No. 22-865

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* AMERICANS FOR PROSPERITY FOUNDATION, REASON FOUNDATION, AND THE FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICI CURIAE* AMERICANS FOR PROSPERITY FOUNDATION, REASON FOUNDATION, AND THE FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2, Americans for Prosperity Foundation ("AFPF"), Reason Foundation, and the Foundation for Individual Rights and Expression (FIRE) respectfully submit this *amici curiae* brief in support of Petitioners.[1]

INTEREST OF *AMICI CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and empowering Americans to address the most important issues facing our country, including civil liberties and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts. Throughout our nation's history, the fight for civil rights has relied on the exercise of civil liberties, which is one reason they must be protected. AFPF is interested in this case because the protection of the freedoms of expression and association, guaranteed by the First Amendment, is necessary for an open and diverse society.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amici* or its counsel made any monetary contributions to fund the preparation or submission of this brief. Counsel for all parties were notified of *amici's* intent to file this brief greater than ten days prior to the date to respond.

policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing Reason Magazine, as well as commentary on its websites, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues.

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended the rights of individuals through public advocacy, strategic litigation, and participation as *amicus curiae* in cases that implicate expressive rights under the First Amendment. *See, e.g.*, Brief of FIRE as *Amicus Curiae* in Support of Petitioner, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); Brief of FIRE as *Amicus Curiae* in Support of Respondents, *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021). FIRE is interested in this case because the Ninth Circuit's opinion, if allowed to let stand, will further embolden governments to promulgate unconstitutional limits on speech under the guise of economic regulation.

SUMMARY OF ARGUMENT

Recent threats to free speech often come veiled as regulation of economic activity; and the proposed rationale for using such laws to limit or compel speech increasingly relies on theories developed for the regulation of commerce. Whether these laws are

backdoor attempts to regulate speech under the lesser standard of rational basis review or are *bona fide* commercial regulations that incidentally burden speech—or can be creatively applied to do so—once the First Amendment is implicated, any content-based regulation must trigger strict scrutiny.

This case merits review by providing a clean example of how economic regulation becomes content-based regulation of speech when blindly applied to speech-based activity.

Petitioners state that "California's trick is to reimagine speech serving a particular function or purpose as a discrete economic activity." California is not alone in recasting speech as regulable activity to expand the reach of commercial regulation. Variations on this approach are endemic, rising to this Court repeatedly in recent years. Just as common is the revelation that nominally commercial laws are the sheep's clothing under which speech regulation—often viewpoint specific—lurks to bite the unwary speaker. And AB5 in many of its applications is no different: enacted as a labor regulation but resulting in a content-based regulation of speech.

Another frequent go-to form of regulation used to police viewpoint is public accommodations law. The public accommodations law that Colorado, for example, employs to compel speech promoting the State's viewpoint has been before this Court on previous occasions and may soon reach this Court again. *See, e.g.*, *303 Creative LLC v. Elenis*, 6 F.4th 1160 (10th Cir. 2021), *cert. granted in part*, 142 S. Ct. 1106 (Feb. 22, 2022) (No. 21-476); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111). *See also Klein v.*

Oregon Bureau of Labor and Industries, 139 S. Ct. 2713 (2019) *cert. granted, judgment vacated, and remanded* 410 P.3d 1051 (Or. 2017) (No. 18-547) (similar under Oregon law); *Arlene's Flowers, Inc. v. Washington*, 141 S. Ct. 2884, *cert. denied*, 441 P.3d 1203 (Wa. 2019) (No. 17-208) (similar under Washington law).

303 Creative is especially instructive because the Tenth Circuit opinion floated another novel theory to subject a speaker to commercial regulation: the idea that an individual artist has a monopoly on her own unique genius and is therefore a regulable monopoly.

Such threats to viewpoint should be resolved under *Reed v. Town of Gilbert*, which declared not only that content-based speech regulations are subject to strict scrutiny but also whether a law is content neutral on its face must be considered before turning to the law's justification or purpose. 576 U.S. 155, 256, 166 (2015). But the recent decision in *City of Austin, Texas v. Reagan National Advertising of Austin, LLC*, that an on-/off-premises distinction for billboards that turns on the contents of the sign to determine whether it relates to a specific location, is facially content neutral and subject to intermediate scrutiny, potentially risks opening another avenue for regulating speech so long as the law does not single out any topic or subject matter for differential treatment. 142 S. Ct. 1464, 1466 (2022).

The move to recast speech as regulable commercial activity seems limited only by the imagination of legislatures and courts. Although these efforts have been resisted with some success, the tide has yet to turn and presents a persistent threat that merits review by this Court.

ARGUMENT

I. AB5 REGULATES SPEECH AND DISTINGUISHES BASED ON CONTENT.

AB5 codified the "ABC Test" set forth in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 4 Cal. 5th 903 (2018), which categorizes workers as employees or independent contractors. *Olson v. California*, No. 21-55757, 2023 WL 2544853, at *2 (9th Cir. Mar. 17, 2023). Under *Dynamex* "'a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor, unless the hiring entity' makes the requisite showing under the ABC test." *Id*. at *3 (citing AB5 § 2(a)(1); *Dynamex*, 4 Cal. 5th at 967). This test had the effect of expanding the definition of employee to a broader range of workers, who had been deemed independent contractors under the prevailing multi-factor balancing test adopted in *S. G. Borello & Sons*. *Id* at *2 n.2 (citing *S. G. Borello & Sons, Inc. v. Dep't of Indus. Relations* 48 Cal. 3d 341 (1989)).

But, from the beginning, AB5 exempted a wide array of workers, including:

> California licensed insurance businesses or individuals, physicians and surgeons, dentists, podiatrists, psychologists, veterinarians, lawyers, architects, engineers, private investigators and accountants; registered securities broker-dealers and investment advisers; direct sales salespersons; commercial fishermen working on American vessels for a limited period; marketers; human resources administrators; travel agents;

> graphic designers; grant writers; fine artists; payment processing agents; certain still photographers or photo journalists; freelance writers, editors, or cartoonists; certain licensed estheticians, electrogists, manicurists, barbers or cosmetologists; real estate licensees; repossession agents; contracting parties in business-to-business relationships; contractors and subcontractors; and referral agencies and their service providers. See A.B. 5 § 2. A.B. 5 also left open the possibility of court-created exemptions.

Id. at *3 (citing AB5 § 2(a)(3)).

Shortly thereafter, AB5 was amended to include exemptions for additional categories of workers:

> newspaper distributor working under contract with a newspaper publisher . . . and a newspaper carrier working under contract either with a newspaper publisher or newspaper distributor;

as well as exemptions for,

> recording artists; songwriters, lyricists, composers, and proofers; managers of recording artists; record producers and directors; musical engineers and mixers; vocalists; musicians engaged in the creation of sound recordings; photographers working on recording photo shoots, album covers, and other press and publicity purposes; and independent radio promoters.

Id. (citing AB 170 § 1(b)(7) and AB 2257 § 2).

Many of these exemptions relate to speech-based occupations, but some do not.

A. AB5 Drives Freelance Expressive Work from the Marketplace.

This petition is not AB5's first trip to this Court. Last spring, the American Society of Journalists and Authors, petitioned for *certiorari* arguing that "[w]ith the enactment of Assembly Bill 5 (AB5) in 2019, California permits favored speaking professionals—those engaged in 'marketing'—to freelance while burdening writers, photographers, and videographers who produce other types of speech with onerous financial burdens and regulations." Petition for *Certiorari*, 2022 WL 577005 at *3 ("ASJA Petition"), *Am. Soc'y of Journalists & Authors, Inc. v. Bonta*, 15 F.4th 954 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 2870 (June 27, 2022) (No. 21-1172) ("ASJA"). By exempting particular speech and speakers from costly regulations, AB5 necessarily disfavors all other speech and speakers. The only way to know whether the favorable or burdensome provisions apply is by scrutinizing the content of the freelancer's work. *Id*. at *4. Accordingly, AB5 should have been reviewed under strict scrutiny, which it could not satisfy. But, because the Ninth Circuit considered that AB5 did not reflect "a legislative content preference", *ASJA*, 15 F.4th at 963, it skipped 'the crucial first step in the content neutrality analysis: determining whether the law is content neutral on its face," *ASJA Petition*, 2022 WL 577005 at *4 (citing *Reed*, 576 U.S. at 165), and affirmed dismissal of ASJA's suit as a rational regulation of economic activity.

The Ninth Circuit's failure to properly apply strict scrutiny has been devastating for freelancers that fall on the wrong side of AB5's preference scheme. As AFPF, filing with The Independent Institute, The National Federation of Independent Business, and New Jobs America, as *amici* explained, AB5 drove freelance speech-creator jobs from the market, thus reducing both the metaphorical marketplace of ideas and the literal marketplace for paid speech.[2] "For example, in response to AB5, Vox Media cut ties with more than 200 independent contractors and replaced them with a mere twenty employees." *Id*. at 9, n 12.[3] "And speech-creator businesses, along with many others, are leaving California and relocating to avoid AB5's impact." *Id*. at 10 n 14.[4] Burdening certain

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[2] Brief of The Independent Institute, National Federation of Independent Business Small Business Legal Center, Americans For Prosperity Foundation, and New Jobs America as *Amici Curiae* Supporting Petitioners, 2022 WL 1250668 at *7–8, *Am. Soc'y of Journalists & Authors, Inc. v. Bonta*, 15 F.4th 954 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 2870 (June 27, 2022) (No. 21-1172).

[3] *Citing* Suhauna Hussain, *Vox Media cuts hundreds of freelance journalists as AB 5 changes loom,* L.A. Times (Dec. 17, 2019), *https://www.latimes.com/business/story/2019-12-17/voxmedia-cuts-hundreds-freelancers-ab5*

[4] *Citing* Karen Anderson, As with California's disastrous AB 5 law, the PRO Act would hurt major sectors of the independent workforce, Americans for Prosperity (June 4, 2021) https://americansforprosperity.org/ab5-pro-act-hurtingworkforce/ (listing examples);
Patrice Onwuka, California's AB5 Triggers Outcry From Independent Contractors, Ind. Women's Forum (Jan. 20, 2020), https://www.iwf.org/2020/01/20/californias-ab5-triggers-outcryfrom-independent-contractors-2/ (detailing interview with writer who moved out of California due to AB5); cf. Isabelle

categories of speech, which can drive speech and speakers from the market is an infringement of the First Amendment that has had disastrous consequences for some categories of speakers.

B. AB5 Is So Riddled with Exceptions It Failed to Satisfy Rational Basis Review for *Bona Fide* Commercial Activity.

In *Olson v. California*, on review of a dismissal and denial of a preliminary injunction, the Ninth Circuit held "the exclusion of thousands of workers from the mandates of A.B. 5 is starkly inconsistent with the bill's stated purpose of affording workers the 'basic rights and protections they deserve'" and on that basis reversed dismissal of the Equal Protection claim. *Olson v. California*, 2023 WL 2544853, at *2, 10.

In that case, Plaintiffs Uber Technologies, Postmates, and individual drivers challenged the constitutionality of AB5 because the vast array of exemptions relieved similar companies of the burdens of AB5 while applying it to Uber and Postmates. *Id*. at *10. The district court had dismissed all claims and denied the requested preliminary injunction. *Id*. at *5. The Circuit Court, however, found that even applying rational basis review Plaintiffs plausibly alleged AB5 violates the Equal Protection Clause for those engaged in app-based, ride-hailing, and delivery services. *Id*. at *10.

Morales, List of Personal Stories of Those Harmed by California's AB5 Law, Americans for Tax Reform (Dec. 22, 2020), https://www.atr.org/ab5/ (collecting 655 testimonials demonstrating how "California's AB5 law . . . has destroyed countless lives and driven people out of the Golden State").

If 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.

C. AB5 Burdens Core Political Speech While Exempting Commercial Speech.

Here, the difference in treatment between favored speakers and disfavored speakers is, if anything, more troubling than either the speech-based distinctions challenged in *ASJA* or the activity-based distinctions challenged in *Olsen*. Disturbing as it may be for the state to pick winners and losers among creative professionals who speak for a living, when the state burdens political speech, while deferring to commercial speech, it turns First Amendment protections on their head.

The carve-out from AB5 for direct sales salespersons applies if an "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[.]" Cal. Lab. Code § 2783(e); Cal. Unemp. Ins. Code § 650(a). Whatever ambiguity may lurk around the edges of the commercial speech doctrine,[5]

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[5] In his concurrence to *Metromedia, Inc. v. City of San Diego*, Justice Brennan highlighted how fuzzy the edges of the commercial speech doctrine are:

> I would be unhappy to see city officials dealing with the following series of billboards and deciding which ones to permit: the first billboard contains the message "Visit Joe's Ice Cream

here, the exemption for door-to-door sales goes straight to the heart of the doctrine: "I will sell you the X prescription drug at the Y price." *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 761 (1976). Thus, had California chosen to apply AB5 to door-to-door sales, it presumably could have done so under *Virginia Pharmacy Board*. But by exempting the one form of speech it *could* regulate while presuming to regulate other content, such as political speech, California has placed itself crossways with the First Amendment, even it did not intend to do so. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) (noting

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> Shoppe"; the second, "Joe's Ice Cream Shoppe uses only the highest quality dairy products"; the third, "Because Joe thinks that dairy products are good for you, please shop at Joe's Shoppe"; and the fourth, "Joe says to support dairy price supports; they mean lower prices for you at his Shoppe." Or how about some San Diego Padres baseball fans—with no connection to the team—who together rent a billboard and communicate the message "Support the San Diego Padres, a great baseball team." May the city decide that a United Automobile Workers billboard with the message "Be a patriot—do not buy Japanese-manufactured cars" is "commercial" and therefore forbid it? What if the same sign is placed by Chrysler?

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 at 538–39 (1981) (Brennan, J., concurring).

"political speech must prevail against laws that would suppress it, whether by design or inadvertence").

Here, one cannot escape the conclusion that AB5 has become a proxy for burdening some categories of speech while privileging others; and, perhaps, that such preferences are linked to the speaker's identity.

II. USING PUBLIC ACCOMMODATIONS LAW TO COMPEL OR SILENCE SPEECH.

Regulating speech under the ambit of employment law is just one of the creative ways regulating commercial activity can morph into regulation of speech while clinging to a more readily satisfied standard of review.

Common carrier laws have long been applied to require transportation of third-party speech. *See, e.g.*, *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727 (1996). But lately, its brethren doctrine, public accommodations law, has been pressed into service as a means not only to require traditional provision of generally-available products and services, but also to require individual speakers to create and deliver messages with which they disagree.

This Court recently heard *303 Creative*, which challenged Colorado's application of its public accommodations law[6] to a website designer's bespoke creations, No. 21-476. The Colorado statute at issue

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[6] CO Rev. Stat. § 24-34-601 (2016) [hereinafter "CADA"] (defining "place of public accommodation" as "any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public" and "discriminatory practice" as withholding or denying the full and equal enjoyment of "a place of public accommodation.").

guarantees access to public accommodations to various enumerated groups and individuals, declaring it unlawful to refuse "to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation." CO Rev. Stat. § 24-34-601(2)(a) (2016).

Although this provision could easily be squared with longstanding protections for paid expression and professional speech, Colorado has gone to great lengths to interpret its law to compel speech-based creation and artistic endeavors by conflating the characteristics of the prospective customer with the characteristics of the requested service. *E.g.*, *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1725–26 (2018).

Public accommodations, far from being a newfangled invention of regulatory law, have a long history, with certain types of businesses, such blacksmiths and inns, traditionally seen as "public accommodations." *See De Wolf v. Ford*, 86 N.E. 527, 529 (N.Y. 1908) ("For centuries it has been settled in all jurisdictions where the common law prevails that the business of an innkeeper is of a quasi-public character, invested with many privileges, and burdened with correspondingly great responsibilities[.]"); Joseph William Singer, *No Right To Exclude: Public Accommodations and Private Property*, 90 Nw. U.L. Rev. 1283, 1321 (1996) (citing *Lane v. Cotton*, 88 Eng. Rep. 1458 (K.B. 1701)). Certain similarities among these businesses, such as reliance by travelers on inns and blacksmiths to

ensure their safety, justified imposing certain duties to the public that were not imposed on other businesses. *See id.* at 5; Singer, 90 Nw. U.L. Rev. at 1292 ("[N]ecessity required special obligations to protect travelers from hardship when they had no place to sleep at night and were vulnerable to bandits on the highways.").

Modern statutes, such as CADA, while extending the definition of public accommodation to a variety of businesses, facilities, and locations[7] do not purport to lump individual speakers—regardless how creative—into the definition of a public accommodation. Nevertheless, they have been applied as if they do.

But the extended duties of certain types of enterprises, such as ferries, railways, and carters, each of which carries goods or persons for hire, limit government's ability to impose common carrier designation involuntarily or by fiat. *Frost v. R.R. Comm'n of State of Cal.,* 271 U.S. 583, 593 (1926) ("[T]he power to compel a private carrier to assume

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[7] Under CADA, place of public accommodation incudes, but is not limited to "any business offering wholesale or retail sales to the public; any place to eat, drink, sleep, or rest, or any combination thereof; any sporting or recreational area and facility; any public transportation facility; a barber shop, bathhouse, swimming pool, bath, steam or massage parlor, gymnasium, or other establishment conducted to serve the health, appearance, or physical condition of a person; a campsite or trailer camp; a dispensary, clinic, hospital, convalescent home, or other institution for the sick, ailing, aged, or infirm; a mortuary, undertaking parlor, or cemetery; an educational institution; or any public building, park, arena, theater, hall, auditorium, museum, library, exhibit, or public facility of any kind whether indoor or outdoor." CO Rev. Stat. § 24-34-601 (2016).

against his will the duties and burdens of a common carrier, the state does not possess."). Any attempt by a state to do so implicates the constitutional rights of the carrier. *See id.* at 592; *Mich. Pub. Utils. Comm'n v. Duke*, 266 U.S. 570 (1925) (statute making persons transporting property over public highways common carriers violated due process of private carriers).

Artists and other speech-based professionals have none of the characteristics that delineate a common carrier or public accommodations under common law. And this Court has rejected the notion that wholly private actors may be deemed mere conduits for the speech of others, losing their right to control the use of their own property. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390 (1993). Thus, private entities such as newspapers, retain First Amendment protection—even from being compelled to include speech clearly attributable to someone else. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). These protections are not limited to the press but apply equally outside the media. *E.g., Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 575–76 (1995).

Even in *Pruneyard Shopping Center v. Robins*, the highwater mark for state power to compel private parties to host the speech of others,[8] the Court based its holding on narrow facts: (1) the shopping center was open to the public to come and go as they please and thus "views expressed by members of the public . . . will not likely be identified with those of the owner"; (2) "no specific message is dictated by the State" and

[8] *Amicus* AFPF has previously argued the Court should reconsider *Pruneyard*. *See Amicus* Br. of AFPF 19, *Cedar Point v. Hassid*, No. 20-107 (filed January 5, 2021).

thus there was "no danger of governmental discrimination for or against a particular message;" and (3) "appellants can expressly disavow any connection with the message" . . . "disclaim[ing] any sponsorship of the message" and "explain[ing] that the persons are communicating their own messages by virtue of state law." 447 U.S. 74, 87 (1980).

Despite being at-odds with centuries of common law, public accommodations law has been stretched to reach speech under the guise of regulating commerce and presents one of the most pressing threats to the First Amendment.

III. THE MONOPOLY ARGUMENT.

The Tenth Circuit opinion in *303 Creative* presented another novel approach to subsuming speech under a form of commercial regulation by asserting that "due to the unique nature of Appellants' services, this case is more similar to a monopoly. The product at issue is not merely 'custom-made wedding websites,' but rather 'custom-made wedding websites of the same quality and nature as those made by Appellants.' In that market, only Appellants exist." 6 F.4th at 1180. The court presented no authority for the novel concept that an individual person or company becomes a monopoly simply because it is unique.

This approach is inconsistent with traditional concepts of monopoly or restraint of trade doctrine, which focus on whether there are viable substitutes for a seller's goods or services. *Nat'l Collegiate Athletic Ass'n v. Alston*, 468 U.S. 85, 111 (2021). Mere differences between two products does not place them in separate relevant markets—and a customer's

preference for a specific product does not automatically render its seller a monopolist.

Although this theory has achieved limited traction since *303 Creative* was decided by the Tenth Circuit, at least one other state has tried to use it to justify compelling speech. *See Chelsey Nelson Photography, LLC v. Louisville/Jefferson Cnty. Metro Gov't*, No. 19-851, 2022 WL 3972873 (W.D. Ky. Aug. 30, 2022).

IV. BOLSTERING COMMERCIAL REGULATIONS THAT DEPEND ON CONTENT THREATENS *REED*.

Under *Reed*, the disposition of this case would be straightforward. In *Reed*, the Court based its analysis on the principle that "Government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163 (citations omitted). There are no hidden mouseholes in this rule or subtle terms of art to trap the unwary. Rather, the definition of "content-based" is the "commonsense meaning of the phrase" that "requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id*. at 163–64 (citations omitted).

To the extent this Court's recent decision in *City of Austin v. Reagan National Advertising* may be interpreted as limiting the straightforward holding of *Reed* by distinguishing between content-based regulations that discriminate based on "the topic discussed or the idea or message expressed," *Reed*, 576 U.S., at 171" and "restrictions on speech [that] may require some evaluation of the speech and nonetheless remain content neutral." 142 S. Ct. at 1473, such an interpretation should be avoided.

Reagan National, rejected the "view that *any* examination of speech or expression inherently triggers heightened First Amendment concern." *Id*. at 1474.

As Justice Thomas warned in dissent, "there is no principled way to decide whether a category of communicative content is 'substantive' or 'specific' enough . . . to deem it a 'topic' or 'subject' worthy of heightened protection." 142 S. Ct. at 1486 (Thomas, J. dissenting). This case provides an example that Justice Thomas's doubt is not hypothetical when the difference between political speech and commercial solicitation—two categories of speech with long lines of precedent—cannot be distinguished from each other based on content This case demonstrates the pitfalls that courts create if they interpret *Reagan* as a limitation on *Reed*.

Reagan also rested on a secondary consideration, the "distinctions between on-premises and off premises signs," that the Court has held to be content neutral. *Id*. at 1488. That consideration does not apply here and should be used to cabin *Reagan* to its facts.

Instead, the Court's treatment of solicitation leads to a different outcome. The Court has held that, "the First Amendment allows for regulations of solicitation—that is, speech 'requesting or seeking to obtain something' or '[a]n attempt or effort to gain business." *Id*. at 1473 (citing Black's Law Dictionary 1677 (11th ed. 2019)). And "the Court has reasoned that restrictions on solicitation are not content based and do not inherently present 'the potential for becoming a means of suppressing a particular point of view,' so long as they do not discriminate based on topic, subject matter, or viewpoint." *Id*. (citing *Heffron*

v. International Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981)). But where such discrimination occurs, the Court has not hesitated to invalidate a statute prohibiting solicitation for religious causes, even though the States would have been "free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience." *Id.* (citing *Cantwell v. Connecticut*, 310 U.S. 296, 306–307 (1940)).

Here there is no dispute that solicitation is involved. The only issue is whether the solicitation is political or commercial, which necessarily must be analyzed based on content. When a door is opened and a solicitor begins speaking, perhaps offering a piece of literature, there is no way to determine whether AB5 applies without the speech being examined. This presents a similar issue to *Reagan*, without the historical billboard gloss, but with the perverse outcome that here commercial speech is unburdened but political speech is.[9] Either way, strict scrutiny

[9] Applying a lower level of scrutiny to commercial speech only ever made sense if one had independent knowledge that the speaker was engaged in regulable business activity such that the associated speech was part of that activity. See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) ("[T]he State's power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is 'linked inextricably' to those transactions."); *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 456 (1978) (commercial speech "occurs in an area traditionally subject to government regulation").

should apply because both categories of speech are protected, albeit at different standards.[10]

This outcome is in direct contrast to the Court's holding in *City of Cincinnati v. Discovery Network, Inc*., in which the issue was whether the city's ban on newsracks "that distribute 'commercial handbills,' but not 'newspapers,'" was content-based. 507 U.S. 410, 429 (1993). There, the city asserted that "its regulation of newsracks qualifie[d] as [a non-content-based] restriction because the interests in safety and esthetics that it serves are entirely unrelated to the content of respondents' publications." *Id*. But the Court was unpersuaded because "the very basis for the regulation is the difference in content between ordinary newspapers and commercial speech." *Id*. Like AB5, which requires analyzing the content of the speech or literature to determine which category of regulation applies, "[u]nder [Cincinnati's] newsrack policy, whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack." *Id*.

Moreover, AB5 distinguishes among speakers, allowing greater flexibility to those who represent a commercial interest from those who do not. "This Court's precedents are deeply skeptical of laws that

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[10] As Justice Thomas noted in dissent in *Reagan* "For several categories of historically unprotected speech, including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct, the government ordinarily may enact content-based restrictions without satisfying strict scrutiny." 142 S. Ct. at 1482 n. 1 (citing *United States v. Stevens*, 559 U.S. 460, 468–469 (2010)).

distinguish among different speakers, allowing speech by some but not others." *Citizens United v. Fed. Elec. Comm'n*, 558 U.S. 310, 340 (2010) (cleaned up). Speaker-based laws run the risk that "the State has left unburdened those speakers whose messages are in accord with its own views." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2378 (2018) (cleaned up). *See also City of Lakewood v. Plain Dealer Pub. Co.,* 486 U.S. 750, 763–64 (1988) ("[A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship.").

This approach triggers strict scrutiny, *Barr v. Am. Ass'n of Political Consultants, Inc*, 140 S. Ct. 2335, 2347 (2020) (robocall restriction with the government-debt exception was content-based and subject to strict scrutiny); is "presumptively invalid," *United States v. Playboy Entertainment Group, Inc*., 529 U.S. 803, 817 (2000) (internal quotation marks omitted), and may generally be upheld only if the government proves that the regulation is narrowly tailored to serve compelling state interests, *R. A. V. v. St. Paul*, 505 U.S. 377, 395 (1992). The very exercise of drafting a rule to distinguish between content involves government in a process that the First Amendment forbids—prioritizing some messages over others.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

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