

Wednesday,
October 14, 2026

FIGHTING CITY HALL

How Companies Are Winning Constitutional Challenges to Local Ordinances

Gibson Dunn Webcast | 9:00–10:00 a.m. PT / 12:00–1:00 p.m. ET

Michael Holecek | Katie Townsend | Jonathan Soleimani | Aaron Smith

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Your Panel



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Lead counsel for DoorDash in its constitutional challenges to New York City ordinances; defends companies in municipal enforcement actions.



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Appellate and Constitutional Law; Media, Entertainment and Technology; briefed the Customer Data Law and fee-cap challenges.



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Appellate and Administrative Law. Regularly brings challenges to federal, state, and city laws under the Constitution and the Administrative Procedure Act.

The Hour at a Glance

01	Why Now: Cities Are Regulating Business Models	Michael
02	Before You Sue: Plaintiffs, Defendants, and Getting in the Door	Jonathan and Aaron
03	The First Amendment Toolkit	Katie
04	Case Study: <i>DoorDash v. City of New York</i>	Michael, Jonathan, and Aaron
05	Beyond Speech: Contracts, Takings, Due Process, Commerce Clause, Preemption	Jonathan and Aaron
06	Remedies: What Clients Can Actually Get	Michael
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WHY NOW: CITIES ARE REGULATING BUSINESS MODELS

Michael Holecek

City councils move fast — and courts are now engaging

01

City Hall Moves Fast: **Four Headlines**

KTRE (East Texas) | Aug. 25, 2026

“Athens City Council votes 3-2 in favor of ordinance banning data centers”

Athens, Texas: an outright ban, not a moratorium

WAFB (Baton Rouge) | Apr. 29, 2026

“Baker City Council approves temporary ban on new barbershops, salons along major roads”

Baker, Louisiana: a moratorium on a trade

SFGATE | Mar. 2, 2021

“Bay Area city becomes first in the US to ban new gas stations”

Petaluma, California: unanimous council vote

FOX 11 Los Angeles | May 2026

“Santa Ana votes to restrict fully automated self-checkouts: What to know”

Santa Ana, California: “Safe Stores are Staffed Stores,” following Long Beach and Costa Mesa



Photo: John Donegan / Long Beach Post

Headlines: The Courts Are Engaging

MLex | Sept. 29, 2026 | [Gibson Dunn matter](#)

“RealPage gets preliminary injunction against New York rent-setting ban”

Algorithmic rent-pricing ban (state law): enjoined as commercial-speech restriction

The Texas Tribune | [June 5, 2026](#)

“Texas county rescinds its data center moratorium after \$100 million lawsuit from developer”

Hill County, Texas: moratorium withdrawn eight days after suit

Reuters | Aug. 5, 2026 | [Gibson Dunn matter](#)

“NYC law on sharing food delivery apps’ data unconstitutional, US appeals court rules”

DoorDash v. City of New York: Customer Data Law struck down (2d Cir.)

SCOTUSblog | Mar. 20, 2026 | [Gibson Dunn matter](#)

“Unanimous court allows street preacher’s free speech case to move forward”

Olivier v. City of Brandon: an individual plaintiff, but the lesson is general; city laws implicate constitutional rights that companies can vindicate too

Local laws carry real constitutional stakes — and companies are now the plaintiffs winning these cases.

Three Postures and the Questions in Between

Comply

Absorb the cost, or route around the rule with a different product. Often right, and the baseline against which litigation is measured.

Sue

A pre-enforcement § 1983 challenge for declaratory and injunctive relief before the effective date (DoorDash, RealPage, REBNY, Hill County).

Defend

The city comes to you: consumer-protection or enforcement suits by a city attorney. Constitutional defenses still matter, but on the government's timeline.

The questions in between

- How bad is bad enough? Does the law compel speech or take a core asset, or just raise costs?
- Is there a clean constitutional hook, or only a policy disagreement?
- What does it mean to sue a government you do business with (permits, contracts, licenses, taxes, and the next bill)?
- Can you buy time? A negotiated stay of enforcement turns a crisis into an orderly case.

BEFORE YOU SUE: **PLAINTIFFS, DEFENDANTS, AND** **GETTING IN THE DOOR**

Jonathan Soleimani and Aaron Smith

The decisions made before the complaint is filed often decide the case

02

Choosing the Parties: Plaintiff, Defendant, Test Case

The plaintiff

- **Individual company**
 - Control strategy, message, and settlement
 - Public exposure
 - Documents are in play
- **Trade association**
 - Spreads cost and exposure
 - Signals industry stakes
 - Associational standing bar (expect to ID members with standing and use declarations)
- **Relief follows the plaintiff**
 - Non-plaintiffs may only benefit if the city stops enforcing the law or if the law is facially invalidated

The defendant(s)

- **The municipality**
 - No Eleventh Amendment or qualified immunity
 - Prospective relief and compensatory damages available
- **Local officials or agencies**
 - Typically redundant
 - Potential exceptions:
 - Enforcer is a distinct agency
 - Individual-capacity damages

The test case

- **Jurisdiction**
 - Worst ordinance
 - Best legal landscape
- **Facts and timing**
 - Stated purpose on the record
 - Effective date
- **Sending a message**
 - Deter copycats
 - Set precedent

Forum, Claims, and the Record

Federal court

- § 1983 is the typical vehicle
- Interlocutory appeal of preliminary injunction rulings
- Fee-shifting under § 1988
- Supplemental jurisdiction over state-law or municipal-law claims

Pair the claims

- Federal constitutional claims
- State constitutional claims
- Home-rule or police-power claims
- Statutory claims, including preemption
- Plead broadly, then narrow

Build the record from day one

- Legislative record
 - Committee reports, testimony, stated purpose, gap between problem described and law passed, alternatives offered and rejected, warnings ignored, absence of any analysis
- Hurdles to discovery
 - Relevance; legislative privilege for City docs and depositions; but get lobbyist communications

Getting in the Door and Staying There

Filing: standing and ripeness

- Pre-enforcement standing:
 - (1) Intent to engage in conduct that is
 - (2) arguably proscribed and (3) a credible threat of enforcement
- Courts presume a government enforces its laws
- Self-executing injuries don't depend on the city's enforcement decision
 - Compliance costs, contract changes
- Ripeness hurdles

Summary judgment: prove it

- Burden to establish standing rises with each stage
- Build the standing record alongside the merits record
- Watch out for government changes in position regarding its enforcement

Mootness

- City may amend, repeal, exempt, or disavow enforcement mid-case
- Legal response: Voluntary cessation
- Practical consideration: Re-plead to challenge the new law

THE FIRST AMENDMENT TOOLKIT

Katie Townsend

Is it speech? What level of scrutiny applies? Can the government carry its burden?

03

The Framework

Threshold: speech or conduct?

Creating and disseminating information is speech (*Sorrell v. IMS Health*). A law regulating what a merchant charges is conduct; a law regulating what it must say about the price is speech (*Expressions Hair Design*).

01 Strict scrutiny

Noncommercial speech

- *Barnette, Wooley, NIFLA*
- Compelling interest; narrowly tailored
- Argued in *DoorDash*; the court didn't need to decide

02 Intermediate scrutiny

*Commercial speech:
Central Hudson*

- Lawful, non-misleading speech
- Substantial interest; direct advancement
- No more extensive than necessary: a "reasonable fit" the government must affirmatively establish (*Fox; Discovery Network*)

03 Deferential review

Compelled disclosures: Zauderer

- Purely factual and uncontroversial
- About the terms of the speaker's own goods or services
- Reasonably related to the interest; not unjustified or unduly burdensome

The Speech/Conduct Line, Two Ways, Both in 2026

RealPage v. James

S.D.N.Y. Sept. 29, 2026 (Caproni, J.) | Preliminary injunction granted

- New York State banned landlords from setting rents based on recommendations from software performing a “coordinating function” (effective Dec. 2025)
- The software’s pricing recommendations are speech: communicating pricing information is the crux of the business
- “A close call,” but RealPage is “marginally” likely to succeed on the merits; Section 3 facially overbroad because it reaches software using only public data
- Preliminary injunction granted and motion to dismiss denied; state had agreed not to enforce pending the ruling

Why it worked: the law targeted the recommendation itself, what the software may tell the landlord.

REBNY v. City of New York

2d Cir. July 13, 2026 | Dismissal affirmed

- The FARE Act bars a broker who publishes a listing for a landlord from charging the tenant a fee
- Regulates commercial speech, but satisfies *Central Hudson*: a specific harm (upfront costs, housing mobility) and a tailored response
- First Amendment and state-preemption claims dismissed; preliminary injunction denied; a narrower Contract Clause claim survived
- Trade association plaintiff; roughly \$1 million in legal fees reported

Why it failed: the regulated act is who pays a fee, economic conduct with only an incidental effect on speech.

Zauderer's Limit: The Speaker's Own Goods or Services

Safelite v. Jepsen

Outside Zauderer

2d Cir. 2014

Connecticut required claims administrators recommending an affiliated glass shop to also name a competitor. A disclosure about a third party: “dispositive”; *Zauderer* inapplicable; “covertly protectionist” goals disfavored.

Volokh v. James

Outside Zauderer (pending)

2d Cir. 2025

NY Hateful Conduct Law required platforms to publish a hateful-conduct policy and complaint mechanism. On its most natural reading, unconstitutional compelled speech; *Zauderer* limited to the speaker's own goods or services. Certified to the NY Court of Appeals.

DoorDash v. City of New York

Outside Zauderer

2d Cir. 2026

Customer names and contact details are facts about third parties who use Marketplace, not about Marketplace. Even on the City's “access to customers” framing, a disclosure about the service would describe the customer base, not reveal every customer's contact information.

Uber Techs. v. City of Seattle

Inside Zauderer

9th Cir. 2026

Seattle required platforms to tell couriers the grounds for deactivation. A disclosure about the platform's own service: *Zauderer* satisfied (alternative holding). Same doctrine, opposite result.

Age Verification: Signals for Interface Regulation

Free Speech Coalition v. Paxton

U.S. June 27, 2025 | 6–3 | Texas H.B. 1181 upheld

- Age verification for sites with substantial sexual content only incidentally burdens adults' access to protected speech
- Intermediate scrutiny, not strict; the dissent would have applied strict scrutiny
- Verification is “an ordinary and appropriate means of enforcing an age limit”

NetChoice v. Fitch

5th Cir. 2025; U.S. No. 25A97 (Aug. 14, 2025) | Mississippi law in effect pending appeal

- Social-media age-verification and parental-consent law; injunction vacated for lack of a proper facial analysis
- Supreme Court declined to vacate the stay; Kavanaugh, J.: law likely unconstitutional, but equities didn't warrant relief
- Merits appeal pending

Signals for business clients

- Verification, consent, and display mandates draw intermediate (not strict) scrutiny when courts see them as incidental to conduct regulation
- Facial challenges are harder after *Moody v. NetChoice*: plead as-applied theories and build the factual record on burden
- Cities will regulate screens next (tip prompts, consent flows, recommendation displays), and courts will ask whether the mandate controls information or merely the transaction

Framing Checklist for a First Amendment Challenge

01

Identify the speaker and the message

What must the company say, not say, or hand over — to whom — and is it about the company’s own product or about third parties?

02

Speech or conduct?

Does the law regulate the information flow or the underlying transaction? Could you comply without saying anything different? (*Expressions Hair Design*; *FAIR*)

03

Pin the level of scrutiny

Commercial or noncommercial? Does *Zauderer* plausibly apply (own product, purely factual, uncontroversial)? Argue the higher tier; brief *Central Hudson* as the floor.

04

Attack the stated interest and the evidence

Courts won’t substitute hypothetical interests (*Edenfield*). “Common sense” and “self-evident” are not evidence (*Fox*; *Turner*).

05

Build the alternatives record

Opt-in regimes, standing opt-outs, targeted rules, incentives.

06

Document the burden and preserve for appeal

Engineering cost, lost revenue, customer harm, privacy exposure; as-applied framing; the standard of review; the city’s concessions.

CASE STUDY:

DoorDash v.

City of New York

Michael Holecek, Jonathan Soleimani, and Aaron Smith

185 F.4th 1 (2d Cir. Aug. 5, 2026), *aff'g* 789 F. Supp. 3d 337 (S.D.N.Y. 2025)

04

The Customer Data Law and What Was at Stake

N.Y.C. Admin. Code § 20-563.7 (Local Law 90 of 2021)

- **On a restaurant's request:** every customer's full name, phone number, email address, delivery address, and order contents
- Machine-readable, disaggregated by customer, at least monthly
- **Consent presumed:** customers must opt out order by order; no standing opt-out
- **Platforms may not limit** restaurants' download, retention, or use of the data for marketing
- **No data-security requirements** on restaurants; resale barred, deletion on request
- **Civil penalties** for noncompliance (§§ 20-563.10–.12); effective date Dec. 27, 2021

The stakes

~13,430

NYC restaurants under contract with DoorDash (Apr. 2023)

~2.5M

DoorDash customers in New York City

First name, last initial, order

What a restaurant sees on a Marketplace order today

The data is the product: with the full customer file, restaurants can leave the platform and market directly; the Council's committee reports said so.

Five Years in Five Steps **and the Lessons**

01 Sept. 15, 2021	02 Oct. 4, 2021	03 2022–2024	04 Sept. 24, 2024	05 Aug. 5, 2026
DoorDash files and moves for a PI, 17 days after enactment	City stipulates not to enforce pending the case; PI motion withdrawn. Uber Eats and Grubhub file in Dec.; consolidated Jan. 7, 2022	Full discovery; platform executives deposed; cross-motions for summary judgment	Summary judgment for plaintiffs on the First Amendment (Torres, J.); takings, Contract Clause, and police-power claims moot	Second Circuit affirms, 3–0 (Wesley, J.; Park, J., concurring); argued Apr. 15, 2026

Litigation lessons

- **Negotiate the stay.** An enforcement stay bought an orderly case and avoided litigating irreparable harm on a thin record.
- **Narrow to the claims you can win.** Four claims went to summary judgment; the court needed only one.
- **Build the alternatives record.** Proof that opt-in already worked (Uber Eats’ data-sharing agreements) and had been offered to the Council (the proposed opt-in amendment) showed less burdensome alternatives existed: the point on which both courts ruled.
- **Frame the appeal around the concessions.** The City did not challenge the holding that the law regulates speech.

The Merits Playbook: Scrutiny, Interest, Tailoring

01 Level of scrutiny

Compelled data disclosure is speech: the City argued the data was merely factual information about the platforms' own service ("access to customers"), so *Zauderer* applies. We argued it was our proprietary information about our customer base, disclosed to counterparties, not the public. Both courts held *Zauderer* inapplicable and didn't choose between strict and intermediate scrutiny, because the law failed even *Central Hudson*.

02 Government interest

District court: the law didn't touch allegedly "exploitive practices" the City cited; City's data interest was "**too speculative**"; "a mere **preference for one industry over another** is not a substantial state interest."

03 Tailoring

Second Circuit: the law involved **presumed consent** plus **order-by-order opt-outs**, with no evidence that obvious, less burdensome alternatives (**opt-in**; a **standing opt-out**) would serve the City's interests worse. It was not enough for the City just to say that any alternative "would likely result in less customer data being shared."

In the Courts' Words

“The result is a marketing list that no customer asked to join and that none can be confident they have permanently left.”

Second Circuit, on the law's design

“The City identifies no reason, and offers no evidence, as to why customers must repeat the same refusal with every single order.”

Second Circuit, on fit

“A mere preference for one industry over another is not a substantial state interest.”

District court

Judge Park's Concurrence: Favoritism Is Not a Substantial Interest

The “deeper problem”

- **The lingering issue:** Were the government's interests substantial?
- **The problem:** The law compels speech “for nothing more than economic favoritism.”
- **Method:** “History and tradition.” Deception, health, and safety have justified disclosure mandates. Favoritism has not.
- **Pretext.** Rebut legislative pretenses and *post hoc* attorney justifications.

How to use it

- **Plead** protectionist purpose from the legislative record.
- **Frame** the interest prong with history and tradition.
- **Develop** the atmospherics and narrative.
- **Advance** the argument rather than assuming the government interest.

BEYOND SPEECH: CONTRACTS, TAKINGS, DUE PROCESS, COMMERCE CLAUSE, PREEMPTION

Jonathan Soleimani and Aaron Smith

Claims that survive dismissal, create leverage — and sometimes win

05

Contract Clause: Two DoorDash Cases, One Lesson

Where we pleaded it

- **Test:** (1) substantial impairment of **existing** contracts, and (2) whether the law is a **reasonable and appropriate** way to advance a **significant and legitimate** public purpose
- **NYC data case:** our contracts shared limited data and barred marketing use; the law forced more data disclosure, for free, with opt-out only, and forbade any limit on marketing
 - **Why substantial:** permanent, unforeseeable (“first of its kind”), and aimed at a central term — expanded data-sharing was a bargaining chip, traded only for value
- **NYC fee-cap case:** all six claims survived dismissal; settled when the Council amended the law

The City’s answers, and the broader context

- **Data-sharing was “ancillary”**
- **“Balance and equity,” “continued vitality”**
 - Protectionism attacks the legitimate-purpose element; leveling the playing field is not a public purpose
- **Other COVID cases**
 - Eviction moratoria and rent-deferral challenges generally failed — temporary deferral, not cancellation, and more firmly tied to the pandemic
- **Leverage**
 - Surviving dismissal is a realistic win
 - Fee-cap settlement

Takings in the Data Case: One Stick, Taken Whole

The property: a bundle of sticks

- Customer data = **trade secret**
- Property is a bundle of rights: use, profit, transfer, and **exclude**
- For a trade secret, exclusion holds up the other sticks: **disclosed once, “lost forever”**

The taking: exclusion, 100%

- **For private use:** A’s data handed to B to ensure “continued vitality,” never to the City or the public
- **Per se taking:** “shall provide,” on demand, every month; right to exclude was destroyed, not merely burdened
- **Regulatory taking** (diminution under *Penn Central*): economic impact, investment-backed expectations, character of the action

The City’s answers

- **“Would still maintain a copy,”** so no **“zero-sum seizure”**: no, the leftover value doesn’t restore exclusion
- **Exclusion is for physical takings:** no, the same applies to papers, recipes, and data
- **“Minimal” impact:** no, the Council’s own reports said restaurants would use data to leave

Dormant Commerce Clause: Three Theories

1. Discrimination

- Discrimination on its **face**
 - Carveouts for small local competitors
- Discrimination in **purpose**
 - Neutral text, but protectionist rhetoric
- Discrimination in **effect**
 - Neutral text and purpose, but the law shifts business from out-of-state firms to local competitors
- Rule: Virtually per se invalidity

2. Extraterritoriality

- A State cannot directly regulate transactions between parties with no connection to the State
- Out-of-state conduct, not out-of-state effects, is what matters
- Example: State A regulates price of drugs sold by manufacturer to distributor in State B and eventually sold to consumers in State A

3. *Pike* balancing

- A burden on interstate commerce clearly excessive in relation to the local benefits
- Still available but difficult
- Most common fact pattern: vehicle routes where company must reconfigure at the border

Due Process: Procedural, Vagueness, Confiscation

Procedural due process

- About implementation
- **NY eviction moratorium (SCOTUS 2021)**: enjoined because tenants could self-certify hardship to block eviction with no chance for landlord to be heard
- **NYC pied-à-terre** rollout ruling: 900k property roll and 17k burden-shifting notices held arbitrary and capricious under Article 78; due process concerns noted

Vagueness and fair notice

- Undefined terms, or compliance that turns on facts the regulated party cannot know, before penalties attach
- Useful against hastily drafted ordinances; pair with a request to stay enforcement while rules are written

Confiscatory rates

- Test is cost of service plus a reasonable return; a cap that only lets you break even is still confiscatory
- Both fee-cap courts let the theory proceed: whether a 15% cap forces losses is a fact question, so plead the economics
- Percentage caps ignore cost: fixed per-transaction costs make low-dollar transactions losers

Preemption: The Statutory Off-Ramp

State preemption

- Express preemption statutes
- Field preemption scheme
- Conflict preemption
- Home-rule limits: cities and counties have only the powers the state grants

Federal preemption

- Section 230 for platform content and moderation
- The Federal Arbitration Act for ordinances interfering with arbitration agreements
- Sector-specific schemes (telecommunications, aviation, motor carriers, securities)

Strategic considerations

- Judges may prefer to rule on narrower statutory grounds
- Industry may prefer consistent regulation over local-law patchwork
- But preemption holdings do not deter copycat ordinances

REMEDIES: WHAT CLIENTS CAN ACTUALLY GET

Michael Holecek

Injunctions, stays, appeals, damages, fees — and the settlement dynamics unique to cities

Remedies: Relief, Money, and the Legislative Off-Ramp

Preliminary relief

- **TRO/PI:** likelihood of success, irreparable harm, equities, public interest; First Amendment harm is presumed irreparable
- **Reality check:** courts deny PIs where you can comply and litigate; Rule 65(c) security is typically waived or nominal when the defendant is a government
- **The negotiated stay** (*DoorDash*; *RealPage*) can beat a contested PI
- **Appeals:** § 1292(a)(1); *Nken* stay factors; state automatic stays (CPLR 5519(a) paused the pied-à-terre ruling)

Money

- **§ 1983 damages** run against the municipality (*Monell*): no sovereign immunity, but no punitive damages (*City of Newport*)
- **Just compensation** for takings: the value taken, in federal court after *Knick*
- **§ 1988 fees** for prevailing plaintiffs; Hill County paid \$100,000 toward RCM Hill's fees
- **Pre-enforcement damages** are usually modest; the injunction is the prize

The legislative off-ramp

- **The remedy is often a new law:** the Council amends (fee caps), the county rescinds (Hill County), the city exempts (Inver Grove Heights)
- **Build the off-ramp into strategy;** preserve fee entitlement and declaratory relief against mootness
- **Final relief:** declaratory judgment and a permanent injunction; the *DoorDash* judgment enjoins enforcement against the Marketplace products
- **A published opinion** changes how other councils draft

Your Questions

Submit questions in the chat / Q&A panel

We'll take as many as time allows. Anything we don't reach, we'll answer by email (contacts on the next slide).

Questions we're often asked

- How should a company respond before an ordinance passes (testimony, alternatives, coalitions)?
- When does a trade association help, and when does it hurt?
- What happens when the city amends or repeals the law mid-case (mootness and fees)?
- How do you weigh suing a government you otherwise do business with?
- Does a decision like *DoorDash* reach other industries (ticketing, travel, marketplaces, fintech)?

Thank You

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Materials (these slides and a one-page case list with citations) were emailed to registrants before the program.

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