No. 20-55734

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Appellants,

v.

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

Appellee.

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

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned counsel of record certifies the following:

Appellant American Society of Journalists and Authors, Inc. has no parent companies and no publicly held corporation owns ten percent or more of its stock.

Appellant National Press Photographers Association has no parent companies and no publicly held corporation owns ten percent or more of its stock.

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INTRODUCTION

Freelance journalism is older than our nation. Charles Dickens, Ernest Hemingway, Eudora Welty, and a long list of history's most prominent writers honed their skills as freelancers. Now, in the digital age, thousands of writers and photographers have used the advances of modern technology to embrace the freedom and independence that a freelancing career provides. For many, their freelancing businesses are the only way they can balance childcare or elder care with a career. Still others choose freelancing as a certain way to retain copyright over their creative work. As independent contractors, freelancers operate as micro businesses, which means they are able to adapt their workload to their financial needs, spread their workload across multiple clients to minimize risk, take tax deductions for their expenses, and find financial security in flexibility. Losing the freedom to freelance is devastating to longstanding careers built on this freedom and flexibility.

Despite freelancing's long pedigree and growing vitality, California recently enacted a new law—Assembly Bill 5, as amended by Assembly Bill 2257 and recodified at Cal. Labor Code §§ 2775–2787—which severely limits freelancing. Section 2778 of that new law singles out freelance journalism as explicitly restricted from communicating through video and also imposes contract restrictions on freelance journalism that do not apply to other types of speech. Cal. Labor Code

§ 2778(b)(2). These arbitrary limits on one type of speech are unconstitutional content-based restrictions that should be enjoined.

Two of the largest and oldest organizations representing writers and photographers, the American Society of Journalists and Authors, Inc. (ASJA), and the National Press Photographers Association (NPPA) (collectively Freelancers), sued to enjoin the arbitrary limits imposed by AB 5. The district court denied their motion for a preliminary injunction and dismissed their claims, based on the court's fundamental failure to apply the rule that speech restrictions based on the "function or purpose" of the speech are subject to strict scrutiny and are presumptively unconstitutional. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227–28 (2015); *Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1070 (9th Cir. 2020); *Recycle for Change v. City of Oakland*, 856 F.3d 666, 670 (9th Cir. 2017). The district court also engaged in a balancing of the evidence in ruling on the motion to dismiss, in similarly stark defiance of this Court's precedents.

While this appeal was pending, the legislature amended AB 5, removing one of the restrictions on freelance journalism imposed by that bill, but adding others. *See* Assembly Bill 2257 (2020). Under AB 5, freelance journalism was limited to 35 "content submissions" by a freelancer per client, per year, any video recording was expressly prohibited, Cal. Labor Code § 2750.3(c)(2)(B)(ix) and (x). The submission limit was lifted by AB 2257; however, the video restriction largely

remains, and the submission limit was replaced with new contract restrictions that continue to restrain the amount of work freelancers can do for their journalism clients. For example, under AB 2257, a freelancer cannot "replac[e] an employee who performed the same work at the same volume for the hiring entity." Cal. Labor Code § 2778(b)(2)(I), (J). Thus, a freelancer cannot meet, let alone exceed, the submission limit set by even a part-time existing employee. In effect, a submission limit remains, but it is now set at whatever number of submissions an employee currently produces. At bottom, the problem remains the same: the freedom to freelance depends on what a writer or photographer has to say and how much they speak. Section 2778 singles out journalism for unfavorable treatment under California labor law, denying full freedom to freelance only to speech that does not fit within content-based exemptions for fine art, marketing, graphic design, grant writing, and sound recordings. Section 2778 threatens to shutter the small businesses of freelance writers, photographers, and videographers whose speech is subject to these limits.

Both the denial of the preliminary injunction and the grant of the motion to dismiss should be reversed and the case remanded for entry of a preliminary injunction enjoining the video ban and contract restrictions on freelance journalism.

STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C § 1331, the federal district court had subject matter jurisdiction over this dispute arising under the United States Constitution. This appeal arises from the district court's July 9, 2020, order dismissing the action with prejudice. ER 007. Appellants filed a timely notice of appeal on July 20, 2020. ER 001. This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1292(a)(1).

STATUTORY PROVISIONS

Pursuant to Circuit Rule 28-2.7, copies of pertinent constitutional provisions, statutes, and regulations appear in the addendum to this brief.

STATEMENT OF THE ISSUES

1. Whether a law that bans freelance journalism communicated through video recording is an unconstitutional content-based restriction on speech.

2. Whether a law that restricts the terms of freelance journalism contracts—but not freelance contracts for other types of communication—is an unconstitutional content-based restriction on speech.

3. Whether such laws are nonetheless unconstitutional if they are characterized as "occupation-based," or speaker-based classifications.

4. Whether it was reversible error to dismiss constitutional claims on the basis of disputed facts outside the pleadings.

STATEMENT OF THE CASE

I. Legal Background of Section 2778

In 2019, California enacted AB 5 which codified, but also significantly expanded the reach and application of the independent contractor test established in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 4 Cal. 5th 903 (2018). *Dynamex* created a new three-part "ABC" test that requires some independent contractors to be classified as employees under certain California wage orders, unless the hiring entity proves that:

> (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact, (B) that the worker performs work that is outside the usual course of the hiring entity's business, and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

Id. at 964. *See also* Cal. Labor Code § 2750.3(a)(1) (repealed and reenacted as Cal. Labor Code § 2775(b)(1)). Failure to prove any element of this ABC test results in the independent contractor being classified as an employee for the purposes of wage orders. *Id*. For wage orders, the *Dynamex* ABC test overruled a prior multi-factor balancing test that considers the economic realities of the employment relationship. *See S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989). Under *Borello*, freelance writers and photographers like those represented

here have worked as independent contractors for decades. ER 056, 060, 067–068, 071, 076; Supp. App. 02, 08, 22, 27.

After *Dynamex*, freelance writers and photographers generally continued to work as independent contractors because of the limited application of the case. While *Dynamex* significantly changed the law where it was applicable, it was limited to the "suffer or permit to work" standard in California wage orders and "equivalent or overlapping non-wage order allegations arising under the Labor Code." *Gonzales v. San Gabriel Transit, Inc.*, No. S259027, 2019 WL 4942213, at *14 (Cal. Ct. App. Oct. 8, 2019), *review granted*, 456 P.3d 1 (Cal. 2020). Wage orders govern issues like minimum wage, overtime pay, meals, and lodging. Professionals engaged in "original and creative" work, like Appellants' members, are largely exempt from wage orders, and thus *Dynamex* had little direct effect on their work.[1]

By contrast, AB 5 applied the strict *Dynamex* ABC test to the entire Labor Code, the Unemployment Insurance Code, and wage orders. Cal. Labor Code § 2750.3(a)(1) (repealed and reenacted as Cal. Labor Code § 2775(b)(1)). AB 5's expansion of the ABC test meant that freelancers like the writers, photographers, and videographers who comprise Appellants' memberships must be classified as employees of the clients for which they produce content because content creation is "the usual course of the hiring entity's business." Cal. Labor Code § 2750.3(a)(1)(B)

[1] https://www.dir.ca.gov/dlse/faq_overtimeexemptions.htm

(repealed and reenacted as Cal. Labor Code § 2775(b)(1)(B)). AB 5 also granted specific enforcement authority to Defendant Attorney General of California Xavier Becerra (Becerra), "[i]n addition to any other remedies available," to bring an action for injunctive relief. Cal. Labor Code § 2750.3(j) (repealed and reenacted as Cal. Labor Code § 2786). This new enforcement authority means that even freelancers who wish to work independently can be forced to become employees. Indeed, the sponsor of AB 5 has encouraged proactive use of the enforcement authority granted by the law,[2] and enforcement actions have already been brought by Becerra and a number of California city attorneys.[3]

As dramatic a shift as AB 5 represented, the legislature responded to intense lobbying efforts by granting dozens of arbitrary exemptions to the strict three-part ABC test. This patchwork of exemptions began with dozens of carveouts in AB 5 itself, but freelancers whose careers were devastated by AB 5 rushed to the capitol in 2020 and successfully pleaded with the legislature to add at least a dozen more categories of workers exempted from AB 5's limits on freelancing. Among the many exemptions created by AB 5 and AB 2257, California Labor Code § 2778 excludes people who work pursuant to "a contract for 'professional services.'" These exempt services remain subject to the existing *Borello* independent contractor test. *Id.*

[2] https://twitter.com/LorenaSGonzalez/status/1197546573158158336?s=20
[3] https://www.sfcityattorney.org/wp-content/uploads/2020/05/2020-05-05-Complaint-Filed.pdf

"Professional services" were originally defined as marketing, human resources administration, travel agents, graphic design, grant writing, fine arts, IRS enrolled agents, payment processing agents through an independent sales organization, estheticians, electrologists, manicurists, barbers, and cosmetologists. Cal. Labor Code § 2750.3(c)(2)(B)(i)(viii), (xi) (repealed and reenacted as Cal. Labor Code § 2778(b)(2)(A)–(H), (L)). AB 2257 added translators, illustrators, content contributors, advisors, producers, narrators, cartographers, "a specialized performer hired by a performing arts company or organization to teach a master class for no more than one week," property appraisers, registered professional foresters, and home inspectors to this extensive list. *Id*. § 2778(b)(2)(I)–(K), (M)–(O). It also added another content-based carveout for "[p]hotographers working on recording photo shoots, album covers, and other press and publicity purposes." *Id.* § 2780(a)(1)(H). And it includes a medium-based carveout for "creative, production, marketing, or independent music publicist services related primarily to the creation, marketing, promotion, or distribution of sound recordings or musical compositions." *Id*. § 2780(a)(1)(J).

Still photography, photojournalism, videography, freelance writing, editing, and newspaper cartoons are included in "professional services," but with important limitations at issue here: (1) video journalism is expressly excluded from the photography and photojournalism exemption, Cal. Labor Code § 2778(b)(2)(I)(i);

and (2) freelance journalism contracts are subject to restrictions not imposed on other freelance speakers, including that they may not "directly replace an employee who performed the same work at the same volume" and may not "primarily perform the work at the hiring entity's business location," *id.* § 2778(b)(2)(I), (J). Under AB 5, this speech was also limited to 35 "content submissions" by a freelancer per client, per year, Cal. Labor Code § 2750.3(c)(2)(B)(ix), (x). That submission limit was lifted by AB 2257; however, it was replaced with other contract restrictions and the video restrictions largely remain unchanged. In some instances, however, the new contract restrictions can be worse than the 35-submission limit they replace. If an employee is producing fewer than 35 submissions per year, a client would be unable to hire a freelancer to replace that employee at the same or higher volume. For example, if an employee producing a biweekly column (26 submissions per year) quits, the client could not hire a freelancer producing the same biweekly column, or a weekly column (52 submissions per year). In effect, the submission limit remains, but it is set at whatever number of submissions an employee—even a part-time employee—currently produces.

At bottom, the nuances between AB 5's submission limit and AB 2257's contract restrictions are just that—subtle differences that do not change the fundamental problem that the freedom to freelance depends on what a freelancer has to say. Section 2778 singles out journalism for unfavorable treatment under

California labor law, denying full freedom to freelance only to speech that does not fit within the content-based exemptions for fine art, marketing, graphic design, grant writing, or sound recordings. Section 2778 threatens to shutter the small businesses of freelance writers, photographers, and videographers whose speech is subject to these limits.

II. The Harm to Journalism from Section 2778

ASJA and NPPA are two of the leading voices for freelance writers and visual journalists in the United States. ER 071, 076. ASJA was founded in 1948 and is the nation's largest professional organization of independent nonfiction writers. ER 071. Its membership consists of freelance writers of magazine articles, trade books, and many other forms of nonfiction writing, each of whom has met exacting standards of professional achievement. *Id*.

Chartered in 1946, NPPA is the nation's leading professional organization for visual journalists. ER 076. Its membership includes visual journalists from print, television, and electronic media. *Id*. NPPA has over 500 members in the State of California. *Id*. On behalf of its members, NPPA works to support its members' copyrights and opposes violations of First Amendment rights to report on news and matters of public concern. *Id*.

These organizations brought this lawsuit to vindicate their members' rights to speak as independent professional freelancers. When AB 5 limited their members to

35 submissions per year and banned their use of video to communicate, it had a devastating effect on California freelancers' ability to publish their work; the lingering video ban and contracting restrictions imposed by Section 2778 continue to stifle journalistic expression in substantially the same way. ER 052, 064, 071, 077; Supp. App. 03, 10–11, 13–16, 18–19, 23–25, 28–29.

At best, Section 2778 forces freelancers to choose between silence and becoming employees. In reality, the restrictions imposed by AB 5 and AB 2257 have led many clients to abandon California freelancers altogether. ER 064, 073, 076; Supp. App. 10, 23, 28. But even the best-case scenario imagined by Section 2778—reclassifying freelancers as employees—brings significant new costs and disadvantages. An independent contractor can deduct expenses such as costly photography equipment, computer equipment and software, training, and travel on their federal and California state taxes, but an employee is not able to deduct these expenses. ER 056, 061, 068, 071–072. Contractors are also able to maintain tax-deductible benefits like healthcare and retirement accounts, regardless of the number of clients they produce content for or the frequency and quantity of their work. ER 068, 071–072. And that flexibility is even more important in the digital space which, unlike the traditional print model, allows for a higher volume of submissions to a greater variety of publications. ER 061–063, 073. Losing the freedom to freelance has been devastating to writers and photographers who have chosen this independent

path. ER 056–057, 063, 068, 072, 077; Supp. App. 03, 10–11, 13–16, 18–19, 23–25, 28–29.

In addition to these costs, erstwhile freelancers who are forced to choose between silence and becoming employees because of the limits on freelance journalism imposed by Section 2778 will also lose ownership of the copyright to their creative work and control of their workload. ER 052–053, 057–058, 067–068, 071–073, 077–078; Supp. App. 04, 09–10, 28. Control over the copyright of their work is especially important for freelance photographers, who routinely license their work but retain ownership of the copyright. ER 068, 077. Under the Copyright Act, the copyright in a work created by an independent contractor photographer is owned by the creator. *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989). However, the copyright in a work created by an employee is owned by the employer. *Id.*; 17 U.S.C. § 201(b). Writers, too, benefit substantially from the ability to republish work that they create as freelancers. ER 061, 073. Freelancers who are forced to become employees due to Section 2778 will lose the copyright to their work. ER 071–072, 077. A lack of clarity on this issue could be financially devastating to a creator, as statutory damages for copyright infringement can be as high as $150,000, plus the award of attorneys' fees. 17 U.S.C. § 504(c).

Control over their workload is a primary concern for every freelancer. Indeed, control is what leads many freelancers to make the choice to work independently.

ER 056–057, 061, 065, 067–068, 071, 078. In a tumultuous industry that continues to lay off employees by the thousands, freelancers find safety in flexibility and self-employment. ER 056, 060, 062, 067, 072–073, 077. Rather than being tied to a single employer, freelancers are able to adapt their workload to their financial needs, balance their work with their other responsibilities, and spread their workload across multiple clients to minimize risk. ER 056, 060–061, 067–068, 071, 077; Supp. App. 03, 05, 09.

Finally, for professionals engaged in "original and creative" work—like ASJA's and NPPA's members—the changes wrought by Section 2778 require them and their clients to shoulder new tax and regulatory burdens, including unemployment taxes,[4] workers' compensation taxes,[5] state disability insurance,[6] paid family leave,[7] and sick leave.[8] *See* ER 060, 062. While these might seem like benefits that favor the independent contractor, a freelancer whose business serves a wide range of clients is left with a patchwork of "benefits" in name only. That is because freelancers who divide work among multiple clients with varying workloads rarely qualify for the benefits these taxes fund because of tenure, accrual, and use rules—not to mention practical problems of how these benefits would be calculated

[4] Cal. Unemp. Ins. Code § 1251.
[5] Cal. Labor Code § 3600.
[6] Cal. Unemp. Ins. Code § 2625.
[7] Cal. Unemp. Ins. Code § 3303.
[8] Cal. Labor Code § 246.

and paid when freelancers have a multitude of clients. *See, e.g.,* Cal. Lab. Code § 246 (explaining minimum length of employment, accrual rules, and use rules for paid sick leave). But when they operate as independent businesses, freelancers can include the cost of these tax-deductible expenses in their rates and secure meaningful benefits for themselves. *See* ER 057, 064, 071, 077. Additionally, the risk of penalties for misclassifying independent contractors is significant enough that some clients have refused to do business with independent writers and photographers in California altogether, even when the freelancers can prove they meet the exemptions. The threat of enforcement has already resulted in lost business opportunities for freelancers. ER 064, 073, 076; Supp. App. 10, 23, 28.

III. Section 2778's Unconstitutional Limits on Freelance Journalism

Section 2778's definition of "professional services" violates the First Amendment because it prohibits certain freelancers from using video as a medium of expression and arbitrarily imposes contract restrictions on certain freelancers. Appellants' freelance members are working writers, journalists, authors, photographers, and videographers who face an immediate and irreparable chilling effect on their First Amendment activity because of the content-based limits on freelancing imposed by Section 2778's definition of "professional services." These limits violate both the Equal Protection Clause of the Fourteenth Amendment and the Free Speech and Press Clauses of the First Amendment. Striking these limits on

the definition of "professional services" would fully protect freelance journalism on the same terms as other types of speech already included in the definition and would resolve Freelancers' constitutional claims against Section 2778.

IV. Trial Court Decision

On December 17, 2019, ASJA and NPPA filed this action on behalf of their freelance members, seeking to enjoin enforcement of the video ban and submission limits. ER 079. Three days later, they moved for a preliminary injunction to stop those restrictions on freelance journalism from going into effect on January 1, 2020. ER 098. Becerra refused to voluntarily delay enforcement of AB 5, so ASJA and NPPA moved for a temporary restraining order on December 31, 2019. ER 100. The district court denied the motion for a temporary restraining order on January 3, 2020. *Id.* On January 24, 2020, Becerra moved to dismiss. *Id.*

After a short hearing on the motion for preliminary injunction, ER 038, the district court issued successive orders denying the motion for preliminary injunction and granting the motion to dismiss with leave to amend. ER 019, 015. The order granting the motion to dismiss relied entirely on the reasoning of the preliminary injunction order. ER 015. ASJA and NPPA timely appealed both orders; that appeal was docketed in this Court as No. 20-55408. ER 009. After the district court issued an order dismissing the case with prejudice on July 9, 2020, Defendant-Appellee moved to dismiss the original appeal. This Court granted the motion to dismiss

No. 20-55408 because the appeal of the preliminary injunction merged with and was duplicative of this appeal. No. 20-55408, Dkt. No. 32. Accordingly, this appeal challenges both the denial of the preliminary injunction and the July 9, 2020, order dismissing the case with prejudice.

SUMMARY OF THE ARGUMENT

Freelancers are entitled to a preliminary injunction enjoining enforcement of AB 5's content-based limits on freelance journalism. Among a long list of freelance "professional services" defined by Section 2778—including fine art, marketing, graphic design, and grant writing—speech deemed "journalism" is subject to restrictions on communicating through video and subject to more onerous contract restrictions, including prohibiting a freelancer from doing work once done by an employee. The law thus limits what voices can be published, barring publication of freelance writers or photographers if they duplicate the work of an erstwhile employee or do work at a client's location and excluding an entire medium from use in freelance journalism.

The district court erred in concluding that Freelancers were unlikely to succeed on the merits of their constitutional claims because it failed to recognize that the limits placed on independent journalism—which are not applied to other types of speech—are content-based restrictions that are subject to strict scrutiny and are presumptively unconstitutional. While agreeing that "the challenged provisions in

AB5 are based on distinctions between speakers," the court held that "AB5 does not reference any idea, subject matter, viewpoint or substance of any speech; the distinction is based on if the individual providing the service in the contract is a member of a certain occupational classification." ER 030–031. But a regulation of speech is content-based if it either (1) applies based on the "function or purpose" of the speech, *Reed*, 135 S. Ct. at 2227–28, or (2) discriminates between speakers, particularly if it "disfavors" certain speakers from exercising their First Amendment rights, *Sorrell*, 564 U.S. at 564. Section 2778 does both.

The video ban and contract restrictions are content-based on their face because they apply to "a particular kind of protected speech": journalism. *Recycle for Change*, 856 F.3d at 673. Even if these burdens were characterized as speaker-based, they would still be subject to strict scrutiny—both because they single out journalism for especially harsh treatment and because they evince a content preference against freelance journalism. *Reed*, 135 S. Ct. at 2230 ("a law limiting the content of newspapers, but only newspapers, could not evade strict scrutiny simply because it could be characterized as speaker based.").

Similarly, strict scrutiny applies to Freelancers' Equal Protection claims because Equal Protection claims rooted in the First Amendment require heightened scrutiny. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101 (1972) ("The Equal Protection Clause requires that statutes affecting First Amendment interests be

narrowly tailored to their legitimate objectives."). Yet, even if rational basis review applied to the Equal Protection claims, Freelancers nevertheless raised serious questions going to the merits because Section 2778 draws arbitrary exemptions to generally applicable economic regulations that "undercut[] the principle of non-contradiction." *Merrifield v. Lockyer*, 547 F.3d 978, 988–89 (9th Cir. 2008). This patchwork of arbitrary exemptions has only grown more fractured and nonsensical since the district court issued its decision and AB 2257 added dozens of additional exemptions without rhyme or reason. Becerra articulated no rationale for allowing unlimited freedom to freelancers when they are creating fine art, marketing, graphic design, or grant applications, some limited freedom for still photographs and written journalism, and no freedom for freelance photojournalism communicated through video. If the state's interest is in regulating the economic relationship between content creator and content publisher, the distinctions Section 2778 has drawn between different types of speech have no apparent connection to that interest. This justifies a preliminary injunction against the Equal Protection violations identified by Freelancers. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

Because strict scrutiny applies, Becerra bears the burden to prove that the restrictions imposed by Section 2778 on freelance journalism are necessary to achieve a compelling government interest. Becerra failed to meet that burden and

the other preliminary injunction factors weigh in favor of enforcing Freelancers' constitutional rights. Accordingly, the district court's denial of a preliminary injunction should be reversed, and the case remanded for entry of a preliminary injunction.

Additionally, the district court erred in dismissing Freelancers' claims, because Becerra failed to meet his burden under strict scrutiny and because the dismissal decision was based entirely on a weighing of speculative and disputed facts outside the pleadings. *Jones v. Johnson*, 781 F.2d 769, 772 n.1 (9th Cir. 1986). Even if a lower level of scrutiny applied, it is the government's burden to satisfy it. *See*, *e.g.*, *McCullen v. Coakley*, 573 U.S. 464, 495 (2014). Instead of applying the appropriate 12(b)(6) standard, the district court accepted Becerra's speculation about what the "Legislature could have reasonably concluded" and gave dispositive weight to that conjecture. That is reversible error. *Frudden v. Pilling*, 742 F.3d 1199, 1207-08 (9th Cir. 2014).

ARGUMENT

I. Freelancers Are Entitled to a Preliminary Injunction

A. Standard of Review

This Court reviews the denial of a preliminary injunction for abuse of discretion. *Harris v. Bd. of Supervisors*, 366 F.3d 754, 760 (9th Cir. 2004). It is an abuse of discretion to deny a preliminary injunction based "on an erroneous legal

standard or on clearly erroneous factual findings." *United States v. Schiff*, 379 F.3d 621, 625 (9th Cir. 2004) (cleaned up). The district court's conclusions of law are reviewed de novo, including statutory interpretations. *See Int'l Franchise Ass'n v. City of Seattle*, 803 F.3d 389, 398 (9th Cir. 2015); *United States v. Liquidators of European Fed. Credit Bank*, 630 F.3d 1139, 1144 (9th Cir. 2011). In appeals concerning First Amendment issues, such as this one, this Court also "conduct[s] an independent review of the facts." *Berger v. City of Seattle*, 569 F.3d 1029, 1035, 1041 (9th Cir. 2009).

Freelancers are entitled to a preliminary injunction preventing Becerra's enforcement of Section 2778's content-based limits on freelancing because: (1) Freelancers are likely to succeed on the merits; (2) they are suffering irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2009). This Court has articulated a variation of the *Winter* test, under which "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Alliance for the Wild Rockies*, 632 F.3d at 1131-32.

The district court erred in concluding that Freelancers were unlikely to succeed on the merits of their constitutional claims; the district court then misevaluated the other factors because of that error on the merits. ER 036–037.

B. Freelancers Are Likely to Succeed on the Merits

1. The Video Ban and Contract Restrictions Violate the First Amendment

a. The Video Ban Burdens Protected Expression

"Audiovisual recordings are protected by the First Amendment as recognized 'organ[s] of public opinion' and as a 'significant medium for the communication of ideas.'" *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (recognizing First Amendment protection for movies)). This Court has long recognized a "First Amendment right to film matters of public interest." *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995). First Amendment protections begin the moment a person lifts the lens to her subject: "It defies common sense to disaggregate the creation of the video from the video or audio recording itself. The act of recording is itself an inherently expressive activity; decisions about content, composition, lighting, volume, and angles, among others, are expressive in the same way as the written word or a musical score." *Animal Legal Def. Fund*, 878 F.3d at 1203.

Section 2778 bans a large swath of freelance videography, including video journalism, by expressly denying the ability to freelance to a photographer, videographer, or photojournalist "who works on motion pictures, which is inclusive of, but is not limited to, theatrical or commercial productions, broadcast news, television, and music videos." *See* Cal. Labor Code § 2778(b)(2)(I)(i). This is a

slightly narrower list of banned freelance content than was operative when the district court issued its decision. *Compare* Cal. Labor Code § 2750.3(c)(2)(B)(ix) *with* Cal. Labor Code § 2778(b)(2)(I)(i). But this exclusion for communicating through video still explicitly prevents freelancers from communicating through video if the content of the communications is "broadcast news." It also prohibits freelancers from contracting with a documentary "theatrical production" or one that might be aired on "television." This definition is also inexhaustive—"inclusive of, but is not limited to"—which means that freelancers cannot safely shoot video as part of *any* contract, unless their speech falls within one of the law's content-based safe harbors. *See, e.g., Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 975 (9th Cir. 2003) (inferring a broad construction from the use of "including but not limited to" language).

Indeed, instead of fixing the content-based and speaker-based flaws of AB 5, AB 2257 doubled down on those problems by carving out a new content-based exemption for speech involving "sound recordings or musical compositions." Cal. Labor Code § 2780 (a)(1). This new category of favored speech includes audio journalism, as well as photography—but not videography—related to the creation of sound recordings and musical compositions. *Id*. § 2780(a)(1)(H) ("Section 2775 and the holding in Dynamex do not apply to … [p]hotographers working on recording photo shoots, album covers, and other press and publicity purposes.").

If a freelancer's speech is deemed marketing, graphic design, grant writing, fine art, or related to sound recordings and musical compositions the video ban does not apply. *See* Cal. Labor Code §§ 2778(b)(2)(A), (D)–(F); 2780(a)(1). *But see* Cal. Labor Code § 2778(b)(2)(I)(i) (baring freelancers from working on "music videos."). Thus, a freelancer's freedom to record video rises and falls based on whether the communicative content of her expression is one of the favored types of speech.[9] The video ban silences speech protected by the First Amendment. *See Animal Legal Def. Fund*, 878 F.3d at 1203.

b. The Contract Restrictions Burden Protected Expression

It is axiomatic that the First Amendment protects the right to publish. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). The First Amendment's "predominant purpose" is "to preserve an

[9] Section 2778(b)(2)(I)(i) also includes a proviso that "[n]othing in this section restricts a still photographer, photojournalist, photo editor, or videographer from distributing, licensing, or selling their work product to another business, except as prohibited under copyright laws or workplace collective bargaining agreements." But this allowance does not prevent a freelancer from being forcibly reclassified as an employee if she shoots video for "broadcast news," because the definition of "professional services" explicitly excludes such journalism speech. Nor does it prevent the open-ended "inclusive of, but [] not limited to" exclusion for "motion pictures" from being applied broadly to any freelance videography.

untrammeled press as a vital source of public information." *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936).

Yet Section 2778 limits journalism—by freelance writers, editors, newspaper cartoonists, still photographers, videographers, and photojournalists—if freelancers duplicate the work of an erstwhile employee or perform work primarily at a client's business location. Cal. Labor Code § 2778(b)(2)(I), (J). Numerous other "professional services" defined by Section 2778 are not subject to these limits. *See generally id*. § 2778(b)(2). Section 2778 cherry-picks journalism for unfavorable treatment under California labor law, denying full freedom to freelance only to speech that does not fit within the content-based exemptions for fine art, marketing, graphic design, grant writing, or sound recording. The law thus limits what voices can be published, barring the work of a freelance writer or photographer if an employee did the same sort of work. *See 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."). This forces an intolerable set of choices on freelancers: (1) stop publishing journalism; (2) give up the freedom that defines freelancing and accept the added tax and regulatory burdens of employment (if employment is even in the offing); or (3) produce the type of freelance speech that

is preferred by Section 2778 (e.g., fine art, marketing, graphic design, or grant writing). The First Amendment does not allow the State to limit speech in that way. *See Minneapolis Star & Tribune Co.*, 460 U.S. at 575. *Cf. Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256 (1974) ("any such compulsion to publish that which 'reason tells them should not be published' is unconstitutional").

The contract restrictions also impose a host of other arbitrary burdens that apply to freelance journalism, but not other types of speech. For example, a photographer taking marketing images can edit his photos at a client's office, Cal. Labor Code § 2778(b)(2)(A); a freelance photo editor cannot make use of the editing software in a client's newsroom, lest she run the risk of "primarily perform[ing] the work at the hiring entity's business location," *id*. § 2778(b)(2)(I), (J); *see* Supp. App. 15. A freelance videographer shooting a documentary at client's location must be an employee, but that same videographer shooting a marketing video would be free to freelance. *Id*.; *see* Supp. App. 23. Or consider a freelance reporter covering breaking news, who must execute a contract covering specific minutiae, including "the rate of pay, intellectual property rights, and obligation to pay by a defined time," *id*. § 2778(b)(2)(I), (J); however, a grant writer may craft a contract as he chooses, *id*. § 2778(b)(2)(E). These contract restrictions burden freelancers' right to publish their work, based entirely on California's judgment that the particular kind of message being communicated is "journalism."

c. The Video Ban and Contract Restrictions Are Content-Based Burdens Subject to Strict Scrutiny

When a law burdens First Amendment rights, the "crucial first step" in determining whether a law is content-based is to "consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227–28 (2015) (quoting *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 566 (2011)). If a law on its face regulates speech based on its "function or purpose," it is content-based and subject to strict scrutiny. *Id.* at 2227, 2230. "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id*. at 2226.

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,* 564 U.S. at 565–66 ("Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content."). *See also Simon & Schuster, Inc.*, 502 U.S. at 115 (content-based financial burden); *Minneapolis Star & Tribune Co.*, 460 U.S. at 575 (speaker-based financial burden).

Only if a law is facially content-neutral does a court consider if the law "cannot be 'justified without reference to the content of the regulated speech,' or [was] adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Reed,* 135 S. Ct. at 2227 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

The Supreme Court made clear in *Reed* that laws "defining regulated speech by its function or purpose" are content-based distinctions. Although "function or purpose" regulations are perhaps "more subtle" than restrictions based on disagreement with a viewpoint, "[b]oth are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." 135 S. Ct. at 2227. In *Reed*, the City of Gilbert's sign code applied different restrictions to directional signs, political signs, and ideological signs based on the "function or purpose" of the sign. *Id.* A church challenged the City's regulation of directional signs, which the church placed to direct people to its services. *Id*. at 2225. The Court held that regulating directional signs differently from other signs was a content-based regulation of speech that failed under strict scrutiny. *Id*. at 2227. Even though the City had no disagreement with the directions the signs were providing, the sign code was content-based because it regulated speech based on the particular kind of message being communicated: directions. *Id*.

Reed's focus on "communicative content" has guided this Court to articulate a straightforward test for determining when strict scrutiny applies, based on whether the law at issue regulates the type of message a speaker conveys. This Court's decision in *Pacific Coast Horseshoeing School v. Kirchmeyer* (*Pacific Coast*) shows how this test functions in practice to root out laws that impose burdens based on what is said or who is speaking. 961 F.3d at 1062. That decision is a roadmap for how this appeal should be decided.

Pacific Coast revived a First Amendment challenge to California's Private Postsecondary Education Act of 2009, which prevents students without a high school degree from enrolling in post-secondary schools unless they pass a test showing that the students have the "ability to benefit" from the course of instruction. *Id*. at 1066. The problem this Court identified with the Act, however, is that it is "riddled with exceptions to the ability-to-benefit rule, and the exceptions turn on one of two things: (1) the content of what is being taught, or (2) the identity of the speaker." *Id*. at 1070. The district court ruled that the restriction governed economic activity, not speech, and dismissed the case under a rational basis analysis. *Id*. at 1068–69. This Court reversed because "the Act contains a number of exemptions that turn on the nature of what is being taught," exempting test preparation, flight instruction, and "avocational or recreational" courses (like golf lessons), but not the farrier classes the plaintiffs sought to teach and take. *Id*. at 1071. These distinctions were

constitutionally "significant—even if we assume that the state has no particular interest in encouraging speech related to golf lessons or suppressing speech related to horseshoeing." *Id*. (citing *Reed*, 135 S. Ct. at 2230 ("[A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.")). This Court further held that the Act was also subject to strict scrutiny because it distinguishes between speakers: "It picks winners and losers when it comes to which institutions must ensure that its listeners have satisfied the ability-to-benefit requirement." *See id.* at 1071–72 (listing more than a dozen exceptions for various speakers offering post-secondary education).

Pacific Coast builds on this Court's decision in *Recycle for Change v. City of Oakland*, where a charity that collected personal items for resale brought a First Amendment challenge against the City of Oakland's regulation of unattended donation collection boxes. 856 F.3d at 670. This Court did not apply strict scrutiny in that case because the regulations applied no matter the communicative content attached to the box: "[i]t does not matter *why* the [box] operator is collecting the personal items, whether it be for charitable purposes or for-profit endeavors," all that matters is that the box collects personal items for resale. *Id*. (emphasis in original). This Court contrasted the Oakland law against a similar law struck down by the Sixth Circuit that only applied to charitable collections. In *Planet Aid v. City of St. Johns*, 782 F.3d 318 (6th Cir. 2015), the law was held to be content-based because "St.

John's ordinance targeted only those bins engaging in a *specific kind of protected expression*." *Recycle for Change*, 856 F.3d at 672 (emphasis added) (citing *Planet Aid*, 782 F.3d at 328). "In *Planet Aid*, the bins' message of charitable giving was viewed as 'content' because it is a particular kind of protected speech." *Recycle for Change*, 856 F.3d at 673.

The Supreme Court has also struck down as content-based a law that "singled out the press for special treatment," burdening First Amendment rights though selective taxation of paper and ink. *See Minneapolis Star & Tribune Co.*, 460 U.S. at 582. In *Minneapolis Star & Tribune*, the Court struck down paper and ink taxes because the practical consequence of the taxes was that a few members of the press were burdened with the taxes. *Id*. But there was "no indication, apart from the structure of the tax itself, of any impermissible or censorial motive on the part of the legislature." *Id*. at 580. Singling out the press as a practical consequence of the law's operation was enough to subject the law to heightened First Amendment scrutiny.

Similarly, in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987), the Court struck down a sales tax on periodicals that exempted "newspapers and religious, professional, trade, and sports journals" after it was challenged by a publication that did not fall within any of those exemptions. *Id*. at 226. The Court held that "official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment[]." *Id*. at 230. As in

Minneapolis Star & Tribune, the Court found no "improper censorial motive," but struck down the arbitrary tax exemptions "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.

Under these precedents, Section 2778 "favors particular kinds of speech and particular speakers through an extensive set of exemptions." *Pacific Coast*, 961 F.3d at 1072. "That means [Section 2778] necessarily disfavors all other speech and speakers." *Id*. The video ban and contract restrictions impose content-based burdens on their face because they impose limits on freelancing for "a particular kind of protected speech." *Recycle for Change*, 856 F.3d at 673. The video ban and contract restrictions apply to journalism, but leave speech that the State deems fine art, marketing, graphic design, and grant writing, for example, available for freelancers to produce without limit. 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 Section 2778 applies to anything a freelancer produces is through "official scrutiny of the content of publications," *Arkansas Writers' Project*, 481 U.S. at 229, to determine the "function or purpose" of the speech, *Reed*, 135 S. Ct. at 2227. *See also Tschida v. Motl*, 924 F.3d 1297, 1303 (9th Cir. 2019) (A content-based law is one that "requires authorities to examine the contents of the message to see if a violation has occurred.").

For example, under Section 2778, freelancers writing marketing materials, perhaps press releases, can freelance freely; but if they write news articles about that same press release, they are subject to the contracting restrictions. If a photographer takes pictures for the purpose of marketing a company, she has no limit, but if that photographer takes the same photographs to communicate in a newspaper about a matter of public concern, she cannot edit the photos at the newspaper's office. Freelance graphic artists can submit unlimited infographics to a newspaper; freelance photojournalism is banned if the freelancer's work mirrors an erstwhile employee's contributions. And freelance visual journalism cannot include any videos—even videos taken with the very same camera used to capture still submissions. "Even if these distinctions could be substantiated with content-neutral justifications—as the district court suggested—it would not change the level of scrutiny we must apply." *Victory Processing, LLC v. Fox*, 937 F.3d 1218, 1226 (9th Cir. 2019).

One must read or view a freelancer's work to know whether it is, for example, "marketing," and therefore fully exempt under Section 2778, or rather "journalism" and therefore subject to the video ban and contracting restrictions. This differential treatment turns on the "function or purpose" of the communicative content that defines the work. *Reed*, 135 S. Ct. at 2227. This is precisely the sort of "extensive set of exemptions" that favor exempted speech and disfavor non-exempted speech

that this Court rejected in *Pacific Coast*. 961 F.3d at 1072. And the Supreme Court has explicitly held that the sorts of distinctions drawn by Section 2778 are content-based, holding in *Sorrell* that "marketing, [] is, speech with a particular content." 564 U.S. at 564. The Court therefore struck down a law that restricted the use of certain information in marketing, but not journalism. *Id*. at 571. Section 2778 does the opposite, 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*.

Under the Court's precedents, it does not matter whether the State *also* disagrees with or seeks to discourage a particular type of speech—singling out speech based on its function or purpose is enough to require strict scrutiny. *Reed*, 135 S. Ct. at 2227; *Pacific Coast*, 961 F.3d at 1071. *See also Minneapolis Star & Tribune*, 460 U.S. at 582; *Arkansas Writers' Project*, 481 U.S. at 229. To paraphrase *Pacific Coast*, this content-based discrimination "is significant—even if we assume that the state has no particular interest in encouraging speech related to [marketing] or suppressing speech related to [journalism]." 961 F.3d at 1071. One might reasonably wonder whether legislators have a particular interest in suppressing speech related to journalism or encouraging the speech of paid marketers. Ultimately, though, it does not matter *why* the legislature favored some speech and

speakers over others—the simple fact that it *has* "pick[ed] winners and losers" is problem enough under the First Amendment. *Id*. Heightened scrutiny applies here to the content-based distinctions drawn by Section 2778's definition of "professional services."

d. Even If Characterized as "Speaker-Based," the Video Ban and Contract Restrictions are Subject to Strict Scrutiny

The district court characterized the challenged distinctions as "speaker based," ER 030, but, like the same characterization rejected in *Reed*, this conclusion is "mistaken on both factual and legal grounds." 135 S. Ct. at 2230. Notably, the district court failed to recognize that even if characterized as "speaker-based," the journalism limits are subject to strict scrutiny. *See Pacific Coast*, 961 F.3d at 1071 ("[T]he PPEA distinguishes between speakers. It picks winners and losers when it comes to which institutions must ensure that its listeners have satisfied the ability-to-benefit requirement."). *See also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340–41 (2010) ("Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers.").

As a factual matter, the very same person may be speaking as a journalist or a marketer depending only on which project she is working on at any moment. ER 053. Like the sign code struck down in *Reed*, who is speaking does not matter under

Section 2778—all that matters is the communicative 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."). The "occupational classification," ER 030, of a particular kind of writer or photographer cannot be divorced from the content they produce. As discussed above, the distinction between freelance journalism and freelance marketing, or freelance fine art and freelance photojournalism, depends entirely on the "function or purpose" evinced by the communicative content of their speech. Who is speaking is relevant to the video ban and contract restrictions only in so far as the employment status of the speaker dictates the type of message that can be communicated.

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." *Reed*, 135 S. Ct. at 2229 (cleaned up). In fact, the *Reed* Court pointed to a hypothetical law that singled out the press as a paradigmatic example of a speaker-based law subject to strict scrutiny: "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.

Targeting journalism reflects a content preference against "an untrammeled press [which is] a vital source of public information, and an informed public is the essence of working democracy." *Minneapolis Star & Tribune*, 460 U.S. at 585 (citation omitted). It is not surprising that "[t]here is substantial evidence that differential taxation of the press would have troubled the Framers of the First Amendment." *Id*. at 583–84. The danger of singling out the press for differential regulatory or tax treatment is that "the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened" and the threat of burdensome taxes or regulations "can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government." *Id*. at 585.

Section 2778 accomplishes this censorship directly by limiting what voices can be published by barring publication of a freelance writer or photographer if she is "directly replacing an employee," by banning freelance news videography, and by burdening freelance journalism with taxes and restrictions that do not apply to other types of speech. *See McDermott*, 593 F.3d at 962.

The constraints on a free and independent press imposed by Section 2778 are especially urgent in the freelance context, where individuals choose to freelance precisely because it gives them control over their work—to write, photograph, and

publish stories of their own choosing on their own schedule, and to republish and repurpose that work by retaining copyright over it. ER 057, 061, 064, 067–068, 071–072, 077. Section 2778 constrains the freedom and flexibility that defines freelancing and that makes freelancing a uniquely independent branch of the institutional press. It does not matter that the legislature did not identify a particular freelancer or viewpoint that it sought to punish with the video ban and contract restrictions—it is constitutionally suspect that Section 2778 targets the press at all. "[D]ifferential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." *Minneapolis Star & Tribune*, 460 U.S. at 585; *Citizens United*, 558 U.S. at 340 ("Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.").

The video ban and contract restrictions are content-based on their face and therefore strict scrutiny applies. *Reed*, 135 S. Ct. at 2227. Because these restrictions are content-based on their 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*. The district court's critical error was failing to consider that restrictions California imposes on freelancing are content-based on their face because they target a "particular kind of protected speech." *Recycle for Change*, 856 F.3d at 673. But even if that error were excused, the most generous

interpretation of the video ban and contract restrictions is that they impose a speaker-based burden that "picks winners and losers" among speakers and evinces a content preference against free and independent journalism. *Pacific Coast*, 961 F.3d at 1071. Strict scrutiny applies.

e. The Video Ban and Contract Restrictions Fail First Amendment Scrutiny

As content- and speaker-based burdens subject to strict scrutiny, the video ban and contract restrictions 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; *Sorrell,* 564 U.S. at 565–66. To survive strict scrutiny, the burden is on Becerra to show that Section 2778's content- and speaker-based burdens are "'necessary to serve a compelling state interest'" and "'narrowly drawn to achieve that end.'" *Animal Legal Def. Fund*, 878 F.3d at 1204 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). Becerra bears a "heavy burden," which requires evidence of a causal link between the specific limits Section 2778 imposes on freelancers and a compelling government interest. Speculation is inadequate to carry Becerra's evidentiary burden. *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"). Freelancers were entitled below to a ruling that they are likely to succeed on the merits, because Becerra failed to meet his burden to justify the differential

restrictions. *See Sanders Cty. Republican Cent. Committee v. Bullock*, 698 F.3d 741, 744 (9th Cir. 2012) ("When seeking a preliminary injunction in the First Amendment context, the moving party bears the initial burden of making a colorable claim that its First Amendment rights have been infringed, or are threatened with infringement, at which point the burden shifts to the government to justify the restriction.").

Becerra must show that "differential treatment, [is] justified by some special characteristic of the press"; otherwise, singling out journalism for harsher regulatory burdens "suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." *Minneapolis Star & Tribune*, 460 U.S. at 585. Becerra must also explain why targeting the press—rather than regulating freelancing in an evenhanded way—is necessary to achieve the government's interests. *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 video ban and contract restrictions were content-neutral—which they are not—a content-neutral regulation will only be sustained if it: (1) "furthers an important or substantial governmental interest"; (2) "if the governmental interest is unrelated to the suppression of free expression"; and (3) "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to

the furtherance of that interest." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994).

Freelancers do not dispute that the state has an interest in properly classifying employees under its labor laws, but the video ban and contract restrictions do not serve that interest, particularly when the existing *Borello* misclassification test is available and serves the misclassification concerns with respect to favored speech like marketing, graphic designers, grant writing, fine art, and speech related to sound recordings and musical compositions. *See McCullen*, 573 U.S. at 495 (the state must show that its use of "other laws already on the books" or other less restrictive means proved ineffective before it can justify a new law restricting speech). At no time has Becerra explained why the *Borello* test works for a photographer or videographer whose clients are marketers, but doesn't work for clients who are journalism publications. In the district court, Becerra failed to point to any special characteristic of the press that necessitates singling out freelance journalism for especially harsh treatment under California labor laws. Under either intermediate or strict scrutiny, the limits on freelance journalism imposed by California are unconstitutional.

The district court speculated that the "'Legislature could have reasonably concluded that the former group [including marketers, graphic designers, grant writers, travel agents] does not perform the same type of work [as photographers, photojournalists, freelance writers, and editors] ….'" ER 027 (substitutions in

original) (quoting Becerra's preliminary injunction brief). But there is no evidence to support that speculation—and speculation is not enough. *Shrink Missouri Gov't PAC*, 528 U.S. at 379. The idea that there are legitimate distinctions between these various "occupations" is belied by the fact that communicative content is the only thing California points to as separating the various types of speech not subject to the video ban and contracting restrictions. Communicative content is not a legitimate basis to differentiate among speech regulations. *Reed*, 135 S. Ct. at 2227; *Pacific Coast*, 961 F.3d at 1071.

Nor is there any evidence to support the woefully underinclusive video ban, which applies to any broadcast news video a freelance writer or photojournalist creates, but applies to none of the content created by freelancers who fit into the content-based exceptions for marketing, graphic design, grant writing, or fine art. Prohibiting only video recordings freelancers use to communicate news, but saying nothing about video, photographs, or other visual media produced for marketing, graphic design, grant writing, or fine art "is suspiciously under-inclusive." *Animal Legal Def. Fund*, 878 F.3d at 1204–05. Why the making of journalistic video recordings would implicate employee misclassification, but videos of the same content used for other types of speech would not, "is a mystery." *Id*.

Below, Becerra nodded to employee misclassification, but the content-based limits on journalism have nothing to do with that interest. When a law can prevent a

"substantive evil without prohibiting expressive activity" the government must choose the speech-respecting route. *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984) (citing *Schneider v. State*, 308 U.S. 147 (1939), for the proposition that a "prophylactic rule [that] . . . gratuitously infringe[s] upon the right of an individual to communicate directly with a willing listener" curtails more speech than is necessary to accomplish its purpose). Enjoining the freelance video ban and contract restrictions would protect expressive activity while continuing to prevent misclassification through the *Borello* test.

2. The Video Ban and Contract Restrictions Violate the Fourteenth Amendment

Because strict scrutiny applies to the First Amendment claims, that level of scrutiny must be applied to the Equal Protection claims as well. *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"); *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."). "The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives." *Mosley*, 408 U.S. at 101. It is presumptively unconstitutional to draw arbitrary distinctions between speaking professionals, and

the government bears the burden to prove otherwise. *Carey v. Brown*, 447 U.S. 455, 459–471 (1980). As discussed above, the limits Section 2778 imposes on journalism are arbitrary, and thus Freelancers are likely to succeed on the merits of their Equal Protection claims.

Yet even under rational basis review, this Court has held that it violates the Equal Protection Clause for the government to draw arbitrary exemptions to generally applicable economic regulations. In *Merrifield v. Lockyer*, Alan Merrifield challenged a law that required him to obtain a license for non-pesticide pest control of "mice, rats, or pigeons," but exempted non-pesticide pest controllers of "bats, raccoons, skunks, and squirrels." 547 F.3d at 988–89. This Court held it irrational to base a licensing requirement on the particular type of pest controlled. Citing the Sixth Circuit's equal protection analysis in *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), the panel determined that "the singling out of a particular economic group, with no rational or logical reason for doing so, was strong evidence of an economic animus with no relation to public health, morals or safety." *Merrifield*, 547 F.3d at 989. This Court ruled that the "license exemption to the extent it does 'not include mice, rats, or pigeons' is unconstitutional." *Id*. at 992.

AB 5 and AB 2257 are so cut through with exemptions that they are defined more by what they don't apply to than what they do cover.[10] The operative part of the law creating the ABC test is a single section of just 325 words. Cal. Labor Code § 2775. The dozens of exemptions to the ABC test span ten sections and 6,902 words. *Id*. §§ 2776–2785. This mélange of exemptions follows no discernable pattern other than "naked favoritism lacking any legitimate purpose." *San Francisco Taxi Coal. v. City & Cty. of San Francisco*, No. 19-16439, 2020 WL 6556314, at *4 (9th Cir. Nov. 9, 2020). Like the many other exemptions to the ABC test, Section 2778 similarly limits its "professional services" exemption with no rational basis. The law articulates no rationale for allowing unlimited freedom to freelancers when they are creating fine art, marketing, graphic design, or grant applications, some limited freedom for still photographs and written journalism, and no freedom for freelance journalism communicated through video. If the state's interest is in regulating the economic relationship between content creator and content publisher, the distinctions Section 2778 draws between different types of speech have no apparent connection to that interest. Freelancers who work on journalism contracts choose that option because of the freedom, flexibility, and control it gives them to dictate their own work. ER 056–057, 061, 065, 067–068, 076–078. A freelancer

[10] The voters have also approved an exception for "App-based drivers" by enacting Proposition 22. *See* https://voterguide.sos.ca.gov/propositions/22/

drafting marketing materials or a grant application for a particular client is much more likely to be under the "control and direction" of the client because that client expects a certain outcome from the material produced, whereas with a freelance journalist there is no expected result by the client other than the professional and timely production of the material. *See* Cal. Labor Code § 2775(b)(1)(A). "Needless to say, this type of singling out, in connection with a rationale so weak that it undercuts the principle of non-contradiction, fails to meet the relatively easy standard of rational basis review." *Merrifield*, 547 F.3d at 991.

The video ban and contract restrictions are subject to and fail strict scrutiny. But even under rational basis, Freelancers raise serious questions going to the merits of their Equal Protection claims that justify a preliminary injunction halting the constitutional violation. *Alliance for the Wild Rockies*, 632 F.3d at 1135.

C. The Remaining Preliminary Injunction Factors Weigh in Freelancers' Favor

"Under the law of this circuit, a party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim." *Sammartano v. First Judicial District Court, in and for County of Carson City*, 303 F.3d 959, 973–74 (9th Cir. 2002); *Warsoldier v. Woodford*, 418 F.3d 989, 1002 (9th Cir. 2005) (same).

Because Freelancers raised substantial First Amendment claims, no further showing of irreparable injury was necessary. *See Sanders Cty. Republican Cent. Committee*, 698 F.3d at 744. Freelancers made "a colorable claim that [their] First Amendment rights have been infringed, or are threatened with infringement"; therefore "the burden shifts to the government to justify the restriction." *Id*.

When the government is a party to an injunctive action, analysis of the public interest and balance of equities factors merges. *See Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). The public interest and balance of equities favor preliminary relief, because it "is always in the public interest to prevent the violation of a party's constitutional rights," *Sammartano*, 303 F.3d at 974 (quote omitted), and courts "have consistently recognized the significant public interest in upholding First Amendment principles." *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1129 (9th Cir. 2011); *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."). Given the primacy of the constitutional rights at stake, a preliminary injunction is in the public interest.

In contrast, and as discussed above, the harms Becerra has imagined are "entirely speculative and in any event may be addressed by more closely tailored regulatory measures"—namely regulations that actually address misclassification.

Ezell v. City of Chicago, 651 F.3d 684, 710 (7th Cir. 2011). In the absence of unconstitutional limits on journalism, the same freelancing rules that apply to other types of speech already afforded full freedom to freelance by Section 2778 will apply to journalism. California will still be able to enforce its labor laws through the *Borello* test, but critically, freelance journalism will not be singled out and silenced. The speculative harms Becerra posits cannot compare to the hardships imposed by the "loss of a constitutionally protected right" like free speech. *Citizens for Free Speech, LLC v. County of Alameda*, 62 F. Supp. 3d 1129, 1143 (N.D. Cal. 2014).

Indeed, Freelancers have already lost opportunities to publish their speech due to the limits codified in Section 2778. ER 051; Supp. App. 03, 10–11, 13–16, 18–19, 23–25, 28–29. The longer the video ban and contract restrictions remain in effect, the greater the loss of the fundamental freedoms infringed by Section 2778. Freelancers are entitled to a preliminary injunction.

II. Freelancers' Claims Should Not Have Been Dismissed

A. Standard of Review

This Court "review[s] de novo the district court's dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)." *Zixiang Li v. Kerry*, 710 F.3d 995, 998 (9th Cir. 2013) (citation omitted). "In determining whether dismissal was properly granted, we assume all factual allegations are true and construe them in the light most favorable to the plaintiff." *Cervantes v. United States*, 330 F.3d

1186, 1187 (9th Cir. 2003) (citation omitted). Generally, a district court's review on a 12(b)(6) motion to dismiss is "limited to the complaint." *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001), *overruled on other grounds by Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119, 1125–26 (9th Cir. 2002).

"[A]ny weighing of the evidence is inappropriate on a 12(b)(6) motion." *Jones*, 781 F.2d at 772 n.1; *see also Neilson v. Union Bank of California*, 290 F. Supp. 2d 1101, 1151 (C.D. Cal. 2003) (collecting cases). "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). 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).

Instead of applying the 12(b)(6) standard described above, the district court accepted Becerra's speculation about what the "Legislature could have reasonably concluded" and gave dispositive weight to that conjecture. That is reversible error. *Frudden v. Pilling*, 742 F.3d 1199, 1207–08 (9th Cir. 2014).

B. The District Court's Dismissal Order Was Improperly Based on Facts Outside the Complaint

Because Freelancers are likely to succeed on the merits of their claims, this Court should reverse the order granting the motion to dismiss. *See Arc of California v. Douglas*, 757 F.3d 975, 993–94 (9th Cir. 2014). But this Court must reverse the dismissal for an independent reason: because the district court relied on speculative facts outside of complaint. In *Frudden v. Pilling,* this Court reversed and remanded the lower court's grant of a motion to dismiss a free speech claim because "[w]hether Defendants' 'countervailing interest is sufficiently compelling to justify requiring' the written motto and the exemption is a question for summary judgment or trial." 742 F.3d at 1207–08 (quoting *Wooley v. Maynard*, 430 U.S. 705, 715–16 (1977)). *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.").

Ultimately, Becerra bears the burden of proving that the video ban and contract restrictions do not violate the Constitution. *Reed*, 135 S. Ct. at 2231; *Simon & Schuster, Inc.*, 502 U.S. at 115 ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech"). Freelancers must rebut any evidence offered, but when ruling on a motion to dismiss, the district court "must assume that [Plaintiffs] can, even if it strikes [this Court] 'that a recovery is very remote and unlikely.'" *Dias v. City and*

Cty. of Denver, 567 F.3d 1169, 1184 (10th Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). Accepting the truth of the allegations in the Complaint, and drawing all inferences in the light most favorable to Freelancers, the district court should have denied the motion to dismiss.

Instead, the district court credited Becerra's arguments in favor of dismissal, which "rest[e]d almost entirely on factual challenges," for which there was no evidence and "[m]ore importantly, the district court's decision to dismiss plaintiffs' [] claims was rooted in defendants' factual assertions. In granting defendant['s] motion[], the court assumed the existence of facts that favor defendant[] based on evidence outside plaintiffs' pleadings, took judicial notice of the truth of disputed factual matters, and did not construe plaintiffs' allegations in the light most favorable to plaintiffs." *Lee*, 250 F.3d at 688.

The district court "refused to grant a preliminary injunction … for the selfsame reason it dismissed [the] claims." *Arc of California*, 757 F.3d at 993–94. The district court granted the motion to dismiss because "[t]he Court concludes that Defendant will likely satisfy its burden here." ER 036; ER 017. That conclusion was based entirely on speculation offered by Becerra about the Legislature's possible motives in enacting AB 5 which, in addition to being insufficient to meet the state's burden, was not based on any evidence before the court. *Id*. Speculation is not enough to carry Becerra's First Amendment burden, and speculation about what the

legislature "could have reasonably concluded," ER 027, about differences between freelance speakers is inappropriate at the motion to dismiss stage. The district 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. The district court's failure to apply the proper 12(b)(6) standard is reversable error.

CONCLUSION

The freedom to write, photograph, and publish freely is at the core of the protections guaranteed by the First Amendment. By subjecting those core freedoms to freelancing rules that do not apply to other speaking professionals, Section 2778's definition of professional services is unconstitutionally narrow.

The district court's orders denying the preliminary injunction and granting the motion to dismiss should be reversed and the case remanded for entry of a preliminary injunction enjoining enforcement of Section 2778 to the extent it limits

the right to record video and imposes freelance contract restrictions on certain types of speech.

DATED: November 24, 2020.

Respectfully submitted,

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By _____s/ James M. Manley_____
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Attorneys for Appellants

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, counsel identifies *California Trucking Association v. Becerra*, No. 20-55106 (9th Cir.) and *Lydia Olson, et al. v. State of California, et al.*, No. 20-55267 (9th Cir.) as related to this appeal, in that they raise different constitutional challenges—under the Supremacy Clause, and the Equal Protection, Due Process, and Contracts Clauses—to AB5. Counsel is unaware of any other related cases currently pending in this Court.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) 20-55734

I am the attorney or self-represented party.

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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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I, James M. Manley, certify that this brief is identical to the version submitted electronically on November 24, 2020.

DATED: November 25, 2020.

s/ James M. Manley
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