v. *Mortgage Bankers Ass'n*, 575 U.S. 92, 96 (2015), and its failure to do so "generally demonstrates that the agency's decision was not based on a consideration of the relevant factors," *Liliputian Sys., Inc.* v. *Hazardous Materials Safety Admin.*, 741 F.3d 1309, 1312 (D.C. Cir. 2014) (cleaned up).

121. "[B]lack-letter law requires that an administrative agency explain its reasoning when it promulgates a rule, not when it seeks to justify a rule, post hoc, in subsequent litigation." *Uber USA, LLC* v. *N.Y.C. Taxi & Limousine Comm'n*, 2023 WL 187123 (N.Y. Sup. Ct. Jan. 10, 2023) (citing *Metro. Taxicab Bd. of Trade* v. *N.Y.C. Taxi & Limousine Comm'n*, 18 N.Y.3d 329, 333 (2011)). An agency's failure to properly explain its rationale and assumptions during the rulemaking process supports issuance of a temporary restraining order; just a few months ago, the New York Supreme Court granted such a TRO with respect to a proposed rule issued by the TLC that was supposed to go into effect imminently. *Id.*

122. In particular, an agency must address and respond to any material comments it received in a statement of basis and purpose. *See* N.Y.C. Charter § 1043(f)(1)(c). "The purpose of a basis and purpose statement is 'at least in part, to respond in a reasoned manner to the comment received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule.'" *Street Vendor Project* v. *City of New York*, 811 N.Y.S.2d 555, 561 (Sup. Ct. 2005) (quoting *Indep. U.S. Tankers Owners Comm.* v. *Lewis*, 690 F.2d 908, 919 (D.C. Cir. 1982)).

ARGUMENT

I. The Challenged Rule Is Arbitrary and Capricious.

123. First, the Challenged Rule should be set aside because the Rule is "not based on a rational, documented, empirical determination," but instead on an irrational, arbitrary, and unsupported assumption that restaurants make zero margin on food delivery platform orders, among other arbitrary assumptions. *Axelrod*, 78 N.Y.2d at 166, 168 (alterations in original) (citations omitted). Moreover, the Department has never disclosed the economic model for the Challenged Rule to the public and other stakeholders who will be significantly harmed by the rule. *Zehn-NY LLC*, 2019 WL 7067072, at *4. To the extent the Department disclosed the model for an earlier version of the rule only to Uber after the comment period for that version had expired, the disclosure only served to demonstrate the flaws in the Department's assumptions, including that restaurants make zero profit from food deliveries.

124. Second, the Challenged Rule includes a workers' compensation cost component that is poorly explained, arbitrarily selected, and irrationally disconnected from any purported purpose. Most obviously, it serves no actual compensation function because there is no requirement that any courier purchase workers comp insurance, nor any evidence that any courier ever has, and no intention that they will. It will undercompensate couriers who are injured on the

job and overcompensate those who are not. The Department dismissed reasonable alternatives without consideration.

125. Third, the Department failed to adequately consider the impact of the Challenged Rule, including the inevitable reduction in the delivery radius around each restaurant that delivery services will allow, which will reduce customer choices, while costs are increasing, and reduce the potential customer base for each restaurant. The Department ignored comments that specifically highlighted the severe negative impact of the Challenged Rule on traditionally underserved areas.

126. Fourth, the Challenged Rule is arbitrary and capricious because it is premised in large part on fundamentally flawed and biased surveys of food delivery workers.

127. Finally, the Challenged Rule institutes burdensome and intrusive recordkeeping and reporting requirements that have no rational connection to a minimum earnings standard.

128. In addition, the Challenged Rule's treatment of "on-call" time is arbitrary and capricious because it includes any time (other than trip time) during which a food delivery worker connects to an app's platform, even if they may be rejecting or ignoring—or not even monitoring—offers for delivery orders. Uber agrees with the factual and legal bases set forth in the Verified Article 78 Petition and Application for a Temporary Restraining Order and Preliminary Injunction in the related action *DoorDash, Inc., Grubhub Inc.* v. *New York City Department of Consumer and Worker Protection, Vilda Vera Mayuga* (N.Y. Sup. Ct. July 6, 2023) (Index No. forthcoming). Just as the *Zehn-NY* court vacated a rule as arbitrary and capricious where the agency considered time a driver spends "en-route" to a passenger in its definition of "cruising" time, this Court should vacate the Challenged Rule for including the time couriers are online but not truly available to accept an order in its calculation of utilization rates. 2019 WL 7067072, at *3 ("*any* review done by TLC would be suspect if the time a driver is en route to a passenger is included in 'cruising'").

A. The Challenged Rule Rests on an Unsupported and Non-Publicized Assumption that Restaurants Do Not Benefit from App-Based Delivery Orders

129. The Department's entire model rests on the facially incorrect assumption that restaurants make zero percent margin on delivery platform orders and therefore will not be impacted by the seismic shift in the market affected by the Challenged Rule. This is tantamount to assuming that thousands of restaurants across New York City who accept delivery orders are not rational economic actors. Even if restaurants earn just a single dollar for each incremental order over the costs associated with that incremental order, the Challenged Rule would deprive restaurants of millions of dollars each year, due to the expected 17.9% drop in demand.[143] Yet the Department has assumed a counterfactual world in which restaurants simply do not care if the volume of the orders they receive via food delivery platforms significantly decreases. And it ignores that even if margins were (implausibly) zero percent, a significant reduction in orders would have no effect on the jobs of the other restaurant workers, such as chefs, dishwashers, and other staff.

130. The Department did not need to rely on an assumption. It could have gathered facts, but it did not do that. The Department ignored comments of restaurant owners and advocates that many restaurants rely on app-based delivery to turn a profit, then went out of its way to avoid finding any contrary facts—declining to include any questions about this in the Department's own 17-question survey of merchants, or taking other steps at its disposal to get the facts, like subpoenaing some financial statements from some restaurants.

131. Then the Department went so far as to conceal its assumption from the public by omitting it from its Report and the rulemaking notices it issued before its Notice of Adoption,

[143] Uber's April 5, 2023 Comment at 14, Ex. 1.

including in its table that claims to list the key inputs into the model.[144] This core assumption only came to light after Uber studied the model underlying the First Proposed Rule, which the Department produced pursuant to a FOIL request just days before the comment period underlying the Second Proposed Rule expired. The Department mentioned it only in the Final Notice of Adoption and only because of Uber's comment. Interested stakeholders were deprived of the opportunity to know about and meaningfully comment on the issue to which they are legally entitled. Because the Challenged Rule is "not based on a rational, documented, empirical determination" and must be set aside. *Axelrod*, 78 N.Y.2d at 168.

132. The Department's assumption is not just facially implausible, it is contradicted by the very source the Department appears to be attempting to rely on. In its response to Uber's comment flagging the Department's zero margin assumption, the Department stated: "The Department's finding of a 0% margin on app delivery is consistent with prior research," citing its "Report at 15." The Report at 15 in turn states "A recent analysis found that margins on app deliveries were slightly negative for restaurants nationally, and that profitability tends to decline as the delivery share of sales increases" citing the McKinsey internet article.[145]

133. The Department's statement in its Report, and consequently its response in the Challenged Rule, is not accurate. The McKinsey Internet article says: "As the COVID-19 pandemic began to pose an existential threat to restaurants, delivery became a saving grace. Many restaurants that delivered through online platforms were able to grow their delivery revenue throughout 2020. Even so, their overall profits generally declined, occasionally resulting in negative margins (Exhibit 3)." As an initial matter, it is unclear why the Department believes this

[144] Challenged Rule at Table 8, Ex. 2.

[145] McKinsey, Ex. 38.

non-peer reviewed Internet article with undisclosed and non-verifiable sources, focused on national data during the height of the COVID-19 pandemic in 2020, carries any weight in assessing the margins that restaurants in New York City will make in 2023, 2024, or 2025. Moreover, the measure of "overall profit," which accounts for all revenues and all costs, differs from margins, or the incremental profit (or loss) that restaurants make on an order, *i.e.*, the difference between revenue received for each incremental order and the costs associated with that incremental order.

134. Moreover, the McKinsey Internet article actually shows, in the Exhibit 3 that the article refers to in connection with the statement above, that marginal profits on app-based delivery orders are in fact positive. Specifically, for an average order of $34.40, profit margins are $12.20 per order without subtracting fixed costs like labor and rent/occupancy, and $4.90 per order if deducting the cost of labor.[146]

135. The net average "overall profit" of -$0.70 shown in Exhibit 3 of the McKinsey article is derived only by subtracting both labor and occupancy, as shown in its Exhibit 3. Labor and occupancy costs, however, are typically considered fixed costs because they generally remain the same regardless of the number of orders received.[147] In other words, because the mortgage or rent and number and hours of employees remains the same even if the number of orders changes, those costs should not be considered in evaluating the margin on each incremental order from a food delivery platform. If labor is indeed a variable cost, meaning it changes as the number of orders change, then as orders from food delivery platforms decline as the Department predicts, it means lost jobs for restaurant employees like dishwashers and cooks. While the Department may

[146] Elworthy Affidavit ¶ 10 ("calculated as revenue ($34.40) minus the variable costs associated with an order: platform commission ($11.10); driver tip ($3.90); and cost of goods sold ($7.20)").

[147] In fact, the McKinsey internet article itself acknowledges that these are fixed costs. McKinsey ("high-margin items . . . help cover the costs of occupancy and labor . . . . With fewer in-house diners, delivery must cover a greater share of restaurants' fixed operating costs"), Ex. 38.

be attempting (without clearly stating so) to rely on Exhibit 3 on the McKinsey article to conclude that restaurants make no profits on food delivery platform orders, if that is the case, the Department should have addressed the impact on restaurant workers as orders decline, as predicted in its modeling.

136. The Department attempts to rescue the situation by asserting for the first time in its Final Notice of Adoption that it "confirmed [its] finding through discussions with restaurant industry stakeholders."[148] Who are these stakeholders? What information were they provided? What did they say? When were these discussions? Did they even own restaurants? Were they representative of merchants throughout the city, of all types and sizes? We do not know the answer to any of these questions because no details whatsoever were provided by the Department. The Department never produced in response to Uber's multiple FOIL letters any emails, meeting recaps, or notes related to any such discussions, casting doubt on whether they ever occurred and how substantive they were or what was actually stated and by whom. The Department also did not explain why it credited these undisclosed "discussions" over the various restaurant owner comments at Department hearings, where restaurant owners stated they do in fact earn money on delivery orders.

137. Ruby Dong, the owner of the restaurant Kings Wok, commented that the Rule will hurt restaurants' bottom line (which, of course, suggests that they do make a profit on delivery).[149] She noted that her restaurant's "loss in income from being unable to deliver food delivery to our customers in a timely fashion—destroying the customer loyalty we have spent years building—

[148] Challenged Rule at 21, Ex. 2.

[149] Ruby Dong's December 9, 2022 Comment, Ex. 24.

would hurt our bottom line and most likely lead us to raise costs. The people hurt by this optimistic guesswork are the restaurant owners."[150]

138. Randy Peers, President and CEO of the Brooklyn Chamber of Commerce, made clear to the Department that "[m]any businesses in our community depend on delivery to connect with customers and cannot afford platforms reducing or eliminating service altogether."[151]

139. Ofeer Benaltaba, the owner of franchise locations for Holy Schnitzel across Brooklyn, Queens, and Staten Island, similarly explained that restaurants "**have come to depend on income we get from 3rd party delivery**, and I worry that limiting our access to customers will force us to close certain stores, or at least cut some staff."[152] As he noted, the rule "seems to look just at the short[-]term gains for one group of workers, rather than the long-term impact to both the drivers and the restaurants."[153]

140. Not only did the Department ignore evidence submitted by restaurants, it deliberately avoided gathering evidence relevant to this assumption when it surveyed restaurants. Before the Department released its Report, between June 28 and July 22, 2022, the Department sent its restaurant survey to approximately 23,000 restaurants, receiving 371 responses.[154] The survey consisted of sixteen questions, focused on the volume of deliveries at respondents' restaurants and how these deliveries were filled.[155] The Department did not ask a single question to restaurants about the impact of delivery on their margins.

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150 *Id*.

151 Randy Peers's December 14, 2022 Comment, Ex. 39.

152 Ofeer Benaltaba's December 12, 2022 Comment, Ex. 40.

153 *Id*.

154 Report at 3, Ex. 4.

155 *See* DCWP Restaurant Delivery Survey Questionnaire, Ex. 7.

141. The Department also disregarded survey evidence submitted by apps during the comment period. Respondents to a survey Uber conducted of independently owned restaurants overwhelmingly responded that revenue from Uber Eats orders helped their bottom line, which reflects that they enjoy a positive margin (as one would of course expect from business owners seeking to earn a living). According to the survey: 84% of those small businesses responded that offering delivery or pickup with Uber Eats increased their revenue, by an average of 15%; 80% reported that they would be more profitable with Uber Eats than without it; and 86% said that Uber Eats has been beneficial to their bottom line.[156] The Department did not even mention the contrary findings of this survey, despite Uber's Comment.[157] *See Street Vendor*, 811 N.Y.S.2d at 561.

142. But the most revealing aspect of this may be what the Department chose *not* to reveal. Even after restaurant owners, advocates, and apps made clear serious concerns about the financial impact to restaurants—including, for some, the very ability to stay in business—the Department still concealed its zero percent margin assumption. The Department did not state this assumption in the Report, nor did it even attempt to measure the impact the Challenged Rule would have on restaurants (resting on its undisclosed assumption that it could have no effect).

143. Uber only discovered this assumption when it reviewed the Department's production of the model underlying the *First* Proposed Rule on April 3, 2023—four months after Uber issued its FOIL request for such information on November 29, 2022, and just four days before the comment deadline for the Second Proposed Rule expired on April 7, 2023.

144. Consistent with a desire to conceal its assumption, what the Department produced was presented in the coding language R, and without any annotation, explanation, or

[156] Uber Eats, "Supporting merchants in business growth and in times of need" (Jan. 10, 2022) at 4, available at https://www.uber.com/newsroom/supporting-merchants-in-business-growth-and-in-times-of-need/, Ex. 34.

[157] Uber's April 7, 2023 Comment at 6, Ex. 31.

documentation of how (if at all) the files related to the First Proposed Rule or the Report. Aware that it was up against the clock, Uber quickly set its economic and data science experts to review the files for any insight into the Department's rulemaking process. It is only through this tortured process that Uber—or any stakeholder or affected party, for that matter—learned of the Department's zero percent margin assumption. And the Department still has not disclosed the model underlying the Challenged Rule.[158]

145. Finally, while the Department (in response to criticism) provided what it claimed was a complete list of the final inputs and outputs of the model in Table 8 of the Challenged Rule,[159] its list omitted the critical zero margin assumption.[160] The Department denied affected parties the opportunity to submit comments on the subject, such that the Court does not have a complete record to evaluate the Department's action. Moreover, Table 8 shows all of the calculations underlying the Department's model, and it seems the Department did not even attempt to calculate the impact on restaurants, let alone assess the impact of the very real scenario in which apps have profit margins, as the law requires agencies to do. The Department's failure to even consider the implications of this core assumption means that the Challenged Rule is "not based on a rational, documented, empirical determination" and must therefore be set aside. *Axelrod*, 78 N.Y.2d at 168; *see also State Farm*, 463 U.S. at 43, 52. And by failing to produce the model underlying the Challenged Rule, the Department ensures that "the Court does not have a record to evaluate the action taken by the [agency] and whether such decision was rational." *Zehn-NY,* 2019 WL 7067072, at *4 (vacating rule).

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[158] Because it was created in connection with the First Proposed Rule, the partial model the Department did produce in response to Uber's FOIL does not reflect the final costs and assumptions laid out by the Department in the Second Proposed Rule.

[159] Challenged Rule at Table 8, Ex. 2.

[160] Uber's April 5, 2023 Comment at 19 n.27, Ex. 1.

B. The Department's Inclusion of a Workers' Compensation Payout Is Poorly Explained, Arbitrarily Selected, and Not Rationally Related to Its Purported Purpose

146. The Department's inclusion of an additional $1.68 per hour in the minimum pay rate as a purported proxy for workers' compensation insurance that couriers would receive if they were employees who were injured while working is arbitrary and capricious.

147. To begin with, the workers compensation component of the minimum pay rate, which the Department says is meant to "compensate" couriers for injuries or lost time when they are hurt, lacks any actual compensation function.[161] There is no requirement that couriers insure themselves against losses or injuries, nor any evidence that this actually happens.

148. Thus, the inclusion of this one-size-fits-all extra payment to all couriers is a blunt instrument that will *over*compensate most couriers—those who are not injured—while *under*compensating those who are actually injured. Either way, workers will be paid an amount that is untethered from actual facts and lacks the requisite "rational connection" to the "facts found." *State Farm*, 463 U.S. at 43. That is an irrational approach.

149. In New York State, workers' compensation is a no-fault system that provides wage replacement benefits and lifetime medical care for work-related injuries and illnesses. Such compensation covers all health care related to a worker's injury, cash benefits of two-thirds of his average weekly wage, up to a maximum, and travel expenses to and from health care appointments. Employers do not charge their employees for such insurance.

150. The Department elsewhere acknowledges that the purpose of the additional "workers' compensation" pay component "is not to enable workers to purchase their own

[161] The "purpose of the workers' compensation component," as stated in the First Proposed Rule, is to "compensate for expected income loss and medical expense associated with on-the-job injuries that food delivery workers experience." First Proposed Rule at 4, Ex. 12; *see also* Second Proposed Rule at 8, Ex. 14.

insurance," but instead "to compensate food delivery workers for their exclusion from the workers' compensation benefits available to most workers."[162] It is unclear what that means. Inclusion in workers comp means having access to the benefits of workers comp insurance in the case of injury. For couriers who are injured, the Challenged Rule's $1.68 per hour will not come close to providing the level of financial support that workers' compensation would provide. Thus, it is an irrational way to address the problem it is intended to solve.[163]

151. The Department also failed to adequately consider in what circumstances private solutions, such as occupational injury coverage, would be sufficient. One platform's current policy, for instance, covers medical expenses up to one million dollars and provides disability payments equal to as much as 50% of average weekly earnings, and is automatically available to delivery workers with no deductibles, co-pays, or premium payments required.[164] The Department responded that that coverage was "inadequate to warrant exemption from the workers' compensation component."[165] But the Department did not explain *why* it was inadequate, or even what *would* constitute adequate coverage—despite stating that the Department may consider in *future* rulemaking providing an exemption for policies that meet some unspecified minimum coverage and accessibility criteria.[166] *See Ahmed* v. *City of New York*, 129 A.D.3d 435 (1st Dep't

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[162] Second Proposed Rule at 8, Ex. 14.

[163] The Department could have rationally addressed this issue. For example, it could have required workers to use this extra pay allowance to buy into a workers' compensation insurance program, or the Department could have created or suggested an industry-wide program (like the Black Car Fund that exists for app drivers regulated by the Taxi & Limousine Commission). These exact solutions were presented to the agency as options during the rulemaking process, including in Uber's December 12, 2022 Comment, but the agency gave no indication of how it considered them or why it rejected them and instead continued forging ahead with its irrational approach. The Department's failure to consider or even address multiple preferable alternatives means the Challenged Rule must be reversed. *See Yakima Valley Cablevision, Inc.* v. *FCC*, 794 F.2d 737, 746 n.36 (D.C. Cir. 1986) ("[T]he failure of an agency to consider obvious alternatives has led uniformly to reversal.").

[164] Stephen G. Bronars, Ph.D., "Comment: Proposed Rule: Minimum Pay for Food Delivery Workers" ¶ 39 (Dec. 12, 2022), Ex. 41.

[165] Second Proposed Rule at 8, Ex. 14.

[166] *Id*.

2015) (rejecting agency rule as arbitrary and capricious where the agency sought to create a surcharge designed to compensate for providing healthcare services and disability coverage, but did not explain how the funds generated from the surcharge were tethered to the cost of healthcare services and disabilities coverage)*; see also Just Bagels Mfg., Inc.* v. *Mayorkas*, 900 F. Supp. 2d 363, 372 (S.D.N.Y. 2012) ("An agency abuses its discretion" if its rulemaking "contains only summary or conclusory statements.").

152. There is another serious problem with the "workers' compensation component" beyond the deficiency in coverage it will yield: the Department has not adequately explained how it arrived at the addition of $1.68 to the minimum pay rate, or why it chose this rate over others. The Department has explained that its calculation was made "to provide for comparability to the actuarial value of the workers' compensation coverage received by employed restaurant delivery workers in New York State (7.84% of payroll)."[167] Though it is not clearly stated in the Rule, the same figure is presented in the Report, which the Department calculates using the "loss cost for employed delivery workers, who belong to rate class 7380, which includes commercial drivers, chauffeurs, and their helpers," as calculated by the New York Compensation Insurance Ratings Board ("NYIRB").[168] But the Department never defines "actuarial value" or "loss cost" or explains what this loss cost is or how it represents an actuarial value for couriers, depriving the public—and especially couriers—an understanding to which they are entitled. *Zehn-NY*, 2019 WL 7067072, at *2 (setting aside agency rule in part due to "scant rationale" for how the agency arrived at a chosen rate).

[167] First Proposed Rule at 4, Ex. 12; *see also* Report at 30, Ex. 4.

[168] Report at 22 n.84, Ex. 4.

153. The Department also provides no basis for choosing "rate class 7380," which is described as applying to "employees engaged in performing duties for the employer principally or in connection with a vehicle or bicycle,"[169] as opposed to, for example, Code 9072 "Restaurant – Fast Food & Drivers," which applies to "employers engaged in fast food type restaurants" and "restaurants that are principally engaged in providing take-out food service," meaning orders that are "picked up by the customer or delivered on foot, by bicycle, vehicle, or public transportation."[170] This appears particularly arbitrary given that the Department's Report treats couriers similarly to fast food delivery workers in its analysis of including tips in the base pay calculation.[171] Yet employers of these workers pay just 1.48% of payroll in workers' compensation costs—just 18% of the rate used in the Department's calculation. The Department's choice of this significantly higher rate without consideration or explanation of other options is further evidence of the Department's arbitrary rulemaking.

C. The Department Did Not Adequately Consider That the Challenged Rule Will Likely Force Delivery Apps to Shrink Their Delivery Radius Around Each Restaurant, Hurting Both Consumers and Restaurants

154. Failure to adequately consider adverse consequences of a Rule is an independent basis for invalidating the rule. *See Zehn-NY*, 2019 WL 7067072, at *3-4 (rejecting rule as arbitrary and capricious where agency's calculation of impact rule was unreliable). In promulgating a rule, an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*, 463

[169] New York Compensation Insurance Rating Board, Classification Digest 2.0, Code 7380 "Drivers, Chauffeurs and Their Helpers – NOC – Commercial," https://www.nycirb.org/classification-digest/index.php?page=phraseology-and-description&class-code=7380.

[170] New York Compensation Insurance Rating Board, Classification Digest 2.0, Code 9072 "Restaurant – Fast Food & Drivers," https://www.nycirb.org/classification-digest/index.php?page=phraseology-and-description&class-code=9072.

[171] Report at 30, Ex. 4.

U.S. at 43. Accordingly, an agency is not permitted to "ignore the evidence and merely rely upon the [agency's] general authority to administer" rules, Application of Gorham, 86 A.D.2d 505, 506 (1st Dep't 1982) (Fein, J., concurring). Here, the Challenged Rule will strongly incentivize apps to reduce the delivery "radius" around each restaurant—that is, the distance that the app will allow couriers to travel to delivery from each restaurant—and the negative impact this will have on consumers and restaurants. In the words of Joan Lewis, owner of The Door Restaurant, this "is little more than a **thinly veiled suggestion they stop delivering to low-income communities specifically**, where orders are less frequent and less profitable."[172] Despite comments like these, the Department has not considered, or grappled with, the severe effects its Challenged Rule will have.

155. A fundamental feature of the Challenged Rule is that it incentivizes apps to increase deliveries per hour per courier. Under the Department's model, higher deliveries per hour per courier will be needed to lower the additional costs per order and thereby mitigate the negative impact on demand.[173]

[172] Joan Lewis's December 16, 2022 Comment (emphasis added), Ex. 42.

[173] Uber's April 5, 2023 Comment at 13, Ex. 1.

Impact of Pay Per Trip Requirement Under the Standard and Alternative Methods (utilization rate of 60%, elasticity of 1)						
	2023 ($17.76 p/h)		2024 ($18.96 p/h)		2025 ($19.96 p/h)	
Deliveries Per Hour	Added Cost Per Delivery	% Δ in Orders	Added Cost Per Delivery	% Δ in Orders	Added Cost Per Delivery	% Δ in Orders
1.94	$4.91	-14.8%	$5.42	-16.4%	$5.94	-17.9%
1.87	$5.26	-15.9%	$5.79	-17.5%	$6.32	-19.1%
1.81	$5.58	-16.8%	$6.13	-18.5%	$6.68	-20.2%
1.75	$5.92	-17.9%	$6.49	-19.6%	$7.06	-21.3%
1.69	$6.28	-19.0%	$6.87	-20.8%	$7.46	-22.5%
1.63	$6.67	-20.2%	$7.28	-22.0%	$7.90	-23.9%

156. The Department recognizes that food delivery platforms will have a strong incentive to reduce the length of deliveries—the distance between a restaurant and the final consumer.[174] What the Department failed to consider, however, is how this reduced delivery length will reduce consumer demand.[175] This, in turn, will cause restaurants to lose a substantial portion of their customer base, and will limit consumer choice, while consumer fees are increasing, resulting in reduced customer goodwill.

157. The Department's response to comments on this issue is, at best, unsupported, and, at worst, nonsensical. According to the Department, the impact of reducing delivery distances is "ambiguous," because restaurants that benefit from longer delivery distances purportedly do so "at

[174] Report at 36 ("apps may strategically restrict delivery distances or limit services to the times and places where delivery can be provided affordably"), Ex. 4.

[175] Uber's April 7, 2023 Comment at 2, Ex. 1.

the expense of other restaurants that face increased competition."[176] But the Department cites no support for that assertion, and there is no reason to think that each restaurant's loss will necessarily be another restaurant's gain. Far more likely, they will all lose.

158. Critically, outsized impact will be felt in less densely populated areas that may not consistently have high delivery volume, including many lower income areas in the outer boroughs. As Cindy Estrada, the Executive Director at the New York City Hispanic Chamber of Commerce, noted: "If, as expected, these rules force platforms to adjust their operations, it's likely they would need to restrict opportunities for delivery workers in certain areas to help cut down on costs, making it even harder for many restaurants to fulfill the orders they need to stay open. For many of our member restaurants located in Harlem, the Upper West Side, Washington Heights and the Bronx, this proposed rule could significantly impair their ability to offer delivery services at all."[177]

159. Restaurant owners similarly recognized the faults in the Department's rule. In response to the Department's suggestion that apps "restrict delivery distances or limit service to the times and places where delivery can be provided affordably,"[178] Randy Peers, President and CEO of the Brooklyn Chamber of Commerce, similarly noted that "delivery services may ultimately end up being greatly limited in less busy areas like those outside Manhattan."[179]

160. The Department brushes these concerns aside, callously stating that it determined the minimum pay rate is necessary and that these less wealthy communities' "inability or unwillingness to pay" does not justify adjusting the rule.[180] *See Street Vendor*, 811 N.Y.S.2d at

[176] Challenged Rule at 21, Ex. 2.

[177] Estrada, Ex. 35; *see also* Uber's April 7, 2023 Comment at 3, Ex. 33.

[178] Report at 36, Ex. 4.

[179] Randy Peers's December 13, 2022 Comment, Ex. 39.

[180] Challenged Rule at 21, Ex. 2.

561 (noting the "purpose of a basis and purpose statement [in proposed rulemaking] is at least in part, to respond in a reasoned manner to the comments received") (internal quotation marks omitted).

D. The Challenged Rule Is Arbitrary and Capricious Because It Is Premised in Large Part on Fundamentally Flawed and Biased Surveys

161. The Challenged Rule should be vacated for the additional reason that it is premised in large part on fundamentally flawed and biased surveys of merchants and food delivery workers.

162. Courts around the country have recognized that agency rules and regulations based on flawed survey results are arbitrary and capricious and therefore invalid. *See*, *e.g.*, *Friends of Boundary Waters Wilderness* v. *Bosworth*, 437 F.3d 815, 826–27 (8th Cir. 2006) ("Sample size, potential for bias, interviewing techniques, reliability of extrapolating data, and poor recollection are all relevant factors the agency failed to properly consider in analyzing the survey results, making the resulting estimates arbitrary and capricious."); *Hernandez* v. *Stewart*, 2021 WL 6274440, at *7–10 (E.D. Wash., 2021) (finding that defendants "acted arbitrarily and capriciously by not conducting a reliable worker survey to validate the results of [an] employer survey"); *High Sierra Hikers Ass'n* v. *Weingardt*, 521 F. Supp. 2d 1065, 1075–76 (N.D. Cal. 2007) (finding that Forest Service's reliance on flawed surveys was "arbitrary and capricious").

163. As discussed above, the Department sent a survey to over 23,000 merchants querying restaurants' delivery volumes and how those deliveries were fulfilled.[181] However, the Department declined to ask restaurants what is arguably the most important question—do they make profits, and how much, on app-based delivery orders. This, as set forth above, was likely part of the Department's effort to preserve its ability to illogically assume that merchants make

[181] Report at 3, Ex. 4.

zero margin on delivery so it could pretend it does not matter if restaurants lose a significant percentage of orders. Likewise, the Merchant Survey did not seek information on the impact to restaurant staff—*e.g.*, cooks, dishwashers—that reduced order volume would have (even assuming zero margin).

164. The Department also relied on two surveys of delivery workers: (i) its own "NYC Delivery Workers Survey," and (ii) the "Columbia-Sam Schwartz-Deliveristas Survey," a survey conducted by a delivery worker advocacy group. These surveys are mentioned more than 90 times in the Department's initial Report, and they were used to help set the expense reimbursement component of the Challenged Rule.

165. Specifically, it appears that the Department used these surveys to (among other things):

a. justify various calculations of assumed expenses that delivery workers incur, including for the purchase of cell phones and batteries;

b. determine the frequency with which delivery workers use multiple apps at one time;

c. determine delivery worker demographics, their mix of vehicles, and hours of work; and

d. estimate time that delivery workers are unable to work due to medical issues, as well as associated medical costs.[182]

166. Uber asked Dr. Itamar Simonson, Emeritus Professor of Marketing at the Graduate School of Business at Stanford University, to review and analyze these surveys. Dr. Simonson found that the surveys "violated fundamental principles of survey design," and were therefore "biased and . . . bound to produce unreliable results."[183] He concluded that out of the thousands of surveys he has reviewed in his career, **"I cannot recall any other surveys in which the**

[182] Second Proposed Rule at 9, Ex. 14; Report § 4, Ex. 4.

[183] Simonson Report at 1, Ex. 13 at Ex. B.

purpose of the surveys and the desirable responses were so clearly revealed in a way that was sure to bias the results. This fatal flaw, by itself, makes the surveys' results unreliable."[184]

167. As Dr. Simonson's unrebutted report details, the Department's surveys violated virtually every principle of designing an unbiased survey, including:

a. avoiding "demand effects" (that is, a survey should not reveal to respondents the purpose, the expected answers and results, and whether providing certain answers is in respondents' self-interest; the reason for this rule is straightforward because such knowledge usually generates bias and encourages respondents to provide the answers that will help the survey designers achieve their stated objectives);

b. avoiding leading questions;

c. including a proper "control" to account for "noise," guessing, and spurious responses;

d. avoiding "focalism bias" whereby the questions single out and suggest items that respondents might not have attributed to the subject at issue;

e. whenever possible, relying on open-ended questions rather than closed-ended (multiple choice questions that provide "appropriate" or expected answers, because such provided response options influence the answers); and

f. ensuring that the phrasing of questions (and any closed-ended questions) is unbiased.[185]

168. For example, one fundamental principle is not to reveal the purpose of a survey, which can prompt respondents to provide what they perceive to be the "correct" answer to promote that purpose, especially if it is in the respondent's own interest to do so. But here, the Department prefaced its survey with the following introduction: "NYC is surveying New Yorkers about their work for delivery apps. **This is part of a new law to raise pay for app delivery workers. Your answers will help NYC set a minimum pay rate that reflects your expenses and needs.**"[186]

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184 *Id.* at 14 (emphasis added).

185 *Id.* at 6-14.

186 Module 1 Questionnaire, NYC Delivery Worker Survey at 1 (emphasis added), Ex. 5.

169. Similarly, the preface to the Columbia-Sam Schwartz Deliveristas Survey, which the Department also relied on, stated that it would "**help DCWP set a minimum pay rate for delivery workers**."[187] This survey even reminded respondents of the purpose of the survey throughout the survey, as a preface to particular questions.[188]

170. Another fundamental principle of survey design is avoiding phrasing questions and providing response options that are likely to bias the results. Here, however, the Department included questions like "During the past 12 months, how many batteries have you bought for your e-bike?" and provided a range of responses from zero to "5 or more."[189] This range "was likely to generate upward-biased estimates of the number of batteries bought."[190]

171. As Dr. Simonson states, these fundamental and pervasive errors in the design of the surveys rendered the results "unreliable," and "it would not be consistent with accepted survey science to rely upon their results for use in justifying the rules at issue here"[191]—particularly in regard to the expense component of the new rule, which is premised almost entirely on the surveys.

172. It is precisely for these types of flaws in surveys that the courts in the cases cited above (*Friends of Boundary Waters Wilderness*, *Hernandez*, and *High Sierra Hikers Association*) rejected rules based on such surveys as being arbitrary and capricious. The Court should do the same here.

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187 Columbia-Sam Schwartz-Deliveristas Survey Questionnaire at 1 (emphasis added), Ex. 6.

188 *See, e.g.*, *id.* at 2.

189 Module 2 Questionnaire, NYC Delivery Worker Survey at 6-7, Ex. 43.

190 Simonson Report at 20, Ex. 13 at Ex. B.

191 *Id.* at 21.

E. The Challenged Rule's Recordkeeping and Reporting Requirements Are Irrational and Unreasonable

173. The Challenged Rule should also be set aside because its incredibly burdensome and invasive recordkeeping and reporting requirements (to which no other businesses are known to be subject) have no rational relationship to administering a minimum earnings standard and will create confidentiality, security, and privacy risks not accounted for by the Department.

174. The Challenged Rule's minimum pay rate turns on the amount of time that couriers engage with a food delivery platform, whether available or executing a trip. But the Challenged Rule's recordkeeping requirements sweep well beyond, including by requiring apps to track and report:

a. the number of trip miles with a pickup or drop-off location in New York City;

b. the amount of gratuities paid to food delivery workers for trips with a pickup or drop-off location in New York City;

c. the number of consumers who received at least one delivery with a pickup or drop-off location in New York City;

d. the number of completed deliveries with a pickup or drop-off location in New York City;

e. the amount charged to consumers for delivery of food, beverage, or other goods with a pickup or drop-off location in New York City;

f. the fees charged to consumers on orders for delivery with a pickup or drop-off location in New York City, itemized by type;

g. the number of merchants in New York City who prepared at least one order for delivery; and

h. the delivery fees, payment processing fees, and other fees charged to merchants in New York City, itemized by type.[192]

175. The Challenged Rule turns exclusively on the time couriers spend engaging with platforms (whether merely online or executing trips). Distance traveled has no role in calculating

[192] Challenged Rule at 26-31, Ex. 2.

minimum earnings, neither does the number of orders, the number of merchants involved, or the amount or cost of food ordered by consumers. The Department therefore has no reasonable basis to increase burdensome recordkeeping/reporting demands around these data types as part of this minimum earnings rule.

176. These new regulatory requirements are both beyond the scope of what the City Council's authorizing legislation authorizes and come with a heavy cost, as numerous commenters noted.[193] *See N.Y.S. Superfund*, 18 N.Y.3d at 294–95. "An agency cannot create rules, through its own interstitial declaration, that were not contemplated or authorized by the Legislature and thus, in effect, empower themselves to rewrite or add substantially to the administrative charter itself." *Tze Chun Liao*, 74 N.Y.2d at 510. These fundamental limits on administrative power apply to local and state agencies alike. *See*, *e.g.*, *Ahmed* v. *City of New York*, 129 A.D.3d 435, 440 (1st Dep't 2015) (annulling a Commission rule promulgated in excess of purported authority delegated by the New York City Council). The New York City Council has tasked the Department only with "study[ing] the working conditions of food delivery workers" and "establish[ing] a method for determining the minimum payments that must be made to a food delivery worker by a third-party food delivery service or third-party courier service." N.Y.C. Admin. Code § 20-1552(a)(3). In promulgating the Challenged Rule, however, the Department greatly exceeded the limited authority to which it was delegated. The Department did not demonstrate or explain how its recordkeeping and reporting requirements have any rational relationship to administering the Department's minimum earning standard.

[193] Uber's December 16, 2022 Comment at 23-25, Ex. 13; DoorDash's April 7, 2023 Comment at 16-17, Ex. 36; Tech:NYC's December 8, 2022 Comment at 3, Ex. 44.

177. Moreover, the sheer volume of data involved creates serious privacy and confidentiality risks because the Challenged Rule requires services to produce highly confidential business data. They constitute an invasion into every highly confidential aspect of Uber Eats' business.

178. The Department's response to these comments was insufficient, simply stating that the recordkeeping requirements "will enable the Department to effectively monitor compliance with the minimum pay rule."[194] But the Department failed even to acknowledge, much less take into account, the heavy burden it was imposing on services, or the confidentiality, security, and privacy issues implicated by the Challenged Rule. Nor did the Department explain how any of these recordkeeping requirements have a rational relationship to the administration of the Challenged Rule. Where, as here, a rule is the product of unauthorized rulemaking, it must be annulled. *See, e.g.*, *Ahmed*, 129 A.D.3d 435 at 440.

II. The Challenged Rule Is Contrary to Law Because It Failed to Follow the City Council's Mandate to Study and Regulate Delivery Workers for All Food Service Establishments, Including Grocery and Convenience Delivery Services

179. The Challenged Rule is contrary to law because the Department improperly excluded grocery and convenience delivery services from its study and regulations, contrary to the City Council's authorizing statute.

180. Local Law 115, codified at New York City Administrative Code § 20-1522, authorized the Department to study the working conditions of food delivery workers and to establish a method for determining the minimum payments that must be made to a food delivery worker by a third-party food delivery service or third-party courier service. The City Council defined these services to mean any platform that arranges or facilitates deliveries from a food

[194] Second Proposed Rule at 16, Ex. 14.

service establishment, which is further defined as "a business establishment located within the city where food is provided ***for individual portion service*** directly to the consumer." N.Y.C. Admin. Code § 20-1501 (emphasis added).

181. Businesses like grocery stores and convenience stores often serve individual portion foods directly to consumers. For instance, Whole Foods sells pizza, sushi, sandwiches, salads, and a hot bar for consumption on site or off premises.[195] Many grocery stores sell pre-made individual portion meals like sandwiches and wraps.[196] Many convenience stores offer pre-packaged fresh fruit, yogurt and granola, and prepared sandwiches, in addition to grocery items. These businesses thus meet the definition of food service establishments. N.Y.C. Admin. Code § 20-1522. Moreover, any third-party delivery services that arrange for the delivery of "food, beverages, or other goods" from one of these businesses is a third-party food delivery service or a third-party courier service.

182. While the statute's language encompasses third-party delivery and courier services that pick up and deliver individual portion items from grocery stores and convenience stores, *e.g.*, Instacart, Shipt, or goPuff,[197] the Department did not study these services, subpoena them, nor include them in its rule. Local Law 115 directs no such distinction. As such, the Department's failure to "study the working conditions" of an entire subset of food delivery and to establish a method for determining their minimum earnings undermines the legality of the Challenged Rule

[195] *See, e.g.*, Whole Foods, Columbus Circle, Eateries and Bars (listing Lunch and Dinner To Go, Columbus Circle Pizza, Market Plate, WFM Coffee Bar, and Genji Sushi), https://www.wholefoodsmarket.com/stores/columbuscircle#store-eateries-and-bars/ , Ex. 45.

[196] *See, e.g.*, Instacart, Fairway, Prepared Foods, Sandwiches & Wraps, https://www.instacart.com/store/fairway/collections/3096-sandwiches-wraps, Ex. 46; GoPuff, Gopuff Launches Street Eats, Bringing Hot Prepared Food To Your Door in Minutes, https://www.gopuff.com/blog/news/street-eats-food-truck s, Ex. 47.

[197] The Department states in its Report that "non-restaurant deliveries are not provided by covered apps in NYC on a scale sufficient to justify a differentiated analysis." Report at 5, Ex. 4.

and requires its vacatur. *See United Home for Aged Hebrews* v. *Axelrod*, 201 A.D.2d 656, 658 (2d Dept 1994) (vacating agency action where it arbitrarily "dr[e]w lines, somewhere, to delineate geographical-based labor markets," despite having broad discretionary power to adjust rates and a statutory direction to "take into consideration various specified behaviors").

183. It is axiomatic that "an agency's authority must coincide with its enabling statute." *N.Y. State Superfund Coal.*, 75 N.Y.2d at 92. "An agency cannot create rules, through its own interstitial declaration, that were not contemplated or authorized by the Legislature and thus, in effect, empower themselves to rewrite or add substantially to the administrative charter itself." *Tze Chun Liao*, 74 N.Y.2d at 510. These fundamental limits on administrative power apply to local and state agencies alike. *See*, *e.g.*, *Ahmed* v. *City of New York*, 129 A.D.3d 435, 440 (1st Dep't 2015) (annulling a Commission rule promulgated in excess of purported authority delegated by the New York City Council).

184. A legislature's delegation of authority to an administrative agency violates the separation of powers where it crosses the line between implementing legislative policy and engaging in policymaking of its own—a task expressly reserved for the legislature. *See Saratoga Cnty. Chamber of Com.* v. *Pataki*, 100 N.Y.2d 801, 821–22 (2003); *Boreali* v. *Axelrod*, 71 N.Y.2d 1, 9, 11 (1987). One of the factors that a court considers in deciding whether a delegation is invalid is whether "the regulatory agency balanced costs and benefits according to preexisting guidelines, or instead made value judgments entailing difficult and complex choices between broad policy goals to resolve social problems." *Nat'l Energy Marketers Ass'n* v. *N.Y.S. Pub. Serv. Comm'n*, 167 A.D.3d 88, 94 (3rd Dep't 2018); *see, e.g.*, *Baldwin Union Free Sch. Dist.* v. *Cnty. of Nassau*, 84 N.Y.S.3d 699, 722 (Sup. Ct. 2018).

185. The Department's inconsistent approach to the statutory requirements also supports vacatur of the Challenged Rule. In its December 2022 comment, DoorDash requested that the Department exempt trips its food delivery workers make from businesses other than restaurants, such as grocery and convenience stores, from the minimum earnings standard. The Department responded that it was explicitly not incorporating that recommendation, because "[f]ood delivery workers require adequate pay for these trips as well."[198] The Department stated that "the protections of Subchapter 1 of Chapter 15 of Title 20 of the Administrative Code"—including those discussed above—"generally apply to such trips, and the law does not specify that minimum pay protections should apply more narrowly than other protections."[199] In other words, the Department insisted that the Challenged Rule will apply to a courier using the same platform whether they are picking up an order from a restaurant versus a grocery or convenience store.

186. Grubhub then commented in April 2023 that the Department's minimum earnings standard should apply to quick convenience and grocery delivery companies. The Department responded that it "cannot adopt Grubhub's recommendation because it is outside the scope of the Department's authority granted by Local Law 115 of 2021."[200]

187. It is unclear how the Department can purport to square these two answers. First, it claims that it has the ability to set rates for food delivery workers with respect to deliveries made by couriers using UberEats, Grubhub, DoorDash, and Relay. But then it asserts that it is not authorized to regulate companies who perform exactly the same action. The Department made this assertion without even purporting to study whether its standard for food delivery services, or

198 Second Proposed Rule at 16, Ex. 14.

199 *Id*.

200 Challenged Rule at 13, Ex. 2.

another one, should apply to quick convenience and grocery companies; it simply forged ahead with its irrational carve-out despite commenters raising the issue.

188. This is a blatantly absurd outcome. For instance, a consumer could order a sandwich or a sushi roll—individual portion foods which can be provided directly to the consumer—from a grocery store like Morton Williams on both Uber Eats and Instacart.[201] While according to the Department's response to comments, a courier making this delivery facilitated by Uber Eats would be covered by the Challenged Rule's minimum earnings standard, the same courier delivering the same order facilitated by Instacart would not be covered by the Rule. At minimum, this displays the arbitrary and capricious nature of the Department's rulemaking—different services subject to study and regulation at the Department's whim. More critically, it demonstrates how the Department enacted the Challenged Rule in contravention of Local Law 115, and must be set aside.

III. The Court Should Enjoin Enforcement of the Challenged Rule Pending Adjudication of the Petition

189. The Court should issue a preliminary injunction enjoining enforcement of the Challenged Rule. A preliminary injunction is warranted if an agency is about to "act in violation of" the petitioner's rights that will "render the [Court's] judgment ineffectual" by imposing losses that are not recoverable at law and enforcement of which during the pendency of this action will "produce injury." N.Y. C.P.L.R. 6301; *see Credit Agricole Indosuez* v. *Rossiyskiy Kredit Bank*, 94 N.Y.2d 541, 544–45 (2000). A preliminary injunction is appropriate where, as here, the moving party shows by clear and convincing evidence "(1) a likelihood of ultimate success on the merits;

[201] *E.g., compare* Uber Eats, Morton Williams, Spicy Salmon Roll, https://www.ubereats.com/store/morton-williams-15-west-end-ave/3uv5i-YUWOaZfAtmuDW1XA/c0c9cc65-8919-5185-988b-1f8b6b4491ae/3c33c0a0-566a-5017-af1c-8ed1fc50832a/b06137ab-95c4-5ed0-9f43-6a793d4b14f3 , Ex. 48, *with* Instacart, Morton Williams, Spicy Salmon Roll, https://www.instacart.com/store/morton-williams-supermarket/products/19987566 , Ex. 49.

(2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in [its] favor." *Doe* v. *Axelrod*, 73 N.Y.2d 748, 750 (1988); N.Y. C.P.L.R. 6301, 6313 (authorizing such relief). A temporary restraining order should also be granted pending a hearing for a preliminary injunction because, in the absence of relief, Uber will suffer "immediate and irreparable injury." N.Y. C.P.L.R. 6301. 179. Uber satisfies each of these requirements and is entitled to a preliminary injunction of the Challenged Rule pending adjudication of the Petition.

A. Uber Is Likely to Succeed on the Merits

190. The threshold inquiry with respect to likelihood of success on the merits is "whether the proponent has tendered sufficient evidence demonstrating ultimate success in the underlying action." *1234 Broadway LLC* v. *W. Side SRO Law Project*, 86 A.D.3d 18, 23 (1st Dep't 2011). Although the movant must "establish a clear right to that relief under the law and the undisputed facts upon the moving papers," it need not "tender conclusive proof beyond any factual dispute establishing ultimate success." *Id.* (cleaned up); *see Ma* v. *Lien*, 198 A.D.2d 186, 187 (1st Dep't 1993) ("[E]ven when facts are in dispute, the nisi prius court can find that a plaintiff has a likelihood of success on the merits, from the evidence presented, though such evidence may not be 'conclusive.'"); *McLaughlin, Piven, Vogel, Inc.* v. *W.J. Nolan & Co.*, 114 A.D.2d 165, 172-73 (2nd Dep't 1986) ("As to the likelihood of success on the merits, a prima facie showing of a right to relief is sufficient; actual proof of the case should be left to further court proceedings . . . .").

191. Uber's Article 78 petition is likely to succeed on the merits for the reasons set forth above.

B. Uber Will Suffer Irreparable Harm Absent Preliminary Relief

192. A party seeking either a temporary restraining order or a preliminary injunction must demonstrate the prospect of irreparable injury if the injunction is not granted. *Gilliland* v. *Acquafredda Enters., LLC*, 936 N.Y.S.2d 125, 129 (1st Dep't 2011). Here, if the Challenged Rule

is permitted to go into effect on July 12, 2023, Uber will be faced with three types of irreparable harm, none of which can be cured later if the Rule goes into effect on July 12, 2023, but is later struck down as it should be. First, the Challenged Rule will cause Uber to suffer irreparable financial harm. Uber will have to pass the increased costs of the Challenged Rule on to consumers, causing a concurrent decrease in demand, or absorb them, with as much as between $100 and $200 million in unrecoverable additional payments in the second half of 2023. Second, unless enjoined, the Challenged Rule will require Uber to continue to divert significant product and engineering resources away from planned projects and towards building new technologies to restrict courier access and otherwise comply with the Challenged Rule. Finally, the Challenged Rule will, in forcing Uber to pass along costs and restrict courier access to the platform, damage Uber's reputation with couriers, merchants, and consumers.

i. The Increased Payments Required for Compliance with the Challenged Rule Are Substantial and Not Recoverable.

193. A key determinant of whether harm is irreparable is "whether or not that harm may be compensated by money damages if the motion is not granted." *H.D. Smith Wholesale Drug Co.* v. *Mittelmark*, No. 650459/2011, 2011 WL 5964555, at *4 (N.Y. Sup. Ct. Nov. 18, 2011); *see also Chi. Research & Trading* v. *N.Y. Futures Exch., Inc*., 84 A.D.2d 413, 416 (1st Dep't 1982) (injunctive relief warranted "where the plaintiff has no adequate remedy at law"). A preliminary injunction is a "reasonable disposition" where its denial "might well have rendered any final judgment ineffectual." *See Garden City Co.* v. *Erickson*, 251 A.D.2d 262, 262 (1st Dep't 1998) (citing cases). Here, the Department itself predicted that the amount paid per delivery by food delivery platforms, for the smaller number of couriers who get opportunities to complete deliveries, would increase by $4.94 per trip. That increase would cost Uber between $100 and $200 million over just the remainder of 2023. If Uber were to absorb those costs, it would have

no way of recovering them from the Department even if it is successful in its Article 78 proceeding because they are not funds recoverable either in this proceeding or in an ancillary one against the Department or New York City.

a. The Increased Payments Required for Compliance Will Cause Irreparable Harm.

194. The Department recognizes and predicts that if the Challenged Rule goes into effect it will require Uber and other food delivery platforms like DoorDash, GrubHub, and Relay to transfer higher amounts of money to the smaller number of couriers that will still receive opportunities to make deliveries. More specifically, the Department predicted that the amount paid per delivery by food delivery platforms, for the smaller number of couriers who get opportunities to complete deliveries, would increase by $5.18 under an initial version of the Challenged Rule. Table 8 in the Statement of Basis and Purpose accompanying the Challenged Rule shows that the Department determines payment per delivery as the minimum hourly rate divided by the deliveries per hour, and using the Department's numbers from its Table 8, that would in 2025 (the year mostly reflected in the Department's Table 8) be $10.29 per delivery, which is $5.97 more than the $4.32 paid on average by food delivery platforms per delivery in 2022, as determined by the Department in its Report. Using the Standard Method of $17.96 per hour rate that would go into effect immediately on July 12, 2023, and the same assumption for deliveries per hour, would equal an increased payment per delivery of $4.94 ($17.96/1.94 = $9.26; $9.26 - $4.32 = $4.94).

195. This $4.94 increase in the fees per trip from the Department's analysis exceeds the entirety of the platforms' average $4.19 gross margin per delivery that the Department calculated based on the data it received—in other words, it more than eliminates all platform margin from

the delivery. Passing on the increase in delivery worker minimum payments per trip to consumers would cause average consumer fees to more than double from current levels.

196. The basic economic fact is that more than doubling the average consumer fees means that consumer demand will decline. Under the Department's own modeling as described in its Report at page 34,[202] merchants, delivery apps, and couriers will suffer a 17.9% reduction in orders placed in 2025, because of the Challenged Rule, due in large part to the pass-on of increased costs that the Department projects under its primary set of assumptions. Such a decrease in orders will have a direct, significant, and negative impact on Uber in loss of revenues. When orders are not placed, there is no way to recoup the amounts that were not earned.

197. Although the Department predicted that Uber will be forced to pass along the increased payments to consumers, it is also possible (at least theoretically) for food delivery platforms like Uber Eats to absorb the increased payments rather than passing them on. That too would result in direct financial harm to Uber. Uber has attempted to calculate the impact of simply absorbing the increased payments, and determined that over just the remainder of 2023, the impact would be between $100 and $200 million.

b. The Increased Payments Required for Compliance Are Not Recoverable at Law, Even If Uber Were to Prevail and Demonstrate That the Challenged Rule Is Unlawful.

198. There is no way for Uber to recover these substantial increased payments required for compliance even if it were to succeed in this proceeding or an ancillary proceeding because sums required for compliance are not recoverable in an Article 78 proceeding and it could not recover damages in a separate lawsuit against New York City due to principles of sovereign immunity.

[202] Report at 34, Ex. 4.

199. *First*, Uber's increased payments costs are not recoverable under New York Civil Procedure Law and Rules 7806, which permits in an Article 78 proceeding only restitution or damages that are "incidental to the primary relief sought." N.Y. C.P.L.R. 7806. Courts have held that monetary injuries are not "incidental" to the relief even when they are caused by compliance with an arbitrary and capricious agency action. *See Metro. Taxicab Bd. of Trade* v. *N.Y.C. Taxi & Limousine Comm'n*, 115 A.D.3d 521, 522 (1st Dep't 2014) (despite finding that challenged rule was arbitrary and capricious, declining to require Commission to reimburse taxi owners for funds that they could not have collected from drivers while unlawful rule was in place). Rather, courts tend only to find that damages are incidental to the primary relief sought where the "primary aim of the Article 78 proceeding would make it a 'statutory duty' of the respondent to pay the petitioner the sum sought." *Metro. Taxicab Bd. of Trade* v. *N.Y.C. Taxi & Limousine Comm'n*, 38 Misc. 3d 936, 941 (N.Y. Sup. Ct. 2013).

200. That is not the case here, where the Department is not withholding or retaining any funds from Uber. *Compare Matter of N.Y. State Assn. of Homes & Servs. for Aging* v. *Perales*, 179 A.D.2d 296, 297–98 (3d Dep't 1992) (agency had to provide, as incidental damages, portion of Medicare rate "withheld or recouped" from nursing homes as a result of invalidated regulation) *with Metro. Taxicab*, 115 A.D.3d at 521-24 (agency did not have statutory duty to reimburse petitioners, owners of taxies, for sales and rental taxes that they were unable to charge to lessees of taxies as result of invalidated rule). Instead, the funds that Uber would be required to transfer to couriers would be "incurred . . . by reason of" Uber's "compliance with the regulation," which the Department is not likely to be obligated to pay. *Metro. Taxicab*, 38 Misc. 3d at 942.

201. *Second*, there is no separate action that would enable Uber to redress its harms because the Department is immune from payment of damages resulting from invalidated rules that,

as here, were implemented as "discretionary action[s] taken during the performance of government functions." *Metro. Taxicab*, 115 A.D.3d at 524–25 (quoting *Valdez* v. *City of New York*, 18 N.Y.3d 69, 76 (2011)) (holding the Commission to be immune and concluding that "the TLC's determination in this case, however unjustified it may have been, was an exercise of discretion"). Thus, even if the Court finds that the Challenged Rule is arbitrary and capricious, it is likely that the City would not be subject to "liability for losses that petitioners claimed to have suffered by reason of their compliance with the regulation." *Metro. Taxicab*, 38 Misc. 3d at 945; *see also Regeneron Pharm.'s, Inc.* v. *U.S. Dep't of Health and Hum Serv.'s*, 510 F. Supp. 3d 29, 39 (S.D.N.Y. 2020) (holding Regeneron would likely suffer "irreparable financial loss absent a preliminary injunction" where monetary damages cannot later be recovered due to sovereign immunity); *Register.com, Inc.* v. *Verio, Inc.,* 356 F.3d 393, 404 (2d Cir. 2004) (finding that loss of business opportunities, loss of goodwill, and harm to a business's reputation cannot be translated into a monetary loss and therefore is irreparable harm).

202. Thus, Uber has no recourse for the significant sums it must expend to comply with the Challenged Rule.[203] That is sufficient to establish irreparable harm, even though some part of the harm is economic in nature. *See Metro. Taxicab Bd. of Trade* v. *City of New York*, No. 08CIV7837(PAC), 2008 WL 4866021, at *5–7 (S.D.N.Y. Oct. 31, 2008) (finding irreparable harm based on unrecoverable costs to be incurred for compliance with regulation); *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring) ("complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs").[204]

[203] Uber cannot, of course, seek to claw back payments made to couriers pursuant to the Challenged Rule if, after full briefing and argument on this Petition, it were later invalidated.

[204] This was the precise argument presented to the New York Supreme Court just a few months ago in the context of an application for a temporary restraining order with respect to a Taxi & Limousine Commission regulation.

ii. The Challenged Rule Will Force Uber to Divert Significant Resources to Building New Technologies

203. Currently, Uber Eats allows couriers to access its platform at any time and any place of their choosing, and allows them to accept or decline delivery opportunities however they wish without any impact on their ability to access the platform or delivery opportunities in the future. Time spent by couriers "online" is not compensated directly, but couriers have maximum flexibility and convenience. Under the Challenged Rule and by its design, this will change dramatically as Uber will minimize on-line time and increase utilization, and at the bare minimum to stay above the 53% utilization threshold set by the Department to be eligible for the Alternative Method.

204. Minimizing "on call" time and maximizing utilization, as well as at least exceeding 53% utilization, requires Uber to build out an entire suite of technologies to manage utilization that Uber does not have in any country globally for food delivery, and that it does not want to build and is only building because of the Challenged Rule, and will only have to implement this technology in one city.

205. As a cautionary measure, Uber has already begun building out this technology, and will have to continue to do so after July 12, to the extent the Challenged Rule is not enjoined. The technology and engineering efforts that have already occurred and that will continue to occur absent an injunction require Uber to divert significant time and resources of its product management, engineering, and legal teams away from projects that Uber wants to build and had

There, the Court granted the temporary restraining order, pausing implementation of the rule until the parties had an opportunity to brief, and the Court could rule on, the merits of the Article 78 petition. *Uber USA, LLC* v. *New York City Taxi & Limousine Commission, et al.*, No. 160451/2022 (New York County Sup. Ct.), Order to Show Cause (Dec. 13, 2022) (Dkt. 65).

on its existing product and tech road map, which irreparably harms Uber's ability to manage and develop its products.

206. More specifically, Uber has already begun and will have to continue building out technology for couriers to schedule a set period of time where they can get guaranteed platform access (generally referred to as scheduling technology). This in turn requires product design and the build out of data analysis and mathematical technologies to determine which couriers receive access to the scheduling feature, and in what order. This is because the periods of time for which a scheduled slot of guaranteed platform access can be granted are not enough for all existing couriers, and thus Uber Eats must determine which cohorts of couriers will receive preferential access, which will receive limited access, and which will receive no access.

207. Likewise, Uber Eats has begun developing and will continue to build gating technology whereby couriers who attempt to go online to be available to receive delivery requests when they are outside of a scheduled period of guaranteed access are barred from going online if consumer demand is too low. This technology is imperative for food delivery platforms like Uber Eats to be able to hit the threshold utilization rate or benefit from the reduced costs associated with higher utilization. This requires the build out of technologies related to the determination of real time metrics like geo-specific forecasted demand and orders as well as geo-specific utilization.

208. Uber has also been developing and will have to continue developing technology to push couriers offline (*i.e.*, make them unavailable to receive delivery opportunities such that they are not in on-call time). Like gating, this requires the product and engineering work to assess and action metrics like those necessary for gating.

209. Uber has begun working on these three technologies, and absent an injunction will have to continue building them until they are complete, at which point it will have to continue to

monitor their performance and iterate on them, as well as refine its method of determining which couriers will have what kind of access to scheduling features. Looking solely at the period of time from July 12, 2023 and forward through the end of 2023, this effort will require 12 employees dedicating 60 engineering weeks to the projects, which costs Uber salaries and expenses.

210. In addition, Uber will need to build technological capabilities and assign employees to the management of weekly utilization measurement, aggregate minimum payment calculations, and amounts and disbursements across the entire pool of delivery workers on a weekly basis, to the extent Uber Eats uses the Standard Method and achieves the benefits of utilization exceeding 60%. This represents an entirely different process from how calculating and disbursing payments works at present.

211. All of these efforts will require diverting high-value team members away from existing engineering projects where their know-how cannot be replaced. More specifically, Uber maintains a product and tech, where it plans out the product improvements it wants to make and the new features it wants to develop. Prior to the announcement of the Rule, Uber had certain projects on its roadmap. Because of the Rule, Uber had to put the technologies described above at the top of its roadmap, which forced down the timeline and roadmap of other projects, including projects designed for improving courier access, safety, and earnings around the globe. *See* Hahn Affidavit.

iii. The Challenged Rule Will Cause Uber to Suffer Irreparable Reputational Harm.

212. Uber will also suffer reputational harm, as a result of the Challenged Rule, to its relationships with couriers, merchants, and eaters. "[I]t is well settled that the loss of goodwill of a viable, ongoing business may constitute irreparable harm warranting the grant of preliminary injunctive relief." *Asprea* v. *Whitehall Interiors NYC, LLC*, 206 A.D.3d 402, 403 (1st Dep't 2022)

(cleaned up); *see also Willis of N.Y.* v. *DeFelice*, 299 A.D.2d 240, 242 (1st Dep't 2022) (loss of business is irreparable harm); *Klein, Wagner & Morris* v. *Lawrence A. Klein, P.C.*, 186 A.D.2d 631, 633 (2d Dep't 1992) (damage to "reputation with clients [and] potential clients . . . would constitute irreparable harm"); *Teamquest Corp.* v. *Unisys Corp.*, No. C97-3049, 2000 WL 34031793, at *13 (N.D. Iowa Apr. 20, 2000) (finding irreparable harm where the plaintiff "would be forced to pass on the increased cost to its customers, which would invariably result in loss of customers to competitors, and would also injure its goodwill within the industry").

213. As to couriers, the Challenged Rule is designed to effect a dramatic change in couriers' relationship to the Uber Eats platform. Currently and historically, couriers can and have been able to access the Uber Eats platform when and where they want, and for how long, and can take or not take any delivery opportunity they receive. This is a key value proposition for couriers who come to the Uber Eats platform. Absent an injunction before July 12, Uber Eats must manage for utilization and restrict couriers' time spent "on-call" and not "on trip," and will begin using gating and scheduling features. This means existing couriers will attempt to go online as they have done historically, but find they cannot go online at that time, and those who would like to become couriers will not be able to do so. Others will be online, and then be forced offline. Others will find they can go online, but only at times that do not work for their schedules or lives. Some couriers will see their ability to access the platform be eliminated entirely. And all couriers who retain platform access will now have to think about their utilization levels, facing increased pressures to be on trip as much as possible.

214. Imposing the utilization and management practices described above will irreparably impair Uber's reputation and good will with couriers. Delivery workers prioritize the freedom to decide when and where to log on to the Uber platform, for however long they choose,

and to accept or not accept trips as they see fit. While the Challenged Rule is designed to cause the types of changes that couriers generally dislike, and that Uber will enact only because of the Challenged Rule, Uber's experience in ridesharing indicates that couriers are likely to hold Uber Eats responsible for the changes, at damage to Uber Eats' relationship and goodwill with couriers, absent relief from the Court. In 2019, after the TLC imposed similar measures that penalized "on call" time in the ridesharing context and thus caused high volume for-hire vehicle platforms to enact limits on platform access, drivers using the Uber Rides platform to provide passenger transportation had an extremely negative reaction and expressed in public statements anger at having their flexibility and independence impeded. They blamed Uber, although the TLC's policies were the cause.

215. Also as to couriers, the Challenged Rule stands to cause serious confusion and frustration among the smaller group of couriers that will continue to be able to get platform access and earn any money through food delivery. They will likely be confused about understanding and predicting how much they will earn each week, or why. First, the Rule allows platforms to switch between the Standard Method and Alternative Method each week, with different incentives. The method of determining earnings could change each week and between platforms. One week a courier may enjoy free platform access, but then the next week face reduced platform access. Couriers are likely to blame Uber for the confusion inherently caused by implementation of the Challenged Rule.

216. Couriers who use the Uber Eats app are not to Uber just couriers—they are also in many instances eaters on the food delivery platform and riders on the ridesharing platform. Thus the Challenged Rule causes reputational damage that will affect Uber with couriers, and also couriers who are eaters and riders.

217. As to merchants, the Challenged Rule incentivizes platforms to reduce or eliminate its platform in times and places where utilization and eater demand is lower. This will likely result in restaurants simply being cut off from the opportunity to arrange for delivery altogether through food delivery platforms. That will also result in a loss of good will to Uber from local merchants.

218. Further, by incentivizing a higher number of deliveries per hour per courier, the Challenged Rule encourages Uber Eats to shrink delivery radius around any one merchant to a smaller number of eaters that are geographically closest to them. This reduces order volumes and reduces merchants' ability to reach new eaters in a broader radius.

219. And as to eaters, they will experience both higher fees, as needed to recoup the increased earnings to couriers, as well as reduced selection, as platforms have to eliminate merchants that are farther away or that are in places with low utilization. These problems will no doubt alienate a critical customer population. Like couriers, eaters are typically also consumers on Uber's ridesharing platform. Thus, alienating them on Uber Eats also causes irreparable harm to Uber's other marketplaces.

220. The Challenged Rule, in short, will tarnish Uber's reputation with New Yorkers. That is quintessentially irreparable harm and should not be permitted pending the determination of whether the Challenged Rule is proper in the first place. *See Second on Second Café, Inc.* v. *Hing Sing Trading, Inc.*, 66 A.D.3d 255, 272–73 (1st Dep't 2009) (finding irreparable harm where petitioner-restaurant's closure would cause it to "miss[] out" on the holiday season and "los[e] . . . the goodwill it built up at this location during its first four years of operation"); *CanWest Glob. Commc'ns Corp.* v. *Mirkaei Tikshoret Ltd.*, 9 Misc. 3d 845, 872 (N.Y. Sup. Ct. 2005) (holding "erosion of . . . reputation" constitutes irreparable harm).

iv. The Department's Unlawful Violations of CAPA Are Irreparably Harming Uber by Depriving Uber of Vital Participatory Rights.

221. Uber has separately suffered irreparable harm due to the Department's blatant violations of CAPA, which cannot be rectified once the Challenged Rule is put into effect.

222. "A procedural violation can give rise to irreparable harm justifying injunctive relief because lack of process cannot be remedied with monetary damages or post-hoc relief by a court." *Invenergy Renewables LLC* v. *United States*, 422 F. Supp. 3d 1255, 1290 (Ct. Int'l Trade 2019), *as modified*, 476 F. Supp. 3d 1323 (2020). Federal courts have routinely held that violations of the APA, whose application informs this Court's interpretation of CAPA, cause irreparable injuries to regulated parties. *See id.* ("A failure to comply with APA procedural requirements therefore itself causes irreparable harm."); *see also ITServe All. Inc.* v. *Scalia*, No. 20-14604, 2020 WL 7074391, at *10 (D.N.J. 2020) ("[M]any courts have found that a preliminary injunction may be issued solely on the grounds that a regulation was promulgated in a procedurally defective manner."); *Eli Lilly & Co.* v. *Cochran*, 526 F. Supp. 3d 393, 408 (S.D. Ind. 2021) (finding irreparable harm based on violation of APA's notice and comment requirement alone); *N. Mariana Islands* v. *United States*, 686 F. Supp. 2d 7, 17–19 (D.D.C. 2009) (same).

223. Here, the Commission violated the notice-and-comment requirements of CAPA by failing to (i) identify with specificity the considerations on which the Challenged Rule is purportedly "base[d]"; or (ii) meaningfully respond to the comments it received from the public. Notice and comment is designed to ensure fairness in the rulemaking process, elicit meaningful participation by the affected public, and give affected parties an opportunity to develop an adequate factual record that will ultimately assist judicial review. *City of Idaho Falls* v. *F.E.R.C.*, 629 F.3d 222, 228–29 (D.C. Cir. 2011); *Am. Clinical Lab. Ass'n* v. *Azar*, 931 F.3d 1195, 1206 (D.C. Cir.

2019). The Department's procedural violations deprived Uber, and the public, of the right to respond substantively and meaningfully to the information on which the Challenged Rule is based.

224. The harm from this procedural violation will be irreparable if the rule is not enjoined.

C. The Balance of Inequities Favors an Injunction

225. Balancing the equities "requires the court to look to the relative prejudice to each party accruing from a grant or a denial of the requested relief." *Ma*, 198 A.D.2d at 187. The balance of equities favors petitioner or plaintiff where the injury to be sustained "is more burdensome to the [petitioner] than the harm caused to the [respondent] through the imposition of the injunction." *Klein, Wagner & Morris*, 186 A.D.2d at 633. Harm to a respondent from imposition of the injunction is particularly low where the injunctive relief would merely preserve the status quo pending final adjudication. *See, e.g.*, *Gramercy Co.* v. *Benenson*, 223 A.D.2d 497, 498 (1st Dep't 1996) ("[T]he balance of the equities tilts in favor of plaintiffs, who merely seek to maintain the status quo, and against the trustees, who may remove the trees" once the underlying claim is adjudicated); *Vapor Tech. Assoc.* v. *Cuomo*, 118 N.Y.S.3d 397, 404 (Sup. Ct. 2020) ("On the other hand, granting the preliminary injunction would maintain the status quo pending the ultimate determination of this controversy."). Finally, in balancing the equities, courts must "consider the enormous public interests involved." *Seitzman* v. *Hudson River Assocs.*, 126 A.D.2d 211, 214 (1st Dep't 1987) (cleaned up).

226. As explained above, Uber and many others will suffer severe and irreparable harm absent injunctive relief. By contrast, there is no discernible harm at all to the Department if the injunction is granted. Although Uber maintains that the rule is unlawful, if it is ultimately upheld, then Uber's requested injunctive relief will merely have resulted in a small delay in implementing a rule. The Department has already been behind the schedule set initially by the City Council.

Granting Uber's requested injunctive relief will simply maintain the status quo pending adjudication of whether the Department's rule is valid—thus encouraging the very policy purpose underlying preliminary injunctive relief. *See Bass* v. *WV Pres. Partners, LLC*, 209 A.D.3d 480, 480 (1st Dep't 2022) ("The purpose of a provisional injunction . . . [is to] maintain the status quo until there can be a full hearing on the merits.") (cleaned up). And, although maintaining the status quo could result in some delay in courier pay increases, "[m]aintaining the status quo . . . would not in any way prevent or hinder the Legislature from taking further action" if it deems in its discretion that this is an issue that warrants immediate attention. *Vapor Tech. Assoc.*, 118 N.Y.S.3d at 404. The Department's desire to implement the Challenged Rule sooner cannot outweigh proper rulemaking and avoiding irreparable harm to interested parties. It is more important to get the Rule right than to move it through as quickly as possible.

227. In terms of the equities affecting the public, an injunction remains favored. The Rule would result in some couriers earning more money, but would also result in other couriers earning less money—including having their earnings opportunities entirely eliminated. It would also cause restaurants (and their employees) to suffer from a significant reduction in orders and revenues, which the Department acknowledges.

228. Moreover, the Department's model shows that if its assumptions are off by even a small amount, the new minimum pay regime could reduce delivery worker earnings and apps' gross margins by hundreds of millions of dollars. For example, as illustrated in the chart below,[205] if the Department's assumptions are correct except that elasticity is -1.5, then the rule will result in a 26.9% decrease in orders. Similarly, if the Department's assumptions are correct except apps can only achieve an average of 1.63 deliveries per hour, then the rule will result in increased costs

[205] Uber's April 5, 2023 Comment at 14, Ex. 1.

per delivery of $7.90. And if the Department's assumptions are incorrect both with respect to elasticity and productivity, and elasticity is -1.5 and apps are unable to increase productivity beyond current rates, the rule will cause a 35.8% reduction in demand. This would be catastrophic.

2025 Impact of Pay Per Trip Requirement Under the Standard & Alternative Method[206] (minimum pay of $19.96 p/h, utilization rate of 60%)				
		Elasticity = 1*	**Elasticity = 1.5**	**Elasticity = 2**
Productivity (Deliveries Per Hour)	Added Cost per Delivery	% Δ in Orders	% Δ in Orders	% Δ in Orders
1.94*	$5.94	-17.9%	-26.9%	-35.9%
1.87	$6.32	-19.1%	-28.7%	-38.2%
1.81	$6.68	-20.2%	-30.3%	-40.4%
1.75	$7.06	-21.3%	-32.0%	-42.6%
1.69	$7.46	-22.5%	-33.8%	-45.1%
1.63**	$7.90	-23.9%	-35.8%	-47.7%

D. This Court Should Issue a Temporary Restraining Order Preventing the Challenged Rule from Going Into Effect While This Court Adjudicates Uber's Request for a Preliminary Injunction

229. "[T]he standard for entry of a TRO is the same as for a preliminary injunction." *Basank* v. *Decker*, 449 F. Supp. 3d 205, 210 (S.D.N.Y. 2020). In particular, a "temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damages will result unless the defendant is restrained before the hearing can be held." N.Y. C.P.L.R. 6301; *see, e.g., Nassau Cnty. Town of N. Hempsted* v. *Cnty. of Nassau*, 929 N.Y.S.2d 833, 834 (Sup. Ct. 2011) (order temporarily restraining Nassau County from auditing petitioner's park district while court resolved Article 78 petition challenging threatened audit as ultra vires); *Flatiron Cmty. Ass'n* v. *N.Y.S. Liquor Auth.*, 784 N.Y.S.2d 823, 824 (Sup. Ct. 2004) (order temporarily restraining nightclub from commencing business while

[206] * 1.94 deliveries per hour is the Department's productivity assumption under the Challenged Rule. ** 1.63 deliveries per hour is the Department's current measure of productivity.

court resolved Article 78 petition challenging agency's decision to grant a liquor license to the nightclub).

230. A temporary restraining order should be entered—maintaining the status quo by preventing the Challenged Rule from going into effect—for the same reasons as should a preliminary injunction. *Basank*, 449 F. Supp. 3d at 210. Uber will suffer "immediate injury" beginning in fewer than two weeks, on December 19, 2022, when the December 2022 per mile and per minute rate adjustments are implemented. N.Y. C.P.L.R. 6301.

CAUSE OF ACTION

Arbitrary and Capricious
(For Judgment Pursuant to N.Y. C.P.L.R. 7803(3) and 7806)

231. Petitioner re-alleges and incorporates by reference the allegations of all paragraphs above as if fully set forth herein.

232. The Challenged Rule's method for determining a minimum earnings standard is arbitrary and capricious for multiple reasons, including that: (1) the Challenged Rule is based on the irrational, arbitrary, and unsupported assumption that restaurants make zero margin on food delivery platform orders, and failed to disclose this fact to the public, providing an inadequate record for commenters and the court to determine whether the Department's actions were rational; (2) the inclusion of a workers' compensation component that is not rationally related to its purported purpose; (3) the Department's failure to consider how the Challenged Rule's incentives will shrink delivery radii, reduce demand, and hurt restaurants; (4) the surveys underlying the Department's rulemaking are biased and fundamentally flawed; (5) the recordkeeping requirements are irrational and unreasonably burdensome; (6) the Department arbitrarily and without explanation excluded grocery and convenience delivery services that are subject to N.Y.C. Administrative Code § 20-1522 from its study of food delivery workers and the Challenged Rule's

minimum earning standards for food delivery workers; and (7) the Department arbitrarily mandated payment for fraudulent non-deliveries, explaining deactivation should result, instead of adequately considering less extreme redresses.

233. The Challenged Rule must therefore be set aside as arbitrary and capricious under N.Y. C.P.L.R. 7803(3). Petitioner is therefore entitled to a judgment under N.Y. C.P.L.R. 7806 vacating and annulling the Challenged Rule.

234. The Challenged Rule therefore violates the City Administrative Procedure Act. Petitioner is therefore entitled to a judgment under N.Y. C.P.L.R. 7806 vacating and annulling the Challenged Rule.

PRIOR APPLICATION

235. No prior application has been made for the relief requested herein.

TRIAL DEMAND

236. Petitioner demands an evidentiary hearing on all causes of action so triable.

RELIEF REQUESTED

WHEREFORE, Petitioner respectfully requests that this Court enter an Order:

A. Issuing a judgment pursuant to N.Y. C.P.L.R. 7806 vacating and annulling the Challenged Rule, as codified in the amendments to Subchapter H of Chapter 7 of Title 6 of the Rules of the City of New York, 6 R.C.N.Y. §§ 7-801, 7-804, 7-805, 7-806, 7-807, 7-810;

B. Permanently enjoining the implementation of the minimum payment methods for food delivery workers reflected in the Challenged Rule and the recordkeeping requirements set forth in connection therewith, as codified in the amendments to Subchapter H of Chapter 7 of Title 6 of the Rules of the City of New York, 6 R.C.N.Y. §§ 7-801, 7-804, 7-805, 7-806, 7-807, 7-810;

D. Entering a temporary restraining order and preliminary injunction preventing implementation of the minimum payment methods for food delivery workers reflected in the Challenged Rule and the recordkeeping requirements set forth in connection therewith until a final judgment has been entered;

E. Holding an evidentiary hearing as needed to resolve any material factual disputes;

F. Ordering Respondents to pay Petitioner its costs, fees, and disbursements incurred in connection with this action pursuant to N.Y. C.P.L.R. 8101; and

G. Granting such other and further relief as the Court deems just and proper.

Dated: July 5, 2023
New York, New York

/s/ Karen L. Dunn

Karen L. Dunn (New York Bar No. 4498028)
Jessica E. Phillips (*pro hac vice* motion forthcoming)
Kyle Smith (New York Bar No. 5075940)
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, NW
Washington, D.C. 20006-1047
(202) 223-7300

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Laura Hahn, being duly sworn, deposes and says:

1. I am the General Manager for New York at Uber Eats for Uber Technologies, Inc. I have read the annexed Petition, and its factual contents are true to my personal knowledge, except as to the matters alleged on information and belief, and as to those matters, I believe them to be true.

2. The grounds for my belief as to all matters not stated upon my personal knowledge are my review of books and records of the corporation and interviews with officers and employees of the corporation.

3. The reason why this verification is not made by Uber Technologies, Inc. is that it is a foreign corporation.

Laura Hahn

Dated: New York, New York
July 5, 2023

Sworn to before me on this 5th day of July, 2023

Notary Public

NICHOLAS K. DAVOLI, ESQ
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 02DA6390879
Qualified in Queens County
Commission Expires April 22, 2027