No. _____

In The
Supreme Court of the United States

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

v.

ROB BONTA,
in his official capacity as
Attorney General of the State of California,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The State of California classifies some independent contractors as employees based solely on the function or purpose of their speech. The State favors writers, photographers, or videographers who sell speech that the state deems marketing, fine art, graphic design, or related to sound recordings and musical compositions (but not music videos). These favored speakers are exempt from a panoply of employment regulations and taxes and allowed the benefits of operating as independent contractors and small businesses. But workers who produce speech with an unfavored function or purpose are classified as employees subject to more onerous tax and regulatory burdens. Due to these unequal employee classification rules, Petitioners' freelance members are deprived of longstanding careers as independent contractors and are losing opportunities to publish.

The questions presented are:

Is a law content-based when it imposes financial and regulatory burdens based on the function or purpose of speech?

Does a law that has the effect of depriving classes of speakers of their livelihood by subjecting them to more onerous taxes and regulations impose a First Amendment burden subject to judicial scrutiny?

LIST OF ALL PARTIES

Petitioners are American Society of Journalists and Authors, Inc. (ASJA), and National Press Photographers Association (NPPA). Respondent is Rob Bonta, in his official capacity as Attorney General of the State of California.

CORPORATE DISCLOSURE STATEMENT

ASJA and NPPA are nonprofit 501(c)(6) corporations incorporated under New York law. They have no parent corporations, and no publicly held company owns 10% or more of their stock.

STATEMENT OF RELATED PROCEEDINGS

A*merican Society of Journalists and Authors, Inc.; National Press Photographers Assn.*, *v. Bonta,* No. 20-55734 (opinion issued Oct. 6, 2021; rehearing *en banc* denied Nov. 23, 2021).

A*merican Society of Journalists and Authors, Inc.; National Press Photographers Assn.*, *v. Bonta,* No. 2:19-cv-10645-PSG-KS (C.D. Cal.) (orders entered March 20, 2020, and July 20, 2020).

TABLE OF CONTENTS

Appendix

TABLE OF AUTHORITIES

Cases

Constitution

Statutes

Regulations

Miscellaneous

PETITION FOR A WRIT OF CERTIORARI

Petitioners American Society of Journalists and Authors, Inc., and National Press Photographers Association respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The panel opinion of the Ninth Circuit is reported at 15 F.4th 954. Appendix (App.) A-1. The order denying rehearing *en banc* is reproduced in the Appendix at E-1.

The unreported opinion of the United States District Court for the Central District of California is available at 2020 WL 1434933. App. C-1. The district court's final order of dismissal is reproduced in the Appendix at B-1.

JURISDICTION

On March 20, 2020, the district court dismissed Petitioners' complaint with leave to amend. App. C-1. When Petitioners elected not to amend, the district court dismissed with prejudice on July 9, 2020. App. B-1. On October 6, 2021, a panel of the Ninth Circuit affirmed. App. A-1. Petitioners filed a petition for rehearing *en banc*, which was denied on November 23, 2021. App. E-1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AT ISSUE

"Congress shall make no law … abridging the freedom of speech, or of the press …." U.S. Const. amend. I.

California Labor Code §§ 2775–2780 are reproduced in Appendix F-1.

INTRODUCTION

Petitioners are two of the leading voices for freelance writers and visual journalists in the United States. App. H-2; I-3. The American Society of Journalists and Authors (ASJA), founded in 1948, is the nation's largest professional organization of independent nonfiction writers. App. H-2. Its members are freelance writers of magazine articles, trade books, and other forms of nonfiction writing who meet exacting standards of professional achievement. *Id*. Two years older, the National Press Photographers Association (NPPA) is the nation's leading professional organization for visual journalists working in print, television, and electronic media. App. I-3. NPPA defends its members' copyrights and First Amendment rights to report on news and matters of public concern. *Id*.

In this digital age, thousands of writers, photographers, and videographers use the advances of modern technology to embrace the freedom and independence that freelancing careers provide. For many, freelancing is the only way to balance childcare or elder care with a career. Others choose freelancing to retain copyright over their creative work. As independent contractors, freelancers operate as micro

businesses, adapting their workload to their financial needs, spreading their workload across multiple clients to minimize risk, taking tax deductions for their expenses, and finding financial security in flexibility. Under California law, freelancers can no longer communicate news through video and they face limits—even total exclusion—on their ability to publish their work and have lost countless opportunities to publish their work. App. H-5; I-4–5; J-7–8; M-3; N-3; O-4–5; P-2–5; Q-2–3; R-3–5; S-3–4. Thousands of freelance writers, photographers, and videographers across California have been silenced because they produce speech that is unfavored under state law. In the decision below, the Ninth Circuit failed to apply *any* level of scrutiny to a law that regulates freelancers differently based on the reason they speak. ASJA and NPPA seek to vindicate their members' rights to speak as independent professional freelancers.

With the enactment of Assembly Bill 5 (AB5) in 2019, California permits favored speaking professionals—those engaged in "marketing"—to freelance while burdening writers, photographers, and videographers who produce other types of speech with onerous financial burdens and regulations. *Compare* Cal. Lab. Code § 2778(b)(2)(A) *with* § 2778(b)(2)(I)(i).[1] "Marketing" is "speech with a particular content," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564 (2011), meaning this is a content-based burden on speech.

[1] All statutory references are to the California Labor Code unless otherwise noted.

Section 2778 is a content-based law "defining regulated speech by its function or purpose." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). It exempts particular speech and speakers from costly regulations, which necessarily disfavors all other speech and speakers. The only way to know whether the favorable or burdensome provisions of Section 2778 apply is through "official scrutiny of the content of [a freelancer's] publications," *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 230 (1987). This is "entirely incompatible with the First Amendment." *Id.* at 229–30.

In reviewing Section 2778, the Ninth Circuit "skip[ped] the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face." *Reed*, 576 U.S. at 165. The "function or purpose" test makes this a straightforward inquiry because "marketing … is speech with a particular content." *Sorrell*, 564 U.S. at 564. In so doing, the decision below conflicts with this Court's decisions and exacerbates a conflict among lower courts, including the Third, Fourth, Fifth, and Eleventh Circuits.[2]

The decision below also conflicts with this Court's decisions by holding that Section 2778 imposed a mere economic burden with "incidental" effects on speech, outside the protection of the First Amendment

[2] This is the same fundamental question this Court is considering in *Reagan National Advertising of Austin v. City of Austin*, 972 F.3d 696 (5th Cir. 2020), *cert. granted*, 141 S. Ct. 2849 (Jun. 28, 2021) (No. 20-1029): Is a law content-based only if it targets topic or subject matter, or also when it is based on the "function or purpose" of speech? *Reed*, 576 U.S. at 163–64.

entirely. App. A-13–14. That ruling reflects ongoing uncertainty in the law about where to locate the line between an incidental speech burden and one that warrants First Amendment scrutiny. The Ninth Circuit's narrow view of what constitutes an economic regulation's "incidental" effect on speech rights is shared by the Third, Seventh, and Eleventh Circuits and the highest courts of Kansas and North Carolina. Meanwhile, in conflict with the Ninth Circuit below, the First, Fourth, and Eighth Circuits and the Connecticut Supreme Court recognize that selective economic burdens on speech warrant heightened scrutiny. This Court's review is necessary to maintain the vitality of its precedents and provide guidance to lower courts about what constitutes an economic regulation's "incidental" effect on speech rights.

STATEMENT OF THE CASE

A. California's Destruction of Freelance Speaking Occupations

In 2019, California enacted AB5 to codify and expand the independent contractor test established in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 4 Cal. 5th 903, 917 (2018). *Dynamex* created a three-part test, which only applied to industries governed by wage orders covering issues like minimum wage and overtime pay. *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 10 Cal. 5th 944, 948 (2021). *Dynamex* requires independent contractors to be classified as employees unless the hiring entity proves:

> (A) that the worker is free from the control and direction of the hiring entity

> in connection with the performance of the work, both under the contract for the performance of the work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

Dynamex, 4 Cal. 5th at 916–17. *See also* Section 2775(b)(1). Failure to prove any element of this "ABC" test results in the independent contractor being classified as an employee. *Id*. The *Dynamex* ABC test replaced a multi-factor balancing test that considers the economic realities of the employment relationship. *See S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341, 354–55 (1989). Under *Borello*, freelance writers and photographers like Petitioners' members worked as independent contractors for decades, and continued to do so after *Dynamex* because of the limited application of the case. App. H-2; I-2–3; J-2–3; K-2–3; L-2–4; N-2; O-2; R-2; S-2.

All that changed with AB5, which, as amended by AB2257, applies the strict *Dynamex* ABC test to all industries and professions governed by the entire Labor Code, the Unemployment Insurance Code, and wage orders. Section 2775(b)(1).[3] AB5's expansion of the ABC test means that freelance journalists are

[3] Unless noted, references to AB5 and statutory citations refer to the amended law.

classified as employees of the clients for which they produce content because content creation is "the usual course of the hiring entity's business." Section 2775(b)(1)(B). AB5 also granted specific enforcement authority to California's Attorney General and certain city attorneys. Section 2786. This new enforcement authority means that even freelancers who wish to work independently can be forced to become employees—and clients must hire freelancers as employees or stop publishing them altogether. Enforcement actions have already been brought by Respondent and several city attorneys.[4]

As dramatic a shift as AB5 represented, some favored freelance services are exempted from its terms, while those providing disfavored services must comply. Section 2778 excludes people who work pursuant to "a contract for 'professional services'" from the ABC test. These exempt services remain subject to the existing *Borello* independent contractor test. *Id*. But the professional service exemption applies differently depending on the function or purpose of a freelancer's speech.

[4] *See People of the State of California v. Uber Technologies, Inc.*, 56 Cal. App. 5th 266, 273 n.1 (2020).

"Professional Services"

Favored services	Burdened services
• Marketing[5] • Graphic design[6] • Grant writing[7] • Fine art[8] • Photographers working on recording photo shoots, album covers, and other press and publicity purposes[9] • Creative, production, marketing, or independent music publicist services related primarily to the creation, marketing, promotion, or distribution of sound recordings or musical compositions[10]	• Freelance writer, translator, editor, copy editor, illustrator, or newspaper cartoonist[11] • Content contributor, advisor, producer, narrator, or cartographer for a journal, book, periodical, evaluation, other publication or educational, academic, or instructional work in any format or media[12] • Still photographer, photojournalist, videographer, or photo editor[13]

[5] "[P]rovided that the contracted work is original and creative in character and the result of which depends primarily on the invention, imagination, or talent of the individual or work that is an essential part of or necessarily incident to any of the contracted work." Section 2778(b)(2)(A).
[6] Section 2778(b)(2)(D).
[7] Section 2778(b)(2)(E).
[8] "'[F]ine artist means an individual who creates works of art to be appreciated primarily or solely for their imaginative, aesthetic, or intellectual content, including drawings, paintings, sculptures, mosaics, works of calligraphy, works of graphic art, crafts, or mixed media." Section 2778(b)(2)(F)(ii).
[9] Section 2780(a)(1)(H).
[10] Section 2780(a)(1)(J).
[11] Section 2778(b)(2)(J).
[12] Section 2778(b)(2)(K).
[13] Section 2778(b)(2)(I)(i).

"Professional Services", cont.

Favored services	Burdened services
• Human resources administration[14] • Travel agents[15] • IRS enrolled agents[16] • Payment processing agents through an independent sales organization[17] • Estheticians, Electrologists, Manicurists, Barbers, and Cosmetologists[18] • Performers teaching a master class for no more than one week[19] • Property appraisers[20] • Registered professional foresters[21] • Real estate agents, home inspectors, and repossession agents[22]	• Still photographer, photojournalist, videographer, or photo editor who works on motion pictures, which is inclusive of, but is not limited to, theatrical or commercial productions, broadcast news, television, and music videos[23]

[14] "[P]rovided that the contracted work is predominantly intellectual and varied in character and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time." Section 2778(b)(2)(B).
[15] Section 2778(b)(2)(C).
[16] Section 2778(b)(2)(G).
[17] Section 2778(b)(2)(H).
[18] Section 2778(b)(2)(L).
[19] Section 2778(b)(2)(M).
[20] Section 2778(b)(2)(N).
[21] Section 2778(b)(2)(O).
[22] Section 2778(c).
[23] Section 2778(b)(2)(I)(i).

The services in the "Burdened" column are subject to more onerous restrictions than the "Favored" services. Speech that is deemed marketing, graphic design, grant writing, fine art, or related to sound recordings and musical compositions (but not music videos) is favored. Speech with a disfavored function or purpose is burdened. *Only* the freelancers producing burdened speech may not "directly replace an employee who performed the same work at the same volume" and may not "primarily perform the work at the hiring entity's business location."

Thus, a newspaper cannot contract with a freelancer to replace an employee at the same or higher volume, but a marketing firm is free to do so. Or if an employee producing a biweekly column quits, the newspaper could not hire a freelancer producing a biweekly column or a weekly column. In effect, the work-volume limit operates as a submission limit, set at whatever number of submissions an employee—even a part-time employee—currently produces. Section 2778(b)(2)(J). Media businesses have a relentless schedule that often means they must rely on freelancers to fill in when staffers quit suddenly, are injured or ill, or take family leave. App. P-5. Filling in for staffers has been especially important in recent years as publications struggle to operate with barebones staff, and freelancers more frequently step in to help meet publication deadlines. *Id*.

The contract restrictions also constrain how freelancers who produce unfavored speech can work. A marketing film produced "primarily … at the hiring entity's business location" is favored speech. If that

same company commissions that same film with the intention to communicate a different kind of message—for example a "broadcast news" video—it is subject to the additional restrictions under Section 2778(b)(2)(I). But freelance creative professionals often do not know in advance how their work will be used, so it is impossible for them to know if they can perform the work at the hiring entity's location. App. R-4.

Freelance video is subject to additional content-based limits. Section 2778 expressly applies the more restrictive ABC test to a freelance photographer, videographer, or photojournalist "who works on motion pictures, which is inclusive of, but is not limited to, theatrical or commercial productions, broadcast news, television, and music videos." Section 2778(b)(2)(I)(i). If, however, a freelance video is communicating a favored marketing message, the ABC test does not apply. *See* Sections 2778(b)(2)(A), (D)–(F); 2780(a)(1). *But see* Section 2778(b)(2)(I)(i) (applying the ABC test to freelance "music videos"). This means that, even within the journalism industry, photojournalists for public radio stations would be treated differently than photojournalists for newspapers. Section 2780(a)(1). App. R-4; S-3. To add to this confusion, modern cameras shoot video or still images with the flip of a switch, and many visual journalists shoot both for the same client. App. Q-3.

Section 2778 limits the ability to work as an independent contractor—with the freedom and flexibility that entails—based on what a freelancer has to say.

B. Forcing Employee Status on Freelancers Limits Their Ability To Speak and To Maintain Their Speaking Businesses

Section 2778's content-based restrictions on certain speech have led many clients to abandon California freelancers. *See* App. S-3 ("[M]edia outlets have resisted working with me because the law does not specifically exempt 'radio or audio journalists.'"); App. R-4 ("The client canceled my involvement because the requirements of AB5 would have forced them to make me an employee and the budget couldn't support the additional costs of putting me on payroll."); Suhauna Hussain, *Vox Media cuts hundreds of freelance journalists as AB5 changes loom*, Los Angeles Times (Dec. 17, 2019).[24]

Today's journalism relies on multiple media sources. Stories for radio are accompanied by text and video online. For example, an online version of a radio story about wildfires may include video of helicopters scooping water from a pond. Under Section 2778, freelancers cannot communicate their reporting through video in this manner, curtailing if not completely silencing their expression. App. S-4. When Section 2778 prevents a news outlet from hiring a freelance photographer to provide visual news reporting, that photographer's voice is silenced. App. R-3–5 ("[T]here are important stories I won't shoot, and the public won't see."). When Section 2778 prevents a newspaper from paying citizens for video footage related to a wildfire, protests, and other breaking news stories inaccessible to other reporters,

[24] https://www.latimes.com/business/story/2019-12-17/vox-media-cuts-hundreds-freelancers-ab5.

those voices are silenced. App. Q-2–3. Some locations such as Indian reservations, isolated wilderness, or mountain towns where snow has rendered roads impassable are simply too remote or inaccessible for staff journalists to access quickly. App. Q-3. Video storytelling from these locations is silenced when, solely because of Section 2778, news outlets cannot license footage from local videographers.

But even the best-case scenario imagined by Section 2778—reclassifying freelancers as employees—brings significant costs and disadvantages that effectively limit speech. Independent contractors can deduct expenses such as costly photography equipment, computers, software, training, and travel on their income taxes, but employees cannot. An erstwhile freelancer with multiple clients is unlikely to have these expenses paid by multiple "employers," each of whom might only contract for a single project. *See* App. O-3 ("The major tax deductions I have as a freelancer are my home office, camera equipment, health insurance, mileage, and car expenses. I would not get many of these deductions as an employee and, in my experience as a staff reporter and photo editor, as an employee I would have less flexibility about what expenses I could charge and uncertainty about whether they would be reimbursed."); App. H-3–5; J-4; K-2; L-3–4; R-2–5. Contractors also maintain tax-deductible benefits like healthcare and retirement accounts, regardless of their number of clients or the quantity of their work. App. H-3–5; L-3–4. That flexibility is critical in the digital space which, unlike traditional print models, allows for a higher volume of submissions to a greater variety of publications. App.

H-6; J-3–7. Losing the freedom to freelance has devastated writers, photographers, and videographers who chose this independent path. App. H-3–4; I-4–5; J-6–7; K-3–4; L-3–4; N-3; O-4–5; P-2–5; Q-2–3; R-3–5; S-3–4.

In addition to these costs, freelancers forced to choose between silence and becoming employees because of Section 2778 also lose ownership of the copyright to their creative work. App. H-2–6; I-3–4; K-3–5; L-2–4; M-2–3; N-3–4; O-3–4; S-3. Freelance photographers routinely license their work but retain ownership of the copyright. App. I-3–4; L-4. Under the Copyright Act, the copyright in a work created by an independent contractor photographer is owned by the creator. *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989). However, the copyright in a work created by an employee is owned by the employer. *Id.*; 17 U.S.C. § 201(b). Writers, too, benefit substantially from the ability to republish work they create as freelancers. App. H-4; J-4. Freelancers forced to become employees due to Section 2778 lose their copyrights, a significant financial burden. App. H-4; I-3–4.

Moreover, freelancers depend on control over their workload. App. H-2–3; I-4; J-4–6, 8–9; K-2–4; L-2–4. In a tumultuous industry that continues to lay off employees by the thousands, freelancers find safety in flexibility and self-employment, continuing to speak when employer-bound journalists lose their platform. App. H-3–5; I-4; J-2–6; K-2–3; L-2–4; N-3–5; O-3.

Finally, Section 2778 requires freelancers who create disfavored speech, and their clients, to shoulder

tax and regulatory burdens, including unemployment taxes,[25] workers' compensation taxes,[26] state disability insurance,[27] paid family leave,[28] and sick leave.[29] *See* App. J-4. This patchwork of "benefits" is illusory, because freelancers with multiple clients and varying workloads rarely qualify for these benefits due to tenure, accrual, and use rules—not to mention practical problems of how these benefits would be calculated and paid when freelancers have a multitude of clients. *See*, *e.g.*, Section 246 (explaining minimum length of employment, accrual rules, and use rules for paid sick leave). But when they operate as independent businesses, freelancers can include the cost of these tax-deductible expenses in their rates and secure meaningful benefits for themselves. *See* App. H-3; I-4; J-4; K-4.

C. Proceedings Below

Petitioners sued for declaratory and injunctive relief and sought a preliminary injunction against AB5's restrictions on freelance speakers. App. G-1. Petitioners' complaint chiefly objected to the restrictions as content-based burdens on their speech.[30] The California Attorney General moved to dismiss the case.

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[25] Cal. Unemp. Ins. Code § 1251.
[26] Section 3600.
[27] Cal. Unemp. Ins. Code § 2625.
[28] Cal. Unemp. Ins. Code § 3303.
[29] Section 246.
[30] Petitioners also challenged the restrictions as violating the Fourteenth Amendment's Equal Protection Clause, but do not seek the Court's review of that issue.

The district court issued successive orders, denying the motion for preliminary injunction and then granting the motion to dismiss. App. D-1; C-1. The order granting the motion to dismiss relied entirely on the reasoning of the preliminary injunction order, which held that California's restrictions were content-neutral and not subject to heightened or strict scrutiny. App. D-19–29.

On appeal, the Ninth Circuit affirmed dismissal.[31] App. A-1. The panel affirmed without applying *any* First Amendment scrutiny, characterizing Section 2778 as a generally applicable economic regulation of employment that "does not, on its face, limit what someone can or cannot communicate." App. A-14. Nor, according to the panel, do Section 2778's exemptions "turn on what workers say but, rather, on the service they provide or the occupation in which they are engaged." App. A-18. The panel also upheld the video restrictions, reasoning that they do not "signify a burden based on the topic discussed or the idea or message expressed. … [W]hether 'motion pictures' involve news or music, section 2778 treats those working on them the same."[32] A-20 (cleaned up).

Petitioners sought rehearing *en banc*, which was denied on November 23, 2021. App. E-1.

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[31] Because the district court's preliminary injunction order merged with its dismissal order, only the affirmance of the dismissal order is at issue here. App. A-11.

[32] As discussed above, this was plainly wrong as a matter of statutory language; video related to sound recordings and musical compositions is treated differently from news video. *See* Sections 2778(b)(2)(I)(i); 2780(a)(1).

REASONS FOR GRANTING THE PETITION

I

THE NINTH CIRCUIT UPHELD CALIFORNIA'S CONTENT-BASED EMPLOYEE CLASSIFICATION LAW, IN CONFLICT WITH DECISIONS OF THIS COURT

Everyone acknowledges that "section 2778 may require state authorities to examine the content of a worker's message when determining whether" the professional services exemption applies. App. A-18. But there is no "may" about it; indeed, the State would review *only* "the content of a worker's message" to determine whether the law's burdens apply. *Id*. The professional services exemption comes down to one question: What is the function or purpose of the worker's speech?

A. The Ninth Circuit's Refusal to Apply the "Function or Purpose" Test Conflicts With This Court's Decisions

Because Section 2778 is content-based, the Ninth Circuit should have applied strict scrutiny under *Reed*. 576 U.S. at 165 ("A law that is content based on its face is subject to strict scrutiny ...."). *See also Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) ("[A]s applied to [appellants], the conduct triggering coverage under the statute consists of communicating a message."). But the Ninth Circuit refused to apply *Reed* to this case and incorrectly applied no scrutiny at all to the First Amendment claims. App. A-19–20. The Ninth Circuit brushed aside the statute's facially content-based standard

because it does not "reflect[] a legislative content preference." App. A-18. But content-based laws target more than just preferred subject matter or viewpoint. *Reed*, 576 U.S. at 163–64. Laws that target the "function or purpose" of speech are also content-based—regardless of the subject matter or viewpoint. *Id.* at 164.

Like the panel reversed in *Reed*, the panel here skipped "the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face." *Id.* at 165. Section 2778 indisputably favors marketing over other forms of speech a freelancer might produce. App. F-14–19; *Sorrell*, 564 U.S. at 564.

Whether a freelancer's work falls within Section 2778's exemptions for marketing, graphic design, grant writing, fine art, or speech related to sound recordings and musical compositions "depend[s] entirely on [its] communicative content." *Reed*, 576 U.S. at 164. This is no different from the facially content-based sign code in *Reed*:

> If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election ….

Id. at 164–65. Similarly, if a freelancer prepares flyers promoting the book club meeting, Section 2778's marketing exemption applies. But if that same

freelancer writes an editorial or news article promoting the group, the regulatory burdens apply. Under *Sorrell* and *Reed*, the Ninth Circuit owed at least *some* First Amendment scrutiny to this facially content-based distinction.

That other exemptions to the ABC test depend on non-speech factors, App. A-18–19, does not change that the exemptions here turn entirely on content. A freelancer can work on a marketing project in the morning, but then must be an employee in the afternoon to film a television documentary. One might wonder whether government has a substantial or compelling interest in favoring the speech of marketers and burdening the speech of independent journalists. At this juncture, though, it does not matter *why* the legislature favored some speech and speakers over others—the simple fact that it *has* picked winners and losers based on the content of speech requires strict scrutiny. Yet the Ninth Circuit applied no scrutiny at all.

Section 2778 differs from "generally applicable" laws because its burdens apply differently based on the type of speech it covers. This Court upheld the Fair Labor Standards Act (FLSA) against a First Amendment challenge because "the Act's purpose was to place publishers of newspapers upon the same plane with other businesses," *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 194 (1946); the National Labor Relations Act, because "[t]he business of the Associated Press is not immune from regulation because it is an agency of the press," *Assoc. Press v. NLRB*, 301 U.S. 103, 132 (1937); the Sherman Act, because "a combination to restrain trade in news and

views has [no] constitutional immunity," *Assoc. Press v. United States*, 326 U.S. 1, 20 (1945); and cable television taxes, because "[t]here is nothing in the language of the statute that refers to the content of mass media communications," *Leathers v. Medlock*, 499 U.S. 439, 449 (1991). Petitioners do not seek immunity or special treatment; they seek *equal* treatment without regard to the content of their speech—precisely the guarantee extended by *Sorrell* and endorsed in *Reed*.

Likewise, it is not "difficult to see how any occupation-specific regulation of speakers would avoid strict scrutiny." *Cf.* App. A-19. This case does not implicate cases permitting less scrutiny of laws regulating uncontroversial factual disclosures in commercial transactions, *cf. Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), nor even commercial speech generally, *see Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

The Ninth Circuit cited "occupation-specific regulation of speakers," App. A-19, but failed to appreciate that these regulations are not subject to strict scrutiny, because they do not change depending on the content, function, or purpose of the worker's speech. They instead depend on how work is performed and worker qualifications. *See, e.g.*, 29 C.F.R. § 541.301 (governing "work requiring advanced knowledge" in a "field of science or learning" "customarily acquired by a prolonged course of specialized intellectual instruction"). Other FLSA regulations govern "work requiring invention, imagination, originality or talent in a recognized field

of artistic or creative endeavor" and apply equally to journalists and advertisers, 29 C.F.R. § 541.302(c)–(d), and this reveals the problem with Section 2778 that the federal regulations avoid: under Section 2778 *why* freelancers speak and *what* they say determines *how* they are regulated.

Similarly, regulations that turn on licensure—e.g., laws regulating the practice of law or medicine—do not depend on the content of speech. *See* 29 C.F.R. § 541.304. They focus on whether certain *conduct* constitutes the practice of the regulated profession. *See Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2373–74 (2018) (distinguishing "regulation of professional conduct" from a law that "regulates speech as speech"); *Cap. Associated Indus., Inc. v. Stein*, 922 F.3d 198, 208 (4th Cir. 2019) ("As CAI recognizes, the practice of law has communicative and non-communicative aspects."). Conversely, Section 2778 bases its exemptions for marketing, graphic design, grant writing, fine art, or speech related to sound recordings and musical compositions only on the "function or purpose," viz. "the content," of freelancers' speech.

This is a facially content-based burden on speech, contrary to what the Ninth Circuit ruled below.

B. Other Courts Have Difficulty Determining How and When the "Function or Purpose" Test Applies

The Ninth Circuit is not alone in struggling to heed *Reed*'s definition of "content-based." Many lower

courts differ on the meaning and application of the "function or purpose" test.

The Fourth and Fifth Circuits have struck down speech restrictions under the "function or purpose" test. In *Texas Entertainment Ass'n, Inc. v. Hegar*, 10 F.4th 495, 510 (5th Cir. 2021), the Fifth Circuit applied *Reed*'s "function or purpose" test to the state Comptroller's rule that scantily clad dancers would be classified as nude for purposes of paying a "sexually oriented business" fee. The state enacted the rule with the purpose of mitigating secondary effects of adult-oriented entertainment but provided no evidence that the fee accomplished that purpose. *Id.* at 511. The court was "'forced to conclude the [Comptroller's rule] is directed at the essential expressive nature of the latex clubs" business, and thus is a content[ ]based restriction' subject to strict scrutiny." *Id.* at 512 (citing *Reed*, 576 U.S. at 163). *See also Cahaly v. Larosa*, 796 F.3d 399, 406 (4th Cir. 2015) (striking down an anti-robocall statute that prohibits "political and consumer" calls while allowing "unlimited proliferation" of other types (citing *Reed*)); *State v. Doyal*, 589 S.W.3d 136, 161–62 (Tex. Crim. App. 2019) (Slaughter, J., concurring) (judge would hold unconstitutional the provision of an open meeting act that forbids meetings of fewer members than a quorum for the *purpose* of conducting secret policy discussions).

The Third Circuit acknowledges the existence of the "function or purpose" test but avoids applying it. In *Bruni v. City of Pittsburgh*, 941 F.3d 73, 84–88 (3d Cir. 2019), the court narrowly construed a speech restriction on "sidewalk counselors" outside an

abortion clinic to avoid the constitutional question. The counselors argued that the restriction was content-based under the "function or purpose" test, because "demonstrating" applied to sidewalk counseling but not to similar communication about other subjects. *Id.* at 84. Although the defendants agreed that enforcement depended on content, *id.* at 84 n.12, the ordinance itself did not single out abortion-related speech, *id.* at 85. The court held it was content-neutral and survived intermediate scrutiny. *Id.* at 88. Judge Hardiman concurred to explain that *Reed* "seems to have expanded the types of laws that are facially content based" to include those that are "subtle, defining regulated speech by its function or purpose." *Id.* at 93 (citing *Reed*'s reliance on *Sorrell* and *NAACP v. Button*, 371 U.S. 415, 438 (1963). *See also March v. Mills*, 867 F.3d 46, 49–50 (1st Cir. 2017) (noise provision limiting speech in abortion clinic buffer zone held content-neutral, reversing district court's application of the "function or purpose" test).

Similarly, the Eleventh Circuit has struggled. In *Harbourside Place, LLC v. Town of Jupiter*, 958 F.3d 1308, 1322 (11th Cir. 2020), the court engaged in a lengthy discussion about whether a noise regulation is content-based without reaching a conclusion. The noise ordinance applied only to live music. Noting that the ordinance does not favor one style of music, e.g., classical over country, could suggest content-neutrality. *Id.* at 1318. But the ordinance's application to live *music* and not to other live events that produce sound (speeches, aerobics classes) could suggest discrimination based on content. *Id.* at 1319. Considering whether the "function or purpose" test

illuminates this analysis, the court simply dismissed the test as dicta. *Id.*; *see also Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266, 1292–93 (11th Cir. 2021).

This Court should grant review because the Ninth Circuit's ruling fails to apply *Reed*'s function or purpose test and the circuit courts conflict on how and when to apply the test.

II

COURTS CONFLICT AS TO WHETHER SPEAKERS SUBJECT TO ONEROUS FINANCIAL REGULATIONS SUFFER A FIRST AMENDMENT BURDEN WARRANTING JUDICIAL SCRUTINY

The Ninth Circuit refused to apply any type of scrutiny to the freelancers' First Amendment claims. It viewed Section 2778 as a wholly economic regulation without a discernable implication on speech rights because it does not limit the viewpoint or topic that someone communicates. App. A-16–19. The court asserted that the law does not "restrict when, where, or how someone can speak," although the record contradicts this. App. A-14. And ignoring the wording of the statute itself, the court held that the speech implications are of no consequence, because the law does not specifically "target the press or a few speakers," but instead "applies across California's economy." App. A-16.

By stating the calculus in this way, with burdened freelance speakers as the numerator over the

enormous California economy—fifth largest in the world[33]—as the denominator, of course the court concluded that the effect on freelance speech was "incidental." But the First Amendment protects *individual* rights and the burden on those individual rights merits judicial scrutiny. *See McCutcheon v. Federal Election Comm'n*, 572 U.S. 185, 205 (2014) (courts assessing First Amendment speech rights appropriately focus on the individual, not the collective public interest); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) ("Where a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force;" courts "may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity.") (citation omitted).

The Ninth Circuit's holding cannot be reconciled with this Court's First Amendment jurisprudence. *Nat'l Inst. of Fam. & Life Advocs.*, 138 S. Ct. at 2373, held that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." (cleaned up). The line between an incidental burden on speech and one that warrants First Amendment scrutiny has proven difficult to draw. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 604 (2001) (Stevens, J., concurring in part). Direct burdens can be trivial, *see,*

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[33] Associated Press, *California now has the world's 5th largest economy* (May 4, 2018), https://www.cbsnews.com/news/california-now-has-the-worlds-5th-largest-economy/.

e.g., *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 75 n.8 (1990) (failure to hold a birthday party for a public employee violates First Amendment if done to punish her for exercising free speech rights), while incidental burdens can be extremely harsh, as when the military's general prohibition against wearing headgear indoors is applied to an Orthodox Jew. *Goldman v. Weinberger*, 475 U.S. 503, 509–10 (1986).

A law that devastates the ability of speaking professionals to earn a living brings the conflict into high relief. On one hand, a law that restricts speakers' ability to be compensated "unquestionably imposes a significant burden on expressive activity" even when it "neither prohibits any speech nor discriminates among speakers based on the content or viewpoint of their messages." *United States v. Nat'l Treasury Employees Union (NTEU)*, 513 U.S. 454, 468 & n.15 (1995). Depriving speakers of compensation "induces them to curtail their expression." *Id.* at 469. The broader the restriction, the heavier the burden on the government to justify it. *Janus v. Am. Fed'n of State, County, and Mun. Employees, Council 31*, 138 S. Ct. 2448, 2472 (2018) (labor law that required non-union public employees to subsidize unions imposed a "widespread impact" warranting "exacting scrutiny"); *NTEU*, 513 U.S. at 474 (regulation that imposed "blanket burden on the speech of nearly 1.7 million federal employees … requires a much stronger justification").

On the other hand, many laws regulating economic activity also affect speech. *See* App. A-12–14 (noting this Court's rejection of First Amendment challenges to various economic regulations). This Court has

never clearly defined when a burden is incidental and when a law is an ordinary economic and social regulation. *See* Clay Calvert, *Is Everything a Full Blown-First Amendment Case After* Becerra *and* Janus*? Sorting Out Standards of Scrutiny and Untangling "Speech as Speech" Cases from Disputes Incidentally Affecting Expression*, 2019 Mich. St. L. Rev. 73, 136. Standards are critical, particularly in First Amendment cases. *See Denver Area Educ. Telecomms. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 785 (1996) (Kennedy, J., concurring) ("the creation of standards and adherence to them" is "the central achievement of … First Amendment jurisprudence." (citations omitted)). Lacking such a definition, the court below ignored evidence of significant burdens on speech and issued a holding that conflicts with other circuit courts that weigh a law's effect on speech interests even when the overall purpose of the law is economic regulation.

The novelty of Section 2778 means that it does not fit perfectly into rules established in prior cases.[34] The court below held that Section 2778 fell on the "economic activity" side of the line, but this result was neither obvious nor preordained. Applying more speech-protective precedents, the court should have held that although California's employee classification scheme also applies to non-protected activities, this does not insulate it from constitutional challenge when the burdens are applied unequally to different speakers. In *Thomas v. Chicago Park Dist.*,

[34] While California is the first to enforce such freelance-killing legislation, other states and Congress are considering following suit. *See* H.B. 842 (Protecting the Right to Organize Act of 2021), 117th Congress (2021–22).

534 U.S. 316, 322–23 (2002), this Court considered whether an ordinance satisfied the First Amendment although it "[wa]s not even directed to communicative activity as such, but rather to *all* activity conducted in a public park." The Court upheld the ordinance, but it wasn't *exempt* from scrutiny. Similarly, in *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130–31 (1992), the Court held that permit and fee requirements applicable to "any activity on public property—from parades, to street corner speeches, to bike races"—warranted scrutiny under the First Amendment. These cases demonstrate that heightened scrutiny corrects for "potential government biases or blind spots, such as indifference to the value of communicative expression, or assigning expressive freedom too little value—which are more likely to produce overregulation of expression where the government regulates specific categories of communicative behavior." John Fee, *The Freedom of Speech-Conduct*, 109 Ky. L.J. 81, 86 (2021).

The economic burdens shouldered by disfavored freelancers—increased taxation, inability to take business deductions, deprivation of copyright, and so on—warrant judicial scrutiny. *See NTEU*, 513 U.S. at 469 n.15, 470 (unconstitutional honoraria ban "would prevent or complicate their recovering other necessary expenses, creating a further disincentive to speak and write" and the denial of compensation "will inevitably diminish their expressive output"). This Court should grant certiorari to hold that exemptions to economic regulations that significantly burden speech must be scrutinized to ensure protection of First Amendment rights, regardless of the

regulations' effect on other industries. *Cf. Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 361, 366–67 (3d Cir. 1999) (Alito, J.) (employing this approach in the free exercise context). The Court also should define when a burden sufficiently infringes on First Amendment speech rights to warrant scrutiny under that clause, and when the burden may be dismissed as "incidental." *See* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 Harv. L. Rev. 1175, 1210 (1996); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 112–14 (1987) (both arguing that significant incidental burdens on speech warrants elevated scrutiny).

A. Disfavored Freelancers Are Silenced and Economically Burdened by Section 2778

As noted above, *supra* at 11, Section 2778 deprives journalists who shoot video designated as "broadcast news" from enjoying the favored freelance status permitted to other photojournalists, videographers, still photographers, and photo editors. Burdened freelance journalists may not sell video to television stations, documentary filmmakers, and more, depriving them of lucrative assignments and the licensing value of their copyright-protected material. App. O-3–4; P-2; S-3. News outlets continue to sever their relationships with freelance journalists, depriving freelancers of the opportunity to speak and income from their speech. *See* App. R-4; S-3–4.

The loss of ownership of the copyright to their work imposes a financial burden on photographers who relied on that income, up to hundreds of thousands of

dollars for footage of major historic events. App. P-2–4. *See also* App. O-4 (I "cannot produce any video for my news clients without being converted to employee status. As a result, I have lost out on significant income from the video production work that I did in the past. In my case, that income would be upwards of 20% or more of my annual income from a single newspaper alone."). Staff photographers who work as W-2 employees are limited in their ability to deduct business expenses from their taxes and rely on the vagaries of their multiple employers to decide whether to reimburse them. *See* App. O-3; R-2–5.

America's tax system does not contemplate a single individual being a W-2 employee for a dozen different employers. Each employer must withhold social security taxes, creating a potential that the combined withholding across multiple companies may exceed the maximum amount of tax for the year. IRS, *Topic No. 608 Excess Social Security and RRTA Tax Withheld* (Jan. 6, 2022).[35] Moreover, working as a W-2 employee requires payment of state-based unemployment and disability insurance fees even though freelancers with multiple clients are ineligible for those benefits because they don't put in enough hours for any individual client. App. S-3. Freelancers are also deprived of employment opportunities to fill in for staff journalists who quit suddenly or take medical or family leave. App. P-5.

The Ninth Circuit considered this evidence of livelihoods irreparably damaged[36] but held that

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[35] https://www.irs.gov/taxtopics/tc608.

[36] App. A-11.

Section 2778 was "incidental" because other portions of AB5 did not specifically target speaking professions. This approach encourages legislatures to enact thousand-page omnibus legislation to bury infringements on free speech amongst unrelated economic regulations. *Cf. United States v. Winstar Corp.*, 518 U.S. 839, 903 n.52 (1996) (noting the hazard presented to the government's contracting power if Congress may repudiate a contract by burying the repudiation in a larger piece of legislation). Free speech rights cannot be dependent on the style and length of legislation.

B. The Court Below, and Some Others, Hold That Economic Regulation That Selectively Burdens Certain Speakers Does Not Implicate First Amendment Speech Rights at All

The Ninth Circuit's narrow view of what constitutes an economic regulation's "incidental" effect on speech rights, rendering it unworthy of judicial scrutiny, is shared by the Third, Seventh, and Eleventh Circuits and the highest courts of Kansas and North Carolina.

In *Left Field Media LLC v. City of Chicago*, 822 F.3d 988 (7th Cir. 2016), the Seventh Circuit considered a Chicago ordinance that regulated peddling on sidewalks adjacent to Wrigley Field. The publisher of a baseball magazine challenged the law after his sales representatives were ordered to move away from the stadium. The court rejected the publisher's First Amendment challenge, holding that the ordinance did not regulate speech; it regulated

peddling "without regard to" the merchandise sold. *Id.* at 990. The court suggested, however, that if Cubs' employees and authorized vendors were allowed to sell game programs and merchandise on the same adjacent sidewalks, this could entitle the publisher to an injunction against discriminatory enforcement of the ordinance. *Id.* at 991. Additionally, the court noted in dicta that the ordinance's exemption for newspapers possibly presented a constitutional problem. *Id.* at 992 (citing *Lowe v. S.E.C.*, 472 U.S. 181, 207–10 (1985)). The city subsequently eliminated that exemption. *Left Field Media LLC v. City of Chicago*, 959 F.3d 839, 840 (7th Cir. 2020).

In *Wright v. City of St. Petersburg, Fla.*, 833 F.3d 1291, 1293 (11th Cir. 2016), the Eleventh Circuit held that a "no trespassing" order that prevented a minister from entering a public park for one year had only an "incidental" effect on his speech rights, although it prevented him from ministering to the poor and homeless there. The prohibition also prevented him from attending a press conference on police brutality held inside the park the day after his arrest. *Id.* at 1294. Because the "no trespassing" ordinance was broadly written to encompass non-speakers, the Eleventh Circuit refused to consider the First Amendment rights of individually silenced for burdened speakers. *Id.* at 1296 (citing *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706–07 (1986)). The court held that, without evidence, the ordinance was employed as a pretext for suppressing speech; a person whose speech is in fact restricted—even completely silenced—has no First Amendment claim and that First Amendment scrutiny "has no relevance" to the ordinance. *Id.* at 1298.

The Third Circuit rejected a student newspaper's First Amendment challenge to a law that prohibited it from running paid advertisements for liquor-related businesses. The newspaper could run the ads but could not accept payment for them. *The Pitt News v. Fisher*, 215 F.3d 354, 366 (3d Cir. 2000). Despite the newspaper losing significant revenue, the court believed the First Amendment was not even implicated, opining that the newspaper "proceeds on the erroneous premise that it has a constitutional right not only to speak, but to speak profitably." *Id.* (quoting *AMSAT Cable Ltd. v. Cablevision of Connecticut*, 6 F.3d 867, 871 (2d Cir. 1993)) (government regulation that has an incidental economic effect of forcing cable operator out of business does not implicate the operator's First Amendment rights)). The Third Circuit concluded that "economic loss ... does not constitute a first amendment injury. 'The inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of [an] ordinance upon freedom of expression.'" *Id.* (citations omitted).

State supreme courts are similarly split in their approaches to economic regulations that affect speaking industries. In *Hest Technologies, Inc. v. State ex rel. Perdue*, 366 N.C. 289 (2012), the North Carolina Supreme Court upheld a state law that banned the operation of video games connected with gambling. *Id.* at 290. A company that produced such games sued, arguing that the law unconstitutionally infringed on its freedom of speech. *See Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 790 (2011) ("[V]ideo games qualify for First Amendment protection."). The court held that the law regulates

conduct and not protected speech. *Hest Techs.*, 366 N.C. at 296. It arrived at this conclusion first by declaring that the law doesn't affect video games *qua* video games; they are regulated only when they are "associated with the conduct of a [sweepstakes] payoff." *Id.* at 297 (citations omitted). The court also held that the law did not target specific speakers and that a sweepstakes winner announcement may not be "protected speech at all because the announcement is merely a necessary but incidental part of the overall noncommunicative activity of conducting the sweepstakes." *Id.* at 299.

The Supreme Court of Kansas upheld legislative abolition of the automobile brokerage business against a First Amendment and other challenges in *Blue v. McBride*, 252 Kan. 894 (1993). Automobile brokers receive referrals of potential new car buyers from credit unions, serve as middlemen between customers and participating sales dealers, and provide information to prospective customers on a wide variety of vehicles. *Id.* at 898. The court resolved the First Amendment claim in syllogistic fashion, noting without citation that (1) the law was intended to abolish the business of automobile brokering; (2) the brokers' speech is incidental to the abolished business; (3) the state can abolish automobile brokering; therefore (4) the individual brokers cannot state a First Amendment claim. *Id.* at 921.

All these courts foreclose First Amendment claims and refuse to engage in *any* judicial scrutiny by deeming laws' effects to be "incidental."

C. Other Courts Hold That Economic Regulation That Selectively Burdens Certain Speakers Requires Judicial Scrutiny Under the First Amendment

In conflict with the Ninth Circuit below, the First, Fourth, and Eighth Circuits and the Connecticut Supreme Court recognize that selective economic burdens on speech warrant heightened scrutiny.

In *Comcast of Maine/New Hampshire, Inc. v. Mills*, 988 F.3d 607, 661 (1st Cir. 2021), the court applied intermediate scrutiny to a cable company's claim that a statute requiring it to carry certain channels violated its First Amendment rights. The state argued that "must-carry" provisions merely regulate industry practices, but Comcast pointed to significant financial burdens on its ability to speak, including overhauling its ordering, distribution, and billing systems; replacing some customers' outdated cable boxes; and legal fees related to renegotiating affiliation agreements. *Id.* at 614. The court noted that "[t]axing the media may be the most obvious way to impose a burden, but it is not the only way." *Id.* at 616 (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 108–09 (1991) ("Son of Sam" law escrowed the speaker's speech-derived income for at least five years)). Given the nature and extent of these financial burdens, the court held that it didn't matter that the must-carry rules lacked any reference to the content of the speech and are not designed to favor or disadvantage any particular speech, *id.* at 643–45, 652, and the court therefore scrutinized Comcast's First Amendment claims. *Id.* at 661.

In *Ness v. City of Bloomington*, 11 F.4th 914 (8th Cir. 2021), the court considered an ordinance forbidding photography and video recording in the public park. A woman was charged with violating the ordinance when she photographed and shot video of activity in the park related to a controversy over the park's usage. The court held that "if the act of making a photograph or recording is to facilitate speech that will follow," it is a First Amendment protected step in the "speech process." *Id.* at 923, relying on *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 336–37 (2010). The court acknowledged the lesser protection granted to speech incidentally burdened by prohibitions on conduct. *Id.* (citing *Sorrell*, 564 U.S. at 567, and *Rumsfeld v. Forum for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 62 (2006)). Yet it held that Ness's photography and video were "analogous to news gathering" and "entitled to First Amendment protection because they are an important stage of the speech process that ends with the dissemination of information about a public controversy." *Id.* (citations omitted). *See also Missouri Broadcasters Ass'n v. Schmitt*, 946 F.3d 453, 458–59 (8th Cir. 2020) (statute regulating economic activity that does not mention speech explicitly still subject to First Amendment scrutiny because "its *practical operation* restricts speech based on content and speaker identity") (emphasis added).

The Fourth Circuit considered the nature of the burden on speech in *Billups v. City of Charleston, South Carolina*, 961 F.3d 673 (4th Cir. 2020), involving a challenge to a city's tour guide licensing scheme. The city described the ordinance as a general

business regulation governing conduct that merely imposes an incidental burden on speech. *Id.* at 682. The court disagreed, holding that the ordinance directly burdened protected speech by prohibiting unlicensed tour guides from "leading paid tours—in other words, speaking to visitors—on certain public sidewalks and streets." *Id.* at 682–83. The court rejected the city's argument that regulation of a commercial transaction is "exempt from First Amendment scrutiny." *Id.* at 683 (citing *Holder*, 561 U.S. at 28 ("The law here may be described as directed at conduct ... but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message."), and *Am. Entertainers, L.L.C. v. City of Rocky Mount,* 888 F.3d 707, 715 (4th Cir. 2018) (the First Amendment applies even if the challenged regulation "was adopted for a purpose unrelated to the suppression of expression—e.g., to regulate conduct, or the time, place, and manner in which expression may take place")). The court concluded that by restricting tours to those led only by licensed guides, the city forbade the expression of ideas and thus warranted judicial scrutiny under the First Amendment. *Id.* at 684.

The Connecticut Supreme Court also carefully scrutinizes general regulations that the government considers only an "incidental" burden on speech. In *Leydon v. Town of Greenwich*, 257 Conn. 318, 320 (2001), the court considered whether a city could restrict access to its parks to residents and their guests. The court held that the access restriction, although not specifically targeting speech, nonetheless implicated First Amendment rights because city parks are public forums and "the

ordinance bars a large class of nonresidents ... from engaging in a multitude of expressive and associational activities." *Id.* at 339–43, 346. The court was unpersuaded by the town's concern with overcrowding, litter, or general maintenance requirements that increase with a park's heavier use because, regardless of intent or justification, the ordinance's actual effect on protected speech required judicial scrutiny.

The common thread through these decisions is a practical assessment of financial and other burdens suffered by *individuals* who claim violation of free speech rights. They stand in stark conflict to the court below, which relegated the significant financial burdens established in the record to specks of insignificance, unworthy of judicial scrutiny.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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