No. 20-55408

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, INC.
and NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION,

Plaintiffs-Appellants,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF
THE STATE OF CALIFORNIA,

Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California
No. 2:19-cv-10645-PSG-KS

BRIEF OF *AMICUS CURIAE* THE INDEPENDENT INSTITUTE IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Independent Institute (the "Institute") states that it has no parent corporation and that no publicly held corporation owns 10% of more of the Institute's stock.

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INTEREST OF *AMICUS CURIAE*[1]

The Independent Institute ("the Institute")[2] is a non-profit, non-partisan public-policy research and educational organization that translates ideas into profound and lasting action through publications, conferences, and effective multi-media programs. The Institute is committed to advancing a peaceful, prosperous, and free society grounded in the recognition of individual human worth and dignity.

The Institute has a keen interest in this case and the many others like it that have been filed in California. The Institute—which has closely studied and monitored the wide-ranging economic consequences of Assembly Bill ("A.B.") 5—believes that A.B. 5 is an irrational means to resolve the labor concerns in California and will cause devastating harm to low- and middle-income workers. Indeed, at the same time A.B. 5 purports to support the middle class, it strips that same group of the ability to pursue meaningful and flexible employment as independent contractors. Further, A.B. 5 will have widespread consequences for California's economy as it removes desperately needed employment flexibility from the labor market. Several of the Institute's scholars, along with its founder and CEO David J.

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[1] All parties have consented to the filing of this *amicus* brief. Thus, no motion for leave to file this *amicus* brief is necessary. *See* Fed. R. App. P. 29(a)(2).

[2] The Institute affirms that no counsel for any party authored this brief in whole or in part; no party or party's counsel contributed money to fund preparation or submission of the brief; and no one but the Institute contributed money to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

Theroux, have also filed an *amicus* brief on these points in a similar case challenging A.B. 5's constitutionality currently pending before this Court. *See Amicus* Br. of David R. Henderson *et al.*, *Olson v. California*, No. 20-55267 (9th Cir. May 14, 2020).

The Institute believes that its expertise regarding the fallout of A.B. 5, and the insight brought by its broad and varied constituents, will be especially useful to the Court's decision-making process. The Institute and its individual scholars have been actively discussing A.B. 5 and its consequences in articles, blog posts, and interviews for the past year. The Institute recently authored an open letter to Governor Gavin C. Newsom and Members of the California State Legislature on behalf of 153 economists and political scientists, calling for A.B. 5's suspension. *See Open Letter to Suspend California AB-5*, Indep. Inst. (Apr. 14, 2020), https://tinyurl.com/y8k3c3f3. The Institute believes that its expertise regarding A.B. 5 will be of particular assistance to the Court, because as the California Legislative Analyst's Office recently advised, it is difficult to obtain empirical data representing the true extent of the harm caused by A.B. 5, due to its recent enactment. *See The 2020-21 Budget: Staffing to Address New Independent Contractor Test*, Cal. Legis. Analyst's Off. (Feb. 11, 2020), https://tinyurl.com/yclljnbl.

SUMMARY OF ARGUMENT

A.B. 5 purports to protect workers, but nothing could be further from the truth. In enacting the statute, the California State Legislature upended the job and economic stability of over a million independent contractors by converting them to employees. At the same time, A.B. 5 imposes an arbitrary and convoluted exemption scheme that benefits high-income jobs while providing no relief for low- and middle-income workers. A.B. 5 has fundamentally transformed California's labor market for the worse. By the Legislature's own count, hundreds of thousands of jobs that the middle class depends on will be lost.

A.B. 5 also discriminates. The statute arbitrarily distinguishes between workers who perform virtually identical tasks, exempts high-income professions from its job-killing mandates, and advances only economic and political favoritism. A.B. 5 is therefore repugnant to the Constitution's guarantee of equal protection. Appellants are correct that A.B. 5's limitations on freelance, video-, and photo-journalism fail strict scrutiny. Appellants' Opening Br. at 20–30, Dkt. No. 6 (May 15, 2020) ("*ASJA* Br."); *see Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227–28 (2015). But, even if the Court were to apply the rational basis standard, A.B. 5 must be enjoined because its classifications are wholly irrational. *See Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008) ("[The state] cannot hope to survive ***rational*** basis review by resorting to irrationality.").

Moreover, this case raises grave concerns about the rational basis standard itself. Although A.B. 5 would not withstand a proper rational basis review, the test too often allows courts to passively defer to lawmakers, rather than to hold them to account for their intrusions on constitutionally protected rights. After invoking rational basis here, the district court effectively rubber stamped a horrendous and arbitrary policy that quashes the economic liberty of more than a million workers. And it is not alone. Courts routinely fail to meaningfully scrutinize and engage with the state's proffered rationale for infringing on economic liberties. This case highlights the problems with applying the rational basis standard to arbitrary laws infringing upon economic liberty.

ARGUMENT

I. A.B. 5 OBSTRUCTS CALIFORNIA WORKERS' ECONOMIC LIBERTIES.

The Constitution protects the economic liberty of all Californians. A.B. 5 infringes on that liberty. That is, A.B. 5 imperils low- and middle-income Californians' ability to freely engage in economic activities by imposing arbitrary classifications that significantly disadvantage—and, at times, completely eliminate—the independent contractor jobs typically held by low- and middle-income Californians. A.B. 5 thus presents a serious threat to California's continued economic success and prosperity.

A. California workers are entitled to the liberty to pursue gig work and freelance positions.

The Constitution protects every individual's right to engage in economic activities. Protected activities include—but are not limited to—the right to pursue one's desired profession, to earn a living, and to freely enter contracts. *See, e.g.*, *Lowe v. S.E.C.*, 472 U.S. 181, 228 (1985).

Constitutional protection for economic liberty is as old as our Republic. Economic rights are among "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *see also The Case of the Monopolies*, 77 Eng. Rep. 1260, 1266 (Q.B. 1602) (Monopoly grants restricting economic activities violated both the common law and "liberty of the subject"); Va. Decl. of Rights § 1 (June 12, 1776) ("[A]ll men . . . have certain inherent rights . . . [such as] the enjoyment of life and liberty, with the means of acquiring and possessing property."). Such rights are thus an inherent part of our system of "ordered liberty." *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citations omitted).

These same economic rights are likewise entitled to protection under the privileges and immunities clauses of the Constitution. *See* U.S. Const. art. IV, § 2 & amend. XIV, § 1; *Merrifield*, 547 F.3d at 983 ("[T]he traditional privileges and immunities of citizenship" included "the right to engage in one's profession of choice" (citing *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823)); *see*

also McDonald v. City of Chicago, 561 U.S. 742, 832 (2010) (Thomas, J., concurring) (observing that the drafters of the Privileges or Immunities Clause sought to "compel [the states] at all times to respect these great fundamental guarantees"). The Supreme Court has long recognized that among the liberties protected by the Constitution are the right "to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference," *Greene v. McElroy*, 360 U.S. 474, 492 (1959), and "to enter into all contracts which may be proper, necessary, and essential to [the] carrying out [of economic activities]," *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897). And, of course, the state may not discriminate in the application of these rights to particular individuals.

Californians have actively pursued their economic liberty and successfully built the largest economy in the Nation. *See, e.g.*, *California's Geography of Wealth* 3, Cal. Legis. Analyst's Off. (Sept. 5, 2019), https://tinyurl.com/ybtgwtay. A key part of this economic success in recent years has been the ability of workers to embrace innovative employment opportunities, including through various independent contractor work, also known as "gig" or "freelance" jobs. "The gig economy is the collection of markets that match providers [of services] to consumers on a gig (or job) basis in support of on-demand commerce." Sarah A. Donovan *et al.*, *What Does the Gig Economy Mean for Workers?*, Cong. Res. Serv., R44365 1 (Feb. 5, 2016), https://tinyurl.com/ya8apson.

The magnitude and importance of the gig economy in California cannot be overstated. "[T]he rise of independent contractors has served to ignite large portions of the California economy, encourage entrepreneurship, and provide income for an estimated 4 million workers" in California. *See Assembly Floor Analysis*, Cal. Legis. Info. (Sept. 10, 2019), https://tinyurl.com/y9bv5vbr. Nationally, the gig economy accounts for "roughly one-third of America's workforce . . . contribut[ing] about $1.4 trillion annually to the U.S. economy." Luka Ladan, *If the Gig Economy has Unintended Consequences, So Does Shutting It Down*, Indep. Inst. Catalyst (Aug. 14, 2019), https://tinyurl.com/ybjlphfk; *see The Gig Economy*, Edison Res. 2–5 (Dec. 2018), https://tinyurl.com/y9rr58vl ("24% of American 18+ earn income by working in the gig economy.").

Gig or freelance work presents many advantages to California workers. These types of workers are generally categorized as ***independent contractors*** and not ***employees***. *See generally* Seth C. Oranburg, *Unbundling Employment: Flexible Benefits for the Gig Economy*, 11 Drexel L. Rev. 1, 21–30 (2018) (describing the legal distinctions between independent contractors and employees). While a traditional employee works under the employer's rules and directions regarding how or when to perform a job, independent contractors can "be their own boss" and are given a greater degree of flexibility and discretion over their rates, schedules, performance, and client base. K. Lloyd Billingsley, *Protestors Rail Against*

California's New Restrictions on Freelancers and the Gig Economy, Indep. Inst. (Feb. 5, 2020), https://tinyurl.com/y8xgm8gq; Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States*, 71 Indus. Lab. Rev. 705, 706 (2018) (finding that Uber attracts driver-partners due to "the nature of the work, the flexibility, and the compensation"). This flexibility greatly benefits freelance workers. *See, e.g.,* M. Keith Chen, *et al*., *The Value of Flexible Work: Evidence from Uber Drivers*, 127 J. Pol. Econ. 2735 (2019) ("Uber drivers earn more than twice the [economic] surplus they would in less-flexible arrangements.").

It is no secret that many people prefer and opt for the flexible work arrangements that come with working as independent contractors. *See, e.g.*, Mark S. Pulliam, *The Exploitation of Labor and Other Union Myths*, Indep. Rev. (Winter 2019/20), https://tinyurl.com/ybbv9mln; Edelman Intelligence, *Freelancing in America: 2019*, Upwork (Oct. 2019), https://tinyurl.com/y7fc4ury (reporting that "51% of freelance workers say there is ***no amount of money*** where they would definitely take a traditional job" (emphasis added)). Many individuals require work flexibility to care for their families, pursue a passion, or protect their own health. Gig work provides options for workers who are not able, or do not wish, to work a typical 9-to-5 job. For example, a single parent who cannot afford childcare, or an individual caring for an ailing loved one, could be a freelance writer for a media

outlet, transcribe audio files for a transcription service company, and provide medical interpretation over the phone, ***all in one day***, ***from home***. *See, e.g.*, Rachel Oh, *From interpreters and journalists to pet sitters, California's gig economy law has independent contractors fretting*, Peninsula Press (Dec. 23, 2019), https://tinyurl.com/yat4xa83 (providing examples).

Freelance work also affords workers a competitive edge in pricing. Freelance workers can provide cheaper services compared to traditional or union employees who are subject to onerous state and federal labor and wage regulations. *See* Oranburg, *Unbundling Employment*, 11 Drexel L. Rev. at 3–4, 24, 28. In a typical employer-employee relationship, the employer is subject to minimum wage, overtime, unemployment compensation, sick leave, and payroll tax requirements. *See id.* at 23–24, 28; Donovan, Cong. Res. Serv., R44365, at 11. By contrast, independent contractors can work without incurring these additional costs, which are ultimately passed on to clients, thereby providing attractive and cheaper services to many companies. Moreover, freelance workers are not subject to payroll withholding, which means that the workers go home with their full pay—allowing immediate use of those funds—and may deduct the cost of expenses from taxes. Workers are entitled to decide whether such arrangements better suit their personal needs. *See* Oranburg, *Unbundling Employment*, 11 Drexel L. Rev. at 47 ("[S]ome

gig workers might reasonably prefer a larger paycheck instead of a retirement plan contribution.").

B. A.B. 5 eliminates the gig option for low- and middle-income California workers.

A.B. 5 harms the economic interests protected by the Constitution. Specifically, it significantly interferes with Californians' ability to earn a living and obtain property by disadvantaging, or eliminating, hundreds of thousands of independent contractor jobs. This has prevented many Californians from pursuing their constitutionally protected rights to pursue economic gain.

In enacting A.B. 5, the Legislature found that "[t]he misclassification of workers as independent contractors has been a significant factor in the erosion of the middle class and the rise in income inequality." *See* A.B. 5 § 1(c). So, the Legislature presumptively redefined every worker in California as an employee unless a stringent three-factor test is met, Cal. Lab. Code § 2750.3(a)(1), ***or*** unless an exemption applies, *id.* § 2750.3(b)–(h). However, ***both*** the presumptive categorization of workers as employees ***and*** the convoluted exemption scheme significantly disadvantage low- and middle-income workers.

The presumptive employee categorization significantly disadvantages, and possibly eliminates, hundreds of thousands of gig and freelance work opportunities. There is no question that reclassifying independent contractors as employees makes gig workers' services more expensive and disincentivizes potential employers from

hiring them. *See* Eli Rosenberg, *Can California rein in tech's gig platforms? A primer on the bold state law that will try.*, Wash. Post (Jan. 14, 2020), https://tinyurl.com/y8vw7fjg (noting that hiring an employee could cost "***20 to 30 percent more*** than what [clients] would pay a contractor" (emphasis added)); *cf.* Lorenzo E. Bernal-Verdugo, *et al.*, *Labor Market Flexibility and Unemployment: New Empirical Evidence of Static and Dynamic Effects*, Int'l Monetary Fund 12 (Mar. 2012), https://tinyurl.com/y87cqld9 (finding that "policies that enhance labor market flexibility should reduce unemployment"). In fact, the California Legislative Analyst's Office projects that only a "***much smaller*** [number of workers] than the roughly 1 million [independent] contractors" who are affected by A.B. 5 will be re-hired as employees. Cal. Legis. Analyst's Off., *The 2020-21 Budget* (emphasis added). In other words, A.B. 5 destroys gig work opportunities.

A.B. 5's devastation of jobs is no surprise. As many scholars have predicted based on well-established economic principles, regulations that ***restrict*** economic liberties—whether or not well intended—do more harm than good. *See, e.g.*, *Occupational Licensing: A Framework for Policymakers*, The White House & U.S. Dep't of Treasury 7–8 (2015), https://tinyurl.com/y7d638de ("[L]icensing . . . reduces access to jobs in licensed occupations."); Bernal-Verdugo, *Labor Market Flexibility and Unemployment*, 54 Comp. Econ. Studies 3 (observing that regulations increase employer costs and unemployment); Juan Botero, *et al.*, *The*

Regulation of Labor, 119 Q. J. Econ. 1339, 1379 (2004), https://tinyurl.com/yabyo8ph (same); Harold L. Cole & Lee E. Ohanian, *New Deal Policies and the Persistence of the Great Depression: A General Equilibrium Analysis*, 112 J. Pol. Econ. 779, 812–13 (2004) (noting that wage restrictions inhibit economic growth); Thomas, J. Holmes, *The Effect of State Policies on the Location of Manufacturing: Evidence from State Borders*, 106 J. Pol. Econ. 667, 702–05 (1998) (noting that right-to-work states have higher rates of employment).

A.B. 5's convoluted exemption scheme compounds the injury. In practice, it results in the elimination of only the gig-work opportunities typically held by low- and middle-income workers. That is, the long list of targeted exemptions preserves the independent-contractor status (and economic vitality) for high-income jobs. *See* Cal. Lab. Code § 2750.3(b)–(h). These jobs include: doctors, lawyers, architects, engineers, insurance brokers, accountants, securities brokers, real estate agents, and certain various professional services providers, such as marketing professionals and human resources administrators, etc. *See id.*; *see also* Judy Lin, *Who's in, who's out of AB 5?*, Cal. Matters (Sept. 11, 2019), https://tinyurl.com/y3g77cm2.

At the same time, A.B. 5 targets for regulation drivers for Uber, Lyft, DoorDash and Postmates, nurses and other non-doctor health professionals, janitors, housekeepers, newspaper carriers, manicurists, interpreters, and more. *See* Lin, *Who's in, Who's out of AB 5?*. These jobs are typically held by low- or middle-

income workers. *See* Annette Bernhardt & Sarah Thomason, *What Do We Know About Gig Work in California? An Analysis of Independent Contracting*, UC Berkeley Lab. Ctr. (June 14, 2017), https://tinyurl.com/y7drqjs8 (categorizing the common occupations held by independent contractors in California from low- to high-wage). Thus, A.B. 5's exemptions allow typically high-income occupations to retain the benefits of independent-contractor status, while imposing crushing burdens of employee designation on all other jobs, effectively resulting in the elimination of those jobs.

II. A.B. 5 VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE IT PLACES UNEQUAL BURDENS AND ARBITRARY RESTRICTIONS ON CALIFORNIA WORKERS.

A.B. 5 is repugnant to the constitutional guarantee of equal protection. The Equal Protection Clause states that "[n]o state shall . . . deny to any person within its jurisdiction the protection of the laws." U.S. Const. amend XIV, § 1. The Clause "commands . . . that all persons similarly situated . . . be treated alike," *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985), and prohibits arbitrary classifications that "affect some groups of citizens differently than others," *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598, 601 (2008) (quoting *McGowan v. Maryland*, 366 U.S. 420, 425 (1961)).

Accordingly, the state does not have "a *carte blanche*" in enacting economic regulations. *United States v. Vaello-Madero*, 956 F.3d 12, 21 (1st Cir. 2020). "To

withstand equal protection review, legislation that distinguishes between [one group of individuals] and others must be rationally related to a legitimate governmental purpose." *Cleburne*, 473 U.S. at 446. A regulation violates this mandate if it unequally burdens one group of economic actors—workers, businesses, and families—while exempting another group from the same regulatory demands. *See, e.g.*, *Merrifield*, 547 F.3d at 988–89, 992 (California law favoring non-pesticide pest controllers of bats, racoons, skunks, and squirrels over non-pesticide pest controllers of mice, rats, and pigeons violated equal protection); *Vaello-Madero*, 956 F.3d at 32 (federal government's categorical denial of disability benefits to Social Security beneficiaries solely based on Puerto Rico residency violated equal protection).

Courts begin this analysis by identifying a legitimate government purpose for the economic classification, including those expressly stated by the legislature. *See Merrifield*, 547 F.3d at 989; *Vaello-Madero*, 956 F.3d at 18; *cf. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (The "desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."). And even where there is a legitimate government purpose, the Constitution will not tolerate irrational or arbitrary distinctions between individuals, as such classifications are unrelated to the state's police power and often merely a shroud for prejudice. A classification is unconstitutional if the connection between "an asserted goal" and the classification

is "so attenuated as to render the distinction arbitrary or irrational." *Cleburne*, 473 U.S. at 446; *accord Angelotti Chiropractic, Inc. v. Baker*, 791 F.3d 1075, 1085 (9th Cir. 2015).

Further, as this Court has observed, the state "cannot hope to survive ***rational*** basis review by resorting to irrationality." *Merrifield*, 547 F.3d at 991; *see also St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) ("[P]laintiffs may . . . negate a seemingly plausible basis for the law by adducing evidence of irrationality."). The proffered justification "cannot be fantasy." *St. Joseph Abbey*, 712 F.3d at 223. "The Supreme Court, employing rational basis review, has been suspicious of a legislature's circuitous path to legitimate ends when a direct path is available." *Craigmiles v. Giles*, 312 F.3d 220, 227 (6th Cir. 2002). The state cannot survive rational basis by offering "a rationale so weak that it undercuts the principle of non-contradiction" and calls into question whether the classifications in fact further a legitimate state interest. *Merrifield*, 547 F.3d at 991; *see also Guggenheim v. City of Goleta*, 638 F.3d 1111, 1134 (9th Cir. 2010) (Bea, J., dissenting) (An ordinance is not "rationally related to a legitimate state interest" if it is "so structured so that it cannot achieve its designated purpose").

A.B. 5 violates equal protection in at least three ways. *First*, A.B. 5 draws arbitrary distinctions between similarly situated individuals. *Second*, A.B. 5 undermines and contradicts the very interests that it claims to protect. *Third*, rather

than helping California workers, A.B. 5 is merely a façade for economic protectionism and political favoritism.

A. A.B. 5 arbitrarily classifies similarly situated individuals.

A.B. 5 should be set aside first and foremost because it draws arbitrary distinctions between workers who perform virtually identical tasks. *See Merrifield*, 547 F.3d at 992. These senseless divisions affect every industry in California.

The present case illustrates A.B. 5's harmful effect on the journalism and publishing industries. For example, the statute draws arbitrary distinctions between freelance writers, editors, photographers, video- and photo-journalists and other professional service providers. The result, as discussed more fully by Appellants, is that professionals engaged in marketing, human resources administration, graphic design, grant writing, and fine arts are exempted from A.B. 5's requirements, but freelance writers or photographers who provide more than 35 "content submissions" to a client are not, and video recording submissions are not exempted at all. *See ASJA* Br. at 6; *compare* Cal. Lab. Code § 2750.3(c)(2)(B)(i), (ii), (iv), (v), and (vi) (describing full exemptions for professionals engaged in marketing, human resources administration, graphic design, grant writing, and fine arts), *with* Cal. Lab. Code § 2750.3(c)(2)(B)(ix) and (x) (stating minimal, or explicitly denying, exemptions for freelance writers, editors, photographers, video-, and photo-journalists). These distinctions in professional service providers are arbitrary,

because there is no material difference between a graphic designer or a fine artist who provide content submissions and writers, editors, and videographers that do the same.

The Legislature made no effort to justify these distinctions. A.B. 5 provides no explanation for exempting freelance workers in human resources administration, marketing, or grant applications—positions that are more likely to be housed within a preexisting employee-employer relationship—while at the same time providing only minimal or no exemption to freelance workers engaged in writing, editing, photo or video journalism, which are longstanding freelance positions. The Legislature also failed to explain the distinction between workers who submit up to thirty-five "content submissions" and those who submit thirty-six or more "content submissions." And it would be especially inappropriate for the Court to try and supply some rational basis for this distinction when A.B. 5's legislative sponsor has publicly conceded in an interview that its distinctions were "arbitrary." Katie Kilkenny, *"Everybody Is Freaking Out": Freelance Writers Scramble to Make Sense of New California Law*, Hollywood Rep. (Oct. 17, 2019, 10:34 AM), https://tinyurl.com/y4n6e3qp.

Similarly, A.B. 5's exemptions for certain, but not all, referral services are irrational. As demonstrated by appellants in *Olson v. California*, No. 20-55267 (9th Cir.), freelance workers partnering with on-demand application companies like

Postmates and Uber perform services—which are not exempted from and have been specifically targeted by the sponsors of A.B. 5[3]—that are nearly indistinguishable from referral services that did receive exemptions. A.B. 5 does not apply to relationships between referral agencies and service providers (which include sole proprietors) that provide certain services. Cal. Lab. Code § 2750.3(g)(2)(C) ("[G]raphic design, photography, tutoring, event planning, minor home repair, moving, home cleaning, errands, furniture assembly, animal services, dog walking, dog grooming, web design, picture hanging, pool cleaning, or yard cleanup."). There are no exemptions, however, for the most common types of on-demand referral work: delivery services, ride-sharing, or transportation services.

The referral service distinctions contained in A.B. 5 border on the absurd. For example, there is no material difference between providing local ***moving*** services, which are exempted, and providing local ***delivery*** services, which are not exempted. *See also Olson* Br. at 26–27 (listing other examples). Further, in some circumstances, the exemptions appear to have nothing to do with the work performed. Exempt versus non-exempt status under A.B. 5 may depend solely on which referral application a client utilizes to request a service. Errand referral services like "Task Rabbit"[4] appear to be exempted from A.B. 5's restrictions, but

[3] *See Olson* Br. at 12–14 (explaining how A.B. 5's sponsors specifically targeted certain on-demand companies with the A.B. 5 legislation).
[4] *Services*, TaskRabbit, https://tinyurl.com/ybmt53us (last visited May 22, 2020).

grocery pickup and delivery services provided by "Instacart" would not be,[5] even though the same task could be performed through either referral application. *Compare Delivery Services*, TaskRabbit, https://tinyurl.com/ybgb2n6r (last visited May 22, 2020) (listing delivery service options), *with How Instacart Works*, Instacart, https://tinyurl.com/y7yy5yls (last visited May 22, 2020) (describing its grocery pickup and delivery service). The state has provided no reason, and the Court surely should not divine one, for this distinction.

At bottom, A.B. 5 contains a seemingly endless list of nonsensical and irrational distinctions between similarly situated workers. *See* Lee E. Ohanian, *California Lawmakers Unwittingly Make Surgery Much More Dangerous*, Indep. Inst. (Apr. 7, 2020), https://tinyurl.com/y8d7by9f (explaining that, despite performing the same duties, MD anesthesiologists are exempted under A.B. 5 but CRNA nurse anesthesiologists are not); Janos Gereben, *Some Musicians May Get Relief From the Onerous Strictures of AB5 Law*, S.F. Classical Voice (Apr. 21, 2020), https://tinyurl.com/ycjd2suo (describing new exemptions for some freelance musicians, but not orchestra musicians, professional musicians, or musical theater productions); Edward Ring, *The Many Unintended Consequences of AB 5*, Cal.

[5] Minute Order at 4, *People v. Maplebear, Inc.*, Case No. 2019-48731 (Cal. Super. Ct. Feb. 18, 2020); Carolyn Said, *Court: Instacart likely to flunk AB5, so shoppers would become employees*, S.F. Chron. (Feb. 25, 2020, 3:44 PM), https://tinyurl.com/yb8ej2ph.

Globe (Dec. 10, 2019, 8:58 PM), https://tinyurl.com/wmgkymt (describing additional exemptions); Lin, *Who's in, who's out of AB 5?* (same). The state cannot, and certainly has not, sought to justify this widespread unequal treatment, nor could it provide some rational basis to support such discrimination.

B. A.B. 5's arbitrary exemption scheme devastates the middle class and undermines the very interests that A.B. 5 claims to protect.

A.B. 5 should also be set aside because it fails to advance its stated purpose. Although the Legislature said that it intended to help the middle class, in reality A.B. 5 devastates low- and middle-income workers. Thus, A.B. 5's arbitrary exemption scheme ***as a whole*** is not rationally related to the Legislature's stated purpose of preventing the erosion of middle class and the rise of income inequality. It, in fact, ***deepens and perpetuates*** the evils that it seeks to cure. *See St. Joseph Abbey*, 712 F.3d at 226 (rejecting the state's consumer protection rationale when the "grant of an exclusive right of sale [of caskets] . . . put [consumers] at a greater risk of abuse including exploitative prices"); Bernard C. Beaudreau & Jason E. Taylor, *Why Did the Roosevelt Administration Think Cartels, Higher Wagers, and Shorter Workweeks Would Promote Recovery from the Great Depression*, 23 Indep. Rev. 91, 103–04 (2018) (explaining that many purportedly pro-worker labor policies implemented during the Great Depression are "contractionary when viewed in light of orthodox economic theory"); *see generally* Richard K. Vedder, *et al.*, *Out of Work: Unemployment and Government in Twentieth Century America* (NYU Press,

Indep. Inst. 1997) (demonstrating that many government labor policies in the Twentieth Century have exacerbated unemployment).

As discussed above, A.B. 5 significantly disadvantages—if not completely eliminates—jobs typically held by low- and middle-income workers. Reclassifying independent contractors as employees makes gig workers' services approximately 20 to 30 percent more expensive and disincentivizes hiring those individuals. *See* Rosenberg, *Can California rein in tech's gig platforms?*; Bernal-Verdugo, *Labor Market Flexibility and Unemployment*, 54 Comp. Econ. Studies 3 ("[R]igid labor market institutions may obstruct job creation."). And the California Legislative Analyst's Office projects a massive job ***loss*** among independent contractors. Cal. *The 2020-21 Budget*, Legis. Analyst's Off. In other words, A.B. 5 "pushed all of the risks and all of the costs of a vibrant gig economy onto lower- and middle-income individuals, those who would benefit most from flexibility to work around the restrictive policies." *Open Letter*, Indep. Inst.

Because of A.B. 5, job opportunities for low- and middle-income workers in California are rapidly shrinking. It should be no surprise that "[m]any firms operating in California will not be able to reinvent their workforces overnight," or absorb the significant added costs caused by A.B. 5, and will simply decide to stop working with gig workers. Louis Hyman, *California's new gig economy law was meant to help workers. But it will likely hurt them instead.*, CNN (Jan. 9, 2020),

https://tinyurl.com/y73hju6e; *see* Bernal-Verdugo, *Labor Market Flexibility and Unemployment*, 54 Comp. Econ. Studies at 12 (concluding that "hiring costs" have a strong negative affect on unemployment). For example, despite its vocal support for A.B. 5, Vox Media announced that it will end its contracts with approximately 200 freelance writers and editors in favor of hiring only twenty employees. *See* Suhauna Hussain, *Vox Media cuts hundreds of freelance journalists as AB 5 changes loom*, L.A. Times (Dec. 17, 2019), https://tinyurl.com/yauudkoy. Or, to avoid the strictures and added costs created by of A.B. 5, internet or remote businesses will simply choose not to hire California workers. *See* Johana Bhuiyan, *Coronavirus is supercharging the fight over California's new employment law*, L.A. Times (Mar. 26, 2020), https://tinyurl.com/y7bpha6k (explaining that audio-transcribing company called "Rev is among a handful of companies that stopped using workers in California"); *see also* Botero, *The Regulation of Labor*, 119 Q. J. Econ. at 1379 ("[H]eavier regulation of labor has adverse consequences for . . . unemployment.").

This is especially devastating for low- and middle-income Californians ***now***, during the COVID-19 pandemic. Due to A.B. 5, freelance workers are unable to take advantage of the increased demand for certain services. *See* Aaron Randle, *I Feel Like a Hero: A Day in the Life of a Grocery Delivery Man*, N.Y. Times (May 18, 2020), https://tinyurl.com/y8zhn9j2 (explaining that Instacart—an online, on-demand, grocery-delivery service—has seen "a more than 400 percent increase in

sales since March"). Workers are further deprived of the many gig opportunities—such as freelance writing, transcribing, and interpreting, etc.—that could be done at home. As one state lawmaker observed, "[a]t a time when most Californians can't work outside the home, . . . AB-5 is stopping many of them from working inside the home." K. Lloyd Billingsley, *How California's AB-5 Hinders Coronavirus Response*, Indep. Inst. (Apr. 1. 2020), https://tinyurl.com/ycdat4o4 (quoting Assemblyman Kevin Kiley); *see Open Letter*, Indep. Inst. Highlighting the arbitrary unfairness of the exemption scheme, A.B. 5 leaves untouched the independent-contractor status of various occupations typically held by high-income workers. *See supra* pp. 10–13. Thus, A.B. 5's exemption scheme privileges high-income workers over low- and middle-income workers and provides no alternatives for such individuals to gain exempted work.

For these reasons, A.B. 5's scheme contradicts the Legislature's stated goal of safeguarding the middle class and ameliorating income inequality. As should be obvious, by removing a key means of income without coordinating alternatives, A.B. 5 entrenches income inequality and destroys the middle class. *See generally* Lawrence Mishel & Heidi Shierholz, *Sustained, High Joblessness Causes Lasting Damage to Wages, Benefits, Income, and Wealth*, Briefing Paper #324, Econ. Pol. Inst. (Aug. 31, 2011), https://tinyurl.com/yd4ht7su. Accordingly, A.B. 5's classifications and exemption scheme fail the rational basis test, because they

contradict and undermine the Legislature's stated purpose. *See Merrifield*, 547 F.3d at 991 (holding that the state "cannot hope to survive ***rational*** basis review" by asking the Court to uphold a regulation that contradicts the very purpose of the regulation).

C. A.B. 5's arbitrary exemption scheme is nothing more than economic protectionism and political favoritism.

A.B. 5 should also be set aside because its true purpose is to favor the politically connected. Indeed, "[n]o sophisticated economic analysis is required to see the pretextual nature" of A.B. 5's exemptions. *Craigmiles*, 312 F.3d at 229. The arbitrary and contradictory line-drawing discussed above demonstrates AB 5's real purpose: to protect the politically powerful in California from the economic challenge posed by innovative and non-traditional work structures. *See, e.g.*, Michael D. Farren, *California's Assembly Bill 5 Shows How Good Intentions Can Lead to Bad Consequences*, The Bridge (Oct. 8, 2019), https://tinyurl.com/y9vhjy8b. This Court, however, has held that such a "naked attempt to raise a fortress protecting one subsection of an industry at the expense of another similarly situated" cannot survive even rational basis review. *Merrifield*, 547 F.3d at 992 (alterations omitted) (quoting *Craigmiles*, 312 F.3d at 229). "For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Moreno*, 413 U.S. at 534.

Economic protectionism and political favoritism cannot satisfy any level of constitutional scrutiny. "This measure to privilege certain businessmen over others at the expense of consumers is not animated by a legitimate governmental purpose and cannot survive even rational basis review." *Craigmiles*, 312 F.3d at 229. Indeed, "economic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate governmental interest." *Merrifield*, 547 F.3d at 991 n.15; *see City of Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1978) ("Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected."). The Court should not allow A.B. 5's sweeping regulations to benefit the coffers of a few, and at the same time force the unequal treatment of more than a million freelance workers.

III. THE DISTRICT COURT'S APPLICATION OF RATIONAL BASIS REVIEW FAILS TO PROTECT IMPORTANT ECONOMIC LIBERTIES.

Finally, the district court's decision avoided any meaningful scrutiny of A.B. 5. Rational basis is not an exacting standard, but it should be a meaningful check on unfounded and harmful state policy. Such a check is particularly important in a case like this one about writers, editors, video, and photo-journalists where "speech is involved." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–54 (2012).

The district court's toneless incantation of the rational basis standard and rubber-stamping of the state's *post hoc* rationale for the arbitrary classifications

found in A.B. 5 reveals a serious danger. Namely, rational basis review in its current form, *see F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993), has created a system in which courts—reflexively citing deference to state legislatures—routinely fail to meaningfully scrutinize and engage with the state's proffered rationale for infringing on economic liberties.

This one-sided approach diminishes the importance of economic rights and subjects those rights—despite their essential nature—to the whims of a political majority and well-connected special interests. "[T]he judiciary's refusal to consider the wisdom of legislative acts—***at least to inquire whether its purpose and the means proposed are 'within legislative power'***—would lead to only one result: '[R]ights guaranteed by the Constitution [would] exist only so long as supposed public interest does not require their extinction.'" *Hettinga v. United States*, 677 F.3d 471, 481 (D.C. Cir. 2012) (Brown, J. & Sentelle, J., concurring) (emphasis added) (citation omitted). Such concerns are all too evident in the case of A.B. 5.

The toothless application of rational basis review used by the district court is also inconsistent with how courts originally and historically reviewed the constitutionality of legislation: meaningfully examining reasonableness in fit between the adopted means and end. *See Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387–88 (1798) (Chase, J., *seriatim*) ("I cannot subscribe to the omnipotence of a State Legislature . . . . The nature, and ends of legislative power will limit the exercise of

it."); *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819) ("Let the end be legitimate, . . . and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."); *Lawton v. Steele*, 152 U.S. 133, 137 (1894) ("[T]he means [must be] reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."). This meaningful means-end scrutiny—not the rubber stamp camouflaged as constitutional review used by the district court—is one of the primary methods by which the judiciary fulfills its responsibility to check the unconstitutional decrees of a legislature.

The Court must faithfully enforce existing case law and apply a meaningful constitutional review. *See, e.g.*, *Cleburne*, 473 U.S. at 446; *Merrifield*, 547 F.3d at 991. As this Court has recognized, enforcing "the Equal Protection Clause's requirement that similarly situated persons must be treated equally" does not require the court to "bas[e] [its] decision . . . on [the judges'] personal approach to economics," or constitute a "return to *Lochner*." *Merrifield*, 547 F.3d at 992 (quoting *Craigmiles*, 312 F.3d at 229)). Instead, the Court should apply rational basis review so as to avoid rendering equal protection guarantees and economic liberties "a nullity." *Vaello-Madero*, 956 F.3d at 21.

"[E]very generation or so a case comes along when [the] Court needs to say enough is enough, if the Equal Proception Clause is to retain any force[.]" *Armor v.*

City of Indianapolis, 566 U.S. 673, 693 (2012) (Roberts, C.J., dissenting). This is such a case.

CONCLUSION

For the foregoing reasons, the Institute respectfully requests that the Court rule in favor of Appellants and find that A.B. 5's irrational and arbitrary exemption scheme violates the Equal Protection Clause, reverse the dismissal of Appellants' complaint, and grant a preliminary injunction in Appellants' favor.

Dated: May 22, 2020

Respectfully submitted,

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