

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

Mobilize the Message LLC et al.,  
Plaintiffs,  
v.  
Rob Bonta,  
Defendant.

Case No. 2:21-cv-05115-VAP-JPRx

**Order GRANTING Motion to Stay  
(Dkt. 29)**

United States District Court  
Central District of California

Before the Court is Plaintiffs’ Mobilize the Message, LLC, Moving Oxnard Forward, Inc., and Starr Coalition for Moving Oxnard Forward (“Plaintiffs”) Motion to Stay (“Motion”). (Dkt. 29).

After considering all the papers filed in support of, and in opposition to, the Motion, the Court deems this matter appropriate for resolution without a hearing pursuant to Local Rule 7-15. The Court **GRANTS** the Motion.

**I. BACKGROUND**

The facts of this case were set forth at length in the Court’s August 09, 2021 Order Denying Plaintiffs’ Motion for Preliminary Injunction. (Dkt. 24). The Court provides only a brief synopsis here.

1 Plaintiffs filed this lawsuit against Defendant Rob Bonta, in his official  
2 capacity as Attorney General of California (“Defendant”), alleging that a  
3 California law pertaining to the classification of employees and independent  
4 contractors, Assembly Bill 5 (“AB 5”), violates the First Amendment right of  
5 free speech. AB 5 codifies the so-called “ABC Test” articulated in *Dynamex*  
6 *Operations W v. Superior Court*, 4 Cal. 5<sup>th</sup> 903, 916 (2018). The test  
7 consists of a three-pronged inquiry that determines whether a worker is  
8 classified as an employee or an independent contractor for certain  
9 purposes. Plaintiffs argue that AB 5 favors commercial speech over political  
10 speech because it exempts certain commercial workers from being  
11 classified as employees, while classifying signature gatherers and  
12 doorknockers for political campaigns as employees.

13  
14 On June 24, 2021, Plaintiffs filed a Motion for Preliminary Injunction  
15 seeking to enjoin Defendant from applying the ABC Test to classify Plaintiffs’  
16 doorknockers and signature gatherers as employees. (Dkt. 9). The Court  
17 denied the Motion for Preliminary Injunction on August 09, 2021, (Dkt. 24),  
18 and Plaintiffs appealed to the Ninth Circuit Court of Appeals on August 10,  
19 2021. (Dkt. 25). Defendant filed a Motion to Dismiss on August 16, 2021.  
20 (Dkt. 28). Plaintiffs filed the instant Motion to Stay Case Pending Appeal on  
21 August 16, 2021, arguing that this case should be stayed pending the  
22 outcome of Plaintiffs’ appeal of this Court’s order denying a preliminary  
23 injunction.

24  
25 **II. LEGAL STANDARD**  
26

1           When a party files an interlocutory appeal from the denial of a motion  
2 for a preliminary injunction, a stay is “not a matter of right . . . .” *Nken v.*  
3 *Holder*, 556 U.S. 418, 433 (2009). The decision to grant a stay “is instead  
4 ‘an exercise of judicial discretion,’ and ‘[t]he propriety of its issue is  
5 dependent upon the circumstances of the particular case.’” *Id.* “The moving  
6 party has the burden of persuading the court that the circumstances of the  
7 case justify a stay.” *Cesca Therapeutics Inc. v. SynGen Inc.*, No. 2:14-CV-  
8 2085-TLN (KJNx), 2017 WL 1174062, at \*2 (E.D. Cal. Mar. 30, 2017).

9  
10           District courts in this Circuit follow one of two standards when  
11 evaluating a motion to stay pending an interlocutory appeal: the *Nken* test or  
12 the *Landis* test. The *Nken* test prompts courts to consider “(1) whether the  
13 stay applicant has made a strong showing that he is likely to succeed on the  
14 merits; (2) whether the applicant will be irreparably injured absent a stay; (3)  
15 whether issuance of the stay will substantially injure the other parties  
16 interested in the proceeding; and (4) where the public interest lies.” *Leiva-*  
17 *Perez v. Holder*, 640 F.3d 962, 964 (9th Cir. 2011) (quoting *Nken v. Holder*,  
18 556 U.S. 418 (2009)). The *Landis* test counsels courts to consider “the  
19 competing interests which will be affected by the granting or refusal to grant  
20 a stay,” including “the possible damage which may result from the granting  
21 of a stay, the hardship or inequity which a party may suffer in being required  
22 to go forward, and the orderly course of justice measured in terms of the  
23 simplifying or complicating of issues, proof, and questions of law which  
24 could be expected to result from a stay.” *Lockyer v. Mirant Corp.*, 398 F.3d  
25 1098, 1110 (9th Cir. 2005).

1 Plaintiffs concede that the Ninth Circuit has not addressed which test  
2 applies for a motion to stay proceedings, but argue that the *Landis* test is  
3 more frequently used in this context and should apply here. (Motion, at 4).  
4 The Court agrees. Although some district courts continue to apply the *Nken*  
5 test, “*Landis* was decided specifically to guide courts deciding on whether to  
6 stay proceedings,” and it is the “growing consensus of the district courts in  
7 this Circuit” to apply *Landis* when evaluating a motion to stay proceedings.  
8 *Hart v. Charter Commc’ns, Inc.*, No. SA CV 17-0556-DOC (RAOx), 2019 WL  
9 7940684, at \*4 (C.D. Cal. Aug. 1, 2019).

10  
11 Moreover, Defendant does not challenge Plaintiffs’ argument that  
12 *Landis* should govern the motion. Defendant instead argues that it is  
13 “irrelevant” whether “this Court concludes that the *Landis* or the *Nken*  
14 standard applies,” because “Plaintiffs cannot meet their burden under either  
15 standard . . . .” (Opp’n, at 5-6). The Court will therefore evaluate Plaintiffs’  
16 motion under the factors articulated in *Landis*.

### 17 18 III. DISCUSSION

#### 19 A. Ninth Circuit Dicta

20 As a threshold matter, Defendant argues that it would contravene  
21 Ninth Circuit instruction for this Court to stay proceedings pending appeal of  
22 a preliminary injunction order. (Opp’n, at 8). Defendant cites to language  
23 from Ninth Circuit cases suggesting that granting a stay under these  
24 circumstances is strongly disfavored. See Opp’n at 8, citing *Cal. v. Azar*,  
25 911 F.3d 558, 583 (9th Cir. 2018) (“We have repeatedly admonished district  
26 courts not to delay trial preparation to await an interim ruling on a

1 preliminary injunction.”); *Melendres v. Arpaio*, 695 F.3d 990, 1002-03 (9<sup>th</sup>  
2 Cir. 2012); *Sports Form, Inc. v. United Press Intern., Inc.*, 686 F.2d 750, 753  
3 (9th Cir. 1982) (“[I]n many cases, appeal of district courts’ preliminary  
4 injunctions will result in unnecessary delay to the parties and inefficient use  
5 of judicial resources.”). Plaintiff responds that Defendant’s argument over-  
6 generalizes the Ninth Circuit’s position, and even if these warnings are  
7 informative, the Court must engage with the *Landis* factors before  
8 summarily denying the motion. See Reply, at 4.

9  
10 A review of decisions in this district demonstrates that courts do not  
11 interpret the Ninth Circuit’s warnings as prohibitively as Defendant suggests.  
12 There are numerous examples of courts granting a motion to stay proceed-  
13 ings pending the appeal of an order granting or denying a preliminary in-  
14 junction. See, e.g., *STM Inv. S.a.r.l. v. 3P Equity Partners, LLC*, No. 19-  
15 1764-CBM (ASx), 2019 WL 9518077, at \*3 (C.D. Cal. June 24, 2019) (grant-  
16 ing an application to stay proceedings pending the Ninth Circuit’s resolution  
17 of plaintiff’s appeal of the preliminary injunction); *Commodity Futures Trad-*  
18 *ing Comm’n v. Bame*, No. CV-08-05593-RGK (PLAx), 2009 WL 10676150,  
19 at \*3 (C.D. Cal. Mar. 6, 2009) (same). Moreover, while the Court may take  
20 the Ninth Circuit’s admonition against granting a stay as cautionary, there is  
21 no “blanket rule” prohibiting consideration of the motion. See *Fraihat v. U.S.*  
22 *Immigr. & Customs Enft*, No. EDCV 19-1546-JGB (SHKx), 2020 WL  
23 6540441, at \*3 (C.D. Cal. Oct. 30, 2020) (noting that the court would con-  
24 sider the Ninth Circuit’s warnings against delaying trial preparation to await  
25 an interim ruling, but Defendants were “correct that there is no such blanket  
26 rule” in the Ninth Circuit).

1  
2 The Court agrees with Plaintiffs that it must apply the *Landis* test to  
3 decide the Motion. The Ninth Circuit’s admonitions, while instructive, do not  
4 prohibit the court from issuing a stay.

5  
6 **B. *Landis* Factors**

7 Plaintiffs advance arguments as to all of the *Landis* factors: “the  
8 possible damage which may result from the granting of a stay, the hardship  
9 or inequity which a party may suffer in being required to go forward, and the  
10 orderly course of justice measured in terms of the simplifying or  
11 complicating of issues, proof, and questions of law which could be expected  
12 to result from a stay.” *Lockyer*, 398 F.3d at 1110. The Court addresses each  
13 argument in turn.

14  
15 1. Possibility of Damage

16 Plaintiffs argue that no possible damage could accrue from a stay  
17 because no injunction was issued in this case, and the “status quo will  
18 remain as it stood the day before Plaintiffs brought their lawsuit.” (Motion, at  
19 6). Defendant does not respond to this argument in his Opposition.

20  
21 The Court agrees that no harm would result from a stay of these  
22 proceedings. Defendant has no need for an immediate resolution of the  
23 case, especially because he is not enjoined from continuing to enforce AB 5  
24 while the appeal is pending. Moreover, Defendant himself has not asserted  
25 that he would suffer damage if a stay were granted. The lack of potential  
26 damage to Defendant stands in stark contrast to the potential consequences

1 to parties in other cases where a stay was denied. *See Dependable*  
2 *Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir.  
3 2007) (finding a “fair possibility” of damage in granting a stay that would  
4 have forced a company to enter into arbitration in a foreign country). The  
5 Court therefore agrees with Plaintiffs that the lack of possible damage  
6 weighs heavily in favor of granting a stay. *See, e.g., Physicians*  
7 *Healthsource Inc. v. Masimo Corp.*, No. SACV 14-00001-JVS (ANx), 2014  
8 WL 12577142, at \*2 (C.D. Cal. May 22, 2014) (determining that there would  
9 be little possibility of damage from granting a stay).

10  
11 2. Hardship or Inequity from Denial of a Stay

12 Next, Plaintiffs argue they would be injured by the denial of this  
13 Motion because it would frustrate their potential to obtain relief in time for  
14 the 2022 election. (Motion, at 6). They contend that the Ninth Circuit could  
15 grant their pending appeal in time to allow them to engage in activities for  
16 the 2022 election, but if this Court denies the stay and ultimately dismisses  
17 the case, the pending appeal would become moot. (*Id.*). Plaintiffs would  
18 then have to appeal again from “square one,” which would push the timeline  
19 for appellate review beyond the 2022 election. (*Id.*). Plaintiffs also allege  
20 that intervening mootness harms both parties “in terms of duplication of  
21 effort on appeal.” (*Id.* at 7).

22  
23 Defendant responds that any prejudice Plaintiffs might suffer is  
24 attributable to their own delay in filing suit. *See* Opp’n. Defendant points  
25 out that AB 5 was enacted in September 2019, and yet “Plaintiffs did not file  
26 suit until two months ago.” (Opp’n, at 1). Defendant also argues that any

1 concern about inefficient litigation stems from Plaintiffs’ own decision to seek  
2 interlocutory review. (*Id.* at 3-4).

3  
4 The Ninth Circuit has determined that simply “being required to  
5 defend a suit does not constitute a ‘clear case of hardship or inequity’ within  
6 the meaning of *Landis*.” *Lockyer*, 398 F.3d at 1112; *Fed. Trade Comm’n v.*  
7 *Cardiff*, No. EDCV 18-2104-DMG (PLAx), 2020 WL 5417125, at \*4 (C.D.  
8 Cal. Sept. 9, 2020) (citing *Lockyer*, 398 F.3d at 1112). Plaintiffs therefore  
9 cannot point to the ordinary burdens of the litigation process, which they  
10 have undertaken themselves, as evidence of hardship or inequity.

11  
12 Nonetheless, Plaintiffs raise a valid argument concerning the  
13 timeliness of obtaining relief. Absent a stay, Plaintiffs would likely be unable  
14 to obtain appellate review in time to perform activities for the 2022 election,  
15 which is a primary purpose of their organizations’ work.

16  
17 The Court emphasizes that it weighs Plaintiffs’ claim of undue  
18 hardship *against* the possibility of damage to Defendant. See *CMAX, Inc. v.*  
19 *Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (“Where it is proposed that a pending  
20 proceeding be stayed, the competing interests which will be affected by the  
21 granting or refusal to grant a stay must be weighed.”) Had Defendant  
22 argued that it would suffer damage from the imposition of a stay, Plaintiffs  
23 would have a more difficult road to establishing undue hardship. *Lockyer*,  
24 398 F.3d at 1112 (quoting *Landis*, 299 U.S. at 255) (“‘[I]f there is even a fair  
25 possibility that the stay ... will work damage to some one else,’ the party  
26 seeking the stay ‘must make out a clear case of hardship or inequity.’”).



1  
2 Where, as here, Defendant has asserted no possibility of damage to  
3 himself, it appears that Plaintiffs' concerns about the timeliness of appellate  
4 review merit consideration. See *Physicians Healthsource Inc.*, 2014 WL  
5 12577142, at \*2 (weighing the possibility of damage to Plaintiff against the  
6 hardship to Defendant). The Court therefore finds that Plaintiffs have  
7 demonstrated a showing of undue hardship if the stay is denied.  
8

9 3. Judicial Efficiency

10 The final factor that Plaintiffs discuss is judicial efficiency. They argue  
11 that the pending case *American Society of Journalists and Authors v. Bonta*,  
12 Ninth Cir. No. 20-55734 ("ASJA"), will likely address overlapping issues of  
13 law that may prove instructive to this Court. (Motion, at 1). Plaintiffs also  
14 argue that the Ninth Circuit's review of the interlocutory appeal will "bear on  
15 the underlying issues of this case," if the ASJA appeal does not do so first.  
16 According to Plaintiffs, this Court would advance the orderly cause of justice  
17 by granting a stay.  
18

19 Defendant responds that the ASJA case might not be decided in the  
20 near future and might not affect the legal issues in this case. (Opp'n, at 1).  
21 Defendant also returns to the Ninth Circuit's warnings to argue that judicial  
22 efficiency is not compromised by failing to grant a stay while an interlocutory  
23 appeal is pending.  
24

25 As to the potential preclusive effect of other proceedings, this Court  
26 previously held that "staying [an] action based on a possibility of a

1 preclusive decision elsewhere is not enough to demonstrate that those other  
2 proceedings “bear upon the case.” *Tesoro Ref. & Mktg. Co. LLC v. City of*  
3 *Long Beach*, No. 2:16-CV-06963-VAP (FFMx), 2019 WL 4422666, at \*2  
4 (C.D. Cal. May 31, 2019); *Leyva*, 593 F.2d at 863-64. Moreover, *Landis*  
5 itself dictates that “[o]nly in rare circumstances will a litigant in one cause be  
6 compelled to stand aside while a litigant in another settles the rule of law  
7 that will define the rights of both.” *Landis*, 299 U.S. at 255; *see also Fed.*  
8 *Trade Comm’n v. Cardiff*, 2020 WL 5417125, at \*3 (declining to stay an  
9 action pending an upcoming U.S. Supreme Court decision that would not  
10 directly affect the present case).

11  
12 Here, Plaintiffs have not met the high burden of proving that the pen-  
13 dency of *ASJA* merits a stay in this action. Plaintiffs acknowledge that  
14 “there is no guarantee that the Ninth Circuit’s forthcoming decision in *ASJA*  
15 would control or even be instructive in this case,” but surmise that “the odds  
16 of that occurring are meaningful.” (Motion, at 1). The Court does not find  
17 that the mere potential of an instructive decision warrants a stay.

18  
19 On the other hand, the Court agrees with Plaintiffs that awaiting the  
20 resolution of the Ninth Circuit’s review of the interlocutory appeal advances  
21 the orderly cause of justice. The order that is before the Court of Appeals  
22 implicates issues that are at the heart of this case. In the August 9, 2021  
23 Order, the Court concluded that Plaintiffs had not shown they were likely to  
24 succeed on the merits. (Dkt. 24). The Court also determined that the chal-  
25 lenged exemptions in AB 5 were neither content-based nor required height-  
26 ened scrutiny. (*Id.* at 7). These issues bear on the heart of Plaintiffs’ First

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1 Amendment claims, and the Ninth Circuit’s review of those issues would al-  
2 most certainly affect the outcome of any proceedings in this Court.

3  
4 The Court agrees with Plaintiffs’ observation that “this is not a case  
5 where the ‘disposition of th[e] appeal will affect the rights of the parties only  
6 until the district court renders judgment on the merits of the case.’” (Reply  
7 at 33, citing *Sports Form, Inc. v. United Press International, Inc.*, 686 F.2d  
8 750, 753 (9th Cir. 1982). It would be wise for the Court to preserve its  
9 judicial resources in light of the pending appellate review of issues central to  
10 this case.

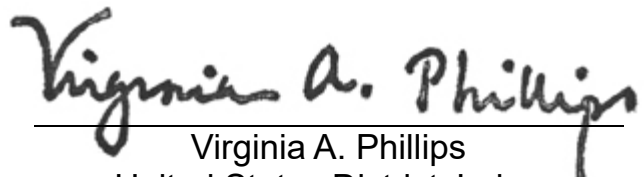
11  
12 Taking all the *Landis* factors together, and considering the various  
13 arguments advanced by Plaintiffs and Defendant in the pleadings, the Court  
14 concludes that a stay of the proceedings is warranted. The proceedings are  
15 stayed pending the resolution of Plaintiffs’ interlocutory appeal before the  
16 Ninth Circuit.

17  
18 **IV. CONCLUSION**

19 The Court therefore **GRANTS** the Motion to Stay pending the  
20 outcome of Plaintiffs’ interlocutory appeal.

21  
22 **IT IS SO ORDERED.**

23  
24 Dated: 9/17/21

25   
26 Virginia A. Phillips  
United States District Judge