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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

RESPONSE IN OPPOSITION TO MOTION TO DISMISS

Judge: Hon. Philip S. Gutierrez
Hearing Date: March 23, 2020
Time: 1:30 P.M.

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On behalf of their members, Plaintiffs American Society of Journalists and Authors (ASJA) and the National Press Photographers Association (NPPA) respectfully respond in opposition to Defendant's Motion to Dismiss, *see* Dkt. # 33; Dkt. # 33-1, Memo. in Support of M. to Dismiss ("*Memo*.").

INTRODUCTION

ASJA's and NPPA's members include independent freelance writers and visual journalists. Compl. ¶¶ 10–15. Under *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989), ASJA's and NPPA's members who choose to work as independent journalists have been classified as independent contractors for decades. As independent contractors, freelance writers and visual journalists enjoy flexibility and control over their workload, retention of copyright ownership over their work, a diverse client base, and tax deductions for business expenses. Compl. ¶¶ 38–48. Indeed, those features are why some of ASJA's and NPPA's members choose to freelance rather than become employees of a publisher or broadcaster. Due to the enactment of Assembly Bill 5 (AB 5, *codified at* Cal. Lab. Code § 2750.3, *et seq*.), however, that freedom and flexibility is lost entirely.

Rather than merely helping workers who are "currently exploited by being misclassified as independent contractors instead of recognized as employees," AB 5 § 1(e), AB 5 singles out freelance writers, editors, newspaper cartoonists, still photographers, photojournalists, and videographers by drawing unconstitutional content-based distinctions about who can freelance, thus upending successful, decades-long careers of freelancers who are at no risk of exploitation. In contrast, freelancers who work as marketers, graphic designers, grant writers, and fine artists, among others, are fully exempt from AB 5's onerous new requirements and left free to continue working independently. Cal. Lab. Code § 2750.3(c)(2)(B)(i)–(viii), (xi).

Instead of seriously attempting to defend the legislature's arbitrary and unconstitutional distinctions between freelancers, Defendant asks this Court to dismiss ASJA's and NPPA's Complaint for failure to state a claim. In so doing,

Defendant does not fault Plaintiffs for insufficiently alleging facts, but essentially asks the Court to rewrite AB 5 so as to avoid the unconstitutionally content-based and arbitrary distinctions enshrined in the law, and apply a level of scrutiny rejected by the Supreme Court. This Court should deny Defendant's motion and hold Defendant to his high burden to justify the provisions challenged in this case, which he cannot do at this stage of the proceedings.

ARGUMENT

AB 5 is unconstitutional to the extent it draws content-based distinctions about who can independently contract ("freelance"), limiting certain speakers to 35 submissions per client, per year, and precluding some independent journalists from making video recordings unless they are classified as employees of that client. The only "professional services" subject to AB 5's 35-submission limit are freelance journalists, editors, newspaper cartoonists, still photographers, photojournalists, and videographers. Cal. Lab. 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 even one video. *Id*. § 2750.3(c)(2)(B)(ix). Highlighting the impermissible arbitrariness of these distinctions is the fact that common professional equipment used by visual journalists allows them to literally flip a switch on their camera to shift back and forth between still and video photography, and clients often request both. Compl. ¶¶ 66–72. *See*, *e.g.*, https://www.nikonusa.com/en/nikon-products/product/dslr-cameras/d5.html ("[B]ring out the absolute best in your photos and videos.").

The arbitrary content-based distinctions created by AB 5 cause ASJA's and NPPA's members to lose work and income, in addition to the constitutional injuries suffered each day AB 5 remains in effect. Compl. ¶¶ 34–49. The only way to maintain their careers as freelancers is for Plaintiffs' members to alter their

expressive activities to comply with the 35-submission limit and video recording ban imposed by AB 5.[1]

At base, Defendant's motion to dismiss errs because it fundamentally misapplies both the text of AB 5 and the relevant caselaw. Defendant's primary argument is that strict scrutiny should not apply because AB 5 does not discriminate based on viewpoint. But this argument has been rejected repeatedly by the Supreme Court.

With Defendant's error about the appropriate level of scrutiny resolved, the motion fails because content-based distinctions like those drawn by AB 5 are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). The burden is on Defendant to justify a rule that singles out freelance writers, editors, newspaper cartoonists, still photographers, and photojournalists from the definition of professional services that applies to other speakers. *Id*. This is a "heavy burden," which requires Defendant to offer evidence of a causal link between the limits AB 5 imposes on "professional services" and a

[1] Defendant's argument that AB 5 has not been applied to Plaintiffs' members or that they have not established that it is facially unconstitutional, raised in a three-sentence footnote to his conclusion, barely merits mention. *Memo.* at 16 n.5; *see Holley v. Gilead Scis., Inc.*, 379 F. Supp. 3d 809, 834 (N.D. Cal. 2019) (quoting *Estate of Saunders v. Comm'r*, 745 F.3d 953, 962 n.8 (9th Cir. 2014) ("'Arguments raised only in footnotes, or only on reply, are generally deemed waived' and need not be considered.")). That argument runs counter to the statute's presumption that "a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor," Cal. Lab. Code § 2750.3(a)(1), ignores the allegations of the Complaint that Plaintiffs' members have already lost work due to AB 5, Compl. ¶¶ 34–37, and confuses the motion to dismiss pleading standard with the ultimate consideration of the merits of Plaintiffs' claims, *Frudden v. Pilling*, 742 F.3d 1199, 1207–08 (9th Cir. 2014); *see also Perez v. Pers. Bd. of City of Chicago*, 690 F. Supp. 670, 677 n.6 (N.D. Ill. 1988) ("A motion to dismiss is not the appropriate avenue for defendants … [to establish] that the policy is necessary to serve a compelling state interest.").

compelling government interest. *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 379 (2000) ("This Court has never accepted mere conjecture as adequate to carry a First Amendment burden …."). *See City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) (Regulatory exemptions "may diminish the credibility of the government's rationale for restricting speech in the first place."). Even if the caselaw were on Defendant's side, AB 5's 35-submission cap and video ban challenged in this case would still be subject to intermediate scrutiny—a standard that Defendant still cannot meet at the motion to dismiss stage. The motion should be denied.

I. Motion to Dismiss Standard

Dismissal under Rule 12(b)(6) for failure to state a claim is only proper where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

When reviewing Defendant's motion to dismiss under Rule 12(b)(6), this Court must "accept all well-pleaded allegations of material fact as true and construe them in the light most favorable to the nonmoving party." *Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777, 783 (9th Cir. 2012). Ultimately, Defendant bears the burden of proving that the challenged law does not violate the Constitution. *See*, *e.g.*, *Destination Ventures*, *Ltd. v. FCC*, 46 F.3d 54, 55–56 (9th Cir. 1995). Plaintiffs must rebut any evidence offered by Defendant, but at the motion to dismiss stage, this Court "must assume that [Plaintiffs] can, even if it strikes [this Court] 'that a recovery is very remote and unlikely.'" *Dias v. City and County of Denver*, 567 F.3d 1169, 1184 (10th Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009) (quotation omitted);

Neilson v. Union Bank of California, 290 F. Supp. 2d 1101, 1151 (C.D. Cal. 2003) (same).

Accepting the truth of the allegations in the Complaint, and drawing all inferences in the light most favorable to Plaintiffs, this Court should deny Defendant's motion to dismiss.

II. Strict Scrutiny Applies to All of Plaintiffs' Claims

A. AB 5's definition of "professional services" is content-based.

All of Plaintiffs' constitutional claims are subject to strict scrutiny, because AB 5 draws content-based distinctions between different types of speech. *Reed*, 135 S. Ct. at 2227. As Defendant admits, strict scrutiny applies to equal protection claims when the First Amendment requires strict scrutiny. *See Memo.* at 10:14 (quoting *Nordlinger v. Hahn*, 505 U.S 1, 10 (1992)) ("'a [statutory] classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right'"); *id*. at 15 n.4 (citing *Wagner v. Fed. Election Comm'n*, 793 F.3d 1, 33 (D.C. Cir. 2015)) ("Although equal protection analysis focuses upon the validity of the classification rather than the speech restriction, 'the critical questions asked are the same.' We believe that the same level of scrutiny ... is therefore appropriate in both contexts.").

Strict scrutiny applies even when the government burdens, rather than bans, protected speech on the basis of content. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 (2000) ("The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans."); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565–66 (2011) ("Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content."). *See also Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) (content-based financial burden); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (speaker-based financial burden).

The Supreme Court made clear in *Reed* 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." 135 S. Ct. at 2227. "Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id*. Put more simply, a speech restriction is content-based if "a law enforcement officer must read a [speaker's] message to determine if the [speech] 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) (striking down content-based sign code that exempted real estate "open house" and other signs).

The only relevant distinctions that AB 5's "professional services" definition draws are based on the content of speech. Compl. ¶¶ 57, 65, 76, 84. For example, under AB 5, writers of marketing materials, perhaps news releases, can freelance freely; but if they write articles about that same news release, they are subject to the 35-submission limit. *Id*. If a photographer takes pictures for the purpose of marketing a company, they have no limit, but if that photographer takes photographs to communicate in a newspaper about a matter of public concern related to that same company, they are subject to a 35-submission limit. *Id*. Freelance graphic artists can submit unlimited infographics to a newspaper; freelance photojournalists are capped at 35 submissions. *Id*. If photographers take only still photographs, they are subject to the 35-submission limit; take a single video (often with the same camera) and they lose the ability to freelance. *Id*.

One has to read or view a freelancer's work to know whether it is, for example, "marketing," and therefore fully exempt under AB 5, or rather "journalism" and therefore subject to the 35-submission cap and video ban. The only distinction between these different "occupations" is the "function or purpose" of the speech that defines them. *Reed*, 135 S. Ct. at 2227. The Court addressed this very distinction in *Sorrell*, holding that "marketing, [] is, speech with a particular content." 564 U.S. at

564. The Court therefore applied strict scrutiny to a law that restricted the use of certain information in marketing, but not journalism. *Id*. at 571. AB 5 does the converse, restricting journalism and sparing marketing (and other types of speech). The law's restrictions on marketing in *Sorrell* imposed a "content-based burden on protected expression, and that circumstance is sufficient to justify application of heightened scrutiny." *Id*. Likewise, heightened scrutiny applies here to the content-based distinctions drawn by AB 5's definition of "professional services."

AB 5's ban on freelance video recording also depends on the content of the freelancer's expression. The statute expressly states that only "still" photojournalism fits within the professional services exemption, and does not permit freelance video journalism. *See* Cal. Lab. Code § 2750.3(c)(2)(B)(ix). But freelancers engaged in marketing, graphic design, grant writing, and fine art have no such medium-based limit. *See id*. § 2750.3(c)(2)(B)(i), (iv)–(vi). To be exact, AB 5 broadly defines "an individual who works on motion pictures," and who is thus excluded from the professional services exemption, to be one whose work comprises, "but is not limited to, 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). This sweeping definition encompasses any video recording—"regardless of the distribution platform"—but the video ban only applies to "a still photographer or photojournalist." *Id*. ("*This clause* is not applicable to an individual who works on motion pictures ….") (emphasis added). Thus, if a freelancer's speech falls within one of the other exemptions for marketing, graphic design, grant writing, or fine art, the video ban does not apply.

Despite the statutory language that applies the video ban only to still photographers and photojournalists, Defendant seems to suggest that the video ban actually applies to all professional services. *Memo*. at 15:5–7. Even assuming Defendant's reading of AB 5 jibed with the statute (it does not), banning freelancers

from using an entire medium would still amount to a content-based regulation of speech because "regulation of a medium inevitably affects communication itself ...." *City of Ladue*, 512 U.S. at 48. The right to shoot video cannot rise and fall based on one's employment status. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428 (1993) (striking down ban on news racks containing "commercial handbills," but not news racks containing "newspapers"); *Reed*, 135 S. Ct. at 2230 (banning the use of sound trucks for only political speech would be a "paradigmatic example" of a content-based regulation).

Like the sign code struck down in *Reed*, AB 5's professional services definition "is content based on its face." 135 S. Ct. at 2227. In *Reed*, the sign code applied different restrictions to directional signs, political signs, and ideological signs based on the "function or purpose" of the sign. *Id*. AB 5 likewise applies different restrictions to marketing, grant writing, fine art, and journalism based on the "function or purpose" of a freelancer's speech. *Id*. Because AB 5 is content-based on its face, "[w]e thus have no need to consider the government's justifications or purposes for enacting the [law] to determine whether it is subject to strict scrutiny." *Id*.

B. Defendant's arguments for content neutrality confuse the distinction between viewpoint-based and content-based laws.

Defendant's motion depends on the argument that a content-based law must "reference an idea or viewpoint, or otherwise reflect a bias for or against any speech or viewpoint." *Memo.* at 12:14–15. This argument was explicitly rejected by the Supreme Court in *Reed*. Neither bias against, nor reference to, a viewpoint are required for a law to be content-based. Nor can Defendant avoid his constitutional burden by characterizing AB 5's discrimination as "speaker-based." *Id*. at 13:19–21.

In *Reed*, the Court rejected the argument that the town's sign code was "content neutral because the Town did not adopt its regulation of speech based on disagreement with the message conveyed." 135 S. Ct. at 2227 (cleaned up).

Defendant presses precisely the same failed argument here. *Memo.* at 12. But just as the Court chastised this approach in *Reed* because it "skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face," *Reed*, 135 S. Ct. at 2228, this Court should likewise reject Defendant's argument here because "an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Id*.

Nor must a law "mention any idea or viewpoint" in order to be content-based. *Id*. at 2230. A law is content-based if it is merely "targeted at specific subject matter … even if it does not discriminate among viewpoints within that subject matter." *Id*. As "a paradigmatic example of content-based discrimination," the *Reed* Court offered that "a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed." *Id*. at 2230. Likewise here, because AB 5 places limits on journalistic speech based on its "function or purpose" that it does not impose on other speech, it is content-based on its face.

Finally, Defendant's argument that AB 5 could be characterized as a speaker-based restriction is, *Memo.* at 13:19–21, like the same argument rejected in *Reed*, "mistaken on both factual and legal grounds." 135 S. Ct. at 2230.

As a factual matter, the "occupational classification," *Memo.* at 13:9, of a particular kind of writer or photographer cannot be divorced from the content they produce. As discussed above, the distinction between a freelance journalist and a freelancer marketer, or a freelance fine artist and a freelance photojournalist, depends entirely on the "function or purpose" of the speech they produce. Indeed, the same person may be a journalist or a marketer depending on which contract they are working on at any moment. *See infra*, part III. Like the sign code struck down in *Reed*, who is speaking does not matter under AB 5—all that matters is the content of the speech. *See* 135 S. Ct. at 2230 ("If a local business, for example, sought to put

up signs advertising the Church's meetings, those signs would be subject to the same limitations as such signs placed by the Church.").

As a legal matter, it should be obvious that a speaker-based law targeting the press suffers from the core "vice of content-based legislation [which] is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes." *Id*. at 2229 (cleaned up). In fact, the Court said exactly that in *Reed*: "a law limiting the content of newspapers, but only newspapers, could not evade strict scrutiny simply because it could be characterized as speaker based." *Id*. at 2230. *See also Citizens for Free Speech*, *LLC v. Cty. of Alameda*, 194 F. Supp. 3d 968, 983 (N.D. Cal. 2016) (applying strict scrutiny to speaker-based restrictions); *Arkansas Writers' Project*, *Inc. v. Ragland*, 481 U.S. 221, 229 (1987); *Minneapolis Star & Tribune Co.*, 460 U.S. at 583. AB 5 limits what voices can be published, barring publication of a freelance writer or photographer after she reaches 35 submissions. *See also McDermott v. Ampersand Pub.*, *LLC*, 593 F.3d 950, 962 (9th Cir. 2010) ("Telling the newspaper that it must hire specified persons, … is bound to affect what gets published. To the extent the publisher's choice of writers affects the expressive content of its newspaper, the First Amendment protects that choice.").

AB 5 singles out writers and visual journalists for unfavorable treatment under California labor law, denying full freedom to freelance only to writers and photographers whose speech does not fit within the content-based exemptions for fine artists, marketing, graphic design, and grant writing. 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. The only way to know how AB 5 applies to anything a freelancer produces is to read the freelancer's writing (or view his photographs and videos) to determine the "function or purpose" of the speech. *Id*. Plaintiffs' claims against AB 5's content-based distinctions are subject to strict scrutiny.

With Defendant's error about the level of scrutiny corrected, it becomes clear that the content-based distinctions drawn by AB 5 are "presumptively unconstitutional" and the burden is on Defendant to produce evidence to rebut that presumption. *Reed*, 135 S. Ct. at 2226; *City of Ladue*, 512 U.S. at 52. Because Defendant cannot attempt to make this evidentiary showing at this stage in the proceedings, the motion to dismiss should be denied.

III. Plaintiffs' Equal Protection Claims

Plaintiffs state valid equal protection claims because AB 5 draws arbitrary distinctions between different sorts of speech. AB 5 creates a category of work called "professional services," which is exempt from AB 5's limits on freelancing. Cal. Lab. Code § 2750.3(c)(2)(B). But that exemption is not applied evenhandedly. The only "professional services" subject to a 35-submission limit are writings by journalists, editing, newspaper cartoons, still photography, and photojournalism. Cal. Lab. Code § 2750.3(c)(2)(B)(ix), (x). This arbitrary variation in the way California regulates these similar "professional services" violates the Equal Protection Clause, in the same manner that arbitrary rules for exterminators violated equal protection in *Merrifield v. Lockyer*, 547 F.3d 978, 988–89 (9th Cir. 2008). But, unlike the law struck down in *Merrifield*, this arbitrary law burdens the fundamental right of free speech and is therefore subject to strict scrutiny. *See supra*.

Defendant's attempt to avoid equal protection scrutiny ignores the text of AB 5. The challenged law does not draw distinctions "based on volume," *Memo.* at 8:16; its distinctions are based on the type of speech produced. Freelance writing that is for the purpose of marketing or grant writing is not subject to AB 5's submission limit; freelance writing that is for the purpose of journalism is limited to 35 submissions. For example, a marketing freelancer can submit unlimited press releases to a client; a journalism freelancer can only submit 35 op-eds. *Cf. Memo.* at 9:16–19 ("Plaintiffs do not explain how a 35-submission limit would apply to

marketers ….”). The legislature could have applied the same “arbitrary”[2] submission limits to all speakers; instead it singled out journalists for unfavorable treatment.

That freelance journalists and freelance marketing writers are similarly situated for purposes of equal protection should require little explanation—marketing and news writing are often two sides of the same coin. Compl. ¶ 75. Indeed, freelancers often work on both marketing and journalism projects; they are not merely similarly situated, they are often the same person. Likewise with grant writers: the key distinction between a grant application and an investigative news article is the “function or purpose” of the speech.

The same goes for visual communicators who work in both still and video media. Only “still photographers and photojournalists” are included in AB 5’s limited definition of professional services, even though visual journalists often communicate through both still and video photography, often using the same camera equipment to capture their message. Whether those images are captured for marketing, fine art, graphic design, a grant application, or journalism simply depends on the intended “function or purpose” of the freelancer’s images.

In any event, Defendant’s speculation about what the legislature “could have reasonably concluded,” *Memo.* at 9:5, about differences between freelance speakers is entirely inappropriate at the motion to dismiss stage. This Court must accept the allegations in the complaint as true, and it cannot consider extraneous evidence—or extraneous speculation. *See Neilson*, 290 F. Supp. 2d at 1151. Plaintiffs’ allegations about the similarities between these freelance speakers meet the motion to dismiss standard to establish that they are similarly situated for equal protection purposes. Compl. ¶¶ 54, 58, 59, 62, 69, 70.

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[2] Katie Kilkenny, *“Everybody Is Freaking Out”: Freelance Writers Scramble to Make Sense of New California Law*, THE HOLLYWOOD REPORTER, Oct. 17, 2019 (quoting AB 5 sponsor Assemblywoman Lorena Gonzalez), https://www.hollywoodreporter.com/news/everybody-is-freaking-freelance- writers-scramble-make-sense-new-california-law-1248195.

Similarly, Defendant cannot meet his burden on the merits at the motion to dismiss stage. Strict scrutiny requires that Defendant prove that AB 5 "furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 135 S. Ct. at 2231 (quote omitted). Defendant cannot make this showing at this stage of the proceedings. *Frudden v. Pilling*, 742 F.3d 1199, 1207–08 (9th Cir. 2014); *see also Perez v. Pers. Bd. of City of Chicago*, 690 F. Supp. 670, 677 n.6 (N.D. Ill. 1988) ("A motion to dismiss is not the appropriate avenue for defendants … [to establish] that the policy is necessary to serve a compelling state interest."). Nor does Defendant make any effort to address any level of heightened scrutiny.

Plaintiffs' equal protection claims cannot be dismissed. Instead, Defendant must proceed to fact-finding and prove that AB 5 survives heightened constitutional scrutiny.

IV. Plaintiffs' First Amendment Claims

Defendant's fundamental misunderstanding about the law of content-based restrictions, *see supra*, fatally undermines his opposition to Plaintiffs' First Amendment claims. Accordingly, Defendant's attempt to distinguish *Arkansas Writers' Project, Inc.*, 481 U.S. at 229, fails at the outset.[3] Contrary to Defendant's mistaken assumption that content-based laws must show "bias for or against any speech or viewpoint," *Memo.* at 12:15, in both *Arkansas Writers' Project* and *Minneapolis Star & Tribune Co.*, 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*. The plain text of AB 5 establishes that the press

[3] Defendant does not address the other key case on point, *Minneapolis Star & Tribune Co.*, 460 U.S. at 583.

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* in the course of defending the video ban. *Memo.* at 14:20–15:3. Defendant argues that content-neutral differential treatment of mediums of expression can be "justified by some special characteristic of the particular medium being regulated." *Memo.* at 15:3 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 660–61 (1994)). This argument suffers from the same confusion about the difference between content-based and viewpoint-based regulations that infects Defendant's other arguments. But Defendant also neglects that it is the *government's* burden to demonstrate such "special characteristics" exist. *Turner Broad. Sys.*, 512 U.S. at 661. In the case on which Defendant relies, *Turner Broadcasting*, the government demonstrated that cable television was uniquely susceptible to "bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television." *Id*. Defendant makes no attempt to show that AB 5's differential treatment of video recording is "justified by some special characteristic of the medium." *Id*. at 660–61. In any event, an attempt to make such a showing would be improper at the motion to dismiss stage, *Frudden*, 742 F.3d at 1207–08, therefore the Court should reject Defendant's reliance on *Turner Broadcasting* here.

Nor does Defendant acknowledge that the upshot of any "special characteristic" showing that he might eventually make does nothing to vindicate his motion to dismiss. If Defendant were able to show that AB 5's differential treatment of video recording were both content-neutral and "justified by some special characteristic of the medium," intermediate scrutiny—rather than strict scrutiny—would apply to Plaintiffs' claims regarding the video ban. *Turner Broad. Sys.*, 512 U.S. at 660–62. That is a fatal problem for Defendant's motion to dismiss because, as discussed above, on a motion to dismiss the government cannot carry its

constitutional evidentiary burden, even under intermediate scrutiny. *See*, *e.g.*, *Destination Ventures*, *Ltd.*, 46 F.3d at 55–56 (observing government's burden of demonstrating "reasonable fit" under intermediate scrutiny).

Defendant does not explain why complying with the First Amendment's speech protections—treating freelance journalists the same as freelance marketers, graphic designers, fine artists, or grant writers—would frustrate any interests served by AB 5. "That is particularly so given that AB-5 provides an alternative should the ABC test be struck down." *California Trucking Ass'n v. Becerra*, No. 3:18-cv-02458-BEN-BLM (S.D. Cal. Dec. 31, 2019) (citing Cal. Lab. 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*, enjoining AB 5 works no injury to the government and preserves important federal rights. Defendant's motion to dismiss the First Amendment claims must be denied.

CONCLUSION

Without explanation, AB 5 arbitrarily singles out freelance writers, editors, still photographers, and photojournalists for negative treatment. Compounding the problem, AB 5's primary author admits that limiting freelance writers and photographers to 35 submissions per publisher, per year is "a little bit arbitrary."[4] As a result, AB 5's arbitrary limits and exclusions not only put the careers of freelance writers and photographers at risk, but they function as a direct attack on First Amendment speech and press rights. For the foregoing reasons, Defendant's Motion to Dismiss should be denied. Should this Court find Plaintiffs' Complaint deficient for any reason, Plaintiffs respectfully request leave to file an amended complaint.

[4] *See supra* n.2.

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Respectfully submitted,

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