

## Uber, Drivers Tell 9th Circ. Calif.'s AB 5 Is Unjustifiable

By Irene Spezzamonte

Law360 (January 23, 2024, 4:53 PM EST) -- A Ninth Circuit panel correctly found that California's Assembly Bill 5 governing worker classification didn't have solid grounds to stand on because the law treats apps that offer identical services differently, Uber, Postmates and two workers told the appeals court.



Uber, Postmates and two drivers say a Ninth Circuit panel got it right when it found that California's A.B.5 is rooted in "animus rather than reason" when it comes to its applicability. (AP Photo/Eric Risberg)

In a **supplemental brief** Monday, the companies and workers Lydia Olson and Miguel Perez urged the Ninth Circuit to keep the panel's decision after the court agreed to review it en banc, saying A.B. 5 draws "irrational distinctions" between apps the Legislature favored and those it didn't like.

"The state has never offered a rational explanation for this arbitrary line-drawing — not in the trial court or in any of its briefing or arguments before this court," the businesses and drivers said. "And the panel correctly reversed the dismissal of plaintiffs' complaint because this court's well-settled precedent precludes the Legislature from acting out of a bare desire to harm a politically disfavored group."

The Ninth Circuit **granted in December** the state's request to hear the case en banc and vacated the panel's unanimous, published opinion from March in which it said that A.B. 5 was **rooted in "animus** rather than reason" when it comes to its applicability.

The law went into effect in California in January 2020, codifying the ABC test, which considers a worker an

employee unless a company can demonstrate the worker is free from its control, performs work outside its line of business and operates as an independent firm.

However, the law also created several exemptions to the ABC test that are instead governed by a 1989 test that weighs 11 factors and focuses on an employer's control over workers. It is often considered more flexible.

Olson, Perez and Uber, which owns Postmates, said Monday that their 89-page complaint fully encapsulated that A.B. 5 treats some businesses differently and that the panel followed well-settled law and precedent when it ruled the district court shouldn't have tossed their equal protection claims against the state.

The businesses and the drivers also said the state has never offered "a rational basis" for the differences A.B. 5 includes until the en banc stage.

"Any such 11th-hour justification is too little, too late," Uber, Postmates and the drivers said.

The state said in its own **supplemental brief**, also filed Monday, that A.B. 5 doesn't "irrationally distinguish" between certain businesses.

For example, referral agencies are exempt under the law because those types of businesses "have long qualified as genuine independent-contracting relationships," the state said.

On the other hand, courts have rejected the idea that "Uber and similar companies serve as mere intermediaries that connect customers and service providers," the state continued.

The state also said the companies and drivers' oppositions to the other exemptions A.B. 5 includes are moot, saying Uber, Postmates and the drivers "make no effort" to show how the workers covered are similarly situated to app-based drivers.

In an **amicus brief** filed Monday, the Owner-Operator Independent Drivers Association backed Uber, Postmates and the drivers.

The panel's ruling "merely reinforces the idea that the government cannot make legal distinctions between similarly situated persons based solely on either claimed 'purposes' that contradict the law itself or animus towards a politically unpopular group (or both)," the association said.

Theane Evangelis of Gibson Dunn & Crutcher LLP, who is representing Uber, Postmates, Olson and Perez, told Law360 on Tuesday that the panel's decision should stay in place.

"The decision followed well-established law, and should stand," Evangelis said. "A.B. 5 is unconstitutional and against the overwhelming will of California voters, who rejected A.B. 5"

Paul D. Cullen Jr. of The Cullen Law Firm PLLC, who is representing the Owner-Operator Independent Drivers Association, told Law360 that the panel's decision won't trigger new litigation, unlike what the state argued.

"Just because one set of workers may not have demonstrated their equal protection claim against A.B. 5, that does not foreclose the equal protection claims of other types of workers who present different facts and are affected by different sections of the same law," Cullen said.

Representatives of the state did not immediately respond to requests for comment Tuesday.

The association is represented by Paul D. Cullen Jr. and Charles R. Stinson of The Cullen Law Firm PLLC and Timothy A. Horton of The Law Office of Timothy A. Horton.

Uber, Postmates, and workers Lydia Olson and Miguel Perez are represented by Theane Evangelis, Blaine H. Evanson, Patrick J. Fuster, Alexander N. Harris and Joseph E. Barakat of Gibson Dunn & Crutcher LLP.

The state is represented by Jose Zelidon-Zepeda, Mark Beckington, Tamar Pachter and Thomas S. Patterson of the Attorney General's Office.

The case is Olson et al. v. State of California et al., case number 21-55757, in the U.S. Court of Appeals

for the Ninth Circuit.

--Editing by Roy LeBlanc.

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