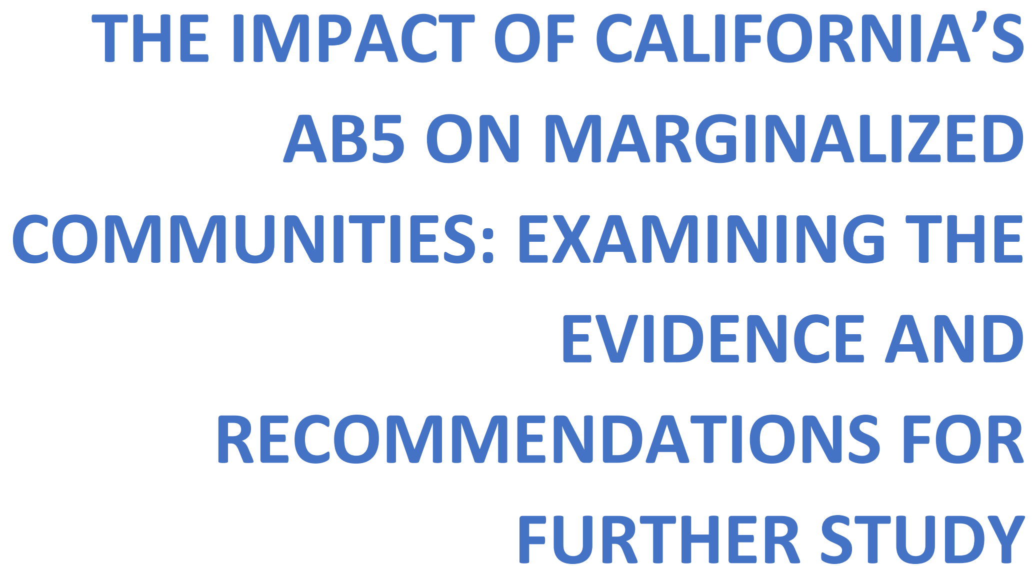

THE IMPACT OF CALIFORNIA'S AB5 ON MARGINALIZED COMMUNITIES: EXAMINING THE EVIDENCE AND RECOMMENDATIONS FOR FURTHER STUDY

PREPARED BY MEMBERS OF THE CALIFORNIA ADVISORY COMMITTEE TO THE U.S. CIVIL RIGHTS COMMISSION

DECEMBER 2024

By Christopher Yost, Daniel Ortner, Maimon Schwarzschild, Star Parker, and Velma Montoya

Since 2021, the California State Advisory Committee (SAC – the "Committee") to the U.S. Commission on Civil Rights has investigated the impact of California's AB5 statute, which severely curtailed the state's definition of an independent contractor. The Committee's goal was to determine whether the law has had a disproportionate impact on minority and other communities in California including women, immigrants, people of color, and the politically powerless.

Over the past few years, the Committee elicited more than a dozen hours of live testimony, examined dozens of studies and reports, and considered more than one hundred written comments from the public. Unfortunately, the Committee was unable to publish a timely report due to numerous factors, including: (1) Commission's SAC Staff generating a draft report, *sua sponte*, which there was no consensus of the Committee to adopt; (2) a laborious, unproductive, line-by-line review of the Staff's draft; (3) a nearly even split among the SAC members on AB 5's consequences; and (4) uneven attendance at SAC meetings by its members. After the line-by-line approach to the Staff-generated report failed to result in progress towards consensus, five members of the SAC produced an alternative report the SAC split on and failed to adopt. Thereafter, a subgroup of four SAC members met regularly in an unsuccessful attempt to forge consensus. The SAC chair offered to draft an alternative report, but just days before the next scheduled SAC meeting, the chair cancelled the meeting and "scratched" the SAC's AB5 project. In response to several SAC members' request that the SAC meet to consider alternatives, David Mussatt, Ph.D., J.D., Supervisory Chief, Regional Programs Unit prematurely ended its term, and declared:

> …. individual statements in the absence of any committee report is not in compliance with FACA or the scope of USCCR's rules and policies.

While the chair offered to request the Staff to schedule another meeting, and eventually proposed a meeting that would be restricted by its ground rules to considering another line-by-line review of the Staff's draft, the Staff expressed no indication it would either schedule such a meeting or reconsider Dr Mussatt's unilateral dissolution of the SAC.

At least five members of the SAC think the compelling evidence the SAC gathered should not be ignored. We therefore would take this opportunity to inform the Commission and the public about the evidence of disproportionate and unfavourable impact of laws like AB5 and to urge further study.

The evidence and testimony the SAC gathered is particularly timely and important given renewed attention to the federal PRO Act, including President Elect Donald Trump's nomination of Lori Chavez-DeRemer, who voted for the PRO Act when in Congress, to lead the Labor Department.

In this brief report, we discuss: (1) factors leading to the adoption AB5 in California; (2) compelling testimony the SAC heard regarding the impact of AB5; and (3) areas where additional research is needed to further investigate the impact of AB5.

I. The History of AB5 and the ABC test

Distinguishing between an employee and an independent contractor has long been seen as depending primarily on the degree of control that a business exercises over its workers. Since 1989, the *Borello*[1] test provided a working paradigm for determining the classification of segments of working Californians as either Independent Contractors or Employees.[2] Also known as "The Right to Control Test," California's courts, Labor Commissioners, and the Employment Development Department relied on the *Borello* test for nearly 30 years in making this determination.[3] The test focuses on understanding the degree to which the hiring company has a right to control the manner and means of performing the work.[4] The 11-factor *Borello* test aims to classify workers based on the level of control a hiring company has over the worker, as well as other factors, such as the worker's ability to profit or suffer loss from the enterprise and who pays for their tools. [5]

In 2018, the California Supreme Court decided *Dynamex v. Superior Court*,[6] a classification case. None of the *Dynamex* parties proposed the adoption of a brand-new test for classification when the case was briefed or in the lower courts. Long after the case had been briefed, and just weeks before oral argument, the California Supreme Court invited the parties to submit letter briefs on whether it should adopt a new test. Less than three months after oral argument, the California Supreme Court, without prompting from the litigants, unilaterally and retroactively, imposed the "ABC Test," which wholly ignored eight of the *Borello* factors.[7] Instead, the new ABC test elevated to determinative status each of the following two *Borello* "secondary" factors:

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1 *S.G. Borello & Sons, Inc. v. Department 0f Industrial Relations*, 48 Cal.3d 341 (1989).
2 See https://www.stoketalent.com/california-assembly-bill-5-ab5/ab5-borello-test/
3 See https://www.stoketalent.com/california-assembly-bill-5-ab5/ab5-borello-test/
4 See https://www.stoketalent.com/california-assembly-bill-5-ab5/ab5-borello-test/
5 See https://www.stoketalent.com/california-assembly-bill-5-ab5/ab5-borello-test/
[6] *Dynamex Operations W. v. Superior Court, 4 Cal.5th 903 (2018)*
[7] The eight factors are: 1)"Right to discharge at will, without cause; not severable or terminable at will by the principal"; 2) "The skill required in the particular occupation"; 3) "Whether the principal or the worker supplies the instrumentalities, tools, and place of work for the person doing the work"; 4) "The alleged employee's investment"; 5) "The method of payment, whether by the time or by the job"; 6) "Whether or not the parties believe they are creating the relationship of employer-employee"; 7) "Opportunity for profit or loss depending upon . . . managerial skill";[7] and 7) "Employment of helpers."

1. "Whether the individual operates a distinct operation or business"; [8] and
2. "Whether or not the work is part of the regular business of the principal". [9]

The change from the *Borello* multifactor test to the *Dynamex* ABC test is outcome-determinative in most employee/independent contractor cases.[10] A high percentage of persons properly deemed independent contractors under *Borello* will be classified as employees under the ABC test.

The seismic impact of *Dynamex* cannot be overstated. As noted above, *Dynamex* wrote out of the *Borello's* multifactor test the following: (1) *Borello's* holding that who controls the means and manner of doing the work is the primary factor; and (2) the eight secondary factors noted above, which frequently point to independent contractor status. Then, *Dynamex* elevated to determinative status two of the *Borello* secondary factors, thus destroying *Borello's* multifactor test.

The elevation of the regular business prong into the "B" of the ABC Test was a particularly dramatic change that swallows up the whole of the test and radically changes the paradigm upon which businesses, including independent contractors, relied and under which California's courts, Labor Commissioners, and the Employment Development Department made classification determinations for almost three decades. The result of this change was that independent contractors could not contract with businesses that specialize in the same thing that they specialize in. Under this test, for example, journalists could not contract with a newspaper to write articles and translators could not take on jobs from a consortium of translators.

Bloomberg BNA's Daily Labor Report, for decades the most trusted source of information for employment-law practitioners, wrote that the decision was regarded as a "bombshell"; "California . . . has so dramatically changed its test that many . . . companies today might be misclassifying workers that were lawfully classified yesterday," Bloomberg BNA quoted an expert as saying. [11]

Had the California Legislature responded in a careful manner, the potentially negative impact of *Dynamex* and the AB5 test could have been limited. the ABC test of *Dynamex* applied only to Wage Order #9, which regulated the transportation industry. [12] Indeed, the *Borello* test is still in use even though it is no longer the primary method by which contractors and companies determine Independent Contractor status.[13] Importantly, after the 2018 *Dynamex* decision, the California

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8 *Id*. at 351.
9 *Id*. at 351.
10 Case: 17-16096, 06/05/2019, ID: 11321325, DktEntry: 97-2, Page 7 of 24.
11 "Calif. Supreme Court Transforms Test for Who Is an Employee," Bloomberg BNA April 30, 2018 (p. 4).
12 Wage orders are regulations determined by a state agency.
13 See https://www.stoketalent.com/california-assembly-bill-5-ab5/ab5-borello-test/

Supreme Court decided the *Borello* test should continue to apply to non-wage order claims (i.e., claims related to violations of workers compensation, anti-discrimination, business expense reimbursements, wrongful termination, failure to pay overtime, waiting time penalties, etc.).

Most critically, and more to the point of our focus, the California Supreme Court did not adopt the ABC Test because the *Borello* test was racist or fell hardest on women, immigrants, people of color, and the politically powerless. *Dynamex* was not a constitutional ruling. The *Dynamex* decision itself recognized this: "The legislature, of course, retains the authority to revise any provisions of the current wage orders through enactment of new legislation."

But legislators and proponents of AB5 falsely claimed *Dynamex* tied their hands and therefore it must be codified into statute. Within two years of the California Supreme Court's *Dynamex* decision, California's super-majority democrat-controlled Legislature adopted the ABC Test in AB5.[14] Under AB5, the ABC Test became the primary system for determining worker classification.[15] AB5 made it more difficult for California's citizens, operating within the Independent Contractor model, to continue to make their living as Independent Contractors.[16]AB5 expanded the ABC test of *Dynamex* beyond the wage orders to include all provisions of the California Labor Code and the Unemployment Insurance Code, thereby applying to all workers and professions in California, not just Wage Order #9 professions.

As further discussed below, the *Dynamex* and AB5 eliminated livelihoods, industries, and the agency of California citizens to engage in entrepreneurial activities as Independent Contractor, imposing either an employee-employee relationship, eliminating their business model, or forcing them out of state.[17] Californians immediately began to suffer under *Dynamex* and AB5, losing their livelihoods and being unable to find work. The toll was particularly severe on creative professionals who were devasted by the B prong of the ABC test.[18] Supporters of AB5 scrambled to fix the damage AB5 had caused. On September 4, 2020, eight months after the enactment of AB5, California Governor Gavin Newsom signed an updated version of the new law, called AB2257.[19] Under the amended law, exemptions from the ABC test were even expanded further. For example, recording artists, landscape architects, translators, copy editors and illustrators, real estate appraisers, home inspectors, and several other categories of freelancers

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[14] Assem. Bill No. 5 (2019-2020 Reg. Sess.)
[15] Assem. Bill No. 5 (2019-2020 Reg. Sess.)
[16] Karen Anderson who testified before out committee has compiled hundreds of stories of professionals driven out of business or forced out of the State of California. *See Anderson at* ___.
[17] *Id.*
[18] https://reason.com/2020/09/08/californias-job-killing-a-b-5-scaled-back-but-only-for-some-professions/
[19] Bill Text - AB-2257 Worker classification: employees and independent contractors: occupations: professional services.

can retain their status as independent contractors. In those cases, the *Borello* test is used to assess the company's right to control and determine the status of the worker. In November 2020, California voters approved Prop 22, adding app-based drivers and food delivery to the growing list of exceptions. These exemptions undercut the alleged intent of the law to protect non-payroll workers.

The evidence of the influence of the powerful union lobby on the seismic change in the classification paradigm is clear in the exemption process. The California legislature essentially outsourced the decision-making process for obtaining an exemption from AB5. [20] The result was the politically powerful and those in industries not historical targets of organized labor were more readily able to obtain an exemption.[21]

However, one industry that was heavily targeted by labor unions, the so-called "gig economy" including apps such as Uber and GrubHub successfully went to the voters to enact Proposition 22 to retain their drivers' status as independent contracts. Proposition 22, preserving the Independent Contractor status of these drivers, passed by the large margin of 58% to 42%. [22] The demographic data indicates minority communities were more likely than majority communities to vote for Proposition 22.[23]

II. There is Significant Evidence Suggesting AB5 Disproportionately and Negatively Affects Women, Immigrants, People of Color, and the Politically Powerless, but Further Study is Needed.

[20] California State Advisory Committee to the US Commission on Civil Rights, Testimony by California State Assemblyman Kevin Kiley, Meeting Transcript pp.20-21, May 23,2022.

[21] [California State Advisory Committee to the US Commission on Civil Rights, Testimony by California State Assemblyman Kevin Kiley, Meeting Transcript pp.20-21, May 23,2022. In *Olson v. California*, 62 F.4th 1206, 1218–20 (9th Cir. 2023), a three-judge panel reversed, in part, the court below and concluded that the district court erred by dismissing Plaintiffs' Equal Protection claims. The panel concluded "that Plaintiffs plausibly alleged that 'the exclusion of thousands of workers from the mandates of A.B. 5 is starkly inconsistent with the bill's stated purpose of affording workers the 'basic rights and protections they deserve.'" *Id.* at 1219 (quoting A.B. 5 § 1(e)). A majority if a divided *en banc* panel reversed, rejecting Plaintiffs' Equal Protection claims, that "A.B. 5 is irrational because it arbitrarily 'singles out' network companies for disfavored treatment. But the statute's referral agency provision plainly excludes not just Uber and Postmates—or any particular network company—but all referral-based businesses that provide 'janitorial, delivery, courier, transportation, trucking, agricultural labor, retail, logging, in-home care, or construction services other than minor home repair.' Cal. Lab. Code § 2777(b)(2)(C). Such a broad definition that sweeps in many different companies across many different industries can hardly be said to 'single out' Plaintiffs for uniquely disfavored treatment." The *en banc* panel rejected Plaintiffs' argument that A.B. 5 was motivated by impermissible animus and political favoritism because the panel was able to articulate "plausible legitimate purposes motivating A.B. 5 and the lines it draws between workers in different industries and occupations[.]"

[22] (Llewyn, T5, p. 3).

[23] (Llewyn, T5, p. 3).

The Committee heard testimony from workers in several industries offering their experiences with AB5 including court reporters, translators, cosmetology workers, and strippers/exotic dancers. Many of the workers we heard from are women, immigrants, people of color, and from other politically disadvantaged groups.

While some workers had positive experiences with AB5, the bulk of the testimony we heard suggested AB5 had a decidedly negative impact causing individuals to lose work and no longer have the option to be independent contractors.[24] We heard particularly compelling testimony regarding the following industries:

Translators and Interpreters

Compelling testimony came from translators and interpreters. Ms. Esther Hermida, a representative of the American Alliance of Professional Translators and Interpreters (AAPTI) testified about AB5's impact on thousands of citizens in her industry comprised of 75% women and many, many minority women and women of color.[25] In addition, over 44% of translators and interpreters were over the age of 55. Translators and interpreters provide crucial services for minority and disadvantaged communities. Translators and interpreters make well over minimum wage;[26] Ms. Hermida, a Cuban-born woman and immigrant had spurned traditional employment opportunities to build a 30-year career as an Independent Contractor translating for clients she was free to hand-select.[27] AB 5 only left a small portion of interpreters who were certified by a single certifying body exempt, which overwhelmingly excluded non-white, deaf, or native ASL speakers (those who grew up with deaf parents) from independent contractor status.[28] While translators and interpreters were able to gain a partial exemption, they are still experiencing negative consequences from AB5. For instance, one professional translator, Ildiko Santana, reported she started her small business in 2000 as an immigrant minority woman. She lost all 50 clients and income in 2020 when AB5 went into effect.

Trucking Industry

We heard similar testimony from the trucking industry, which sprung up after deregulation in the 1980s.[29] This industry is comprised of minorities, including Hispanics and African Americans, who built business around transporting freight in some of our biggest ports and earned, in some cases, $5,000/week.[30] AB5 has caused

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[24] (Black, T5, p. 5); (Crane, T2, p. 20)
[25] (Hermida, T5, p. 8-11).
[26] (Hermida, T5, p. 10).
[27] (Hermida, T5, p. 8-11)
[28] (Anderson Letter to Governor)
[29] (Schrap, T5, p. 11-14).
[30] (Hermida, T5, p. 10).

widespread displacement, increased costs,[31] and loss of opportunities. For instance, in June 2023, the City of Los Angeles terminated a 132-year-old program called the As-Needed Haul Truck Program, costing hundreds of independent truckers and their families their livelihoods. The program is comprised of 87% minority drivers, many whose fathers and grandfathers worked in the program.[32]

Performing Arts

AB5 also appears to have had a detrimental impact on small performing arts organizations, community theater venues, the non-profit arts and the performing arts. In Los Angeles, the concert dance scene, comprised of small and culturally diverse dance companies mostly run by women and minorities, struggles to comply with the law, as reported by Judith Flex Hella via written testimony. The impact appears to have been similar on independent filmmakers like Margarita Reyes, whose written testimony reveals how she now struggles to provide youth mentoring programs to minorities in the independent filmmaking sector due to AB5. We also received written testimony from Gail Gordon, founder of Muni Opera in Los Angeles, a small nonprofit opera company she founded in honor of her mother, a holocaust survivor. Her company presented music by Jewish composers suppressed by the Nazis. She is no longer able to carry on with her opera because the cost of putting on a single production has increased by almost 70 percent due to AB5's requirement that independent contractors are banned from being hired for musical theater production and must be converted into employees even if the work is for an hour a day.

Exotic Dancers

One particularly disturbing experience we heard from multiple witnesses is that those who were once independent contractors and are now forced into employment relationships have suffered from increased racism, ageism, and other forms of discrimination.

The testimony of Onyx Black, an advocate for exotic dancers and strippers, is salient on each of these points. Specifically, Ms. Black credibly testified that: (1) work opportunities for minority and transgender exotic dancers shrank by about 50% - 60% in the aftermath of AB5;[33] (2) exotic dancers with disabilities, including physical and emotional disabilities, are prevented by their new employers from working regular shifts and schedules;[34] (3) AB5 has had the pernicious effect of reducing work opportunities for minority, transgendered, and undocumented exotic dancers; and 4) the shift to employment status has driven many of them into

[31] (Hermida, T5, p. 10).
[32] (FreightWaves article: https://shorturl.at/bCRV9).
[33] (Black, T5, p. 5-6).
[34] (Black, T5, p. 5-6).

dangerous sex work and deprived them of Medicare and MediCal.[35] These negative impacts appear to be in addition to more the more general consequences of the shift to employment status such as the loss of the ability to set prices and hours of work;[36] and the loss of the ability to decline to perform lap dances or enter VIP rooms.[37]

Forensic Nurses

Another disturbing development is that AB5 has made it more difficult for minorities and women to access crucial services. For instance, we heard testimony from a forensic nurse who stated AB5 has had detrimental impact on the ability of rape victim to seek justice. Many forensic nurses work as independent contractors for hospitals, providing sexual assault forensic medical evidentiary examinations. Without the availability of forensic nurses, particularly in rural hospitals, patients who have been sexually assaulted can suffer long wait times and may receive substandard exams if provides by untrained medical personnel in an emergency department. Rural hospitals in particular cannot keep a forensic nurse on staff full time. They are called in as needed.

Gig Workers

One of the industries at the center of the debate over AB5 has been the "gig economy," such as ride share and food delivery apps. Dr. David Lewin provided compelling data regarding the gig economy and the impact that AB5 would have had on ride share and food delivery drivers if Proposition 22 had not been enacted by voters.

Dr. Lewin analyzed data for over one million Californians who served for ride share and food delivery.[38] Dr. Lewin's research revealed the following, salient facts:

(1) most gig economy drivers for ride share and delivery companies were doing so to supplement income to them and their families;[39]

(2) many such drivers held other full and part-time jobs;[40]

(3) 15% of these drivers were students looking to offset tuition and room-and-board costs;[41]

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[35] (Black, T5, p. 6).
[36] (Black, T5, p. 5-6).
[37] (Black, T5, p. 5-6).
[38] (Llewyn, T5, p. 3).
[39] (Llewyn, T5, p. 3).
[40] (Llewyn, T5, p. 3).
[41] (Llewyn, T5, p. 3).

(4) 15% of these drivers were retirees looking to supplement their retirement income from prior employment to help support their families and themselves;[42]

(5) about 80% of these drivers worked less than 20 hours a week, and relied on other jobs or sources of income as their main income and were supplementing that main source of income by driving.[43]

(6) between the third and fourth quarter of 2020 and the third quarter of 2021, these Independent Contractor drivers earnings increased to an average of $34.46 per hours, a 20% increase over 2019.[44]

(7) surveys by the U.S. Department of Labor establish very large majorities of those surveyed voice their preference for the independent contracting relationship based on flexibility and opportunities for additional income.[45] Similarly, 85% to 90% express strong satisfaction with the independent contracting arrangement.[46]

Dr. Lewin's research further shows:

(1) a sizable portion of the driver population identify with minority communities and/or as people of color;[47]

(2) these communities were disproportionately impacted by the pandemic;[48]

(3) these communities were likely to be those negatively impacted by the conversion from Independent Contractors to employees of these companies;[49] and

(4) this conversion would result in 25% to 35% increases in costs to consumers, depending on markets, and increase wait times.

III. Further Study is needed to Fully Examine the Impact of Laws like AB5.

As discussed above, we heard compelling testimony suggesting that AB5 has subjected marginalized workers to increased discrimination. However, there have been limited efforts to empirically study the impact of AB5 on these industries and

[42] (Llewyn, T5, p. 3).
[43] (Llewyn, T5, p. 3).
[44] (Llewyn, T5, p. 4).
[45] (Llewyn, T5, p. 4).
[46] (Black, T5, p. 5).
[47] (Llewyn, T5, p. 3).
[48] (Llewyn, T5, p. 3).
[49] (Llewyn, T5, p. 3).

others. Therefore, much of the information that we received was anecdotal rather than empirical. However, the testimony we heard came from a significant number of different industries and circumstances suggesting the unfavorable impact of AB5 is quite widespread.

We therefore make the following recommendations:

1) the Commission should further study the disproportionate impact of labor laws like AB5 on minorities.
2) lawmakers should be extremely cautious before adopting the ABC test at the national level. The experience of California shows shifting to the ABC test can result in significant negative consequence. A national, one-size fits all approach is particularly likely to have unintended consequences and harm countless workers across the country.
3) states should avoid some of the pitfalls that California fell into, including rushing into the adoption of the ABC test and politicizing the exemption process.
4) the success of Proposition 22 and popularity of gig work, *inter alia,* among minority communities in California, demonstrates the virtue of allowing gig workers to retain their independent contractor status and should caution lawmakers against targeting gig workers.

Dated: December 3, 2024

Respectfully submitted,

CHRISTOPHER J. YOST

DANIEL M. ORTNER

MAIMON SCHWARZSCHILD

STAR PARKER

VELMA MONTOYA