No. 20-55408

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, INC., *et al.*,

Appellants,

v.

XAVIER BECERRA,
in his official capacity as Attorney General of the State of California,

Appellee.

On Appeal from the United States District Court
for the Central District of California
Case No. 19-cv-10645
The Honorable Philip S. Gutierrez, U.S. District Judge

Brief of Americans for Prosperity Foundation as *Amicus Curiae* in Support of Appellants and Reversal

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INTEREST OF *AMICUS CURIAE*

The Americans for Prosperity Foundation ("AFPF") is a 501(c)(3) organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. AFPF works toward these goals, in part, by defending the individual rights and economic freedoms that are essential to ensuring that all members of society have an equal opportunity to thrive. As part of this mission, it appears as an *amicus curiae* before federal and state courts.

AFPF is committed to ensuring the freedom of expression and association guaranteed by the First Amendment, particularly where those rights are crucial to economic freedom and prosperity. California Assembly Bill 5 ("AB5") imperils the rights of free speech, free association, and free enterprise. The independence of freelance service providers, including freelance writers, is a key part of the success of the modern American society and economy. Freelance work is essential to the new economy, in which both purchasers and providers of services value flexibility, independence, and adaptability. AB5 will directly harm the market for freelance

work, including the market for freelance writing. This irrational law will harm writers, slow economic growth, and undermine the financial and professional stability of countless Californians.[1]

STATEMENT

For decades, California classified service providers as employees or independent contractors based on the standard set forth in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 769 P.2d 399 (Cal. 1989). *Borello* establishes a multi-factor test that examines the service provider's business and the relationship between the contractor and the alleged employer. *Id.* at 404–05, 407. The *Borello* standard rests on the governing Restatement of the Law—Agency. *See id.* at 407 ("the Restatement guidelines . . . remain a useful reference"); *see also* Restatement (Second) of Agency § 220 (setting out multifactor test distinguishing servants from independent contractors); Restatement (Third) of Agency § 7.07 *cmt. F* (discussing "numerous factual indicia" "relevant to whether an agent is an employee").

Although California workers and businesses have relied on *Borello* for many years, last year the California Legislature adopted new rules for determining employee status. For many service providers, AB5 upends *Borello*'s settled system and

[1] This brief was not authored in whole or in part by a party or counsel to a party. No person other than the *amicus curiae* and its counsel contributed money intended to fund this brief.

replaces it with a new regime, commonly called the "ABC" test, that assumes a worker is an employee unless the alleged employer can prove: "(A) [that t]he person is free from the control and direction of the hiring entity . . . (B) [that t]he person performs work that is outside the usual course of the hiring entity's business [and] (C) [that t]he person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed." Cal. Lab. Code § 2750.3(a)(1). This new standard applies across a variety of state-law regimes, resulting in a broad range of additional obligations for businesses and independent providers.[2] Reclassification will translate into substantially higher costs and significant administrative burdens.

AB5's changes will have a widespread impact given the prevalence of free-lancing in the modern economy. Thirty-five percent of American workers, some 57 million people, freelance each year.[3] And these freelancers are not powerless low-

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[2] To take just one example, a self-employed writer reclassified as an employee could be eligible to contribute to a retirement account only one tenth to one third what she could have contributed while self-employed. *See COLA Increases for Dollar Limitations on Benefits and Contributions*, Internal Revenue Service (Dec. 21, 2019), https://www.irs.gov/retirement-plans/cola-increases-for-dollar-limitations-on-benefits-and-contributions.

[3] Adam Ozimek, *Freelancing in America: 2019*, Upwork (Oct. 3, 2019), https://www.upwork.com/press/economics/freelancing-and-the-economy-in-2019/.

wage workers—freelancing is most common among holders of post-graduate degrees; forty-five percent of freelancers are professionals selling skilled labor while fewer than one in three work in unskilled positions. Ozimek, *Freelancing in America*, *supra* note 3. The flexibility and independence that freelance work allows will only become more desirable in light of the current health crisis and resulting economic upheaval.

AB5's heightened burdens do not apply equally to all service providers. Instead, AB5 includes an array of special carve-outs that allow providers in certain industries to continue to be assessed under the *Borello* standard (and thus avoid the costs and burdens of employee status).[4] These exemptions are arbitrary. AB5's new standard applies to writers and musicians, but not to lawyers, accountants, or private investigators; it applies to nurse practitioners and occupational therapists but not to doctors or psychologists; it applies to seamen and farmhands but not to commercial fishermen. Cal. Lab. Code § 2750.3(b) (listing exempt providers).

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[4] AB5 purports to codify *Dynamex Operations West, Inc. v. Superior Court*. 416 P.3d 1 (Cal. 2018). But *Dynamex* adopted the ABC test *only* for wage orders, which set minimum wage, maximum hours, and a handful of other workplace regulations. *Id.* at 5. AB5 expands the ABC test to *all* employment contexts for most workers but, for the favored classes of service providers, it repeals the ABC test and restores the *Borello* standard even for the wage orders addressed in *Dynamex*. Cal. Lab. Code § 2750.3(b).

The boundaries separating favored and disfavored groups are equally arbitrary. For the freelance writers who brought this lawsuit, AB5's heightened standard applies only to writers who submit more than 35 pieces of writing to a single publication in a single year. Cal. Lab. Code § 2750.3(c)(2)(B)(x). And, while columnists and photographers who meet the 35-submission limit are subject to AB5's ABC test, advertising copy writers, graphic designers, and grant writers are assessed under *Borello* regardless of the number of contacts they have with individual clients. *Id.* § 2750.3(c)(2)(B). These exemptions, enacted with reference to little other than lobbying influence, place millions of Californians outside the reach of the new ABC test.[5] Exempted professions include manicurists, tutors, event planners, newspaper deliverymen, web designers, pool cleaners, and repossession agents. No rational standard connects the dozens of disparate service providers who are exempted from AB5.

AB5 is already having significant impacts on the California labor market. The Legislative Analyst's Office, a nonpartisan policy analyst attached to the California

[5] One exemption, for example, places California's 2.2 million direct sellers under the *Borello* standard. Cal. Lab. Code § 2750.3(b)(5); *see also Direct Selling Association Applauds Direct Seller Exemption in California AB 5*, Direct Selling Association (Sept. 26, 2019), https://www.dsa.org/events/news/individual-press-release/direct-selling-association-applaids-direct-seller-exemption-in-california-ab-5.

Legislature, estimates that "roughly 1 million workers" previously engaged as independent contractors will face reclassification as a result of AB5. *Staffing to Address New Independent Contractor Test*, Legislative Analyst's Office (Feb. 11, 2020), https://lao.ca.gov/Publications/Report/4151. This estimate *does not* include the tens if not hundreds of thousands of Californians currently employed in professions—commercial truck driving, journalism, or ride-share driving—that are challenging AB5 in court. *Id.* For reclassified Californians—more than 1 million people—AB5 could have a ruinous impact. Due to the increased costs and regulatory burdens of employee status, many of these workers will not be hired as employees and will lose their livelihoods entirely. Indeed, the Analyst's Office estimates that the number who successfully transition to employee status will be "much smaller than the roughly 1 million contracts that AB5 applies to" because, among other reasons, "[s]ome businesses may hire . . . some, but not all, of their contractors" and other businesses "may decide to stop working with their California-based contractors." *Id.*

AB5's consequences extend beyond the loss of income for service providers. For those businesses that do choose to retain service providers as employees, AB5 will lead to increased costs that are passed to consumers.[6] Some businesses will

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[6] Margot Roosevelt, *New California Labor Law AB 5 Is Already Changing How Businesses Treat Workers*, L.A. Times (Feb. 14, 2020), https://www.latimes.com/business/story/2020-02-14/la-fi-california-independent-contractor-small-

curtail their offerings, such as the Sierra Madre Playhouse, a non-profit theater company that cancelled its annual youth production after AB5 raised production costs by more than 70%. Roosevelt, *New California Labor Law*, *supra* note 6. Other organizations are closing down entirely because of AB5, such as the Lake Tahoe Academy Orchestra, which is closing its summer classical music program after more than forty years because of AB5.[7]

AB5's erratic approach to the freelance writing community, and in particular its arbitrary 35-article limit, will have severe impacts on the industry. As even the law's chief sponsor acknowledged, AB5's 35-submission cap is "a little bit arbitrary."[8] And because of that arbitrary cap, California freelancers are losing business with publications that previously paid them substantial sums. As the publisher of the *San Francisco Chronicle* explained, the inclusion of freelance writers "was a poorly considered part of the law, likely based on a fundamental misunderstanding of why companies use freelancers." Kilkenny, *Everybody Is Freaking Out*, *supra*

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business-ab5 (noting one small business that already raised prices more than 20% to accommodate increased costs).

[7] *Planning Update for 2020*, Lake Tahoe Music Festival (May 13, 2020), https://www.tahoemusic.org/index.html.

[8] Katie Kilkenny, *"Everybody Is Freaking Out": Freelance Writers Scramble to Make Sense of New California Law*, Hollywood Reporter (Oct. 17, 2019), https://www.hollywoodreporter.com/news/everybody-is-freaking-freelance-writers-scramble-make-sense-new-california-law-1248195.

note 8. In short, as the publisher continued, "AB5 will limit opportunities for some freelancers and silence a number of voices in the market." *Id.*

AB5's negative impacts fall disproportionately on writers for digital media outlets, which are often small and rely heavily on high-volume freelance contributions like blog posts.[9] Because of the 35-submission limit, online publishers located outside California are likely to cut ties with California writers or closely restrict the number of submissions purchased from each writer each year. One prominent New York-based media conglomerate, Vox Media, responded to AB5's passage by firing 200 independent writers who had worked with SB Nation, one of its sports publications.[10] Instead of contracting with those 200 writers as it had previously done, SB Nation intends to replace them with approximately 20 part- and full-time employees. Hussain, *Vox Media Cuts Hundreds*, *supra* note 10.

AB5's effects on the writing community will be widespread. AB5's 35-article limit makes the law's burdens fall most heavily on freelance writers who rely predominantly or exclusively on their writing as a career. These reporters, columnists,

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[9] Billy Binion, *California Freelancers Sue to Stop Law That's Destroying Their Jobs,* Reason (Dec. 23, 2019), https://reason.com/2019/12/23/california-freelancers-sue-to-stop-ab5-law-thats-destroying-their-jobs-pol-says-those-were-never-good-jobs-anyway/.

[10] Suhauna Hussain, *Vox Media Cuts Hundreds of Freelance Journalists as AB 5 Takes Effect*, L.A. Times (Dec. 17, 2019), https://www.latimes.com/business/story/2019-12-17/vox-media-cuts-hundreds-freelancers-ab5.

and commentators will face reduced publishing opportunities and falling incomes. If a previously independent writer is able to find a publication willing to offer employment, she may receive decreased compensation as her employer cuts pay to mitigate the increased costs of employment status. The writer will also have less control over her own schedule and less authorial independence as she is made to rely ever more closely on a particular employer. Transitioning to employee status also impacts a writer's ability to retain ownership of her own work product. While an independent writer is presumptively the owner of the copyright in the writer's works, the *employer* presumptively owns the copyright in an employee's work. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 742–43 (1989).

AB5 will also distort media content in California, benefitting large, legacy publications, such as major city newspapers, at the expense of other publications, including new digital platforms and smaller, more rural newspapers. That is so because larger legacy publications typically rely more heavily on employee staff writers, whereas smaller newspapers and digital media are more likely to rely on contributions from freelance writers (which is why three major cities—New York, D.C., and L.A., with only 13% of U.S. population—are home to more than one in five

newsroom employees).[11] Because of the rigid cap on contributions per writer, AB5 "strikes at the heart of how many small, local newspapers operate, with residents, or local officials writing weekly columns about everything from school sports to city politics."[12] The result will be the further decay of local journalism and diminished coverage of state and local politics in California, including coverage of the very legislators who voted to enact AB5,[13] and the amplification of the viewpoints expressed in big-city media at the expense of those carried in local and regional media platforms.

SUMMARY OF ARGUMENT

AB5 interferes with both the freedom of speech and the freedom of association protected by the First Amendment. Laws like AB5 that separate speakers into favored and disfavored classes based on the speaker's identity must, at the very least, satisfy the "intermediate level of scrutiny." *Turner Broad. Sys., Inc. v. FCC*, 512

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[11] Elizabeth Grieco, *10 Charts About America's Newsrooms*, Pew Research Center (Apr. 28, 2020) https://www.pewresearch.org/fact-tank/2020/04/28/10-charts-about-americas-newsrooms/.

[12] Jill Cowan, *Why Newspapers Are Fighting California's Landmark Labor Bill*, N.Y. Times (Sept. 12, 2019), https://www.nytimes.com/2019/09/12/us/newspapers-gig-economy-bill-california.html.

[13] *See* Mary Ellen Klas, *Less Local News Means Less Democracy*, Nieman Reports (Sept. 20, 2019), https://niemanreports.org/articles/less-local-news-means-less-democracy/.

U.S. 622, 662 (1994).[14] To meet this standard, "the Government bears the burden of identifying a substantial interest and justifying the challenged restriction" by proving that "'the regulation directly advances the governmental interest asserted, and . . . is not more extensive than is necessary to serve that interest.'" *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 183 (1999) (quoting and applying *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980)); *see also Turner*, 512 U.S. at 662 (speaker discrimination must "'further[ ] an important or substantial governmental interest'" and impose no "'restriction on alleged First Amendment freedoms . . . greater than is essential to the furtherance of that interest'" (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968))). "California's burden under this test is 'heavy,' *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996), and the Attorney General cannot satisfy it 'by mere speculation or conjecture.' *Edenfield v. Fane*, 507 U.S. 761, 770 (1993)." *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1176 (9th Cir. 2018).

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[14] AFPF agrees with the Plaintiffs' contention that AB5 is properly viewed as a content-based regulation and is subject to strict scrutiny. Rather than repeat the Plaintiffs' arguments in that regard, this brief demonstrates that AB5 also fails even the less severe intermediate scrutiny independently required by AB5's speaker-based discrimination and intrusion on associational freedoms.

AB5 also creates regulatory and financial barriers that discourage writers from associating with publishers to spread their ideas to the public. It discourages like-minded writers and publishers from associating with one another through common participation in a shared media outlet. Laws like AB5 that impede the freedom of association in this way are properly subject to heightened scrutiny. California therefore bears the burden of showing that the law serves "a sufficiently important interest" and "employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *Buckley v. Valeo*, 424 U.S. 1, 25 (1976).

Under the heightened scrutiny standard of *Greater New Orleans*, *Turner*, and *Buckley*, once an invasion of a protected freedom is shown, AB5 is presumptively invalid unless California identifies a sufficiently important government interest and proves that AB5 will address that interest. California "must do more than simply 'posit the existence of the disease sought to be cured.'" *Turner*, 512 U.S. at 664 (plurality opinion) (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985)). California "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.*

California has not demonstrated the existence of any societal ill that will be redressed by AB5. To the contrary, ample evidence already suggests that AB5 will injure the very service providers it is intended to assist. AB5 threatens the livelihood

of hundreds of thousands of Californians, will raise costs for the public, and endangers the viability of small businesses, including the local newspapers and publishers that are vital to the survival of a diverse free press in this State.

ARGUMENT

I. AB5 Is Subject to Heightened Scrutiny

AB5 creates two classes of journalists. Those who publish infrequently receive favored treatment under the statutory regime and may continue to contract under the *Borello* standard as independent contractors, exercising control over their work relationships and retaining ownership of their writing. Those who publish frequently, by contrast, are disfavored and subject to the increased costs and burdens of the ABC test and employment status. These writers may no longer be able to find a publisher willing to pay for their services. If they are able to find work at the desired frequency, they are likely to lose ownership of their writing and receive lower compensation.

The effects of AB5—loss of income, diminished ability to publish, loss of ownership over written work—impair independent writers' ability to speak to the public and make a living from writing. These effects impose burdens on writers' ability to speak freely, which is protected by the First Amendment. More troublingly, AB5 imposes these burdens only on some writers, while leaving others (and many non-writer professionals) free to operate without those burdens. When the

State uses an ostensibly neutral rule to separate speakers into distinct classes subject to discriminatory regulations, the speaker-identity classification must, at the very least, satisfy heightened scrutiny.

A. AB5 Classifies Speakers into Favored and Disfavored Groups

Laws that appear, on their face, to be neutral and unrelated to speech can have the effect of suppressing the open public discourse that the First Amendment exists to protect. When a neutral law has the effect of fencing out certain voices from the public arena, or of reducing the amount of speech that one voice can contribute, it can distort the views available to the public. Indeed, "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). But even "apart from the purpose or effect of regulating content," "the Government may commit a constitutional wrong when by law it identifies certain preferred speakers." *Id.*; *see also Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (striking down discriminatory tax without assessing effect on content). That is because discriminatory laws put government in the position of policing who may and may not speak freely, an exercise fraught with danger to the free exchange of ideas.

Laws that classify speakers into groups, governed by differing legal regimes, layer equal protection concerns on top of free speech concerns. These classifications result in "discrimination among different users of the same medium for expression."

Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972). In such cases, an "equal protection claim . . . is closely intertwined with First Amendment interests," and special care must be taken before permitting the law. *Id.* at 95. And when the State enacts laws like the 35-submission limit that impose special burdens on a particular subset of speakers, there is particular cause for concern. Laws aimed at particular members of the institutional press, for example, are suspect because they "can operate as effectively as a censor to check critical comment by the press." *Minneapolis Star & Tribune*, 460 U.S. at 585. The same concerns arise from laws that burden subclasses of speakers of any kind because the Supreme Court has "'consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.'" *Citizens United*, 558 U.S. at 352 (citation omitted).

The First Amendment's non-discrimination principle appears in decades of precedent establishing that laws based on the identity or characteristics of a speaker must withstand heightened scrutiny. Taxing and licensing schemes that target some but not all publishers have been invalidated as a result of this principle. So too, campaign finance laws that discriminate between donors and speakers based on the donor's identity have fallen afoul of the principle. AB5, by separating writers into classes based on the writer's volume of writing and the variety of publications for which he writes, discriminates among writers based on the writer's identity.

1. Regulating for-profit journalists based on speaker identity is subject to heightened scrutiny

AB5 is but the latest in a long line of economic regulations that impose barriers to speech on a discriminatory basis. In a particularly notorious instance, Louisiana enacted a surcharge tax on the gross advertising receipts of all newspapers in the state with a weekly circulation of over 20,000 copies. *Grosjean v. Am. Press Co.*, 297 U.S. 233, 240 (1936). Only thirteen of Louisiana's 120 weekly newspapers met the threshold, and twelve of the thirteen had been loudly critical of then-Senator Huey Long. *Minneapolis Star & Tribune*, 460 U.S. at 579. The Court invalidated the discriminatory tax regime, but notably *did not* rest its reasoning on the legislature's content-based ulterior motive. Instead, it struck down the tax because its discriminatory criterion, based on the volume of speech reaching the public, tended to "limit the circulation of information to which the public is entitled." *Grosjean*, 297 U.S. at 250. Just as Louisiana's discriminatory tax, based on the number of copies sold, threatened to suppress the volume of speech available to the public, so too AB5's 35-submission threshold threatens to suppress the volume of speech available to the public. It must be subject to the same rigorous scrutiny.

Grosjean's skepticism of speaker-based regulation is one of many economic-regulation cases adopting the non-discrimination approach to free speech. In *Greater New Orleans*, the Supreme Court considered a federal statute that allowed

broadcast radio and television stations to carry advertising for tribal casinos and government operated nonprofit casinos while prohibiting advertising for privately operated commercial casinos. 527 U.S. at 190. The Court applied heightened scrutiny to the statute. Before assessing the evidence in support of the Government's asserted interest—that the prohibition was necessary to reduce compulsive gambling—the Court identified a "fundamental" flaw in the Government's case. *Id.* "The [statute] and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it." *Id*. Because "the Government presents no convincing reason for pegging its speech ban to the identity of the owners or operators of the advertised casinos," the Government could not meet its burden under the heightened scrutiny analysis. *Id.* at 191.

The Supreme Court similarly applied heightened scrutiny to a speaker-identity based rule in *Minneapolis Star & Tribune*, 460 U.S. 575. The Court examined a "use tax" that applied to the paper and ink used in printing newspapers. *Id.* at 581. Even though the State's tax system exempted newspapers from the sales taxes applicable to other businesses, the Court expressed serious concern with the use tax applicable only to publishers. Given the "special problems created by [the] differential treatment" under the tax, which "singled out the press," the Court concluded that "a heavier burden of justification" was required than would apply to a run-of-the-mill economic regulation. *Id.* at 582.

As these cases demonstrate, it is no defense for California merely to assert that AB5 is an economic regulation. Even economic regulations of for-profit entities must withstand heightened scrutiny if they discriminate based on the identity of the speaker.

2. Regulating the transmission of speech to the public based on the speaker's identity is subject, at a minimum, to heightened scrutiny

The Supreme Court has taken the same critical approach to restrictions on the financial transactions necessary to distribute speech to the public when those laws are based on the identity of the organization making the expenditures. In a succession of cases, the Court has rejected legislation that purports to prohibit corporations from spending money to purchase and publish speech. *See, e.g.*, *Citizens United*, 558 U.S. 310; *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Buckley*, 424 U.S. at 23, 39 n.45; *United States v. CIO*, 335 U.S. 106, 155 (1948) (Rutledge, J., concurring).

These decisions reject the suggestion that "speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation . . . ." *Bellotti*, 435 U.S. at 784. Indeed, such a law must fail because "the legislature is constitutionally disqualified from dictating the subjects about which persons may speak *and the speakers who may address a public issue.*" *Id.* at 784–85 (emphasis added). Crucially, *Bellotti*'s holding "did not rest

on the existence of a viewpoint-discriminatory statute" but on "the principle that the Government lacks the power to ban corporations from speaking." *Citizens United*, 558 U.S. at 347.

The Court reiterated and reaffirmed this principle in *Citizens United*, holding that "the Government may not suppress political speech on the basis of the speaker's corporate identity." 558 U.S. at 365. *Citizens United* rejected a statute that prohibited corporations from making independent expenditures putting speech into the marketplace. The Court drew particular attention to the exemptions in the statute that excluded some corporations—media organizations—from the otherwise applicable prohibition on corporate expenditures. The law's discriminatory design "disclose[d] further difficulties with the law" because it rested on a presumption that the Government could identify certain favored speakers who should be exempted from otherwise applicable burdens on speech. *Id*. at 352. The statute's attempt to "exempt[] some corporations but cover[] others" served as "a further, separate reason for finding this law invalid" because "differential treatment cannot be squared with the First Amendment." *Id.* at 352–53; *see also Appalachian Power Co. v. Sadler*, 314 F. Supp. 2d 639, 643 (S.D.W. Va. 2004) (striking down prohibition on corporate contributions that applied only to railroads or utility companies).

Like campaign finance restrictions that apply only to some participants in the regulated activity based on the identity of the donor, AB5 burdens speech based on

the identity of the writer. That attempt to impose different regulatory systems based on the characteristics of the speaker is constitutionally suspect under the reasoning of *Bellotti* and *Citizens United*. AB5 runs afoul of the speaker-identity standard in at least two ways. First, it separates freelance writers and photographers from other similarly expressive or persuasive professions (graphic designers, grant writers, or advertising professionals, for example) without any justification for the differential treatment. Second, it draws arbitrary distinctions between writers who sell more than 35 submissions each year to the same publisher and writers who do not. Both categorizations single out speech for differential treatment based on the nature of the speaker, necessitating careful and skeptical judicial scrutiny under the First Amendment.

B. AB5 Impinges on the Right of Writers and Publishers to Associate Freely

AB5 also imposes substantial burdens on the ability of writers to associate freely with publishers. By increasing the costs that a publisher faces from recurrent association with a writer, AB5 creates an incentive for publishers to minimize their contact with individual writers. Similarly, by imposing the increased costs of employee status on writers who generate a high volume of content, AB5 creates an incentive for writers to reduce their total output or limit their interactions with particular publications. In both of these ways, AB5 has a direct chilling effect on the ability of like-minded writers and publishers to cooperate to promote shared ideas

or messages. Finally, by discouraging long-running in-depth relationships between individual authors and a single outlet, AB5 discourages writers with similar views from associating with one another through frequent publication in a shared outlet.

By increasing the costs of close association between writers and publishers and, as a result, limiting the number of avenues for writers to communicate to the public on an ongoing basis, AB5 imposes economic burdens on independent writers. Those who publish more than 35 articles per year may be forced to abandon their independent status and take on employee status, surrendering the flexibility of freelance work. These regulatory burdens, which increase the barriers—financial and practical—to association even without outright prohibiting the association, necessarily invade the freedom of association protected by the First Amendment.

States must tread with caution when they seek to impose barriers on associations formed for the purpose of transmitting ideas into the public sphere. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech"). When a publisher purchases an article from a freelancer, they form an association intended to put the writer's ideas—his written work—before the public. And when one publisher sets out to advocate for particular ideas, or comment on a particular subject matter, the publisher provides a platform

for likeminded writers to associate with the publisher and one another in furtherance of that common goal. By requiring employment status for writers who associate repeatedly with a particular media outlet, California has imposed heightened financial and regulatory burdens on such associations in a targeted manner. And for many writers, the practical effect of those increased costs will be to reduce or eliminate such associations, by discouraging publishers from connecting with freelancers and raising—to unsustainable levels—costs for publishers that now depend on freelancers.

As with AB5's impingement on speech, the mere fact that AB5 burdens associational rights by imposing financial burdens rather than direct prohibitions does not lessen the constitutional harm.[15] Laws that raise the costs and difficulty of association, even without expressly prohibiting association, are constitutionally suspect. For example, in *Healey v. James*, the Court struck down a school policy that denied official recognition to a student organization. 408 U.S. 169 (1972). Denial of official recognition did not prohibit the students from gathering to discuss ideas, but it

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[15] So too, the mere fact that AB5 is an employment regulation does not lessen its interference with associational rights. The Supreme Court has repeatedly struck down employment-based regulations that imposed reputational and professional burdens on an employee's ability to associate freely. *See, e.g.*, *Shelton v. Tucker*, 364 U.S. 479, 489–90 (1960) (employment requirement that teachers disclose membership in political and social organizations violates First Amendment); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 609–10 (1967) (same).

did raise the burdens for the association by "den[ying it] use of campus facilities for meetings [and] use of campus bulletin boards and the school newspaper." *Id.* at 181. Nonrecognition, even without prohibition, made it more difficult for the group to promote its ideology, endangering its ability "to remain a viable entity in a campus community in which new students enter on a regular basis." *Id.*

AB5 erects similar barriers to association: It imposes increased costs on associational activities between publishers and freelancers. Indeed, for many writers, AB5 will endanger their ability to maintain a viable career as writers promoting particular views or ideas. It will cut writers off from lasting relationships with publishers and undermine the financial stability of publishers that frequently rely upon independent columnists or critics. AB5, as a restriction on the freedom of association, "'is subject to the closest scrutiny'" and may only survive if California "demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *Buckley*, 424 U.S. at 25 (quoting *NAACP*, 357 U.S. at 460–61).

II. AB5's Classifications Cannot Survive Heightened Scrutiny

Under the heightened scrutiny standard, which must be satisfied both because AB5 is a speaker-based regulation and because it interferes with the freedom of association, California "bears the burden of identifying a substantial interest" to be achieved by AB5, showing that AB5 "'directly advances the governmental interest

asserted,'" and showing that AB5's burdens are "'not more extensive than is necessary to serve that interest.'" *Greater New Orleans Broad.*, 527 U.S. at 183 (quoting *Cent. Hudson*, 447 U.S. at 566).[16] California fails all three elements of this standard. It has not shown that there is a substantial government concern that demands the State's intervention to remedy. And it has not shown that AB5 will actually remedy the alleged concern, much less that it is closely tailored to do so.

California may not defend AB5 merely by asserting that it was adopted to serve a pressing public need.[17] "When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.'" *Turner*, 512 U.S. at 664 (plurality opinion) (quoting *Quincy Cable TV*, 768 F.2d at 1455).

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[16] The district court erred by applying rational basis review to Plaintiffs' equal protection claim. "Where a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force." *City of Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 496 (1986).

[17] It is insufficient for California to argue that AB5 lacks illicit intent. The Supreme Court has "'long recognized that even regulations aimed at proper government concerns can restrict unduly the exercise of rights protected by the First Amendment.'" *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (quoting *Minneapolis Star & Tribune*, 460 U.S. at 592). Just as a law that "is content based . . . is subject to strict scrutiny regardless of the government's benign motive," *Reed v. Gilbert*, 135 S. Ct. 2218, 2228 (2015), so too a law that is speaker based must be subject to heightened scrutiny regardless of the innocence of the government's motive.

"It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id*. California has done neither.

The district court erred by accepting, without any evidentiary foundation, California's contention that AB5 addresses a substantial government interest. California posits widespread employee "misclassification" based on a twenty-year-old survey and, without support, ascribes "the erosion of the middle class and the rise in income inequality" to that failure. D.E. 36 at 3. But the empirical evidence fails to back up AB5's "misclassification" claim or in any way link misclassification to declining incomes or rising inequality. Freelance work allows people who otherwise would not work into the labor market; it is not merely a lower status forced upon full-time employees. Roughly one quarter of freelance workers are students, five percent are retirees, fewer than one half describe themselves as employed full-time,[18] and half of freelancers say that personal circumstances would make a traditional job impossible even if it were offered to them.[19] The widespread adoption of work-from-home and other flexible work arrangements in response to the current health

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[18] Aaron Smith, *Gig Work, Online Selling & Home Sharing*, Pew Research Center (Nov. 17, 2016), https://www.pewresearch.org/internet/2016/11/17/labor-platforms-technology-enabled-gig-work/.

[19] Ozimek, *Freelancing in America*, *supra* note 3.

crisis will only increase the draw of independent work arrangements. The most common motivation for gig work is "simply having fun or having something to do in their spare time," but freelancers also value control over their own schedule and the ability to fill in fluctuations in other sources of income. Smith, *Gig Work*, *supra* note 18. Nearly eighty percent of freelancers say independent work is better than traditional employment and say freelancing makes them more likely to feel respected and empowered.[20] Contrary to California's assertion, freelancers choose to work independently because of the benefits it brings them, not because they are misclassified employees.

Even if the State had identified a general misclassification problem, California has introduced no evidence suggesting a problem in the market for freelance writing that would justify the burdensome and arbitrary approach AB5 takes toward the freelance writing market. And without actual evidence of a defect in the market for writing, California cannot justify a law that burdens the dissemination of speech through that market. "[T]he mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation from" application of traditional "First Amendment standards." *Turner*, 512 U.S. at 640.

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[20] *Infographic: Freelancing in America 2016*, Upwork, https://s3-us-west-1.amazonaws.com/adquiro-content-prod/documents/FU_FreelancinginAmerica2016_Infographic_FINAL.pdf.

AB5 also fails heightened scrutiny because California has not carried its burden of establishing that AB5 meaningfully addresses the alleged problem. A law "may not be sustained if it provides only ineffective or remote support for the government's purpose." *Cent. Hudson*, 447 U.S. at 564. The Court "may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803 n.22 (1984). California must prove AB5's efficacy.

The district court skipped this step entirely. The court asked only whether a substantial interest existed, whether the restriction was content based, and whether incidental impingements on speech were broader than necessary. ER27. At no point did the court require California to establish that AB5 will remedy the concerns it was purportedly enacted to address. Had the court held California to its burden, it could not have sustained AB5.

California has not introduced any evidence, or even proposed a plausible theory, that demonstrates that AB5 will improve the position of the freelance workers it purports to protect. Moreover, any claim to that effect is highly implausible in light of AB5's arbitrary and inconsistent variations between the ABC test and the *Borello* standard. When rules apply inconsistently, tightly regulating some actors while allowing others to operate freely, the government faces additional obstacles in

proving that the higher burden on the disfavored class is necessary to serve the purported government interest. *See Greater New Orleans Broad.*, 527 U.S. at 187 (inconsistent regulation undermined alleged interest in discouraging gambling); *see also Citizens United*, 558 U.S. at 352.

Here, California must defend the legislature's decision to impose the ABC test in some professions, such as high-volume freelance writing, while placing other professions under the more permissive *Borello* standard. California has not demonstrated any relevant differences between the ABC professions and the *Borello* professions that would justify its discriminatory approach. Indeed, in light of the "overall irrationality of the . . . scheme," AB5 "cannot directly and materially advance [the State's] asserted interest." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995). California has not even attempted to offer a justification for AB5's piecemeal structure. As a result, AB5 cannot survive heightened scrutiny.

CONCLUSION

AB5 is subject, at a minimum, to heightened scrutiny because it discriminates among professions (and among individual writers within the writing profession) based on the identity and communicative activities of the freelancer. AB5 is further subject to heightened scrutiny because it interferes with the right of writers and publishers to associate freely with one another. It cannot survive that scrutiny. California has not shown that AB5 is a response to an important policy problem, nor has it

proven that AB5, riddled as it is with inconsistencies and exemptions, will remedy that problem. The Court should reverse the decision below.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I am counsel for *amicus curiae* Americans for Prosperity Foundation. This brief contains 6,450 words, excluding the items exempted by Federal Rule of Appellate Procedure 32(f). The brief's size and typeface comply with Federal Rule of Appellate Procedure 32(a)(5) and (6). I certify that this brief is an *amicus* brief and complies with the word limit of Federal Rule of Appellate Procedure 29(a)(5).

Dated: May 22, 2020

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