

# 26-158

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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DOORDASH, INC.; UBER TECHNOLOGIES, INC.,  
*Plaintiffs-Appellants,*

v.

CITY OF NEW YORK,  
*Defendant-Appellee.*

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On Appeal from the United States District  
Court for the Southern District of New York  
(Case No. 25-10268 - Judge George B. Daniels)

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**BRIEF OF WASHINGTON LEGAL FOUNDATION  
AS AMICUS CURIAE SUPPORTING  
PLAINTIFFS-APPELLANTS AND REVERSAL**

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## INTEREST OF AMICUS CURIAE\*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as amicus curiae in First Amendment cases to oppose government efforts to compel speech. *E.g.*, *Moody v. NetChoice*, 603 U.S. 707 (2024); *Nat’l Retail Fed’n v. James*, Case No. 25-2818 (2d Cir. 2026).

### INTRODUCTION AND SUMMARY OF ARGUMENT

If it’s not necessary for a government to compel speech, it’s necessary for the government not to compel speech. *See PDK Labs, Inc. v. U.S. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring); *cf. Lamont v. Postmaster Gen. of U.S.*, 381 U.S. 301, 310 (1965) (Brennan, J., concurring) (“In the area of First Amendment freedoms, government has the duty to confine itself to the least intrusive regulations which are adequate for the purpose”).

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\* No party’s counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief’s preparation or submission. All parties consented to WLF’s filing this brief.

New York City thinks that Appellants don't pay delivery workers enough. The City took direct action to address that concern. It ordered the Delivery Services to pay at least a \$21.44-an-hour wage to delivery drivers. But the City wasn't satisfied with that rate. Rather than hike the wage further—or subsidize delivery personnel through enhanced welfare benefits or other state-funded measures—the City opted to cajole more tipping of those workers.

That would be fine if the City openly did so through its own words. A public-education campaign urging New Yorkers to think of their delivery drivers when punching in an order for Old Bay chicken wings or a jo-chirashi poses no First Amendment problems. But rather than speaking forthrightly, the City decided to seize the Delivery Services' speech. Worried that users balk at sufficiently tipping on a final order screen, the City forced the Delivery Services to push the tipping screen earlier in the commercial back-and-forth that occurs when a user builds, reviews, and places an order on an app. The City even has a preferred minimum tip—10 percent—and its law compels the Services to parrot that viewpoint at the City's preferred point in the transaction.

Because the First Amendment covers even speech that “only pertain[s] to a commercial transaction,” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 369 (2010), the government’s interruption of a free and fair exchange is of constitutional moment. See *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 48 (2017) (“In regulating the communication of prices rather than prices themselves” a government “regulates speech”). But rather than apply the exacting scrutiny the First Amendment demands, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564 (1980), the district court gave the City’s law a far more relaxed standard of review—passing it through both the “deferential” rule of *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), and “intermediate scrutiny in name only” far less searching than actual heightened scrutiny. Compare *Op. 7–9 with Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 608 (2021) (Roberts, C.J., controlling) (“Regardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny”).

How did this happen? The district court made two material errors. First, it blithely adopted *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006), as a proper overlay for this case.

That set the stage for the district court’s kid-gloved decision. But *Rumsfeld* deference has no purchase here. *Rumsfeld* is a wartime decision about raising and supporting the Nation’s armed forces. It’s woefully inapposite on these facts.

Second, the lower court misapplied *Zauderer* and misunderstood the requisite tailoring analysis. It’s true that *Zauderer* cuts the government slack—but only because it applies when the government compels speech to serve a public-safety interest that “enjoy[s] a long historical tradition.” *Chiles v. Salazar*, 607 U.S. \_\_; 146 S. Ct. 1010, 1022 (2026) (discussing *Zauderer*). Whatever you think about increasing the labor-price for gig workers, it’s just not the same as staving off a serious risk of deception, *Ibanez v. Fla. Dep’t of Bus. & Prof. Regul.*, 512 U.S. 136, 146 (1994), or keeping New Yorkers safe from mercury poisoning. *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 116 (2d Cir. 2001).

So the City must run the gauntlet of exacting scrutiny and show that interrupting the Services’ commercial transaction is a less speech-restrictive way to “directly advance” a vital interest than other, viable alternatives. *Cent. Hudson*, 447 U.S. at 564–65. It’s not. Even spotting the City a constitutionally sufficient interest in compelling speech to hike

wages for delivery workers, there's plenty of direct alternatives to meet that mission without infringing on speech. For one, the City could just hike the delivery-worker minimum pay rate some more. This option may be economically unwise, but it doesn't touch First Amendment freedoms. That stark reality resolves the case. "We need not linger over the balance" any further. *Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989). A direct, non-speech approach is more narrowly tailored than the takeover of private speech "every time." *Id.*

## ARGUMENT

### I. *RUMSFELD HAS NO APPLICATION HERE.*

The City compels every commercial transaction via one of the Services' apps to carry specific government-sponsored content. This commercial set of transactional facts doesn't come with the swelling music and inspiring heroism of some of the Supreme Court's cornerstone First Amendment precedents. *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977). But such venerable caselaw dictates the right outcome all the same.

"Commercial corporations may not have a public persona as sympathetic as that of" children forced to attest their patriotism or

Jehovah’s Witnesses standing athwart ideological conformity, “but they are no less entitled to this Court’s concern.” *Austin v. Mich. Chamber of Com.*, 494 U.S. 652, 682 (1990) (Scalia, J., dissenting) (emphasis omitted), *overruled by Citizens United*, 558 U.S. at 365. As the Supreme Court put it long ago, “[t]he idea is not sound . . . that the First Amendment’s safeguards are wholly inapplicable to business or economic activity.” *Thomas v. Collins*, 323 U.S. 516, 531 (1945). The Constitution doesn’t defer to a government’s seizing a commercial transaction for public use. It insists that the City show its work before it may do so. *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993); *see infra* at 10–16.

But the court below put those precedents aside with a swift citation, a *see cite* no less, to *Rumsfeld v. FAIR*. Op. 6. That sent the court down the wrong path—allowing the court to quickly dispatch the Services’ constitutional claim. That’s reversible error. *Rumsfeld* is no throat-clearing citation that generally excuses “regulat[ing] conduct where that conduct has expressive components.” *Id.* To understand why, let’s step back a quarter-century.

“On September 11, 2001, [al Qaida] brought the battle to American soil, killing 2,749 at the Twin Towers in New York City, 184 at the

Pentagon in Washington, D. C., and 40 in Pennsylvania.” *Boumediene v. Bush*, 553 U.S. 723, 827 (2008) (Scalia, J., dissenting). The United States responded by taking the fight to “a radical network of terrorists, and every government that supports them.” George W. Bush, *Address to a Joint Session of Congress* (Sept. 20, 2001); Pub. L. 107-40 (Sept. 18, 2001) (authorizing warfare “against those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons”); Pub. L. 107-243 (Oct. 16, 2002) (authorizing warfare to “defend the national security of the United States against the continuing threat posed by Iraq”).

To raise and support a military capable of carrying out this Global War on Terrorism, the United States had to recruit men and women to the Armed Forces. A material percentage of competent, military-age Americans can be found on the campuses of the Nation’s universities. There was just one problem. A critical mass of universities had walled off their students from military recruiters.

This practice began in protest to the military’s old policy excluding gays and lesbians from service and continued through the early days of

the post-9/11 wars. *Rumsfeld*, 547 U.S. at 52–53. So in 2004—with American forces waging counterterrorism and counterinsurgency campaigns in Afghanistan and Iraq—Congress used the annual National Defense Authorization Act to strengthen existing protections for on-campus military recruitment. The pre-9/11 law merely guaranteed the services “entry to campuses.” Pub. L. 108-375 (Oct. 28, 2004). The wartime statute ensured “access to campuses . . . in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer.” *Id.* The challengers in *Rumsfeld* argued this law improperly compelled speech because schools notify students where private recruiters are available and “schools offering such services to other recruiters must also send e-mails and post notices on behalf of the military to comply” with the equal-treatment rule. 547 U.S. at 61.

In short, *Rumsfeld* was no garden-variety First Amendment dispute—let alone a commercial speech precedent. The *Rumsfeld* challengers lost because Congress, in wartime, was acting through its “broad and sweeping” authority “to ‘provide for the common Defence,’ ‘to raise and support Armies,’ and ‘to provide and maintain a Navy.’”

*Rumsfeld*, 547 U.S. at 58 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968) and U.S. Const., art. I, § 8) (brackets omitted); Pet. Br. 17, *Rumsfeld v. Forum for Acad. & Institutional Rts.*, 547 U.S. 47 (U.S. July 19, 2005) (statute “is addressed solely to an institution’s *conduct* in denying equal access—conduct that undermines the military’s recruitment effort, particularly in a time of War”) (capitalization and emphasis in original).

No matter how important increasing the take-home pay of delivery drivers may be to the City, it pales against Congress’s core national security powers in wartime. “[J]udicial deference is at its apogee when Congress legislates under its authority to raise and support armies”—not when a local government compels domestic speech for plainly parochial purposes. *Rumsfeld*, 547 U.S. at 58 (internal punctuation and citation omitted). Whether it did so knowingly or unknowingly, the district court’s application of *Rumsfeld* deference in a non-national security context warped its subsequent application of First Amendment doctrine. It’s the original sin of the district court’s relaxed review.

## II. THE CITY’S LAW FLUNKS FIRST AMENDMENT SCRUTINY.

Sans *Rumsfeld* deference, the City’s mandate must survive scrutiny under the peacetime Constitution. There, how a seller poses an offer to a prospective buyer—including the structure of pre-checkout pricing—is protected speech. *Expressions Hair Design*, 581 U.S. at 48 (“In regulating the communication of prices rather than prices themselves” a state “regulates speech”). And since “government has no [general] power to restrict expression because of its message, its ideas, its subject matter, or its content,” *Volokh v. James*, 148 F.4th 71, 84 (2d Cir. 2025) (quoting *Brown v. Entertainment Merchants Ass’n*, 564 U.S. 786, 790–91 (2011)), this Court “treat[s] a law compelling—rather than restricting—speech” as presumptively unconstitutional. *Id.*

The City will object that this is a *Zauderer* case—and so its mandate escapes rigorous review. *Cf.* Op. 7–8. Not so. *Zauderer*, like *Rumsfeld*, is a narrowly crafted exception to the general rule—not the new normal. Recall that Philip Q. Zauderer was a liar. A lawyer working on contingency, Mr. Zauderer wished to distribute ads that promised “[i]f there is no recovery, no legal fees are owed by our clients.” *Zauderer*, 471 U.S. at 631. But Zauderer didn’t inform his audience “that the client may

have to bear certain expenses”—namely, costs. *Id.* at 650. Those communications courted a “self-evident” risk of fraud. *Id.* at 652. A lay consumer might consider a “no fees” ad as a pitch for genuinely free-if-you-lose-your-case legal services—then be snookered into signing a pay-costs-no-matter-what contract. So Ohio redlined Mr. Zauderer’s work out of a legitimate and painfully obvious concern that without disclosure, a potential client might be swindled into thinking something was free when it was not.

In every “First Amendment context, fit matters.” *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 218 (2014) (Roberts, C.J., controlling). *Zauderer* allows a somewhat looser fit where the government is compelling speech to advance an obvious public-safety mission with significant “historical pedigree”—to stop fraud, to “prevent consumer deception or to ensure consumer health or safety.” *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 32 (D.C. Cir. 2014) (Kavanaugh, J., concurring). Indeed, the *Zauderer* Court’s much ballyhooed note that Ohio could append only “factual and uncontroversial information” to Mr. Zauderer’s business pitch was a limiting instruction—not a license. 471 U.S. at 651. Even where the government is acting to protect the public

from predatory asks and public health risks, it can't compel any speech beyond the unambiguous truth—and even then, it can't use up any more of the speaker's platform than necessary to do the job. *Am. Bev. Ass'n v. City & Cnty. of S.F.*, 916 F.3d 749, 757 (9th Cir. 2019) (applying *Zauderer* and rejecting commercial disclaimer twice as long as needed to effectively communicate the government's health-and-safety messaging). Conversely, when the state interrupts a commercial transaction for any other reason, a government's demand falls out of *Zauderer's* grasp, and exacting scrutiny applies.

Consider mandatory mercury labeling or a compelled calorie-count on a menu—both instances where this Court determined *Zauderer* scrutiny sufficed. Both cases sound in a legitimate, longstanding state interest in consumer safety. Mercury poisoning is toxic—and truthfully flagging a bulb's mercury content reinforces that consumers have a choice between mercury and LED lightbulbs. *See Nat'l Elec. Mfrs. Ass'n*, 272 F.3d at 115 n.6. Obesity kills—and the caloric content of foods can be counterintuitive. *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 136 (2d Cir. 2009) (“ . . . a smoked turkey sandwich at Chili's contains 930 calories, more than a sirloin steak, which contains 540, or

that 2 jelly-filled doughnuts at Dunkin’ Donuts have fewer calories than a sesame bagel with cream cheese”).

But forcing a dairy producer to say its cows were treated with a safety-neutral growth hormone? That’s outside the *Zauderer* zone. *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67, 72–74 (2d Cir. 1996). Compelling a pro-life crisis pregnancy center to steer clients to clinics offering abortion? There’s no “historical pedigree” there, *Am. Meat Inst.*, 760 F.3d at 32 (Kavanaugh, J., concurring), and “*Zauderer* has no application.” *Nat’l Inst. of Fam. & Life Advocates v. Becerra*, 585 U.S. 755, 768–69 (2018) (*NIFLA*). Here, New York isn’t promoting public health with a “curative disclosure.” *Am. Meat Inst.*, 760 F.3d at 39 (Brown, J., dissenting). It’s trying to increase take-home pay for food-delivery workers.

Even if the City mustered a relevant interest, it still hasn’t shown that it’s forcing an uncontroversial ask. It’s “*Zauderer*-controversial” when the government interrupts a commercial transaction to steer it toward a state-sponsored conclusion. *NIFLA*, 585 U.S. at 768–69 (“*Zauderer* has no application” where the government goes beyond providing “information about the terms under which [goods or] services

will be available”) (quoting *Zauderer*, 471 U.S. at 651) (ellipses omitted); *WLF v. Henney*, 56 F. Supp. 2d 81, 85–86 (D.D.C. 1999) (First Amendment forbids restrictions designed to “balance” a company’s opinion and understanding of its own product), *judgment vacated in part due to lack of Article III controversy*, 202 F.3d 331 (D.C. Cir. 2000). Advancing the tipping screen and asking for more money is counterproductive to the Services and risks annoying customers off their platforms. Pl. Mem. of Law (ECF No. 10) at 6 (“Customers are particularly opposed to tipping when the request [for a tip] feels premature”) (brackets in original, internal quotation marks and citation omitted).

Worse yet, quietly pushing the Services to make this ask also undermines the platforms’ speech in other ways. Say what you will about a Surgeon General’s warning on a pack of cigarettes, but at least it’s signed by the federal government. But the City’s imposition bears no such authorship—the default tip looks like it’s the Services’ own idea. That ventriloquism undermines the Services’ own position on a political controversy. The Services opposed the City’s enacting a \$21.44 minimum pay rate for delivery drivers. But by forcing them to suggest a 10 percent

tip on every order, the City’s messaging transmogrifies that opposition into an implied contention that workers earning \$21.44 an hour is *insufficient*. A company can’t be directed to “disseminate hostile views” against its own interests. *Pac. Gas & Elec. Co. v. Pub. Utilities Comm’n of Cal.*, 475 U.S. 1, 14 (1986) (Powell, J., plurality). In sum, the City’s mandate compels the Delivery Services to undermine both their business model and their prior position on a public controversy. That’s *NIFLA*, 585 U.S. at 762, not *Zauderer*.

That doesn’t disempower the City wholesale. But it means that the government must show that its compulsion is narrowly tailored to directly advance a substantial interest. *Cent. Hudson*, 447 U.S. at 564; *Ams. for Prosperity Found.*, 594 U.S. at 608 (Roberts, C.J., controlling) (“Regardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny”). It’s far from clear that ensuring that one category of worker makes more money is a sufficiently vital state interest—but even if you spot that to the City, it still flunks exacting scrutiny.

The City has lots of non-speech-restrictive options at hand to get more money in the pockets of delivery personnel. For example, the City

could enhance welfare services for those workers or pay them an additional subsidy to build up their incomes. But there's no need to engage with those hypotheticals. After all, the City has already directly increased the minimum pay for delivery workers by fiat. If that's insufficient, it could raise the minimum-wage floor higher.

There's no question that a direct wage hike is less constitutionally restrictive than compelling speech. And it's also a more direct way of accomplishing that goal than outsourcing a pay raise to the unpredictable mercies of a delivery app's customers. "We need not linger over the balance" any further at this point. *Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989). A direct, non-speech approach is more narrowly tailored than the seizure of private speech "every time."  
*Id.*

## CONCLUSION

This isn't a national security case. This isn't a public safety or consumer protection case. The district court treated it like one—and that's why it got the First Amendment wrong. This Court should reverse.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limits of Federal Rule of Appellate Procedure 29(a)(5) because it contains 3,138 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

I also certify that this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it uses 14-point Century Schoolbook font.

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