No. 20-55734

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 PLAINTIFFS-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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constiutional Provisions

Statutes and Rules

Other Authorities

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 and its later amendment in A.B. 2257—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 group of the ability to pursue meaningful and flexible employment as independent contractors. Further, A.B. 5 has already demonstrated widespread consequences for California's economy as it removed desperately needed employment flexibility from the labor market during the COVID-19

[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).

pandemic. A dozen of the Institute's scholars, along with its founder and CEO David J. 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 15, 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 eighteen months. The Institute also 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, due to the difficulty of obtaining empirical data on such a new law. *See The 2020-21 Budget: Staffing to Address New Independent Contractor Test*, Cal. Legis. Analyst's Office (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 Legislature upended the job and economic stability for more than 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 thus 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 16–19, Dkt. No. 7-1 (Nov. 24, 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 an 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 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 (K.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).

These same economic rights are likewise entitled to protection under the privileges and immunities and privileges or 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" (citation omitted)); *see also McDonald v. City of*

Chicago, 561 U.S. 742, 832 (2010) (Thomas, J., concurring) (observing that the drafters of the Privileges and 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 rights "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 embraced their economic liberty and successfully built the largest economy in the Nation. *See, e.g.*, Erin Duffin, *U.S. Real Gross Domestic Product (GDP) by state 2020*, Statista (Oct. 6, 2020) https://tinyurl.com/yxbwbgd5. Indeed, in 2018, California was identified as the fifth largest economy in the world. *See California now has the world's 5th largest economy*, CBS News (May 4, 2018), https://tinyurl.com/y5ffyntx. 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. Rsch. Serv., R44365 1 (Feb. 5, 2016), https://tinyurl.com/ya8apson; *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.

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. This number, however, may be low as specific measurements of the size of the gig economy vary. Nationally, an estimated 57 million Americans work in the gig economy: roughly 35% of the U.S. workforce. *Freelancing in America: 2019*, Upwork and Freelancers Union (Oct. 2019), https://tinyurl.com/y7fc4ury; *see The Gig Economy*, Edison Rsch. 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 follows 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. "Research shows that workers are turning to gig in the pursuit of creating the ultimate work-life blend where their careers meet income needs, provide a flexible schedule, and also give them a sense of purpose." Liz Harish, *Flexibility and Purpose — Workforce Turns to Gig in Pursuit of the Ultimate Work-Life Blend*, Bus. Wire (Aug 20, 2019), https://tinyurl.com/y6ct3ltk; *see* Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States*, 71 Indus. & Lab. Rels. 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, 2735 (2019) ("Uber drivers earn more than twice the [economic] surplus they would in less-flexible arrangements.").

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; *California Promise: Opportunity for All*, CalChamber Advoc. (Jan. 2020), https://tinyurl.com/y3mgmozf ("The current workforce values flexibility . . . ."); *Freelancing in America: 2019*, https://tinyurl.com/y7fc4ury (reporting that "51% of freelancers say there is ***no amount of money*** where they would definitely take a traditional job" (emphasis added)); *What are the experiences of gig workers?*, Gig Economy Data Hub, https://tinyurl.com/y55wzcxg ("[M]ore than two thirds of non-traditional workers report being satisfied with their work arrangements."). Many individuals require work flexibility to care for their families, pursue a passion, or protect their own health during the COVID-19 pandemic. 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 full-time childcare, or an individual caring for an ailing loved one, could perform multiple freelance jobs ***all in one day***, ***from home***. *See, e.g.*, Jeff Joseph, *Gig workers like and want flexibility, and that's why they became gig workers*, Orange Cnty. Reg. (Sept. 18, 2020), https://tinyurl.com/y2lzdrat; 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. Rsch. Serv., R44365, at 11. By contrast, independent contractors can work without incurring these additional costs—which are ultimately passed on to the consumer—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.

B. A.B. 5 eliminates the gig option for hundreds of thousands of California workers.

A.B. 5 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.[3]

There is no question that presumptive employee categorization makes gig work more expensive and disincentivizes hiring. *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*

[3] It became immediately apparent upon passage of A.B. 5 that the exemption scheme contained in A.B. 5 was too narrow in many respects. *See* Tiffany Stecker, *California Assembly Moves to Loosen Gig-Worker Law*, Bloomberg Law (June 11, 2020), https://tinyurl.com/yywaar35. As a result, the California Legislature passed a second bill (A.B. 2257), which was signed into law in September 2020, adding additional exemptions to "revise and recast" the exemption scheme.

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. *The 2020-21 Budget*, Cal. Legis. Analyst's Office, (emphasis added); *see also* David Lewin, *et al.*, *Analysis of the Driver Job Losses if Gig Economy Companies Must Re-Classify Drivers as Employees Rather than Independent Contractors*, Berkeley Rsch. Grp. (May 14, 2020), https://tinyurl.com/yym9m42c (finding that "requiring [app-based] drivers to become full-time employees will reduce the number of needed drivers from more than 1,000,000 to less than 100,000"). In other words, A.B. 5 destroys gig-work opportunities.

A.B. 5's devastation is no surprise. As well-established economic principles show, regulations that ***restrict*** economic liberties—regardless of good intentions—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."); Lorenzo E. Bernal-Verdugo, *Labor Market Flexibility and Unemployment*, 54 Comp. Econ. Stud. 3 (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) (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) (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 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 §§ 2778, 2783. These jobs include: doctors, lawyers, architects, engineers, insurance brokers, accountants, securities brokers, direct salespersons, real estate agents, and certain various professional services providers, such as marketing professionals, human resources administrators, and travel agents, etc. *See id.*; *see also* Aaron H. Cole & Julia A. Luster, *AB 2257 Enacts Significant Changes to AB 5 on Classification of Workers as Independent Contractors*, Nat'l L. Rev. (Oct. 13, 2020), https://tinyurl.com/y3okw7s6; 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 and its progeny target for regulation drivers for Uber, Lyft, DoorDash and Postmates, nurses and other non-doctor health professionals, janitors, housekeepers, couriers, newspaper carriers, manicurists, retail, construction services, and more. *See* Cal. Lab. Code §§ 2277, 2783. These jobs are typically held by low- or middle-income workers. *See What Do We Know About Gig Work in California?*, https://tinyurl.com/y7drqjs8 (categorizing the common low- to high-wage occupations held by independent contractors in California). 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. This directly infringes on the right to economic freedom for those hundreds of thousands of Californians that would otherwise perform those jobs.

II. A.B. 5 VIOLATES THE EQUAL PROTECTION CLAUSE BY PLACING UNEQUAL BURDENS AND ARBITRARY RESTRICTIONS ON CALIFORNIANS.

A.B. 5 is also 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 equal 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) (quotation omitted).

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 mice, rats, and pigeons over non-pesticide pest controllers of bats, racoons, skunks, and squirrels 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 is unconstitutional 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. A.B. 5 was arbitrary from its inception. A.B. 5 has become even worse after the California Legislature enacted A.B. 2257, which has created an even more convoluted scheme with 109 additional exemptions.

A.B. 5 initially drew arbitrary distinctions between freelance writers, editors, photographers, photo-journalists and other professional service providers. Professionals engaged in marketing, graphic design, grant writing, and fine arts were exempted from A.B. 5's requirements, but freelance writers or photographers who provided more than 35 "content submissions" were not. *Compare* Cal. Lab. Code § 2750.3(c)(2)(B)(i), (ii), (iv), (v), and (vi), *repealed by* A.B. 2257, *with* Cal. Lab.

Code § 2750.3(c)(2)(B)(ix) and (x), *repealed by* A.B. 2257. The Legislature made no effort to justify these distinctions, and A.B. 5's legislative sponsor publicly conceded that these distinctions were "arbitrary." Katie Kilkenny, *"Everybody Is Freaking Out": Freelance Writers Scramble to Make Sense of New California Law*, Hollywood Rep. (Oct. 17, 2019), https://tinyurl.com/y4n6e3qp.

A.B. 5's exemptions remain arbitrary. Although A.B. 2257 removed the 35-submission cap, other arbitrary distinctions persist. *See* Cal. Lab. Code § 2778(b)(2)(I)(i), (J). For example, the statute treats freelance photo editors and videographers who work on still photos differently from freelance photo editors and videographers who work on motion pictures and imposes A.B. 5's stringent regulations on the latter group without any rational basis for this distinction. *See id.* § 2778(b)(2)(I)(i) (no exemption for "a still photographer, photojournalist, videographer, or photo editor ***who works on motion pictures***, which is inclusive of, but is not limited to, theatrical or commercial productions, broadcast news, television, and music videos"). There is no rational reason, and the California Legislature has not identified one, for treating still-photo freelancers differently from those who edit motion pictures. The arbitrary treatment of videographers is further highlighted by the fact that the statute exempts "digital content aggregators" (including videographers) who may also work on motion pictures as part of their work. *See id.* § 2778(b)(2)(II).

A.B. 5 and A.B. 2257 draw another inexplicable distinction based on "business-to-business" relationships. Under the business-to-business exemption, an independent contractor is exempted if the contractor is a "business service provider" providing services "to another such business or to a public agency or quasi-public corporation ('contracting business')" and satisfies 12 additional requirements. *See id.* § 2776(a). A "business service provider" is "an individual acting as a sole proprietor, or a business entity formed as a partnership, limited liability company, limited liability partnership, or corporation." *Id.* There is no rational reason why an individual acting as a business (even a sole proprietorship)—if she can satisfy the 12 requirements—should be exempted, but an individual providing the exact same services must be categorized as an employee. Similarly, there is no rational reason why a business providing services ***to another business or a state agency*** should be exempted while the same business providing the same services to a non-business or non-agency consumers is not.

Exemptions for certain, but not all, referral services are also arbitrary. A.B. 5 and A.B. 2257 do not exempt freelance workers partnering with on-demand application companies like Postmates and Uber that perform driving services that are nearly indistinguishable from referral services that received exemptions. For example, A.B. 2257 expanded the referral services exemptions to include "graphic design, web design, photography, tutoring, ***consulting***, ***youth sports coaching***,

caddying, ***wedding or event planning***, ***services provided by wedding and event vendors***, minor home repair, moving, errands, furniture assembly, animal services, dog walking, dog grooming, picture hanging, pool cleaning, yard cleanup, and ***interpreting services***." *Id.* § 2777(b)(2)(B) (expanded exemptions emphasized). At the same time, the statute expressly states that "referrals for businesses that provide janitorial, delivery, courier, transportation, trucking, agricultural labor, retail, logging, in-home care, or construction services other than minor home repair" are not exempt. *Id.* § 2777(b)(2)(C). There is no rational distinction, and the California Legislature certainly has not provided one, between providing local ***moving*** services, which are exempted, and providing local ***delivery*** or ***courier*** services, which are not exempted.[4]

The list of nonsensical and irrational distinctions between similarly situated workers is seemingly endless. For example, despite performing the same duties, MD

[4] Passage of California's Proposition 22 through November 2020 ballot initiative was critical for companies like Uber, Lyft, and DoorDash. Proposition 22, provided a new kind of exemption to A.B. 5, stating that "an app-based driver [or deliverer] is an independent contractor and not an employee or agent with respect to the app-based driver's relationship with a network company if [certain] conditions are met[.]" Text of Proposed Laws, *Proposition 22*, Cal. Sec'y of State 31 (2020), https://tinyurl.com/yy4yybca. However, most freelancers in California cannot undertake a multi-million dollar ballot initiative campaign to obtain a similar reprieve. *See* Timothy Puko, *In Los Angeles, an Economy Built on Freelancers Crumbles*, Wall St. J. (June 30, 2020), https://tinyurl.com/yylom72b ("These freelancers . . . suffer more because they can't rely on the big corporation to protect [them].").

anesthesiologists were exempted, but CRNA nurse anesthesiologists were not. *See* Lee E. Ohanian, *California Lawmakers Unwittingly Make Surgery Much More Dangerous*, Indep. Inst. (Apr. 7, 2020), https://tinyurl.com/y8d7by9f. And physical therapists—especially those who subcontracted from other physical therapists—have already lost their freelance opportunities. *See* Eliot Brown, *A California Law Was Supposed to Give Uber Drivers New Protections. Instead, Comedians Lost Work*, Wall St. J. (Sept. 12, 2020), https://tinyurl.com/yyd4j4fg. No adequate remedy or amendment for these arbitrary distinctions appears to be on the horizon.[5]

Perhaps even more unfairly, additional exemptions have been created as a result of significant lobbying efforts in various industries, including the music industry. *See generally* Cal. Lab Code § 2780; 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 lobbying efforts). As a result, recording artists, songwriters, record producers, certain vocalists, and others were given an exemption from A.B. 5's requirements. *See* Cal. Lab. Code § 2780(a)(1). Further, freelance musicians who engaged in a one-time live performance are generally exempt. *See id.* § 2780(b)(1). However, the law excludes from

[5] Although theoretically, some of these physical therapists could attempt to avail themselves of the business-to-business exemption or other exemptions, this would require them to form a business and/or seek only subcontracting opportunities exclusively. Other similar licensed and exempted medical professional are not subjected to this burden.

exemption—without any rational reasons—symphony orchestras, musical groups that perform as a headliner at a venue with more than 1,500 attendees, or musical groups that perform at a festival that sells more than 18,000 tickets per day. *Id.* These exemptions highlight even more starkly the many occupations that lack the political power to seek exemptions and are subject to arbitrary categorizations. Janet Barsky & Richard Reibstein, *AB2257: Not Much Better Than AB5 for Most Industries in California Using Independent Contractors*, JD Supra (Oct. 29, 2020), https://tinyurl.com/y3992yn9. California 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 undermines the very interests that A.B. 5 claims to protect.

A.B. 5 should also be set aside because it is contrary to 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] . . . puts [consumers] at a greater risk of abuse including exploitative prices").

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 thus disincentivizes companies from hiring those individuals. *See* Rosenberg, *Can California rein in tech's gig platforms?*; Bernal-Verdugo, *Labor Market Flexibility and Unemployment*, 54 Comp. Econ. Studies at 3 ("[R]igid labor market institutions may obstruct job creation."). And the California Legislative Analyst's Office projected a massive job ***loss*** among independent contractors while the Legislature deliberated on the passage of A.B. 5. Cal. *See The 2020-21 Budget*, Cal. Legis. Analyst's Office. 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. *See* Paul Kotapish, *A New Bill Loosens Strictures for Some Musicians and Other Freelancers*, S.F. Classical Voice (Sept. 9, 2020), https://tinyurl.com/y3df2tz8 (describing A.B. 5's "collateral damage" as "instantaneous"). 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/y3p4by48; *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). 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.").

These losses are 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. Even worse, however, A.B. 5 leaves untouched the independent-contractor status of various occupations typically held by high-income workers. *See supra* pp. 13–14. 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'y 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 passing 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.

Political and economic favoritism has been on full display during the Legislature's deliberation. To be sure, significant lobbying was reported even before A.B. 5's enactment. *See AB5 is now law in California. Now What?* JD Supra (Oct. 7, 2019), https://tinyurl.com/y6qa3n4g (noting that lobbying efforts secured exemptions for "doctors, dentists, insurance agents, lawyers, account[ant]s, real estate agents, hairstylists, and a variety of creative professionals"). And it was no surprise that in the aftermath of A.B. 5's passage, various industries spent significant effort to lobby for further exemptions. *See, e.g., Gov. Signs Bill Allowing Producers, Writers, Musicians and More to Remain Freelancers*, Sacramento Observer (Sept. 9, 2020), https://tinyurl.com/y224uadr. As a result of intense lobbying, the Legislature picked winners and losers, and the winners included the music and insurance industries. *See, e.g., Insurers Again Battled Many California Bills, but a Fight Last Year Was Biggest Recent Victory*, Ins. J. (Oct. 28, 2020), https://tinyurl.com/y6q6outv. At the same time, Uber and is allies were repeatedly rebuffed by the Legislature and had to seek a ballot initiative. Sara Ashley O'Brien, *Prop 22 passes in California, exempting Uber and Lyft from classifying drivers as employees*, CNN (Nov. 4, 2020), https://tinyurl.com/y2xf9n5z.

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 millions of freelance workers.

III. 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 legally deficient 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." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–54 (2012).

The district court's empty 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 claiming 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. 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 checks the unconstitutional decrees of the legislative branch.

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 the rational basis review so as to avoid rendering equal protection guarantees and economic liberties "a nullity." *See 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 Protection 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 find that A.B. 5's irrational and arbitrary exemption scheme violates the Equal Protection Clause and reverse the dismissal of Appellants' complaint.

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Respectfully submitted,

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