Charles H. Rivkin
CHAIRMAN & CEO
MOTION PICTURE ASSOCIATION

March 23, 2022

The Honorable Ash Kalra
The Honorable Heath Flora
Chair & Vice Chair, Assembly Committee on Labor and Employment
California State Capitol
Sacramento CA 95814

RE: Assembly Bill 2926 – Oppose

Dear Chair Kalra and Vice Chair Flora:

On behalf of the members of the Motion Picture Association, I am enclosing a Memo in Opposition to Assembly Bill 2926.

This bill, if enacted, will disrupt the long-standing business practices and legal principles that have made California home to the vibrant motion picture, TV and streaming business. A.B. 2926 undermines both private contracts and the collective bargaining process that are hallmarks of the entertainment industry.

California enjoys a robust middle class of citizens who earn their living as employees in the film, TV and streaming industry and countless small and large businesses that are part of the entertainment ecosystem. The prohibition on exclusive contracts, in A.B. 2926, will upend this vital sector.

Thank you for your consideration. Please feel free to contact me, or my California staff, Melissa Patack (818.292.2784) or MPA's legislative advocate in Sacramento, Felipe Fuentes (818.512.6484)

Sincerely,

cc: Members of Assembly Committee on Labor & Employment
Felipe Fuentes

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MOTION PICTURE ASSOCIATION

Memo in Opposition to California Assembly Bill 2926

A.B. 2926 Upends Longstanding Business Practices that Have Made California Home to the Vibrant Film, TV and Streaming Business, Undermines Collective Bargaining and Harms the Industry that has Created a Robust Middle Class of Entertainment Industry Workers.

The Motion Picture Association, Inc. ("MPA") respectfully opposes A.B. 2926 (the "Bill"). The Bill would prohibit exclusivity provisions in contracts between producers of movies, television and streaming programs and their employees, radically upending nearly a century of business practices and legal principles that have benefited employers and employees alike.

Exclusivity clauses—based on the principle that an employee should direct their full attention to one employer at a time—are utilized to retain the services of highly talented artists who are essential to a particular feature film or TV or streaming series. For the employer, an exclusivity clause ensures that employees are available to work in the often-unpredictable context of a production where hundreds of people may be necessary to film a scene and guarantee that the employee's full attention and effort is directed to the job at hand. An exclusivity clause can be advantageous to entertainment industry employees, who, through collective bargaining and in their personal contracts, have negotiated for increased compensation in exchange for a contractual promise of exclusivity: the broader the exclusivity clause, the more the employee is paid for that commitment. And an exclusivity clause, negotiated by well-represented parties to the agreement, can account for other work in which the artist may engage.[1]

This is a quintessential topic for negotiations between the private parties, who can craft exclusivity provisions that consider the specifics of the employer and employee's needs for a particular project—not for a one-size-fits-all "solution" like A.B. 2926. MPA urges members of the Legislature to reject this Bill.

I. THE BILL IS DEEPLY FLAWED AND WOULD PROHIBIT LONGSTANDING AND SUCCESSFUL ENTERTAINMENT INDUSTRY PRACTICES.

A. The bill is overbroad and vague.

[1] As discussed later in this Memo, a performer who is a "series regular" can typically work on feature films, commercials and voice-overs and guest appearances on other series during hiatus periods and between seasons.

The Bill provides in relevant part: "Notwithstanding any other provision of law, a contract for the personal or professional services of an employee shall not prohibit an employee from working for multiple employers," subject to certain exceptions. Proposed Cal. Labor Code §2855(e). In other words, this Bill would prohibit employers and employees—in any industry, not just the motion picture industry —from negotiating the terms of an exclusive engagement for any position, at any salary level, for any length of time. In so doing, the Bill would effectively eliminate the ability of an individual to command a higher rate of compensation, based on their unique talents, skills and experience, in exchange for providing services on an exclusive basis to one employer.

And especially troubling is that the Bill would impose its requirements retroactively to existing contracts, an unreasonable and unfair burden on the parties that have negotiated contractual arrangements (including salaries that compensate artists for their exclusivity) and conduct business in reliance on their terms. *See* Proposed §2855(f), (g). The last ten years have seen an explosive growth in entertainment programming across platforms, creating new opportunities for all the talented and creative professionals who comprise the motion picture, television and streaming industry and has expanded economic growth across this sector. The Bill puts this entire ecosystem at risk by effectively eliminating the ability of a producer-employer and artist to contract for a well-compensated exclusive employment arrangement and by negating existing contracts to which parties have agreed.

Furthermore, the bill is so broadly drafted that it could effectively outlaw common exclusive contractual arrangements known as "overall deals" between a studio, production company, or exhibitor and top-level talent, under which the company compensates talent in exchange for their creative output.[2] Top-level talent often prefer these highly sought-after deals for the certainty and stability of such exclusive overall relationships, which offer them unfettered creativity to develop their projects and are accompanied by generous compensation packages. These overall deals benefit entertainment industry employees at all levels; the steady pipeline of projects provide a constant supply of work and provide good middle-class jobs for tens of thousands of Californians who work on these productions, as well as the thousands of businesses, both large and small, that supply goods and services to production.

And A.B. 2926 will lead to disputes over the ownership of intellectual property, if individuals are working for competitors at the same time and the bright lines that define employment relationships are blurred. Employers such as news organizations, universities, pharmaceutical companies, toy manufacturers, and motion picture studios all rely on clear chain of title to the employee's creations usually via work made for hire agreements where the employer compensates the employee for the creation of new writing, research, vaccines and other medicines, toys and motion pictures television and streaming projects. Under the Bill, employers will lose the certainty of knowing that the new medication, new toy or television show in which

[2] *See* "TV Facts on Pacts: Who's Scored Overall Deals," *Variety*, May 16, 2018, *available at* https://variety.com/2018/tv/news/tv-facts-on-pacts-overall-deals-shonda-rhimes-ryan-murphy-netflix-1202811730/

they have invested and launched (and for which the employee has likely been generously compensated) is theirs.

B. The purported exceptions in the Bill are vague and unworkable and will flood the courts with litigation.

The Bill purports to limit its prohibition on exclusivity to those circumstances in which other employment would "pose a direct conflict for the employer or materially interfere with the employee's performance obligations to the existing employer." Proposed §2855(e)(1)(A). However, the terms "direct conflict" and "materially interfere" are vague and subjective and will do little more than flood California's already overburdened courts with lawsuits to determine whether particular factual circumstances meet those malleable standards.

Moreover, the Bill places an additional burden on California employers in the motion picture and television industry, by narrowing the scope of the "direct conflict" exception to only those conflicts that constitute "direct **scheduling** conflict(s)" (emphasis added) or those that "would materially interfere with the employer's business." *Id.* §2855(e)(1)(B). These vague, undefined standards would erect unprecedented impediments to the production of TV and streaming series, as well as feature films.

For example, the "direct scheduling conflict" exception is simply unworkable in an industry where hundreds of people are often necessary for the filming of a single scene, and the absence of key talent or crew can delay an entire production for hours or days, resulting in significant additional expenses. And film and TV production is unpredictable. A production may plan to film only Tuesday-Thursday, seemingly leaving Friday free for talent to take on other projects. However, because of delays due to unpredictable factors such as weather and illness, it may suddenly and unexpectedly become necessary to film on Friday as well. Thus, what didn't seem to be a "direct conflict" at the time a contract was signed can suddenly become one in the middle of a production. And talent may have additional post-production obligations and responsibilities outside the filming schedule, such as press tours and promotional appearances that may or may not constitute a "direct scheduling conflict"—another issue ripe for disputes and litigation.

For work on feature films, the issue of scheduling is specifically addressed with the talent involved in making a feature film. In general, the artists working on a feature film commit to exclusive work on the feature for the specified time. Based on the time commitment agreed between the producer and the talent, the producer plans the rest of the film schedule, including engaging all the other employees needed to work on the film project, as well as all the suppliers, from camera and lighting equipment to catering and locations. If a producer is precluded from securing the talents' exclusive commitment for the specified time, it will be exceedingly difficult, if not impossible, to put all the other pieces together to produce a feature film.

The "materially interfere with the employer's business" standard is also extremely vague and problematic—a highly fact-dependent inquiry that would be a recipe for lawsuits and intrusion into the creative process. An "artist" who is working on one production and simultaneously working for a competitor could severely undermine the first project's success and constitute, at least from the producer's perspective, material interference with its business. For example, a

highly compensated judge of a singing competition show or performer in a soap opera on one television network might seek to work on a different network's singing competition show or soap opera on their days off. Typically, an exclusivity clause would prevent such a scenario, which would undermine the producer's legitimate interest in distinguishing its show from competitors'. But this Bill would arguably prohibit such exclusivity clauses, or at the very least foment legal disputes about whether the moonlighting judge's or soap opera actor's second job "materially interferes with the employer's business." Similar examples would abound within the entertainment industry. For example:

- Can a news broadcast organization contract with an on-air news anchor to broadcast on its news station Monday through Thursday under an exclusive contract that would preclude the anchor from working for a competing news broadcast organization as a weekend anchor?
- Can a sports network enter an exclusive arrangement with a broadcast talent to announce NFL games on Sunday night that would limit that talent's ability to announce NFL games on Thursday night on another network?[3]
- Can a late-night talk-show host on one network work on another talk show for another network, so long as the shows are not taped at the exact same time?

We won't know the answers to these and countless similar questions until millions of dollars have been expended paying the lawyers who will litigate the inevitable flood of lawsuits over such issues. And there is no reason to ask these questions of the legal system, as the existing system of private negotiations is perfectly capable of addressing them and has done so for decades.

The Bill will lead to uncertainty and create instability in this industry. There are many hurdles and challenges that must be successfully navigated to get a series or film onto the screen for viewers to enjoy. For feature films, companies have a finite period of time in which to have an entire team of people come together to produce a successful creative endeavor. If the production cannot ensure that the talent will be available exclusively for the duration, the production becomes impossible to support, which will have a devastating impact on film production as a whole. For TV and streaming series[4], a producer expects and works toward that series becoming a multi-year project.[5] Longevity for a series leads to steady employment not only for actors, but for the hundreds of employees behind the cameras, as well as stable business relationships for the vendors who supply those productions. Without the ability of the producer and artists to enter

[3] See "Mike Tirico Joins NBC's 'Sunday Night Football" Booth in Latest Sports Talent Maneuver," *Variety*, March 22, 2022, available at: https://variety.com/2022/tv/news/mike-tirico-sunday-night-football-nbc-joins-1235211953/#recipient_hashed=01234113e09d472f8b8025aac9562fd17938d9fc1120e00f17fb7dcb1fb20c6a and "ESPN to Give Tony Roma Money to Troy Aikman" in *NJ.com*, Feb. 28, 2022 available at: https://www.nj.com/giants/2022/02/nfl-rumors-troy-aikman-set-to-get-tony-romo-money-from-espn-list-of-highest-paid-announcers.html for recent information about some sports broadcast deals, including the generous compensation paid to the announcers for their work.

[4] There are feature films that are "franchises" – multiple pictures over several years. Those franchise films projects rely on the ability to bring the leading talent together to create, produce and distribute these projects.

[5] As discussed in the next section, those who work as series regulars can generally work on feature films, commercials and voice-over and guest starring roles on other series when on hiatus or between seasons.

into an exclusive contract, these long-term series, and the employment and business relationships that depend upon them, will be in jeopardy.

For nearly a century, California has been the home to the community of producers and artists who work together to develop, produce, and distribute world class entertainment. These projects afford generous compensation packages for artists, who in return provide their exclusive services to their employers and satisfy the necessity for availability and flexibility in film, television and streaming production. A.B. 2926 puts all of this at risk.

II. A.B. 2926 UNDERMINES COLLECTIVE BARGAINING.

This Bill directly targets the collective bargaining process in the entertainment industry, through which producers and industry guilds and unions negotiate and agree on a host of rules governing the terms and conditions of employment—including rules for exclusivity—with great specificity, nuance, and an appreciation for the particularities of film and television production. This Bill would override negotiated collective bargaining agreements ("CBAs")—***including already negotiated agreements***—with respect to exclusivity, disregarding longstanding and settled business practices. We urge the Legislature to respect the collective bargaining process, and leave the parties affected by these practices to negotiate the rules around exclusivity.

The Bill does not define "artist" as used in proposed §2855(e)(1)(B). But that term will likely be interpreted to include any member of the cast or crew, including directors, writers, and producers. CBAs between SAG-AFTRA and the AMPTP[6] and the Writers Guild of America and the AMPTP already address exclusivity.[7] These CBAs specifically address exclusivity in television and most streaming series, taking into account the specific and practical contexts of these industries and type of work.[8] The CBAs include extensively negotiated rules about the permitted scope of exclusivity, which vary depending on the salary earned by the writer or performer: the higher the pay, the more exclusivity is permitted.[9]

Under the collective bargaining contract between the AMPTP and SAG-AFTRA, a producer is generally only able to negotiate without restriction for exclusivity with an individual performer

[6] The Alliance of Motion Picture and Television Producers ("AMPTP") is the entertainment industry's official collective bargaining representative, responsible for negotiating 80 industry-wide collective bargaining agreements on behalf of 350 motion picture and television and streaming series producers. Its members include MPA's members: The Walt Disney Studios Motion Pictures, Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC and Warner Bros. Entertainment Inc.

[7] The CBA between the Directors Guild of America and the AMPTP does not address exclusivity; therefore directors and producers may freely negotiate the scope of exclusivity and accompanying compensation.

[8] The CBAs do not restrict exclusivity on feature film projects. Feature films are time-consuming and often require writers or performers to work on the project full time for the duration of their engagement. The Producer and the writer or performer are free to negotiate about the level of exclusivity that is appropriate to the project.

[9] The collective bargaining agreements set basic minimum thresholds; performers and writers additionally negotiate individual contracts with the producer-employer. A writer or performer is typically represented by a team that includes legal counsel, a talent agent, and a manager.

who is a "series regular,"[10] and only once the performer earns at least $15,000 per week or per episode on a half-hour series, or $20,000 per week or per episode on a one-hour series.[11] Those who work as series regulars can typically work on feature films, commercials, voice-overs, guest starring roles on other series and other work during hiatus periods and between seasons.[12] The issue of exclusivity was a subject of discussion between the AMPTP and SAG-AFTRA during the most recent collective bargaining negotiations in 2020.

For writers on television series, with limited exceptions, the collective bargaining agreement provides that exclusivity, which applies during the production period, may be freely negotiated between a writer and producer only if the writer is earning at least $325,000 in a 12-month period (or $250,000 for writers working on children's programming).

By explicitly overriding individual contracts and CBAs—even those already agreed to by all parties—A.B. 2926 upends what has been settled at the bargaining table by sophisticated parties on both sides who know the practicalities of the business. The Legislature should not allow itself to be drawn into matters that are routinely discussed and negotiated by the parties in a collective bargaining process that has resulted in the creation of a vibrant middle class of entertainment-industry workers in this state.

III. THE BILL WOULD CREATE UNCERTAINTY AND INSTABILITY AND LEAD TO UNINTENDED CONSEQUENCES.

In undermining the traditional employment relationship, A.B. 2926 would create uncertainty and instability in the creation, production and distribution of movies and series. As mentioned earlier, there are many variables that need to be brought together, like a jigsaw puzzle, to bring a story to the screen for viewers' enjoyment. The essential elements include a well-crafted script by a talented writer, an ensemble of accomplished performers, an experienced directorial team and hundreds, if not thousands of behind-the-scenes professional crafts persons, as well as editors and post-production workers, who bring the production to life. And producers have a critical role to secure the financing for what most investors would consider a venture with a great deal of risk and uncertainty, not the least of which is whether the completed film or series will garner an audience. If A.B. 2926 becomes law, preventing artists and producers from committing to exclusivity, the financial underpinnings of movies and series will be put at risk. No bank will want to loan money, nor will an insurance company will want to provide insurance on a project that cannot have the principal talent – actors, writers, directors, producers, committed exclusively to the project. The proponents of the Bill believe that A.B. 2926 will

[10] In general, a "series regular" is an actor who is guaranteed to work on at least seven episodes of a season of a TV series. Aside from series regulars, the CBA also allows for exclusivity to be freely negotiated with performers employed under a term contract (e.g., a performer hired to work 10 weeks in a 13-week period). However, term contracts are rarely used today.

[11] The CBAs provide a minimum threshold; per episode fees for series regulars are significantly higher.

[12] In 2021, in response to Assembly Bill 1385 (Gonzalez), MPA determined that in 95%-97% of the circumstances in which a performer who was a series regular brought another work opportunity to the attention of the producer, the producer did not object to the actor taking the additional work. Only in the very limited circumstances of direct scheduling conflicts did producers decline to waive the exclusivity obligation.

create more work opportunities for their members. But in fact, this Bill will create fewer jobs for artists at less pay.

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If enacted, A.B. 2926 would cause irreparable disruption to the creation, production, distribution and exhibition of movies and episodic series and all audiovisual entertainment content across all platforms and harm the tens of thousands of Californians who earn their livelihood working in film, TV and streaming entertainment. For these reasons, MPA urges the Legislature reject A.B. 2926.

March 2022