No. S267138

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

MONICA MARIE MARTINEZ ,
Defendant and Appellant.

Sixth Appellate District, Case No. H046164
Santa Clara County Superior Court, Case No. C1518585
The Honorable Socrates Manoukian, Judge

REPLY BRIEF ON THE MERITS

ROB BONTA (SBN 202668)
Attorney General of California
MICHAEL J. MONGAN (SBN 250374)
Solicitor General
LANCE E. WINTERS (SBN 162357)
Chief Assistant Attorney General
JANILL L. RICHARDS (SBN 173817)
Principal Deputy Solicitor General
JEFFREY M. LAURENCE (SBN 183595)
Senior Assistant Attorney General
*SAMUEL T. HARBOURT (SBN 313719)
Deputy Solicitor General
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 510-3919
Samuel.Harbourt@doj.ca.gov
Attorneys for Plaintiff and Respondent

November 22, 2021

TABLE OF CONTENTS

Page

Introduction....6

Argument....7

I. Section 2076 prohibits insider-tipping "arrangements," not all communications about recent arrests....8

II. The Court of Appeal erred by striking down section 2076 on its face....11

A. As applied to insider-tipping arrangements with jail inmates, section 2076 rationally furthers valid penological interests....11

B. As applied here, section 2076 also operates as a constitutionally valid commercial speech regulation....14

1. Section 2076 is a commercial speech regulation....14

2. As applied here, section 2076 satisfies intermediate scrutiny....18

C. There is no basis for addressing hypothetical applications of section 2076 not presented here....22

Conclusion....24

TABLE OF AUTHORITIES

Page

CASES

Arcadia Unified School Dist. v. State Dept. of Education
(1992) 2 Cal.4th 251 23

Bd. of Trustees of State Univ. of N.Y. v. Fox
(1989) 492 U.S. 469 14

Beeman v. Anthem Prescription Management, LLC
(2013) 58 Cal.4th 329 ..... 14, 15, 16, 17

Bell v. Wolfish
(1979) 441 U.S. 520 12

Bolger v. Youngs Drug Products Corp.
(1983) 463 U.S. 60 15

Bull v. City & Cty. of San Francisco
(9th Cir. 2010) 595 F.3d 964 (en banc) 12

Central Hudson Gas & Electric Corp. v. Pub. Service Com. of N.Y.
(1980) 447 U.S. 557 ..... 14, 16, 18, 21

DVD Copy Control Assn., Inc. v. Bunner
(2003) 31 Cal.4th 864 16

FCC v. Beach Communications, Inc.
(1993) 508 U.S. 307 13

Fla. Bar v. Went For It, Inc.
(1995) 515 U.S. 618 18

Kasky v. Nike, Inc.
(2002) 27 Cal.4th 939 ..... 16, 17

Nat. Cable & Telecommunications Assn. v. FCC
(D.C. Cir. 2009) 555 F.3d 996 17

TABLE OF AUTHORITIES
(continued)

Page

Ohralik v. Ohio State Bar Assn.
(1978) 436 U.S. 447 17

People v. Biane
(2014) 58 Cal.4th 381 24

People v. Buza
(2018) 4 Cal.5th 658 23

People v. Dolezal
(2013) 221 Cal.App.4th 167 ..... 15, 20, 22

People v. Rhodes
(1974) 12 Cal.3d 180 21

Rubin v. Coors Brewing Co.
(1995) 514 U.S. 476 17

Thompson v. Dept. of Corrections
(2001) 25 Cal.4th 117 13

Thornburgh v. Abbott
(1989) 490 U.S. 401 ..... 11, 12

Turner v. Safley
(1987) 482 U.S. 78 ..... *passim*

U.S. West, Inc. v. FCC
(10th Cir. 1999) 182 F.3d 1224 17

United States v. Williams
(2008) 553 U.S. 285 10

Valdez v. Rosenbaum
(9th Cir. 2002) 302 F.3d 1039 12

Williams-Yulee v. Fla. Bar
(2015) 575 U.S. 433 10

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

Bail Bond Regulatory Act of 1937 13

Gov. Code, § 6254, subd. (f) 19

Penal Code
§ 851.5 22
§ 160 20
§ 851.5 22
§ 4002 13

REGULATIONS

California Code of Regulations, title 10
§ 2076 ..... *passim*
§ 2079 20
§ 2079.1 20

OTHER AUTHORITIES

Lewis, *Inside Santa Clara Jails, Predatory Bail Schemes Flourished for Years,* KQED (Apr. 10, 2017) available at <https://www.kqed.org/news/11393155/inside-santa-clara-jails-predatory-bail-schemes-flourished-for-years> 12

Rest., Torts (1939) § 757 16

INTRODUCTION

Since its promulgation in 1941, section 2076 of title 10 of the California Code of Regulations—prohibiting bail bond licensees from entering into certain insider-tipping arrangements—has played a critical role in promoting both fair bail industry competition and security in the State's jails. Defendant's answer brief turns largely on mischaracterizing the regulation as penalizing "free communication about important public facts" concerning arrests and incarceration. (ABM 14; see, e.g., ABM 26-27, 37.) Based on that mischaracterization, defendant asserts that it is "unclear who the [State is] attempting to protect." (ABM 36.)

The regulation in fact bars any "bail licensee [from] . . . enter[ing] into an *arrangement*" with various insiders, including "law enforcement officer[s] [or] . . . person[s] incarcerated in a jail," to inform the licensee of new arrestees. It does not prevent public disclosure of, or free communication about, arrest-related information. (See, e.g., OBM 28, 45-46, 49, 63.) Rather, it prohibits bail bond licensees from arranging to secure *unfair*, *asymmetric* access to that information at the expense of their competition. (OBM 27-28, 49-52, 54-56.)

The State's early 20th-century experience shows what happens when such informational asymmetries go unregulated: one firm, or a small clique of firms, can gain a stranglehold on the industry, charging excessive fees and reaping monopoly profits that fuel corruption and criminality. (OBM 21-27.) Section 2076 responds to that experience, protecting honest bail bond

businesses who would otherwise lose out to unscrupulous competitors; recent arrestees and their families who would otherwise receive pricier, lower-quality bail services; and jail inmates and officials who would otherwise face security risks posed by competing gangs working on the inside for rival bail bond firms. The public at large also benefits from knowing that the State's criminal justice system functions with integrity and fairness.

The Court of Appeal erred in facially invalidating this important, longstanding regulation.

ARGUMENT

Properly construed, section 2076 serves not only valid penological interests in jail security and administration, but also the State's substantial interest in promoting fair bail industry competition. Application of the regulation here thus presents no constitutional difficulties. And defendant has not attempted to—and could not—satisfy the exacting standard for facial relief. This Court should reverse the Court of Appeal's facial invalidation of section 2076.[1]

[1] As in the opening brief, the People use the term "as applied" to refer to a constitutional challenge to the specific portion of section 2076 charged in defendant's criminal complaint: application to insider-tipping arrangements with "person[s] incarcerated in a jail." (OBM 37-38, fn. 16.)

I. SECTION 2076 PROHIBITS INSIDER-TIPPING "ARRANGEMENTS," NOT ALL COMMUNICATIONS ABOUT RECENT ARRESTS

Much of defendant's answer is based on a misreading of section 2076. Defendant repeatedly asserts that the regulation bars "free communication of the 'public fact' of an arrest" (e.g., ABM 37), and suggests that an arrestee could be "criminally charged" under the regulation for simply "ask[ing] a bail licensee" for help in arranging bail for a co-arrestee (ABM 46), or for "discussing even the possibility of a commercial bail release" with a licensee (ABM 45). Defendant likewise suggests that other insiders, such as police officers or reporters, "could be fired for a 'criminal' communication with a bail licensee about the public fact of an arrest." (ABM 46; see also ABM 13, 18, 28, 37-38, 42 [similar].)

Defendant misconstrues the regulation. As the Court of Appeal recognized, section 2076 does not bar all *communications* between bail bond licensees and insiders with information about recent arrests. (Opn. 22.) It instead bars "*arrangement[s]* or *understanding[s]* . . . to have such information channeled to any licensee." (*Ibid.*, italics added.) The regulation, in other words, prohibits "arrangements which facilitate the wholesale identification of people with imminent bail needs" to prevent certain licensees from gaining an "unfair competitive advantage over licensees who are not engaged in this [insider-tipping] practice." (Dis. opn. 4, internal quotation marks omitted.) Its broad application to "an arrangement of any kind" (§ 2076) ensures that the regulation covers any scheme that unscrupulous

bail bond licensees might devise to obtain inside information about recent arrests. (See opn. 12 [section 2076 "makes clear that the section's prohibition extends as broadly as possible to any prohibited arrangement or understanding, regardless of the identity of the other party, regardless of the purpose, and regardless whether it is entered or carried out through intermediaries"].)

Defendant makes a similar mistake in arguing that "the People's justifications" for the regulation improperly "rely on elements of compensation and confidentiality that are not necessary elements of a violation of [section] 2076." (ABM 13; see also ABM 16-17, 41-43.) The People are not asking the Court to read such elements into the regulation. Rather, the People contend that section 2076-prohibited "*arrangement[s]*" or "*understanding[s]*," by their nature, are certain (or virtually certain) to involve compensation and an agreement to exchange nonpublic information. The very purpose of such arrangements is to obtain access to information *before* it is public. If arrest-related information is already public—because, for example, a jail facility or local government has posted the name of a recently arrested person online, as many jurisdictions routinely do in California (see OBM 28-29, and fn. 11)—the licensee can simply obtain the information that way. And it is simple common sense (and has been documented in practice) that no inmate or insider is likely to enter into a prohibited "arrangement" or "understanding" without demanding something of value

(monetary or otherwise) from the licensee. (See, e.g., OBM 41, fn. 18; OBM 44.)[2]

In asking the Court to disregard these realities, defendant not only seeks invalidation of section 2076 based on "fanciful hypotheticals" with no basis in the statutory or regulatory text. (*United States v. Williams* (2008) 553 U.S. 285, 301; see, e.g, ABM 45-47.) Defendant also assumes that there must be a "perfect[]" or exact fit between a regulation's elements and the interests put forward by the government to justify it. (*Williams-Yulee v. Fla. Bar* (2015) 575 U.S. 433, 454, internal quotation marks omitted.) But even strict scrutiny does not go so far. (See, e.g., *ibid.*) The relevant standards of scrutiny here—the rational basis standard for jail and prison regulations (*post*, pp. 11-14) and the intermediate scrutiny standard for commercial speech regulations (*post*, pp. 14-22)—certainly do not. The Court should thus give section 2076 its natural, common sense reading, and assess its constitutionality on that basis. Properly construed, section 2076 is constitutionally valid because it directly furthers substantial government interests in jail security and fair bail industry competition.

---

[2] To be clear, however, section 2076 would serve valid interests even as applied to a hypothetical arrangement or understanding in which the inmate or other insider demanded no compensation. Regardless of any monetary or non-monetary reward for funneling insider information about recent arrests to a bail bond licensee, such information provides an anticompetitive advantage to the licensee, distorting the bail market to the detriment of inmates and a just bail system. (See OBM 48-56.)

II. THE COURT OF APPEAL ERRED BY STRIKING DOWN SECTION 2076 ON ITS FACE

Whether considered under the rational basis standard governing challenges to restrictions on communication with incarcerated persons (OBM 38-47), or instead under intermediate scrutiny (OBM 47-57), the application of section 2076 alleged in defendant's criminal complaint is constitutionally valid. And defendant does not even attempt to satisfy the demanding standard for facial invalidation.

A. As applied to insider-tipping arrangements with jail inmates, section 2076 rationally furthers valid penological interests

Under the standard articulated in *Turner v. Safley* (1987) 482 U.S. 78, the government may restrict communications between jail inmates and non-inmates so long as the restrictions "rationally relate[]" to legitimate penological interests. (*Thornburgh v. Abbott* (1989) 490 U.S. 401, 414.) As applied to insider-tipping arrangements with "person[s] incarcerated in jail," section 2076 satisfies that standard. Such arrangements—which generally involve compensation (monetary or otherwise) to inmates—can erode the deterrent and retributive value of incarceration (OBM 41-42), promote inmate rivalries and even violence (OBM 42-44), and among other things, provide a profit-motivated incentive for inmates to steer business toward a particular bail bond firm (OBM 44-45; see, e.g., Lewis, *Inside*

Santa Clara Jails, Predatory Bail Schemes Flourished for Years, KQED (Apr. 10, 2017)).[3]

Defendant does not (and cannot) suggest that these penological concerns are "[il]legitimate." (*Thornburgh*, *supra*, 490 U.S. at p. 414.) Nor does defendant doubt that section 2076 will address these concerns in a great many cases. (OBM 41-46.) That more than suffices to satisfy *Turner*, under which a regulation will be upheld so long as it is not "arbitrary or irrational." (*Turner*, *supra*, 482 U.S. at p. 90.) An "'exact fit'" between the regulation's elements and the penological concerns advanced to justify it is not required. (E.g., *Valdez v. Rosenbaum* (9th Cir. 2002) 302 F.3d 1039, 1046 (en banc).)

Defendant also contends that the *Turner* standard does not apply "to restrict the constitutional rights of pretrial detainees," as opposed to "convicted inmates." (ABM 45.) That is incorrect. *Turner* "appl[ies] to pre-trial detainees" and "convicted inmates" alike. (*Bull v. City & County of San Francisco* (9th Cir. 2010) 595 F.3d 964, 974, fn. 10 (en banc), internal quotation marks omitted.) In *Turner* itself (482 U.S. at p. 87), the high court drew heavily from *Bell v. Wolfish* (1979) 441 U.S. 520, 546, fn. 28, which expressly refused to "distinguish[] between pretrial detainees and convicted inmates in reviewing" the validity of certain jail-related policies. That made good sense: the "penological interest in security and safety is applicable in *all* correction facilities,"

---

[3] Available at <https://www.kqed.org/news/11393155/inside-santa-clara-jails-predatory-bail-schemes-flourished-for-years> (as of Nov. 19, 2021).

whether the facility houses convicted prisoners, pre-trial detainees, or both. (*Bull*, *supra*, 595 F.3d at p. 974, fn. 10, italics added.)[4]

Defendant also finds it "farfetched" that "the Insurance Commissioner considered the penological interests of jailors when enacting a regulation of . . . bail licensees." (ABM 44-45.) Under the rational basis standard recognized in *Turner*, however, it is enough that the government "*might reasonably have thought* that the policy would advance" legitimate penological interests. (*Thompson v. Dept. of Corrections* (2001) 25 Cal.4th 117, 133, some italics omitted; cf. *FCC v. Beach Communications, Inc.* (1993) 508 U.S. 307, 315 [similar under ordinary rational basis standard].) And it is not at all implausible to think that the Insurance Commissioner might have considered interests in jail security and administration when devising a comprehensive regime to regulate an industry whose work often takes place in, and is intimately tied to, jails across the State. Indeed, the Insurance Commissioner's early investigations under the Bail Bond Regulatory Act of 1937 revealed a host of abusive bail industry practices occurring in jail facilities (see OBM 25-28), and

---

[4] In any event, section 2076 applies to arrangements with *all* "person[s] incarcerated in a jail," including both convicted inmates and pretrial detainees. Depending on how a jail houses inmates and detainees, convicted inmates can be in a position to learn of recent arrests and provide that inside information to bail bond licensees. (See Pen. Code, § 4002, subd. (a) [authorizing jails to group together "persons . . . detained for trial [and] . . . persons convicted and under sentence" for certain purposes, including "supervised activities and . . . housing"].)

the Commissioner's original 1941-issued regulations made a number of express references to such facilities (see OBM 66-75). The Court should apply *Turner* and uphold the application of section 2076 in this case.

B. As applied here, section 2076 also operates as a constitutionally valid commercial speech regulation

While application of *Turner* suffices to show why defendant's First Amendment challenge fails, the Court may alternatively uphold the application of section 2076 alleged here as a valid regulation of commercial expression.

1. Section 2076 is a commercial speech regulation

While "[c]ontent-based regulations" generally trigger strict scrutiny (ABM 11), "commercial speech doctrine allows the government greater latitude in regulating [content-based] speech intended for commercial purposes" (ABM 30; see *Central Hudson Gas & Electric Corp. v. Pub. Service Com. of N.Y.* (1980) 447 U.S. 557, 561-566). As defendant acknowledges, "the intermediate level of constitutional scrutiny applied to commercial speech" requires "a fit between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable." (ABM 40, quoting *Bd. of Trustees of State Univ. of N.Y. v. Fox* (1989) 492 U.S. 469, 480.)

Under this Court's decision in *Beeman v. Anthem Prescription Management, LLC* (2013) 58 Cal.4th 329, 352, a regulation qualifies as a restriction of commercial speech if it "operates in a commercial setting," "relate[s] to the economic

interests" of those who work in that setting, and plays a role in (or is closely "linked" to) a broader commercial regulatory regime. Section 2076 does each of those things. (OBM 48, fn. 24.) As the dissent explained below, the regulation "pertains only to bail bond agents and reaches only information identifying potential clients to the bail licensee." (Dis. opn. 2.) Identification of potential customers or clients is, of course, a quintessential commercial activity. And with its goal of "prevent[ing] unfair competition among licensed bail agents" (dis. opn. 4), section 2076 is closely linked to the Insurance Department's overall bail industry regulatory regime, which seeks to maintain an "orderly," "even playing field for all [bail] licensees in the state" (*People v. Dolezal* (2013) 221 Cal.App.4th 167, 171; see ABM 43 [noting that "[s]ection 2076 is part of a larger regulatory scheme to regulate the bail industry"]).[5]

Defendant asserts that, "[a]t a minimum," the regulated expression must involve "a proposal for a commercial transaction" (ABM 33) or a "traditional merchant customer

---

[5] Rather than engaging with the standard applied in *Beeman*, defendant focuses on the factors considered in *Bolger v. Youngs Drug Products Corp.* (1983) 463 U.S. 60, 67—factors that "[in] combination," provided "strong support for the . . . conclusion that [certain] pamphlets [were] properly characterized as commercial speech." (See ABM 32-33; *Bolger*, *supra*, 463 U.S. at pp. 66-67 [considering whether the pamphlets "are . . . advertisements," make "reference to a specific product," and were produced out of "economic motivation"].) But as defendant acknowledges, these factors need not "be present in order for speech to be commercial." (*Id.* at p. 67, fn. 14; see ABM 32 ["These so-called *Bolger* factors . . . are not dispositive."].)

communication" (ABM 38) to qualify as commercial speech. But this Court has expressly rejected that argument. It held in *Beeman*, for example, that the speech in question, "though *not* proposing a commercial transaction," "readily qualif[ied]" as commercial expression because it "related to the economic interests" at issue and was closely "linked" to certain highly regulated commercial transactions. (58 Cal.4th at p. 352, italics added.) Similarly, in *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 956, the Court recognized that "the category of commercial speech is not limited to" "'speech proposing a commercial transaction.'"[6]

Defendant also asserts that "the People fail to cite any case" in which the commercial speech standard was applied to a regulation limiting a business's ability "to gather information about potential clients." (ABM 34; see also ABM 16.) But courts have had no trouble concluding that such regulations are subject to *Central Hudson* review. The Tenth Circuit, for example, applied that standard to regulations limiting the ability of

---

[6] There are many traditional forms of commercial regulation restricting information disclosure that do not typically involve "speech proposing a commercial transaction." States have, for example, long restricted disclosure of trade secrets and other forms of confidential commercial information. (See, e.g., Rest., Torts (1939) § 757, and com. b; *id.*, § 759.) And insider trading laws at the state and federal levels limit the ability of insiders to share certain material nonpublic information. (OBM 51.) These well-established forms of commercial regulation are not subject to strict scrutiny under the First Amendment. (See, e.g., *DVD Copy Control Assn., Inc. v. Bunner* (2003) 31 Cal.4th 864, 879, 884.)

telecommunications companies to share data about their customers' phone calls—"such as when, where, and to whom a customer places calls"—with businesses seeking that information for marketing purposes. (*U.S. West, Inc. v. FCC* (10th Cir. 1999) 182 F.3d 1224, 1228, fn. 1; see *id.* at p. 1233; *id.* at p. 1244 (dis. opn. of Briscoe, J.); see also *Nat. Cable & Telecommunications Assn. v. FCC* (D.C. Cir. 2009) 555 F.3d 996, 1000 [similar].)

Finally, defendant argues that "information about the status of an arrestee" is not, considered on its own, a form of commercial speech. (ABM 34.) But the question of what constitutes commercial expression is a context-sensitive inquiry, rooted in "'common-sense' distinction[s]." (*Ohralik v. Ohio State Bar Assn.* (1978) 436 U.S. 447, 455-456; see *Kasky*, *supra*, 27 Cal.4th at p. 962.) The alcohol content of a certain type of beer, for example, would not be considered commercial speech if referenced by a character on a TV show, but would be when it appears on a product label communicating that information to potential buyers. (See *Rubin v. Coors Brewing Co.* (1995) 514 U.S. 476, 481; *Beeman*, *supra*, 58 Cal.4th at p. 343.) Likewise, information about a customer's phone calls, such as when, where, and to whom the customer places calls, would not be "commercial" if freely discussed with friends or family by that customer herself, but would be if disclosed by the phone company to a business seeking that information for marketing purposes. (See, e.g., *U.S. West*, *supra*, 182 F.3d at p. 1233.) In much the same way, a news report about a recent arrest would not qualify as commercial speech; but when an inmate or other insider conveys that

information to a bail bond licensee as part of an arrangement to drum up new business, that exchange of information is commercial in character. Because section 2076 restricts such commercial arrangements, it qualifies as a commercial speech regulation.

2. As applied here, section 2076 satisfies intermediate scrutiny

By "restricting bail licensees' access" to insider information about "people with imminent bail needs," section 2076 "directly prevents unfair competition among licensed bail agents." (Dis. opn. 4; see OBM 48-52.) That "'simple common sense'" explanation would suffice to justify a regulation like section 2076 even "in a case applying strict scrutiny." (*Fla. Bar v. Went For It, Inc.* (1995) 515 U.S. 618, 628.) It follows that section 2076, as applied here, satisfies intermediate scrutiny. (See *Central Hudson*, *supra*, 447 U.S. at p. 566.)[7] That conclusion is only reinforced by the substantial body of historical evidence revealing the anticompetitive, corrupting influence of section 2076-barred insider-tipping arrangements. (See OBM 21-27, 54-56).[8]

---

[7] Because "simple common sense" can justify a regulation even "in a case applying strict scrutiny" (OBM 53, quoting *Fla. Bar*, *supra*, 515 U.S. at p. 628), section 2076 would satisfy strict scrutiny for substantially the same reasons that it satisfies intermediate scrutiny. (See OBM 47-57.) Defendant is thus incorrect that the People "do[] not even attempt to justify the speech restrictions of 2076 under . . . strict scrutiny." (ABM 13.)

[8] The portions of section 2076 that prohibit non-inmate insider-tipping arrangements—such as arrangements with "law enforcement officer[s]"—advance the same or similar government

(continued…)

Defendant does not contest the common-sense insight about unfair competition at the heart of the People's justification for section 2076. To the contrary, defendant repeatedly acknowledges that "the first licensee to discover [a recent arrest] has an advantage" over his or her competitors. (ABM 29; see also ABM 17, 27.) Defendant instead argues that the government lacks a valid interest in restricting access to arrest-related information because the State's Public Records Act requires disclosure of "such facts as the name, occupation and detailed physical description of every individual arrested." (ABM 21, citing Gov. Code, § 6254, subd. (f); see also ABM 22-23, 26, 42.) Defendant goes so far as to suggest that the People's argument has "chilling echoes of secret arrests." (ABM 18.) But that entirely misunderstands the People's argument and the operation of section 2076.

The regulation operates to prevent only *asymmetric* access to arrest-related information through insider-tipping arrangements before licensees' competitors have a fair opportunity to obtain the same information. (OBM 49-52, 54-56.) Just because the government has a statutory obligation to disclose arrest-related information in certain circumstances (see OBM 28, 49) does not mean, as a practical matter, that such information will be *immediately* disclosed. There will thus be opportunities for jail

---

(…continued)

interests. Those interests would also adequately justify those portions of the regulation, were they at issue here. (See OBM 47, fn. 23; OBM 60-61, and fn. 32.)

inmates and other insiders to leak advance tips about recent arrests to bail bond agencies looking for a leg up on the competition. *That* unfair informational advantage is what section 2076 is designed to address.

Defendant also suggests that other provisions—specifically, Penal Code, section 160, and sections 2079 and 2079.1 of title 10 of the Code of Regulations—suffice to address "[t]he government interests identified by the People." (ABM 41, see also ABM 14, 24-25, 27, 28, 36, 43, 45.) But those provisions address a distinct source of harm: coercive solicitation practices, rather than insider-tipping arrangements allowing bail bond firms to learn of new arrestees potentially in need of bail services. (See opn. 26-31; *Dolezal*, *supra*, 221 Cal.App.4th at pp. 176-179.) Even if a bail firm complies with all solicitation-related regulations, it can still obtain an unfair advantage over its competitors—and introduce serious security threats into a jail facility—by entering into arrangements with jail inmates or other insiders to pass along inside information. (See, e.g., OBM 50-51.)

In defendant's view, the government's argument in this case would justify similar restrictions on "any professional group." (ABM 39.) Nothing the Court decides here, however, will necessarily validate restrictions on data or information-sharing in other contexts. Insider disclosure in other industries does not always, or even typically, involve the unique risks to jail security (and criminal justice administration more generally) posed by for-profit arrangements between bail bond businesses and

incarcerated persons and other insiders. (See OBM 41-47, 49.)[9] Nor do other industries necessarily face the same risks of, or have the demonstrated experience of suffering from, unfair competition.

As the People have explained, arrestees and their families are often highly distressed and desperate for assistance (OBM 51, and fn. 26), meaning that "[t]here is of course an advantage to a bail licensee being the first to contact such potential clients" (ABM 27). And the history of California's pre-regulatory bail industry reveals the kind of corrupt, monopolistic abuses that can result when certain bail bond firms gain unfair advantages over their competitors. (See OBM 21-27, 54-57.) Indeed, before the 1941 promulgation of comprehensive bail industry regulations, firms gained substantial competitive advantages through the very practice barred by section 2076. (OBM 21-24, 25-26, and fn. 9.) As a consequence, arrestees were subjected to exorbitant bail bond fees (e.g., OBM 26), bail firms reaped monopoly profits that fueled rampant corruption and criminality (e.g., OBM 21-24), and public trust in the overall criminal justice system was compromised (see, e.g., OBM 24). It is "essential that the public have absolute confidence in the integrity and impartiality of our criminal justice system" (*People v. Rhodes* (1974) 12 Cal.3d 180,

---

[9] Defendant appears to suggest that penological interests are relevant only when applying the *Turner* rational basis standard discussed above. (See ABM 44-47.) That is incorrect. Those interests also qualify as "substantial governmental interest[s]" for purposes of applying intermediate scrutiny under *Central Hudson*, *supra*, 447 U.S. at p. 569. (See OBM 49.)

185), and bail bond agents are "an integral part of" that system (*Dolezal*, *supra*, 221 Cal.App.4th at p. 174).

Defendant's final argument is that application of section 2076 "delay[s]" or prevents "the discovery of the arrest of the defendant by those who can secure his or her release" (ABM 36), thereby "caus[ing] profound harm" to arrestees (ABM 39; see ABM 17, 27, 29, 37). But the Department of Insurance, entrusted by the Legislature with comprehensively regulating the bail industry (see OBM 24-26), has plainly made a different determination. That policy judgment is sound and sensible.[10] The Court should uphold application of section 2076 here.

C. There is no basis for addressing hypothetical applications of section 2076 not presented here

The only application of section 2076 alleged by the criminal complaint is that defendant entered into prohibited

---

[10] Arrestees, either on their own or with the help of family members or friends, are capable of securing their release without assistance from bail bond firms tipped off by insiders. Arrestees have a right "[i]mmediately upon being booked and . . . no later than three hours after arrest" to make calls to an attorney, a bail bond agent, and a relative or friend. (Pen. Code, § 851.5, subd. (a)(1).) Arrestees generally "have access to phone books where bail agents can advertise," as well as other forms of bail industry advertising. (*Dolezal*, *supra*, 221 Cal.App.4th at p. 172.) And because "California has numerous immigrant populations that speak a wide variety of languages" (ABM 27), California law requires jails to inform arrestees of their right to place telephone calls to bail bond agents "in English and any non-English language spoken by a substantial number of the public." (Pen. Code, § 851.5, subd. (f).)

arrangements with "person[s] incarcerated in a jail" to inform her of new arrestees potentially in need of bail services. (OBM 30, 36-37; see CT 2-4.) As explained above, that application of the regulation is entirely valid. And absent special circumstances—such as cases where First Amendment overbreadth doctrine applies—this Court adheres to the rule that constitutional challenges are limited to a statute or regulation's application *in the case at hand*; courts are not to address the constitutionality of a provision's "potential application to other, differently situated individuals" not before the court. (E.g., *People v. Buza* (2018) 4 Cal.5th 658, 675; see OBM 57-59.)

Defendant has not pursued an overbreadth claim. Defendant invoked that doctrine below (see, e.g., AOB 25-26), but for good reason, the answer brief does not renew the argument. (See OBM 59-63 [explaining why any overbreadth challenge would fail].) And defendant acknowledges that the ordinary standard for facial relief is exacting, requiring a showing that the challenged law "present[s] total and fatal conflict with applicable constitutional provisions." (ABM 12, quoting *Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 267.) While the answer brief makes quick reference, in passing, to hypothetical cases involving prohibited insider arrangements with a "newspaper reporter" or "policeman" (ABM 46-47), defendant provides no basis for the Court to address such applications of section 2076 in this case—and certainly no reason to facially invalidate the regulation based on theoretical concerns

with any such applications (which, as explained at OBM 60-62, would be constitutionally valid in any event).[11]

The Court of Appeal accordingly erred in facially invalidating section 2076—a restriction that has well served substantial government interests for nearly 80 years.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

ROB BONTA
Attorney General of California
MICHAEL J. MONGAN
Solicitor General
LANCE E. WINTERS
Chief Assistant Attorney General
JANILL L. RICHARDS
Principal Deputy Solicitor General
JEFFREY M. LAURENCE
Senior Assistant Attorney General
SAMUEL T. HARBOURT
Deputy Solicitor General

Attorneys for Plaintiff and Respondent

November 22, 2021

---

[11] Defendant also hypothesizes that inmates and other insiders, while not "direct . . . target[s]" of section 2076, could be "criminally charged [with] conspiracy to commit a felony" for entering into a prohibited arrangement with a bail bond licensee. (AB 46.) But that is not at all clear (cf. *People v. Biane* (2014) 58 Cal.4th 381, 384, 395), and certainly is not an issue properly presented here.

CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF ON THE MERITS uses a 13-point Century Schoolbook font and contains 4,534 words.

ROB BONTA
Attorney General of California

/s/ Samuel Harbourt

SAMUEL T. HARBOURT
Deputy Solicitor General
Attorneys for Plaintiff and Respondent

November 22, 2021

DECLARATION OF ELECTRONIC SERVICE

Case Name: ***People v. Martinez***
No.: **S267138**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practices at the Office of the Attorney General for collecting and processing electronic and physical correspondence. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically.

On November 22, 2021, I electronically served all parties in the case, as well as the Sixth District Court of Appeal and the Santa Clara County District Attorney's Office, with the attached **REPLY BRIEF ON THE MERITS** by transmitting a true copy via this Court's TrueFiling system.

I also directed a legal assistant with the California Department of Justice to serve a print copy of the brief on the superior court at the following address: Clerk of Court, ATTN: Chambers of Honorable Socrates Manoukian, Old Courthouse, Santa Clara County Superior Court, 161 N. First Street, San Jose, CA 95113.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on November 22, 2021, at San Francisco, California.

Samuel T. Harbourt	*/s/ Samuel T. Harbourt*
Declarant	Signature

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. MARTINEZ**
Case Number: **S267138**
Lower Court Case Number: **H046164**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **samuel.harbourt@doj.ca.gov**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	People v. Martinez - Reply Brief on the Merits
PROOF OF SERVICE	POS.People v Martinez 11.22.21

Service Recipients:

Person Served	Email Address	Type	Date / Time
Loretta Quick 6th District Appellate Program 148692	Lori@sdap.org	e-Serve	11/22/2021 1:25:21 PM
Janill Richards Office of the Attorney General 173817	janill.richards@doj.ca.gov	e-Serve	11/22/2021 1:25:21 PM
John Rorabaugh Court Added 178366	baillaw@usa.net	e-Serve	11/22/2021 1:25:21 PM
Samuel Harbourt Office of the Attorney General 313719	samuel.harbourt@doj.ca.gov	e-Serve	11/22/2021 1:25:21 PM
Kaci Lopez 173659	klopez@dao.sccgov.org	e-Serve	11/22/2021 1:25:21 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

11/22/2021
Date

/s/Samuel Harbourt
Signature

Harbourt, Samuel (313719)

Last Name, First Name (PNum)

California Department of Justice

Law Firm