

1 INSTITUTE FOR FREE SPEECH
Alan Gura, SBN 178221
2 agura@ifs.org
1150 Connecticut Avenue, N.W.,
3 Suite 801
Washington, DC 20036
4 Phone: 202.967.0007
Fax: 202.301.3399
5

6 Attorneys for Plaintiffs
Mobilize the Message, LLC; Moving
7 Oxnard Forward, Inc.; and Starr
Coalition for Moving Oxnard Forward
8

9 **UNITED STATES DISTRICT COURT**
10 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
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12 MOBILIZE THE MESSAGE, LLC; 13 MOVING OXNARD FORWARD, 14 INC.; and STARR COALITION FOR MOVING OXNARD FORWARD, 15 16 17 ROB BONTA, in his official 18 capacity as Attorney General of California, 19 20 21 22 23 24 25 26 27 28	Plaintiffs, v. Defendant.) Case No 2:21-cv-05115 VAP (JPRx)) MEMORANDUM OF POINTS AND) AUTHORITIES SUPPORTING) PLAINTIFFS' MOTION TO STAY) PROCEEDINGS PENDING) APPEAL) Date: Sept. 20, 2021) Time: 2:00 p.m.) Courtroom: 8A) Judge: The Honorable Virginia A. Phillips) Trial Date: Not set) Action Filed: 6/23/2021
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23 **MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING**
24 **PLAINTIFFS' MOTION TO STAY PROCEEDINGS PENDING APPEAL**
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1 MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING
2 PLAINTIFFS’ MOTION TO STAY PROCEEDINGS PENDING APPEAL

3 INTRODUCTION

4 “[T]he power to stay proceedings is incidental to the power inherent in
5 every court to control the disposition of the causes on its docket with
6 economy of time and effort for itself, for counsel, and for litigants.” *Landis*
7 *v. North American Co.*, 299 U.S. 248, 254 (1936); *Rivers v. Walt Disney*
8 *Co.*, 980 F. Supp. 1358, 1360 (C.D. Cal. 1997). Those interests now counsel
9 the staying of further proceedings pending the outcome of Plaintiffs’
10 interlocutory appeal. A stay would prejudice no one, but it would aid the
11 efficient resolution of this case, preserve judicial resources and litigation
12 resources on both sides, and may prevent Plaintiffs from sustaining
13 irreparable harm.

14 FACTUAL AND LEGAL BACKGROUND

15 Two facts not previously discussed by the parties are of special
16 relevance to this motion. First, on June 11, 2021, the Ninth Circuit heard
17 argument in the substantially related case of *American Society of*
18 *Journalists and Authors v. Bonta*, Ninth Cir. No. 20-55734 (“*ASJA*”).
19 Although Judge Gutierrez did not agree that the cases are sufficiently
20 related for purposes of judicial assignment, he acknowledged that the
21 cases “likely address overlapping issues of law.” Order re: Transfer, ECF
22 12. Plaintiffs believed *ASJA* warranted discussion and distinction in their
23 initial moving papers on preliminary injunction, and Defendant argued
24 that the District Court’s view of *ASJA*’s merits supported his position.
25 This Court agreed with Defendant and found *ASJA* instructive.

26 Although there is no guarantee that the Ninth Circuit’s forthcoming
27 decision in *ASJA* would control or even be instructive in this case, the
28 odds of that occurring are meaningful. The odds are also meaningful that

1 the Ninth Circuit would decide *ASJA* before the resolution of any appeal
2 arising from this case. This Court may thus wish to have the benefit of the
3 forthcoming *ASJA* opinion in deciding this case.

4 Second, Plaintiffs have appealed from this Court's order denying their
5 motion for a preliminary injunction. If this Court were to grant
6 Defendant's motion to dismiss, it would moot that appeal and spark a
7 second, slower appeal that, even if successful, would not likely be decided
8 in time to assuage Plaintiffs' fears about participating in the 2022 election
9 with the aid of independent contractors. Moreover, the parties and the
10 courts would be burdened with duplicative work.

11 SUMMARY OF ARGUMENT

12 Motions for stays pending appeal are governed by either of two legal
13 standards, depending on whether the movant seeks to stay an order or
14 stay the proceedings. Although courts have applied the preliminary
15 injunction factors set forth in *Nken v. Holder*, 556 U.S. 418 (2009) when
16 considering whether to stay proceedings, the consensus holds that "*Nken*
17 applies *specifically* to stays of the enforcement of an order or judgment,
18 not stays of an action during interlocutory appeal of an order denying a
19 preliminary injunction." *Am. Hotel & Lodging Ass'n v. Cty. of Los Angeles*,
20 CV 14-09603-AB, 2015 WL 10791930, at *2 (C.D. Cal. Nov. 5, 2015)
21 (emphasis in original). Courts tend to recognize that motions to stay the
22 course of proceedings are committed to their inherent discretion in
23 managing their dockets, as guided by *Landis* and *Lockyer v. Mirant Corp.*,
24 398 F.3d 1098 (9th Cir. 2005).

25 All *Lockyer* factors plainly support staying the proceedings. The
26 granting of a stay would damage no one, proceeding with the case would
27 damage both sides, and a stay could only simplify the case and aid the
28

1 Court in resolving it. A stay should also issue under the modified *Landis*
2 approach followed by some district courts, which focuses more precisely on
3 efficiency and the appellate proceedings’ potential impact on the
4 litigation.

5 Alternatively, a stay should issue under the *Nken* test. Plaintiffs
6 acknowledge that this Court rejected their *Nken* argument in the
7 preliminary injunction context, but the stay context differs in several key
8 respects. The question of irreparable harm is no longer merely whether
9 Plaintiffs could obtain relief so that they might circulate petitions for the
10 2022 elections, but whether they can obtain timely review of their claims.
11 The balance of equities/public interest factor differs as well. The issue in
12 that regard is not so much the balancing of interests in enforcing the law
13 and securing constitutional rights, but the interest shared by all parties,
14 the public, and the courts in the efficient resolution of cases and the
15 preservation of litigation and judicial resources, whatever the outcome.
16 Should the Court apply *Nken* instead of *Landis/Lockyer*, it could stay
17 further proceedings pending appeal without revisiting or qualifying its
18 earlier decision denying Plaintiffs’ motion for preliminary injunction.

19 ARGUMENT

20 I. MOTIONS TO STAY PROCEEDINGS, AS OPPOSED TO MOTIONS TO STAY 21 ORDERS, ARE COMMITTED TO THE COURT’S DISCRETION PER *LANDIS* AND *LOCKYER*.

22 “District courts in this circuit have catalogued a divide regarding the
23 appropriate standard by which a district court is to exercise its discretion
24 in whether to grant a stay pending an interlocutory appeal.” *Peck v. Cnty.*
25 *of Orange*, CV 19-4654 DSF, 2021 WL 1186337, at *4 (C.D. Cal. Mar. 26,
26 2021) (internal quotation marks and citations omitted). Courts either
27 apply the *Nken* factors, or the *Landis*-based factors set forth in *Lockyer*.
28

1 For its part, “[i]t appears that the Ninth Circuit has not addressed which
2 test applies” on a motion to stay proceedings pending an interlocutory
3 appeal. *Kuang v. United States DOD*, No. 18-cv-03698-JST, 2019 WL
4 1597495, at *2 (N.D. Cal. Apr. 15, 2019).

5 But “district courts that have directly confronted the question have
6 overwhelmingly concluded that the *Landis* test or something similar
7 governs” motions to stay proceedings. *Peck*, 2021 WL 1186337, at *4
8 (quoting *Kuang*, 2019 WL 1597495, at *3 (collecting cases)).¹ Indeed, that
9 position is “the growing consensus of the district courts in this circuit.”
10 *Hart v. Charter Communs., Inc.*, SA CV 17-0556-DOC, 2019 WL 7940684,
11 at *4 (C.D. Cal. Aug. 1, 2019). “Those courts have reasoned that the *Nken*
12 test ‘is applicable when there is a request to stay a district court’s
13 judgment or order pending an appeal of the same case,’ while *Landis*
14 applies to the decision to stay proceedings, regardless whether the stay is
15 based on a direct appeal or an independent case.” *Kuang*, 2019 WL
16 1597495, at *3 (quoting *23andMe, Inc. v. Ancestry.com DNA, LLC*, No. 18-
17 CV-02791-EMC, 2018 WL 5793473, at *3 (N.D. Cal. Nov. 2, 2018)) (adding
18 emphasis) (other citations omitted); *Hart*, 2019 WL 7940684, at *4 (“The
19 *Nken* test has primarily been applied when a party seeks to stay the effect
20 of a judgment. *Landis* was decided specifically to guide courts deciding on
21 whether to stay proceedings.”).

22
23
24 ¹ The “something similar” to *Landis* test asks “whether (1) resolution by
25 the Ninth Circuit of the issue addressed in the appealed order could
26 materially affect this case and advance the ultimate termination of
27 litigation and (2) whether a stay will promote economy of time and effort
28 for the Court and the parties.” *Kuang*, 2019 WL 1597495, at *3 n.3
(collecting cases).

1 As *Kuang* explained,

2 different concerns predominate when a court decides whether to stay
3 an injunction or other order. There, the overarching question is not
4 whether going forward with the litigation will be inefficient for the
5 parties and the court, but rather if equity demands that the court
6 preserve the pre-judicial-relief status quo pending the appellate court's
7 determination of the correctness of that relief. In most cases, the
8 choice between relief and no relief is starker than the choice between
9 litigating or not litigating. Accordingly, the types and degree of harm
10 necessary to support a stay may differ. Moreover, because the impacts
11 of an injunction — or the conduct that will occur in its absence — may
12 ripple far beyond the parties and the court, a broader consideration of
13 the public interest is necessary.

14 *Kuang*, 2019 WL 1597495, at *3 (internal quotation marks and citations
15 omitted).

16 **II. THIS COURT SHOULD EXERCISE ITS INHERENT DISCRETIONARY POWER
17 OVER ITS DOCKET TO STAY FURTHER PROCEEDINGS PENDING APPEAL.**

18 Plaintiffs bear the burden of showing that a stay is appropriate.

19 *Clinton v. Jones*, 520 U.S. 681, 708 (1997). That burden is satisfied here.

20 A trial court may, with propriety, find it is efficient for its own docket
21 and the fairest course for the parties to enter a stay of an action before
22 it, pending resolution of independent proceedings which bear upon the
23 case. This rule applies whether the separate proceedings are judicial,
24 administrative, or arbitral in character, and does not require that the
25 issues in such proceedings are necessarily controlling of the action
26 before the court.

27 *Bradshaw v. City of Los Angeles*, No. 2:19-CV-06661-VAP-JC, 2020 WL
28 2065007, at *4-*5 (C.D. Cal. Mar. 23, 2020) (quoting *Leyva v. Certified
Grocers of California, Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979)) (other
citations omitted).

In considering whether to stay proceedings pursuant to their inherent
case management powers, courts examine (1) “the possible damage which
may result from the granting of a stay”; (2) “the hardship or inequity
which a party may suffer [if the case is allowed] to go forward”; and (3)
“the orderly course of justice measured in terms of the simplifying or
complicating of issues, proof, and questions of law which could be expected

1 to result from a stay.” *Lockyer*, 398 F.3d at 1110 (quoting *CMAX, Inc. v.*
2 *Hall*, 300 F.2d 265, 268 (9th Cir. 1962)). Notwithstanding these “general
3 considerations that are helpful in determining whether to order a stay,
4 ultimately ‘the totality of the circumstances governs.’” *Golo, LLC v. Goli*
5 *Nutrition Inc.*, No. 2:21-cv-02348-VAP (MAAx), 2021 WL 3360134, at *9
6 (C.D. Cal. July 30, 2021) (quoting *Universal Elec., Inc. v. Universal*
7 *Remote Control, Inc.*, 943 F. Supp. 2d 1028, 1031 (C.D. Cal. 2013)).

8 The relevant considerations all indicate the propriety of a stay. First,
9 because no injunction has issued, no possible damage could accrue from a
10 stay’s issuance. The status quo will remain as it stood the day before
11 Plaintiffs brought their lawsuit. However, Plaintiffs could well be injured
12 by this motion’s denial. The potential mootness of an interlocutory appeal
13 is “a sufficient basis” for staying the proceedings. *Nat’l Ass’n of African-*
14 *American Owned Media v. Charter Communs., Inc.*, CV 16-609-GW
15 (FFMx), 2016 WL 10647193, at *6 (C.D. Cal. Dec. 12, 2016) (citations and
16 footnote omitted); *see also Unitek Solvent Servs. v. Chrysler Grp. LLC*, 12-
17 00704 DKW-RLP, 2014 WL 12576648 (D. Haw. Jan. 14, 2014).

18 The law affords Plaintiffs an opportunity, of which they have availed
19 themselves, to obtain a speedy review of their request for a preliminary
20 injunction. If they are entitled to relief, the Ninth Circuit’s expedited
21 schedule, as it now stands, allows them to obtain it in time to participate
22 in the 2022 election. But if this case were to proceed and moot that
23 appeal, a subsequent appeal would set them back to square one, and
24 proceed at a pace that would be unlikely to result in an appellate opinion
25 before the 2022 election, let alone in time to qualify a ballot measure and
26 campaign for its enactment.

1 Moreover, given the Ninth Circuit’s briefing schedule, intervening
2 mootness would probably harm both sides, in terms of duplication of effort
3 on appeal.

4 Finally, interests of judicial efficiency counsel for a stay as well. When
5 a case is stayed pending the resolution of other proceedings, “[t]he
6 question is whether there is sufficient overlap between the proceedings
7 that waiting for one to be resolved would work to simplify issues in the
8 other or preserve judicial resources.” *United States v. California*, No. 2:18-
9 cv-00490-JAM-KJN, 2018 WL 5310675 at *3 (E.D. Cal. Oct. 19, 2018).

10 That overlap is manifest. The Ninth Circuit might well comment on the
11 merits of Plaintiffs’ claims soon enough. That guidance could prove useful.

12 III. THE COURT SHOULD ALSO STAY THESE PROCEEDINGS PURSUANT TO
13 THE NKEN FACTORS.

14 Under *Nken*, courts consider “(1) whether the stay applicant has made
15 a strong showing that he is likely to succeed on the merits; (2) whether
16 the applicant will be irreparably injured absent a stay; (3) whether
17 issuance of the stay will substantially injure the other parties interested
18 in the proceeding; and (4) where the public interest lies.” *Nken*, 556 U.S.
19 at 426 (internal quotation marks omitted). “Courts in the Ninth Circuit
20 weigh these factors with a ‘general balancing’ or ‘sliding scale’ approach,
21 under which ‘a stronger showing of one element may offset a weaker
22 showing of another.’” *Stiner v. Brookdale Senior Living, Inc.*, 383 F. Supp.
23 3d 949, 953 (N.D. Cal. 2019) (quoting *Leiva-Perez v. Holder*, 640 F.3d 962,
24 964 (9th Cir. 2011)).

25 Plaintiffs preserve their argument that they are likely to succeed on
26 the merits, but also readily acknowledge that this Court takes a different
27 view. For purposes of the requested stay, in the event that this Court
28 would follow *Nken* instead of *Landis* and *Lockyer*, Plaintiffs note that they

1 would establish the first prong because they can “at least demonstrate
2 that the appeal presents a ‘substantial case on the merits,’ or that there
3 are ‘serious legal questions’ raised.” *Stiner*, 383 F. Supp. 3d at 953
4 (quoting *Leiva-Perez*, 640 F.3d at 965-68). Courts have found that an
5 appeal demonstrates “a substantial case on the merits” if it “(1) ‘raises
6 genuine matters of first impression within the Ninth Circuit’; (2) may
7 ‘implicate a constitutional question’; or (3) ‘otherwise address[es] a
8 pressing legal issue which urges that the Ninth Circuit hear the case.’” *Id.*
9 at 953-54 (internal quotation marks omitted). This case qualifies under all
10 of these lower standards, even if it would be unlikely to succeed. Until
11 *ASJA* is decided (and maybe after), the case is one of first impression at
12 the Ninth Circuit, as to the intersection of First Amendment speech rights
13 and AB 5’s classification and exemption regime. It plainly implicates a
14 constitutional question. And, Plaintiffs submit, it addresses a pressing
15 legal issue, considering AB 5’s impact on political campaigns—all political
16 campaigns, regardless of viewpoint. These are also “serious legal
17 questions.”

18 Of course, satisfying this lower version of the first *Nken* prong obligates
19 Plaintiffs to establish “that the balance of hardships tips sharply in [their]
20 favor.” *Leiva-Perez*, 640 F.3d at 970. Even if the balance of hardships did
21 not tip in Plaintiffs’ favor in moving for a preliminary injunction, it does
22 so now. First, unlike with the previous motion, the state’s interest in
23 enforcing its law is not implicated. Second, the harms of inefficient
24 litigation will be born by both sides, and therefore, by the public as well.
25 “Although the public always has an interest in the timely resolution of
26 litigation, it also has an interest in efficient and economical litigation.
27 This is particularly apparent when a governmental entity is involved
28

1 because public resources are often at stake.” *Burgan v. Nixon*, No. CV 16-
2 61-BLG-CSO, 2016 WL 6584478, at *5 (D. Mont. Nov. 7, 2016).

3 The motion should be granted pursuant to *Landis* and this Court’s
4 inherent supervisory powers, but it also satisfies the *Nken* factors.

5 CONCLUSION

6 The Court should grant the motion to stay further proceedings pending
7 the final resolution of Plaintiffs’ appeal of the order denying their motion
8 for a preliminary injunction.

9 Dated: August 16, 2021 Respectfully submitted,

10 By: /s/ Alan Gura
11 Alan Gura (SBN 178221)
12 agura@ifs.org
13 INSTITUTE FOR FREE SPEECH
14 1150 Connecticut Avenue, N.W., Suite 801
15 Washington, DC 20036
16 Phone: 202.967.0007
17 Fax: 202.301.3399

18 Attorneys for Plaintiffs
19 Mobilize the Message, LLC; Moving
20 Oxnard Forward, Inc.; and Starr
21 Coalition for Moving Oxnard Forward
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27
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