25-81
DoorDash, Inc. v. City of New York

PARK, *Circuit Judge*, concurring:

Today's opinion correctly concludes that New York City's Customer Data Law is unconstitutional because the City fails to establish a "reasonable fit between the means and ends of the regulatory scheme." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561 (2001). The opinion focuses on two relatively technical aspects of the Law—presumed consent and order-by-order opt-outs—that fail under the fourth prong of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). I agree with the opinion in full but write separately to note a deeper problem.

The Law compels speech for nothing more than economic favoritism. The City's stated goal is to "support the restaurant industry" by requiring delivery platforms to disclose valuable customer data to restaurants. Appellant's Br. 1. The Law's sponsor explained that the objective was to "strike the right balance and equity between" platforms and restaurants and to "give" restaurants "a better opportunity to compete." Joint App'x 661 (Transcript of June 8, 2021 Hearing of New York City Council Committee on Consumer Affairs and Business Licensing).

A vague desire to support an industry comprised of tens of thousands of stores is not the type of interest that can justify abridging the freedom of speech of disfavored competitors. Under *Central Hudson*, we "ask whether the asserted governmental interest is substantial." 447 U.S. at 566. To determine which interests qualify as substantial in the compelled commercial disclosure context, "history and tradition are reliable guides." *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 31 (D.C. Cir. 2014) (en banc) (Kavanaugh, J., concurring in the judgment). For example, the "Government has long required commercial disclosures to prevent consumer deception or to ensure consumer health or safety," and "[t]hose interests explain and justify" compelled disclosures like "nutrition labels and health warnings." *Id.* But here, the City does not even offer consumer protection as a pretext (nor could it because the Law would actually harm consumers by disclosing their personally identifiable information without consent, *see ante* at 21–25).

In *Safelite Group, Inc. v. Jepsen*, 764 F.3d 258 (2d Cir. 2014), we enjoined the enforcement of a statute that was "highly likely to further covertly protectionist, rather than consumer information, goals" "by protecting" certain businesses against others. *Id.* at 259, 264. The Law here similarly—but overtly—seeks to advance protectionist goals by requiring delivery platforms to turn over valuable data for the sole aim of supporting restaurants. I do not think that is a substantial governmental interest under *Central Hudson*.