No. 21-1172

In The
Supreme Court of the United States

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

v.

ROB BONTA,
Attorney General of the State of California,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The questions presented ask this Court to resolve a circuit split on important questions of law. Unless this Court acts, thousands of independent freelance voices will remain silenced in California, without ever receiving judicial scrutiny of their First Amendment claims. This Court should grant review.

ARGUMENT

I

THE NINTH CIRCUIT IMMUNIZED ECONOMIC REGULATIONS FROM FIRST AMENDMENT SCRUTINY, INCONSISTENT WITH THIS COURT'S PRECEDENTS

A. California Law Imposes a Facially Content-based Burden on Speech

California permits favored speaking professionals—those engaged in "marketing, graphic design, grant writing, fine art, or speech related to sound recordings and musical compositions"—to freelance, while burdening writers, photographers, and videographers who produce other types of speech with onerous financial obligations and regulations. *Compare* Cal. Lab. Code § 2778(b)(2)(A) *with* § 2778(b)(2)(I)(i). Section 2778's favored treatment of some types of speech and speakers over others is content-based under *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), and *City of Austin v. Reagan Nat'l Advert. of Austin*, 142 S. Ct. 1464 (2022).

Respondent's Brief in Opposition, like the Ninth Circuit decision it defends, skips "the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face." *Reed*, 576 U.S. at 165. In so doing, Petitioners' First Amendment claims receive no scrutiny at all. App. A-19–20.

The Ninth Circuit brushed aside the statute's facially content-based standard because favoring marketing speech over journalistic speech does not "reflect[] a legislative content preference" for a particular topic or viewpoint. App. A-18. But content-based laws that target the "function or purpose" of speech are also content-based—regardless of the topic or viewpoint. *Reed*, 576 U.S. at 164. Whether a professional service is subject to Section 2778's exemptions or is instead saddled with additional restrictions "depend[s] entirely on [its] communicative content." Pet. at 18 (quoting *Reed*, 576 U.S. at 164).

Euphemisms about "the terms of the worker's contract, the nature of the work, the job title, and the type of industry," Opp'n at 11, "simply [ ] swap[] an obvious subject-matter distinction for a 'function or purpose' proxy that achieves the same result." *City of Austin*, 142 S. Ct. at 1474. Unlike federal labor regulations that turn on content-neutral factors such as how work is performed or worker qualifications, *see, e.g.*, 29 C.F.R. § 541.301, why freelancers speak and what they say determines how they are regulated under Section 2778. If the Fair Labor Standards Act (FLSA) applied to journalists but not marketers, this Court could not have said that its "purpose was to

place publishers of newspapers upon the same plane with other businesses." *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 194 (1946); *see* 29 C.F.R. § 541.302(c)–(d) (applying FLSA equally to journalists and advertisers). Section 2778 is not susceptible to a similarly equitable assessment.

Like the sign code in *City of Austin*, Section 2778 does not restrict what can be said. But both laws burden speech. Austin regulated how messages could be displayed (digital vs. analog), and Section 2778 dictates how a freelancer is regulated. Austin's sign code was "agnostic as to content"—applying different rules for approving digitized signs based only on a sign's location. 142 S. Ct. at 1471. Not so here. If AB5 regulated signs, it would allow a digitized sign that said, "Got milk?" (marketing) and burden one stating, "California faces milk shortages" (journalism).

Section 2778 favors marketing over other forms of speech freelancers might produce. App. F-14–19. *Only* freelancers producing unfavored speech may not "directly replace an employee who performed the same work at the same volume" and may not "primarily perform the work at the hiring entity's business location." Pet. at 8–9. And *only* those unfavored speakers are restricted from communicating through video. *Id.* "Marketing" is "speech with a particular content," *Sorrell,* 564 U.S. at 564, meaning this is a facially content-based burden on speech.

Respondent views *Sorrell* solely as a viewpoint discrimination case. Opp'n at 13 n.5. This argument ignores *Sorrell*'s core holding, as well as the record

evidence that freelance journalists and videographers offer unique voices that are stifled, when not completely silenced, by AB5. Pet. at 12–13. This "subtler form" of content-based discrimination "favors those who do not want to disturb the status quo [and] may interfere with democratic self-government and the search for truth." *City of Austin*, 142 S. Ct. at 1472 n.4 (quoting *Reed*, 576 U.S. at 174 (Alito, J., concurring)). The simple fact that AB5 picks winners and losers based on the content of speech requires strict scrutiny. *Id.*[1] Yet the Ninth Circuit applied no scrutiny at all.

Contrary to Respondent's assertion, Opp'n at 12, "communicative content" has always been the touchstone of Section 2778's application and Petitioners' argument. Pet. at 3, 11–12, 16, 18. Just as the Town of Gilbert treated directional and political signs differently, Section 2778 treats marketing and journalism messages differently. A freelance writer who creates and sells marketing flyers promoting a book club is regulated under Section 2778's general professional services exemption for marketing, but if the same writer drafts an editorial or news article

[1] Strict scrutiny applies even when the government burdens, rather than bans, protected speech based on content. *See United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 812 (2000) ("The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans."); *Sorrell*, 564 U.S. at 565–66 ("Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content."). *See also Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) (content-based financial burden); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 581 (1983) (speaker-based financial burden).

about the group, a different and more onerous set of restrictions govern that speech. Pet. at 18–19. Respondent offers no response to this example of differential treatment.

The differential treatment is significant. More than 35 amici on behalf of hundreds of thousands of freelancers seek this Court's review of the career-silencing restrictions imposed by Section 2778's discriminatory treatment of unfavored speech and speakers. The problem is real and urgent. Pet. App. S-4; R-3–5; Q-2–3. If a freelancer's speech does not fit within the favored professional services exemptions, additional restrictions on her ability to freelance govern how, where, and how much she can communicate. Pet. at 10–11. Those restrictions are often impossible for freelance journalists to meet, *id.* at 11–12, effectively foreclosing a freelancer from working independently because creating and sharing ideas through words and images is not "work that is outside the usual course of the hiring entity's business." *Id.* at 7.[2] None of those burdens attach if

[2] Petitioners do not argue that *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341 (1989), rubberstamps all independent contracting arrangements, but the ABC test absolutely precludes them. *Contra* Opp'n at 11 n.3. Respondent does not dispute that "[u]nder *Borello*, freelance writers and photographers like Petitioners' members worked as independent contractors for decades" or that "AB5's expansion of the ABC test means that freelance journalists are classified as employees of the clients for which they produce content." Pet. at 6–7. *See, e.g., D.A.R.E. America v. Rolling Stone Magazine*, 101 F.Supp.2d 1270, 1279–80 (C.D. Cal. 2000) (applying case analyzed by *Borello* to hold writer was independent contractor), *aff'd* 270 F.3d 793 (9th Cir. 2001)); *Ali v. L.A. Focus Publ'n*, 112 Cal.App.4th 1477, 1484–86 (2003) (remanding for

the freelancer instead produces speech with a favored communicative content.

Respondent mischaracterizes these burdens on unfavored services as applying without regard to content, but this puts the cart before the horse. Opp'n at 10–11. Respondent's argument confuses which limitations apply (based on content) with what the limitations restrict (not based on content). The limits Section 2778 imposes on some speakers—replacing an employee, primary work location, ability to communicate with video—do not themselves regulate content (although all burden speech similarly to Austin's billboard digitization rules). But the threshold question here, unlike in *City of Austin*, is content-based: what type of speech is this worker producing? Only the answer to that content-based question determines how the restrictions apply; Section 2778 "differentiate[s] between speakers based on their message." Opp'n at 7.

B. Review Is Warranted Based on Conflicts Among the Lower Courts and the Evolution of This Court's Precedents

The First Amendment prohibits the government from regulating based on the "function or purpose" of speech to favor particular speech or speakers. *Reed*, 576 U.S. at 163. And laws that single out marketing for special treatment regulate "speech of a particular content." *Sorrell*, 564 U.S. at 564. Under those well-

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consideration under *Borello* whether newspaper columnist was employee or independent contractor).

established standards, Section 2778 is content-based and should have faced strict scrutiny.

Yet the Ninth Circuit's confusion reflects disarray among lower courts on how and when to apply *Reed* and *Sorrell*. Respondent dismisses these divergent decisions as "fact-intensive applications of *Reed*'s general principle," but that is precisely the problem. The lower courts need guidance on what facts call for application of these tests, and this case offers a clean vehicle to clarify how and when they apply.

City of Austin "extensively discussed the 'function or purpose' language from *Reed*," Opp'n at 14, refining that test and holding that even a content-neutral law must be examined for evidence of "impermissible purpose or justification" and measured against intermediate scrutiny if the law is found to be genuinely content-neutral. *City of Austin*, 142 S. Ct. at 1475–76. The Ninth Circuit's decision applied no level of First Amendment review at all—inconsistent with *City of Austin*, *Reed*, and *Sorrell*, as well as other lower court decisions. Full review is warranted, but at the very least this case should be remanded to allow the panel to apply *City of Austin* in the first instance. *See Pakdel v. City & Cty. of San Francisco*, 141 S. Ct. 2226, 2229 (2021) (vacating and remanding given this Court's intervening decisions).

II

LOWER COURTS NEED STANDARDS TO KNOW WHEN INCIDENTAL SPEECH BURDENS IN BROADER REGULATIONS WARRANT HEIGHTENED SCRUTINY

A. Courts Conflict on Approaches to First Amendment Burdens in Economic Regulations

The process of creating pure speech (such as writing or videography) and the product of these processes (the news article or essay or the "film at 11:00") are equally protected by the First Amendment. *See, e.g.*, *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 792 n.1 (2011) ("Whether government regulation applies to *creating*, distributing, or consuming speech makes no difference.") (emphasis added). This is true even when the speech restriction is connected to economic regulation. *Simon & Schuster*, 502 U.S. at 118 (invalidating "[t]he Son of Sam law" because it "establishe[d] a financial disincentive to *create* or publish [written] works") (emphasis added). When economic regulation creates incentives and disincentives based on the nature and purpose of the speech to be created, it is a speech restriction subject to First Amendment scrutiny.

Respondent argues that regulations must "uniquely burden" speech to warrant First Amendment review. Opp'n at 9. This is plainly wrong. *Cornelio v. Connecticut*, 32 F.4th 160, 169 (2d Cir. 2022), quoting *Zieper v. Metzinger*, 474 F.3d 60, 65 (2d Cir. 2007) ("It is well-established that First Amendment rights may be violated by the chilling

effect of governmental action that falls short of a direct prohibition against speech."). This Court consistently reviews laws—even content-neutral laws—that impose incidental burdens on speech. *See, e.g.*, *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994); *Ward v. Rock Against Racism*, 491 U.S. 781, 789, 791 (1989) (granting certiorari "to clarify the legal standard applicable to governmental regulation of the time, place, or manner of protected speech."). In *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988), this Court held that Virginia's tort of intentional infliction of emotional distress was "a law of general applicability" unrelated to the suppression of speech, but when used to penalize the expression of opinion, the law was subject to First Amendment scrutiny.

Likewise, courts generally treat day laborer traffic ordinance cases—ostensibly governing traffic safety—as regulations of speech. *See, e.g.*, *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 112 (2d Cir. 2017) ("Although the Ordinance has a conduct component—the attempted stopping of a vehicle—the Ordinance only punishes such conduct if done 'for the purpose of soliciting employment.'" Town officials who "monitor and evaluate the speech of those stopping or attempting to stop vehicles … may sanction the speaker only if a suspect says the wrong thing, for example, 'hire me' as opposed to 'tell me the time.'"); *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 818, 823 (9th Cir. 2013) ("Arizona may prohibit pedestrians and motorists from blocking traffic, and it has done so." But "it may not, consistent with the First Amendment, use a content-based law to target

individuals for lighter or harsher punishment because of the message they convey while they violate an unrelated traffic law. Such disparate treatment implicates the First Amendment.").

Notwithstanding those cases, courts remain conflicted as to when an incidental burden warrants heightened scrutiny. Three cases decided since the Petition was filed illustrate the confusion, with the Eleventh Circuit holding that economic licensing laws that incidentally burden speech do not warrant First Amendment scrutiny and the Missouri Supreme Court and Texas Court of Appeals holding that they do.

In *Del Castillo v. Secretary, Fla. Dep't of Health*, 26 F.4th 1214, 1219 (11th Cir. 2022), an unlicensed nutritionist challenged an occupational licensing requirement on First Amendment grounds because her business—giving clients individualized dietary and nutrition advice—solely consists of speech activity. The Eleventh Circuit held that the licensing scheme did not violate the nutritionist's First Amendment rights because the overall purpose of the law was to regulate professional conduct and had only an incidental effect on her speech. *Id.* at 1220, 1225. The court refused to apply any scrutiny to the nutritionist's First Amendment claims.

In *Fox v. State*, 640 S.W.3d 744, 747, 750 (Mo. 2022), the Missouri Supreme Court considered a First Amendment challenge to a state law that required criminal defense lawyers to provide information to victims of sexual assault prior to interviewing them. The state argued that the law simply regulated

professional conduct with only an incidental burden on speech, analogous to informed consent laws, *id.* at 752, but the court disagreed: "Conduct—engaging in an interview—may trigger the speech requirement, but the disclosures are the true focus of the statute." *Id.* As a result, the court reviewed the disclosure law under strict scrutiny.

Finally, in *Stonewater Roofing, Ltd. v. Tex. Dep't of Ins.*, 641 S.W.3d 794, 801 (Tex. App.—Amarillo 2022), the court reviewed a statute that required a public insurance adjuster license before a company could act on behalf of an insured party and adjust insurance claims. The state argued that the law applies only to conduct, but the court held that "we find any conduct under the statute consists of communicating." *Id.* at 802. Because the regulated business "necessarily and inextricably involves speech," the court had to consider its implications under the First Amendment. *Id. See also id.* at 803 (First Amendment scrutiny required "even if these prohibitions restrict speech only incidentally in the regulation of non-expressive professional conduct").

"Economic" regulation that effectively silences speakers based on the function and purpose of their speech is a "command and control" model of governance that cannot be reconciled with the First Amendment. *Dana's R.R. Supply v. Att'y Gen., Fla.*, 807 F.3d 1235, 1251 (11th Cir. 2015). AB5 results in severe economic burdens that effectively silence many journalistic freelancers. Were these burdens in a standalone law, rather than buried amid a tangle of regulations and exemptions, there could be no doubt that the burdens are far more than incidental. This

Court should grant certiorari to protect speech restricted by comprehensive legislation.

B. The Importance of the Issues Warrants Certiorari

The novelty of AB5-style legislation means that multiple circuits and state courts have not opined on its implications for speaking professions. Yet this Court grants petitions that raise important constitutional questions, especially in First Amendment cases, even without a circuit split. *See, e.g.*, *New York Times v. Sullivan*, 376 U.S. 254, 264 (1964); *Burson v. Freeman*, 504 U.S. 191, 195 (1992); *Frisby v. Schultz*, 487 U.S. 474, 479 (1988); *Hill v. Colorado*, 530 U.S. 703 (2000). Certiorari particularly is warranted when the importance of the constitutional issue is coupled with its novelty. *See Pub. Utilities Comm'n of D.C. v. Pollak*, 343 U.S. 451, 458 (1952) (granting certiorari "because of the novelty and practical importance to the public of the questions involved"); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (granting certiorari because of the issue's importance and the "novel view" adopted by the court below). This Court should act to ensure First Amendment scrutiny of such speech restrictive legislation before it spreads nationwide. *See*, *e.g.*, Fight for Freelancers amicus br. at 29–33. Even if the assault on freelancers' speech never extends past California's borders, it still harms an enormous number of speakers due to the state's sheer size, as evinced by the more than three dozen amici urging this Court to grant the petition.

Referring to *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892 (9th Cir. 2008), Ninth Circuit Judge Wardlaw noted that this Court granted certiorari "not because there exists an inter-circuit split, as this question has been decided only by the Ninth Circuit—but most likely because of the importance of defining reasonable expectations of privacy in the information age." Kim McLane Wardlaw, *Introduction*, 40 Golden Gate L. Rev. 293, 294 (2010). Similarly, the importance of the issues here warrants certiorari.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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