**No. 21-55757**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

LYDIA OLSON *et al.*,

Plaintiffs-Appellants,

v.

STATE OF CALIFORNIA *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California

# BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING APPELLEES

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## INTEREST OF THE UNITED STATES

The central issue presented in this *en banc* proceeding is whether a California statute should be upheld under the deferential standard of review—rational-basis scrutiny—that courts apply when assessing an equal protection challenge to the lines drawn by economic legislation. The United States has a substantial interest in the proper resolution of that question because the same standard of review applies when a federal statute involving economic regulation is at issue. Indeed, the controlling Supreme Court case, *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993), involved an Act of Congress.

## STATEMENT OF THE CASE

The challenged state statute (AB 5, as amended) established a framework for distinguishing between employees and independent contractors for purposes of state labor laws. The economic legislation applies to "'hundreds of different industries,'" *California Trucking Ass'n v. Bonta*, 996 F.3d 644, 659 (9th Cir. 2021), but also contains exemptions for various industries. The effect of the exemptions is that the distinction between an employee and independent contractor is assessed under a different framework, such that the

employer has less of a burden to show that a worker is an independent contractor.[1]

The district court rejected plaintiffs' contention that it was irrational for the state legislature to exempt certain industries from the new framework without also extending exemptions to plaintiffs' industries. *See Olson v. Bonta*, No. CV 19-10956-DMG (RAOx), 2021 WL 3474015, at *3-5 (C.D. Cal. July 16, 2021). As particularly relevant here, the court concluded that there are "rational differences between exempted errand-running and dog-walking, and non-exempted passenger and delivery driving," such that any disparate treatment on this basis does not give rise to an equal protection violation. *Id.* at *5. For example, the district court reasoned that "[d]og-walking and errand-running are traditionally activities performed by a household member, and a client's relationships with those service providers is necessarily a more intimate one." *Id.* The court explained that "[b]ecause those tasks likely involve entering a client's home, the client and individual service provider likely exert more control over the service than the depersonalized referral agency, and the service providers may have their supplies provided

[1] The United States expresses no view on which standards California should apply for determining whether workers are employees or independent contractors under state law. California's standards apply independently and have no bearing on federal labor laws, which have their own standards for determining whether workers are employees or independent contractors.



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by the client." *Id.* The court further noted that the non-exempted "transportation industry has historically experienced misclassification of drivers," and that "the sheer number of pre-AB 5 lawsuits against Uber alone indicates drivers' and competitors' perception that Uber's drivers are misclassified as independent contractors." *Id.*

A panel of this Court did not take issue with the district court's conclusion that there were conceivable reasons for the state legislature to have treated plaintiffs' industries differently from the exempted industries. Nonetheless, the panel ruled that the equal protection claim could proceed for fact-finding because plaintiffs "plausibly allege that their exclusion from wide-ranging exemptions, including for comparable app-based gig companies, can be attributed to animus rather than reason." *Olson v. California*, 62 F.4th 1206, 1219-20 (9th Cir. 2023). In so ruling, the panel emphasized that "some professions in which workers have more negotiating power or autonomy than in low-wage jobs"—such as "lawyers, accountants, architects, dentists, insurance brokers and engineers"—had successfully lobbied for exemptions from the new framework. *Id.* at 1219 (quotation marks omitted). The panel also relied on statements attributed to the legislator who sponsored the state law, such as a statement that the sponsor was "open to changes in the bill next year, including an exemption for musicians—but not for app-based



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ride-hailing and delivery giants." *Id.* at 1220 (emphasis and quotation marks omitted). Based on such allegations, the panel concluded that plaintiffs "plausibly allege that the primary impetus for the enactment of A.B. 5 was the disfavor with which the architect of the legislation viewed Uber, Postmates, and similar gig-based business models." *Id.* at 1219.

This Court ordered rehearing *en banc*. *Olson v. California*, 88 F.4th 781, 782 (9th Cir. 2023).

## ARGUMENT

The panel decision rested on a basic misunderstanding of controlling Supreme Court precedent.

This case does not implicate "a 'fundamental right'" or "a 'suspect' classification." *Armour v. City of Indianapolis*, 566 U.S. 673, 681 (2012). It does not involve allegations of discrimination against a person because of a particular trait. *Cf., e.g.*, *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973). And "no one here claims that [AB 5] has discriminated against out-of-state commerce or new residents." *Armour*, 566 U.S. at 681. Rather, the statute's "subject matter is local, economic, social, and commercial." *Id.* Traditional principles of rational-basis review therefore govern.



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Properly applied, rational-basis review of economic legislation "is a paradigm of judicial restraint." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993). "Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices" under the rational-basis standard. *Id.* at 313. On the contrary, "[i]n areas of . . . economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge" as long as "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* In this context, "the classification is presumed constitutional" and "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Armour*, 566 U.S. at 681 (quotation marks omitted).

The Supreme Court has emphasized that, under this standard, "[w]here there are 'plausible reasons' for" the legislature's action, a court's "inquiry is at an end." *Beach Commc'ns*, 508 U.S. at 313-14 (quoting *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980)). Here, the district court identified plausible reasons for the distinctions drawn by AB 5, and the panel did not conclude that those proffered reasons were implausible. Indeed, the panel identified additional conceivable bases for the lines drawn by the state



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legislature. For example, the panel stated that in some of the exempted professions—such as "lawyers, accountants, architects, dentists, insurance brokers and engineers"—"workers have more negotiating power or autonomy than in low-wage jobs." *Olson v. California*, 62 F.4th 1206, 1219 (9th Cir. 2023) (quotation marks omitted). That distinction could itself provide a conceivable basis for exempting such workers from the framework that AB 5 established.

The panel compounded its error by relying on statements attributed to the state law's sponsor in the context of rational-basis review of economic legislation. The Supreme Court has cautioned that "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *United States v. O'Brien*, 391 U.S. 367, 384 (1968); *see United States v. Carrillo-Lopez*, 68 F.4th 1133, 1140 (9th Cir. 2023) (explaining that "the statements of a handful of lawmakers may not be probative of the intent of the legislature as a whole"), *cert. denied*, No. 23-6221 (U.S. Jan. 22, 2024). After all, "[p]assing a law often requires compromise, where even the most firm public demands bend to competing interests." *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 306 (2017); *see also Board of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986) ("Congress may be unanimous in its intent to stamp out some vague



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social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises.").

Under the highly deferential rational-basis standard, moreover, the focus is not on the legislature's actual reason for enacting the challenged law, but instead on whether there is any "conceivable basis which might support it." *Armour*, 566 U.S. at 685 (quoting *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)); *see also Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992) (explaining that "the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification"). Here, the statement quoted by the panel simply indicated that AB 5's sponsor was open to certain exemptions but not others, which is not an impermissible perspective regarding economic legislation. *See Olson*, 62 F.4th at 1220 (quoting a reported statement that the sponsor was "'open to changes in the bill next year, including an exemption for musicians—*but not for app-based ride-hailing and delivery giants*'" (panel's emphasis)).

Finally, plaintiffs' argument regarding the "plausibility" pleading standard that applies to factual allegations, *see* Suppl. Br. 27-33, turns the Supreme Court's rational-basis precedent on its head. As noted, the relevant



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legal question here is not whether plaintiffs have plausibly attacked AB 5, but whether there are plausible reasons for the classifications drawn by the legislature. *See Armour*, 566 U.S. at 680-681, 685. The Supreme Court has repeatedly admonished that, under the rational-basis standard, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Commc'ns*, 508 U.S. at 315 (collecting cases). If there are "plausible rationales" for AB 5, "the very fact that they are 'arguable' is sufficient, on rational-basis review, to 'immunize'" the statute "from constitutional challenge." *Id.* at 320 (alteration omitted). Accordingly, to state an equal protection claim under rational-basis review, a complaint "must plausibly allege facts showing that no reasonably conceivable state of facts could provide a rational basis for the challenged policy." *Sanchez v. Office of State Superintendent of Educ.*, 45 F.4th 388, 396 (D.C. Cir. 2022), *cert. denied*, 143 S. Ct. 579 (2023); *see also, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) (stating that, on a motion to dismiss, courts "tak[e] note of the elements a plaintiff must plead to state a claim"); *Muscarello v. Ogle Cty. Bd. of Comm'rs*, 610 F.3d 416, 423 (7th Cir. 2010) (explaining that rational-basis review "raises a pure question of law").

Plaintiffs' reliance on *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam), and its progeny is misplaced. Those cases are



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inapposite because they involve a "class of one" claim in which a party challenges the discriminatory application of a facially neutral law. *See, e.g.*, *id.* at 564. That is a different claim, subject to different elements, from plaintiffs' allegation that a state statute itself drew irrational lines. Nothing in *Olech* or in Rule 12(b)(6) relieves courts of the responsibility to "imagine any conceivable basis supporting a law" when presented with a rational-basis challenge to economic legislation. *Fowler Packing Co. v. Lanier*, 844 F.3d 809, 815 n.3 (9th Cir. 2016). When, as here, such a basis is conceivable, the "inquiry is at an end." *Beach Commc'ns*, 508 U.S. at 314 (quoting *Fritz*, 449 U.S. at 179).

## CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This amicus brief complies with this Court's January 11, 2024 order, Federal Rule of Appellate Procedure 29, and Ninth Circuit Rule 29-2 because it contains 1,839 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Georgia 14-point font, a proportionally spaced typeface.

*s/ Nicholas S. Crown*
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