No. 21-1172

In The
Supreme Court of the United States

AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, INC., and NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION,

Petitioners,

v.

ROB BONTA, in his official capacity as Attorney General of the State of California,

Respondent.

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

BRIEF OF INSTITUTE FOR FREE SPEECH AS AMICUS CURIAE SUPPORTING PETITIONERS

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INTERESTS OF AMICUS CURIAE[1]

The Institute for Free Speech ("IFS") is a nonpartisan, nonprofit organization dedicated to the protection of the First Amendment rights of speech, assembly, press, and petition. In addition to scholarly and educational work, the Institute represents individuals and civil society organizations in litigation securing their First Amendment liberties.

The Institute files this brief to advise the Court of the Ninth Circuit decision's potentially far-reaching ramifications. "AB 5," as California's ever-evolving employee classification regime is popularly known, violates not only Petitioners' First Amendment rights. It also burdens campaign speech based on political content, impeding Californians' access to the ballot and impairing their engagement with the democratic process.

The Institute represents a civic group, its political action committee, and a campaign labor provider in a First Amendment challenge to AB 5's content-based discriminatory treatment of political speech. Their pending challenge, *Mobilize the Message v. Bonta*, Ninth Cir. No. 21-55855 (argued and submitted Feb. 7, 2022), is controlled by the precedent challenged here. Although the best reading of the opinion below

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief. All parties received timely notice of this brief and have consented to its filing.

indicates that IFS's clients should prevail, courts have not yet viewed it this way.

More to the point, the fact that IFS's clients ought to prevail under the Ninth Circuit's approach does not excuse its flaws, to which no speaker should be subjected. Because "the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office," *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (internal quotation marks omitted), this Court should consider how the Ninth Circuit's reasoning is employed to curtail the fundamental right to shape and speak about the ballot—and what that may portend for speech rights more broadly if the decision below is not checked now.

SUMMARY OF ARGUMENT

Consider three singers: one writes and performs commercial jingles for an advertising agency, the second writes and performs love songs, and the third sings political songs criticizing state officials. One would think that the state could not make and enforce laws targeting any of these—especially the third singer engaged in core political speech—based on her speech's subject matter, function, or purpose, at least not without passing strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015).

But under the decision below, California might be able to declare that the first singer is engaged in

"marketing," Cal. Lab. Code § 2778(b)(2)(A), a preferred economic activity; classify the second singer as a "balladeer," whose wholesome trade strengthens relationships and comforts the brokenhearted; but classify the third as a "protest singer"—and stick her with onerous and expensive regulatory burdens whose suitability for that allegedly distinct occupation is a matter of the legislature's rational basis prerogative.

This future is not too distant. AB 5 already discriminates in this fashion against canvassers should they discuss politics rather than consumer products, and against delivery workers who deliver voter guides rather than newspaper shopping guides. And the state, successfully thus far, offers the same defense to these distinctions that it offers here: these are different occupations, and its discrimination is thus economic and not based on the content of the workers' speech. The First Amendment is inapplicable.

The Ninth Circuit's decision here acknowledges that the state cannot escape strict scrutiny by recasting every speech distinction as an economic one. But the court's ultimate blessing of that artifice indicates that it cannot be relied upon to police the line between speech and conduct. The Ninth Circuit's approach threatens fundamental First Amendment rights well beyond this case's particular circumstances. This Court should not wait to review it.

ARGUMENT

I. AB 5 is not a law of general application.

In his brief below, Respondent referred to AB 5 as a "generally applicable economic regulation" or some variant thereof no fewer than a dozen times. The Ninth Circuit got the message, recalling that "we recently upheld AB 5 as a 'generally applicable' law in another context, despite its exemptions because it applies to employers generally." App. A-17 (citing *Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644, 658-59 (9th Cir. 2021), *cert. pending*, No. 21-194 (filed Aug. 9, 2021)).

"In another context" does a lot of work here, because AB 5 is nothing but the sum of countless "contexts." Even if the law had a general application, the question before the Court is whether AB 5's particular provisions at issue make constitutionally defensible distinctions. That the Labor Code applies to everyone is irrelevant. But because the state, and thus far the Ninth Circuit, nonetheless describe AB 5 as a law of general application and use that determination to reduce the protection afforded First Amendment rights, the "general application" claim warrants examination—which it fails.

What people refer to as "AB 5" is the statutory article entitled, "Worker Status: Employees," codified at Cal. Lab. Code § 2775, et seq. The opening section, setting forth the "ABC Test" for employment classification, runs 325 words. Among these is a retention of all exemptions found anywhere in the Labor Code, the Unemployment Insurance Code, and Industrial

Welfare Commission orders. Cal. Lab. Code § 2775(b)(2). And then the "generally applicable" rule turns to legislative Swiss cheese—loopholes for innumerable situations, professional services, events, occupations, etc., spread across the next nine statutes, all totaling another 7,110 words, not including the various statutes to which these refer and rely upon.[2] For every word of Section 2775's "generally applicable" rule, AB 5 contains almost 22 words of exceptions, ever evolving depending on which lobby catches the legislature's attention—or that of the voters. Not technically within AB 5: the 185 words of Cal. Bus. & Profs. Code § 7451, "Driver independence," enacted by initiative to exempt from AB 5's reach the app-based drivers that the law first primarily targeted.

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[2] Cal. Lab. Code § 2776, "Exception for bona fide business-to-business contracting relationship," 563 words; *id.* § 2777, "Exception for relationship between referral agency and service provider," 1367 words; *id.* § 2778, "Exception for contract for 'professional services,' " 1554 words; *id.* § 2779, "Exception for relationship between individuals acting as sole proprietor or separate partnership, limited liability company, limited liability partnership, or corporation performing contract work for single-engagement event," 364 words; *id.* § 2780, "Exception for specified occupations related to creating, marketing, promoting, or distributing sound recordings or musical compositions," 1074 words; *id.* § 2781, "Exception for relationship between contractor and individual performing work pursuant to subcontract in construction industry," 544 words; *id.* § 2782, "Exception for relationship between data aggregator and research subject," 191 words; *id.* § 2783, "Exceptions for other specific occupations," 1341 words; and *id.* § 2784, "Exception for relationship between motor club and individual performing services pursuant to contract between motor club and third party," 112 words.

AB 5 is many things. It is a constant exercise in democracy, representative and direct, by which every worker's employment classification is up for grabs. It is the font of endless litigation. It is, in many ways, economic micromanagement, but also, in other ways, a speech code. It is not, however, a law of general application. And even if it were, that would not matter where the state uses AB 5 to treat identical conduct differently depending on the content of a worker's speech.

II. AB 5 discriminates against political speech based on its subject matter, function, and purpose.

Petitioners are not alone in suffering from content-based speech discrimination under AB 5. The law also hurts campaign workers, political campaigns, campaign service providers, and ultimately California's electorate.

The First Amendment protects the traditional act of going door-to-door and engaging residents in efforts to persuade them. It likewise protects the circulation of written material. "For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meetings." *Martin v. Struthers*, 319 U.S. 141 (1943). And "[f]or over 50 years, the Court has invalidated restrictions on door-to-door canvassing

and pamphleteering." *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 160 (2002) (footnote omitted). "[T]he cases discuss extensively the historical importance of door-to-door canvassing and pamphleteering as vehicles for the dissemination of ideas." *Id.* at 162.

The activities—engaging others, persuading them, giving them literature—are the same, even if the subject matters discussed or the activities' function or purpose may vary. And there is no doubt as to the essential roles that canvassing and literature distribution play in our nation's democratic process. "Of course, as every person acquainted with political life knows, door to door campaigning is one of the most accepted techniques of seeking popular support, while the circulation of nominating papers would be greatly handicapped if they could not be taken to the citizens in their homes." *Martin*, 319 U.S. at 146 (footnote omitted). "The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Meyer v. Grant*, 486 U.S. 414, 421 (1988). "Thus, the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Id.* at 421-22 (footnote omitted).

1. AB 5 privileges commercial over political canvassing.

The dictionary tells us that to "canvass" is "to go through (a district) or go to (persons) in order to solicit orders or political support or to determine opinions or sentiments." *Canvass*, Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/canvass (last visited Apr. 20, 2022). The usage examples given are "canvass voters" and "canvassed the neighborhood to solicit magazine subscriptions." *Id.* The Ninth Circuit has understood that canvassing can serve commercial and non-commercial purposes. *S.O.C., Inc. v. Cnty. of Clark*, 152 F.3d 1136, 1145-47 (9th Cir. 1998).

Under AB 5, a canvasser who works "to solicit orders," and is paid by the visit or by the signature on a sales contract is subjected to a legal regime that has long been understood to classify her as an independent contractor. But if she does so "to solicit political support," and is paid by the visit or signature on a ballot petition, she's subjected to a legal regime that consigns her to "employee" status—a class of inflexible and often unaffordable worker.

Among the occupations exempted from AB 5's "ABC Test" is that of "[a] direct sales salesperson as described in Section 650 of the Unemployment Insurance Code, so long as the conditions for exclusion from employment under that section are met." Cal. Lab. Code § 2783(e). Per that provision, "'[e]mployment' does not include services performed as a . . . direct

sales salesperson . . . by an individual" if "[t]he individual . . . is engaged in the trade or business of primarily in person demonstration and sales presentation of consumer products, including services or other intangibles, in the home . . . or otherwise than from a retail or wholesale establishment," "[s]ubstantially all" of the seller's remuneration "is directly related to sales or other output (including the performance of services) rather than to the number of hours worked by that individual," and the worker and hiring entity agree in writing to treat the worker as an independent contractor. Cal. Unemp. Ins. Code § 650.

The Direct Selling Association "work[ed]" with AB 5's sponsor to enact the exemption, and understands it provides "that direct sellers are clearly and specifically independent contractors." *Direct Selling Association Applauds Direct Seller Exemption in California AB 5*, Sep. 26, 2019, https://bit.ly/3xOArGF.

But campaign workers are not "direct sellers." The only distinction between the two is that the latter promote "consumer products." Cal. Unemp. Ins. Code § 650. The same canvasser knocking on the same doors, working on the same non-hourly basis and paid on the same performance terms, is an exempted "direct sales salesperson" if she seeks signatures on commercial contracts, but a mere campaign worker with fewer labor rights if she seeks signatures on a ballot petition. She can freelance on behalf of steak knives, but must be "employed" on behalf of political causes.

2. AB 5 privileges delivering certain newspapers and associated publications over political literature.

Under AB 5, delivering legislatively favored newspapers or their related publications earns independent contractor status. But delivering ballot petitions or other campaign materials triggers often undesirable employee status under the more stringent ABC test.

A "newspaper carrier"—someone who "effects physical delivery of the newspaper to the customer or reader," Cal. Lab. Code § 2783(h)(2)(D), is exempt from AB 5, *id.* § 2783(h)(1). But not everything is a "newspaper." The newspaper must be one "of general circulation," meeting various content and publication history criteria under Cal. Gov't Code §§ 6000 or 6008; or it may be "an extension of or substitute for that newspaper's own publication," such as a "shoppers' guide." Cal. Lab. Code § 2783(h)(2)(A). Alternatively, a qualifying "newspaper" may be a publication "distributed periodically [at] short intervals for the dissemination of news of a general or local character and of a general or local interest." *Id*.

Neither ballot petitions nor campaign literature qualify as "newspapers." The law privileges delivering an *L.A. Times'* "Shoppers' Guide" over the delivery of a voters' guide. And a worker is more easily hired to deliver a newspaper that contains political endorsements, than to deliver campaign literature that reprints those same endorsements. Absent the newspaper exemption, "[c]lassifying independent

contractors as employees would impose at least $80 million in new costs on the newspaper industry." Bill Swindell, *Legislature passes one-year exemption for newspaper carriers from AB 5*, The Press Democrat, Sep. 1, 2020, https://bit.ly/3gVc0Aq.

In extending this exemption, California's legislature found that newspapers "face the specter of an average increase of 85 percent in distribution costs" absent relief from AB 5, Cal. Assembly Bill 323, § 1(f) (2020), dealing a "potentially devastating blow" to newspapers, *id.* § 1(h), when the economy "calls into question the very future of the news industry," *id.* § 1(g). The legislature made no findings about AB 5's impact on the cost of distributing political literature.

III. The Ninth Circuit's difficulty in distinguishing outright content-based discrimination from economic regulation threatens core First Amendment rights.

AB 5's second-class treatment of campaign workers, denying them the benefits of independent contracting, is consequential. Political campaigns often rely on paid workers to gather the signatures needed to qualify their measures for the ballot. Campaigns also rely on paid workers to get their message out, including by door-to-door voter education and engagement. Historically, these have been treated as independent contractors. Hiring them under California's employment classification is no more affordable or practical for political campaigns than it is for the for-profit direct sales

and newspaper industries which obtained legislative relief for their contractors. In *Mobilize the Message*, IFS represents a campaign labor provider driven from the California market by AB 5, as well as the sponsors of ballot initiatives who can neither afford to hire campaign workers as "employees" nor qualify their ballot measures without hiring help.

In *Meyer*, this Court struck down a prohibition on the use of paid petition circulators as inconsistent with the First Amendment's Free Speech guarantee. "Colorado's prohibition of paid petition circulators restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication." *Meyer*, 486 U.S. at 424. "The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Id.* AB 5's burdening of hired campaign help, which often amount to a constructive prohibition, should meet the same fate under *Reed*, as the state never bothered trying to justify its scheme under strict scrutiny.

Unfortunately, the *Mobilize the Message* plaintiffs are appellants before the Ninth Circuit. Following the district court opinion in this case, the *Mobilize the Message* district court denied their preliminary injunction motion, holding that "the distinctions between cosmetics salespersons and campaign signature gatherers or doorknockers under AB 5 are based on the worker's occupation." *Mobilize the Message LLC v. Bonta*, No. 2:21-cv-05115-VAP-JPRx, 2021 WL 3556959, 2021 U.S. Dist.

LEXIS 153388, at *9 (C.D. Cal. Aug. 9, 2021), *appeal pending*, Ninth Cir. No. 21-55855 (argued and submitted Feb. 7, 2022). "The distinctions based on the types of products sold or services rendered are directly related to the occupation or industry of a worker as opposed to the statements the worker uses to sell such goods or perform such services." *Id.*

The district court failed to comprehend that the supposed occupational distinction turns not on any task the workers perform, but on the content of their messages. They differ only as to their purpose or function. "That is about as content-based as it gets. Because the law favors speech made for [selling consumer products] over political and other speech, the law is a content-based restriction on speech." *Barr v. Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335, 2346 (2020) (plurality).

Indeed, in *Barr*, this Court explained that the government cannot escape the First Amendment's presumptive invalidity of content-based speech restriction by recasting a content classification as an economic one. The government could not privilege robocalls seeking the repayment of government debt over robocalls bearing different messages by classifying government debt-collection as a different economic activity. The relevant activity was robo-calling, a form of expression. Government debt collection, like political campaigning or commercial sales, was the purpose.

The Ninth Circuit may yet correctly distinguish between speech and conduct in *Mobilize the Message*.

In the decision below, it seemed to accept, if not emphasize, that the government cannot simply label any message as conduct and therefore escape strict scrutiny of its speech discrimination at will. It acknowledged that "rules [governing employment relationships] understandably vary based on the nature of the work performed or the industry in which the work is performed." App. A-14 (footnote omitted). But the court then immediately erred in completing its sentence by finding that the distinctions here at issue are "no different in this regard." *Id.*

The Ninth Circuit's struggle with the speech/conduct distinction in evaluating the regulation of speaking professions included an important limitation of the state's power to treat messages as occupational talismans. Finding that "the inclusion of provisions specific to such 'speaking' professionals does not, in our view, transform a broad-ranging, comprehensive employment law like section 2778 into a content-based speech regulation," App. A-19 (citations omitted), the court nonetheless cautioned that "[a] legislature could conceivably define services or occupations so granularly that a court could isolate the speech's communicative intent as a defining distinction." *Id.* n.9.

If the Ninth Circuit heeds that warning, IFS's clients ought to prevail in their appeal. What could be more "granular" than the "consumer products" element of Cal. Unemp. Ins. Code § 650, dividing the traditional, common-sense understanding of what canvassers do, otherwise captured by the statutory definition,

into privileged "direct sales salespersons" and the unlucky others, primarily campaign workers?

A "newspaper carrier," without more, might be more narrowly understood as someone who delivers, specifically, newspapers, in the sense that the milkman traditionally delivered milk and not other beverages. But the peculiar definition of "newspaper" found in Cal. Lab. Code § 2783(h)(2)(A), which excludes some newspapers yet includes some publications that are not newspapers (though they are owned by newspaper companies), calls upon courts to focus on the workers' conduct—the delivery of printed material—in determining the true economic activity at issue. The statute's distinctions based on the publications' subject matter, function, or purpose are properly viewed as content-based speech discrimination. IFS's campaigning clients ought to prevail on this basis, too.

Yet the result in this case suggests that the Ninth Circuit's approach may be unworkable. Perhaps it would be safer if any speech-based occupational definition received a closer judicial look. This would not be the end of government regulation, *see*, *e.g.*, *Holder* v. *Humanitarian Law Project*, 561 U.S. 1 (2010), but the courts' primary concern should be with securing First Amendment rights, not government power. And if instead, all that is needed is a modest course correction properly calibrating the Ninth Circuit's ability to discern a content-based speech restriction from an occupational regulation, it is better that this be done sooner rather than later. This Court should address the threat posed to everyone's First Amendment speech rights by

a potentially unchecked content-based discrimination power.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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