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

## BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS


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## Question Presented

Whether regulating canvassing and the delivery of printed material based on that speech's content, function, or purpose implicates the First Amendment.

## Table of Contents

Question Presented .................................................... i

Table of Authorities .................................................. iii

Interest of Amicus Curiae ......................................... 1

Introduction and Summary of Reasons
for Granting the Petition ............................................ 1

Reasons for Granting the Petition ............................. 4

I. The Ninth Circuit's Decision Conflicts with This Court's Precedent by Refusing to Apply Any First Amendment Scrutiny to a Content-Based Regulation ................................ 4

II. Individual Statutory Provisions that Target Speech Implicate the First Amendment......... 10

A. The Nature of the Burden on Speech Must Focus on Individual Speakers ........ 11

B. Treating a Law's Effect on Individual Speech Rights Is Consistent with the Law of Severability .................................. 13

Conclusion ............................................................... 15

## Table of Authorities

**Page(s)**

**Cases**

*Am. Soc'y of Journalists & Authors, Inc. v. Bonta* (*ASJA*), 15 F.4th 954 (9th Cir. 2021), *cert. denied*, 142 S.Ct. 2870 (2022) .......................................... 1

*Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) ............................................. 4

*Assoc. Press v. NLRB*, 301 U.S. 103 (1937) ............................................. 6

*Assoc. Press v. United States*, 326 U.S. 1 (1945) .................................................. 6

*Barilla v. City of Houston*, 13 F.4th 427 (5th Cir. 2021)................................ 1

*Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985) ........................................... 14

*Cap. Associated Indus., Inc. v. Stein*, 922 F.3d 198 (4th Cir. 2019) ............................... 9

*Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980) ............................................. 7

*Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104 (2d Cir. 2017)............................... 12

*City of Austin, Texas v. Reagan National Advertising of Austin, LLC*, 142 S.Ct. 1464 (2022) ................................. 1, 3, 5

*City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986) .......... 11

*Cornelio v. Connecticut*, 32 F.4th 160 (2d Cir. 2022) .......... 12

*Dynamex Operations West, Inc. v. Superior Court*, 4 Cal.5th 903 (2018) .......... 1, 6, 10

*Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) .......... 8

*Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) .......... 13

*Gerken v. Fair Political Practices Comm'n*, 6 Cal.4th 707 (1993) .......... 14

*Gray v. Dep't of Public Safety*, 248 A.3d 212 (Me. 2021) .......... 9

*Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) .......... 12

*Leathers v. Medlock*, 499 U.S. 439 (1991) .......... 6

*Leavitt v. Jane L.*, 518 U.S. 137 (1996) .......... 14

*Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001) .......... 14

*McCutcheon v. Federal Election Comm'n*, 572 U.S. 185 (2014) .......... 11

*Missouri Broadcasters Ass'n v. Schmitt*, 946 F.3d 453 (8th Cir. 2020) .......... 8

*Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S.Ct. 2361 (2018) .......... 9

*NetChoice, LLC v. Attorney General, Florida*, 34 F.4th 1196 (11th Cir. 2022) ...........14

*Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) ............................................7

*Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186 (1946) ............................................6

*Pacific Coast Horseshoeing School v. Kirchmeyer*, 961 F.3d 1062 (9th Cir. 2020) .............................3

*Recht v. Morrisey*, 143 S.Ct. 527 (2022) ............................................1

*Reed v. Town of Gilbert*, 576 U.S. 155 (2015) ........................................3–7

*Seila Law v. Consumer Fin. Prot. Bureau*, 140 S.Ct. 2183 (2020) .......................................13

*Simon & Schuster v. Members of New York Crime Victims Board*, 502 U.S. 105 (1991) ............................................8

*Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011) ....................................3, 6, 7

*Stonewater Roofing Co. v. Texas Dep't of Ins.*, 641 S.W.3d 794 (Tex. App.), *reh'g denied* (Tex. Apr. 21, 2022) ..............................13

*Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622 (1994) ..........................................12

*United States v. Nat'l Treasury Employees Union (NETU)*, 513 U.S. 454 (1995) ............................................8

*Vizaline, L.L.C. v. Tracy*, 949 F.3d 927 (5th Cir. 2020) ..............................9

*Wyoming Farm Bureau Fed. v. Babbitt*,
199 F.3d 1224 (10th Cir. 2000) .........................14

**Statutes**

Cal. Lab. Code § 2775, et seq....................................2

Cal. Lab. Code § 2783(e) ..................................2, 3, 9

Cal. Lab. Code § 2783(h)(1) .....................................2

Cal. Lab. Code § 2787 ...........................................13

**Rules of Court**

Sup. Ct. R. 37.2 ........................................................1

Sup. Ct. R. 37.6 ........................................................1

**Other Authorities**

29 C.F.R. § 541.301 ..................................................7

29 C.F.R. § 541.302(c)–(d).........................................7

29 C.F.R. § 541.304 ..................................................9

Nightingale, Robert L., Note, *How to Trim a Christmas Tree: Beyond Severability and Inseverability for Omnibus Statutes*, 125 Yale L. J. 1672 (2016).......................................13

## Interest of Amicus Curiae

Pacific Legal Foundation litigates matters affecting the public interest at all levels of state and federal courts.[1] PLF represents entrepreneur clients who rely on communication to build their businesses and livelihood and to educate the public about matters within their expertise. In furtherance of PLF's continuing mission to defend individual and economic liberty, the Foundation has directly represented speakers, *see, e.g.*, *Am. Soc'y of Journalists & Authors, Inc. v. Bonta* (*ASJA*), 15 F.4th 954 (9th Cir. 2021), *cert. denied*, 142 S.Ct. 2870 (2022); *Barilla v. City of Houston*, 13 F.4th 427 (5th Cir. 2021), and participated in several cases as amicus curiae, *see, e.g.*, *City of Austin, Texas v. Reagan National Advertising of Austin, LLC*, 142 S.Ct. 1464 (2022); *Recht v. Morrisey*, 143 S.Ct. 527 (2022), before this Court and lower courts on matters affecting the public interest, including issues related to the First Amendment and economic regulation.

## Introduction and Summary of Reasons for Granting the Petition

California's Assembly Bill 5 (AB 5) codified and expanded the independent contractor test established in *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal.5th 903, 964 (2018) (the "ABC test"), requiring that most workers be classified as employees unless

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[1] Pursuant to Rule 37.2, PLF provided timely notice to all parties. Pursuant to Rule 37.6, PLF affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than PLF, its members, or its counsel made a monetary contribution to its preparation or submission.

they fall into some narrowly drawn exceptions. Cal. Lab. Code § 2775, et seq. AB 5 contains a hodgepodge of exemptions, including some that turn solely on the content of the workers' speech. *See, e.g.*, Cal. Lab. Code § 2783(e) ("direct sales salespersons"); Cal. Lab. Code § 2783(h)(1) (newspaper distributers and carriers). Workers exempt from AB 5 are assessed under the more flexible common law test to distinguish between independent contractors or employees. Pet.App.8a–9a.

Petitioners Mobilize the Message (MTM), Moving Oxnard Forward (MOF), and Starr Coalition provide political campaigns with doorknockers and signature gatherers, who were classified as independent contractors under the common law test. MTM left California due to AB 5 and has since declined prospective "contracts in California because it cannot afford the administrative expenses of hiring its independent contractors as employees." Pet.App.10a. MOF is a nonprofit corporation dedicated to making the government of Oxnard, California, more efficient and transparent. Starr Coalition is MOF's political action committee, which seeks "to effect political change by enacting ballot measures." Pet.App.10a. They depend on signature gatherers to qualify their measures for the ballot. MOF and Starr Coalition previously hired signature gatherers as independent contractors but now refrain because of economic infeasibility. Starr Coalition would like to contract with Mobilize the Message to gather signatures or to hire its own signature gatherers as independent contractors. Pet.App.10a.

Petitioners sought a preliminary injunction against the application of AB 5 to their workers. The

district court denied the injunction and the Ninth Circuit affirmed. Pet.App.2a–3a. The majority held that the First Amendment is not implicated in this case because any effect on speech is merely incidental to the legislation's overall goal of regulating employment law. Pet.App.18a. Judge Van Dyke dissented on the ground that speech distinctions masquerading as worker classifications are content-based restrictions subject to strict scrutiny as required by *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015), and *Reagan Nat'l Advert.*, 142 S.Ct. at 1471. Pet.App.22a–23a, 28a (The state's "broad power to regulate labor markets … runs into fundamental rights protected by the Constitution when those regulations turn on the speech of the worker. Regardless of whether such content-based distinctions hide under the veneer of a labor classification, the First Amendment's protections remain the same.").

The provisions of the California Labor Code added and amended by AB 5 are similar to California's Private Postsecondary Education Act (PPEA) in that both "favor[] particular kinds of speech and particular speakers through an extensive set of exemptions." *Pacific Coast Horseshoeing School v. Kirchmeyer*, 961 F.3d 1062, 1072 (9th Cir. 2020) (interpreting PPEA). "That means [these exemptions] necessarily disfavor[] all other speech and speakers." *Id.* AB 5's exemptions favor "marketing, that is, speech with a particular content," *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 564 (2011), by applying less restrictive employee classification rules to door-to-door solicitation involving commercial rather than political speech. *See* Cal. Labor Code § 2783(e). Section 2783 is therefore a content-based law "defining regulated speech by its function or purpose." *Reed*, 576 U.S. at 163. The only

way to know how Section 2783 applies to door-to-door solicitation is through "official scrutiny of the content of publications," *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987), to determine the "function or purpose" of the speech, *Reed*, 576 U.S. at 163.

The Ninth Circuit erred by applying no First Amendment scrutiny at all to AB 5. The Ninth Circuit decision conflicts with this Court's guidance in *Reed* by ignoring "the crucial first step in the content-neutrality analysis." The Ninth Circuit further erred by considering AB 5 as a whole, rather than interpreting the constitutionality of specific provisions as they apply to individual speakers. In doing so, the Ninth Circuit created a rule of decision that effectively exempts byzantine legislation from judicial review and allows the State of California to strangle constitutional rights amid a tangle of regulations and exemptions. For these reasons, the Petition should be granted.

## Reasons for Granting the Petition

### I. The Ninth Circuit's Decision Conflicts with This Court's Precedent by Refusing to Apply Any First Amendment Scrutiny to a Content-Based Regulation

The Ninth Circuit concluded that AB 5's exemptions "do not depend on the communicative content, if any, conveyed by the workers but rather on the workers' occupations." Pet.App.19a. But the majority never asked the obvious next question: What defines workers' occupations? Dissenting Judge Van Dyke confronted that question directly: AB 5 creates occupational classifications that "turn predominantly,

if not entirely, on the content of the workers' speech." Pet.App.21a.

The majority's failure to look past the "occupation" label effectively "skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face." *Reed*, 576 U.S. at 165. That allowed AB 5 to "escape classification as facially content based simply by swapping an obvious subject-matter distinction for a 'function or purpose' proxy that achieves the same result." *Reagan Nat'l Advert.*, 142 S.Ct. at 1474. The Ninth Circuit's shortcut cannot be reconciled with this Court's First Amendment jurisprudence.

Whether a worker's solicitations and deliveries fall within the exemptions for door-to-door solicitation and newspaper delivery (Section 2783(e), (h)(1)) "depend[s] entirely on [its] communicative content." *Reed*, 576 U.S. at 164. This resembles the facially content-based sign code in *Reed*:

> If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election ....

*Id.* at 164–65. Similarly, if a door-to-door solicitor is selling copies of John Locke's Two Treatises of Government, he can work as an independent contractor; but if he goes door-to-door to pitch political candidates who support Lockean government, he must be hired as an employee. A contractor can deliver newspapers in the morning, but then must be an employee to deliver political pamphlets in the

afternoon. That other exemptions to the ABC test depend on non-speech factors, Pet.App.18a–19a, does not change that the exemptions here turn entirely on content. Under *Sorrell* and *Reed*, the panel owed at least some First Amendment scrutiny to this facially content-based distinction.

One might wonder what substantial or compelling government interest justifies burdening the speech of independent political activists. At this juncture, though, this Court need not examine why the legislature favored some speech and speakers over others—the simple fact that the statute picked winners and losers based on the content of speech requires strict scrutiny. Yet the Ninth Circuit applied no scrutiny at all.

AB 5 differs from "generally applicable" laws because its burdens apply differently based on the type of speech it covers. This Court upheld the Fair Labor Standards Act (FLSA) against a First Amendment challenge because "the Act's purpose was to place publishers of newspapers upon the same plane with other businesses," *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 194 (1946); the National Labor Relations Act, because "[t]he business of the Associated Press is not immune from regulation because it is an agency of the press," *Assoc. Press v. NLRB*, 301 U.S. 103, 132 (1937); the Sherman Act, because "a combination to restrain trade in news and views has [no] constitutional immunity," *Assoc. Press v. United States*, 326 U.S. 1, 20 (1945); and cable television taxes, because "[t]here is nothing in the language of the statute that refers to the content of mass media communications," *Leathers v. Medlock*, 499 U.S. 439, 449 (1991). Petitioners here do not seek

immunity or special treatment; they seek *equal* treatment without regard to the content of their speech—precisely the guarantee extended by *Sorrell* and endorsed in *Reed*.

The Ninth Circuit fretted that, if it adopted the Petitioners' view, it would be "difficult to see how any occupation-specific regulation of speakers would avoid strict scrutiny." Pet.App.16a (quoting *ASJA*, 15 F.4th at 963–64). Such fear is unfounded because the only means to determine whether AB 5 applies is by reviewing the content of the Petitioners' politically oriented communications. AB 5 therefore warrants more scrutiny than laws regulating uncontroversial factual disclosures in commercial transactions, *cf. Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), or even commercial speech generally. *See Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

First Amendment scrutiny of the content-based job descriptions in AB 5 also poses no threat to FLSA regulations that apply only depending on how work is performed and worker qualifications—not content. *See, e.g.*, 29 C.F.R. § 541.301 (governing "work requiring advanced knowledge" in a "field of science or learning" "customarily acquired by a prolonged course of specialized intellectual instruction"). Other FLSA regulations govern "work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor," 29 C.F.R. § 541.302(c)–(d), and this reveals the problem with AB 5 that the federal regulations avoid: under Section 2783, *why* workers speak and *what they say* determines how they are regulated.

First Amendment-protected speech frequently arises in the context of paid communication, and this in no way reduces constitutional scrutiny. As this Court explained in *United States v. Nat'l Treasury Employees Union* (*NETU*), 513 U.S. 454, 468 & n.15 (1995), a law that restricts speakers' ability to be compensated "unquestionably imposes a significant burden on expressive activity" even when it "neither prohibits any speech nor discriminates among speakers based on the content or viewpoint of their messages." *See also Simon & Schuster v. Members of New York Crime Victims Board*, 502 U.S. 105, 115 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech"). Depriving speakers of compensation "induces them to curtail their expression." *NETU,* 513 U.S. at 469. *See also Missouri Broadcasters Ass'n v. Schmitt*, 946 F.3d 453, 458–59 (8th Cir. 2020) (statute regulating economic activity that does not mention speech explicitly still subject to First Amendment scrutiny because "its *practical operation* restricts speech based on content and speaker identity") (emphasis added).

Moreover, exemptions to economic regulations that significantly burden speech in one industry must be scrutinized to ensure protection of the regulated industrial speakers' First Amendment rights, regardless of the regulations' effect on other industries. *Cf. Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 361, 366–67 (3d Cir. 1999) (Alito, J.) (employing this approach in the free exercise context). Petitioners' theory also poses no threat to regulations that turn on licensure—e.g., laws regulating the practice of law or medicine—because those laws do not depend on the

content of speech. *See* 29 C.F.R. § 541.304. They focus on whether certain conduct constitutes the practice of the regulated profession. *See Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S.Ct. 2361, 2373–74 (2018) (distinguishing "regulation of professional conduct" from a law that "regulates speech as speech"). For instance, the Fourth Circuit applied intermediate scrutiny to hold that a regulatory ban on corporate law practice was targeted at conduct rather than speech because it focused on "who may conduct themselves as lawyers" rather than on the "communicative aspects of law." *Cap. Associated Indus., Inc. v. Stein*, 922 F.3d 198, 208−09 (4th Cir. 2019) (Recognizing that "the practice of law has communicative and non-communicative aspects"). *See also Gray v. Dep't of Public Safety*, 248 A.3d 212, 221 (Me. 2021) ("In light of *NIFLA* and *Stein*, we similarly conclude that intermediate scrutiny is the proper test to apply when a regulation of conduct that does not explicitly target speech but incidentally burdens it is challenged on First Amendment grounds."); *Vizaline, L.L.C. v. Tracy*, 949 F.3d 927, 934 (5th Cir. 2020) ("Whatever its regulatory interests might turn out to be, though, Mississippi's surveyor requirements are not wholly exempt from First Amendment scrutiny simply because they are part of an occupational-licensing regime."). Conversely, Section 2783 bases its exemptions only on the "function or purpose," viz. "the content," of workers' speech. This results in AB 5 favoring commercial over political speech. *See* Cal. Labor Code § 2783(e).

This Court should grant the petition to clarify that AB 5, which targets politically-oriented canvassing businesses, is a facially content-based burden on speech.

## II. Individual Statutory Provisions that Target Speech Implicate the First Amendment

The Ninth Circuit deprived Petitioners of First Amendment protection by holding that AB 5 must be treated solely as economic regulation. Pet.App.18a ("Section 2783 does not target certain types of speech. Unless an occupational exemption exists, the ABC test 'applies across California's economy.'") (citing *ASJA*, 15 F.4th at 962–63). Dissenting Judge Van Dyke correctly offered this rejoinder:

> This misunderstands the relevant First Amendment inquiry. Plaintiffs are not required to engage in some balancing test where the constitutional parts of AB 5 are weighed against the unconstitutional parts of AB 5. Even if most aspects of a given law regulate broadly without regard to speech, that cannot possibly protect the parts of that law that do distinguish on speech. If this were true, the government could circumvent the First Amendment simply by hiding content-based distinctions within a sweeping regulation. Rather, the proper inquiry is whether the exact exemptions challenged here predominately turn on the content of the workers' speech.

Pet.App.26a. Any discrete section of legislation that impinges on the First Amendment rights of *individuals* requires strict scrutiny, even if it is buried amid a tangle of regulations and exemptions. Free speech rights cannot be dependent on the style and length of legislation.

### A. The Nature of the Burden on Speech Must Focus on Individual Speakers

This Court should grant the petition to engage in a practical assessment of the financial and other burdens suffered by the *individuals* who claim violation of free speech rights. *See McCutcheon v. Federal Election Comm'n*, 572 U.S. 185, 205 (2014) (courts assessing First Amendment speech rights appropriately focus on the individual, not the collective public interest). "Where a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force." *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986). Courts "may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity." *Id.* (citation omitted).

The question here is whether AB 5 discriminates against speech on the basis of content, in violation of the First Amendment, by classifying canvassers who speak about "consumer products" more favorably than canvassers who speak about politics, and by classifying workers who deliver particular newspapers more favorably than workers who deliver ballot petitions and other campaign material. The Ninth Circuit incorrectly ignored the *individual* rights of the canvassers and deliverers of communications containing political content, viewing the speakers as nothing more than occupational categories unworthy of judicial scrutiny. *See* Pet.App.28a (Van Dyke, J., dissenting) ("Regardless of whether such content-based distinctions hide under

the veneer of a labor classification, the First Amendment's protections remain the same.").

Regulations need not uniquely burden speech to warrant First Amendment review. For example, in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988), this Court held that Virginia's tort of intentional infliction of emotional distress was "a law of general applicability" unrelated to the suppression of speech, but when used to penalize the expression of opinion, the law was subject to First Amendment scrutiny. *See also Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994).

The decision below conflicts with the Second Circuit's approach to laws that touch on speech and non-speech issues. For example, that court analyzes day laborer traffic cases to ensure protection of individual speech rights. *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 112 (2d Cir. 2017), concerned an ordinance with a conduct component relating to the attempted stopping of a vehicle but, as the court pointed out, that ordinance "only punish[ed] such conduct if done 'for the purpose of soliciting employment.'" *Id.* Thus, under that ordinance, town officials who "monitor[ed] and evaluate[d] the speech of those stopping or attempting to stop vehicles" could only sanction the speaker "if a suspect sa[id] the wrong thing, for example, 'hire me' as opposed to 'tell me the time.'" *Id.* That Court ultimately concluded the ordinance was not narrowly drawn and was an unconstitutional restriction of commercial speech. *Id.* at 115–18; *see also Cornelio v. Connecticut*, 32 F.4th 160, 169 (2d Cir. 2022) ("It is well-established that First Amendment rights may be violated by the chilling effect of

governmental action that falls short of a direct prohibition against speech.") (citation omitted). Texas courts take the same approach. *See, e.g.*, *Stonewater Roofing Co. v. Texas Dep't of Ins.*, 641 S.W.3d 794, 803 (Tex. App.), *reh'g denied* (Tex. Apr. 21, 2022) (First Amendment scrutiny required "even if these prohibitions restrict speech only incidentally in the regulation of non-expressive professional conduct").

### B. Treating a Law's Effect on Individual Speech Rights Is Consistent with the Law of Severability

AB 5, as amended, is a complex attempt to regulate huge swaths of California's economy. Like other long, complex statutes, it "reflect[s] numerous compromises and bargains." Robert L. Nightingale, Note, *How to Trim a Christmas Tree: Beyond Severability and Inseverability for Omnibus Statutes*, 125 Yale L. J. 1672, 1676 (2016). Perhaps anticipating that such complicated regulations and exemptions might leave certain provisions vulnerable to legal challenges, the AB 2257 amendments to AB 5 added a severability clause. Cal. Lab. Code § 2787.

The clause highlights the general rule that exists even without such explicit direction. When a constitutional flaw exists in such a statute, courts "try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) (cleaned up); *Seila Law v. Consumer Fin. Prot. Bureau*, 140 S.Ct. 2183, 2208 (2020) (Roberts, C.J., joined by Alito & Kavanaugh, JJ.) ("It has long been settled that 'one section of a statute may be repugnant to the Constitution without rendering the whole act void.'")

(citation omitted). This demonstrates the Ninth Circuit's flaw in reviewing AB 5 as a monolith, rather than a collection of discrete provisions.[2] While the meaning of a particular provision may be interpreted in accordance with the entire law's objective and policy, *Wyoming Farm Bureau Fed. v. Babbitt*, 199 F.3d 1224, 1235 (10th Cir. 2000), constitutional challenges focus on individual sections.

This Court applied the general rule of severability to First Amendment claims in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985), reversing the Ninth Circuit's facial invalidation of a state obscenity statute according to the "normal rule that partial, rather than facial, invalidation is the required course." Noting that "the same statute may be in part constitutional and in part unconstitutional," the *Brockett* Court held that "if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected." *Id.* at 502 (quotations and citations omitted). Similarly, in *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 549 (2001), this Court affirmed a Circuit Court's invalidation of a "fragment" of a statutory provision that violated the First Amendment while leaving the rest of the statute in place. *See also NetChoice, LLC v. Attorney General, Florida*, 34 F.4th 1196, 1231 (11th Cir. 2022) (affirming a district court's preliminary injunction of

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[2] Federal courts apply state law to determine severability, *Leavitt v. Jane L.*, 518 U.S. 137, 139–40 (1996), and California law permits severability when an invalid provision is "grammatically, functionally, and volitionally separable." *Gerken v. Fair Political Practices Comm'n*, 6 Cal.4th 707, 721 (1993) (citing *Calfarm Ins. Co. v. Deukmejian*, 48 Cal.3d 805, 821–22 (1989)).

a law's provisions "that are substantially likely to violate the First Amendment" while reversing the injunction as to the law's provisions "that aren't likely unconstitutional.").

The general law of severability combined with the actual severance clause in the legislation challenged in this case highlight the Ninth Circuit's fundamental error in refusing to consider the speech-restricting portions of AB 5 as discrete infringements on the First Amendment.

## Conclusion

The Petition should be granted.

DATED: April 2023.

Respectfully submitted,

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