

In The
Supreme Court of the United States

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

v.

ROB BONTA,
in his official capacity as
Attorney General
of the State of California,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* OF
FIGHT FOR FREELANCERS, *ET AL*.
IN SUPPORT OF PETITIONERS

Maurice Baskin
Counsel of Record
James A. Paretti, Jr.
LITTLER MENDELSON, P.C.
815 Connecticut Avenue, NW
Washington, DC 20006
(202) 842.3400
mbaskin@littler.com
jparetti@littler.com

Counsel for Amici Curiae

Dated: April 12, 2022

TABLE OF CONTENTS

	<u>Page</u>
INTEREST OF AMICI CURIAE.....	1
SUMMARY OF ARGUMENT	12
ARGUMENT.....	14
I. The Choice of Freelance Work Has Been Legal Since America’s Founding.....	14
II. Independent Contractors Comprise One-Third of the U.S. Workforce.....	16
III. The Vast Majority of Independent Contractors Want to Remain Independent.....	21
IV. Overly Restrictive Standards Misclassify Legitimate Freelancers as Employees.....	26
V. Overly Restrictive Standards Create an Unfair Regulatory Landscape.....	30
VI. Women in Particular Are Harmed by Restrictive Independent Contractor Standards.....	34
CONCLUSION	37

TABLE OF AUTHORITIES

Page(s)

CASES

Coalition for Workforce Innovation v. Walsh,
No. 21-cv-130-MAC (E.D. TX)..... 30

Dynamex Operations West, Inc.,
4 Cal. 5th 903 (Cal. 2018) 27

SuperShuttle DFW, Inc.,
367 NLRB No. 75 (2019) 12

CONSTITUTIONAL PROVISION

U.S. Const. art. I, § 8 15

STATUTES

Copyright Act of 1790, Pub. L. No. 1-15,
1 Stat. 124 (1790) 15

War Revenue Act of 1917, 40 Stat. 300
(1917) 15

OTHER AUTHORITIES

ADP Research, “Illuminating the Shadow
Workforce: Insights into the Gig Workforce
in Businesses” 22, 23

American Society of Journalists and Authors,
“Independent Writers Sue California to
Protect Rights of Freelancers” (Dec. 17,
2019) 31

Anderson, Monica, <i>et al.</i> , Pew Research Center, “The State of Gig Work in 2021” (Dec. 8, 2021)	20
Assemb. B. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019).....	1
Benjamin Franklin Historical Society, “Benjamin Franklin, the Printer”	14
Clark, Liat, <i>Wired</i> , “The gig economy threatens to take us back to pre-Industrial Revolution times” (June 23, 2017).....	14
Cole, Aaron H., <i>et al.</i> , <i>National Law Review</i> , “AB 2257 Enacts Significant Changes to AB 5 on Classification of Workers as Independent Contractors” (Oct. 13, 2020).....	12, 19, 28
Delfino, Devon, <i>et al.</i> , LendingTree, “Metros Where Entrepreneurship Boomed Amid the Coronavirus Crisis” (Jan. 3, 2022).....	17
Federal Register, “Independent Contractor Status Under the Fair Labor Standards Act; Withdrawal” (Mar. 12, 2021)	13
The Free Dictionary, “Hang Out (One’s) Shingle”	15
Freelancers Against AB5, Affected Professions	19
Freshbooks Cloud Accounting, “Women in the Independent Workforce – 2nd Annual Report, 2019”	10, 25, 36

Gallup, “2019 Gig Economy and Self Employment Report”	23
Garrity, Phillip, Contently, “What Freelancers Have to Say about AB5” (Jan. 30, 2020)	22, 24, 25
Goldman, Tanya & Weil, David, Institute for New Economic Thinking, “Who’s responsible here? Establishing legal responsibility in the fissured workplace”	31
Gonzalez, Lorena, “AB 2257 – Protecting Workers, Businesses, and Taxpayers Against Misclassification”	28
Gonzalez, Lorena, <i>The Washington Post</i> , “The gig economy has costs. We can no longer ignore them” (Sep. 11, 2019).....	19
GrowTal, “The State of Freelancing” (Oct. 20, 2021).....	24
Harris, Kamala, <i>The New York Times</i> , “2.5 Million Women Left the Work Force During the Pandemic. Harris Sees a 'National Emergency'” (Feb. 18, 2020).....	10, 35
Interpreter Intelligence, “California Interpreters Finally Exempt From AB5” (Aug. 31, 2020).....	31
Jackson, Emilie et al., U.S. Department of Treasury Office of Tax Analysis, “Working Paper 114” (Jan. 2017)	19

Kavin, Kim, <i>Entrepreneur</i> , “Older Women Say PRO Act Unfairly Targets Them” (June 24, 2021)	36
Kochan, Thomas A., <i>et al.</i> , “Voice Gaps at Work, Options for Closing Them, and Challenges for Future Actions and Research” (June 2018).....	25
Letter from Renee Lee-Guerrido, NJ Dep’t of Labor (Feb. 16, 2022)	33
Lim, Katherine, <i>et al.</i> , “Independent Contractors in the U.S.: New Trends from 15 years of Administrative Tax Data” (July 2019)	35
Liu, Jennifer, CNBC, “Roughly 47 million people quit their jobs last year: ‘All of this is uncharted territory’” (Feb. 1, 2022)	17
Luque, Adela, <i>et al.</i> , U.S. Census Bureau, “Nonemployer Statistics by Demographics (NES-D): Using Administrative and Census Records Data in Business Statistics”	35
Manyika, James, <i>et al.</i> , McKinsey Global Institute, “Independent work: Choice, necessity, and the gig economy” (Oct. 10, 2016).....	24
MBO Partners, “11th Annual State of Independence”	22
MBO Partners, “The State of Independence in America 2020”	20, 35

Mitchell, Josh, <i>et al.</i> , <i>The Wall Street Journal</i> , “Workers Quit Jobs in Doves to Become Their Own Bosses” (Nov. 29, 2021)	17
Myers, John, <i>et al.</i> , <i>Los Angeles Times</i> , “Newsom signs bill rewriting California employment law, limiting use of independent contractors” (Sept. 18, 2021) ...	11, 27
<i>National Federation of Independent Business</i> , <i>et al.</i> , Nos. 21A244 and 21A247 (2022).....	13
National Labor Relations Board, “NLRB Invites Briefs Regarding Independent Contractor Standard” (Dec. 27, 2021)	13
New Jersey Senate Labor Committee Hearing, (Mar. 10, 2022)	33
News12 New Jersey, “Independent contractors question proposed bill that only protects golf caddies” (Dec. 14, 2021).....	32
Ozimek, Adam, “Freelance Forward Economist Report” (Dec. 2, 2021).....	21
Ozimek, Adam, “The Great Resignation: From Full-Time to Freelance” (Aug. 2, 2021)	17, 22
Quackenbush, Jeff, <i>North Bay Business Journal</i> , “‘Brighter days ahead’: North Coast recovery ‘strong,’ despite challenges, legislator says” (Mar. 10, 2022)	28
Rainey, Rebecca, Bloomberg Law, “Gig Economy May See Tougher Contractor Rule After Court Victory” (Mar. 17, 2022).....	30

Scalia, Eugene, Fox Business, “Labor Secretary: Clarity for ‘gig workers’ – Proposed rule simplifies definition for contractors, businesses” (Sept. 22, 2020)	29
Skemp, Sheila, Reviews in American History, Johns Hopkins University Press, “Paul Revere: Artisan Republican”	14
Tanzi, Alexandre, Bloomberg, “Covid Pandemic Turns America into a Nation of Freelancers” (Sep. 15, 2020)	16
Taylor, C. James, Miller Center, “John Adams: Life Before the Presidency”	15
U.S. Bureau of Labor Statistics, “Contingent and Alternative Employment Arrangements” (June 7, 2018)	23
U.S. Department of Labor, “Remarks of Labor Secretary Martin J. Walsh to US Conference of Mayors” (Jan. 1, 2022)	18
U.S. Department of Labor, “Withdrawn Rule: Independent Contractor Status Under the Fair Labor Standards Act”	29
U.S. Government Accountability Office, “Contingent Workforce: Size, Characteristics, Earnings, and Benefits” (April 20, 2015)	23
U.S. Senate Committee on Health, Education, Labor and Pensions, “Senator Murray Applauds House Passage of the PRO Act, Urges Senate Action” (Mar. 10, 2021)	11

Vernuccio, F. Vincent, The Hill, “Labor Agency
Bucks Court to Attack Independent
Contractors” (Jan. 2, 2022) 16

INTEREST OF AMICI CURIAE¹

Fight For Freelancers is a nationwide, nonpartisan, self-funded coalition of several thousand solopreneurs, small business owners, freelancers and other independent contractors. New Jersey-based freelance writers and editors seeking to protect their decades-long chosen careers founded the grassroots group in 2019 after the passage of California's Assembly Bill 5 (AB5). All of FFF's founders and leaders are women, and its membership is 87 percent female, with many in their prime earning ages of 35 to 54. FFF members specialize in professions that include physical therapy, graphic design, beauty and wellness, photography, stand-up comedy, opera production, makeup artistry, ESL teaching, translating, interpreting, kitchen design, music performance, journalism, ghostwriting, copywriting, marketing, editing and proofreading, book indexing, speech coaching, and website development.

¹ Pursuant to S. Ct. R. 37.6, counsel for amici certifies that no counsel for a party authored this brief in whole or in part, and no party other than *amici*, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to S. Ct. R. 37.a(2), counsel for *amici* certifies that counsel of record for all parties received timely notice of the intent to file this brief and consent to its filing.

In 2020, FFF's advocacy helped to defeat an AB5 copycat bill in New Jersey. In 2022, it led a coalition representing more than 250,000 self-employed Americans in filing an amicus brief urging the National Labor Relations Board to refrain from imposing an overly restrictive independent contractor test like AB5. FFF members regularly meet with lawmakers at the local, state and federal levels, and speak out in the media, about the need to preserve the choice of self-employment.

The Society of Professional Journalists is the nation's most broad-based journalism organization dedicated to encouraging the free practice of journalism and high standards of ethical behavior. SPJ promotes the free flow of information vital to a well-informed citizenry through the daily work of its roughly 6,000 members and protects First Amendment guarantees of freedom of speech and press through its advocacy.

The Society of Professional Journalists Freelance Community represents freelance journalists within the Society of Professional Journalists, many of whom have been working independently for years or decades. SPJFC regularly provides resources to guide freelancers through challenges of running a freelance business.

PEN America is a nonprofit, nonpartisan organization that stands at the intersection of literature and human rights to protect free expression in the United States and worldwide.

The Society of American Travel Writers is the nation's premier professional travel media organization, composed of nearly 1,000 of the industry's most experienced journalists, photographers, editors, broadcast/video/film producers, bloggers, website owners, media relations experts and hospitality industry representatives from around the world. All members must meet and maintain the industry's highest standards of productivity, ethics and conduct, and support SATW's mission of inspiring travel through responsible journalism.

The National Society of Newspaper Columnists promotes professionalism among columnists and other writers of the serial essay, including bloggers. NSNC advocates for columnists and free-press issues.

The Association of Health Care Journalists is a nonprofit organization dedicated to improving the quality, accuracy and visibility of health care reporting, writing and editing. With about 1,400 members nationwide, AHCJ provides training and resources to its members (nearly one-third of whom are

freelancers), and advocates on public matters affecting journalism.

The Society of Environmental Journalists is the only North American membership association of professional journalists dedicated to more and better coverage of environment-related issues. SEJ's mission is to strengthen the quality, reach and viability of journalism that advances public understanding of environmental issues. SEJ's membership includes more than 1,400 journalists (including freelancers) and academics working around the world. As a 501(c)3 nonprofit, SEJ provides educational opportunities and vital support to journalists who cover complex environmental issues.

Boating Writers International is a professional organization of writers, editors, publishers, photographers, videographers, broadcasters, public relations specialists and other stakeholders associated with the boating industry.

The Dog Writers Association of America is a group of journalists, artists, photographers, writers, poets, historians, veterinarians, radio hosts, bloggers, website producers, social media experts and videographers whose work focuses on all aspects of the world of dogs.

The National Association of Independent Writers and Editors represents novelists, copywriters, copy editors, proofreaders, writing teachers, writing coaches, business writers, business editors, academic writing evaluators, indexers, cover designers, project managers, public speakers and other specialists, and helps members experience the freedom of working independently.

Freelancing Females is a global community of 300,000 women, about 80 percent of them in the United States, cultivating each other's ability to achieve independence through their work, for a more equitable and prosperous world. Freelancing Females provides mentorship, jobs, and camaraderie to women.

Freelance Success is a consortium of hyperlocal websites in more than 30 cities, run by mostly women. The contractors who work with Freelance Success are professionals throughout North America who set their own hours and enjoy the flexibility of being their own bosses.

California Freelance Writers United comprises more than 1,500 independent contractors, along with small-business-owner writers, journalists, editors, still photographers and casters based in California. It formed a coalition in 2019 to collaborate with

California lawmakers on a workable AB5 exemption and lobbied for the creation and passage of AB2257.

Independent Writers of Southern California represents writers in Los Angeles and greater Southern California. IWOSC has helped thousands of writers hone their literary and business skills through education programs covering media ethics, new issues involving multimedia, copyright law, and more.

SoCal Science Writers represents science, medical, and environmental journalists, as well as public information officers, scientists and researchers.

The Texas Freelance Association is a 501(c)3 nonprofit organization that helps freelancers start, grow, and run their business successfully through education, networking, benefits, and access to jobs and affordable health insurance.

Freelancers Against AB5's more than 18,600 members are independent contractors and small businesses representing more than 600 categories of professions. The all-volunteer group formed in response to AB5 and has since documented hundreds of professions the law has threatened or harmed.

The People vs. AB5 is a group of several thousand California-based independent contractors, freelancers and small businesses. The group was

founded in April 2020, after the state effectively ended the way they work. Members are Democrats, Republicans, Independents, Libertarians and others of all political stripes. Advocacy focuses on the need for a full repeal of AB5, and on the need to reject similar ABC Test legislation at the state and federal levels.

The American Alliance of Professional Translators and Interpreters represents independent contractors, freelancers, staff interpreters and translators nationwide. The group promotes the professionalization of translators and interpreters by advocating for public policy that benefits the language profession. All board members are microbusiness owners and helped to obtain an exemption for translators, and a partial exemption for interpreters, under AB2257.

The National Association of Judiciary Interpreters and Translators is a nonprofit association of interpreters and translators. NAJIT promotes the highest professional standards in interpreting and translation. It provides continuing education for professionals to grow their knowledge and refine their skills.

The Association of Independent Judicial Interpreters of California is a nonprofit professional

organization that represents freelance court interpreters in California.

The Coalition of Practicing Translators & Interpreters is a nonpartisan group of language professionals that advocates for respect for linguists' independence and expertise, and protection of the essential right to language access for all Americans. The coalition led the effort to win exemption from AB5 for misclassified translators and interpreters.

Professional Independent Consultants of America is a national association that helps people launch and grow consulting businesses by providing education, tools, advice, and community. PICA helps its members be more efficient and profitable, enabling them to live the life they want in the consulting career of their dreams.

Numi Opera Theatre is a nonprofit opera company that was created to keep alive the Jewish-composed music that Nazis suppressed. Its more than 50 independent contractors include classical instrumentalists, singers, stage managers, hair and make-up professionals, dancers, coaches and conductors. Created by the daughter of a Holocaust survivor, it produces shows that are intended to ensure the masses "never forget."

Solo Opera a 501(c)3 nonprofit opera company and a Professional Company Member of Opera America. Its mission is to educate, entertain, and enrich the community through opera productions, concerts, and outreach programs.

Clarity Music LLC is a company that contracts musicians for a wide variety of ensembles and musical situations, booked directly with clients or through agents. These musicians perform for weddings, corporate events, religious services, parades, and community concerts.

Boomvang Creative Group is a Phoenix-based provider of marketing and advertising services founded in 1999.

Len Fernandes, doing business as SierraTech Public Relations in the eastern Sierras, runs a consultancy with more than 35 years of experience and worldwide media contacts.

Elsa Peterson Ltd. is an editorial services firm based in Norwalk, Connecticut that has been in business since 1994.

Tom Myers has nearly 25 years of experience in the performing arts as an actor, improvisational entertainer, and stand-up comedian. He currently

hosts the comedy/current events podcast “Tom Myers vs. the Rest of the World.”

The enactment of AB5 in California threatens to disrupt the income and outlaw the careers of as many as 59 million independent contractors in countless professions across the United States. Most of these freelancers—70 percent to 85 percent—wish to remain self-employed, according to more than a dozen studies published from 2015 to the present, including several by the federal government.² This desire to remain self-employed is especially strong among women, whose livelihoods suffered the worst of the COVID-19 pandemic’s economic harms in 2020-21.³ Some 73 percent of self-employed women say they have a better work-life balance; 68 percent earn the same as or more than in a traditional job; 59 percent say they have less stress; and 57 percent say they are healthier as independent contractors.⁴

² Available at: <https://fightforfreelancersusa.com/data-and-studies>.

³ Harris, Kamala, *The New York Times*, “2.5 Million Women Left the Work Force During the Pandemic. Harris Sees a ‘National Emergency’” (Feb. 18, 2021) at: <https://www.nytimes.com/2021/02/18/us/politics/women-pandemic-harris.html>

⁴ Freshbooks Cloud Accounting, “Women in the Independent Workforce – 2nd Annual Report, 2019” at:

Proponents of AB5 claimed that there is a need for an overly restrictive independent contractor test to “reduce worker misclassification” and protect “workers’ right to join a union.”^{5, 6} In California, these statements have proved patently false. AB5 has not created any quantifiable number of traditional jobs, has not resulted in any notable increase in state prosecutions of true misclassification claims, and has not led to the creation of a single new union. Instead, AB5’s primary result has been the widespread and pervasive misclassification of legitimate independent contractors.

This misclassification destroys mutually beneficial business relationships—so much so that less than a year after AB5 was enacted, citizen outcry led the California Legislature to pass an emergency

<https://www.freshbooks.com/press/data-research/women-in-the-workforce-2019>

⁵ Myers, John, *et al.*, *Los Angeles Times*, “Newsom signs bill rewriting California employment law, limiting use of independent contractors” (Sept. 18, 2021) at: <https://www.latimes.com/california/story/2019-09-18/gavin-newsom-signs-ab5-employees0independent-contractors-california>

⁶ U.S. Senate Committee on Health, Education, Labor and Pensions, “Senator Murray Applauds House Passage of the PRO Act, Urges Senate Action” (Mar. 10, 2021) at: <https://www.help.senate.gov/chair/newsroom/press/senator-murray-applauds-house-passage-of-the-pro-act-urges-senate-action>.

measure, AB2257, exempting, at least partially, more than one hundred professions from the ABC Test.⁷

Amici have a vital interest in stopping the spread of laws and regulations based on AB5's overly restrictive, economically punitive, and wholly unjustifiable independent contractor test.

SUMMARY OF ARGUMENT

When the National Labor Relations Board ruled in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019) on what constitutes an appropriate test to determine independent contractor status, it stated that it was returning to the traditional common-law test because an attempt to impose a more restrictive test “impermissibly altered the common-law test and long-standing precedent.” *Amici* strongly agree with that ruling and urge the Court to grant *certiorari* for the same reason: Long-standing precedent should be respected to protect what have been legal business relationships between independent contractors and their clients since the very founding of the nation.

⁷ Cole, Aaron H., *et al.*, *National Law Review*, “AB 2257 Enacts Significant Changes to AB 5 on Classification of Workers as Independent Contractors” (Oct. 13, 2020) at: <https://www.latimes.com/california/story/2019-09-18/gavin-newsom-signs-ab5-employees0independent-contractors-california>

The Court should stop overreaching law- and policy-makers from misclassifying millions of legitimate independent contractors as employees, destroying their small businesses and chosen livelihoods, whether through legislation or regulatory “work-arounds” such as those currently contemplated at the National Labor Relations Board⁸ and U.S. Department of Labor.⁹ This Court has made clear that stopping regulatory work-arounds that lack congressional legislation is a defining concern, most recently evidenced in *National Federation of Independent Business, et al.*, Nos. 21A244 and 21A247 (2022). AB5 has set off a torrent of state and federal actions that include such work-arounds, which must be abated to protect legitimate independent contractors. For these reasons, FFF urges the Court to grant *certiorari* in this case.

⁸ National Labor Relations Board, “NLRB Invites Briefs Regarding Independent Contractor Standard” (Dec. 27, 2021) at: <https://www.nlr.gov/news-outreach/news-story/nlr-invites-briefs-regarding-independent-contractor-standard>.

⁹ Federal Register, “Independent Contractor Status Under the Fair Labor Standards Act; Withdrawal” (Mar. 12, 2021) at: <https://www.federalregister.gov/documents/2021/03/12/2021-05256/independent-contractor-status-under-the-fair-labor-standards-act-withdrawal>.

ARGUMENT

I. The Choice of Freelance Work Has Been Legal Since America's Founding

Being self-employed has been a legal option for U.S. citizens since the nation's founding in 1776. Indeed, self-employment was the norm prior to the industrial revolution and advent of large-scale factories.¹⁰ Some of the nation's best-known historical figures and earliest leaders earned income independently by opening their own businesses. Paul Revere was an artisan who worked in gold and silver.¹¹ Benjamin Franklin's many credits as a writer include *Poor Richard's Almanac*.¹² John Adams, before being

¹⁰ Clark, Liat, *Wired*, "The gig economy threatens to take us back to pre-Industrial Revolution times" (June 23, 2017) at: <https://www.wired.co.uk/article/gig-economy-bank-of-england-worker-rights>.

¹¹ Skemp, Sheila, *Reviews in American History*, Johns Hopkins University Press, "Paul Revere: Artisan Republican" at: <https://muse.jhu.edu/article/29122>.

¹² Benjamin Franklin Historical Society, "Benjamin Franklin, the Printer" at: <http://www.benjamin-franklin-history.org/benjamin-franklin-printer/>.

elected U.S. president, first established his own law practice.¹³

U.S. law historically protected those Americans who choose to perform independent contractor work, based on the understanding that one of the nation's core founding principles is affording citizens the opportunity to become whatever they choose to be. In the field of freelance writing, Article I, Section 8 of the U.S. Constitution states that Congress shall have the power to secure for authors and inventors "the exclusive right to their respective writings and discoveries." The second session of the first U.S. Congress passed the Copyright Act of 1790, creating a set of exclusive rights for individual authors to copy, print, and sell their expressive works. The legal choice of self-employment was so ubiquitous in the 1800s that the phrase "hang out one's shingle" became a colloquialism, with independent lawyers, doctors and businesses using shingles for signboards.¹⁴ The 1099 tax form that the IRS uses for independent contractor income dates to 1918, following passage of the War Revenue Act of 1917.

¹³ Taylor, C. James, Miller Center, "John Adams: Life Before the Presidency" at: <https://millercenter.org/president/adams/life-before-the-presidency>.

¹⁴ The Free Dictionary, "Hang Out (One's) Shingle" at: <https://idioms.thefreedictionary.com/hang+out+shingle>.

The long-standing precedent throughout the nation's history has been for U.S. law to err on the side of protecting the choice of self-employment. As recently as 2017, courts have rebuked the National Labor Relations Board for attempting to limit self-employment options.¹⁵ It is of paramount importance to maintain this protection of independent contractors, who now comprise one-third of the U.S. workforce and increasingly see their livelihoods threatened and outlawed by overly restrictive tests that limit the choice of self-employment.

II. Independent Contractors Comprise One-Third of the U.S. Workforce

Today, independent contractors number as many as 59 million in the United States, comprising one-third of the U.S. workforce.¹⁶ Currently available data suggests that their ranks only continue to grow. During the Great Resignation, when roughly 47 million Americans quit their jobs amid the COVID-19

¹⁵ Vernuccio, F. Vincent, The Hill, "Labor Agency Bucks Court to Attack Independent Contractors" (Jan. 2, 2022) at: <https://thehill.com/opinion/finance/590337-labor-agency-bucks-courts-to-attack-independent-workers>.

¹⁶ Tanzi, Alexandre, Bloomberg, "Covid Pandemic Turns America into a Nation of Freelancers" (Sep. 15, 2020) at: <https://www.bloomberg.com/news/articles/2020-09-15/covid-pandemic-turns-america-into-a-nation-of-freelancers>.

pandemic,¹⁷ the number of unincorporated self-employed workers rose by at least 500,000, and entrepreneurs applied for federal tax-identification numbers to register at least 4.54 million new businesses (two-thirds being businesses that weren't expected to hire employees).¹⁸ As one study noted, "The Great Resignation isn't just about workers moving from one full-time job to another; 20 percent, or 10 million Americans, are considering freelancing."¹⁹ Another found that the number of people filing paperwork to start a business in the United States rose 25 percent between 2019 and 2020—with some sole proprietors ("freelancers, financial planners and consultants") omitted from that data.²⁰ U.S. Labor

¹⁷ Liu, Jennifer, CNBC, "Roughly 47 million people quit their jobs last year: 'All of this is uncharted territory'" (Feb. 1, 2022) at: <https://www.cnbc.com/2022/02/01/roughly-47-million-people-quit-their-job-last-year.html>.

¹⁸ Mitchell, Josh, *et al.*, *The Wall Street Journal*, "Workers Quit Jobs in Drove to Become Their Own Bosses" (Nov. 29, 2021) at: <https://www.wsj.com/articles/workers-quit-jobs-in-drove-to-become-theizr-own-bosses-11638199199>.

¹⁹ Ozimek, Adam, "The Great Resignation: From Full-Time to Freelance" (Aug. 2, 2021) at: <https://www.upwork.com/research/the-great-resignation>.

²⁰ Delfino, Devon, *et al.*, LendingTree, "Metros Where Entrepreneurship Boomed Amid the Coronavirus Crisis" (Jan. 3, 2022) at: <https://www.lendingtree.com/business/small/entrepreneurship-boom-study/>.

Secretary Martin Walsh noted this same Great Resignation trend in January 2022 when he told the U.S. Conference of Mayors: “In addition to retirements, we are also seeing more people go into business for themselves. In 2021, the number of self-employed workers grew by over 7 percent.”²¹

Today’s independent contractors have careers in hundreds of professions, including accounting, acting, animal-shelter consulting, auditing, bartending, beekeeping, bookkeeping, business consulting, cartography, coaching, comedy, competition judging, computer programming, copy editing, court reporting, CPR instruction, data aggregation, dog-walking, event planning, financial advisement, forestry, golf, graphic design, hair styling, home inspection, illustration, information technology, journalism, landscape architecture, language translation, law, marketing, massage therapy, medical billing, music, nursing, occupational therapy, orchestra conducting, paralegal services, pet-sitting, photography, physical therapy, proofreading, public speaking, real estate, respiratory therapy, securities dealing, sign-language interpretation, singing, stenography, teaching,

²¹ U.S. Department of Labor, “Remarks of Labor Secretary Martin J. Walsh to US Conference of Mayors” (Jan. 1, 2022) at: <https://www.dol.gov/newsroom/speech/20220121>.

transcription, trucking, tutoring, videography, wedding planning, and writing.^{22, 23}

It is a common misperception that most modern-day independent contractors are engaged in app-based or “gig platform” work that proponents of laws like AB5²⁴ typically cite when claiming a need to restrict self-employment. As the U.S. Treasury Department noted in a study²⁵ cited by the U.S. Labor Department, “Some media suggest that the gig economy is a large and growing segment of the U.S. labor market, revealing a marked shift in the nature of work relationships. However, there is little empirical evidence that this is the case.”²⁶

According to Pew Research Center, as of December 2021 only 4 percent of the U.S. workforce

²² Cole, n.7, *supra*.

²³ Freelancers Against AB5, Affected Professions, available at: <https://www.facebook.com/groups/FreelancersAgainstAB5/permalink/498056374235597>.

²⁴ Gonzalez, Lorena, *The Washington Post*, “The gig economy has costs. We can no longer ignore them” (Sep. 11, 2019) at: <https://www.washingtonpost.com/opinions/2019/09/11/gig-economy-has-costs-we-can-no-longer-ignore-them/>.

²⁵ Jackson, Emilie, *et al.*, U.S. Department of Treasury Office of Tax Analysis, “Working Paper 114” (Jan. 2017) at: <https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/WP-114.pdf>.

²⁶ See n.9, *supra*.

currently performs gig-platform work, and the majority spent less than 10 hours a week performing tasks or didn't do tasks at all most weeks.²⁷ Indeed, millions of independent contractors have been legally earning income in hundreds of professions for years or decades prior to the creation of the app-based economy.

Regulations, legislation and court decisions regarding the legality of independent contractor work primarily affect Americans engaged in professions other than app-based work. Generally, many independent contractors are specialists in their fields.²⁸ Their services are needed by numerous companies, but not at a frequency that lends itself to traditional full-time or even part-time employment.

For instance, most courts would have no need to create an employee position for a person who translates Portuguese into English, but many courts, on occasion, require the services of such a person as an independent contractor to assist the occasional courtroom participant who speaks only Portuguese. Similarly,

²⁷ Anderson, Monica, *et al.*, Pew Research Center, "The State of Gig Work in 2021" (Dec. 8, 2021) at: <https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021/>.

²⁸ MBO Partners, "The State of Independence in America 2020" at: https://info.mbopartners.com/rs/mbo/images/MBO_Partners_State_of_Independence_2020_Report.pdf.

hospitals without a forensic nurse on staff may use the services of independent contractors to perform evidentiary exams of rape victims as needed. Few modern newspapers have budgets that allow for staff reporters to cover topics of local importance such as community theater or restaurant reviews, but many occasionally seek out experts in those fields to produce articles as independent contractors.

Skilled professionals are one of the fastest-growing segments of the independent workforce. Their numbers have risen in each year since 2011, representing a 71 percent increase as of 2020.²⁹ As of 2021, 51 percent of workers with postgraduate degrees were freelancers, up 6 percent since 2020, and 53 percent of all freelancers provided skilled services such as computer programming, marketing, information technology, and business consulting.³⁰

III. The Vast Majority of Independent Contractors Want to Remain Independent

Most of America's independent contractors *intentionally choose* this type of work. They do not want traditional employer-employee relationships. In 2021,

²⁹ *Id.*

³⁰ Ozimek, Adam, "Freelance Forward Economist Report" (Dec. 2, 2021) at: <https://www.upwork.com/research/freelance-forward-2021>.

87 percent said they were happier, and 78 percent said they were healthier, working independently.³¹

The top reasons cited for freelancing were flexible schedules and more personal time.³² Most independent contractors place a premium on flexibility as a key motivation behind their decision, over financial security or benefits.³³ Lawmakers who view freelancing as a last resort are misguided; 75 percent of respondents chose to freelance because they preferred it to full-time work.³⁴

Numerous other studies³⁵ show that the vast majority of independent contractors are choosing to earn income independently, are happy doing so, and want to remain classified as independent contractors.

³¹ MBO Partners, “11th Annual State of Independence” at: <https://www.mbopartners.com/state-of-independence/>.

³² Ozimek, n.19, *supra*.

³³ ADP Research, “Illuminating the Shadow Workforce: Insights into the Gig Workforce in Businesses” at: <https://www.prnewswire.com/news-releases/adp-research-institute-report-reveals-the-gig-workforce-is-filling-a-void-in-the-tight-labor-market-300998593.html?fbclid=IwAR1lc8xnqPFyd6TbK0NyQKfjqZ5N12MDRsiABVgWzJeXdfFf3e0T8PLocFg>.

³⁴ Garrity, Phillip, Contently, “What Freelancers Have to Say about AB5” (Jan. 30, 2020) at: <https://contently.net/2020/01/30/resources/we-pollled-573-freelancers-about-ab5-theyre-not-happy/>.

³⁵ See n.2, *supra*.

In 2015, the Government Accountability Office reported that more than 85 percent of independent contractors and the self-employed appeared content with their employment type.³⁶ In 2018, the U.S. Bureau of Labor Statistics reported that 79 percent of independent contractors preferred their arrangement over a traditional job.³⁷

In 2019, Gallup found that many self-employed workers “seem to like the autonomy and independence of these arrangements. They benefit from the income it affords them and are engaged in the work.”³⁸ In 2020, studies by multiple NGOs found that more than 70 percent of independent contractors were working independently by their own choice;³⁹ 75 percent chose to freelance because they preferred it to a traditional

³⁶ U.S. Government Accountability Office, “Contingent Workforce: Size, Characteristics, Earnings, and Benefits” (April 20, 2015), at: <https://www.gao.gov/assets/gao-15-168r.pdf>.

³⁷ U.S. Bureau of Labor Statistics, “Contingent and Alternative Employment Arrangements” (June 7, 2018), at: <https://www.bls.gov/news.release/conemp.htm>.

³⁸ Gallup, “2019 Gig Economy and Self Employment Report” at: <https://quickbooks.intuit.com/content/dam/intuit/quickbooks/Gig-Economy-Self-Employment-Report-2019.pdf>.

³⁹ ADP Research, “Illuminating the Shadow Workforce: Insights into the Gig Workforce in Businesses” at: <https://www.prnewswire.com/news-releases/adp-research-institute-report-reveals-the-gig-workforce-is-filling-a-void-in-the-tight-labor-market-300998593.html>.

job;⁴⁰ and 60 percent said no amount of money would convince them to take a traditional job.⁴¹

In 2021, 62 percent of independent workers said that choosing freelance work was a personal decision, and that the government should not classify them as an employee.⁴² Among app-based independent contractors specifically, 65 percent viewed themselves as independent contractors.⁴³

For years, the majority of independent contractors have stated consistently that they prefer self-employment. They have greater job satisfaction across all ages, income brackets and education levels;⁴⁴ feel more financially secure than in traditional jobs;⁴⁵ have access to more professional opportunities than

⁴⁰ Garrity, n.34, *supra*.

⁴¹ Ozimek, n.30, *supra*.

⁴² GrowTal, “The State of Freelancing” (Oct. 20, 2021) at: [Growfinance.yahoo.com/news/greater-flexibility-improved-mental-wellbeing-130000389.html](https://growfinance.yahoo.com/news/greater-flexibility-improved-mental-wellbeing-130000389.html).

⁴³ Anderson, n.27, *supra*.

⁴⁴ Manyika, James, *et al.*, McKinsey Global Institute, “Independent work: Choice, necessity, and the gig economy” (Oct. 10, 2016) at: <https://www.mckinsey.com/featured-insights/employment-and-growth/independent-work-choice-necessity-and-the-gig-economy>.

⁴⁵ MBO Partners, n.28, *supra*.

they would as full-time employees;⁴⁶ earn the same as or more than they would with a traditional employer;⁴⁷ and their overall happiness and well-being has improved since they became self-employed.⁴⁸

Further, we note the frequent mischaracterization of a 2018 study by MIT Sloan⁴⁹ that is often referenced to assert that half the U.S. workforce wants to be reclassified as employees so they can join unions. This pool of respondents contained a higher percentage of low-income workers than in the national population, and only 8 percent of the respondents were independent contractors. Thus, while it found that approximately 48 percent of nonunion workers would join a union if they could, this study primarily references workers already classified as employees. It is not probative of the wishes of independent contractors.

It is important that the Court, along with lawmakers and regulators, understand the reality of

⁴⁶ Garrity, n.34, *supra*.

⁴⁷ Freshbooks, n.4, *supra*.

⁴⁸ *Id.*

⁴⁹ Kochan, Thomas A., *et al.*, “Voice Gaps at Work, Options for Closing Them, and Challenges for Future Actions and Research” (June 2018) at: <https://gcgj.mit.edu/sites/default/files/imce/resource-uploads/Kochan%20et%20al.%20Worker%20Voice%20Survey%20Paper%20June%202018.pdf>.

independent contracting. When governmental actors disregard that reality, the primary result is a disastrous outcome for legitimate independent contractors.

IV. Overly Restrictive Standards Misclassify Legitimate Freelancers as Employees

There has been an effort in some states and in the U.S. Congress since 2019 to broadly impose a restrictive version of the ABC Test when determining independent contractor status. This version of the ABC Test language generally requires that:

- (A) the individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of service and in fact;
- (B) the service is performed outside the usual course of the business of the employer;
- (C) the individual is customarily engaged in an independently established trade,

occupation, profession or business of the same nature as the service performed.⁵⁰

In California, the ABC Test was introduced into the legislature as AB5 and went into effect January 1, 2020. It expanded the use of the ABC Test beyond the ruling in *Dynamex Operations West, Inc.*, 4 Cal. 5th 903 (Cal. 2018), which applied only to wage orders. AB5 included all provisions of California’s labor and unemployment insurance code, thereby affecting all types of professions. California Governor Gavin Newsom wrote when signing AB5 that it “will help reduce worker misclassification — workers being wrongly classified as ‘independent contractors’ rather than employees, which erodes basic worker protections like the minimum wage, paid sick days and health insurance benefits.”⁵¹

Newsom’s claim has proved patently false. As of early 2022, California had reported no increase in prosecution of companies intentionally misclassifying employees. Instead, the California legislature had to pass an emergency measure, AB2257, ultimately exempting more than 100 professions from AB5 to preserve the income and careers of legitimate

⁵⁰ This version of the ABC Test differs from versions used for various purposes in all but one state, Massachusetts.

⁵¹ Myers, n.5, *supra*.

independent contractors whose livelihoods were harmed after AB5 misclassified them as employees.⁵² California Assemblywoman Lorena Gonzalez, the sponsor of AB5 and AB2257, wrote of the latter, “While legitimate independent contractors can be classified as such if they meet the criteria under the ABC Test, AB 2257 outlines additional instances when an individual who operates their own independent business is clearly subject to the previous Borello standard for the purposes of determining their employment classification.”⁵³ Problems stemming from AB5 continue to harm legitimate independent contractors in California. In March 2022, one legislator announced that another AB5 cleanup bill would be introduced in the current legislative session to exempt even more industries and categories of independent contractors who are still being misclassified as employees.⁵⁴

⁵² Cole, n.7, *supra*.

⁵³ Gonzalez, Lorena, “AB 2257 – Protecting Workers, Businesses, and Taxpayers Against Misclassification” at: <https://a80.asmdc.org/sites/a80.asmdc.org/files/pdf/AB%202257%20%28Gonzalez%29%20Factsheet%20FINAL%208.25.20.pdf>.

⁵⁴ Quackenbush, Jeff, *North Bay Business Journal*, “Brighter days ahead’: North Coast recovery ‘strong,’ despite challenges, legislator says” (Mar. 10, 2022) at: <https://www.northbaybusinessjournal.com/article/article/brighter-days-ahead-north-coast-recovery-strong-despite-challenges-l/>.

The damage that AB5 caused to legal business relationships between independent contractors and their clients was so profound that the U.S. Department of Labor promulgated a new rule to protect independent contractors nationwide from suffering a similar fate. U.S. Labor Secretary Eugene Scalia wrote in introducing the new federal rule, “As originally enacted AB5 was so unworkable that the state Legislature felt compelled to riddle it with amendments, establishing dozens of job-specific exemptions. Unlike AB5, our rule doesn’t propose radical changes in who’s classified as an employee or independent contractor.”⁵⁵

The current administration withdrew this U.S. Labor Department rule in May 2021,⁵⁶ leaving tens of millions of legitimate independent contractors again in danger of being misclassified as employees. In March 2022, the U.S. District Court for the Eastern District of Texas held that in doing so the department violated

⁵⁵ Scalia, Eugene, Fox Business, “Labor Secretary: Clarity for ‘gig workers’ – Proposed rule simplifies definition for contractors, businesses” (Sept. 22, 2020) at: <https://www.foxbusiness.com/economy/labor-secretary-gig-workers-rule-contractors-businesses>.

⁵⁶ U.S. Department of Labor, “Withdrawn Rule: Independent Contractor Status Under the Fair Labor Standards Act” at: <https://www.dol.gov/agencies/whd/flsa/2021-independent-contractor>.

government rulemaking procedures. *See Coalition for Workforce Innovation v. Walsh*, No. 21-cv-130-MAC (E.D. TX). Less than a week later, the Solicitor of Labor declared that “the Department is evaluating all legal options, including the potential need for rulemaking.”⁵⁷

In the face of these continuing threats and harms, it is of paramount importance for the Court to protect and preserve the long-standing legal status of independent contractors. When overly restrictive regulations are implemented or threatened, a wholly unfair regulatory landscape results.

V. Overly Restrictive Standards Create an Unfair Regulatory Landscape

One of the most inequitable elements of AB5 was the way that lawmakers granted exemptions to certain professions, protecting their independent contractor status while simultaneously misclassifying legitimate independent contractors in other professions as employees. These exemptions were a matter of political

⁵⁷ Rainey, Rebecca, Bloomberg Law, “Gig Economy May See Tougher Contractor Rule After Court Victory” (Mar. 17, 2022) at: <https://news.bloomberglaw.com/daily-labor-report/gig-economy-may-see-tougher-contractor-rule-after-court-victory>.

will and power,⁵⁸ doled out to favored or organized special-interest groups that had paid lobbyists and privileged access to lawmakers, leaving thousands of everyday Californians in the lurch without similar ways to protect their careers. In some cases, obtaining an exemption for legitimate independent contractors after AB5 was signed into law required a full year's worth of petitioning, protesting and lobbying.⁵⁹ Other professions are still fighting several years later through the federal courts to achieve full and clear exemptions.⁶⁰

The same favored-interest process has played out in recent months in New Jersey, which tried, but failed, to codify California's version of the ABC Test in

⁵⁸ Goldman, Tanya & Weil, David, Institute for New Economic Thinking, "Who's responsible here? Establishing legal responsibility in the fissured workplace" at: https://www.researchgate.net/publication/339832079_Who's_Responsible_Here_Establishing_Legal_Responsibility_in_the_Fissured_Workplace.

⁵⁹ Interpreter Intelligence, "California Interpreters Finally Exempt From AB5" (Aug. 31, 2020) at: <https://www.interpreterintelligence.com/california-interpreters-finally-exempt-from-ab5/>.

⁶⁰ American Society of Journalists and Authors, "Independent Writers Sue California to Protect Rights of Freelancers" (Dec. 17, 2019) at: <https://www.asja.org/who-we-are/media-releases/independent-writers-sue-california-to-protect-rights-of-freelancers/>.

2019-20. That failed legislative attempt included exemptions only for certain professions and led lobbyists during the 2020-21 legislative session to request individual bills to protect favored professions going forward.

In December 2021, the New Jersey Legislature passed legislation that classified golf caddies as independent contractors under state employment law. When independent contractors from other professions without professional lobbyists cried foul, the state Assembly minority leader responded that lawmakers were responding to the requests of favored groups with access to legislative leadership: “There were communications between a number of golf clubs between myself and the Senate president, indicating that because we have the No. 1 golf course in the world and many of the top, that this is important to keep our caddy programs going.”⁶¹

The types of favored-interest exemptions and standalone bills seen in California and New Jersey are a politically driven, haphazard effort to stop the misclassification of legitimate independent contractors. This process of playing favorites creates an

⁶¹ News12 New Jersey, “Independent contractors question proposed bill that only protects golf caddies” (Dec. 14, 2021) at: <https://newjersey.news12.com/independent-contractors-question-proposed-bill-that-only-protects-golf-caddies>.

unfair regulatory landscape for independent contractors in professions that lack the advantage of professional lobbyists and an equitable way to ensure that lawmakers and regulators are serving their interests. It also encourages overreach by regulators seeking to limit the choice of self-employment for whichever unprotected group they choose to target.

As an example, in February 2022, an auditor for the New Jersey Department of Labor told an independent contractor that items such as business letterhead, telephone-book advertisements, and newspaper advertisements were required to verify the contractor's relationship to another company⁶²—as if most businesses even *have* or advertise in printed telephone books anymore, and as if email and websites do not exist for business communications and marketing. One month later, when the state Labor Commissioner was asked about the state's future plans with regard to classification, he said, "We're not going to stop."⁶³

⁶² Letter from Renee Lee-Guerrido, NJ Dep't of Labor (Feb. 16, 2022) available at: <https://twitter.com/EntreCourier/status/1496538490569379843>.

⁶³ New Jersey Senate Labor Committee Hearing, Mar. 10, 2022, at: <https://www.njleg.state.nj.us/archived-media/2022/SLA-meeting-list/media-player?committee=SLA&agendaDate=2022-03-10-13:00:00&agendaType=M&av=V>.

These threats persist because lawmakers and regulators well beyond California's borders are attempting to copy AB5 and limit the choice of self-employment. Many of the legitimate independent contractors being left at a disadvantage are women, a problem that only deepens the diversity, equity and inclusion challenges that our society is wrestling with in many ways today.

VI. Women in Particular Are Harmed by Restrictive Independent Contractor Standards

Overly restrictive independent contractor standards such as AB5, and the unfair regulatory landscape they propagate, are particularly harmful to working women.

Data analyzed by the IRS and Treasury Department suggests a structural shift among American women toward independent contractor work since at least 2001. Approximately 55 percent of the growth in independent contracting from 2001 to 2016 was attributable to the increase in female independent contractors; women saw a 68 percent increase in the number of independent contractors while men saw a

comparatively smaller 37 percent increase.⁶⁴ By 2019, about 45 percent of sole proprietors were women.⁶⁵

This structural shift of the U.S. workforce led by women independent contractors became clear during the pandemic and Great Resignation in 2020-21. At least 2.5 million women left the workforce—a situation that Vice President Kamala Harris called “a national emergency.”⁶⁶

It soon became clear where at least some of those women went: 55 percent of people new to independent contracting in 2021 were women.⁶⁷ Why? Because women in traditional jobs during the pandemic struggled to perform employer-designated work alongside tasks at home, such as childcare and remote schooling, or caring for aging relatives. Women needed

⁶⁴ Lim, Katherine, *et al.*, “Independent Contractors in the U.S.: New Trends from 15 years of Administrative Tax Data” (July 2019) at: <https://www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf>.

⁶⁵ Luque, Adela, *et al.*, U.S. Census Bureau, “Nonemployer Statistics by Demographics (NES-D): Using Administrative and Census Records Data in Business Statistics” at: <https://www2.census.gov/ces/wp/2019/CES-WP-19-01.pdf>.

⁶⁶ Harris, n.3, *supra*.

⁶⁷ MBO Partners, n.31, *supra*.

more flexibility and control over their schedules and lives.

Flexibility and control are among the key benefits of independent contractor work, often without any loss of income. Significant majorities of self-employed women say they have better work-life balance, earn the same as or more than in a traditional job, have less stress, and are healthier.⁶⁸

This is especially true among older women, who report feeling like “a ghost” because traditional employers don’t want to hire them after a certain age. “I was looking for W2 work—I wanted the steady paycheck,” one FFF member told *Entrepreneur* in 2021, after losing her job at age 52 to a younger employee. “I wanted all the things like benefits that go with a W2 job. But the more I did independent work, the more I realized that I was so much happier. I actually like being my own boss.”⁶⁹

⁶⁸ Freshbooks, n.4, *supra*.

⁶⁹ Kavin, Kim, *Entrepreneur*, “Older Women Say PRO Act Unfairly Targets Them” (June 24, 2021) at: <https://www.entrepreneur.com/article/375537>.

CONCLUSION

For these reasons, the Court should grant the Petition and protect the 59 million Americans who have purposefully and voluntarily rejected the employer-employee relationship and have chosen to hang out their own shingles in keeping with the nation's long-standing history.

Dated: April 12, 2022

Respectfully submitted,

Maurice Baskin
Counsel of Record
James A. Paretto, Jr.
Littler Mendelson, P.C.
815 Connecticut Ave, NW
Washington, DC 20006
202.842.3400
mbaskin@littler.com
jparetti@littler.com

Counsel for Amici Curiae