

Date of Hearing: April 22, 2021

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Ed Chau, Chair

AB 286 (Lorena Gonzalez) – As Amended March 22, 2021

SUBJECT: Food delivery: fees and tips

SUMMARY: This bill would prohibit a food delivery platform from charging a food facility more than 15% of the purchase price of each online order for the use of their services, from charging a customer a purchase price that exceeds the price set by the food facility, and from retaining any portion of amounts designated as a tip or gratuity; and would require food delivery platforms to disclose to the customer and the food facility certain specified information related to fees, commissions, and costs charged to both parties. Specifically, **this bill would:**

- 1) Prohibit a food delivery platform, as defined, from charging a food facility, as defined, any combination of fees, commissions, or costs for a food facility's use of the food delivery platform's service that totals more than 15% of the purchase price of each online order.
- 2) Prohibit a food delivery platform from charging a food facility any amount designated as a delivery fee for an online order that does not involve the delivery of food or beverages.
- 3) Prohibit a food delivery platform from charging a food facility any fee, commission, or cost other than as permitted in 1) and 2), above.
- 4) Prohibit a food delivery platform from charging a customer any purchase price, as defined, for food or beverage that is higher than the price set by the food facility.
- 5) Prohibit a food delivery platform from retaining any portion of amounts designated as a tip or gratuity; and provide that any tip or gratuity shall be paid by a food delivery platform, in its entirety, to the person delivering the food or beverage.
- 6) Require a food delivery platform to disclose to the customer and to the food facility an accurate, clearly identified, and itemized cost breakdown of each transaction, including but not limited to the following information: (1) the purchase price of the food and beverage; (2) the delivery fee charged to the food facility; (3) each fee, commission, or cost charged to the food facility; (4) each fee, commission, or cost charged to the customer by the food delivery platform; and (5) any tip or gratuity that will be paid to the person delivering the order.
- 7) Provide that a violation of the provisions of the bill shall constitute unfair competition pursuant to the Unfair Competition Law.
- 8) Specify that the provisions of the bill are severable, and that if any provision of the bill or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.
- 9) Provide various definitions, including "online order" and "purchase price."
- 10) Make various legislative findings and declarations in support of the bill.

EXISTING LAW:

- 1) Establishes the Unfair Competition Law, which, among other things, provides for specific or preventive relief to enforce a penalty, forfeiture, or penal law in the case of unfair competition; and defines unfair competition to mean any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, and untrue or misleading advertising. (Bus. & Prof. Code Sec. 17200, et seq.)
- 2) Permits actions for relief pursuant to 1), above, to be prosecuted exclusively by the Attorney General, a district attorney, a county counsel as specified, a city attorney as specified, or a city prosecutor as specified, in the name of the people of the State of California, or by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition. (Bus. & Prof. Code Sec. 17204.)
- 3) Permits any person specified in 2), above, to seek injunctive relief and actual damages, and permits any person specified in 2) except for a person who has suffered injury in fact to pursue civil penalties, as specified, for violations of the provisions of the Unfair Competition Law. (Bus. & Prof. Code Secs. 17204 and 17206.)
- 4) Prohibits a food delivery platform, as defined, from arranging for the delivery of an order from a food facility, as defined, without first obtaining an agreement with the food facility expressly authorizing the food delivery platform to take orders and deliver meals prepared by the food facility. (Bus. & Prof. Code Sec. 22599.)
- 5) For purposes of 4), above, defines “food delivery platform” to mean an online business that acts as an intermediary between consumers and multiple food facilities to submit food orders from a consumer to a participating food facility, and to arrange for the delivery of the order from the food facility to the consumer. (Bus. & Prof. Code Sec. 22598(a).)
- 6) For purposes of 4), above, defines “food facility” to mean an operation that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption at the retail level, including, but not limited to the following: (1) an operation where food is consumed on or off the premises, regardless of whether there is a charge for the food; and (2) a place used in conjunction with the operations described in this definition, including but not limited to storage facilities for food-related utensils, equipment, and materials; and provides several specified inclusions and exclusions. (Health & Safety Code Sec. 113789.)
- 7) Prohibits an employer or agent, as defined, from collecting, taking, or receiving any gratuity or art thereof that is paid, given to, or left for an employee, as defined, by a patron; or deducting any amount from wages due an employee on account of gratuity; or requiring an employee to credit the amount, or any part thereof, of a gratuity against and as a part of the wages due the employee from the employer; and provides that any employer who violates this provision is guilty of a misdemeanor, punishable by a fine not exceeding \$1,000 or by imprisonment for not exceeding 60 days, or both. (Lab. Code Secs. 351 and 354.)
- 8) Defines “employee” for the purposes of 7), above, to mean every person, including aliens and minors, rendering actual service in any business for an employer, regardless of the conditions of payment or wages, or the nature of the service rendered; and defines “employer” to mean every person engaged in any business or enterprise in this state that has one or more persons in service under any appointment, contract of hire, or apprenticeship,

express or implied, oral or written, irrespective of whether the person is the owner of the business or is operating on a concessionaire or other basis. (Lab. Code Sec. 350(a) and (b).)

- 9) Pursuant to Proposition 22 (Ballot Measure, Primary Elec. Nov 3, 2020), among other things, prohibits a network company or agent, as defined, from taking, receiving, or retaining any gratuity or a part thereof that is paid, given to, or left for an app-based driver, as defined, by a customer; or deducting any amount from the earnings due an app-based driver for a ride or delivery on account of a gratuity paid in connection with the ride or delivery. (Bus. & Prof. Code Sec. 7453(c).)

FISCAL EFFECT: None. This bill has been keyed as nonfiscal by the Legislative Counsel.

COMMENTS:

- 1) **Purpose of this bill:** This bill seeks to improve parity in business relationships between food delivery platforms and food facilities, and to provide consumers and food facilities with the ability to make informed purchasing and contracting decisions with respect to food delivery platforms, by capping the total costs a food delivery platform can charge a food facility for their services at 15% of the purchase price of the order, and by requiring disclosures relating to the fees, commissions, and costs charged to the food facility and charged to the consumer by the food delivery platform. This bill is author sponsored.
- 2) **Author's statement:** According to the author:

In recent years, food delivery companies like GrubHub, Postmates, and UberEats have aggressively entered the food service space. Some restaurateurs buy into the idea that these companies will grow their customer base and increase their total revenues, and are offered limited-time discounts or rate cuts by the delivery service for joining. However, restaurants have reported unauthorized listing of their business on platforms, the lack of an ability to connect with their customers, and difficulty with ensuring quality of service. [...]

Restaurants pay delivery companies a commission on their sales, as determined by the food delivery company. While large chains may be able to negotiate the amount, smaller neighborhood restaurants often lack negotiating power. In the event a restaurant objects to the commission amounts or commission increases, or stops doing business with a delivery company, food delivery companies can undercut restaurants by re-directing customers to a competing business or “ghost kitchen.”

As additional restaurants turned to the use of third-party companies to provide delivery service shortly after the Stay at Home Order, many owners quickly found that fees and service charges frequently reached and exceeded 30%, and in some cases would vary per order. In an industry where profit margins are tight, restaurateurs are reporting that commission costs take a significant portion of their margins, and in some cases, are even losing the restaurant money. [...]

AB 286 will protect small community and family-run restaurants from exorbitant fees charged by third-party food delivery companies, and provide transparency to customers.

- 3) **Food delivery platforms, COVID-19, and the transition to digital dining:** According to the California Restaurant Association, the restaurant industry has suffered the most significant sales and job losses of any industry since the COVID-19 outbreak began.¹ More than 8 million restaurant employees had been laid off or furloughed, and the industry lost approximately \$80 billion in sales, as of the end of April 2020.¹ Coincident with the hardship faced by the restaurant industry, the use of food delivery platforms, which facilitate food orders, pick-up, and delivery from restaurants and other food facilities, has seen a marked increase as food delivery continues to accommodate a population that is either sheltering-in-place or wary of in-person dining.

Though accelerated by COVID-19 pandemic, the transition away from in-person dining and to digital ordering for take-out or delivery long preceded the pandemic's limitations on dining-in. According to a report by NPD Group, a market research firm, from 2013-2019, restaurant digital orders grew at an average annual rate of 23%, and were expected to triple in volume by the end of 2020 even before any knowledge of the impending pandemic.² However, often operating on razor-thin margins, and now facing severe economic hardship, many small restaurants lack the staff capacity and logistical resources to transition from primarily dine-in operations to in-house managed delivery services.

- 4) **Pros and cons for restaurants of contracting with food delivery platforms:** Restaurants without the capacity to develop the costly information technology infrastructure and delivery logistics to keep pace with the rapid transition to digital dining are at constant risk of losing their customer base to those who do. To remain solvent, many such restaurants have little choice but to enter into contracts with food delivery platforms to provide these services on their behalf. These contracts typically stipulate that in exchange for the use of their digital interface, and in most cases their delivery services, the food delivery platform receives from the restaurant a certain percentage of the purchase price. In some cases, these services can be a lifeline for businesses that need digital services, marketing exposure, and delivery to remain competitive, but cannot afford the initial and ongoing investments necessary to sustain them. As a coalition consisting of the Small Business & Entrepreneurship Council, the Center for Individual Freedom, the Hispanic Leadership Fund, Consumer Action for a Strong Economy, and the American Consumer Institute Center for Citizen Research contends in opposition to this bill:

Restaurants have a choice. They have the option of providing delivery on their own, just as many pizza and other establishments have done for decades. But many, after looking at the investments required, have opted instead to work with third-party food delivery services. [...] Third-party delivery services have helped bridge the gap between restaurants and customers and provided a dependable revenue stream for them and their workers during the pandemic. [...] Price controls limit the options of small businesses to compete against larger businesses and franchises that can absorb the costs of delivery and spend significantly on advertising and marketing.

¹ California Restaurant Association, "Coronavirus Information and Resources," Apr. 30, 2020, <https://restaurant.org/Covid19>.

² NPD Group, "Mobile Apps Now Represent the Bulk of Restaurant Digital Orders and Restaurant Branded Apps Dominate," Press Release, Feb. 4, 2019, <https://www.npd.com/wps/portal/npd/us/news/press-releases/2019/mobile-apps-now-represent-the-bulk-of-restaurant-digital-orders-and-restaurant-branded-apps-dominate/>.

Unfortunately, not all restaurateurs share this positive experience. Because restaurants in many cases are existentially reliant on their services, the disparity in bargaining power between the platforms and restaurants often results in exploitative or unfair contracts that can be harmful to the restaurants, including by charging them extremely high commissions on deliveries and otherwise charging delivery fees to the food facility when a delivery isn't actually carried out. In support of the bill, SEIU California explains:

[S]maller neighborhood restaurants often lack the negotiating power to secure lower commission rates. While larger, nationwide chains may be able to negotiate the service fee amount, independent restaurateurs often find themselves paying commission fees that frequently exceed 30% of the purchase price of each order. In an industry where profit margins are tight, restaurateurs are reporting that commission costs take a significant portion of their margins, and in some cases, are even losing the restaurant money.

Though one may expect that in these cases, a restaurant would simply cease contracting for services that do not yield a profit, the choice is not always so simple. As the Small Business Majority points out in support of the bill:

Without a level playing field between food delivery companies and restaurants, smaller restaurants are at a disadvantage against their larger counterparts that may have the resources to afford the high commissions on each sale – often up to 30% of the sales price. As a result, small business owners must choose between losing business because they are not listed on the platform or losing business because their profit margins cannot cover the lost revenue.

Despite growing competition in the food delivery platform space, the industry is primarily controlled by only four companies, compounding this bind. As of March 2021, Uber Eats, Postmates, DoorDash, and Grubhub together controlled a 99% share of sales in the food delivery market, and a May 2020 article in *Bloomberg* reported that Uber and Grubhub have discussed a possible merger, potentially further reducing the already meager options for restaurants when faced with suboptimal contract terms.³

In many cases, these platforms also lack transparency with respect to the prices being charged to consumers. Food delivery platforms often charge customers service and delivery fees, in addition to listing higher prices for the same menu items. For the top five food delivery platforms, these markups total to increases ranging from 17% to 40.5% of list price for the same items at the restaurant.⁴ Though these costs are imposed by the platform, consumers may assume the costs are the result of agreements between the restaurant and the platform, or are the typical prices for the restaurant itself, skewing the perceived value of the restaurant's product. Restaurants contracting with food delivery platforms are not always aware of the specific fees and mark-ups charged to customers, making it difficult for a

³ Liyin Yeo, "Which company is winning the restaurant food delivery war?" *Bloomberg Second Measure*, Apr. 14, 2021, <https://secondmeasure.com/datapoints/food-delivery-services-grubhub-uber-eats-doorDash-postmates/>; Ed Hammond, "Uber Approaches Grubhub With Takeover Offer," *Bloomberg*, May 12, 2020, <https://www.bloomberg.com/news/articles/2020-05-12/uber-is-said-to-approach-grubhub-with-takeover-offer>.

⁴ Noah Lichtenstein, "The hidden cost of food delivery," *TechCrunch*, Mar. 16, 2020, <https://techcrunch.com/2020/03/16/the-hidden-cost-of-food-delivery/>

restaurant to choose to do business only with platforms that would not expose them to this risk.

Similarly, consumers are often blind to the relationships between food delivery platforms and restaurants, obscuring how much of their money is actually supporting the local restaurant, and how much is going to the platform. For consumers who hope to “vote with their wallet” by supporting platforms providing fairer contractual terms to restaurants, this lack of transparency makes informed choice difficult.

In 2020, this Legislature passed AB 2149 (Gonzalez, Ch. 125, Stats. 2020), which required a food delivery platform to contract with a food facility before arranging for the delivery of an order from that food facility, and was the first California law explicitly regulating the food delivery platform industry. AB 286 seeks to expand on that law by further regulating the terms of contractual relationships between food delivery platforms and food facilities, and how these relationships affect consumers.

- 5) **AB 286 would permanently regulate food delivery platforms in a manner similar to temporary measures adopted by many cities:** In response to COVID-19’s exacerbation of restaurant reliance on food delivery platforms, several cities have enacted temporary measures capping the fees and costs food delivery platforms can charge restaurants for their services, hoping to allay the stress local restaurants are facing. Cities across the country such including Washington D.C., Chicago, Portland, and New York, as well as cities in California including Los Angeles, Berkeley, and San Francisco have established such temporary caps, in place until the pandemic emergency is resolved.

In the case of Los Angeles, for instance, temporary regulations on the food delivery platform industry will remain in place until 90 days after the City’s Order prohibiting on-premises dining is lifted, and provide that it shall be unlawful for such a platform to charge a restaurant a delivery fee that totals more than 15% of the purchase price of each online order, or any combination of fees, commissions, or costs not including the delivery fee that total more than 5% of the purchase price of each online order. The ordinance prohibits a platform from charging a restaurant any amount designated as a delivery fee for an online order that does not involve the delivery of food or beverages, nor any fee or commission except as provided above. The Los Angeles ordinance also provides that it shall be unlawful for a platform to charge a customer any purchase price for a food or beverage item that is higher than the price set by the restaurant. The ordinance prohibits a platform from retaining any amounts designated as tip or gratuity, and requires platforms to disclose to customers an accurate, clearly identified, and itemized cost breakdown of each transaction, including specified information: the purchase price of the food and beverages at the cost listed on the restaurant’s menu; the delivery fee charged to the food establishment; each fee, commission, or cost, other than a delivery fee, charged to the restaurant; and any tip or gratuity that will be paid to the person delivering the food or beverages.

The Los Angeles commission cap is just one of many such ordinances adopted in California cities. This piecemeal approach has the potential to cause significant problems for enforcement and compliance, especially since deliveries can often operate across the borders of municipalities. For this reason, the author contends a statewide measure is appropriate.

AB 286 is substantively similar to the ordinance imposed by Los Angeles, with certain exceptions. First, and most notably, AB 286 does not contain a sunset date, and would

instead be a permanent measure barring further legislative action. Second, the bill does not allow for a 5% cap on costs other than the delivery fee, but instead prohibits a platform from charging any additional costs to the food facility beyond the 15%-capped delivery fee outright. Finally, the disclosure of costs required by AB 286 must be provided to both the customer and the food facility. Staff notes that while AB 286 also contains a provision, similar to the Los Angeles ordinance, that prohibits a food delivery platform from retaining any tips or gratuity, and requiring tips and gratuity to be provided in full to the person delivering the order, California state law already provides this requirement in both the Labor Code (Sec. 351), and in the Business & Professions Code pursuant to Proposition 22 (Sec. 7453(c)). Including this provision again in this bill again may clarify the availability of remedies provided under the Unfair Competition Law in the event such a practice is undertaken, but could also complicate interpretation of the law due to redundancy.

- 6) **While AB 286 would likely provide useful transparency, the commission cap may impede flexibility for cost structures:** By requiring clear disclosure of the cost breakdown, including specific fees, commissions, and costs charged to the food facility and to the customer, as well as the purchase price of the food and beverage, AB 286 would provide transparency to both customers and food facilities with respect to the business practices, and relative values, of food delivery platforms. As a coalition of labor rights organizations consisting of United Food and Commercial Workers – Western States Council, California Labor Federation, and California Teamsters Public Affairs Council, argue in support of the bill:

[T]ransparency on fees charged by third-party food delivery companies to customers and business owners are essential. Chicago and Washington D.C have implemented measures to increase transparency for consumers of pricing for third-party food delivery services. Food delivery app companies have been employing design practices that obfuscate fees that ultimately impact restaurant profits and worker pay. A Medium article [Citation] states, “Transparency is helpful to empower users to make clear decisions about what their money is going toward and how it’s impacting their local economy and the contract delivery people who lack full-time worker protections and benefits. It is one of many mechanisms in an ecosystem of change we need to further hold companies accountable to the many stakeholders who rely on their services. At a minimum, consumers deserve to know what they’re paying for — be it a service fee, a tip, or a meal — and who they’re paying for it — so that they can make informed choices about whether and how to utilize these services, with an understanding of how these services can affect their local community. Consumers deserve more transparency into how these businesses operate to hold themselves accountable as consumers, to hold the companies accountable for their practices, and to hold their representatives accountable for the effectiveness of their policies.

By requiring the cost breakdown to be provided to both the customer and the food facility, such transparency can also help food facilities determine whether platforms with whom they contract are complying with the law, and how their assignment of costs and fees to customers may affect the customer’s perception of the restaurant’s relative value. Staff notes, however, that the bill in print does not include state and local tax imposed on the order in the cost breakdown, which is essential for a customer to wholly evaluate their charges. If this bill passes out of this Committee, the author should consider amending the bill to address this technical consideration.

Supporters and opponents of the bill disagree significantly on the merits of the hard cap on commissions imposed by AB 286. While supporters generally believe the cap on commissions and fees would rectify the imbalance in negotiating power that arises from the existential dependence of many small restaurants on food delivery platforms, opponents contend that there is sufficient choice available in the delivery platform market to allow restaurants to negotiate appropriately, and that a fee cap would drive up costs for consumers and limit the availability of their services, thereby harming restaurants and potentially threatening the ability of the platforms to continue to operate. Staff notes that while competition within the food delivery platform space is fierce, it is nonetheless effectively limited to only a very small number of large companies and their subsidiaries, which may undermine the ability of market forces to rationally dictate commissions. Accordingly, price controls on this business relationship have the potential to stabilize the market if carefully considered and thoughtfully structured.

That said, the inflexibility of the commission cap imposed by AB 286 may to some extent limit the bill's effectiveness by limiting the payment structures made available to food facilities by food delivery platforms. The bill allows only for a delivery fee capped at 15% of the purchase price of the order, and permits no other charges or costs to the restaurant. This would effectively require all food delivery platforms to operate solely on a commission-based model, without the ability to innovate business models that may better accommodate the unique circumstances of specific restaurants. For instance, as it is currently structured, this cap would not permit a combination of commissions and flat rates to be charged, or a monthly subscription model, or any other model not based on a percentage commission on the price of the order. It is true that virtually all major food delivery platforms currently operate based on a commission model, but foreclosing the possibility of other models may make it more difficult for new players in the platform space to emerge and compete with the few dominant companies who have already more or less optimized that particular business model. Additionally, AB 286 may not provide for the possibility that a food delivery platform offer a food facility services beyond delivery only. As Grubhub points out in opposition to the bill:

Grubhub provides much more than delivery for our restaurant partners. We primarily act as a marketing and advertising partner that generates increased sales for independent restaurants. Marketing services can include search engine marketing and optimization, loyalty and rewards programs, point of sale integration and other programs. These aggregated services have associated hard costs that restaurants would otherwise have to incur themselves. By providing these discounted by scale, Grubhub allows independent restaurants to compete against large chains with massive marketing budgets. If passed, this legislation would limit California's independent restaurants' ability to utilize these services, hurting them in both the short- and long-term.

Notably, the Los Angeles ordinance did provide for additional costs beyond the delivery fee, though those costs were capped at 5% of the purchase price of an order, and could not be charged according to any other payment model. For these and other reasons, the author has opted to strike from the bill the provisions imposing the cap on fees, commissions, and costs, as well as the legislative findings and declarations, while maintaining the required cost breakdown and the prohibitions on charging a purchase price higher than the price set by the food facility and on the retention of any portion of amounts designated as a tip or gratuity by the platform. With this amendment, the bill seems likely to provide useful transparency

without imposing on the emergence of innovative business models in the food delivery platform industry.

Author's amendment:

Strike page 2 in its entirety; on page 3, strike lines 1-10, inclusive, and strike lines 35-38, inclusive; on page 4, strike lines 1-5, inclusive.

- 7) **Constitutional concerns raised by opposition appear to lack merit:** Several opposition groups raised concerns related to the constitutionality of the provisions of AB 286 on a number of different grounds. Perhaps most expansive in their constitutional contentions, a coalition of business advocacy groups consisting of CalChamber, Silicon Valley Leadership Group, TechNet, Internet Association, Civil Justice Association of California, and California Taxpayer Association argues:

If enacted, AB 286 would infringe on the constitutional rights of local restaurants and delivery platforms by:

- Rewriting and interfering with existing contracts between restaurants and delivery platforms in violation of the Contract Clause.
- Depriving restaurants and delivery platforms of their right to contract in violation of the Due Process Clause.
- Depriving delivery platforms of their contracted for property interests without any compensation in violation of the Takings Clause.
- Favoring one industry (restaurants) without any legitimate justification and to the likely detriment of local consumers and local delivery persons in violation of the Equal Protection Clause.
- Prohibiting restaurants from purchasing additional services from delivery platforms (such as advertising and marketing) in violation of the First Amendment.
- Compelling commercial speech in violation of the First Amendment by requiring delivery platforms to disclose an itemized cost breakdown to consumers and restaurants.

A review of relevant case law, however, indicates that these constitutional concerns are likely overblown, or based on misapplications of their respective constitutional provisions. The author's decision to strike the cap on costs charged to food facilities also renders all of these constitutional concerns moot, with the exception of the compelled commercial speech issue related to the required disclosure. Nonetheless, the potential for violation of constitutional rights demands scrutiny whenever it arises, necessitating careful consideration of the permissibility of compelling an itemized disclosure of costs.

First Amendment: The First Amendment of the U.S. Constitution provides that "Congress shall make no law [...] abridging the freedom of speech [...]" (U.S. Const., 1st Amend.), and courts have consistently held that this prohibition on legislation abridging speech applies to state and local governments. (See, e.g., *Gitlow v. New York* (1925) 268 U.S. 652.) Courts have further established the contours of First Amendment protection of speech to include prohibitions against government compulsion of speech and against laws that serve the

purpose of chilling speech on the basis of content, even if the law itself does not explicitly ban certain speech.

Generally speaking, a law that infringes on the freedom of individual speech based on the content of that speech must survive a so-called “strict scrutiny” analysis, which considers the law unconstitutional unless it meets three criteria: (1) the law must be justified by a compelling governmental interest; (2) the law must be narrowly tailored to achieve that goal or interest; and (3) it must be the least restrictive means for achieving that interest. On the other hand, regulation of commercial speech is typically afforded some leniency relative to individual speech. Rather than facing strict scrutiny, as is the case for individual speech, regulation of commercial speech is generally subjected to a four-part test, as prescribed by *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n* (1980) 447 U.S. 557, in order to determine whether it passes constitutional muster:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. (*Id.* at p. 566.)

Case law supports greater leniency still for disclosure requirements, rather than blanket bans on content of that speech. As was held in *Zauderer v. Office of Disciplinary Counsel of Supreme Court* (1985) 471 U.S. 626:

[I]n virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser’s interests than do flat prohibitions on speech, “[warnings] or [disclaimers] might be appropriately required...in order to dissipate the possibility of consumer confusion or deception.” [Citation.]

We do not suggest that disclosure requirements do not implicate [...] First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that [First Amendment] rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers. (*Id.* at p. 651.)

The decision in *Zauderer v. Office of Disciplinary Counsel, supra*, provided a separate three pronged test with respect to the constitutionality of compelled disclosures to protect consumers from deception, or otherwise inform them: (1) the disclosure is purely factual; (2) the disclosure is noncontroversial; and (3) the disclosure is not unjustified or unduly burdensome.

Considering the itemized cost breakdown that must be provided to customers and food facilities is explicitly required to include “an accurate” itemized cost breakdown of each transaction including specified information, it is difficult to argue the required disclosure is not purely factual, and, as such, noncontroversial. There should be little disagreement as to the factual nature of those statements of cost. Because the relationship between a disclosure

to consumers and restaurants of costs charged by a food delivery platform in their tripartite relationship and the State's interest in informing consumers, and indeed businesses, of the origins and destinations of their money, and the State's reasonable interest in informing consumers, the cost breakdown disclosure requirement of AB 286 appears to pass constitutional muster with respect to First Amendment rights prohibiting the compulsion of commercial speech, since it is not overly burdensome, nor is it unjustified.

REGISTERED SUPPORT / OPPOSITION:

Support

California Employment Lawyers Association
California Labor Federation
California State Council of Service Employees International Union (SEIU California)
California Teamsters Public Affairs council
City of Berkeley
City of San Diego
RAISE High Road Restaurants
Small Business Majority
United Food and Commercial Workers, Western States Council

Opposition

American Consumer Institute
Asian Industry B2B
Asian/Pacific Islander American Chamber of Commerce and Entrepreneurship
Bay Area Council
Brea Chamber of Commerce
CalAsian Chamber of Commerce
California Black Chamber of Commerce
California Chamber of Commerce
California Hispanic Chambers of Commerce
California Taxpayer Protection Committee
California Taxpayers Association (CALTAX)
Center for Individual Freedom
Central City Association of Los Angeles
Christ Liberation Ministries
Civil Justice Association of California
Congress of Racial Equity, California (CORE-CA)
Consumer Action for a Strong Economy
Consumer Choice Center
Dine Black Los Angeles
Disability:in
Fremont Chamber of Commerce
Garden Grove Chamber of Commerce
Greater Los Angeles African American Chamber of Commerce
Greater Riverside Chambers of Commerce
Green Olive Restaurant
Grubhub

Hispanic Leadership Fund
Internet Association
Latin Business Association
Latino Leadership & Policy Forum
Latino Restaurant Association
League of United Latin American Citizens (LULAC)
League of United Latin American Citizens Council 3288
Mt. Salem - New Wave Christian Fellowship Church
National Action Network Los Angeles
National Asian American Coalition
National Diversity Coalition
National Latino Evangelical Coalition
National LGBT Chamber of Commerce
National Taxpayers Union
New Earth
North Orange County Chamber of Commerce
Oceanside Chamber of Commerce
Oxnard Chamber of Commerce
Placer County Taxpayers Association
Pleasanton Chamber of Commerce
Redondo Beach Chamber of Commerce
Roseville Area Chamber of Commerce
Sacramento Metropolitan Chamber of Commerce
San Diego Tax Fighters
San Fernando Valley NAACP
San Gabriel Valley Economic Partnership
Silicon Valley Leadership Group
Small Business and Entrepreneurship Council
South Bay Association of Chambers of Commerce
Southwest California Legislative Council
TechNet
The Baptist Ministers Conference of Los Angeles and Southern California
Torrance Area Chamber of Commerce
Tulare Chamber of Commerce
US Black Chambers, INC.
US Hispanic Chamber of Commerce
Valley Industry & Commerce Association (VICA)

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