No. 22-_____

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**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

California applies different work-classification rules to canvassers depending on the subject, function, and purpose of their speech. The state thus allows canvassers promoting consumer products and services to work as independent contractors, but it classifies canvassers promoting political campaigns as employees whose employment relationships are governed by more onerous and expensive laws. Likewise, workers who distribute or deliver state-designated newspapers and related publications may work as independent contractors, while workers who deliver or distribute political campaign material may not. The additional burdens California places on political canvassing and the distribution of political material deny Petitioners the ability to hire independent contractors, and thus prevent Petitioners from circulating ballot petitions and campaigning. The question presented is:

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

PARTIES TO THE PROCEEDING

Petitioners Mobilize the Message, LLC; Moving Oxnard Forward, Inc.; and Starr Coalition for Moving Oxnard Forward were plaintiffs in the district court and appellants in the court of appeals.

Respondent Rob Bonta, in his official capacity as Attorney General of California, was the defendant in the district court and appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Mobilize the Message, LLC, is a Florida limited liability company that has no parent company, and no publicly held company owns 10% or more of its stock.

Moving Oxnard Forward, Inc., is a California nonprofit corporation that has no parent company, and no publicly held company owns 10% or more of its stock.

Starr Coalition for Moving Oxnard Forward is a California political committee whose parent company is petitioner Moving Oxnard Forward, Inc. No publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

United States District Court (C.D. Cal.):

Mobilize the Message v. Bonta, No. 2:21-cv-05115-VAP-JPR (order denying motion for preliminary injunction issued August 9, 2021).

Mobilize the Message v. Bonta, No. 2:21-cv-05115-VAP-JPR (order staying proceedings pending appeal issued September 17, 2021).

United States Court of Appeals (9th Circuit):

Mobilize the Message v. Bonta, No. 21-55855 (reported at 50 F.4th 928) (judgment entered October 11, 2022).

Mobilize the Message v. Bonta, No. 21-55855 (order denying petition for rehearing en banc issued January 17, 2023).

Mobilize the Message v. Bonta, No. 21-55855 (order staying mandate pending certiorari issued January 20, 2023).

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PETITION FOR A WRIT OF CERTIORARI

Mobilize the Message, LLC; Moving Oxnard Forward, Inc.; and Starr Coalition for Moving Oxnard Forward respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

This Court's decisions leave no doubt that a state "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (citations omitted). But California purportedly devised a workaround bypassing this precedent, enabling the state to discriminate against speech whose content, function, or purpose—urging the qualification of ballot measures and swaying political campaigns—rests at the First Amendment's core. The impact on California's democracy is severe.

California's trick is to reimagine speech serving a particular function or purpose as a discrete economic activity. It claims that speakers performing identical tasks and providing identical services nonetheless play different economic roles based solely on their speech's distinct commercial or political messages. Content-based speech regulation, which must satisfy strict First Amendment scrutiny, is thereby transformed into mere economic regulation, which does not implicate the right to free speech at all.

The state thus maintains relaxed rules for canvassing about consumer products, but tightly regulates canvassing about politics. It makes the delivery of shopping guides cheap, but renders the delivery of voting guides cost-prohibitive. And the state justifies this discrimination by positing that doorknockers who encourage residents to sign sales contracts would perform a completely different job if they encouraged the same people to sign ballot petitions, just as workers who deliver voting guides are engaged in a completely different occupation than those who deliver shopping guides. After all, the legislature has decreed that these are different occupations, which it can regulate differently. It might only be coincidental that commercial speech does not challenge legislators and their interests the way that political speech does.

Only last term, this Court warned against such reasoning. "[A] regulation of speech cannot 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." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1474 (2022). But the Ninth Circuit reads *Austin* in a manner that practically overrules *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), allowing courts carte blanche to disregard content-based distinctions. Breaking from the Tenth Circuit, the Ninth Circuit approved of explicit content-based discrimination in regulating door-to-door speech and the delivery of printed material. These irreconcilable decisions are

part of a wider split separating circuits that implement *Reed*'s function or purpose test from those that do not.

This Court has always recognized the First Amendment primacy of political canvassing. Given the outsized importance that such speech plays in the basic functioning of our democracy, the Ninth Circuit's abandonment of protection from content-based discrimination in this context and the circuit split it implicates merits this Court's review.

OPINIONS BELOW

The Ninth Circuit's opinion, App.1a-29a, is reported at 50 F.4th 928. The Ninth Circuit's order denying the petition for rehearing en banc, App.42a-43a, is not reported. The Ninth Circuit's order staying the mandate, App.44a, is not reported. The district court's opinion denying Petitioners' motion for a preliminary injunction, App.30a-41a, is not reported. The district court's opinion and order staying the case, App.45a-56a, is not reported.

JURISDICTION

The court of appeals entered its judgment on October 11, 2022. On January 17, 2023, the court of appeals denied Petitioners' timely petition for rehearing en banc. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment, and Section 1 of the Fourteenth Amendment; Cal. Govt. Code §§ 6000 and 6008; Cal. Lab. Code §§ 2775, 2783(e), 2783(h), and 2787; and Cal. Unemp. Ins. Code § 650, appear at App.57a-65a.

STATEMENT OF THE CASE

A. California's selective crackdown on independent contracting discriminates against political speech.

1. The ability to hire a worker often turns on whether that worker can be classified as an independent contractor rather than as an employee. In California, as elsewhere, an employer's control over an "employee" comes at great cost, including workers' compensation insurance, Cal. Lab. Code § 3700; sick leave, Cal. Lab. Code § 246; and unemployment insurance taxes, Cal. Unemp. Ins. Code §§ 13020, 13021. Employers also face additional payroll expenses when hiring employees and may also be more readily susceptible to tort claims arising from their employees' conduct, thus incurring additional insurance costs. Workers, too, might prefer to work as independent contractors. From their perspective, formal employment may include certain benefits, but often carries a significant cost in loss of freedom and flexibility over one's working hours and conditions.

California once classified workers as either employees or independent contractors under a multifactor balancing test set forth in *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal. 3d 341 (1989). But in 2018, California's Supreme Court discarded *Borello* in favor of a more restrictive "ABC" test to determine workers' classification when applying state wage orders. The ABC test presumptively classifies workers as employees, unless the hiring entity establishes each of three so-called "ABC" factors. *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903, 955-56 (2018).

In *Dynamex*'s wake, California's legislature enacted Assembly Bill 5 ("AB 5"), which codified *Dynamex*'s application of the ABC test to wage orders and extended the ABC test's application, including its presumptive denial of independent contractor status, to the entirety of California's Labor and Unemployment Insurance Codes. Cal. Lab. Code § 2775(b)(1).

But AB 5 also enacted myriad exemptions for workers who would be governed by the more-lenient *Borello* test for all purposes. Subsequent legislation enacted additional *Borello* exemptions to the ABC test. The classification regime remains a subject of legislative activity, as the state continues extending and modifying its exemptions.

This case concerns two exemptions from the ABC test.

2a. Among the alleged occupations that "shall be governed by Borello" rather than the 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). The referenced section provides that "[e]mployment does not include services performed as a . . . direct sales salesperson" if "(a) [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. . . ."; "(b) [s]ubstantially all of the remuneration (whether or not paid in cash) for the services performed by that individual 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 (c) the worker and hiring entity agree in writing to treat the worker as an independent contractor for tax purposes. Cal. Unemp. Ins. Code § 650.

The Direct Selling Association "work[ed]" with AB 5's sponsor to enact this exemption, and understands that 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. Thus, a canvasser who knocks on doors, and agrees to be paid as an independent contractor by the visit or signed agreement rather than by the hour, can work as an independent contractor—so long as the canvasser speaks about "consumer products." The same canvasser, also paid by output rather than by time, who promotes political candidates or ballot measures, is presumptively

ineligible for independent contractor status under the ABC test (and is unlikely to overcome that presumption).

2b. Newspaper distributors and carriers are also exempt from the ABC test and instead subject to *Borello*. Cal. Lab. Code § 2783(h)(1). "'Newspaper distributor' means a person or entity that contracts with a publisher to distribute newspapers to the community," *id.* § 2783(h)(2)(C), while "'[n]ewspaper carrier' means a person who effects physical delivery of the newspaper to the customer or reader," other than as an app driver, *id.* § 2783(h)(2)(D).

But what is a "newspaper?" As used in this statute, the term includes various publications not commonly described that way, such as "shoppers' guides," and excludes any newspaper catering to particular, non-local topics. *See id*. § 2783(h)(2)(A). Ballot petitions and campaign literature do not qualify, as these are not distributed "periodically at . . . short intervals, for the dissemination of news of a general or local character and of a general or local interest," *id*., nor do they otherwise meet the "newspaper" tests of Cal. Gov't Code §§ 6000 and 6008.

Allowing some "newspapers" to classify their carriers as independent contractors saves their industry at least $80 million a year. Bill Swindell, *Legislature passes one-year exemption for newspaper carriers from AB 5*, The Press Democrat, Sep. 1, 2020, https://bit.ly/3gVc0Aq. Political campaigns enjoy no

such advantage when hiring workers to deliver printed matter to the voters.

3. AB 5 contains a severability provision. Cal. Lab. Code § 2787. It further provides that if a court enjoins any application of the ABC test, *Borello* governs in that context. Cal. Lab. Code § 2775(b)(3).

B. Petitioners rely on independent contractors to qualify ballot measures and run election campaigns.

Petitioner Mobilize the Message, LLC ("MTM") hires doorknockers to canvass neighborhoods and personally engage voters at home on behalf of its client campaigns. Their purpose is to seek support for and gather feedback on political candidates and ballot measures. App.67a, ¶ 1. MTM also hires signature gatherers to persuade voters, at home and in public places, to sign petitions qualifying measures for the ballot. *Id.*

MTM hires doorknockers and signature gatherers on an independent contractor basis, paying them based on output rather than by time. *Id.* ¶ 2; App.68a, ¶ 7. MTM pays doorknockers for reaching door milestones. Signature gathering campaigns may target particular areas to satisfy legal requirements, but gatherers may gather signatures from anywhere within such boundaries and are paid per valid signature obtained. App.67a-68a, ¶ 3.

Petitioner Moving Oxnard Forward, Inc. ("MOF"), a California nonprofit corporation dedicated to improving Oxnard, California's government, maintains a political action committee, petitioner Starr Coalition for Moving Oxnard Forward, that creates, qualifies, and through its efforts enacts ballot measures in Oxnard's municipal elections. Starr Coalition's measures regularly appear on the ballot, and at times prevail. App.72a, ¶¶ 1-2. As MOF and Starr Coalition's purpose is to effect political change by enacting ballot measures, they depend on signature gatherers who persuade voters, at home and in public places, to sign petitions qualifying measures for the ballot. *Id.*, ¶ 3.

MOF and Starr Coalition have historically hired signature gatherers as independent contractors. App.73a, ¶¶ 4, 7. Like MTM, MOF and Starr Coalition paid these gatherers by the signature, not by the hour, and exercised no control over when, where, or how these gatherers worked. App.73a, ¶ 4. Typically, MOF and Starr Coalition's signature gatherers would set their own schedule, and walk around highly trafficked public spaces or go door-to-door to speak to voters and persuade them to sign petitions to qualify MOF and Starr Coalition's ballot measures. *Id.*, ¶ 5.

Plaintiffs' doorknockers and signature gatherers are expected to use their improvisational, conversational, and persuasive skills to "sell" candidates and ballot measures. App.68a, ¶ 5; App.73a, ¶ 5. Considering plaintiffs' lack of control over their doorknockers and signature gatherers, and the degree of independent judgment that these individuals exercised in

generating the performance milestones for which plaintiffs paid them, plaintiffs' doorknockers and signature gatherers have always been essentially independent direct sales salespeople—notwithstanding that their advocacy is political rather than commercial. App.68a-69a, ¶ 8; App.73a-74a, ¶ 8.

C. California's discrimination against political speech silences Petitioners.

MTM abandoned the California market upon AB 5's enactment. MTM passed on doorknocking and signature gathering contracts in California because it cannot afford the administrative expenses of hiring its independent contractors as employees, and it does not wish to encourage inefficient work by disconnecting performance milestones from pay. App.69a, ¶ 9.

MOF and Starr Coalition have already missed participating in one election owing to California's discriminatory treatment of canvassers. They intended to hire MTM to gather signatures qualifying their measures for Oxnard's 2022 municipal election, App.74a-75a, ¶ 11, and MTM intended to accept that work, just as it intends to provide other campaigns with doorknocking and signature-gathering services in California, App.69a, ¶ 10. Absent the ability to use MTM, Starr Coalition intended to hire its own signature gatherers as independent contractors, as it has done in years past before the advent of AB 5. But given MOF and Starr Coalition's limited resources, Starr

Coalition cannot afford the burden of hiring signature gatherers as employees. App.75a, ¶ 11.

Petitioners currently refrain from hiring doorknockers and signature gatherers solely because doing so as employers per the ABC test is unfeasible. Petitioners are concerned that their doorknockers and signature gatherers would be classified as employees, as they could not overcome the ABC test's presumption against independent contracting, and they reasonably fear criminal and civil penalties for "misclassifying" these workers as independent contractors. Plaintiffs can also ill afford the costs of defending themselves from misclassification claims. App.69a, ¶ 11; App.75a, ¶ 12.

Absent paid signature gatherers, Starr Coalition must rely on volunteers, including the volunteer efforts of its otherwise-employed principals to gather signatures. App.75a, ¶ 13. But Starr Coalition cannot gather enough signatures to qualify a measure for the ballot using only volunteer labor. Lack of access to paid signature gatherers, caused solely by the ABC test, is thus preventing MOF and Starr Coalition from speaking to the voters and qualifying their ballot measures. *Id*.

D. Procedural history

1. Petitioners sought injunctive and declaratory relief against the ABC test's application to their hiring of doorknockers and signature gatherers. They alleged that the test's selective application violates their First Amendment rights by discriminating against their speech based on its content.

The district court denied Petitioners' motion for a preliminary injunction. The court asserted that the challenged distinctions do not trigger heightened scrutiny because AB 5 is "directed at economic activity generally [and] does not directly regulate or prohibit speech." App.37a (internal quotation marks omitted). But the court stayed the case pending the outcome of Petitioners' appeal. Its holding that the challenged provisions are not content-based and do not require strict scrutiny "bear on the heart of Plaintiffs' First Amendment claims, and the Ninth Circuit's review of those issues would almost certainly affect the outcome of any proceedings in this Court." App.55a. "It would be wise for the Court to preserve its judicial resources in light of the pending appellate review of issues central to this case." App.56a.

2. A divided Ninth Circuit panel affirmed, addressing only Petitioners' likelihood of success. App.12a. The majority accepted, without discussion, the state's claim that the challenged exemptions describe discrete professional occupations: "Several occupations, including direct sales salesperson, newspaper distributor, and newspaper carrier, are exempt from section 2775 and *Dynamex* and instead governed by *Borello*." App.17a (citations omitted). The majority further suggested that because AB 5 "does not restrict what, when, where, or how a worker may communicate," but targets the economic relationships of particular speakers, "[i]t is a regulation of economic activity, not speech." *Id.* (footnote omitted). "Unless an occupational exemption exists, the ABC test applies across

California's economy. Thus, Plaintiffs are not unfairly burdened by application of the ABC test to their door-knockers and signature gatherers." App.18a (internal quotation marks omitted).

The majority acknowledged that legislatures might employ "pernicious granularity" in defining occupations based on workers' communicative intent. App.19a. But without explanation, it denied that California had done so in defining the contested exemptions according to whether canvassers discuss "consumer products" or circulate state-defined "newspapers," rejecting the relevance of evidence that canvassing is understood as such regardless of whether it is directed to commercial or political purposes. Per the majority, the exemptions for the state-defined occupations at issue "do not depend on the communicative content, if any, conveyed by the workers but rather on the workers' occupations." *Id*.

Finally, the majority minimized the extent to which California's asserted classifications turn on the content of a workers' speech and dismissed that fact's relevance. "Although determination of whether an individual is, for example, a direct sales salesperson might require *some* attention to the individual's speech, the Supreme Court has rejected 'the view that *any* examination of speech or expression inherently triggers heightened First Amendment concern.'" *Id.* (quoting *Austin*, 142 S. Ct. at 1474).

3. Judge VanDyke dissented. "This case comes down to a single constitutional question: whether AB

5's employment classification before us turns predominately on the content of the workers' speech." App.20a. "[D]ig beneath the surface of these 'occupations' and it becomes clear that these occupational labels turn predominantly, if not entirely, on the content of the workers' speech." App.21a. "[T]he governmental burdens challenged here turn primarily on what is said, not labor distinctions unrelated to speech." *Id.* Judge VanDyke would have reversed the denial of a preliminary injunction. App.28a.

4. The Ninth Circuit declined to rehear the matter en banc, App.42a-43a, but stayed its mandate pending this Court's decision on certiorari, App.44a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision deepens an important circuit split, and directly challenges all that this Court has done in recent years to protect the right of free speech from content-based discrimination. It should not evade review.

The nation's most populous state has categorically decimated grassroots election speech on the pretense that speech about elections can be regulated as a distinct economic activity. If core First Amendment political speech is just another "economic" activity subject to California's regulatory whims, and *Austin* authorized legislatures to draw any content-based distinctions they wish without triggering strict

scrutiny, the content-based discrimination doctrine is dead.

The Ninth Circuit's decision is irreconcilable with this Court's established First Amendment precedent, and with the Tenth Circuit's application of that precedent in precisely the same context: discrimination against canvassers based on whether their speech is commercial or socio-political. But this decision marks only the latest instance of the lower courts' growing confusion over the nature and meaning of this Court's function or purpose test.

Considering the importance of this question, and the circumstances under which it arises here—a cleanly presented, often-prohibitive burden on core First Amendment political speech—the Court should put this confusion to rest by granting the petition.

I. The Ninth Circuit's decision conflicts with this Court's precedent.

A. Function or purpose distinctions cannot mask content-based discrimination.

This Court's precedent is clear: "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163 (citations omitted). "A regulation of speech is facially content based under the First Amendment if it 'target[s] speech based on its communicative content'—that is, if it 'applies to particular speech because of the topic discussed or the idea or message expressed.'" *Austin*, 142 S. Ct. at 1471 (quoting *Reed*, 576 U.S. at 163); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011).

The "commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech on its face draws distinctions based on the message a speaker conveys." *Reed*, 576 U.S. at 163 (internal quotation marks omitted). It does not matter whether a law does so by "defining regulated speech by particular subject matter," or by "defining regulated speech by its function or purpose." *Id*. "Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id*. at 163-64. To avoid strict scrutiny, a law may reference the content of speech only in aid of a neutral distinction; it must remain "agnostic as to content" and lack

"a content-based purpose or justification." *Austin*, 142 S. Ct. at 1471.

The Ninth Circuit's decision turns this understanding on its head. It did not point to any non-speech factor distinguishing Petitioners' disfavored workers from those privileged by California's scheme. The relevant workers all perform the same tasks. The different functions and purposes of the workers' speech is their only defining distinction. But the majority viewed this distinction as a reason to withhold rather than apply First Amendment scrutiny. As the dissent noted, the majority's assertion that the challenged distinctions are based on occupation is mere "ipse dixit." App.22a. "This position subverts First Amendment protections to the mere semantics of legislation—content-based speech restrictions are impermissible, but labor classifications based on the content of the industry's speech are allowed, and the legislature's choice of label determines which bucket a classification falls into." App.22a-23a.

Assigning workers different occupational labels, based on the purpose of their speech or the content of the publications they deliver, "swap[s] an obvious subject-matter distinction for a 'function or purpose' proxy that achieves the same result." *Austin*, 142 S. Ct. at 1474. For example, the government recently asserted that callers seeking to collect government debt practice a different occupation than other callers. It "argu[ed] that the legality of a robocall under the [federal robocall ban]," which exempts calls made to collect government debt, "depends simply on whether the caller

is engaged in a particular economic activity, not on the content of speech." *Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2347 (2020). But this Court saw through the ploy. "The law here focuses on whether the caller is *speaking* about a particular topic." *Id.*

Barr stands directly on-point. Petitioners' doorknockers perform the exact same tasks as those whom California labels "direct sales salespersons." They visit people "in person . . . in the home" to perform "presentation[s]," Cal. Unemp. Ins. Code § 650(a); their pay is "directly related to [their] output (including the performance of services) rather than to [time worked]," *id.* § 650(b); and they agree to be independent contractors, *id.* § 650(c). The defining distinction between these allegedly different occupations is that exempted canvassers speak about "consumer products." *Id.* § 650(a). "[T]hey are treated differently under AB 5 because one is selling a vacuum cleaner, while the other is selling a political idea." App.26a. "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." *See Barr*, 140 S. Ct. at 2346.

California's "newspaper" delivery exception likewise exemplifies content-based discrimination. This Court has held that "by any commonsense understanding of the term," a ban on newsracks that contain "commercial handbills" rather than "newspapers" "is 'content based.'" *Cincinnati v. Discovery Network*, 507 U.S. 410, 429 (1993). "[W]hether any particular

newsrack falls within the ban is determined by the content of the publication resting inside that newsrack." *Id.* Burdening workers who distribute political materials, but not those who distribute state-sanctioned "newspapers," is likewise content-based regulation.

Reed deemed an ordinance content-based because it would have treated a sign differently depending on whether it advertised a discussion of Locke's Two Treatises of Government, endorsed a Lockean candidate's election, or expressed Locke's ideology. *Reed*, 576 U.S. at 165. California's scheme functions the same way. Independent contractors can sell a politician's book door-to-door, but they cannot visit homes to sell his candidacy. Likewise, independent contractors may deliver an editorial endorsing a political candidate—if that editorial is enclosed within a state-approved "newspaper." That same editorial, however, cannot be delivered by the same worker to the same home when reprinted as part of a political pamphlet, unless the campaign can afford to hire the worker as an employee.

The "occupations" here do not change with the messages conveyed by the workers. This Court has always understood the relevant activities here, "door-to-door canvassing and pamphleteering[,] as vehicles for the dissemination of ideas." *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 162 (2002). Not any particular ideas, but ideas generally—including religious expression, labor organization, the sale of war bonds, and political persuasion. *Martin v. Struthers*, 319 U.S. 141, 145-46 (1943); *cf. Lovell v.*

Griffin, 303 U.S. 444, 452 (1938) ("Liberty of circulating is as essential to that freedom [of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value") (internal quotation marks omitted). Even where the state might regulate speech serving a particular function or purpose as a form of conduct, it cannot define that conduct by referencing the speaker's subject matter and still hope to avoid a date with strict scrutiny. *See Austin*, 142 S. Ct. at 1473 (solicitation restrictions permissible "so long as they do not discriminate based on topic, subject matter, or viewpoint") (citation omitted).

California would not be heard to argue the First Amendment's irrelevance if it regulated singers differently according to their songs' subject matter, burdening "protest singers" more significantly than "balladeers" by claiming that the former "occupation" serves a political purpose while the latter relates to personal interests. The state's attempt to carve the traditionally understood activity of canvassing into a multiplicity of artificial "occupations," based on the canvasser's expressive purpose in a given instance, likewise implicates the First Amendment.

B. *Austin* did not overrule *Reed*.

In *Austin*, this Court clarified that a regulation may examine the content of speech yet remain content-neutral—in specific, *limited* circumstances, where doing so serves content-neutral distinctions. The Ninth Circuit, however, reads *Austin* as an expansive license

to uphold content-based speech regulations without such constraints. In practical terms, the Ninth Circuit reads *Austin* as having overruled *Reed*.

Austin upheld an ordinance privileging on-premises over off-premises signs as a neutral time, place, and manner restriction notwithstanding the fact that applying the rule required reading the sign. Although "enforcing the City's challenged sign code provisions requires reading a billboard to determine whether it directs readers to the property on which it stands or to some other, offsite location," the ordinance was nonetheless content neutral because "the City's provisions distinguish based on location: A given sign is treated differently based solely on whether it is located on the same premises as the thing being discussed or not." *Austin*, 142 S. Ct. at 1472-73.

"The message on the sign matters only to the extent that it informs the sign's relative location. The on-/off-premises distinction is therefore similar to ordinary time, place, or manner restrictions. *Reed* does not require the application of strict scrutiny to this kind of location-based regulation." *Id.* at 1473 (citation omitted).

Austin went to great lengths rooting its decision on its established understanding of on/off-premises distinctions as content-neutral and "the Nation's history of regulating off-premises signs." *Id.* at 1474. Responding to the dissent's fear that its reasoning might supplant *Reed* generally, the majority offered that it "merely appl[ied]" precedent "to reach the

'commonsense' result" approving of "a location-based and content-agnostic on-/off-premises distinction." *Id.* at 1475.

But here, the Ninth Circuit ignored *Austin*'s constraints and simply declared that this Court "rejected 'the view that *any* examination of speech or expression inherently triggers heightened First Amendment concern.'" App.19a (quoting *Austin*, 142 S. Ct. at 1474). A regulation's reliance on the content of speech might trigger strict scrutiny—and, as here, it might not, without a word regarding *Austin*'s requirement that in order to avoid strict scrutiny, content-based speech regulations must be content-agnostic in effectuating a neutral time, place, or manner distinction.

Of course, the challenged provisions cannot satisfy *Austin*'s requirements. Neither the promotion of "consumer products" nor a publication's status as a state-sanctioned "newspaper" have anything to do with the time, place, or manner of canvassing or publication delivery. Nor is it a fair reading of California's law to declare that the "determination of whether an individual is . . . a direct sales salesperson might require *some* attention to the individual's speech." App.19a. The law unambiguously demands that the canvasser's speech relate to "consumer products." Cal. Unemp. Code § 650(a).

The Ninth Circuit's misreading of *Austin* as constructively abrogating *Reed* warrants review now, before it causes any further damage.

II. The courts of appeals are divided on the question presented.

The Ninth Circuit's decision upholding regulations that turn on whether a canvasser promotes consumer products squarely conflicts with the Tenth Circuit's decision condemning such regulation as content-based. But this key disagreement over whether the First Amendment protects a traditional form of speech against content-based regulation presents only one facet of a wider 3-2 disagreement over *Reed*'s "function or purpose" test.

1. The Tenth Circuit affirmed an injunction against a curfew imposed upon commercial canvassers but not on canvassers for other causes. *Aptive Envtl., LLC v. Town of Castle Rock*, 959 F.3d 961 (10th Cir. 2020). "[T]he Curfew *is* content-based, at least insofar as the . . . ordinance determines to whom the Curfew applies by distinguishing between the commercial and noncommercial content of the solicitors' speech." *Id.* at 982 & n.6 (citing *Discovery Network*, 507 U.S. at 428-29 and *Reed*, 576 U.S. at 165) (other citations omitted).

"Specifically, the ordinance treats civic, religious, philosophical, and ideological solicitors who incidentally sell a good or service differently from those who solicit with the '*primary purpose*' of selling a good or service." *Aptive*, 959 F.3d at 982 (citations omitted) (emphasis added); *compare* Cal. Unemp. Ins. Code § 650(a) ("primarily in person demonstration and sales presentation of consumer products"). "And so, because the . . . ordinance creates a content-based

distinction—which determines to which solicitors the Curfew applies—between commercial and noncommercial speech, we must reject any argument that the Curfew is . . . not subject to First Amendment scrutiny at all. . . ." *Id*. at 983. Applying intermediate scrutiny because the curtailed speech was commercial, the Tenth Circuit struck down the curfew. *Id*. at 986-87.

The decision below is plainly irreconcilable with *Aptive*. It also stands at odds with the Fourth Circuit's holding that "an anti-robocall statute [that] applies to calls with a consumer or political message but does not reach calls made for any other purpose" is content based. *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015).

2. But other courts share the Ninth Circuit's reluctance to follow *Reed*'s "function or purpose" test. The First Circuit has held that the test was only "a single sentence in *Reed,*" *March v. Mills*, 867 F.3d 46, 58 (1st Cir. 2017), and a nullity at that. It held that an ordinance banning the making of noise for the specific purpose of disrupting healthcare facilities was not content-based within *Reed*'s meaning. What matters is the speech's "communicative content," and as the First Circuit saw it, one might seek to disrupt a healthcare facility in the course of advancing any number of causes. *Id.* at 58-59. *Reed* explained that "obvious," "particular subject matter" distinctions and "more subtle" "function or purpose" distinctions are "both . . . drawn based on the message a speaker conveys," 576 U.S. 163-64, but the First Circuit apparently rejects that view.

The Eleventh Circuit likewise declines to implement *Reed*'s "function or purpose" test. *Reed* "suggests" the test, but "[t]hat language is dicta . . . because the Supreme Court did not apply it." *Harbourside Place, LLC v. Town of Jupiter*, 958 F.3d 1308, 1319 (11th Cir. 2020); *see also Fort Lauderdale Food not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266, 1292 (11th Cir. 2021) ("*Reed*'s allusion to the possibility" of the function or purpose test is "dicta"). In *Harbourside*, the court could not decide whether a noise ordinance applicable only to live music regulates speech based on its content.

3. The circuit conflict is mature, and this Court will not benefit from its further percolation. If *Reed* was worth deciding, it is worth re-enforcing against a growing trend of circuits declining or otherwise failing to implement the decision. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). The broad denial of protection against content-based discrimination exemplified by the Ninth Circuit's decision should be addressed now.

III. This case presents an ideal vehicle to resolve an exceptionally important question.

Canvassing—not least including Plaintiffs' efforts to engage and persuade voters on political matters—is plainly among the highest forms of protected expression. So is the distribution of literature. Whether the

state can discriminate against non-commercial canvassing without triggering First Amendment scrutiny presents the circuit conflict over the "function or purpose" test in what may arguably be the most acute circumstances.

"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*, 319 U.S. at 141. And "[f]or over 50 years, the Court has invalidated restrictions on door-to-door canvassing and pamphleteering." *Watchtower*, 536 U.S. at 160 (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.

"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. And the First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office." *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (internal quotation marks omitted).

The First Amendment's special concern for political campaign speech extends to the circulation of

petitions. "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).

Some well-heeled political interests can survive AB 5. Ironically, the rideshare and other app-based driver companies who were the bill's original prime targets managed to enact an independent contractor exemption for their industry via ballot initiative. *See* Cal. Bus. & Prof. Code § 7451. Smaller grass-roots operations such as Petitioners cannot afford this version of democracy in qualifying their measures. And "door to door distribution of circulars is essential to the poorly financed causes of little people," *Watchtower*, 536 U.S. at 163 (internal quotation marks omitted), especially in expensive media markets. As reflected in this Court's engagement of the issue in *Reed*, *Austin*, and other cases, content-based speech discrimination is always worth addressing. But it is especially worth addressing in this context.

The First Amendment issue here is as focused as it is important. The case does not turn on any disputed or even disputable facts, but on a clean record. There is no question that Petitioners' labor relations are subjected to more burdensome classification standards, including presumptive denial of independent contracting status, than those governing identically situated

workers who speak about different subjects. The lower courts have wrongly assessed Petitioners' likelihood of success at zero as a matter of law. Recognizing the dispositive nature of that decision, the courts stayed further proceedings pending higher authoritative review. Considering the importance of this issue, especially under these circumstances, this Court should provide that much-needed guidance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted.

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General Information

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