No. 22-865

In The
Supreme Court of the United States

MOBILIZE THE MESSAGE, LLC;
MOVING OXNARD FORWARD, INC.; AND
STARR COALITION FOR MOVING OXNARD FORWARD,

Petitioners,

v.

ROB BONTA, IN HIS OFFICIAL CAPACITY AS
ATTORNEY GENERAL OF CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF

ALAN GURA
Counsel of Record
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., N.W.
Suite 801
Washington, DC 20036
(202) 301-3300
agura@ifs.org
Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

REPLY SUMMARY OF ARGUMENT

Only a week after this petition's docketing, a different Ninth Circuit panel acknowledged the plain reality about AB 5—the scheme is subject to invalidation under rational basis review. *See Olson v. California*, 62 F.4th 1206 (9th Cir. 2023).

This development did not escape amici's attention. *See* Ams. for Prosperity Found. Br. at 9-10; Independent Inst. Br. at 15.

The brief in opposition should have addressed it. After all, California's position depends on the fiction that in regulating speech on the basis of its content, the state actually regulates different "economic activity." BIO at 5 (quoting Pet. App. 17a). But even "economic activity" cannot be regulated irrationally.

Of course, unlike the distinctions litigated in *Olson*, the challenged exemptions here do not distinguish between economic activities but between different subjects of speech. And as amici observed, "[i]f AB5 fails rational basis review for distinctions between bona fide commercial activities, that holding surely casts doubt on the constitutionality of making such distinctions based on speech," Ams. for Prosperity Found. Br. at 10.

Ignoring *Olson* is at least consistent with the state's general approach, which substitutes an alternative reality for statutory text, legislative history, and the record, all while failing to address the Ninth Circuit's conflict with this Court's precedent and the precedent of other circuits.

California's law, and the Ninth Circuit's opinion upholding it, pose serious challenges to First Amendment freedoms. This Court's review is warranted.

ARGUMENT

I. California's content-based speech restrictions fail even rational basis review.

At long last, too late for previous AB 5 litigants but not too late for Petitioners, we are told by the Ninth Circuit that AB 5's exclusions are "starkly inconsistent with the bill's stated purpose," and that "the piecemeal fashion in which the exemptions were granted . . . lends credence to Plaintiffs' allegations that the exemptions were the result of 'lobbying' and 'backroom dealing' as opposed to adherence to the stated purpose of the legislation." *Olson*, 62 F.4th at 1219. "[A] lobbying frenzy led to exemptions for some professions in which workers have more negotiating power or autonomy than in low-wage jobs." *Id.* (internal quotation marks omitted). Indeed, some of AB 5's classifications "can be attributed to animus rather than reason." *Id.* at 1219-20.

If the scheme below might well be *irrational*, this Court's review is necessary to clarify whether and why political speech cannot obtain the same level of protection as driving for Uber. At the legislative level, that outcome makes sense: Rideshare companies (and "newspapers of general circulation," and "consumer products" industries, et al.) have money and lobbyists.

Grassroots political activists don't. But the latter have the First Amendment, and a body of precedent that subjects content-based speech discrimination to strict scrutiny.

It would be incongruous for Petitioners' election speech to lose the constitutional battle because it's just an "economic activity," while the economic activity of ridesharing, targeted by the same scheme, enjoys the courts' solicitude under rational basis review. After all, commercial speech, whose regulation must satisfy intermediate scrutiny, does not enjoy greater protection than does Petitioners' election speech. The state "may not conclude that the communication of commercial information concerning goods and services . . . is of greater value than the communication of noncommercial messages." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1981) (plurality opinion) (footnote omitted).

That describes the present scheme, which privileges commercial over political canvassing. Having submitted no evidence that might help it carry a heightened scrutiny burden, California seeks refuge in the legislative record, but "[t]here is no indication that many of the workers in exempted categories" have less need for AB 5's purported benefits. *Olson*, 62 F.4th at 1219. Nothing indicates that the legislature considered the distinction between political and commercial canvassers in subjecting them to different classification regimes. Surely California would have pointed to that deliberation had it occurred.

California may want to wish *Olson* away, but the Ninth Circuit has finally acknowledged AB 5's rational basis problems. This Court should not look past the scheme's more serious First Amendment defects.

II. The challenged exemptions do not distinguish between distinct occupations.

California struggles to support the notion that workers perform different economic activities when changing the subject, purpose or function of their speech. The state asserts that for many years, in a different context, it has been treating "direct sales salespersons" differently. After all, AB 5's exemption of such workers imports a longstanding definition from the unemployment insurance code. "California has identified direct sales salespersons as a distinct occupation—and expressly excluded those workers from the State's unemployment and disability insurance regimes—for fifty [*sic*] years." BIO at 9-10 (citing Cal. Unemp. Ins. Code § 650; 1983 Cal. Stat. 2213).

The argument is misleading. California omits mention of an even older provision of its code that specifically exempts election campaign workers from the same scheme. *See* Cal. Unemp. Ins. Code § 636; 1957 Cal. Stat. 2682.[1] In other words, when California first

[1] While this provision might benefit Petitioners' workers with respect to unemployment insurance, Cal. Lab. Code § 2775(b)(2) (existing exemptions "shall remain in effect for the purposes set forth therein"), it affords them no protection from employment classification for all other purposes. For the same reason, "direct sales salespersons" could not rely solely on their

treated "direct sales salespersons" as a distinct occupation that need not pay unemployment insurance, it put them on par with Petitioners' workers. The different treatment with respect to their classification started with AB 5.

Of course, Petitioners do not dispute that the state can regulate the sale of consumer products. But Petitioners are not subject to such laws. The challenge here is to AB 5's different treatment of canvassers based on the subject of their speech, Cal. Lab. Code §§ 2775, 2783(e), not to some specific law that regulates commercial sales.

California makes even less effort to differentiate Petitioners' workers from "newspaper carriers," a distinction the challenged statutes plainly base on which publications workers deliver. Rather than explain away this content-based distinction, the state claims that the newspaper exemption is merely a temporary measure giving that industry, as the state defines it, "additional time 'in order to come into compliance with' the ABC test adopted by A.B. 5." BIO at 10 (quoting Cal. S. Comm. on Lab., Pub. Emp. & Ret., A.B. 170, at 2, 3 (Sept. 12, 2019)).

Set aside whether "temporary" First Amendment violations are acceptable. The measure is not temporary. The state cites a 2019 report concerning the newspapers' *first* exemption, valid until 2021. But in 2020, that exemption was extended until 2022. *See* Cal. Lab.

---

existing unemployment insurance code exemption, and received fuller protection under Cal. Lab. Code § 2783(e)—protection not afforded political canvassers.

Code § 2783(h)(3) (2021). "Many newspapers in California [were] facing financial failure," 2020 Cal. Assembly Bill 323, § 1(e), and "face[d] the specter of an average increase of 85 percent in distribution costs if the California Legislature [did] not extend the [2019] exemption for news carriers, forcing papers to abandon their contract delivery model in 2021," *id.* § 1(f). The legislature then again extended the "newspaper" exemption, to its current 2025 expiration date. *See* 2021 Cal. Assembly Bill 1506, § 1.

And so, this one-year exemption has quadrupled over two extensions. At this point, it is probably silly to believe that California-defined "newspapers" will ever be subject to AB 5. Too much money is at stake, and the industry has repeatedly demonstrated its legislative pull, having secured exemption after extended exemption. Yet the legislature afforded political canvassers no such favor. Mobilize the Message left the state, and the Oxnard petitioners missed qualifying their measure for the 2022 election.

Should Petitioners win this case, they would at least be free to knock on doors and distribute literature in the months leading up to the November 2024 election, well before the newspaper exemption is next slated to expire. And in any event, the "direct sales salesperson" exemption has no sunset clause.

III. Burdening speech based on its content suffices to trigger strict scrutiny.

California repeatedly asserts that AB 5's discriminatory treatment of Petitioners' speech is lawful because it does not amount to an outright prohibition. "The statute challenged here does not restrict any speech based on its content or otherwise. . . . [C]lassification serves to determine whether and how certain labor laws apply to workers—not to prohibit any speech by workers or by the entity that hires them." BIO at 6. "Nothing in A.B. 5 restricts petitioners from speaking about political campaigns or prevents petitioners from hiring workers to speak on their behalf." BIO at 14.

And indeed, California seizes on a supposed prohibition/regulation distinction in seeking to distinguish *Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335 (2020) and *Cincinnati v. Discovery Network*, 507 U.S. 410 (1993). The statute at issue in *Barr* prohibited phone calls based on their content, just as the ordinance in *Discovery* banished publications based on their content. California thus exclaims, "[t]hat is not remotely comparable to the law here, which does not prohibit any speech and merely [regulates]." BIO at 12.

But it was not the fact that these laws prohibited, rather than regulated, that made them content based. *Barr* and *Discovery*'s provisions were content based because—just like the provisions challenged here—they *applied* on the basis of speech content.

"It is of no moment that the statute does not impose a complete prohibition." *United States v. Playboy Entm't Group*, 529 U.S. 803, 812 (2000). "The Court has recognized that the 'distinction between laws burdening and laws banning speech is but a matter of degree' and that the 'Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.'" *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 565-66 (2011) (quoting *Playboy*, 529 U.S. at 812). "Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Id.* (collecting cases).

Petitioners are not even required to prove that the challenged scheme invariably precludes their speech, although the record on that score is incontrovertible. The mere fact that California regulates speech on the basis of its content suffices to impose a strict scrutiny burden on Respondent, a burden that he has not attempted to carry.

The state is more accurate in offering other general, if irrelevant, points of law. True, newspapers and other speakers may be "subject . . . to generally applicable economic regulations without creating constitutional problems," BIO at 8 (internal quotation marks omitted), but the challenged scheme is not a law of general application; it is a regulation that applies to some canvassers, but not others, based on the content of their speech. It is also true that this "Court has repeatedly rejected First Amendment challenges to economic regulations that impose incidental burdens on speech-based professionals and businesses." *Id.* (citations

omitted). But there is nothing incidental about the burdens that the challenged regime places on Petitioners' speech. If they spoke about "consumer products," Cal. Unemp. Ins. Code § 650, or delivered "shoppers' guides," Cal. Lab. Code § 2783(h)(2)(A), they'd be in business. And the ABC test does not apply to Petitioners because "they engage in speech" or because "speech is a component of [their] activity," BIO at 9 (internal quotation marks omitted)—it applies (or not) based on what they say.

IV. California ignores the Ninth Circuit decision's conflicts with this Court's precedent and the precedent of other circuits.

California concedes that when this Court "held that an ordinance distinguishing between on-premises and off-premises signs was not content-based," it "reason[ed] that the ordinance 'require[d] an examination of speech *only in service of drawing neutral, location-based lines.*'" BIO at 11 (quoting *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1471 (2022)) (emphasis added).

But when California examines the content of Petitioners' speech, it does not do so in service of drawing neutral, location-based lines, or any other kind of "content-agnostic" distinction. *Austin*, 142 S. Ct. at 1475. Yet the Ninth Circuit invoked *Austin* in upholding California's ability to regulate Petitioners' speech based on its content because *Austin* purportedly stands only for the proposition that content-based regulation

is sometimes acceptable. When, exactly, and whether that circumstance is present here, the Ninth Circuit never explained. Its holding can be summed up as, "content-based speech regulation is acceptable, *see Austin*," a position that cannot be reconciled with *Reed v. Town of Gilbert*, 576 U.S. 155 (2015).

And here, California merely asserts, *ipse dixit*, that the Ninth Circuit "faithfully applied" *Austin* and *Reed*.

California likewise fails to grapple with the circuit split joined by the decision below. It recites some of the basic features of the various cases on either side of the split over *Reed*'s "function or purpose" test, but offers only the unremarkable point that all cases purported to follow *Reed*. BIO at 12.

As Petitioners explained, some circuits decide cases by applying *Reed*'s "function or purpose" test, including the Tenth Circuit, whose decision in *Aptive Envtl., LLC v. Town of Castle Rock*, 959 F.3d 961 (10th Cir. 2020) striking down a commercial/non-commercial canvassing distinction under that test stands in direct and obvious conflict with the Ninth Circuit's opinion here. Other circuits do not apply the test at all. But the phrase "function or purpose" appears just once in California's brief, inside a quote setting out *Reed*'s rule. BIO at 7. The state avoids addressing the split altogether.

V. California's discrimination against Petitioners' election speech harms the democratic process.

California misconceives the nature of Petitioners' injury, asserting that they might not be harmed at all because the ABC test "does not invariably classify [their] workers as employees." BIO at 15. Indeed, it offers that the classification of newspaper carriers and salespersons under *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal. 3d 341 (1989), is sometimes debatable. *Id.* And if only they worked fewer hours, Petitioners' workers might be affordable as employees. BIO at 16.

This is not how discrimination cases work. Whether Petitioners' putative workers are ultimately classified as independent contractors, Petitioners cannot take the risk of trying to overcome their presumptive status as employees. Every discrimination case—including this content-based speech discrimination case—rests on the theory that the legal relationships between individuals and the state matter. It makes all the difference to people whether the state subjects them to one set of laws or another. It makes a difference to enforcement officials, and to judges and other adjudicators as well.

The legislature's expressed goal in enacting AB 5 was to end "[t]he misclassification of workers as independent contractors." 2019 Cal. Assembly Bill 5, § 1(c). The scheme's impact cannot be gainsaid. There is no dispute that because of the challenged provisions, Mobilize the Message abandoned the California market,

and the Oxnard Petitioners failed to qualify their ballot measure for the last election. Petitioners, their amici, and the countless others who have litigated against AB 5 or left the state are not just imagining things. Amicus is not paying $10 per ballot petition signature in California as a philanthropic measure. Howard Jarvis Taxpayers Ass'n Br. at 12.

California is getting exactly what it bargained for when it declared war on independent contracting, with all the attendant politically unavoidable special deals for favored businesses. To the extent this scheme discriminates against political speech, the state should answer for its conduct here, not pretend away its law's intended impact.

VI. AB 5's severability provisions make this petition an excellent vehicle to address the scheme's First Amendment defects.

Contrary to California's assertion, AB 5's severability provisions are a feature of this petition, not a bug.

First, if severability were an obstacle to this Court's review, AB 5 would be unreviewable. The scheme addresses California's entire economy, to which it applies a dizzying array of convoluted exemptions and exclusions. Of course no single case can challenge the whole regime—no single worker or group of workers perform *all the jobs* in California. Challengers must address their own discrete circumstances, and so cases have targeted AB 5's applications to truckers, *Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644 (9th Cir. 2021); writers, photographers and videographers, *Am.*

Soc'y of Journalists & Authors, Inc. v. Bonta, 15 F.4th 954 (9th Cir. 2021); app-based drivers, *Olson*; and now, campaign workers.

If, as California posits, Petitioners' victory here would only knock out the preferential treatment enjoyed by the exemption holders, that would be relief enough: it would end the discrimination against Petitioners. *Barr*, 140 S. Ct. 2354. Moreover, given the political reality, it would almost assuredly result in the enactment of broader exemptions that would cover Petitioners' workers, an outcome no more or less speculative than California's assumption that nobody would gain relief.

But there is no need to speculate as to the outcome. California simply errs in describing the severability process. As Petitioners noted, AB 5's severability mechanism provides that "if a court enjoins any application of the ABC test, *Borello* governs." Pet. at 8 (citing Cal. Lab. Code § 2775(b)(3)). The legislature has already considered the prospect of AB 5's invalidation in some circumstances, and it chose, in such an event, to have *Borello* apply.

Cognizant of the legislature's severability mechanism, Petitioners sought precisely this relief: an injunction barring Respondent "from applying the ABC test to classify Plaintiffs' doorknockers and signature gatherers," and a declaration "that, pursuant to Cal. Labor Code § 2775(b)(3), Plaintiffs' doorknockers and signature gatherers must be classified under *Borello*." Complaint at 17.

AB 5's severability provisions enable this Court's coherent, narrowly focused examination of the constitutional issue at stake, and guarantee that Petitioners can obtain meaningful relief.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted.

ALAN GURA
Counsel of Record
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., N.W.
Suite 801
Washington, DC 20036
(202) 301-3300
agura@ifs.org
Counsel for Petitioners

MAY 26, 2023