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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.

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

REPLY IN SUPPORT OF PLAINTIFFS' EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE WHY A MOTION FOR PRELIMINARY INJUNCTION SHOULD NOT ISSUE

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ARGUMENT

On behalf of their members, Plaintiffs American Society of Journalists and Authors, Inc. (ASJA) and the National Press Photographers Association (NPPA) (collectively "Journalists") respectfully reply in support of their application for an order temporarily enjoining enforcement of Assembly Bill 5 (AB 5, codified at Cal. Labor Code § 2750.3, *et seq*.). Journalists seek a temporary injunction of AB 5 only to the extent it draws unconstitutional content-based distinctions about who can independently contract ("freelance"), limiting certain speakers to 35 submissions per client, per year, and precluding some freelancers from making video recordings. The only "professional services" subject to AB 5's 35-submission limit are freelance writers, editors, newspaper cartoonists, still photographers, and photojournalists. Cal. Labor Code § 2750.3(c)(2)(B)(ix-x). Moreover, only photographers and photojournalists are specifically excluded from the definition of "professional services" if they shoot video. *Id*. In the face of Defendant's insistence to begin immediately enforcing these restrictions, Journalists seek a narrow temporary restraining order focused on these two provisions to protect their constitutional rights until the pending Motion for Preliminary Injunction can be heard by this Court.

I. Journalists Are Likely To Succeed on the Merits of Their Claims

All of Journalists' constitutional claims are subject to strict scrutiny, because AB 5 draws content-based distinctions between different speaking professions. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). As Defendant admits, strict scrutiny applies to equal protection claims when First Amendment analysis requires strict scrutiny. Oppo. 5:2-5, ECF No. 28.

Defendant argues that a law that distinguishes between freelancers based on what type of speech they engage in is not a content-based law subject to strict scrutiny. Oppo. 6:4–13. AB 5 singles out writers and visual journalists for unfavorable treatment under California labor law, denying full freedom to freelance only to those writers and photographers who do not fit within the content-based

exemptions for fine artists, marketing, graphic design, and grant writing. *See* ECF No. 12-1 at 19:20–24; ECF No. 27-1 at 18:3–6. But the only distinction between marketing and journalism, or photojournalism and fine art, is the "function or purpose" of the speech. *Reed*, 135 S. Ct. at 2227. Defendant does not cite *Reed*, and instead mistakenly assumes that a content-based law must "reference an idea or viewpoint, or otherwise reflect a bias for or against any speech or viewpoint." Oppo. 6:14–15. But *Reed* acknowledges that content-based laws include both those enacted "because of disagreement with the message [the speech] conveys," and "more subtle" content-based distinctions, like those "defining regulated speech by its function or purpose." *Reed*, 135 S. Ct. at 2227. "Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id*.

Defendant's First Amendment argument relies entirely on cases that pre-date *Reed*. Oppo. 6:4–8:4. Yet two of those cases, *see id*. at 7:4–9, presage *Reed* in holding that a speech restriction is content-based if "a law enforcement officer must read a sign's message to determine if the sign is exempted from the ordinance." *Foti v. City of Menlo Park*, 146 F.3d 629, 636 (9th Cir. 1998), *as amended on denial of reh'g* (July 29, 1998) (citing *Desert Outdoor Advertising v. City of Moreno Valley*, 103 F.3d 814, 820 (9th Cir. 1996)). Likewise, AB 5's exemptions depend on reading a speaker's message to determine whether it is marketing, grant writing, or journalism. Defendant does not acknowledge any of this, and so his response is based on a false premise.

Nor does Defendant attempt to distinguish the two cases most directly on point: *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 583 (1983), and *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987). Contrary to Defendant's mistaken assumption that content-based laws must show "bias for or against any speech or viewpoint," Oppo. 6:14–15, in both cases, the Court stressed that there was "no indication, apart from the structure of the tax itself, of any impermissible or censorial motive on the part of the legislature,"

Minneapolis Star & Tribune, 460 U.S. at 580, and no "improper censorial motive," *Arkansas Writers' Project*, 481 U.S. at 228. The Court enjoined both laws "because selective taxation of the press—either singling out the press as a whole or targeting individual members of the press—poses a particular danger of abuse by the State." *Id*. at 228. The plain text of AB 5 makes clear that the press has been singled out as the only "professional service" defined in AB 5 that is subject to a 35-submission limit or a restriction on video recording.

Defendant ignores *Minneapolis Star & Tribune* entirely, and only cites *Arkansas Writers' Project* to admit that tax exemptions given to "religious, professional, trade, or sports periodical[s]" were held to be impermissible content-based exemptions. Oppo. 7:12–15. In the same way that a tax exemption limited to, for example, trade publications violates the First Amendment, so too, as here, does a freelancing exemption limited to, for example, marketers. In either case, "official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press." *Id*. at 230. Yet the only way to know if AB 5's freelancing exemptions apply is to scrutinize the content of a writer's or photographer's work. Both the Arkansas tax and AB 5 are "[c]ontent-based laws—those that target speech based on its communicative content" and they "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226. Defendant makes no attempt at that proof.

Defendant's treatment of AB 5's video restriction likewise addresses none of the legal arguments raised by Journalists. Defendant admits that video recording is a protected medium of expression and that AB 5 excludes video from its definition of "professional services" provided by photojournalists. Oppo. 7:22–26. These admissions confirm that AB 5's video exclusion functions like the selective ban on news racks containing "commercial handbills," but not news racks containing

"newspapers," enjoined in *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 418 (1993). *See* ECF No. 12-1 at 21:8–18 (discussing *Discovery Network*). Instead of acknowledging any of this, Defendant points to an equal protection case involving rational basis scrutiny to invent a new First Amendment standard. Oppo. 7:26–8:2. The on-point Supreme Court case law Defendant ignores provides the correct standard of decision—a standard Defendant makes no attempt to meet.

II. Journalists' Application Was Timely Filed

There is no support for Defendant's argument that Journalists unduly delayed by filing suit and seeking preliminary relief barely three months after AB 5 was enacted. This is simply the reality of engaging in fully considered litigation in federal court. Defendant is legally, practically, and factually incorrect that a "delay" of just three months between a challenged law's enactment and the date of filing suit is sufficient to warrant denial of a temporary restraining order "by itself." Oppo. 1:9–12, 8:9–10. Likewise, the time between filing the complaint and the application for a temporary restraining order was entirely appropriate.

Defendant provides no authority even hinting that a challenge to the constitutionality of a statute is unduly delayed by the passage of any amount of time after a statute's enactment. In contrast a few months "delay" is ordinary and beneficial. *See*, *e.g.*, *California Trucking Ass'n v. Becerra*, No. 3:18-cv-02458-BEN-BLM (S.D. Cal. Dec. 31, 2019) (TRO granted where plaintiffs amended complaint to add challenge to AB 5 nearly two months after enactment, and then filed a motion for preliminary injunction nearly three weeks later, and then filed a motion for a temporary restraining order another three weeks later); *Chamber of Commerce of the USA v. Becerra*, No. 2:19-cv-02456-KJM-DB (E.D. Cal. Dec. 30, 2019) (TRO granted against enforcement of statute in case filed nearly two months after enactment, and motion for TRO filed a week later); *Meland v. Padilla*, No. 2:19-cv-02288-JAM-AC (E.D. Cal Nov. 13, 2019) (complaint filed nearly 14 months after enactment of challenged statute).

Defendant's suggestion that plaintiffs should immediately rush to court following the enactment of a statute—and preemptively file for a temporary restraining order—or else lose the ability to seek preliminary relief, ignores the realities of thoughtful litigation, would unfairly prejudice litigants, and would unduly burden the Court. That it took ASJA and NPPA—two national organizations with governing boards and thousands of members—just three months from enactment of AB 5 to consider options for legal action, communicate with their members about AB 5's effect on their businesses, hire counsel, develop legal theories, and draft their Complaint and Motion for Preliminary Injunction along with producing supporting declarations of their members, reflects their considered and urgent need to challenge the statute. Were the Court to instead require plaintiffs to rush to file challenges to enacted statutes immediately or risk losing the ability to obtain preliminary relief, the opportunity for full consideration of a party's options (e.g., whether a court challenge is even necessary) would be lost, and the Court would be burdened with a multitude of cases that include allegations and causes of action that a more considered approach would omit.

The cases relied on by Defendant provide no support for his position that Journalists' complaint or the application for temporary relief were untimely. None of Defendant's cases addresses constitutional claims and all involve significant delay. *See* Oppo. 9. In *First Franklin Fin. Corp. v. Franklin First Fin. Ltd.*, 356 F. Supp. 2d 1048, 1049–50, 1054 (N.D. Cal. 2005), a plaintiff in a trademark infringement case failed to discover competing uses of its mark for 11 years before waiting two months after discovering the competing use to send a cease-and-desist letter and file a complaint. In *Metromedia Broad. Corp. v. MGM/UA Entm't Co., Inc.*, 611 F. Supp. 415, 420 (C.D. Cal. 1985), a plaintiff did not merely seek preliminary relief four months after an adverse action, but sought to "reverse the results of four months' negotiation" and require the defendant to accept an alternative financial deal through the issuance of preliminary relief. In *Kiva Health*

Brands LLC v. Kiva Brands Inc., 402 F. Supp. 3d 877, 898 (N.D. Cal. 2019), the court denied preliminary relief to a trademark infringement plaintiff who waited nearly three years from discovering a potentially infringing mark before sending a cease-and-desist letter, and another four months to file suit, then an additional three months before seeking preliminary relief. In *Giving Back Fund Inc. v. Miami Mktg. Grp. LLC*, 2011 WL 13217774, at *4 (C.D. Cal. Jan. 20, 2011), the plaintiffs waited over two months between filing their complaint and seeking a temporary restraining order. *See also* Oppo. 9 (citing *Williford v. Ocwen Loan Servicing LLC*, 2011 WL 13187265, at *1 (C.D. Cal. July 15, 2011) (more than two years between filing complaint and seeking TRO); *Miller for & on Behalf of N.L.R.B. v. California Pac. Med. Ctr.*, 991 F.2d 536, 539 (9th Cir. 1993), *on reh'g*, 19 F.3d 449 (9th Cir. 1994) (eight months between filing unfair labor practice charge and seeking a preliminary injunction pursuant to section 10(j) of the National Labor Relations Act); *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1101 (3d Cir. 1984) (six-month delay in seeking section 10(j) relief)). Defendant has therefore produced no case that supports the proposition that a "delay" of barely three months between enactment of a statute and the filing of a complaint (and filing a motion for preliminary relief days later) is tardy.

Finally, the blame for the need for a temporary restraining order in this case does not fall on ASJA and NPPA, but on the California Legislature and Defendant. The Legislature has provided extended lead times for the effective date of statutes enacted near the end of legislative sessions. *See*, *e.g.*, AB 2455, 2017–2018 Reg. Sess., 2018 Stats. Ch. 917 (codified at Cal. Health & Saf. Code § 1796.29) (enacted Sept. 29, 2018, effective July 1, 2019). In the case of AB 5, however, the Legislature chose to provide less than four months between the enactment and effective dates of a controversial and complex law.

Defendant, too, could have avoided the need for temporary relief by agreeing to a brief stay of enforcement of the two provisions of AB 5 challenged in this case,

but he refused. Prior to filing the Application for a Temporary Restraining Order, counsel for ASJA and NPPA complied with the Court's Standing Order and L.R. 7-3 by conferring with counsel for Defendant. As noted in ASJA's and NPPA's Notice to Counsel, ECF No. 27-2 at 3, the Complaint and Motion for Preliminary Injunction were served on Defendant on Friday, December 20, 2019. The following Monday, December 23, Plaintiffs' counsel Caleb Trotter attempted to determine who in the Attorney General's office was serving as counsel for Defendant in this case, but he was unable to so determine. He could not so determine because the Attorney General's automated phone answering service did not provide an option to speak to a receptionist, and the menu option to access the case docket department was not functional. After subsequent attempts to contact the Attorney General's office in Sacramento remained unfruitful, Mr. Trotter was finally able to reach someone in the Attorney General's San Francisco office on December 27, who informed him of Mr. Zelidon-Zepeda's assignment to the case. Upon reaching Mr. Zelidon-Zepeda's voicemail, Mr. Trotter learned that Mr. Zelidon-Zepeda would be out of the office on vacation until December 30, 2019. On December 30 and 31, counsel for Plaintiffs and Defendant were able to confer, and counsel for Defendant notified counsel for ASJA and NPPA at approximately 1:30 p.m. on December 31 that Defendant would not agree to stipulate to a stay of enforcement of the provisions of AB 5 challenged in this case, thus necessitating the Application for a Temporary Restraining Order. This consultation with Defendant took time, but Plaintiffs should not be faulted for seeking to avoid emergency proceedings.

III. Equitable Considerations Favor a Temporary Restraining Order

The function of preliminary relief is to maintain the status quo *ante litem* pending a determination of the action on the merits. The status quo is the last, uncontested status before the dispute developed. *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808–09 (9th Cir. 1963); *Washington Capitols Basketball Club, Inc. v. Barry*, 419 F.2d 472, 476 (9th Cir. 1969) (to determine status quo, a court

must "examine the last, uncontested status of the parties"). *See also* 11A Wright, *et al*., Federal Practice and Procedure § 2948 (3d ed.). If a party has recently disturbed the status quo, an injunction "to reverse its actions . . . restores, rather than disturbs, the status quo ante, and is thus not an exception to the rule." *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 1013 (10th Cir. 2004), *aff'd and remanded sub nom. Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418 (2006) (McConnell, J., concurring). Here, the "last, uncontested status of the parties" pre-dates the effective date of AB 5. Therefore, a temporary restraining order enjoining enforcement of the 35-submission and video recording limits would maintain the status quo.

Defendant does not dispute that denial of Journalists' constitutional rights causes irreparable harm. *See Sanders County Republican Cent. Committee v. Bullock*, 698 F.3d 741, 744 (9th Cir. 2012). Any purported injury suffered by Defendant in being temporarily enjoined from enforcing AB 5's 35-submission limit and video recording restriction, *see* Oppo. 9–10, are far outweighed by the constitutional injuries suffered by ASJA's and NPPA's members as a result of the offending provisions, which also cause loss of work and income, ECF No. 27-1 at 10:22–13:2. Each day that AB 5 remains in effect, Plaintiffs' members must alter their expressive activities to comply with the 35-submission and video recording limits imposed by AB 5. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

Similar to Defendant's merits discussion, he does not explain why complying with the First Amendment's speech protections—treating freelance journalists the same as freelance marketers, graphic designers, or grant writers—would frustrate any interests served by AB 5. Defendant does not dispute Plaintiffs' contention that "[a]ny harms Defendant might imagine are 'entirely speculative and in any event may be addressed by more closely tailored regulatory measures.'" ECF No. 27-1 at

20:21–22 (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 710 (7th Cir. 2011)). The balance of equities favors Journalists. "That is particularly so given that AB-5 provides an alternative should the ABC test be struck down." *California Trucking Ass'n*, No. 3:18-cv-02458-BEN-BLM (S.D. Cal. Dec. 31, 2019) (citing Cal. Labor Code § 2750.3(a)(3)'s provision that the *Borello* standard applies should the ABC test be struck down). As the court recognized in *California Trucking Ass'n v. Becerra*, delaying the implementation of AB 5 works no injury to the government and preserves important federal rights.

Defendant does not dispute that "it is always in the public interest to prevent the violation of a party's constitutional rights." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002) (citation omitted). Any interest the state has in enforcing its laws must yield to the Constitution. *See Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005) ("Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution."). Because Journalists are suffering an ongoing violation of their constitutional rights, the balance of equities must favor granting injunctive relief. *Sanders County Republican Cent. Committee*, 698 F.3d at 744. *See also Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 649 (6th Cir. 2007) ("'[I]n [a First Amendment] case, the issues of the public interest and harm to the respective parties largely depend on the constitutionality of the statute.'").

CONCLUSION

A temporary restraining order is appropriate to maintain the status quo and enjoin enforcement of AB 5 to the extent it imposes a 35-submission limit on certain speakers and to the extent it limits the definition of professional services based on what medium of expression a speaker uses pending the resolution of Journalists' motion for a preliminary injunction.

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DATED: January 3, 2020.

Respectfully submitted,

By /s/ Caleb R. Trotter
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing REPLY IN SUPPORT OF PLAINTIFFS' EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE WHY A MOTION FOR PRELIMINARY INJUNCTION SHOULD NOT ISSUE has been served through the Court's CM/ECF system on all registered counsel this 3rd of January, 2020.

DATED: January 3, 2020.

/s/ Caleb R. Trotter
CALEB R. TROTTER

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