No. 20-55267

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LYDIA OLSON, *et al*.

Appellants,

v.

STATE OF CALIFORNIA, *et al.*,

Appellees.

On Appeal from the United States District Court
for the Central District of California
Case No: 2:19-cv-10956-DMG-RAO | Hon. Dolly M. Gee

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES, ENGINE ADVOCACY, INTERNET ASSOCIATION, R STREET INSTITUTE, AND TECHNET IN SUPPORT OF APPELLANTS AND REVERSAL OF DISTRICT COURT'S DECISION

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO FRAP 29(A)(4)

The Chamber of Commerce of the United States of America is a non-profit corporation that offers no stock; there is no parent corporation that owns 10 percent or more of this entity's stock.

Engine Advocacy is a non-profit corporation organized under the laws of the state of California that does not have any parent company; no publicly-held corporation owns 10 percent or more of its stock.

Internet Association is a trade association representing leading global internet companies on matters of public policy. Internet Association offers no stock; there is no parent corporation that owns 10 percent or more of this entity's stock.

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Dated: May 14, 2020

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For the reasons set forth herein, *amici curie* the Chamber of Commerce of the United States, Engine Advocacy, Internet Association, the R Street Institute, and TechNet respectfully urge this Court to reverse order of the district court's denying a preliminary injunction enjoining Assembly Bill 5 ("AB 5") while Plaintiff-Appellants' claims are adjudicated.

INTEREST OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

Engine Advocacy ("Engine") is a non-profit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups, working with government and a community of high-technology, growth-oriented startups across the nation to support the development of technology

[1] No counsel for a party in this litigation authored this brief in whole or in part. No person or entity, other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

entrepreneurship. Engine conducts research, organizes events, and spearheads campaigns to educate elected officials, the entrepreneur community, and the general public on issues vital to fostering technological innovation. Engine seeks to bring to the Court's attention the particularly severe burdens that would fall on early-stage companies in the absence of a preliminary injunction in this case.

Internet Association ("IA") represents more than 40 leading global internet companies on matters of public policy. IA's mission is to foster innovation, promote economic growth, and empower people through the free and open internet. IA members include sharing economy companies that rely on on-demand workers to provides innovative services while allowing these workers to benefit from unprecedented levels of flexibility, autonomy, and choice over when, how, and where to work.

The R Street Institute ("R Street") is a nonprofit, nonpartisan public-policy research organization. R Street's mission is to engage in policy research and educational outreach that promotes free markets as well as limited yet effective government, including properly calibrated legal and regulatory frameworks that support economic growth and individual liberty.

TechNet is the national, bipartisan network of technology CEOs and senior executives that promotes the growth of the innovation economy by advocating a targeted policy agenda at the federal and 50-state level. TechNet's diverse

membership includes 83 dynamic American businesses ranging from startups to the most iconic companies on the planet and represents over three million employees and countless customers in the fields of information technology, e-commerce, the sharing and gig economies, advanced energy, cybersecurity, venture capital, and finance. TechNet seeks to bring to the Court's attention the significant harm to its member businesses and the state's economy if a preliminary injunction does not issue in this case.

This brief is filed in accordance with Federal Rule of Appellate Procedure 29(a). All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

In September 2019, the State of California adopted AB 5, which purports to cure the "harm" and "unfairness" to workers who are "exploited" when they are classified as independent contractors under state labor and wage and hour laws. AB 5, section 1(b), (d). In fact, AB 5 has had the opposite effect, making it harder for countless workers (and would-be workers) to earn their livelihood, while wreaking havoc on businesses, the consuming public, and the state's economy writ large.

The district court erred in concluding that Plaintiffs failed to raise serious questions going to the substantive merits of their claims that AB 5 is unconstitutional; in concluding in the face of undisputed evidence that the imminent enforcement of AB 5 would not cause Plaintiffs irreparable harm sufficient to justify injunctive relief; and in concluding that the balance of the equities and the public interest did not favor enjoining the enforcement of AB 5 until Plaintiffs' claims are decided on their merits. The district court's decision should be reversed, and it should be ordered by this Court to enjoin enforcement of AB 5 pending the adjudication of Plaintiffs' claims.

ARGUMENT

Plaintiffs seeking a preliminary injunction must show that: (1) they are likely to prevail on the merits of their case; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tip in their favor; and

(4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). In this Court, these elements are balanced, "so that a stronger showing of one element may offset a weaker showing of another." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Assessed under this standard, the district court's denial of preliminary injunctive relief was reversible error.

I. Plaintiffs Established That They Are Likely to Succeed on the Merits of Their Claims, and at a Minimum, Raised Serious Questions as to the Merits of Their Claims Sufficient to Justify the Grant of Preliminary Injunctive Relief

As set forth in their Opening Brief, Plaintiffs established in the district court that they are likely to succeed on the merits of their claims; at a minimum, they raised "serious questions going to the merits" of their claims, justifying injunctive relief. *City & Cty. of San Francisco v. U.S. Dept. of Homeland Security*, 944 F.3d 773, 789 (9th Cir. 2019) (quoting *Cottrell*, 632 F.3d at 1135).

As the Ninth Circuit has recognized, regulatory exclusions that are irrational, arbitrary, or serve illegitimate purposes violate the Fourteenth Amendment's Equal Protection Clause. *See, e.g.*, *Fowler Packing Co., Inc. v. Lanier*, 844 F.3d 809, 815-16 (9th Cir. 2016) (inclusion of exceptions in legislation solely for the purpose of obtaining support of organized labor violates Equal Protection); *Merrifield v. Lockyer*, 547 F.3d 978, 986 (9th Cir. 2008) (irrational exclusions contained in statute violate Equal Protection). AB 5 denies covered businesses the equal protection of

the laws because it singles out "gig" economy workers and other particular industries and business models—notably those that organized labor want to target for organizing drives—for unfavorable regulatory treatment without any legitimate or rational basis (other than the capriciousness of the unions).[2]

Moreover, AB 5 dramatically restricts the freedom of businesses and individuals to contract with one another to set the terms and conditions of their labor, unlawfully "impairing the Obligation of Contracts." U.S. Const., Art. I, § 10. The Contracts Clause prohibits States from substantially impairing contractual rights without sufficient justification. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978) (Contract Clause imposes limits on state abridging existing contractual relationships even when exercising otherwise legitimate police power). AB 5 violates that constitutional prohibition. Plaintiffs have accordingly met their

[2] To be clear, *amici* do not contend that AB 5 applies to any particular Plaintiff, that a Company Plaintiff's workers would (or should) be classified as statutory employees under AB 5, or that the Company Plaintiffs cannot meet the ABC test in either AB 5 or *Dynamex Operations West v. Superior Court*, 416 P.3d 1 (Cal. 2018). In fact, in a pre-AB 5 case, another federal district court in California ruled that a worker who used an online platform comparable to Plaintiff Postmates' platform was properly classified as an independent contractor under California law. *See Lawson v. Grubhub, Inc.*, 302 F. Supp. 3d 1071 (N.D. Cal. 2018). Many of the same factors analyzed by the court in *Lawson* are part of the analysis required by AB 5's ABC test. *Compare id.* at 1083, *with Dynamex*, 416 P.3d at 36-40. That said, as explained in Section II.A *infra*, whether Plaintiffs' workers are properly classified as independent contractors is immaterial to the question of whether AB 5 is lawful, and the present threat of irreparable harm to Plaintiffs of enforcement of the statute while that question has yet to be decided justifies a grant of preliminary injunctive relief.

burden of establishing that they are likely to succeed on the merits of their claims, or at a minimum, that there are serious questions as to the merits of their claims, which justifies the grant of preliminary injunctive relief.

Amici focus the remainder of this brief on the irreparable harm Plaintiffs will suffer in the absence of injunctive relief, which alone justifies reversal of the district court's decision, and the strong public interest favoring the grant of injunctive relief while the merits of Plaintiffs' claims are adjudicated.

II. The Enforcement and Threat of Continued Enforcement of AB 5 Establishes Irreparable Harm to Plaintiffs Justifying Injunctive Relief

The district court erred in its conclusion that the irreparable harm to Company Plaintiffs and Individual Plaintiffs did not warrant the grant of preliminary injunctive relief.

A. The Evidence of Irreparable Harm to Company Plaintiffs Establishes the Need for Preliminary Injunctive Relief

It is well-settled in this Circuit that the imminent threat of government enforcement of a statute (even if ultimately unsuccessful), and the potential threat of civil and criminal penalties, are sufficient to establish irreparable harm. *See Valle del Sol, Inc. v. Whiting*, 732 F.3d 1106, 1029 (9th Cir. 2013) ("credible threat" of unconstitutional statute's enforcement establishes likelihood of irreparable harm).

With respect to AB 5, the threat of irreparable harm to Plaintiffs is no longer merely imminent or speculative. On May 5, 2020, the State of California filed a

complaint in the Superior Court of the State of California against two on-demand service providers, including Uber Technologies, Inc., *a Company Plaintiff in this action*, alleging the misclassification of defendants' workers under AB 5. *See* Dkt. No. 17, Ex. 1 (Superior Court Complaint). In its complaint, the State seeks injunctive relief pursuant to AB 5 to order defendants to reclassify their independent contractor workers as employees, as well as an award of damages and civil penalties against them.[3] Given this aggressive enforcement posture, there is nothing to suggest that the State will not turn its eye to Company Plaintiff Postmates Inc., or any other on-demand or "gig" economy service provider, imminently.

This fact alone supports this Court's reversal of the district court and an order directing the lower court to maintain the status quo and enjoin enforcement of AB 5 until the question of whether the statute is unlawful is adjudicated. In the absence of injunctive relief, Company Plaintiff Uber Technologies, Inc. finds itself (and other on-demand platform companies may soon find themselves) in the untenable position of defending—at great cost—a suit brought by the state based on a law the very constitutionality of which is under challenge. Whether these companies are ultimately successful in defending such suits on their substantive merits is

[3] Moreover, in its complaint, the State alleges violation of certain wage and hour laws that carry the potential threat of criminal penalties for violations. *See, e.g.*, Cal. Labor Code § 553 (failure to pay overtime pay); *id.* § 199 (failure to pay minimum wage).

immaterial to the question of whether AB 5 is invalid in the first instance. What is material is the cost they will face in doing so. Indeed, they are presented with exactly the "Hobson's Choice" of potentially "continually violat[ing]" a law and exposing themselves to "potentially huge liability" or "suffer[ing] the injury of obeying the law during the pendency of the proceedings and any further review" that this Court has found to constitute imminent harm. *See Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1057-58 (9th Cir. 2009) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992)).

The fact that they have been haled into court by the State of California to defend themselves against alleged violations of AB 5, under threat of civil and criminal penalties, could not make clearer that the harm Plaintiffs face is not "speculative" and justifies preliminary injunctive relief. Indeed, district courts in this Circuit have already recognized that AB 5's civil and criminal penalties, and the threat of their enforcement, constitute irreparable harm warranting preliminary injunctive relief. *See Cal. Trucking Ass'n v. Becerra*, No. 3:18-cv-023458-BEN-BLM, 2020 WL 248933, at *10-11 (Jan. 16, 2020); *see also Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1052 (S.D. Cal. 2006) (holding that threats of enforcement are sufficient to establish irreparable harm).

Finally, and no less compelling, it is well-established in this Circuit that the likely deprivation of constitutional rights in and of itself constitutes an irreparable

injury. *See, e.g., Associated Ge. Contractor v. Coal. for Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991) ("We have stated that '[a]n alleged constitutional infringement will often alone constitute irreparable harm.'" (quoting *Goldies's Bookstore v. Superior Ct.*, 739 F.2d 466, 472 (9th Cir. 1984))).

In short, under well-established principles, Company Plaintiffs demonstrated to the district court evidence of irreparable harm more than sufficient to justify the grant of preliminary injunctive relief.

B. If AB 5 Is Enforced, Individual Plaintiffs Will Suffer Irreparable Harm That Company Plaintiffs Cannot Alleviate by Classifying Them as Employees

The district court erred in concluding that the Individual Plaintiffs would not suffer irreparable harm because Company Plaintiffs "could still offer [them] flexibility and freedom while treating them as employees." ER021. The uncontroverted evidence in the record demonstrates that this is not in fact the case, but rather, proves that if forced to reclassify Individual Plaintiffs (and other individuals who are similarly-situated) as employees, Company Plaintiffs would not be able to do so, and Individual Plaintiffs and others would bear the brunt of such reclassification.

Plaintiffs provided the district court with ample evidence of AB 5's economic harm from potentially requiring platform-based companies to reclassify their workers as statutory employees, and how, if AB 5 is applied to these companies,

workers will suffer: "[T]here will be less need for labor that uses those network companies to provide work." ER534. Alternatively, companies required to classify independent contractors will pass on higher costs "in the form of lower wages to workers." *Id.* This evidence was uncontroverted by Defendants.

This conclusion is further borne out with specificity in the evidentiary declarations submitted to the district court by representatives of Company Plaintiffs, who attested to the inability of Company Plaintiffs to maintain operations and flexibility for workers if they were required to reclassify independent contractors as employees. As the Director of Trust and Safety and Insurance Operations for Company Plaintiff Postmates Inc. explained, the company "cannot hire as employees every one of the independent contractor couriers with whom it has entered Fleet Agreement contracts and assume that the platform would work as it currently does. Given that numerous employment laws (e.g., rest and meal breaks) are based around scheduled 'shift work,' an employment model on the platform would necessitate an increased amount of control over the work being performed. This would result in diminished access to the platform by couriers who have trouble finding traditional employment and rely on flexibility in when, where, and how they work (e.g., students and retirees)." ER635. *See also* Declaration of Brad Rosenthal, Director of Strategic Operational Initiatives for Company Plaintiff Uber Technologies Inc. ("Uber would have to restructure its entire business if [Service Agreement contracts]

were declared unenforceable because Uber's core business model relies on the flexibility provided to both Uber and the independent service providers in these provisions . . . . Uber cannot hire as employees every one of the independent service providers with whom it has entered into these contracts.") ER567.

These realities, and their implication for platform and other on-demand service providers bear equally on other businesses.

Traditional employment arrangements will irreparably harm contractors by requiring that they give up the flexibility and freedom to be their own boss which independent contracting provides. Mobile platforms that operate in a manner similar to Uber and Postmates function in a way that is incommensurate with an employment relationship between the platform company and its workers. These apps establish an online marketplace for users to find one another and transact for services. California's employment rules do not map well onto such a platform.

For example, the California Wage Orders require employers to provide an uninterrupted 10-minute rest period to employees for every four hours worked, or major fraction thereof. *See, e.g.*, IWC Order 5-2001, Section 12. Failure to provide the required rest period results in a penalty of one hour of pay, due to the employee. California Labor Code § 225.7. California Labor Code § 512 also requires that employees receive a duty-free, uninterrupted meal period before the end of the fifth hour of work. Again, failure to provide the required rest period triggers a penalty of

one hour of pay, due to the employee. California Labor Code § 226.7. So, for an eight-hour work day, employees must be away from their homes and families for at least eight and a half hour per day.

Yet another example is that employers must reimburse their employees for business expenses. *See* California Labor Code § 2080. This makes remote work complicated—employers potentially must reimburse those who work at home for such things as home internet access, furniture, heat, electricity, and rent. As a result, employers have traditionally limited remote work except where absolutely necessary.

These restrictions severely limit when, where, and how California employees work, making it impossible for them to have true flexibility. By contrast, independent contractors can work as many or as few hours in a day, with as many or as few breaks, as they choose, without cutting through any administrative red tape. They can eat when they like so they can end work when they want and pursue other endeavors, such as spending more time with their family. They can take unpaid time to conduct personal business or be with their family, and then return to work, as they choose. They can report to work, or ask about its availability, without requiring pay unless they actually work. And they are much freer to choose where they work because they cover their own expenses. These freedoms are particularly salient in the context of the current COVID-19 pandemic, when some drivers may desire to

limit their exposure by avoiding work in certain areas or by not working at all, while others may be eager to work more than usual. Indeed, due to the large-scale shuttering of the nation's (and the world's) economy, unemployment in the United States now stands at 14.7%, with approximately 4.1 million unemployed workers in the State of California alone. These recently displaced individuals need *work*—which does not necessarily mean that they need formal *employment*. AB 5 largely eliminates this work-life flexibility which independent contractors enjoy, and limits options for businesses, individual workers, and society as a whole—all at a time when we need as many options as possible to extricate our economy from its current morass.

Moreover, businesses are confronted with difficult compliance questions and draconian civil and criminal penalties if they make the wrong choice. For example, how do California's meal-and-break requirements apply where a putative "employee" performs services throughout the workday for a series of different companies? Many "gig" economy workers "multi-app," completing tasks for several platform-based companies each day. Which, if any, company must provide the required breaks? If a multi-apping worker uses his or her car to perform services for numerous companies for various purposes throughout the day—say, delivering groceries in the afternoon, passengers during rush hour, and restaurant meals in the evening—which company or companies must reimburse mileage and other business-

related expenses? These difficult legal questions will inevitably arise, and the state labor code carries very serious consequences for potentially "wrong" answers. As a result, companies wishing to avoid this potential liability are likely to prohibit "multi-apping," reduce worker flexibility and discretion, and ultimately, reduce their demand for labor. *See* ER538-539.

Insofar as AB 5 directly threatens the viability of such platform-based services, it likewise threatens the financial viability of new and fledgling businesses that rely on them and the many early-stage platform startups that are not parties to this litigation but face significant harms from AB 5. Injunctive relief pending the adjudication of whether AB 5 is invalid, as Plaintiffs contend, is appropriate to halt each of these ongoing injuries.

III. The Public Interest Strongly Favors Injunctive Relief to Maintain the Status Quo Pending Adjudication of Plaintiffs' Claims on the Merits

Many workers in California and throughout the country have continued to work as independent contractors. In a 2005 report, the Bureau of Labor Statistics (BLS) surveyed contractors and concluded that: "The majority of independent contractors (82 percent) preferred their work arrangement to a traditional job." U.S. Dep't of Labor, Bureau of Labor Statistics, *Contingent and Alternative Employment Relationships* (July 2005). BLS found similar results in its 2017 survey: "Independent contractors overwhelmingly prefer their work arrangement (79 percent) to traditional jobs. Fewer than 1 in 10 independent contractors would prefer

a traditional work arrangement." U.S. Dep't of Labor, Bureau of Labor Statistics, *Contingent and Alternative Employment Relationships* (May 2017). These surveys show that for many years independent contractors have preferred their work arrangements to traditional W2 employment. AB 5 largely denies workers this choice, forcing them to choose between their livelihoods and employment relationships which they neither want nor need.

The innovative business models used by Company Plaintiffs significantly enhance social welfare. They provide goods and services to consumers more efficiently, at lower prices. For example, on-demand ride-sharing services provide faster and more efficient transportation than traditional medallion-based taxi services. *See, e.g.*, "Faster and Cheaper: How Ride-Sourcing Fills a Gap in Low-Income Los Angeles Neighborhoods," BOTEC Corporation, July 2015, available at http://botecanalysis.com/wp-content/uploads/2017/02/Uber-LA-Report.pdf (last accessed May 14, 2020). The growth of platform-based on-demand rideshare services has likewise reduced drunk driving. *See* James Sherk, "The Rise of the Gig Economy: Good for Workers and Consumers," Heritage Foundation (October 6, 2016) (citing Brad Greenwood and Sunil Wattal, "Show Me the Way to Go Home: An Empirical Investigation of Ride Sharing and Alcohol Related Motor Vehicle Homicide," Temple University Fox School of Business Research Paper No. 15-054, January 29, 2015, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2557612),

available at https://www.heritage.org/jobs-and-labor/report/the-rise-the-gig-economy-good-workers-and-consumers#_ftn21 (last accessed May 14, 2020).

AB 5 undermines these public benefits, threatening enforcement actions that increase Company Plaintiffs' costs, which the consuming public will ultimately bear through higher prices. *See* ER532 ("Thus, since marginal costs increase substantially due to AB 5, such companies will increase their prices to consumers, with some of the prices increases likely being substantial.").

This harm goes far beyond direct costs to companies, or lost earnings to workers. For example, platform-based services may facilitate greater competition. A large, national chain restaurant may enjoy the economies of scale and name recognition needed to maintain a workforce of dedicated delivery drivers. But a new, independent restaurant with slim profit margins may be unable to afford to hire a delivery employee, even on only a part-time basis. But that same restaurant, at a fraction of the cost, can subscribe with any number of platform-based delivery services to deliver their meals to a wide range of customers. Because AB 5 directly threatens the viability of such platform-based services, it likewise threatens the financial viability of new and fledgling businesses that rely on them.

An analysis done earlier this year by the Chamber makes clear that the harmful effects on the "gig" economy of state regulation like AB 5 are not limited solely to

workers or the platform-based companies that they utilize. On the contrary, they harm a far broader swath of the economy and even government itself:

> Logically, platform holders would have to make some changes to their models. If gig workers become employees, they will be subject to state wage-and-hour laws. Platform holders will become responsible for providing an hourly minimum wage and overtime. So to ensure they can continue making a profit, platform holders will have to take more control over when where gig employees work. . . .
>
> And these controls will necessarily change the nature of gig work—often to the detriment of gig workers. Military spouses, transitioning service members, ex-offenders, students, parents, and moonlighters may no longer have access to the gig economy. *Legislators will have closed an avenue for millions of Americans to supplement their incomes or sustain themselves when they are in between jobs. In that sense, they may actually be raising costs for the state, which may need to provide social services to people who no longer have alternative work opportunities. And they will, perhaps, have smothered a nascent industry in its cradle*.

ER 352, 353.

The threat of AB 5's enforcement is already causing harm to the livelihood of hundreds of thousands of workers in California. California State Assemblyman Kevin Kiley has collected the testimony of these victims in the recently published *AB 5 STORIES: Testimonials of Californians Who Have Lost Their Livelihoods.* ER032-314. Just a small sampling of these accounts makes clear that AB 5 has already wreaked, and continues to threaten, irreparable harm to workers and small businesses alike.

- Ryan: "I am the owner of a pediatric therapy company. We provide work to approximately 40 ICs who want to see a few clients in addition to their full

time jobs. *This law would force me to let go of all 40 ICs as I cannot afford to pay them*." ER115-116.

- Jan: "I'm an older woman with two teaching credentials living in a small county who cannot find employment outside of independent contractor online teaching jobs. *One company has already announced they will no longer contract with California teachers. I care for a disabled husband. I will lose my home if I cannot work for those companies*." ER094.

- Ernie: "I'm retired and at age 75 the freelance writing I do for several publications is an important supplemental income source for me and my family. I'm good at what I do and produce about 200 articles a year. *Yesterday I was notified that my work is being cut in half and I am losing one column entirely because I submit more than the arbitrary 35 to that publication*." ER086.

- Cori: "AB 5 is detrimental to my small blog. Hiring contractors to do small things for me here and there is how I make it work. I cannot ask all of those contractors to become employees. It is unsustainable. *I will have to look out of state for help*." ER036.

- Hope: "*This bill will devastate the services the Deaf community receive*. Almost all of the American Sign Language Interpreters that work in the community are Independent Contractors. We get the bulk of our work through agencies that work like clearing houses that send out the work. We set our pay and take the work if we want or don't want." ER084-085.

- Donna: "I am a bandleader and work with 20 different musicians through the course of the year. Some I will use once some 15-20 times. *The costs of making them employees, work comp, payroll costs etc. will put me out of business*." ER049.

- Andrea: "I'm a freelance writer who writes dozens of pieces for various clients each month. I did my writing through a content mill, which has now blocked California writers from communicating with any new clients and is limiting us to 34 articles per year for the clients we already had. For perspective, I often wrote more than 34 articles per MONTH for ONE of my clients alone. I am now losing these clients, many of whom I've worked with for years. I was incredibly happy with my work life prior to AB 5. *I made enough money to satisfy my needs, and I was able to work when I wanted and*

take time off when I wanted, something I needed due to my chronic health problems." ER101-102.

- Susan: "I am a tax preparer. I prepare corporate and partnership returns for mostly entertainment clients. *If they are forced to become employees of the studios, I lose my business.* I've had some of my clients for 30 years." ER056.
- Marsha: "I lost my job of 12 years as a medical transcriptionist because of AB 5. Many in this profession value the flexibility in hour and working from home more than employee status. *Now I have no money at all*." ER070.
- Andi: "Just lost my ability to earn a living because of California Assembly Bill 5. My freelance brokerage company says that they have to let California authors go. *Almost a decade of hard work gone in an instant. I can't stop crying. Right before Christmas*." ER060-61.

(Emphases added.) These examples demonstrate how, contrary to its stated purpose, AB 5 has caused workers and small businesses serious and sometimes devastating financial and personal harm—harm that is all the more troubling in light of the current COVID-19 pandemic. Because of AB 5, much less work is available. Clients no longer do business with contractors, threatening their economic security. AB 5 also removed essential flexibility in their working arrangements that allowed them to care for ailing family members or otherwise balance work and life commitments. Small and independent businesses are likewise suffering, as the threat of AB 5 enforcement forces them to dramatically restructure their businesses in unsustainable ways. As set forth in Section II.B *supra*, the district court's conclusion that Company Plaintiffs and other on-demand or platform-based service providers could simply alleviate this problem by reclassifying independent contractors as employees, thus mitigating the harm to these workers, is demonstrably untrue.

Additional economic harm from AB 5 is already well documented, as California businesses close and businesses (and workers) leave the state to pursue their livelihood free of AB 5's reach. *See, e.g.*, Karen Anderson, "Another Voice: Assembly Bill 5 harms hundreds of industries and professions," *Sacramento Business Journal* (January 24, 2020) (describing how AB 5 has led to closures of businesses, outflux of California independent contractors, and relocation of California platform-based employers); Nellie Bowles & Noam Scheiber, "California Wanted to Protect Uber Drivers. Now It May Hurt Freelancers," *New York Times* (December 31, 2019) (detailing deleterious effects of AB 5 on freelance workers, including writers, translators, transcriptionists, performers, and clergy); Max Willens, "'It definitely limits our options': Under AB 5, publishers and freelancers see costs rise," *Digiday* (January 17, 2020) (cataloging negative economic impact of AB 5 on freelance writers and publishers that engage them). All of these facts make clear that the public interest favors enjoining the enforcement of AB 5, pending adjudication of Plaintiffs' claims on their merits.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the district court, and order that the court enjoin Defendants from enforcing AB 5 against Plaintiffs and maintain the status quo, pending final judgment and an adjudication of their claims on the merits.

May 14, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

Pursuant to Federal Rule of Appellate Procedure 32(a), the undersigned certifies that this brief complies with the applicable type-volume limitation, typeface requirements, and type-style requirements.

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because the brief contains 5,148 words, excluding exempt portions.

2. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief was prepared in a proportionally spaced typeface using Microsoft Word 2016 with 14-point Times New Roman font in text and footnotes.

Dated: May 14, 2020

/s/ Bruce J. Sarchet
Bruce J. Sarchet

CERTIFICATE OF SERVICE

I certify that on the 14th day of May 2020, the foregoing brief was filed using this Court's Appellate CM/ECF system, which effected service on all parties.

/s/ James A. Paretti, Jr.
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