Case No. 20-55734

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Appellants,

v.

XAVIER BECERRA,
in his official capacity as Attorney General of the State of California,

Appellee.

BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF APPELLANTS FILED WITH CONSENT OF ALL PARTIES

On Appeal from the United States District Court
for the Central District of California, Los Angeles
Case No. 2:19-cv-10645-PSG-KS, Hon. Philip S. Gutierrez, presiding

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IDENTITY AND INTEREST OF AMICUS[1]

The Goldwater Institute ("GI") is a nonpartisan public policy foundation dedicated to advancing the principles of limited government, economic freedom, and individual responsibility through litigation, research, and policy briefings. Among GI's principal goals is defending free speech and economic liberty. GI has represented parties and appeared as amicus curiae in many state and federal courts to promote the enforcement of these rights. *See, e.g.*, *McComish v. Bennett*, 611 F.3d 510 (9th Cir. 2010); *Flytenow, Inc. v. FAA*, 808 F.3d 882 (D.C. Cir. 2015); *Coleman v. City of Mesa*, 284 P.3d 863 (Ariz. 2012); *Korwin v. Cotton*, 323 P.3d 1200 (Ariz. App. 2014). GI scholars have also written extensively about the constitutional rights of free speech and economic liberty. *See* Sandefur, *The Right to Earn a Living* (2020); Sandefur & Riches, *Sharing Economy Gag Rule: Targeting Communication Innovations in the Information Age*, 1 Ariz. L.J. Emerging Tech. 1 (2017).[2] The Goldwater Institute believes its legal and policy expertise will benefit this Court in deciding this case.

[1] Pursuant to Fed. R. App. P. 29(a)(2), this brief is filed with the consent of all parties. No counsel for any party authored this brief in whole or part, and no person or entity other than the Institute, its members, or counsel, made any monetary contribution for the preparation or submission of this brief.

[2] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2935416.

INTRODUCTION AND SUMMARY OF ARGUMENT

AB2257 tries to grant or withhold exceptions from its expensive mandates by pigeonholing occupations. But the lines it draws are based on acts of speech, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010), as well as "the topic[s] discussed … or message[s] expressed," *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015), and the identities of speakers, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). It is therefore presumptively unconstitutional and must withstand strict scrutiny.

In addition, AB2257 is so byzantine that it crosses the line into unconstitutional vagueness. It purports to classify workers as employees or independent contractors, but it actually does not do that. Instead, it dictates to courts what precedents they may use when evaluating a worker's employment status—whether courts may use the multifactor test established in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341, 350–51 (1989), or the three-factor test established in *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal.5th 903, 964 (2018). The act makes this distinction through a series of bewilderingly complicated multi-factor tests, meaning that the act requires workers and employers to consider myriad overlapping considerations to determine whether a *second* set of complex multi-factor tests will then determine the worker's employment status.

With respect to expression-related occupations, the act does this based on the existence of speech, the content of speech, and the identity of the speaker. For example, "grant writers" are subject to the *Borello* test—but writers of, say, technical instruction manuals are not. Cal. Lab. Code § 2778(b)(2)(E). "Videographers" are subject to the *Borello* test—but not if they "work[] on motion pictures." *Id.* § 2778(b)(2)(I)(i). Freelance writers are subject to the *Borello* test—but not if they agree to an exclusive contract with a publisher. *Id.* § 2778 (b)(2)(J). And singers are subject to *Borello* if they record their singing, *id.* § 2780(a)(G), and sing for only one performance, *id.* § 2780(b)(1)—unless they perform with a symphony orchestra, in which case they are not subject to the *Borello* test after all. *Id.* § 2780(b)(1)(A).

The District Court disregarded these First Amendment concerns and concluded that rational basis scrutiny applies here because the law is triggered by commercial activity. *Am. Soc'y of Journalists & Authors, Inc. v. Becerra*, No. CV19-10645 PSG (KSx), 2020 WL 1444909 at **4–5 (C.D. Cal. Mar. 20, 2020). But that either/or approach conflicts with the Supreme Court's repeated emphasis on the need to attend to the nuances of the effects regulations will have on speech, even where those regulations seem facially neutral. Where a law has a "nexus to expression, or to conduct commonly associated with expression" such that the government's restriction "pose[s] a real and substantial threat" of censorship or

self-censorship, courts must apply a more vigilant scrutiny. *City of Lakewood v. Plain Dealer Publ'g Co*., 486 U.S. 750, 759 (1988). That is why courts have paid careful attention to laws that restrict coin-operated newspaper stands, *see id*., or that impose taxes on newspapers. *See, e.g.*, *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983).

The burdens AB2257 imposes on those engaged in expressive occupations pose a particular threat to one type of speech: that produced by media that rely primarily on free-lance contributors. Such expression tends to be of a particular ideological or social perspective: it tends to focus on political dissent, alternative lifestyles, or journalism from an anti-establishment perspective. *See, e.g.*, Cantenys, *Journalism Needs Freelancers, and Freelancers Need Protection*, Open Society Foundations Voices, Feb. 23, 2018.[3] While large-scale corporate media can afford the heavy employment costs that laws such as AB2257 impose, smaller-scale organizations often cannot. They need the utmost freedom to accomplish their communicative mission. In *City of Lakewood*, 486 U.S. at 762, the Court warned about the fact that prohibitions on coin-operated sidewalk newsstands had a disproportionate impact on "low-budget, controversial neighborhood

[3] https://www.opensocietyfoundations.org/voices/journalism-needs-freelancers-and-freelancers-need-protection

newspapers." The disproportionate impact of AB2257 is simply the modern version of that.

But even aside from the expressive concerns, the opacity of AB2257's classification scheme violates the due process of law. It is simply not possible for a person of ordinary intelligence to make sense of many of its requirements—which increases the risk of arbitrary enforcement and the danger to California's long-term economic success. The act is therefore unconstitutional.

ARGUMENT

I. AB2257's burdens on free-lance writers impose content—and identity—based speech restrictions.

The District Court erred in concluding that AB5 (or, now, AB2257) is content-neutral. It based its conclusion on the belief that the speech burden the law imposes "does not hinge on the content of a message," *Becerra*, 2020 WL 1444909 at *8, but that is not true.

A. Strict scrutiny is required any time a law is triggered by a speech act, or by the content of speech, or by the speaker's identity.

Holder concluded that a statute penalizing assistance to terrorist organizations was unconstitutional because it was triggered solely by the communication of a message. 561 U.S. at 28. Although the government claimed that the law only prohibited conduct, the Court found that the "conduct" in question "consist[ed] of communicating a message." *Id*. Specifically, the

plaintiff—an organization that sought to assist certain foreign entities engaged in terrorism—was barred from "impart[ing] a 'specific skill' or communicat[ing] advice derived from 'specialized knowledge'" to these entities. *Id.* at 27. In other words, laws whose burdens or benefits are triggered by an act of speech are subject to First Amendment scrutiny.

Sorrell held that a Vermont law prohibiting the communication of information for commercial reasons was based on the *identity* or the *motive* of the speaker. 564 U.S. at 567. That law prohibited the dissemination of certain medical data for "marketing" purposes, *id.* at 559, but allowed that information to be disseminated for other purposes. *Id.* at 559-60. The Court found that the law was subject to strict scrutiny, since it was "aimed at particular speakers"—specifically, those who engaged in speech "from an economic motive." *Id.* at 567.

And *Reed* found that a regulation of sidewalk signs was subject to strict scrutiny because its applicability depended on the signs' *content*. The sign code distinguished between "ideological" signs, "political" signs, signs directing people to "religious" events, etc. 576 U.S. at 159-61. The Court found that this was a content-based restriction because it "depend[ed] entirely on the communicative content of the sign." *Id.* at 164. It made no difference that the code was not motivated by hostility to the messages expressed, *id.* at 165, and did not discriminate among viewpoints. *Id.* at 169.

Even if a speech regulation only differentiates between *categories* of speech, the Court observed, it would still have a perverse influence on the free flow of ideas: "For example, a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints." *Id.* "The Town's Sign Code … singles out specific subject matter for differential treatment, even if it does not target viewpoints …. Ideological messages are given more favorable treatment than messages concerning a political candidate, which are themselves given more favorable treatment than messages announcing an assembly of like-minded individuals." *Id.* Finally, the Court rejected the argument that the code was based only on who did the speaking, or based only on the type of event being advertised—because even if true, that would not show that the code was not content-neutral. *Id.* at 170-71. "A regulation that targets a sign because it conveys an idea about a specific event," it said, "is no less content based than a regulation that targets a sign because it conveys some other idea." *Id.* at 171.

AB2257 seeks to categorize virtually every occupation in the state into either "full-time employees" or "independent contractors" (although it does so not by any clear specification, but by specifying which California legal precedents should apply to persons within those categories),and does so based on *acts* of

speech, the *content* of speech, and the *identities* of speakers. In short, it draws lines in the three ways that *Holder, Sorrell,* and *Reed* say require strict scrutiny.

B. Because it imposes burdens based on the content of speech and the identity of speakers, AB2257 is subject to strict scrutiny.

Among the distinctions established in AB2257 are several that apply based on the content of expression.

For example, a house-painter would presumably be classified as an employee, *see* Cal. Lab. Code § 2775(b), but if the same person painted wall murals on buildings instead, she would qualify as a "fine artist" under Section 2778(b)(2)(F), and her employment status would be analyzed under the multifactor *Borello* test. The difference between the two is the presence or absence of artistic expression, and the content of that expression, as specified in Section 2778(b)(2)(F)(ii).

Classifying a commercial sign painter would be slightly harder. If she simply paints "For Sale" signs, she would presumably *not* be classified as either a fine artist or a "graphic artist" under Section 2778(b)(2)(D), whereas if she also paints logos or symbols on those signs, she would. The content of the sign would therefore determine whether her employment status would be adjudicated pursuant to *Borello* or *Dynamex*.

Or consider tattoo artists. Tattooing is expression protected by the First Amendment. *Coleman v. City of Mesa,* 284 P.3d 863 (Ariz. 2012); *Anderson v.*

City of Hermosa Beach, 621 F.3d 1051 (9th Cir. 2010). Many tattooists prefer to work as independent contractors at a single location. *See* Rittie, *Tattoo Artists: Independent Contractors or Employees?*, EinhornBarbarito Employment Law Blog, May 21, 2013.[4] Some tattoos are unquestionably works of fine art—but others are not. Walsh, *Painting on A Canvas of Skin: Tattooing and the First Amendment*, 78 U. Chi. L. Rev. 1063, 1066 (2011) ("whereas commercial tattooing is generally not expressive, fine art tattooing is.") Some are wholly utilitarian and are not meant "to be appreciated primarily or solely for their imaginative, aesthetic, or intellectual content" as required by Cal. Lab. Code § 2778(b)(2)(F)(ii). For example, Adam Savage, a professional craftsman, recently had a ruler tattooed on his arm to enable him to measure things while working in his craft shop.[5] Many livestock owners have their animals tattooed as a modern, humane form of branding, *see, e.g.*, *Vallette v. Toussaint*, 467 So.2d 107, 108 (La. App. 1985), which is, again, not "imaginative, aesthetic," or otherwise artistic. Cal. Labor Code § 2778(b)(2)(F)(ii). So to determine whether a tattooist must be classified as an employee under Section 2775(b), or is instead a fine artist or graphic designer

[4] https://www.einhornlawyers.com/blog/employment-law-blog/tattoo-artists-independent-contractors-or-employees/

[5] *See* Adam Savage (@donttrythis), Twitter (Jan. 12, 2019), https://twitter.com/donttrythis/status/1084272599339753473.

subject to the *Borello* test, a court would necessarily have to consult the content of the tattoos themselves.

Other provisions of AB2257 are even more plainly speech-centered. For example, courts deciding the employment status of "specialized performer[s]" who are "hired by a performing arts company … to teach a master class for no more than one week," are commanded to follow *Borello*. Cal. Lab. Code § 2778(b)(2)(M). But in a case involving someone hired to teach about a different subject—say, an engineer or physicist who teaches a master class for a week on the subjects of engineering or physics—courts are instructed *not* to follow *Borello*, but to follow *Dynamex*, instead—solely because of the content that is taught.

What's more, Section 2778(b)(2)(M) only applies to teachers who are "expert[s] in a recognized field of artistic endeavor" (a phrase that is not defined) and who is hired by a "*performing* arts company"—which presumably means that a person who teaches painting would not qualify, but an acting coach would—a distinction triggered solely by what they teach. Moreover, it is unclear what type of "recognition," or by whom, would suffice, and answering that question inevitably requires an evaluation of the content of expressive activity.

New forms of artistic expression are devised all the time. *See, e.g.*, *Ringgold v. Black Entm't Television, Inc*., 126 F.3d 70, 72 (2d Cir. 1997). When they first

emerge, they may not initially be "recognized" as art.[6] In 2010, a performance artist named Tino Sehgal put on a project at New York's Guggenheim Museum entitled "Tino Sehgal." It was a "performative installation" that consisted of Sehgal engaging in conversations with attendees—which led critics to debate whether this qualified as art. Strickland, *Is it Art? For Performance Artist Tino Sehgal, It's Immaterial*, Christian Science Monitor, Feb. 16, 2010.[7] Another performance artist, Ann Carlson, put on what she called *Doggie Hamlet*, which consisted of performing animals, human dancers, and sound effects in an open field—again leading to debates over whether it was art. *See* Kourlas, *But is it Art? In the Case of 'Doggie Hamlet,' Yes*, N.Y. Times, Apr. 7, 2017.[8] The artist Banksy recently sold a painting designed to self-destruct upon being purchased; the idea being that the aesthetic value lay in the act of purchasing, not the object. *See* Barnes, *Banksy Painting Immediately Self-Destructs After Being Sold at Auction for Over $1.3 Million*, MyModernMet.com, Oct. 8, 2018.[9]

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[6] For example, motion pictures were denied First Amendment protection until 1952. *Compare Mut. Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230, 242 (1915) (denying that movies are protected speech), *with Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (recognizing that they are).

[7] https://www.csmonitor.com/The-Culture/Arts/2010/0216/Is-it-art-For-performance-artist-Tino-Sehgal-it-s-immaterial.

[8] https://www.nytimes.com/2017/04/07/arts/dance/but-is-it-art-in-the-case-of-doggie-hamlet-yes.html.

[9] https://mymodernmet.com/banksy-self-destructing-art/

If asked to determine whether practitioners of these and other avant-garde styles are engaged in "recognized" artistic forms—and therefore, whether the fact that they teach a master class for less than a week should render their employment status a matter to be determined by the *Borello* test—courts would necessarily have to "examine the content of the message that is conveyed." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (citations and quotation marks omitted). That means these distinctions are content-based.

The same is true of photojournalists and videographers. Section 2778(b)(2)(I)(i) commands courts to apply the *Borello* test to them—if they do not "work[] on motion pictures," which includes television. But the only distinction between someone who earns a living making wedding videos or corporate training videos on one hand, and someone who makes a living filming big-screen movies on the other, is the *content* of the expression, or the *identity* of the person engaged in filming.

In 1969, the musician Tiny Tim married Victoria Budinger live on *The Tonight Show*. The videographers filming that ceremony would, presumably, *not* have been subjected to the *Borello* test pursuant to Section 2778(b)(2)(I)(i), because they "work[ed] on motion pictures." But any videographers who filmed Tiny Tim's *second* wedding, in 1984, presumably *would* have qualified, because that was not broadcast on television. The sole legal difference between these two

examples is the *identity* of the individuals engaged in video-recording and the form of their speech.[10]

The act's rules governing performers are even more labyrinthine—and even more intertwined with expression. Section 2780(c)(1), for example, mandates the *Borello* test for performers who "perform[] material that is their original work," as long as their performances are "creative in character" and "depend[] primarily on [their own] invention, imagination, or talent." Last year, *Star Trek* actor Patrick Stewart revived his popular one-man stage show, which consists of a dramatic reading of Charles Dickens's *A Christmas Carol*. Had AB2257 applied, Stewart presumably would *not* have fallen into this category, because he was not performing his own "original work," but was reading from Dickens's 1843 novella. By contrast, his fellow *Star Trek* actor, William Shatner—who performs a one-man stage show called "Shatner's World"—*would* fall into the Section 2780(c)(1) category, because the text of his performance was written by Shatner himself. The sole distinctions are the content of the work and the identities of the speakers—which means strict scrutiny must apply.

[10] Video-recording is expressive activity covered by the First Amendment. *ACLU v. Alvarez*, 679 F.3d 583, 596 (7th Cir. 2012); *Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty. Metro Gov't,* No. 3:19-CV-851-JRW, 2020 WL 4745771 at **9-10 (W.D. Ky. Aug. 14, 2020).

The same holds for musicians. In 1998, Eric Clapton performed concerts promoting his album *Pilgrim*. These concerts were divided into sections so that for part of the performance, Clapton was accompanied by a 20-person concert orchestra. *See Blues Legend Eric Clapton Takes Orchestra on Tour*, MTV, Feb. 19, 1998.[11] Had AB2257 been in effect, Clapton *himself* would have been subject to the *Borello* test under Section 2780(b)(1), because these were "single-engagement live performance event[s]," he was the "event headliner," and the events drew more than 1,800 attendees. But a violinist in the orchestra would *not* have been subject to the *Borello* test; her employment status would be determined by applying the *Dynamex* test instead, because she was performing in "a symphony orchestra," Cal. Lab. Code § 2780(b)(1)(A), and was not the headliner.

Of course, it might be that this orchestra would not have qualified as a "symphony" orchestra, a term not defined in AB2257 or elsewhere in California law. But for a court to try to distinguish between performers in *true* symphony orchestras (subject to *Dynamex*), and those who play for mere *chamber* orchestras (subject to *Borello*) would be both farcical and illustrative of the essential First Amendment problem here: AB2257 differentiates between occupations, and

[11] http://www.mtv.com/news/3318/news-flash-blues-legend-eric-clapton-takes-orchestra-on-tour/

imposes regulatory burdens, based on expressive content and the identity of the speaker—which means strict scrutiny applies.

II. AB2257 is Unconstitutionally Vague.

A. AB2257 does not actually establish a law.

The difficulty of determining how workers are classified under AB2257 points to another constitutional flaw: its vagueness. Due process of law requires that *all* laws be clear enough that people of ordinary intelligence can know what is permitted and proscribed. *Holder*, 561 U.S. at 19. Even where speech is not involved, vague laws are unconstitutional. *Boutilier v. INS*, 387 U.S. 118, 123 (1967); *Cape & Vineyard Div. of New Bedford Gas v. Occupational Safety & Health Review Comm'n*, 512 F.2d 1148, 1152 (1st Cir. 1975). But regulations of speech must be as clear and forthright as possible to prevent enforcement officers from singling out disfavored speech under the guise of regulation, and to ensure against the "chill[ing]" effect that results in self-censorship. *Hunt v. City of L.A.*, 601 F.Supp.2d 1158, 1169–70 (C.D. Cal. 2009), *aff'd* 638 F.3d 703 (9th Cir. 2011). Even where no motive of censorship exists, vague regulations affecting speech can result in unequal, potentially biased enforcement, or self-censorship by vulnerable groups.

Vagueness can result from a single, poorly defined rule, but can also arise where there are so many complicated rules that they become incomprehensible.

Citizens United v. Federal Election Commission, 558 U.S. 310, 334–36 (2010), found that the campaign finance regulations at issue were so complicated that anyone wishing to engage in constitutionally protected speech was effectively required to ask the government for permission before speaking—which meant that "[a]s a practical matter" the rules were "the equivalent of prior restraint." *Id.* at 335.

Here, employers and employees—including those engaged in speech as an occupation—must undertake a similarly complex task to determine whether they may work as contractors or whether they must be classified as employees, with all the costs and burdens associated with that status.

In fact, determining whether a worker falls into the *Borello* or *Dynamex* categories under AB2257 is only the first step. Then the person must apply the *Borello* or *Dynamex* tests. These are both broadly phrased multi-factor analyses. In *Borello*, the court, emphasizing "the inherent[] difficult[y]" of classifying a worker as an employee or an independent contractor, 48 Cal.3d at 355, said it was not adopting "detailed new standards" for making that distinction, but just listing considerations and "useful reference[s]" for courts to use. It concluded that "[e]ach service arrangement must be evaluated on its facts, and the dispositive circumstances may vary from case to case." *Id*. at 354.

The factors to be considered include, among other things: the type of work being done and the skill it requires; whether the worker supplies her own tools; where the work is done; how long it takes; who controls the manner and means of accomplishing the desired result; whether this type of work is usually done "under the direction of the principal or by a specialist without supervision"; how payment is handled (hourly or per-job); whether the work is part of the principal's usual business; whether the worker exercises her own managerial skill; whether she employs assistants; how permanent the working relationship is—and the parties' intent. *Id.* at 351.

A court must also consider these factors in light of the purposes of the Worker's Compensation Act, which are to ensure that risks to workers are incorporated into the prices of goods and services; to ensure prompt compensation for injuries; to encourage industrial safety; and to protect employers against common law liability. *Id.* at 350-51, 354–55. Even these factors are not exhaustive, since they "cannot be applied mechanically" but are "intertwined and their weight depends often on particular combinations." *Id*. at 351 (citation omitted).

Dynamex is no less complicated. It observed that "a worker may properly be considered an employee with reference to one statute but not another," before adopting what it called "a simpler, more structured test" to supplement, but not

displace, *Borello*. 4 Cal.5th at 948, 955. The test is not actually simpler, though, because it embeds vagueness in its broad terms. It presumes a worker is an employee unless the business proves that she is "free from the control and direction of the hirer," "performs work that is outside the usual course of the hiring entity's business," and "is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed." *Id*. at 955–56. For workers engaged in brand new occupations—as in a start-up entrepreneurial venture—the *Dynamex* test is as complicated as *Borello*. The result is a bewildering array of considerations and factors that brings to mind Madison's warning that it would be "of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood." *The Federalist* No. 62 at 421 (J. Cooke ed., 1961).

The point is not to criticize these cases, but to show that AB2257 does not purport to set a rule. Instead, it dictates which of these complex, multifactor precedents courts must apply. In fact, AB2257 seeks to impose a "theoretical directive" instructing courts how to interpret existing laws, which offends the separation of powers as much as it violates freedom of speech Jellum, *"Which Is to Be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. Rev. 837, 882–90 (2009); *see also Evans v.*

State, 872 A.2d 539, 552 (Del. 2005) (legislature may not tell court what methods to use in interpretation).[12]

B. The act's vagueness threatens freelance speech.

AB2257's opacity is a threat to free speech. Consider a hypothetical drawn from an actual job posting[13]: a family-owned business seeks to hire an "art counselor" to run a summer camp for the family's children as well as children of employees, given that the COVID-19 pandemic has closed normal summer activities. The worker would perform the services at the family's home, but would be paid by the business, on the grounds that in-home care allows the parents to devote their attention to their work. Could the art counselor work as an independent contractor under AB2257?

Because her work is like that of a tutor, the answer would depend on whether she uses a "referral agency." If so, the question of whether the multifactor *Borello* analysis applies would depend on considerations that include, but are not limited to: whether she uses "[her] own teaching methodology or techniques," Cal. Lab. Code § 2777(b)(5), whether she is "customarily engaged, or was previously

[12] In fact, AB2257 fails to make *law* at all. It does not establish a rule of action, but instead directs the judicial branch of government how to exercise its powers in adjudicating disputes. *Cf. In re Initiative Petition No. 364*, 930 P.2d 186, 194–95 (Okla. 1996) (voter initiative that commanded the legislature to exercise its powers to call for a federal constitutional amendment did not make a law).

[13] https://jobatic.com/jobs/amp/colorado/boulder/im-trucking-inc/private-art-counselor-for-a-couple-of-6th-grade-girls.html

engaged, in an independently established business or trade of the same nature as, or related to" art counseling, *id*. § 2777(a)(7), and whether she brings her own paint brushes. *Id*. § 2777(a)(6). If she does not use a referral agency, then the application of *Borello* or *Dynamex* would depend on whether she is engaged in a "bona fide business-to-business contracting relationship," *id.* § 2776—which she is likely not, because she is not "free from the control and direction of the contracting business" in performing her work. *Id.* Consequently, the question of whether she would be allowed to maintain her independent contractor status would be answered based on *Dynamex* instead of *Borello*, meaning the family business would be forced to shoulder the expense of bringing her on staff—a far more expensive and difficult undertaking.

Yet if she were a "grant writer" under Section 2778(b)(2)(E), or a "fine artist" under Section 2778(b)(2)(F), her employment status would be determined by *Borello*—that is, by considering factors that include, but are not limited to: whether she controls the means of accomplishing the result desired; how much skill art-counseling requires; whether she exercises managerial skill; whether classifying her as an employee or a contractor would best ensure that risk to her is incorporated into the rates she charges, etc. 48 Cal.3d at 351.

Given the bewildering complexity of these overlapping multifactor analyses, it would be the rare employer who would bother hiring this hypothetical art

counselor, given that the business would be almost certainly compelled to hire her as an employee rather than an independent contractor—and the extraordinary costs of doing so make that inefficient.

III. AB2257's burdens hinder freelance journalism.

Vagueness in regulations touching on speech, or laws that impose burdens based on content of speech or the identity of the speaker, almost invariably result in chilling effects. Speakers censor themselves to avoid the burdens imposed by the law, and the unpredictable or uneven nature of those burdens distort the free flow of information, which has disproportionate consequences for certain types of speech. That is why the Supreme Court has been sensitive to the ways in which restricting *forms* of speech can still have a problematic effect on the free flow of information.

Thus in *City of Cincinnati v. Discovery Network, Inc*., 507 U.S. 410 (1993), the Court found that an ordinance that prohibited commercial newsstands but allowed traditional newspaper racks was unconstitutional. It did not matter that there was "no evidence that the city has acted with animus toward the ideas contained within respondents' publications." *Id*. at 429. The restriction was still "content based", *id.*, and as Justice Blackmun observed, the result of this differential treatment was to distort the marketplace of ideas; it limited access to information that consumers often found "keen[ly]" important—information

relating to "important decisions" such as "education, [and] professional and personal development." *Id.* at 432, 437 (Blackmun, J., concurring) (citations omitted).

The Court made the same point in *City of Lakewood*, which involved an ordinance that effectively prohibited coin-operated sidewalk newsstands. Recognizing that the ordinance had a disproportionate impact on "low-budget, controversial neighborhood newspapers," 486 U.S. at 762, the Court was sensitive to the concern "that majoritarian institutions, even when regulating speech in a content-neutral manner, will be less sensitive to the interests of disfavored speakers." Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 Ind. L.J. 1, 65 (2011).

In *Minneapolis Star & Tribune Co.*, the Court held that a tax on newspaper ink and paper violated the First Amendment regardless of whether the government had any censorial motive. 460 U.S. at 585. The state argued that it had a legitimate interest: raising revenue. But the Court found that this was insufficient to justify the tax because "an alternative means of achieving the same interest" was "clearly available"—the state could have the imposed an across-the board tax. *Id.* at 586.

Like the laws invalidated in those cases, the burdens imposed by AB2257 appear neutral but have a disproportionate effect because they are triggered by a

speaker's identity and motive. This creates a bias against small news outlets that overwhelmingly rely on freelance contributors because—in the words of the *Bay Area Reporter*, a gay community newspaper headquartered in San Francisco—"small news and media outlets like ours simply cannot hire additional full-time or part-time employees." *Editorial: Newspapers Need An Exemption in AB5*, Bay Area Reporter, Sep. 4, 2019.[14]

AB2257's provisions relating to freelancers are triggered by the identity of the speaker. Section 2778(b)(2)(J) says freelance writers fall into the *Borello* category as long as they are not "directly replacing an employee who performed the same work at the same volume for the hiring entity" and do not agree to exclusive contracts.[15] In other words, if a freelance writer agrees to an exclusive contract, then her employment status must be governed by *Dynamex* instead—which probably will mean the person must be deemed an employee, which results in greater burdens and expenses for both parties.

But other occupations are treated differently with regard to freelance status and exclusivity. For example, a licensed private investigator is placed in the

[14] https://ebar.com/news/news/281347

[15] The terms "replacing," "same work," and "volume" are not defined in the statute, so it is unclear whether the exemption would govern a case in which a newspaper reorganizes its staff to substitute a bi-weekly freelance column for a monthly—but twice as long—column by a staff writer, who is then also assigned other duties.

Borello category, regardless to whether she works exclusively for one client.[16] Cal. Lab. Code § 2783(c). Yet the occupation of private investigation is itself First Amendment activity, just like that of a writer or a reporter. California law defines private investigation as "furnish[ing], or…to mak[ing]…any investigation for the purpose of obtaining, information with reference to...the identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of any person." Cal. Bus. & Prof. Code § 7521(b).

In other words, a person who investigates and writes a report about the habits, business, or activity of the mayor of Los Angeles or a famous movie star, falls into one AB2257 category if she holds a state private investigator license, and will therefore likely be allowed to decide whether to work exclusively for one client or not. But a reporter who investigates and writes a report about the same information, is placed in the *Dynamex* category—meaning she will likely *not* be permitted that right because she lacks a private investigator license. The difference is the identity of the speaker. Meanwhile, a "grant writer" is placed in the *Borello*

[16] But only if licensed by the state of California. If licensed by another state and working in California pursuant to the temporary reciprocity privilege accorded by Cal. Bus. & Prof. Code § 7520.5, the *Borello* test would *not* apply.

category regardless of whether she agrees to work exclusively for one entity, Cal. Lab. Code § 2778(b)(2)(E)—a distinction based on the *content* of the writing.

The act's burdens are also triggered by the *form* of expression. Radio broadcasters are placed in the *Dynamex* category, whereas "narrator[s]" who work for "publication[s]" in "any format" are placed in the *Borello* category. *Id*. § 2778(b)(2)(K). Because "publication" is not defined, it is unclear how this would apply to, say, a freelance contributor to NPR's *This American Life*, but it appears that this provision would not apply, since it specifies contributors to "journal[s], book[s], periodical[s], evaluation[s], other publication[s]," and an *in pari materia* reading would counsel against interpreting this exemption to apply to radio announcers. Thus the statute distinguishes between written and spoken speech, by exempting some of the former in some circumstances, and not exempting the latter at all. On the other hand, if this exemption *does* apply to radio broadcasters as "narrators," it still does *not* apply to *television* broadcasters—meaning that, again, the exemption is written (notwithstanding its vagueness) so as to draw lines based on the identity of the speaker.

This is important because local radio and television stations often depend on freelance contributors and even anchors. Manuel Alvarado, et al., eds., *The SAGE Handbook of Television Studies* 281 (2015). Establishment media, by contrast—meaning large, traditional media corporations such as the *Los Angeles Times* or

NBC News—can better afford the burdens imposed by the employment mandates of AB2257.

Moreover, free-lance journalists regularly produce work that establishment media are unwilling or unable to address. Perhaps the best-known recent example is NBC News's refusal to publish information about sexual assault allegations against Hollywood producer Harvey Weinstein. After freelance journalist Ronan Farrow broke the story in *The New Yorker*, it was revealed that NBC had spiked it in 2017. *See* Warren, *Harvey Weinstein Was Just Sentenced to 23 Years in Prison, Business Insider*, Mar 11, 2020.[17] Freelance journalists such as Glenn Greenwald and John Stossel are also more likely than establishment media to cover stories that question government policies. *See* Greenwald, *No Place to Hide: Edward Snowden, the NSA, and the U.S. Surveillance State* 232 (2014).

Freelance journalists often have more time and contacts to track down details of complicated stories than their full-time colleagues. *See* Chantler & Stewart, *Essential Radio Journalism: How to Produce and Present Radio News* 41 (2009). In 2017, a pair of freelance journalists reported on civilian deaths in the Iraq war for the *New York Times Magazine*; their report forced Pentagon officials to take better measures to avoid such casualties. In a later interview, one of the

[17] https://www.businessinsider.com/ronan-farrow-nbc-harvey-weinstein-investigation-timeline-2019-10

writers explained that there was "no way that we could have done this as staffers at an institution." Cantenys, *supra*.

Freelancers are also able to use the greater flexibility of their positions to focus their attention on communities that are typically overlooked or that larger media companies find it unprofitable to cover. This year, a special Pulitzer was awarded to a freelance journalist for reporting on sexual violence against Native Alaskan women; a subject the Pulitzer Committee said had been "mostly ignored" by establishment media. *2020 Breakthrough Journalism Award Winner Announced*, Pulitzer Center, Apr 16, 2020.[18]

But even in less controversial situations, freelancers are able to cover stories or serve communities that are otherwise ignored. The online journal *Postindustrial*, for example, focuses on communities in the "Rust Belt" and Appalachia. It was co-founded by freelance journalists who found that establishment media are unable to address the news in these communities. *See* Stevens, *How Independent Journalists Are Covering More Than Just 'The Amount of Rust' in America's Overlooked Regions*, Poynter, Jan. 28, 2019.[19]

[18] https://pulitzercenter.org/blog/2020-breakthrough-journalism-award-winner-announced

[19] https://www.poynter.org/business-work/2019/how-independent-journalists-are-covering-more-than-just-the-amount-of-rust-in-americas-overlooked-regions/

The point is not merely that freelance journalism is important; it is that a law that hinders the ability of news outlets to rely on freelancers privileges one type of journalism over another, with disparate consequences on the kinds of information the public receives. This concern has led courts to warn against laws that "discriminate among media, or among different speakers within a single medium." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 659 (1994).

In *City of Ladue v. Gilleo*, 512 U.S. 43, 54–55 (1994), for example, the Court found that an ordinance that barred homeowners from displaying signs other than "for sale" signs was unconstitutional because it restricted a particular means of expression. The ordinance was not content-based, but it still stifled a "means of communication that is both unique and important." *Id*. at 54. Yard signs that express opinions on local matters "both reflect and animate change in the life of a community," and "are displayed to signal the resident's support for particular candidates, parties, or causes" in a way that was "distinct" from that which "other media" make possible. *Id*. at 54–55. To foreclose them therefore had a distorting effect on speech in the community. And in *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543 (2001), the Court held that a law restricting funds for some types of lawsuits but not others "distort[ed]" the "usual functioning" of "an existing medium of expression."

In applying its formalistic, either/or approach, the District Court relied primarily on *Turner Broadcasting*'s statement that not all regulations of media are subject to strict scrutiny. That case upheld the "must-carry" provisions of a cable television regulation, on the grounds that "the differential treatment" at issue there was "'justified by some special characteristic of' the particular medium." 512 U.S. at 660–61 (citation omitted). But *Turner Broadcasting* also observed that the must-carry rules "are not structured in a manner that carries the inherent risk of undermining First Amendment interests." *Id*. at 661. That is not true here. A rule that burdens freelance journalists *does* risk undermining First Amendment interests—precisely those interests *City of Lakewood* referenced: the risk of restricting speech by controversial and local news outlets. That case's observation that bans on newspaper stands would have a disproportionately negative effect on "low-budget, controversial neighborhood newspapers," which have fewer opportunities to reach potential readers, is certainly applicable here. 486 U.S. at 762.

CONCLUSION

The District Court erred in applying rational basis scrutiny to a speaker-based and content-based speech restriction. Its decision should be *reversed*.

Date: December 1, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,492 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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