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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

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| **American Society of Journalists and Authors; et al.,**<br>Plaintiffs,<br>**v.**<br>**Attorney General Xavier Becerra, in his official capacity,**<br>Defendant. | 2:19-cv-10645-PSG<br>**DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**<br>Date: March 9, 2020<br>Time: 1:30 P.M.<br>Courtroom: 6A, 6th Floor<br>Judge: Hon. Philip S. Gutierrez<br>Trial Date: Not set<br>Action Filed: December 17, 2019 |

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## INTRODUCTION

The Legislature determined that widespread and systematic employer misclassification of workers as independent contractors, instead of as employees, was exploiting working Californians by denying them significant statutory labor protections. To combat this persistent problem, the Legislature passed AB 5, which codified and expanded the application of the "ABC" test that the California Supreme Court adopted in April 2018 to simplify determinations of employment status. Plaintiffs, American Society of Journalists and Authors, and National Press Photographers Association, challenge this law. As relevant here, AB 5 includes an exemption for freelance writers, editors, and newspaper cartoonists, as well as an exemption for still photographers and photojournalists, but these two exemptions are subject to limitations. It is the limitations on these two exemptions from the ABC test, one based on volume of work and another based on type of industry, that are the subject of Plaintiffs' challenge. Specifically, they allege that these limitations (the exceptions to the exemptions) fail on equal protection and First Amendment grounds. Plaintiffs now move for a preliminary injunction, seeking to stay enforcement of AB 5's exemptions that apply to them, to the extent they impose the 35-submission limit and exclude work on motion pictures.

Plaintiffs cannot satisfy the criteria for issuance of a preliminary injunction. As already argued in Defendants' motion to dismiss (ECF No. 33-1), Plaintiffs' legal claims lack merit. The limitations challenged here are ordinary legislative line-drawing in generally applicable economic regulation. Plaintiffs' equal protection claims are unlikely to succeed because the challenged limitations on these exemptions do not distinguish between similarly situated groups, and even if they did, are subject to rational basis review, and satisfy that standard as a matter of law. Plaintiffs' First Amendment claims are also unlikely to succeed because the challenged limitations are not restrictions on speech nor do they classify based on the content of speech. In addition, the fact that Plaintiffs waited three months to file

suit against a law enacted in September 2019, demonstrates a lack of harm requiring preliminary relief. Finally, the balance of equities weighs against preliminary relief, in part because an injunction would be counter to the public interest. For these reasons, the Court should deny the Plaintiffs' motion for a preliminary injunction.

## BACKGROUND

### A. The *Dynamex* Decision Adopted the ABC Test.

The distinction between workers classified as employees and those classified as independent contractors is significant because California law affords employees rights that independent contractors do not enjoy. *See Dynamex Operations West v. Superior Court*, 4 Cal. 5th 903, 912 (Cal. 2018). In April 2018, the California Supreme Court held that courts must apply the ABC test to determine whether a worker is classified as an employee for certain purposes under California's labor laws. *Id.* at 916. *Dynamex* noted that the "critically important objectives" of wage and hour laws, including ensuring low income workers' wages and conditions despite their weak bargaining power, "support a very broad definition of the workers" who fall within the employee classification. *Id.* at 952. Similarly, a broad definition benefits "those law-abiding businesses that comply with the obligations imposed" by state labor laws, "ensuring that such responsible companies are not hurt by unfair competition from competitor businesses that utilize substandard employment practices." *Id.* Lastly, the ABC test also benefits "the public at large, because if the wage orders' obligations are not fulfilled, the public often will be left to assume the responsibility of the ill effects to workers and their families resulting from substandard wages or unhealthy and unsafe working conditions." *Id.* at 953.

Under this test, a worker is considered an employee, rather than an independent contractor, unless the hiring entity establishes: (a) that the worker is "free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such 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 916-17.

**B. Assembly Bill 5 Codified the ABC Test and Expanded Its Scope.**

The Legislature subsequently enacted AB 5, which codified the ABC test and expanded its scope. 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).) The Legislature noted that "a 2000 study commissioned by the U.S. Department of Labor found that nationally between 10% and 30% of audited employers misclassified workers," and that a 2017 audit program by the California Employment Development Department that conducted 7,937 audits and investigations "identified nearly *half a million* unreported employees." (Bill Analysis, Assembly Committee on Labor and Employment 7/5/19 at p. 2, available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB5 [last visited Feb. 12, 2020] (emphasis in original).)

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).) AB 5 codifies the ABC test adopted in *Dynamex*, and extends its scope to contexts beyond those at issue in *Dynamex*, to include (among other things) workers'

compensation, unemployment insurance, and disability insurance. Cal. Lab. Code, § 2750.3(a)(1); *id.* § 3351(i).

### C. Assembly Bill 5 also Created Statutory Exemptions to the ABC Test.

AB 5 also created limited statutory exemptions to the ABC test for certain occupations and industries, where the Legislature felt the ABC test was not a good fit. The Legislature considered various factors in deciding on these exemptions, including whether the individuals who hold professional licenses (for example, insurance brokers, physicians and surgeons, and securities dealers). (Bill Analysis, Senate Committee on Labor Employment and Retirement 7/8/19 at pp. 2-3, https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB5 [last visited Feb. 12, 2020].) Other factors considered included 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). (*Id.*) Still others were considered for an exemption if they perform "professional services," as a sole proprietor or other business entity and meet specific indicia of status as independent businesses. (*Id.*) In its effort to identify the hallmarks of true independent contractors for purpose of exemptions from the ABC test, the Legislature also considered the bargaining power of workers in particular occupations and industries, the ability of the worker in particular occupations and industries to set their own rate of pay, and the nature of the relationship between the contractor and the client. (*Id.* at 8-10.)

AB 5 provides several categories of exemptions from the ABC test, including an exemption for "a contract for 'professional services.'" (Cal. Lab. Code § 2750.3(c)(1).) At issue here are two of these enumerated professional services exemptions: (1) "services provided by a still photographer or photojournalist who do not license content submissions to the putative employer more than 35 times per

year"[1] ("Exemption 9"); and (2) "services provided by a freelance writer, editor, or newspaper cartoonist who does not provide content submissions to the putative employer more than 35 times per year"[2] ("Exemption 10"). Cal. Lab. Code § 2750.3(c)(2)(B)(ix) & (x). Exemption 9 does not apply at all to still photographers and photojournalists working in the motion picture industry, specifically, "to an individual who works on motion pictures, which includes, but is not limited to" projects 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).

**D. Allegations of the Complaint.**

The complaint alleges that AB 5's "expansion of the ABC test means that freelancers like the writers, editors, photographers, and videographers who comprise Plaintiffs' members must be classified as employees of the publishers for which they produce content." (ECF No. 1 at 5 ¶ 25.) As a result, AB 5 allegedly "limits freelancers' ability to record, sell, or publish audio content." (*Id.* at 6 ¶ 30.) Plaintiffs challenge two exemptions in AB 5, without which they contend that Plaintiffs will be classified as employees, allegedly "bring[ing] significant new costs and disadvantages." (*Id.* at 7 ¶ 36; ECF No. 12-1 at 10.) This is because employee status means that employers will have to pay unemployment taxes, workers' compensation, etc., which will in turn "make Plaintiffs' members' work

[1] For this exemption, a "submission" is defined as "one or more items or forms of content produced by a still photographer or photojournalist that: (I) pertains to a specific event or specific subject; (II) is provided for in a contract that defines the scope of the work; and (III) is accepted by and licenses to the publication or stock photography company and published or posted." Cal. Lab. Code § 2750.3(c)(2)(B)(ix).

[2] For this exemption, a "submission" is "one or more items or forms of content by a freelance journalist that: (I) pertains to a specific event or topic; (II) is provided for in a contract that defines the scope of the work; and (III) is accepted by the publication or company and published or posted for sale." Cal. Lab. Code § 2750.3(c)(2)(B)(x).

more costly—and thus less attractive—to the client-turned-employer." (*Id.* at 7 ¶ 36.)

Plaintiffs bring free speech, free press, and equal protection claims under the First and Fourteenth Amendments to the Constitution, and seek declaratory and injunctive relief. (ECF No. 1 at 10-15.) Specifically, they claim that the 35-submission limit on Exemptions 9 and 10 violates the Equal Protection Clause, because this volume limitation does not apply to other exemptions for professional services in marketing, graphic design, grant writing, and fine art (see Cal. Lab. Code § 2750.03(c)(2)(B)(i), (iv)-(vi), "Exemptions 1, 4, 5 and 6"). (ECF No. 1 at 11-13 ¶¶ 53-60.) They likewise contend that excluding from Exemption 9 photographers and photojournalists working in the motion picture industry violates equal protection, because the same industry limitation does not apply to Exemptions 1, 4, 5 and 6 (exemptions for marketers, graphic designers, grant writers, and fine artists) (see Cal. Lab. Code § 2750.03(c)(2)(B)(i),(iv)-(vi)). (ECF No. 1 at 11-13 ¶¶ 61-72.) Lastly, they claim that both the 35-submission limit, and the exclusion of those photographers and photojournalists in the motion picture industry, violate their First Amendment rights. (*Id.* at 13-15 ¶¶ 74-90.)

## LEGAL STANDARD

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008); *Dymo Indus., Inc. v. Tapeprinter, Inc.*, 326 F.2d 141, 143 (9th Cir. 1964) (per curiam). In seeking one, Plaintiffs must demonstrate that they are likely to succeed on the merits of their claims, that they are likely to suffer irreparable harm without preliminary relief, that the balance of equities tips in their favor, and that an injunction is in the public interest. *Winter*, 555 U.S. at 20; *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

Moreover, because Plaintiffs seek a preliminary injunction to *change* the status quo, they must carry "a heavy burden of persuasion." *3570 East Foothill*

*Blvd., Inc. v. City of Pasadena*, 912 F. Supp. 1257, 1260 (C.D. Cal. 1995). As noted above, AB 5 was enacted in September 2019, and became effective on January 1, 2020. "Mandatory preliminary relief, which goes well beyond simply maintaining the status quo pendente lite, is particularly disfavored, and should not be issued unless the facts and law clearly favor the moving party." *Anderson v. U.S.*, 612 F.2d 1112, 1114 (9th Cir. 1979) (citation omitted).

## ARGUMENT

### I. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

Plaintiffs argue that a preliminary injunction should issue because they are likely to succeed on their equal protection and First Amendment claims. (ECF No. 12-1 at 14-21.) They first contend that, under their Equal Protection claim, AB 5 is subject to strict scrutiny because it allegedly affects First Amendment interests, and, alternatively, that AB 5 fails even under rational basis. (*Id.* at 14-15.) Second, they claim that two exemptions under AB 5 are invalid content- and medium- based restrictions. (*Id.* at 18-21.) As argued in the pending motion to dismiss (ECF No. 33-1), these arguments fail as a matter of law. AB 5 does not violate equal protection because it is a generally applicable economic regulation subject to deferential rational basis review, and satisfies this standard.[3] AB 5 does not violate the First Amendment because a plain reading of the statutory language demonstrates that the challenged exemptions are not content based. Thus, Plaintiffs cannot meet their burden to show a likelihood of success on their claims.

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[3] Notably, a different court in this district recently denied preliminary injunctive relief in another challenge to AB 5, which was also based in part on an equal protection claim. *Olson v. State of California*, No. 19-cv-10956-DMG-RAO (C.D. Cal. Feb. 10, 2020 Ord.). There, the district court concluded that AB is rationally related to a legitimate state interest. (*Id.* at 7-8.)

### A. Plaintiffs' Equal Protection Claim Fails Under Rational Basis Review.

The Equal Protection Clause forbids the government from "deny[ing] to any person within its jurisdiction the equal protection of the laws." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); *Shakur v. Schriro*, 514 F.3d 878, 891 (9th Cir. 2008). The first step in assessing Plaintiffs' equal protection claim is to identify the classification of groups. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1166-67 (9th Cir. 2005); *Furnace v. Sullivan*, 705 F.3d 1021, 1030 (9th Cir. 2013). "The groups must be comprised of similarly situated persons so that the factor motivating the alleged discrimination can be identified." *Furnace*, 705 F.3d at 1030 (citation omitted). Plaintiffs cannot state an equal protection claim by "conflating all persons not injured into a preferred class receiving better treatment" than them. *Thornton*, 425 F.3d at 1167.

Plaintiffs' equal protection claims fail at the threshold because the 35-submission limitation distinguishes based on *volume*, not occupation, and the motion picture industry limitation distinguishes based on *industry*, not occupation. Still photographers and photojournalists and freelance writers, editors, and newspapers cartoonists on the one hand and marketers, graphic designers, grant writers and fine artists on the other hand ALL enjoy exemptions, regardless of occupation. Any distinction drawn based on occupation is not between the occupations in Exemptions 9 and 10 on the one hand, and the occupations in Exemptions 1, 4, 5 and 6 on the other, but between *all* the occupations that get exemptions and those that don't. A similar analysis applies to the motion picture industry limitation. Thus, to the extent Plaintiffs claim an impermissible distinction between these two sets of exemptions based on occupation, the clear statutory language belies this claim.[4]

[4] Plaintiffs argue that the AB 5 statutory exemption fails even under rational basis, relying on *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008). But as the

AB 5 does not warrant heightened review because it implicates no fundamental right,[5] or suspect classification, so rational basis review applies. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Economic regulation such as AB 5 enjoys a strong presumption of validity, and need only further a legitimate state interest. Under rational basis review, the challenged statutory classifications are "presumed constitutional," and Plaintiffs bear the burden "to negative every conceivable basis which might support it." *FCC v. Beach Commc'ns,* 508 U.S. 307, 314-15 (1993) (internal quotations and citations omitted). Plaintiffs cannot undermine this presumption here. The absence of legislative facts explaining a statutory classification "has no significance in rational-basis analysis," and a legislative choice is entitled to such deference that it "is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Commc'ns*, 508 U.S. at 315; *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.").

Even if there were an *occupational* distinction drawn between these categories of exemptions, Plaintiffs cannot show that the two groups are similarly situated.

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Ninth Circuit has 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. v. Baker*, 904 F.3d 1053, 1065-66 (9th Cir. 2018). The same is not true or alleged here.

[5] Plaintiffs contend that strict scrutiny applies to their equal protection claim because their claims allegedly implicate free speech concerns. (ECF No. 12-1 at 14.) This is incorrect; in the absence of a suspect class, rational basis review provides the standard. The Supreme Court has sometimes applied a stricter standard in cases where the challenged regulations *directly* regulate speech. *Police Department of City of Chicago v. Mosley*, 408 U.S. 92 (1972); *Carey v. Brown*, 447 U.S. 455 (1980). That standard does not apply here because AB 5 does not directly regulate speech. As discussed in greater detail below in relation to Plaintiffs' First Amendment claim, AB 5 does not regulate the content of any speech. As the District of Columbia Court of Appeals explained, "Although 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 have itself required such scrutiny." *Wagner v. Federal Election Comm'n*, 793 F.3d 1, 32 (D.C. Cir. 2015).

Simply put, marketers, graphic designers, grant writers, and fine artists are different occupations and thus not "similarly situated" to photographers, photojournalists, freelance writers, and editors. The Legislature could have reasonably concluded that the former group does not perform the same type of work, and that an 35-submission limit was not warranted for those occupations. (Bill Analysis, Senate Committee on Labor Employment and Retirement 7/8/19 at pp. 8-10, https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB5 [last visited Feb. 12, 2020] (discussing factors taken into account regarding the exemptions.) For example, grant writers and graphic designers do not necessarily publish a high volume of articles annually with the same publisher, as photographers, photojournalists, and freelance writers do. And Plaintiffs do not explain how a 35-submission limit would apply to marketers, and grant writers (for example), whereas that limit is readily ascertainable for photographers, photojournalists, and freelance writers, by reference to the statutory scheme. Cal. Lab. Code § 2750.3(c)(2)(B)(ix) & (x) (defining "submission"). 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 35 items or fewer per year to a single publisher, and to exempt them would contribute to the systemic harm associated with misclassification. Plaintiffs cannot show that this legislative line-drawing is illegitimate.

The challenge to the motion picture industry exclusion fails under the same analysis. Courts have upheld employment laws that apply to specific industries. *See Fortuna Enterprises, L.P. v. City of L.A.*, 673 F. Supp. 2d 1000, 1014 (C.D. Cal. 2008) (holding that living wage ordinance applicable only to hotels in certain area of the city does not violate equal protection); *Woodfin Suite Hotels 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). All the exemptions in AB 5, as well as

the limitations on those exemptions challenged here, fall into the category of discretionary legislative line-drawing in generally applicable economic regulation, and are presumptively valid.

### B. Plaintiffs' First Amendment Claims Do Not Establish a Likelihood of Success on the Merits.

Plaintiffs also argue that they are entitled to preliminary injunctive relief based on their claim that AB 5's limitations on Exemptions 9 and 10 for "professional services" improperly discriminate based on the content of speech. (ECF No. 12-1 at 20-21.) As discussed above, however, the distinctions drawn in these limitations are based on *volume and industry,* and even if based on occupation, do not classify based on the content of expression. Accordingly, Plaintiffs are unlikely to succeed on their First Amendment challenge.

#### 1. The 35-Submission Limit Is Not a Content-Based Restriction.

"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 Broad. Sys. v. FCC*, 512 U.S. 512 U.S. 622, 643 (1994). 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." *Id.* Usually, a regulation's purpose or justification will be evident on its face. *Id.* at 642; *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2231 (2015) ("As we have explained, a speech regulation is content based if the law applies to particular speech because of the topic discussed or the idea or message conveyed").

Plaintiffs claim that, by imposing a 35-submission limit on photographers, photojournalists, freelance writers, and editors but not imposing this cap on marketing, graphic design, grant writing, and fine arts, AB 5 violates the First Amendment because "[t]he ability to freelance rises or falls based on whether expression is deemed marketing or editorial, graphic design," etc. (ECF No. 12-1 at

19.) But this limitation does not reference an idea or viewpoint, or otherwise reflect a bias for or against any speech or viewpoint; it instead hinges on whether the individual providing the service is a still photographer, photojournalist, freelance writer, editor, or newspaper cartoonist *who submits more than 35 items a year to the same publisher*. Cal. Lab. Code § 2750.3(c)(2)(B)(ix) & (x). Plaintiffs argue that AB 5 somehow singles out freelance journalists for unfavorable treatment, but fail to point to anything in AB 5 that predicates the statutory exemptions on the *substance* of a communication. Instead, Plaintiffs argue that the 35-submission limitation on Exemptions 9 and 10 is impermissibly content-based because it hinges on whether Plaintiffs' members 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. This argument fails first, because the distinction drawn in AB 5 is based on volume, not occupation. And even if based on occupation, it would fail.

In *Foti v. City of Menlo Park*, 146 F.3d 629, 636 (9th Cir. 1998), the Ninth Circuit upheld against a First Amendment challenge, a local regulation prohibiting signs on public property but exempting real estate, safety, traffic, and other signs. The court noted that if enforcement of the ordinance requires that the content of the message be read to assess if an exemption applies, then the ordinance is content-based. *Id.* at 636; *see also Desert Outdoor Advertising, Inc. v. City of Moreno Valley*, 103 F.3d 814, 820 (9th Cir. 1996). As explained above, the exemptions for freelance writers and still photographers (among others) do not hinge on any aspect of the *content* they produce, but on their occupational classification as writers or photographers. Cal. Lab. Code § 2750.3(c)(2)(B)(ix) & (x). The limitation on that occupational exemption challenged here is based on volume, and is even further afield from a content-based restriction.[6]

[6] Plaintiffs attempt to illustrate their claim with the following hypothetical: "writers of marketing materials, perhaps news releases, can freelance freely; but if

Cases have drawn a distinction where "the [challenged] exemption is plainly 'speaker-based,' not content-based." *Hampsmire v. City of Santa Cruz*, 899 F. Supp. 2d 922, 931 (N.D. Cal. 2012). For example, the Ninth Circuit held that a sign ordinance was not content-based where permitting "officers decide whether an exemption applies by identifying the entity speaking through the sign without regard for the *actual substance* of the message." *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1078 (9th Cir. 2006) (emphasis added). The Supreme Court has pointed out that "laws favoring some speakers over others demand strict scrutiny *when the legislature's speaker preference reflects a content preference*." *Reed*, 135 S. Ct. at 223 (citation omitted, emphasis added). In the context of laws that burden speech but do not ban it, the applicable test is "whether the speech-burdening restrictions 'are *justified* without reference to the content of the regulated speech." *Doe v. Harris*, 772 F.3d 563, 575 (9th Cir. 2014) (emphasis in original).

The cases Plaintiffs rely on in fact undermine their claims. (ECF No. 12-1 at 16.) For example, *Interpipe Contracting, Inc. v. Becerra* holds that "generally applicable economic regulations *affecting* rather than *targeting* news publications" pass constitutional muster. 898 F.3d 879, 896 (9th Cir. 2018) (emphasis added). At issue there was a generally applicable wage law targeting employer use of employee wages, rather than singling out particular entities. *Id.* at 895. In this regard, the Supreme Court has made it clear that "the States and the Federal Government can subject newspapers to generally applicable regulations without creating constitutional problems." *Minneapolis Star & Tribune Co. v. Minn. Com'r*

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they write articles *about* the same news release, they are subject to the 35-submission limit." (ECF No. 12-1 at 15.) This demonstrates the fallacy of their argument— the challenged exemption does not cover "writers of marketing materials," but "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 employee or work that is an essential part of or necessarily incident to any of the contracted work." Cal. Lab. Code § 2750.3(c)(2)(B)(i). Plaintiffs do not establish that a news release is "marketing" within the scope of this provision.

*of Revenue*, 460 U.S. 575, 581 (1983). Plaintiffs cannot show that the exemptions at issue here target, rather than merely *affect*, news publications.[7]

Plaintiffs are unlikely to succeed on their First Amendment challenge because the volume limitations on Exemptions 9 and 10 do not reference or burden content in any way.

**2. The Motion Picture Exclusion Is Not a Content-Based Restriction.**

Plaintiffs' challenge to the motion picture industry limitation on Exemption 9 fails for similar reasons. They allege that AB 5's exclusion of "video recording impose[s] content-based limits on which freelancers can record video." (ECF No. 12-11 at 20.) In fact, AB 5 excludes from the statutory exemption "an individual who works in the motion picture industry, which includes, but is not limited to projects 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." Cal. Lab. Code § 2750.3(c)(2)(B)(ix). There is no content restriction to be found.[8]

Plaintiffs' claim fails because this exclusion is based on industry—that is, on whether an individual "works on motion pictures" and other similar projects in a wide range of media. The exclusion does not hinge on the *content* of the message. *See, e.g., Recycle for Change v. City of Oakland*, 856 F.3d 666, 670 (9th Cir. 2017)

[7] The other cases Plaintiffs rely on are similarly inapposite because they addressed content-based restrictions. *See U.S. v. Playboy Entm't Grp, Inc.*, 529 U.S. 803 (2000) (regulation applicable to channels with "sexually explicit adult programming"); *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) (regulation "forbids sale subject to exceptions based in large part on the content of a purchaser's speech"); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (Son of Sam law singling out income derived from expressive activity).

[8] *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), on which Plaintiffs rely, is inapposite. There, the Court struck a "categorical ban on commercial newsracks," rejecting the defendant's attempt to distinguish between commercial and noncommercial speech. *Id.* at 424. The Court concluded that the distinction drawn "bears no relationship *whatsoever* to the particular interests that the city has asserted," and thus is "an impermissible means of responding to the city's admittedly legitimate interests." *Id.*

("A content-based law is one that targets speech based on its communicative content or applies to particular speech because of the topic discussed or the idea or message expressed.") (citation omitted).

By contrast, *Arkansas Writers Project Inc. v. Ragland*, 481 U.S. 221 (1987), on which Plaintiffs rely, addressed a state law that exempted from taxation newspapers and "religious profession, trade and sports" publications, which the Court concluded was a content-based restriction. *Id.* at 230. As the Court subsequently noted in distinguishing its decision in that case, "[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 Broadcasting Sys.*, 512 U.S. at 660. Instead, heightened scrutiny is warranted where the challenged regulations are "structured in a manner that raised suspicions that their objective was, in fact, the suppression of certain ideas." *Id.* Heightened scrutiny is not appropriate "when the differential treatment is justified by some special characteristic of the particular medium being regulated." *Id.* at 660-61 (citation omitted). Here, Plaintiffs do not demonstrate that AB 5 is structured in a way that raises suspicion that its focus is on the suppression of speech. Moreover, any differential treatment is based on the particular characteristics of the medium being regulated. Although Plaintiffs lump together these categories, it is not clear that individuals who work in marketing, graphic design, grant writing, or as fine artists would also fit within the exclusion for "an individual who works on motion pictures," particularly given the restrictions applicable (for example) to the exemption for marketing. (Cal. Lab. Code § 2750.3(c)(2)(B)(i).)

"[S]peaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)." *Turner Broadcasting Sys.*, 512 U.S. at 658; *Reed*, 135 S. Ct. at 2231 (2015). Plaintiffs

cannot meet their burden to demonstrate that the challenged industry and volume exemptions are based on a content preference, or that they otherwise "cannot be justified without reference to the content of the regulated speech," or were adopted by the Legislature "because of disagreement with the message" conveyed. *U.S. v. Swisher*, 811 F.3d 299, 313 (9th Cir. 2016) (en banc). Where a challenged regulation is content neutral, can be justified without reference to the content of the regulated message, and there is no evidence that it was adopted due to disagreement with the message conveyed, the First Amendment challenge fails. *Recycle for Change*, 856 F.3d at 670. Plaintiffs are not likely to succeed on the merits of this claim.

## II. PLAINTIFFS' DELAY IN SEEKING PRELIMINARY INJUNCTIVE RELIEF DEMONSTRATES A LACK OF IRREPARABLE HARM.

Plaintiffs also fail to show that they will suffer irreparable harm if an injunction does not issue. Under the case law, a plaintiff's "long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm." *Miller for and on behalf of N.L.R.B. v. Cal. Pac. Medic. Ctr.*, 991 F.2d 536, 544 (9th Cir. 1993) (citation omitted); *see also Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1091 n.27 (3d Cir. 1984) ("[T]he district court may legitimately think it suspicious that the party who asks to preserve the status quo through interim injunctive relief has allowed the status quo to change through unexplained delay.").

As this Court noted in denying Plaintiffs' application for a temporary restraining order, "Plaintiffs' delay belies their claim that there is an emergency." (ECF No. 30 at 3.) In this regard, courts in this Circuit have found unexplained delays of three months in seeking injunctive relief supported a finding of lack of irreparable harm. *First Franklin Fin. Corp. v. Franklin First Fin. Ltd.*, 356 F. Supp. 2d 1048, 1055 (N.D. Cal. 2005); *see also Metromedia Broad. Corp. v. MGM/UA Entm't Co, Inc.*, 611 F. Supp. 415, 427 (C.D. Cal. 1985) (concluding that four month delay warranted denying injunctive relief); *Kiva Health Brands LLC v.*

*Kiva Brands Inc.*, 402 F. Supp. 3d 877, 898-99 (N.D. Cal. 2019) (same). Plaintiffs do not explain this delay at all, and instead support their motion with a generic argument that they meet the irreparable harm element because they allegedly show "substantial constitutional claims." (ECF No. 12-1 at 21-22.) But that argument presupposes that Plaintiffs' substantive claims will prevail, which is undermined by the case law discussed above.

Instead, it is the State that will suffer irreparable injury if this Court enjoins AB 5's enforcement. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, ___, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (citation omitted); *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) ("[I]t is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined."); *but see Latta v. Otter*, 771 F.3d 496, 500 & n.1 (9th Cir. 2014) (per curiam). These concerns are particularly acute here, because a preliminary injunction would prevent the State from enforcing laws designed to address the widespread problem of misclassification of employees, and the attendant deprivation of protections under state labor law to which they are properly entitled. Plaintiffs respond that any harm to Defendant from a preliminary injunction is "entirely speculative" (ECF No. 12-1 at 22), but that argument ignores the legitimate and significant state interest in protecting employees from misclassification.

Finally, Plaintiffs seek to change rather than preserve the status quo. Here, the "status quo" is the ABC test, which has been in effect since January 1, 2020 under AB 5, and since the California Supreme Court's adoption of the ABC test in April 2018. *Golden Gate Restaurant Ass'n v. City & Cty. of San Francisco*, 512 F.3d 1112, 1116 (9th Cir. 2008). Although Plaintiffs seek to *alter* this status quo, they have not shown that the facts and the law "clearly favor" such relief. *Anderson v. U.S.*, 612 F.2d 1112, 1114 (9th Cir. 1979) (citation omitted).

## III. THE PUBLIC INTEREST WEIGHS AGAINST A PRELIMINARY INJUNCTION.

Plaintiffs must also establish that the public interest warrants a preliminary injunction, but merely argue generally that protecting First Amendment rights is in the public interest. (ECF No. 12-1 at 23.) Plaintiffs' perfunctory analysis fails because the public interest weighs heavily against enjoining state law.

Here, a court order 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(c).) In enacting the statute, 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).) 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." (*Id.*) These paramount state interests outweigh Plaintiffs' interests in delaying complying with the law.

"In cases where the public interest is involved, the district court must also examine whether the public interest favors the plaintiff." *Fund for Animals v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) ("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."). The public interest is involved when an injunction impacts individuals beyond the parties. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009).

The Legislature concluded that misclassification of workers as independent contractors has harmed workers, and has contributed to the shrinking of the middle class, and to that end enacted the protections of AB 5. (AB 5 § 1(c) & (e).) Given

that AB 5 was enacted after a full legislative process, including discussion about its impact and the necessity for it, and negotiation with various stakeholders including industry, labor, and others, the public interest weighs against a preliminary injunction. As noted above, courts hold that states suffer harm when enforcement of their laws is enjoined. *Maryland v. King*, 567 U.S. 1301, ___, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (citation omitted). Where, as here, "responsible public officials" have considered the public interest and enacted a statute, the public interest weighs against enjoining such legislation. *Golden Gate Restaurant Ass'n*, 512 F.3d at 1126-27. "[I]t is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." *Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943).

## CONCLUSION

For these reasons, the Court should deny Plaintiffs' motion for a preliminary injunction.

Dated: February 14, 2020

Respectfully submitted,

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# CERTIFICATE OF SERVICE

Case Name: ***American Society of Journalists and Authors, Inc. et al v. Xavier Becerra*** Case No. **2:19-cv-10645-PSG**

I hereby certify that on February 14, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

- **DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 14, 2020, at San Francisco, California.

| M. Mendiola | /s/ *M. Mendiola* |
|---|---|
| Declarant | Signature |

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