

IN THE
United States Court of Appeals
for the Ninth Circuit

LYDIA OLSON, et al.,
Plaintiffs-Appellants,
v.
STATE OF CALIFORNIA, et al.,
Defendants-Appellees.

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

**BRIEF FOR *AMICUS CURIAE* INDEPENDENT WOMEN'S FORUM
IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL**

JENNIFER C. BRACERAS
INDEPENDENT WOMEN'S LAW CENTER
4 Weems Lane, #312
Winchester, VA 22601

SEAN MAROTTA
BENJAMIN A. FIELD
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
Telephone: (202) 637-5600
Fax: (202) 637-5910

May 14, 2020

Counsel for Amicus Curiae
Independent Women's Forum

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF COMPLIANCE WITH RULE 29.....	1
IDENTITY AND INTEREST OF <i>AMICUS CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. The Gig Economy Is A Critical Part of the Labor Market, Especially for Women	4
A. The Gig Economy	4
B. Women in the Gig Economy.....	5
II. AB5 Hurts Workers—Women in Particular	11
III. The District Court Should Have Stayed Enforcement of AB5 until Final Judgment on Plaintiffs’ Suit	17
CONCLUSION	23
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

	<u>Page</u>
CASES:	
<i>All. for the Wild Rockies v. Cottrell</i> , 632 F.3d 1127 (9th Cir. 2011)	17
<i>Drakes Bay Oyster Co. v. Jewell</i> , 747 F.3d 1073 (9th Cir. 2014)	17, 18
<i>Merrifield v. Lockyer</i> , 547 F.3d 978 (9th Cir. 2008)	20
<i>Nken v. Holder</i> , 556 U.S. 418 (2009).....	18
<i>Republic of the Philippines v. Marcos</i> , 862 F.2d 1355 (9th Cir. 1988)	20
<i>Shell Offshore, Inc. v. Greenpeace, Inc.</i> , 709 F.3d 1281 (9th Cir. 2013)	17
<i>Winter v. Nat. Res. Def. Council, Inc.</i> , 555 U.S. 7 (2008).....	17
STATUTES:	
Cal. Labor Code § 2750.3(b)(2).....	22
Cal. Labor Code § 2750.3(b)(6).....	22
Cal. Labor Code § 2750.3(c)(2)(B)(v).....	21
Cal. Labor Code § 2750.3(c)(2)(B)(ix).....	21
Cal. Labor Code § 2750.3(c)(2)(B)(x).....	21
Cal. Labor Code § 2750.3(f)	22

TABLE OF AUTHORITIES - Continued

	<u>Page</u>
RULES:	
Federal Rule of Appellate Procedure 29(a)	1
Circuit Rule 29-2(a)	1
OTHER AUTHORITIES:	
Allana Akhtar, <i>‘It feels cold and heartless’: Hundreds of California freelancers have been fired before the holidays over a state law meant to help Uber and Lyft drivers</i> , BUS. INSIDER (Dec. 18, 2019), https://bit.ly/3dqTqwE	11, 15
Annette Bernhardt & Sarah Thomason, UC Berkeley Labor Center, <i>What Do We Know About Gig Work in California?: An Analysis of Independent Contracting</i> (June 2017), https://bit.ly/2WcFvUZ	4
Billy Binion, <i>California’s Gig Economy Is Under Attack</i> , REASON (Apr. 2020), https://bit.ly/3fvwjTw	15, 16
Sophia Bollag & Dale Kaslerthe, <i>California workers blame new labor law for lost jobs. Lawmakers are scrambling to fix it</i> , N. BAY BUS. J. (Feb. 10, 2020), https://bit.ly/2yLSy78	11, 15
Alexia Fernández Campbell, <i>Gig workers’ win in California is a victory for workers everywhere</i> , VOX (Sept. 11, 2019), https://bit.ly/3bjiXq2	12
E-mail from Nancy P. to Indep. Women’s Forum (on file with Indep. Women’s Forum)	7, 12, 22
Faces of AB5 (@Ab5Of), TWITTER (May 2, 2020, 10:47 PM), https://bit.ly/2YK0OyY	14
Faces of AB5 (@Ab5Of), TWITTER (May 2, 2020, 10:48 PM), https://bit.ly/3bk8NWp	14
Diana Farrell, Fiona Greig & Amar Hamoudi, JPMorgan Chase & Co. Institute, <i>The Online Platform Economy in 2018: Drivers, Workers, Sellers, and Lessons</i> (Sept. 2018), https://bit.ly/2L6aGv5	9

TABLE OF AUTHORITIES - Continued

	<u>Page</u>
Federal Reserve Banks of New York, Cleveland, Richmond, <i>Small Business Credit Survey: Report on Nonemployer Firms</i> (2018), https://bit.ly/2WAol2J	10
Philip Garrity, <i>We Polled 573 Freelancers About AB5. They're Not Happy</i> , THE FREELANCER (Jan. 30, 2020), https://bit.ly/2WAO6Qv	5
Ben Gitis, Douglas Holtz-Eakin & Will Rinehart, <i>The Gig Economy: Research and Policy Implications of Regional, Economic, and Demographic Trends</i> , AMERICAN ACTION FORUM (Jan. 10, 2017), https://bit.ly/2WA34Gu	9
Suhauna Hussain, <i>Vox Media cuts hundreds of freelance journalists as AB 5 changes loom</i> , L.A. TIMES (Dec. 17, 2019), https://lat.ms/2LdPPpM	12
Lawrence F. Katz & Alan B. Krueger, <i>The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015</i> (Nat’l Bureau of Econ. Research, Working Paper No. 22667, Sept. 2016), https://bit.ly/3ck0b3m	9
Karin Klein, <i>Contract workers in California should be protected. Assembly Bill 5 doesn’t do it</i> , SACRAMENTO BEE (Dec. 19, 2019), https://bit.ly/2SKNh6K	14
Sanjay Lakhotia, <i>Gig Economy: A Boon for Women</i> , ENTREPRENEUR (May 24, 2019), https://bit.ly/2WB6GYL	11
Katy Macek, <i>The Gig Economy And What’s In It For Women</i> , BRAVA MAG. (Sept. 5, 2019), https://bit.ly/2SMwTIU	4, 6
Fran Maier, Lynn Perkins & Anna Zornosa, <i>Can’t Stop, Won’t Stop Her Side Hustle: Women in the Gig Economy 2018</i> (Sept. 5, 2018), https://bit.ly/2YIfyyw	6, 8, 9
James Manyika et al., McKinsey Global Institute, <i>Independent Work: Choice, Necessity, and the Gig Economy</i> (Oct. 2016), https://mck.co/2WawJXO	10

TABLE OF AUTHORITIES - Continued

	<u>Page</u>
MBO Partners, <i>The State of Independence in America: 2019: The Changing Nature of the American Workforce</i> , https://bit.ly/3fwrLvU	9, 16
Milja Milenkovic, <i>The Future of Employment—30 Telling Gig Economy Statistics</i> , SMALLBIZGENIUS (Aug. 20, 2019), https://bit.ly/2xJewar	5
News Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS – MAY 2017 (June 7, 2018), https://bit.ly/2WdUNJ6	9
Paypal, <i>U.S. Freelancer Insights Report</i> (2017), https://bit.ly/2zplgdL	10
Kathleen Pender, <i>Why some self-employed Californians are angry about unemployment benefits</i> , S.F. CHRON. (May 2, 2020), https://bit.ly/35TqivD	19
Elaine Pofeldt, <i>Are We Ready For A Workforce That is 50% Freelance?</i> , FORBES (Oct. 17, 2017), https://bit.ly/3cd6w0r	5
Elaine Pofeldt, <i>California’s AB5 Leaves Women Business Owners Reeling</i> , FORBES (Jan. 19, 2020), https://bit.ly/2WCs53U	7, 13
Press Release, Upwork & Freelancers Union, <i>Sixth annual “Freelancing in America” study finds that more people than ever see freelancing as a longer-term career path</i> (Oct. 3, 2019), https://bit.ly/3dnCffo	4, 5
Bárbara J. Robles & Marysol McGee, Board of Governors of the Federal Reserve System, <i>Exploring Online and Offline Informal Work: Findings from the Enterprising and Informal Work Activities (EIWA) Survey</i> (Oct. 2016), https://bit.ly/35E8HHI	9
Jennifer Van Laar, <i>AUDIO: Jennifer Van Laar Talks With Larry O’Connor About CA’s AB 5</i> , REDSTATE (Jan. 3, 2020), https://bit.ly/2WaYn6Q	14
David Wagner, <i>Workers Turn To Gig Platforms Like Uber And Lyft As An ‘Alternative Safety Net’</i> , LAIST (Sept. 6, 2019), https://bit.ly/2SIqeJq	8

TABLE OF AUTHORITIES - Continued

Page

Who participates in the gig economy?, Gig Economy Data Hub,
<https://bit.ly/2WajZQR> (last visited May 14, 2020).....10

STATEMENT OF COMPLIANCE WITH RULE 29

No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *Amicus curiae* submits this brief without an accompanying motion for leave to file or leave of court because all parties have consented to its filing. Fed. R. App. P. 29(a); Circuit Rule 29-2(a).

IDENTITY AND INTEREST OF AMICUS CURIAE

Independent Women’s Law Center is a project of Independent Women’s Forum (IWF), a nonprofit, non-partisan 501(c)(3) organization founded by women to foster education and debate about legal, social, and economic policy issues. IWF promotes access to free markets and the marketplace of ideas and supports policies that expand liberty, encourage personal responsibility, and limit the reach of government. Independent Women’s Law Center supports this mission by advocating—in the courts, before administrative agencies, in Congress, and in the media—for equal opportunity, individual liberty, and respect for the American constitutional order.

Independent Women’s Law Center is particularly concerned that California’s AB5 law will harm freelance workers, many of whom are women who prefer the flexibility of contract work to working as traditional employees.

Independent Women's Law Center is also concerned that carving out exemptions for certain categories of workers and not others rewards industries with powerful lobbying organizations and unreasonably harms groups that lack this influence, leaving them struggling to stay afloat.

INTRODUCTION AND SUMMARY OF ARGUMENT

Millions of Californians choose to freelance in the “gig” economy because they prefer control and flexibility over any benefits that come with the regimented nature of being a full-time, traditional employee. These gig-economy workers value the ability to work from anywhere and to schedule work around time with family and other responsibilities. Some workers use occasional gigs to supplement their regular employment income or their household's income. Women and men alike prize those aspects of gig-economy work, but many women especially value the flexibility and independence that freelancing offers as a work lifestyle option.

California's AB5 aims to limit women's choices and the choices of gig workers more generally. In the guise of helping workers by making it harder to classify them as independent contractors, AB5 will have the effect of shoehorning workers and their clients into a one-size-fits-all traditional employment arrangement. At best, AB5 threatens to make gig work unavailable by imposing tremendous legal risk on clients who want to hire freelancers. And as California courts apply AB5, it will deprive workers in certain professions of the option of

choosing freelancing over traditional employment. At worst, AB5 will destroy work altogether in industries that cannot practically transition from a freelance to a traditional employment model.

To the many thousands, or perhaps even millions, of women who stand to lose out, AB5 could cause irreparable harm to their ability to make a living or to work in the way that suits them best. Yet all Plaintiffs asked for below was a modest preliminary injunction to leave California labor law as it was just a few months ago, while the District Court adjudicates the merits of their claims. If AB5 is unconstitutional, a preliminary injunction will ensure that the rights of millions of Californians are not abridged. If Plaintiffs lose at the end of the day, an injunction will have simply delayed by a matter of months a change to California law. In light of those lopsided interests, the balance of the equities and the public interest weigh heavily in favor of a preliminary injunction.

In short, the District Court legally blundered by failing to recognize the tremendous harm to California freelance workers—including many women who are especially severely affected—from having a potentially unconstitutional law diminish their options to choose how to work. That harm is especially severe in light of the coronavirus pandemic, when the ability to work flexibly from home and to be able to care for family members is at an unprecedented premium. Given the serious constitutional questions raised by AB5, the District Court should have

preliminarily enjoined the law’s enforcement for the modest amount of time it would take to reach a final judgment. It was error to do otherwise, and this Court should reverse.

ARGUMENT

I. THE GIG ECONOMY IS A CRITICAL PART OF THE LABOR MARKET, ESPECIALLY FOR WOMEN.

A. The Gig Economy.

In 2019, 57 million Americans—or 35 percent of the U.S. workforce—performed independent freelance work, contributing nearly one *trillion* dollars in freelance income to the U.S. economy and nearly five percent of U.S. GDP.¹ In California, 8.5 percent of workers in 2016 considered independent contracting work to be their “main job.”² Freelancing, often referred to as the “gig economy,”³ includes a variety of highly-skilled services (such as computer programming and

¹ Press Release, Upwork & Freelancers Union, Sixth annual “Freelancing in America” study finds that more people than ever see freelancing as a longer-term career path (Oct. 3, 2019), <https://bit.ly/3dnCffo> (“Freelancing in America Study”).

² Annette Bernhardt & Sarah Thomason, UC Berkeley Labor Center, *What Do We Know About Gig Work in California?: An Analysis of Independent Contracting* 7 (June 2017), <https://bit.ly/2WcFvUZ>.

³ Although some people colloquially use “gig economy” as limited to those who use a digital “platform”—such as a ridesharing app or a handyman app, to get work—many more freelance and independent workers consider themselves part of the gig economy. See, e.g., Katy Macek, *The Gig Economy And What’s In It For Women*, BRAVA MAG. (Sept. 5, 2019), <https://bit.ly/2SMwTIU>.

business consulting), as well as other services (such as dog walking and ridesharing), selling goods, and other activities.⁴

Freelancing is often a lifestyle choice for workers who prioritize flexibility and independence. It provides workers the ability to choose when and where to work and allows them to supervise themselves and avoid unproductive workplace settings. Surveys indicate that those who choose to freelance have more job satisfaction than those who work as traditional employees.⁵ Not surprisingly, then, prior to the coronavirus pandemic, the independent workforce was growing three times faster than the total U.S. workforce,⁶ and economists predicted that by 2027 more than 50 percent of the U.S. workforce would participate in the gig economy.⁷

B. Women In The Gig Economy.

Women play an important role in the gig economy, and the gig economy is especially valuable to women. Patricia Mullins of the Wisconsin School of

⁴ See *Freelancing in America Study*, *supra* note 1.

⁵ See, e.g., Milja Milenkovic, *The Future of Employment—30 Telling Gig Economy Statistics*, SMALLBIZGENIUS (Aug. 20, 2019), <https://bit.ly/2xJewar> (84 percent of freelancers say that they are living their preferred lifestyle, compared to just 54 percent of those working as traditional employees); Philip Garrity, *We Polled 573 Freelancers About AB5. They're Not Happy*, THE FREELANCER (Jan. 30, 2020), <https://bit.ly/2WAO6Qv> (75 percent of freelancers say that they prefer it over a full-time job as a traditional employee).

⁶ See Milenkovic, *supra* note 5.

⁷ Elaine Pofeldt, *Are We Ready For A Workforce That is 50% Freelance?*, FORBES (Oct. 17, 2017), <https://bit.ly/3cd6w0r>.

Business at the University of Wisconsin–Madison spent decades studying career development and has identified “three categories of women who typically go into free-lance or contract work”: (1) “At-home parents looking to fill their free time and continue their skills or learn new ones”; (2) “those who want income to supplement the salary of their spouse, who already carries the benefits of a traditional job”; and (3) “those who are working multiple jobs and picking up side gigs to support their family on one income.”⁸

Freelance work is particularly important to women with children, as it allows them to earn money and to focus on their careers without compromising time with family. Mullins notes that, “[f]or a long time, day care was the only option for us as working women” who sought to maintain a career while raising children, but “now there is more of an option with the gig economy.”⁹ According to a 2018 survey of women who work in the gig economy by three San Francisco startups, more than half (54 percent) of those with children under the age of five said they were more likely to do side gigs to be able to increase the amount of time they have to spend with their children.¹⁰

⁸ Macek, *supra* note 3.

⁹ *Id.*

¹⁰ See Fran Maier, Lynn Perkins & Anna Zornosa, *Can't Stop, Won't Stop Her Side Hustle: Women in the Gig Economy 2018*, at 10 (Sept. 5, 2018), <https://bit.ly/2YIfyyw>.

Independent Women’s Forum has heard from women whose personal experiences reflect and confirm the survey data and Mullins’s observation. One representative example is an email from a freelance optometrist who signed her note “Nancy P., O.D.” She wrote, “My name is Nancy and I have been an independent contractor optometrist for 18 years. I currently work part-time so that I can raise my two boys. Being an IC optometrist has given me the flexibility and the income to have the best of both worlds, a fulfilling career and be present for my children.”¹¹

Similar examples abound in the popular press. For instance, Aimee Benavides works independently as a translator and interpreter. She started her home-based business in 2010 after leaving a full-time job in the court system. She was able to build a successful career as an independent worker while homeschooling her nine-year-old daughter, who has autism, and her eleven-year-old son.¹²

But it is not just women with children, like Nancy and Aimee, who enjoy working independently. Many women choose freelance work in order to care for a sick relative or an aging parent. *See, e.g.*, ER680-681. In California, many women

¹¹ E-mail from Nancy P. to Indep. Women’s Forum (on file with Indep. Women’s Forum).

¹² *See* Elaine Pofeldt, *California’s AB5 Leaves Women Business Owners Reeling*, FORBES (Jan. 19, 2020), <https://bit.ly/2WCs53U>.

trying to break into the entertainment industry drive for Uber or Lyft to support themselves in between acting jobs, which allows them flexibility to be able to take entertainment jobs as they come.¹³ And older women without children at home also enjoy freelancing. As one woman in her sixties who left a full-time job to join the gig economy noted: “I love the control I have over who I work for and with, and the variety of people I meet!”¹⁴ The 2018 survey by the San Francisco startups found that 44 percent of women who work in the gig economy do so for increased flexibility. Of these, 65 percent said it is “extremely important” to them to maintain flexibility.¹⁵

Women who freelance are happy doing so. In fact, 95 percent of the women who participated in the San Francisco survey reported they are fulfilled by their gig work, with 47 percent saying they find the work “extremely fulfilling.”¹⁶ Women also reported that they prefer to have an independent relationship with their companies or clients, rather than work as an employee—61 percent of those

¹³ See David Wagner, *Workers Turn To Gig Platforms Like Uber And Lyft As An ‘Alternative Safety Net’*, LAIST (Sept. 6, 2019), <https://bit.ly/2SIqeJq>.

¹⁴ Maier, Perkins & Zornosa, *supra* note 10, at 3.

¹⁵ *Id.* at 10.

¹⁶ *Id.* at 3.

surveyed said they prefer to be independent, while only 12 percent said they would want to be an employee of the companies for which they gig.¹⁷

Women make up a large, and perhaps even dominant, share of the gig economy. Economic survey data shows that women make up at least a third, and perhaps a majority, of gig economy workers, depending on the specific survey and its methodology.¹⁸ The inconsistency in survey data may be the result of patterns

¹⁷ *Id.*

¹⁸ See, e.g., MBO Partners, *The State of Independence in America: 2019: The Changing Nature of the American Workforce 3*, <https://bit.ly/3fwrLvU> (showing women made up 46 percent of full-time independent workers in 2019); News Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Contingent and Alternative Employment Arrangements – May 2017, at 4, 6 (June 7, 2018), <https://bit.ly/2WdUNJ6> (2017 survey showing women are 47 percent of “contingent” workers and a third of independent contractors); Diana Farrell, Fiona Greig & Amar Hamoudi, JPMorgan Chase & Co. Institute, *The Online Platform Economy in 2018: Drivers, Workers, Sellers, and Lessons 22* (Sept. 2018), <https://bit.ly/2L6aGv5> (showing women are 80 percent as likely as men to work on online platforms); Ben Gitis, Douglas Holtz-Eakin & Will Rinehart, *The Gig Economy: Research and Policy Implications of Regional, Economic, and Demographic Trends*, AMERICAN ACTION FORUM (Jan. 10, 2017), <https://bit.ly/2WA34Gu> (citing General Social Survey data showing that about 40 percent of gig workers were women in 2014); Bárbara J. Robles & Marysol McGee, Board of Governors of the Federal Reserve System, *Exploring Online and Offline Informal Work: Findings from the Enterprising and Informal Work Activities (EIWA) Survey 12* (Oct. 2016), <https://bit.ly/35E8HHI> (showing women are 56 percent of those who “participated in informal paid work activities”); Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015*, at 12-13 (Nat’l Bureau of Econ. Research, Working Paper No. 22667, Sept. 2016), <https://bit.ly/3ck0b3m> (“[W]omen are now more likely than men to be employed in an alternative work arrangement.”).

in which men are more likely to freelance full-time, while women are more likely to work part-time, occasionally, or seasonally and to use freelance work as supplemental income.¹⁹ One type of gig work that seems especially dominated by women is freelance work via the Internet, a category in which women make up 69 percent of workers.²⁰ In addition, the Small Business Credit Survey, a collaboration among twelve U.S. Federal Reserve Banks, reports that women also comprise a growing number (37 percent) of owners of “nonemployer” businesses (firms without full-time or part-time workers on payroll), which often employ contract workers.²¹

Critics of gig-economy jobs for women argue that when women trade in full-time traditional employment for flexible (and often part-time) freelance work, they earn less money. Such critiques, however, presume that money is always

¹⁹ See, e.g., James Manyika et al., McKinsey Global Institute, *Independent Work: Choice, Necessity, and the Gig Economy* 43 (Oct. 2016), <https://mck.co/2WawJXO> (“There is gender parity in independent work, but men are more likely to be free agents and women are more likely to be supplemental earners.”); *Who participates in the gig economy?*, GIG ECONOMY DATA HUB, <https://bit.ly/2WajZQR> (last visited May 14, 2020) (reporting that 48 percent of gig economy workers are women but explaining that “there are . . . a lot of discrepancies between surveys,” and that “[m]uch of this inconsistency stems from differences in how each survey defines non-traditional work, since different groups are disproportionately represented in different types of arrangements”).

²⁰ Paypal, *U.S. Freelancer Insights Report* (2017), <https://bit.ly/2zplgdL>.

²¹ See Federal Reserve Banks of New York, Cleveland, Richmond, *Small Business Credit Survey: Report on Nonemployer Firms* 3 (2018), <https://bit.ly/2WAol2J>.

more important to women than flexibility and ignores that women who choose freelance employment have the power to earn more by working more if they so choose. Interestingly, some studies report that the raw gender pay gap in the gig economy is less than half that under traditional employment models.²²

II. AB5 HURTS WORKERS—WOMEN IN PARTICULAR.

California legislators claim that AB5 protects workers' rights. *See, e.g.*, ER2, 8. And yet, instead of providing job security and benefits to California workers, AB5 has cost independent contractors significant work and income. *See* ER520, 691-692.

Artists, writers, and other contractors have reported losing contracts and jobs, and immediately losing critical income.²³ Moreover, as Plaintiffs' economics expert Dr. Justin McCrary has observed, the additional costs of converting independent contractors to traditional employees will take up a third of drivers'

²² *See* Sanjay Lakhota, *Gig Economy: A Boon for Women*, ENTREPRENEUR (May 24, 2019), <https://bit.ly/2WB6GYL> (citing study showing that “there is a 12 per cent point gap between men and women in traditional full-time jobs but a 5 per cent point difference between men and women working in the gig economy”).

²³ *See, e.g.*, Sophia Bollag & Dale Kaslerthe, *California workers blame new labor law for lost jobs. Lawmakers are scrambling to fix it*, N. BAY BUS. J. (Feb. 10, 2020), <https://bit.ly/2yLSy78> (discussing problems caused by AB5 to musicians, a sign-language interpreter, truckers, and a court transcript editor); Allana Akhtar, *'It feels cold and heartless': Hundreds of California freelancers have been fired before the holidays over a state law meant to help Uber and Lyft drivers*, BUS. INSIDER (Dec. 18, 2019), <https://bit.ly/3dqTqwE>.

incomes on the Uber and Lyft platforms. ER530-531. One inevitable result of such increased costs is a reduction in the amount of available work and in driver flexibility. ER534, 536-537, 539.

These basic economic principles have already had an impact on other high profile companies such as Vox Media. Vox has laid off hundreds of freelance writers in response to AB5.²⁴ Ironically, the outlet had earlier hailed AB5 as a “victory for workers,”²⁵ but the market realities associated with the costs of replacing freelancing with traditional employment relationships forced the company’s hand.²⁶

Because women play such an important role in the gig economy, many of those hit hardest by California’s assault on the gig economy are women. Nancy P., the optometrist who wrote to Independent Women’s Forum, *see supra* p. 7, says that AB5 has cut her income by 30 percent.²⁷

Lead Plaintiff Lydia Olson is another excellent example. She earned an MBA and started her own consulting business, which provided flexibility that was

²⁴ See Suhauna Hussain, *Vox Media cuts hundreds of freelance journalists as AB 5 changes loom*, L.A. TIMES (Dec. 17, 2019), <https://lat.ms/2LdPPpM>.

²⁵ See Alexia Fernández Campbell, *Gig workers’ win in California is a victory for workers everywhere*, VOX (Sept. 11, 2019), <https://bit.ly/3bjiXq2>.

²⁶ See Hussain, *supra* note 24 (explaining that because of AB5 Vox would replace about 200 freelancers with 20 traditional employees).

²⁷ E-mail from Nancy P., *supra* note 11.

especially important in allowing her to care for her husband when he developed multiple sclerosis. ER680. Olson augmented her consulting earnings by driving for Uber and Lyft but will not be able to do so anymore as a traditional employee. ER681. As Olson explained: “Given my husband’s illness and the fact that I have little or no notice of when I will have to take time off to care for him, I could not give up the flexibility that I have as an independent contractor.” *Id.* If AB5 works as its sponsors intended, to force ridesharing platforms to treat drivers as employees, Olson will simply lose the supplemental income on which she and her family have relied.

Additional examples abound:

- Rona Prestler, a mother of two, “relied on freelancing to earn a full-time income from home since 2016” but says she lost half her clients as a result of AB5. She now thinks she will be forced to look for a traditional job requiring her to commute several hours a day or potentially move.²⁸

²⁸ See Pofeldt, *California’s AB5 Leaves Women Business Owners Reeling*, *supra* note 12.

- Jessica Tucker, an independent contractor transcriptionist for years, lost her job after her out-of-state client elected not to work with California contractors anymore because of AB5.²⁹
- Kathy Seress is a phlebotomist who performs life insurance exams. She has lost her independent status and can no longer deduct any expenses from her taxes. AB5 has also interfered with her ability to continue freelancing work she used to do as an instructor for how to use medical devices and as a tech support provider.³⁰
- Kayla Lotstein is a broadcast captioner for the hearing impaired who says that “[s]everal agencies [that she has] personally spoken to are trying to figure out what to do with AB5 and have said they’re just trying not to close their doors at this point.”³¹
- Jennifer Van Laar is a freelance writer who moved out of California after living there for several years because of AB5’s effect on her work.³²

²⁹ See Karin Klein, *Contract workers in California should be protected. Assembly Bill 5 doesn’t do it*, SACRAMENTO BEE (Dec. 19, 2019), <https://bit.ly/2SKNh6K>.

³⁰ Faces of AB5 (@Ab5Of), TWITTER (May 2, 2020, 10:47 PM), <https://bit.ly/2YK0OyY>.

³¹ Faces of AB5 (@Ab5Of), TWITTER (May 2, 2020, 10:48 PM), <https://bit.ly/3bk8NWp>.

³² See Jennifer Van Laar, *AUDIO: Jennifer Van Laar Talks With Larry O’Connor About CA’s AB 5*, REDSTATE (Jan. 3, 2020), <https://bit.ly/2WaYn6Q>.

- Michelle Mista worked as a freelance writer after having a daughter and developing an autoimmune disease. Her chronic illness made traditional employment difficult for her, and freelancing allowed her to “rest or modify [her] activities as [she] need[s].” She fears that AB5 will “upend everything [her] family has planned.”³³
- Lacey Easton is a professional sign-language interpreter who freelances for schools, job-training agencies, and medical appointments. She has seen her work decrease dramatically because of AB5 and notes that, “[m]ore importantly, deaf and hard of hearing people have lost access to communication.”³⁴

AB5 threatens the livelihood and economic security of women like these who work independently as freelancers, or those who own their own non-employer businesses that rely on contract work. Unsurprisingly, one of the leading groups that opposed AB5—California Freelance Writers United—is over 70 percent female.³⁵ As its leader explained,

³³ Akhtar, *supra* note 23.

³⁴ Bollag & Kaslerthe, *supra* note 23.

³⁵ See Billy Binion, *California’s Gig Economy Is Under Attack*, REASON (Apr. 2020), <https://bit.ly/3fvwjTw>.

The reality is it still falls primarily on women to be the caretakers and caregivers of their families, and freelancing allows women to be stay-at-home mothers or to care for an aging parent. . . . Being made employees kills their flexibility and ability to be home when needed. I cannot stress enough how anti-women this bill is.³⁶

The law's proponents claim that it replaces pay uncertainty with stability. Yet, in a recent survey, more than half of full-time independent workers said that they feel more financially secure as independents than as traditional employees.³⁷ And even if workers in the gig economy could substitute their gig arrangements with a traditional employee relationship—an unlikely proposition given Plaintiffs' evidence that gig work cannot readily be converted to traditional employment, *see supra* pp. 11-12—that option will be illusory for workers who prefer gig work to traditional employment to be able to balance family responsibilities with work or those who use gig work only to supplement income intermittently. AB5 leaves those workers with no option to work as they wish, and those workers are especially likely to be women. *See supra* pp. 5-11.

³⁶ *Id.*

³⁷ *See MBO Partners, supra* note 18, at 11.

III. THE DISTRICT COURT SHOULD HAVE ENJOINED ENFORCEMENT OF AB5 UNTIL FINAL JUDGMENT ON PLAINTIFFS' SUIT.

The familiar four-factor test for a preliminary injunction requires a plaintiff to show: (1) likelihood of success on the merits, (2) that she is likely to suffer irreparable harm absent preliminary relief, (3) that the balance of equities tips in her favor, and (4) that the injunction is in the public interest. *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1289 (9th Cir. 2013) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). “When the government is a party, these last two factors merge.” *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). This Court applies this four-factor test with a sliding-scale approach. If the “‘balance of hardships tips sharply in the plaintiff’s favor,’” then the plaintiff need not show a likelihood of success on the merits, but need only make the “lesser showing” that there are “‘serious questions going to the merits.’” *Shell Offshore*, 709 F.3d at 1291 (quoting *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)) (emphasis omitted).

Here, the harm to the many California women working in the gig economy of enforcing AB5 shows that the balance of equities and public interest tip sharply in Plaintiffs’ favor. The women profiled above and the broader class of female gig-economy workers they represent will lose their livelihoods or the option of

working flexibly if AB5 is enforced. On the other side of the ledger, California's argument for the immediate necessity of imposing the more-stringent ABC test on gig-economy workers is belied by the numerous arbitrary exemptions that would apply a *laxer* test to many classes of workers than the test they would face had AB5 never been enacted. *See* Appellants' Br. 9-12; ER3; *infra* pp. 20-22. If there is a compelling interest in imposing a stricter independent-contractor test on certain workers, then there must be an equally compelling interest in *enjoining* AB5 so that it does not exempt similarly-situated workers from this stricter test.

Setting aside the self-contradictory nature of California's argument, *even if* some workers might benefit from AB5 taking away their option to work as independent contractors, a preliminary injunction would only maintain the status quo ante while the merits of Plaintiffs' suit is adjudicated. If California prevails, all it means is that the pre-AB5 legal regime would be restored for a few additional months. In the meantime, nothing would stop workers who wish to work as traditional employees from pursuing that arrangement with potential employers. If, however, Plaintiffs prevail on their constitutional claims *without* a preliminary injunction having been granted, many thousands of women working in the gig economy will have been unnecessarily deprived of their rights and may see their gig work arrangements irreparably destroyed by the later-adjudicated-to-be-

unlawful enforcement of AB5.³⁸ By the time Plaintiffs prevail, some of those unnecessarily impacted women may have lost their clients or even been forced to move. *See supra* pp. 11-16. California's desire to impose its patchwork regulatory scheme more quickly hardly outweighs those harms.

The balance of equities is made even clearer with the advent of the coronavirus pandemic. With sweeping unemployment, schools closed, and a statewide stay-at-home-order in effect, California workers need the flexibility and independence that freelancing can offer more than ever. Additionally, for those who are primarily self-employed, federal coronavirus relief has been structured in a way that gives substantially more generous benefits to those whose side jobs are treated as independent contracting rather than employment, making the enforcement of AB5 especially harmful to the self-employed at this fraught moment.³⁹ However a court would weigh the public interest in normal times, at this time—when Californians are at home caring for children and family while

³⁸ Extrapolating from the overall statistics about participation in the gig economy, *see supra* p. 4, and women's large share of that gig-economy workforce, *see supra* pp. 9-10, somewhere between hundreds of thousands and millions of California women participate in the gig economy. Many more women, who live in other States but wish to perform freelance work for California companies, are also affected. No matter how broad AB5's reach turns out to be when it is fully enforced, then, it will inevitably impact a tremendous number of women who participate in the gig economy.

³⁹ *See* Kathleen Pender, *Why some self-employed Californians are angry about unemployment benefits*, S.F. CHRON. (May 2, 2020), <https://bit.ly/35TqivD>.

trying to make ends meet—the last thing they need is a radical restructuring of the labor market before a court adjudicates whether that drastic change is lawful.

With the balance of equities and public interest tipping sharply in Plaintiffs' favor, all Plaintiffs needed to show to satisfy the “serious questions” standard was that they have “a fair chance of success on the merits,” which is a lower threshold even than showing “a probability of success.” *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) (internal quotation marks omitted). Plaintiffs more than satisfied that modest requirement in showing that AB5 violates the Equal Protection Clause of the Fourteenth Amendment. *See* Appellants' Br. 20-33.

This Court has explained that the Equal Protection Clause requires “that similarly situated persons must be treated equally,” and that an economic regulation is unconstitutional where it creates arbitrary exemptions that treat like persons differently. *Merrifield v. Lockyer*, 547 F.3d 978, 992 (9th Cir. 2008). The law purports to benefit workers by limiting their ability to work outside of the traditional employer-employee relationship. But AB5 actually shifts California labor law in opposite and contradictory directions: Although non-exempted workers face a more stringent test to be able to be classified as independent contractors (the ABC or *Dynamex* test), the favored industries whose lobbies

procured carve-outs now face a more lax test (the so-called *Borello* test) than they would without AB5. *See* Appellants’ Br. 21-31; ER3.

To take just one subset of especially arbitrary results, consider AB5’s treatment of writers and artists. There is no rational reason that freelance grant-writers should be permitted to work as independent contractors under a more flexible test than would exist absent AB5, while at the same time freelance journalists are subjected to the stringent ABC test. *Compare* Cal. Labor Code § 2750.3(c)(2)(B)(v), *with id.* § 2750.3(c)(2)(B)(x). Why writing grants should be treated so radically different from writing news articles is left to the imagination. AB5 also limits freelance writers, editors, newspaper cartoonists, still photographers, and photojournalists to 35 submissions per publication without any rational basis for this arbitrary cut off. *Id.* § 2750.3(c)(2)(B)(ix)-(x). And its treatment of photography is particularly absurd. Freelancers benefit from an exception if they are a “*still* photographer or photojournalist,” but not if their work is used in the laughably broad definition of “motion pictures,” which “includes, but is not limited to, projects produced for theatrical, television, internet streaming for any device, commercial productions, broadcast news, music videos, and live shows, whether distributed live or recorded for later broadcast, regardless of the distribution platform.” *Id.* § 2750.3(c)(2)(B)(ix) (emphasis added).

If workers in the exempted industries—some of which are male-dominated professions such as construction and commercial fishing, *see id.* § 2750.3(b)(6), (f)—would benefit from a change to the law allowing more flexible work arrangements under the *Borello* test, then there is no reason workers in the non-exempted professions (including women) would not equally benefit from that change. Instead, the law does the opposite by imposing the stricter ABC test on workers not lucky enough to have cajoled the legislature into granting them a carve-out.

Optometrist Nancy P., who has lost 30 percent of her income because of AB5, *see supra* p. 12, explained that fundamental unfairness eloquently in her letter to Independent Women’s Forum:

AB5 gave exemptions to surgeons, psychologists and podiatrists but not to optometrists. This makes no sense and is completely unfair. Optometrists are doctors and recognized as physicians under Medicare. We have historically worked as independent contractors, often working in several practices. Why aren’t we exempt? Did we not lobby hard enough? Not contribute enough money to get the exemption?⁴⁰

The bottom line is simple: In the name of giving workers the supposed benefits of traditional employment, Defendants are paternalistically reducing the work options available to Californians, including millions of women. They are

⁴⁰ E-mail from Nancy P., *supra* note 11; *see* Cal. Labor Code § 2750.3(b)(2) (exempting physicians, surgeons, dentists, podiatrist, psychologists, and veterinarians, but not, for instance, optometrists or nurse practitioners).

doing so in the middle of a pandemic, when the needs for worker flexibility and the ability to make extra income are at their zenith. The law Defendants seek to enforce is self-contradictory on its own terms and draws patently arbitrary distinctions between similarly-situated persons, thereby raising grave constitutional questions. All Plaintiffs requested was that the District Court press pause on AB5 until those constitutional questions could be adjudicated. That request should have been granted in the public interest.

CONCLUSION

AB5 denies workers the freedom to work independently and to be their own bosses. The law is particularly troubling for women, who dominate certain sectors of the freelancing world and many of whom desire flexibility and time over the benefits that may come with traditional employment. Given the law's arbitrary and irrational distinctions among workers in similarly-situated professions, AB5 violates the Equal Protection Clause of the Fourteenth Amendment. At the very least, the law raises sufficiently substantial constitutional questions to warrant a preliminary injunction pending adjudication of Plaintiffs' suit to prevent irreparable harm to the many women who stand to suffer from AB5's enforcement.

For the forgoing reasons, the Court should reverse the decision below and remand with instructions to grant a preliminary injunction against AB5's enforcement pending a final judgment on Plaintiffs' claims.

May 14, 2020

JENNIFER C. BRACERAS
INDEPENDENT WOMEN'S LAW CENTER
4 Weems Lane, #312
Winchester, VA 22601

Respectfully submitted,

/s/ Benjamin A. Field

SEAN MAROTTA
BENJAMIN A. FIELD
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
Telephone: (202) 637-5600
Fax: (202) 637-5910

*Counsel for Amicus Curiae
Independent Women's Forum*

CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because it contains 5,365 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman 14-point font.

/s/ Benjamin A. Field
Benjamin A. Field

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 14, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Benjamin A. Field
Benjamin A. Field