

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE ATLANTA OPERA, INC.

and

Case No. 10-RC-276292

MAKE-UP ARTISTS AND HAIR STYLISTS
UNION, Local 798, IATSE

BRIEF OF AMICI CURAE

FIGHT FOR FREELANCERS, AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS,
SOCIETY OF PROFESSIONAL JOURNALISTS FREELANCE COMMUNITY,
ASSOCIATION OF HEALTH CARE JOURNALISTS, CALIFORNIA FREELANCE
WRITERS UNITED, EDITORIAL FREELANCERS ASSOCIATION, NATIONAL
ASSOCIATION OF INDEPENDENT WRITERS AND EDITORS, SOCIAL SCIENCE
WRITERS, FREELANCING FEMALES, FREELANCERS AGAINST AB5, NUMIOPERA
THEATRE, AMERICAN ALLIANCE OF PROFESSIONAL TRANSLATORS
AND INTERPRETERS, NATIONAL ASSOCIATION OF JUDICIARY INTERPRETERS
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INTERESTS OF THE *AMICI CURIAE*

Fight For Freelancers is a nationwide, nonpartisan, self-funded, ad hoc coalition of several thousand solopreneurs, small business owners, freelancers and other independent contractors in professions ranging from physical therapy and music to graphic design and website development. New Jersey-based writers seeking to protect their careers founded the grassroots group in 2019 after the passage of California's Assembly Bill 5. The group's advocacy helped to defeat a copycat bill in New Jersey in 2020, and to stall federal legislation with the same anti-independent contractor language in 2021. Fight For Freelancers members regularly meet with lawmakers and speak out in the media to protect the choice of independent contractor work.

Founded in 1948, the **American Society of Journalists and Authors, Inc.**, is the nation's largest professional organization for independent nonfiction writers. For its members, freelance writing is not a hobby; it's a profession. ASJA members are entrepreneurs, as well as writers, working primarily in three industries: journalism, books and content marketing. From the start, ASJA has been a leading voice for the First Amendment, contributing to and promoting Banned Books Week, and taking legal action to prevent censorship. ASJA members have helped to lead the charge against anti-freelance measures, like California's Assembly Bill 5 and the federal PRO Act, as well as similar legislation that failed in New Jersey and New York. ASJA also partners with other writers' associations to lobby lawmakers against limiting the careers of freelance writers. The interest of ASJA and its members in this matter is to support and encourage the use of a flexible and reasonable test for determining the worker classification of freelance writers.

The **Society of Professional Journalists Freelance Community** represents freelance journalists of all kinds within the Society of Professional Journalists, the nation's most broad-based and oldest journalism organization. The community is represented by a board of eight members from across the country who are all freelancers, many of whom have been working independently for years or decades. The SPJ Freelance Community has a hub on SPJ's website, a Facebook group of more than 2,200 freelancers, and a Twitter feed with more than 5,100 followers. The SPJ Freelance Community regularly holds events related to freelancing for its members, and helps to guide freelancers through challenges that come up while running a freelance business.

The **Association of Health Care Journalists** is an independent, nonprofit organization dedicated to improving the quality, accuracy and visibility of health care reporting, writing and editing. With about 1,400 members nationwide, AHCJ provides training and resources to its members, and serves as their advocate on public matters affecting journalism. The ABC Test is of deep concern to this organization because nearly one-third of its members are freelancers.

California Freelance Writers United comprises more than 1,500 independent contractors, small-business-owner writers, journalists, editors, still photographers and casters based in the Golden State. It formed a nonpartisan, volunteer, ad hoc coalition in 2019 to collaborate with California lawmakers on a workable Assembly Bill 5 exemption. Alongside other industries, it lobbied for the creation and passage of Assembly Bill 2257. CAFWU crafted language that was adopted into the bill and passed into law as an urgency measure in September 2020.

The **Editorial Freelancers Association** is the oldest national association for freelance editorial professionals. Its more than 3,000 members include editors, writers, proofreaders, indexers, translators, graphic designers and other freelance professionals in the editorial field. The members, all freelancers, work with publishers, publications, academics, government agencies, academic institutions, self-publishing authors, corporations and nonprofits.

The **National Association of Independent Writers and Editors**, founded in 2007, represents novelists, copywriters, copy editors, proofreaders, writing teachers, writing coaches, business writers, business editors, academic writing evaluators, indexers, book cover designers, project managers, public speakers and other specialists. The organization helps members experience the freedom of working independently.

SoCal Science Writers, founded in 2018 as a regional affiliate of the National Association of Science Writers, represents science, medical and environmental journalists, as well as public information officers, scientists and researchers. The group has organized events in tandem with the University of California Los Angeles, the University of Southern California, and the Aquarium of the Pacific. Its upcoming climate crisis symposium is funded by The Science Literacy Foundation.

Freelancing Females is a U.S.-based, global community of 300,000 women, about 80 percent of them in the United States, redefining the nine-to-five. The group is composed of women cultivating each other's ability to achieve independence through their work, for a more equitable and prosperous world. Freelancing Females provides mentorship, jobs and camaraderie to women through its website, podcast and newsletter.

Freelancers Against AB5 has more than 18,600 members who are independent contractors and small businesses representing more than 600 categories of professions. The all-volunteer, ad hoc group formed in response to California's Assembly Bill 5 and has since documented hundreds of professions the law has threatened or harmed. The group speaks out to the media and lawmakers about the damage the law inflicts on legitimate independent contractors and small businesses.

NumiOpera Theatre is a nonprofit Los Angeles opera company that was created to keep alive the Jewish-composed music that Nazis suppressed. Its more than 50 independent contractors include classical instrumentalists, singers, stage managers, hair and make-up professionals, dancers, coaches and conductors. Created by the daughter of a Holocaust survivor from Poland, the NumiOpera Theatre produces shows that are intended to ensure the masses "never forget."

The **American Alliance of Professional Translators and Interpreters** represents independent contractors, freelancers, staff interpreters and translators nationwide. Its mission is to promote the professionalization and advancement of translators and interpreters by lobbying and advocating for public policy that benefits the communities we serve and the language profession. All board members are micro-business owners and were involved in obtaining an exemption for translators, and a partial exemption for interpreters, under California's Assembly Bill 2257.

The **National Association of Judiciary Interpreters and Translators** is a nonprofit, professional association of interpreters and translators. NAJIT promotes the highest professional standards in interpreting and translation. It provides continuing education for professionals to grow their knowledge, refine their skills, and stay updated on innovations within the profession. Through the work of volunteers, the NAJIT Board and committees seek out ways to influence legislation and support important issues of the profession.

SUMMARY OF ARGUMENT

When the Board ruled in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019) on what constitutes an appropriate test to determine independent contractor status, it stated that it was returning to the traditional common-law test because an attempt to impose a more restrictive test “impermissibly altered the common-law test and longstanding precedent.”

We strongly agree with the Board’s 2019 ruling. Long-standing precedent should be respected, to protect what have been legal business relationships between independent contractors and their clients since the founding of the United States of America. Any attempt by the Board to impose a more restrictive test in determining independent contractor status, such as the ABC Test from California’s Assembly Bill 5, would misclassify millions of legitimate independent contractors as employees, harming income and careers in hundreds of professions.

We also believe that any attempt by the Board to impose a more restrictive test such as the ABC Test from California’s Assembly Bill 5, which the U.S. Congress failed to pass in the Protecting the Right to Organize Act (PRO Act), would be unlikely to survive judicial review by the U.S. Supreme Court. Stopping regulatory “work-arounds” in the absence of congressional legislation is a defining concern of the Roberts Court, as most recently evidenced in *National Federation of Independent Business, et al.*, Nos. 21A244 and 21A247 (2022).

ARGUMENT

A. The Choice Of Independent Contractor Work Has Been A Legally Protected Option Since The Nation's Founding

Independent contractor work has been a legal option for U.S. citizens since the nation's founding in 1776. Indeed, being self-employed was the norm prior to the rise of the industrial revolution and large-scale factories. Hours were flexible, depending on what work was needed to collect crops, milk cows, corral horses or perform other farming-related tasks.¹

U.S. law, throughout the years, has routinely strengthened the protections afforded to Americans who choose to perform independent contractor work. In the profession of freelance writing, the second session of the very first U.S. Congress passed the Copyright Act of 1790, creating a set of exclusive rights for individual authors to copy, print and sell their expressive works. The legal choice of self-employment was so ubiquitous in the 1800s that the phrase "hang out one's shingle" became a common colloquialism, with independent lawyers, doctors and business concerns using shingles for signboards.² The 1099 tax form that the Internal Revenue Service uses to track independent contractor income dates to 1918, following passage of the War Revenue Act of 1917. The Taft-Hartley Act of 1947, enacted during the postwar rise of factories and unions, explicitly protected the right of independent contractors to remain a part of the workforce, separate from employees.

The long-standing precedent throughout the nation's history has been for U.S. law to err on the side of protecting independent contractors and the choice of self-employment. As recently

¹ Clark, Liat, Wired, [The gig economy threatens to take us back to pre-Industrial Revolution times](#)

² The Free Dictionary, [Hang Out \(One's\) Shingle](#)

as 2017, the courts have rebuked the Board for attempting to limit self-employment options.³ It is of paramount importance to maintain this protection of independent contractors, who, as discussed below, now comprise one-third of the U.S. workforce.

B. Today’s Independent Contractors Comprise One-Third Of The U.S. Workforce In Hundreds Of Professions

Today, independent contractors number as many as 59 million in the United States, comprising one-third of the U.S. workforce.⁴

Currently available data suggests that the ranks of independent contractors continue to grow. During the Great Resignation of 2020-21 that saw at least 4.5 million Americans quit their jobs amid the Covid-19 pandemic,⁵ the number of unincorporated self-employed workers rose by at least 500,000, and entrepreneurs applied for federal tax-identification numbers to register at least 4.54 million new businesses, with two-thirds being for businesses that weren’t expected to hire employees.⁶ As one study released in January 2022 noted, “The Great Resignation isn’t just about workers moving from one full-time job to another; 20 percent, or 10 million Americans, are considering freelancing.”⁷ Another study released in January 2022 found that the number of people filing initial paperwork to start a business in the United States rose 25 percent between 2019 and 2020—with at least some sole proprietors (“think freelancers, financial planners and

³ Vernuccio, F. Vincent, The Hill, [Labor Agency Bucks Court to Attack Independent Contractors](#)

⁴ Tanzi, Alexandre, Bloomberg, [Covid Pandemic Turns America into a Nation of Freelancers](#)

⁵ Leonhardt, Megan, Fortune, [The Great Resignation rages on as a record 4.5 million Americans quit](#)

⁶ Mitchell, Josh, et al., The Wall Street Journal, [Workers Quit Jobs in Doves to Become Their Own Bosses](#)

⁷ Ozimek, Adam, Upwork, [The Great Resignation: From Full-Time to Freelance](#)

consultants”) omitted from that data.⁸ U.S. Labor Secretary Marty Walsh noted this same Great Resignation trend in January 2022 when he told the U.S. Conference of Mayors: “In addition to retirements, we are also seeing more people go into business for themselves. In 2021, the number of self-employed workers grew by over 7 percent.”⁹

Today’s independent contractors earn income and have careers in hundreds of professions, including but not limited to: accounting, acting, animal-shelter consulting, auditing, bartending, beekeeping, bookkeeping, business consulting, cartography, coaching, comedy, competition judging, computer programming, copy editing, court reporting, CPR instruction, data aggregation, dog-walking, event planning, financial advisement, forestry, golf, graphic design, hair styling, home inspection, illustration, information technology, journalism, landscape architecture, language translation, law, marketing, massage therapy, medical billing, music, nursing, occupational therapy, orchestra conducting, paralegal services, pet-sitting, photography, physical therapy, proofreading, public speaking, real estate, respiratory therapy, securities dealing, sign-language interpretation, singing, stenography, teaching, transcription, trucking, tutoring, videography, wedding planning and writing.^{10, 11}

It is a common misperception that the majority of modern-day independent contractors are engaged in app-based, or “gig platform,” work. As the U.S. Treasury Department Office of Tax Analysis noted in a study¹² cited by the Wage and Hour Division of the U.S. Labor

⁸ Delfino, Devon et al., LendingTree, [Metros Where Entrepreneurship Boomed Amid the Coronavirus Crisis](#)

⁹ U.S. Department of Labor, [Remarks of Labor Secretary Martin J. Walsh to US Conference of Mayors](#)

¹⁰ Cole, Aaron H. et al., Ogletree, Deakins et al., Nash, Smoak & Stewart, National Law Review, [AB 2257 Enacts Significant Changes to AB 5 on Classification of Workers as Independent Contractors](#)

¹¹ Freelancers Against AB5, [Affected Professions](#)

¹² Jackson, Emilie et al., U.S. Department of Treasury Office of Tax Analysis, [Working Paper 114](#)

Department in March 2021,¹³ “Some media suggest that the gig economy is a large and growing segment of the U.S. labor market, revealing a marked shift in the nature of work relationships. However, there is little empirical evidence that this is the case.” According to Pew Research Center as of December 2021, only 4 percent of the U.S. workforce are currently performing gig-platform work.¹⁴ Indeed, many of today’s millions of independent contractors have been legally earning income in hundreds of professions for years or decades prior to the creation of app-based companies such as Uber (2009) and Lyft (2012).

Regulations, legislation and Board rulings regarding the legality of independent contractor work primarily affect Americans engaged in professions *other than* app-based work. Generally speaking, many independent contractors are specialists in their fields.¹⁵ Their services are needed by numerous companies and agencies, but not at a frequency that lends itself to traditional full-time or even part-time employment.

For instance, most U.S. courts would have no need or budget to create an employee position for a person who translates Portuguese into English, but many courts, on occasion, require the services of such a person as an independent contractor, to assist the occasional courtroom participant who speaks only Portuguese. Similarly, hospitals without a forensic nurse on staff 24/7/365 may use the services of independent contractors for evidentiary exams of rape victims as needed. Yet another example: Few modern newspapers have budgets that allow for staff reporters to cover topics of local importance such as community theater, restaurant reviews or real estate, but many newspapers occasionally seek out writers who are experts in those fields to produce articles as independent contractors.

¹³ Federal Register, [Independent Contractor Status Under the Fair Labor Standards Act: Withdrawal](#)

¹⁴ Anderson, Monica et al., Pew Research Center, [The State of Gig Work in 2021](#)

¹⁵ MBO Partners, [The State of Independence in America 2020](#)

Skilled professionals are one of the fastest-growing segments of the independent workforce. Their numbers have risen in each year since 2011, with one report showing a 71 percent increase as of 2020.¹⁶ As of 2021, according to another report, 51 percent of workers with postgraduate degrees were freelancers, up 6 percent since 2020, and 53 percent of all freelancers provided skilled services such as computer programming, marketing, information technology and business consulting.¹⁷

As discussed below, the vast majority of independent contractors are *intentionally choosing* this type of work. They do not want traditional employer-employee relationships. In 2021, some 87 percent said they were happier, and 78 percent said they were healthier, working independently.¹⁸

In a report released in January 2022, the top reasons cited for freelancing were flexible schedules and more personal time.¹⁹ Most independent contractors place a premium on flexibility as a key motivation behind their decision, over financial security or benefits.²⁰

As one recent report noted, “Lawmakers may view freelancing as a last resort, but 75 percent of respondents chose to freelance because they prefer it to full-time work.”²¹

¹⁶ MBO Partners, [The State of Independence in America 2020](#)

¹⁷ Ozimek, Adam, Upwork, [Freelance Forward Economist Report](#)

¹⁸ MBO Partners, [11th Annual State of Independence](#)

¹⁹ Ozimek, Adam, Upwork, [The Great Resignation: From Full-Time to Freelance](#)

²⁰ ADP Research, [Illuminating the Shadow Workforce: Insights into the Gig Workforce in Businesses](#)

²¹ Garrity, Phillip, Contently, [What Freelancers Have to Say About AB5](#)

C. The Vast Majority Of Independent Contractors Want To Remain Classified As Independent Contractors

Numerous studies dating back nearly a decade²² show that the vast majority of independent contractors are choosing to earn income independently, are happy with the way they are earning income, and want to remain classified as independent contractors.

In 2015, the U.S. Government Accountability Office reported that more than 85 percent of independent contractors and the self-employed appeared content with their employment type.²³ In 2018, the U.S. Bureau of Labor Statistics reported that 79 percent of independent contractors preferred their arrangement over a traditional job.²⁴

In 2019, Gallup found that self-employed workers with only one job “rate their work situation higher than workers in one traditional full-time job as an employee.”²⁵ In 2020, studies by multiple nongovernment organizations found that more than 70 percent of independent contractors were working independently by their own choice;²⁶ 75 percent chose to freelance because they preferred it to full-time work;²⁷ and 60 percent (who were surveyed during the height of the Covid-19 pandemic’s earliest problems) said no amount of money would convince them to take a traditional job.²⁸

²² Compilation of studies is available at [Fight For Freelancers. Data and Studies](#)

²³ U.S. Government Accountability Office, [Contingent Workforce: Size, Characteristics, Earnings, and Benefits](#)

²⁴ U.S. Bureau of Labor Statistics, [Contingent and Alternative Employment Arrangements News Release](#)

²⁵ Gallup, [2019 Gig Economy and Self Employment Report](#)

²⁶ ADP Research, [Illuminating the Shadow Workforce: Insights into the Gig Workforce in Businesses](#)

²⁷ Garrity, Phillip, Contently, [What Freelancers Have to Say about AB5](#)

²⁸ Upwork, [Freelance Forward 2020](#)

In 2021, more than three in five independent workers (62 percent) overall said that choosing freelance work was a personal decision, and that the government should not classify them as an employee.²⁹ Among app-based independent contractors specifically, as of December 2021, 65 percent viewed themselves as independent contractors.³⁰

Throughout the years in various studies, the majority of independent contractors have stated consistently that they prefer self-employment for multiple reasons. They have greater job satisfaction across all ages, income brackets and education levels;³¹ they feel more financially secure as independents than in traditional jobs;³² they have access to more professional opportunities than they would as full-time employees;³³ they earn the same as or more than they would with a traditional employer;³⁴ and their overall happiness, health and mental wellbeing has improved since they became self-employed.³⁵

Further, we encourage the Board to note the frequent mischaracterization of a 2018 study by MIT Sloan³⁶ that is often referenced with the assertion that half the U.S. workforce wants to be reclassified as employees so they can join unions. While that study did find that approximately 48 percent of nonunion workers would join a union if they could, the study's authors noted (on page 10) that the pool of respondents contained a higher percentage of low-income workers than in the national population, and (on page 11) that only 8 percent of the respondents were independent contractors. Thus, this study primarily references lower-income

²⁹ GrowTal, [“The State of Freelancing”](#)

³⁰ Anderson, Monica et al., Pew Research Center, [The State of Gig Work in 2021](#)

³¹ Manyika, James et al., McKinsey Global Institute, [Independent work: Choice, necessity, and the gig economy](#)

³² MBO Partners, [The State of Independence in America 2020](#)

³³ Garrity, Phillip, Contently, [What Freelancers Have to Say about AB5](#)

³⁴ Freshbooks Cloud Accounting, [Women in the Independent Workforce – 2nd Annual Report, 2019](#)

³⁵ Freshbooks Cloud Accounting, [Women in the Independent Workforce – 2nd Annual Report, 2019](#)

³⁶ Kochan, Thomas A. et al., [Voice Gaps at Work, Options for Closing Them, and Challenges for Future Actions and Research](#)

workers already classified as employees. It is not relevant when determining the wishes of independent contractors.

It is important that the Board understand and respect the reality of independent contractor careers and desires. As discussed below, when governmental actors disregard that reality, the primary result is a disastrous outcome for legitimate independent contractors.

D. A Restrictive Standard Such As California’s ABC Test Misclassifies Legitimate Independent Contractors As Employees

There has been an effort in some states, and in the U.S. Congress, since 2019 to impose a restrictive version of the ABC Test for determining independent contractor status. This version of the ABC Test differs from the versions used for various purposes since the 1930s in some states.

Its language is as follows or similar:

- (A) the individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of service and in fact;
- (B) the service is performed outside the usual course of the business of the employer;
- (C) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

In California, this version of the ABC Test was introduced into the legislature as Assembly Bill 5, was signed into law in September 2019, and went into effect January 1, 2020. It expanded the use of the ABC Test beyond the ruling in *Dynamex Operations West, Inc.* 4 Cal. 5th 903 (Cal. 2018), which applied only to wage orders. Assembly Bill 5 included all provisions of California’s labor code and the unemployment insurance code, thereby affecting all types of professions. California Gov. Gavin Newsom wrote in his signing message that the law “will help reduce worker misclassification — workers being wrongly classified as ‘independent contractors’ rather than employees, which erodes basic worker protections like the minimum wage, paid sick days and health insurance benefits.”³⁷

Newsom’s claim has proved patently false. As of early 2022, California had reported no increase in prosecutions of companies that intentionally misclassify employees. Instead, the California legislature had to pass an emergency measure, Assembly Bill 2257, ultimately exempting more than 100 professions from Assembly Bill 5 and its ABC Test.³⁸ The emergency measure was needed to preserve the income and careers of legitimate independent contractors whose livelihoods were harmed after the ABC Test misclassified them as employees. California Assemblywoman Lorena Gonzalez, the sponsor of both AB5 and AB2257, wrote of the latter, “While legitimate independent contractors can be classified as such if they meet the criteria under the ABC Test, AB 2257 outlines additional instances when an individual who operates their own independent business is clearly subject to the previous Borello standard for the purposes of determining their employment classification.”³⁹

³⁷ Myers, John et al, Los Angeles Times, [Newsom signs bill rewriting California employment law, limiting use of independent contractors](#)

³⁸ Cole, Aaron H. et al., Ogletree, Deakins, Nash, Smoak & Stewart, National Law Review, [AB 2257 Enacts Significant Changes to AB 5 on Classification of Workers as Independent Contractors](#)

³⁹ Gonzalez, Lorena (California Assemblywoman), [AB 2257 – Protecting Workers, Businesses, and Taxpayers Against Misclassification](#)

The need for AB 2257 and the damage that AB5 caused to legal business relationships between independent contractors and their clients was so profound in California that the U.S. Department of Labor put forward a new rule to protect independent contractors nationwide from suffering a similar fate. U.S. Labor Secretary Eugene Scalia wrote, in introducing the new federal rule, “As originally enacted AB5 was so unworkable that the state Legislature felt compelled to riddle it with amendments, establishing dozens of job-specific exemptions. Unlike AB5, our rule doesn’t propose radical changes in who’s classified as an employee or independent contractor.”⁴⁰

This U.S. Labor Department rule has since been rescinded, leaving tens of millions of legitimate independent contractors once again in danger of being misclassified as employees. This rescission is currently being challenged in federal court, via *Coalition for Workforce Innovation v. Walsh*, No. 21-cv-130-MAC (E.D. TX).

We strongly urge the Board to take a different approach and protect the long-standing legal status of America’s independent contractors. As discussed below, when overly restrictive regulations are implemented or even attempted to be implemented, a wholly unfair regulatory landscape is the result.

E. Restrictive Standards Create An Unfair Regulatory Landscape

One of the most unfair elements of Assembly Bill 5 in California was the way that lawmakers granted exemptions to certain professions, protecting their independent contractor status, while simultaneously misclassifying legitimate independent contractors in other professions as

⁴⁰ Scalia, Eugene, Fox Business, [Labor Secretary: Clarity for 'gig workers' – Proposed rule simplifies definition for contractors. businesses](#)

employees. These exemptions were doled out to favored or organized special-interest groups that had paid lobbyists and privileged access to lawmakers, leaving thousands of everyday Californians in a lurch without similar ways to protect their careers. In some cases, such as with translators and interpreters, obtaining an exemption for legitimate independent contractors after AB5 was signed into law required a full year's worth of petitioning, protesting and lobbying.⁴¹ Other professions, such as freelance journalists and photographers, are still fighting several years later through the federal court to achieve full and clear exemptions.⁴²

The same favored-interest process has played out in recent months in New Jersey, which tried, but failed, to codify California's version of the ABC Test in 2019-20. That failed legislative attempt, Senate Bill 4204, included exemptions only for certain professions, and led lobbyists during the 2020-21 legislative session to request individual bills to protect favored professions going forward. In December 2021, the New Jersey Legislature passed Senate Bill 4260, codifying the right of real estate broker-salespersons to define themselves as independent contractors; and Senate Bill 4194, which classified golf caddies as independent contractors for purposes of state employment law. When independent contractors from other professions without professional lobbyists cried foul, the golf caddie bill's primary sponsor, who was also the New Jersey Assembly minority leader, responded that lawmakers were responding to the requests of favored groups with access to legislative leadership: "There were communications between a number of golf clubs between myself and the Senate president, indicating that because we have the No. 1 golf course in the world and many of the top, that this is important to keep our caddy programs going."⁴³

⁴¹ Interpreter Intelligence, [California Interpreters Finally Exempt From AB5](#)

⁴² American Society of Journalists and Authors, [Independent Writers Sue California to Protect Rights of Freelancers](#)

⁴³ News 12 New Jersey, [Independent contractors question proposed bill that only protects golf caddies](#)

The types of favored-interest exemptions and standalone bills seen in recent years in California and New Jersey are required to stop the misclassification of legitimate independent contractors when regulators implement unduly restrictive independent contractor tests. This process creates an unfair regulatory landscape for independent contractors in hundreds of professions that lack the advantage of professional lobbyists and an equitable way to ensure that lawmakers and regulators are serving their interests.

As discussed below, many of the legitimate independent contractors left at a disadvantage are women, a problem that only deepens the diversity, equity and inclusion challenges that our society is wrestling with in many ways today.

F. Women, In Particular, Are Harmed By Restrictive Independent Contractor Standards

Overly restrictive independent contractor standards such as California’s ABC Test, and the unfair regulatory landscape they propagate, are particularly harmful to working women.

Data analyzed by the Internal Revenue Service and U.S. Treasury Department suggests a structural shift among American women toward independent contractor work since at least 2001. Approximately 55 percent of the growth in independent contracting from 2001 to 2016 was attributable to the increase in female independent contractors; women saw a 68 percent increase in the number of independent contractors during those years while men saw a comparatively smaller 37 percent increase.⁴⁴

This structural shift of the U.S. workforce led by women independent contractors became overtly apparent during the Covid-19 pandemic and Great Resignation. At least 2.5 million

⁴⁴ Lim, Katherine et al., [*Independent Contractors in the U.S.: New Trends from 15 years of Administrative Tax Data*](#)

women left the workforce during that time—so many that Vice President Kamala Harris called the situation “a national emergency” in *The New York Times*.⁴⁵ By 2021, it was clear where at least some of those women went: 55 percent of people new to independent contracting in 2021 were women.⁴⁶

Why? Because women in traditional jobs during the Covid-19 pandemic struggled to perform employer-designated work along with increasingly challenging tasks at home, such as child care and remote schooling. Women needed more flexibility and control over their schedules and lives.

Flexibility and control are among the key benefits of independent contractor work, often without any loss of income. Some 73 percent of self-employed women say they have a better work-life balance; 68 percent earn the same as or more than in a traditional job; 59 percent say they have less stress; and 57 percent say they’re healthier.⁴⁷

This is especially true among older women, who report feeling like “a ghost” because traditional employers don’t want to hire them after a certain age, and because the recent trend of some lawmakers embracing anti-independent contractor legislation and regulations is now putting unnecessary pressure on their ability to remain self-employed. “I was looking for W2 work—I wanted the steady paycheck,” Lila Stromer told *Entrepreneur* in 2021, after losing her job at age 52 to a younger employee. “I wanted all the things like benefits that go with a W2 job. But the more I did independent work, the more I realized that I was so much happier. I actually like being my own boss.”⁴⁸

⁴⁵ Harris, Kamala, *The New York Times*, [2.5 Million Women Left the Work Force During the Pandemic. Harris Sees a ‘National Emergency.’](#)

⁴⁶ MBO Partners, [11th Annual State of Independence](#)

⁴⁷ Freshbooks Cloud Accounting, [Women in the Independent Workforce – 2nd Annual Report, 2019](#)

⁴⁸ Kavin, Kim, *Entrepreneur*, [Older Women Say PRO Act Unfairly Targets Them](#)

CONCLUSION

For the reasons set forth above, the Board should adhere to the independent contractor standard in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019). Alternatively, if the board replaces the standard, it should do so with a standard that affords even *more protection* to the choice of independent contractor work. Misclassification problems, to the extent that they exist, can be addressed under the current standard.

We sincerely appreciate the opportunity, through this brief, to make clear the wishes of the vast majority of America's 59 million independent contractors. The Board should respect the will of these people who have purposefully, consciously and voluntarily rejected the traditional employer-employee relationship.

CERTIFICATE OF SERVICE

Pursuant to the Board's December 27, 2021, invitation to file briefs, the undersigned hereby certifies that a copy of the foregoing amicus brief in Case 10-RC-276292 was electronically filed via the NLRB E-Filing system with the National Labor Relations Board and served via e-mail to the following persons on February 10, 2022:

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