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. ____________

MEMORANDUM OF LAW IN SUPPORT OF UBER USA, LLC'S VERIFIED ARTICLE 78 PETITION AND APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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Petitioner Uber Technologies, Inc. ("Uber") respectfully submits this memorandum of law in support of its Verified Article 78 Petition ("Petition").

INTRODUCTION

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.

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 (referred to herein as the "Challenged Rule") 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.

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%. Furthermore, the Department's assessment of increased fees and 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.

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. 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.

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." 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.

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."

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. 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).

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.

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.

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

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. 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.

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.

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.

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. The Department's decision to exclude grocery and convenience delivery apps is contrary to the letter of the authorizing statute and common sense. In failing to even study these other services, let alone implement an appropriate minimum earnings standard, the Department acted contrary to law.

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.

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.

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. 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.

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." 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.

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.

FACTUAL BACKGROUND

The factual bases for the relief Uber seeks are set forth in Uber's Petition. Uber respectfully refers the Court to, and incorporates by reference herein, the entirety of the Petition and all facts and arguments asserted therein.

ARGUMENT

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.

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; (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). The test for a preliminary injunction and a temporary restraining order are the same; and a TRO is appropriate where, as here, it appears that immediate and irreparable injury will result if relief is not granted before a hearing on the preliminary injunction. N.Y. C.P.L.R. 6301.

I. Uber Is Likely to Succeed on the Merits

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). Uber's Article 78 petition is likely to succeed on the merits for the reasons set forth in the Petition and summarized below.[1]

[1] 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 Article 78 Petitions in the related actions filed concurrently with this one.

A. The Challenged Rule Is Arbitrary and Capricious

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

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.[2] 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.

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. 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.

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, as Uber explains in its Petition and in the affidavit of Harry Elworthy. The Department attempts to rescue the situation by asserting for

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

the first time in its Final Notice of Adoption that it "confirmed its finding through discussions with restaurant industry stakeholders."[3] Who are these stakeholders? What did they say? When? Do they even own restaurants? We do not know the answer to any of these questions because no details whatsoever were provided by the Department, and no records of such discussions were produced, 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.

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, the Department surveyed approximately 23,000 restaurants, receiving just 371 responses.[4] The survey consisted of sixteen questions, focused on the volume of deliveries at respondents' restaurants and how these deliveries were filled.[5] The Department did not ask a single question about the impact of delivery on their margins. The Department also disregarded survey evidence submitted by apps during the comment period.

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).

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3 Challenged Rule at 21, Ex. 2.
4 Report at 3, Ex. 4.
5 *See* DCWP Restaurant Delivery Survey Questionnaire, Ex. 7.

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. 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, LLC* v. *N.Y.C. Taxi & Limousine Comm'n*, 2019 WL 7067072, at *4 (N.Y. Sup. Ct. Dec. 23, 2019).

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

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.

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.[6] There is no requirement that couriers insure themselves against losses or injuries, nor any evidence that this actually happens.

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.

[6] 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.

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.[7] The Department responded that that coverage was "inadequate to warrant exemption from the workers' compensation component."[8] 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. *Ahmed* v. *City of New York*, 129 A.D.3d 435 (1st Dep't 2015) (rejecting rule as arbitrary and capricious where 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 disability coverage); *see also Just Bagels Mfg., Inc.* v. *Mayorkas*, 900 F. Supp. 2d 363, 372 (S.D.N.Y. 2012).

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's choice of a significantly higher rate, apparently based on selecting without explanation a classification from actuarial tables—without consideration or explanation of other options—is further evidence of the Department's arbitrary rulemaking.

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

8 Second Proposed Rule at 8, Ex. 14.

iii. 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

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 of 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 U.S. at 43.

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."[9] Despite comments like these, the Department has not considered, or grappled with, the severe effects its Challenged Rule will have.

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.[10]

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

10 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%

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.[11] What the Department failed to consider, however, is how this reduced delivery length will reduce consumer demand.[12] 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.

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 the expense of other restaurants that face increased competition."[13] But the Department cites no

11 Report at 36 ("apps may strategically restrict delivery distances or limit services to the times and places where delivery can be provided affordably").

12 Uber's April 7, 2023 Comment at 2, Ex. 1.

13 Challenged Rule at 21, Ex. 2.

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.

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. The Department brushes these concerns—which were explained by numerous commenters during the rulemaking process—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.[14] *See Street Vendor Project* v. *City of New York*, 811 N.Y.S.2d 555, 561 (Sup. Ct. 2005) (noting the "purpose of a basis and purpose statement in proposed rulemaking, at least in part, to respond in a reasoned manner to the comments received") (cleaned up).

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

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.

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); *High Sierra Hikers Ass'n* v. *Weingardt*, 521 F. Supp. 2d 1065, 1075–76 (N.D. Cal. 2007).

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[14] *Id.*

The Department surveyed over 23,000 merchants querying restaurants' delivery volumes and how those deliveries were fulfilled.[15] 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 was likely part of the Department's effort to preserve its ability to illogically assume that merchants make zero margin on delivery so it could pretend it does not matter if restaurants lose a significant percentage of orders. Likewise, this 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).

The Department's surveys are mentioned more than 90 times in its initial Report, and were used to help set the expense reimbursement component of the Challenged Rule.

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."[16] He concluded that out of the thousands of surveys he has reviewed in his career, **"I cannot recall any other surveys in which the 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."**[17]

As Dr. Simonson's unrebutted report details, the Department's surveyed violated virtually every principle of designing an unbiased survey.[18] As Dr. Simonson states, these fundamental and pervasive errors in the design of the surveys rendered the results "unreliable," and "it would not

15 Report at 3, Ex. 4.
16 Simonson Report at 1, Ex. 13 at Ex. B.
17 *Id.* at 14 (emphasis added).
18 *Id.* at 6-14.

be consistent with accepted survey science to rely upon their results for use in justifying the rules at issue here."[19] It is precisely for these types of flaws in surveys that the courts in the cases cited above rejected rules based on such surveys as being arbitrary and capricious. The Court should do the same here.

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

The Challenged Rule should also be set aside because it's 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.

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 numerous categories of highly-specific data.[20]

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.[21] *See Tze Chun Liao* v. *N.Y.S. Banking Dep't*, 74 N.Y.2d 505, 510 (1989); *N.Y.S. Superfund Coal, Inc.* v. *N.Y.S. Dep't of Envtl. Conservation*, 18 N.Y.3d 289, 294-95 (2011). These fundamental limits on administrative power apply to local and state agencies alike. *See*, *e.g.*, *Ahmed*, 129 A.D.3d at 440 (annulling a Commission rule promulgated in excess of purported authority delegated by the New York City Council).

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19 *Id.* at 21.

20 Challenged Rule at 26-31, Ex. 2.

21 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.

The City Council 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 § 20-1522(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 earnings standard. 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. Where, as here, a rule is the product of unauthorized rulemaking, it must be annulled. *See Ahmed*, 129 A.D.3d 435 at 440.

B. The Challenged Rule Is Contrary to Law

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.

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 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).

Businesses like grocery stores and convenience stores often serve individual portion foods directly to consumers. For instance, many grocery stores sell pre-made individual portion meals like sandwiches and wraps, and 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.

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, 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 and requires its vacatur. *See United Home for Aged Hebrews* v. *Axelrod*, 201 A.D.2d 656, 658 (2d Dep't 1994) (vacating agency action where it arbitrarily "dr[e]w liens, somewhere, to delineate geographical-based labor markets").

The Department's approach creates 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. 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.

II. Uber Will Suffer Irreparable Harm Absent Preliminary Injunctive Relief

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. The irreparable harm to Uber is set out in detail in the accompanying affidavit of Laura Hahn.

III. The Balance of Equities Favors an Injunction

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* v. *Lien*, 198 A.D.2d 186, 187 (1st Dep't 1993). 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* v. *Lawrence A. Klein, P.C.*, 186 A.D.2d 631, 633 (2d Dep't 1992). 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.*, *Vapor Tech. Assoc.* v. *Cuomo*, 118 N.Y.S.3d 397, 404 (Sup. Ct. 2020). 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).

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. It is critical to get the Rule right rather than to move it through as quickly as possible.

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.

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 Uber showed in its comments submitted during the rulemaking process, 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 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.

IV. The Court Should Issue a Temporary Restraining Order Pending Resolution of the Requested Preliminary Injunction

A temporary restraining order should be entered—maintaining the status quo by preventing the Challenged Rule from going into effect in under a week—for the same reasons as should a preliminary injunction. *Basank* v. *Decker*, 449 F. Supp. 3d 205, 210 (S.D.N.Y. 2020).

CONCLUSION

Uber respectfully requests that the Court grant (i) its application for a preliminary injunction and temporary restraining order; and (ii) the relief requested in the Petition.

Dated: July 6, 2023
New York, New York

<u>/s/ Karen L. Dunn</u>
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Certification of Compliance with Word Count

Pursuant to Section 202.8-b of the New York Codes, Rules and Regulations, I certify that this affidavit complies with that rule because it contains 6,977 words. In making this certification, I relied on Microsoft Word's "Word Count" tool.

Dated: New York, New York
July 6, 2023

By: */s/ Karen L. Dunn*
Karen L. Dunn
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