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

APPENDIX

JAMES M. MANLEY*
DEBORAH J. LA FETRA
CALEB R. TROTTER
**Counsel of Record*
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: jmanley@pacificlegal.org

Counsel for Petitioners

Appendix

Appendix A-1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, INC.; NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, Plaintiffs-Appellants, v. ROB BONTA*, Attorney General of the State of California, Defendant-Appellee.	No.20-55734 D.C. No. 2:19-cv-10645-PSG-KS OPINION

Appeal from the United States District Court
for the Central District of California
Philip S. Gutierrez, Chief District Judge, Presiding

Argued and Submitted June 11, 2021
Pasadena, California

Filed October 6, 2021

*Under Fed. R. App. P. 43(c)(2), Rob Bonta has been substituted for his predecessor, Xavier Becerra, as California Attorney General.

Before: Consuelo M. Callahan and Danielle J. Forrest, Circuit Judges, and Richard Seeborg, ** District Judge.

Opinion by Judge Callahan

SUMMARY***

Civil Rights

The panel affirmed the district court's dismissal of a suit brought by the American Society of Journalists and Authors and the National Press Photographers Association challenging, on First Amendment and Equal Protection grounds, California's Assembly Bill 5 and its subsequent amendments, which codified the more expansive ABC test previously set forth in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles,* 416 P.3d 1 (Cal. 2018), for ascertaining whether workers are classified as employees or independent contractors.

The ABC test permits businesses to classify workers as independent contractors only if they meet certain conditions. If a business cannot make that showing, its workers are deemed employees, and the business must comply with specific requirements, and state and federal labor laws. AB5 and its subsequent

**The Honorable Richard Seeborg, Chief United States District Judge for the Northern District of California, sitting by designation.

***This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

amendments, now codified at section 2778 of the California Labor Code, provides for certain occupational exemptions. Because freelance writers, photographers and others received a narrower exemption than was offered to certain other professionals, plaintiffs sued, asserting that AB5 effectuates content-based preferences for certain kinds of speech, burdens journalism and burdens the right to film matters of public interest.

The panel held that section 2778 regulates economic activity rather than speech. It does not, on its face, limit what someone can or cannot communicate. Nor does it restrict when, where, or how someone can speak. The statute is aimed at the employment relationship--a traditional sphere of state regulation. The panel further acknowledged that although the ABC classification may indeed impose greater costs on hiring entities, which in turn could mean fewer overall job opportunities for certain workers, such an indirect impact on speech does not necessarily rise to the level of a First Amendment violation. The panel rejected plaintiffs' assertion that the law singled out the press as an institution and was not generally applicable.

Addressing the Equal Protection challenge, the panel held that the legislature's occupational distinctions were rationally related to a legitimate state purpose.

COUNSEL

James M. Manley (argued), Caleb R. Trotter, and Jeremy Talcott, Pacific Legal Foundation, Sacramento, California, for Plaintiffs-Appellants.

Jose A. Zelidon-Zepeda (argued), Deputy Attorney General; Heather Hoesterey, Supervising Deputy Attorney General; Thomas S. Patterson, Senior Assistant Attorney General; Office of the Attorney General, San Francisco, California; for Defendant-Appellee.

Ilya Shapiro and Trevor Burns, Cato Institute, Washington, D.C.; Manuel S. Klausner, Law Offices of Manuel S. Klausner, Los Angeles, California; for Amici Curiae Cato Institute, Reason Foundation, and Individual Rights Foundation.

Timothy Sandefur and Christina Sandefur, Scharf-Norton Center for Constitutional Litigation at the Goldwater Institute, Phoenix, Arizona, for Amicus Curiae The Goldwater Institute.

Krystal B. Swendsboe and Hyok Frank Chang, Wiley Rein LLP, Washington, D.C., for Amicus Curiae The Independent Institute.

Daniel R. Suhr and Reilly Stephens, Liberty Justice Center, Chicago, Illinois, for Amicus Curiae Liberty Justice Center.

OPINION

CALLAHAN, Circuit Judge:

To confront the misclassification of employees as independent contractors, California passed Assembly Bill (AB) 5, then AB 2257, which codified a more expansive test for determining workers' statuses, albeit with certain occupational exemptions. Because freelance writers, photographers, and others received a narrower exemption than was offered to certain other professionals, the American Society of Journalists and Authors, Inc., and the National Press Photographers Association (collectively, ASJA) sued, alleging violations of the First Amendment and Equal Protection Clause. We conclude, however, that the laws do not regulate speech but, rather, economic activity. We further conclude that the legislature's occupational distinctions are rationally related to a legitimate state purpose. We therefore affirm the district court's dismissal of ASJA's suit.

I.

The California Supreme Court dramatically altered state labor law in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 416 P.3d 1 (Cal. 2018), by adopting the "ABC test" for ascertaining whether workers were employees or independent contractors. That test permits businesses to classify workers as independent contractors only if they (a) are "free from the control and direction of the hirer," (b) perform work "that is outside the usual course of the hiring entity's business," and (c) are "customarily engaged in an independently established trade, occupation, or business." *Id.* at 34. If a business cannot make that showing, its workers are deemed employees, in which case the business must comply with certain requirements "paying federal Social

Security and payroll taxes, unemployment insurance taxes and state employment taxes, providing worker's compensation insurance, and ... complying with numerous state and federal statutes and regulations governing the wages, hours, and working conditions of employees." *Id.* at 5.

Before Dynamex, California courts applied the multifactor test established in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 769 P.2d 399 (Cal. 1989). Under *Borello*, a worker's status turned primarily on the hiring entity's right to control the worker. *Id.* at 403-04. But courts also looked to several "secondary indicia" of employment, including the hiring entity's right to discharge workers at will, the length of the workers' services, and whether the work was part of the hiring entity's regular business.[1]

---

[1] The other factors include

> whether the one performing services is engaged in a distinct occupation or business; . . . the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; ... the skill required in the particular occupation; ... whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; ... the method of payment, whether by the time or by the job; ... and whether the parties believe they are creating the relationship of employer-employee.

Id. at 404. Importantly, no factor was dispositive; courts engaged in a case-by-case evaluation of the arrangement at issue. *Id.* at 407. This flexibility gave the California Supreme Court pause. Concerned that the *Borello* standard caused confusion and enabled businesses to evade labor requirements, the *Dynamex* court adopted the more rigid ABC test. 416 P.3d at 33-34.

Although *Dynamex* was initially limited to wage orders,[2] with *Borello* applying outside that context, the California legislature codified the ABC test and expanded its applicability through the enactment of AB 5. The legislature gave several reasons for taking this step. It found that misclassification caused workers to "lose significant workplace protections," deprived the state of needed revenue, and ultimately contributed to the "erosion of the middle class and the rise in income inequality." AB 5, Ch. 296, 2019-2020 Reg. Sess. (Cal. 2019). With AB 5, the legislature declared, it was protecting "potentially several million workers." *Id.*

AB 5 did not apply *Dynamex* across the board, however, but specified that the *Borello* standard would continue governing many occupations and industries. *See generally* Cal. Lab. Code § 2750.3. For

---

Borello, 769 P.2d at 404.

[2] Wage orders are "quasi-legislative regulations" that "impose obligations relating to the minimum wages, maximum hours, and a limited number of very basic working conditions (such as minimally required meal and rest breaks) of California employees." *Dynamex,* 416 P.3d at 5 & n.3.

example, the law exempted from the ABC test licensed doctors, lawyers, architects, engineers, and accountants, as well as certain commercial fishermen, salesmen, and investment advisers, among many others. *Id.* § 2750.3(b)(2)-(6). It also exempted those engaged in enumerated "professional services," which were defined to include marketing, graphic design, grant writing, barbery, cosmetology, and fine art. *Id.* § 2750.3(c)(2)(B)(i), (iv)-(vi), (xi).

At issue here are AB 5's "professional service" exemptions for freelance workers, including freelance writers and photographers. *Id.* § 2750.3(c)(2)(B)(ix)-(x). As originally enacted, AB 5 limited this exemption to freelancers who submitted fewer than thirty-five pieces of work to a single entity in a given year. *Id.* If a freelancer stayed within that limit, *Borello* governed. If he exceeded it, *Dynamex* instead applied. AB 5 also provided that the exemption did not apply to photographers, photojournalists, and videographers working on "motion pictures"—i.e., "projects produced for theatrical, television, internet streaming for any device, commercial productions, broadcast news, music videos, and live shows." *Id.* § 2750.3(c)(2)(B)(ix). *Dynamex* governed their arrangements no matter the situation.

ASJA sued to enjoin the above limitations and thereby expand the freelance exemptions. In ASJA's view, the submission limit and exclusion of "motion picture" workers offended the Free Speech, Free Press, and Equal Protection Clauses because they did not apply to other professionals, such as marketers and artists, who enjoyed broader, or at least differently contoured, exemptions from *Dynamex's*

ABC test. The restrictions burdened journalism, ASJA claimed, by forcing freelancers to become employees, thereby reducing their work opportunities and inhibiting their "freedom to freelance."

ASJA moved for a preliminary injunction and for a temporary restraining order. The court denied the restraining-order request and, after concluding that ASJA was unlikely to prevail, declined to issue a preliminary injunction. It rejected ASJA's First Amendment argument, finding that AB 5 regulated economic conduct, not speech, and that the law evinced no content preference. The court also held that AB 5 survived ASJA's Equal Protection challenge because the regulated occupations were not similarly situated and, even if they were, there was a rational basis for the legislature's occupational classifications.

ASJA appealed the district court's order, and California moved for dismissal of the underlying action. The court dismissed the suit for the same reasons that it denied the preliminary injunction, and ASJA appealed that order, too. We then dismissed ASJA's first appeal, holding that the denial of the preliminary injunction "merged" into the final judgment. No. 20-55408, Dkt. No. 32 (9th Cir. Aug. 20, 2020).

In the meantime, the California legislature amended AB 5 with AB 2257, which added new "professional service" exemptions and clarified existing ones.[3] *See* Cal. Lab. Code § 2778. As relevant

---

[3] Exempted professionals now include creative marketers, human resources administrators, travel

here, AB 2257 dropped the thirty-five-submissions limit but bounded the freelance exemptions in other ways. Now, for *Borello* to apply, freelance workers cannot "directly rep lac[e] an employee who performed the same work at the same volume for the hiring entity," "primarily perform the work at the hiring entity's business location," or be "restricted from working for more than one hiring entity."[4] *Id.*

---

agents, graphic designers, grant writers, fine artists, payment processing agents, estheticians, electrologists, manicurists, barbers, cosmetologists, specialized performers hired by a performing arts company or organization to teach a master class, appraisers, foresters, real estate agents, home inspectors, and repossession agencies. Cal. Lab. Code § 2778(b)(2)(A)-(H), (L)-(0); *see also infra* n.5.

While the exemptions accorded to these services differ in their particulars, workers providing a "professional service" listed in AB 2257 must, in addition to satisfying their industry's individualized conditions, "maintain[] a business location ... separate from the hiring entity," set their own hours "[o]utside of project completion dates and reasonable business hours," and "customarily and regularly exercise[] discretion and independent judgment in the performance of the services," among other requirements. Cal. Lab. Code § 2778(a).

[4] The freelance exemption's revised conditions apply to services provided by still photographers, photojournalists, videographers, photo editors, *id.* § 2778(b)(2)(1); freelance writers, translators, editors, copy editors, illustrators, or newspaper cartoonists, *id.* § 2778(b)(2)(J); and content contributors, advisors,

§ 2778(b)(2)(1)--(J). The law remained largely the same in other respects. Thus, notwithstanding AB 2257's changes, ASJA maintains that the law, now codified at section 2778 of California's Labor Code, continues to violate the First Amendment and Equal Protection Clause.[5]

II.

Because the district court dismissed AJSA's suit while its appeal of the preliminary-injunction order was pending, the orders merged. *See Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 730-31 (9th Cir. 2017) (describing the merger doctrine); *accord SEC v. Mt. Vernon Mem. Park*, 664 F.2d 1358, 1361-62 (9th Cir. 1982). We thus begin and ultimately end-with the dismissal order, which we review de novo. *Butterfield v. Bail*, 120 F.3d 1023, 1024 (9th Cir. 1997).

III.

A.

The First Amendment, applied to states through the Fourteenth Amendment, prohibits laws that

---

producers, narrators, or cartographers for journals, books, periodicals, evaluations, other publications, or educational, academic, or instructional works in any format or media, *id.* § 2778(b)(2)(K).

[5] We GRANT ASJA's motion to supplement the record with declarations showing that AB 2257 did not moot this appeal. *See Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1020 n.3 (9th Cir. 2010).

abridge the freedom of speech or the press. U.S. Const. amend. I. Governments cannot, therefore, "restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (quoting P*olice Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972)). Such restrictions are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* In ascertaining whether a speech-restricting law triggers this exacting standard of review, we consider whether it "defin[es] regulated speech by particular subject matter" or, more subtly, "by its function or purpose." *Id.* Strict scrutiny applies in either case. *Id.* But before conducting that analysis, we must assess whether the law regulates speech in the first place. *See, e.g., United States v. Swisher*, 811 F.3d 299, 314 (9th Cir. 2016).

1.

The thrust of ASJA's First Amendment argument is that, under section 2778, a worker's likelihood of being classified as an employee, rather than an independent contractor, turns on the content of his work. If the worker provides marketing services, for example, then *Borello* governs "provided that the contracted work is original and creative in character." Cal. Lab. Code § 2778(b)(2)(A). If the worker instead produces art, then *Borello* applies when the work is "to be appreciated primarily or solely for [its] imaginative, aesthetic, or intellectual content." *Id.* § 2778(b)(2)(F)(ii). Grant writers and graphic designers meanwhile enjoy broader exemptions from *Dynamex*. *Id.* § 2778(b)(2)(D)(E). But for *Borello* to

apply to a freelance writer or photographer, he must not replace an employee that performed the same workload, be restricted from working for other entities, or work primarily at the hirer's business location. *Id.* § 2778(b)(2)(1)-(J). In ASJA's view, these restrictions single out journalism and, more generally, effectuate content-based preferences for certain kinds of speech. ASJA concludes that because employees impose greater financial burdens on prospective hirers than do independent contractors, the law interferes with freelancers" right to speak for a profession.

There is a distinction, however, between "restrictions on protected expression" and "restrictions on economic activity." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). Whereas the First Amendment may prohibit the former, it "does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Id.* Consistent with this view, the Supreme Court has rejected First Amendment challenge to the Fair Labor Standards Act and its exceptions *Okla. Press Club Co. v. Walling*, 327 U.S. 186, 192-94 (l946); the National Labor Relations Act, *Assoc. Press v. NLRB*, 301 U.S. 103, 130-33 (1937); the Sherman Act, *Assoc. Press v. United States*, 326 U.S. 1, 19-20 (1945); and taxes, *Leathers v. Medlock*, 499 U.S. 439, 447-49 (1991). These cases, and others like them, establish that an entity "cannot claim a First Amendment violation simply because it may be subject to ... government regulation." *Univ. of Penn. v. EEOC*, 493 U.S. 182, 200 (1990).

Section 2778 fits within this line of cases because it regulates economic activity rather than speech. It does not on it's face limit what someone can or cannot communicate. Nor does it restrict when, where, or how someone can speak. It instead governs worker classification by specifying whether *Dynamex's* ABC test or *Borello's* multi-factor analysis applies to given occupation under given circumstances. In other words, the statute is aimed at the employment relationship-a traditional sphere of state regulation. *See DeCanas v. Bica*, 424 U.S. 351 356 (1976). Such rules understandably vary based on the nature of the work performed or the industry in which the work is performed and section 2778 is no different in this regard.[6] But whether employees or independent contractors, workers remain able to write, sculpt, paint, design, or market whatever they wish.[7]

---

[6]Although not at issue here, federal employment regulations draw similar distinctions. *See generally,* 29 C.F.R. Subpt. D (setting forth exemptions from the Fair Labor Standards Act for "professional employees"). Like section 2778, those rules exempt lawyers, doctors, and architects from minimum-wage and overtime requirements. *Id.* §§ 541.301, 304. They also generally exempt "music, writing, ... and the graphic arts," among others, as well as certain painters, cartoonists, novelists, and journalists. *Id.* § 541.302; *see also id.* § 541.300(a)(2)(ii) (exempting those whose work "[r]equir[es] invention, imagination, originality or talent in a recognized field of artistic or creative endeavor").

[7] Section 2778 thus differs from the laws deemed problematic in cases like *Reed*, 576 U.S. 155; *Sorrell*, 564 U.S. 552; and *Pacific Coast Horseshoeing School*

The ABC test may, as ASJA contends, make it more likely that some of its members are classified as employees. And that classification may indeed impose greater costs on hiring entities, which in tum could mean fewer overall job opportunities for workers, among them certain "speaking" professionals. But such an indirect impact on speech does not necessarily rise to the level of a First Amendment violation. After all, "every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 (1986); cf. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 470 (1997) ("The fact that an economic regulation may indirectly lead to a reduction in a[n] ... advertising budget does not itself amount to a restriction on speech.").

Granted, economic regulations can still implicate the First Amendment when they are not "generally

---

v. Kirchmeyer, 961 F.3d 1062 (9th Cir. 2020), upon which ASJA relies. In *Reed*, the Court invalidated an ordinance restricting residents' display of signs-"a canonical First Amendment medium-on the basis of the language they contained," Note, *Free Speech Doctrine after* Reed v. Town of Gilbert, 129 Harv. L. Rev. 1981, 1993 (2016). *Sorrell* dealt with content-based prohibitions on disseminating information, an established form of speech. 564 U.S. at 563, 567-69. And Pacific Coast Horseshoeing concerned a law that "squarely" implicated the First Amendment by "regulat[ing] what kind of educational programs different institutions can offer to different students." 961 F.3d at 1069.

applicable" but instead target certain types of speech and thereby raise the specter of government discrimination. Hence, in *Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), the Supreme Court rejected a special-use tax on paper and ink products used exclusively by newspapers. The tax both singled out the press for special treatment, raising free-press problems, and targeted just a few newspapers, raising censorship concerns. *Id.* at 578-79. In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), the Court invalidated a state's selective taxation of certain magazines but not religious, trade, or sports ones. And, relatedly, in *Simon & Schuster v. Members of New York Crime Victims Board*, 502 U.S. 105 (1991), the Court found unconstitutional a law requiring publishers of criminals' books to turn over an author's proceeds if the book concerned his or her crime. Notwithstanding the law's laudable goal of compensating victims, it imposed a content-based financial burden disincentivizing certain types of speech. *Id.* at 115-18; *see also Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 903 (9th Cir. 2018) (expounding on when economic regulations might implicate the First Amendment).

Section 2778 poses none of these problems, however. It does not target the press or a few speakers because it applies across California's economy. That is, it establishes a default rule applying *Dynamex's* ABC test to the classification of all work arrangements unless an arrangement falls within an exemption, in which case *Borello* applies. Freelancers and related professionals enjoy one exemption and may understandably want it broadened. But many

occupations have no exemption at all; the ABC test governs their classification regardless of the circumstances. So if a freelance writer falls out of the exemption's scope—by, say, being restricted from working for more than one entity—he is not uniquely burdened. Rather, he is then treated the same as the many other workers governed by the ABC test. This distinguishes section 2778 from the newspaper-ink tax invalidated in *Minneapolis Star* which was "without parallel in the State's tax scheme," 460 U.S. at 582, and the targeted burden at issue in *Simon & Schuster* which "the State place[d] on no other income." 502 U.S. at l16.

We note, moreover, that the specific conditions complained of apply not only to journalists, but to all freelance writers, photographers, and others in the state including narrators and cartographers for journals, books, or "educational, academic, or instructional work[s] in any format or media." Cal. Lab. Code § 2778(b)(2)(1)-(K). As a result, those conditions do not single out the press, as an institution. And contrary to ASJA's contention, the law is not rendered generally inapplicable just because some other professionals—among them lawyers, human-resource administrators, and creative marketers—enjoy different, or even broader carveouts from the ABC test. *See Okla. Press*, 327 U.S. at 193 (rejecting the notion that federal labor law could not be applied to the press because it exemted "seamen, farm workers and others"). Indeed, we recently upheld AB 5 as a "generally applicable" law in another context, despite its exemptions because it applies to employers generally. *Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644, 658-59 (9th Cir. 2021). "Labor

Laws typically include exemptions," we explained. *Id.* at 659 n.9.

Nor does section 2778 impose content-based burdens on speech, for even assuming that the ABC test constitutes an economic burden akin to a tax, its applicability does not turn on what workers say but, rather, on the service they provide or the occupation which they are engaged. And although some regulated occupations "speak" as part of their professions, nothing about section 2778's text, structure, or purpose reflects a legislative content preference.[8] *See Reed*, 576 U.S. at 170. Notably, the practice of most exempted professions—such as home inspectors, foresters, and fisherman—does not equate to "speech." Other regulated services, which could constitute "speech," do not serve as stand-ins for particular subject matters. These include freelance writers, graphic designers, and photo editors. *Cf.*

---

[8] ASJA argues that section 2778 may require state authorities to examine the content of a worker's message when determining whether *Borello* or *Dynamex* applies. This, ASJA contends, signals that the law impermissibly singles out speech based on its subject matter. That can be true, but it is not dispositive. *See Recycle for Change v. City of Oakland*, 856 F.3d 666, 671 (9th Cir. 2017) (collecting cases). A government might have to examine the contents of writings to determine if someone is engaged in the unauthorized practice of law, for example, but that alone would not violate the First Amendment. Furthermore, assessing a worker's duties in the employment setting is typically a fact-intensive inquiry concerning the nature of one's work.

Mastrovincenzo v. City of N.Y., 435 F.3d 78, 99 (2d Cir. 2006) ("The mere fact that [the rule] differentiates between categories of vendors—that is, vendors of written materials, paintings, photographs, prints and sculptures are exempt from its licensing requirement while other vendors are not—does not suggest that [it] targets particular messages and favors others." (emphasis omitted)). Creative marketers will, of course, communicate about marketing, just as lawyers will about law. But the inclusion of provisions specific to such "speaking" professionals does not, in our view, transform a broad-ranging, comprehensive employment law like section 2778 into a content-based speech regulation. *Cf. Ohlralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) ("[T]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity."). If it did, it is difficult to see how any occupation-specific regulation of speakers would avoid strict scrutiny.[9] We decline ASJA's invitation to apply the First Amendment in this manner.

2.

ASJA separately challenges section 2778's application of the ABC test to freelancers working on "motion pictures." *See* Cal. Lab. Code § 2778(b)(2)(I)(i). According to ASJA, this provision burdens the right to film matters of public

[9] A legislature could conceivably define services or occupations so granularly that a court could isolate the speech's communicative intent as a defining distinction.

interest. We do not share this concern, as "motion pictures" refers to an industry or medium through which content is conveyed, and such distinctions do not typically implicate the First Amendment. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 660 (1994) ("[T]he fact that a law singles out a certain medium . . . is insufficient by itself to raise First Amendment concerns.") (citation omitted); *see also Assoc. Film Dist. Corp. v. Thornburgh*, 683 F.2d 808, 812–13 (3d Cir. 1983) (describing as "clearly content-neutral" a law regulating "trade practice legislation, directed at the motion picture industry as opposed to other industries, not because that industry communicates ideas, but rather because . . . the market structure of that industry is unique").

True, the provision defines "motion pictures" as including "theatrical or commercial productions, broadcast news, television, and music videos," Cal. Lab. Code § 2778(b)(2)(I)(i), but this does not signify a burden based on the "topic discussed or the idea or message expressed." *Recycle for Change v. City of Oakland*, 856 F.3d 666, 670 (9th Cir. 2017) (quoting *Reed*, 576 U.S. at 163). Rather, the definition provides an illustrative, non-exclusive list of productions that constitute "motion pictures." So even if those examples equate to different subject matters, the law does not distinguish between them; whether "motion pictures" involve news or music, section 2778 treats those working on them the same.

B.

The Equal Protection Clause prohibits states from "deny[ing] to any person within its jurisdiction

the equal protection of the laws." U.S. Const. amend. XIV, § 1; *Plyler v. Doe*, 457 U.S. 202, 216 (1982) ("The Equal Protection Clause directs that all persons similarly circumstanced shall be treated alike."). When a law burdens a fundamental right, like that to free speech, we apply strict scrutiny. *See Honolulu Weekly, Inc. v. Harris*, 298 F.3d 1037, 1047 (9th Cir. 2002). But having found that section 2778 does not implicate the First Amendment, we review for a rational basis, asking only whether the statute's occupational classifications are "rationally-related to a legitimate governmental interest."[10] *Id.* (citation omitted).

This is a fairly forgiving standard, given the wide latitude afforded to states in managing their economies. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). We uphold economic classifications so long as "there is any reasonably conceivable state of facts that could provide a rational basis" for them. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). Therefore, to prevail, the party attacking a law must "negate every conceivable basis which might have supported" the distinctions drawn. *Angelotti Chiropractic v. Baker*, 791 F.3d 1075, 1086 (9th Cir. 2015) (internal quotation marks and citation omitted).

ASJA has not done that. In deciding whether and under what conditions *Dynamex's* ABC test applies to a given occupation, California weighed several factors: the workers' historical treatment as employees or independent contractors, the centrality

---

[10] ASJA acknowledges the state's interest in properly classifying workers.

of their task to the hirer's business, their market strength and ability to set their own rates, and the relationship between them and their clients. *See generally* Cal. Bill Analysis, AB 5 (July 10, 2019). It is certainly conceivable that differences between occupations warrant differently contoured rules for determining which employment test better accounts for a worker's status.[11] It is also conceivable that misclassification was more rampant in certain industries and therefore deserving of special attention. "Legislatures may implement their program step by step . . . , adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations." *City of New Orleans*, 427 U.S. at 303 (citations omitted); *accord Angelotti*, 791 F.3d at 1085–86. And even if California could have better addressed misclassification some other way, or with greater precision, the Equal Protection Clause does not require it. *See Beach Commc'ns, Inc.*, 508 U.S. at 315 ("[A] legislative choice is not subject to courtroom fact-finding and may be based on rational

---

[11] Occupational classifications often survive Equal Protection challenges. *See, e.g., Ala. Dep't of Revenue v. CSX Transp., Inc.*, 575 U.S. 21, 28 (2015) (collecting examples); *see also id.* (noting states' power to "impose widely different taxes on various trades or professions" (quoting 1 J. Hellerstein & W. Hellerstein, State Taxation § 3.03 (3d ed. 2001–2005)). For example, a rule can apply to opticians but not optometrists, *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 486–91 (1955), or to dentists but no one else, *Semler v. Ore. State Bd. of Dental Examiners*, 294 U.S. 608, 610 (1935).

speculation unsupported by evidence or empirical data."); *see also Williamson*, 348 U.S. at 487–88 ("[T]he law need not be in every respect logically consistent with its aims to be constitutional."). So long as the law rests upon some rational basis—as it does here—our inquiry is at an end.

ASJA does not meaningfully challenge the conceivable bases underpinning section 2778's distinctions but, instead, likens them to those deemed unconstitutional in *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008). We disagree with the comparison, as *Merrifield* "presented a unique set of facts." *Allied Concrete & Supply Co. v. Baker*, 904 F.3d 1053, 1065 (9th Cir. 2018). It involved a state licensure requirement applicable to pest controllers dealing with bats, raccoons, skunks, and squirrels but not pest controllers dealing with mice, rats, or pigeons. *Merrifield*, 547 F.3d at 981–82. In defending the law against a due process challenge, the state had argued that licensure was needed to educate workers about pesticide risks. *Id.* at 987–88. But since those eradicating mice, rats, and pigeons were more likely to encounter pesticides, the state had "undercut its own rational basis for the licensing scheme." *Id.* at 992.

Unlike the situation in *Merrifield*, however, nothing about section 2778 suggests that its classifications "border[] on corruption, pure spite, or naked favoritism lacking any legitimate purpose." *S.F. Taxi Coal. v. City and Cnty. of S.F.*, 979 F.3d 1220, 1225 (9th Cir. 2020) (explaining that *Merrifield* represents the "outer limit to the state's authority"). Instead, like many other employment laws, section

2778 permissibly subjects workers in different fields to different rules.

IV.

Section 2778's use of different worker-classification tests for different occupations under different circumstances does not implicate the First Amendment or violate the Equal Protection Clause. The law regulates economic activity, not speech, and a rational basis supports the distinctions it draws. We therefore affirm the dismissal of ASJA's suit and, accordingly, need not address the denial of ASJA's request for a preliminary injunction.

AFFIRMED.

Appendix B-1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	CV 19-10645 PSG (KSx)
Date	July 9, 2020
Title	American Society of Journalists and Authors, Inc., et al v. Xavier Becerra

Present: The Honorable Philip S. Gutierrez, United States District Judge

Deputy Clerk: Wendy Hernandez
Court Reporter: Not Reported
Attorneys Present for Plaintiff(s): Not Present
Attorneys Present for Defendant(s): Not Present

Proceedings (In Chambers):
The Court GRANTS the motion to dismiss

On March 20, 2020, the Court granted Defendant Xavier Becerra's ("Defendant") motion to dismiss. *See* Dkt. # 45. The Court also granted Plaintiffs American Society of Journalists and Authors, Inc. and National Press Photographers Association ("Plaintiffs") leave to amend, with a deadline to amend their complaint of April 17, 2020. *See id.* The Court directed that failure to amend by that date would "result in dismissal of Plaintiffs' claims with prejudice." *See id.* Plaintiffs failed to amend their complaint by that date. On April 17, 2020, Plaintiffs filed a notice of appeal. *See* Dkt. # 46. Plaintiffs appealed both this Court's order denying Plaintiffs' preliminary injunction, Dkt. # 44, and the

dismissal order. *See id.* Defendant now moves to dismiss this action with prejudice pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. *See* Dkt. # 53. Although the parties have differing views on the nature of the Court's jurisdiction, Plaintiffs do not oppose. *See* Dkt. # 56.

A notice of appeal generally deprives the district court of jurisdiction to adjudicate the matters appealed, *Griggs v. Provident Consumer Disc. Co.,* 459 U.S. 56, 58 (1982), however, "an appeal from an interlocutory order does not divest the trial court of jurisdiction to continue with other phases of the case," *Plotkin v. Pac. Tel. & Tel. Co.,* 688 F.2d 1291, 1293 (9th Cir. 1982). The district court is divested of authority to proceed further with respect to matters appealed, "except in aid of the appeal ... or in aid of execution of a judgment that has not been superseded," and the rationale is to "avoid the confusion and waste of time that might flow from putting the same issues before two courts at the same time." *Matter of Thorp,* 655 F.2d 997, 998 (9th Cir. 1981). Where a notice of appeal is deficient, for instance, by "reference to a nonappealable order," the district court may "disregard the purported notice of appeal and proceed with the case, knowing that it has not been deprived of jurisdiction," or, if the district court is in doubt, "it may decline to act further until the purported appellee obtains dismissal of the appeal in the court of appeals." *Ruby v. Sec'y of U.* S. *Navy,* 365 F.2d 385, 389 (9th Cir. 1966). Where the district court "correctly determines that its jurisdiction has not been ousted by a purported notice of appeal, because the latter was not taken from an appealable order, a notice of appeal directed to the non-

appealable order will be regarded ... as directed to the subsequently-entered final decision." *Id.*

Defendant argues that the dismissal order was not immediately appealable, and that the Court retains jurisdiction to grant dismissal. *See* Dkt. # 53. "[A] plaintiff, who has been given leave to amend, may not file a notice of appeal simply because he does not choose to file an amended complaint." *WMX Techs., Inc. v. Miller,* 104 F.3d 1133, 1136 (9th Cir. 1997). Plaintiff responds that assuming the order was final and appealable, the Court has jurisdiction "in aid of the appeal" to enter final judgment. *See* Dkt. # 56.

The Court concludes that because the dismissal order was a non-final, non-appealable order, it has jurisdiction to grant dismissal here. Accordingly, the Court **GRANTS** Defendant's motion and **DISMISSES** the action with prejudice. This order closes the case.

IT IS SO ORDERED.

Appendix C-1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	CV 19-10645 PSG (KSx)
Date	March 20, 2020
Title	American Society of Journalists and Authors, Inc., et al. v. Xavier Becerra

Present: The Honorable Philip S. Gutierrez, United States District Judge

Deputy Clerk: Wendy Hernandez
Court Reporter: Not Reported
Attorneys Present for Plaintiff(s): Not Present
Attorneys Present for Defendant(s): Not Present

Proceedings (In Chambers):
The Court GRANTS the motion to dismiss

Before the Court is Defendant Xavier Becerra's ("Defendant") motion to dismiss. *See* Dkt. # 33 ("*Mot.*"). Plaintiffs American Society of Journalists and Authors, Inc. ("ASJA") and National Press Photographers Association ("NPPA") (collectively, "Plaintiffs") oppose, *see* Dkt.# 37 ("*Opp.*"), and Defendant replied, *see* Dkt. # 41 ("*Reply*"). The Court finds the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. Having considered the moving, opposing, and reply papers, the Court **GRANTS** the motion to dismiss.

I. Background

The Court has recounted the background of this case in its prior order, and will not do so again here. *See* Dkt. # 44. In sum, Plaintiffs allege that the 35-submission limit and videography exception that apply to specific exemptions in AB 5 violate their members' rights under the U.S. Constitution's Fourteenth Amendment Equal Protection Clause and First Amendment. *See generally Complaint*, Dkt. #1 ("*Compl.*"); A.B. 5, Ch. 296, 2019–2020 Reg. Sess. (Cal. 2019) ("AB 5"); Cal. Lab. Code § 2750.3. Plaintiffs seek declaratory and injunctive relief, and an award of attorneys' fees and costs. *See Compl.* at 15–16. Plaintiffs sue Defendant in his role as Attorney General of California. *See id.* ¶ 16.

II. Legal Standard

To survive a motion to dismiss under Rule 12(b)(6), a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In assessing the adequacy of the complaint, the court must accept all pleaded facts as true and construe them in the light most favorable to the plaintiff. *See Turner v. City & Cty. of San Francisco*, 788 F.3d 1206, 1210 (9th Cir. 2015); *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). The court then determines whether the complaint "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Accordingly, "for a complaint to

survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (internal quotation marks omitted).

A court may "consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

III. Discussion

Defendant argues that the Court should dismiss the complaint in its entirety for failure to allege a viable claim, because the limitations challenged by Plaintiffs are ordinary legislative line-drawing in generally applicable economic regulation. Mot. 1:24–26. Plaintiffs respond that a higher level of scrutiny applies and, even if lesser scrutiny is applicable, Defendant cannot meet such scrutiny at the motion to dismiss stage. *See* Opp. 4:6–8.

As to the Equal Protection Clause challenge, the Court has concluded that the groups of exemptions (marketers, graphic designers, grant writers, and travel agents, on the one hand, and photographers, photojournalists, freelance writers, and editors, on the other) attacked by Plaintiffs are not "similarly situated," for constitutional purposes and, even if they were, there is a conceivable, rational basis for the distinctions. *See* Dkt. # 44. Plaintiffs'

allegations do not raise any factual questions that would require discovery, instead Plaintiffs' challenge is based purely on the statutory text, and the Court has considered the complaint's allegations and the text of AB 5, including its stated purpose, in making its determinations. *See Garcia v. Harris*, No. CV 16–02572–BRO (AFMx), 2016 WL 9453999, at *7 (C.D. Cal. Aug. 5, 2016), *aff'd sub nom. Gallinger v. Becerra*, 898 F.3d 1012 (9th Cir. 2018) (granting motion to dismiss a challenge to law under the Equal Protection Clause because there was a legitimate governmental interest rationally related to the challenged exemptions); *Dias v. City & Cty. of Denver*, 567 F.3d 1169, 1184 (10th Cir. 2009) (reversing dismissal of substantive due process claim where plaintiffs had alleged factual allegations demonstrating that distinction drawn in law between dog breeds was irrational).

As to the First Amendment claims, the Court has concluded that the distinctions drawn in the generally applicable economic regulation, which Plaintiffs attack, are not content-based, do not single out the press, serve a governmental interest stated in Section 1 of AB 5 that is unrelated to the suppression of speech, and Plaintiffs have not made any allegations that the law was adopted to favor or disfavor any message. *See* Dkt. # 44; *see generally* Compl.; AB 5. Plaintiffs' allegations in the complaint rest entirely on the assertion that the 35-submission limit and videography exception are content-based distinctions on the face of the law and single out journalistic speech, thus unconstitutionally burdening speech. *See* Compl. ¶¶ 73–90. The Court has rejected these arguments. *See* Dkt. # 44. The

Court concludes that Plaintiffs have not alleged viable claims.

Accordingly, the Court GRANTS Defendant's motion to dismiss the complaint in its entirety.

IV. Leave to Amend

Whether to grant leave to amend rests in the sound discretion of the trial court. *See Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). Courts consider whether leave to amend would cause undue delay or prejudice to the opposing party, and whether granting leave to amend would be futile. *See Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir. 1996). Generally, dismissal without leave to amend is improper "unless it is clear that the complaint could not be saved by any amendment." *Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir. 2003).

Here, the Court has concluded that Plaintiffs' claims are insufficient. However, at this early stage of the proceedings, the Court is not convinced that any amendment would necessarily be futile. Accordingly, the Court **GRANTS** leave to amend.

V. Conclusion

For the foregoing reasons, the Court **GRANTS** Defendant's motion to dismiss, and **GRANTS** Plaintiffs leave to amend.

Plaintiffs may file an amended complaint consistent with this order no later than **April 17,**

2020. Failure to file an amended complaint by that date will result in dismissal of Plaintiffs' claims with prejudice.

IT IS SO ORDERED.

Appendix D-1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	CV 19-10645 PSG (KSx)
Date	March 20, 2020
Title	American Society of Journalists and Authors, Inc., et al v. Xavier Becerra

Present: The Honorable Philip S. Gutierrez, United States District Judge

Deputy Clerk: Wendy Hernandez
Court Reporter: Not Reported
Attorneys Present for Plaintiff(s): Not Present
Attorneys Present for Defendant(s): Not Present

Proceedings (In Chambers):
The Court DENIES the motion for preliminary injunction

Before the Court is Plaintiffs American Society of Journalists and Authors, Inc. ("ASJA")and National Press Photographers Association's ("NPPA") (collectively, "Plaintiffs") motion for preliminary injunction. *See* Dkt. # 12 ("Mot."). Defendant Xavier Becerra ("Defendant") opposes, *see* Dkt. # 36 ("Opp."), and Plaintiffs replied, *see* Dkt. # 38 ("Reply"). The Court held a hearing on the matter on March 11, 2020.

Having considered the moving, opposing, and reply papers and arguments made at the hearing, the Court **DENIES** the motion for a preliminary injunction.

Appendix D-2

I. Background

A. AB 5

This case challenges Assembly Bill 5 (AB 5), codified at Cal. Lab. Code §§ 2750.3 *et seq.*, a California law pertaining to the classification of employees and independent contractors. In 2018, the California Supreme Court in *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903, 916 (2018), held that courts should apply a three-part test, the "ABC" test, to determine whether a worker is properly classified as an employee for certain purposes. The Court explained the test as follows:

> [U]nless the hiring entity establishes (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, the worker should be considered an employee and the hiring business an employer under the suffer or permit to work standard in wage orders. The hiring entity's failure to prove any one of these three prerequisites will be sufficient in itself to establish that the worker is an included employee, rather than an excluded

> independent contractor, for purposes of the wage order.

Id. at 964.[1] The distinction between employees and independent contractors is significant because employers have obligations to employees that are not afforded to independent contractors. *See id*. at 912. The Court explained the import of the employee/independent contractor distinction in the following way: "[w]age and hour statutes and wage orders were adopted in recognition of the fact that individual workers generally possess less bargaining power than a hiring business and that workers' fundamental need to earn income for their families' survival may lead them to accept work for substandard wages or working conditions. The basic objective of wage and hour legislation and wage orders is to ensure that such workers are provided at least the minimal wages and working conditions that are necessary to enable them to obtain a subsistence standard of living and to protect the workers' health and welfare." *Id*. at 952. These objectives supported "a very broad definition of the workers who fall within the reach of the wage orders." *Id*. Dynamex applied the ABC test to all employees and workers covered by California Industrial Wage Commission ("IWC") wage orders. *Id*. at 964.[2]

On September 18, 2019, the California Legislature codified the ABC test adopted in Dynamex by enacting AB 5, which applies the ABC test to the entire Labor Code, the Unemployment Insurance Code, and wage orders. *See* A.B. 5, Ch. 296, 2019–2020 Reg. Sess.(Cal. 2019) ("AB 5"); Cal. Lab. Code § 2750.3. The Legislature found that "[t]he misclassification of

workers as independent contractors has been a significant factor in the erosion of the middle class and the rise in income inequality," and AB 5's purpose was to ensure those workers "who are currently exploited by being misclassified as independent contractors," have basic rights and protections, and cited benefits to the state and other employers of proper classification. AB 5 § 1. Under AB 5, the ABC test is the standard test for ascertaining whether a worker is an employee, however, the law creates certain exceptions for categories of workers that remain subject to the multi-factor "*Borello*" standard, under *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989). *See, e.g.*, Cal. Lab. Code § 2750.3(c)(1)–(2). As relevant here, AB 5 contains an exemption from the *Dynamex* test for "a contract for 'professional services.'" *See id.* § 2750.3(c)(1). This is defined to include, among a list of other professions, photographers or photojournalists or freelance writers, editors or newspaper cartoonists who do not license or provide content submissions to the putative employer more than 35 times per year, *id.* § 2750.3(c)(2)(B)(ix) & (x) ("35-submission limit"),and the exemption provided to photographers and photojournalists does not apply to "an individual who works on motion pictures," *id.* § 2750.3(c)(2)(B)(ix) ("videography exception" or "motion picture exception").

B. Plaintiffs and Alleged Burden of AB 5

ASJA is a 1,100-member non-profit association of independent non-fiction authors. *See Declaration of Randy Dotinga*, Dkt. # 23 ("*Dotinga Decl.*"), ¶ 2. The association was founded in 1948, and serves as a voice

and resource for freelance writers and book authors. *Id*.

NPPA was chartered in 1946, and is a leading professional organization for visual journalists. *Declaration of Michey H. Osterreicher*, Dkt. # 22 ("*Osterreicher Decl.*"), ¶ 9. Its membership includes news photographers from print, television, and electronic media. *Id*. NPPA has 536 members in California. *Id*.

Plaintiffs assert that reclassifying freelancers as employees will bring costs and disadvantages, including: added costs to pay unemployment taxes, workers' compensation taxes, state disability insurance, paid family leave, and sick leave. *Mot*. 10:19–23. Plaintiffs assert that the costs will make a freelancer's work "more expensive—and thus less attractive—to the employer." *Id*. 10:23–11:1. Declarations submitted by freelance journalists state that they will lose, and have lost, employment opportunities. *See Declaration of Jobeth McDaniel Clark*, Dkt. # 25 ("*Clark Decl*."), ¶ 20 ("AB 5 is already harming me and my colleagues as employers blacklist California workers rather than face harsh penalties, additional costs and taxes, and widespread uncertainty about the law."); *Osterreicher Decl*. ¶ 16; *Dotinga Decl*. ¶ 14

Additionally, freelancers categorized as employees will "lose ownership of the copyright to their creative work and control of their workload." *Mot*. 11:7–11. In general, under the Copyright Act, the copyright in a work created by an independent contractor photographer is owned by the creator, while the

copyright in a work created by an employee is owned by the employer. *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 750–51 (1989). Freelance photographers and journalists' declarations attest that control over copyright work is a significant benefit of freelance work, which can allow additional income. *See Clark Decl.* ¶ 9; *Dotinga Decl.* ¶ 10; *Osterreicher Decl.* ¶¶ 10–12; *Declaration of Brian Feulner*, Dkt. # 24 ("*Feulner Decl.*"), ¶ 11.

Another concern is control over workload; freelance photographers and journalists describe this control as the reason they choose to work independently. *See Clark Decl.* ¶¶11–12, 25; *Dotinga Decl.* ¶¶ 7–9, 12; *Feulner Decl.* ¶¶ 4, 7–8; *Osterreicher Decl.* ¶ 15; *Declaration of Spencer Grant*, Dkt. # 26 ("*Grant Decl.*"), ¶¶ 6–7, 10. This flexibility includes the ability to deduct business expenses on their federal taxes, *see Clark Decl.* ¶ 10, *Dotinga Decl.* ¶¶ 4, 11, and maintain benefits like healthcare and retirement accounts, regardless of the number of publishers they produce content for or the frequency and quantity of their work, *see Dotinga Decl.* ¶¶ 4, 11, *Feulner Decl.* ¶ 10.

C. Procedural Background

On December 17, 2019, Plaintiffs filed this lawsuit, alleging that the 35-submission limit and videography exception that apply to specific exemptions in AB 5 violate their members' constitutional rights. *See generally Complaint*, Dkt. #1 ("*Compl.*"). Plaintiffs seek declaratory and injunctive relief, and an award of attorneys' fees and costs. *See id.* at 15–16. Plaintiffs

sued Defendant in his role as Attorney General of California. *See id.* ¶ 16.

Plaintiffs now move for a preliminary injunction. *See generally Mot.* Specifically, Plaintiffs request that the Court preliminarily enjoin AB 5's 35-submission limit and videography exception. *See Reply* 2:10–14.

II. Legal Standard

A preliminary injunction is an "extraordinary and drastic remedy." *Munaf v. Geren*, 553 U.S. 674, 689 (2008) (quotation marks and citation omitted); *see also Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24 (2008). A party seeking a preliminary injunction must demonstrate each of the following elements: (1) a likelihood of success on the merits, (2) a likelihood of irreparable injury to the plaintiff if injunctive relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) an advancement of the public interest. *See Winter*, 555 U.S. at 20, 22. A preliminary injunction may also be appropriate "when a plaintiff demonstrates that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor," so long as the other *Winter* factors are met. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–32 (9th Cir. 2011) (citation and modification omitted) (allowing for a post-*Winter* "sliding scale" analysis in preliminary injunction inquiries where "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another").[3]

III. Discussion

The Court addresses each of the *Winter* factors in turn.

A. Likelihood of Success on the Merits

Plaintiffs' complaint contains four claims against Defendants for violations of the U.S. Constitution's Fourteenth Amendment Equal Protection Clause and First Amendment based on two challenged provisions of AB 5: Cal. Labor Code §§ 2750.3(c)(2)(B)(ix)[4] & 2750.3(c)(2)(B)(x)[5]. *See generally Compl.* The Court turns first to Plaintiffs' Equal Protection Clause claims and then to the First Amendment claims.

i. Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1; *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); *Shakur v. Schriro*, 514 F.3d 878, 891 (9th Cir. 2008). This is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne*, 473 U.S. at 439. "As a general rule, legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." *Nordlinger v. Hahn*, 505 U.S. 1, 10(1992) (citing *McGowan v. Maryland*, 366 U.S. 420, 425–26 (1961)). "Accordingly, [the Supreme] Court's cases are clear that, unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal

Protection Clause requires only that the classification rationally further a legitimate state interest." *Id.* (citations omitted).

"The first step in equal protection analysis is to identify the [defendant's asserted] classification of groups." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1166–67 (9th Cir. 2005) (citing *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995)) (internal quotations omitted). "The groups must be comprised of similarly situated persons so that the factor motivating the alleged discrimination can be identified." *Id.* "An equal protection claim will not lie by conflating all persons not injured into a preferred class receiving better treatment than the plaintiff." *Id.* (internal quotations omitted). "The groups need not be similar in all respects, but they must be similar in those respects relevant to the Defendants' policy." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1064 (9th Cir. 2014).

The "professional services" exemption in AB 5 exempts freelance writers, editors, newspaper cartoonists, still photographers, and photojournalists if they do not exceed the 35-submission limit; while the exemptions for services provided by graphic designers, grant writers, human resource administrators, and fine artists, for example, are not limited to 35 submissions. *See* Cal. Lab. Code § 2750.3(c)(2)(B)(i)–(xi). Second, the exemption for "still photographers and photojournalists" does not apply to "an individual who works on motion pictures," which is defined to include "projects produced for theatrical, television, internet streaming for any device, commercial productions, broadcast

news, music videos, and live shows, whether distributed live or recorded for later broadcast, regardless of the distribution platform." *Id.* § 2750.3(c)(2)(B)(ix) (emphasis added). This same limitation does not apply to the exemptions for other listed "professional services." *See id.* § 2750.3(c)(2)(B)(i)–(xi).

Plaintiffs argue that AB 5 draws distinctions which are arbitrary because the State has no basis to distinguish among freelancers, for example: "[f]reelance graphic artists can submit unlimited infographics to a newspaper; freelance photojournalists are capped at 35 submissions." *Mot.* 15:23–16:10. But the two groups, those professions that are subject to the limitations and those that are not, are not "similarly situated"; they are of different occupations. *See Opp.* 10. For example, grant writers and graphic designers may not necessarily publish a high volume of articles annually with the same publisher, as photographers, photojournalists, and freelance writers do. *See Opp.* 8:14–26; *Thornton*, 425 F.3d at 1166–67 ("Evidence of different treatment of unlike groups does not support an equal protection claim."). The differences between these occupations is directly relevant to AB 5, which seeks to properly classify workers. *See* AB 5 §1. However, even assuming the two groups are similarly situated, there need only be a rational basis for the distinctions, and AB 5 meets that standard.

Plaintiffs do not argue that AB 5 includes a suspect classification. Plaintiffs' only argument that heightened review applies is that AB 5 implicates fundamental rights, specifically, free speech rights under the First Amendment. *See Mot.* 14:12–24.

Plaintiffs argue that drawing arbitrary distinctions between speaking professionals renders the law presumptively unconstitutional. *See id.* 14:18–22 (citing *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 101 (1972); *Carey v. Brown*, 447 U.S. 455, 459–71 (1980)). Both of the cases Plaintiffs cite in support, however, involved statutes that prohibited certain types of picketing, and treated labor and nonlabor picketing differently for the purposes of the prohibition. *See Mosley*, 408 U.S. at 93–95; *Brown*, 447 U.S. at 459–71. Those cases directly prohibited speech, for instance, in *Mosley*, the Plaintiff would be arrested if he continued his speech activity of picketing. *See Mosley*, 408 U.S. at 93. Here, in contrast, AB 5 does not directly regulate or prohibit speech, but regulates the employment relationship. Moreover, as another court has explained, "[a]lthough the Court has on occasion applied strict scrutiny in examining equal protection challenges in cases involving First Amendment rights, it has done so only when a First Amendment analysis would itself have required such scrutiny." *Wagner v. Fed. Election Comm'n*, 793 F.3d 1, 32 (D.C. Cir. 2015). As discussed below, the Court concludes that a First Amendment analysis does not require heightened scrutiny. Accordingly, the Court concludes that AB 5 does not "categorize[] on the basis of an inherently suspect characteristic," nor does it "jeopardize[] the existence of a fundamental right," and thus it does not warrant heightened review. *See Nordlinger*, 505 U.S. at 10.

Under rational basis review, a statute bears "a strong presumption of validity," and "those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which

might support it.'" *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314–15 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). "Where there are 'plausible reasons' for [California's] action, 'our inquiry is at an end.'" *Id.* (citing *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980)). "In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger*, 505 U.S. at 11 (internal citations omitted). Moreover "the absence of 'legislative facts' explaining the distinction '[o]n the record,' has no significance in rational-basis analysis," and a "legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Commc'ns, Inc.*, 508 U.S. at 315 (internal citation omitted) (citing *Nordlinger*, 505 U.S. at 15); *see also Clements v. Fashing*, 457 U.S. 957, 963 (1982) ("Classifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them.").

There is a legitimate state interest here. Section 1 of AB 5 sets forth a statement of purpose: "[t]he misclassification of workers as independent contractors has been a significant factor in the erosion of the middle class and the rise in income inequality."

AB 5 § 1. The Legislature's stated intent in enacting AB 5 is:

> to ensure workers who are currently exploited by being misclassified as independent contractors instead of recognized as employees have the basic rights and protections they deserve under the law, including a minimum wage, workers' compensation if they are injured on the job, unemployment insurance, paid sick leave, and paid family leave. By codifying the California Supreme Court's landmark, unanimous *Dynamex* decision, this act restores these important protections to potentially several million workers who have been denied these basic workplace rights that all employees are entitled to under the law.

Id.

Defendant argues that there is a "plausible reason" for the distinctions in AB 5. As to the 35-submission limit, the "Legislature could have reasonably concluded that the former group [including marketers, graphic designers, grant writers, travel agents] does not perform the same type of work [as photographers, photojournalists, freelance writers, and editors], and that a 35-submission limit was not warranted for those occupations." *Opp*. 10:3–9. A 35-submission limit is "readily ascertainable" for photographers and journalists, but not for marketers and grant writers, for instance, and it "is rational to

infer that photographers, photojournalists, and freelance writers who submit more than 35 items per year to a single publisher are more like employees than those who submit . . . fewer," and thus to exempt them "would contribute to the systemic harm associated with misclassification." *Id.* 10:11–20. The Court agrees that it would be rational to determine that the nature of the employment relationship in certain industries, including for photographers and editors, would more readily resemble employees if their submission number to a certain employer was high; it is rational that that same measure may not apply to, for instance, a grant writer. There are material differences between these occupations bearing on whether a submission limit makes sense for employment classification purposes. *See Allied Concrete & Supply Co. v. Baker*, 904 F.3d 1053, 1058, 1062 (9th Cir. 2018) (rejecting equal protection challenge to state statute that extended prevailing wage law to delivery drivers of ready-mix concrete, and concluding the district court wrongly disregarded certain differences between ready-mix drivers and other drivers that the legislature could have relied on); *see also Dandridge v. Williams*, 397 U.S. 471, 485 (1970) ("The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific."). The same is true for the distinction between the exemption for photographers and photojournalists which is subject to the motion picture industry exception, and the other exemptions, like grant writers, which are not. It is not clear how the motion picture industry exception would necessarily apply to other occupational exemptions. *See* Cal. Lab. Code §2750.3(c)(2)(B)(i)–(xi).

Courts have concluded that economic regulations that distinguish based on industry are not necessarily irrational, and that the State must be given "leeway to approach a perceived problem incrementally." *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1155–56 (9th Cir. 2004) (rejecting an equal protection challenge to a living wage city ordinance that targeted only employers of a certain size within a certain zone of the City of Berkeley, and concluding it was "certainly rational . . . for the City to treat Marina businesses differently from their competitors outside the Marina"). For instance, in *Fortuna Enterprises, L.P. v. City of Los Angeles*, the court concluded that an ordinance requiring only hotels within a zone of a certain airport to pay a living wage did not violate the equal protection clause, refusing to examine the legislative purposes and explaining "it makes no difference that the Ordinance here only targets hotels in a certain area of the City near the airport, as the Ninth Circuit has said that legislative bodies must be able to approach problems, such as depressed wages, 'incrementally,'" and that exceptions for workers party to a collective bargaining agreement "could rationally arise from the expectation that unionized workers are better able to protect their interests with regard to wages than non-unionized workers." 673 F. Supp. 2d 1000, 1014 (C.D. Cal. 2008); *see also Woodfin Suite Hotels, LLC v. City of Emeryville*, No. C 06-1254 SBA, 2006 WL 2739309, at *21 (N.D. Cal. Aug. 23, 2006) (holding that wage ordinance applicable to large hotels but not other large businesses meets rational basis scrutiny). Here, statutory differences between the exemptions could rationally be related to characteristics of the differing industries and worker-

relationships in those industries, including differences in independence exerted, and the State's decision to attack a problem incrementally does not necessarily render the law irrational.

Thus, AB 5 is dissimilar from the law in *Merrifield v. Lockyer*, 547 F.3d 978, 988–89 (9th Cir. 2008), on which Plaintiffs rely for their contention that the law is arbitrary. *See Mot*. 14–16. In that case, the Ninth Circuit found no rational basis to require pest controllers dealing with mice, rats, or pigeons to obtain a license relating to pesticide use, while exempting similar pest controllers dealing with bats, raccoons, skunks, and squirrels from the licensing requirement, despite being more likely than the former group to encounter pesticides. *See Merrifield*, 547 F.3d at 988, 992. The Ninth Circuit pointed out that the government had "undercut its own rational basis for the licensing scheme by excluding [plaintiff] from the exemption." *Id*. at 992. As the Ninth Circuit has since explained, *Merrifield* involved a "unique set of facts," where the challenged legislative classification "actually contradict[ed]" the purposes of the statute, or otherwise suggested "improper favoritism." *Allied Concrete & Supply Co*., 904 F.3d at 1065–66. Here, in contrast, Plaintiffs have not shown that imposing a 35-submission limit on some occupational exemptions contradicts the State's interest in proper classification, or otherwise suggests favoritism. The same is true for the motion picture industry exception.

Plaintiffs have failed to carry their burden "to negative every conceivable basis which might support" AB 5. *Beach Commc'ns, Inc.*, 508 U.S. at 315.

Plaintiffs have not explained why the 35-submission limit and motion picture industry exception as applied to some workers might not be a rational means of distinguishing what test should be applied to determine who is an "employee" and who an "independent contractor," based on the various characteristics of the industry or profession. The Court cannot conclude that the distinctions made are wholly arbitrary, lacking any plausible basis.[6] *See Clements*, 457 U.S. at 963; *see also Olson v. California*, No. CV 19-10956-DMG (RAOx), 2020 WL 905572, at *1, 9 (C.D. Cal. Feb. 10, 2020).

ii. First Amendment

Plaintiffs argue that AB 5 limits the definition of "professional services" based on content of speech, triggering First Amendment protection and requiring strict scrutiny. *See Mot.* 18–21. If a law "imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2231 (2015); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."). By contrast, "regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny." *Turner*, 512 U.S. at 642. "[R]estrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct . . . [T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Int'l Franchise Ass'n,*

Inc. v. City of Seattle, 803 F.3d 389, 408 (9th Cir. 2015) (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011)). The question is whether conduct with a "significant expressive element" drew the legal remedy or the statute has the "inevitable effect of singling out those engaged inexpressive activity." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706–07 (1986). "[G]enerally applicable economic regulations affecting rather than targeting news publications" pass constitutional muster. *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 896 (9th Cir. 2018) (generally applicable wage law targeting employer use of employee wages regulated conduct and was not subject to First Amendment scrutiny).

Here, AB 5 applies a particular test to determine if a worker is considered an "employee" as opposed to an "independent contractor," to the Labor Code, the Unemployment Insurance Code, and wage orders. *See* AB 5. It is thus directed at economic activity generally—the employee-employer relationship—it does not directly regulate or prohibit speech. However, according to Plaintiffs, AB 5 imposes a burden on protected First Amendment activities, and thus requires First Amendment scrutiny.

The Court turns first to whether the challenged provisions of AB 5 are content-based or content-neutral, and then applies the appropriate level of scrutiny.

a. Content-Neutral or Content-Based

"As a general rule, laws that by their terms distinguish favored speech from disfavored speech on

the basis of the ideas or views expressed are content based." *Turner*, 512 U.S. at 643. A law is content-based if it "target[s] speech based on its communicative content," or "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2226–27. On the other hand, "laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral." *Turner*, 512 U.S. at 643. "The purpose, or justification, of a regulation will often be evident on its face." *Id*. at 642. The first step is to "consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Recycle for Change v. City of Oakland*, 856 F.3d 666, 670 (9th Cir. 2017) (quoting *Reed*, 135 S. Ct. at 2227–28). Strict scrutiny is also applied if the law is facially neutral but "cannot be 'justified without reference to the content of the regulated speech,' or [was] adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Id*. (quoting *Reed*, 135 S. Ct. at 2227).

1. 35-Submission Limit

Plaintiffs explain that "[t]he only 'professional services' subject to AB 5's 35-submission limit are freelance writers, editors, newspaper cartoonists, still photographers, and photojournalists." *Reply* 1:24–26. They argue that this imposes a burden on speech because"[t]he ability to freelance rises or falls based on whether expression is deemed marketing or editorial, graphic design or photography, grant writing or news reporting." *See Mot*. 19:12–15. But, as Defendant argues, AB 5 does not reference any idea,

subject matter, viewpoint or substance of any speech; the distinction is based on if the individual providing the service in the contract is a member of a certain occupational classification. *See* Cal. Lab. Code § 2750.3(c)(2)(B)(i)–(xi); *Opp*. 12.

Defendant argues that the exemption is "speaker-based" not content-based. *See Opp*. 13. In *G.K. Ltd. Travel v. City of Lake Oswego*, the Ninth Circuit held that a sign ordinance was not content-based because it categorized by speaker: "officers decide whether an exemption applies by identifying the entity speaking through the sign without regard for the actual substance of the message." 436 F.3d 1064, 1078 (9th Cir. 2006). However, the Supreme Court has since clarified that "the fact that a distinction is speaker based does not, as the Court of Appeals seemed to believe, automatically render the distinction content neutral. Because '[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content,' we have insisted that 'laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference' . . . [c]haracterizing a distinction as speaker based is only the beginning—not the end—of the inquiry." *Reed*, 135 S. Ct. at 2230 (quoting *Turner*, 512 U.S. at 658) (internal citations omitted) (emphasis added). For instance, in *Turner*, the Court was considering "must-carry" provisions requiring cable television systems to devote a portion of their channels to transmitting local broadcast television stations. 512 U.S. at 626. The Court acknowledged that these "must-carry" provisions "distinguish[ed]between speakers in the television programming market," favoring broadcast

programmers over cable programmers. *Id*. at 645, 657. But, the Court explained, "they do so based only upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry: Broadcasters, which transmit over the airwaves, are favored, while cable programmers, which do not, are disfavored." *Id*. at 645. "So long as they are not a subtle means of exercising a content preference, speaker distinctions of this nature," otherwise content-neutral, are not subject to strict scrutiny. *Id*.; *see also Doe v. Harris*, 772 F.3d 563, 575 (9th Cir. 2014).

The Court agrees that the challenged provisions in AB 5 are based on distinctions between speakers. AB 5 makes distinct exemptions from the ABC test for those "contract[s]" for "professional services," services including those by a "grant writer," "administrator of human resources," "fine artist," or "still photographer," regardless of whether the message is about politics or sports. *See* Cal. Lab. Code § 2750.3(c)(1)–(2). The relevant question is thus whether the speaker-based distinction "reflect[s] a content preference." *See Reed*, 135 S. Ct. at 2230; *Citizens for Free Speech v. Cty. of Alameda*, 194 F. Supp. 3d 968, 983–85 (N.D. Cal. 2016).

There is no indication that AB 5 reflects preference for the substance or content of what certain speakers have to say, or aversion to what other speakers have to say. *See Turner*, 512 U.S. at 658–59; cf. *Sorrell*, 564 U.S. at 564 (law prohibiting pharmacies and other regulated entities from selling or disseminating prescriber-identifying information for marketing, while allowing it for educational communications, "disfavor[ed] marketing," and thus "on its face

burden[e]d disfavored speech by disfavored speakers"). The justification for these distinctions isproper categorization of an employment relationship, unrelated to the content of speech. *See* AB5 § 1; *cf. Citizens for Free Speech*, 194 F. Supp. 3d at 984 (preference for official public signs justified based on importance of government information). Defendant has identified a governmental interest in proper classification of employees and independent contractors across industries, and in ensuring that employees receive all applicable protections under labor laws. *See* AB 5 § 1; *Dynamex*, 4 Cal. 5th at 912–13 (describing consequences of employee status). This interest is "unrelated to the suppression of free expression." *Turner*, 512 U.S. at 662. Defendant argues that "[i]t is rational to infer that photographers, photojournalists, and freelance writers who submit more than 35 items per year to a single publisher are more like employees than those who submit 35 items or fewer . . . and to exempt them would contribute to the systemic harm associated with misclassification," and this same measure may not be as readily ascertainable for other occupations, such as grant writers. *Opp*. 10:15–18. Placing a 35-submission limit on certain professions serves the State's interest of protecting its workforce by preventing misclassification of certain professionals as independent contractors when they resemble employees, and is unrelated to the content of the expression they produce. The same is true for the videography provision. AB 5 was not written in a way that suggests a motive to target certain content by targeting speakers, and Plaintiffs have pointed to none. There is no indication that AB 5 "cannot be justified without reference to the content of the

regulated speech," nor is there any indication or argument by Plaintiffs that it was adopted because of disagreement with the message of the speech. *See generally Mot.*; *Recycle for Change*, 856 F.3d at 670; *Reed*, 135 S. Ct. at 2226–27. Accordingly, the Court concludes these provisions are content-neutral.

2. Videography or Motion Picture Industry Exception

Plaintiffs make a separate argument that the videography or motion picture industry exception is subject to strict scrutiny because it differentially impacts medium. *See Mot.* 20–21. Plaintiffs state: "only photographers and photojournalists are specifically excluded from the definition of 'professional services' if they shoot video." *Reply* 1:26–28. Plaintiffs rely on *City of Cincinnati v. Discovery Network, Inc.*, in which the Court rejected the argument that commercial speech has "low value," and thus that the city could enact a "categorical ban on commercial newsracks," but permit other newsracks containing noncommercial handbills. 507 U.S. 410, 418, 420 (1993); *see also Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 64–69 (1983) (holding a federal statute that prohibited the mailing of unsolicited advertisements for contraceptives could not be applied to the appellee's promotional materials). Plaintiffs argue that here, like Discovery Network and Bolger, AB 5 "denies access to video for freelancers" who fall within the exemption; but those cases found First Amendment problems with regulations that prohibited the use of newsracks or the mail based on the "content of the publication." *See Discovery Network, Inc.*, 507 U.S. at 418; *Bolger*, 463 U.S. at 64. By contrast, here, no speech is prohibited,

and the exclusion from the *Borrello* test for individuals that "work[] on motionpictures" and similar projects does not hinge on the content of a message, but, as discussed above, is based on the occupation or industry of the individual providing the service. *See* Cal. Lab. Code § 2750.3(c)(2)(B)(ix); *Recycle for Change*, 856 F.3d at 670 ("A content-based law is one that targets speech based on its communicative content or applies to particular speechbecause of the topic discussed or the idea or message expressed."); *Honolulu Weekly, Inc. v. Harris*, 298 F.3d 1037, 1044 n.7 (9th Cir. 2002) ("Because Honolulu Weekly was still free to distribute its paper, its reliance on [*Discovery Network*] is misplaced."). In addition, the Supreme Court has explained that "[i]t would be error to conclude, however, that the First Amendment mandates strict scrutiny for any speech regulation that applies to one medium (or a subset thereof) but not others." *Turner*, 512 U.S. at 660–61. "The fact that a law singles out a certain medium, or even the press as a whole, 'is insufficient by itself to raise First Amendment concerns.'" *Id*. The Court is again not convinced that Plaintiffs' argument regarding a medium-based distinction warrants strict scrutiny.

3. Whether AB 5 Singles Out the Press

Finally, Plaintiffs argue that AB 5 "single[s] out the press," and therefore requires strict scrutiny. *Mot.* 17–18. In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue* the Supreme Court held that a law may not "single out the press," however, the Court made clear that "the States and the Federal Government can subject newspapers to

generally applicable regulations without creating constitutional problems." 460 U.S. 575, 581 (1983). The Court explained that in contrast to a "generally applicable economic regulation," the challenged special use tax on ink and paper used in publications singled out the press. *Id.* at 581–83. Additionally, the tax targeted a small group of newspapers, which was due to the fact that the first $100,000 of paper and ink were exempt from the tax, the tax thus "single[d] out a few members of the press" for special treatment: the largest newspapers. *Id.* at 591. Similarly, in *Arkansas Writers' Project, Inc. v. Ragland*, the Supreme Court struck down a tax exemption which differentiated between magazines based on the content of those magazines: if articles in a magazine were "devoted to religion or sports" the magazine would be exempt. 81 U.S. 221, 229–31 (1987). As the Court has since explained, those cases "targeted a small number of speakers, and thus threatened to 'distort the market for ideas,'" and "[a]lthough there was no evidence that an illicit governmental motive was behind either of the taxes, both were structured in a manner that raised suspicions that their objective was, in fact, the suppression of certain ideas." *Turner*, 512 U.S. at 660–61; *see also Koala v. Khosla*, 931 F.3d 887, 896–97 (9th Cir. 2019) ("[I]t is sufficient to show the government acted with the intent to burden the press in order to plead a viable Free Press Clause claim, but it is not necessary to show invidious intent; where differential taxation of the press burdens the special interests protected by the First Amendment, it is presumptively unconstitutional.").

At first glance, there is some resemblance to *Minneapolis Star* here, where AB 5 differentially

affects enumerated professions, which are part of the press. *See Minneapolis Star & Tribune Co.*, 460 U.S. at 581. However, the 35-submission limit is just one of many rules governing applicability of the ABC test to particular workers,[7] it does not uniquely single out the press in that it applies a unique burden, such as a special tax, on the press. Unlike *Minneapolis Star*, AB 5, which includes numerous statutory requirements, exemptions, and exceptions to determine which test applies for determination of employment status, does not uniquely burden the press to the exclusion of others, nor is there any differentiation among publications based on content, as in *Arkansas Writers' Project*. *See Minneapolis Star & Tribune Co.*, 460 U.S. at 581; *Arkansas Writers' Project, Inc.*, 481 U.S. at 229–31. Plaintiffs have pointed to nothing in the structure of AB 5 that indicates an intent to uniquely burden the press or particular ideas.

In sum, the Court concludes that the challenged exemptions in AB 5 are not content-based nor otherwise require heightened scrutiny.

b. Review

Defendant argues that because AB 5 is a generally applicable labor law, which is content-neutral, serves important governmental interests unrelated to the suppression of speech, and there is no evidence that it was adopted to favor or disfavor any message conveyed, a First Amendment challenge fails. *See Opp.* 15:25–16:10. But even if intermediate scrutiny applies, Plaintiffs have not demonstrated a likelihood of success on the merits.

A "content-neutral regulation will be sustained if 'it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'" *Turner*, 512 U.S. at 662 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). The requirement is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). "'Narrow tailoring' does not require the government to adopt the 'least restrictive or least intrusive means of serving the statutory goal' when the regulation does not completely foreclose any means of communication." *Honolulu Weekly, Inc.*, 298 F.3d at 1045 (quoting *Hill v. Colorado*, 530 U.S. 703, 726 (2000)).

Defendant explains the governmental interest in the law as follows:

The Legislature found that "[t]he misclassification of workers as independent contractors has been a significant factor in the erosion of the middle class and the rise in income inequality." AB 5 § 1(c). In enacting AB 5, the Legislature intended "to ensure workers who are currently exploited by being misclassified as independent contractors instead of recognized as employees have the basic rights and protections they deserve under the law," including minimum wage, workers' compensation, unemployment insurance, paid sick leave, and paid family leave. *Id.* § 1(e) . . . By adopting the ABC test, AB 5 "restores these important

protections to potentially several million workers who have been denied these basic workplace rights that all employees are entitled to under the law." AB 5 § 1(e). *Opp*. 3:7–25. Defendant explains that the exemptions were created "for certain occupations and industries, where the Legislature felt the ABC test was not a good fit." *Id*. 4:5–7. The Legislature "considered various factors in deciding these exemptions," including whether an individual holds a professional license, whether "the worker is truly free from direction or control of the hiring entity (for example, workers providing hairstyling and barbering services who have their own set of clients and set their own rates)," or whether "they perform 'professional services,' as a sole proprietor or other business entity and meet specific indicia of status as independent businesses." *Id*. 4:7–22. The purpose was to "identify the hallmarks of true independent contractors" for the purpose of exemption from the ABC test. *Id*. 4:18–19.

The Court concludes that Defendant will likely satisfy its burden here. As discussed, Defendant has identified an important or substantial governmental interest in correcting misclassification of employees and independent contractors, and in ensuring that employees receive all applicable protections under labor laws, and the Court has concluded that that interest can be justified without reference to the content of expression and is unrelated to the suppression of free expression. Finally, Defendant will likely prevail in demonstrating that the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the State's interest in proper classification for purposes of labor law protections.

Although a different submission limit may also have accomplished the State's goal, the State had a basis to require less than 35 submissions to be categorized under the *Dynamex* test for certain occupations, to achieve its aim of proper classification. Plaintiffs have provided the Court with no basis to conclude that the 35-submission limit is overly broad and that it unnecessarily burdens speech, nor have they done so for the videography exception. *See generally Mot*.

iii. Conclusion

The Court concludes that Plaintiffs have not demonstrated a likelihood of success on the merits or serious questions going to the merits on their Equal Protection and First Amendment claims.

B. Likelihood of Irreparable Injury

"[P]laintiffs seeking preliminary relief [must] demonstrate that irreparable injury is likely in the absence of an injunction," not merely that it is possible. *Arc of California v. Douglas*, 757 F.3d 975, 990 (9th Cir. 2014) (quoting *Winter*, 555 U.S. at 22). Plaintiffs argue that because they "raise substantial constitutional claims, no further showing of irreparable injury is necessary." *See Mot.* 22:7–8.

An "alleged constitutional infringement will often alone constitute irreparable harm." *Associated Gen. Contractors of California, Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991) (citing *Goldie's Bookstore v. Superior Ct.*, 739 F.2d 466, 472 (9th Cir. 1984)). However, where a constitutional claim is "too tenuous," such a presumption is not

warranted. *See id*. Here, the Court has already concluded that Plaintiffs are not likely to succeed on the merits of their constitutional claims, and thus the presumption of irreparable harm is "too tenuous." *See id*. Plaintiffs have not briefed any other basis on which to conclude that they would suffer irreparable harm absent an injunction. *See Mot*. 21–22; *Reply* 8–11.

C. Balance of Hardships and Advancement of the Public Interest

When the government is a party, the "last two factors merge." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). To qualify for injunctive relief, the plaintiffs must establish that "the balance of equities tips in [their] favor." *Winter*, 555 U.S. at 20. "In assessing whether the plaintiffs have met this burden, the district court has a 'duty . . . to balance the interests of all parties and weigh the damage to each.'" *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (quoting *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1203 (9th Cir. 1980)).

Plaintiffs' only arguments regarding these factors are derivative of their arguments on the merits. *See Mot*. 22:14–23:14. The Court has already determined that Plaintiffs are unlikely to succeed on the merits of their claims. Defendant has provided reasons for why the balance of hardships and the public interest tip in its favor. *Opp*. 18:6–9 (arguing that enjoining the State's enforcement of AB 5 would "further delay the State's ability to effectively address the misclassification of workers and the public consequences of such misclassification, which the

Legislature concluded warranted remediation"); AB 5 § 1; *see also Olson*, 2020 WL 905572, at*15. While the Court passes no judgment on the desirability or wisdom of AB 5, Defendant has presented a reasoned basis for concluding the legislation, which was fully considered by the Legislature, would promote the public interest. *See Opp*. 19:1–4; *Golden Gate Rest. Ass'n v. City & Cty. of San Francisco*, 512 F.3d 1112, 1127 (9th Cir. 2008) ("The public interest may be declared in the form of a statute.") (quoting 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948.4, at 207 (2d ed. 1995)). Considering the impact of an injunction on the State's ability to properly classify and provide protection of the labor laws to those that it determined should properly be classified as employees, the Court concludes that these two factors weigh in favor of Defendant.

D. Summation

The Court concludes that Plaintiffs have not shown serious questions going to the merits, the critical factor. And, because Plaintiffs' arguments with regard to the final three *Winter* factors are derivative of their merits arguments, they have also failed to demonstrate likelihood of irreparable harm, that the balance of hardships tips in their favor, and advancement of the public interest. Accordingly, the *Winter* factors weigh against granting Plaintiffs' preliminary injunction.

IV. Conclusion

For the foregoing reasons, the Court **DENIES** Plaintiffs' motion for a preliminary injunction.

IT IS SO ORDERED.

Appendix E-1

FILED

NOV 23 2021

MOLLY C. DWYER, CLERK

U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

ROB BONTA, Attorney General of the State of California,

Defendant-Appellee.

No.20-55734

D.C. No.

2:19-cv-10645-PSG-KS
Central District of California, Los Angeles

ORDER

Before: CALLAHAN and FORREST, Circuit Judges, and SEEBORG, *District Judge.

Judge Callahan and Judge Forrest have voted to deny the petition for rehearing en banc, and Judge Seeborg so recommends. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the

matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is denied. Appellants' motion for an extension of time to file petition for rehearing (Dkt. No. 51) is denied as moot.

*The Honorable Richard Seeborg, Chief United States District Judge for the Northern District of California, sitting by designation.

Appendix F-1

West's Annotated California Codes
Labor Code (Refs & Annos)
Division 3. Employment Relations
Chapter 2. Employer and Employee
Article 1.5. Worker Status: Employees (Refs & Annos)

§ 2775. Determination of status as employee or independent contractor; conditions; court decisions

Effective: September 4, 2020
Currentness

(a) As used in this article:

(1) "*Dynamex*" means *Dynamex Operations W. Inc. v. Superior Court* (2018) 4 Cal. 5th 903.

(2) "*Borello*" means the California Supreme Court's decision in *S. G. Borello & Sons, Inc. v. Department of lndustrial Relations* (1989) 48 Cal. 3d 341.

(b)(l) For purposes of this code and the Unemployment Insurance Code, and for the purposes of wage orders of the Industrial Welfare Commission, a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied:

(A) The person 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) The person performs work that is outside the usual course of the hiring entity's business.

(C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

(2) Notwithstanding paragraph (1), any exceptions to the terms "employee," "employer," "employ," or "independent contractor," and any extensions of employer status or liability, that are expressly made by a provision of this code, the Unemployment Insurance Code, or in an applicable order of the Industrial Welfare Commission, including, but not limited to, the definition of "employee" in subdivision 2(E) of Wage Order No. 2, shall remain in effect for the purposes set forth therein.

(3) If a court of law rules that the three-part test in paragraph (1) cannot be applied to a particular context based on grounds other than an express exception to employment status as provided under paragraph (2), then the determination of employee or independent contractor status in that context shall instead be governed by the California Supreme Court's decision in *S. G. Borello & Sons, Inc. v. Department of lndustrial Relations* (1989) 48 Cal.3d 341 (*Borello*).

Credits (Added by Stats. 2020, c. 38 (A.B.2257), § 2, eff. Sept. 4, 2020.)
Notes of Decisions (20)

Appendix F-3

West's Ann. Cal. Labor Code § 2775, CA LABOR § 2775
Current with urgency legislation through Ch. 1 of 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document

West's Annotated California Codes
Labor Code (Refs & Annos)
Division 3. Employment Relations
Chapter 2. Employer and Employee
Article 1.5. Worker Status: Employees (Refs & Annos)

§ 2776. Determination of status as employee or independent contractor; business contract relationship; conditions

Effective: September 4, 2020

Currentness

Section 2775 and the holding in Dynamex do not apply to a bona fide business-to-business contracting relationship, as defined below, under the following conditions:

(a) If an individual acting as a sole proprietor, or a business entity formed as a partnership, limited liability company, limited liability partnership, or corporation ("business service provider") contracts to provide services to another such business or to a public agency or quasi-public corporation ("contracting business"), the determination of

employee or independent contractor status of the business services provider shall be governed by *Borello*, if the contracting business demonstrates that all of the following criteria are satisfied:

(1) The business service provider is free from the control and direction of the contracting business entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

(2) The business service provider is providing services directly to the contracting business rather than to customers of the contracting business. This subparagraph does not apply if the business service provider's employees are solely performing the services under the contract under the name of the business service provider and the business service provider regularly contracts with other businesses.

(3) The contract with the business service provider is in writing and specifies the payment amount, including any applicable rate of pay, for services to be performed, as well as the due date of payment for such services.

(4) If the work is performed in a jurisdiction that requires the business service provider to have a business license or business tax registration, the business service provider has the required business license or business tax registration.

(5) The business service provider maintains a business location, which may include the business

service provider's residence, that is separate from the business or work location of the contracting business.

(6) The business service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed.

(7) The business service provider can contract with other businesses to provide the same or similar services and maintain a clientele without restrictions from the hiring entity.

(8) The business service provider advertises and holds itself out to the public as available to provide the same or similar services.

(9) Consistent with the nature of the work, the business service provider provides its own tools, vehicles, and equipment to perform the services, not including any proprietary materials that may be necessary to perform the services under the contract.

(10) The business service provider can negotiate its own rates.

(11) Consistent with the nature of the work, the business service provider can set its own hours and location of work.

(12) The business service provider is not performing the type of work for which a license from the Contractors' State License Board is required, pursuant to Chapter 9 (commencing with Section

7000) of Division 3 of the Business and Professions Code.

(b) When two bona fide businesses are contracting with one another under the conditions set forth in subdivision (a), the determination of whether an individual worker who is not acting as a sole proprietor or formed as a business entity, is an employee or independent contractor of the business service provider or contracting business is governed by Section 2775.

(c) This section does not alter or supersede any existing rights under Section 2810.3.

Credits
(Added by Stats. 2020, c. 38 (A.B.2257), § 2, eff. Sept. 4, 2020.)

West's Ann. Cal. Labor Code § 2776, CA LABOR § 2776 Current with urgency legislation through Ch. 1 of 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document

West's Annotated California Codes
Labor Code (Refs & Annos)
Division 3. Employment Relations
Chapter 2. Employer and Employee
Article 1.5. Worker Status: Employees (Refs & Annos)

Appendix F-7

§ 2777. Determination of status as employee or independent contractor; referral agencies; service providers

Effective: September 4, 2020 Currentness

Section 2775 and the holding in *Dynamex* do not apply to the relationship between a referral agency and a service provider, as defined below, under the following conditions:

(a) If an individual acting as a sole proprietor, or a business entity formed as a partnership, limited liability company, limited liability partnership, or corporation ("service provider") provides services to clients through a referral agency, the determination of whether the service provider is an employee or independent contractor of the referral agency shall be governed by *Borello*, if the referral agency demonstrates that all of the following criteria are satisfied:

(1) The service provider is free from the control and direction of the referral agency in connection with the performance of the work for the client, both as a matter of contract and in fact.

(2) If the work for the client is performed in a jurisdiction that requires the service provider to have a business license or business tax registration in order to provide the services under the contract, the service provider shall certify to the referral agency that they have the required business license or business tax registration. The referral agency shall keep the

certifications for a period of at least three years. As used in this paragraph:

(A) "Business license" includes a license, tax certificate, fee, or equivalent payment that is required or collected by a local jurisdiction annually, or on some other fixed cycle, as a condition of providing services in the local jurisdiction.

(B) "Local jurisdiction" means a city, county, or city and county, including charter cities.

(3) If the work for the client requires the service provider to hold a state contractor's license pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, the service provider has the required contractor's license.

(4) If there is an applicable professional licensure, permit, certification, or registration administered or recognized by the state available for the type of work being performed for the client, the service provider shall certify to the referral agency that they have the appropriate professional licensure, permit, certification, or registration. The referral agency shall keep the certifications for a period of at least three years.

(5) The service provider delivers services to the client under the service provider's name, without being required to deliver the services under the name of the referral agency.

(6) The service provider provides its own tools and supplies to perform the services.

(7) The service provider is customarily engaged, or was previously engaged, in an independently established business or trade of the same nature as, or related to, the work performed for the client.

(8) The referral agency does not restrict the service provider from maintaining a clientele and the service provider is free to seek work elsewhere, including through a competing referral agency.

(9) The service provider sets their own hours and terms of work or negotiates their hours and terms of work directly with the client.

(10) Without deduction by the referral agency, the service provider sets their own rates, negotiates their rates with the client through the referral agency, negotiates rates directly with the client, or is free to accept or reject rates set by the client.

(11) The service provider is free to accept or reject clients and contracts, without being penalized in any form by the referral agency. This paragraph does not apply if the service provider accepts a client or contract and then fails to fulfill any of its contractual obligations.

(b) For purposes of this section, the following definitions apply:

(1) “Client” means:

(A) A person who utilizes a referral agency to contract for services from a service provider, or

(B) A business that utilizes a referral agency to contract for services from a service provider that are otherwise not provided on a regular basis by employees at the client's business location, or to contract for services that are outside of the client's usual course of business. Notwithstanding subdivision (a), it is the responsibility of a business that utilizes a referral agency to contract for services, to meet the conditions outlined in this subparagraph.

(2)(A) "Referral agency" is a business that provides clients with referrals for service providers to provide services under a contract, with the exception of services in subparagraph (C).

(B) Under this paragraph, referrals for services shall include, but are not limited to, graphic design, web design, photography, tutoring, consulting, youth sports coaching, caddying, wedding or event planning, services provided by wedding and event vendors, minor home repair, moving, errands, furniture assembly, animal services, dog walking, dog grooming, picture hanging, pool cleaning, yard cleanup, and interpreting services.

(C) Under this paragraph, referrals for services do not include services provided in an industry designated by the Division of Occupational Safety and Health or the Department of Industrial Relations as a high hazard industry pursuant to subparagraph

(A) of paragraph (3) of subdivision (e) of Section 6401. 7 of the Labor Code or referrals for businesses that provide janitorial, delivery, courier, transportation,

trucking, agricultural labor, retail, logging, in-home care, or construction services other than minor home repair.

(3)(A) "Referral agency contract" is the agency's contract with clients and service providers governing the use of its intermediary services described in paragraph (2). The intermediary services provided to the service provider by the referral agency are limited to client referrals and other administrative services ancillary to the service provider's business operation.

(B) A referral agency's contract may include a fee or fees to be paid by the client for utilizing the referral agency. This fee shall not be deducted from the rate set or negotiated by the service provider as set forth in paragraph (10) of subdivision (a).

(4) "Service provider" means an individual acting as a sole proprietor or business entity that agrees to the referral agency's contract and uses the referral agency to connect with clients.

(5) "Tutor" means a person who develops and teaches their own curriculum, teaches curriculum that is proprietarily and privately developed, or provides private instruction or supplemental academic enrichment services by using their own teaching methodology or techniques. A "tutor" does not include an individual who contracts with a local education agency or private school through a referral agency for purposes of teaching students of a public or private school in a classroom setting.

(6)(A) "Youth sports coaching" means services provided by a youth sports coach who develops and implements their own curriculum, which may be subject to requirements of a youth sports league, for an athletic program in which youth who are 18 years of age or younger predominantly participate and that is organized for the purposes of training for and engaging in athletic activity and competition. "Youth sports coaching" does not mean services provided by an individual who contracts with a local education agency or private school through a referral agency for purposes of teaching students of a public or private school.

(7) "Interpreting services" means:

(A) Services provided by a certified or registered interpreter in a language with an available certification or registration through the Judicial Council of California, State Personnel Board, or any other agency or department in the State of California, or through a testing organization, agency, or educational institution approved or recognized by the state, or through the Registry of lnterpreters for the Deaf, Certification Commission for Healthcare Interpreters, National Board of Certification for Medical Interpreters, International Association of Conference Interpreters, United States Department of State, or the Administrative Office of the United States Courts.

(B) Services provided by an interpreter in a language without an available certification through the entities listed in subparagraph (A).

(8) "Consulting" means providing substantive insight, information, advice, opinions, or analysis that requires the exercise of discretion and independent judgment and is based on an individual's knowledge or expertise of a particular subject matter or field of study.

(9) "Animal services" means services related to daytime and nighttime pet care including pet boarding under Section 122380 of the Health and Safety Code.

(c) The determination of whether an individual worker is an employee of a service provider or whether an individual worker is an employee of a client is governed by Section 2775.

Credits
(Added by Stats. 2020, c. 38 (A.B.2257), § 2, eff. Sept. 4, 2020.)

Notes of Decisions (1)
West's Ann. Cal. Labor Code § 2777, CA LABOR § 2777 Current with urgency legislation through Ch. 1 of 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document

West's Annotated California Codes
Labor Code (Refs & Annos)
Division 3. Employment Relations
Chapter 2. Employer and Employee
Article 1.5. Worker Status: Employees (Refs & Annos)

§ 2778. Determination of status as employee or independent contractor; contracts for professional services; factors

Effective: January 1, 2022 Currentness

(a) Section 2775 and the holding in *Dynamex* do not apply to a contract for "professional services" as defined below, and instead the determination of whether the individual is an employee or independent contractor shall be governed by *Borello* if the hiring entity demonstrates that all of the following factors are satisfied:

(1) The individual maintains a business location, which may include the individual's residence, that is separate from the hiring entity. Nothing in this paragraph prohibits an individual from choosing to perform services at the location of the hiring entity.

(2) If work is performed more than six months after the effective date of this section and the work is performed in a jurisdiction that requires the individual to have a business license or business tax registration, the individual has the required business license or business tax registration in order to provide the services under the contract, in addition to any required professional licenses or permits for the individual to practice in their profession.

(3) The individual has the ability to set or negotiate their own rates for the services performed.

(4) Outside of project completion dates and reasonable business hours, the individual has the ability to set the individual's own hours.

(5) The individual is customarily engaged in the same type of work performed under contract with another hiring entity or holds themselves out to other potential customers as available to perform the same type of work.

(6) The individual customarily and regularly exercises discretion and independent judgment in the performance of the services.

(b) For purposes of this section:

(1) An "individual" includes an individual providing services as a sole proprietor or other business entity.

(2) "Professional services" means services that meet any of the following:

(A) Marketing, provided 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.

(B) Administrator of human resources, provided 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.

(C) Travel agent services provided by either of the following:

(i) A person regulated by the Attorney General under Article 2.6 (commencing with Section 17550) of Chapter 1 of Part 3 of Division 7 of the Business and Professions Code.

(ii) An individual who is a seller of travel within the meaning of subdivision (a) of Section 17550.1 of the Business and Professions Code and who is exempt from the registration under subdivision (g) of Section 17550.20 of the Business and Professions Code.

(D) Graphic design.

(E) Grant writer.

(F)(i) Fine artist.

(ii) For the purposes of this subparagraph, "fine 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.

(G) Services provided by an enrolled agent who is licensed by the United States Department of the Treasury to practice before the Internal Revenue Service pursuant to Part 10 of Subtitle A of Title 31 of the Code of Federal Regulations.

(H) Payment processing agent through an independent sales organization.

(I) Services provided by any of the following:

(i) By a still photographer, photojournalist, videographer, or photo editor who works under a written contract that specifies the rate of pay and obligation to pay by a defined time, as long as the individual providing the services is not directly replacing an employee who performed the same work at the same volume for the hiring entity; the individual does not primarily perform the work at the hiring entity's business location, notwithstanding paragraph (1) of subdivision (a); and the individual is not restricted from working for more than one hiring entity. This subclause is not applicable to a 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. Nothing in this section restricts a still photographer, photojournalist, photo editor, or videographer from distributing, licensing, or selling their work product to another business, except as prohibited under copyright laws or workplace collective bargaining agreements.

(ii) To a digital content aggregator by a still photographer, photojournalist, videographer, or photo editor.

(iii) For the purposes of this subparagraph the following definitions apply:

(I) "Photo editor" means an individual who performs services ancillary to the creation of digital content, such as retouching, editing, and keywording.

(II) "Digital content aggregator" means a licensing intermediary that obtains a license or assignment of copyright from a still photographer, photojournalist, videographer, or photo editor for the purposes of distributing that copyright by way of sublicense or assignment, to the intermediary's third-party end users.

(J) Services provided by a freelance writer, translator, editor, copy editor, illustrator, or newspaper cartoonist who works under a written contract that specifies the rate of pay, intellectual property rights, and obligation to pay by a defined time, as long as the individual providing the services is not directly replacing an employee who performed the same work at the same volume for the hiring entity; the individual does not primarily perform the work at the hiring entity's business location, notwithstanding paragraph (1) of subdivision (a); and the individual is not restricted from working for more than one hiring entity.

(K) Services provided by an individual as a 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, who works under a written contract that specifies the rate of pay, intellectual property rights and obligation to pay by a defined time, as long as the individual providing the services is not directly

replacing an employee who performed the same work at the same volume for the hiring entity, the individual does not primarily perform the work at the hiring entity's business location notwithstanding paragraph (1) of subdivision (a); and the individual is not restricted from working for more than one hiring entity.

(L) Services provided by a licensed esthetician, licensed electrologist, licensed manicurist, licensed barber, or licensed cosmetologist provided that the individual:

(i) Sets their own rates, processes their own payments, and is paid directly by clients.

(ii) Sets their own hours of work and has sole discretion to decide the number of clients and which clients for whom they will provide services.

(iii) Has their own book of business and schedules their own appointments.

(iv) Maintains their own business license for the services offered to clients.

(v) If the individual is performing services at the location of the hiring entity, then the individual issues a Form 1099 to the salon or business owner from which they rent their business space.

(vi) This subparagraph shall become inoperative, with respect to licensed manicurists, on January 1, 2025.

(M) A specialized performer hired by a performing arts company or organization to teach a master class for no more than one week. "Master class" means a specialized course for limited duration that is not regularly offered by the hiring entity and is taught by an expert in a recognized field of artistic endeavor who does not work for the hiring entity to teach on a regular basis.

(N) Services provided by an appraiser, as defined in Part 3 (commencing with Section 11300) of Division 4 of the Business and Professions Code.

(0) Registered professional foresters licensed pursuant to Article 3 (commencing with Section 750) of Chapter 2.5 of Division 1 of the Public Resources Code.

(c) Section 2775 and the holding in Dynamex do not apply to the following, which are subject to the Business and Professions Code:

(1) A real estate licensee licensed by the State of California pursuant to Division 4 (commencing with Section 10000) of the Business and Professions Code, for whom the determination of employee or independent contractor status shall be governed by subdivision (b) of Section 10032 of the Business and Professions Code. If that section is not applicable, then this determination shall be governed as follows:

(A) For purposes of unemployment insurance by Section 650 of the Unemployment Insurance Code.

(B) For purposes of workers' compensation by Section 3200 *et seq*.

(C) For all other purposes in the Labor Code by *Borello*. The statutorily imposed duties of a responsible broker under Section 10015.1 of the Business and Professions Code are not factors to be considered under the *Borello* test.

(2) A home inspector, as defined in Section 7195 of the Business and Professions Code, and subject to the provisions of Chapter 9.3 (commencing with Section 7195) of Division 3 of that code.

(3) A repossession agency licensed pursuant to Section 7500.2 of the Business and Professions Code, for whom the determination of employee or independent contractor status shall be governed by Section 7500.2 of the Business and Professions Code, if the repossession agency is free from the control and direction of the hiring person or entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

Credits (Added by Stats.2020, c. 38 (A.B.2257), § 2, eff. Sept. 4, 2020. Amended by Stats. 2021, c. 422 (A.B.1561), § 1, eff. Jan. 1, 2022.)

Notes of Decisions (2)

West's Ann. Cal. Labor Code § 2778, CA LABOR § 2778 Current with urgency legislation through Ch. 1 of 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of document

West's Annotated California Codes
Labor Code (Refs & Annos)
Division 3. Employment Relations
Chapter 2. Employer and Employee
Article 1.5. Worker Status: Employees (Refs & Annos)

§ 2779. Determination of status as employee or independent contractor; sole proprietor; partnership; limited liability company; corporation performing work pursuant to contract

Effective: September 4, 2020
Currentness

(a) Section 2775 and the holding in *Dynamex* do not apply to the relationship between two individuals wherein each individual is acting as a sole proprietor or separate business entity formed as a partnership, limited liability company, limited liability partnership, or corporation performing work pursuant to a contract for purposes of providing services at the location of a single engagement event, as defined below, under the following conditions:

(1) Neither individual is subject to control and direction by the other, in connection with the performance of the work, both under the contract for the performance of the work and in fact.

(2) Each individual has the ability to negotiate their rate of pay with the other individual.

(3) The written contract between both individuals specifies the total payment for services provided by both individuals at the single-engagement event, and the specific rate paid to each individual.

(4) Each individual maintains their own business location, which may include the individual's personal residence.

(5) Each individual provides their own tools, vehicles, and equipment to perform the services under the contract.

(6) If the work is performed in a jurisdiction that requires an individual to have a business license or business tax registration, then each individual has the required business license or business tax registration.

(7) Each individual is customarily engaged in the same or similar type of work performed under the contract or each individual separately holds themselves out to other potential customers as available to perform the same type of work.

(8) Each individual can contract with other businesses to provide the same or similar services and maintain their own clientele without restrictions.

(b) "Single-engagement event" means a stand-alone non-recurring event in a single location, or a series of events in the same location no more than once a week.

(c) "Services" under this section do not include services provided in an industry designated by the

Division of Occupational Safety and Health or the Department of lndustrial Relations as a high hazard industry pursuant to subparagraph (A) of paragraph (3) of subdivision (e) of Section 6401.7 or janitorial, delivery, courier, transportation, trucking, agricultural labor, retail, logging, in-home care, or construction services other than minor home repair.

Credits
(Added by Stats. 2020, c. 38 (A.B.2257), § 2, eff. Sept. 4, 2020.)

West's Ann. Cal. Labor Code § 2779, CA LABOR § 2779 Current with urgency legislation through Ch. 1 of 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document

West's Annotated California Codes
Labor Code (Refs & Annos)
Division 3. Employment Relations
Chapter 2. Employer and Employee
Article 1.5. Worker Status: Employees (Refs & Annos)

§ 2780. Determination of status as employee or independent contractor; occupations in connection with sound recordings or musical compositions

Effective: September 4, 2020
Currentness

(a)(l) Section 2775 and the holding in Dynamex do not apply to the following occupations in connection with creating, marketing, promoting, or distributing sound

recordings or musical compositions, and instead the holding in *Borello* shall apply to all of the following:

(A) Recording artists, subject to the below.

(B) Songwriters, lyricists, composers, and proofers.

(C) Managers of recording artists.

(D) Record producers and directors.

(E) Musical engineers and mixers engaged in the creation of sound recordings.

(F) Musicians engaged in the creation of sound recordings, subject to the below.

(G) Vocalists, subject to the below.

(H) Photographers working on recording photo shoots, album covers, and other press and publicity purposes.

(I) Independent radio promoters.

(J) Any other individual engaged to render any creative, production, marketing, or independent music publicist services related primarily to the creation, marketing, promotion, or distribution of sound recordings or musical compositions.

(2) This subdivision shall not apply to any of the following:

(A) Film and television unit production crews, as such term is commonly used in the film and television

industries, working on live or recorded performances for audiovisual works, including still photographers and cinematographers.

(B) Publicists who are not independent music publicists.

(3) Notwithstanding Section 2775, paragraphs (1) and (2), and the holding in *Dynamex*, the tenns and conditions of any current or future collective bargaining agreements or contractual agreements between the applicable labor unions and respective employers shall govern the determination of employment status in all events.

(4) The following shall apply to recording artists, musicians, and vocalists:

(A) Recording artists, musicians, and vocalists shall not be precluded from organizing under applicable provisions of labor law, or otherwise exercising rights granted to employees under the National Labor Relations Act (29 U.S.C. Sec. 151 *et seq*.).

(B)(i) Musicians and vocalists who are not royalty-based participants in the work created during any specific engagement shall be treated as employees solely for purposes of receiving minimum and overtime wages for hours worked during the engagement, as well as any damages and penalties due to the failure to receive minimum or overtime wages. Any such wages, damages, and penalties owed under this subparagraph shall be determined according to the applicable provisions of this code,

wage orders of the Industrial Welfare Commission, or applicable local laws.

(ii) "Royalty-based participant" means an individual who has either negotiated for the collection or direct administration of royalties derived from the exploitation of a sound recording or musical composition, or is entitled to control, administer or collect royalties related to the exploitation of a sound recording or musical composition as a co-author or joint owner thereof.

(C) In all events, and notwithstanding subparagraph (B), the terms and conditions of any current or future collective bargaining agreements or contractual agreements between the applicable labor unions and respective employers shall govern the determination of employment status.

(b)(l) Section 2775 and the holding in *Dynamex* do not apply to a musician or musical group for the purpose of a single engagement live performance event, and instead the determination of employee or independent contractor status shall be governed by *Borello*, unless one of the following conditions is met:

(A) The musical group is performing as a symphony orchestra, the musical group is performing at a theme park or amusement park, or a musician is performing in a musical theater production.

(B) The musical group is an event headliner for a performance taking place in a venue location with more than 1,500 attendees.

(C) The musical group is performing at a festival that sells more than 18,000 tickets per day.

(2) This subdivision is inclusive of rehearsals related to the single-engagement live performance event.

(3) As used in this subdivision:

(A) "Event headliner" means the musical group that appears most prominently in an event program, advertisement, or on a marquee.

(B) "Festival" means a single day or multiday event in a single venue location that occurs once a year, featuring performances by various musical groups.

(C) "Musical group" means a solo artist, band, or a group of musicians who perform under a distinct name.

(D) "Musical theater production" means a form of theatrical performance that combines songs, spoken dialogue, acting, and dance.

(E) "Musician" means an individual performing instrumental, electronic, or vocal music in a live setting.

(F) "Single-engagement live performance event" means a stand-alone musical performance in a single venue location, or a series of performances in the same venue location no more than once a week. This does not include performances that are part of a tour or series of live performances at various locations.

(G) "Venue location" means an indoor or outdoor location used primarily as a space to hold a concert or musical performance. "Venue location" includes, but is not limited to, a restaurant, bar, or brewery that regularly offers live musical entertainment.

(c) Section 2775 and the holding in *Dynamex* do not apply to the following, and instead, the determination of employee or independent contractor status shall be governed by *Borello*:

(1) An individual performance artist performing material that is their original work and creative in character and the result of which depends primarily on the individual's invention, imagination, or talent, given all of the following conditions are satisfied:

(A) The individual is free from the control and direction of the hiring entity in connection with the performance of the work, both as a matter of contract and in fact. This includes, and is not limited to, the right for the performer to exercise artistic control over all elements of the performance.

(B) The individual retains the rights to their intellectual property that was created in connection with the performance.

(C) Consistent with the nature of the work, the individual sets their terms of work and has the ability to set or negotiate their rates.

(D) The individual is free to accept or reject each individual performance engagement without being penalized in any form by the hiring entity.

(2) "Individual performance artist" shall include, but is not limited to, an individual performing comedy, improvisation, stage magic, illusion, mime, spoken word, storytelling, or puppetry.

(3) This subdivision does not apply to an individual participating in a theatrical production, or a musician or musical group as defined in subdivision (b).

(4) In all events, notwithstanding paragraph (1), the terms and conditions of any current or future collective bargaining agreements or contractual agreements between the applicable labor unions and respective employer shall govern the determination of employment status.

Credits
(Added by Stats.2020, c. 38 (A.B.2257), § 2, eff. Sept. 4, 2020.)

West's Ann. Cal. Labor Code § 2780, CA LABOR § 2780 Current with urgency legislation through Ch. 1 of 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document

Appendix G-1

CALEB R. TROTTER, Cal. Bar No. 305195
Email: CTrotter@pacificlegal.org
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
JAMES M. MANLEY, Ariz. Bar No. 031820*
Email: JManley@pacificlegal.org
Pacific Legal Foundation
3217 E. Shea Blvd.# 108
Phoenix, Arizona 85028
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
*Pro Hac Vice Pending
Attorneys for Plaintiffs American Society of Journalists and Authors, Inc., and National Press Photographers Association

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

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

v.

XAVIER BECERRA, in his official capacity as Attorney General of the 24 State of California,

Defendant.

Appendix G-2

Case No.: 2:19-cv-10645

COMPLAINT FOR VIOLATION OF FEDERAL CIVIL RIGHTS UNDER 42 U.S.C. § 1983 DECLARATORY AND INJUNCTIVE RELIEF

On behalf of their members, Plaintiffs American Society of Journalists and Authors (ASJA) and the National Press Photographers Association (NPPA), by and through their undersigned attorneys, file this Complaint against Defendant and allege as follows:

INTRODUCTION

1. This civil rights lawsuit seeks to vindicate the constitutional rights to free speech, the press, and equal protection for the members of Plaintiffs American Society of Journalists and Authors and the National Press Photographers Association.

2. ASJA and the NPPA are two of the leading voices advocating for the rights of independent contractor (freelance) writers and visual journalists in the United States.

3. As a result of a recently enacted California law (AB 5, codified at Cal. Labor Code § 2750.3, *et seq.*), the constitutional rights of ASJA's and NPPA's members are impaired, threatening the livelihood of those who work as freelancers.

4. The government faces a heavy burden of justification when its regulations single out the press. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 583 (1983).

5. In violation of the First and Fourteenth Amendments to the United States Constitution, AB 5 singles out ASJA's and NPPA's members who are writers, editors, still photographers, and visual journalists by drawing unconstitutional content-based distinctions about who can freelance-limiting certain speakers to 35 submissions per client, per year, and precluding some freelancers from making video recordings.

6. As a result, ASJA and NPPA seek prospective relief for their members in the form of a declaration that the challenged provisions of AB 5 are invalid, unenforceable, and void; a permanent and preliminary injunction against any further enforcement of the challenged provisions; plus costs and reasonable attorney fees, pursuant to 42 U.S.C. § 1988. ASJA and NPPA do not seek money damages against Defendant.

JURISDICTION AND VENUE

7. ASJA and NPPA bring this lawsuit on behalf of their members pursuant to 42 U.S.C. § 1983 for the violation of rights secured by the First and Fourteenth Amendments to the United States Constitution.

8. Jurisdiction over ASJA's and NPPA's claims for declaratory and injunctive relief is proper under 28 U.S.C. §§ 1331 (federal question), 1343 (civil rights), and 2201-2202 (Declaratory Judgment Act).

9. Venue is proper in this Court under 28 U.S.C § 1391(b) on the ground that all or a substantial part

of the acts giving rise to ASJA's or NPPA's claims occurred in the Central District of California.

PARTIES

Plaintiffs

10. ASJA was founded in 1948 and is the nation's largest professional organization of independent nonfiction writers. Its membership consists of freelance writers of magazine articles, trade books, and many other forms of nonfiction writing, each of whom has met exacting standards of professional achievement.

11. ASJA has approximately 120 members in California.

12. Chartered in 1946, NPPA is the nation's leading professional organization for visual journalists. Its membership includes visual journalists who are still photographers, videographers, multimedia journalists, editors and students from print, television, and electronic media.

13. NPPA has 536 members in California.

14. NPPA advocates in support of visual journalists' First Amendment rights to report on news and matters of public concern as well as protect the copyright of their images.

15. The term "photojournalist" is used throughout this Complaint to track with the language of AB 5, as well as the synonymous "visual journalist." Within the

journalism profession, the term photojournalist means any visual journalist, including news photographers, videographers, and multimedia journalists who shoot either still or video images.

Defendant

16. Defendant Xavier Becerra is the Attorney General of California and the chief law officer of the state. *See* Cal. Gov. Code§ 12511. AB 5 grants Mr. Becerra specific authority to enforce the provisions of AB 5 complained of in this action. Cal. Labor Code § 2750.3U). Plaintiffs are informed and believe, and on that basis allege, that Mr. Becerra also has ultimate responsibility for enforcing AB 5. Defendant is being sued in his official capacity, pursuant to *Ex parte Young*, 209 U.S. 123 (1908), for depriving Plaintiffs' members of their First and Fourteenth Amendment rights under color of state law by enforcing AB 5.

FACTUAL ALLEGATIONS
I
LEGAL FRAMEWORK
Dynamex ABC Test

17. Plaintiffs incorporate and reallege each and every allegation in the preceding paragraphs of this Complaint.

18. California recently enacted Assembly Bill 5 (AB 5, codified at Cal. Labor Code§ 2750.3, *et seq.*). AB 5 codifies and expands the independent contractor test established in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 4 Cal. 5th 903 (2018).

19. Under *Dynamex*, independent contractors must be classified as employees under certain California wage orders unless the hiring entity satisfies a new three-part test:

> (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.

Id. at 964. *See also* Cal. Labor Code § 2750.3(a)(l).

20. Failure to prove any element of the *Dynamex* ABC test results in the independent contractor being classified as an employee.

21. The *Dynamex* ABC test overruled a prior multi-factor balancing test that considered the economic realities of the employment relationship. *See S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989).

22. Under *Borello*, freelancers like Plaintiffs' members represented here 12 are classified as independent contractors and have been for decades.

23. Dynamex was limited to the "suffer or permit to work" standard in 14 California wage orders and "equivalent or overlapping non-wage order allegations arising under the Labor Code." *Gonzales v. San Gabriel Transit, Inc.*, 2019 WL 16 4942213, *14 (Cal. Ct. App. Oct. 8, 2019). Wage orders govern issues like minimum wage, overtime pay, meals, and lodging. Professionals engaged in "original and creative" work, like Plaintiffs' members, are largely exempt from wage orders, and thus *Dynamex* had little direct effect on their work.

ABS

24. AB 5 applies the strict *Dynamex* ABC test to the entire Labor Code, the Unemployment Insurance Code, and wage orders. Cal. Labor Code § 2750.3(a)(l).

25. AB 5's expansion of the ABC test means that freelancers like the writers, editors, photographers, and videographers who comprise Plaintiffs' memberships must be classified as employees of the publishers for which they produce content because content creation is "the usual course of the hiring entity's business." Cal. Labor Code § 2750.3(a)(l)(B).

26. AB 5 also contains a number of exemptions to the ABC test, including people who work pursuant to "a contract for 'professional services."' Cal. Labor Code § 2750.3(c)(l). These exempt professionals remain subject to the existing *Borello* independent contractor test.

27. AB 5 defines "professional services" as those provided by marketers, human resources administrators, travel agents, graphic designers, grant writers, fine artists, IRS enrolled agents, payment processing agents through an independent sales organization, estheticians, electrologists, manicurists, barbers, and cosmetologists. 8 Cal. Labor Code § 2750.3(c)(2)(B)(i)-(viii), (xi).

28. Still photographers, photojournalists, freelance writers, editors, and newspaper cartoonists are also included in "professional services," but with important limitations: (1) these speaking professions are limited to 35 "content submissions" per client, per year, Cal. Labor Code § 2750.3(c)(2)(B)(ix) and (x); and (2) video is expressly excluded from the still photography and photojournalism exemption. Cal. Labor Code § 2750.3(c)(2)(B)(ix).

29. AB 5 does not exclude audio recording from the definition of professional services.

30. The 35-submission cap in Cal. Labor Code § 2750.3(c)(2)(B)(ix) and (x) limits freelancers' ability to record, sell, or publish audio content.

31. The 35-submission cap in Cal. Labor Code § 2750.3(c)(2)(B)(x) only applies to "items or forms of content by a freelance journalist" that meet the other requirements of§ 2750.3(c)(2)(B)(x).

32. ASJA's membership includes freelance writers and editors who are covered under AB 5's "professional services" exemption but subject to the limit of 35 content submissions per client, per year.

33. NPPA's membership includes still photographers and photojournalists who are covered under AB 5's "professional services" exemption but subject to the limit of 35 content submissions per client, per year. NPPA's membership also includes videographers who are excluded from AB 5's definition of "professional services."

34. AB 5 grants specific enforcement authority to Defendant "[i]n addition to any other remedies available," to bring an action for injunctive relief. Cal. Labor Code § 2750.3(j). This new enforcement authority means that Plaintiffs' members who wish to work independently can still be forced to become employees due to Defendant's enforcement of AB 5.

II

AB 5 HARMS PLAINTIFFS' MEMBERS BY SINGLING OUT FREELANCE JOURNALISTS FOR UNIQUE AND SIGNIFICANT BURDENS

35. Plaintiffs incorporate and reallege each and every allegation in the preceding paragraphs of this Complaint.

36. Classifying Plaintiffs' members as employees rather than freelance independent contractors brings significant new costs and disadvantages to the members. For professionals engaged in "original and creative" work, AB 5 adds costs their client-turned-employer will have to pay, such as unemployment

taxes[1], workers' compensation taxes[2], state disability insurance[3], paid family leave[4] , and sick leave[5]. Some of these costs are borne by an employer, but they all make Plaintiffs' members' work more costly-and thus less attractive-to the client turned-employer. The additional burden on Plaintiffs' members' ability to engage in independent journalism is a direct result of their classification as employees under AB 5's "usual course of the hiring entity's business" prong. Cal. Labor Code 24 § 2750.3(a)(l)(B).

37. The threat of enforcement has already resulted m lost freelancing opportunities for Plaintiffs' members.

38. In addition to these unavoidable costs of converting freelancers to employees, Plaintiffs' members who are forced to become employees because of AB 5 will also lose ownership of the copyright to their creative work and control of their workload unless they are able to negotiate to retain that right.

39. Ownership of the copyright of their work is especially pressing for NPPA's members, who license their photographs and videos to their clients, but often retain the copyright to such work, which they can then relicense for additional income. Under the Copyright Act, the copyright in a work created by an independent contractor vests with the creator. *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737

---

[1] Cal. Un. Ins. Code § 1251.
[2] Cal. Labor Code § 3600.
[3] Cal. Un. Ins. Code § 2625.
[4] Cal. Un. Ins. Code § 3303.
[5] Cal. Labor Code § 246.

(1989). However, the copyright in a work created by an employee is usually owned by the employer, unless the employee is able to negotiate to retain that right.

40. ASJA's members similarly benefit substantially from the ability to republish work that they create as freelance independent contractors.

41. Freelance journalists who are forced to become employees due to AB 5 will lose the copyright to their work.

42. Control over their workload is also a primary concern for Plaintiffs' members, and is what leads many of them to make the choice to work independently.

43. In a tumultuous industry that continues to lay off employees, Plaintiffs' members find safety in flexibility. Rather than being tied to a single employer, Plaintiffs' members are able to adapt their workload to their financial needs, balance their work with their other responsibilities, and spread their workload across multiple clients to minimize risk.

44. That flexibility even extends to business decisions, such as the choice to attend a conference or event.

45. In addition, Plaintiffs' members can deduct business expenses on their federal taxes for numerous expenses, including professional memberships,

46. They are also able to maintain benefits like healthcare and retirement accounts, regardless of the

number of publishers they produce content for or the frequency and quantity of their work.

47. Flexibility is even more important in the digital space which, unlike the traditional print model, allows for a higher volume of submissions to a greater variety of publications.

48. Losing the freedom to freelance would upend years-long careers of Plaintiffs' members which are built on this freedom and flexibility.

49. AB 5 is especially threatening to groups that are not well-represented among voices in the media like women, ethnic minorities, LGBT people, the disabled, and the elderly, because members of these groups work more often as freelancers rather than staff employees.

50. By enforcing content-based distinctions about who can freelance limiting certain speakers to submissions per client, per year, and precluding some freelancers from making video recordings—Defendant currently maintains and actively enforces a set of laws, practices, policies, and procedures under color of state law that deprive Plaintiffs' members of their rights to free speech, free press, and equal protection, in violation of the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.

51. Plaintiffs have no adequate remedy at law to compensate for the loss of these fundamental freedoms and will suffer irreparable injury absent an injunction restraining Defendant's enforcement of the

35-submission limit and the video recording restrictions.

52. Plaintiffs are therefore entitled to prospective declaratory and permanent injunctive relief against continued enforcement and maintenance of Cal. Labor Code § 2750.3(c)(2)(B)(ix) and (x). *See* 28 U.S.C. §§ 2201, 2202.

LEGAL CLAIMS
Count I: Equal Protection
(Cal. Labor Code § 2750.3(c)(2)(B)(ix) and (x))
(Limit of 35 content submissions)

53. Plaintiffs incorporate and reallege each and every allegation in the preceding paragraphs of this Complaint.

54. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the government from drawing arbitrary distinctions between similarly situated professionals. *See* U.S. Const. amend. XIV, § 1.

55. Granting a full exemption from AB 5 to speaking professionals who engage in marketing, graphic design, grant writing, and fine arts, but subjecting speaking professionals like Plaintiffs' members who are still photographers, photojournalists, freelance writers, and editors, to a limit of 35 content submissions per publisher per year, creates an irrational and arbitrary distinction among speaking professionals.

56. By enforcing the irrational and arbitrary distinction among speaking professionals, Defendant, acting under color of state law, irrationally and arbitrarily discriminates against Plaintiffs' members in violation of their right to equal 19 protection of the laws.

57. Privileging marketers, graphic designers, grant writers, and fine artists by providing those speaking professions with an exemption from AB 5, while limiting still photographers, photojournalists, freelance writers, and editors to an exemption of only 35 submissions per publisher per year, is not narrowly tailored to any compelling government objective, nor is it rationally related to any legitimate government objective.

58. Plaintiffs' members who are still photographers, photojournalists, freelance writers, and editors are similarly situated to speaking professionals not subject to the 35-submission limit of AB 5.

59. Plaintiffs' members will suffer substantial and ongoing harm from being subject to Defendant's enforcement of the 35-submission limit while other similarly situated speaking professionals are not.

60. Plaintiffs' members will continue to suffer substantial and irreparable harm unless the discrimination enshrined in AB 5's selective and arbitrary imposition of the 35-submission limit is declared unlawful and enjoined by this Court.

Appendix G-15

Count II: Equal Protection
(Cal. Labor Code § 2750.3(c)(2)(B)(ix))
(Exclusion of videography)

61. Plaintiffs incorporate and reallege each and every allegation in paragraphs 1-52 of this Complaint.

62. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the government from drawing arbitrary distinctions between similarly situated professionals. *See* U.S. Const. amend. XIV, § 1.

63. Permitting marketers, graphic designers, grant writers, and fine artists to record video images, but excluding the recording of video images from the limited exemption for photographers and photojournalists, creates an irrational and arbitrary distinction among speaking professionals.

64. By enforcing the irrational and arbitrary distinction among speaking professionals, Defendant, acting under color of state law, irrationally and arbitrarily discriminates against Plaintiffs' members in violation of their right to equal protection of the laws.

65. Privileging marketers, graphic designers, grant writers, and fine artists by permitting them to record video images and remain exempt from AB 5, while providing no exemption to photographers and photojournalists who record video, is not narrowly tailored to any compelling government objective, nor is it rationally related to any legitimate government objective.

66. Exempting still photographers and photojournalists for up to 35 submissions of still photographs per publisher per year, but providing no exemption to photographers and photojournalists who record video images, creates an irrational and arbitrary distinction between those individuals and others who provide professional services under AB5's exemptions.

67. By enforcing the irrational and arbitrary distinction among photographers and photojournalists, Defendant, acting under color of state law, irrationally and arbitrarily discriminates against Plaintiffs' members in violation of their right to equal protection of the laws.

68. Privileging still photographers and photojournalists who submit still photographs by allowing them to submit up to 35 submissions per publisher per year while remaining exempt from AB 5, while providing no exemption to those recording video, is not narrowly tailored to any compelling government objective, nor is it rationally related to any legitimate government objective.

69. Plaintiffs' members who are photographers and photojournalists that record video are similarly situated to marketers, graphic designers, grant writers, and fine artists who record video images.

70. Plaintiffs' members who are photographers and photojournalists that record video are similarly situated to those who are still photographers and photojournalists that do not shoot video.

71. Plaintiffs' members will suffer substantial and ongoing harm from being subject to Defendant's enforcement of the exclusion of video recordings by photographers and photojournalists from AB 5's exemptions.

72. Plaintiffs' members will continue to suffer substantial and irreparable harm unless the discrimination enshrined in AB 5's selective and arbitrary imposition of the exclusion of video recordings by photographers and photojournalists from AB 5's exemptions is declared unlawful and enjoined by this Court.

Count III: First Amendment
(Cal. Labor Code § 2750.3(c)(2)(B)(ix) and (x))
(Limit of 35 content submissions)

73. Plaintiffs incorporate and reallege each and every allegation in paragraphs 1-52 of this Complaint.

74. Pursuant to Cal. Labor Code§ 2750.3(c)(2)(B)(ix) and (x), Defendant, acting under color of state law, limits AB 5's exemption for "professional services" as applied to speaking professionals who engage in still photography, photojournalism, freelance writing, and editing to only 35 content submissions per publisher per year. In contrast, AB 5 grants an exemption free from the 35-submission limit to speaking professionals who engage in marketing, graphic design, grant writing, and fine arts.

75. The 35-submission limit applies to Plaintiffs' members based on the content of their speech—i.e.,

whether they write about or photograph a topic in a manner that constitutes marketing versus a manner that constitutes journalistic reporting, or whether images are graphic design versus still photography.

76. Limiting AB 5's exemption for "professional services" as applied to speaking professionals who engage in still photography, photojournalism, freelance writing, and editing to only 35 content submissions per publisher per year, while granting an exemption free from the 35-submission limit to speaking professionals who engage in marketing, graphic design, grant writing, and fine arts is not narrowly tailored to a compelling governmental interest.

77. Under the AB 5 scheme, journalistic speech is expressly disfavored.

78. By enforcing the 35-submission limit, Defendant, acting under color of state law, unconstitutionally deprives Plaintiffs' members of their freedom of speech as protected by the First and Fourteenth Amendments to the U.S. Constitution.

79. By enforcing the 35-submission limit, Defendant, acting under color of state law, unconstitutionally burdens the press in violation of the First and Fourteenth Amendments to the U.S. Constitution, because many of Plaintiffs' members are journalists.

80. Plaintiffs' members will suffer substantial and ongoing harm from being subject to Defendant's enforcement of the 35-submission limit.

81. Plaintiffs' members will continue to suffer substantial and irreparable harm unless the speech- and press-burdening 35-submission limit is declared unlawful and enjoined by this Court.

Count IV: First Amendment
(Cal. Labor Code § 2750.3(c)(2)(B)(ix))
(Exclusion of videography)

82. Plaintiffs incorporate and reallege each and every allegation in paragraphs 1-52 of this Complaint.

83. Pursuant to Cal. Labor Code § 2750.3(c)(2)(B)(ix), Defendant, acting under color of state law, excludes from AB 5 's exemption for "professional services" the recording of video images by photographers and photojournalists. In contrast, the recording of video images for marketing, graphic design, and fine arts is not excluded.

84. The exclusion of video recording from the "professional services" exemption applies to Plaintiffs' members based on the content of their speech—i.e., whether they record video to communicate news versus expression that is deemed marketing.

85. Excluding video recording by photographers and photojournalists from AB 5's "professional services" exemption is not narrowly tailored to a compelling government interest.

86. Under the AB 5 scheme, journalistic speech is expressly disfavored.

87. By enforcing the video recording exclusion for photographers and photojournalists, Defendant, acting under color of state law, unconstitutionally deprives Plaintiffs' members of their freedom of speech as protected by the First and Fourteenth Amendments to the U.S. Constitution.

88. By enforcing the video recording exclusion for photographers and photojournalists, Defendant, acting under color of state law, unconstitutionally burdens the press in violation of the First and Fourteenth Amendments to the U.S. Constitution, because many of Plaintiffs' members are journalists.

89. Plaintiffs' members will suffer substantial and ongoing harm from being subject to Defendant's enforcement of the video recording exclusion for photographers and photojournalists.

90. Plaintiffs' members will continue to suffer substantial and irreparable harm unless the speech- and press-burdening video recording exclusion for photographers and photojournalists is declared unlawful and enjoined by this Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request the following relief:

1. Entry of a declaratory judgment that:

a. Limiting AB 5's "professional services" exemption for still

photographers, photojournalists, freelance writers, editors, and newspaper cartoonists to 35 submissions per publisher per year, as codified at Cal. Labor Code § 750.3(c)(2)(B)(ix) and (x), is unconstitutional, facially and as applied to Plaintiffs' members, to the extent that it deprives Plaintiffs' members of equal protection of the laws in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution;

b. Excluding photographers and photojournalists who record video images from AB 5's "professional services" exemption, as codified at Cal. Labor Code § 2750.3(c)(2)(B)(ix), is unconstitutional, facially and as applied to Plaintiffs' members, to the extent that it deprives Plaintiffs' members of equal protection of the laws in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution;

c. Limiting AB 5's "professional services" exemption for still photographers, photojournalists, freelance writers, editors, and newspaper cartoonists to 35 submissions per publisher per year, as codified at Cal. Labor Code § 2750.3(c)(2)(B)(ix) and (x), is unconstitutional, facially and as applied to Plaintiffs' members, to the extent that it burdens protected speech and the press in violation of the First and Fourteenth Amendments to the U.S. Constitution;

d. Excluding photographers and photojournalists who record video images from AB 5's "professional services" exemption, as codified at Cal. Labor Code § 2750.3(c)(2)(B)(ix), is unconstitutional, facially and as applied to Plaintiffs' members, to the extent that it burdens protected speech and the press in violation of

the First and Fourteenth Amendments to the U.S. Constitution;

2. Entry of a permanent and preliminary injunction against Defendant, his agents, representatives, employees, and all persons in active concert or participation 16 with him, from enforcing the 35-submission limit and video recording exclusion codified at Cal. Labor Code § 2750.3(c)(2)(B)(ix) and (x), as well as any and all implementing administrative rules and regulations, and the policies and practices by which Defendant enforces these provisions;

3. An award of Plaintiffs' attorney fees, costs, and expenses in this action pursuant to 42 U.S.C. § 1988; and

4. An award of any further legal and equitable relief as the Court may deem just and proper.

DATED: December 17, 2019.

Respectfully submitted,

By /s/Caleb R. Trotter
CALEB R. TROTTER

CALEB R. TROTTER
(Cal. Bar No. 305195)
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Email: CTrotter@pacificlegal.org
JAMES M. MANLEY
(Ariz. Bar No. 031820*)
Pacific Legal Foundation
3241 E. Shea Blvd. #108
Phoenix, Arizona 85028
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
Email: JManley@pacificlegal.org
*Pro Hac Vice pending
Attorneys for Plaintiffs American Society of Journalists and Authors, Inc., and National Press Photographers Association

Appendix H-1

CALEB R. TROTTER, Cal. Bar No. 305195
Email: CTrotter@pacificlegal.org
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
JAMES M. MANLEY, Ariz. Bar No. 031820*
Email: JManley@pacificlegal.org
Pacific Legal Foundation
3241 E. Shea Blvd. #108
Phoenix, Arizona 85028
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
*Pro Hac Vice Pending
Attorneys for Plaintiffs American Society of Journalists and Authors, Inc. and National Press Photographers Association

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

Case No.: 2:19-cv-10645-PSG-KS

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

Plaintiffs,

v.

Appendix H-2

XAVIER BECERRA, in his official capacity as Attorney General of the State of California,

Defendant.

DECLARATION OF RANDY DOTINGA IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I, Randy Dotinga, declare as follows:

1. The facts set forth in this declaration are based on my personal knowledge, and if called as a witness, I could and would competently testify thereto under oath. As to those matters which reflect a matter of opinion, they reflect my personal opinion and judgment upon the matter.

2. I have been a full-time freelance writer based in San Diego, California, for 20 years. I am a former president of the American Society of Journalists and Authors (ASJA), an 1,100-member non-profit association of independent non-fiction authors. I served as the ASJA president from 2014-2016 and continue to serve on the ASJA's board of directors. The ASJA was created in 1948 and serves as a voice and resource for freelance writers and book authors.

3. I write for about 10–12 clients a year and make enough money to live comfortably in San Diego, one of the nation's most expensive cities. Most of my clients are based out-of-state but must still comply with California law.

4. I pay self-employment payroll taxes, I file a federal tax Schedule C, I have a city-issued business license, I pay for my own health insurance, and I pay for expenses such as supplies, computer, online access, and cross-country travel to writer conferences to rustle up new assignments.

5. I maintain a business location that is separate from my clients. I set or negotiate my own rates and set my own hours. I customarily contract for freelancing projects and hold myself out to other potential customers as available to perform the same type of work. I customarily and regularly exercise discretion and independent judgment when freelancing.

6. I have been a self-employed independent journalist for 20 years, and I have never tried to get a media staff job during that time. I prefer to work independently for numerous reasons.

7. Freelancing provides me more security and more income than staff media jobs. Over my two decades of freelancing, I have never struggled to put food on the table. Nor have I worried about my future (until now). I have always kept a stable of multiple clients. I am able to tolerate losing one or two clients because the rest of my workload is generally stable, even during rough economic times, and having multiple clients allows me to survive until I can find replacement clients.

8. By contrast, my newspaper colleagues from the 1990s have almost all abandoned journalism for public relations or other jobs because of the rapid decline of the media industry. Those that decided to

stay have suffered through severe uncertainty and unrelenting anxiety. Two of my closest friends, an editor and a photographer, were both laid off by the San Diego Union-Tribune. They were each rehired a few months later. Then they were each laid off again. They continue to struggle. Freelancing has allowed me to continue working in a field I love and remain committed to telling the truth.

9. I value the flexibility that freelancing provides. Control over my workload allows me to care for my elderly parents and my severely disabled brother in a way that would never be possible in a staff job. I am the sole caregiver of all three of them. They are often ill and have made many visits to the emergency room in recent years. Every single time, I have been able to drop everything and rush to their side, whether it is 2:00 in the afternoon or 4:00 in the morning.

10. Freelancing allows me to own the copyright to my work. As a freelancer, I own my work by default and can sell or license it; employers own the work of their employees by default. If I'm forced to become a staff writer, I will automatically lose ownership of my work under copyright law. That means I can't license it to another publication, reprint it in a book or sell it to Hollywood. Nor can I prevent it from being used in inappropriate ways or take legal action if my work is stolen.

11. As an independent contractor, I take business-expense write-offs for a variety of expenses that aren't reimbursable by employers. These include expenses for health insurance and for travel to conferences where I find new work. I save thousands of dollars this

way. If I am put on staff, I will still need health insurance, but it is unlikely that any of my multiple part-time employers will be obligated to provide it.

12. As a freelancer, I have more leeway than staff workers to free myself from abusive work environments and abusive bosses. Ideally, I avoid having any client who accounts for more than 30% of my income. This is standard practice among freelancers. Diversification is crucial. If we find an editor to be abusive or inappropriate, we can "fire" that client and survive—without needing unemployment insurance. That sort of security and control does not exist in staff jobs.

13. AB 5 threatens my livelihood as a freelance journalist and my right to own and control my work. It also treats me as a second-class writer by imposing restrictions on journalists like me that do not burden our freelance colleagues who use their writing skills to promote products and politicians.

14. Hundreds if not thousands of freelance journalists—especially those in digital media—fear losing their jobs due to the 35-submission cap imposed by AB 5, Blacklisting by out-of-state companies and outsourcing by in-state companies is already happening as a direct result of AB 5, as illustrated in the attached Exhibit.

15. I expect that multiple clients will either cut me off in 2020 or limit my workload to a cap, per AB 5, of 35 submissions.

16. Thirty-five submissions is not a lot of work for a freelancer. Writing an article or a blog post can take a matter of minutes or just a few hours. From 1999 until 2011, I wrote a weekly column for a local daily newspaper on a freelance basis. It took me 2–3 hours a week and provided me with reliable income. AB 5's 35-submission cap necessarily forbids freelance writers from producing weekly columns. In my experience, it is unlikely that any news outlet would hire a writer as an employee to just work 2–3 hours a week.

17. In my role with ASJA, I have learned that AB 5 is especially threatening to groups that are not well-represented among voices in the media: women, ethnic minorities, LGBT people, the disabled, and older people.

18. Honest and accurate journalism is more important than ever. This is an especially dangerous time for the State of California to violate the First Amendment by treating freelance journalists as second-class writers and photographers while favoring marketers—those whose job is to massage the truth. We must be treated the same as everyone else who enjoys the free press and free speech rights guaranteed by the First Amendment.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on December 16, 2019 at San Diego, California.

RANDY DOTINGA

SAMPLING OF FREELANCE JOBS LOST DUE TO AB5

•Vox Media: Hundreds of Calif. Freelance writers will be cut. "Hundreds of freelance writers at Vox Media, primarily those covering sports for the SB Nation site, will lose their jobs in the coming months as the company prepares for a California law to go into effect that will force companies to reclassify contractors in the state as employees." https://www.cnbc.com/2019/12/16/vox-media-to-cut-hundreds-of-freelance-jobs-ahead-of-californias-ab5.html

•Insider and Business Insider, news sites: Will limit California contributors to 35 articles. "This bill was supposed to create jobs not blacklist Ca writers." https://twitter.com/madivanderberg/status/1204615244540071936

•Scripted, a service that links writers to clients: "Out of an abundance of caution for both ourselves and our publisher customers... Scripted will no longer be able to allow California-based writers to use our platform for new jobs..." https://twitter.com/Sunnychanel/status/1204476572612231168

•Rev, a transcription service that hires writers: "We have made the decision to withdraw from the state." https://twitter.com/rachelkiley/status/1184574480804438023

Appendix H-8

• San Francisco Examiner: Taxi driver columnist loses weekly column. "'I Drive S.F.' is no longer a weekly affair, thanks to the AB 5 bill that passed in September." https://www.sfexaminer.com/news-columnists/a-working-class-hero-aint-nothing-to-be/

• San Francisco Weekly cuts cannabis columnist from weekly status: "I've written it every week for over three years. The paper is losing quality content and I'm losing my anchor gig." https://twitter.com/zackruskin/status/1190424732685885440

Appendix I-1

CALEB R. TROTTER, Cal. Bar No. 305195
Email: CTrotter@pacificlegal.org
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
JAMES M. MANLEY, Ariz. Bar No. 031820*
Email: JManley@pacificlegal.org
Pacific Legal Foundation
3217 E. Shea Blvd. # 108
Phoenix, Arizona 85028
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
*Pro Hac Vice Pending
Attorneys for Plaintiffs American Society of Journalists and Authors, Inc., and National Press Photographers Association

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Case No.: 2:19-cv-10645-PSG-KS

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

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California,

Defendant.

DECLARATION OF MICKEY H. OSTERREICHER
IN SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION

I, Mickey H. Osterreicher, declare as follows:

1. The facts set forth in this declaration are based on my personal knowledge obtained in my role as General Counsel of Plaintiff National Press Photographers Association (NPPA) and, if called as a witness, I could and would competently testify thereto under oath. As to those matters which reflect a matter of opinion, they reflect my personal opinion and judgment upon the matter.

2. I began my career as a photojournalist nearly 50 years ago as a freelancer for the Associated Press and the New York Times.

3. I was part of the first graduating class of "special majors" at SUNY Buffalo, receiving my Bachelor of Science degree in "Photography/Photojournalism" in 1973. Earlier that year I had already been hired as a staff photographer for the Buffalo Courier-Express where I worked until it closed in 1982. I also did freelance work for Time Magazine and many other publications.

4. After the Buffalo Courier-Express closed, I went to work at the local ABC affiliate, WKBW-TV, shooting and editing video along with field producing, until 2004.

5. I also freelanced for ESPN and a number of other networks as well as shooting stills for Time and USA Today.

6. I went to law school while I was still working at WKBW-TV and was admitted to practice in New York in 1999.

7. I joined the National Press Photographers Association in 1973 and continue to be a proud dues-paying member.

8. I became NPPA's general counsel in 2006.

9. Chartered in 1946, NPPA is the nation's leading professional organization for visual journalists. Its membership includes news photographers from print, television, and electronic media. NPPA has 536 members in the state of California. NPPA advocates in support of visual journalists' First Amendment rights to report on news and matters of public concern as well as to protect the copyright of their images.

10. As the U.S. Supreme Court explained in *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989), the default in copyright law is that an employer owns the copyright to the photographs taken by their employees.

11. In my experience as a visual journalist and general counsel for NPPA, I have never seen a staff photographer or videographer retain the copyright to their work. As independent contractors, freelance visual journalists retain their copyright by default

and it is common for our members to insist that they retain the copyright to their work.

12. Retaining the copyright to their work as freelancers allows our members more opportunities to further license their work and realize additional income.

13 At an earlier point in the history of NPPA, much of our membership was composed of visual journalists, like me, who were employed as staff photographers.

14. Over the years that membership demographic has changed so that currently, a large number of our members work as freelancers. This is due in great part to the fact that many news organizations have greatly reduced their staff (in both print and broadcast), eliminated their photo staffs entirely, or have ceased to exist altogether.

15. In the visual journalism industry, many freelancers choose to be independent contractors because it offers them greater flexibility and fewer hours than full-time employment. Still others choose to freelance because they earn significantly more money, and have greater financial security. An independent visual journalist can have a variety of clients which diversifies their income stream. In addition, independent photographers have the flexibility to work on special projects that are foreclosed by the demands of a staff position.

16. Despite AB 5's supposed well-meaning intentions, the economic reality 4 for those in the news industry is that nothing will force already struggling

companies to hire more employees, and in fact the 35submission cap for still photographers, and failure to include those who shoot video in the "professional services" exemption, will result in devastating hardship to our freelance members who are impacted by the bill.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on December 17, 2019, at Buffalo, New York.

MICKEY H. OSTERREICHER

Appendix J-1

CALEB R. TROTTER, Cal. Bar No. 305195
Email: CTrotter@pacificlegal.org
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
JAMES M. MANLEY, Ariz. Bar No. 031820*
Email: JManley@pacificlegal.org
Pacific Legal Foundation
3241 E. Shea Blvd. # 108
Phoenix, Arizona 85028
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
*Pro Hac Vice
Attorneys for Plaintiffs American Society of Journalists and Authors, Inc., and National Press Photographers Association

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

Case No.: 2:19-cv-10645-PSG-KS

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

Plaintiffs,

v.

Appendix J-2

XAVIER BECERRA, in his official capacity as Attorney General of the State of California,

Defendant.

DECLARATION OF JOBETH MCDANIEL CLARK IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I, JoBeth McDaniel Clark, declare as follows:

1. The facts set forth in this declaration are based on my personal knowledge, and if called as a witness, I could and would competently testify thereto under oath. As to those matters which reflect a matter of opinion, they reflect my personal opinion and judgment upon the matter.

2. I am a freelance journalist, past president of the Southern California chapter of American Society of Journalists and Authors (ASJA), and current national 8 chair for the ASJA First Amendment Committee.

3. I maintain a business location that is separate from my clients. I set or negotiate my own rates and set my own hours. I customarily contract for freelancing projects and hold myself out to other potential customers as available to perform the same type of work. I customarily and regularly exercise discretion and independent judgment when freelancing.

4. I began freelancing for three newspapers as a teenaged college student in Auburn, Alabama, making enough to pay my tuition and expenses. After graduation, I turned down offers for newspaper staff

jobs that paid less than my part- time college earnings.

5. I worked for a magazine until I received a same-day notice that the entire staff had been fired, and the office closed. For four decades since then, I have rejected staff job offers from my media clients to focus on freelance reporting, writing, and editing for the world's largest publishers on my own schedule. I run a 22 small business that evolved to survive and thrive despite decades of constant upheaval in journalism.

6. AB 5's author Rep. Lorena Gonzalez stated on public forums that my fellow freelancers and I should get "good jobs."[1] This is offensive to me, and false.

7. Freelance journalism is older than our nation. Charles Dickens, Ernest Hemingway, Eudora Welty, and a long list of history's most prominent writers honed their skills as freelance journalists.

8. I have outlasted five different managing editors to work steadily as a freelance reporter, writer, editor, and bureau chief for Life magazine during the 1980s, 1990s, and again in the 2000s, when the magazine was resurrected as a weekly newspaper insert. One editor hired me steadily over three decades as she edited at Investor's Business Daily, Working Woman, Hearst Publications, and Consumer Reports. I am a true professional working in a "good job" and running a small business that brings money into California mostly from East Coast businesses.

---

[1] https://twitter.com/BlumenthalRossa/status/1205315347743531009

9. One of the many reasons I prefer freelance work is that staff journalists relinquish all copyright to employers, which prevents us from reselling our work, including film options, book deals, international rights, and other adaptation of our work. In my case, this would have been a six-figure penalty, because I have optioned my work to television and theatrical performances, and have re-sold published stories and essays to numerous anthologies, college textbooks, websites, and English language publications on three continents.

10. One of the many reasons I prefer freelance work is that I can deduct any expenses for professional memberships, educational and networking conferences, travel, equipment, and my home office. Losing this benefit as an employee would be an enormous penalty for those of us living in expensive cities. In addition, IRS rules require that I keep two separate home offices with separate equipment if my earnings come from both 1099 and W2 work. While I will lose these tax benefits as an employee, the project-based nature of my work means that I will not receive equal benefits from a group of part-time W2 employers. Journalists are paid by the project, not by the hour. I will be paying a large chunk of my earning into benefit systems, yet I will be unable to draw benefits unless I work regular hours for a larger business. The reality is that I can be exploited more easily as a W2 employee by a business that can legally restrict outside work, then reduce my hours—and my access to benefits—on a whim. Our systems are simply not set up for workers with more than one W2 employer.

11. One of the many reasons I prefer freelance work is that employees in journalism are often restricted from working for other publications and can be forced to report and write only on one topic (medical, sports, cars, travel, etc.). Successful freelancers maintain relationships with multiple clients and are open to writing about a wide range of topics.

12. One of the many reasons I prefer freelance work is that employees in Journalism are often required to work in specific places, and usually cannot set their own work hours. My husband was hospitalized nine times between 2015 and 2017, while I was in graduate school, teaching college journalism, and writing full time as a freelancer for major publications. This would have been impossible had I not been in control of my own schedule and workload as a freelancer. Currently, I help care for my frail 95-year-old mother-in-law and her 103-year-old cousin, who both live near me. In previous years, when my father was dying in Alabama, I was able to travel and be his primary caretaker for weeks at a time, staying employed by working on my assignments at night. When my husband and I got permanent custody of an abandoned foster child, a child we had known since birth, I could be home or on call for his school as needed, 24 hours per day, as required by his social worker and the courts. That year, I turned down a job offer with a large publication, rejected assignments requiring me to travel, and still managed to stay employed. AB 5's limits on freelancing will punish workers who face these situations.

13. One of the many reasons I prefer freelance work is that regular employment in journalism is less stable

in the long term. As a freelance creative, I enjoy running a small business that can quickly change to meet market demand. Podcasting is booming, so I've joined thousands of my journalism colleagues in audio training.

14. In a busy year, I might freelance for a dozen different digital and print publishers. In recent years, I've worked for four to five publications under one large parent company, which issues all the payment checks. AB 5's 35-submission cap 4 will penalize writers like me who are in demand from multiple outlets within one large company.

15. In the past, I have surpassed the 35-submission cap with several publications, mainly the ones who have hired me to do editing and digital reporting/writing. I would not be able to keep this work under AB 5's 35-submission 9 limit.

16. Social media has been a large section of my work. I've been paid 11 between $5,000 and $8,000 to build social media channels for major publishers, with 12 multiple posts that would have violated AB 5's 35-submission cap within a week or two. I was paid $100 to $200 per hour for these creative, professional skills.

17. I have also sold videos and audio clips to publications, as is common in today's multimedia environment. This seems to be banned for freelancers in AB 5, with "photojournalism" work on "motion pictures" on any medium (even phones) limited to employees.

18. During the past year, I've taken workshops and other training in videography and in podcasting, where much longform and investigative journalism has moved in recent years. I've talked with producers and sound designers I'd like to hire to help me on a podcast. When Gov. Newsom signed AB 5 into law, I dropped these plans, because this law has changed the financial entry point for video and podcasting. Instead of hiring a few independent consultants, editors, and assistants with special skills, I would have to create jobs for all of them, even if I hired them once for two hours of work.

19. I was also meeting with radio consultants about my plans to create a regular show focusing on California scientists. AB 5 has zero mention of audio reporting, making it unclear whether any station or podcasting network could legally 1 pay me on a freelance basis. Nor do I want to be hired as an employee, for the reasons discussed in this declaration.

20. AB 5 is already harming me and my colleagues as employers blacklist California workers rather than face harsh penalties, additional costs and taxes, and widespread uncertainty about the law. For example, even Patch, a "hyper-local" digital news company, recently advertised for journalists in Arizona and Nevada who can cover California stories. When I sent an email asking if Patch would consider hiring a California writer to write California stories, I got no response.

21. I know that attorneys for media companies across the U.S. are already advising their editors to stop

working with all California freelancers, or severely limit our assignments, thanks to confusion over AB 5. Uber must hire drivers living in California. Most freelance creative professionals can work from anywhere, Dubuque to Dubai, so our publications are easily replacing us with non-California 14 and non-U.S. workers. It takes years to build up a freelancing business. It will take us years to recover from AB 5.

22. In my roles with ASJA, I am familiar with many other freelance journalists and I am knowledgeable about the journalism industry generally.

23. In a world where media outlets are shuttered daily, and journalism 19 employment has shrunk by more than half since the 1990s, freelancers like myself have far more job stability with multiple clients than we do as employees of one 21 publication.

24. Many freelancers are women, in part because by staying independent, we are better able to avoid abuses, from rampant sexual harassment to discrimination due to age, ethnic identity, religion, and sexual orientation. Two decades into this century, older white males still make the majority of media hiring decisions, and hold nearly all top media executive jobs. AB 5 forces creative professionals into employee-employer situations, making their lives dependent upon the whims of others. Therefore, AB 5 will likely lead to greater discrimination/exploitation of vulnerable groups who are already at a disadvantage in these workplaces.

25. Freelance journalists are far more likely to have health issues that could grow worse under long

commutes or the mandatory extended office hours common for media staffers. I have two genetic conditions that put me at significant risk for blindness, blood clots, and cardiac events, with a family history of early disability and death. My conditions make me a poor fit for traditional office employment, yet I have never applied for disability, because I can work at home, set my own hours, and accept assignments that allow me to maintain my excellent health.

26. Many freelancers are older women like me. Despite our talent and experience, we are rarely considered for full-time positions with media employers. AARP research shows that my demographic has the highest levels of poverty and the fastest growing rates of suicide and homelessness in the United States. We are more likely to be unemployed or underemployed, the least likely to get to the interview stage for full-time jobs. Yet until AB 5, competent freelancers of all ages could find plenty of well-paid work across the U.S. and internationally. My aunt freelanced regularly until she was in her 90s. AB 5 would have impoverished her.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on December 16, 2019 at California. Los Angeles

JOBETH MCDANIEL CLARK

Appendix K-1

CALEB R. TROTTER, Cal. Bar No. 305195
Email: CTrotter@pacificlegal.org
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
JAMES M. MANLEY, Ariz. Bar No. 031820*
Email: JManley@pacificlegal.org
Pacific Legal Foundation
3241 E. Shea Blvd. #108
Phoenix, Arizona 85028
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
*Pro Hac Vice Pending

Attorneys for Plaintiffs American Society of Journalists and Authors, Inc. and National Press Photographers Association

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

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

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California,

Defendant.

Appendix K-2

Case No.: 2:19-cv-10645-PSG-KS

DECLARATION OF SPENCER GRANT IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I, Spencer Grant, declare as follows:

1. The facts set forth in this declaration are based on my personal knowledge, and if called as a witness, I could and would competently testify thereto under oath. As to those matters which reflect a matter of opinion, they reflect my personal opinion and judgment upon the matter.

2. Since age 13, photojournalism has always been a calling to me, not just a job. I have been a professional for over 50 years; my love and commitment to my work is as strong as ever. I have been a freelance photojournalist ever since I left the Boston Globe in 1974. I first joined the National Press Photographers Association in 1969.

3. I maintain a business location that is separate from my clients. I set or negotiate my own rates and set my own hours. I customarily contract for freelancing projects and hold myself out to other potential customers as available to perform the same type of work. I customarily and regularly exercise discretion and independent judgment when freelancing.

4. For the past four years I have freelanced for The Daily Pilot, the newspaper of the Orange County

California beach cities, doing 90–100 assignments a year. The work is both a joy and much-needed income. If that publication is forced to comply with AB 5, the result would be: they would not hire me as an employee, I would not want to be their employee even if they were willing and able to hire me, and most importantly, it would cut my freelance assignments with them by two-thirds, which would be economically devastating for me.

5. California Assembly Bill 5 will cause me nothing but harm. While its 35-assignment cap on freelance "photographers and photojournalists" is supposed to force clients into hiring them for full-time unionized jobs, such a "benefit" is not realistic for news publications in this economy and neither desirable nor viable for a freelance photographer like me.

6. I am 75 years old. At my age I do not want full time employment. The idea that my clients should be forced to make me a staffer is not only ridiculous, but also inapplicable to me. The Daily Pilot already has four staff photographers; they do not need, want, or can afford any more. It is my role to fill-in on weekends and evenings when staffers are not available. My schedule is therefore inconsistent, and I have the flexibility I need to accept or decline assignments.

7. I am the only caregiver for my wife Mara. She suffers from cervical dystonia, arteriosclerosis aorta, ventricular and paroxysmal supraventricular tachycardia, hyperlipidemia, obstructive sleep apnea, a compromised left rotator cuff, scoliosis, and frequent urinary tract infections. I need to be available to help

her in myriad ways that require me to have control over my schedule: I take her to doctor visits, I am her "trainer" when she goes to the YMCA gym, I do shopping, cooking, and I drive her to work (yes, she is still working at 78). There is no way I could be a loving and supportive husband and provide the level of care that her medical conditions require if I had to give up control over my workload. She comes first. If I were an employee, I would not have the flexibility to accept or decline assignments as needed to help my wife.

8. Like many freelancers, I deduct my business expenses on my income taxes. As an employee, these deductions would be limited if not eliminated.

9. These assignments from The Daily Pilot are a joy to me; cutting them by two-thirds would be not only cruel but pointless since the paper has confirmed that they would never hire me. Even if I were offered a regular position, I could not accept it. I have always paid my bills and loved my work, but this is the first time I have faced a gratuitous gutting of my work for the benefit of no one.

10. Since I could not accept regular employment, the avowed purpose of AB 5 is not only inapplicable to me, it is extremely detrimental. My present working situation fits my available time and professional commitment. I threaten no one. I only wish to continue freelancing for The Daily Pilot as I have for the past four years.

11. While well-intentioned, AB 5 hurts thousands of "independent contractors" who are not being exploited against their will and are not only content

with their status but—in the case of journalists and photojournalists—are actively contributing to the success of countless newspapers who need their contributions and who cannot afford to hire them as employees. Without freelancers like me newspapers could not fulfill their roles. AB 5 seeks to undermine my work and limit my business in pursuit of an impossible one-size-fits-all dream of increased employment benefits.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on December 17, 2019 at Laguna Niguel, California.

s/ Spencer Grant
SPENCER GRANT

Appendix L-1

CALEB R. TROTTER, Cal. Bar No. 305195
Email: CTrotter@pacificlegal.org
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
JAMES M. MANLEY, Ariz. Bar No. 031820*
Email: JManley@pacificlegal.org
Pacific Legal Foundation
3217 E. Shea Blvd. # 108
Phoenix, Arizona 85028
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
*Pro Hac Vice Pending

Attorneys for Plaintiffs American Society of Journalists and Authors, Inc. and National Press Photographers Association

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

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

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California,

Defendant.

Appendix L-2

Case No.: 2:19-cv-10645-PSG-KS

DECLARATION OF BRIAN FEULNER IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I, Brian Feulner, declare as follows:

1. The facts set forth in this declaration are based on my personal knowledge, and if called as a witness, I could and would competently testify thereto under oath. As to those matters which reflect a matter of opinion, they reflect my personal opinion and judgment upon the matter.

2. I've been a working photojournalist for nearly 15 years, since I graduated college with a degree in photography in 2005. I worked my way up being employed by small newspapers to some of the largest in our country, weathering the recession that hit our industry so hard, and paying off the huge student loans that came with following my dream.

3. I am a member of Plaintiff National Press Photographers Association; I first joined in 2003, when I was a college student studying photojournalism.

4. After finally becoming a photo editor at a prominent California newspaper, I decided a full-time employment position wasn't for me. I wanted a chance to be in control of my income and to choose the type of work that I wanted to do. I wanted to follow the path of being an independent photographer.

5. Finally, after several long years of working as an employee, I left that large-market newspaper on good terms and began freelancing for them as much as I could. The role change was from manager back to photojournalist, and I loved it.

6. In some months I get upwards of 10 assignments from the newspaper. Having two assignments a day, or what Assembly Bill 5 refers to as "submissions," is common. I will quickly exceed the 35-submission limit, and so would most freelance visual journalists.

7. Often times, the help from independent contractors, like myself, can help relieve a publication's staff to allow them to work on larger, more impactful projects. But I have the ability to say no if I don't want to do a certain assignment and also have the ability to work on different projects.

8. I don't want to become an employee; I enjoy the freedom of running my own business.

9. I maintain a business location that is separate from my clients. I set or negotiate my own rates and set my own hours. I customarily contract for freelancing projects and hold myself out to other potential customers as available to perform the same type of work. I customarily and regularly exercise discretion and independent judgment when freelancing.

10. 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.

11. As a freelancer, I own the copyright to my work, and I get regular requests to relicense it. When I relicense my work, I earn additional income. As a staff photographer, the employer would own the copyright to my work and I would not have that income stream.

12. Part of the advantage of being a freelancer is diversification of clients and work. As part of that diversification, I've invested greatly in video production equipment. Videography is also a passion I have and another great way to tell and share amazing stories with the world.

13. Every year I have between 10 and 15 clients that are the largest source of my income. I earn nearly 1/3 of my revenue from a local San Francisco paper; most of that revenue comes from video projects I do for that paper.

14. Under AB 5, I won't be able to produce any video for my news clients without being converted to employee status. If I cease producing videos for my clients, I will lose out on significant income from the video production work that I do. In my case, that income would be upwards of 20% or more of my annual income from a single newspaper alone.

15. The 35-submission limit rule will most likely mean that I will get fewer assignments, as I will

quickly exceed that limit. This is a challenging industry and frankly one that most photojournalists do because of a passion for visual storytelling and making a difference by spreading truth in the world by using our First Amendment right to free speech and a free press. Capping my constitutional right to submit photos at 35 submissions a year per client only makes it more difficult to survive as an independent freelancer.

16. I am a hard-working independent contractor and I enjoy this lifestyle. It's work that isn't hurting anyone, only helping to fill a need and allow people's voices to be heard through my journalism. AB 5 limits free speech/press and only continues to hurt an already challenged industry.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on December 16, 2019, at San Francisco, California.

s/ Brian Feulner
BRIAN FEULNER

Appendix M-1

CALEB R. TROTTER, Cal. Bar No. 305195
Email: CTrotter@pacificlegal.org
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
JAMES M. MANLEY, Ariz. Bar No. 031820*
Email: JManley@pacificlegal.org
Pacific Legal Foundation
3241 E. Shea Blvd. # 108
Phoenix, Arizona 85028
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
*Pro Hac Vice
[Additional Counsel on Following Page]
JEREMY B. TALCOTT, Cal. Bar No. 311490
Email: JTalcott@pacificlegal.org
Pacific Legal Foundation
1212 W. Amerige Ave.
Fullerton, California 92833
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Attorneys for Plaintiffs American Society of Journalists and Authors, Inc.,
and National Press Photographers Association

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

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

Appendix M-2

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California,

Defendant.

Case No.: 2:19-cv-10645-PSG-KS

SUPPLEMENTAL DECLARATION OF RANDY DOTINGA IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I, Randy Dotinga, declare as follows:

1. The facts set forth in this declaration are based on my personal knowledge, and if called as a witness, I could and would competently testify thereto under oath. As to those matters which reflect a matter of opinion, they reflect my personal opinion and judgment upon the matter.

2. American Society of Journalists and Authors' efforts to secure pro bono representation in this matter were performed entirely on an unpaid basis by volunteer leaders who are all working journalists, with other responsibilities as ASJA leaders.

3. Like many freelance writers, I produce both traditional journalism content and marketing content, while taking care to follow ethical rules regarding any potential conflicts with my journalism work. It's common for freelancers like me to wear multiple "hats" and work on both journalism and marketing projects during the same day or even the

same hour.

4. Since my previous Declaration in this case (Dkt. # 23), I have learned that additional clients have blacklisted California freelance writers or restricted their workloads in various ways in response to AB 5. These clients include the following 34 companies: Los Angeles Times; San Francisco Chronicle; Vox/SB Nation; SF Weekly; San Francisco Examiner; Forbes; Business Insider; San Diego Union-Tribune; Reuters; Variety; Medium; Mediaite; Nerd Wallet; Proofit; Rev; Xist Publishing; Zergnet; Doityourself; FamilyMinded; Scripted; Textbroker; BK Content; Gamespot; Evolve Media; Western Outdoor News; Daily Republic (Solano County); Sonoma Media (incl. Santa Rosa Press Democrat); Page One Power; Insider; Considerable; Sacramento News & Review; Travelingmom; Bustle Digital Group; The Manual.

5. Recent results of a survey of over 500 independent writers (freelancers) commissioned by Contently,[1] show that 88% percent oppose AB 5's 35-submission limits, and 82% oppose a cap of any number on submissions.

6. According to the survey, 90% of freelancers believe AB 5's limits "could negatively affect their livelihoods," because substantial majorities agree that publishers will seek out freelancers outside of California or cut their freelance budgets, rather than hire them as part- or full-time staff in response to AB 5.

7. Even if freelancers were offered part- or full-time staff positions, it is unlikely they would accept

---

[1] *Available at* https://contently.net/2020/01/30/resources/we-polled-573-freelancers-about-ab5-theyre-not-happy/

them, however, because the survey shows 75% of freelancers freelance by choice.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 24, 2020 at San Diego, California.

Randy Dotinga
RANDY DOTINGA

Appendix N-1

No. 20-55734

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Appellants,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California,

Appellee.

On Appeal from the United States District Court for the Central District of California, Los Angeles The Honorable Philip S. Gutierrez, District Judge

DECLARATION OF RANDY DOTINGA IN SUPPORT OF MOTION TO SUPPLEMENT THE RECORD

CALEB R. TROTTER
JAMES M. MANLEY
JEREMY TALCOTT
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
Attorneys for Appellants

Appendix N-2

I, Randy Dotinga, declare as follows:

1. The facts set forth in this declaration are based on my personal knowledge, and if called as a witness, I could and would competently testify thereto under oath. As to those matters which reflect a matter of opinion, they reflect my personal opinion and judgment upon the matter.

2. I have been a full-time freelance writer based in San Diego, California, for more than 20 years. I am a current member and former president of the American Society of Journalists & Authors (ASJA), an 1,100-member non-profit association of independent non-fiction authors. I served as president from 2014-2016. The ASJA was created in 1948 and serves as a voice and resource for freelance writers and book authors.

3. Honest and accurate journalism is more important than ever. This is an especially dangerous time for the state of California to separate journalists into different groups with different rights depending solely on the content we produce. The First Amendment demands that we must be treated the same.

4. In early 2019, I led the creation of a coalition of 20 creator organizations (17 national, 3 California-based) to advocate before the California legislature on the then-recently introduced AB 5. Coalition members included several major national writer associations and every major national photographer association. We advocated for many changes to AB 5.

5. With the enactment of AB 5—and even after the enactment of AB 2257 in 2020—my livelihood as an independent journalist remains threatened due to the laws' restrictions on freelance videography.

6. I write for about 10-12 clients a year and make enough money to live comfortably in San Diego, one of the nation's most expensive cities. Most of my clients are based out-of-state but must still comply with California law in order to work with me.

7. Freelance writers like me do more than type on keyboards. In the 21st century, we are expected to be multimedia journalists who are skilled at producing audio journalism, photojournalism and video journalism. While most of my work is written, clients still request that I participate in video interviews, either in person or via the Internet. I have also taken photographs and video on assignment. It would not be unusual for a client to ask me to shoot video to accompany an article.

8. AB 2257, the 2020 California legislation that aimed to repair AB 5, specifically prevents journalists who shoot "broadcast news" from taking advantage of an exemption provided to photojournalists, videographers, still photographers and photo editors. As a result, I cannot enter into a contract that requires me to shoot video during an assignment.

9. I prefer to work independently for numerous reasons.

10. I prefer to own my own work under copyright law. As a freelancer, I own my work by default and can sell

or license it; employers own the work of their employees by default. If I'm forced to become a staff writer as an employee, I will automatically lose ownership of my work under copyright law. That means I can't license it to another publication, reprint it in a book or sell it to Hollywood. Nor can I control its use in inappropriate ways or go to court if my work is stolen.

11. As an independent contractor, I take business-expense write-offs for a variety of expenses that aren't reimbursable by employers. These include expenses for health insurance and for travel to conferences where I find new work. I save thousands of dollars this way each year. If I'm forced to become a part-time staff writer as an employee, I will still need to pay for my health insurance, but it's unlikely that any of multiple part-time employers will be obligated to provide it. And I will still need to pay to find new work when clients stop using me.

12. Freelancing provides me with more security and more income than staff media jobs. Over my two decades of freelancing, I have never struggled to put food on the table. Nor have I worried about my future (until now). I have always kept a stable of multiple clients. I am able to tolerate losing one or two clients because the rest of my workload is generally stable, even during difficult economic times, and it allows me to survive until I can find replacement clients.

13. By contrast, my newspaper colleagues from the 1990s have almost all abandoned journalism for public relations or other jobs because of the rapid decline of the media industry. Those that decided to

stay have suffered through severe uncertainty and unrelenting anxiety. Two of my closest friends, an editor and a photographer, were both laid off by the San Diego Union-Tribune. They were each rehired a few months later. Then they were each laid off again. They continue to struggle.

14. Freelancing has allowed me to continue working in a field I love and remain committed to telling the truth.

15. I value the flexibility that freelancing provides. Control over my workload allows me to care for my elderly parents and my severely disabled brother in a way that would never be possible in a staff job. I am the sole caregiver of all three of them. They are often ill and have made many visits to the emergency room in recent years. Every single time, I have been able to drop everything and rush to their side, whether it is 2:00 in the afternoon or 4:00 in the morning.

16. As a freelancer, I also have more leeway than staff workers to free myself from abusive work environments and abusive bosses.

17. Ideally, as a freelancer I do not have any client who accounts for more than 30% of my income. Diversification is crucial. That means freelancers can survive—without needing unemployment—if we find a boss to be abusive or inappropriate and "fire" that client. Not many people can easily quit their staff job, and forgo unemployment, if they feel abused.

18. There are obviously many benefits to staff work. And there is obviously exploitation of freelancers. But

many of us are not exploited. Nor do we exploit anyone. If we are exploited, California employment misclassification law predating AB 5 is sufficient to protect us.

19. The law should treat all California independent journalists—and all the companies that hire them—in the exact same way. We who devote our careers to storytelling must not face limitations based on the kinds of stories that we produce. The First Amendment demands no less.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 17, 2020, at San Diego, California.

RANDY DOTINGA

Appendix O-1

No. 20-55734

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Appellants,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California,

Appellee.

On Appeal from the United States District Court for the Central District of California, Los Angeles The Honorable Philip S. Gutierrez, District Judge

DECLARATION OF BRIAN FEULNER IN SUPPORT OF MOTION TO SUPPLEMENT THE RECORD

CALEB R. TROTTER
JAMES M. MANLEY
JEREMY TALCOTT
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
Attorneys for Appellants

Appendix O-2

I, Brian Feulner, declare as follows:

1. The facts set forth in this declaration are based on my personal knowledge, and if called as a witness, I could and would competently testify thereto under oath. As to those matters which reflect a matter of opinion, they reflect my personal opinion and judgment upon the matter.

2. I've been a working photojournalist for nearly 15 years, since I graduated college with a degree in photography in 2005. I worked my way up being employed by small newspapers to some of the largest in our country, weathering the recession that hit our industry so hard, and paying off the huge student loans that came with following my dream.

3. I am a member of Plaintiff National Press Photographers Association (NPPA); I first joined in 2003, when I was a college student studying photojournalism.

4. After finally becoming a photo editor at a prominent California newspaper, I decided a full-time employment position wasn't for me. I wanted a chance to be in control of my income and to choose the type of work that I wanted to do. I wanted to follow the path of being an independent photographer.

5. Finally, after several long years of working as an employee, I left that large-market newspaper on good terms and began freelancing for them as much as I could. The role change was from manager back to photojournalist, and I loved it.

6. Prior to AB 5 taking effect in January, I got upwards of 10 assignments from the newspaper in some months.

7. Often times, the help from independent contractors, like myself, can help relieve a publication's staff to allow them to work on larger, more impactful projects. But I have the ability to say no if I don't want to do a certain assignment and also have the ability to work on different projects.

8. I don't want to become an employee; I enjoy the freedom of running my own business.

9. I maintain a business location that is separate from my clients. I set or negotiate my own rates and set my own hours. I customarily contract for freelancing projects and hold myself out to other potential customers as available to perform the same type of work. I customarily and regularly exercise discretion and independent judgment when freelancing.

10. 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.

11. As a freelancer, I own the copyright to my work, and I get regular requests to relicense it. When I relicense my work, I earn additional income. As a staff

photographer, the employer would own the copyright to my work and I would not have that income stream.

12. Part of the advantage of being a freelancer is diversification of clients and work. As part of that diversification, I've invested greatly in video production equipment. Videography is also a passion I have and another great way to tell and share amazing stories with the world.

13. Every year I have between 10 and 15 clients that are the largest source of my income. Prior to AB 5, I earned nearly 1/3 of my revenue from a local San Francisco paper; most of that revenue came from video projects I did for that paper.

14. Even with the enactment of AB 2257, I still 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.

15. This is a challenging industry and frankly one that most photojournalists do because of a passion for visual storytelling and making a difference by spreading truth in the world by using our First Amendment right to free speech and a free press. Limiting my constitutional right to tell stories through videography—as AB 5 did, and AB 2257 leaves in place—only makes it more difficult to survive as an independent freelancer.

16. I am a hard-working independent contractor and I enjoy this lifestyle. It's work that isn't hurting anyone, only helping to fill a need and allow people's voices to be heard through my journalism. AB 5 and AB 2257 limit free speech and the free press and continue to hurt an already challenged industry.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 20, 2020, at Pacifica, California.

BRIAN FEULNER

Appendix P-1

No. 20-55734

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California,
Appellee.

On Appeal from the United States District Court for the Central District of California, Los Angeles The Honorable Philip S. Gutierrez, District Judge

DECLARATION OF JOBETH MCDANIEL IN SUPPORT OF MOTION TO SUPPLEMENT THE RECORD

CALEB R. TROTTER
JAMES M. MANLEY
JEREMY TALCOTT
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
Attorneys for Appellants

I, JoBeth McDaniel, declare as follows:

Appendix P-2

1. The facts set forth in this declaration are based on my personal knowledge, and if called as a witness, I could and would competently testify thereto under oath. As to those matters which reflect a matter of opinion, they reflect my personal opinion and judgment upon the matter.

2. With the enactment of AB 2257, the harms to freelance writers and journalists created by AB 5 are not resolved.

3. AB 2257 maintains AB 5's ban on the sale of all video taken by independent contractor freelance journalists to television stations, documentary filmmakers, and more, cutting California journalists off from lucrative assignments and the legal resale of their copyright-protected material.

4. The prohibition on the sale of freelance video reporting is one of the most outrageous and destructive laws in the United States involving press freedoms that I've seen in my work as chair of the American Society of Journalists and Authors First Amendment Committee, where we've reviewed and supported dozens of First Amendment lawsuits over the years.

5. Affordable video tools and broadband internet mean that video journalism is now faster and cheaper than other types of journalism, including print. Video also can provide more accurate interviews and important footage of news events. In recent years, I've incorporated video reporting in projects for multiple media businesses. Magazines and newspapers often have parent companies that own television stations

and filmmaking divisions, so there is no good way that journalists or editors can be assured that they are abiding by AB 5, unless journalists are forced to give away their work for free. For example, Josie Huang was freelancing on assignment for Los Angeles radio station KPCC when she was arrested and injured on September 12, 2020. Her mobile phone video of the incident, which she uploaded and provided to media outlets for free,[1] ran on television stations around the globe and proved that Los Angeles Sheriff's deputies falsified information in their official report about her arrest. Huang faced charges (now dropped) that could have put her in prison for years. Yet under AB 5 and AB 2257, she could not legally sell her copyright-protected video journalism to television stations. This is a dangerous restriction on the estimated 60 percent of journalists who work as freelancers.

6. In addition, AB 2257 maintains AB 5's prohibition on filmmakers buying a freelance journalist's video. This includes documentary filmmakers (who are typically freelance journalists themselves) reporting on society's most entrenched and complex problems.

7. The video ban freezes freelance journalists like me from the sale of video we own, or forces us into W2 employment where we lose copyright ownership of what could be our most valuable work. Footage of major historic events can sell for hundreds of thousands of dollars.[2] Yet freelancers are now forced

---

[1] https://www.newsweek.com/reporter-tackled-arrested-l-deputies-shares-videos-incident-1531672?amp=1

[2] *See, e.g.*, https://deadline.com/2019/02/knock-down-the-house-10-million-dollarnetflix-deal-alexandra-oca

to give away our work for free or keep it in storage. This harms journalists and our media outlet clients, and it restricts important journalism from reaching the public at large.

8. For myself, and other ASJA members, video has become a standard part of our print assignments. For example, when I cover events on assignment featuring prominent experts or politicians, I always shoot video that can run alongside the story. This growth of video journalism will only expand in future years, as it becomes easier to transfer longer video segments from mobile phones.

9. Another part of AB 2257 that concerns me is its restriction on freelance journalists working on site at a client's office. Freelance journalists often need access to a client's higher-end equipment, as well as vast archives that aren't yet fully digitized or accessible online. In recent years, multiple publications have asked me to move temporarily into an office at their headquarters. This is essential on longer assignments that include video or audio files, on collaborative work involving multiple journalists, or with investigative assignments that require close work with a client's media attorneys. Freelancers like myself will be shut out of these lucrative and important assignments due to these restrictions on the independent press in AB 2257.

---

sio-cortez-sundance-festival-documentary-renaissance1202550755/amp/; https://documentary-cameras.com/how-to-license-television-news-footage/.

10. The other part of AB 2257 that harms me and other freelance journalists is the vague restriction blocking us from "replacing" a staffer, with no time frame to determine when this is legal or illegal. Media businesses have relied on me and other freelancers to fill in when staffers quit suddenly, are injured or ill, or take family leave. Filling in for staffers has been especially important in recent years as publications are struggling to operate with barebones staff, and it's even more crucial that freelancers be able to step in and help meet critical publication deadlines. Most media outlets follow a grueling schedule and can't skip publication when it is inconvenient. Recently, I stepped in to help after a journalist had a heart attack. He cannot work for an undetermined time. AB 2257 forces serious financial repercussions if I am deemed to have "directly replaced" him. AB 2257 places additional burdens only on freelance journalists and the media outlets that hire me and other freelance journalists.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November ___, 2020, at _____, California.

JOBETH MCDANIEL

Appendix Q-1

No. 20-55734

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Appellants,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California,

Appellee.

On Appeal from the United States District Court for the Central District of California, Los Angeles The Honorable Philip S. Gutierrez, District Judge

DECLARATION OF MIRIAM RAFTERY IN SUPPORT OF MOTION TO SUPPLEMENT THE RECORD

CALEB R. TROTTER
JAMES M. MANLEY
JEREMY TALCOTT
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
Attorneys for Appellants

Appendix Q-2

I, Miriam Raftery, declare as follows:

1. The facts set forth in this declaration are based on my personal knowledge, and if called as a witness, I could and would competently testify thereto under oath. As to those matters which reflect a matter of opinion, they reflect my personal opinion and judgment upon the matter.

2. I am the founder and editor of East County Magazine, a San Diego County-based non-profit community news organization. I am also a member of the American Society of Journalists and Authors.

3. As a result of AB S's video ban (which AB 2257 left in place), our ability to cover breaking news and important community news and events is constrained.

4. Prior to the enactment of AB 5, our organization's coverage of wildfires, civil unrest, earthquakes, plane crashes, and other unpredictable events frequently required spur-of-the-moment availability inquiries of freelance journalists with whom we maintained relationships. In addition to still photographs that those journalists included in written stories, they also frequently shot video. Due to AB 5 and AB 2257, however, we can no longer include the video component in our coverage. This is deeply unfortunate as video is sometimes the best storyteller.

5. Sometimes members of the public even contact me to tell me there's a wildfire, and prior to AB 5 I would ask them to shoot a video and send it in. I should not have to ask them to offer it to us for free, as now required under AB 5 and AB 2257; I should be able to

offer a reasonable fee for their video. In the past, I've run citizen videos of things like plane crashes, a tsunami hitting Japan, protests, civil unrest, politicians speaking, press conferences, and more.

6. We cover a large geographical area of over 2,0000 square miles; there are no videography companies in some of the more remote locations. If we need video of breaking news on one of our county's 18 Native American reservations, or in a remote desert area or mountain town where snow sometimes makes roads impassable to outsiders, it's crucial to have the flexibility to hire anybody in the vicinity with a camera or even a cell phone with video.

7. I have made photos and video available to documentary filmmakers, such as a film on clashes between Native Americans and developers of wind energy projects, and to broadcast news stations. AB 2257 prohibits me from using video shot by a freelancer in "motion pictures" and "broadcast news." This restriction amounts to censorship of news and minority voices, simply because it is communicated by a freelancer using video.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 20, 2020, at La Mesa, California.

MIRIAM RAFTERY

Appendix R-1

No. 20-55734

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Appellants,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California,

Appellee.

On Appeal from the United States District Court for the Central District of California, Los Angeles The Honorable Philip S. Gutierrez, District Judge

DECLARATION OF JUSTIN STEWART IN SUPPORT OF MOTION TO SUPPLEMENT THE RECORD

CALEB R. TROTTER
JAMES M. MANLEY
JEREMY TALCOTT
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
Attorneys for Appellants

Appendix R-2

I, Justin Stewart declare as follows:

1. The facts set forth in this declaration are based on my personal knowledge, and if called as a witness, I could and would competently testify thereto under oath. As to those matters which reflect a matter of opinion, they reflect my personal opinion and judgment upon the matter.

2. I am a member of the National Press Photographers Association, which I first joined in 2014.

3. I have a freelance photography and videography business and also use drone photography and drone videography for my work.

4. I maintain a business location that is separate from my clients'. I set or negotiate my own rates and set my own hours. I customarily contract for freelancing projects and hold myself out to other potential customers as available to perform the same type of work. I customarily and regularly exercise discretion and independent judgment when freelancing.

5. AB5 and AB2257 treat me differently based on who my client is, what I am documenting, and where the work is being presented to the public. If I photograph topics that are favored by AB2257, such as projects related to sound recordings, I get to deduct my business expenses on my taxes. Additionally, for those projects, my clients don't pay the cost to put me on "payroll" which is of little benefit to me because of the length of time I would be an employee. However, if I shoot a disfavored subject, such as something that is not related to a sound recording, and if my work is

published on a disfavored platform such on television, or in a theater, I suffer the tax penalties and my client has to put me on payroll.

6. The practical result is that clients have not been hiring me for projects that would subject me to AB5 and AB2257. Additionally, were I to have clients willing to put me on payroll for these brief projects, sorting out the tax implications of my business expenses would be a huge challenge, subjecting me to serious penalties for errors.

7. In 2016, 2017, 2018 and 2019, I shot videos as well as still photography for event coverage around Los Angeles, California. Additionally, I was a part of documentary projects. I work with both documentary and commercial clients.

8. For example, I shot drone footage of the Long Beach Congressional Cup yacht race for a broadcast client Boxx Communications, LLC in 2019. This year, the race was canceled because of the pandemic, but I would not have been able to accept this freelance broadcast video job due to restrictions caused by AB5 and AB2257.

9. As a videographer who sometimes has to document the work of my clients, I sometimes perform my work at my client's business location. However, my commercial clients are not able to hire me as a staffer, and for them to do so would cause problems with my business structure, have a negative impact on my tax deductions and my copyright.

10. In November of 2019, I was negotiating for a position as director of photography for a documentary videography project which was to take place in 2020. Earlier this year I attended a budget planning meeting on the project. 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. Because this was a video project, Section 2778 would also have made me an employee.

11. Section 2778 is difficult to comply with because it treats videographers and those in the videography industry differently based on where a project is published—something that is not always determined in advance. When I am involved in a documentary project, we do not know where the project will end up. The projects are typically submitted to festivals, and then the owner of the production licenses the project from there. Therefore, at the time of creation there is no way to determine whether the project will be shown on television, in the theater, or on a different platform. In some cases, a project could be shown both on television and on a non-traditional platform.

12. The practical impact of the confusion surrounding AB5 and AB2257 is that clients don't fully understand it. They don't understand how it is going to be applied and the fear of running afoul of AB2257 is driving them away from good projects and from independent videographers in California like myself.

13. In October of 2020, I shot still photographs of a musician who was recording music singles. Unlike the documentary videography projects that I have been

unable to shoot due to AB5 and AB 2257, there were no obstacles to shooting that assignment. Because AB2257 creates more obstacles to my documentary videography projects, and doesn't create obstacles to my photography, videography or other publicity work related to sound recordings and musicians, I am forced to reduce my independent documentary videography projects. As a result, there are important stories I won't shoot, and the public won't see.

14. Like many freelancers, I deduct my business expenses on my income taxes. As an employee, these deductions would be limited if not eliminated.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 21, 2020, at Los Angeles, California.

JUSTIN STEWART

Appendix S-1

No. 20-55734

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, INC. and NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION,
Appellants,
v.
XAVIER BECERRA, in his official capacity as Attorney General of the State of California,
Appellee.

On Appeal from the United States District Court
for the Central District of California, Los Angeles
The Honorable Philip S. Gutierrez, District Judge

DECLARATION OF SUSAN VALOT IN SUPPORT OF MOTION TO SUPPLEMENT THE RECORD

CALEB R. TROTTER
JAMES M. MANLEY
JEREMY TALCOTT
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Attorneys for Appellants

Appendix S-2

I, Susan Valot, declare as follows:

1. The facts set forth in this declaration are based on my personal knowledge, and if called as a witness, I could and would competently testify thereto under oath. As to those matters which reflect a matter of opinion, they reflect my personal opinion and judgment upon the matter.

2. I am a freelance public radio reporter and podcast producer, and I am also a member of the American Society of Journalists and Authors (ASJA), as well as other journalism groups. I have been a radio journalist since 1997, spending the last nine years as a freelancer. I also am an adjunct audio/film/TV professor at Saddleback College. I have also worked as an adjunct media center adviser at a major university, teaching young journalists about the journalism business.

3. As a journalist, I maintain a business location that is separate from my clients. I set or negotiate my own rates and set my own hours. I customarily contract for freelancing projects and hold myself out to other potential customers as available to perform the same type of work. I customarily and regularly exercise discretion and independent judgment when freelancing.

4. Until the implementation of AB 5, I produced stories for a local NPR station, a statewide public radio program, and national NPR programs. I also did recordings for shows and podcasts.

5. I prefer owning a freelance multimedia business to working as a W-2 employee for an outlet, because it provides me the freedom and flexibility to live the life I want. I make the equivalent of what I was making at my last W-2 job in public radio, but I enjoy a greater work-life balance and generally have a happier life. I also prefer owning my own business because working as a W-2 employee would force me to pay into systems like unemployment and disability, that as a freelancer with multiple clients, I cannot use. It would also imperil my ability to retain the copyright and resale rights to my work. In the near future I will be faced with caring for aging parents, who live next door to me. Building and maintaining my freelance business will give me flexibility for that, as well.

6. As a result of AB 5, I have lost many of my freelance radio clients since the start of 2020. While I should be exempt under the AB 2257 "fix" for sound recording, stations and other media outlets have resisted working with me because the law does not specifically exempt "radio or audio journalists." One outlet has said that they will now only accept completed pieces, which can take 20-40 hours to do because of the need for sound gathering and in-person interviews. This sort of "on spec" business practice is freelancer suicide. There is no way to survive doing business as a freelancer that way because it requires a large investment of time without any guarantee clients will buy the work. It is a direct result of confusion caused by AB 5 and AB 2257. I also know of other radio and podcast outlets that I could have pitched to before AB 5 that are no longer taking

freelance work because of the law, even with AB 2257. This has closed potential markets for my business.

7. When I cover stories for any outlet, I cover them with today's journalism landscape in mind. I usually do stories for radio with an accompanying written story. Also, I include videos in my online stories where appropriate, such as those from fires where there is video of a plume of smoke, or video of a firefighting helicopter getting water from a pond. These are simple videos, often shot on a cell phone, but even after enactment of AB 2257 it is illegal for me as a freelancer to communicate my reporting through video. As a result, the law hinders how I communicate as a reporter.

8. This is how journalism today operates. We are all multimedia reporters who must determine the best method or methods to tell a story in today's media landscape. We deal in text, in audio, in video, and in social media. That is our job.

9. When I was an adjunct media adviser at a major university, we taught students that there was no more "radio reporter" or "TV reporter" or "print reporter." Every student in that media center became an MMJ—a multimedia journalist. They were taught to approach stories this way: What is the best way to tell this story? Should it be audio? Should it be video? Should it be data-driven with graphics? This is the basis of the journalism field today. We are no longer siloed into the various mediums.

10. AB 5 and AB 2257 approach journalism and freelance journalism without this understanding of

how modern reporters communicate. It threatens to make it impossible for me to work as a multimedia journalist in California, putting constraints on me that journalists in other states don't face. Even with its long list of "fixes," AB 2257 is a destructive law that only targets certain industries. The law handcuffs the creative flexibility of freelance journalists, which hinders our ability to do business in this state.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 19, 2020, at Lomita, California.

Susan Valot
SUSAN VALOT