

No. 22-865

IN THE
Supreme Court of the United States

MOBILIZE THE MESSAGE, LLC, *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, INC., AND NEW
JOBS AMERICA AS *AMICI CURIAE*
SUPPORTING PETITIONERS**

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<i>Sorrell v. IMS Health Inc.</i> , 564 U.S. 552 (2011)	11, 12
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Other Authorities

- Katherine G. Abraham, *et al.*, *The Independent Contractor Workforce: New Evidence On Its Size and Composition and Ways to Improve Its Measurement in Household Surveys*, Nat'l Bureau Econ. Research, Working Paper 30997 (Mar. 2023), <https://www.nber.org/papers/w30997>.....7
- 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/>22
- Lorenzo E. Bernal-Verdugo *et al.*, *Labor Market Flexibility and Unemployment: New Empirical Evidence of Static and Dynamic Effects*, Int'l Monetary Fund, Working Paper No. 2012/064 (2012), <https://www.imf.org/en/Publications/WP/Issues/2016/12/31/Labor-Market-Flexibility-and-Unemployment-New-Empirical-Evidence-of-Static-and-Dynamic-25753>21

- Annette Bernhardt, *et al.*, *Independent Contracting in California: An Analysis of Trends and Characteristics Using Tax Data*, UC Berkeley Labor Center (Mar. 1, 2022), <https://laborcenter.berkeley.edu/independent-contracting-in-california/#s-2>.....6
- Juan Botero *et al.*, *The Regulation of Labor*, 119 Q. J. Econ. 1339 (2004), <https://academic.oup.com/qje/article-abstract/119/4/1339/1851075?redirectedFrom=fulltext>.....21
- 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>22
- Assembly Floor Analysis*, Cal. Legis. Info. (Sept. 10, 2019), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB56
- M. Keith Chen *et al.*, *The Value of Flexible Work: Evidence from Uber Drivers*, 127 J. Pol. Econ. 2735 (2019)27

- Coalition for Workforce Innovation, *National Study of 600 Self-Identified Independent Contractors* (Jan. 2020),
<https://rilastagemedia.blob.core.windows.net/rila-web/rila.web/media/media/pdfs/letters%20to%20hill/hr/cwi-report-final.pdf> 25, 26
- 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 25
- Edelmen Data & Intelligence, *Freelance Forward 2022*, Upwork (2022),
<https://www.upwork.com/research/freelance-forward-2022> 7, 24
- Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168, 1219 (Jan. 7, 2021) 27
- Best States for Business 2019: California*, Forbes,
<https://www.forbes.com/places/ca/?sh=3821404e3fef> 8
- 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 (2018).... 26

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>22

Open Letter from the Indep. Inst. to Governor Newsom, to Suspend California AB-5 (Apr. 14, 2020), <https://www.independent.org/news/article.asp?id=13119>.....2

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/>.....25

Katie Kilkenny, *Everybody Is Freaking Out*, Hollywood Rep. (Oct. 17, 2019), <https://www.hollywoodreporter.com/news/general-news/everybody-is-freaking-freelance-writers-scramble-makesense-new-california-law-1248195/>5

Katherine Lim *et al.*, *Independent Contractors in the U.S.* (July 2019), <https://www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf>.....7

Anu Madgavkar, *et al.*, *Human capital at work: The value of experience*, McKinsey Global Institute (June 2, 2022), <https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/human-capital-at-work-the-value-of-experience>26

Isabelle Morales, *List of Personal Stories of Those Harmed by California's AB5 Law*, Americans for Tax Reform (July 26, 2022), <https://www.atr.org/ab5/>22

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* (Nov. 22, 2019), <https://www.newmassjobs.com/single-post/measuring-the-salary-value-of-education-and-work-experience-in-massachusetts#viewer-8lhp5>27

NFIB, *Independent Contractors*, 8 Nat'l Small Bus. Poll, no. 6 (2008), http://www.411sbfacts.com/files/SBP_V8I6_IndyContract_1_6.pdf.....8

- 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/>25
- Adam Ozimek, *Freelance Forward Economist Report*, Upwork (2021),
<https://www.upwork.com/research/freelance-forward-2021>24
- Mark S. Pulliam, *The Exploitation of Labor and Other Union Myths*, 24 *Indep. Rev.* 409, at 429 (2019),
https://www.independent.org/pdf/tir/tir_24_3_06_pulliam.pdf24
- Gig Economy Statistics & Trends for 2021 and Beyond*, Shift Pixy (Feb. 18, 2021),
<https://shiftpixy.com/gig-economy-statistics/>7

- 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>21
- Economic 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 7
- News Release, U.S. Bureau of Lab. Stats., Employer Costs for Employee Compensation—December 2022 (Mar. 17, 2023), <https://www.bls.gov/news.release/pdf/ecec.pdf>.... 19
- Holly Wade & Andrew Heritage, *Small Business Problems & Priorities*, NFIB Rsch. Ctr. (10th ed. 2020), <https://assets.nfib.com/nfibcom/NFIB-Problems-and-Priorities-2020.pdf>20
- Barbara Weltman, *How Much Does an Employee Cost You?*, U.S. Small Bus. Admin. (Aug. 22, 2019), <https://proxy.www.sba.gov/blog/how-much-does-employee-cost-you> 19

INTEREST OF THE *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 California Assembly Bill 5 (“AB5”) and its amendments²—believes that AB5 burdens the political speech of canvassers and causes devastating harm to independent contractors and small businesses. The Institute has been studying AB5 and its consequences for over three 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

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 of *amici*’s filing of this brief.

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

AB5’s suspension.³ The Institute has also been active amicus participant in similar suits challenging AB5’s constitutionality, including filing amicus briefs in a similar First Amendment suit brought by the American Society of Journalists and Authors (“ASJA”), *see, e.g.* Amicus Br. of the Independent Institute, *et al.*, *ASJA v. Bonta*, No. 21-1172 (U.S. April 22, 2022), and the Institute’s scholars and its late founder and CEO David J. Theroux also filed an amicus brief in support of app-based workers in a suit challenging AB5 on Equal Protection grounds, *see* Amicus Br. of David R. Henderson *et al.*, *Olson v. California*, No. 20-55267 (9th Cir. May 14, 2020).

The National Federation of Independent Business Small Business Legal Center, Inc. (“NFIB 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. It is an affiliate of the National Federation of Independent Business, Inc. (“NFIB”), which is the nation’s leading small business association. NFIB’s mission is to promote and protect

³ Open Letter from the Indep. Inst. to Governor Newsom, to Suspend California AB-5 (Apr. 14, 2020), <https://www.independent.org/news/article.asp?id=13119>.

the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

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 unconstitutionally burdens political speech and hurts workers and businesses. California’s enactment of AB5 pulled the rug out from under more than one million independent contractors by converting them to employees. At the same time, AB5 burdens political speech of independent contractors who work as grassroots canvassers—as well as the organizations that express their political viewpoint through canvassers—by imposing content-based speech restrictions that deprive these speakers of their

livelihoods and curtail Californians' ability to communicate political messages through canvassing. AB5 is therefore incompatible with the First Amendment and should have been struck down by the Ninth Circuit for failure to satisfy constitutional scrutiny.

The Ninth Circuit, however, went the opposite way. The panel latched on to California's framing of AB5 as a generally applicable "economic regulation" that does not implicate speech. *See* Pet.App. at 14a–16a (majority op.). But that purported "economic regulation," as the dissent noted, "turn[s] predominantly, if not entirely, on the content of the workers' speech." Pet.App. at 21a (dissenting op.). The panel's attempt to reframe AB5 as a generally applicable and content neutral law—and to avoid applying the appropriate level of constitutional scrutiny—is contrary to this Court's jurisprudence. Further, the panel ignored the function-or-purpose test articulated in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), deepening a circuit split regarding application of that test that only this Court can resolve.

AB5 has fundamentally transformed California's labor market for the worse, harming independent contractors and businesses alike. By the Legislature's own count, hundreds of thousands of jobs are lost as a result of AB5 and businesses bear the burden of gap-

filling with more expensive and less flexible options. And independent contractors are losing the benefits of flexibility, autonomy, and economic opportunity that encouraged them to become independent contractors in the first place. The Court should grant plenary review to correct these serious constitutional and societal harms.

ARGUMENT

California’s AB5 codifies a stringent test that requires nearly all independent contractors in California—with only limited, admittedly “arbitrary,” exemptions⁴—to be reclassified as employees. *See* Cal. Lab. Code § 2775(b)(1) (citing *Dynamex Operations W., Inc. v. Super. Ct. of L.A.*, 416 P.3d 1 (Cal. 2018)). This harsh result did not improve with amendment. Instead, the amendments (2020 California Assembly Bills 170 and 2257) further entrenched AB5’s arbitrary, business-killing mandates, adding

⁴ Katie Kilkenny, *Everybody Is Freaking Out*, *Hollywood Rep.* (Oct. 17, 2019), <https://www.hollywoodreporter.com/news/generalnews/everybody-is-freaking-freelance-writers-scramble-makesense-new-california-law-1248195/> (quoting AB5’s author, Assemblywoman Lorena Gonzalez).

exemptions for only a few politically favored groups.⁵ The majority of independent contractors in California—including Petitioners who are, and use, canvassers and door knockers for political organizations—remain subject to AB5’s restrictions. *See* Pet. at 8–9.

Independent contractors are widespread in a broad variety of industries. Indeed, “the rise of independent 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.⁶ Nationally, independent

⁵ *See Olson v. California*, 62 F.4th 1206, 1219 (9th Cir. 2023) (finding plausible Plaintiffs’ allegations that AB5’s exemptions “were the result of ‘lobbying’ and ‘backroom dealing’” and identifying support).

⁶ *Assembly Floor Analysis*, Cal. Legis. Info., at 2 (Sept. 10, 2019), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB5 (quoting analysis provided by the Southwest California Legislative Council); *see also* Annette Bernhardt, *et al.*, *Independent Contracting in California: An Analysis of Trends and Characteristics Using Tax Data*, UC Berkeley Labor Center (Mar. 1, 2022), <https://laborcenter.berkeley.edu/independent-contracting-in-california/#s-2> (identifying approximately 2.7 million Californians as independent contractors based on 2016 tax data).

contractors account for approximately ten percent of the American workforce,⁷ more than ten million workers as of 2017.⁸ And independent contractors are

⁷ Katherine Lim *et al.*, *Independent Contractors in the U.S.*, at 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 Katherine G. Abraham, *et al.*, *The Independent Contractor Workforce: New Evidence On Its Size and Composition and Ways to Improve Its Measurement in Household Surveys*, Nat'l Bureau Econ. Research, Working Paper 30997 (Mar. 2023), <https://www.nber.org/papers/w30997> (noting that the share of independent contractors in the labor force may be “about 15% of all workers.”); *Gig Economy Statistics & Trends for 2021 and Beyond*, Shift Pixy (Feb. 18, 2021), <https://shiftpixy.com/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)).

⁸ Economic 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 Data & Intelligence, *Freelance Forward 2022*, Upwork (2022), <https://www.upwork.com/research/freelance-forward-2022> (noting that “a staggering 39% of the U.S. workforce, or 60 million Americans, performed freelance work” in 2022, earning \$1.35 trillion).

“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 via regular employment, providing otherwise unavailable or too costly expertise on a limited basis, and generally filling periodic gaps that arise from fluctuating demand.”⁹

AB5, therefore, has drastic and harmful consequences for California—one of the largest economies in the world¹⁰—that are felt most directly by independent contractors and businesses across the state. Adding insult to injury, AB5 imposes additional burdens on the speech of grassroots political advocates and canvassers that cannot be ignored as merely “indirect impact.” Pet.App. at 18a (majority op.).

⁹ NFIB, *Independent Contractors*, 8 Nat’l Small Bus. Poll, no. 6, at 2 (2008), http://www.411sbfacts.com/files/SBP_V8I6_IndyContract_1_6.pdf.

¹⁰ *Best States for Business 2019: California*, Forbes, <https://www.forbes.com/places/ca/?sh=3821404e3fef> (last visited Apr. 10, 2023) (“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.”).

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE NINTH CIRCUIT'S DECISION DISREGARDS THIS COURT'S PRECEDENT AND DEEPENS A CIRCUIT SPLIT.

Content-based speech restrictions, like those imposed by AB5, “are presumptively unconstitutional.” *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). The “government has no power to restrict expression because of . . . its subject matter, or its content.” *Police Dep’t of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Speech regulation that “on its face draws distinctions based on the message a speaker conveys” are, therefore, generally prohibited and “may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Reed*, 576 U.S. at 156, 163.

Yet the decision below ignores this fundamental limit on government power. The Ninth Circuit bestowed its imprimatur to the content-based speech restrictions within AB5 largely because of the state’s incantation of its power to regulate the labor market. *See* Pet.App. at 13a, 17a (majority op.). That is, the panel found that AB5’s distinctions between political door-knockers and signature-gatherers (not exempt under AB5) and door-to-door salesmen or newspaper carriers (exempt from AB5’s mandates) were acceptable because they were part of a “generally

applicable” economic regulation and “do not depend on the communicative content, if any, conveyed by the workers but rather on the workers’ *occupations*,” while, at the same time, acknowledging that it “might require some attention to the individual’s speech” to distinguish between individuals performing exempt and non-exempt roles. Pet.App. at 18a–19a (majority op.) (emphasis added). But that self-serving division cannot be dispositive. This Court’s recent speech precedents do not allow a content-discriminatory regulation to escape serious review simply due to the state’s creative labeling.

This case also reveals a troubling circuit split regarding the application of the “function or purpose” test articulated in *Reed*. See 576 U.S. at 165. As discussed below, the Ninth Circuit’s surface-level analysis of AB5’s exemptions ignores this Court’s warning in *Reed* that content discrimination may be “subtle,” and courts must consider whether a regulation has the “function or purpose” of distinguishing based on message. This position is contrary to the robust interpretation of *Reed* adopted by the Fourth and Tenth Circuits. And worse yet, like the Ninth Circuit, the First and Eleventh Circuits have chosen either only to apply the test in limited circumstances, or not apply it at all.

This Court’s intervention is required to resolve these important issues of constitutional law.

A. The Ninth Circuit’s Decision Rewrites This Court’s Precedent From Below.

The Ninth Circuit’s decision subverts this Court’s precedents by creating a false distinction between a content-based speech regulation and sweeping economic schemes or run-of-the-mill occupation regulations. As the dissent correctly recognized, if the majority opinion stands “[t]he government could circumvent the First Amendment simply by hiding content-based distinctions within a sweeping regulation.” Pet.App. at 26a. (dissenting op.); *cf. Bank Markazi v. Peterson*, 578 U.S. 212, 236–37 (2016) (Roberts, C.J., dissenting) (“Who would you say decided your case: the legislature, which targeted your specific case and eliminated your specific defenses so as to ensure your neighbor’s victory, or the court, which presided over the *fait accompli*?”). Generally applicable economic schemes or occupation regulations may run afoul of the First Amendment, and “an innocuous justification cannot transform a facially content-based law into one that is content neutral.” *Reed*, 576 U.S. at 166. At bottom, the Ninth Circuit’s ruling misinterprets or ignores this Court’s key content-discrimination precedents—in chronological order, *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), *Reed*, *Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 140 S. Ct. 2335 (2020), and *City of*

Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464 (2022)—and should be reversed.

First, contrary to the Ninth Circuit's mistaken description, *Sorrell* does not justify its false distinction between speech and economic regulations. Rather, *Sorrell* explicitly rejected the argument the Ninth Circuit relies on here—that the challenged law is merely a generally applicable economic regulation—and struck down a content-based restriction that disfavored pharmaceutical marketing, which is “speech with a particular content.” *Sorrell*, 564 U.S. at 564. This Court went further still and found that the challenged regulation imposed “speaker-based restrictions” because the law burdened speech differently based on the speaker's identity. *Id.* Thus the regulation at issue in *Sorrell*, like AB5, “on its face burdens disfavored speech by disfavored speakers.” *Id.* AB5 should be similarly struck down for its content-based and speaker-based regulations.

Second, the Ninth Circuit diminishes *Reed*'s import, ignoring its application completely after finding that AB5 is a “regulation of economic activity, not speech.” Pet.App. at 17a (majority op.). *Reed* explicitly admonishes against laws “singl[ing] out specific subject matter for differential treatment.” *Reed*, 576 U.S. at 169. *Reed* further cautions that some content-based restrictions “are more subtle, defining regulated speech by its function or purpose”

but that does not change their content-based nature or the constitutional scrutiny required. *Id.* at 163–64. However, when faced with the differential treatment imposed by AB5, the panel ducked the issue, citing its own “surface-level labels . . . to avoid First Amendment scrutiny.” Pet.App. at 27a. (dissenting op.).

Third, although it avoids mentioning *Barr* entirely, the Ninth Circuit’s conclusion that the First Amendment is only implicated when regulations specifically target speech similarly misunderstands and seeks to limit this Court’s *Barr* decision. *Cf.* Pet.App. at 18a (majority op.). Indeed, contrary to the Ninth Circuit’s limitation, *Barr* makes clear that special carveouts in a generally applicable law that favor certain messages over others—like the exemptions for jobs that use commercial speech that are exempt under AB5—violate the First Amendment. *Barr*, 140 S. Ct. at 2356. There, this Court held unconstitutional a special exception within the Telephone Consumer Protection Act—which generally prohibited robocalls to cell phones to advance political speech—for robocallers seeking to collect government debt. *Id.* at 2347, 2356. Under *Barr*, a content-based exception to a general rule is still a content-based regulation requiring strict scrutiny review.

Barr further rejected the false dichotomy between content-based regulations and occupational

regulations like that relied on by the Ninth Circuit. *Cf.* Pet.App. at 19a (majority op.). The government in *Barr*, like California, argued that the challenged regulation did not regulate content but sought to draw distinctions based on “speakers.” *Id.* at 2347. The Court firmly denied this argument, reasoning that “‘the fact that a distinction is speaker based’ does not ‘automatically render the distinction content neutral,’” and, instead, “laws favoring some speakers over others demand strict scrutiny when the legislatures speaker preference reflects a content preference.” *Id.* (citations omitted). Indeed, this Court has made clear that “speech restrictions based on the identity of the speaker are all too often simply a **means to control content.**” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010) (emphasis added); *see also* Pet.App. at 27a (dissenting op.) (analyzing *Barr* and noting that the panel opinion’s position was rejected by this key precedent).

Finally, the Ninth Circuit’s decision subverts this Court’s most recent content-discrimination decision in *Reagan National*. Contrary to the Ninth Circuit’s view, that decision does not give courts license to ignore content-based speech regulations. *See* Pet.App. at 19a (majority op.). Instead, *Reagan National* is a limited opinion in which the Court concluded that a sign ordinance was not “automatically” a content-based regulation merely because it required the Court

to read the sign to determine the binary issue of whether a sign refers to something on the same premises or another location. *Reagan Nat'l*, 142 S. Ct. at 1471–72. Here, by contrast, rather than “distinguish[ing] based on location,” *id.* at 1472, AB5 requires consideration of the broader subject matter of a communication—*e.g.*, political versus commercial speech—and makes distinctions based on the content of the communication.

Under no circumstances can *Reagan National* be read to empower states to arbitrarily penalize businesses based on the message that business espouses. Indeed, “[t]his Court’s precedents are deeply skeptical of” such laws. *See Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2378 (2018). This Court should be especially suspicious of sweeping laws that draw irrational distinctions between similarly situated groups and are motivated by political animus, which a different Ninth Circuit panel recently acknowledged may be at work with AB5. *See Olson*, 62 F.4th at 1219–20. This Court should grant certiorari to ensure that arbitrary and politically motivated laws hiding content-based speech restrictions receive meaningful constitutional review.

B. The Circuits Are Split On How To Apply the *Reed* Function-or-Purpose Test.

Additionally, the circuits are in deep confusion regarding application of *Reed*'s "function or purpose" instruction. *Reed*, 576 U.S. at 163. The decision below does not mention the function-or-purpose test at all, despite criticism from the dissent. *See* Pet.App. at 22a (dissenting opinion). Instead, the Ninth Circuit opinion looked to legislative labels to conclude that AB5 regulates occupational groups rather than speech content. *Id.* at 19a (majority opinion).

As Petitioner points out, the Ninth Circuit's decision stands in stark contrast to the Fourth and Tenth Circuits, which employ a robust interpretation of the function-or-purpose test. *See* Pet. at 23–25. The Fourth Circuit applied *Reed*, and the requisite strict scrutiny standard, to strike down an "anti-robocall statute [that] applies to calls with a consumer or political message but does not reach calls made for any other purpose." *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015); *accord Barr*, 140 S. Ct. at 2356; *see also* Pet. at 24. And the Tenth Circuit concluded that a curfew restriction that treated solicitors differently based on whether they were primarily commercial salesmen or a "civic, religious, philosophical, and ideological solicitors who incidentally sell a good or service" was a content-based restriction. *Aptive Env't*,

LLC v. Town of Castle Rock, 959 F.3d 961, 982 (10th Cir. 2020).

At the same time, like the Ninth Circuit, the First and Eleventh Circuits have all but ignored *Reed*'s function-or-purpose test. The First Circuit refused to apply the test unless the restriction at issue “depend[s] entirely for its application on the ‘communicative content.’” *March v. Mills*, 867 F.3d 46, 58 (1st Cir. 2017); *see also* Pet. at 24. And while the Eleventh Circuit avoided an ultimate decision on the function-or-purpose test, it discounted the test as dicta. *Harbourside Place, LLC v. Town of Jupiter*, 958 F.3d 1308, 1319 (11th Cir. 2020); *see also* Pet. at 25. Thus, the Ninth Circuit’s blatant disregard of one of this Court’s key speech precedents demonstrates a pattern from certain circuits that must be corrected. This Court should grant certiorari to resolve the circuit split regarding *Reed*'s application.

II. THIS CASE PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE MERITING REVIEW BECAUSE AB5 SUBSTANTIALLY BURDENS THE SPEECH OF INDEPENDENT CONTRACTORS AND HARMS EMPLOYERS, WORKERS, AND THE PUBLIC.

A. Recategorizing Independent Contractors As Employees Impermissibly Burdens Political Speech.

AB5 burdens independent contractors who engage in grassroots political communications and silences organizations that present their message via political canvassers. It does so by discriminating between canvassers (and the organizations that hire them)—categorizing only some canvassers as employees and imposing heightened financial barriers on their use while exempting other canvassers from AB5’s strict requirements—based on the content of the message expressed by the canvassers. These First Amendment harms are serious, and, although the case comes in an interlocutory posture, this constitutional violation cannot wait for review down the road. As demonstrated here, AB5 harms both the political process—working to burden political messages that would otherwise be shared by canvassers—and it keeps everyday Californians from earning a living.

First, AB5 silences political speakers by imposing content-based limitations on political canvassers’ speech. As Petitioners make clear, AB5 “singles out specific subject matter for differential treatment.” *Reed*, 576 U.S. at 169; *see* Pet. at 6–7, 27–28. That is, under AB5, those who go door-to-door to persuade people of the merits of a Hoover vacuum have the freedom of an independent contractor. But if that same person goes door-to-door to persuade someone of the merits of voting Hoover for president that canvasser must be treated as an employee with all of

the attending legal obligations. *See* Pet. at 6–8. That “is about as content-based as it gets.” *Cf. Barr*, 140 S. Ct. at 2346 (analyzing a law permitting certain robocalls and forbidding others).

Second, AB5 burdens the political speech of canvassers working as independent contractors by reducing the number of paid political canvasser positions across the board and thereby limiting political canvassers’ ability to make a living. It is indisputable that recategorizing independent contractors as employees is expensive and increases costs for businesses. Indeed, as a general rule, the cost of an employee “is typically 1.25 to 1.4 times the salary.”¹¹ This is because hiring an individual employee—versus hiring an independent contractor—requires a small business to cover payroll costs, insurance coverage, and likely fringe benefits.¹² AB5,

¹¹ Barbara Weltman, *How Much Does an Employee Cost You?*, U.S. Small Bus. Admin. (Aug. 22, 2019), <https://proxy.www.sba.gov/blog/how-much-does-employee-cost-you>; News Release, U.S. Bureau of Lab. Stats., *Employer Costs for Employee Compensation—December 2022* (Mar. 17, 2023), <https://www.bls.gov/news.release/pdf/ecec.pdf> (finding that the average cost of benefits accounted for 31% of employer costs for employee compensation).

¹² Weltman, *supra* note 11.

therefore, creates added costs for every business that previously employed independent contractor canvassers to perform non-exempted work. And, in addition to the financial cost of hiring employees, AB5 imposes non-financial costs by causing businesses to divert energy and resources to hiring, retention, and related concerns like employee training, management, and regulations,¹³ which only intensify under AB5's requirement to forego independent contractors in favor of hiring employees. Many businesses simply cannot afford the additional costs and do not replace independent contractors with employees when independent contractors are no longer available.

As a result, AB5's forced mass reclassification causes a net ***decrease*** of employment opportunities,

¹³ Holly Wade & Andrew Heritage, *Small Business Problems & Priorities*, NFIB Rsch. Ctr., at 9-11 (10th ed. 2020), <https://assets.nfib.com/nfibcom/NFIB-Problems-and-Priorities-2020.pdf> (collecting data showing that employers face increased problems, when compared to 2016 surveys, with "Locating Qualified Employees" (ranked 2nd with 31% labeling as "critical"); "Finding and Keeping Skilled Employees" (ranked 5th with 26% labeling as "critical"); "Training Employees" (ranked 32nd); "Managing Employees" (ranked 35th); "Hiring/Firing/Employment Regulations" (ranked 43rd); and "Employee Turnover" (ranked 50th)).

resulting in fewer jobs across the board.¹⁴ Indeed, as the result of a recent mandatory reclassification of Uber drivers from independent contractors to employees in Geneva, Switzerland approximately 77% of couriers—a thousand people—lost their jobs.¹⁵ This is certainly the case in California, as the California Legislative Analyst’s Office projected that only a “***much smaller*** [number of workers] than the roughly

¹⁴ Cf. Lorenzo E. Bernal-Verdugo *et al.*, *Labor Market Flexibility and Unemployment: New Empirical Evidence of Static and Dynamic Effects*, Int’l Monetary Fund, Working Paper No. 2012/064, at 12 (2012), <https://www.imf.org/en/Publications/WP/Issues/2016/12/31/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).

¹⁵ 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”).

1 million [independent] contractors” who are affected by AB5 would be rehired as employees.¹⁶ Political canvassers are no exception. Even if some were to see this reduction as a societal benefit, “the enshrinement of constitutional rights necessarily takes certain policy choices off the table.” *D.C. v. Heller*, 554 U.S. 570, 636 (2008).

Indeed, Petitioners are a prime example of how political canvasser positions have simply disappeared or been limited in the wake of AB5. Petitioner

¹⁶ *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>; *see, e.g.*, 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> (reporting that Vox Media cut ties with more than 200 independent contractors and replaced them with only twenty employees); 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); Isabelle Morales, *List of Personal Stories of Those Harmed by California’s AB5 Law*, Americans for Tax Reform (July 26, 2022), <https://www.atr.org/ab5/> (collecting 676 testimonials demonstrating how AB5 “has destroyed the dreams and livelihoods of countless Golden State households”).

Mobilize the Message abandoned California because, due to AB5's restrictions, it could not afford to hire door knockers and canvassers as employees. *See* Pet. at 10. Similarly, AB5 has already prevented Petitioner Moving Oxnard Forward, and its political action committee Petitioner Starr Coalition for Moving Oxnard Forward, from participating in one election. *See id.* As Judge VanDyke made clear in his dissent to the Ninth Circuit panel opinion, Petitioners face “cost-prohibitive expenses under [AB5] because of the content of the speech in which they engage.” Pet.App. at 28a (dissenting op.).

B. AB5 Harms Independent Contractors.

In addition to impermissibly burdening political speech, AB5 restricts the rights of independent contractors “to follow a chosen profession free from unreasonable governmental interference,” *Greene v. McElroy*, 360 U.S. 474, 492 (1959). Specifically, AB5 interferes with independent contractors’ flexibility and freedom to live according to their needs. In 2022, it is estimated that 60 million Americans performed freelance work annually, contributing approximately \$1.35 trillion to the U.S. economy.¹⁷ And in 2022,

¹⁷ *See* Edelman Data & Intelligence, *supra* note 8.

professionals increasingly report that they are exploring the benefits of freelancing, for extra income, flexibility and control over their future, or as a way to find more meaningful work.¹⁸ In general, independent workers overwhelmingly prefer to remain independent and do not want to be treated as “employees.”¹⁹ Indeed, nearly half of all freelancers agree that “there is *no amount of money* that would convince them to take a traditional job.”²⁰

Independent contracting also provides much-needed flexibility for many individuals and is often the most viable option for workers trying to balance their jobs with competing personal obligations.²¹

¹⁸ See Edelman Data & Intelligence, *supra* note 8.

¹⁹ See, e.g., Mark S. Pulliam, *The Exploitation of Labor and Other Union Myths*, 24 *Indep. Rev.* 409, at 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.”).

²⁰ Adam Ozimek, *Freelance Forward Economist Report*, Upwork (2021), <https://www.upwork.com/research/freelance-forward-2021> (emphasis added).

²¹ Edelman Data & Intelligence, *supra* note 8 (reporting that 69% of surveyed freelancers state that they have a “healthy work life balance” and 73% of freelancers say freelancing gives them

Independent contracting may be the only option for a health-compromised individual who must work remotely, a single parent without reliable childcare, or an individual caring for an ailing loved one.²² Independent contractor status also provides greater flexibility to individuals seeking entrepreneurial opportunities, allows independent contractors to be their “own boss,” and to exercise total control over when and how work is performed.²³

“flexibility to address [their] personal, mental, or physical needs”).

²² 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/> (providing examples); 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/> (same).

²³ 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. 10, 2023) (“77% of Americans are interested in flexible, entrepreneurial/income-earning opportunities.”); Coalition for Workforce Innovation, *National Study of 600 Self-*

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.²⁴ This increased work experience directly correlates to improved salary options.²⁵ Further, even without the

Identified Independent Contractors, at 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”).

²⁴ See Coalition for Workforce Innovation, *supra* note 23, 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”).

²⁵ See Anu Madgavkar, *et al.*, *Human capital at work: The value of experience*, McKinsey Global Institute (June 2, 2022), <https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/human-capital-at-work-the-value-of-experience> (“[W]ork experience contributes 40 percent of the average individual’s lifetime earnings” and it “gives

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”²⁶

that person a track record, which is valuable in and of itself for the signal it sends to potential future employers”); 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* (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, “the salary value of work experience contributes eight times as much to their salary as education does”).

²⁶ 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*, Nat’l Bureau Econ. Research, Working Paper 22667 (2018), <https://www.nber.org/papers/w22667>); 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.”).

These benefits are lost when independent contractors are reclassified as employees. The flexibility, autonomy, and control prized by independent contractors are unique to independent contracting and simply cannot be replicated in traditional employment. Therefore, in addition to burdening speech, AB5 inhibits the right of independent contractors to earn a living in their preferred manner and deprives them of status-specific economic benefits and opportunities.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

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