No. 25-81

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOORDASH, INC.,

Plaintiff-Appellee,

GRUBHUB INC., PORTIER, LLC

Consolidated-Plaintiffs-Appellees,

v.

CITY OF NEW YORK,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of New York
No. 1:21-cv-7695 (Judge Analisa Torres)

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CORPORATE DISCLOSURE STATEMENT

DoorDash, Inc. is a publicly held corporation that has no parent company, and no publicly held corporation owns 10% or more of its stock.

Grubhub Inc. is a wholly owned subsidiary of Wonder Group, Inc., a private company. No publicly held corporation owns 10% or more of its stock.

Portier, LLC is a wholly owned subsidiary of Uber Technologies, Inc. ("Uber"), a publicly traded corporation. Based solely on filings with the Securities and Exchange Commission regarding beneficial ownership of the stock of Uber, neither Portier, LLC nor Uber is aware of any entity or individual who beneficially owns 10% or more of Uber's outstanding stock.

/s/ Michael Holecek
Michael Holecek

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INTRODUCTION

The City of New York's "Customer Data Law" (the "Law") is an unprecedented ordinance that compels Plaintiffs DoorDash, Portier (Uber), and Grubhub to divulge their private, sensitive customer information to restaurants without customers' affirmative consent, without any protections, and for nothing in return. *See* N.Y.C. Admin. Code § 20-563.7. The Law forces Plaintiffs to disclose information they otherwise would not share, squandering their years-long investment in building a loyal customer base that trusts Plaintiffs to hold and protect their personal information. The Law advances no legitimate government interest—let alone a substantial or compelling one—and is not sufficiently tailored in any event. The district court correctly held that the Law violates the First Amendment. This Court should affirm.

Plaintiffs are technology companies that offer food-ordering, delivery-facilitation, and restaurant-marketing services. Through Plaintiffs' apps and websites, customers can order food from thousands of restaurants. The Law forces Plaintiffs to disclose sensitive, personally identifying customer information—full names, phone numbers, delivery addresses, email addresses, and order contents for every order (collectively,

"Customer Data")—to *any* restaurant that requests it, from pushcarts to pizza shops. The Law imposes no privacy or data-security protections on the personal data turned over to restaurants, and is designed to allow merchants to use the data for their own commercial interests to Plaintiffs' detriment. What's more, customers who want to stop the disclosure of their private information must opt out of data sharing each and every time they place an order; otherwise, the Law presumes they have consented. If a customer forgets to opt out of data sharing when ordering a meal—even once—the restaurant can demand private data about the customer, and Plaintiffs must hand it over. As dozens of privacy-advocacy organizations, community groups, and dissenting Council Members warned during the legislative process, these compelled disclosures put customers—including vulnerable populations to whom data privacy is vital—at risk.

Plaintiffs play important roles in New York City's vibrant food industry. They offer a host of marketing products that empower restaurants to reach new and existing customers and make sales they otherwise would not. Contrary to the City's suggestion that Plaintiffs somehow prevent restaurants from accessing and forming lasting relationships

with customers, Opening Br. 1, the record shows the opposite: Plaintiffs offer, and many restaurants use, products that allow restaurants to access and own customer data with appropriate privacy protections. For years, Plaintiffs have offered restaurants a series of options (DoorDash Storefront, DoorDash Drive, Uber Direct, and Grubhub Direct) that enable restaurants to access all five categories of data that the Customer Data Law covers. With these options, restaurants can leverage Plaintiffs' technology to build their own customer-facing platforms—and, in turn, own the client relationship and accompanying data. Thousands of restaurants contract for and use these alternatives every day.

Restaurants that instead wish to avoid doing their own marketing to new and returning customers, processing orders and payments, analyzing their market performance, and investing in data security can contract with Plaintiffs to use their flagship "Marketplace" products. With Marketplace contracts, Plaintiffs make the investments to build and sustain their *own* technology and platforms. And Plaintiffs attract, retain, and market to customers, using the customers' contact information and order histories, to encourage them both to try new restaurants and order from old favorites.

The Law drives a truck through these carefully constructed business models. It allows restaurants already using Marketplace to demand the Customer Data that Plaintiffs invested hundreds of millions of dollars to collect and protect, and forces Plaintiffs to disclose that information *for free* so restaurants can use it to solicit Plaintiffs' customers and cut Plaintiffs out of the economic equation entirely.

As the district court rightly held, the Law violates the First Amendment because it cannot survive even intermediate scrutiny—the minimum default standard of review for laws "[m]andating speech that a speaker would not otherwise make." *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988); *accord Nat'l Inst. of Fam. & Life Advocates v. Becerra*, 585 U.S. 755, 768 (2018) ("*NIFLA*"). Neither the Law's ends nor its means are constitutionally appropriate.

With respect to the ends, the district court correctly held that the City cannot compel Plaintiffs' speech based on a "mere preference for one industry over another." Special Appendix ("SPA") 37. The City Council openly declared its intent to "drive future profits for restaurant owners" by handing restaurants all the benefits of Customer Data without having to pay the costs. Joint Appendix ("JA") 8105. But there is no substantial

government interest in using compelled speech as a "protectionist" tool to reconfigure an industry to the government's liking. *Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258, 263-64 (2d Cir. 2014).

Even if the Law's ends were legitimate, its means are impermissible. As the district court rightly concluded, the City failed to show the Law would "directly and materially advance[]" any substantial government interest. SPA33-38; *see Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488-89 (1995). And as the court correctly held, the City had several "[l]ess restrictive alternatives" available to "promote the same goal" without burdening as much speech. SPA37. The City admits it did not even consider those alternatives, much less prove their ineffectiveness. It was the City's burden to do so.

The City's primary argument for reversal is that the district court should have applied a less stringent standard of review under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985), which applies to compelled disclosure of "purely factual and uncontroversial information about the terms under which [the speaker's] services will be available." But the Customer Data Law does no such thing. To start, the Law requires Plaintiffs to disclose personally identifying information

about specific people, not the "terms" under which Plaintiffs' "services will be available." *Id.* These compelled disclosures constitute noncommercial speech implicating individuals' privacy interests, not routine commercial speech, such as disclosures about advertised products made to avoid consumer confusion or deception.

Further, the Law is not the kind of "informational disclosure" law that falls within *Zauderer*'s limited "exception" from the general rule that at least intermediate scrutiny applies to laws compelling speech. *Safelite*, 764 F.3d at 262. Rather, by requiring Plaintiffs to engage in speech that restaurants can then use to market for and seek out direct orders that bypass Plaintiffs' services altogether, the Law creates a "serious deterrent to commercial speech" and is "highly likely to further covert protectionist, rather than consumer information goals," *id.* at 264, making *Zauderer*'s application inappropriate. Disclosing Customer Data to restaurants does not prevent deception or inform customers, *Zauderer*, 471 U.S. at 651—it blasts sensitive personal information out to countless businesses with no privacy safeguards or meaningful limits on use.

Nor can the compelled disclosures be described as "uncontroversial." *NIFLA*, 585 U.S. at 768. Forcing Plaintiffs to disclose information

about New York City residents' locations (delivery addresses), contact information (phone numbers and emails), and food orders without their express consent implicates fundamental issues of personal-data privacy. That reality was underscored by the many individuals, community groups, privacy-interest groups, and legislators who cried foul throughout the legislative process.

But even if *Zauderer* applied, the Law would still violate the First Amendment. A regime under which Plaintiffs must bear the costs of building platforms, developing a customer base, and receiving orders, while they are compelled to disclose the resulting Customer Data to restaurants—indefinitely, for free, and without protection—cannot withstand any level of scrutiny.

Because the Law violates the First Amendment, this Court should affirm.

STATEMENT OF THE ISSUE

Did the district court correctly conclude that the Customer Data Law violates the First Amendment?

STATEMENT OF THE CASE

I. Plaintiffs structured their business models around their customer relationships and customer data.

Plaintiffs are technology companies that offer online products for restaurants to enhance their businesses, expand their range, and connect with new and existing customers. JA8126, JA8161, JA8237-40.

Plaintiffs offer two types of products relevant to this case. Their main products—DoorDash Marketplace, Uber Marketplace, and Grubhub Marketplace—are app-based platforms where consumers can browse and order from dozens of available restaurants. They connect Plaintiffs' customers with restaurants and offer those restaurants a suite of marketing and delivery-facilitation services. If restaurants want the exposure of being on Plaintiffs' Marketplaces and the related marketing opportunities, they can use these products with the understanding—and contractual agreement—that Plaintiffs will own the customer relationships and any associated customer data.

Plaintiffs also offer other products—DoorDash Storefront and DoorDash Drive, Uber Webshop and Uber Direct, and Grubhub Direct—where the *restaurant* takes responsibility for attracting customers to and

through the restaurant's *own* website. Plaintiffs assist by providing certain back-end technology solutions or delivery-facilitation services to complete the restaurants' orders. In those cases, the *restaurant* owns the customer relationship and associated customer data that it obtains through its own channel.

A. Plaintiffs' core "Marketplace" products connect restaurants with Plaintiffs' customers.

Plaintiffs' "Marketplace" platforms are their most popular products among restaurants and a core component of Plaintiffs' businesses. JA8126, JA8140, JA8163-64, JA8237. Because Plaintiffs do the work of building these platforms and attracting customers to them, Plaintiffs own the customer relationships and associated customer data.

1. Restaurants use Plaintiffs' Marketplace products because they provide restaurants with significant benefits.

Plaintiffs' Marketplace products connect thousands of New York City restaurants with potential customers (diners). JA8237, JA8139, JA8202. These products help restaurants reap the benefits of the rapidly expanding digital-food-delivery market, in which U.S. restaurant digital-delivery revenues increased from $9.8 billion in 2014 to $55.3 billion in 2022. JA8237, JA8128-29. These benefits include access to the 40% of

restaurant customers who prefer to order food online and spend 20% more on online orders. JA8237. By some estimates, 80% of online food-delivery sales are "incremental" for restaurants, meaning that a dine-in or takeout customer would not otherwise have placed the order. JA8240; *see* JA8129. By another estimate, platforms can help restaurants generate an "extra $288,000 of revenue per year." JA8240; *accord* JA8161-62. Given these benefits, Plaintiffs' Marketplace products are, by far, their most popular offerings. JA8140, JA8163, JA8237, JA2995.

2. Plaintiffs' Marketplace products use Customer Data to benefit restaurants and customers.

Plaintiffs' customers sign up for and use Plaintiffs' Marketplace platforms to order from among thousands of local restaurants with whom Plaintiffs have partnered. JA8126, JA8163-64, JA8237. Plaintiffs often then facilitate delivery or customer pickup of the order. JA8126, JA8163-64, JA8237.

Customers provide Plaintiffs with personally identifying information, including that which effectuates the delivery or pickup: first and last name, delivery address (if using delivery), email address, phone number, and order contents. JA313, JA8131-32, JA8172-73, JA8245. These are the same five categories of Customer Data that the Law covers.

Plaintiffs' "most valuable asset is our relationship with our diners," and these relationships rely on Plaintiffs maintaining ownership of Customer Data. JA8247. That is because Plaintiffs' Customer Data powers the marketing, promotion, and success of their Marketplace products. Plaintiffs can—in several ways, and while helping restaurants—monetize information about what food customers order, what kinds of restaurants they like, and where their orders are delivered.

First, Plaintiffs can use Customer Data to offer relevant advertisements or promotions. For example, Plaintiffs can send promotional offers to customers who have never ordered with particular restaurants, enabling restaurants to reach new customers. JA8135. Plaintiffs can also identify customers who regularly order pizza, for example, and then present those customers advertisements, deals, and promotions for new pizza restaurants. JA8134; *see also* JA8135, JA8169-70, JA8246-47. Plaintiffs also help restaurants reconnect with customers by identifying "lapsed" users—i.e., those who enjoy a certain food or restaurant but have not ordered that food or from that restaurant recently—and then sending those users personalized ads or promotions. JA8135, JA8246-47. Res-

taurants thus can use Plaintiffs' many data-driven solutions to "incentivize customers to order from their specific store[s]" on Plaintiffs' platforms. JA8134-35, JA8237-39.

Second, Plaintiffs offer data-driven analytics tools that help restaurants make business decisions. JA8129, JA8137, JA8170, JA8237-42. For example, Plaintiffs' tools help restaurants understand where customers order from and pinpoint "optimal locations" for additional stores. JA8137. Plaintiffs can also help restaurants increase sales by analyzing restaurants' menu options and customer profiles. JA8137; *see* JA8237-39. Restaurants can also access data about their menu performance and customer feedback. JA8129, JA8237-39.

Third, Plaintiffs use Customer Data to market their own products to attract customers to Plaintiffs' platforms. JA8132, JA8245-47. When customers order from restaurants using Plaintiffs' platforms, everyone wins. If a customer finds a new restaurant using Plaintiff's platforms, that restaurant makes a sale—and earns potential future business—that it otherwise might have missed. *See supra*, at 9-10.

Plaintiffs are compensated for the work they do and the value they bring. Specifically, Plaintiffs earn revenue (negotiated commissions)

from restaurants for orders placed on their platforms. JA8126, JA8129, JA8163, JA8241-42. Plaintiffs also earn fees from restaurants that use Plaintiffs' suite of marketing tools. JA8135, JA8224-25, JA8241-42. This compensation is the result of Plaintiffs' ongoing, and successful, efforts to maintain strong relationships with their customers in a way that helps both restaurants' and Plaintiffs' businesses succeed. Plaintiffs have invested tens of millions of dollars in advertising and marketing to grow their customer databases and build their platforms. *E.g.*, JA8247, JA8256. Today, tens of millions of people use Plaintiffs' platforms every month across the country, and New York City is one of Plaintiffs' largest markets. JA8133, JA8161-62, JA8163, JA8237.

3. Plaintiffs' Marketplace contracts provide for limited sharing of Customer Data.

Plaintiffs work hard to maintain a business model that balances helping restaurants with protecting the value of Plaintiffs' investments and their customers' data. Given the importance of Customer Data to both Plaintiffs' businesses and customers' privacy, Plaintiffs structure their Marketplace contracts to clearly delineate who receives, owns, and controls that data.

Most restaurants using Marketplace products agree to a standard contract and terms of service. JA8144-47, JA8165, JA8255. Under these contracts, Plaintiffs *do not* share with restaurants a customer's full name, email address, non-masked phone number, or (where Plaintiffs facilitate delivery) delivery address. JA8146, JA8228, JA8230, JA8251-52, JA8285-90. Rather, Plaintiffs share the "minimum amount of information required" for the restaurant to prepare a particular order: a customer's first name, last initial, order information, and (for Grubhub) masked phone number. JA8146, JA8228, JA8251-52; JA301, JA402. Restaurants agree *not* to disclose the limited data they receive to third parties and not to use it to solicit Plaintiffs' customers. JA8145, JA8198, JA8206, JA8209, JA8251-52, JA8253-54; JA111. Indeed, these contracts often expressly state that the Customer Data belongs to Plaintiffs and not the restaurants. JA8281, JA8248-49, JA8170, JA8188, JA8285-90.

A very limited number of restaurants enter into customized Marketplace contracts that may include carefully negotiated, bespoke data-sharing provisions. JA8144, JA8149-51, JA8205, JA8258-59. There, the data is consideration Plaintiffs use in negotiations. Plaintiffs agree to additional data sharing in exchange for something of commensurate

value—for example, to secure a higher commission, a new relationship with a significant restaurant partner, or an exclusive partnership. JA8152, JA8258-59. And Plaintiffs generally limit sharing of their Customer Data to when a customer affirmatively opts *in* to sharing and the restaurant commits to using industry standards or best practices to keep Plaintiffs' Customer Data secure. JA8151, JA8204, JA8265-66, JA8273-75.

The details of these customized contracts vary by Plaintiff and by restaurant. At a high level, Plaintiffs may provide some additional categories of customer data to those restaurants, including full names, email addresses, and order contents. JA8150-52, JA8204, JA8251-52. But *zero* restaurants have contracts where Plaintiffs share *all five* categories of Customer Data as the Law defines it. *E.g.*, JA8151, JA8252-53; JA10554.

B. Plaintiffs offer alternatives to Marketplace that enable restaurants to build their own customer relationships.

Each Plaintiff offers alternatives to its Marketplace products for restaurants that want to build their own ordering channel, such as a restaurant-owned and -operated website, through which customers directly place their orders. The customer data garnered from those orders there-

fore belongs to the restaurant. When using these services, the restaurants use Plaintiffs' offerings for other purposes, which fall into two categories.

First, if a restaurant needs help building its own channel for customers to place online orders directly with the restaurant, Plaintiffs offer DoorDash Storefront, Uber Webshop, and Grubhub Direct. These products enable restaurants to add to their own websites an ordering platform powered by Plaintiffs' software. JA8127, JA8164, JA8239-40.

Second, if a restaurant only needs help delivering orders, DoorDash and Uber offer DoorDash Drive and Uber Direct, respectively. These products enable restaurants to take their own orders and then obtain delivery services from couriers that use Plaintiffs' applications. JA8128, JA8164.

Each product involves data-sharing and data-ownership relationships that differ from Marketplace relationships. Specifically, restaurants—not Plaintiffs—generate and receive the orders from customers. JA8141, JA8164, JA8249-51. Consequently, restaurants—not Plaintiffs—own the resulting customer data. JA8143, JA8249-51; JA263. For DoorDash and Grubhub, the restaurants receive the customer's full

name, phone number, delivery address, email address, and order contents. JA8143, JA8249-51. For Uber, the restaurant generally will receive the customer's first name, last initial, delivery address, and order contents, but can receive the customer's last name and email address if the customer affirmatively opts in to data sharing. JA8230.

With these products, the restaurant may transmit to Plaintiffs the minimal amount of data necessary to enable delivery—e.g., the customer's first name, last initial, and delivery address, as needed. JA8142-43, JA8230. But even then, restaurants retain the advantage they earned by winning the customer's order. DoorDash, for example, is contractually bound *not* to use the data it receives "to solicit Customers" or for any purpose other than facilitating orders. JA8143-44; JA263.

II. The City Council designed the Customer Data Law to economically advantage restaurants at Plaintiffs' expense.

In May 2021, Council Member Keith Powers introduced a bill that would become the Customer Data Law. JA8104. The Law's supporters did not hide their intentions to modify existing contractual arrangements, enable restaurants to use Plaintiffs' valuable Customer Data for free, cut Plaintiffs out of the transactions entirely, and disrupt Plaintiffs' business models.

As committee reports showed, the City knew that Plaintiffs "assert ownership" of the customer data they acquire through "their [own] products," and that this data "enables them to enhance their own services." JA529-31. But the City was determined to "attack[] an industry" that it "do[es]n't like." JA859. So the City set out to hamstring a foundational pillar of Plaintiffs' business models under the guise of creating "an equitable playing field between [third-party] platforms and the restaurants." JA833.

The City's express goal was to "drive future profits for restaurant owners" by giving restaurants the ability to use the Customer Data Plaintiffs collect to pull customers away from using Plaintiffs' platforms. JA574, JA580. Although Plaintiffs and restaurants are business partners, the City also recognized they may "compete"—the City's word, not Plaintiffs'—to a degree. JA661. When a City resident plans to order a meal, Plaintiffs want that person to order through their platform (benefitting both Plaintiffs and restaurants), while some restaurants want that person to order directly with them (benefitting only restaurants). Both restaurants and Plaintiffs thus advertise for customers to place online food orders, select promotions, and get food delivered.

As the legislative history makes clear, however, the City wanted to give restaurants Plaintiffs' Customer Data so restaurants could take customers from Plaintiffs. If restaurants had Plaintiffs' Customer Data, they could conduct "marketing outreach like offering promo codes . . . or special discounts" to Plaintiffs' customers—i.e., market directly to customers and entice them to order from the restaurants directly. JA530. Armed with Plaintiffs' Customer Data, restaurants could "bypass[]" Plaintiffs' platforms and "self-market" to diners. JA8256. The end result fundamentally disrupts Plaintiffs' business models: if restaurants can use Plaintiffs' data to ensure that a customer orders with the restaurant directly, then the customer won't use Plaintiffs' platforms to browse restaurants, use Plaintiffs' promotions, and place orders. This would "cut[]" Plaintiffs "out of the transaction" and cause them to lose customers. JA8257.

Some Council Members also said they sought to bail restaurants out during the COVID-19 pandemic. JA8105. But by the time the Law was enacted, the City and State had already lifted many of the COVID-19 safety measures on which the Law was purportedly premised. JA8123. So, as Council Member Yeger explained, the City's *permanent*

data-sharing ordinance "ha[d] nothing to do with COVID-19," and the City Council was "creatively stretch[ing] the relationship between the pandemic" and the Law. JA8121; JA801-02.

Plaintiffs heavily criticized the proposed Law, as did over 5,000 New York City residents, more than a dozen third-party organizations, and dissenting Council Members. JA8112-13 (collecting organizations' opposition letters); JA8118 (individuals' opposition letters).[1]

Plaintiffs explained to the Council that customers "do not expect their information to be shared" by Plaintiffs with restaurants. JA8108-09. After all, restaurants do not typically collect a trove of Customer Data "in the analog world" of sit-down diners. *Id.* Moreover, by refusing customers the ability to "opt-*in* to the sharing" of their data, many customers would *inadvertently* allow restaurants to receive their data. JA8112,

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[1] Groups that raised concerns include the Electronic Frontier Foundation, Tech:NYC, Americans for Tax Reform, American Consumer Institute Center for Citizen Research, National Action Network, New York Urban League, Arc of Justice, Gay Men's Health Crisis, Haitian American Caucus, Hispanic Federation, Asian American Federation, New York Immigration Coalition, Information Technology & Innovation Foundation, TechNet, New York City Hispanic Chamber of Commerce, National LGBT Chamber of Commerce, Internet Association, Data Catalyst Institute, and Catalyst Research. JA8112-18.

JA8115-21. And Plaintiffs already offer various products—such as DoorDash Storefront, Uber Webshop, and Grubhub Direct—that allow restaurants to collect their own customer data. JA8107, JA8239-40.

Additionally, community-interest groups explained that the Law posed "substantial privacy risks for all New Yorkers" and urged the City to adopt a "clear opt-*in* process," among other recommendations. JA8114 (emphasis added). The Electronic Frontier Foundation and Tech:NYC, for example, raised concerns that the Law "simply assume[d] that restaurants have the technical capacity to download this information and store it in a way that will not allow for unauthorized individuals to access it." JA8116. According to the Hispanic Federation, this posed a "risk of leaving already vulnerable communities further unprotected." JA8115. That group thus joined the "growing chorus of advocacy organizations" that opposed the Law because requiring an "individual to opt-*out* of every single transaction . . . runs counter to modern day privacy and transparency standards." JA8114-15 (emphasis added). Community groups urged the Council to adopt an opt-in, recognizing that one's ability to "keep their personal information private and confidential is often directly linked to their safety and security." JA8114.

Some City Council Members acknowledged these concerns. Council Member Yeger, for example, criticized the "anti-consumer bill." JA803. As he explained, the Law "forc[es]" disclosure of customers' private data to restaurants that may lack "the kind of secure platforms that the app companies have." JA803. And the Law's opt-*out* mechanism certainly did not address this concern. After all, "how many people read through the opt-out questions before they just[] [say] no, . . . let's keep going, let's just get my order in?" JA804.

III. The City enacts the Customer Data Law.

The City Council enacted the Customer Data Law in 2021 as Local Law No. 2021/090, codified at N.Y.C. Administrative Code § 20-563.7 (SPA43). The Law regulates the data-sharing relationship between "third-party food delivery services," like Plaintiffs' services, and "food service establishments," like restaurants. *Id.*

The crux of the Law is its mandate that Plaintiffs disclose Customer Data to restaurants. *Id.* A restaurant "may request customer data" from Plaintiffs, and upon such request, Plaintiffs "shall provide" the restaurant with "all applicable customer data." *Id.* § 20-563.7(a). The compelled disclosure includes a customer's: (1) full name; (2) phone number;

(3) email address; (4) delivery address; and (5) the contents of the customer's order. *Id.* § 20-563. Plaintiffs must provide these five pieces of information—collectively, the "[C]ustomer [D]ata"—"on an at least monthly basis" by sending restaurants a machine-readable file containing the information. *Id.* § 20-563.7(c).

The Law "presume[s]" that customers have consented to having the Customer Data shared. *Id.* § 20-563.7(b). To prevent the transmission of their data to restaurants, customers must opt *out* of data sharing, and they must do so for each and every "specific online order." *Id.*

The Law prohibits Plaintiffs from imposing *any* "limit" on how restaurants "download," "retain," or "use" that data "for marketing or other purposes." *Id.* § 20-563.7(c). Other than prohibiting restaurants from selling or disclosing Customer Data for financial benefit without consent, *id.* § 20-563.7(d), the Law imposes no conditions or requirements on how restaurants collect, store, secure, or use the data. Restaurants can use Plaintiffs' Customer Data to market to individuals who placed orders on Plaintiffs' platforms and can explicitly encourage customers not to use Plaintiffs' platforms.

The Law is permanent. And the penalties are severe: $500 per "violation," with violations accruing "on a daily basis for each day and for each [restaurant]." *Id.* § 20-563.10(a).

IV. The district court concludes the Law violates the First Amendment.

Plaintiffs each filed complaints challenging the Law's constitutionality on First Amendment and other grounds. The parties ultimately cross-moved for summary judgment on the First Amendment claim and other claims not at issue in this appeal. The district court granted summary judgment in Plaintiffs' favor on their First Amendment claim.

The district court initially determined that the Law regulates commercial speech because the "customer data is economically valuable," although the court acknowledged that the Law regulates "more" than "core" commercial speech. SPA29-30.

The district court next resolved the level of scrutiny. It rejected the City's invitation to apply the standard of review under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), because the compelled disclosures do not serve "a helpful corrective purpose" and are made to restaurants, "not to the general public." SPA31. The court did not resolve

whether strict or intermediate scrutiny applied, because it concluded that the Law "cannot withstand even intermediate scrutiny." SPA32.

Under intermediate scrutiny, courts ask "(1) 'whether the asserted governmental interest is substantial,' (2) 'whether the regulation directly advances the governmental interest asserted,' and (3) 'whether [the regulation] is not more extensive than is necessary to serve that interest.'" SPA32 (citation omitted). The district court held that the Law failed at every step.

The court first rejected the City's asserted interests as not substantial or not directly and materially advanced by the Law. The City had argued that the Law addressed Plaintiffs' practices of limiting restaurants' ability to retain Customer Data and to advertise directly to customers. SPA34. But the City's claim that Plaintiffs' practices were "exploitative" was simply wrong. SPA36-37. The City did "not dispute that Plaintiffs provide restaurants with access to customers and orders that they may not otherwise have"; that Plaintiffs' advertising tools enable restaurants to market to customers who have previously ordered from them; or that Storefront, Webshop, Drive, and Direct provide restaurants with back-end support for taking orders and "owning their customer

data." SPA36. Although the City may prefer that restaurants have access to customer data, "a mere preference for one industry over another is not a substantial state interest." SPA37.

The court then rejected another asserted interest as unsubstantiated. The City argued that the Law addressed Plaintiffs' practices of using a restaurant's data to promote other restaurants that pay higher fees. SPA34. But the Law does not restrict how Plaintiffs use data or list restaurants on their platforms, so the Law would not "affect the objectionable practices." SPA34-35. Further, the Law did not materially advance the City's stated goal of helping restaurants leave Plaintiffs' platforms because "restaurants can leave Plaintiffs' platforms now." SPA35.

Finally, the court explained that the City had "not demonstrated that the Customer Data Law is appropriately tailored" to any substantial interest, assuming one existed. SPA37. The City could have enacted less-restrictive alternatives to promote its purported goal. *Id.* For example, the City could have considered: requiring Plaintiffs to offer an opt-*in* program for customers to send their data to restaurants; providing financial incentives to encourage Plaintiffs to share certain customer data with restaurants; or subsidizing the development of online-ordering platforms

for individual restaurants. SPA37. But the City had not met its burden to show that an "incentive-based program or more fine-tuned regulation would be ineffective." SPA38.

The district court concluded that the "Law regulates commercial speech," "fails intermediate scrutiny," and "violates the First Amendment." SPA38. The court declined to address Plaintiffs' remaining claims and denied as moot the cross-motions as to those claims. *Id.*

SUMMARY OF ARGUMENT

I. The Customer Data Law is subject to at least intermediate scrutiny, which it fails.

A. The district court correctly determined that the less stringent standard of review under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), does not apply. That standard narrowly applies only to a specific category of informational disclosure laws that compel "purely factual and uncontroversial information about the terms under which … services will be available." *Nat'l Inst. of Fam. & Life Advocates v. Becerra*, 585 U.S. 755, 768 (2018) ("*NIFLA*").

Zauderer is inapplicable here for four independent reasons.

First, the Customer Data Law compels the disclosure of information about people, not the "terms" under which Plaintiffs' "services will be available." *NIFLA*, 585 U.S. at 768.

Second, the Law is not an "informational disclosure" law, such as laws requiring the disclosure to consumers of calorie information on food and beverages, or related to avoiding deception. *Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258, 262 (2d Cir. 2014). Instead, it is a "protectionist" law that compels speech that undermines Plaintiffs' economic interests in an effort to recalibrate an economic playing field. *Id.* at 264.

Third, the Law does not compel the disclosure of purely factual and "uncontroversial" information, such as the existence of workplace laws. *NIFLA*, 585 U.S. at 768. To the contrary, it forces Plaintiffs to broadly share Customer Data to restaurants across New York City, regardless of whether they have any means of securely storing that data—raising highly controversial issues about the privacy of personal data.

Fourth, the Law compels the disclosure of noncommercial speech rather than commercial speech: the mandated disclosures are not advertisements, do more than propose a commercial transaction, do not reference a specific product, and do not serve Plaintiffs' economic interests.

Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth., 134 F.3d 87, 96-97 (2d Cir. 1998). Even if the compelled speech could be characterized "in the abstract" as "merely 'commercial,'" it is "inextricably intertwined" with "otherwise fully protected speech," and thus loses its purely "commercial character" and warrants treatment as fully protected speech. *Riley*, 487 U.S. at 782.

B. The Law fails intermediate scrutiny. The City enacted the Law to economically advantage restaurants at Plaintiffs' expense, but compelling speech to "benefit [the speaker's perceived] competitors" is not a substantial governmental interest. *Safelite*, 764 F.3d at 265. The Law also does not directly advance the interests it purports to serve, as Plaintiffs already do not hinder restaurants from forming connections with customers. Finally, the Law is not adequately tailored because the City failed to meet its burden of showing that less-speech-restrictive alternatives were unavailable.

II. While the Court need not decide which specific form of heightened scrutiny to apply, to the extent it does so, it should apply strict scrutiny rather than intermediate scrutiny. The Law is content-based: it compels Plaintiffs to communicate specific categories of Customer Data

to restaurants that Plaintiffs currently do not disclose, thereby altering the content of Plaintiffs' speech. And the compelled speech is noncommercial. The Law is thus subject to strict scrutiny and fails that demanding standard.

III. Even if *Zauderer*'s less stringent standard of review applied, the Law is unconstitutional. The Law lacks a legitimate justification and does not "remedy a harm that is potentially real," as opposed to "purely hypothetical." *NIFLA*, 585 U.S. at 776 (cleaned up). Plaintiffs already give restaurants ways to access Customer Data through specific products and opportunities to market to customers through their advertising tools, undermining the City's argument that restaurants are suffering real harm. The Law also "extend[s] . . . broader than reasonably necessary," *id.* (cleaned up), because the City could effectively accomplish its stated goals while burdening less (or no) speech.

ARGUMENT

I. The Customer Data Law is subject to at least intermediate scrutiny, which it fails.

The district court concluded that the Customer Data Law triggers at least intermediate scrutiny. SPA24. The court did not decide whether to apply strict or intermediate scrutiny, because it concluded that the

Law would fail either. *Id.*; *see, e.g.*, *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 245 (2d Cir. 2014) (declining to decide between intermediate and strict scrutiny where law failed intermediate scrutiny).

The district court's measured approach was correct. At a minimum, intermediate scrutiny is required because the Law does not fit within *Zauderer*'s narrow exception for certain disclosure requirements unlike those at issue here. The Law fails intermediate scrutiny.

A. At the very least, intermediate scrutiny, not *Zauderer*, applies.

The First Amendment prohibits the government from "abridging the freedom of speech." U.S. Const. amend. I. The guarantee of "freedom of speech" "necessarily compris[es] the decision of both what to say and what *not* to say." *Riley*, 487 U.S. at 796-97. This right to tailor speech applies equally to both "statements of 'fact'" (as here) and compelled "statements of opinion." *Id.* at 797. So even "dry information" is protected by the First Amendment. *IMS Health Inc. v. Sorrell*, 630 F.3d 263, 271-72 (2d Cir. 2010), *aff'd*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011).

To protect the right not to speak, courts apply different levels of scrutiny to review a law's constitutionality. In general, "content-based

regulations"—that is, laws "[m]andating speech that a speaker would not otherwise make"—are subject to strict scrutiny. *Evergreen*, 740 F.3d at 244. Intermediate scrutiny, however, applies to regulations of "commercial speech," though even then the government's power is still "circumscribed." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980). As these doctrines reflect, the "right not to speak inheres in political and commercial speech alike." *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 71 (2d Cir. 1996).

In *Zauderer*, the Court carved out an exception from the general intermediate-scrutiny rule for commercial-speech laws that compel "purely factual and uncontroversial information about the terms under which … services will be available." *NIFLA*, 585 U.S. at 768 (quoting *Zauderer*, 471 U.S. at 651). But the Court has made clear on more than one occasion that this narrow exception "does not apply outside of these circumstances." *Id.* at 769; *see also Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995) (same).

The district court correctly concluded that the Law is subject to heightened scrutiny, not *Zauderer*'s more deferential framework. SPA30-31. The City's contrary argument (at 37-46) requires stretching

the Supreme Court's *Zauderer* standard beyond recognition in four ways, given that the Law (1) is not about the terms of products or services; (2) does not serve consumer-information purposes; (3) is controversial; and (4) compels noncommercial speech.

1. The Law requires disclosing information about Plaintiffs' customers, not the terms on which Plaintiffs offer Marketplace products.

Zauderer applies only where a law compels disclosure of the "terms under which" the speaker's "services will be available." *NIFLA*, 585 U.S. at 768. The paradigmatic example is *Zauderer* itself, where a state required attorneys advertising contingent-fee legal services to disclose whether the attorney's percentage cut would be calculated before or after deducting court costs. 471 U.S. at 633. By contrast, the Law requires Plaintiffs to disclose personal information about their own customers—disclosures that say nothing about the terms on which Plaintiffs offer their products or services, such as their Marketplace platforms or advertising products.

The City first contests the Supreme Court's settled standard, arguing that *Zauderer* is "not limited to clarifying a proposed transaction's terms." Opening Br. 44. But the Court has expressly held otherwise,

rejecting *Zauderer*'s application to a law that did not "relate[] to the services" provided by regulated parties. *NIFLA*, 585 U.S. at 769. This Court did the same, observing in *Safelite* that "all of [the Second Circuit's] case law" applying *Zauderer*—and "indeed, as far as we know, all federal cases applying *Zauderer*"—has been confined to laws regulating speech "about a company's own products or services." 764 F.3d at 263-64. And that makes good sense. In *Zauderer*, the Court explicitly identified advertising as the reach of its holding no less than 13 times in its four-page discussion of compelled speech. 471 U.S. at 650-53. Once someone puts a product into the market and advertises it to consumers, his First Amendment interest in withholding from consumers accurate information about that product and the terms on which it is offered is "minimal," so disclosure requirements "trench much more narrowly" in that context. *Id.* at 651.

The only precedent the City cites, *CompassCare v. Hochul*, 125 F.4th 49 (2d Cir. 2025), is not to the contrary and did not expand *Zauderer*'s framework. In *CompassCare*, a New York law compelled employers to disclose in employee handbooks the existence of workplace anti-

discrimination laws. *Id.* at 54. That notice requirement required disclosure of information "'about the terms under which … services will be available,' … specifically, the terms of employment under New York law." *Id.* at 64-65 (quoting *Zauderer*, 471 U.S. at 651). The disclosure in *CompassCare* thus "clarif[ied] a proposed transaction's terms." Opening Br. 44. It did not change *Zauderer*'s standard and does not advance the City's argument here.

The City also invokes two out-of-circuit decisions, but neither justifies an expanded reading of *Zauderer*. Opening Br. 44 (citing *Md. Shall Issue, Inc. v. Anne Arundel Cnty.*, 91 F.4th 238 (4th Cir. 2024); *Chamber of Com. v. SEC*, 85 F.4th 760 (5th Cir. 2023)). To start, in those cases, neither the Fourth nor Fifth Circuit considered whether the speech at issue concerned the terms on which the speaker's services would be available, as that issue was not contested in either case. These decisions thus provide no guidance on the question.

Furthermore, the decisions are both distinguishable and unpersuasive. The Fourth Circuit upheld a law requiring gun sellers to provide literature to purchasers, analogizing it to "product safety warnings,"

which have "long [been] considered permissible under the *Zauderer* jurisprudence." *Md. Shall Issue*, 91 F.4th at 245-47 (cleaned up). But compelled disclosure of Customer Data does not serve a consumer-protection or safety purpose and bears no resemblance to a product-safety warning, which is information about the product being offered. Meanwhile, the Fifth Circuit's decision concerned a challenge to an SEC rule requiring disclosures from publicly traded companies about stock repurchases, which again is information about the product being offered (there, the company's stock). *Chamber of Com.*, 85 F.4th at 760. The Fifth Circuit concluded that objections to *Zauderer*'s application were "foreclosed" by a prior decision that the Supreme Court has since vacated. *Id*. at 769-70 (citing *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 485 (5th Cir. 2022), *vacated and remanded sub nom. Moody v. NetChoice, LLC*, 603 U.S. 707 (2024)). That makes *Chamber of Commerce* an especially thin reed of support.

The City next contends that the Law does in fact concern the terms on which Plaintiffs' products will be offered. In the City's view, restaurants "essentially purchase [P]laintiffs' services to access more customers," so the Law compels disclosure of information "about the very thing

that plaintiffs are offering restaurants." Opening Br. 45. That is wrong. What Plaintiffs actually offer is the ability to appear on Plaintiffs' platforms, which facilitate orders and deliveries. SPA12. As the district court correctly recognized, a customer's name, contact information, delivery address, and order information is "data collected by Plaintiffs in the course of their services," SPA31-32, not information "*about*" the "terms" of those services, *Zauderer*, 471 U.S. at 651 (emphasis added).

The City's logic collapses the distinction between compelling disclosures about the terms on which a product is offered and compelling a gift of the product itself. Suppose the band Bon Jovi recorded an album, then advertised it for sale. If the government required those advertisements to contain a disclosure about the terms on which the band was selling the album (such as an explicit-language warning), *Zauderer* might be the appropriate standard (assuming its other elements were met). But if the government instead required Bon Jovi to provide singles from the album to radio stations for free, even under the guise of a "disclosure" requirement, there would be no basis to apply *Zauderer*. So, too, with the data here. If a company advertises its customer list for sale, *Zauderer* might apply if the government directed the company to disclose the conditions

under which another business could acquire the list or the protections that must accompany it. But a law compelling disclosure of the customer list itself would not be a commercial-speech disclosure governed by *Zauderer*.

2. The Law is not an informational disclosure law.

As this Court has made clear, *Zauderer* is rooted in avoiding consumer deception and thus creates an exception for "informational disclosure" laws. *Safelite*, 764 F.3d at 262. The district court correctly reasoned that the Law will "not serve the public informational interest" animating *Zauderer*. SPA31. Disclosing Customer Data to restaurants does not "prevent[] deception," *Zauderer*, 471 U.S. at 651, does not better inform customers placing orders on Plaintiffs' platforms, and does not better inform restaurants that agreed to terms governing what data they would and would not receive from Plaintiffs. The Law just gives restaurants Customer Data because the City wants them to have it.

The Law falls outside the core of *Zauderer*: disclosure laws that "prevent[] deception of consumers." 471 U.S. at 651. In the 30 years since *Zauderer*, the Supreme Court has applied its standard only to cases involving mandates correcting deceptions. *Compare United States v.*

United Foods, Inc., 533 U.S. 405, 416 (2001); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250-53 (2010), *with In re R.M.J.*, 455 U.S. 191, 205 (1982) (applying intermediate scrutiny to disclosure rules accompanying non-misleading ads). Here, however, there is "no suggestion" that the compelled speech is "necessary to make voluntary advertisements nonmisleading for consumers." *United Foods*, 533 U.S. at 416. The Law's disclosures thus lack the "helpful corrective purpose" at *Zauderer*'s core, SPA31, and the City does not argue otherwise.

Nor does the Law fall within *Zauderer*'s periphery. This Court has extended *Zauderer* to laws aimed at better informing consumers who are not misled—such as laws requiring disclosure of calorie information to restaurant-goers or notices regarding civil-rights laws to employees. *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 132 (2d Cir. 2009); *CompassCare*, 125 F.4th at 65; *see* Opening Br. 41-42. But *Zauderer* does not extend to factual disclosures meant to satisfy "consumer curiosity" alone. *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 115 n.6 (2d Cir. 2001). Nor does it apply to factual-disclosure mandates designed to boost a "competitor's products or services" rather than serve

"consumer information" goals. *Safelite*, 764 F.3d at 264. These boundaries confine *Zauderer*'s scope to "traditional anti-deception, health, or safety interest[s]" that have historically justified intruding upon the right not to speak. *Am. Meat Inst. v. Dep't of Agric.*, 760 F.3d 18, 31 (D.C. Cir. 2014) (Kavanaugh, J., concurring in the judgment).

The Law exceeds these limits. It does not serve any "public informational interest," since Plaintiffs would be forced to disclose Customer Data "not to the general public," but to restaurants. SPA31. Consumers ordering food from Plaintiffs' platforms are not better informed about Plaintiffs' services because of the compelled disclosures. That contrasts sharply with other laws subject to *Zauderer*, such as laws requiring mercury-warning labels on light bulbs, calorie counts on restaurant menus, or notices of employment terms and conditions. *Nat'l Elec. Mfrs.*, 272 F.3d at 114-15; *N.Y. State Rest. Ass'n*, 556 F.3d at 132; *CompassCare*, 125 F.4th at 65.

Because the Law's disclosures do not directly inform customers about anything, the City speculates that they might indirectly accomplish that task because "many [restaurants] will use [Customer Data] to make more information available to their customers." Opening Br. 42.

But the City cites no record evidence to support that assertion. Nor does it explain what "more information" restaurants would supposedly provide. The only additional information restaurants would receive is Customer Data, which the customers themselves already possess. Tellingly, the City cites no case applying *Zauderer* to disclosures made to another business on the theory that the business might later re-disclose the information or use it to provide new information to the public.[2]

Pivoting, the City argues (at 40-42) that the Law serves "truth-seeking principles" because restaurants are the relevant consumers of the Customer Data here. But the Law and the legislative record refute the premise that restaurants are consumers and demonstrate instead that restaurants were perceived as "plaintiffs' competitors, at least insofar as the Customer Data Law is concerned." Opening Br. 42; *see* SPA31 & n.11. The Law expressly authorizes restaurants to use Customer Data

[2] Even if the City were right, this aspect of the Law still wouldn't satisfy prong three of the *Central Hudson* test, which requires showing that the law *directly* and materially advances a substantial government interest. *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). The City's argument here, at best, shows that the Law might *indirectly* advance its stated interest.

"for marketing or other purposes," empowering them to solicit customers away from Plaintiffs' platforms. JA974 (N.Y.C. Admin. Code § 20-563.7(c)). The legislative history is replete with references to helping restaurants "compete" with third-party platforms, JA661-62, and "driv[ing] … profits" from Plaintiffs to restaurants, JA529-30; *see supra*, at 17-19. And the City concedes that the Law allows restaurants to "promot[e] themselves through *direct* customer outreach," Opening Br. 57 (emphasis added), to entice customers away from Plaintiffs' platforms.

All this evidence demonstrates that the Law falls outside *Zauderer*'s scope because it serves "protectionist, rather than consumer information, goals." *Safelite*, 764 F.3d at 264. This Court's decision in *Safelite* is directly on point.

There, a law required an insurer advertising its affiliated glass-repair service to also "promote the product of a competitor" when an insurance customer called. 764 F.3d at 260, 264. Although the mandate compelled purely factual and uncontroversial information, this Court explained that it was "a very serious deterrent to commercial speech" and "highly likely to further covertly protectionist, rather than consumer information, goals." *Id.* at 264. The same is true here. The Customer Data

Law is not an "informational disclosure law" that fits into *Zauderer*'s "exception," *id.* at 262, but a mandate that forces one company to speak for the benefit of other companies, to the speaker's own detriment. That does "more to inhibit First Amendment values than to advance them." *Id.* at 264. As *Safelite* makes clear, a law of this kind must—at minimum—be subject to intermediate scrutiny. *Id.*

The City's only response to *Safelite* is that the law there was not "purely" a disclosure mandate but also a "restriction on speech." Opening Br. 45. That's an empty distinction. The law did not bar the insurer from saying anything; it simply required that *if* the company spoke, it must also make the compelled disclosure. 764 F.3d at 260. Even the insurer itself acknowledged the law "contains no restrictions on speech," but rather creates a disclosure "trigger" "only if [plaintiff] chooses to" speak. *Id.* at 263. The same could be said of *Zauderer*: it restricted the attorney's advertising *if* the attorney did not disclose his contingent-fee terms. 471 U.S. at 633. The district court here, therefore, did not "ignore[] the distinction between regulations compelling speech and those restricting that speech." Opening Br. 39-40. What matters is that laws compelling

speech in an effort to level an economic playing field fall outside the "exception" *Zauderer* created for "an informational disclosure law." *Safelite*, 764 F.3d at 262.

Even if restaurants were considered Plaintiffs' customers, the Law still would not serve *Zauderer*'s informational aims. Neither the City nor the Law's supporters argued that restaurants are misinformed about the terms of Plaintiffs' offerings. *Cf.* Opening Br. 47. Nor could they. There is no evidence in the record of any restaurant being deceived about Plaintiffs' offerings. And the terms of Marketplace contracts make clear that Plaintiffs own the data they receive from customers and that restaurants may use the limited data they receive only to fulfill the order. JA294, JA302, JA996, JA1111-12, JA1140. The Law does not make any of those terms clearer or fill any informational gaps. Instead, it *changes* the terms of the agreement between a Plaintiff and a restaurant simply because restaurants would like to receive the information. That's no better than a law requiring disclosures to satisfy "consumer curiosity alone"—a purpose that does not qualify for *Zauderer* scrutiny. *Int'l Dairy Foods*, 92 F.3d at 74. "[H]istory and tradition provide no support for that kind of

free-wheeling government power to mandate compelled commercial disclosures." *Am. Meat Inst.*, 760 F.3d at 32 (Kavanaugh, J., concurring in the judgment).

Contrary to the City's claim, rejecting *Zauderer*'s application here would not require the government to "compel a speaker to provide *more* speech" to satisfy the First Amendment. Opening Br. 43. The problem with the Law's disclosure is not that it would reach *too small* an audience, but that it reaches the *wrong* audience: not consumers who need more information about a product, but restaurants seeking Customer Data to undercut Plaintiffs' business model. This Court should not create a *Zauderer* loophole for governments to compel disclosure of valuable speech from disfavored businesses to favored businesses.

3. The Law and the compelled disclosures are controversial.

Zauderer recognizes that one's interest in not speaking is relatively modest when the government forces disclosure of purely factual and "uncontroversial" information. *Zauderer*, 471 U.S. at 650-51. Requiring employers to tell employees about the "existence and contents" of non-discrimination laws, for example, is uncontroversial. *CompassCare*, 125

F.4th at 65. When the compelled disclosure is not eyebrow-raising, there is correspondingly less room for scrutiny.

The Customer Data Law is different. The speech it compels is controversial because it implicates fundamental questions about the privacy of people's sensitive personal information—an issue at the center of ongoing debate across the country.

Start with the contents of the compelled speech. A person's full name, delivery address, email, and phone number are not "bland" pieces of information. *Evergreen*, 740 F.3d at 250. For example, information about a person's "physical location"—here, delivery address(es)—raises deep-seated "privacy concerns" because it provides an "intimate window into a person's life." *Carpenter v. United States*, 585 U.S. 296, 311 (2018). Likewise, contact information—here, emails and phone numbers—is typically *protected* from disclosure because it's sensitive and personal. *Solomon v. Flipps Media, Inc.*, 136 F.4th 41, 53 (2d Cir. 2025) (citing 15 U.S.C. § 6501(8)).

Unsurprisingly, the wisdom of forcing Plaintiffs to disseminate all this private information to restaurants across the City—often, if not usu-

ally, without affirmative consent—became a "controversial topic of debate" during the legislative process. *Book People, Inc. v. Wong*, 91 F.4th 318, 340 & n.127 (5th Cir. 2024) (rejecting application of *Zauderer*). More than 5,000 individual City residents opposed the Law, warning it would "turn[] [the resident] and [his] information into a commodity being traded away." JA5846; *see also* JA8118. Roughly a dozen community-interest groups likewise denounced the Law as posing "substantial privacy risks for all New Yorkers." JA8114. They emphasized the particular dangers to "communities of color, vulnerable populations[,] and undocumented immigrants." *Id.* The Law would require sharing personal information outside third-party platforms' "sophisticated technology that protects data against bad actors," JA9632, with no assurance that data would not be sent to or accessed by vendors contracting with immigration and law-enforcement agencies, JA9641.

Moreover, there was a robust debate in the privacy-expert community about the propriety of the disclosures. *See CTIA-Wireless Ass'n v. City & Cnty. of San Francisco*, 494 F. App'x 752, 753-54 (9th Cir. 2012) (rejecting *Zauderer*'s application in similar circumstances); *accord Nat'l Ass'n of Wheat Growers v. Bonta*, 85 F.4th 1263, 1279 (9th Cir. 2023). For

example, the organization Catalyst Research convened an "'expert group' of privacy professionals, law professors, small business advocates, restaurant owners, and industry innovators" who identified challenges with the Law's disclosures, including increased "potential for consumer harm and restaurant liability." JA951-52. The Electronic Frontier Foundation and Tech:NYC likewise "strongly oppose[d]" the Law and its "dangerous data sharing mandate," which put consumers' information at risk by requiring platforms to provide restaurants with information they would not "require during their normal course of business." JA9644. The result "no doubt" would be "unsolicited calls and text messages, email spam, and junk email" inundating New Yorkers' phones and inboxes. JA8284.

This outcry from City residents, community groups, and privacy-interest groups rebuts the City's claim that the "customer data itself—and even its disclosure—is not controversial in any relevant sense." Opening Br. 46. As one data-privacy organization explained, the Law is "unprecedented data-sharing legislation," JA8117, not the kind of "uncontroversial" and nothing-to-see-here disclosure requirement that is part of a "longstanding tradition in this country" and warrants lessened First Amendment scrutiny, *CompassCare*, 125 F.4th at 65.

4. The Law compels noncommercial speech.

Zauderer is an exception from the ordinary standard of review for regulations of "commercial" speech. 471 U.S. at 651. It cannot apply here because the Law compels disclosures of noncommercial—rather than commercial—speech. So-called "core" commercial speech is speech that "does no more than propose a commercial transaction." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (cleaned up). "Outside this so-called 'core' lie various forms of speech that combine commercial and non-commercial elements" and, depending on the circumstances, might be considered commercial. *Bad Frog*, 134 F.3d at 97. Under either formulation, Plaintiffs' speech is noncommercial in nature.

"Core" commercial speech: At its "core," commercial speech "does no more than propose a commercial transaction." *Bolger*, 463 U.S. at 66; *see Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473-74 (1989) (whether speech "propose[s] a commercial transaction" is "the test for identifying commercial speech"). Examples include an advertisement for "the sale of admission to a submarine" or a "proposal of possible employment." *Pittsburgh Press Co. v. Pittsburgh Com. on Human Rels.*, 413 U.S. 376, 385 (1973). The Law here is different. It requires disclosing

Customer Data to restaurants only *after* customers have already ordered from Plaintiffs' platforms. Far from proposing a commercial transaction, the compelled speech occurs after the transaction.

The City asserts (at 30) that core commercial speech also includes speech "related solely to the economic interests of the speaker and its audience." *CompassCare*, 125 F.4th at 64 (quoting *Cent. Hudson*, 447 U.S. at 561). But that "broader definition" is not one the Supreme Court typically uses when distinguishing between commercial and noncommercial speech. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422 (1993) (citing *Bolger*, 463 U.S. 60). For good reason. While an "intent to make a profit" is the "end result" underlying much speech, the speech is not commercial unless it specifically "*proposes* a commercial transaction." *Fox*, 492 U.S. at 482. If taken at face value, an "overbroad" definition like the City's proposed one would dilute First Amendment protection "for most financial journalism" merely because it is "economically motivated." *Commodity Futures Trading Comm'n v. Vartuli*, 228 F.3d 94, 110 n.8 (2d Cir. 2000). Again, the proper inquiry remains whether the speech does "'more than propose a commercial transaction' between

speaker and listener." *Id.* at 109. The disclosures here neither propose any commercial transaction nor do anything "more."

In any event, the broader definition turns on one word: whether the speech relates "*solely*" to the speaker's and audience's economic interests. *CompassCare*, 125 F.4th at 64 (emphasis added). A website about diets and nutrition, for example, is not commercial speech merely because it "contains commercial elements," such as an "offer to purchase" diet products. *Gorran v. Atkins Nutritionals, Inc.*, 279 F. App'x 40, 41 (2d Cir. 2008). Here, Plaintiffs have a noncommercial privacy-based interest in refraining from the speech. The Law forces them to disseminate a compendium of sensitive personal information about their customer base—including contact information and delivery addresses—that "is encyclopedic, not transactional," much like publication of an "online database" containing personal information about individuals. *IMDb.com v. Becerra*, 962 F.3d 1111, 1122 (9th Cir. 2020). Compelled disclosure of such information constitutes noncommercial speech. *Id.* It is immaterial that such disclosures do not implicate *other* kinds of noncommercial speech, such as "social commentary" on matters of "public concern" like politics or religion. Opening Br. 34.

Nor does it matter whether the speech is in the economic interests of restaurants as the "audience." Opening Br. 32-33. If noncommercial speech is not rendered commercial simply because "the end result is the [speaker's] intent to make a profit," *Fox*, 492 U.S. at 482, it makes even less sense for noncommercial speech to become commercial because the *recipient* of the speech intends to profit off it. That is a recipe for compelling businesses to speak away their informational assets.

Speech that combines commercial and noncommercial elements: Where speech is not "core" commercial speech but instead "combine[s] commercial and noncommercial elements," three factors dictate whether speech should be "treated as commercial speech": (1) whether the communication "is an advertisement"; (2) whether it "makes reference to a specific product"; and (3) whether "the speaker has an economic motivation for the communication." *Bad Frog*, 134 F.3d at 97. The "combination of *all* these characteristics" could "support" treating speech as commercial. *Bolger*, 463 U.S. at 66-67. Plaintiffs' speech fits none of the three *Bad Frog* factors—and certainly not all three—and therefore should not be treated as commercial in nature.

First, the speech that the Law compels is not "an advertisement." In *Bad Frog*, labels used in marketing alcoholic beverages were considered "a form of advertising." 134 F.3d at 90-91, 97. And in *Bolger*, "informational pamphlets discussing the desirability and availability" of contraceptives were "conceded to be advertisements." 463 U.S. at 62, 66. By contrast, Customer Data does not advertise anything.

The City does not argue otherwise. Instead, it argues that Customer Data is "closely related to advertising" and "enables . . . more effective marketing." Opening Br. 36. But what matters is whether the communication *itself* is a "form of advertising," not whether a communication has potential downstream use for advertising in separate speech. *Bad Frog*, 134 F.3d at 97. Under the City's expansive reading of this element, nearly anything could be an advertisement. Information about a person's political speech can later be used for advertising purposes, *see* Digital Marketing Group, *How data-driven targeted ads are shaping modern political campaigns*,[3] but that political speech surely does not transform

[3] https://tinyurl.com/aaebfdck (last accessed Sept. 19, 2025).

into commercial speech simply because it might later enable more effective marketing. As the Ninth Circuit explained in an analogous context, a law compelling disclosure of a website manager's political affiliations did not compel "commercial speech subject to a lower tier of scrutiny," even though the political affiliations could "play a role" in consumers' decisions of whether to use the platform. *X Corp. v. Bonta*, 116 F.4th 888, 902 n.10 (9th Cir. 2024).

Second, the speech that the Law compels does not "refer[] to a specific product." *Bad Frog*, 134 F.3d at 97. This factor means what it says. In *Bad Frog*, the brewery's labels identified its alcoholic beverages. *Id.* In *Bolger*, the pamphlets identified contraceptives. 463 U.S. at 66-67. By contrast, Customer Data refers to private information about a customer, not a product or service.

The City again seeks to rewrite the standard, arguing that Customer Data "concerns both the services that restaurants purchase from plaintiffs" and "the products offered to those restaurants"—namely, "access to the customers and their orders." Opening Br. 36. But as the district court recognized, the "specific product" at issue is each Plaintiffs' Marketplace offering, which "allows a restaurant to appear on Plaintiffs'

web and mobile platforms." SPA12. The five categories of Customer Data would not give restaurants any information *about* Plaintiffs' Marketplaces. Instead, Customer Data is separate speech about Plaintiffs' customers that is a *byproduct* of restaurants and customers using Plaintiffs' Marketplaces.

Third, divulging Customer Data to third parties does not "serve the economic interest of the speaker." *Bad Frog*, 134 F.3d at 97. As explained above, it does the opposite. The required disclosures cut against Plaintiffs' economic interests and privacy-based interests in refraining from disseminating information to restaurants. *See supra*, at 17-18, 28.

Finally, at the very least, the Law compels speech that is "inextricably intertwined" with "otherwise fully protected speech," such that it does not "retain its commercial character" and warrants the protection afforded to "fully protected speech." *Riley*, 487 U.S. at 782.

* * *

The district court correctly concluded that *Zauderer* does not apply to the Customer Data Law, which instead is subject to, at least, intermediate scrutiny.

B. The Law fails intermediate scrutiny.

Under intermediate scrutiny, a law regulating speech is unconstitutional unless: (1) the speech it regulates is "misleading" or does not "concern lawful activity"; (2) the asserted governmental interest is "substantial"; (3) the regulation "directly advances the governmental interest"; and (4) the regulation is "narrowly drawn" and not "more extensive than necessary to serve the interest." *Cent. Hudson*, 447 U.S. at 565-66, 591 (cleaned up). The City has never argued the speech here is "misleading or unlawful." And it cannot show that any of the three remaining elements is met, much less all of them.

1. The Law does not advance "substantial" governmental interests.

The district court correctly held that while "[t]he City may prefer that restaurants have access to customer data, . . . a mere preference for one industry over another is not a substantial state interest." SPA37.

Tellingly, the City has abandoned its initial central justification for the Law. The City Council originally asserted the Law was necessary to "support the restaurant industry as it weathers ongoing effects of the COVID-19 pandemic," JA8323, and the City similarly argued below that the Law was needed to aid restaurants as they "continue[d] to weather

the effects" of the pandemic, SPA36. That justification was dubious even when the Law was enacted: a permanent mandate for the indiscriminate disclosure of Customer Data to all restaurants "has nothing to do with COVID-19." JA8121 (statement of Councilmember Yeger). The district court correctly rejected this argument. SPA36. And the City does not revive it on appeal.

The City's other expressed goal was economic favoritism of restaurants over platforms such as Plaintiffs. The City Council was not shy about it. As one of the bill's sponsors explained, the Law would create "balance and equity" by granting restaurants access to platforms' hard-won data. JA8105. The Council Speaker echoed that goal, saying the Law's purpose was to "create an equitable playing field between [third-party] platforms and the restaurants." JA8121.

Governments usually disavow—not embrace—an intent to alter an economic "playing field" (and undo customers' evolving preferences), because doing so is not a substantial reason to burden speech. In *Safelite*, again, a "protectionist" statute prevented insurers from providing drivers with the names of company-owned glass shops unless they also provided "the name of at least one additional licensed glass shop," thereby giving

a "free advertisement for a competitor." 764 F.3d at 260, 264. The law was enacted for reasons that sound strikingly familiar: it would establish a "more fair playing field" in the auto-repair industry. *Id.* at 260 n.2. But the government's later defense of the law abandoned these justifications and instead concocted other "post hoc rationalizations." *Id.* at 265.

The implication, which this Court recognized, is that legislation "designed to benefit [plaintiff's] competitors" does not serve a "substantial" interest in restricting speech. *Safelite*, 764 F.3d at 265. And that implication is correct, as the Supreme Court has made clear in other First Amendment contexts. *See, e.g.*, *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 728, 749 (2011) ("We have repeatedly rejected the argument that the government has a compelling state interest in 'leveling the playing field' that can justify undue burdens on political speech.").

That resolves this element of *Central Hudson*. If the government lacks a substantial interest in compelling a company to advertise its competitors, *Safelite*, 764 F.3d at 265, the City likewise lacks a substantial interest in compelling Plaintiffs to give their Customer Data to restaurants so they can advertise themselves to Plaintiffs' customers. The First

Amendment prevents compelling speech to create a "more fair playing field" in an industry, *id.* at 260 n.2, or an "equitable playing field between [third-party] platforms and the restaurants," JA8121. Were such rationales sufficient, there would be "no end to the information [the City] could require" businesses to divulge to other businesses under the guise of recalibrating an industry. *Int'l Dairy Foods*, 92 F.3d at 74. And the logic would not stop there—by the City's reasoning, for example, the government could assert the same interests to compel disfavored universities to disclose donor lists to favored schools so the latter could directly solicit those donors.

The City tries to dress up the Law's economic protectionism in more favorable garb, claiming it serves interests in "preserving the viability of the restaurant industry" and "in ensuring that restaurants are not subject to unfair competitive restraints." Opening Br. 54. In the City's view, Plaintiffs "stand between restaurants and their customers," and the Law prevents Plaintiffs from "exploit[ing]" this so-called "power dynamic." *Id.* at 51-52. The City's factual premise is wrong, and its conclusion lacks any legal support.

The City's premise that Plaintiffs are "continuing to stand between restaurants and their customers," Opening Br. 51, ignores the record. As the district court found, Plaintiffs offer a range of products that give restaurants freedom to choose the data-based arrangements they prefer, SPA12; SPA36 (recognizing restaurants can choose whether to use Plaintiffs' "advertising tools," "back-end support," or delivery-facilitation services). If restaurants prefer to receive and own Customer Data, they can build their own websites or apps to take orders. Or they can use Plaintiffs' alternative products—like Storefront, Drive, or Direct—where restaurants do most of the legwork, like directly sourcing and receiving orders through their own sites, powered by Plaintiffs' technology. In those arrangements, the *restaurant* gets the customer data under the parties' contracts. Thousands of restaurants have signed contracts to use these products. JA8140, JA8237.

By contrast, restaurants that prefer to shoulder less of a burden can opt for Plaintiffs' Marketplace products—and many do. Tens of thousands of restaurants willingly agree to Marketplace contracts. JA8140, JA8237. That's because Plaintiffs' services provide significant value.

They relieve restaurants from the costs and burdens of customer acquisition, delivery-facilitation services, and data-security requirements. They also provide valuable marketing and analytics services that help customers discover new restaurants or return to longstanding favorites, thus increasing the restaurants' business. The flip side of Plaintiffs doing all this work is that they own the customer data.

The Law inverts this paradigm. When restaurants use Storefront, Drive, or Direct, they do not have to share their customer data with Plaintiffs. But when restaurants use Marketplace, the Law would gift them Plaintiffs' Customer Data, enabling restaurants to cut Plaintiffs out of the food-sales equation entirely. Taking an asset that one party worked to obtain and then giving it to another that chose not to make such efforts does not "promote[] economic freedom," Opening Br. 52; it curtails free-market forces, *Safelite*, 764 F.3d at 265.

These facts set this case apart from the two decisions the City invokes to argue it has a substantial interest in favoring restaurants over Plaintiffs. Opening Br. 54. Neither grants the City freewheeling authority to compel speech in the name of fairness.

In *Time Warner Cable, Inc. v. FCC*, 729 F.3d 137 (2d Cir. 2013), an FCC order limited the circumstances under which cable providers could refuse to carry unaffiliated TV channels. *Id.* at 143. The order advanced the government's interest in "eliminating restraints on fair competition"—an interest the plaintiff did not contest. *Id.* at 160. But *Time Warner* referred to "competition" in the antitrust sense. The cable companies were "vertically integrated" with top TV networks, and vertical integration was "pervasive in the video programming industry." *Id.* at 162. These vertically integrated cable companies had an "interest in the success of [their] affiliated networks," a corollary interest in shutting out competing "unaffiliated networks," and the "market power" to exclude those rivals "from th[e] market altogether." *Id.* at 162-63.

By contrast, Plaintiffs are not vertically integrated with any restaurants, so antitrust-based competitive concerns are absent here. Far from "eliminating restraints on fair competition," *Time Warner*, 729 F.3d at 160, the Law *imposes* restraints on Plaintiffs' ability to compete fairly in the market. The Law gives restaurants the fruits of Plaintiffs' labor so they can market directly to customers using the data that Plaintiffs invested in obtaining and thereby cut Plaintiffs out of the picture.

The D.C. Circuit's decision in *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014), is even further afield. *Edwards* upheld a licensing requirement for tour guides, supported by an uncontroverted substantial interest in "promoting a major industry"—tourism. *Id.* at 1002. The requirement did not impact other industries or favor tour guides over competitors such as museums and entertainment venues—unlike the City's favoritism here. To the extent *Edwards* can be read to support a substantial interest in promoting the restaurant industry, Opening Br. 54, *Safelite* squarely forecloses the notion that the City can promote one set of market participants (restaurants) at the direct expense of others (Plaintiffs)—in a zero-sum game.

2. The Law does not directly and materially advance the City's asserted interests.

Even assuming the City has identified a substantial interest, it has failed to show that the Law "directly advances the governmental interest asserted." *Cent. Hudson*, 447 U.S. at 566. This requirement is "not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alle-

viate them to a material degree." *Edenfield*, 507 U.S. at 770-71. Providing "only ineffective or remote support for the government's purpose" does not suffice. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996). But that is, at most, what the City has proffered.

The City contends that restaurants need Customer Data "to market directly" to Plaintiffs' customers and "conver[t] … them into repeat customers" of restaurants. Opening Br. 56; *see also id.* at 51. To support this claim, the City cites the statistic that 80 percent of restaurants' business comes from 20 percent of their customers. *Id.* at 56. But the City offers no evidence suggesting how many restaurants could convert infrequent customers to loyal ones through Customer Data-driven promotions or other means. That omission is especially glaring because Plaintiffs *already* provide restaurants with tools to convert new patrons into repeat customers—through analytics and promotions available on Plaintiffs' platforms—without any additional compelled data disclosures. SPA36.

The same failure to marshal evidence doomed the regulation in *44 Liquormart*, where a state banned alcohol-price advertising without identifying "what price level would lead to a significant reduction in alcohol consumption" or "the amount that it believe[d] prices would decrease

without" the regulation. 517 U.S. at 506-07. Likewise, finding a "direct" and "material" connection between the City's stated ends and its chosen means would require "the sort of speculation or conjecture that is . . . unacceptable" under intermediate scrutiny. *Id.* at 505, 507 (cleaned up).

Relatedly, the City argues that restaurants need Customer Data to preserve the option of "leav[ing] third-party platforms should business needs demand it." Opening Br. 55. But, as the district court noted, "restaurants can leave Plaintiffs' platforms now." SPA35. Because the City "has not shown any effect" the Law will have on the number of restaurants leaving the platform compared to the status quo, the City's asserted interests are "too speculative" and do not materially advance its purported goals. *IMS Health*, 630 F.3d at 276.

Finally, the City suggests the Law is necessary to remedy "the high fees that plaintiffs were charging." Opening Br. 55. But the Law does not regulate fees at all. And any interest in controlling Plaintiffs' fees through the Customer Data Law is undercut by the City's separate Commission Caps ordinance, which directly regulates those fees by capping the commissions that Plaintiffs earn per delivery. N.Y.C. Admin. Code § 20-563.3, *as amended by* L.L. 2025/079 (effective June 30, 2025).

3. The Law is not adequately tailored.

Under intermediate scrutiny, a regulation must be "narrowly drawn" and not "more extensive than necessary to serve the interest" the government asserts. *Cent. Hudson*, 447 U.S. at 565, 591. Speech regulations are not sufficiently tailored when alternative forms of regulation burdening less speech are available. *44 Liquormart*, 517 U.S. at 507. Here, a number of "[l]ess restrictive alternatives" were available to promote the City's goals. SPA37. For example, the City could have (if otherwise consistent with legal requirements):

- Launched City-run "educational campaigns" to inform customers of their ability to order directly from restaurants or to teach restaurants how to build their own channels. *44 Liquormart*, 517 U.S. at 507.
- Given tax breaks or other incentives to restaurants that build their own order-taking channels. *Id.* at 507-08; JA8104 (Comptroller report noting the City could provide tax credits to restaurants); SPA37.
- Provided financial incentives to third-party platforms (like Plaintiffs) that provide certain customer data to restaurants.

SPA37; *see Linmark Assocs. Inc. v. Willinboro Township*, 431 U.S. 85, 97 (1977) (noting government could "endeavor to create [financial] inducements" instead of regulating speech).

- Enacted a narrower law requiring platforms to allow restaurants to place "flyers and other direct marketing [materials] in [delivery] bags." JA8108.
- Enacted a narrower law permitting a customer opt-in method for data disclosure, rather than one that presumed consent absent perpetual opting-out. SPA37.

The "availability of these options, all of which could advance the Government's asserted interest in a manner less intrusive" to the First Amendment, indicates that the Law "is more extensive than necessary." *Rubin*, 514 U.S. at 491; *see* SPA37.

The City complains that these alternatives would not "directly address the harms to restaurants from lack of access to customer data." Opening Br. 59. But the City never "cite[s] any evidence or authority" demonstrating that the "abuses" it seeks to cure "cannot be combated" by these "less restrictive means." *Alexander v. Cahill*, 598 F.3d 79, 96 (2d

Cir. 2010). The City speculates, for example—without citing any evidence—that the alternatives "*may* result" in less data sharing with restaurants or "do nothing to preserve the relationship with existing customers." Opening Br. 59-60 (emphasis added). That failure to marshal evidence is fatal: the government has the burden to "demonstrate that a less burdensome alternative . . . would not advance the asserted governmental interests," and the City made no effort to meet that burden here. *Cornelio v. Connecticut*, 32 F.4th 160, 175 (2d Cir. 2022).

The City's argument also defies common sense and underscores why the Law is misguided. Numerous organizations urged the City to (at minimum) amend the Law to require customers to opt *in* to data sharing, rather than opt *out* on an order-by-order basis. An opt-*in* regime would equally serve the City's asserted interest in giving restaurants "access to consumer data." Opening Br. 59. The only difference is that an opt-*in* would ensure consumers *affirmatively consent* to those practices. As consumer-interest groups explained, "requiring an individual to opt-out of every single transaction, rather than asking them to opt-in if they are comfortable with sharing this data, runs counter to modern day privacy and transparency standards." JA8115 (cleaned up); *see also* JA8114,

JA8116-17. The City never provided a legitimate reason (let alone a narrowly tailored one) to jeopardize the privacy of City residents' personal information.

The City had many tools available to further its stated goals of aiding restaurants. It could not, as a first and only resort, compel Plaintiffs to communicate valuable Customer Data that they otherwise would not divulge. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002) ("If the First Amendment means anything, it means that regulating speech must be a last—not first—resort").

II. Alternatively, the Customer Data Law is subject to strict scrutiny, which it fails.

Because the Customer Data Law is subject to at least intermediate scrutiny and fails that standard, this Court need not decide whether strict or intermediate scrutiny governs. If the Court does reach that question, however, it should apply strict scrutiny. And the Law cannot withstand that level of review.

A. Strict scrutiny applies.

Although a content-based regulation of *commercial* speech is subject to intermediate scrutiny, *Vugo, Inc. v. City of New York*, 931 F.3d 42,

49 (2d Cir. 2019), a content-based regulation of *noncommercial* speech is subject to strict scrutiny. *E.g.*, *NIFLA*, 585 U.S. at 766.[4]

Strict scrutiny applies here because the Customer Data Law is a content-based regulation of noncommercial speech. It is content-based because it "[m]andat[es]" the disclosure of specific information—Customer Data—that Plaintiffs "would not otherwise [have] ma[de]." *Riley*, 487 U.S. at 795. Plaintiffs are "devoted to opposing" such disclosure. *NIFLA*, 585 U.S. at 766. The Law thus "alters the content" of Plaintiffs' speech. *Id.* And the speech the Law compels is noncommercial rather than commercial in nature, for reasons noted above. *See supra*, at 49-55.

B. The Law fails strict scrutiny.

The Law cannot "survive strict scrutiny, which is even more demanding" than intermediate scrutiny. *Volokh v. James*, 148 F.4th 71, 94 n.8 (2d Cir. 2025). Notably, the City does not argue otherwise.

Laws subject to strict scrutiny "may be justified only if the government proves that they are narrowly tailored to serve compelling state

[4] Plaintiffs respectfully preserve the argument that this Court should overrule *Vugo en banc*.

interests." *NIFLA*, 585 U.S. at 766. As the Supreme Court recently made clear, strict scrutiny is "unforgiving because it is the standard for reviewing the direct targeting of fully protected speech," and "as a practical matter," such scrutiny is "fatal … absent truly extraordinary circumstances." *Free Speech Coal. v. Paxton*, 145 S. Ct. 2291, 2310 (2025).

Only interests "of the highest order" are compelling. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). Legislation "designed to benefit [Plaintiffs'] competitors" does not serve a "substantial" interest, let alone a compelling one, in restricting speech. *Safelite*, 764 F.3d at 265; *see supra*, at 17-19. The Law also is not narrowly tailored because "several less restrictive alternatives" were available. *Green Party v. Garfield*, 616 F.3d 189, 209 (2d Cir. 2010); *see supra*, at 66-67. Each would have burdened "less speech"—or no speech at all—compared to the Law. *McCullen v. Coakley*, 573 U.S. 464, 495 (2014); *see* SPA37. Yet the City did not "prove the[se] alternative[s] to be ineffective," despite having been "presented with" them. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 822-23, 827 (2000).

The law thus cannot withstand strict scrutiny.

III. Even under *Zauderer*, the Law is unconstitutional.

Even under *Zauderer*, the Customer Data Law fails if it is (1) "unjustified or unduly burdensome," (2) does not "remedy a harm that is potentially real, not purely hypothetical," or (3) "extend[s] . . . broader than reasonably necessary." *NIFLA*, 585 U.S. at 776 (cleaned up). The government "has the burden to prove" that the Law satisfies these standards. *Id.* The City has not met this burden for two reasons.

First, the Law is designed to remedy a purely hypothetical concern that Plaintiffs are preventing struggling restaurants from accessing data about their own customers. *NIFLA* is instructive on this point. There, the law required medical clinics to notify women that they were not licensed to provide medical services. 585 U.S. at 761. The purported aim was to ensure that pregnant women in California "know when they are getting medical care from licensed professionals." *Id.* at 776. But California cited no evidence suggesting that "pregnant women do not already know" that certain facilities were staffed by unlicensed professionals. *Id.* at 777.

Here, likewise, the record belies the City's assertion that the Law is needed because Plaintiffs' supposed "stranglehold on customer data"

has "displaced restaurants' ability to form direct relationships with their customers." Opening Br. 50-51. In reality, Plaintiffs offer Storefront, Drive, and Direct, which allow restaurants to form direct relationships with their customers using the Customer Data that Plaintiffs would otherwise collect. *See supra*, at 3, 8-9. Restaurants choose not to use these products when the benefits of Marketplace outweigh the costs of not receiving customer data directly. And restaurants remain free to use whatever customer data they obtain outside of Plaintiffs' platforms. These facts undercut the notion that the Law provides a "remedy" for a "real" harm. *NIFLA*, 585 U.S. at 776.

Second, the Law is "broader than reasonably necessary." *Id*. A law is overbroad when less burdensome disclosures would still "accomplish [the government's] stated goals." *Am. Beverage Ass'n v. City & Cnty. of San Francisco*, 916 F.3d 749, 757 (9th Cir. 2019). In *American Beverage*, for example, a rule requiring warnings to occupy 20% of a product label was overbroad and unduly burdensome because a "smaller warning" would have accomplished the government's goals. *Id.* Here, as discussed above, the City could have served its purported aim of helping restaurants by compelling far less speech. For example, the City could have

required customers to opt in rather than opt out. *See supra*, at 68. Instead, the Law compels Plaintiffs to disclose vast amounts of valuable, sensitive information on a monthly basis—means that are far too "cumbersome" to justify the ends. *Dwyer v. Cappell*, 762 F.3d 275, 284 (3d Cir. 2014). The Law also unduly burdens Plaintiffs' speech rights by requiring them to engage in speech that enables restaurants to encourage consumers to remove Plaintiffs from the economic equation. As this Court recognized in *Safelite*, such a law "is a very serious deterrent to commercial speech." 764 F.3d at 264.

The City downplays the Law's burden by claiming it relates only to "a narrow slice" of customer information that pales in comparison to the total amount of data Plaintiffs collect. Opening Br. 52. But as consumer-privacy groups explained, even that slice is still a "massive amount[] of consumer information." JA8117. And compliance is far from trivial: building the mandated opt-out mechanisms and disclaimers the Law requires would be a cumbersome process that would take "at least six months" and require "significant financial resources." JA8124-25.

The City also insists the Law is narrow in scope because it "does not prevent plaintiffs from using any of the data themselves." Opening

Br. 52. That is beside the point. A law that unconstitutionally compels speech becomes no less unconstitutional just because it leaves the speaker free to engage in other speech. Otherwise, *NIFLA* would have come out the other way: nothing in the law there barred medical facilities from performing or discussing their own services. 585 U.S. at 777; *see generally 303 Creative LLC v. Elenis*, 600 U.S. 570 (2023) (law compelling statements violating speaker's beliefs was unconstitutional even though speaker remained free to make statements consistent with her beliefs).

Finally, the City claims the Law is narrow because it "requires disclosures to restaurants only when they request it." Opening Br. 53. But making valuable data freely available on demand is anything but narrow. In the brief period between the Law's effective date and the City stipulating to non-enforcement, several restaurants immediately requested Customer Data. JA8284. And the City Council plainly believes that many restaurants will do the same. Otherwise, it would not have passed the Law.

CONCLUSION

The First Amendment prohibits the City from compelling Plaintiffs to speak not about their products and services, but about their customers'

personal data. The Law provides no corresponding benefits to consumer information, rests on no demonstrated governmental interest, and ignores more tailored alternatives. This Court should affirm the grant of summary judgment for Plaintiffs.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Local Rule 32.1(a)(4)(A) because it contains 13,978 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point, New Century Schoolbook font.

Dated: September 19, 2025

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CERTIFICATE OF SERVICE

I hereby certify that, on September 19, 2025, I caused the foregoing brief to be electronically filed and served on all counsel of record via this Court's CM/ECF system.

Dated: September 19, 2025 /s/ *Michael Holecek*
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