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

In the Matter of the Application of, DOORDASH, INC., and GRUBHUB INC., Petitioners, For Judgment Pursuant to CPLR Article 78 – against – NEW YORK CITY DEPARTMENT OF CONSUMER AND WORKER PROTECTION, and VILDA VERA MAYUGA, in her official capacity as Commissioner of the New York City Department of Consumer and Worker Protection, Respondents.	Index No. _____/2023 **Oral Argument Requested** **VERIFIED ARTICLE 78 PETITION AND APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Table of Contents

Petitioners DoorDash, Inc. and Grubhub Inc. ("Petitioners"), by their undersigned attorneys, Gibson, Dunn & Crutcher LLP, for their Verified Petition, allege as follows:

NATURE OF THE PROCEEDING

1. This Petition, pursuant to CPLR Article 78, challenges an unlawful, arbitrary and capricious new rule (the "Rule") promulgated by the New York City Department of Consumer and Worker Protection ("DCWP"), and seeks a temporary restraining order and preliminary injunction preventing DCWP from implementing or enforcing the Rule—which is set to take effect on July 12, 2023—during the pendency of these proceedings.[1]

2. Ignoring mountains of hard data and analysis, and over emphatic objections from a range of constituents, DCWP enacted the Rule, which threatens to single out and punish Petitioners and other third-party food delivery services[2] like them unless they meet DCWP's newly-contrived minimum-pay requirements for delivery workers who independently contract with Petitioners. Under the Rule, Petitioners must pay delivery workers either (1) nearly $20 per hour for any time delivery workers spend logged into one of the third-party food delivery services that Petitioners maintain, regardless of whether workers are running personal errands while passively receiving (and not even reviewing) delivery offers on Petitioners' platforms, waiting for offers of delivery jobs, working with another third-party delivery service while logged into multiple platforms simultaneously, or making deliveries; or, in the alternative, (2) $33 per hour for the time all workers spend making deliveries—an increased rate that is *double* the City's minimum wage and

[1] Petitioners join in the arguments asserted by Uber Technologies, Inc. and Relay Delivery, Inc. in their concurrently filed petitions.

[2] Petitioners are not "food delivery services." They are technology *platforms* that connect consumers, merchants, and (sometimes) delivery workers. The New York City law, however, refers to Petitioners as "third-party food delivery services." For simplicity, this Petition uses the same terminology.

that DCWP admits was designed to compensate delivery workers indirectly for all time spent logged into Petitioners' platforms, regardless of what they are doing during such periods.

3. Although Petitioners are not opposed to a well-constructed minimum-pay standard for delivery workers (and, indeed, have supported such standards in other jurisdictions), the implementation of this ill-conceived Rule will have drastic—and immediate—consequences for all concerned parties if it is permitted to take effect on July 12, as scheduled. For New York City consumers, it will mean—according to DCWP's own analyses—a *$5.18-per-order* average increase in charges across the industry, representing a 15% increase on current costs. For New York City restaurants and other merchants, it will mean losing access to valuable delivery services that merchants—particularly small and independent merchants—cannot replace on their own. For delivery workers who work with DoorDash or Grubhub, it will mean the loss of a flexible opportunity that they value, as well as decreased demand for their services. And for Petitioners, it will mean damage to their business relationships, reputations, and goodwill, as well as significant monetary damages that are difficult to quantify and unrecoverable even if the Court eventually holds—as it should—that the Rule must be annulled.

4. Perhaps unsurprisingly, then, the rule-making record in this case demonstrates that DCWP's adoption of the Rule violated bedrock administrative-law principles and was irrational, arbitrary, and capricious in multiple respects, any one of which is sufficient to compel the Rule's annulment.

5. First, both the Rule and the study upon which it is based ran afoul of DCWP's statutory mandate to study and regulate delivery-worker pay for *all* third-party food delivery services. More specifically, the City Council directed DCWP to study and promulgate a rule establishing a method for determining minimum payments "by a third-party food delivery service"

to "a food delivery worker." Affirmation of Gabriel Herrmann ("Herrmann Aff.") Ex. 2 ("Local Law 115"). By its plain language, that law encompasses *all* third-party delivery services—including those that do business with not only restaurants, but also other individual-portion food purveyors, such as grocery stores. Yet DCWP erroneously asserted in a single unexplained sentence that third-party delivery services predominantly doing business with grocery stores supposedly fell outside the scope of its statutory authority—and thus unlawfully excluded them from its study and resulting rule. DCWP's process thus foundered at the start, and the Rule is arbitrary and capricious and irredeemably affected by an error of law.

6. Second, DCWP based the Rule in large part on two fatally flawed surveys of food-delivery workers that were biased and unreliable on their face, including because they disclosed at the outset that DCWP was conducting the surveys in order to "raise pay for app delivery workers." DCWP's surveys were further tainted because they incorporated improper leading questions, suggestive close-ended responses, and other improper survey techniques, reflecting the fact that DCWP had pre-judged the outcome of its rulemaking process all along and had set out to ensure increases in delivery-worker pay, as opposed to studying objectively what an appropriate "minimum" payment standard for the industry would be. DCWP's reliance on such inherently biased and unreliable survey data renders the adoption of the Rule arbitrary and capricious as a matter of law.

7. Third, DCWP artificially inflated its pay standards by centering them on a requirement that Petitioners pay delivery workers for time they spend not working. When delivery workers log onto DoorDash or Grubhub's system, they are free to accept delivery offers, reject delivery offers and wait for other offers, or do nothing. They can even be logged on while running personal errands or sitting in a movie theater. The flexibility and control delivery workers hold

over their schedules and work practices are core features of the "gig economy" opportunity that Petitioners like DoorDash and Grubhub offer to the market, and delivery workers value it. But the Rule unfairly makes Petitioners pay for *all* of the time that delivery workers spend logged on to Petitioners' platform—even if the workers are attending to personal matters and even if they reject, or simply ignore, every offer they receive. Such a requirement will result in decreased demand and delivery volumes on Petitioners' platforms and therefore will result in fewer opportunities for delivery workers. The Rule irrationally treats this key feature of the industry as a bug, and its implementation will end up harming all industry participants rather than protecting delivery workers.

8. Fourth, DCWP artificially inflated its payment standards in yet another way, charging Petitioners for purported "workers' compensation" benefits that are the opposite of workers' compensation. Instead of calling for an entire group to make incremental payments into an insurance pool to cover the medical expenses of an unfortunate few who suffer work-related injuries, the Rule requires Petitioners to pay every delivery worker a $1.68-per-hour upcharge that DCWP admits workers will not use to procure comparable private insurance benefits. It undercompensates injured workers but overcompensates uninjured workers—thus providing nothing more than an arbitrary windfall for uninjured workers that serves none of the purposes of, and does not supply a meaningful substitute for, workers' compensation benefits. Indeed, it serves only as an irrational economic disincentive for delivery services to supply voluntary accident-insurance benefits for delivery workers that approximate workers compensation—which some currently do—potentially resulting in *less* insurance coverage for workers. That is the height of arbitrary rule-making.

9. Fifth, DCWP's analysis was premised on the conclusion that restaurants make a 0% margin on orders placed through third-party food delivery services. But that assumption is not supported by record evidence and is not rational on its face because if it were, there would not be so many restaurants on Petitioners' platform. DCWP purported to substantiate its assumption by citing a single internet article that does not say restaurants make 0% margin and by referencing undisclosed conversations with restaurant stakeholders that the interested public never had a chance to learn about or evaluate. Principled agency decision-making demands more.

10. The Rule did not have to turn out this way. Petitioners, scores of delivery workers, and a range of community groups expressed their concerns through two rounds of comment letters and proposed sensible alternative approaches that could have benefited, rather than harmed, workers, businesses, and consumers across New York City. But DCWP either ignored them or rejected them on grounds that do not withstand scrutiny. Its actions are disappointing, but perhaps not surprising. This is hardly the first time that City officials have aggressively sought to single out and regulate food delivery services like Petitioners in irrational and unlawful ways. For example, they have imposed unlawful permanent caps on the fees third-party food delivery services may charge to food service establishments. They have unlawfully attempted to require third-party food delivery services to share their valuable customer data with merchants, without providing for adequate privacy protections. And DCWP now seeks to unlawfully reconfigure the nature of this industry, and squelch innovation and flexibility, by imposing onerous minimum-pay requirements in the name of worker protection—likely harming the very workers they purport to protect. Unfortunately, this latest Rule is as irrational and wrong-headed as the measures that have come before it.

11. Left with no other choice, Petitioners bring this Article 78 Petition to vacate and annul DCWP's arbitrary and capricious Rule. Petitioners further request that this Court enter a preliminary injunction and a temporary restraining order preventing DCWP from enforcing the Rule before the rule takes effect on July 12. DCWP may be entitled to promulgate sensible rules establishing, on a proper record, a "method for determining the minimum payments that must be made" to delivery workers across this entire industry. But the Rule is no such regulation, and its implementation and enforcement must immediately and permanently be enjoined.

THE PARTIES

I. Petitioners

12. Petitioner DoorDash, Inc. ("DoorDash") is a technology company founded in 2013 and headquartered in San Francisco, California. DoorDash operates a third-party platform in New York City (and elsewhere in the United States) that facilitates the order and delivery of food and other goods by connecting consumers to a broad array of merchants, and in some cases delivery workers.

13. Petitioner Grubhub Inc. ("Grubhub") is a technology company founded in 2004 and headquartered in Chicago, Illinois. Grubhub's online food ordering and delivery marketplace (operating under the Grubhub and Seamless brands) connects consumers with a broad array of local takeout and delivery merchants, and in some cases, independent-contractor delivery workers.

14. Each of the Petitioners, as entities directly regulated by Respondents and by the challenged Rule, independently has standing to bring this Article 78 proceeding.

II. Respondents

15. Respondent Department of Consumer and Worker Protection ("DCWP") is an administrative agency of the City of New York that was created as the Department of Consumer

Affairs on April 29, 1969 by the New York City Consumer Protection Law of 1969. Among other responsibilities, DCWP regulates delivery service in New York City.

16. Respondent Vilda Vera Mayuga is the Commissioner of DCWP. She is named as a respondent here in her official capacity only.

JURISDICTION AND VENUE

17. This Court has jurisdiction over this proceeding against Respondents pursuant to CPLR 3001 and 7801, 7802, 7803, 7804, 7806.

18. This proceeding is timely because it is commenced within four months after issuance of the Rule.

19. Venue is also appropriate in the County of New York pursuant to CPLR 506 and 7804(b) because DCWP determined to promulgate the Rule in the County of New York and the principal office of DCWP is within the Judicial District that includes the County of New York.

FACTUAL BACKGROUND

I. Petitioners Provide Delivery Workers with Flexible Work Opportunities, Available on Their Preferred Schedule.

20. For years, DoorDash and Grubhub have provided online platforms for New York City residents to order food from local restaurants, grocery stores, and convenience stores. Affidavit of Abhishek Poykayil ("Poykayil Aff.") ¶¶ 3–4; Affidavit of Dan Schechner ("Schechner Aff.") ¶ 12. Petitioners have since become a cornerstone of the local restaurant industry, responsible for facilitating hundreds of thousands of deliveries and proving significant value to the thousands of New Yorkers who use their platforms each year. Poykayil Aff. ¶ 12; Schechner Aff. ¶ 5.

21. Consumers using DoorDash enjoy the ability to order from thousands of restaurants, convenience stores, pet stores, grocery stores, and other businesses that DoorDash

makes available at their fingertips. Schechner Aff. ¶ 5. DoorDash has built a strong reputation based on the vast array of merchants it partners with from a wide range of industries, and its ability to provide those merchants with many valuable services including marketing, facilitating food delivery and pickup, order processing, customer support, and technology and product development. Consumers, merchants, and delivery workers each play an important role in DoorDash's business. *Id.* ¶¶ 4–5.

22. Grubhub provides an online and mobile takeout marketplace that arranges retail pick-up and delivery orders by connecting consumers with a broad array of local takeout and delivery merchants (including florists, grocery, and convenience stores). Poykayil Aff. ¶ 4. Consumers can place orders directly online on websites or mobile applications operated by Grubhub. *Id.* Grubhub facilitates food ordering through innovative technology, easy-to-use platforms, and improved delivery experience. *Id.* ¶ 5. At the heart of Grubhub's success are its relationships with merchants, delivery workers, and consumers, and the strong reputation it has carefully built in nearly twenty years of operation as a reliable and beneficial partner to them. *Id.*¶ .

23. Both DoorDash and Grubhub operate in an extremely competitive delivery industry—against each other and other companies. For example, each of the following companies facilitates deliveries from food service establishments in New York City: Portier, LLC ("Uber Eats"); Instacart Inc. ("Instacart"); Relay Delivery, Inc. ("Relay"); Chowbus Inc. ("Chowbus"); Club Feast Inc. ("Club Feast"); Just Order Enterprises Corp. ("Fantuan"); HungryPanda US Inc. ("HungryPanda"); Patio Delivery, Inc. ("Patio"); and GoHive Inc ("GoHive"). *See* Herrmann Aff. Ex. 4 ("DCWP Report") at 2.

24. Many of these platforms, including DoorDash, Grubhub, Uber Eats, and Relay, facilitate food deliveries from restaurants to consumers. Others, such as Instacart, primarily

facilitate delivery of food from grocery stores, convenience stores, and other non-restaurant merchants. DoorDash, Grubhub, Uber Eats, and others also facilitate food delivery from grocery and convenience stores, albeit on a more limited scale relative to restaurant deliveries. DoorDash and Grubhub compete amongst these companies for relationships with merchants, delivery workers, and consumers.

25. Petitioners provide flexible, reliable work opportunities for thousands of delivery workers in New York City. Schechner Aff. ¶ 7; Poykayil Aff. ¶ 8. This flexibility arises from an approach unique to the third-party delivery industry. Poykayil Aff. ¶ 36. Delivery workers who partner with Petitioners and many of their competitors access work opportunities by logging onto these companies' platforms. *Id.*; Schechner Aff. ¶ 35. Delivery workers receive offers to make deliveries and are free to choose whether to accept, reject, or simply ignore them. Schechner Aff. ¶¶ 8, 36; Poykayil Aff. ¶ 10. If they accept, they are expected to perform the delivery. If they reject the offer, they will continue to see available offers until they log off the platform. If they ignore the offer, the offer will lapse after a period of seconds, and they will continue to see available offers until they log off the platform. Petitioners have not historically required delivery workers to accept any minimum number of offers to remain on their platforms, so a delivery worker is free to log onto a platform for hours without accepting a single delivery. Schechner Aff. ¶ 36; Poykayil Aff. ¶¶ 10, 39.

26. The independent contractors who partner with DoorDash and Grubhub control their delivery work. Schechner Aff. ¶ 8; Poykayil Aff. ¶ 10. They can choose when and for how long to log on to a platform. Schechner Aff. ¶ 8; Poykayil Aff. ¶ 10. They can choose which delivery offers they want to accept, and which to reject or ignore. Schechner Aff. ¶ 8; Poykayil Aff. ¶ 10. In a practice called "multi-apping," they can—and often do—log into multiple platforms at once

and interchangeably complete deliveries through multiple delivery providers within the same working session. Schechner Aff. ¶ 8; Poykayil Aff. ¶¶ 11, 39.

27. This flexibility is a key reason why delivery workers choose to provide deliveries with Petitioners. Although delivery workers are welcome to log onto the platforms for longer periods of time or accept more deliveries, most nevertheless choose to work with third-party food delivery services part-time as a source of supplemental—rather than primary—income. Schechner Aff. ¶ 8; Poykayil ¶ 39.

28. For example, DoorDash commented to DCWP that in the third quarter of 2022, delivery workers who use its platform (called "Dashers") delivered 3.18 hours per week on average. Herrmann Aff. Ex. 6 ("Public Comments on First Proposed Rule") at 1423.

29. DoorDash pays Dashers a "base pay" for each delivery they perform. Schechner Aff. ¶ 9. This base pay is determined based on a variety of factors, including delivery time, distance, and desirability. *Id.* DoorDash also offers Dashers promotions to incentivize the acceptance of certain delivery offers, and Dashers keep 100% of all tips they receive from consumers. ¶ *Id.*

30. Similarly, Grubhub pays delivery workers a "base amount" for each delivery they perform. Poykayil Aff. ¶ 9. This base amount is determined for each delivery based on mileage, delivery type, the time spent on the delivery, and the local market. *Id.* Grubhub also offers delivery workers promotional pay for performing certain deliveries, and its delivery workers keep 100% of all tips they earn from consumers for their deliveries. *Id.*

31. Because the vast majority of delivery workers use Petitioners' platforms part-time and on flexible schedules, both DoorDash and Grubhub allow delivery workers to choose to receive compensation on an expedited basis. For example, Petitioners each offer a same-day

payout feature, whereby delivery workers can be paid for their work within 24 hours of completion. Public Comments on First Proposed Rule at 1536.[3] It is difficult to imagine another type of work where workers have total control over the amount of time they work *and* the ability to collect their wages at will.

32. Petitioners understand this unparalleled flexibility to be a key reason why tens of thousands of people have signed up to deliver with their platforms—and thus why they can offer such comprehensive delivery services throughout the City.

33. For example, in a recent survey, DoorDash found that 88% of Dashers identified work flexibility as the key reason they choose delivery work. Schechner Aff. ¶ 35. Recognizing this, Petitioners have sought to avoid implementing changes that would curtail delivery workers' flexibility.

34. Other third-party food delivery services employ a different business model for their delivery worker partners. For example, Relay employs what it refers to as a "fundamental[ly] differen[t]" approach, in which it pays delivery workers on a per-hour basis rather than a per-delivery basis. Herrmann Aff. Ex. 8 ("Public Comments on Second Proposed Rule") at 364–66. Relay supports this payment structure through a "different operations model" which "maximize[s] the efficiency of its delivery system" by "maximiz[ing] the number of trips a courier does per hour." *Id.* at 365. According to their website, Relay also "discourage[s]" delivery workers from "multi-apping" while "working" on the Relay app, because doing so may "interfere with . . . assigned deliver[ies] and routes."[4]

[3] *See also* https://help.doordash.com/dashers/s/article/What-is-Fastpay?language=en_US
[4] https://www.relay.delivery/couriers.

II. The City Passes Local Laws Affecting Third-Party Food Delivery Service Industry.

35. On October 24, 2021, New York City passed a suite of municipal laws affecting the third-party delivery service industry. Among them, the City passed Local Law 114/2021 (Local Law 114) and Local Law 115/2021 (Local Law 115).

36. Local Law 114 established several general provisions regulating the third-party delivery service industry. In doing so, it defined several key terms:

> "The term '**food delivery worker**' means any natural person or any organization composed of no more than one natural person, whether or not incorporated or employing a trade name, who is hired, retained, or engaged as an independent contractor by a third-party food delivery service required to be licensed pursuant to section 20-563.1 or a third-party courier service to deliver food, beverage, or other goods from a business to a consumer in exchange for compensation."
>
> "The term '**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."
>
> "The term '**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 a third-party food delivery service and (ii) that is owned and operated by a person other than the person who owns such food service establishment."[5]
>
> "The term **'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

[5] In 2023, this definition was amended by Local Law 2023/017, and now reads: "The term '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.*" N.Y.C. Admin. Code § 20-1501 (emphasis added to reflect changes).

establishment."

Herrmann Aff. Ex. 1 ("Local Law 114") at 2.

37. In addition, the NYC Council committee report for Local Law 114 explained that a "food service establishment . . . could include restaurants, food trucks, grocery stores or any other establishment meeting the definition." Herrmann Aff. Ex. 3 ("City Counsel Briefing Paper") at 23.

38. Local Law 115 ordered DCWP to "study the working conditions for food delivery workers," including, "at 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 used by such workers, the safety conditions of such workers, and such other topics as the department deems appropriate." Local Law 115 at 1–2.

39. In addition, the ordinance gave DCWP the power to issue subpoenas to third-party delivery services requesting a wide variety of data, including "worker identifiers, information about the times that such workers are available to work for such third-party food delivery service or third-party courier service, the mode of transportation such workers use, how trips are offered or assigned to food delivery workers, the data such service maintains relating to the trips of such workers, the compensation such workers receive from such third-party food delivery service or third-party courier service, any gratuities such workers receive, information relating to both completed and cancelled trips, agreements with or policies covering such workers, contact information of such workers, information relating to the setting of fees paid by food service

establishments and consumers, and any other information deemed relevant by the department." *Id.* at 2.

40. Local Law 115 further directed DCWP to "by rule establish a method for determining the minimum payments that must be made to a food delivery worker by a third-party food delivery service." *Id.*

41. Local Law 115 also mandates that in promulgating this rule, DCWP consider a number of specific factors, including, "at a minimum . . . 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.* at 2–3.

42. Around the same time, the New York City Council passed other ordinances seeking to impose entirely separate limitations upon the third-party delivery industry that Petitioners and other third party food delivery services are currently challenging in court.

43. First, Local Law 103/2021 ("Local Law 103") prohibits third-party delivery services from charging more than 15% of an order total as a "delivery fee," and limits other fees, too. Petitioners are currently challenging Local Law 103 in the U.S. District Court for the Southern District of New York. *See Doordash, Inc. v. City of New York*, Index No. 21-cv-7564 (S.D.N.Y.).

44. Second, Local Law 90/2021 ("Local Law 90") purported to require third-party food delivery services to disclose troves of their customers' personal data to the food service establishments they order from. That is, if a food service establishment requested the personal data of customers who ordered through a third-party delivery service, that service would have to

provide the establishment "all applicable customer data" in a "machine readable format, disaggregated by customer, on an at least monthly basis."

45. Local Law 90 would prohibit third-party food delivery services from "limit[ing] the ability" of the recipients to "download and retain such data, nor limit their use of such data for marketing or other purposes." It also states that customers would be "presumed to have consented to the sharing of such customer data" unless the customer makes a request to opt out of sharing their data in relation to each "specific online order." Petitioners are currently challenging Local Law 90 in the U.S District Court for the Southern District of New York. *See DoorDash, Inc. v. City of New York*, No. 21-cv-7695 (S.D.N.Y.); *Grubhub Inc. v. City of New York*, No. 21-cv-10602 (S.D.N.Y.). Enforcement of Local Law 90 is stayed pending resolution of the lawsuit.

III. DCWP Studies Working Conditions for Delivery Workers, but Improperly Excludes Grocery Delivery Services from the Scope of its Study.

46. Pursuant to Local Law 115, DCWP commenced its study of the "working conditions for delivery workers." Local Law 115 at 1.

47. DCWP intentionally studied only "[r]estaurant delivery," on the basis that restaurant delivery "is a requirement for an app to be covered" by Local Law 115. DCWP Report at 5. DCWP accordingly did not study grocery delivery services. *See id.*

48. DCWP issued subpoenas to Petitioners, as well as Uber Technologies, Inc (Uber Eats) and Relay, Inc., requesting a vast array of data. *Id.* at 2. Petitioners fully complied with these subpoenas and provided the requested data.

49. DCWP also issued similar subpoenas to Chowbus, Club Feast Inc., Just Order Enterprises Corp., HungryPanda, Patio Delivery, Inc., and GoHive Inc. *Id.* The agency refused to issue similar subpoenas to third-party food delivery services that provide online ordering and delivery primarily to grocery stories, convenience stores, and other non-restaurant businesses.

There is no evidence DCWP ever subpoenaed, requested, or received data from Instacart or similar companies in connection with its study.

50. In addition, DCWP conducted three surveys, two of which were directed toward delivery workers: The "NYC Delivery Worker Survey" and the "Columbia-Sam Schwartz-Deliveristas Survey" (the "Deliveristas Survey"). The third survey was administered to restaurants (the "NYC Restaurant Delivery Survey"). *Id.* at 2–3.

51. The NYC Delivery Worker Survey was an online survey, which DCWP distributed via email and text to delivery workers who had performed deliveries with Petitioners, Uber Eats, Relay, Chowbus, or HungryPanda between October 1 and December 31, 2021. *Id.* at 2. Between June 8 and July 26, 2022, DCWP sent messages to 179,354 phone numbers and 192,546 email addresses, each including a custom link purportedly allowing DCWP to match survey responses to record-level data collected from the third-party delivery services. *Id.*

52. The NYC Delivery Worker Survey was divided into three modules asking about vehicle-related expenses, non-vehicle expenses, and safety and demographics respectively.

53. Each of these three modules began with the following preamble (emphasis added):

> 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.*** The survey should take less than 5 minutes. It is being conducted by the NYC Department of Consumer and Worker Protection. Your answers are confidential and will not be shared with your apps. For more information, visit nyc.gov/Delivery Apps or call 311 and say "Delivery Worker."
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> Public Comments on First Proposed Rule at 1508–09 (Simonson Rep. ¶ 31).

54. The NYC Delivery Worker Survey used closed-ended, multiple choice questions. Affidavit of Jonah Berger Ex. 1 ("Berger Rep.") ¶ 17. It did not include control questions (also known as "phantom" questions), which are typically used to account for guessing and biased

responses. *Id.* at ¶ 18. DCWP also failed to validate survey responses. Delivery workers were not asked for receipts or credit card statements to corroborate claimed expenses—even for purchases as large as mobile phones. *Id.* at 19.

55. The Deliveristas Survey was an "in-person field survey of delivery workers" conducted in partnership with "Sam Schwartz Engineering, . . . Worker's Justice Project, an NYC-based worker center and sponsor of the Los Deliveristas Unidos campaign, and the Columbia University Labor Lab." DCWP Report at 3.

56. This survey consisted of 58 questions regarding delivery workers' "work history, expenses," purported "discipline and nonpayment on the apps," and safety. *Id.*

57. In addition to conducting "street canvassing" where delivery workers were purported to congregate, DCWP stated that the respondents from this field survey were "recruited" from a specific subset of delivery workers: those "visiting Worker's Justice Project offices" and attendees of "Los Deliveristas Unidos events held throughout the city." *Id.*

58. The Deliveristas Survey also contained the below preamble (emphasis added):

> "Hello. This survey is being conducted by Sam Schwartz Engineering for the NYC Department of Consumer and Worker Protection (DCWP). This survey asks about your experience as a delivery worker, but does not ask for your name or any other identifying information. Your responses are anonymous and will be shared with Columbia University ***to help DCWP set a minimum pay rate for delivery workers***. ***Staff from the Worker's Justice Project/Los Deliveristas Unidos are assisting with outreach for this survey. They may be available to help you complete this survey or answer questions."***
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> Public Comments on First Proposed Rule at 1509 (Simonson Rep. ¶ 31 n.189).

59. Upon information and belief, members of the Worker's Justice Project and Los Deliveristas Unidos actively recruited and assisted delivery workers to fill out this survey.

60. DCWP also fielded the online NYC Restaurant Delivery Survey to restaurant owners and managers. DCWP Report at 3. The survey consisted of 15 questions about the volume of deliveries at respondents' restaurants and how these deliveries were fulfilled. *Id.*[6]

IV. DCWP Issues a First Proposed Rule and Accompanying Report, and Receives Significant Criticism.

A. The First Proposed Rule and November 2022 Report.

61. On November 3, 2022, DCWP issued its First Proposed Rule, purporting to implement Local Law 115. Herrmann Aff. Ex. 5 ("First Proposed Rule").

62. Along with the First Proposed Rule, DCWP issued a report that summarized "the findings of its study into the working conditions" of delivery workers. DCWP Report at ii. The DCWP Report drew "principally on data that the Department obtained from apps in response to administrative subpoenas combined with a survey that was distributed to nearly all of the approximately 123,000 workers who performed app deliveries in NYC between October and December 2021 [the NYC Delivery Worker Survey]." *Id*. at 2.

63. The core of DCWP's First Proposed Rule was its minimum hourly pay rate of $23.82. First Proposed Rule at 3.

64. DCWP's proposed minimum pay rate included three components. First, "Base Pay" of $19.86 per hour. *Id.* at 3. That base pay rate, DCWP asserted, was "very close" to what delivery workers would earn if they were "employees" rather than independent contractors. *Id.* at 4. DCWP asserted that if delivery workers were employees, they would earn a $15 minimum

[6] DoorDash has submitted Freedom of Information Law requests seeking information from DCWP about its rulemaking and survey process. As of this filing, DCWP has not completed its response to those requests. DoorDash reserves all rights—but relevant here, DCWP's incomplete responses highlight the shaky foundation of DCWP's regulatory process.

wage plus the value of paid leave, sick leave, unemployment insurance, and medical insurance. *Id.* at 3–4.

65. The second component of the minimum pay rate was a "Workers' Compensation Component," which DCWP valued at $1.70. *Id.* at 4. This component was based on the NYC Delivery Worker Survey's self-reported occupational injury and expenses data. First Proposed Rule at 4; DCWP Report at 24–26. DCWP acknowledged that under New York law, only employees are eligible for workers' compensation. First Proposed Rule at 4. But DCWP included the Workers' Compensation component to "compensate for expected income loss and medical expense associated with on-the-job injuries" of delivery workers. *Id.* DCWP calculated the Workers' Compensation component as $1.70 because employed restaurant delivery workers receive workers' compensation benefits that the New York Compensation Insurance Rating Board say are worth 7.84% of their payroll, and 7.84% of DCWP's base rate for food delivery workers is $1.68. DCWP Report at 30.

66. The third component of the minimum pay rate was an "Expense Component," which DCWP valued at $2.26 per hour. First Proposed Rule at 4. The purpose of this component was purportedly to compensate delivery workers for "necessary expenses," such as the average hourly expenses of using an electric bicycle and the cost of purchasing a mobile phone with a data plan. *Id.* at 4. The Expense Component was also based on NYC Delivery Worker Survey data. *Id.* at 3; DCWP Report at 18–20.

67. DCWP proposed to require food delivery services like Petitioners to compensate delivery workers for *both* their "trip time" and their so-called "on-call time." First Proposed Rule at 4. Trip time, as its name suggests, consists of the time between "the moment a delivery worker accepts an offer" to perform a trip through "the moment a trip is completed or cancelled." *Id.* at

5. "On-call time," by contrast, consists of the time when a delivery worker "is connected to" a food delivery 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," excluding trip time. *Id.* In other words, "on-call time" is a misnomer. It equates to time the delivery worker was *logged on* to DoorDash or Grubhub's systems, regardless of whether the delivery worker accepts any delivery offers. It thus would cover time in which a delivery worker was logged on with no intention of accepting delivery offers, or in which a delivery worker was *inadvertently* logged on while watching a movie at the theater.

68. To comply with the minimum pay rate, food delivery services would have had to make weekly payments that conformed to both an individual minimum and an aggregate minimum. First Proposed Rule at 4. (In the Rule, this would become the "Standard Method" of compensation.) Under the "individual" requirement, each food delivery service's payment to each delivery worker would have to meet the minimum pay rate ($23.82 per hour) multiplied by the sum of that worker's trip time. *Id.* Under the "aggregate" requirement, each app's *total* payments to *all* delivery workers would have to meet the minimum pay rate ($23.82 per hour) multiplied by the sum of all these workers' trip time *and* on-call time. *Id.*

69. DCWP further determined that delivery workers earned on average $14.18 per hour with tips. *Id.* DCWP also calculated that the First Proposed Rule would increase consumers' delivery costs by $5.18 per delivery, but asserted without support that "the number of app deliveries will still increase by 35% by 2025." DCWP Report at ii.

70. DCWP also analyzed delivery workers' working hours. *Id.* at 15. DCWP determined, based on survey results, that delivery workers "spend 61% of their working time engaged in a trip and 39% on-call." *Id.* at 16. Of that 39% of time spent "on-call," 9% is spent

between the delivery worker logging in and the first trip; 6% is spent between trips; 12% is between the last trip and logging off; and 12% is spent between login and logoff *with no trip* taken. *Id.* at 17. And during that on-call time, delivery workers on average receive a trip offer every 4 minutes and accept an offer every 11 minutes—meaning that delivery workers accept about 1 in 3 offers. *Id.* at 16.

71. DCWP's Report acknowledged that its rule would require "apps to make operational changes" to achieve DCWP's desired increase in deliveries per hour. *Id.* at 31; *see also id.* at 35. Third-party food delivery services could, DCWP stated: (1) offer "more lucrative trip offers;" (2) "tighten limits on access to the platforms;" (3) "directly incentivize productivity" by "providing preferential access to their platforms based, in part, on acceptance rates" and "make greater use of these practices in response to the rule"; (4) "make more progress" on efficiency gains by "increased use of trips where a worker may pick up two orders from the same restaurant;" (5) "increase consumer fees;" and (6) "discourage or eliminate tipping." *Id.* at 35–36.

72. DCWP asked for comments on its First Proposed Rule within a month. *See* First Proposed Rule at 1.

B. Commenters Raise Numerous Concerns with the First Proposed Rule.

73. During the notice and comment period for the First Proposed Rule, Petitioners and other stakeholders submitted comments raising significant concerns with DCWP's proposal.

74. First, Petitioners commented that the First Proposed Rule improperly and irrationally purported to apply to delivery services that predominantly facilitate deliveries from restaurants but not to similar delivery services that predominantly facilitate deliveries from grocery stores or convenience stores, such as "Instacart [or] Shipt." Public Comments on First Proposed Rule at 1536. Petitioners noted that this would impermissibly apply different regulations to "two identical orders from the same local business, fulfilled using similar app-based technology, and

delivered by the same exact person," placing the regulated company at a "competitive disadvantage" and "creat[ing] confusion for delivery workers." *Id.* at 1426; *see also id.* at 1536 (Grubhub comment asserting that exempting grocery and convenience stores would be "unfair and anti-competitive").

75. Second, Petitioners raised concerns about DCWP's methodological approach to the study. For example, Petitioners noted that one of the agency's surveys stated that it was part of a new law "to raise pay." *Id.* at 1422 n.48. Previewing the agency's preferred outcome in the survey questions—i.e., that DCWP believed it was on a mission to "raise" pay—created the potential for "biase[d]" responses. *Id.*; *see also, e.g.*, *id.* at 1438 (economist explaining that DCWP's survey was "biased and unreliable"), 1495 (expert report concluding that surveys "were biased and bound to produce unreliable results").

76. Third, Petitioners explained that DCWP's inclusion of "on-call time" failed to recognize the particular nature of Petitioners' platforms. "[O]nline time is a unique feature of app-based work that is not synonymous with working time," and delivery workers can choose to log in to Petitioners' systems *without* being under Petitioners' control or having any obligation to accept offers presented to them. *Id.* at 1411; *see also id.* at 1537 (Grubhub comment explaining that the rule's inclusion of on-call time would make companies compensate workers regardless of "whether or not there is work being done"). Moreover, requiring Petitioners to compensate for on-call time would push Petitioners to eliminate valued flexibility for workers, cracking down on work hours, pre-scheduled shifts, multi-apping, and more. *Id.* at 1536–37; *see also id.* at 1413–1416. Instead of compensating all "online time," Petitioners suggested that DCWP apply a static multiplier that would account for the average amount of time a delivery worker waits online before accepting a delivery offer. *Id.* at 1418. This way, workers would be paid for their time both

actively delivering and while actually waiting for an order, without compensating all time (including time in which delivery workers were rejecting or ignoring all offers) logged onto their platform. *See id.*

77. Fourth, Petitioners raised concerns with the purported "workers' compensation" component of the First Proposed Rule, pointing out that the rule would be more efficient if it allowed third-party platforms to elect to voluntarily provide worker injury insurance in lieu of paying the "workers' compensation" component. *Id.* at 1420. DoorDash noted that it already "maintains occupational accident insurance to protect NYC Dashers;" this insurance policy covers medical expenses up to $1 million. *Id.*

78. Comments from other stakeholders made clear that the First Proposed Rule would likely impose serious additional costs on local restaurants. For example, the New York State Restaurant Association (the "NYSRA") commented that requiring payment for all delivery worker online time would result in "higher delivery costs to consumers," "more regimented and less flexible work opportunities for drivers," and the "reduc[tion] or eliminat[tion] [of] delivery fulfillment in New York City." *Id.* at 1553.

79. Thousands of delivery workers submitted comments opposing the First Proposed Rule. *See e.g.*, *id.* at 55–624 (reproducing hundreds of emails from delivery workers). Many agreed that they valued the "freedom and flexibility" offered by the prevailing third-party delivery service worker model, and affirmed that this was the reason they decided to sign up to work as a delivery worker in the first place. *Id.* at 1642, 1675, 1707. They also stated that they did not want to "compete" with other drivers for the best hours or otherwise get "locked out" from any of the platforms. *Id.* at 55–624.

V. DCWP Issues a Second Proposed Rule that Does Not Resolve the Many Concerns Raised by Stakeholders.

A. The Second Proposed Rule.

80. On February 28, 2023, DCWP issued a Second Proposed Rule. This proposal largely left in place the core components of the First Proposed Rule—and the changes that DCWP made did not alleviate the concerns that stakeholders previously raised.

81. This time around, DCWP set forth two different methods by which third-party food delivery services could meet the minimum pay requirement.

82. DCWP called the first the "Standard Method." Herrmann Aff. Ex. 7 ("Second Proposed Rule") at 4. The Standard Method worked the same way as the First Proposed Rule—each app would have to meet the same individual pay requirement (payments to each worker must meet the minimum pay rate multiplied by the sum of each worker's own trip time) and the same aggregate pay requirement (total payments to all workers must meet the minimum pay rate multiplied by the sum of all workers' total trip *and* on-call time). *Id.* The standard pay rate would be $19.96 per hour. DCWP claimed that the decrease from the First Proposed Rule's standard pay rate was due to "minor changes" to the formula, including a subtraction from the base pay to account for multi-apping. *Id.* at 5.

83. DCWP called the second proposed method the "Alternative Method." *Id.* at 4. This method was a new introduction to DCWP's proposal. Under the Alternative Method, each app must pay each food delivery worker for their trip time—not under the standard pay rate ($19.96 per hour), but rather under the alternative pay rate ($33.26 per hour). *Id.* This alternative pay rate represented the standard rate divided by 60%, and the 60% figure represented the proportion of time DCWP asserted that delivery workers spend engaged in trips compared to being logged in. *Id.* DCWP stated that its "[r]ationales" for its proposed minimum pay rate, and the two methods

for complying with it, included "to incentivize apps to make operational changes to use workers' time on the apps more efficiently, thereby increasing deliveries per hour," and to "accommodate the variety of pay arrangements already present in the industry." *Id.* at 11.

84. Under both the Standard Method and the Alternative Method, therefore, DCWP's Second Proposed Rule would require third-party food delivery services to compensate delivery workers for "on-call time"—either directly (under the Standard Method) or indirectly (under the Alternative Method). *See id.* at 4. DCWP did not change its definition of "on-call time." *Id.* at 3.

85. DCWP also retained the workers' compensation component of the minimum pay rate, with no material changes. DCWP stated that the purpose of the workers' compensation payment was "not to enable workers to purchase their own insurance," but rather "to compensate food delivery workers for their exclusion from the workers' compensation benefits available to most workers." *Id.* at 7–8.[7]

86. DCWP also included a multi-apping adjustment to purportedly account for time delivery workers spend logged on to multiple third-party delivery services' or ridesharing platforms. This reduced the minimum hourly payment from $23.36 to $19.96 starting on April 1, 2025. The multi-apping multiplier was based on a calculation of the percentage of workers with multiple accounts that relied on NYC Delivery Worker Survey data. *Id.* at 10; Report at 4–5.

87. Finally, DCWP swept aside all criticism of the surveys on which it relied, claiming that it had "reviewed the methodological critiques provided in comments but was not persuaded that the survey is inappropriate." *Id.* at 9.

[7] DCWP's conclusion that "[f]ood delivery workers' rates of injury and work-loss time are high" was derived from NYC Delivery Worker Survey data. Second Proposed Rule at 8 (citing DCWP Report at 24-26).

B. Commenters Again Raise Significant Concerns with DCWP's Proposal.

88. During the comment period on the Second Proposed Rule, Petitioners and other stakeholders again identified multiple flaws in DCWP's proposal.

89. First, Petitioners reiterated their questions about why DCWP excluded from its study and its proposed rules deliveries "not only from restaurants, but also from every other type of business, such as grocery and convenience stores." Public Comments on Second Proposed Rule at 322. Petitioners explained that the rules should apply to Instacart and other similar entities, rather than unfairly targeting one group of third-party platforms. *Id.* at 303.

90. Second, Petitioners explained that DCWP's new Alternative Method did not address their earlier concerns. To the contrary, the Alternative Method's pay rate of $33.27 per hour was so "extreme"—double the City's $15 per hour minimum wage for employees that has been in place since 2016, Herrmann Aff. Ex. 9 ("Rule") at 11—that it was prohibitively "unsustainable" for both the platform and the merchants it contracts with. Public Comments on Second Proposed Rule at 309. The onerous effects of that rate were further compounded, Petitioners explained, by the "fee caps" the City previously imposed on them and other third-party delivery services, which restrict the "decisions" Petitioners can make "to offset some of those losses." *Id.* at 305.

91. Petitioners also explained that the proposal improperly continued to require third-party food delivery services to compensate delivery workers for all time spent online, including time in which workers were not accepting any offers, were performing deliveries arranged through other platforms, or were running personal errands. *Id.* at 313–15; *id.* at 304. Under both the Traditional Method and the Alternative Method, delivery workers would be compensated for time in which they were not engaged in deliveries and were not actively waiting for or seeking work. *Id.* at 314.

92. In an effort to work with DCWP to find reasonable solutions to DCWP's stated goals, Petitioners proposed multiple changes to the Alternative Method that would fairly compensate workers for time they spent making deliveries *and* a reasonable amount of time spent either accepting or rejecting offers. *See id.* at 307, 320. Petitioners' proposals would have compensated workers at *higher* rates than what DCWP originally proposed. *Id.* at 320. As one option, DoorDash and Grubhub proposed a multiplier that compensates delivery workers for time spent waiting between delivery offers—which DCWP's own Report found was 4 minutes on average. *Id.* at 306, 320. Under that approach, third-party food delivery services would pay $23.07 per hour under the Alternative Method. *Id.* As another option, DoorDash proposed compensating delivery workers for time spent waiting for delivery offers *and* time spent rejecting a reasonable number of delivery offers. *Id.* at 320. For example, if the calculations factored in a four-minute wait time and time needed to reject one out of three offers, third-party food delivery services would pay $25.03 per hour under the Alternative Method. *Id.*

93. Third, DoorDash reiterated concerns about DCWP's proposal to include the workers' compensation component in the minimum pay requirement and the significant flaws in the collection of delivery worker survey data. *Id.* at 336, 337 n.343, 351.

94. The NYSRA submitted a second comment on behalf of local restaurants. In relevant part, it noted that if "third-party delivery platforms are required to pay their delivery workers at a higher rate for both trip time and 'on call' time, or a **much** higher rate for just trip time," they anticipated that delivery platforms would have to impose restrictions on workers, increasing costs for restaurants, or decreasing the availability of delivery fulfillment in the City. *Id.* at 385. It urged DCWP to consider these "consequences" and the "negative spillover effects" restaurants would experience as a result of this rule. *Id.*

95. Finally, hundreds of delivery workers once again made their voices heard and asked the City to refrain from taking any action that would reduce their flexibility to deliver as much or as little as they like, and when and where their busy schedules allow. *See, e.g.*, *id.* at 2.

VI. DCWP Issues the Rule, Which is Set to Take Effect on July 12, 2023.

96. On June 12, 2023, DCWP published the final Rule.

97. The Rule keeps intact the minimum pay rates and component parts of the Standard Method and Alternative Method. Rule at 2–5. Accordingly, under the Standard Method, delivery services like Petitioners must pay each delivery worker $19.96 per hour for each worker's trip time, and must pay all workers $19.96 per hour multiplied by the sum of their total trip time and on-call time. *Id.* at 4. Under the Alternative Method, third-party food delivery services must pay each delivery worker $33.26 per hour—the standard rate divided by 60%, with 60% representing DCWP's ratio of trip time to total online time—for that worker's total trip time. *Id.*

98. DCWP retained its definition of "on-call time" as the time a delivery worker is "connected to" a third-party food delivery service's electronic system "in a status where the food delivery worker is available to receive or accept trip offers," excluding trip time. *Id.* at 26. DCWP concluded that in light of Local Law 115's directive to consider "the on-call and work hours" of workers, it would "not be appropriate to exclude portions of workers' on-call time." *Id.* at 5. DCWP further reasoned that the "ongoing assessment of trip offers is intrinsic to work on the apps," but rejected Petitioners' alternative recommendations for treating on-call time—which would have compensated workers for time spent waiting for offers and time spent rejecting a reasonable amount of offers—as "arbitrary and not based on the results of the study." *Id.*

99. DCWP further rejected Petitioners' proposal to adjust the workers' compensation component of the rule for "the reasons stated previously." *Id.* at 9.

100. As for the scope of its Rule, DCWP stated that it could not "adopt Grubhub's recommendation" for the rule to "apply to all delivery companies," including grocery store and convenience store delivery companies, "because it [was] outside the scope of the Department's authority granted by Local Law 115." *Id.* at 13. DCWP did not elaborate on how it reached that conclusion.

101. In response to comments raising concerns about the surveys underlying the Rule, DCWP stated that the rule purportedly relied only on data from the NYC Delivery Worker Survey, and not from the Deliveristas Survey or NYC Restaurant Delivery Survey. *Id.* at 22. DCWP also declared that it "would not have been appropriate to conduct a survey without informing respondents that it was being conducted by the City of New York or informing respondents how their responses would be used," and that the use of control questions to correct for bias effects supposedly is "not customary in government surveys." *Id.* at 24–25.

102. Despite comments encouraging DCWP to set an implementation date of 60 or 120 days to allow third-party food delivery services meaningful time to adjust to a rule that would require substantial operational changes to its business, DCWP ordered that the Rule would become effective in 30 days—starting July 12, 2023. *See id.* at 19.

STANDARD OF REVIEW

103. CPLR Article 78 authorizes this Court to "annul" an agency "determination" that "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." CPLR 7803(3), 7806. "Administrative rules are not judicially reviewed pro forma in a vacuum, but are scrutinized for genuine reasonableness and rationality in the specific context." *N.Y. State Ass'n of Counties v. Axelrod*, 78 N.Y.2d 158, 166 (1991). The rule must have "a rational basis"; it cannot be unreasonable, arbitrary, or capricious. *Id.*

104. An agency "can only promulgate rules to further the implementation of the law as it exists"—it has "no authority to create a rule out of harmony with the statute." *Jones v. Berman*, 37 N.Y.2d 42, 53 (1975). Because an agency "cannot by regulatory fiat directly or indirectly countermand a statute enacted by the Legislature," a regulation "disharmonious with the statute it was intended to implement[] must be found void." *Servomation Corp. v. Tax Comm'n*, 51 N.Y.2d 608, 612 (1980).

105. A rule is unlawfully arbitrary if "the agency fails to identify a rational basis for the rule" or the "agency does not demonstrate [the] rule is based on a rational, documented, empirical determination." *Lynch v. N.Y. City Civilian Complaint Rev. Bd.*, 98 N.Y.S.3d 695, 703–04 (Sup. Ct. N.Y. Cnty. 2019); *accord, e.g., Ward v. Long Beach*, 20 N.Y.3d 1042, 1043 (2013) (agency action is arbitrary and capricious if "taken without sound basis in reason or regard to the facts"). A rule is also considered capricious if it treats those who are similarly situated differently. *See Frank Lomangino & Sons, Inc. v. City of New York*, 980 F. Supp. 676, 681 (E.D.N.Y. 1997); *Concord Assocs., L.P. v. Town of Thompson*, 980 N.Y.S.2d 275 (Sup. Ct. Sullivan Cnty. 2013). Regulations must also have an "evidentiary basis in the . . . record for [an agency's] choice of" specific rules. *Jewish Mem'l Hosp. v. Whalen*, 47 N.Y.2d 331, 343 (1979). Absent that justification, a rule "must . . . be set aside as without rational basis and wholly arbitrary." *Id.*

106. Judicial review of an agency's action must be "limited to the grounds invoked by the agency." *Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991). "If 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).

107. As set forth below, the Rule enacted by DCWP here is affected by errors of law, is arbitrary and capricious, and is lacking in rational evidentiary record support. Therefore, it must be vacated and annulled for several independent reasons.

ARGUMENT

I. The Rule Contravenes DCWP's Statutory Authority, Is Affected by Errors of Law, and Is Arbitrary and Capricious.

108. The Rule is unlawful for at least five independent reasons:

(1) DCWP's adoption of the Rule is affected by errors of law, and inherently arbitrary and capricious, because DCWP's decision to exclude third-party food delivery services that do business primarily with grocery stores and/or other non-restaurant purveyors of food contravenes the plain language of the City Council's statutory mandate. The City Council instructed DCWP to "study" the "working conditions for food delivery workers," Local Law 115 at 1, and to promulgate a rule governing payments by "a third-party food delivery service or third-party courier service," *id.* at 2. Those statutes encompass third-party food delivery services that do business with primarily non-restaurants, yet DCWP intentionally omitted them. Accordingly, DCWP never studied where there are material differences between restaurant and grocery work—such as whether grocery delivery work involves fewer trips per hour or requires more or less drive time—and thus didn't assess whether excluding this large segment of food delivery work impacted the results of its study.

(2) DCWP acted irrationally, arbitrarily, and capriciously by relying extensively upon a fatally flawed survey of food delivery workers that improperly disclosed to the surveyed workers both "'the sponsor of the survey and its purpose,'" Public

Comments on First Proposed Rule at 1501 (Simonson Rep. ¶ 13, quoting Shari Seidman Diamond, *Reference Guide on Survey Research* in REFERENCE MANUAL ON SCI. EVID 411 (Fed. Judicial Ctr. 3d ed. 2011)), rendering the survey inherently "biased" and its results "unreliable" as matter of law, *Marria v. Broaddus*, 200 F. Supp. 2d 280, 289–90 (S.D.N.Y. 2002).

(3) The Rule irrationally requires third-party food delivery services to compensate delivery workers for all time spent logged into an app, regardless of whether the worker is engaged in any work-like activity during such periods. DCWP set this requirement based on its erroneous conclusion that it was mandated by statute to compensate for such "idle" time. DCWP refused to engage with feasible alternatives that would accomplish the same goals of compensating workers for time needed to assess offers, and failed to comprehend that imposing its on-call compensation requirement would frustrate DCWP's own stated goals of promoting efficiency.

(4) The Rule unlawfully inflates the minimum pay rate imposed on third-party delivery services by including a $1.68 "workers' compensation component" that bears no rational relationship to the concept of workers' compensation benefits or the purposes underlying it, that would result in injured drivers being over-compensated and uninjured drivers being undercompensated, and that causes some third-party platforms to either eliminate occupational accident insurance that it provides or to pay twice to protect workers from injury.

(5) The Rule relies on a critical assumption—that restaurants partner with third-party food delivery services despite making *zero* profit—that is faulty on its face and that

rests on mischaracterizations of record evidence and undisclosed private discussions with industry stakeholders.

109. Each of these reasons would independently suffice to justify the Rule's annulment. Collectively, they compel it.

A. DCWP Violated Its Statutory Mandate by Excluding Grocery Delivery Companies from Both Its Study of Delivery Worker Pay and the Scope of Its Resulting Rule.

110. Agencies must "consider statutory requirements" when coming to a decision, *Caldwell v. Comm'r of Health*, 47 A.D.2d 689, 690 (3d Dep't 1975), and cannot "promulgate a rule out of harmony with or inconsistent with the plain meaning of the statutory language." *Trump-Equitable Fifth Ave. Co. v. Gliedman*, 57 N.Y.2d 588, 595 (1982). DCWP's Rule, however, contravenes its statutory mandate.

111. When it passed Local Law 115 of 2021, the City Council directed DCWP to "study the working conditions for food delivery workers" and "by rule 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." Local Law 115 at 1–2. DCWP declared without explanation or examination that it could "not adopt a minimum pay rule that appl[ies] to quick convenience and grocery delivery companies" as well as delivery services that partner with restaurants because such a rule supposedly "is outside the scope of the Department's authority granted by Local Law 115 of 2021." Rule at 13.

112. This legal conclusion was wrong. Nothing in the City Council's legislative mandate calling for DCWP to study and regulate delivery-worker pay even authorized DCWP to exclude non-restaurant food deliveries from its study and rule-making. And DCWP's flawed reading of its statutory mandate served as the basis for the *entire* administrative process underlying the minimum pay rule, from DCWP's crafting of its initial study and the NYC Delivery Worker

Survey to the formulation of the Rule. The Rule is therefore fundamentally and fatally "affected by error of law" and must be annulled. *Riccelli Enters., Inc. v. N.Y. State Dep't of Env't Conservation*, 30 Misc. 3d 573, 585 (Sup. Ct. Onondaga Cnty. 2010); *see, e.g.*, *Matter of DeVera,* 32 N.Y.3d 423, 438 (2018).

113. Indeed, every piece of available information—from the plain meaning of the relevant statutes and the applicable legislative history, to past precedents involving the use of parallel statutory provisions in similar legislation—confirms that the City Council intended for non-restaurant food deliveries, and companies such as Instacart that facilitate such deliveries, to be included in the scope of DCWP's regulation of delivery-worker minimum pay.

114. First, the plain language of DCWP's statutory mandate unambiguously reaches delivery services provided both to grocery stores (and other food purveyors) as well as to restaurants. The provisions of the New York City Administrative Code adopted by Local Laws 114 and 115 of 2021 call for DCWP to "study the working conditions for food delivery workers" and devise 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." Local Law 115 at 1–2. They also set forth a series of statutory definitions relevant to ascertaining the scope of that mandate. A "food delivery worker" is a person "engaged as an independent contractor by a third-party food delivery service . . . or a third-party courier service." Local Law 114 at 2. A "third-party food delivery service," in turn, is a "website, mobile application, or other internet service" not owned by a food service establishment that "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 a "third-party courier service" is a "service" other than a third-party food delivery service that "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." *Id.* And a "food service establishment" is 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.*

115. None of those definitions provides for the exclusion of grocery or other non-restaurant food-delivery services from the scope of DCWP's statutory mandate. Grocery stores undoubtedly are "food service establishments" as they routinely provide food for "individual portion service" to be consumed "off the premises" (and often for on-premises consumption as well). *Id.* Accordingly, the delivery services like Petitioners and services that focus on grocery stores in New York City undoubtedly are "third-party food delivery services" and "third-party courier services," because they arrange for the sale and/or "same-day delivery or same-day pickup of food and beverages" from grocery stores. *Id.* And the delivery workers who contract with those delivery services are "food delivery workers" for the same reason. *Id.* Thus, there is no basis in the statutory text for DCWP's unsupported and erroneous conclusion that regulating worker pay for "grocery delivery companies" would be "outside the scope" of DCWP's statutory authority.

116. DCWP has never articulated the basis for its flawed conclusion. Respondents may argue in response to this Petition, however, that grocery delivery services should be excluded because the definition of a "third-party food delivery service" applies only to a company that "offers or arranges for the sale of food and beverages prepared by…a food service establishment," on the theory that grocery stores—as opposed to restaurants—do not sell food that is "prepared by" the seller itself. Nothing could be further from the truth. Whether at a deli counter, a salad bar, a rotisserie station, or in any number of other contexts, grocery stores routinely sell food and

beverages in individual portions that are cooked, sliced, portioned and packaged, or otherwise prepared, at least in part, by those grocery stores themselves. *See generally* Affirmation of Leesa Haspel ("Haspel Aff.") (describing investigation of Instacart offerings). And services such as Instacart regularly offer those products for sale by grocery stores and arrange for their same-day delivery to consumers in New York City.

117. To cite just a few examples, at the time of filing of this Petition, Instacart offered delivery of the following items in New York City:

- 4-piece fried chicken from Wegmans;
- Store made meatloaf by the pound from D'Agostino;
- An individual grilled chicken cutlet from Morton Williams;
- Coleslaw salad by the pound from Gristedes; and
- Individual Boar's Head turkey club sandwich from Gristedes.

Haspel Aff. ¶¶ 8–9, 11, 16, 18.

118. Even if there were a basis to exclude grocery delivery companies from the definition of "third-party food delivery service" on the ground that they do not deliver food and beverages "prepared by" grocery stores—which there is not—grocery delivery companies would nevertheless qualify as third-party courier services under the statute. A company is a "third-party courier service" if it "facilitates the same-day delivery or same-day pickup of food, beverages, or other goods from a food service establishment . . . and is not a third-party food delivery service." Local Law 114 at 2. As such, grocery delivery companies such as Instacart unquestionably would be third-party courier services within the scope of the statute even if they did not qualify as third-party food delivery services (which they do).

119. Thus, it is clear from the face of Local Laws 114 and 115 that DCWP's statutory mandate—which instructed DCWP to regulate minimum payments made to food delivery workers by third-party food delivery services and third-party courier services—applies to food delivery workers contracted with services such as Instacart that specialize in grocery orders and delivery. But DCWP went the opposite direction, inexplicably declaring that grocery delivery companies somehow fell outside the scope of its authority under Local Law 115.

120. The legislative history further confirms that grocery stores are food service establishments within the scope of Local Law 115. In the City Council committee report for Local Laws 114 and 115 of 2021, the Committee on Consumer Affairs and Business Licensing expressly noted that the definition of a food service establishment "could include restaurants, food trucks, [or] *grocery stores* or any other establishment meeting the definition." City Counsel Briefing Paper at 23 (emphasis added). The Committee report's discussion of restaurants and grocery stores in the same breath compels only one conclusion: each is a business establishment that provides food in individual portions for consumption on or off the premises.

121. The legislative history relating to the City Council's enactment of Local Law 100 of 2021—which implemented the licensing requirement for third-party food delivery services set forth in section 20-563.1 of the Administrative Code, and which incorporates materially identical definitions paralleling those incorporated into the minimum pay law—also indicates that grocery store deliveries are properly within the scope of any minimum-pay regulation. In a legislative hearing, the then-Chairperson of the City Council's Committee on Consumer Affairs and Business Licensing discussed the City bills limiting the commissions "that restaurants *and grocery stores* have to pay third party food delivery companies." Herrmann Aff. Ex. 10 at 20 (emphasis added).

This statement reaffirms that restaurants and grocery stores were understood to fall under the same statutory umbrella.

122. Case law also supports this interpretation. On this point, *New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Department of Health & Mental Hygiene*, 110 A.D.3d 1 (2013), *aff'd*, 23 N.Y.3d 681 (2014), is instructive. There, a City agency promulgated the "Soda Ban," which limited the maximum self-service cup or container size for sugary drinks to 16 fluid ounces for all "food service establishments" as defined by the Health Code. The Health Code's definition of a food service establishment is essentially identical to the definition underlying DCWP's minimum pay rule: "a place where food is provided for individual portion service directly to the consumer whether such food is provided free of charge or sold, whether consumption occurs on or off the premises or is provided from a pushcart, stand or vehicle." *Id.* at 4. In the Soda Ban rule, it was uncontested that grocery stores *were* food service establishments.[8] *Id.* at 4, 6 (emphasis added).

123. Based on the plain meaning of DCWP's statutory mandate, the legislative history, and past practice, DCWP's study of this industry, as well as the subsequent rule-making, DCWP should have included data from grocery delivery companies and their workers. Local Law 115 ordered DCWP to "study the working conditions for food delivery workers," which includes grocery delivery workers. DCWP not only disagreed, choosing instead to limit the scope of its study at the outset, but it waited until it released the Notice of Adoption of the Rule—at the very end of the administrative process—to offer its bare justification for excluding grocery delivery

[8] Grocery and convenience stores were exempt from the ban for unrelated reasons: the ban was limited to "those FSEs subject to the agency's inspections under" a memorandum of understanding that limited the agency's inspection authority to businesses that derived "50% or more" of their revenues "from the sale of food for consumption on the premises or ready-to-eat for off-premises consumption." *Id.* at 4, 6. The City Council offered no such exemption here.

companies from its study and its rule-making. In response to a comment from Grubhub that "the minimum pay rule should apply to all delivery companies, not only food delivery services," and specifically, "that the minimum pay rule should apply to quick convenience and grocery delivery companies," DCWP 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." Rule at 13. DCWP elaborated no further. And DCWP cannot point to anything in the record that substantiates its conclusory assumption.

124. The exclusion of data from grocery delivery companies and their workers undermined DCWP's study. DCWP's study and surveys used data only from Uber Eats, Grubhub, DoorDash, Relay, Chowbus, Club Feast, Fantuan, HungryPanda, Patio, and GoHive. Report at 2. By stating that Uber Eats, Grubhub, DoorDash, and Relay "are collectively responsible for 99% of app deliveries in NYC" (*id.*), DCWP made clear that it did not consider grocery delivery workers to be "food delivery workers" for purposes of its mandate. Because of DCWP's misinterpretation of the statute, the foundation of the Rule—DCWP's study of the pay and expenses of delivery workers, which it impermissibly limited—is necessarily incomplete and unreliable.

125. Nor is there any rational explanation for DCWP's exclusion of third-party delivery services such as Instacart from its study and the minimum pay rule. DCWP's sole basis for doing so was its flawed interpretation of Local Law 115's scope. *See* Rule at 13. And because DCWP did not study such an essential segment of the industry that the City Council ordered it to study, the entire rule is flawed beyond repair. DCWP did not "consider statutory requirements" when it acted, *Caldwell*, 47 A.D.2d at 690, leading it to "promulgate a rule out of harmony with or inconsistent with the plain meaning of the statutory language," *Trump-Equitable Fifth Ave. Co.*, 57 N.Y.2d at 595. "Given the clear mission statement by [the City Council]," DCWP's role was

"to promulgate regulations consistent with the legislation[,] not to substitute its own policy choices for that of [the City Council]." *See Riccelli Enters., Inc.*, 30 Misc. 3d 573 at 575, 581–82, 584–85 (annulling regulation as ultra vires, "affected by error of law" and "beyond [agency's] statutory delegation of authority"); *accord Gabel v. Toia*, 64 A.D.2d 267, 268 (4th Dep't 1978) ("challenged regulation may not stand" if "in conflict with the intent" of its authorizing legislation). By excluding delivery workers partnered with third-party delivery services such as Instacart from its study and design of the minimum pay rule, DCWP substituted "its own policy choice" for that of the City Council. Therefore, the Rule cannot stand.[9]

126. For these reasons, DCWP misconstrued the statute and excluded grocery stores from its analysis. The entire minimum pay rule is "fatally tainted by [DCWP's] abdication of its responsibility to fairly consider all relevant factors" as ordered by City Council. *See King v. N.Y. State Div. of Parole*, 598 N.Y.S.2d 245, 252 (1st Dep't 1993), *aff'd*, 83 N.Y.2d 788 (1994). Accordingly, the Rule is "irrational and unreasonable" and should be annulled. *See Abraham & Strauss v. Tully*, 47 N.Y.2d 207, 213 (1979) (holding agency interpretation unreasonable).

B. The Rule Must Be Annulled Because DCWP Irrationally Based Its Rule-Making on the Results of Irredeemably Flawed Surveys

127. DCWP's reliance here on two biased and invalid surveys of delivery workers it conducted during the rule-making process further compels the annulment of the Rule. An agency determination that is premised on "erroneous information" or "incomplete and/or outdated facts"—such as the results of invalid surveys and other studies—"must be annulled." *N.Y. Palm*

[9] The Rule does not invoke any deference to a DCWP interpretation of the statute—indeed, the Rule does not engage in any statutory analysis at all. Nor could DCWP claim deference. The statutory text is unambiguous, and "agency determinations that conflict with the clear wording of a statute are entitled to little or no weight." *Destiny USA Dev., LLC v. N.Y. State Dep't of Env't Conservation*, 63 A.D.3d 1568, 1569 (4th Dep't 2009). Moreover, determining whether grocery stores qualify as food service establishments requires no "special competence or expertise"; the "question is one of pure statutory reading and analysis." *Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459 (1980).

Tree, Inc. v. N.Y. State Liquor Auth., 2007 WL 4374275, at * 3, *7 (Sup. Ct. N.Y. Cnty. Dec. 5, 2007); *see Humana of Aurora, Inc. v. Heckler*, 753 F.2d 1579, 1583 (10th Cir. 1985) (agency action is arbitrary and capricious when based on a flawed study); *Almay, Inc. v. Califano*, 569 F.2d 674, 682 (D.C. Cir. 1977) (rejecting regulation produced "on the basis of the flawed survey"); *see also Schur v. N.Y. State Div. of Hous. & Cmty. Renewal*, 169 A.D.2d 677, 678 (1st Dep't 1991) (annulling determination due to improper "reliance" on flawed inspection report). Indeed, courts routinely reject as "biased" and "unreliable" the results of surveys that fail to provide sufficient "assurance of objectivity in the information gathering process, such as whether the questions asked of interviewees were framed in a clear, precise, and non-leading manner." *E.g.*, *Marria v. Broaddus*, 200 F. Supp. 2d 280, 289–90 (S.D.N.Y. 2002).

128. DCWP's surveys in this rule-making process were infected by multiple fatal flaws. Most notably, both surveys were irredeemably tainted at the outset because DCWP included introductory language announcing to survey respondents both the fact that DCWP was the party conducting the survey and the reason why it was doing so, which was to raise pay for food delivery workers. More specifically, the preamble to the NYC Delivery Worker Survey was: "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." Rule at 24 n.1 (emphasis added).

129. The other study commissioned by DCWP, the Deliveristas Survey, likewise announced in its introduction that it was being conducted for DCWP in order "to help DCWP set a minimum pay rate for delivery workers." Public Comments on First Proposed Rule at 1508–09 (Simonson Rep. ¶ 31 n.27). As multiple experts on survey methods have opined, this amounted to an improper "invitation for upwardly biased answers" that "undoubtedly affected the provided

answers, . . . rendering results from the surveys unreliable." *Id*. at 1509 (Simonson Rep. ¶ 33); Berger Rep. ¶ 13. That alone is a "fatal flaw." Public Comments on First Proposed Rule at 1508 (Simonson Rep. ¶ 30); Berger Rep. ¶ 13.

130. Indeed, in *Marria v. Broaddus*, a case involving strikingly similar facts, Judge Buchwald in the Southern District of New York held that improperly biased introductory remarks in a survey rendered the survey's results impermissibly "subjective and biased." 200 F. Supp. 2d at 289–90. The survey at issue there was prepared by counsel for the New York State Department of Correctional Service ("DOCS"), and it sought information from other state prison administrators about their policies relating to a religious group that had challenged the legality of DOCS's parallel policies concerning that group. *Id.* at 282, 289–90. There, as here, the survey's "introduction" revealed at the outset that the survey was being conducted on DOCS's behalf (i.e., for purposes of "helping to defend" DOCS in the lawsuit), as well as "the specific topic of the lawsuit," and it invited responses that would be "helpful…in defending" DOCS in that suit." *Id.* at 289. The "biased nature" of that survey "render[ed] its results unreliable" and "inadmissible." *Id.* at 289–90. The same is true of DCWP's fundamentally flawed surveys here.

131. But that is far from the only flaw rendering DCWP's surveys invalid. As expert testimony has confirmed, several of the surveys' individual questions were improper, "including the use of leading/biased questions, introduction of focalism bias, and inappropriate use of closed-ended, rather than open-ended, questions." Berger Rep. ¶ 15; Public Comments on First Proposed Rule at 1495–96 (Simonson Rep. ¶ 2). For example, the survey asked "how many batteries have you bought for your moped" while providing five choices—an inappropriate close-ended question. Berger Rep. at 5. Courts have repeatedly refused to credit the results of surveys that utilize improper "leading questions" and open-ended question structures that inject "demand effects" and

unwarranted "focalism." *See, e.g.*, *In re KIND "Healthy & All Natural" Litig.*, 627 F. Supp. 3d 269, 287–88 (S.D.N.Y. 2022) (rejecting survey that "improperly directs survey participants to the 'correct' answer"); *In re Elysium Health-ChromaDex Litig.*, 2022 WL 421135, at *12 (S.D.N.Y. Feb. 11, 2022) (rejecting survey that drew participants' "attention to a particular message such that the message took on disproportionate significance in their minds"); *Saxon Glass Techs., Inc. v. Apple Inc.*, 393 F. Supp. 3d 270, 288 (W.D.N.Y. 2019) (rejecting survey's improper use of "leading questions").

132. DCWP further compounded the multiple errors in its construction of the relevant survey questions by failing to include any control questions in the surveys (sometimes referred to as "phantom questions"), which provide a benchmark for determining whether an answer is accurate or merely reflects the impact of bias in the design of survey questions. Courts "'routinely hold'" that "'a survey's lack of a control group or control questions'" fatally undermines the validity of the survey. *Saxon Glass*, 393 F. Supp. 3d at 287 (quoting *Valador, Inc. v. HTC Corp.*, 242 F. Supp. 3d 448, 463 (E.D. Va. 2017)). DCWP's surveys utterly failed to include any control questions "to account for guessing," the survey "respondents' desire to help and please," or the possibility that respondents may well have just been "misremembering" when they responded to the surveys' leading questions. Public Comments on First Proposed Rule at 1515 (Simonson Rep. ¶ 39).

133. DCWP was alerted to all of these fatal flaws in its survey methodology during the comment period on the proposed rule, *see, e.g.*, Public Comments on First Proposed Rule at 1500–16 (Simonson Rep. ¶¶ 12–42); *id.* at 1445–47 (Bronars Rep. ¶¶ 48–54), but it failed to address them in any meaningful fashion. Instead, DCWP merely swept aside all criticism of the surveys, claiming without citation to any authority—or even any rational explanation—that it had

"reviewed the methodological critiques provided in comments but was not persuaded that the survey is inappropriate." Second Proposed Rule at 9.[10] Those conclusory statements do nothing to remedy any of the systemic methodological failures that fatally undermine the results of DCWP's flawed surveys, and that render DCWP's reliance on those results irrational as a matter of law. *See* Berger Rep. ¶¶ 13–19.

134. Perhaps recognizing as much, DCWP also sought to downplay its reliance on these flawed survey results in its responses to comments during the rule-making process. It claimed survey bias was not an issue for its expense calculations because it "did not use any responses in which a respondent was asked to report a monetary amount" for those calculations. Rule at 24. Perhaps not—but it indisputably *did* use those biased survey responses to estimate the "[p]robability that a worker experiences loss or theft of their e-bike," the "[f]requency with which workers purchase replacement batteries or phones," and the "[s]hare of respondents purchasing each e-bike accessory" it factored into its expense projections, all of which were components in DCWP's calculation of the Rule's cost component. *Id.* DCWP's reliance on those biased and inherently unreliable metrics in calculating the cost component of the Rule is irrational, arbitrary, and capricious regardless of whether DCWP also looked to other sources for the dollar amounts it combined with those inflated numbers.

135. Moreover, DCWP cannot deny that its irrational reliance on these improper survey results extends far beyond the calculation of the Rule's cost component. For example, DCWP relied on respondents' answers to the biased survey in determining that delivery workers spend

[10] In the Rule, DCWP similarly declared, again without any support or explanation, that it "would not have been appropriate to conduct a survey without informing respondents that it was being conducted by the City of New York or informing respondents how their responses would be used"—which supposedly was a "customary" disclosure; that it had determined based on survey respondents' "difficulty" in answering open-ended questions that "close-ended responses were the most appropriate format for this population"; and that the use of control questions to correct for bias effects supposedly is "not customary in government surveys." Rule at 24-25.

17.7% of their working time engaged in so-called "multi-apping." DCWP Report at 5 ("the Department used the record-level data it obtained from the apps to analyze the login and logoff times of workers . . . (*as measured from NYC Delivery Worker Survey data*)" to "estimate[] that workers spend 17.7% of working time connected to more than one app" (emphasis added)); *accord* Rule at 23 (identifying "[p]ercentage of workers who multi-app" as an "Input[] into the Minimum Pay Rate Derived from NYC Delivery Worker Survey"). That 17.7% multi-apping estimate factors into the final compensation rates set by the Rule, because DCWP relied upon it in calculating the "multi-apping adjustment factor of 0.8471 in its calculation of the minimum pay rate *for both the alternative and standard methods*." Rule at 10 (emphasis added). DCWP's irrational reliance on its improper survey results contaminates the Rule to its very core, and therefore compels its annulment.

C. The Rule's Treatment Of "On-Call" Time Is Arbitrary And Capricious.

136. The Rule establishes two different methods for calculating worker compensation: the "Standard Method" and "Alternative Method." Under both methods, Petitioners must directly or indirectly pay delivery workers for *all* of their "on-call" hours—meaning *all* of the time the workers are "connected" to a third-party platform's system and "available to receive or accept" delivery offers, N.Y.C. Rule 7-801(a)(4), including time the workers are not monitoring offers or are rejecting every offer they see.

137. Specifically, the Standard Method requires that each third-party food delivery services's total payments to all its delivery workers meet or exceed the standard minimum pay rate—$19.96 per hour—multiplied by the sum of all workers' trip time *and* all workers' total "on-call time." Rule at 4. The Standard Method thus requires third-party food delivery services to compensate delivery workers for all of their on-call time.

138. The Alternative Method works slightly differently, but reaches the same problematic result. It requires each app to pay workers the alternative minimum pay rate—$33.26 per hour in 2023, more than *double* New York City's $15 per hour minimum wage—for their total trip time. Although on-call time is not directly incorporated into the Alternative Method, this method "indirectly compensates them for uncompensated on-call time." Rule at 4. That is because the alternative minimum pay rate—$33.26 per hour—equals the standard minimum pay rate ($19.96) divided by the third-party food delivery services' average utilization rate (which DCWP calculated as 60%). *Id*. The average utilization rate represents the workers' trip time divided by the workers' total time connected to the app. *Id*.; *see also id*. at 6.

139. DCWP's decision to promulgate a minimum pay requirement that includes "all on-call time," *id*. at 5, is arbitrary and capricious for three reasons.

140. *First*, DCWP erroneously believed it was statutorily bound to include all on-call time. Local Law 115 directed DCWP to do two things: (1) "study the working conditions for food delivery workers," which study must include "the hours of such workers," and (2) "establish a method for determining the minimum payments" to delivery workers, which method must "*consider* . . .the on-call and work hours of food delivery workers." Local Law 115 at 1–2 (emphasis added). DCWP seemingly understood the statute as a mandate to include, rather than just "consider," all on-call hours in the pay rate. After reciting NYC Admin. Code § 1522(a)(3)'s requirement "to establish the minimum pay rate in consideration of 'the on-call and work hours,'" DCWP asserted that "it would not be appropriate to exclude portions of workers' on-call time from the alternative minimum pay rate calculation." Rule at 5. DCWP thus improperly concluded that its hands were tied—the statute mentioned the phrase "on-call," so DCWP had to include *all* on-call time in the compensation calculations.

141. The agency's conclusion is not supported by the statute, and a rule premised on a legal error cannot stand. The Legislature only told DCWP to "consider" on-call hours, N.Y.C. Admin. Code § 20-1522(a)(3)—in other words, to "think about" on-call hours when making its decision. *Consider*, Merriam-Webster Online Dictionary (2023). The Legislature did not tell DCWP what result it must reach after considering the issue. But DCWP suggested that the statute, in and of itself, made it "[in]appropriate to exclude portions of workers' on-call time." Rule at 5. Because DCWP "misconceived the statutory scheme," its rule must be "annulled." *See Woods v. N.Y. City Dep't of Citywide Admin. Servs.*, 16 N.Y.3d 505, 509 (2011); *see also SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (agency order that "misconceived the law" "may not stand").

142. *Second*, regardless of what the authorizing statute says, the Rule's inclusion of *all* on-call time is not supported by a reasoned explanation.

143. As an initial matter, the Rule compensates for time that is not "work" under any meaning of the term. DCWP defines "on-call time" to include any time (other than trip time) during which a food delivery worker connects to Petitioners' systems "in a status where the food delivery worker is available to receive or accept offers or assignments." Rule at 26 (quoting N.Y.C. Rule 7-801(a)(4)). But under Petitioners' "existing flexible work model, there is no requirement to work while online" and connected to Petitioners' systems. Public Comments on Second Proposed Rule at 308. Accordingly, workers may connect to Petitioners' systems even if they are *not* monitoring offers, are rejecting or ignoring 100% of offers received, are working another job (including performing delivery services with Instacart or ride-sharing services with Lyft), or are running personal errands. *See* Public Comments on Second Proposed Rule at 309; Public Comments on First Proposed Rule at 1412 & n.4 (describing surveys showing it is "common for [app-based] workers to stay online even when taking breaks or mainly doing

personal tasks"). DCWP does not deny these facts. Yet Petitioners must include those hours in their minimum-pay calculations. That is irrational. DCWP insisted that its rule "compensate[s]" workers for time worked, Rule at 5, but "[c]ompensation" consists of benefits received "in return for services rendered." *Compensation*, Black's Law Dictionary (11th ed. 2019). When delivery workers are not monitoring offers, are rejecting or ignoring all offers, or are completing personal tasks, they are not rendering services. *See Nicolas v. Uber Techs., Inc.*, 2021 WL 2016161, at *5–7 (N.D. Cal. May 20, 2021) (concluding that "time logged onto the Uber App and waiting for requests" does not qualify as a task that observers "would recognize as work").

144. Moreover, food delivery workers' ability to log on to platforms without accepting any offers is a unique feature of app-based work that is not mirrored in the employment context, *see* Public Comments on First Proposed Rule at 1411—a distinction that undermines DCWP's defense of its minimum-payment standard as "consistent" with the Fair Labor Standards Act, under which an employee must be compensated when "'engaged to wait.'" DCWP Report at 32 (quoting D.O.L. Fact Sheet #22 (July 2008), https://www.dol.gov/agencies/whd/fact-sheets/22-flsa-hours-worked). In the employment context, some workers are "on-call" in the ordinary sense of that term—meaning they must be accountable to their employer during work hours even if they are waiting for work to do, without freedom to undertake personal tasks. By contrast, app-based workers choose to log in to Petitioners' systems entirely on their own; they are not under the platform's control; and they have independent authority to accept, deny, or ignore offers (in which case the offers lapse through inaction) as they please. In light of this distinction, DCWP's attempt to analogize its rule to FLSA requirements is irrational. Indeed, the Rule is the *opposite* of "consistent" with the FLSA, as DCWP claimed. DCWP Report at 32. Under the FLSA, food delivery workers would *not* be considered "working" while they are merely logged on: they are

not "engaged to wait (which is work time)," but rather, they are "waiting to be engaged (which is not work time)." U.S. Dep't of Labor Fact Sheet #22, *supra*.[11]

145. DCWP compounded this error by rejecting without adequate explanation Petitioners' alternative proposals. *See Trump on Ocean, LLC v. Cortes-Vasquez*, 908 N.Y.S.2d 694, 700 (2d Dep't 2010) (agency determination "lacked a rational basis" where it "failed to explain" why alternatives did not "meet its concerns"). Petitioners proposed alternative payment calculations that would include (1) "necessary waiting time" and (2) if warranted, "time to reject some reasonable amount of offers." Public Comments on Second Proposed Rule at 309–10; *see also id.* at 306. Those proposals are fully responsive to DCWP's assertions that the "ongoing assessment of trip offers is intrinsic to work on the apps and fundamental to how workers manage the earnings uncertainty created by apps' business model." Rule at 5. By compensating delivery workers for necessary waiting time (including time to reject some offers), Petitioners' recommendations would capture all the time required to assess trip offers—no more, and no less.

146. DCWP did not explain why Petitioners' proposals fell short of addressing DCWP's stated interests in paying food delivery workers for the time they need to assess offers. Instead, DCWP criticized Petitioners' proposals as "arbitrary and not based on the results of the study, which found that on-call time represents 24 out of every 60 minutes workers log on the apps." Rule at 5. But that reasoning simply assumes the answer to the relevant question: whether *all* on-call time, including unnecessary waiting time or time spent rejecting or just ignoring an

[11] DCWP also cited the Taxi and Limousine Commission's minimum-pay rule, which required ride-share companies to include "time waiting for a dispatch." N.Y.C. Taxi & Limousine Comm'n, *Notice of Promulgation: High-Volume For-Hire Services* (Mar. 8, 2023), codified at 35 RCNY § 59D-22. In DCWP's view, there was no "basis for departing from" the Commission's rule. Rule at 5. But reflexively taking action simply because another agency did the same thing doesn't meet DCWP's obligation to provide a reasonable explanation for *this* rule on *this* record. In any event, the Commission's rule never grappled with the fact that drivers could be logged on (and thus trigger compensation) without legitimately searching for work, and it never discussed whether *all* on-call time should count for compensation. *See* N.Y.C. Taxi & Limousine Comm'n, *Notice of Promulgation* at 1–12.

unreasonable amount of offers, should be compensated. It thus does not "explain how the agency resolved any significant problems raised by the comments." *See Street Vendor Project*, 811 N.Y.S.2d 555, 561 (Sup. Ct. N.Y. Cnty. 2005) (quotation marks omitted). Nor is the 24-out-of-60-minutes statistic a substitute for the explanatory work that agencies must provide in a rulemaking. In the study, DCWP recited findings that 39% of workers' hours (i.e., 24 out of 60 minutes) are spent on-call—but that 39% includes 9% between login to first trip, another 12% between the last trip and logoff, and another 12% between login and logoff *with no trip taken at all*. DCWP Report at 16–17. DCWP made no attempt to justify why requiring Petitioners to compensate workers for all of that time made sense or was necessary to serve the agency's stated goal of compensating workers for time spent assessing offers.

147. *Third*, the Rule "clashes with the design and intendment" of DCWP's stated purpose. *See N.Y. State Ass'n of Counties*, 78 N.Y.2d at 167. DCWP asserted that one "rational[e]" for requiring Petitioners to "assume financial responsibility for all . . . on-call time" was to make "workers' time on the apps more efficien[t], thereby increasing deliveries per hour." Second Proposed Rule at 11. Another rationale was to "accommodate" the arrangements "already present in the industry." *Id.* Requiring Petitioners to compensate for *all* on-call time, however, fails on both counts.

148. The Rule does not rationally advance efficiency. Delivery workers "often" get online and indicate availability to work—thus triggering the Rule's payment obligations—while "in practice" choosing not to work at all. Public Comments on First Proposed Rule at 1411–12. The Rule thus incentivizes these periods of online-but-not-working time, even though such time is not dedicated to the Rule's stated goal of more efficiently delivering food from restaurants to

consumers. Under those circumstances, who would not log on to an app while running a personal errand, or even sitting at home, if it means higher pay?

149. By requiring compensation for all on-call time—including time spent actively not accepting offers—DCWP also undermines its own 60% utilization rate. DCWP's Alternative Method requires dividing the standard pay rate by 60%, with 60% reflecting the utilization rate—that is, the proportion of time engaged in deliveries to total time online. But as just discussed, DCWP's Rule incentivizes delivery workers to spend *more* time logged on but not delivering—thus reducing the utilization rate, and driving further apart the theoretical underpinnings of the Rule and real-world practice. In fact, even *without* the incentives created by the Rule, the utilization rate consistently decreased every quarter from Q1 2021 through Q2 2022 (with one exception in which the rate stayed constant). Rule at 6. DCWP noted the downward trend, but did not even pretend to address what it meant or whether such a trend indicated that the 60% utilization rate did not reflect present-day reality. *Id.*

150. Nor does the Rule accommodate the industry's existing practices. *Contra* Second Proposed Rule at 11. Quite the opposite. Petitioners currently provide delivery workers with a high degree of "independence and flexibility." Public Comments on First Proposed Rule at 1413. Workers can work for as long or as little as they desire—a characteristic of work that 70% of New York City Dashers consider highly valuable. *Id.* The Rule, however, undermines Petitioners' ability to offer flexible arrangements. To limit the amount of time that workers are allowed to be online (thus starting the clock under the Rule, no matter what workers subsequently do while logged on), Petitioners may need to: force workers to schedule delivery blocks; restrict workers from rejecting offers; automatically disconnect workers' access during inactive periods or travel outside of busy areas; or eliminate platform access altogether for workers who reject too many

offers. Public Comments on First Proposed Rule at 1414; *see also id.* at 1537 (discussing potential restrictions on multi-apping). Those impacts will harm the delivery workers who most need work, such as workers who seek to earn supplemental income to avoid payday loans (28% of Dashers) or avoid government benefits (30% of Dashers). *Id.* at 1415. There is nothing "accommodat[ing]" about forcing Petitioners, and the delivery workers who will feel the squeeze, to make these difficult choices. Second Proposed Rule at 11.

151. Even more broadly, the Rule will force third-party food delivery services to reduce their delivery radiuses—another change to Petitioners' existing practices that DCWP ignored. DCWP recognized that third-party food delivery services will have incentives under the Rule to reduce delivery distances. *See* DCWP Report at 36. As one restaurant owner stated, that is a "thinly veiled suggestion they stop delivering to low-income communities." Public Comments on First Proposed Rule at 1534; *see also id.* at 1564 (comments of Brooklyn Chamber of Commerce noting that "delivery services may ultimately end up being greatly limited in less busy areas"). DCWP acknowledged "that some consumers may be more price-sensitive than others," but ignored the Rule's actual impact on low-income communities. Rule at 21.

152. Because the Rule lacks a "rational relationship to [the] agency's stated purpose" of promoting efficiency and accommodating existing business practices, it is arbitrary and capricious. *Lynch*, 98 N.Y.S.3d at 703.

D. The Rule's Inclusion Of A Workers' Compensation Component Is Arbitrary And Capricious.

153. On top of the base pay that Petitioners are responsible for under the Rule, the minimum-pay rate includes a "workers' compensation component." Rule at 9. Petitioners must pay $1.68 per hour of purported workers' compensation to every delivery worker. Rule at 3. DCWP chose that number because employed restaurant-delivery workers receive workers'

compensation benefits that are purportedly worth 7.84% of their payroll, and 7.84% of DCWP's base rate for food delivery workers is $1.68. Second Proposed Rule at 7.

154. DCWP's explanation for including this workers' compensation component is arbitrary and capricious, for two independent reasons.

155. *First*, DCWP's reasons for imposing a workers' compensation charge conflict with how workers' compensation works and the goals that workers' compensation serves. It *overcompensates* uninjured workers, and *undercompensates* injured workers. DCWP's Rule thus fails Article 78's reasoned decision-making requirement.

156. Workers' compensation, like insurance, serves its function in the marketplace by "spread[ing]" costs across a broad group. *Ortega v. Noxxen Realty Corp.*, 798 N.Y.S.2d 711, at *2 (Sup. Ct. Kings Cnty. 2004). When one unlucky member of that group is injured, he receives full *ex post* benefits in the form of payments to cover medical expenses actually incurred. *Id.* By definition, the vast majority of the group—i.e., uninjured workers—never receive a payout from workers' compensation.

157. The workers' compensation component of DCWP's minimum-pay rate works in the exact opposite way. Under the Rule, *every* member of the group receives a full financial benefit all the time—an extra $1.68 per hour, every hour—regardless of whether they suffer an injury. Conversely, if one unlucky member of that group is injured, the Rule does not fulfill the function that workers' compensation serves because it does not provide any relief from injury-related costs actually incurred. DCWP concluded that injured app-based workers averaged "$1,717 in medical care expenses." DCWP Report at 26. But a delivery worker who sustains a broken arm in their 100th hour of work will have made $160.80 in total workers' compensation money—a "small amount of additional cash" that will not cover medical expenses, and thus does not serve the

purpose of providing insurance coverage for on-the-job injuries. Public Comments on Second Proposed Rule at 336; *see also id.* at 349 ("an additional $1.68 per hour is a very poor substitute for occupational accident insurance"); *id.* at 85 (DCWP is "awarding amounts with no basis").

158. DCWP even conceded that delivery workers will not use money paid under the workers' compensation component to "purchase" actual workers' compensation coverage. Second Proposed Rule at 8. The workers' compensation component of the Rule is arbitrary and capricious.

159. *Second*, at least one company (DoorDash) would (absent changes) pay for *overlapping* insurance *twice*—yet DCWP failed to account for that aspect of the problem, despite the fact that commenters highlighted it during the rule-making process and also offered straightforward solutions.

160. DoorDash "maintains occupational accident insurance" that covers up to $1 million in medical expenses for injuries suffered "while making a delivery on the platform." Public Comments on First Proposed Rule at 1420. "This coverage is available automatically to Dashers" at no cost to Dashers. *Id.* Under the Rule, whose stated goal was to "compensate" food delivery workers for ordinary workers' compensation benefits available to other workers, Second Proposed Rule at 8, DoorDash will thus pay for both (1) occupational accident insurance that covers New York City Dashers and (2) $1.68 per hour in workers' compensation payments to those same New York City Dashers. *See* Public Comments on First Proposed Rule at 1421.

161. DCWP did not dispute this double-payment problem. But neither did DCWP adjust its rule to account for it. DCWP rejected the proposal—advanced by DoorDash and independent third parties—to "allo[w] an exemption" to the workers' compensation pay requirement for platforms that already provide insurance, which exemption would have resolved the double-payments concern. Public Comments on First Proposed Rule at 1577; *see also id.* at 1586. DCWP

justified that decision by complaining that DoorDash's insurance coverage does not compensate for injuries sustained "during on-call time" and contains "less generous" coverage than the New York State workers' compensation system. Second Proposed Rule at 8. But the rational response to those concerns would have been to condition an exemption on meeting certain qualifications, not to deny an exemption entirely and thus allow a double-recovery problem to persist. Compounding the problem, DCWP said it would consider adopting an exemption in "future rulemaking" without articulating why it did not choose that option here. Second Proposed Rule at 8. That unexplained punt violates the administrative-law principle that an "agency is required to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives." *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 242 (D.C. Cir. 2008).

162. Further, even if DoorDash's current insurance policy does not *fully* capture the $1.68-per-hour value that DCWP has ascribed to workers' compensation coverage, *see* Proposed Rule at 9, DCWP could have, at a minimum, allowed DoorDash to take a corresponding *discount* to the workers' compensation component of the pay rate—rather than insisting that DoorDash pay twice for the same thing. Commenters proposed this "sensible policy" to DCWP after the Second Rule, explaining that DCWP should "allow an app to pay a lower minimum pay rate per hour if it provides accident insurance to its delivery workers." Public Comments on Second Proposed Rule at 349 (Bronars Rep. II ¶ 21). But DCWP ignored that proposal. Its Rule adopted the "reasons stated" in the Second Proposed Rule because, in DCWP's view, comments about the workers' compensation issue simply "reiterated previous recommendations." Rule at 9. But that is not true—comments responding to the Second Proposed Rule raised additional viable solutions to the workers' compensation issue that DCWP had not confronted or rejected. Agencies must

acknowledge "suggestions received during the public comment period" and provide an "explanation" for not adopting them. *Med. Soc'y of State v. Serio*, 100 N.Y.2d 854, 870 (2003); *see PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) (agency's failure to "respond meaningfully" or "directly" to commenters' concerns "renders [a rule] arbitrary and capricious"). DCWP failed that test here.

E. The Rule Was Premised On An Unsupported Assumption That Restaurants Earn 0% Margin On Delivery Orders.

163. The Rule reveals DCWP's shoddy evidentiary foundation in other ways. DCWP modeled the Rule based on an assumption that restaurants will operate at a "0% margin on app delivery." Rule at 21. (This assumption was revealed only through Uber conducting an expert analysis of material disclosed only through a Freedom of Information Law request. *See* Public Comments on Second Proposed Rule at 298.) But this assumption is not supported by the authority DCWP cites. And on its face, this is nonsensical: why would thousands of New York City restaurants be included on Petitioners' platforms if the orders gave them 0% margin? The truth is, they don't. Notaro Aff. ¶ 9; Thiam Aff. ¶ 9. Because the Rule is "not based on a rational, documented, empirical determination," it must be set aside. *Axelrod*, 78 N.Y.2d at 168.

164. In the Rule, DCWP claims its "finding" was "consistent with prior research." Rule at 21 (citing DCWP Report). The DCWP Report, in turn, asserts that a "recent analysis found that margins on app deliveries were slightly negative for restaurants nationally." DCWP Report at 10 (citing Kabir Ahuja, *Ordering in: The rapid evolution of food delivery*, McKinsey & Co. (Sept. 2021)).[12] But the McKinsey article does not say that restaurants operate at $0 margin, or even that margins on app deliveries are slightly negative. Instead, the McKinsey article says that as the

[12] The McKinsey article is available at https://www.mckinsey.com/industries/technology-media-and-telecommunications/our-insights/ordering-in-the-rapid-evolution-of-food-delivery#/.

COVID-19 pandemic began, restaurants' "overall profits generally declined, *occasionally* resulting in negative margins." Ahuja, *Ordering in*, *supra*. Occasional negative margins is not the same as constant negative margins, much less $0 margins. A core premise of DCWP's Rule, therefore, relied on a factual assertion that is irrational and unsupported by record evidence.

165. Nor was it rational for DCWP to rely on the McKinsey article. It is not peer-reviewed and does not disclose its sources. And it uses data collected during the COVID-19 pandemic—a different time for the restaurant business—so it could not predict present-day trends in the restaurant industry generally. As Uber explained, the model underlying the Rule assumes that restaurants would irrationally continue to accept delivery orders at a 0% margin even if orders were to decrease significantly. Public Comments on Second Proposed Rule at 298.[13]

166. Perhaps recognizing that its reliance on the McKinsey article was flawed, DCWP also said its 0% margin assumption was "also confirmed" through "discussions with restaurant industry stakeholders." Rule at 21. That's a candid lack of transparency. DCWP doesn't say who those discussions were with or what those discussions entailed. Nor was any evidence of those discussions in the rulemaking record for Petitioners and other interested members of the public to see, evaluate, and comment on. And there could be even more problems in the as-yet-unreleased FOIL responses. *See supra*, at 17 n.4.

167. For these reasons, basing the Rule on the assumption that restaurants operate at a 0% margin, supported only by skewed data and unsourced "discussions," is arbitrary and capricious.

[13] DCWP also assumed that industry growth for third-party food service deliveries would continue at the historically high rate of 17%, as in previous years. This assumption was wrong—and it makes the Rule's effects even more disastrous. For example, if the annual growth rate is half of what the Department assumes (8.5%), DCWP predicts a 25% reduction in total deliveries and in Petitioners' total gross margins, equal to 35 million fewer trips and a staggering $147 million less in gross margin. Rule at 15–16 (Table 7).

II. The Court Should Enjoin Enforcement Of The Challenged Rule Pending Adjudication Of The Petition.

168. A preliminary injunction is warranted if the movant demonstrates "(1) a likelihood or probability of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of granting the injunction." *Stockley v. Gorelik*, 24 A.D.3d 535, 536 (2d Dep't 2005). All three elements are met here.

A. Petitioners Are Likely To Succeed On The Merits.

169. To establish likelihood of success, Petitioners need only make a "*prima facie* showing," and need not demonstrate a "certainty of success." *Parkmed Co. v. Pro-Life Counselling, Inc.*, 91 A.D.2d 551, 553 (1st Dep't 1982); *see also McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co.*, 114 A.D.2d 165, 172–73 (2nd Dep't 1986) ("[A] prima facie showing of a right to relief is sufficient; actual proof of the case should be left to further court proceedings."). Indeed, a likelihood of success can be established "even when facts are in dispute" and the "evidence presented" is "not…'conclusive.'" *Ma v. Lien*, 198 A.D.2d 186, 187 (1st Dep't 1993); *accord, e.g.*, *Stockley*, 24 A.D.3d at 536 ("The existence of an issue of fact 'shall not in itself be grounds for denial of the motion.'" (quoting CPLR 6312(c))). Where, as here, "injunctive relief can be tailored to preserve the *status quo* with little prejudice to either side," or "denial of injunctive relief would render the final judgment ineffectual," the "degree of proof required as to the elements, other than irreparable injury and the balancing of the equities, for a preliminary injunction may be accordingly reduced." *Ma*, 198 A.D.2d at 187; *accord O'Henry's Film Works, Inc. v. Bureau of Ferry & Gen. Aviation Operations*, 111 Misc. 2d 464, 469 (Sup. Ct. N.Y. Cnty. 1981).

170. "[A] governmental entity's serious substantive and procedural violations of applicable laws are in and of themselves sufficient to establish a likelihood of success on the

merits." *Lee v. NYC Dep't of Hous. Pres. & Dev.*, 162 Misc. 2d 901, 909 (Sup. Ct. N.Y. Cnty. 1994).

171. Here, based on the strength of their arguments, as described in detail above, Petitioners are significantly more likely than not to succeed on their Article 78 petition. At a minimum, Petitioners have established a prima facie showing of success, which is all that is required at this stage to warrant preliminary relief.

B. Petitioners Will Suffer Irreparable Harm Absent Injunctive Relief.

172. Petitioners have also established the second prong of the preliminary injunction inquiry: they will be irreparably harmed if the Rule is permitted to go into effect. In New York, "[i]rreparable harm is an injury that is not remote or speculative but actual and imminent, and 'for which a monetary award cannot be adequate compensation.'" *Tom Doherty Associates, Inc. v. Saban Entertainment, Inc*., 60 F.3d 27 (2d Cir. 1995) (citation omitted). Absent an injunction, Petitioners in this case face imminent, unredressable harm in at least two forms: (1) damage to their business relationships, reputations, and goodwill; and (2) significant monetary damages that are difficult to quantify and are unrecoverable.[14]

173. If forced to comply with the Rule, Petitioners will need to eliminate much of the flexibility that delivery workers prize. One or both Petitioners will need to raise fees on consumers; they will need to reduce delivery radiuses, drastically impacting the reach and revenue of their merchant partners; and they will be required to bundle more deliveries, which will slow down the speedy delivery times their consumers value. This will cause significant damage to their

[14] As public companies, Petitioners are limited in the type of information they can disclose in a public filing, but would be prepared to provide more specific details regarding the expected financial impact of the Rule under seal should the Court find that information pertinent.

reputations, business relationships, and goodwill, and will cause them to permanently lose consumers, delivery workers, and merchants.

1) Complying with the Rule will damage Petitioners' business relationships, reputations, and goodwill.

174. Irreparable harm exists where a business's relationships, reputation, or goodwill[15] will be impaired. *See Asprea* v. *Whitehall Interiors NYC, LLC*, 206 A.D.3d 402, 403 (1st Dep't 2022) ("[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."); *FTI Consulting, Inc. v. PricewaterhouseCoopers LLP*, 8 A.D.3d 145, 146 (1st Dep't 2004) (similar); *Destiny USA Holdings, LLC v. Citigroup Global Mkts. Realty Corp.*, 69 A.D.3d 212, 222 (4th Dep't 2009) (similar for "[h]arm to business reputation"); *Konishi v. Lin*, 88 A.D.2d 905, 905 (2d Dep't 1982) (similar for "loss of patients" and "damage to [] reputation"). Where, as here, a business's "success is dependent on its relationships with an array of" partners, "collateral consequences to [movant's] business" constitute irreparable harm. *TVT Recs. v. Island Def Jam Music*, 225 F. Supp. 2d 398, 404 (S.D.N.Y. 2002).

175. Petitioners' businesses depend on the strong relationships, reputations, and goodwill they have cultivated with consumers, merchants, and delivery workers. *See, e.g.,* Poykayil Aff. ¶¶ 5–12; Schechner Aff. ¶¶ 4–8. Petitioners' success is literally tied to the success of their merchants and delivery workers in satisfying consumers.

176. *Consumers*. Thousands of consumers in New York—who have placed at least hundreds of thousands of orders via third-party delivery services—rely on Petitioners because their

[15] Goodwill refers to "the expectancy of continued patronage," *Singas Famous Pizza Brands Corp. v. New York Advert. LLC*, 2011 WL 497978, at *6 (S.D.N.Y. Feb. 10, 2011), *aff'd*, 468 F. App'x 43 (2d Cir. 2012), and "constitutes the intangible qualities of a business that attract customers, including the company's reputation in the market with respect to both current and potential customers." *Nat'l Elevator Cab & Door Corp. v. H & B, Inc.*, 2008 WL 207843, at *5 (E.D.N.Y. Jan. 24, 2008), *aff'd and remanded*, 282 F. App'x 885 (2d Cir. 2008).

platforms enable fast ordering and on-demand delivery from a wide range of merchants. Schechner Aff. ¶ 5; *see also* Poykayil Aff. ¶ 12. In particular, food "delivery sales have been growing faster than the restaurant industry as a whole." DCWP Report at 9. Petitioners' reputation, goodwill, and relationships with consumers are based on, among other things, Petitioners' reasonable fees, wide selection of merchants and robust delivery radiuses, and user-friendly websites and apps that feature minimal distracting advertisements. Poykayil Aff. ¶¶ 12, 49; Schechner Aff. ¶¶ 41, 55, 60.

177. *Merchants*. Petitioners partner with thousands of New York City merchants, who trust Petitioners to provide important services that are often prohibitively expensive for smaller businesses to perform on their own, including marketing, delivery and pickup, sales analytics, customer support, and technology and product development. Poykayil Aff. ¶¶ 6–7; Schechner Aff. ¶¶ 4–6. Through their expansive platforms and wide delivery radiuses, Petitioners give merchants opportunities to expand their consumer bases and grow their businesses, at affordable commission rates. Poykayil Aff. ¶¶ 6; Schechner Aff. ¶¶ 6, 41; Notaro Aff. ¶ 6; Thiam Aff. ¶¶ 5, 8.

178. DCWP estimates that 92% of restaurants in New York City prepare orders for delivery, and most do not employ their own delivery workers, instead relying exclusively on couriers sourced by third-party delivery services like Petitioners to fulfil delivery orders. DCWP Report at 10. Thirty-two percent of New York City restaurants that prepare orders for delivery use delivery workers sourced by third-party delivery services to deliver at least some of their takeout orders. *Id.* Grubhub and DoorDash power deliveries for 67% and 63% of the restaurants that prepare orders for delivery, respectively. *Id.*

179. Many merchants expressed their high regard for Petitioners by submitting comments to DCWP, including that "[a]pp-based food delivery services have been a lifeline for

restaurants attempting to build back following the COVID-19 shutdown," Public Comments on First Proposed Rule at 1552, and that "[w]hile we have always loved welcoming customers into our restaurant, our business changed significantly after the pandemic, when we joined delivery platforms like DoorDash and UberEats that help us reach new customers and grow our business," Public Comments on Second Proposed Rule at 377.

180. *Delivery workers*. Petitioners' strong relationships and favorable reputations with the delivery workers with whom they contract are part of Petitioners' success. Delivery workers are drawn to Petitioners for the flexibility they provide—including by letting delivery workers set their own schedules, and choose which and how many orders to accept and where they want to deliver. Poykayil Aff. ¶¶ 9–10, 38, 42; Schechner Aff. ¶¶ 8, 36.

181. Delivery workers told DCWP that they "really enjoy working with DoorDash it's a great help when you need cash on hand and has flexible hours and I can work with my kids and my family at the same time I'm really happy I ran into this because it has helped me and my family very much," Public Comments on First Proposed Rule at 1691, and noted that "Doordash is in a unique position" because it can provide flexible part-time work "depending on the needs of the individual worker. I for example, am not able to find part-time work due to my schedule at my first job, save for doordash," Public Comments on First Proposed Rule at 1760. Another delivery worker explained that delivering with Grubhub and DoorDash "turned out to be one of the best [] decisions I've made," and the fact that these companies are "working with, and not against, their delivery partners, not only seeking input but actually implementing the ideas that work . . . has helped to create new bonds in our communities, as restaurants (old and new), drivers and customers engage and 'discover' each other." Public Comments on First Proposed Rule at 1702–04.

182. DCWP acknowledges that in order to absorb the increased cost of the Rule's minimum pay rate without significantly impairing their profitability, Petitioners will be forced to change their operations and processes in ways that offset these costs. For example, DCWP assumes that Petitioners will raise the fees and commissions they charge consumers and merchants and will also make a number of changes to "increase [delivery partners'] productivity." DCWP Report at 35. But DCWP fails to recognize that these changes will eliminate or significantly impair many of the benefits that are at the heart of Petitioners' relationships with their delivery workers, consumers, and merchant partners.

a. Petitioners will be irreparably harmed from passing increased costs on to consumers.

183. Petitioners will offset the increased labor costs required by the Rule in part by making changes designed to increase their revenues. Poykayil Aff. ¶ 60; Schechner Aff. ¶¶ 24, 42. As DCWP acknowledged, "[d]elivery apps generate revenue by charging fees to restaurants and consumers." DCWP Report at 8.[16] It is not feasible for Petitioners to generate the additional revenue they will need by charging merchants higher commission rates and fees. "Any increase in commissions would be harmful to" many of the merchants Petitioners partner with, particularly the large number that use Petitioners for delivery services, because "[t]he costs of hiring a delivery worker, plus the van and insurance, make it too expensive for [them] to do delivery on [their] own." Notaro Aff. ¶¶ 11, 8. Many of these businesses simply "cannot afford to pay higher commissions." *Id.* ¶ 11; *see also* Thiam Aff. ¶¶ 11, 15. If commission fees become high enough that merchants can no longer afford to pay them, merchants will terminate their relationships with Petitioners. Notaro Aff. ¶ 9; Thiam Aff. ¶ 9. And even if Petitioners did not face these practical

[16] At least one Petitioner may also seek to raise additional revenue by increasing the number of ads that consumers will see on the Petitioner's platforms, but this is likely to alienate consumers who appreciate the Petitioner's streamlined app experience, and result in consumers placing fewer orders. Schechner Aff. ¶¶ 60-61.

limitations on raising merchant commissions and fees, City law also imposes caps on the amounts Petitioners can charge. Poykayil Aff. ¶ 24; Schechner Aff. ¶ 28.

184. Accordingly, as DCWP predicted, one or both Petitioners must therefore also generate additional revenue by raising the fees they charge consumers or imposing new, additional fees. DCWP Report at 34; *see also* Poykayil Aff. ¶ 60; Schechner Aff. ¶¶ 24–26, 44. These increased fees will reduce consumer demand. DCWP Report at 34. Petitioners have conducted in-depth studies of their consumer bases, which show that consumers are highly sensitive to fee changes, and a significant number will stop using Petitioners' platforms once fees rise. Poykayil Aff. ¶¶ 25, 61; Schechner Aff. ¶¶ 24–26.[17] DCWP itself recognized that rather than pay more for delivery, consumers may well order food and groceries through other, lower-cost channels, including dining-in or ordering takeout or delivery directly from restaurants. DCWP Report at 35.

185. Further, due to DCWP's flawed reading of Local Law 115, companies like Instacart will not be regulated by the Rule, and will be able to fulfill some of the same food orders from the same food-service establishments as Petitioners, Haspel Aff. ¶¶ 14–18, but without raising fees. The unregulated companies will likely seize upon this opportunity to shrink Petitioners' business in New York City by offering the same service at a lower cost.

186. In Petitioners' experience (and as courts have recognized), once a consumer stops using a particular delivery service and replaces it with a different alternative, it is unlikely that the

[17] Although DCWP contends that "apps could choose to reduce consumers' costs through changes to the user interface that discourage or eliminate tipping," DCWP Report at 36, the agency assumes for purposes of modeling the minimum pay rates set forth in the Rule that "tips per dollar ordered . . . would [] remain as present," *id.* at 34, and that "hourly tips will *increase* by $3.19 (45%) from $7.09 to $10.28. . . . from the increase in deliveries per hour," *id.* at 35 (emphasis added). At least one Petitioner plans to adopt DCWP's suggestion to adjust its tipping policy in order to ameliorate the "sticker shock" consumers will experience due to increased or additional fees, and expects that tips will decrease substantially as a result. Schechner Aff. ¶ 33. This will harm delivery workers by compensating them less than DCWP has projected, and will accordingly damage the Petitioner's relationship with its delivery workers. This damage will be particularly acute if the Petitioner's competitors do not also modify their tipping policies, and Petitioner is therefore left at a competitive disadvantage.

consumer will ever return, even if Petitioners ultimately prevail in this action and are able to lower their fees. Poykayil Aff. ¶ 25; Schechner Aff. ¶ 24; *Johnson Controls, Inc. v. A.P.T. Critical Sys., Inc*., 323 F. Supp. 2d 525, 532 (S.D.N.Y. 2004) (finding irreparable harm because "[o]nce lost . . . there is little guarantee that, should [movant] ultimately prevail in this action, these clients would return to [movant]."); *Battenkill Veterinary Equine P.C. v. Cangelosi*, 1 A.D.3d 856, 859 (3d Dep't 2003) ("Irreparable injury may be shown through a loss of [clients and] permanent loss of revenues from those . . . clients."). This type of customer loss is exactly the kind of irreparable harm that warrants an injunction. *See Teamquest Corp.* v. *Unisys Corp.*, 2000 WL 34031793, at *13 (N.D. Iowa Apr. 20, 2000) (finding irreparable harm where 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.").

b. Petitioners will be irreparably harmed by instituting other necessary cost-reducing measures.

187. Because Petitioners are constrained in their ability to generate additional revenue, they must also mitigate the Rule's financial impact by reducing their expenses. DCWP recognized that "the rule will incentivize apps to make operational changes to use workers' time on the apps more efficiently, increasing deliveries per hour." DCWP Report at 31. And DCWP acknowledged that because the Rule will require Petitioners to pay delivery workers for idle on-call time in which the worker is logged onto Petitioners' platforms but not actually accepting or delivering orders, Petitioners would "mak[e] operational changes that limit on-call time." *Id*. Even then, the agency conceded that these changes would only "*partially* offset the increase in unit labor costs associated with higher pay." *Id*. (emphasis added). DCWP accurately predicted a number of the changes Petitioners will be forced to make if the Rule goes into effect, while dismissing their negative

effects. Many of these changes will significantly limit—if not outright eliminate—the flexibility that delivery workers say is integral to their relationships with Petitioners.

188. Delivery workers have made clear that "[they] need to be able to decide when [they] work and how much [they] work each week" so that even if, for example, they are "too exhausted" or busy to accept deliveries on certain days, they can "rest assured knowing [they] can [deliver] when [they] need to so that [they] make sure no bills go unpaid." Public Comments on First Proposed Rule at 1711. Similarly, "the freedom to choose which deliveries [they] accept" is of the utmost importance to delivery workers. *Id.* at 890; *see also* Poykayil Aff. ¶ 10; Schechner Aff. ¶¶ 40 ("80% of surveyed Dashers said they would not continue dashing if they were not free to turn down orders they did not want to take. And 83% said they would not continue to dash if they could not choose how much or how little to work.").

189. This flexibility exists because Petitioners do not currently restrict or limit idle time. As explained above, delivery workers can log on to Petitioners' platforms whenever they want from wherever they want and accept as many or few delivery offers as they want. Poykayil Aff. ¶¶ 10, 38–39; Schechner Aff. ¶¶ 8, 36. They can (and often do) even access multiple delivery platforms at the same time and accept offers from them interchangeably. Poykayil Aff. ¶¶ 11, 39; Schechner Aff. ¶ 8.

190. But DCWP correctly realized that Petitioners and their competitors will seek to reduce the amount of idle on-call time they must pay for by "tighten[ing] limits on access to their platforms, better matching supply to demand." DCWP Report at 35. DCWP completely failed to consider the domino effects of such a change. For example, in order to comply with the Rule, one Petitioner may be required to restrict access to its platform by, among other things: (1) permanently deactivating thousands of its current New York City-based delivery worker fleet

within the first few weeks or months of the Rule's effective date so that they no longer accrue any idle (or active trip) time, Poykayil Aff. ¶¶ 29–30; (2) requiring delivery workers in New York City to accept a certain percentage of the offers they receive or else be logged off and locked out of the platform for a designated period of time so that delivery workers cannot be indefinitely idle, *id.* ¶ 41; and (3) requiring drivers to pre-schedule their delivery blocks so that only a certain number of delivery workers are online accruing idle time at any given point, *id.* ¶ 43. DCWP also "is not permitting apps to withhold payment from workers for time spent on cancelled trips," Rule at 14, so to avoid potentially paying for fraudulent conduct—such as where a worker accepts a trip without intending to ever actually complete it and then cancels—Petitioners may have to effectively take the most restrictive possible measure and deactivate delivery workers who cancel trips. Relatedly, DCWP also correctly predicted that Petitioners and their competitors will need to increase delivery efficiency by taking steps like "strategically restrict[ing] delivery distances or limit[ing] service to the times and places where delivery can be provided affordably," and making "changes in how they match workers to deliveries," including through bundling orders, in which "a worker may pick up two orders from the same restaurant and deliver them sequentially." DCWP Report at 36. Once again, DCWP failed adequately to take into account the negative effects of such changes. If the Rule goes into effect, one Petitioner will indeed likely need to impose geographical limitations to prevent delivery workers located outside New York City (for instance, in Westchester County) from receiving or accepting offers to deliver in the City (and vice versa). Poykayil Aff. ¶ 46. And Petitioners will also need to reduce delivery radiuses. Poykayil Aff. ¶ 50; Schechner Aff. ¶ 42. Both of these changes will limit the distance delivery workers have to travel during deliveries, which will decrease their average trip time and allow them to complete more deliveries in any given period. Poykayil Aff. ¶ 50; Schechner Aff. ¶ 42. Similarly, at least one

Petitioner will likely bundle substantially more orders, which will increase trip time but reduce the overall number of offers that are available to delivery workers. Poykayil Aff. ¶¶ 55, 65.

191. Merchants use Petitioners to expand the number of consumers they can reach, and provide those consumers with prompt delivery service. Thiam Aff. ¶ 5; Notaro Aff. ¶ 7; Poykayil Aff. ¶¶ 6, 68; Schechner Aff. ¶¶ 6, 46. Specifically, merchants report that they "regularly receive[] orders for delivery from customers outside of the neighborhoods where [their businesses] are located, who otherwise probably would not know about [the merchant] or would not bother to order from us because they are too far away to conveniently order on premises or place pick-up orders." Thiam Aff. ¶ 12. By reducing delivery radiuses, Petitioners will also reduce the broad consumer reach they currently provide their partners. Notaro Aff. ¶ 12; Poykayil Aff. ¶¶ 6, 51; Schechner Aff. ¶ 47. In addition, bundling orders more frequently will increase the amount of time some consumers must wait for their deliveries, which will in turn increase customer dissatisfaction with both the delivery service and merchant, thereby undermining another key benefit Petitioners currently provide to their merchant partners and consumers. Poykayil Aff. ¶¶ 66–67.

192. Petitioners will also attempt to mitigate the increased costs of the Rule by taking steps to limit the number of little- or no-profit orders they facilitate. For instance, Petitioners will reduce or eliminate consumers' ability to place (and merchants' and delivery workers' abilities to fulfill) small orders because the increased cost of delivery pay will now exceed the revenue Petitioners can generate on these types of orders through consumer and merchant fees. Poykayil Aff. ¶ 57; Schechner Aff. ¶ 50. One Petitioner is also considering whether to adjust its algorithm to give greater prominence to merchants who generate higher profits for the Petitioner (including because they do not use the Petitioners' delivery worker services). Poykayil Aff. ¶ 54. In turn,

less profitable merchants are likely to see a decrease in their order volume, and consumers will have a harder time finding merchants they like.

193. Each of these changes necessitated by the Rule will eliminate many of the benefits that are essential to Petitioners' relationships with their consumers, merchant partners, and delivery worker partners and permanently damage those relationships. The changes will also undermine the strong reputations and goodwill Petitioners have built in their years of operation in New York City. Poykayil Aff. ¶¶ 31, 52, 58, 61, 67; Schechner Aff. ¶¶ 23, 40, 54. This damage to "the intangible qualities of a business that attract customers, including the company's reputation in the market with respect to both current and potential customers," constitutes irreparable harm that necessitates injunctive relief. *Nat'l Elevator*, 2008 WL 207843, at *5; *see also New York City Triathlon, LLC v. NYC Triathlon Club, Inc*., 704 F. Supp. 2d 305, 343 (S.D.N.Y. 2010) (where challenged conduct "mak[es] it more difficult for Plaintiff to secure sponsors" and "is likely to compromise [movant's] relationship" with a partner, "[p]rospective loss of this goodwill alone is sufficient to support a finding of irreparable harm.").

2) The Rule will impose costs upon Petitioners that are difficult to quantify, and in any event, are not recoverable.

194. A party can also establish irreparable harm "where there is a threatened imminent loss that will be very difficult to quantify at trial." *Tom Doherty*, 60 F.3d at 38. Courts have found that customer loss constitutes irreparable harm because "it would be very difficult to calculate monetary damages that would successfully redress the loss of a relationship with a client that would produce an indeterminate amount of business in years to come." *Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 69 (2d Cir. 1999); *see also Register.com, Inc. v. Verio, Inc*., 126 F. Supp. 2d 238, 248 (S.D.N.Y. 2000), *aff'd as modified*, 356 F.3d 393 (2d Cir. 2004) (irreparable harm exists because "[n]either this Court nor the parties to this action could calculate with any precision the

amount of the monetary loss which has resulted and which would result in the future from the loss of Register.com's relationships with customers and co-brand partners."). Here, Petitioners are likely to permanently lose consumers, merchant partners, and delivery workers as a result of the reputational and other damage they will suffer as a result of the changes described above, and the financial impact of those losses cannot easily be quantified.

195. It will also be difficult to quantify the harm Petitioners will incur due to lost future opportunities, although they are likely to be substantial. If they are unable to offer the benefits that drew consumers, merchants, and delivery workers to Petitioners in the first place, Petitioners will struggle to establish new relationships and improve their reputations. For instance, some smaller merchants (particularly those in lower-income areas) will likely be unable to afford higher commission fees, or they won't find value in Petitioners' platforms after delivery radiuses are reduced and small orders are eliminated. Poykayil Aff. ¶¶ 58, 61; Schechner Aff. ¶¶ 47–48, 53–54. Petitioners will likely struggle to recruit new delivery workers if they cannot offer flexible work opportunities. Poykayil Aff. ¶ 48. Petitioners' ability to continue to scale and grow their businesses in the future will therefore be seriously constrained. Poykayil Aff. ¶ 33. In addition, existing and future consumers may be unwilling or unable to use Petitioners' services because of the higher fees or more limited merchant selection, among other reasons. Poykayil Aff. ¶¶ 61, 63; Schechner Aff. ¶¶ 56–57, 59. The damages that flow from this loss of existing and future business will be difficult—if not impossible—to calculate and redress, and therefore qualify as irreparable harm. *John E. Andrus Mem'l, Inc. v. Daines*, 600 F. Supp. 2d 563, 571–72 (S.D.N.Y. 2009) (finding irreparable harm where customers "would cease" giving new business to the plaintiff and existing customers "would begin seeking alternative" arrangements).

196. In addition to the increased costs associated with the minimum-pay rate, Petitioners have already incurred significant costs to prepare for the Rule, and those costs will continue to grow at a substantial rate if the rule goes into effect. Poykayil Aff. ¶¶ 26–27; Schechner Aff. ¶ 30. Petitioners have devoted thousands of hours of employee time, including engineering and programming time, as a precautionary measure and at substantial cost to prepare to reconfigure their platforms in light of the changes that are effectively necessitated by the Rule. Poykayil Aff. ¶ 30; Schechner Aff. ¶¶ 26–27.

197. And because they only have a limited number of engineering and programming employees, Petitioners need to prioritize implementing the changes described above instead of pursuing other key initiatives Petitioners had planned to explore. Schechner Aff. ¶ 31; Poykayil Aff. ¶ 27. The costs associated with these lost or delayed opportunities are not easily calculated. Schechner Aff. ¶ 31. And these costs will continue to grow if the Rule is permitted to go into effect. Petitioners anticipate that they may need to spend as much as tens of thousands of employee hours in the future over the course of several months to finish implementing the various changes and ensure ongoing compliance with the Rule. Schechner Aff. ¶ 30; Poykavil Aff. ¶ 27. These costs cannot be recovered if the Rule is later invalidated.

198. Indeed, there is also no vehicle to recover damages from DCWP if Petitioners ultimately prevail. Article 78 proceedings do not provide a means of financial recovery, and only permit restitution or damages that are "incidental to the primary relief sought." CPLR 7806. Damages are incidental when 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 (Sup. Ct. N.Y. Cnty. 2013). That is not the case here, where DCWP is not withholding or retaining any funds from Petitioners,

and Petitioners do not seek to make it a "statutory duty" for DCWP to repay the money Petitioners will lose as a result of the Rule.

199. Moreover, Petitioners cannot file a separate damages action. Agencies like DCWP are immune from liability for damages when they engage in "a discretionary exercise of a governmental function." *Mehta v. New York City Dep't of Consumer Affs*., 162 A.D.2d 236, 237 (1st Dep't 1990). Although the Rule is arbitrary, capricious, and affected by an error of law, it is also a discretionary exercise of DCWP's governmental function. Therefore, even if Petitioners filed a separate action and won, they could not recover damages. Petitioners thus have no recourse to recover the many millions of dollars in damages they will incur as a result of the Rule, and this unrecoverable injury is the definition of irreparable harm. *See Metro. Taxicab Bd. of Trade v. City of New York*, 2008 WL 4866021, at *5–7 (S.D.N.Y. Oct. 31, 2008).

C. The Balance Of Equities Weighs Overwhelmingly In Petitioners' Favor.

200. The final prong of the preliminary-injunction inquiry involves a balance of the equities, which "requires the court to look to the relative prejudice to each party accruing from a grant or denial of the requested relief"—in other words, to determine whether "the irreparable injury to be sustained is more burdensome to [Petitioners] than the harm caused to [Respondents] through the imposition of the injunction." *Ma*, 198 A.D.2d at 186–87; *Klein, Wagner & Morris v. Lawrence A. Klein, P.C.*, 186 A.D.2d 631, 633 (2d Dep't 1992). Courts should also consider the public interests involved. *Seitzman v. Hudson River Assocs.*, 126 A.D.2d 211, 214 (1st Dep't 1987). The balance of equities typically "tilts in . . . favor" of parties like Petitioners in cases in which the Court must assess "which of the two parties would suffer most grievously if the preliminary injunction motion were wrongly decided." *Tradescape.com v. Shivaram*, 77 F. Supp. 2d 408, 411 (S.D.N.Y. 1999). The answer is unquestionably Petitioners.

201. Injunctive relief is appropriate here because Petitioners "merely seek to maintain the status quo" until the Court can resolve the underlying dispute on the merits. *Gramercy Co. v. Benenson*, 223 A.D.2d 497, 498 (1st Dep't 1996). The equities in this case weigh in Petitioners' favor.

202. Indeed, Petitioners will be immediately and irreparably injured if this flawed Rule is permitted to go into effect and they are forced to implement changes that will damage their businesses. *Kaufman v. O'Hagan*, 52 A.D.2d 562, 562 (1st Dep't 1976) (granting injunction where "serious possibilities of hardship justify maintaining the status quo."). As explained in greater detail above, the changes necessitated by the Rule will likely result in a permanent loss of consumers and the goodwill that Petitioners have spent years building, substantially impair Petitioners' carefully cultivated relationships with their merchant and delivery partners, and significantly decrease Petitioners' order volume and associated revenues.

203. These changes will also negatively impact consumers, merchants, and the very delivery workers the Rule seeks to benefit. As explained by Kathleen Reilly, the NYC Government Affairs Manager for the New York State Restaurant Association in a public comment on the First Proposed Rule:

> 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 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.

Public Comments on First Proposed Rule at 1553.

204. Merchants echoed the devastating effects they anticipate if the Rule is made effective, with one explaining that "80% of our business is from these delivery platforms. . . . Our

business will likely have to close if we are not able to get enough delivery orders." Public Comments on First Proposed Rule at 1546; *see also* Notaro Aff. ¶¶ 10–14; Thiam Aff. ¶¶ 10–15. And delivery workers described how they will be harmed if the Rule goes into effect: "With a full time job schedule and a family, having the flexibility to choose when I decide to dash, or not, is worth its weight in gold to me and if that choice is taken away from me, it will have a severe impact on me." Public Comments on First Proposed Rule at 1745.

205. In addition, the changes Petitioners must make to comply with the Rule will likely disproportionately affect smaller businesses and consumers in lower-income areas who cannot afford to pay increased fees. Poykayil Aff. ¶ 61; Schechner Aff. ¶ 25. It is particularly likely that smaller merchants will experience a devastating loss of business if their order volume declines because delivery radiuses decrease, they can no longer accept small orders, and lower-income consumers within their delivery radius cannot afford increased or additional delivery fees. Poykayil Aff. ¶¶ 51, 58; Schechner Aff. ¶¶ 47–48, 54.

206. In contrast, the only harm Respondents will suffer if they are enjoined and the Court ultimately denies the Petition is a temporary delay in effectuating the Rule. Respondents presumably will argue that delivery workers will be denied the opportunity to earn additional pay during the pendency of the case if an injunction is granted. But the platform changes that Petitioners will be forced to implement to comply with the Rule will harm delivery workers, merchants, and consumers, and that harm significantly outweighs any potential harm that delivery workers might suffer from a short delay of the Rule's effective date. And regardless, if the City believes delivery worker pay must be increased during the pendency of this Action, it remains free to "exercise [its] legislative prerogative" and take additional action. *See Vapor Tech. Ass'n v. Cuomo*, 118 N.Y.S.3d 397, 404 (Sup. Ct. Albany Cnty. 2020).

207. For all of these reasons, the equities tip strongly in favor of Petitioners and the entry of an injunction to maintain the status quo while this Petition can be decided.

III. This Court Should Issue A Temporary Restraining Order While It Adjudicates Petitioners' Request For A Preliminary Injunction.

208. CPLR 6301 permits this Court to enter a temporary restraining order pending a hearing on a preliminary injunction if "it appears that immediate and irreparable injury, loss or damages will result unless the defendant is restrained before the hearing can be held." CPLR 6301; *see Nassau Cnty. Town of N. Hempsted v. Cnty. of Nassau*, 929 N.Y.S.2d 833, 834 (Sup. Ct. Nassau Cnty. 2011) (temporarily restraining Nassau County from auditing petitioner's park district while court resolved Article 78 petition); *Flatiron Cmty. Ass'n v. N.Y.S. Liquor Auth.*, 784 N.Y.S.2d 823, 824 (Sup. Ct. N.Y. Cnty. 2004) (temporarily restraining nightclub from commencing business while court resolved Article 78 petition).

209. Here, the Court should enter a temporary restraining order maintaining the status quo and enjoining the Rule from becoming effective for the same reasons a preliminary injunction is warranted: (1) Petitioners are likely to succeed on their Article 78 petition; (2) Petitioners will suffer immediate and irreparable harm if the Rule goes into effect on July 12; and (3) the equities balance in favor of an injunction. *Gang v. Venegas*, 2008 WL 743842 (Sup. Ct. N.Y. Cnty. Mar. 7, 2008).

FIRST CAUSE OF ACTION

UNLAWFUL, ARBITRARY AND CAPRICIOUS, AND INVALID AGENCY ACTION IN VIOLATION OF CPLR ARTICLE 78

210. Petitioners repeat and re-allege the allegations of the preceding paragraphs as if set forth fully herein.

211. DCWP's decision to amend Subchapter H of Chapter 7 of Title 6 of the Rules of the City of New York set forth in the Department's Notice of Adoption of the Rule entitled

Minimum Pay for Food Delivery Service Workers published in the New York City Record on June 12, 2023 (the "Delivery Worker Pay Rule"), including without limitation amended section 7-805 and new subsections 7-810(b) and 7-810(c) of Title 6 of the Rules of the City of New York, was made contrary to its mandate and the definitions of Local Law 114 and NYC Admin. Code § 20-1501. DCWP's decision to adopt the Rule was affected by errors of law because it did so based on its incorrect understanding of the scope of its mandate. Under NYC Admin. Code § 20-1501, grocery-focused third-party delivery services clearly fall within the definition of a "third-party food delivery service," because grocery stores are clearly "food service establishments." DCWP wrongly determined that those third-party food delivery services fall outside of their mandate, and failed to consider those third-party food delivery services in its rulemaking process. The Rule was thus affected by an error of law.

212. DCWP based its Rule on a flawed survey, which cannot be relied upon. The survey tells respondents the goal of the survey at the outset, suggests the "correct" answers, presents leading questions to respondents, and was not distributed to delivery workers for grocery-focused delivery services like Instacart, whose responses would need to be factored into the empirical analysis before proposing the Rule.

213. DCWP's Rule also arbitrarily and capriciously includes all "on-call" time in its minimum pay rate. The Rule's inclusion of on-call time was based on DCWP's misconception of its authorizing statute, lacks a rational basis, and is not supported by adequate reasoning. DCWP further failed to respond adequately to alternative proposals.

214. DCWP's Rule also arbitrarily and capriciously includes a workers' compensation component in its minimum pay rate. The Rule's inclusion of a workers' compensation component is arbitrary and capricious because it is inconsistent with how workers' compensation systems

work, lacks an adequate justification, and fails to respond to problems identified in the rulemaking record.

215. DCWP's Rule also arbitrarily and capriciously relied on an assumption—that restaurants make a 0% profit margin on orders placed through third-party food delivery services—that is irrational on its face and unsupported by DCWP's evidentiary basis.

216. These requirements will harm everyone involved in food delivery, delivery workers, restaurants, small businesses, New York City, and New York City consumers, by forcing third-party delivery services to reduce delivery radiuses, increase fees, increase delivery wait times, decrease consumer choices, and reduce delivery work opportunities. These impacts will disproportionately affect small businesses and low-income communities.

217. DCWP's decision to adopt the Rule is therefore unlawful, invalid, unenforceable, and accordingly must be vacated and annulled.

NO PRIOR APPLICATIONS

218. Petitioners have made no prior application in this or any Court for the relief sought in this Petition.

TRIAL DEMAND

219. Petitioners demand an evidentiary hearing on all causes of action so triable.

PRAYER FOR RELIEF

WHEREFORE, Petitioners pray for entry of an order and a judgment, pursuant to CPLR 3001, 6301, 6311, 6312, 7801, 7803, 7805, and 7806:

1. Vacating and annulling the Rule in its entirety;
2. Preliminarily and permanently enjoining Respondents from implementing or taking any steps to enforce the Rule;
3. Awarding Petitioners the costs, fees, and disbursements incurred in connection

with these proceedings; and

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

Dated: July 5, 2023
New York, New York

Respectfully submitted,
GIBSON, DUNN & CRUTCHER LLP

By: */s/ Gabriel Herrmann*

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Attorneys for Petitioners

VERIFICATION

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

Katie Armistead, being duly sworn, states that she is Deputy General Counsel of Grubhub Inc., a Petitioner in this proceeding, and has read the foregoing Petition and knows the contents thereof; that the same is true to his own knowledge, except to matters therein that are stated upon information and belief or for which citations are provided; and as to those matters, she believes them to be true.

Katie Armistead

Sworn before me this
5th day of July, 2023

NOTARY PUBLIC

OFFICIAL SEAL
ELIZABETH C MACDOUGALD
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES: 8/9/2025

Sworn and subscribed before me by means of ✓ physical presence or ___ online notarization, this 5th day of July, 2023 by Elizabeth C. MacDougald

Elizabeth C. MacDougald
Signature of Notary Public

Printed Name: Elizabeth C. MacDougald

OFFICIAL SEAL
ELIZABETH C MACDOUGALD
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES: 8/9/2025

Commission Number: _____

Commission Expiration: 8/9/2025

Type of Identification Produced Personally Known

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

In the Matter of the Application of, DOORDASH, INC.; GRUBHUB, INC., Petitioners, For Judgment Pursuant to CPLR Article 78 – against – The NEW YORK CITY DEPARTMENT OF CONSUMER AND WORKER PROTECTION; VILDA VERA MAYUGA, in her official capacity as the Commissioner of the New York City Department of Consumer and Worker Protection; Respondents.	Index No. _____/2023 **CERTIFICATE OF CONFORMITY**

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

I, Samuel Lemberg, being duly sworn, depose and say:

1. I am attorney at law duly admitted to practice in the Illinois.
2. I am fully acquainted with the laws of the State of Illinois pertaining to notarial acts.
3. Based upon my review, Grubhub Inc.'s notarial acts as performed by Illinois commissioned notaries appear to conform with the laws of the State of Illinois.
4. I am swearing to this Certificate of Conformity in accordance with the requirements of the State of New York CPLR 2309(c).

Signature – Samuel Lemberg