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PRESS RELEASE

Small-Business and Self-Employment Advocates Turn to Wiley to Protect First Amendment Rights in Supreme Court Amicus Brief

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Washington, DC – Wiley Rein LLP filed an *amicus* brief in the U.S. Supreme Court on behalf of the Independent Institute, the National Federation of Independent Businesses Small Business Legal Center, Inc., and New Jobs America in a case that could classify canvassers and independent contractors such as grassroots workers, campaign staff, and gig economy workers as employees, which in turn burdens political speech, hurts workers, and financially impacts small and large businesses.

The brief supports the petition for certiorari filed in *Mobilize the Message v. Bonta*, Case No. 22-865, urging the Supreme Court to review a October 2022 decision from the U.S. Court of Appeals for the Ninth Circuit. At issue is a California law, Assembly Bill 5 (AB5), that requires that canvassers be classified as employees rather than independent contractors. This policy makes hiring more expensive for the employers and gives less freedom to workers to express their political viewpoint.

In the *amicus* brief, Wiley attorneys outline the top problems that such a policy, and the Ninth Circuit's protection of such a policy, causes.

1. First, and foremost, AB5 violates the First Amendment's prohibition against content discrimination. By classifying these grassroots contractors as employees, AB5 is, "imposing content-based speech restrictions that deprive these speakers of their livelihoods and curtail Californians' ability to

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communicate political messages through canvassing. AB5 is therefore incompatible with the First Amendment and should have been struck down by the Ninth Circuit for failure to satisfy constitutional scrutiny," says the brief.

2. Second, the Ninth Circuit deepened a circuit court split on the "function or purpose" test the Supreme Court announced in *Reed v. Town of Gilbert*. In essence, some laws will obviously discriminate based on the content of speech. However, *Reed* notes that other laws will be more subtle, and courts should look to whether the challenged law has the function or purpose of content discrimination. The circuit courts are divided on how (and whether) to apply that test. Additionally, the Ninth Circuit's decision ignores the Supreme Court's key content discrimination precedents, such as *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, which makes clear that special carveouts in a generally applicable law that favor certain messages over others – like the exceptions for jobs that use commercial speech that are exempt under AB5 – run afoul of the First Amendment.
3. Third, AB5 creates additional costs for businesses that could impact California's labor market. The extra expense would likely mean, businesses would cut contractor jobs or make the jobs of contractors less flexible than their current positions.

"If allowed to stand, the Ninth Circuit's decision threatens First Amendment rights by imposing content-based limitations on political canvassers' speech, and imposes unfair economic pressures on employers who want or need to hire independent contractors for their business," said Krystal B. Swendsboe, counsel of record for the brief. "The Ninth Circuit's surface-level analysis of AB5's exemptions ignores this Court's warning in *Reed* that content discrimination can sometimes be 'subtle,' and courts must consider whether a regulation has the 'function or purpose' of distinguishing based on message." Wiley partner and co-chair of Wiley's Issues and Appeals Practice, Thomas M. Johnson Jr., and associate William Turner also contributed to the brief, which can be read here.