No. 21-1172

IN THE
Supreme Court of the United States

AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, INC., ET AL.,

Petitioners,

v.

ROB BONTA, ATTORNEY GENERAL OF CALIFORNIA,

Respondent.

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

BRIEF OF THE INDEPENDENT INSTITUTE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AMERICANS FOR PROSPERITY FOUNDATION, AND NEW JOBS AMERICA AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Independent Institute (the "Institute") is a nonprofit, nonpartisan public-policy research and educational organization that is committed to advancing a peaceful, prosperous, and free society grounded in the recognition of individual human worth and dignity. The Institute—which has closely studied and monitored the wide-ranging economic consequences of Assembly Bill 5 ("AB5") and its amendments[2]—believes that AB5 burdens the speech of speech-creators and causes devastating harm to workers and small businesses. In addition to filing *amicus* briefs in the proceedings below, the Institute's scholars and its founder and CEO David J. Theroux, also filed an *amicus* brief in a similar case challenging AB5's constitutionality. *See* Amicus Br. of David R. Henderson et al., *Olson v. California*, No. 20-55267 (9th Cir. May 14, 2020). The Institute has been studying AB5 and its consequences for over two years and penned an open letter to Governor Gavin C. Newsom and Members of the California State Legislature on behalf of 153 economists and political scientists, calling for AB5's suspension. *See Open Letter to Suspend California AB-5*, Indep. Inst. (Apr. 14, 2020),

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[1] No party's counsel authored this brief in whole or in part, and no person or entity, other than *amici* or their counsel, made a monetary contribution to fund the brief's preparation or submission. All parties in this case were provided timely notice and have consented to *amici*'s filing of this brief.

[2] Unless otherwise stated, references to AB5 and statutory citations refer to the amended law.

https://www.independent.org/news/article.asp?id=13119.

The National Federation of Independent Business ("NFIB") is the nation's leading small business association. Its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. The NFIB Small Business Legal Center ("Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. To fulfill its role as the voice for small businesses, the Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

Americans for Prosperity Foundation ("AFPF") is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. AFPF is committed to ensuring the freedom of expression and association guaranteed by the First Amendment and to 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 state and federal courts, including filing an *amicus* brief in the proceedings below.

New Jobs America ("NJA") is a 501(c)(4) social welfare organization that advocates for the rapid growth of new jobs, educates freelance workers and lawmakers on policy initiatives, and promotes the rights of freelance workers across America. NJA has closely studied the political and economic impacts of AB5, and similar legislation across the country, as well as the so-called "ABC" test on which AB5 is modeled. NJA is committed to advocating on behalf of freelance workers and working to prevent state and local governments from interfering with the benefits created by independent contracting.

SUMMARY OF ARGUMENT

AB5 purports to protect workers, but nothing could be further from the truth. When California enacted AB5, it upended the economic stability of over a million independent contractors by converting them to employees. At the same time, AB5 burdens the speech of independent contractors who work as speech-creators, imposing content-based speech restrictions that deprive speech-creators of their livelihoods and that curtail their ability to produce content for a broad variety of publications. AB5 is thus repugnant to the First Amendment and cannot hope to satisfy strict scrutiny. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

AB5 has fundamentally transformed California's labor market for the worse, harming independent contractors and small businesses alike. By the Legislature's own count, hundreds of thousands of jobs will be lost as a result of AB5. And independent contractors are losing the benefits of flexibility,

autonomy, and economic opportunity that encouraged them to become independent contractors in the first place. Small businesses are similarly harmed by AB5 as they must weather the additional costs and non-financial burdens caused by the reclassification of independent contractors as employees. The Court should grant plenary review to correct these severe constitutional and societal harms.

At a minimum, the Court should grant, vacate, and remand (GVR) in light of its recent decision in *City of Austin v. Reagan National Advertising of Austin, LLC*, 596 U.S. ___, No. 20-1029 (Apr. 21, 2022) ("*Reagan*"). *Reagan* addresses the function-or-purpose test for content-based speech that was articulated in *Reed* and presented in Petitioner's first issue, as well as the analytical process for evaluating First Amendment limitations, both of which the Ninth Circuit bypassed entirely in this case. Accordingly, the Court's decision in *Reagan* constitutes an "intervening development[ ]" that "reveal[s] a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

REASONS FOR GRANTING CERTIORARI

I. THIS CASE PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE MERITING REVIEW BECAUSE AB5 SUBSTANTIALLY BURDENS THE SPEECH OF INDEPENDENT CONTRACTORS.

California enacted AB5 in 2019 to codify the stringent independent-contractor test established in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 416 P.3d 1 (Cal. 2018). *See* Cal. Lab. Code § 2775(b)(1). The *Dynamex* test replaced the prior, flexible, multi-factor balancing test for determining a worker's status. Now though, AB5 requires ***nearly all*** independent contractors in California—with only limited, admittedly "arbitrary," exemptions[3]—to be reclassified as employees.

This harsh result did not improve with amendment. Instead, the amendment (2020 California Assembly Bill 2257) further entrenched AB5's arbitrary, business-killing mandates, adding exemptions for only a few politically-favored groups. The majority of independent contractors in California remain subject to AB5's restrictions. *See* Pet. Writ Cert. ("Pet.") at 6–10 (Feb. 22, 2022).

Independent contractors participate in a wide variety of industries. Indeed, "the rise of independent

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[3] Katie Kilkenny, *"Everybody Is Freaking Out,"* Hollywood Rep. (Oct. 17, 2019), https://www.hollywoodreporter.com/news/general-news/everybody-is-freaking-freelance-writers-scramble-make-sense-new-california-law-1248195/ (quoting AB5's author, Assemblywoman Lorena Gonzalez).

contractors has served to ignite large portions of the California economy, encourage entrepreneurship, and provide income for an estimated 4 million workers" in California alone.[4] And nationally, independent contractors account for approximately ten percent of the American workforce,[5] more than ten million workers as of 2017.[6]

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[4] *Assembly Floor Analysis*, Cal. Legis. Info. (Sept. 10, 2019), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB5 (quoting analysis provided by the Southwest California Legislative Council).

[5] Katherine Lim et al., *Independent Contractors in the U.S.* 58 (July 2019), https://www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf (noting that 10.56% of the U.S. workforce received a Form 1099). Some metrics identify even higher percentages of the population as potential independent contractors. *See* Edison Res. & Marketplace, *The Gig Economy* 2–5 (Dec. 2018), http://www.edisonresearch.com/wp-content/uploads/2019/01/Gig-Economy-2018-Marketplace-Edison-Research-Poll-FINAL.pdf ("24% of Americans 18+ earn income by working in the gig economy."); *Gig Economy Statistics & Trends for 2021 and Beyond*, Shift Pixy (Feb. 18, 2021) https://shiftpixy.com/2021/02/18/gig-economy-statistics/ (reporting that "the number of gig economy workers in the U.S. (either through primary or secondary jobs) is 36%" (citation omitted)).

[6] News Release, U.S. Bureau of Lab. Stats., *Contingent and Alternative Employment Arrangements* (June 7, 2018), https://www.bls.gov/news.release/archives/conemp_06072018.htm. Due to the difficulty in identification, the total number of independent contractors in the United States may be even higher. *See, e.g.*, Edelman Intelligence, *Freelance Forward 2020*, Upwork (Sept. 2020), https://www.upwork.com/documents/freelance-forward-2020 (noting that "59 million Americans freelanced" in 2020, earning "$1.2 trillion in annual earnings from freelancing").

AB5, therefore, has drastic and harmful consequences for California—one of the largest economies in the world[7]—that are felt most directly by individual independent contractors and small businesses across the state. Adding insult to injury, AB5 imposes additional burdens on speech-creators that cannot be ignored as merely "incidental."

A. There Is No Question That Recategorizing Independent Contractors As Employees Burdens Speech.

As Petitioners point out, journalists, authors, photographers, videographers, and other speech-creators routinely work as independent contractors. Pet. at 2.[8] But unlike the other affected industries, AB5 has the pernicious consequence of burdening, and ultimately silencing, independent contractors who work as speech-creators.

First, AB5 burdens the speech of independent contractors by reducing the number of paid speech-creator positions across the board and thereby

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[7] *Best States for Business 2019: California*, Forbes, https://www.forbes.com/places/ca/?sh=3821404e3fef (last visited Apr. 22, 2022) ("If it were a country, California's $3.1 trillion economy would be the fifth biggest in the world, ranked between Germany and the United Kingdom.").

[8] *See, e.g.*, Nat'l Endowment for the Arts, *Artists and Other Cultural Workers: A Statistical Portrait* iii (Apr. 2019), https://www.arts.gov/sites/default/files/Artists_and_Other_Cultural_Workers.pdf (finding that "[a]rtists are 3.6 times as likely as other workers to be self-employed" and that "roughly 34 percent of all artists were self-employed" as compared to "9 percent of all workers").

limiting speech-creators' abilities to make a living from their craft. As discussed in more detail below, recategorizing independent contractors as employees is expensive and increases costs for businesses. Indeed, hiring an employee could cost "***20 to 30 percent more*** than what [businesses] would pay a contractor."[9] Many businesses simply cannot afford the additional costs and thus do not replace independent contractors with employees when independent contractors are no longer available. Thus, AB5's forced mass reclassification causes a net ***decrease*** of employment opportunities, resulting in fewer jobs across the board.[10] This is certainly the

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[9] Eli Rosenberg, *Can California rein in tech's gig platforms? A primer on the bold state law that will try.*, Wash. Post (Jan. 14, 2020), https://www.washingtonpost.com/business/2020/01/14/can-california-reign-techs-gig-platforms-primer-bold-state-law-that-will-try/ (emphasis added); *see also* Barbara Weltman, *How Much Does an Employee Cost You?*, U.S. Small Bus. Admin. (Aug. 22, 2019), https://www.sba.gov/blog/how-much-does-employee-cost-you#:~:text=There's%20a%20rule%20of%20thumb,little%20harder%20to%20pin%20down ("There's a rule of thumb that the cost is typically 1.25 to 1.4 times the salary, depending on certain variables.").

[10] *See* Alison Stein, *Independent couriers' reaction to employee reclassification: learnings from Geneva*, Medium (Sept. 22, 2020), https://medium.com/uber-under-the-hood/independent-couriers-reaction-to-employee-reclassification-learnings-from-geneva-e3885db12ea3 (finding that reclassification of Uber drivers as employees in Geneva "**put 77% of couriers, or 1,000 people, out of work**"); *cf.* Lorenzo E. Bernal-Verdugo et al., *Labor Market Flexibility and Unemployment: New Empirical Evidence of Static and Dynamic Effects* 12 (Int'l Monetary Fund, Working Paper No. 12/64, 2012), https://www.imf.org/en/Publications/WP/Issues/2016/12/

case in California, as the California Legislative Analyst's Office projected that only a "***much smaller*** [number of workers] than the roughly 1 million [independent] contractors" who are affected by AB5 would be rehired as employees.[11] Speech-creator positions are no exception.

Indeed, many speech-creator jobs have simply disappeared, or been limited, in the wake of AB5. For example, in response to AB5, Vox Media cut ties with more than 200 independent contractors and replaced them with a mere twenty employees.[12] AB5 also prevents certain independent contractors from working for speech-creating businesses, like political campaigns or advocacy groups, because it requires

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31/Labor-Market-Flexibility-and-Unemployment-New-Empirical-Evidence-of-Static-and-Dynamic-25753 (finding that "policies that enhance labor market flexibility should reduce unemployment"); *id.* at 3 (observing that regulations "obstruct job creation and tend to be associated with higher levels of unemployment"); Juan Botero et al., *The Regulation of Labor*, 119 Q. J. Econ. 1339, 1379 (2004), https://academic.oup.com/qje/article-abstract/119/4/1339/1851075?redirectedFrom=fulltext (same).

[11] *The 2020-21 Budget: Staffing to Address New Independent Contractor Test*, Cal. Legis. Analyst's Off. (Feb. 11, 2020), https://lao.ca.gov/Publications/Report/4151.

[12] *See* Suhauna Hussain, *Vox Media cuts hundreds of freelance journalists as AB 5 changes loom*, L.A. Times (Dec. 17, 2019), https://www.latimes.com/business/story/2019-12-17/vox-media-cuts-hundreds-freelancers-ab5; *see also* App. R-4 ("The client canceled my involvement because the requirements of AB5 would have forced them to make me an employee and the budget couldn't support the additional costs of putting me on payroll.").

those businesses to classify workers as employees.[13] And speech-creator businesses, along with many others, are leaving California and relocating to avoid AB5's impact.[14]

Second, AB5 burdens independent contractors' speech, and the public's right to read and hear that speech, by imposing practical limitations that curtail independent contractors' abilities to publish or speak

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[13] *See* Appellants' Opening Br., *Mobilize the Message, LLC v. Bonta*, No. 21-55855 (9th Cir. filed Aug. 20, 2021) (challenging AB5 because companies that provide door-knocking and signature gathering services are required to classify independent contractors as employees when hired by political campaign clients or advocacy groups).

[14] *See* Karen Anderson, *As with California's disastrous AB 5 law, the PRO Act would hurt major sectors of the independent workforce*, Americans for Prosperity (June 4, 2021) https://americansforprosperity.org/ab5-pro-act-hurting-workforce/ (listing examples); Johana Bhuiyan, *Coronavirus is supercharging the fight over California's new employment law*, L.A. Times (Mar. 26, 2020), https://www.latimes.com/business/technology/story/2020-03-26/coronavirus-disrupted-their-income-now-their-calls-for-california-to-take-action-on-ab5-are-getting-louder (explaining that audio-transcribing company called "Rev is among a handful of companies that stopped using workers in California"); Patrice Onwuka, *California's AB5 Triggers Outcry From Independent Contractors*, Ind. Women's Forum (Jan. 20, 2020), https://www.iwf.org/2020/01/20/californias-ab5-triggers-outcry-from-independent-contractors-2/ (detailing interview with writer who moved out of California due to AB5); *cf.* Isabelle Morales, *List of Personal Stories of Those Harmed by California's AB5 Law*, Americans for Tax Reform (Dec. 22, 2020), https://www.atr.org/ab5/ (collecting 655 testimonials demonstrating how "California's AB5 law . . . has destroyed countless lives and driven people out of the Golden State").

broadly. This is precisely the type of First Amendment infringement that the Court found unconstitutional in *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) ("*NTEU*").

Like the ban on honoraria at issue in *NTEU*, AB5 "unquestionably imposes a significant burden on expressive activity." *NTEU*, 513 U.S. at 468. Under AB5, if a speech-creator wishes to produce content for potentially dozens of publications—or even just a single publication—on a variety of different topics (as a speech-creator could do before AB5's passage), that speech-creator is required to be an employee of each publication. In doing so, the speech-creator sacrifices the ability to deduct business expenses from his tax bill and loses ownership of the copyright to his creative work. *See* Pet. at 13–14. Additionally, as an employee for multiple masters, issues inevitably arise regarding how to split benefits, compensation, tax liability, or unemployment obligations between employers.[15] Publisher employers and the U.S. tax structure have never before been asked to address an ***employee*** who works only a small amount per year for potentially dozens of publications, adding costs and

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[15] *See, e.g.*, U.S. Chamber of Commerce, *Opportunity at Risk, A New Joint-Employer Standard and the Threat to Small Business* 4 (2015), https://www.uschamber.com/assets/archived/images/documents/files/joint_employer_standard_final_0.pdf (cautioning that "[a] broadened joint-employer standard will result in the comprehensive restructuring of many business relationships, likely resulting in higher costs, fewer new businesses, less growth, and fewer new jobs").

complexity for speech-creators.[16] To avoid complications or risk losing a project to independent contractors from other states, speech-creators would likely self-censor by reducing the number of publications for whom they write or by altering their content to ensure continued engagement with the AB5-limited list of contacts.[17] Thus, by denying certain speech-creators the ease and benefit of independent contractor status, AB5 "induces them to curtail their expression," and burdens "the public's right to read and hear what the [speech-creators] would otherwise have written and said." *NTEU*, 513 U.S. at 469–70.

Third, AB5 is a content-based limitation on contractor speech, because AB5 "singles out specific subject matter for differential treatment." *Reed*, 576 U.S. at 169; *see Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2346 (2020) (finding that law "favor[ing]" speech by one entity over others was content-based). That is, AB5 requires a speaker to be

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[16] *Cf.* Holly Wade & Andrew Heritage, *Small Business Problems & Priorities* 7, NFIB Rsch. Ctr. (10th ed. 2020), https://assets.nfib.com/nfibcom/NFIB-Problems-and-Priorities-2020.pdf (finding that small businesses routinely cite "Tax Complexity" as a critical problem); *Top Five Tax Surprises with Multiple Jobs*, Overemployed, https://overemployed.com/taxes-with-multiple-jobs-top-5-surprises/ (last visited Apr. 22, 2022) ("The IRS and tax regulations still operate in a one-employer-for-one-employee world.").

[17] *See, e.g.*, Morales, *supra* note 14 (listing examples of how AB5 "has destroyed countless lives and driven people out of the Golden State"). *Cf.* Onwuka, *supra* note 14 (discussing one writer's concern about expanding the list of publications for which she writes due to AB5).

classified as an employee or an independent contractor based on ***what message*** a speaker presents. *See* Pet. at 10–11. For example, a worker who provides marketing speech is exempt from AB5, but only if the marketing speech is deemed "original and creative in character." Cal. Lab. Code § 2778(b)(2)(A). Similarly, a freelance writer is exempt from AB5, but only if the freelance writer does not "directly replac[e] an employee" based on the type and volume of speech he creates. *Id.* § 2778(b)(2)(J). In other words, the content of a worker's speech determines whether he is subject to AB5's requirements. This kind of line-drawing is a content-based restriction on speech that violates the First Amendment.

B. Recategorizing Independent Contractors As Employees Harms Independent Contractors.

Beyond the constitutional infirmity, AB5 denies independent contractors a host of additional benefits. As an initial matter, most independent contractors simply do not ***want*** to be employees. Independent workers overwhelmingly prefer to remain independent and do not want to be treated as "employees."[18] Indeed, "60% of new freelancers agree

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[18] *See, e.g.*, Mark S. Pulliam, *The Exploitation of Labor and Other Union Myths*, 24 Indep. Rev. 409, 429 (2019), https://www.independent.org/pdf/tir/tir_24_3_06_pulliam.pdf ("In the 'gig economy' . . . many workers prefer the flexible hours of independent-contractor arrangements in lieu of traditional employment.").

that there is ***no amount of money*** that would convince them to take a traditional job."[19]

Independent contracting provides much-needed flexibility for many individuals. Indeed, independent work is often the most viable option for workers trying to balance their jobs with competing personal obligations.[20] For example, independent contracting may be the only option for a health-compromised individual who must work remotely, a single parent who cannot afford childcare, or an individual caring for an ailing loved one.[21] Independent contractor status also provides greater flexibility to individuals seeking entrepreneurial opportunities, allows independent contractors to be their "own boss," and to

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[19] Edelman Intelligence, *supra* note 6, at 43 (emphasis added).

[20] *Id.* at 9 ("48% of freelancers report being caregivers while 33% report having a disability in their household, surpassing non-freelancers and US workers overall."); *see also id.* ("76% of caregivers who freelance say freelancing gives them more flexibility to be available for their families; 72% of freelancers with a disability in their household say freelancing gives them flexibility to address their personal, mental, or physical needs.").

[21] Rachel Oh, *From interpreters and journalists to pet sitters, California's gig economy law has independent contractors fretting*, Peninsula Press (Dec. 23, 2019), https://peninsulapress.com/2019/12/23/from-interpreters-and-journalists-to-pet-sitters-californias-gig-economy-law-has-independent-contractors-fretting/ (providing examples); Jeff Joseph, *Gig workers like and want flexibility, that's why they became gig workers*, Orange Cnty. Reg. (Sept. 18, 2020), https://www.ocregister.com/2020/09/18/gig-workers-like-and-want-flexibility-thats-why-they-became-gig-workers/.

exercise total control over when and how work is performed.[22]

Moreover, independent contractor jobs provide economic opportunities not typically available to employees. Individuals serving as independent contractors, who may not otherwise meet certain work qualifications, have the opportunity to gain training and experience in skills not part of their daily work.[23] This increased work experience directly correlates to improved salary options.[24] Further, even

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[22] Direct Selling Ass'n, *2020 Consumer Attitudes & Entrepreneurship Study* (2020), https://www.dsa.org/docs/default-source/research/dsa-ipsos-2020-consumerattitudesinfographic2-27.pdf?sfvrsn=68ddfa5_2 (last visited Apr. 22, 2022) ("77% of Americans are interested in flexible, entrepreneurial/income-earning opportunities."); Coalition for Workforce Innovation, *National Study of 600 Self-Identified Independent Contractors* 17 (Jan. 2020), https://rilastagemedia.blob.core.windows.net/rila-web/rila.web/media/media/pdfs/letters%20to%20hill/hr/cwi-report-final.pdf (finding that 90% of individuals favor "[a]ffirming the right of individuals to choose an independent style of work"); Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States*, 71 Indus. Lab. Rev. 705, 706 (2018) (finding that Uber attracts driver-partners due to "the nature of the work, the flexibility, and the compensation").

[23] *See* Coalition for Workforce Innovation, *supra* note 22, at 10 (finding that 89% of respondents agreed that "[g]ig work has made it easier for workers to leave a bad situation and try new opportunities that provide additional benefits, flexibilities and are more meaningful and rewarding than a traditional job").

[24] *See* New Jobs America, *Measuring the Salary Value of Education and Work Experience in Massachusetts: A Regression-Model Study of Salaries in New-Hire Job Postings*

without the added opportunities for experience, independent contractors may also ***earn more*** than their employee counterparts. Relying on certain studies, the U.S. Department of Labor found in 2021 that "independent contractors tend to earn more per hour: Employees earned an average of $24.07 per hour, self-employed independent contractors earned an average of $27.43 per hour . . . ."[25]

These benefits are lost, or at least severely hindered, when independent contractors are reclassified as employees. The flexibility, autonomy, and control prized by independent contractors are unique to independent contracting. These benefits often cannot be replicated in traditional employment, where an employer must make a profit from an employee's work—a circumstance that prioritizes set work schedules, institutional learning, and traditional management structures. Therefore, in addition to burdening speech, AB5 inhibits the right of independent contractors to earn a living in their

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(Nov. 22, 2019), https://www.newmassjobs.com/single-post/measuring-the-salary-value-of-education-and-work-experience-in-massachusetts#viewer-8lhp5 (finding that, for Massachusetts employees as a whole, "the salary value of work experience contributes eight times as much to their salary as education does").

[25] *See* Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168, 1219 (Jan. 7, 2021) (citing, *inter alia*, L.F. Katz & A.B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015* (2018); M. Keith Chen et al., *The Value of Flexible Work: Evidence from Uber Drivers*, 127 J. Pol. Econ. 2735 (2019) ("Uber drivers earn more than twice the [economic] surplus they would in less-flexible arrangements.")).

preferred manner and deprives them of status-specific economic benefits and opportunities.

C. Recategorizing Independent Contractors As Employees Significantly Harms Small Businesses.

AB5 also harms small businesses, which make up 99.8% of all businesses in California.[26] Indeed, small businesses rely on independent contractors for success, and AB5's forced reclassification creates enormous costs that many small businesses cannot easily absorb.

Employees, and the costs attendant to employees, constitute a major financial investment on the part of businesses. As a general rule, the cost of an employee "is typically 1.25 to 1.4 times the salary."[27] This is because hiring an individual employee—versus hiring an independent contractor—requires a small business to cover payroll costs, insurance coverage, and likely

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[26] California For All, *Small Business Fact Sheet* (Sept. 9, 2020) https://www.gov.ca.gov/wp-content/uploads/2020/09/Small-Business-Fact-Sheet-9.9.20.pdf ("California is home to 4.1 million small businesses, representing 99.8 percent of all businesses in the state and employing 7.2 million workers in California, or 48.5 percent of the state's total workforce.").

[27] Weltman, *supra* note 9; News Release, U.S. Bureau of Lab. Stats., *Employer Costs for Employee Compensation—December 2021* (Mar. 18, 2022), https://www.bls.gov/news.release/pdf/ecec.pdf (finding that the average cost of benefits accounted for 31% of "[e]mployer costs for employee compensation").

fringe benefits.[28] Thus, AB5 creates added costs for every business that previously employed independent contractors to perform non-exempted work.

In addition to the financial cost of hiring employees, AB5 imposes non-financial burdens on small businesses. The requirement to hire employees causes small businesses to divert energy and resources away from performance or related business concerns and instead emphasize employee hiring and retention. Additionally, the flexibility afforded to independent contractors also flows to California's, and the nation's, small businesses. Forcing small businesses to hire employees instead of utilizing independent contractors creates burdens not present in the contractor relationship.

Every four years, the NFIB Research Center surveys the problems facing small businesses. In its most recent 2020 survey, "Locating Qualified Employees" ranked as the second greatest concern for small businesses, with 31% labeling it as "critical."[29] This represented an eight-spot increase from 2016 and a thirty-spot increase from 2012.[30] Not far behind in the 2020 rankings was "Finding and Keeping Skilled Employees," with 26% labeling it as a "critical" problem.[31] Undoubtedly, related concerns like employee training, management, regulations, and

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[28] Weltman, *supra* note 9.

[29] Wade & Heritage, *supra* note 16, at 9.

[30] *Id.* at 22–26.

[31] *Id.* at 9.

turnover only intensify under AB5's requirement to forego independent contractors in favor of hiring employees.[32]

At bottom, the costs of increased hiring caused by AB5 are a black hole for small businesses. Most small businesses simply do not need to employ someone to perform the work that is otherwise done by independent contractors. Independent contractors are "indispensable to the smooth operation of the small business economy, filling production and service needs when it is inefficient for the firm to do so, providing otherwise unavailable or too costly expertise on a limited basis, and generally filling periodic gaps that arise from fluctuating demand."[33] This is particularly true of certain industries, like construction, transportation, and computer services, where such services are needed infrequently or require significant financial investment (like the purchase of a vehicle, equipment, or insurance) for the average small business.[34] For most small businesses,

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[32] *Id.* at 9–11 (collecting data showing that employers face increased problems, when compared to 2016 surveys, with "Finding and Keeping Skilled Employees" (ranked 5th); "Training Employees" (ranked 32nd); "Managing Employees" (ranked 35th); "Hiring/Firing/Employment Regulations" (ranked 43rd); and "Employee Turnover" (ranked 50th)).

[33] NFIB, *Independent Contractors*, 8 Nat'l Small Bus. Poll, no. 6, 2008, at 2, http://www.411sbfacts.com/files/SBP_V8I6_IndyContract_1_6.pdf.

[34] *Id.* at 1; *see also At Large Firms Across Industries, One in Six Are Gig Workers*, Staffing Indus. Analysts (Feb. 4, 2020), https://www2.staffingindustry.com/Editorial/Daily-News/At-

it is not cost-effective to hire employees to perform the tasks handled by independent contractors. And due to the size and nature of their client bases, small businesses are generally less able to pass on the additional costs caused by AB5 to their clients or consumers.[35]

Thus, by removing the option to hire independent contractors, AB5 imposes additional significant costs—both financial and non-financial—on small businesses that burden their ability to operate.

II. AT MINIMUM, THIS COURT SHOULD GRANT, VACATE, AND REMAND FOLLOWING ITS RECENT DECISION IN *CITY OF AUSTIN V. REAGAN NATIONAL ADVERTISING*.

This Court should grant plenary review of this case to vindicate the important First Amendment

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large-firms-across-industries-one-in-six-are-gig-workers-52688 ("[E]very industry relies on gig workers . . . as companies scramble to find the right talent.").

[35] *Cf.* Reeve T. Bull, *How to Account for Small Business Interests in President Biden's Modernizing Regulatory Review Initiative*, Brookings (Sept. 29, 2021), https://www.brookings.edu/blog/up-front/2021/09/29/how-to-account-for-small-business-interests-in-president-bidens-modernizing-regulatory-review-initiative/ (explaining that "large firms" often possess "market power," which means "[t]hey can easily charge their largest customers a little more in overhead expenses to cover the cost of their compliance fees," while "[s]mall firms, by contrast, are often competing for less lucrative transactions, and their customers are likely to notice and take their business elsewhere if they try to charge a premium to cover compliance costs").

rights of independent contractors highlighted above. At minimum, however, this Court should grant, vacate, and remand (GVR) this case in light of its decision in *City of Austin v. Reagan National Advertising of Austin, LLC*, 596 U.S. ___, No. 20-1029 (Apr. 21, 2022).

GVR is appropriate because *Reagan* addressed the function-or-purpose test for content-based speech that was articulated in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), affecting the first issue presented by Petitioners. Based on *Reagan*'s elucidation of *Reed*—that "a regulation of speech cannot escape classification as facially content based simply by swapping an obvious subject-matter distinction for a 'function or purpose' proxy that achieves the same result," *Reagan*, slip op. at 11—the Ninth Circuit should be required to apply the correct test for determining whether a law is content-based, something it entirely omitted in the decision below.

In *Reagan*, an outdoor advertising company challenged the City of Austin's sign code, which either permits or prohibits the digitization of signs based on whether they advertise something "on-premises" or "off-premises." Slip op. at 3. Reagan, like Petitioners in this case, argued that a law was content based, and therefore subject to strict scrutiny, because the benefits or burdens of the relevant law "depend[ed] entirely on the communicative content" of the speech at issue, thus "singl[ing] out specific subject matter for differential treatment." *Reed*, 576 U.S. at 164, 169. Even though the Court held that Austin's sign code "d[id] not single out any topic or subject matter for differential treatment," AB5 goes far beyond the

distinctions "based on location" that were at issue in *Reagan*. Slip op. at 8. Indeed, as discussed above, AB5 distinguishes between independent contractors and employees based on the very subject matter and nature of workers' speech. *See supra* Section I.A (discussing distinctions based on the "original and creative" content in marketing speech); *cf. Reagan*, slip op. at 8 (finding regulation content neutral when the "substantive message itself is irrelevant to the application of the provisions").

For this reason alone, the Ninth Circuit's decision in this case must be vacated in light of *Reagan*'s elucidation of the function-or-purpose test and its application of that test. *See Reagan*, slip op. at 1 (Alito, J. concurring in the judgment in part and dissenting in part) (agreeing that the Court "must reverse" because the Court of Appeals "did not apply" the requisite constitutional tests). Thus, *Reagan* constitutes an "intervening development[ ]" that "reveal[s] a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence*, 516 U.S. at 167.

GVR is further appropriate because the Ninth Circuit made a grievous order of operations error that *Reed* condemned and this Court further reproached in *Reagan*. Rather than evaluating the First Amendment claims before it, the Ninth Circuit improperly bypassed *Reed*'s, and now *Reagan*'s, analytical framework by accepting California's claim that AB5 regulated "economic activity," not speech. *Am. Soc'y of Journalists & Authors, Inc. v. Bonta*, 15 F.4th 954, 960–61 (9th Cir. 2021). The Ninth Circuit

thus never analyzed AB5 as a content-based restriction. But *Reed* requires courts to evaluate whether a law is a content-based speech restriction ***first***. The Court made clear in *Reed* that "we have repeatedly considered whether a law is content neutral on its face ***before*** turning to the law's justification or purpose." 576 U.S. at 166 (emphasis in original). This is because "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* at 165 (citation omitted). "In other words, an innocuous justification," like California's claim that AB5 is primarily an economic regulation, "cannot transform a facially content-based law into one that is content neutral." *Id.* at 166.

Reed's analytical process for determining whether a law is content based was squarely at issue in *Reagan*. Indeed, the City of Austin defended its sign code on the grounds that *Reed* never altered the "***nature*** of a content-based law," it simply clarified "the analytical ***process*** courts should use to identify one": test for content neutrality first, ***then*** consider government justifications. Br. for Petitioner, at 23, *Reagan Nat'l Advertising*, No. 20-1029 (Aug. 13, 2021) (emphases in original). This Court clarified in *Reagan* that content neutrality is the first issue for consideration. In fact, *Reagan* ***only*** considered whether the "City's ordinance [was] facially content neutral." Slip op. at 13. It never considered the ordinance's "purpose or justification." It instead remanded this secondary issue to the Court of Appeals, recognizing that "evidence [of] an

impermissible purpose or justification" could subsequently invalidate "a facially content-neutral restriction." *Id.* Accordingly, the Ninth Circuit's purpose-first ruling contravenes *Reed* and *Reagan* in the first instance and must be vacated.

In sum, GVR will permit the Ninth Circuit to correct its failure to properly apply *Reed*, and its elucidation in *Reagan*, in a manner likely to "determine the ultimate outcome of the litigation." *Lawrence*, 516 U.S. 167. Indeed, this Court adopted a similar approach in the wake of its decision in *Reed* and should do so again here. *See, e.g.*, *Herson v. City of Richmond*, 577 U.S. 801 (2015) (GVR to consider whether the City of Richmond's sign ordinance violated the First Amendment in light of *Reed*); *Wagner v. City of Garfield Heights*, 576 U.S. 1049 (2015) (same); *Thayer v. City of Worcester*, 576 U.S. 1048 (2015) (same); *Central Radio Co. v. City of Norfolk*, 576 U.S. 1049 (2015) (same); Br. of Six Law Professors & the Pennsylvania Center for the First Amendment in Support of Petitioners, *Central Radio Co. v. City of Norfolk*, No. 14-1201, 2015 WL 2266464 (U.S. May 4, 2015) (advocating for GVR in light of forthcoming decision in *Reed*). The Court doing so would guarantee to ASJA "full and fair consideration of [its] rights in light of all pertinent considerations." *Stutson v. United States*, 516 U.S. 193, 197 (1996).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari. In the alternative, and at the very least, the Court should vacate and remand in light of its decision in *Reagan*.

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Respectfully submitted,

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