No. 20-55408

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN SOCIETY OF JOURNALISTS, ET AL.,
Plaintiff-Appellants,

v.

XAVIER BECERRA,
Defendant-Appellee.

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

BRIEF OF THE CATO INSTITUTE, REASON FOUNDATION, AND INDIVIDUAL RIGHTS FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANTS

Manuel S. Klausner
LAW OFFICES OF
MANUEL S. KLAUSNER
Wells Fargo Center
333 S. Grand Avenue, Suite 4200
Los Angeles, CA 90071
(213) 617-0414
mklausner@klausnerlaw.us

Ilya Shapiro
Counsel of Record
Trevor Burrus
James T. Knight II
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

May 22, 2020

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Cato Institute and Reason Foundation are each nonprofit entities operating under § 501(c)(3) of the Internal Revenue Code. The Individual Rights Foundation is the legal arm of the David Horowitz Freedom Center, which is also a nonprofit 501(c)(3) organization. None of these *amici* is a subsidiary or affiliate of any publicly owned corporation, and none issue shares of stock. No publicly held corporation has a direct financial interest in the outcome of this litigation due to any *amicus*'s participation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

Reason Foundation is a nonpartisan and nonprofit organization, founded in 1978 to promote liberty by developing, applying, and communicating libertarian principles and policies, including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its website, and by issuing policy research reports. Reason also communicates through books and articles, and appearances at conferences and on radio and television. Reason's personnel consult with public officials on the national, state, and local level on public policy issues. Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues.

---

[1] Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in whole or in part. No person or entity other than *amici* made a monetary contribution to its preparation or submission. Pursuant to Ninth Circuit Local Rule 29-2(a), all parties have been notified and have consented to the filing of this brief.

The Individual Rights Foundation ("IRF") is the legal arm of the David Horowitz Freedom Center ("DHFC"), a nonprofit 501(c)(3) organization (formerly known as the Center for the Study of Popular Culture). The mission of DHFC is to promote the core principles of free societies—and to defend America's free society—through educating the public to preserve traditional constitutional values of individual freedom, the rule of law, private property and limited government. In support of this mission, IRF litigates cases and participates as *amicus curiae* in appellate cases that raise significant First Amendment speech and issues.

This case interests *amici* both because the freedoms of speech and press are vital to a free society and because the California law at issue endangers individual liberty by restricting the ability of freelance journalists to make a living.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

"Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I. The same prohibition applies to state legislatures through the Fourteenth Amendment. *See, e.g., Stromberg v. California*, 283 U.S. 359, 368 (1931). Laws that "target speech based on its communicative content," are "[c]ontent-based" and are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). In other words, content-based laws are "subject to strict scrutiny." *Id.* at 2227.

California's AB 5 places tight restrictions on the ability of freelance journalists to make a living by subjecting them to limits on the number of submissions they may make to an individual publisher in a given year and, in the case of photojournalists, prohibiting them from making video submissions. The only alternative to these restrictions is to become a full employee of their client publishers. Even if publishers were willing to hire every freelance journalist and photojournalist in the state of California, many prefer freelance work for a variety of reasons, such as the freedom to set their own hours and pursue work that interests them. The restrictions applied to freelance journalism are unique: other categories of constitutionally protected speech, such as "original and creative" marketing, fine art, and graphic design are subject to neither the submission limit nor the video ban. This distinction is not only arbitrary and harmful. It is unconstitutional.

The distinction between journalism, marketing, fine art, and graphic design is entirely dependent on the content of the speech at issue. Under AB 5 as it currently stands, it would be legal for a freelancer to sell 36 images categorized as "graphic design" to a newspaper but illegal for her to sell 36 images of "photojournalism" to the same paper. The only difference? The content of the images themselves. The law is clear: such content-based restrictions are presumptively unconstitutional and must pass strict scrutiny to survive. But California wants to evade strict scrutiny by using the complexity of AB 5 to its advantage, obfuscating the way the law works in an

attempt to change a content-based restriction into a content-neutral one. Without explanation, the court below bought California's argument and threw the journalists challenging the law out of court. This result in inconsistent with the Supreme Court's decision in *Reed v. Town of Gilbert*, and with the First Amendment.

Courts around the country have applied *Reed*'s standard clearly and consistently. This Court should reverse the district court, join its sister circuits in affirming that *Reed* is the law of the land, and grant journalists their day in court.

ARGUMENT

I. CALIFORNIA'S SUBMISSION LIMIT AND VIDEO BAN ARE CONTENT-BASED RESTRICTIONS THAT, UNDER *REED V. TOWN OF GILBERT*, ARE SUBJECT TO STRICT SCRUTINY

For a freelancer to fall under AB 5 subdivision (c)'s exception to the onerous ABC test established by subdivision (a), he must meet one of the 11 categories of services deemed "professional services." Whether or not a freelancer is able to satisfy the requirements of that definition will thus often determine whether the freelancer can engage in her chosen profession without California requiring her to sacrifice her freelance career and find a job with a single, permanent employer.

The majority of the 11 categories qualifying as "professional services" concern speech protected by the First Amendment. But the limitations placed on the various categories of speech are unequal. While freelancers may produce fine art, "original and creative" marketing, and graphic design without limitation, freelance

photographers, photojournalists, writer, editors, and newspaper cartoonists are subject to a unique limitation: they may not "provide content submissions to [any single] putative employer more than 35 times per year." Cal. Labor Code § 2750.3(c)(2)(B)(ix)-(x). Freelance photojournalists face an additional limitation: they may not make any video submissions. *Id.* at (ix). Neither the 35-submission limit nor the video ban apply to other types of speech covered by "professional services." While a freelancer may legally complete a contract to deliver a series of 36 recurring submissions deemed to be "marketing" to a single client, the same freelancer may not fulfill an otherwise identical contract for 36 submissions deemed to be "journalism" without obtaining permanent employment from the client. Similarly, a freelancer may deliver any number of videos deemed to be "fine art," but she may not deliver even a single video deemed to be "photojournalism."

What distinguishes speech categorized as marketing or fine art from speech categorized as journalism or photojournalism? The content, of course. And when a law targets speech based on content, Supreme Court precedent is unambiguous: strict scrutiny applies. *Reed*, 135 S. Ct. at 2227. The district court did not apply strict scrutiny, however, because it concluded that AB 5's distinctions "are not content-based," agreeing instead with Defendant that the distinctions are speaker-based and content-neutral. *Am. Soc'y of Journalists & Authors v. Becerra*, No. CV 19-10645, 2020 U.S. Dist. LEXIS 52898, at *4 (C.D. Cal. Mar. 20, 2020).

The Supreme Court, however, clarified the test for what constitutes a "content-based" distinction in the 2015 case *Reed v. Town of Gilbert*. *Reed*, as well as its application in other circuits, make clear that the district court erred in concluding that AB 5's "professional services" distinctions are not content-based. Under *Reed*, AB 5's distinctions are indubitably subject to strict scrutiny.

Reed concerned a town sign code "governing the manner in which people may display outdoor signs." 135 S. Ct. at 2224. The code created "various categories of signs based on the type of information they convey," each subject "to different restrictions." *Id.* Because the code "impose[d] more stringent restrictions on [a certain category of] signs than it d[id] on signs conveying other messages," the Court held that the provisions were unconstitutional "content-based regulations of speech that cannot survive strict scrutiny." *Id.*

Just as in *Reed*, AB 5's "professional services" definition creates "various categories of [services] based on the type of information they convey," with each subject "to different restrictions" or none at all. And because AB 5 imposes "more stringent restrictions" on freelance writing, editing, newspaper cartoons, photography, and photojournalism than it does on services "conveying other messages" such as marketing, fine art, or graphic design, the distinctions drawn by the "professional services" definition are content based and subject to strict scrutiny.

Reed provides a clear framework for determining whether a restriction is content-based or content-neutral. Courts must "consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id.* at 2227 (quoting *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011)).[2] "Obvious" facial distinctions include "defining regulated speech by particular subject matter," while "subtle" facial distinctions might "defin[e] regulated speech by its function or purpose." In either case, however, the "distinctions [are] drawn based on the message a speaker conveys, and therefore, are subject to strict scrutiny." *Id.* at 2227.

The Court determined that the sign code at issue in *Reed* was "content based on its face" because "[t]he restrictions in the Sign Code that apply to any given sign . . . depend entirely on the communicative content of the sign." *Id.* A "Political Sign" could not be distinguished from a "Temporary Directional Sign" on any basis other than the type of message that the sign conveyed. The Court stressed that this was the case even though the sign code did not discriminate between viewpoints within those

[2] A facially neutral law is also considered content-based if its rationale is content-based. This category includes "laws that cannot be 'justified without reference to the content of the regulated speech,' or that were adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Id*. (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (alteration in original). Notably, the rationale behind the law is irrelevant if the law is *facially* content-based: "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* at 2228 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)). Thus, "an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Id.*

categories. *Id.* at 2230 ("a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter."). "[I]t is well established," the Court wrote, that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Id*.

The definition of "professional services" in AB 5 is content-based for the same reason that the sign code in *Reed* was: the distinction between categories within the "professional services" definition "depend entirely on the communicative content" of the service in question. The categories drawn by the definition are inherently based on the subject matter of the communications. If AB 5 were to be enforced, the content of the submissions is the only thing that determines whether a contract for services falls into the unrestricted categories or the restricted categories. While a freelancer could contract to produce a video marketing the newest gadget from ACME Inc., she could not enter a contract requiring her to produce a video reporting on the release of the same gadget. While a freelancer could enter a contract to provide 52 works of art for the offices of her local newspaper, she could not enter an otherwise identical contract to submit one cartoon a week for one year to the same newspaper without being hired as an employee. And if she wished to contract out cartoons to five, ten, or twenty papers? She's out of luck, unless every paper looking to run her cartoons is willing to hire her as an employee and she is willing to be an

employee at all those businesses. California has not targeted cartoons or journalism for the particular viewpoint expressed—but that, as *Reed* makes clear, is irrelevant.

As a final note, California cannot save AB 5's "professional services" distinctions from strict scrutiny by framing them as a "speaker-based" rather than "content-based." Like the sign code in *Reed*, "the ["professional services" definition's] distinctions are not speaker based." *Id.* at 2230. The restrictions for various categories of services "apply equally no matter" the speaker. *Id.* The definition at issue is for which *services* constitute "professional services," not which workers constitute "professionals." The same freelancer could, complying with AB 5's provisions, have multiple contracts for different types of services that fell into different categories under the "professional services" definition. Regardless, "the fact that a distinction is speaker based does not . . . automatically render the distinction content neutral." *Id.* Relevantly, the Court adds: "a law limiting the content of newspapers, but only newspapers, could not evade strict scrutiny simply because it could be characterized as speaker based." *Id.* Such is the law here.

Reed leaves little room for interpretation: laws that draw distinctions of the sort that AB 5's "professional services" definition does are facially content based and subject to strict scrutiny.

II. FINDING AB 5'S RESTRICTIONS TO BE CONTENT-BASED WOULD BE CONSISTENT WITH *REED*'S APPLICATIONS IN THE FIRST, THIRD, EIGHTH, AND ELEVENTH CIRCUITS

Reed set a clear and easy-to-follow standard for determining whether a law's restrictions of speech are content based. It is little surprise, therefore, that the circuit courts' applications of *Reed* also counsel that the California law's "professional services" distinctions are content based.

March v. Mills provided the First Circuit an opportunity to apply *Reed* to a closer case than the sign code had presented. 867 F.3d 46 (1st Cir. 2017). *March* challenged a Maine law that stops a person from intentionally "making noise that 'can be heard within a building'" after law enforcement has ordered the person to stop and with the intent to either "jeopardize the health of persons receiving health services within the building; or to interfere with the safe and effective delivery of those services within the building." *Id.* at 49–50. The challenger was an opponent of abortion who would frequently protest outside a health facility that provides abortions in Portland, Maine. *Id.* Although the district court had concluded that the law was a content-based restriction on speech, the First Circuit reversed, concluding that the law was not content based, either on its face or through its rationale. *Id.*

The court observed that the "Noise Provision says not a word about the relevance—if any—of the content of the noise that a person makes to the determination of whether that person has the requisite disruptive intent." *Id.* at 56. It

went on to note that a person's "manner of making noise can itself be highly probative of one's disruptive intent quite independent of what one actually says." *Id.* Thus, a person would violate the law by loudly singing "Yankee Doodle"—or by screaming without any words at all—outside of a health clinic with the intent to disrupt the procedures occurring within, while he would not violate the law by making a speech at a reasonable volume on why he believed the abortion procedures happening inside were wrong, immoral, or sinful. The manner of speaking (and the intent it conveyed), not the content, was the key aspect of the law.

Not so for the "professional services" distinctions. It would be impossible to distinguish between photojournalism and graphic design without considering the content of the image at issue. Without seeing the images, it would be impossible to apply AB 5 to a contract between a freelancer and a newspaper simply for "36 images submissions in 2020." Such a contract might be permissible for graphic design or impermissible for photojournalism. While in *March* there was "no reason to conclude that disruptive intent [was] necessarily a proxy for a certain category of content," here the distinctions *are* categories of content, not mere proxies. *Id.* at 56.

One year before *March*, the Third Circuit considered a challenge to a similar ordinance banning "demonstrating" within a certain distance of health-care facilities. *Bruni v. City of Pittsburgh*, 941 F.3d 73 (3d Cir. 2016). The challengers wanted to provide "sidewalk counseling" outside certain health care facilities to convince

women not to obtain abortions. *Id.* Like the First Circuit in *March*, the Third Circuit in *Bruni* found that the law was not content-based and determined that the ordinance prohibited a certain manner of speech ("demonstrating") that did not include plaintiffs' sidewalk counseling. "[I]f the Ordinance by its terms did prohibit one-on-one conversations about abortion but not about other subjects within the zone," the court cautioned, "it would be highly problematic." *Id.* at 85. AB 5's distinction between speech about the news and other speech, such as marketing, is precisely this type of restriction: "highly problematic." Rather than draw distinctions based on the manner of speech, California draws distinctions based on the content of speech. Unlike the manner-of-speech restriction in *Bruni*, AB 5 must meet strict scrutiny.

Wilson v. City of Bel-Nor, 924 F.3d 995 (8th Cir. 2019), recently provided the Eighth Circuit an opportunity to apply *Reed* in a case closer to *Reed*'s own facts: a Bel-Nor, Missouri ordinance permitting property owners to display only one sign on the property—with an exception allowing, in addition to the sign, one flag. The *Wilson* court determined that the ordinance was content-based because "its flag exemption imposes different restrictions on signs depending on their content." *Id.* at 1000. Under the ordinance, what made a display a "flag" and not a "sign" was not simply a matter of material. In addition to being made of "fabric or bunting," the object must contain "distinctive colors, patterns, or symbols used as a symbol of a government or institution" to be a flag. *Id.* This requirement meant that flags *not*

containing the pattern or symbol of a government or institution were prohibited. Thus, any inquiry into whether the second fabric displayed on a person's property was "a sign or a flag—and whether it is prohibited by the Ordinance—depends on . . . 'the topic discussed or the idea or message expressed.'" *Id.* at 1000–01 (quoting *Reed*, 135 S. Ct. at 2227). Again, the court's *Reed* analysis counsels that AB 5's submission limit and video ban are content-based restrictions. An inquiry into the lawfulness of a freelancer's 36th submission to one publisher in a single year will depend on "the topic discussed or the idea or message expressed." If the topics of the 36 submissions are the news, then the freelancer violates AB 5 and either cannot make the submission or must become an employee. If the topic of even one of the 36 submissions is, instead, marketing or fine art, then the freelancer is in the clear.

Finally, the Eleventh Circuit case *Wollschlaeger v. Governor* concerned Florida's Firearms Owners' Privacy Act (FOPA), which in part restricted speech about firearm ownership by doctors and other medical professionals. 848 F.3d 1293 (11th Cir. 2017). The court found that the provision violates the First Amendment, because the "record-keeping, inquiry, and anti-harassment provisions of FOPA are speaker-focused and content-based restrictions. They apply only to the speech of doctors and medical professionals, and only on the topic of firearm ownership." *Id.* at 1307. Two aspects of that decisions are relevant to the present case.

First, the Eleventh Circuit reiterated the *Reed's* distinction between viewpoint- and content-neutrality, writing that "[e]ven if the restrictions on speech can be seen as viewpoint neutral—a point we need not address—that does not mean that they are content-neutral." *Id.* By subjecting a given category or topic of speech to restrictions not applicable to other categories or topics, a law's restrictions are content-based and subject to strict scrutiny. That AB 5 does not prefer or discourage certain journalistic viewpoints is thus no defense of restrictions targeting journalism.

Second, in *Wollschlaeger* the state officials argued that "the First Amendment [wa]s not implicated because any effect on speech [wa]s merely incidental to the regulation of professional conduct." *Id.* at 1308. The court was unconvinced: "Keeping in mind that '[n]o law abridging freedom of speech is ever promoted as a law abridging freedom of speech,' we do not find the argument persuasive," adding that the argument that "restrictions on writing and speaking are merely incidental to speech is like saying that limitations on walking and running are merely incidental to ambulation." *Id.* (quoting Rodney A. Smolla, *Free Speech in an Open Society* 58 (1992)). California officials might, like their Florida counterparts, contend that the effect of AB 5's "professional services" definition on speech is "merely incidental to the regulation of professional conduct," in that the purpose of AB 5 is not the restriction of speech, but the restructuring of employment relationships. But while the intent to directly target and restrict speech may be a sufficient condition to run

afoul of the First Amendment, it is not a necessary one. Laws that facially restrict speech on the basis of content must satisfy strict scrutiny whatever their purpose.

III. SIXTH AND SEVENTH CIRCUIT CASES MAKE CLEAR THAT CALIFORNIA'S SUBMISSION LIMIT AND VIDEO BAN ARE AT BEST "SPEAKER-BASED RESTRICTIONS THAT ARE NOTHING MORE THAN CONTENT-BASED RESTRICTIONS IN DISGUISE"

Despite *Reed*'s clear rejection of "speaker-based" restrictions as a cover for impermissible content-based restrictions, California argues that the distinctions drawn by the "professional services" definitions can evade strict scrutiny by construing them as restrictions based on "industry," "speaker," or "volume" because the laws are "*justified* without reference to the content of the regulated speech." Mot. to Dismiss, *Am. Soc'y of Journalists & Authors v. Becerra*, No. CV 19-10645, 2020 U.S. Dist. LEXIS 52898 (C.D. Cal. Mar. 20, 2020) (quoting *Doe v. Harris*, 772 F.3d 563, 575 (9th Cir. 2014)). But the fact that the restrictions are based on "volume" is a mischaracterization. That a law restricts the amount of speech does not make it a "volume-based" restriction. In *Bel-Nor*, the Eighth Circuit ruled the ordinance was a content-based restriction on the number of signs, not a "number-based" restriction. Similarly, AB 5 imposes volume restrictions *based on the content* of the speech.

Of more consequence is the argument that the "professional services" distinctions are "speaker based" (or "industry based") rather than content-based. This argument has several problems, the first being that *Reed* made plain that a "speaker-based" restriction can still be content-based. 135 S. Ct. at 2230 ("[T]he fact

that a distinction is speaker based does not . . . automatically render the distinction content neutral.") The Court reiterated that "speech restrictions based on the identity of the speaker are all too often simply a means to control content." *Id.* (quoting *Citizens United v. FEC*, 558 U.S. 310, 340 (2010)) (cleaned up). The presence of ostensibly speaker-based restrictions on speech would seem to *increase*, not decrease, the likelihood that a law impermissibly restricts speech based on content. At the very least, "[c]haracterizing a distinction as speaker based is only the beginning—not the end—of the inquiry." *Reed*, 135 S. Ct. at 2230–31. Even if a law draws speaker-based distinctions, courts must still follow *Reed*'s test to determine whether the law restricts speech based on content, either as a result of the speaker-based distinctions or in addition to them. A law that could be characterized as both speaker- and content-based is a content-based restriction triggering strict scrutiny. *Id.* ("Thus, a law limiting the content of newspapers, but only newspapers, could not evade strict scrutiny simply because it could be characterized as speaker based.").[3]

Several circuit cases have addressed the line between content-based and content-neutral restrictions that draw distinctions on the basis of who is speaking. *Schickel v. Dilger* is particularly instructive in that it shows what a truly content-

[3] To the extent that "industry based" is not simply a synonym for "speaker based," it would suffer from the same deficiency: if the *Reed* test determines that a law facially restricts speech on the basis of content, it is irrelevant if it could also be characterized as a restriction based on "industry."

neutral, speaker-based restriction would look like. 925 F.3d 858 (6th Cir. 2019). *Dilger* concerned a Kentucky law restricting gifts to legislators based on the identity of the giver. *Id.* The legislators challenging the law argued "that the gift ban provision is a content-based restriction" and thus subject to strict scrutiny. *Id.* at 875–76. The Sixth Circuit noted, however, that "speaker-based bans are not automatically content based or content neutral." *Id.* at 876. The court recognized that "*Reed*, at bottom, teaches us to be wary of speaker-based restrictions that are nothing more than content-based restrictions in disguise." *Id.* But, unlike in *Reed*—and unlike here—"Kentucky's gift ban provision" was "unrelated to the content of expression and is justified without any reference to the content of the gifts regulated." *Id.* In fact, it applies to gifts "regardless of whether they convey any message at all." *Id.* As with the healthcare demonstration restrictions considered by other circuits, the content of the speech at issue (if any) is in no way determinative.

Contrast the Kentucky gift law with California's AB 5 "professional services" distinctions. The Kentucky law applies whether the gift is "fine art" or has no speech or creative value at all. The same cannot be said of AB 5's "professional services" distinctions. Categorizing a service as subject to the submission limit or video ban does not turn on the identity of the speaker; the subdivision (c) exemption containing the "professional services" language exempts individual "contract[s] for 'professional services'" from AB 5's ABC test. Cal. Labor Code § 2750.3(c)(1).

Thus, the same freelancer could have multiple contracts falling into different categories of "professional services." Some might be "marketing" or "graphic design" and thus free of both the submission limit and the video ban, while others might be for "photojournalism," subject to both restrictions. While the Kentucky law applies to specific speakers (or "givers") regardless of the content of their speech, AB 5's "professional services" exemption does the opposite: it applies to specific types of content regardless of the specific speaker.[4]

An opinion from Judge Easterbrook in *Left Field Media LLC v. City of Chicago*, 822 F.3d 988 (7th Cir. 2016) drives the point home. The case concerned a challenge to an ordinance forbidding all peddling on streets next to Wrigley Field. The court found the ordinance to be content-neutral because it did not regulate speech and applied to all peddling regardless of what was sold or what message was being communicated, if any. *Id.* The court left undecided on ripeness and standing grounds, however, another challenge to the city's peddling ordinances that required "licensure of anyone selling anything . . . on streets anywhere in the City of Chicago," but exempted newspapers. *Id.* at 991–92. Although the court did not

[4] Reading AB 5 as speaker-based would yield odd results. If a person termed a photojournalist is restricted to 35 submissions per publisher per year and subject to a video ban *regardless of content*, and a person termed a graphic designer is unhampered by either restriction on their submissions *regardless of content*, then a graphic designer would, paradoxically, be able to make more submissions with the content of photojournalism than would a person deemed a photojournalist.

resolve the question, Judge Easterbrook noted that "a law that distinguishes discussion of baseball from discussion politics, by classifying one kind of publication as a magazine and another as a newspaper, is at risk under the approach of [*Reed*]." *Id.* at 992. *Reed*, he went on, warns that "newspaper exceptions to generally applicable laws create difficult constitutional problems." *Id.* The court considered the issue of a newspaper exemption unresolved by the Supreme Court because the exemption distinguished newspapers from other forms of journalism, such as sports journalism published in a baseball pamphlet, on the basis of the frequency of its publication. *Reed*'s warning on newspaper exemptions is, however, far more apt here, where journalism writ large is subject to different and more onerous restrictions that other categories of speech.

While a law that applies to newspapers or other journalistic enterprises may appear at first glance to be speaker-based, the categorical embrace of all freelance journalism in the AB 5 restrictions intrinsically ties the speakers, journalists, to the category of speech, journalism. Because AB 5's "professional services" distinctions are drawn along entire categories of speech, they are content based even if they may also be characterized another way. And because AB 5's submission limit and video bar are content-based restrictions, they are therefore subject to strict scrutiny.

CONCLUSION

For the foregoing reasons, as well as those presented by Plaintiff-Appellants, the Court should grant the petition for rehearing.

Respectfully submitted,

DATED: May 22, 2020.

/s/ Ilya Shapiro

Manuel S. Klausner
LAW OFFICES OF
MANUEL S. KLAUSNER
333 S. Grand Avenue, Suite 4200
Los Angeles, CA 90071
(213) 617-0414
mklausner@klausnerlaw.us

Ilya Shapiro
Counsel of Record
Trevor Burrus
James T. Knight II
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of 9th Cir. R. 29-2(c)(2) because it contains 4,463 words, excluding the parts exempted by Fed. R. App. P. 32(f).
2. This 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 it has been prepared in a proportionally spaced typeface in Times New Roman, 14-point font.

/s/ *Ilya Shapiro*
May 22, 2020

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

/s/ *Ilya Shapiro*
May 22, 2020