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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION  
HONORABLE PHILIP S. GUTIERREZ, U.S. DISTRICT JUDGE

AMERICAN SOCIETY OF JOURNALISTS AND )  
AUTHORS, INC., and NATIONAL PRESS )  
PHOTOGRAPHERS ASSOCIATION, ) CASE NO.  
 ) CV 19-10645 PSG  
Plaintiffs, )  
 )  
v. )  
 )  
XAVIER BECERRA, in his official )  
capacity as Attorney General of the )  
State of California, )  
 )  
Defendant. )  
 )

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REPORTER'S TRANSCRIPT OF PROCEEDINGS  
WEDNESDAY, MARCH 11, 2020  
1:49 P.M.  
LOS ANGELES, CALIFORNIA

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1 LOS ANGELES, CALIFORNIA; WEDNESDAY, MARCH 11, 2020

2 1:49 P.M.

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5 THE COURTROOM DEPUTY: Calling Item 4, CV 19-10645,  
6 American Society versus Becerra.

7 Counsel, please state your appearances.

8 MR. MANLEY: Good afternoon, Your Honor.  
9 James Manley for the plaintiffs, American Society of  
10 Journalists and Authors and the National Press Photographers  
11 Association, and with me is my colleague Caleb Trotter.

12 THE COURT: Good afternoon.

13 MR. ZELIDON-ZEPEDA: Good afternoon, Your Honor.  
14 Jose Zelidon-Zepeda, Attorney General's Office, for defendants.

15 THE COURT: Let me hear from the moving party first,  
16 the plaintiffs.

17 I'm going to start with a question because I don't  
18 want to forget the question. I just don't understand  
19 something. So it's not that you are on the losing end or  
20 winning side of it. There's an argument being made that  
21 occupation affects content, the difference between  
22 videographers and still photo, for example. Can you -- can you  
23 try to explain that argument to me a second time?

24 MR. MANLEY: Certainly. I think it's defendant's  
25 argument, that they are making this argument that if we

1 classify this as an occupational classification rather than a  
2 speech classification, then they avoid any scrutiny.

3 THE COURT: And but you say the opposite. That's  
4 why I was asking you first.

5 MR. MANLEY: Yeah. The one point I would make first  
6 is that even if we credit the defendant's argument, the  
7 standard that would apply would be intermediate scrutiny. And  
8 so the question about whether it's strict scrutiny or  
9 intermediate scrutiny that the parties have argued about in the  
10 briefs sort of misses the point which is that plaintiffs have  
11 raised a colorable First Amendment claim and therefore the  
12 burden has shifted to defendant and defendant has not met that  
13 burden.

14 But to take your question precisely about the issue  
15 of whether this is an occupational classification or a speech  
16 classification, the way AB 5 is structured is there's a list of  
17 professional services that can be offered by freelancers, and  
18 on that list are things like marketing, graphic design, grant  
19 writing, fine art, and journalism.

20 Now, the only way to know which category applies is  
21 to look at what the freelancer has produced and determine does  
22 it fit into the marketing bucket or does it fit into the  
23 journalism bucket. So to the extent there's a distinction  
24 between these occupations, the law doesn't really treat them as  
25 occupations. The law treats them as different types of

1 services.

2 But to the extent there's a distinction between  
3 them, the distinction is based on the output of the freelancer.  
4 And it's particularly true here where you have freelancers who  
5 can be working on a marketing contract providing marketing  
6 services. They'd be totally unrestricted under AB 5. But the  
7 moment they turn to a journalism contract, they face these  
8 restrictions. And that's really the heart of the matter.

9 The problem is that the law treats different types  
10 of speech differently. The Court has told us that a law that  
11 treats speech differently based on the function or purpose of  
12 the speech is content based and is subject to strict scrutiny.

13 The Court has also told us in *Sorrell* that marketing  
14 is speech with a particular content. And so in *Sorrell* the  
15 Court applied strict scrutiny to a law that restricted  
16 marketing but allowed journalism. And here AB 5 does the  
17 converse. It restricts journalism but leaves marketing and  
18 other types of speech alone.

19 So as I say, because plaintiffs have presented a  
20 colorable First Amendment claim, the burden has shifted to  
21 defendant to justify that, the restrictions that are imposed on  
22 the First Amendment rights of my client's members.

23 And defendant has made no effort to meet that  
24 burden. The only thing that defendant has pointed to is one  
25 committee report that doesn't really even address the speech

1 distinctions that are at the heart of plaintiffs' claims here.

2 Now, I'd be happy to address the other preliminary  
3 injunction factors as well, or I can save my -- the rest of my  
4 time for rebuttal.

5 THE COURT: Okay. Let me hear from the State.

6 MR. ZELIDON-ZEPEDA: Good afternoon, Your Honor. If  
7 the Court would prefer, I can address that discussion first or  
8 make some points specifically that I wanted to --

9 THE COURT: Go ahead and make your points.

10 MR. ZELIDON-ZEPEDA: Okay. So I think what's  
11 important to take this back to Your Honor is looking at the  
12 statute overall. The statute is regarding the classification  
13 as to employees as independent contractors or employees. And I  
14 think the reason why that's important is the cases that are  
15 cited by the plaintiffs in support of their motion for a  
16 preliminary injunction regard issues like permitting statutes,  
17 licensing statutes, those types of things that are obviously  
18 addressed to speech.

19 What we have here instead is a law regarding the  
20 classification of employees. So there's a disconnect between  
21 those arguments, specifically regarding the -- how this would  
22 play out. We are not talking about a situation where a  
23 permitting officer, a government officer would be saying, well,  
24 is this marketing and therefore it's allowed, or is this  
25 actually a freelancer and it's not allowed unless you fall

1 within these limits?

2 We are talking about a law that does not ban anybody  
3 from doing anything. That's why these other statutes or the  
4 laws that were at issue in other cases are inapt and --

5 THE COURT: It says, for example -- so I understand  
6 the statute, it just says, for example, that if I submit  
7 35 photographs or 35 stories to Publication X, what the  
8 government is saying when you are submitting 35 submissions --  
9 when you go from 34 to 35, it starts smelling like you are an  
10 employee, not an independent contractor.

11 MR. ZELIDON-ZEPEDA: Exactly, Your Honor. And the  
12 way this would work out in practice is if somebody -- for  
13 example, if somebody is doing a particular type of work and  
14 then that individual claims that that individual falls within  
15 an exception, then that individual would -- the -- whoever is  
16 deciding that, whether in an administrative setting or in a  
17 lawsuit, would look at the totality of the circumstances of the  
18 ABC test and then decide whether that individual was working in  
19 the capacity of an independent contractor or an employee.

20 Either way there is nothing that says you cannot  
21 publish more than 35 or you can only -- or you are not subject  
22 to that exemption if you are a marketer, for example.

23 And bringing it back to the case law, what we  
24 pointed out in our brief or what the case -- one of the cases  
25 that plaintiffs relied on is the *Interpipe Contracting* case.

1 And I think that case is the one that is more particularly apt  
2 for this situation.

3 In that case what was at issue was a state law that  
4 did not address speech. It was a limitation on deductions and  
5 what -- whether they could be used to satisfy a requirement  
6 that employees credit a particular rate or wage for an  
7 employee. What the Ninth Circuit said is this might have an  
8 incidental impact on your speech, but it's more like a conduct  
9 type of regulation. We are not talking about something that  
10 says you cannot do this type of speech.

11 Looking at the statute overall, the purpose here --  
12 or the purpose in that case was to address employee  
13 contributions and deductions. There's no implication here or  
14 nothing that plaintiff has pointed to in AB 5 that was talking  
15 about concerns about speech. And that's why this whole  
16 distinction between intermediate scrutiny or heightened  
17 scrutiny is inapt.

18 What we are really talking about is is this actually  
19 a type of law that impacts speech that is therefore subject to  
20 a First Amendment claim type of challenge.

21 The other part of it I'd be more than happy to  
22 elucidate on that. But I think what's important also to  
23 emphasize is we are talking about a preliminary injunction  
24 motion. It is plaintiffs' burden. So it is not enough to  
25 raise a, quote, colorable First Amendment claim as my



1 colleagues said. They have to show that they have a likelihood  
2 of success on the merits, and because they are basically trying  
3 to change the status quo, they have to show that the law and  
4 the facts clearly favor their claims.

5 If the Court would like, I can go ahead and address  
6 the equal protection challenge. But other than that, we'll  
7 submit on the papers.

8 THE COURT: All right. Let me just hear the last  
9 word to the plaintiff and then we'll submit.

10 MR. ZELIDON-ZEPEDA: Thank you.

11 THE COURT: Thank you.

12 MR. MANLEY: Thank you, Your Honor.

13 It's important to focus on what plaintiffs are  
14 challenging. We are not challenging the entirety of AB 5. Our  
15 challenge is based on the definition of professional services.  
16 And that definition makes distinctions based on what type of  
17 speech the person is engaged in, whether they are engaged in  
18 marketing or whether they are engaged in journalism. There's  
19 no other distinction between them.

20 And the only professional service that's covered  
21 under these restrictions, the 35 submission restriction and  
22 this restriction on shooting any video, are journalists and  
23 photojournalists.

24 The notion that the fact that this burdens  
25 First Amendment rights changes the inquiry is absolutely wrong.

1 The Court addressed that in *Sorrell* where it said that "A  
2 burden on a First Amendment right is treated the same as a ban  
3 on a First Amendment right."

4 And even more on point are the cases like  
5 *Minneapolis Star & Tribune* and *Arkansas Writers Project* where  
6 very similar to AB 5 these laws imposed a tax on the exercise  
7 of the First Amendment right. In *Minneapolis Star*, the tax was  
8 levied on paper and ink.

9 And just by the fact of the way that the tax  
10 applied, it happened to burden the speech of the  
11 *Minneapolis Star & Tribune* in particular. And the Court said  
12 that singling out the press for special treatment, and  
13 especially negative treatment, raises First Amendment concerns.

14 And we have the same situation here where the press  
15 has been singled out for especially negative treatment under  
16 the definition of professional services in AB 5. The only way  
17 to know which one -- which regulation applies is to look at the  
18 speech of the freelancer to know if it fits into the marketing  
19 exemption or if it fits into the journalism exemption, for  
20 example.

21 Now, in looking at the other factors, AB 5 tells us  
22 what happens if part of the law is struck down. And that's all  
23 we are asking for here is for these limits on journalists to be  
24 held unconstitutional, to be enjoined. We are not asking for a  
25 wholesale change in the law.

1           But AB 5 tells us that if part of the law is struck  
2 down, then the old *Borello* standard applies, and that's how the  
3 state enforces its labor laws. And, in fact, that's how the  
4 State is enforcing its labor laws against all other  
5 professional services except journalists and writers and  
6 photojournalists who are subject to these other restrictions  
7 that don't apply to other freelancers.

8           So there's no harm that will result in -- or lack of  
9 enforcement that will result that AB 5 tells us what happens in  
10 this situation. And, of course, because we have raised a  
11 First Amendment claim, the burden does shift to the defendant  
12 to justify that. That's -- the law of this circuit is that  
13 raising a colorable First Amendment claim establishes  
14 irreparable injury, and at that point the burden shifts to the  
15 defendant. The *Sammartano* case from the Ninth Circuit says  
16 that explicitly.

17           So the burden is -- was on defendant to justify  
18 these restrictions, and they have not attempted to do that. So  
19 given the Constitutional dimension of plaintiffs' injuries and  
20 defendant's lack of any evidence to support the burden that  
21 AB 5 imposes on journalists, a preliminary injunction is  
22 appropriate to put a stop to the 35 submission limit and the  
23 ban on video recording.

24           Are there any other questions, Your Honor?

25           THE COURT: All right. Thank you. The matter will

1 stand submitted.

2 (At 2:02 p.m. the proceedings adjourned.)

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**CERTIFICATE OF OFFICIAL REPORTER**

I, Marea Woolrich, Federal Official Realtime Court Reporter, in and for the United States District Court for the Central District of California, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulation of the Judicial Conference of the United States.

DATED THIS 14TH DAY OF MARCH, 2020.

/S/ MAREA WOOLRICH

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