Case No. 20-55408

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.

BRIEF *AMICUS CURIAE* OF GOLDWATER INSTITUTE IN SUPPORT OF APPELLANTS FILED WITH CONSENT OF ALL PARTIES

On Appeal from the United States District Court
for the Central District of California, Los Angeles
Case No. 2:19-cv-10645-PSG-KS, Hon. Philip S. Gutierrez, presiding

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IDENTITY AND INTEREST OF *AMICUS*[1]

The Goldwater Institute ("GI") was established in 1988 as a nonpartisan public policy foundation dedicated to advancing the principles of limited government, economic freedom, and individual responsibility through litigation, research, and policy briefings. Through its Scharf–Norton Center for Constitutional Litigation, GI litigates cases and files *amicus* briefs when its or its clients' objectives are directly implicated.

Among GI's principal goals is defending the vital principles of free speech and economic liberty. GI has represented parties and appeared as *amicus curiae* in many state and federal courts to promote the enforcement of these rights. *See, e.g., McComish v. Bennett,* 611 F.3d 510 (9th Cir. 2010); *Flytenow, Inc. v. FAA,* 808 F.3d 882 (D.C. Cir. 2015); *Coleman v. City of Mesa,* 284 P.3d 863 (Ariz. 2012); *Korwin v. Cotton*, 323 P.3d 1200 (Ariz. App. 2014). GI scholars have also written extensively about the constitutional rights of free speech and economic liberty. *See* Timothy Sandefur, *The Right to Earn a Living* (2020); Christina Sandefur, *Sharing Thoughts on the Sharing Economy,* 39 U. Haw. L. Rev. 299 (2017). The

[1] Pursuant to Fed. R. App. P. 29(a)(2), this brief is filed with the consent of all parties. No counsel for any party authored this brief in whole or part, and no person or entity other than the Institute, its members, or counsel, made any monetary contribution for the preparation or submission of this brief.

Goldwater Institute believes its legal and policy expertise will benefit this Court in its consideration of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The 35-item free-lance submission quota violates the First Amendment, because it is not only a *content*-based speech restriction, but also an *identity*-based speech restriction and a "speech trigger" law (i.e., a law that imposes burdens upon a triggering communicative act). For all three reasons, the appropriate level of scrutiny is strict scrutiny, not rational basis. And even if the 35-item quota is viewed as a content-neutral time, place, and manner restriction, the proper scrutiny requires narrow tailoring, which the court below failed to require.

The quota is *content*-based because it applies only when an article or photo "pertains" to a "topic" or "event," but not if it does not (as with, for example, certain kinds of poetry or artistic photographs); it is *identity*-based because it only applies to the communicative acts of specified persons (journalists but not poets, print journalists but not broadcasters, photographers but not motion picture photographers); and it is a speech trigger because the operative event that causes the law to apply is an act of communication (submitting for publication an article or photograph that "pertains" to a "topic" or "event.").

The District Court concluded that rational basis scrutiny applies because the law is triggered by a commercial activity, and therefore does not relate to

expression in a way that raises concerns about speech. But this either/or approach is inconsistent with the Supreme Court's repeated emphasis on the need to focus attention on the nuances of the effects regulations have on free expression, even where those regulations appear to be facially neutral. Where a law has a "nexus to expression, or to conduct commonly associated with expression" such that the government's restriction "pose[s] a real and substantial threat" of censorship or self-censorship, courts must apply a more vigilant scrutiny. *City of Lakewood v. Plain Dealer Publ'g Co*., 486 U.S. 750, 759 (1988). That is why courts have paid careful attention to laws that restrict coin-operated newspaper stands, *see id.*, or that impose taxes on newspapers, *see, e.g., Grosjean v. Am. Press Co*., 297 U.S. 233 (1936).

The free-lance writing quota poses a significant risk to a particular kind of expression: that produced by media that primarily rely on free-lance contributors. That expression tends to be of a particular ideological or social perspective: it tends to focus on political dissent, alternative lifestyles, or journalism from an anti-establishment perspective. *See, e.g.,* Elisabet Cantenys, *Journalism Needs Freelancers, and Freelancers Need Protection*, Open Society Foundation Voices, Feb. 23, 2018.[2] While large-scale corporate media can afford the heavy

[2] https://www.opensocietyfoundations.org/voices/journalism-needs-freelancers-and-freelancers-need-protection

employment costs that laws such as AB5 impose, smaller-scale journals cannot. They and their contributors need the utmost freedom to accomplish their communicative mission. In *City of Lakewood*, 486 U.S. at 762, the Court warned about the fact that prohibitions on coin-operated sidewalk newsstands had a disproportionate impact on "low-budget, controversial neighborhood newspapers." The disproportionate impact of AB5 is simply the modern version of that.

The District Court erred, therefore, both by failing to apply heightened scrutiny to a speech restriction that treats certain speakers differently from others, and by failing to apply heightened scrutiny to a law that, by increasing the cost of hiring free-lance contributions, burdens some speech but not other speech.

ARGUMENT

I. The AB5 burden on free-lance writers imposes a content- and identity-based speech restriction.

The District Court erred in concluding that AB5 is content-neutral. It based that conclusion on its belief that the speech burden here "does not hinge on the content of a message," *Am. Soc'y of Journalists & Authors, Inc. v. Becerra*, No. CV19-10645 PSG (KSx), 2020 WL 1444909, at *8 (C.D. Cal. Mar. 20, 2020), but that is simply not true.

A. Because the 35-item quota applies based on what a submission "pertains to," it is a content-based restriction.

AB5's 35-article-limit applies to print journalists and other writers whose contributions consist either of "content produced on a recurring basis related to a general topic," or content produced periodically that "pertains to a specific event or topic." Cal. Labor Code § 2750.3(c)(2)(B)(x). This would appear to exclude persons whose work does not "pertain" to either "events" or "topics," such as poets, creative writers, or certain photo-artists. But the line between articles or photos that pertain to events or topics, and articles or photos that do not, can only be drawn by "examin[ing] the content of the message that is conveyed"—and therefore that distinction is content-based. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (citations and quotation marks omitted).

As the Supreme Court has observed, the "Jabberwocky verse of Lewis Carroll" and the "painting[s] of Jackson Pollock" are not about specific events or topics, *see Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995)—so if Carroll or Pollock were alive today, these works would not count toward their 35-submission quota. By contrast, a journalist, short-story writer, or news photographer writing about or shooting a "specific event or topic" is *not* exempt, and therefore would have their submissions count against their 35-item quota.

This means that photographers such as Robert Mapplethorpe (who specialized in black and white photographs of flowers) or Ray Collins (who specializes in art photographs of water) could submit an *unlimited* number of photos for publication without being forced to give up their freelance status, because their photos do not pertain to events or topics. On the other hand, Pulitzer Prize winners Dieu Nalio Chery and Rebecca Blackwell of the *Associated Press* and Tom Fox of *The Dallas Morning News* would have a 35-photo limit, because their photographs depict specific events.[3] And the only way to tell the difference is by consulting the *content* of their photographs. This distinction is therefore a content-based speech restriction under *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015).

The same applies to writing. Former U.S. Poet Laureate Ted Kooser publishes a weekly syndicated column called "American Life in Poetry."[4] Each

[3] Actually, *some* of Collins's photos would and some would not, because along with his still photos, Collins specializes in what he calls "cinemagraphs," which are a unique hybrid of still photo and animation that, in his words, create an "illusion of movement" in an "infinite loop." *See* https://raycollinsphoto.com/blogs/cinemagraphs. Because AB5 does not apply to photographers who shoot *motion* pictures, *see* Cal. Labor Code § 2750.3(c)(2)(B)(ix), a court would have to determine whether his infinite-loop cinemagraphs are still photos or motion pictures. And, again, drawing the line between which of Collins's photos qualify and which do not would require consulting the *content* of the image—and therefore the restriction is content-based under *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015).

[4] https://www.americanlifeinpoetry.org/columns/current

installment features a poem by a different poet, alongside a brief paragraph of Kooser's own thoughts about that poem. Presumably, if Kooser's column were published *without* his one-paragraph commentary, it would not count against the 35-item quota, because *without* that paragraph, the poem by itself typically does not "pertain" to a "topic" or "event"—whereas *with* that paragraph, a column "pertains" to a "topic."

In the early 20th century, newspaperman Don Marquis published daily columns in the *New York Daily Sun* and *New York Herald Tribune* which consisted of satirical free-verse poems alleged to have been written by a cockroach named Archy. *See generally* Don Marquis, *the lives and times of archy & mehitabel* (1933). Presumably if Marquis were alive today, some of his submissions would not count against his quota, and others would, based on their content. "archygrams"[5] would not count, because it does not pertain to a specific event, while "a warning"[6] *would*, because it relates to a specific event.

Other writers would have an even harder time figuring out the quota. In 1933, E.E. Cummings published a travelogue about his visit to the Soviet Union, written in his characteristic experimental style. It includes lines such as "(b)ungarded-by-bayonets ancient impersons,of various species,laving their strictly

[5] "the oyster is useful in his fashion / but has little pride or passion." *Id.* at 260.
[6] "i am glad to see business / picking up again but when i hear / that the stock market is on the rise / there is a bit of a chill…" *Id.* at 283.

not to be described hideousness." E.E. Cummings, *Eimi: A Journey Through Soviet Russia* 330 (New York: Norton, 2007) (1933). As a travelogue, this presumably "pertains" to a "topic," yet sentences such as this do not, literally speaking, "pertain" to anything at all. In any event, determining whether any of these items, or anything else, "pertains" to a "topic" requires consulting its content—which is why AB5 is a content-based restriction under *Reed*, 135 S. Ct. at 2231.

B. AB5 imposes an identity-based speech restriction.

Even if AB5's 35-item quota were not explicitly content-based, AB5 still imposes an *identity*-based speech restriction like that found invalid in *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011). In that case, the Court ruled that a Vermont law prohibiting the communication of information for commercial reasons was both content-based and identity-based. It was identity-based because it applied based on whether the communication was done for a commercial motive. *Id.* at 567. In the same way, AB5 restricts speech by imposing a burden on print journalists and photographers based on a combination of frequency of submission and commercial motive. Likewise, AB5 increases the cost of employing print journalists or photographers who contribute more than 35 articles or photos to a publication for pay. A writer who produces columns every other week (26 per

year) would *not* be subject to the AB5's costly burdens, whereas a writer who contributes a weekly free-lance column would.

The burden is also based on the nature of the speech, in that it applies only to print journalists but not broadcasters. A person who writes 36 editorials for his city's newspaper would be subjected to the burden, while the same person reading the same 36 editorials into a microphone for his city's radio station would not be. The burden also applies to still photographers but not to "an individual who works on motion pictures," which includes people who submit videos to online platforms. Cal. Labor Code § 2750.3(c)(2)(B)(ix), (x). This means a person who submits 35 still photos would be subject to the burden, whereas a person who submits 35 videos—no matter how short they might be—would not be subject to the requirement.

The District Court found that the restriction had no censorial motive, and therefore applied only rational-basis scrutiny. *Am. Soc'y of Journalists & Authors,* 2020 WL 1444909, at *8. But *Reed* declared that the absence of a desire to censor is insufficient to satisfy the First Amendment's requirements. 135 S. Ct. at 2228. And federal courts have long emphasized the importance of applying realistic, meaningful scrutiny to speech restrictions rather than being satisfied with formalistic categories.

C. AB5's 35-item quota is a "speech trigger".

Finally, even if the restriction is not content- or identity-based, it constitutes a "speech trigger" under *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). The 35-item quota provides that a freelance writer or photographer may speak in the manner she chooses 35 times, but when she does so the 36th time, she crosses a line and is subject to the statute's burdens. That is inherently and unavoidably a speech restriction.

Of course, the government may impose numerical limits on expressive activities in certain narrowly limited circumstances, but none are present here. For example, the government may set a time limit on speaking at city council meetings. *Shero v. City of Grove*, 510 F.3d 1196, 1202–03 (10th Cir. 2007). But that is because a city council meeting is a designated public forum. *Id.* That reasoning is therefore inapplicable here, since this case involves pure speech. The government may also require permits for parades—but only so long as they are content-neutral time, place, and manner restrictions. *Nationalist Movement*, 505 U.S. at 130–31. Even content-neutral restrictions, however, must be "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 940 (9th Cir. 2011) (citations and quotation marks omitted). Here, the District Court did not analyze AB5 to determine whether it satisfies

narrow tailoring or leaves ample alternative channels open. And, as noted above, the restriction is not content-neutral, but requires consideration of the content of the speech, as well as the identity and motive of the speaker.

AB5 is better seen as a speech trigger, in that its application depends on an act of speech. *Holder* held that a law that was "directed at conduct" nonetheless violated the First Amendment because "the conduct triggering coverage under the statute consists of communicating a message." 561 U.S. at 28. Here, the law is aimed at regulating business transactions, but it applies or does not apply to the Plaintiffs based on an act of communication: i.e., the submission for publication of an article or a photograph that pertains to an event or a topic. That act is inherently communicative. The statute does not apply based on the number of hours worked, or amount of money earned, by the writer or photographer in question. It applies based on the fact that the person submits a 36th article or photograph that "pertains" to a "topic or event."

II. The restriction on free-lance print journalism has disproportionate consequences for a distinctive type of speech.

In *Grosjean,* the Court ruled that a facially-neutral tax imposed on newspapers with a circulation above a certain threshold was unconstitutional. 297 U.S. at 251. After a long discussion of the history of freedom of the press and the dangers of taxing or regulating the operation of the press, the Court found that

although the tax did not differentiate between newspapers based on their content or perspective, it was nonetheless unconstitutional. *Id.* at 240.

In *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983), the Court reinforced *Grosjean* by holding that a tax on newspaper ink and paper violated the First Amendment regardless of whether the government had any censorial motive. *Id.* at 585. The state argued that it had a legitimate interest: raising revenue. But the Court found that this interest was insufficient to justify the tax because "an alternative means of achieving the same interest" was "clearly available"—the state could have the imposed an across-the board tax. *Id.* at 586.

Like the taxes in *Grosjean* and *Minneapolis Star Tribune*, the burdens imposed by AB5 appear neutral but have a disproportionate effect thanks to the fact that they are triggered by the writer's identity and motive. This has a disproportionate impact on small newspapers, niche websites, which overwhelmingly rely on freelance workers because—in the words of the *Bay Area Reporter*, a gay community newspaper headquartered in San Francisco, "small news and media outlets like ours simply cannot hire additional full-time or part-time employees." *Editorial: Newspapers Need An Exemption in AB5*, Bay Area Reporter, Sep. 4, 2019.[7] Establishment media, by contrast—meaning large,

[7] https://ebar.com/news/news/281347.

traditional media corporations such as the *Los Angeles Times* or NBC News—can better afford the burdens imposed by AB5.

Free-lance journalists regularly produce work that establishment media are unwilling or unable to address. Perhaps the best-known recent example is the refusal of NBC News to publish information about sexual assault allegations against powerful Hollywood producer Harvey Weinstein. After freelance journalist Ronan Farrow broke the Weinstein story in *The New Yorker*, it was revealed that NBC had spiked the story in 2017. *See* Katie Warren, *Harvey Weinstein Was Just Sentenced to 23 Years in Prison*, Business Insider, Mar 11, 2020.[8] Freelance journalists such as Glenn Greenwald and John Stossel are more likely than establishment media to cover stories that challenge government policies. *See* Glenn Greenwald, *No Place to Hide: Edward Snowden, the NSA, and the U.S. Surveillance State* 232 (2014).

Freelance journalists often have more time and contacts to track down details of complicated stories than their full-time colleagues. *See* Paul Chandler & Peter Stewart, *Essential Radio Journalism: How to Produce and Present Radio News* 41 (2009). In 2017, a pair of freelance journalists reported on civilian deaths in the Iraq war for the *New York Times Magazine*; their report forced Pentagon

[8] https://www.businessinsider.com/ronan-farrow-nbc-harvey-weinstein-investigation-timeline-2019-10

officials to take better measures to avoid such casualties. In a later interview, one of the writers explained that there was "no way that we could have done this as staffers at an institution." Cantenys, *supra.*

Freelancers are also able to use the greater flexibility of their positions to focus their attention on communities that are typically overlooked or that larger media companies find it unprofitable to cover. This year, a special Pulitzer was awarded to freelance journalist Victoria McKenzie for reporting on sexual violence against Native Alaskan women; a subject the Pulitzer Committee judge said had been "mostly ignored" by establishment media. *2020 Breakthrough Journalism Award Winner Announced*, Pulitzer Center, Apr 16, 2020.[9]

But even in less controversial situations, freelance journalists are able to use their positions to cover stories or serve communities that are often ignored by establishment media. The online journal *Postindustrial*, for example, focuses on individuals and communities in the "Rust Belt" and Appalachia. It was co-founded by freelance journalists who found that establishment media are simply unable to address the news in such communities. *See* Tiffany Stevens, *How Independent*

[9] https://pulitzercenter.org/blog/2020-breakthrough-journalism-award-winner-announced

Journalists Are Covering More Than Just 'The Amount of Rust' in America's Overlooked Regions, Poynter, Jan. 28, 2019.[10]

The point is not merely that freelance journalism is admirable and important; it is that a law that hinders the ability of newspapers to rely on freelance writers privileges one type of journalism and handicaps another, which has disparate consequences on the kinds of information the public receives. This concern has led courts to warn against laws that discriminate against a *medium* of expression. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 659 (1994) ("Regulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns.")

In *City of Ladue v. Gilleo*, 512 U.S. 43, 54–55 (1994), for example, the Court found that a city ordinance that barred homeowners from displaying signs other than "for sale" signs was unconstitutional because it restricted a particular means of expression. The ordinance was not content-based, of course, but it still stifled a "means of communication that is both unique and important." *Id*. at 54. Yard signs that express opinions on local matters "both reflect and animate change in the life of a community," and "are displayed to signal the resident's support for particular candidates, parties, or causes" in a way that was "distinct" from that

[10] https://www.poynter.org/business-work/2019/how-independent-journalists-are-covering-more-than-just-the-amount-of-rust-in-americas-overlooked-regions/

which "other media" make possible. *Id*. at 54–55. To foreclose them therefore had a distorting effect on speech in the community. And in *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543 (2001), the Court held that a law restricting funds for some types of lawsuits but not others "distort[ed]" the "usual functioning" of "an existing medium of expression."

In applying its formalistic, either/or approach, the District Court relied primarily on *Turner Broadcasting*'s statement that not all regulations of media are subject to strict scrutiny. That case upheld the "must-carry" provisions of a regulation of cable television, on the grounds that "the differential treatment" at issue there was "'justified by some special characteristic of' the particular medium being regulated." 512 U.S. at 660–61. But *Turner Broadcasting* also observed that the must-carry rules "are not structured in a manner that carries the inherent risk of undermining First Amendment interests." *Id.* at 661. That is not the case here. A rule that burdens freelance journalists does carry an inherent risk of undermining First Amendment interests—in fact, precisely those interests that *City of Lakewood* referenced: the risk of restricting speech by controversial neighborhood newspapers, Alt-Weeklies, and similar media—and the audiences who rely on them.

AB5 inherently privileges establishment press outlets, outlets that inherently produce a distinctively different kind of journalism, focusing on different types of

stories and emphasizing different social and political values. The observation in *City of Lakewood* that bans on coin-operated newspaper stands would have a disproportionately negative effect on "low-budget, controversial neighborhood newspapers," which have fewer opportunities to reach potential readers, is certainly apparent here. 486 U.S. at 762. As Professor Rosenthal has noted, "a greater measure of scrutiny" is warranted in cases like this by the risk "that majoritarian institutions, even when regulating speech in a content-neutral manner, will be less sensitive to the interests of disfavored speakers." Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 Ind. L.J. 1, 65 (2011).

CONCLUSION

The District Court erred in applying rational basis scrutiny to a speaker-based and content-based speech restriction. Its decision should be *reversed*.

Date: May 20, 2020

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