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.

ROB BONTA, IN HIS OFFICIAL CAPACITY AS 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' PETITION FOR REHEARING EN BANC

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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

Constitutional 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 recognizing 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 devastate low- and middle-income workers. 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 pandemic. A dozen of the Institute's

[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* 9th Cir. R. 29-2(a).

[2] 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).

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. *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 more than two years. The Institute also authored an open letter to Governor Gavin 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, e.g.*, *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

The Panel's flawed review of A.B. 5 must be corrected. Not only does the Panel decision conflict with multiple binding First Amendment cases that subject

A.B. 5 to strict scrutiny review, *see* Pet. 7-19, its insipid application of rational-basis review conflicts with binding Ninth Circuit precedent and avoids any meaningful analysis of A.B. 5. A.B. 5 upended job and economic stability for more than a million independent contractors by classifying them as employees and thus forcing businesses to choose between putting them on the payroll or dispensing with their services altogether. At the same time, A.B. 5 imposes an arbitrary and convoluted exemption scheme that undermines its stated purpose of helping low- and middle-income workers and that benefits the well-funded and politically favored. This is precisely the type of law that the Ninth Circuit rejected in *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008). The Panel improperly limited *Merrifield*'s holding and failed to apply rational-basis review appropriately.

Moreover, this case raises an issue of exceptional importance about the rational-basis standard itself. Although A.B. 5 would not withstand a proper rational-basis review, the Panel's decision demonstrates exactly how courts passively defer to lawmakers, rather than to hold them to account for their intrusions on constitutionally protected rights. After invoking rational basis here, the Panel 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 demonstrates the problems with applying the rational-basis standard to arbitrary laws infringing upon economic liberty.

ARGUMENT

I. THE PANEL'S DECISION CONTRADICTS PRECEDENT AND IGNORES A.B. 5'S ARBITRARY AND UNEQUAL BURDENS.

The Panel decision fails to meaningfully analyze the Equal Protection concerns in this case. In addition to conflicting with binding First Amendment precedent—which has been ably discussed by Petitioners, Pet. 7-19—the Panel's decision contradicts Ninth Circuit Equal Protection precedent. As a result, the Panel fails to address the unequal burdens and arbitrary restrictions that A.B. 5 imposes on Californians.

A. The Panel Opinion Conflicts With *Merrifield v. Lockyer*.

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). "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. Contrary to the

Panel's reading, this does not grant the state "a *carte blanche*" to enact discriminatory economic regulations. *United States v. Vaello-Madero*, 956 F.3d 12, 21 (1st Cir. 2020) (rejecting denial of disability benefits based on Puerto Rico residency).

Merrifield is the key case addressing the limits of rational-basis review in the Ninth Circuit. There, the Ninth Circuit struck down an extermination licensing regime (that focused on pesticide use) for a non-pesticide exterminator, as the licensing classifications failed to serve the state's claimed interest. *See Merrifield*, 547 F.3d at 992.

Although states have leeway to further a legitimate government purpose through regulation, *Merrifield* identified three hallmarks of regulations that cannot sustain even rational-basis review. *First*, 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. *See Merrifield*, 547 F.3d at 988-89. 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).

Second, the state "cannot hope to survive ***rational*** basis review by resorting to irrationality." *Merrifield*, 547 F.3d at 991 (emphasis added); *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."); *Craigmiles v. Giles*, 312 F.3d 220, 227 (6th Cir. 2002) ("The Supreme Court . . . has been suspicious of a legislature's circuitous path to legitimate ends when a direct path is available."). The state's proffered justification for regulation "cannot be fantasy." *St. Joseph Abbey*, 712 F.3d at 223. The state therefore 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").

Third, a law cannot satisfy rational basis if it serves as mere economic protectionism. "[E]conomic 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. Specifically, the *Merrifield* court made clear that the "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. *Id.* 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." *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

The Panel ignored these points. The Panel relegated the *Merrifield* opinion to obscurity, noting that it only applied when classifications "border[] on corruption, pure spite, or naked favoritism lacking any legitimate purpose." Op. 21 (quotation omitted). As made clear above, that is not a correct reading of *Merrifield*. Rather than grapple with the nuances of A.B. 5 and the government's alleged interests, the Panel simply side-stepped *Merrifield* entirely. Contrary to the Panel's unilateral limitation of *Merrifield*'s holding, *Merrifield* remains binding precedent and cannot be overruled except by the Ninth Circuit sitting *en banc* or the issuance of "clearly irreconcilable" higher authority. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc). The Panel's decision thus conflicts with *Merrifield*, and incorrectly upholds A.B. 5.

B. A.B. 5 Cannot Satisfy Rational-Basis Review Under *Merrifield*.

A.B. 5 fails the rational-basis standard, as explained by *Merrifield*, for at least three reasons. *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.

1. 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. The Legislature made no effort to justify these distinctions, and A.B. 5's legislative sponsor publicly conceded that the distinctions contained in A.B. 5 were "arbitrary." Katie Kilkenny, *"Everybody Is Freaking Out,"* Hollywood Rep. (Oct. 17, 2019), https://tinyurl.com/y4n6e3qp. A.B. 5's senseless divisions affect every industry in California, and have only become worse with the California Legislature's enactment of A.B. 2257, which has created an even more convoluted scheme with 109 additional exemptions.

A.B. 5's exemptions remain arbitrary. For example, the statute distinguishes freelance photo editors and videographers who work on still photos from freelance photo editors and videographers who work on motion pictures, imposing A.B. 5's stringent regulations only on the latter group. *See* Cal. Lab. Code § 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" (emphasis added)). The fact that the statute exempts "digital content aggregator[s]"

(including videographers) who may also work on motion pictures as part of their work further highlights the arbitrary treatment of videographers. *See id.* § 2778(b)(2)(I)(ii). Similarly, musicians who perform a "single-engagement live performance" at a venue no more than once per week are exempted from A.B. 5. *Id.* § 2780(b)(1). But musicians performing a "single-engagement live performance" at a theme park, amusement park, or as part of a musical theater production or symphony orchestra—even if it is only one performance per week—are not. *Id.* § 2780(b)(1)(A). 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, or for treating musicians who perform a "single-engagement" at a venue differently than a musician who performs a "single-engagement" at a theme park.

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" includes sole proprietors. *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 contractor 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. Freelance workers partnering with on-demand application companies like Postmates and Uber that perform driving services are not exempted, even though they are indistinguishable from referral services that received exemptions.[3] For example, A.B. 5 and A.B. 2257 include exemptions for twenty separate referral services, including consulting, caddying, wedding or event planning, services provided by wedding and event vendors, minor home repair, moving, errands, furniture assembly, dog walking, picture hanging, and pool cleaning. *Id.* § 2777(b)(2)(B). Yet "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,

[3] California's Proposition 22 provided a new exemption for "an app-based driver." Text of Proposed Laws, *Proposition 22*, Cal. Sec'y of State 31 (2020), https://tinyurl.com/yy4yybca. A California state court, however, struck down Proposition 22, and the case is currently on appeal. *See* Maeve Allsup, *Pro. 22 Backers Appeal Ruling Striking California Gig Work Law*, Bloomberg L. (Sept. 22, 2021), https://tinyurl.com/2jyw5ea5.

between providing local ***moving*** services (which are exempt), and providing local ***delivery*** or ***courier*** services, which are not exempt. These absurd and baseless distinctions between similarly situated workers cannot satisfy rational-basis review.

2. A.B. 5's Arbitrary Exemptions Undermine The Interests That A.B. 5 Claims To Protect.

A.B. 5 should also be set aside because it contradicts its stated purpose. 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). Although the Legislature intended to protect workers and 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. 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 statute put consumers "at a greater risk of abuse including exploitative prices").

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 companies from hiring those individuals. *See* Eli Rosenberg*, Can California rein in tech's gig platforms?*, Wash. Post (Jan. 14, 2020), https://tinyurl.com/y8vw7fjg. And the California Legislative

Analyst's Office projected a massive job ***loss*** among independent contractors even before the passage of A.B. 5. *See The 2020-21 Budget*, Cal. Legis. Analyst's Office; *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 (converting app-based drivers to 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 "pushed all of the risks and all of the costs of a vibrant gig economy onto lower- and middle-income individuals." *Open Letter*, Indep. Inst.; *see* Peter Buckley, *Bill AB5 and the Gig Economy*, 29 U. Mia. Bus. L. Rev. 49, 68 (2021) (noting that gig workers "lose their freedom to work when they want, and their job loses the appeal that drew them to it in the first place").

A.B. 5 eliminates income-earning opportunities for low- and middle-income workers. Unsurprisingly, companies operating in California cannot "reinvent their workforces overnight," or absorb A.B. 5's added costs, and will simply stop using gig workers. Louis Hyman, *California's new gig economy law was meant to help workers*, CNN (Jan. 9, 2020), https://tinyurl.com/y3p4by48. Indeed, to avoid the limitations created by A.B. 5, businesses are choosing not to hire California workers. *See* Buckley, *supra*, at 67 ("If the cost to transition from their current business model to a new one was too steep, companies would simply pull out of California

completely . . . ."); 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 Rev "stopped using workers in California"); Maeve Allsup, *Gig Companies Face California Crackdowns That Uber, Lyft Escape*, Bloomberg L. (Apr. 15, 2021), https://tinyurl.com/a4z27vd4 (noting that YourMechanic, a platform for skilled laborers, is considering leaving California).

These losses are devastating during the COVID-19 pandemic. Due to A.B. 5, freelance workers are unable to capitalize on the increased demand for certain services. *See* Ania Smith, *Covid-19 and the Gig Economy*, Forbes (Sept. 10, 2021), https://tinyurl.com/4hkj8b59 (describing the "massive need for services and a growing pool of newly available workers who needed to generate income"). Workers are further deprived of the many gig opportunities—such as freelance writing, transcribing, and interpreting, etc.—that could be done at home. *See* Bhuiyan, *supra* (highlighting one such freelance writer). 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). At the same time, A.B. 5 ignores the independent-contractor status of various occupations

typically held by high-income workers. *See* Cal. Lab. Code §§ 2778, 2783 (exempting doctors, lawyers, architects, engineers, accountants, securities brokers, direct salespersons, real estate agents, and certain various professional services providers). 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.

A.B. 5's scheme thus contradicts the Legislature's stated goals. 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.

3. A.B. 5 Exemplifies Economic Protectionism And Political Favoritism.

A.B. 5 also fails rational basis 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 A.B. 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.

Political and economic favoritism has been on full display with A.B. 5. To be sure, significant lobbying was reported even before A.B. 5's enactment. *See AB5 is now law in California.*, Openforce (Oct. 3, 2019), https://tinyurl.com/2f4zpwfe (noting successful lobbying efforts to secure exemptions). And it was no surprise that after A.B. 5's passage, various industries spent significant effort to lobby for further exemptions. *See, e.g.*, Lynn Rhinehart et al., *Misclassification, the ABC test, and employee status*, Econ. Pol'y Inst. (June 16, 2021), https://tinyurl.com/4cctx7fe (discussing significant lobbying for exceptions to A.B. 5 from various industries). Indeed, the "mishmash of last-minute exemptions" are arguably "based on little more than which industry groups were able to get legislators' ears in the hours before the statute was passed." *See* Michael Kun, *California Adds More Exemptions to Controversial Independent Contractor Statute*, JD Supra (Sept. 8, 2020), https://tinyurl.com/3w2cfnw. As a result of intense lobbying, the Legislature has picked winners and losers. *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; Margot Roosevelt et al., *Sweeping bill rewriting*

California employment law sent to Gov. Newsom, L.A. Times (Sept. 11, 2019), https://tinyurl.com/5ydcpd5z (discussing the lobbying effort by the California Chamber of Commerce and "score of trade associations"). At the same time, Uber and its allies were repeatedly rebuffed by the Legislature and had to seek a ballot initiative to obtain any relief. Rhinehart et al., *supra*.

Economic protectionism 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 Phila. 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."). Contrary to the Panel's ruling, rational basis does not allow laws like A.B. 5 that benefit the coffers of a few and, at the same time, force the unequal treatment of millions of workers.

II. THE CIRCUIT PANEL'S TOOTHLESS APPLICATION OF RATIONAL-BASIS REVIEW PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE.

At bottom, the Panel avoided any meaningful scrutiny of A.B. 5. Rational basis ***should be*** a meaningful check on unfounded and legally deficient state policy.

Such a check is particularly important in a case like this one where "speech is involved." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253-54 (2012).

The Panel's empty incantation of the rational-basis standard and rubber-stamping of the state's *post hoc* rationale for A.B. 5's arbitrary classifications reveals a serious danger. Namely, rational-basis review in its current form, *see FCC 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 engage with the state's proffered rationale for infringing on economic liberties.

This one-sided approach diminishes the importance of essential economic rights and subjects those rights 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 & Sentelle, JJ., concurring) (emphasis added) (citation omitted).

The Panel's toothless application of rational-basis review is also inconsistent with how courts historically reviewed the constitutionality of legislation: meaningfully examining reasonableness of 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 Panel's rubber stamp camouflaged as constitutional review—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 the *Merrifield* court 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 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[.]" *Armour v. City of Indianapolis*, 566 U.S. 673, 693 (2012) (Roberts, C.J., dissenting). A.B. 5 presents just such an opportunity.

CONCLUSION

For the foregoing reasons, the Institute respectfully requests that the Court grant Petitioners' Petition for Rehearing En Banc.

Dated: November 1, 2021

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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