No. 20-55734

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Appellants,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA,

Appellee.

On Appeal from the United States District Court
for the Central District of California
No.: 2:19-cv-10645-PSG (KS)
Hon. Philip S. Gutierrez

BRIEF OF THE LIBERTY JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

Whether the California Labor Code is subject to strict scrutiny because it discriminates between news reporters and compromises editorial independence in violation of the First Amendment.

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INTERESTS OF THE *AMICUS CURIAE*[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to protect core First Amendment rights.

To advance these goals, the Liberty Justice Center stands for a vigorous free press, representing news outlets and reporters in First Amendment challenges. *Reeder v. Madigan*, 780 F.3d 799 (7th Cir. 2015) (representing reporter Scott Reeder and the Illinois News Network); *John K. MacIver Inst. for Pub. Policy v. Evers*, No. 20-1814 (7th Cir. appeal pending) (representing reporter Bill Osmulski and the MacIver News Service). This case has important ramifications for the rights of reporters and publishers and the standard of scrutiny used to evaluate their First Amendment claims.

Liberty Justice Center also regularly litigates the right of workers to make their own employment choices in the 21st Century "gig" economy.

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[1] Fed. R. App. P. 29(a)(4)(E) statement: No counsel for any party authored any part of this brief, and no person or entity other than Amicus funded its preparation or submission.

See, e.g., *Vugo, Inc. v. City of Chi.*, 273 F. Supp. 3d 910 (N.D. Ill. 2017) (representing drivers who make money thru ride-sharing apps). Liberty Justice Center also resists efforts by unions to maintain or expand their membership at the expense of individual workers' free choices. *See, e.g.*, *O'Callaghan v. Regents of the Univ. of Cal.*, No. CV 19-2289 JVS (DFMx), 2019 U.S. Dist. LEXIS 208392, at *1 (C.D. Cal. Sep. 30, 2019); *Stroeder v. SEIU*, No. 3:19-cv-01181-HZ, 2019 U.S. Dist. LEXIS 213528, at *1 (D. Or. Dec. 6, 2019).

Amicus recognizes that the Plaintiffs argue their case primarily relying on free-speech precedents like *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), rather than on free-press precedents. However, the Plaintiffs weave free-press cases, such as *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), throughout their briefing. App. Br. at v (Table of Authorities cites case six times). The District Court also discusses *Minneapolis Star* and the rights of journalists and the press. App. Vol. 1 at E.R.33. And the Plaintiffs do advance a free press claim. App. Br. at 14. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S.

334, 358 (1995) (Thomas, J., concurring) (explaining the intertwined original meaning of the two clauses).

Liberty Justice Center secured permission from counsel for Plaintiffs and Defendant to file this brief. *See* Fed. R. App. P. 29(a)(2).

DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(a)(4)(a), Liberty Justice Center states that it is a nonprofit corporation registered in the State of Illinois, and has no parent company and no stockholders.

INTRODUCTION

In the face of the economic evolution of the news industry, unions representing full-time reporters convinced the California legislature to enact a bill that capped submissions from freelancers and stringers (an alternate industry term for freelance reporters) in order to prevent work from shifting away from union members. Tony Biasotti, "California's new 35-story limit for freelancers," COLUMBIA JOURNALISM REV. (Sept. 24, 2019).[2] The legislation, Assembly Bill (A.B.) 5, also enacted limits for numerous other industries that regularly employ independent contractors. The Legislature subsequently revisited that choice, and replaced the strict cap with contract limitations and other burdens through Assembly Bill 2257 (hereafter "the California Labor Code"). Those may or may not be good policy choices, and the wisdom of the California legislators' decision is not before this Court.

[2] Available at https://www.cjr.org/united_states_project/california-assembly-bill-5.php.

The particular provisions affecting freelance journalists, whether print or video, are different from those affecting every other industry, however, because journalism is protected by the First Amendment. While employees in other industries only receive the rational-basis scrutiny courts afford to economic regulations, the plaintiffs in this case are entitled to strict scrutiny because the law discriminates between types of journalists and compromises the editorial independence of news organizations.

ARGUMENT

These California Labor Code provisions are subject to strict scrutiny.

I. The First Amendment's freedom-of-the-press guarantee covers both publishers and reporters, including stringers and freelancers.

Though many of the canonical free press cases were brought by news organizations, the First Amendment's freedom of the press protects both news organizations and individual journalists. *See, e.g., New York Times Co. v. United States*, 403 U.S. 713 (1971) and *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241 (1974) (news

organizations); *Farr v. Pitchess*, 409 U.S. 1243, 1243 (1973) (Douglas, J., in chambers) and *Leigh v. Salazar*, 677 F.3d 892, 898 (9th Cir. 2012) (individual reporter). Thus, after collecting a number of examples, a federal district judge concluded: "the cases do not distinguish between the First Amendment rights of reporters and the media for whom they report." *Brown v. Damiani*, 154 F. Supp. 2d 317, 320 n.4 (D. Conn. 2001).

The "First Amendment rights of reporters" includes stringers and freelancers as well as full-time employees of news organizations. *Bowens v. Superintendent of Miami S. Beach Police Dep't*, 557 F. App'x 857, 863 (11th Cir. 2014) (freelance photojournalist treated as "member of the press" for First Amendment purposes); *Cty. Sec. Agency v. Ohio DOC*, 296 F.3d 477, 479 (6th Cir. 2002) (freelance journalist protected by First Amendment right against prior restraint on press publication); *United States v. Morison*, 844 F.2d 1057, 1082 (4th Cir. 1988) (Wilkinson, J., concurring) (considering stringer's free-press rights); *Adelman v. Dall. Area Rapid Transit*, No. 3:16-cv-2579-S, 2018 U.S. Dist. LEXIS 121809, at *7 (N.D. Tex. July 20, 2018) (considering freelance photojournalist's First

Amendment claims); *Higginbotham v. City of N.Y.*, 105 F. Supp. 3d 369, 378 (S.D.N.Y. 2015) (treating freelance video-journalist as member of the press for First Amendment analysis); *Okla. Observer v. Patton*, 73 F. Supp. 3d 1318, 1323 (W.D. Okla. 2014) (considering stringer's right to attend an execution); *State v. McCormack*, 682 P.2d 742, 746 (N.M. Ct. App. 1984) (freelance journalist a member of the press for purposes of considering First Amendment claim to cover event). *See Cher v. Forum Int'l, LTD*, 692 F.2d 634, 637 (9th Cir. 1982) (First Amendment applies when newsmagazine purchases story from a freelance writer).

As Justice Douglas observed, for nearly a century the Court has "defined the First Amendment right with which we now deal in the broadest terms," *Cammarano v. United States*, 358 U.S. 498 (1959) (Douglas, J., concurring) (citing *Lovell v. Griffin*, 303 U.S. 444 (1938)), and that broad definition encompasses freelance journalists like those constricted by the California Labor Code.

II. Laws that discriminate between types of press and laws that affect editorial independence are subject to strict scrutiny.

A. Laws that discriminate among types of press receive strict scrutiny.

The U.S. Supreme Court warned in *Turner Broadcasting Systems*: "Regulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 660 (1994). There the Court considered how to square its holding in that case, which applied heightened scrutiny to a cable industry regulation, with three prior precedents: *Leathers v. Medlock*, 499 U.S. 439 (1991), which upheld a tax on cable companies; *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue,* 460 U.S. 575 (1983), which applied strict scrutiny to strike down a tax on paper and ink used to produce newspapers; and *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987), which applied strict scrutiny to strike down a tax on certain types of magazines. The key to reconciling the four holdings, the Court concluded, was that the taxes in

Minneapolis Star and *Arkansas Writers' Project* "targeted a small number of speakers, and thus threatened to distort the market for ideas." *Turner Broad. Sys.*, 512 U.S. at 661. By contrast, the two decisions affecting the cable industry did not warrant strict scrutiny because "the differential treatment is justified by some special characteristic of the particular medium being regulated." *Id.*

The District Court below recognized "some resemblance to *Minneapolis Star* here," but ultimately concluded that the law "does not uniquely single out the press in that it applies a unique burden, such as a special tax, on the press . . ." App. Vol. 1 at E.R. 34.

This Court should reverse and conclude that *Minneapolis Star* controls, and thus that strict scrutiny applies. The California Labor Code uniquely singles out freelance journalist for special burdens, with particular contract restrictions and burdens on freelance submissions and "broadcast news" freelance videography. The law "distort[s] the market

for ideas" by limiting the reporters available to cover stories, which substantially compromises editorial discretion (as discussed more thoroughly below).

The practical effect of the California Labor Code is to handcuff the flexibility of editors as they deal with stringers. In many cases, a stringer who has supposedly replaced an employee, even a part-time employee, will still face a submission cap in relation to that prior employee's output. App. Br. at 3. In that circumstance, an editor is faced with one of three choices: ask a different, second-choice stringer to cover the story; take wire content rather than doing their own story; or not cover the story at all. Any of these outcomes distorts the market for ideas. Not all reporters have the same reputation, background, perspective, or depth of experience or knowledge in a particular field. Wire stories tend to be short, generic, and heavily factual, and do not have the specific angle or tie-in unique to the paper's particular community or readership. And to forsake covering a story at all because no employee reporter is available to cover

it is to substantially affect the content of the newspaper. In all these instances, the market for ideas is limited and an editor's discretion is compromised.

These California Labor Code provisions are not like *Leathers* or *Turner*, where the broadcast or cable medium is inherently different as a loan of the public airwaves or a monopoly operation. *Turner*, 512 U.S. at 661. Rather, these code sections are an effort by politically powerful unions to leverage a friendly legislature to punish economic competitors regardless of the impact on the public reporting and discussion of news and ideas. Because it is a law that creates a specific burden on the press, *Minnesota Star* dictates that it is subject to strict scrutiny.

B. Laws that affect editorial independence receive strict scrutiny.

"A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials -- whether fair or unfair -- constitute the exercise of editorial control and judgment. It

has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." *Tornillo*, 418 U.S. at 258. *Accord Turner Broad. Sys.*, 512 U.S. at 653 ("*Tornillo* affirmed an essential proposition: The First Amendment protects the editorial independence of the press.").

Though *Tornillo* was decided before the modern tiers-of-scrutiny framework, and therefore did not invoke any particular shibboleth of scrutiny, later courts have read *Tornillo* as guaranteeing strict scrutiny to laws affecting the editorial independence of the press. *Satellite Broad. & Communs. Ass'n of Am. v. FCC*, 146 F. Supp. 2d 803, 817 (E.D. Va. 2001); *Turner Broad. Sys. v. FCC*, 819 F. Supp. 32, 59 (D.D.C. 1993) (3-judge panel).

The California Labor Code strikes at a core editorial decision: which reporter to assign to cover a story. "To the extent the publisher's choice of writers affects the expressive content of its newspaper, the First Amendment protects that choice." *McDermott v. Ampersand Pub., LLC*,

593 F.3d 950, 962 (9th Cir. 2010). *See Claybrooks v. ABC, Inc.*, 898 F. Supp. 2d 986, 1000 (M.D. Tenn. 2012) (same, as to television show production).

The selection of a particular reporter to cover a specific story is a key editorial decision, because editors know their reporters' reputations. Some reporters may have a reputation for armchair quarterbacking and second-guessing, while others may be known as a "homer" for a particular sports team or political view. Some may have a track record of deep investigative journalism and tough questions, while others may bring a more upbeat, friendly style. Assigning one reporter to a story instead of a colleague is a core editorial decision that often reflects considered judgment as to the type of story to be reported.

Hiring stringers or freelancers to report on particular stories is a classic example of these sorts of editorial choices. The Reuters Handbook explains three common circumstances when a stringer is used: "We use 'stringers' in places where the flow of news is not sufficient to justify the presence of a staff correspondent, in countries where the authorities may

not allow Reuters to assign a staff journalist or to cover stories of a specialist nature when we do not have the necessary expertise among our own staff." "Dealing with Stringers," Reuters Handbook of Journalism (2008).[3] A series of examples illustrating these three and other scenarios details the crucial editorial discretion involved in hiring freelance journalists:

- A national news organization like the *New York Times* or CNN does not have the resources or need to have a bureau in every state. Rather, as of 2013 the *Times* had 14 bureaus in the United States[4] (the number may have decreased since then). If breaking national news happens outside of driving distance of one of those 14 bureau cities, the *Times* has a choice: it can pick up the story from a wire service, or it can send a stringer. Given that wire services generally report

[3] Available at http://handbook.reuters.com/index.php?title=Dealing_with_stringers&oldid=1319.

[4] The New York Times Company Media Group, available at https://web.archive.org/web/20131013010504/http://www.nytco.com/company/business_units/new_york_times_media_group.html (site archived from 2013).

stories a certain way (just the facts, minimal color or characterization, not a lot of investigative digging), the decision to send a stringer is an editorial choice to pursue a different depth and type of reporting. If the *Times* reduced its Los Angeles news staff, then ran "too many" stories from a stringer California, it would be forced to either hire her as an employee, find a different stringer, or stop covering news in California altogether.

- A metro newspaper previously had a generic floating full-time sports reporter who covers all games and matches in all sports. The paper, recognizing a market demand for more specialized coverage for highly invested fans/subscribers, decided to replace that full-time reporter with stringers who can bring expertise and experience particular to each program and sport. Each of those stringers would now face a content cap based on that reporter's previous output.
- Many events happen at the same time or in a limited season, whether Friday night high school football or election campaigns.

Video stringers let a broadcast news organization adjust capacity based on the news cycle. A single baseball beat reporter cannot cover every high school, college, and professional baseball game in a particular market because they often are played at the same time; without stringers, producers will be forced to simply cover fewer games. Similarly, a television station won't be able to hire a stringer to provide daily coverage of a particular political campaign for only the final sprint from Labor Day to Election Day. They will have to reassign employee reporters from other beats instead, reducing the coverage of those other stories.

- A national television outlet cannot meet the credentialing requirements to get a media pass to cover a particular state government because they do not have an on-site reporter who can regularly attend briefings and press conferences. A stringer who serves a variety of news outlets holds a credential because she does regularly report on the state's activities. Because of the ban on videography journalism, the national news organization will have no way to ask

questions of the state's officials during in-person, on-camera briefings, which provides the best content for the outlet's broadcasts.

- Many newspapers print weekly columns on food, travel, sports, or politics, and rely on writers to submit 52 weekly columns each year providing commentary, opinion, and insight on their assigned topic. If a paper chooses to replace a full-time columnist with a stringer, that columnist is now strictly limited to 52 columns per year; if a news event happens that justifies writing more than once a week, that option is foreclosed to that columnist.

These are just a few examples of the myriad ways that stringers and freelancers play an important role in the news industry. And they illustrate the truth behind a *New York Times* headline atop a story on the importance of their place in journalism: "What Makes a Good Editor? A Long List of Stringers." Melina Delkic, N.Y. TIMES (Aug. 3, 2017).[5] Editors rely on stringers to do their job, and capping or eliminating the

[5] Available online at https://www.nytimes.com/2017/08/03/insider/stringer-freelance-reporter.html.

stringers available will compromise editors' and producers' independence and discretion.

Finally, the harsh practical reality is that the freelance videography ban will simply stop broadcast news from covering stories in the vast interstices between California's major cities. There will be a few bureaus located in metropolitan areas, and that will be it. Any news that happens in a far-flung rural community that is inconvenient to a major city will simply go uncovered, because producers cannot afford to send a news van on the road for several hours out of the workday to cover a single story. Editorial judgment will mean nothing in the face of financial constraints on using employees and legal constraints on using stringers. And so the quality of journalism will suffer, and the quality of our democracy will decline as well as the press increasingly ignores whole swaths of the state.

The California Labor Code places a substantial burden on editors' and producers' independence: it eviscerates their ability to hand-pick string-

ers with the proximity, expertise, or reputation they seek to cover a particular story a particular away. For that reason, it is subject to strict scrutiny.

CONCLUSION

Regardless of the clause at issue, the First Amendment generally treats laws in two ways. Neutral laws of generally applicability (otherwise called content-neutral time-place-manner regulations) receive generally deferential review. Specific laws targeting and burdening a fundamental right receive strict scrutiny. The California Labor Code falls in the second category: it treats particular types of journalists in a particular way, and it significantly limits and compromises editorial independence. For both those reasons, it should receive strict scrutiny. As such, the California Labor Code is presumptively unconstitutional. *Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1010 (9th Cir. 2003).

Respectfully submitted,

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Tuesday, December 1, 2020

CERTIFICATE AS TO LENGTH

Pursuant to Fed. R. App. P. 32(g)(1), counsel of record certifies that the body of this brief, including footnotes, contains 3,047 words.

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United States Court of Appeals for the Ninth Circuit

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